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Poland

2023

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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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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 2021, 87 % of people who believed that they had been discriminated against did not inform any public body.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 and the new Programme for 2022-2030 was adopted only in 2022.² Since the parliamentary elections in autumn 2015, the activities of the Government Plenipotentiary for Equal Treatment³ have been very limited. At the same time, from 2015 to 2021, 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.

The concept of age discrimination (discrimination that is focused primarily on older people) has found its place 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. In October 2018, the Council of Ministers adopted the document *Social Policy for Older People 2030 – safety, participation, solidarity*.⁴ However, as underlined by the Ombud, no concrete measures have been proposed in the area of combating discrimination.

Discrimination against persons 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. In 2022, the Ombud decided to appoint a main coordinator for the implementation of the provisions of the Convention on the Rights of Persons with Disabilities. Persons 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.

LGBTQI minorities are in a very difficult position in Poland, since they are a frequently attacked group. Poland was ranked 43rd out of 49 countries (in last place among EU Member States) in ILGA Europe's 2021 annual review of the state of legal protection provided to LGBTQI people. 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). All nine resolutions previously challenged by the Ombud were recognised by the administrative courts as having been adopted without a legal basis, discriminatory and invalid.

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). Apart from the dominant Catholic Church, there are around 200 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

¹ Ombud, research commissioned from Kantar Public on 'Legal awareness in the context of equal treatment', Kantar 2021. In 2022, such research was not commissioned.

² National Programme of Activities for Equal Treatment for 2022-2030 (*Krajowy Program Działań na rzecz Równego Traktowania na lata 2022-2030*).

³ Government Plenipotentiary for Equal Treatment (*Pełnomocnik Rządu do Spraw Równego Traktowania*).

⁴ See: *Polityka społeczna wobec osób starszych 2030. Bezpieczeństwo - Uczestnictwo - Solidarność*.

programmes aimed at cultivating their culture, heritage and language. In 2022, however, the subsidy for teaching German as a language of the German minority was cut significantly⁵. There are also special support programmes for the Roma population.⁶ 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 registers around 90-100 cases of this type annually. In 2022, many refugees came to Poland due to Russia's attack on Ukraine. Over seven million people crossed the border, and over 1.5 million remained in Poland.

2. Main legislation

According to the general anti-discrimination clause in the Polish Constitution (Article 32),⁷ 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 2011.⁸

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).⁹ 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 Office of the Commissioner for Human Rights (Rzecznik Praw Obywatelskich) as the equality body.

In order to implement the equality directives, the Code of Civil Procedure was amended in 2004.¹⁰ 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 In effect since September 2022.

⁶ See: *Programme for Social and Civic Integration of the Roma Community in Poland for 2021-2030*, available in English at: <https://www.gov.pl/web/mniejszosci-narodowe-i-etniczne/programme-of-roma-integration-2021-2030>.

⁷ 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/>.

⁸ 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.

⁹ Act on the Labour Code (referred to as the Labour Code) (*Ustawa z dnia 26 czerwca 1974 r. Kodeks pracy*), 26 June 1974.

¹⁰ 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 person with a disability 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.

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, although associated discrimination has been recognised in one case by the courts.¹¹

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

¹¹ 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.

private and family life and legal actions related to these spheres, nor does it cover freedom of contract in private and family life 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.

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. However, courts have extended the protection, arguing that the ETA also covers non-material damage, defined as a damage to the dignity of the party.¹²

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. The Code (Articles 444 and 445)¹³

¹² Toruń Regional Court, judgment of 21 August 2020, No. VIII Ca 1058/19.

¹³ Act on the Civil Code (referred to as the Civil Code) (*Ustawa z dnia 23 kwietnia 1964 r. Kodeks cywilny*), 23 April 1964.

provides for safeguards and compensation for the harm (*zadośćuczynienie*) in case of injury. 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).¹⁴ 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.

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

¹⁴ Act on the Civil Code.

demonstrated),¹⁵ 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 persons 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 November 2021, however, the new Ombud abolished the Social Councils: advisory expert bodies operating in the main Ombud Office and in local Ombud offices. In the case of the Government Plenipotentiary for Equal Treatment, such possibilities have in fact come to an end, since the Office of the Plenipotentiary no longer seriously 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.¹⁶ In 2015, a new Equal Treatment Department was created. The Ombud is also engaged in research activities as well as the compilation of existing data on some issues. The ETA provides that, in implementing the principle of equal treatment, the Ombud should: analyse, monitor and support the equal treatment of everyone; conduct independent surveys on discrimination; prepare and publish independent reports; and issue recommendations regarding discrimination issues.

The problem of providing independent assistance to victims is more complicated since, according to the Polish Constitution and the ETA, the Ombud's 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).¹⁷ The Plenipotentiary's main task is to execute Government policy in the field of equal treatment. Since 2016, the Plenipotentiary's involvement in equal treatment matters has significantly decreased due to the reorganisation of the office and the

¹⁵ See, for instance, the Supreme Court judgment of 10 May 2018, No. I PK 54/17.

¹⁶ Act on the Commissioner for Human Rights (*Ustawa z 15 lipca 1987 r. o Rzeczniku Praw Obywatelskich*), 15 July 1987.

¹⁷ 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.

assumption of new responsibilities relating to civil society. In 2020, the office was moved to the Ministry of Family and Social Policy and has resumed its initial functions.¹⁸

As far as the rights of national and ethnic minorities are concerned, the Act on National and Ethnic Minorities and on Regional Languages of 2005¹⁹ 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.

The body responsible for disability policy is the Government Plenipotentiary for Persons with Disabilities. 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 Persons with Disabilities (Persons with Disabilities Act).²⁰

In December 2022, the Ombud created a new position in the office: Plenipotentiary for the implementation of the provisions of the UN Convention on the Rights of Persons with Disabilities.²¹

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 12 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).²²

One of the reasons for the small number of cases is generally the problem of under-reporting.

In 2020, the Ombud summed up 10 years of the ETA.²³ 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

¹⁸ 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 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-spolescnej>.

¹⁹ 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.

²⁰ Act on the Vocational and Social Rehabilitation and Employment of Persons with Disabilities (Persons with Disabilities Act) (*Ustawa z dnia 27 sierpnia 1997 r. o rehabilitacji zawodowej i społecznej oraz zatrudnianiu osób niepełnosprawnych*), 27 August 1997.

²¹ See: <https://bip.brpo.gov.pl/pl/content/RPO-zmiany-kadrowe-w-biurze-grudzien-2022>.

²² See more detailed information in section 6.1.c below.

²³ 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).

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.

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. In response to the cases lost before the European Courts, the Polish Government referred the matters to the politicised Constitutional Tribunal, which ruled in both cases that the relevant European Union and Council of Europe provisions were not in line with the Polish Constitution.²⁴ The Constitutional Tribunal ceased to be a check on power and became an executor of political will.²⁵

²⁴ See Constitutional Tribunal, judgment of 7 October 2021, K3/21, available in English at: <https://trybunal.gov.pl/en/hearings/judgments/art/11662-ocena-zgodnosci-z-konstytucja-rp-wybranych-przepisow-traktatu-o-unii-europejskiej>; and Constitutional Tribunal, judgment of 24 November 2021, K6/21, available in English at: <https://trybunal.gov.pl/en/hearings/judgments/art/11709-art-6-ust-1-zd-1-konwencji-o-ochronie-praw-czlowieka-i-podstawowych-wolnosci-w-zakresie-w-jakim-pojeciem-sad-obejmuje-trybunal-konstytucyjny>.

²⁵ See for instance: Łętowska, E., 'The Honest (though Embarrassing) Coming-out of the Polish Constitutional Tribunal', *VerfBlog*, 29 November 2021, available at: <https://verfassungsblog.de/the-honest-though-embarrassing-coming-out-of-the-polish-constitutional-tribunal/>; see also 'Statement of Retired Judges of the Polish Constitutional Tribunal', *VerfBlog*, 11 October 2021, available at: <https://verfassungsblog.de/statement-of-retired-judges-of-the-polish-constitutional-tribunal/>.

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;²⁶ 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

Official title of the law: Act on the Implementation of Certain Provisions of the European Union in the Field of Equal Treatment²⁷

Name used in this report: Equal Treatment Act

Abbreviation: ETA

Date of adoption: 3 December 2010

Entry into force: 1 January 2011

Latest relevant amendment: 29 April 2016

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,²⁸ 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 five 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.

Official title of the law: Act on the Labour Code²⁹ (implementation amendment)

Name used in this report: Labour Code

Abbreviation:

Date of adoption: 14 November 2003

Entry into force: 1 January 2004 (18 January 2009) (1 January 2011)

Latest relevant amendment: 21 November 2008

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

²⁶ 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.

²⁷ 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.

²⁸ 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.

²⁹ Act on the Labour Code (*Ustawa z dnia 26 czerwca 1974 r. Kodeks pracy*), 26 June 1974.

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.

Official title of the law: Act on the Commissioner for Human Rights³⁰
(implementation amendment)

Name used in this report: Law on the Ombud

Abbreviation:

Date of adoption: amendment adopted on 3 December 2010

Entry into force: 1 January 2011

Latest relevant amendment: 3 December 2010

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

Principal content: Designation of Commissioner for Human Rights (Ombud) as an equality body

³⁰ Act on the Commissioner for Human Rights (*Ustawa z 15 lipca 1987 r. o Rzeczniku Praw Obywatelskich*), 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 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’.³¹

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

This provision is directly applicable. The Constitution stipulates that its provisions are directly applicable unless the Constitution itself states otherwise.³² 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 2016–2022 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.³³

Recent developments, although not directly related to discrimination, have implications for the entire legal system. In response to the cases lost before the CJEU³⁴ and the ECtHR,³⁵

³¹ Constitutional Tribunal, judgment of December 1997, No. K. 8/9716.

³² 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/>.

³³ 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>.

³⁴ See CJEU, C-824/18, *A.B. and Others v Krajowa Rada Sądownictwa and Others*, 2 March 2021, EU:C:2021:153.

³⁵ ECtHR, *Xero Flor v. Poland*, 7 May 2021, available at: <https://hudoc.echr.coe.int/eng#%7B%22itemid%22%3A%22001-210065%22%7D>; See Constitutional Tribunal, judgment of 24 November, 2021, K6/21, available in English at: <https://trybunal.gov.pl/en/hearings/judgments/art/11709-art-6-ust-1-zd-1-konwencji-o-ochronie-praw-czlowieka-i-podstawowych-wolnosci-w-zakresie-w-jakim-pojeciem-sad-obejmuje-trybunal-konstytucyjny>; see also its judgment of 10 March 2022, K7/21, available in English at: <https://trybunal.gov.pl/en/hearings/judgments/art/11820-dokonywanie-na-podstawie-art-6-ust-1-zd-1->

the Polish Government referred the matters to the Constitutional Tribunal, which ruled in both cases that the relevant EU provisions or those contained in the European Convention on Human Rights and Fundamental Freedoms are not in line with the Polish Constitution (the primacy of the EU law – and of the ECtHR – is expressly questioned).³⁶ According to academics as well as former justices of the Constitutional Tribunal, the Tribunal ceased to be a check on power and became an executor of political will.³⁷

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 politically and to be neither independent nor impartial) the number of questions submitted has dropped.³⁸

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.

[ekpcz-przez-sady-krajowe-lub-miedzynarodowe-oceny-zgodnosci-z-konstytucja-i-ekpcz-ustaw-dotyczacych-ustroju-sadownictwa-wlasciwosci-sadow-oraz-ustawy-dotyczacej-krajowej-rady-sadownictwa.](#)

³⁶ Regarding EU law, see: Constitutional Tribunal, judgment of 7 October 2021, K3/21, available in English at: <https://trybunal.gov.pl/en/hearings/judgments/art/11662-ocena-zgodnosci-z-konstytucja-rp-wybranych-przepisow-traktatu-o-unii-europejskiej>; regarding the ECtHR, see two rulings: Constitutional Tribunal, judgment of 24 November 2021, K6/21, available in English at: <https://trybunal.gov.pl/en/hearings/judgments/art/11709-art-6-ust-1-zd-1-konwencji-o-ochronie-praw-czlowieka-i-podstawowych-wolnosci-w-zakresie-w-jakim-pojeciem-sad-obejmuje-trybunal-konstytucyjny>; see also judgment of 10 March 2022, K7/21, available in English at: <https://trybunal.gov.pl/en/hearings/judgments/art/11820-dokonywanie-na-podstawie-art-6-ust-1-zd-1-ekpcz-przez-sady-krajowe-lub-miedzynarodowe-oceny-zgodnosci-z-konstytucja-i-ekpcz-ustaw-dotyczacych-ustroju-sadownictwa-wlasciwosci-sadow-oraz-ustawy-dotyczacej-krajowej-rady-sadownictwa>.

³⁷ See for instance: Łętowska, E., 'The Honest (though Embarrassing) Coming-out of the Polish Constitutional Tribunal', *VerfBlog*, 29 November 2021, available at: <https://verfassungsblog.de/the-honest-though-embarrassing-coming-out-of-the-polish-constitutional-tribunal/>; see also 'Statement of Retired Judges of the Polish Constitutional Tribunal', *VerfBlog*, 11 October 2021, available at: <https://verfassungsblog.de/statement-of-retired-judges-of-the-polish-constitutional-tribunal/> and 'Statement by Retired Judges of the Constitutional Tribunal on the Constitutional Tribunal Judgment in case K 7/21', *VerfBlog*, 14 March 2022, available at: <https://verfassungsblog.de/statement-by-retired-judges-of-the-constitutional-tribunal-on-the-constitutional-tribunal-judgment-in-case-k-7-21/>.

³⁸ The Constitutional Tribunal received 135 questions of law from the judges in 2015, but only 15 in 2020 and 14 in 2021. See annual information regarding the Tribunal at: <https://trybunal.gov.pl/publikacje/informacje-o-problemach-wynikajacych-z-dzialalnosci-i-orzecznictwa-tk/od-2003>.

- 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 persons 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'.

2 THE DEFINITION OF DISCRIMINATION

2.1 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.

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:

- 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.'³⁹

The Act goes on to enumerate the recognised national minorities: Armenian, Belarusian, Czech, German, Jewish, Lithuanian, Russian, Slovak and Ukrainian.⁴⁰

'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.'⁴¹

As above, the Act goes on to enumerate the recognised ethnic minorities: Karaimi, Lemk, Roma and Tatar.⁴²

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 and war refugees 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

³⁹ Act on National and Ethnic Minorities and Regional Languages, 6 January 2005, Article 2(1).

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

⁴¹ Act on National and Ethnic Minorities and Regional Languages, 6 January 2005, Article 2(3).

⁴² Act on National and Ethnic Minorities and Regional Languages, 6 January 2005, Article 2(4).

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 or belief

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

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

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 Persons with Disabilities (Persons with Disabilities Act)⁴³ 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.'⁴⁴ A disability has to be confirmed by a competent medical authority⁴⁵ at three possible levels: slight, moderate or severe.⁴⁶

The above definition may be of some help in clarifying what disability means for the purposes of the Labour Code or the ETA (which do not contain a definition of disability). It is important to stress that the Persons with Disabilities 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 Persons with Disabilities Act, but it may go beyond this definition. Some disabilities may not qualify as a disability under the Act, but persons 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 persons with disabilities to ensure their subsistence, adaptation to work and social communication'. A commentary on the Constitution points out the open character of the term 'disability'.⁴⁷ 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 Persons with Disabilities Act. According to this commentary, the Constitution should be interpreted as providing a much broader definition of 'disability' than the Persons with Disabilities Act. Under the Constitution, 'disability' has an independent meaning that is not restricted by any decision of the medical authorities.

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

⁴³ Persons with Disabilities Act, 27 August 1997.

⁴⁴ Compare with Persons with Disabilities Act, 27 August 1997, Article 2(10).

⁴⁵ Persons with Disabilities Act, 27 August 1997, Article 1.

⁴⁶ Persons with Disabilities Act, 27 August 1997, Article 3(1).

⁴⁷ Garlicki L. (ed.) (2003), *Komentarz do Konstytucji RP (Commentary on the Polish Constitution)*, Wydawnictwo Sejmowe, Volume III, Warsaw.

environmentally created barriers, the Polish definition in the Persons with Disabilities Act focuses exclusively on impairments.

Another difference is that, according to the definition in the Persons with Disabilities 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 Persons with Disabilities Act.

Finally, the guidance contained in the UNCRPD (the Convention was ratified on 6 September 2012) may be used. In fact, reference may 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, if developed, should focus on the potential of a person with disability, and not on his/her dysfunctions'.⁴⁸ The Ombud considers these issues to be a priority and continues to call for increased efforts in this regard.⁴⁹ 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.

The Committee on the Rights of Persons with Disabilities (CRPD) underlined the lack of a strategy and a plan for the implementation of the obligations under the Convention, which seek to ensure a comprehensive paradigm shift, replacing the medical model of disability with a human rights-based model.⁵⁰ Such a programming document was adopted by Resolution No. 27 of the Council of Ministers of 16 February 2021 on the adoption of the document *Strategy for Persons with Disabilities 2021-2030*.⁵¹ This is the first document that takes into account the Convention model and its approach to disability. The Ombud is closely monitoring the progress of its implementation.⁵²

d) Age

There is no law on discrimination, taking into account the ETA, which defines grounds of age. In practice, however, it is recognised by the equality body and by the courts and academia that it covers both younger and older groups of citizens.⁵³

The Act on Elderly People (senior citizens), passed in 2015, defines 'senior citizens' as persons of 60 years of age or older.⁵⁴ 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.

⁴⁸ Ombud, annual report for 2018, p. 99.

⁴⁹ Ombud, address to the Government Plenipotentiary for Persons with Disabilities, 30 August 2021 (III.7060.1037.2015).

