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Strengthening anti-discrimination policies

Document 1

**Analysis of the status quo of Polish
Anti-Discrimination Legislation and Policies**

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Twinning Project Poland – Austria
“Strengthening Anti-discrimination Policies”
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1 Introduction¹

The present study has been conducted in the framework of the Twinning Project in Poland *Strengthening Anti-discrimination Policies* and aims to accomplish a review of anti-discrimination policies in Poland in order to identify potential areas of improvement and to define and initiate positive measures targeted to counteract discrimination on the grounds of race, ethnic origin, beliefs, age and sexual orientation. The present paper analyses the actual situation of social groups discriminated against in Poland and their need for protection and support. The standards for this analysis are above all the relevant *EU Acquis* as well as international human rights standards regarding the prohibition of discrimination

The report is structured into three main parts: The first chapter intends to give an overview on relevant Polish legislation on the protection against discrimination. In order to gain a better understanding of the actual situation of groups vulnerable to discrimination the Sectionond part of the study focuses on reports of governmental as well as non-governmental institutions such as local human rights organisations or international organisations. Finally, the third chapter analyses Polish legal framework against discrimination with regard to the requirements set out by the EU anti-discrimination Directives². The structure of this chapter is in line with the articles of both Directives, analysing article by article the need for legislative changes.

2 Overview on Polish legal framework against discrimination

Presently, Polish legal system contains no specific law entirely devoted to the issue of counteracting discrimination; instead, Polish legislator opted to include anti-discrimination provisions within the scope of other acts, such as the Labour Code, the Penal Code or (draft-) act on the protection of national minorities³. However, these provisions provide no systematic concept of protection against discrimination as they differ widely concerning their scope and grounds of discrimination. This scattered structure not only complicates the application and enforcement of these provisions but also introduces a kind of hierarchy of grounds of prohibition. Despite the wide anti-

¹ This report has been written by Ms Birgit Weyss, legal researcher at the Ludwig Boltzmann Institute of Human Rights, in close co-operation with a group of Polish legal experts, namely: Ms. Katarzyna Gonera – Judge of the Supreme Court, Ms. Monika Platek – President of Polish Association for Legal Education, Ms. Teresa Romer – President of the Association of Polish Judges, and Mr. Roman Wieruszewski – Professor at the Institute of Legal Studies of Polish Academy of Science. Without their outstanding expertise and their extremely useful comments and remarks the conduct of this analysis would have been very difficult and certainly would have remained on a rather superficial level. The author wants to take this opportunity to once again thank the experts involved for the fruitful discussions and the numerous advices and clarifications that were extremely helpful throughout the period of research.

² Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (in the following referred to as: Racial Equality Directive or RED); Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (in the following referred to as: Employment Equality Directive or EED)

³ Such as draft Act on National and Ethnic Minorities in the Republic of Poland. Sejm document No. 223 of 11 Jan. 2002

discrimination clause in Article 32 of the Constitution, Polish legal framework contains very little specific anti-discrimination legislation, in areas such as housing, contractual relations between private persons (except for the employment sector) as well as access to public places.

2.1 *Principle of Equal Treatment*

2.1.1 Constitution

The Constitution, which was adopted in 1997, establishes in Article. 32 the principle of equality and non-discrimination:

Article 32 of Polish Constitution

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

This general prohibition of discrimination contains no specific grounds of discrimination. State authorities argue that this wording would provide a wider scope of application for the provision. According to the judgement of the Constitutional Tribunal, the wording of Article 32 (2) means that “the creators of the Constitution gave the principle of equality a universal dimension, referring to all forms of differentiation which may arise in political, social or economic life, regardless of the characteristic according to which differentiation may occur.”⁴. However, due to the fact that Polish legal system presently contains no definition of discrimination it is unclear under what circumstances one can refer to Article 32. Another argument in favour of a broadening amendment of this article is that the Constitutional Tribunal presently follows a rather restrictive interpretation. According to the Tribunal, a constitutional claim cannot be based solely on Article 32 but must be claimed in connection with another constitutional right or freedom⁵. The European Commission against Racism and Intolerance (ECRI) suggests in its country report that a non-exhaustive list of grounds of discrimination – including race and ethnic origin - should be introduced into Article 32⁶. Furthermore, in the light of the two EU anti-discrimination directives, it also seems important to explicitly include the grounds of discrimination mentioned in Article 13 of the Treaty of the European Community (TEC): sex, race, ethnic origin, religion or belief, disability, age and sexual orientation.

Probably the strongest argument in favour of the introduction of a non-exhaustive list of prohibited grounds of discrimination into Article 32 is that it would enhance the awareness and the applicability of this provision. Although lawyers and judges might know that Article 32 of the Constitution has to be interpreted in line with international standards and European Law, it might be difficult for the general population to perceive the scope of application of this constitutional prohibition of discrimination.

⁴ Judgement of the Constitutional Tribunal of 16 December 1997 K. 8/97. See: Zienkiewicz, E. Mazur-Rafal, M. (2003) Report on measures to combat discrimination in the 13 candidate countries (VT/2002/47) country report on Poland, p. 4.

⁵ This information on the Constitutional Tribunal’s interpretation of Article 32 of Polish Constitution was provided by Prof. Roman Wieruzewski.

⁶ ECRI (2000) Sectionond Report on Poland, adopted on 10 December 1999, Strasbourg: CoE, p. 5.

Aside from this general anti-discrimination clause, the Constitution contains specific equal-treatment provisions regarding women and men⁷, religious associations⁸, national and ethnic minorities⁹, children¹⁰, consumers and war veterans and invalids. However, sexual minorities are not mentioned as specifically vulnerable group. These provisions will be further analysed in the relevant subchapters on the different grounds of discrimination.

2.1.2 Labour Code

The most elaborated prohibition of discrimination can be found in the newly amended Labour Code. This Code includes a definition of direct and indirect discrimination, prohibiting discrimination on the grounds of gender¹¹, race, ethnic origin, religion and belief, disability, age and sexual orientation.

2.2 *Minority Rights*¹²

Article 35 of Polish Constitution guarantees Polish citizens belonging to national or ethnic minorities to maintain and develop their own language, to maintain customs and traditions, and to develop their own culture.

Article 35 of Polish Constitution

- (1) The Republic of Poland shall ensure Polish citizens belonging to national or ethnic minorities the freedom to maintain and develop their own language, to maintain customs and traditions, and to develop their own culture.
- (2) National and ethnic minorities shall have the right to establish educational and cultural institutions, institutions designed to protect religious identity, as well as to participate in the resolution of matters connected with their cultural identity.

According to Article 91 of Polish Constitution, ratified international agreements constitute part of the domestic legal order. Citizens can therefore directly refer to norms contained in ratified Conventions, which relate to the protection of national minorities.

Furthermore, a bill on national minorities is in the process of being drafted by the Sejm Commission for National and Ethnic Minorities. One of the most important issues the bill deals with are language rights of national minorities. More precisely, the draft deals with the possibility of using minority languages as supplementary language in contacts with public administration organs. Presently, Article 27 of Polish Constitution lays down that Polish is the only official language in Poland. (For further information on the draft act, see chapter 3.1)

⁷ Article 33 of the Constitution.

⁸ Article 25 of the Constitution.

⁹ Article 27 and 35 of the Constitution.

¹⁰ Article 72 of the Constitution.

¹¹ The anti-discrimination provision concerning gender has already been in force since 2001.

¹² For further information see also chapter 3.1

In April 2001, Poland ratified the Framework Convention for the Protection of National Minorities. Furthermore, Poland has signed, but still not ratified, the European Charter for Regional or Minority Languages.

2.3 *The prohibition of discrimination in the Penal Code*

The amendment of the Penal Code in 1997 led to the introduction of two articles concerning the prohibition of discrimination into Chapter XVI of the Penal Code, dealing with offences against peace and humanity as well as war crimes.

Article 118 of the Penal Code

- (1) Whoever, acting with an intent to destroy in full or in part, any ethnic, racial, political or religious group, or a group with a different perspective on life, commits homicide or causes a serious detriment to the health of a person belonging to such a group, shall be subject to the penalty of the deprivation of liberty for a minimum term of 12 years, the penalty of deprivation of liberty for 25 years or the penalty of deprivation of liberty for life.
- (2) Whoever, with the intent specified under paragraph 1, creates, for persons belonging to such a group, living conditions threatening its biological destruction, applies means aimed at preventing births within this group, or forcibly removes children from the persons constituting it, shall be subject to the penalty of the deprivation of liberty for a minimum term of 5 years or the penalty of deprivation of liberty for 25 years.

Article 119 of the Penal Code

- (1) Whoever uses violence or makes unlawful threat towards a group of persons or a particular individual because of their national, ethnic, political or religious affiliation, or because of their lack of religious beliefs, shall be subject to the penalty of the deprivation of liberty for a term of between three months and five years.
- (2) The same punishment shall be imposed on anyone, who incites commission of the offence specified under paragraph 1.

Furthermore, Article 256 of the Penal Code punishes the public propagation of fascist or totalitarian systems of state and the incitement to hatred based on national, ethnic, racial or religious differences.

Article 256 of the Penal Code

Who publicly propagates fascism or other totalitarian regime or exhorts to hatred based on national, ethnic, racial or religious differences or on irreligious attitude, is liable to fine, penalty of limited freedom or penalty of 3 months to 5 years imprisonment.

Article 257 of the Penal Code prohibits public insult of a group or an individual because of their national, ethnic, racial or religious background.

Article 257 of the Penal Code

Who publicly insults a group of people or an individual person on account of his or her national, ethnic, racial, or religious affiliation or because of his or her irreligious attitude, or on these grounds infringes physical integrity of another person, is liable to penalty of imprisonment up to three years.

According to Polish State report to the Committee on the Elimination of Racial Violence the majority of cases in connection with Articles 256 and 257 were concluded with the discontinuance of proceedings; mostly due to non-detection of the related perpetrator¹³. In its latest country report on Poland, ECRI mentions that cases of racial hatred and contempt are relatively rarely brought before the courts¹⁴. From September 1998 to September 1999, 6 out of a total of 36 cases reported to the authorities were handled in court proceedings. ECRI considers that the implementation of legislation in this field should be improved. Furthermore, the Commission encourages Polish authorities to monitor closely the number of cases reported, action taken by the authorities and the related outcome. Due to the fact that many cases of racist attacks and violence may not be considered as such by the authorities, ECRI also encourages the setting-up of a system of data collection by which the ethnic origin of victims of crimes may be voluntarily given and recorded¹⁵.

As to collecting data on racially motivated crimes, the Ministry takes the view that there is no legal ground for collecting data on race, nationality, religion or sexual orientation of victims, since it did not have the powers to do so and since Article 8 of Act on Public Statistics prohibits such collection: „In statistical research with individuals participating, information concerning race, religion, personal life, and philosophical and political views cannot be collected on a compulsory basis”.

Polish Penal Code contains no specific provision, which explicitly refers to racist or xenophobic motivation as an aggravating factor. However, Article 53 Para. 2 Penal Code provides that courts, when determining the penalty, have to take into account the perpetrator’s motivation and manner of behaviour. In order to efficiently combat racist, anti-Semitic, xenophobic or homophobic tendencies it seems crucial to investigate by the police, public prosecutors or judges whether criminal offences were racially motivated.

2.3.1 Prohibition of formation of organisations and political parties which invoke racial and national hatred

Article 13 of Polish Constitution prohibits formation of political parties and other organisations, which assume or allow racial hatred in their programme or activities.

¹³ Sixteenth periodic report of Poland submitted to CERD in July 2001, p16.

¹⁴ ECRI (2000) Second Report on Poland, adopted on 10 December 1999, Strasbourg: CoE, pp. 6-7

¹⁵ Ibidem.

Article 13 of Polish Constitution

Political parties and other organisations whose programmes are based upon totalitarian methods and the modes of activity of Nazism, fascism and communism, as well as those whose programmes or activities sanction racial or national hatred, the application of violence for the purpose of obtaining power or to influence the State policy, or provide for the secrecy of their own structure or membership, shall be forbidden.

The District Court in Warsaw, which registers political parties, is supposed to ensure the compliance of the goals and activities of political parties with the Constitution. If it seems questionable whether a political party's programme or statute complies with Article 13 the District Court may apply to the Constitutional Tribunal, which has the authority to examine whether the party's political goals comply with the Constitution. If the Constitutional Tribunal ascertains non-compliance, the District Court refuses to enter the party into the register.

As regards decisions on declaring illegal or prohibiting other organizations whose activities are aimed at racial discrimination, article 258 of the Penal Code applies:

Article 258 of the Penal Code

- (1) Whoever participates in an organized group or association having for its purpose the commission of offences shall be subject to the penalty of deprivation of liberty for up to three years.
- (2) If the group or association specified in paragraph 1 has the characteristics of an armed organization, the perpetrator shall be subject to the penalty of deprivation of liberty for a term of between three months and five years.
- (3) Whoever sets up the group or association specified in paragraphs 1 or 2 or leads such a group or association shall be subject to the penalty of deprivation of liberty for a term of between six months and eight years.

2.4 *Anti-discrimination Provisions in Civil Law and Labour Law*¹⁶

According to Article 23 Civil Code "personal values" – in particular health, freedom, dignity, freedom of conscious, name or pseudonym, image, secrecy of correspondence, inviolability of home, academic, artistic, inventive and rationalising creativity are protected by civil law without prejudice to protection provided by other regulations. Courts and the judicial doctrine have always agreed that beyond any doubt the person's dignity constitutes a personal value protected by the law¹⁷. Therefore, if a person is being discriminated because of his or her race or ethnic origin his or her dignity is obviously infringed as well. This approach should certainly also

¹⁶ See also chapter 4.5

¹⁷ Under the present legislation there are firm constitutional grounds for this opinion as Article 30 of the Constitution states that "the inherent and inalienable dignity of the person shall constitute a source of freedoms and rights of persons and citizens; it shall be inviolable; the respect and protection thereof shall be the obligation of public authorities." Article 23 of the Civil Code must be interpreted in line with to the content of Article 30 of the Constitution.

apply to the other grounds of discrimination as any deliberate denial of equal treatment ultimately results in an infringement of the person's dignity.

On the basis of Article 24.1 Civil Code a person whose values become endangered by other person's action can demand to abandon the action unless it is not unlawful. Furthermore, if personal values have been infringed the person concerned can demand from the one who infringed them to remove the effects of violation. The plaintiff can demand that the respondent makes a statement of appropriate content and form. Furthermore, in cases of material as well as immaterial damage¹⁸, the plaintiff can also demand pecuniary satisfaction or payment of an appropriate sum for indicated public interest based on the rules of compensation laid down in the Civil Code¹⁹.

The described regulations on compensation claims, however, do not ensure protection against discrimination on racial and ethnic grounds as determined in Article 3 Section 1 letters e) to h) of the Racial Equality Directive as not every case of indirect discrimination might be considered as a violation of personal interests. Furthermore, Polish civil law provides no compensation claim for damages that result out of the denial of concluding the contract due to discriminatory reasons. This form of protection against discrimination becomes especially important with regard to the employment and housing sector. For example, a person who is refused to enter a tenancy agreement or employment contract because of his or her ethnic background presently has no remedy under civil law against this discriminatory treatment. Presently, Polish civil law only provides for compensation claims in case there have been any previous negotiations or pre-contractual obligations between parties²⁰. However there is no legal redress in cases in which a refusal of sale or service on discriminatory grounds takes place at the first contact of the potential contracting parties, thus before any legal relation resulting from an obligation is established²¹ and before any negotiation between the potential contracting parties are conducted²².

Regarding the conclusion of contracts concerning goods and services, the Code of Minor Offences contains two provisions: Article 135 and Article 138 which put the refusal of selling goods or providing services under fine. However, this fine does not comply with the requirements set out in Article 15 of the Racial Equality Directive, as it cannot be seen as efficient, proportional and dissuasive sanctions.

Discrimination at the workplace on the grounds of sex, age, disability, race, national origin, beliefs, especially political or religious ones, and trade union membership are prohibited by Article 11³ of the Labour Code. The Code, however, contains no specific procedural rule for the enforcement of this provision. If an employee considers him or herself discriminated on the basis of one of the grounds mentioned in Article 11³, he or she can apply to the Labour Court and launch litigation in order to protect human dignity and personal values. The legal basis for this kind of claims can

¹⁸ The legal basis for compensation of immaterial damage can be found in Article 445 and Article 448 Civil Code.

¹⁹ Article 415 of the Civil Code includes a general compensation clause which lays down that a person who caused damage due to his or her own fault is obliged to redress it.

²⁰ See Article 72 Para. 2 of the Civil Code regulates civil liability for *culpa in contrahendo*.

²¹ This excludes the application of Article 471 Civil Code.

²² This excludes the application of Article 72 Para. 2 Civil Code which regulates the culpa in contrahendo civil liability.

be found in Article 23 and 24 of the Civil Code together with Article 11 of the Labour Code. As already described above, the claimant can demand that discrimination cease and that the employer has to compensate for the employee's damages.

2.5 *The situation of resident foreigners in Poland*

According to Article 37 of the Constitution of the Republic of Poland, aliens in Poland benefit from the same constitutional rights as Polish citizens unless exceptions are provided by a legal act.

1. 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.

Previous Act of 25th June 1997 on Aliens also contained a general clause of equality of rights in its Article 25 ("During the stay in the territory of the Republic of Poland, a foreigner has the same rights and obligations as Polish citizens unless the provisions of this Act or other Acts provide otherwise"), unlike the new Act of 1 June 2003 on Aliens.

Restrictions to certain rights depend above all on the alien's residence permission. Aliens residing in Poland on the basis of a residence permit have practically the same rights as Polish citizens, with the exception of political rights and rights related to the holding of public offices²³.

Some acts regulating the status of professional self-government councils include the requirement of Polish citizenship as one of the conditions for obtaining the right to carry out a certain profession. Aliens, even when residing permanently in Poland and having graduated from a Polish university, are subject to special measures in order to obtain this right to perform a profession. Complaints have been reported in this regard concerning lengthy decision-making processes of these councils which prevented aliens to perform their profession meanwhile²⁴.

2.6 *Prohibition of discrimination in the media*

Under the Act on Radio and Television programmes or other transmissions shall not contain discriminatory content with regard to race, gender or nationality. Furthermore, programmes should respect the religious convictions of the audience, especially "Christian values"²⁵. According to Article 21 of the Radio and Television Act, public radio and television programmes should take into account the needs of national minorities and ethnic groups. Finally, Article 16b Section 3 of the same law prohibits advertisements, which infringe upon human dignity, offend religious or political

²³ Aliens also face restrictions with regard to the acquisition of real estate. See: Zienkiewicz, E. Mazur-Rafal, M. (2003), p. 8.

²⁴ Zienkiewicz, E. Mazur-Rafal, M. (2003), p. 8.

²⁵ Article 18 Section 1 and 2 of the 1992 Radio and Television Act.

convictions or include discriminatory contents with regard to race, gender or nationality.

2.7 Restitution claims²⁶

The Government continues to work with both local and international religious groups to address property claims and other sensitive issues stemming from Nazi- and Communist-era confiscation and persecutions. The Ministry of Foreign Affairs largely is responsible for the co-ordination between the Government and these organisations.

Furthermore, progress had been reported regarding the implementation of laws permitting local religious communities to submit claims for property owned prior to World War II that subsequently was nationalised.

