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Country report

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including summary



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Country report

Non-discrimination

Transposition and implementation at national level of
Council Directives 2000/43 and 2000/78

Poland

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CONTENTS

EXECUTIVE SUMMARY	5
INTRODUCTION	14
1 GENERAL LEGAL FRAMEWORK	15
2 THE DEFINITION OF DISCRIMINATION	17
2.1 Grounds of unlawful discrimination explicitly covered	17
2.1.1 Definition of the grounds of unlawful discrimination within the directives	17
2.1.2 Multiple discrimination	21
2.1.3 Assumed and associated discrimination	22
2.2 Direct discrimination (Article 2(2)(a))	24
2.3 Indirect discrimination (Article 2(2)(b))	24
2.3.1 Statistical evidence	26
2.4 Harassment (Article 2(3))	27
2.5 Instructions to discriminate (Article 2(4))	30
2.6 Reasonable accommodation duties (Article 2(2)(b)(ii) and Article 5 Directive 2000/78)	31
3 PERSONAL AND MATERIAL SCOPE	36
3.1 Personal scope	36
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)	36
3.1.2 Natural and legal persons (Recital 16 Directive 2000/43)	37
3.1.3 Private and public sector including public bodies (Article 3(1))	37
3.2 Material scope	37
3.2.1 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))	37
3.2.2 Employment and working conditions, including pay and dismissals (Article 3(1)(c))	39
3.2.3 Access to all types and all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience (Article 3(1)(b))	40
3.2.4 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))	40
3.2.5 Social protection, including social security and healthcare (Article 3(1)(e) Directive 2000/43)	41
3.2.6 Social advantages (Article 3(1)(f) Directive 2000/43)	42
3.2.7 Education (Article 3(1)(g) Directive 2000/43)	43
3.2.8 Access to and supply of goods and services that are available to the public (Article 3(1)(h) Directive 2000/43)	51
3.2.9 Housing (Article 3(1)(h) Directive 2000/43)	52
4 EXCEPTIONS	55
4.1 Genuine and determining occupational requirements (Article 4)	55
4.2 Employers with an ethos based on religion or belief (Article 4(2) Directive 2000/78)	55
4.3 Armed forces and other specific occupations (Article 3(4) and Recitals 18 and 19, Directive 2000/78)	56
4.4 Nationality discrimination (Article 3(2))	56
4.5 Health and safety (Article 7(2) Directive 2000/78)	58
4.6 Exceptions related to discrimination on the ground of age (Article 6 Directive 2000/78)	59
4.6.1 Direct discrimination	59
4.6.2 Special conditions for younger or older workers	60

4.6.3	Minimum and maximum age requirements	61
4.6.4	Retirement	62
4.6.5	Redundancy	67
4.7	Public security, public order, criminal offences, protection of health, protection of the rights and freedoms of others (Article 2(5), Directive 2000/78)	68
4.8	Any other exceptions	68
5	POSITIVE ACTION (Article 5 Directive 2000/43, Article 7 Directive 2000/78)	69
6	REMEDIES AND ENFORCEMENT	71
6.1	Judicial and/or administrative procedures (Article 7 Directive 2000/43, Article 9 Directive 2000/78)	71
6.2	Legal standing and associations (Article 7(2) Directive 2000/43, Article 9(2) Directive 2000/78)	79
6.3	Burden of proof (Article 8 Directive 2000/43, Article 10 Directive 2000/78) ..	82
6.4	Victimisation (Article 9 Directive 2000/43, Article 11 Directive 2000/78)	83
6.5	Sanctions and remedies (Article 15 Directive 2000/43, Article 17 Directive 2000/78)	84
7	BODIES FOR THE PROMOTION OF EQUAL TREATMENT (Article 13 Directive 2000/43)	88
8	IMPLEMENTATION ISSUES	102
8.1	Dissemination of information, dialogue with NGOs and between social partners	102
8.2	Measures to ensure compliance with the principle of equal treatment (Article 14 Directive 2000/43, Article 16 Directive 2000/78)	108
9	COORDINATION AT NATIONAL LEVEL	110
10	CURRENT BEST PRACTICES	112
11	SENSITIVE OR CONTROVERSIAL ISSUES	113
11.1	Potential breaches of the directives at the national level	113
11.2	Other issues of concern	113
12	LATEST DEVELOPMENTS IN 2020	118
12.1	Legislative amendments	118
12.2	Case law	118
ANNEX 1: MAIN TRANSPOSITION AND ANTI-DISCRIMINATION LEGISLATION		122
ANNEX 2: INTERNATIONAL INSTRUMENTS		124

EXECUTIVE SUMMARY

1. Introduction

Due to several factors, which include the low level of legal awareness in Polish society; people's passivity (and sometimes fear) around seeking to uphold their rights; and a lack of systematic research, it is impossible to assess the real scale of discrimination in Poland. Research commissioned by the Polish Ombud found that in 2020, 81 % of people who believed that they had been discriminated against did not inform any public body (73% in 2018, 92 % in 2016 and 81 % in 2015).¹ For this reason, raising legal awareness among the public would seem to require systemic activities on a large scale. The Polish Government lacks a strategic approach to counteracting discrimination. The first National Programme of Activities for Equal Treatment, covering 2013-2016, has ended. Since the parliamentary elections in autumn 2015, the activities of the Government Plenipotentiary for Equal Treatment² have been very limited; an evaluation of the previous programme has not been completed, and work on a new national programme started only in late 2020.³

Since 2015, the Ombud's Office, which plays the role of equality body, has faced political attacks for its activities targeting discrimination. In fact, the general political environment around counteracting discrimination has become hostile.⁴

The concept of age discrimination (discrimination that is focused primarily on older people) has found its place in recent years, and awareness of such discrimination among older people is growing. The activities of the Ombud have resulted in more research and recommendations. In 2013, the Minister of Labour appointed a Council for Older People's Policy; it prepared guidelines for long-term policy on older people for 2014-2020, which were adopted by the Council of Ministers. In October 2018, the Council of Ministers adopted the document *Social Policy for Older People 2030 – safety, participation, solidarity*. However, as underlined by the Ombud, no concrete measures have been proposed in the area of combating discrimination.

Discrimination against people with disabilities (12.2 % of the population) has traditionally been tackled in numerous ways. Poland ratified the UN Convention on the Rights of Persons with Disabilities (UNCRPD) in 2012, without the optional protocol on the right of individual petition. People with disabilities are still largely invisible in public, due to a variety of barriers. Many problems are faced by pupils in access to and reasonable accommodation in education.

LGBTI minorities are in a very difficult position in Poland, since they are a frequently attacked group. Homophobic speech is still present, not least in comments from politicians. In the last few years, both censorship and homophobic speech have increased markedly. This has been manifested in, *inter alia*, anti-LGBT rhetoric during the presidential election in 2020; bans on equality parades; and more than 50 local government resolutions to create 'zones free from LGBT ideology' (the EU has acknowledged and taken action to counteract these developments).

In general, national and religious minorities are small in Poland (1.46 % of the population declare that they are members of a national/ethnic minority). There are around 200

¹ Ombud, research commissioned from Kantar Public on 'Legal awareness in the context of equal treatment', Kantar 2020, 2018, 2016, 2015.

² Government Plenipotentiary for Equal Treatment - Pełnomocnik Rządu do Spraw Równego Traktowania.

³ Government Plenipotentiary for Equal Treatment, *Krajowy Program Działań na rzecz Równego Traktowania na lata 2013-2016 (National Programme of Activities for Equal Treatment for 2013-2016)*, available at: https://www.un.org/development/desa/disabilities/wp-content/uploads/sites/15/2019/11/Poland_National-Action-Program-for-Equal-Treatment-2013-2016.pdf.

⁴ The Ombud's term of office ended in July 2020, but as of the cut-off date of this report, no new Ombud had been appointed. The previous Ombud therefore continued his service.

minority churches and denominations; the biggest are Orthodox, Protestant and Jehovah's Witnesses. 'Traditional' national and ethnic minorities as well as religious minorities are supported by various positive action programmes aimed at cultivating their culture, heritage and language. There are also special support programmes for the Roma population.⁵ However, hate speech and hate violence and crime targeted at people of different ethnic and religious backgrounds (including immigrants and refugees, especially Muslims) has escalated in recent years: the Ombud registered 60 such cases in 2016, 100 in 2017, 90 in 2018, 100 in 2019 and 90 in 2020.

2. Main legislation

According to the general anti-discrimination clause in the Polish Constitution (Article 32),⁶ all people are equal before the law and have the right to equal treatment by the public authorities, and no one may be discriminated against in political, social or economic life for any reason whatsoever. This principle does not specify criteria for prohibited forms of discrimination.

By 2010, Poland had transposed the equality directives, mainly in the employment field. Existing gaps, which had resulted in some referrals to the Court of Justice of the European Union (CJEU), mobilised the Polish Government to finally adopt the Act on the Implementation of Certain Provisions of the European Union in the Field of Equal Treatment (Equal Treatment Act – ETA), which entered into force on 1 January 2011.⁷

Until 2010, the Act on the Labour Code was the main element in Polish anti-discrimination legislation (it was amended in 2004 and 2008 in order to transpose the directives).⁸ The Labour Code regulates employment under labour contracts and lists several grounds of discrimination, but only as examples; the list remains open.

In contrast to the Labour Code, the ETA contains an exhaustive list of grounds of discrimination: gender, race, ethnic origin, nationality (citizenship was added in 2016), religion, belief, political opinion, disability, age and sexual orientation. In addition to broad protection from discrimination in the employment field (extended to civil contracts, self-employment and independent professions), the law provides protection from discrimination in all fields outside employment, but only in relation to race, ethnic origin and nationality (it also covers gender, but only in access to social protection, goods and services, including housing, and not in healthcare and education). The Act designated the Ombud's Office as the equality body.

In order to implement the equality directives, the Code of Civil Procedure was amended in 2004.⁹ It gives legal standing to civil society organisations (CSOs), which may institute actions on behalf of claimants and join the proceedings at any stage thereof.

Generally speaking, the law is enforced, especially in respect of labour relations. However, outside the field of employment the process is rather slow. In fact, claims under the ETA are made only occasionally.

⁵ Ministry of Internal Affairs and Administration (2014), *Programme for the Integration of the Roma Community in Poland 2014-2020 (Program integracji społeczności romskiej w Polsce na lata 2014-2020)*, available in English at: <http://mniejszosci.narodowe.mswia.gov.pl/mne/romowie/program-integracji-spol>.

⁶ Constitution of the Republic of Poland (*Konstytucja Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r.*), 2 April 1997, available at: <http://trybunal.gov.pl/en/about-the-tribunal/legal-basis/the-constitution-of-the-republic-of-poland/>.

⁷ Act on the Implementation of Certain Provisions of the European Union in the Field of Equal Treatment (referred to as the Equal Treatment Act – ETA) (*Ustawa z dnia 3 grudnia 2010 r. o wdrożeniu niektórych przepisów Unii Europejskiej w zakresie równego traktowania*), 3 December 2010.

⁸ Act on the Labour Code (referred to as the Labour Code) (*Ustawa z dnia 26 czerwca 1974 r. Kodeks pracy*), 26 June 1974.

⁹ Act on the Code of Civil Procedure (referred to as the Code of Civil Procedure) (*Ustawa z dnia 17 listopada 1964 r. Kodeks postępowania cywilnego*), 17 November 1964.

3. Main principles and definitions

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

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

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

The ETA implemented the duty to provide reasonable accommodation, stating that an employer is obliged to provide the necessary reasonable accommodation for a disabled person who is in an employment relationship with them; participating in the recruitment process; or undergoing vocational or professional training, apprenticeship or practice. 'Necessary reasonable accommodation' means introducing necessary changes and adjustments in a particular case in line with specific needs reported to the employer stemming from somebody's disability, unless the introduction of such changes or adjustments would impose a disproportionate burden on the employer. The burden is not disproportionate when it is sufficiently remedied by public funds. Controversial changes were introduced in the school year beginning in September 2017. The Ministry of National Education claims to support integration and mainstream schools. However, according to the amended regulations, individual teaching provision that is required because of special needs may be organised at home, not in school. Some schools are using this opportunity to neglect their responsibilities. Both the Ombud and the Ombud for Children's Rights are monitoring the situation.

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

Multiple discrimination, assumed and associated discrimination are not regulated and are still new concepts. They were included in the draft laws that were prepared in 2012 and 2013 with the aim of amending the ETA, but those laws were never passed. In 2014 (and

in a final second-instance verdict delivered in 2015) associated discrimination was recognised by a court for the first time.¹⁰

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

4. Material scope

According to the Labour Code, in the field of employment any discrimination is forbidden, in particular with regard to the conclusion and termination of an employment relationship; the terms of employment and promotion; and access to vocational training aimed at upgrading professional qualifications. The prohibition on discrimination also applies to all the institutions operating in the labour market, such as employment agencies and employment advice services as well as training courses for the unemployed. The rules apply equally to the public and private sectors. Since the enactment of the ETA in 2010, the prohibition on discrimination has been extended to cover civil contracts, self-employment and the self-regulating professions (such as advocates and legal advisors).

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

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

¹⁰ Warsaw Śródmieście District Court, judgment of 9 July 2014, *XY and Polish Society of Antidiscrimination Law on behalf of XY v. Company Z*, No. VI C 402/13; Warsaw Regional Court (second instance), judgment of 18 November 2015, No. V Ca 3611/14.

5. Enforcing the law

The ETA introduced a general compensation claim stating that anyone (natural and legal persons) who suffers as a result of an infringement of the principle of equal treatment is entitled to compensation (Article 13). However, instances of such cases being brought to the courts have been rare. One of the reasons for that, as pointed out by the Ombud in its annual reports, is the fact that the ETA refers to compensation (*odszkodowanie*) which covers only material (and not non-material) damage and therefore limits the scope of the protection. The provision for compensation claims under the ETA should be widened to include non-material damages as well. However, in a recent case, a district court awarded compensation under the ETA, arguing that the Act also covers non-material damage – in the specified case, damage to the dignity of the party.¹¹

On the other hand, recourse may be made to general civil provisions. The Civil Code provides for compensation claims for material and non-material damages, but there is no shift of the burden of proof in general civil procedure. In addition, in matters not covered by the ETA, one can use the protection of 'personal rights' such as health, freedom and honour (Articles 23 and 24 of the Civil Code).¹² An individual whose personal rights are endangered by another's actions can: demand that the action cease, unless it is not unlawful; demand that the effects of the violation be rectified (in particular, that a statement of appropriate content and form be made); and demand pecuniary satisfaction or payment of an appropriate sum to a designated social cause. If the infringement of personal rights results in material damage, the victim may demand reinstatement under general law terms. These provisions on personal rights have become a more popular basis for discrimination claims than the ETA, which is in fact the dedicated Act.

Claims arising from an employment relationship can be determined either by a labour court or by a conciliation committee. The special employment claim for compensation was introduced into the Labour Code in 2004. Anyone who suffers from an infringement of the principle of equality in employment is entitled to start judicial proceedings and to seek compensation at a level that is no lower than the minimum monthly salary.

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

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

In principle, legal representation may be provided by an advocate or legal adviser. In labour cases, a representative of a trade union, a labour inspector or another employee of the enterprise may also act as the legal representative of an employee. Furthermore, civil society organisations whose official objectives include equality protection and counteracting discrimination may institute actions on behalf of citizens and join proceedings. CSOs are also entitled to institute or join administrative proceedings, and their representatives may be admitted to criminal proceedings. In practice, part of the discrimination cases outside the field of employment are brought on behalf of victims (or joined) by CSOs such as the Polish Society of Anti-Discrimination Law or the Helsinki Foundation for Human Rights.

¹¹ Toruń Regional Court, judgment of 21 August 2020, No. VIII Ca 1058/19. See more information in section 3.2.7 and 12.2 of this report.

¹² Act on the Civil Code (referred to as the Civil Code) (*Ustawa z dnia 23 kwietnia 1964 r. Kodeks cywilny*), 23 April 1964.

In Polish anti-discrimination law, there is no explicit mention of the use of statistical evidence or situation testing. This does not mean that their use is theoretically excluded (both concepts are discussed by CSOs and in judicial circles), and it can be presumed that this kind of evidence could be admitted by a court. However, with regard to situation testing, this is not obviously the case and such a strategy would be risky; there are also theoretical arguments against accepting such evidence. So far, people who have brought cases that are in fact based on situation testing have not admitted this in court; rather, they have argued that they were simply discriminated against.

Since the amendment of the Labour Code in 2004, the burden of proof has shifted from the complainant to the respondent, but only in employment cases. The 2010 ETA introduced a shift of the burden of proof in all compensation proceedings relating to infringement of the principle of equal treatment governed by the Act; it does not therefore extend to claims based on civil law (with the exception of 'personal rights', for which there is an autonomous mechanism for shifting the burden of proof). According to the Labour Code and the ETA, the complainant must substantiate the probability of a violation (it sometimes happens that courts also expect a particular ground of discrimination to be demonstrated),¹³ and the respondent is obliged to show that they did not commit the violation.

Under Polish anti-discrimination law, there is no specific system of sanctions (apart from compensation under the Civil Code and Labour Code described above); there are only penalties and punishments set out by the Penal Code and the Code of Petty Crimes. On the basis of the Civil Code and the Labour Code, it is possible to claim compensation for material and non-material damages.

Positive action and special programmes are traditionally targeted at national and religious minorities (such as special subsidies for minority schools); the Roma community (special programmes since 2003 covering education, healthcare and housing); and people with disabilities (in education and employment). Some actions have been also undertaken for senior citizens.

The Ombud's Office is generally open to collaboration with CSOs and social partners. In the case of the Government Plenipotentiary for Equal Treatment, such possibilities have in fact come to an end since the Office no longer really engages with equality issues.

6. Equality bodies

Until 2010, no institution was designated as the specialised body. The 2010 ETA designated the Ombud's Office as the equality body. The Act granted the Ombud new competences (in addition to its human rights mandate). No grounds of discrimination are listed in the Ombud's mandate and it can therefore deal with any ground, including but not limited to those listed in the ETA.¹⁴ In 2015, a new Equal Treatment Department (Zespół do spraw Równego Traktowania) was created (with sections for anti-discrimination law and the rights of migrants and national minorities). The Ombud is also engaged in research activities as well as the compilation of existing data on some issues. It has also launched a section of its website dedicated to equality issues; collected information on jurisprudence relating to discrimination; established thematic teams of external experts to support the Ombud; and set up a telephone hotline to deal with all cases, including discrimination cases.

The ETA provides that, in implementing the principle of equal treatment, the Ombud should: analyse, monitor and support the equal treatment of everyone; conduct

¹³ See, for instance, the following Supreme Court verdicts: judgment of 10 May 2018, No. I PK 54/17; judgment of 3 June 2014, No. III PK 126/13; and judgment of 18 April 2012, No. II PK 196/11.

¹⁴ Act on the Commissioner for Human Rights (*Ustawa z 15 lipca 1987 r. o Rzeczniku Praw Obywatelskich*), 15 July 1987.

independent surveys on discrimination; prepare and publish independent reports; and issue recommendations regarding discrimination issues.

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

The second institution that has a mandate to promote the equal treatment of everyone without discrimination based on racial or ethnic origin (among other grounds) is the Government Plenipotentiary for Equal Treatment. This post was created in April 2008 within the Chancellery of the Prime Minister (the 2010 ETA provided a new legal basis for its operation).¹⁵ The Plenipotentiary's main task is to execute Government policy in the field of equal treatment. In 2016, the office of the Plenipotentiary was closed; its staff was reduced and is now responsible for a variety of other issues; and a new Plenipotentiary was appointed to combine two positions – the newly created position of Government Plenipotentiary for Civil Society (Pełnomocnik Rządu do spraw Społeczeństwa Obywatelskiego) together with that of the Plenipotentiary for Equal Treatment. Since then, equal treatment issues have become much less important in the activities of the Plenipotentiary. In February 2020, the office of the Plenipotentiary for Equal Treatment was again separated and moved to the Ministry of Family and Social Policy (and on 5 March 2020, the deputy minister was appointed to the function of the Plenipotentiary for Equal Treatment).¹⁶

As far as the rights of national and ethnic minorities are concerned, the Act on National and Ethnic Minorities and on Regional Languages of 2005¹⁷ created a Joint Committee of the Government and National and Ethnic Minorities. It is composed of representatives of selected ministries and minorities, and its remit includes issuing opinions regarding the rights and needs of minorities; programmes and draft laws in the field; and the principles of allocation and levels of resources from the state budget directed at preserving the cultural identity of minorities. It is also tasked with taking action in the field of combating discrimination. In 2008, the Roma Issues Team was created within the Committee. In 2013, the then Prime Minister created the Council for the Prevention of Racial Discrimination, Xenophobia and Related Intolerance. However, in April 2016, the subsequent Prime Minister issued a regulation abolishing the Council.

The body responsible for disability policy is the Government Plenipotentiary for Disabled People. The Plenipotentiary, formally a part of the Ministry of Family and Social Policy, is primarily responsible for implementing the Act on the Vocational and Social Rehabilitation and Employment of Disabled Persons (Disabled Persons Act).¹⁸

¹⁵ Regulation of the Council of Ministers regarding the Government Plenipotentiary for Equal Treatment (*Rozporządzenie Rady Ministrów z dnia 22 kwietnia 2008 r. w sprawie Pełnomocnika Rządu do spraw Równego Traktowania*), 22 April 2008.

¹⁶ Therefore, contrary to recommendations (e.g. in CERD (2019), *Concluding observations on the combined twenty-second to twenty-fourth periodic reports of Poland*), the position of the Plenipotentiary has been additionally weakened. See Law of 23 January 2020 amending the Act on Government Administration Departments and some other acts (*ustawa z 23 stycznia 2020 r. o zmianie ustawy o działach administracji rządowej oraz niektórych innych ustaw*) (Dz.U. z 2020, poz. 284), Article 70. See also: <https://www.gov.pl/web/rodzina/anna-schmidt-rodziewicz-nowym-wiceministrem-rodziny-pracy-i-polityki-spolecznej>.

¹⁷ Act on National and Ethnic Minorities and on Regional Languages (*Ustawa z dnia 6 stycznia 2005 r. o mniejszościach narodowych i etnicznych oraz o języku regionalnym*), 6 January 2005.

¹⁸ Act on the Vocational and Social Rehabilitation and Employment of Disabled Persons (Disabled Persons Act) (*Ustawa z dnia 27 sierpnia 1997 r. o rehabilitacji zawodowej i społecznej oraz zatrudnianiu osób niepełnosprawnych*), 27 August 1997.

7. Key issues

A significant problem is the fact that the ETA is under-used. There are limited statistics on the number of discrimination-related cases that have been brought to justice (and those which do exist are erroneous and not wholly reliable). However, the little that is known shows clearly that victims of discrimination rarely use the ETA, with only a few cases being brought over the course of 10 years (the first final decision was not issued until November 2015). In addition, the number of cases involving discrimination in employment and based on the Labour Code is relatively low (50-100 cases a year).¹⁹

One of the reasons for the small number of cases is generally the problem of under-reporting. Surveys commissioned by the Ombud show that a large number of people (73 % in 2018 and 81 % in 2020) who believed that they had been discriminated against during the previous year did not report this to any public institution.²⁰

In 2020, the Ombud summed up 10 years of the ETA.²¹ Among the successes, the Ombud mentioned: introducing the topic of discrimination into mainstream public debate and changing social awareness of this phenomenon, thanks also to research that was conducted; clarification of the standard of legal protection in the course of court proceedings; and adoption and implementation of Government programmes aimed at more complete observance of the principle of equal treatment. At the same time, the Ombud emphasised that the same issues still remained as challenges for the future: discrimination continues to be misunderstood, leading to further perpetuation of negative stereotypes about various social groups, which thus weakens them; legal regulations raise questions of interpretation and contain gaps, and are therefore insufficient to provide real support to all people experiencing discrimination; and incomplete legal instruments and limited objectives of the implemented public policies make it impossible to achieve real equality.

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

The Ombud, in its annual report for 2019,²² underlined the following challenges:

- Due to the shortcomings of the ETA, the practical effect of the ETA is negligible because of the limited application of the instrument in practise. This undermines the effectiveness of the implementation of EU directives.
- An additional problem is the unreliable system of collecting data on cases of violation of the principle of equal treatment pending before common courts. The data available to the Ministry of Justice is subject to numerous errors. This hinders reliable monitoring of the application of the ETA.
- Limited legal protection against discrimination in access to services as a result of the judgment of the Constitutional Tribunal, which repealed the provision in the Code of Petty Offences (138) penalising the refusal to provide a service.²³ Removing this provision carries negative consequences for the implementation of

¹⁹ See more detailed information in Section 6.1.c below.

²⁰ Ombud, research commissioned from Kantar Public on legal awareness in the context of equal treatment, Kantar Public, 2018, 2020.

²¹ See 'Ochrona przed dyskryminacją w Polsce. Stan prawny i świadomość społeczna. Wnioski i rekomendacje RPO' ('Protection against discrimination in Poland: legal status and social awareness. Conclusions and recommendations of the Ombud'), *Equal Treatment Principle: Law and Practice*, No. 30, 2020, pp. 4-5. Hereafter referred to as 'Protection against discrimination in Poland' (2020).

²² See Ombud, annual report for 2019.

²³ Constitutional Tribunal (Trybunał Konstytucyjny), judgment of 26 June 2019, No. K 16/17; see more at: <http://trybunal.gov.pl/s/k-1617>.

the principle of equal treatment – in terms of both the significant limitation of legal protection and the social significance of this change. As of 4 July 2019, when the provision lost its power, there has been a real threat of segregation in the service market. There were comments in the public space that the CT judgment confirmed the existence of the so-called universal 'conscience clause', i.e. the view that the service provider may freely choose the clients whom he serves.

- The Ombud noted that he encounters 'a significant number of cases initiated by citizens experiencing discrimination by private entities, in particular in the area of access to services. Therefore, it seems that in order to fully implement the European standards of operation of equal treatment bodies, it would be necessary to enable the equal treatment body to take direct intervention in cases involving violations by entities other than state authorities'.²⁴

Finally, the so-called 'rule-of-law backsliding' crisis should be mentioned. Although the Polish Government calls it a necessary judicial reform, it is being characterised by the international community and by academia as a crisis or even a constitutional coup d'état. The main part of it refers to the independence of the judiciary, and it is therefore likely to impact on the effectiveness of the fight against discrimination.

²⁴ Ombud, annual report for 2019, p. 26.

INTRODUCTION

The national legal system

Legislative power in Poland is centralised. The basic law is the 1997 Constitution. Other sources of universally binding law include acts/statutes of Parliament (*ustawy*); ratified international agreements that become part of domestic law after ratification;²⁵ and ordinances/regulations (*rozporządzenia*) issued by a Minister or by the Council of Ministers. Legislative power is exercised jointly by the House of Deputies, known as the Sejm, and the Senate, which are the two houses of Parliament. In order for a piece of legislation to be adopted, both houses must consent and the President – who is empowered to employ the right of veto (which may be rejected in Parliament) – must sign it. The act must then be promulgated in the *Journal of Laws*.

List of main legislation transposing and implementing the directives

Act on the Implementation of Certain Provisions of the European Union in the Field of Equal Treatment²⁶

Date of adoption: 3 December 2010

Protected grounds: gender, race, ethnic origin, nationality, citizenship,²⁷ religion, belief, political opinion, disability, age and sexual orientation

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

Act on the Labour Code²⁸ (implementation amendment)

Date of adoption: 14 November 2003

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

Material scope: Employment

Act on the Commissioner for Human Rights²⁹ (implementation amendment)

Date of adoption: 3 December 2010

Protected grounds: no grounds mentioned

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

²⁵ For instance, the UN Convention on the Rights of Persons with Disabilities (UNCPRD), after ratification (September 2012) and publication in the *Journal of Laws* (October 2012), became part of binding domestic law.

²⁶ Equal Treatment Act, 3 December 2010.

²⁷ Protection is limited to certain categories of persons, and discrimination on the grounds of citizenship as such is not prohibited in the ETA; see more in Section 2.1.

²⁸ Labour Code, 26 June 1974.

²⁹ Act on the Commissioner for Human Rights, 15 July 1987.

1 GENERAL LEGAL FRAMEWORK

Constitutional provisions on protection against discrimination and the promotion of equality

The Polish Constitution (of 1997, before implementation of the anti-discrimination law in Poland) includes the following general Article dealing with non-discrimination.

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

This provision applies to all areas covered by the directives. Its material scope is broader than that of the directives.

'This means that the creators of the Constitution gave the principle of equality a universal dimension, referring to all forms of distinction which may arise in political, social or economic life, regardless of the characteristic (criterion) according to which a distinction may occur'.³⁰

This provision is directly applicable. The Constitution stipulates that its provisions are directly applicable unless the Constitution itself states otherwise.³¹ Thus the presumption is in favour of the direct applicability of constitutional provisions. However, to a significant extent, this remains theoretical. It is not easy to put the concept of direct applicability into operation before a court, because in judicial proceedings it is necessary to use the existing legal and procedural framework and adapt the constitutional argument to it. In Poland, there is little precedent for invoking constitutional provisions directly, and the courts are not used to doing so. The issue of direct applicability of the Constitution became a subject of interest and debate in the years 2016–2020 due to political developments regarding the role of the Constitutional Tribunal (CT). From late 2015, the CT became the target of political attack, and its role has been significantly reduced. Many experts are of the opinion that because of the de facto limited role of the Constitutional Tribunal, the ordinary courts should directly apply the Constitution more often.³²

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

³⁰ Constitutional Tribunal, judgment of December 1997, No. K. 8/9716.

³¹ Constitution of the Republic of Poland, 2 April 1997, Article 8(2), available at: <http://trybunal.gov.pl/en/about-the-tribunal/legal-basis/the-constitution-of-the-republic-of-poland/>.

³² See articles on the blog, available at: <http://verfassungsblog.de/tag/polish-constitutional-tribunal/>. In particular, see Grzelak, A., 'Sententia non existens – the future of jurisprudence of the Polish Constitutional Tribunal?', 17 March 2017, available at: <http://verfassungsblog.de/sententia-non-existens-the-future-of-jurisprudence-of-the-polish-constitutional-tribunal/>. See also Matczak, M. (2018), *Poland: From Paradigm to Pariah? Polish Constitutional crisis – facts and interpretations*, Oxford, available at: <http://www.fljs.org/content/prominent-critic-law-and-justice-party-denounces-“assault-rule-law-poland”-“out-political”>; and Pietrzak, M. (2017), *The Constitutional Court of Poland: The Battle for Judicial Independence*, available at: <http://www.fljs.org/sites/www.fljs.org/files/publications/The%20Constitutional%20Court%20of%20Poland.pdf>.

politically and to be neither independent nor impartial) the number of questions submitted has dropped.³³

In principle, these provisions can be enforced against the state and private individuals, but any legal action should have a specific legal basis.

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

- Article 13: bans political parties and other organisations which include or allow racial hatred in their programme or activities.
- Article 25: principle of the equal rights of religious associations.
- Article 33(1), 33(2): both women and men have equal rights in family, political, social and economic life and, in particular, both have equal rights to education, employment and promotion, equal pay for equal work, social benefits, holding posts, etc.
- Article 35(1): guarantees people the freedom to preserve and develop their own language, preserve customs and traditions and develop their own culture.
- Article 35(2): national and ethnic minorities have the right to establish their own educational, cultural and religious institutions.
- Articles 53, 54(1), 58(1) and 60: freedom of conscience and religion, freedom of expression, freedom of association and the right of access to public services are equally safeguarded for all Polish citizens, including members of national and ethnic minorities.
- Article 67(1): people unable to work due to illness or disability and people who have reached the age of retirement are guaranteed the right to social security.
- Article 69: public authorities must provide, in accordance with statutes, assistance to people with disabilities to ensure their subsistence, adaptation to work and social communication.
- The Constitution uses various terms for those entitled to rights and freedoms: in some articles, it uses 'everyone' or 'anyone', but in others it uses the term 'citizen'. However, it also includes a general clause of protection: Article 37(1), which provides that 'Anyone, being under the authority of the Polish State, shall enjoy the freedoms and rights ensured by the Constitution. 2. Exemptions from this principle with respect to foreigners shall be specified by statute'.

³³ The Constitutional Tribunal received 135 questions of law from the judges in 2015, but only 21 in 2016, 21 in 2017, 15 in 2018 and 23 in 2019. See annual information regarding the Tribunal at: <https://trybunal.gov.pl/publikacje/informacje-o-problemach-wynikajacych-z-dzialalnosci-i-orzecznictwa-tk/od-2003>.

2 THE DEFINITION OF DISCRIMINATION

2.1 Grounds of unlawful discrimination explicitly covered

The following grounds of discrimination are explicitly prohibited in the main legislation (listed in the Introduction) transposing and implementing the two EU anti-discrimination directives:

ETA, Article 1: gender, race, ethnic origin, nationality, citizenship (see the scope below), religion, belief, political opinion, disability, age and sexual orientation.

The Labour Code, Article 18(3a)(1): gender, age, disability, race, religion, nationality, political opinion, membership of a trade union, ethnic origin, belief, sexual orientation, employment for a definite or indefinite period of time, part-time or full-time employment. The grounds are listed as examples only, the list remaining open because of the Article's wording: 'any discrimination [...] in particular on the grounds of ...'. This means that other grounds of discrimination could equally be taken into consideration by the courts when applying this provision (but since the number of cases is very limited, it does not often happen in practice).

2.1.1 Definition of the grounds of unlawful discrimination within the directives

a) Racial or ethnic origin

There is no law on discrimination, taking into account the 2010 Equal Treatment Act, which defines grounds of racial or ethnic origin.

Racial origin

The 2008 amendment to the Act on Granting Protection to Aliens on the Territory of the Republic of Poland,³⁴ which transposed the Qualification Directive³⁵ and the Asylum Procedures Directive,³⁶ is not part of anti-discrimination legislation (and was not applied in a context of counteracting discrimination), but it introduced a definition of 'race'. Article 14 includes some definitions that are useful in 'assessing the grounds of persecution' for people who apply for refugee status:

'The concept of **race** includes in particular colour of skin, descent, or membership of a particular **ethnic group**' and 'the concept of **nationality** is not limited to a **citizenship** or its absence, but shall in particular include membership of a group defined by: a) cultural, ethnic or linguistic identity or b) common geographical or political origin or c) linkage with the population of another country [...].'

Ethnic origin

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

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

³⁴ Act on the amendment of the Act of 13 June 2003 on Granting Protection to Aliens on the Territory of Poland (*Ustawa z dnia 13 czerwca 2003 r. o udzielaniu cudzoziemcom ochrony na terytorium Rzeczypospolitej Polskiej*), 18 March 2008.

³⁵ Council Directive 2004/83/EC on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted.

³⁶ Council Directive 2005/85/EC on minimum standards on procedures in Member States for granting and withdrawing refugee status.

- 1) is less numerous than the rest of the Polish population;
- 2) differs in a significant manner from other citizens by way of language, culture or tradition;
- 3) aspires to preserve its own language, culture or tradition;
- 4) has awareness of its historic national community and is focused on its expression and protection;
- 5) has inhabited the territory of the Republic of Poland for at least 100 years; and
- 6) identifies itself with a nation organised in its own state.³⁷

The Act goes on to enumerate the recognised national minorities: Armenian, Belarusian, Czech, German, Jewish, Lithuanian, Russian, Slovak and Ukrainian.³⁸

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

- 1) is less numerous than the rest of the Polish population;
- 2) differs in a significant manner from other citizens by way of language, culture or tradition;
- 3) aspires to preserve its own language, culture or tradition;
- 4) has awareness of its historic ethnic community and is focused on its expression and protection;
- 5) has inhabited the territory of the Republic of Poland for at least 100 years;
- 6) does not identify itself with a nation organised in its own state.³⁹

As above, the Act goes on to enumerate the recognised ethnic minorities: Karaimi, Lemk, Roma and Tatar.⁴⁰

The above definitions have been criticised, for two reasons. First, they exclude some significant national or ethnic groups in Poland (e.g. 'new immigrants' such as the Vietnamese). Furthermore, the definitions are restricted to Polish citizens and therefore do not refer, for example, to migrant workers originating from neighbouring countries (e.g. Ukrainians).

The aim of the Act on National and Ethnic Minorities and Regional Languages is, however, to provide certain rights – mostly linguistic and cultural rights – to national and ethnic minorities, as well as to protect them through state action (in 2014, social integration was added as a goal). Article 6 of the Act on National and Ethnic Minorities and Regional Languages prohibits discrimination based on membership of a minority. This provision clearly refers only to the national and ethnic minorities provided for in the Law.

b) Religion and belief

There is no law on discrimination, taking into account the 2010 Equal Treatment Act, which defines grounds of religion and belief.

The 2008 amendment to the Act on Granting Protection to Aliens on the Territory of the Republic of Poland,⁴¹ mentioned above, introduced a definition of 'religion':

'The concept of **religion** shall in particular include: a) having theistic, non-theistic or atheistic beliefs, b) participation, or refraining from participation, in religious

³⁷ Act on National and Ethnic Minorities and Regional Languages, 6 January 2005, Article 2(1).

³⁸ Act on National and Ethnic Minorities and Regional Languages, 6 January 2005, Article 2(2).

³⁹ Act on National and Ethnic Minorities and Regional Languages, 6 January 2005, Article 2(3).

⁴⁰ Act on National and Ethnic Minorities and Regional Languages, 6 January 2005, Article 2(4).

⁴¹ Act on the amendment of the Act of 13 June 2003 on Granting Protection to Aliens on the Territory of Poland, 18 March 2008.

rituals, performed in public or in private, individually or collectively, c) other acts of a religious character, beliefs expressed or form of individual or collective behaviour as a result of religious beliefs or related to them.'

c) Disability

There is no law on discrimination, taking into account the 2010 Equal Treatment Act, which defines the ground of disability.

There are some definitions of 'disability' at national level, which relate to certain legal acts.

The Act on the Vocational and Social Rehabilitation and Employment of Disabled Persons (Disabled Persons Act)⁴² defines the term 'disability' as 'a permanent or temporary inability to carry out social roles due to a permanent or long-term disturbance of performance of the human organism, in particular, resulting in incapacity to work.'⁴³ A disability has to be confirmed by a competent medical authority⁴⁴ at three possible levels: slight, moderate or severe.⁴⁵

The above definition may be of some help in clarifying what disability means for the purposes of the Labour Code (which itself does not contain a definition of disability). It is important to stress that the Disabled Persons Act refers only to those disabilities that are registered by the medical authorities. A case could come before the Polish courts involving an individual with a category of disability that has, for various reasons, not been certified by the relevant authority. In this event, the court itself must decide whether the person concerned is disabled or not. The court may take into account the definition contained in the Disabled Persons Act, but it may go beyond this definition. Some disabilities may not qualify as a disability under the Act, but people with such a disability may nevertheless be subject to discrimination or may feel themselves to be disabled.

According to Article 69 of the Polish Constitution, 'Public authorities shall provide, in accordance with statutes, assistance to disabled persons to ensure their subsistence, adaptation to work and social communication'. A commentary on the Constitution points out the open character of the term 'disability'.⁴⁶ In particular, it says that, in relation to the meaning of 'disability', the drafters of the Constitution took into account the recommendations of the Committee of Ministers of the Council of Europe of 1992 as well as the Disabled Persons Act. According to this commentary, the Constitution should be interpreted as providing a much broader definition of 'disability' than the Disabled Persons Act. Under the Constitution, 'disability' has an independent meaning that is not restricted by any decision of the medical authorities.

Similarly, law analysis leads to the conclusion that under the Labour Code, the term should also be interpreted independently and should not be restricted to the meaning contained in the Disabled Persons Act.

Thus, there are differences between the concept of disability adopted by the CJEU and the Polish definition. While the CJEU focuses on the interaction between impairments and environmentally created barriers, the Polish definition in the Disabled Persons Act focuses exclusively on impairments.

⁴² Disabled Persons Act, 27 August 1997.

⁴³ Compare with Disabled Persons Act, 27 August 1997, Article 2(10).

⁴⁴ Disabled Persons Act, 27 August 1997, Article 1.

⁴⁵ Disabled Persons Act, 27 August 1997, Article 3(1).

⁴⁶ Garlicki L. (ed.) (2003), *Komentarz do Konstytucji RP (Commentary on the Polish Constitution)*, Wydawnictwo Sejmowe, Volume III, Warsaw.

Another difference is that, according to the definition in the Disabled Persons Act, disability must be confirmed by a competent medical authority – something which is not required by the CJEU. However, as mentioned above, when determining whether discrimination has taken place, the Polish courts are not bound by the definition in the Disabled Persons Act.

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

The Ombud has repeatedly drawn attention to the need to change the system of requiring disability to be confirmed by a competent medical authority. In the Ombud's opinion, according to the UNCRPD 'this system should allow to determine the personalised support needed for a given person, both financial and non-financial. According to the Ombud, three levels of disability currently in use are inadequate in this respect. It is important that the new system of confirming disability should focus on the potential of a person with disability, and not on his/her dysfunctions'.⁴⁷ The idea concerns disability assessment not just in the non-discrimination context, but more broadly, for the purposes of claiming a benefit or similar. Once elaborated, however, the proper system of disability assessment could also be used in the context of non-discrimination claims.

d) Age

There is no law on discrimination, taking into account the ETA, which defines grounds of age. In practice, however, it is recognised that it covers both younger and older groups of citizens.⁴⁸

The Act on Elderly People (senior citizens), passed in 2015, defines 'senior citizens' as persons of 60 years of age or older.⁴⁹ However, despite the fact that the Law provides the exact age at which someone qualifies as a senior citizen, it does not have any binding effect on anti-discrimination laws.

e) Sexual orientation

There is no law on discrimination, taking into account the 2010 Equal Treatment Act, which defines grounds of sexual orientation.

The 2008 amendment to the Act on Granting Protection to Aliens on the Territory of the Republic of Poland,⁵⁰ mentioned above, introduced a definition of 'sexual orientation':

'Depending on the conditions prevailing in the country of origin, a particular social group might include a group whose members share a common **sexual orientation**, but sexual orientation cannot include acts which, according to Polish law, constitute crimes.'

There is a small amount of anti-discrimination case law relating to discrimination because of sexual orientation (mostly relating to gay and lesbian people). There is no anti-

⁴⁷ Ombud, annual report for 2018, p. 99.

⁴⁸ See, for instance, the Ombud's annual reports in which he addresses cases of age discrimination relating to different age groups.

⁴⁹ Act on Elderly People, (*Ustawa z dnia 11 września 2015 r. o osobach starszych*), 11 September 2015.

⁵⁰ Act on the amendment of the Act of 13 June 2003 on Granting Protection to Aliens on the Territory of Poland (*Ustawa z dnia 13 czerwca 2003 r. o udzielaniu cudzoziemcom ochrony na terytorium Rzeczypospolitej Polskiej*), 18 March 2008.

discrimination case law that might indicate how the judiciary understands 'sexual orientation'.

2.1.2 Multiple discrimination

In Poland, multiple discrimination is not prohibited in law.

