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Summary of legislation implementing

Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation

with respect to sexual orientation

in Poland

This summary was written in 2005 at the request of Kees Waaldijk & Matteo Bonini-Baraldi, when they were writing their book *Sexual orientation discrimination in the European Union: national laws and the Employment Equality Directive* (The Hague: T.M.C. Asser Press, 2006), and has been published on the website of the E.M. Meijers Institute of Legal Studies of the Universiteit Leiden; see www.emmeijers.nl/experts.

For this summary the template of the book *Sexual orientation discrimination in the European Union* has been used, although for some items of that template no information could be given. These empty paragraphs are marked with an asterisk.

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1 General legal situation

1.1 Constitutional protection against discrimination

The principle of equality of citizens before the law is enshrined in the Constitution of the Republic of Poland; in particular Article 32 states that all are equal before the law and all have the right to equal treatment by the public authorities. No-one may be discriminated against in political, social or economic life for any reason whatsoever.

1.2 General principles and concepts of equality

The general constitutional principle of equality is applicable to every citizen without distinction. However, other articles of the Constitution of the Republic of Poland specifically highlight the principle of equality of some groups of citizens such as: women, children, national and ethnic minorities, workers, disabled persons etc. Notably, sexual minorities are not explicitly mentioned.

In the Polish legal system there is no homosexual criminal offence without heterosexual equivalent.

Article 27(1) of the law on protecting personal data² stipulates that the processing of details of a person's intimate life is prohibited. Article 22 of the Labour Code stipulates that during the recruitment stage an employer is not allowed to ask the candidate about, *inter alia*, details of his or her intimate life (with reference to the law on protection of personal data).

1.3 Division of legislative powers relating to discrimination in employment

According to the constitutional principle of the division of powers, Parliament, Council of Ministers, President and 100.000 citizens are allowed to submit a legislative initiative. Moreover, executive acts are issued by the Minister proper for employment.

1.4 Basic structure of employment law

The main Polish law regulating the employment relationship is the Law of June 26, 1974: the Labour Code.³ Another important law concerning the issue of employment is the Act of 20 April 2004 on the Promotion of Employment and the Institutions of the Labour Market. On the basis of the Labour Code executive regulations are issued. According to article 300 of the Labour Code, regulations of the Civil Code are to be applied in cases which are not regulated by provisions of the Labour Code.

² 29 August 1997, O.J. from 2002 No 101, position 926.

³ Official Journal of Laws of 1998 No. 21, item 94 as amended. In particular the implementation of the Employment Equality Directive was made by way of an amendment which entered into force on 1 January 2004.

1.5 Provisions on sexual orientation discrimination in employment or occupation

Provisions on sexual orientation discrimination in employment and occupation are implemented by two main laws:

- The Labour Code, Section One, includes chapter IIa entitled: “Equal Treatment in Employment”. This chapter includes provisions prohibiting discrimination based on *inter alia* sexual orientation.
- The Law on the Promotion of Employment and the Institutions of the Labour Market stipulates the application of the equality principle (irrespective of sex, age, disability, race, ethnic origin, nationality, sexual orientation, political convictions, religion or union membership) at a job placement, while using vocational guidance services and while directing for training. It also prohibits the formulation by the employers of requirements which discriminate against some applicants, in respect to the drawing up of information on employment vacancies or vocational training vacancies.

1.6 Important case law precedents on sexual orientation discrimination in employment or occupation

The subject of legally recognized discrimination is quite new in the Polish legal system. Therefore there are a very limited number of legitimate cases brought before courts. Most of the case law concerns discrimination on the grounds of sex – for example, from the 1st of January until the 30th of June 2004, there were 58 registered cases of sex discrimination. Cases concerning discrimination on grounds other than sex are very rare. Since the new anti-discrimination law (amendment to the Labour Code) was introduced in Poland (1st of January 2004) only one case of discrimination on the grounds of sexual orientation in the workplace was brought before the court and the procedure is still on going. This case concerns the unlawful termination of an employment relationship due to the homosexuality of the employee. This is why it is very hard to interpret how sexual orientation discrimination will be regarded by courts and what the scope of the sexual orientation discrimination provisions will be.

