

Strengthening anti-discrimination policies

Document 4

Manual on Improving Polish Anti-Discrimination Policies

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Twinning Project Poland – Austria
"Strengthening Anti-discrimination Policies"
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Foreword

The present manual has been conducted in the framework of the Twinning Project Poland – Austria 'Strengthening Anti-discrimination Policies' (activity 1.4 of the Covenant).

The manual aims to identify the needs of reform of the Polish legal order with regard to the Council Directives 2000/43/EC and 200078/EC (in the following, both together referred to as: 'EU Directives', the first as 'Racial Equality Directive' and the second as 'Employment Equality Directive')[1] by demonstrating shortcomings in Polish anti-discrimination law. Assessing how to overcome the deficiencies from examples of good practises in different EU MS it is supposed to form the basis for developing proposals of Polish anti-discrimination policies including positive measures aimed to counteract discrimination on the grounds of 'race', ethnic origin, believes, age and sexual orientation (activity 1.5 of the Covenant).

This manual is structured into two main parts:

- Chapter 1 'Introduction and Summary' introduces into the types of problem and the challenges the authors were facing according to the recent efforts and developments in Poland combating discrimination and implementing the relevant EU *Acquis communautaire*. The introduction also explains the methods that were applied to identify the needs of reform. Finally, the chapter summarizes the main outcome of the assessment given in chapter 2.
- Chapter 2 'Needs of reform in Polish legal order with regard to the implementation of the EU Anti-discrimination Directives' sets out in detail the requirements of reform of the Polish legal order with regard to the Anti-discrimination Directives and illustrates with examples of good practises in EU MS different possibilities to overcome the deficiencies. This chapter is structured according to the concept of the Anti-discrimination Directives.

[1] 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).

1 Introduction and Summary

As stated in the project's report 'Analysis of the Status Quo of Polish Anti-discrimination Legislation and Policies' (in the following referred to as 'Status Quo Analysis Report') of October 2003 the Polish legal framework so far 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 1994 Labour Code and in the latest amendments to it.

In 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 burden of proof is not regulated regarding 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 taking 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. Furthermore, victims and witnesses of discrimination should have access to free legal counselling.

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 on perpetrators and should not be restricted to the criteria of nationality but should include criteria of certain 'visibility'-factors 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 it would be impossible to draw a true picture of the whole scale and scope of racial, ethnic, religious discrimination in Poland. The functions of the specialised body which shall be established according to art 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 but also for concrete jurisdiction in regard to indirect discrimination.

Finally, it can be said that in 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.

2 Needs of Reform in Polish Legal Order with regard to the Implementation of the EU Anti-discrimination Directives

2.1 Legal concept of non-discrimination (Article 2 of both Directives)

2.1.1 Principle of equality and non-discrimination (Article 2 para 1 of both Directives)

- *Needs of reform*

    - On constitutional level:

The general precept of equality respectively the general prohibition of discrimination in Article 32 of the Polish Constitution contains no specific grounds of discrimination. Aside from this article and the wording of most of the human rights provisions in the Polish Constitution as 'everyone's rights', the Constitution contains ***specific equal-treatment provisions*** regarding women and men (Article 33), religious associations (Article 25), national and ethnic minorities (Article 27 and 35), children (Article 72), consumers (Article ..) and war veterans and invalids (Article ..), but not covering all grounds of discrimination mentioned in Article 13 TEC (see chapter 2.1 of the Status Quo Analysis Report). **Not included are discriminations on the grounds of sexual orientation and race as well as disability, age and religion or belief in a comprehensive sense.**

    - On statutory level:

As chapters 2.2 – 2.7 of the Status Quo Analysis Report show ***several legal provisions*** implement the principles of equality and non-discrimination in various laws, such as in penal, civil, labour, media and aliens law and with regard to religious groups. **Nevertheless, not all grounds and aspects of discrimination in the meaning of Article 13 TEC and the EU Anti-discrimination Directives are included by the Polish legal order** (see chapters 3 and 4 of the Status Quo Analysis Report).

Regarding discrimination on the grounds of **'race and ethnic origin'**:
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 'race' or 'national or ethnic minority'. However, a draft Act on National and Ethnic Minorities contains a definition of 'national or ethnic minorities'.
(See chapter 3.1 of the Status Quo Analysis Report).

Regarding discrimination on the grounds of **'religion and belief'**:
Article 6 para 1 of the 1989 Law guaranteeing Freedom of Conscience and Religion prohibits discrimination or granting of privileges on the basis of religion or beliefs regarding religious issues. But 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 constraints. Religious minority groups encounter problems in trying to rent premises for their routine work, to organise open meetings and religious celebrations. In few cases acts of aggression against religious minorities are reported to the police; due to insufficient means and experience to use the available remedies religious groups or their members very rarely claim their religious rights guaranteed by the Constitution or the Law on Freedom of Consciences and Religion. Also anti-Semitic feelings and attitudes persist among certain sectors of the Polish population.
(See chapter 3.2 of the Status Quo Analysis Report.)

