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# Country report

## Non-discrimination

Netherlands

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# **Country report**

# **Non-discrimination**

# **Netherlands**

Rikki Holtmaat

Reporting period 1 January 2015 – 31 December 2015

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## EXECUTIVE SUMMARY

### 1. Introduction

The Netherlands is a representative democracy premised upon a bicameral system. King Willem-Alexander is the official head of state. The Government always consists of a coalition of different political parties, since a multitude of parties are elected to Parliament and none of them has ever had an absolute majority. The political climate in the Netherlands in the past 15 years has been influenced considerably by the rise of far right-wing parties, such as the Party for Freedom (*Partij voor de Vrijheid*, PVV). Issues brought up by such parties, in particular concerning immigration and anti-Islam or anti-terrorism measures, now dominate political discourse in general. The current Coalition Government consists of the People's Party for Freedom and Democracy (*Volkspartij voor Vrijheid en Democratie*, VVD) (liberal) and the Labour Party (*Partij van de Arbeid*, PvdA). Because the Coalition does not have a majority in the Senate, the Government is dependent on co-operation with other parties, for which they have to negotiate on a case-by-case basis.

The Netherlands is party to all the major international agreements relevant to combating discrimination, including the European Convention on Human Rights (including Protocol No. 12), the International Covenant on Civil and Political Rights (ICCPR), the Optional Protocol to the Covenant, the Covenant on Economic, Social and Cultural Rights (ECOSOC), the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), including the Optional Protocol to this Convention, and the Convention of the Rights of the Child (UNCRC). The Netherlands has signed but not yet ratified the International Convention on the Rights of Persons with Disabilities (UNCRPD), although ratification is expected in 2016.<sup>1</sup> The above-mentioned instruments constitute part of the domestic legal order after they have been published in the official Law Gazette and can be applied directly by domestic courts if the provision concerned is sufficiently clear and precise.

The Kingdom of the Netherlands has the second highest population density in the European Union, after Malta. People of immigrant origin predominantly come from Turkey, Morocco, Suriname and the Dutch Antilles (although people from the Dutch Antilles cannot really be described as 'immigrants'). The main religions are Roman Catholic 26%, Protestant 16%, Muslim 5%, other 6% and none 47% (2014).<sup>2</sup>

### 2. Main legislation

**International law:** the Constitution bars the Dutch Supreme Court from exercising Constitutional review of formal statutory acts. However, the Netherlands adheres to a 'monist theory' of international law. This means that the Dutch courts can apply international standards of equal treatment and non-discrimination directly, including when it concerns statutory acts.

**The Constitution:** a non-discrimination clause is contained in Article 1 of the Dutch Constitution. It covers the grounds of religion, philosophy of life, political convictions, race and sex, as well as 'any other ground'. This Article can be invoked by an individual applicant against actions by the Government and by private institutions and can also be invoked between individuals.

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<sup>1</sup> After the cut-off date of this report the process was concluded. The Convention was ratified on 14 June 2016.

<sup>2</sup> Netherlands Statistics (2014), *De religieuze kaart van Nederland, 2010-2013* [Religious map of the Netherlands, 2010-2013], available at: [www.cbs.nl/NR/rdonlyres/20EC6E0B-B87A-4CFE-818B-579FB779009F/0/20140209b15art.pdf](http://www.cbs.nl/NR/rdonlyres/20EC6E0B-B87A-4CFE-818B-579FB779009F/0/20140209b15art.pdf) (last accessed 20 April 2016).

**Criminal law provisions:** there are several provisions in the Criminal Code prohibiting discriminatory speech and prohibiting discrimination in the social and economic sphere.

**General civil law:** provisions in the Civil Code may offer protection against unlawful discrimination, e.g. on the basis of the provisions concerning tort and provisions concerning labour law.

**Employment:** the Act on Working Conditions contains an obligation to prevent any labour conditions which may cause stress or psychological or physical damage. This provision also puts a positive obligation on employers to prevent and combat discrimination and (sexual) harassment.

**Statutory equal treatment acts:** the relevant (civil law) equal treatment acts are the 1994 General Equal Treatment Act (GETA); the 2003 Disability Discrimination Act (DDA); and the 2004 Age Discrimination Act (ADA). The GETA covers religion, belief, political opinion, race, sex, nationality, hetero or homosexual orientation and marital status. The DDA covers disability and chronic disease, while the ADA provides protection against age discrimination. These acts flesh out Article 1 of the Constitution for horizontal relations. In addition, they must be perceived as measures transposing the equality guarantees contained in the EU anti-discrimination directives.

In the context of the implementation of Directives 2000/43/EC and 2000/78/EC it is thought that the Dutch legislator has in some respects fallen short of EU requirements. In 2008, the European Commission started an infringement procedure, inter alia about the definitions of direct and indirect discrimination and about the fact that, in the case of religious organisations, the law allows too much room for justifications of direct discrimination. Some of these issues were resolved by an amendment to the equal treatment laws in 2011. The procedure was subsequently closed by the Commission in 2013. In other respects the Dutch legislator has gone beyond what is strictly required by the directives. For example, the protection against discrimination on the grounds of religion and belief and sexual orientation also applies in the area of goods and services.

Given the scope of this summary, the discussion is limited to the GETA, DDA and ADA in the light of the implementation of Directives 2000/43/EC and 2000/78/EC.

### 3. Main principles and definitions

The Dutch equal treatment laws (GETA, DDA and ADA) cover the grounds mentioned in Article 19 TFEU and some other grounds, including nationality and marital status. Specifically, the GETA covers race, religion and belief, political opinion, hetero- or homosexual orientation, sex, nationality and civil (or marital) status. In contrast to any other area of Dutch anti-discrimination law and in contrast to EU law, these acts are centred on the concept of 'distinction' (*onderscheid*) instead of 'discrimination' (*discriminatie*). Distinction does not have the same negative connotation, and there may be a suggestion that it is possible to justify such distinctions. In practice, however, the laws are interpreted in line with the directives and the case law of the CJEU.

*Direct discrimination* – Since 2011, the definition of direct discrimination in the equal treatment laws has copied the wording of the directives, except for the use of the word 'distinction' instead of 'discrimination'. Although this is not explicitly included in the definition of direct discrimination in the directives or the (amended) Dutch equal treatment laws, the possibility of discrimination by association has been acknowledged by the Dutch equality body, the Netherlands Institute for Human Rights (NIHR), and its predecessor, the Equal Treatment Commission (ETC).<sup>3</sup>

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<sup>3</sup> E.g. in ETC 2006-227 and ETC 2011-90.



*Indirect discrimination* – Since 2011, indirect discrimination has been defined in the GETA, ADA and DDA in a similar way to the definition in the directives, except for the use of the word 'distinction' instead of 'discrimination'.

*Victimisation* – Legal measures of protection against victimisation are available. All three acts (GETA, DDA and ADA) provide protection against dismissal related to victimisation and against other forms of disadvantage as a result of the fact that an individual has invoked the statutory equality act or has otherwise assisted in proceedings under these acts.

*Harassment* – Harassment is explicitly defined as a form of discrimination which can never be justified. The current definition of 'harassment' in the GETA, DDA and ADA mirrors the definition given in the directives. However, the latter definition is stricter than the one used by the (predecessor of) the NIHR in its pre-implementation case law. Hence, the Dutch approach falls short of the directives' *non-regression clause*.

*Instruction to discriminate* – Prior to implementation, the prohibition of the 'instruction to make a distinction' was already implied within Dutch equal treatment legislation. In the implementation process, this implication was made explicit within the GETA, DDA and ADA. Both the person who *instructs* (e.g. the employer) and the person who carries out the instruction (e.g. a recruitment agency) act in contravention of the law. If the instruction has been given within a hierarchical employment relationship (a manager instructing an employee to discriminate), it is only the person in charge (the manager, not the employee) whom an individual victim can hold (vicariously) liable. The Dutch approach in this respect arguably reflects an unduly narrow interpretation of the concept as contained in the directives.

*Reasonable accommodation* – This concept has only been enshrined in the DDA. The law speaks of 'effective' instead of 'reasonable' accommodation: the accommodation sought must have the pursued effect(s), which means that the accommodation must be both 'appropriate' and 'necessary'. It must also be reasonable, in the sense that it may not impose a disproportionate (financial) burden upon the employer. The duty to make an 'effective accommodation' is not a generic obligation: it must be clear for the employer, for example, that an accommodation is needed and what kind of accommodation that should be. Lastly, the duty can never have the effect that employers must hire people who cannot fulfil the essential job requirements.

*Exceptions* – The GETA, DDA and ADA all enshrine exceptions to the central norm. In the first two acts these exceptions are explicitly and exhaustively listed by the legislator within the acts themselves as far as direct discrimination is concerned. These exceptions are interpreted restrictively by the courts and the NIHR. The ADA offers more flexibility for (semi-)judicial interpretation: both direct and indirect age discrimination may be 'objectively justified' and only certain exceptions have been *a priori* and explicitly listed within the act itself. Overall, the exceptions in the equal treatment laws, such as the general occupational requirement, are in line with those possible under the directives, especially since the Government made some corrections due to an infringement procedure by the European Commission.

The exception of Article 5(2)(c) of the GETA for religious organisations to require that people subscribe to the ethos of their organisation was also mentioned by the Commission. This hotly-debated exception aimed to eliminate the possibility of a distinction being made exclusively on the ground of political opinion, race, sex, nationality, hetero-or homosexual orientation or civil status, under the guise of exceptions which are permitted by law. The 'sole ground' that a person is homosexual, could *per se* not lead to a refusal to hire or to a dismissal. However, the outcome could be different if additional circumstances were taken into account, which effectively led to (for example) Christian schools refusing to hire or dismissing cohabiting homosexual

teachers. In 2015, after several Bills and advice from various NGOs, the Council of State and the (former) equality body, the Equal Treatment Commission, this sole ground construction was finally abolished.<sup>4</sup>

#### **4. Material scope**

The GETA applies to the areas of employment and occupation, provision of goods and services (including education) and, only in the context of racial discrimination, the areas of social security, social protection and healthcare. All guarantees flowing from the directives also apply in the area of the provision of goods and services. The DDA applies to employment, professional education, housing and primary and secondary education. In addition, the act also applies to the area of public transport, after Articles 7 and 8 of the DDA entered into force in 2012.<sup>5</sup> The ADA is most limited in its material scope: it only applies to employment and employment-related education.

The concept of 'employment' in all three acts must be interpreted broadly, covering both public and private sector employment and ranging from recruitment to dismissal, including promotion, employment conditions, employment mediation and (vocational) training. In addition, self-employment is covered by all three acts.

The boundaries to the GETA's scope are threefold. First, the act is not applicable with regard to the internal affairs of churches and religious communities; secondly, it remains without prejudice to already existing sex discrimination law; and thirdly it is not applicable to the internal affairs of associations (this follows implicitly from the constitutionally guaranteed freedom of association). Furthermore, the law is not applicable to unilateral acts by public officials or government bodies (i.e. acts of regulation and legislation and acts by which such rules are executed). The latter limitation to the scope does not apply to statutory social security provisions (which are only covered for the ground of race / ethnicity).

The prohibition of age discrimination in the ADA is inapplicable with regard to (occupational) pension provision (supplementary to pension provision on the basis of social security law) and with regard to actuarial calculations for pension provision.<sup>6</sup>

#### **5. Enforcing the law**

Neither the GETA, nor the DDA or ADA contain compulsory judicial procedures. Normal civil or administrative procedures can be used to enforce the equal treatment standards. All of these procedures lead to a legally binding decision. In practice, the equality norm is in most cases enforced through a special low threshold procedure before the NIHR. The NIHR is an independent quasi-judicial body whose case law is *non-binding* but nevertheless authoritative. No legal representation in cases before the NIHR is required. Interest groups (NGOs and other organisations) have legal standing both under the ordinary civil and administrative law procedures and the NIHR procedure. In addition, the NIHR may conduct an investigation on its own initiative. All parties involved in any investigation by the NIHR are under a duty to provide the NIHR with all requested information. A failure to do so may result in criminal law proceedings.

The 'partially reversed burden of proof' applies in procedures before the courts and is applied by the NIHR as well. With regard to sanctions, the GETA, DDA and ADA only stipulate that discriminatory dismissals (and dismissals related to victimisation) shall be

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<sup>4</sup> Tweede Kamer 2010-2011/2013-2014, 32 476, nos. 1-11.

<sup>5</sup> After the cut-off date of this report the DDA was amended and as of 14 June 2016 also covers goods and services.

<sup>6</sup> No adjustments have been made to this exception in response to the Court's judgment in *HK Danmark* (CJEU 26 September 2013, C-476/11), in which age-related increases in pension contributions were found to be outside the scope of Article 6(2) of the Employment Equality Framework Directive.

void and that contractual provisions which are in contravention of the equal treatment acts shall be null and void. Under the ordinary court procedures, if an employee has been dismissed contrary to equal treatment law, the termination of the contract can be invalidated and the employee can thereupon claim wages. They can also request to be reinstated in the job. Alternatively, they can claim compensation for pecuniary damages under the sanctions of general administrative, contract or tort law.

The laws' complicated and, in fact, limited arsenal of sanctions raises doubts about whether the requirement in the directives, that sanctions be 'effective', 'proportionate' and 'dissuasive', is met. In addition, the statutory non-discrimination acts contain (softer) 'sanctions' which can only be imposed by the NIHR and not by the courts. Thus, the NIHR can make *recommendations* to the party who has discriminated against someone. It may also forward its findings in an Opinion to the Minister concerned and to organisations of employers, employees, professionals and the like. Situation testing and the use of statistical evidence to prove indirect discrimination are admissible in court.

Furthermore, although this option has never been used, the NIHR may bring legal action with a view to obtaining a court 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.

## **6. Equality bodies**

The NIHR is the main officially designated equality body (on the basis of Article 13 of the Directive 2000/43/EC). It is a quasi-judicial tribunal type of equality body and its main remit is to hear discrimination complaints and to give legal opinions on them. These opinions are not binding, but are in practice very authoritative. Its mandate further covers conducting surveys and issuing reports and recommendations. The NIHR does not cover the task of assisting victims of discrimination. This function is carried out by Art.1 and the ADVs (see below), as it is considered in the Netherlands to be contradictory to the main task of the equality body, which is to hear and investigate cases of (alleged) discriminatory practices or conduct. This latter task takes most of the time and resources of the NIHR. The NIHR also operates in a consultative fashion (e.g. for the government when drafting or amending equality laws or for employers when developing new policies) and it performs informative and research activities (e.g. through its annual bulletins and by assigning research projects to independent institutes).

In short, the NIHR (in contrast to the courts) operates both reactively and proactively in order to give full effect to the principles of equality and non-discrimination. The NIHR members are all legal experts and are independent of the government. The (expert) members are appointed by the Government for a fixed period of six years. Members of staff have the same position as civil servants working for a ministry but are only accountable to the Director of the NIHR (not to a minister). The NIHR is funded by the Government (from the budgets of different ministries). It is accountable to the Government by means of an annual report and by independent financial auditing. Every five years an internal and external evaluation report is published (and submitted to Government and Parliament). The annual budget of the NIHR for 2014 amounted to EUR 5.7 million. An independent evaluation conducted in 2015 found that the budget should be at least EUR 5.8 million, whereas the NIHR itself requested EUR 7.4 million. However, the minister responsible refused to increase the budget.<sup>7</sup> The NIHR has 12 Members and a Director and a staff of approximately 50 (mostly academic lawyers). The NIHR deals with all non-discrimination grounds in the GETA, DDA and ADA, as well as more specific equal treatment grounds (such as the type or duration of employment contracts). All reports, advice and Opinions (judgements in individual cases) are published on the Institute's website: <http://www.mensenrechten.nl/>.

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<sup>7</sup> See Tweede Kamer, 2015-2016, 34 338, no. 1,

A Dutch anti-discrimination NGO, Art.1, has also been designated by the Government as an equality body in terms of the directives. This organisation covers all non-discrimination grounds mentioned in Article 19 TFEU. Art.1 does not hear and investigate cases, which is the NIHR's task. Its main role is to assist victims and to monitor developments with respect to (non-)discrimination in (Dutch) society in a broad sense, which includes reports, independent surveys and recommendations. In addition, it co-ordinates and supports the work of many local anti-discrimination bureaus (ADV's), which are funded by local authorities. The NIHR and Art.1 thus fulfil different tasks, closely related but not overlapping.

All local authorities are obliged by law to have an anti-discrimination bureau (ADV) in place. The ADV's were designated as equality bodies in the Explanatory Memorandum to the Act on Local Anti-Discrimination Bureaus.<sup>8</sup> The ADV's have two legal tasks: to assist people who have a discrimination complaint and to register all such complaints and bring them to the attention of the Minister of the Interior and Kingdom Relations. In addition to this, one of the functions that these organisations fulfil is situation testing, mostly with respect to bars and night clubs.

In the opinion of the authors of this report, the NIHR, Art. 1 and the ADV's all function independently.

## **7. Key issues**

The following key issues are most important and/or problematic in the Dutch context, regarding the implementation and transposition of the Directives:

- The accumulative conditions in the 'harassment' definition arguably fall short of the directives' 'non-regression' clause (see Section 2.4 of the report).
- Arguably, the Dutch Government interprets the prohibition of an 'instruction to make a distinction' unduly narrowly (see Section 2.5 of the report).
- An unduly restrictive approach is also adopted by the Dutch Government as regards the 'scope of liability' for discrimination (see Section 2.4 and 2.5 of the report).
- Both Article 2(5) and Article 7(2) of the Employment Framework Directive talk about national legislation or measures taken by the Member States' governments in order to protect health and safety. Article 3(1)(a) of 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 Section 4.6 of the report).
- The partially reversed burden of proof is not applicable in case of victimisation claims, which falls short of EU requirements (see Section 6.4 of the report).
- The requirement that sanctions need to be 'effective', 'dissuasive' and 'proportionate' seems not to be met by the Dutch legislation (see Section 6.5 of the report).
- 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, for example, more room for justifications than would seem appropriate, considering the general rule of the CJEU that exceptions to the non-discrimination principle should be interpreted restrictively. However, the Dutch NIHR and the courts do seem to follow the CJEU in this regard, so in practice this is not really problematic.

Equal treatment and discrimination have been high on the agenda in recent years. The following issues have been most salient.

- Research (among others from the SCP) shows time and again that discrimination in the labour market on the ground of religion and/or ethnic origin (in particular against non-Western people of immigrant origin) is widespread. A nationwide action

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<sup>8</sup> See Tweede Kamer, 2007-2008, 31 439, no. 3, p. 7.

- plan against labour market discrimination has been presented and an evaluation was published in September 2015.
- Geert Wilders, the leader of right-wing PVV party, led a gathering of his followers in an anti-Moroccan chant in the aftermath of the local elections in March 2014. The Public Prosecution Service announced its intention to prosecute Wilders, who is suspected of having insulted a population group in relation to their race and of incitement to discrimination and hatred (Articles 137c and 137d Criminal Code). The court is expected to hear the case in October 2016.
  - Another salient issue has been the debate on the allegedly racist character of Black Pete (*Zwarte Piet*), one of the central figures in the Dutch Saint Nicholas festivities. This debate was fuelled again after the UN Committee for the Elimination of Racial Discrimination (CERD) published its Concluding Observations on the Netherlands in August 2015, calling upon the State party to eliminate ‘those features of Black Pete which reflect negative stereotypes], with the recommendation to “find a reasonable balance, such as a different portrayal of Black Pete’.<sup>9</sup> In a reaction, Prime Minister Mark Rutte stated, as he had before, that it is not up to the Dutch government to decide on the content of any celebration or cultural manifestation.
  - Wearing a headscarf, and specifically a face-covering niqab in schools or in public offices, is a sensitive matter. Another ongoing issue is the alleged right of Muslims to refuse to shake hands with people of the opposite sex on religious grounds in various contexts, such as applications for positions in public office.
  - The recording of data on ethnicity and origin has also been a sensitive and much debated issue. Both privacy regulations and non-discrimination provisions are at issue here. However, in recent years this issue has seemed to attract less attention from politicians and legal experts.
  - Among specialists in the field of anti-discrimination law there is some debate about the necessity or desirability of integrating the six existing equal treatment laws into one general equal treatment law. The Government is said to be in the process of developing a new General Equal Treatment Act in which the GETA, ETA, DDA and ADA, as well as the existing provisions in the Civil Code will be integrated. This is meant as a technical ‘integration’ of these laws; no substantive changes are foreseen. The Government has made no real progress in this regard in the last decade.
  - Finally, some lawyers and NGOs are calling for an extension or broadening of the scope of the equal treatment legislation to the grounds of (in particular) disability and age, in order to avoid any discrepancies or hierarchies between the various grounds of discrimination. This would mean, at least, that the area of social advantages and (commercial) goods and services would need to be included in all equal treatment laws. Meanwhile, the legislator extended the scope of the DDA to the fields of housing and primary and secondary education in 2009, and to public transport in 2012.
  - In relation especially to gender and ethnic and cultural minorities, there is some discussion about the desirability or legal acceptability of positive action measures. The future of any positive action policy of the Government itself has been uncertain since the 2010 Coalition Agreement (supported by the PVV) provided that the Government would terminate all activities concerning positive action and diversity policies on the grounds of gender and race/ethnicity. The current Government takes a more positive stance regarding positive action measures, and in 2014 employers’ organisations made a commitment to employ more people with disabilities on a voluntary basis, failing which a legal obligation could be imposed in 2017.

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<sup>9</sup> The CERD’s Concluding observations on the nineteenth to twenty-first periodic reports of the Netherlands are available at: [http://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/NLD/CERD\\_C\\_NLD\\_CO\\_19-21\\_21519\\_E.pdf](http://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/NLD/CERD_C_NLD_CO_19-21_21519_E.pdf) (last accessed 7 March 2016).

## RÉSUMÉ

### 1. Introduction

Les Pays-Bas sont une démocratie représentative fondée sur un système bicaméral. Le chef officiel de l'État est le roi Willem-Alexander. Le gouvernement est toujours formé d'une coalition, étant donné qu'une multitude de partis politiques différents obtiennent des sièges au Parlement mais qu'aucun d'entre eux n'a jamais eu la majorité absolue. Le climat politique a été considérablement influencé aux Pays-Bas ces quinze dernières années par la montée de partis de droite tels que le Parti pour la liberté (*Partij voor de Vrijheid, PVV*). Les questions soulevées par ces partis, concernant l'immigration et les mesures anti-islam ou anti-terrorisme en particulier, dominent désormais l'ensemble du discours politique. La coalition gouvernementale actuelle comprend le Parti populaire pour la liberté et la démocratie (*Volkspartij voor Vrijheid en Democratie, VVD*) (libéral) et le Parti travailliste (*Partij van de Arbeid, PvdA*). Étant donné que cette coalition ne dispose pas d'une majorité au Sénat, le gouvernement dépend d'une coopération avec d'autres partis – laquelle doit être négociée au cas par cas.

Les Pays-Bas ont signé toutes les grandes conventions internationales visant à lutter contre la discrimination telles que la Convention européenne de sauvegarde des droits de l'homme (CEDH) (y compris le protocole n° 12), la Convention internationale sur les droits civils et politiques (CIDCP) et son protocole optionnel, le Pacte international relatif aux droits économiques, sociaux et culturels (ECOSOC), la Convention sur l'élimination de toutes les formes de discrimination raciale (CERD), la Convention sur l'élimination de toutes les formes de discrimination à l'égard des femmes (CEDAW) (y compris son protocole optionnel) et la Convention relative aux droits de l'enfant. Les Pays-Bas ont signé, mais n'ont pas encore ratifié, la Convention internationale relative aux droits des personnes handicapées, mais cette ratification est attendue en 2016.<sup>10</sup> Les instruments précités font partie intégrante de l'ordre juridique national après avoir été publiés au Journal officiel du Royaume des Pays-Bas; ils peuvent faire l'objet d'une application directe par les juridictions nationales pour autant que la disposition en cause soit suffisamment claire et précise.

Le Royaume des Pays-Bas affiche la densité de population la plus élevée de l'Union européenne, derrière Malte. Les personnes issues de l'immigration sont principalement originaires de Turquie, du Maroc, du Suriname et des Antilles néerlandaises (bien que les personnes en provenance de ces dernières ne puissent pas vraiment être désignées comme des «immigrants»). Les principales religions sont le catholicisme romain (26 %), le protestantisme (16 %) et l'islam (5 %); 6 % de la population pratiquent une autre religion et 47 % n'en pratiquent aucune (2014).<sup>11</sup>

### 2. Législation principale

**Droit international:** la Constitution interdit à la Cour suprême néerlandaise de procéder à l'examen constitutionnel des actes législatifs formels. Étant donné toutefois que les Pays-Bas adhèrent à une «théorie moniste» du droit international, les juridictions néerlandaises peuvent appliquer directement les normes internationales en matière d'égalité de traitement et de non-discrimination, y compris lorsqu'il s'agit d'actes législatifs.

**La Constitution:** l'article 1<sup>er</sup> de la Constitution comporte une clause de non-discrimination. Cet article, qui couvre les motifs de la religion, de la philosophie de vie,

<sup>10</sup> Le processus s'est achevé après la date fixée pour le présent rapport. La Convention a été ratifiée le 14 juin 2016.

<sup>11</sup> Institut statistique des Pays-Bas [CBS] (2014), *De religieuze kaart van Nederland, 2010-2013* [La carte religieuse des Pays-Bas, 2010-2013], disponible sur: [www.cbs.nl/NR/rdonlyres/20EC6E0B-B87A-4CFE-818B-579FB779009F/0/20140209b15art.pdf](http://www.cbs.nl/NR/rdonlyres/20EC6E0B-B87A-4CFE-818B-579FB779009F/0/20140209b15art.pdf) (consulté en dernier lieu le 20 avril 2016).

des convictions politiques, de la race et du sexe ainsi que «tout autre motif», peut être invoqué par un requérant individuel contre des actes commis par le gouvernement et par des institutions privées; il peut également être invoqué entre personnes physiques.

**Dispositions du droit pénal:** le Code pénal contient plusieurs dispositions qui interdisent le discours discriminatoire et la discrimination dans le domaine économique et social.

**Droit civil général:** les dispositions du Code civil peuvent offrir une protection contre la discrimination illégale par l’invocation de ses dispositions en matière de responsabilité civile et de ses dispositions en matière de droit du travail, par exemple.

**Emploi:** la loi sur les conditions de travail prévoit l’obligation de prévenir toute condition d’emploi susceptible de causer un stress ou un préjudice psychologique ou physique. Cette disposition crée également pour l’employeur l’obligation positive de prévenir et de combattre toute forme de discrimination et de harcèlement (sexuel).

**Actes législatifs relatifs à l’égalité de traitement:** les lois pertinentes en matière d’égalité de traitement (droit civil) sont la loi générale de 1994 sur l’égalité de traitement; la loi de 2003 relative à la discrimination à l’égard des personnes handicapées; et la loi de 2004 relative à la discrimination fondée sur l’âge. La loi générale couvre la religion, les convictions, l’opinion politique, la race, le sexe, la nationalité, l’orientation hétérosexuelle ou homosexuelle, et l’état matrimonial; la loi relative aux personnes handicapées couvre le handicap et les maladies chroniques; et la troisième de ces lois assure une protection contre la discrimination fondée sur l’âge. Ces lois précisent l’article premier de la Constitution pour ce qui concerne les relations horizontales. Il convient en outre de les envisager en tant que mesures de transposition des garanties d’égalité contenues dans les directives européennes antidiscrimination.

On considère que, dans la perspective de la mise en œuvre des directives 2000/43/CE et 2000/78/CE, le législateur néerlandais n’a pas satisfait à certains égards aux exigences de l’UE. La Commission européenne a engagé en 2008 une procédure d’infraction portant notamment sur les définitions de la discrimination directe et indirecte et sur la marge excessive laissée par la législation nationale aux organisations religieuses pour justifier une discrimination directe. Certains de ces points ont été résolus par un amendement aux lois relatives à l’égalité de traitement, voté en 2011. La Commission a subséquentement clôturé la procédure, en 2013. À d’autres égards toutefois, le législateur néerlandais a été au-delà de ce qu’exigent strictement les directives. C’est ainsi que la protection contre la discrimination fondée sur la religion et les convictions et contre la discrimination fondée sur l’orientation sexuelle s’applique également dans le domaine des biens et des services.

Compte tenu de l’objet du présent résumé, la discussion ci-après se limite à la loi générale sur l’égalité, à la loi relative à la discrimination à l’égard des personnes handicapées et à la loi relative à la discrimination fondée sur l’âge considérées sous l’angle de la mise en œuvre des directives 2000/43/CE et 2000/78/CE.

### **3. Principes généraux et définitions**

Les lois néerlandaises relatives à l’égalité de traitement (générale, handicap et âge) couvrent les motifs mentionnés à l’article 19 TFUE, ainsi que certains autres motifs tels que la nationalité et l’état matrimonial. De façon plus spécifique, la loi générale vise la race, la religion et les convictions, l’opinion politique, l’orientation hétéro- ou homosexuelle, le sexe, la nationalité et l’état civil (ou matrimonial). Contrairement à tout autre domaine de la législation antidiscrimination néerlandaise et au droit européen, ces lois sont centrées sur le concept de «distinction» (*onderscheid*) et non sur celui de «discrimination» (*discriminatie*). Le terme «distinction» n’a pas la même connotation

négative et pourrait laisser supposer une possibilité de justification. En pratique, toutefois, les lois sont interprétées conformément aux directives européennes et à la jurisprudence de la CJUE.

*Discrimination directe* – Depuis 2011, la définition de la discrimination directe figurant dans les lois sur l'égalité de traitement reproduit le libellé des directives, si ce n'est qu'elle utilise le terme «distinction» au lieu de «discrimination». Sans être expressément incluse dans la définition de la discrimination directe – que ce soit dans les directives ou dans les lois néerlandaises (modifiées) sur l'égalité de traitement – la possibilité d'une discrimination par association a été admise par le principal organisme néerlandais en charge de l'égalité, à savoir le Collège pour les droits de l'homme (*College voor de Rechten van Mens* ou CRM), comme par son prédécesseur, la Commission pour l'égalité de traitement (*Commissie Gelijke Behandeling* ou CGB).<sup>12</sup>

*Discrimination indirecte* – Depuis 2011, la définition de la discrimination indirecte figurant dans les trois lois sur l'égalité de traitement (générale, handicap et âge) est similaire à celle figurant dans les directives, si ce n'est qu'elle utilise le terme «distinction» au lieu de «discrimination».

*Rétorsion* – Des mesures légales de protection contre les rétorsions sont en place. Les trois lois (générale, handicap et âge) prévoient toutes une protection contre un licenciement lié à une rétorsion et contre toute autre forme de traitement moins favorable parce qu'une personne a invoqué une disposition législative en matière d'égalité ou prêté autrement assistance dans le cadre d'une procédure engagée en vertu d'une disposition de ce type.

*Harcèlement* – Le harcèlement est expressément défini comme une forme de discrimination ne pouvant faire l'objet d'aucune justification. La définition actuelle du «harcèlement» dans les trois lois (générale, handicap et âge) reflète celle qui figure dans les directives. Cette dernière est cependant plus stricte que celle appliquée par la CGB (qui a précédé le CRM) dans sa jurisprudence antérieure à la mise en œuvre des directives. L'approche néerlandaise ne satisfait pas, dès lors, à la *clause de non-régression* prévue par les directives.

*Injonction de discriminer* – Avant la mise en œuvre des directives, l'interdiction de «tout comportement consistant à enjoindre quiconque de pratiquer une distinction» était déjà implicitement contenue dans la législation néerlandaise relative à l'égalité de traitement. Lors du processus de mise en œuvre, cette présence implicite est devenue explicite dans les trois lois sur l'égalité de traitement (générale, handicap et âge). Tant l'auteur de l'injonction (l'employeur, par exemple) que la personne qui l'exécute (une agence de recrutement, par exemple) contrevient à la loi. Si l'injonction a été formulée dans le cadre d'une relation professionnelle hiérarchique (un employeur enjoignant un travailleur à pratiquer une discrimination), seul le décideur (le patron et non le travailleur) peut être tenu pour responsable par une victime (responsabilité du fait d'autrui). L'approche néerlandaise à cet égard reflète sans doute une interprétation trop étroite du concept tel qu'il est contenu dans les directives.

*Aménagement raisonnable* – Ce concept n'a été explicitement consacré que dans la loi relative à la discrimination à l'égard des personnes handicapées, qui parle d'aménagement «effectif» plutôt que «raisonnable»: l'aménagement recherché doit avoir l'effet ou les effets escompté(s), ce qui signifie que l'aménagement doit être à la fois «approprié» et «nécessaire». Il doit également être raisonnable au sens qu'il ne peut imposer une charge (financière) disproportionnée à l'employeur. L'obligation de procéder à un «aménagement effectif» ne revêt pas un caractère général: la nécessité d'un aménagement et le type de cet aménagement doivent apparaître clairement à

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<sup>12</sup> Voir notamment CGB 2006-227 et CGB 2011-90.



l'employeur. Enfin, l'obligation ne peut jamais avoir pour effet de contraindre les employeurs à engager des personnes qui ne peuvent satisfaire pleinement aux exigences essentielles de la fonction.

*Exceptions* – La loi générale sur l'égalité de traitement, la loi relative à la discrimination à l'égard des personnes handicapées et la loi relative à la discrimination fondée sur l'âge contiennent toutes trois des exceptions à la norme de référence. En ce qui concerne les deux premières, ces exceptions sont énumérées de façon explicite et exhaustive par le législateur dans les lois elles-mêmes pour ce qui concerne la discrimination directe. Ces exceptions font l'objet d'une interprétation restrictive de la part des tribunaux et du CRM. La troisième loi (âge) offre quant à elle davantage de flexibilité au niveau de l'interprétation (quasi-)judiciaire: tant la discrimination directe qu'indirecte fondée sur l'âge peut être «objectivement justifiée» et seules certaines exceptions ont été mentionnées a priori et expressément dans la loi proprement dite. De manière générale, les exceptions prévues par les lois sur l'égalité de traitement sont conformes à celles qui peuvent être appliquées en vertu des directives, surtout depuis les corrections apportées par le gouvernement en réponse à la procédure d'infraction engagée par la Commission européenne.

L'exception visée à l'article 5, paragraphe 2 sous c), de la loi générale autorisant les organisations religieuses à exiger que les personnes travaillant pour elles souscrivent à leur éthique a également été mentionnée par la Commission. Cette exception très controversée avait pour but de supprimer la possibilité de pratiquer une discrimination exclusivement fondée sur l'opinion politique, la race, le sexe, la nationalité, l'orientation hétéro-ou homosexuelle ou sur l'état civil sous le couvert d'exceptions autorisées par la loi. Le «motif unique» de l'homosexualité d'une personne ne peut intrinsèquement entraîner un refus d'embauche ou un licenciement, mais la situation pourrait se présenter différemment si d'autres circonstances étaient prises en compte – lesquelles ont effectivement conduit (par exemple) des écoles chrétiennes à refuser d'engager, ou à licencier, des enseignants homosexuels cohabitant. Après plusieurs projets de loi et de nombreux conseils de la part de diverses ONG, du Conseil d'État et de l'(ex-)organisme pour l'égalité (la Commission pour l'égalité de traitement ou CGB), cette interprétation du concept de «motif unique» a finalement été abolie en 2015.<sup>13</sup>

#### **4. Champ d'application matériel**

La loi générale sur l'égalité de traitement s'applique aux domaines de l'emploi et du travail, à la fourniture de biens et de services (y compris l'enseignement) et, uniquement dans le contexte de la discrimination raciale, aux domaines de la sécurité sociale, de la protection sociale et des soins de santé. Toutes les garanties découlant des directives s'appliquent également à la fourniture de biens et de services. La loi relative à la discrimination à l'égard des personnes handicapées s'applique à l'emploi, à l'enseignement professionnel, au logement et à l'enseignement primaire et secondaire; elle s'applique en outre au domaine des transports publics depuis que ses articles 7 et 8 ont pris leurs effets en mai 2012.<sup>14</sup> La loi relative à la discrimination fondée sur l'âge a pour sa part un champ d'application matériel plus limité puisqu'elle s'applique uniquement à l'emploi et à la formation liée à l'emploi.

Dans les trois lois en question, la notion «d'emploi» doit être comprise au sens large: ce terme couvre à la fois l'emploi dans le secteur public et dans le secteur privé; il s'étend du recrutement au licenciement, en ce compris notamment la promotion, les conditions d'emploi, la médiation et la formation (professionnelle). De surcroît, l'exercice d'un emploi indépendant est couvert par les trois lois.

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<sup>13</sup> Tweede Kamer 2010-2011/2013-2014, 32 476, n° 1-11.

<sup>14</sup> Cette loi a été modifiée après la date fixée pour le présent rapport et couvre désormais également, depuis le 14 juin 2016, les biens et les services.

