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Strengthening anti-discrimination policies

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**Brochure on Anti-Discrimination
Legislation and Policies in Poland**

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written by

Barbara Liegl, Bernhard Perchinig and Birgit Weyss

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**Ludwig Boltzmann Institute for Human Rights, Vienna
Mandated Body**

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A Introduction

The first chapter of this brochure aims to provide a short overview on the actual situation of social groups which are particularly vulnerable to discrimination in Poland and aims to draw attention to their needs for protection and support. It continues to identify potential areas of improvement and reform of anti-discrimination policies in Poland with regard to the Racial Equality and Employment Equality Directive.

The second chapter develops suggestions about the institutional set up a new Polish anti-discrimination system based on analysis of existing structures and the experiences with anti-discrimination bodies in Ireland, the Netherlands and the United Kingdom.

The section on monitoring sets out by describing the concept and the monitoring procedures currently in place in Poland. Based on the description of the status quo gaps in the monitoring system are identified and good practices suggesting how to fill the gaps are highlighted. This takes the reader to the last sub-section showing what the most important aspects are that should be observed in monitoring procedures.

B Anti-discrimination legislation in Poland

1. General Overview on the situation of groups vulnerable to discrimination in Poland

1.1 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 (2-3% of all the entire Polish population), inhabit Poland.

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 the latter is defined in a draft Act on National and Ethnic Minorities, which is still being reviewed by a especially established Sub-Committee of the Sejm.

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 police. Furthermore, there are several complaints that authorities did not always react seriously towards acts of violence against the Roma population. 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 severe 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.

Already in 1999 the European Commission on Racism and Intolerance (ECRI) stated in its second country specific report that “Poland remains a society in which the issues of racism, xenophobia, anti-Semitism and intolerance are still relatively unacknowledged”. The European Roma Rights Centre claimed that in the meantime”), little has changed in the attitude of Polish authorities, which so far had not implemented appropriate policies to combat racism. 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 Małopolska 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.” Although the Committee on the Elimination of Racial Discrimination appreciated the efforts of the Polish government to meet the specific educational needs of Roma children by special measures it was concerned that in some cases these efforts might have lead to segregated classes having a lower standard of education than their Polish counterparts. 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 obligation.

1.2 Discrimination on the grounds of religion and 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 Church.

In Poland there are at present 196 churches and religious associations. 147 churches and religious associations are registered. Religious communities may register with the Government, however, they are not required to do so and may function freely without registration.

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.

According to their right to freedom of religion pupils are supposed to have the choice between religious instruction and ethics. However, the Ombudsperson for Civil Rights states that in most schools, ethics courses are not offered due to financial constraints. Furthermore, the Helsinki Foundation for Human Rights reported that religious minority groups encountered problems in trying to rent premises for their routine work, to organise open meetings and religious celebrations. Another problem observed is that religious groups very rarely claim their right to freedom of religion guaranteed by the Constitution. Even acts of aggression against a religious minority are reported to the police in very few cases. One reason for this lack of enforcement might be the insufficient knowledge about legal remedies and institutional support regarding their access to justice. Some religious groups might also prefer not to claim their rights as they fear open conflicts and an atmosphere of sensation and public scandal.

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 Institute.

1.3 Discrimination on the grounds of age

Persons who have reached the age of retirement are guaranteed the right to social security by the Polish Constitution. 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. 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 only. 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. 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 employee reached the age of retirement seven years ago, since this would be a violation of the prohibition of discrimination on the grounds of age”.

In 2000 an Ombudsperson for Children’s Rights was established who 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 also been criticised regarding the situation of *separated refugee children* since it is planned to give de facto protection of unaccompanied minors only after procedures for granting him or her refugee status have been completed. As it would be in the best interest of the concerned child a legal guardian should be appointed to all separated children, irrespective of whether he or she is seeking asylum.

1.4 Discrimination on the grounds of sexual orientation

According to a report on discrimination on Grounds of Sexual Orientation in Poland commissioned by the European Section of the International Lesbian and Gay Association (ILGA), negative attitudes towards homosexuals in the Polish society mostly derive from the belief that homosexuals undermine the fundamental values, which are mainly based on the notion of family and Christianity. Furthermore, it is being reported that frequent statements of church officials and the mass media are promoting a negative climate concerning homosexuals in Poland. Gays i.e. 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.

The report which has been written by the Lambda Warszawa Association includes a whole list of cases concerning violence and harassment against homosexuals, discrimination at work, in churches and with regard to the use of public services. 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 rape. In the light of the present analysis it seems important to mention that 77% of cases of physical assault were not reported to the police. 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 police.

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.

As far as the **housing** sector is concerned 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 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 reason might be the dissatisfactory or even discriminatory behaviour of some 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.

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 persons. 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.

2. The transposition process of the two EU Anti-discrimination Directives in Poland

When Poland became a Member State of the European Union on May 1, 2004 it should have completed the legislative adoption process to bring Polish legislation in line with the *acquis communautaire*. The Racial Equality Directive prohibiting racial and ethnic discrimination and the Employment Equality Directive prohibiting discrimination on the grounds of religion and belief, disability, age and sexual orientation in employment form part of this common set of obligatory minimum standards passed within the framework of the European Union. Poland is therefore

bound to these two directives which provide a whole set of rights against discrimination and on their enforcement. In case Poland fails to transpose both directives within approximately a year it might have to face the initiation of an infringement procedure by the European Commission. This would mean that Poland will be held accountable for its reluctance to adapt its legislation to the principle of equal treatment as set forth in the directives before the European Court of Justice.

2.1 Transposing the EU Anti-discrimination Directives – where do we start from?

Presently, the Polish legal system contains no specific law entirely devoted to the issue of counteracting discrimination; instead, the 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 minorities. However, these provisions provide no systematic concept of protection against discrimination as they differ widely concerning their scope and grounds of discrimination. Despite the wide anti-discrimination clause in Article 32 of the Constitution, the 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.

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.

Poland is party to most of the important international agreements combating various forms of discrimination namely:

- the United Nations Convention on the Elimination of All Forms of Discrimination against Women,
- the United Nations Covenant on Civil and Political Rights
- the United Nations Covenant on Economic, Social and Cultural Rights
- the United Nations Convention on the Elimination of all Forms of Racial Discrimination
- the European Convention for the Protection of Human Rights and Fundamental Freedoms
- the Convention No 111 of the International Labour Organisation (ILO)

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. Important legal documents which have not yet been ratified by Poland are 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.

The following chapters aim to compare and analyse the Polish anti-discrimination legislation with regard to the requirements set out by the two EU anti-discrimination Directives¹.

2.2 Definition of Discrimination

Both directives define four different forms of discrimination: direct and indirect discrimination, discriminatory harassment and instruction to discriminate. For all four forms of discrimination it is irrelevant whether the person who discriminates has the **intention** to do so or not. The prohibition of discrimination also applies to so-called **perceived characteristics**. This means, for example, that a person is discriminated against because of his or her skin colour although the person has just come back from a long summer vacation. Situations where a person is discriminated against because of his or her **association** with a person of a different ethnic or religious background is also covered by the wording of the directives. A person who has suffered disadvantageous treatment because he or she is married to a black person could therefore claim his or her right to non-discrimination according to the Racial Equality Directive.

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 newly amended 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 detailed definition of discrimination:

Article 18^{3a} of amended Labour Code

Para. 3: Direct discrimination takes place when an employee is or may be treated, in a comparable situation, less favourably than other employees.

Para. 4: 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.

Para. 5: A manifestation of discrimination, as understood by § 2, is also:

- 1) an action which consists in encouraging other person to infringe the principle of equal treatment in employment
- 2) a behaviour which aims for or results in infringement of dignity or in degradation or humiliation of an employee (harassment).

Unfortunately, Polish legislation still lacks a definition for discrimination with regard to the non-employment related scope of the Racial Equality Directive prohibiting ethnic and racial discrimination in regard to access to goods and services including housing, social security, health and education. The definition of Article 18^{3a} may not

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)

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 prevent further scattering of anti-discrimination provisions it is suggested to elaborate one single act regulating equal treatment in non-employment related areas (as these are regulated by the Labour Code for the employment sphere). This act could be common for both civil law relations (with regard to sale, rent or service, be they free, sold, hired or exchanged) and administrative law relations, covering as well public services (e.g. education, health services, social services) and other acts based on administrative law.

2.3 Prohibition of Discrimination in regard to Employment

Both the Racial Equality Directive and the Employment Equality Directive prohibit discrimination in regard to all aspects of employment such as access to employment, self-employment and occupation, access to coational guidance and training, working conditions, pay and membership in an organisation of workers or employers. Due to the European Court of Justice's extensive interpretation of the term 'pay', the related prohibition of discrimination applies also in regard to occupation pension schemes, temporary post-employment payments, sick leave benefits, severance allowances and travel concessions.

The latest amendments of the Labour Code, entering into force on 1 January 2004, extended the prohibition of discrimination to encompass not only gender but also the other grounds of discrimination. The new Article 18^{3a} Para. 1 contains an 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.

Any discrimination in access to **vocational guidance and training** is prohibited due to the equal treatment clause of Article 11.3. Conditions regarding vocational guidance and training by public authorities are regulated by Act of 20 April 2004 on Promotion of Employment and on Institutions of the Labour Market.

Free **access to self-employment** is provided in Article 6.1 of Act of 2 July 2004 on Freedom of Economic Activity, 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 professions² 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 Regional Administrative Court claiming that the right to freedom of profession has been violated according to Article 65 of the Constitution.

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 contracts³.

Article 36 Section 5 of Act on Promotion of Employment and on Institutions of the Labour Market bans **discriminatory job postings**, which are being published.

Act of 20 April 2004 on Promotion of Employment and on Institutions of the Labour Market

Article 36

5. 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.

2.4 Non-employment-related scope of the Racial Equality Directive:

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, following the minimum standards of the directives, homosexuals would not be entitled to compensation claims in case are denied to conclude tenant contract because of their sexual orientation. Not

² Such as barristers/ solicitors, veterinarians, architects, financial auditors etc.

³ See: Zienkiewicz, E. Mazur-Rafal, M. (2003), p. 13.

only that the borderline between different grounds of discrimination is often blurred, like in the case of ethnic origin and religion, the different weighting of grounds of discrimination also seems highly unconceptual 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.

The rights to social security, health care and education are guaranteed to all Polish citizens by the Constitution. Although the EU directives do not include nationality as a ground of discrimination, from a human rights point of view access to these rights should be granted to every person under the jurisdiction of the Polish Republic. Benefits from the health fund are for instance provided to Polish citizens residing in the territory of Poland as well as to foreigners having a permanent or temporary residence card.

In regard to the **access to social security** the Polish Constitution lays down that 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. Furthermore, a citizen remaining without employment against his/her will and without other means of support has the right to social security.⁴ 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. In order to comply with the EU directives and to provide for a concise scope of the prohibition of discrimination, it would be necessary to introduce also the explicit discrimination on the ground of race, ethnic origin. In order to prohibit also other forms of unjustified differentiations regarding the access to social security it the list of prohibited grounds of discrimination should be non-exhaustive.

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

Article 70 of the Constitution

Para. 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.

Para. 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.

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,

⁴ Article 67 of Polish Constitution.

institutions designed to protect religious identity, as well as to participate in the resolution of matters connected with their cultural identity. Also the Act on the System of Education 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. However, assessing the state of education of national and ethnic minorities is made difficult by the lack of precise data on this issue⁵. Problems encountered most frequently by national minorities relate to lack of specific curricula, textbooks, teachers and funds⁶.

As mentioned above, the directives further prohibit racist and ethnic discrimination regarding **access to and supply of goods and services, including housing**. The Code of Minor Offences contains two provisions Article 135 and 138 which put the refusal of selling goods or providing services under fine.

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

Art. 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.

Art. 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.