A 1997 law permits the local Jewish community to submit claims for such property, which mirrored legislation benefiting other religious communities. The laws allow for the return of churches and synagogues, cemeteries, and community headquarters, as well as buildings that were used for other religious, educational, or charitable activities. The laws included time limits for filing claims; in several cases the deadlines have expired, and no additional claims may be filed. However, restitution commissions (composed of representatives of the Government and the religious community) are continuing adjudication of previously filed claims. The Government is drafting legislation that is expected to grant all affected religions an additional 2-year period to file claims.

The time limit for applications by the Catholic Church expired in December 1991. As of May 2002, 2,693 of the 3,051 claims filed by the Church had been concluded, with 1,282 claims settled by agreement between the Church and the party in possession of the property (usually the national or a local government); 866 properties were returned through decision of the Commission on Property Restitution, which rules on disputed claims; 507 claims were rejected; and 17 cases were likely to go to court. Claims by the local Jewish community (whose deadline for filing claims under the 1997 law expired on May 11, 2002) number approximately 5,200. The Commission on Property Restitution considered 1,136 cases; 211 were closed – 109 by a financial agreement between the parties and 72 with ownership transferred. A total of 25 cases were discontinued. As of May 2002, Lutheran claims for 1,200 properties had resulted in 583 cases being closed with the return of the properties in question (the deadline for filing such claims was July 1996). A total of 120 claims were filed with the Commission for the Orthodox Church, of which 49 were closed by agreement as of May 2002.

The laws on communal property restitution also do not address the issue of communal properties to which third parties now have title, leaving several controversial and complicated cases unresolved. In a number of cases over several years, buildings and residences were built on land that included Jewish cemeteries that were destroyed during or after World War II.

²⁶ The wording of this chapter is based on Polish Section of the International Religious Freedom Report – 2002 which was released by the Bureau of Democracy, Human Rights and Labor - U.S. Department of State in 2003, pp.2-3.

2.8 *Implementation of International Anti-Discrimination provisions*

With the exception of the Protocol No. 12 to the European Convention of Human Rights, the European Charter for Regional or Minority Languages and the UN Convention on the Rights of Migrant Workers and their Families, Poland is a party to the important international anti-discrimination agreements. However, anti-discrimination provisions contained in international human rights treaties ratified by Poland only include criteria such as sex, race and ethnic origin, religion or belief but do not cover criteria such as age, sexual orientation or disability as mentioned in Article 13 TEC.

Article. 91 of Polish Constitution lays down that ratified international agreements – after having been promulgated in the official Journal of Laws of the Republic of Poland – constitute part of the domestic legal order and can be applied directly by domestic courts, unless its application depends on the enactment of a statute²⁷.

2.8.1 International Covenant on Civil and Political Rights

Poland ratified the International Covenant on Civil and Political Rights (CCPR) in 1977. In 1992 Poland also ratified the Optional Protocol to the Covenant which provides for an individual complaint mechanism. Therefore, any subject to Polish jurisdiction²⁸, after having exhausted all available domestic remedies, may complain to the treaty body (the Human Rights Committee) that his or her rights under the treaty have been violated. Article 2 of the Covenant on Civil and Political Rights obliges the signatory states to ensure the rights recognised in the Covenant to all individuals without discrimination.

“Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

According to the Committee, not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant²⁹. The wording to “respect” and to “ensure” implies both, negative and positive state obligations. Poland is therefore not only bound to refrain from any direct interference

²⁷ Sixteenth periodic report of Poland submitted to CERD in July 2001, p5.

²⁸ Generally not only Polish citizens can bring a complaint against Poland but anyone who stays within the Polish territory and is subject to its jurisdiction. However, some rights such as voting rights are limited to nationals.

²⁹ Human Rights Committee, General Comment 18, Non-discrimination (Thirty-seventh session, 1989), adopted on 10/18/99, Para. 13. In the same General Comment the Committee expresses that “the term »discrimination« as used in the Covenant should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms. Positive action or other preferential measures are therefore allowed and may even be required for a certain period of time, if they are necessary to correct negative results which derived from discriminatory practices in the past.

with an individual's right not to be discriminated (e.g. through a discriminatory decision or treatment by public authorities) but is furthermore obliged to take effective measures to secure that the rights guaranteed in the Covenant are protected in relation to all violations, including those that result from actions by non-state actors.

The obligation in Article 2 further means that the level of protection afforded cannot vary from group to group, but has to be the same for all³⁰. With regard to the protection of homosexuals, it seems crucial to note that the Human Rights Committee has established in its decisions the concept that the criteria of "sex" also includes sexual orientation³¹.

Article 2 of CCPR, however, only has accessory character, meaning that it can only be invoked in connection with the alleged violation of another substantive right guaranteed in the Covenant. In contrast to Article 2, Article 26 of the Covenant on Civil and Political Rights contains a free-standing prohibition of discrimination:

"All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

In contrast to Article 2 the scope the prohibition of discrimination of Article 26 is not limited to the enjoyment of rights guaranteed in the Covenant but also applies with regard to economic and social rights³². The application of Article 26 is rather delimited by the concepts of "equality before the law" (meaning with regard to the application of the law) and "equal protection of the law" (meaning with regard to the adoption of laws)³³. Thus, when legislation is adopted in Poland, it must comply with the requirement of Article 26 in that its content should not be discriminatory³⁴.

Finally, it should be mentioned that the concept of discrimination adopted by the Committee of Human Rights covers not only intentional but also unintentional forms of discrimination³⁵.

2.8.2 Covenant on Economic, Social and Cultural Rights

The Covenant on Economic, Social and Cultural Rights was ratified by Poland in 1977. The obligation of non-discrimination with regard to economic and social rights becomes particularly important with regard to elderly people or persons with disabilities. Article 2 Para. 2 of the Covenant lays down the following:

³⁰ Makkonen, T. (2003) The principle of non-discrimination in international human rights law and EU law, p. 6, available at: <http://www.iom.fi/anti-discrimination/pdf/CHAPTER%20III%20FINAL%20V2.pdf>.

³¹ See: decision Gueye et al. v France, No. 196/1985. See also Makkonen, T. (2003), p. 7.

³² Scheinin, M. (1999), "Women's Economic and Social Rights as Human Rights – Conceptual Problems and Issues of Practical Implementation", in Hannikainen & Nykänen (1999). See also: Makkonen, T. (2003), p. 8.

³³ Makkonen, T. (2003), p. 8.

³⁴ Ibidem.

³⁵ See footnote 27.

“The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

Poland is therefore obliged to undertake all measures needed to effectively ensure that all economic, social and cultural rights can be enjoyed in practice without any discrimination³⁶. The Committee on Economic, Social and Cultural Rights has noted that also non-public entities, such as private employers and private suppliers of goods and services, should be subject to both non-discrimination and equality norms. The Committee’s interpretation becomes particularly relevant with regard to the increasing privatisation of public services³⁷.

With regard to discrimination on the basis of age the Committee on Economic, Social and Cultural Rights has noted “while it may not yet be possible to conclude that discrimination on the ground of age is comprehensively prohibited by the Covenant, the range of matters in relation to which such discrimination can be accepted is very limited”³⁸.

Article 2 CDESCR is accessory in character and can only be invoked in connection with other rights enshrined in the Covenant on Economic Social and Cultural Rights.

2.8.3 Convention on the Elimination of all Forms of Racial Discrimination

According to Article 91 in connection with Article 241 of the Constitution, the Convention on the Elimination of all Forms of Racial Discrimination (CERD) may be applied directly and has precedence over statutes³⁹. In September 1998, Polish Government recognised the competence of the Committee on the Elimination of Racial Discrimination to receive complaints from persons or groups of persons subject to the jurisdiction of the Republic of Poland who claim that they are victims of the violation by Poland of any of the rights specified in the Convention.

In its latest Concluding Comment on the fifteenth and sixteenth periodic reports of Poland, the Committee on the Elimination of Racial Discrimination (further: the Committee) expresses as principal subject of concern that some cases of incitement to racial hatred have been dismissed with reference to their low degree of damage to the society. The Committee further expressed the view that, according to the Convention, all such cases are very harmful to society⁴⁰. Furthermore, the Committee criticises that reports of racially motivated harassment and discrimination against Jews, Roma and

³⁶ See: Makkonen, T. (2003), p. 12.

³⁷ Committee on Economic, Social and Cultural Rights, General Comment No. 5, Persons with disabilities, adopted by the Committee at its 11th session, on 25 November 1994. See also: Makkonen, T. (2003), p. 12.

³⁸ Committee on Economic, Social and Cultural Rights, General Comment No. 6, The economic, social and cultural rights of older persons, adopted by the Committee at its 39th session, on 24 November 1995, Para. 13.

³⁹ Sixteenth periodic report of Poland submitted to CERD in July 2001, p5.

⁴⁰ Committee on the Elimination of Racial Discrimination (2003) Concluding comment on the 15th and 16th periodic reports of Poland, Para. 9.

persons of African and Asian origin have not been properly investigated by the law enforcement agencies⁴¹.

In reaction to a State party report – given in 2001 – the Committee on the Elimination of Racial Discrimination commented:

- The Committee repeated its request to provide in the next periodic report specific examples of court decisions making reference to the Convention.
- The Committee reminded Poland of its obligation under article 4 to prohibit all organizations and activities, including those of the mass media, which promote and incite racial discrimination, and insisted that Poland should strengthen its efforts to implement existing legislation in this regard.
- The Committee was concerned that some cases of incitement to racial hatred have been dismissed with reference to their low degree of damage to society. The Committee expresses the view that, according to the Convention, all such cases are very harmful to society.
- The Committee expressed concern about reports of racially motivated harassment and discrimination against Jews, Roma and persons of African and Asian origin (lack of proper investigation). The Committee recommended to intensify efforts to combat all such cases, especially through the strict application of relevant legislation and adequate trainings for law enforcement bodies and for the judiciary.
- The Committee expressed concern about reports of irregularities during the census with regard to the recording of information of persons claiming a nationality other than Polish and it recommended to take all effective measures to prevent similar incidents in the future.
- The Committee welcomed the programme for Roma population in the Malopolska region and encouraged Poland to extend the programme to other regions of the country. It further recommended that Poland pay particular attention to the rights to housing and to employment of the Roma population.
- The Committee criticized segregated classes having a lower standard of education than Polish counterparts and recommended that new programmes integrate Roma children into mainstream schools as far as possible and that Poland recruit more teachers and teaching assistants from the Roma minority.
- The Committee encouraged Poland to consult with anti-discrimination NGOs during the preparation of the next periodic report.
- The Committee recommended that Poland take into account the relevant parts of the Durban Declaration and Programme of Action when implementing the Convention in the domestic legal order, in particular in respect of articles 2 to 7 of the Convention.

2.8.4 Framework Convention on the Protection of National Minorities

During a meeting on 17 April 2003, members of the Advisory Committee – in connection with Report to Secretary General of the Council of Europe on implementation of Framework Convention of the Council of Europe for the Protection

⁴¹ Ibidem, Para. 10.

of National Minorities (FCNM) – expressed concerns as to clause of “insignificant harmfulness to the society” included in the Penal Code.

In a response to the Committee, the Ministry of Justice stated that the notion of “insignificant harmfulness to the society” is used as a “safety valve” for cases when, due to particular circumstances, even the smallest possible penalty would be unjust. This “safety valve” is meant for all crimes, not only racially motivated ones.

On annual meeting of chiefs of appellate public prosecutors' offices, they were obliged to sensitise their inferiors to issues of racially motivated crimes in their districts (this meant at first including racial background of a crime in qualification and description of a crime).

According to the Ministry, the Criminal Code prevents excessive subjectivity of judge's assessment through introducing a list of circumstances which must be taken into account when assessing the level of harmfulness of the crime. In the Ministry's opinion, particular circumstances (such as minimum harm made to the legally protected value, manner of perpetrator's behaviour that does not deserve special condemnation, situation impairing the perpetrator's ability to decide) may indicate “insignificant harmfulness to the society”.

The Ministry mentioned that the issue of racial motivation of crimes was a subject of activities that aimed at sensitising the judges and public prosecutors to this problem in order to prevent racial motivation of crimes from being disregarded. The Ministry also stated that the number of discontinuations of criminal cases on the ground of “insignificant harmfulness to the society” is decreasing in favour of conditional discontinuations (with a period of probation).

As examples of strong-minded attitude of Polish authorities towards racially and ethnically motivated crimes, the Ministry listed 13 court cases that ended up with a conviction or conditional discontinuation of criminal procedure and 4 cases in progress.

2.8.5 Convention of the Rights of the Child

Anti-discrimination provisions of Convention on the Rights of the Child

Article 2

States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

Article 23

States Parties recognize that a mentally or physically disabled child should enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child's active participation in the community.

Article 30

In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practice his or her own religion, or to use his or her own language.

2.8.6 Protocol No. 12 to the European Convention on Human Rights

Protocol No. 12 was adopted in November 2000 in Rome. In Article 1 the Protocol contains a general prohibition of discrimination:

Article 1 of Protocol No. 12 to the European Convention on Human Rights

1. The enjoyment of any right set forth by law shall be secured without any discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.
2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.

Compared to Article 14 of the European Convention on Human Rights (ECHR) the protective scope of Article 1 of Protocol 12 is much broader as it is not limited to the enjoyment of the rights and freedoms set forth in the Convention, but extends to “all rights set forth by law”.

According to the Explanatory Report, the Protocol provides added protection, in comparison to Article 14, where the person is discriminated against:

- in the enjoyment of any right specifically granted to an individual under national law;
- in the enjoyment of a right which may be inferred from a public authority's clear obligation under national law to behave in a particular manner;
- by a public authority in the exercise of discretionary power (for example, granting subsidies);
- or by any other act or omission of a public authority (for example, the behaviour of police officers when controlling a riot)⁴².

The principal objective of Article 1 is to protect individuals from discrimination by public authorities, including the courts, legislative bodies and the administrative bodies.

⁴² Explanatory Report of Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Para. 22.

Poland has not yet signed Protocol No. 12. Though it is presently under consideration whether Poland will sign the Protocol, so far no indication was given when a decision on the ratification might be taken. According to expert opinions, Polish Government might wish to wait for some jurisprudence from the European Court of Human Rights in order to fully assess the implications of the Protocol.

Considering that Polish Constitution in fact already forbids discrimination in public, social and economic life for any reason whatsoever, it seems questionable why Polish Government is so hesitant to ratify Protocol No. 12. The fact that Poland will preside over the Council of Europe in 2004 might have some stimulating influence with regard to ratification of the additional Protocol No. 12.

2.9 *Recent Developments regarding the transposition of the two EU Anti-Discrimination Directives*⁴³

The adaptation of Polish labour law to the requirements of both Directives was mainly achieved through passing of a law amending the Labour Code, which entered into force on 1 January 2004, and through amending the Act on Employment and Counteracting Unemployment. The changes in the Labour Code refer directly to all the grounds indicated in the Directives, but the Act on Employment and Counteracting Unemployment is somewhat inconsistent as regards sexual orientation: while it is mentioned as a prohibited ground of discrimination in Article 12.3 (prohibition of setting discriminatory criteria in information on a job vacancy, which an employer is obliged to send to local labour office) and in Article 37.13 (prohibition of discrimination by private employment agencies), it is not listed as such in Article 6c (Section 1, point 3 – prohibition of setting discriminatory criteria of granting work permits for non-resident foreigners and promises of such permits) neither in recently added Section 1a of Article 15 (prohibition of discrimination by state labour offices in selection for vocational trainings).

In June 2002, the Government adopted a regulation extending the powers and tasks of the Plenipotentiary for Equal Status of Women and Men to “making arrangements for establishing an office for counteracting discrimination based on race, ethnic origin, religion or belief, age and sexual orientation”. Furthermore, the new mandate also charges the Plenipotentiary with the task to counteract discrimination based on national and ethnic origin, age, religion and sexual orientation, until the new institution has been established. In December 2002, the Plenipotentiary submitted the first draft of the Act on the Inspector General for Counteracting Discrimination to the Chief of the Prime Minister’s Chancellery and started consultations with government institutions and with Social Partners. Furthermore, the Office of the Committee for European Integration⁴⁴ – as well as non-governmental organisations – approved the draft. Unfortunately, due to substantial discrepancies concerning the establishment of a new institution and its consequential costs the further elaboration of the draft was practically suspended. According to the point of view of the Ministry of Justice and

⁴³ See also chapter 4.11

⁴⁴ The Office of the Committee for European Integration and Non-Governmental organisation, which has the status of a Ministry, is the main responsible body with regard to issues related to Poland’s accession to the EU.

the Ministry of the Interior the establishment of such a body is neither required nor appropriate considering Poland's difficult budgetary situation. Furthermore, it has been argued that the Ombudsperson can fulfil the tasks set out by Article 13 of Directive on Combating Discrimination on Racial and Ethnic Ground, which would make the establishment of a new institution unnecessary.

3. General Overview on Polish situation with regard to the single grounds of discrimination

3.1 *Discrimination on the grounds of race and ethnic origin:*

Currently, representatives of 13 national and ethnic minorities, whose population is estimated at approximately 1 million people, which accounts for 2-3% of all the inhabitants, inhabit Poland. Some people belonging to national and ethnic minorities live in communities, whilst others are dispersed. The following national and ethnic minorities are present in Poland: Germans (300-500,000), Ukrainians (200-300,000), and Byelorussians (200-300,000), Lemks 60-70,000), Lithuanians (20-25,000), Slovaks (10-20,000), Russians (10-15,000), Jews (8-10,000), Armenians (5-8,000), Tatars (5,000), Czechs (3,000) and Karaites (200). The Roma population numbers around 20-30,000, of which a significant proportion lives in Malopolska province⁴⁵. However, these numbers differ significantly from those that came out from the last National Census in 2002 (Germans – 152,900, Byelorussians – 48,700, Ukrainians – 31,000, Silesians – 173,200, Roma – 12,900, Russians – 6,100, Lemks – 5,900, Lithuanians – 5,800, Kaszubs – 5,100, Slovaks – 2,000 Jews – 1,100, Armenians 1,100, Czechs 800).

During the National Census, there were allegations that some data collectors recorded the nationality of respondents as “Polish” without asking them about it (or indicated nationality in pencil), which might have lowered the number of national minorities in Poland. Also the Committee Against Racial Discrimination expressed its concern about reports of such irregularities and it recommended to take all effective measures to prevent similar incidents in the future.

In 2000, a pilot project was launched in the southern province of Malopolska. The programme aims at achieving full participation of the Roma and equal levels of development in areas such as education, employment, health, hygiene and accommodation.

Presently, Polish law neither provides for a procedure concerning the recognition of a given group as a national or ethnic minority nor does it contain a definition of the term “national minority”. However, the draft Act on National and Ethnic Minorities in the Republic of Poland, which is currently being revised by a especially established Sub-Committee of the Sejm contains such definition:

⁴⁵ Report to the Secretary General of the Council of Europe on the Realisation by the Republic of Poland of the Provisions of the Framework Convention of the Council of Europe for the Protection of National Minorities (2002), p. 7-8. See: European Commission - Directorate-General for Employment and Social Affairs - Unit D.4 (2002) Equality, Diversity and Enlargement, Report on measures to combat discrimination in acceding and candidate countries, p. 91.

Article 2 of draft Act on National and Ethnic Minorities in the Republic of Poland

National or ethnic minority is understood as a group of citizens of the Republic of Poland of separate origin, traditionally dwelling the territory of the Republic of Poland, remaining in a minority in relation to the rest of citizens, and being characterised by aiming for preservation of their language, customs, traditions, culture, religion or national or ethnic consciousness.