Regarding discrimination on the ground of **'age'**:
Article 11 para 3 of the Labour Code prohibits discrimination on the ground of age.
Nevertheless, the Polish ***pension law*** required a mandatory earlier retirement for women at the age of 60, whereas men had to retire at the age of 65. As a result of this earlier retirement women received approximately 60 percent of the average pension that men received. According to the Constitutional Court which ruled that this regulation was discriminatory, the Polish government is presently drafting a legal amendment to the Pension Code which is supposed to bring the pension law in line with this judgement.
Another unequal treatment between women and men on the basis of age concerns the minimum age for ***marriage***. Men are not permitted to marry without parental permission until the age of 21, whereas women may marry at the age of 18. Furthermore, women can enter into marriage and thereby gain legal majority at the age of 16 with the consent of her parents and the guardianship court, whereas men may only do so at the age of 18.
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 benefits. This concerns mostly younger people who are regularly in an economically less favourable situation as unemployment benefits are limited to one year only.
In 2000 an Ombudsperson for Children's Rights was established that has the mandate to protect ***children*** from violence, cruelty, neglect and other mistreatment. Although the law generally prohibits violence against children there are no procedures in schools to protect children from abuse by teachers. The teachers' work code provides legal immunity from prosecution for the use of corporal punishment in classrooms.
Poland has been criticised regarding the situation of ***separated refugee children*** in Poland. Since it is planned to give de facto protection of unaccompanied minors only after procedures for granting him or her refugee status have been established, it has to be critisized that legal guardian should be appointed to all separated children, irrespective of whether he or she is seeking asylum.
(See chapter 3.3 of the Status Quo Analysis Report.)

Regarding discrimination on the ground of **'sexual orientation'**:
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 Christianity, but also on 'integrity' or 'high morals' (for example as criteria for the appointment to professions).
Gays are frequently mentioned in the context of HIV/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.
Many cases and statistics show ***violence and harassment*** against homosexuals, discrimination at work, in regard to housing and medical care, in churches and with regard to the use of public services. Homosexuals do not always receive adequate protection form the police. Discrimination of homosexuals can also be found in some approved textbooks in which homosexuality is presented as a perversion, and 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 the Polish Criminal Code does not specifically penalise discriminatory offences against homosexuals. 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. 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.
In Poland ***same-sex partners*** generally do not enjoy same rights and benefits granted to spouses (for example no right to inheritance, 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 Polish legal system provides no legal basis, which would legally recognise same-sex unions and thereby putting them on equal status like married couples.
(See chapter 3.4 of the Status Quo Analysis Report.)

- On the level of international agreements:

According to Art 91 of the Polish Constitution, ratified international agreements constitute part of the domestic legal order and can be applied directly by domestic courts, unless its application depends on the enactment of a statute. With the exception of Protocol No 12 to the European Convention on 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 party to most of 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** (see chapter 2.8 of the Status Quo Analysis Report).

- *Possible measures*

Although the general wording of Article 32 of the Constitution – according to the jurisdiction of the Constitutional Court and comparable to most of the constitutions of EU Member States – provides a wide scope of application and the mentioned specific equal-treatment constitutional provisions cover most of the grounds of discrimination in the meaning of Article 13 TEC it seems important to explicitly include all grounds of discrimination mentioned in Article 13 TEC – sex, race, ethnic origin, religion or belief, disability, age and sexual orientation – into Article 32. Insofar this provision would make visible very clearly for anybody that the Polish Constitution orientates completely towards the concept of anti-discrimination laid down in Article 13 TEC and the EU Anti-discrimination Directives. Due to the superiority of constitutional law the progress would be that any act of legislation and its implementation would have to be in accordance with the *acquis communautaire* in this field.

Additionally, Poland is recommended to ratify also **Protocol No 12** to the European Convention on Human Rights, the European Charter for Regional or Minority Languages and the UN Convention on the Rights of Migrant Workers and their Families according to Article 91 of its Constitution.

Large scale **information campaigns** for potential victims as well as potential perpetrators on the one hand and training initiatives for the police and the judiciary personnel on the other hand will be necessary to improve awareness about discrimination.

2.1.2 Definition of direct discrimination (Article 2 para 2 lit a of both Directives)
2.1.3 Definition of discriminatory harassment (Article 2 para 3 of both Directives)

The ***amended Labour Code*** gives a definition of direct and indirect discrimination – these basically meet the requirements of both the EU Directives.

- *Possible measures*

It is recommended, to use the definitions of the EU Directives in all relevant legal acts – especially in a legal act regulating discrimination outside the workplace sphere. The definitions could be broadened in scope – for example regarding People with HIV/Aids, or more generally for the ground of "health status"

- *Needs of reform*

The present Polish legal order does not contain a definition or comprehensive prohibition of harassment.

Only Article 257 of the Penal Code prohibits an aspect of it in the form of hate speech in regard to a person's race, national or ethnic origin or religious believes. And

according to Article 24.1 of the 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 and compensation for the damages unless the action is not unlawful (see chapters 2.3, 2.4 and 4.1.3 of the Status Quo Analysis Report).

