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Strengthening anti-discrimination policies

Document 7

**Proposals for the implementation
of anti-discrimination policies
including positive measures**

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Contents

1. Anti-discrimination legislation regarding the employment-related spheres	2
2. Anti-discrimination legislation regarding the non-employment-related spheres	3
3. A strong structure for victim support – based on NGO-co-operation.....	6
4. Setting up an Independent Body against Discrimination.....	7
5. Codes of Practice	9
6. Positive Duty for Public Bodies	10
7. Social Dialogue and Voluntary Measures	11

1. Anti-discrimination legislation regarding the employment-related spheres

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. Nevertheless there are shortcomings, which need to be tackled.

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.

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

Furthermore, employers should be made responsible to immediately take action if they get to know about discriminatory actions of employees against their colleagues, clients or customers. For this reason, discrimination against colleagues, clients or customers and bullying and harassment should be mentioned as a legitimate reason of dismissal in employment legislation. Employers, who fail to take action against acts of discrimination committed by their employees, should be made jointly liable for discriminatory actions taken by them.

With regard to the Act on Employment and Counteracting Unemployment, discrimination on the ground of sexual orientation is covered somewhat inconsistently. While it is mentioned as a prohibited ground of discrimination in Article 12.3 (prohibition of setting discriminatory criteria in information on a job vacancy, which an employer is obliged to send to the local labour office), and Article 37.13 (prohibition of discrimination by private employment agencies), it is not mentioned as such in Article 6c (section 1.3, prohibition of setting discriminatory criteria for granting work permits for non resident foreigners and promises of such permits) and in paragraph 1a of Article 15 (prohibition of discrimination by labour offices in selection for vocational training). Furthermore, discrimination on the ground of sexual orientation is prohibited by this Act only with regard to activities of employers and private employment agencies, but not with regard to activities of public authorities. It is suggested, to implement a clear prohibition of discrimination on the ground of sexual orientation in the Articles mentioned, including the activity of public authorities.

2. Anti-discrimination legislation regarding the non-employment-related spheres

It seems a good idea to elaborate one single act containing provisions that would transpose the provisions of both Directives into Polish legal system in non-employment aspects (as these are regulated by the Labour Code for the employment sphere).

This act could be common for both civil law relations (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) or in candidate countries (e.g. Czech Republic).

The guiding idea of the 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.

Thus the law will have to include in particular:

- Introducing the principle of equal treatment and setting a general prohibition of discrimination.
- Introducing the principle that change of action and procedures to redress existing and prevent further discrimination should be seen as of the same importance as redress and compensation for the victim.
- Introducing fair, transparent and impartial procedures to determine whether discrimination has occurred.
- Introducing definitions of direct and indirect discrimination, discrimination by association (=discrimination of a person associated with a person, who is the target of discrimination), harassment, and bullying/mobbing.
- Giving detailed description of prohibited grounds of discrimination in all relationships of public (administrative) and private (civil) nature, on the model of Article 11 of the Labour Code. The list of grounds of discrimination mentioned in the bill should be constructed as exhaustive list. Determining other possible grounds of discrimination should be left to political decision-making.
- Determining the scope of the act – at this level, it should be considered whether domestic legislation is to implement only the basic standard of

protection as set by the Directives 2000/43/EC and 2000/78/EC, or whether – which is highly recommended - it should provide higher standard in regard to equal access to goods and services – incl. housing – regardless of racial and ethnic origin but also of religion and sexual orientation and of all other grounds mentioned in Art. 13 ETC. Based on consistent information of the Polish experts about problems of discrimination of single – parent families and persons suffering from HIV/Aids especially in the area of housing, it is further suggested to extend the grounds of discrimination to discrimination based on marital and family status and on discrimination based on real or perceived health status, especially HIV/AIDS.