⁵⁰ Ombud, annual report for 2018, p. 99.

⁵¹ Resolution No. 27 of the Council of Ministers of 16 February 2021, on the adoption of the document *Strategy for Persons with Disabilities 2021-2030* (*Strategia na rzecz osób z niepełnosprawnościami 2021-2030*), M. P. poz. 218.

⁵² Ombud, annual report for 2021, p. 589.

⁵³ See 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'). See also, for instance, the Ombud's annual reports in which the Ombud addresses cases of age discrimination relating to different age groups.

⁵⁴ Act on Elderly People, (*Ustawa z dnia 11 września 2015 r. o osobach starszych*), 11 September 2015.

e) Sexual orientation

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

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

2.2 Multiple and intersectional discrimination

In Poland, multiple discrimination is not prohibited in law.

In Poland, intersectional discrimination is not prohibited by 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 and intersectional 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.⁵⁵

Cases of discrimination on more than one ground may be adjudicated under the law in force, despite the lack of a definition of multiple and intersectional 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 and intersectional 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.⁵⁶ 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.⁵⁷

⁵⁵ In draft laws proposed in 2012 (but never passed), the concept of multiple discrimination was introduced; 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>.

⁵⁶ Supreme Court, resolution of 21 January 2009.

⁵⁷ 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.

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).⁵⁸

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-judicial mechanisms to prevent and protect against discrimination against persons with disabilities, including comprehensive damages mechanisms.⁵⁹

In his comments on the draft *Strategy for Persons 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.⁶⁰

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),⁶¹ showing a large inconsistency with this document.⁶²

In Poland, there is no case law dealing with 'multiple discrimination' and 'intersectional discrimination' as such.

2.3 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.⁶³

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.

⁵⁸ 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).

⁵⁹ 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.

⁶⁰ Ombud, annual report for 2020, pp. 392-393.

⁶¹ Resolution No. 161 of the Council of Ministers of 26 October 2018 on the adoption of the document *Social Policy for Older Persons 2030: SECURITY – PARTICIPATION – SOLIDARITY (Polityka społeczna wobec osób starszych 2030. BEZPIECZEŃSTWO – UCZESTNICTWO – SOLIDARNOŚĆ)*.

⁶² Ombud, annual report for 2020, pp. 392-393.

⁶³ In draft laws presented in 2012 (but never passed), the concept of assumed discrimination was introduced; 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>.

b) Discrimination by association

In Poland, discrimination based on association with persons with particular characteristics is not prohibited in national law.⁶⁴

Despite the lack of legislation, two landmark court rulings introduced the concept of discrimination by association.

One of these rulings concerned the first case finally decided under the ETA (2014 – first instance ruling, 2015 – second instance ruling).⁶⁵ XY worked as a shop security guard employed by Company Z. XY took part in the equality parade shown on television and as a consequence was fired. The court of first instance found (and the court of second instance confirmed) that there had been discrimination by association based on sexual orientation and awarded the claimant material damages (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. YZ supported on social media the petition for legalising civil partnerships. Shortly after, he lost the job 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.

The regional court (March 2017) reversed the verdict, finding that there had been discrimination and awarding damages. 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*).⁶⁶

2.4 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

⁶⁴ In draft laws presented in 2012 (but never passed), the concept of discrimination by association was introduced; 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>.

⁶⁵ 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).

⁶⁶ The claimant YZ did not wish to publicise his case. The verdict is final.

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).⁶⁷ As regards the specified 'exclusion' situations, see section 2.3.b below.

2.5 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, 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 indirect 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.⁶⁸ 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,

⁶⁷ Labour Code, 26 June 1974, Article 18(3b)(1) *in fine*.

⁶⁸ Act on the amendment of the Act on the Labour Code, 21 December 2008, in force since 18 January 2009.

criterion or action is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary'.⁶⁹

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 person with a disability might affect only a small number of persons with that specific disability, rather than a large number of persons with disabilities.

In one of the rulings, the Supreme Court has shown that controversy regarding erroneous implementation when it comes to the definition of indirect discrimination in the Labour Code is not just theoretical and may have consequences.⁷⁰

The Supreme Court stated that two criteria are used to establish the existence of indirect discrimination: the collective criterion and the regulatory effect criterion. The first decides which group distinguished due to the forbidden criterion is subject to the regulation that may be considered discriminatory.

In the justification of the judgment, it was indicated that indirect discrimination should be understood as creating an unfavourable situation for all or a significantly bigger part of the representatives of the group distinguished on the basis of discrimination. In the case of indirect discrimination, in the opposing positions are not individuals (as in the case of direct discrimination), but rather a group of people in a privileged position and a group of people who are disadvantaged. According to the Supreme Court, 'for the adoption of indirect discrimination, it would be necessary, first of all, to rely on circumstances proving that, as a result of the neutral criterion used by the employer when terminating employment relationships, i.e. the inability to perform duties related to the position held by employees, the situation of all or a significant number of employees belonging to the group distinguished due to disability in relation to the group of employees not characterized by this feature. The applicant does not indicate such circumstances and they do not arise from the facts of the case.' As a result, the Supreme Court, like the lower courts, did not find a violation of the prohibition of indirect discrimination.

Other cases that would limit the protection due to this erroneous implementation and definition of indirect discrimination were not identified; however, courts are still referring to this concept even if it is not decisive in a particular case. For example, in a resolution, the Supreme Court stated:

'[...] indirect discrimination is defined in Article 183a § 4 of the Labour Code. It is indirect, because it does not result from the employer's behaviour towards an individual employee, but towards a whole group of employees, singled out by means of the prohibited ground referred to in Article 183a § 1 of the Labour Code.'⁷¹

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 difficult to say – due to the small body of relevant case law – how they would be treated by the courts; previously, disproportionate treatment could simply be justified by 'other objective reasons'.

⁶⁹ Labour Code, 26 June 1974, Article 18(3a)(4) (as amended).

⁷⁰ Supreme Court, 12 May 2011, II PK 276/2010, available at: <http://www.sn.pl/Sites/orzecznictwo/Orzeczenia1/II%20PK%20276-10-1.pdf>.

⁷¹ Resolution of the Supreme Court of 4 June 2013, II PK 26/13.

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:⁷²

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

2.5.1 Statistical evidence

Section 2.5.1 has not been updated for 2022. Regarding the legal framework and the practice, please see: Country report Non-discrimination Poland 2022, Transposition and implementation at national level of Council Directives 2000/43 and 2000/78, reporting period 1 January 2021 – 1 January 2022.

2.6 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 – either 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.

⁷² Labour Code, 26 June 1974, Article 18(3b)(2) (as amended).

Another 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'. 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).

2.7 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.

A particularly important case in this respect was decided by the Poznań Court of Appeal in 2012.⁷³ 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.

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.

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

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

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

The Persons with Disabilities 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 person with a disability 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 (discrimination) within the meaning of Article 183a(2-5) of the Labour Code.

⁷³ Poznań Appellate Court, judgment of 29 February 2012, A.G. v. K. L.-B., No. I ACA 1162/11.

The Persons with Disabilities Act defines a workstation adapted to the needs of a person with a disability. 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

The Supreme Court has 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.⁷⁴

The Supreme Court has also held that both European and Polish law imply an obligation on the employer to introduce reasonable accommodation for an employee with a disability, as long as it does not constitute a disproportionately high burden.⁷⁵ It is for the court/judge to assess all the circumstances of a given case.⁷⁶ The concept of accommodation should be interpreted broadly and take into account both material and organisational measures.⁷⁷ Thus, the termination of an employment contract may be considered justified only if the employer does not have any reasonable means of enabling the person with a disability to continue employment.⁷⁸ In this judgment, the Supreme Court was of the opinion that Article 23a of the Persons with Disabilities 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. 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.⁷⁹ It is also relevant that it is possible for the employer to obtain public funds for the introduction of changes enabling the further employment of an employee with a disability.

c) Definition of disability and non-discrimination protection

As mentioned above, it seems that in most cases, persons with disabilities would be identified on the basis of the definition provided by the Persons with Disabilities 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).

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

⁷⁴ 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, as the case was initiated in 2008, before the introduction of the reasonable accommodation duty in Poland through the ETA (in force since 1 January 2011). However, the Supreme Court ruled in 2011, four months after the change in the law, and simply decided to point out the new legal situation for future reference.

⁷⁵ 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>).

⁷⁶ See: Supreme Court, judgment of 12 April 2012, II PK 218/11, item 105.

⁷⁷ 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.

⁷⁸ See: Opinion of the Advocate General in case C-13/05, pp. 81- 82.

⁷⁹ 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.

on reasonable accommodation also apply to the narrowed group of persons with disabilities'.⁸⁰

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

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

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 or discrimination in the case of failure, with regard to other forms of employment (for instance, contracts under civil law).⁸¹

The failure to provide necessary reasonable accommodation is deemed to infringe the principle of equal treatment in employment (discrimination) within the meaning of Article 18(3a)(2-5) of the Labour Code⁸² (which prohibits and defines direct discrimination, indirect discrimination, harassment and instructions to discriminate).⁸³ 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 2022, a gross salary of PLN 3 010 (EUR 644) per month).

The body of jurisprudence regarding reasonable accommodation is still small.

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

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

The Persons with Disabilities Act (amended by the ETA) limits the obligation to provide reasonable accommodation to the employment field. Potentially, the UN CRPD (as international law that is directly enforceable by Polish courts) could also be relevant in this context.⁸⁴

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

Section 2.8.f has not been updated for 2022. Please see: Non-discrimination Country report Poland 2022, Transposition and implementation at national level of Council Directives 2000/43 and 2000/78, reporting period 1 January 2021 – 1 January 2022.

⁸⁰ See expert opinion commissioned by the Office of the Ombud and prepared by 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).

⁸¹ 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'.

⁸² Persons with Disabilities Act, 27 August 1997, Article 23a(3).

⁸³ The 2010 ETA introduced the concept of reasonable accommodation but put it into another act of law – the Persons with Disabilities Act of 27 August 1997. Since the 'reasonable accommodation' provision covers employment, the Persons with Disabilities Act refers to the Labour Code and not to the ETA.

⁸⁴ Ratified international agreements become part of domestic law after ratification.

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.⁸⁵ 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.

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.⁸⁶

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.

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 (the latter with regard to the race/ethnic origin/nationality of their members) 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

⁸⁵ 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.

⁸⁶ See Labour Code, 26 June 1974, Articles 1-3, which do not include any criteria related to nationality or citizenship.

extends only to the grounds of the race, ethnic origin and nationality of their members. All forms of discrimination are prohibited.⁸⁷

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. Gender identity/expression or sex characteristics are not covered in national legislation.

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.⁸⁸

⁸⁷ See also: 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'), p. 94.

⁸⁸ Labour Code, 26 June 1974, Article 18(3a-3b).

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.⁸⁹ 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).⁹⁰

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.⁹¹

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.⁹²

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.⁹³

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.⁹⁴

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.⁹⁵

The Ombud received complaints from persons 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 certificates should instead indicate the adaptation and facilities needed for the person with

⁸⁹ Ombud, annual report for 2014, p. 51.

⁹⁰ Ombud, annual report for 2015, p. 39.

⁹¹ Employment Act, 2 April 2004, as amended, Article 19(c).

⁹² Ombud, annual report for 2018, pp. 136-137.

⁹³ Employment Act, 2 April 2004, as amended, Article 36(4)(3).

⁹⁴ Employment Act, 2 April 2004, as amended, Article 36(5)(e).

⁹⁵ Employment Act, 2 April 2004, as amended, Article 38(2)(3).

disabilities in the workplace and in the work process.⁹⁶ Finally, the Ordinance of the Minister of Economy, Labour and Social Policy on disclosing the cause of disability⁹⁷ was found to be unconstitutional by the Polish Constitutional Tribunal.⁹⁸ The Tribunal emphasised that the role of the legislator is to choose such means that will ensure the provision of support to persons 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. Gender identity/expression or sex characteristics are not covered in national legislation.

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 has 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 the wage gap between Korean employees and Polish workers who perform the same or comparable work.⁹⁹

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. Gender identity/expression or sex characteristics are not covered in national legislation.

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'.¹⁰⁰ 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).

⁹⁶ Ombud, annual report for 2016, p. 90.

⁹⁷ 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.

⁹⁸ 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/>.

⁹⁹ Supreme Court, judgment of 22 November 2012, No. I PK 100/12.

¹⁰⁰ Labour Code, 26 June 1974, Article 18(3a)(1).

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.¹⁰¹

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. Gender identity/expression or sex characteristics are not covered in national legislation.

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).

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)¹⁰² 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). Gender identity/expression or sex characteristics are not covered in national legislation.

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.¹⁰³

The Capital-based Pensions Act¹⁰⁴ (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.

¹⁰¹ Employment Act, 2 April 2004, as amended, Article 40(6).

¹⁰² However, Article 7 mentions access to publicly offered 'housing services' (*usługi mieszkaniowe*).

¹⁰³ 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.

¹⁰⁴ Act on Capital-based Pensions (*Ustawa z 21 listopada 2008 r. o emeryturach kapitałowych*), 21 November 2008.

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.¹⁰⁵ In this way, the Act prohibits discrimination, although the specific grounds of racial or ethnic origin are not mentioned.

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). Gender identity/expression or sex characteristics are not covered in national legislation. The ETA 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.¹⁰⁶ 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. 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 largely theoretical considerations that have not been reflected in the known jurisprudence.¹⁰⁷

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.¹⁰⁸

The death allowance is payable to any person who covers the costs of a funeral.¹⁰⁹ However, someone who is not a spouse but a partner (including same-sex partners), would have to supply documentary evidence of the costs incurred.¹¹⁰

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). Gender identity/expression or sex characteristics are not covered in national legislation. The ETA does not provide details regarding admission, expulsion, transfer and disciplinary measures

¹⁰⁵ 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).

¹⁰⁶ 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.

¹⁰⁷ Kułak, M. (2021), pp. 11-13.

¹⁰⁸ Act on Family Benefits (*Ustawa z 28 listopada 2003 r. o świadczeniach rodzinnych*), 28 November 2003, Article 9.

¹⁰⁹ 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).

¹¹⁰ Act on Retirement and Disability Pensions from the Social Insurance Fund, 17 December 1998, Article 79(1).

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.¹¹¹

In general, discrimination in education is prohibited – the 2016 Education Law¹¹² refers in its preamble to the Constitution as well as to the major international human rights instruments: the Universal Declaration of Human Rights (1948), the International Covenant on Civil and Political Rights (1966) and the UN Convention on the Rights of the Child (1989). However, 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).¹¹³

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,¹¹⁴ 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.¹¹⁵ 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.

The Ombud considers the right of national and ethnic minorities to learn and teach their own languages to be an integral element of the right to preserve their separate cultural identities. In this context, the Ombud asked the Prime Minister to undertake legislative

¹¹¹ ETA commentary 2017, pp. 137-140.

¹¹² 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.

¹¹³ 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.

¹¹⁴ As described above, the 1991 Education Act is still partly in force even though the new 2016 Education Law entered into force in 2017.

¹¹⁵ The 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 [...] amended; (*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.

work aimed at granting this right also to those communities that do not formally have the status of national and ethnic minorities, but there is no doubt that they preserve their distinct cultures and their own historical and linguistic identities, and wish to cultivate this distinctiveness. According to the Ombud, a desirable solution would be, for example, to grant the status of a regional language to the Silesian and Vilamovian languages (*śląski* and *wilamowski*).¹¹⁶ In the view of the Minister of Interior and Administration, however, these ethnolects do not fulfil the statutory conditions for recognition of an independent regional language. The Ombud will continue to analyse the possibility of broadening the circle of beneficiaries of rights and freedoms guaranteed in the Act on National and Ethnic Minorities and on Regional Language.¹¹⁷

In order to compensate for their higher operating costs, schools for national minorities receive an extra subsidy in order to organise additional language lessons; the exact sums differ annually.¹¹⁸ During the parliamentary passage of the state budget for 2022, the educational subsidy for German language teaching was significantly reduced through a motion from an MP. As a consequence, the Minister of National Education changed the relevant ordinance, in effect since 1 September 2022.¹¹⁹ The change reduces the number of hours of German as a minority language from three to one. All other languages stay at the level of three hours per week.¹²⁰

The Ministry of Education organised several activities within the 'Safe and Friendly School' Government programme for 2014-2020.¹²¹ These included training on diversity and counteracting discrimination (mainly based on ethnic origin).¹²² However, it is difficult to evaluate the impact of these activities, in view of the fact that politicians and Government representatives use stigmatising and discriminatory language, including hate speech, in their public appearances. In addition, anti-discrimination educational activity is under attack in recent years. 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

¹¹⁶ Address of Ombud to the Prime Minister of 29 January 2021 (XI.816.20.2020).

¹¹⁷ Ombud, annual report for 2021, pp. 600-602.

¹¹⁸ Based on Article 13 of the 1991 Education Act and changed annually ordinances of the Minister of Education, see: Ordinance of the Minister of Education, 21 December 2021 r. on the manner of distribution of the educational part of the general subvention for local government units in the year 2022 (*Rozporządzenie Ministra Edukacji w sprawie sposobu podziału części oświatowej subwencji ogólnej dla jednostek samorządu terytorialnego w roku 2022*).

¹¹⁹ The 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. Amended by § 1 point 1 of the regulation of February 4, 2022 (*Rozporządzenie z 4 lutego 2022 r., Dz.U.2022.276*).

¹²⁰ New wording of the § 8 (change in bold italics) In the inter-school teaching team, teaching a minority or regional language is conducted in the form of additional teaching of a minority or regional language, referred to in § 4 sec. 1 point 1, for students of schools of the same type, 3 hours a week, and in the case of students belonging to the German minority - 1 hour a week.