An ***amended Labour Code*** contains a definition of harassment. But with regard to the phenomena of mobbing at the workplace the scope of the definition of the draft seems rather narrow. The wording should therefore also include forms of behaviour which leads to the creation of an intimidating, hostile, degrading humiliating or offensive environment, as mentioned in Articles 2 para 3 of both the EU Directives (see chapters 2.1 and 4.1.3 of the Status Quo Analysis Report).

- *Possible measure*

It is recommended, to use the definitions of the EU Directives in all relevant legal acts. Furthermore, additional legislative measures are necessary to prohibit discriminatory harassment in regard to the non-employment-related scope of the Racial Equality Directive (see chapter 4.1.3 of the Status Quo Analysis Report).

2.1.4 Definition of instruction to discrimination (Article 2 para 4 of both Directives)

- *Needs of reform*

The present Polish legal order does not contain a definition or prohibition of instruction to discrimination in the comprehensive understanding of Articles 2 para 4 of both the EU Directives.

Only Art 18.1 and 18.2 of the Penal Code lay down the concept of directing or instigating the committal of a criminal offence. Therefore incitements to carry out discriminatory acts which are prohibited under the Penal Code are unlawful too (see chapter 4.1.4 of the Status Quo Analysis Report). And on the basis of civil law a person who has incurred damages due to instructions to discriminate can seek compensation according to general principles (see chapters 2.4 and 4.1.4 of the Status Quo Analysis Report).

Beside the open question whether the penal wordings 'instigation or incitements' are congruent with the term 'instruction' used by both the EU Directives, it has to be observed that Articles 2 para 4 of both the EU Directives are not restricted only to penal and civil law.

- *Possible measure*

The non-employment related scope of directive 2000/43/EC should be covered by the legal order – including the prohibition of instruction to discriminate.

2.2 Scopes (Article 3 of both Directives)

2.2.1 Employment sector (Article 3 para 1 lit a-d and para 2 of both Directives)

- *Needs of reform*

Actually, the amended Polish Labour Code meets the requirements set out in Article 3 para 1 lit a-d of both Directives.

- *Possible measures*

Not necessary. The amended Labour Code meets the relevant requirements. It might be nevertheless important to include more grounds for unlawful discrimination, like HIV/ Aids or health status.

2.2.2 Non-employment-related sector (Article 3 para 1 lit e-h and para 2 of the Racial Equality Directive – only prohibition of discriminations on the grounds of race and ethnic origin)

2.2.2.1 General remarks

The scope of the Racial Equality Directive goes beyond the Employment Equality Directive 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 introduce a kind of hierarchy of grounds of discrimination. For example: Whereas discrimination on the ground of ethnic origin is being prohibited in regard to the housing sector, individuals belonging to a certain religious group or homosexuals can still be excluded from tenant contracts without having legal remedies.

Not only that the clear differentiation of different grounds of discrimination is often blurred or overlapping, like in the case of ethnic origin and religion, the different weighting of grounds of discrimination also seems highly artificial and arbitrary when it comes to basic notions of human dignity and human rights and the question who shall gain and who shall be excluded from their guarantees. Poland should therefore strive to follow a progressive approach in counteracting all grounds of discrimination mentioned in both the Directives and should prohibit non-employment-related discrimination also on the grounds of religion or belief, age, disability and sexual orientation. Poland could even go further in the direction of a comprehensive anti-discrimination legislation in taking into account additional important grounds, as there are for example HIV/Aids or health status or social status.

The principle of equality, respectively of non-discrimination generally does not oblige private persons. Both Directives now demand exactly this in different areas of life. Since the access to and supply of goods and services which are available to the public, including housing, are legally settled in civil law, it seems advisable, in order to

efficiently prohibit discrimination between private persons in this regard, to introduce a general prohibition of discrimination on the grounds of race and ethnic origin in the Civil Code or in a separate law. Infringements of this prohibition should lead to a claim for compensation.

Possible measures in general (following largely Katarzyna Gonera):

It seems a good idea to elaborate one single act containing provisions that would transpose the provisions of both Directives into Polish legal system in non-employment aspects (as these are regulated by the Labour Code for the employment sphere).
This act could be common for both civil law relations (e.g. with regard to refusal of entering into a contract of sale or rental) and administrative ones (e.g. access to education – both at level governed by Act on the System of Education or at level governed by Act on Higher Education).
This conclusion may be drawn also from comparative studies. Acts that govern the whole issue of equal treatment and non-discrimination – apart from present legislation like labour codes or civil codes – have been already introduced or are being elaborated in EU member states (e.g. Ireland) or in candidate countries (e.g. Czech Republic).