2.5 Exception to the principle of equal treatment in employment

Both directives provide for an exception of the principle of equal treatment when it comes to **genuine and determining occupational requirements**. Thus differential treatment based on racial or ethnic origin, religion or belief, age, disability, sexual orientation is not discriminatory if it is justifiable by certain characteristics related to the job, by reason of the particular occupational activities concerned or by the context in which these activities are carried out. Furthermore, to constitute a genuine and determining occupational requirement, the objective must be legitimate and the requirement must be proportionate. The rationale for this exception is that it is generally recognised and accepted that a legitimate need exists to allow employers to look e.g. for persons from a specific ethnic background or with a specific religion. This exception might apply to any job that involves a person's authenticity like in the case of an actor, or a model or a waiter in a restaurant that serves food from a

⁵ Zienkiewicz, E. Mazur-Rafał, M. (2003), p. 14.

⁶ Ibidem.

particular country or culture. Also, for example, counselling services providing assistance to migrants are not hindered by the directives to recruit only people who have a particular ethnic background. In order not to evade the strict prohibition on discrimination the preambles of both directives state that a difference in treatment based on a genuine and determining occupational requirement is justified only in very limited circumstances⁷.

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 183a § 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 set forth by the 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.

Specific exception for religious institution or other organisation with a religious ethos:

The Equal Employment Directive provides for a more specific exception in cases where the employer is a **religious institution or other organisation with a religious ethos** such as faith schools, religious charitable organisations etc. Thus Poland may maintain national legislation or practices existing at the date of the adoption of the Employment Equality Directive pursuant to which a difference in treatment based on an employee’s religion or belief shall not constitute discrimination.

This requirement is reflected in Article 18^{3b} Para. 4 of amended Labour Code:

Article 18^{3b}

Para. 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

⁷ See recital 18 Racial Equality Directive and recital 23 Employment Equality Directive.

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 whether or not such a differentiation in treatment is necessary, attention must be paid to the specific occupation in question. Thus, different standards regarding occupational requirements apply depending on whether the person concerned works, for example, as a press officer or simply as a typist.

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 law⁸. The Directive does not, however, permit a religious organisation to simply exclude all lesbians and gay men from access to employment⁹.

Specific exception on the principal of equal treatment on the basis of age:

The Employment Equality Directive leaves space for certain **justification of differences of treatment on grounds of age**. Hence 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:

- 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;
- the fixing of minimum conditions of age, professional experience or seniority in service for access to employment or to certain advantages linked to employment;
- 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 etc.

Certain 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). These provisions allow 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 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.

⁸ Zienkiewicz, E. Mazur-Rafał, M. (2003), p. 16.

⁹ 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.

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.

Also the prohibition of regular employment of children below the age of 16 or the list of certain prohibited jobs for juveniles provided for in the Labour Code is in line with the requirements of the Employment Equality Directive as these regulations clearly aim at the protection of the health and physical development of children and juveniles.

2.6 Positive action

Both directives permit Member States to maintain or adopt so-called **positive measures** to prevent or compensate for disadvantages linked to certain forms of discrimination and to achieve full equality in practice. In the context of positive measures adopted to ensure the equality of women and men the ECJ held that absolute and unconditional priority for members of one group overstretches the scope of justified positive measures. Thus positive measures require a justification in the form of a need to overcome past discrimination that originates from the disadvantaged position of ethnic minorities. According to the wording of the directives, Member States are permitted but not required to adopt legislation that provide for the possibility of positive action.

Article 18^{3b} Para. 2 Section 2 of the amended Labour Code provides a legal basis for 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.

In Poland, several positive action programmes to promote political representation of national minorities and to support their educational system exist. Furthermore, specific positive measures in the area of education, employment, health, hygiene, housing conditions have been adopted to improve the living conditions of the Roma community in the Małopolska Province.

2.7 Adequate legal measures to enforce anti-discrimination provisions set forth by both Directives

The directives have a strong focus on remedies and enforcement. Furthermore, they follow a so-called **rights-based approach** obliging Member States to ensure that judicial and/or administrative procedures for the enforcement of the rights provided by the directives are put in place. The directives also refer to conciliation procedures that should be foreseen by Member States in order to provide for extra-judicial means to resolve related conflicts. The directives foresee a number of instruments and measures, which are supposed to facilitate the enforcement of the rights conferred by the directives: shift of burden of proof in favour of alleged victims of discrimination, support by specialised organisations and NGOs, protection against victimisation etc.

Judicial and administrative procedures for the enforcement of the obligations under the Directives:

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.

Penal Law:

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 court¹⁰.

Civil Law:

- 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 health¹¹.
- 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 become 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. Furthermore, an employee who feels discriminated can also apply to the trade unions and to the State Labour Inspectorate.

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.

¹⁰ Article 55 Para. 1-4 of the Penal Code.

¹¹ According to Article 23 of the 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.

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.¹²

Liability of a civil servant for violation of his/her obligations as provided by Article 61 Para. 1 Section 1 of the Act of 18 Dec. 1998 on Civil Service is a disciplinary liability. A member of the civil service corps is subject to periodic assessment (Article 74 Para. 1 of Act on Civil Service). In case of an unfavourable assessment, a civil servant is subject to another one, not earlier than after 6 months from the previous one. In case of two subsequent unfavourable assessments mentioned in Article 74 Para. 1, a civil servant is dismissed with a notice period of 3 months (Article 61 Para. 1 item 1 of Act on Civil Service). A civil servant and an employee of the Civil Service are subject to internal liability for violations of obligations of member of the civil service corps (Article 106 Para. 1 of Act on Civil Service). In procedures before disciplinary commissions, provisions of the Code of Criminal Procedure are applied *mutatis mutandis*. Disciplinary liability does not exclude a related criminal charge, if a given action constitutes a crime.

Punishment in disciplinary procedure may lead to the termination of an employment contract (compare with Article 107 Para. 1 item 7, and Article 107 Para. 2 item 6 of Act on Civil Service). Employment of a civil servant terminates – among others – in case of a legally valid decision on imposing a disciplinary punishment of expulsion from the civil service and in case of legally valid conviction for a crime committed intentionally (Article 60 of Act on Civil Service).

Complaints brought before the Ombudsperson for Civil Rights: 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 by the Constitution, including the general prohibition of discrimination¹³. According to Article 80 of the Constitution every person, irrespective of Polish or any other nationality, has the right to apply to the Ombudsperson.

Rights of NGOs to engage in court proceedings to support victims of discrimination

The directives oblige Poland to create a legal basis that allows **organisations with a legitimate interest** in compliance with the principle of equal treatment to bring enforcement actions on behalf or in support of the complainant. A precondition for organisations to engage or initiate such proceedings is that the alleged victim consents to the related action. The enforcement of anti-discrimination provisions therefore relies on the individual litigation.

Generally in Poland, only an advocate or legal counsellor may provide legal representation. 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. The list of the organisations is determined by the Minister of Justice. A social non-profit organisation can also participate in the proceeding acting as an “**amicus curiae**” and present its opinion on the case to the court.

¹² Act of 18 December 1998 on Civil Service.

¹³ Article 208 of Polish Constitution.

In August 2004, the government adopted an amendment to the Code of Civil Procedure which allows certain NGOs to lodge a complaint on behalf of an alleged victim of discrimination. A precondition of such claim is that the person concerned consents on the claim and that the organisation's statute, includes the protection of equality and non-discrimination. Under these preconditions such organisations may initiate such claims or join the proceedings at any stage.

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)¹⁴. 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.

The **Ombudsperson for Civil Rights** may provide legal advice by indicating possible legal measures but cannot act directly on behalf of the complainant. 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 Civil Rights:

- demand that proceedings be instituted in civil cases, and participate in any ongoing proceedings with the rights enjoyed by the prosecutor,
- demand that preparatory proceedings be instituted by a competent prosecutor in cases involving offences prosecuted *ex officio*,
- ask for instituting administration proceedings, lodge complaints against decisions to administrative court and participate in such proceedings with the rights enjoyed by the prosecutor,
- move for punishment as well as for reversal of a valid decision in proceedings involving misdemeanour, under rules and procedures set forth elsewhere,
- lodge cassation or extraordinary appeal against each final and valid sentence, under rules and procedures set forth elsewhere.

¹⁴ Article 63 Code of Civil Procedure.

The Ombudsperson may initiate a civil procedure in all the situations a public prosecutor can do.

Shift of Burden of Proof

The second legal instrument that both directives provide in order to facilitate access to justice is the **shift of the burden of proof** in favour of the person who wants to enforce his or her right to non-discrimination. Whereas the complainant has to establish facts from which discrimination can be presumed, the respondent has to prove that he or she has not discriminated on one of the grounds mentioned by the directives. This procedural regulation becomes particularly important in cases where an employee or a job candidate has no access to staff files, payrolls or other documents that would provide information on the discriminatory act.

Article 6 of the Civil Code lays down the general principle in relation to the burden of proof in civil law proceedings laying down that the burden to prove a fact rests on the person who derives legal effects from the fact

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.

Due to the fact that the above mentioned principal 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.

Protection against victimisation

Another aspect crucial to the effective enforcement of the right not to be discriminated is the protection against **victimisation**. The directives prohibit any adverse treatment or consequences as reactions to a complaint. In a working environment it seems particularly important that this protection also applies to other employees or witnesses who might need to bear evidence in court proceedings. In order to ensure an effective protection against victimisation it should be defined as a form of discrimination resulting in the same effective, proportionate and dissuasive sanctions as well as in shifting the burden of proof.

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.

Article 18^{3e} of newly amended Labour Code contains a rather restrictive regulation providing protection against victimisation. According to this provision 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.

Effective, proportionate and dissuasive sanctions

In order to effectively prevent discrimination both directives oblige Member States to adopt effective, proportionate and dissuasive **sanctions**. It is up to the Member States whether they choose to adopt criminal sanctions such as fines or civil law sanctions comprising compensation claims for material and immaterial damages. Community service or the ban of certain activities, as well as the confiscation of property or the withdrawal of subsidies, might also qualify as sanctions as long as they seem effective, proportionate and dissuasive in relation to the breach of the principle of equal treatment.

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. However, there is no legal basis for compensation claims against no-employment related discrimination between private parties as Poland has still not introduced such prohibition into its civil law framework.

The newly introduced amendments to the Labour code abolished the upper limits regarding compensation claims for infringements of the principle of equal treatment but left the minimum limits unchanged. Hence, the amount of such compensation of damages has to be at least equal to the minimum wage.

It is questionable whether this minimum limit is high enough in order to fulfil the requirements of the Race Equality Directive and 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.

2.8 Dissemination of information

Both directives oblige Poland to make sure that the provisions adopted pursuant to the directives, 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 sometimes contains imprecise or even wrong 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 and Labour.

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 treatment.

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 Economy and Labour, the National Labour Inspectorate, as well as NGOs counselling victims of discrimination.

2.9 Dialogue with Social Partners and NGOs

Poland is further obliged to **encourage dialogue with specialised NGOs** having a legitimate interest in contributing to the fight against discrimination and with a view to promoting equal treatment. This state obligation recognises the pivotal roles of such organisations in enhancing the protection against discrimination and in supporting victims of discrimination in their access to justice. NGOs can therefore call upon governments to interact with them and, for example, to take into account their expertise in regard to drafting and mainstreaming anti-discrimination policies.

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. Among the major issues discussed were the amendments to the Labour Code, draft bill on the General Inspectorate for Counteracting Discrimination, draft bill on equal status of women and men, and draft bill on preventing and counteracting violence in close relationships. The Advisory Council provides for a forum for dialogue between the government and NGOs, which has been perceived very positively by both sides.

In regard to **social partner organisations** Member States must adopt measures to promote social dialogue between the two parties in industrial relations in order to foster equal treatment. Such measures can include monitoring workplace practices, collective agreements, codes of conduct, research and exchange of experience as well as good practice. Where consistent with national traditions and practices Member States must encourage the Social Partners to conclude agreements laying down anti-discrimination rules in regard to employment issues falling within the scope of collective bargaining.

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. This Commission could provide a forum for dialogue among these three parties in order to deal with issues connected to anti-discrimination policies and measures.

2.10 Abolishment of any provisions contrary to the principal of equal treatment

The final provisions of the directives place the duty upon Poland to **screen its national legal framework** for laws, regulations and administrative provisions contrary to the principle of equal treatment in order to abolish them. Furthermore, discriminatory provisions included in individual or collective contracts or agreements, internal rules or undertakings, rules governing profit-making or non-profit-making associations, and rules governing the independent professions as well as workers' and employers' organisations shall be declared null and void or shall be amended.