If the Act on National and Ethnic Minorities will not be passed Ms. Katarzyna Gonera recommends to consider introducing definitions of “racial origin”, “ethnic origin”, “national minority”, “ethnic minority” etc. in the future law on equal treatment and prohibition of discrimination. According to Ms. Gonera these definitions would seem important, even if they were to be applied in connection with anti-discrimination provisions only.

The particular situation of the Roma community in Poland

In his latest report on Poland, the Commissioner for Human Rights of the Council of Europe (CoE) mentions ill-treatment by the police as one of the major concerns. According to the Commissioner, it would appear that the Romani population belongs to those groups most frequently suffering from indifference or ill-treatment by the police⁴⁶. Furthermore, authorities did not always react seriously towards acts of violence against the Roma population⁴⁷.

In September 2002, the European Roma Rights Centre published a report „The Limits of Solidarity” addressing the situation of Roma in Poland. The report presented the situation of Roma in Poland as particularly difficult. The most important problems mentioned in the conclusions of the report are:

- The lack of adequate protection against racially motivated crimes against members of Roma communities,
- The downplaying the problem of racial motivation of crimes,
- Poverty, unemployment and poor housing conditions,
- Segregation in education,
- A hostile attitude of local authorities,
- Discrimination in access to health service, social welfare, and other public services.

The report claimed that despite critical remarks in ECRI’s Second report on Poland in 1999 (ECRI noted that “Poland remains a society in which the issues of racism, xenophobia, anti-Semitism and intolerance are still relatively unacknowledged”), little has changed in the attitude of Polish authorities, which so far had not implemented appropriate policies to combat racism.

⁴⁶ Report of the Commissioner for Human Rights, Mr. Alvaro Gil-Robles, on his visit to Poland 18 – 22 November 2002, CommDH(2003)4, Office of the Commissioner for Human Rights: Strasbourg, p. 8.

⁴⁷ Ibidem, p. 11.

Also reports of Amnesty International and ECRI reports state cases of ill-treatment of Roma.

By resolution of the Council of Ministers of 13 February 2001, Pilot Government Programme for Roma Community in Malopolska province for 2001–2003 was introduced. It included members of Roma communities in 4 districts of the province. The main goals of the programme were „making the Roma fully participate in the life of civil society and levelling the differences that divide this group from the rest of the society. Particularly important issue is equalisation of levels in such fields as: education, employment, health, hygiene, housing conditions and ability to function within a civil society.”

3.2 Discrimination on the grounds of religion and belief:

Article 53 of Polish Constitution

- (1) Freedom of faith and religion shall be ensured to everyone.
- (2) Freedom of religion shall include the freedom to profess or to accept a religion by personal choice as well as to manifest such religion, either individually or collectively, publicly or privately, by worshipping, praying, participating in ceremonies, performing of rites or teaching. Freedom of religion shall also include possession of sanctuaries and other places of worship for the satisfaction of the needs of believers as well as the right of individuals, wherever they may be, to benefit from religious services.
- (3) Parents shall have the right to ensure their children a moral and religious upbringing and teaching in accordance with their convictions. The provisions of Article 48, Para. 1 shall apply as appropriate.
- (4) The religion of a church or other legally recognized religious organization may be taught in schools, but other peoples' freedom of religion and conscience shall not be infringed thereby.
- (5) The freedom to publicly express religion may be limited only by means of statute and only where this is necessary for the defence of state security, public order, health, morals or the freedoms and rights of others.
- (6) No one shall be compelled to participate or not participate in religious practices.
- (7) No one may be compelled by organs of public authority to disclose his philosophy of life, religious convictions or belief.

The great majority (over 95 %) of Polish society declares itself as Roman Catholic. The people who belong to the Orthodox Church make up about 1.43% of the

population, while less than 0.5 % Poles are Protestant and of Protestant tradition. In comparison, around 0.14% people are attached to the Old Catholic Church⁴⁸.

In Poland there are at present 196 churches and religious associations. 147 churches and religious associations are entered into the Register of Churches and Other Religious associations and operate on the basis of the Act of May 1989 on Guarantees of the Freedom of Conscience and Faith. 15 Churches – among them the Jewish⁴⁹ and the Muslim⁵⁰ faith community - operate on the basis of separate acts regulating the relations of the state with particular Churches and religious associations. Religious communities may register with the Government, however, they are not required to do so and may function freely without registration.

Article 6 (1) of the 1989 Act on Guarantees of Freedom of Conscience and Religion prohibits discrimination or granting of privileges on the basis of religion or beliefs regarding religious issues.

While pupils are supposed to have the choice between religious instruction and ethics, the Ombudsperson for Human Rights states that in most schools, ethics courses are not offered due to financial constraints⁵¹.

On the basis of legal regulations, members of Churches and religious associations are ensured the possibility of obtaining days off from work or study during **religious holidays**⁵².

According to a monitoring report on freedom of conscience and religion, issued by the Helsinki Foundation for Human Rights, religious minority groups encounter **problems in trying to rent premises** for their routine work, to organise open meetings and religious celebrations⁵³. It is also reported that religious groups very rarely claim their religious rights guaranteed by the Constitution or the Law on guarantees of the freedom of consciences and religion. Even acts of aggression against a religious minority are reported to the police in very few cases. According to the report one reason for this lack of enforcement is due to the insufficient means and experience to use the available remedies. Furthermore some religious groups prefer not to claim their rights as they fear open conflicts and an atmosphere of sensation and public scandal.

⁴⁸ Data stem from the web site of Polish Official Statistics: www.stat.gov.pl and www.archiserwis/database/g/u/s/gus.htm See: European Commission - Directorate-General for Employment and Social Affairs - Unit D.4 (2002) Equality, Diversity and Enlargement, Report on measures to combat discrimination in acceding and candidate countries, p. 91.

⁴⁹ Act of 20 February 1997 on the Relation of the State to the Jewish Religious Communities in the Republic of Poland (Journal of Laws No. 97, item 480 as amended).

⁵⁰ Act of 21 April 1936 on the Relation of the State to the Muslim Religious association in the Republic of Poland (Journal of Laws No. 30, item 241).

⁵¹ Bureau of Democracy, Human Rights and Labor - U.S. Department of State (2003) International Religious Freedom Report – 2002: Poland.

⁵² Article 42 of the Act on Guarantees of the Freedom of Conscience and Religion. See also: Decree of the Minister of Labour and Social Policy and the Minister of National Education of 11 March 1999 on days off from work or study for persons belonging to churches and other religious associations in order to celebrate religious holidays which are not statutory holidays (Journal of Laws No. 26, item 235).

⁵³ Mikulska Agnieszka (2002), "Freedom of conscience and Religion – Monitoring Report" (*Wolnosc sumienia i wyznania. Raport z monitoringu*), Helsinki Foundation for Human Rights, Warsaw, p. 73-75.

According to the International Religious Freedom Report 2002 anti-Semitic feelings and attitudes persist among certain sectors of Polish population. However, it has been reported, that according to surveys anti-Semitic sentiments are constantly declining. Unfortunately this positive development has been interrupted, in spring 2002, when some far-right Members of Parliament made anti-Semitic remarks in a parliamentary debate over the activities of the National Remembrance Institute⁵⁴.

3.3 *Discrimination on the grounds of age*

Persons who have reached the age of retirement are guaranteed the right to social security by the Constitution⁵⁵.

It has been observed that employers in Poland frequently use **the criteria of age as a basis for dismissing** a person who meets the requirements to apply for pre-retirement welfare benefits⁵⁶. In situation of necessary redundancies, persons entitled to pre-retirement welfare benefits or pensions frequently come first in line. This is mostly due to the fact that younger are regularly in an economically less favourable situation as unemployment benefits are limited to one year only⁵⁷. However, according to a ruling by the Supreme Court in October 2000 a claim for admittance to work cannot be seen as contrary to the principles of community life simply because of the fact that an employer reached the age of retirement seven years ago⁵⁸. According to the court such refusal to admittance would amount to a violation of the prohibition on discrimination on the grounds of age lied down in the Labour Code.

Due to the fact that the general retirement age of women is five years lower than for men they are particularly vulnerable to this forms of discriminatory dismissals.

Another issue of unequal treatment between women and men on the basis of age concerns the **age for marriage**. Although the general minimum age for getting married is 18 years for both sexes, a woman can enter into marriage (and thereby gain legal majority) at the age of 16 with the consent of the guardianship court, if (in court's opinion) it's consistent with the good of future family. Men are not allowed to get married under the age of 18 in any circumstances. The government has issued a draft of the amendments to the Family and Guardianship Code, which was brought before the Sejm on April 23, 2003. The draft includes propositions, which equate the minimum age for women and men to conclude marriage⁵⁹.

Protection of children's rights:

⁵⁴ Bureau of Democracy, Human Rights and Labor - U.S. Department of State (2003) International Religious Freedom Report – 2002: Poland, p. 3. The National Remembrance Institute was created to provide access to Communist era Sectionret police files and to provide an accurate history of the Communist period.

⁵⁵ Article 67 (1) of the Constitution.

⁵⁶ According to Article 37k 1994 Law on Employment and countering Unemployment persons who have lost their jobs after a long period of employment are entitled to pre-retirement welfare benefits.

⁵⁷ Zienkiewicz, E. Mazur-Rafal, M. (2003), p. 20.

⁵⁸ Claim of the Supreme Court of 4 October 2000, I PKN 65/ 2000, OSNAPiUS 2002/9/212. See: Zienkiewicz, E. Mazur-Rafal, M. (2003), p. 19.

⁵⁹ See Article 10 of the draft of the Family and Guardianship Code.

In 2000, the Ombudsperson for Children's Rights, responsible for monitoring children's rights in Poland, was established. The **Ombudsperson for Children's Rights** is appointed by the Sejm and has the mandate to protect children from violence, cruelty, neglect and other mistreatment. This institution therefore is the official contact point for complaints about violations of human rights of children and submits requests to the appropriate law-enforcement or other authorities for action. The Ombudsperson is supposed to submit annually reports on the condition of children's rights in Poland to the Sejm. Finally, the Ombudsperson for Children is entitled to propose legislative changes in order to improve the human rights situation of children⁶⁰.

Poland has been criticised regarding the situation of separated refugee children in Poland⁶¹. The situation in this scope changed when Act of 13 June 2003 on the assistance granted to non-nationals within the territory of the Republic of Poland entered into force (on 1 Sept. 2003). Under its Article 48, a "de facto guardian" will be appointed for an unaccompanied minor after the procedures for granting him or her refugee status are established. However, the Commissioner for Human Rights of the Council of Europe strongly suggested that a legal guardian would be appointed to all separated children, irrespective of whether he or she is seeking asylum⁶².

3.4 Discrimination on the grounds of sexual orientation

In the framework of a research project carried out by the European Section of the International Lesbian and Gay Association (ILGA) a report on discrimination on Grounds of Sexual Orientation in Poland has been published⁶³. According to this report in Poland negative attitudes towards homosexuals mostly derive from the belief that homosexuals undermine the fundamental values, which are mainly based on the notion of family and Christianity⁶⁴. Furthermore, frequent statements of church officials and the mass media are promoting this negative climate concerning homosexuals in Poland⁶⁵. Gays are frequently mentioned in the context of AIDS, paedophilia, immoral behaviour etc. Due to this social disapproval of and aversion to homosexuality in Poland, many homosexuals suffer under low self-esteem and tend to hide their sexual orientation.

Discriminatory acts experienced by homosexuals in Poland:

The above mentioned report of the Lambda Warszawa Association also includes a whole list of cases concerning violence and harassment against homosexuals,

⁶⁰ Ibidem.

⁶¹ Report of the Commissioner for Human Rights, Mr. Alvaro Gil-Robles, on his visit to Poland 18 – 22 November 2002, CommDH(2003)4, Office of the Commissioner for Human Rights: Strasbourg, p. 16. Committee on the Rights of the Child, CRC/C/15/ADD. 194.

⁶² Report of the Commissioner for Human Rights, Mr. Alvaro Gil-Robles, on his visit to Poland 18 – 22 November 2002, p. 17.

⁶³ Lambda Warszawa Association (2001) Report on Discrimination on grounds of sexual orientation in Poland.

⁶⁴ Ibidem, p. 30.

⁶⁵ Ibidem, p. 28-29

discrimination at work, in churches and with regard to the use of public services.⁶⁶ The report emphasises that the full seriousness of these findings can only be understood by taking into account the high proportion of respondents who hide their sexual orientation.

According to the outcome of this research every fifth respondent out of 215 has experienced **violent attacks** such as beatings, physical assaults and rape⁶⁷. In the light of the present analysis it seems important to mention that 77% of cases of physical assault were not reported to the police⁶⁸. The majority of those persons who reported such cases to the police claimed that the reaction of the police was hostile or neutral. Only in two cases the respondents reported that the treatment by the police was supportive. Also the Commissioner for Human Rights of CoE deplored in his report on Poland that homosexuals do not always receive adequate protection from the police⁶⁹.

51% of the respondents have experienced **harassment** such as threats, verbal abuse, vandalism etc. 93.5% of those who have experienced harassment did not report it to the police.

With regard to discrimination at the **workplace** 25.5 % of the respondents have experienced harassment. However, these figures have to be read by taking into account that around 70 % of the respondents indicated that they hide their sexual orientation at the workplace.

With regard to the **housing** sector 7 % of the respondents have experienced discrimination by landlords who refused to conclude a contract or through harassment by neighbours, who found out about the respondent's homosexuality. Furthermore it has been reported that municipalities sometimes refuse to agree that the partner may live in a municipal apartment as a sub-tenant despite the fact that the municipality cannot refuse its permission without reasonable grounds.

The Commissioner for Human Rights of CoE reports on cases in which homosexuals have been denied **medical care** because of fear that they might have HIV/AIDS⁷⁰.

Discrimination of homosexuals can also be found in some **textbooks** in which homosexuality is presented as a perversion. Lambda Warsaw, who has protested against the decision of the Minister of National Education to approve these books, also deplores that tolerance towards homosexuals is never made a subject in school lessons.

The extremely low number of cases on discrimination on the ground of sexual orientation, which had been reported to the police, can be traced back to several reasons. One might be found in the fact that Polish Criminal Code does not

⁶⁶ During February until April 2001 the Association of Lambda Warszawa collected 215 completed questionnaires.

⁶⁷ Lambda Warszawa Association (2001) p.8.

⁶⁸ Ibidem, p. 9.

⁶⁹ Report of the Commissioner for Human Rights, Mr. Alvaro Gil-Robles, on his visit to Poland 18 – 22 November 2002, p. 9.

⁷⁰ Ibidem.

specifically penalise discriminatory offences against homosexuals. Another reason can be seen in the dissatisfactory or even discriminatory behaviour of the police officers to whom such cases are being reported. Finally, the lack of reporting might be due to the fact that many victims are not aware of their rights and the possibility to claim damage according to civil or labour law. Major information campaigns for potential victims as well as perpetrators on the one hand and training initiatives for the police and the judiciary personnel on the other hand will therefore be necessary to improve this highly unsatisfactory situation.

Legal provisions regarding discrimination on the basis of sexual orientation:

The context of the drafting process of the 1997 Constitution clearly indicates the difficult situation when it comes to legally fighting discrimination on the basis of sexual orientation in Poland. One of the drafts of the general equal treatment clause of Article 32 of the present Constitution included sexual discrimination as one of the prohibited grounds of discrimination. In fact this draft was being rejected due to the explicit clause prohibiting discrimination on the grounds of sexual orientation. This draft, therefore, had to give way in favour of a provision on non-discrimination “on any reason whatsoever”.⁷¹ This wording, however, changes nothing regarding the legal fact that also the present version of Article 32 implies the prohibition of discrimination on the basis of sexual orientation. This sad anecdote about the discussions, which went on during the constitutional drafting period, indicates the great amount of rejections against homosexuals and the lack of recognition that this group is highly vulnerable to discrimination and therefore needs better protection and efficient legal remedies.

Although the Constitution includes specific clauses referring to social groups which are **considered as specifically vulnerable to discrimination** such as religious communities (Article 25), national and ethnic minorities (Article 27 and 35), women (Article 33), children (Article 72) or consumers (Article 76) it does not mention explicitly homosexual persons⁷². Again, this can be seen as a lack of recognition of homosexuals’ rights by ignoring the great number of day-to-day discrimination homosexuals presently face in Poland. Also the **Penal Code** penalises hate crimes only against groups and individuals, who belong to national, ethnic, racial, religious and atheist minorities and provides no special sanction concerning homophobic crimes against sexual minorities.

In Poland same-sex partners generally do not enjoy same **rights and benefits granted to spouses**. This is true with regard to civil law⁷³ (no right to inheritance⁷⁴) as well

⁷¹ Ibidem, p. 24

⁷² Ibidem, pp. 24-25.

⁷³ Although Article 691 of the Civil Code, which regulates the succession of lease relationships, refers to persons who remained in a factual cohabitation with the lessee, it does not apply to homosexual partners, as it is presently interpreted very restrictively referring only to marital relationships. According to this provision “in the event of the death of a person renting an apartment the spouse of the lessee, who is not a co-lessee, the children of the lessee and the spouse, other persons to whom the lessee was obliged to pay alimony and a person who remained in the factual cohabitation with the lessee assume the lease relationship”.

⁷⁴ According to Article 931 Civil Code, the homosexual partner of the deceased inherits from his or her partner only if the deceased made a will, whereas the spouse inherits under the law. Furthermore, the

labour law (e.g.: no right to sick leave in order to take care of a sick spouse, social security at the age of retirement, right to death allowance etc.). The main argument that these provisions, referring only to conventional spouses, amount to discrimination is based on the fact that Polish legal system provides no legal basis, which would legally recognise same-sex unions and thereby putting them on equal status like married couples.

Another issue of concern identified in the report of the Lambda Warszawa Association are legal provisions laying down criteria for the appointment to professions by referring to undefined criteria such as “**integrity**”⁷⁵ or “**high morals**”⁷⁶. According to the report in practice these terms are often interpreted in the light of traditional, heterosexual family life etc. Hence, it has been argued that the freedom to choose a profession and the prohibition of discrimination of employees, guaranteed by the Constitution⁷⁷ and the Labour Code may be undermined where the law makes the right to perform a certain profession dependent on specific morals or personal properties.

Also the term “**Christian values**” in Polish Act on Radio and Television causes problems when it comes to equal treatment not only of homosexuals but also other religious minorities in Poland. Article 18 of this act includes an obligation of mass media to respect religious views of the audience and especially “Christian values”.

The report concludes that the interpretation of these terms in light with traditional customs, which are mostly hostile towards lesbians and gays, can in fact turn such regulations aimed at protecting society against corruption into a weapon against emancipation of the homosexual community⁷⁸.

limit of value of legacy that is exempt from taxation (which depends on the degree of kinship or affinity of the testator and the inheritor) is much lower for homosexual couples than for spouses.

⁷⁵ Article 24 of the Law on Legal Counsels, Article 28 of the Law on the Supreme Court, Article 51 of the Law on the Courts of Law.

⁷⁶ Article 2 of the Law on the Ombudsman

⁷⁷ Article 65 of Polish Constitution.

⁷⁸ Lambda Warszawa Association (2001) p.27.