Les limites du champ d'application de la loi générale sur l'égalité sont de trois ordres. Premièrement, la loi ne s'applique pas aux affaires internes des Églises et des communautés religieuses; deuxièmement, elle reste sans préjudice de la loi existante en matière de discrimination sexuelle; et troisièmement, elle ne s'applique pas aux affaires internes d'associations (ceci découlant implicitement de la liberté d'association garantie par la Constitution). De même, la loi ne s'applique pas aux actes unilatéraux de fonctionnaires publics ou d'organismes gouvernementaux (autrement dit aux actes réglementaires et législatifs) et à leurs actes d'exécution. Cette dernière restriction du champ d'application ne concerne pas les dispositions législatives en matière de sécurité sociale (seuls les motifs de la race et de l'origine ethnique étant couverts).

L'interdiction de discrimination fondée sur l'âge consacrée par la loi spécifique en la matière ne s'applique pas aux prestations de la retraite professionnelle (en complément de la prestation de pension prévue par la loi sur la sécurité sociale) ni aux calculs actuariels des prestations de pension.<sup>15</sup>

## 5. Mise en application de la loi

Aucune des trois lois relatives à l'égalité de traitement (générale, handicap et âge) ne contient de procédures judiciaires obligatoires. Les procédures ordinaires du droit civil ou administratif peuvent être utilisées pour faire appliquer les normes en la matière et aboutissent toutes à une décision juridiquement contraignante. Dans la pratique, le respect de la norme d'égalité est le plus souvent assuré par le biais d'une procédure spéciale «à bas seuil» auprès du Collège pour les droits de l'homme (CRM). Ce dernier est un organisme indépendant quasi-judiciaire dont la jurisprudence n'est *pas exécutoire*, mais fait néanmoins autorité. Aucune représentation juridique n'est requise dans les affaires introduites auprès du CRM. Les procédures ordinaires du droit civil comme du droit administratif et la procédure du CRM habilitent les groupes d'intérêts (ONG et autres associations) à ester en justice. Le CRM peut en outre mener une enquête de sa propre initiative. Toutes les parties impliquées dans une quelconque enquête du CRM sont tenues de lui fournir l'ensemble des informations qu'il réclame. Tout manquement à cette obligation peut donner lieu à des poursuites pénales.

Le «renversement partiel de la charge de la preuve» est d'application dans les procédures engagées devant les tribunaux, ainsi qu'au niveau du CRM. En ce qui concerne les sanctions, les trois lois relatives à l'égalité (générale, handicap et âge) précisent uniquement que les licenciements à caractère discriminatoire (et les licenciements relevant de rétorsions) sont déclarés nuls et nonavenus, de même que les dispositions contractuelles contrevenant aux lois en question. En vertu des procédures judiciaires ordinaires, lorsque le licenciement d'un travailleur/d'une travailleuse enfreint la loi sur l'égalité de traitement, la résiliation du contrat peut être invalidée et le travailleur/la travailleuse peut, sur cette base, réclamer un salaire; il/elle peut aussi demander à être rétabli(e) dans ses fonctions. Il/elle a pour option alternative de réclamer une réparation pécuniaire en vertu des sanctions prévues par le droit général de l'administration, des contrats ou de la responsabilité civile.

La panoplie complexe et, en réalité, limitée des sanctions législatives suscite certains doutes quant au respect de l'exigence des directives réclamant que les sanctions soient «effectives», «proportionnées» et «dissuasives». Les lois antidiscrimination prévoient en outre des «sanctions» (plus douces) qui ne peuvent être imposées que par le CRM et non par les tribunaux. C'est ainsi que le CRM peut adresser des *recommandations* à la partie ayant pratiqué une discrimination. Il peut également transmettre ses conclusions dans un avis adressé au ministre concerné et aux organisations patronales, syndicales,

<sup>15</sup> Aucun ajustement n'a été apporté à cette exception par suite de l'arrêt de la Cour de justice de l'Union européenne dans l'affaire *HK Danmark* (C-476/11, 26 septembre 2013), qui dit pour droit que la progressivité des cotisations de retraite en fonction de l'âge ne relève pas de l'article 6, paragraphe 2, de la directive-cadre relative à l'égalité de traitement en matière d'emploi.

professionnelles et autres. Le test de situation et l'utilisation de preuves statistiques pour démontrer l'existence d'une discrimination indirecte sont recevables en justice.

De surcroît, bien que cette possibilité n'ait encore jamais été utilisée, le CRM peut intenter une action en justice pour obtenir une décision judiciaire établissant le caractère illégal d'un comportement contraire à la législation pertinente en matière d'égalité de traitement, et pour réclamer l'interdiction de ce comportement ou une sommation d'en réparer les conséquences.

## **6. Organismes de promotion de l'égalité de traitement**

Le Collège pour les droits de l'homme (CRM) est le principal organisme de promotion de l'égalité de traitement officiellement désigné (en vertu de l'article 13 de la directive 2000/43/CE). Il s'agit d'un organisme de type «tribunal quasi-judiciaire» qui a pour mission principale de connaître des plaintes et de formuler des avis juridiques à leur propos. Ces avis ne sont pas contraignants mais ils font, dans la pratique, largement autorité. Le mandat du CRM couvre également la réalisation d'études, la publication de rapports et la formulation de recommandations, mais n'inclut pas l'assistance aux victimes de discrimination. Cette fonction est assurée par l'organisation «Article 1<sup>er</sup>» et les bureaux anti-discrimination ADV (voir ci-après) car elle est jugée, aux Pays-Bas, incompatible avec la mission principale de l'organisme pour l'égalité, qui est d'entendre les cas (présumés) de pratiques ou comportements discriminatoires et d'enquêter à leur sujet – une mission qui mobilise la majeure partie de son temps et de ses ressources. Le CRM assume également un rôle consultatif (par exemple auprès du gouvernement lors de l'élaboration ou de la modification des lois sur l'égalité, ou auprès des employeurs lors du développement de nouvelles mesures) et mène des activités d'information et de recherche (au travers notamment de ses bulletins annuels et de l'attribution de projets de recherche à des instituts indépendants).

En résumé, le CRM (contrairement aux tribunaux) agit à la fois de manière réactive et de manière proactive, afin de donner plein effet aux principes d'égalité et de non-discrimination. Tous les membres du Collège sont des experts juridiques qui exercent leur fonction de façon autonome. Ces membres experts sont nommés par le gouvernement pour une période déterminée (six ans). Les membres du personnel ont pour leur part la même position que des fonctionnaires travaillant pour un ministère, si ce n'est qu'ils rendent uniquement compte au directeur du CRM (et non à un ministre). Le CRM est financé par le gouvernement (les fonds provenant du budget de divers ministères). Il doit rendre compte de ses activités au gouvernement au moyen d'un rapport annuel et d'un audit financier indépendant. Un rapport d'évaluation interne et externe est publié tous les cinq ans (et présenté au gouvernement et au Parlement). Le budget annuel du CRM s'est élevé à 5,7 millions d'euros en 2014. Une évaluation indépendante réalisée en 2015 conclut que ce budget devrait être de 5,8 millions d'euros au moins, tandis que le Collège lui-même demande qu'il passe à 7,4 millions d'euros. Le ministre compétent a toutefois refusé qu'il soit augmenté.<sup>16</sup> Le Collège se compose de douze membres et d'un directeur ainsi que d'un personnel de 50 personnes environ (juristes universitaires pour la plupart). Le CRM traite tous les motifs de non-discrimination visés par la loi générale sur l'égalité de traitement, la loi relative à la discrimination à l'égard des personnes handicapées et la loi relative à la discrimination fondée sur l'âge, ainsi que de motifs d'égalité plus spécifiques (type ou durée du contrat de travail, par exemple). Tous les rapports, conseils et avis (décisions dans des affaires individuelles) sont publiés sur le site Internet du Collège: <http://www.mensenrechten.nl/>.

Une ONG néerlandaise, «Article 1<sup>er</sup>», active dans la lutte contre la discrimination a également été désignée par le gouvernement en qualité d'organisme pour l'égalité aux termes des directives. Cette organisation couvre tous les motifs interdits de

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<sup>16</sup> Voir *Tweede Kamer*, 2015-2016, 34 338, n° 1.

discrimination cités à l'article 19 TFUE. «Article 1<sup>er</sup>» n'entend pas et n'enquête pas sur les plaintes. Cette ONG a pour mission principale de prêter assistance aux victimes et de suivre les évolutions en matière de (non-)discrimination dans la société (néerlandaise) au sens large – ce qui inclut la publication de rapports, la réalisation d'études indépendantes et la formulation de recommandations. Elle est chargée en outre de coordonner et d'étayer le travail de nombreux bureaux locaux de lutte contre la discrimination (ADV), lesquels sont financés par les autorités locales. Le CRM et «Article 1<sup>er</sup>» assument donc des tâches différentes, qui sont étroitement liées mais ne se recoupent pas.

La loi oblige toutes les autorités locales à mettre en place un bureau de lutte contre la discrimination (ADV). Les ADV ont été désignés en tant qu'organismes pour l'égalité dans l'exposé des motifs de la loi sur les bureaux locaux antidiscrimination.<sup>17</sup> Ces bureaux assument deux tâches légales: venir en aide aux personnes qui se plaignent de discrimination, et consigner l'ensemble de ces plaintes pour les porter à l'attention du ministre de l'Intérieur et des relations au sein du Royaume. Leur mandat couvre aussi, entre autres, la réalisation de tests de situation, le plus souvent en rapport avec des bars et discothèques.

De l'avis des auteurs du présent rapport, le CRM, «Article 1<sup>er</sup>» et les ADV fonctionnent tous de manière indépendante.

## 7. Points essentiels

Les points suivants sont ceux qui s'avèrent les plus importants et/ou problématiques dans le contexte néerlandais pour ce qui concerne la transposition et la mise en œuvre des directives:

- les conditions cumulatives figurant dans la définition du «harcèlement» pourraient bien ne pas satisfaire à la *clause de non-régression* prévue par les directives (voir le point 2.4 du rapport);
- le gouvernement néerlandais donne sans doute une interprétation trop étroite à l'interdiction d'une «injonction de pratiquer une distinction» (voir le point 2.5 du rapport);
- le gouvernement adopte également une approche indûment restrictive en ce qui concerne le champ de responsabilité en matière de discrimination (voir les points 2.4 et 2.5 du rapport);
- l'article 2, paragraphe 5, et l'article 7, paragraphe 2, de la directive-cadre relative à l'emploi parlent l'un et l'autre de la législation nationale et des mesures prises par les États membres pour protéger la santé et la sécurité. L'article 3, paragraphe 1 sous a), de la loi relative à la discrimination à l'égard des personnes handicapées prévoit une dérogation fondée sur le motif du handicap, mais la conformité de cette disposition aux exigences de la directive est contestable (voir le point 4.6 du rapport);
- le renversement partiel de la charge de la preuve ne s'applique pas en cas de recours pour faits de rétorsion, ce qui ne satisfait pas aux exigences de l'UE (voir le point 6.4 du rapport);
- l'exigence selon laquelle les sanctions doivent être «efficaces», «dissuasives» et «proportionnées» ne semble pas remplie par la législation néerlandaise (voir le point 6.5 du rapport);
- par ailleurs, le droit en matière d'égalité de traitement a parfois été formulé de telle manière que les dispositions se prêtent à une interprétation assez large – ce qui laisse notamment des possibilités de justification qui semblent excessives au vu de la règle générale de la CJUE selon laquelle les dérogations au principe de non-discrimination doivent être interprétées de façon restrictive. Cette situation ne pose

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<sup>17</sup> Voir *Tweede Kamer* 2007-2008, 31 439, n° 3, p. 7.

pas réellement problème dans la pratique, étant donné que le CRM et les tribunaux néerlandais semblent suivre la CJUE à cet égard.

L'égalité de traitement et la discrimination sont des préoccupations prioritaires depuis quelques années. Les points suivants en fournissent l'illustration:

- des études (réalisées par le SCP [*Sociaal en Cultureel Planbureau*] notamment) montrent régulièrement que la discrimination (en particulier à l'égard de personnes non occidentales issues de l'immigration) est une pratique courante sur le marché du travail. Un plan d'action national de lutte contre cette forme de discrimination a été présentée et une évaluation publiée en septembre 2015;
- Geert Wilders, leader du parti de droite PVV (Parti pour la liberté), a fait scander des propos anti-marocains à ses partisans lors d'un meeting électoral en mars 2014 (campagne pour les élections municipales). Le ministère public a annoncé son intention de poursuivre Wilders, suspecté d'insulte à une population en rapport avec sa race et d'incitation à la discrimination et à la haine (articles 137c et 137d du Code pénal). L'affaire devrait être entendue en justice en octobre 2016;
- une autre problématique a été à l'ordre du jour avec le débat sur le caractère prétendument raciste de l'un des personnages centraux de la fête de Saint-Nicolas, à savoir le Père Fouettard (*Zwarte Piet*). Ce débat a été attisé à nouveau après que le Comité des Nations unies pour l'élimination de la discrimination raciale (CERD) ait publié en août 2015 ses Observations finales concernant les Pays-Bas, dans lesquelles il invite l'État partie à éliminer les traits caractéristiques du personnage de *Zwarte Piet* qui reflètent des stéréotypes négatifs, et recommande de trouver un équilibre raisonnable (une représentation différente de *Zwarte Piet*, par exemple).<sup>18</sup> Le Premier ministre Mark Rutte a réagi en déclarant, comme il l'avait déjà fait, qu'il n'appartient pas au gouvernement néerlandais de décider du contenu d'une quelconque célébration ou manifestation culturelle;
- le port du voile, et plus spécifiquement d'un niqab couvrant le visage, dans les écoles et les services publics, est une question sensible. Une autre problématique porte actuellement sur le droit allégué par les Musulmans de refuser de serrer la main d'une personne du sexe opposé pour des motifs d'ordre religieux dans divers contextes, et notamment lors d'une candidature à un emploi dans la fonction publique;
- l'enregistrement de données relatives à l'ethnicité et l'origine a également été une question sensible et très controversée. Ce sont à la fois les réglementations en matière de protection de la vie privée et les dispositions en matière de discrimination qui sont au cœur de ce débat. Il semblerait cependant que la question mobilise moins l'attention des politiciens et des experts juridiques ces dernières années;
- les spécialistes du droit antidiscrimination débattent quant à savoir s'il est nécessaire ou souhaitable d'intégrer les six lois relatives à l'égalité de traitement en une seule et unique loi générale en la matière. Le gouvernement s'attache apparemment à préparer une nouvelle loi générale sur l'égalité de traitement qui intégrerait la loi générale actuelle, la loi sur l'égalité de traitement, la loi relative à la discrimination à l'égard des personnes handicapées et la loi relative à la discrimination fondée sur l'âge, de même que les dispositions existantes du Code civil. Il s'agirait d'une «intégration» technique de ces lois: aucun changement de fond n'est prévu. Le gouvernement n'a accompli aucune véritable avancée à cet égard au cours des dix dernières années;
- enfin, plusieurs juristes et ONG réclament que le champ d'application de la législation en matière d'égalité de traitement soit étendu ou élargi aux motifs (en particulier) du handicap et de l'âge, afin d'éviter toute disparité ou hiérarchie entre

<sup>18</sup> Les Observations finales du CERD concernant les dix-neuvième, vingtième et vingt-et-unième rapports périodiques des Pays-Bas sont disponibles (en anglais) sur: [http://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/NLD/CERD\\_C\\_NLD\\_CO\\_19-21\\_21519\\_E.pdf](http://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/NLD/CERD_C_NLD_CO_19-21_21519_E.pdf) (consulté en dernier lieu le 7 mars 2016).

les divers motifs de discrimination. Cette démarche ferait au moins en sorte que le domaine des avantages sociaux et celui des biens et services (commerciaux) soient inclus dans toutes les lois relatives à l'égalité de traitement. Entre-temps, le législateur a étendu le champ d'application de la loi relative à la discrimination à l'égard des personnes handicapées aux secteurs du logement et de l'enseignement primaire et secondaire en 2009, et au secteur des transports publics en 2012;

- des débats sont en cours sur le point de savoir s'il est souhaitable ou juridiquement admissible d'adopter des mesures d'action positive en rapport plus particulièrement avec le genre et avec les minorités ethniques et culturelles. L'avenir de toute politique d'action positive émanant du gouvernement lui-même est incertain du fait que l'accord de coalition de 2010 (soutenu par le PVV) prévoit que le gouvernement mettra fin à toutes les activités relevant de l'action positive et à toutes les politiques en faveur de la diversité en termes de genre et/ou de race/d'origine ethnique. Le gouvernement actuel a une position plus constructive vis-à-vis des mesures d'action positive et, en 2014, des organisations d'employeurs se sont engagées à recruter volontairement davantage de personnes handicapées – si tel n'était pas le cas, une obligation légale leur serait imposée à cette fin en 2017.

## ZUSAMMENFASSUNG

### 1. Einleitung

Die Niederlande sind eine repräsentative Demokratie mit einem Zweikammersystem. Offizielles Staatsoberhaupt ist König Willem-Alexander. Die Regierung besteht immer aus einer Koalition mehrerer politischer Parteien, weil viele Parteien ins Parlament gewählt werden und keine je die absolute Mehrheit erreichen konnte. Das politische Klima des Landes war in den letzten 15 Jahren vom Aufstieg rechtsextremer Parteien wie der Partei für die Freiheit (*Partij voor de Vrijheid, PVV*) geprägt. Die wichtigsten Themen dieser Parteien, insbesondere Einwanderung und der Kampf gegen Islam und Terrorismus, dominieren inzwischen auch den allgemeinen politischen Diskurs. Die derzeitige Koalitionsregierung besteht aus der Volkspartei für Freiheit und Demokratie (*Volkspartij voor Vrijheid en Democratie, VVD*) (liberal) und der Arbeiterpartei (*Partij van de Arbeid, PvdA*). Da die Koalition keine Mehrheit im Senat besitzt, ist die Regierung auf die Unterstützung durch andere Parteien angewiesen, über die von Fall zu Fall verhandelt wird.

Die Niederlande sind allen wichtigen internationalen Übereinkommen beigetreten, die sich auf den Kampf gegen Diskriminierung beziehen, beispielsweise der Europäischen Menschenrechtskonvention (einschließlich des 12. Protokolls), dem Internationalen Pakt über bürgerliche und politische Rechte (IPbPR), dem Fakultativprotokoll zum Internationalen Pakt, dem Internationalen Pakt über wirtschaftliche, soziale und kulturelle Rechte (IPwskR), dem Internationalen Übereinkommen zur Beseitigung jeder Form von Rassendiskriminierung (ICERD), dem Übereinkommen zur Beseitigung der Diskriminierung von Frauen (CEDAW) einschließlich des Fakultativprotokolls zu diesem Übereinkommen und dem Übereinkommen über die Rechte des Kindes (UNCRC). Das Übereinkommen über die Rechte von Menschen mit Behinderungen (BRK) haben die Niederlande unterzeichnet, jedoch noch nicht ratifiziert. Mit der Ratifizierung wird jedoch 2016 gerechnet.<sup>19</sup> Die derzeitige Regierung bereitet die Ratifizierung des Übereinkommens vor. Die oben genannten Rechtsinstrumente werden nach ihrer Veröffentlichung im Amtsblatt der Niederlande Teil des heimischen Rechtssystems und können von niederländischen Gerichten unmittelbar angewendet werden, sofern das Gericht ihre Bestimmungen ausreichend klar und präzise findet.

Das Königreich der Niederlande hat nach Malta die zweithöchste Bevölkerungsdichte in der Europäischen Union. Menschen mit Migrationshintergrund kommen vorwiegend aus der Türkei, Marokko, Surinam und den Niederländischen Antillen (obgleich Menschen von den Niederländischen Antillen nicht wirklich als „Zuwanderer“ bezeichnet werden können). Die wichtigsten Glaubensgemeinschaften sind Katholiken 26 %, Protestanten 16 %, Muslime 5 % und sonstige 6 %; 47 % der Bevölkerung gehören keiner Glaubensgemeinschaft an (2014).<sup>20</sup>

### 2. Wichtigste Gesetze

**Internationales Recht:** Die Verfassung verbietet es dem Obersten Gericht der Niederlande, Gesetze auf ihre Verfassungsmäßigkeit zu prüfen. In den Niederlanden herrscht jedoch ein „monistisches Verständnis“ des internationalen Rechts. Das heißt, niederländische Gerichte können internationale Normen zur Gleichbehandlung und Nichtdiskriminierung direkt anwenden, auch wenn andere Rechtsvorschriften betroffen sind.

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<sup>19</sup> Der Prozess wurde nach Redaktionsschluss dieses Berichts abgeschlossen. Das Übereinkommen wurde am 14. Juni 2016 ratifiziert.

<sup>20</sup> Niederländisches Amt für Statistik (2014), *De religieuze kaart van Nederland, 2010-2013* (Religiöse Karte der Niederlande, 2010-2013), abrufbar unter: [www.cbs.nl/NR/rdonlyres/20EC6E0B-B87A-4CFE-818B-579FB779009F/0/20140209b15art.pdf](http://www.cbs.nl/NR/rdonlyres/20EC6E0B-B87A-4CFE-818B-579FB779009F/0/20140209b15art.pdf) (letzter Zugriff am 20. April 2016).

**Verfassung:** Artikel 1 der niederländischen Verfassung enthält ein Verbot von Diskriminierung. Es gilt für die Diskriminierungsgründe Religion, Weltanschauung, politische Überzeugung, Rasse und Geschlecht sowie für „jeden anderen Grund“. Dieser Artikel kann zu Klagen von Einzelpersonen gegen Handlungen der Regierung oder privater Organisationen und auch bei Streitfällen zwischen Einzelpersonen geltend gemacht werden.

**Strafrecht:** Es gibt mehrere Bestimmungen im Strafgesetzbuch, die diskriminierende Aussagen und Diskriminierung im sozialen und wirtschaftlichen Leben verbieten.

**Zivilrecht:** Das Zivilgesetzbuch bietet Schutz gegen illegale Diskriminierung, z. B. auf der Grundlage des Schadensrechts und der Bestimmungen zum Arbeitsrecht.

**Beschäftigung:** Das Gesetz über Arbeitsbedingungen verpflichtet Arbeitgeber, alle Arbeitsbedingungen zu verhindern, die Stress bzw. körperliche oder psychische Schäden verursachen können. Damit ist auch die positive Verpflichtung verbunden, Diskriminierung und (sexuelle) Belästigung zu verhindern.

**Gleichbehandlungsgesetze:** Die einschlägigen (zivilrechtlichen) Gleichbehandlungsgesetze sind das Allgemeine Gleichbehandlungsgesetz (AGBG) von 1994, das Behindertendiskriminierungsgesetz (BDG) von 2003 und das Altersdiskriminierungsgesetz (ADG) von 2004. Das AGBG erstreckt sich auf Religion, Weltanschauung, politische Überzeugung, Rasse, Geschlecht, Nationalität, sexuelle Ausrichtung und Familienstand. Das BDG deckt Behinderungen und chronische Krankheiten ab, das ADG schützt vor Altersdiskriminierung. Diese Gesetze konkretisieren Artikel 1 der Verfassung in Bezug horizontale Beziehungen. Außerdem dienen sie der Umsetzung der Gleichbehandlungsgarantie, die in den Antidiskriminierungsrichtlinien der EU festgelegt ist.

Allerdings muss man davon ausgehen, dass dem niederländischen Gesetzgeber die Umsetzung der Richtlinien 2000/43/EG und 2000/78/EG nicht vollständig gelungen ist. Im Jahr 2008 leitete die Europäische Kommission ein Vertragsverletzungsverfahren ein, unter anderem weil die Definition von unmittelbarer und mittelbarer Diskriminierung nicht den europäischen Vorgaben entspricht und weil das Gesetz religiösen Organisationen zu viel Spielraum bei der Rechtfertigung unmittelbarer Diskriminierungen einräumt. Ein Teil dieser Probleme wurde durch eine Überarbeitung der Gleichbehandlungsgesetze im Jahr 2011 gelöst. 2013 wurde das Verfahren daraufhin von der Kommission eingestellt. In anderen Bereichen ist der niederländische Gesetzgeber sogar über die Anforderungen der Richtlinien hinausgegangen. Beispielsweise gilt der Schutz vor Diskriminierung aufgrund der Religion, Weltanschauung und sexuellen Ausrichtung auch für den Zugang zu Gütern und Dienstleistungen.

Aufgrund der geforderten Kürze behandelt diese Zusammenfassung im Folgenden nur die Umsetzung der Richtlinien 2000/43/EG und 2000/78/EG durch das AGBG, BDG und ADG.

### 3. Wichtigste Grundsätze und Begriffe

Die niederländischen Gleichbehandlungsgesetze (AGBG, BDG und ADG) decken alle Diskriminierungsgründe ab, die in Artikel 19 AEUV genannt sind, sowie weitere Gründe wie Nationalität und Familienstand. Im Einzelnen verbietet das AGBG Diskriminierung aufgrund von Rasse, Religion und Weltanschauung, politischer Überzeugung, hetero- oder homosexueller Ausrichtung, Geschlecht, Nationalität und Familienstand. Im Gegensatz zu jedem anderen Bereich des niederländischen Antidiskriminierungsrechts und zum EU-Recht kreisen diese Gesetze um den Begriff „Unterscheidung“ (*onderscheid*) und nicht um „Diskriminierung“ (*discriminatie*). Unterscheidung ist weniger negativ konnotiert und verleitet zu der Annahme, dass Unterscheidung in bestimmten Fällen gerechtfertigt ist. In der Praxis stimmt die Auslegung der Gesetze jedoch mit den



Richtlinien und der Rechtsprechung des EuGH überein.

*Unmittelbare Diskriminierung* – Seit 2011 folgt die Definition von „unmittelbarer Diskriminierung“ in den Gleichbehandlungsgesetzen dem Wortlaut der Richtlinien, nur wurde der Begriff „Diskriminierung“ durch „Unterscheidung“ ersetzt. Obgleich eine mögliche Diskriminierung durch Assoziierung zwar in den Richtlinien oder den (überarbeiteten) niederländischen Gleichbehandlungsgesetzen nicht ausdrücklich erwähnt ist, haben die Niederländische Gleichbehandlungsstelle, das Niederländische Institut für Menschenrechte (NIHR) und dessen Vorgänger, die Gleichbehandlungskommission (ETC), anerkannt, dass dies eine Form der Diskriminierung darstellt.<sup>21</sup>

*Mittelbare Diskriminierung* – Seit 2011 entspricht die Definition von „mittelbarer Diskriminierung“ AGBG, BDG und ADG der Begriffsbestimmung der Richtlinien, nur wird statt „Diskriminierung“ der Begriff „Unterscheidung“ verwendet.

*Viktimisierung* – Es besteht ein gesetzlicher Schutz vor Viktimisierung. Alle drei Gesetze (AGBG, BDG und ADG) schützen vor einer Entlassung aufgrund von Viktimisierung und vor anderen Benachteiligungen als Reaktion auf die Tatsache, dass sich eine Person auf die Gleichbehandlungsgesetze berufen oder sich an Verfahren auf Grundlage dieser Gesetze beteiligt hat.

*Unerwünschtes Verhalten* – Unerwünschtes Verhalten wird in den Gesetzen ausdrücklich als Form von Diskriminierung definiert, die nie gerechtfertigt ist. Die Begriffsbestimmung im AGBG, BDG und ADG entspricht denjenigen der Richtlinien. Letztere ist enger definiert als der Begriff, den der Vorläufer des NIHR vor Umsetzung der Richtlinien in seiner Rechtsprechung angewendet hat. Damit führt der niederländische Ansatz zu einer *Absenkung des Schutzniveaus*, was gegen die Richtlinien verstößt.

*Anweisung zur Diskriminierung* – Schon vor Umsetzung der Richtlinien beinhaltete das niederländische Gleichbehandlungsrecht implizit ein Verbot der „Anweisung zur Unterscheidung“. Im Rahmen des Umsetzungsverfahrens wurde dieses Verbot explizit in das AGBG, BDG und ADG aufgenommen. Sowohl derjenige, der *Anweisungen gibt* (z. B. der Arbeitgeber) als auch die Person, die die Anweisung ausführt (z. B. eine Arbeitsvermittlung), verstoßen gegen das Gesetz. Wurde die Anweisung im Rahmen eines hierarchischen Beschäftigungsverhältnisses erteilt (eine Führungskraft weist einen Mitarbeiter zur Diskriminierung an), kann das Opfer nur den Verantwortlichen (die Führungskraft und nicht den Mitarbeiter) stellvertretend haftbar machen. Damit verwendet der niederländische Ansatz womöglich eine unzulässige Verengung des Begriffs im Vergleich zu den Richtlinien.

*Angemessene Vorkehrungen* – Dieser Begriff wird nur im BDG festgeschrieben. Dabei spricht das Gesetz statt von „angemessenen“ von „wirksamen“ Vorkehrungen: Die Vorkehrung muss den gewünschten Effekt haben, d. h. sie muss „zweckdienlich“ und „notwendig“ sein. Außerdem muss sie vernünftig in dem Sinne sein, dass sie den Arbeitgeber nicht unverhältnismäßig (finanziell) belastet. Die Pflicht zu „wirksamen Vorkehrungen“ ist keine allgemeine Verpflichtung, d. h. dem Arbeitgeber muss beispielsweise bekannt sein, dass und welche Vorkehrungen benötigt werden. Schließlich darf diese Pflicht nie dazu führen, dass Arbeitgeber Personen einstellen müssen, die wesentliche berufliche Anforderungen nicht erfüllen.

*Ausnahmen* – AGBG, BDG und ADG sehen alle Ausnahmen von der Grundregel vor. In den ersten beiden Gesetzen werden Ausnahmen vom Verbot der unmittelbaren Diskriminierung ausdrücklich und vollständig vom Gesetzgeber aufgelistet. Diese Ausnahmen werden von den Gerichten und dem NIHR sehr restriktiv ausgelegt. Das ADG erlaubt eine flexiblere (halb-)juristische Auslegung: sowohl mittelbare als auch unmittelbare Altersdiskriminierung kann „objektiv gerechtfertigt“ sein und im Gesetz

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<sup>21</sup> Z. B. in ETC 2006-227 und ETC 2011-90.

selbst wurden nur bestimmte Ausnahmen *a priori* und ausdrücklich aufgezählt. Insgesamt entsprechen die Ausnahmen in den Gleichbehandlungsgesetzen, z. B. die Ausnahme für wesentliche berufliche Anforderungen, den Vorgaben der Richtlinien, insbesondere seit der Neufassung der Gesetze infolge des Vertragsverletzungsverfahrens der Europäischen Kommission.

Die Ausnahme von Artikel 5 Absatz 2 Buchstabe c des AGBG, nach der religiöse Organisationen von ihren Mitarbeitern die Einhaltung des eigenen Ethos verlangen können, wurde ebenfalls von der Kommission beanstandet. Die heiß diskutierte Ausnahme sollte die Möglichkeit ausschließen, dass Ungleichbehandlung ausschließlich aufgrund von politischer Überzeugung, Rasse, Geschlecht, Nationalität, hetero- oder homosexueller Ausrichtung oder Familienstand stattfindet, sich aber hinter der gesetzlich erlaubten Ausnahmeregelung versteckt. Der „alleinige Grund“, dass eine Person z. B. homosexuell ist, darf *per se* nicht zur Ablehnung von Bewerbern oder zur Kündigung führen. Wenn die weiteren Umstände in Betracht gezogen werden, könnte ein Gericht jedoch zu dem Ergebnis kommen, dass z. B. christliche Schulen offen homosexuelle Lehrer nicht einstellen bzw. kündigen dürfen. 2015 wurde nach mehreren Entwürfen und auf Rat verschiedener NRO, des Staatsrats und der Gleichbehandlungskommission diese Konstruktion mit einem „alleinigen Grund“ abgeschafft.<sup>22</sup>

#### **4. Sachlicher Anwendungsbereich**

Das AGBG gilt für die Bereiche Beschäftigung und Beruf, die Bereitstellung von Gütern und Dienstleistungen (mit Bildung) und in Bezug auf die Rassendiskriminierung auch für soziale Sicherheit, Sozialschutz und Gesundheitswesen. Der in den Richtlinien garantierte Gleichbehandlungsgrundsatz gilt in vollem Umfang für die Bereitstellung von Gütern und Dienstleistungen. Das BDG gilt für Beschäftigung, berufliche Bildung, Wohnraum und die allgemeine Bildung. Seitdem 2012 die Artikel 7 und 8 des BDG in Kraft getreten sind, fällt auch der öffentliche Personennahverkehr unter das Gesetz.<sup>23</sup> Das ADG hat den engsten Geltungsbereich: Es gilt nur für Beschäftigungsverhältnisse und berufliche Bildung.

Der Begriff „Beschäftigung“ ist in allen drei Gesetzen sehr weit gefasst und umfasst sowohl öffentliche, als auch private Beschäftigungsverhältnisse und deren unterschiedliche Aspekte wie Einstellung, Kündigung, Beförderung, Arbeitsbedingungen, Arbeitsvermittlung und berufliche Aus- und Weiterbildung. Auch selbständige Beschäftigung fällt unter diese drei Gesetze.

Der Geltungsbereich des AGBG wird von drei Seiten begrenzt. Erstens gilt das Gesetz nicht für die inneren Angelegenheiten von Kirchen und religiösen Gemeinschaften, zweitens bleiben bereits bestehende Gesetze zur Diskriminierung aufgrund des Geschlechts davon unberührt und drittens kann es nicht auf die inneren Angelegenheiten von Vereinigungen angewendet werden (dies folgt implizit aus der durch die Verfassung garantierten Vereinigungsfreiheit). Ferner ist das Gesetz nicht auf einseitige Handlungen von Amtsträgern oder staatlichen Stellen anwendbar (d. h. auf die Regulierung und Gesetzgebung und die Durchführung von Gesetzen). Letztere Einschränkung gilt nicht für gesetzliche Bestimmungen zur sozialen Sicherheit (bei denen nur Rasse und ethnische Herkunft als Diskriminierungsgründe verboten sind).

Das Verbot der Altersdiskriminierung durch das ADG gilt nicht für berufliche Rentensysteme (zusätzliche Rentenbestimmungen auf der Grundlage des Sozialrechts) und bei der versicherungsmathematischen Berechnung von Rentenbeiträgen.<sup>24</sup>

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<sup>22</sup> Tweede Kamer 2010-2011/2013-2014, 32 476, Nr. 1-11.

<sup>23</sup> Nach Redaktionsschluss dieses Berichts wurde das ADG geändert und umfasst seit dem 14. Juni 2016 auch Waren und Dienstleistungen.

<sup>24</sup> Infolge des Urteils des EuGH in der Rechtssache *HK Danmark* (EuGH, 26. September 2013, C-476/11), in dem festgestellt wurde, dass altersbezogene Erhöhungen der Rentenbeiträge nicht unter Artikel 6 Absatz 2

## 5. Rechtsdurchsetzung

Weder AGBG noch BDG oder ADG sehen obligatorische gerichtliche Verfahren vor. Zur Durchsetzung des Gleichbehandlungsprinzips dienen reguläre Zivil- oder Verwaltungsverfahren. Beide Verfahren führen zu rechtlich bindenden Urteilen. In der Praxis wird das Gleichbehandlungsprinzip in den meisten Fällen durch ein besonders niederschwelliges Verfahren vor dem NIHR durchgesetzt. Das NIHR ist eine unabhängige quasi-gerichtliche Behörde, deren Rechtsprechung zwar *nicht bindend*, aber dennoch maßgeblich ist. Bei Verfahren vor dem NIHR ist keine rechtliche Vertretung erforderlich. Interessenverbände (NRO und andere Organisationen) können sowohl regulären zivil- und verwaltungsrechtlichen Verfahren, als auch Verfahren vor dem NIHR als Partei beitreten. Außerdem kann das NIHR auf eigene Initiative Untersuchungen durchführen. Personen, die vom NIHR untersucht werden, sind verpflichtet, dem NIHR alle geforderten Informationen zur Verfügung zu stellen. Die Verweigerung von Informationen kann zu einem Strafverfahren führen.

Sowohl vor den ordentlichen Gerichten, als auch vor dem NIHR gilt die „teilweise Umkehrung der Beweislast“. Bei den Strafbestimmungen sagen AGBG, BDG und ADG nur aus, dass diskriminierende Kündigungen (und Kündigungen infolge von Viktimisierung) sowie vertragliche Bestimmungen, die gegen die Gleichbehandlungsgesetze verstoßen, unwirksam sind. Wenn bei der Kündigung eines Angestellten das Gleichbehandlungsprinzip verletzt wurde, kann ein ordentliches Gericht die Beendigung des Beschäftigungsverhältnisses aufheben, sodass der Arbeitnehmer Anspruch auf weitere Gehaltszahlungen hat. Außerdem kann er eine Weiterbeschäftigung verlangen. Wahlweise kann der Betroffene eine Entschädigung für die finanziellen Verluste gemäß dem allgemeinen Verwaltungs-, Vertrags- oder Schadensersatzrecht fordern.