The subject of this legal act should be all the issues (or overwhelming majority of them) which have been pointed out in „*Analysis of the status quo of Polish Anti-Discrimination Legislation and Policies*".
This includes in particular:

1) Introducing the principle of equal treatment and setting a general prohibition of discrimination.
2) Detailed description of prohibited grounds of discrimination in all relationships of public (administrative) and private (civil) nature, on the model of Article 11 of the Labour Code;
3) Introducing definitions of direct and indirect discrimination, positive action (acceptable unequal treatment in order to equalise the chances), harassment, and mobbing;
4) Determining the scope of the act – at this level, it should be considered whether domestic legislation is to implement only the basic standard of protection as set by the Directives 2000/43/EC and 2000/78/EC, or whether – which is highly recommended - it should provide higher standard in regard to equal access to goods and services – incl. housing – regardless of racial and ethnic origin but also of religion and sexual orientation or even of all grounds mentioned in Art. 13 ETC;
5) introducing provisions on the burden of proof, in accordance with both Directives;
6) ensuring effective, proportionate and deterring compensations for the victims, e.g. in the form of damages, fines, and other measures of civil and administrative law, which fall under category of compensation constituting a sanction for those infringing the principle of equal treatment and non-discrimination;
7) introducing measures necessary for protection of the victims against repressions for a complaint or a procedure aiming at enforcement of the principle of equal treatment and non-discrimination.

A good model may be e.g. Act on Protection of Competition and Consumers, which is composed of three parts: (a) substantial provisions, (b) systemic provisions concerning powers of the Head of Office for Protection of Competition and Consumers ands structure of the Office itself, and (c) procedural provisions which govern various procedures before Head of the Office, decisions issued by the Head, and possibilities of appealing against these decisions etc.

2.2.2.2 Social protection, including social security and healthcare (Article 3 para 1 lit e)

- *Needs of reform*

Defined by law, all Polish citizens have 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, and remaining without employment (see chapter 4.2.2.1 of the Status Quo Analysis Report).

But according to Article 2a para 1 of the Law on the Social Security System (see chapter 4.2.2.1 of the Status Quo Analysis Report), the principle of equal treatment of all Polish citizens socially insured is only guaranteed to the criteria of sex, marital status, and family status. Even though this anti-discrimination clause ought to be broadly applied and interpreted in practice, it has to be stated that the wording of the mentioned provision does not refer explicitly to the required grounds of discrimination laid down in the Racial Equality Directive, namely race and ethnic origin, and has therefore to be amended accordingly.

The Polish Constitution contains an equal treatment clause concerning access to health care services and the Act on Universal Health Insurance provides an obligatory health insurance. Benefits from the health fund are provided to Polish citizens who reside in the territory of the Republic of Poland and to foreigners residing in Poland on the basis of a permanent or temporary residence card (see chapter 4.2.2.1 of the Status Quo Analysis Report).

As described above both the right to social security as well as the right to health care is guaranteed by the constitution.
Due to the fact that the scope of both EU Directives (see Articles 3 para 2) does not cover differences of treatment based on nationality the limitation of these rights to Polish citizens does not conflict with their minimum requirements. However, from a human rights point of view access to basic health facilities and social assistance should be granted to every person in need under the jurisdiction of the Republic of Poland.

There are no specific regulations prohibiting discrimination in relation to social insurance benefits provided by private companies.

- *Possible measures*

Include in the general anti-discrimination-act (as described above in 2.2.2.1.) the principle of equal treatment on all relevant grounds for the scope of social protection

as defined in the Directive. Alternative: Amend the Law on the Social Security System respectively.
Make sure that the regulations of private companies regarding (voluntary) social (insurance) benefits are subject to the principle of equal treatment.

2.2.2.3 Education (Article 3 para 1 lit g)

- *Needs of reform*

The Polish Constitution and educational system guarantee all individuals the right to education and equal access to it, under the age of 18 years education is obligatory and free in public schools. Citizens and institutions have the right to establish primary and secondary schools and institutions of higher education and educational development institutions (see chapter 4.2.2.2 of the Status Quo Analysis Report).

- *Possible measures*

It nevertheless seems to be necessary to improve the educational system of national and ethnic minorities which is lacking specific curricula, textbooks, teachers and funds. An extremely serious problem concerns Roma children to whom 30% do not fulfil the compulsory schooling obligation (see chapter 4.2.2.2 of the Status Quo Analysis Report).

2.2.2.4 Access to and supply of goods and services which are available to the public, including housing (Article 3 para 1 lit h)

- *Needs of reform*

The Code of Minor Offences contains two provisions which put the refusal of selling goods or providing services under fine. Only discrimination which leads to the refusal of a tenant contract does not fall under the scope of these provisions (see chapter 4.2.2.3 of the Status Quo Analysis Report).

- *Possible measures*

Since these provision stem from the communist regime which were released in order to prevent stockpiling of commercial during periods of shortage of commodities it seems advisable to introduce a general prohibition of discrimination on the grounds mentioned in both EU Directives in the Civil Code or a specific Anti-Discrimination-Act in order to efficiently prohibit discrimination between private persons.
It is absolutely crucial to include the aspects of total refusal of any pre-contractual negotiations as just excluding people is the most affecting form of discrimination especially in the field of housing.