1.7 Provisions on discrimination in employment or occupation that do not (yet) cover sexual orientation

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1.8 Provisions on sexual orientation discrimination in other fields than employment and occupation

There are no provisions explicitly covering sexual orientation discrimination in other fields of law.

2 The prohibition of discrimination required by the Directive

2.1 Instrument(s) used to implement the Directive

The directive has been implemented through amendments to the Labour Code and the passing of a new Act on the Promotion of Employment and the Institutions of the Labour Market.

Article 94¹ Labour Code: The employer shall make available to employees the text of provisions on equal treatment in employment in the form of a written document disseminated throughout the employing establishment or provide access for employees to such provisions in a different manner adopted by a given employer.

2.2 Concept of sexual orientation (art. 1 Directive)

The ground of sexual orientation is not developed beyond the use of the term “sexual orientation”.

2.3 Direct discrimination (art. 2(2)(a) Directive)

Article 11³ Labour Code

Any direct or indirect discrimination in employment – particularly if based on the grounds of sex, age, disability, race, religion, nationality, political orientation, union membership, ethnic origin, belief, sexual orientation, as well as employment for a definite or indefinite period of time, full or part-time – is unacceptable.

Article 18^{3a} Labour Code:

§ 3. Direct discrimination shall be taken to occur where one employee is treated less favourably than another has been or would be treated in a comparable situation, on any of the grounds referred to in § 1 (sex, age, disability, race, religion, nationality, political orientation, union membership, ethnic origin, belief, sexual orientation, as well as employment for a definite or indefinite period of time, full or part-time).

2.4 Indirect discrimination (art. 2(2)(b) Directive)

Article 18^{3a} Labour Code:

§ 4. Indirect discrimination shall be taken to occur where due to an apparently neutral provision, criterion or practice there occur some disproportions with respect to the employment conditions which put all or some of the employees, having one or more of the characteristics enumerated in § 1, at a particular disadvantage compared with other employees, unless these disproportions can be objectively justified.

2.5 Prohibition and concept of harassment (art. 2(3) Directive)

Article 18^{3a} § 5 Labour Code: “The following shall also be deemed to be a form of discrimination within the meaning of § 2: (...) conduct with the purpose or effect of violating the dignity or degrading and/or humiliating of an employee (harassment).”

Mobbing is not regulated as a discrimination in Polish Labour Code; so none of the instruments concerning discrimination (burden of proof, victimisation etc) can be applied during the court proceedings.

Article 94³ states that the employer shall prevent mobbing and adds: ‘Mobbing shall be taken to occur where action or behaviour concerns or is directed against the employee and involves persistent and long-term harassment or frightening of the employee, resulting in his low self-assessment of professional usefulness, with the purpose and effect of violating his dignity or humiliating him, isolating him or eliminating him from a team of colleagues.’

2.6 Instruction to discriminate (art. 2(4) Directive)

According to article 18^{3a} § 5 Labour Code “an instruction inducing or encouraging another person to violate the principle of equal treatment in employment” shall also be deemed to be a form of discrimination within the meaning of § 2.

2.7 Material scope of applicability of the prohibition (art. 3 Directive)

Article 18^{3a} § 1 Labour Code: Employees should receive equal treatment with regard to such issues as entering into and dissolving employment relationships, working conditions, promotion and access to vocational training irrespective of sex, age, disability, race, religion, nationality, political orientation, union membership, ethnic origin, belief, sexual orientation, as well as employment for a definite or indefinite period of time, full or part-time.