Die komplizierten und in der Tat begrenzten Sanktionsmöglichkeiten des Gesetzes haben Zweifel geweckt, ob die Anforderung der Richtlinien nach „wirksamen“, „verhältnismäßigen“ und „abschreckenden“ Sanktionen erfüllt ist. Die Nichtdiskriminierungsgesetze enthalten außerdem weitere (weichere) „Sanktionen“, die nur vom NIHR, jedoch nicht von Gerichten, verhängt werden können. So kann das NIHR der Partei, die jemanden diskriminiert hat, *Empfehlungen* aussprechen. Außerdem kann es seine Ergebnisse dem zuständigen Minister und Arbeitgeber-, Arbeitnehmer- und Berufsverbänden in Form eines Gutachtens vorlegen. Situationstests und statistische Daten sind als Beweise für mittelbare Diskriminierung vor Gericht zulässig.

Schließlich kann das NIHR vor einem Gericht auf ein Urteil klagen, durch das Verhaltensweisen, die gegen einschlägiges Gleichbehandlungsrecht verstoßen, für illegal erklärt werden. Dadurch können diese Verhaltensweisen verboten und die gerichtliche Entscheidung erzielt werden, dass derartige Verhaltensweisen geändert werden müssen. Das NIHR von dieser Möglichkeit allerdings noch nie Gebrauch gemacht.

## 6. Gleichbehandlungsstellen

Das NIHR ist die wichtigste offizielle Gleichbehandlungsstelle der Niederlande (auf der Grundlage von Artikel 13 der Richtlinie 2000/43/EG). Es ist ein Gleichstellungsorgan mit quasi-richterlichen Befugnissen und hat die Aufgabe, Diskriminierungsklagen entgegen zu nehmen und rechtlich zu prüfen. Seine Entscheidungen sind nicht bindend, werden in der Praxis aber meist beachtet. Zu seinen Aufgaben gehören außerdem die Durchführung von Befragungen und die Veröffentlichung von Berichten und Empfehlungen. Das NIHR hat nicht die Aufgabe, Opfer von Diskriminierung zu unterstützen. Diese Funktion wird von Art. 1 und den Antidiskriminierungsstellen (ADV) (siehe unten) übernommen, weil die Niederlande die wichtigste Aufgabe der Gleichbehandlungsstelle darin sehen, Klagen

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der Gleichbehandlungsrahmenrichtlinie fallen, wurden an dieser Ausnahme keine Änderungen vorgenommen.

gegen (mutmaßliche) diskriminierende Praktiken oder Verfahren entgegen zu nehmen und zu prüfen. Diese Aufgabe nimmt den größten Teil der Arbeitszeit und Ressourcen des NIHR in Anspruch. Das NIHR hat auch beratende Funktionen (z. B. wenn die Regierung Gleichstellungsgesetze entwirft oder überarbeitet oder ein Arbeitgeber neue Richtlinien erstellt) und führt Informationskampagnen und Studien durch (z. B. in den jährlichen Mitteilungen oder durch die Vergabe von Forschungsprojekten an unabhängige Institute).

Kurz gesagt arbeitet das NIHR (anders als Gerichte) sowohl reaktiv als auch proaktiv für die Durchsetzung des Gleichbehandlungsgrundsatzes und den Kampf gegen Diskriminierung. Die Mitglieder des NIHR sind Juristen und nicht an Weisungen der Regierung gebunden. Die (Fach-)Mitglieder werden von der Regierung für eine Amtszeit von sechs Jahren ernannt. Die Mitarbeiter haben die Stellung von Ministerialbeamten, sind aber nur dem Direktor des NIHR rechenschaftspflichtig (keinem Minister). Das NIHR wird von der Regierung finanziert (aus den Haushalten mehrerer Ministerien). Es muss der Regierung in einem Jahresbericht und einer unabhängigen Wirtschaftsprüfung Rechenschaft ablegen. Alle fünf Jahre wird ein interner und externer Prüfbericht veröffentlicht (und Regierung und Parlament vorgelegt). Der Jahreshaushalt des NIHR betrug 2014 5,7 Mio. EUR. Eine im Jahr 2015 durchgeführte unabhängige Bewertung ergab, dass das Budget mindestens 5,8 Mio. EUR betragen sollte, während das NIHR selbst 7,4 Mio. EUR forderte. Der zuständige Minister lehnte eine Erhöhung des Budgets jedoch ab.<sup>25</sup> Das NIHR hat zwölf Mitglieder, einen Direktor und einen Stab von rund 50 Mitarbeitern (zum Großteil Juristen). Das NIHR ist für Diskriminierung aus den in AGBG, BDG und ADG genannten Gründen und speziellen Gleichbehandlungsgründen (z. B. Art und Dauer von Beschäftigungsverträgen) zuständig. Alle Berichte, Empfehlungen und Gutachten (Entscheidungen in einzelnen Fällen) werden auf der Website des Instituts veröffentlicht: <http://www.mensenrechten.nl/>.

Auch die niederländische Antidiskriminierungs-NRO Art. 1 wurde von der Regierung zur Gleichbehandlungsstelle im Sinne der Richtlinien ernannt. Die Organisation deckt alle Diskriminierungsgründe ab, die in Artikel 19 AEUV genannt sind. Art. 1 ist, anders als das NIHR, nicht für die Entgegennahme und Prüfung von Beschwerden zuständig. Seine wichtigste Aufgabe ist die Unterstützung von Opfern und die Überwachung der Entwicklungen in Bezug auf die (Nicht-)Diskriminierung in der niederländischen Gesellschaft durch Berichte, unabhängige Studien und Empfehlungen. Außerdem koordiniert und unterstützt sie die Arbeit der lokalen Antidiskriminierungsstellen (ADV), die von kommunalen Behörden finanziert werden. Das NIHR und Art. 1 erfüllen also unterschiedliche Aufgaben, die zwar eng verwandt sind, sich jedoch nicht überschneiden.

Alle lokalen Behörden sind gesetzlich zur Einrichtung einer Antidiskriminierungsstelle (ADV) verpflichtet. In der Begründung zum Gesetz über lokale Antidiskriminierungsstellen sind die ADVs als Gleichbehandlungsstellen ausgewiesen.<sup>26</sup> Sie haben zwei gesetzliche Aufgaben: Unterstützung von Bürgern, die eine Diskriminierungsbeschwerde haben und Erfassung der Beschwerden für einen Bericht an den Minister für Inneres und die Beziehungen des Königreiches. Außerdem führen diese Stellen häufig Situationstests durch, zum größten Teil bei Bars und Nachtclubs.

Nach Ansicht der Autoren dieses Berichts sind NIHR, Art. 1 und die ADV vollkommen unabhängig.

## **7. Wichtige Punkte**

In den Niederlanden gibt es bei der Umsetzung der Richtlinien die folgenden wichtigen und/oder problematischen Punkte:

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<sup>25</sup> Siehe Tweede Kamer 2015-2016, 34 338, Nr. 1.

<sup>26</sup> Siehe Tweede Kamer 2007-2008, 31 439, Nr. 3, S. 7.

- Die kumulativen Bedingungen der Definition von „unerwünschtem Verhalten“ verstoßen gegen die Bestimmung der Richtlinien, dass das Schutzniveau durch die Umsetzung nicht abgesenkt werden darf (siehe Abschnitt 2.4 des Berichts).
- Möglicherweise legt die niederländische Regierung das Verbot der „Anweisung zur Unterscheidung“ zu eng aus (siehe Abschnitt 2.5 des Berichts).
- Auch beim „Haftungsumfang“ für Diskriminierung verfolgt die niederländische Regierung einen zu restriktiven Ansatz (siehe die Abschnitte 2.4 und 2.5 des Berichts).
- Gemäß Artikel 2 Absatz 5 und Artikel 7 Absatz 2 der Gleichbehandlungsrahmenrichtlinie können die Mitgliedstaaten zum Schutz der Gesundheit und der öffentlichen Sicherheit Gesetze erlassen oder andere Maßnahmen ergreifen. Artikel 3 Absatz 1 Buchstabe a des BDG sieht eine Ausnahmeregelung auf dieser Grundlage vor. Es lässt sich jedoch darüber streiten, ob diese Bestimmungen die Anforderungen der Richtlinie erfüllen (siehe Abschnitt 4.6 des Berichts).
- Die teilweise Umkehrung der Beweislast gilt nicht bei Fällen von Viktimisierung, was gegen die Anforderungen der EU verstößt (siehe Abschnitt 6.4 des Berichts).
- Die nach niederländischem Recht möglichen Sanktionen erfüllen nicht die Kriterien „wirksam“, „abschreckend“ und „verhältnismäßig“ (siehe Abschnitt 6.5 des Berichts).
- Einige Punkte der Gleichbehandlungsgesetze sind so formuliert, dass sie eine sehr breit gefasste Auslegung ermöglichen. Dadurch lassen sich womöglich mehr Ausnahmen rechtfertigen als gewünscht, insbesondere wenn man die allgemeine Regel des EuGH bedenkt, dass Ausnahmen vom Gleichbehandlungsgrundsatz sehr restriktiv auszulegen sind. Allerdings folgen das NIHR und die niederländischen Gerichte in diesem Punkt dem EuGH, sodass dies in der Praxis kein Problem darstellt.

Gleichbehandlung und Diskriminierung standen in den vergangenen Jahren weit oben auf der politischen Agenda. Dabei wurden insbesondere die folgenden Punkte diskutiert:

- Die Forschung (unter anderem durch das Soziale und Kulturelle Planungsbüro (SCP)) zeigt immer wieder, dass auf dem Arbeitsmarkt Diskriminierung aufgrund der Religion und/oder ethnischen Herkunft weit verbreitet ist (insbesondere Migranten aus nicht-westlichen Kulturen werden häufig diskriminiert). Es wurde ein nationaler Aktionsplan gegen Diskriminierung auf dem Arbeitsmarkt präsentiert, und im September 2015 wurde eine Auswertung veröffentlicht.
- Nach den Kommunalwahlen im März 2014 leitete Geert Wilders, der Vorsitzende der rechten Partei PVV, eine Zusammenkunft seiner Anhänger zu anti-marokkanischen Gesängen an. Die Staatsanwaltschaft hat Anklage gegen Wilders wegen des Verdachts erhoben, dass er eine Gruppe von Menschen wegen ihrer Rasse beleidigt sowie zu Diskriminierung und Hass aufgerufen habe (Artikel 137c und 137d Strafgesetzbuch). Das Gericht wird voraussichtlich im Oktober 2016 über die Klage entscheiden.
- Ein weiteres umstrittenes Thema ist die Diskussion über die mutmaßlich rassistische Figur des Schwarzen Peters (*Zwarte Piet*), einer zentralen Figur bei den niederländischen Feierlichkeiten zum Nikolaustag. Erneut angeheizt wurde die Diskussion, nachdem der UN-Ausschuss zur Beseitigung der Rassendiskriminierung (CERD) im August 2015 seine Abschließenden Bemerkungen zu den Niederlanden veröffentlichte, in denen er den Vertragsstaat aufforderte, „die Merkmale des Schwarzen Peters, in denen negative Stereotypen zum Ausdruck kommen“ zu eliminieren, und ihm empfahl, „einen vernünftigen Ausgleich, etwa eine andere Darstellung des Schwarzen Peters, zu finden“.<sup>27</sup> In seiner Reaktion darauf erklärte Ministerpräsident Mark Rutte wie schon zuvor, dass es nicht Sache der

<sup>27</sup> Die Abschließenden Bemerkungen des CERD zum 19. – 21. Staatenbericht der Niederlande sind abrufbar unter: [http://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/NLD/CERD\\_C\\_NLD\\_CO\\_19-21\\_21519\\_E.pdf](http://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/NLD/CERD_C_NLD_CO_19-21_21519_E.pdf) (letzter Zugriff am 7. März 2016).

niederländischen Regierung sei, über den Inhalt eines Festes oder einer kulturellen Veranstaltung zu entscheiden.

- Das Tragen des Kopftuchs, und insbesondere des Niqab, der das Gesicht bedeckt, in Schulen oder öffentlichen Ämtern, ist ein sensibles Thema. Ebenfalls umstritten ist, ob Muslime es in bestimmten Situationen aus religiösen Gründen ablehnen dürfen, Personen des anderen Geschlechts die Hand zu geben, beispielsweise bei der Bewerbung um eine Stelle im öffentlichen Dienst.
- Ebenfalls sehr sensibel und stark umstritten ist die Frage, ob Daten zur ethnischen Zugehörigkeit und Herkunft erfasst werden dürfen. Dies berührt sowohl das Thema Datenschutz als auch den Bereich der Diskriminierung. In den letzten Jahren scheinen Politiker und Juristen allerdings das Interesse an diesem Thema zu verlieren.
- Experten für Antidiskriminierungsrecht diskutieren darüber, ob es notwendig oder wünschenswert ist, die bestehenden sechs Gleichbehandlungsgesetze zu einem allgemeinen Gleichbehandlungsgesetz zusammenzufassen. Die Regierung arbeitet angeblich am Entwurf eines neuen Allgemeinen Gleichbehandlungsgesetzes, in dem AGBG, GBG, BDG und ADG sowie einschlägige Bestimmungen des Zivilgesetzbuches harmonisiert werden. Das heißt, es ist die technische „Integration“ dieser Gesetze geplant, keine sachliche Änderung. Im letzten Jahrzehnt hat die Regierung bei dieser Arbeit keine wirklichen Fortschritte gemacht.
- Schließlich fordern manche Anwälte und NRO, den Geltungsbereich der Gleichbehandlungsgesetze (vor allem) für die Diskriminierungsgründe Behinderung und Alter zu erweitern, um Diskrepanzen oder Hierarchien zwischen den einzelnen Diskriminierungsgründen zu vermeiden. Zu diesem Zweck müssten zumindest die Bereiche Sozialfürsorge und (kommerzielle) Güter und Dienstleistungen in alle Gleichbehandlungsgesetze aufgenommen werden. Der Gesetzgeber hat den Geltungsbereich des BDG im Jahr 2009 bereits auf die Bereiche Wohnraum und allgemeine Bildung und im Jahr 2012 auf den Öffentlichen Personennahverkehr ausgedehnt. Insbesondere für die Diskriminierungsgründe Geschlecht und für ethnische und kulturelle Minderheiten wird darüber diskutiert, ob positive Fördermaßnahmen wünschenswert oder rechtlich möglich sind. Die Förderpolitik der Regierung steht insgesamt in Frage, seit in der Koalitionsvereinbarung von 2010 (unterstützt von der PVV) vereinbart wurde, dass die Regierung alle positiven Fördermaßnahmen und Diversitätsstrategien in Bezug auf Geschlecht und Rasse/ethnische Herkunft beendet. Die aktuelle Regierung nimmt gegenüber positiven Fördermaßnahmen eine positivere Haltung ein und im Jahr 2014 haben sich die Arbeitgeberverbände auf freiwilliger Basis verpflichtet, verstärkt Menschen mit Behinderung zu beschäftigen. Wenn sie diese Selbstverpflichtung nicht erfüllen, ist im Jahr 2017 eine gesetzliche Regelung geplant.

## INTRODUCTION

### The national legal system

In the Netherlands central government is the only level of government that passes anti-discrimination or equal treatment legislation. The principles of equality and non-discrimination are covered by various areas of the law. Of importance are the Constitution, private and public employment law, criminal law and specific statutory equal treatment acts. Moreover, since the Dutch constitutional system adheres to a 'monist theory' of international law, international equality guarantees are automatically applicable in the national legal system provided that they are sufficiently clear and precise to be justiciable in concrete cases (cf. Articles 93 and 94 of the Constitution). Private employment contracts are regulated by Book 7 of the Civil Code (*Burgerlijk Wetboek*) which contains equal treatment provisions, and by specific statutory equal treatment acts. Furthermore, regulation may occur through Collective Labour Agreements at the level of the sector or individual employer. The employment of most public service employees is regulated by the Civil Servants Act (*Ambtenarenwet*). Each sector of public employment is normally also covered by a Collective Labour Agreement. The main equality body is the Netherlands Institute for Human Rights (NIHR) (*College voor de Rechten van de Mens*), which has a section that deals with complaints about unequal treatment.

### List of main legislation transposing and implementing the directives

- Article 1 of the Constitution (*Grondwet*) enshrines a constitutional equality and non-discrimination guarantee.
- International non-discrimination provisions (e.g. Article 26 of the International Covenant on Civil and Political Rights (ICCPR) and Article 14 of the European Convention on Human Rights (ECHR)) can be directly applied in court proceedings. Sometimes provisions from the UN International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the UN Convention on the Rights of People with Disabilities (CRPD) or the UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) are also called upon before Dutch courts. The Netherlands is currently in the process of ratifying the International Convention on the Rights of Persons with Disabilities (UNCRPD).<sup>28</sup>
- EU Treaty provisions and directives can be directly applied under the normal conditions for applicability of EU Law in the Member States.
- The Criminal Code (*Wetboek van Strafrecht*) includes specific provisions criminalising discriminatory speech and publications (Articles 137d-137f) and discriminatory acts in the performance of an individual's job or enterprise (Articles 137g and 429quater). Discrimination is defined in Article 90quater, in line with Article 1 of the UN ICERD and therefore different from the definition in the directives. In addition, Article 137c forbids insulting groups of people because of their race, religion/belief and homo-/heterosexual orientation.
- The Civil Code (*Burgerlijk Wetboek*) includes specific articles prohibiting sex discrimination and discrimination in relation to the duration of employment contracts and whether they are permanent or fixed-term contracts (Articles 7:646-7:649). Employers are also liable if they fail to guarantee safe working conditions. This includes an environment free from discrimination and (sexual) harassment (Article 7:658).
- The Civil Servants Act (*Ambtenarenwet*) contains similar provisions for the public service sector (Articles 125g and 125h).
- The Act on Working Conditions (*Arbeidsomstandighedenwet*) contains provisions concerning (sexual) harassment, aggression, violence and discrimination in the

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<sup>28</sup> After the cut-off date of this report the process was concluded. The Convention was ratified on 14 June 2016.

workplace. These provisions put a positive obligation on employers to prevent and combat discrimination and (sexual) harassment. The Labour Inspectorate (*Arbeidsinspectie*) can impose fines on employers who do not comply with this obligation.

- Since 1994, race and ethnic origin, religion and belief and sexual orientation have been covered together with 'political opinion', 'sex', 'nationality' and 'civil status' as grounds for discrimination by the General Equal Treatment Act or GETA (*Algemene Wet Gelijke Behandeling*).<sup>29</sup> After the adoption of the directives, the GETA was amended by the EC Implementation Act.<sup>30</sup> This Act entered into force on 1 April 2004.<sup>31</sup> Importantly, the Dutch Government 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 (e.g. 'race', 'religion/belief', 'sexual orientation') to other grounds that are also covered by the GETA.<sup>32</sup> Every five years, an evaluation of the GETA takes place in which both the equality body<sup>33</sup> and independent experts make an assessment of legal problems surrounding the implementation and the social effects of the equal treatment legislation. The next assessment is due in 2016.
- The Act on Equal Treatment on the Ground of Age in Employment (*Wet Gelijke Behandeling op grond van Leeftijd bij de Arbeid*), hereafter referred to as the Age Discrimination Act or ADA.<sup>34</sup> The ADA entered into force on 1 May 2004.<sup>35</sup> In 2009, an evaluation report, written by independent experts, was sent to Parliament.<sup>36</sup> The then Equal Treatment Commission (ETC) (*Commissie gelijke behandeling, CGB*) published its own evaluation report.<sup>37</sup>
- The Act on Equal Treatment on the Ground of Disability or Chronic Illness (*Wet Gelijke Behandeling op grond van Handicap of Chronische Ziekte*) hereafter referred to as the Disability Discrimination Act or DDA.<sup>38</sup> The DDA entered into force on 1

<sup>29</sup> Netherlands, Act of 2 March 1994, concerning the establishment of general rules protecting against discrimination on the ground of religion, belief, political opinion, race, sex, nationality, hetero- or homosexual orientation, or civic status (*Wet van 2 maart 1994 houdende algemene regels ter bescherming tegen discriminatie op grond van godsdienst, levensovertuiging, politieke gezindheid, ras, geslacht, nationaliteit, hetero- of homoseksuele gerichtheid of burgerlijke staat*), *Staatsblad* [Official gazette]1994, 230.

<sup>30</sup> Netherlands, Act of 21 February 2004 regarding the amendment of the General Equal Treatment Act and 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)*).

<sup>31</sup> Determined by Governmental Decree of 11 March 2004, concerning the establishment of the date for the entry into force of the Act of 21 February 2004 regarding the amendment of the General Equal Treatment Act and 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>32</sup> Explanatory Memorandum to the EC Implementation Act, Tweede Kamer, 2002-2003, 28 770, no. 3, p. 3.

<sup>33</sup> The latest evaluation report was published in 2011 (hereafter: ETC (2011), *Third evaluation report (2004-2009)*) and is available at: [www.mensenrechten.nl/publicaties/detail/9895](http://www.mensenrechten.nl/publicaties/detail/9895) (last accessed 7 March 2016). In the response of the Government to this report, it was openly discussed whether any such reports would be necessary in the future. See Tweede Kamer, 2011-2012, 28 481 no. 16. This was confirmed in a debate in Parliament, Tweede Kamer, 2011-2012, 28 481 no. 17, p. 24.

<sup>34</sup> Netherlands, 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>35</sup> Determined by Governmental Decree of 23 February 2004, concerning the establishment of a date for the entry 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>36</sup> See Tweede Kamer, 2008-2009, 30 347, no. 2.

<sup>37</sup> This report is entitled *WGBL, geen symbool-wetgeving; evaluatie van de Wet gelijke behandeling op grond van leeftijd bij de arbeid* and is available on the website of the NIHR: [www.mensenrechten.nl/publicaties/detail/9904](http://www.mensenrechten.nl/publicaties/detail/9904) (last accessed 7 March 2016).

<sup>38</sup> Netherlands, 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.



December 2003.<sup>39</sup> In 2004 the DDA was amended by means of the aforementioned EC Implementation Act. The initial scope of the DDA was restricted to employment and vocational education, but in 2009 this was extended to the fields of primary and secondary education (Article 5b DDA) and housing (Articles 6a, 6b and 6c DDA).<sup>40</sup> Public transport is covered in Articles 7 and 8 of the law, and these Articles entered into force on 9 May 2012. However, the Decree giving effect to these Articles contains a complicated schedule of gradual implementation.<sup>41</sup> In fact, it will take until 2030 before the whole public transport sector (apart from transport on ferries) will actually fall under the scope of the DDA. In 2009, an evaluation report, written by independent experts, was sent to Parliament.<sup>42</sup>

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<sup>39</sup> Determined by Governmental Decree of 11 August 2003, concerning the establishment of a date for the entry 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.

<sup>40</sup> Netherlands, Amendment to the Disability Discrimination Act concerning the extension to primary and secondary education and housing (*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*), *Staatsblad* 2009, 101.

<sup>41</sup> See the Decree of 19 April 2012, *Staatsblad* 2012, 199. The Decree is entitled 'Concerning the establishment of a date for the entry into force of Articles 7 and 8 of the Act on Equal Treatment on the Grounds of Disability or Chronic Disease and the entry into force of the Decree on the accessibility of public transport' (*Houdende het tijdstip van inwerkingtreding van de artikelen 7 en 8 van de Wet gelijke behandeling op grond van handicap of chronische ziekte en inwerkingtreding van het Besluit toegankelijkheid van het openbaar vervoer*).

<sup>42</sup> See Tweede Kamer, 2008-2009, 29 355, no. 39. The then ETC published its own evaluation report, entitled *Zonder vallen en opstaan; Evaluatie van de WGBHcz*, available at: [www.mensenrechten.nl/publicaties/detail/10027](http://www.mensenrechten.nl/publicaties/detail/10027) (last accessed 7 March 2016).

## **1 GENERAL LEGAL FRAMEWORK**

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

In the Dutch constitution, Article 1 covers non-discrimination:

'All persons in the Netherlands shall be treated equally in equal circumstances. Discrimination on the grounds of religion, belief, political opinion, race, sex or on any other ground shall be prohibited.'

This provision applies to all areas covered by the directives. Its material scope is larger than those of the directives, as there are no boundaries to the personal and material scope of this article, which means that the Constitutional provision applies to everybody in the country and to all fields of social and economic life.

The constitutional anti-discrimination provision is directly applicable in vertical relations. There is a limitation to this: formal statutory Acts (adopted by the Government in co-operation with Parliament) may not, according to Article 120 of the Constitution, be subjected to Constitutional review by the courts, and thus also not to a Constitutional 'equality' review'.<sup>43</sup> However, Dutch courts do have the power to revoke 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 frequently have to consider whether a particular piece of legislation violates Article 14 of the European Convention on Human Rights, Article 26 of the International Covenant on Civil and Political Rights, or any other international or European non-discrimination provision.

The constitutional equality clause can be enforced against private actors.<sup>44</sup> However, since this is an 'open clause' it does not specify what the equal treatment or non-discrimination norm entails in concrete situations and how this norm should be weighed 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 incorporated into criminal law provisions and specific statutory equal treatment legislation (ADA, DDA, GETA and ETA).

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<sup>43</sup> There is a Bill in which it is proposed to introduce Constitutional review into the Constitution (Tweede Kamer, 2001-2002, 28 331, nos. 1-2 of 11 April 2001).

<sup>44</sup> E.g. Supreme Court 8 October 2004, *NJ* 2005/117 (*Van Pelt/Martinair* and *KLM / Vereniging van Verkeersvliegers*), ECLI:NL:HR:2004:AP0425.

## 2 THE DEFINITION OF DISCRIMINATION

### 2.1 Grounds of unlawful discrimination explicitly covered

The following grounds of discrimination are explicitly prohibited in national law:

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

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

The words racial or ethnic origin, religion or belief, disability, age and sexual orientation are not defined in Dutch equal treatment law. Dutch equal treatment legislation applies symmetrically, in the sense that persons from both the dominant group and the disadvantaged group 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.

*Race and ethnic origin.* The Explanatory Memorandum to the GETA<sup>45</sup> stresses that 'race' is a broad concept, which must be interpreted in line with the UN International Convention on the Elimination of Racial Discrimination (ICERD).<sup>46</sup> The concept embraces race, colour, descent and national or ethnic origin.<sup>47</sup> The Supreme Court, as well as the NIHR, use the ICERD definition of race. In the EC Implementation Act of 2004, the Government has not deemed it necessary to explicitly include the notion of 'ethnic origin', since this is sufficiently captured by this interpretation of 'race'.<sup>48</sup> The NIHR 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>49</sup> Sometimes, however, 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 the 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 religion). Another discussion concerns the exact borderline between 'race / ethnicity' and nationality (which is also covered under the GETA).<sup>50</sup>

The allegedly racist character of Black Pete (*Zwarte Piet*), one of the central figures in the Dutch Saint Nicholas festivities, has been the topic of debate. In 2014, the highest administrative court of the Netherlands ruled that mayors, when deciding on whether or not to grant a permit, are not empowered to take into account whether Black Pete would stereotype black people. Instead, mayors are limited to evaluating the effects on public

<sup>45</sup> Explanatory Memorandum to the GETA, Tweede Kamer, 1990-1991, 22 014, no. 3 (*Memorie van Toelichting bij de Algemene Wet Gelijke Behandeling*).

<sup>46</sup> International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) of 21 December 1965. Many indications of what constitutes a 'race' can also be found in the discussions between the 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 ICERD. See van der Neut, J. L. (1986), *Discriminatie en Strafrecht*, Arnhem, Gouda Quint.

<sup>47</sup> Explanatory Memorandum to the GETA, Tweede Kamer, 1990-1991, 22 014, no. 3, p. 13. It should 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 of nationality.

<sup>48</sup> Explanatory Memorandum to the EC Implementation Act, Tweede Kamer, 2002-2003, 28 770, no. 3, p. 3. See also Gerards, J. H. and Heringa, A. W. (2003), *Wetgeving gelijke behandeling* ('Equal treatment legislation'), Deventer, Kluwer, pp. 28-30.

<sup>49</sup> See, for example, ETC 1997-119 and 1998-57.

<sup>50</sup> See, for example, ETC 2011-97 and 2011-98, especially the note to both cases by A. Böcker and S. Dursum-Aksel, to be found in Foster, C. J. et al. (eds.) (2012), *Oordelenbundel 2011* ('NIHR Opinions 2011'). Nijmegen, Wolf Legal Publishers, pp. 453-464.

order and security.<sup>51</sup> This debate was fuelled again after the UN Committee for the Elimination of Racial Discrimination (CERD), on 28 August 2015, published its Concluding Observations on the Netherlands, calling upon the State party to eliminate 'those features of Black Pete which reflect negative stereotypes', with the recommendation to 'find a reasonable balance, such as a different portrayal of Black Pete'.<sup>52</sup> In reaction, Prime Minister Mark Rutte stated, as he did before, that it is not up to the Dutch government to decide on the content of any celebration or cultural manifestation.

*Religion or belief.* Religion is also not defined in the Constitution, in the GETA or anywhere else in the equal treatment legislation. In the Netherlands the term 'belief' is not used. In the Explanatory Memorandum to the EC Implementation Act, the Government has made it clear that it wishes to continue using the term 'philosophy of life' (*levensovertuiging*), rather than to introduce the term belief (*geloof*), the term used by Directive 2000/78/EC. According to the Government, there is no material difference between these two terms.<sup>53</sup> Both *religion* and *belief* are defined and applied in a broad sense. In cases that come before the NIHR and the courts (including cases concerning the freedom of religion), the Institute and the judges use a wide definition of religion and belief. The only restriction to the scope of the concept is that it should exceed a mere personal conviction or expression.<sup>54</sup> On the other hand, it is not necessary that all believers of a certain religion adhere to a certain conviction (e.g. the wearing of headscarves by women).<sup>55</sup> Finally, it is also established in 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 act in accordance with that religion or belief.<sup>56</sup> Since political opinion is also protected, no sharp line between belief and political opinion needs to be drawn. The interpretation of all of these terms is strongly inspired by the case law of the European Court of Human Rights (ECtHR) and other international institutions (e.g. the UN Human Rights Committee).

*Disability.* Dutch equality law does not define disability, as the Government has deemed it unnecessary and undesirable to do so.<sup>57</sup> However, contrary to the EU level of protection, in addition to 'disability', 'chronic disease' is also explicitly included as a ground in the DDA. With regard to the definition, some guidelines can be derived from the *travaux préparatoires* of the DDA and the cases of the then ETC (now NIHR). Criteria mentioned during the preparation of the Law were, amongst others, the long duration of the disability or chronic disease and the fact that – in the case of disability – the impairment is irreversible. This means that temporary disability as a consequence of an accident is excluded.<sup>58</sup> According to the Explanatory Memorandum to the DDA, the concept of disability (*handicap*) may cover not only physical, but also intellectual and psychological impairments.<sup>59</sup> The Government is of the opinion that the question of what constitutes a disability is not only dependent on the physical or psychological characteristics of the individual, but also on the physical and social environment that

<sup>51</sup> Netherlands, Administrative Jurisdiction Division of the Council of State, 12 November 2014, ECLI:NL:RVS:2014:4117.

<sup>52</sup> The CERD's Concluding observations on the nineteenth to twenty-first periodic reports of the Netherlands are available at: [http://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/NLD/CERD\\_C\\_NLD\\_CO\\_19-21\\_21519\\_E.pdf](http://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/NLD/CERD_C_NLD_CO_19-21_21519_E.pdf) (last accessed 7 March 2016).

<sup>53</sup> Since the Government does not seem to see a difference in meaning, we have translated *levensovertuiging* as 'belief' in this report. The NIHR, in the English translation of the GETA on its website, also translates '*levensovertuiging*' as 'belief'.

<sup>54</sup> See, for example, ETC 2007-207.

<sup>55</sup> See, for example, ETC 2008-12.

<sup>56</sup> See, for example, ETC 1997-46, 2004-112 and 2004-148, as well as the Explanatory Memorandum to the GETA, Tweede Kamer, 1990-1991, 22 014, no. 3, p. 39-40. And, similarly, Memorandum in Response to the GETA, 1990-1991, 22 014, no. 5, p. 39-40 (*Memorie van Antwoord bij de Algemene Wet Gelijke Behandeling*).

<sup>57</sup> Explanatory Memorandum to the DDA, Tweede Kamer, 2001-2002, 28 169, no. 3, p. 9.

<sup>58</sup> See the Explanatory Memorandum to the ADA, Tweede Kamer, 2001-2002, 28169, no. 3, p. 9 and p. 24 and no. 5, p. 16. See also ETC 2005-234.

<sup>59</sup> Tweede Kamer, 2001-2002, 28 169, no. 3, p. 24.

allows/does not allow a person to participate on an equal footing. The NIHR has accepted this line of reasoning and – considering the goal of the DDA – interprets the terms disability and chronic disease in an extensive way.<sup>60</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. The use of classifications like 'young', 'old', 'adult', 'pensioner' or 'student' may also be considered to cause age discrimination. Since the ADA allows for objective justifications (open system) in case of both direct and indirect discrimination, the boundary between what kind of classification constitutes direct or indirect discrimination is not problematic.

*Sexual orientation.* The GETA employs the terminology 'hetero- or homosexual orientation', to cover the ground of 'sexual orientation' of Directive 2000/78/EC. The Dutch Government opted for the term 'orientation' (*gerichtheid*) rather than 'preference' (*voorkeur*). The term 'orientation' reflects that not only individual emotions are covered, but also concrete expressions thereof. Another major reason for the preference for the term 'hetero- or homosexual orientation' over 'sexual preference' or 'sexual orientation' is that the latter terms might possibly include 'paedophile orientation'. The notion of 'hetero- or homosexual orientation' has been interpreted by the courts to cover bisexual orientation, but it excludes transsexuals or transgender people. Under Dutch equal treatment law, discrimination on the ground of being a transsexual or transgender person is regarded as a form of sex discrimination.<sup>61</sup> In 2011-2012 some MPs expressed the wish to explicitly include 'gender identity' (*genderidentiteit*) and 'expression of gender' (*genderexpressie*) as non-discrimination grounds in the GETA.<sup>62</sup> The proposal to include these grounds in the GETA was included in the December 2013 National Action Plan on Human Rights,<sup>63</sup> but no progress has been made since (although it was indicated in November 2015 that the proposal was still under investigation).<sup>64</sup>

### 2.1.2 Multiple discrimination

In the Netherlands prohibition of multiple discrimination is not included in the law. Although the GETA contains a closed list of non-discrimination grounds, parliamentary precedent does not exclude the possibility of a combination of grounds. Moreover, including the prohibition of discrimination based on a combination of grounds seems to be most in line with the legislator's objectives. In its third five-yearly evaluation report, the then ETC concluded that it may be desirable to include an explicit prohibition of multiple discrimination in the GETA.<sup>65</sup> The Government did not deem such a provision necessary and rejected a suggestion for further research.<sup>66</sup>

In the Netherlands the following case law deals with multiple discrimination: the ETC (now NIHR) followed an intersectional approach in a case where the grounds of disability and race intersected and it acknowledged the combined effect thereof.<sup>67</sup> However, this

<sup>60</sup> See, for example, ETC 2005-234, 2006-227, 2007-25, 2009-62, 2009-102 and 2011-78.

<sup>61</sup> Court of Appeal Leeuwarden, 13 January 1995, *NJ* 1995, 243, [ECLI:NL:GHLEE:1995:AC2855](#) and ETC Opinions 1998-12, 2000-73, 2004-72/73, 2007-201, 2009-108, 2010-175, 2012-146 and 2012-166.

<sup>62</sup> Tweede Kamer, 2011-2012, 28 481, no. 17, p. 18. The proposal to include these grounds in the Criminal Code was immediately rejected by the Minister of Security and Justice.

<sup>63</sup> Ministry of the Interior and Kingdom Relations, *Nationaal Actieplan Mensenrechten; Bescherming en bevordering van mensenrechten op nationaal niveau*, Tweede Kamer, 2013-2014, 33 826 no. 1, p. 33.

<sup>64</sup> Letter dated 11 November 2015 from the Minister of the Interior and Kingdom Relations to COC Nederland (the main LGBT organisation in the Netherlands), available at <https://zoek.officielebekendmakingen.nl/blg-652182> (last accessed 7 March 2016).

<sup>65</sup> ETC (2011), *Third evaluation report (2004-2009)*, p. 64.

<sup>66</sup> Tweede Kamer, 2011-2012, 28 481, no. 16, p. 4.

<sup>67</sup> ETC 2006-256, concerning a complaint against an employment office by a blind Turkish woman for not being entitled to an adapted examination. A recent example of a case in which multiple discrimination is at issue is NIHR 2013-33 concerning ethnic origin, age, disability, sex and economic status.

combined effect did not provide a reason for a different sanction in this case.<sup>68</sup> In its third evaluation report, the (then) ETC acknowledged that there were other cases concerning multiple grounds at the same time.<sup>69</sup> The ETC has showed willingness to apply different grounds of discrimination coherently in some of these other cases (with gender aspects as well), but in each case the claimant failed to substantiate the (alleged) discrimination, as well as the combined effect of the intersection of grounds.<sup>70</sup> One category of cases in which the ETC (now NIHR) could apply this approach would be that concerning Islamic headscarves. Such cases are almost always seen only as direct or indirect discrimination on the ground of religion.

