



**REPORT ON MEASURES TO COMBAT DISCRIMINATION**  
**Directives 2000/43/EC and 2000/78/EC**

**COUNTRY REPORT 2008**

**THE NETHERLANDS**

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**State of affairs up to 31 December 2008**

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## INTRODUCTION

### 0.1 The national legal system

*Explain briefly the key aspects of the national legal system that are essential to understanding the legal framework on discrimination. For example, in federal systems, it would be necessary to outline how legal competence for anti-discrimination law is distributed between different levels of government.*

In the Netherlands, there is only one level of (central) government that issues anti-discrimination or equal treatment legislation. The principles of equality and non-discrimination are captured by various realms of the law. Of importance are: the Constitution, private and public employment law, criminal law and specific additional statutory non-discrimination acts. Moreover, since the Netherlands' constitutional system adheres to a 'monist theory' of international law, international equality guarantees automatically filter into the national legal system (provided in Articles 93 and 94 of the Constitution). In respect of the legislative procedure, statutory acts ("wetten in formele zin") are the product of concerted action between the Government on one hand, and both Chambers of Parliament ("Eerste en Tweede Kamer der Staten Generaal") on the other. The Parliament may delegate the regulation of details to the Government, which can adopt Governmental or Ministerial decrees. Private employment contracts are regulated by Book 7 of the Civil Code ("Burgerlijk Wetboek") and by specific statutory non-discrimination acts. Moreover, regulation may occur via Collective Labour Agreements ("CAO") per sector or per employer. The employment of most public employees is regulated by the Civil Servants Act ("Ambtenarenwet"). For each sector of public employment, there is normally also a Collective Labour Agreement.

The following non-discrimination and equal treatment provisions are of key importance:

- Article 1 of the Constitution enshrines a constitutional equality and non-discrimination guarantee.
- International non-discrimination provisions (e.g. Article 26 ICCPR and Article 14 ECHR) can be directly applied in court proceedings. Sometimes provisions from UN CERD or UN CEDAW are also called upon before Dutch courts.<sup>1</sup>
- EC-Treaty provisions and Directives can be directly applied under certain conditions.<sup>2</sup>
- The Criminal Code ("Wetboek van Strafrecht") entails specific provisions criminalising discriminatory speech and publications (Articles 137d-137f) and discriminatory acts in the performance of one's job or one's enterprise (Articles 137g and 429quater). Discrimination is defined in Article 90quater.<sup>3</sup> In addition, Article 137c forbids insulting groups of people because of their *race, religion/belief* and *homo-/heterosexual orientation*.
- The Civil Code entails specific articles prohibiting sex discrimination in labour contracts (Articles 7:646-7:649). Employers are also liable if they fail to guarantee safe working conditions. (Article 7:658).

<sup>1</sup> Very often not successful, since the courts most of the time deem these provisions not sufficiently clear and precise to apply them.

<sup>2</sup> These are the normal conditions for applicability of EC-Law in the Member States.

<sup>3</sup> This definition is substantially different from the definition in the Directives and from the definition of "onderscheid" (distinction) that is used in Dutch equal treatment legislation. The Criminal Code definition is more in line with the one in Article 1 of the UN CERD.

- The Civil Servants Act (Articles 125g and 125h) contains similar provisions for the public service sector.
- The Act on Working Conditions (“Arbeidsomstandighedenwet”) contains provisions concerning (sexual) harassment at the workplace and aggression and violence at the workplace.
- Race and ethnic origin, religion and belief and sexual orientation are covered together with ‘political opinion’, ‘sex’, ‘nationality’ and ‘civil status’ as grounds for discrimination by Dutch law since 1994 by the General Equal Treatment Act, or GETA (“Algemene Wet Gelijke Behandeling”).<sup>4</sup> The 1994 Act has been amended and complemented by the EC Implementation Act GETA. Importantly, the Dutch government has deemed it desirable to extend many of the amendments that were legally required for the grounds covered both by the 1994 Act and the Directives (*i.e.*, ‘race’, ‘religion/belief’, ‘sexual orientation’) to other grounds that are also covered by the GETA.<sup>5</sup>
- The Equal Treatment Act for Men and Women in Employment Act (“Wet gelijke behandeling van mannen en vrouwen bij de arbeid”), which already existed when the GETA came into force, regulates, among others, the topic of equal pay.<sup>6</sup>

In the framework of the implementation of the Directives the following equal treatment legislation is of importance too:

### ***Age as a ground for discrimination***

Implementation of the discrimination ground *age* has been achieved by the adoption of the Act on Equal Treatment on the Ground of Age in Employment (“Wet Gelijke Behandeling op grond van Leeftijd bij de Arbeid”), hereinafter referred to as the Age Discrimination Act or ADA.<sup>7</sup> The ADA entered into force on 1 May 2004.<sup>8</sup> Implementation of ‘age’ has been achieved in Dutch law in a *single staged process*.

This means that the bill on age discrimination<sup>9</sup> aimed to implement both the *age specific* and the *common provisions*<sup>10</sup> of the Directives. As will be discussed below, this contrasts with the *modus* of implementation of ‘disability’ which occurred via a *two-staged process*.

<sup>4</sup> Staatsblad 1994, 230.

<sup>5</sup> Explanatory Memorandum to the EC Implementation Act, Tweede Kamer, 2002-2003, 28 770, nr. 3, p. 3.

<sup>6</sup> Since this Network does not deal with the topic of gender discrimination, this Act will not be discussed in this Report.

<sup>7</sup> Act of 17 December 2003, concerning the equal treatment on the ground of age in employment, occupation and vocational training (“Wet van 17 december 2003, houdende gelijke behandeling op grond van leeftijd bij de arbeid, beroep en beroepsonderwijs”), Staatsblad 2004, 30.

<sup>8</sup> Determined by Governmental Decision of 23 February 2004, concerning the establishment of a date of the entering into force of the Act on Equal Treatment on the Ground of Age in Employment (“Besluit van 23 februari 2004, houdende vaststelling van de datum van inwerkingtreding van de Wet gelijke behandeling op grond van leeftijd bij de arbeid”), Staatsblad 2004, 90.

<sup>9</sup> Bill for an Act on Equal Treatment on the Ground of Age in Employment, Occupation and Vocational Training (“Voorstel van Wet gelijke behandeling op grond van leeftijd bij de arbeid, beroep en beroepsonderwijs”), Tweede Kamer, 2001-2002, 28170, nrs. 1-2.

<sup>10</sup> *Common provisions* are those provisions which are found in both the Race and the Employment Framework Directive and which are applicable to all grounds for discrimination covered by these Directives. See Explanatory Memorandum to the EC Implementation Act GETA (“Memorie van Toelichting bij de EG Implementatiewet AWGB”), Tweede Kamer, 2002-2003, 28 770, nr. 3, p. 7. Examples are: the definitions of discrimination, the burden of proof, positive action, remedies, victimisation, *etc.*





### ***Disability as a ground for discrimination***

Like ‘age’, ‘disability’ has been regulated outside the general framework of the GETA in a separate law. For reasons of political expediency, implementation of the ground ‘disability’ occurred in a *two-staged process*. In the first stage of implementation, the ‘disability’ specific provisions of the Employment Framework Directive were implemented by the Disability Discrimination Act or DDA.<sup>11</sup> The DDA entered into force on 1 December 2003 (except for Articles 7 and 8 of the Act which relate to public transport).<sup>12</sup> In the second stage of implementation, the *common provisions*<sup>13</sup> were implemented by means of the adoption of the EC Implementation Act GETA.<sup>14</sup> This Act *inter alia* complements the DDA of the first stage of implementation. The EC Implementation Act (which amended the DDA) entered into force on the 1<sup>st</sup> of April 2004.<sup>15</sup> The initial scope of the DDA was restricted to employment and vocational education. The scope of the DDA will be extended to the fields of primary and secondary education and of housing during 2009 (note: this amendment has been enacted after the cut off date of the country report 2009).<sup>16</sup>

## **0.2 Overview/State of implementation**

*List below the points where national law is in breach of the Directives. This paragraph should provide a concise summary, which may take the form of a bullet point list. Further explanation of the reasons supporting your analysis can be provided later in the report. Please clearly and briefly indicate whether the Member State had taken advantage of the option to defer implementation of Directive 2000/78 EC to 2 December 2006 in relation to age and disability?*

*This section is also an opportunity to raise any important considerations regarding the implementation and enforcement of the Directives that have not been mentioned elsewhere in the report.*

<sup>11</sup> Act of 3 April 2003 regarding the establishment of the Act on Equal Treatment on the grounds of disability or chronic disease (“Wet van 3 april 2003 tot vaststelling van de Wet Gelijke Behandeling op grond van Handicap of Chronische Ziekte”), Staatsblad 2003, 206.

<sup>12</sup> Determined by Governmental Decision of 11 August 2003, concerning the establishment of a date of the entering into force of the Act on Equal Treatment on the Grounds of Disability or Chronic Disease (“Besluit van 11 augustus 2003, houdende vaststelling van het tijdstip van inwerkingtreding van de Wet gelijke behandeling op grond van handicap of chronische ziekte”), Staatsblad 2003, 329. A proposal for a bill amending the DDA in this respect has been made by some members of Parliament. See Tweede Kamer 2006-2007, 30878, nrs 1-3.

<sup>13</sup> *Common provisions* are those provisions which are found in both the Race and the Employment Framework Directive and which are applicable to all grounds for discrimination covered by these Directives.

<sup>14</sup> Act of 21 February 2004 regarding the amendment of the General Equal Treatment Act en some other Acts in order to implement Directive 2000/43/EC and Directive 2000/78/EC (“Wet van 21 februari 2004 tot wijziging van de Algemene Wet Gelijke Behandeling en enkele andere wetten ter uitvoering van richtlijn 2000/43/EG en richtlijn 2000/78/EG (EG Implementatiewet AWGB)”)), Staatsblad 2004, 120.

<sup>15</sup> Determined by Governmental Decision of 11 March 2004, concerning the establishment of the date of the entering into force of the Act of 21 February 2004 regarding the amendment of the General Equal Treatment Act en some other Acts in order to implement Directive 2000/43/EC and Directive 2000/78/EC (EC Implementation Act GETA) (“Besluit van 11 maart 2004, houdende vaststelling van het tijdstip van inwerkingtreding van de Wet van 21 februari 2004 tot wijziging van de Algemene Wet Gelijke Behandeling en enkele andere wetten ter uitvoering van richtlijn 2000/43/EG en richtlijn 2000/78/EG (EG Implementatiewet AWGB)”)), Staatsblad 2004, 120.

<sup>16</sup> Kamerstukken Tweede Kamer, 2008/2009, 30 859, ‘Wijziging van de Wet gelijke behandeling op grond van handicap of chronische ziekte in verband met de uitbreiding met onderwijs als bedoeld in de Wet op het primair onderwijs en de Wet op het voortgezet onderwijs en met wonen’ (= Amendment to the Disability Discrimination Act concerning the extension to primary and secondary education and housing).



*This could also be used to give an overview on the way (and if at all) national law has given rise to complaints or changes, including, eventually a reference to the number of complaints, whether instances of indirect discrimination have been found by judges, and if so, for which grounds, etc.*

*Please ensure that you review the existing text and remove items where national law has changed and is no longer in breach.*

1. The Dutch legislator might need to bring the definition of ‘indirect discrimination’ more in line with the Directives’ requirements. [See para. 2.3 of this report and also under NB below]
2. The accumulative conditions in the ‘harassment’ definition arguably fall short of the Directives’ ‘non regression’ clause. [See para. 2.4 of this report.]
3. Arguably, the Dutch government interprets the prohibition of an ‘instruction to make a distinction’ unduly narrow. [See para. 2.5 of this report.]
4. An unduly restrictive approach is also adopted by the Dutch government as regards the ‘scope of liability’ for discrimination. [See para. 3.1.3 of this report.]
5. Both Article 2(5) and Article 7(2) of the Framework Directive speak of national legislation or measures taken by the Member States government in order to protect health and safety. Article 3(1) sub a in the DDA provides for a justification on this ground, but it is disputable whether this provision is in line with the requirements of the Directive. (See para. 4.6 of this report.)
6. The partially reversed burden of proof – not applicable in victimisation claims – falls short of EC requirements. [See para. 6.4 of this report.]
7. The requirement that sanctions be ‘effective’, ‘dissuasive’ and ‘proportionate’ seems not to be met by the Dutch legislation. [See para. 6.5 of this report.]
8. Apart from this, at some points the equal treatment law has been worded in such a way that a rather wide interpretation of the provision is possible, leaving e.g. more room for justifications than would seem appropriate, considering the general rule of the ECJ that exceptions to the non-discrimination principle should be interpreted restrictively. See e.g. para. 4.2 of this report where the wording of the exceptions based on Article 4(2) of the Framework Directive is discussed.

The Dutch government did notify (16.12.2003) the use of three extra years for the implementation of the discrimination ground ‘age’.

Eventually however, the ADA entered into force on 1 May 2004 and thus, the requested extra time has not been made use of, apart from the transitional provision in Article 16 of the ADA concerning retirement before the age of 65. This transitional period has expired on December 2, 2006. The implementation of the discrimination ground ‘disability’ has been completed on 1 April 2004 when the DDA came into force.





NB: On January 2008, the Netherlands have received a letter from the European Commission Member Mr. V. Spidla, which points at alleged inadequacies in transposing ‘employment’ Directive 2000/78/EC.<sup>17</sup> In short, the Commission criticised:

- the definitions of direct and indirect discrimination in the GETA;
- the (broadness of) the exclusion of the ban on discrimination with regard to ‘personal services’ (Article 5(3) GETA)
- the broadness of the exceptions for employment in church or religious associations (Articles 4(1) and 5(2) GETA).

With regard to the definitions of direct and indirect discrimination, the government has recently introduced a bill into Parliament, which proposes to adopt the definitions of the Directives ‘word by word’.<sup>18</sup> In the explanatory memorandum, the government emphasizes that this proposal is meant only to streamline, and not to change any of the content of Equal Treatment Legislation in substantive law. A parliamentary evaluation on the use of the word ‘distinction’ instead ‘discrimination’ is forthcoming (see also below). With respect to the other points, the Dutch government has denied the other alleged inadequacies, stating in short that the criticized exceptions are in substantive (case-)law in line with the Directive’s requirements.<sup>19</sup> No answer from the Commission to these statements is received yet.

### **Short list of abbreviations / translations:**

ADA = Age Discrimination Act

DDA = Disability Discrimination Act

ETC = Equal Treatment Commission

GETA = General Equal Treatment Act

Staatsblad = Law Gazette<sup>20</sup>

Tweede Kamer (der Staten Generaal) = Second Chamber (of Parliament)<sup>21</sup>

### **Preliminary observation about terminology of Dutch equal treatment law:**

#### **The use of the word ‘distinction’ instead of discrimination**

In the Netherlands, the word ‘distinction’ is used in the GETA, instead of ‘discrimination’. (There is a prohibition of making direct and indirect distinctions on certain non-discrimination grounds.) Although the Government is taking the stance that there is no substantive difference between these words, this choice of terminology has raised a lot of critique by (among others) the Council of State [*Raad van State*], which is the most important advisor of the Government in the process of drafting new legislation.

<sup>17</sup> Letter dated on 11 January 2008, with reference to the infringement procedure of 18 December 2006, infringement No 2006/2444. Press releases from the European Commission can be found at:

<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/155&format=HTML&aged=1&language=EN&guiLanguage=en> and

<http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/08/68&format=HTML&aged=0&language=EN&guiLanguage=en>

<sup>18</sup> Kamerstukken 2008-2009, 31 832, nr. 2 and 3.

<sup>19</sup> Letter of the Dutch government, dated on 18 March 2008, *Kamerstukken II*, 2007-2008, 27 017 nr. 40, annex.

<sup>20</sup> The system of reference to Acts that have been published in the Law Gazette is as follows: Title of the Act, Law Gazette (Staatsblad), year, number. Only the titles have been translated into English.

<sup>21</sup> Parliamentary papers, motions or amendments or letters from the government to Parliament are referred to in the footnotes by the Dutch system of reference: Tweede Kamer, parliamentary years, number of the bill and the number of order, followed by a page number. Only the titles of these papers have been translated here.



The Council has advised the Government to abandon the neutral word ‘distinction’ and has demonstrated itself to be an advocate of using a more normative concept of discrimination.<sup>22</sup> The main reason for this preference is to bring the terminology of Dutch equal treatment legislation in line with EC Equality Law.<sup>23</sup> In 2005, the Government has commissioned an in-depth study on this matter. This report was finalised in September 2006.<sup>24</sup> The conclusion of the author is that the way in which the word distinction is used in the Dutch equal treatment legislation is in line with the meaning of the word discrimination in EU non-discrimination law. However, for other reasons, it might be preferable to change the terminology of the GETA, DDA and ADA. One of these reasons being that the word distinction might suggest that each and every differentiation between categories of people amounts to discrimination. The use of the word distinction, for that reason, is almost always immediately accompanied with the adjective ‘unjustified’. The concept of an unjustified distinction is perfectly in line with what generally is conceived of as discrimination. The Dutch government is preparing a reaction to the expert’s report that will be send to Parliament together with a bill for a law that will integrate all of the existing equal treatment laws (GETA, DDA, ADA and sex-discrimination laws). However, neither this reaction nor the integration bill is received yet.

### 0.3 Case-law

*Provide a list of any important case-law within the national legal system relating to the application and interpretation of the Directives. This should take the following format:*

**Name of the court**

**Date of decision**

**Name of the parties**

**Reference number** (or place where the case is reported).

**Address of the webpage** (if the decision is available electronically)

**Brief summary** of the key points of law and of the actual facts (no more than several sentences)

➔ Please use this section not only to update, complete or develop last year's report, but also to include information on important and relevant case law concerning the equality grounds of the two Directives, even if it does not relate to the legislation transposing them (e.g. if it concerns previous legislation unrelated to the transposition of the Directives)

Please describe trends and patterns in cases brought by Roma and Travellers , and provide figures – if available.

<sup>22</sup> Advisory Opinion of the Council of State and Complementary Report (“Advies van de Raad van State en nader Rapport”), Tweede Kamer, 2001-2002, 28 169, B, p. 5-6 and Implementation of the Directives on Equal Treatment, Advisory Opinion of the Council of State and Complementary Report (“Implementatie van de richtlijnen inzake gelijke behandeling, Advies Raad van State en nader rapport”), Tweede Kamer, 2001-2002, 28 187, A, p. 4-5.

<sup>23</sup> The same advice had also been given by the Interdepartmental Commission European Law (ICER, “Interdepartementale Commissie Europees Recht”). See ICER, *Implementation of the Article 13 Directives, conclusions and recommendations* (“Implementatie Richtlijnen op grond van Artikel 13 EG Verdrag, conclusie en aanbevelingen”), ICER 2001/54, p. 2.

<sup>24</sup> M.L.M. Hertogh & P.J.J. Zoontjens (eds): *Gelijke behandeling: principes en praktijken. Evaluatieonderzoek Algemene wet gelijke behandeling*. Wolf Legal Publishers Nijmegen 2006. The part of the report on the differences in meaning between the words ‘distinction’ and ‘discrimination’ (pp 3-113) was written by prof. Rikki Holtmaat.

**Case Law<sup>25</sup>:*****Race and ethnic origin:*****Name of the court:** Equal Treatment Commission (ETC)**Date of decision:** 18 February 2005**Name of the parties:** Stichting (Foundation) Welzijn Tiel vs. Local authority of Tiel**Reference number:** Opinion 2005-25<sup>26</sup>**Address of the webpage:** <http://www.cgb.nl/opinion-full.php?id=453056867>**Held: Breach**

The local government of Tiel (a small town in the Netherlands) conducts a policy to spread the (aspirant) pupils whose parents are of non-Dutch origin, who have lower or no education and who do manual labour.<sup>27</sup> This means that each publicly funded primary school in this town should not have more than a certain percentage of such pupils. If a school already has reached this percentage the child will not be accepted and will have to go to another school, even if this is outside its own neighbourhood. The ETC first establishes that the 'service' to provide education falls under the scope of the GETA. Next it examines the practice of this policy and finds that the first factor (non-Dutch origin of the parents) in fact is decisive. It then decides that this constitutes a form of 'hidden' direct discrimination on the ground of race for which the GETA allows no justification.<sup>28</sup> Therefore, a breach of Equal Treatment Law was found by the ETC. It is debated in the Netherlands whether the way in which the ETC constructs this category of hidden direct discrimination is the correct way. The ETC does so by equating a neutral criterion (national origin) with a suspect criterion (race) and then concluding that this is unjustifiable direct discrimination.<sup>29</sup>

**Name of the court:** District Court Amsterdam**Date of decision:** 23 February 2006**Name of the parties:** Criminal case against a public prosecutor**Reference number:** LJN: AV2447**Address of the webpage:**<http://zoeken.rechtspraak.nl/resultpage.aspx?snelzoeken=true&searchtype=ljn&ljn=AV2447>**Held: No Breach**

<sup>25</sup> Apart from a few exceptions, the following overview contains cases that are dealt with on the basis of the ADA, DDA and GETA. (We can not provide an extensive overview of criminal law cases or cases that have been decided upon with the use of Constitutional or International Law provisions) Relatively few cases are brought to the attention of the Dutch Courts. Most cases are brought before the ETC. Opinions by the ETC are not binding. They are called "Opinions". All publications (Opinions, etc.) of the ETC are available at [www.cgb.nl](http://www.cgb.nl) and can easily be searched on the basis of the case's reference number. The parties' names are kept anonymous. In the year 2007, the ETC gave 247 Opinions (as against 282 in 2006 and 245 in 2005). Around one third of them dealt with discrimination on the ground of age. An explanation of this high percentage is that, because the ADA is relatively new, there is a lot of uncertainty about the interpretation of this Act. Religion and belief and race are also important categories. A lot of other cases were about gender discrimination, a topic which is not covered by this report. Due to limited space, only a few court cases and ETC Opinions can be presented in this overview.

<sup>26</sup> Also published in AB 2005, 230 with a case note of C.W. Noorlander.

<sup>27</sup> See also para 9 of this report under the heading of 'race'.

<sup>28</sup> This *Opinion* has also been discussed by B.P. Vermeulen in the annual '*Oordelenbundel*' of the ETC: 'De toelaatbaarheid van spreidingsbeleid en aanverwante maatregelen in het onderwijs' [The admissibility of policies to spread pupils.] . In: S.D. Burri (ed.) *Oordelenbundel* 2005. Kluwer, Deventer June 2006.

<sup>29</sup> This method has been accepted in the case of pregnancy, which is equated with direct sex discrimination.



A public prosecutor was accused of insulting Roma during a court case. He had said, among other things, that almost all Roma people are criminals or are found guilty of criminal offences. According to the Court, this is of course unfortunate and deplorable. However, the context in which the statements were made takes away the penal nature of the remarks. In his plea, the public prosecutor could take into account the established criminal behaviour of certain Roma groups; besides he has apologised for his generalising remarks. Therefore, he was not sanctioned.

**Name of the court:** ETC

**Date of decision:** 6 November 2006

**Name of the parties:** ...[anonymous], ... and ... Vs Local authority of Haarlemmermeer

**Reference number:** Opinion 2006-222

**Address of the webpage:** <http://www.cgb.nl/opinion-full.php?id=453056498>

**Held:** no breach

A family of travelers (people who live in caravans and travel around),<sup>30</sup> consisting of three generations, complains that a local government discriminates on the ground of race (ethnic identity) by not taking their special interests into account in its housing policy. The local government decided not to continue a special waiting list for persons who want to live in a caravan because there were hardly any applications for this type of housing. The ETC concludes that it is competent to assess this housing policy on the basis of Article 7a GETA. The assessment whether there is a case of unlawful distinction is - contrary to other areas - marginally, as a consequence of the local government's margin of appreciation to formulate its social policies, including those concerning housing. Although in this particular case there is an objective justification because the local government has proven that the measure (to abolish the special waiting list) was legitimate and that the means chosen (the general waiting list) were proportionate and effective, the ETC recommends the local government to prevent indirect discrimination in the future by giving more attention to the special needs of people who prefer housing in caravans.<sup>31</sup>

**Name of the court:** District Court Haarlem

**Date of decision:** 8 May 2007

**Name of the parties:** ...[anonymous] Vs Local authority of Haarlem

**Reference number:** LJN: BA5410

**Address of the webpage:**

<http://zoeken.rechtspraak.nl/resultpage.aspx?snelzoeken=true&searchtype=ljn&ljn=BA5410>

**Held:** breach

A specific investigation into legal residency and the rightfulness of receiving welfare benefits ordered by the City Administration of Haarlem exclusively addressed to Somalian inhabitants who receive such benefits has been deemed unlawful.

The Court found no sufficient objective justifications for the clear infringements on the prohibition of discrimination on the ground of race under Article 1 of the Dutch Constitution.

<sup>30</sup> The ETC decided that this group of people falls under the ground race or ethnic origin. Some of the travellers are Roma or Sinti, but not all. See also ETC Opinion 2006-5.

<sup>31</sup> The ECT did not openly refer to a more substantive notion of equality, like was done by the ECtHR in the *Thlimmenos* case. See: ECtHR, *Thlimmenos v. Greece* of 6 April 2000.

The City Administration had put forward as a justification that they had indications that a considerable number of Somalians had moved to the United Kingdom without checking themselves out of the administrative system of the City and still received benefits.

**Name of the court:** Raad van State ['Council of State', = highest administrative judge]

**Date of decision:** 3 September 2008

**Name of the parties:** Stichting Overlegorgaan Caribische Nederlanders (OCaN) Vs Dutch Data Protection Authority (DDPA)

**Reference number:** 200706325/1, LJN: BE9698

**Address of the webpage:**

<http://zoeken.rechtspraak.nl/resultpage.aspx?snelzoeken=true&searchtype=ljn&ljn=BE9698>

**Held: no breach**

The Dutch minister of Integration and Immigration policy had asked for and obtained an exemption under the Personal Details Protection Act from the DDPA in order to establish a database of Antillian youth ('*Verwijsindex Antillianen*') without work or education and with criminal records. A complaint against this was lodged by a deliberative body of Dutch Antillians. According to the minister and the DDPA, the database was required to trace the Antillian youth with problems in The Netherlands, which is particularly difficult, as young Antillians are often moving between Dutch municipalities without registering themselves. According to these municipalities and the minister, the registrations system is required for an effective approach to the high rates of social deprivation and criminality among the Antillian youth in The Netherlands.

The judgement of the Council of State set aside the earlier judgement of the District Court (District Court of Den Haag, 26 July 2006, LJN: BB0711), which had stated that the registration of a persons race was a drastic and inappropriate means, as the failure of the common Civil registration system to address the problems was insufficiently established. The Council of State however held that – although registration based on *race* can only be justified by very weighty reasons - the government had proved sufficiently that this database had a justified and weighty aim and was necessary to pursue that aim (the database was not treated as a positive action). Proportionality of the means was established by the Council of State by pointing at the serious nature of the problems being tackled and the fact that the lack of adequate registration was part of the specific problems of the group concerned. This judgment has been criticized by some jurists, stating that the ECHR does not permit any distinction based on race whatsoever, pointing at cases of *Timishev v. Russia* and *D.H. v. Czech Republic*. Meanwhile, the government intends to give up the introduction of the database voluntarily as a result of political pressure.

**Age:**

**Name of the court:** ETC

**Date of decision:** 3 October 2005

**Name of the parties:** ... [anonymous employee] Vs ... [supermarket]

**Reference number:** Opinion 2005-180

**Address of the webpage:** <http://www.cgb.nl/opinion-full.php?id=453055673>

**Held: breach**

This concerns the case that a temporary contract of a young employee in a supermarket was not substituted into a permanent contract.



According to the applicant this decision was due to her age and she submitted a case under the ADA. The ETC applied the rules of the (partial) reversal of the burden of proof (Article 10 GETA, also applicable in ADA cases). The applicant stated that she had heard rumours that the management found 18 and 19 year old employees 'too expensive'. According to the ETC, this 'fact' is reflected in the general picture that exists in the media about the human resource policies of super markets and that also flows from other complaints that are brought to the attention of the ETC. All together this 'picture' is enough to substantiate the criterion "*if a person who considers herself to have been wronged*").

**Name of the court:** Supreme Court (*Hoge Raad*)

**Date of decision:** 10 November 2006

**Name of the parties:** Kingdom of the Netherlands v. National Federation of Dutch Trade Unions (FNV) and the Youth Organisation of the National Federation of Christian Trade Unions (CNV)

**Reference number:** LJN: AY9216

**Address of the webpage:**

<http://zoeken.rechtspraak.nl/resultpage.aspx?snelzoeken=true&searchtype=ljn&ljn=AY9216>

**Held: no breach.**<sup>32</sup>

The FNV and the Youth Organisation CNV claimed that the Kingdom of the Netherlands was discriminating on the ground of age without any justification, by distinguishing between 15-year old children and 13- and 14-year old children. For the former, there is minimum-wage legislation. For the latter there is not, notwithstanding the fact that they are allowed to work under restricted conditions. The Supreme Court stated that, in the light of international provisions (Art. 26 ICCPR; Art. 7 European Social Charter; Art. 7 ICESCR and Directive 94/33/EC),<sup>33</sup> there must be an objective and reasonable justification to treat these cases differently. It assessed the legitimacy of the aim of this distinction and the effectiveness and proportionality of the means used positively. More in general, education deserves priority over the regular employment of young children.

**Name of the court:** ETC

**Date of decision:** 25 March and 21 July 2005

**Reference number:** Opinions 2005-49, 2005-50 and 2005-135

**Address of the webpage:** <http://www.cgb.nl/extensivesearch.php>

**Held: Breach in first two cases, no breach in the latter**

These three cases concerned age discrimination in the liberal professions. Doctors and psychiatrists only get paid for their work by medical insurance companies when they have a service contract with one of these companies. The ETC is of the opinion that in general it can be accepted as an argument that elderly people (over 65) will sometimes have trouble in performing their medical profession accurately.

<sup>32</sup> Earlier, the Court of Appeal in The Hague had held that there was a breach of the non-discrimination principle entailed in these international provisions. See: Hof Den Haag [Court of Appeal, the Hague] 24 March 2005, JAR 2005, 98.

<sup>33</sup> At the time when these court proceedings were initiated, the ADA was not yet in force. However, under the ADA it would most probably have been decided the same way.





Whether this needs to be tested in every individual case depends on the question whether there are valid methods available to carry out such testing.<sup>34</sup>

**Name of the court:** ETC

**Date of decision:** 19 December 2005

**Reference number:** Opinion 2005-240

**Address of the webpage:** <http://www.cgb.nl/opinion-full.php?id=453055743>

**Held: breach**

In this case, a rejected applicant stated that he was rejected because of his age by pointing at the wording of the job advertisement. The ETC held that a job advertisement, describing the team as ‘young and dynamic’, constituted a presumption of discrimination which has to be refuted by the defendant. The ETC hereby applied Article 12(1) ADA concerning the burden of proof.

Article 3(a) of the Age Discrimination Act (ADA), read in conjunction with Article 1, prohibits age discrimination in public job offers. The criterion applied by the ETC is whether the job description implies that only or preferably people of a certain age category will be employed. As the defendant did not succeed in proving that the selection had not taken place on the basis of the applicant’s age, this rejection was in breach with the ADA.

**Name of the court:** ETC

**Date of decision:** 27 August 2007 and 4 September 2007

**Reference number:** Opinion 2007-158 and ETC Opinion 2007-162

**Address of the webpage:** <http://www.cgb.nl/extensivesearch.php>

**Held: breach (2007-158) and no breach (2007-162)**

In the first case, a maximum work experience requirement of 3 years for a vacancy for ‘junior policy advisor’ at the Ministry of Foreign Affairs was deemed unjustifiable indirect distinction on the ground of age. A 38 year old man who had complained for not being invited for an interview was told by representatives of the Ministry that “applicants above 30 years would have a problem”. In a comparable case, a local government managed to justify indirect distinction on ground of age by demanding a certain work experience for a “prospective policy advisor”. The local government had argued successfully that the nature of the work activities demands for an applicant that is not over-qualified.