Some Polish laws stipulate that discrimination might occur on the basis of one or more grounds, but do not treat the situation of multiple discrimination differently (the anti-discrimination provisions of the Labour Code, for example, provide definitions of direct and indirect discrimination that refer to 'one or several grounds'). However, the 2010 Equal Treatment Act does not mention the possibility of 'several grounds', listing the grounds of discrimination separately. In draft laws proposed in 2012 (but never passed), the concept of multiple discrimination was introduced.⁵¹

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

In cases of discrimination on the ground of gender plus other grounds, courts tend to focus on the gender discrimination and, once this has been proved, they do not devote attention to other causes of discrimination. A good example to illustrate this issue concerns discrimination in cases of 'forced retirement', when employees are dismissed on reaching retirement age. Since the retirement age for women was for many years (and is once again) lower than the age for men (as a general rule, it is 60 for women and 65 for men), cases of forced retirement for women were treated by the courts as gender discrimination and the issue of age discrimination never attracted attention (gender discrimination prevailed over age discrimination). However, similar cases involving men were treated as age discrimination. Only in 2009 did the Supreme Court state in a resolution that such cases involve two kinds of discrimination: indirect discrimination because of gender and direct discrimination on the ground of age.⁵² Since the law was changed and the legislation reverted to setting different retirement ages for women (at 60) and men (at 65), similar cases may arise in future.⁵³

Occasionally, cases occur in which more than one ground of discrimination is identified. In one case, for instance, the district and regional courts identified discrimination on the grounds of both sexual orientation and obesity (obesity is not a listed characteristic as such).⁵⁴

The ETA has been repeatedly criticised by international bodies and organisations. In September 2018, the UN Committee on the Rights of Persons with Disabilities recommended that Poland explicitly recognise and prohibit multiple and intersectional discrimination based on disability, gender, age, ethnicity, gender identity or sexual orientation and all other premises in all areas of life, and that it set up judicial and quasi-

⁵¹ See Government Plenipotentiary for Equal Treatment (2013), *Report on the Activities of the Government Plenipotentiary for Equal Treatment for the period 1 January 2012 – 31 December 2012 (Sprawozdanie z działalności Pełnomocnika Rządu do spraw Równego Traktowania za okres od 1 stycznia 2012 r. do 31 grudnia 2012 r.)*, Warsaw, pp. 14-17, and the draft law, available at: <http://orka.sejm.gov.pl/Druki7ka.nsf/0/866BA4538180DB32C1257AFC003C8D94/%24File/1051.pdf>.

⁵² Supreme Court, resolution of 21 January 2009.

⁵³ In May 2012, the retirement age was changed by Parliament. The normal retirement age for both men and women was set at 67 (to be introduced incrementally). However, in 2016, the previous retirement ages (60 for women, 65 for men) were restored and came into force in October 2017.

⁵⁴ See Słubice District Court, judgment of 18 June 2012, No. IV P 30/11; Gorzów Wielkopolski Regional Court, judgment of 27 November 2012, No. VI Pa 56/12 (not published).

judicial mechanisms to prevent and protect against discrimination against people with disabilities, including comprehensive damages mechanisms.⁵⁵

In his comments on the draft *Strategy for People with Disabilities 2020-2030*, the Ombud pointed out that, in the introduction to the strategy, the situation of women and girls with disabilities was noted, acknowledging that this group encounters specific additional barriers to full inclusion in public, social and professional life. However, their needs (and related recommendations of the UN Committee) were not included in any of the priority actions planned by the Government for the next 10 years. This gives rise to serious concern that women and girls with disabilities will continue to remain invisible to the state's disability policy.⁵⁶

The Ombud also pointed out that the most numerous group with disabilities indicated in the statistics are elderly people who face various types of disabilities and other difficulties resulting from age-related health conditions. Seniors with disabilities are perceived not only through the prism of stereotypes relating to disability, but also through the prism of stereotypes typical of old age, which are related to ageism. The draft strategy does not recognise this problem and does not refer in any way to the activities already planned under the resolution *Social Policy for Older People 2030 – safety, participation, solidarity* (adopted in 2018), showing a large inconsistency with this document.⁵⁷

In Poland, there is no case law dealing with multiple discrimination.

2.1.3 Assumed and associated discrimination

a) Discrimination by assumption

In Poland, discrimination based on a perception or assumption of a person's characteristics is not prohibited in national law.

In draft laws presented in 2012 (but never passed), the concept of assumed discrimination was introduced.⁵⁸

One can imagine that the concept of discrimination by assumption could be introduced by a court ruling (as happened regarding the concept of discrimination by association; see below) but such rulings have not thus far been identified.

b) Discrimination by association

In Poland, discrimination based on association with persons with particular characteristics is not prohibited in national law.

In draft laws presented in 2012 (but never passed), the concept of discrimination by association was introduced.⁵⁹

⁵⁵ See final remarks adopted by the Committee on the Rights of Persons with Disabilities on 29 October 2018, CRPD/C/POL/CO/1, points 8b and c. See also Ombud, annual report for 2020, pp. 391-401.

⁵⁶ Ombud, annual report for 2020, pp. 392-393.

⁵⁷ Ombud, annual report for 2020, pp. 392-393.

⁵⁸ See Government Plenipotentiary for Equal Treatment (2013), *Report on the Activities of the Government Plenipotentiary for Equal Treatment for the period 1 January 2012 – 31 December 2012 (Sprawozdanie z działalności Pełnomocnika Rządu do spraw Równego Traktowania za okres od 1 stycznia 2012 r. do 31 grudnia 2012 r.)*, Warsaw, pp. 14-17, and the draft law, available at: <http://orka.sejm.gov.pl/Druki7ka.nsf/0/866BA4538180DB32C1257AFC003C8D94/%24File/1051.pdf>.

⁵⁹ See Government Plenipotentiary for Equal Treatment (2013), *Report on the Activities of the Government Plenipotentiary for Equal Treatment for the period 1 January 2012 – 31 December 2012 (Sprawozdanie z działalności Pełnomocnika Rządu do spraw Równego Traktowania za okres od 1 stycznia 2012 r. do 31 grudnia 2012 r.)*, Warsaw, pp. 14-17, and the draft law, available at: <http://orka.sejm.gov.pl/Druki7ka.nsf/0/866BA4538180DB32C1257AFC003C8D94/%24File/1051.pdf>.

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

One of these rulings concerned the first case finally decided under the ETA (2014 – first instance ruling, 2015 – second instance ruling).⁶⁰ XY worked as a shop security guard employed by Company Z. XY took part in the equality parade (focused traditionally, but not exclusively, on the rights of the LGBTQ community), clips of which were shown on television. After the broadcast, XY received a text message from his employer (from the security chief of the store where he worked), in which he was informed that he was fired. The information was confirmed in a telephone conversation, with the argument that an individual who participates in such events and is associated with groups organising them cannot be a security guard because it tarnishes the company's image. XY sued the employer, claiming discrimination by association based on sexual orientation. The court of first instance found that there had been discrimination by association and awarded the claimant PLN 2 500 (EUR 625) for material damages only and refused to grant non-material damages.

In the second case, YZ (a journalist and known media personality) sued the Roman Catholic Diocese of H. for compensation for infringement of the rule of equal treatment on the ground of sexual orientation by association (direct discrimination and harassment), referring to the ETA, EU directives and CJEU jurisprudence. According to YZ, he supported on social media the petition for legalising civil partnerships (for both heterosexual and same-sex partners). Shortly after, he lost the job (YZ argued there was a verbal civil agreement) of running a Radio B. concert in D. The Catholic priest who organised the concert told him that this was because he supported gays. The district court of first instance (*sąd rejonowy*) – dismissed the lawsuit, stating that there was no binding contract between the parties. In respect of discrimination, the court did not accept the shift of the burden of proof, arguing that the claimant himself should have provided more evidence. The court also argued that the organiser of the concert, being part of the Catholic Church structure, had a right to refuse collaboration with persons who support ideas with which the Catholic Church does not agree. Even if one could conclude, therefore, that the reason for the breach of contract was the claimant's support for civil partnerships between same-sex partners, it would not constitute discrimination. The court relied on Article 5(7) of the ETA, and similar provisions of the Labour Code (genuine, determining and proportionate occupational requirement). YZ appealed the ruling.

In March 2017 the regional court of second instance (*sąd okręgowy*) reversed the verdict, finding that there had been discrimination and awarding PLN 1 000 (EUR 250) to YZ and PLN 1 000 to the PTPA (the CSO representing the claimant). The court decided that there was a binding verbal contract between the parties. The court stated that the claimant had provided enough evidence to substantiate discrimination and the burden of proof shifted to the respondent, who had not proved that there was no breach of the rule of equal treatment. According to the court, the limitations stemming from Article 5(7) of the ETA (the court of first instance referred to these) did not apply in the given case. Finally, the court concluded that the respondent discriminated against the claimant – the court did not discuss the concept of discrimination by association, but found that there had been indirect discrimination on the grounds of political opinion (*światopogląd*).

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

⁶⁰ Warsaw Śródmieście District Court, judgment of 9 July 2014, *XY and Polish Society of Anti-discrimination Law on behalf of XY v. Company Z*, No. VI C 402/13; Warsaw Regional Court (second instance), judgment of 18 November 2015, No. V Ca 3611/14 (not published).

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

a) Prohibition and definition of direct discrimination

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

The 2010 Equal Treatment Act (Article 3(1)) defines direct discrimination in line with the EU equality directives. It stipulates that direct discrimination takes place when 'a natural person because of their gender, race, ethnic origin, nationality, religion, belief, political opinion, disability, age or sexual orientation, is treated less favourably than another is, has been or would be treated in a comparable situation'. Even though the provision refers to 'natural person', this wording has never given rise to (nor could in fact be interpreted as) the limitation of protection from direct discrimination to one person as opposed to a group of persons.

Parallel to this definition, the definition in the Labour Code is still in force. This is slightly different and erroneous, most probably due to a translation error. In Article 2(2a) of Directive 2000/43/EC, the 'hypothetical' nature refers to the behaviour to which the discriminatory treatment is being compared (treatment of another person in a comparable situation) and not the discrimination itself, in contrast with the Labour Code, which reads (Article 18(3a)(3): 'Direct discrimination takes place when an employee, for one or more reasons listed in paragraph 1, was, is, or may be treated, in a comparable situation, less favourably than other employees'. However, this erroneous translation has had no practical consequences so far (for instance, in court rulings) and remains rather an academic issue.

b) Justification for direct discrimination

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

Apart from these exceptions (transposed from the directives), the ETA states *expressis verbis* that it does not cover the spheres of private and family life (not defining them) and legal actions related to these spheres (Article 5(1)), nor does it cover the freedom to choose a party to a contract (it does not refer to employment), as long as the choice is not based on the grounds of gender, race, ethnic origin or nationality (Article 5(3)).

However, Polish law permits the justification of both direct and indirect discrimination in respect of all grounds in the field governed by the Labour Code. In accordance with the Code, in order to justify different treatment that leads to a breach of the principle of equal treatment in employment, the employer must prove the existence of 'objective reasons' for his/her actions (in fact, this provision regulates the shift of the burden of proof).⁶¹ As regards the specified 'exclusion' situations, see Section 2.3.b below.

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

a) Prohibition and definition of indirect discrimination

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

The ETA defines indirect discrimination, in general, in line with the directives and states (Article 3(2)) that indirect discrimination is considered to take place in a situation in which unfavourable differences or particular disadvantage occur or could occur for a natural person because of their gender, race, ethnic origin, nationality, religion, belief,

⁶¹ Labour Code, 26 June 1974, Article 18(3b)(1) *in fine*.

political opinion, disability, age or sexual orientation, due to an apparently neutral provision, criterion used or practice/action undertaken, unless that decision, criterion or action is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary. Even though the provision refers to 'natural person', this wording has never given rise to (nor could in fact be interpreted as) the limitation of protection from direct discrimination to one person as opposed to a group of persons.

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

Simultaneously, the definition of indirect discrimination formulated in the Labour Code, and amended in 2008, is still valid in the employment field.⁶² According to the Labour Code indirect discrimination takes place when, 'due to an apparently neutral provision, criterion used or practice/action undertaken, unfavourable differences or particular disadvantage occur or could occur in terms of the establishment and termination of employment, conditions of employment, promotion, and access to training for enhancing professional qualifications, for all or a large number of employees who are members of a group distinguished on one or more of the grounds referred to in § 1, unless that decision, criterion or action is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary'.⁶³

Although, following the 2008 amendment, the Labour Code's definition of indirect discrimination is better than it was previously, it still does not seem to be fully compatible with the directives. Specifically, the definition refers to disadvantage for 'all or a large number of employees who are members of a group [...]'. This is not a requirement found in the directives, and it is problematic. For example, an indirectly discriminatory measure in relation to a disabled person might affect only a small number of people with that specific disability, rather than a large number of disabled people. However, it is a theoretical issue, since 'large number' has not been interpreted in a way that would limit the protection. No relevant case law has been identified.

b) Justification test for indirect discrimination

The definition of 'indirect discrimination' as quoted above has been in force since 1 January 2011 (definition in the ETA) and since 18 January 2009 (definition in the Labour Code). The concepts of 'legitimate aim' and 'appropriate and necessary measures' were not recognised before. It is therefore difficult to say – due to the lack of relevant case law – how they would be treated by the courts; previously, disproportionate treatment could simply be justified by 'other objective reasons'.

However, in relation to both direct and indirect discrimination, an additional amended provision could be applied that specifies under which circumstances certain conduct cannot be considered as discrimination. The following differentiating measures, if they are proportionate to achieving a legitimate aim, do not amount to a violation of the principle of equal treatment:⁶⁴

- 1) failure to employ an individual on the basis of one or more of the grounds listed in the definition of discrimination, if the type of work or working conditions mean that the reason or reasons for different treatment are genuine and determining occupational requirements;

⁶² Act on the amendment of the Act on the Labour Code, 21 December 2008, in force since 18 January 2009.

⁶³ Labour Code, 26 June 1974, Article 18(3a)(4) (as amended).

⁶⁴ Labour Code, 26 June 1974, Article 18(3b)(2) (as amended).

- 2) changing the employee's employment conditions in respect of working time, if this is justified by reasons not related to employees, and without reference to the grounds of discrimination listed in the definition of discrimination;
- 3) applying measures that make a distinction in the legal situation of an employee on account of protection of the employee's parenthood status or disability;
- 4) using the criterion of length of service in setting the terms of employment and dismissal, remuneration and promotion and access to vocational training, which justifies differential treatment because of age.

2.3.1 Statistical evidence

a) Legal framework

In Poland, there is legislation regulating the collection of personal data.

On the one hand, there is constitutional protection for scientific research (Article 73), but on the other hand, according to the Constitution everyone has the right to legal protection of their private life and family life, honour and good reputation and to make decisions about their personal life.⁶⁵ Furthermore, no one may be obliged, except on the basis of an act of Parliament, to disclose personal information.⁶⁶

Due to the implementation of the EU General Data Protection Regulation (GDPR), a new Act on Personal Data Protection was adopted in 2018.⁶⁷ Article 107.2 of the Act translates directly Article 9 of the GDPR and prohibits the processing of personal data that reveals racial or ethnic origin, political opinions, religious or philosophical beliefs or trade union membership, and the processing of genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person's sex life or sexual orientation.

In accordance with the general framework set out in the Act on Personal Data Protection, the Act on Public Statistics⁶⁸ makes research on discrimination possible only when sensitive data is gathered with the consent of the individuals involved.⁶⁹

An exceptional situation occurs when a national census is organised – in such a case, the provision of information might be obligatory but requires a special act of Parliament as a legal basis.⁷⁰

Thus far, there has been no tradition of data being collected solely for litigation purposes, nor have there been any specific examples. However, if any research exists, it may be submitted as additional evidence.

In Poland, statistical evidence may be admitted under national law in discrimination cases, including in order to establish indirect discrimination. However, the use of statistical evidence is not (explicitly) permitted by national law.

⁶⁵ Constitution of the Republic of Poland, 2 April 1997, Article 47, available at: <http://trybunal.gov.pl/en/about-the-tribunal/legal-basis/the-constitution-of-the-republic-of-poland/>.

⁶⁶ Constitution of the Republic of Poland, 2 April 1997, Article 51(1), available at: <http://trybunal.gov.pl/en/about-the-tribunal/legal-basis/the-constitution-of-the-republic-of-poland/>.

⁶⁷ Act on Personal Data Protection (*Ustawa z 10 maja 2018 r. o ochronie danych osobowych*), 10 May 2018.

⁶⁸ Act on Public Statistics (*Ustawa z dnia 29 czerwca 1995 r. o statystyce publicznej*), 29 June 1995, as amended, available at: <http://bip.stat.gov.pl/en/law/law-on-official-statistics/>.

⁶⁹ Act on Public Statistics, 29 June 1995, Article 8, amended.

⁷⁰ Act on Public Statistics, 29 June 1995, Article 9(1); see, for instance, Act on the National Population and Housing Census in 2021 (*Ustawa z dnia 9 sierpnia 2019 r. o narodowym spisie powszechnym ludności i mieszkań w 2021 r.*), which provides that the next national census will be conducted from 1 April to 30 June 2021.

Although there is no explicit mention of the use of statistical evidence to establish indirect discrimination in Polish law, including in the ETA, this does not mean that it is not possible. Under the Code of Civil Procedure, there are no restrictions regarding the sources or forms of evidence. The Code lists the most common of these and provides principles concerning their admission, but does not exclude the possibility of other forms of evidence, such as statistics (Article 232). Article 233 of the Code of Civil Procedure provides that the court must assess the evidence according to its own convictions, on the basis of a comprehensive examination of the collected material. One of the Supreme Court judges, in her academic writings, underlines the possibility of using statistical data.⁷¹ Due to a lack of court cases, it is difficult to predict whether this would be a commonly used approach.

b) Practice

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

There have been no cases identified involving indirect discrimination in which statistics were used in order to prove discrimination.⁷²

2.4 Harassment (Article 2(3))

a) Prohibition and definition of harassment

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

The ETA (Article 3(3)) defines harassment in line with the directives as any unwanted conduct with the purpose or effect of violating the dignity of a natural person and of creating an intimidating, hostile, degrading, humiliating or offensive environment. The material scope of the prohibition on harassment is the same as in the case of direct or indirect discrimination, in all fields protected by the Act. Although the provision refers to 'natural person', this wording has never given rise to (nor could in fact be interpreted as) the limitation of protection from harassment to one person as opposed to a group of persons.

The ETA also prohibits, and considers as unequal treatment, the less favourable treatment of people caused by rejection of harassment or submission to harassment and, in addition, it prohibits instructions to discriminate or harass – both encouraging and ordering discrimination or harassment (Article 3(5), Article 9).

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

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

⁷¹ See, for instance, Gonera, K. (2016), 'Stosowanie prawa antydyskryminacyjnego – perspektywa sądu, zagadnienia wybrane' ('Implementation of anti-discrimination law – court perspective, selected problems'), in Bojarski, Ł. (ed.) (2016), *Wspólnie przeciw dyskryminacji. Sędziowie i organizacje obywatelskie na rzecz równego traktowania* (Together against discrimination. Judges and CSOs for equal treatment), pp. 44-47.

⁷² From interviews conducted to update this report.

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

In Poland, harassment explicitly constitutes a form of discrimination. Both sexual harassment and harassment are treated as forms of discrimination and thus are prohibited in both the ETA and the Labour Code.

b) Scope of liability for harassment

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

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

Compensation claims as introduced by the ETA (Article 13) are governed by the general rules of the Civil Code and the Code of Civil Procedure. No specific provisions are included in the ETA.

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

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

In the case of damage caused by discriminatory acts – most likely non-material damage – the employer (the state or its representatives) bears responsibility for the acts of its employees. For example, a state hospital is responsible for the actions of a doctor it employs (there are, of course, specific conditions to be fulfilled for this provision to apply, such as the fact that there must be an employment contract between the hospital and the doctor). In such cases, an individual (the claimant) may raise the issue of the employer's responsibility for the actions of their employees.

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

There is no significant case law on harassment in Poland. However, a case of harassment on the grounds of religion or lack of religion is described below.

G. J. (the complainant) worked as a mathematics teacher in a sports school (the respondent). During the complainant's one-year leave (a sabbatical), a cross (crucifix) was placed in the teachers' staff room on the initiative of K. W., a priest teaching religion in the school. The priest obtained the consent of some teachers to hang the cross (they signed a list). G. J. found the crucifix upon returning to work after the sabbatical. G. J. removed the cross from the wall twice. During the next Pedagogical Council meeting (announced in advance without a specific agenda), the school head indicated in an initial speech that 'the council was convened in connection with removing the cross from the teachers' staff room and was demanded by the majority of teachers, who were outraged by removal of the cross' and stated that: 'We already know who dared to remove the cross.' During this speech, some teachers loudly expressed their indignation, using terms such as 'scandal' as well as 'Who dared to remove the cross?' and similar phrases. Other teachers, namely D. F. and A. G., described the atmosphere of the meeting as like 'a lynching, terror'. Some teachers sent a complaint to the school head, pointing out that

they did not agree that 'G. J. did not follow the internal school complaints procedures – and instead arbitrarily decided to remove the cross'. The school head decided to issue an admonition as a penalty. However, after G. J. formally objected to the penalty, stating that it did not present specific charges and dates for committing the alleged acts, the school head quashed it.

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

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

The court of first instance stated that the behaviour of the employers and teachers described above had the effect of violating the dignity of G. J., creating an atmosphere of humiliation, exclusion, intimidation and hostility towards her – i.e. discrimination in the form of harassment.⁷³

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

The District Court awarded G. J. the amount of PLN 5 000 (EUR 1 200) as compensation and ordered the respondent to publish an apology for unlawful admittance of discriminatory actions against G. J. and violation of her personal dignity. Both sides (teacher and school) appealed against the verdict, but the appellate court dismissed both appeals.⁷⁴

After the Court of Appeal's judgment, the school paid compensation and published an apology. Despite this, in June 2017, the Regional Prosecutor's Office, which was not a party to the case, filed a cassation appeal to the Supreme Court arguing that the behaviour of the school's headmaster and teachers should not be treated as discrimination. The Supreme Court dismissed the cassation complaint and found that the behaviour of the school management towards the teacher constituted discrimination against the employee in the form of harassment due to her beliefs.⁷⁵ A verdict of the Supreme Court becomes final, but in this particular case the Prosecutor General/Minister of Justice submitted in February 2020 (16 months since the final Supreme Court verdict) an extraordinary cassation to the Supreme Court, demanding that the verdict of the Court of Appeal in Wrocław and the Supreme Court be set aside. The case is pending.⁷⁶

⁷³ Opole Regional Court (first instance), judgment of 15 September 2016, No. V P 40/14, available at: <https://www.saos.org.pl/judgments/27571>.

⁷⁴ Wrocław Court of Appeal (second instance), judgment of 31 January 2017, No. III APa, 33/16, available at: [http://orzeczenia.wroclaw.sa.gov.pl/content/\\$N/155000000001521_III_APa_000033_2016_Uz_2017-02-10_001](http://orzeczenia.wroclaw.sa.gov.pl/content/$N/155000000001521_III_APa_000033_2016_Uz_2017-02-10_001).

⁷⁵ Supreme Court (cassation), judgment of 7 November 2018, No. II PK 210/17, available at: http://www.sn.pl/orzecznictwo/SitePages/Baza_orzeczen.aspx?ItemSID=34043-57a0abe2-a73c-441d-9691-b79a0c36be5c&ListName=Orzeczenia3&Tresc=krzy%u017c.

⁷⁶ The Prosecutor General used the power that he was granted by the amendment to the Act on the Supreme Court (3 April 2018). According to that Law (Article 89(1)), an extraordinary cassation may be lodged for any final judgment of the past 20 years if it is 'necessary to ensure the rule of law and social justice'.

2.5 Instructions to discriminate (Article 2(4))

a) Prohibition of instructions to discriminate

In Poland, instructions to discriminate are prohibited in national law. Instructions to discriminate are defined as 'ordering' but also as 'encouraging', and therefore go beyond the scope of the directives.

Instructions to discriminate are prohibited in employment by the Labour Code (Article 18(3a)(5)(1)). The provision of the Labour Code regarding instructions to discriminate was broadened in 2008, and now covers both encouraging (which existed before) and ordering (which was added) infringement of the principle of equal treatment with respect to another person.

The ETA prohibits instructions to discriminate, including both encouraging (*zachęcanie*) and ordering (*nakazywanie*) someone to discriminate (Article 3(5), Article 9). The material scope of the prohibition covers all fields protected by the Act.

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

In Poland, instructions explicitly constitute a form of discrimination.

b) Scope of liability for instructions to discriminate

In Poland, the instructor is liable.

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

Compensation claims as introduced by the ETA (Article 13) are governed by the general rules of the Civil Code and the Code of Civil Procedure. No specific provisions are included in the Act: a person who has incurred damage due to instructions to discriminate can seek compensation according to general principles.

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

An interesting case in this respect was decided by the Poznań Court of Appeal in 2012.⁷⁷ It concerned the liability of a club owner for the discriminatory actions of the club's security guards, who were employed not directly by the club but by a separate company hired by the owner. Both the security guards and the club owner admitted that the owner had asked the security guards not to admit Roma customers. The Court of Appeal reversed the ruling of the first instance court and ruled that the restriction of access to the club based on ethnic origin constituted an infringement of the right to personal dignity as protected by the Civil Code. The Court also stated that, even though the club's security was provided by an external company, the club's owner bore responsibility for the actions and harm caused by the security guards.

⁷⁷ Poznań Appellate Court, judgment of 29 February 2012, A.G. v. K. L.-B., No. I ACA 1162/11.

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

The employer (the state or its representatives) bears responsibility for the acts of its employees. For example, a state hospital is responsible for the actions of a doctor it employs (there are, of course, specific conditions to be fulfilled for this provision to apply, such as the fact that there must be an employment contract between the hospital and the doctor). In such cases, an individual (the claimant) may raise the issue of the employer's responsibility for the actions of their employees.

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

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

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

- a) Implementation of the duty to provide reasonable accommodation for people with disabilities in the area of employment

In Poland, the duty on employers to provide reasonable accommodation for people with disabilities is included in the law and is defined.

The Disabled Persons Act (amended by the 2010 ETA) provides in Article 23a(1-3) that:

- an employer is obliged to provide the necessary reasonable accommodation for a disabled person with whom they are in an employment relationship, or who is participating in a recruitment process or undertaking vocational or professional training or an apprenticeship or internship;
- necessary reasonable accommodation means introducing necessary changes and adjustments in a particular case in line with the specific needs reported to the employer stemming from somebody's disability, unless the introduction of such changes or adjustments would impose a disproportionate burden on the employer;
- the burden is not deemed disproportionate when it is sufficiently remedied by public funds;
- failure to provide necessary reasonable accommodation is deemed an infringement of the principle of equal treatment in employment within the meaning of Article 183a(2-5) of the Labour Code.

The amendment of 20 December 2002 to the Disabled Persons Act introduced the definition of a workstation adapted to the needs of a disabled person. This is a workstation which is suitably equipped and adapted to the needs arising from the type and degree of disability of the individual (according to the certificate of disability granted under this Act).

- b) Case law

Since the ETA entered into force (together with its amendment to the Disabled Persons Act), there has been little jurisprudence on the issue.

The Supreme Court, in its judgment of 12 May 2011,⁷⁸ emphasised that the obligation to provide reasonable accommodation should be interpreted in line with recital 20 of the preamble to Directive 2000/78/EC and that it extends beyond premises or equipment to cover working time and the distribution of duties.

In the Supreme Court judgment of 12 April 2012,⁷⁹ a junior prosecutor (*asesor*) was dismissed because, according to the regional prosecutor, as a disabled person she could not perform all the duties of a prosecutor. She challenged the dismissal and finally lost the case in the Supreme Court. The substance of the verdict was as follows:

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

The Supreme Court's judgment of 4 June 2013⁸⁰ concerned hypothetical disability, not explicitly raised in the complaint to the SC. The termination of an employment contract, due to an employee's loss of the ability to perform work (not the worker's fault), as a result of receiving a certificate of moderate disability, may be justified only when such a state of disability objectively prevents (excludes) the performance of basic or essential employee duties by a disabled employee, despite the use of rationally justified reasonable accommodation improvements to the employee workplace.

The use by the employee (the applicant) of the right to change the organisation of work in connection with the identified disability cannot be a reason justifying the termination of the employment relationship (Article 18(3e) of the Labour Code).

From the justification: The cassation appeal lacked allegations regarding unjustified termination of the employment contract (Article 45(§1) of the Labour Code) or violation of the principle of equal treatment and the prohibition of discrimination because of the applicant's disability (Article 18(3a) and (3e) of the Labour Code). However, the Supreme Court found that the applicant's procedural grounds were justified, because the judgment appealed was delivered prematurely without proper explanation of the essential circumstances of the case.

The Supreme Court judgment of 12 November 2014 ran as follows.⁸¹ Both European and Polish law imply an obligation on the employer to introduce reasonable accommodation

⁷⁸ Supreme Court, judgment of 12 May 2011 (II PK 276/10). The opinion was formulated as an aside, in the last sentence of the judgment since the case was initiated in 2008, before the introduction of the reasonable accommodation duty in Poland by the ETA (in force since 1 January 2011). However, the Supreme Court ruled in 2011, four months after the change in the law, and it simply decided to point out the new legal situation for future reference.

⁷⁹ Supreme Court, judgment of 12 April 2012 (II PK 218/11). See: <https://sip.lex.pl/#/jurisprudence/521407352/1/ii-pk-218-11-zwolnienie-prokuratora-ze-wzgledu-na-jego-niezdolnosc-do-wykonywania-pracy-wyrok...?cm=RELATIONS>.

⁸⁰ Supreme Court, judgment of 4 June 2013 (I PK 26/13), published: LEX nr 1554965, available at: <https://sip.lex.pl/orzeczenia-i-pisma-urzedowe/orzeczenia-sadow/i-pk-26-13-kompetencja-komisji-bhp-do-kontroli-521648661>.

⁸¹ Supreme Court, judgment of 12 November 2014 (I PK 74/14), published: OSNP 2016/8/101, available at: <https://sip.lex.pl/orzeczenia-i-pisma-urzedowe/orzeczenia-sadow/i-pk-74-14-wprowadzanie-racjonalnych-usprawnień-dla-521661154>.

for a disabled employee, as long as it does not constitute a disproportionately high burden. It is for the court/judge to assess all the circumstances of a given case.⁸²

In any case, the concept of accommodation should be interpreted broadly and take into account both material and organisational measures.⁸³

Thus, the termination of an employment contract may be considered justified only if the employer does not have any reasonable means of enabling the disabled person to continue employment.⁸⁴

In this judgment, the Supreme Court was of the opinion that Article 23a of the Disabled Persons Act should be interpreted in such a way that by adopting appropriate, i.e. effective and practical measures to adapt the workplace to take into account disability, one should understand not only the adaptation of premises or equipment, but also of working time and division of duties.

As in any case of this type, it is necessary to consider all possible changes, taking into account the rationality of their introduction in terms of the burden put on the employer. The employer's failure to take any actions, limiting itself only to the finding that they constitute a disproportionate burden, cannot be regarded as fulfilling the obligation under Article 23a of the Disabled Persons Act.⁸⁵ It should also be remembered that it is possible for the employer to obtain public funds for the introduction of changes enabling the further employment of a disabled employee.

c) Definition of disability and non-discrimination protection

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

This, however, might be also seen as an incorrect implementation of Article 5 of Directive 2000/78, 'by narrowing the definition of disability and making it dependent on the possession of an appropriate certificate.' In addition, as a consequence, 'the provisions on reasonable accommodation also apply to the narrowed group of persons with disabilities'.⁸⁶

d) Failure to meet the duty of reasonable accommodation for people with disabilities

In Poland, failure to meet the duty of reasonable accommodation in employment for people with disabilities is recognised as a form of discrimination.

⁸² See: Supreme Court, judgment of 12 April 2012, II PK 218/11, item 105.

⁸³ See: Derlacz-Wawrowska, M., *Glosa* (gloss) to the judgment of the Court of Justice of April 11, 2013, C-335/11 and C-337/11, LEX / el 2013.

⁸⁴ See: Opinion of the Advocate General in case C-13/05, pp. 81- 82.

⁸⁵ See: Latos-Miłkowska, M., 'Ochrona trwałości stosunku pracy pracowników niepełnosprawnych i opiekunów osób niepełnosprawnych', in Giedrewicz-Niewińska, A. and Szablowska-Juckiewicz, M. (eds.) (2014), *Zatrudnianie osób niepełnosprawnych*, Warsaw, p. 260.

⁸⁶ See expert opinion commissioned by the Office of the Ombud and prepared by an expert: Dr. M. Kułak, *Analiza poprawności implementowania do polskiego porządku prawnego dyrektyw Unii Europejskiej w obszarze równego traktowania, Ekspertyza przygotowana na zlecenie Biura Rzecznika Praw Obywatelskich, (Analysis of the correctness of implementation of European Union directives in the field of equal treatment into the Polish legal system,)*, 4 January 2021, pp. 31-32; hereafter referred to as: Kułak, M. (2021).

It is worth mentioning that failure to provide reasonable accommodation results in discrimination only in a situation in which there is a 'traditional' employment contract (covered by the Labour Code). Unfortunately, there is no provision on either duty and discrimination in the case of failure, with regard to other forms of employment (for instance, contracts under civil law).⁸⁷

The failure to provide necessary reasonable accommodation is deemed to infringe the principle of equal treatment in employment within the meaning of Article 18(3a)(2-5) of the Labour Code⁸⁸ (which prohibits and defines direct discrimination, indirect discrimination, harassment and instructions to discriminate).⁸⁹ Legislation and case law do not specify whether such a failure amounts to direct or indirect discrimination (or another form).

In respect of sanctions in the field of employment, Article 18(3d) of the Labour Code provides that a person who is subjected to discriminatory treatment by an employer is entitled to compensation not lower than the level of one month's minimum wage as defined in separate laws (in 2020, a gross salary of PLN 2 600 (EUR 580) per month).

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

- e) Duties to provide reasonable accommodation in areas other than employment for people with disabilities

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

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

However, there are some developments in the sphere of education. 'Promotion of reasonable accommodation in education' was one of the activities described in the *National Programme of Activities for Equal Treatment for 2013-2016*.⁹⁰ Various activities have been undertaken, such as the provision of financial support for students and PhD students with disabilities. However, the Ombud consistently points to problems with the practical implementation of the right of students with disabilities to inclusive education, which are related to the refusal to provide them with reasonable accommodation in mainstream schools, and to problems with transporting students with disabilities to schools and educational institutions or the reimbursement of their parents for the costs of this transport.⁹¹

In 2019, the Act on Education was amended in part regarding the transport of children and students with disabilities to schools and institutions.⁹² During the legislative process, the Ombud presented two opinions indicating incomplete implementation of the

⁸⁷ This could theoretically be challenged but has not been so far. However, considering the type (and short duration) of work that is usually undertaken under civil contracts, most forms of accommodation might generally be considered to be 'unreasonable'.

⁸⁸ Disabled Persons Act, 27 August 1997, Article 23a(3).

⁸⁹ The 2010 ETA introduced the concept of reasonable accommodation but put it into another act of law – the Disabled Persons Act of 27 August 1997. Since the 'reasonable accommodation' provision covers employment, the Disabled Persons Act refers to the Labour Code and not to the ETA.

⁹⁰ Government Plenipotentiary for Equal Treatment (2015) *Report on the execution of the National Programme of Activities for Equal Treatment for 2014 (Raport z realizacji Krajowego Programu Działań na rzecz Równego Traktowania za 2014 r.)* Warsaw, p. 95.

⁹¹ Ombud, annual report for 2018, p. 158; Ombud, annual report for 2019, p. 477; Ombud, annual report for 2020, pp. 410-416.

⁹² Act on Education, Article 39a, added by Article 1(3) of the Act amending the Act on Education, 16 October 2019, in force since 3 December 2019.

resolution of the Constitutional Tribunal by the draft provisions.⁹³ In the resolution, the Tribunal had indicated that parents should be reimbursed for the actual costs of transport. The amendment introduced an algorithm to calculate the amount due to the parent, but it includes only the price of fuel and the distance necessary to travel. It does not clearly indicate the number of trips a day for which a parent may request a refund.

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

There is no legal duty to provide reasonable accommodation in respect of other grounds in the public and the private sector.

⁹³ Constitutional Tribunal, resolution of 17 October 2017, No. S 1/17 (based on the constitutional complaint – resolution of 4 October 2017, No. SK 28/16, see: <https://trybunal.gov.pl/s/sk-2816>).

3 PERSONAL AND MATERIAL SCOPE

3.1 Personal scope

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

In Poland, there are no residence or citizenship/nationality requirements for protection under the relevant national laws transposing the directives. However, Article 5(9) of the ETA (transposing the directives) provides that the Act does not cover differences in treatment based on nationality, especially in relation to entry into and residence in Poland and in relation to the legal status of natural persons who are citizens of countries other than EU Member States, Member States of EFTA or the Swiss Confederation.

The 2016 amendment to the ETA added citizenship as a protected ground, but only for some categories of people.⁹⁴ This Act implements EU Directive 2014/54/EU of 16 April 2014 on measures facilitating the exercise of rights conferred on workers in the context of freedom of movement for workers. The amendment to the ETA adds one more discrimination ground by stating in Article 1(2) (previously only Article 1(1) listed discrimination grounds) that the ETA provisions regarding nationality should adequately apply to the citizenship of persons exercising freedom of movement for workers within the scope defined in Articles 1-10 of Regulation (EU) No. 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the European Union.⁹⁵

At the same time, however, the provisions of the Labour Code apply in principle to all employees and employers without any distinction on the basis of nationality, citizenship or status.⁹⁶

There is a wide range of possible categories which allow the individuals belonging to them to be covered by the provisions of the Labour Code.

In respect of aliens, in most cases they are required to obtain a work permit. However, there are several exceptions that relate to citizens of the Member States of the European Union and other countries covered by agreements on the free movement of people, as well as to people who have been granted different categories of stay permit, refugee status or similar. Within these groups, no distinction as to nationality, citizenship or status is made. The only relevant criterion is the legality of residence on the territory of the Republic of Poland.

⁹⁴ Act on the amendment of the Act on the Promotion of Employment and the Institutions of the Labour Market, Act on the National Labour Inspectorate and Act on the Implementation of Certain Provisions of the European Union in the Field of Equal Treatment (*Ustawa z dnia 29 kwietnia 2016 r. o zmianie ustawy o promocji zatrudnienia i instytucjach rynku pracy, ustawy o Państwowej Inspekcji Pracy oraz ustawy o wdrożeniu niektórych przepisów Unii Europejskiej w zakresie równego traktowania*) (Dz.U.2016.691), 29 April 2016.

⁹⁵ This amendment also changed two other Acts. In the Act on the Promotion of Employment and the Institutions of the Labour Market, 20 April 2004, as amended, it added (in Article 4(1)(7a)) monitoring, analyses and supporting of equal treatment of country nationals from EU and EEA countries exercising freedom of movement for workers within the scope defined in Articles 1-10 of Regulation (EU) No. 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union to the competences of the Minister of Labour. In the Act on the National Labour Inspectorate (*Ustawa z 13 kwietnia 2007 r. o Państwowej Inspekcji Pracy*), 13 April 2007, it added new competences to the National Labour Inspectorate, including (in Article 10(1)(14a)) providing advice to promote the equal treatment of citizens of EU Member States, the European Free Trade Association (EFTA) – parties to the Agreement on the European Economic Area that exercise freedom of movement for workers and members of their families.

⁹⁶ See Labour Code, 26 June 1974, Articles 1-3, which do not include any criteria related to nationality or citizenship.

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

a) Protection against discrimination

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

Recital 16 was transposed into the ETA. Both natural and legal persons are protected against discrimination (Article 2(1)) but according to Article 10, protection for legal persons extends only to the grounds of the race, ethnic origin and nationality of their members. All forms of discrimination are prohibited.⁹⁷

The right to compensation also applies to legal persons (Article 12(2), Article 13) within the protection provided in Article 10 (only on the grounds of the race, ethnic origin and nationality of their members).

b) Liability for discrimination

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

With regard to liability, national law (Article 2(1) of the ETA) does not distinguish between natural and legal persons.

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

a) Protection against discrimination

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

National law (Article 2(1) of the ETA) is applicable to both the private and public sectors, including public bodies.

b) Liability for discrimination

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

National law (Article 2(1) of the ETA) is applicable to both the private and public sectors, including public bodies.

3.2 Material scope

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

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

⁹⁷ See also ETA commentary 2017, p. 94.

The Labour Code sets out the principle of equal treatment and the prohibition on discrimination and covers conditions for access to employment, including selection criteria, recruitment conditions and promotion. The same legal regime applies to both the public and private sectors. All grounds are covered.⁹⁸

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

Nevertheless, there are certain practical limitations on the protection of those employed under civil law contracts. The National Labour Inspectorate may monitor the implementation of labour law but not the implementation of the ETA. The Ombud has identified this problem and proposed relevant changes to the law.⁹⁹ In October 2015, the Ombud addressed the Prime Minister, pointing out the need to introduce protection mechanisms regarding civil contracts and an extension of the powers of the Labour Inspectorate (the law has not been changed).¹⁰⁰

Labour market institutions, such as employment agencies, are also obliged to behave in a non-discriminatory manner. According to the Employment Act, an employment agency (and other listed institutions providing similar services) cannot discriminate against people for whom it seeks employment or paid work (including self-employment) on the grounds of gender, age, disability, race, ethnic origin, nationality, sexual orientation, political opinions, religious beliefs or membership or non-membership of a trade union.¹⁰¹

In 2018, irregularities relating to non-compliance with the prohibition on discrimination were disclosed in audits of 10 employment agencies. In most cases, they concerned job offers containing illegal criteria of a discriminatory nature. Labour inspectors directed recommendations to the audited agencies, obliging them to remove irregularities and abandon unfair practices in the future.¹⁰²

Similarly, other labour market institutions, such as employment services for the unemployed and those seeking work, must operate in a non-discriminatory manner as specified by the law. The Employment Act clearly determines that such services should be provided free of charge to everyone in accordance with the principle of equality. This means that they should be provided irrespective of a person's gender, age, disability, race, ethnic origin, nationality, sexual orientation, political opinions, religious beliefs and membership or non-membership of a trade union.¹⁰³

Likewise, employers providing district labour offices with current information concerning available jobs cannot formulate any requirements that discriminate against candidates on the grounds of gender, age, disability, race, ethnic origin, nationality, sexual orientation, political opinions, religious beliefs or membership or non-membership of a trade union.¹⁰⁴

Correspondingly, district labour offices and the centres for information and career planning run by regional voivodeship (*województwo*) labour offices must dispense career advice in accordance with the principle of equality, irrespective of gender, age, disability, race, ethnic origin, nationality, sexual orientation, political opinion and religion or for reasons of trade union membership.¹⁰⁵

⁹⁸ Labour Code, 26 June 1974, Article 18(3a-3b).

⁹⁹ Ombud, annual report for 2014, p. 51.

¹⁰⁰ Ombud, annual report for 2015, p. 39.

¹⁰¹ Employment Act, 2 April 2004, as amended, Article 19(c).

¹⁰² Ombud, annual report for 2018, pp. 136-137.

¹⁰³ Employment Act, 2 April 2004, as amended, Article 36(4)(3).

¹⁰⁴ Employment Act, 2 April 2004, as amended, Article 36(5)(e).

¹⁰⁵ Employment Act, 2 April 2004, as amended, Article 38(2)(3).