3. 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 Directives refers to different branches of law which are traditionally regulated separately in Polish legal system.

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 of the burden of proof in favour of plaintiffs filing a claim against discrimination is not regulated as regards non-employment-related discriminations.

A good solution to fill these gaps would be 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 (with regard to sale, rent or service, be they free, sold, hired or exchanged) and administrative law relations, covering as well public services (e.g. education, health services, social services) and other acts based on administrative law. 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, Czech Republic).

The guiding idea of such law should be to help develop a culture of equality, where discrimination is not only outlawed, but equality is seen as a gain for the whole society.

Although the recently amended Polish Labour Code and the amended Act on Employment and Countering Unemployment generally provide a good coverage of the scope of the two relevant directives some shortcomings can be identified. In order to comply with the directives Poland will have to find a solution to the following loopholes in the protection against discrimination.

A major shortcoming is the rather restrictive regulation on the issue of victimisation. Currently only the termination of an employment-relationship on the ground of exercising one's right to equal treatment as laid down in the Labour Code is prohibited. 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). Furthermore, it should be secured, that due distinction is made between an unsuccessful and a malicious claim of discrimination. 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.

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.

Finally, it can be said that with regard to the legal fight against discrimination Poland is presently going through an important development. In order to avoid an infringement procedure before the European Court of Justice Poland will have to speed up in filling the gaps described in this chapters and to provide an efficient legal framework promoting equality with a prospering society while tackling discriminatory practices and structures.

C Specialised bodies against discrimination

The Racial Equality Directive requires Member States to designate one body or several bodies for the promotion of equal treatment of all persons irrespective of their racial or ethnic origin. These so-called bodies for the promotion of equal treatment shall be responsible for providing independent assistance to victims of discrimination, conducting independent surveys concerning discrimination, publishing independent reports and making recommendations on any issue relating to such discrimination. Although the Employment Equality Directive does not provide for a similar obligation, the majority of Member States extended the competences of such bodies or established new institutions with similar mandates to also encompass the other grounds of discrimination.

According to Racial Equality Directive the aims and tasks of the bodies for the promotion of equal treatment are :

- giving independent assistance to the victims of discrimination;
- conducting surveys and studies; and
- publishing reports and recommendations.

The European Union has not defined fundamental principles for the construction of specialised bodies, but a study on 21 specialised bodies funded by the European Commission (European Commission 2002: Promoting Diversity. 21 bodies promoting diversity and combating discrimination in the European Union) has endorsed, that the fundamental principles laid down at the first international meeting of the national institutions for the promotion and protection of human rights in Paris during 7–9 October 1991 (known as the ‘Paris principles’) should also guide the setting up of the bodies mentioned in the Racial Equality Directive. These minimum standards for independent commissions are:

- Independence guaranteed by a constitutional or legislative framework;
- Autonomy from government;
- Pluralism, including pluralism of composition;
- A broad mandate;
- Adequate powers of investigation;
- Sufficient resources.

An effective institutional framework has to be tailored to the specific legal, societal and political conditions of the country concerned, while at the same time taking best practices in other Member States as an important source of inspiration and guidance. In the case of anti-discrimination policies, specific legislation and specialised bodies already existed in some Member States (Belgium, Ireland, the Netherlands, Sweden and the United Kingdom¹⁵) well before the Racial Equality Directive was passed. To allow learning from the experiences in these countries, a comparative study on anti-discrimination legislation and practices in Ireland, the Netherlands and the UK as well as a detailed analysis of the existing legal and institutional framework in Poland was

¹⁵ Internet addresses of these institutions are provided in the last chapter of the booklet.

written, which both formed the base for the recommendations on how to implement anti-discrimination legislation in Poland.

1. Specialised bodies in Ireland, the Netherlands and the United Kingdom

In all three countries, well-funded implementation bodies do exist¹⁶. In The UK and Ireland, the implementation structure is based mainly on state-bodies with a broad mandate including the representation of victims before the court, conducting formal investigations, campaigning for equality and reviewing the existing legislation. In The Netherlands, the Equal Treatment Commission has a more limited mandate concentrating on the issuing of opinions to cases of discrimination brought before the Commission. An NGO-based structure of 25 local anti-discrimination offices and a national office against discrimination support its work.

Implementation structures differ considerably with regard to their general approach, institutional structure and the way in which victim support is organised.

- Whereas in the British case a separate legal and institutional framework has been established for different grounds of discrimination, as well the Dutch as the Irish case follow an horizontal approach, where a single body handles all complaints. This separation, which can be explained by the peculiar British history, has come under increased scrutiny in recent years. Due to growing criticism and due to the implementation of the EU anti-discrimination directives, also in the UK the move to a single body is planned.
- In all three countries, the specialised bodies are independent by law.
- In the British and the Irish case the specialised bodies have as well a quasi-judicial and a more political and public function including network – building, policy consultation, awareness raising and research. The Dutch Commission for Equal Treatment only has quasi-judicial functions, here the other functions necessary for a successful anti-discrimination system are taken over by a well developed and funded NGO – network. In Ireland, the tasks of adjudication and awareness – raising and policy consultation are divided between two authorities, the Equality Authority and the ODEI-The Equality Tribunal, which only has the task to adjudicate and redress.
- Both the British Commission for Racial Equality and the Irish Equality Authority provide victim-support. In the Netherlands, victim support is organised within a framework of NGOs, which run 25 local and municipal anti-discrimination offices. The funding of these offices is regulated by law, giving them the role of ‘first contact’ points. They act as a kind of filter to the Commission for Equal Treatment, try to settle cases and prepare cases for the Commission and the courts. This model of inclusion of the civil society in

¹⁶ Ireland: The Equality Authority, ODEI-The Equality Tribunal; Netherlands: Equal Treatment Commission; UK: Race Relations Commission

everyday anti-discrimination action is noteworthy and an important element for the widespread public acceptance of anti-discrimination legislation in the Netherlands.

- In all three countries, the specialised bodies may represent victims before the court or initiated proceedings on their own.
- In all three countries the specialized bodies hold investigative powers and have the right to get access to files in cases of alleged discrimination. All institutions do not only have the right to investigate cases, but also to investigate companies and institutions, if they suspect them to discriminate.
- As well the British Race Relations Commission as the Equality Authority do not only have the right to investigate single cases, but they also may conduct formal investigations of industries and areas of concern on their own initiative. They may issue binding orders forcing the respective companies or institutions to change their procedures in order to prevent further discrimination. If not followed, these orders may be implemented by the courts. The Dutch Equal Treatment Commission is missing this opportunity, but may only issue recommendations. Although due to the Dutch climate of consensus its recommendations are often followed, this lack of powers seriously hampers its effectiveness.
- Both in the British and the Irish case the implementation institutions have the right to pass binding decisions, which may be challenged before the court. In the Netherlands, the Equal Treatment Commission may issue non-binding opinions in individual cases, which in most cases are followed by the courts.
- In all three countries the relevant equality bodies do have a policy advisory role and the statutory task to regularly evaluate the functioning of existing anti-discrimination legislation to ensure their further development. This policy advisory role is seen by all authorities as an important precondition to be able to fulfil their task.

2. Existing Bodies for the Promotion of Equal Treatment in Poland

Currently the following bodies dealing with several aspects of equal treatment exist in Poland:

- **The Government Plenipotentiary for Equal Status of Women and Men**

On the basis of an ordinance of the Council of Ministers, the Government Plenipotentiary for Equal Status for Women and Men was established in November 2001. In 2002, its powers and tasks 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.

- **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 authority, in particular with regard to the fundamental rights guaranteed the Constitution including the general prohibition of discrimination. 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 the appropriate bodies. Disputes arising from contractual relationships between natural persons do not fall under the Ombudsperson's powers.

- **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 work of the Inter-Departmental Team for National Minorities should lay ground for governmental activities aimed at the creation of favourable conditions for the national minorities that live in Poland and should elaborate solutions aimed at co-ordinating the activities taken by the organs of State administration which deal with national minorities.

- **National Minorities Division**

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

None of these bodies fulfils all criteria mentioned in the Paris principles. Furthermore, the responsibility for different grounds of discrimination are scattered among several authorities, which prevents the development of an overarching and comprehensive approach. Thus a new structure should be set up for the implementation of the EU-anti-discrimination directives.

3. Suggestions for specialized bodies in Poland

Based on the comparative study on specialised bodies in Ireland, the Netherlands and the United Kingdom and the analysis of the status quo in Poland, it was decided to suggest a three-tier system as the most appropriate solution for this country.

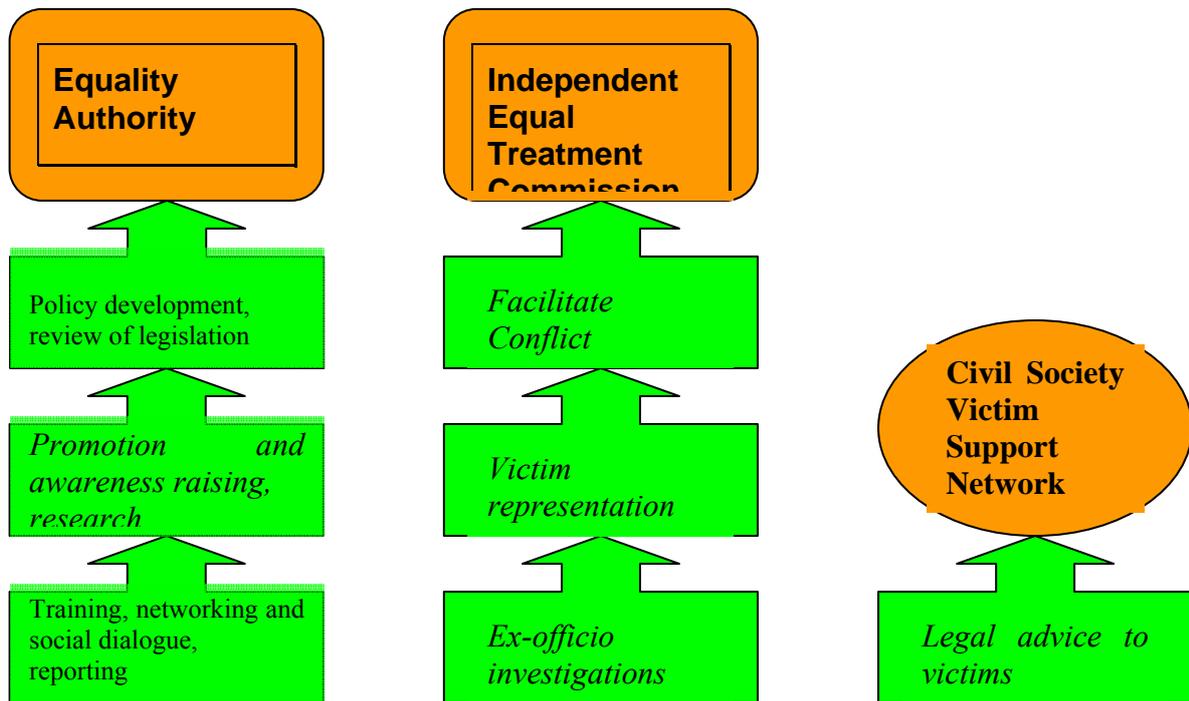
The system should exist of the following institutions:

- A central and permanent governmental body (the Equality Authority) responsible for the non-judicial tasks, like e.g. promotion, awareness raising and policy development
- An Independent Equal Treatment Commission responsible for handling of cases and investigations
- A civil-society based network responsible for victim support

These institutions should be entitled to deal with all forms of discrimination in the employment and the non-employment sector to avoid further scattering of the subjects and to guarantee a consistent development of legal practice.

In order to safeguard the right to a fair trial, the non-judicial tasks like promotion, awareness - raising and policy development should not be dealt within the same institution like mediation or decision making in single cases, like it is the case in e.g. the British Commission for Racial Equality. In order to secure a prominent place in Polish politics, promotional and policy-related activities should become the task of a governmental body, whereas single cases should be dealt within an independent commission, whose structure and function is described below.