¹²¹ 'Safe and Friendly School' Government programme for 2014-2020 (*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>. The new programme implemented in the school year 2020-21 had its name changed to 'Safe education' (*Bezpieczna szkoła*) and focused on COVID-19-related issues, see: <https://www.gov.pl/web/edukacja-i-nauka/bezpieczna-edukacja>.

¹²² 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 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.

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.¹²³

The Ombud criticises the fact that education law lacks explicit references to the principle of equal treatment of women and men, human rights education or anti-discrimination education. The current core curriculum does not include the obligation of primary schools to take appropriate steps to prevent any discrimination, which was provided for in the Regulation of 2012. The obligation to conduct anti-discrimination education, imposed on all kindergartens, schools and educational institutions by the Regulation of 6 August 2015 on the requirements for schools and institutions, is also no longer included in a relevant regulation issued on 11 August 2017.¹²⁴

At the same time, however, education on discrimination has the support of society. In the opinion of 76 % of Poles (70 % in 2020), anti-discrimination education should be provided in schools¹²⁵ (15 % of respondents did not agree with the introduction of anti-discrimination education, 3 % were strongly opposed and 12 % expressed a negative opinion with some hesitation).¹²⁶ The rate of support among students is even higher, with a total of 81.5 % believing that such education should be provided in schools.¹²⁷

In the report based on the research commissioned by the Ombud, the authors highlight the following phenomena (examples):¹²⁸

- None of the educational-preventive programmes of primary schools analysed appeared, in their contents, to refer to the possibility of reporting or reacting to manifestations of unequal treatment, discrimination or prejudice.
- Tolerance and respect for differences are included relatively more frequently than negative aspects such as discrimination and prejudice.
- Some important social groups are omitted or underrepresented. Programmes focus mainly on national, ethnic and religious groups and on disability. Categories relating to gender, gender identity, sexual orientation and age are significantly underrepresented.
- The vast majority (nearly 75 %) of teachers interviewed believe that anti-discrimination education helps to prevent violence at school.
- Almost 90 % of teachers surveyed believe that anti-discrimination education should be compulsory in schools.
- Anti-discrimination education is considered an important issue by most of the teachers surveyed. At the same time, only one in three has participated in such workshops during their professional career.
- Between 10 % and 35 % of pupils feel that they experience various manifestations of unequal treatment.

¹²³ See: <https://oko.press/ordo-iuris-men-ostzegaja-nauczycieli-wpuszczajcie-szkol-organizacji-pozarzadowych-ktore-ucza-o-prawach-czlowieka/>.

¹²⁴ The 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 [...] amended, (Dz.U.2017, 1627), 18 August 2017. See also: Ombud (2021), *Equal treatment at school – Report of a survey in schools and a quantitative analysis of educational and preventive programmes (Równe traktowanie w szkole. Raport z badania w szkołach oraz analiza ilościowa programów wychowawczo-profilaktycznych)*, p. 14.

¹²⁵ Ombud, research commissioned from Kantar Public on 'Legal awareness in the context of equal treatment', Kantar 2021, 2020. In 2022 the research was not commissioned.

¹²⁶ Ombud, annual report for 2021, pp. 577-579.

¹²⁷ See: Ombud (2021), *Equal treatment at school – Report of a survey in schools and a quantitative analysis of educational and preventive programmes (Równe traktowanie w szkole. Raport z badania w szkołach oraz analiza ilościowa programów wychowawczo-profilaktycznych)*, available at: <https://bip.brpo.gov.pl/pl/content/rpo-raport-rowne-traktowanie-szkola>.

¹²⁸ Ombud (2021), *Equal treatment at school. Report of a survey in schools and a quantitative analysis of educational and preventive programmes*, pp. 68-72.

Based on those findings, the Ombud proposed a number of recommendations, including the following legislative recommendations:

- Providing students with opportunities to develop in a safe atmosphere free from discrimination as one of the objectives of the educational system included in Article 1 of the Education Law.
- The inclusion of an obligation for schools to take appropriate action to prevent all forms of discrimination in the Regulation on the core curriculum for pre-school education and general education in different types of schools.
- Reinstatement of the obligation to conduct anti-discrimination education by all kindergartens, schools and educational institutions.
- Supplementing the core curricula of selected subjects by including content concerning human rights, multiculturalism and counteracting discrimination and stereotypes, and violence based on them, in the teaching content of a greater number of school subjects, which would make it possible to provide students at all stages of education with comprehensive knowledge on functioning in a diverse society.
- Introducing in education law an obligation to include in the school statute provisions, including anti-discrimination procedures, specifying in particular the grounds, procedure for lodging complaints about unequal treatment and possible sanctions.
- The inclusion of pedagogical supervision of the implementation by schools of their educational and preventive functions in the field of equal treatment, understood in accordance with international standards applicable to human rights education.
- The introduction of compulsory in-service training for teachers on equal treatment and non-discrimination in the Teachers' Charter Act.
- The amendment of the ETA by establishing a ban on discrimination in the field of education also on grounds other than race, ethnic origin and nationality.¹²⁹

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 schools.

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*.¹³⁰

According to the Ombud, the COVID-19 pandemic exposed and exacerbated problems relating to equal access to education for students with disabilities. The Ombud conducted a relevant survey with the aim of identifying the barriers and challenges faced by students. The study confirmed that for the majority of students with various disabilities, remote learning was not appropriate to their needs and specific disabilities. Access to remote education was also limited by the lack of competence of teachers to conduct such classes. Additionally, the role of the support teacher was not clearly defined and, as a result, not optimally used during remote education. As of 2022, the report on this study had not yet been published.¹³¹

According to the 2016 Education Law (Article 39(4)(1)), every local authority has the duty to transport pupils with disabilities 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

¹²⁹ Ombud (2021), *Equal treatment at school. Report of a survey in schools and a quantitative analysis of educational and preventive programmes*, pp. 73-74.

¹³⁰ 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>.

¹³¹ Ombud, annual report for 2021, pp. 409-415.

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.¹³²

The Ombud has criticised provisions of the 2016 Educational Law (Article 127(13-14)), according to which the *starosta* (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.¹³³

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.¹³⁴ 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. 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.

In relation to the Roma community, special programmes have been developed, such as the *Government Roma Programme 2004-2013*, the *Programme for the Integration of the Roma Community in Poland 2014-2020*¹³⁵ and the *Programme for the Social and Civic Integration of the Roma Community in Poland for 2021-2030*.¹³⁶

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).

¹³² 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.

¹³³ Ombud, annual report for 2020, p. 416.

¹³⁴ 2016 Education Law, Article 1; 1991 Education Law, Article 13.

¹³⁵ 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>.

¹³⁶ *Programme for the Social and Civic Integration of the Roma Community in Poland for 2021-2030*, in English, see: <https://www.gov.pl/web/mniejszosci-narodowe-i-etniczne/programme-of-roma-integration-2021-2030>.

The social policies concerning the whole society contributed to a significant improvement in the economic situation of the Roma.¹³⁷ This made possible to reformulate the objectives of the new strategy towards developing more systemic mechanisms aimed at improving the educational prospects of this group.¹³⁸

Examples of activities regarding education included under the Roma programme are as follows:

- larger subsidies for schools with Roma pupils if the school applies (which is not the rule) for different activities;
- employing Roma education assistants to assist the teachers of integrated classes (approx. 90 persons of Roma origin are employed in schools);
- employing assistant teachers;
- integration day centres for children run by Roma organisations;
- additional educational and other activities for Roma children and parents, local cultural events and happenings, psychological and pedagogical advice, organising holidays and camps, material help;
- special stipends for Roma students.

'Examples of educational measures (the catalogue is open):

- formal education (school clubs, knowledge and sports contests, competitions, reviews, sightseeing tours, etc.),
- informal education (daycare centres, educational fairs, sightseeing tours, camps, etc.),
- history education (history of own family, preparation of materials and teaching about the Roma Holocaust, tasks related to identification of unknown burial sites of Roma casualties of World War II, commemoration of the Roma Holocaust, etc.),
- civic education (citizens' rights and obligations, patriotic ceremonies and ones related to 'little homelands', shaping tolerant attitudes, forging bonds with the national community, education related to electoral processes, etc.),
- health education (vaccinations for Roma pupils, prevention programmes aimed at Roma pupils and parents, including addiction prevention, promotion of a healthy lifestyle, healthy nutrition, ecology, sports activities, etc.),
- safety education (educational meetings, including with police officers, municipal guards, e.g. on the phenomena of peer violence, domestic violence, addictions, cyber threats, road safety, safety during holidays, etc.), workshops on peer violence, domestic violence, counteracting discrimination, etc.
- pro-vocational education (meetings with a career counsellor, 'meetings with interesting individuals', how to become an entrepreneur, how to establish a start-up, a social cooperative, etc.),
- developing and disseminating methodologies for working with bilingual and bicultural pupils.'¹³⁹

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.¹⁴⁰ 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

¹³⁷ See more in section 8.1.d), below.

¹³⁸ See: *Programme for the Social and Civic Integration of the Roma Community in Poland for 2021-2030*, justification.

¹³⁹ *Programme for the Social and Civic Integration of the Roma Community in Poland for 2021-2030*, p. 54.

¹⁴⁰ 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. See minutes of the fourth meeting (2008) of the Roma Issues Team, available at: <https://www.gov.pl/web/mniejszosci-narodowe-i-etniczne/iv-posiedzenie-zespołu-do-spraw-romskich-komisji-wspólnej-rządu-i-mniejszosci-narodowych-i-etnicznych>.

reference to ECtHR case law has been made).¹⁴¹ According to governmental information, in less than a decade (until 2020), their share of this type of education fell from a level of about 17 % to about 10 %.¹⁴² Nevertheless, this remains one of the important objectives of the new strategy: to reduce the phenomenon to a level comparable to the data for the general population (approximately 3.5 %).¹⁴³

According to recent data, 81 % of Roma take part in primary education, but half of them do not complete it. Among the reasons for dropping out of school are factors that are partly culturally motivated: the conviction indicated by Roma respondents of having a sufficient level of education (28 %) and the tradition of early marriage and pregnancies (18 %).¹⁴⁴ The participation of Roma in secondary and higher education can be estimated at around 5 %. For this reason, education remains a priority for action and has been broadly defined in the Integration Programme 2021-2030, covering formal and informal education of Roma children and youth, as well as Roma adults. Actions in this area will focus mainly on: ensuring the implementation of compulsory education/schooling until the age of 18; ensuring the implementation of compulsory pre-school education; increasing the participation of Roma children and youth in secondary education, especially vocational education; reducing their over-representation in the special education system; pro-health education; pro-vocational and vocational education; education on security, and raising civic, historical and cultural awareness.¹⁴⁵ According to the first implementation report for 2021 – as in previous Integration Programmes – education remains the priority area of intervention. The greatest number of tasks were implemented in this area – 176 (i.e. 72.7 % of all tasks), with a total value of PLN 5 208 786. Activities in the field of education covered the largest number of people: 4 684 Roma (2 583 women and 2 101 men). Among the educational tasks carried out were: support for pre-school education, school starter kits, motivational scholarships, remedial classes, support for integration day centres, pro-vocational education (including vocational/qualification courses), competitions, trips, camps, publications, employment of Roma education assistants, conferences, purchase of accident insurance, educational subsidies, sports activities, Roma Holocaust commemoration activities, Roma culture promotion tasks, adult Roma classes, etc.¹⁴⁶

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).¹⁴⁷ 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.

¹⁴¹ Ombud, annual report for 2015, p. 102.

¹⁴² *Programme for the Social and Civic Integration of the Roma Community in Poland for 2021-2030*, justification, p. 2, available at: https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKewi4s46jqcf_AhXaOfEDHXVKAj4QFnoECBMQAQ&url=https%3A%2F%2Fwww.gov.pl%2Fattachement%2F5f29fc92-6db3-4a1c-88db-d0dcbb5b9ec2&usq=AOvVaw1YqvLbSc8_RUG1pIdLhFbP.

¹⁴³ *Programme for the Social and Civic Integration of the Roma Community in Poland for 2021-2030*, p. 30.

¹⁴⁴ *Programme for the Social and Civic Integration of the Roma Community in Poland for 2021-2030*, p. 9.

¹⁴⁵ *Programme for the Social and Civic Integration of the Roma Community in Poland for 2021-2030*, justification.

¹⁴⁶ *Report on the implementation of the Programme of social and civic integration of Roma in Poland for 2021-2030 in 2021 (Sprawozdanie z realizacji Programu integracji społecznej i obywatelskiej Romów w Polsce na lata 2021-2030 w 2021 r.)*, August 2022, available at: <https://www.gov.pl/web/mniejszosci-narodowe-i-etniczne/sprawozdanie-z-realizacji-programu-integracji-spolecznej-i-obywatelskiej-romow-w-polsce-na-lata-2021-2030-w-2021-r>.

¹⁴⁷ 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.

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.¹⁴⁸ Other grounds, including gender identity/expression or sex characteristics, 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 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.¹⁴⁹

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 was not in conformity with the Constitution meant that it ceased 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

¹⁴⁸ See interesting analyses regarding 'public offer' and definition of 'housing' in the ETA commentary 2017, pp. 141-144.

¹⁴⁹ 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/>.

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.

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 (gender identity/expression or sex characteristics are not covered), 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 Allowances¹⁵⁰ and the Act on the Protection of Tenants' Rights.¹⁵¹ They contain no provisions of a discriminatory nature.¹⁵²

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).¹⁵³ According to the Ombud's

¹⁵⁰ Act on Housing Allowances (*Ustawa z 21 czerwca 2001 o dodatkach mieszkaniowych*), 21 June 2001.

¹⁵¹ 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.

¹⁵² 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.

¹⁵³ 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

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.

According to the governmental evaluation, 'The housing situation of the Roma varies. The situation of groups living in the southern and western regions of Poland, especially in mountainous areas, remains the worst. Several factors contribute to this group's housing problem – the persistent housing deficit in Poland in general, the significant shortage of communal and social housing, the lack of stable income in Roma households enabling the purchase of a flat (or obtaining a loan), the multi-generational character and large size of Roma families, which affects housing densities and quicker appearance of successive generations.'¹⁵⁴

In the field of housing, 'in the years 2015–2019, 188 tasks were carried out [...] related to the improvement of housing conditions. On average, these tasks consumed about 23.3 % of annual funds allocated in subsequent years – the total amount was [...] approx. EUR 3.3 million, and provided support to 2 291 people. It bears recalling that the activities related to improving the Roma's housing conditions in the region of Małopolska (Lesser Poland), which has the largest Roma population, have been conducted since 2001, while nationwide activities began in 2004. It should be stressed however, that none of the previous integration programmes managed to address the problems of several settlements in Małopolska that required urgent action.'¹⁵⁵

The programme states: 'The *Integration Programme for 2021-2030* focuses primarily on rapidly improving housing conditions in those cities where the housing problem threatens the life or health of residents. In order to avoid local tensions, renovation-related tasks should in principle be inclusive, which means they should also cover some non-minority neighbours. Support should be provided primarily to families living in the poorest housing conditions, characterised by readiness for integration and fulfilment of civic duties (e.g. children's obligation of compulsory education, payment of housing charges), where at least one member of the family is professionally active. Such conditionality with regard to assistance helps emphasise that attitudes of pro-activity and independence in solving one's own life problems are promoted. It should be noted that providing assistance to passive persons may increase tensions in the local environment and reinforce attitudes of entitlement.'¹⁵⁶

According to the first implementation report for 2021, a total of 33 tasks worth PLN 2 491 312 (EUR 558 590) were carried out in this area in 2021. Their executors were local government units and there were 553 beneficiaries of the tasks (including 302 women and 251 men) in 121 households. The structure of the tasks indicates the focus of local self-government units on the renovation of communal housing structures.¹⁵⁷

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. The results of the 2021 census should be available in 2023.

¹⁵⁴ *Programme for the Social and Civic Integration of the Roma Community in Poland for 2021-2030*, p. 55.

¹⁵⁵ *Programme for the Social and Civic Integration of the Roma Community in Poland for 2021-2030*, p. 23.

¹⁵⁶ *Programme for the Social and Civic Integration of the Roma Community in Poland for 2021-2030*, p. 55.

¹⁵⁷ *Report on the implementation of the Programme of social and civic integration of Roma in Poland for 2021-2030 in 2021 (Sprawozdanie z realizacji Programu integracji społecznej i obywatelskiej Romów w Polsce na lata 2021-2030 w 2021 r.)*, August 2022, available at: <https://www.gov.pl/web/mniejszosci-narodowe-i-etniczne/sprawozdanie-z-realizacji-programu-integracji-spolecznej-i-obywatelskiej-romow-w-polsce-na-lata-2021-2030-w-2021-r>.

The Ombud continues to work to improve the living conditions of the Roma community, especially in the Maszkowice estate.¹⁵⁸ 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.'¹⁵⁹

Due to the Ombud's concerns regarding the spending of public funds at the disposal of the Łącko Municipality for Roma community purposes, the Ombud reported this issue to the Supreme Chamber of Control as a proposed topic for the audits planned for 2023.¹⁶⁰

¹⁵⁸ Ombud (2023), *Information on activities undertaken by the Commissioner for Human Rights to protect the rights of national and ethnic minorities in the years 2020-2022* (Informacja o działaniach podejmowanych przez Rzecznika Praw Obywatelskich na rzecz ochrony praw mniejszości narodowych i etnicznych w latach 2020 – 2022), available at: https://bip.brpo.gov.pl/sites/default/files/2023-01/Raport_RPO_mniejszosci_narodowe_etniczne_2020-2022_styczen2023.pdf.

¹⁵⁹ Ombud, annual report for 2020, pp. 92-93.

¹⁶⁰ Ombud (2023), *Information on activities undertaken by the Commissioner for Human Rights to protect the rights of national and ethnic minorities in the years 2020-2022*, p. 6-10.