**Name of the court:** ETC

**Date of decision:** 2 August 2007

**Name of the parties:** ...[anonymously] v. Contactorgaan Nederlandse orkesten, the National Federation of Dutch Trade Unions (FNV) Kunsten, informatie en Media and De Nederlandse toonkunstenaarsbond

**Reference number:** Opinion 2007-148

**Address of the webpage:** <http://www.cgb.nl/opinion-full.php?id=453056715>

**Held: Breach**

<sup>34</sup> A similar conclusion can be drawn from case law of the Centrale Raad van Beroep [ the Highest Social Security Court] and Hof Den Bosch [the Court of Appeal Den Bosch]: CRvB 17 februari 2005, *TAR* 2005, 70; Hof Den Bosch 10 mei 2005, *JAR* 2005, 149. These were cases concerning ‘functional age dismissal’ in the (voluntary) fire departments. At the time that these cases were initiated before the courts the ADA was not yet in force. The Courts therefore use Article 26 ICCPR.



A professional oboist was demoted by his employer (an orchestra) because of reaching the age of 60, according to a regulation arranged in the collective agreement for Dutch Orchestras. The ETC deemed the procedure of the orchestra as well as the regulation in the collective agreement unlawful, for it is a direct distinction on the ground of age.

The parties who had drafted the regulation in collective agreement had proceeded on the basis that musicians lose some of their skills around the age of 60, and this generic measure was meant to be “a safeguard for the quality of orchestras in deference to the musician’s artistic feelings”. The ETC however held that musicians deserve an individual assessment of their skills.

### ***Disability and Chronic Illness:***

**Name of the court:** ETC

**Date of decision:** 5 November 2004

**Reference number:** Opinion 2004-146

**Address of the webpage:** <http://www.cgb.nl/opinion-full.php?id=453055459>

**Held: breach**

The respondent, a school, refuses a disabled job- applicant for the post of receptionist by reason of an alleged lack of authority. The Commission stresses that Article 17 of Directive 2000/78 explicitly states that employers cannot be obliged to hire candidates who cannot fulfil the essential requirements for the job. If a disabled person cannot perform the essential job requirements and, if a reasonable accommodation cannot alter this situation, an employer may lawfully refuse her. However, in the case at hand it did not concern a person who was not suitable for the post at hand. The Commission took the view that none of the Article 3 exceptions of the DDA applied. Direct disability distinction. *Held: breach.*

**Name of the court:** Hoge Raad (Supreme Court)

**Date of decision:** 22 December 2006

**Name of the parties:** [Various NGO’s] v. The State (of the Netherlands)

**Reference number:** LJN AY8050

**Address of the webpage:**

<http://zoeken.rechtspraak.nl/resultpage.aspx?snelzoeken=true&searchtype=ljn&ljn=AY8050>

**Held: no breach**

Appeal from Court of Appeal, the Hague, 31 March 2005 (LJN AT2882), concerning collective action of many NGO’s against the State. The NGO’s claimed that the new system for reimbursing costs of public transport (the so-called ‘Valys system’) to disabled persons is discriminatory and therefore wrongful. The new system (2003) restricted the number of kilometres disabled persons could travel against low tariff. The Court of Appeal held that the State has the liberty to make policy choices. The Supreme Court agreed that under the ECHR “the State is not obliged to maintain State-funded provisions regarding public transport on an equal standard with the former system”.<sup>35</sup>

<sup>35</sup> See W. Brussee & M. Kroes, ‘Handicap en chronische ziekte’ [Disability and Chronic Illness]. In: S.D. Burri (ed.) *Oordelenbundel 2005*. Kluwer, Deventer June 2006.



**Name of the court:** ETC

**Date of decision:** 19 July 2005

**Reference number:** Opinion 2005-133

**Address of the webpage:** <http://www.cgb.nl/opinion.php?id=453055627>

**Held:** no breach

The claimant in this case stated that the employer had refused to change his temporary contract into a permanent contract because of his disability. The ETC considered that the claimant had not notified the employer about the nature of his (psychological) problems (that caused malfunctioning) and therefore could not expect the employer to take measures (provide a reasonable accommodation). This case touches upon the complicated matter whether an applicant for a job needs to notify the employer about the existence of a disability of chronic illness. According to the Law on Medical Examinations [Wet Medische Keuringen] an applicant is not obliged to undergo medical examinations in the course of the application procedure. This can conflict with the DDA.<sup>36</sup>

**Name of the court:** ETC

**Date of decision:** 13 December 2005

**Reference number:** Opinion 2005-234

**Address of the webpage:** <http://www.cgb.nl/opinion-full.php?id=453055739>

**Held:** breach

The claimant in this case had a whiplash as a consequence of a car accident. The ETC *inter alia* interpreted the word ‘disability’ in a broad way. It states that the overall goal of the ADA asks for a ‘broad minded’ interpretation. Also, in this case the ETC stated that the comparison to be made is between disabled persons and non-disabled persons. The complainant had compared himself to other disabled persons, who did indeed get equal treatment. However, the fact that the employer treated the other disabled persons equally did not mean that he could not have treated the applicant unequally.

**Name of the court:** ETC

**Date of decision:** 23 November 2006

**Reference number:** Opinion 2006-227

**Address of the webpage:** <http://www.cgb.nl/opinion-full.php?id=453056509>

**Held:** no breach

A student has been refused to become a trainee at a University Medical Centre and states that this refusal is based on the fact that her mother has a chronic disease. Implicitly the ETC acknowledges in this case that discrimination by association is also prohibited under the DDA. However, in the case at hand there was no proof of this. As for the possibility that her own (possible) future disablement could play a role, the applicant had not proven that the Medical Centre has refused to give her this position because they were afraid that she would get the same disease or that she would be mentally incapable of doing the work as a consequence of the stress caused by her mother’s condition. The applicant did not prove that she herself had been disadvantaged as a consequence of disablement or association with a disabled person.

<sup>36</sup> See W. Brussee & M. Kroes, ‘Handicap en chronische ziekte’ [Disability and Chronic Illness]. In: S.D. Burri (ed.) Oordelenbundel 2005. Kluwer, Deventer June 2006. The authors also discuss the following Opinions that deal with this same issue: 2005-40, 2005-41, 2005-44, 2005-186 and 2005-187. See about the conflict between the DDA and general labour law norms concerning the duty to inform the employer about disabilities Aart Hendriks NJB 2006, p. 1044.



**Name of the court:** ETC

**Date of decision:** 12 February 2007

**Reference number:** Opinion 2007-26

**Address of the webpage:** <http://www.cgb.nl/opinion-full.php?id=453056571>

**Held:** no breach

The applicant was dismissed from a course for beautician, due to suffering of narcolepsies. The main features of this disease are an incapacity to concentrate and to stay awake during the day. The dismissal constituted a distinction on ground of chronic disease, which is forbidden by Article 6 of the DDA. Nevertheless, the ETC deemed the dismissal justified, for the applicant failed to ask for and to consult about a possible reasonable accommodations. Furthermore, the narcolepsies could be a threat to the health of third persons, namely customers, since a beautician has to handle risky apparatus and tools.

### *Religion and Belief:*

**Name of the court:** ETC

**Date of decision:** 8 September 2004

**Reference number:** Opinion 2004-112

**Address of the webpage:** <http://www.cgb.nl/opinion-full.php?id=453055421>

**Held:** breach

Headscarf case; ‘classical’ instance of indirect religious distinction in the area of goods and services. The respondent was a restaurant that conducted a policy according to which customers were prohibited from wearing headgear. As a consequence of this policy four Muslim women who by reason of their belief wear headscarves were refused entry into the restaurant. Prima facie indirect religious distinction which could not be ‘objectively justified’. Although the respondent’s aim was legitimate, the means used to achieve it were neither appropriate nor necessary.

**Name of the court:** ETC

**Date of decision:** 15 November 2005

**Reference number:** Opinion 2005-222

**Address of the webpage:** <http://www.cgb.nl/opinion-full.php?id=453055723>

**Held:** breach

A Muslim woman was refused a job as a teacher of the Arab language when she applied for a post in a Muslim school. The reason for this was that she refused to wear the headscarf. The ECT first decided that this is a case of direct discrimination on the ground of religion or belief. In the view of the ETC the Muslim school did not succeed in proving that wearing the headscarf was a necessary condition for maintaining or realising the (religious) founding principles of the school.

**Name of the court:** ETC

**Date of decision:** 15 April 2005

**Reference number:** Opinion 2005-67

**Address of the webpage:** <http://www.cgb.nl/opinion-full.php?id=453055566>

**Held:** breach



A complainant stated that a distinction on the ground of ‘belief or philosophy of life’ was made because she did not get a job on the ground that the employer suspected that she was a member of a certain religious group. Is the ‘belief’ of Osho<sup>37</sup> to be considered as a religion? In this Opinion the ETC gives a general guideline as to what is to be considered as a religion. Central in the distinction between ‘religion’ and ‘philosophy of life’<sup>38</sup> is that in the first a ‘high authority’ (‘God’) is central. Also, it should not be a mere individual opinion.<sup>39</sup>

However, the employer did make an unlawful distinction on the ground of philosophy of life; the way the employer asked questions about her beliefs even could be qualified as harassment.

**Name of the court:** ETC

**Date of decision:** 27 March 2006

**Reference number:** Opinion 2006-51

**Address of the webpage:** <http://www.cgb.nl/opinion-full.php?id=453055799>

**Held: breach**

An Islamic woman was refused admittance to a school where she wanted to be trained as an educational assistant, because she had indicated that she did not want to shake hands with men. This is, according to the ETC, an expression of religious belief.<sup>40</sup> The ETC concluded that, since the school did not directly refer to the applicant’s religion, the refusal amounted to indirect discrimination. By focussing on the behavioural codes of Dutch society, the school excluded pupils from minority cultures. There were other ways of showing respect than by means of shaking hands. Equality of men and women fundamental principle could also be upheld by asking the applicant to shake hands with neither men nor women..<sup>41</sup>

**Name of the court:** ETC

**Date of decision:** 20 July 2006

**Reference number:** Opinion 2006-154

**Address of the webpage:** <http://www.cgb.nl/opinion.php?id=453056419>

**Held: no breach**

A former student of an institute that provides education and training for religious spokesmen or leaders for a particular Christian Church (so-called ‘pentecostalism’) wanted to spend some more time there in order to be able to pass some exams, but had already expressed his feeling that he did not fully subscribe to the beliefs and convictions of his Church anymore. He also wanted to live together with his girlfriend. The institute refused (re)admission. The ETC examined whether the institute could be seen as an independent section of a church. This appeared to be the case, since the institute was very closely related to the Church in question and was instrumental in obtaining the main goals of the Church.

The requirement that students should not have sexual relationships outside marriage was considered of central importance for the internal affairs of this institute.

<sup>37</sup> The Bagwan Shree Rajneesh philosophy.

<sup>38</sup> The other protected ground in the GETA. Belief is as such not a protected ground. See para 2.1.1. of this report.

<sup>39</sup> See also 2005-162 (Rastafarians) and 2005-22 (Nazireërs).

<sup>40</sup> See also ETC Opinions 1998-94, 1998-95 and 2002-22.

<sup>41</sup> See also J. Tigchelaar, ‘Respect! Handen schudden II), in: *NJCM-Bulletin* 2006, nr. 6, p. 833-843.



The admittance policy and educational functions were closely linked to its religious identity and was applied equally to all students. Therefore Article 3a of the GETA is applicable and the case falls outside the scope of the equal treatment legislation.

**Name of the court:** Court of Appeal of Amsterdam

**Date of decision:** 24 July 2007

**Reference number:** LJN: BB0057

**Address of the webpage:**

<http://zoeken.rechtspraak.nl/resultpage.aspx?snelzoeken=true&searchtype=ljn&ljn=BB0057>

**Held: breach**

A Christian school for professional education was not allowed to refuse admittance to a student whose parents' ideas differ partially from issues of moral behaviour. The school's admittance policy involved that parents declared that they did not have television or an open internet connection at home, that they use a certain translation of the Bible and that they respect the God-given natural order between men and women. The parents of the claimant had stated that they did have some different opinions in that regard. In addition, it was known to the school board that the applicant's sister wore trousers at home sometimes, which was not accepted in the school's view (it is not clear from the judgement whether she is or has been a student on the same school). According to Article 23 of the Dutch Constitution, schools are allowed to set their own criteria as to which students can be admitted. However, in order to be accepted as an objective justification for different treatment on the ground of religion, these criteria must be closely linked to the (often religious) identity of the school, they must be aimed at maintaining this identity and must be consistently kept. Contrary to the District Court's decision, the Court of Appeal decided that the claimants had managed to prove that the operated criteria were not consistently kept by the school board in other cases. The student, therefore, had to be admitted.

**Name of the court:** ETC

**Date of decision:** 1 October 2007

**Reference number:** Opinion 2007-173

**Address of the webpage:** <http://www.cgb.nl/opinion-full.php?id=453056739>

**Held: breach**

Headscarf case. A fitness centre applied a prohibition on 'religion related clothing, such as headscarf's and garments'. The ETC deemed this practice a direct discrimination on ground of religion, as an explicit link was established between the clothing regulation and a religion. (It would be *indirect discrimination* if it had been a neutral formulated clothing regulation, for which a broader range of possible justifications is applicable under the GETA) No legal justifications for this distinction were found.

**Name of the court:** District Court Utrecht

**Date of decision:** 30 August 2007

**Reference number:** LJN: BB2648

**Address of the webpage:**

<http://zoeken.rechtspraak.nl/resultpage.aspx?snelzoeken=true&searchtype=ljn&ljn=BB2648>

**Held: no breach**

A female Muslim teacher on a public school had decided not to shake hands with men anymore on ground of her religious belief.





The school had dismissed her on ground of a breach of confidence between employer and employee. This argument was accepted by the Court.

According to the Court, the woman had failed in her duty in communicating her decision properly and, in addition to this, she should have known that her decision would cause commotion and unrest among the multi-ethnic pupils. The Court held that the freedom of religion nor any other fundamental principle was at stake in this case: in the view of the Court, it was simply a question about the reasonableness of continuing the employment contract. The school had nevertheless to pay the full dismissal compensation. In earlier instance, the ETC had deemed this a breach of the equal treatment legislation and had called on the school board to reengage the teacher. The Court however, claimed not to judge about whether or not a school board may oblige teachers to shake hands, but only to judge this case from the point of view of labour law.

The Court stated that the case should not be judged on the Equal Treatment Law, as the dismissal was not based on neglect of duty or in inaptitude for the job as a teacher, but on only a breach of confidence that was caused by the careless way of announcing her decision not to shake hands anymore. This had caused a lot of commotion on the multicultural school, which had had a negative influence on the educational climate on the school.

**Name of the court:** District Court Den Haag

**Date of decision:** 20 December 2007

**Reference number:** LJN: BC0619

**Address of the webpage:**

<http://zoeken.rechtspraak.nl/resultpage.aspx?snelzoeken=true&searchtype=ljn&ljn=BC0619>

**Name of the court:** Raad van State (Council of State, highest administrative court),

**Date of decision:** 5 December 2007

**Reference number:** LJN: BB9493

**Address of the webpage:**

<http://zoeken.rechtspraak.nl/resultpage.aspx?snelzoeken=true&searchtype=ljn&ljn=BB9493>

The political party SGP (Staatkundig Gereformeerde Partij) is founded on the Bible and a strict Reformed version of the Christian belief. In their view, women should not take part in political life, since their role and mission in life is not to lead over men. According to the statutes of the SGP, women can only become associate members of the party, which means that they cannot represent the party in Parliament or any other political position. A number of women's rights organizations have issued a summons against the Dutch government, since in their view the government (and female SGP members as well) has failed to take steps against the discriminatory policy of the SGP. A District Court had decided in 2005 that the government should take the necessary steps to ban discrimination of women in political and public life, as is prescribed by article 7 of CEDAW (previously, this case was found inadmissible before the ETC, which has no jurisdiction with regard to internal affairs of political parties, see *Opinion 2001-150*). This means inter alia that the government is not allowed to subsidize this party. However, in December 2007, the highest Administrative Court in the Netherlands (Raad van State) ruled that the subsequent decision of the Minister of Interior to withdraw the subsidy in turn was illegal since the SGP had not breached Dutch criminal law provisions concerning discrimination.



A few weeks later, on appeal from the District Court decision, the Court of Appeal decided that the SGP can indeed be compelled by the government to change its policies.

In their view, the prohibition on discrimination of women should prevail over the freedom of religion and association in this case. The SGP as well as the State again appealed to this decision and the matter finally will have to be decided by the Supreme Court.

A crucial underlying issue is whether the principle of democracy and the right to freedom of association are implying that political associations have the right to make (internal) rules and regulations whatever they want, even if these rules discriminate against women. The Supreme Court. Secondly, the issue is complicated since the civil courts and the administrative courts appear to have different views on what the central government can or should do to here; the Civil court of Appeal accepts the competence of the Council of State as the highest Administrative judge about rules of the subsidizability and non-subsidizability, but simultaneously insist that non-discrimination law demands that something has to be done against the alleged discriminatory conduct of the SGP. The Supreme Court will have to cut the knot with regard to this issue.

**Name of the court:** District Court Rotterdam

**Date of decision:** 6 August 2008

**Reference number:** LJN: BD9643

**Address of the webpage:**

[http://zoeken.rechtspraak.nl/resultpage.aspx?snelzoeken=true&searchtype=kenmerken&vrije\\_tekst=hand+schudden](http://zoeken.rechtspraak.nl/resultpage.aspx?snelzoeken=true&searchtype=kenmerken&vrije_tekst=hand+schudden)

**Held: no breach**

A male Muslim applicant was rejected for the position of ‘Customer Manager’ at the Social Services department of the city of Rotterdam because he refused to shake hands with individuals of the opposite sex. The applicant claimed that this was because of his Islamic belief. The municipality stated in defence that they had to protect women against discrimination by a civil servant. In the specific job of customer manager, the applicant would be receiving many people, and therefore ‘greeting’ should be regarded as an essential aspect of the position. In earlier instance, the ETC decided that the protection of women against discrimination constituted a legitimate aim, but that the municipality had failed to seek alternative ways of showing respect to both male and female clients equally, as the applicant had offered not to shake hands with both men and women. (see ETC Opinion 2006-202 of 5 October 2006). The District Court, however, judged that a customer manager is an important contact person between the local authorities and their citizens. The Court ruled that the community has the right to choose ‘to observe the usual rules of etiquette and of greeting customs in the Netherlands’. As a result, the Court considered it necessary and proportional to reject a candidate for the specific position who is not willing to observe those rules of etiquette. In this case, the right to have a job as a civil servant without regard to religion is colliding with the right to be treated equally by civil servants. The case is complicated because ‘shaking hands’ is not a written right or obligation, but a custom, which might be considered as specific Western.



**Name of the court:** ETC

**Date of decision:** 23 October 2008

**Reference number:** Opinion 2008-123

**Address of the webpage:** <http://www.cgb.nl/opinion.php?id=453056386>

**Held:** +/- breach

In this Opinion of the ETC Commission had to decide upon a recent change of policies of the Amsterdam-Amstelland police force. A police officer, who until that time had been performing her work in civilian clothes (her tasks were of administrative nature), had been ordered to wear the police uniform.

This meant that she was no longer able to wear her headscarf (since the uniform instructions do not allow wearing anything else than the uniform cap). In the Opinion, the ETC acknowledges the right of the Ministry / Head of Police to require that police officials who are in contact with the general public should wear a uniform. However, for some functions where there is no such contact, they should be restrictive in stating that wearing a uniform is obligatory.

The ETC avoids taking a particular position in the delicate issue whether the police uniform dress code should be compatible or not with particular clothes or head gear that expresses some kind of religious belief. But in case of a police uniform which rules out religious signs such as a headscarf – a position to which the current government seems to incline to – the ETC recommends a restrictive use of the requirement of wearing the uniform, especially in cases when there is no contact between a police officer and the general public.

### ***Sexual Orientation:***

**Name of the court:** Chairman of District Court The Hague

**Date of decision:** 26 July 2006

**Reference number:** LJN AY5005

**Address of the webpage:**

<http://zoeken.rechtspraak.nl/resultpage.aspx?snelzoeken=true&searchtype=ljn&ljn=AY5005>

**Held:** no breach

In a “Kort Geding” (summary proceeding), the Chairman of the Court ruled that the Dutch General Federation for Dancing Sports did not unlawfully exclude a homosexual couple from participation in national dancing contests. With this, the Chairman judged different from an earlier ETC Opinion (2004-116 of 21 September 2004) which stated that the exclusion of this couple constituted direct discrimination on the ground of sex, as well as direct discrimination on the ground of sexual orientation, for which there was no legally acceptable justification. The Chairman judged that although the dancing sports federation discriminated between sexes, this was justified under the clause in article 2(2) of the GETA which allows for ‘gender specific requirements’. In the case of sport competitions, a requirement could be, on the basis of a decree by the Government, the fact that there is a relevant difference in physical strength between men and women. Homosexual persons can actually participate in dancing contests, provided that they are prepared to dance with a partner of the opposite sex.



*ETC Opinion 2005-5 of 18 January 2005*: A medical research institute that works for the pharmaceutical industry advertised for heterosexual men (and their partners) to participate in a test for a medicine that would prevent a premature ejaculation. Homosexual couples were excluded from the survey.

According to the ETC, the exclusion amounted to direct discrimination on the ground of sexual orientation for which the law does not allow a justification.<sup>42</sup>

**Name of the court:** ETC

**Date of decision:** 27 February 2006

**Reference number:** Opinion 2006-20

**Address of the webpage:** <http://www.cgb.nl/opinion-full.php?id=453055769>

**Held:** Breach

On the basis of national health policy, many Municipal Health Services supply cheap vaccinations against Hepatitis A and B to men with homosexual contacts, drug addicts and prostitutes on the ground of their increased risk of catching this illness. The applicant (male, heterosexual) requested a vaccination and had to pay far more than the above-mentioned groups.

The ETC considered this a direct discrimination on the ground of sexual orientation, because homosexuality is the distinguishing criterion. According to the ETC however, such direct discrimination may be justified when the prohibition of a certain measure would be unacceptable or completely irrational. In this case, public health interests can justify an inroad to the closed system of justifications. The ETC advises the legislator to provide for such an exception by law as soon as possible.<sup>43</sup> This case is particularly interesting because for the first time the ETC decided (*contra legem*) that there was a possibility for an objective justification in a clear case of direct discrimination. Thereby, the ETC – in a situation that application of this system would lead to outcomes that can in no way be deemed “rational” or “reasonable” – broke open the closed system of justification that has been laid down both in the Directives and in the Dutch equal treatment legislation.<sup>44</sup>

**Name of the court:** ETC

**Date of decision:** 2 August 2007

**Reference number:** Opinion 2007-85

**Address of the webpage:** <http://www.cgb.nl/opinion.php?id=453056641>

**Held:** no breach

In this case, men who have had homosexual intercourse were rejected as blood donors by a blood bank on the basis of national and EU health directives. The ETC judged that rendering the possibility to donate blood, has to be regarded as rendering a service in the sense of the GETA. The ETC held again (as it did before in opinion 2006-20) that there was an extralegal objective justification for a case of direct discrimination.

<sup>42</sup> In a commentary to this Opinion Waaldijk observes that this case demonstrates that sometime an exception (like ‘genuine sex’ requirement) could be necessary. C. Waaldijk: ‘Seksuele gerichtheid en burgerlijke staat’ [Sexual orientation and civil status]; in: Oordelenbundel 2005, red. S.D. Burri, Kluwer Deventer June 2006. Waaldijk mentions a second case that demonstrates this necessity in his view: Opinion 2005-58, which was about a dating site on the internet.

<sup>43</sup> This advice was already given to the government in the Evaluation Report of the ETC of the year 2000. The government chose not to follow up on that advice until now.

<sup>44</sup> See T. Loenen, ‘Doorbreking gesloten systeem AWGB’, in: *NJCM-Bulletin* 2006, nr. 6, p. 823-832.



In this case the ETC considered the severe consequences of the risk of blood recipients for getting HIV infected blood as an objective justification, for there is still no blood test that is 100 % scientifically reliable on detecting HIV. This case is also of great importance for Dutch equal treatment law in general, as the ETC breaks through the closed system of legally prescribed justifications that might possibly justify forms of direct discrimination in this case.

**Name of the court:** ETC

**Date of decision:** 15 April 2008

**Reference number:** Opinion 2008-40

**Address of the webpage:** <http://www.cgb.nl/opinion-full.php?id=453056852>

**Held: breach**

A municipality in the Netherlands (Gemeente *Langedijk*) had rejected an applicant for the position of registrar, for the reason that he was not willing to marry same-sex couples (same-sex couples have a right to marry under Dutch law since 1998).

The applicant stated that he had religiously based conscientious objections against same-sex marriage, and therefore he was indirectly discriminated against on the ground of religion. In earlier occasions (Opinions 2002-25 and 2005-26), the Equal Treatment Commission (ETC) found that communities should search for 'practical solutions' in time-tables, in order to employ applicants with conscientious objections against same-sex marriages and at the same time have same-sex marriages performed by colleagues without such objections. In this case however, the ETC judged that the rights of third persons (namely same-sex couples) were at stake.

The ETC deemed it "hard to justify" that a municipality allowing a registrar to discriminate between same-sex and heterosexual couples. Therefore, the rejection of the applicant constituted indirect discrimination on the ground of religion, but this decision was objectively justified.

In this case, the general principle of non-discrimination is conflicting with the principle of the equal right to be employed in public office. As stated above, the ETC made a reversal with respect to earlier decisions in similar cases. The ETC seems to attach more importance now to the exemplary role of a (local) government in combating discrimination. In connection with this, less room is left for the individual religious conscience of the civil servant. It must be noticed that this Opinion of the ETC is opposing the intended policy of the current national government to ensure the rights of same-sex couples simultaneously with the rights of individual local registrars with conscientious objections. According to the coalition agreement, every single municipality is obliged to perform same-sex marriages, but at the same time conscientious objections should be dealt with pragmatically. This means that every municipality is obliged to have one or more registrars who don't have objections towards same-sex marriage.

However, as the opinions of the ETC are not binding, it is not sure how such a case would be judged by the Court, which has deemed a dismissal by a municipality unlawful in the past in similar circumstances on the basis of general provisions in labour law. (District Court of Leeuwarden 24 June 2003, LJN AH8543).





## 1. GENERAL LEGAL FRAMEWORK

### Constitutional provisions on protection against discrimination and the promotion of equality

- a) *Briefly specify the grounds covered (explicitly and implicitly) and the material scope of the relevant provisions. Do they apply to all areas covered by the Directives? Are they broader than the material scope of the Directives?*

Article 1 of the Dutch Constitution (1983) reads as follows: “All who are in the Netherlands shall be treated equal in equal circumstances. Discrimination on the grounds of religion, belief, political opinion, race, sex or on any other ground shall be prohibited”.

There are no boundaries to the personal and material scope of Article 1. This means that the Constitutional provision applies to everybody who actually is in the country and to all fields of social and economic life that are covered by the Directives and beyond.

A Parliamentary motion to explicitly include ‘disability’ and ‘chronic disease’ in the list of grounds was accepted in 2001.<sup>45</sup> In the view of the Government however, these were covered by ‘any other grounds’. Nevertheless, it has investigated the possibility for an expansion of the list in Article 1.<sup>46</sup> In 2004, the ETC has advised to expand the list to all grounds covered by the GETA, the ADA and the DDA.<sup>47</sup> Subsequently, the Government announced that for the time being it would stick to its earlier opinion and commissioned at the same time an in-depth study into the matter by experts in constitutional law.<sup>48</sup> This commission of experts has published its report on April 12, 2006. It concludes that it is not necessary to expand the list of grounds in Article 1 of the Constitution, since this provision has direct horizontal effect between citizens and can also be applied by judges in cases of disability, age or the other grounds of the GETA that are not covered in the list of Article 1 (e.g. marital status). The inclusion in the Constitution of such grounds does not offer additional protection. In addition, the commission remarks that, by endlessly extending the non-discrimination grounds in the Constitution, there is danger of inflation in the sense that discrimination will no longer be seen as a very serious matter (restricted to grave grounds). The Minister has presented the report to Parliament and subscribes to its conclusions.<sup>49</sup>

- b) *Are constitutional anti-discrimination provisions directly applicable?*

The Constitutional equality guarantee is beyond doubt directly applicable in *vertical* relations. However, there is a limitation to this.

<sup>45</sup> Motion Rouvoet of 6 December 2001, Tweede Kamer, 2001-2002, 28 000 XVI, nr. 63 (“Motie Rouvoet”). It should be noted that, in respect of ‘disability and chronic disease’, the discussion on an (explicit) expansion of Article 1 of the Constitution to include these grounds had already taken place during the Parliamentary debates on the AWGB. See the amendment handed in by Groenman (Tweede Kamer, 1992/1993, 22 014, nr. 15), which did not receive sufficient Parliamentary support.

<sup>46</sup> Letter of the Minister of Internal Affairs (“Brief van de Minister van Binnenlandse Zaken en Koninkrijksrelaties”), Tweede Kamer, 2001-2002, 28 000 XVI, nr. 112. See also Tweede Kamer, 2005-2006, 29 355, nr. 24, in which the Government announces the installment of the commission of experts.

<sup>47</sup> ETC Advice 2004/03 of 26 February 2004.

<sup>48</sup> Letter of the Minister of Internal Affairs, Tweede Kamer, 2003-2004, 29 355, nr. 7.

<sup>49</sup> Tweede Kamer 2005-2006, 29 335, nr. 28 of 1 May 2006.





Formal statutory acts (i.e., Acts made by the Government and the Parliament) may not be subjected to Constitutional review by the Courts (according to Art 120 of the Constitution), and thus, neither to a Constitutional ‘equality’ review.<sup>50</sup>

c) *In particular, where a constitutional equality clause exists, can it (also) be enforced against private actors (as opposed to the State)?*

It is widely accepted that the Constitutional equality guarantee can be applied in horizontal relations as well (Cf. *Hoge Raad* (Supreme Court) in *Van Pelt/Martinair*, 8 October 2004, NJ 2005, 117). However, there is some debate about what the equal treatment or non-discrimination norm entails in concrete situations and how this norm should be weighted against other constitutional rights (e.g. freedom of speech/opinion or freedom of belief/religion). In order to ensure the applicability of the equality principle in horizontal relations, the Constitutional guarantee has been elaborated in criminal law provisions and in specific statutory Equal Treatment Acts.

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<sup>50</sup> However, Dutch courts do have the power to strike down legislation that violates any directly applicable provision of international law (under Articles 93 and 94 of the Constitution). With respect to discrimination, the Dutch courts have to consider rather frequently whether some piece of legislation violates Art. 14 of the European Convention on Human Rights, Art. 26 of the International Covenant on Civil and Political Rights, or any other international or European equality provision.



## 2. THE DEFINITION OF DISCRIMINATION

### 2.1 Grounds of unlawful discrimination

*Which grounds of discrimination are explicitly prohibited in national law? All grounds covered by national law should be listed, including those not covered by the Directives.*

Sex (including pregnancy), religion, belief, political opinion, race, nationality, hetero- and homosexual orientation, civil (marital status), discrimination on the grounds of employment duration, discrimination on the grounds of the employee's permanent/fixed-term contract, age and disability. Article 1 of the Constitution is open-ended.

#### 2.1.1 Definition of the grounds of unlawful discrimination within the Directives

- a) *How does national law on discrimination define the following terms: racial or ethnic origin, religion or belief, disability, age, sexual orientation?*  
*Is there a definition of disability on national level and how does it compare with the concept adopted by the European Court of Justice in case C-13/05, Chacón Navas, Paragraph 43, according to which "the concept of 'disability' must be understood as referring to a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life"?*

The words *racial or ethnic origin, religion, belief, disability, age and sexual orientation* are not defined in Dutch equal treatment law. The respective acts of Dutch equal treatment law apply symmetrically, in the sense that both persons of the dominant group (ethnic majority, religious majority, non-disabled people, young/old people<sup>51</sup> and heterosexuals) and the disadvantaged group (ethnic minority, religious minority, disabled people, old people/young people and homosexuals) are covered. However, as grounds of discrimination have to be interpreted in concrete cases, some indications about the definition of grounds can be derived from case-law (Please see below under section b) for an overview).