Victim-support and legal representation should become the task of a network of civil society organisations with local outlets in all provinces. The organisations forming the network should be selected in a public call for tenders and the quality of their work should regularly be monitored.



Why a single central governmental body?

As the examples from other European countries have shown, a single authority responsible for awareness raising, training and policy development is a better institutional solution for efficient anti-discrimination policies than several specialised agencies for different grounds of discrimination. Even in countries, where separate bodies for different grounds of discrimination do exist, there is a tendency to include them into a single body responsible for all grounds. A single institution covering all grounds for discrimination in specialised departments is not only more efficient in organisational terms, as it allows for exchange of experience and creates synergies through focused work on different areas of discrimination, but is also better equipped to deal with multiple discrimination as it can easily pool the specific knowledge of its specialists. Furthermore, a central governmental body is a clear public signal that outlawing discrimination is a central political goal.

Why an Independent Equality Commission for handling cases and investigation?

Institutions dealing with single cases should be institutionally separated from other bodies to safeguard independence and the division of powers. Discrimination is an issue as well in the civil as in the public sector, thus any institution dealing with single cases has to be competent for both areas. It has to be able to deal with cases in the employment sector and in the non-employment sector, like e.g. housing or the provision of goods and services, thus the traditional Ombudsperson with its limitation on administrative wrongdoings is not the first choice. Given the wide range of cases to be dealt with, a collective structure like a Commission is the best tool to safeguard a broad integration of different grounds of discrimination and to find the necessary balance of interests for sustainable solutions. Furthermore, a specific Commission dealing with discrimination only is a strong and visible signal to the public.

Why a civil-society based victim support network?

Victim support has to be as close to the people concerned and as easily accessible as possible. In most cases, victim support only will be successful, if the support structures are well connected to the “vulnerable groups” and are sensible to the regional context. It should not be reduced to neutral legal counselling, as it also includes victim-centred psychological and social support. Thus victim-support structures cannot be neutral, but are obviously standing on the side of the victim. These preconditions make civil society organizations, like e.g. Law Clinics or other NGOs more suitable and credible for victim support than administrative bodies, as it is easier for them to be clearly partial in their attitude and appearance – obviously standing on the side of the victim – than it is for any governmental institution.

3.1 The Equality Authority

3.1. General considerations

In order to secure effective and continuous efforts to promote equality in society, the “Equality Authority” should be set up as a permanent governmental body funded by the regular budget and should have to deal with all grounds for discrimination. It should resort to a Minister or Secretary of State, with whom it should have to coordinate strategic planning. The Equality Authority also should have the task to oversee mainstreaming of anti-discrimination policies within the other governmental departments. It should have to annually report to parliament and the public about its work and the progress made.

The Equality Authority should be headed by a director and a deputy director appointed by the appropriate Minister or Secretary of State. The director and the deputy director should be appointed following a public call for application and a public hearing. The director and the deputy director should receive renewable employment contracts for a specified period of time, at least five to seven years. Dissolving and renewal of contract should only be possible after a public parliamentary hearing.

The director and the deputy director should be entitled to jointly appoint staff of their choice within the framework of the budget and the salary structure applicable for public institutions. There should be a duty for a public call for applications for the staff of the Equality Authority. The Equality Authority should receive a statutory budget from the general state budget, which should be appropriate to its tasks. It should be secured, that there is enough staff to handle the expected workload.

The Equality Authority should be obliged to formulate a strategic plan for three years and agree it with the appropriate Minister or Secretary of the State. To facilitate the implementation of the strategic plan, annual business plans should be set up. Both the strategic and the annual plan should be made public.

3.1.2 Rights and Duties of the Equality Authority

The Equality Authority should have the following duties:

- **Promotion and Awareness Raising**

A major task of the authority will be the continuous development and implementation of an effective promotion and awareness raising strategy aiming at improving the overall understanding of equality issues in society. This strategy should include advertising and public-relations activities aimed at the general public as well as the development of continuous communication and exchange with experts, NGO’s and representatives of groups of potential victims of discrimination.

- **Information activities**

The Equality Authority will have to publish information on anti-discrimination legislation, its implementation and case law on a regular base to keep the general public, potential victims and NGOs informed. Furthermore it will have to develop

information material about best practices of implementation for specific audiences, e.g. employers, the housing sector or public authorities. It will have to regularly consult with representatives of different sectors to evaluate their needs for information. It is suggested to encourage setting up an information service on equality issues within the organisations of the relevant sectors.

- Research and studies

The Equality Authority will have to develop a strategic program of research into different aspects of the situation of potential victims and the implementation of anti-discrimination policy and legislation, especially with regard to the development of monitoring procedures. In order to facilitate this task, it is suggested to set up regular round-tables with the academic community and relevant NGOs in this field, which should help to develop a research strategy, which reflects as well the needs of the Equality Authority and the civil society organisations in this field. As a general principle, the Equality Authority should be obliged to publish all funded or co-funded studies in due time after reception of the final report.

- Development of Codes of Practice

The Equality Authority should be obliged to develop “Codes of Practice” containing detailed and comprehensive explanations on how to implement non-discriminatory practices in specific areas of life with regard to employment and customers’ relations. These Codes of Practice should be developed in consultation with the social partners, NGOs and relevant actors and experts in the fields concerned. They should contain checklists on what procedures in specific sectors should be regarded as discriminatory, and what procedures, albeit formally non-discriminatory, might induce discrimination in effect. Furthermore they should describe examples of discrimination-free procedures in different sectors and explain methods of monitoring and reporting procedures. In this respect, the Codes of Practice issued by the British Commission for Racial Equality could serve as examples of good practice.

- Training

The Equality Authority should have to produce training-manuals and set up regular trainings on anti-discrimination legislation, the development of case law and methods of counselling of potential victims for

- The planned victim support network
- Judges and Lawyers
- The Police
- The Trade Unions and the Social Partners
- The Educational and Social Professions

Furthermore, it will have to support the development of training material and general anti-discrimination training for multipliers, including e.g. NGOs, youth workers, teachers, journalists etc. in order to support a broad understanding of equality issues within the general public.

To facilitate the implementation of Codes of Practice, the Equality Authority should organise and/or support the organisation of trainings on the implementation of these Codes of Practice with the trade unions, employers and service providers and NGOs. To facilitate this task, specific funds should be allocated within the budget of the Equality Authority.

- Networking and Social Dialogue

The Equality Authority should be obliged to develop a framework for a continuous dialogue between the government, the social partners and the relevant NGOs. Round Tables including all relevant actors should be held at least once a year, and working groups of representatives of the Body against Discrimination, government representatives, social partners and NGO's on specific topics should be installed with the task to develop strategies for specific fields of action.

To keep well informed about regional and sectoral developments, it is suggested that the Equality Authority sets up a fast-response network of experts and NGOs able to report on specific issues on request.

Specific attention should be given to regular consultations with the social partners on issues concerning the implementation of anti-discrimination practices in business and the work life. In this respect, it is suggested to implement incentives for business to develop employment equality, like e.g. public awards, and to support business alliances between companies implementing equality measures. Here the Equality Authority will need to develop a proactive role in supporting the exchange of good practices and supporting a business climate, where employment equality is seen as an asset.

To allow for a deeper integration into European developments, the Equality Authority should take part in European networks and consultations of similar bodies and organise exchange of good practice with them.

- Reviewing of existing anti-discrimination legislation and its implementation

The Equality Authority should be obliged to review the existing anti-discrimination legislation and its implementation regularly, at least each five years. It should be entitled to make suggestions for alterations of the law and its implementation, define strategic priorities and inform about areas of concern. Furthermore, it should review the position of the Polish anti-discrimination legislation and case law with regard to European developments and inform about the exchange of practice with similar bodies in Europe. The parliament should be obliged to discuss the review of the Equality Authority.

Furthermore, the Equality Authority should be entitled to publicly comment on legal and political developments in areas falling under its competence and have the duty to comment on draft bills and drafts of action plans whenever asked to do so by a ministry or another public body.

- Mainstreaming of anti-discrimination measures within public administration

The Equality Authority should be given the task to oversee mainstreaming of anti-discrimination measures within other governmental departments. In order to do so, it shall have the right to consult with other departments on the development and

implementation of action plans, develop codes of conducts and report to responsible Minister or Secretary of State on the results.

- Reporting to the parliament and the public

The Equality Authority should be obliged to annually report to the parliament and the public about

- Progress in enhancing anti-discrimination policies in all relevant areas,
- Experiences with existing legal regulations and institutional structures,
- Specific areas of concern,
- The situation of specific vulnerable groups,
- Its own activities,
- The Activities of public bodies to implement equality measures
- Policy recommendations,
- Progress in enhancing anti-discrimination policies in all relevant areas,
- The applicability and efficiency of existing legal regulations and institutional structures,
- Specific areas of concern,
- The situation of specific vulnerable groups,
- Its own activities,
- Policy recommendations,
- Recommendations for amendments of legislation

These reports should be made accessible to the public in print and on the internet.

3.2 The Equal Treatment Commission

In order to safeguard fair and fast solution of individual cases, an independent body, the Independent Equal Treatment Commission, entitled to deal with all grounds of discrimination should be set up.

The Commission should consist of the Chairperson and two Vice-chairs, appointed by a parliamentary board following a public hearing, and of (up to) 12 additional Commissioners, appointed by these chairs. The chairs should publicly invite NGOs active in the field of anti-discrimination for nomination of Commissioners. At least five of the Commissioner should be female and five should to be male, and a just representation of the different groups vulnerable to discrimination should be sought. All Commissioners should be appointed on a full time base, their salary should be funded by the statutory budget.

The independence of the Chairs and the Commissioners should be guaranteed by law. They should have graduated from law-school, and should have some proven experience in the field of anti-discrimination, labour law or consumer protection. There should be enough additional staff (professionally qualified legal advisers, administrative staff) to make sure that the Commission is able to handle the workload. The Chairs and Commissioners should be appointed for a four years period. (Multiple) reappointment should be permitted so that the experience gained can persist within the institution. The Commission should have competence for civil and administrative law cases,

3.2.1 Tasks of the Commission

The main tasks of the Commission should be:

- Mediation in individual cases
- Legal representation of victims of discrimination before the courts
- Formal investigations of industries and areas of concern on own initiative
- Issuing of opinions and proposals for course of action
- Reporting to the parliament and the public

3.2.2 Mediation

In order to find sustainable solutions in individual cases and to prevent an overburdening of the court-system, mediation should be the preferred means of conflict resolutions for the Commission. Mediation should in principle make use of a pool of court – mediators, as envisaged under the suggested amendment of the Code of Civil Procedure¹⁷, but only of those who have specifically been trained in anti-discrimination issues. In this respect, the Equality Authority should be obliged to organise appropriate training procedures. The fees for mediation will have to be paid by the Commission, which shall receive due funding for this task. A compromise reached before a mediator shall become legally binding without further action.

A legally binding mediation agreement on compensation and the course of further action should be the envisaged outcome of the mediation procedure. Either party should have the right to withdraw from mediation at any time.

If mediation is rejected by the person allegedly responsible for the discrimination, the Commission should start a formal investigation considering evidence and in a first step issue an opinion whether there is prima-facie evidence for discrimination and how discrimination could be ended and compensated. The conflicting parties can then come to an agreement on the basis of this proposal. Again the Commission can approve this agreement in order to make it legally binding and immediately enforceable.

3.2.3 Legal representation

If the alleged perpetrator again refuses mediation, the alleged victim should have the right to free legal representation before the court and the funding of court-fees to make sure that the financial risk of further proceedings is taken away from the alleged victim. The free legal representation can be done by the Commissions' staff, external advocates, trade union lawyers or specialised NGO staff holding an university degree in law and approved by the Commission.

¹⁷ It should be envisaged to waive the eligibility-criterion of Polish citizenship for mediators in the field of discrimination

If the alleged victim refuses mediation, the Commission should have the right to decide whether s/he will receive further assistance. In any case, the alleged victim should have the right to directly approach the court on his/her own costs.

3.2.4 Ex-officio investigations

Cases of gross and systematic discrimination cannot be tackled by individual case work alone. Therefore the Commission should have the right to initiate formal investigations of industries, institutions or areas of concern on its own initiative, if there are hints for systematic discrimination. These formal investigations should initiate structural changes, where discriminatory practice has become a part of everyday procedures and draw the attention to the need of institutional reforms where they are necessary.