Article 18^{3b} § 1 Labour Code: Notwithstanding § 2-4, differentiation of an employee’s situation by the employer on any of the grounds referred to in Article 18^{3a} § 1 is also deemed a violation of the principle of equal treatment in employment, particularly if it is done with the following purpose or effect:

1. refusal to enter into or dissolution of an employment relationship,
2. introduction of unfavourable payment scheme or other employment conditions, passing employees over for promotion or other employment benefits,
3. passing employees over for vocational training,

– unless the employer can prove that the grounds for these actions were legitimate and objective.

2.8 Personal scope of applicability: natural and legal persons whose actions are the object of the prohibition

According to Article 3 of the Labour Code an employer is an organizational unit, even without legal personality, or a natural person, employing employees.

3 What forms of conduct in the field of employment are prohibited as sexual orientation discrimination?

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4 Exceptions to the prohibition of discrimination

4.1 Objectively justified indirect disadvantages (art. 2(2)(b)(i) Directive)

According to Article 18^{3a} § 4 of the Labour Code there is no indirect discrimination if the disproportions (which put all or some of the employees, having one or more of the characteristics enumerated in § 1, at a particular disadvantage), can be objectively justified. See paragraph 2.4 above.

4.2 Measures necessary for public security, for the protection of rights of others, etc. (art. 2(5) Directive)

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4.3 Social security and similar payments (art. 3(3) Directive)

Some people may be tempted to invoke this regulation to discriminate against LGBT persons, mainly in cases of occupations requiring exceptional “moral predisposition”. In Polish law there are plenty of similar occupational requirements, which are impossible to define; for example the requirement of an “immaculate character” (e.g. laws relating to occupational requirements of judges, advocates, solicitors, those in the public service etc.) or “moral qualities” (for example the Act on the Commissioner for Civil Rights Protection – Ombudsman), or in the law called the Teacher’s Charter: “the obligation to uphold moral principles”. Such an interpretation – i.e. preventing people from taking up certain jobs or occupations or forcing them to conceal their orientation – is undoubtedly against the provisions of the directive, as well as certain constitutional rights – the right to legal protection of private life, of honour and good reputation and to make decisions about personal life (article 47 of the Constitution of the Republic of Poland) or the freedom to choose and to pursue occupation and to choose the place of work (article 65). It also seems contrary to the Polish Labour Code (which should be interpreted according to the directive it implements), taking into consideration the substance and purpose of those acts – that is to say the elimination of stereotypes and their consequences, such as discrimination. Claiming that someone is immoral and depraved simply for being homosexual takes us back to times when homosexuality was believed to be an illness.⁴

4.4 Occupational requirements (art. 4(1) Directive)

Article 18^{3b} § 2 Labour Code: The following will not be deemed a violation of the equal treatment principle in employment:

1. non-employment of an employee on any of the grounds referred to in Article 18^{3a} § 1 where it is justified by reason of the nature of the particular

⁴ Patrycja Pogodzinska, *Recognizing sexual orientation in Polish law - from combating discrimination to claiming new rights*, (paper delivered at) Conference: *Gays' and Lesbians' Rights in an Enlarged European Union*, Brussels, December 3 & 4, 2004.

- occupational activities concerned, conditions in which they are carried out or genuine occupational requirements,
2. termination of the employee's agreement within the scope of the work-time where it is justified by reasons unconnected with the employees (...).

4.5 Loyalty to the organisation's ethos based on religion or belief (art. 4(2) Directive)

18^{3b} § 4 Labour Code: Differentiation of employees by their religion or denomination does not breach the principle of equal treatment in employment, if the religion or denomination of the employee is an important and justified professional requirement dictated by the type and character of activities performed by a church or other denominational union, or organisation whose objectives are in a close relation to religion or denomination.

4.6 Positive action (art. 7(1) Directive)

18^{3b} § 3 of Labour Code: The principles of equal treatment in employment are not breached by measures adopted for a specified period of time, intended to make opportunities equal to all or a group of employees distinguished by one or more reasons specified in article 18^{3a} § 1 by way of reducing the actual inequalities to the benefits of those employees in a scope defined by this regulation.