### 2.1.3 Assumed and associated discrimination

#### a) Discrimination by assumption

In the Netherlands the following national law (including case law) prohibits discrimination based on perception or assumption of what a person is: the DDA. Neither the Constitution nor the GETA prohibit discrimination based on assumed grounds explicitly, but such cases are covered implicitly.

#### b) Discrimination by association

In the Netherlands national law (including case law) prohibits discrimination based on association with people with particular characteristics. However, the wording of Article 1 sub (b) of the GETA (the legal definition of a 'direct distinction') does not explicitly require that the alleged distinction is factually based on the race, religion/ belief, or sexual orientation of the alleged victim. It is therefore theoretically possible that discrimination based on association is covered as well. The same line of reasoning can be followed as regards age (as protected by the ADA). Concerning 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. In Opinion 2006-227 the ETC considered an alleged case of disability discrimination by association and implicitly acknowledged that discrimination by association is also prohibited under the DDA. The case failed because there was no proof that the applicant had suffered any damage because of the fact that someone in her environment was disabled. In 2011, the ETC, with reference to the Court of Justice of the European Union (CJEU) in *Coleman*,<sup>71</sup> found that there was indeed a case of unlawful discrimination by association on the ground of disability. In that case, a temporary contract was not prolonged because the employee had called in sick several times because he had to take care of his wife, who was ill.<sup>72</sup>

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<sup>68</sup> Since the ETC (now NIHR) cannot impose sanctions, this is a somewhat misleading statement. There was the usual conclusion that the defendant had made an unlawful distinction.

<sup>69</sup> ETC (2011), *Third evaluation report (2004-2009)*, pp. 61-62. Apart from the cases mentioned below, the ETC here also mentions Opinion 2008-25 (complaint about season tickets for football stadiums, involving sex and civil status). In Opinion 2011-83, the grounds of sex and age were at issue. Again the ETC did not take this fact explicitly into consideration.

<sup>70</sup> ETC 2006-67 (complaint from a divorced father against a hospital for not giving adequate information about his son. The alleged intersecting grounds were sex and civil status; presumption not substantiated, no breach); ETC 2007-40 (complaint from a female cleaner about dismissal and (sexual) harassment; alleged intersecting grounds: sex and race; presumption not substantiated, no breach); ETC 2008-55 (complaint from an Iranian man claiming that his contract was not prolonged because it was presumed that a Muslim man would not accept orders from female colleagues - presumption not substantiated, no breach); ETC 2008-107 (complaint by an elderly non-Dutch woman because she had not received a subsidy to start a company; presumption not substantiated, no breach).

<sup>71</sup> CJEU, Case C-303/06, *Coleman v Attridge Law* [2008], ECR I-5603.

<sup>72</sup> ETC 2011-90. In a more recent case on discrimination by association (NIHR 2013-129), it was judged that the Ministry of Defence did not discriminate against an applicant with a Turkish wife. He needed a certificate of conduct (*Verklaring omtrent gedrag*) to be appointed, but the activities of his wife over the last three years were unclear, therefore the certificate could not be granted. The NIHR deemed the requirement of a certificate of conduct necessary and proportionate.

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

### a) Prohibition and definition of direct discrimination

In the Netherlands direct discrimination is defined and prohibited in national law.

Before 2011, Dutch equal treatment legislation contained its own (different) definition of direct and indirect discrimination. In November 2011 the equal treatment legislation (GETA, ETA, DDA and ADA and some provisions in the Civil Code) was amended in order to bring the definitions of direct and indirect discrimination into line with the EU directives.<sup>73</sup> This change was required by the European Commission, which maintained that, as a consequence of the different wording of the definitions, victims of discrimination were offered less protection than the EU directives require.<sup>74</sup> The Government has always held that this was not the case,<sup>75</sup> but nevertheless proposed this Amendment in 2008, in which the definitions from the directives are included word for word.<sup>76</sup> One difference between the language in the directives and the Dutch legislation remains, namely the usage of the word 'distinction' instead of the word 'discrimination'.

Article 1 of the GETA now 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: if a person is treated differently than another person in a comparable situation is or would be treated on the grounds of religion, belief, political opinion, race, sex, nationality, hetero- or homosexual orientation or civil status; (...)'.

Although the comparator element is now included in the definition, 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 or does not have a disability. It seems that this must be decided on a case-by-case basis. There are some Opinions of the ETC (now NIHR) in which this issue has been discussed.<sup>78</sup>

### b) Justification of direct discrimination

Under the GETA and DDA, direct distinctions can only be justified if one of the legally prescribed justifications is applicable. These justifications are as follows, insofar as they are relevant to this report:

1. if the aim of the discriminatory measure is to place people belonging to a particular ethnic or cultural minority group or disabled people in a privileged position in order to eliminate or reduce existing inequalities connected with race or disability and the discrimination is in reasonable proportion to that aim (positive action);

<sup>73</sup> Netherlands, *Wet van 7 November 2011, Staatsblad 2011*, 554.

<sup>74</sup> Letter dated 31 January 2008, with reference to the infringement procedure of 18 December 2006, infringement no. 2006/2444.

<sup>75</sup> Letter from the Dutch Government to Vladimír Špidla, dated 18 March, entitled *Reactie Nederlandse regering op het met redenen omkleed advies van de Europese Commissie; ingebrekestelling no. 2006/2444* (response to letter dated 31 January 2008).

<sup>76</sup> See Tweede Kamer, 2008-2009, 31 832, nos. 1-3 and Tweede Kamer, 2009-2010, 31 832, nos. 4-8.

<sup>77</sup> The ETA, DDA and ADA contain similar definitions.

<sup>78</sup> See ETC 2005-234. Although in that case the Commission stated that the applicant should not compare himself with other disabled people, according to many commentators it is possible that a disabled person compares themselves with people who are otherwise disabled.

2. in cases where a person's outer racial appearance is a genuine and determining (occupational) requirement, provided that the aim is legitimate and provided that the requirement is proportionate to that aim (these cases are detailed exhaustively by a Ministerial Decree, the *Besluit Gelijke Behandeling*);<sup>79</sup>
3. if the discrimination is based on generally binding regulations or on written or unwritten rules of international law;
4. in cases where nationality is a determining factor (cases also detailed in a Ministerial Decree).

On a few occasions, the former ETC accepted that direct discrimination may be objectively justified when the prohibition of a certain distinction would be absolutely unacceptable or completely irrational, without the presence of one of the listed grounds of justification.<sup>80</sup> The issue was raised in the third evaluation report of the ETC (for the years 2004-2009).<sup>81</sup> If the Government should wish to open up the closed system, the equality body proposes including a provision identical to Article 2(5) of the Employment Equality Directive 2000/78/EC in the Dutch equal treatment laws. Insofar as such an exception or justification clause would apply to the protection of public health (*volksgezondheid*), the Government appears to agree with including it in the equal treatment laws.<sup>82</sup> In 2011, a case concerning discrimination on the basis of political convictions triggered considerable discussion among equal treatment specialists, where the then ETC found that freedom of expression, as guaranteed in Article 10 ECHR, prevailed over the equal treatment norm.<sup>83</sup>

## 2.2.1 Situation testing

### a) Legal framework

In the Netherlands situation testing is permitted. Although no statutory provision clearly permits or prohibits situation testing, it is allowed before civil and criminal courts, as well as in procedures before the NIHR. In criminal cases, it needs to be prepared very carefully to ensure that it does not amount to provocation (*uitlokking*). The criterion applied by the courts in this respect seems to be that the NGO which initiated the testing or the individual who participated during the situation testing and became a victim of discrimination had no personal interest in the accused committing the crime of discrimination. As there is no legislation in this respect, no grounds are legally excluded from the possibility of situation testing.

### b) Practice

In the Netherlands situation testing is used in practice, most frequently by NGOs and sometimes as an individual initiative.<sup>84</sup> It predominantly concerns job applications and admission to bars and restaurants or night clubs, most often in the context of the ground

<sup>79</sup> *Staatsblad* 1994, 657. Initially, this Decree also allowed exceptions with respect to areas outside employment relations, i.e. in beauty contests and in the provision of goods and services. After the EU Commission had objected to this wide scope of exceptions in 2009, the Decree was amended in 2010 (*Staatsblad* 2010, 299).

<sup>80</sup> See, for example, ETC 2006-20 and ETC 2007-85; other cases are ETC 2005-155 concerning pregnancy and ETC 2010-62 concerning goods and services.

<sup>81</sup> ETC (2011), *Third evaluation report (2004-2009)*, p. 7.

<sup>82</sup> Tweede Kamer, 2011-2012, 28 481, no. 16, p. 9, referring to an earlier promise of the Government to include such an exception (Tweede Kamer, 2008-2009, 28 481, no. 5, p. 4.).

<sup>83</sup> ETC Opinion 2011-69. See for a comment on this case Noorlander, C.W. (2012) 'Godsdienst, Levensovertuiging en Politieke Gezindheid' ['Religion, belief and political opinion'] in: Forder, C. (ed.), *Oordelenbundel 2011* [NIHR Opinions 2011], Nijmegen, Wolf Legal Publishers, pp. 159-178 and Terlouw, A.B. (2011), 'De CGB en de algemene mensenrechtentoets' ['The ETC and the general human rights test'], in *MTM-NJCM-Bulletin*, 2011, pp. 656-671.

<sup>84</sup> See, for example, ETC 2011-99, 2012-50 and 2012-128. See more generally on this topic: Rodrigues, P. R. 'Eén voor allen: collectieve acties en gelijke behandeling' ['One for all: collective action and equal treatment'], in: Forder C. (ed.) (2011), *Gelijke behandeling: oordelen en commentaar 2010* [NIHR Opinions 2010], Nijmegen, Wolf Legal Publishers, pp. 309-324.



of race / ethnic origin. The non-governmental organisation, Art.1, and local Anti-Discrimination Bureaus (ADV's)<sup>85</sup> use situation testing, but trade unions have also sometimes used it. The NIHR never uses it, since its main task is to investigate complaints about discrimination that are brought to its attention, not to reveal instances of discrimination.

The NIHR (formerly the ETC) has issued several Opinions in the past about the criteria for situation testing.<sup>86</sup> Situation testing mostly occurs when two groups seek admission to a night club.<sup>87</sup> One of the requirements is that the two groups are comparable in appearance – especially in terms of clothing and hairdos (except, of course, for their ethnic or racial 'appearance'). Another requirement is that both groups seek to be admitted under the same circumstances (e.g. neither group have membership cards) and on the same evening.<sup>88</sup> In addition, there should not be a long time between the two test situations.<sup>89</sup>

Courts in the Netherlands have accepted situational testing as a means of proving discrimination. Both in civil<sup>90</sup> and criminal litigation,<sup>91</sup> situational testing has been allowed as sufficient evidence.

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

#### **a) Prohibition and definition of indirect discrimination**

In the Netherlands indirect discrimination is defined and prohibited in national law. Before 2011, Dutch equal treatment laws contained a definition of direct and indirect discrimination that was different from the EU directives. In November 2011 the equal treatment laws (GETA, ETA, DDA and ADA and some provisions in the Civil Code) were amended in order to bring the definitions of direct and indirect discrimination into line with the directives.<sup>92</sup> Article 1(c) of the GETA now includes the following definition of 'indirect distinction':

'indirect distinction: where an apparently neutral provision, criterion or practice would affect persons of a particular race (et cetera) in a particular way.'<sup>93</sup>

#### **b) Justification test for indirect discrimination**

Article 2(1) of the GETA contains an objective justification test for indirect distinction cases, which includes the elements of legitimate aim, appropriateness and necessity. The same applies to Article 3(2) of the DDA and Article 7(1) under (c) of the ADA. All three provisions mirror the core substantive elements of the objective justification test in indirect discrimination cases as laid down in Article 2(2)(b) under (i) of Directive

<sup>85</sup> These organisations assist victims of discrimination and may be regarded as equality bodies under Article 13 of the Racial Equality Directive. See also Chapter 7 of this report concerning equality bodies.

<sup>86</sup> See, for example, ETC Opinions 1997-62, 1997-64, 65 and 66, 1997-133, 1998-39, 2009-15 and 2012-50. The latter case is discussed by Rikki Holtmaat, 'CGB oordeelt over deurbeleid café-dancing op basis van praktijktesten. Noot bij Commissie Gelijke Behandeling 15 maart 2012' In *NTM-NJCM Bulletin*, 38 [2013] no. 1, p. 118-123. For another example, see a report by the Netherlands Institute for Social Research (*Op achterstand*), available at: [www.scp.nl/Publicaties/Alle\\_publicaties/Publicaties\\_2012/Op\\_achterstand](http://www.scp.nl/Publicaties/Alle_publicaties/Publicaties_2012/Op_achterstand) (last accessed 7 March 2016).

<sup>87</sup> Another case where situation testing was applied, in the situation of a job application, is ETC 2005-136 in which a young man with a foreign surname 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 discrimination.

<sup>88</sup> See ETC 1997-133.

<sup>89</sup> See ETC 1998-39.

<sup>90</sup> President District Court of Zutphen, 26 June 1980, *NJ* 1981, no. 29.

<sup>91</sup> Local Court of Amsterdam, 4 January 1982, *RR* no. 36.

<sup>92</sup> Netherlands, *Wet van 7 November 2011*, *Staatsblad* 2011, 554.

<sup>93</sup> Similar definitions are used in the ETA, DDA and ADA.

2000/78/EC. This also reflects the case law of the CJEU in indirect discrimination cases, which is followed by the NIHR and the courts.<sup>94</sup>

It is hard to summarise the wide range of possible legitimate aims. However, it is clear that legitimate aims may not be in contradiction with the principle of equality. An example may be Opinion 2007-173, where the then ETC held that a language requirement in a fitness centre in order to prevent customers from feeling intimidated when others talk a different language is not legitimate, because this aim fosters and affirms prejudices which are in contradiction with the principle of non-discrimination. The appropriateness and necessity of a measure is judged by a testing system shaped in case law, too sophisticated to summarise in brief.<sup>95</sup>

#### c) Comparison in relation to age discrimination

Neither the ADA nor the Explanatory Memorandum to the ADA specifies the comparison in relation to age discrimination. However, the nature of indirect discrimination means that the comparison must be drawn at a group level (i.e. comparator group), rather than at the individual level (as is the case with direct discrimination).

### 2.3.1 Statistical evidence

#### a) Legal framework

In the Netherlands there are no national rules permitting data collection, but statistical data can certainly be used to design and defend positive action measures. Most of the data is generated by the Netherlands Institute for Social Research (*Sociaal en Cultureel Planbureau, SCP*), a governmental research institute that collects data in many fields, and Netherlands Statistics (*Centraal Bureau voor de Statistiek, CBS*). It must be noted that the collection of data can be restricted by privacy and non-discrimination law. In general the author of this report is of the opinion that the purpose of data collection and the process of collecting data seem to be in compliance with EU law as far as EU non-discrimination norms are concerned.<sup>96</sup>

For the purpose of preventing data collection that might go against the non-discrimination principle, some of the grounds are covered by the Personal Data Protection Act (PDPA) (*Wet Bescherming Persoonsgegevens*). 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'. Registration of disability is not classified. Employers are allowed to/not prohibited from registering who is disabled.

However, in Dutch legislation, these data protection laws are not always implemented in a sufficiently deterrent manner. An example is legislation concerning the Register of Young People At-Risk (*Verwijsindex Risicojongeren*), by means of which a number of judicial, social and health organisations can record the ethnic origin of a young person at risk.<sup>97</sup>

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<sup>94</sup> See, for example, NIHR 2014-44 and NIHR 2014-174.

<sup>95</sup> For a brief overview, see Gerards, J. H. (2003), 'Het toetsingsmodel van de CGB voor de beoordeling van indirect onderscheid' ['The ETC testing model for the assessment of indirect discrimination'], in: *Gelijke behandeling: oordelen en commentaar* [Equal treatment: opinions and commentary], Deventer, Kluwer, pp. 77-95. An extended overview of the Dutch justification tests in equal treatment cases can be found in: Gerards, J. H. (2005), *Judicial review in equal treatment cases*, Leiden/Boston, Martinus Nijhoff Publishers.

<sup>96</sup> It is beyond the scope of this report to test whether Dutch data collection legislation is in line with EU directives in this area.

<sup>97</sup> This registration is possible on the basis of the Law on the Care of Young People (*Wet op de Jeugdzorg*). In February 2011, the Dutch Data Protection Authority (*College Bescherming Persoonsgegevens*) prohibited a District Council in Rotterdam from continuing to record the ethnic background of young people at risk. The Data Protection Authority declared the policy unlawful under the Personal Data Protection Act and ordered

As far as the classifications or prohibited categories are concerned, the following observations can be made.

*Race:* 'Allochtoon' is a word widely used in the Netherlands (as opposed to 'autochtoon'). Both Government officials and academics tend (but are not obliged) to use the definition of 'allochtoon' which is used by Netherlands Statistics. An 'allochtoon' is someone one or both of whose parents were not born in the Netherlands.

A 'trend' which has become increasingly popular is the so-called 'etno-selectie' for marketing and policy-development purposes. 'Etno-selectie' refers to the construction and analysis of huge databases in which people's behaviour is matched with (amongst other factors) their ethnic or social background. The Dutch Government itself quite often uses this instrument, for example in the framework of its (migrant) integration policies. This has been criticised on the ground that the mechanism is increasingly used for exclusionary ends instead of for positive action purposes.<sup>98</sup>

In addition, there are practices in the police to record and monitor crimes and crime suspects according to the ethnic origin of those involved. The competences of the police in this area have been widened over the last decade, in response to increasing calls to intensify the fight against crime.<sup>99</sup> Ethnic profiling is highly disputed among lawyers and in Dutch society as a whole and leads to great indignation among those (who feel) targeted. In 2013, the Dutch branch of Amnesty International published a report that strongly condemned ethnic profiling.<sup>100</sup> The Government reacted to this Amnesty report in a letter to Parliament, strongly condemning ethnic profiling, but also defending police practices based on 'objective criteria'.<sup>101</sup>

Several municipalities with a considerable number of Roma or Sinti residents maintain a special register of them, in which all kinds of data are stored. This includes information about the family situation, housing subsidies, welfare dependence, school drop-outs, criminal activities and health situation.

*Religion:* It is not known whether there is a standard usage of a classification of different religions in official publications or statistics.

*Disability:* The classification of disabled people is a sensitive issue in the Netherlands. In the DDA, the legislator has chosen not to define the word 'disability'. The Netherlands Institute for Social Research (SCP), when compiling the data for the (now abolished) 'Disability monitor' ('*Gehandicaptenmonitor*'), a report on the living circumstances of disabled people in the Netherlands, used the International Classification of Functioning, Disability and Health (WHO, 2001).

In the Netherlands statistical evidence is permitted by national law in order to establish indirect discrimination. There are no specific conditions for this kind of evidence to be admissible in court.

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the District Council of Rotterdam to stop the policy. The District Council eventually lodged an appeal against the decision, which was rejected (ECLI:NL:RBROT:2012:BW5513).

<sup>98</sup> See Prins, C. (2005), 'Etno-selectie', in: *Nederlands juristenblad*, 2005-8, p. 411. For more information about the increased usage of ICT and its consequences on privacy see Prins, C. (2011), 'Jeugdzorg via systemen. De Verwijsindex Risicojongeren als spin in een digitaal vangnet' ['Youth welfare through systems. The Register of Young People at Risk as a spider in a digital safety net'] in *De Staat van Informatie*, Scientific Council for Government Policy (WRR), report no. 86: pp. 293-348.

<sup>99</sup> See on this development van der Leun, J. P. and Van der Woude, M. A. (2011), 'Ethnic profiling in the Netherlands? A reflection on expanding preventive powers, ethnic profiling and a changing social and political context' in *Policing and society*, vol. 21, no. 4, pp. 444-455.

<sup>100</sup> Amnesty International (2013) *Gelijkheid onder druk: de impact van etnisch profileren* [Equality under pressure: the impact of ethnic profiling], available at: [www.amnesty.nl/sites/default/files/public/osf\\_ainl\\_gelijkheid\\_onder\\_druk\\_nov\\_2013.pdf](http://www.amnesty.nl/sites/default/files/public/osf_ainl_gelijkheid_onder_druk_nov_2013.pdf) (last accessed 7 March 2016).

<sup>101</sup> Tweede Kamer, 2013-2014, 29 628, no. 423.

## b) Practice

In the Netherlands statistical evidence in order to establish indirect discrimination is used in practice. This kind of evidence is used quite often by the NIHR, but it is not known to what extent this is done by the courts, since judgments on equal treatment cases that are issued by (district) courts are not registered (and therefore cannot be researched) separately. There seems to be no reluctance to use statistical data. There are no signs that developments in other countries in the EU influence Dutch case law or NIHR's Opinions in this respect.

When using statistical evidence, the NIHR uses the standard consideration that the contested rule or practice predominantly (*'in overwegende mate'*) affects a category of people which is protected by one of the non-discrimination grounds.<sup>102</sup> In this context the NIHR stresses that this should not be calculated on the basis of absolute figures, but should be seen relatively. In a number of cases, the then ETC used the standard rule that people in the group alleged to be indirectly discriminated against (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. However, from 2004 the ETC no longer explicitly mentioned this standard or criterion. Instead, it started to use other methods of calculation, especially in cases where the (absolute) numbers are very small. This comes down to an extremely complicated way of calculating the chance that a particular group will experience more negative effects than another group.<sup>103</sup> Facts of common knowledge are taken into account, either in the absence of relevant statistics or to support such statistics.<sup>104</sup> However, facts of common knowledge are not accepted as an exclusive means of evidence. Only in clear-cut cases does the NIHR not require statistics or facts of common knowledge.

There are many indirect discrimination cases in which data collection plays a role, especially in indirect discrimination cases that were dealt with by the then ETC. One example is Opinion 2007-91, in which different local communities were compared with respect to their policies as regards granting subsidies to unemployed artists. Although in that case there was a certain statistical correlation between the harshness of the criteria and the compilation of the population (the percentage of the population of immigrant origin), the ETC held that local authorities should have a wide margin of discretion in setting criteria for subsidies.<sup>105</sup> Another example is the case of a man complaining about indirect age discrimination in the area of pay. The then ETC, following the CJEU in *Royal Copenhagen*,<sup>106</sup> states that the single fact that there is a (slight) statistical difference between the salaries of certain age categories of workers is not in itself enough to conclude that there is a case of indirect discrimination. Such statistical evidence may give reason to suspect that there is indirect discrimination, but there needs to be other evidence as well.<sup>107</sup>

## 2.4 Harassment (Article 2(3))

### a) Prohibition and definition of harassment

In the Netherlands harassment is prohibited in national law. It is defined in Article 1(a) of the GETA, which reads as follows:

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<sup>102</sup> See, for example, ETC 2003-91.

<sup>103</sup> Waaldijk, K. 'The Netherlands', in: Waaldijk, K. and Bonini-Baraldi, M. (eds.) (2004), *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, pp. 341-375, available online at: <https://openaccess.leidenuniv.nl/handle/1887/12587> (last accessed 7 March 2016).

<sup>104</sup> Gerards, J. H. and Heringa, A. W. (2003), *Wetgeving gelijke behandeling* ('Equal treatment legislation'), Deventer, Kluwer, pp. 45-49.

<sup>105</sup> ETC 2007-91.

<sup>106</sup> CJEU, Case C-400/93, *Royal Copenhagen* [1995], ECR I-1275.

<sup>107</sup> ETC 2009-76.

1. The prohibition of distinction as 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(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 prohibition of unequal treatment; i.e. harassment is per se prohibited*].<sup>108</sup>

Similar prohibitions are included in Article 2 of the ADA and Article 1a of the DDA.

In the Netherlands harassment does explicitly constitute a form of discrimination (see Article 1 sub (a) of the GETA, cited above). Discriminatory treatment, in the sense of offensive attitudes, hate speech or other 'mistreatment', can be examined in addition to 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, a single case of a discriminatory insult is not enough to constitute a case of harassment, but nevertheless it can be qualified as (prohibited) direct discriminatory treatment.<sup>109</sup>

#### b) Scope of liability for harassment

The prohibition of (sexual) harassment is aimed at the employer or anyone who acts on their behalf. This means that if harassment takes place between colleagues, in principle the victim cannot (under the equal treatment law as such; and possibly under general tort law, see below) hold their colleague(s) accountable, but should address the employer. In this case, the victim should state that the employer has not taken sufficient preventive or protective measures and therefore violates the norm that working conditions should be free from discrimination, including (sexual) harassment.

Even if the (sexual) harassment itself is difficult to prove (e.g. because it happened behind closed doors between colleagues), any complaint about this kind of behaviour should be investigated seriously by the employer and adequate protective measures should be taken. Otherwise the norm that the employer should not discriminate as regards (equal) working conditions is considered to have been breached.<sup>110</sup>

The ADA, the DDA and the GETA do not specify to whom the prohibition of making a distinction, including harassment, victimisation and instruction to discriminate, is addressed. Although all three Acts specify the areas of social and economic life to which each Act applies (material scope), the Acts remain silent on the matter of 'personal scope'.<sup>111</sup> With regard to employment, the only area that is covered by all three Acts, the central norm is aimed not only at private and public employers, but also at employers' organisations, workers' organisations, employment offices, (public) recruitment agencies, pension funds, some external advisors, members of the liberal professions, bodies of liberal professionals, training institutions, schools, universities, etc. However, it is not clear from this whether only the official owner or managers of these enterprises or

<sup>108</sup> Similar provisions are laid down in Article 1 (a) of the DDA and in Article 2 of the ADA.

<sup>109</sup> Rodrigues, P. R. 'Ras en nationaliteit' ('Race and nationality'), in: Burri, S. D. (ed.) (2006), *Oordelenbundel 2005* ('ETC Opinions 2005'), Nijmegen, Wolf Legal Publishers.

<sup>110</sup> See, for example, ETC 2011-148 and ETC 2011-156.

<sup>111</sup> Cremers-Hartman, E. 'Werkingsfeer AWGB (Art. 3, 4 sub c, 5 lid 1, 6, 7 lid 1 AWGB)' ['The scope of the GETA'], in: Asscher-Vonk, I.P. and Groenendijk, C.A. (1999), *Gelijke behandeling: regels en realiteit* [Equal treatment: regulations and reality], The Hague, SDU Uitgevers, pp. 29-88, p. 33.

institutions can be held liable under the Acts or whether this also applies to colleagues or third parties.

The matter of personal scope was raised in Parliamentary discussions on the implementation of the directives. It follows clearly from these discussions that the Government did not intend to make the equal treatment legislation applicable in relationships between colleagues, let alone in relationships with third parties.<sup>112</sup> Victims of discrimination by colleagues or third parties can always bring a claim under tort law provisions in the general Civil Code and claim damages or a court injunction under this law.

However, it was indicated by the Government that the non-discrimination laws are aimed at those employees who, in the name of their employer, exercise authority over their co-employees. Such an employee functions *de facto* in the capacity of employer.<sup>113</sup> The purported inapplicability of the Dutch equal treatment acts in relationships between colleagues *inter se*, appears particularly problematic in the context of work-related (*sexual*) harassment. In its current format and in the light of the Parliamentary comments, the equal treatment laws prevent an alleged victim of harassment from holding a colleague or a third party directly liable for the contested behaviour under these laws. 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 acts of harassment acts by a third party was, for example, at issue in ETC Opinion 1997-82.<sup>114</sup> The ETC repeated its stance that the employer is under a legal duty to prevent acts of harassment by persons under their supervision. It took the view that, although the alleged acts of harassment were not perpetrated by a colleague, but by a third party, this did not in any way circumscribe the employer's duty of care. Moreover, and this also follows from the ETC's case law prior to the implementation of the directives, a *general duty of care* rests 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 in the workplace.<sup>115</sup>

Beyond the scope of Dutch equal treatment legislation, it is essential that the following be taken into account. The employer may be held vicariously liable for discriminatory acts or harassment perpetrated by colleagues under employment law. The relevant Articles upon which a claim can be based are (a) good employer practice (Article 7:611 of the Civil Code); and (b) 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 perpetrated by the employer themselves or by others over whom the employer has control.

In the past it was much disputed whether Article 7:658 of the Civil Code could form the legal basis for claims that concern mere psychological damage, rather than physical damage.<sup>116</sup> It is a fact that damage resulting from discriminatory treatment and

<sup>112</sup> Explanatory Memorandum to the ADA, Tweede Kamer, 2001-2002, 28169, no. 3, p. 19. See also Parliamentary Papers Second Chamber of Parliament, 2002-2003, 28770, no. 5, p. 28.

<sup>113</sup> Explanatory Memorandum to the ADA, Tweede Kamer, 2001-2002, 28169, no. 3, p. 19.

<sup>114</sup> This case concerned the racial harassment of a nurse by a patient. Employers were equally held liable in some court cases. See Holtmaat, R. (2009) *Seksuele intimidatie, de juridische gids* [Sexual harassment: legal guide], Nijmegen, Ars Aequi Libri, Chapter 6. See also ETC 2004-128 and NIHR 2012-197.

<sup>115</sup> See, for example, ETC 2004-08. See also Asscher-Vonk, I. P. and Monster, W. C. (2002), *Gelijke behandeling bij de arbeid* [Equal treatment in employment], Deventer, Kluwer, p. 164.

<sup>116</sup> Geers, A. 'Intimidatie op de werkplek' ['Harassment in the workplace'], in: van Maanen, G. (ed.) (2003), *De rol van het aansprakelijkheidsrecht bij de verwerking van persoonlijk leed* [The role of liability law in processing personal suffering], Den Haag, Boom, pp. 183-198, at p. 188, with further references to the literature on this question. See also Vegter, M. S. A. 'Aansprakelijkheid werkgever voor psychische schade werknemer als gevolg van seksuele intimidatie van de werknemer' ['Liability of the employer for

harassment is most often psychological. In 2005 the Supreme Court accepted that Article 7:658 Civil Code can include psychological damage.<sup>117</sup> The 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>118</sup>

In the light of the presumed broad scope of the personal applicability of Directives 2000/43/EC and 2000/78/EC, it appears that the Dutch Government's view that the Dutch non-discrimination acts are aimed at employers and other organisations but not at employees (and third parties) is unduly restrictive. According to the case law of the ETC (now NIHR), the person exercising authority may be held responsible for acts of distinction, including harassment by employees or third parties (provided they do not take appropriate action against such offences). According to the case law of the Dutch civil courts (including the Supreme Court), these individuals can also be held responsible and accountable under general civil law provisions/procedures.

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

### a) Prohibition of instructions to discriminate

In the Netherlands instructions to discriminate are prohibited in national law, but are not explicitly defined. Prior to the implementation of the directives, a prohibition of the instruction to make a distinction was implied within the GETA.<sup>119</sup> However, in order to avoid any misunderstanding, Article 1(a) of the Act was included in the EC Implementation Act, 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(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, extending also to goods and services and (with respect to race) social security and social benefits).<sup>120</sup>

It has been indicated by the Government that the notion of instruction refers to 'opdracht' in the meaning of Article 7:400 of the Civil Code. This Article regulates the law on contracts for the provisions of services.<sup>121</sup> In the Explanatory Memorandum to the ADA, the Government mentions the example of an employer who instructs a recruitment agency to select only people under the age of 30 (without a sound justification for this). According to the Explanatory Memorandum, in such a scenario, both the person who gives the contested instruction and the person who carries out the instruction violate the non-discrimination norm. If the 'recipient' of the instruction refuses to abide by it and, as a consequence thereof, suffers damages, they can hold the person who gave the instruction liable for that.

According to the Government's explanation, an instruction which has been given within the employment relationship (e.g. if a director instructs a member of the personnel

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psychological harm to the employee caused by sexual harassment'], in: *Aansprakelijkheid, verzekering en schade* [Liability, insurance and damage] no. 5, October 2001, pp. 133-140, at p. 134. With regard to Article 7:611 of the Civil Code, the Supreme Court has decided that this Article may be relied upon to claim compensation for damages of only a psychological nature. See Supreme Court, 11 July 1993, *NJ* 1993/667 (*Nuts/Hofman*), ECLI:NL:HR:1993:ZJ 1032.

<sup>117</sup> Supreme Court, 11 March 2005, *RvdW* 2005/37 (*ABN AMRO / Nieuwenhuys*), ECLI:NL:HR:2005:AR6657.

<sup>118</sup> See Vegter, M. S. A. 'Aansprakelijkheid werkgever voor psychische schade werknemer als gevolg van seksuele intimidatie van de werknemer' ['Liability of the employer for psychological harm to the employee caused by sexual harassment'], in: *Aansprakelijkheid, verzekering en schade* [Liability, insurance and damage] no. 5, October 2001, pp. 133-140, at pp. 134-135. See also Holtmaat, R. (2009) *Seksuele intimidatie; de juridische gids* [Sexual harassment: legal guide], Nijmegen, Ars Aequi Libri.

<sup>119</sup> Explanatory Memorandum to the EC Implementation Act, Tweede Kamer, 2002-2003, 28 770, no. 3, p. 7.

<sup>120</sup> Examples of cases where the ETC found that there was a case of 'instruction to discriminate' are ETC 2006-82, 2007-211, 2009-40, 2010-95, 2010-179, 2012-30, 2012-37 and 2012-43.

<sup>121</sup> Explanatory Memorandum to the ADA, Tweede Kamer, 2001-2002, 28169, no. 3, p.18.

department to only recruit young people) is not covered by the prohibition of instruction to make a distinction. In the Government's view, such a scenario is covered 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 and excludes the employee.<sup>122</sup> This interpretation is followed by the ETC (now NIHR).<sup>123</sup> This reasoning might fall short of what the EU legislator had in mind with the prohibition of instruction to discriminate. Arguably, on this point the Dutch Government interprets the prohibition of an instruction to make a distinction unduly narrowly.

The then ETC 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>124</sup> This advice was not followed by the Government. It maintained its position that an instruction to make a distinction implies active rather than passive behaviour. This is a narrow interpretation of the verb 'to instruct'. The Government has nevertheless indicated that the toleration of existing discriminatory conduct or acts might still be covered by the prohibition of making (direct or indirect) distinctions.<sup>125</sup> The then ETC, as well as the NIHR, has applied its own interpretation and has also covered situations where there was no explicit instruction, and / or where an employer allowed a temporary work agency to discriminate, under this prohibition.<sup>126</sup>

In addition, the instruction to discriminate on grounds of race, religion/belief, sex and homo- or heterosexuality can also be subject to criminal prosecution under Article 137d of the Criminal Code. Moreover, 'scornful blasphemy' (*'smalende godslastering'*) used to be prohibited in a separate article, namely Article 147 of the Criminal Code, but this provision was revoked in 2013.<sup>127</sup> The significance of this repeal lies in its symbolic meaning more than in its practical effects, as the provision had already been a 'dead letter' for decades.

#### b) Scope of liability for instructions to discriminate

In the Netherlands the instructor is liable, but the discriminator is not. The employer may be held liable under employment law for discriminatory acts or harassment perpetrated by workers. The relevant articles upon which a claim can be based are Articles 7:611 and 7:658 of the Civil Code. Both of these Articles are directed at the employer's liability for acts perpetrated by the employer themselves or by others over whom the employer has control. In 2005 the Supreme Court accepted that Article 7:658 of the Civil Code can include psychological damage.<sup>128</sup> The 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>129</sup> Individuals who perpetrated acts of discrimination because of an instruction to do so will normally fall under the scope of Article 7:658 of the Civil Code, i.e. the employer will be held liable. We have not found any case law indicating the contrary.

<sup>122</sup> Explanatory Memorandum to the ADA, Tweede Kamer, 2001-2002, 28169, no. 3, p. 19.

<sup>123</sup> ETC (2011), *Third evaluation report (2004-2009)*, p. 30.

<sup>124</sup> ETC Advice 2001-03, p. 6 and 2001-04, p. 4.

<sup>125</sup> Explanatory Memorandum to the ADA, Tweede Kamer, 2001-2002, 28169, no. 3, p.18.

<sup>126</sup> ETC( 2011) *Third evaluation report (2004-2009)*, p. 30. The ETC mentions Opinion 2005-154 as an example of such a case. See also several opinions of the NIHR, such as 2012-175/176/177.

<sup>127</sup> Tweede Kamer, 2012-2013, 32 203, no. 8.

<sup>128</sup> Supreme Court, 11 March 2005, *RvdW 2005/37 (ABN AMRO / Nieuwenhuys)*, ECLI:NL:HR:2005:AR6657. See, on this case: Houben, E. J. 'Schadevergoeding bij zuiver psychisch letsel' ['Compensation for exclusively psychological damage'] in *Arbeidsrecht* [Employment law] 2006, no. 2. p. 31-36.

<sup>129</sup> See Vegter, M. S. A., 'Aansprakelijkheid werkgever voor psychische schade werknemer als gevolg van seksuele intimidatie van de werknemer' ['Liability of the employer for psychological harm to the employee caused by sexual harassment'], in: *Aansprakelijkheid, verzekering en schade* [Liability, insurance and damage] no. 5, October 2001, pp. 133-140, at pp. 134-135. See also Holtmaat, R. (2009) *Seksuele intimidatie; de juridische gids* [Sexual harassment: legal guide], Ars Aequi Libri, Nijmegen.