There should be a provision dealing explicitly with the prohibition of discriminatory advertisements. These published offers can have a great impact on a large number of people at once and should therefore be treated with care and attention. Besides of excluding some people from the actual offer they additionally have the vicious effect

of publicly spreading the idea that certain people are generally unwanted in society and their appearance could – for example – indicate a danger of falling prices for accommodation in a certain neighbourhood. Due to the public nature of such advertisements it seems appropriate to use penal law or to allow for class actions (by specialised bodies/ NGOs) without the need of presenting a singled out victim.

2.3 Exception to the principle of equal treatment in employment

2.3.1 General exception: Genuine and determining occupational requirements (Article 4 of both Directives)

- *Needs of reform*

The recently amended Labour Code regulates exceptions to the principle of equal treatment which are in line with the requirements of set out in Article 4 of both EU Directives (see chapter 4.3.1 of the Status Quo Analysis Report).

- *Possible measures*

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 adopt the exact wording of the EU Directives regarding the rather restrictive exceptions to the principle of equal treatment.

2.3.2 Exceptions in regard to professions related to religion or religious belief (Article 4 para 2 of the Employment Equality Directive)

- *Needs of reform*

There is no need of reform. § 4 of the amended Labour Code deals with this aspect in full compliance with the directive.

2.3.3 Justified exeption to the principle of equal treatment on the ground of age (Article 6 of the Employment Equality Directive)

See chapter 2.2.1, part ‘age’.

2.4 Positive actions (Article 5 of the Racial Equality Directive and Article 7 of the Employment Equality Directive)

- *Needs of reform*

In line with the Directives the Labour Code allows the 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 (see chapter 4.4 of the Status Quo Analysis Report). Positive actions have to be developed.

- *Possible measures*

Two examples for positive measures from The Netherlands:

a) The "Newcomers Integration Act"

The language-training and familiarisation programme for new immigrants, which was laid down in the "Newcomers Integration Act" (Wet-Inburgering-Nieuwkomers WIN) of 1998, was enacted primarily in order to improve the labour-market integration of new immigrants. It consists of 500 hours compulsory language-training and 100 hours compulsory familiarisation – courses for any new immigrant from non-Western countries. According to the law, new immigrants are provided with compulsory language training according to their level of knowledge and have the right to receive assistance in seeking employment during their first year of stay. The full programme consists of an exploratory phase of no more than four months, an integration phase of no more than one year (language classes and introduction to Dutch society and career opportunities) and the final phase of no more than six months, during which time the participants are referred to follow-up programmes or the labour market. The state-funded programme is administered by the municipalities and implemented in conjunction with immigrants NGOs and local adult-education organisations.

b) The Wet SAMEN:

Although not directly related to equal treatment issues, the *Act on Stimulation of Labour participation of Ethnic Minorities (Wet SAMEN)* is the main instrument of administrative law related to antidiscrimination issues.

The WET SAMEN was introduced in 1998 and succeeded a previous act (Act on the Enhancement of Equal Labour Market Participation of Allochtones (WBEAA) of 1994), which had the same goal: to achieve a proportionate representation of ethnic minorities in the workforce. The Acts are seen as the implementation of article 2.2 of the *ICERD*. Both the public and the private sector fall under the scope of the Act.

The Act is not specifically aimed at combating racial discrimination, but it is a useful tool to reduce discrimination in the labour market. It obliges firms employing a staff of 35 persons or more to recruit a proportion of immigrant workers equal to the proportion of immigrants living in the region where the firm is established. These firms have to report yearly about their efforts to the employment services. The employers´ council of the company is allowed to attach its judgement about the annual report as an integral part of it. Further to the written yearly report the companies have to develop a written plan to improve the participation of ethnic minorities at all levels of the workforce in the company or organisation.

In order to fulfil their obligations, companies with more than 35 staff have to report about the ethnic composition of their workforce. They may do so be either referring to an objective procedure outlined in the Act, using a table of designated countries of