Since there is no definition of disability in the DDA we can not compare it with the standards set by the ECJ in the Chacón Navas case. Dutch equality law does not define disability, but contrary to the EU level of protection, "chronic disease" is in addition to "disability" explicitly included as a ground in the DDA.<sup>52</sup> With regard to the definition, we can derive some guidelines from the *travaux préparatoires* of the DDA and the cases of the ETC. Criteria mentioned during the preparation of the Law were (*inter alia*) the long duration of the disablement or chronic disease and the fact that – in case of disablement – the impairment is irreversible. This means that temporary disablements as a consequence of accidents are excluded.<sup>53</sup>

<sup>51</sup> Here it is difficult to establish who is the oppressed/dominant group in the context of age discrimination, because, as was observed by Veldman, with regard to 'age' one may distinguish many different groups (50+/50-/25+/30-/young people/old people). See A. Veldman, 'Wet Leeftijdscriminatie gooit veel overhoop', in: *Sociaal Recht* 2003, p. 363-364, at p. 363.

<sup>52</sup> For a comparison of the EU and Dutch level of protection against discrimination of disability, see L.B. Waddington and M.H.S. Gijzen, '(Her)definitie van het begrip 'handicap in de EG en Nederlandse gelijke behandelingswetgeving', NTER nummer 12, december 2006, p. 270-279.

<sup>53</sup> See Explanatory Memorandum to the ADA, Tweede Kamer 2001-2002, 28169, nr 3, p. 9 and p. 24 and nr. 5, p. 16.



According to the Explanatory Memorandum to the DDA, the concept of “handicap” (disability) may embrace not only physical, but also mental and psychological impairments.<sup>54</sup> The Government is of the opinion that the question what constitutes a disability is not only dependent on the physical or psychological features/characteristics of the individual, but also on the physical and social environment that allows/does not allow people to participate on an equal footing. The ETC has accepted this line of reasoning and – with a view to the goal of the DDA – interprets the terms disablement and chronic disease in a broad way.<sup>55</sup>

- b) *Where national law on discrimination does not define these grounds, how far have equivalent terms been used and interpreted elsewhere in national law (e.g. the interpretation of what is a ‘religion’; or a “disability”, sometimes defined only in social security legislation)? Is recital 17 of Directive 2000/78/EC reflected in the national legislation against discrimination?*

**Disability and Chronic Disease:** The concepts of ‘disability’ and ‘chronic disease’ have not been defined in the DDA. The Government has deemed it unnecessary and undesirable to do so.<sup>56</sup> Some guidelines as to the meaning of this word can be derived from the discussions that took place during the enactment procedure of the DDA. These are the long duration of the disablement / chronic disease, the fact that no cure is possible and the fact that it covers physical and mental or psychological impairments. (See also the answer to question a) in this section.)

National law on discrimination uses functional criteria like the duration, the seriousness and the irreversibility of the disablement. As far as there are definitions of “disability” in other legislation, these do not affect the material scope of “disability” as a ground of discrimination. Recital 17 of Directive 2000/78/EC expresses that the directive does not oblige employers to appoint individuals who are not capable or available for the essential functions of a post. Although this recital is not explicitly reflected in the DDA or GETA, its content is covered by Article 1 of the Dutch Constitution, which states that all men shall be treated equal “in equal cases”. In case of an individual who is not capable to perform the essential tasks of a post, the case is not considered as “equal”, and consequently there is no obligation to treat an incapable applicant equal. Article 2 of the DDA equates the failure to make reasonable adjustments for employees with disabilities with discrimination itself. Reasonable adjustments are under article 2 ‘reasonable’ for as long they do not impose ‘disproportional loads’ upon the employer. The boundary between the case in which an applicant is not capable or available for “essential functions” and the case in which reasonable accommodations could be made, is to be drawn in case law.

<sup>54</sup> *Ibid.*, Tweede Kamer 2001-2002, 28169, nr 3, p. 24.

<sup>55</sup> See e.g. ETC *Opinions* 2005-234, 2006-227, 2007-25.

<sup>56</sup> Explanatory Memorandum to the DDA, Tweede Kamer 2001-2002, 28 169, nr. 3, p. 9.

**Race:** The Explanatory Memorandum to the GETA<sup>57</sup> stresses that ‘race’ is a broad concept, which must be interpreted in line with the UN Convention on the Elimination of Racial Discrimination (CERD).<sup>58</sup> The concept embraces: *race, colour, descent and national<sup>59</sup> or ethnic origin.*<sup>60</sup> The Dutch Supreme Court as well as the ETC use the CERD definition of race. In the EC Implementation Act, which has amended the GETA, the Government has not deemed it necessary to explicitly include the notion of ‘ethnic origin’ in the law, since this is sufficiently captured by this interpretation of ‘race’.<sup>61</sup> The ETC uses as a yardstick whether the applicant belongs to *a coherent group with collective physical, ethnic, geographical or cultural characteristics and which distinguishes itself from other groups by common features or a common behaviour.*<sup>62</sup> However, sometimes it is difficult to draw the line between race, ethnicity and religion. If all three grounds were protected in the same sense (as far as personal and material scope of the legislation is concerned and the exceptions to the non-discrimination ground are similar for each of these grounds), that would be no problem. However, this is not the case in the Dutch legal system (where race and ethnicity are covered more broadly than the ground religion).

**Religion and Belief:** In the Explanatory Memorandum to the EC Implementation Act, the Government has made it clear that it wishes to stick to the term “levensovertuiging” (philosophy of life), rather than introducing the term “geloof” (belief), the term used by Directive 2000/78. According to the Government there is no material difference between these two terms. In addition to “levensovertuiging”, the GETA also covers “godsdienst” (religion).<sup>63</sup> Having said this, *religion* and *belief* are defined and applied in a broad sense. The only restriction to the scope of the concept is that it should exceed a mere personal conviction or expression.<sup>64</sup> On the other hand, it is not necessary that a certain conviction (the need of wearing a headscarf for women, for instance) is adhered by all believers of a certain religion for protection under the ground of religion.<sup>65</sup> Finally, it is also established (ETC-) case-law that the right not to be discriminated against on the ground of religion incorporates both the right to have religious beliefs or to adhere to a certain philosophy of life and the right to behave in accordance with that religion or belief.<sup>66</sup>

**Age:** The legislator has not defined the word ‘age’. However, it is not only direct references to someone’s age that are considered to be direct distinctions on this ground.

<sup>57</sup> Explanatory Memorandum to the GETA, Tweede Kamer, 1990-1991, 22 014, nr. 3 (“Memorie van Toelichting bij de Algemene Wet Gelijke Behandeling”).

<sup>58</sup> International Convention on the Elimination of All Forms of Racial Discrimination of 21 December 1965. Many indications of what constitutes a ‘race’ can also be found in the discussions between Government and Parliament during the drafting of the Criminal Code provisions against racial discrimination in 1971. It appears that the same interpretation has been given to these criminal law provisions as in equal treatment legislation, since both are meant to implement the UN CERD. See J.L. van der Neut, *Discriminatie en Strafrecht*, Arnhem: Gouda Quint 1986.

<sup>59</sup> It is to be noted that the notion of “national origin” only embraces nationality in an *ethnic* sense. Nationality in a *civic* sense is covered by the non-discrimination ground “nationality”.

<sup>60</sup> Explanatory Memorandum to the GETA, Tweede Kamer, 1990-1991, 22 014, nr. 3, p. 13.

<sup>61</sup> Explanatory Memorandum to the EC Implementation Act, Tweede Kamer, 2002-2003, 28 770, nr. 3, p. 3. See also J.H. Gerards and A.W. Heringa, *Wetgeving Gelijke Behandeling*, Kluwer: Deventer 2003, p. 28-30.

<sup>62</sup> See, e.g., Opinions 1997-119 and 1998-57.

<sup>63</sup> Since the government does not seem to see a difference in meaning, we have translated “levensovertuiging” in belief in this report. The ETC, in the English translation of the GETA on its web site, also translates “levensovertuiging” into belief.

<sup>64</sup> See, e.g., ETC Opinion 2007-207.

<sup>65</sup> See, e.g., ETC Opinion 2008-12.

<sup>66</sup> See, e.g., ETC Opinion 1997-46 and opinions 2004-112, 2004-148 and Explanatory Memorandum to the GETA, Tweede Kamer, 1990-1991, 22 014, nr. 3, p. 39-40. And, similarly, Memorandum in Reply to the GETA, 1990-1991, 22 014, nr. 5, p. 39-40 (“Memorie van Antwoord bij de Algemene Wet Gelijke Behandeling”).



Also the use of classifications like ‘young’, ‘old’, ‘adult’, ‘pensioner’, or ‘student’ may be considered to cause age discrimination. Since the ADA allows for objective justifications (open system) both in the case of direct and indirect discrimination, the boundaries between what kind of classification constitutes direct or indirect discrimination are not problematic.

**Sexual orientation:**<sup>67</sup> The GETA employs the terminology ‘hetero- or homosexual orientation’, to refer to the terminology (in English) used by Directive 2000/78 *i.e.*, ‘sexual orientation’. The Dutch Government opted for the term “gerichtheid” (orientation) rather than “voorkeur” (preference). The term ‘orientation’ expresses better that not only individual emotions are covered, but also concrete expressions thereof. A major other reason for the Government’s preference for the term ‘hetero- or homosexual orientation’ above ‘preference’ or simply sexual orientation, has been that the latter term might possibly include ‘paedophile orientation’.

The notion ‘hetero- or homosexual orientation’ does cover ‘bisexual orientation’ but it excludes ‘transsexuality’ and ‘transvestism’. Under Dutch equal treatment law, discrimination on the ground of ‘transsexuality’ or ‘transvestism’ is regarded a form of sex discrimination.<sup>68</sup>

c) *Are there any restrictions related to the scope of ‘age’ as a protected ground (e.g. a minimum age below which the anti-discrimination law does not apply)?*

The ADA makes no restrictions whatsoever to the scope of this ground for discrimination. The law applies symmetrically (it does not provide for a higher level of protection for certain age categories (such as ‘the elderly’) and there is no cut-off point (no minimum age for application of the ADA).

d) *Please describe any legal rules (or plans for the adoption of rules) or case-law (and its outcome) in the field of anti-discrimination which deal with situations of multiple discrimination. This includes the way equality body (or bodies) are tackling cross-grounds or multiple grounds discrimination.*

- *Would national or European legislation dealing with multiple discrimination be necessary in order to facilitate the adjudication of such cases?*

The concept of multiple discrimination is not explicitly addressed in Dutch equal treatment legislation. Although the General Equal Treatment Act contains a closed list of non-discrimination grounds of discrimination, parliamentary history does not exclude the possibility of a combination of grounds. Moreover, including also the prohibition of discrimination based on a combination of grounds seems to be most in line with the legislator’s objectives with this legislation. See below (section e) for Dutch case-law dealing with intersecting grounds of discrimination.

Multiple discrimination (or intersectional discrimination) now is discussed more and more in the Dutch legal academic world and among equal treatment specialists.<sup>69</sup>

<sup>67</sup> The meaning of ‘sexual orientation’ in Dutch equal treatment law in the context of EC law has extensively been discussed by Kees Waaldijk in his sexual orientation report. See: Kees Waaldijk, ‘The Netherlands’, in: Kees Waaldijk & Matteo Bonini-Baraldi (eds.), *Combating sexual orientation discrimination in employment: legislation in fifteen EU member states*, Report of the European Group of Experts on Combating Sexual Orientation Discrimination, Leiden: Universiteit Leiden 2004, p. 341-375, online at [www.emmeijers.nl/experts](http://www.emmeijers.nl/experts) and at [www.eu.int/comm/antidiscrimination](http://www.eu.int/comm/antidiscrimination).

<sup>68</sup> Court of Appeal Leeuwarden, 13 January 1995, *Nederlandse Jurisprudentie* 1995 nr. 243 and, *e.g.*, ETC Opinions 1998-12 and 2000-73.



The problem is also discussed in the second 5-year (internal) evaluation of the ETC.<sup>70</sup> There still seems to be too little knowledge about the actual extent of the problem. The authors are therefore not yet convinced if – and if so – what kind of special legal approach could be of added value.

- e) *How have multiple discrimination cases involving one of Art. 13 grounds and gender been adjudicated by the courts (regarding the burden of proof and the award of potential higher damages)? Have these cases been treated under one single ground or as multiple discrimination cases?*

The ETC has accepted an intersectional approach in only one case.<sup>71</sup> In this case, the grounds of disability and race intersected and the combined effect was acknowledged by the ETC. This combined effect was no reason for a higher sanction in this case. The ETC has showed willingness to apply different grounds of discrimination coherently in some other cases (with gender aspects as well), but the petitioner failed to substantiate the (alleged) discrimination, as well as the combined effect of intersection grounds in these cases.<sup>72</sup> As far as the author is aware, there are no instances of cases of multiple discrimination before Dutch courts.

### 2.1.2 Assumed and associated discrimination

- a) *Does national law (including case law) prohibit discrimination based on perception or assumption of what a person is? (e.g. where a person is discriminated against because another person assumes that he/she is a Muslim or has a certain sexual orientation, even though that turns out to be an incorrect perception or assumption).*

Prohibition of discrimination on the basis of an assumed characteristic only is explicitly prohibited in the DDA (Article 1 sub b). This is prohibited under the definition of a direct distinction: “*distinction between people on the ground of a real or **alleged** disability or chronic illness*”. Neither the Constitution nor the GETA are prohibiting discrimination based on assumed grounds *explicitly*, but it is assumed that such instances are covered implicitly.

- b) *Does national law (including case law) prohibit discrimination based on association with persons with particular characteristics (e.g. association with persons of a particular ethnic group or the primary carer of a disabled person)? If so, how? Is national law in line with the judgment in Case C-303/06 Coleman v Attridge Law and Steve Law?*

<sup>69</sup> See e.g. Rodrigues & Van Walsum, Ras en Nationaliteit; in J.M. Gerards e.a. (eds), *Oordelenbundel 2006*. Nijmegen: Wolf Legal Publishers 2007.

<sup>70</sup> ETC 2005: Het verschil gemaakt (Making the difference), Utrecht 2005. At p. 39-40.

<sup>71</sup> ETC Opinion 2006-256 (complaint of a Turkish blind woman against an employment office for not being subjected to an adapted examination), accessible in Dutch on [www.cgb.nl](http://www.cgb.nl).

<sup>72</sup> ETC Opinion 2006-67 (complaint from a divorced father against a hospital for not giving adequate information about his son; alleged intersecting grounds: sex and marital status; presumption not substantiated, no breach), ETC Opinion 2007-40 (complaint of a female cleaner about dismissal and (sexual) harassment; alleged intersecting grounds: sex and race; presumption not substantiated, no breach), accessible in Dutch on [www.cgb.nl](http://www.cgb.nl).



Discrimination by association is not covered *explicitly* in national law. However, article 1 sub b of the GETA contains the legal definition of a ‘direct distinction’. The wordings of this Article do not explicitly require that the alleged distinction is *de facto* based on the race, religion/ belief, or sexual orientation *of the alleged victim*.<sup>73</sup> Therefore, in theory, it is possible that discrimination based on association is covered as well. The same line of reasoning can be followed as regards age (as protected in the ADA). With regard to disability and chronic illness, it is stated in the Parliamentary discussions on the DDA that what matters is not (actually) having a disability but being discriminated against as compared with a person who does have or does not have a disability.

Some commentators have explained this to mean that persons associated with disabled people are protected as well.<sup>74</sup> In *Opinion* 2006-227 the ETC has considered an alleged case of disability discrimination by association. *Implicitly* the ETC acknowledges in this case that discrimination by association is also prohibited under the DDA. However, in that case there was no proof that the applicant had suffered any detriment because of the fact that someone in her environment was disabled

## 2.2 Direct discrimination (Article 2(2)(a))

### a) How is direct discrimination defined in national law?

#### Formal v. substantive equality

Dutch equal treatment legislation largely advocates the *formal*, rather than *substantive*, equality approach. All persons, and not only those belonging to the ‘disadvantaged groups’ in society, are protected by the law. Unjustified distinctions are assessed on an individual level, not at the level of the group to which one belongs.<sup>75</sup> Moreover, positive action measures are perceived as being an exception to the central norm, which dovetails with the formal equality approach. In a substantive approach, such measures would form part and parcel of the central norm.<sup>76</sup> It is however submitted, that in various regards the substantive approach makes its presence felt. A-symmetry can be found in the context of ‘pregnancy’ and in certain other contexts.<sup>77</sup> The substantive approach especially permeated in the duty for the employer (or other addressees of the law) under the DDA to provide a reasonable accommodation for disabled people. Through this concept it is recognised *to a certain extent* that the equality principle not only prohibits the unequal treatment of equals, but also entails a positive duty of unequal treatment of unequals [the so-called ‘*Thlimmenos* doctrine’].<sup>78</sup>

<sup>73</sup> See also Kees Waaldijk *supra* footnote 67.

<sup>74</sup> However, in our view this passage refers to the fact that the DDA contains a symmetrical non-discrimination norm, both applying to disabled persons and non-disabled persons.

<sup>75</sup> Eerste Kamer, 1992-1993, 22 014, nr. 212b, p. 4 and nr. 212c, p. 8, cited by K. Wentholt, “Het verbod om onderscheid te maken”, in: I.P. Asscher-Vonk and C.A. Groenendijk, *Gelijke Behandeling: Regels en Realiteit*, Den Haag: SDU uitgevers 1999, p. 89-130, at p. 91.

<sup>76</sup> T. Loenen, *Het Gelijkheidsbeginsel*, Ars Aequi Cahiers, Rechtstheorie deel 2, Nijmegen: Ars Aequi Libri 1998, p. 66-67.

<sup>77</sup> ETC Opinions 1998/131, 2002/188 and 2003/47.

<sup>78</sup> European Court of Human Rights in *Thlimmenos v. Greece* of 6 April 2000, where the Court held that “the right not to be discriminated against (...) is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different”. Similarly: European Court of Justice, Case C-342/93 *Gillespie* [1996] ECR I-475.



### **Direct discrimination under the Age Discrimination Act<sup>79</sup>**

Article 1(1) of the ADA defines a ‘distinction’ as follows: “*In this Act, distinction shall mean distinction on the grounds of age or on the grounds of other characteristics or conduct that results in distinction on the grounds of age*”. Article 1(1) transposes Articles 2(1) and 2(2) under (a) and (b) of Directive 2000/78 (regarding the concepts of direct and indirect discrimination). Clearly, *direct* discrimination is implemented by the phrase ‘distinction on the grounds of age’, and *indirect* discrimination by the phrase ‘[distinction] on the grounds of other characteristics or conduct that results in distinction on the grounds of age’.

In contrast to the conventional approach adopted in the Dutch equal treatment legislation, no distinction has been made in the ADA as between *direct* and *indirect* distinction.

In this regard the legal approach for ‘age’ differs, compared with the other grounds for discrimination.<sup>80</sup> The Government has pointed out that Article 6 of Directive 2000/78 provides for a possibility of ‘objective justification’ for instances of direct age discrimination.<sup>81</sup> Given that both direct and indirect age discrimination may be ‘objectively justified’,<sup>82</sup> in the Government’s view, any distinction between these two concepts becomes redundant.<sup>83</sup> In its commentary on the *bill* for the ADA the ETC has advised the Government to make the conventional schism between direct and indirect distinction in the law.

### **Direct discrimination under the General Equal Treatment Act (inter alia: race, religion and belief, sexual orientation)**

Article 1 of the GETA reads as follows:

*“In this Act and in the provisions based upon this Act the following definitions shall apply:*

- a. Distinction: direct and indirect distinction, as well as the instruction to make a distinction;*
- b. Direct distinction: distinction between persons on the grounds of religion, belief, political opinion, race, sex, nationality, hetero-or homosexual orientation or marital status; (...)*”

What is said above with regard to direct age and disability distinction applies *eo ipso* with regard to the definition of direct distinction in the GETA.

In principle, the GETA entails a ‘*closed* system’ of justification grounds. This means that it does not provide for a general and open ‘objective justification ground’ and that only the justifications (exceptions) that the law provides for can be brought forward (see Chapter 4 of this report).

<sup>79</sup> The template questions shall be dealt with firstly, in the context of the ADA (under A), secondly, in the context of the DDA (under B), and thirdly, in the context of the GETA (under C).

<sup>80</sup> Explanatory Memorandum to the ADA, Tweede Kamer 2001-2002, 28169, nr 3, p. 17.

<sup>81</sup> ‘Objective justification’ as well as the other exceptions to the prohibition of age discrimination shall be dealt with in paragraph 4.7. of this report in much detail. In this paragraph, the objective justification test is only mentioned, in order to explain the absence of a distinction in the Dutch ADA as between ‘direct distinction’ and ‘indirect distinction’.

<sup>82</sup> *Indirect* age discrimination can be ‘objectively justified’ on the basis of Article 2(2) b under i of Directive 2000/78. *Direct* age discrimination can be ‘objectively justified’ on the basis of Article 6 of Directive 2000/78.

<sup>83</sup> Explanatory Memorandum to the ADA, Tweede Kamer 2001-2002, 28169, nr 3, p. 17.



The ETC has accepted on one occasion that direct discrimination may be objectively justified when the prohibition of a certain distinction would be absolutely unacceptable or completely irrational (see ETC *Opinion* 2006-20).

### **Direct discrimination under the Disability Discrimination Act**

Article 1 of the DDA reads as follows:

*“In this Act the following definitions shall apply:*

- a. Distinction: direct and indirect distinction as well as the instruction to make distinction;*
- b. Direct distinction: distinction between persons on the ground of an actual or an assumed disability or chronic disease; (...)*”

What is said above with regard to direct age distinction is also applicable here.

Direct disability discrimination cannot be objectively justified given that the DDA rests upon a ‘closed system’ of justification grounds. There are some explicitly mentioned grounds for justifications (also called “exceptions”). These will be discussed in part 4 of this report. The DDA follows a so-called closed system of justifications.

As for the element of ‘unfavourable treatment’ the same applies as in the case of age discrimination. It is unclear from the definition of direct distinction in the DDA, with whom a disabled person must be compared in case of an alleged instance of direct distinction. In the Parliamentary discussions on the DDA it is stated that what matters is not (actually) having a disability but being discriminated against *as compared with* a person who does have or does not have a disability. There is case law of the ETC in which this topic has been discussed.<sup>84</sup> It seems that this has to be decided on a case by case basis.

In the ETC’s view, the sort of distinction (direct or indirect) that is at stake in a given case may have an impact upon the modus of review and upon the burden of proof.<sup>85</sup> However, the advice of the ETC has not altered the Government’s approach.<sup>86</sup> Although there has been some debate on this issue in academic literature<sup>87</sup>, it seems that in practice this does not cause any difficulties.

- b) Are discriminatory statements or discriminatory job vacancies announcements capable of constituting direct discrimination in national law? (as in Case C-54/07 Firma Feryn)*

Yes, they are under the GETA (art 5(1) section a), ADA (art 3(1) section a) and DDA (art 4(1) section a). However, as the main sanction of Dutch Equal Treatment Law is rescission of a (legal) transaction, it is uncertain which sanction is to be imposed upon the perpetrator in cases of absence of an actual victim.

<sup>84</sup> See ETC Opinion 2005-234.

<sup>85</sup> Commentary by the Equal Treatment Commission on the Bill for the Act on Equal Treatment on the ground of age (“Commentaar van de Commissie Gelijke Behandeling inzake het voorstel voor een Wet gelijke behandeling op grond van leeftijd”) 2001, at [www.cgb.nl](http://www.cgb.nl).

<sup>86</sup> See Follow-up Memorandum to the bill on Equal Treatment on the Ground of Age, (“Wet Gelijke Behandeling op grond van leeftijd, Nota naar aanleiding van het verslag”), Tweede Kamer, 2001-2002, 28170, nr. 5, p. 26-27.

<sup>87</sup> F.B.J. Grapperhaus, ‘Het verbod op onderscheid op grond van leeftijd in arbeid en beroep’, *Ondernemingsrecht* 2002-12, p. 356-363.



It is highly questionable whether Dutch Equal Treatment law contains effective sanctions against discriminatory job advertisements. The negative publicity of a condemnation for discriminatory job vacancies might be deterrent to a certain degree. Only in seriously humiliating cases, the Criminal Code with corresponding sanctions is to be applied.

- c) *Does the law permit justification of direct discrimination generally, or in relation to particular grounds? If so, what test must be satisfied to justify direct discrimination? (See also 4.7.1 below).*

Under the GETA and DDA, direct *distinctions* can only be justified if one of the legally prescribed justifications does apply.

These justifications are:

- a. in cases in which sex is a determining factor (these cases are elaborated limitatively by Ministerial Decree, *Besluit Gelijke Bjhandeling*)
- b. in cases concerning the protection of women, notably in relation to pregnancy and maternity
- c. if the aim of the discriminatory measure is to place women or persons belonging to a particular ethnic or cultural minority group in a privileged position in order to eliminate or reduce existing inequalities connected with race or sex and the discrimination is in reasonable proportion to that aim.
- d. in cases where a person's racial appearance is a genuine and determining requirement, provided that the aim is legitimate and provided that the requirement is proportionate to that aim;
- e. if the discrimination concerns a person's racial appearance and constitutes, by reason of the nature of the particular occupational activity in question or of the context in which it is carried out, a genuine and determining occupational requirement, provided that the aim is legitimate and the requirement is proportionate to that aim.
- f. if the discrimination is based on generally binding regulations or on written or unwritten rules of international law;
- g. in cases where nationality is a determining factor (cases also elaborated by Ministerial Decree).
- h. finally, these strict justifications only applies within the scope of the GETA an DDA. Outside these scopes, all distinctions may be justified in principle.

In the context of the ADA (age), both *direct* and *indirect* distinctions on the ground of *age* may be objectively justified. This follows from Article 7(1) sub c of the ADA. This Article intends to implement Article 6(1) of Directive 2000/78. Given that the ADA also contains justification grounds that have been explicitly inserted by the legislator, this Act follows a 'half-open system' of justifications.

This differs fundamentally from the 'closed system' underpinning the GETA and the DDA.

- d) *In relation to age discrimination, if the definition is based on 'less favourable treatment' does the law specify how a comparison is to be made?*

The words “less favourable treatment” do not appear in the definition of a prohibited distinction on the ground of age.

In the view of the ETC a ‘less favourable treatment’ implies the existence of a *detriment* (“nadeelsvereiste”) and of a *test* whether cases can be *compared* (“vergelijkbaarheidstoets”). With regard to the detriment part, the case law by the ETC indicates that an applicant must, in order to successfully lodge a complaint, have suffered a sufficiently *measurable* (“meetbaar”) and *real* (“werkelijk”) detriment. Moreover, the alleged detriment must be *protected by law* (“door het recht beschermd belang”).<sup>88</sup>

The sub elements contained in the Directive’s definition, *i.e.*, ‘one person’, ‘treated’, ‘less favourably than another’, ‘is/has been/would be treated’, ‘comparable situation’, may, if an extensive reading is adopted, all be embraced by the single word ‘distinction’ in the Dutch equal treatment legislation. However, this depends on its interpretation by the courts and the ETC. The Dutch definition leaves it in a state of uncertainty whether or not a past or a hypothetical comparator is permitted for. It is clear neither from the legal text nor from the Explanatory Memorandum, with whom an alleged victim of direct age distinction is to be compared. In order to avoid any misunderstandings, the Dutch government meanwhile has announced to incorporate the sub elements of the Directive’s definition of discrimination in the Dutch definition.<sup>89</sup> However, the broad interpretation of the Dutch definition could guarantee that all the elements enshrined in the Directive’s definition of direct discrimination are duly covered already.<sup>90</sup>

The ADA’s definition of *direct* distinction only mentions the word ‘distinction’, whereas its counterpart definitions in the GETA and the DDA use the wording ‘distinction between persons’ (Article 1 b of both last-mentioned Acts) It follows explicitly from the Explanatory Memorandum to the ADA, that *direct* age distinction might not only occur if a person’s age forms the basis of a given decision but also where age categories are employed in a given decision-making process.<sup>91</sup> In fact, then a distinction is made between *groups* of persons, rather than between persons.

A last question is when a distinction is a distinction on the ground of age? It is established ETC case law that the relevant ground(s) (*e.g.*, age) for an alleged distinction need(s) not be the *sole reason* for that distinction. It suffices for establishing a distinction on the grounds of age, that age has been a material factor in making up for the alleged distinction. Or, in the wording of the Commission: “[it suffices that the ground at stake] has also played a role”.<sup>92</sup>

<sup>88</sup> See the detailed analysis by J.H. Gerards, ‘Het toetsingsmodel van de CGB voor de beoordeling van indirect onderscheid’, in: *Gelijke Behandeling: Oordelen en Commentaar*, Deventer: Kluwer 2003, p. 77-95, and J.H. Gerards and A.W. Heringa, *Wetgeving Gelijke Behandeling*, Deventer: Kluwer 2003, p. 43-44. A recent case in which this approach is demonstrated is Opinion 2006-227. The ETC leans on Article 12 sub 1 of the GETA, where it is defined who have access to the ETC: only those people who have suffered from a disadvantage on the ground of unlawful distinction and who have a real interest in upholding the law.

<sup>89</sup> See *Kamerstukken I* 2008-2009, 31 832.

<sup>90</sup> Which is confirmed by the government, stating that this act ‘does not change anything in substantive law’; see Tweede Kamer 2008-2009, 31 832, nr 3 (explanatory memorandum), p. 2.

<sup>91</sup> For example, the Governmental decree on ‘dismissal’ (“ontslagbesluit”) employs age categories in a situation of collective dismissal for the purpose of determining the order of who should be dismissed first.

<sup>92</sup> See the recent ETC Opinion 2004-130 concerning an instance of age discrimination and in which the Commission refers to other opinions in which this same stance is reflected (*e.g.*, Opinions 1995-15; 1999-34; 2001-113, RN 2002, 1507, annotated by M.S.A. Vegter and 2004-26).





## 2.2.1 Situation Testing

- a) *Does national law permit the use of ‘situational testing’? If so, how is this defined and what are the procedural conditions for admissibility of such evidence in court?. For what discrimination grounds is situation testing permitted? If not all grounds are included, what are the reasons given for this limitation?*

Yes, according to case law of the courts, this is allowed both in case of civil procedures and in procedures before the ETC as well as in criminal procedures. However, in the latter case this needs to be prepared very carefully in order that this would not amount to “uitlokking” (provocation). As there is no legislation in this respect, no grounds are legally excluded from the possibility of situational testing. In practice, situation testing is most often used in the context of the ground of “race”.

- b) *Is there any reluctance to use situational testing as evidence in court (e.g. ethical or methodology issues)? In this respect, does evolution in other countries influence your national law (European strategic litigation issue)?*

There is some reluctance to use this method, especially in cases where criminal sanctions can be imposed in case – as a result of this testing – it is shown that some categories of people are systematically disadvantaged. The criterion applied by the courts seems to be that the NGO who initiated the testing or the individual who has been a victim of discrimination during the testing, did have no real interest that the accused would indeed commit the crime of discrimination. The author of this report is not aware that in this respect developments in other EU countries have influenced the Dutch policies.

- c) *Outline important case-law within the national legal system on this issue.*

The ETC has given several Opinions in the past about the criteria for situation testing.<sup>93</sup> Situation testing mostly occurs when two groups of youngsters want to be admitted to a discotheque.<sup>94</sup> One of the requirements is that the two groups are comparable in appearance – especially in clothing and hairdos. (Except, of course, for their ethnic or racial ‘appearance’.) Another requirement is that both groups actually try to get in under the same circumstances (e.g., both groups don’t have a membership card) and at the same night.<sup>95</sup> Also, there should not be a long time between the two test-situations.<sup>96</sup>

The following case law has been summarised by Dick Houtzager, senior staff member of the National Bureau against Racial Discrimination (LBR) in Rotterdam. His text is included in this report with his explicit permission.