In order to be able to carry out mediation and ex-officio procedures, the Commission should be granted the right to access to all documents deemed necessary by the Commission, including administrative and judicial files, after the formal investigation has been opened. It should be granted the right to summon witnesses for a hearing and the right to publish its opinions and investigation reports.

3.2.5 Opinions and proposals for course of action

As well in single cases as in ex-officio investigations the Commission shall have the right to propose detailed recommendations and suggestions for a course of action which will prevent the further occurrence of discrimination. The Commission should be entitled to examine the implementation of the recommendations after a reasonable period of time and to publish the results of the formal investigations and the implementation examinations as a means to enhance public awareness of the issue. It should be made sure that these recommendations could be used as opinions in individual judicial procedures.

3.2.6 Reporting

The Commission should have the duty to publish an annual report about its work and to publish all cases dealt it has dealt with in an electronically accessible database.

3.3 The Victim Support Network

There is the need to establish an easily accessible victim-support-structure, which should give victims of discrimination free professional legal advice. Regional outlets in most provinces should be set up in close cooperation with the civil society to guarantee easy accessibility and sustainable civil-society involvement. Specific attention should be given to set up appropriate support structures in areas with a high percentage of Roma population.

In order to safeguard the quality of such a support structure, it should be regularly evaluated. The evaluation should especially stress the following criteria:

- Length of existence and dedication to issues of discrimination

- Education and experience of staff especially regarding legal advice
- Accessibility of premises – regional accessibility
- Experience of cooperation with other NGOs and governmental partners

Funding for the regional offices must be guaranteed by law, but contracts should be limited for a period of 5 – 7 years and should be renewable after an evaluation. The offices should be obliged to cooperate with victims' NGOs.

The main task of the offices is to provide legal advice and to prepare cases for the Independent Equal Treatment Commission; furthermore they should organise awareness-raising campaigns and provide anti-discrimination training to public authorities and private companies. It is advisable to run a telephone-hotline for advice for victims of discrimination. The offices can act as a filter for the IETC, as many cases of discrimination will be first reported to a local anti-discrimination office.

As the development of such a network will need time and the existing Polish NGO-structure might not be prepared for this task yet, the existing networks of law-clinics giving free legal advice to citizens would be a good starting point for this victim-support network. Furthermore, the chamber of attorneys at law could be helpful by providing a list of attorneys specialised in anti-discrimination law and ready to cooperate with the law clinics.

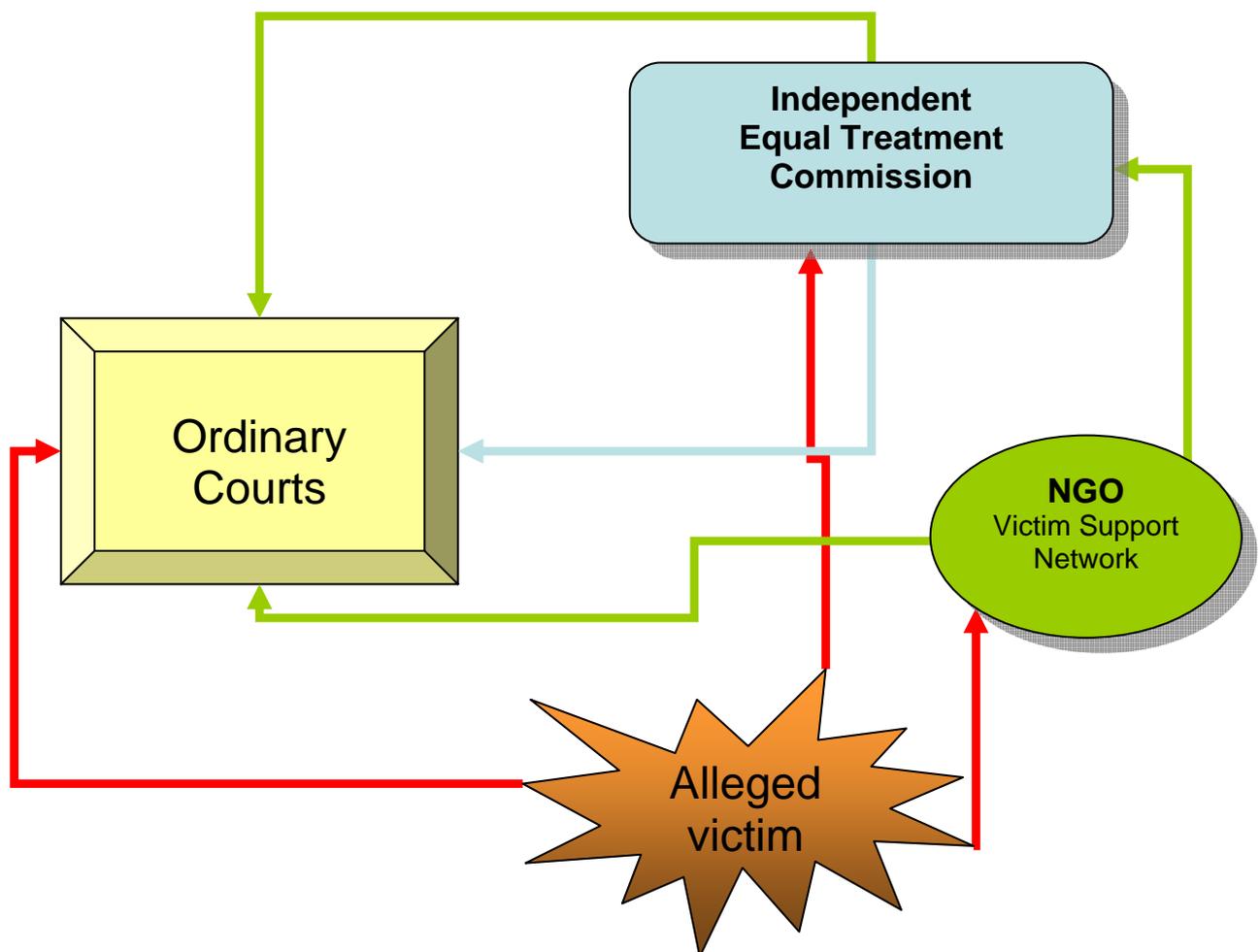
3.4 Further measures to support the implementation of anti-discrimination

The stronger anti-discrimination measures are supported by public policy, the more effectively they will be implemented. Public administration is a major tool to change attitudes towards discrimination by acting as a role model for discrimination-free procedures. Therefore a positive duty to prevent discrimination in organisational procedures and services for all public authorities with regard to their employees and clients like in the United Kingdom should be considered. All public bodies should be obliged to regularly report to the Equality Authority about their progress.

Access to public funding should be restricted to those companies and institutions proving compliance with anti-discrimination legislation. Compliance with legislation shall be proven by independent auditors, who have been approved by the Equality Authority as "equality auditors". Companies applying for public funding shall have to submit an audit statement of an approved equality auditor not older than one year in order to be eligible for public funding. Companies, which have been sentenced because of a violation of anti-discrimination legislation, should be excluded from public tenders for a specified period of time.

With regard to public authorities, they should be ordered to develop of internal equal opportunity action plans within two years after entry into force of the anti-discrimination law. These action plans should define what action needs to be taken to give equal access and possibilities for promotion to persons likely to be discriminated on the grounds mentioned in anti-discrimination legislation. The implementation of internal equal opportunity policies should be defined explicitly as duty and

responsibility of heads of unit and other leading personnel. The Equality Authority should be obliged to report to the parliament each second year on the progress of equality policies within public authorities and the needs for further action.



3.5 Example of good practice

In the case of racial and ethnic discrimination, the work of the Dutch Equal Treatment Commission is supported by 25 local and municipal anti-discrimination offices and the ‘National Bureau against Discrimination’ (Landelijk Bureau Racismebestrijding, LBR), which forms a part of the umbrella-organisation ‘FORUM’ and provides anti-discrimination training and prevention activities. The 25 local anti-discrimination offices are organized as Non-Governmental Organisations and provide victim-support and conflict mediation. The state, the provinces and the local municipalities fund them. The offices act as a kind of filter for the Equal Treatment Commission, as de facto most cases of racial discrimination are at first reported to a local anti-discrimination office, which prepares the files for the procedure at the Commission. It has to be noted, that the funding of the anti-discrimination 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 Dutch *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 British Commission for Racial Equality (CRE) is vested with wide powers in the fight against racial discrimination and has a major law enforcement function in this field. It can

- conduct formal investigations where it is believed that discrimination is or has been occurring;
- issue non-discrimination notices;
- institute legal proceedings in cases of persistent discrimination;
- take proceedings in respect of discriminatory practices, advertisements and in respect of discriminating instructions or pressure;
- assist at individual complaints.

Its powers include statutory powers to require production of documents and oral evidence. Formal investigation powers are not used in relation to individual complaints, which are considered by industrial tribunals and civil courts. Often, individual cases act as a trigger, alerting the Commission to discriminatory practices within an organisation and leading to formal investigations into organisations, firms or areas of economic activity. Where an investigation discloses acts of unlawful discrimination, the Commission can issue a non-discrimination notice requiring the

respondent or organisation to bring the particular acts of discrimination to an end and to inform the Commission by a specified date of the measures taken to prevent further discrimination. The notice remains in force for 5 years and, if not followed by the company, may be enforced by the civil courts. Since 1977, the Commission has carried approximately hundred formal investigations in a wide range of public and private organisations.

According to the Local Government Act 1998, in the United Kingdom the municipal administration has the right to implement compliance with anti-discrimination legislation as criterion for public tendering. Companies adopting the relevant Codes of Practice are privileged in contracting ('Contract Compliance'), thus the local government may indirectly influence the local economy to comply with anti-discrimination legislation. According to a recent study, 75% of all companies competing for public tenders as opposed to only 18% of companies not interested in public tenders have installed internal anti-discrimination procedures, 80% declared themselves as 'equal opportunities employers' in public advertisement. The amended Race Relations Act of 2000 has improved the powers of the local governments to implement contract compliance, as it implements a positive duty on local governments to improve race relations.

ODEI - The Equality Tribunal of Ireland

The ODEI was established in 1999 under the Employment Equality Act 1998 as an independent statutory body with the function to adjudicate and/or mediate complaints of unlawful discrimination. It has the power to investigate in cases of alleged discrimination.

An investigation is a quasi-judicial process carried out by the Tribunal Equality Officer, similar to that of the Labour Court. Tribunal Equality officers sit at sole member tribunals and normally request and consider information from both parties before arranging a joint hearing of the case, which is followed by a decision. Where discrimination is found to have occurred, an order for redress is made, including, where appropriate.:

- Compensation
- Equal Pay
- Arrears of Equal Pay
- Equal Treatment
- An order for a specified person or persons to take course of action

The decision of an Equality Officer is binding and enforceable at law. As an alternative to the investigation process the ODEI offers a statutory mediation option. If both parties agree to mediation, the case is referred to an Equality Mediation Officer. Either party may withdraw from mediation at any time. In this case the normal investigation procedure is enacted. A mediation agreement is legally binding.

4. Monitoring

Monitoring is a process documenting various phases of activities performed within a project, programme or policy area to facilitate assessing impacts and achievements of goals. It is not an end in itself as its results can be integrated into feedback loops to continuously improve programmes and policies. Those directly and indirectly engaged in the process gain greater awareness of the issues and mechanisms involved. Regarding equality, diversity and anti-discrimination policies documentation of the various steps taken makes transparent in what way different vulnerable or marginalized groups are affected and whether all groups benefit to the same extent. However, monitoring and auditing procedures should not only form the basis for evaluating **anti-discrimination policies** but also for assessing equality with regard to **participation in certain markets** (e.g., labour market, housing market) as well as **access to resources, services, goods** (e.g., social welfare, health, education) and **rights** (social, political, cultural, economic).