origin for the qualification as member of a minority - group, or according to a procedure called “restrictive self-evaluation”. This procedure states, that if the country of birth of one or both of the parents of the employee differs from that of the employee and if at least one of the stated countries belongs to the group of designated countries, the employee may choose whether s/he want to belong to the designated group. As the employer has to decide, if the employees are allowed self-identification, the quality of the data differs strongly in between companies.
Compared to the Act of 1994, the new Act relies more on voluntary involvement of companies than on mandatory interventions, which characterised the 1994 Act, which in practice was never really put in action due to the resistance of the employers. The new Act introduces a more pronounced co-responsibility of employees´ councils and labour unions and the employer and employers´ organisations. Nevertheless an evaluation in 2000 showed, that employers still perceive it as a burden and are reluctant to implement it. Of 21.000 companies covered by the Act, three quarters run a registration system, and 49 percent filled in their yearly report in 1999. The majority of the measures reported pertain to recruitment and preferential treatment, a minority is directed at career mobility and prevention of discharge. The effects of the Act on the position of minorities within the companies are small: The proportion of minorities in companies under the act has increased by 305 as compared to 23% within companies not obliged to report. Only in 2/3 of the filed report have works-councils attached their opinion. It is striking, that many municipalities do not comply with the need to reporting: only 55% of the municipalities, as against of 49% of private companies, have filed their report in 1998
The Commission issued rulings in two similar cases, where a city council asked explicitly for members of ethnic minorities to apply for jobs as social workers. People from Dutch origin could not apply. On the complaint of a Dutch citizen, the Commission ruled that the preferential treatment of ethnic minorities was allowed. The Commission argues, that in this case the Act on the stimulation of labour participation of ethnic minorities (Wet SAMEN, see below), had to be taken into account, which requires organisations to reach a proportionate participation of ethnic minorities in their staff. Because the Wet SAMEN is an implementation of section 2.2 of the ICERD, the Equal Treatment Act needs to be interpreted in conjunction with this Convention, the Commission argues. This meant, according to the Commission, that the criteria for positive action should not be interpreted too narrowly, as the objective of the WET SAMEN includes reaching de facto equality of minority groups on the labour market and thus allows for privileging members of minority groups, as long they are underrepresented in the staff of the company concerned (Houtzager 2001, p. 31).

2.4.1 Defence of rights by associations, organisations or other legal entities (para 2 leg.cit.)

- *Needs of reform*

According to 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. 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 court. In order to comply with the Directives the scope the Code of Civil Procedure (Article 61) should be extended allowing also organisations which support the interests of

victims of discrimination to engage in any stage of the proceeding on behalf or in support of the complainant, provided that he or she consents (see chapter 4.5.1 of the Status Quo Analysis Report).

In relation to the *Labour Code*, a labour inspector can launch court proceedings on behalf of citizens or join pending proceedings. This intervention is, however, limited to cases, which are linked to existing employment relationships. According to the 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 a labour court (see chapter 4.5.1 of the Status Quo Analysis Report).

In 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 interest. 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 (see chapter 4.5.1 of the Status Quo Analysis Report).

The *Ombudsperson for Human Rights* may provide legal advice by indicating possible legal measures but cannot act directly on behalf of the complainant (see chapter 4.5.1 of the Status Quo Analysis Report).

- *Possible measures*

1. In order to comply with the Directives the scope the Code of Civil Procedure (Article 61) should be extended allowing also organisations which support the interests of victims of discrimination to engage in any stage of the proceeding on behalf or in support of the complainant, provided that he or she consents.

2. Build up and funding of a support structure of local NGOs or a network of NGOs following for example the best practice case of LBR in the Netherlands:
In the case of racial and ethnic discrimination, the work of the governmental Equal Treatment Commission is supported by the work of 25 local antidiscrimination offices and the "National Bureau against Discrimination" (Landelijk Bureau Racismebestrijdig, LBR), which forms a part of the umbrella-organisation "FORUM" and provides antidiscrimination training and prevention activities. The 25 local antidiscrimination offices are organized as Non-Governmental Organisations and provide victim-support and conflict mediation. The state, the provinces and the local municipalities fund them. They act as a kind of filter for the CBR, as de facto most cases of racial discrimination are at first reported to a local antidiscrimination office, which gives prepares the files for the procedure at the CBR. It has to be noted, that the funding of the antidiscrimination offices is regulated by a separate law granting state funding for local antiracism activities. Furthermore consultation and funding of representative organisations of major immigrant groups is also granted by specific legal regulations.
The *National Bureau against Racism* (LBR) is an independent organisation funded by the Department of Justice, working as a national centre of expertise for the prevention of racial discrimination in the Netherlands. LBR provides its expertise to assist

individuals and organisations in a practical fashion, through a team of information advisors, documentation specialists, legal and policy advisors and researchers. Key areas of work include: the labour market, housing, the media, education welfare and the legal system. A hotline for discrimination-related offences on the Internet (MDI) was established in 1997 and is funded by the government. The LBR cooperates with the local antiracism offices and provides legal training and counselling for them.

The advantages of such a NGO network are manifold:
The most important aspect is that NGOs are usually very "close to the people", meaning that they work in regional context – often also within certain communities of "vulnerable groups". This makes them more easily accessible for the victims of discrimination.
An other advantage is that it is, legally speaking, more easy for NGOs to be clearly partial in their attitude and appearance– obviously standing on the side of the victim – than it is for any governmental institution.

2.5 Burden of Proof (Article 8 of the Racial Equality Directive and Article 10 of the Employment Equality Directive)

- *Needs of reform*

According to the fundamental principle of civil law, the burden of proof rests upon the plaintiff. Although civil law operates with a series of legal presumptions, which facilitate the determination of legally significant facts, no such presumptions have been formulated within the context of discrimination. Only the 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. But there are still no draft provisions regulating the alleviation of burden of proof regarding the non-employment-related scope, prohibiting discrimination regarding social protection, social advantages, education and access to goods and services (see chapter 4.6 of the Status Quo Analysis Report).