The Ombud received complaints from people with disabilities regarding the specific requirement, as a condition of employment, to include the disability symbol and an official indication of the specialism of the certifying doctor on certificates of disability. The applicants pointed out that such regulations interfere in an unreasonable and excessive way with the right of persons with disabilities to privacy. According to the Ombud, the mandatory provision of information to the employer about a specific illness that a worker has may raise doubts in respect of the constitutional right to privacy, the protection of personal data and the right to confidentiality of the patient, and consequently lead to discrimination against persons with disabilities in the labour market. This type of legal regulation is a hindrance to finding a job, especially for people with hidden illnesses such as mental illness, intellectual disability or epilepsy. Such workers often do not need special adaptations to the workplace or working conditions, but common stereotypes associated with their disability still result in a reluctance on the part of employers to employ them. The certificates should instead indicate the adaptation and facilities needed for the person with disabilities in the workplace and in the work process.¹⁰⁶

Finally, the Ordinance of the Minister of Economy, Labour and Social Policy on disclosing the cause of disability¹⁰⁷ was found to be unconstitutional by the Polish Constitutional Tribunal.¹⁰⁸ The Tribunal emphasised that the role of the legislator is to choose such means that will ensure the provision of support to people with disabilities in the labour market, while respecting their right to privacy and taking into account the interests of employers.

As a result of the judgment of the Constitutional Tribunal, the bodies that decide on the degree of disability lost the right to insert the symbol '02-P' (for mental illness), along with other symbols, in the certificate based on their decision. In the Tribunal's opinion, such information may be stigmatising.

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

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

Employment and working conditions, including pay and dismissals, are covered by the prohibition on discrimination in the Labour Code (Article 18(3a)(1), Article 18(3b)(1).

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

The Supreme Court issued a judgment in an interesting case relating to the pay of foreign employees of a company.¹⁰⁹ The Court decided that paying Korean employees more for the same work was discriminatory. It stressed that the need to 'attract' employees of Korean nationality to work in Korean companies operating in Poland was vague and impossible to verify objectively, and did not constitute a justified criterion for

¹⁰⁶ Ombud, annual report for 2016, p. 90.

¹⁰⁷ Ordinance of the Minister of Economy, Labour and Social Policy on adjudication on disability and the degree of disability (*Rozporządzenie Ministra Gospodarki, Pracy i Polityki Społecznej z 15 lipca 2003 r. w sprawie orzekania o niepełnosprawności i stopniu niepełnosprawności*), 15 July 2003.

¹⁰⁸ Constitutional Tribunal, decision of 19 June 2018, No. SK 19/17, available at: <http://trybunal.gov.pl/postepowanie-i-orzeczenia/wokanda/art/10142-ujawnianie-przyczyny-niepelnosprawnosci-w-orzeczeniu-o-stopniu-niepelnosprawnosci/>.

¹⁰⁹ Supreme Court, judgment of 22 November 2012, No. I PK 100/12.

the wage gap between Korean employees and Polish workers who perform the same or comparable work.

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

In Poland, national legislation prohibits (only partially) discrimination in vocational training outside the employment relationship, such as adult lifelong learning courses or vocational training provided by technical schools or universities.

The Labour Code anti-discrimination provision which covers access to vocational training (all grounds are protected) is not very detailed and uses the general term 'access to vocational training increasing qualifications'.¹¹⁰ However, taking into consideration labour law as a whole, it should be interpreted widely to cover all elements listed by the directives. As relevant case law is very limited, it is difficult to assess the interpretation of this provision in practice. The Labour Code provisions apply only to training organised by the employer. Other kinds of training provided outside employment are governed by different laws on education that generally lack clear anti-discrimination clauses in relation to different kinds of vocational training (see Section 3.2.7).

The ETA, which widens protection and covers self-employment and civil law contracts (i.e. contract work), for all grounds, prohibits discrimination in access to vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience (Article 8(1)(1)).

The Starosta (a local government body) is the public body which initiates, organises and finances training for the unemployed to enable them to improve their chances of finding employment or another form of paid work or to upgrade their vocational qualifications. When sending someone for training, the principle of equality in access to training must be complied with, irrespective of gender, age, disability, race, ethnic origin, nationality, sexual orientation, political opinion, religion or trade union membership.¹¹¹

3.2.4 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))

National legislation prohibits discrimination in relation to membership of and involvement in workers' or employers' organisations as formulated in the directives, for all five grounds and in both private and public employment.

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

The ETA (Article 8(1)(3)) prohibits discrimination in membership of and involvement in trade unions, organisations of employers or any organisation whose members carry on a particular profession, including the benefits provided for members of such organisations (all grounds are covered).

¹¹⁰ Labour Code, 26 June 1974, Article 18(3a)(1).

¹¹¹ Employment Act, 2 April 2004, as amended, Article 40(6).

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

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

The ETA prohibits discrimination in social protection (social housing is not mentioned verbatim)¹¹² on the grounds of gender, race, ethnic origin or nationality (Article 6) and discrimination in relation to healthcare on the grounds of race, ethnic origin and nationality (Article 7).

There is also, as has been mentioned, the anti-discrimination clause in the Social Security Act, which is the basic statute for the social security field. Until 2010, this provision limited the principle of equal treatment of all socially insured people to the grounds of sex, marital status and family status, but it has been extended (as of 1 January 2011) to cover the grounds of race, ethnic origin and nationality.¹¹³

The Capital-based Pensions Act¹¹⁴ (Article 2), amended by the ETA (Article 30), prohibits discrimination in calculating pension levels on the grounds of gender, race, ethnic origin, nationality, state of health, family and marital status.

The Medical Treatment Act provides that, when determining access to medical services and to waiting lists in particular (some medical services are not accessible immediately – in such cases a person must sign up to a list and wait for their turn, which may take a few weeks or months), such lists should be drawn up in line with the principle of just, equal, anti-discriminatory and fair access to medical treatment.¹¹⁵ In this way, the Act prohibits discrimination, although the specific grounds of racial or ethnic origin are not mentioned.

In 2014, the Ombud published findings from its research as part of a series on 'The principle of equal treatment – law and practice', in a document entitled *Equal treatment of patients: non-heterosexual people in the healthcare system – analysis and recommendations*.¹¹⁶ The findings were presented together with recommendations in the Ombud's motion to the Minister of Health in March 2016.¹¹⁷ The Ombud's recommendations included: amendment of the ETA so that compensation and redress can be claimed in the event of a breach of the principle of equal treatment in the field of health care due to sexual orientation; amendment of the Act on Patients' Rights so that any discrimination, including discrimination based on sexual orientation, is considered at the same time to be a violation of the patient's rights; the need to take into account the specific problems of LGB persons in health programmes and policies – for example, in the development of programmes for the prevention of suicide among children and adolescents; the need to disseminate among medical staff knowledge about the specific treatment of LGB people; and the need to raise the standards of teaching for midwives and nurses.¹¹⁸ However, the Ombud's recommendations were not implemented, and the ETA was not amended.

¹¹² However, Article 7 mentions access to publicly offered 'housing services' (*usługi mieszkaniowe*).

¹¹³ Act on the Social Security System (*Ustawa z dnia 13 października 1998 r. o systemie ubezpieczeń społecznych*), 13 October 1998, Article 2a(1), as amended by the Equal Treatment Act, 3 December 2010.

¹¹⁴ Act on Capital-based Pensions (*Ustawa z 21 listopada 2008 r. o emeryturach kapitałowych*), 21 November 2008.

¹¹⁵ Act on Medical Treatment Financed from Public Resources (*Ustawa z 27 sierpnia 2004 r. o świadczeniach opieki zdrowotnej finansowanych ze środków publicznych*) (Dz.U.2017.1938 t.j.), 27 August 2004, Article 20(5).

¹¹⁶ Ombud (2014) *Equal treatment of patients: non-heterosexual people in the healthcare system – analysis and recommendations* (*Zasada równego traktowania. Prawo i praktyka. Równe traktowanie pacjentów – osoby nieheteroseksualne w opiece zdrowotnej. Analiza i zalecenia*), available at: www.rpo.gov.pl.

¹¹⁷ See Ombud correspondence available at: <http://www.sprawy-generalne.brpo.gov.pl/pdf/2016/3/XI.411.2.2016/692747.pdf>.

¹¹⁸ See: <https://oko.press/zboczcencow-leczymy-homofobie-transfobie-lekarzy-mozna-leczyc/>.

An interesting case with regard to the sexual orientation ground was decided in 2016.¹¹⁹ The claimant challenged the decision of the National Health Fund in respect of a refusal by the health insurance body to provide cover to a same-sex spouse (the civil partnership was concluded abroad, in Scotland) as a member of the claimant's family.

In its justification of the judgment, the court of first instance held that, according to the provisions of the Act of 27 August 2004 on Medical Treatment financed from Public Resources,¹²⁰ the circle of close relatives who may be considered family members is a closed catalogue. In Article 5(3)(b), the Law implies that only a marital spouse is considered to be a family member. The Law does not mention the civil partner of the insured person. The court of first instance noted that both marriage and partnership are national civil-family law institutions, and they are interpreted in the light of the national legal system. In the Polish legal system, there is no regulation formalising civil partnerships. The court also referred to Article 18 of the Constitution, which provides that: 'Marriage, being a union of a man and a woman [...] shall be placed under the protection and care of the Republic of Poland'.¹²¹ The Court also referred to the judgment of the CJEU in *Römer*,¹²² finding that persons in a life partnership may claim the same treatment as married spouses only if a registered legal form of life partnership for same-sex couples is provided for by national law, in parallel to marriage reserved only to heterosexual couples, and moreover when national law thus shapes the legal situation of persons in a life partnership so that it is comparable to the situation of married spouses. It found that only the occurrence of such comparability may speak in favour of so-called direct discrimination, in this case on the grounds of sexual orientation. The claimant appealed against the judgment. However, the Supreme Administrative Court dismissed the appeal, agreeing with and repeating large sections of the justification of the court of first instance.¹²³

a) Article 3(3) exception (Directive 2000/78)

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

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

In Poland, national legislation prohibits discrimination in social advantages, as formulated in the Racial Equality Directive.

The ETA prohibits discrimination in social protection on the grounds of gender, race, ethnic origin or nationality (Article 6). It does not use the term 'social advantages', but the definition of social protection (not a legal definition, but a definition developed in academic texts) traditionally extends to the issues relating to social advantages.¹²⁴ In order to draw a conclusion from the complex combination of provisions pertaining to a number of different fields, it may be said that discrimination related to social advantages is unlawful. Dr. M. Kułak analyses in detail the meaning and scope of the terms used in the Directive and the ETA, pointing out some differences and doubts. However, these are

¹¹⁹ Supreme Administrative Court (*Naczelny Sąd Administracyjny*), final judgment of 25 October 2016, No. II GSK 866/15, available at: http://www.orzeczenia-nsa.pl/wyrok/ii-gsk-866-15/sprawy_ubezpieczen_zdrowotnych/33055d0.html.

¹²⁰ Act on Medical Treatment financed from Public Resources, 27 August 2004.

¹²¹ Constitution of the Republic of Poland, 2 April 1997, Article 18, available at: <http://trybunal.gov.pl/en/about-the-tribunal/legal-basis/the-constitution-of-the-republic-of-poland/>.

¹²² Judgment of 10 May 2011, *Jürgen Römer v Freie und Hansestadt Hamburg*, C-147/08, available at: <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A62008CJ0147>.

¹²³ Supreme Administrative Court, final judgment of 25 October 2016, No. II GSK 866/15, available at: http://www.orzeczenia-nsa.pl/wyrok/ii-gsk-866-15/sprawy_ubezpieczen_zdrowotnych/33055d0.html (see more in Section 12.2).

¹²⁴ See, for instance, Piotrowski, J. (1966), *Zabezpieczenie społeczne. Problematyka i metody*, Wydawnictwo KiW, Warsaw, p. 28; Rajkiewicz, A. (ed.) (1979) *Polityka społeczna*, Wydawnictwo PWE, Warsaw, p. 432; and the Constitutional Tribunal's ruling in case No. TK K 17/92.

largely theoretical considerations that have not been reflected in the known jurisprudence.¹²⁵

There is a rather complex system of different allowances and grants. Most of them are not discriminatory, such as a childbirth grant, which is payable to the mother, father or legal guardian of a child. It can also be paid to the de facto guardian of a child up to the age of one, if it has not been granted to the mother, father or legal guardian.¹²⁶

The death allowance is payable to any person who covers the costs of a funeral.¹²⁷ However, a same-sex partner, unlike a spouse, would have to supply documentary evidence of the costs incurred.¹²⁸

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

National legislation prohibits discrimination in education as formulated in the Racial Equality Directive.

The ETA *expressis verbis* prohibits discrimination in education and higher education, but only on the grounds of race, ethnic origin or nationality (Article 7). The ETA does not provide details regarding admission, expulsion, transfer and disciplinary measures in education; it formulates a general prohibition on discrimination, and therefore the prohibition covers these elements.

The authors of the first commentary on the ETA pointed out, however, that the terms used in the Act may narrow down the scope of the protection. The ETA does not use the term 'education' in general; instead, it refers to 'system of education' (*oświata*) and 'higher education' (*szkolnictwo wyższe*). The potential problem is that both terms are defined in law and refer specifically to listed types of educational institutions. Thus, discrimination might happen in an institution in the system of education or higher education that is not specifically covered by the Act (as in the case detailed below).¹²⁹

An interesting case was decided by the administrative and civil courts regarding the decision of the dean of a private vocational college (the College of Social and Media Culture in Toruń), who, acting pursuant to the Act on Higher Education (as was then in force) and the statute of the school, decided not to accept M.J. for postgraduate studies in 'Environmental protection – ecology and management' in the academic year 2016-2017 (summer semester). In justifying the decision, the Dean stated that, in the application process, M.J. did not attach a required document: a priest's opinion appropriate to the applicant's place of residence.

The Voivodeship Administrative Court rejected the complaint (cassation was also rejected, and the Court's ruling became final).¹³⁰

The Court stated that a substantive assessment of the decision must be preceded by a determination of whether the complaint is admissible at all.

¹²⁵ Kułak, M. (2021), p. 11-13.

¹²⁶ Act on Family Benefits (*Ustawa z 28 listopada 2003 r. o świadczeniach rodzinnych*), 28 November 2003, Article 9.

¹²⁷ Act on Retirement and Disability Pensions from the Social Insurance Fund (*Ustawa z 17 grudnia 1998 r. o emeryturach i rentach z Funduszu Ubezpieczeń Społecznych*), 17 December 1998, Article 78(1).

¹²⁸ Act on Retirement and Disability Pensions from the Social Insurance Fund, 17 December 1998, Article 79(1).

¹²⁹ ETA commentary 2017, pp. 137-140.

¹³⁰ Voivodeship Administrative Court in Bydgoszcz, judgment of 18 October, 2017, No. II SA/Bd 732/17, available at: <http://orzeczenia.nsa.gov.pl/doc/BC5FC53775>; Supreme Administrative Court, judgment of 17 April 2018, No. II SA/Bd 732/17; <https://orzeczenia.nsa.gov.pl/doc/157A08408E>.

The subject of the complaint was a decision on admission to postgraduate studies. In order to determine whether such a decision is subject to judicial review and therefore whether it constitutes an administrative decision, it was necessary to determine a) the status of the entity that issued it, and b) the meaning of the Act on Higher Education.

In respect of point a), the university/college is an administrative establishment. It is an organisational unit that is not a state body or a self-governing body, but it has been established to perform public tasks and is entitled to establish administrative and legal relations.

In respect of point b), the Act on Higher Education, in Article 2, clearly differentiates between two main forms of education: the first one at higher education (Article 2(1)(5)), first degree (Article 2(1)(7)), second degree (Article 2(1)(8)) or uniform master studies (Article 2(1)(9)) and third-degree studies – doctoral studies (Article 2(1)(10)), and the second one at postgraduate studies.

The legislator also determined that: 1) a student is a person studying at higher education; 2) a PhD student is a participant in doctoral studies; and 3) an attender (*sluchacz*) is a participant in postgraduate studies.

It means that the organisation of studies that allow an individual to obtain a professional or scientific title and, consequently, its judicial-administrative control, does not apply to postgraduate students.

The courses of studies are subject to a specific legal regime and state control, while issues relating to postgraduate studies and students are left to higher education institutions under the autonomy granted to them.

In these circumstances, the controlling rules do not apply to students in postgraduate studies, as they are not students under the meaning of the provisions of the Act on Higher Education, which implies the need to recognise that the decision on enrolment for postgraduate education is not an administrative decision subject to judicial-administrative control.

The Court noted, as a *de lege ferenda* postulate, that it would be advisable to establish the courts' power to control any acts issued by university bodies that influence the rights and obligations of not only students but also postgraduate students.

Consequently, due to the formal nature of the resolution, which prevents the substantive assessment of the contested decision, the Court dismissed the evidence submitted by the applicant.

The Supreme Administrative Court (with a single judge sitting in a session *in camera*) decided to dismiss the cassation complaint. The Court agreed with the court of first instance that the provisions determining the position and character of postgraduate studies preclude the notion that the decision on the admission or refusal of admission to postgraduate studies could be considered a 'decision' to which the provisions of the code of administrative procedure shall apply accordingly and which is subject to appeal to the administrative court.

The Court also noted that the ECtHR, in its judgment of 11 March 2014 in the case of *Howald Moor and others v. Switzerland* (No. 52067/10 and 41072/11), underlined that, according to its case law, the right to go to court is not absolute and may be subject to certain restrictions; they are implicitly permissible, as the right to court requires by its very nature to be regulated by a state which has a margin of appreciation in that regard.

The verdict might be seen as controversial. The Supreme Administrative Court spent a lot of time and effort (the justification was 6 000 words long) on proving that admission to postgraduate studies may not be controlled by the judicial-administrative control procedure. Even given these doubts (which are valid, as there seems to be some sort of a gap in the regulations), in the author's opinion the court could ask 'a constitutional question' of the Constitutional Court regarding whether this limitation does not breach the constitutionally protected right to court.

The applicant also brought a complaint for compensation to the civil court, based on the ETA (the complaint was brought by the Polish Society of Antidiscrimination Law on behalf of the client). The court of first instance delivered a verdict and awarded the claimant PLN 5 000 (EUR 1 200) plus PLN 1 167 (EUR 280) for the reimbursement of legal expenses.¹³¹ This ruling is an important one, and not only because the court found that there was indirect discrimination on the ground of religion/belief.¹³² It is especially interesting because the court awarded compensation (as requested by the complainant) based on the ETA. Previously, courts had tended (in the very few such cases that were brought to justice) to award compensation only for material damage, arguing that, that is what the ETA covers. In this case, however, the court argued, quoting European law and rulings by the CJEU,¹³³ that the compensation available under ETA also covers non-material damage, including damage to the dignity of the party (however, it still underlined that the punitive element is not included in Polish law). The court did not consider filing for a preliminary reference to the CJEU.

The ruling of the district court has been appealed by the college in the regional court. The Regional Court, after the meeting held *in camera*, dismissed the appeal of the college, agreed with all the findings of the first instance court and, in addition, awarded the claimant PLN 450 (EUR 100) as reimbursement of the costs of legal representation in the appeal proceedings.¹³⁴

Finally, the claimant also decided to file a complaint with the ECHR. It was sent on 9 November 2018. In a letter dated 8 January 2019, the ECHR confirmed receipt of the complaint and registered it under the number 54711/18. The complaint has not yet been communicated to the Polish Government. The applicant alleges in the complaint that the Polish State has violated Article 13 of the Convention and Articles 13, 14 and 9 in conjunction with Article 2 of Protocol 1 to the Convention.

In general, discrimination in education is prohibited – the 2016 Education Law¹³⁵ refers in its preamble to the Constitution as well as to the major international human rights instruments: the Universal Declaration of Human Rights (1948), the International Covenant on Civil and Political Rights (1966) and the UN Convention on the Rights of the

¹³¹ Toruń District Court, judgment of 6 August 2019, No. I C 469/18.

¹³² The claimant argued that there had been direct discrimination, but the court stated that: 'The requirement to provide such an opinion is seemingly neutral as it applies to all candidates for studies. In fact, however, it is only possible for people who actively participate in the life of the parish to do so, thus excluding both non-believers and non-Christian believers from the group of people who can study at the university (in fact, all non-Christian believers other than the practicing Catholic because – although this was not explicitly expressed – given the nature of the university in question, it can be assumed that this was the opinion of the parish priest of the Catholic church)'.

¹³³ Including the following rulings: judgment of 13 February 1985, *Francoise Gravier v. the city of Liege*, C-293/83, EU:C:1985:69; judgment of 2 February 1988, *Vincent Blaizot v. the University of Liege and others*, C-24/86, EU:C:1988:43.

¹³⁴ Toruń Regional Court (2nd instance), judgment of 21 August 2020, No. VIII Ca 1058/19. See more in section 12.2 below.

¹³⁵ Act on Education Law (*Ustawa z dnia 14 grudnia 2016 r. Prawo oświatowe*), 14 December 2016, in force since 1 September 2017 (Dz.U.2017.59). This Act partially replaced the previous Act on the Education System (*Ustawa z dnia 7 września 1991 r. o systemie oświaty*) (Dz. U. 2016. poz. 1943, 1954, 1985, 2169), 7 September 1991. The 1991 Act is still partly in force, in the version published in 2017 (Dz.U.2017.2198 t.j.). To differentiate between these Acts, in this report they are described as the 1991 Education Act and the 2016 Education Law.

Child (1989). However, the Act has no separate and explicit anti-discrimination provision listing protected grounds.

Similarly, there is no general non-discrimination provision in the legislation on higher education. However, access to higher education institutions is granted to foreigners based on the international agreements and also on the decisions of appropriate bodies (with some exceptions regarding, for instance, tuition).¹³⁶

Under the statutes in the field of education, schools must ensure that each pupil has the knowledge and skills necessary for their development and must prepare them to fulfil family and civic responsibilities based on the principles of solidarity, democracy, tolerance, justice and freedom. According to Article 13 of the 1991 Education Act,¹³⁷ the duties of schools and public facilities include enabling pupils to uphold a sense of national, ethnic, linguistic and religious identity, especially by learning their own language, history and culture. At the request of parents, such teaching may be provided in separate groups, sections or schools; in groups, sections or schools with additional lessons on language, history and culture; or in inter-school teaching teams (Article 13(2)).

In their teaching and pastoral work, schools are also obliged to uphold regional cultures and traditions. The conditions for, and means of realisation of, the above tasks are described in the special ordinance.¹³⁸ The ordinance stipulates, for instance, the minimum number of pupils required in order to organise education for minorities, and the number of hours of relevant language education or lessons on history, culture and geography.

In order to compensate for their higher operating costs, schools for national minorities receive an extra 20 % of subsidy in comparison to other schools (and even 150 % in the case of small schools); the exact sums differ annually. The state budget also invests in schools and subsidises the production and publication of textbooks. Furthermore, the Ministry of Culture and National Heritage subsidises the minority press and other publications and sponsors cultural events organised by national and ethnic minorities.¹³⁹

The Ministry of Education organised several activities within the 'Safe and Friendly School' Government programme for 2014-2020.¹⁴⁰ These included training on diversity and counteracting discrimination (mainly based on ethnic origin).¹⁴¹ However, it is

¹³⁶ Act on Higher Education and Science (*Ustawa z 20 lipca 2018 r. prawo o szkolnictwie wyższym i nauce*) (Dz.U.2018.1669), 20 July 2018, Article 323 and following.

¹³⁷ As described above, the 1991 Education Act is still partly in force even though the new 2016 Education Law entered into force in 2017.

¹³⁸ Ordinance of the Minister of National Education on the conditions and means of realisation by nurseries, schools and public institutions of public duties in a way which enables the upholding of the national, ethnic and linguistic identity of pupils belonging to national and ethnic minorities [...] (*Rozporządzenie Ministra Edukacji Narodowej z dnia 18 sierpnia 2017 r. w sprawie warunków i sposobu wykonywania przez przedszkola, szkoły i placówki publiczne zadań umożliwiających podtrzymywanie poczucia tożsamości narodowej, etnicznej i językowej uczniów należących do mniejszości narodowych i etnicznych oraz społeczności posługującej się językiem regionalnym*), (Dz.U.2017, 1627), 18 August 2017.

¹³⁹ Information on particular programmes may be found on the website of the Ministry of Internal Affairs and Administration; as far as problems related to these programmes are concerned, please see minutes from the meetings of the Joint Committee of the Government and Ethnic and National Minorities, available at: <https://www.gov.pl/web/mniejszosci-narodowe-i-etniczne/komisja-wspolna>. The page dedicated to the education strategy is available at: <https://www.gov.pl/web/mniejszosci-narodowe-i-etniczne/strategie-rozwoju-oswiaty>.

¹⁴⁰ 'Safe and Friendly School' Government programme for 2014-20 (Rządowy program na lata 2014-2020 „Bezpieczna i przyjazna szkoła”), information available at: <https://www.gov.pl/web/edukacja-i-nauka/bezpieczna-i-przyjazna-szkola>.

¹⁴¹ Government Plenipotentiary for Equal Treatment (2016), *Report on the Activities of the Government Plenipotentiary for Equal Treatment for the period 1 January 2015 – 31 December 2015* (*Sprawozdanie z działalności Pełnomocnika Rządu do spraw Równego Traktowania za okres od 1 stycznia 2015 r. do 31 grudnia 2015 r.*), Warsaw, pp. 113-126; Government Plenipotentiary for Equal Treatment (2017), *Report on the Activities of the Government Plenipotentiary for Equal Treatment for the period 1 January 2016 – 31*

difficult to evaluate the impact of these activities, in view of the fact that politicians and Government representatives use stigmatising and discriminatory language, including hate speech, in their public appearances. In addition, anti-discrimination educational activity is currently under attack. For example, the Ordo Iuris Institute has published a report detailing 25 CSOs that conduct such activities, warning parents and schools against them (Ordo Iuris also had a meeting with officials from the Ministry of Education). Anti-discrimination education is presented in the report and in public discourse as harmful and dangerous, and the report recommends not allowing such organisations to enter schools.¹⁴²

The Ombud addressed the Ministry of Education regarding these issues (October 2019) and in response, the Minister of National Education stated that anti-discrimination education is provided in Polish schools in a satisfactory manner. In the opinion of the Ombud, this view is not justified.

In 2020,¹⁴³ the Ombud received complaints from parents and teachers concerned about written statements delivered by some parents, in which they declared their disagreement with the participation of their child in any lessons, activities or events in which: 'the programme relates in whole or in part to the issues of sexual education, [...] equality, tolerance, diversity, anti-discrimination and exclusion, counteracting violence, LGBT, homophobia, gender identity, gender'. The statement also includes an obligation to 'notify the relevant state institutions (school superintendents and the Minister of National Education) about cases or attempts to organise such events at school'.¹⁴⁴ Due to the inactivity of the Ministry and its conviction that parents have such a right (stemming from their constitutional right to raise their children), with which the Ombud disagrees, the Ombud addressed this matter directly to schools, teachers, and other education workers, with an open letter on the occasion of National Education Day:

'Being aware of the much-debated issue of extracurricular school initiatives in the context of parents' right to raise their children according to their own convictions, I would like to point out that according to Polish law any parent may exempt his/her child from activities not covered by the core curriculum. This does not mean, however, that the consent of each parent is required in order to hold such classes or events at school.¹⁴⁵ It also does not mean that a parent may exempt a child from all classes on equal treatment and anti-discrimination, as related content is also taught in some compulsory classes.¹⁴⁶ Indeed, it is difficult to imagine the smooth functioning of the educational system in a situation in which each parent could individually challenge all educational and upbringing activities of the school on the basis of his or her own beliefs.'¹⁴⁷

The Ombud consistently takes the position that reliable and universal anti-discrimination education is necessary to ensure the safety and equal treatment of all students in

December 2016 (*Sprawozdanie z działalności Pełnomocnika Rządu do spraw Równego Traktowania za okres od 1 stycznia 2016 r. do 31 grudnia 2016 r.*), Warsaw, pp. 113-128.

¹⁴² See: <https://oko.press/ordo-iuris-men-ostrzegaja-nauczycieli-wpuszczajcie-szkol-organizacji-pozarzadowych-ktore-ucza-o-prawach-czlowieka/>.

¹⁴³ Ombud, annual report for 2020, pp. 62-64.

¹⁴⁴ Ombud, annual report for 2020, p. 64.

¹⁴⁵ In accordance with Article 86 of the Education Law Act of 14 December 2016 (*Journal of Laws of 2020*, item 910), in order for a school to start cooperation with an external organisation, it is required to obtain a positive opinion from the parents' council by the school director.

¹⁴⁶ The grounds for exemption from participation in classes covered by the core curriculum are set out in Article 44(d) and Article 44(b) of the Act of 7 September 1991 on the Education System (*Journal of Laws of 2020*, item 1327).

¹⁴⁷ Ombud, open letter to schools, teachers and education staff, 14 October 2020 (*List otwarty RPO do szkół, nauczycieli i nauczycieli, pracowników oświaty z 14 października 2020 r.*), available at: <https://bip.brpo.gov.pl/pl/content/list-otwarty-rpo-do-nauczycieli>.

schools. In 2020, the Ombud commissioned a social survey on equal treatment in schools; the results will be elaborated and published in 2021.¹⁴⁸

In 2019, the Ombud published an interesting report summarising its activities in respect of education: *Ombud on schools, pupils, parents and teachers – examples of cases 2015-2019*.¹⁴⁹

During the pandemic, in the General statement addressed to the Ministry of Education, the Ombud pointed to the difficult situation of children from national and ethnic minorities and pupils with disabilities.¹⁵⁰ The main problem, most often reported to the Ombud, is the lack of computers and equipment for audio-visual communication with the teacher. This may concern, *inter alia*, foreign children staying in centres for persons applying for international protection or guarded centres under the Border Guard, run by the Office for Foreigners, and children of Roma origin, including residents of Roma settlements, who have been facing digital exclusion for years. A frequent problem is also the lack of direct communication between teachers and parents resulting from the language barrier. The Ombudsman recalls that the role of the Ministry of Education is to prepare appropriate educational tools and materials available in different languages to enable the education of foreign children and members of national minorities.

In view of these challenges, the Ombud asked the Ministry of Education whether an evaluation of remote learning is currently being carried out and what the results are. The Ombud also wants to know whether additional resources will be allocated to help students with special educational needs.

According to the 2016 Education Law (Article 39(4)(1)), every local authority has the duty to transport disabled pupils to schools free of charge and to provide protection during this time; in cases where a parent or guardian transports a child, the costs of public transport (for the child and their guardian) should be reimbursed. In practice, this provision raises concerns. The Ombud has received complaints from parents of students with disabilities regarding problems connected with their transport to schools and other educational institutions. These difficulties often lead to a situation in which pupils do not fulfil their schooling obligations. In practice, the rules for reimbursement of transport costs are often determined unilaterally by the local government authorities responsible (mayors, heads of city councils) and often do not cover the actual costs incurred by carers for transporting a child. Parents are reimbursed for transport when accompanying a child, but not for travelling without a child (i.e. for two and not four journeys per day). The Ombud undertakes relevant actions, advocating for relevant changes of the law and advising parents on the measures they should take to receive adequate reimbursement.¹⁵¹

Controversial changes were introduced in 2017 (entering into force since 1 September 2017, the start of the school year). The Ministry of National Education limited the possibilities for the integration of pupils with disabilities in schools.¹⁵² According to the amended law, individual teaching that is required because of special needs is to be

¹⁴⁸ Ombud, annual report for 2020, p. 62.

¹⁴⁹ Ombud (2019), *Ombud on schools, pupils, parents and teachers – examples of cases 2015-2019 (RPO w sprawie szkół, uczniów, rodziców i nauczycieli. Przykłady spraw z kadencji 2015-2019)*, available at: <https://www.rpo.gov.pl/sites/default/files/RPO%20w%20sprawie%20szk%C3%B3%C5%82.pdf>.

¹⁵⁰ See: <https://www.rpo.gov.pl/pl/content/koronawirus-rpo-pyta-men-czy-prowadzi-ewaluacje-przebiegu-zdalnej-edukacji-i-jakie-sa-jej-wyniki>.

¹⁵¹ Ombud, annual report for 2017, pp. 48, 528-530; Ombud annual report for 2018, pp. 89-91, 139-140; Ombud, annual report for 2020, p. 550.

¹⁵² Ordinance of the Minister of National Education amending the ordinance on the individual obligatory annual pre-school preparation of children and individual teaching of children and young people (*Rozporządzenie Ministra Edukacji Narodowej z dnia 28 sierpnia 2017 r. zmieniające rozporządzenie w sprawie indywidualnego obowiązkowego rocznego przygotowania przedszkolnego dzieci i indywidualnego nauczania dzieci i młodzieży*) (Dz.U.2017.1656), 28 August 2017.

organised at home, not in school. Teachers will go to pupils' homes and these pupils will, therefore, not participate in integrated education. This amendment (even when still in draft form) provoked numerous protests from parents, CSOs and the Ombud's Office. It is seen as a step back in the introduction of integrated education, and it causes a number of practical problems (parents argue, for instance, that they have to leave their jobs to stay at home with their children).¹⁵³ The Ombud is monitoring the implementation of this law.¹⁵⁴ The Minister of Education gave an assurance that the aim of the change was also the inclusion of pupils within their peer group.¹⁵⁵ In addition, the Children's Rights Ombud monitors changes and identified cases of discrimination, including cases in which pressure is put on parents to apply for a decision on individual teaching, with an unlawful request on withdrawing a child from school.¹⁵⁶ No information on possible court cases stemming from this change in the law is available.

The Ombud has criticised provisions of the 2016 Educational Law (Article 127(13-14)), according to which the *staroste* (head of *powiat*, local government) of the place of residence, at the parents' request, provides a child with a special education certificate with an appropriate form of education, taking into account the type of disability. This means that students with disabilities are, unlike other students, covered by the zoning. Institutions located further than in the nearest *powiat* are in fact inaccessible to these students, which presents a legal barrier and a systemic barrier. The Ombud is of the opinion that restricting the possibility of choosing a secondary school near their place of residence should be considered as having a discriminatory effect, and thus a violation of the principle of equal access to education. The Ministry of Education disagrees with the Ombud.¹⁵⁷

a) Trends and patterns regarding Roma pupils

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

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

In the field of education, the Polish Government has invested serious effort in guaranteeing full equality and non-discrimination for members of national minorities. Children of minority origin have equal access to all schools on the same terms as other pupils.¹⁵⁸ Access to institutions of higher education is also granted equally.

However, in practice, the implementation of the right to education in the case of Roma children still raises some concerns. A serious problem for the education of Roma children remains their inadequate knowledge of the Polish language, in addition to cultural barriers, which results in problems at school from the very beginning of their education.¹⁵⁹ This often leads to failure at school, with problems such as marks that are significantly below average, low attendance and pupils dropping out of school or transferring to special schools for children with learning disabilities.

¹⁵³ Ombud, annual report for 2017, pp. 531-532.

¹⁵⁴ See statement of the Ombud to the Minister of Education, 9 September 2019, XI.7036.12.2017, available at <https://www.rpo.gov.pl/>.

¹⁵⁵ Ombud, annual report for 2018, pp. 90-91.

¹⁵⁶ Ombud, annual report for 2018, pp. 137-138.

¹⁵⁷ Ombud, annual report for 2020, p. 416.

¹⁵⁸ 2016 Education Law, Article 1; 1991 Education Law, Article 13.

¹⁵⁹ See annual reports on the 2014-2020 Roma programme, available at: <http://mniejszosci.narodowe.mswia.gov.pl/mne/romowie/program-integracji-spol>.

In 2020, the Ombud approached the Ministry of Education regarding, *inter alia*, the situation of Roma pupils.¹⁶⁰ The main problem, most often reported to the Ombud, is the lack of computers and equipment for audio-visual communication with the teacher. This may concern, *inter alia*, children of Roma origin, including residents of Roma settlements, who have been facing digital exclusion for years. The Ombud reiterated that the role of the Ministry of Education is to prepare appropriate educational tools and materials and make them available in different languages.

The Ombud also appealed to local authorities to take measures to reduce the epidemic risk in Roma settlements and ensure the implementation of the right to education for children. The answers showed that distance learning was introduced in all communes. For students who do not have access to the internet or the necessary equipment, packages with tasks in paper form were prepared. Most municipalities also applied to the Ministry of Digitisation for additional funds for the purchase of computer equipment for distance learning.¹⁶¹

Finally, the Ombud undertook an intervention in favour of Romanian Roma residents of Wrocław, Gdańsk and Poznań, addressing the mayors of these cities. According to replies, all cities undertook special measures. Due to the lack of appropriate computer equipment, the children could not take full advantage of online learning, so the support of education assistants, who acted as intermediaries in contacts between children and schools, was secured.¹⁶²

In relation to the Roma community, special programmes have been developed, such as the *Government Roma Programme 2004-2013* and the *Programme for the Integration of the Roma Community in Poland 2014-2020*.¹⁶³

The main goal of the Roma programme was to improve the integration of the Roma in four core fields, one of which is education (including, as a separate issue, cultural, historical and civic education). Examples of activities regarding education included under the Roma programme are as follows (and similar activities are to be continued):

- larger subsidies for schools with Roma pupils (up to 150 % more money per pupil) if the school applies (which is not the rule) for different activities;
- including extra classes;
- employing Roma education assistants to assist the teachers of integrated classes;
- employing assistant teachers;
- additional educational and other activities for Roma children and parents, psychological and pedagogical advice, organising holidays and camps, material help (purchasing school textbooks, etc.);
- special stipends for Roma students.

In addition, the problem of the over-representation of Roma children in special schools has been known about for many years, and the Government has promised to improve the situation.¹⁶⁴ In relation to the procedure used for placement in a special school, the Minister of Education formulated additional conditions to be fulfilled in order to make sure that placement in a special school is needed – previously, only a test in the Polish language was used, causing problems for some Roma children.

¹⁶⁰ See: <https://www.rpo.gov.pl/pl/content/koronawirus-rpo-pyta-men-czy-prowadzi-ewaluacje-przebiegu-zdalnej-edukacji-i-jakie-sa-jej-wyniki>.

¹⁶¹ Ombud, annual report for 2020, pp. 92-94.

¹⁶² Ombud, annual report for 2020, pp. 92-94.

¹⁶³ Ministry of Internal Affairs and Administration (2014), *Programme for the Integration of the Roma Community in Poland 2014-2020* (*Program integracji społeczności romskiej w Polsce na lata 2014-2020*), available in English at: <http://mnieszosci.narodowe.mswia.gov.pl/mne/romowie/program-integracji-spol>.

¹⁶⁴ As a result of many protests by Roma leaders and CSOs, the Ministry of National Education and Sport recommended that educational facilities pay greater attention to this problem and ordered verification of the decisions to send Roma children to these schools.

The Ombud's Office continues to monitor the matter. In its annual reports, the Ombud recommends counteracting the segregation of Roma pupils in schools and including them in mainstream education. The Ombud has called for monitoring of the practice of placing Roma children in special schools based on their low level of comprehension of the Polish language (no reference to ECtHR case law has been made).¹⁶⁵ The Ombud has so far three times – in 2015, 2016 and 2017¹⁶⁶ – addressed the Ministry of Education with a request for a compilation of current data on the number of children of Roma origin admitted to and studying in special schools. The data that the Ombud received from the Ministry shows that in those three years, the number of Roma children in special education was relatively small and did not undergo significant changes: there were between 200 and 220 Roma children of a total of around 2,300 children of that nationality, in schools or kindergartens.

CERD, in its 2019 report *Concluding observations on the combined twenty-second to twenty-fourth periodic reports of Poland*, noted the information provided on measures taken to improve the situation of Roma, including through the Programme for the Integration of the Roma Community in Poland (2014–2020).¹⁶⁷ However, the Committee expressed concern regarding the low attendance rates of Roma children in primary schools, the high rates of school dropout, their persistent overrepresentation in special schools and their underrepresentation in secondary and post-secondary education. The Committee recommended coordination at all levels of government and engagement with Roma communities in the design, implementation and evaluation of inclusion policies and action plans. The Committee also recommended the continuation of efforts to end all segregation in education faced by Roma children, and the use of effective measures, including special measures, to enhance rates of school attendance, including in institutions of higher education, and rates of school completion among Roma children.

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

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

The 2010 Equal Treatment Act *expressis verbis* prohibits discrimination in access to goods and services. The relevant provision (Article 6) prohibits unequal treatment in access to services, including housing, goods, purchasing rights and energy if they are offered to the public, on the grounds of sex, race, ethnic origin and nationality.¹⁶⁸ Other grounds are not covered. A failure to adapt goods or a service to meet the needs of a person with a disability is not a form of discrimination prohibited in the ETA.

Until June 2019, there was additional provision regarding refusal of services. Article 138 of the Code of Petty Crimes provided as follows: 'Anyone who, being a professional service provider, demands or collects payment higher than that in force, or deliberately refuses to provide the service without just cause, shall be subject to a fine'. As a consequence of a case decided by Polish courts (in three instances, including the Supreme Court) in which the owner of a publishing house who refused to print a banner for an LGBT initiative was found guilty, the Prosecutor General/Minister of Justice decided to challenge Article 138 before the Constitutional Tribunal. In his motion, he argued that the Article rules contrary to the principle of a democratic state of law as expressed in the

¹⁶⁵ Ombud, annual report for 2015, p. 102.

¹⁶⁶ See Ombud annual reports, although in the report covering 2018 there is no information on this issue.

¹⁶⁷ Committee on the Elimination of Racial Discrimination (CERD), *Concluding observations on the combined twenty-second to twenty-fourth periodic reports of Poland*, 24 September 2019, available at: https://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/POL/CERD_C_POL_CO_22-24_36935_E.pdf.

¹⁶⁸ See interesting analyses regarding 'public offer' and definition of 'housing' in the ETA commentary 2017, pp. 141-144.

Constitution (Article 2: 'The Republic of Poland shall be a democratic state ruled by law and implementing the principles of social justice.').

The Constitutional Tribunal held (in a majority decision, three to two) that Article 138 was unconstitutional. There was no public hearing; only an announcement of the verdict.¹⁶⁹

The Tribunal stated that the legislator's decision to penalise a refusal to provide services by 'a professional service provider' (even 'deliberately, without just cause') is inadequate to meet the legislative objective under Article 138 of the Code of Petty Crimes, and thereby violates Article 2 of the Constitution. In the Tribunal's view, doubts related in particular to the notions of 'being obliged to provide a service' or 'unjustified refusal to provide a service'. The imprecise nature of these concepts may – at the application stage – lead to various interpretations, including interpretations so broad that they would not be justified by constitutional principles and values. Doubts about the interpretation of these concepts cannot be removed by way of interpretation in accordance with the Constitution and for this reason, the Tribunal was required to intervene.

Holding that Article 138 of the Code of Petty Crimes is not in conformity with the Constitution means that it ceases to be in force. On the basis of this Article, people have in the past been punished for refusing access to goods and services – for example, a refusal to provide goods and services to persons with a disability. As a consequence of the change, at present victims of discrimination may seek the protection of their rights only on the basis of the general principles of civil law. That is possible but difficult, and is of a different character – a party has to act by itself, whereas under Article 138 the police acted *ex officio*).

In its reports to the European Commission, the Polish Government always claimed that Article 138 implemented the equality directives (even though the law was passed for different reasons during the communist era). In the opinion of the author, the challenge to this provision by the Prosecutor General/Minister of Justice in the Constitutional Tribunal, as well as the Constitutional Tribunal's ruling (delivered by Tribunal members appointed by the current political majority in a procedure that raises doubts as to its legality) manifestly shows the attitude of Polish authorities to the issue of equal treatment. The protection available under the ETA remains limited to certain grounds, as described above.

a) Distinction between goods and services available publicly or privately

In Poland, national law does not explicitly distinguish between goods and services that are available to the public (e.g. in shops, restaurants and banks) and those that are available only privately (e.g. restricted to members of a private association) but it does specify that goods and services 'offered to the public' are covered by the prohibition of discrimination.