<sup>93</sup> See, e.g., Opinions, 1997-62, 1997-64-66, 1997-133 and 1998-39.

<sup>94</sup> A recent case where this was applied in the situation of job application is Opinion 2005-136 in which a young man with a foreign surname has applied for a job; a friend with a Dutch surname applied for the same job, sending more or less the same letter of application. The ETC accepted this as evidence of a case of discrimination.

<sup>95</sup> See Opinion 1997-133.

<sup>96</sup> See Opinion 1998-39.





### **Test litigation in the Netherlands, text by Dick Houtzager:**

Courts in the Netherlands have accepted situational testing as a method to prove discrimination. Both in civil as well as in criminal litigation, testing has been allowed as sufficient proof.

#### **Civil law:**

*President District Court of Zutphen, 26 June 1980, NJ 1981, no. 29*

Facts: A., a member of the NGO 'Open Doors', and a number of other people of different ethnic background and skin colour, went in the course of an evening at different times to Discotheque X, with the objective to test whether the discothèque had a discriminatory door policy. The ethnic minority persons of the NGO were refused; they were told they were not members of the discotheque. Similar couples of Dutch origin were allowed in; they were not checked on their membership.

The NGO brought the case before the court for preliminary ruling.

On the request of A. and the NGO 'Open Doors', the President of the Court, in a preliminary decision, forbids Discotheque X to refuse entrance to mr A. on the grounds of his race or his skin colour or his belonging to an ethnic minority group.

The defence brought forward that the NGO and its members had provoked the disco into a criminal offence. The President dismissed this line of reasoning, stating that "it is by no means plausible that the plaintiffs had an interest that the respondent in the pursuance of his profession would refuse services to members of the NGO Open Doors, on the grounds of racial discrimination."

#### **Criminal law:**

*Local Court of Amsterdam, 4 January 1982, RR no. 36*

Facts: T. and B., both with an ethnic minority background, and H. and B., both native Dutch persons, separately asked to enter Disco Y. T. and B. were refused on the pretext that they were not members. The other couple, H. and B., were allowed in a little time later, although they were not members of the club.

T. and B. reported this as a criminal offence at the police, who investigated the case. The public prosecutor brought the case before the local court. T. and B. joined in as civil parties and requested damages.

The defence claimed that the plaintiffs had abetted a punishable offence, which had gone to Y in order to see whether Y discriminated, and to prove that through the use of witnesses.

The court argued: 'We reject this defence. Nor T. and/or B. nor one of the other witnesses has intentionally stimulated the discrimination and in no way it has been made plausible that they had an interest in the defendant's discriminatory behaviour against T. and/or B.'

The defendant was sentenced to a fine of Euro 240. The plaintiffs were awarded symbolic damages of Euro 0.50 each.

*District Court of Amsterdam, 20 March 1992, RR no. 287*

Situation testing of a number of discotheques, carried out by the Anti-discrimination agency (ADA) in Hilversum.



The defence claimed that the proof was inadmissible, because the test had been carried out as an investigation by the ADA, without guidance and supervision of the police or the public prosecutor.

The court dismissed this defence, stating that the police had made up a report after the reporting of the offence by the ADA. The requirement that investigation by an ADA should be carried out under supervision of the Public Prosecutor finds no basis in the law.

Apart from the courts, the Equal Treatment Commission (CGB)<sup>97</sup> has confirmed in a number of cases that situational testing is admissible as a way to prove discrimination. See: ETC 10 June 1997, no. 1997-65.

The Anti discrimination agency (ADA) in the town of Enschede has carried out a situational test at a number of discotheques. The persons of ethnic minority background, included in the test couples, were refused, whilst the native Dutch persons were allowed in. In the complaint, submitted before the CGB, the ADA stated that the groups, participating in the test could be assumed to be average discotheque visitors. They had no relationship with the ADA; they had no criminal past; they could not be distinguished from the average discothèque visitor as far as hairdo, clothing, shoes etcetera were concerned; the persons participating did have a sufficient command of the Dutch language to communicate with the doorman.

The CGB considered: ‘the Commission is of the opinion that by means of situational testing, depending on the circumstances, proof of unequal treatment can be given’.”

d) *Outline how situation-testing is used in practice and by whom (e.g. NGOs, equality body, etc)*

Situation testing is used in the Netherlands by NGOs and sometimes as an individual initiative.<sup>98</sup> Mostly it concerns job applications and admittance to bars and restaurants. Recently there has been a lot of debate on the necessity of using this method. In November 2004, the LBR and the National Association of Anti-Discrimination Bureaus (LVADB) published a report on ‘discrimination in the bar and restaurant (“horeca”) sector’.<sup>99</sup> As a reaction to this, the Labour Party (then opposition) has published a “plan van aanpak” (plan how to tackle this problem) and asked the Government for measures. The Government replied with a letter to Parliament in which it gave an analysis of the problem and in which it discussed *inter alia* the possibilities to use situation testing.<sup>100</sup> The Government recommends that these tests are carefully prepared and are executed in close co-operation between the Anti-Discrimination Bureaus, the Public Prosecutors Office and the Police.

## 2.3 Indirect discrimination (Article 2(2)(b))

a) *How is indirect discrimination defined in national law?*

<sup>97</sup> The CGB acts as the Dutch specialised body, in accordance with the Racial Equality Directive. It is a semi-court, which delivers opinions in discrimination cases. The Opinions are non-binding.

<sup>98</sup> See, e.g., ETC Opinion 2005-136.

<sup>99</sup> LBR and LVADB, ‘Geweigerd?! Discriminatoire deurbelied in de horeca’, Rotterdam, November 2004.

<sup>100</sup> See Tweede kamer 2004-2005, 29 800 VI, nr. 165.



Article 1(1) of the ADA reads as follows: “*In this Act, distinction shall mean distinction on the grounds of age or on the grounds of other characteristics or conduct that result in distinction on the grounds of age*”. Indirect discrimination is covered in the phrase “*distinction (...) on the grounds of other characteristics or conduct that results in discrimination on the grounds of age*”.<sup>101</sup>

Article 1 under (c) of the GETA enshrines the following definition of ‘indirect distinction’: “*indirect distinction: distinction on the ground of other qualities or acts than those meant by indent b [i.e., inter alia, religion, belief, (..), race, (...)] hetero- or homosexual orientation (...)] which result in direct distinction*”. All what is said above with regard to the grounds ‘age’ applies *eo ipso* at this junction.

Article 1 under (c) of the DDA defines ‘indirect distinction’ as follows: “indirect distinction: distinction on the ground of other qualities or acts than those meant by indent b which results in direct distinction”. Indent b defines ‘direct distinction’ as follows: “distinction between persons on the ground of an actual or an assumed disability or chronic disease”. The observations with respect to indirect age distinction also apply here. In addition, it can be observed that, according to the Directive’s definition, an applicant who claims an instance of indirect disability discrimination must have a *particular disability*. This requirement does not explicitly follow from the wordings of the definition in the DDA. It may thus be argued that the DDA provides greater protection than the Employment Framework Directive.

Article 3(2) of the DDA, after having been amended by the EC Implementation Act, explicitly enshrines all the elements of the objective justification test as laid down in Article 2(2)(b) under (i) of Directive 2000/78: legitimate aim, appropriateness, necessity.

A comparative analysis of the Dutch definition with the definition given in the Directive warrants the following comments:

1. The Directive’s definition unequivocally enshrines a *detriment* element as follows from the phrase ‘at a particular disadvantage’. This is not the case with the Dutch definition. However, the ETC’s case law indicates that a *measurable* and *real* detriment as regards an interest which is *protected by law* is called for in the establishment of a claim. Even if this did not follow from the case law, the Dutch definition would still be in conformity with that of the Directive, since the former would then adopt a wider standard than the latter. This is permitted since the Directive only lays down *minimum standards*. (See also Article 8(1) of Directive 2000/78).<sup>102</sup>
2. It might be argued that under the Directive’s definition of indirect discrimination, an applicant can more easily establish a case of indirect discrimination than under the Dutch definition.

<sup>101</sup> In paragraph 2.2. section **B**, under question *a*, it has been explained that no clear-cut distinction has been made in the ADA as between *direct* and *indirect* distinction. For reasons extensively dealt with before, this is in my view in contravention of the requirements imposed by Directive 2000/78. Similarly, the absence of the conventional schism has been criticised by the ETC and in academic literature.

<sup>102</sup> See also Consideration 28 of Directive 2000/78. And, as for Directive 2000/43, Article 6(1) and Consideration 25 of that Directive.



Under the Directive's definition, an applicant needs to establish that the group to which the applicant belongs (*e.g.*, persons between over 60 years old) would be put *at a particular disadvantage*. Under Dutch law – at least in the way it is applied by the ETC – an applicant must in most instances establish a case of indirect distinction on the basis of numbers and statistics. Although facts of common knowledge can be forwarded to support statistical evidence, these are generally not accepted as an exclusive means of evidence. Only in very obvious cases does the ETC *not* require statistical numbers or 'common knowledge facts'.<sup>103</sup>

3. As has been observed by Waaldijk<sup>104</sup>, the Directive's wording 'apparently neutral provision, criterion or practice', is (problematically) reduced in the Dutch definition to 'other [i.e., other than age] characteristics or conduct that result in discrimination on the grounds of age'. The difference seems to be that whereas under the Dutch definition, a prohibited distinction can only be the result of a *characteristic* or *conduct* that already makes a certain distinction on the basis of a non-prohibited ground, under the Directive indirect discrimination might also arise out of a general (non distinguishing) provision or practice. This indeed appears to be falling short of the Directive's requirements. Moreover, it is not quite clear why the Dutch definition speaks of *characteristics* or *conduct*, whereas the Directive makes use of the wording 'apparently neutral provision, criterion or practice'. It is recommended that the Dutch legislator bring the definition of 'indirect age distinction' more in line with the definition of indirect discrimination in Directive 2000/78.
4. In order to be complete, it is submitted that with regard to *indirect* distinction, the focus is upon the *effects* of the contested 'behaviour'. It is thus irrelevant whether or not the alleged perpetrator had the intent to discriminate.<sup>105</sup> This is both recognised in EC and Dutch law.
- b) *What test must be satisfied to justify indirect discrimination? What are the legitimate aims that can be accepted by courts? Do the legitimate aims as accepted by courts have the same value as the general principle of equality, from a human rights perspective as prescribed in domestic law? What is considered as an appropriate and necessary measure to pursue a legitimate aim?*

Article 7(1) under (c) of the ADA provides that: "*The prohibition of distinction [i.e., direct and indirect distinction as well as the instruction to make distinction] does not apply if the distinction: (...) c.) is otherwise objectively justified by a legitimate aim and the means to reach that aim are appropriate and necessary*".

<sup>103</sup> J.H. Gerards, 'Het toetsingsmodel van de CGB voor de beoordeling van indirect onderscheid', in: *Gelijke Behandeling: Oordelen en Commentaar*, Deventer: Kluwer 2003, p. 77-95.

<sup>104</sup> See: Kees Waaldijk, 'The Netherlands', in: Kees Waaldijk & Matteo Bonini-Baraldi (eds.), *Combating sexual orientation discrimination in employment: legislation in fifteen EU member states*. Report of the European Group of Experts on Combating Sexual Orientation Discrimination, Leiden: Universiteit Leiden 2004, p. 341-375, Waaldijk has made his argument in the context of the concept of indirect sexual orientation discrimination. However, it can be extrapolated to the current discussion on indirect age distinction.

<sup>105</sup> I.P. Asscher-Vonk, 'Towards one Concept of Objective Justification', in: T. Loenen and P.R. Rodrigues, *Non-Discrimination Law – Comparative Perspectives*, The Hague: Kluwer Law International 1999, p. 39-51, at p. 43.



This provision mirrors the core material elements of the objective justification test in indirect discrimination cases as laid down by Article 2(2)(b) under (i) of Directive 2000/78. This also reflects the stance taken by the European Court of Justice in indirect discrimination cases, which has been followed by the ETC and the Dutch courts.

It is very hard to summarise the wide range of possible legitimate aims. However, it is clear that legitimate aims may not be in contradiction to the principle of equality. An example in this occasion may be Opinion 2007-173, where the ETC held that a language requirement in a fitness centre in order to prevent customers having (false) feelings of being intimidated when others talk a different language, is not legitimate, because this aim fosters and affirms prejudices which are in contradiction to the principle of non-discrimination.

The appropriateness and necessity of a measure is a sophisticated testing system which is also too sophisticated to summarise in short.<sup>106</sup> It is shaped by the mentioned case-law in para 0.3.

Article 3(2) of the DDA, after having been amended by the EC Implementation Act, explicitly enshrines all the elements of the objective justification test as laid down in Article 2(2)(b) under (i) of Directive 2000/78: legitimate aim, appropriateness, necessity.

Article 2(1) of the GETA, as amended by the EC Implementation Act, entails an objective justification test for indirect distinction cases, which mirrors the well-known elements of legitimate aim, appropriateness and necessity.<sup>107</sup>

c) *Is this compatible with the Directives?*

Yes, it is.

d) *In relation to age discrimination, does the law specify how a comparison is to be made?*

No, this is neither specified in the law nor by the Explanatory Memorandum to the ADA. The nature of *indirect* discrimination makes, however, that the comparison is to be drawn at a *group* level, rather than at the individual level (as is the case with *direct* discrimination).

e) *Have differences in treatment based on language been perceived as indirect discrimination on the grounds of racial or ethnic origin?*

Yes, language requirements are perceived as indirect discrimination on the ground of race. A considerable amount of cases in this respect are brought to the ETC in the last years.

<sup>106</sup> For a brief overview, cf. J.H. Gerards, 'Het toetsingsmodel van de CGB voor de beoordeling van indirect onderscheid', in: *Gelijke Behandeling: Oordelen en Commentaar*, Deventer: Kluwer 2003, p. 77-95. An extended overview of the Dutch justification tests in equal treatment cases can be found in: J.H. Gerards, *Judicial Review in Equal Treatment Cases*, Leiden/Boston: Martinus Nijhoff Publishers 2005.

<sup>107</sup> Before the amendments brought about by the *EC Implementation Act*, these 3 elements of the test had not been *explicitly* enshrined. The amendment was made by *Article I, under E subsection 1* of the *EC Implementation Act*, which amended Article 2(1) of the GETA 1994. However, the ETC anyhow adhered to these 3 elements in its case law, also before the implementation of the Article 13 Directives.



The ETC employs a strict functionality test to language requirements.<sup>108</sup> Generally speaking, language requirements imposed upon employees may only be justified if strictly functional to a certain job.

This therefore results in different standards for e.g. cleaners and librarians. Dismissal or not employing persons because they are speaking with an accent doesn't seem to be justified in any case whatsoever.

### 2.3.1 Statistical Evidence

a) *Does national law permit the use of statistical evidence to establish indirect discrimination? If so, what are the conditions for it to be admissible in court.*

Yes, this is permitted. There are no specific conditions for this kind of evidence to be admissible in court. The ETC uses the standard consideration that the contested rule, practice, etc. has to affect a category of persons that is protected by one of the non-discrimination grounds “in overwegende mate”, which can be translated as: the rule, etc. has to effect this category *predominantly*.<sup>109</sup> In this context the ETC always stresses the point that this should not be calculated on the basis of absolute figures, but should be seen relatively (as a percentage).<sup>110</sup> In a number of cases, the ETC has given the standard rule that people in the alleged indirectly discriminated group (e.g. women) should at least be disadvantaged by the apparently neutral rule or practice *1.5 times as often* as people from the comparator-group (e.g. men). However, since 2004 the ETC has not explicitly mentioned this standard or criterion anymore. Recently, it has started to use other methods of calculation, especially in cases where the (absolute) numbers are very small.<sup>111</sup> This comes down to an extremely complicated way of calculating the chance that a particular group will have more negative effects than another group.<sup>112</sup> Facts of common knowledge are taken into account, either in the absence of relevant statistics or, to support such statistics.<sup>113</sup> However, facts of common knowledge are not accepted as an *exclusive* means of evidence. Only in plainly clear cases does the ETC *not* require statistical numbers or facts of common knowledge.

b) *Is the use of such evidence widespread? Is there any reluctance to use statistical data as evidence in court (e.g. ethical or methodology issues)? In this respect, does evolution in other countries influence your national law?*

Yes, this kind of evidence is used quite often by the ETC (see e.g. the above-mentioned cases), but it is not known to what extent this is done by the courts since judgements on equal treatment cases that are issued by (district) courts are not registered (and therefore cannot be researched) separately.

<sup>108</sup> See for example ETC Opinion 1996-29, 2003-18, 2007-173, 2008-12 and 2008-78.

<sup>109</sup> See, e.g., Opinion 2003-91.

<sup>110</sup> See also J.H. Gerards and A.W. Heringa, *Wetgeving Gelijke Behandeling*, Deventer: Kluwer 2003, p. 45-49, especially at p. 46-47 with references to the case law.

<sup>111</sup> See, e.g., Opinion 2003-91 and 2003-92.

<sup>112</sup> See Kees Waaldijk, *supra* footnote 42.

<sup>113</sup> J.H. Gerards and A.W. Heringa, *Wetgeving Gelijke Behandeling*, Deventer: Kluwer 2003, p. 45-49.





No, there seems to be no reluctance to use statistical data. The author of this report is not aware of evolutions in other EU countries in this respect and can therefore not answer the last part of this question.

c) *Please illustrate the most important case law in this area.*

There are many indirect discrimination cases in which data collection plays a role, especially in indirect discrimination cases that are dealt with by the ETC (which has been discussed above).

d) *Are there national rules which permit data collection? Please answer in respect to all 5 grounds. The aim of this question is whether or not data collection is allowed for the purposes of litigation and positive action measures. Specifically, are statistical data used to design positive action measures? How are these data collected/ generated?*

Statistical data can certainly be used to design and defend positive action measures. Most of the data is generated by the Dutch Central Cultural Planning Bureau ('SCP' a Governmental research institute that collects data in many fields) and the Central Bureau of Statistics ('CBS', a Governmental institute for many kinds of statistical data).<sup>114</sup> It must be noticed that the collection of data can be restricted by privacy and non-discrimination law (e.g. the case of the *VerwijzIndex Antillianen*, see above under para 0.3 Case-law, ground 'Race').

For this purpose for some of the grounds there is the Personal Data Protection Act ("Wet Bescherming Persoonsgegevens"), hereinafter referred to as PDPA. According to Article 16 of the PDPA, information about someone's race, political convictions, religion or belief, health, sexual life and membership of a trade union are "special data" or "classified data". Also, information about criminal sentences is classified. This means that, for collecting and using these data, there are strict conditions and rules. These data can only be compiled and used by institutions that have been granted this authority by law or with the explicit permission of the persons whom it concerns. In Article 18 of the PDPA, an exception to this rule is made for the case of positive action. Under the strict condition of serving this particular goal and of proportionality and subsidiarity, the collection and use of data about people of non-Dutch origin is permissible. The supervision of this legislation is in the hands of the Dutch Data Protection Authority. Information about their activities can be found at their web site: <http://www.dutchdpa.nl>.

Registration of disability is not classified. Employers are allowed/not prohibited to register who is disabled. At the request of the Ministry of Health (VWS), the Social and Cultural Planning Bureau publishes a so-called "Gehandicaptenmonitor".<sup>115</sup>

In order to assemble this overview, employers are asked to voluntarily provide information about the number of disabled people in their workforce to the SCP. Besides, the Ministry of social Affairs and Employment is responsible for the implementation of the Law for the Reintegration of Disabled People ("Wet REA").

<sup>114</sup> [www.cbs.nl](http://www.cbs.nl) and [www.scp.nl](http://www.scp.nl)

<sup>115</sup> Officially called *Rapportage Gehandicapten*, to be found at: <http://www.scp.nl/publicaties/boeken/9037701043.shtml>.



In this framework, the Ministry assembles information about employers that apply for subsidies that help them to employ people with a handicap.

As far as the classifications or categories are concerned the following can be observed:

**Race:** In the Netherlands, both Government and academics tend (but are not obliged) to use the definition of “allochtoon” which is used by the Central Bureau for Statistics (CBS).

(“Allochtoon” is a word much used in the Netherlands, (as opposed to “autochtoon” – indigenous), roughly meaning: someone who is not born in the Netherlands or who does not have parents who are of Dutch origin.) This definition can be found on their web site: <http://www.cbs.nl/nl-NL/default.htm>. Also notice again current discussion about the final judgement of the Council of State in the case ‘*VerwijzIndex Antillianen*’, as stated above in section 0.3.

The CBS uses the word “herkomstgroepering” (grouping according to country of origin). This means: a distinguishing mark or feature that indicates with which country a person has a factual tie, considering the country of birth of the parents of his/her own country of birth. As far as the “herkomstgroepering” is concerned, the CBS makes the primary distinction between “autochtoon” and “allochtoon”. Next, it makes a further distinction within the category “allochtoon” by numbering the generations: a *first generation* “allochtoon” is categorised according to the country where he/she is born, a *second generation* “allochtoon” is categorised according to the country where his/her mother was born, unless this is also the Netherlands, in which case he/she will be classified as a second generation “allochtoon” from the country where his/her father was born. In this category of second generation “allochtoon” people, a distinction is made between persons with one non-Dutch parent and persons whose parents both are of non-Dutch origin. In the third place, a distinction is made between “allochtoon” people who are from *western* and *non-western* origin, because there are big differences in the social-economic and cultural situation in the countries of origin. In the group of non-western origin, the four main categories are: Turkey, Morocco, Surinam and The Netherlands Antilles. Sometimes a more refined classification is used, according to the purpose of the survey or monitoring activity.

A ‘trend’ that becomes more and more popular, also with the government, is the so-called ‘etno selection’ for marketing and policy-development purposes. By ‘etno selection’ is meant: the construction and analysis of huge databases in which the behaviour of people<sup>116</sup> is matched with (*inter alia*) their ethnic or social background. The Dutch government itself uses this instrument quite often, *e.g.* in the framework of its (migrant) integration policies. This is described and criticized by Corien Prins.<sup>117</sup> One of the conclusions of this author is that this mechanism is more and more used for exclusionary purposes instead of for positive action purposes.

Also, there are practices in the police force to register and monitor crimes and crime-suspects according to the ethnic origin of the persons involved.

<sup>116</sup> *E.g.*, buyers preferences, housing preferences, educational preferences, *etc.*

<sup>117</sup> Corien Prins, ‘Etno-selectie’, in : *Nederlands Juristenblad* [Dutch Journal for Lawyers], 2005-8, p. 411.



This is especially so, when young men from the Netherlands Antilles are involved. This practice is highly disputed among (criminal) lawyers.

**Religion:** It is not known whether there is a standard usage of a classification of various religions in official publications or statistics. The CBS uses for the standard surveys of developments in the population the following categories: Roman Catholics, Protestants (divided in the main Churches in the Netherlands) and other religions. For other surveys, more refined lists of religions or churches are used.

**Disability:** Classification of disabled persons is a sensitive issue in the Netherlands. In the DDA, the legislator has chosen not to define the word ‘disability’.

(See above, where the definitions are discussed.) The SCP, in constituting the “gehandicaptenmonitor”, uses the International Classification of Functioning, disability and health (WHO, 2001).

## 2.4 Harassment (Article 2(3))

- a) *How is harassment defined in national law? Include reference to criminal offences of harassment insofar as these could be used to tackle discrimination falling within the scope of the Directives.*

Pre-implementation of Directives 2000/43 and 2000/78, ‘harassment’ was not defined as a concept in Dutch equal treatment legislation. However, the ETC’s case law provided that the right to equality and non discrimination in regard to ‘employment conditions’, including ‘working conditions’, encapsulates a person’s right to be free from ‘ground-related’ harassment in the workplace.<sup>118</sup> It also follows from the ETC’s case law that the employer’s duty of care brings with it that he/she must have in place an *adequate complaints mechanism*.<sup>119</sup> This is also the case after implementation of the new ‘harassment provision’ has taken place.<sup>120</sup>

Post-implementation of the Directives, Article 1 under (a) of the GETA reads as follows:

1. *The prohibition of distinction laid down in this Act shall also include a prohibition of harassment.*
2. *Harassment as referred to in the first subsection shall mean conduct related to the characteristics or behaviour as referred to in Article 1 under (b) [i.e., the grounds covered by the Act, including race, religion, sexual orientation] and, which has the purpose or effect of violating the dignity of a person and creating an intimidating, hostile, degrading, humiliating or offensive environment.*
3. *Article 2, Article 5 subsections 2-6, Article 6a subsection 2 and Article 7 subsections 2 and 3 shall not apply to the prohibition of harassment contained in this Act. [These contain exceptions to the central norm. Harassment is per se prohibited].*

<sup>118</sup> See *inter alia* the following Opinions of the ETC: 96/88, 97/82, 97/91, 2001/131, 2003/138.

<sup>119</sup> I.P. Asscher Vonk & W.C. Monster, *Gelijke Behandeling bij de Arbeid*, Kluwer Deventer 2002, p. 165. Also, opinion 99/48 25 May 1999 AB 1999, nr. 353.

<sup>120</sup> See, e.g., Opinion 2005-125, discussed by P. R. Rodrigues, ‘Ras en nationaliteit’, in: S.D. Burri (ed.), *Oordelenbundel 2005*, Nijmegen: Wolf Legal Publishers 2006.



Similar provisions are laid down in Article 1 (a) of the DDA and in Article 2 of the ADA.

*b) Is harassment prohibited as a form of discrimination?*

Yes, it is. See Article 1 sub (a), cited above. The provision that harassment can never be justified is laid down in Article 1a (3) of the GETA and the DDA and Article 7(2) of the ADA.

From the case law of the ETC in 2005, it becomes clear that the ETC differentiates between ‘discriminatory treatment’ and ‘harassment’.<sup>121</sup> Discriminatory treatment, in the sense of offensive attitudes, speech or other ‘maltreatment’, can be examined besides harassment. According to Rodrigues, this indicates that the ETC sees harassment as an aggravated form of discriminatory treatment, for which no justifications can be brought forward. For instance: one case of discriminatory insult is not enough to constitute a case of harassment, but nevertheless it can be qualified as (forbidden) direct discriminatory treatment.<sup>122</sup>

*c) Are there any additional sources on the concept of harassment (e.g. an official Code of Practice)?*

The 1994 Act on Working Conditions enshrines a prohibition of *sexual harassment* and of *aggression and violence* at the workplace.<sup>123</sup> The former prohibition is of help not only for women (and men), but also for *homosexual* women and men. The latter prohibition offers protection to other groups, including racial and religious minorities, disabled people and elderly/young people. The latter prohibition is formulated broadly: it does offer protection against *ground-related* harassment and against mobbing more generally. Harassment may also be litigated under the provisions of employment law and tort law. If the harassment takes the form of physical abuse it can be prosecuted as a criminal offence (e.g. maltreatment, assault or rape). If the abuse takes the form of verbal offences, criminal procedures are also a possibility.<sup>124</sup>

## 2.5 Instructions to discriminate (Article 2(4))

*Does national law (including case-law) prohibit instructions to discriminate?*

*If yes, does it contain any specific provisions regarding the liability of legal persons for such actions?*

Prior to implementation of the Directives a prohibition of the instruction to make a distinction was indeed implied within the GETA.<sup>125</sup>

<sup>121</sup> These are not synonyms, unlike the Government seems to suggest in the Explanatory Memorandum to the EC Implementation Act. See P.R. Rodrigues, ‘Ras en nationaliteit’, in: S.D. Burri (ed.), *Oordelenbundel 2005*, Nijmegen: Wolf Legal Publishers 2006.

<sup>122</sup> Rodrigues refers to ETC Opinions 2005-30, 2005-75 and 2005-167.

<sup>123</sup> Act on Working Conditions (“Arbeidsomstandighedenwet” 1998, which amended the 1994 version in certain regards), Staatsblad 1999, 184. It has also been defined in the Schools Inspectorate Act (“Wet op het Onderwijstoezicht”), Staatsblad 2002, nr. 387.

<sup>124</sup> A complete overview of the legal norms has been given in: R. Holtmaat, *Seksuele intimidatie op de werkplek; een juridische gids*, Nijmegen; Ars-Aequi Libri 1999.

<sup>125</sup> Explanatory Memorandum to the EC Implementation Act, Tweede Kamer, 2002-2003, 28 770, nr. 3, p. 7.



However, in order to avoid any misunderstanding, Article 1 under (a) of the Act was complemented with the phrase ‘as well as the instruction to make a distinction’.

The counterpart provisions in the ADA and DDA are Article 1(2) and Article 1 under (a) respectively. The prohibition to make an instruction to discriminate is applicable for the whole scope of the equal treatment legislation (as far as the GETA is concerned, this covers more than employment and employment related education and training, but also goods and services and (with respect to race) social security and social benefits).

It has been indicated by the Government that the notion of *instruction* (“opdracht”), refers to “opdracht” in the meaning of Article 7:400 of the Dutch Civil Code.

This Article regulates the law on *contract for the provisions of services*.<sup>126</sup> In the Explanatory Memorandum to the ADA, the Government mentions the example of an employer who instructs a recruitment agency to select for a given job only persons under the age of 30 (in absence of a sound justification for this).

According to the Explanatory Memorandum, in a scenario such as this one, both the person who *gives* the contested instruction and the person who *carries out* the instruction, act in contravention of the central norm. If the ‘recipient’ of the instruction refuses to abide by it and as a consequence thereof, he/she suffers damage, he/she can hold the person who *gave* the instruction liable for that.

The ETC has suggested that the prohibition of instruction to make a distinction should also include a prohibition of the *passive toleration* of an existing discriminatory situation or act.<sup>127</sup> This advice has not been followed by the Government. The latter defended its own stance by saying that an instruction to make a distinction implies *active* rather than *passive* behaviour. This mirrors a narrow interpretation of the verb *to instruct*. The Government has nevertheless indicated that the toleration of existing discriminatory conduct or acts might nevertheless be embraced by the prohibition of making (direct or indirect) *distinction*.<sup>128</sup>

According to the Government’s explanation on the issue of instruction to make distinction, an instruction which has been given *within the employment relationship* (e.g., the scenario where a director instructs a member of the personnel department to merely recruit youngsters) is not covered by the prohibition of instruction to make a distinction. In the Government’s view, such a scenario is embraced by the *exercise of authority* by the employer over the employee within the employment relationship (“gezagsuitoefening in het kader van de arbeidsovereenkomst”). Any *distinction* that might occur within this *exercise of authority* can only be attributed to the employer, to the exclusion of the employee.<sup>129</sup>

This reasoning might fall short of what the Directives had in mind with the prohibition of instruction to make distinction. In the present author’s view, the Dutch Government at this point interprets the prohibition of instruction to make distinction unduly narrow.

<sup>126</sup> Explanatory Memorandum to the ADA, Tweede Kamer 2001-2002, 28169, nr 3, p.18.

<sup>127</sup> ETC Advice 2001-03, p. 6 and 2001-04, p. 4.

<sup>128</sup> Explanatory Memorandum to the ADA, Tweede Kamer 2001-2002, 28169, nr 3, p.18.

<sup>129</sup> *Ibid.*, p. 19.





Finally, it has to be noticed here that the instruction to discriminate on grounds of race, religion/belief, sex and homo- or heterosexuality can be prosecuted criminally under the Penal Code, art 137d (*Wetboek van Strafrecht*).