4 EXCEPTIONS

4.1 Genuine and determining occupational requirements (Article 4 Directive 2000/43, Article 4(1) Directive 2000/78)

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 Code¹⁶¹ (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 (there is no relevant case law). The test of the proportionality of measures and the concept of legitimate aim was also introduced.¹⁶²

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

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

The 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.¹⁶³

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 of the commentary, this may raise doubts as to its conformity with EU law, in that its approach is too wide (there is no relevant case law).¹⁶⁴

- 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.

¹⁶¹ Act on the amendment of the Act on the Labour Code, 21 November 2008, in force since 18 January 2009.

¹⁶² Labour Code, 26 June 1974, Article 18(3b)(2)(1) (as amended).

¹⁶³ Labour Code, 26 June 1974, Article 18(3b)(4), amended by Article 25 of the Equal Treatment Act.

¹⁶⁴ ETA commentary 2017, pp. 157-159.

In one of the very few cases brought under the ETA, a landmark case decided in 2016, 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 instance¹⁶⁵ dismissed the lawsuit but the court of second instance¹⁶⁶ awarded compensation (final verdict). The court concluded that the respondent discriminated against the claimant – there was indirect discrimination not on the ground of sexual orientation, but because of beliefs/worldview/political opinion (*światopogląd*), one of the ETA's discrimination grounds.

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

In Poland, 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 within the judiciary and state security agencies, as well as civil servants and some teachers and doctors.

¹⁶⁵ 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).

¹⁶⁶ Regional Court, judgment of 22 March 2017, No. I Ca 75/17 (not published).

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).¹⁶⁷

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.¹⁶⁸ 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 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.¹⁶⁹

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.¹⁷⁰

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.

¹⁶⁷ 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).

¹⁶⁸ 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.

¹⁶⁹ 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.

¹⁷⁰ 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.

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 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 at work (Article 7(2) Directive 2000/78)

In Poland, there are exceptions in relation to disability and health and safety at work 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 persons with disabilities (in order to protect them), but does not refer verbatim to 'health and safety' issues (Article 18(3b)(paragraph 2)(3)).

The ETA does not refer to health and safety at work.

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 [...]'.

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.¹⁷¹ There are fixed ages for entitlement to benefits.¹⁷² 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 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*¹⁷³ 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.¹⁷⁴

In the case already mentioned above, the Supreme Court ruled that reaching retirement age is a socially justified criterion for selecting employees for dismissal as part of collective redundancies, and therefore cannot be considered a discriminatory criterion for a specific group of employees with whom the employer terminates employment relationships.¹⁷⁵

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 [...]'.

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).

¹⁷¹ Act on the Social Security System, 13 October 1998, Article 6.

¹⁷² Act on Retirement and Disability Pensions from the Social Insurance Fund, 17 December 1998, Articles 24 and 27.

¹⁷³ Judgment of 22 November 2005, *Mangold v. Helm*, C-144/04, EU:C:2005:709.

¹⁷⁴ Judgment of 19 January 2010, *Kücükdeveci v. Swedex GmbH & Co. KG*, C-555/07, EU:C:2010:21.

¹⁷⁵ Supreme Court, judgment of 20 May 2020, I PK 110/19.

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.¹⁷⁶ There are fixed ages (in most cases, 60 for women and 65 for men) for entitlement to benefits.¹⁷⁷ 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,¹⁷⁸ every year the relevant ministry 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.¹⁷⁹ The catalogue of basic forms of professional activation in 2022 includes: internships, training, intervention works, public works, refunding costs of equipment or additional equipment of 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).¹⁸⁰

Those who have completed the first eight grades of their school education¹⁸¹ 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.

¹⁷⁶ Act on the Social Security System, 13 October 1998, Article 6.

¹⁷⁷ Act on Retirement and Disability Pensions from the Social Insurance Fund, 17 December 1998, Articles 24 and 27.

¹⁷⁸ 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).

¹⁷⁹ See: <https://www.gov.pl/web/rodzina/katalog-podstawowych-form-aktywizacji-zawodowej>.

¹⁸⁰ Labour Code, 26 June 1974, Articles 190, 191 and 202.

¹⁸¹ 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

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.¹⁸² 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.¹⁸³ In order to become a judge of the Supreme Court, a person must be more than 40 years old.¹⁸⁴ With regard to administrative courts, there is an age limit for judges in regional administrative courts, who must be 35 or over.¹⁸⁵ 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.¹⁸⁶

The minimum age for becoming a prosecutor is 26.¹⁸⁷ Under the Law on Notaries Public, one of the conditions of becoming a notary is to be at least 26.¹⁸⁸

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.¹⁸⁹ 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.'¹⁹⁰ Therefore, the law that

change was introduced. Gymnasiums were gradually abolished, and general education now comprises two levels only: primary school (eight grades) and secondary school (four grades).

¹⁸² Law on Ordinary Courts Organisation, 27 July 2001, Article 61(1)(5).

¹⁸³ Law on Ordinary Courts Organisation, 27 July 2001, Articles 63(1) and 64(1).

¹⁸⁴ Act on the Supreme Court, 8 December 2017, Article 30(1)(3).

¹⁸⁵ 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).

¹⁸⁶ Law on the Organisation of the Administrative Judiciary, 25 July 2002, Article 7(1).

¹⁸⁷ Act on Public Prosecution (*Ustawa z dnia 28 stycznia 2016 r. o prokuraturze*), 28 January 2016, Article 75(1)(5).

¹⁸⁸ Law on Notaries Public (*Ustawa z dnia 14 lutego 1991 r. Prawo o notariacie*), 14 February 1991, Article 11(7).

¹⁸⁹ 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.

¹⁹⁰ Ombud, annual report for 2018, pp. 60-61.

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).¹⁹¹

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 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 no earlier than seven years ago.'¹⁹²

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).

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.¹⁹³ 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).¹⁹⁴ 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.¹⁹⁵

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.¹⁹⁶ 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

¹⁹¹ Act on Higher Education and Science, Article 233(1)(5).

¹⁹² Act on Higher Education and Science, Article 360; see also Ombud, annual report for 2018, pp. 61-63.

¹⁹³ Act on Retirement and Disability Pensions from the Social Insurance Fund, 17 December 1998, Article 103a.

¹⁹⁴ 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).

¹⁹⁵ 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).

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

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,¹⁹⁷ 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 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 landmark case was decided by the Constitutional Tribunal, which answered a legal question formulated by the Łódź Regional Court:¹⁹⁸ 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'.¹⁹⁹

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

¹⁹⁷ Supreme Court, resolution of 21 January 2009, No. II PZP13/08.

¹⁹⁸ Łódź Regional Court, judgment of 23 October 2007, *Marek R. v Zakład Ubezpieczeń Społecznych*, No. P 10/07.

¹⁹⁹ 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.

if their employment has been terminated (if the individual continues to work for the same employer, the pension is suspended).²⁰⁰

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,²⁰¹ public prosecutors,²⁰² court enforcement officers (bailiffs)²⁰³ and notaries public.²⁰⁴

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 2017.²⁰⁵ 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.²⁰⁶ 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 [...]'.²⁰⁷

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)'.²⁰⁸

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.²⁰⁹

²⁰⁰ Act on Employees' Pension Programmes (*Ustawa z 20 kwietnia 2004 r. o pracowniczych programach emerytalnych*), 20 April 2004, Article 42(1) and (2).

²⁰¹ Law on Ordinary Courts Organisation, 27 July 2001, Article 69(1) and (3).

²⁰² Act on Public Prosecution, 28 January 2016, Article 127.

²⁰³ Act on Court Bailiffs (*Ustawa z dnia 22 marca 2018 r. o komornikach sądowych*), 22 March 2018, Article 19.1(2).

²⁰⁴ Law on Notaries Public, 14 February 1991, Article 16(1)(2a).

²⁰⁵ 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).

²⁰⁶ 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.

²⁰⁷ See: http://europa.eu/rapid/press-release_IP-17-5367_en.htm.

²⁰⁸ See: http://europa.eu/rapid/press-release_IP-17-5367_en.htm.

²⁰⁹ The ruling of the CJEU was delivered on 24 June 2019.

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.

The law protects all employees irrespective of age (with the exception described below, which is aimed at 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.²¹⁰ 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 permit age to be taken into account in selecting workers for redundancy, but only for the purpose of protecting a certain category of workers.

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.²¹¹

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

²¹⁰ Labour Code, 26 June 1974, Article 39.

²¹¹ Labour Code, 26 June 1974, Articles 39 and 40.

legislation.²¹² 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.²¹³ There is an exemption in the case of the bankruptcy or liquidation of the employer; in such cases, the above-mentioned provision does not apply.

b) Age taken into account for redundancy compensation

In Poland, national law provides compensation for redundancy. This is not affected by the age of the worker. It is affected by the wages and number of years of employment with 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 Further exceptions necessary in a democratic society: 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 morals²¹⁴ or the freedoms and rights of other persons. Such limitations must not violate the essence of freedoms and rights.²¹⁵

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)).

²¹² 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).

²¹³ Act on the Special Conditions of Termination of Employment Relations for Reasons not related to Employees, 13 March 2003, Article 5(6).

²¹⁴ Council Directive 2000/78/EC does not provide for justifications based on 'public morals'.

²¹⁵ 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/>.

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.).²¹⁶ It seems to be a theoretical doubt, however, as no such case has been identified.

²¹⁶ 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.²¹⁷ 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.²¹⁸

There is no case law identified concerning this issue.

b) Quotas in employment for persons with disabilities

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

The Persons with Disabilities Act contains the 'System of Quotas and Penalties' – a system of incentives and penalties for employers which aims to support the employment of persons 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 Persons with Disabilities Rehabilitation Fund (*Państwowy Fundusz Rehabilitacji Osób Niepełnosprawnych - PFRON*) for adapting existing workstations or creating new ones to meet the needs of persons with disabilities; adapting or buying equipment to help persons with disabilities to function at work; and having the needs of persons with disabilities identified by occupational health services.²¹⁹

Furthermore, an employer who employs persons with disabilities is entitled to receive a monthly subsidy for the remuneration of employees with disabilities.²²⁰ The amount of the subsidy is related to the level of impairment of the persons with disabilities who are employed, and is currently approximately PLN 2 400, PLN 1 350 or PLN 500 (EUR 513, EUR 288 or EUR 107), depending on the level of disability.²²¹ An employer may also receive

²¹⁷ Labour Code, 26 June 1974, Article 18(3b)(3).

²¹⁸ ETA commentary 2017, p. 190.

²¹⁹ Persons with Disabilities Act, 27 August 1997, Article 26.

²²⁰ Persons with Disabilities Act, 27 August 1997, Article 26a.

²²¹ As of 1 January 2023, the exchange rate was EUR 1.00=PLN 4.68.

a refund for the cost of a co-worker who helps a person with a disability in adapting to work and communicating.²²²

For employers (both public and private), there is a supplementary – this time negative – incentive to employ persons with disabilities. An employer who employs at least 25 employees is obliged to pay a monthly sum to the PFRON unless the proportion of their employees with a disability is at least 6 %.²²³ 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 % individuals with disabilities among all the people employed by the specific employer. According to the Act on the Civil Service,²²⁴ if the proportion of persons with disabilities employed in a public office is less than 6 %, an individual with a disability has priority in a recruitment process if they are among the five best candidates.²²⁵

²²² Persons with Disabilities Act, 27 August 1997, Article 26d.

²²³ Persons with Disabilities Act, 27 August 1997, Article 21(1-2).

²²⁴ Act on the Civil Service, (*Ustawa o służbie cywilnej z 21 listopada 2008*), Dz.U.2017.1889 t.j., 21 November 2008, Article 29a.

²²⁵ 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 persons with disabilities. The first case concerned access to a supermarket for a blind person with a guide dog. The case was settled and led to an amendment in legislation regulating the access of guide dogs to restaurants, grocery stores, etc.²²⁶ The second case concerned the refusal to allow access to a restaurant by a wheelchair user with an assistance dog. The court stated that such a refusal violated the protection of 'personal rights' and equal treatment in access to services offered to the public.²²⁷

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.

²²⁶ Warsaw Regional Court, judgment of 28 January 2009, No I C 498/08.

²²⁷ Warsaw Court of Appeal, judgment of 28 September 2011, No I ACa 300/11.

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.²²⁸

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.²²⁹ 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.²³⁰

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,²³¹ 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.²³²

²²⁸ 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.

²²⁹ 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 63¹ of the Code of Civil Procedure.

²³⁰ Ombud, annual report for 2020, p. 339.

²³¹ Code of Civil Procedure, 17 November 1964, Article 87(1).

²³² Code of Civil Procedure, 17 November 1964, Article 465(1).

In addition, in labour cases, claims are automatically exempted from court costs (with some exceptions).²³³

Petty crimes

The Law on Petty Crimes²³⁴ 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 1 068). 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 was held to be unconstitutional by a Constitutional Tribunal (see more in section 3.2.8, above). As underlined by the Ombud, 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.²³⁵ 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.

Criminal law

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

The Penal Code does not cover all cases of discrimination, but nevertheless criminal proceedings may be instituted in more serious cases, such as: the use of force or an illegal threat towards individuals or groups of people because of their national, ethnic, racial, political or religious affiliation;²³⁶ a public insult towards individuals or groups of people or the infringement of the personal integrity of another person on these same grounds;²³⁷ and the propagation of fascism and incitement to hatred based on national or ethnic origins, race or religion.²³⁸ 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

²³³ 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, Article 96.

²³⁴ Act on Petty Crimes (*Ustawa z dnia 20 maja 1971 r. Kodeks wykroczeń*) (Dz.U.1971.12.115), 20 May 1971.

²³⁵ Ombud, annual report for 2019, pp. 23-26.

²³⁶ Act on the Penal Code (referred to as the Penal Code) (*Ustawa o Kodeks karny*), 6 June 1997, Article 119(1).

²³⁷ Penal Code, 6 June 1997, Article 257.

²³⁸ Penal Code, 6 June 1997, Article 256.

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).²³⁹

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.²⁴⁰ 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.²⁴¹ 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).²⁴²

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.

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.²⁴³

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.²⁴⁴ 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.²⁴⁵

²³⁹ See information 'Administrative_Judiciary_Poland' available at the website of the Supreme Administrative Court: <http://www.nsa.gov.pl>, pp 1-4.

²⁴⁰ 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.

²⁴¹ Administrative Procedure Code, 14 June 1969, Article 145b(1).

²⁴² See Law on the Ombud, 15 July 1987, Articles 11-14.

²⁴³ Labour Code, 26 June 1974, Article 242.

²⁴⁴ Labour Code, 26 June 1974, Article 251.

²⁴⁵ Labour Code, 26 June 1974, Article 255(1).

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.²⁴⁶ 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.²⁴⁷ 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'.²⁴⁸

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.²⁴⁹ The administrative decision may be quashed within five years of it being served or announced.²⁵⁰

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.²⁵¹ 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.²⁵²

Moreover, an employee can terminate an employment contract without notice if the employer has severely violated their obligations towards the employee,²⁵³ and the employee can then bring a case against the employer.

When it comes to the directives' requirement for CSOs' effective participation (not formal, but real) it might not be fulfilled by the fact that the court may order an organisation to

²⁴⁶ See Code of Civil Procedure, 17 November 1964, Articles 184-186.

²⁴⁷ Labour Code, 26 June 1974, Article 291.

²⁴⁸ Civil Code, 23 April 1964, Article 118 (as amended in 2018).

²⁴⁹ Administrative Procedure Code, 14 June 1969, Article 145b(2).

²⁵⁰ Administrative Procedure Code, 14 June 1969, Article 146(1).

²⁵¹ Labour Code, 26 June 1974, Article 18(3e).

²⁵² Labour Code, 26 June 1974, Articles 44-45.

²⁵³ Labour Code, 26 June 1974, Article 55.

pay the reimbursement of trial costs to an opponent. This might create a freezing effect regarding CSOs' activity due to the financial risks involved.²⁵⁴

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 persons 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.²⁵⁵ 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.²⁵⁶ What is more, the cases for 2011 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).²⁵⁷

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.²⁵⁸ 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.

²⁵⁴ Kułak, M. (2021), pp. 34-35.

²⁵⁵ 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.

²⁵⁶ Ombud annual report for 2012, p. 451.

²⁵⁷ 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.

²⁵⁸ 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.

d) Registration of national court decisions on discrimination cases

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 comes to cases based on the Labour Code – some categories of discrimination cases were registered 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.²⁵⁹

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.²⁶⁰ 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).²⁶¹ 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.²⁶² It is, however, an academic doubt, as there are no known cases of such a limitation in practice.

²⁵⁹ 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).

²⁶⁰ Code of Civil Procedure, 17 November 1964, Article 8.

²⁶¹ 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.

²⁶² 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). 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'.²⁶³ 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).²⁶⁴

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.²⁶⁵

- 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.

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 indirect²⁶⁶ 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).²⁶⁷

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).²⁶⁸ 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.²⁶⁹

²⁶³ Administrative Procedure Code, 14 June 1969, Article 31(1).

²⁶⁴ Administrative Procedure Code, 14 June 1969, Article 31(3).

²⁶⁵ 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.

²⁶⁶ Please note the comment on the wording of the provision in point a), above.

²⁶⁷ Act amending the Code of Civil Procedure and some other acts, 2 July 2004, entered into force on 4 February 2005, Article 61.

²⁶⁸ Code of Civil Procedure, 17 November 1964, Article 63.

²⁶⁹ Constitutional Tribunal, judgment of 16 January 2006, No. SK 30/05, justification No. p. I. 8. p. III 2.2.

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'.²⁷⁰ 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).²⁷¹ 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.²⁷² 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,²⁷³ 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.