- *Possible measures*

In order to fulfil the minimum standard of the Racial Equality Directive, Poland should adopt the mentioned reversal of burden of proof for discrimination cases for the non-employment-related scope, prohibiting discrimination regarding social protection, social advantages, education and access to goods and services.

2.6 Victimisation (Article 9 of the Racial Equality Directive and Article 11 of the Employment Equality Directive)

- *Needs of reform*

Presently, the Polish Legal framework neither contains a definition of victimisation nor does it provide any effective legal remedy protecting victims of discrimination against the risk of retaliation or other unjustified disadvantages related to the

enforcement of their right not to be discriminated (see chapter 4.7 of the Status Quo Analysis Report).

The amended Labour Code contains a rather restrictive regulation: Only exercising the rights arising from breaches of the principle of equal treatment in employment may not be the ground for terminating an employment relationship. 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 (see chapter 4.7 of the Status Quo Analysis Report).

- *Possible measures*

It seems essential to introduce the possibility to stop victimisation and for a claim for compensation against persons who engaged in victimisation actions. Furthermore, effective protection against victimisation can not only be granted to the person directly concerned – namely the one claiming his or her rights – but also to witnesses and others who support the claimant. This broader concept of protection against victimisation becomes especially important in 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.

2.7 Dissemination of information (Article 10 of the Racial Equality Directive and Article 12 of the Employment Equality Directive)

- *Needs of reform*

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 (see chapter 4.8 of the Status Quo Analysis Report).

The Labour Code obliges employers to disseminate written information on provisions related to the principle of equal treatment (see chapter 4.8 of the Status Quo Analysis Report).

- *Possible measures*

To ensure constant information flow about equal treatment issues, a specialised governmental body should be entrusted with the duty to disseminate such information and to build networks with NGOs and academic institutions as well as with social partners.

Specific attention should be given to the development of an information service for employers and companies with regard to the implementation of antidiscrimination - measures, which should give free information to companies and institutions.. The Service should support employers how to introduce fair and effective recruitment and promotion systems, monitoring system and policies to combat harassment. Similar information services should be implemented for public institutions, like labour offices, regional and local governments or medical or educational establishments.

2.8 Social Dialogue (Article 11 of the Racial Equality Directive and Article 13 of the Employment Equality Directive)

- *Needs of reform*

In 1994 the Minister of Labour and Social Policy established a special Tripartite Committee for Social and Economic Affairs composed by 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 committee had been impeded through political tension between the parties involved. In 2001 the Law on the Tripartite Commission was passed which led to stabilisation of the co-operation between the government and the social partners.
However, improvement of the social dialogue between employers and employees seems to be necessary, especially with regard to monitoring of workplace practices, collective agreements, codes of conduct, research or exchange of experiences and good practises.

- *Possible measures*

Best practice

1. (from Ireland) The Irish Congress of Trade Unions, the Irish Business and Employers' Confederation, the Construction Industry Federation and the Equality Authority have jointly produced a resource pack entitled "Supporting an anti-racist workplace". The Pack contains a statement of commitment by the two sides of industry to work together in partnership to promote anti-racist workplaces and to act together and within their own spheres of influence to promote a positive approach to diversity and Interculturalism. The Pack also includes material defining racism / xenophobia and cultural diversity; outlining the relevant legislation; and practical activities for developing an anti-racist workplace.

2. (from Ireland) The Programme for Prosperity and Fairness (the national social partnership agreement) provides for the establishment of a Framework for the Development of Equal Opportunities at the Level of the Enterprise. The Framework includes representatives from the Irish Business and Employers Confederation, Public Sector Employers, the Irish Congress of Trade Unions, the Department of Justice, Equality and Law Reform and the Equality Authority. The purpose of the Framework is to assist in the development and implementation on a voluntary basis of equal

opportunity policies at enterprise level and provide encouragement, training, information and support to employers and employees/representatives.

3. (from the Netherlands) Although not directly related to antidiscrimination issues, agreements between the social partners are an important tool to improve the position of minorities at the labour market. In 2000, the social partners signed an agreement between the association of small and medium enterprises and the labour office granting to employ 20.000 members of minority groups until May 2001 in small and medium enterprises. The agreement was prolonged until end of 2002 and lead to 40.000 new jobs for members of minority groups. A similar agreement was signed in 2002 for companies between 500 and 150.000 employees. This agreement was not signed at the level of social partner organisations, but at company level. Until March 2002, 110 companies signed the agreement, which led to the creation of 60.000 new employment contracts with minority members. Several municipal authorities (e.g. Amsterdam, Rotterdam) run specific programmes to enhance the employment of minority members among their staff or make subsidies for companies dependent on their to employ a certain number or percentage of members of minority groups

2.9 Dialogue with non-governmental organisations (Article 12 of the Racial Equality Directive and Article 14 of the Employment Equality Directive)

- *Needs of reform*

In 2002 the Government Plenipotentiary for Equal Treatment of Women and Men established an 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. The Advisory Council provides a forum for dialogue between the government and NGOs, which has been perceived very positively by both sides (see chapter 4.10 of the Status Quo Analysis Report).