## 2.6 Reasonable accommodation duties (Article 2(2)(b)(ii) and Article 5 Directive 2000/78)

- a) *How does national law implement the duty to provide reasonable accommodation for people with disabilities? In particular, specify when the duty applies, the criteria for assessing the extent of the duty and any definition of ‘reasonable’. e.g. does national law define what would be a "disproportionate burden" for employers or is the availability of financial assistance from the State taken into account in assessing whether there is a disproportionate burden? Please also specify if the definition of a disability for the purposes of claiming a reasonable accommodation is the same as for claiming protection from non-discrimination in general, i.e. is the personal scope of the national law different (more limited) in the context of reasonable accommodation than it is with regard to other elements of disability non-discrimination law.*

Article 2 of the DDA reads as follows: “*The prohibition of making a distinction also includes the duty for the person to whom the prohibition is addressed, to make effective accommodations in accordance to the need for this, unless doing so would constitute a disproportionate burden upon him or her*”.

Instead of the term *reasonable*, which is the term used in Article 5 of the Directive, Article 2 of the DDA employs the term *effective*. In the Government’s view, the latter term reflects better than the term *reasonable*, that an accommodation must have the pursued *effect*.<sup>130</sup> One can see that the aspect of reasonableness is reflected afterwards, in the sense that there is no obligation to accommodate if doing so would constitute a disproportionate burden.

The test whether an employer is under a duty to provide an accommodation to a disabled person who so requires, runs as follows:<sup>131</sup>

1. *Is the accommodation that has been asked for “effective”?*

This means two separate questions need to be answered:

- Is the accommodation that has been asked for *appropriate*: does it really enable the disabled person to do the job?
- Is the accommodation that has been asked for *necessary* (is it a pre-condition to do the job)?

If the conclusion is that no accommodation could be effective to help the disabled person do the job properly, the claim will be denied. If the answer to both questions is ‘yes’, the second part of the test will be done.

<sup>130</sup> Explanatory Memorandum to the DDA, Tweede Kamer 2001-2002, 28 169, nr. 3, p. 25.

<sup>131</sup> Concluded from the Explanatory Memorandum to the DDA, Tweede Kamer 2001-2002, 28 169, nr. 3.





The outcome of this two-fold test may be that *another* (e.g. cheaper) accommodation than the one that was asked for is also effective and that it will help the disabled person to stay in the job or to do the job. In that case, the second part of the test will focus on this particular cheaper accommodation.

2. *Can the employer reasonably be expected to pay for this particular accommodation?*

This part concerns the question whether supplying the accommodation puts a disproportionate burden on the employer. National law does not define what this would be. However, there are some indicators.

According to the Explanatory Memorandum to the DDA, this ‘balancing exercise’ between the interests of the disabled person v. those of the employer must be carried out in the light of ‘open norms’ of civil law (i.e., the duty of the good employer and the notion of ‘reasonableness’).<sup>132</sup> If financial compensation exists for the realisation of the effective accommodation, it cannot be regarded as ‘disproportionate’.<sup>133</sup> The Government also underscored Consideration 21 of the Preamble to Directive 2000/78<sup>134</sup> and added as an additional criteria that the duration of the employment contract may be a weighty factor.<sup>135</sup>

As stated above, disability is not explicitly defined in Dutch equal treatment law. As far as the authors know, there are no signs that concept is of disability is applied in the a different ways in cases of non-discrimination protection in general on the one hand and the right to claim reasonable accommodation on the other.

A final note concerns the explicit statement by the ETC<sup>136</sup> that the employer’s defence that he does not make a distinction in any way between disabled and non-disabled people does not mean that he is in compliance with the DDA. Equal treatment in such unequal (labour) circumstances leads to inequality, according to the ETC.

*b) Does national law provide for a duty to provide a reasonable accommodation for people with disabilities in areas outside employment? Does the definition of “disproportionate burden” in this context, as contained in legislation and developed in case law, differ in any way from the definition used with regard to employment?*

At the cut-off date of this report, the DDA only covers employment and vocational education.

<sup>132</sup> Explanatory Memorandum to the DDA, Tweede Kamer 2001-2002, 28 169, nr. 3, p. 25-30.

<sup>133</sup> This follows from the Explanatory Memorandum to the DDA, Tweede Kamer 2001-2002, 28 169, nr. 3, p. 28. However, this is not explicitly mentioned in Article 2.

<sup>134</sup> On the factors to be considered when determining whether making a reasonable accommodation would amount to a disproportionate burden.

<sup>135</sup> It is submitted that this might, however, trigger indirect sex discrimination, since women are more likely than men to be employed on the basis of a fixed term contract.

<sup>136</sup> ETC Opinion 2005-160.

However, the Dutch legislator has passed bills to extend the scope of the DDA to *housing* from 15 March 2009 and to *primary* and *secondary education* (new arts 6a-6c DDA) from 1 August 2009.<sup>137</sup> However the obligation to provide for reasonable accommodation will apply to the fields of primary and secondary education but *not* to the field of housing.

In the field of education, there already exist social security provisions which provide for a certain amount of money for parents of children with disabilities in order to make their schools able to provide for accommodation and special attention for their children.<sup>138</sup>

Another example of the right to an accommodation in the field of education is the right to take the state exams in adapted ways, such as a big letter exam or an extension of time for an exam in order to meet dyslexia or motor disabilities.

c) *Does failure to meet the duty of reasonable accommodation count as discrimination? Is there a justification defence? How does this relate to the prohibition of direct and indirect discrimination?*

A failure to meet this duty in principle counts as a form of *distinction*, which is prohibited.<sup>139</sup> However, the text of Article 2, in conjunction with that of Article 1 (definitions of *direct* and *indirect* distinction) and 3 (regarding the exceptions to the central norm), does not shed light upon the question whether an omission to bring about an *effective* accommodation, constitutes *direct*, *indirect* or a *third* way of distinction.<sup>140</sup> With regard to the duty to provide an effective accommodation, Article 2 of the DDA provides that if this constitutes a disproportionate burden on the employer this duty shall not exist (*cf.* Article 5 of Directive 2000/78).

Article 3(1)<sup>141</sup> enshrines three *exceptions* to the central norm (*i.e.*, the prohibition to make distinction which according to Article 2 also includes the duty to make effective accommodations). In brief, the exceptions are: *public security and health* (indent a), *supportive social policies* (indent b) and *positive action measures* (indent c). Thus, a textual reading of Article 3(1) suggests that these three exceptions could also ‘lift’ the effective accommodation duty, as this falls within the central norm. However, logically and in accordance with what the Government has observed in its Explanatory Memorandum, *only* the exception in indent a (*public security and health*) can have the effect of ‘lifting’ the duty enshrined in Article 2.<sup>142</sup> Consequently, the other two exceptions in indents b and c cannot be invoked by employers with respect to their effective accommodation duty. It is indeed difficult to perceive in what ways the exceptions in indents b and c could be applicable in a case concerning the failure of bringing about an effective accommodation.

<sup>137</sup> Kamerstukken Tweede Kamer, 2008/2009, 30 859 *Wijziging van de Wet gelijke behandeling op grond van handicap of chronische ziekte in verband met de uitbreiding met onderwijs als bedoeld in de Wet op het primair onderwijs en de Wet op het voortgezet onderwijs en met wonen*.

<sup>138</sup> This provision is called ‘*het rugzakje*’ (the rucksack).

<sup>139</sup> See ETC Opinion 2004-140, where it held: “*It concerns a sui generis form of (making a ) distinction, which does not yet occur in the other equal treatment laws*”. In this Opinion, the ETC seems to suggest that the duty to provide a reasonable accommodation should also be included in the sex equality laws, the GETA and the ADA.

<sup>140</sup> See Lisa Waddington and Aart Hendriks, ‘The expanding concept of Employment Discrimination in Europe: From Direct and Indirect Discrimination to Reasonable Accommodation Discrimination’, In: *International Journal of Comparative Labour Law and Industrial Relations*, Winter 2002, p. 403-427.

<sup>141</sup> Article 3(2), moreover, stipulates that indirect differentiation can be objectively justified.

<sup>142</sup> Explanatory Memorandum to the DDA Tweede Kamer 2001-2002, 28 169, nr. 3, p. 33.



It is noted that the DDA does not enshrine an exception in regard to the armed forces, which would have been allowed for by Article 3(4) of Directive 2000/78.

*d) Has national law (including case law) implemented the duty to provide reasonable accommodation in respect of any of the other grounds (e.g. religion)?*

No, not as such.<sup>143</sup> However, when proportionality of a certain unequal treatment (with a legitimate aim) is tested in case law, one sometimes might distinguish an implicit duty to provide reasonable accommodation, although this is not made explicit.

For instance, in ETC Opinion 2006-202 of 5 October 2006 the ETC considers that a municipality had failed to search for alternative ways of greeting within their organisation.

Therefore, an applicant couldn't be rejected solely because he refused to shake hands when greeting others because of his Islamic belief (however, the Court subsequently has taken a different approach in this case).

*e) Does the national law clearly provides for the shift of the burden of proof, when claiming the right to reasonable accommodation?*

Yes, it does: see article 10(2) DDA.

*f) Does national law require services available to the public, buildings and infrastructure to be designed and built in a disability-accessible way? If so, could and has a failure to comply with such legislation be relied upon in a discrimination case based on the legislation transposing Directive 2000/78?*

Yes, it does. There exists no general legal obligation to grant accessibility to disabled persons in a general and anticipatory manner. As far as public spaces and buildings (in which public offices and social services are located), education, health care and infrastructures are concerned there are some specific regulations.

The Ministry for Housing, Environmental Planning and Milieu has a so-called "Bouwbesluit" [a decree on how to build houses and offices, *etc.*] This decree contain some requirements about accessibility of public buildings. Also the Ministry for Education has detailed instructions as to how to build schools. Idem the Ministry for health, concerning hospitals and medical service centers. The Ministry for Transport has regulations as to how buses and trains should be constructed. For some time it was expected that transport by busses and trains would be fully accessible in 2010 and 2030 respectively. In 2006 the government has sent letters to Parliament from which it becomes clear that these targets will not be met.<sup>144</sup>

<sup>143</sup> This means that the so-called Thlimmenos doctrine of the ECHR (*Thlimmenos v. Greece* of 6 April 2000) is only applicable with respect to disability. Perhaps the ETC or the Courts will extend this in the future, but we have no case law in this field until now.

<sup>144</sup> See Letter of the Minister of Transport, DGP/MDV/ U.05.02732, 17 May 2006 with appendixes , And Letter containing the "stappenplan NS en Prorail" DGP/SPO/U.0.602435, September 2006. The content of these documents is described in the Memorandum of Explanation to the bill about extending the scope of the DDA to transport: Tweede Kamer 2006-2007, 30878, nrs 1-3.

The present author is not familiar with the details of this type of specialized legislation (which is very technical; *e.g.* specifying the height of stoops and the breadth of doorways).

A failure to comply with such legislation can not be relied upon in a discrimination case, based on the DDA, except for the case that a reasonable accommodation has been asked for by a disabled person and the employer was already – under this other (than the DDA) legislation – obliged to provide this particular facility (*e.g.* a door that is wide enough to let wheelchairs pass through). When such other legislation exists, the employer can never state that the accommodation is not “reasonable”.

In this framework it is noteworthy that the Government has not yet decided when the Articles 7 and 8 of the DDA will enter into force.<sup>145</sup> A letter (to Parliament) about this topic was expected in the spring of 2006, but has still not yet been sent.

*g) Does national law contain a general duty to provide accessibility for people with disabilities by anticipation? If so, how is accessibility defined, in what fields (employment, social protection, goods and services, transport, housing, education, etc.) and who is covered by this obligation? On what grounds can a failure to provide accessibility be justified?*

Besides the foregoing rights and obligations, national law does not provide for a general duty to provide for accessibility for people with disabilities.

*h) Please explain briefly the existing national legislation concerning people with disabilities (beyond the simple prohibition of discrimination). Does national law provide for special rights for people with disabilities?*

Apart from the DDA (which only covers employment and vocational education) the Netherlands have developed a wide range of social rights and facilities for people with disabilities in the past centuries. Some of them consist in general (monetary) allowances for people with disabilities, while many others are granting rights to financial or material support for people with disabilities (such as wheelchairs and special adaptations at home). Also a great amount of facilities for people with disabilities is rendered by local governments.

The main laws in this respect are:

- *Wet Maatschappelijke Ondersteuning (WMO)*: Social Support Act  
This act addresses a broad range of financial facilities, and the availability of care facilities and practical aids for – among others – people with disabilities. Many responsibilities are delegated to local governments by this act.
- *Wet Arbeidsongeschiktheidsvoorziening Jonggehandicapten (WAJONG)*:  
Law Disablement Allowance for Young Disabled people.  
This act provides for an allowance for young people with disabilities, who were never able to participate in paid labour. Such an allowance is needful, as a general allowance for disability under the WAO (*Wet op de ArbeidsOngeschiktheid*, Work Disablement Act) can only be claimed with a certain employment history.
- *Wet Sociale Werkvoorziening (WSW)*: Sheltered Employment Act.

<sup>145</sup> Article 7 defines the term ‘public transport’. In Article 8, unequal treatment in public transport is prohibited.



This act provides for sheltered (or semi-sheltered) workplaces for workers with disabilities. See below under 2.7 a) for a more detailed description.

- *Algemene Wet Bijzondere Ziektekosten (AWBZ)*: General Law for Special Medical Care  
Under this act, expenses for special medical care can be declared. This facility could be used pre-eminently for special care that is needed due to disabilities and chronic illnesses.

## 2.7 Sheltered or semi-sheltered accommodation/employment

- a) *To what extent does national law make provision for sheltered or semi-sheltered accommodation/employment for workers with disabilities?*

The aim of sheltered employment is to help disabled people find a suitable full-time job that enables them to work independently as far as possible. These are generally people who are unable to work in the regular labour market because of mental or physical disabilities.

Around 90.000 full time places are available for people with an occupational disability under the terms of the Sheltered Employment Act (*Wet Sociale Werkvoorziening*, 'WSW'). Most of the people in this group work in a sheltered work company. The Government's aim is to get more people in the WSW target group into jobs with regular employers (supported employment). The first phase of modernisation of the WSW started in 2004. One of the first steps is, that as of 2005 the Centre for Work and Income (CWI) will assess who is eligible for a job in a sheltered workplace. Local authorities are responsible for the creation of the workplaces. The yearly budget for this is 2.2 million Euro. From 1 January 2007 onwards the governments intends to spend another 18 million Euro extra on a yearly basis for the implementation of this law. The second phase is aimed at increasing the number of disabled people who find work outside of sheltered workplaces. This means finding supervised jobs with regular employers or placement in service of a sheltered work company.

- b) *Would such activities be considered to constitute employment under national law?*

Sheltered employment is being seen as employment. This means that the equal treatment laws (including the DDA) apply fully to this type of employment. The wages are according to the norms set in Collective Agreements for the relevant sectors. Nevertheless, this work can not be equated fully to work on the regular labour market. It falls under the exception that is made in Article 3 para 1, sub b of the DDA. This provision enshrines for a possibility for *supportive social policies* for disabled people. (Compare art. 7(2) of the Framework Directive.)





### 3. PERSONAL AND MATERIAL SCOPE

#### 3.1 Personal scope

##### 3.1.1 EU and non-EU nationals (Recital 13 and Article 3(2) Directive 2000/43 and Recital 12 and Article 3(2) Directive 2000/78)

*Are there residence or citizenship/nationality requirements for protection under the relevant national laws transposing the Directives?*

The principle in Dutch law is that “all persons in the Netherlands shall be treated equally in equal circumstances”, as provided for in Article 1 of the Constitution. Thus, the protective scope provided by criminal law, civil law, equal treatment legislation and administrative law covers *any person on the territory of the Netherlands*.<sup>146</sup>

##### 3.1.2 Natural persons and legal persons (Recital 16 Directive 2000/43)

*Does national law distinguish between natural persons and legal persons, either for purposes of protection against discrimination or liability for discrimination?*

For purposes of protection against discrimination, there is some discussion whether only natural persons are protected or that legal persons (e.g. an association, an institution or an enterprise) is also protected. Since the laws mainly see at labour relations, in fact it is mostly private persons that enjoy the protection of these laws. As far as liability for discrimination is concerned, no such distinction is made. This means that both natural and legal persons can be held accountable.

##### 3.1.3 Scope of liability

*What is the scope of liability for discrimination (including harassment and instruction to discriminate)? Specifically, can employers or (in the case of racial or ethnic origin) service-providers (e.g. landlords, schools, hospitals) be held liable for the actions of employees? Can they be held liable for actions of third parties (e.g. tenants, clients or customers)? Can the individual harasser or discriminator (e.g. co-worker or client) be held liable? Can trade unions or other trade/professional associations be held liable for actions of their members?*

Not a single Article in the ADA, the DDA and the GETA specifies to whom the prohibition of making distinction, including harassment, is addressed. Although all of the three Acts specify the areas of *social and economic life* to which each Act applies, the Acts remain silent on the matter of ‘personal applicability’.<sup>147</sup>

<sup>146</sup> In Article 2(5) of the GETA in case of nationality discrimination (also covered by the GETA), the following exception exists: “The prohibition on discrimination on the grounds of nationality contained in this Act shall not apply:

(a) if the discrimination is based on generally binding regulations or on written or unwritten rules of international law and (b) in cases where nationality is a determining factor.” This clause is generally understood in such a way that especially immigration law and nationality law is exempted from the equal treatment legislation.

<sup>147</sup> E. Cremers-Hartman, ‘Werkingsfeer AWGB (Art. 3, 4 sub c, 5 lid 1, 6, 7 lid 1 AWGB)’, in: I.P. Asscher Vonk and C.A. Groenendijk, *Gelijke Behandeling: Regels en Realiteit*, The Hague: SDU Uitgevers 1999, p. 29-88, at p. 33.



With regard to the employment area, *i.e.*, the only area that is commonly covered by the three Acts, the central norm is addressed not only to *private* and *public* employers, but also to organisations of employers, organisations of workers, employment offices, (public) job agencies, pension funds, some external advisors, ('liberal') professionals, bodies of liberal professionals, training institutions, schools, universities, *etc.*<sup>148</sup> However, it is not clear from this whether colleagues or third persons can be held liable under the Acts.

The matter was explicitly raised in Parliamentary discussions on the implementation of the Directives. It follows clearly from these discussions that the Government has not intended to render the non-discrimination Acts applicable in relationships between colleagues, let alone in relationships with third persons.<sup>149</sup> The Government defends this by noting that between colleagues *inter se*, there is no contract or relationship of authority. However, it was indicated by the Government that those employees who in name of their employer exercise authority over their co-employees are addressees of the central norm. *De facto*, such an employee functions in the capacity of employer.<sup>150</sup> The purported inapplicability of the Dutch Acts in relationships between colleagues *inter se*, appears particularly problematic in the context of work-related *harassment*. In its current format and in the light of the Parliamentary comments, the law prevents an alleged victim of harassment from holding a colleague or a third person directly liable for the contested acts. The only way to do this would be by seeking recourse to the general provisions of *tort law* enshrined in the Dutch Civil Code. The employer's vicarious liability for harassing acts by a third person was, for example, at stake in ETC Opinion 1997-82. The case concerned racial harassment of a nurse by a patient. The ETC repeated its stance that the employer is under a legal duty to prevent occurring acts of harassment by persons under his supervision. It took the view that, although the alleged harassing acts were not done by a colleague, but by a third person, this did not circumscribe whatsoever the employer's duty of care.<sup>151</sup> However, and this also follows from the ETC's case law pre-implementation of the Directives, there rests a *general duty of care* upon the employer to maintain a discrimination-free and safe workplace. An employee's right not to be discriminated against in his or her employment and working conditions, embraces the right to be free from discrimination and harassment at the workplace.<sup>152</sup>

Beyond the scope of Dutch equal treatment legislation, the following is essential to take account of. The employer may be held vicariously liable for discriminatory or harassing acts done by colleague workers under employment law. The relevant Articles upon which a claim can be based are 1. the good employer's practice (Article 7:611 of the Civil Code); 2. the employer's general duty of care (*i.e.*, the employer's liability for damages suffered by an employee in the performance of job-related duties, laid down in Article 7:658 of the Civil Code). Both of these Articles are directed at the employer's liability for acts done by the employer himself, or by others over whom the employer has control.

<sup>148</sup> *Ibid.*

<sup>149</sup> Explanatory Memorandum to the ADA, Tweede Kamer 2001-2002, 28169, nr 3, p. 19 (where this was said in the context of harassment). See also Parliamentary Papers Second Chamber of Parliament, 2002-2003, 28770, nr. 5, p. 28.

<sup>150</sup> Explanatory Memorandum to the ADA, Tweede Kamer 2001-2002, 28169, nr 3, p. 19.

<sup>151</sup> Although and as will be explained under 'enforcement issues', the Commission's opinions are not binding, an opinion by the Commission that has been ruled in the victim's favour can still be valuable in terms of recognition of the complaint and of emotional satisfaction. See: A. Geers, 'Intimidatie op de werkplek', in: G. van Manen (ed.), *De rol van het aansprakelijkheidsrecht bij de verwerking van persoonlijk leed*, Den Haag: Boom 2003, p. 183-198, at p. 194.

<sup>152</sup> See, *e.g.*, ETC Opinion 2004-08 (race and religion). See also I.P. Asscher-Vonk and W.C. Monster, *Gelijke Behandeling bij de Arbeid*, Deventer: Kluwer 2002, p. 164.

In the past it was much disputed in legal circles whether Article 7:658 of the Civil Code could form the legal basis for claims that regard mere psychological damage, rather than physical damage.<sup>153</sup> It is a fact that damage resulting from discriminatory treatment and harassment is most often of a psychological kind. In 2005 the Dutch Supreme Court did accept that Article 7:658 Civil Code can include psychological damage.<sup>154</sup> Lower courts have accepted that, in cases of *sexual harassment*, this Article can form the basis for financial compensation of psychological damage resulting from such behaviour.<sup>155</sup>

In the light of the presumed broad scope of the personal applicability of Directives 2000/43 and 2000/78, it appears that the Dutch Government's view that the Dutch non discrimination Acts are directed to employers and other organisations but not to employees (and third persons) is unduly restrictive. According to case law of the ETC the person *exercising authority* may be held responsible for acts of distinction, including harassment done by employees or third persons. According to case law of the Dutch Civil Courts (including the High Court), these persons can also be held responsible and accountable under general civil law provisions/procedures.

## 3.2 Material Scope

### 3.2.1 Employment, self-employment and occupation

*Does national legislation apply to all sectors of public and private employment and occupation, including contract work, self-employment, military service, holding statutory office?*

Yes, it does.

*In paragraphs 3.2.2 - 3.2.5, you should specify if each of the following areas is fully and expressly covered by national law for each of the grounds covered by the Directives.*

<sup>153</sup> A. Geers, A. Geers, 'Intimidatie op de werkplek', in: G. van Manen (ed.), *De rol van het aansprakelijkheidsrecht bij de verwerking van persoonlijk leed*, Den Haag: Boom 2003, p. 183-198, at p. 188, with further references to the literature on this question. See also M.S.A Vegter, 'Aansprakelijkheid werkgever voor psychische schade werknemer als gevolg van seksuele intimidatie van de werknemer', in: *Aansprakelijkheid, Verzekering en Schade* nr. 5, October 2001, p. 133-140, at p. 134. With regard to Article 7:611 of the Civil Code, the Dutch Supreme Court has decided that this Article may be relied upon to claim compensation for damages of a mere psychological kind. See Supreme Court, 11 July 1993, NJ 1993, 667 (*Nuts/Hofman*), cited by A. Geers, A. Geers, 'Intimidatie op de werkplek', in: G. van Manen (ed.), *De rol van het aansprakelijkheidsrecht bij de verwerking van persoonlijk leed*, Den Haag: Boom 2003, p. 183-198, at p. 188.

<sup>154</sup> HR 11 March 2005, RvdW 2005, 37 (ABN AMRO / Nieuwenhuys). See about this case: E.J. Houben: *Schadevergoeding bij zuiver psychisch letsel*. Arbeidsrecht 2006, nr 2. pp. 31-36.

<sup>155</sup> See M.S.A Vegter, M.S.A Vegter, 'Aansprakelijkheid werkgever voor psychische schade werknemer als gevolg van seksuele intimidatie van de werknemer', in: *Aansprakelijkheid, Verzekering en Schade* nr. 5, October 2001, p. 133-140, at p. 134-135, where she extensively elaborates on the case law. The relevant cases to which she refers are District Court Rotterdam, 30 September 1999, JAR 1999, 230; President of Rotterdam District Court, 22 February 2001, Rechtspraak Nemesis 2001, 1319; Cantonal Court Harderwijk, 25 April 2001, JAR 2001, 118. In the latter case, an amount of about € 14.000 (at the time NFL 30.000) was awarded for psychological damages.



### **3.2.2 Conditions for access to employment, to self-employment or to occupation, including selection criteria, recruitment conditions and promotion, whatever the branch of activity and at all levels of the professional hierarchy (Article 3(1)(a)) Is the public sector dealt with differently to the private sector?**

The public sector is dealt with in the same way as the private sector. Article 5(1) of the GETA prohibits unlawful distinctions in the context of employment. No unlawful distinctions shall be made with regard to the following areas:

- 1) public advertising of employment and procedures leading to the filling of vacancies;
- 2) the employment of a worker via an employment agency (inserted by the EC Implementation Act);
- 3) the commencement or termination of an employment relationship;
- 4) the appointment and dismissal of civil servants;
- 5) terms and conditions of employment;
- 6) permission for staff to receive education or training during or prior to the employment relationship;
- 7) promotions;
- 8) working conditions (inserted by the EC Implementation Act).

The ADA and DDA have counterpart provisions in Articles 3 and 4 respectively. These Articles reflect exactly the same material scope, although sometimes the sequence of subsections differs. Both public and private labour relations are covered. The central norm applies to the entire employment process, *i.e.*, from the moment of notice of a vacancy, to the commencement of the employment relationship or public appointment, until its termination.<sup>156</sup>

In the GETA, self-employment is covered by Article 6. This Article provides that “*it shall be unlawful to make distinctions with regard to the conditions for and access to the liberal professions and with regard to pursue the liberal professions or for development within them*”. The counterpart Articles reflecting an identical content are Article 4 of the ADA and Article 5 of the DDA. It is to be noted that the term “self employment” is not used in the mentioned Articles which instead speak of the “liberal profession”. The term “liberal profession” (“free occupation”) might be slightly narrower in scope than “self-employment” (the term used in the Directives). However, the problem can easily be circumvented by attaching a broad interpretation to the term “liberal profession” in order to guarantee that not only doctors, architects etc are covered, but also free lancers, solo traders, entrepreneurs, *etc.*<sup>157</sup> This might seem odd for a British reader since in English, the term ‘liberal profession’ is quite a lot narrower than self-employment and could not easily be approximated. However, in the Dutch equality legislation context the usage of ‘liberal profession’ has not led to problems. The ETC has at all times attached a very broad meaning to this notion. Discrimination is thus also prohibited in such working relationships where the hierarchy between the ‘employer’ and ‘employee’ is absent.

<sup>156</sup> See, *e.g.*, the Explanatory Memorandum to the DDA, Tweede Kamer 2001-2002, 28 169, nr. 3, p. 34. The same applies *eo ipso* in the context of the ADA and the GETA.

<sup>157</sup> See Kees Waaldijk, *supra* footnote 42.



### 3.2.3 Employment and working conditions, including pay and dismissals (Article 3(1)(c))

*In respect of occupational pensions, how does national law ensure the prohibition of discrimination on all the grounds covered by Directive 2000/78 EC? NB Case C-267/06 Maruko confirmed that occupational pensions constitute part of an employee's pay under Directive 2000/78 EC.*

*Note that this can include contractual conditions of employment as well as the conditions in which work is, or is expected to be, carried out.*

Employment and working conditions, including pay, occupational pensions and dismissals are fully covered by Article 5(1) of the GETA, subsections c, d, e, h. In the ADA by Article 3 subsections c, d, e, h. In the DDA by Article 4 subsections b, c, e, h.

### 3.2.4 Access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience (Article 3(1)(b))

*Note that there is an overlap between 'vocational training' and 'education'. For example, university courses have been treated as vocational training in the past by the Court of Justice. Other courses, especially those taken after leaving school, may fall into this category. Does the national anti-discrimination law apply to vocational training outside the employment relationship, such as that provided by technical schools or universities, or such as adult life long learning course?*

In the first place, under all three laws (GETA, ADA and DDA) there is a prohibition to make a distinction with respect to giving permission for staff to receive education or training during or prior to the employment relationship. (Art. 5(1) sub f GETA, 3, sub f. DDA and 4 sub f ADA.)

The prohibition of making a distinction in the areas of vocational training and professional guidance is laid down in Article 5 of the ADA and in Article 6 of the DDA. Both Articles are identical. Subsection a lays down the prohibition of distinction with regard to vocational guidance ("loopbaanoriëntatie en beroepskeuzevoorlichting"). Subsection b renders the central norm applicable to education oriented towards entry to and functioning in the labour market ("onderwijs gericht op toetreding tot en functioneren op de arbeidsmarkt"). In short, this might be referred to as 'vocational training', although this term is not as such used within the respective Articles. *De facto* however, the heading 'vocational training' only consists of Article 6 and Article 5 of the ADA and DDA respectively. The Explanatory Memoranda provide guidance as to what is meant by subsection b. All what will be said about the DDA hereinafter applies *eo ipso* to the ADA.

Subsection b of these Articles covers education which is a last step prior to entering the labour market including retraining and further training courses.<sup>158</sup>

<sup>158</sup> Explanatory Memorandum to the DDA, Tweede Kamer 2001-2002, 28 169, nr. 3, p. 38.





*In concreto* this embraces: practical education (“praktijkonderwijs”), (which forms part of ‘secondary education’); technical and vocational training for 16-18 year-olds (“middelbaar beroepsonderwijs”); technical and vocational training for 18+ (“hoger beroepsonderwijs”) and university education. ‘Adult life long learning courses’ are not mentioned specifically but are covered by Article 5 DDA too. So regular ‘secondary education’ (“voortgezet onderwijs”) (as well as primary education) are not yet covered at the cut-off date of this report, but as mentioned above, these fields will be covered from 1 August 2009 on. The establishments that are covered are not only those which are recognised or subsidised by the Ministry, but also those which are not recognised or subsidised by the Ministry or whose regulation is left to the market.<sup>159</sup> Subsections a and b of Articles 5 and 6 of the ADA and DDA respectively, are not directed to a specific addressee. These subsections are therefore directed to “all persons”.

As to subsection b, this is addressed to *public education, private/denominational education, and education that is not publicly funded*.<sup>160</sup> Subsection b covers more than Article 3(1)(b) of the Employment Framework Directive. The Directive only prohibits discrimination at the stage of ‘entry to’ vocational training. The Dutch Acts cover the entire path from registration until termination of education.<sup>161</sup>

In the GETA, Article 7, which is located under title 4 of the Act which reads *other (i.e., other than employment and self employment) provisions in the socio-economic area*, renders the prohibition of making a distinction applicable (in brief):

- The supply of or permission of access to goods or services which also embraces all forms of education;<sup>162</sup>
- The provision of career orientation and guidance (“loopbaanoriëntatie”);
- Advice or information regarding the choice of an educational establishment or career.

It is furthermore specified in Article 7 that the Act only applies to the above-mentioned areas if the alleged discriminatory acts are committed: a. *in the course of carrying on a business or exercising a profession*; b. *by the public service*; c. *by institutions which are active in the field of housing, social services, health care, cultural affairs or education*; or, d. *by private persons not engaged in carrying on a business or exercising a profession in so far as the offer is made publicly*. This does entirely cover what is mentioned in Article 3(1)(b) of the Directives.

It is to be emphasised that the material scope regarding goods, services and the entire education field as laid down in Article 7 of the GETA, applies to all grounds that are covered by the Act. In this regard the Dutch law goes far beyond that what is strictly required by Directive 2000/78.

<sup>159</sup> Explanatory Memorandum to DDA, Tweede Kamer 2001-2002, 28 169, nr. 3, p. 38.

<sup>160</sup> Explanatory Memorandum to the DDA, Tweede Kamer 2001-2002, 28 169, nr. 3, p. 37.

<sup>161</sup> Explanatory Memorandum to the DDA, Tweede Kamer 2001-2002, 28 169, nr. 3, p. 37-38.