In 2009, Parliament passed a law on class action which entered into force on 19 July 2010.²⁷⁴ 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;

²⁷⁰ Administrative Procedure Code, 14 June 1969, Article 31(1).

²⁷¹ Administrative Procedure Code, 14 June 1969, Article 31(2-5).

²⁷² 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).

²⁷³ 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.

²⁷⁴ 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.

it is undertaken by lawyers representing clients. There are no amendments foreseen regarding collective redress mechanisms.²⁷⁵

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,²⁷⁶ 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,²⁷⁷ a compensation claim for non-material damage would require following general civil rules – again, without the shift in the burden of proof.²⁷⁸

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.

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.²⁷⁹

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

²⁷⁵ 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).

²⁷⁶ See point 6.1 above.

²⁷⁷ 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.

²⁷⁸ See interesting analyses on the burden of proof in the ETA commentary 2017, pp. 192-203.

²⁷⁹ ETA commentary 2017, Article 13.

burden of proof shift to the employer.²⁸⁰ 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.).²⁸¹ The protection goes beyond the scope of the Directive and extends to a person who in any way supports someone exercising their rights²⁸² (such as a witness or a person helping the victim to bring a complaint).²⁸³ In the case of victimisation, the victim may file the same compensation claims as a victim of discrimination.²⁸⁴

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.²⁸⁵

In the employment field, the previous provisions continue to exist simultaneously with the ETA. Any adverse treatment and any negative consequences are prohibited (Article 18(3e)(1) of the Labour Code). This Labour Code protection covers complainants but also extends to employees who in any way support a victim of discrimination (Article 18(3e)(2)). The national courts in employment cases confirm the broad understanding of the very concept of 'exercise of rights available by virtue of a breach of the principle of equal treatment'. It cannot be equated merely with bringing a claim against the person who has breached the prohibition of discrimination, but covers any lawful action taken in relation to such breaches,²⁸⁶ including seeking to clarify the allegation of unequal treatment²⁸⁷ or to confirm its existence²⁸⁸ or, finally, to report such treatment which takes place according to the subjective perception of the person concerned.^{289,290}

As the Supreme Court elaborated, 'There is no doubt that any lawful action²⁹¹ undertaken by an employee in relation to a breach of the principle of equal treatment cannot lead to any negative consequences. Furthermore, the phrase 'exercise of rights by the employee' cannot be equated only with the employee making claims against the employer. This notion undoubtedly also includes the employee's actions leading to the confirmation of their existence.²⁹² In the event of a potential dispute, it will be the employer's responsibility to prove that the dismissal or worsening of the conditions of employment of the employee is not connected with actions taken by the employee in connection with a breach of the principle of equal treatment. A distinction must be made between grounds for

²⁸⁰ 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.

²⁸¹ Equal Treatment Act, 3 December 2010, Article 17(1).

²⁸² Equal Treatment Act, 3 December 2010, Article 17(2).

²⁸³ See ETA commentary 2017, p. 232.

²⁸⁴ Equal Treatment Act, 3 December 2010, Article 17(3) and Article 13.

²⁸⁵ Equal Treatment Act, 3 December 2010, Article 3(5).

²⁸⁶ Supreme Court, resolution of 4 June 2019, II PK 140/18.

²⁸⁷ Supreme Court, judgment of 26 May 2011, II PK 304/10.

²⁸⁸ Supreme Court, judgment of 15 July 2011, I PK 12/11.

²⁸⁹ District Court in Gdynia, judgment of 16 August 2019, IV P 405/18.

²⁹⁰ Kułak, M. (2021), pp. 6-37.

²⁹¹ LB: it could be also translated as lawful activities, as court does not limit it in any way.

²⁹² Sanetra, W. in Iwulski, J. and Sanetra, W. (2009), 'Komentarz do Kodeksu pracy' (Commentary on the Labour Code), Warsaw, p. 161.

discrimination and grounds for termination. Both issues must be examined separately. This is what happened in this case.²⁹³

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 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).²⁹⁴

However, the ETA refers to compensation (*odszkodowanie*) only, which covers material but not non-material damage and therefore limits protection.²⁹⁵

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 444 and 445 provide for safeguards and compensation for the harm (*zadośćuczynienie*) in case of injury. Articles 445 and 448 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 2022, a gross salary of PLN 3 010 (EUR 643) 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'.²⁹⁶

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

²⁹³ Supreme Court, resolution of 4 June 2019, II PK 140/18.

²⁹⁴ Equal Treatment Act, 3 December 2010, Articles 13(2) and 14(1).

²⁹⁵ 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.

²⁹⁶ Supreme Court, judgment of 9 May 2019, III PK 50/18; OSNP 2020/5, item 42; quoted in: 'Protection against discrimination in Poland' (2020), p. 27.

solutions lies with the employee, but the labour court rules on the advisability or possibility of the individual returning to work.²⁹⁷

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.²⁹⁸ 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.²⁹⁹ 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 PLN 3 000 (EUR 641).³⁰⁰ 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.³⁰¹

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 2022, a gross salary of PLN 3 010 (EUR 643) per month).³⁰²

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)).³⁰³ 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

²⁹⁷ 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).'

²⁹⁸ Labour Code, 26 June 1974, Article 55(1).

²⁹⁹ Labour Code, 26 June 1974, Article 94(2b).

³⁰⁰ Employment Act, 20 April 2004, Article 121(3).

³⁰¹ Employment Act, 20 April 2004, Article 123.

³⁰² The level of the minimum wage is set each year by the Regulations on the Minimum Wage.

³⁰³ Ombud, annual report for 2013, p. 92.

the claimant YZ and PLN 1 000 (EUR 250) to the PTPA as the CSO acting on his behalf. In a 2019 case, the court awarded PLN 5 000 (EUR 1 200) plus costs.³⁰⁴

Generally, in civil cases, the level of compensation awarded for 'moral loss' or 'suffering'³⁰⁵ 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.³⁰⁶ The law grants discretion to judges, stating that they should determine 'an appropriate amount'³⁰⁷ 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.³⁰⁸

In one labour case, 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'.³⁰⁹

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 as the equality body. In the Ombud's view, the compensation provision under the Act should be widened to include non-material damage.³¹⁰ 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.³¹¹

In the first landmark case decided under Article 13 of the ETA (mentioned in section 2.3 above),³¹² the court of first instance awarded the claimant material damages only and refused to grant non-material damages. The claimant appealed against the ruling, arguing

³⁰⁴ Toruń District Court, judgment of 6 August 2019, No. I C 469/18; see more information in section 3.2.7 of this report.

³⁰⁵ Civil Code, 23 April 1964, Articles 445 and 448.

³⁰⁶ 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.

³⁰⁷ Civil Code, 23 April 1964, Article 445.

³⁰⁸ Supreme Court, judgment of 4 February 2008, No. III KK 349/2007.

³⁰⁹ Supreme Court, judgment of 9 May 2019, No. III PK 50/18, OSNP 2020, nr 5, item 42.

³¹⁰ Ombud, *Bulletin* 2012/2, pp. 78-79.

³¹¹ Ombud, annual report for 2016, pp. 155-156.

³¹² 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).

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 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, in a landmark 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.³¹³ 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'.³¹⁴

³¹³ Toruń District Court, judgment of 6 August 2019, No. I C 469/18; see more information in section 3.2.7 of this report.

³¹⁴ Warsaw Regional Court, judgment of 29 September 2020 r., No. V Ca 2686/19 (not published), quoted in: 'Protection against discrimination in Poland' (2020), p. 26.

7 BODY FOR THE PROMOTION OF EQUAL TREATMENT (Article 13 Directive 2000/43)

7.1 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 Rights³¹⁵ (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 Ombud operates through its main offices in Warsaw but also through Field Plenipotentiaries of the Commissioner for Human Rights in [Katowice](#), [Gdańsk](#) and [Wrocław](#). Each of the field offices is responsible for three regions, where it coordinates the work of the Ombud and receives complaints. Until November 2021, social advisory councils operated in Warsaw and three field offices. They supported the Ombud in the implementation of its statutory tasks, and they also help field plenipotentiaries in their work. They prepared opinions, expert opinions and positions.³¹⁶ Apart from the permanent activity of the field offices, the Ombud also organises duty hours in other places. In 2022 such duty hours were organised in: Bydgoszcz, Koszalin, Kraków, Lublin, Szczecin, Wałbrzych.³¹⁷ The Ombud is also present on social media platforms: Facebook, Twitter, LinkedIn, YouTube and Instagram.

The services of the Ombud are accessible on an equal basis for all and without cost. When it comes to the accessibility of the Ombud's offices, according to the Ombud's report,³¹⁸ three out of five buildings are fully accessible. In the other two, which are partially accessible, clients may receive assistance from the security office. The Ombud has a declaration of partial accessibility when it comes to its websites and mobile applications. The office provides the opportunity to use the assistance of a sign language interpreter and has devices and technical means to serve persons with hearing impairments.

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. The services of the Plenipotentiary are accessible on an equal basis for all and without cost. Between 2016 and 2020, the function of the Government Plenipotentiary for Equal Treatment was conducted by a 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).³¹⁹ 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

³¹⁵ 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'.

³¹⁶ In 2021, the newly appointed Ombud resigned from these advisory bodies and terminated their activities.

³¹⁷ See: <https://bip.brpo.gov.pl/pl/content/punkty-przyjec-interesantow>.

³¹⁸ Ombud (2021), *Public entity accessibility status report for MINISTRY OF FUNDS AND REGIONAL POLICY (Raport o stanie zapewniania dostępności podmiotu publicznego, MINISTERSTWO FUNDUSZY I POLITYKI REGIONALNEJ)*, see: https://bip.brpo.gov.pl/sites/default/files/atoms/files/Raport_dostepnosc_BRPO_2021_wydruk_w_formie_do_stepnej.pdf.

³¹⁹ 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.

Minister was appointed to the function of the Plenipotentiary for Equal Treatment). The relevant Article 20(3) of ETA was amended.³²⁰

7.2 Political, economic and social context of the designated body

There is evidence of political hostility to the governance of the designated body during the previous 2015-2021 term. After the parliamentary elections in October 2015, the Ombud faced various political attacks (including calls and even campaigns demanding that the appointment of the (then) Ombud, Dr Adam Bodnar, should be revoked by the Parliament because he represented liberal-leftist views, supported LGBT people etc.). Both politicians³²¹ (as confirmed by the spokeswoman for the ruling party)³²² and the legal think-tank Ordo Iuris³²³ 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 Bodnar. They have accused him of not remaining neutral and of being politically engaged (the Ombud defended the 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.

In July 2021, the Parliament elected the next Ombud, Dr Marcin Wiącek, who is head of the Department of Human Rights at the Faculty of Law and Administration of the University of Warsaw and specialises in constitutional law and human rights. With this appointment, the position of the office changed. The new Ombud is less outspoken when it comes to the overall situation with the rule of law backsliding, and is therefore seen by the world of politics as less controversial. This has resulted, for instance, in a better budgetary situation (see section 7.4.c, below).

The personnel policy of the new Ombud has aroused controversies. The changes include, among others, the dismissal of the deputy Ombud, Dr. Hanna Machińska, which provoked numerous protests, and the appointment of males only as deputies. Thus, the Ombudsman and his three deputies are now men.

Since the change of the Government in 2015, the Ombud office has experienced financial difficulties. If one compares the various public institutions, it was clearly noticeable that the budgets of the others were increasing significantly. The Ombud's Office was probably the last to face such financial restraints (after the Constitutional Tribunal was – as experts have stated – taken over by the ruling party and its budget increased as a result).³²⁴

³²⁰ 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.

³²¹ 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>.

³²² See: <http://300polityka.pl/news/2016/11/05/po-wypowiedzi-mazurek-do-odwolania-bodnara-potrzeba-35-glosow-pis-musialoby-szukac-wsparcia-u-opozycji/>.

³²³ See: <http://www.maszwpływ.pl/adam-bodnar-musi-odejsc-57,k.html>.

³²⁴ 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>.

7.3 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)³²⁵ – 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. Since 2015, there has been an Equal Treatment Department with two units: the Discrimination Law Unit and the Migrants' and National Minorities' Rights Unit.³²⁶

7.4 Status of the designated body – general independence and resources

a) Status of the body

- Separate or other legal status or personality: an independent body elected by the Parliament.

The Ombud (the Commissioner for Human Rights) is an independent body elected by and accountable to the Parliament.³²⁷ The Ombud's Office is a national human rights institution with additional mandates.

- Selection of governing body: by the Parliament.

The Ombud is appointed by the Sejm, subject to the approval of the Senate, for a five-year term.

- Sources of funding: state budget decided by a Parliament.

The budget of the Ombud's Office comes from the central state budget and is approved by the Parliament.

- Powers to recruit and manage staff: independent by Ombud within financial limitations.

Within the given budget, the Ombud appoints deputy ombuds and recruits staff independently.

- Accountability: to the Parliament (annual reports).

The Ombud informs the Sejm and the Senate annually on its activities and the reports are available to the public.³²⁸ From 2012 until 2020, as a separate part of the annual report,

³²⁵ 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.

³²⁶ Ombud, annual report for 2015, pp. 11-12; annual report for 2016, p. 15, annual report for 2018, p. 14.

³²⁷ Law on the Ombud, 15 July 1987, Articles 3, 5 and 7.

³²⁸ 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>.

the Ombud published an additional report on activities relating to equality and discrimination. Since 2020, there has been one general report only.³²⁹

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.

b) Independence of the body

The Ombud is an independent body and is accountable to the Parliament.³³⁰ 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 Law on the Ombud) emphasises that activities relating to equal treatment are to be undertaken independently.

The Ombud can definitely be considered to be independent in practice. However, those in power occasionally attempt to undermine this independence by applying various pressures, such as the budget decisions or the critique, as mentioned below.

³²⁹ Ombud (2023), draft annual report.

- Ombud (2022), *Information on the activities of the Commissioner for Human Rights and on the observance of human rights and freedoms in the year 2021* (Informacja o działalności Rzecznika Praw Obywatelskich oraz o stanie przestrzegania wolności i praw człowieka i obywatela w roku 2021), Warsaw [referred to in this report as 'Ombud, annual report for 2021'].
- 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/qfx/senat/userfiles/public/k8/dokumenty/druki/300/345.pdf>. In June 2013, the Ombud published the final version on its website, with the same content but 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'].

³³⁰ Law on the Ombud, 15 July 1987, Articles 3, 5 and 7.

c) Resources

- Annual budget of the body: in 2022, PLN 59 million (EUR 12.6 million).
- Share of the annual budget dedicated to the equality body mandate: no such information.
- Total number of staff of the body: in the last decade, between 290 and 300 employees.
- Number of staff dedicated to the equality body mandate: 11 in 2022.

Since the change of Government in 2015, 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. A similar 'critique' was also formulated by the Parliamentary Committee on Justice, which issued a negative opinion on the draft budget for 2018.³³¹ MPs from the ruling coalition attacked the Ombud for being focused 'on pathological groups' (by which they meant LGBTQI people). In the opinion of the Ombud, the resources provided for the Office were and are not adequate for the realisation of the Ombud's designated tasks.³³²

The financial difficulties of the Ombud were also recognised by CERD in its 2019 *Concluding observations* report on Poland.³³³ 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 of Equal Treatment, with the human and financial resources necessary to enable it to fully discharge its mandates in an independent and impartial manner.'

However, the situation is improving after the election of the new Ombud in 2021. The Ombud's budget for 2021 was increased from the state financial reserve during the year, and the budget for 2022 increased significantly (the additional money were not dedicated to the equality issues). In the table below the row C. represents most relevant figure as it shows the Ombud's expenditure fund, excluding modernisation funds.

³³¹ See: <https://www.rpo.gov.pl/en/content/parliamentary-committee-justice-issued-negative-opinion-chr%E2%80%99s-draft-budget-2018>.

³³² All budgetary information provided is based on information prepared by the Ombud's Office.

³³³ 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.

Table. Financial resources of the Ombud (in millions, PLN/EUR; the exchange rate: EUR 1 = PLN 4.5)³³⁴

	2015	2016	2017	2018	2019	2020	2021	2022
A. Projected	PLN 41.9 (EUR 9.3)	PLN 45.5 (EUR 10.1)	PLN 41 (EUR 9.1)	PLN 42.6 (EUR 9.4)	PLN 48.1 (EUR 10.6)	PLN 59.7 (EUR 13.2)	PLN 60.5 (EUR 13.4)	PLN 59.9 (EUR 13.3)
B. Received	PLN 38.6 (EUR 8.5)	PLN 35.6 (EUR 7.9)	PLN 37.1 (EUR 8.2)	PLN 39.4 (EUR 8.7)	PLN 40.8 (EUR 9.0)	PLN 45.2 (EUR 10.0)	PLN 51.1 (EUR 11.3)	PLN 59.1 (EUR 13.1)
C. Current expenses	PLN 38.6 (EUR 8.5)	PLN 34.6 (EUR 7.6)	PLN 35.2 (EUR 7.8)	PLN 35.4 (EUR 7.8)	PLN 35.9 (EUR 7.9)	PLN 38.7 (EUR 8.6)	PLN 39.5 (EUR 8.7)	PLN 51.1 (EUR 11.3)

A. Draft budget: funds requested;

B. Financial plan: funds received;

C. Funds allocated for current expenditure, excluding modernization funds.

In total, there are currently 11 members of staff working on the equality mandate: five persons in the Discrimination Law Unit and four persons in the Migrants' and National Minorities' Rights Unit, plus the head of the Department and a secretary. The level of staffing has remained more or less stable in recent years.

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.

7.5 Grounds covered by the designated body

The Law on the Ombud 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,³³⁵ 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.

³³⁴ Data from a letter of the Ombud to the Ministry of Foreign Affairs within the UPR process (*Środki finansowe RPO (w PLN) – dane z pisma RPO do MSZ ws. UPR, VII.071.30.2022*).