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

- a) Implementation of the duty to provide reasonable accommodation for people with disabilities in the area of employment

In the Netherlands the duty to provide reasonable accommodation is included in the law. It is defined in Article 2 of the DDA, which 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’ (*doeltreffend*). In the Government’s view, the latter term reflects better than the term ‘reasonable’ the fact that an accommodation must have the desired effect.<sup>130</sup> The aspect of reasonableness is reflected in the second part of the provision, in the sense that there is no obligation to accommodate if doing so would constitute a disproportionate burden (i.e. would not be reasonable).

- b) Practice

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

*Is the accommodation that has been asked for ‘effective’?*

This means that 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 request will be denied. If the answer to both questions is ‘yes’, the second part of the test will follow. The outcome of this first part of the test may be that another (e.g. cheaper) accommodation than that requested could also be effective and would help the disabled person to stay in the job or to do the job. In this case, the second part of the test will focus on this particular cheaper accommodation.

*Can the employer reasonably be expected to provide this particular accommodation?*

This concerns the question of 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 versus 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’ in civil law).<sup>132</sup> If financial compensation (e.g. a subsidy) exists for the realisation of the effective accommodation,

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<sup>130</sup> Explanatory Memorandum to the DDA, Tweede Kamer, 2001-2002, 28 169, no. 3, p. 25.

<sup>131</sup> Concluded from the Explanatory Memorandum to the DDA, Tweede Kamer, 2001-2002, 28 169, no. 3.

<sup>132</sup> Explanatory Memorandum to the DDA, Tweede Kamer, 2001-2002, 28 169, no. 3, p. 25-30.

it cannot be regarded as 'disproportionate'.<sup>133</sup> Financial compensation is, for example, offered through Article 36 of the Work and Income according to Labour Capacity Act (WIA). The Government also highlighted Consideration 21 of the Preamble to Directive 2000/78/EC<sup>134</sup> and added as an additional criterion that the duration of the employment contract may be a weighty factor.<sup>135</sup>

c) Definition of disability and non-discrimination protection

Disability is not explicitly defined in Dutch equal treatment law. There are no signs that the concept of disability is applied in different ways in cases of non-discrimination protection in general, on the one hand, and the right to claim a reasonable accommodation, on the other hand. A problem may arise when an employer is prohibited from requesting information about the physical and/or intellectual condition of an applicant during the selection procedure, but at the same time needs to have this information in order to be able to provide a reasonable accommodation.

A final note concerns the explicit statement by the then ETC<sup>136</sup> that the employer's defence that they do not make a distinction in any way between disabled and non-disabled people does not mean that they comply with the DDA. Equal treatment in unequal (labour) circumstances may lead to inequality, according to the ETC. In many of the cases on the ground of disability that come before the equality body an appeal to the obligation to provide a reasonable accommodation is made. Often the ETC found that this duty had indeed been breached.<sup>137</sup>

d) Duties to provide reasonable accommodation in areas other than employment for people with disabilities

In the Netherlands there is a duty to provide reasonable accommodation for people with disabilities outside the employment field. Originally, the DDA only covered employment and vocational education. However, in 2009 the Dutch legislator passed laws to extend the scope of the DDA to housing from 15 March 2009 and to primary and secondary education (Articles 6a-6c DDA) from 1 August 2009.<sup>138</sup> Regulations made by owners' associations should not directly or indirectly discriminate on the ground of disability (Article 1 DDA) and fall under the obligation to make reasonable accommodations (Article 2 DDA).

The duty to provide reasonable accommodation in the field of housing is restricted. Article 6c of the amended DDA states that Article 2 (concerning the duty to provide effective accommodation) is not applicable if it would require reconstruction or building work in or around a residential building. The ETC started using the reasonable accommodation standard outside the area of employment in 2010.<sup>139</sup> The ETC, in this case, did not decide whether the refusal to make the required accommodation constitutes direct or indirect discrimination on the ground of disability. However, it applies a justification ground explicitly written for direct discrimination. Article 3 of the DDA leaves room to justify a case of direct discrimination if 'the contested rule or measure is necessary for health and safety reasons'. Many cases that come before the NIHR concern reasonable accommodations in the area of (vocational) education. This is caused (inter

<sup>133</sup> This follows from the Explanatory Memorandum to the DDA, Tweede Kamer, 2001-2002, 28 169, no. 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 2005-160.

<sup>137</sup> A quick search for the term '*doeltreffende aanpassingen*' (effective adjustments) reveals that in 2015 16 such cases were decided by the NIHR; in six of these cases the body found that the norm had been violated.

<sup>138</sup> Tweede Kamer, 2008-2009, 30 859.

<sup>139</sup> See ETC 2010-35, and ETC 2011-30, in which the ETC reached the same conclusion.

alia) by the fact that mainstream schools are obliged to admit children with a disability unless they can prove they are unable to provide adequate education.

In the field of education, there also exist provisions for a certain amount of money to be made available for parents of children with disabilities in order to enable their schools to make adjustments and provide special assistance for their children. From 2014 onwards, these provisions have been changed. The money will no longer go to the parents, but will go directly to the schools. Another example of the right to accommodation in the field of education is the right to have adaptations made to state exams, such as an exam paper printed in a larger font or an extension of the time allowed for an exam, in order to meet the needs of students with dyslexia or motor disabilities.

e) Failure to meet the duty of reasonable accommodation for people with disabilities

In the Netherlands failure to meet the duty of reasonable accommodation does count as discrimination or, more specifically, as a form of prohibited distinction, for which the ordinary sanctions can be imposed.<sup>140</sup> However, the text of Article 2, in conjunction with that of Article 1 (definitions of direct and indirect distinction) and Article 3 DDA (regarding the exceptions to the central norm), does not shed light upon the question of whether a failure to provide an effective accommodation constitutes direct, indirect or a third type of distinction.<sup>141</sup> With regard to the duty to provide an effective accommodation, Article 2 of the DDA states that if making an accommodation constitutes a *disproportionate* burden on the employer, then the duty does not exist (cf. Article 5 of Directive 2000/78/EC). In the amended DDA, in Article 6c the exception is made that Article 2 (concerning the duty to provide an effective accommodation) is not applicable if it would require reconstruction or building work in or around a residential building.

Article 3(1) DDA<sup>142</sup> enshrines three general exceptions to the central norm (i.e. the prohibition of making a distinction, which on the basis of Article 2 also includes the duty to provide effective accommodations). In brief, the exceptions are: public security and health, supportive social policies, and positive action measures. Thus, a textual reading of Article 3(1) DDA suggests that these three general 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 concerning public security and health can have the effect of 'lifting' the duty enshrined in Article 2.<sup>143</sup> Consequently, the other two exceptions mentioned cannot be invoked by employers with respect to their effective accommodation duty. It is indeed difficult to perceive in what ways the other exceptions could be applicable in a case concerning the failure to provide effective accommodation.

f) Duties to provide reasonable accommodation in respect of other grounds

In the Netherlands there is no duty to provide reasonable accommodation in respect of other grounds than disability in the public and/or the private sector. The NIHR or the courts may extend this in the future, but no such case law has yet been seen.

However, when (in the case of indirect discrimination) the proportionality of a certain unequal treatment (with a legitimate aim) is tested in case law, an implicit duty might sometimes be identified to provide reasonable accommodation, although this is not made explicit. For instance, in ETC Opinion 2006-202 it was considered that a municipality had

<sup>140</sup> See ETC 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 reasonable accommodation should also be included in the sex equality laws, the GETA and the ADA.

<sup>141</sup> See Waddington, L. and Hendriks, A. '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, pp. 403-427.

<sup>142</sup> Article 3(2), moreover, stipulates that indirect distinction can be objectively justified.

<sup>143</sup> Explanatory Memorandum to the DDA, Tweede Kamer, 2001-2002, 28 169, no. 3, p. 33.

failed to seek alternative ways of greeting people within their organisation. Therefore, the applicant could not be rejected for a job solely because he refused to shake hands when greeting people of the opposite sex because of his Muslim faith.<sup>144</sup> In a similar vein, the then ETC required local councils to provide 'solutions' for civil servants who have religious objections to celebrating same-sex marriages.<sup>145</sup> However, the then ETC reversed this position in Opinion 2008-40. After much debate, several Bills and advice from the Council of State, an amendment to Article 1:16 of the Civil Code which made it impossible to appoint new civil servants who refuse to serve as registrars to same-sex couples was adopted in 2014.<sup>146</sup>

#### g) Accessibility of services, buildings and infrastructure

In the Netherlands national law requires services available to the public, buildings and infrastructure to be designed and built in a disability-accessible way. However, no general legal obligation exists to always guarantee accessibility for disabled people or to take anticipatory measures (for example, structural adaptations of buildings). With regard to public spaces and buildings in which public offices and social services are located (education, healthcare and other general services), there are some specific regulations. The Ministry of Infrastructure and the Environment issued a decree stipulating construction requirements (*Bouwbesluit*). This decree contains some requirements about the accessibility of public buildings. A similar decree exists relating to the construction of buses and trains. The Ministry of Education, too, has issued detailed instructions as to how to build schools, as did the Ministry of Health, concerning hospitals and medical centres.

A failure to comply with such legislation cannot be relied upon in a discrimination case, based on the DDA, except for cases where reasonable accommodation has been requested by a disabled person and the employer or school board was already – under this other legislation (not the DDA) – obliged to provide this particular facility (e.g. having a door wide enough for wheelchairs). When such other legislation exists, the employer or school board can never state that the accommodation is not 'reasonable'.

Regarding public transport, this area was included in the DDA, but the respective Articles 7 and 8<sup>147</sup> did not enter into force immediately. In 2011, a Decree elaborating Articles 7 and 8 DDA was adopted.<sup>148</sup> Articles 7 and 8 of the DDA entered into force in 2012, meaning that the DDA effectively came to cover public transport as well. However, the Decree that gave effect to these Articles contains a complicated schedule of gradual implementation.<sup>149</sup> In fact, it will take until 2030 before the entire public transport sector (apart from transport on ferries) will actually fall under the scope of the DDA.

In the Netherlands national law does not contain a general duty to provide accessibility by anticipation for people with disabilities. Apart from the rights and obligations described above, national law does not contain a general duty to provide accessibility.

#### h) Accessibility of public documents

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<sup>144</sup> See, however, the judgment of the District Court of Rotterdam, 6 August 2008, ECLI:NL:RBROT:2008:BD9643.

<sup>145</sup> ETC 2002-25 and 2006-26.

<sup>146</sup> See Law Gazette (*Staatsblad*) 2014, 260.

<sup>147</sup> Article 7 defines the term 'public transport'. In Article 8, unequal treatment in public transport is prohibited. Article 8 section 2 contains an obligation to make adaptations in order to make public transport accessible for disabled people.

<sup>148</sup> Netherlands, Decree on accessibility in public transport (*Besluit toegankelijkheid van het openbaar vervoer*), *Staatsblad* 2011, 225.

<sup>149</sup> See the Decree of 19 April 2012, *Staatsblad* 2012, 199, entitled 'Concerning the establishment of a date of the entry into force of Articles 7 and 8 of the Act on Equal Treatment on the Grounds of Disability or Chronic Disease and the entry into force of the Decree on accessibility public transport' (*Houdende het tijdstip van inwerkingtreding van de artikelen 7 en 8 van de Wet gelijke behandeling op grond van handicap of chronische ziekte en inwerkingtreding van het Besluit toegankelijkheid van het openbaar vervoer*).

This is not required by law, but many public websites feature the possibility to have the text read out loud (using the 'read' button). The Government has indicated the need to strive for accessibility,<sup>150</sup> but in 2015 a report commissioned by the NIHR found that many local council websites did still not adhere to the accessibility standards.<sup>151</sup> The general impression of the author of this report is that sign language interpreting is often available, yet there remains room for improvement.

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<sup>150</sup> Tweede Kamer 2012-2013, 26 643, no. 260 and no. 276.

<sup>151</sup> Tweede Kamer 2014-2015. 26 643, no. 366, attachment 2015D20740.

### 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)

In the Netherlands there are no 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 protection against discrimination provided by criminal law, civil law, equal treatment legislation and administrative law covers any person on the territory of the Netherlands.<sup>152</sup>

##### 3.1.2 Protection against discrimination (Recital 16 Directive 2000/43)

###### a) Natural and legal persons

In the Netherlands the personal scope of anti-discrimination law does not cover (certain) legal persons for the purpose of protection against discrimination. For the purposes of protection against discrimination only natural persons are protected. This follows from the Memorandum of Reply to the GETA, where the Government explained that the definition of 'distinction' in Article 1 GETA refers to making a distinction *between persons*.<sup>153</sup> However, where a group of natural persons is collectively subject to discrimination (e.g. when an association of professionals, a political association / party or a religious organisation is refused a contract for hiring a meeting room in a hotel), their organisation may be seen as the rights holder, according to the then ETC in a number of its Opinions.<sup>154</sup> These cases all concerned access to and supply of goods and services. In one case, the then ETC allowed a company to submit a complaint against a customer.<sup>155</sup> Nevertheless, it is commonly held that legal persons (e.g. an association, foundation, institution or enterprise, etc.) do not fall under the personal scope (in the sense of being rights holders).

In the Netherlands the personal scope of anti-discrimination law covers natural and legal persons for the purpose of liability for discrimination. This means that both natural and legal persons can be held accountable.

###### b) Private and public sector including public bodies

In the Netherlands the personal scope of anti-discrimination law does not cover the private and public sectors, including public bodies, for the purpose of protection against discrimination.

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<sup>152</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 to mean that immigration law and nationality law, in particular, are exempted from the equal treatment legislation.

<sup>153</sup> Tweede Kamer, 1991-1992, 22 014, no. 5, p. 87-88. In addition, the new definition of a distinction in the GETA refers to 'where one person is treated less... etc.'

<sup>154</sup> See e.g. ETC 1996-110, 1998-31 and 1998-45. Besides this there is a possibility for associations to act on behalf of victims of discrimination when this is a (statutory) goal of their organisation.

<sup>155</sup> ETC 2003-142. It concerned a company whose employee had been discriminated against by another company. The ETC decided that this situation was covered under the prohibition of discrimination in the area of goods and services and that in the case at issue the defendant had indeed discriminated against the employee of the complainant. See also the contribution by Peter Rodrigues in: de Wolff, D. (ed) (2004) *Gelijke behandeling, oordelen en commentaar 2003* ('ETC Opinions 2003'), Deventer, Kluwer.

The personal scope of anti-discrimination law does cover the private and public sectors, including public bodies, for the purpose of liability for discrimination.

### **3.2 Material scope**

#### **3.2.1 Employment, self-employment and occupation**

In the Netherlands national legislation applies to all sectors of private and public employment, self-employment and occupation, including contract work, self-employment, military service and holding statutory office, for the five grounds (see Articles 5(1) and 6 GETA, 3 and 4 ADA and 4 and 5 DDA). The exception to this rule is *holding statutory office* in the public administration sector. In the latter case, if the discriminatory treatment consists of a so-called 'unitary legislative act', the person or organisation who issues such acts cannot be held accountable for it under the equal treatment legislation. This is the case, for example, when a civil servant, on behalf of a local council, refuses to grant someone a permit or a subsidy.

#### **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))**

In the Netherlands national legislation includes 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 for the five grounds in both private and public sectors, as described in the directives.

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:

- a. public advertising of employment and procedures leading to the filling of vacancies;
- b. the employment of a worker via an employment agency or job placement (inserted by the EC Implementation Act);
- c. the commencement or termination of an employment relationship;
- d. the appointment and dismissal of civil servants;
- e. terms and conditions of employment;
- f. permission for staff to receive education or training during or prior to the employment relationship;
- g. promotions;
- h. 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 being published of a vacancy, to the commencement of the employment relationship or public appointment and 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 pursuing the liberal professions or for development within them'. For identical provisions, see also Article 4 ADA and Article 5 DDA. It is to be noted that the term 'self-employment' is not used in the articles mentioned, which

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<sup>156</sup> See the Explanatory Memorandum to the DDA, Tweede Kamer, 2001-2002, 28 169, no. 3, p. 34. The same applies in the context of the ADA and the GETA.

instead speak of the 'liberal professions'. The term 'liberal profession' ('free occupation') might be slightly more narrow than 'self-employment' (the term used in the directives). However, the problem can easily be circumvented by interpreting the term 'liberal profession' in a broad way in order to guarantee that not only doctors, architects etc. are covered, but also freelancers, sole traders, entrepreneurs, etc. This may seem odd to some readers, since in English the term 'liberal profession' is interpreted in a more narrow way than self-employment and could not easily be approximated. However, in the context of Dutch equality legislation, the use of 'liberal profession' has not led to problems. Discrimination is thus also prohibited in any working relationships where a relationship of authority between the employer and employee is absent.

A note on access to employment for disabled persons: a major barrier may be that disabled or chronically ill persons are asked questions about their physical or intellectual condition during the selection procedure and that their answers lead to a decision not to appoint them. In 2012 the law was amended in order to make the regulations in this regard stricter and to create a possibility for a complaints procedure at the national level.<sup>157</sup>

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

In the Netherlands national legislation includes working conditions including pay and dismissals, for all five grounds and for both private and public employment.

#### **3.2.3.1 Occupational pensions constituting part of pay**

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

### **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))**

In the Netherlands national legislation applies to vocational training outside the employment relationship, such as that provided by technical schools or universities, or such as adult lifelong learning courses.

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

The prohibition against 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 distinctions with regard to vocational guidance (*loopbaanoriëntatie en beroepskeuzevoorlichting*). Subsection (b) renders the central norm applicable to education aimed at entry to and functioning in the labour market (*onderwijs gericht op toetreding tot en functioneren op de arbeidsmarkt*). Subsection (b) covers education and training which form the final stage prior to entering the labour market, including retraining and further training courses.<sup>158</sup>

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<sup>157</sup> Netherlands, Medical Examinations Act (*Wet aanscherping medische keuringen*) *Staatsblad* 2012, 146.

<sup>158</sup> Explanatory Memorandum to the DDA, Tweede Kamer, 2001-2002, 28 169, no. 3, p. 38.



In practice, this covers 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 those aged 18+ (*hoger beroepsonderwijs*) and university education. 'Adult lifelong learning courses' are not mentioned specifically but are covered by Article 5 of the DDA as well.

Mainstream secondary education (*voortgezet onderwijs*), as well as general primary education, has been covered under the DDA since August 2009. The institutions that are covered are not only those which are recognised or subsidised by the Ministry of Education, 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 are not aimed at a specific group. This norm therefore covers 'everyone' working within these institutions. With regard to subsection (b), this is aimed at 'state education, private / denominational education, and education that is not publicly funded'.<sup>160</sup> Subsection (b) covers a wider range of education and training 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 legislation covers the entire path from registration until the termination of the education or training.<sup>161</sup> In the GETA, Article 7 renders the prohibition against making a distinction applicable to (in brief): the supply of or access to goods or services which also embraces all forms of education;<sup>162</sup> the provision of career orientation and guidance; and advice or information regarding the choice of an educational institution 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 a public service;
- (c) by institutions which are active in the field of housing, social services, healthcare, 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 covers what is mentioned in Article 3(1)(b) of the directives; beyond that, general primary and secondary education are also covered by this provision.

It should 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 Dutch law goes far beyond the requirements of Directive 2000/78/EC.

### **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))**

In the Netherlands national legislation includes membership of and involvement in workers' or employers' organisations as formulated in the directives for all five grounds

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<sup>159</sup> Explanatory Memorandum to the DDA, Tweede Kamer, 2001-2002, 28 169, no. 3, p. 38.

<sup>160</sup> Explanatory Memorandum to the DDA, Tweede Kamer, 2001-2002, 28 169, no. 3, p. 37.

<sup>161</sup> Explanatory Memorandum to the DDA, Tweede Kamer, 2001-2002, 28 169, no. 3, pp. 37-38.

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

and for both private and public employment. Article 6a of 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 and Article 6 of the ADA are identical to this provision.

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

In the Netherlands national legislation includes social protection, including social security and healthcare as formulated in the Racial Equality Directive.

#### **3.2.6.1 Article 3.3 exception (Directive 2000/78)**

Dutch law does not rely on the Article 3.3 exception. Under Article 7a of the GETA, the extension to social protection is restricted to racial discrimination. The other grounds are only protected by the constitutional and international prohibitions of discrimination in the areas of social life mentioned above. The issue of the scope of the protection against discrimination in the area of social security and social benefits arises regularly in discussions about the possibilities for local social assistance and social benefits offices to cut benefits or even refuse benefits for citizens who, as a consequence of certain behaviour (for example, a refusal to shake hands with a person of the opposite sex) or wearing specific religiously required dress (e.g. a burqa or a headscarf), do not succeed in their obligation to find paid work.

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

In the Netherlands national legislation includes social advantages as formulated in the Racial Equality Directive.

Subsection 2 of Article 7a GETA specifies that, ‘the concepts of social protection, social security and social advantages, mentioned in subsection 1, can be defined by Governmental decree’.

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. In addition, its relationship with ‘social security’ is explained in the Memorandum. ‘Social security’ concerns the statutory social insurance schemes which cover the risks that occur if a person loses their income as a result of, for example, unemployment, illness, disability, age or death. Moreover it covers child benefits.<sup>163</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 CJEU case law rendered in the context of Regulation 1612/68 on free movement of workers.<sup>164</sup>

In the Government’s view the notion of ‘social advantages’ refers to advantages of an economic and cultural kind which may be granted by both 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 cinemas and theatres for certain categories of visitors.<sup>165</sup> Thanks to this

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<sup>163</sup> Explanatory Memorandum to the EC Implementation Act, Tweede Kamer, 2002-2003, 28 770, no. 3, p. 14.

<sup>164</sup> Explanatory Memorandum to the EC Implementation Act, Tweede Kamer, 2002-2003, 28 770, no. 3, p. 15.

<sup>165</sup> Explanatory Memorandum to the EC Implementation Act, Tweede Kamer, 2002-2003, 28 770, no. 3, p. 15.

view, in the Netherlands the lack of definition of social advantages does not cause problems.

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

In the Netherlands national legislation includes education as formulated in the Racial Equality Directive. The GETA is integrally applicable to all aspects of education, including all types of schools. This provision 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 set by the directive.<sup>166</sup> Vocational training given before or during the employment relationship is regulated by Article 5(1) sub f of the GETA. Since August 2009, the scope of the DDA has also been extended to general primary and secondary education.<sup>167</sup>

One problem that has been dealt with in the framework of equal treatment legislation is the fact that many boards of schools (or local authorities in charge of state-funded schools) have designed or are in the process of designing regulations to increase the distribution of children from different cultural background across schools, in order to avoid the development of 'black schools' (i.e. schools with a great majority of pupils of immigrant origin). There has been some discussion in the Netherlands about whether local government has the right to 'disperse' people of non-Dutch descent or people with low incomes as far as housing and schools are concerned, in order to prevent 'black neighbourhoods' or 'black schools' from emerging. In relation to housing, the then ETC strongly advised against such policies.<sup>168</sup> The policy of a local authority to disperse pupils of different origins across various state-funded schools was also deemed to be directly discriminatory on the ground of ethnic origin.<sup>169</sup> In the past there has been some academic debate about the question of whether equal treatment legislation is unduly restrictive as far as the possibilities for local government to develop such policies are concerned.<sup>170</sup> In 2015, a campaign ('Is this white enough for you?') launched by two Amsterdam primary schools with a large share of pupils with an immigrant background aiming for more 'white' children to attend received wide media coverage.<sup>171</sup>

One of the reasons for 'black schools' developing is the fact that, in the Netherlands, schools run on a religious or other special basis (such as a specific educational philosophy) have the constitutional freedom to develop their own identity and to conduct their own admissions policies. As long as such schools comply with the general quality requirements for education, public funding for them is guaranteed.<sup>172</sup> A restrictive admissions policy among state-funded Christian schools is alleged to be one cause of the

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<sup>166</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, no. 1, pp. 10-11.

<sup>167</sup> Netherlands, Amendment to the Disability Discrimination Act concerning the extension to primary and secondary education and housing (*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*), *Staatsblad* 2009-101, Wet van 19 jan. 2009. See Articles 5b (education) and 6a, 6b and 6c (housing).

<sup>168</sup> See ETC Advice 2005/03.

<sup>169</sup> ETC 2005-25.

<sup>170</sup> See, e.g. Bovens, M. and Trappenburg, M., 'Segregatie door Anti-Discriminatie' ['Segregation through Anti-Discrimination'], in: Holtmaat, R. (2004), *Gelijkheid en (andere) grondrechten* ['Equality and (other) fundamental rights'], Deventer, Kluwer, pp. 171-186. See also the report by the Council for Public Administration (*Raad voor openbaar bestuur*) (2006) *Verschil moet er zijn; bestuur tussen discriminatie en differentiatie* ['There must be difference; administration between discrimination and differentiation'], The Hague.

<sup>171</sup> See e.g. [www.nrc.nl/handelsblad/2015/05/22/amsterdam-actie-van-bedreigde-scholen-1499907](http://www.nrc.nl/handelsblad/2015/05/22/amsterdam-actie-van-bedreigde-scholen-1499907), (last accessed 7 March 2016).

<sup>172</sup> See Article 23 of the Constitution.

growth of 'black' state schools.<sup>173</sup> Currently, only 30% of schools are state-run, while the remaining 70% are overwhelmingly Christian.<sup>174</sup>

In 2005, some Members of Parliament therefore initiated a bill in which this 'freedom of education' was to be restricted for all state-funded schools, including those run on a religious or philosophical basis, but this Bill was never discussed in Parliament. Freedom of education remains a highly controversial topic, especially since it is deemed crucial by religious political parties, such as the Christian Union and the Reformed Political Party (SGP).

#### a) Pupils with disabilities

In the Netherlands the general approach to education for pupils with disabilities does not cause problems. Several provisions are made with regard to people with disabilities in the field of education. The issue of the accessibility of (school) buildings has already been addressed above (Section 2.6 et seq.). In addition, people with disabilities have certain rights to accommodation of the education itself. Parents can request accommodations for their children with disabilities. Another example is the right to have adaptations made to state exams, such as large-print exam papers or an extension of the time allowed for an exam, in order to meet the needs of students with dyslexia or other disabilities.<sup>175</sup> There are several forms of special primary education for pupils with certain cognitive impairments in the Netherlands. However, these schools are only accessible for pupils in cases of absolute necessity. A primary aim of the Dutch school system remains to educate as many pupils as possible in mainstream schools.

In 2014 a new law on special education for pupils and students with intellectual and physical disabilities, the Act on Tailored Education (*Wet Passend Onderwijs*), entered into force.<sup>176</sup> This new act changed the way in which schools are compensated for the costs associated with teaching students with learning disabilities and includes severe austerity measures. Financing was moved from individual schools to groups of schools and the total budget available for schools that are solely open to students with learning disabilities will be reduced, inevitably leading to more intellectually and physically disabled pupils applying for admission to mainstream schools. In 2015, the Ombudsman for Children (*Kinderombudsman*) published a report in which the new law was severely criticised.<sup>177</sup>

#### b) Trends and patterns regarding Roma pupils

In the Netherlands there are no specific patterns existing in education regarding Roma pupils, such as segregation. Therefore, in this respect it does not seem to be necessary to put into effect legal instruments with regard to Roma and Traveller children.<sup>178</sup> In the

<sup>173</sup> I.e. schools that are governed by local authorities.

<sup>174</sup> See Statistics Netherlands, Yearbook Education in Numbers (in Dutch), available at: <https://www.cbs.nl/nl-nl/publicatie/2012/51/-/media/5c737d3a3b4742878cd4f0f23ca026dc.ashx> (last accessed 7 March 2016), p. 74.

<sup>175</sup> In 2012, a case was brought before the then ETC (2012-85) about maths charts, needed by a pupil with dyscalculia. She requested permission to use a maths chart during her final exam, which was refused on the ground that the regulations had prohibited this since 2009. However, the ETC rightfully pointed to the ranking of the legislation at issue and stated that, the prohibition notwithstanding, the school should still have offered the pupil a reasonable accommodation. It thereby complements the general directions, given in an earlier Opinion, about what schools need to do in order to fulfil their obligation to provide reasonable accommodation for pupils with (learning) disabilities (for example, ETC 2011-75, para 3.15).

<sup>176</sup> Netherlands, Act of 11 October 2012 concerning the amendment of several acts regarding education (*Wet van 11 oktober 2012 tot wijziging van enkele onderwijswetten in verband met een herziening van de organisatie en financiering van de ondersteuning van leerlingen in het basisonderwijs, speciaal en voortgezet speciaal onderwijs, voortgezet onderwijs en beroepsonderwijs*), *Staatsblad* 2012, 533.

<sup>177</sup> The report is available at: [www.dekinderombudsman.nl/ul/cms/fck-uploaded/2015.KOM014.Werkpassendonderwijs.rapport.pdf](http://www.dekinderombudsman.nl/ul/cms/fck-uploaded/2015.KOM014.Werkpassendonderwijs.rapport.pdf) (last accessed 7 March 2016).

<sup>178</sup> There are special measures aimed at avoiding school drop-out by Roma children. See Tweede Kamer, 2008-2009, 31 700 XVIII, no. 90.

field of education, only one case of alleged discrimination is known. In this case, a board of an association of 14 (Christian) primary schools used a quota of 15% per institution for pupils who speak the Dutch language as a second language, in order to combat segregation (the measure was not explicitly targeting Roma and Travellers, but also children with an immigrant background). This admissions policy was deemed to be unlawful indirect distinction against Roma and Sinti communities, on the ground of race/ethnic origin.<sup>179</sup>

The Dutch Government initiated an exchange of information / policies within a network of municipalities with a considerable proportion of Roma inhabitants. The aim was (amongst others) to develop measures to reduce the number of Roma children who drop out of the school system.<sup>180</sup> Such measures were developed in 2009 by the Association of Dutch Local Councils (*Vereniging van Nederlandse Gemeenten*) for a number of local communities with considerable numbers of Roma residents.<sup>181</sup> In relation to the agreement in the European Council of June 2011 to enhance a national policy on the integration of Roma people in each Member State, the Dutch Government sent a letter to Parliament in which it sketched the outlines of the current problems and the policies to address these problems, including with regard to the education of Roma and Sinti children.<sup>182</sup> In early 2014 it became known that several of the municipalities with a considerable proportion of Roma inhabitants were cooperating with the police in a programme that specifically targeted shoplifting by Roma children. Earlier complaints that the policy was developed without consultation with Roma organisations were reiterated.<sup>183</sup>

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

In the Netherlands national legislation includes access to and supply of goods and services as formulated in the Racial Equality Directive. This is covered by Article 7 of GETA. Subsection 1 of Article 7 provides as follows: 'It is unlawful to make a distinction in offering goods or services, in concluding, implementing or terminating agreements thereon, and in providing educational or career guidance if such acts of making a distinction are committed:

- a. in the course of carrying on a business or practising a profession;
- b. by the public sector;
- c. by institutions which are active in the fields of housing, social services or welfare, healthcare, cultural affairs or education; or
- d. by private persons not engaged in carrying on a business or practising a profession, insofar as the offer is made publicly.'

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<sup>179</sup> See ETC 2003-105.

<sup>180</sup> See Tweede Kamer, 2008-2009, 31 700 XVIII, no. 90.

<sup>181</sup> See Vereniging van Nederlandse Gemeenten (VNG) (2010) *Projectvoorstellen Platform Roma-Gemeenten* [Project proposals – Roma Communities Platform], Den Haag. See also Jaarnota Integratiebeleid 2007-2011, Tweede Kamer, 2009-2010, 31 268, no. 34, pp. 11-12. Sources derived from Davidovic, M. and Rodrigues, P. 'Antiziganisme' in Rodrigues, P. and van Donselaar, J. (2010), *Monitor racisme en extremisme. Negende rapportage 2010* [Racism and extremism monitor. Ninth report 2010], Anne Frank Foundation and Pallas Publications, Amsterdam, pp. 153-179. Available at: [www.annefrank.org/ImageVault/Images/id\\_11703/scope\\_0/ImageVaultHandler.aspx](http://www.annefrank.org/ImageVault/Images/id_11703/scope_0/ImageVaultHandler.aspx) (last accessed 7 March 2016).

<sup>182</sup> Letter from the Minister of Immigration, Integration and Asylum, Tweede Kamer, 2011-2012, 21501-20, no. 599.

<sup>183</sup> [www.nrc.nl/handelsblad/van/2014/januari/27/het-meisje-van-10-ging-met-opa-uit-stelen-1341979](http://www.nrc.nl/handelsblad/van/2014/januari/27/het-meisje-van-10-ging-met-opa-uit-stelen-1341979) (last accessed 7 March 2016).

This is applicable to all grounds covered by the GETA. In this regard, Dutch law extends beyond the directives' requirements. Unilateral governmental decisions and acts (e.g. a decision not to grant a subsidy) do not fall under the scope of Article 7.<sup>184</sup>

#### 3.2.9.1 Distinction between goods and services available publicly or privately

In the Netherlands national law distinguishes 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). From Article 7 (subsection d), it is clear that the distinction between goods and services that are available privately and those that are available publicly is of importance only insofar as supply by private persons is concerned. It follows from parliamentary precedent (and from case law) that this similarly applies to private associations. The latter is the result of the balancing of interests of the Constitutional right to freedom of association and the right to equal treatment.

It should be noted that the area of access to goods and services in general is not covered by the ADA and the DDA. However, under the DDA the areas of education (which may be seen as a good or service), housing and public transport are covered.<sup>185</sup>

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

In the Netherlands national legislation includes housing as formulated in the Racial Equality Directive. Housing is covered under article 7(1) subsection c of the GETA and, since 2009, also by Articles 6a, 6b and 6c of the DDA.<sup>186</sup> The duty to make reasonable accommodations in relation to housing only exists in the case of disability discrimination. However, this provision is not applicable in as far as the adaptations would require building or reconstruction work in or around a house (on the basis of Article 6c of the DDA).

The prohibition of discrimination applies to all aspects of housing. No specific exceptions apply as regards housing other than those which will be dealt with below. The Rotterdam Act (*Rotterdamwet*),<sup>187</sup> which grants local authorities the right to refuse to let subsidised houses in certain areas to persons or households with a low income or without steady jobs and to refer them to other areas, in order to avoid the emergence of 'ghettos', has now been in place for a couple of years and has not been found discriminatory.<sup>188</sup> The current minister responsible for housing plans to give municipalities even more possibilities to set strict requirements.<sup>189</sup>

##### 3.2.10.1 Trends and patterns regarding housing segregation for Roma

In the Netherlands there are patterns of housing segregation and discrimination against the Roma. Roma and Traveller people tend to live in caravans or trailers which are situated in officially designated 'trailer parks' (*woonwagenkampen*). The lack of systematic data in this respect makes it difficult to give exact numbers on the housing situation of Roma and Travellers, but it has been observed that a shortage of caravan sites makes it impossible for family members to live in the same encampment,

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<sup>184</sup> NB: Article 7a, which concerns social security and social services, does include unilateral actions by government or government agencies.

<sup>185</sup> After the cut-off date of this report the DDA was amended and as of 14 June 2016 also covers goods and services.

<sup>186</sup> Tweede Kamer, 2008-2009, 30 859, Netherlands, Amendment to the Disability Discrimination Act concerning the extension to primary and secondary education and housing (*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*). Law of 29 January 2009, *Staatsblad* 2009, 101.

<sup>187</sup> Tweede Kamer, 2004-2005, 30 091. Law of 20 December 2005, *Staatsblad* 2005, 726.

<sup>188</sup> Although the ETC (now NIHR) thought that this could be the case. See Advice 2005/03.

<sup>189</sup> Tweede Kamer, 2013-2014, 30 798.

something of paramount importance to Roma and Sinti.<sup>190</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 Racial Equality Directive. A recent Opinion of the NIHR again emphasised the importance of providing sufficient caravan sites. The NIHR found that a policy implemented by a local authority that would eventually put an end to 'trailer parks' amounted to discrimination on the ground of race (ethnic identity).<sup>191</sup> In addition to this case, the author of this report was able to find two fairly recent cases dealing with housing of Roma / Traveller people,<sup>192</sup> as well as two older cases.<sup>193</sup>

The Government sent a letter to Parliament in response to the agreement in the European Council of June 2011 to enhance national policy on the integration of Roma people. In this letter the Government sketched the outlines of the problems and policies, including as regards housing.<sup>194</sup> However, this topic does not receive much attention in the document, which focuses strongly on education and combating criminal behaviour.

The GETA and the DDA do not specifically address the special housing needs of older people. There is (recently amended) general social assistance legislation (*Wet maatschappelijke ondersteuning 2015*) which provides that elderly and disabled people can obtain special facilities from the local authority (e.g. adaptations in their homes or preference when they need to live in a specially designed institution). It goes beyond the scope of this report to describe the details of this kind of social assistance legislation.

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<sup>190</sup> van Donselaar, J. and Rodrigues, P. (eds.) (2006), *Monitor racisme and extremisme. Zevende rapportage* [Racism and extremism monitor. Seventh report], Amsterdam, Anne Frank Stichting/Leiden, Leiden University, available at: [www.annefrank.org/ImageVaultFiles/id\\_11493/cf\\_21/Monitor2006-7.pdf](http://www.annefrank.org/ImageVaultFiles/id_11493/cf_21/Monitor2006-7.pdf) (last accessed 7 March 2016).