- Introducing a broad understanding of “ground of discrimination” including discrimination based on the perception of the existence of a “ground of discrimination”.
- Clearly defining the content and scope of reasonable exemptions from the law based on considerations of protection of privacy and on considerations of religion or belief.
- Introducing provisions on the burden of proof, in accordance with both Directives;
- Ensuring effective, proportionate and deterring compensations for the victims, e.g. in the form of damages, fines, and other measures of civil and administrative law, and course of action adequate to remedy the discrimination occurred. Material compensation should be standardised in detail for discrimination in different areas taking into account the importance of the area (e.g. access to housing, access to pubs/restaurants etc.) for everyday life and should set inflation-linked ceilings.
- Introducing measures necessary for protection of the victims and witnesses against repression for a complaint or a procedure aiming at enforcement of the principle of equal treatment and non-discrimination.
- It should be secured, that complainants in cases of alleged discrimination have legal standing and the right to represent themselves, including the right to appeal, in any penal law and administrative penal procedures concerning their case. The complainant should be entitled to be represented by a lawyer or other expert entitled by law to representation.

- Ensuring that courses of action decided by the court or within mutual agreements are implemented quickly and thoroughly.
- Introducing definitions of positive action (measure to promote redress for imbalances)

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

3. A strong structure for victim support – based on NGO-co-operation

There is the need to establish an easily accessible victim-support-structure with regional outlets in all provinces.

Here the support structure found in the Netherlands in the area of racial discrimination may serve as example of good practice, which has to be adapted to the situation in Poland. In the Netherlands, 25 local anti-discrimination offices, which are organised as NGOs, but receive statutory funding by the local and central government and the municipalities, allow victims of discrimination easy access to counselling and legal advice. Their main task is to provide legal advice and, if the victim wants so, conflict mediation; furthermore they organise awareness-raising campaigns and provide anti-discrimination training to public authorities and private companies. 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 activities¹. The most important aspect is, that NGOs are usually very “close to the people”, meaning that they can work in a regional context – often also within certain communities of “vulnerable groups”. This makes them more easily accessible for the victims of discrimination. Another advantage is that it is, legally speaking, more suitable and

credible for NGOs to be clearly partial in their attitude and appearance – obviously standing on the side of the victim – than it is for any governmental institution.

In order to comply with the Directives the scope the Code of Civil Procedure (Article 61) should be extended allowing those organisations, which have been selected in an appropriate procedure to be allowed representation of complainants, to engage in any stage of the proceeding on behalf or in support of the complainant, provided that the victim consents.

As the development of such a network will need time, it is suggested to start with pilot-projects in areas where NGOs prepared for this task already exist. The network should be further developed with the perspective to finalise its development after 5 – 7 years. Specific attention should be given to set up support structures in areas with a high percentage of Roma - population. In order to develop a structure of NGOs for the future, training and capacity building measures should be organised on a regular base. The work of the NGOs should be evaluated regularly, setting clear criteria for funding.

Funding of NGO – activities should be statutory and should be based on long-term contracts (3 – 7 years), which should be granted following a public call for tender for the development of antidiscrimination activities. It should be secured, that funding does not only rely on the central government, but also on contributions of the regional and municipal governments.

4. Setting up an Independent Body against Discrimination

The Directive 2000/43/EC demands an Independent Body for issues of discrimination. The instalment of such an institution is one of the major chances for real change in regard to discrimination. We recommend setting up a structure dealing with all forms of discrimination to avoid further scattering of the subjects and guarantee a consistent development of legal practice. This structure should be responsible for the employment as well as for the non-employment related sphere irrespective of the jurisdiction of other deciding authorities.