Not only policy makers, public authorities and gate keepers in different markets play an important role in shaping public attitudes and values but also the media. Both written and spoken words convey images of and attitudes towards people. Language can both indicate the importance of equality but also focus on exclusion. Abusive language very often paves the way for physical violence. **Media monitoring** is a helpful tool to spot such exclusionary and discriminatory trends at a very early stage. Countries, which have successfully established monitoring procedures, usually have an **equality legislation** determining the grounds on which discrimination is prohibited. Furthermore, most of these laws explicitly require authorities, employers or other organisations to assess their policies' impact on different marginalized groups or the representation of various vulnerable groups among their workforce.

British Race Relations Act of 1976

Canadian Employment Equity Act of 1995

Irish Employment Equality Act of 1998 and Equal Status Act of 2000

This results in the inclusion of equality commitments in strategy or action plans, which have to contain verifiable targets that make positive or negative effects on equality or success respectively failure in enhancing equality easily assessable. Whether the level that has to be reached is higher or lower depends on how strict the rules provided by legislation are. Furthermore, when discrimination on specific grounds is legally forbidden, then the public image of organisations not complying is more likely to be adversely affected than in countries without such legislation and non-compliance could result in the reduction of the pool of applicants as well as clients/customers.

Monitoring has to be a **continuous and regularly repeated process**. The outcomes of this process have to result in the correction of policies/practices that have adversely affected vulnerable groups, but can also contribute to setting qualitatively enhanced equality goals. Monitoring contributes to the constant refinement of strategy and action plans. It provides measures for performance/outcomes as well as progress in policy areas, it helps to identify examples of good practice as well as weaknesses/gaps, it can support setting bench marks and developing mechanisms for achieving pre-established targets.

The monitoring process depends on a **starting line** from which it can go on. Therefore, monitoring depends to a great extent on the collection of data providing

information on the status quo with a focus on the barriers limiting access of vulnerable groups. In determining the status quo it is important to look for the right **indicators** that can be operationalised. Indicators must

- be simple,
- be measurable,
- be realistic,
- mirror the needs of vulnerable groups.

They also need to reflect the multidimensional nature and intersection of inequalities experienced by members of different vulnerable groups as well as reflect both objective and subjective experiences of discrimination.

Confidentiality of data is a critical issue in relation to monitoring and auditing especially when personal data or highly sensitive business data is concerned. Self-identification with a certain vulnerable group might be psychologically difficult, as people might not want to put themselves in the category of potential victims of discrimination. Perceiving discrimination as such first of all involves the reflection of the concept of discrimination in relation to one's own experiences. The next step is as difficult as the first one, namely to talk about personal discriminatory experiences in the presence of third parties. These psychological barriers may result in non-identification with a designated group.

Although some data has to be treated with care and sensitivity, **reporting** is an essential part of monitoring. First of all, such reports have to identify the aims and the target group(s) of the monitoring procedure, the instruments applied and the indicators used. If it is a follow-up report, it is not only important to report on the progress but also on the targets that have not been reached and why it was impossible to achieve them. When public authorities or enterprises disseminate information on their monitoring procedures either aiming at the promotion of equality or of non-discrimination policies, they make the wider public aware of the issue of discrimination and make it an important aspect of the public image of either companies or public bodies. Distribution of information on monitoring and on what kind of data is available or missing can stimulate

- progress in collating and disseminating data,
- research,
- the collection of specific statistical data,
- the development of tools for mainstreaming equal opportunities,
- the development of tools for monitoring progress to removing inequalities.

In order to find out more about what kind of monitoring procedures are already in place in Poland, interviews with representatives of Polish governmental organisations (GOs) and non-governmental organisations (NGOs) were conducted¹⁸. Based on their experiences and gap analysis, areas in which monitoring should be continued or established were highlighted and the five most important aspects of monitoring were identified.

¹⁸ Mr Maciej Geller (Open Republic – Association against Anti-Semitism and Xenophobia), Ms Agnieszka Mikulska (Helsinki Foundation for Human Rights), and Ms Barbara Rymaszewska (Ministry of Justice, Department of Training).

4.1 Current monitoring in Poland

According to the interview partners and experts in the field, the discussion on the issue of discrimination only started about two years ago. Discrimination is hardly made visible, campaigns regarding the issue of discrimination are lacking and information in newspapers is rare.

4.1.1 Who knows what about racism, xenophobia and anti-Semitism in Poland?

In the framework of the PHARE RAXEN_CC Project, done on behalf of the European Monitoring Centre on Racism and Xenophobia (EUMC), the Polish Focal Point established within the Helsinki Foundation for Human Rights conducted a mapping exercise in 2003. The aim of this exercise was to find out who knows what about racism, xenophobia and anti-Semitism in Poland. 84 organisations and more than 200 activities and publications were included in the mapping exercise. However, the Focal Point could not identify any organisations directly dealing with discrimination or racism. One of the reasons for this gap is that it is rather difficult for NGOs to get funding for projects relating to these issues. The main foci of interest are human rights, open society, multi-cultural issues, promotion of tolerance, support of refugees and prevention of the repetition of the Holocaust.

When Poland became a member of the European Union in May 2004, the mandate of the Focal Point was extended to do monitoring in five specific areas: the transposition of the anti-discrimination directives into Polish legislation, discrimination in education, employment and housing as well as an analysis of the occurrence of racist violence. The report on these five issues will establish what kind of data is available and analyse the data gaps, which prevent a detailed analysis of the situation of vulnerable groups.

4.1.2 Situation of minority groups

Monitoring in this area is also done by the Helsinki Foundation for Human Rights. The NGO follows a three step approach: At first, the legal situation of the relevant minority group is analysed. In a second step representatives of national and local authorities are interviewed. Their views are compared to and supplemented with interviews among representatives of the community. Thirdly, reports written by organisations representing the interests of the minority group are assessed. In a general report on the human rights situation in Poland the Foundation identified the main problems encountered by minorities and evaluated the programmes that had already been implemented to improve their situation.

4.1.3 Programmes targeted at minority groups (especially Roma)

Programme evaluation is another important aspect of the monitoring done by the Helsinki Foundation. Very often, problems already occur at the very beginning of the implementation. For instance, the local media informed the population about a project specifically targeted at Roma. As members of the Roma community usually concentrate in very poor regions, where unemployment rates are rather high, the Polish community members turned very angry about the Roma receiving support from which they were excluded. Alarmed by this hostile attitude, the organisations involved in the project started to inform the public about the situation of the Roma and the necessity of improvement. The Foundation therefore closely observed how these programmes affected the relationship between the Roma and the Polish people and whether these changes differed from region to region. Moreover, the implementation

of such programmes is rather often adversely affected by a clash of interests between the national and local governments as well as the target group of the programme. This monitoring process allows for the adaptation of measures within these programmes, in case sub-ordinate targets cannot be reached.

4.1.4 Education

In 2002, a report on the education of minorities was done by the Helsinki Foundation. The aim was to monitor the right to education all over Poland with a focus on minorities. Questionnaires were sent to about 100 schools. When analysing the data generated by the survey, it became clear that minorities were not well represented in the sample. The quantitative data had to be supplemented by qualitative data based on interviews with representatives of the Ministry of National Education and of the Ministry of Interior and Administration, school superintendents as well as representatives of the minorities. It turned out that the educational situation of Roma children differed to a great extent from those of other minority groups, as some of the Roma children did not attend school at all or dropped out after 4 or 5 years of education.

The books used for instruction are essential elements of the educational system. The NGO Open Republic asked a group of young academics (mainly historians, linguists, psychologists and sociologists) to evaluate Polish language, history and citizenship education books. The researchers looked for multi-cultural attitudes towards history and the Polish language, as well as for xenophobic and anti-Semitic aspects. Open Republic's general opinion was that the situation was not too bad, but that there were certain groups of books that were unsatisfactory. They supplied the Ministry of National Education with their findings, which resulted in the Ministry's realisation that it was a good idea to have reviewers that have a closer look at the content of the books. Besides that, two meetings for school teachers were organised in the Warsaw region to inform them and discuss with them the findings of this project. About 100 teachers attended each of the meetings.

4.1.5 Media

The book "*Zamiast procesu. Raport o mowie nienawiści*" (Instead of Trial – Report on Hate Speech) by Sergiusz Kowalski and Magdalena Tulli published in 2003 contains anti-Semitic citations from five different journals¹⁹. These publications were observed daily during 2001. The aim of the project was to raise awareness for the content of these papers among the general public. The book was discussed in several monthly journals and the NGO Open Republic organised meetings to disseminate their findings and discuss this publication in different places. These discussions were targeted at journalists, teachers and representatives of the judicial system (lawyers, prosecutors, judges). Especially the latter group was described as being difficult to involve. Experience with prosecutors had shown that they were rather reluctant to investigate incidents of anti-Semitic hate speech.

The NGO Open Republic also tries to monitor broadcastings of Radio Maria, which can be listened to all over Poland. Especially in the evenings, they broadcast discussions between representatives of the clergy and of right wing movements; listeners are given the opportunity of calling in. These broadcastings contain lots of nationalistic and anti-Semitic statements. Therefore, the NGO wants to visualise and

¹⁹ Namely: "Nasz Dziennik" (Our Journal), "Nasza Polska" (Our Poland), "Głos" (Voice), "Najwyższy Czas" (The Highest Time) and "Tygodnik Solidarność" (Weekly Solidarity).

make audible on their web-site representative statements recorded during the course of such broadcastings. This monitoring process cannot be done on a continuous basis though, as the NGO very largely depends on voluntary contributions by their members that have incidentally picked up discriminatory statements when listening to or watching broadcastings.

4.2 Gaps in the Polish monitoring system

The monitoring procedures described above are very important but rather incremental first steps in the development of a comprehensive monitoring system regarding the promotion of equality and anti-discrimination. However, these actions are not linked to legislative requirements and therefore done on a voluntary basis. So far, areas like employment and housing as well as policies not specifically targeted at minority groups have not been monitored.

4.2.1 *Anti-discrimination policies and other relevant policy areas*

Anti-discrimination policies or aspects of anti-discrimination measures within the framework of other policies have to be closely monitored to see whether the aims set can be reached or the measures taken have to be adapted in order to reach the goals established. Such policies should also allow for positive or affirmative action as suggested by the two EU directives. Affirmative action is seen as a way of overcoming the effects of past societal discrimination by allocating jobs and resources to members of specific vulnerable groups. This is very often done by ways of quotas, which are a good starting point for monitoring, reporting and setting new targets. Positive action also targets specific groups of people who are under-represented in a particular sector for whatever reason, and gives them extra encouragement to take up training, i.e., it tries to empower members of vulnerable groups for easier access to certain sectors of society. Monitoring in this context would mean to evaluate the courses offered and see how many of the participants manage to e.g., get a job or get promoted. In order to check, whether these measures fulfil the principle of sustainability the participants would have to be monitored for a longer period of time. Public authorities can furthermore define criteria for awarding contracts to service providers and other possible contractors. Such criteria could for instance include the existence of an equality or diversity action plan, the fulfilment of certain quotas for the representation of members of vulnerable groups, or no sentences for violating anti-discrimination legislation during the past five years. One precondition for such measures is of course that the public authorities themselves comply with the suggested awarding criteria. This means that they would have to monitor their staff as well as applicants for jobs, promotion and trainings and in addition develop an equality policy in the areas of service delivery and corporate image.

The **British Race Relations Act** obliges local governments to fulfil a “general duty” aiming at

- the promotion of racial equality central to the work of the local authority,
- taking the lead in promoting equality of opportunity and good race relations,
- preventing unlawful discrimination.

Local governments must take account of racial equality in their day to day work of policy-making, service delivery, and employment practice. In addition to this general duty, public authorities are bound by the “employment duty”, which

means that they must monitor, by ethnic group, their existing staff, as well as applicants for jobs, promotion and training and publish the results every year.

The **Commission for Racial Equality** has developed a questionnaire auditing for equality at the local government level.

Specific duties on employment available at:

<http://www.cre.gov.uk/duty/index.html>, Questionnaire available at:

http://www.cre.gov.uk/gdpract/govt_audit_key.html

For the sake of transparency and credibility the results of the monitoring process, both achievements and failures, should be published annually.

Essential prerequisites for implementing such measures are anti-discrimination legislation and legislative incentives for the private sector to develop equality or diversity action plans, because only then all the relevant data for checking the compliance with the awarding criteria is available.