<sup>162</sup> The material scope of the GETA covers the entire field of education. It thus offers a wider protection than the Directives.



### **3.2.5 Membership of, and involvement in, an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations (Article 3(1)(d))**

Article 6a in the GETA provides the following: “*it shall be unlawful to make distinctions with regard to the membership of or involvement in an employers’ organisation or trade union, or a professional occupational organisation, as well as with regard to the benefits which arise from that membership or involvement*”. Article 5a of the DDA is identical to this provision, as well as article 6 of the ADA.

*In relation to paragraphs 3.2.6 – 3.2.10 you should focus on how discrimination based on racial or ethnic origin is covered by national law, but you should also mention if the law extends to other grounds.*

### **3.2.6 Social protection, including social security and healthcare (Article 3(1)(e) Directive 2000/43)**

*In relation to religion or belief, age, disability and sexual orientation, does national law seek to rely on the exception in Article 3(3), Directive 2000/78?*

No. Under art 7a of the GETA, the extension to social protection is restricted to racial discrimination. As indicated by Waaldijk, the other grounds are only protected by the constitutional and international prohibitions of discrimination in the above areas of social life.<sup>163</sup>

### **3.2.7 Social advantages (Article 3(1)(f) Directive 2000/43)**

*This covers a broad category of benefits that may be provided by either public or private actors granted to people because of their employment or residence status, for example, e.g. reduced rate train travel for large families, child birth grants, funeral grants and discounts on access to municipal leisure facilities. It may be difficult to give an exhaustive analysis of whether this category is fully covered in national law, but you should indicate whether national law explicitly addresses the category of ‘social advantages’ or if discrimination in this area is likely to be unlawful.*

Subsection 2 of Article 7a specifies that “*the concepts of social protection, social security and social advantages, mentioned in subsection 1, can be defined by governmental decree. A governmental decree determined pursuant to the first sentence, shall not be recommended earlier than four weeks after which the draft has been submitted to both Chambers of the Parliament*”.

No such decree has been adopted thus far. However, the interpretative tools regarding the meaning of ‘social advantages’ are laid down in the Explanatory Memorandum to the EC Implementation Act.

<sup>163</sup> See Kees Waaldijk, *supra* footnote 67.



Also, its relationship with ‘social security’ is explained in the Memorandum. ‘Social security’ concerns the legal social insurance schemes which cover the risks that occur if a person loses his income as a result of (e.g.) unemployment, illness, disability, age and decease. Moreover it covers child benefits.<sup>164</sup> With regard to the notion of ‘social advantages’ it is observed by the Government, that this notion must be interpreted in the light of ECJ case law rendered in the context of Regulation 1612/68 on free movement of workers.<sup>165</sup>

In the Government’s view, the notion of ‘social advantages’ refers to advantages of an economic and cultural kind which may be granted both by private and public entities. These may include student grants, public transport reductions and reductions for cultural or other events. Advantages offered by private entities are for example reductions to entry prices for cinema and theatre.<sup>166</sup>

### 3.2.8 Education (Article 3(1)(g) Directive 2000/43)

*This covers all aspects of education, including all types of schools. Please also consider cases and/ or patterns of segregation and discrimination in schools, affecting notably the Roma community and people with disabilities. If these cases and/ or patterns exist, please refer also to relevant legal/political discussions that may exist in your country on the issue.*

*Please briefly describe the general approach to education for children with disabilities in your country, and the extent to which mainstream education and segregated “special” education is favoured and supported.*

The GETA is integrally applicable to all aspects of education, including all types of schools (Article 7). This thus applies to ‘race’ and ‘ethnic origin’ but also to ‘religion/belief’ and ‘sexual orientation’ (as well as to all other grounds covered by the GETA). In this regard, Dutch law goes beyond the requirements imposed by the Directives.<sup>167</sup> Vocational training that is given before or during the employment relationship is regulated by Article 5(1) sub f of the GETA. From 1 august 2009, the scope of the DDA (regarding disability) will be extended to primary and secondary education as well.

A problem that has been dealt with in the framework of anti-discrimination or equal treatment legislation, is the fact that many boards of schools (or local governments that are in charge of publicly funded schools) have designed/want to design rulings that enhance a spreading of children of different cultural background over schools, in order to avoid the coming into existence of ‘black schools’ (i.e., schools with a great majority of non-Dutch nationals). There is some discussion going on in the Netherlands about the issue whether local governments have the right to spread people of certain non-Dutch decent or people with low incomes as far as housing and schools are concerned, in order to prevent ‘black ghetto’s’ or ‘black schools’ to emerge.

<sup>164</sup> Explanatory Memorandum to the EC Implementation Act, Tweede Kamer, 2002-2003, 28 770, nr. 3, p. 14.

<sup>165</sup> See the ECJ’s case law in Case C-261/83 (*Castelli*) of 12 July 1984 and Case C-249/83 (*Hoecx*) of 27 March 1985, as referred to in the Explanatory Memorandum to the EC Implementation Act, Tweede Kamer, 2002-2003, 28 770, nr. 3, p. 15.

<sup>166</sup> Explanatory Memorandum to the EC Implementation Act, Tweede Kamer, 2002-2003, 28 770, nr. 3, p. 15.

<sup>167</sup> See also Memorandum concerning the Implementation of Directive 2000/78/EC and Directive 2000/43/EC (“Notitie over de Implementatie van Richtlijn 2000/78/EG en Richtlijn 2000/43/EG”), Tweede Kamer, 2001-2002, 28 187, nr. 1, p. 10-11.

In fact this is the topic of the discussion about the so-called “Rotterdamwet” in which local governments get the possibility to refuse subsidised housing to certain categories of poor people in order to avoid the emergence of “ghettos”.<sup>168</sup> The ETC has advised against such policies.<sup>169</sup> There is considerable debate about the question whether equal treatment legislation is unduly restrictive as far as the possibilities for local government are concerned to develop such policies.<sup>170</sup> One of the reasons for ‘black schools’ to develop is the fact that, in the Netherlands, schools on a religious or other ‘denotative’ basis (such as a special philosophical view on education) have the freedom - guaranteed by the Constitution - to develop an own identity and to conduct their own admittance policies. As long as such schools are complying with the general quality requirements for education, public funding for these schools is guaranteed in the Netherlands (see Article 23 of the Constitution). A restricting admittance policy of publicly funded Christian schools (to only Christian pupils) is supposed to be (inter alia) a cause of the growth of ‘black’ public schools.<sup>171</sup>

In December 2005, some Members of Parliament have therefore initiated a bill in which this ‘freedom of education’ was to be restricted for all publicly funded schools, including those on a religious or philosophical basis. This proposed law would grant pupils an unrestricted right to admittance to virtually any school and would pose a corresponding obligation to these schools to accept everybody. Only schools that – during at least 10 years – have followed a very strict policy to only admit their ‘own’ pupils would be exempted from this obligation.<sup>172</sup> It is highly disputable whether this would be in line with the constitutional guaranteed freedom for religious groups to have their own schools. Some commentators think that Article 23 of the Constitution needs to be abolished first before such a law could be enacted. Due to the current (new) political circumstances, the bill has still not yet been discussed in Parliament.

With respect to Roma and travellers, the patterns of segregation in the Dutch school system don’t seem to affect these minorities in particular. Therefore, it does not seem to be necessary to put into effect legal instruments with regard to Roma and travellers’ children. In the field of education, only one case of alleged discrimination is known. In this case, a board of an association of 14 primary (Christian) schools used a quota of 15 % per establishment for pupils who speak the Dutch language as a second language, in order to combat segregation. This admittance policy was deemed to be unlawful indirect distinction against Roma and Sinti communities, on the ground of race/ethnic origin.<sup>173</sup>

Several provisions are made with regard to people with disabilities in the field of education. The issue of accessibility of (school) buildings is already addressed above (Section 2.6 et seq).

<sup>168</sup> Tweede Kamer, 2004-2005, 30 091. Law of 20 December 2005, Staatsblad 2005, 726.

<sup>169</sup> See ETC Advice 2005/03 and Opinion 2005-25 (Tiel).

<sup>170</sup> See, e.g., Mark Bovens and Margo Trappenburg, ‘Segregatie door Anti-Discriminatie’, in: ed. R. Holtmaat, *Gelijkheid en (andere) grondrechten*, Deventer: Kluwer 2004, p. 171-186. See also the report by the Raad voor openbaar bestuur (Rob): *Verschil moet er zijn; bestuur tussen discriminatie en differentiatie*. ([Council for Public Administration: *There should be difference; administration between discrimination and differentiation*.] The Hague, April 2006.

<sup>171</sup> I.e., schools that are governed by local authorities.

<sup>172</sup> Tweede Kamer, 2005-2006, 30 417. See for a commentary on this bill: B.P. Vermeulen and C.M. Zoethout, ‘Godsdienst, levensovertuiging en politieke gezindheid, in: S.D. Burri (ed.), *Oordelenbundel 2005*, Nijmegen: Wolf Legal Publishers 2006.

<sup>173</sup> See ETC Opinion 2003-105.



Besides all this, people with disabilities have certain rights to accommodation of education itself. Parents can request accommodations for their children (with disabilities). The school can claim the expenses from the government. Another example is the right to take the state exams in adapted ways, such as a big letter exam or an extension of time for an exam in order to meet dyslexia or motor disabilities. There are several forms of special primary education for pupils with certain cognitive impairments in the Netherlands. These schools however are only accessible for pupils in case of necessity. The primary aim of the Dutch school system remains to educate as much as possible in regular schools.

### 3.2.9 Access to and supply of goods and services which are available to the public (Article 3(1)(h) Directive 2000/43)

- a) *Does the law distinguish between goods and services available to the public (e.g. in shops, restaurants, banks) and those only available privately (e.g. limited to members of a private association)? If so, explain the content of this distinction.*

The access to and supply of goods and services is covered by Article 7 of GETA. Subsection 1 of Article 7 provides as follows: *“It shall be unlawful to make distinctions in offering or permitting to goods and services, in concluding, implementing or terminating agreements on the subject (...), if such acts of distinction are committed:*<sup>174</sup>

- a) *In the course of carrying on a business of exercising a profession;*
- b) *by the public service;*
- c) *by institutions which are active in the field of housing, social services, health care, cultural affairs or education; or*
- d) *by private persons not engaged in carrying on a business or exercising a profession, in so far as the offer is made publicly.”*

This is applicable to all grounds covered by the GETA. In this regard, Dutch law extends beyond the Article 13 Directives’ requirements. Unilateral governmental decisions and acts do not fall under the scope of Article 7.<sup>175</sup>

From art 7 subsection d) it is clear that the distinction between goods and services available private and those that are available public is of importance in so far that the supply by private persons is concerned. It follows from the parliamentary history (and case-law) that this similarly holds for private *associations*. The latter is the result of the balancing of interests between on the one hand the right of freedom of association and on the other hand the right to equal treatment.<sup>176</sup>

<sup>174</sup> It should be noted that the limitations to follow under a-d are also applicable with regard to the remainder of areas covered by Article 7, *i.e.*, 2. the provision of career orientation and guidance (“loopbaanoriëntatie”); 3. advice or information regarding the choice of an educational establishment or career, and which have been analyzed above.

<sup>175</sup> J.H. Gerards and A.W. Heringa, *Wetgeving Gelijke Behandeling*, Deventer: Kluwer 2003, p. 72-73, with references to ETC case law.

<sup>176</sup> This topic has also been studied by the group of independent experts who were appointed by the Government to conduct the second (external) 5-year term evaluation of the functioning of the GETA. The policy of the ETC is to apply the equal treatment norms full scale as soon as it is established that the activities of the association are (unrestrictedly) open to the general public and take place on a commercial basis. The experts conclude that (taken International Human Rights Standards into account) the right to equal treatment does not automatically prevail over the right to free association. The ETC and the judges should have the possibility for a case by case assessment of the conflicting rights that are at stake.





- b) *Does the law allow for differences in treatment on the grounds of age and disability in the provision of financial services? If so, does the law impose any limitations on how age or disability should be used in this context, e.g. does the assessment of risk have to be based on relevant and accurate actuarial or statistical data?*

Dutch equal treatment law does not provide for specific exceptions on the general prohibitions of discrimination with regard to financial services, other than art 8 ADA (regarding age) which exempts distinctions with regard to age-based provisions in pension regulations.

### 3.2.10 Housing (Article 3(1)(h) Directive 2000/43)

*To which aspects of housing does the law apply? Are there any exceptions? Please also consider cases and patterns of housing segregation and discrimination of the Roma and other minorities or groups and the extent to which the law requires or promotes the availability of housing which is accessible to people with disabilities and older people.*

‘Housing’ is captured by article 7(1) subsection c of the GETA, and from 15 March 2009 also by articles 6a-6c of the DDA. It applies to all aspects of housing. No specific exceptions apply as regard housing other than those which will be dealt with below. It remains to be seen whether the ‘Rotterdamwet’, in which local authorities get the right to refuse to rent houses in certain areas to persons or households with a low-income or without steady jobs and to refer them to other areas, will be deemed indirectly discriminatory on the ground of ethnic origin when a case is brought to the attention of the courts. As the measure may only be applicable to certain poor districts, it probably will not result in homelessness.

Roma and traveler people tend to live in caravans or trailers which are situated on officially designated ‘trailer parks’ (woonwagenkampen). The already mentioned lack of systematic data in this respect makes it difficult to give exact numbers on the housing situation of Roma and travelers. In the *Monitor Racism and Extremism*<sup>177</sup> we found a quite critical assessment of the situation concerning the housing of these people in trailer parks. It is stating that the most important issue for Roma and Sinti in the area of housing is policymaking related to caravan sites. In this respect, the *Monitor* observes a shortage of caravan sites that is estimated at somewhere around 3,000 sites.<sup>178</sup> “This often makes it impossible for family members to pitch on the same encampment, something of great importance to the Roma and Sinti.”<sup>179</sup> In failing to provide enough caravan sites, the government makes it impossible for Roma and Sinti to sustain their cultural identity. This violates the requirement to provide housing without distinguishing by ethnic background, as established in the European Racial Equality Directive.”<sup>180</sup>

<sup>177</sup> Jaap van Donselaar and Peter Rodrigues (eds.), *Monitor Racisme & Extremisme. Zevende rapportage* (Monitor Racism & Extremism. Seventh report), Amsterdam: Anne Frank Stichting/Leiden: Leiden University 2006  
<http://www.annefrank.org/upload/downloads/monitor2006-7.pdf>

<sup>178</sup> K. Sikkema, *Roma and Sinti in Nederland, Een onderzoek naar de algemene levensomstandigheden, gezondheidssituatie en toegang tot de gezondheidszorg van de Roma and Sinti in Nederland*. Amsterdam: Dokters van de Wereld, February 2004, p.10.

<sup>179</sup> See also the questions to the government, *Aanhangsel Handelingen II* (Appendix parliamentary questions II), 2002/03, no. 32 and no.199.

<sup>180</sup> *Monitor*, p. 53.



The only case we found about the housing situation of Roma and Sinti people concerns the already mentioned case that was decided by the ETC (Opinion 2006-222 of 6 November 2006; see section 0.3 of this Report). A family of travellers,<sup>181</sup> consisting of three generations, complained that a local government who had decided not to continue a special waiting list for persons who want to live in a caravan or trailer because there were hardly any applications for this type of housing. Although in this particular case there is an objective justification because the local government has proven that the measure (to abolish the special waiting list) was legitimate and that the means chosen (the general waiting list) were proportionate and effective, the ETC recommends the local government to prevent indirect discrimination in the future by giving more attention to the special needs of people who prefer housing in caravans.<sup>182</sup>

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<sup>181</sup> The ETC decided that this group of people falls under the ground race or ethnic origin. Some of the travellers are Roma or Sinti, but not all of them. See also ETC Opinion 2006-5.

<sup>182</sup> The ECT did not openly refer to a more substantive notion of equality, like was done by the ECtHR in the *Thlimmenos* case. See: ECtHR, *Thlimmenos v. Greece* of 6 April 2000.



## 4. EXCEPTIONS

### 4.1 Genuine and determining occupational requirements (Article 4)

*Does national law provide an exception for genuine and determining occupational requirements? If so, does this comply with Article 4 of Directive 2000/43 and Article 4(1) of Directive 2000/78?*

In the GETA, the ‘GOR-exception’ only exists for the grounds *race* and *sex* (the latter ground is not dealt with in this report). As far as race is concerned, this has been laid down in Article 2(4) of the GETA<sup>183</sup>: “*The prohibition of making distinctions on the grounds of race as it is contained in this Act, shall not apply:*

- a) *in cases where a person’s racial appearance is a determining factor, provided that the aim is legitimate and the requirement is proportionate to that aim;*
- b) *if the distinction concerns a person’s [outer] racial appearance and constitutes, by reason of the nature of the particular occupational activity concerned, or of the context in which it is carried out, a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate to that objective.”*

In contrast to Article 4 of Directive 2000/43 that speaks of a *characteristic related to racial or ethnic origin*, the Dutch provision specifies that only *outer racial appearances* may constitute a *genuine occupational requirement*.<sup>184</sup> This means that ‘race’ *in se* is not regarded as a permissible ground for a given distinction.<sup>185</sup> Only *physical differences* (skin colour, hair type, etc.) may form a basis for a distinction, to the exclusion of *sociological differences* (e.g., The GETA does not allow a care institution, which looks after the well being of young Moroccan delinquents, to express in a job advertisement a preference for a *Moroccan* social worker.<sup>186</sup>) Under art 4(6) GETA, this legal exceptions have been elaborated in a Governmental Decree of 1994.<sup>187</sup> The Decree exhaustively indicates to which categories the Article 2(4) exceptions apply. These are:

- a. The profession or activity of actor, dancer or artist insofar that the profession or activity regards the performance of a certain role (elaboration of subsection b);
- b. Mannequins, models for photographers, artists, etc., insofar as in reasonableness requirements can be imposed upon outer appearances (elaboration of subsection b);
- c. Participation in beauty contests insofar as appearances connected with a person’s race, are vital in the light of the contest’s aims (elaboration of subsection a);
- d. The provision of services that can only be provided to persons having certain outer appearances (elaboration of subsection a).

<sup>183</sup> Subsection b was inserted by the EC Implementation Act. With the insertion of a new subsection b the government has intended to follow more closely the wordings of the Directive. See Explanatory Memorandum to the EC Implementation Act, Tweede Kamer, 2002-2003, 28 770, nr. 3, p. 10. However, pre-implementation the ‘genuine occupational requirement exception’ was also covered by the more general wording of subsection a of Article 2(4).

<sup>184</sup> Explanatory Memorandum to the EC Implementation Act, Tweede Kamer, 2002-2003, 28 770, nr. 3, p. 10.

<sup>185</sup> J.H. Gerards and A.W. Heringa, *Wetgeving Gelijke Behandeling*, Kluwer Deventer 2003, p. 129.

<sup>186</sup> See Opinion 1997-51 of the Dutch Equal Treatment Commission.

<sup>187</sup> Governmental Decree on Equal Treatment (“Besluit Gelijke Behandeling”), 18 August 1994, Staatsblad 1994, 657. This Decree has been up dated on 21 June 1997, Staatsblad 1197, 317.

(The examples given by the Government are special hair dress services for people with ‘afro-hair’ or skin treatment for persons with a particular skin type).

For the grounds religion or belief, sexual orientation, disability and age the exception of the GOR was not deemed necessary.<sup>188</sup>

**Religion, belief, sexual orientation:** Although Directive 2000/78 would have allowed for it (Article 4(1) of the Directive), no GOR-exception has been enshrined in the GETA for these grounds. However, in the context of the exceptions of Article 5(2) of the GETA, institutions founded on religious principles, or on political principles, or schools founded on the basis of religious denomination may impose requirements on the occupancy of a post which, in view of the organisation’s purpose, are necessary to live up to its founding principles. The Article 5(2) exceptions are not rationalised by the idea of ‘genuine occupational requirements’ though. They were regarded necessary in order to reconcile the constitutional principle of equality with other constitutional principles, namely the freedom of religion and the freedom of education as well as the freedom of political opinion. Although the rationalization is different, in practice this exception is compatible with Article 4(1) of the Framework Directive. The requirements that are set on this ground need to be closely linked to the nature and content of the job. This means that only functions that are related to the “mission” of the organisation can be exempted from the equal treatment norm. (I.e. the exception is not applicable when it concerns a gardener for a church.) It is also a requirement that the organisation applies a consistent policy in this respect. The criteria have been explained by the ETC in its Opinion 1996-118.

**Disability:** The GOR-exception has not been included in the DDA. The Government’s view is that, in contrast to ‘race’ and ‘sex’, no scenario is imaginable in which ‘disability’ would constitute a genuine occupational requirement.<sup>189</sup> An amendment was submitted by a Member of Parliament in this respect; however, without any effect.<sup>190</sup>

**Age:** Since the ADA does not differentiate between ‘direct’ and ‘indirect’ distinction and ‘objective justification’ is provided for both types of ‘distinction’ (Article 7(1)(c) ADA), the Government considered including the GOR-exception a redundant exercise. In this view, in cases in which ‘age’ is considered a genuine occupational requirement, this can be assessed via the objective justification test.<sup>191</sup> Conceptually speaking, this is open to criticism.

In this view, the Article 4(1) exception of the Directive is regarded as a species of the Article 6 exception of the Directive.<sup>192</sup> In that light it would have been preferable, had the Government explicitly included the GOR-exception.

## 4.2 Employers with an ethos based on religion or belief (Art. 4(2) Directive 2000/78)

a) *Does national law provide an exception for employers with an ethos based on religion or belief? If so, does this comply with Article 4(2) of Directive 2000/78?*

<sup>188</sup> On the ground of case law of the ETC in 2005, Waaldijk, *supra* footnote 42.

<sup>189</sup> Explanatory Memorandum to the DDA, Tweede Kamer 2001-2002, 28 169, nr. 3, p. 35.

<sup>190</sup> Amendement Terpstra, Tweede Kamer, 2001-2002, 28 169, nr. 11. This amendment was rejected.

<sup>191</sup> Explanatory Memorandum to the ADA, Tweede Kamer 2001-2002, 28169, nr 3, p. 35.

<sup>192</sup> See F.B.J. Grapperhaus, ‘Het verbod op onderscheid op grond van leeftijd in arbeid en beroep’, *Ondernemingsrecht* 2002-12, p. 356-363, at p. 362.



With regard to the exception of religious ethos, the GETA on the one hand sets *boundaries* to its scope of applicability; on the other hand it provides for *exceptions*.

Please note that the following does **not** apply to distinctions made on the grounds age and disability since the ADA and the DDA do not contain similar provisions as in the GETA (discussed below). Therefore, employers with an ethos based on religion or belief can only rely on this exception in the case of race, sex, sexual orientation or religion/belief (and the other grounds covered by the GETA: nationality, civil status and political conviction).

### **Boundaries to the scope of application.**

The GETA does not apply to legal relationships *within* churches, other religious communities, or associations of a spiritual nature and excludes the application of equal treatment norms to ‘ministers of religion’ (priests, ministers, imams, et cetera). (See Article 3 GETA.) These are considered to be internal affairs of these (religious) organisations. The rationale for this lies in the principle of *freedom of religion* and in the *division between state and church*.

Article 3 GETA:

*This Act does not apply to:*

- a. *legal relations within religious communities, independent sections or associations thereof and within other associations of a spiritual nature*
- b. *the office of minister of religion.*

It is to be noted that only purely *internal* affairs of Churches fall outside the scope of the GETA. Thus, for example, the employment relationship between a gardener or cleaner with a Church or a religious community falls within the scope of the GETA. As has been observed by Gerards and Heringa, the more the legal relationship is disconnected from the rationales of freedom of religion and the division between state and church, the less likely is it to be considered as a purely internal affair.<sup>193</sup> The question whether the autonomy of churches should be limited with a view to respecting the equal treatment principle was subject of a study by independent academic experts who were appointed by the Government to conduct the second (external) 5-year term evaluation of the functioning of the GETA. An extensive review was made of the international and national human rights norms that are at stake (ICCPR, ECHR, EU-legislation and the Dutch Constitution).

The conclusion of these experts was that Article 3 of the GETA does not exceed the criteria set by the constitutional guarantee of the freedom of religion and the protection against discrimination. Also, this Article is in line with the exceptions that are possible under the EC-Directives.<sup>194</sup>

<sup>193</sup> J.H. Gerards and A.W. Heringa, *Wetgeving Gelijke Behandeling*, Deventer: Kluwer 2003, p. 105.

<sup>194</sup> M.L.M. Hertogh & P.J.J. Zoontjens (eds): *Gelijke behandeling: principes en praktijken. Evaluatieonderzoek Algemene wet gelijke behandeling*. Wolf Legal Publishers Nijmegen 2006. The part about the exemption of the Churches was written by prof. Ben Vermeulen. See pp. 219-248.





## Exceptions for employers on the ground of religion and belief

In this regard two provisions in the GETA are important:

**Article 5(2)(a) GETA** contains an exception to the prohibition of distinction in employment for *institutions founded on religious or ideological principles*. It reads as follows:

*the freedom of an institution founded on religious or ideological principles to impose requirements which, having regard to the institution's purpose, are necessary for the fulfilment of the duties attached to a post; such requirements may not lead to discrimination on the sole grounds of political opinion, race, sex, nationality, heterosexual or homosexual orientation or civil status;*

**Article 5(2)(c) GETA** provides that distinctions may lawfully be made by private educational establishments founded on religious or ideological principles.

Article 5(2)(c) reads as follows:

*the freedom of an educational establishment founded on religious or ideological principles to impose requirements on the occupancy of a post which, in view of the institution's purpose, are necessary for it to live up to its founding principles; such requirements may not lead to discrimination on the sole grounds of political opinion, race, sex, nationality, heterosexual or homosexual orientation or civil status.*

Institutions under sub a may only make distinctions that are necessary for the *effective performance* of the job. Distinctions made with reliance under the exception under sub c must (only) be necessary in order for the establishment to *effectively realise its founding principles*. This implies, that establishments under c are granted more leeway in making distinctions than institutions under a. After all, establishments under sub c may impose requirements that are not directly linked up with the performance of a person's duties within that establishment.

Establishments that fall under sub c may even impose requirements upon the acts of (would be) employees which take place *outside* the sphere of the establishment, if this is necessary for the effective realisation of the establishment's founding principles.<sup>195</sup>

*Do the exceptions under article 5(2)(a) and article 5(2)(c) comply with Article 4(2) of Directive 2000/78?*

### The exception under article 5 (2)(a) GETA

The exception under sub (a) is formulated slightly differently than its counterpart definition in the Directive. The Directive uses as main yardstick whether, while having regard to the organisation's ethos, a person's religion or belief constitutes a *genuine, legitimate and justified occupational requirement*, by reason of the nature of the occupational activities or of the context in which they are carried out. Within the context of the GETA, it is of prime interest that the distinction made is necessary for the *fulfilment of duties* attached to a post.

<sup>195</sup> J.H. Gerards and A.W. Heringa, *Wetgeving Gelijke Behandeling*, Deventer: Kluwer 2003, p. 109.

From the wording of this provision it follows that the imposed requirements need necessarily be linked up with a person's *job performance*. In the light of the case law of the ETC, it appears to us that the Dutch law thus is in conformity with the Directive. The word 'necessary' implies that the requirements must be legitimate and justified.

That the requirements must be 'genuine' is also reviewed (and required) by the ETC. The Commission looks at the institution's statutes and at what the institution does in practice, in order to realise its religious and ideological foundations. The ETC's line of reasoning is largely based upon the guidance given in the Parliamentary Documents to the Article 5(2)(a) exception.

### **The exception under article 5(2)(c) GETA**

From the wording of this provision it follows that the imposed requirements need not necessarily be linked up with a person's *job performance*. Also behaviour outside the establishment (e.g. living together without being married or living together with a same-sex partner) might be a factor that can be taken into account by the establishment in its decision as to whether or not a given person complies with the founding principles underlying the establishment.<sup>196</sup> Requirements must however be 'necessary' for the effective realisation of the institution's founding principles. The Commission looks at the institution's statutes and at what the institution does in practice, in order to realise its religious and ideological foundations. It seems that, in the light of the quite broad wording of Article 4(2) of the Directive, this exception is in line with EC law.

### **The 'sole ground' construction in the articles 5(2) sub (a) and (c)**

This so-called 'sole ground construction' is equivalent to the clause in Article 4(2) of the Employment Framework Directive. The 'sole ground construction' aims at eliminating the possibility that a distinction is exclusively made on the grounds of political opinion, race, sex, nationality, hetero- or homosexual orientation or civil status, under the guise of exceptions which are permitted by the law (i.e., the exceptions enshrined under sub a and c for the grounds religion and belief).<sup>197</sup>

In essence, the construction has played an important role with regard to the question whether a Christian School may lawfully refuse cohabitating homosexuals for a teaching position. It is stated clearly in the Parliamentary Documents that the 'sole fact' that a person is homosexual, may per se not lead to the refusal to hire such a person or to dismiss him.<sup>198</sup> However, this may be different if 'additional circumstances'<sup>199</sup> are taken into account.<sup>200</sup>

<sup>196</sup> See e.g. Opinion 1999-38.

<sup>197</sup> The Explanatory Memorandum points out that, in respect of the grounds 'race' and 'sex', it is difficult to see how 'accessory circumstances' or 'concomitant' behaviour could possibly result in the justification of a discriminatory act. The Memorandum only gives one example of justified discrimination on the grounds of race. The example given is that of Jewish associations which impose differentiating requirements on the ground of Jewish descent. The differentiation is a direct consequence of the Jewish belief. The special relationship in this example between *descent* on the one hand and *religion and belief* on the other hand may at certain instances justify the discriminatory act. See Explanatory Memorandum to the GETA, Tweede Kamer, 1990-1991, 22 014, nr. 3, p. 19.

<sup>198</sup> Parliamentary Documents First Chamber of Parliament, 1992-1993, 22 014, nr. 212c, p. 10-11.

<sup>199</sup> In the Parliamentary comments, the example is given of a teacher in social studies at a denominational school. This teacher is homosexual and cohabitates with a same sex partner. According to the example, the teacher may in reasonableness be expected to elaborate in his classes upon the concept of "marriage". See Parliamentary Documents 1990-1991 Memorandum in Reply, p. 41.

<sup>200</sup> Explanatory Memorandum to the GETA, Tweede Kamer, 1990-1991, 22 014, nr. 3, p. 18-19. See also ETC Opinion 1996-39 and 1999-38 and J.H. Gerards and A.W. Heringa, *Wetgeving Gelijke Behandeling*, Deventer: Kluwer 2003, p. 105.



The Directive's wording in Article 4(2) seems not to permit that 'additional circumstances' play a material role *unless* such circumstances coincide with the organisation's religion or belief.

Examples given by the government during the parliamentary discussions and ETC-Opinions regarding 'additional circumstances' are all related to behaviour or circumstances that have a relationship with the religious ethos of the organisation. Therefore, this 'sole ground construction' seems to be in conformity with the Directive.<sup>201</sup>

- b) *Are there any specific provisions or case-law in this area relating to conflicts between the rights of organisations with an ethos based on religion or belief and other rights to non-discrimination? (e.g. organisations with an ethos based on religion v. sexual orientation or other ground.)*

Specific provisions in this area are Article 3 GETA and Article 5(2) GETA, which have been discussed extensively above under section a). As for case law, there are quite a number of cases of the ETC in which these Articles are at stake. Quite often, this concerns questions related to Islamic faith, e.g. whether the Islamic headscarf is allowed or whether a person can be obliged to shake hands.<sup>202</sup> As far as the "sole ground" construction is concerned, see ETC Opinions 1996-39 and 1999-38 in which the ETC examined the 'sole ground construction' in the context of Article 5(2) under c. In 1998-38 the ETC concluded that the *a priori* refusal of a homosexual person without granting her a chance to express her viewpoints makes that the Article 5(2)(c) exception can not be successfully relied upon.<sup>203</sup>

#### **4.3 Armed forces and other specific occupations (Art. 3(4) and Recital 18 Directive 2000/78)**

- a) *Does national law provide for an exception for the armed forces in relation to age or disability discrimination (Article 3(4), Directive 2000/78)?*

Article 17 of the ADA enshrined an exception (which was of a temporary kind): until 1 January 2008 at the latest, the ADA did not apply to the military service. In the DDA and the GETA there have never been any limitations to the Acts' scope concerning the armed forces.