<sup>191</sup> NIHR 2014-165, 2014-166 and 2014-167. See also NIHR 2015-61, as described in 12.2 of this report.

<sup>192</sup> ETC 2012-12, in which the ETC decided that no distinction had been made on the ground of race, and NIHR 2013-111, in which it was decided that the refusal of a mortgage for a house, solely because it was situated in a trailer camp, constituted a prohibited distinction on the ground of race.

<sup>193</sup> The then ETC decided in these cases that the ground of race or ethnic origin was at issue. Some of the Travellers involved are Roma or Sinti, but not all of them. See ETC 2006-5 and ETC 2006-222.

<sup>194</sup> Letter from the Minister of Immigration, Integration and Asylum of 21 December 2011, Tweede Kamer, 2011-2012, 21501-20, no. 599. In addition to this letter, the Dutch Government drafted a set of policy measures to foster the social inclusion of Roma and Sinti people, as requested by the European Commission. This policy paper can be found at: [http://ec.europa.eu/justice/discrimination/files/roma\\_nl\\_strategy\\_en.pdf](http://ec.europa.eu/justice/discrimination/files/roma_nl_strategy_en.pdf) (last accessed 7 March 2016).

## 4 EXCEPTIONS

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

In the Netherlands national legislation provides for an exception for genuine and determining occupational requirements.

**Race, sex.** In the GETA, the 'GOR-exception' only exists for the grounds *race* and *sex*. As far as race is concerned, this has been laid down in Article 2(4) of the GETA: '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 [outward] 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.<sup>195</sup>

In contrast to Article 4 of Directive 2000/43/EC, which speaks of a characteristic related to racial or ethnic origin, the Dutch provision specifies that only outward racial appearances may constitute a genuine occupational requirement.<sup>196</sup> This means that 'race' as such is not regarded as a permissible ground for a particular distinction.<sup>197</sup> Only physical differences (skin colour, hair type, etc.) may form the basis for a distinction, to the exclusion of sociological differences. The GETA does not, for example, allow a care institution, which looks after the well-being of young offenders of Moroccan origin, to express in a job advertisement a preference for a social worker of Moroccan origin.<sup>198</sup> On the basis of Article 4(6) GETA, these exceptions have been set out in a Governmental Decree of 1994.<sup>199</sup> The Decree exhaustively indicates to which professional activities 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 requirements can reasonably be imposed on outward appearances (elaboration of subsection b).

**Religion, belief, sexual orientation.** Although Article 4(1) of Directive 2000/78/EC would have allowed for it, 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 a religious denomination may impose requirements in relation to the occupancy of a post which, in view of the organisation's purpose, are necessary to live up to its founding principles. However, the Article 5(2) GETA exceptions were not rationalised by the idea of 'genuine occupational requirements'. They were regarded as necessary in order to reconcile the constitutional right to equality with other constitutional rights, namely the freedom of religion and the freedom of education, as

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<sup>195</sup> Subsection b was inserted by the EC Implementation Act. With this amendment the Government intended to follow the wording of the directive more closely. See Explanatory Memorandum to the EC Implementation Act, Tweede Kamer, 2002-2003, 28 770, no. 3, p. 10. However, prior to implementation the 'genuine occupational requirement exception' was also covered by the more general wording of subsection a of Article 2(4).

<sup>196</sup> Explanatory Memorandum to the EC Implementation Act, Tweede Kamer, 2002-2003, 28 770, no. 3, p. 10.

<sup>197</sup> Gerards, J. H. and Heringa, A. W. (2003), *Wetgeving gelijke behandeling* [Equal treatment legislation], Deventer, Kluwer, p. 129.

<sup>198</sup> See ETC 1997-51.

<sup>199</sup> Governmental Decree on Equal Treatment (*Besluit Gelijke Behandeling*), *Staatsblad* 1994, 657, last amended in 2012: *Staatsblad* 2012, 565.



well as the freedom of political opinion. Although the rationalisation is different, in practice this exception is compatible with Article 4(1) of the Employment Framework Directive. The requirements that are set on this ground need to be closely linked to the nature and content of the job in this particular context (of an institution of a specific religious denomination). 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.<sup>200</sup>

**Disability.** The GOR-exception was not included in the DDA. In the Government's view, in contrast to 'race' and 'sex', no scenario is imaginable in which 'disability' would constitute a genuine occupational requirement.<sup>201</sup> An amendment submitted by a Member of Parliament in this respect was rejected.<sup>202</sup>

**Age.** Since the ADA does not differentiate between 'direct' and 'indirect' distinction, an 'objective justification' is possible for both types (see Article 7(1)(c) ADA), the Government considered it not to be necessary to include the GOR-exception. In this view, in cases in which 'age' is considered a genuine occupational requirement, this can be assessed via the objective justification test.<sup>203</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>204</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 (Article 4(2) Directive 2000/78)**

In the Netherlands national law provides for an exception for employers with an ethos based on religion or belief, in Article 5(2) GETA. Employers with an ethos based on religion or belief can only rely on this exception in the case of an accusation of discrimination based on religion/belief and political conviction.

Although formally not an exception to the prohibition of discrimination, one should be aware that 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', as these are considered to be internal affairs. This means a restriction of the scope of application (see Article 3 GETA), for which the rationale lies in the constitutional right of freedom of religion and in the division between church and state.

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.'

<sup>200</sup> These criteria were explained by the ETC in its Opinion 1996-118.

<sup>201</sup> Explanatory Memorandum to the DDA, Tweede Kamer, 2001-2002, 28 169, no. 3, p. 35.

<sup>202</sup> Amendement Terpstra, Tweede Kamer, 2001-2002, 28 169, no. 11. This amendment was rejected.

<sup>203</sup> Explanatory Memorandum to the ADA, Tweede Kamer, 2001-2002, 28169, no. 3, p. 35.

<sup>204</sup> See Grapperhaus, F. B. J. (2002), 'Het verbod op onderscheid op grond van leeftijd in arbeid en beroep' ['The prohibition of discrimination on the ground of age in employment and occupation'], in *Ondernemingsrecht* [Company law], 2002-12, pp. 356-363, at p. 362.

It should be noted that only purely internal affairs of religious organisations fall outside the scope of the GETA. Thus, for example, the employment relationship between a gardener and a religious community falls within the scope of the GETA. The more the legal relationship is disconnected from the rationales of freedom of religion and the division between church and state, the less likely is it to be considered a purely internal affair.<sup>205</sup>

In the Netherlands, the now abolished 'sole-ground construction' (*enkelefeitconstructie*) has played an important role with regard to the question of whether a Christian school may lawfully refuse to employ a cohabitating homosexual in a teaching position. While the 'sole ground' that a person is homosexual could not *per se* lead to the refusal to employ such a person or to dismiss them, the situation might be different if 'additional circumstances' were taken into account. This could be any 'behaviour' inside and/or outside the school from which it is apparent that the teacher does not subscribe to the particular religious belief or even contests this belief openly. The wording of Article 4(2) of Directive 2000/78/EC seemed not to permit that 'additional circumstances' play a material role *unless* such circumstances coincide with the organisation's religion or belief.

As a reaction to the European Commission's infringement procedure against the Netherlands, where this issue was mentioned by the Commission,<sup>206</sup> the Government asked for advice from the Council of State and, on that basis, announced that it would rephrase the exception in such a way that the wording would more closely reflect the wording of the directive. In 2015, after several Bills and advice from various NGOs, the Council of State and the (former) equality body, the sole ground construction was finally abolished.<sup>207</sup> The new text of Article 5(2) GETA corresponds closely to the wording of the exception in Article 4(2) of Directive 2000/78/EC.

- Conflicts between rights of organisations with an ethos based on religion or belief and other rights to non-discrimination

In the Netherlands there are 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. Specific provisions in this area are Articles 3 and 5(2) of the GETA, which have been discussed above. With regard to case law, there are a number of cases in which these articles are at issue. Quite often, this concerns questions related to the Muslim faith, e.g. whether headscarves are allowed or whether a person can be obliged to shake hands.<sup>208</sup> In 2011, the ETC affirmed that the exception must be interpreted narrowly.<sup>209</sup> Only when a certain measure or policy is necessary for maintaining the institution's ethos may it be used to justify a distinction based on religion.

As regards discrimination on the ground of sexual orientation, there has been continuous legal and political debate about the existence of the right of civil servants to refuse to register marriages between same-sex couples. After much debate, several Bills and advice from the Council of State, a Bill making it impossible to appoint new civil servants who refuse to marry same-sex couples was adopted in 2014.<sup>210</sup>

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<sup>205</sup> Gerards, J. H. and Heringa, A. W. (2003), *Wetgeving gelijke behandeling* [Equal treatment legislation], Deventer, Kluwer, p. 105.

<sup>206</sup> Letter dated 31 January 2008 (no. 2006-2444), with reference to the infringement procedure of 18 December 2006, infringement No. 2006/2444. Article 5(2) GETA was mentioned, however, in the end the Commission did not ask the Government to change this provision.

<sup>207</sup> Tweede Kamer 2010-2011/2013-2014, 32 476, nos. 1-11.

<sup>208</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>209</sup> ETC 2011-2.

<sup>210</sup> See Tweede Kamer 2012-2013, 33 344, nos. 1-8; Eerste Kamer 2013-2014, 33344, A-E.

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

In the Netherlands national legislation does not provide for an exception for the armed forces in relation to age or disability discrimination. Article 17 of the ADA enshrined an exception (which was of a temporary kind): until 1 January 2008, the ADA did not apply to military service. There have never been any limitations to the scope of the DDA and the GETA concerning the armed forces.

#### **4.4 Nationality discrimination (Article 3(2))**

##### **a) Discrimination on the ground of nationality**

In the Netherlands national law does not include exceptions relating to difference of treatment based on nationality. 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 equal treatment acts is not tied to any nationality requirement.

In the Netherlands nationality (as in citizenship) is explicitly mentioned as a protected ground in national anti-discrimination law. Besides discrimination on the ground of race, the GETA also prohibits nationality discrimination. Thus, the Dutch General Equal Treatment Act goes beyond the requirements stemming from Directive 2000/43/EC. Distinction on the grounds of nationality is, in principle, prohibited as follows from Article 1. However, Article 2(5) enshrines some exceptions: 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>211</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>212</sup> Nationality discrimination does include stateless status.

##### **b) Relationship between nationality and 'race or ethnic origin'**

There is no legal relationship between nationality and race/ethnicity. However, of course, in practice different treatment on the ground of nationality may often result in indirect discrimination on the ground of race/ethnicity. In respect of nationality discrimination, more 'exceptions' (or justifications) are allowed, especially when the different treatment is related to issues concerning immigration and nationality legislation. In cases where indirect discrimination on the ground of race / ethnicity is suspected, the regular objective justification test applies.

There is an overlap between nationality and race/ethnicity in the context of indirect discrimination. Sometimes, a case of direct nationality discrimination can be qualified as a case of indirect racial discrimination. Because both grounds of discrimination are covered in the GETA, this does not cause great difficulties in the case law insofar as the areas that are covered by the non-discrimination principle (material scope) are the same. However, for race/ethnicity, the scope of the prohibition of discrimination is wider, also including social protection (Article 7a GETA.) When a complaint concerns social protection, including *inter alia* social security rights, the NIHR is inclined to interpret the concept of race/ethnicity in a wide sense, including situations that at first glance clearly

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<sup>211</sup> See e.g. ETC 1997-13, 1998-81 and 2002-61.

<sup>212</sup> See e.g. ETC 1996-77.

refer to nationality as the ground for making a distinction. The NIHR seems to equate the concepts of national origin and ethnic origin and also equates ethnic origin and race.<sup>213</sup>

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

##### **a) Benefits for married employees**

In the Netherlands it would constitute unlawful discrimination in national law if an employer only provided benefits to those employees who are married: this would be regarded as a distinction based on civil status, which is prohibited under the GETA.

##### **b) Benefits for employees with opposite-sex partners**

In the Netherlands it would constitute unlawful discrimination in national law if an employer only provided benefits to those employees with opposite-sex partners: this would be considered to be a direct distinction on the ground of sexual orientation. This follows not only from the Parliamentary Documents but has also been confirmed by the former ETC in several of its Opinions.<sup>214</sup> Since 1998, the Netherlands has had the possibility for couples to register a same-sex partnership and, since 2001, legal marriage is also open to same-sex couples. The GETA prohibits distinctions from being made between same-sex and opposite-sex partners who have the same civil status.

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

Exceptions in relation to disability and health/safety

In the Netherlands there are exceptions in relation to disability and health and safety (Article 7(2), Directive 2000/78/EC). The DDA contains a provision that mirrors Article 7(2) of the directive.<sup>215</sup>

Article 3(1)(b) of the DDA provides:

'The prohibition from making a distinction shall not apply if:  
(...)

- a) the distinction relates to a regulation, standard or practice which is aimed at creating or maintaining specific provisions and facilities for the benefit of persons with a disability or chronic illness'

Apart from this, there is also Article 3(1)(a) of the DDA:

'The prohibition from making a distinction shall not apply if:

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

It is sometimes stated that this latter provision also represents the implementation of Article 7(2) of the directive (only applicable to disability). The author of this report holds that it is the implementation of (the more generally applicable) Article 2(5) of the directive and therefore also deals with this particular provision in Section 4.8 below.

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<sup>213</sup> For two cases in which the (former) ETC concluded that a distinction on the ground of nationality amounted to direct discrimination on the ground of race/ethnicity, see Opinion 2011-97 and 2011-98. A critical note to these Opinions was written by Böcker, A. and Dursun-Aksel, S. in Forder, C. J. (2012), *Oordelenbundel 2011* ('NIHR Opinions 2011'), Wolf Legal Publishers, pp. 460-464.

<sup>214</sup> See Opinions 1997-47 and 48, Opinion 1999-08 and Opinion 1999-13. More recent Opinions could not be found, which may be due to the fact that legal marriage has also been open to same-sex couples since 2001.

<sup>215</sup> This provision often seems to be confused with Article 3 (1)(a) of the DDA, which mirrors Article 2(5) of the directive, which is aimed at national legislation that is necessary for reasons of public health and safety. This exception is discussed later in this report in Section 4.8.

The exception made by Article 3 (1)(a) of the DDA must be interpreted narrowly. It follows from parliamentary precedent 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 or security, they must duly motivate their claim. If there is a possibility of removing the risk by means of an effective and reasonable accommodation, it is not possible to rely on the exception.<sup>216</sup> There are a few points that need further clarification. Under the Working Conditions Act and under civil employment law, the employer has a duty to eliminate/reduce, as far as possible, any risk to the health and well-being of their employees. It is not fully clear from parliamentary precedent or from 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 themselves that they wish 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. Further judicial interpretation is therefore needed.

The exception regarding health and safety can also be applied to age (see Article 3(1)(a) of the ADA). A similar counterpart exception has not been included in the GETA. However, safety and security issues may come to 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.<sup>217</sup>

It has to be noted that there has been some debate about the question of whether this is a shortcoming in the GETA.<sup>218</sup> In the framework of the third evaluation report of the equal treatment legislation it was suggested that a general exception concerning public health and security (*gevaren voor de volksgezondheid*) be included in the GETA.<sup>219</sup> The then ETC proposed the inclusion of a provision identical to Article 2(5) of Directive 2000/78/EC in the Dutch equal treatment laws. Insofar as such an exception or justification clause would apply to the protection of public health, the Government appears to agree with including it in the equal treatment laws, but no change has yet been made.<sup>220</sup>

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

### **4.7.1 Direct discrimination**

In the Netherlands national law provides an exception for direct discrimination on age. Article 7(1) of the ADA reads:

'The prohibition of making a distinction shall not apply if the distinction: 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; b) relates to the termination of an employment relationship because

<sup>216</sup> See also Hendriks, A. C. (2003), *Wet gelijke behandeling op grond van handicap of chronische ziekte* [The Act on Equal Treatment on the Ground of Disability or Chronic Illness], Deventer, Kluwer, pp. 66-67.

<sup>217</sup> The ETC (now NIHR) applies this exception (strictly) in inter alia the context of religious discrimination, where sometimes it is argued that a prohibition of the Islamic headscarf must be prohibited for reasons of safety. See e.g. ETC 2011-195.

<sup>218</sup> See ETC Opinion 2006-20 and ETC Opinion 2007-85, 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 directly a distinction based on sexual orientation because of public health risks. In NIHR Opinion 2015-46, however, the NIHR found the protection of public health cannot justify the measure (contrary to CJEU Case C-528/13 *Léger*, 12 June 2015, n.y.r.).

<sup>219</sup> ETC (2011) *Third evaluation report (2004-2009)*, p. 8.

<sup>220</sup> Tweede Kamer, 2011-2012, 28 481, no. 16, p. 9, referring to an earlier promise by the Government to include such an exception (Tweede Kamer, 2008-2009, 28 481, no. 5, p. 4).

the person concerned has reached the 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; c) is otherwise objectively justified by a legitimate aim and the means used to achieve that aim are appropriate and necessary.'

a) Justification of direct discrimination on the ground of age

In the Netherlands it is possible, generally, or in specified circumstances, to justify direct discrimination on the ground of age. From Article 7(1) of the ADA it follows that in two specific circumstances direct discrimination may be justified (see Article 7(1)(a) and (b)).

Both direct and indirect age distinction may be 'objectively justified' under Article 7(1)(c) of the ADA. The situation in this respect is in line with the requirements set out by the CJEU in *Mangold*.<sup>221</sup>

b) Permitted differences in treatment based on age

In the Netherlands national law permits differences in treatment based on age for any activities within the material scope of Directive 2000/78/EC. Article 7(1)(a) and (b) of the ADA enshrine two exceptions that are deemed *a priori* to be 'objectively justified' because, according to the Government, they are closely linked to the justifications mentioned in the directive.

Subsection (a), which is the transposition of Article 6(1) of the directive, 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.

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, or, of a *higher* (not lower!)<sup>222</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.

c) Fixing of ages for admission or entitlements to benefits of occupational pension schemes

In the Netherlands national law allows occupational pension schemes to fix ages for admission to the scheme or entitlement to benefits, taking up the possibility provided for by Article 6(2). Article 8 of the ADA provides that the prohibition against making a distinction is not applicable with regard to (occupational) pension schemes and actuarial calculations for pension provision. Article 8(2) provides, in essence, that the prohibition of a distinction on the ground of age shall not apply to the admission or entitlement to pension provision,<sup>223</sup> nor to the fixing under such provision of different ages for employees or categories of employees. Article 8(3) of the ADA renders this norm non-applicable with regard to the use of age criteria in actuarial calculations. This has not been changed in response to a preliminary ruling of the European Court of Justice concerning the interpretation of Article 6(2) of the Employment Equality Directive.<sup>224</sup>

<sup>221</sup> Case C-144/04, *Mangold v Helm* [2005], ECR I-9981.

<sup>222</sup> It follows from the Explanatory Memorandum that subsection b does not apply to dismissal based on reaching a pensionable age which is *lower* than 65 years. See Explanatory Memorandum to the ADA, Tweede Kamer, 2001-2002, 28 169, no. 3, p. 32.

<sup>223</sup> A concept defined in Article 8(1) of the ADA.

<sup>224</sup> CJEU, Case C-476/11, *HK Danmark v Experian A/S*, 26 September 2013, n.y.r.

The directive states that the exception made by Article 6(2) may not lead to discrimination on the ground of sex. This clause has not been added to the Dutch ADA. However, this is regulated in the sex-discrimination legislation (see Article 12b and 12c of the ETA.)

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

In the Netherlands there are special conditions set by law for older or younger workers in order to promote their vocational integration. Article 7(1)(a) ADA enshrines an exception for policies that are aimed at the promotion of labour market participation by certain age categories. No special conditions exist for people with caring responsibilities.

This article reads as follows: 'The prohibition on making a distinction shall not apply if the distinction: 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**

In the Netherlands there are no exceptions permitting minimum and/or maximum age requirements in relation to access to employment (notably in the public sector) and training. However, this would be possible on the basis of a broad reading of the exception under Article 7(1)(a) or Article 7(1)(c) of the ADA (general possibility of an objective justification).

#### **4.7.4 Retirement**

##### **a) State pension age**

*In the Netherlands there is a state pension age, at which individuals must begin to collect their state pensions.* The statutory pensionable age used to be 65, but has been raised gradually from January 2013 onwards. In 2021 the general pensionable age will be 67 and will from then on be raised in accordance with general increases in life expectancy.

If an individual wishes to work longer, the pension cannot be deferred. Every citizen receives a state pension on the basis of the General Old Age Pensions Act from the statutory retirement age onwards.

An individual can collect a pension and still work, as the right to receive a state pension (AOW) at the statutory pensionable age is independent of the question of whether the person has (or has had) a paid job. In 2015, working after pensionable age has been reached was simplified. The so-called *Raetlie* rule (Article 7:667(4) Civil Code), which provides that a fixed-term contract replacing a permanent contract within six months with the same (or subsequent) employer does not end by operation of the law, no longer applies when the employment contract ends after reaching the statutory retirement age. This means that it is possible to agree upon a fixed-term contract for employees reaching the retirement age, even if such an employment contract succeeds a permanent contract.

##### **b) Occupational pension schemes**

In the Netherlands there is no normal age when people can begin to receive payments from occupational pension schemes and other employer-funded pension arrangements. The date on which benefits can be collected under these schemes depends on the conditions under which such schemes are contractually agreed.

If an individual wishes to work for longer, payments from such occupational pension schemes can be deferred. Some schemes are more flexible than others as far as an individual's wish to work longer is concerned.

An individual can collect a pension and still work. It is possible for an individual to collect a pension under the occupational pension scheme and on top of that to have other income, e.g. from a paid job.

c) State imposed mandatory retirement ages

In the Netherlands there is no state-imposed mandatory retirement age. However, in some professions there are age limits that are regulated by law or by a professional organisation (e.g. the National Organisation of General Practitioners). These are also regularly included in a collective labour agreement (*collectieve arbeidsovereenkomst*).

d) Retirement ages imposed by employers

In the Netherlands national law permits employers to set retirement ages (or ages at which the termination of an employment contract is possible) by contract and collective bargaining.

Many employment contracts contain an automatic dismissal clause (*pensioenontslagbeding*), which stipulates that the contract ends automatically upon the employee reaching the statutory retirement age. There have been many legal proceedings on the question of whether these retirement dismissal clauses are valid, but in 2012 it was decided by the Dutch Supreme Court that such a clause is valid, even if it concerns a permanent employment contract.<sup>225</sup> Since 2015, Article 7:669(4) Civil Code also provides that employers may terminate the employment contract if the employee has reached the statutory retirement age.

Article 7(1)(b) of the ADA, moreover, reads as follows:

'The prohibition on the making of a distinction shall not apply if the distinction: (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 or in academic literature, as far as the author of this report is aware.

e) Employment rights applicable to all workers irrespective of age

The law on protection against dismissal and other laws protecting employment rights are applicable to all workers, without exception. As long as someone is an employee with a permanent contract, according to the definitions of these laws, they are protected by the civil laws regulating employment rights and by the ADA, regardless of age. Employees with temporary contracts have no protection against dismissal when the contract ends. However, it is prohibited not to renew a temporary contract on discriminatory grounds.<sup>226</sup> It should be noted that employers who do allow people who have reached the statutory retirement age to continue working for them, do so mostly on the basis of a temporary contract.

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<sup>225</sup> Supreme Court, 13 July 2012, ECLI:NL:HR:2012:BW3367.

<sup>226</sup> However, there are many examples in the case law of the ETC (now NIHR), especially relating to women not receiving an extension of a temporary contract once the employer discovers they are pregnant. The author of this report assumes that similar cases exist for the grounds of race/ethnicity and age.



f) Compliance of national law with CJEU case law

Dutch national legislation is in line with the CJEU case law on age regarding compulsory retirement.

#### 4.7.5 Redundancy

a) Age and seniority taken into account for redundancy selection

In the Netherlands national law permits age or seniority to be taken into account in selecting workers for redundancy. The Explanatory Memorandum to the ADA explicitly mentions that the use of the 'last in, first out principle' (which works to the advantage of older workers) could be objectively justified under Article 7(1)(c) of the Act. This is, however, not the principle provided by Dutch employment law, which by default stipulates that the employer, in case of a collective dismissal, should select redundant employees on the basis of a balancing principle, the so-called 'mirror image rule' (*afspiegelingsbeginnel*), under which account must be taken of the age balance of the workforce.<sup>227</sup>

b) Age taken into account for redundancy compensation

In the Netherlands national law provides compensation for redundancy. This was previously affected by the age of the worker as it was calculated on the basis of the so-called 'cantonal court formula' (*kantonrechttersformule*):  $a \times b \times c$ . This formula consisted of three variables, namely a) the employee's number of years of service, b) the monthly gross salary and c) a 'correction factor' dependent on the individual circumstances of the case. The first two variables were clearly connected to the employee's age and this was made even less favourable for younger workers in 2009, as from then on a higher factor was used for older workers.<sup>228</sup> The other factor was age-neutral, and a social plan that made a distinction between younger and older employees in relation to the correction factor was considered to constitute unlawful age discrimination.<sup>229</sup>

However, a major overhaul of Dutch labour law has led to the abolishment of the cantonal court formula. In 2015, this formula was replaced by a system of 'transitional severance pay' (*transitievergoeding*).<sup>230</sup> In the new system, the compensation is solely based on the employee's number of years of service. For the first ten years, an employee receives one third of the monthly gross salary, after ten years, one half of the monthly gross salary, to a maximum amount of EUR 75,000 (or, if the annual salary is higher, to a maximum amount of the annual salary). The new system reduces the inequalities between older and younger employees, although a difference remains.

#### 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)

In the Netherlands national law includes exceptions that seek to rely on Article 2(5) of the Employment Equality Directive. It can be maintained that Articles 3(1)(a) of the ADA and DDA are (also) implementing Article 2(5) of the directive. (Article 3(1)(a) DDA, moreover, probably implements Article 7(2) of the directive as well.) However, in this case the requirement that any such health and safety measures must be based on a law is not included in the Dutch equal treatment legislation.

<sup>227</sup> Article 11 Dismissal Decree 2015 (*Ontslagregeling 2015*), *Staatscourant* 2015, 12685.

<sup>228</sup> For people aged 35-45, every full year of service counted as one, for those aged 45-55 as 1.5, and aged 55 years and older as two. Below the age of 35, an employee only got a 0.5 a-factor.

<sup>229</sup> District Court Leeuwarden, 31 May 2005, ECLI:NL:RBLLE:2005:AT7230.

<sup>230</sup> Netherlands, Labour and Security Act (*Wet Werk en Zekerheid*), *Staatsblad* 2014, 216.

It should be noted that the GETA, concerning inter alia the grounds of religion, race and ethnicity, sexual orientation and sex, does not contain any such public health and security exception. In the framework of the third evaluation report, a proposal was made to include such a general exception in the equal treatment laws.

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

In the Netherlands other exceptions to the prohibition of discrimination (on any ground) provided in national law are the following:

1. Article 5(3) of the GETA contains an exception regarding the private nature of the employment relationship. Article 7(3) of the GETA, concerning the provision of goods and services, contains an exception regarding the private nature of the circumstances in which the legal relationship takes place (for example, a woman who rents out a room in her own house may lawfully require that the person who rents the room is a woman).<sup>231</sup> The Commission, in the infringement procedure against the Netherlands, held that the wording of these exceptions in the GETA was too wide and that, in the case of goods and services, it unjustifiably also applied to discrimination on the ground of race. In response to this, in November 2011 the Government changed the GETA.<sup>232</sup> The exception clauses in the GETA now expressly state that it is only possible to rely on this exception when the aim is legitimate and when the means are appropriate and necessary. With respect to discrimination in the area of goods and services, the exception no longer applies to the ground of race.
2. Article 7(2) of the GETA grants private educational institutions (which are generally funded by the state) the freedom to impose requirements governing admission to or participation in the education that the institution provides. Article 7(2) is in accordance with the exception in Article 5(2)(c) of the GETA. However, this Article 7(2) applies to the admission of pupils to denominational schools and thus not to employment.
3. The internal affairs of associations fall outside the scope of the GETA. This follows from Parliamentary precedent and is not explicitly provided for in the GETA.<sup>233</sup>

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<sup>231</sup> This topic has been discussed in great detail in the second evaluation report about the functioning of the GETA. See Hertogh, M. L. M. and Zoontjens, P. J. J. (eds.) (2006), *Gelijke behandeling: principes en praktijken. Evaluatieonderzoek Algemene wet gelijke behandeling* [Equal treatment: principles and practices. Evaluation report on the General Equal Treatment Act], Nijmegen, Wolf Legal Publishers. The part about the relationship between equality and freedom of association and the right to privacy was written by Professor Paul Zoontjens. See pp. 175-216.

<sup>232</sup> *Staatsblad* 2011, 554.

<sup>233</sup> This topic has also been discussed in great detail in the second evaluation report about the functioning of the GETA. See footnote 212.

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

### a) Scope for positive action measures

In the Netherlands positive action in respect of racial or ethnic origin, religion or belief, disability, age or sexual orientation is provided for in national law.

Positive action schemes are – to a certain extent – only possible with respect to the grounds of sex, race and disability. The Government defends the fact that positive action is only possible with respect to sex, race and disability with the reasoning that only on those grounds do groups of people suffer from *structural disadvantages* in society. Structural disadvantage is defined as ‘suffering disadvantages in several social fields at the same time which are not temporary in nature’.<sup>234</sup>

Article 2(3) of the GETA (covering race and sex) imposes the following conditions on positive action measures and policies:

1. the initiative must be a *specific measure*;
2. the measure is intended to confer a preferential position on women or people belonging to ethnic or cultural minorities;<sup>235</sup>
3. the measure is intended to *remove* or *reduce* actual 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/EC.

The Dutch definition leaves less room for positive action policies and programmes, since it does not allow measures which aim to *prevent*, in addition to *removing* or *reducing* disadvantages.<sup>236</sup>

It should be noted that the proportionality principle is explicitly mentioned in the GETA, which means that in every case brought before the courts or the NIHR, the following aspects of the positive action plan must be tested:

- Does the plan have a clearly described aim? (which must be legitimate in itself);
- Is the plan appropriate and necessary to achieve this aim? (Is it potentially effective and / or could the aim be achieved with less damaging/ discriminatory means?)

Article 3(1) sub (c) of the DDA enshrines a positive action exception to the prohibition to make a distinction on the ground of disability under that Act. The same conditions as described above apply here.

In practice, any contested positive action plan is tested by the NIHR, according to the standards that are set out in the case law of the CJEU.

The general point of view is that – at least when the positions that are at stake are to be considered as employment relationships – EU legislation and case law (most notably the *Kalanke* case) prohibit a system of fixed quota and require an individual assessment of any job applicant’s capabilities and suitability for the job in the context of sex.<sup>237</sup> Any policy in which a company or organisation strives for *proportional representation* of various ethnic groups in proportion to their prevalence in society is seen as direct

<sup>234</sup> See Tweede Kamer, 2001-2002, 28 169, no. 5, p. 17.

<sup>235</sup> The concept of ‘ethnic or cultural minority group’ is not defined in Dutch law, but it is usually applied as ‘being of non-Dutch descent’.

<sup>236</sup> See Explanatory Memorandum to the EC Implementation Act, Tweede Kamer, 2002-2003, 28 770, no. 3, p. 9.

<sup>237</sup> CJEU, Case C-450/93 *Kalanke v Freie Hansestadt Bremen* [1995], ECR I-3051.

discrimination. When the aim of such a policy is simply achieving 'proportionality' or 'diversity' (i.e. when the aim is not to put people belonging to an under-represented or systematically disadvantaged group in a better position), the specialised body will not apply the positive action exception (and therefore the policy will be illegal).<sup>238</sup>

In its third evaluation report the ETC (now NIHR) concludes that the provisions concerning positive action in the GETA and DDA are adequate and do not need revision. The equality body defends its restrictive interpretation of this exception with reference to CJEU case law and maintains that, when overcoming structural disadvantages of certain groups is deemed necessary, general social policy measures should be developed that can address these disadvantages effectively.<sup>239</sup> However, in December 2012 the NIHR applied a less strict criterion and accepted 'exceptional circumstances' in a sex discrimination case.<sup>240</sup>

As far as the DDA is concerned, in addition to the positive action measures as set out in Article 7(1) of the Employment Framework Directive, there are also general supportive measures for disabled people, as set out in Article 7(2) of the directive. This provision has been transposed by Article 3(1)(b) of the DDA, which enshrines the possibility of supportive social policies for disabled people. In contrast to 'positive action measures', these measures are not time-restricted. In recent years, the Government has introduced several supportive measures designed to promote the (re)integration of disabled people into society. The Act on the (Re)integration of Disabled People into Employment (REA) (*Wet op de (Re)integratie Arbeidsgehandicapten*)<sup>241</sup> was of particular importance. This Act aimed to create a coherent set of measures which facilitate the (re)integration of disabled people into employment. The REA was replaced by inter alia the Work and Income according to Labour Capacity Act (WIA) (*Wet Werk en Inkomen naar Arbeidsvermogen*) in 2005.<sup>242</sup> The 2012 Coalition Agreement contained a proposed 5% quota, a positive action measure reserving jobs for disabled people. This quota is, however, off the table for the next couple of years, as employers made a commitment to employ more disabled workers in the so-called Social Accord. Only if they fail to do so may a legal obligation be imposed after all in 2017.<sup>243</sup>

The ADA does not contain a positive action exception clause,<sup>244</sup> but since unequal treatment on the ground of age may be objectively justified (open system of justifications) in any case the defence that the unequal treatment is in fact a positive action measure may be put forward and will be tested in the same way as described above.

#### b) Main positive action measures in place at national level

Although many private companies and public organisations take positive action measures, only a few general (and legal) measures exist. Insofar as such plans exist they mainly concern the field of employment. With regard to public employment, such policies

<sup>238</sup> See ETC Opinion 1998-105 and ETC Opinion 2012-50.

<sup>239</sup> ETC (2011) *Third evaluation report (2004-2009)*, 7.

<sup>240</sup> NIHR 2012-189.

<sup>241</sup> Netherlands, Act on the (Re)integration of Disabled People into Employment (*Wet op de (Re)integratie Arbeidsgehandicapten*) of 23 April 1998, *Staatsblad 1998*, 290 (repealed).

<sup>242</sup> Netherlands, Labour Capacity Act of 10 November 2005 (*Wet Werk en Inkomen naar Arbeidsvermogen van 10 November 2005*), *Staatsblad 2005*, 572. The Act was supplemented by Netherlands, Act on the establishment and financing of the Labour Capacity Act (*Wet Invoering en Financiering van de Wet Werk en Inkomen naar Arbeidsvermogen*). *Staatsblad 2005*, 573.

<sup>243</sup> The Accord is available at:

[www.stvda.nl/~media/Files/Stvda/Convenanten\\_Verklaringen/2010\\_2019/2013/20130411-sociaal-akkoord.ashxlink](http://www.stvda.nl/~media/Files/Stvda/Convenanten_Verklaringen/2010_2019/2013/20130411-sociaal-akkoord.ashxlink) (last accessed 7 March 2016).

<sup>244</sup> One might read a positive action exception in Article 7(1) of the ADA, which states: 'The prohibition of 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.'

are often restricted to inserting notes in advertisements that women and people from ethnic minorities are especially invited to apply. In general, there is a lot of resistance to positive action measures that go further (e.g. preferential treatment of certain categories).

Until 2003 a special Act was operative (known as the Wet SAMEN), which contained an obligation for employers to register the increase in numbers of employees from minorities and to set up a certain minorities policy. Partly due to debate about its effectiveness, this act 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 the abolition of the positive action exception in the GETA.<sup>245</sup> The VVD called this 'positive discrimination' and wanted to abolish this type of policy because of the resistance it provokes 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 people.

As far as disabled people are concerned, in 2004 the Government started a process called 'inclusive policy'. The Government initiated this policy with an action plan called Equal Treatment in Practice (*Actieplan gelijke behandeling in de praktijk*).<sup>246</sup> This involves a kind of mainstreaming of specific (permanent) social policies to improve the position of disabled people. Five government departments were requested (by the Ministry of Health) to submit policy plans. The proposals covered a wide range of measures, from making electronic voting machines that can be used by blind people, to the adaptation of houses to the needs of elderly people and wheelchair users.

With regard to Roma people, no specific positive action measures are taken in the Netherlands. However, it should be noted that Roma people who live in trailer camps (as well as other Travellers) do receive special attention from local authorities, as their specific housing situation in many regards demands a specific policy. In 2010, the Government initiated extensive cooperation and exchange of information between local municipal authorities in towns that have a considerable number of Roma residents in order to increase the effectiveness of their policies.<sup>247</sup> In relation to the agreement in the European Council of 24 June 2011 to enhance a national policy on the integration of Roma people in all Member States, the Dutch Government sent a letter to Parliament in which it outlined the current problems and policies to address them.<sup>248</sup> However, this policy document does not contain any positive action measures.