The **Canadian Employment Equity Act** 1995 requires public agencies as well as federally regulated private sector organisations to develop and implement an employment equity programme to remove barriers for

- women,
- members of visible minorities,
- Aboriginal persons,
- persons with disabilities.

The Act aims at achieving a representative workforce within corporations compared to the overall representation of members of each of these groups on the labour market the employers recruit from. An employer has to generate data showing how representative his/her workforce is.

Description of record keeping available at:

http://info.load_otea.hrdc_drch.gc.ca/workplace_equity/downloads/guide/gdln10.pdf

A comprehensive monitoring approach would also have to take into account general policies as well as service delivery by public authorities not specifically aiming at promoting equality, because they both might affect members of vulnerable groups in one way or the other.

The **Irish Equality Authority** developed an **Equality Proofing Template** in close cooperation and consultation with equality representative groups. The Authority aims at supporting the City and County Development Boards (CDBs) with a practical template in order to enable them to equality proof their plans. The ultimate objective of equality proofing is to place equality at the centre of decision making, which facilitates the establishment of an equality dimension to all objectives. The equality dimension includes assessing the impact of plans on groups experiencing inequality, resourcing participation of those affected by inequality and focussing attention on equality outcomes.

Equality Authority (2002) An Equality Proofing Template For the City and County Development Boards.

Among the most essential policies that should be carefully evaluated are labour market, social welfare, health, education and housing policies.

It would be necessary to look into already established policies and their effects on vulnerable groups. This has already partly been done in connection with education policy and its impact on the Roma. Furthermore, when developing new policies, aspects such as equality and diversity should be taken into account from the very beginning. To be able to do monitoring in all these areas both quantitative as well as qualitative data on vulnerable groups has to be available. Each group's situation, experience and identity have to be considered. It is important to revert to research published by other agencies, the voluntary sector and representative organisations, moreover local data should not be forgotten. A very important resource for the data needed are those NGOs that offer services to members of vulnerable groups in these specific fields. They know what kind of discrimination their clients experience and therefore what kind of stereotypes and prejudices they face. They also see how general policies affect their clients' access to the labour market, to housing, to education, to the welfare and the health care system.

4.2.2 Implementation of the amended Labour Code

The Polish Labour Code was amended in 2003 and came into force at the beginning of 2004. The amendment of the Code was covered by the media; however awareness of these legal remedies is still rather low. Besides unawareness the bad economic situation seems to be another reason for experts to believe that the amendments might not result in a big number of court cases. The unemployment rate is very high and therefore people might have the feeling that it is better to endure discrimination resulting in lower remuneration, unfavourable working conditions or unfavourable conditions for promotion than to jeopardise their current job by filing a complaint. Lack of information makes employers not aware of the fact that the newly amended Labour Code provides for protection against victimisation. However, this provision is rather restrictive as it only protects the plaintiff against dismissal but not against any adverse treatment or consequence affecting his/her employment situation.

These are just hypotheses regarding the barriers for potential victims to make use of the new legal situation promoting equal treatment in employment. An evaluation of the implementation of the amended Labour Code would be a good opportunity to find out more about potential barriers and the experiences of those actors involved. An essential prerequisite for such an evaluation is the documentation of discriminatory incidents as well as the actions taken by representatives or organisations supporting people affected. These documentations would have to be supplemented by analysing court statistics as well as conducting qualitative interviews with relevant actors on the labour market, NGOs or law clinics as easily accessible units of counselling as well as legal experts.

The Vienna based NGO **ZARA** – *Zivilcourage und Anti-Rassismus-Arbeit* **counsels** persons who have experienced racist attacks, insults or discrimination, either as witnesses or as the targets of such actions – and it offers advice, legal counselling, help and information free of charge. ZARA publishes an annual report on racism in Austria, which is based on the documentation of all the incidents reported to the organisation. Furthermore, ZARA is a member of an **umbrella organisation** of specialised NGOs committed to **supporting victims** of discrimination **before the court**.

<http://www.zara.or.at>, <http://www.klagsverband.at>

The following questions should be addressed when evaluating the effects of the newly amended Labour Code:

- Are members of vulnerable groups, relevant actors on the labour market (e.g., labour inspectors, members of trade unions), members of NGOs and law clinics as well as legal experts informed about the amended Labour Code?
- What incidents of discrimination were (not) reported (e.g., discriminatory job postings, access to employment of professional training, promotion, differentiation regarding the position of an employee, termination of a contract) and why?
- Who were the addressees of such reports (e.g., trade unions, NGOs, law clinics, etc.) and what did the procedure of reporting look like?
- What incidents of discrimination were resolved by conciliation committees/the labour courts?
- What were the results of amicable settlements/court cases?
- What positive and negative aspects of the amended Labour Code have the judges experienced in handling cases of discrimination?
- What positive and negatives aspects of the amended Labour Code have the representatives of victims in court (e.g., lawyers, trade unions) experienced?
- What were the reasons that so many/few cases were resolved by conciliation committees or taken to the labour courts?
- How did the victims of discrimination experience the work of the conciliation committees or the labour courts?

The answers to these questions should help to identify the strengths and weaknesses of the newly amended Labour Code and to frame recommendations for a target group oriented information policy, changes in implementation and new amendments to the Code. Good legislation is a crucial first step, but the law on its own cannot change entrenched practices or attitudes. Therefore, this evaluation could also be the starting point for regularly reviewing, setting new aims and designing accompanying measures for preventing discrimination on the labour market.

Trade union agreements on issues of specific concern to migrants and ethnic minorities are employed for promoting equality at national, sector or company level.

Most of these declarations in Germany are signed at individual company level and promote equality of opportunity as well as protect employees against discrimination. Some provide for complaints mechanisms and sanctions including dismissal. In the UK, some agreements cover the promotion of equal opportunities or diversity usually specifying policies in explicit areas like recruitment. Sometimes they include provisions regarding holidays, vacations and practices of prayer.

Such issues were also taken up by sectoral arrangements in Italy and Spain, where it was agreed that working time could be adjusted during Ramadan. National agreements were signed in Belgium, Denmark, Finland, the Netherlands and Sweden. They ranged from very general provisions in Finland and Sweden to very detailed ones in the other countries. Most of these more detailed agreements aimed at the increase in the percentage of ethnic minorities among the workforce.

Fulton, L. (2003) Migrant and ethnic minority workers: challenging trade unions, available at: http://www.etuc.org/EN/Dossiers/RacismDiscr/Study_2003_EN.cfm.

Such measures would also contribute to the awareness raising for the issue of discrimination among relevant labour market actors like representatives of placement agencies, of human resource departments in enterprises and organisations, of trade unions and labour inspectors. They should be able to recognise discriminatory structures as well as behaviour and to know how to deal with reported incidents of discrimination. These actors could also be the driving forces in developing anti-discrimination measures, mediation processes and monitoring tools highlighting discriminatory incidents as well as reviewing aims set in connection with eliminating/preventing discrimination.

Codes of conduct developed and established within companies aiming at the promotion of equal opportunities as well as providing for mechanisms of conflict resolution are another successfully implemented tool. The **Irish Equality Authority** as well as the **British Commission for Racial Equality** are both actively involved in the development of codes of conduct and codes of practice. Furthermore, several development partnerships within the **EQUAL Community Initiative** mainly funded by the European Social Fund work on the development of such codes.

<http://www.equality.ie>, <http://www.cre.gov.uk>,
http://europa.eu.int/comm/employment_social/equal/index_en.html

4.2.3 *Media Policy*

Media are very influential in shaping people's opinions. Derogatory elements in both spoken and written language have a powerful potential of legitimising the creation of a hostile atmosphere towards members of vulnerable or marginalized groups. Therefore, both the press but also radio and TV broadcastings should be monitored for how they present members of vulnerable groups and how they deal with statements by politicians or other relevant actors that are sexist, racist, anti-Semitic or homophobic. Media monitoring should be done on a broad and continuous basis and accompanied by awareness raising among journalists and other relevant media representatives.

The Polish Act on Radio and Television determines that broadcastings should not include discriminatory contents with regard to race, gender or nationality, and should value the religious convictions of the audience. It also prohibits advertisements, which infringe upon human dignity, offend religious or political convictions or include discriminatory contents in regard to race, gender or nationality. Furthermore, public radio and television programmes should take into account the needs of national minorities and ethnic groups.

The Act on Radio and Television but also Articles of the Penal Code prohibiting the public propagation of fascist or totalitarian systems of state, incitement to hatred based on national, ethnic, racial or religious differences or public insult of a group or an individual because of their national, ethnic, racial or religious background provide some criteria for monitoring discriminatory aspects and trends in the media. The work of NGOs in this area is very important, but usually they do not have enough human and financial resources to do media monitoring on a broad and permanent basis. The NGO Open Republic for instance relies on members that haphazardly record or

document discriminatory statements but it lacks the staff and technical equipment necessary for a broader coverage of different media all over Poland. There are both quantitative and qualitative approaches (e.g. discourse analysis, interviews with experts) to media monitoring.

The Dutch NGO-network On Line/More Colour in the Media (OL/MCM) initiated together with the European Monitoring Centre on Racism and Xenophobia (EUMC) a **European Day of Media Monitoring** on November 13, 2003. It aimed at a quantitative content analysis of the media representation of ethnic minority groups in the 15 Member States of the EU. It is the first EU-wide benchmark report on the representation of ethnic minorities in the media. It has to be kept in mind though that it is based on just a one-day monitoring of the media output of 15 different Member States. Despite of these shortcomings, the results of the monitoring process show the importance of involving minority organisations, journalists, editors and broadcasters in a plan of action to improve the quality in reporting on diversity in multicultural societies. This activity should be seen as an essential starting point for media-monitoring which should be done on a continuous basis including a wide spectrum of papers and broadcasts.

Ter Wal, Jessika (2004) European Day of Media Monitoring: Quantitative analysis of daily press and TV contents in the 15 EU Member States – Pilot study in the framework of the Online/More Colour in the Media project “European Day of Media Monitoring”, available at: <http://www.grupbarnils.org/idom.pdf>.

The next step is to decide which media/broadcastings are included in the monitoring procedure. Another important aspect to be monitored is how members of vulnerable groups themselves feel about their representation in the media and what would have to be changed that they see themselves as equally represented. The results and recommendations based on these assessments should be presented to representatives of the media as well as the public.

Codes of conduct aiming at the prevention of using discriminatory and derogatory language as well as the setting of specific goals (e.g., employment of a specific percentage of members of different vulnerable groups, having a certain percentage of readers from different vulnerable groups) would motivate the editorial staff of newspapers/magazines and representatives of broadcasting stations to implement monitoring and reporting tools to demonstrate that they comply with their self-imposed codes.

4.3 The five most important factors in monitoring

4.3.1 Legislative incentives

Monitoring is usually not done without strong legislative incentives. Anti-discrimination legislation should therefore explicitly contain obligations for monitoring the effectiveness of anti-discrimination policies at various levels and the impact of general policies on vulnerable groups. So far no structures for these processes have been provided for in the Polish system. Most of the initiatives promoting equality do not cover all the areas included in the EU directives but rather focus on the public and private labour market and partly on the provision of goods and services. Nevertheless, these two areas are a good starting point for generating incentives in monitoring, as the involvement in such a process helps to raise awareness among a broad spectrum of relevant actors as well as the population in

general. Legislation should also provide for an independent specialised body which has the knowledge and expertise of where to obtain relevant data regarding discrimination and which generates facts and figures about discriminatory incidents.