4. Analysis of Polish legal framework with regard to the transposition of the EU Anti-Discrimination Directives

4.1 Concept of Discrimination

Article 2 of Racial Equality Directive

(Employment Equality Directive contains the same definitions, except different list of grounds of discrimination)

1. For the purposes of this Directive, the principle of equal treatment shall mean that there shall be no direct or indirect discrimination based on racial or ethnic origin.
2. For the purposes of paragraph 1:
 - (a) direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation on grounds of racial or ethnic origin;
 - (b) indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.
3. Harassment shall be deemed to be discrimination within the meaning of paragraph 1, when an unwanted conduct related to racial or ethnic origin takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment. In this context, the concept of harassment may be defined in accordance with the national laws and practice of the Member States.
4. An instruction to discriminate against persons on grounds of racial or ethnic origin shall be deemed to be discrimination within the meaning of paragraph 1.

4.1.1 Definition of direct discrimination:

The former version of the Labour Code, which was only amended on January 1, 2004, explicitly referred to the concepts of direct and indirect discrimination on the basis of sex⁷⁹ but only provided a definition for the latter.

According to a ruling of the Supreme Court in relation to the applicability of Article 11.3 of the Labour Code discrimination can be defined as “[...] illicit deprivation or limitation of rights arising from the employment relationship, or unequal treatment of employees for reasons of their gender, age, disability, nationality, race, beliefs or opinions, especially religious or political and trade union memberships, as well as

⁷⁹ Labour Code, Chapter II: Equal Treatment of women and men, Article 18^{3a} Para. 2: “Equal treatment for men and women shall mean lack of any discrimination, direct or indirect, based on sex.”

granting some employees less rights than other employees in the same situation, de iure and de facto.”⁸⁰

In November 2002 a legal draft of the Act amending the Labour Code and some other Acts, which is supposed to implement the employment-related requirements of the Directives into Polish Labour Code, was presented to the Sejm. The new Labour Code was subsequently adopted and entered into force on January 1, 2004. Article 18^{3a} Para. 3 of this new law now contains a definition of direct discrimination:

Article 18^{3a} Para. 3 of amended Labour Code

Direct discrimination takes place when an employee is or may be treated, in a comparable situation, less favourably than other employees.

Article 18^{3a} has to be read together with Article 11 of the new Labour Code, which lies down the specific grounds of discrimination.

Unfortunately, Polish legislation still lacks a definition for direct discrimination with regard to non-employment related issues. The definition of Article 18^{3a} may not be applied to issues outside the field of employment, as the provisions of civil law, administrative law and social protection law do not provide for appropriate application of Labour Code provisions. In order to solve this problem it seems advisable to counteract further scattering of anti-discrimination provisions by introducing such definition in a comprehensive anti-discrimination Act regulating equal treatment in non-employment related areas.

4.1.2 Definition of indirect discrimination

Compared to the previous version of the Labour Code, which only applied with regard to equal treatment of women and men⁸¹, the new Labour Code contains a broader definition of indirect discrimination. The newly amended text of Article 18^{3a} is designed according to the definition set out by both Directives in Article 2 Para. 1 lit b:

Article 18^{3a} Para. 4 of amended Labour Code

Indirect discrimination shall be taken to occur where, due to apparently neutral decision, criterion, or action, based on one or more grounds mentioned in Para. 1, disproportions in the scope of terms of employment occur or may occur to employee's disadvantage, unless they can be justified by other objective reasons.

Like in the case of definition of direct discrimination, Polish legislation also lacks a definition for indirect discrimination with regard to the non-employment-related

⁸⁰ Supreme Court ruling of 19 January 1998, I PKN 484/97, OSNAPiUS 1998/24/710. See Zienkiewicz, E. Mazur-Rafal, M. (2003), p. 9.

⁸¹ The text of Article 18^{3a} Para. 3 of the previous Labour Code was: “Indirect discrimination shall be taken to occur where there is disproportion as regards the conditions of employment to the disadvantage of all employees of a given sex or a considerable number thereof it cannot be objectively justified by reasons other than sex.”

scope of the Racial Equality Directive. (For further comments please see above chapter 4.1.1.)

4.1.3 Discriminatory harassment:

As already outlined in chapter 2.3, the Penal Code prohibits crimes such as hate speech with regard to a person's race, national or ethnic origin or religious beliefs.

On the basis of Article 24.1 Civil Code a person whose "personal values", such as health or dignity, become endangered by other person's action can demand to cease the action unless it is not unlawful. Furthermore, if personal values have been infringed the person concerned can demand from the one who infringed them to compensate for the damages. (For further detail see chapter 2.4.)

The newly amended Labour Code defines harassment as follows:

Article 18^{3a} Para. 6 of amended Labour Code

Discrimination, on the grounds mentioned in Para. 1, also consist of actions which [...] aim for or result in infringement of dignity or degradation or humiliation of an employee; such behaviours may include physical verbal, or non-verbal elements (harassment).

With regard to the phenomena of mobbing at the workplace the scope of this definition seems rather narrow. Mobbing can take place in very subtle ways, which are difficult to detect. The wording of Article 18^{3a} Para. 6 should therefore also include forms of behaviour which lead to the creation of an intimidating, hostile, degrading humiliating or offensive environment, as mentioned in Article 2 Para. 3 of both Directives.

Furthermore, additional legislative measures are necessary to prohibit discriminatory harassment with regard to the non-employment-related scope of the Racial Equality Directive⁸².

4.1.4 Instruction to discrimination:

Articles 18.1 and 18.2 of the Penal Code lay down the concept of directing or instigating the committal of a criminal offence. Therefore, instructions to carry out discriminatory acts, which are prohibited under the Penal Code, are unlawful too⁸³.

On the basis of civil law, a person who has incurred damages due to instructions to discriminate can seek compensation according to general principles⁸⁴. (For further detail see chapter 2.4.)

The new Labour Code defines instruction to discriminatory actions as a form of discrimination as laid down in Article 2 of both Directives:

⁸² See Article 3 Para. 1 lit e-h Racial Equality Directive prohibiting discrimination regarding social protection, including social security and healthcare, social advantages, education and access to and supply of goods and services which are available to the public, including housing.

⁸³ Article 18.1 and 18.2 Penal Code lies down the concept of directing or instigating the committal of a criminal offence.

⁸⁴ Article 415 Civil Code.

Article 18^{3a} Para. 6 of amended Labour Code

Discrimination, on the grounds mentioned in Para. 1, also consist of actions which consist in encouraging other persons to infringe the principle [...] of dignity or degradation or humiliation of an employee; such behaviours may include physical verbal, or non-verbal elements.

As in the case of the prohibition of harassment additional legislative measures are necessary to prohibit instruction to discriminate with regard to the non-employment-related scope of the Racial Equality Directive.

4.2 Scope

Article 3 - Scope (both Directives)

- (1) Within the limits of the powers conferred upon the Community, this Directive shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to:
 - (a) conditions for access to employment, to self-employment and to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion;
 - (b) access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience;
 - (c) employment and working conditions, including dismissals and pay;
 - (d) 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;

[following litterae are only included in the Racial Equality Directive]

- (e) social protection, including social security and healthcare;
 - (f) social advantages;
 - (g) education;
 - (h) access to and supply of goods and services which are available to the public, including housing.
- (2) This Directive does not cover difference of treatment based on nationality and is without prejudice to provisions and conditions relating to the entry into and residence of third-country nationals and stateless persons on the territory of Member States, and to any treatment which arises from the legal status of the third-country nationals and stateless persons concerned.

4.2.1 Employment Sector

According to Article 65 of the Constitution, everyone is free to choose and carry out an occupation and to choose a workplace.

The Labour Code of 26th June 1974 laid down the principle of equal treatment of employees, which referred to employment relationships in both the public and the private sector.

Labour Code of 26th June 1974

Article. 11¹ The employer is obliged to respect dignity and other personal values of the employee.

Article 11² Employees have equal rights with regard to the equal fulfilment of the same obligations; in particular, these rights refer to equal treatment of men and women in the field of employment.

Article 11³ Any discrimination in labour relations, in particular, based on sex, age, disability, race, national origin, beliefs, especially political or religious ones, and trade union membership, is prohibited.

The latest amendment of the Labour Code, entering into force on 1 January 2004, introduced the prohibition of discrimination on the basis of sexual orientation into Article 11.3. Furthermore, the amendments extended the scope of chapter IIa which until then only regulated issues concerning equal treatment of women and men. The new Article 18^{3a} Para. 1 contains a non-exhaustive list of grounds of discrimination, including sex, age, disability, racial or ethnic origin, religion, beliefs and sexual orientation with regard to following issues:

- establishment and termination of employment relationships,
- terms of employment,
- promotions,
- access to professional training aimed at improving professional qualifications.

Furthermore, Article 18^{3b} Para. 1 Section 1 broadens the scope of the equal treatment clause of Article. 18^{3a} Para. 1 by prohibiting differentiations regarding the position of an employee on one or more grounds, mentioned in Article. 18^{3a} Para. 1 and prohibiting in particular those differentiations which result in:

- refusal to establish an employment relationship
- termination of an employment relationship
- lower remuneration
- unfavourable working conditions,
- unfavourable conditions for promotion or other benefits related to work.

With regard to **vocational guidance and training** Article 17 in connection with Article 103 of the Labour Code obliges employers to facilitate the upgrading of employees' professional qualifications⁸⁵. Any discrimination in this regard is prohibited due to the equal treatment clause of Article 11.3. Conditions regarding vocational guidance and training by public authorities are regulated by Article 15.1 of the 1994 Act on Employment and Counteracting Unemployment.

Free **access to self-employment** is provided in Article 5 of the Act on Economic Activity of 1999, which lays down the general principle that the undertaking and carrying out economic activities is free to everyone on an equal basis, under the conditions defined by legal regulations. However, in Poland there are around 25 **professional self-government councils**, which regulate the access to particular professions⁸⁶ on the basis of requirements set out by various acts on professional self-government. As already mentioned in chapter 2.5 some of these acts include the requirement of Polish citizenship as one of the conditions for obtaining the right to carry out a certain profession. Due to EU-law exceptions exist with regard to EU-citizens. In case when a person feels discriminated by a self-government council regarding the access to a certain profession, he or she may appeal to the Chief Administrative Court claiming that the right to freedom of profession has been violated according to Article 65 of the Constitution.

Polish Constitution includes a general equal treatment clause regarding the equal **access to public service positions**.

Article 60 Polish Constitution

Polish citizens enjoying full public rights shall have a right of access to the public service based on the principle of equality.

Also Article 4 and 5 of the 1998 Civil Service Act contains a similar equal treatment clause providing equal access to professions within the civil service to all Polish citizens.

Equal access regarding the **membership of and involvement in an organisation of workers or employers** is guaranteed in Article 59 of the Constitution. Furthermore the right to create and join trade unions is granted to all workers regardless of the basis of their employment relationships as well as to members of farming co-operatives and to persons carrying out work on the basis of agency contracts⁸⁷.

Article 12 Section 3 of the Act on Employment and Counteracting Unemployment bans **discriminatory job postings**, which are being published.

⁸⁵ See also: Ordinance of the Minister of National Education and the Minister of Labour and Social Policy of 1993 on the principles and conditions of upgrading the professional qualifications and general education of adults. Zienkiewicz, E. Mazur-Rafal, M. (2003), p. 12.

⁸⁶ Such as barristers/ solicitors, veterinarians, architects, financial auditors etc.

⁸⁷ See: Zienkiewicz, E. Mazur-Rafal, M. (2003), p. 13.

Article 12 of Act of 14 December 1994 on Employment and Counteracting Unemployment

(...)

- (3) Employers are obliged to inform the regional labour offices, responsible for their region, on vacant job postings of vacant posts for vocational training. When providing information on the posts, employers may not formulate requirements that are discriminatory on the grounds of sex, age, disability, race, ethnic origin, nationality, sexual orientation, beliefs – especially political or religious ones - or trade union membership.

With regard to the employment-related scope of both Directives, the described provisions of the amended Labour Code meet the requirements set out in Article 3 Para. 1 litterae (a) to (d) of both Directives. However, the Labour Code does not apply to so-called “self-employment” (which means undertaking business activity on the basis of Article of 19 Nov. 1999 on economic activity, or performing “free professions” which were excluded from this Act and are regulated by special acts, e.g. barristers, legal advisers, patent & trademark attorneys). Therefore, related provisions protecting against discrimination with regard to self-employment still need to be adapted.

4.2.2 Non-employment-related scope:

The scope of the Racial Equality Directive goes beyond the employment sector by prohibiting discrimination also in the ambit of social protection, social advantages, education and access to and supply of goods and services, which are available to the public. Unfortunately, these different scopes of application introduce a kind of hierarchy of grounds of discrimination. Whereas discrimination on the ground of ethnic origin is prohibited with regard to the housing sector, homosexuals would not be entitled to compensation claims in case they experience discrimination by being denied to conclude tenant contract because of their sexual orientation. Not only that the borderline between different grounds of discrimination is often blurred, like in the case of ethnic origin and religion, but the different weighting of grounds of discrimination also seems to be not conceptual when it comes to basic notion of human dignity and human rights. Poland should therefore strive to follow a progressive approach in counteracting all grounds of discrimination mentioned in the Directives and should prohibit non-employment-related discrimination also on the grounds of religion or belief, age, disability and sexual orientation.

4.2.2.1 Social protection, including social security and healthcare

Every citizen has the right to social security in the event of incapacity to work due to illness or disability, as well as after reaching the age of retirement. A citizen remaining without employment against his/her will and without other means of support has the right to social security⁸⁸ The scope and forms of social security are defined by law, including the 1990 Act on Social Assistance, the 1998 Act on

⁸⁸ Article 67 of Polish Constitution.

Retirement and Disability Pensions from the Social Insurance Fund, and the 1998 Act on the System of Social Security.

The anti-discrimination clause contained in Article. 2a (1) of the 1998 Act on the System of Social Security limits the principle of equal treatment of all those socially insured to the criteria of sex, marital status, and family status. According to the Ministry of Economy, Labour and Social Policy, the anti-discrimination clause ought to be broadly interpreted⁸⁹. According to Ms. Maria Teresa Romer, former judge of the Supreme Court and currently President of the Association of Polish Judges – “Iustitia”, Article 2a of the 1998 Act on the System of Social Security has proved to be a “blank norm”, which is hardly ever being applied by judges. Furthermore, the general tendency in jurisprudence is that the social insurance norms have to be interpreted very strictly. Ms Romer therefore believes that Article 2a is not comparable with the anti-discrimination provision of Article 5 of the Civil Code or Article 8 of the Labour Code. In order to provide for a concise scope of the prohibition of discrimination, included in Article 2a, it would be essential to introduce all other grounds of discrimination mentioned in Article 13 TEC into this article.

Polish Constitution also contains an equal treatment clause concerning **access to health care services**. Furthermore, public authorities are additionally obliged to ensure particular health care to vulnerable groups such as children or elderly persons.

Article 68 of the Constitution

- (1) Everyone shall have the right to have his health protected.
- (2) Equal access to health care services, financed from public funds, shall be ensured by public authorities to citizens, irrespective of their material situation. The conditions for, and scope of, the provision of services shall be established by statute.
- (3) Public authorities shall ensure special health care to children, pregnant women, handicapped people and persons of advanced age. (...)

In January 1999 the Act on Common Health Insurance entered into force and introduced obligatory health insurance. Benefits from the health fund are provided to Polish citizens who reside in the territory of the Republic of Poland. It also covers foreigners residing in Poland on the basis of a permanent or temporary residence card.

As described above both the right to social security as well as the right to health care is guaranteed by the constitution only to Polish citizens. Due to the fact that the scope of both Directives does not cover differences of treatment based on nationality⁹⁰ the limitation of these rights to Polish citizens does not conflict with their minimum requirements. However, from a human rights point of view basic access to health facilities and social assistance should be granted to every person in need which is under the jurisdiction of the Republic of Poland.

⁸⁹ Zienkiewicz, E. Mazur-Rafal, M. (2003), p. 6.

⁹⁰ See Article 3 Para. 2 of both Directives.

There are no specific regulations prohibiting discrimination in relation to insurance benefits provided by private companies. Anyone who feels himself or herself discriminated against, therefore, has to refer to compensation claims as outlined in chapter 2.4.

The supervisory body in the field of insurances is Commission for Insurance Supervision. It has certain powers over the insurance companies; however, its duties do not include supervision over issues such as general terms of insurances or particular activities with regard to potential discrimination. The Commission may issue recommendations to insurance companies in order to adjust their activities to the law (failure to implement these recommendations may result in administrative sanctions, incl. fines for the management and for the company itself).

There is no specific complaint procedure for the clients. The Act on Insurance Activities established an Ombudsperson for the Insured Persons, but this institution does not have any power over insurance companies – he/she may provide assistance and representation for clients of insurance companies. The Ombudsperson participates in meetings of the Commission (only with an advisory vote).

4.2.2.2 Education

Article 70 of Polish Constitution lays down the general principle of equal treatment concerning the access to education:

Article 70 of the Constitution

- (1) Everyone shall have the right to education. Education to 18 years of age shall be compulsory. The manner of fulfilment of schooling obligations shall be specified by statute.
- (2) Education in public schools shall be without payment. Statutes may allow for payments for certain services provided by public institutions of higher education.
- (3) Parents shall have the right to choose schools other than public for their children. Citizens and institutions shall have the right to establish primary and secondary schools and institutions of higher education and educational development institutions. The conditions for establishing and operating non-public schools, the participation of public authorities in their financing, as well as the principles of educational supervision of such schools and educational development institutions, shall be specified by statute.
- (4) Public authorities shall ensure universal and equal access to education for citizens. To this end, they shall establish and support systems for individual financial and organisational assistance to pupils and students. The conditions for providing of such assistance shall be specified by statute.
- (5) The autonomy of the institutions of higher education shall be ensured in accordance with principles specified by statute.

Polish educational system is governed by the Act on the System of Education, which lays down in Article 1 that every Polish citizen has the right to education, including children, who have the right to education in school. Education until the age of 18 is obligatory and free in public schools. Public authorities are obliged to ensure that all citizens have equal access to education. To this end, they shall establish and support systems for individual financial and organisational assistance to pupils and students.⁹¹

According to Article 35 of the Constitution, national and ethnic minorities have the right to maintain and develop their own language, to maintain customs and traditions, and to develop their own culture. The same article also provides that national and ethnic minorities shall have the right to establish educational and cultural institutions, institutions designed to protect religious identity, as well as to participate in the resolution of matters connected with their cultural identity. Also the Education Act of 1991 lays down in Article 13 that schools and public institutions have the obligation to enable schoolchildren to maintain their sense of national, ethnic, linguistic and religious identity and in particular to provide them with the possibility to study their language and their own history and culture.

Assessing the state of education of national and ethnic minorities is made difficult by the lack of precise data on this issue⁹². Problems encountered most frequently by national minorities relate to lack of specific curricula, textbooks, teachers and funds⁹³.

In its Concluding Comment on the fifteenth and sixteenth periodic reports of Poland the Committee on the Elimination of Racial Discrimination appreciated the efforts of Polish government to meet the specific educational needs of Roma children. However, the Committee was concerned that in some cases these efforts had led to segregated classes having a lower standard of education than their Polish counterparts⁹⁴. According to Polish state report on the realisation of the Framework Convention of the Council of Europe for the Protection of National Minorities, around 30 % of Roma children do not fulfil the schooling obligation⁹⁵. (As regards specific problems encountered by the Roma community, see chapter 3.1)

4.2.2.3 Access to and supply of goods and services which are available to the public, including housing

Regarding the conclusion of contracts concerning goods and services, the Code of Minor Offences contains two provisions Article 135 and 138 which put the refusal of selling goods or providing services under fine.