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

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

National legislation prohibits discrimination in the area of housing, as formulated in the Racial Equality Directive.

¹⁶⁹ Based on the information from the website of the Constitutional Tribunal, available at: <http://trybunal.gov.pl/postepowanie-i-orzeczenia/komunikaty-prasowe/komunikaty-po/art/10679-odmowa-swiadczenia-uslugi-ze-wzgledu-na-wolnosc-sumienia-i-religii-uslugodawcy/>.

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

According to Article 75(1) of the Constitution, public authorities are obliged to establish policies enabling them to meet the housing needs of citizens and, in particular, to counteract homelessness, support the development of social building projects and support the efforts of citizens to secure their own housing.

Access to housing is regulated by the following legislation: the Act on Housing Allowances¹⁷⁰ and the Act on the Protection of Tenants' Rights.¹⁷¹ They contain no provisions of a discriminatory nature.¹⁷²

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

a) Trends and patterns regarding housing segregation for Roma

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

The situation for a considerable number of Roma in terms of housing and living conditions are very poor (especially for Bergitka/Carpathian Roma).¹⁷³ According to the Ombud's annual reports, some of the problems faced by the Roma community have for many years remained unresolved. The Roma, and especially the Bergitka Roma, still live in extreme poverty on the margins of society with no real opportunities to improve their living conditions. The possibility of using funds from the Roma programme in Poland would not seem to be sufficient. In the opinion of the Ombud, it is necessary to create a separate, comprehensive new programme for the Roma community, the aim of which would be solely the planning and financing of improvements to housing and living conditions for Roma settlements throughout Poland. This could be accomplished by the Roma programme, which includes a section on housing.¹⁷⁴ On the basis of on-site visits, the Ombud has repeated these recommendations every year.¹⁷⁵ The Ombud has identified various problems, including municipalities buying houses in other municipalities for Roma families and asking them to move (without their consent, which causes an impasse, as they do not want to move).¹⁷⁶

¹⁷⁰ Act on Housing Allowances (*Ustawa z 21 czerwca 2001 o dodatkach mieszkaniowych*), 21 June 2001.

¹⁷¹ Act on the Protection of Tenants' Rights, Municipal Housing Resources and Amendments to the Civil Code (*Ustawa z 21 czerwca 2001 o ochronie praw lokatorów, mieszkaniowym zasobie gminy i zmianie kodeksu cywilnego*), 21 June 2001.

¹⁷² There was, however, an interesting case which ended up before the ECtHR: *Kozak v. Poland*, No. 13102/02, 2 March 2010. Generally speaking, same-sex cohabitants may currently inherit the right to housing (which was previously limited) after a partner's death.

¹⁷³ It is hard to estimate the overall number of Bergitka Roma suffering from poor living conditions, since even the total number of Roma in Poland varies between different sources of information. According to the 2002 national census, there were 12 731 Roma, while according to the 2011 census, there were 16 000 (including Roma as both the only identity and as one of two identities). Roma organisations sometimes claim that there are around 30 000 Roma in Poland, and international sources even give the number as 50 000-60 000.

¹⁷⁴ Ministry of Internal Affairs and Administration (2014), *Programme for the Integration of the Roma Community in Poland 2014-2020 (Program integracji społeczności romskiej w Polsce na lata 2014-2020)*, available in English at: <http://mniejszosci.narodowe.mswia.gov.pl/mne/romowie/program-integracji-spol>.

¹⁷⁵ Ombud, annual report for 2016, pp. 22-24; Ombud, annual report for 2017, pp. 21-23; Ombud, annual report for 2018, pp. 26-28, 150-151; Ombud, annual report for 2019, pp. 59-63; Ombud, annual report for 2020, pp. 92-93

¹⁷⁶ Ombud, annual report for 2015, pp. 17-19, p. 102; Ombud, annual report for 2017, pp. 26-28.

For instance, Limanowa municipality decided to buy a property, paid for with Roma programme money, to provide housing for Roma. However, it deliberately bought property not within its boundaries but in a different municipality (Czchów), so that the Roma would have to move. The Mayor of Czchów issued a decree prohibiting the occupation of the property bought by Limanowa.¹⁷⁷ However, all the beneficiaries had earlier declared before a notary public that they would leave their current place of residence. They agreed that notarial declarations might become enforcement orders.¹⁷⁸ At the Ombud's request, the District Court suspended execution of the orders.¹⁷⁹

In the administrative procedure joined by the Ombud, the Regional Administrative Court¹⁸⁰ recognised the contested decree of the Mayor of Czchów as invalid.¹⁸¹ The cassation appeal was dismissed by the Supreme Administrative Court.¹⁸²

In 2020, as in previous years, the Ombud continued to work to improve the living conditions of the Roma community, especially in the Maszkowice estate. Despite the Ombud's activity, the Łącko commune failed to adopt a comprehensive revitalisation plan for the estate. The only reason for this is the resistance of local government authorities, which, according to the Ombud, is not unrelated to the discriminatory approach to the local Roma community.

'The Roma estate in Maszkowice, currently inhabited by about 300 people, consists of several dozen residential and farm buildings [...] The standard of these buildings is deteriorating year by year. The inhabitants, left on their own, are unable to improve their situation. Lack of education, as well as systemic exclusion from the labour market, experienced by a significant part of the Roma community in Poland, make the inhabitants of the estate permanent beneficiaries of social assistance. [...] However, it is not the lack of money that is the main reason why the situation in the estate in Maszkowice is not improving. Such funds exist thanks to the government's Program for the integration of the Roma community in Poland. However, the use of these funds depends on the will of local authorities. Only a commune, if only because of ownership issues, can carry out construction investments on the estate. On October 19, 2020, the Ombud asked the Deputy Prime Minister, Jarosław Kaczyński, to look at the conditions in which Roma live in Maszkowice and to engage in dialogue with the local authorities of the commune.'¹⁸³

¹⁷⁷ Czchów City Council, Decree No. 12/2016 of 17 February 2016, approved by resolution No. XIII/139/2016 of 16 March 2016.

¹⁷⁸ Ombud, annual report for 2017, pp. 107-109, 26-28.

¹⁷⁹ Limanowa District Court, judgment of 5 January 2017.

¹⁸⁰ Kraków Regional Administrative Court, judgment of 1 February 2017, No. III SA/Kr 679/16.

¹⁸¹ Ombud, annual report for 2016, pp. 22-24.

¹⁸² Supreme Administrative Court, judgment of 12 January 2018, *Mayor of Czchów v. Governor* (with the participation of the Ombud), No. I OSK 1633/17, available at:

<http://orzeczenia.nsa.gov.pl/doc/6865F5D82D>; see also Ombud, annual report for 2019, pp. 26-28.

¹⁸³ Ombud, annual report for 2020, pp. 92-93.

4 EXCEPTIONS

4.1 Genuine and determining occupational requirements (Article 4)

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

The ETA (Article 5(6)) introduces an exception as provided in Article 4 of the directives. In fact, it is translated almost verbatim from the text of the directives. The exception covers 'possibilities and conditions of undertaking and conducting occupational activities as well as training (including higher education)'.

The 2008 amendment to the Labour Code¹⁸⁴ (Article 18(3b)(2)(1)) had already placed national legislation regarding employment based on labour contracts in line with the Directives. The notions of proportionality, legitimate aim and genuine and determining occupational requirements were added. According to the Labour Code, an employer may refuse to employ an individual on the basis of one or more grounds listed in the definition of discrimination, if the type of work or working conditions means that the reason or reasons for different treatment are genuine and determining occupational requirements. There is no list of those genuine and determining occupational requirements given by the law, so it is left to the evaluation of the judge. The test of the proportionality of measures and the concept of legitimate aim was also introduced.¹⁸⁵

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

National law provides for an exception for employers with an ethos based on religion or belief.

The ETA (Article 5(7)) introduces an exception as provided in Article 4(2) of the Directive. In fact, it is translated almost verbatim from the text of the Directive. It covers the limitation of access to and the performance of occupational activities.

The ETA also amends the Labour Code, introducing the same exception in relation to access to employment.¹⁸⁶

However, the provisions in both the ETA and the Labour Code do not cover the part of Article 4(2) of the Directive which stipulates that the difference in treatment should not justify discrimination on another ground. In addition, as pointed out in the first Commentary to the ETA, Article 5(7) added two notions to the exception: acting in good faith and loyalty towards the ethics of a particular entity (such as a church or religious organisation). According to the authors, this may raise doubts as to its conformity with EU law, in that its approach is too wide.¹⁸⁷

- Conflicts between rights of organisations with an ethos based on religion or belief and other rights to non-discrimination

In Poland, there is specific case law relating to conflicts between the rights of organisations with an ethos based on religion or belief and other rights to non-discrimination in the context of employment.

¹⁸⁴ Act on the amendment of the Act on the Labour Code, 21 November 2008, in force since 18 January 2009.

¹⁸⁵ Labour Code, 26 June 1974, Article 18(3b)(2)(1) (as amended).

¹⁸⁶ Labour Code, 26 June 1974, Article 18(3b)(4), amended by Article 25 of the Equal Treatment Act.

¹⁸⁷ ETA commentary 2017, pp. 157-159.

In an interesting case decided in 2016 and mentioned above,¹⁸⁸ YZ (a journalist and known media personality) supported a petition to legalise civil partnerships, and shortly after he lost a civil contract opportunity (as host of a concert organised by the Diocese – work that he had already performed in previous years). YZ sued the Roman Catholic Diocese of H. for compensation for infringement of the rule of equal treatment on the ground of sexual orientation by association (direct discrimination and harassment). The court of first instance¹⁸⁹ dismissed the lawsuit. The court of second instance¹⁹⁰ changed the verdict awarding compensation. The court stated that the claimant had provided enough evidence to substantiate discrimination and the burden of proof was shifted to the respondent, who did not prove that there was no breach of the rule of equal treatment. According to the court, the limitations stemming from Article 5(7) of the ETA (the court of first instance referred to these) did not apply. The court concluded that the respondent discriminated against the claimant – there was indirect discrimination because of political opinion (*światopogląd*) and not on the ground of sexual orientation.

4.3 Armed forces and other specific occupations (Article 3(4) and Recitals 18 and 19, Directive 2000/78)

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

The ETA does not refer to the armed forces, but the armed forces are covered in the same way as any other employer by the anti-discrimination law.

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

4.4 Nationality discrimination (Article 3(2))

a) Discrimination on the ground of nationality

National law includes exceptions relating to difference in treatment based on nationality.

The ETA includes a provision relying on Article 3(2). Article 5(9) of the ETA provides that the law does not cover differences in treatment based on nationality, especially in relation to entry into and residence in Poland, and in relation to the legal status of natural persons who are citizens of countries other than EU Member States, Member States of EFTA or the Swiss Confederation.

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

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

¹⁸⁸ See Section 2.1.3. b. The court rulings are public (although not published). However, the claimant asked that the case not be publicised; it has therefore been anonymised.

¹⁸⁹ District Court, *Polish Society for Anti-Discrimination Law on behalf of YZ v Catholic Diocese of H.*, judgment of 16 December 2016, No. I C 1326/15 (not published).

¹⁹⁰ Regional Court, judgment of 22 March 2017, No. I Ca 75/17 (not published).

- in a number of state security agencies, special forces, intelligence services, customs services, the military and the police, and as firefighters, prison guards, municipal police, inspectors of different state inspectorates;
- judge, prosecutor, bailiff, curator;
- detectives, private security guards (but possible for EU and EFTA nationals);
- notary public (but possible for EU and EEA nationals);
- all civil servants (Act on the Civil Service, Article 4, but with some exceptions in accordance with Article 5), public servants (Law on employees of state administration, Article 3), employees in municipal administration (Law on municipal employees, Article 6, with some exceptions, Article 11(2) and (3));
- two categories of teachers – appointed and certified (*mianowany, dyplomowany*) – with the exception of nationals of other EU and EFTA Member States (Teachers' Charter, Article 10(5));
- medical doctors (with a number of exceptions regarding other EU and other nationals) (Law on doctors, Article 5).

The 2017' Act on the Supreme Court and the amendment to the Law on Ordinary Courts Organisation introduced a change stating that a candidate for the position of judge, judge assessor or lay judge must have exclusively Polish citizenship (dual citizenship of another EU Member State also eliminates the candidate).¹⁹¹ The Ombud drew attention to this issue of restricting access to public service as judges, assessors and lay judges as a result of the requirement to have only Polish citizenship. In the Ombud's opinion, the principles of access to public service must be objective in nature, enabling various candidates to apply for such posts in accordance with the principles of equal opportunities, without any discrimination or unjustified restrictions. The Ombud drew attention to the lack of any indication, in the justification to the draft law, of the purpose of the new requirement for candidates. Pursuant to the provisions of the Act on Polish Citizenship, a Polish citizen who simultaneously holds citizenship of another state has the same rights and obligations as a person who has only Polish citizenship. According to Article 60 of the Constitution, Polish citizens exercising full public rights have the right to equal access to public service. The Ombud asked the Marshal of the Sejm (the lower house of the Polish Parliament) to take these arguments into consideration during the legislative process, but the arguments were not accepted.

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

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

Discrimination on the grounds of citizenship (as such) is not fully prohibited in the ETA. However, since the ETA was amended in 2016, Article 1(2) provides that the regulation regarding nationality shall apply accordingly to citizenship. The 2016 amendment added citizenship as a protected ground only for some categories of people.¹⁹² It implements EU Directive 2014/54/EU of 16 April 2014 on measures facilitating the exercise of rights conferred on workers in the context of freedom of movement for workers. It also adds to the ETA one more discrimination ground; the ETA now states at Article 1(2) – previously only Article 1(1) listed discrimination grounds – that its provisions regarding nationality

¹⁹¹ Act on the Supreme Court (*Ustawa z 8 grudnia 2017 o Sądzie Najwyższym*), 8 December 2017, Article 30(1)(1); Law on Ordinary Courts Organisation (*Ustawa z dnia 27 lipca 2001r. Prawo o ustroju sądów powszechnych*), 27 July 2001 (amended on 8 December 2017, in force from 3 April 2018), Article 61(1)(1).

¹⁹² Act on the amendment of the Act on the Promotion of Employment and the Institutions of the Labour Market, the Act on the National Labour Inspectorate and the Act on the Implementation of Certain Provisions of the European Union in the Field of Equal Treatment (*Ustawa z dnia 29 kwietnia 2016 r. o zmianie ustawy o promocji zatrudnienia i instytucjach rynku pracy, ustawy o Państwowej Inspekcji Pracy oraz ustawy o wdrożeniu niektórych przepisów Unii Europejskiej w zakresie równego traktowania*), 29 April 2016.

should be adequately applied to the citizenship of persons exercising freedom of movement for workers within the scope defined in Articles 1-10 of Regulation (EU) No. 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the European Union.¹⁹³

In its 2019 *Concluding observations* report on Poland, CERD expressed its concern that the ETA does not explicitly prohibit discrimination on grounds of 'national origin' (also 'colour' and 'descent') and recommended relevant amendments.¹⁹⁴

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

Similarly, the anti-discrimination provisions of the Labour Code, Article 11(3), cover everyone, no matter what their nationality (or stateless status), but the Code does not contain the term 'stateless person'.

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

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

There is no relevant case law dealing with nationality and ethnicity and the possible overlap of these two grounds.

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

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

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

The ETA does not refer to health and safety.

¹⁹³ This amendment also changed two other Acts. In the Act on the Promotion of Employment and the Institutions of the Labour Market (*Ustawa z 20 kwietnia 2004 o promocji zatrudnienia i instytucjach rynku pracy*), 20 April 2004, as amended, it added (in Article 4(1)(7a)) monitoring, analyses and supporting of equal treatment of country nationals from EU and EEA countries exercising freedom of movement for workers within the scope defined in Articles 1-10 of Regulation (EU) No. 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union to the competences of the Minister of Labour. In the Act on the National Labour Inspectorate (*Ustawa z 13 kwietnia 2007 r. o Państwowej Inspekcji Pracy*), 13 April 2007, it added new competences to the National Labour Inspectorate, including (in Article 10(1)(14a)) the provision of advice to promote equal treatment of citizens of EU Member States and the European Free Trade Association (EFTA) – parties to the Agreement on the European Economic Area that exercise freedom of movement for workers and members of their families.

¹⁹⁴ CERD, *Concluding observations on the combined twenty-second to twenty-fourth periodic reports of Poland*, 24 September 2019, available at: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolNo=CERD/C/POL/CO/22-24&Lang=En.

According to the Constitution, any exceptions to the prohibition on discrimination may be justified only by reasons of public security, public order, health, morality or the rights and freedoms of other people (Constitution, Article 31(3)). This clause creates a very broad scope of guarantee which aims to eliminate any possible discrimination.

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

4.6.1 Direct discrimination

a) Exceptions to the prohibition of direct discrimination on grounds of age

In Poland, national law provides for specific exception(s) for direct discrimination on the ground of age. The ETA transposed Article 6, using the same wording as the Directive.

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

The ETA (Article 5(8)(b)) permits different treatment of natural persons due to age: 'that consists of establishing, for the purposes of social security, different rules for assigning or acquiring the right to benefits, including different age criteria for the calculation of the amount of benefits [...]'.¹⁹⁵

Differences in treatment based on age are also permitted in other legislation, besides the ETA, in some situations (see more in the sections below).

National anti-discrimination law allows occupational pension schemes to fix ages for admission to the scheme or entitlement to benefits, taking up the possibility provided for by Article 6(2). The ETA transposed Article 6(2) of the Directive. The ETA justifies different treatment if the conditions transposed from Article 6(2) are met. In the case of employee occupational pension schemes, different treatment is permitted provided that it does not result in discrimination on the grounds of sex (ETA, Article 5(8)(b), second sentence).

According to Polish law, individuals (women and men equally) are obliged to contribute to pensions once they commence employment.¹⁹⁵ There are fixed ages for entitlement to benefits.¹⁹⁶ Nevertheless, some labour groups have special preferences, e.g. miners, teachers, professional soldiers, police officers, etc.

b) Justification of direct discrimination on the ground of age

In Poland, national law provides for justifications for direct discrimination on the ground of age. The ETA transposed Article 6, using the same wording as the Directive. It is therefore possible, in specified circumstances, to justify direct discrimination on the ground of age.

The ETA (Article 5(8)(a)), following Article 6 of the Directive, justifies different treatment of natural persons because of age 'if it is objectively and reasonably justified by a legitimate aim, in particular by vocational training objectives, and if the means of achieving that aim are appropriate and necessary'.

The Labour Code has also introduced (2008 amendment, Article 18(3b)(2)(4)) one exception – the principle of equal treatment in employment is deemed not to be

¹⁹⁵ Act on the Social Security System, 13 October 1998, Article 6.

¹⁹⁶ Act on Retirement and Disability Pensions from the Social Insurance Fund, 17 December 1998, Articles 24 and 27.

breached by actions of the following kind, provided that they are proportionate to achieving a legitimate aim: applying the criterion of length of service in determining the conditions for hiring and firing, pay and promotion rules, and rules on access to training for the enhancement of professional qualifications, which may indirectly justify the different treatment of employees based on age.

The CJEU case of *Mangold*¹⁹⁷ has not so far been directly invoked. It could be used, but the particular issue to which it refers was decided in Poland in a different way – in fixed-term labour contracts, the same protection exists no matter what the age of employee. There is also no age discrimination in Polish law regarding a service-related statutory minimum notice period, as there was in the CJEU *Kücükdeveci* case.¹⁹⁸

c) Permitted differences of treatment based on age

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

The ETA (Article 5(8)(b)) permits different treatment of natural persons due to age: 'that consists of establishing, for the purposes of social security, different rules for assigning or acquiring the right to benefits, including different age criteria for the calculation of the amount of benefits [...]'.¹⁹⁹

d) Fixing of ages for admission to occupational pension schemes

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

The ETA transposed Article 6(2) of the Directive. The ETA justifies different treatment if the conditions transposed from Article 6(2) are met. In the case of employee occupational pension schemes, different treatment is permitted provided that this does not result in discrimination on the grounds of sex (ETA, Article 5(8)(b), second sentence).

According to Polish law, individuals (women and men equally) are obliged to contribute to pensions once they commence employment.¹⁹⁹ There are fixed ages (in most cases, 60 for women and 65 for men) for entitlement to benefits.²⁰⁰ Nevertheless, some labour groups have special preferences (lower age limit, earlier pension), e.g. miners, teachers, professional soldiers, police officers, etc.

4.6.2 Special conditions for younger or older workers

In Poland, there are some special conditions set by law for older and younger workers in order to promote their vocational integration.

According to the Law,²⁰¹ every year the relevant ministry (currently the Ministry of Development and Technology) publishes a Catalogue of Basic Forms of Professional Activation. These are labour market services and instruments financed by the Labour Fund. Catalogues since 2016 are available on the Ministry's website.²⁰² The catalogue of basic forms of professional activation in 2021 includes: internships, training, intervention works, public works, refunding costs of equipment or additional equipment of

¹⁹⁷ Judgment of 22 November 2005, *Mangold v. Helm*, C-144/04, EU:C:2005:709.

¹⁹⁸ Judgment of 19 January 2010, *Kücükdeveci v. Swedex GmbH & Co. KG*, C-555/07, EU:C:2010:21.

¹⁹⁹ Act on the Social Security System, 13 October 1998, Article 6.

²⁰⁰ Act on Retirement and Disability Pensions from the Social Insurance Fund, 17 December 1998, Articles 24 and 27.

²⁰¹ Act on the Promotion of Employment and the Institutions of the Labour Market (*Ustawa z 20 kwietnia 2004 o promocji zatrudnienia i instytucjach rynku pracy*), 20 April 2004, as amended, Article 4(11)(1).

²⁰² See: <https://www.gov.pl/web/rozwój-technologia/katalog-podstawowych-form-aktywizacji-zawodowej>.

workstations, one-off measures to co-finance business start-up, housing allowance. Age, usually below 25 and above 50 years of age, is one of the conditions of receiving these kinds of services.

These forms of professional activation are being implemented by *powiat* Labour Offices. For example, *powiat* Labour Offices may initiate, and finance, intervention works. As part of these works, employers employ the unemployed who are in a special situation on the labour market in exchange for a partial refund of remuneration costs and social insurance premiums. The group of the unemployed in a special situation in the labour market includes, among others, the unemployed under 25 years of age and the unemployed over 50 years of age. Similarly, such persons may be offered referral to public works. Scholarships for studying at schools are intended for the unemployed under 25 who do not have professional qualifications.

4.6.3 Minimum and maximum age requirements

There are exceptions that permit minimum and maximum age requirements in relation to access to employment and training.

According to the provisions in Polish labour law, a minimum age of 18 is, in general, required for engagement as an employee. There are some exceptions regarding minors over 15 (employment of a minor under 15 years old is generally forbidden, with some exceptions).²⁰³

Those who have completed the first eight grades of their school education²⁰⁴ may become employed if they obtain medical approval for the specific kind of work and any occupational qualifications that may be required for the offered position.

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

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

There are specific age limits concerning some parts of the public sector. Minimum age limits exist – e.g. within the judiciary. According to the judiciary act, in order to become a judge in a first instance court, a person must be more than 29 years old.²⁰⁵ This age limit is not problematic from the point of view of age discrimination, as it usually takes a person until the age of 29 to complete the whole course of education and training to become a judge. Nomination to the courts of second instance requires a certain length of practice, and therefore this is an indirect age limit.²⁰⁶ In order to become a judge of the Supreme Court, a person must be more than 40 years old.²⁰⁷ With regard to administrative courts, there is an age limit for judges in regional administrative courts, who must be 35 or over.²⁰⁸

²⁰³ Labour Code, 26 June 1974, Articles 190, 191 and 202.

²⁰⁴ Until 2017, general education comprised the following stages: (a) primary/basic education, 7-13 years old; (b) lower secondary education (gymnasium), 13-16 years old; (c) upper secondary education (lyceum), 16-19 years old; and (d) higher education (higher schools, universities, etc.), from 19 years old. In 2017, a change was introduced. Gymnasiums were gradually abolished, and general education now comprises two levels only: primary school (eight grades) and secondary school (four grades).

²⁰⁵ Law on Ordinary Courts Organisation, 27 July 2001, Article 61(1)(5).

²⁰⁶ Law on Ordinary Courts Organisation, 27 July 2001, Articles 63(1) and 64(1).

²⁰⁷ Act on the Supreme Court, 8 December 2017, Article 30(1)(3).

²⁰⁸ Law on the Organisation of the Administrative Judiciary (*Ustawa z dnia 25 lipca 2002. Prawo o ustroju sądów administracyjnych*), 25 July 2002, Article 6(1)(5).

In order to become a judge of the Supreme Administrative Court, the minimum age is 40 years, unless the candidate has been a judge in a regional administrative court for at least three years.²⁰⁹

The minimum age for becoming a prosecutor is 26.²¹⁰ Under the Law on Notaries Public, one of the conditions of becoming a notary is to be at least 26.²¹¹

The Ombud pays special attention to the problem of age limits. For instance, according to the Act on Degrees and Academic Titles, candidates for membership of the Central Commission for Degrees and Titles could not be over 70 years of age.²¹² According to the Ministry of Science and Higher Education, the age restriction was not discriminatory. However, the Ombud considered that the total exclusion of persons over 70 years of age from the Commission may be discriminatory and addressed the Minister of Science and Higher Education with a request to consider taking legislative measures aimed at removing the age limit in the indicated scope.

In response, the Minister noted that 'in the assessment of the Court of Justice of the European Union it is acceptable – from the point of view of equal treatment in employment – to introduce regulations according to which university professors are compulsorily retired at the age of 68, while continuing their activities after the age of 65 is only possible on the basis of fixed-term contracts, as long as these provisions pursue a legitimate aim, in particular in the field of employment and labour market policies, such as the implementation of high-quality teaching and the optimal intergenerational distribution of professorships, and provided that these provisions allow this objective to be achieved by appropriate and necessary means. The solutions applied in the Act on Higher Education and Science were analogical in character and purpose, and therefore – in the opinion of the Minister – doubts as to their admissibility are not founded.'²¹³ Therefore, the new law that replaced the Central Commission for Degrees and Titles with the Council of Scientific Excellency kept the same provision and age limit (candidates cannot be over 70 years of age).²¹⁴

In the opinion of the Ombud, the provision in the 2010 Act on the Principles of Financing Science that formulated the legal definition of a 'young scientist' was discriminatory due to the age criterion of 35 years. The Ombud addressed the Minister of Science and Higher Education, who promised that the Act on Higher Education and Science (in force from October 2018) would change the definition. The new definition (Article 360) indicates that 'A young scientist is a scientist who is a PhD student and does not have a doctoral degree, or has a doctoral degree, obtained not earlier than 7 years ago.'²¹⁵

4.6.4 Retirement

a) State pension age

In Poland, there is no state pension age at which individuals must begin to collect their state pensions but there is a state pension age at which individuals may begin to collect their state pensions (60 for women and 65 for men).

²⁰⁹ Law on the Organisation of the Administrative Judiciary, 25 July 2002, Article 7(1).

²¹⁰ Act on Public Prosecution (*Ustawa z dnia 28 stycznia 2016 r. o prokuraturze*), 28 January 2016, Article 75(1)(5).

²¹¹ Law on Notaries Public (*Ustawa z dnia 14 lutego 1991 r. Prawo o notariacie*), 14 February 1991, Article 11(7).

²¹² Act on Degrees and Academic Titles and Degrees and Titles in the Field of Art (*Ustawa z 14 marca 2003 r. o stopniach naukowych i tytule naukowym oraz o stopniach i tytule w zakresie sztuki*), 14 March 2003, Article 34a – now repealed.

²¹³ Ombud, annual report for 2018, pp. 60-61.

²¹⁴ Act on Higher Education and Science, Article 233(1)(5).

²¹⁵ Ombud, annual report for 2018, pp. 61-63.

If an individual wishes to work beyond the state pension age, the pension can be deferred.

An individual can collect a pension and still work.

It is possible, as a rule, for people who have reached normal pension age to combine employment with receipt of a pension. However, there is an exception to this rule: if people of pension age do not terminate their employment contract and continue to work for the same employer (this applies equally to women and men), payment of their pension is suspended.²¹⁶ There are many cases regarding this provision, but it is part of the legal system and it has passed the constitutionality test (with one exception – the Constitutional Tribunal held that the provision may not apply retrospectively to persons who already collect a pension, and applies only in future).

There is no requirement for employees to retire when they reach pension age. Until the end of 2012, the general pension age was 60 for women and 65 for men. In May 2012, however, the pension age was changed by Parliament. The normal pension age for both men and women was set at 67 (to be introduced incrementally – for men by 2020 and for women by 2040).²¹⁷ Under legislation passed in 2016 (in force since October 2017) the previous pension age (60 for women and 65 for men) has been restored as a result of political promises in the parliamentary election campaign.²¹⁸

The pension age is treated as a right, not as an obligation, and it is left to the discretion of the employee whether to collect their pension.²¹⁹ On the one hand, only employees themselves can apply to the social security agency to be issued with a decision granting a pension. On the other hand, entitlement to a retirement pension is not subject to resignation from employment.

For many years this was not obvious, as the jurisprudence of the courts, including the Supreme Court, varied among cases in which reaching the retirement age and entitlement to a pension were the reasons for the termination of a labour contract. In a number of cases, the Supreme Court adopted different decisions. Finally, in 2009, the Supreme Court,²²⁰ in a special procedure, answered a 'legal question' lodged by the Ombud (this special procedure may be initiated by the Ombud in situations where differences exist in the interpretation of the law in court judgments; the legal question is not based on any particular case). The resolution (ruling) was passed by a special panel of seven judges.

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

²¹⁶ Act on Retirement and Disability Pensions from the Social Insurance Fund, 17 December 1998, Article 103a.

²¹⁷ Act on Retirement and Disability Pensions from the Social Insurance Fund, 17 December 1998, Articles 24 and 27 (amended 11 May 2012, in force since 1 January 2013).

²¹⁸ Act on Retirement and Disability Pensions from the Social Insurance Fund, 17 December 1998, Articles 24 and 27 (amended 16 November 2016, in force since 1 October 2017).

²¹⁹ Act on Retirement and Disability Pensions from the Social Insurance Fund, 17 December 1998, Articles 24 and 27.

²²⁰ Supreme Court, resolution of 21 January 2009, No. II PZP13/08.

employee, as the retirement age for women is lower) and direct discrimination on the ground of age (in the case of female and male employees).

Another interesting case was decided by the Constitutional Tribunal, which answered a legal question formulated by the Łódź Regional Court:²²¹ whether Article 29(1) of the Act of 17 December 1998 on Retirement and Disability Pensions from the Social Insurance Fund violates the constitutional rules of equality in law and the prohibition on discrimination (Articles 32 and 33). The law that was challenged made a distinction between the situation of men and women in terms of the right to 'early retirement'. The normal retirement age was 60 for women and 65 for men. However, women were entitled to 'early retirement' at the age of 55 if they had at least 30 years of paid pension insurance, while men in a similar situation (35 years of insurance payments and 60 years of age) were not entitled to early retirement. The Constitutional Tribunal found the law on pensions to be discriminatory. Following the verdict, the law was changed. The case was considered as a matter of sex discrimination, although the issue might also be seen as age discrimination concerning the age difference for men and women in granting them particular rights to retirement. This case referred to 'early retirement'.²²²

b) Occupational pension schemes

In Poland, there is no standard age at which people can begin to receive payments from occupational pension schemes and other employer-funded pension arrangements.

If an individual wishes to work for longer, payments from such occupational pension schemes cannot be deferred. An individual can collect a pension and still work.

The rules that apply to payments from the Employees' Pension Programmes system, which is a system of voluntary collection of pension contributions, are rather specific. Individuals begin receiving payments in the following cases: 1) upon a decision by the individuals once they reach the age of 60; 2) upon presentation of a decision granting the right to a state pension when the individual reaches the age of 55; and 3) when the individual reaches the age of 70, under two conditions: if the individual has not applied to receive payments and if their employment has been terminated (if the individual continues to work for the same employer, the pension is suspended).²²³

c) State imposed mandatory retirement ages

Poland has no state-imposed mandatory retirement age(s).

There is neither a specific regulation allowing employers to terminate an employment contract on account of an employee reaching retirement age nor mandatory retirement ages for any sector, with the exception of judges,²²⁴ public prosecutors,²²⁵ court enforcement officers²²⁶ and notaries public.²²⁷

There are relevant cases that should be mentioned in this context.

²²¹ Łódź Regional Court, judgment of 23 October 2007, *Marek R. v Zakład Ubezpieczeń Społecznych*, No. P 10/07.

²²² As mentioned in point c) below, the 2016 reversion to 60 and 65 years for females and males respectively went against previous verdicts. It is clear that the re-establishment of different mandatory retirement ages for female and male judges has a discriminatory character.

²²³ Act on Employees' Pension Programmes (*Ustawa z 20 kwietnia 2004 r. o pracowniczych programach emerytalnych*), 20 April 2004, Article 42(1) and (2).

²²⁴ Law on Ordinary Courts Organisation, 27 July 2001, Article 69(1) and (3).

²²⁵ Act on Public Prosecution, 28 January 2016, Article 127.

²²⁶ Act on Court Bailiffs (*Ustawa z dnia 22 marca 2018 r. o komornikach sądowych*), 22 March 2018, Article 19.1(2).

²²⁷ Law on Notaries Public, 14 February 1991, Article 16(1)(2a).

An interesting problem arose in 2012 (initiated by a complaint from an affected party) that engaged both the Ombud and the Plenipotentiary for Equal Treatment. The Act on Pharmaceutical Law limited the possibility of being a manager of a pharmacy to those who are aged below 65 or 70 (if extended using the special procedure). This provision was criticised as discriminatory by the Ombud and the Plenipotentiary in their representations to the Minister of Health. The process of amendment of the law relating to retirement took place at the same time, and the questionable provision was changed with effect from 1 January 2013.²²⁸

In 2013, the Supreme Administrative Court delivered a judgment²²⁹ regarding the retirement age of court bailiffs (judicial enforcement officer – *komornik sądowy*).²³⁰ Until 2013, under the Act on Court Bailiffs and Enforcement (Article 15a(1)(3a)), the Minister of Justice could dismiss bailiffs when they turned 65; the age for dismissal was later changed to 70, but since 2019 it has returned to 65. A dismissal by the Minister was challenged by a dismissed bailiff before a Regional Administrative Court, which upheld the Minister's decision. The Supreme Administrative Court considered the cassation appeal against this verdict. In the opinion of the Court, the interpretation of Article 15a of the Act required from the Minister of Justice, in the absence of appropriate legislative action, direct application of the provisions of Directive 2000/78/EC – in particular, Article 2(2). The Court found the decision of the Minister of Justice to be discriminatory on the ground of age.

In 2014, the Ombud continued its efforts to challenge certain upper age limits. It objected to the change in the age limit for bailiffs (as a result of the case mentioned above, the law was amended, and the age limit was changed from 65 to 70 years).²³¹ In the opinion of the Ombud, the law still failed to comply with Directive 2000/78/EC, as well as with the Constitution, as the change was introduced without being properly substantiated.²³² In 2015, the opinion of the Ombud was supported by the bailiffs' self-regulatory body, the National Council of Bailiffs (*Krajowa Rada Komornicza*).²³³ However, the Minister of Justice took a different view, stating that, in his opinion, there was no need to work on revising the regulation according to which, after reaching the age of 70, a bailiff is dismissed from office by the Minister of Justice. He stated that the current regulation does not infringe EU law or the Constitution, and it is essential in order to ensure that the rights of all parties to enforcement proceedings are respected, as well as to safeguard the interests of the Treasury.²³⁴

In 2015, an interesting case was decided by the Supreme Court.²³⁵ A prosecutor who had reached the age of 65 sought the consent of the Prosecutor-General to continue in employment. She was refused and challenged the refusal in court. The Supreme Court stated that generational change is a criterion that the Prosecutor-General may take into account.²³⁶

²²⁸ Ombud, annual report for 2012, pp. 394-395; Government Plenipotentiary for Equal Treatment (2013), *Report on the Activities of the Government Plenipotentiary for Equal Treatment for the period 1 January 2012 – 31 December 2012 (Sprawozdanie z działalności Pełnomocnika Rządu do spraw Równego Traktowania za okres od 1 stycznia 2012 r. do 31 grudnia 2012 r.)*, Warsaw, pp. 65-66; Act on Pharmaceutical Law (*Ustawa z dnia 6 września 2001 r. Prawo farmaceutyczne*), 6 September 2001 (as amended in 2012), Article 88.

²²⁹ Supreme Administrative Court, judgment of 9 July 2013, *R.C. v Minister of Justice*, No. II GSK 391/12.

²³⁰ Ombud, annual report for 2013, pp. 72-73. Act on Court Bailiffs and Enforcement, 29 August 1997.

²³¹ However, in the new law on bailiffs, the age was restored to 65 – see: Act on Court Bailiffs (*Ustawa z dnia 22 marca 2018 r. o komornikach sądowych*), 22 March 2018, Article 19.1(2).

²³² Ombud, annual report for 2014, pp. 22-23.

²³³ Ombud, annual report for 2015, p. 38.

²³⁴ Ombud, annual report for 2014, p. 23.

²³⁵ Supreme Court, judgment of 16 July 2015, *XY v. Prosecutor General*, No. III PO 6/15, available at: <https://www.saos.org.pl/judgments/243008>.

²³⁶ Supreme Court, judgment of 16 July 2015, *XY v. Prosecutor General*, No. III PO 6/15, available at: <https://www.saos.org.pl/judgments/243008>. The Supreme Court ruled that a properly conducted 'generational replacement' is an acceptable premise, also recognised in the jurisprudence of the CJEU (judgments in C-159/10 and C-160/10). The Supreme Court stated: 'Settled case law of the Supreme Court

As already mentioned above, in 2016 the previous general pension age (60 for women and 65 for men) was restored, coming into force in October 2017.²³⁷ This also led to changes in the mandatory retirement age for some specific professions, including judges and prosecutors, and has affected not only future judges but also judges in service.²³⁸ The change also raised questions regarding discrimination. It is clear that the re-establishment of different mandatory retirement ages for female and male judges has a discriminatory character.

The change drew a firm reaction from the European Commission. The Commission concluded on 20 December 2017 that there was a clear risk of a serious breach of the rule of law in Poland. It therefore decided to take the next step in its infringement procedure against Poland for breaches of EU law by the Law on Ordinary Courts Organisation. The Commission recommended that the Polish authorities: 'remove the new retirement regime for judges including the discretionary powers of the Minister of Justice to prolong the mandate of judges and to appoint and dismiss presidents of courts' and that they: 'Amend the Supreme Court law, not apply a lowered retirement age to current judges, remove the discretionary power of the President to prolong the mandate of Supreme Court judges [...]'.²³⁹

According to the press release, 'The Commission's key legal concern identified in this law related to the discrimination on the basis of gender due to the introduction of a different retirement age for female judges (60 years) and male judges (65 years)'.²⁴⁰

The Polish legislator changed controversial provisions. Nevertheless, the CJEU concluded that, despite the amendment of the Supreme Court Act (21 November 2018), it is not certain whether this Law eliminates all the alleged violations of EU law.²⁴¹

d) Retirement ages imposed by employers

In Poland, national law does not permit employers to set retirement ages (or ages at which the termination of an employment contract is possible) by contract and/or collective bargaining and/or unilaterally.

e) Employment rights applicable to all workers irrespective of age

The law on protection against dismissal and other laws protecting employment rights apply to all workers irrespective of age, even if they remain in employment after attaining pensionable age or any other age.

The employer can terminate employment only on the basis of general rules governing the termination of labour relations.

is the position according to which the generational replacement of prosecutors is the premise that the Attorney General may consider in deciding on a prosecutor's application for consent to continue to hold the post. The Supreme Court cannot interfere with the statutory powers of the Attorney General and assess whether the person concerned should continue to perform its function as prosecutor. The Supreme Court only examines whether the decision of the Attorney General is not arbitrary or taken using prohibited criteria'. See also Ombud, annual report for 2016, pp. 77-78.

²³⁷ Act on Retirement and Disability Pensions from the Social Insurance Fund, 17 December 1998, Articles 24 and 27, (amended 16 November 2016, in force since 1 October 2017).

²³⁸ According to the European Commission: 'Over a period of two years, the Polish authorities have adopted more than 13 laws affecting the entire structure of the justice system in Poland, impacting the Constitutional Tribunal, Supreme Court, ordinary courts, National Council for the Judiciary, prosecution service and National School of Judiciary. The common pattern is that the executive and legislative branches have been systematically enabled to politically interfere in the composition, powers, administration and functioning of the judicial branch'. See information at: http://europa.eu/rapid/press-release_IP-17-5367_en.htm.

²³⁹ See: http://europa.eu/rapid/press-release_IP-17-5367_en.htm.

²⁴⁰ See: http://europa.eu/rapid/press-release_IP-17-5367_en.htm.

²⁴¹ The ruling of the CJEU was delivered on 24 June 2019.

The law protects all employees irrespective of age (with the exception described below, which is aimed protecting people close to pensionable age). According to the 2009 resolution of the Supreme Court mentioned above, reaching pensionable age cannot be the sole reason for dismissal – this would be discrimination. However, if there is another reason behind the need for dismissal (for instance, reductions in staff), it is acceptable to dismiss people who have the right to a pension.

In addition, employees are protected against dismissal in the four years before they reach pensionable age, if the period for which they have been employed gives them the right to a retirement pension on reaching pensionable age.²⁴² No distinction is made between women and men in this respect.

In practice, of course, many problems occur, some of which eventually end up in court. Employees quite often feel that they are being put under pressure to resign from their job when they reach pensionable age, or that they are supposedly being dismissed for reasons other than reaching pensionable age (but in fact the sole reason is their age). It is probable that many of them do not challenge their employers due to a lack of legal awareness, but the Supreme Court rulings, and their publication, are no doubt helping to raise awareness.

f) Compliance of national law with CJEU case law

National legislation is in line with the CJEU case law on age regarding mandatory retirement (please note the issues concerning retirement from judicial office, mentioned above).

4.6.5 Redundancy

a) Age and seniority taken into account for redundancy selection

In Poland, national law does not permit age or seniority to be taken into account in selecting workers for redundancy.

The general provision states that an employer may not terminate the employment contract of an employee who has less than four years to go before they reach pensionable age, unless such a person is being granted a pension on the grounds of incapacity to work.²⁴³

In this period of special protection against termination of the employment contract, the employer is allowed only to change the existing working and remuneration conditions but, additionally, only in respect of certain groups of employees enumerated in the legislation.²⁴⁴ Even in the latter case, when such a change would lead to a reduction in remuneration, the employer is obliged to pay a special allowance to compensate for this reduction in pay.²⁴⁵ There is an exemption in the case of the bankruptcy or liquidation of the employer; in such cases, the above-mentioned provision does not apply.

²⁴² Labour Code, 26 June 1974, Article 39.

²⁴³ Labour Code, 26 June 1974, Articles 39 and 40.

²⁴⁴ Act on the Special Conditions of Termination of Employment Relations for Reasons not related to Employees (*Ustawa z 13 marca 2003 r. o szczególnych zasadach rozwiązywania z pracownikami stosunków pracy z przyczyn niedotyczących pracowników*), 13 March 2003, Article 5(5).

²⁴⁵ Act on the Special Conditions of Termination of Employment Relations for Reasons not related to Employees, 13 March 2003, Article 5(6).

b) Age taken into account for redundancy compensation

In Poland, national law provides compensation for redundancy. This is not affected by the age of the worker. It is affected by the wages and number of years of employment with a particular employer.