- *Possible measures*

Keep the Advisory Council and expand its scope for all other grounds, mentioned in the (future) Anti-Discrimination Act.

Best practice (from Ireland):

The KNOW RACISM - National Anti-Racism Awareness Programme Committee was established by Government and launched in 2001. The Committee is a partnership of government departments, agencies and non-governmental organisations. Its overall aim is to provide an ongoing structure to develop programmes and actions aimed at developing an integrated approach against racism and to act in a policy advisory role to the Government. The Committee has to date supported local awareness raising initiatives, provided support for an Anti-Racism Workplace Week, the International Day against Racism and the European Week against Racism.

2.10 Bodies for the Promotion of Equal Treatment (Article 13 of the Racial Equality Directive)

- *Needs of reform*

Following presently existing bodies are charged with tasks including, among other issues, the promotion of equal treatment, but not in the entire scope of Article 13 of the Racial Equality Directive:

- Plenipotentiary for Equal Status of Women and Men,
- Ombudsperson for Human Rights,
- Inter-ministerial Team for National Minorities,
- National Minorities Division,
- Bureau for National Minority Affairs within the Ministry of Culture and Arts,
- Parliamentary Commission for National and Ethnic Minorities.

Their legal status, structure and functions are in the end and in all not in line with all the requirements set out in Article 13 of the Racial Equality Directive (see chapter 4.11 of the Status Quo Analysis Report).

Therefore presently, the Polish legal order does not have a specialised body as described in Article 13 of the Racial Equality Directive. Although a first draft of an 'Act on the Inspector General for Counteracting Discrimination' has been submitted in December 2002 no decision on the establishment of such institution was reached up until now. Furthermore, it has been argued that the Plenipotentiary for Equal Status of Women and Men or the Ombudsman for Human Rights could be charged with the functions laid out by the Racial Equality Directive. 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 (see chapter 4.11 of the Status Quo Analysis Report).

- *Possible measures*

In order to make sure that such body can correctly and efficiently fulfil its mandate in the understanding of the Racial Equality Directive it is of utmost importance that:

- its political and legal independence as well as all its functions and tasks will be guaranteed respectively described by statute or , if necessary even by constitutional provisions,
- its financial resources will be sufficient to look after all its functions and tasks efficiently,
- it will be empowered to assist independently victims of discrimination in pursuing their complaints about discrimination, including inspection of files and the right to information,
- it will be able to conduct independent research work and surveys concerning discrimination, including free access to data collected by other authorities,
- it will be authorised to publish independent reports and recommendations on any issue relating to such discrimination,
- any victim of discrimination will have free access to such a body and will have the right to be free of charge supported in legal matters.

2.11 Abolishment of any provisions contrary to the principal of equal treatment (Article 14 of the Racial Equality Directive and Article 16 of the Employment Equality Directive)

- *Needs of reform / Possible measures*

The necessary measures to be taken to fulfil these Articles of the Directives follow from the needs of reform described in chapters 2.1 to 2.11 and 2.13 of this manual.

- *Possible measures*

Having in view the need to have a very clear and precise body of regulations on illegal discrimination, a more general clause declaring all legislation void, if found contradicting the principle of equal treatment, doesn't seem to be the best solution.

A different approach might bring more clarity but afford much more work: To set up a Commission for the reform of the Polish legal system to work on concrete proposals bringing everything in line with the principle of equal treatment.

Sanctions and Compensation (Article 15 of the Racial Equality Directive and Article 17 of the Employment Equality Directive)

- *Needs of reform*

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 Criminal Code and by the Code of Minor Offences. Furthermore, the Polish Civil Code and Labour Code provide for compensation claims for material and immaterial damages (see chapter 4.13 of the Status Quo Analysis Report).

The Polish Penal Code contains no specific provision, which explicitly refers to racist or xenophobic motivation as aggravating factor. However, the Penal Code lies down that courts, when determining the penalty, have to take into account the perpetrator's motivation and manner of behaviour (see chapter 2.3 of the Status Quo Analysis Report).

Also it is questionable whether the minimum compensation/sanction limits laid down by law are high enough in order to fulfil the requirements of both Directives which oblige Member States to lay down sanctions which must be 'effective, proportionate and dissuasive'. Although both Directives state that sanctions have to be provided for and those 'may comprise the payment of compensation to the victim' the Polish system of compensation of damages is only based on the concept of redressing damages and does not include a sanctioning character (see chapter 4.13 of the Status Quo Analysis Report).

- *Possible measures*

In order to efficiently combat racist, anti-Semitic, xenophobic or homophobic tendencies it seems crucial to set into force an additional provision claryfying that racist or xenophobic motivation has to be qualified as aggravating circumstances in all penal proceedings.

It also seems necessary to introduce additional sanctions parallel to compensation, which should be proportionate to the economic power of the perpetrator in order to have a dissuasive effect on the victim of discrimination. (punitive damages)