⁹¹ Article. 70 (4) of the Constitution; see also: Ordinance of the Council of Ministers of 1993 relating to the conditions, form, and mode of granting and dispensing material assistance to schoolchildren. See: Zienkiewicz, E. Mazur-Rafal, M. (2003), p. 14.

⁹² Zienkiewicz, E. Mazur-Rafal, M. (2003), p. 14.

⁹³ Ibidem.

⁹⁴ Committee on the Elimination of Racial Discrimination (2003) Concluding comments on the 15th and 16th periodic reports of Poland, Para. 13.

⁹⁵ Report to the Secretary General of the Council of Europe on the Realisation by the Republic of Poland of the Provisions of the Framework Convention of the Council of Europe for the Protection of National Minorities (2002), p. 37.

Code of Minor Offences, Chapter XV – Offences against the interest of consumers

Article 135 Whoever, dealing with selling goods in a retail sale or catering business, hides the goods meant for sale or deliberately refuses selling them without a founded reason, is subject to fine.

Article 138 Whoever, being a professional service provider, demands or collects payment higher than one in force, or deliberately refuses to provide the service without a founded reason, is subject to fine.

Although these provision stem from the communist regime which were released in order to prevent stockpiling of commercial goods during periods of shortage of commodities, they could also be used to prohibit discrimination with regard to access and supply of goods and services which are available to the public. Discrimination, which leads to refusal to conclude a tenant contract, however, does not fall under the scope of these provisions and thereby has to be regulated separately.

In order to efficiently prohibit discrimination between private persons, it would seem advisable to introduce a general prohibition of discrimination on the grounds mentioned in both Directives applying with regard to access to and supply of goods and services which are available to the public, including housing.

4.3 Exception to the principle of equal treatment in employment

4.3.1. General Exception: Genuine and determining occupational requirements

Article 4 – Genuine and determining occupational requirements
(both Directives)

Notwithstanding Article 2(1) and (2), Member States may provide that a difference of treatment which is based on a characteristic related to racial or ethnic origin [religion or belief, disability, age or sexual orientation] shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.

The newly amended Labour Code does not define the concept of “**genuine and determining occupational requirements**” as mentioned in the Directives but regulates exceptions to the principle of equal treatment in Article 18^{3b} Para. 2:

Article 18^{3b} Para 2 of newly amended Labour Code.

The principle of equal treatment shall not be breached by actions consisting in:

- 1) not employing a person on one or more grounds mentioned in Article 18^{3a} § 1, if this is justified in performing given work due to its nature, conditions it is performed in, or requirements laid down to employees,

- 2) giving an employee a notice on change of terms of employment (in the scope of working time) if it is justified by reasons which do not regard employees,
- 3) applying measures that differentiate the situation in favour of an employee due to protection of parenthood, age, or disability of an employee,
- 4) setting terms of engaging and dismissing the employees, principles of remuneration and promotions, and access to professional training in order to improve professional qualifications, that take into account the professional experience.

These exceptions seem to be in line with the requirements of set out in Article 4 of both Directives. However, bearing in mind that the application of these provisions has to be in line with the interpretation and jurisdiction of the European Court, it seems advisable to adapt the exact wording of the Directives regarding the rather restrictive exceptions to the principle of equal treatment.

4.3.2. Exceptions with regard to professions related to religion or religious belief (Article 4.2 Employment Equality Directive)

Article 4 Para. 2 of Equal Employment Directive

Member States may maintain national legislation in force at the date of adoption of this Directive or provide for future legislation incorporating national practices existing at the date of adoption of this Directive pursuant to which, in the case of occupational activities within churches and other public or private organisations the ethos of which is based on religion or belief, a difference of treatment based on a person's religion or belief shall not constitute discrimination where, by reason of the nature of these activities or of the context in which they are carried out, a person's religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos. This difference of treatment shall be implemented taking account of Member States' constitutional provisions and principles, as well as the general principles of Community law, and should not justify discrimination on another ground. Provided that its provisions are otherwise complied with, this Directive shall thus not prejudice the right of churches and other public or private organisations, the ethos of which is based on religion or belief, acting in conformity with national constitutions and laws, to require individuals working for them to act in good faith and with loyalty to the organisation's ethos.

Article 4 Para. 2 is reflected by Article 18^{3b} Para. 4 of amended Labour Code:

Article 18^{3b}

§ 4.

Differentiating the employees on the grounds of religion or belief shall not constitute a violation of the principle of equal treatment in employment if – in connection with kind and nature of activities undertaken within churches and religious associations, and organizations whose goals are directly related to religion or belief – religion or belief of an employee constitutes an essential, legitimate, and justified occupational requirement.”

According to the Directives, religious organisations will continue to be able to take into account religion or belief in making recruitment decisions, but only if this is necessary to maintain the ethos of the organisation. In deciding whether or not such a differentiation in treatment is necessary, regard must be had to the specific occupation in question.

The position of the Catholic Church and other religious communities is guaranteed in the Constitution and specific legislation, providing them with specific rights and privileges like for example in the recruitment of teachers for religious education. Furthermore Catholic churches and other religious communities have the right to run their own educational activities, which are granted autonomy by law⁹⁶. The Directive does not, however, permit a religious organisation to simply exclude all lesbians and gay men from access to employment⁹⁷.

⁹⁶ Zienkiewicz, E. Mazur-Rafal, M. (2003), p. 16.

⁹⁷ Bell, M. (2002) *Anti-discrimination law and the European Union*, Oxford University Press: New York, p. 117. See: *Equal Opportunities Review*, 'EU Employment Framework Directive: and EOR guide' (Jan/Feb 2001) No 95, 32,36.

4.3.3. Justified exception to the principle of equal treatment on grounds of age

Article 6 EED⁹⁸ - Justification of differences of treatment on grounds of age

- (1) Notwithstanding Article 2(2), Member States may provide that differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary.
Such differences of treatment may include, among others:
 - (a) the setting of special conditions on access to employment and vocational training, employment and occupation, including dismissal and remuneration conditions, for young people, older workers and persons with caring responsibilities in order to promote their vocational integration or ensure their protection;
 - (b) the fixing of minimum conditions of age, professional experience or seniority in service for access to employment or to certain advantages linked to employment;
 - (c) the fixing of a maximum age for recruitment which is based on the training requirements of the post in question or the need for a reasonable period of employment before retirement.
- (2) Notwithstanding Article 2(2), Member States may provide that the fixing for occupational social security schemes of ages for admission or entitlement to retirement or invalidity benefits, including the fixing under those schemes of different ages for employees or groups or categories of employees, and the use, in the context of such schemes, of age criteria in actuarial calculations, does not constitute discrimination on the grounds of age, provided this does not result in discrimination on the grounds of sex.

According to Article 65 of the Constitution, regular employment of children below the age of 16 is prohibited. Furthermore there is an additional prohibition on the employment of juveniles (minors between the age of 16 and 18 years) in work described in a list of so-called prohibited jobs⁹⁹. Due to the fact that these regulations clearly aim at the protection of the health and physical development of children and juveniles, these provisions are in line with the requirements of the Employment Equality Directive.

Further exceptions to the principle of equal treatment with regard to age are laid down in Article 18^{3b} Para. 2 Section 2 and 3 of the amended Labour Code (see chapter 4.3.1). This provision allows for the use of measures that differentiate the situation in favour of an employee due to the protection of parenthood, age or disability of an

⁹⁸ EED stands for Employment Equality Directive: Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

⁹⁹ These jobs are defined in Article 190 of the Labour Code. See: Zienkiewicz, E. Mazur-Rafal, M. (2003), p. 15.

employee. The wording “in favour” secures that such measures are only applied as positive actions and do not allow for any less favourable treatment on the basis of age. According to Section 3 of the same provision setting terms of engaging and dismissing employees, principles of remuneration and promotions and access to vocational training are allowed as far as they take into account the length of employment history.

Both provisions of the new Labour Code seem to be in line with the standards set out by Article 6 of the Employment Equality Directive.

But also the previous version of the Labour Code provided protection against discrimination with regard to dismissal of persons because of their age which would allow them to apply for (pre-) retirement welfare benefits.¹⁰⁰ (See chapter 3.3) In 2000 the Supreme Court ruled that a claim for admittance to work could not have been seen as contrary to the principles of community life simply because of the fact that an employee reached the age of retirement seven years ago.¹⁰¹ According to the Court, such refusal of admittance amounted to a violation of the prohibition of discrimination on the grounds of age lied down in Article 11 Para. 3 of the Labour Code.

4.4 Positive action

Article 5 RED¹⁰² - Positive action (Article 7 EED)

With a view to ensuring full equality in practice, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to racial or ethnic origin.

As already mentioned above, Article 18^{3b} Para. 2 Section 2 of the amended Labour Code (see chapter 4.3.1) allows adoption of positive measures that differentiate the situation in favour of an employee due to the protection of parenthood, his or her age or disability.

In 2002, Migration Policy Group published a report on combating discrimination in EU candidate countries. In the report, an overview of present positive actions was given:

Race and ethnic origin:

Electoral law: electoral committees formed by national minorities are exempt from the requirement to exceed a threshold of votes in order to Secure seats in the *Sejm* or Senate.

¹⁰⁰ According to Article 37 k 1994 Law on Employment and countering Unemployment persons who have lost their jobs after a long period of employment are entitled to pre -retirement welfare benefits.

¹⁰¹ Claim of the Supreme Court of 4 October 2000, I PKN 65/ 2000, OSNAPiUS 2002/9/212. See: Zienkiewicz, E. Mazur-Rafal, M. (2003), p. 19.

¹⁰² RED stands for Racial Equality Directive: Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

Education: Financial assistance and preferences for schools conducting lessons in national minorities' languages, minority publishing houses, and financing certain cultural events.

Roma issues: Pilot Government Programme for the Roma Community in the Malopolska Province for the Years 2001-2003 was implemented (however, due to the difficult budgetary situation of the country and the fact that local governments were given the power to decide on its implementation, its implementation did not go according to plan and in some localities it was virtually suspended).

Religion: no positive action was taken in this field.

Age: The report gave the "First Job" Programme as an example of counteracting discrimination on the grounds of age, but it may be doubted that the group concerned in this programme can be seen as particularly vulnerable group.

Disability: Financial incentives (reimbursement of some costs etc.) to enterprises employing certain number of disabled persons. The programmes "Merkury" and "Hefajstos" for disabled persons were launched in order to support those who establish their own enterprises or want to improve their professional qualifications. Within the "First Job" programme, the "Junior" project was established in order to provide assistance to enterprises who engage disabled graduates for internships or employ them.

A "Student" programme supports disabled persons in gaining higher education.

Disabled students who were granted a student loan may apply for complete remission of the loan (if they are permanently unable to work).

Sexual orientation: no examples of positive action so far.

Currently, Polish version of the "EQUAL" programme is being developed in the Ministry of Economy, Labour and Social Policy.

4.5 Adequate legal measures to enforce anti-discrimination provisions set out by both Directives

Article 7 RED – Defence of rights (Article 9 EED)

- (1) Member States shall ensure that judicial and/or administrative procedures, including where they deem it appropriate conciliation procedures, for the enforcement of obligations under this Directive are available to all persons who consider themselves wronged by failure to apply the principle of equal treatment to them, even after the relationship in which the discrimination is alleged to have occurred has ended. (...)

The following paragraphs shall give an overview on legal remedies and other forms of complaint procedures in cases of experienced discrimination.

Constitutional Law:

According to Article 79 Para. 1 everyone whose constitutional freedoms or rights have been infringed, has the right to appeal to the Constitutional Tribunal for its judgement on the conformity to the Constitution of a statute or another normative act upon basis of which a court or organ of public administration has made a final decision on his freedoms or rights or on his obligations as specified in the Constitution. However, the right to appeal may only be asserted after all available means of legal protection have been exhausted.

In 1980, the Supreme Administrative Court (Naczelny Sad Administracyjny – NSA) was established [since 1 January 2004, Regional Administrative Courts have been introduced as the first instance of administrative court system]. The Court has the power to control final administrative decisions in the scope of their conformity with the Constitution and inferior legislation (including ratified international agreements). Therefore, the Court (and District Administrative Courts as the first instance) has the power to overrule a decision issued by a body of public administration on the grounds of violating an international agreement (e.g. CERD). However, it seems that no cases concerning discrimination on the grounds mentioned in RED have been brought before NSA¹⁰³.

In a ruling of 14 Feb. 2002 (I S.A./Po 461/01), NSA stated that its judges have the right (and when the Constitutional Tribunal cannot adjudicate due to the fact that an act came out of power – an obligation) to adjudicate directly on the basis of the Constitution. Thanks to it, they have the right to pass over a law that they consider contrary to the Constitution or a inferior regulation that they consider contrary to a statute or the Constitution.

Penal Law(see chapter 2.3):

In cases where discriminatory acts fulfils the elements of a crime, a public prosecutor is obliged to initiate and conduct a preparatory procedure and to bring charges against and support the charge against the prosecuted *ex officio*. In case of a repeated issuance of a refusal to initiate proceedings or of discontinuance of the case, the wronged party can independently lay charges in court¹⁰⁴.

Civil Law(see chapter 2.4):

Compensation claim: According to Article 415 of the Civil Code a compensation claim can be lodged on the basis of damages incurred due to illegal action. Article 24 Civil Code provides a legal basis for compensation claims regarding discriminatory actions, which lead to a violation of “personal values” such as dignity, freedom and health¹⁰⁵.

Polish civil law, however, provides no compensation claim for damages that result out of a denial to conclude a contract due to discriminatory reasons. This form of protection against discrimination becomes especially important with regard to the employment and housing sector. A person who is refused to enter a tenancy agreement or employment contract because of his or her ethnic background presently has no remedy under civil law against this discriminatory treatment.

¹⁰³ Review of LEX/Temida legal database (updated on 01 Sept. 2003)

¹⁰⁴ Article 55 Para. 1-4 of the Penal Code.

¹⁰⁵ According to Article 23 of the Civil Code “personal values” – in particular health, freedom, dignity, freedom of conscious, name or pseudonym, image, Sectionrecy of correspondence, inviolability of home, academic, artistic, inventive and rationalising creativity, are protected by civil law without prejudice to protection provided by other regulations.

Claim to cease and desist from actions threatening the personal welfare of a person: On the basis of Article 24.1 Civil Code a person whose “personal values” specified in Article 24.1 Civil Code becomes endangered by other person’s action can demand to cease the action unless it is not unlawful.

Claims in relation to employment relationships: Disputes in the field of labour law can be settled either by conciliation committees on the basis of a friendly settlement or through the labour courts. If an employee considers him or herself discriminated on one of the grounds mentioned in Article 11³, he or she can apply to the Labour Court and launch litigation in order to protect human dignity and personal values. The legal basis for this kind of claims can be found in Article 23 and 24 of the Civil Code together with Article 11 of the Labour. Proceedings in cases concerning a employees’ claim relating to the employment relationship are free from court fees.

Labour inspectors can represent the plaintiff in all cases connected with the employment relationship independently whether they are linked to existent employment. If the labour inspector considers a contract as a contract of employment unless it was formulated as a civil contract he or she can bring the case before the labour court without the knowledge or even more without the agreement of the person concerned.

Furthermore, an employee who feels discriminated can also apply to the trade unions and to the State Labour Inspectorate.

Act on Civil service: If a civil servant speaks or behaves in a discriminatory manner, he or she would violate the Constitution and the Article 67 point 1 of Act on Civil Service.¹⁰⁶

Ombudsperson for Human Rights: (for more information see also chapter 4.11) The Ombudsperson’s main task is to safeguard the rights and freedoms of persons and citizens provided for in the Constitution, in particular with regard to the fundamental rights guaranteed in Chapter II of the Constitution (including the general prohibition of discrimination)¹⁰⁷. According to Article 80 of the Constitution every person, irrespective of Polish or any other nationality, has the right to apply to the Ombudsperson.

4.5.1 National associations or other legal entities to engage in legal proceedings for the enforcement of rights under the Directives

Article 7 RED - Defence of rights (Article 9 EED)

(...)

(2) Member States shall ensure that associations, organisations or other legal entities, which have, in accordance with the criteria laid down by their national law, a legitimate interest in ensuring that the provisions of this Directive are complied with, may engage, either on behalf or in support of the complainant,

¹⁰⁶ Act of 18 December 1998 on Civil Service.

¹⁰⁷ Article 208 of Polish Constitution.

with his or her approval, in any judicial and/or administrative procedure provided for the enforcement of obligations under this Directive.

- (3) Paragraphs 1 and 2 are without prejudice to national rules relating to time limits for bringing actions as regards the principle of equality of treatment.

Generally in Poland, only an advocate or legal counsellor may provide legal representation.¹⁰⁸ However, according to Article 61 of the Code of Civil Procedure the participation of social organisations in proceedings before civil courts is allowed in some selected types of cases such as consumer protection.

Article 61 of the Code of Civil Procedure of 17th November 1964

- (1) Non-profit making social organisations may lodge a complaint to the benefit of citizens in alimony and consumer protection cases. The list of the organisations is determined by the Minister of Justice¹⁰⁹.
- (2) In cases mentioned in the preceding Paragraph the organisation may join a proceeding at any stage thereof. (...)

If a social organisation cannot participate in the proceeding it can still act as an “**amicus curiae**” and present its opinion on the case to the court¹¹⁰.

The government drafted an amendment to the Code of Civil Procedure (currently being subject to a debate in a parliamentary commission) which would include following regulations:

Drafted amendment of Article 61 of the Code of Civil Procedure

- § 1 In the cases regarding alimony claims and consumers’ rights protection, social organisations, which do not have as task running economic activity, are entitled to file claims on behalf of citizens.
- § 2 In the cases mentioned in the Para. above, the organisation may join the proceedings at any stage.
- § 3 Social organisations which, according to their statute, have as their tasks protection of environment, protection of consumers or protection of rights issuing for the person’s invention, may join the proceedings at any stage, providing the case falls within the above mentioned scope and the plaintiff consents to it.
- § 4 Social organisations which, according to their statute, have as their tasks protection of minorities and anti-discrimination constituted by, either direct or indirect, unequal distribution of rights and obligations of citizens, providing the case falls within the above mentioned scope, may file claims on behalf of citizens

¹⁰⁸ Article 87.1 Code of Civil Procedure.

¹⁰⁹ A list of social organisations that may participate in court proceedings on the basis of this article is fixed by the Minister of Justice. This list does not refer to certain names of organisations but indicates what goals and tasks have to be include in the organisational statutes. See Ordinance of 1 July 1991 of the Minister of Justice on the list of social organisations entitled to act before courts on behalf of or to the benefit of citizens

¹¹⁰ Article 63 Code of Civil Procedure.

who consent to it or may join the proceedings at any stage, providing the plaintiff consents to it.

§ 5 The Minister of Justice shall specify in the form of regulation a list of organisations referred to in § 1, 3 and 4.

This means that, as a result of amendment to the Article 61 of the Code of Civil Procedure, the requirement for ensuring the participation of social organisations in court proceedings regarding acts of discrimination, pursuant to the two “equality” Directives will be met; these organisations will be allowed to act directly in the interest of victims of discrimination.