5 Remedies and enforcement

5.1 Basic structure of enforcement of employment law

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5.2 Specific and/or general enforcement bodies

Although parliament adopts the law, the leading government body in implementing the Directive into the Polish legal system was (is) the Ministry of Economy, Labour and Social Policy (now – the Ministry of Economy and Labour) with the cooperation of the Government Plenipotentiary for Equal Status of Women and Men.

Regulation of the Council of Ministers of 25 June 2002 on the Government Plenipotentiary for Equal Status of Women and Men, § 4:

1. Until the office in charge of counteracting discrimination is established, the duties of the Plenipotentiary include promoting, initiating, implementing or co-ordinating the implementation of governmental programmes aimed at counteracting discrimination on the grounds, referred to in § 2 subparagraph 2.
2. The Plenipotentiary exercises the duty, referred to in item 1, specifically through:
 - i) spreading knowledge about discrimination and its manifestations as well as about methods and strategies of counteracting discrimination,

- ii) co-operation with appropriate units of public administration, non-governmental organisations and institutions – within the scope of their responsibility for carrying out educational programmes related to counteracting discrimination,
- iii) initiating, evaluating and drafting legal acts and other governmental documents, aimed at counteracting discrimination,
- iv) inspiring and supporting the activities of groups, organisations and circles to combat discrimination.

5.3 Civil, penal, administrative, advisory and/or conciliatory procedures (art. 9(1) Directive)

Article 242 Labour Code § 1: An employee may pursue his claims under an employment relation(ship) before the court. § 2: Prior to pursuing the matter before the court, an employee may request that conciliatory proceeding be held before a conciliation commission.

5.4 Civil, penal and/or administrative sanctions (art. 17 Directive)

Article 18^{3d} Labour Code: Persons who have been subjected to discrimination based on unequal treatment in employment are entitled to compensation equal to at least their minimum pay, determined under separate provisions.

5.5 Natural and legal persons to whom sanctions may be applied

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5.6 Awareness among law enforcers of sexual orientation issues

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5.7 Standing for interest groups (art. 9(2) Directive)

Article 61 § 4 of the Act of 17 November 1964 the Civil Procedure Code⁵ as proposed in the draft law amending the Civil Procedure Code and some other laws (still under parliamentary scrutiny): “Community organisations whose statutory objectives include equality protection and non-discrimination protection by unfounded, direct or indirect differentiation of rights and duties of citizens, may, in the cases of claims in this field with the consent of the citizens, institute actions on behalf of the citizens and with the consent of the plaintiff ma, join the proceedings in each stage thereof.”

5.8 Burden of proof of discrimination (art. 10 Directive)

See paragraph 2.7 above.

5.9 Burden of proof of sexual orientation

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⁵ Official Journal of Laws of 1964 No. 43, item 296 as amended.

5.10 Victimization (art. 11 Directive)

Article 18^{3e} Labour Code: The fact that an employee executed his rights resulting from discrimination based on unequal treatment in employment cannot constitute a reason for his subsequent dismissal or termination of his employment contract.

6 Reform of existing discriminatory laws and provisions

Article 9 § 4 Labour Code: The provisions of collective labour agreements and other collective contracts based on this Act, regulations and statutes laying down the rights and obligations of parties to an employment relationship, which violate the principle of equal treatment in employment, shall be invalid.

Article 18 § 3 Labour Code: Provisions of contracts and other acts, on the basis of which the employment relationship is established, that violate the principle of equal treatment in employment, are invalid. Relevant provisions of the labour regulations shall supersede the invalid provisions, and in the event of their absence the invalid provisions should be replaced with other provisions of non-discriminatory nature.

7 Concluding remarks

Although the Directive is almost fully implemented into the Labour Code (the main Polish law which regulates the employment relationship), one may say that matters still outstanding in the implementation of the Directive in Poland are the following:

- the lack of anti-discrimination in the field of self-employment;
- the lack of anti-discrimination provisions in the laws in respect of the professional bodies, such as barristers, legal advisers, notaries etc.