If the above-mentioned employee, who is protected in the period before they reach pensionable age, is somehow made redundant, they have the right to be re-employed or compensated.

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

In Poland, national law includes exceptions that seek to rely on Article 2(5) of the Employment Equality Directive.

The 2010 Equal Treatment Act transposed Article 2(5). It justifies different treatment of natural persons on the grounds of religion, belief, political opinion, disability, age or sexual orientation, in undertaking measures necessary in a democratic society, for public security and the maintenance of public order, for the protection of health and for the protection of the rights and freedoms of others as well as the prevention of criminal offences, to the extent specified in other provisions (Article 8(2)).

The Polish Constitution also stipulates generally that any limitation on the exercise of constitutional freedoms and rights may be imposed only by statute, and only when necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health or public morals or the freedoms and rights of other persons. Such limitations must not violate the essence of freedoms and rights.²⁴⁶

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

4.8 Any other exceptions

There are no other exceptions to the prohibition on discrimination (on any ground covered by this report) provided for in national law.

Apart from the above-mentioned exceptions (transposed from the directives), the ETA provides *expressis verbis* that it does not cover the spheres of private and family life and legal actions related to these spheres (Article 5(1)), and that it does not cover freedom to choose a party to a contract as long as it is not based on the grounds of gender, race, ethnic origin or nationality (Article 5(3)).

According to M. Kułak, Article 5(1) goes too far and might be understood as excluding from the protection situations in the 'private' sphere of employment, for example, work at home (housekeeping, cleaning etc.).²⁴⁷ It seems to be a theoretical doubt, however, as no such case has been identified.

²⁴⁶ Constitution of the Republic of Poland, 2 April 1997, Article 31, available at: <http://trybunal.gov.pl/en/about-the-tribunal/legal-basis/the-constitution-of-the-republic-of-poland/>.

²⁴⁷ Kułak, M. (2021), pp. 17-18.

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

a) Scope for positive action measures

Positive action is permitted in national law in respect of racial or ethnic origin, religion or belief, disability, age or sexual orientation.

The ETA provides in general (Article 11) that adopting specific measures that are aimed at preventing or compensating for unequal treatment linked with inequality does not constitute a breach of the principle of equal treatment (all grounds are protected by law).

The 2003 amendment of the Labour Code, which took effect on 1 January 2004, introduced a clear and general stipulation allowing for positive action in employment relations.²⁴⁸ This provision covers positive action not only for racial or ethnic origin, religion or belief, disability, age and sexual orientation but equally for some additional grounds: gender, political opinion and membership of a trade union.

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

A comparison of the ETA and the Labour Code shows that in the latter, the law mentions 'a limited period of time' within which positive action may be introduced. However, this should have no practical consequences.²⁴⁹

There is no case law identified concerning this issue.

b) Quotas in employment for people with disabilities

In Poland, national law provides for quotas for the employment of people with disabilities.

The Disabled Persons Act contains the 'System of Quotas and Penalties' – a system of incentives and penalties for employers which aims to support the employment of people with disabilities. Employers who, for at least 36 months, employ people who are officially recognised as disabled (who are unemployed or seeking work while not holding a job, or whose disability occurred while working for the employer, except if this disability was caused by the fault of, or infringement of regulations by, the employer or the employee) may receive reimbursements from the National Disabled Rehabilitation Fund (Państwowy Fundusz Rehabilitacji Osób Niepełnosprawnych - PFRON) for adapting existing workstations or creating new ones to meet the needs of disabled people; adapting or buying equipment to help disabled people to function at work; and having the needs of persons with disabilities identified by occupational health services.²⁵⁰

Furthermore, an employer who employs people with disabilities is entitled to receive a monthly subsidy for the remuneration of disabled employees.²⁵¹ The amount of the subsidy is related to the level of impairment of the people with disabilities who are employed, and is currently approximately PLN 1 950, PLN 1 200 or PLN 450 (EUR 430, EUR 260 or EUR 100), depending on the level of disability.²⁵² An employer may also

²⁴⁸ Labour Code, 26 June 1974, Article 18(3b)(3).

²⁴⁹ ETA commentary 2017, p. 190.

²⁵⁰ Disabled Persons Act, 27 August 1997, Article 26.

²⁵¹ Disabled Persons Act, 27 August 1997, Article 26a.

²⁵² As of March 2020 (exchange rate approx. EUR 1.00=PLN 4.5)

receive a refund for the cost of a co-worker who helps a person with a disability in adapting to work and communicating.²⁵³

For employers (both public and private), there is a supplementary – this time negative – incentive to employ disabled people. An employer who employs at least 25 employees is obliged to pay a monthly sum to the PFRON unless the proportion of their employees who are disabled is at least 6 %.²⁵⁴ This amount is determined according to a formula in which 40.65 % (the figure might be reduced by 5 % in special circumstances) of the average remuneration is multiplied by the theoretical number of employees who should be taken on in order to reach the threshold of 6 % disabled individuals among all the people employed by the specific employer. According to the Act on the Civil Service,²⁵⁵ if the proportion of people with disabilities employed in a public office is less than 6 %, a disabled individual has priority in a recruitment process if they are among the five best candidates.²⁵⁶

²⁵³ Disabled Persons Act, 27 August 1997, Article 26d.

²⁵⁴ Disabled Persons Act, 27 August 1997, Article 21(1-2).

²⁵⁵ Act on the Civil Service, (*Ustawa o służbie cywilnej z 21 listopada 2008*), Dz.U.2017.1889 t.j., 21 November 2008, Article 29a.

²⁵⁶ Ombud, annual report for 2014, pp. 71-72.

6 REMEDIES AND ENFORCEMENT

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

- a) Available procedures for enforcing the principle of equal treatment

In Poland, the following procedures exist for enforcing the principle of equal treatment:

Civil law

The ETA introduced a compensation claim (Articles 12-13) stating that anyone (natural and legal persons) who suffers an infringement of the principle of equal treatment is entitled to damages. The relevant general rules of the Civil Code and the Code of Civil Procedure apply. Court verdicts are binding.

In addition, in matters not covered by the ETA, recourse may be made to civil law, which affords protection of 'personal rights' (Articles 23-24 of the Civil Code). According to Article 30 of the Constitution, the inherent and inalienable dignity of the individual is a source of freedoms and rights for individuals and citizens. It is inviolable. The respect and protection thereof is the obligation of the public authorities. Article 23 of the Civil Code (which should be interpreted in line with the above-mentioned constitutional provision) provides for general protection of 'personal rights'. According to this provision, personal rights – in particular, health, freedom, honour, freedom of conscience, name or pseudonym, image, privacy of correspondence, inviolability of the home and scientific and artistic work, as well as inventions and improvements – are protected by civil law without prejudice to any protection provided by other regulations.

The provision quoted does not include dignity or, for instance, age, disability, ethnic origin, race or sexual orientation, but the list of 'personal rights' is not exhaustive. There is no doubt that personal dignity is protected (as stated in the Constitution and confirmed by a wealth of legal writings and jurisprudence). Therefore, if a person is discriminated against outside the labour context on the grounds of age, sexual orientation, race or any other reason, the dignity of that individual is obviously infringed and they may try to seek redress through this general civil clause. This provision on personal rights was used, for example, in two cases related to access to services for people with disabilities.

In the case *Jolanta K. v. Carrefour Polska Sp.z.o.o.*,²⁵⁷ the issue concerned access to a supermarket for a blind person with a guide dog. The parties reached a settlement in court. Carrefour also announced that the company has changed its negative internal rules on people with disabilities. In addition, the case resulted in an amendment to Polish law in relation to access specifically for blind people with guide dogs to grocery stores, restaurants and similar premises (in force since June 2009).

In the case *Dominik Rymer v. XY, owner of the Sfinks restaurant*²⁵⁸ the issue concerned access to a restaurant by a wheelchair user with an assistance dog. The court stated that refusal of access to a restaurant by a disabled person with an assistance dog violates the protection of 'personal rights', and violates the principle of equal treatment in access to services offered to the public. Interestingly, the claimant lost his case in the first instance court. The Regional Court decided – with quite an extraordinary justification – that his personal rights were not violated since he was an active person who enjoyed sport, which was a kind of therapy for him, and was therefore strong psychologically and self-confident.

²⁵⁷ Warsaw Regional Court, judgment of 28 January 2009, No I C 498/08.

²⁵⁸ Warsaw Court of Appeal, judgment of 28 September 2011, No I ACa 300/11.

On the basis of Article 24(1) of the Civil Code, an individual whose personal rights are jeopardised by another's actions can demand that the action cease, unless it is not unlawful. Furthermore, if personal rights have been infringed, the individual concerned can demand that the person who infringed them rectify the effects of the violation, - in particular, by making a statement of appropriate content and form. The claimant can also demand pecuniary satisfaction or payment of an appropriate sum to a designated social cause based on the rules of compensation laid down in the Civil Code. If the infringement of personal rights results in material loss, the victim may demand compensation on general legal terms (Article 24(2)). Court verdicts are binding.

Labour law

Prior to 2011, a discrimination compensation complaint had been introduced only in the Labour Code, effective as of 1 January 2004 (Article 18(3d)). Anyone who suffers an infringement of the principle of equality in employment is entitled to commence judicial proceedings and seek compensation of at least the minimum monthly salary. The labour court which determines the compensation will take into consideration the type and gravity of the discriminatory measures applied in respect of the complainant. Court verdicts are binding.

Furthermore, the principle of equal treatment and non-discrimination is considered to be one of the fundamental obligations of the employer to the employee. Therefore, the employee is entitled to terminate their labour contract without prior notice on the basis of a grave infringement by the employer of fundamental obligations towards the employee (Article 55(1)(1) of the Labour Code).

An employee is also entitled to initiate judicial proceedings in order to establish the existence of a labour relationship with a specific content, e.g. in order to determine appropriate remuneration when this has been reduced in a discriminatory manner.²⁵⁹

Labour inspectors

In addition, certain remedies may be applied by the labour inspectors, who supervise and monitor the observance of labour law (including anti-discrimination provisions). According to the Act on the National Labour Inspectorate, a labour inspector may issue orders or improvement notices, make submissions or bring claims to a labour court if the establishment of the existence of a labour relationship is at stake.²⁶⁰ Measures taken by labour inspectors are binding, but the employer may challenge them in an administrative court.

In its information on the challenges due to the pandemic situation in 2020, the Ombud's Office provided an interesting example. The Ombud sent a letter to the Labour Inspectorate asking about its actions. The Labour Inspectorate responded that during the epidemic, it would not be dealing with its primary task – investigating violations of workers' rights – but only with those violations of labour law that threaten to cause death. Other matters would be dealt with after the state of epidemic was suspended. From 16 March 2020, therefore, inspections of labour inspectors were de facto limited to cases of direct threat to the life and health of employees and to investigations of fatal, serious and collective accidents at work. As a result, the situation of the lack of state supervision over the conditions of performing work, which is difficult to accept for constitutional reasons, has arisen.²⁶¹

²⁵⁹ Proceedings on the basis of Article 189 of the Code of Civil Procedure; see Rączka K. and Salwa. Z. (ed.) (2004) *Kodeks pracy. Komentarz*, 6th ed., Warsaw, p. 72.

²⁶⁰ Act on the National Labour Inspectorate (*Ustawa z 13 kwietnia 2007 r. o Państwowej Inspekcji Pracy*), Dz.U.2012.404 j.t., 13 April 2007, Articles 21-33. See also Article 63(1) of the Code of Civil Procedure.

²⁶¹ Ombud, annual report for 2020, p. 339.

Legal representation and court fees

As far as legal representation is concerned, some preferential treatment is allowed in labour cases. In principle, legal representation may be provided by an advocate (attorney-at-law) or a legal adviser,²⁶² but for an employee, a representative of a trade union, a labour inspector or another employee of the enterprise may also act as a legal representative.²⁶³ In addition, in labour cases, claims are automatically exempted from court costs (with some exceptions).²⁶⁴

Petty crimes

The Law on Petty Crimes²⁶⁵ defines the refusal to sell goods as a petty crime. This provision stem from the Communist era and had a different meaning at that time, but it might play a role in the prohibition of discrimination in access to goods. In such cases, victims should apply to the police, who act as prosecutors in petty crimes (district court). The Code of Petty Crimes (minor offences) provides in Article 135 that 'Anyone who, carrying on the sale of goods in a retail or catering business, hides goods meant for sale or deliberately refuses to sell them without just cause shall be subject to a fine'. The fine imposed by the court (Article 1(1)) may be up to around PLN 5 000 (EUR 1 250). Court verdicts are binding.

Until June 2019, one further provision was in force: Article 138, which stated that 'Anyone who, being a professional service provider, demands or collects payment higher than that in force, or deliberately refuses to provide the service without just cause, shall be subject to a fine.'

This provision had not been used for years until the Ombud finally decided to use it (Article 138 regarding services) in the case of a person using a wheelchair who was asked to leave a shop.²⁶⁶

However, in 2016, the provisions of the Law on Petty Crimes mentioned above became the subject of vigorous debate. A small printing company refused to print a roll-up banner for the LGBT Business Forum (a CSO). In an email refusing the work, an employee wrote: 'We do not contribute to the promotion of the LGBT movement in our work.' Following a complaint, the Ombud made a submission to the police suggesting an investigation in relation to discrimination in access to goods based on the Law on Petty Crimes. The police agreed and filed a motion in court to fine the company. The Łódź-Widzew District Court fined the printers PLN 200 (EUR 45) in a simplified procedure. The fine was challenged and the case started again in a court of first instance.

The Łódź-Widzew District Court decided, on 31 March 2017, that the entrepreneur was guilty of committing a misdemeanour under Article 138 of the Code of Petty Crimes and indicated that his personal convictions did not justify a refusal to perform the service. The court of second instance – the Łódź Regional Court – decided on 26 May 2017, the very last day on which the case could be decided, to reject the appeal and uphold the ruling of the court of first instance.

However, in September 2017, the Minister of Justice filed a cassation complaint with the Supreme Court. The Supreme Court pointed out²⁶⁷ that freedom of conscience and religious beliefs may justify a refusal to provide a service. However, a balance between freedom of conscience and religious beliefs on the one hand and the prohibition of

²⁶² Code of Civil Procedure, 17 November 1964, Article 87(1).

²⁶³ Code of Civil Procedure, 17 November 1964, Article 465(1).

²⁶⁴ Act on Court Costs in Civil Cases (*Ustawa z dnia 28 lipca 2005 r. o kosztach sądowych w sprawach cywilnych*) (Dz.U.2018.300 t.j.), 28 July 2005, Article 35.

²⁶⁵ Act on Petty Crimes (*Ustawa z dnia 20 maja 1971 r. Kodeks wykroczeń*) (Dz.U.1971.12.115), 20 May 1971.

²⁶⁶ Information provided to the author of the report by the Ombud's Office.

²⁶⁷ Based on the information on the Supreme Court's website, available at:

http://www.sn.pl/aktualnosci/SitePages/Komunikaty_o_sprawach.aspx?ItemSID=229-271e0911-7542-42c1-ba34-d1e945caefb2&ListName=Komunikaty_o_sprawach.

discrimination on the other should always be struck in the light of the circumstances of the case. In the given case, the Supreme Court held that the accused had no legitimate reason to refuse to perform a service motivated by his convictions.

The Prosecutor General/Minister of Justice decided to challenge Article 138 of the Code of Petty Crimes before the Constitutional Tribunal as being contrary to the principle of a democratic state of law expressed in the Constitution (Article 2: 'The Republic of Poland shall be a democratic state ruled by law and implementing the principles of social justice').

The Constitutional Tribunal held (in a majority decision, three to two) that Article 138 was unconstitutional.²⁶⁸ The Tribunal stated that the legislator's decision to penalise a refusal to provide services by 'a professional service provider' (even 'deliberately, without just cause') is inadequate to the legislative objective to be met under Article 138 of the Code of Petty Crimes, and thereby violates Article 2 of the Constitution. In the Tribunal's view, doubts relate in particular to the notions of 'being obliged to provide a service' or 'unjustified refusal to provide a service'. The imprecise nature of these concepts may – at the application stage – lead to various interpretations, including interpretations so broad that they will not be justified by constitutional principles and values. According to the Tribunal, doubts about these concepts cannot be removed by a method of interpretation in accordance with the Constitution.

As underlined by the Ombud, the judgment of the Constitutional Tribunal limits legal protection against discrimination in access to services. Removing this provision carries negative consequences for the implementation of the principle of equal treatment – in terms of both significant limitation of legal protection and the social significance of this change. As of 4 July 2019, when the provision lost its power, there is a real threat of segregation in the service market. There were comments in the public space that the CT judgment confirmed the existence of the so-called universal 'conscience clause', i.e. the view that the service provider may freely choose the clients whom he serves.²⁶⁹ One could consider the breach of the non-regression rule (p. 28) as defined by the Racial Equality Directive (2000/43/EC). However, as already pointed out, the provision in question, Article 138 of the Code of Petty Crimes, was passed for reasons completely different and unrelated to protection against discrimination.

A similar case involving access to services was heard in March 2017. An entrepreneur (Robert K.) who delivers training courses in Krav Maga, a form of self-defence and fighting system, at first agreed to run a course, but later refused when he found out that the group that requested it comprised gay people. The group sent a complaint to the Ombud and considered invoking Article 138 of the Code of Petty Crimes.²⁷⁰ The Ombud informed the police, who decided to bring²⁷¹ the case to court. In March 2018, the court of first instance found Robert K. guilty of a misdemeanour, but the punishment was waived.

Criminal law

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

²⁶⁸ Based on information on the website of the Constitutional Tribunal, available at: <http://trybunal.gov.pl/postepowanie-i-orzeczenia/komunikaty-prasowe/komunikaty-po/art/10679-odmowa-swiadczenia-uslugi-ze-wzgledu-na-wolnosc-sumienia-i-religii-uslugodawcy/>.

²⁶⁹ Ombud, annual report for 2019, pp. 23-26.

²⁷⁰ See: <https://www.facebook.com/grupastonewall/posts/1021872407956405>; <http://rainbowstar.pl/pl/samoobrona-dla-osob-lgbt/>; <http://wyborcza.pl/7,87647,21625227,samoobrona-przed-gejami.html>.

²⁷¹ See: <http://poznan.wyborcza.pl/poznan/7,36001,21890090,odmowil-lekcji-osobom-lgbt-policja-stawia-zarzuty-ale-waha.html>.

The Penal Code does not cover all cases of discrimination, but nevertheless criminal proceedings may be instituted in more serious cases, such as: the use of force or an illegal threat towards individuals or groups of people because of their national, ethnic, racial, political or religious affiliation;²⁷² a public insult towards individuals or groups of people or the infringement of the personal integrity of another person on these same grounds;²⁷³ and the propagation of fascism and incitement to hatred based on national or ethnic origins, race or religion.²⁷⁴ Court decisions are binding.

Administrative law

There are four stages of the administrative procedure, two within the administration itself (the first and the second instance) and two judicial, the first instance (appeal procedure) before the Regional Administrative Court and the second instance (cassation procedure) before the Supreme Administrative Court. Administrative Courts exercise control over the performance of the public administration, the control also extends to judgments on the conformity to statute, of resolutions issued by the organs of local government and normative acts of territorial authorities of government administration (Article 184 of the Constitution). The task of administrative judiciary is to control actions taken by public administration in terms of their lawfulness (cassation-appeal-based adjudicating founded on the criterion of legality).²⁷⁵

There are no administrative remedies laid down specifically to deal with discrimination issues, although such issues can sometimes be present in administrative proceedings. However, the ETA (Article 24) introduced a new possibility into administrative procedure, amending the Administrative Procedure Code.²⁷⁶ It now provides that, if there has been a court ruling that found that there had been an infringement of the principle of equal treatment, and if this infringement influenced the final administrative decision, an administrative retrial may be demanded.²⁷⁷ The procedure is binding.

Therefore, when it comes to the discrimination by public authorities and bodies administrative procedure might be helpful to establish lack of legality of their actions. But when it comes to the compensation claims and damages it is civil courts and general compensation claims under ETA and Civil Code that need to be used.

Ombud

With regard to non-judicial measures, a complaint to the Ombud's Office may prove to be an effective tool. Since 1 January 2011, the Ombud has been designated as an equality body. Although the Ombud cannot issue a legally binding decision, the Ombud's Office can investigate a case and exert pressure on the bodies responsible for inappropriate conduct, or it can take certain legal steps (see more under Section 7).²⁷⁸

European Court of Human Rights

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

²⁷² Act on the Penal Code (referred to as the Penal Code) (*Ustawa o Kodeks karny*), 6 June 1997, Article 119(1).

²⁷³ Penal Code, 6 June 1997, Article 257.

²⁷⁴ Penal Code, 6 June 1997, Article 256.

²⁷⁵ See information 'Administrative_Judiciary_Poland' available at the website of the Supreme Administrative Court: <http://www.nsa.gov.pl/download.php?id=1020>, pp 1-4.

²⁷⁶ Act on the Code of Administrative Procedure (referred to as the Administrative Procedure Code) (*Ustawa z dnia 14 czerwca 1960 r. - Kodeks postępowania administracyjnego*), 14 June 1969, as amended.

²⁷⁷ Administrative Procedure Code, 14 June 1969, Article 145b(1).

²⁷⁸ See Act on the Commissioner for Human Rights, 15 July 1987, Articles 11-14.

Alternative dispute resolutions

According to the Labour Code (Article 242), claims stemming from an employment relationship can be adjudicated either by a labour court or by a conciliation committee.²⁷⁹ Cases can be referred to a conciliation committee only by employees and not by employers. The conciliation procedure is intended to be speedy; the Labour Code specifies a period of 14 days as the normal term within which the committee should adjudicate.²⁸⁰ An agreement reached before a conciliation committee should be implemented voluntarily by the employer. If the employer opposes this and does not put the agreement into operation, it can be executed in accordance with civil procedure.²⁸¹

In both criminal and civil procedure, the possibility of mediation exists and is gradually becoming more popular. If the court directs the case (criminal or civil) to mediation, its result (if agreement is reached) is confirmed by the court and is as binding as a court decision.

Another conciliation mechanism is provided for in the Code of Civil Procedure and allows a court, acting through a single judge, to confirm an agreement reached between the parties before court proceedings commence.²⁸² Confirmation by a court of an agreement reached between parties is binding in the same way as a court decision.

The procedures mentioned are the same in relation to employment in the private and public sectors.

b) Barriers and other deterrents faced by litigants seeking redress

The time limits in the procedures mentioned vary, but generally speaking they do not act as deterrents to seeking redress, as they are counted in years rather than months. The time limits in relation to discrimination proceedings are the same as general time limits in other labour or civil cases.

The statute of limitations in compensation claims based on infringement of the principle of equal treatment (Article 15 of the ETA) is three years from the moment when the person learns about the infringement, and no later than five years from the infringement itself. According to the Labour Code, claims under the employment relationship shall expire after three years from the date on which the claim became due.²⁸³ In general, the statute of limitations in civil matters is six years, and three years in cases of 'periodic services' or cases related to the 'professional activity of the party as an entrepreneur'.²⁸⁴ This shortened three-year period may cause problems. According to research conducted in 2009 by the Polish Section of the International Commission of Jurists (ICJ),²⁸⁵ a major source of obstacles in pursuing justice before the claim becomes time-barred is the situation of dependency between a person eligible to bring the lawsuit and the liable party. It has been observed that employees often do not seek to enforce their rights through fear of losing their jobs. As long as the employment relationship lasts, the employee may be afraid of bringing a claim against the employer. The short time bar on claims for payment (three years), when combined with a lack of legal awareness and fear of loss of livelihood, may create a serious obstacle to pursuing justice.²⁸⁶

²⁷⁹ Labour Code, 26 June 1974, Article 242.

²⁸⁰ Labour Code, 26 June 1974, Article 251.

²⁸¹ Labour Code, 26 June 1974, Article 255(1).

²⁸² See Code of Civil Procedure, 17 November 1964, Articles 184-186.

²⁸³ Labour Code, 26 June 1974, Article 291.

²⁸⁴ Civil Code, 23 April 1964, Article 118 (as amended in 2018).

²⁸⁵ See Szymielewicz, K. (2009), *Access to justice for human rights abuse involving corporations. A project of the International Commission of Jurists – Report for Poland*.

²⁸⁶ See 'Rozpoczęcie biegu przedawnienia roszczenia pracowniczego' ('Commentary on the Supreme Court judgment of 3 February 2009') (I PK 156/08)), *Monitor Prawa Pracy* (6), 2009.

An application for an administrative retrial (described under point a) above – if there has been a court ruling which finds that there has been an infringement of the principle of equal treatment, an administrative retrial may be demanded if this infringement influenced the final administrative decision) may be filed within a month of the court ruling on which the claim is based, becoming final.²⁸⁷ The administrative decision may be quashed within five years of it being served or announced.²⁸⁸

In Polish law, it is possible to bring a case after the employment relationship has ended. The exercise by an employee of their rights arising from a violation of the principle of equal treatment cannot constitute a reason for the employer to terminate the employment relationship.²⁸⁹ If the contract is terminated, the employee can either (1) make a request to a court that the notice to quit be recognised as void; or (2) if the employment relationship has already ended, the employee has the right to demand to return to work under the previous conditions or to receive compensation.²⁹⁰

Moreover, an employee can terminate an employment contract without notice if the employer has severely violated their obligations towards the employee,²⁹¹ and the employee can then bring a case against the employer.

Functional barriers constitute one other factor which could act as a deterrent to people seeking redress. Some courts and other bodies involved in the administration of justice are not easily accessible for people with disabilities. In addition, it is relatively difficult to find information in Braille.

Finally, one could argue that 'rule-of-law crisis' in Poland could be a barrier or deterrent faced by litigants seeking redress.

c) Number of discrimination cases brought to justice

In Poland, statistics on the number of cases related to discrimination brought to justice are not available.

There are still no full and reliable official statistics on the number of cases related to discrimination that are brought to justice. After the ETA came into force on 1 January 2011, the Polish Society of Anti-Discrimination Law sent a letter (dated 24 January 2011) to the Minister of Justice urging the Ministry to collect the relevant statistical data. Both the Ombud and the Government Plenipotentiary for Equal Treatment supported the idea expressed in this letter, and the Ministry of Justice declared that it would collect the relevant data. As a result, the Ministry of Justice provided information for 2011 – the first year of the operation of the law. According to this information, in 2011 30 cases were brought to district and regional courts for compensation for discrimination under the ETA. Of those 30 cases, 17 were decided and 13 were still pending in 2012.²⁹²

However, in the Ombud's annual report for 2013, numbers for 2012 were not given and the report stated that, despite its declarations, the Ministry of Justice had still not provided the relevant information.²⁹³ What is more, the cases for 2011 mentioned above,

²⁸⁷ Administrative Procedure Code, 14 June 1969, Article 145b(2).

²⁸⁸ Administrative Procedure Code, 14 June 1969, Article 146(1).

²⁸⁹ Labour Code, 26 June 1974, Article 18(3e).

²⁹⁰ Labour Code, 26 June 1974, Articles 44-45.

²⁹¹ Labour Code, 26 June 1974, Article 55.

²⁹² Ombud, 'Information on activities of the Commissioner for Human Rights in the field of equal treatment in 2011 and on the observance of the principle of equal treatment in the Republic of Poland' ('Informacja o działalności Rzecznika Praw Obywatelskich w obszarze równego traktowania w roku 2011 oraz o przestrzeganiu zasady równego traktowania w Rzeczypospolitej Polskiej'), *Bulletin 2012/2* ((*Biuletyn Rzecznika Praw Obywatelskich 2012, nr 2*), Warsaw, June 2012, p. 79, available at: <http://rpo.gov.pl/>; see also Ombud, annual report for 2012, p. 404.

²⁹³ Ombud annual report for 2012, p. 451.

listed by the Ministry of Justice, were reviewed by the Polish Society for Anti-Discrimination Law within the framework of a monitoring project, which found that, apparently, they were not based on the ETA, as declared by the Ministry of Justice, but on other laws (such as the Labour Code and the Civil Code).²⁹⁴

According to information provided by the Ministry of Justice²⁹⁵ at the request of the Ombud in 2013, 11 cases claiming compensation for discrimination on the basis of the protection of personal rights and the ETA were brought to district and regional courts and one case was brought to an appellate court. Of the 12 cases, in three cases the claims were dismissed; two cases were returned; one case was discontinued; and six cases were still pending in 2014. In the Ombud's annual reports since 2014, numbers are not given, since the Ministry does not provide them. The number of cases based on the ETA in 2015 were provided in the report of the Plenipotentiary.²⁹⁶ In answer to a query from the Plenipotentiary, the Ministry of Justice provided information on 17 cases that were brought in 2015 under the ETA and 24 that were brought in 2016.²⁹⁷ However, nobody verified this information.

Although the information provided is official (covering at least some years), it must be said that it is not wholly reliable. In 2014, a coalition of CSOs contacted all Polish courts to request, in the official formula of access to public information, data on discrimination cases brought under the ETA.²⁹⁸ All 287 courts responded. Only five cases brought to the courts under the ETA over the course of four years (2011-2014) were identified; some of them had actually been brought by the same organisations carrying out the research.

This obviously proves that claims based on the ETA are not being brought to the courts.

There were, however, more detailed statistics covering court cases based on the Labour Code: sex discrimination in employment (528 cases heard in 2012, 427 in 2013); sexual harassment as discrimination in employment (14 cases in 2012, four cases in 2013); bullying (324 cases in 2012, 330 cases in 2013); and discrimination in employment (93 cases in 2012, 63 cases in 2013, but no disaggregation by ground).²⁹⁹

d) Registration of national court decisions on discrimination

In Poland, court decisions on discrimination are registered as such by national courts.

There are still no full and reliable official statistics on the number of cases related to discrimination brought to justice based on the ETA and the Civil Code. The Ministry of Justice declared that it would collect relevant data but, as described in point c) above, the information on discrimination cases is limited. What is more, although theoretically cases are registered, the system is not wholly reliable. The situation was better when it

²⁹⁴ See: PTPA (2013), *Prawo antydyskryminacyjne w praktyce polskich sądów powszechnych. Raport z monitoringu (Anti-discrimination law in the practice of Polish Ordinary Courts – monitoring report)*, Polish Society of Anti-Discrimination Law, pp. 98-99, available at: www.ptpa.org.pl.

²⁹⁵ Ombud, annual report for 2013, p. 107.

²⁹⁶ Government Plenipotentiary for Equal Treatment (2016), *Report on the Activities of the Government Plenipotentiary for Equal Treatment for the period 1 January 2015 – 31 December 2015 (Sprawozdanie z działalności Pełnomocnika Rządu do spraw Równego Traktowania za okres od 1 stycznia 2015 r. do 31 grudnia 2015 r.)*, Warsaw, pp. 10-11.

²⁹⁷ Government Plenipotentiary for Equal Treatment (2018), *Report on the Activities of the Government Plenipotentiary for Equal Treatment for the period 1 January 2017 – 31 December 2017 (Sprawozdanie z działalności Pełnomocnika Rządu do spraw Równego Traktowania za okres od 1 stycznia 2017 r. do 31 grudnia 2017 r.)*, Warsaw. More recent data is not available.

²⁹⁸ Kukowka, G. and Siekiera, A. (eds) (2014), *Monitoring skuteczności funkcjonowania Ustawy z dnia 3 grudnia 2010r. o wdrożeniu niektórych przepisów Unii Europejskiej w zakresie równego traktowania (Monitoring the effectiveness of the functioning of the Act of 3 December 2010 on the Implementation of Certain Provisions of the European Union in the Field of Equal Treatment (ETA))*, Warsaw.

²⁹⁹ Ombud, annual report for 2012, pp. 450-451; annual report for 2013, p. 107. No relevant information is given in the reports for 2014, 2015, 2016, 2017, 2018 and 2019.

comes to cases based on the Labour Code – some categories of discrimination cases were registered (see point c) above) but not disaggregated by ground.

One more problem is, if there is a change in the legal qualification of a case during a procedure. It can happen that the initial qualification changes but there is no possibility of changing it in the statistics. As a result, the data on cases registered is not wholly reliable.

This lack of statistical information is constantly brought up by the Ombud in its annual reports.

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

a) Engaging in proceedings on behalf of victims of discrimination (representing them)

In Poland, associations/organisations/trade unions are entitled to act on behalf of victims of discrimination.³⁰⁰

This solution was adopted in the Code of Civil Procedure, which allows CSOs (this includes trade unions) to file a claim on behalf of individuals or join such proceedings,³⁰¹ e.g. in alimony (maintenance) and consumer protection cases³⁰² or in labour law and social security cases.³⁰³ According to the Code of Civil Procedure, organisations involved in combating discrimination may engage in judicial procedures on behalf of a complainant. Article 61 stipulates that organisations whose official objectives include protecting equality and non-discrimination and protection from *unfounded direct or indirect violation* of the rights and duties of citizens may, in the case of claims in this field and with the written consent of citizens, institute actions on behalf of citizens (the court verifies only the fulfilment of the formal criteria, such as the association's official objectives).³⁰⁴ Since May 2012, CSOs may also initiate proceedings on behalf of an individual who is an entrepreneur (if that individual is a member of the organisation and provides written consent) in a dispute with another entrepreneur.

According to M. Kułak, the use of the wording 'unfounded *direct or indirect* violation' (Article 61(1)(5)) could suggest that the standing is limited to cases of *direct or indirect* discrimination and no other forms.³⁰⁵ It is, however, an academic doubt, as there are no known cases of such a limitation in practice. The report author is also of the opinion that the directives' requirement for CSOs' effective participation (not formal, but real) might be not fulfilled by the fact that the court may order an organisation to pay the reimbursement of trial costs to an opponent. This might create a freezing effect and lack of CSOs' activity due to the financial risks.³⁰⁶

³⁰⁰ See more detailed analyses in: Spurek, S., 'Udział organizacji społecznej w postępowaniu karnym, cywilnym i administracyjnym' ('Participation of civil society organisations in criminal, civil and administrative proceedings'), in: Śmiszek, K. (ed.) (2006), *Przeciwdziałanie dyskryminacji z powodu orientacji seksualnej w świetle prawa polskiego oraz standardów europejskich (Counteracting discrimination on the ground of sexual orientation in the light of Polish law and European standards)*, Warsaw; Gonera, K. (Supreme Court Judge), 'Udział organizacji społecznych w postępowaniu sądowym jako gwarancja prawa do rzetelnego procesu' ('Participation of civil society organisations in court proceedings as a guarantee of the right to fair trial') and Bernatt, M., 'Opinia przyjaciela sądu (*amicus curiae*) jako pomocnicza instytucja prawna w orzecznictwie sądów polskich' ('The *amicus curiae* brief as an auxiliary legal institution in the jurisprudence of Polish courts'), both in: Bojarski, Ł. and Beck, C. H. (eds.) (2008), *Sprawny sąd. Zbiór dobrych praktyk (The Efficient Court – collection of best practices)*, Warsaw, pp. 166-176 and pp. 184-189).

³⁰¹ Code of Civil Procedure, 17 November 1964, Article 8.

³⁰² Code of Civil Procedure, 17 November 1964, Article 61.

³⁰³ Code of Civil Procedure, 17 November 1964, Article 462.

³⁰⁴ Act amending the Code of Civil Procedure and some other acts (*Ustawa z dnia 2 lipca 2004 r. o zmianie ustawy – Kodeks postępowania cywilnego oraz niektórych innych ustaw*), 2 July 2004, entered into force on 4 February 2005, Article 61.

³⁰⁵ Kułak, M. (2021), pp. 34-35.

³⁰⁶ Kułak, M. (2021), pp. 34-35.

If an organisation initiates civil proceedings on behalf of a party, it has the rights of a party to the proceedings and may seek and obtain any remedy, including calling witnesses or appealing the ruling (the obligations for the party also apply, such as respecting court orders and compliance with deadlines) (Article 62 of the Code of Civil Procedure).

Until 2012, there were no special provisions on victim consent in civil proceedings; it was a matter of judicial practice. In some cases, the victim's verbal consent on the court record was enough. Since May 2012, the written consent of the party is always needed. There are no special additional provisions on victim consent.

Similarly, CSOs are entitled to bring administrative proceedings. Article 31(1) of the Code of Administrative Procedure reads: 'A civil society organisation may, in a case concerning another person, request: 1) to institute proceedings, 2) to be admitted to proceedings, if it is justified by the official objects of the organisation and when it is in the public interest'.³⁰⁷ It is up to the administrative organ to decide whether to admit the CSO, but this decision may be appealed. An organisation admitted to administrative proceedings has the rights of a party (with some limitations).³⁰⁸

It should be mentioned that, in fact, standing on behalf of victims of discrimination is seen by CSOs as very much a professional activity that requires special competences. Research undertaken by the Polish Association of Anti-Discrimination Law has shown that not many CSOs engage in this kind of work: it is mostly done by those familiar with legal issues, especially large, strong CSOs based in the capital city.³⁰⁹

- b) Engaging in proceedings in support of victims of discrimination (joining existing proceedings)

Associations/organisations/trade unions are entitled to act in support of victims of discrimination.

A CSO (including trade unions) may act in support of the complainant.³¹⁰

According to the Code of Civil Procedure, organisations involved in combating discrimination may engage in judicial procedures in support of a complainant. Article 61 stipulates that organisations whose official objectives include protecting equality and non-discrimination and protection from unfounded direct or indirect³¹¹ violation of the rights and duties of citizens, in the case of claims in this field and with the written consent of the claimant, may join proceedings at any stage thereof (the court verifies only the fulfilment of the formal criteria, such as the association's official objectives).³¹²

³⁰⁷ Administrative Procedure Code, 14 June 1969, Article 31(1).

³⁰⁸ Administrative Procedure Code, 14 June 1969, Article 31(3).

³⁰⁹ See PTPA (2013), *Prawo antydyskryminacyjne w praktyce polskich sądów powszechnych. Raport z monitoringu (Anti-discrimination law in the practice of Polish Ordinary Courts – monitoring report)*, Polish Society of Anti-Discrimination Law, pp. 179-212; available at: www.ptpa.org.pl.

³¹⁰ See more detailed analyses in: Spurek, S., 'Udział organizacji społecznej w postępowaniu karnym, cywilnym i administracyjnym' ('Participation of civil society organisations in criminal, civil and administrative proceedings'), in: Śmiszek, K. (ed.) (2006), *Przeciwdziałanie dyskryminacji z powodu orientacji seksualnej w świetle prawa polskiego oraz standardów europejskich (Counteracting discrimination on the ground of sexual orientation in the light of Polish law and European standards)*, Warsaw; Gonera, K. (Supreme Court Judge), 'Udział organizacji społecznych w postępowaniu sądowym jako gwarancja prawa do rzetelnego procesu' ('Participation of civil society organisations in court proceedings as a guarantee of the right to fair trial') and Bernatt, M., 'Opinia przyjaciela sądu (*amicus curiae*) jako pomocnicza instytucja prawna w orzecznictwie sądów polskich' ('The *amicus curiae* brief as an auxiliary legal institution in the jurisprudence of Polish courts'), both in Bojarski, Ł. and Beck, C. H. (eds.) (2008), *Sprawny sąd. Zbiór dobrych praktyk (The Efficient Court – collection of best practices)*, Warsaw (pp. 166-176 and 184-189).

³¹¹ Please note the comment on the wording of the provision in point a), above.

³¹² Act amending the Code of Civil Procedure and some other acts, 2 July 2004, entered into force on 4 February 2005, Article 61.

Since May 2012, CSOs may also join proceedings in support of an individual who is an entrepreneur (if that individual is a member of the organisation and provides written consent) in a dispute with another entrepreneur.

If a CSO does not participate in the proceedings, it may still present its opinion on the case to the court (acting de facto as an *amicus curiae* even if the law does not use this expression).³¹³ An important ruling by the Constitutional Tribunal referred to an *amicus curiae* brief provided by a CSO in a case before the CT, thus in a way recognising the use of an *amicus curiae* by the courts even without a clear legal provision allowing for this.³¹⁴

Similarly, CSOs are entitled to join administrative proceedings. Article 31(1) of the Code of Administrative Procedure reads: 'A civil society organisation may, in a case concerning another person, request: 1) to institute proceedings, 2) to be admitted to proceedings, if it is justified by the official objectives of the organisation and when it is in the public interest'.³¹⁵ It is up to the administrative organ to decide whether to admit the civil society organisation, but this decision may be appealed. But even if it is not taking part in proceedings as a party, an organisation, with the consent of the administrative organ, may still express its opinion (*amicus curiae* brief).³¹⁶ The Act on Procedure before Administrative Courts (a separate instrument from the Code of Administrative Procedure) also allows CSOs to take part in proceedings when this is justified by their official objectives and in cases specified by particular provisions.³¹⁷ An organisation admitted to administrative proceedings has the rights of a party (with some limitations) (Article 31(3) of the Code of Administrative Procedure).

Representatives of CSOs may also be admitted to criminal proceedings. According to the Code of Criminal Procedure,³¹⁸ a representative of a CSO may be admitted if 'there is a need to protect the public interest or an important individual interest falling within the official objectives of the organisation, in particular the need to protect human rights and freedoms.' The decision whether to admit the representative rests with the court, which evaluates the importance of the public or individual interest. The application to admit a representative should be submitted in writing and designate as the representative a specific person or persons. In criminal proceedings, a written application would be needed.

In criminal proceedings, the rights of a representative of a CSO are limited to participation in the hearing, expressing their opinion verbally on the court record and submitting their opinion in writing (Article 91 of the Code of Criminal Procedure).

c) *Actio popularis*

National law does not allow associations, organisations or trade unions to act in the public interest on their own behalf, without a specific victim to support or represent (*actio popularis*).

d) Class action

National law does not allow associations, organisations or trade unions to act in the interest of more than one individual victim (class action) for claims arising from the same event.

³¹³ Code of Civil Procedure, 17 November 1964, Article 63.

³¹⁴ Constitutional Tribunal, judgment of 16 January 2006, No. SK 30/05, justification No. p. I. 8. p. III 2.2.

³¹⁵ Administrative Procedure Code, 14 June 1969, Article 31(1).

³¹⁶ Administrative Procedure Code, 14 June 1969, Article 31(2-5).

³¹⁷ Act on Procedure before Administrative Courts, (*Ustawa z dnia 30 sierpnia 2002 r. Prawo o postępowaniu przed sądami administracyjnymi* (Dz.U.2017.1369 t.j.), 30 August 2002, Articles 9, 25(4) and 33(2).

³¹⁸ Act on the Code of Criminal Procedure (*Ustawa z dnia 6 czerwca 1997 r. Kodeks postępowania karnego* (Dz.U.2017.1904 t.j.), 6 June 1997, Articles 90-91.

In 2009, Parliament passed a law on class action which entered into force on 19 July 2010.³¹⁹ The European model of class action, as opposed to the American one, was chosen – meaning that all parties interested in the case must join it personally.

Unfortunately, at the very end of work on the draft act, when it had already been passed by the Sejm, the Senate introduced some changes that significantly narrowed the scope of the law and limited it to consumer protection claims and torts (with the exception of protection of 'personal rights'). Therefore, it does not include, for instance, employment cases (although the issue is disputed and requires judicial interpretation as opinions have been voiced that some employment claims, such as those based on torts, could be filed as a collective claim). Nevertheless, organisations have no right to take part in class action; it is undertaken by lawyers representing clients. There are no amendments foreseen regarding collective redress mechanisms.³²⁰

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

In Poland, national law requires a shift in the burden of proof from the complainant to the respondent.