With regard to problems in relation to the Labour Code, a **labour inspector** can launch court proceedings on behalf of citizens or join pending proceedings (but only in cases when existence of an employment relationship should be acknowledged or is disputed)¹¹¹. The inspector can bring the case before the labour court even without the knowledge or even more without the agreement of the person concerned. According to Article 465.1 Code of Civil Procedure, besides the labour inspector, also a representative of a trade union or another employee of the enterprise, can legally represent an employee in proceedings before the labour law. According to Article 465 § 1 of the Code of Civil Procedure, a trade union representative or a labour inspector may be plenipotentiaries of an employee or of a person insured in the proceedings before the court of labour and social insurance. The participation of a labour inspector in proceedings concerning employment related is of particular importance, as he or she is vested with legal instruments (determined by the Law of March 6th 1981 on the state’s labour inspectorate) appropriate for the supervision and control of employers’ compliance with labour law regulations.

With regard to **administrative procedures** a social organisation may, lodge proceedings or be admitted to the proceedings, if this is justified by the organisation’s statutory objectives and if such involvement is in the public interest¹¹².

Article 31.1 Code of Administrative Procedure of 14th June 1960

A social organisation, in a case concerning another person, may submit a demand to:

- (1) start a proceeding,
- (2) permit it to take part in a proceeding, if it is justified by statutory objectives of the organisation and by public interest.

A solution similar to drafted amendment of Article 61 of the Code of Civil Procedure should be included in the Code of Administrative Procedure and in the provisions regulating proceedings before the administrative courts.

However, since there are no specific administrative procedures providing legal remedies against discrimination, this provision might only become important with newly introduced administrative provisions providing legal remedies against discrimination.

¹¹¹ Article 63 Code of Civil Procedure.

¹¹² Article 31.1 of the Administrative Procedural Code. See: Zienkiewicz, E. Mazur-Rafal, M. (2003), p. 25.

The **Ombudsperson for Civil Rights** [sometimes referred to as the Commissioner for Human Rights] may provide legal advice by indicating possible legal measures but cannot act directly on behalf of the complainant¹¹³. According to Article 393 of the Code of Civil Procedure, the Ombudsperson for Civil Rights is authorised to claim the given case before the Supreme Court.

Substantial powers of the Ombudsperson for Civil Rights are provided in the Article 14 of Act on the Ombudsperson for Human Rights:

Article 14 Act on the Ombudsperson for Human Rights

Having examined a case, the Ombudsperson may:

- 1) explain to applicants that no infringement of liberties and rights of a human and a citizen has been found,
- 2) refer applicants to the agency, organisation or institution whose activity has been found to have caused an infringement of the liberties and right of a human and a citizen; such motion may not, however, infringe upon independence of the judiciary,
- 3) request an agency superior to the one referred to in point 2 to apply measures provided by law,
- 4) demand that proceedings be instituted in civil cases, and participate in any ongoing proceedings with the rights enjoyed by the prosecutor,
- 5) demand that preparatory proceedings be instituted by a competent prosecutor in cases involving offences prosecuted ex officio,
- 6) ask for instituting administration proceedings, lodge complaints against decisions to administrative court and participate in such proceedings with the rights enjoyed by the prosecutor,
- 7) move for punishment as well as for reversal of a valid decision in proceedings involving misdemeanour, under rules and procedures set forth elsewhere,
- 8) lodge cassation or extraordinary appeal against each final and valid sentence, under rules and procedures set forth elsewhere.

This means that, in relation to court proceedings, the provisions of the Code of Civil Procedure regarding the rights of the prosecutor, in particular Articles 7 and 55-60, are applied to the Ombudsperson for Civil Rights. The Ombudsperson therefore can demand that proceedings be initiated in all those cases, which could also be brought forward by public prosecutors.

4.6 Burden of Proof

Article 8 RED - Burden of proof (Article 10 EED)

- (1) Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been

¹¹³ Article 11.2 Act on Ombudsperson for Human Rights.

applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.

- (2) Paragraph 1 shall not prevent Member States from introducing rules of evidence which are more favourable to plaintiffs.
- (3) Paragraph 1 shall not apply to criminal procedures.
- (4) Paragraphs 1, 2 and 3 shall also apply to any proceedings brought in accordance with Article 7(2).
- (5) Member States need not apply paragraph 1 to proceedings in which it is for the court or competent body to investigate the facts of the case

Article 6 of the Civil Code lays down the general principle in relation to the burden of proof in civil law proceedings.

Article 6 of Civil Code of 13th April 1964

The burden to prove a fact rests on the person who derives legal effects from the fact.

Therefore, the burden of proof does not necessarily rest upon the plaintiff. According to Article 6 of the Civil Code and Article 232 of the Code of Civil Procedure (the parties are obliged to present proofs of the facts to which they attribute legal consequences) the burden of proof may rest both on plaintiff and defendant, depending on what factual statements the parties made in a concrete case¹¹⁴. In some categories of cases the burden of proof is shifted over to the opposing party – e.g. in cases concerning protection of personal interests, it is the defendant's obligation to prove that his conduct, yet infringing the plaintiff's personal interests, is not illegal (Article. 24 § 1 of the Civil Code), as well as in cases concerning redressing the damage resulting from non-performance or improper performance of an obligation, where the debtor is obliged to prove that the non-performance or improper performance is a result of circumstances for which the debtor is not liable. In the mentioned categories of cases the burden of proof is shifted over to the defendant.

Furthermore, Polish civil law operates with a series of legal presumptions, which facilitate the determination of legally significant facts. However, no such presumptions have been formulated within the context of discrimination¹¹⁵.

The newly amended Labour Code contains a special provision regarding the burden of proof, which shall be incumbent on the employer, if an employee complains about discriminatory practices.

18^{3b} Para. 1 Amended Labour Code

¹¹⁴ This paragraph has been formulated by Ms. Katarzyna Gonera, presently judge of the Supreme Court in Poland.

¹¹⁵ Zienkiewicz, E. Mazur-Rafal, M. (2003), p. 26.

Differentiating the position of an employee by an employer on one or more grounds mentioned in Article in 18^{3a} Para. 1 [...] will be regarded as breach of equal treatment in employment [...] unless the employer proves that s/he was guided by other reasons.

Due to the fact that the above mentioned principle regarding the burden of proof, enshrined in Article 6 of the Civil Code, does not fully implement a clear shift of the burden of proof, Poland has to adopt a similar provision to Article 18^{3b} Para. 1 of the amended Labour Code with regard to the non-employment-related scope of the Racial Equality Directive.

4.7 Victimization

Article 9 RED – Victimization (Article 11 EED)

Member States shall introduce into their national legal systems such measures as are necessary to protect individuals from any adverse treatment or adverse consequence as a reaction to a complaint or to proceedings aimed at enforcing compliance with the principle of equal treatment.

The applicability of any anti-discrimination law decisively depends upon the effective protection against any adverse treatment that is in connection with the enforcement of anti-discrimination provisions. The victim's fear of being dismissed, down-graded or set out any other adverse treatment, directly influences his or her decision whether to take up legal remedies against discrimination.

The amended Labour Code contains a rather restrictive regulation providing protection against victimisation:

Article 18^{3c} of newly amended Labour Code

Exercising the rights arising from breaches of the principle of equal treatment in employment may not be the ground for terminating an employment relationship, neither with nor without notice.

The wording of the Directives, however, is much broader providing protection not only against dismissal but against any adverse treatment or adverse consequence which can be seen as a reaction to a complaint or to proceedings aimed at enforcing compliance with the principle of equal treatment.

Although the Directives do not regulate any legal consequence in cases of victimisation, it seems essential to introduce a claim for compensation or any other sanction for persons who engaged in victimisation actions. Furthermore, protection against victimisation should not only be granted to the person concerned – namely the one claiming his or her rights – but also witnesses and others who support the claimant. This broader concept of protection against discrimination becomes especially important with regard to discrimination at the workplace as other

employees might refuse to corroborate a charge of discrimination due to fears of dismissal or other adverse treatment.

In order to implement efficient protection against victimisation it would seem most appropriate to define victimisation as a form of discrimination leading to the same consequences as set out by the relevant laws.

4.8 Dissemination of information¹¹⁶

Article 10 RED - Dissemination of information (Article 12 EED)

Member States shall take care that the provisions adopted pursuant to this Directive, together with the relevant provisions already in force in this field, are brought to the attention of the persons concerned by all appropriate means, for example at the workplace, throughout their territory.

In Poland knowledge on anti-discrimination provisions is very low. Also the media coverage on issues related to the protection against discrimination is very low and often contains errors and imprecise information. Due to the fact that several questions of major significance for the future system of combating discrimination remains unresolved, the entire information campaign on legal changes aiming to counteract discrimination has not been carried out so far by the Ministry of Economy, Labour and Social Policy.

According to Article 94 of the Labour Code, **the employer is obliged to inform** employees of changes to the Labour Code. Furthermore, the latest amendment of the Labour Code introduced the obligation for employers to disseminate written information on provisions related to the principle of equal treatment¹¹⁷.

Regarding future awareness campaigns the main players regarding the distribution of information will be: the body which will be created to counteract discrimination, the Ministry of Labour and Social Policy, the National Labour Inspectorate¹¹⁸, as well as NGOs counselling victims of discrimination.

¹¹⁶ Information provided in this chapter is heavily based upon the Country report on Poland regarding on measures to combat discrimination: Zienkiewicz, Ernest & Mazur-Rafal, Monika (2003), p. 28-31.

¹¹⁷ Article 94 (1) of the amended Labour Code.

¹¹⁸ The tasks of the National Inspectorate (PIP) include among other functions the control and supervision, diagnosis and monitoring of working conditions, the adherence to labour law and safety and hygiene standards.

4.9 Social Dialogue

Article 11 RED - Social dialogue (Article 13 EED)

- (1) Member States shall, in accordance with national traditions and practice, take adequate measures to promote the social dialogue between the two sides of industry with a view to fostering equal treatment, including through the monitoring of workplace practices, collective agreements, codes of conduct, research or exchange of experiences and good practices.
- (2) Where consistent with national traditions and practice, Member States shall encourage the two sides of the industry without prejudice to their autonomy to conclude, at the appropriate level, agreements laying down anti-discrimination rules in the fields referred to in Article 3 which fall within the scope of collective bargaining. These agreements shall respect the minimum requirements laid down by this Directive and the relevant national implementing measures.

In 1994 the Minister of Labour and Social Policy established a special Tripartite Commission for Social and Economic Affairs composed of representatives of the Government, employers' and employees' organisations. It was meant to be a forum for dialogue among these three parties in order to deal with issues connected to labour policy. However, the work of this Tripartite Commission had been impeded through political tension between the parties involved. In 2001, the Sejm passed the Act on the Tripartite Commission, which led to stabilisation of the cooperation between the government and the social partners.

4.10 Dialogue with non-governmental organisations

Article 12 RED - Dialogue with non-governmental organisations (Article 14 EED)

Member States shall encourage dialogue with appropriate non-governmental organisations, which have, in accordance with their national law and practice, a legitimate interest in contributing to the fight against discrimination on grounds of racial and ethnic origin with a view to promoting the principle of equal treatment.

In 2002 the Government Plenipotentiary for Equal Status of Women and Men established the Advisory Council whose members include NGO representatives, researchers and other experts. The Advisory Council meets regularly every two months to discuss legislative changes, activities and other measures that relate to the Plenipotentiary's competencies. One of the major issues discussed were the amendments to the Labour Code and the draft bill on the General Inspectorate for Counteracting Discrimination. The Advisory Council provides for a forum for

dialogue between the government and NGOs, which has been perceived very positively by both sides¹¹⁹.

4.11 Bodies for the Promotion of Equal Treatment

Article 13 RED Bodies for the Promotion of Equal Treatment

(no equivalent provision included in EED)

- (1) Member States shall designate a body or bodies for the promotion of equal treatment of all persons without discrimination on the grounds of racial or ethnic origin. These bodies may form part of agencies charged at national level with the defence of human rights or the safeguard of individuals' rights.
- (2) Member States shall ensure that the competences of these bodies include: - without prejudice to the right of victims and of associations, organisations or other legal entities referred to in Article 7(2), providing independent assistance to victims of discrimination in pursuing their complaints about discrimination, - conducting independent surveys concerning discrimination, - publishing independent reports and making recommendations on any issue relating to such discrimination.

So far, the Council of Ministers has still not decided upon the structure and the legal status of the specialised body as described in Article 13 of the Racial Equality Directive. (See chapter 2.9) The main counter-arguments regarding the establishment of a new body refer to Poland's difficult budgetary situation, which would not allow the establishment of another body. Furthermore, it has been argued that the Ombudsman for Human Rights could be charged with the functions laid out by the Racial Equality Directive (related counter-arguments will be discussed below).

The following paragraphs shall give an overview on the presently existing bodies that are charged with tasks including, among other issues, the promotion of equal treatment.

Plenipotentiary for Equal Status of Women and Men:

On the basis of an ordinance of the Council of Ministers the Plenipotentiary for Equal Status for Women and Men was established in November 2001. Due to an ordinance adopted by the government in June 2002, the powers and tasks of the Plenipotentiary were extended in order to prepare the establishment of an institution for counteracting discrimination based on race, ethnic origin, religion and beliefs, age and sexual orientation. Furthermore, the new mandate also charges the Plenipotentiary with task to counteract discrimination based on national and ethnic origin, age, religion and sexual orientation, until the new institution is being established. These tasks shall be realised through:

- Disseminating information on discriminating and its manifestations as well as developing methods and strategies to counteract discrimination.

¹¹⁹ See: Zienkiewicz, Ernest & Mazur-Rafal, Monika (2003), p. 33.

- Co-operation with the appropriate organs of public administration, NGOs and institutions within the scope of their responsibilities for realising educational and formative programmes associated with countering discrimination.
- Initiating, commenting and developing legal acts and other governmental documents aiming at counteracting discrimination.
- Inspiring and supporting groups, organisations and societies working to fight discrimination¹²⁰.

Although the Plenipotentiary submitted the first draft of the Act on the Inspector General for Counteracting Discrimination to the Chief of the Prime Minister's Chancellery already in December 2002, no decision on the establishment of such institution was reached up until now. Therefore, no accurate assessment of the body's conformity with the requirements set out in Article 13 of the Racial Equality Directive can be made at this stage. However, it can be said that the present legal status of the Plenipotentiary, which rests solely upon an ordinance of the Council of Ministers, does not provide for any institutional stability. In order to make sure that such body can efficiently fulfil its mandate it is of utmost importance that its political independence is guaranteed by statute¹²¹.

Ombudsperson for Civil Rights:

The institution of the Ombudsperson for Civil Rights was established in 1987. Its main task is to protect civic rights and freedoms infringed upon as a result of improper decisions taken by the public authority¹²². According to Article 208 of Polish Constitution, the Ombudsperson is supposed to safeguard the rights and freedoms of persons and citizens provided for in the Constitution, in particular with regard to the fundamental rights guaranteed in chapter II of the Constitution including the general prohibition of discrimination. According to Article 80 of the Constitution every person, irrespective of Polish or any other nationality, has the right to apply to the Ombudsperson.

Article 80 of Polish Constitution

In accordance with principles specified by statute, everyone shall have the right to apply to the Commissioner for Citizens' Rights for assistance in protection of his freedoms or rights infringed by organs of public authority.

Generally, the Ombudsperson can only take up complaints concerning public authorities. However, the Ombudsperson may also become involved in cases involving non-state actors, in which he or she may either conduct the explanatory procedure him/herself, or refer the investigation of the matter in whole or in part to

¹²⁰ Article 4 Section 1 and 2 of the Ordinance of the Council of Ministers of 2002. See: Zienkiewicz, Ernest & Mazur-Rafal, Monika (2003), p. 37.

¹²¹ European Commission, Directorate-General for Employment and Social Affairs Unit D.4 (2002) Promoting diversity - 21 bodies promoting diversity and combating discrimination in the European Union (executive summary), p. 10.

¹²² Act of 17 July 1987 on the Ombudsperson for Civil Rights, Journal of Laws from 2001, No. 14, item 147.

the appropriate bodies¹²³. Disputes arising from contractual relationships between natural persons do not fall under the Ombudsperson's powers. The Commissioner initiates proceedings following a complaint submitted by an individual person or upon his or her own initiative. The Ombudsman, however, not only deals with individual complaints but also conducts more general studies on the compliance with minority rights. Furthermore, no legally binding decisions can be issued by this institution. The Ombudsperson for Human Rights may provide legal advice by indicating possible legal measures but cannot act directly on behalf of the complainant¹²⁴. Notwithstanding, a case may be directed simultaneously to a court and the Ombudsperson rendering both institutions independent while examining the case.

According to the latest state report to the Committee on the Elimination of Racial Discrimination covering the period between August 1997 and December 1999, there have been relatively few complaints related to discrimination on account of race, skin colour, national or ethnic origin.¹²⁵ The European Roma Rights Centre believes that the low number of complaints is not due to the low number of discrimination cases in Poland but rather reflects the fact that channels for reporting and seeking remedy are inaccessible for victims of discrimination¹²⁶.

Although the Ombudsperson has wide range of competencies regarding the protection of civil rights it nevertheless does not fulfil the requirements set out by the Racial Equality Directive. Firstly, the Ombudsperson is not obliged to take up a complaint but can choose freely, which case he or she wants to taken up. This fact led to the criticism that not a single case regarding discrimination on the grounds of sexual orientation has been admitted by the Ombudsperson so far, although many complaints had been lodged.

Inter-ministerial Team for National Minorities:

Even though the Inter-ministerial Team for National Minorities has no legal powers to settle disputes it plays quite an important role in the political terms. The tasks of the Inter-Departmental Team for National Minorities include among other tasks:

- Drawing up draft projects to lay ground for governmental activities aimed at the creation of favourable conditions for the national minorities that live in Poland;
- Elaborating solutions aimed at co-ordinating the activities taken by the organs of State administration which deal with national minorities;
- Providing assessments and formulating proposals as regards ensuring the execution of rights and needs of national minorities;
- Formulating assessments and proposals with respect to the effectiveness of counteracting the phenomena which infringe the rights of national minorities, as well as initiating activities aimed at combating such phenomena
- Initiating research on the situation of national minorities ;

¹²³ Article 12 Act on Ombudsperson for Civil Rights. See: Zienkiewicz, Ernest & Mazur-Rafal, Monika (2003), p 35.

¹²⁴ Article 11.2 Act on Ombudsperson for Civil Rights.

¹²⁵ Sixteenth periodic report of Poland submitted to CERD in July 2001, p12.

¹²⁶ ERRC (2002) The Limits of Solidarity: Roma in Poland After 1989, p 14.

National Minorities Division

The National Minorities Division forms part of the Ministry of the Interior and Administration. The Division is entrusted with the task of considering complaints concerning the activities of public administration in the sphere of national minorities¹²⁷. The Division, however, has no authority to issue any legally binding decision.

Within the **Ministry of Culture and National Heritage**, there is the **Department of Culture of National Minorities**. Tasks of the Department include:

- 1) providing assistance to social organizations in preserving tradition and culture of national minorities,
- 2) supporting cultural events organized by associations of national minorities,
- 3) supporting publications and press of national minorities,
- 4) cooperation with associations of minorities in cultural education of children and youth,
- 5) providing opinions on legislation, covenants, treaties and international standards regarding issue of culture of minorities,
- 6) supporting undertakings for tolerance and actions for disseminating the issues of culture of minorities among Polish society,
- 7) performing tasks resulting from cooperation with Inter-Ministerial Team for National Minorities

The main parliamentary body (in Sejm) in this field is the National and Ethnic Minorities Committee. According to the internal regulation of Sejm, within the scope of the Committee rest “issues related to preserving cultural heritage of national, ethnic and language minorities and protection of their rights”. Within the Committee, there is the “Special Sub-Committee for the Work on the Draft Act on National Minorities”.