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

¹ Regulation for the promotion of professionalisation of the anti-discrimination bureaus (Stimuleringsregeling)

- Its political and legal independence as well as all its functions and tasks will be guaranteed respectively described by statute, or, if found necessary, by constitution,
- Its financial resources will be sufficient to look after all its functions and tasks efficiently,
- It will be empowered to independently assist victims of discrimination in pursuing their complaints about discrimination,
- It will be able to conduct or fund independent research work and surveys concerning discrimination, including free access to data collected by other authorities,
- It will be authorised to publish independent reports and recommendations on any issue relating to such discrimination,
- It will further the dialogue between the government, social partners and the civil society on all issues related to its domain of work by regularly organising round tables or similar meetings,
- It should be obliged to promote and raise awareness for equality,
- It should be obliged to regularly review the functioning of the existing antidiscrimination legislation,
- Any alleged victim of discrimination should have free access to such a structure,
- There should be a clear separation between the promotional and general tasks and the task of dealing with individual cases. To secure this, a specific independent commission dealing with individual cases should be set up.

There should be an obligation for the institutions to at least annually report to the parliament about

- Progress in enhancing antidiscrimination 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

Furthermore, it should be obliged to set up action plans for specific areas of concern including planned measures, milestones and targets to be reached within a set time-frame after consultation with social partners and civil society organisation in the course of regularly held roundtables.

5. Codes of Practice

It is suggested to implement a system of “Codes of Practice” similar to the “Codes of Practice” (COP) issued by the British Commission for Racial Equality. “Codes of Practice” are “soft law” containing detailed and comprehensive manuals on non-discriminatory practices in specific areas of life. They contain checklists on what procedures in specific sectors should be regarded as discriminatory, what procedures, albeit formally non-discriminatory, might induce discrimination in effect and how discrimination-free procedures in these sectors should look like. Furthermore, the COP’s define monitoring and reporting procedures and describe in detail, what steps employers, shop owners or private or institutionalised landlords or service-providers should take to avoid discrimination.

As the British example has shown, these COP’s not only serve potential victims of discrimination, but also help employers and service providers in complying with antidiscrimination legislation. Most importantly, they enhance public understanding, legal security and speed up implementation of antidiscrimination regulations.

The Codes shall be drawn up and issued by the Body against Discrimination after consultation with the social partners and the civil society organisations relevant for the specific field. They should have a status as non binding recommendations. Companies able to prove compliance with the relevant Codes of Practices should be considered favourably in public tenders. There should be regular training about the content of these Codes of Practice for representatives of the economic and social sector concerned.

At least Specific Codes of Practice should cover the following areas:

- Employment, including access to employment and employment-related training

- Education, including universities and adult education
- Health Care
- Housing, including private and public rented housing and owner occupied housing
- Social Security and Social Services, including the public and private pension systems
- Public Authorities, including the police
- Sexual and other harassment
- Paternity, maternity, pregnancy discrimination
- Flexible working

In this respect, the Codes of Practice developed by the British Commission for Racial Equality could serve as examples of good practice.

6. Positive Duty for Public Bodies

It is suggested to implement a positive duty to prevent discrimination in organisational procedures and services for all public authorities with regard to their employees and clients. It should also be considered to include discrimination based on family and marital status and on health status (especially HIV/AIDS) into this duty. All public bodies should be obliged to annually report to the Body against Discrimination about their progress.

Access to public funding and access to public calls for tender should be restricted to those companies and institutions proving compliance with antidiscrimination legislation. Compliance with legislation shall be proven by independent auditors based on criteria developed by the Body against Discrimination. Companies, which have been sentenced because of a violation of antidiscrimination 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 antidiscrimination 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 antidiscrimination legislation. They should be obliged to report to the Body against Discrimination each second year on their progress. The implementation of internal equal opportunity policies should be defined explicitly as duty and responsibility of heads of unit

and other leading personnel. The Body against Discrimination 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.

7. Social Dialogue and Voluntary Measures

Further to the suggested legal measures, a framework for a continuous dialogue between the government, the social partners and the relevant NGO's should be set up. Round Tables 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.

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

Companies and institutions should be encouraged to develop "Codes of Conduct" adapting the existing Codes of Practices to their situation. These codes should focus on recruitment, selection and promotion procedures, flexible work, harassment and on the provision of services and should define proper procedures for staff behaviour and treatment of members of minority groups.