³³⁵ 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.

7.6 Competences of the designated body – and their independent exercise

The Ombud is the institution which possesses the strongest instruments to intervene in cases of discrimination.

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.³³⁶ 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 Law on the Ombud) 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.³³⁷ 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.³³⁸

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.

³³⁶ 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/>.

³³⁷ See <https://www.rpo.gov.pl/en/content/what-does-commissioner-human-rights-do>; for more detail, see Law on the Ombud, 15 July 1987, available at: <https://www.rpo.gov.pl/en/content/act-commissioner-human-rights>.

³³⁸ Law on the Ombud, 15 July 1987, Article 17b.

a) Independent assistance to victims

The Ombud has the competence to provide independent assistance to victims (this competence is exercised by the Ombud's office employees and not delegated to a third party).³³⁹ 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.³⁴⁰ 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.³⁴¹ M. Kułak argues that *providing information* means less than *providing assistance* required by the directives, and therefore the implementation is not adequate.³⁴²

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.³⁴³

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 impact litigation in courts. 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.

³³⁹ Information received from the Ombud's office.

³⁴⁰ Law on the Ombud, 15 July 1987, Article 11.

³⁴¹ See annual Ombud reports. See also ETA commentary 2017, pp. 259-261.

³⁴² Kułak, M. (2021), pp. 45-47.

³⁴³ Law on the Ombud, 15 July 1987, Article 12.

b) Independent surveys and reports

The Ombud has the competence to conduct independent surveys and publish independent reports.³⁴⁴ 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 Persons with Disabilities, the Rights of Elderly People and the Rights of Migrants were the first of these to be set up.³⁴⁵ Others, such as the expert committees on Mental Health Protection, Deaf People, Health and Counteracting Homelessness, then followed.³⁴⁶

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:

- Information on activities undertaken by the Commissioner for Human Rights to protect the rights of national and ethnic minorities in the years 2020-2022 (2023).³⁴⁷
- Support for the elderly during the pandemic. Research report on the situation of people aged 60+ during the COVID-19 pandemic in Poland (2022).³⁴⁸
- Equal treatment at school – Report of a survey in schools and a quantitative analysis of educational and preventive programmes (2021).³⁴⁹
- Proceedings in cases for determination of gender identity – a guide for judges and attorneys (2020).³⁵⁰
- Accessibility of health care services for persons with disabilities - analysis and recommendations (2020).³⁵¹
- Protection against discrimination in Poland. Legal status and social awareness. Conclusions and recommendations of the Ombud (2020).³⁵²

³⁴⁴ Law on the Ombud, 15 July 1987, Article 17b.

³⁴⁵ Ombud, annual report for 2016, pp. 15, 109-123.

³⁴⁶ See list of the committees at: <https://bip.brpo.gov.pl/content/komisje-ekspertow>.

³⁴⁷ Ombud (2023), *Information on activities undertaken by the Commissioner for Human Rights to protect the rights of national and ethnic minorities in the years 2020-2022* (Informacja o działaniach podejmowanych przez Rzecznika Praw Obywatelskich na rzecz ochrony praw mniejszości narodowych i etnicznych w latach 2020 – 2022), available at: https://bip.brpo.gov.pl/sites/default/files/2023-01/Raport_RPO_mniejszosci_narodowe_etniczne_2020-2022_styczen2023.pdf.

³⁴⁸ Ombud (2022), *Support for the elderly during the pandemic. Research report on the situation of people aged 60+ during the COVID-19 pandemic in Poland* (*Wsparcie osób starszych w czasie pandemii. Raport z badania na temat sytuacji osób w wieku 60+ w czasie pandemii COVID-19 w Polsce*), available at: <https://bip.brpo.gov.pl/sites/default/files/2022-09/Raport%20RPO%20-%20Wsparcie%20osob%20starszych%20w%20czasie%20pandemii%20-%20wersja%20dostepna.pdf>.

³⁴⁹ Ombud (2021), *Equal treatment at school – Report of a survey in schools and a quantitative analysis of educational and preventive programmes* (*Równe traktowanie w szkole. Raport z badania w szkołach oraz analiza ilościowa programów wychowawczo-profilaktycznych*), available at: <https://bip.brpo.gov.pl/pl/content/rpo-raport-rowne-traktowanie-szkola>.

³⁵⁰ 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>.

³⁵¹ Ombud (2020), *Accessibility of health care services for persons 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>.

³⁵² 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-spoeczna>.

- Legal situation of non-heterosexual and transgender people in Poland (2020).³⁵³
- Equal treatment based on religion in employment – analysis and recommendations (2018).³⁵⁴
- Experience of harassment among female students – analysis and recommendations (2018).³⁵⁵
- Crimes motivated by prejudice – analysis and recommendations (2017).³⁵⁶
- Personal assistants for persons with disabilities – analysis and recommendations (2017).³⁵⁷

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. Such consultations have not taken place in recent years due to a shortage of funds.

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).

The Ombud does not engage in strategic planning and does not adopt a multi-annual programme setting out its priorities and prospective activities. However, the Ombud occasionally adopts individual internal strategies on specific issues in order to monitor relevant developments (for instance, regarding local government resolutions on 'LGBT ideology'; see more at 11.2, below). This can be noticed in strategic litigation undertaken by the office as well as in particular subjects being kept live, sometimes for years, with work undertaken periodically, for instance in 'general statements'.

³⁵³ 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_prawnaRaport_ZRT.pdf.

³⁵⁴ 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>.

³⁵⁵ 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%20C%202018.pdf>.

³⁵⁶ 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/Przestępstwa%20motywowane%20uprzedzeniami%20ZRT%20nr%2023%202017.pdf>.

³⁵⁷ Ombud (2017), *Personal assistants for persons 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>.

c) Recommendations

The Ombud has the competence to issue independent recommendations on discrimination issues.³⁵⁸ The Ombud issues 'general problem statements' (*wystąpienia generalne/problemowe*) on the basis of complaints regarding equal treatment and research. The number of statements in each year is as follows: 20 (2019), 56 (2020) 35 (2021) and 29 in 2022.³⁵⁹ 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.³⁶⁰ 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, for example, 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 of 50 complaints, the general statement was not successful.³⁶¹ In 2019, 36 complaints resulted in 'general statements', and in 29 cases the problem was solved.³⁶²

d) Prevention, promotion and awareness-raising

In connection with the implementation of the EU directive on work-life balance,³⁶³ work was under way in 2022 on an amendment to the Law on the Ombud, according to which the Ombud would be responsible for promoting the issue of equal treatment (new Article 17.b.1, not passed yet). In practice, however, the Ombud promotes these issues and raises awareness in various fields, through social media, publications (including guidebooks), participation in seminars and conferences, cooperation with social organisations and similar.

The Ombud also provides information on equal treatment at the request of various entities (for example, recommendations for private e-commerce entities on the availability of services for people with disabilities).

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

³⁵⁸ Law on the Ombud, 15 July 1987, Article 17b.

³⁵⁹ 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; Ombud, annual report for 2021; Ombud, annual report for 2022, draft.

³⁶⁰ 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.

³⁶¹ Ombud, annual report for 2018, pp. 163-164.

³⁶² Ombud, annual report for 2019, pp. 559-573. Detailed data for 2020 and subsequent years is not available as there are no separate reports 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](https://www.rpo.gov.pl).

³⁶³ Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019 on work-life balance for parents and carers and repealing Council Directive 2010/18/EU.

treatment of everyone.³⁶⁴ 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*)³⁶⁵ are a good example, as they were a new initiative undertaken by the previous Ombud (until 2021). 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.

e) 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.³⁶⁶

7.7 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 (meaning the Ombud may bring a complaint both on behalf of the victim and independently; the Ombud acts as a party); take part in any pending civil case or administrative proceedings; request the institution of preparatory proceedings by a competent prosecutor in the case of offences prosecuted *ex officio*; and apply to administrative bodies to implement measures laid down by law.³⁶⁷ 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).³⁶⁸

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.

³⁶⁴ Law on the Ombud, 15 July 1987, Article 17b.

³⁶⁵ 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](https://www.rpo.gov.pl).

³⁶⁶ Law on the Ombud, 15 July 1987, Article 13.

³⁶⁷ Law on the Ombud, 15 July 1987, Article 14.

³⁶⁸ Law on the Ombud, 15 July 1987, Article 16.

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.

7.8 Dispute resolution

a) Quasi-judicial functions

In Poland, the designated body is not a quasi-judicial institution.

The body cannot issue binding enforceable decisions. It cannot impose sanctions. It can, however, formulate its opinion in different forms including within the court procedure (*amicus curiae* brief), in a letter to authorities, in order to illustrate the 'general statement' or just in order to communicate the issue to the public (see, for example, information on Roma cases in section 3.2.9.a above).

b) Amicable settlements

The Ombud does not conduct a formal mediation or negotiation – this is not included in the catalogue of measures under Article 14 of Law on the Ombud. It may, however, offer advice and suggest amicable resolution to the interested parties by highlighting existing opportunities under the law (see point 6.1 above). This is rather a matter of practice, but there are no legal limitations to it. Even if the Ombud does not in practice play the role of mediator in individual cases in a way that would be formalised (a meeting of parties with a mediator), it still may act on behalf of the party in a letter to the institution involved.

If that happened (direct mediation) and the Ombud decided later also to litigate a particular case, there are no specific regulations regarding the Ombud in such a situation. Possible rules in order to avoid a conflict of interest etc. would therefore be used most probably *per analogiam* with other regulations.

One example might be in the case of Roma settlements, where the Ombud investigated the case (on site visits) and litigated it, but also proposed conciliation (focusing on convincing the local authorities involved in the case).

7.9 Procedural safeguards

As a state body, the Ombud is obliged to act on the basis and within the limits of the law (Article 7 of the Constitution).³⁶⁹ The Ombud is a body that carries out several mandates and is entrusted with several powers.

When it comes to the procedural aspects relating to the Ombud as the body competent in matters of equal treatment, the ETA³⁷⁰ specifies only that the Ombud performs tasks related to the implementation of the principle of equal treatment on the terms and in the manner specified in separate regulations.

In the case of the Ombud's competences, there is no conflict of interest and there is no doubt as to its impartiality. It should be underlined that the Ombud is also a law protection body, i.e. assessing cases through the prism of specific standards of legal protection of human rights, possibly acting on behalf of a given person. The Ombud does not, however, act as a victim's advocate. The Ombud may bring a complaint without the request or approval of the victim and becomes a separate party to the case.

³⁶⁹ 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/>.

³⁷⁰ Equal Treatment Act, Article 19.

Deciding and reporting on participation in the proceedings before the court (joining or lodging a complaint) takes place after the particular case is examined by the Ombud, as part of the on-going explanatory proceedings.³⁷¹ The Ombud decides to use specific procedural rights after collecting relevant information – there is a clear distinction between the different competences of (1) examining a case and determining whether or not discrimination has taken place, and (2) eventually joining a complaint before the courts or lodging a complaint on behalf of a victim (or *ex officio*).

The specificity of the Ombud's activities should also be noted: as a body controlling public authorities – acting for the benefit of citizens (which limits its activity in horizontal matters); as a body promoting standards of human rights protection – proceedings in which the Ombud is involved should also benefit not only the party alleging discrimination, but also more generally – obtaining a verdict confirming a specific level of protection.

When it comes to the theoretical risks regarding conflict of interest and similar considerations, there are no separate rules regarding the Ombud. However, the Ombud employs lawyers, advocates and legal advisors, who are bound by the relevant standards of professional conduct. The Ombud's employees are also bound by the legislation regarding civil servants, which includes the obligation to perform tasks reliably, fairly and impartially.

7.10 Data collection by the designated body

a) Registration 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 for 2020 the general number of complaints is known, but the data is not disaggregated by grounds. 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: 511 in 2022;³⁷² 436 in 2021;³⁷³ 752 in 2020;³⁷⁴ 571 in 2019;³⁷⁵ and 626 in 2018³⁷⁶.

The Ombud's Office divides complaints received into the following categories (number of cases and their share as a percentage of the total).³⁷⁷ As mentioned above, the figures for 2020 are not known, apart from the overall number of complaints.

³⁷¹ Law on the Ombud, Article 11-14.

³⁷² Ombud, annual report for 2022 (draft), p. 31.

³⁷³ Statistical Information Department, information and statistical data in the field of equal treatment for 2021 (*Dane informacyjno-statystyczne z zakresu problematyki równego traktowania za 2021r.*), not published. The information is not provided, unlike in previous years, in the Ombud's annual report for 2021.

³⁷⁴ Ombud, annual report for 2020, p. 635. Ombud, annual report for 2022 (draft), p. 30.

³⁷⁵ Ombud, annual report for 2019, pp. 559-573.

³⁷⁶ Ombud, annual report for 2018, pp. 159-160.

³⁷⁷ Based on: Ombud, annual report for 2022 (draft), p. 31; annual report for 2015, p. 111; annual report for 2016, pp. 171-172; annual report for 2018, pp. 159-160, annual report for 2019, pp. 559-573; Statistical Information Department, information and statistical data in the field of equal treatment for 2021 (*Dane informacyjno-statystyczne z zakresu problematyki równego traktowania za 2021r.*), not published. 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.

Matter	2015	2016	2017	2018	2019	2021	2022
Principle of equality before the law	13 1.7 %	15 2.4 %	6 1.1 %	3 0.5 %	1 0.2 %	2 0.5 %	4 0.8 %
Prohibition of unequal treatment/discrimination	28 3.6 %	27 4.3 %	18 3.2 %	15 2.5 %	14 2.5 %	17 3.9 %	22 4.3 %
based on sex	55 7.0 %	60 9.7 %	49 8.8 %	80 12.8 %	101 17.7 %	75 17.2 %	56 11 %
based on religion or belief	45 5.7 %	28 4.5 %	23 4.1 %	27 4.3 %	42 7.4 %	10 2.3 %	6 1.2 %
based on sexual orientation	59 7.5 %	59 9.5 %	48 8.6 %	34 5.4 %	110 19.3 %	22 5.0 %	28 5.5 %
based on age	46 5.8 %	43 6.9 %	24 4.3 %	37 5.9 %	40 7 %	19 4.4 %	14 2.7 %
based on nationality	76 9.7 %	45 7.2 %	84 15 %	72 11.2 %	76 13.3 %	47 10.8 %	79 15.5 %
based on disability	238 30.2 %	211 33.9 %	161 28.7 %	156 24.9 %	87 15.2 %	148 33.9 %	210 41.1 %
of social and occupational groups	6 0.8 %	3 0.5 %	1 0.2 %	2 0.3 %	1 0.2 %	4 0.9 %	n/a
related to taxes	6 0.8 %	3 0.5 %	2 0.4 %	n/a	3 0.5 %	n/a	n/a
of people without a registered place of permanent residence	5 0.6 %	3 0.5 %	4 0.7 %	4 0.6 %	n/a	4 0.9 %	n/a
based on race and ethnic origin	30 3.8 %	18 2.9 %	40 7 %	26 4.2 %	12 2.1 %	2 0.5 %	18 3.5 %
based on worldview/opinions ³⁷⁸ (including non-denominational, non-religious) ³⁷⁹	9 1.1 %	2 0.3 %	1 0.2 %	5 0.8 %	3 0.5 %	8 1.8 %	4 0.8 %
based on political opinions	9 1.1 %	1 0.2 %	1 0.2 %	5 0.8 %	4 0.6 %	1 0.2 %	n/a
based on sexual identity	8 1.0 %	9 1.5 %	9 1.6 %	12 1.9 %	30 5.3 %	19 4.4 %	30 5.9 %
related to legal and material/property status	15 1.9 %	4 0.6 %	8 1.4 %	5 0.8 %	3 0.5 %	1 0.2 %	n/a
based on education or occupation	5 0.6 %	7 1.1 %	1 0.2 %	2 0.3 %	1 0.2 %	3 0.7 %	3 0.5 %

³⁷⁸ The term used for 'worldview' is *Światopogląd*.

³⁷⁹ The term used for 'non religious' is *Bezwyznaniowość*.

Matter	2015	2016	2017	2018	2019	2021	2022
based on social origin		0	n/a	n/a	2 0.3 %	n / a 0.5 %	n/a
based on other reasons	143 18.2 %	84 13.5 %	80 14.3 %	139 22.2 %	43 7.5 %	52 11.9 %	37 7.2 %

	2015	2016	2017	2018	2019	2020	2021	2022
Number of complaints per year	810	624	560	626	571	752	436	511
Number of complaints where the Ombud simply informed the parties about other means of action and legal measures to which individuals are entitled	292	229	187	170	188	n/a	n/a	n/a

b) Equality data collection

In Poland, the designated body does not collect general equality data.

The problem of collecting equality data is profound, as in fact very little data is collected by anyone. Changes in this area have been postulated for years. This is also reflected (once again) in the new National Action Programme for Equal Treatment for the years 2022-2030.³⁸⁰

7.11 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 subsequent programmes for the integration of the Roma community. The Roma programmes alone, however, are 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

³⁸⁰ Resolution No. 113 of the Council of Ministers of 24 May 2022 on the establishment of the National Action Programme for Equal Treatment for the years 2022-2030 (*UCHWAŁA NR 113 RADY MINISTRÓW z dnia 24 maja 2022 r. w sprawie ustanowienia Krajowego Programu Działań na rzecz Równego Traktowania na lata 2022-2030*); Monitor Polski, 5 July 2022 r., Poz. 640, see: <https://www.gov.pl/web/rownetraktowanie/krajowy-program-dzialan-na-rzecz-rownego-traktowania-2022-2030>.