4.12. Abolishment of any provisions contrary to the principal of equal treatment

Article 14 RED – Compliance (Article 16 EED)

Member States shall take the necessary measures to ensure that:

- (a) any laws, regulations and administrative provisions contrary to the principle of equal treatment are abolished;
- (b) any provisions contrary to the principle of equal treatment which are included in contracts or collective agreements, internal rules of undertakings or rules governing the independent occupations and professions and workers' and employers' organisations are, or may be, declared null and void or are amended.

¹²⁷ The Division can, for example, request explanations, present opinions, provide information or recommend other institutions to take appropriate action.

4.13. Sanctions and Compensation

Article 15 RED – Sanctions (Article 17 EED)

Member States shall lay down the rules on sanctions applicable to infringements of the national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that they are applied. The sanctions, which may comprise the payment of compensation to the victim, must be effective, proportionate and dissuasive. The Member States shall notify those provisions to the Commission by 19 July 2003 at the latest and shall notify it without delay of any subsequent amendment affecting them

The present Polish anti-discrimination legislation does not provide for any specific system of sanctions but refers to penalties and punishments set out by the Penal Code and by the Code of Minor Offences. Furthermore, Polish Civil Code and Labour Code provide compensation claims for material and immaterial damages.

The newly introduced amendments to the Labour code abolished the upper limits regarding compensation claims for infringements of the principle of equal treatment¹²⁸ but left the minimum limit unchanged. According to Article 183d of the previous version of the Labour Code, the amount of such compensation claims had to be at least equal to minimum remuneration for work, but could not exceed six times of this remuneration.

It is questionable whether this minimum limit is high enough in order to fulfil the requirements of Article 15 of the Race Equality Directive and Article 17 of the Employment Equality Directive which oblige Member States to lay down sanctions which must be “effective, proportionate and dissuasive”. Although both Directives state that sanctions “may comprise the payment of compensation to the victim”, Polish system of compensation of damages is based on the concept of redressing damages and does not include a sanctioning character. Whereas for a small enterprise one monthly salary could have a dissuasive character, a bigger company might not even notice the monetary loss related to the compensation. It therefore seems necessary to introduce – parallel to compensation – additional sanctions, which should be proportionate to the size of the company in order to have a dissuasive effect on the convicted employers.

5. Conclusion

Polish legal framework contains no single anti-discrimination act, but comprises scattered provisions prohibiting discrimination, which are underpinned by a constitutional equal treatment clause. The most detailed anti-discrimination provisions can be found in the newly amended Labour Code, which entered into force on January 1, 2004. The difficulties regarding the adoption of a coherent anti-discrimination legislation partly stem from the fact that the scope of both Anti-Discrimination

¹²⁸ This compensation claims only applied to infringements of the principle of equal treatment of men and women.

Directives refers to different branches of law which are traditionally regulated separately in Polish legal system. This challenge, however, could be overcome by adapting a separate piece of legislation regulating not only the prohibition of non-employment related discrimination but also establishing a specialised body as described in Article 13 of the Racial Equality competent for all grounds of discrimination mentioned in Article 13 TEC. The structure of this act could be similar to the Act on Protection of Competition and Consumers, which is composed of three parts: (a) substantial provisions, (b) organisational provisions concerning the powers and the structure of the Office for Protection of Competition and Consumers and (c) procedural provisions.

With regard to the transposition of the two anti-discrimination Directives the biggest deficits can be found regarding the non-employment-related scope of the Racial Equality Directive. For example, Polish legislation contains no definition of direct or indirect discrimination outside the Labour Code. Equally, the concepts of harassment and instruction to discrimination are only defined in the Labour Code. Also the shift in the distribution of the burden of proof is not regulated as regards non-employment-related discriminations.

One of the major obstacles in making anti-discrimination provisions effective in Poland is caused by exceedingly long and ineffective court proceedings and related costs. This led to the common conviction among Poles that bringing a case to court will not bring the desired results but rather burden the plaintiff with court fees. Many victims of discrimination therefore take up a passive attitude in asserting their rights. Consequently, there are extremely few cases in relation to anti-discrimination provisions, which have been brought to court. This deficit of relevant jurisdiction could be tackled by promoting test litigation, which would enhance the predictability and awareness of certain anti-discrimination provisions.

In order to improve access to justice anti-discrimination provisions should be as precise as possible, making clear and foreseeable what forms of behaviour or actions amount to discrimination and are therefore prohibited by law. Moreover, victims and witnesses of discrimination should have access to free legal counselling.

Furthermore, in order to enhance the protection against discrimination it would also be important to record more statistical data on direct and specifically on indirect discrimination. This data should include information on victims as well as perpetrators and should not restrict itself to the criteria of nationality but should include "visible" criteria such as colour of skin, ethnic background or membership to a religious community. Although the collection of this data is a highly sensitive issue, which has to be handled with utmost care, it should be acknowledged that without them there would be no true picture on the whole scale and scope of racial, ethnic, religious and homophobic discrimination in Poland. The function of the specialised body which shall be established according to Article 13 of the Racial Equality Directive should therefore also include the establishment of a sound system of data collection on complaints as well as on information on victims and perpetrators. This data can provide an important basis for research studies and consequently for policy decisions fighting discrimination.

Finally, it can be said that with regard to the legal fight against discrimination Poland is presently going through an important development – which is, however, less based on its own initiative but rather on its accession to the EU. It therefore seems particularly important to make sure that the new anti-discrimination provisions do not result in mere lip services but efficiently enhance the protection against discrimination in Poland.

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APPENDIX I

Council Directive 2000/78/EC

of 27 November 2000

Establishing a General Framework for Equal Treatment in Employment and Occupation

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 13 thereof,

Having regard to the proposal from the Commission,

Having regard to the Opinion of the European Parliament,

Having regard to the Opinion of the Economic and Social Committee,

Having regard to the Opinion of the Committee of the Regions,

Whereas:

1. In accordance with Article 6 of the Treaty on European Union, the European Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to all Member States and it respects fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, as general principles of Community law.
2. The principle of equal treatment between women and men is well established by an important body of Community law, in particular in Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions.
3. In implementing the principle of equal treatment, the Community should, in accordance with Article 3 (2) of the EC Treaty, aim to eliminate inequalities, and to promote equality between men and women, especially since women are often the victims of multiple discrimination.
4. The right of all persons to equality before the law and protection against discrimination constitutes a universal right recognised by the Universal Declaration of Human Rights, the United Nations Convention on the Elimination of All Forms of Discrimination against Women, United Nations Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights and by the European Convention for the Protection of Human Rights and Fundamental Freedoms, to which all Member States are signatories. Convention No 111 of the International Labour Organisation (ILO) prohibits discrimination in the field of employment and occupation.
5. It is important to respect such fundamental rights and freedoms. This Directive does not prejudice freedom of association, including the right to establish unions with others and to join unions to defend one's interests.
6. The Community Charter of the Fundamental Social Rights of Workers recognises the importance of combating every form of discrimination, including the need to take

appropriate action for the social and economic integration of elderly and disabled people.

7. The EC Treaty includes among its objectives the promotion of coordination between employment policies of the Member States. To this end, a new employment chapter was incorporated in the EC Treaty as a means of developing a coordinated European strategy for employment to promote a skilled, trained and adaptable workforce.
8. The Employment Guidelines for 2000 agreed by the European Council at Helsinki on 10 and 11 December 1999 stress the need to foster a labour market favourable to social integration by formulating a coherent set of policies aimed at combating discrimination against groups such as persons with disability. They also emphasise the need to pay particular attention to supporting older workers, in order to increase their participation in the labour force.
9. Employment and occupation are key elements in guaranteeing equal opportunities for all and contribute strongly to the full participation of citizens in economic, cultural and social life and to realising their potential.
10. On 29 June 2000 the Council adopted Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin. That Directive already provides protection against such discrimination in the field of employment and occupation.
11. Discrimination based on religion or belief, disability, age or sexual orientation may undermine the achievement of the objectives of the EC Treaty, in particular the attainment of a high level of employment and social protection, raising the standard of living and the quality of life, economic and social cohesion and solidarity, and the free movement of persons.
12. To this end, any direct or indirect discrimination based on religion or belief, disability, age or sexual orientation as regards the areas covered by this Directive should be prohibited throughout the Community. This prohibition of discrimination should also apply to nationals of third countries but does not cover differences of treatment based on nationality and is without prejudice to provisions governing the entry and residence of third-country nationals and their access to employment and occupation.
13. This Directive does not apply to social security and social protection schemes whose benefits are not treated as income within the meaning given to that term for the purpose of applying Article 141 of the EC Treaty, nor to any kind of payment by the State aimed at providing access to employment or maintaining employment.
14. This Directive shall be without prejudice to national provisions laying down retirement ages.
15. The appreciation of the facts from which it may be inferred that there has been direct or indirect discrimination is a matter for national judicial or other competent bodies, in accordance with rules of national law or practice. Such rules may provide, in particular, for indirect discrimination to be established by any means including on the basis of statistical evidence.
16. The provision of measures to accommodate the needs of disabled people at the workplace plays an important role in combating discrimination on grounds of disability.
17. This Directive does not require the recruitment, promotion, maintenance in employment or training of an individual who is not competent, capable and available to perform the essential functions of the post concerned or to undergo the relevant

training, without prejudice to the obligation to provide reasonable accommodation for people with disabilities.

18. This Directive does not require, in particular, the armed forces and the police, prison or emergency services to recruit or maintain in employment persons who do not have the required capacity to carry out the range of functions that they may be called upon to perform with regard to the legitimate objective of preserving the operational capacity of those services.
19. Moreover, in order that the Member States may continue to safeguard the combat effectiveness of their armed forces, they may choose not to apply the provisions of this Directive concerning disability and age to all or part of their armed forces. The Member States which make that choice must define the scope of that derogation.
20. Appropriate measures should be provided, i.e. effective and practical measures to adapt the workplace to the disability, for example adapting premises and equipment, patterns of working time, the distribution of tasks or the provision of training or integration resources.
21. To determine whether the measures in question give rise to a disproportionate burden, account should be taken in particular of the financial and other costs entailed, the scale and financial resources of the organisation or undertaking and the possibility of obtaining public funding or any other assistance.
22. This Directive is without prejudice to national laws on marital status and the benefits dependent thereon.
23. In very limited circumstances, a difference of treatment may be justified where a characteristic related to religion or belief, disability, age or sexual orientation constitutes a genuine and determining occupational requirement, when the objective is legitimate and the requirement is proportionate. Such circumstances should be included in the information provided by the Member States to the Commission.
24. The European Union in its Declaration No 11 on the status of churches and non-confessional organisations, annexed to the Final Act of the Amsterdam Treaty, has explicitly recognised that it respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States and that it equally respects the status of philosophical and non-confessional organisations. With this in view, Member States may maintain or lay down specific provisions on genuine, legitimate and justified occupational requirements which might be required for carrying out an occupational activity.
25. The prohibition of age discrimination is an essential part of meeting the aims set out in the Employment Guidelines and encouraging diversity in the workforce. However, differences in treatment in connection with age may be justified under certain circumstances and therefore require specific provisions which may vary in accordance with the situation in Member States. It is therefore essential to distinguish between differences in treatment which are justified, in particular by legitimate employment policy, labour market and vocational training objectives, and discrimination which must be prohibited.
26. The prohibition of discrimination should be without prejudice to the maintenance or adoption of measures intended to prevent or compensate for disadvantages suffered by a group of persons of a particular religion or belief, disability, age or sexual orientation, and such measures may permit organisations of persons of a particular religion or belief, disability, age or sexual orientation where their main object is the promotion of the special needs of those persons.
27. In its Recommendation 86/379/EEC of 24 July 1986 on the employment of disabled people in the Community, the Council established a guideline framework setting out

examples of positive action to promote the employment and training of disabled people, and in its Resolution of 17 June 1999 on equal employment opportunities for people with disabilities, affirmed the importance of giving specific attention *inter alia* to recruitment, retention, training and lifelong learning with regard to disabled persons.

28. This Directive lays down minimum requirements, thus giving the Member States the option of introducing or maintaining more favourable provisions. The implementation of this Directive should not serve to justify any regression in relation to the situation which already prevails in each Member State.
29. Persons who have been subject to discrimination based on religion or belief, disability, age or sexual orientation should have adequate means of legal protection. To provide a more effective level of protection, associations or legal entities should also be empowered to engage in proceedings, as the Member States so determine, either on behalf or in support of any victim, without prejudice to national rules of procedure concerning representation and defence before the courts.
30. The effective implementation of the principle of equality requires adequate judicial protection against victimisation.
31. The rules on the burden of proof must be adapted when there is a *prima facie* case of discrimination and, for the principle of equal treatment to be applied effectively, the burden of proof must shift back to the respondent when evidence of such discrimination is brought. However, it is not for the respondent to prove that the plaintiff adheres to a particular religion or belief, has a particular disability, is of a particular age or has a particular sexual orientation.
32. Member States need not apply the rules on the burden of proof to proceedings in which it is for the court or other competent body to investigate the facts of the case. The procedures thus referred to are those in which the plaintiff is not required to prove the facts, which it is for the court or competent body to investigate.
33. Member States should promote dialogue between the social partners and, within the framework of national practice, with non-governmental organisations to address different forms of discrimination at the workplace and to combat them.
34. The need to promote peace and reconciliation between the major communities in Northern Ireland necessitates the incorporation of particular provisions into this Directive.
35. Member States should provide for effective, proportionate and dissuasive sanctions in case of breaches of the obligations under this Directive.
36. Member States may entrust the social partners, at their joint request, with the implementation of this Directive, as regards the provisions concerning collective agreements, provided they take any necessary steps to ensure that they are at all times able to guarantee the results required by this Directive.
37. In accordance with the principle of subsidiarity set out in Article 5 of the EC Treaty, the objective of this Directive, namely the creation within the Community of a level playing-field as regards equality in employment and occupation, cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale and impact of the action, be better achieved at Community level. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve that objective,

HAS ADOPTED THIS DIRECTIVE:

CHAPTER I: GENERAL PROVISIONS

Article 1

Purpose

The purpose of this Directive is to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment.

Article 2

Concept of discrimination

1. For the purposes of this Directive, the "principle of equal treatment" shall mean that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1.
2. For the purposes of paragraph 1:
 - a. direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1;
 - b. indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons unless:
 - i. that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary, or
 - ii. as regards persons with a particular disability, the employer or any person or organisation to whom this Directive applies, is obliged, under national legislation, to take appropriate measures in line with the principles contained in Article 5 in order to eliminate disadvantages entailed by such provision, criterion or practice.
3. Harassment shall be deemed to be a form of discrimination within the meaning of paragraph 1, when unwanted conduct related to any of the grounds referred to in Article 1 takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment. In this context, the concept of harassment may be defined in accordance with the national laws and practice of the Member States.
4. An instruction to discriminate against persons on any of the grounds referred to in Article 1 shall be deemed to be discrimination within the meaning of paragraph 1.
5. This Directive shall be without prejudice to measures laid down by national law which, in a democratic society, are necessary for public security, for the maintenance of public order and the prevention of criminal offences, for the protection of health and for the protection of the rights and freedoms of others.

Article 3

Scope

1. Within the limits of the areas of competence conferred on the Community, this Directive shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to:

- a. conditions for access to employment, to self-employment or to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion;
 - b. access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience;
 - c. employment and working conditions, including dismissals and pay;
 - d. 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.
2. This Directive does not cover differences of treatment based on nationality and is without prejudice to provisions and conditions relating to the entry into and residence of third-country nationals and stateless persons in the territory of Member States, and to any treatment which arises from the legal status of the third-country nationals and stateless persons concerned.
 3. This Directive does not apply to payments of any kind made by state schemes or similar, including state social security or social protection schemes.
 4. Member States may provide that this Directive, in so far as it relates to discrimination on the grounds of disability and age, shall not apply to the armed forces.

Article 4

Occupational requirements

1. Notwithstanding Article 2(1) and (2), Member States may provide that a difference of treatment which is based on a characteristic related to any of the grounds referred to in Article 1 shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.
2. Member States may maintain national legislation in force at the date of adoption of this Directive or provide for future legislation incorporating national practices existing at the date of adoption of this Directive pursuant to which, in the case of occupational activities within churches and other public or private organisations the ethos of which is based on religion or belief, a difference of treatment based on a person's religion or belief shall not constitute discrimination where, by reason of the nature of these activities or of the context in which they are carried out, a person's religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos. This difference of treatment shall be implemented taking account of Member States' constitutional provisions and principles, as well as the general principles of Community law, and should not justify discrimination on another ground. Provided that its provisions are otherwise complied with, this Directive shall thus not prejudice the right of churches and other public or private organisations, the ethos of which is based on religion or belief, acting in conformity with national constitutions and laws, to require individuals working for them to act in good faith and with loyalty to the organisation's ethos.

Article 5

Reasonable accommodation for disabled persons

In order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities, reasonable accommodation shall be provided. This means that employers shall take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer. This burden shall not be disproportionate when it is sufficiently remedied by measures existing within the framework of the disability policy of the Member State concerned.

Article 6

Justification of differences of treatment on grounds of age

1. Notwithstanding Article 2(2), Member States may provide that differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary. Such differences of treatment may include, among others:
 - a. the setting of special conditions on access to employment and vocational training, employment and occupation, including dismissal and remuneration conditions, for young people, older workers and persons with caring responsibilities in order to promote their vocational integration or ensure their protection;
 - b. the fixing of minimum conditions of age, professional experience or seniority in service for access to employment or to certain advantages linked to employment;
 - c. the fixing of a maximum age for recruitment which is based on the training requirements of the post in question or the need for a reasonable period of employment before retirement.
2. Notwithstanding Article 2(2), Member States may provide that the fixing for occupational social security schemes of ages for admission or entitlement to retirement or invalidity benefits, including the fixing under those schemes of different ages for employees or groups or categories of employees, and the use, in the context of such schemes, of age criteria in actuarial calculations, does not constitute discrimination on the grounds of age, provided this does not result in discrimination on the grounds of sex.

Article 7

Positive action

1. With a view to ensuring full equality in practice, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to any of the grounds referred to in Article 1.
2. With regard to disabled persons, the principle of equal treatment shall be without prejudice to the right of Member States to maintain or adopt provisions on the protection of health and safety at work or to measures aimed at creating or maintaining provisions or facilities for safeguarding or promoting their integration into the working environment.

Article 8

Minimum requirements

1. Member States may introduce or maintain provisions which are more favourable to the protection of the principle of equal treatment than those laid down in this Directive.
2. The implementation of this Directive shall under no circumstances constitute grounds for a reduction in the level of protection against discrimination already afforded by Member States in the fields covered by this Directive.

CHAPTER II: REMEDIES AND ENFORCEMENT

Article 9

Defence of rights

1. Member States shall ensure that judicial and/or administrative procedures, including where they deem it appropriate conciliation procedures, for the enforcement of obligations under this Directive are available to all persons who consider themselves wronged by failure to apply the principle of equal treatment to them, even after the relationship in which the discrimination is alleged to have occurred has ended.
2. Member States shall ensure that associations, organisations or other legal entities which have, in accordance with the criteria laid down by their national law, a legitimate interest in ensuring that the provisions of this Directive are complied with, may engage, either on behalf or in support of the complainant, with his or her approval, in any judicial and/or administrative procedure provided for the enforcement of obligations under this Directive.
3. Paragraphs 1 and 2 are without prejudice to national rules relating to time limits for bringing actions as regards the principle of equality of treatment.