In anti-discrimination cases in relation to employment matters, the burden of proof is partially shifted from the complainant to the respondent. Article 18(3b)(1) *in fine* of the Labour Code clearly states that it is the employer who must prove that there were objective reasons to apply discriminatory treatment. It is sufficient for the employee to indicate only facts from which it can be presumed that discrimination has occurred.

Until 2010, the shift in the burden of proof existed only in the Labour Code. The 2010 ETA (Article 14) introduced the shift in the burden of proof in all compensation proceedings regarding infringement of the principle of equal treatment governed by the Act, which is an exception from the general rule for civil proceedings that the obligation to prove a fact falls on the person who derives legal effects from the fact (Article 6 of the Civil Code).

However, since in reality parties rarely base their claims on the ETA,³²¹ the use of the shift in the burden of proof is limited in general to Labour Code cases, and to some extent only to discrimination cases based on the general provisions of the Civil Code – in personal rights cases – where the burden of proof is not shifted as under the ETA or Labour Code but there is still a mechanism for reversing the burden of proof (Article 24(1) of the Civil Code).

In addition, since the ETA seems to limit possible damages sought to material damage only,³²² a compensation claim for non-material damage would require following general civil rules – again, without the shift in the burden of proof.³²³

According to the ETA (Article 14(2)), whoever (complainant) alleges infringement of the principle of equal treatment must substantiate the probability of a violation. If there is *prima facie* evidence (probability) of a violation of the principle of equal treatment, the respondent is obliged to show that they did not commit the violation (Article 14(3)). This provision refers to all cases governed by law – this means all forms of discrimination (including harassment) on the grounds protected by the Act.

³¹⁹ Act on Pursuing Claims in Collective Actions (*Ustawa z dnia 17 grudnia 2009 r. o dochodzeniu roszczeń w postępowaniu grupowym*), 17 December 2009, in force from 19 July 2010.

³²⁰ See: Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law (2013/396/EU).

³²¹ See point 6.1 above.

³²² See point 6.5 below, but note the different ruling by Toruń District Court in its judgment of 6 August 2019, No. I C 469/18. See more information in Section 3.2.7 of this report.

³²³ See interesting analyses on the burden of proof in the ETA commentary 2017, pp. 192-203.

The reversal of the burden of proof applies only to establishing discrimination, not to the severity of damages. However, the court's assessment of the extent of the damage or harm suffered should take into account all the circumstances of the case.³²⁴

What is problematic, as documented in a number of cases brought under labour law, is that, in practice, the courts in most cases (but not all cases; this seems to be a problematic issue) expect not just a substantiation of the probability of a violation but also that the particular ground of discrimination be demonstrated; parties sometimes do not mention the ground or may not even be aware of the ground of discrimination. Only then does the burden of proof shift to the employer.³²⁵ If the claimant is not able to show the particular ground of discrimination, the complaint might be dismissed.

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

In Poland, there are legal measures of protection against victimisation.

The ETA introduced a general prohibition on victimisation (Article 17) on all grounds protected by the Act: gender, race, ethnic origin, nationality, religion, belief, political opinion, disability, age and sexual orientation. The Law provides that use of rights to defend against unequal treatment ('rights arising from a breach of the principle of equal treatment') must not form the basis for adverse treatment and must not cause any negative consequences for the individual (although the provision refers to 'person', this wording has never given rise to, nor could it be interpreted to cover, the limitation of protection from victimisation to one person as opposed to a group of persons.).³²⁶ The protection goes beyond the scope of the Directive and extends to a person who in any way supports someone exercising their rights³²⁷ (such as a witness or a person helping the victim to bring a complaint).³²⁸ In the case of victimisation, the victim may file the same compensation claims as a victim of discrimination.³²⁹

The Act also treats as unequal treatment, and prohibits, less favourable treatment on the basis of someone's rejection of harassment or submission to harassment.³³⁰

In the employment field, the previous provisions continue to exist simultaneously with the ETA. The prohibition on victimisation was substantially broadened in the 2008 amendment to the Labour Code (in force since 18 January 2009).³³¹ Previously, the Labour Code prohibited only the termination of a labour contract as the result of an employee having used their rights to defend themselves against unequal treatment. This provision was amended and currently any other adverse treatment and any other negative consequences are prohibited (Article 18(3e)(1) of the Labour Code). This broadened Labour Code protection covers complainants but also extends to employees who in any way support a victim of discrimination (Article 18(3e)(2)). Courts' rulings in Labour Code cases confirm this broad understanding.³³²

In addition, in relation to harassment, the amended part of the Labour Code states: 'Submission of an employee to harassment or sexual harassment, as well as the taking of

³²⁴ Kędziora, K. and Śmiszek, K. (eds.)(2017), *Ustawa o wdrożeniu niektórych przepisów Unii Europejskiej w zakresie równego traktowania. Komentarz* (Act on the implementation of certain provisions of the European Union in the field of equal treatment: commentary), Article 13.

³²⁵ See, for instance, the following Supreme Court decisions: judgment of 10 May 2018, No. I PK 54/17; judgment of 3 June 2014, No. III PK 126/13.

³²⁶ Equal Treatment Act, 3 December 2010, Article 17(1).

³²⁷ Equal Treatment Act, 3 December 2010, Article 17(2).

³²⁸ See ETA commentary 2017, p. 232.

³²⁹ Equal Treatment Act, 3 December 2010, Article 17(3) and Article 13.

³³⁰ Equal Treatment Act, 3 December 2010, Article 3(5).

³³¹ Act on the amendment of the Act on the Labour Code, 21 November 2008.

³³² See examples of rulings in: Kułak, M. (2021), p. 36-37.

actions rejecting (counteracting) harassment or sexual harassment, may not result in any adverse consequences for the employee' (Article 18(3a)(7)).

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

a) Applicable sanctions in cases of discrimination – in law and in practice

The ETA introduces a general rule that everybody whose right to equal treatment is infringed has the right to compensation, and this extends beyond employment (Article 13). The right refers to both natural persons (on all protected grounds by the Act) and legal persons on the grounds of race, ethnic origin and nationality (Article 12). The Act does not introduce a new procedure but refers to the general rules of the Civil Code and the Code of Civil Procedure (including injunction reliefs).³³³

However, the ETA refers to compensation (*odszkodowanie*) only, which covers material but not non-material damage and therefore limits protection.³³⁴

The Civil Code provides for general compensation claims for material and non-material damage. Article 415 *et seq.* set out the general terms of compensation for material damage. The compensation should cover all damage that occurs as a consequence of an unlawful act or a failure to act by the person who discriminated against the claimant. Articles 445 and 448 of the Civil Code regulate pecuniary damages and state that damages should be appropriate, which means that they should ensure effective redress of the damage suffered. Article 448 specifies that an appropriate sum may be paid to a designated social cause (the court may decide, for instance, that a particular sum should be paid to an anti-discrimination CSO; claimants often request such a measure, naming a concrete cause or organisation).

In addition, if there are cases not covered by the provisions of the ETA, it is also possible to seek to rely on the protection of personal rights described in Section 6.1. Among the actions that a claimant may demand are pecuniary satisfaction and payment to a social cause.

In the field of employment, Article 18(3d) of the Labour Code provides that a person who was the subject of discriminatory treatment by an employer is entitled to compensation not lower than the minimum wage as defined in separate laws (in 2020, a gross salary of PLN 2 600 (EUR 580) per month). According to the Supreme Court, 'the compensation claim under Article 18(3d) of the Labour Code, includes both, compensation of material and non-material damage'.³³⁵

Under the provisions of the Labour Code, an employee whose contract was terminated without notice, in violation of the regulations for terminating labour contracts, has the right to seek reinstatement on the same terms as before or compensation. The choice of solutions lies with the employee, but the labour court rules on the advisability or possibility of the individual returning to work.³³⁶

³³³ Equal Treatment Act, 3 December 2010, Articles 13(2) and 14(1).

³³⁴ See interesting analyses on compensation in the ETA commentary 2017, pp. 192-203. Note also the different ruling by the Toruń District Court in its judgment of 6 August 2019, No. I C 469/18. See more information in Section 3.2.7 of this report.

³³⁵ Supreme Court judgment of 9 May 2019, No. III PK 50/18; OSNP 2020/5, item 42; quoted in: 'Protection against discrimination in Poland' (2020), p. 27.

³³⁶ Labour Code, 26 June 1974, Articles 56(1) and 45(2). See also the Supreme Court judgment of 9 February 1999, No. I PKN 565/98 (OSNAPiUS 2000/6/225), which stated: 'The necessity of hiring new employees with appropriate qualifications, which the claimant does not hold, speaks to the inadvisability of returning him to his job (Article 45(2), Labour Code).'

An employee is entitled to terminate their labour contract without prior notice on the basis of a grave infringement by the employer of fundamental obligations towards the employee.³³⁷ In such a case, the employee is entitled to compensation equal to their salary for the period of notice.

The Labour Code does not envisage any sanctions for violations of the employer's obligation to create an environment free from discrimination in the workplace, especially with respect to gender, age, disability, race, religion, nationality, political beliefs, membership of trade unions, ethnic origin, belief and sexual orientation.³³⁸ In light of this, the provision takes on the character of a mere declaration.

The Employment Act provides for two sanctions in the case of conduct contrary to the Act. First, anyone running an employment agency (or similar services listed by the Act) who does not comply with the prohibition of discrimination based on gender, age, disability, race, religion, ethnic origin, nationality, sexual orientation, political opinion, beliefs or membership of a trade union is liable to a minimum fine of approximately PLN 3 000 (EUR 700).³³⁹ Secondly, anyone who – on the same grounds – refuses to employ a candidate in a vacant post or to accept an individual for vocational training is liable to the same fine.³⁴⁰

In addition, criminal sanctions may apply if the discriminatory treatment constitutes a criminal offence – such as, for instance, the public insult of individuals or groups due to their national, ethnic or racial origin.

b) Compensation – maximum and average amounts

There is no maximum amount for compensation. Neither the compensation clause provided by the Act on the Implementation of Certain Provisions of the European Union in the Field of Equal Treatment (Article 13) nor the Civil Code to which the Act refers envisage any ceiling on the maximum amount of compensation that can be awarded.

In the Labour Code, there is no maximum threshold for this compensation, and a court can award it according to its assessment of the type and gravity of the discriminatory treatment in a specific case. There is, however, a minimum compensation level, which is at least equal to the minimum wage (in 2020, a gross salary of PLN 2 600 (EUR 580) per month).³⁴¹

There is no reliable information on the average amount of compensation available to victims. The number of cases in which compensation was given is still small but, in general, courts tend to grant moderate compensation awards (the compensation range is usually between PLN 1 200 (EUR 300) and PLN 22 000 (EUR 5 000). In 2013, compensation based on the ETA was awarded in only one case (approximately PLN 1 200 (EUR 300)).³⁴² In 2017, compensation based on the ETA was awarded in the case of indirect discrimination because of political opinion (*światopogląd*). The court of second instance changed the decision of the court of first instance and in March 2017 awarded PLN 1 000 (EUR 250) to the claimant YZ and PLN 1 000 (EUR 250) to the PTPA as the CSO acting on his behalf. In the most recent case, the court awarded PLN 5 000 (EUR 1 200) plus costs.³⁴³

³³⁷ Labour Code, 26 June 1974, Article 55(1).

³³⁸ Labour Code, 26 June 1974, Article 94(2b).

³³⁹ Employment Act, 20 April 2004, Article 121(3).

³⁴⁰ Employment Act, 20 April 2004, Article 123.

³⁴¹ The level of the minimum wage is set each year by the Regulations on the Minimum Wage.

³⁴² Ombud, annual report for 2013, p. 92.

³⁴³ Toruń District Court, judgment of 6 August 2019, No. I C 469/18; see more information in Section 3.2.7 of this report.

Generally, in civil cases, the level of compensation awarded for 'moral loss' or 'suffering'³⁴⁴ resulting from discrimination is rather low. There is no tradition of valuing this type of loss, and different judges use different methods to calculate it. There are Supreme Court rulings which give only general guidelines – the court should take into consideration the living conditions of the party, average standards of living and the state's level of economic development.³⁴⁵ The law grants discretion to judges, stating that they should determine 'an appropriate amount'³⁴⁶ for moral loss and suffering. This judicial independence is supported by the Supreme Court, which leaves the level of compensation to be awarded solely to the discretion of the judges deciding particular cases.³⁴⁷

In one of the recent labour cases, the Supreme Court stated that circumstances on the employer's side that the court should take into account when determining the amount of compensation as an effective, proportionate and dissuasive sanction include: 'The frequency and duration of discriminatory practices, their possible accumulation and degree of severity, whether they constitute direct or indirect discrimination, the degree of the employer's fault or generally its attitude towards the discriminated person or the group of employees to which s/he belongs, in particular whether it is not the result of prejudices and stereotypes, the employer's position in the labour market, its official declarations regarding its anti-discrimination policy in relation to employed women or the size and financial status of the employer'.³⁴⁸

c) Assessment of the sanctions

As already mentioned in point a) above, the Polish system of compensation for damage is essentially based on the concept of redressing damage. The ETA refers to 'compensation', using a term which is generally interpreted as covering only compensation for material damage [*odszkodowanie*], although civil law in general differentiates between compensation for material damage and for non-material damage [*zadośćuczynienie*] and regulates the two separately. This was pointed out by the Ombud in June 2012 in its first report. In the Ombud's view, the compensation provision under the Act should be widened to include non-material damage.³⁴⁹ The relevant legislative amendments were also proposed in two draft laws (neither of which were passed).

There are, however, also interpretations that state that 'compensation' under the ETA should cover non-material damage, as it should be read in line with the Directives (non-material damage should be covered, even though the provision mentions only 'compensation', or it should be covered by using the general provisions of the civil law to which the ETA refers). This is also the current position of the Ombud, which regrets that courts sometimes do not see it this way.³⁵⁰

In the first case³⁵¹ decided under Article 13 of the ETA, the court of first instance found that there had been discrimination by association and awarded the claimant compensation. The court differentiated between material and non-material damages, underlining that Article 13 covers both; however, it awarded only material damages and refused to grant non-material damages. The claimant appealed against the ruling, arguing that Article 13 of the ETA should be read together with Article 17 of Directive

³⁴⁴ Civil Code, 23 April 1964, Articles 445 and 448.

³⁴⁵ See e.g. Supreme Court, judgment of 29 May 2008, No. II CSK 78/2008; judgment of 12 July 2012, No. V CKN 1114/2000.

³⁴⁶ Civil Code, 23 April 1964, Article 445.

³⁴⁷ Supreme Court, judgment of 4 February 2008, No. III KK 349/2007.

³⁴⁸ Supreme Court, judgment of 9 May 2019, No. III PK 50/18, OSNP 2020, nr 5, item 42.

³⁴⁹ Ombud, *Bulletin* 2012/2, pp. 78-79.

³⁵⁰ Ombud, annual report for 2016, pp. 155-156.

³⁵¹ Warsaw Śródmieście District Court, judgment of 9 July 2014, *XY and Polish Society of Anti-discrimination Law on behalf of XY v. Company Z*, No. VI C 402/13; Warsaw Regional Court (second instance), judgment of 18 November 2015, No. V Ca 3611/14 (not published).

2000/78/EC. The claimant argued that, due to mistaken interpretation, the national court did not impose a sanction that could be understood as effective, dissuasive and proportionate. The second instance court stressed that the ETA does not differentiate in Article 13 between material and non-material damages and that by doing so, the first instance court made a mistake. The second instance court suggested that referral to the Civil Code (which includes non-material damages) should be used, but at the same time the court decided that the amount of the damages awarded was adequate. The lack of an adequate number of cases based on the ETA does not allow for a clear line of judicial interpretation.

In the case of discrimination by association (described in section 2.1.3.b above)³⁵² the court of first instance found that there had been discrimination by association and awarded the claimant PLN 2 500 (EUR 625) for material damages only and refused to grant non-material damages. The claimant appealed against the ruling, arguing that limiting the compensation to material damages only contradicted the duties of the EU Member States (Article 13 of the ETA read together with Article 17 of Directive 2000/78/EC). The claimant argued that, due to this mistaken interpretation, the national court did not impose a sanction that could be understood as effective, dissuasive and proportionate. The second instance court dismissed the appeals of both parties. The court stressed that the ETA does not differentiate in Article 13 between material and non-material damages and that by doing so, the first instance court made a mistake. However, without going into details and discussing the proportionality and dissuasive nature of the sanction, the court declared that, in regard to compensation, 'the amount is adequate and sufficiently compensates for the damage'.

However, in the case decided in 2019, the court awarded compensation under the ETA, arguing that the relevant provision also covers non-material damage – in the specified case, damage to the dignity of the party.³⁵³ Similarly, in 2020, the Regional Court in Warsaw stated that 'art. 13 on compensation should be interpreted in such a way that it compensates not only for pecuniary damage, but also non-pecuniary damage. This is the purpose of the directives that the Equal Treatment Act implements, and it also stems from the case law of the Court of Justice of the EU'.³⁵⁴

³⁵² Warsaw Śródmieście District Court, judgment of 9 July 2014, *XY and Polish Society of Anti-discrimination Law on behalf of XY v. Company Z*, No. VI C 402/13; Warsaw Regional Court (second instance), judgment of 18 November 2015, No. V Ca 3611/14 (not published).

³⁵³ Toruń District Court, judgment of 6 August 2019, No. I C 469/18; see more information in section 3.2.7 of this report.

³⁵⁴ Warsaw Regional Court, judgment of 29 September 2020 r., No. V Ca 2686/19 (nonpublished), quoted in: 'Protection against discrimination in Poland' (2020), p. 26.

7 BODIES FOR THE PROMOTION OF EQUAL TREATMENT (Article 13 Directive 2000/43)

- a) Body designated for the promotion of equal treatment irrespective of racial/ethnic origin according to Article 13 of the Racial Equality Directive

After years of a lack of an equality body in Poland, the 2010 Act on the Implementation of Certain Provisions of the European Union in the Field of Equal Treatment finally designated as an equality body the existing Ombud's Office – as mentioned, above, its official name is the Commissioner for Human Rights³⁵⁵ (Rzecznik Praw Obywatelskich). The Act appropriately amended the original Act on the Commissioner for Human Rights, introducing new competences for the Ombud. The Ombud took on its new responsibilities on 1 January 2011.

The second institution which has a mandate to promote equal treatment of everyone without discrimination based on racial or ethnic origin (among other grounds) is the Government Plenipotentiary for Equal Treatment – a body in charge of non-discrimination policies and the coordination of governmental efforts rather than an equality body. Since 2016, the function of the Government Plenipotentiary for Equal Treatment has been conducted by a new Plenipotentiary who was appointed to combine two positions – the second was the newly created position of Government Plenipotentiary for Civil Society (Pełnomocnik Rządu do spraw Społeczeństwa Obywatelskiego).³⁵⁶ In February 2020, the office of the Plenipotentiary for Equal Treatment was again separated from the office of the Government Plenipotentiary for Civil Society and moved from the Chancellery of the Prime Minister to the Ministry of Family and Social Policy (and on 5 March 2020, the deputy Minister was appointed to the function of the Plenipotentiary for Equal Treatment). The relevant Article 20(3) of ETA was amended.³⁵⁷

- b) Political, economic and social context of the designated body

There is evidence of recent political hostility to the governance of the designated body. After the parliamentary elections in October 2015 and shifts within the Government in the years 2016-2020, the Ombud faced various political attacks (including calls and even campaigns demanding that the current Ombud's appointment should be revoked by the Parliament because he represents liberal-leftist views, supports LGBT people etc.). Both, politicians³⁵⁸ (as confirmed by the spokeswoman for the ruling party)³⁵⁹ and the legal think-tank *Ordo Iuris*³⁶⁰ gave voice to this view. Senior Government officials and members of Parliament from the ruling party have, on many occasions (including in the Parliament during discussions on the Ombud's proposed budget and annual information on activities), attacked Dr Adam Bodnar, the current Ombud. They have accused him of not remaining neutral and of being politically engaged (the Ombud defends the

³⁵⁵ The Office of the Ombud has also referred to itself in English as the Human Rights Defender, although 'Commissioner for Civil Rights Protection' is a more accurate translation of the Polish title 'Rzecznik Praw Obywatelskich'.

³⁵⁶ Council of Ministers, Ordinance on the Government Plenipotentiary for Civil Society (*Rozporządzenie Rady Ministrów z dnia 8 stycznia 2016 r. w sprawie ustanowienia Pełnomocnika Rządu do spraw społeczeństwa obywatelskiego*), 8 January 2016.

³⁵⁷ Therefore, contrary to recommendations (e.g. in CERD (2019), *Concluding observations on the combined twenty-second to twenty-fourth periodic reports of Poland*), the position of the Plenipotentiary has been additionally weakened. See Law of 23 January 2020 amending the Act on Government Administration Departments and some other acts (*ustawa z 23 stycznia 2020 r. o zmianie ustawy o działach administracji rządowej oraz niektórych innych ustaw*) (Dz.U. z 2020, poz. 284), Article 70. See also: <https://www.gov.pl/web/rodzina/anna-schmidt-rodziewicz-nowym-wiceministrem-rodziny-pracy-i-polityki-spolecznej>.

³⁵⁸ See: <https://oko.press/pieta-chce-odwolac-bodnara/>; <https://wiadomosci.wp.pl/w-pis-pojawil-sie-pomysl-odwolania-adama-bodnara-to-skutek-materialu-wiadomosci-tvp-6056077225185921a>.

³⁵⁹ See: <http://300polityka.pl/news/2016/11/05/po-wypowiedzi-mazurek-do-odwolania-bodnara-potrzeba-35-glosow-pis-musialoby-szukac-wsparcia-u-opozycji/>.

³⁶⁰ See: <http://www.maszwpływ.pl/adam-bodnar-musi-odejść-57,k.html>.

independence of the judiciary, which is openly attacked and undermined by the ruling Law and Justice Party) as well as accusations such as treason, reporting to international human rights bodies and focusing too much on anti-discrimination issues.

During the past five years, since the change of Government, there have been significant developments regarding the budget. For instance, during the meetings of parliamentary commissions, MPs from the ruling party expressed their concerns regarding the policy of the Ombud. They underlined their dissatisfaction that the Ombud had appointed a 'gender expert' as a deputy. The budget in 2017 was PLN 37 180 000 (EUR 8 850 000), while the Commissioner had applied for PLN 41 million (EUR 9 750 000). A similar 'critique' was also formulated by the Parliamentary Committee on Justice, which issued a negative opinion on the draft budget for 2018.³⁶¹ MPs from the ruling coalition attacked the Ombud for being focused 'on pathological groups' (by which they meant LGBTI people). Every year, the proposed budget prepared by the Ombud is cut by the Parliament. In the 2019 budget, there was a slight increase from the 2018 budget, but the overall amount was still lower than requested, by approximately PLN 7.2 million (EUR 1.6 million). The budget for 2020 represented an increase; however, this was mainly for spending on building renovation, not the daily activity of the Ombud's Office. In 2020, the Ombud received 20 % more complaints. In the most recent budget passed, for 2021, the amount is still smaller than the budget for 2013.³⁶² In the opinion of the Ombud, the resources provided for the Office are not adequate for the realisation of the Ombud's designated tasks.³⁶³

Changes in the Ombud's budget³⁶⁴ (the exchange rate for EUR changes, but as of 31 December 2020, EUR 1 = PLN 4.61).

2013 – PLN 37 175 mln (EUR 8 063 mln)
2014 – PLN 37 353 mln (EUR 8 102 mln)
2015 – PLN 37 761 mln (EUR 8 191 mln)
2016 – PLN 34 022 mln (EUR 7 380 mln)
2017 – PLN 34 464 mln (EUR 7 475 mln)
2018 – PLN 34 561 mln (EUR 7 496 mln)
2019 – PLN 35 258 mln (EUR 7 648 mln)
2020 – PLN 37 105 mln (EUR 8 048 mln)
2021 – PLN 36 485 mln (EUR 7 914 mln)

Moreover, if one compares the various public institutions, it is clearly noticeable that the budgets of the others are increasing significantly. The Ombud's Office is probably the last to still face such financial restraints (after the Constitutional Tribunal was – as experts have stated – taken over by the ruling party and its budget increased as a result).³⁶⁵

The financial difficulties of the Ombud were also recognised by CERD in its 2019 *Concluding observations* report on Poland.³⁶⁶ It stated: 'The Committee remains concerned about the insufficient human and financial resources allocated to the Commissioner, in particular to its Department of Equal Treatment, which put in jeopardy its ability to fulfil its mandates', and that: 'The Committee recommends that the State party provide the Commissioner for Human Rights of Poland, in particular its Department

³⁶¹ See: <https://www.rpo.gov.pl/en/content/parliamentary-committee-justice-issued-negative-opinion-chr%E2%80%99s-draft-budget-2018>.

³⁶² Ombud, annual report for 2020, p. 10.

³⁶³ All budgetary information provided is based on information prepared by the Ombud's Office.

³⁶⁴ See: <https://bip.brpo.gov.pl/pl/content/budzet-rpo-na-rok-2021-%C2%A0informacja>.

³⁶⁵ See, for instance: <http://www.tvpparlament.pl/aktualnosci/wzrost-dochodow-budzetu-pozwoli-na-realizacje-ambitnych-planow/39319447> and <http://www.tokfm.pl/Tokfm/7,103085,24911449,wolny-jak-trybunal-konstytucyjny-sa-sprawy-ktore-czekaja-juz.html>.

³⁶⁶ CERD, *Concluding observations on the combined twenty-second to twenty-fourth periodic reports of Poland*, 24 September 2019, available at: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolNo=CERD/C/POL/CO/22-24&Lang=En.

of Equal Treatment, with the human and financial resources necessary to enable it to fully discharge its mandates in an independent and impartial manner.'

The numerous attacks on the Ombud created defensive reactions in circles that support this office. Therefore, for the past five years, both supportive and hostile voices have been heard.

The campaign by Ordo Iuris to revoke the appointment of the Ombud was signed by over 35 000 people. The first sentence of its manifesto reads: 'One cannot be silent when a constitutional human rights body is opposed to fundamental freedoms and rights guaranteed in the Constitution of the Republic in the name of the particular interests of the LGBT subculture. The events of recent months show that radical social activist Adam Bodnar has failed to cope with the difficult mission of impartiality to guard our rights and freedoms.' It then lists various actions of the Ombud and concludes: 'All these actions demonstrate that the Ombud's biased commitment to the ideology of LGBT leads to violations of constitutional freedoms and the rights of ordinary people. Therefore, we ask for a strong response from the Sejm and the Senate of the Republic of Poland, who are entitled to dismiss the Ombud, who has misrepresented the complex vow and dignity of the office. Poles need an Ombud who will not be a soldier of radical ideology but a defender of the rights of all citizens.'³⁶⁷ The political decision to revoke the appointment of the Ombud has not yet been taken. However, this would need a three-fifths majority in the Parliament, which the ruling parties do not have.

In reaction to the Ordo Iuris proposition (even if it was not representative) and attacks by politicians, the CSO Akcja Demokracja (Action Democracy) started a campaign of support. For instance, citizens are encouraged to send postcards of support to the Ombud's Office, or sign petitions defending him (over 50 000 signatures were recorded as of December 2018).³⁶⁸

c) Institutional architecture

In Poland, the designated body forms part of a body with multiple mandates.

The Ombud, also known as the Polish Commissioner for Human Rights, holds four different mandates:

1. Role of the National Human Rights Institution (NHRI)³⁶⁹ – general mandate, since 1988;
2. National Preventive Mechanism – mandate since 2008;
3. Equality Body – mandate since 2011;
4. Independent Monitoring Mechanism in reference to the UNCRPD – since 2013, after ratification of the UNCRPD in 2012.

The Ombud has been the general human rights institution since 1998 and in recent years has employed circa. 300 employees (around 285 full-time positions, but with some employees working part time). In 2011, the Anti-Discrimination Law Section was created within the Department of Constitutional and International Law, and by 2013 it employed nine people. In 2015, significant changes took place. The new Ombud, Dr Adam Bodnar, assumed office in September 2015. He appointed for the first time a deputy responsible for equal treatment issues.³⁷⁰ A new Equal Treatment Department was established, with

³⁶⁷ See: <http://www.maszwpolyw.pl/adam-bodnar-musi-odejsc-57,k.html>.

³⁶⁸ See: <https://dzialaj.akcjademokracja.pl/campaigns/bodnar>.

³⁶⁹ Compliant with the United Nations standards on National Human Rights Institutions as set out in the Paris Principles. The Office of the Ombud holds 'A' status under the Paris Principles.

³⁷⁰ However, in February 2019, the Deputy Ombud resigned and became a Member of the European Parliament. A new person was not appointed to the post, and the Equal Treatment Department became the only department that is supervised directly by the Ombud and not by a deputy.

two units: the Discrimination Law Unit (Wydział Prawa Antydyskryminacyjnego) and the Migrants' and National Minorities' Rights Unit (Wydział Praw Migrantów i Mniejszości Narodowych).³⁷¹

In total, there are 12 members of staff working on the equality mandate (of a total staff of circa. 300 in the Ombud's Office).

There is no reliable information available on the part of the budget allocated to the equality mandate. There is an (internal) budget category designated as 'Equal Treatment Mechanism' with more or less the same situation and tasks; it was calculated as covering the cost of 33 persons in 2016 and of 12 persons in 2017. Difficulties stem from the fact that certain discrimination cases are dealt with by other thematic departments and teams in the Ombud's Office, therefore one may only attempt to estimate this cost.

d) Status of the designated body – general independence

i) Status of the body

The Ombud is an independent body and is accountable to the Parliament.³⁷² The Ombud is appointed by the Sejm, subject to the approval of the Senate, for a five-year term. The Ombud's Office (the Commissioner for Human Rights) is a national human rights institution with additional mandates.

The Ombud informs the Sejm and the Senate annually on its activities and the reports are available to the public.³⁷³ From 2012, as a separate part of the annual report, the Ombud has also prepared an additional report on activities relating to equality and discrimination. Since 2018, the Ombud has published a general report with a new structure referring to the constitutional provisions, and information on equal treatment is therefore scattered throughout the report. However, a separate report on equal treatment was still being published till 2020.³⁷⁴

³⁷¹ Ombud, annual report for 2015, pp. 11-12; annual report for 2016, p. 15, annual report for 2018, p. 14.

³⁷² Act on the Commissioner for Human Rights, 15 July 1987, Articles 3, 5 and 7.

³⁷³ Comprehensive information about the activities of the Ombud is prepared annually for Parliament and is available in printed form and on its website (www.rpo.gov.pl); summaries of the reports are also available in English at: <http://rpo.gov.pl/en>.

³⁷⁴ Ombud (2021), *Information on the activities of the Commissioner for Human Rights and on the observance of human rights and freedoms in the year 2020* (Informacja o działalności Rzecznika Praw Obywatelskich oraz o stanie przestrzegania wolności i praw człowieka i obywatela w roku 2020), Warsaw [referred to in this report as 'Ombud, annual report for 2020'].

Ombud (2020), *Information on the activities of the Commissioner for Human Rights and on the observance of human rights and freedoms in the year 2019* (Informacja o działalności Rzecznika Praw Obywatelskich oraz o stanie przestrzegania wolności i praw człowieka i obywatela w roku 2019), Warsaw [referred to in this report as 'Ombud, annual report for 2019'].

Ombud (2019), *Information on the activities of the Commissioner for Human Rights in the field of equal treatment in 2018 and on the observance of the principle of equal treatment in the Republic of Poland* (Informacja o działalności Rzecznika Praw Obywatelskich w obszarze równego traktowania za rok 2018 oraz o przestrzeganiu zasady równego traktowania w Rzeczypospolitej Polskiej) Warsaw [referred to in this report as 'Ombud, annual report for 2018']. The Polish version quoted in this report was received as the final, but not yet published, version from the Ombud's Office in June 2019.

Ombud (2018) *Information...* [referred to in this report as 'Ombud, annual report for 2017'].

Ombud (2017) *Information...* [referred to in this report as 'Ombud, annual report for 2016']. The Polish version quoted in this report was received as the final, but not yet published, version from the Ombud's Office in June 2017.

Ombud (2016) *Information...* [referred to in this report as 'Ombud, annual report for 2015'].

Ombud (2015) *Information...* [referred to in this report as 'Ombud, annual report for 2014'].

Ombud (2014) *Information...* [referred to in this report as 'Ombud, annual report for 2013']. The Polish version quoted in this report was published on the website of the Ombud in June 2014; an English version of the report was also published later, available at: <http://rpo.gov.pl/en/>.

Ombud (2013) *Information...* [referred to in this report as 'Ombud, annual report for 2012'] The version quoted in this report was published by the Polish Senate on 22 April 2013; see: <http://www.senat.gov.pl/gfx/senat/userfiles/public/k8/dokumenty/druki/300/345.pdf>. In June 2013, the

In theory, the appointment of an Ombud might be revoked by the Parliament. The Sejm and the Senate are entitled to dismiss an Ombud 'who has misrepresented the complex vow and dignity of the office'; such a decision would require a three-fifths majority in the Parliament.

The budget of the Ombud's Office comes from the central state budget and is approved by Parliament.

The Ombud appoints Deputy Ombuds and recruits staff within the given budget.

ii) Independence of the body

The Ombud is an independent body and is accountable to the Parliament.³⁷⁵ The Ombud's Office is independent of other state administration bodies and in practice performs its duties independently.

In addition, the ETA (which amends the Act on the Commissioner for Human Rights) emphasises that activities relating to equal treatment are to be undertaken independently.

The Ombud can definitely be considered to be independent in practice, as the situation of the current Ombud (Adam Bodnar) proves. The Ombud has remained independent, despite facing political attacks and pressure from the Government.

e) Grounds covered by the designated body

The Act on the Commissioner for Human Rights does not list any grounds (the same applies to the Constitution), so the activities of the Ombud are not limited to given grounds. However, according to the ETA (Articles 1 and 18), which designated the Ombud as an equality body, the protected grounds are gender, race, ethnic origin, nationality, citizenship,³⁷⁶ religion, belief, political opinion, disability, age and sexual orientation.

Due to a shortage of funds, it is difficult for the Ombud to manage its work so as to ensure that adequate and appropriate expertise and attention are given to each ground. Therefore, although the Ombud tries to deal adequately with all the grounds, it also sets certain priorities.

It can be seen that each ground is dealt with by the Ombud's office. However, it is noticeable that there is a very small intake of complaints regarding discrimination based on religion and belief.

f) Competences of the designated body – and its independent exercise

The Ombud is the institution which possesses the strongest instruments to intervene in cases of discrimination.

Ombud published the final version on its website, with the same content but with a different format and page numbering, available at: <http://rpo.gov.pl>.

Ombud, 'Information on activities of the Commissioner for Human Rights in the field of equal treatment in 2011 and on the observance of the principle of equal treatment in the Republic of Poland' ('Informacja o działalności Rzecznika Praw Obywatelskich w obszarze równego traktowania w roku 2011 oraz o przestrzeganiu zasady równego traktowania w Rzeczypospolitej Polskiej') *Bulletin 2012/2 (Biuletyn Rzecznika Praw Obywatelskich 2012, nr 2)* Warsaw, June 2012, p. 79, available at: <http://rpo.gov.pl/>. [referred to in this report as 'Ombud, *Bulletin 2012/2*'].

³⁷⁵ Act on the Commissioner for Human Rights, 15 July 1987, Articles 3, 5 and 7.

³⁷⁶ Protection is limited to certain categories of persons only. Discrimination on grounds of citizenship as such is not prohibited in the ETA. See more in Section 2.1.

According to the Constitution, everyone has the right to apply to the Ombud for assistance in protecting their freedoms or rights if those are infringed by public authorities.³⁷⁷ The scope of the Ombud's activities is very broad (protecting human rights and freedoms and citizens' rights and freedoms). Although the issue of the different dimensions of discrimination on all grounds has formed part of its activities from the beginning, this has not been a priority issue.

The ETA changed the situation (by amending the Act on the Commissioner for Human Rights) and widened the scope of the competences of the Ombud's Office by adding that the Ombud must also protect the execution of the principle of equal treatment, as well as by listing new competences as required by the Directives. The competences of the Ombud in relation to equal treatment and individual complaints are as follows.³⁷⁸ The Ombud:

- safeguards the observation of the equal treatment principle;
- analyses, monitors and supports the equal treatment of everyone;
- prepares and issues independent reports and recommendations regarding discrimination-related problems;
- does not have the right of legislative initiative, but can apply to the competent authorities for a legislative initiative to be undertaken, or to have a legal act issued or amended;
- cooperates with civil society, associations and foundations acting in the area of equal treatment;
- provides support to the victims of discrimination;
- examines facts described by a complainant;
- can apply to another state audit institution for examination of a case if it is established that the principle of equal treatment has been violated;
- applies to the competent authorities for the rectification of a violation and subsequently monitors the implementation of any recommendations;
- can require that preparatory proceedings be initiated and participate in all ongoing civil or administrative proceedings;
- in cases where only private entities are involved, the Ombud can indicate the legal measures to which a given person is entitled.

The ETA also formulated some additional competences of the Ombud's Office. It provides that the Ombud, in its implementation of the principle of equal treatment, should: analyse, monitor and support the equal treatment of everyone; conduct independent surveys of discrimination; prepare and publish independent reports; and issue recommendations regarding discrimination issues.³⁷⁹

In practice, the competences of the Ombud are exercised in an independent manner. However, the opinion is voiced in public debate that the fact that the Ombud is responsible for all human rights issues limits its activities regarding discrimination, and that a body dedicated solely to discrimination issues could do much more. On the other hand, it must be admitted that the situation is much better in comparison with the situation prior to 2011, when there was no designated equality body.

³⁷⁷ Constitution of the Republic of Poland, 2 April 1997, Article 80, available at: <http://trybunal.gov.pl/en/about-the-tribunal/legal-basis/the-constitution-of-the-republic-of-poland/>.

³⁷⁸ See <https://www.rpo.gov.pl/en/content/what-does-commissioner-human-rights-do>; for more detail, see Act on the Commissioner for Human Rights, 15 July 1987, available at: <https://www.rpo.gov.pl/en/content/act-commissioner-human-rights>.

³⁷⁹ Act on the Commissioner for Human Rights, 15 July 1987, Article 17b.

i) Independent assistance to victims

The Ombud has the competence to provide independent assistance to victims. However, as already mentioned, according to the Constitution and the ETA, these competences refer to a vertical understanding of human rights (the relationship between a public authority and an individual) and are limited where conflicts between private parties are concerned. In such cases, according to the law, the Ombud can only provide victims with information on their rights and possible actions.³⁸⁰ In reality however, the Ombud occasionally tries to intervene in cases between private parties (directly – for instance, by sending a letter to the enterprise concerned – or indirectly, by contacting other relevant public agencies and urging them to intervene). Whether the Ombud's competences ('providing victims with *information* on their rights and possible actions') comply with the Racial Equality Directive requiring 'independent *assistance* to victims of discrimination in pursuing their complaints' is controversial. The Ombud itself criticises the limitations of its power and advocates for changes to the law.³⁸¹ M. Kułak argues that *providing information* means less than *providing assistance* required by the directives, and therefore the implementation is not adequate.³⁸²

These limitations have also been noted by international bodies. CERD, in its 2019 *Concluding observations*, stated that it 'remains also concerned that the Commissioner has no statutory mandate to investigate complaints from victims of racial discrimination concerning incidents occurring in the private sector' and recommended 'that the State party amend its legislation to provide the Commissioner with the statutory mandate to investigate cases of racial discrimination both in the public and private sectors'.

In general, the Ombud's decision as to whether to provide assistance to an individual is discretionary. When accepting a case, the Ombud may carry out its own fact-finding investigation or request the competent institutions (supervisory bodies, prosecutor's offices, state bodies or occupational inspectorates) to examine the case or part of it. The Ombud can also request the Sejm to order the Supreme Audit Office (Najwyższa Izba Kontroli) to carry out an inspection in order to examine the case or part of it.³⁸³

In practice, this competence is effectively exercised in an independent manner. The Ombud itself decides to whom it provides assistance and what kind of assistance is provided. The fact that the Ombud does this despite criticism and other pressures is proof of its independence.

Since the Ombud's decision as to whether to provide assistance to an individual is discretionary, the Ombud's Office does not, due to its limited resources, offer legal assistance to everyone. It chooses cases of a strategic nature for litigation. Once a result is achieved, other interested complainants who have similar problems are advised to rely on the previous case and the argumentation formulated therein. The Ombud does not provide information on the criteria used to decide on cases for strategic litigation.

For instance, the Ombud pursued the case of a parent who was not given an adequate refund for delivering a child with disabilities to school. The municipality paid for two journeys per day, while the parent made four journeys per day (two to deliver the child to school and twice to take the child back home). The Ombud won the case, and other parents in similar situations approached the Office for the assistance. Rather than the Ombud taking on their cases, they were simply instructed that they should proceed themselves.

³⁸⁰ Act on the Commissioner for Human Rights, 15 July 1987, Article 11.

³⁸¹ See annual Ombud reports. See also ETA commentary 2017, pp. 259-261.

³⁸² M. Kułak, (2021), pp. 45-47.

³⁸³ Act on the Commissioner for Human Rights, 15 July 1987, Article 12.

ii) Independent surveys and reports

The Ombud has the competence to conduct independent surveys and publish independent reports.³⁸⁴ Aside from examining individual cases, the Ombud may also commission expert assessments and opinions as well as publish information about the types of cases that it deals with, including recommendations. Furthermore, the Ombud may also establish thematic expert teams and ask them for reports on specific issues. The expert committees on People with Disabilities, the Rights of Elderly People and the Rights of Migrants were the first of these to be set up.³⁸⁵ Others, such as the expert committees on Mental Health Protection, Deaf People, Health and Counteracting Homelessness, then followed.

In 2011, the Ombud also started commissioning research (mainly desk-based rather than empirical research) and published several reports (the authors of these reports included their own recommendations). The Ombud also formulates recommendations, both in the process of its daily work (usually within 'general statements') and in the annual reports. Thematic reports in 'The principle of equal treatment – law and practice' series ('Zasada Równego Traktowania. Prawo i praktyka') published by the Ombud in recent years include:

- *Proceedings in cases for determination of gender identity - a guide for judges and attorneys* (2020).³⁸⁶
- *Accessibility of health care services for people with disabilities - analysis and recommendations* (2020).³⁸⁷
- *Protection against discrimination in Poland. Legal status and social awareness. Conclusions and recommendations of the Ombud* (2020).³⁸⁸
- *Legal situation of non-heterosexual and transgender people in Poland* (2020).³⁸⁹
- *Equal treatment based on religion in employment – analysis and recommendations* (2018).³⁹⁰
- *Experience of harassment among female students – analysis and recommendations* (2018).³⁹¹
- *Crimes motivated by prejudice – analysis and recommendations* (2017).³⁹²

³⁸⁴ Act on the Commissioner for Human Rights, 15 July 1987, Article 17b.

³⁸⁵ Ombud, annual report for 2016, pp. 15, 109-123.

³⁸⁶ Ombud (2020), *Proceedings in cases for determination of gender identity - a guide for judges and attorneys* (*Postępowania w sprawach o ustalenie płci – przewodnik dla sędziów i pełnomocników*), available at: <https://www.rpo.gov.pl/pl/content/postepowania-w-sprawach-o-ustalenie-plci-przewodnik-dla-sedziow-i-pelnomocnikow>.

³⁸⁷ Ombud (2020) *Accessibility of health care services for people with disabilities - analysis and recommendations* (*Dostępność usług opieki zdrowotnej dla osób z niepełnosprawnościami – analiza i zalecenia*), available at: <https://www.rpo.gov.pl/pl/content/dostepnosc-uslug-opieki-zdrowotnej-dla-osob-z-niepelnosprawnosciami>.