In the past, the ETC (now NIHR) was inclined to accept that, in the case of racial or ethnic discrimination, there should be more room for positive action plans (i.e. a more lenient test should be applied than in the case of sex). This conclusion could be derived from ETC case law. The ETC issued opinions in two similar cases, where a city council asked explicitly for members of ethnic minorities to apply for jobs as social workers and excluded people of Dutch origin. The Commission ruled that the preferential treatment of ethnic minorities was allowed.<sup>249</sup>

In 2008-2009, some debate about the desirability of 'diversity politics' took place in the framework of the development of what is known as the Corporate Governance Code.<sup>250</sup> The Corporate Governance Code of 2004<sup>251</sup> was amended in 2009. Two *diversity clauses*

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<sup>245</sup> See Tweede Kamer, 2003-2004, 28 770, EG-implementatiewet Awgb, no. 7.

<sup>246</sup> Tweede Kamer, 2003-2004, 29 355, no. 1.

<sup>247</sup> See Tweede Kamer, 2008-2009, 31 700 XVIII, no. 90.

<sup>248</sup> Letter from the Minister of Immigration, Integration and Asylum of 21 December 2011, Tweede Kamer, 2011-2012, 21501-20, no. 599.

<sup>249</sup> ETC 1999-31 and 1999-32.

<sup>250</sup> This discussion led to the acceptance of a motion that urged the Government to request the inclusion of diversity targets in the Code. See Tweede Kamer, 2007-2008, 31083, no. 17. The Code was developed by a committee of experts and is named after its Chair, Tabaksblat. See (in English) <http://commissiecorporategovernance.nl/download/?id=606> (last accessed 7 March 2016).

<sup>251</sup> Dutch Corporate Governance Code, *Staatsblad* 2004, 25 035.

were included in the new code.<sup>252</sup> One concerns the characterisation or profile of supervisory boards in terms of the number of board members, their expertise and capacities, etc.; the other provision concerns the composition of boards. In both cases, the Code stresses that diversity in the compilation of boards, in terms of age, nationality, gender, expertise and societal background, is necessary. It is requested that companies publicise their targets in this respect and that the relevant policies are described in their annual reports. The Code does not contain 'hard' quota, nor is there any sanction for companies which do not live up to the standards.

In 2011, following political and academic debate about positive action (or a system of quota) mostly concerning positive action schemes for women on company boards, some rather soft quota measures were adopted.<sup>253</sup>

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<sup>252</sup> *Staatscourant* 3 December 2009, 18 499.

<sup>253</sup> Law of 6 June 2011, published in the *Staatsblad* 2011, 275.

## 6 REMEDIES AND ENFORCEMENT

### 6.1 Judicial and/or administrative procedures (Article 7 Directive 2000/43, Article 9 Directive 2000/78)

- a) Available procedures for enforcing the principle of equal treatment

In the Netherlands the following procedures exist for enforcing the principle of equal treatment: judicial procedures (criminal, administrative and civil) and alternative dispute resolution, namely the procedure before the equality body NIHR.

The principle of non-discrimination can be enforced by means of criminal law procedures. Criminal law provisions may be applied in as far as the offences / discrimination fall under the definition of discrimination in Article 90quater of the Criminal Code. In 2014, for example, the Public Prosecution Service announced its intention to prosecute Geert Wilders MP, the leader of the right-wing Party for Freedom (*Partij voor de Vrijheid*, PVV) for controversial remarks about Moroccans, about which the police received over 6,400 complaints.<sup>254</sup> The politician is suspected of having insulted a population group with respect to their race and of incitement to discrimination and hatred (Articles 137c and 137d Criminal Code) and is expected to appear in court in October 2016.

The following paragraphs leave aside criminal law offences and concentrate on civil law equal treatment norms and their enforcement.

The GETA, DDA and ADA do not entail compulsory judicial procedures. If discrimination occurs in the sphere of private employment, civil (labour) law procedures apply. If it occurs in public employment, the procedures of administrative employment law apply. The civil courts also have competence in cases in which discriminatory contractual agreements (goods and services supplied by private parties or the Government) are concerned. Outside the area of contract law, an instance of discrimination (e.g. harassment) can be considered as tort and be dealt with in a civil law court procedure. The administrative courts have competence with respect to public employment contracts (civil servants) and when government actions in the sphere of public services amount to discrimination. This does not include unilateral Government decisions (e.g. to grant a subsidy). Government actions can also be considered as tort (*onrechtmatige overheidsdaad*) in which case a civil court is competent to hear the case.<sup>255</sup>

In addition to this, the equal treatment legislation provides for a special (non-compulsory) procedure before the NIHR, which has a section that deals with complaints about discrimination. The NIHR is a quasi-judicial body which issues non-binding Opinions. After it has issued an Opinion, a complaint may still be lodged before a conventional civil/ administrative court if the applicant wishes to obtain a binding judgment. The NIHR is a low-threshold body: no legal representation is required.

Moreover, the procedure before the NIHR is free of charge. As for civil law and administrative law procedures in court there is a system of free legal aid for people with very low incomes. Fees to gain access to court procedures have been increased in recent years. Many commentators fear that this will raise the threshold for victims of (inter alia) discrimination seeking redress in court.

There are no specific legal rules requiring courts / the NIHR premises to be physically accessible for people with disabilities; general rules about accessibility do apply to these buildings. Neither is it specified anywhere that information must be provided in Braille. However, the information on the legal system which is provided on the internet and in

<sup>254</sup> See the Public Prosecution Service's press release: [www.om.nl/vaste-onderdelen/zoeken/@86738/wilders-suspected/](http://www.om.nl/vaste-onderdelen/zoeken/@86738/wilders-suspected/) (in English, accessed 7 March 2016).

<sup>255</sup> Such a case is based upon Article 6:162 of the Civil Code.

special brochures conforms with standards set by blind people's organisations. No special procedures exist for dealing with individuals with a learning disability. There is no legal obligation to provide sign language interpreting. However, information from the Ministry of Security and Justice states that special internal procedures for accessibility for people with disabilities do, in fact, exist in a handbook and that, in practice, sign language interpreting is available.

People who feel they have been discriminated against may submit a complaint to the NIHR in writing (Article 10 NIHR Act). For non-Dutch people this is not always an easy task and therefore it is possible to lodge the complaint during an interview at the NIHR office. By analogy, special measures could be taken for people with a disability.

#### *Barriers and other deterrents faced by litigants seeking redress*

The costs litigants seeking redress face are limited, as it is not mandatory to instruct a lawyer for proceedings in civil law, administrative law or at the NIHR. Time limits differ:

Administrative law procedures: the General Act on Administrative Law provides that, in principle, an appeal must be lodged within six weeks of the day after the day on which the contested decision was delivered.

Civil law procedures: according to Article 8(2) of the GETA (Article 9(2) DDA and Article 11(3) ADA) an applicant who wishes to contest the lawfulness of the termination of an employment contract (discriminatory dismissal/dismissal related to victimisation) must do so within two months of the termination of the employment contract (see also Articles 7:647(2), 7:649(2) and 7:648(1) Civil Code). A legal claim with regard to the nullification of the employment contract can no longer be made once six months have passed after the day on which the employment contract was terminated (Article 8(3) of the GETA; Article 9(3) DDA; Article 11(4) ADA). A procedure based on tort law must be initiated before the general five-year limitation period under Article 3:310 Civil Code has expired.

NIHR procedures: Article 12(1)(c) of the NIHR Act only sets the requirement that a complaint must be lodged within a reasonable period (this also applies in the context of procedures lodged under the DDA and ADA).

#### b) Number of discrimination cases brought to justice

In the Netherlands there are statistics available on the number of cases related to discrimination brought to justice. An internal report of the National Expertise Centre on Discrimination, which forms part of the Public Prosecution Service, was examined by a television show. The report discusses the handling of discrimination by the Public Prosecutor, and its conclusions are worrying: out of 1,600 cases of discrimination reported to the police in 2013, only 83 were taken on by the Public Prosecutor – the lowest number since registration began in 1998. Yet there is no reason to assume that the actual prevalence of discrimination is lower than before. Most cases concern the discrimination ground of race/ethnic origin.<sup>256</sup>

In 2015, the Verwey-Jonker Institute (a social science research institute) published its fourth report on racism, anti-Semitism and extreme-right violence in the Netherlands.<sup>257</sup> The report found that the number of racist incidents has increased sharply, from 2,189 in 2013 to 2,764 in 2014 (an increase of 26%). Racism against Muslims amounted to 142 of these incidents, as compared to 35 incidents in 2013. The real prevalence of this kind of

<sup>256</sup> See [www.nrc.nl/nieuws/2015/03/29/aangifte-van-discriminatie-belandt-vaak-niet-bij-om/](http://www.nrc.nl/nieuws/2015/03/29/aangifte-van-discriminatie-belandt-vaak-niet-bij-om/) (last accessed 7 March 2016).

<sup>257</sup> Verwey\_Jonker Instituut, *Vierde rapportage racisme, antisemitisme en extreemrechts geweld in Nederland* [Fourth report on racism, anti-Semitism and extreme-right violence in the Netherlands]. Available at: [www.annefrank.org/ImageVaultFiles/id\\_17776/cf\\_21/Racisme\\_2014\\_VJI.PDF](http://www.annefrank.org/ImageVaultFiles/id_17776/cf_21/Racisme_2014_VJI.PDF) (last accessed 7 March 2016).



discrimination is, however, difficult to estimate, especially because the police only started to register such incidents separately in 2013. Anti-Semitism was also reported more often, 76 times in 2014, as compared to 61 incidents in 2013. The increase in racist and anti-Semitic incidents is commonly linked to Israel's military actions against Hamas in the summer of 2014 and the discussions in the Netherlands about Black Pete and Islam. The report did not cover incidents concerning LGBT people.

c) Registration of discrimination cases by national courts

In the Netherlands discrimination cases are not registered as such by national courts.

## **6.2 Legal standing and associations (Article 7(2) Directive 2000/43, Article 9(2) Directive 2000/78)**

a) Engaging on behalf of victims of discrimination (representing them)

In the Netherlands associations, organisations and trade unions are entitled to act on behalf of victims of discrimination. Under Article 3:305a of the Civil Code interest groups in the form of an association or foundation with full legal powers can take legal action in court on behalf of people whose (similar) interests have been damaged; i.e. also on behalf of victims of discrimination. In addition to associations and foundations, other entities can also act on behalf or in support of victims of discrimination. The organisations cannot seek pecuniary damages (3:305a (3) Civil Code).

Public law organisations, such as the State, local councils or public bodies like the Bar Association are entitled under Article 3:305b of the Civil Code to act on behalf of victims of discrimination. The article does not mention 'in support' of victims, only 'on behalf' of them, but entitles public bodies to act on behalf of victims, 'insofar as these interests are entrusted to the particular organisation'. Protection against discrimination can be seen as an important general task of most public bodies. However, the author of this report is not familiar with any such body taking concrete legal action against discrimination.

According to Article 3:305a of the Civil Code, private associations and foundations can act on behalf of victims of discrimination, provided that they are an association or foundation with full legal powers according to the civil law, and provided that their statutory goals cover this particular interest (e.g. combating discrimination in general or enhancing disability rights). The proof thereof is requested by the court and can be given by showing the deed or act by which the association or foundation was founded.

Before an organisation can act, two conditions must be met. Firstly, the organisation must represent 'similar interests'. This means that the interests represented must be similar to the interests of the organisation. Secondly, the organisation must (before taking the case to court) have tried to obtain satisfactory compensation or rebuttal from the perpetrator or otherwise have tried to come to an agreement (see Article 3:305a (2) and Article 3:305b(2) of the Civil Code).

There are no associations or public bodies that have a specified legal duty to take legal action against discrimination or to act on behalf of victims of discrimination. There are some organisations (such as Art.1, a national expert centre in this area and local Anti-Discrimination Bureaus (ADVs)) which receive a subsidy from central or local government, provided that they fulfil the function of assisting victims of discrimination. However, it certainly cannot be regarded as a legal duty to initiate legal actions on behalf of victims.

b) Engaging in support of victims of discrimination

In the Netherlands associations, organisations and trade unions are entitled to act in support of victims of discrimination, on the basis of Article 3:305a Civil Code. They do, however, need authorisation from the victim(s) to do so.

c) Actio popularis

In the Netherlands national law allows associations, organisations and trade unions to act in the public interest on their own behalf, without a specific victim to support or represent (**actio popularis**).

These cases are called 'general interest actions' (*algemeen belangacties*). Even if no victims have come forward, or if victims are not known, this action is possible if it is in the public interest. The interest may be quite diffuse (e.g. 'combating racial stereotypes'). This procedure is allowed under Articles 3:305a (1) and 3:305b (1) of the Civil Code (discussed above) and Article 1:2(3) of the General Act on Administrative Law (AWB). The law speaks of 'bringing legal action to protect similar interests of other persons'. However, if a concrete victim of certain discriminatory behaviour does come forward and objects to the procedure, the association or foundation or public body cannot go ahead with the procedure insofar as this particular victim's interests are under discussion (see Article 3:305a(4) of the Civil Code). The judgment of the court will have no effect as regards victims who have objected to the procedure, unless it is impossible to individualise the effects of the judgment (see Article 3:305a(5) of the Civil Code).

The same types of organisations (associations and foundations) as mentioned above have this possibility. They may use the same court procedures (excluding criminal procedures), as described above and may seek the same remedies (i.e. excluding pecuniary damages). The burden of proof is also the same as in any other discrimination case. These organisations also have the right to ask the NIHR to start an investigation into (alleged) discriminatory practices. The organisation again must have full legal powers 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 10(2)(e) of the NIHR Act). However, if the case is based on a concrete action from which (a) concrete individual(s) has / have suffered, the case can only be investigated by the NIHR if this/these individual(s) agree(s) to it (Article 10(3) NIHR Act).

d) Class action

In the Netherlands national law allows associations, organisations and trade unions to act in the interest of more than one individual victim (**class action**) for claims arising from the same event.

This is called a 'group action' (*groepsactie*). This kind of legal action is possible if a group of people suffers as a result of the same rules, events or acts and if a foundation or association brings one case on behalf of all of them (without specifying the names of the victims). It is possible under Article 3:305a of the Dutch Civil Code and Article 1:2(3) of the General Act on Administrative Law (AWB), both of which have been discussed above. The law speaks of 'bringing legal action to protect similar interests of other persons'.

However, if a concrete victim of certain discriminatory behaviour does come forward and objects to the procedure, the association or foundation can no longer go ahead with the procedure insofar as this particular victim's interests are under discussion (see Article 3:305a (4) of the Civil Code). The judgment of the court will have no effect as regards victims who have objected to the procedure, unless it is impossible to individualise the effects of the judgment (see Article 3:305a (5) of the Civil Code).

The same types of organisations (associations and foundations) as described above have this possibility. They may use the same court procedures (excluding criminal procedures), as described above and may seek the same remedies (excluding pecuniary damages). The burden of proof is also the same as in any other discrimination case.

### **6.3 Burden of proof (Article 8 Directive 2000/43, Article 10 Directive 2000/78)**

In the Netherlands national law requires a shift of the burden of proof from the complainant to the respondent.

Article 10(1) GETA reads as follows:

'If a person who considers themselves to have been wronged through "distinction" as referred to in this Act establishes 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 (2) and 12(1) respectively. Subsection 2 of these three Articles provides that the partially reversed burden of proof also applies in collective actions and general interest actions under Article 3:305a of the Civil Code and Article 1:2(3) of the General Act on Administrative Law. These rules apply for all forms of discrimination, including harassment. It should be noted that these rules do not apply in the case of victimisation (see the next section of this report).

### **6.4 Victimisation (Article 9 Directive 2000/43, Article 11 Directive 2000/78)**

In the Netherlands there are legal measures of protection against victimisation. All three Acts (GETA, DDA and ADA) protect against dismissal related to victimisation 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, for example, by means of a testimony. See Articles 8(1) and Article 8a of the GETA. Equivalent articles are included in the DDA (Articles 9(1) and 7a) and in the ADA (Articles 11(2) and 10).

Article 8(1) of the GETA reads as follows:

'If an employer terminates an employee's contract of employment in contravention of Section 5, on the ground that the employee has invoked Section 5, either in a court procedure or otherwise, such termination is voidable.'<sup>258</sup>

It should be noted that until the amendments of the EC Implementation Act in 2004 (and still in the Civil Code) this provision included the word 'or' instead of a comma in between 'section 5' and 'on the ground that...'. In the current text it looks as if dismissal is only voidable if this occurs in relation to complaints about discrimination (i.e. victimisation), thus that discriminatory dismissal as such is not voidable. In its third five-yearly evaluation report, the then ETC recommended that the word 'or' be reinserted into this provision.<sup>259</sup> The Government, in its reaction to the report, acknowledged that this was an editorial mistake and that this will be corrected with the next amendment of the GETA.<sup>260</sup>

Article 8a of the GETA reads as follows:

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<sup>258</sup> The term 'voidable' (*vernietigbaar*) means that it is not automatically void but that this may be established during a court procedure.

<sup>259</sup> ETC (2011) *Third evaluation report (2004-2009)*, p. 24.

<sup>260</sup> Tweede Kamer, 2011-2012, 28 481, no. 16, p. 2.

'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.'

Article 8a of the GETA does not explicitly mention dismissal as a specific way of disadvantaging people who have made complaints about discrimination. In its third evaluation report (2009), the ETC recommended that Article 8a of the GETA (and equivalent provisions in the DDA and ADA) be incorporated into one new Article 8, which begins (in para. 1) by explicitly prohibiting dismissal and causing any other disadvantage on the ground that someone has made a complaint about discrimination and this includes (in para. 2) the old Article 8(1) (concerning the fact that any such dismissal is voidable).<sup>261</sup> The Government does not see pressing reasons for such changes and proposes to maintain the separate provisions (Article 8(1) and 8a of the GETA).<sup>262</sup>

People who assist a victim of discrimination are protected by Article 8a of the GETA as well. The shifting of the burden of proof does not apply to victimisation.<sup>263</sup> According to Ambrus, the (then) ETC offered two ways for the claimant to prove that victimisation took place. Firstly, the claimant may prove that the complaint about discrimination led to a chain of events that eventually resulted in disruption of the labour relationship or even termination of the employment contract; secondly, the claimant may prove that the complaint is the only reason for the dismissal.<sup>264</sup> In its evaluation report, the ETC stated that, in practice, the burden of proof is not too heavy for the complainant. It therefore makes no recommendations to change the law on this point. However, at the same time it appears from the figures that only in seven out of 19 victimisation cases did the claimant win.<sup>265</sup> The (then) ETC made it clear that in a case of victimisation the prohibition is absolute, i.e. that no (objective) justification may be put forward.<sup>266</sup>

In 2008-2009, a study of the issue of victimisation was conducted on behalf of the then ETC.<sup>267</sup> It concerns the first large-scale research into this topic in the Netherlands. Previous smaller studies had shown that complaining about discrimination often leads to serious negative consequences, but also that many victims do not make official complaints for fear of victimisation. These findings were confirmed. The researchers found that serious forms of victimisation occurred most often in cases of discrimination on the ground of race, sex or disability, where they concerned discriminatory treatment in the workplace by colleagues and direct supervisors and where the claimant was in an isolated position at work. The report shows that it is certainly not enough to have a prohibition of victimisation in place, but that much more needs to be done in terms of having in place an informal complaints procedure, having counsellors in the workplace who can deal with complaints confidentially, and giving training to people working for personnel departments and managers. In 2015, five victimisation complaints were lodged with the NIHR; in one case, victimisation was found proven.<sup>268</sup>

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<sup>261</sup> ETC (2011) *Third evaluation report (2004-2009)*, p. 25.

<sup>262</sup> Tweede Kamer, 2011-2012, 28 481, no. 16, p. 2.

<sup>263</sup> See also Ambrus, M. 'The concept of victimisation in the racial equality directive and in the Netherlands: a means for effective enforcement of the right to equal treatment' in *Nederlands tijdschrift voor de mensenrechten*, NJCM-bulletin, 2011 (1), pp. 9-23, at p. 20.

<sup>264</sup> Ambrus, M. 'The concept of victimisation in the racial equality directive and in the Netherlands: a means for effective enforcement of the right to equal treatment' in *Nederlands tijdschrift voor de mensenrechten*, NJCM-bulletin, 2011 (1), p. 21.

<sup>265</sup> ETC (2011) *Third evaluation report (2004-2009)*, p. 25.

<sup>266</sup> Ambrus mentions ETC Opinion 2006, 34, para. 3.19. See Ambrus, M. 'The concept of victimisation in the racial equality directive and in the Netherlands: a means for effective enforcement of the right to equal treatment' in *Nederlands tijdschrift voor de mensenrechten*, NJCM-bulletin, 2011 (1), pp. 9-23, at p. 20.

<sup>267</sup> See van Genugten, M. and Svensson, J. (2010), *Dubbel de dupe? Een studie naar de benadeling van werknemers die gelijke behandeling aan de orde stellen* [Victim twice over: a study of disadvantages experienced by employees who raise the issue of equal treatment], University of Twente/ETC. The full report, as well as an English summary, are available at: [www.mensenrechten.nl/publicaties/detail/10028](http://www.mensenrechten.nl/publicaties/detail/10028), last accessed 7 March 2016.

<sup>268</sup> NIHR 2015-34, NIHR 2015-43, NIHR 2015-75, NIHR 2015-77, NIHR 2015-105. Victimisation was found proven in NIHR 2015-75.

## 6.5 Sanctions and remedies (Article 15 Directive 2000/43, Article 17 Directive 2000/78)

### a) Applicable sanctions in cases of discrimination – in law and in practice

The NIHR can only declare that a certain situation is in breach of equal treatment legislation. It cannot impose fines or damages to be paid to the victim.

Articles 11(2), 11(3) and 13 of the NIHR Act mention some specific sanctions that may be imposed by the NIHR. Under Article 11(2), the NIHR may make recommendations when forwarding its findings (in an Opinion) to the party found to have made an unlawful distinction. Under Article 11(3) the NIHR may also forward its findings to the ministers concerned, and to organisations of employers, employees, professionals and public servants, to consumers of goods and services and to relevant consultative bodies. Under Article 13(1), the NIHR may bring legal action with a view to obtaining a court ruling that a particular 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>269</sup> This power must be regarded in light of the fact that the NIHR's Opinions are not binding. The ETC never made use of this possibility. If a case is brought by interest groups, the sanctions under the GETA are similar. In legal academic circles, there is serious doubt as to whether the range of remedies and sanctions available under the equal treatment legislation is in conformity with the requirement that sanctions be 'effective, proportionate and dissuasive'.<sup>270</sup>

Any other sanctions in discrimination cases must be imposed by a court. The system is such that, in case of criminal offences, fines and sentences may be imposed by a criminal court. This happened, for example, in 2014 in a case concerning a discriminatory email that was mistakenly sent to an applicant (community sentence and fine),<sup>271</sup> and in 2015 for discriminatory remarks made on Facebook (suspects were offered the possibility of settling their case by paying a fine).<sup>272</sup> In the case of civil lawsuits or administrative procedures, the normal sanctions in these areas of law are applicable. In case of employment cases, for instance, an employer may be held accountable to pay pecuniary damages,<sup>273</sup> to take preventive measures or to reinstate an employee who was unlawfully dismissed. In case of tort, an injunction may be imposed, as well as pecuniary sanctions. It is impossible to give an overview of all of the possibilities in this regard.

The following sanctions are specifically mentioned in the equal treatment legislation. According to Article 8(1) of the GETA, Article 11(1) ADA and Article 9(1) of the DDA, discriminatory dismissals and dismissals related to victimisation are 'voidable'. This

<sup>269</sup> Unless the person affected by the alleged discriminatory conduct has imposed conditions (Article 13(2) of the NIHR Act). 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>270</sup> See Waaldijk, K. 'The Netherlands', in Waaldijk, K. and Bonini-Baraldi, M. (eds.) (2004), *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, pp. 341-375, available online at <https://openaccess.leidenuniv.nl/handle/1887/12587> (last accessed 7 March 2016) and Holtmaat, R. 'Uit de Keuken van de Europese Unie: de Gelijkebehandelingsrichtlijnen op grond van Artikel 13 EG Verdrag' ['The Equal Treatment Directives on the basis of Article 10 EC Treaty'], in T. Loenen *et al.* (eds.) (2001), *Gelijke behandeling: oordelen en commentaar 2000* [Equal treatment: opinions and commentary], Deventer, Kluwer, pp. 105-124 and Asscher-Vonk, I. P. 'Sancties' ['Sanctions'] and 'Conclusie juridische analyse' ['Conclusion legal analysis'], in Asscher-Vonk, I. P. and Groenendijk, C. A. (eds.) (1999), *Gelijke behandeling regels en realiteit* [Equal treatment: regulations and reality], Den Haag, SDU, pp. 202-234 and pp. 301-319.

<sup>271</sup> District Court Gelderland, 27 August 2014, ECLI:NL:RBGEL:2014:5457.

<sup>272</sup> Official press release from the Public Prosecution Service regarding the three fines imposed: [www.om.nl/actueel/nieuwsberichten/@88544/reacties/](http://www.om.nl/actueel/nieuwsberichten/@88544/reacties/) (last accessed 7 March 2016).

<sup>273</sup> Associations and foundations that bring cases on behalf of victims or bring collective or public interest actions before a civil or administrative court may not seek pecuniary damages (see Article 305(a) para. 4 of the Civil Code).

applies to both public and private employment. The employee can ask the court to invalidate the termination of the contract and can thereupon claim wages. They can also request to be reinstated in the job or claim compensation for pecuniary damages under the sanctions of general administrative/ (labour) contract law or tort law.

Contractual provisions which are in conflict with the GETA, the ADA and the DDA shall be considered null and void. This follows from Article 9, Article 13 and Article 11 of these acts respectively.

b) Ceiling and amount of compensation

In civil and administrative court cases there is no ceiling for the amount of damages or compensation that may be sought. Compensation for both material and non-material damages can be requested. In criminal procedures, the Public Prosecutor is bound to the level of the fines set out in the criminal law provisions concerning discrimination.

The sanctions mentioned in the equal treatment legislation are not in terms of pecuniary damages but offer other 'remedies' (see above).

c) Assessment of the sanctions

1. Monetary compensation is very rarely granted. This only occurs when, for example, the judge agrees with the dismissal since employment relationships have been disrupted and, in that case, they set a relatively high sum to compensate the termination of the contract.
2. No information can be given on the topic of sanctions without an extensive examination of the case law of the district courts. Generally, such cases are not published in official law journals. In addition, the registration of cases within the court system is not done systematically on the basis of the legal provisions at stake. Thus it might very well be that many 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. Very generally speaking, it can be noted that Dutch courts are restrictive in granting damages that are not strictly material damages (e.g. unpaid wages). Non-material damages (e.g. hurt feelings) will only be compensated for minimally.

As to the question of 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. It has never been properly investigated whether they are effective and proportionate, neither by the equality body, nor by any other institution.

## **7 BODIES FOR THE PROMOTION OF EQUAL TREATMENT (Article 13 Directive 2000/43)**

- a) Body/bodies designated for the promotion of equal treatment irrespective of racial/ethnic origin according to Article 13 of the Racial Equality Directive

In the Netherlands there are two types of equality body. First, there is a quasi-judicial (or tribunal type of) body assigned with the tasks of hearing complaints about unequal treatment, drafting reports, giving advice to the government and investigating possible instances of structural discrimination on its own accord. This function is currently fulfilled by a department of the Netherlands Institute for Human Rights (NIHR).<sup>274</sup> In 2012, the NIHR assumed all the tasks of the previous Equal Treatment Commission (ETC) (*Commissie Gelijke Behandeling, CGB*) in this regard.<sup>275</sup> The ETC was the first officially designated body by which the Government implemented Article 13 of the Racial Equality Directive, although it was not officially appointed as such by a separate law or decree.<sup>276</sup> The status as an equality body follows from the tasks given to the NIHR in the NIHR Act (Articles 9-13 of the NIHR Act; originally Articles 11-21 of the GETA). Other equal treatment acts also assign these tasks to the NIHR (see Article 12 DDA and Article 14 ADA). On the basis of the NIHR Act, decrees have been adopted in order to regulate the legal status of members of the Institute and its staff<sup>277</sup> and the internal procedures of the department of the NIHR that deals with complaints about unequal treatment.<sup>278</sup>

The Dutch Government established the NIHR after long discussions about the best way to implement the Paris Principles.<sup>279</sup> The role of the new NIHR as regards investigating complaints about unequal treatment has not been changed. The establishment of the Institute also does not change the competences of the ADVs (see below) as regards their role in assisting victims. The role of assisting victims was never part of the ETC's work and is not part of the work of the NIHR, because it is deemed to be incompatible with the role of independently issuing legal opinions about discrimination complaints. In addition to the nine members of the previous ETC, three additional members were appointed to the NIHR. There have also been increases in terms of budget and staff.<sup>280</sup> The number of cases has decreased, from 221 in 2011 to 179 in 2014 (see below).

Secondly, there are the Anti-Discrimination Bureaus (*Anti-discriminatievoorzieningen*, ADVs) at local level.<sup>281</sup> The ADVs have a legal basis in the Act on Local Anti-

<sup>274</sup> Netherlands, Act of 24 November 2011 containing the establishment of the Netherlands Institute for Human Rights (*Wet van 24 november 2011, houdende de oprichting van het College voor de rechten van de mens*); *Staatsblad* 2011, 573. The Act entered into force on 1 October 2012.

<sup>275</sup> The provisions of the General Equal Treatment Act in which the former ETC was regulated were repealed in the NIHR Act. Instead, the same tasks and authorities are now regulated in a specific chapter of the NIHR Act: 'Chapter 2: Investigations and findings relating to equal treatment' (Articles 9-13).

<sup>276</sup> This designation follows from statements from the Government in various Parliamentary Papers. See e.g. Explanatory Memorandum to the bill which led to the *EG-Implementatiewet Awgb* (EC-Implementation law Equal Treatment Law) Tweede Kamer, 2002-2003, 28 770, nos. 1-3 at page 20, where it is mentioned in the Appendix, at page 20, that the implementation of Article 13 of the Racial Equality Directive is already completed because of the existence in the Netherlands of the ETC (*EG Implementatiewet Awgb*: Law of 21 February 2004, *Staatsblad* 2004, 119).

<sup>277</sup> *Besluit van 28 augustus 2012, houdende regels over de rechtspositie van de leden van het College voor de rechten van de mens en de tot het bureau behorende ambtenaren (Besluit rechtspositie College voor de rechten van de mens)* [Decree legal position Netherlands Institute for Human Rights], *Staatsblad* 2012, 389.

<sup>278</sup> *Besluit van 31 augustus 2012, houdende nadere regels over de werkwijze van de afdeling, bedoeld in hoofdstuk 2 van de Wet College voor de rechten van de mens (Besluit werkwijze onderzoek gelijke behandeling)*, *Staatsblad* 2012, 394.

<sup>279</sup> Principles relating to the Status of National Institutions Adopted by UN General Assembly resolution 48/134 of 20 December 1993.

<sup>280</sup> For adjustments to the budget, see below under question b.

<sup>281</sup> The ADVs were designated as equality bodies in the Explanatory Memorandum to the Act on Local Anti-discrimination Bureaus; Tweede Kamer, 2007-2008, 31 439, no. 3, p. 7.

Discrimination Bureaus (*Wet gemeentelijke antidiscriminatievoorzieningen*).<sup>282</sup> All 390 municipalities are obliged to establish and subsidise an ADV and receive an amount per resident for this purpose. However, it has become known that local authorities do not always spend the money that they get from the national government on the ADVs, who are in fact confronted with severe budget cuts. Local authorities receive EUR 0.37 per resident, specifically designated to be spent on the ADV, but on average of only EUR 0.27 is spent.<sup>283</sup> No government response to this finding has been published.

The main task of the ADVs is to assist victims of discrimination and to monitor the situation in this regard. The ADVs work together in an association called the National Association of Anti-Discrimination Bureaus (*Landelijke Vereniging ADB's*) and are supported by the expert institute, Art.1, named after the constitutional non-discrimination provision. The ADVs and Art.1 cover all of the Article 19 TFEU non-discrimination grounds and are officially recognised as equality bodies (in terms of Article 13 of the Racial Equality Directive).<sup>284</sup> The ADVs, the NIHR and Art.1 thus fulfil different tasks that are closely related but not overlapping.

#### b) Status of the designated body/bodies – general independence

The NIHR is an independent quasi-judicial body. Article 4 of the NIHR Act explicitly stipulates that, 'The Institute is independent in the performance of its duties'. Independence is further guaranteed in several provisions of the NIHR Act. In a number of them, reference is made to the Autonomous Administrative Authorities Framework Act (AAAF) (*Kaderwet Zelfstandige Bestuursorganen*), the Advisory Bodies Framework Act (ABFA) (*Kaderwet Adviescolleges*), the Judicial Officers Legal Status Act (*Wet Rechtspositie Rechterlijke Ambtenaren*) and the Central and Local Government Personnel Act (*Ambtenarenwet*) in which a detailed regulation is given of the status of independence, accountability, incompatibilities etc. of people who work directly or indirectly for the Government. In many respects the members of the NIHR, its Advisory Council (see below) and its staff are covered by these laws. In some other respects, these laws are exempted precisely in order to guarantee the independence of the Institute.

Article 16 regulates how members of the Institute are appointed: the Advisory Council makes suggestions to the Minister of Security and Justice, who then makes a recommendation to appoint them by decree for a period of six years (Article 17 (2) NIHR Act).

Article 17 of the NIHR Act gives a detailed regulation of the legal status of the members in terms of the duration of their appointment, their working conditions, salary, possibility of disciplinary sanctions and dismissal, etc. To emphasise the independence of the members, subsection 1 states that, apart from a few exceptions, the provisions of the Judicial Officers Legal Status Act concerning dismissal, suspension and disciplinary measures apply *mutatis mutandis* to them.<sup>285</sup> This provision contains a few changes compared to the former Article 16 (4) of the General Equal Treatment Act, all of which are intended to emphasise / strengthen the independence of the members of the Institute.

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<sup>282</sup> *Wet gemeentelijke antidiscriminatievoorzieningen*, *Staatsblad* 2009, 313. On the basis of this law, a Decree was adopted in which a more detailed regulation of the local ADVs is laid down. It contains provisions concerning the independence, competency and procedures which must be followed when the ADVs provide information and assist victims of discrimination (see *Besluit gemeentelijke antidiscriminatievoorzieningen*, *Staatsblad* 2009, 373, *Besluit gemeentelijke antidiscriminatievoorzieningen*).

<sup>283</sup> See [www.nrc.nl/nieuws/2013/10/25/gemeenten-steken-geld-voor-discriminatieklachten-in-andere-zaken/](http://www.nrc.nl/nieuws/2013/10/25/gemeenten-steken-geld-voor-discriminatieklachten-in-andere-zaken/) (last accessed 7 March 2016).

<sup>284</sup> In 2004, for the first time the Government recognised these organisations as equality bodies in the sense of Article 13 Racial Equality Directive. See Tweede Kamer, 2003-2004, 28 770, no. 5.

<sup>285</sup> One important difference with the position of judges is that members of the NIHR are appointed for a period of six years with the possibility of re-appointment, while judges are appointed for life.



Article 18 of the NIHR Act regulates the position of the staff of the Institute. Staff are appointed by the Institute (represented by the Director). Their employment conditions are similar to those of civil servants in national and local government. The Institute as a whole is the 'competent authority' as meant in the Central and Local Government Personnel Act, which means that all matters, such as promotion, dismissal, salary, etc. are decided by the Director of the Institute. In this respect, there is a major difference compared to the situation under the GETA, where staff were appointed by the Ministry of Security and Justice. Members and staff members of the former ETC all automatically became members and staff of the NIHR. (Article 35 of the NIHR Act.) Currently, the NIHR has 12 Members and a Director and a staff of approximately 50 (mostly academic lawyers). The annual budget of the NIHR for 2014 amounted to EUR 5.7 million.

In 2015, an independent evaluation conducted by Pro Facto found that the annual budget should be at least EUR 5.8 million (which is the projected amount for the coming years).<sup>286</sup> The NIHR itself, in a reaction to the report, requested EUR 7.4 million to carry out its tasks.<sup>287</sup> However, the responsible Minister (of Security and Justice) refused to increase the NIHR's budget.<sup>288</sup>

In addition to members and staff, there is an Advisory Council, which consists (*qualitate qua*) of the National Ombudsman, the chair of the Data Protection Agency, the chair of the Council for the Judiciary and a minimum of four and a maximum of eight members drawn from civil society organisations concerned with the protection of one or more human rights, from organisations of employers and employees and from the academic world (Article 15 (2) of the NIHR Act.) Apart from the aforementioned *qualitate qua* members, the members of the Council are appointed by the Minister of Security and Justice, after consultation with the Minister of the Interior and Kingdom Relations, the NIHR, the Ombudsman, the chair of the Data Protection Agency and the chair of the Council for the Judiciary (Article 15 (3)).