Article 10

Burden of proof

1. Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.
2. Paragraph 1 shall not prevent Member States from introducing rules of evidence which are more favourable to plaintiffs.
3. Paragraph 1 shall not apply to criminal procedures.
4. Paragraphs 1, 2 and 3 shall also apply to any legal proceedings commenced in accordance with Article 9(2).
5. Member States need not apply paragraph 1 to proceedings in which it is for the court or competent body to investigate the facts of the case.

Article 11

Victimisation

Member States shall introduce into their national legal systems such measures as are necessary to protect employees against dismissal or other adverse treatment by the employer as a reaction to a complaint within the undertaking or to any legal proceedings aimed at enforcing compliance with the principle of equal treatment.

Article 12

Dissemination of information

Member States shall take care that the provisions adopted pursuant to this Directive, together with the relevant provisions already in force in this field, are brought to the attention of the persons concerned by all appropriate means, for example at the workplace, throughout their territory.

Article 13

Social dialogue

1. Member States shall, in accordance with their national traditions and practice, take adequate measures to promote dialogue between the social partners with a view to fostering equal treatment, including through the monitoring of workplace practices, collective agreements, codes of conduct and through research or exchange of experiences and good practices.
2. Where consistent with their national traditions and practice, Member States shall encourage the social partners, without prejudice to their autonomy, to conclude at the appropriate level agreements laying down anti-discrimination rules in the fields referred to in Article 3 which fall within the scope of collective bargaining. These agreements shall respect the minimum requirements laid down by this Directive and by the relevant national implementing measures.

Article 14

Dialogue with non-governmental organisations

Member States shall encourage dialogue with appropriate non-governmental organisations which have, in accordance with their national law and practice, a legitimate interest in contributing to the fight against discrimination on any of the grounds referred to in Article 1 with a view to promoting the principle of equal treatment.

CHAPTER III: PARTICULAR PROVISIONS

Article 15

Northern Ireland

1. In order to tackle the under-representation of one of the major religious communities in the police service of Northern Ireland, differences in treatment regarding recruitment into that service, including its support staff, shall not constitute discrimination insofar as those differences in treatment are expressly authorised by national legislation.
2. In order to maintain a balance of opportunity in employment for teachers in Northern Ireland while furthering the reconciliation of historical divisions between the major religious communities there, the provisions on religion or belief in this Directive shall not apply to the recruitment of teachers in schools in Northern Ireland in so far as this is expressly authorised by national legislation.

CHAPTER IV: FINAL PROVISIONS

Article 16

Compliance

Member States shall take the necessary measures to ensure that:

- a. any laws, regulations and administrative provisions contrary to the principle of equal treatment are abolished;

- b. any provisions contrary to the principle of equal treatment which are included in contracts or collective agreements, internal rules of undertakings or rules governing the independent occupations and professions and workers' and employers' organisations are, or may be, declared null and void or are amended.

Article 17

Sanctions

Member States shall lay down the rules on sanctions applicable to infringements of the national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that they are applied. The sanctions, which may comprise the payment of compensation to the victim, must be effective, proportionate and dissuasive. Member States shall notify those provisions to the Commission by 2 December 2003 at the latest and shall notify it without delay of any subsequent amendment affecting them.

Article 18

Implementation

Member States shall adopt the laws, regulations and administrative provisions necessary to comply with this Directive by 2 December 2003 at the latest or may entrust the social partners, at their joint request, with the implementation of this Directive as regards provisions concerning collective agreements. In such cases, Member States shall ensure that, no later than 2 December 2003, the social partners introduce the necessary measures by agreement, the Member States concerned being required to take any necessary measures to enable them at any time to be in a position to guarantee the results imposed by this Directive. They shall forthwith inform the Commission thereof.

In order to take account of particular conditions, Member States may, if necessary, have an additional period of 3 years from 2 December 2003, that is to say a total of 6 years, to implement the provisions of this Directive on age and disability discrimination. In that event they shall inform the Commission forthwith. Any Member State which chooses to use this additional period shall report annually to the Commission on the steps it is taking to tackle age and disability discrimination and on the progress it is making towards implementation. The Commission shall report annually to the Council.

When Member States adopt these measures, they shall contain a reference to this Directive or be accompanied by such reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States.

Article 19

Report

1. Member States shall communicate to the Commission, by 2 December 2005 at the latest and every five years thereafter, all the information necessary for the Commission to draw up a report to the European Parliament and the Council on the application of this Directive.
2. The Commission's report shall take into account, as appropriate, the viewpoints of the social partners and relevant non-governmental organisations. In accordance with the principle of gender mainstreaming, this report shall, inter alia, provide an assessment of the impact of the measures taken on women and men. In the light of the information received, this report shall include, if necessary, proposals to revise and update this Directive.

Article 20

Entry into force

This Directive shall enter into force on the day of its publication in the Official Journal of the European Communities.

Article 21

Addressees

This Directive is addressed to the Member States.

Done at Brussels, 27 November 2000.

For the Council
The President
É. Guigou

(1) Not yet published in the Official Journal.

(2) Opinion delivered on 18.5.2000 (not yet published in the Official Journal).

(3) Opinion delivered on 12.4.2000 (not yet published in the Official Journal).

(4) Opinion delivered on 31.5.2000 (not yet published in the Official Journal). (5) OJ L 185, 24.7.1996, p. 5.

APPENDIX II

Council Directive 2000/43/EC

of 29 June 2000

implementing the principle of equal treatment between persons irrespective of racial or ethnic origin

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community and in particular Article 13 thereof,

Having regard to the proposal from the Commission(1),

Having regard to the opinion of the European Parliament(2),

Having regard to the opinion of the Economic and Social Committee(3),

Having regard to the opinion of the Committee of the Regions(4),

Whereas:

(1) The Treaty on European Union marks a new stage in the process of creating an ever closer union among the peoples of Europe.

(2) In accordance with Article 6 of the Treaty on European Union, the European Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States, and should respect fundamental rights as guaranteed by the European Convention for the protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, as general principles of Community Law.

(3) The right to equality before the law and protection against discrimination for all persons constitutes a universal right recognised by the Universal Declaration of Human Rights, the United Nations Convention on the Elimination of all forms of Discrimination Against Women, the International Convention on the Elimination of all forms of Racial Discrimination and the United Nations Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights and by the European Convention for the Protection of Human Rights and Fundamental Freedoms, to which all Member States are signatories.

(4) It is important to respect such fundamental rights and freedoms, including the right to freedom of association. It is also important, in the context of the access to and provision of goods and services, to respect the protection of private and family life and transactions carried out in this context.

(5) The European Parliament has adopted a number of Resolutions on the fight against racism in the European Union.

(6) The European Union rejects theories which attempt to determine the existence of separate human races. The use of the term "racial origin" in this Directive does not imply an acceptance of such theories.

(7) The European Council in Tampere, on 15 and 16 October 1999, invited the Commission to come forward as soon as possible with proposals implementing Article 13 of the EC Treaty as regards the fight against racism and xenophobia.

(8) The Employment Guidelines 2000 agreed by the European Council in Helsinki, on 10 and 11 December 1999, stress the need to foster conditions for a socially inclusive labour market

by formulating a coherent set of policies aimed at combating discrimination against groups such as ethnic minorities.

(9) Discrimination based on racial or ethnic origin may undermine the achievement of the objectives of the EC Treaty, in particular the attainment of a high level of employment and of social protection, the raising of the standard of living and quality of life, economic and social cohesion and solidarity. It may also undermine the objective of developing the European Union as an area of freedom, security and justice.

(10) The Commission presented a communication on racism, xenophobia and anti-Semitism in December 1995.

(11) The Council adopted on 15 July 1996 Joint Action (96/443/JHA) concerning action to combat racism and xenophobia(5) under which the Member States undertake to ensure effective judicial cooperation in respect of offences based on racist or xenophobic behaviour.

(12) To ensure the development of democratic and tolerant societies which allow the participation of all persons irrespective of racial or ethnic origin, specific action in the field of discrimination based on racial or ethnic origin should go beyond access to employed and self-employed activities and cover areas such as education, social protection including social security and healthcare, social advantages and access to and supply of goods and services.

(13) To this end, any direct or indirect discrimination based on racial or ethnic origin as regards the areas covered by this Directive should be prohibited throughout the Community. This prohibition of discrimination should also apply to nationals of third countries, but does not cover differences of treatment based on nationality and is without prejudice to provisions governing the entry and residence of third-country nationals and their access to employment and to occupation.

(14) In implementing the principle of equal treatment irrespective of racial or ethnic origin, the Community should, in accordance with Article 3(2) of the EC Treaty, aim to eliminate inequalities, and to promote equality between men and women, especially since women are often the victims of multiple discrimination.

(15) The appreciation of the facts from which it may be inferred that there has been direct or indirect discrimination is a matter for national judicial or other competent bodies, in accordance with rules of national law or practice. Such rules may provide in particular for indirect discrimination to be established by any means including on the basis of statistical evidence.

(16) It is important to protect all natural persons against discrimination on grounds of racial or ethnic origin. Member States should also provide, where appropriate and in accordance with their national traditions and practice, protection for legal persons where they suffer discrimination on grounds of the racial or ethnic origin of their members.

(17) The prohibition of discrimination should be without prejudice to the maintenance or adoption of measures intended to prevent or compensate for disadvantages suffered by a group of persons of a particular racial or ethnic origin, and such measures may permit organisations of persons of a particular racial or ethnic origin where their main object is the promotion of the special needs of those persons.

(18) In very limited circumstances, a difference of treatment may be justified where a characteristic related to racial or ethnic origin constitutes a genuine and determining occupational requirement, when the objective is legitimate and the requirement is proportionate. Such circumstances should be included in the information provided by the Member States to the Commission.

(19) Persons who have been subject to discrimination based on racial and ethnic origin should have adequate means of legal protection. To provide a more effective level of protection, associations or legal entities should also be empowered to engage, as the Member States so

determine, either on behalf or in support of any victim, in proceedings, without prejudice to national rules of procedure concerning representation and defence before the courts.

(20) The effective implementation of the principle of equality requires adequate judicial protection against victimisation.

(21) The rules on the burden of proof must be adapted when there is a prima facie case of discrimination and, for the principle of equal treatment to be applied effectively, the burden of proof must shift back to the respondent when evidence of such discrimination is brought.

(22) Member States need not apply the rules on the burden of proof to proceedings in which it is for the court or other competent body to investigate the facts of the case. The procedures thus referred to are those in which the plaintiff is not required to prove the facts, which it is for the court or competent body to investigate.

(23) Member States should promote dialogue between the social partners and with non-governmental organisations to address different forms of discrimination and to combat them.

(24) Protection against discrimination based on racial or ethnic origin would itself be strengthened by the existence of a body or bodies in each Member State, with competence to analyse the problems involved, to study possible solutions and to provide concrete assistance for the victims.

(25) This Directive lays down minimum requirements, thus giving the Member States the option of introducing or maintaining more favourable provisions. The implementation of this Directive should not serve to justify any regression in relation to the situation which already prevails in each Member State.

(26) Member States should provide for effective, proportionate and dissuasive sanctions in case of breaches of the obligations under this Directive.

(27) The Member States may entrust management and labour, at their joint request, with the implementation of this Directive as regards provisions falling within the scope of collective agreements, provided that the Member States take all the necessary steps to ensure that they can at all times guarantee the results imposed by this Directive.

(28) In accordance with the principles of subsidiarity and proportionality as set out in Article 5 of the EC Treaty, the objective of this Directive, namely ensuring a common high level of protection against discrimination in all the Member States, cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale and impact of the proposed action, be better achieved by the Community. This Directive does not go beyond what is necessary in order to achieve those objectives,

HAS ADOPTED THIS DIRECTIVE:

CHAPTER I

GENERAL PROVISIONS

Article 1

Purpose

The purpose of this Directive is to lay down a framework for combating discrimination on the grounds of racial or ethnic origin, with a view to putting into effect in the Member States the principle of equal treatment.

Article 2

Concept of discrimination

1. For the purposes of this Directive, the principle of equal treatment shall mean that there shall be no direct or indirect discrimination based on racial or ethnic origin.
2. For the purposes of paragraph 1:
 - (a) direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation on grounds of racial or ethnic origin;
 - (b) indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.
3. Harassment shall be deemed to be discrimination within the meaning of paragraph 1, when an unwanted conduct related to racial or ethnic origin takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment. In this context, the concept of harassment may be defined in accordance with the national laws and practice of the Member States.
4. An instruction to discriminate against persons on grounds of racial or ethnic origin shall be deemed to be discrimination within the meaning of paragraph 1.

Article 3

Scope

1. Within the limits of the powers conferred upon the Community, this Directive shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to:
 - (a) conditions for access to employment, to self-employment and to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion;
 - (b) access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience;
 - (c) employment and working conditions, including dismissals and pay;
 - (d) 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;
 - (e) social protection, including social security and healthcare;
 - (f) social advantages;
 - (g) education;
 - (h) access to and supply of goods and services which are available to the public, including housing.
2. This Directive does not cover difference of treatment based on nationality and is without prejudice to provisions and conditions relating to the entry into and residence of third-country nationals and stateless persons on the territory of Member States, and to any treatment which arises from the legal status of the third-country nationals and stateless persons concerned.

Article 4

Genuine and determining occupational requirements

Notwithstanding Article 2(1) and (2), Member States may provide that a difference of treatment which is based on a characteristic related to racial or ethnic origin shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.

Article 5

Positive action

With a view to ensuring full equality in practice, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to racial or ethnic origin.

Article 6

Minimum requirements

1. Member States may introduce or maintain provisions which are more favourable to the protection of the principle of equal treatment than those laid down in this Directive.
2. The implementation of this Directive shall under no circumstances constitute grounds for a reduction in the level of protection against discrimination already afforded by Member States in the fields covered by this Directive.

CHAPTER II

REMEDIES AND ENFORCEMENT

Article 7

Defence of rights

1. Member States shall ensure that judicial and/or administrative procedures, including where they deem it appropriate conciliation procedures, for the enforcement of obligations under this Directive are available to all persons who consider themselves wronged by failure to apply the principle of equal treatment to them, even after the relationship in which the discrimination is alleged to have occurred has ended.
2. Member States shall ensure that associations, organisations or other legal entities, which have, in accordance with the criteria laid down by their national law, a legitimate interest in ensuring that the provisions of this Directive are complied with, may engage, either on behalf or in support of the complainant, with his or her approval, in any judicial and/or administrative procedure provided for the enforcement of obligations under this Directive.
3. Paragraphs 1 and 2 are without prejudice to national rules relating to time limits for bringing actions as regards the principle of equality of treatment.

Article 8

Burden of proof

1. Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the

principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.

2. Paragraph 1 shall not prevent Member States from introducing rules of evidence which are more favourable to plaintiffs.

3. Paragraph 1 shall not apply to criminal procedures.

4. Paragraphs 1, 2 and 3 shall also apply to any proceedings brought in accordance with Article 7(2).

5. Member States need not apply paragraph 1 to proceedings in which it is for the court or competent body to investigate the facts of the case.

Article 9

Victimisation

Member States shall introduce into their national legal systems such measures as are necessary to protect individuals from any adverse treatment or adverse consequence as a reaction to a complaint or to proceedings aimed at enforcing compliance with the principle of equal treatment.

Article 10

Dissemination of information

Member States shall take care that the provisions adopted pursuant to this Directive, together with the relevant provisions already in force, are brought to the attention of the persons concerned by all appropriate means throughout their territory.

Article 11

Social dialogue

1. Member States shall, in accordance with national traditions and practice, take adequate measures to promote the social dialogue between the two sides of industry with a view to fostering equal treatment, including through the monitoring of workplace practices, collective agreements, codes of conduct, research or exchange of experiences and good practices.

2. Where consistent with national traditions and practice, Member States shall encourage the two sides of the industry without prejudice to their autonomy to conclude, at the appropriate level, agreements laying down anti-discrimination rules in the fields referred to in Article 3 which fall within the scope of collective bargaining. These agreements shall respect the minimum requirements laid down by this Directive and the relevant national implementing measures.

Article 12

Dialogue with non-governmental organisations

Member States shall encourage dialogue with appropriate non-governmental organisations which have, in accordance with their national law and practice, a legitimate interest in contributing to the fight against discrimination on grounds of racial and ethnic origin with a view to promoting the principle of equal treatment.

CHAPTER III

BODIES FOR THE PROMOTION OF EQUAL TREATMENT

Article 13

1. Member States shall designate a body or bodies for the promotion of equal treatment of all persons without discrimination on the grounds of racial or ethnic origin. These bodies may form part of agencies charged at national level with the defence of human rights or the safeguard of individuals' rights.

2. Member States shall ensure that the competences of these bodies include:

- without prejudice to the right of victims and of associations, organisations or other legal entities referred to in Article 7(2), providing independent assistance to victims of discrimination in pursuing their complaints about discrimination,
- conducting independent surveys concerning discrimination,
- publishing independent reports and making recommendations on any issue relating to such discrimination.

CHAPTER IV

FINAL PROVISIONS

Article 14

Compliance

Member States shall take the necessary measures to ensure that:

- (a) any laws, regulations and administrative provisions contrary to the principle of equal treatment are abolished;
- (b) any provisions contrary to the principle of equal treatment which are included in individual or collective contracts or agreements, internal rules of undertakings, rules governing profit-making or non-profit-making associations, and rules governing the independent professions and workers' and employers' organisations, are or may be declared, null and void or are amended.

Article 15

Sanctions

Member States shall lay down the rules on sanctions applicable to infringements of the national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that they are applied. The sanctions, which may comprise the payment of compensation to the victim, must be effective, proportionate and dissuasive. The Member States shall notify those provisions to the Commission by 19 July 2003 at the latest and shall notify it without delay of any subsequent amendment affecting them.

Article 16

Implementation

Member States shall adopt the laws, regulations and administrative provisions necessary to comply with this Directive by 19 July 2003 or may entrust management and labour, at their joint request, with the implementation of this Directive as regards provisions falling within the scope of collective agreements. In such cases, Member States shall ensure that by 19 July 2003, management and labour introduce the necessary measures by agreement, Member States being required to take any necessary measures to enable them at any time to be in a position to guarantee the results imposed by this Directive. They shall forthwith inform the Commission thereof.

When Member States adopt these measures, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. The methods of making such a reference shall be laid down by the Member States.

Article 17

Report

1. Member States shall communicate to the Commission by 19 July 2005, and every five years thereafter, all the information necessary for the Commission to draw up a report to the European Parliament and the Council on the application of this Directive.
2. The Commission's report shall take into account, as appropriate, the views of the European Monitoring Centre on Racism and Xenophobia, as well as the viewpoints of the social partners and relevant non-governmental organisations. In accordance with the principle of gender mainstreaming, this report shall, inter alia, provide an assessment of the impact of the measures taken on women and men. In the light of the information received, this report shall include, if necessary, proposals to revise and update this Directive.

Article 18

Entry into force

This Directive shall enter into force on the day of its publication in the Official Journal of the European Communities.

Article 19

Addressees

This Directive is addressed to the Member States.

Done at Luxembourg, 29 June 2000.

For the Council

The President

M. Arcanjo

- (1) Not yet published in the Official Journal.
- (2) Opinion delivered on 18.5.2000 (not yet published in the Official Journal).
- (3) Opinion delivered on 12.4.2000 (not yet published in the Official Journal).

(4) Opinion delivered on 31.5.2000 (not yet published in the Official Journal).

(5) OJ L 185, 24.7.1996, p. 5.