- b) *Are there any provisions or exceptions relating to employment in the police, prison or emergency services (Recital 18, Directive 2000/78)?*

No, there are not.

<sup>201</sup> This is contrary to the opinion of Marinne Gijzen, who submitted the first Country Report to the Network.

<sup>202</sup> See e.g. 2006-218, 2006-144, 2006-128, 2006-93, 2006-63, 2005-222, 2005-102, 2005-19, 2004-160, 2004-138, 2003-145, 2003-114, 2001-01 and 2000-67. Some of these cases have been reported in the framework of the thematic study concerning religion and belief. See: Lucy Vickers: *Religion and Belief Discrimination in Employment – the EU Law*. European Commission, November 2006.

<sup>203</sup> J.H. Gerards and A.W. Heringa, *Wetgeving Gelijke Behandeling*, Deventer: Kluwer 2003, p. 109.

- c) *Are there cases where religious institutions can select people (on the basis of their religion) to hire or to dismiss from a job - when that job is in a state entity, or in an entity financed by the State (e.g. the Catholic church in Italy or Spain can select religious teachers in state schools)? In what conditions is that selection done ? Is this possibility provided for by national law only, or international agreements with the Holy See, or a combination of both ?*

Under article 23 of the Dutch Constitution, (Freedom of education), schools with both neutral or general foundations (in the Netherlands called ‘public schools’) and schools with a specific religious/philosophical foundation, have a right to governmental funding. As a result, teachers and other personnel in these publicly financed schools can be hired or dismissed on religious/ ideological criteria, under conditions set in equal treatment legislation and case-law. In short, these criteria must be closely linked to the (often religious) identity of the school, they must be aimed at maintaining this identity and consistently kept<sup>204</sup>. These possibilities are provided by national law: no international agreements are concluded between the Netherlands and the Holy See in this respect.

#### 4.4 Nationality discrimination (Art. 3(2))

*Both the Race Directive and the Framework Employment Directive include exceptions relating to difference of treatment based on nationality (Article 3(2) in both Directives).*

- a) *How does national law treat nationality discrimination? Does this include stateless status?*  
*What is the relationship between ‘nationality’ and ‘race or ethnic origin’, in particular in the context of indirect discrimination?*  
*Is there overlap in case law between discrimination on grounds of nationality and ethnicity (ie where nationality discrimination may constitute ethnic discrimination as well?)*

Article 1 of the Constitution provides that “*all persons in the Netherlands shall be treated equally in equal circumstances*”. Protection against discrimination offered by Article 1 of the Constitution, by criminal law, by civil law and under the specific Statutory Anti-Discrimination Acts, is not tied to any nationality requirement.

Beside discrimination on the ground of race, nationality discrimination is prohibited by the GETA. Thus, the Dutch Act goes beyond the requirements stemming from Directive 2000/43. Distinction on the grounds of nationality is in principle prohibited as follows from Article 1 of the Act. However, Article 2(5) of the Act enshrines exceptions to this. The prohibition on the grounds of nationality shall not apply, if the distinction is based upon *generally binding rules* (i.e., Statutory Acts and Acts by the administration such as governmental decrees) or on *written or unwritten rules of international law*.<sup>205</sup> Moreover, the prohibition shall not apply in such cases where ‘nationality’ is a determining factor (e.g., nationality requirements imposed upon players for the national football team).<sup>206</sup> Nationality discrimination does indeed include stateless status.

<sup>204</sup> See (e.g.) ETC Opinion 2004-168, in which these criteria are applied clearly.

<sup>205</sup> See e.g. ETC Opinion 2002-61, 1998-81 and 1997-13.

<sup>206</sup> See e.g. ETC Opinion 1996-77.



There is an overlap between nationality and race in the context of indirect discrimination. Because both grounds of discrimination are covered in Dutch Equal treatment law, this fact does not cause difficulties. However, if the Court is convinced that race is involved, this will lead to a more strict juridical review than if a treatment was solely based on nationality. As stated above, if a certain treatment was based on the ground of nationality but could not in any way related to the ground of “race”, further exceptions may be applied on the prohibition of discrimination.

*b) Are there exceptions in anti-discrimination law that seek to rely on Article 3(2)?*

Yes, see Article 2(5) GETA (cited above); this provision existed before the Directives were adopted and has not been changed since.

#### **4.5 Work-related family benefits (Recital 22 Directive 2000/78)**

*Some employers, both public and private, provide benefits to employees in respect of their partners. For example, an employer might provide employees with free or subsidised private health insurance, covering both the employee and their partner. Certain employers limit these benefits to the married partners (e.g. Case C-267/06 Maruko) or unmarried opposite-sex partners of employees. This question aims to establish how national law treats such practices. Please note: this question is focused on benefits provided by the employer. We are not looking for information on state social security arrangements.*

*a) Does national law permit an employer to provide benefits that are limited to those employees who are married?*

No, this will be regarded as a distinction based on marital or civil status, which is prohibited under the GETA.

*b) Does national law permit an employer to provide benefits that are limited to those employees with opposite-sex partners?*

No, this will be considered to be a direct distinction on the ground of sexual orientation. Since 1998, legal marriage is open for both opposite-sex couples and same-sex couples (marriage has been “opened” for same-sex couples). This follows not only from the Parliamentary Documents but it has also been confirmed by the ETC in several of its Opinions.<sup>207</sup> It is therefore prohibited to make distinctions between same-sex and opposite-sex partners, with the same civil status.

#### **4.6 Health and safety (Art. 7(2) Directive 2000/78)**

*Are there exceptions in relation to disability and health and safety (Article 7(2), Directive 2000/78)?*

*Are there exceptions relating to health and safety law in relation to other grounds, for example, ethnic origin or religion where there may be issues of dress or personal appearance (turbans, hair, beards, jewellery etc)?*

<sup>207</sup> See Opinions 1997-47 and 48, Opinion 1999-08 and Opinion 1999-13.





Yes, the DDA contains a provision that is mirroring Article 7(2) of the Directive.<sup>208</sup> See Article 3, section a. of the DDA:

*“The prohibition of making a distinction shall not apply if:*

- a) the distinction is necessary for the protection of public security and health; (...).”*

The exception of Article 3 (1) sub (a) in the DDA must be interpreted narrowly. It follows from Parliamentary History that a high threshold is set for any successful reliance upon this exception. If an employer claims that a distinction on the ground of disability is necessary for reasons of health, safety of security, he must duly motivate his claim. If there is a possibility to remove the risk by means of an effective and reasonable accommodation, it is not possible to rely on the exception.<sup>209</sup> There are a few points that need further clarification. Under the 1998 Working Conditions Act and under private employment law, the employer has a duty to eliminate/reduce much as possible any risk to the health and well being of his employees. It is not totally clear from the Parliamentary History or from existing case law whether an employer can exclude a disabled person on the ground that the work will pose a risk to the disabled person's own health or safety (but not the health and safety of others). Neither is it clear whether a disabled individual can decide for him/ herself that he/ she wishes to accept such a risk. Moreover, it is not clear whether the employer would be excluded from liability should the disabled individual suffer harm in such circumstances.

An exception regarding health and safety is not to be applied to other grounds. A similar counterpart exception has not been enshrined in the GETA or in the ADA. However, safety and security issues may come at the surface in the ‘objective justification test’ for indirect discrimination cases. For example, a prohibition of headscarves during gymnastics for reasons of safety and security can be objectively justified. It has to be noticed that there has been some debate about the question whether this is a shortcoming in the GETA.<sup>210</sup>

#### **4.7 Exceptions related to discrimination on the ground of age (Art. 6 Directive 2000/78)**

##### **4.7.1 Direct discrimination**

- a) Is it possible, generally, or in specified circumstances, to justify direct discrimination on the ground of age? If so, is the test compliant with the test in Article 6, Directive 2000/78, account being taken of the European Court of Justice in the Case C-144/04, Mangold ?*

Both direct and indirect age distinction may be ‘objectively justified’ under Article 7(1)(c) of the ADA.

<sup>208</sup> This provision seems often to be confused with the Article 3 (1) sub a DDA, that mirrors Article 2(5) of the Directive, which aims at national legislation that is necessary for reasons of public health and safety. This exception is discussed later in this report under the heading 4.8.

<sup>209</sup> See also A.C. Hendriks, *Wet Gelijke Behandeling op grond van handicap of chronische ziekte* (Actualiteiten Sociaal Recht), Deventer: Kluwer 2003, p. 66-67.

<sup>210</sup> See ETC Opinion 2006-20, (also referred to in section 0.3: case-law) in which the ETC deemed a measure which rejects homosexual blood donors legally justified, in spite of the lack of a legal provision to justify direct a distinction based on sexual orientation because of health risks.



The Dutch Government, until now, more or less assumed that whenever the legislator had laid down a criterion based on age, this was objectively justified as soon as the legislator had given some ‘good reasons’ for doing this.<sup>211</sup> The case law of the Court means that every legal norm that contains a differentiation based on age needs to be justified. This seems to be in line with the Mangold judgement of the ECJ. The Government has made a start with this during 2004-2005. Every Department of the Government was obliged to make a report in which it gives an inventory of age criteria in its legislation and has to give the reasons why these criteria exist.<sup>212</sup>

b) *Does national law permit differences of treatment based on age for any activities within the material scope of Directive 2000/78?*

Yes, it does. *Article 7(1)* subsections (a) and (b) enshrine two exceptions that are deemed *a priori* to be ‘objectively justified’.

Subsection (a) provides that the prohibition of age distinction shall not apply if the distinction is based on employment- or labour market policies which are aimed at promoting labour participation of certain age categories provided that such policies are enshrined in a Statutory Act or in a Governmental Decree.<sup>213</sup> [Transposition of Art. 6(1) of Directive 2000/78].

Subsection (b) provides that the prohibition of age distinction shall not apply if the distinction regards the termination of the employment relationship, either by reason of having reached the statutory retirement age (65), or, of a *higher* (not lower!)<sup>214</sup> age than that provided this higher age has been laid down by Statutory Act or governmental decree, or has been mutually agreed on by the parties involved. [Transposition of Art. 6(2) of Directive 2000/78].

In addition, Article 16 of the ADA provided that the prohibition of age distinction should, until 2 December 2006, *not* apply to distinctions regarding termination of the employment contract as a result of having reached the – by the employment contract agreed- retirement age *lower than* the statutory retirement age, *provided* this had been agreed on before 1 May 2004 (when the ADA entered into force). Since that time, ‘objective justification’ had been called for.

<sup>211</sup> See Explanatory Memorandum to the ADA, Tweede Kamer 2001-2002, 28169, nr 3. See for the consequences of the Mangold test also M. Heemskerk & M.J.J. Dankbaar, ‘Leeftijd’ [Age]. In: S D.Burri (ed.) Oordelenbundel 2005. Kluwer, Deventer June 2006.

<sup>212</sup> This was requested by the Second Chamber of Parliament; see the letter to the Minister of Social Affairs, dd 14 June 2004, 85-04-SZW. The answers were sent to Parliament in the course of 2005. See Tweede Kamer 2004-2005, 28 170, nr 30: Inventory of the Ministry of Social Affairs and Employment; *ibid.*, nr. 31: Inventory of the Ministry of Housing; *ibid.*, nr. 32: Inventory of the Ministry of Finance; *ibid.*, nr. 33: Inventory of the Ministry of Foreign Affairs; *ibid.*, nr. 34: Inventory of the Ministry of Health; *ibid.*, nr. 35: Inventory of the Ministry of Education; *ibid.*, nr. 36: Inventory of the Ministry of Transport and Water Management; *ibid.*, nr. 38: Inventory of the Ministry of Agriculture and Nature; *ibid.*, nr. 39 + 44: Inventory of the Ministry of Internal Affairs and Kingdom Relations; *ibid.*, nr. 41: Inventory of the Ministry of Justice. The report of the Ministry of Social Affairs and Employment is available on the internet; see [www.minszw.nl](http://www.minszw.nl).

<sup>213</sup> A concrete example of this exception concerns the Act on a Minimum Wage and Minimum Holiday Allowance (“Wet Minimumloon en Minimum Vakantietoelage”). This Act contains both a maximum and a minimum age limit of 65 and 23 years old respectively. The Act’s purpose is the promotion of employment in general and paid employability for young persons specifically. See Explanatory Memorandum to the ADA, pp. 28-30. The exception under subsection (a) reflects the exception of *Article 6(1)* of Directive 2000/78.

<sup>214</sup> It follows from the Explanatory Memorandum that subsection b does not apply to dismissal based upon reaching a pensionable age which is *lower* than 65 years. See Explanatory Memorandum to the ADA, , Tweede Kamer 2001-2002, 28169, nr 3, p. 32.



- c) *Does national legislation allow occupational pension schemes to fix ages for admission to the scheme or entitlement to benefits under it taking up the possibility provided for by article 6(2) ?*

Yes, it does. Article 8 of the ADA renders the prohibition to make a distinction inapplicable in regard to (occupational) pension schemes and in regard to actuarial calculations for pension provision. Article 8(2) provides in essence, that the prohibition of age distinction shall not apply to the admission or entitlement to pension provision<sup>215</sup>, nor to the fixing under such provision of different ages for employees or categories of employees. Article 8(3) renders this norm inapplicable in regard to the use of age criteria in actuarial calculations. [Transposition of Art. 6(2) of Directive 2000/78]. The Directive states that this exception may not lead to discrimination on the ground of sex. This clause has not been added in the Dutch ADA. However, this is regulated in the sex-discrimination legislation. (See Article 12b and 12c of the Equal Treatment Male/Female in Employment Act.)

#### **4.7.2 Special conditions for young people, older workers and persons with caring responsibilities**

*Are there any special conditions set by law for older or younger workers in order to promote their vocational integration, or for persons with caring responsibilities to ensure their protection? If so, please describe these.*

Article 7(1) sub (a) enshrines an exception for labour market policies that are aimed at the promotion of labour participation of certain age categories. No special conditions exist for persons with caring responsibilities.

This article reads as follows: “1. The prohibition on discrimination shall not apply if the discrimination: a) is based on employment or labour-market policies to promote employment in certain age categories, provided such policies are laid down by or pursuant to an Act of Parliament; (...)”.

#### **4.7.3 Minimum and maximum age requirements**

*Are there exceptions permitting minimum and/or maximum age requirements in relation to access to employment (notably in the public sector) and training?*

There are no explicit exceptions with such contend. However, this is possible on the ground of a broad reading of the exception under Article 7(1) sub a or under Article 7(1) sub (c) of the ADA (general possibility of an objective justification).

<sup>215</sup> A concept defined in Article 8(1) of the ADA.



#### 4.7.4 Retirement

*In this question it is important to distinguish between pensionable age (the age set by the state, or by employers or by collective agreements, at which individuals become entitled to a state pension, as distinct from the age at which individuals retire from work), and mandatory retirement ages (which can be state-imposed, employer-imposed, imposed by an employee's employment contract or imposed by a collective agreement).*

For these questions, please indicate whether the ages are different for women and men.

- a) *Is there a state pension age, at which individuals must begin to collect their state pensions? Can this be deferred if an individual wishes to work for longer, or can an individual collect a pension and still work?*

→ all following provisions are to be applied equally to women and men under Dutch law.

The right to receive a state pension on the basis of the General Old Age Pensions Act (AOW) at the age of 65 is independent from the question whether the person has (or has had) a paid job or not.

The Dutch government is of the opinion that dismissal on the age on which one is entitled to a AOW pension is objectively justified. The explanatory statement (MvT) tot the ADA says that the objective justification lies in the following aspects:

- dismissal at a certain age accomplishes the use of an objective criterion irrespective of people; there is no need to determine whether the employee concerned still meets the requirements or not;
- there is a general consensus for the age of 65 years as a 'limit' in the Dutch society ('groot maatschappelijk draagvlak');
- the age of 65 years underlies the social security system in the Netherlands;
- at the age of 65 employees are entitled to an income (a pension under the General Old Age Pensions Act), which consists of a benefit based on legal social security as well as of an (additional) occupational pension ('bovenwettelijke pensioen') Individuals do not need to have a history of employment in order to receive the basic pension under the General Old Age Pensions Act.

The ADA leaves room for social partners to agree - if required - on a higher age, until which employees can continue working after they turned 65.

The ADA prohibits compulsory retirement (dismissal) before the age of 65, unless the distinction made on ground of age is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

It is not possible to fix a lower retirement age by individual agreement nor by collective agreement, unless the distinction made on ground of age is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

- b) *Is there a normal age when individuals can begin to receive payments from occupational pension schemes and other employer-funded pension arrangements?*



*Can payments from such occupational pension schemes be deferred if an individual wishes to work for longer, or can an individual collect a pension and still work?*

The date on which benefits can be collected under these schemes depends on the conditions under which such schemes are contractually agreed. Some schemes are more flexible as others as far as an individual's wishes to work longer are concerned.

c) *Is there a state-imposed mandatory retirement age(s)? Please state whether this is generally applicable or only in respect of certain sectors, if so please state which. Have there been recent changes in this respect or are any planned in the near future?*

No, there is not a general a mandatory retirement age in any provision in the Dutch law that regulates the possibilities of dismissal of workers. However, in some professions there are age limitations that are regulated by law or by the professional organisation (e.g. the National Organisation of General Practitioners).<sup>216</sup> These are also regularly included in a Collective Labour Agreement ("Collectieve Arbeidsovereenkomst"). Furthermore, in an employment contract it can be determined that it ends at the age of 65.

A complete overview of such regulations can not be given here. The ETC decides on a case by case basis whether there is sufficient objective justification for such a fixation of a retirement age or the age on which an other contractual relationship will be ended. See e.g. ETC-Opinion 2005-49, where a General Practitioner (GP) aged 80 contested exclusion by an insurance company, the ETC concluded that there were solid methods available to test whether elderly GP's are still able to do their job properly. In fact a Registration Committee of Medical Doctors and the National Association of Medical Doctors apply these methods. Following the results of these tests the insurance company can decide whether or not to conclude a service contract with a doctor who is over the age of 65. Therefore the conclusion was that there is no objective justification for the exclusion of this particular doctor.

d) *Does national law permit employers to set retirement ages (or ages at which the termination of an employment contract is possible) by contract, collective bargaining or unilaterally?*

Yes, see article 7(1) sub (b). This article reads as follows: "1. The prohibition on discrimination shall not apply if the discrimination:

*(a) (...) (b) relates to the termination of an employment relationship because the person concerned has reached pensionable age under the General Old Age Pensions Act (AOW), or a more advanced age laid down by or pursuant to an Act of Parliament or agreed between the parties; (...)"*

The Government holds the view that this exception is fully in compliance with the Directive.

This view has not been contested in Parliament nor in academic literature, as far as it is known.

<sup>216</sup> See <http://www.leeftijd.nl/vragen/binnenkort65>.





- e) *Does the law on protection against dismissal and other laws protecting employment rights apply to all workers irrespective of age, if they remain in employment or are these rights lost on attaining pensionable age or another age (please specify)?*

Yes, these laws are applicable to all workers, without any exception. As long as someone is an employee according to the definitions of these laws, they are protected by the civil laws regulating employment rights and by the ADA, not matter his/her age.

#### 4.7.5 Redundancy

- a) *Does national law permit age or seniority to be taken into account in selecting workers for redundancy?*

Yes, it does. However, it has been provided for in employment law, that in case of the restructuring of a company, the so-called ‘last in, first out’ principle may be used as a yardstick in the choice as to whom to dismiss first.

The principle works to the advantage of older workers (and constitutes ‘indirect distinction’ of younger workers). The principle has also been accepted in case law. The Explanatory Memorandum to the ADA explicitly says that the use of this principle may be “objectively justified” under Article 7(1) (c) of the Act. It is noted that the ‘last in, first out’ principle currently forms object of debate in the Dutch Parliament.<sup>217</sup>

Article 7(1)(c) ADA reads as follows: “1. *The prohibition on discrimination shall not apply if the discrimination: (...) (c) is otherwise objectively justified by a legitimate aim and the means used to achieve that aim are appropriate and necessary.*”

- b) *If national law provides compensation for redundancy, is this affected by the age of the worker?*

Yes, it is. Compensation is calculated on the basis of the so-called ‘cantonal courts formula’ (“kantonrechtersformule”), *i.e.*,  $a \times b \times c$ .<sup>218</sup>

The factor *a* stands for the employee’s number of years of service. This factor is connected to the employee’s age. Until 40 years old, every full year of service counts for 1, between 40-50 years old it counts for 1.5, and, as from 50 years old it counts for 2. (Factor *b* reflects a remuneration component (monthly gross salary) and factor *c* is a ‘correction factor’).

<sup>217</sup> On 18 December 2003 the Second Chamber of Parliament accepted a Motion (Motion Verburg, Weekers, Bakker and Noorman den Uyl) which begged the Government to reconsider the usage of the ‘last in, first out’ principle in cases of dismissal for reasons related to the economic situation of a company. See Tweede Kamer, 2003-2004, 29 200, XV, nr. 48. See also the recent Note on Reconsideration of the Last In First Out Principle in cases of dismissal for reasons related to the economic situation of a company, available at [www.szw.nl](http://www.szw.nl).

<sup>218</sup> See H.L. Bakels, I.P. Asscher Vonk, W.J.P.M. Fase, *Schets van het Nederlands Arbeidsrecht*, Deventer: Kluwer 2003, p. 179.



In 2005 the Cantonal Court of Sneek decided that a ‘Social Plan’ whereby the Trade Unions and the Management of a Company, in a case of a large scale reorganisation, agreed to make an age distinction whereby this ‘cantonal courts formula’ was ‘neutralised’ (correction factor  $c = 1$ ) only for employees under the age of 57 (while for the employees over 57 there was a general wage compensation scheme in place) amounted to unlawful age discrimination.<sup>219</sup>

The case came down to the question whether a person over the age of 57 years old needs to use the special arrangement for older workers in the Social Plan or that he is free to choose to be made redundant in the normal way (termination of the employment contract and normal application of the so-called cantonal judges formula), which would be more profitable. The ETC (and the judges) ruled that the special rules for the redundancy payment of older people are not objectively justified (not meeting the criterion of proportionality). Those cases concerned a situation of large scale dismissals (reorganisation-dismissals). In practice, the formula is still being used in individual cases of dismissal.

#### **4.8 Public security, public order, criminal offences, protection of health, protection of the rights and freedoms of others (Article 2(5), Directive 2000/78)**

*Does national law include any exceptions that seek to rely on Article 2(5) of the Framework Employment Directive?*

It can be maintained that Article 3(1) sub (a) of the ADA is implementing Article 2(5) of the Directive. However, in that case the requirement that measures on this ground need to be based on a law is not fulfilled (See above, para 4.6.).

#### **4.9 Any other exceptions**

*Please mention any other exceptions to the prohibition of discrimination (on any ground) provided in national law.*

In the context of the GETA, the following exceptions have not been mentioned so far:

1. Article 5(3) of the GETA contains an exception regarding the private nature of the employment relationship. (The scope of this exception has been criticized by the European Commission, see also section 0.2)
2. Article 7(2) of the GETA grants private educational establishments the freedom to impose requirements governing admission to or participation in the education that the establishment provides. Article 7(2) accords with the exception in Article 5(2)(c) of the GETA, however, Article 7(2) applies to the entry of pupils to denominational schools and thus not to employment.
3. Article 7(3) concerning providing goods and services of the GETA contains an exception regarding the private nature of the circumstances at which the legal relationship sees (*e.g.*, a woman who rents a room in her own house may lawfully require that the person who rents the room is female).<sup>220</sup>

<sup>219</sup> Cantonal Court Sneek, 31 May 2005, LJN AT7230.

<sup>220</sup> This topic has been discussed in great detail in the second evaluation report about the functioning of the GETA which was published in the end of 2006. See M.L.M. Hertogh & P.J.J. Zoontjens (eds): *Gelijke behandeling: principes en praktijken. Evaluatieonderzoek Algemene wet gelijke behandeling*. Wolf Legal Publishers Nijmegen 2006. The part about the



4. The internal affairs of associations fall outside the scope of the GETA. This follows from the Parliamentary History and is not explicitly provided for in any Article of the Act.<sup>221</sup>

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relationship between equality and freedom of association and the right to privacy was written by prof. Paul Zoontjens. See pp. 175-216.

<sup>221</sup> This topic has also been discussed in great detail in the second evaluation report about the functioning of the GETA. See the previous footnote.



## 5. POSITIVE ACTION (Article 5 Directive 2000/43, Article 7 Directive 2000/78)

- a) *What scope does national law provide for taking positive action in respect of racial or ethnic origin, religion or belief, disability, age or sexual orientation? Please refer to any important case-law or relevant legal/political discussions on this topic*

Positive action schemes are – to a certain extent – only possible with respect to sex, race, age and disability. Article 2(3) of the GETA in its post-implementation format imposes the following conditions to positive action measures and policies:

1. the initiative must be a *specific measure*;
2. the measure is aimed at the conferral of a preferential position for women or for people belonging to ethnic or cultural minorities<sup>222</sup>;
3. the measure is aimed at the *removal* or the *reduction* of factual inequalities;
4. there must be a *proportionate* relationship between the measure and the objective pursued. This last element is not required by Directive 2000/43. The Dutch definition leaves *less scope* for affirmative action policies and programmes, since it does not allow measures which aim at *preventing*, in addition to *removing* or *reducing* disadvantages.<sup>223</sup>
5. With regard to age: a measure must be laid down by statutory act (see art 7(1)(a) ADA).

Article 3(1) sub (c) of the DDA enshrines a positive action exception to the prohibition of distinction under that Act. The same conditions as described above apply here.

In 2005 there was a discussion on the question whether the possibility to develop and apply positive action schemes should be extended to the other grounds that are covered in the GETA and to age discrimination. The Government has published a draft report and got comments from, *inter alia*, the ETC. Although the ETC recognises that in Dutch society there is hardly any structural disadvantage on the ground of age, religion or sexual orientation, the ETC is of the opinion that positive action measures should in principle be possible for all groups that are protected in Article 13 EC Treaty. The main reason for this is that it is important that the equal treatment legislation is consistent and transparent and contains the same system of exceptions for all non-discrimination grounds. In May 2005, a final Memorandum was sent to Parliament.<sup>224</sup> The Government concluded that it is not necessary to change the Dutch equal treatment legislation in view of the case law of the ECJ and the implementation of Directives 2000/43, 2000/78 and 2002/73. In this Memorandum, the measures that the Government employs in this respect are described in great detail.

As far as the DDA is concerned, apart from positive action measures as meant in Article 7(1) of the Framework Directive, there are also general supportive measures for disabled people, as meant in Article 7(2) of the Directive.

<sup>222</sup> The concept of 'ethnic or cultural minority group' is not defined in Dutch law, but it is usually applied as 'being from another descent than Dutch'.

<sup>223</sup> See Explanatory Memorandum to the EC Implementation Act, Tweede Kamer, 2002-2003, 28 770, nr. 3, p. 9.

<sup>224</sup> Memorandum on Preferential Treatment ("Nota Voorkeursbehandeling"), Tweede Kamer, 2004-2005, 28 770, nr. 11.



This provision has been transposed in Article 3(1) sub (b) DDA, which enshrines a possibility for supportive social policies for disabled people. In contrast to ‘positive action measures’, these are not ‘time restricted’.

The Dutch Government has introduced several supportive measures designed to promote the reintegration of disabled people in society over the past years. The 1998 Act on the Reintegration of Disabled People in Employment (“Wet op de (Re)integratie Arbeidsgehandicapten”), or REA<sup>225</sup> is of particular importance.

This Act aims at creating a coherent set of measures which facilitate the (re)integration of ‘employment disabled people’ (“arbeidsgehandicapten”) in employment. The means to achieve this objective are in essence: faster payment of expenses (related to (re)integration) to employers; flexible application of qualifications for benefits and, a reduction of the risks for employers.<sup>226</sup> The REA also has the purpose of achieving a clear allocation of responsibilities between the various actors involved with (re)integration. The REA enshrines the *possibility* for prescribing a *quota*, i.e., the obligation for employers to employ a certain number of ‘employment disabled persons’. However, this possibility has not been made use of so far. In essence the REA aims at reducing or taking away objections by employers to the employment of disabled persons.

b) *Do measures of positive action exist in your country? Which are the most important? Please provide a list and short description of the measures adopted., classifying them into broad social policy measures, quotas, or preferential treatment narrowly tailored. Refer to measures taken in respect of all 5 grounds, in particular refer to the measures related to disability and any quotas for access of people with disabilities to the labour market, any related to Roma and regarding minority rights based measures.*

Although many companies and governmental organisations do take measures of positive action, just a few general (and legal) measures can be mentioned.<sup>227</sup> In as far as such plans actually exist they concern the field of employment. As far as public employment is concerned such policies are often restricted to making remarks in advertisements that women and persons from ethnic minorities are especially invited to apply for the job. In general, there is quite a bit of resistance against positive action measures that are stronger than this (e.g. preferential treatment). Until 2003, a special act (the so called ‘Wet SAMEN’) regarding an obligation for employers to register the increase of numbers of employees from minorities and to set up a certain minorities policy was operative. Partly due to debate about the effectiveness of this act, it has been repealed.

In the past there has been some debate about this topic in Parliament when one member of the Liberal Party (VVD) proposed to abolish the positive action exception in the General Equal Treatment Act. (See TK 28 770 2003-2004, EG-implementatiewet Awgb, nr 7: amendement Luchtenveld (VVD) dd 8 October 2003).

<sup>225</sup> Act on the Reintegration of Disabled People in Employment (“Wet op de (Re)integratie Arbeidsgehandicapten”) of 23 April 1998, Staatsblad 1998, 290, most recently amended by Act of 15 December 1999, Staatsblad 1999, 564.

<sup>226</sup> D. Beekman and E.J. Kronenburg Willems, *Wet op de (re)integratie arbeidsgehandicapten, PS Special Wet REA*, 1998.

<sup>227</sup> Under Dutch Equal Treatment law, it is not necessary that a positive action has a specific legal basis.



The VVD called this ‘positive discrimination’ and wanted to abolish this type of policies because of the resistance it evokes among groups that are not targeted by such policies. On the other hand the same party is strongly in favour of positive action measures that are aimed at disabled persons.

As far as disabled people are concerned, in 2004 the Government started a trajectory called ‘inclusive policy’ (“*inclusief beleid*”). The Government made a start with this policy with an action plan called “Equal Treatment in Practice” (“*Actieplan gelijke behandeling in de praktijk*”).<sup>228</sup> This forms a kind of mainstreaming of specific (permanent) social policies concerning the improvement of the position of disabled people.

Five Departments of the Government were requested (by the Ministry for Health) to send in their policy plans.<sup>229</sup> The proposals covered a wide range of measures, from making electronic voting machines that can be handled by blind persons, to adaptation of houses to the needs of old people and people with wheelchairs.

With regard to Roma people, no specific measures of positive action are taken in the Netherlands. However, it must be noticed that Roma people who are living on trailer camps (as well as other travellers) do have special attention from local governments, as their specific housing situation in many regards demands for a specific policy.

However, it seems that the Equal Treatment Commission is inclined to accept that in the case of racial or ethnic discrimination there should be more room for positive action plans. This conclusion can be derived from some (we must admit quite old!) case law of the ETC. The Commission issued opinions in two similar cases, where a city council asked explicitly for members of ethnic minorities to apply for jobs as social workers (case no. 1999-31 and 1999-32). People from Dutch origin could not apply. On the complaint of a Dutch citizen, the Commission ruled that the preferential treatment of ethnic minorities was allowed. Although the Equal Treatment Act holds the principle that positive action for women and ethnic minorities should be implemented in the same way, the Commission was of the view that this principle does not need to be effected in the same way. The effectuation of positive action depends, according to the Commission, on its legal and social context. In this regard, the Act on the stimulation of labor participation of ethnic minorities (Wet SAMEN) had to be taken into account.<sup>230</sup> The Wet SAMEN requires organizations to reach a proportionate participation of ethnic minorities in their staff. Because the Wet SAMEN is an implementation of section 2.2 of the ICERD, the Equal Treatment Act needs to be interpreted in conjunction with this Convention. This means, according to the Commission, that the criteria for positive action should not be interpreted too narrowly. The objectives of the various laws include reaching de facto equality of minority groups on the labor market.