³⁸⁸ Ombud (2020) *Protection against discrimination in Poland. Legal status and social awareness. Conclusions and recommendations of the Ombud* (*Ochrona przed dyskryminacją w Polsce. Stan prawny i świadomość społeczna. Wnioski i rekomendacje RPO*), available at: <https://www.rpo.gov.pl/pl/content/ochrona-przed-dyskryminacja-w-polsce-stan-prawny-i-swiadomosc-spoieczna>.

³⁸⁹ Ombud (2020) *Legal situation of non-heterosexual and transgender people in Poland* (*Sytuacja prawna osób nieheteroseksualnych i transpłciowych w Polsce*), Warsaw, available at: https://www.rpo.gov.pl/sites/default/files/Sytuacja_prawna_raport_ZRT.pdf.

³⁹⁰ Ombud (2018) *Equal treatment based on religion in employment – analysis and recommendations* (*Równe traktowanie ze względu na wyznanie w zatrudnieniu. Analiza i zalecenia*), Warsaw, available at: <https://www.rpo.gov.pl/sites/default/files/R%C3%B3wne%20traktowanie%20ze%20wzgl%C4%99du%20na%20wyznanie%20w%20zatrudnieniu.pdf>.

³⁹¹ Ombud (2018) *Experience of harassment among female students – analysis and recommendations* (*Doświadczenie molestowania wśród studentów i studentek. Analiza i zalecenia*), Warsaw, available at: <https://www.rpo.gov.pl/sites/default/files/Do%C5%9Bwiadczenie%20molestowania%20w%C5%9Br%C3%B3d%20studentek%20i%20student%C3%B3w%2C%202018.pdf>.

³⁹² Ombud (2017) *Crimes motivated by prejudice – analysis and recommendations* (*Przestępstwa motywowane uprzedzeniami. Analiza i zalecenia*), Warsaw, available at: <https://www.rpo.gov.pl/sites/default/files/Przestepstwa%20motywowane%20uprzedzeniami%20ZRT%20nr%2023%202017.pdf>.

- Personal assistants for people with disabilities – analysis and recommendations (2017).³⁹³

Previous reports (from the years 2011-2016) are available on the Ombud's website (<https://www.rpo.gov.pl/>).

In 2013, the Ombud also initiated public consultations with various institutions and CSOs regarding proposed subjects to be commissioned for research. Institutions and CSOs proposed particular subjects to choose from.

In practice, this competence is effectively exercised in an independent manner. The Ombud's Office decides independently which surveys to undertake and prepares its reports independently. The effectiveness of this competence is limited, mainly due to the shortage of funding. There is only one sociologist in each department and only two research themes are chosen annually. Moreover, even if a subject is chosen, the subject matter of the research and the survey cannot be treated in a complex way, otherwise the project becomes too expensive. The other limiting factor is that one of the two research subjects selected annually must touch on issues pertaining to persons with disabilities (as the Ombud has the monitoring mandate under the UNCRPD).

iii) Recommendations

The Ombud has the competence to issue independent recommendations on discrimination issues.³⁹⁴ The Ombud issues 'general statements' (*wystąpienia generalne/problemowe*) on the basis of complaints regarding equal treatment and research. The number of statements in each year is as follows: 51 (2011), 67 (2012), 66 (2013), 55 (2016),³⁹⁵ 30 (2017), 61 (2018), 20 (2019) and 56 (2020).³⁹⁶ The Ombud presents to the relevant agencies, organisations and institutions opinions, conclusions and recommendations that aim to ensure the effective protection of the human rights and freedoms of citizens and to facilitate the procedures that such cases may involve.³⁹⁷ Additionally, the preparation of annual reports that are printed, made available on the Ombud's website and presented in Parliament provides a good opportunity for the Ombud to formulate recommendations. In practice, this competence is effectively exercised in an independent manner. The Ombud formulates its recommendations based solely on the work of the Ombud's Office. When those recommendations are not implemented (as is often the case), the Ombud repeats them in subsequent statements. Considering the number and high quality of the analyses in the 'general statements' prepared by the Ombud and addressed to different agencies, as well as the recommendations grouped together in its annual reports, it may be said that this competence is effectively exercised. The reaction to those recommendations and their implementation by relevant agencies is, of course, a different issue and varies from year to year. In 2018, in the case of 38 complaints that resulted in 'general statements', the statement was taken into consideration and the problem was solved, whereas in the case

³⁹³ Ombud (2017) *Personal assistants for people with disabilities – analysis and recommendations (Asystent osobisty osoby z niepełnosprawnością. Analiza i zalecenia)*, Warsaw, available at: <https://www.rpo.gov.pl/sites/default/files/Asystent%20osobisty%20osoby%20z%20niepe%C5%82nosprawno%C5%9Bci%C4%85%20-%20zapotrzebowanie%20na%20miar%C4%99%20Konwencji%20o%20prawach%20os%C3%B3b%20z%20niepe%C5%82nosprawno%C5%9Bciami.pdf>.

³⁹⁴ Act on the Commissioner for Human Rights, 15 July 1987, Article 17b.

³⁹⁵ The figure for 2014-2015 was not provided in the annual report.

³⁹⁶ Ombud, annual report for 2019, available at: <https://www.rpo.gov.pl/pl/content/informacja-roczna-rpo-2019>; Ombud, annual report for 2020, p. 626.

³⁹⁷ Ombud, *Bulletin 12/2*, p. 9; annual report for 2012, p. 609, annual report for 2013, p. 9, annual report for 2016, p. 172, annual report for 2017, p. 709.

of 50 complaints, the general statement was not successful.³⁹⁸ In 2019, 36 complaints resulted in 'general statements', and in 29 cases the problem was solved.³⁹⁹

iv) Other competences

When carrying out an investigation, the Ombud has the right to examine every matter on the spot. The Ombud's Office may 'request a hearing or presentation of files of each case conducted by the supreme and central state administration bodies, government bodies, bodies of cooperative organisations, social, professional and socio-professional and the bodies of organisational units with legal personality as well as local government bodies and local government organisational units'. As far as court cases are concerned, the Ombud may request information on the status of a case and may request access to court and prosecution files.⁴⁰⁰

Apart from the competences already mentioned that stem directly from the Directives, the Ombud should, in implementing the principle of equal treatment, not only analyse and monitor equal treatment, conduct independent surveys on discrimination, prepare and publish independent reports and issue recommendations but should also 'support' equal treatment of everyone.⁴⁰¹ The term 'support' should be understood to include media campaigns and awareness-raising activities, communication and promotion. If it was given adequate resources, the Ombud could engage in these activities in addition to its other work. The Ombud's regional meetings (*spotkania regionalne*)⁴⁰² are a good example, as they are a new initiative undertaken by the current Ombud. The Ombud travelled to various regions for visits lasting several days and held many personal meetings with different groups, organisations and institutions. These visits and meetings covered the whole country and fulfilled requirements for many of the activities mentioned above, including promotion and raising awareness.

g) Legal standing of the designated body

In Poland, the designated body (the Ombud) has legal standing to:

- bring discrimination complaints on behalf of identified victims to court;
- bring discrimination complaints *ex officio* to court;
- intervene in legal cases concerning discrimination, for example, as an *amicus curiae*.

In Poland, the designated body (the Ombud) does not have legal standing to:

- bring to court discrimination complaints on behalf of non-identified victims.

The Ombud, after examining a case, may *inter alia* request that civil and administrative proceedings be instituted; take part in any pending civil case or administrative proceedings; request the institution of preparatory proceedings by a competent prosecutor in the case of offences prosecuted *ex officio*; and apply to administrative

³⁹⁸ Ombud, annual report for 2018, pp. 163-164.

³⁹⁹ Ombud, annual report for 2019, pp. 559-573. Detailed data for 2020 is not available as there is no separate report on equal treatment, but see a publication devoted to the general statements during the whole term of office of the previous Ombud: Ombud (2020), *Selected General Statements of the Human Rights Defender 2015-2020 (Wybrane Wystąpienia Generalne Rzecznika Praw Obywatelskich 2015-2020)*, available at: rpo.gov.pl.

⁴⁰⁰ Act on the Commissioner for Human Rights, 15 July 1987, Article 13.

⁴⁰¹ Act on the Commissioner for Human Rights, 15 July 1987, Article 17b.

⁴⁰² Information available at: <https://www.rpo.gov.pl/pl/sprawa/spotkania-regionalne-rpo>. See also a publication summing up this effort: Ombud (2020), *Ex officio. Non-official report on complaints, talks and meetings with the Ombudsman of the 7th Term 2015-2020 Adam Bodnar (Z urzędu. Nieurzędowy raport ze skarg, rozmów, spotkań z Rzecznikiem Praw Obywatelskich VII Kadencji 2015-2020 Adamem Bodnarem)*, available at: rpo.gov.pl.

bodies to implement measures laid down by law.⁴⁰³ It may also lodge a constitutional complaint (review *in abstracto*) or join proceedings before the Constitutional Tribunal started by someone else (before 2015, the Ombud could join only cases of individual constitutional complaint; since 30 August 2015, the Ombud has been able to join any case).⁴⁰⁴

There is no *actio popularis* in Poland. The constitutional complaint (review *in abstracto*) could be understood as a complaint on behalf of non-identified victims, since the Ombud challenges a law as unconstitutional; i.e. a law that is or could be a basis for decisions and rulings affecting many people. However, this is not *actio popularis* exercised in the common courts.

In practice, the Ombud brings a number of cases *ex officio*, mostly based on media reports. The Ombud's Office contacts interested parties in a case and offers its assistance. It might investigate the case or bring the case to the court, or it might join proceedings if these have already been instituted.

h) Quasi-judicial competences

In Poland, the designated body is not a quasi-judicial institution.

i) Registration by the body/bodies of complaints and decisions

The Ombud registers the number of complaints of discrimination made by ground, field, type of discrimination, etc. These data are available to the public, although 2014 is an exception in this regard. Information on the number of enquiries received is not publicly available but is reported internally within the Ombud's Office.

According to the reports produced by the Ombud as the equality body, the total number of discrimination complaints received by the Ombud's Office is as follows: 1 046 in 2020;⁴⁰⁵ 571 in 2019;⁴⁰⁶ 626 in 2018;⁴⁰⁷ 560 (669) in 2017;⁴⁰⁸ 622 in 2016;⁴⁰⁹ 787 in 2015;⁴¹⁰ 1 198 in 2014;⁴¹¹ 845 in 2013; 1 960 in 2012; and 1 033 in 2011). The term 'complaint' can mean a complaint brought by an individual, but many of the complaints might in fact be identical letters sent to the Ombud by a number of people in order to protest against something, such as discriminatory public statements.⁴¹² Thus, for instance, the 90 % increase in discrimination complaints in 2012 was the result of almost 1 000 letters/complaints protesting against the decision of the Minister of Labour and Social Policy not to appoint any deaf people as members of the Polish Council for Sign Language.⁴¹³ In 2013, in contrast, there were no 'group complaints', so the overall number of complaints was smaller.

The Ombud's Office divides complaints received into the following categories (number of cases and their share as a percentage of the total).⁴¹⁴ As mentioned above, the figures

⁴⁰³ Act on the Commissioner for Human Rights, 15 July 1987, Article 14.

⁴⁰⁴ Act on the Commissioner for Human Rights, 15 July 1987, Article 16.

⁴⁰⁵ Ombud, annual report for 2020, p. 635.

⁴⁰⁶ Ombud, annual report for 2019, pp. 559-573.

⁴⁰⁷ Ombud, annual report for 2018, pp. 159-160.

⁴⁰⁸ Ombud, annual report for 2017. The report gives two different numbers: 560 on p. 60, and 669 on p. 714.

⁴⁰⁹ Ombud, annual report for 2016, p. 171.

⁴¹⁰ Ombud, annual report for 2015, p. 10, pp. 110-111.

⁴¹¹ Government Plenipotentiary for Equal Treatment (2015), *Report on the Activities of the Government Plenipotentiary for Equal Treatment for the period 1 January 2014– 31 December 2014 (Sprawozdanie z działalności Pełnomocnika Rządu do spraw Równego Traktowania za okres od 1 stycznia 2014 r. do 31 grudnia 2014 r.)*, Warsaw, p. 3.

⁴¹² Ombud, *Bulletin* 2012/2, p. 9.

⁴¹³ Ombud, annual report for 2012, p. 390.

⁴¹⁴ Based on: Ombud, *Bulletin* 2012/2, pp. 90-91; annual report for 2012, pp. 607-608; annual report for 2013, pp. 103-104; annual report for 2015, p. 111; annual report for 2016, pp. 171-172; annual report for

for 2014 are not known. The figures for 2020 have not been published, apart from the overall number of 1 046 complaints.

Matter	2011	2012	2013	2015	2016	2017	2018	2019
Principle of equality before the law	42 4.1 %	40 2 %	44 5.2 %	13 1.7 %	15 2.4 %	6 1.1 %	3 0.5 %	1 0.2 %
Prohibition of unequal treatment/discrimination								
Prohibition of unequal treatment/discrimination	85 8.2 %	21 1.1 %	27 3.2 %	28 3.6 %	27 4.3 %	18 3.2 %	15 2.5 %	14 2.5 %
based on sex	56 5.4 %	52 2.7 %	39 4.6 %	55 7.0 %	60 9.7 %	49 8.8 %	80 12.8 %	101 17.7 %
based on religion or belief	67 6.5 %	158 8 %	42 5.0 %	45 5.7 %	28 4.5 %	23 4.1 %	27 4.3 %	42 7.4 %
based on sexual orientation	334 32.3 %	21 1.1 %	65 7.7 %	59 7.5 %	59 9.5 %	48 8.6 %	34 5.4 %	110 19.3 %
based on age	58 5.6 %	57 2.9 %	49 5.8 %	46 5.8 %	43 6.9 %	24 4.3 %	37 5.9 %	40 7 %
based on nationality	42 4.1 %	54 2.8 %	81 9.6 %	76 9.7 %	45 7.2 %	84 15 %	72 11.2 %	76 13.3 %
based on disability	92 8.9 %	1 097 56 %	305 36.1 %	238 30.2 %	211 33.9 %	161 28.7 %	156 24.9 %	87 15.2 %
of social and occupational groups	30 2.9 %	14 0.7 %	7 0.8 %	6 0.8 %	3 0.5 %	1 0.2 %	2 0.3 %	1 0.2 %
related to taxes	6 0.6 %	20 1 %	6 0.7 %	6 0.8 %	3 0.5 %	2 0.4 %	n/a	3 0.5 %
of people without a registered place of permanent residence	3 0.3 %	13 0.6 %	5 0.6 %	5 0.6 %	3 0.5 %	4 0.7 %	4 0.6 %	n/a
based on race and ethnic origin	25 2.4 %	16 0.8 %	18 2.1 %	30 3.8 %	18 2.9 %	40 7 %	26 4.2 %	12 2.1 %
based on worldview/opinions ⁴¹⁵ (including non-denominational, non-religious) ⁴¹⁶	n/a	n/a	n/a	9 1.1 %	2 0.3 %	1 0.2 %	5 0.8 %	3 0.5 %
based on political opinions	6 0.6 %	6 0.3 %	3 0.3 %	9 1.1 %	1 0.2 %	1 0.2 %	5 0.8 %	4 0.6 %
based on sexual identity	12 1.2 %	4 0.2 %	20 2.4 %	8 1.0 %	9 1.5 %	9 1.6 %	12 1.9 %	30 5.3 %
related to legal	66	123	46	15	4	8	5	3

2018, pp. 159-160, annual report for 2019, pp. 559-573. Information covering the year 2017 is not provided in the Ombud's annual report for 2017. However, it was provided in the draft report, in which the total number of 560 complaints was subdivided into categories. The numbers given here are therefore based on the numbers in the draft report, as provided by the Ombud's Office.

⁴¹⁵ The term used for 'worldview' is *Światopogląd*.

⁴¹⁶ The term used for 'non religious' is *Bezwyznaniowość*.

Matter	2011	2012	2013	2015	2016	2017	2018	2019
and material/property status	6.4 %	6.3 %	5.4 %	1.9 %	0.6 %	1.4 %	0.8 %	0.5 %
based on education or occupation	11 1.0 %	107 5.5 %	9 1.1 %	5 0.6 %	7 1.1 %	1 0.2 %	2 0.3 %	1 0.2 %
based on social origin	4 0.4 %	1 0.1 %	0	0	n/a	n/a	2 0.3 %	n/a
based on other reasons	94 9.1 %	150 7.6 %	79 9.4 %	143 18.2 %	84 13.5 %	80 14.3 %	139 22.2 %	43 7.5 %

	2011	2012	2013	2015	2016	2017	2018	2019
Number of complaints per year	1033	1960	845	810	624	560	626	571
Number of complaints where the Ombud simply informed the parties about other means of action and legal measures to which individuals are entitled	376	458	308	292	229	187	170	188

j) Roma and Travellers

Complaints against breaches of national minority rights constitute a small percentage of cases sent to the Ombud. However, the Ombud is unequivocally committed to Roma issues and over the years has reported on the clearly unfavourable situation faced by the Roma community.

Every year, the Ombud addresses the problems of the Roma community, focusing on access to education, housing and employment, both supporting victims in individual cases and addressing systemic problems in the 'general statements'. The Ombud visits the Roma in the places where they live; monitors the situation of Roma pupils in education; counteracts school segregation; protects Roma from eviction, and begins or joins proceedings on behalf of Roma.

According to the Ombud, the situation of the Roma minority is gradually improving, thanks to the activity of Roma organisations and the *Programme for the Integration of the Roma Community in Poland 2014-2020*. The Roma Programme alone, however, is not enough to effectively counteract the exclusion from social and economic life that is still faced by a large part of the Roma community. The Ombud proposes, for instance, the creation of a separate project involving investment activities in the housing sphere. Financial mechanisms should also be created to encourage local government to use the funds available in the Roma programme.

During the pandemic, the Ombud focused on ensuring that the authorities are devoted to the needs of the Roma minority. The Ombud sent several letters and statements and asked about the situation of the Roma community in different regions.⁴¹⁷ According to the Ombud, due to the exclusion they experience on a daily basis, Roma may have limited access to information on risks regarding covid19, protection measures and medical assistance. Local authorities have a duty to safeguard the health of all their citizens as equally as possible.

In 2020, the Ombud appealed to local authorities to take measures to reduce the epidemic risk in Roma settlements and ensure the implementation of the right to education for children. The Ombud sent several letters and statements and asked about the situation of the Roma community in different regions. The answers showed that only in some communes was it decided to provide the Roma with additional support through personal protection measures.

The Defender also undertook an intervention in favour of Romanian Roma, residents of Wrocław, Gdańsk and Poznań, addressing the mayors of these cities with a request for information whether, in connection with the epidemic threat, local government authorities had taken measures to prevent infections that would be addressed directly to this particular group of residents. The answers obtained showed that the authorities of each city undertook preventive and informative activities, including by publishing leaflets on epidemic threats in Polish and Romanian, and by providing food and basic personal protective equipment to those in need. Due to the lack of appropriate computer equipment, the children could not take full advantage of online learning. The support of education assistants, who acted as intermediaries in contact between children and schools, was secured.⁴¹⁸

⁴¹⁷ See: <https://www.rpo.gov.pl/pl/content/koronawirus-rpo-pyta-o-sytuacje-imigrantow-romskich-mieszkajacych-we-wroclawiu-gdansk-i-poznaniu>; <https://www.rpo.gov.pl/pl/content/koronawirus-wojt-gminy-o-pomocy-dla-osiedla-romskiego-w-maszkowicach>.

⁴¹⁸ Ombud, annual report for 2020, pp. 92-94; see also: <https://www.rpo.gov.pl/pl/content/koronawirus-rpo-pyta-o-sytuacje-imigrantow-romskich-mieszkajacych-we-wroclawiu-gdansk-i-poznaniu>; <https://www.rpo.gov.pl/pl/content/koronawirus-wojt-gminy-o-pomocy-dla-osiedla-romskiego-w-maszkowicach>.

8 IMPLEMENTATION ISSUES

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

- a) Dissemination of 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 publicly announcing legal norms and enabling public awareness of what the law says. Usually, however, publication in an official journal does not mean much to the general public. Nevertheless, it should be noted that awareness of equal treatment and the need to safeguard non-discrimination is slowly but surely increasing in Poland, although it cannot yet be deemed satisfactory.

Because of this, the Ombud decided to focus its research on under-reported issues and find out why victims of discrimination do not report it.⁴¹⁹ According to annual studies commissioned by the Ombud, 70 % to 90 % of people who believed that they had experienced discrimination in the given year have not reported this to any public institution (the figure was 73 % in 2018 and in 2020, it was 81 %).⁴²⁰ Moreover, the majority of people are unaware that discrimination is prohibited in areas such as employment and the labour market or in access to goods and services.

According to the Ombud, the reasons for this are manifold and include a low level of legal awareness; a lack of understanding of the notion of discrimination; a lack of trust in public bodies and institutions; a fear of retaliation as a result of reporting discrimination; a reluctance to disclose intimate information about one's life; as well as a lack of faith in the effectiveness of an intervention. For these reasons, the Ombud has appealed to the state authorities to exercise special sensitivity, and in particular to take proactive measures to counter and combat discrimination, even without specific victims taking the initiative.⁴²¹ In addition, due to both global and national developments, worrying social processes have developed, such as an increase in hate speech and hate crime against ethnic and religious minorities, as well as an increase in antisemitism, and rising levels of homophobia and even physical attacks on the offices of LGBT organisations.

From the legal point of view, the most important instrument for the effective dissemination of information related to the issues of discrimination in employment is Article 94(1) of the Labour Code. It imposes on all employers an obligation to enable employees to access, in the workplace, the legal provisions concerning equal treatment in employment. In this way, it directly implements the option included in Article 12 of the Employment Equality Directive. The Labour Code recommends that the employer should meet this requirement by disseminating information in written form. The employer is, however, free to choose other options and grant access to the information 'by another means accepted by a particular employer'.

The options chosen to put this provision into operation may vary among different employers – it can take the form of printed leaflets or brochures distributed in the workplace, or printed information given to the employee, who may be required to provide their signature as proof that they have taken note of it.⁴²² Such information can also be attached to labour contracts or workplace codes of conduct. The National Labour Inspectorate is responsible for the implementation of Article 94(1).

⁴¹⁹ Ombud, annual report for 2013, p. 10.

⁴²⁰ Ombud, research commissioned from Kantar Public on 'Legal awareness in the context of equal treatment', Kantar 2020, 2018, 2016, 2015.

⁴²¹ Ombud, annual report for 2016, pp. 114, 70, 156.

⁴²² See, for example, Potocka, P. (2004), *Model information on equal treatment in employment*, Gdańsk (published by a private centre for consultancy and vocational training).

This obligation is not imposed by the ETA, which constitutes an unjustified differentiation of the situation of employees depending on the form of employment (under labour law or civil law) in accessing information about the prohibition of discrimination and the protection measures in this respect.⁴²³

A view has emerged that, if social research indicated a low level of social awareness about legal protection against discrimination, it would be necessary to consider the allegation of incorrect implementation by not ensuring the effective implementation of the objective of the regulations.⁴²⁴ In fact, the general level of awareness about discrimination issues is low, as proved by the surveys commissioned by the Ombud.⁴²⁵

Since the Ombud became the equality body in 2011, it has organised numerous events on discrimination issues, commissioned research and published a number of reports and manuals. Some of the activities of the Ombud attract public attention and are more widely publicised, including the work of the Expert Committee on People with Disabilities and the Expert Committee on the Rights of Elderly People.⁴²⁶ The committees present their findings, opinions and publications during conferences.⁴²⁷ In addition, since 2011, the Ombud's website has included a section on the role of the Ombud as the equality body (in Polish and English, although the information is limited).⁴²⁸ The Ombud has also printed leaflets and guidance on its role as the equality body and is involved in dissemination activities.

The Office of the Government Plenipotentiary for Equal Treatment has the obligation of 'promotion, dissemination and propagation of issues of equal treatment'.⁴²⁹ The Office created a website at the end of 2008, which was quite limited in substance but gradually became an interesting source of information. However, this ceased due to the changes and the merger of this Office with the Office of the Government Plenipotentiary for Civil Society, described in detail in Section 7.a, and new information is currently very limited.⁴³⁰ In the past, the Office also engaged in campaigns and organised some competitions (for school children and journalists) that could play a role in awareness-raising.⁴³¹ The Plenipotentiary dealt with various grounds of discrimination, but most of its activities were and still are focused on issues of sex discrimination and, recently, on issues affecting families with children.⁴³²

Until 2017, according to Polish law, nurseries, schools and educational institutions had to include in their curricula anti-discrimination education and activities embracing the full

⁴²³ 'Protection against discrimination in Poland' (2020), p. 17.

⁴²⁴ M.Kuśak (2021), p. 43-44.

⁴²⁵ See information on surveys by Kantar (2015, 2016, 2018, 2020) in other parts of the report.

⁴²⁶ Ombud, annual report for 2012, pp. 419-423; Ombud, annual report for 2013, p. 62; Ombud, annual report for 2016, pp. 15, 109-123; Ombud, annual report for 2017, pp. 723-763; Ombud, annual report for 2018, p. 14; Ombud, annual report for 2020, pp. 600-601.

⁴²⁷ See, for instance: Ombud, annual report for 2013, pp. 62-64; Ombud, annual report for 2014, pp. 78-80; Ombud, annual report for 2016, pp. 109-123.

⁴²⁸ Available in Polish at: www.rpo.gov.pl/pl/rowne-traktowanie. Available in English at: www.rpo.gov.pl/en/content/equal-treatment.

⁴²⁹ Equal Treatment Act, 3 December 2010, Article 21(2)(6); Ordinance on the Government Plenipotentiary for Equal Treatment, 22 April 2008, § 2(1)(7).

⁴³⁰ See: <https://www.rownetraktowanie.gov.pl>.

⁴³¹ Government Plenipotentiary for Equal Treatment (2013), *Report on the Activities of the Government Plenipotentiary for Equal Treatment for the period 1 January 2012 – 31 December 2012 (Sprawozdanie z działalności Pełnomocnika Rządu do spraw Równego Traktowania za okres od 1 stycznia 2012 r. do 31 grudnia 2012 r.)*, Warsaw, pp. 42-46.

⁴³² Government Plenipotentiary for Equal Treatment (2020), *Report on the Activities of the Government Plenipotentiary for Equal Treatment for the period 1 January 2019 – 31 December 2019 (Sprawozdanie z działalności Pełnomocnika Rządu do spraw Równego Traktowania za okres od 1 stycznia 2019 r. do 31 grudnia 2019 r.)*; Government Plenipotentiary for Equal Treatment (2017), *Report on the Activities of the Government Plenipotentiary for Equal Treatment for the period 1 January 2016 – 31 December 2016 (Sprawozdanie z działalności Pełnomocnika Rządu do spraw Równego Traktowania za okres od 1 stycznia 2016 r. do 31 grudnia 2016 r.)*, Warsaw.

spectrum of their respective communities.⁴³³ However, this requirement has been changed. The Ministry of National Education removed anti-discrimination education from the Ordinance on school requirements.⁴³⁴ The draft justification of the new wording of the Ordinance stated that, at school, 'it is important to shape patriotic attitudes, civic attitudes, a sense of identity, national and cultural awareness'.⁴³⁵ This was welcomed in various conservative circles as a 'retreat from gender ideology', as the previous provision had been described as 'opening the gate to depravity'.⁴³⁶ It should be underlined that, although the draft Ordinance was sent out for public consultation, the list of those to whom it was addressed by the Ministry of National Education did not include organisations conducting anti-discrimination education.⁴³⁷

It must be emphasised that, more often than not, most information on equality issues and non-discrimination is not accessible to people with disabilities. However, it should be noted that some initiatives have been undertaken in this respect. The websites of a number of institutions include a version that is accessible to people with visual impairments. The Ombud's Office website contains an increasing number of videos in sign language.

- b) Measures 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)

According to the law, the Ombud should cooperate with associations, CSOs and other voluntary organisations and foundations as well as with foreign and international bodies and organisations.⁴³⁸ The Government Plenipotentiary for Equal Treatment should, in the execution of its duties, collaborate with CSOs, including trade unions and organisations of employers.⁴³⁹

Both the above-mentioned institutions maintain dialogue with CSOs. CSO representatives are invited to present their opinions and discuss issues of mutual concern. However, since the activities of the Plenipotentiary for Equal Treatment were limited since 2016 (due to the merger with the Office of the Government Plenipotentiary for Civil Society, as described in Section 7.a), collaboration with CSOs has been limited as well.

Dialogue with CSOs was also encouraged by the *National Programme of Activities for Equal Treatment for 2013-2016*.⁴⁴⁰ The last report on the programme covers the year 2016. Despite the legal obligation to do so, a new programme has not been prepared for four years. Only at the end of 2020 was a draft programme prepared and published for consultation.

In the Ombud's Office, three special teams of experts have been established (representing three priorities of the previous Ombud) – namely, the Expert Committee on People with Disabilities, the Expert Committee on the Rights of Elderly People (since

⁴³³ Ordinance of the Minister of National Education on the requirements for schools and institutions (*Rozporządzenie Ministra Edukacji Narodowej z dnia 6 sierpnia 2015 r. w sprawie wymagań wobec szkół i placówek*, Dz.U.2015.1214), 6 August 2015.

⁴³⁴ Ordinance of the Minister of National Education on the requirements for schools and institutions (*Rozporządzenie Ministra Edukacji Narodowej z dnia 11 sierpnia 2017 r. w sprawie wymagań wobec szkół i placówek*, Dz.U.2017.1611), 11 August 2017 (replacing the Ordinance of 2015).

⁴³⁵ See: <http://wyborcza.pl/osiemdziewiec/7,159012,22043484,fabryka-patriotow-pis-wyrzuca-edukacje-antydiskryminacyjna.html>.

⁴³⁶ See: <http://www.oswiata.abc.com.pl/czytaj/-/artykul/dzialania-antydiskryminacyjne-znikna-z-rozporzadzenia>; <https://naszdzienik.pl/polska-kraj/184845,odwrot-od-gender.html>.

⁴³⁷ See: <http://wyborcza.pl/osiemdziewiec/7,159012,22043484,fabryka-patriotow-pis-wyrzuca-edukacje-antydiskryminacyjna.html>.

⁴³⁸ Act on the Commissioner for Human Rights, 15 July 1987, Article 17a.

⁴³⁹ Equal Treatment Act, 3 December 2010, Article 21(2)(7); Ordinance on the Government Plenipotentiary for Equal Treatment, 22 April 2008, § 3(3).

⁴⁴⁰ *Report on the execution of the National Programme of Activities for Equal Treatment for 2015 (Raport z realizacji Krajowego Programu Działań na rzecz Równego Traktowania za 2015 r.)*, January 2017, p. 8.

March 2011) and the Expert Committee on the Rights of Migrants (since May 2011); some members of these committees represent CSOs.⁴⁴¹ Other committees were subsequently created, such as the Expert Committee on Mental Health Protection, the Expert Committee on Deaf People, the Expert Committee on Health and the Expert Committee on Counteracting Homelessness. The Social Council, which has a general advisory character, was established in December 2010.⁴⁴² In addition to organising regular meetings with CSOs, the Ombud invites representatives of CSOs to take part in its activities and events.

In 2013, the Ombud decided to start public consultations regarding the subjects of research commissioned by the Ombud's Office. There was no list of suggested subjects; the Ombud asked an open question, but added that it was particularly interested in ideas regarding the needs of social groups that have so far not been addressed for various reasons, which has led to under-reporting. The Ombud selected research subjects for the years 2014-2015, 2016-2017 and 2019-2020⁴⁴³ based on these suggestions (most of them proposed by CSOs).⁴⁴⁴

The Ombud's annual reports for 2019 and 2020 list hundreds of occasions on which the Ombud and its office and employees collaborated with various social initiatives and organisations; participated in conferences and seminars; and conferred the Ombud's honorary patronage.⁴⁴⁵

The Plenipotentiary has published manuals and guidebooks,⁴⁴⁶ and until the end of 2015 it organised (and often co-organised) regular conferences with CSOs, round-table discussions and meetings on different subjects. However, in 2016, the situation changed. The Plenipotentiary for Equal Treatment drafted a negative opinion of the Polish Government with regard to the proposal for the EU horizontal directive. CSOs dealing with discrimination expressed their concern that they were not consulted in the process of the preparation of the opinion and could not provide their detailed opinions. When asked about this before the Parliamentary Commission, the Plenipotentiary did not reply directly, but in a response mentioned meeting with some CSOs on discrimination policies, stating that for the first time conservative organisations (he mentioned three of these) had a chance to raise their voice.⁴⁴⁷ However, there were in fact no consultations, as was finally admitted later, when the Plenipotentiary was asked for a list of the organisations consulted. Apparently, no invitations to consultations were issued and no written opinions were formulated, even though a number of CSOs had expressed their interest in preparing opinions on the draft directive. As explained by an employee of the

⁴⁴¹ See: www.rpo.gov.pl/en..

⁴⁴² See: www.rpo.gov.pl/pl/content/rada-spoleczna-rpo.

⁴⁴³ Due to lack of funds, research projects for 2018 and 2019 have been postponed; see:

<https://www.rpo.gov.pl/pl/content/badania-antydiskryminacyjne-RPO>.

⁴⁴⁴ According to the Ombud's announcement on 22 September 2015, of 54 suggestions from CSOs and academics, the Ombud chose six topics for the years 2016 and 2017, as follows. In 2016: personal assistants for people with disabilities (*Asystent osobisty osoby z niepełnosprawnością*); unequal treatment in the workplace on grounds of religion (*Nierówne traktowanie w miejscu pracy ze względu na religię*); and prevention of violence motivated by sexual orientation and gender identity (*Przeciwdziałanie przemocy motywowanej orientacją seksualną oraz tożsamością płciową*). In 2017: discrimination against people with disabilities in healthcare (*Dyskryminacja osób z niepełnosprawnością w opiece zdrowotnej*); the phenomenon of harassment and sexual harassment (*Zjawisko molestowania i molestowania seksualnego*); and discrimination on the grounds of nationality and ethnic origin in employment (*Dyskryminacja ze względu na narodowość i pochodzenie etniczne w zatrudnieniu*). Information available at: www.rpo.gov.pl/pl/content/tematy-badan-antydiskryminacyjnych-na-lata-2016-i-2017.

⁴⁴⁵ Ombud, annual report for 2019, pp. 591-632; Ombud, annual report for 2020, pp. 645-667.

⁴⁴⁶ Government Plenipotentiary for Equal Treatment (2015), *Report on the Activities of the Government Plenipotentiary for Equal Treatment for the period 1 January 2014 – 31 December 2014 (Sprawozdanie z działalności Pełnomocnika Rządu do spraw Równego Traktowania za okres od 1 stycznia 2014 r. do 31 grudnia 2014 r.)*, Warsaw, p. 16.

⁴⁴⁷ Parliamentary Commission meeting minutes, available at: <http://orka.sejm.gov.pl/zapisy8.nsf/0/01EB7ECB99A118CEC1258028004B2A03/%24File/0096508.pdf>.

Plenipotentiary's Office, the Plenipotentiary instead based its opinion on media materials.⁴⁴⁸

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

The Constitution contains a general provision on dialogue and cooperation between the social partners as one of the foundations of the Polish economic system.⁴⁴⁹

In 2001, Parliament issued the Act on the Tripartite Committee for Social and Economic Affairs and Voivodeship Committees for Social Dialogue.⁴⁵⁰ It was replaced in July 2015 by the Act on the Social Dialogue Council and Other Institutions of Social Dialogue.⁴⁵¹

'The social dialogue entails the involvement of employers, employees and governments into the decision-making process regarding employment and workplace-related issues. This dialogue includes all types of the negotiations, consultations and an information exchange between the representatives of abovementioned groups, on the issues of common interest, related to the economic, labour and social policy. [...] The bipartite dialogue between social partners (i.e. the employees and employers) may have the form of collective bargaining or any other form of negotiation, cooperation, preventing and solving of the disputes. The tripartite dialogue – engages the representatives of employees, employers and government [...]. The Social Dialogue Council is the main institution of the national tripartite dialogue. At the voivodeship level there are the Voivodeship Social Dialogue Councils. The sectoral dialogue has also the tripartite formula.'⁴⁵²

In 1995, the Ministry of Economy and Labour established the Centre for Social Partnership, known as the 'Dialogue Centre'. The Centre was intended to initiate and promote social dialogue, assist social partners and offer training.⁴⁵³

Hence, there are venues and opportunities for initiating dialogue between social partners in order to give effect to the principle of equal treatment. However, according to the research undertaken for this report, the subject of combating discrimination has never been included on the Tripartite Committee's agenda. It is interesting to note that in 2016, the Plenipotentiary for Equal Treatment proposed the following issues for inclusion in the Social Dialogue Council agenda for 2017: 'Review of instruments supporting the professional activity of people aged 50+ and presentation of recommendations and necessary actions'; and 'Instruments supporting the entry of people with disabilities into the labour market – analysis, possible changes in this area'. The Plenipotentiary's proposals were not included in the Social Dialogue Council's work plan for 2017, 2018, 2019 or 2020.⁴⁵⁴

⁴⁴⁸ See: <http://www.tokfm.pl/Tokfm/1,103454,20871375,pelnomocnik-ds-rownego-traktowania-odrzucil-dyrektywe-bez-konsultacji.html>.

⁴⁴⁹ Constitution of the Republic of Poland, 2 April 1997, Article 20, available at: <http://trybunal.gov.pl/en/about-the-tribunal/legal-basis/the-constitution-of-the-republic-of-poland/>.

⁴⁵⁰ Act on the Tripartite Committee for Social and Economic Affairs and Voivodeship Committees for Social Dialogue (*Ustawa z 6 lipca 2001 o Trójstronnej Komisji do Spraw Społeczno-Gospodarczych i wojewódzkich komisjach dialogu społecznego*), 6 July 2001.

⁴⁵¹ Act on the Social Dialogue Council and other institutions of social dialogue (*Ustawa z dnia 24 lipca 2015 r. o Radzie Dialogu Społecznego i innych instytucjach dialogu społecznego*), 24 July 2015.

⁴⁵² See: <http://www.dialog.gov.pl/en/>.

⁴⁵³ For more information, see the Centre's website, available at: www.cpsdialog.pl/.

⁴⁵⁴ See documents of the Council, available at: <http://www.dialog.gov.pl/dialog-krajowy/rada-dialogu-spolecznego/uchwaly-rds/>.

d) Addressing the situation of Roma and Travellers

In 2002, a special team on Roma issues was established within the Ministry of the Interior. Later, the role of the team was taken over by the new Joint Commission of the Government and Ethnic and National Minorities (an advisory body established on the basis of the 2005 Act on National and Ethnic Minorities and Regional Languages). The Joint Commission met between three and six times per year until 2020, when they met only once.⁴⁵⁵ There are two Roma members on the Commission (out of 35 members).⁴⁵⁶ In June 2008, the Commission established a special Roma Issues Team. The Roma Issues Team comprised 26 leaders and representatives of the Roma community representing different CSOs and representatives of Government bodies responsible for equality issues, as well as local government representatives from places with a large Roma population.⁴⁵⁷ Following its establishment in June 2008, it met 15 times by the end of December 2012. After a four-year break, the team restarted its meetings and met twice in 2016 for its 16th and 17th meetings (there have been no meetings since 2017). The team discussed various issues relevant to the Roma community and, in particular, various programmes devoted to the Roma community. Minutes of the Team's meetings are available.⁴⁵⁸

Roma organisations also have the opportunity to receive funds from, among other sources, the current Roma programme, and many of them are beneficiaries of such grants.

Roma issues were not on the agenda of the Tripartite Committee for Social and Economic Affairs (comprising Government, employers' organisations and trade unions), which is a platform for social dialogue in Poland. However, as the Roma population is very small and most Roma are unemployed, this should not be considered as being an issue of concern for the Committee's members.

When the Government's Programme for the Roma Community in Poland for 2004-2013 ended, a new programme, as mentioned above, was begun. The *Programme for the Integration of the Roma Community in Poland 2014-2020*⁴⁵⁹ document was finally adopted by the Council of Ministers on 7 October 2014.

The main goal of the programme was to improve the integration of the Roma in four core fields: education (including, as a separate issue, cultural, historical and civic education), housing, health and employment. The programme followed the EU framework for national Roma integration strategies to 2020, as outlined in Council conclusions (2011/C 258/04). Priority within the programme was given to complex projects, based on local analysis of needs and executed in partnerships with CSOs and local government. The programme included a diagnosis of the situation of the Roma minority – i.e. its demographic characteristics, main problems and needs. It describes the activities undertaken so far (from 2001 until 2013) and formulates outcomes, indicators and measures for the period 2014-2020. The programme started in 2015, and information on activities that have received funding in subsequent years is available (however, the only reports available on the execution of the programme are for the years 2015 and

⁴⁵⁵ See: <http://mniejszosci.narodowe.mswia.gov.pl/mne/komisja-wspolna/posiedzenia/2020/11206,LXX-posiedzenie-Komisji-Wspolnej-Rzadu-i-Mniejszosci-Narodowych-i-Etnicznych-17-.html>.

⁴⁵⁶ See: <http://mniejszosci.narodowe.mswia.gov.pl/mne/komisja-wspolna/sklad-i-regulamin>.

⁴⁵⁷ The list of members is attached to the minutes of the first meeting in 2016; see: <http://mniejszosci.narodowe.mswia.gov.pl/mne/komisja-wspolna/zespol-do-spraw-romski/posiedzenia/9852,XVI-posiedzenie-Zespolu-do-spraw-romskich-Komisji-Wspolnej-Rzadu-i-Mniejszosci-N.html>.

⁴⁵⁸ See: <http://mniejszosci.narodowe.mswia.gov.pl/mne/komisja-wspolna/zespol-do-spraw-romski/posiedzenia>.

⁴⁵⁹ Ministry of Internal Affairs and Administration (2014), *Programme for the Integration of the Roma Community in Poland 2014-2020 (Program integracji społeczności romskiej w Polsce na lata 2014-2020)*, available in English at: <http://mniejszosci.narodowe.mswia.gov.pl/mne/romowie/program-integracji-spol>.

2017).⁴⁶⁰ In 2020, an evaluation of the Programme for the integration of the Roma community for the years 2014-2020 was conducted throughout the country from April to July 2020 (therefore it covered only part of 2020.⁴⁶¹ The new programme has not yet been prepared.

8.2 Measures to ensure compliance with the principle of equal treatment (Article 14 Directive 2000/43, Article 16 Directive 2000/78)

a) Compliance of national legislation (Articles 14(a) and 16(a))

The scope of the general constitutional anti-discrimination clause is wide, and if there are any laws contrary to the principle of equality, it is primarily for the Constitutional Tribunal to declare their non-conformity with the Constitution. As a consequence of such a declaration, the provisions in question will become void as soon as the Tribunal's judgment enters into force. There is no specific measure other than the general constitutional clause.