4.3.2 Data availability

Monitoring always depends on the availability of data. First of all a base line has to be established, i.e. the situation regarding discriminatory structures and procedures within a certain company, the housing situation of a certain vulnerable group, or the discrimination experienced by members of vulnerable groups within the education or health care system. This base line includes both statistical as well as research data and is an important benchmark for making comparisons later on. Therefore, analysis and pilot surveys should focus on the generation of

- Statistical data, which should include variables like

<ul style="list-style-type: none"> ⇒ gender ⇒ age ⇒ born in Poland or another country ⇒ parents' country of birth ⇒ citizenship ⇒ educational attainment (acquired in Poland or another country) ⇒ membership in vulnerable group (e.g., ethnic/national origin, disability, sexual orientation, race, religion) 	<ul style="list-style-type: none"> ⇒ language competence ⇒ legal terms of employment (self-employed, employee, blue collar worker, civil servant) ⇒ professional position ⇒ full/part time contract ⇒ limited/unlimited contract ⇒ vocational training ⇒ unemployment ⇒ income ⇒ housing situation
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- Research regarding
 - ⇒ attitudes of the **general public** towards vulnerable groups,
 - ⇒ discrimination experienced by **members of vulnerable groups**,
 - ⇒ discrimination identified by **representatives of NGOs** working with clients vulnerable to discrimination,
 - ⇒ awareness of relevant **actors** on the **labour/housing market**, within the **social security**, **health care** or **educational system**,
 - ⇒ awareness of **representatives** of the **judicial system**,
 - ⇒ **documentation** material of NGOs or other institutions registering incidents of discrimination,
 - ⇒ **discrimination testing** in the areas of employment and housing by
 - a) sending CVs of members of vulnerable groups as well as of the majority population displaying the same qualifications and legal conditions for entry into the labour market to potential employers,
 - b) applying for vacant flats as a member of the majority population to make sure that the flat is still available and only then reveal that one is looking for a flat on behalf of a member

of a vulnerable group,
and evaluate the reactions of the potential employers or the persons
advertising the flats.

4.3.3 Development of indicators

The data described above provides contextual indicators and is necessary to get a general overview of patterns of discrimination and to know in which of these areas problems are most virulent. For monitoring specific anti-discrimination policies/programmes, equality/diversity action plans or the effect of general policies on various vulnerable groups the development of indicators is a necessity. Indicators can only be developed though when policies, programmes or action plans contain well defined aims that can be turned into quantifiable, i.e. measurable, indicators. Besides being measurable indicators should be simple, realistic and mirror the needs of those groups vulnerable to discrimination.

4.3.4 Continuity

Monitoring is a process that is only useful when it is done on a continuous and regular basis. The aims set have to be frequently reviewed in order to see whether they have been reached and when they have not been reached to look for the reasons and causes of failure. Besides that, if a goal has been achieved one can think about setting new targets or about how to keep a high level of equality/diversity in the sense of sustainability. Regular monitoring has the potential of highlighting weaknesses and makes possible the adaptation of measures to reach the aims set. Furthermore, if similar organisations or institutions regularly do monitoring, they become more easily comparable and those succeeding in reaching their diversity/equality aims could gain competitive advantages.

A competitive approach to promoting equality in companies is done by the British campaign called **Race for Opportunity (RfO)** which works with over 180 private and public sector organisations across the UK to realise their objectives on race, usually as part of their diversity programme. The campaign works in partnerships with these organisations to help them reap the business benefits of implementing an effective race and diversity action plan. The fundamental commitment in joining RfO is to benchmark with other organisation in the network. This benchmarking is based on a self-evaluation of the companies that belong to the network and the results are published annually.

http://www.bitc.org.uk/programmes/programme_directory/race_for_opportunity/index.htm

4.3.5 Reporting

Although some of the data generated for the monitoring process has to be treated with care and sensitivity, reporting is an essential part of monitoring. Such reports have to identify the aims and the target group(s) of the monitoring procedure, as well as the instruments and indicators used. If it is a follow-up report, it is not only important to report on the progress but also on the targets that have not been reached and why it was impossible to achieve them. When public authorities or enterprises disseminate information on their monitoring procedures, they make the wider public aware of the issue of discrimination and make it an important aspect of the public image of either companies or public bodies. The more information is available on monitoring

procedures going on and on what kind of data is accessible or missing, the more these procedures can stimulate the collection of specific statistical or research data, which helps to generate new and up to date facts and figures.

Monitoring is a process involving many different actors at various levels. Therefore, the establishment of a single independent specialised body which can first of all generate facts and figures relevant to and accessible by all these actors but can also provide support by developing guidelines for monitoring and offering trainings to those involved is of great importance.

4. List of relevant links

International and EU institutions/bodies:

Committee on the Elimination of Racial Discrimination:

<http://www.unhchr.ch/html/menu2/6/cerd.htm>

Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families: <http://www.unhchr.ch/html/menu2/6/cmwf/>

EQUAL: http://europa.eu.int/comm/employment_social/equal/index_en.html

European Commission DG Employment and Social Affairs:
http://europa.eu.int/comm/employment_social/index_en.html

European Commission DG Justice and Home Affairs:
http://europa.eu.int/comm/dgs/justice_home/index_en.htm

European Monitoring Centre on Racism and Xenophobia (EUMC):
<http://www.eumc.eu.int>

European Social Fund: http://europa.eu.int/comm/employment_social/esf2000/index-en.htm

Human Rights Committee: <http://www.unhchr.ch/html/menu2/6/hrc.htm>

INTI: http://europa.eu.int/comm/justice_home/funding/inti/funding_inti_en.htm

Office of the High Commissioner for Human Rights (OHCHR):
<http://www.unhchr.ch>

The website of the OHCHR provides useful information complaint procedures under international human rights treaties: <http://www.unhchr.ch/html/menu6/2/fs7.htm>.

Social Inclusion: http://europa.eu.int/comm/employment_social/soc-prot/soc-incl/index_en.htm

United Nations Educational, Scientific and Cultural Organization:
<http://portal.unesco.org/>.

Homepages of specialised bodies:

Arbitration and Conciliation Service (ACAS): <http://www.acas.org.uk>

Canadian Human Rights Commission: <http://www.chrc-ccdp.ca>

Centre for Equal Opportunities and Opposition to Racism (CEOR):
http://www.antiracisme.be/en/kader_eng.htm

Commission for Racial Equality (CRE): <http://www.cre.gov.uk/>

Danish Centre for International Studies and Human Rights: <http://www.dcism.dk/>

Departmental Commissions for Access to Citizenship (CODAC), toll free help line "le 114": <http://www.le114.com>

Documentation and Information Centre for Research on Racism: <http://www.dir-info.de>

Employment Tribunal Service (ETS): <http://www.ets.gov.uk>

Equal Treatment Commission (ETA): <http://www.cgb.nl/english/default.asp>

Equality Authority (EA): <http://www.equality.ie/>

Greek Ombudsman: http://www.synigoros.gr/en_index.htm

High Commissioner for Immigration and Ethnical Minorities (HCIEM):
<http://www.acime.gov.pt>

Human Resources and Skill Development Canada:
<http://www.hrsdc.gc.ca/en/home.shtml>

National Bureau against Racial Discrimination (LBR):
<http://www.lbr.nl/euroinfo/english/folderengl.html>

National Consultative Committee on Racism and Interculturalism (NCCRI):
<http://www.nccri.com>

Office of the Director of Equality Investigations (ODEI): <http://www.odei.ie/>

Ombudsman against Ethnic Discrimination (DO): <http://www.do.se/o.o.i.s?id=618>

National Action Plans on Employment:

http://europa.eu.int/comm/employment_social/employment_strategy/national_en.htm

Homepages of NGOs and platforms:

DECEMBER 18: <http://www.december18.net/>

Helsinki Foundation for Human Rights: <http://www.hfhrpol.waw.pl>

Klagsverband: <http://www.klagsverband.at>

Migration Policy Group (MPG): <http://www.migpolgroup.com/>

On Line/More Colour in the Media: <http://www.olmcm.org>

Open Republic – Association against Anti-Semitism and Xenophobia:
<http://or.icm.edu.pl>

SOS Racism: <http://www.sosracisme.org>

ZARA – Zivilcourage und Anti-Rassismus-Arbeit: <http://www.zara.or.at>

Relevant UN and EU documents:

CERD General Recommendation No. 14: Definition of discrimination (22/03/1993), available at: <http://www.unhchr.ch/tbs/doc.nsf>.

CERD General Recommendation No. 10: non-discriminatory implementation of rights and freedoms (Art. 5), (15/03/1996), available at: <http://www.unhchr.ch/tbs/doc.nsf>.

CERD General Recommendation No. 26: Article 6 of the Convention (24/03/2000), available at: <http://www.unhchr.ch/tbs/doc.nsf>.

Convention concerning Discrimination in respect of Employment and Occupation (C111), available at: http://www.ilo.org/public/english/employment/skills/recomm/instr/c_111.htm.

Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, available at: http://europa.eu.int/eur-lex/pri/en/oj/dat/2000/l_180/l_18020000719en00220026.pdf.

Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, available at: http://europa.eu.int/eur-lex/pri/en/oj/dat/2000/l_303/l_30320001202en00160022.pdf

Declaration of Fundamental Rights and Principles at Work, available at: http://training.itcilo.it/ils/foa/library/declaration/decl_en.html.

International Covenant on Civil and Political Rights, available at: http://www.unhchr.ch/html/menu3/b/a_ccpr.htm.

International Convention on the Elimination of All Forms of Racial Discrimination, available at: http://www.unhchr.ch/html/menu3/b/d_icerd.htm.

International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, available at: http://www.unhchr.ch/html/menu3/b/m_mwctoc.htm.

Statistical survey of individual complaints considered under the procedure governed by article 14 of the International Convention on the Elimination of All Forms of Racial Discrimination available at: <http://www.unhchr.ch/html/menu2/8/stat4.htm>.

Relevant Reports and other documents on Poland:

Sixteenth periodic report of Poland submitted to CERD in July 2001; online available at: http://www.ms.gov.pl/prawa_czl_onz/XV_XVI_CERD_report_en.doc

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), online available at: [http://www.coe.int/T/E/human_rights/Minorities/2_FRAMEWORK_CONVENTION_\(MONITORING\)/2_Monitoring_mechanism/3_State_reports/ACFC_SR\(2002\)002%20E%20state%20report%20Poland%20.asp#TopOfPage](http://www.coe.int/T/E/human_rights/Minorities/2_FRAMEWORK_CONVENTION_(MONITORING)/2_Monitoring_mechanism/3_State_reports/ACFC_SR(2002)002%20E%20state%20report%20Poland%20.asp#TopOfPage)

Report on measures to combat discrimination in the 13 candidate countries: Country report on Poland (2003); online available at: <http://www.migpolgroup.com/uploadstore/POLANDFinalEN.pdf>

Report on Discrimination on grounds of sexual orientation in Poland (2001), Lambda Warszawa Association; online available at: http://lambdawa.gejowo.pl/pliki/raport_engl.pdf

Report of the Commissioner for Human Rights on his visit to Poland 18 – 22 November 2002, CommDH(2003)4; online available at: [http://www.coe.int/T/E/Commissioner_H.R/Communication_Unit/Documents/CommDH\(2003\)4_E.asp#TopOfPage](http://www.coe.int/T/E/Commissioner_H.R/Communication_Unit/Documents/CommDH(2003)4_E.asp#TopOfPage)

Concluding comment of the Committee on the Elimination of Racial Discrimination on the 15th and 16th periodic reports of Poland (2003); online available at: [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CERD.C.62.CO.6.En?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CERD.C.62.CO.6.En?Opendocument)

The Limits of Solidarity: Roma in Poland After 1989, (2002) European Roma Rights Centre; online available at: http://www.errc.org/publications/reports/polandE_2002.pdf

Country Reports on Human Rights Practices – 2002: Poland (2003) Bureau of Democracy, Human Rights and Labor - U.S. Department of State; online available at: <http://www.state.gov/g/drl/rls/hrrpt/2002/18385.htm>

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

<http://www.state.gov/g/drl/rls/irf/2002/13955.htm>

Concluding observations of the Committee on –Economic, Social and Cultural Rights on Poland (2002); online available at:

http://www.coe.int/T/E/Human%5FRights/Esc/4%5FReporting%5Fprocedure/2%5FRacent%5FConclusions/1_By_State/Social_Charter/XVI_2/Conclusions%20XVI-2_Poland.pdf

Second ECRI Report on Poland, adopted on 10 December 1999; online available at:

http://www.coe.int/T/E/human_rights/Ecri/1-ECRI/2-Country-by-country_approach/Poland/CBC2%20Poland.pdf

Statistical data on Poland can be obtained at the web site of Polish Official Statistics: www.stat.gov.pl and www.archiserwis/databasee/g/u/s/gus.htm.