<sup>228</sup> Tweede Kamer 2003-2004, 29 355, nr. 1.

<sup>229</sup> See Tweede Kamer 2004/2005, 29 355, nr. 11, 14 and 15. It concerns the Ministries of Internal Affairs and Kingdom Relations, Education, Social Affairs and Employment, Transport and Water Management, Housing, and the Ministry of Healthcare.

<sup>230</sup> This law has since been abolished.



## 6. REMEDIES AND ENFORCEMENT

### 6.1 Judicial and/or administrative procedures (Article 7 Directive 2000/43, Article 9 Directive 2000/78)

*In relation to each, of the following questions please note whether there are different procedures for employment in the private and public sectors.*

*In relation to the procedures described, please indicate any costs or other barriers litigants will face (e.g. necessity to instruct a lawyer?) and any other factors that may act as deterrents to seeking redress (e.g. strict time limits, complex procedures, location of court or other relevant body)?*

*Are there available statistics on the number of cases related to discrimination brought to justice ? If so, please provide recent data.*

*a) What procedures exist for enforcing the principle of equal treatment (judicial/administrative/alternative dispute resolution such as mediation)?*

The principle of non-discrimination can be enforced by means of criminal law procedures and non-criminal law procedures. Criminal law provisions may be applied in as far as the offences / discriminations fall under the definition of discrimination in Article 90quater of the Criminal Code. In this report, we leave aside these offences and concentrate on civil equal treatment legislation.

The GETA, DDA and ADA do not entail *compulsory* judicial procedures.<sup>231</sup> If discrimination occurs in the sphere of private employment, the conventional civil (labour) law procedures apply. If it occurs in public employment, the ordinary procedures of administrative law apply.<sup>232</sup> If it occurs in the contractual sphere (providing goods and services) it can be dealt with in normal civil law procedures. If it occurs in the sphere of public services with the exclusion of unilateral acts or decisions of the administration or legislator) it can be dealt with in administrative procedures. Apart from all that, an instance of discrimination can be considered a tort and be dealt with in a civil law procedure. In addition, the equal treatment legislation provides for a special (non compulsory) procedure before the ETC. The ETC is a semi-judicial body which renders non-binding Opinions. After it has rendered an Opinion, a complaint may still be lodged before the conventional civil/ administrative courts if the applicant wishes to obtain a *binding* judgment. The ETC is a low threshold body: no legal representation is required. Moreover, the procedure before this Commission does not cost anything. As for civil law and administrative law procedures in court there is a system of free legal aid for people with low incomes. To the current author's knowledge, no specific rules exist requiring courts/ETC to be physically accessible. Neither is it specified anywhere to the author's knowledge that information must be provided in Braille. No special procedures exist for dealing with individuals with a learning disability. Sign language interpretation must legally seen not be provided to the author's knowledge. The person who feels discriminated against can file a petition at the ETC in writing (Article 12 GETA).

<sup>231</sup> See K. Waaldijk, *supra* footnote 67.

<sup>232</sup> The civil court has competence in cases in which discriminatory contractual agreements (goods and services supplied by the Government) are at stake. And, with regard to unilateral governmental decisions, e.g., concerning the allocation of social security benefits/social advantages, administrative procedures apply.



For non-Dutch people this is not always an easy task and therefore it is possible to specify the complaint during an interview at the Commission's office. By analogy, special measures might be taken for persons with a disability.<sup>233</sup>

### Numbers of cases dealt with by the ETC<sup>234</sup>

*Tabel 11 – Opinions in 2006 and 2007*

	Total 2006		Total 2007	
	Absolute	%	Absolute	%
Sex	45	16	29	12
Race	46	16	31	13
Nationality	10	4	5	2
Religion	26	9	22	9
Sexual Orientation	3	1	4	2
Civil status	3	1	2	1
Political conviction	0	0	0	0
Philosophy of life	0	0	0	0
Working hours	7	3	7	3
Temporary/permanent employment	8	3	1	0
Disability/Chronic Illness	23	8	29	12
Age	85	30	82	33
Several grounds <sup>235</sup>	27	9	35	14
<b>Total</b>	<b>282</b>	<b>100</b>	<b>247</b>	<b>100</b>

### Numbers of cases dealt with by courts

No statistics on these numbers are available.

*b) Are these binding or non-binding?*

The normal judicial procedures lead to a legally binding judgement. The ETC is a semi-judicial body which renders non-binding 'Opinions'.

*c) Can a person bring a case after the employment relationship has ended?*

Yes, this is possible. With regard to time limits, the following rules are applicable:

Administrative law procedures: the General Act on Administrative Law provides that in principle an appeal must be lodged *within 6 weeks* counted as from the day *after the day* on which the contested decision has been made known.

<sup>233</sup> This information has been provided by the ETC-office.

<sup>234</sup> Statistics of 2008 were not yet available at the cut-off date of this report. They will be released in the annual report of the ETC of 2008. All annual reports of the ETC can be downloaded from: <http://www.cgb.nl/downloadables.php>.

<sup>235</sup> I.e. cases in which the complainant claimed to be discriminated against on more than one ground. This does not necessarily concern cases of multiple (intersectional) discrimination.



Civil law procedures: *Ex* Article 8(2) of the GETA (Art. 9(2) DDA and Art. 11(3) ADA) an applicant who wishes to contest the lawfulness of the termination of an employment contract (discriminatory dismissal/victimisation dismissal) must do so *within 2 months* after the termination of the employment contract. (See also: Articles 7:647(2), 7:649(2) and 7:648(1) of the Dutch Civil Code).<sup>236</sup> A legal claim with regard to the nullification of the employment contract can no longer be made after 6 months have passed after the day on which the employment contract was terminated (Article 8(3) of the GETA/Art. 9(3) DDA/Art. 11(4) ADA).

Equal Treatment Commission procedures: Article 14(1)(c) of the GETA only sets a requirement of reasonableness. (This also applies in the context of procedures lodged under the DDA and ADA).

## **6.2 Legal standing and associations (Article 7(2) Directive 2000/43, Article 9(2) Directive 2000/78)**

*Please list the ways in which associations may engage in judicial or other procedures*

### *a) in support of a complainant*

Under Article 3:305a and 3:305b of the Dutch Civil Code and Article 1:2(3) of the General Act on Administrative Law a certain type of class action is possible. Interest groups can take legal action in court, provided that they are an association or foundation with full legal powers according to the law, and provided that their statutory goals cover this particular interest (*e.g.*, disability rights). The partially reversed burden of proof also applies here. Interest groups also have the right to ask the ETC to start an investigation. The interest group must again have full legal powers (they must be an association or foundation according to the law) and it must follow from its statutes that it represents the interests of those whose protection is the objective of the statutory equality acts. (Article 12(2)(e) of the GETA).

### *b) on behalf of one or more complaints (please indicate if class actions are possible)*

Interest groups can take legal action in court, provided that they are an association or foundation with full legal powers according to the law, and provided that their statutory goals cover this particular interest (*e.g.*, disability rights). When they bring a claim on their own behalf, they do not need to stand up for a concrete victim.

## **6.3 Burden of proof (Article 8 Directive 2000/43, Article 10 Directive 2000/78)**

*Does national law require or permit a shift of the burden of proof from the complainant to the respondent? Identify the criteria applicable in the full range of existing procedures and concerning the different types of discrimination, as defined by the Directives (including harassment).*

<sup>236</sup> J.H. Gerards and A.W. Heringa, *Wetgeving Gelijke Behandeling*, Kluwer Deventer 2003, p. 199.



Article 10(1) GETA reads as follows:

*“If a person who considers himself to have been wronged through ‘distinction’ as referred to in this Act established before a court facts from which it may be presumed that distinction has taken place, it shall be for the respondent to prove that the contested act was not in contravention of this Act”.*

The equivalent Articles in the DDA and ADA are Articles 10(1) and 12(1) respectively. Subsection 2 of these three Articles provides that the partially reversed burden of proof also applies in group actions under Article 3:305a Civil Code and Article 1:2(3) of the General Act on Administrative Law. Strictly spoken, the partially reversed burden of proof does not apply in procedures before the ETC. However, on a voluntary basis the Commission nevertheless applies it in its case law.

#### **6.4 Victimisation (Article 9 Directive 2000/43, Article 11 Directive 2000/78)**

*What protection exists against victimisation? Does the protection against victimisation extend to persons other than the complainant? (e.g. witnesses, or person that help the victim of discrimination to present a complaint)*

All three Acts protect against victimisation dismissal and against other forms of disadvantage as a result of the fact that a person has invoked the statutory equality act or has otherwise assisted in proceedings under these Acts, e.g., by means of a testimony. See Articles 8(1) and Article 8a GETA. Article 8(1) reads as follows:

*“If an employer terminates an employee's contract of employment in contravention of section 5 or on the grounds that the employee has invoked section 5, either at law or otherwise, such termination is voidable”.*<sup>237</sup>

Article 8a GETA reads as follows:

*“It is unlawful to disadvantage persons because they have invoked this Act, either in or out of court, or have assisted others in this respect.”*

Persons who help the victim are protected by Article 8a. Equivalent Articles are enshrined in the DDA (Articles 9(1) and 7a respectively) and in the ADA (Articles 11(2) and 10 respectively). The reversed burden of proof does not apply to victimization.

#### **6.5 Sanctions and remedies (Article 15 Directive 2000/43, Article 17 Directive 2000/78)**

- a) *What are the sanctions applicable where unlawful discrimination has occurred? Consider the different sanctions that may apply where the discrimination occurs in private or public employment, or in a field outside employment.*

Sanctions in case of discrimination are applied by the courts.

<sup>237</sup> The term ‘voidable’ (“vernietigbaar”) means that it is not automatically void but that this may be established during a court procedure.



According to Article 8(1) of the GETA, Article 11(1) and 11(2) ADA, and Article 9(1) DDA, discriminatory dismissals and victimisation dismissals are “voidable” (“vernietigbaar”).<sup>238</sup> This applies both with regard to public and private employment. The employee can ask the court to invalidate the termination of the contract and can thereupon claim wages. He can also claim to be reinstated in the job. Or, he can claim compensation for pecuniary damages under the sanctions of general administrative/ contract or tort law. Contractual provisions which are in conflict with the GETA, the ADA and the DDA, shall be null and void. This follows from Article 9, Article 13 and Article 11 of these Acts respectively. Articles 13(2), 13(3) and 15 of the GETA mention some additional sanctions. Sanctions under these Articles are imposed by the ETC, not by the courts. Under Article 13(2), the ETC may make recommendations when forwarding its findings (in an Opinion) to the party found to have made unlawful distinction. Under Article 13(3) the ETC may also forward its findings in an Advise to the Ministers concerned, and to organisations of employers, employees, professionals, public servants, (consumers of goods and services) and to relevant consultative bodies. Under Article 15(1) the ETC may bring legal action with a view to obtaining a ruling that conduct contrary to the relevant equal treatment legislation is unlawful, requesting that such conduct be prohibited or eliciting an order that the consequences of such conduct be rectified.<sup>239</sup> This power must be regarded in light of the fact that the ETC’s Opinions are not binding. The Commission has never made use of this possibility. In case the case has been brought by interest groups the sanctions are similar. It is seriously doubted in academic legal circles, whether the range of sanctions available under the equal treatment legislation is in conformity with the requirement that sanctions be ‘effective, proportionate and dissuasive’.<sup>240</sup>

b) *Is there any ceiling on the maximum amount of compensation that can be awarded?*

The question whether there is a ceiling is not applicable, since most of the sanctions are not in terms of (money) compensation but offer other ‘remedies’ (see above). In case where a compensation is given, there is no official ceiling.

c) *Is there any information available concerning:*

- *the average amount of compensation available to victims*
- *the extent to which the available sanctions have been shown to be - or are likely to be effective, proportionate and dissuasive, as is required by the Directives?*

This information is not available for two reasons:

<sup>238</sup> The term ‘voidable’ (“vernietigbaar”) means that it is not automatically void but that this may be established during a court procedure.

<sup>239</sup> Unless the person affected by the alleged discriminatory conduct has made reservations (Article 15(2) GETA). In theory this could amount to a court order, e.g., to make a desegregation plan for schools; however, the Dutch courts are very careful not to interfere with what they call the discretionary powers of the administration and the Government.

<sup>240</sup> See the report by Kees Waaldijk, *supra* footnote 67 and R. Holtmaat, ‘Uit de Keuken van de Europese Unie: de Gelijkebehandelingsrichtlijnen op grond van Artikel 13 EG Verdrag’, in T. Loenen *et al.* (eds.), *Gelijke Behandeling: Oordelen en Commentaar 2000*, Deventer Kluwer 2001, pp. 105-124 and I.P. Asscher-Vonk, ‘Sancties’ & Conclusie Juridische Analyse’, in I.P. Asscher-Vonk & C.A. Groenendijk (eds.) *Gelijke Behandeling Regels en Realiteit*, Den Haag SDU 1999, pp. 202-234 and pp. 301-319.



1. There hardly ever is compensation in terms of money. This only occurs when, for example, the judge agrees to the dismissal since employment relationships have been disturbed, and in that case sets a relatively high sum for compensation because of the termination of the contract.
2. No information can be given on this topic without an extensive survey into the case law of the cantonal courts and the district courts. Most of the time, such cases are not published in official law journals. Also, the registration of cases within the court system is not systematically done on the basis of the legal provisions at stake. So, it might very well be that a lot of cases are registered under the heading of a general provision like 'breach of labour contract' (with no specification about the reasons for this) or tort. This means that such a survey would extend far beyond the time that is available for updating this country report. Very generally speaking it can be noticed that Dutch courts are restrictive in granting damages that are not strictly material damages (*e.g.*, wages not paid). Immaterial damages (*e.g.*, hurt feelings) will only minimally be compensated for.

As to the question whether the available sanctions have been shown to be - or are likely to be - effective, proportionate and dissuasive, as is required by the Directives, it can be observed that the sanctions do not seem to be very dissuasive. One problem is that the ETC can not impose them. Discriminatory acts or discriminatory termination of a contract are not automatically void, but need to be contested in Court. Another problem is that the equal treatment legislation itself does hardly mention any sanctions. Victims have to know which sanctions normal civil law and administrative law contains. Therefore, it has been proposed to include the sanctions (that are available under civil and administrative law) in the ETC in order to clarify this point for both the victims and perpetrators of discrimination.<sup>241</sup> In addition, a motion has been submitted in parliament in which the government has been asked to extend the possibilities for the Labour Inspectorate to impose sanctions in the case of gender and racial discrimination, but it was voted down.<sup>242</sup> The conclusion may be that the Directive's requirement that sanctions be 'effective', 'dissuasive' and 'proportionate' seems not to be met by the Dutch legislation. This also seems to be the opinion of one of the political parties that now is participating in the new government (to be installed in February 2007). In November 2006 an MP of the PvdA (social democrats) offered a "black book age discrimination" to the Minister of Social Affairs and Employment, proposing at that occasion to make age discrimination a punishable act (to be fined up to 6000 Euro).

<sup>241</sup> See *e.g.* Asscher-Vonk, previous footnote, at page 233.

<sup>242</sup> See Tweede Kamer 2005-2006, 28 770, nr. 12.

## 7. SPECIALISED BODIES, Body for the promotion of equal treatment (Article 13 Directive 2000/43)

*When answering this question if there is any data regarding the activities of the body (or bodies) for the promotion of equal treatment, include reference to this (keeping in mind the need to examine whether the race equality body is functioning properly). For example, annual reports, statistics on the number of complaints received in each year or the number of complainants assisted in bringing legal proceedings.*

- a) *Does a ‘specialised body’ or ‘bodies’ exist for the promotion of equal treatment irrespective of racial or ethnic origin?(Body/bodies that corresponds to the requirements of article 13. If the body you are mentioning is not the designated body according to the transposition process, please clearly indicate so)*

The ETC is the first officially designated body by which the governments implements Article 13 of the Race Directive. Besides this, on the first of January 2007 two non-governmental organizations, the Landelijk Bureau Racismebestrijding (LBR) and the local Anti-Discriminatie Bureaus (ADB's) have been merged into one new organization called “Art. 1”. (After Article 1 of the Constitution.) This new organization now covers all of the Art. 13 ECT non-discrimination grounds and is officially designated as one of the equality bodies (in terms of Art. 13 of the Race Directive). It has mainly a role in assisting victims and in monitoring developments in society with regard to (non-)discrimination. The ETC has the competence to assist victims and to bring cases to courts, but they never make use of this competence in practice. They probably do not do so because they see a conflict with their main task as an independent (quasi-) judicial body which settles conflicts.

- b) *Describe briefly the status of this body (or bodies) including how its governing body is selected, its sources of funding and to whom it is accountable.*

The ETC is an independent quasi-judicial body; its members are installed by the Government for a fixed period of time (5 years). It is funded by the Government (from the budget of five Ministries). It is accountable to the Government by means of an annual report and by independent financial auditing. Every 5 years an internal and an external evaluation report is published (and send to government and parliament). The annual budget of the ETC amounts to 5 million Euro. It has 9 Members and a Chair and a staff of approximately 45 persons (mostly academic lawyers).

The Status of the organization “Art. 1” is that of an independent non-governmental organization, (although it is subsidized by the government). The legal and financial regulation of this organization and the local bureaus that are attached to it will be regulated in a new enacted law, which will come into force in 2009.<sup>243</sup>

- c) *Describe the competences of this body (or bodies), including a reference to whether it deals with other grounds of discrimination and/or wider human rights issues.*

<sup>243</sup> Tweede Kamer 2007-2008, 31 439, nrs 1-3: *Wet gemeentelijke antidiscriminatievoorziening*.



The ETC deals with all non-discrimination grounds in the GETA, DDA, ADA as well as more specific grounds (like the type of duration of the employment contract). The Equal Treatment Commission's principal function is to investigate alleged cases of discriminatory practices or behaviours. Besides, the ETC may investigate structural instances on its own accord<sup>244</sup> and may advise organisations (including governmental organisations) who want to know whether their policies are or are not in contravention to the law. It may also give advice to the government in discrimination issues, including proposals for new legislation or proposals for amendments of legislation.

The role of "Art. 1" is mainly to assist victims of discrimination and to monitor developments with respect to (non-)discrimination in society.

*d) Does it / do they have the competence to provide independent assistance to victims, conduct independent surveys and publish independent reports, and issue recommendations on discrimination issues?*

Yes, the ETC does have all of these roles (assisting victims, conducting independent surveys, publishing reports and issuing recommendations to organizations). However, with regard to the competence to assist victims and to bring cases to courts, it has to be noticed that they never make use of this competence in practice. This role is seen to be conflicting with the role of investigating individual complaints and giving an opinion about them. However, another body, namely *Art. 1* fulfils this role. The role of "Art. 1" is mainly to assist victims of discrimination and to monitor developments with respect to (non-)discrimination in society.

*e) Does the body (or bodies) have legal standing to bring discrimination complaints or to intervene in legal cases concerning discrimination?*

The ETC does have this competence, but it never makes use of this possibility. "Art. 1" can bring claims before courts just like any other NGO, in the framework of the general "group action" possibilities that exist under Dutch civil law. (no data of numbers of class actions are available)

*f) Is / are the body / bodies a quasi-judicial institution? Please briefly describe how this functions. Are the decisions binding? Does the body /bodies have the power to impose sanctions? Is an appeal possible? To the body itself? To courts?) Are the decisions well respected? (Please illustrate with examples/decisions)*

The ETC is – as stated above – a quasi-judicial institution. Their decisions and recommendations are not binding and they have no power to impose sanctions. There is no appeal possible to the ETC itself, but a case can always be brought to court in order to obtain a binding judgement. According to the Annual Year report of the ETC of 2007<sup>245</sup>, 67% of all cases have led to individual measures and 75% to structural measures by the defendant.

<sup>244</sup> The possibilities to do so have been extended by the so-called Evaluatiewet AWGB [Wet tot wijziging van de Algemene Wet Gelijke Behandeling; Evaluatiewet Awgb of 15 September 2005, Stb 2005, 516. (The law that amended the GETA on the basis of proposals that stemmed from the first evaluation of the Act over the period 1994-1999.)

<sup>245</sup> See CGB Jaarverslag 2007, p.46- 48, report accessible at <http://www.cgb.nl/downloadables.php>.



Example: a sports school decided to abandon their prohibition on headscarves, and now offers sporting-proof headscarves, after a recommendation of the ETC. See also under section 6.1

(a) for itemized numbers of cases brought before the ETC in the past years.

*g) Is the work undertaken independently?*

The ETC has a position as a semi-judicial body and the experts that are Members of the Commission all have an independent status. “Art. 1” is an independent NGO, although it receives subsidy from the government.

*h) Does the body treat Roma and Travellers as a priority issue? If so, please summarise its approach relating to Roma and Travellers.*

The ETC does not treat Roma and Travellers as a special or priority issue. It has to be noticed here that Roma, Sinti and Travellers are not represented in overviews by the National Federation of Anti-Discrimination Agencies and Hotlines. Furthermore, according to the figures, Roma and Sinti hardly ever file their complaints with the Dutch Equal Treatment Commission (ECT) or the Public Prosecutor’s Office. Reasons for the absence of complaints could include the distrust of the authorities by Roma and Sinti, language barriers and the idea that complaining about discrimination or unequal treatment may make their situation worse. With that, the social situation of Roma and Travellers in the Netherlands might be not so precarious (compared to other European countries) that it demands for priority treatment.

We do not know whether the newly established “Art. 1” or their predecessors has as yet any specific programs concerning Roma or Sinti or travellers.





## 8. IMPLEMENTATION ISSUES

### 8.1 Dissemination of information, dialogue with NGOs and between social partners

*Describe briefly the action taken by the Member State*

- a) *to disseminate information about legal protection against discrimination (Article 10 Directive 2000/43 and Article 12 Directive 2000/78)*

The Ministry for Social Affairs and Employment is primarily responsible for activities to enhance compliance with the equal treatment legislation, esp. as far as this legislation applies to employment relationships. This Ministry has taken the initiative for many different activities to inform the general public about the (new) legal standards, to inform social partners and to stimulate their involvement in the implementation of the legal non-discrimination norms. Also the Ministry is actively engaged into promoting studies and surveys in this field. The same goes for the Ministry of Health and Welfare as far as discrimination on the ground of disability is concerned. Information about their activities can be found at: [www.szw.nl](http://www.szw.nl) and [www.vws.nl](http://www.vws.nl)

- b) *to encourage dialogue with NGOs with a view to promoting the principle of equal treatment (Article 12 Directive 2000/43 and Article 14 Directive 2000/78) and*

Several NGO's in the field of non-discrimination and minority rights get subsidy from the government. The goal of the already mentioned NGO *Art.1* is promoting the principle of non-discrimination in the broad sense. Art.1 gives advises to (governmental) organisations, and it provides public information about non-discrimination and training sessions. Besides this, several NGO's with a view to combating discrimination on a particular ground are subsidized in order to encourage dialogue, such as the *COC* (advocates gay and lesbian rights).

- c) *to promote dialogue between social partners to give effect to the principle of equal treatment within workplace practices, codes of practice, workforce monitoring (Article 11 Directive 2000/43 and Article 13 Directive 2000/78)*

The Ministry of Social affairs has established a network of professionals on equal treatment issues, consisting of representatives from the most important ministries and national labour and employers' organisations.

- d) *to specifically address Roma and Travellers*

No specific measures are addressed on Roma and Travellers.

### 8.2 Compliance (Article 14 Directive 2000/43, Article 16 Directive 2000/78)

- a) *Are there mechanisms to ensure that contracts, collective agreements, internal rules of undertakings and the rules governing independent occupations, professions, workers' associations or employers' associations do not conflict with the principle of equal treatment?*



*These may include general principles of the national system, such as, for example, "lex specialis derogat legi generali (special rules prevail over general rules) and lex posteriori derogat legi priori (more recent rules prevail over less recent rules).*

Article 9 of the GETA, Article 13 of the ADA and Article 11 of the DDA stipulate that 'agreements' which are in contravention of the equal treatment legislation shall be null and void. This also concerns collective agreements.

*b) Are any laws, regulations or rules contrary to the principle of equality still in force?*

Not to the authors' knowledge.



## 9. CO-ORDINATION AT NATIONAL LEVEL

*Which government department/ other authority is/ are responsible for dealing with or co-ordinating issues regarding anti-discrimination on the grounds covered by this report?*

For various (legislative) procedures and paths, frequent co-operation exists between the Ministries of: *Interior and Kingdom Affairs, Justice, Education/Culture/Science, Social Affairs and Labour* and *Health/Welfare/Sports*. For certain specified projects, the Ministries of *Housing, Planning and Environment* and *Traffic and Water* are also involved. The co-ordination can be mirrored in the following way:

1. Equal Treatment in Employment: (inter alia: Equal Treatment Act Men/Women): *Ministry of Social Affairs and Labour.*
2. Age Discrimination: *Ministry of Social Affairs and Labour.*
3. Disability Discrimination: *Ministry of Health Welfare and Sports*
4. General Equal Treatment Act + Constitutional provisions: *Ministry of the Interior and Kingdom Relations.*
5. Criminal law provisions regarding discrimination: *Ministry of Justice.*



## ANNEX

- 1. Table of key national anti-discrimination legislation**
- 2. Table of international instruments**

**ANNEX 1: TABLE OF KEY NATIONAL ANTI-DISCRIMINATION LEGISLATION**

Name of Country: The Netherlands

Date: 18 March 2009

<b>Title of Legislation (including amending legislation)</b>	<b>In force from:</b>	<b>Grounds covered</b>	<b>Civil/Administrative / Criminal Law</b>	<b>Material Scope</b>	<b>Principal content</b>
This table concerns only key national legislation; please list the main anti-discrimination laws (which may be included as parts of laws with wider scope). Where the legislation is available electronically, provide the webpage address.	Please give month / year			e.g. public employment, private employment, access to goods or services (including housing), social protection, social advantages, education	e.g. prohibition of direct and indirect discrimination, harassment, instruction to discriminate or creation of a specialised body
1. Article 1 of the Constitution	1983 (Revision of 1815)	Religion, belief, political opinion, race, sex or on any other ground (open ended clause).	Constitutional Law	Predominantly vertical relations but might also have an effect in horizontal	
2. The Act on Equal Treatment between Women and Men 1989 (NB: after that year the Act has been amended several times).	1989 (Law Gazette 1989, 168).	Sex	Civil law and administrative law	<i>Grosso modo</i> : Access to employment (public and private), remuneration, the liberal profession, vocational training and pension provision. (pension provision since 1999).	Prohibition of direct and indirect distinction. Includes sexual harassment and instruction to discriminate. Protection against victimisation.



Title of Legislation (including amending legislation)	In force from:	Grounds covered	Civil/Administrative / Criminal Law	Material Scope	Principal content
3. Articles 7:646 and 7:647 of the Civil Code.	1992	Sex	Civil Law	Equal Treatment between men and women within employment (7:646) and protection against victimisation dismissal (7:647).	Prohibition of direct and indirect distinction. [also includes pregnancy/maternity]. Protection against discriminatory and victimisation dismissal.
4. General Equal Treatment Act (GETA)	1994 (Law Gazette 1994, 230).	Religion, belief, political opinion, race, sex, nationality, hetero- or homosexual orientation, civil status.	Civil and administrative law.	Employment, goods and services (which includes housing), education, health, and, <i>social security and advantages</i> (for the ground 'race' only).	Prohibition of direct and indirect distinction, instruction to discriminate, prohibition of harassment, protection against victimisation.
5. Act on Prohibition of Distinction on the ground of Employment Duration (Article 7:648 of the Civil Code and 125g of the Civil Servants Act)	1996	Employment duration (arbeidsduur).	Civil and administrative law	Employment (private and public)	Prohibition of distinction ( <i>no</i> distinction is made between <i>direct</i> and <i>indirect</i> distinction). Both are susceptible for 'objective justification'.

<b>Title of Legislation (including amending legislation)</b>	<b>In force from:</b>	<b>Grounds covered</b>	<b>Civil/Administrative / Criminal Law</b>	<b>Material Scope</b>	<b>Principal content</b>
					Protection against discriminatory and victimisation dismissal.
6. Act amending the Act on Equal Treatment between men and women and Titel 7.10 of the Civil Code in order to implement the EC Burden of Proof Directive in cases of discrimination on the ground of sex.	2000 (Law Gazette 2000, 635).	Sex	Civil and administrative law	Employment and Pension Schemes	Introduction of the partially reversed burden of proof.
7. Act on the Prohibition of Distinction on the ground of the employee's temporary contract/ permanent contract (Article 7: 649 of the Civil Code).	2002 (Law Gazette 2002, 560)	Temporary contract/ permanent contract	Civil Law	Conditions of Employment	Prohibition of distinction, . Protection against discriminatory and victimisation dismissal.
8. Act on Equal Treatment on the ground of Age in Employment (ADA)	1 <sup>st</sup> of May 2004.	Age (both young and old age)	Civil and administrative law	Employment (public and private).	Prohibition of distinction, instruction to discriminate, harassment, victimisation,



<b>Title of Legislation (including amending legislation)</b>	<b>In force from:</b>	<b>Grounds covered</b>	<b>Civil/Administrative / Criminal Law</b>	<b>Material Scope</b>	<b>Principal content</b>
9. Act on Equal Treatment on the ground of disability or chronic disease (DDA)	1 <sup>st</sup> of Dec. 2003	Disability and chronic disease	Civil and administrative law	Employment (public and private) and transport	Prohibition of distinction, instruction to discriminate, harassment, victimisation
10. EC Implementation Act General Equal Treatment Act 2004	1 <sup>st</sup> of April 2004	Amends (inter alia) the General Equal Treatment Act + the Disability Discrimination Act with a view to compliance with the Article 13 EC Directives	Civil and administrative law		

**ANNEX 2: TABLE OF INTERNATIONAL INSTRUMENTS**

Name of country: The Netherlands

Date: 18 March 2009

<b>Instrument</b>	<b>Signed (yes/no)</b>	<b>Ratified (yes/no)</b>	<b>Derogations/ reservations relevant to equality and non- discrimination</b>	<b>Right of individual petition accepted?</b>	<b>Can this instrument be directly relied upon in domestic courts by individuals?</b>
European Convention on Human Rights (ECHR)	Yes	Yes	No	Yes	Yes
Protocol 12, ECHR	Yes	Yes	No	Yes	Yes
Revised European Social Charter	Yes	Yes	No	Ratified collective complaints protocol? Yes	Yes
International Covenant on Civil and Political Rights	Yes	Yes	No	Yes	Yes
Framework Convention for the Protection of National Minorities	Yes	Yes	No	Not applicable	Not applicable
International Convention on Economic, Social and Cultural Rights	Yes	Yes	No	Not applicable	Yes



<b>Instrument</b>	<b>Signed (yes/no)</b>	<b>Ratified (yes/no)</b>	<b>Derogations/ reservations relevant to equality and non- discrimination</b>	<b>Right of individual petition accepted?</b>	<b>Can this instrument be directly relied upon in domestic courts by individuals?</b>
Convention on the Elimination of All Forms of Racial Discrimination	Yes	Yes	No	Yes	Yes
Convention on the Elimination of Discrimination Against Women	Yes	Yes	No	Yes	Yes
ILO Convention No. 111 on Discrimination	Yes	Yes	No, not to the author's knowledge	Not applicable	Yes
Convention on the Rights of the Child	Yes	Yes	No	Not applicable	Yes
Convention on the Rights of Persons with Disabilities	Yes	No	No	Not applicable	Yes