However, it must be stressed that since the end of 2015, the CT has been undergoing an acute crisis; indeed, some people claim that the CT is 'paralysed' or claim that it no longer has validity. The composition of the bench has changed; some judges have been suspended; and some are known as 'understudies' as they have agreed to take on positions to which others had already been appointed. The CT may therefore no longer be fully trusted as a guarantor of the protection of civil liberties.⁴⁶²

In general, even if the relevant provisions seem to be non-discriminatory and neutral, their interpretation and implementation may result in discriminatory treatment. It is therefore rather a matter of practice – there are provisions which have a discriminatory character in fact, but it is difficult to identify them on a theoretical basis; in order to challenge them, a specific case involving their discriminatory application must be identified.

b) Compliance of other rules/clauses (Articles 14(b) and 16(b))

The Labour Code stipulates that provisions of collective agreements and staff regulations must not be less beneficial to employees than the provisions of the Code and other legislative and Government acts.⁴⁶³ Thus, should the internal rules of an enterprise, a collective agreement or a private contract include discriminatory clauses, they would clearly be in violation of the ETA as well as the Constitution.⁴⁶⁴ In addition, according to the Labour Code, they would be null and void and appropriate provisions of the Code would be applied in their place.⁴⁶⁵

⁴⁶⁰ Ministry of Internal Affairs and Administration (2014), *Programme for the Integration of the Roma Community in Poland 2014-2020 (Program integracji społeczności romskiej w Polsce na lata 2014-2020)*, available in English at: <http://mniejszosci.narodowe.mswia.gov.pl/mne/romowie/program-integracji-spol>.

⁴⁶¹ Ministry of Internal Affairs and Administration, *Evaluation study of the Programme for the Integration of the Roma community in Poland for the years 2014 – 2020: Final Report (Badanie ewaluacyjne Programu integracji społeczności romskiej w Polsce na lata 2014 – 2020. Raport końcowy)*, available at: <http://mniejszosci.narodowe.mswia.gov.pl/mne/romowie/program-integracji-spol/11251,Raport-z-ewaluacji-Programu-romskiego-2014-2020.html>.

⁴⁶² There are numerous sources describing the constitutional crisis in Poland. These include European Commission recommendations and statements, available at: http://europa.eu/rapid/press-release_IP-17-5367_en.htm; Venice Commission opinions, available at: <http://www.venice.coe.int/webforms/documents/?country=23&year=all>; and descriptions by legal scholars on constitutional blogs, e.g.: <http://verfassungsblog.de/?s=Poland>; <http://www.constitutionnet.org/news?region=96>.

⁴⁶³ Labour Code, 26 June 1974, Article 9(2).

⁴⁶⁴ Constitution of the Republic of Poland, 2 April 1997, Article 32, available at: <http://trybunal.gov.pl/en/about-the-tribunal/legal-basis/the-constitution-of-the-republic-of-poland/>.

⁴⁶⁵ Labour Code, 26 June 1974, Article 18(2).

Moreover, since 2011, civil law contracts have been covered by the ETA, and the Civil Code stipulates that legal provisions contrary to the law are null and void. Nullity may be limited to a part of the legal provision (e.g. a single clause in a contract), if the conflict with the law concerns only that part of the Act.⁴⁶⁶

In addition, the internal rules of occupations, professions, associations, etc. are reviewed by the courts on the request of a member or another monitoring body, such as the relevant ministry. Usually, any rules or decisions adopted may be reviewed by an internal second-instance body, but they may then be challenged before an administrative court. Generally, the right to challenge any rules violating the constitutional prohibition of discrimination arises from the right to a court hearing (Article 45 of the Constitution, Article 6 of the ECHR).

Polish legislation is based on a hierarchical system of law sources. One of the most important general principles is *lex superior derogat legi inferiori* (higher rules – rules with greater legal force – prevail over lesser rules). There are also the following principles: *lex specialis derogat legi generali* (special rules prevail over general rules) and *lex posterior derogat legi priori* (more recent rules prevail over less recent rules).

⁴⁶⁶ Civil Code, 23 April 1964, Article 58(1) and (3).

9 COORDINATION AT NATIONAL LEVEL

There is no single ministry responsible for the coordination at national level of all issues of equal treatment and non-discrimination based on all the grounds of racial or ethnic origin, religion or belief, disability, age and sexual orientation.

However, the Government Plenipotentiary for Equal Treatment has the obligation to execute Government policy in relation to the principle of equal treatment.⁴⁶⁷

According to the ETA, the Government Plenipotentiary for Equal Treatment should prepare and present to the Council of Ministers a national action programme for equal treatment⁴⁶⁸ and then report annually on its execution⁴⁶⁹. The Polish Council of Ministers adopted the first *National Action Programme for Equal Treatment 2013-2016* (*Krajowy program działań na rzecz Równego Traktowania na lata 2013-2016*) document on 20 December 2013.⁴⁷⁰ The first annual report on the execution of the programme was published on 27 June 2014.⁴⁷¹ The second report was sent to the Council of Ministers on 7 May 2015⁴⁷² (this is the version used in this report). The report covering 2015 was published in January 2017.⁴⁷³ The last report, covering 2016, was published in July 2017.⁴⁷⁴ There have been no reports since 2017. According to the information provided by the Plenipotentiary in 2016, evaluation was being undertaken, and the next programme would be developed, based on input from various Government agencies. The draft programme for the years 2021-2030 was prepared and published for consultation only in November 2020.⁴⁷⁵ According to the Ombud, the draft programme, in principle, does not take into account formulated recommendations (also by the Ombud) and the results of the Programme for 2013-2016.⁴⁷⁶ The draft programme should be finalised in 2021.

The *National Action Programme for Equal Treatment 2013-2016* was the first Government document to tackle the problem of discrimination in general (previously, there were programmes focused only on the issues of racism, xenophobia and related intolerance). The programme focused on six areas: anti-discrimination policy; equal treatment in the labour market and social security system; counteracting violence (including domestic violence) and increasing protection for victims of violence; equal

⁴⁶⁷ Equal Treatment Act, 3 December 2010, Article 21(1).

⁴⁶⁸ Equal Treatment Act, 3 December 2010, Article 22.

⁴⁶⁹ The reports published so far are available at: <https://www.rownetraktowanie.gov.pl/raporty-z-realizacji-krajowego-programu-dzialan-na-rzecz-rownego-traktowania>.

⁴⁷⁰ See *Public Information Bulletin – information on the draft National Programme of Activities for Equal Treatment*, February 2013, and comments on the draft programme and its consecutive versions, including the last version adopted by the Council of Ministers, from 10 December 2013, published on 13 December 2013. Information about the adoption of the *National Action Programme for Equal Treatment 2013-2016* by the Council of Ministers is available on the website of the Prime Minister, available at: <https://www.premier.gov.pl/wydarzenia/decyzje-rzadu/krajowy-program-dzialan-na-rzecz-rownego-traktowania-na-lata-2013-2016.html>. The Programme is on the website of the Government Plenipotentiary for Equal Treatment, available at: <http://rownetraktowanie.gov.pl/aktualnosci/krajowy-program-dzialan-na-rzecz-rownego-traktowania-na-lata-2013-2016>.

⁴⁷¹ Government Plenipotentiary for Equal Treatment (2014) *Report on the execution of the National Programme of Activities for Equal Treatment for 2013* (*Raport z realizacji Krajowego Programu Działan na rzecz Równego Traktowania za 2013 r.*), Warsaw.

⁴⁷² Government Plenipotentiary for Equal Treatment (2015) *Report on the execution of the National Programme of Activities for Equal Treatment for 2014* (*Raport z realizacji Krajowego Programu Działan na rzecz Równego Traktowania za 2014 r.*) Warsaw.

⁴⁷³ Government Plenipotentiary for Equal Treatment (2017) *Report on the execution of the National Programme of Activities for Equal Treatment for 2015* (*Raport z realizacji Krajowego Programu Działan na rzecz Równego Traktowania za 2015 r.*), Warsaw.

⁴⁷⁴ Government Plenipotentiary for Equal Treatment (2017) *Report on the execution of the National Programme of Activities for Equal Treatment for 2016* (*Raport z realizacji Krajowego Programu Działan na rzecz Równego Traktowania za 2016 r.*), Warsaw.

⁴⁷⁵ See: <https://www.gov.pl/web/rodzina/projekt-uchwaly-rady-ministrow-w-sprawie-ustanowienia-programu-wieloletniego---krajowy-program-dzialan-na-rzecz-rownego-traktowania-na-lata-2021-2030>.

⁴⁷⁶ Ombud, annual report for 2020, p. 542.

treatment in education; equal treatment in the healthcare system; and equal treatment in access to goods and services.

In 2019, CERD, in its *Concluding observations* report, expressed concern regarding the 'dissolution, in 2016, of the Council for the Prevention of Racial Discrimination, Xenophobia and Related Intolerance without replacing it by another institution with a similar mandate' and recommended that the Government 'reinstate the Council for the Prevention of Racial Discrimination, Xenophobia and Related Intolerance or establish an alternative multi-stakeholder institution with a similar mandate'.⁴⁷⁷

In relation to the Roma community, special programmes have been developed, such as the Government Roma Programme 2004-2013 and the Programme for the Integration of the Roma Community in Poland 2014-2020 (see more in section 3.2.8.b).⁴⁷⁸

⁴⁷⁷ CERD, *Concluding observations on the combined twenty-second to twenty-fourth periodic reports of Poland*, 24 September 2019, available at: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CERD/C/POL/CO/22-24&Lang=En.

⁴⁷⁸ *Programme for the Integration of the Roma Community in Poland 2014-2020 (Program integracji społeczności romskiej w Polsce na lata 2014-2020)*, Warsaw, 2014, available at: <http://mniejszosci.narodowe.mswia.gov.pl/mne/romowie/program-integracji-spol>.

10 CURRENT BEST PRACTICES

In Poland, no best practices can be identified in relation to the use of artificial intelligence (AI) to improve the effective implementation of the national legislation transposing the directives.

Good practice by the Ombud includes regional meetings – the Ombud visits different regions one by one (each visit lasts for a couple of days) and meets with different institutions, CSOs and citizens. As the Ombud stated in the annual report for 2017, 'An important element of my work as the Ombudsman [...] were regional meetings organised throughout the country. In nearly all of these meetings, the participants raised issues related to discrimination or exclusion. Both I and the representatives of my Office have made every effort to ensure that each case is properly explained.'⁴⁷⁹ This practice continued, and concluded in a special report.⁴⁸⁰

⁴⁷⁹ Ombud, annual report for 2016, p. 3.

⁴⁸⁰ Ombud (2020), *Ex officio. Non-official report on complaints, talks and meetings with the Ombudsman of the 7th Term 2015-2020 Adam Bodnar* (Z urzędu. Nieurzędowy raport ze skarg, rozmów, spotkań z Rzecznikiem Praw Obywatelskich VII Kadencji 2015–2020 Adamem Bodnarem), available at: <https://bip.brpo.gov.pl/>.

11 SENSITIVE OR CONTROVERSIAL ISSUES

11.1 Potential breaches of the directives at the national level

Although the 2010 ETA seems to fully implement Directives 2000/43/EC and 2000/78/EC (as described above), it raises some doubts and debate.

A problematic issue highlighted by the Ombud in its first report, published in June 2012, and repeated since then, is related to the compensation claim introduced by the ETA. The ETA (Article 13) refers to compensation (*odszkodowanie*), which seems to cover only material (but not non-material) damage and therefore limits protection. The provision for compensation under the Act should be widened to include non-material damages. It is questionable whether both sanctions based on the ETA, as well as the only special sanction in the Labour Code, meet the criteria of the Directives (effective, proportionate and dissuasive). However, it is currently the subject of debate, and written opinions and court decisions vary in their views.⁴⁸¹ See, for instance, the case in which the Court awarded compensation under the ETA, arguing that the ETA also covers non-material damage – in the specified case, damage to the dignity of the party.⁴⁸²

As revealed by the administrative courts in the case regarding refusal of access to postgraduate studies, there are limits to the protection offered against discrimination in education.⁴⁸³ The verdict in that case is controversial. The administrative courts declared that, according to a very formal interpretation of law and legal definitions of particular legal terms, admission to postgraduate studies may not be controlled under the judicial-administrative control procedure.

As mentioned in Section 2.6.a above, failure to provide reasonable accommodation results in discrimination only in a situation where there is a 'traditional' labour contract (covered by the legal regime of the Labour Code). Unfortunately, there is no provision on this in respect of other forms of employment (for instance, contracts under civil law covered by the ETA). This limits the protection.

11.2 Other issues of concern

The Law and Justice Party, which formed a Government in October 2015, has never had equality issues on its agenda.

A new trend has been observed by the Ombud and other actors engaged in LGBTI issues in the past couple of years following the elections: all court cases relating to the rights of LGBTI persons that are dealt with by the Ombud's Office attract attention from the prosecution services. Prosecutors (exercising their right) then decide to join all such proceedings, not in order to support the victim of discrimination or the Ombud's efforts but as a way to monitor what is happening in court or to represent the opposing party rather than the alleged victim of discrimination (for example, in the case against a publishing company described in Section 3.2.8 above, and in the case of harassment caused by a teacher taking off a cross from the school wall, described in section 2.4.b).⁴⁸⁴

⁴⁸¹ See also: ETA commentary 2017, pp. 192-201.

⁴⁸² Toruń District Court, judgment of 6 August 2019, No. I C 469/18; see more information in Section 3.2.7 of this report.

⁴⁸³ Voivodeship Administrative Court, Bydgoszcz, judgment of 18 October 2017, *M.J. (Marek Jopp) v. CSMC (College)*, No. II SA/Bd 732/17, available at: <http://orzeczenia.nsa.gov.pl/doc/BC5FC53775>; Warsaw Supreme Administrative Court, judgment of 17 April 2018, available at: <http://orzeczenia.nsa.gov.pl/doc/157A08408E>.

⁴⁸⁴ In February 2020, a new development took place. The Prosecutor General/Minister of Justice submitted an extraordinary cassation to the Supreme Court demanding that the verdict of the Court of Appeal in Wrocław and the Supreme Court be set aside. The Prosecutor General used the power that he was granted by the amendment to the law on the Supreme Court (April 3, 2018). According to that law (Article 89(1)), an

These attitudes and actions on the part of public bodies and officials (e.g. the action of a minister who lodged an application for extraordinary remedy against a judgment establishing discrimination based on sexual orientation) are worth noting, particularly in the context of the denial of budgetary resources to the Ombud, which has the knock-on effect of the Ombud not being able to adequately assist victims of discrimination.

There are two bodies in Poland that have a mandate to deal with discrimination: the Ombud (as the equality body) and the Government Plenipotentiary for Equal Treatment. There are important developments with regard to both those bodies. The Ombud faces problems related to the budget of the Ombud's Office as well as political attacks (including calls for the Ombud's appointment to be revoked by the Parliament because he represents liberal-leftist views, supports LGBT people etc.). The role of the Plenipotentiary for Equal Treatment has been marginalised. The Office was combined with the Office of the Government Plenipotentiary for Civil Society created in January 2016. Since the merger of the two bodies, the role of the Plenipotentiary in discrimination issues has been minimalised, the office has been reduced and the remaining staff directed to focus on issues of civil society. In February 2020, the Plenipotentiary became the Secretary of State in the office of the Minister for Family Affairs. Therefore, contrary to recommendations (e.g. in CERD's 2019 *Concluding observations* report), the position of the Plenipotentiary has been additionally weakened.⁴⁸⁵

In March 2016, the Ombud expressed its concern over escalating racial tensions in Poland: 'We can observe an extraordinary wave of hatred on the internet. (...) This is the moment when words turn into deeds. About once a week, or every two weeks we [receive a report] of a racial beating.'⁴⁸⁶ In 2017, 2018 and 2019, the Ombud continued to express its concerns on the increase in racial discrimination and hate speech, including at conferences such as 'Fight against anti-Semitism and anti-Gypsyism in Poland – monitoring, intervention, education'⁴⁸⁷ and 'Antisemitism in Poland: Diagnosis, Consequences, and Methods of Prevention',⁴⁸⁸ and on the occasion of the publication of a report in the series 'The principle of equal treatment – law and practice' entitled *Crimes motivated by prejudices – analysis and recommendations*.⁴⁸⁹ In 2016, the Ombud registered around 60 cases of hate speech and violence; in 2017, around 100; in 2018, around 90; in 2019, around 100; and in 2020, around 90.⁴⁹⁰

In March 2016, in a complaint to the Constitutional Tribunal, the Ombud challenged the constitutionality of the provisions of the ETA 'in so far as they limit the scope of the Act because of the closed catalogue of discriminatory grounds. The law excludes some social groups that experience discrimination in many areas of their lives.'⁴⁹¹ The Ombud argued

extraordinary cassation may be lodged for any final judgment of the past 20 years if it is 'necessary to ensure the rule of law and social justice'.

⁴⁸⁵ See Law of 23 January 2020 amending the Act on Government Administration Departments and some other acts (Dz.U. z 2020, poz. 284), Article 70.

⁴⁸⁶ See more at: <http://www.thenews.pl/1/9/Artykul/243728,Racial-tension-escalating-in-Poland-human-rights-ombudsman#sthash.D4vZbvqJ.dpuf>, on hate speech and hate crime; see also Ombud, annual report for 2017, pp. 66-67.

⁴⁸⁷ Information available at: <https://www.rpo.gov.pl/pl/content/konferencja-walka-z-antysemityzmem-i-antycyganizmem-w-polsce-monitoring-interwencja-edukacja>.

⁴⁸⁸ Information available at: <https://www.rpo.gov.pl/pl/content/z-przejawami-nienawisci-nalezy-stanowczo-walczyć-adam-bodnar-na-konferencji>.

⁴⁸⁹ Ombud (2017) *Crimes motivated by prejudice – analysis and recommendations (Przestępstwa motywowane uprzedzeniami. Analiza i zalecenia)*, Warsaw, available at: <https://www.rpo.gov.pl/sites/default/files/Przestepstwa%20motywowane%20uprzedzeniami%20ZRT%20nr%2023%202017.pdf>.

⁴⁹⁰ Ombud, annual report for 2017, p. 77; Ombud, annual report for 2018, p. 17; for 2019, information provided by the Ombud; Ombud, annual report for 2020, p. 52.

⁴⁹¹ See: <https://www.rpo.gov.pl/pl/content/wniosek-do-trybunalu-konstytucyjnego-ws-zakresu-stosowania-ustawy-o-rownym-traktowaniu> (this and subsequent quotes translated by author).

that: 'the Constitution (Article. 32) prohibits discrimination on any grounds.'⁴⁹² According to the Ombud, 'Persons experiencing discrimination that does not fall within the scope of the Equal Treatment Act may benefit from legal protection measures provided for in the Civil Code. However, their procedural situation is far less favourable than those who experience discrimination within the scope of the Equal Treatment Act.'⁴⁹³ In April 2017, the Ombud withdrew the complaint and asked for discontinuation (redemption) of the case. The CT took a resolution on discontinuation in October 2017, as a result of which the case was formally dropped. The Ombud did not provide information about this decision or its reasons.⁴⁹⁴

The Ombud also notes that its 'office regularly receives complaints from citizens experiencing discrimination by private entities, in particular in the area of access to services. Therefore, it seems that in order to fully implement the European standards of operation of equal treatment bodies, it is necessary to enable the equal treatment body to take direct intervention in cases that involve violations by entities other than state authorities'.⁴⁹⁵

Resolutions of municipalities including declaration of being free from 'LGBT ideology'

A number of Polish municipalities have adopted resolutions that include a declaration of being free from the so-called 'LGBT ideology'. By 2020, the number of declarations had reached over 55 – all of them directly mention LGBTI matters (in titles or content), in most cases declaring 'freedom from LGBT ideology'.

Simultaneously, a number of regions, counties and municipalities (over 35 as of 2020) have adopted 'Charters of Family Rights', which discriminate against single parents and LGBTI families by strongly supporting and favouring only the heterosexual family model. However, their unlawfulness is less direct and harder to argue against. They do not mention even once the term 'LGBT', nor they do not talk about sexual orientation; they focus, as their authors underline, on stressing conservative values and the traditional model of the family.

The first resolutions including a declaration by municipalities that they were free from the so-called 'LGBT ideology' were adopted in March 2019. Shortly thereafter, other municipalities and regional authorities followed.

Resolutions were adopted by different units of local government (territorial units): regional councils of *voivodships*, councils of *poviats* and councils of communes. Resolutions of bodies differ significantly in nature and legal effects, and thus so do the requirements and criteria for assessing their legality. Resolutions of legislative organs of local government units can be classified, for instance, as imperious (imperative) or non-imperious (more of a programme nature, or declaring the authors' intentions), as of internal or external character (binding only organs or binding also external subjects).⁴⁹⁶

⁴⁹² See: <https://www.rpo.gov.pl/pl/content/wniosek-do-trybunalu-konstytucyjnego-ws-zakresu-stosowania-ustawy-o-rownym-traktowaniu>.

⁴⁹³ Ombud, 'Application to the Constitutional Tribunal regarding the Act on equal treatment' ('Wniosek do Trybunału Konstytucyjnego w sprawie ustawy o równym traktowaniu'), 31 March 2016, available at: <https://www.rpo.gov.pl/pl/content/wniosek-do-trybunalu-konstytucyjnego-ws-zakresu-stosowania-ustawy-o-rownym-traktowaniu>.

⁴⁹⁴ For full information on the case, see the Constitutional Tribunal website, available at: <http://trybunal.gov.pl/postepowanie-i-orzeczenia/postanowienia/art/9882-ustawa-o-wdrozeniu-niektorych-przepisow-unii-europejskiej-w-zakresie-rownego-traktowania/>.

⁴⁹⁵ Ombud, annual report for 2019, p. 26.

⁴⁹⁶ See the expertise of Professor. D. Sześciło, Opinion on the admissibility of complaints lodged by the Ombud regarding resolutions of the councils of local government units on 'suppressing LGBT ideology' (Opinia w sprawie dopuszczalności zaskarżenia przez Rzecznika Praw Obywatelskich uchwał rad niektórych jednostek samorządu terytorialnego w sprawie „powstrzymywania ideologii LGBT”), available at

In most cases, the resolutions use the expression 'on restraining/stopping/suppressing'⁴⁹⁷ LGBT ideology'. In fact, they are an attempt to create a new public task for local government in the form of 'restraining LGBT ideology'.

The subject of discriminatory resolutions passed by Polish local and regional authorities is widely discussed in public and political debate in Poland and abroad; see, *inter alia*, information on the European Parliament resolution of 18 December 2019.⁴⁹⁸ During the visit of Vice-President Vera Jourova to Poland (focused on the rule of law and the judiciary), this topic was raised during a meeting with the Commissioner for Human Rights (Ombud) on 28 January 2020.⁴⁹⁹ Finally, the issue was raised by President von der Leyen in her State of the Union Address in September 2020.⁵⁰⁰

In his statement, the Ombud condemned such declarations.⁵⁰¹ The Ombud decided to focus on resolutions of the first type (on 'freedom from LGBT ideology') in his legal analyses and actions, and brought a number of complaints to the Polish courts (see more at section 12.2 below).

The Ombud receives complaints from LGBT people (and their allies) about resolutions, but all complaints relate rather to citizens' concerns and uncertainties in relation to the resolutions (what the meaning of the resolution is, what consequences it will have for their legal situation, etc.). There are no complaints regarding concrete situations in which unequal treatment has already happened that resulted from such a resolution. In complaints lodged by the Ombud to administrative courts, the Ombud argued, however, that such concerns, relating to resolutions alone, could be considered a violation of civil rights, in accordance with the concept of a freezing effect resulting from the Strasbourg case law.

Indirect connections between resolutions and the actual situation can also be seen in the education system. The Ombud knows of various cases (even a 'trend') of schools resigning from or cancelling anti-discrimination workshops and equal treatment events, due to the fear that controversial LGBT topics will appear. However, there are no specific examples of situations in which an event has been cancelled in a municipality that has adopted a resolution, in order to show that one event can be directly linked to another.

Pandemic and equal treatment

In the opinion of the Ombud, the scale of infringements of the rights and freedoms during the pandemic is very large.⁵⁰² Most of the information regarding the limitations of rights, and the problems with which people are struggling due to the pandemic, may be found on a special sub-section of the Ombud's website, entitled 'Coronavirus and epidemic in Poland'.⁵⁰³

The Ombud undertook different interventions related to the pandemic situation (examples are provided in the report). One further example concerns the rights of the elderly. The Ombud appealed to the Ministry of Family and Social Policy to get involved in

<https://www.rpo.gov.pl/sites/default/files/Opinia%20dr.%20hab.%20Dawida%20Sześciło%20ws.%20uchwał%20antyLGBT%20.pdf>.

⁴⁹⁷ *Powstrzymywanie* in Polish.

⁴⁹⁸ See: https://www.europarl.europa.eu/doceo/document/TA-9-2019-0101_EN.html.

⁴⁹⁹ See: <https://www.rpo.gov.pl/pl/content/vera-jourova-spotkala-sie-z-rpo>.

⁵⁰⁰ See: https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_20_1655.

⁵⁰¹ See: https://www.rpo.gov.pl/pl/content/stanowisko-rpo-ws-przyjmowania-przez-organy-wladzy-publicznej-deklaracji-przeciw-ideologii-lgbt#_ftn2.

⁵⁰² 'Ombud on government activities during the epidemic: the scale of violations is shocking' ('RPO o działaniach rządu w czasie epidemii: skala naruszeń prawa jest porażająca'), 25 May, interview by Marcin Wyrwał with Deputy Ombud Maciej Taborowski, available at: <https://wiadomosci.onet.pl/tylko-w-onecie/koronawirus-w-polsce-rpo-o-masowych-naruszeniach-prawa-przez-rzad-w-czasie-epidemii/v6cnrkx>.

⁵⁰³ See: 'Coronavirus and epidemic in Poland', available at: <https://www.rpo.gov.pl/pl/kategoria-tematyczna/koronawirus-i-epidemia-w-polsce>.

defending the rights of older people at the international level by engaging Poland in the work on the Convention on the Elderly. The Ombud prepared a common position together with the German Institute for Human Rights – on ‘Human rights of the elderly during a pandemic’ - on the occasion of the European Day of Intergenerational Solidarity (and forwarded it to the Ministry asking for its analysis and dissemination among public authorities).⁵⁰⁴ The position urges authorities to undertake a non-discriminatory and proactive approach towards the needs of the elderly.

No issues of concern were identified regarding the use of artificial intelligence in relation to the implementation of the national legislation transposing the directives, or regarding the regulation of artificial intelligence.

⁵⁰⁴ ‘Human rights of the elderly during a pandemic’ (‘Prawa człowieka osób starszych podczas pandemii’), 25 April 2020, available at: <https://www.rpo.gov.pl/sites/default/files/Wspólne%20oświadczenie%20RPO%20i%20DiMR%20w%20sprawie%20praw%20osób%20starszych%20podczas%20pandemii.pdf>.

12 LATEST DEVELOPMENTS IN 2020

12.1 Legislative amendments

Since 2016, the function of the Government Plenipotentiary for Equal Treatment has been conducted by a new Plenipotentiary, who was appointed to combine two positions – the second was the newly created position of Government Plenipotentiary for Civil Society (Pełnomocnik Rządu do spraw Społeczeństwa Obywatelskiego). In February 2020, the Office of the Plenipotentiary for Equal Treatment was separated from the Office of the Government Plenipotentiary for Civil Society and moved from the Chancellery of the Prime Minister to the Ministry of Family and Social Policy (and on 5 March 2020, the deputy minister was appointed to the function of the Plenipotentiary for Equal Treatment). The relevant Article 20(3) of the ETA was amended.⁵⁰⁵

12.2 Case law

Relevant discrimination ground(s): Religion or belief

Name of the court: Date of decision:

Regional Court (Sąd Rejonowy) in Torun (first instance) (6 August 2019)

District Court (Sąd Okręgowy) in Torun (second instance) (21 August 2020)

Name of the parties: *M. J. v. the College of Social and Media Culture in Toruń*⁵⁰⁶

Reference number: I C 469/18 and VIII Ca 1058/19

Link: N/A

Brief summary: In a decision of March 2017, the Dean of the College of Social and Media Culture (CSMC) decided not to accept M.J. for postgraduate studies in environmental protection – ecology and management. The Dean stated that M.J. did not attach as part of the application procedure a required document: the opinion of the parish priest from the applicant's place of residence.

Earlier, however, in a letter of March 2017, M.J. had been informed that he was admitted to the course of study.

M.J. appealed the decision to the rector of the College, stating that: a) he had read the list of documents required at the recruitment stage; b) in January 2017, he had written an email to the College asking whether the delivery of an opinion issued by the parish priest was obligatory in the case of studies subsidised by the National Fund for Environmental Protection and Water Management; c) he had received a reply stating that if he did not want to provide an opinion, he should send a statement stating the reasons why the opinion had not been submitted; d) M.J. did so and received confirmation of the submission of the documents required; e) subsequently, M.J. received a positive decision on admission to the College, including information on the required transfer of tuition fees for the first semester; f) M.J. transferred the tuition fees and appeared at the College in order to receive the *indeks* (student record book); g) on this occasion, the dean informed M.J. that he was not admitted to the College, and after a few days M.J. received a written rejection decision.

In his appeal to the rector, M.J. argued that the refusal was in conflict with the constitutional obligation of equal treatment in education regardless of religion. Additionally, the course was subsidised from public funds. Thus, it should be available

⁵⁰⁵ Therefore, contrary to recommendations (e.g. in CERD (2019), *Concluding observations on the combined twenty-second to twenty-fourth periodic reports of Poland*), the position of the Plenipotentiary has been additionally weakened. See Law of 23 January 2020 amending the Act on Government Administration Departments and some other acts (*ustawa z 23 stycznia 2020 r. o zmianie ustawy o działach administracji rządowej oraz niektórych innych ustaw*) (Dz.U. z 2020, poz. 284), Article 70. See also: <https://www.gov.pl/web/rodzina/anna-schmidt-rodziewicz-nowym-wiceministrem-rodziny-pracy-i-polityki-spoecznej>.

⁵⁰⁶ The College of Social and Media Culture (Wyższa Szkoła Kultury Społecznej i Medialnej) – a private vocational college in Toruń, Poland.

universally, without using the criterion of religion, even if it is run by a College with a religious profile. The Rector upheld the decision. According to the Rector, Article 70(5) of the Constitution of the Republic of Poland provides higher schools (universities, colleges) with full autonomy and Article 73 provides for freedom of teaching.

In his civil complaint to the court, M.J. alleged a violation of (among others) the Constitution, the European Convention on Human Rights and Fundamental Freedoms, the Act on the Implementation of Certain Regulations of the European Union in Equal Treatment (ETA) and also an infringement of the Law on Higher Education, Act on Public Finance in connection with the Environmental Protection Act and Code of Administrative Procedure.

M.J. alleged a violation of his right to equal treatment and non-discrimination in social life for any reason, including a violation of his right to professional training by simultaneously violating the principle of autonomy of higher education, refusing to accept the claimant's application to the secular post graduate studies due to his failure to submit a written opinion by the priest.

The complaint was brought by PTPA⁵⁰⁷ on behalf of M. J., who was represented by one lawyer from PTPA and two local lawyers collaborating with PTPA.

The District Court (first instance) found indirect discrimination on the ground of religion/belief and awarded PLN 5 000 (EUR 1 200) in compensation to the claimant, as well as PLN 1 167 (EUR 250) for the reimbursement of legal expenses. The verdict was challenged by the College in the appeal.

The Regional Court (second instance), after a meeting held *in camera*, dismissed the appeal of the College, agreed with all the findings of the first instance court and additionally awarded the claimant PLN 450 (EUR 100) as reimbursement of the costs of legal representation in the appeal proceedings. When the respondent did not execute the judgment voluntarily, the claimant requested the court bailiff to transfer the funds from the College. The court bailiff transferred to M.J.'s bank account the compensation awarded from the College on 7 October 2020. M.J. declared in the media that he had decided to spend the money awarded by enrolling to the same College for other postgraduate studies.

This is an important ruling, and not just because the Court found indirect discrimination. It is especially interesting because the Court awarded PLN 5 000 (EUR 1 200) as compensation (as requested by the claimant) based on the ETA. Previously, courts had tended (in the very few such cases that were brought to justice) to award compensation only for material damage, arguing that that is what the ETA covers. In this case, however, the Court argued, quoting European law and rulings by the CJEU,⁵⁰⁸ that the compensation available under ETA also covers non-material damage, including damage to the dignity of the party (however, it still underlined that the punitive element is not included in Polish law). The Court did not consider filing for a preliminary reference to the CJEU.

The Court found indirect discrimination, unlike the claimant who argued that there had been direct discrimination. The Court stated that: 'The requirement to provide such an opinion is seemingly neutral as it applies to all candidates for studies. In fact, however, it is only possible for people who actively participate in the life of the parish to do so, thus excluding both non-believers and non-Christian believers from the group of people who can study at the university (in fact, all non-Christian believers other than the practising

⁵⁰⁷ Polskie Towarzystwo Prawa Antydyskryminacyjnego (Polish Society of Anti-Discrimination Law).

⁵⁰⁸ Including the following rulings: judgment of 13 February 1985, *Francoise Gravier v. the city of Liege*, C-293/83, EU:C:1985:69; judgment of 2 February 1988, *Vincent Blaizot v. the University of Liege and others*, C-24/86, EU:C:1988:43.

Catholic because – although this was not explicitly expressed – given the nature of the university in question, it can be assumed that this was the opinion of the parish priest of the Catholic church)’.

The verdict of the second instance court is final. However, the National Public Prosecutor’s Office asked the Regional Court for the case file. The case file was sent to the Prosecutor’s Office on 25 September 2020. Theoretically, this could indicate that the Prosecutor General is considering initiating an extraordinary cassation procedure before the Supreme Court. This procedure was introduced by the current Government and allows the Prosecutor General to challenge any final verdict before the Supreme Court. So far, there has been no information from the Prosecutor General on bringing such a cassation complaint.

It should also be noted that the claimant has lost his case in the administrative courts (both instances); additionally, his complaint is pending in the European Court of Human Rights.⁵⁰⁹

Relevant discrimination ground(s): Sexual orientation

Name of the court: Date of decision: Reference number:

Provincial Administrative Court in Gliwice (July 14, 2020) III SA/GI 15/20

(<http://orzeczenia.nsa.gov.pl/doc/64BDAC55E5>)

Provincial Administrative Court in Warsaw (July 15, 2020) VIII SA/Wa 42/20

(<http://orzeczenia.nsa.gov.pl/doc/62A1A3C0D7>)

Provincial Administrative Court in Lublin (August 6, 2020) III SA/Lu 7/20

(<http://orzeczenia.nsa.gov.pl/doc/C2138D9662>)

Provincial Administrative Court in Kielce (September 11, 2020) II SA/Ke 382/20

(<http://orzeczenia.nsa.gov.pl/doc/6F1BD26B84>)

Name of the parties: *Ombud v. local government*

Link: Information on the Ombud’s website: <https://www.rpo.gov.pl/pl/content/wsa-nie-zbadal-merytorycznie-skarg-rpo-na-dwie-uchwaly-anty-lgbt>

Brief summary: A number of Polish municipalities have adopted resolutions (since March 2019) that include a declaration of being free from the so-called ‘LGBT ideology’. In his statement, the Ombud condemned such declarations.⁵¹⁰ Nevertheless, by 2020, the number of declarations had reached over 55 – all of them directly mention LGBTI matters (in titles or content), in most cases declaring ‘freedom from LGBT ideology’.

Simultaneously, a number of regions, counties and municipalities (over 35 as of 2020) adopted ‘Charters of Family Rights’ which discriminate against single parents and LGBTI families by strongly supporting and favouring only the heterosexual family model. However, their unlawfulness is less direct and harder to argue. They do not mention even once the term ‘LGBT’, nor do they talk about sexual orientation; they focus, as their authors underline, on stressing the conservative values and the traditional model of the family.

The Ombud decided to focus on resolutions of the first type (on ‘freedom from LGBT ideology’) in his legal analyses and actions.

In December 2019, the Ombud lodged complaints against five selected resolutions by communes’ councils⁵¹¹ with five Regional Administrative Courts, with the aim of revoking

⁵⁰⁹ See more in section 3.2.7 above.

⁵¹⁰ See: https://www.rpo.gov.pl/pl/content/stanowisko-rpo-ws-przyjmowania-przez-organy-wladzy-publicznej-deklaracji-przeciw-ideologii-lgbt#_ftn2.

⁵¹¹ See: Ombud, annual report for 2020, pp. 60-62.

the resolutions. Later, in March 2020, the Ombud filed four additional complaints, so there were nine altogether.⁵¹²

In the opinion of the Ombud: Those resolutions are unlawful and are not a mere symbolic declaration without legal effects; they illegitimately interfere with fundamental human rights and violate the principle of equal treatment; they exceed the competences of local and regional governments; they are in breach of the constitution, Polish administrative law, international and EU law (including the principle of free movement of persons).

The Ombud argues that the resolutions: 'certainly result in a chilling effect and could lead to unequal treatment; the applicability of their provisions is questionable, as they impose legally unfounded obligations which cannot be fulfilled by the addressee'. With no intention of underestimating the threat the resolutions cause, the Ombud gives an assurance that: 'if the acts are in any case applied in practice with the result of unequal treatment or other harm to an individual', he will 'make efforts to exercise other legal mechanism of protection in order to safeguard the fundamental rights of every Polish citizen'.

In March 2020, the Ombud extended the five complaints submitted in December 2019 to include arguments based on European law.⁵¹³ In the opinion of the Ombud, the resolutions violate the EU Charter of Fundamental Rights and the Treaty on the Functioning of the European Union. They violate the right to respect for private and family life, freedom of expression and the prohibition of discrimination on grounds of sexual orientation and gender identity. Furthermore, they discourage EU citizens – who, for example, identify themselves as LGBT people – from staying in areas where such resolutions apply. In a case in which the Polish courts had doubts, the Ombud proposed that the courts refer a question for preliminary ruling to the CJEU – whether European law allows a Member State's local government to adopt a resolution declaring freedom from 'LGBT ideology'.

In the four rulings listed above, courts invalidated four challenged resolutions by local government on 'being free from LGBT ideology'. Taking into account all the allegations of the Ombud, the courts found that the acts concerned matters relating to public administration and contained administrative ruling elements. The courts recognised that the resolutions interfered with human rights and freedoms. The courts recognised that, *inter alia*, the resolutions unjustifiably differentiated the position of LGBT people and violated the Constitution. The verdicts were appealed, and the cases are pending.

According to the Ombud, it does not matter that the resolutions use the term 'LGBT ideology' and not just the abbreviation 'LGBT'. In the justification for its judgment, the Provincial Administrative Court in Gliwice emphasised that the term 'LGBT ideology' *de facto* also refers to LGBT people, and explaining that LGBT is an ideology and not a people is turning a blind eye to reality. None of the rulings is final.

⁵¹² See the information, legal opinion and text of the complaints lodged in December 2019 at: <https://www.rpo.gov.pl/pl/content/rpo-skarzy-do-sadow-uchwaly-samorzadow-o-przeciwdzialaniu-ideologii-lgbt>. See the information and text of the complaints lodged in March 2020 at: <https://www.rpo.gov.pl/pl/content/rpo-uchwaly-anty-lgbt-sprzeczne-takze-z-prawem-europejskim>.

⁵¹³ See: <https://www.rpo.gov.pl/pl/content/rpo-uchwaly-anty-lgbt-sprzeczne-takze-z-prawem-europejskim>.

ANNEX 1: MAIN TRANSPOSITION AND ANTI-DISCRIMINATION LEGISLATION

Country: Poland
Date: 31 December 2020

Title of the Law: Act on the Implementation of Certain Provisions of the European Union in the Field of Equal Treatment

Abbreviation: ETA

Date of adoption: 03.12.2010

Latest relevant amendment: 29.04.2016

Entry into force: 01.01.2011

Web link: <https://www.rpo.gov.pl/en/content/act-3rd-december-2010-implementation-some-regulations-european-union-regarding-equal>

Grounds covered: gender, race, ethnic origin, nationality, citizenship,⁵¹⁴ religion, belief, political opinion, disability, age and sexual orientation

Civil/administrative/criminal law

Material scope: Full scope as covered by Directives 2000/43 and 2000/78:

employment, access to goods and services (including housing), social protection, social advantages, education

Principal content: Almost verbatim implementation of 5 Directives, including 2000/43 and 2000/78:

- prohibition of direct and indirect discrimination, instructions to discriminate harassment and victimisation
- right to compensation for infringement of equal treatment
- designation of Ombud as an equality body

Title of the Law: Act on the Labour Code (implementation amendment)

Abbreviation:

Date of adoption: 14.11.2003

Latest relevant amendment: major amendment 21.11.2008

Entry into force: 01.01.2004 (18.01.2009) (01.01.2011)

Web link: <http://www.przepisy.gofin.pl/przepisy,2,9,9,212,,,ustawa-z-dnia-26061974-r-kodeks-pracy.html>

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

Civil law: labour law

Material scope: Employment

Principal content:

- prohibition of direct and indirect discrimination, instructions to discriminate harassment and victimisation
- right to compensation for infringement of equal treatment
- obligation to provide information on equal treatment rules

Title of the Law: Act on the Commissioner for Human Rights

Abbreviation:

Date of adoption: amendment adopted on 03.12.2010

Latest relevant amendment: 03.12.2010

Entry into force: 01.01.2011

Web link: <http://rpo.gov.pl/pl/content/ustawa-o-rzeczniku-praw-obywatelskich>

Grounds covered: not listed

Civil/administrative/criminal law

Material scope: full scope

⁵¹⁴ Protection is limited to certain categories of persons only. Discrimination on the grounds of citizenship as such is not prohibited in the ETA. See more in Section 2.1.

Principal content: Designation of Commissioner for Human Rights (Ombud) as an equality body

ANNEX 2: INTERNATIONAL INSTRUMENTS

Country: Poland
Date: 31 December 2020

Instrument	Date of signature	Date of ratification	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)	26.11.1991	19.01.1993	No	Yes	Yes
Protocol 12, ECHR	Not signed	No	No	No	No
Revised European Social Charter	25.10.2005	No	No	Ratified collective complaints protocol? No	No
International Covenant on Civil and Political Rights	02.03.1967	18.03.1977	No	Yes	Yes
Framework Convention for the Protection of National Minorities	01.02.1995	20.12.2000	No	N/A	Yes
International Covenant on Economic, Social and Cultural Rights	02.03.1967	18.03.1977	No	N/A	Yes
Convention on the Elimination of All Forms of Racial Discrimination	07.03.1966	05.12.1968	No	Yes	Yes
ILO Convention No. 111 on Discrimination		08.05.1961	No	N/A	Yes

Instrument	Date of signature	Date of ratification	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?
Convention on the Rights of the Child	29.01.1990	07.06.1991	No	N/A	Yes
Convention on the Rights of Persons with Disabilities	30.03.2007	06.09.2012	Reservations and interpretative declaration – please see below.	No Poland has not signed the Convention's Optional Protocol.	Yes

Convention on the Rights of Persons with Disabilities – reservations

- 'The Republic of Poland understands that Article 23(1)(b) and Article 25(a) shall not be interpreted in a way conferring an individual right to abortion or mandating state party to provide access thereto, unless that right is guaranteed by the national law.'
- Reservations to Article 23(1)(a) of the Convention until relevant domestic legislation is amended. Until the withdrawal of the reservation a disabled person whose disability results from a mental illness or mental disability and who is of marriageable age, cannot get married without the court's approval based on the statement that the health or mental condition of that person does not jeopardise the marriage, nor the health of prospective children and on condition that such a person has not been fully incapacitated. These conditions result from Article 12(1) of the Polish Code on Family and Guardianship.
- One interpretative declaration: 'The Republic of Poland declares that it will interpret Article 12 of the Convention in a way allowing the application of the incapacitation, in the circumstances and in the manner set forth in the domestic law, as a measure indicated in Article 12(4), when a person suffering from a mental illness, mental disability or other mental disorder is unable to control his or her conduct.'

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