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.³⁸¹ According to the Ombud, due to the exclusion they experience on a daily basis, Roma may have limited access to information on risks regarding Covid 19, protection measures and medical assistance. Local authorities have a duty to safeguard the health of all their citizens as equally as possible.³⁸²

³⁸¹ See: <https://www.rpo.gov.pl/pl/content/koronawirus-rpo-pyta-o-sytuacje-imigrantow-romskich-mieszkajacych-we-wroclawiu-gdansku-i-poznaniu>; <https://www.rpo.gov.pl/pl/content/koronawirus-wojt-gminy-o-pomocy-dla-osiedla-romskiego-w-maszkowicach>.

³⁸² 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-gdansku-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, in the opinion of the author, awareness of equal treatment and the need to safeguard non-discrimination is slowly but surely increasing in Poland,³⁸³ although it cannot yet be deemed satisfactory.

Because of this, the Ombud decided in 2013 to focus its research on under-reported issues and find out why victims of discrimination do not report it.³⁸⁴ 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, 81 % in 2020 and 87 % in 2021).³⁸⁵ 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.³⁸⁶ 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.

In the Ombud's opinion, the phenomenon of underreporting persists – data presented by state authorities do not reflect the real scale of events of a xenophobic and antisemitic nature.³⁸⁷ There is also still no publicly available statistical information on cases of crimes committed with racist, antisemitic or xenophobic motives, which until 2018 were published on the website of the National Prosecutor's Office. The Ombud notes that the lack of information and adequate reaction of the relevant authorities to incidents, including those fulfilling the elements of a prohibited act, may discourage victims from sending notices and create a feeling of impunity of perpetrators.³⁸⁸

The Ombud also notes that public authorities do not conduct education and information campaigns to combat hate speech and incitement to hatred and hate crimes, nor campaigns to address issues of prejudice and negative attitudes towards groups and individuals belonging to different minorities that are particularly vulnerable to

³⁸³ For instance, due to activities of the Ombud since it became the Equality Body, activities of civil society and numerous civil society organisations focusing on discrimination and activities within the legal profession (dedicated to lawyers and judges) focused on discrimination.

³⁸⁴ Ombud, annual report for 2013, p. 10.

³⁸⁵ Ombud, research commissioned from Kantar Public on 'Legal awareness in the context of equal treatment', Kantar 2021, 2020, 2018, 2016, 2015. In 2022, such research was not commissioned.

³⁸⁶ Ombud, annual report for 2016, pp. 114, 70, 156.

³⁸⁷ See: <https://bip.brpo.gov.pl/pl/content/jak-sciga-sie-propagowanie-i-pochwalanie-faszyzmu-prokuratura-krajowa-w-koncu-ujawnila-rpo>.

³⁸⁸ Ombud, annual report for 2021, pp. 604-607.

discrimination. Meanwhile, it is essential to build awareness through the implementation of social campaigns aimed at counteracting discrimination and creating tolerance, as well as at preventing intolerant attitudes and hate crimes.³⁸⁹

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 94¹ 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.³⁹⁰ 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 94¹.

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.³⁹¹

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.³⁹² In fact, the general level of awareness about discrimination issues is low, as proved by the surveys commissioned by the Ombud.³⁹³

Since the Ombud became the equality body in 2011, it has organised numerous events on discrimination issues regarding all grounds covered by the Directives, 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 Persons with Disabilities and the Expert Committee on the Rights of Elderly People.³⁹⁴ The committees present their findings, opinions and publications during conferences.³⁹⁵ In addition, since 2011, the Ombud's website has included a section on the role of the Ombud as the equality body.³⁹⁶ 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'.³⁹⁷ 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

³⁸⁹ Ombud, annual report for 2021, pp. 604-607.

³⁹⁰ See, for example, Potocka, P. (2004), *Model information on equal treatment in employment*, Gdańsk (published by a private centre for consultancy and vocational training).

³⁹¹ 'Protection against discrimination in Poland' (2020), p. 17.

³⁹² Kułak, M. (2021), pp. 43-44.

³⁹³ See information on surveys by Kantar (2018, 2020, 2021) in other parts of the report.

³⁹⁴ See Ombud, annual reports at www.rpo.gov.pl.

³⁹⁵ See: <https://bip.brpo.gov.pl/pl/content/komisje-ekspertow>.

³⁹⁶ Available in Polish at: www.rpo.gov.pl/pl/rowne-traktowanie. Available in English at: www.rpo.gov.pl/en/content/equal-treatment.

³⁹⁷ Equal Treatment Act, 3 December 2010, Article 21(2)(6); Ordinance on the Government Plenipotentiary for Equal Treatment, 22 April 2008, § 2(1)(7).

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.³⁹⁸ 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.³⁹⁹ The Plenipotentiary dealt with various grounds of discrimination, but most of its reported activities⁴⁰⁰ were and still are focused on issues of sex discrimination and, recently, on issues affecting families with children as well as counteracting family violence.⁴⁰¹

It must be emphasised that, more often than not, most information on equality issues and non-discrimination is not accessible to persons 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.⁴⁰² The Government Plenipotentiary for Equal Treatment should, in the execution of its duties, collaborate with CSOs, including trade unions and organisations of employers.⁴⁰³

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.

³⁹⁸ See: <https://www.gov.pl/web/rownetraktowanie>.

³⁹⁹ 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.

⁴⁰⁰ See: <https://www.gov.pl/web/rownetraktowanie/sprawozdania>.

– Government Plenipotentiary for Equal Treatment (2022), *Report on the Activities of the Government Plenipotentiary for Equal Treatment for the period 1 January 2021 – 31 December 2021* (Sprawozdanie z działalności Pełnomocnika Rządu do spraw Równego Traktowania za okres od 1 stycznia 2021 r. do 31 grudnia 2021 r.);

– Government Plenipotentiary for Equal Treatment (2021), *Report on the Activities of the Government Plenipotentiary for Equal Treatment for the period 1 January 2020 – 31 December 2020* (Sprawozdanie z działalności Pełnomocnika Rządu do spraw Równego Traktowania za okres od 1 stycznia 2020 r. do 31 grudnia 2020 r.);

– 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.

⁴⁰¹ In accordance with the Organisational Regulations of the Ministry of Family and Social Policy, annexed to Regulation No. 33 of the Minister of Family and Social Policy of 10 December 2020 on establishing the organisational regulations of the Ministry of Family and Social Policy (Dz. Urz. Min. Rodz. i Pol. Społ., item 36), the tasks of the Office of the Government Plenipotentiary for Equal Treatment include issues related to counteracting family violence.

⁴⁰² Law on the Ombud, 15 July 1987, Article 17a.

⁴⁰³ Equal Treatment Act, 3 December 2010, Article 21(2)(7); Ordinance on the Government Plenipotentiary for Equal Treatment, 22 April 2008, § 3(3).

Dialogue with CSOs was also encouraged by the National Programme of Activities for Equal Treatment for 2013-2016.⁴⁰⁴ A new programme, finally adopted after a six-year delay, also underlines the need for such dialogue.⁴⁰⁵

In the Ombud's Office, three special teams of experts have been established – namely, the Expert Committee on Persons with Disabilities, the Expert Committee on the Rights of Elderly People (since March 2011) and the Expert Committee on the Rights of Migrants (since May 2011); some members of these committees represent CSOs.⁴⁰⁶ 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 had a general advisory character, was established in December 2010. However, in November 2021, the new Ombud abolished both the main and local Social Councils. The members received the letter with information stating that this was 'due to the new concept of managing the office'.⁴⁰⁷

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 2019-2020⁴⁰⁸ based on these suggestions (most of them proposed by CSOs).⁴⁰⁹ During the period from 2021-2022, such consultations were not organised.

The Ombud's annual reports 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.

The Plenipotentiary has published manuals and guidebooks, and until the end of 2015 it organised (and often co-organised) regular conferences with CSOs, round-table discussions and meetings on different subjects.⁴¹⁰ However, since 2016, the policy of the Government has 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.⁴¹¹ However, there were in fact no consultations, as was finally admitted later, when the Plenipotentiary was asked for

⁴⁰⁴ *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.

⁴⁰⁵ National Action Programme for Equal Treatment for the years 2022-2030.

⁴⁰⁶ See: <https://bip.brpo.gov.pl/pl/content/komisje-ekspertow>.

⁴⁰⁷ The councils prepared opinions, expertise and positions. They operated in the Office in Warsaw, as well as in the offices in Gdańsk; in Katowice; and in Wrocław. 'See: www.rpo.gov.pl/pl/content/rada-spoleczna-rpo.

⁴⁰⁸ 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>.

⁴⁰⁹ 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. Information available at: www.rpo.gov.pl/pl/content/tematy-badan-antydiskryminacyjnych-na-lata-2016-i-2017.

⁴¹⁰ 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.

⁴¹¹ Parliamentary Commission meeting minutes, available at: <http://orka.sejm.gov.pl/zapisy8.nsf/0/01EB7ECB99A118CEC1258028004B2A03/%24File/0096508.pdf>.

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 Plenipotentiary's Office, the Plenipotentiary instead based its opinion on media materials.⁴¹²

- 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.⁴¹³

In 2001, Parliament issued the Act on the Tripartite Committee for Social and Economic Affairs and Voivodeship Committees for Social Dialogue.⁴¹⁴ It was replaced in July 2015 by the Act on the Social Dialogue Council and Other Institutions of Social Dialogue.⁴¹⁵

'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.'⁴¹⁶

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.⁴¹⁷

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 persons 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, 2020 or 2021.⁴¹⁸ What is more, during the preparation and consultation of the National Action

⁴¹² See: <http://www.tokfm.pl/Tokfm/1,103454,20871375,pelnomocnik-ds-rownego-traktowania-odrzucil-dyrektywe-bez-konsultacji.html>.

⁴¹³ 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/>.

⁴¹⁴ Act on the Tripartite Committee for Social and Economic Affairs and Voivodeship Committees for Social Dialogue (*Ustawa z 6 lipca 2001 o Trójjstronnej Komisji do Spraw Społeczno-Gospodarczych i wojewódzkich komisjach dialogu społecznego*), 6 July 2001.

⁴¹⁵ 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.

⁴¹⁶ See: <http://www.dialog.gov.pl/en/>.

⁴¹⁷ For more information, see the Centre's website, available at: www.cpsdialog.pl/.

⁴¹⁸ See documents of the Council, available at: <http://www.dialog.gov.pl/dialog-krajowy/rada-dialogu-spolecznego/uchwaly-rds/>.

Programme for Equal Treatment for 2022-2030, the Social Dialogue Council was asked for its opinion on the draft programme but did not submit one.⁴¹⁹

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 meets between one and six times per year. In 2020, the Commission met once, and in 2021, as well as in 2022, twice.⁴²⁰ There are two Roma members on the Commission (out of 35 members).⁴²¹

In June 2008, the Commission established a permanent 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.⁴²² 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.⁴²³

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.

The *Programme for the Integration of the Roma Community in Poland 2014-2020*⁴²⁴ has ended, and has been evaluated.⁴²⁵ 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 for 2014-2020 covered four areas: education, work, housing and health. A total of 942 entities participated in the activities, of which 529 (56 %) were entities from

⁴¹⁹ See Resolution No. 113 of the Council of Ministers of 24 May 2022 on the establishment of the National Action Program for Equal Treatment for 2022-2030, pp. 11-12, at: <https://www.gov.pl/web/rownetraktowanie/krajowy-program-dzialan-na-rzecz-rownego-traktowania-2022-2030>.

⁴²⁰ See: <https://www.gov.pl/web/mniejszosci-narodowe-i-etniczne/komisja-wspolna>.

⁴²¹ See: <https://www.gov.pl/web/mniejszosci-narodowe-i-etniczne/sklad-komisji>.

⁴²² 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>.

⁴²³ See: <https://www.gov.pl/web/mniejszosci-narodowe-i-etniczne/zespol-do-spraw-romskich>.

⁴²⁴ 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>.

⁴²⁵ 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>.

the public finance sector, including local government units, and 413 (44 %) NGOs, including 239 (70 % from NGOs) Romani organisations.⁴²⁶

Based on the evaluation, the new programme was prepared and adopted: the *Programme for the Social and Civic Integration of the Roma Community in Poland for 2021-2030* (*Program integracji społecznej i obywatelskiej Romów w Polsce na lata 2021-2030*).⁴²⁷

It states: 'The main objective of the Integration Programme for 2021–2030 is to increase the level of social and civic integration of the Roma in Poland. The key tool for improving the level of the group's integration is broadly understood education. Without improving the level of education all actions carried out in other areas of community life will prove ineffective. One of the factors supporting education is the improvement of housing situation for the most vulnerable families, living in poor conditions that are, above all, a hazard to their life or health. Social and civic integration is also achieved by ensuring the participation of the Roma in consultation and decision-making processes at all levels and by promoting implemented measures, which in effect helps reduce the level of social distance towards the group.'⁴²⁸

The programme reformulates – in comparison with previous programmes – the objectives of the strategy: from support of a social nature towards the development of more systemic mechanisms aimed at improving the educational prospects of this group and improving the housing situation of families living in sub-standard housing conditions.⁴²⁹ This is due to the fact that the social policies implemented by the state and concerning the whole society (programmes: the Family 500+, the Good Start, Mother4+) contributed to a significant improvement in the economic situation of Roma, as follows:

- 'the government's pro-demographic programme *Family 500+* (operating since 2016), which grants a monthly benefit of PLN 500 (approx. € 117) per child; the Roma became its relatively largest beneficiaries on account of their large family model,
- the government's programme *Good start* (operating since 2018): a benefit of PLN 300 (approx. € 70) granted once a year per child up to the age of 20 (or 24, if they have a disability certificate),
- the government's programme *Mother 4+* (since 2019), under which mothers who gave birth to and brought up at least four children will be entitled to a so-called 'parental supplementary benefit' (in practice: the equivalent of the lowest pension). This programme fundamentally changes the situation of Roma women who often have no chance of earning a pension due to the phenomenon of early marriage.'⁴³⁰

The local dimension of the implementation of the Programme 2021-2030 is its key value, as it is at this level that real changes take place. The addressees of the Programme 2021-2030 are, therefore, primarily local self-government units and non-governmental organisations. Experience to date indicates that local self-governments are not able to cope with the existing problems on their own, which requires the continuation of the Government administration's involvement. On the other hand, given the specificity and hermetic

⁴²⁶ *Programme for the Social and Civic Integration of the Roma Community in Poland for 2021-2030*, p. 17.

⁴²⁷ Resolution No. 190/2020 of the Council of Ministers of 21 December 2020 on establishing the *Programme for the Social and Civic Integration of the Roma Community in Poland for 2021-2030* (*Uchwała nr 190/2020 Rady Ministrów z dnia 21 grudnia 2020 r. w sprawie ustanowienia "Programu integracji społecznej i obywatelskiej Romów w Polsce na lata 2021-2030"*), see: <https://www.gov.pl/web/mniejszosci-narodowe-i-etniczne/rada-ministrow-uchwalila-nowy-program-integracji-spolecznej-i-obywatelskiej-romow-w-polsce-na-lata-2021-2030>.

⁴²⁸ *Programme for the Social and Civic Integration of the Roma Community in Poland for 2021-2030*, point 4.2 Objectives of the Integration Programme for 2021-2030, p. 52.

⁴²⁹ *Programme for the Social and Civic Integration of the Roma Community in Poland for 2021-2030*, p. 45.

⁴³⁰ *Programme for the Social and Civic Integration of the Roma Community in Poland for 2021-2030*, p. 45.

character of the Roma, the participation of NGOs makes it possible to directly reach this community and involve the Roma in the implementation of individual activities.

The previous strategies, although they did not fully solve the existing problems, contributed to clear changes in this community and to changes in social attitudes towards this group. They have initiated a noticeable self-organisation among Roma, resulting in the establishment of dozens of Roma organisations actively participating in the implementation of state measures – Roma NGOs accounted for 30 % of the entities implementing tasks in the integration programme for 2014-2020. In addition, they have resulted in the empowerment of the Roma community both at the central level – Roma participate in the work of the Joint Commission of the Government and National and Ethnic Minorities and the Team for Roma Affairs – and at the local level, through participation in consultation processes of local self-governments.⁴³¹

When it comes to targeting discrimination, the programme states:

'Measures taken in previous strategies with respect to improving safety and anti-discrimination measures did not arouse interest among their participants. It seems that the most efficient method of combating discrimination is increasing social awareness of the majority group with regard to cultural diversity – the possibility to refer to the historical tradition of a Polish Commonwealth of Many Nations is not insignificant here.

Therefore, the present strategy does not define the phenomenon of discrimination as a separate area of intervention but treats the principle of non-discrimination and the human rights protection perspective as a general rule and objective guiding the entire *Programme*. This stems from the assumption that acts of discrimination are complex in nature and require long-term measures, mainly in the field of education. All measures taken by the State, also outside this strategy, should contribute to the elimination this phenomenon which destroys the civic community and providing education and knowledge to the Roma community and to the majority society is the most effective tool possible to protect individuals and the whole group from discrimination. The broadly defined civic education will serve this purpose. Of great importance will also be educational measures targeted at officers by the National Police Headquarters under the policy of raising awareness on human rights protection and non-discrimination against members of the Roma community as well as monitoring information concerning hate crimes and the number of convictions for hate crimes perpetrated against people from the Roma community, reported by the National Police Headquarters and the Ministry of Justice.

When discussing the discrimination phenomenon, one should not forget intra-group discrimination which exists in relations between individual Roma groups in Poland and sometimes impedes the organisation of joint undertakings for Roma and their effectiveness as well as discrimination against women and girls among this group. The Roma themselves pointed to the need of combating intra-group discrimination during the evaluation carried out in 2011. It is necessary to strive to eliminate these negative phenomena when planning measures, all the more so, as existence of prejudice against representatives of other Roma groups is not identified in these communities as a discrimination phenomenon.'⁴³²

The 2021-2030 programme also opens up the possibility of implementing innovative projects, going beyond education and housing, due to the need for non-standard solutions in response to the locally defined deficits of particular Roma groups.