The status of the organisation Art.1 and the local ADVs is that of independent non-governmental organisations (NGOs), although the ADVs are subsidised by the local authorities. The legal regulation of the local bureaus (ADV's) is set out by a law which came into force in 2009. The ADVs have two legal tasks: to assist people with discrimination complaints and to record all such claims and bring them to the attention of the Minister of the Interior and Kingdom Relations.

c) Grounds covered by the designated body/bodies

NIHR: religion and belief, political opinion, hetero- or homosexual orientation, sex, nationality and civil (or marital) status, disability, age, plus 'working time' and 'type of labour contract'.

Art. 1: religion and belief, political opinion, hetero- or homosexual orientation, sex, nationality and civil (or marital) status, disability and age.

d) Competences of the designated body/bodies – and their independent exercise

The NIHR deals with all the non-discrimination grounds mentioned in the GETA, DDA and ADA, as well as some more specific grounds (like the type or duration of employment contracts). The NIHR's principal function is to investigate alleged cases of discriminatory practices or conduct. In addition, the NIHR may investigate structural instances of discrimination of its own accord<sup>289</sup> and may advise organisations (including governmental

<sup>286</sup> See Tweede Kamer, 2015-2016, 34 338, no. 1, attachment 2015D43169.

<sup>287</sup> See Tweede Kamer, 2015-2016, 34 338, no. 1, attachment (not yet numbered).

<sup>288</sup> See Tweede Kamer, 2015-2016, 34 338, no. 1.

<sup>289</sup> The scope for this was extended by the *Evaluatiewet AWGB* [Wet tot wijziging van de Algemene Wet Gelijke Behandeling; Evaluatiewet Awgb] of 15 September 2005, *Staatsblad 2005*, 516. (This is the law which

organisations) who want to know whether their policies or practices are in compliance with the law. It may also advise the Government on discrimination issues, including advice about proposals for new legislation or proposals for amendments to legislation. The NIHR sometimes conducts research (or assigns experts to do this on its behalf) into specific issues, such as victimisation or discrimination in the workplace on the ground of sexual orientation. Furthermore, the NIHR has the general purpose and task of promoting human rights and investigating human rights violations and providing advice about improving the protection of human rights etc. It does not have the competence and authority to hear individual complaints about human rights violations beyond the scope of the equal treatment legislation.

Art.1 mainly has a role in monitoring developments in society with regard to (non-) discrimination and bringing instances of (structural) discrimination to the attention of the general public and to politicians. Art.1 also functions as the national expert centre which supports the work of the local ADVs, by, for example, offering training to employees working for the local ADVs. The main function of the local ADVs is to assist victims of discrimination and they do bring many complaints about discrimination to the NIHR and to the courts in support or on behalf of victims, and also in the form of general interest actions or collective actions. They also set up situation testing processes, in order to bring systemic discrimination to light, especially in the area of cafés and night clubs (see Section 6.2 of this report).

The NIHR has the task of investigating complaints about discrimination, conducting independent surveys, publishing reports and giving recommendations to organisations and advice to the Government. The quantity of surveys/advice varies considerably: in 2013 the NIHR produced nine advice documents, whereas it produced only one in 2012.

The role of assisting victims is seen as being in conflict with the role of independently investigating individual complaints and giving an authoritative opinion on them. The same applies to the NIHR's official competence to bring cases of unequal treatment to the attention of the courts; the NIHR never makes use of this competence as it would conflict with its own quasi-judicial function. However, Art.1 and the local ADVs effectively fulfil these functions. The role of the latter organisations is mainly to assist victims of discrimination and to monitor developments with respect to discrimination in society. They bring many cases of discrimination to the attention of the NIHR and the courts.

Apart from assisting victims and assisting and training the local ADVs, Art.1 also conducts independent surveys and issues comments and advice (mostly to municipal authorities) about combating discrimination. Art.1 can be considered to be a non-governmental 'watchdog', whereas the NIHR is an independent state body which has as its most important task to deal with equal treatment cases. An evaluation of the functioning of the ADVs was submitted to Parliament in December 2012.<sup>290</sup>

Other organisations also publish very informative reports about the prevalence and causes of discrimination. The main (publicly funded) research institution in this regard is the Netherlands Institute for Social Research (*Sociaal Cultureel Planbureau, SCP*). In 2013, an SCP study revealed that harassment at work is one of the greatest problems encountered by LGBT people.<sup>291</sup> In 2014, the SCP published a report on the way people

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amended the GETA on the basis of proposals stemming from the first evaluation of the Act during the period 1994-1999).

<sup>290</sup> Tweede Kamer 2012-2013, 30 950, no. 47, attachment 2012D48322. The statistics were collected by Netherlands Statistics (CBS) on the basis of data supplied by the municipal authorities (*Registratie discriminatieklachten*), see Tweede Kamer, 2012-2013, 30 950, no. 63.

<sup>291</sup> See the SCP Report, *Seksuele oriëntatie en werk. Ervaringen van lesbische, homoseksuele, biseksuele en heteroseksuele werknemers* [Sexual orientation and work. Experiences of lesbian, gay, bisexual and heterosexual employees]. In December 2013, the Minister of Education, Culture and Science sent a letter to Parliament on the topic of discrimination against LGBT employees, see Tweede Kamer, 2013-2014, 30 420, no. 204

perceive discrimination, followed in 2015 by a report on labour market discrimination in The Hague.<sup>292</sup> In addition, it publishes an annual Integration Report in cooperation with Netherlands Statistics.

e) Legal standing of the designated body/bodies

In the Netherlands the designated bodies have legal standing to bring discrimination complaints (on behalf or not of identified victim(s)) or to intervene in legal cases concerning discrimination. The NIHR does have this competence (in Article 13 NIHR Act), but it never makes use of it because it conflicts with its main task of investigating individual complaints about discrimination in a neutral and objective manner.

Art.1 and the local ADVs can bring claims to court within the framework of the general rules that exist under Dutch civil law concerning actions on behalf of victims and general interest actions or collective actions. (No data on numbers of class actions are available.) See Section 6.2 of this report.

f) Quasi-judicial competences

In the Netherlands the NIHR is a quasi-judicial institution. Its decisions and recommendations are not binding and it does not have the power to impose sanctions. No appeal is possible to the NIHR itself, but a case can be brought to a (civil or administrative) court in order to obtain a binding judgment. On the basis of an Opinion of the NIHR in which a certain practice or conduct has been declared discriminatory, a defendant (or their organisation) may also take voluntary measures to put an end to the discrimination or take action to prevent it from happening in the future.

According to the Annual Reports of the NIHR for 2012, 2013 and 2014, in 16%/ 11%/ 12% of cases an individual measure was taken by the defendant / company or institution, in 26%/ 33%/ 36% only a structural measure and in 28%/ 32%/ 36% both an individual and a structural measure. Measures were taken in 70%/ 77%/ 83% of all cases as a result of the Opinion or recommendation.

It is not always feasible to take an individual measure. As regards Opinions where this was possible, individual measures were implemented in 2012, 2013 and 2014 in 49%/ 53%/ 53% of such cases. With regard to the opinions for which structural measures are possible, structural measures were taken in 55% / 66% / 72% of cases.<sup>293</sup> From these figures it appears that in 2014 defendants were more inclined to take structural measures than in the previous years.

NB: at time of writing the NIHR had not yet published its annual report for 2015.

Art.1 is not a (quasi) judicial institution, neither are the local ADVs. They do not hear complaints, but they may assist victims to bring complaints before the NIHR or the courts.

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<sup>292</sup> SCP 2014, *Ervaren Discriminatie in Nederland*, available at: [www.scp.nl/Publicaties/Alle\\_publicaties/Publicaties\\_2014/Ervaren\\_discriminatie\\_in\\_Nederland](http://www.scp.nl/Publicaties/Alle_publicaties/Publicaties_2014/Ervaren_discriminatie_in_Nederland); SCP 2015, *Op Afkomst Afgewezen*, [http://www.scp.nl/Publicaties/Alle\\_publicaties/Publicaties\\_2015/Op\\_afkomst\\_afgewezen](http://www.scp.nl/Publicaties/Alle_publicaties/Publicaties_2015/Op_afkomst_afgewezen) (both last accessed 7 March 2016).

<sup>293</sup> All annual reports are available in Dutch and English at: [www.mensenrechten.nl/publicaties/zoek?categorie01=434555](http://www.mensenrechten.nl/publicaties/zoek?categorie01=434555) (last accessed 7 March 2016).

g) Registration by the body/bodies of complaints and decisions

In the Netherlands the bodies register the number of complaints and decisions (by ground, field, type of discrimination, etc.). These data are available to the public; see above in this report.

<b>Number of requests for an ETC/NIHR-Opinion:</b> <sup>294</sup>	
<i>Year:</i>	<i>Number of requests:</i>
2010	423
2011	719
2012	634
2013	498
2014	463
2015	Not yet available

	2011		2012		2013		2014	
	<i>N</i>	%	<i>N</i>	%	<i>N</i>	%	<i>N</i>	%
Gender	38	17	44	21	40	22	43	24
Race	22	10	27	13	27	15	28	16
Nationality	4	2	12	6	14	8	11	6
Religion	17	8	16	8	18	10	18	10
Sexual orientation	1	0	2	1	0	0	7	4
Civil status	1	0	3	1	2	1	0	0
Political beliefs	6	3	8	4	3	2	0	0
Philosophy of life	1	0	1	0	0	0	0	0
Part-time / full-time	7	3	14	7	5	3	3	2
Temp/perm. employment	4	2	0	0	0	0	0	0
Disability/chronic illness	37	17	39	18	31	17	26	14
Age	53	24	34	16	32	17	31	17
Multiple grounds <sup>295</sup>	30	14	11	5	11	6	12	7
<b>Total:</b>	<b>221</b>		<b>212</b> <sup>296</sup>		<b>183</b>		<b>179</b>	

h) Roma and Travellers

The NIHR does not treat Roma and Travellers as a priority issue. Reasons for the absence of complaints could include distrust of the authorities by Roma and Sinti people, language barriers and the idea that complaining about discrimination or unequal treatment may make their situation worse (fear of victimisation). In addition, a possible explanation could be that the social situation of Roma and Travellers in the Netherlands may not be so precarious (compared to other European countries) that it demands priority treatment.

Roma, Sinti and Travellers are not specifically mentioned in overviews of discrimination complaints by Art.1 and the ADVs. According to a search on its website, Art.1 has no specific programmes concerning Roma, Sinti or Travellers. As for the local ADVs, this is hard to say since there are hundreds of such local bureaus. The organisation in the Netherlands which was most active in the past in gathering and disseminating

<sup>294</sup> *Annual report 2014*, Table 3. See the website of the NIHR, where all the annual reports are published: [www.mensenrechten.nl/publicaties/zoek?categorie%5b0%5d=434555](http://www.mensenrechten.nl/publicaties/zoek?categorie%5b0%5d=434555) (last accessed 7 March 2016). As shown in the table below in this text ('Numbers of opinions given by the ETC/NIHR'), only approximately 25% of all requests result in an Opinion from the NIHR. Others are not admissible (outside the scope of the legislation) or are manifestly ill-founded. Furthermore, some people just want information and do not want to submit a formal complaint.

<sup>295</sup> I.e. cases in which the complainant claimed to have been discriminated against on more than one ground. This does not necessarily concern cases of multiple (intersectional) discrimination.

<sup>296</sup> One case was labelled 'no ground' by the NIHR.

information on Roma and Sinti people is the Anne Frank Foundation in Amsterdam. See, for example, their report, *Racism and extremism monitor 2009*.<sup>297</sup>

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<sup>297</sup> This report by the Anne Frank Stichting may be found at: [www.annefrank.org/en/Education/Monitor-Homepage/Racism-monitor/Promising-new-strategy-for-right-wing-extremist-youth/](http://www.annefrank.org/en/Education/Monitor-Homepage/Racism-monitor/Promising-new-strategy-for-right-wing-extremist-youth/) (last accessed 7 March 2016).

## **8 IMPLEMENTATION ISSUES**

### **8.1 Dissemination of information, dialogue with NGOs and between social partners**

The Ministry of the Interior and Kingdom Relations (Department of Constitutional Affairs) co-ordinates all activities in the area of EU law implementation issues, since all equal treatment legislation is (also) seen as part of the general principle of equality and non-discrimination included in Article 1 of the Constitution. The Ministry of Social Affairs and Employment is responsible for activities to enhance compliance with the equal treatment legislation, 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. In addition, the Ministry is actively engaged in promoting studies and surveys in this field. The same goes for the Ministry of Health, as far as discrimination on the ground of disability is concerned, and the Ministry of Education in relation to discrimination in this area. The latter Ministry is also responsible for general policies concerning sex/gender and LGBT issues.

Finally, the Ministry of Foreign Affairs plays a role in assembling and disseminating the information that is needed to issue periodic reports to the international monitoring bodies (CEDAW, the CERD Committee, the UN Human Rights Committee).

There are several NGOs in the field of non-discrimination and minority rights, including the aforementioned Art.1. Art.1's mission is to promote the principle of non-discrimination in its broadest sense. Art.1 offers advice to (governmental) organisations, provides public information about non-discrimination and supplies training sessions. In addition, it assists the local ADVs in their work and supports them with training and educational activities. Whereas Art. 1 does not receive any government subsidy, several NGOs with the objective of combating discrimination and/or encouraging dialogue are subsidised. An example is the COC, the main LGBT organisation in the Netherlands advocating for LGBT rights. The Ministry of Social Affairs and Employment also consults the MBO Raad<sup>298</sup> in relation to equal treatment of young people with disabilities.

The Ministry of the Interior and Kingdom Relations co-ordinates a network of professionals and experts on equal treatment and discrimination issues, consisting of civil servants from the relevant ministries (such as Social Affairs and Employment, Education, Health, Security and Justice) and national labour and employers' organisations and NGOs which are active in this field (e.g. the Dutch Council of Chronically Ill and Disabled Persons and the COC).

No official body or agency exists that is specifically appointed to address Roma and Travellers' issues at national level. However, in 2009-2010 the Government initiated co-ordination, mutual support and exchange of information between local authorities in which a substantial number of Roma people live.<sup>299</sup>

As stated above, a set of policy measures was drafted by the Dutch government in 2011 to foster the social inclusion of Roma and Sinti people, as requested by the European Commission. In addition, the Dutch Government developed a qualitative monitoring instrument to measure the social inclusion of Roma and Sinti in the Netherlands. This instrument includes indicators such as education, employment, healthcare, housing and dialogue with local authorities.

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<sup>298</sup> The MBO Raad is the Dutch association of vocational education and training colleges. It represents all colleges for secondary vocational education and training and adult education.

<sup>299</sup> See Tweede Kamer, 2008-2009, 31 700 XVIII, no. 90.

Some NGOs (partly subsidised by the Government) pay special attention to Roma and Travellers. The Anne Frank Foundation regularly focuses on the situation of Roma in its *Racism and extremism monitor* reports. In 2013, a *Monitor* on Roma inclusion was published. From this report it appears that the social integration of Roma is still very problematic.<sup>300</sup>

## **8.2 Compliance (Article 14 Directive 2000/43, Article 16 Directive 2000/78)**

### **a) Mechanisms**

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) Rules contrary to the principle of equality**

Apart from some regulations in Dutch family law, which might be contrary to the principle of sexual equality in the CEDAW, to the author's knowledge there are no rules in the Netherlands which are contrary to the principle of equality.

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<sup>300</sup> See Movisie (2013) *Monitor Inclusie: Nulmeting. Ervaringen en opvattingen van Roma, Sinti en professionals over de sociale inclusie van Roma en Sinti op de domeinen onderwijs, arbeid, wonen, gezondheid en veiligheid* [Monitor of inclusion: Baseline assessment. Experiences and opinions of Roma, Sinti and professionals in relation to the social inclusion of Roma and Sinti in the areas of education, work, housing, health and security], Utrecht. The Minister of Social Affairs and Employment responded to this report in a letter to Parliament, see Tweede Kamer, 2013-2014, 32 824, no. 46.

## 9 COORDINATION AT NATIONAL LEVEL

For various (legislative) procedures and the development of policies, frequent co-operation exists between the Ministries of the Interior and Kingdom Relations, Social Affairs and Employment, Education, Culture and Science, Health, Welfare and Sport and Security and Justice. For some specific projects other ministries may be involved. The division of tasks is organised in the following way:

1. Equal treatment in employment: (inter alia: GETA, ADA, DDA and Equal Treatment Act Men/Women): Ministry of Social Affairs and Employment.
2. Age discrimination in employment: Ministry of Social Affairs and Employment.
3. General policies against racism: Ministry of Social Affairs and Employment.
4. Disability discrimination: Ministry of Health, Welfare and Sport
5. General Equal Treatment Act, Constitutional provisions, general coordination of anti-discrimination policies: Ministry of the Interior and Kingdom Relations.
6. Criminal law provisions regarding discrimination, anti-discrimination policies for the police/public prosecution: Ministry of Security and Justice.
7. Emancipation policies for women and LGBT people: Ministry of Education, Culture and Science

The Ministry of the Interior and Kingdom Relations co-ordinates all the legislative activities because it is responsible for the implementation of the Constitution, which in Article 1 contains a general non-discrimination provision.

The anti-discrimination policies are also coordinated by the Ministry of the Interior and Kingdom Relations. The Ministry is responsible for municipal anti-discrimination services.

The Dutch government enacted a national anti-discrimination action programme in 2010, which included monitoring, prevention and prosecution measures (for instance to combat discrimination in education), guidelines for website moderators on keeping websites free of discriminatory content that violates the criminal law, and methods for identifying and prosecuting perpetrators of discrimination. This anti-discrimination action programme covered all grounds of discrimination, including racism and racial discrimination. A revised action programme was published in January 2016.<sup>301</sup>

A comprehensive action plan against labour market discrimination, targeting discrimination on the grounds of age, disability, race/ethnic origin, sex and sexual orientation was published in 2014.<sup>302</sup> The plan comprised dozens of measures, ranging from pre-existing government policies and already proposed legislative changes to new policy proposals. In September 2015, a report on the progress made in implementing the action plan's measures was published.<sup>303</sup> The opposition was critical of the progress made and called for further action.

The government informs parliament regularly about its activities, for example in the annual 'discrimination letter'. In February 2015, the latest annual 'discrimination letter' was sent to Parliament.<sup>304</sup> This letter reports on the measures taken to prevent and combat discrimination and intolerance, and outlines current developments in the field of human rights protection.

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<sup>301</sup> *Nationaal Actieprogramma tegen discriminatie* (National action programme against discrimination), Tweede Kamer, 2015-2016, 30 950, no. 84

<sup>302</sup> Tweede Kamer, 2013-2014, 29 544, no. 523

<sup>303</sup> Tweede Kamer, 2014-2015, 29 544, no. 649

<sup>304</sup> Tweede Kamer, 2014-2015, 30 950, no. 76.



The development of a specific national strategy against racism is one of the policy recommendations in ECRI's fourth periodic report on the Netherlands.<sup>305</sup> In December 2013, the Government published its first National Action Plan on Human Rights,<sup>306</sup> the implementation of which was reported to Parliament in December 2014.<sup>307</sup> This plan covers all grounds of discrimination.

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<sup>305</sup> The European Commission against Racism and Intolerance (ECRI), the Council of Europe's monitoring body, published this report in October 2013. The report is available at [www.coe.int/t/dghl/monitoring/ecri/Country-by-country/Netherlands/NLD-CbC-IV-2013-039-ENG.pdf](http://www.coe.int/t/dghl/monitoring/ecri/Country-by-country/Netherlands/NLD-CbC-IV-2013-039-ENG.pdf) (last accessed 7 March 2016). See also the Government's letter to Parliament in response to this report, Tweede Kamer, 2013-2014, 30 950, no. 62.

<sup>306</sup> Ministry of Interior and Kingdom Relations, *Nationaal Actieplan Mensenrechten; Bescherming en bevordering van mensenrechten op nationaal niveau* [National Action Plan on Human Rights: protection and promotion of human rights at national level], see Tweede Kamer, 2013-2014, 33 826 no. 1.

<sup>307</sup> Ministry of Interior and Kingdom Relations, *Tussenrapportage Nationaal Actieplan Mensenrechten* [Interim report on the National Action Plan on Human Rights], Tweede Kamer, 2014-2015, 33 826 no. 7.

## **10 CURRENT BEST PRACTICES**

- The introduction of a National Action Plan on Human Rights;
- The reports on the prevalence and causes of discrimination published by the SCP;
- The employers' organisations' promise to employ more disabled workers, as contained in the Social Accord.

## **11 SENSITIVE OR CONTROVERSIAL ISSUES**

### **11.1 Potential breaches of the directives (if any)**

- The accumulative conditions in the 'harassment' definition arguably fall short of the directives' 'non-regression' clause (see Section 2.4 of the report).
- Arguably, the Dutch Government interprets the prohibition of an 'instruction to make a distinction' unduly narrowly (see Section 2.5 of the report).
- An unduly restrictive approach is also adopted by the Dutch Government as regards the 'scope of liability' for discrimination (see Section 2.4 and 2.5 of the report).
- Both Article 2(5) and Article 7(2) of the Employment Framework Directive talk about national legislation or measures taken by the Member States' governments in order to protect health and safety. Article 3(1)(a) of 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 Section 4.6 of the report).
- The partially reversed burden of proof is not applicable in case of victimisation claims, which falls short of EU requirements (see Section 6.4 of the report).
- The requirement that sanctions need to be 'effective', 'dissuasive' and 'proportionate' seems not to be met by the Dutch legislation (see Section 6.5 of the report).
- 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, for example, more room for justifications than would seem appropriate, considering the general rule of the CJEU that exceptions to the non-discrimination principle should be interpreted restrictively. However, the Dutch NIHR and the courts do seem to follow the CJEU in this regard, so in practice this is not really problematic.

### **11.2 Other issues of concern**

- The main issue of concern with regard to the implementation and practical application of the anti-discrimination directives at national level is the huge gap between the prevalence of discrimination that appears in research and the comparatively low number of cases that come before the courts, either in the context of the equal treatment legislation or in the context of the criminal law provisions prohibiting discrimination.

## 12 LATEST DEVELOPMENTS IN 2015

- Research (among others by the SCP) shows time and again that discrimination in the labour market on the ground of religion and/or ethnic origin (in particular against non-Western people of immigrant origin) is widespread.<sup>308</sup> A nationwide action plan against labour market discrimination has been presented and an evaluation was published in September 2015.
- In 2014, the Public Prosecution Service announced its intention to prosecute Geert Wilders MP, the leader of the right-wing Party for Freedom, who led a gathering of his followers in an anti-Moroccan chant in the aftermath of the local elections. The politician is suspected of having insulted a population group with respect to their race and of incitement to discrimination and hatred (Articles 137c and 137d Criminal Code). The court is expected to hear the case in October 2016. (See Section 6.1 of this report).
- Another salient issue has been the debate on the allegedly racist character of Black Pete (*Zwarte Piet*), one of the central figures in the Dutch Saint Nicholas festivities. In November 2014, the highest administrative court of the Netherlands ruled that mayors, when deciding whether or not to grant a permit, are not empowered to take into account whether Black Pete stereotypes black people and instead are limited to evaluating the effects on public order and security<sup>309</sup> (see Section 2.1.1 of this report). This debate was fuelled again after the UN Committee for the Elimination of Racial Discrimination (CERD) published its Concluding Observations on the Netherlands in August 2015, calling upon the State party to eliminate 'those features of Black Pete which reflect negative stereotypes' and with the recommendation to 'find a reasonable balance, such as a different portrayal of Black Pete'.<sup>310</sup>
- The Labour and Security Act (*Wet Werk en Zekerheid*) entered into force July 2015.<sup>311</sup> This major revision of labour law has, *inter alia*, important implications for redundancy compensations (see Section 4.7).

### 12.1 Legislative amendments

- Entry into force of the Labour and Security Act.<sup>312</sup>
- The sole ground construction (Article 5(2) GETA) was abolished in 2015.<sup>313</sup>

### 12.2 Case law

A few interesting cases are briefly summarised below. The judiciary and the NIHR follow the CJEU's interpretation of the grounds (e.g. disability, as is clear from Opinion 2015-18, for example, as summarised below), its restrictive approach concerning the possibilities to justify discrimination and its lenient or wide approach concerning the interpretation of the scope of application of this legislation.

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

**Date of decision:** 24 February 2015

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<sup>308</sup> SCP 2014, *Ervaren Discriminatie in Nederland*, available at: [www.scp.nl/Publicaties/Alle\\_publicaties/Publicaties\\_2014/Ervaren\\_discriminatie\\_in\\_Nederland](http://www.scp.nl/Publicaties/Alle_publicaties/Publicaties_2014/Ervaren_discriminatie_in_Nederland); SCP 2015, *Op Afkomst Afgewezen*, [http://www.scp.nl/Publicaties/Alle\\_publicaties/Publicaties\\_2015/Op\\_afkomst\\_afgewezen](http://www.scp.nl/Publicaties/Alle_publicaties/Publicaties_2015/Op_afkomst_afgewezen) (both last accessed 7 March 2016).

<sup>309</sup> Administrative Jurisdiction Division of the Council of State, 12 November 2014, ECLI:NL: RVS:2014:4117.

<sup>310</sup> The CERD's Concluding observations on the nineteenth to twenty-first periodic reports of the Netherlands are available at: [http://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/NLD/CERD\\_C\\_NLD\\_CO\\_19-21\\_21519\\_E.pdf](http://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/NLD/CERD_C_NLD_CO_19-21_21519_E.pdf) (last accessed 7 March 2016).

<sup>311</sup> Netherlands, Labour and Security Act (*Wet Werk en Zekerheid*), *Staatsblad* 2014, 216.

<sup>312</sup> Netherlands, Labour and Security Act (*Wet Werk en Zekerheid*), *Staatsblad* 2014, 216.

<sup>313</sup> Tweede Kamer 2010-2011/2013-2014, 32 476, nos. 1-11.

**Reference number:** ECLI:NL:RBROT:2015:2848

**Address of the webpage:** [www.rechtspraak.nl](http://www.rechtspraak.nl)

**Brief summary:** This case concerned a shop manager who, as a reaction to several instances of theft, put up a note in the staff room, which called upon all employees to be more attentive, and which amongst the characteristics of potential thieves mentioned "Antilleans / gold teeth". The employer, following complaints from other employees, decided to use the most far-reaching measure possible and summarily dismissed the shop manager (with immediate effect). Such a dismissal (on the ground of Article 7:677 jo. 7:678 Dutch Civil Code) requires an urgent cause, which must be such that an employer cannot be expected to continue the contract.

The District Court of Rotterdam, in summary proceedings brought by the dismissed shop manager against the dismissal, decided that the circumstances of the case did not justify such a strong measure, inter alia referring to the fact that the note had been in the staff room for weeks without any reaction whatsoever before complaints were made by other employees (which implied that the requirement of urgency had not been met). The Court decided that the shop manager was entitled to receive her salary from the date of the unjustified termination and that the employer should allow her to start working again.

It is important to note in this respect that summary dismissals usually remove every right to severance/redundancy pay and, particularly, unemployment benefits (although welfare benefits, which are far lower, remain available). Courts are, partly for this reason, very reluctant to grant summary dismissal and normally only allow it in very exceptional circumstances, such as fraud or theft.

**Name of the Court:** Limburg District Court

**Date of decision:** 31 March 2015

**Reference number:** ECLI:NL:RBLIM:2015:2660

**Address of the webpage:** [www.rechtspraak.nl](http://www.rechtspraak.nl)

**Brief summary:** This case concerned a security employee working for a casino who posted remarks on Facebook that were strongly discriminatory, for example referring to Muslims as an "enormous cancer tumour". This was against the official company policy as regards discrimination, which was laid down in its employment regulations. The employee, moreover, had a long history of conflicts with his employer and had received official warnings before. Unlike the first case above, the employee was not dismissed with immediate effect, but the employer did decide to go to court, requesting the court to dissolve the employment contract on the basis of an urgent reason or, alternatively, on the basis of a substantial change of circumstances (7:685(2) jo. 7:678 Dutch Civil Code).

The District Court of Limburg found that the circumstances of the case did not justify dismissal for an urgent reason. However, the Court did grant the alternative request to dissolve the labour agreement on the basis of a substantial change of circumstances. In the Court's decision, the previous conflicts between the employee and the employer, as well as the former's refusal to follow an anti-aggression course, were considered to constitute important circumstances. The employment contract was therefore terminated, and the employee was not granted any compensation.

**Name of the Court:** Netherlands Institute for Human Rights

**Date of decision:** 26 February 2015

**Reference number:** NIHR 2015-18

**Address of the webpage:** [www.rechtspraak.nl](http://www.rechtspraak.nl)

**Brief summary:** In this case, a woman had submitted an application for a job as a junior promotion employee at a marketing company. The job would entail working at various locations, as well as wearing clothing in accordance with a dress code (depending on the client). This clothing is provided by the marketing company in two sizes, M and L. In response to her application, the woman received a questionnaire, which contained a question as to her clothing size. After finding out that the clothing size of the applicant

was XL, the employer refused to hire her, because there were no work clothes available in her size.

The woman decided to complain about this decision to the local Anti-Discrimination Bureau. After several emails and telephone conversations between the Anti-Discrimination Bureau and the employer, the latter offered the woman a job as senior promotion employee, which would entail different clothing requirements. However, the applicant refused this offer, as she did not possess a driving licence or a car. Eventually, she decided to bring the case to the Dutch equality body, the Netherlands Institute for Human Rights (NIHR).

The NIHR first reiterated the case law of the CJEU. Referring to joined Cases C-335/11 and C-337/11 (*Skouboe Werge and Ring*), it held that the concept of 'disability' must be understood as 'a limitation which results in particular from physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers'.

Subsequently, the equality body found, in line with Case C-354/13 (*FOA/Kommunernes Landsforening*), that obesity in itself does not constitute a 'disability' within the meaning of Directive 2000/78/EC and the case-law of the CJEU, as it does not necessarily entail the existence of a limitation. However, if the obesity entails a limitation that may hinder the full and effective participation of that person in professional life on an equal basis, it can be covered by the concept of 'disability'. This would be the case, in particular, if the obesity hindered full and effective participation on account of reduced mobility or the onset in the individual of medical conditions preventing them from carrying out their work or causing discomfort when carrying out their professional activity.

Based on this case law, the NIHR found that the DDA, which transposes Directive 2000/78/EC, applied in the case at hand, as the de facto requirement of size M/L meant that the obesity of the applicant concerned entailed a limitation that might hinder their full and effective participation in professional life on an equal basis, thus giving rise to indirect discrimination on the ground of disability/chronic disease (obesity).

The defendant argued that the requirement was objectively justified, as the discriminatory measure aimed to preserve an efficient business model, which is necessary in a market that is distinguished by a high level of competition. The NIHR found that this was a legitimate aim. Furthermore, it considered the requirement proportionate and necessary, finding that the proposed reasonable accommodation of providing clothing in larger sizes would impose a disproportionate burden upon the employer. The applicant's proposal to wear men's clothes was also rejected as being unreasonable.

The NIHR decided that, in balancing the interest of the defendant to preserve low costs against the interest of the applicant to be hired, the interests of the defendant in this case were more important, especially since the applicant was offered a job as a senior promotion employee instead (which, as it apparently turned out during the hearing, could also be fulfilled without possessing a driving licence). Thus, the NIHR found the indirectly discriminatory requirement objectively justified, and ruled that the employer did not make a prohibited distinction on the ground of chronic disease.

**Name of the Court:** Netherlands Institute for Human Rights

**Date of decision:** 28 May 2015

**Reference number:** NIHR 2015-61

**Address of the webpage:** [www.rechtspraak.nl](http://www.rechtspraak.nl)

**Brief summary:** In this case, the NIHR confirmed its previous case-law that a policy implemented by a local government that would eventually put an end to 'trailer parks'

(*woonwagenkampen*) amounts to discrimination on the ground of race (ethnic identity). In the Netherlands, many Roma and Traveller people live in caravans or trailers, situated in officially designated trailer parks.

In the city of Vlaardingen, nine places for caravans or trailers were available at a designated trailer park. The municipal government, with reference to (i) integrating the residents of these parks into wider society and (ii) the financial costs associated with these parks, implemented a practice of dismantling any stand which became unoccupied. A resident of the trailer park in Vlaardingen brought a case before the NIHR against the municipal government, complaining about this policy. The woman, who lived with her parents in one of the trailers, wanted to leave the parental home and move into a trailer of her own with her partner. She complained that the policy rendered it effectively impossible for (the children of) current residents to move to another trailer and therefore threatened their way of living (invoking the ground of race / ethnic identity).

The NIHR, referring to its Decisions in NIHR 2014-165, -166 and -167, found that the policy affected the core of caravan culture. The equality body considered that the (*prima facie* neutral) policy only affected one particular group, i.e. Roma people and Travellers, and therefore concluded that the policy was directly discriminatory on the ground of race (the NIHR referred here to CJEU Case C-196/02 (*Nikoloudi*), ECLI:EU:C:2005:141). The two exceptions of Article 2(4) GETA, concerning cases where a person's racial appearance is a determining factor, or cases where a person's racial appearance is, by reason of the nature of the particular occupational activity concerned, a genuine and determining occupational requirement, do not apply. The municipal policy thus constituted a prohibited distinction on the ground of race.

## ANNEX 1: TABLE OF KEY NATIONAL ANTI-DISCRIMINATION LEGISLATION

Please list below the **main transposition and anti-discrimination legislation** at both federal and federated/provincial level.

**Country: the Netherlands**

**Date: 31 December 2015**

<b>Title of legislation (including amending legislation)</b>	Title of the Law: General Equal Treatment Act Abbreviation: GETA Date of adoption: 2 March 1994 Entry into force: 1 September 1994 Latest amendments: 15 June 2015 Web link: <a href="http://wetten.overheid.nl/BWBR0006502">http://wetten.overheid.nl/BWBR0006502</a> Grounds covered: Race, religion & belief, political opinion, hetero- or homosexual orientation, sex, nationality and civil (or marital) status
	Civil
	Material scope: Employment relationships (both civil and public), occupational training and education, goods and services (including general education) + liberal professions
	Principal content: Prohibition of direct and indirect discrimination
<b>Title of legislation (including amending legislation)</b>	Title of the Law: Disability Discrimination Act Abbreviation: DDA Date of adoption: 3 April 2003 Entry into force: 1 December 2003 Latest amendments: 10 July 2014 Web link: <a href="http://wetten.overheid.nl/BWBR0014915">http://wetten.overheid.nl/BWBR0014915</a> Grounds covered: Disability and chronic disease
	Civil
	Material scope: Employment relationships (both civil and public), occupational training and education + liberal professions + education + housing
	Principal content: Prohibition of direct and indirect discrimination
<b>Title of legislation (including amending legislation)</b>	Title of the Law: Age Discrimination Act Abbreviation: ADA Date of adoption: 17 December 2003 Latest amendments: 10 July 2014 Entry into force: 1 May 2004 Web link: <a href="http://wetten.overheid.nl/BWBR0016185">http://wetten.overheid.nl/BWBR0016185</a> Grounds covered: Age
	Civil
	Material scope: Employment relationships (both civil and public), occupational training and education + liberal professions
	Principal content: Prohibition of direct and indirect discrimination



## ANNEX 2: TABLE OF INTERNATIONAL INSTRUMENTS

**Country: the Netherlands**

**Date: 31 December 2015**

<b>Instrument</b>	<b>Date of signature (if not signed please indicate) Dd/mm/yyyy</b>	<b>Date of ratification (if not ratified please indicate) Dd/mm/yyyy</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)	Date of signature: 4.11.1950	Date of ratification: 31.8.1954	No	Yes	Yes
Protocol 12, ECHR	Date of signature: 4.11.2000	Date of ratification: 28.7.2004	No	Yes	Yes
Revised European Social Charter	Date of signature: 23.1.2004	Date of ratification: 3.5.2006	No	Yes	Yes
International Covenant on Civil and Political Rights	Date of signature: 25.6.1969	Date of ratification: 11.12.1978	No	Yes	Yes
Framework Convention for the Protection of National Minorities	Date of signature: 1.2.1995	Date of ratification: 16.2.2005	No	N.A	Yes
International Covenant on Economic, Social and Cultural Rights	Date of signature: 25.6.1969	Date of ratification: 11.12.1978	No	Yes	Yes
Convention on the Elimination of All Forms of Racial Discrimination	Date of signature: 24.10.1966	Date of ratification: 10.12.1971	No	Yes	Yes
Convention on the Elimination of Discrimination Against	Date of signature: 17.7.1980	Date of ratification: 23.7.1991	No	Yes	Yes

<b>Instrument</b>	<b>Date of signature (if not signed please indicate) Dd/mm/yyyy</b>	<b>Date of ratification (if not ratified please indicate) Dd/mm/yyyy</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>
Women					
ILO Convention No. 111 on Discrimination	Date of signature: unknown	Date of ratification: 15.3.1973	No	NA	Yes
Convention on the Rights of the Child	Date of signature: 26.1.1990	Date of ratification: 6.2.1995	No	NA	Yes
Convention on the Rights of Persons with Disabilities	Date of signature: 30.3.2007	Date of ratification: ratification in process <sup>314</sup>	No	No	No

<sup>314</sup> After the cut-off date of this report the process was concluded. The Convention was ratified on 14 June 2016.

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