⁴³¹ *Programme for the Social and Civic Integration of the Roma Community in Poland for 2021-2030*, justification, p.2.

⁴³² *Programme for the Social and Civic Integration of the Roma Community in Poland for 2021-2030*, pp. 61-62.

Finally, the Ombud's office, which has been involved in activities on behalf of the Roma community for many years, has assessed the new programme's objectives favourably, stating: 'The Ombud has high hopes regarding the implementation of the current edition of the Programme, and is pleased to note that the necessary changes to the conception of the Programme, advocated by the Ombud, have been made.'⁴³³

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 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.⁴³⁴

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.⁴³⁵ 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.⁴³⁶ 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.⁴³⁷

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.⁴³⁸

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

⁴³³ Ombud, annual report for 2021, p. 603.

⁴³⁴ 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>.

⁴³⁵ Labour Code, 26 June 1974, Article 9(2).

⁴³⁶ 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/>.

⁴³⁷ Labour Code, 26 June 1974, Article 18(2).

⁴³⁸ Civil Code, 23 April 1964, Article 58(1) and (3).

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).

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.⁴³⁹

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 treatment⁴⁴⁰ and then report annually on its execution⁴⁴¹. 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 2013.⁴⁴² The first annual report on the execution of the programme was published on 27 June 2014.⁴⁴³ The second report was sent to the Council of Ministers on 7 May 2015.⁴⁴⁴ The report covering 2015 was published in January 2017.⁴⁴⁵ The last report, covering 2016, was published in July 2017.⁴⁴⁶ There have been no reports since 2017.

The draft programme for the years 2021-2030 was prepared and published for consultation only in November 2020 and was finally passed in 2022 as the National Programme of Activities for Equal Treatment for 2022-2030 (*Krajowy Program Działań na rzecz Równego Traktowania na lata 2022-2030*).⁴⁴⁷ According to the Ombud, the programme, in principle, did not take into account recommendations formulated during consultations (also by the Ombud) and the results of the Programme for 2013-2016.

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

⁴³⁹ Equal Treatment Act, 3 December 2010, Article 21(1).

⁴⁴⁰ Equal Treatment Act, 3 December 2010, Article 22.

⁴⁴¹ The reports published so far are available at: <https://www.rownetraktowanie.gov.pl/raporty-z-realizacji-krajowego-programu-dzialan-na-rzecz-rownego-traktowania>.

⁴⁴² 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>.

⁴⁴³ 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 Działań na rzecz Równego Traktowania za 2013 r.)*, Warsaw.

⁴⁴⁴ 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.

⁴⁴⁵ 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 Działań na rzecz Równego Traktowania za 2015 r.)*, Warsaw.

⁴⁴⁶ 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 Działań na rzecz Równego Traktowania za 2016 r.)*, Warsaw.

⁴⁴⁷ See: Resolution No. 113 of the Council of Ministers of 24 May 2022 on the establishment of the National Action Programme for Equal Treatment for 2022-2030 (*UCHWAŁA NR 113 RADY MINISTRÓW z dnia 24 maja 2022 r. w sprawie ustanowienia Krajowego Programu Działań na rzecz Równego Traktowania na lata 2022-2030*); Monitor Polski, 5 July 2022 r., Poz. 640, see at: <https://www.gov.pl/web/rownetraktowanie/krajowy-program-dzialan-na-rzecz-rownego-traktowania-2022-2030>.

Discrimination, Xenophobia and Related Intolerance or establish an alternative multi-stakeholder institution with a similar mandate'.⁴⁴⁸

In relation to the Roma community, special programmes have been developed. The latest one is the Programme for Social and Civic Integration of the Roma Community in Poland for 2021-2030, available in English at: <https://www.gov.pl/web/mniejszosci-narodowe-i-etniczne/programme-of-roma-integration-2021-2030>. (see more in section 8.1.d.).

Other programmes and strategies include:

'Social Policy for Older People 2030 – safety, participation, solidarity', adopted in 2018 by the Council of Ministers.⁴⁴⁹ However, as underlined by the Ombud, no concrete measures have been proposed in the area of combating discrimination.⁴⁵⁰ As noted by the Ombud's Expert Committee on Older Persons, 'The Senior Citizens' Policy Programme should be a widely consulted document. Despite the Ombudsman's official request to the government to present the results of this consultation and to indicate how the government plans to disseminate the contents of the programme, we have not received such information. From a non-systematic observation of the consultation process in February, March 2018, it appears that the document did not trigger a lively public debate on the situation of the elderly, while there was a very good opportunity to do so'.⁴⁵¹

The *Strategy for Persons with Disabilities 2021-2030*.⁴⁵² This is the first document that takes into account the CRPD model and its approach to disability. The Ombud is closely monitoring the progress of its implementation. It was adopted after a wide-ranging public consultation took place in 2020, receiving 1 600 views from the public.⁴⁵³

⁴⁴⁸ 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.

⁴⁴⁹ Resolution No. 161 of the Council of Ministers of 26 October 2018, on the adoption of the document *Social Policy for Older Persons 2030: Security, Participation, Solidarity* (*Polityka społeczna wobec osób starszych 2030. Bezpieczeństwo – Uczestnictwo – Solidarność*). See: <https://www.gov.pl/web/family/-social-policy-for-older-people-2030-safety-participation-solidarity-presentation-of-the-assumptions>.

⁴⁵⁰ Ombud, annual report for 2020, pp. 392-393.

⁴⁵¹ Analysis of the government's programme *Social Policy for Older Persons 2030: Security - Participation - Solidarity* by the Ombudsman's Expert Committee on Older Persons (13 April 2018), see at: <https://econjournals.sgh.waw.pl/KSzPP/article/view/2675/2371>.

⁴⁵² Resolution No. 27 of the Council of Ministers of 16 February 2021, on the adoption of the document *Strategy for Persons with Disabilities 2021-2030* (*Strategia na rzecz osób z niepełnosprawnościami 2021-2030*), M. P. poz. 218.

⁴⁵³ See: <http://www.niepelnosprawni.pl/ledge/x/1756921>.

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.

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.⁴⁵⁴ 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.⁴⁵⁵

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.⁴⁵⁶ 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 2.8.d 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 LGBTIQI issues in the past couple of years following the 2015 parliamentary elections: all court cases relating to the rights of LGBTIQI 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.

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.'⁴⁵⁷ The Ombud argued

⁴⁵⁴ See also: ETA commentary 2017, pp. 192-201.

⁴⁵⁵ Toruń District Court, judgment of 6 August 2019, No. I C 469/18; see more information in section 3.2.7 of this report.

⁴⁵⁶ 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>.

⁴⁵⁷ 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.'⁴⁵⁸ 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.'⁴⁵⁹ 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.⁴⁶⁰

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'.⁴⁶¹

Poland was ranked 42nd out of 49 countries (in last place among EU Member States) in the ILGA's Europe 2022 annual review of the state of legal protection provided to LGBTQI people.⁴⁶² The ranking thus illustrates a continuing worrying trend, in which for years the worst-rated areas have been the protection of family and private life, protection from hate crimes and protection from discrimination.⁴⁶³ The conclusions remain consistent with the Ombud's observations and are reflected in the Ombud's actions. With the continued escalation of prejudice against LGBTQI people from 2019 onwards, the gaps in the legal protection system against human rights violations of this social group are even more pronounced. At the same time, as in previous years, an increasingly important role in the protection of the human rights of LGBTQI people is played by judicial decisions, which, in the absence of legislation or its inconsistent application, have a significant impact on the actual legal situation of non-heteronormative and transgender people.⁴⁶⁴

Resolutions of municipalities including declaration of being free from 'LGBT ideology'

Starting in 2019, a number of Polish municipalities had adopted resolutions that included 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 LGBTQI matters (in titles or content), in most cases declaring 'freedom from LGBT ideology'.

Resolutions were adopted by different units of local government (territorial units): regional councils of voivodships, councils of *powiats* and councils of communes. Resolutions of bodies differed significantly in nature and legal effects, and thus so did 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

⁴⁵⁸ See: <https://www.rpo.gov.pl/pl/content/wniosek-do-trybunalu-konstytucyjnego-ws-zakresu-stosowania-ustawy-o-rownym-traktowaniu>.

⁴⁵⁹ 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>.

⁴⁶⁰ 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/>.

⁴⁶¹ Ombud, annual report for 2019, p. 26.

⁴⁶² See: <https://rainbow-europe.org/#8653/0/0>.

⁴⁶³ See: https://www.ilga-europe.org/sites/default/files/2023/full_annual_review.pdf.

⁴⁶⁴ Ombud, annual report for 2021, pp. 597-600. Of course, this does not apply to the verdicts of the seized and politicised TK, as in the case of Article 138 of the Code of Petty Crimes.

internal or external character (binding only organs or binding also external subjects).⁴⁶⁵ In most cases, the resolutions use the expression 'on restraining/stopping/suppressing⁴⁶⁶ LGBT ideology'. In fact, they were 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 was widely discussed in public and political debate in Poland and abroad; see, *inter alia*, information on the European Parliament resolution of 18 December 2019.⁴⁶⁷ 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 2020.⁴⁶⁸ Finally, the issue was raised by President von der Leyen in her State of the Union Address in September 2020.⁴⁶⁹

In December 2019, the Ombud lodged complaints against five selected resolutions of communes' councils:⁴⁷⁰ Istebna (woj. śląskie), Lipinki (woj. małopolskie), Klwów (woj. mazowieckie), Serniki (woj. lubelskie), Niebylec (woj. podkarpackie) with five regional administrative courts with the aim of revoking the acts.⁴⁷¹

In March 2020, the Ombud extended the five complaints submitted so far to include arguments based on European law.⁴⁷² In addition, the Ombud filed some new complaints – not only against the resolutions of commune councils, but also against two district councils (Tarnów and Rycki) and the voivodship assembly (Lubelskie).⁴⁷³ The choice of which resolutions to challenge was based on limited resources and a strategic choice of factors such as geographic factors and the jurisdiction of different administrative courts.

In the original five cases brought by the Ombud, courts rejected the Ombud's complaints on procedural grounds.⁴⁷⁴ The courts' justifications for rejection differed slightly, but none of the courts examined the merits of the complaint. In all cases, the decisions were appealed and cassation complaints were decided by the Supreme Administrative Court in 2021. In all five cases, the Supreme Administrative Court upheld the Ombud's cassation complaints, referring the cases for re-examination.⁴⁷⁵

In four other (additional to the original five) complaints filed by the Ombud, the provincial administrative courts deemed four appealed resolutions invalid.⁴⁷⁶

⁴⁶⁵ 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 <https://www.rpo.gov.pl/sites/default/files/Opinia%20dr.%20hab.%20Dawida%20Sześciło%20ws.%20uchwał%20antylgbt%20.pdf>.

⁴⁶⁶ *Powstrzymywanie* in Polish.

⁴⁶⁷ See: https://www.europarl.europa.eu/doceo/document/TA-9-2019-0101_EN.html.

⁴⁶⁸ See: <https://www.rpo.gov.pl/pl/content/vera-jourova-spotkala-sie-z-rpo>.

⁴⁶⁹ See: https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_20_1655.

⁴⁷⁰ Name of the commune and, in brackets, name of the province: *województwo* – voivodeship.

⁴⁷¹ 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-uchwały-samorządów-o-przeciwdziałaniu-ideologii-lgbt>.

⁴⁷² See: <https://www.rpo.gov.pl/pl/content/rpo-uchwały-anty-lgbt-sprzeczne-także-z-prawem-europejskim>.

⁴⁷³ See the information and text of the complaints lodged in March 2020 at: <https://www.rpo.gov.pl/pl/content/rpo-uchwały-anty-lgbt-sprzeczne-także-z-prawem-europejskim>.

⁴⁷⁴ See relevant resolutions of Regional Administrative Courts at: III SA/Lu 312/20 - Postanowienie WSA w Lublinie z 2021-02-17; III SA/Lu 240/20 - Postanowienie WSA w Lublinie z 2021-02-17; II SA/Rz 27/20 - Postanowienie WSA w Rzeszowie z 2020-09-08; III SA/Kr 360/20 - Postanowienie WSA w Krakowie z 2020-06-24; III SA/Kr 105/20 - Postanowienie WSA w Krakowie z 2020-06-23.

⁴⁷⁵ See, for instance, Resolution of the Supreme Administrative Court, 2 July 2021, III OSK 3682/21 at: <https://orzeczenia.nsa.gov.pl/doc/3075FAA1BA>; Resolution of the Supreme Administrative Court, 2 July 2021, III OSK 3353/21 at: <https://orzeczenia.nsa.gov.pl/doc/9B8C4416C2>.

⁴⁷⁶ See: Provincial Administrative Court in Gliwice (14 July 2020) III SA/GI 15/20 (<http://orzeczenia.nsa.gov.pl/doc/64BDAC55E5>); Provincial Administrative Court in Warsaw (15 July 2020) VIII SA/Wa 42/20 (<http://orzeczenia.nsa.gov.pl/doc/62A1A3C0D7>); Provincial Administrative Court in Lublin

In 2022,⁴⁷⁷ the Ombud continued its efforts to eliminate resolutions against LGBT 'ideology' discriminating against LGBTI people. All nine resolutions previously challenged by the Ombud were held by the regional administrative courts to have been adopted without a legal basis and invalid due to gross violation of the law by the authorities adopting them. Administrative courts, considering these cases on their merits, had no doubts that resolutions (also known as positions or declarations) against LGBT 'ideology' discriminate against specific people and create a hostile, derogatory and intimidating atmosphere around them, which may result in the risk of violence against these people. The judgments emphasised that no one, due to their sexual orientation and gender identity, could be discriminated against by public authorities, and by adopting such resolutions, local government units called for non-compliance with the generally applicable law.⁴⁷⁸ On 28 June 2022, the Supreme Administrative Court dismissed the cassation appeals against four judgments of the regional administrative courts - thus, these judgments became final.⁴⁷⁹ Due to the fact that the discussed resolutions are still in force in some communes and *poviats*, the Ombud appealed to 24 communes and 12 *poviats* to take steps to repeal them. The Ombud argued that since Supreme Administrative Court confirmed that local government 'anti-LGBT' resolutions were adopted without a legal basis and are invalid due to gross violation of the law; therefore, local government bodies should take that argument into account.⁴⁸⁰

(6 August 2020) III SA/Lu 7/20 (<http://orzeczenia.nsa.gov.pl/doc/C2138D9662>); Provincial Administrative Court in Kielce (11 September 2020) II SA/Ke 382/20 (<http://orzeczenia.nsa.gov.pl/doc/6F1BD26B84>).

⁴⁷⁷ See: Ombud, annual report for 2022 (draft), p. 23-24.

⁴⁷⁸ Judgment of the Provincial Administrative Court in Kraków of January 10, 2022, file ref. III SA/Kr 976/21 (regarding the resolution of the Lipinki Commune Council); judgment of the Provincial Administrative Court in Kraków of January 10, 2022, file ref. III SA/Kr 975/21 (regarding the resolution of the Tarnów District Council); judgment of the Provincial Administrative Court in Rzeszów of March 29, 2022, file ref. no. II SA/Rz 27/20 (regarding the resolution of the Niebylec Commune Council); judgment of the Provincial Administrative Court in Lublin of May 9, 2022, file ref. III SA/Lu 312/20 (regarding the resolution of the Ryki Poviats Council); judgment of the Provincial Administrative Court in Lublin of May 9, 2022, file ref. III SA/Lu 240/20 (regarding the resolution of the Sejmik of the Lubelskie Voivodeship).

⁴⁷⁹ Supreme Administrative Court, decision of 28 June 2022, Sygn. akt III OSK 4028/21, available at: https://bip.brpo.gov.pl/sites/default/files/2022-07/NSA_uchwaly_antyLGBT_Serniki_wyrok_uzasadnienie_28.06.2022.pdf.

⁴⁸⁰ See Ombud's positions to the executive bodies of local government units, XI.505.10.2020 of 28 November 2022, at <https://bip.brpo.gov.pl/pl/content/rpo-uchwaly-anty-lgbt-samorzady-odpowiedzi>.

12 LATEST DEVELOPMENTS IN 2022

12.1 Legislative amendments

Change to the Ordinance of the Minister of National Education⁴⁸¹ on the conditions and means of implementation 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 [...].⁴⁸² The change reduces the number of hours of German as a minority language from three to one. The new part (in effect since 1 September 2022), states at paragraph 8: In the inter-school teaching team, teaching a minority or regional language is conducted in the form of additional teaching of a minority or regional language, referred to in paragraph 4, Section 1, point 1, for students of schools of the same type, three hours a week, *and in the case of students belonging to the German minority - one hour a week.*⁴⁸³

12.2 Case law

No relevant landmark or final cases were identified in 2022.

⁴⁸¹ See: *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.

⁴⁸² § 8 sec. 3 amended by § 1 point 1 of the regulation of February 4, 2022 (*Journal of Laws* 2022.276) amending this regulation as of September 1, 2022 (*Rozporządzenie z 4 lutego 2022 r.*; Dz.U.2022.276).

⁴⁸³ See: W międzyszkolnym zespole nauczania nauka języka mniejszości lub języka regionalnego jest prowadzona w formie dodatkowej nauki języka mniejszości lub języka regionalnego, o której mowa w § 4 ust. 1 pkt 1, dla uczniów szkół tego samego typu w wymiarze 3 godzin tygodniowo, a w przypadku uczniów należących do mniejszości niemieckiej - w wymiarze 1 godziny tygodniowo.

ANNEX 1: TABLE OF INTERNATIONAL INSTRUMENTS

Country: Poland
Date: 1 January 2023

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 person with a disability 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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