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Country report

Gender equality



The Netherlands
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Country report

Gender equality

How are EU rules transposed into
national law?

The Netherlands

Marlies Vegter

Reporting period 1 January 2017 – 31 December 2017

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1. Introduction

1.1 Basic structure of the national legal system

The Netherlands is a civil-law country. Its laws are written. The role of case law is small in theory, but in practice it is impossible to understand the law in many fields without taking into account the relevant case law. The primary law-making body is formed by the Dutch Parliament in cooperation with the government. When operating jointly to create laws, they are commonly referred to as the legislature.

The Dutch court system consists of various types of courts. At first instance judgments are rendered by, what is simply called, 'the courts' (the ordinary courts). Appeals from the judgments of the (ordinary) courts can be brought before the appeal courts. On top of the hierarchy there is the Dutch Supreme Court ('Hoge Raad'). Within the courts a distinction is made between criminal law, civil law and administrative law. In addition there are specific courts for administrative cases on appeal from the ordinary courts. These courts are the so-called Central Appeals Tribunal ('Centrale Raad van Beroep') and the Administrative litigation section of the Council of State.

1.2 List of main legislation transposing and implementing Directives

- Article 1 of the Constitution stipulates that the government must treat all citizens equally and forbids discrimination on all relevant grounds. The article has been implemented in various laws.
- Act on the Netherlands Institute for Human Rights (2012), Stb. 2011, 573.
- General Equal Treatment Act (1994), Stb. 1994, 230.
- Act on Equal Treatment of Men and Women (1980), Stb. 1980, 86.
- Civil Code, Article 7:646 (prohibiting sex discrimination in employment relationships) and Article 7:670(2) (prohibiting the termination of the employment relationship during pregnancy, maternity leave and six weeks after resuming work).

2. General legal framework

2.1 Constitution

2.1.1 Does your national Constitution prohibit sex discrimination?

Yes. Article 1 of the Constitution stipulates that the government must treat all citizens equally and forbids discrimination on, inter alia, the ground of sex.

2.1.2 Does the Constitution contain other Articles pertaining to equality between men and women?

No.

2.1.3 Can the Article(s) mentioned in the two previous questions be invoked in horizontal relations (between private parties)?

No.

2.2 Equal treatment legislation

2.2.1 Does your country have specific equal treatment legislation?

Yes. Equal treatment between men and women is prescribed by General Equal Treatment Act ('GETA'), Act on Equal Treatment of Men and Women ('ETA') and Article 7:646 of the Dutch Civil Code. Article 5 GETA forbids discrimination in the field of employment, Article 6 GETA in the field of the liberal professions, Article 6a GETA in the area of associations of employers, employees and in professional organisations, Article 7 in the field of goods and services and Article 7a in the area of social protection, including social security and social advantages. ETA prohibits sex discrimination in the field of employment and pensions, both in the private and in the public sector. Article 7:646 of the Dutch Civil Code specifically relates to the private sector.

GETA also prohibits discrimination on other grounds: race/ethnic origin, religion/beliefs, political affiliation, nationality and marital status. The Equal Treatment Act on the Ground of Age prohibits age discrimination and the Equal Treatment Act on the Ground of Handicap and Chronic Illness forbids discrimination on these grounds. The Dutch Civil Code contains specific articles that relate to discrimination on the ground of full-time or part-time work (Article 7:648) and the temporary character of the employment agreement (Article 7:649).

3. Implementation of central concepts

3.1 Sex/gender/transgender

3.1.1 Are the terms gender/sex defined in your national legislation?

No.

3.1.2 Is discrimination due to gender reassignment explicitly prohibited in your national legislation?

No. Discrimination due to gender reassignment, however, is considered to be a form of discrimination on the basis of sex by both the Netherlands Institute for Human Rights and by the courts.

3.2 Direct sex discrimination

3.2.1 Is direct sex discrimination explicitly prohibited in national legislation?

Yes. Direct sex discrimination is explicitly prohibited in Article 1(1)(b) GETA, Article 1(1)(b) ETA and Article 7:646 of the Dutch Civil Code.

Direct sex discrimination, or as is stated in Dutch law, 'direct distinction', is defined as treating a person in a different way than another person in a comparable situation on the ground of sex. In my view this definition complies with the EU definition. The only difference is that Dutch law uses the term 'distinction' instead of 'discrimination'. However, from the case law it is clear that a 'distinction' is interpreted in the same manner as 'discrimination'. This is not explicitly stated, but is clear from the judgments in discrimination cases.

3.2.2 Are pregnancy and maternity discrimination explicitly prohibited in legislation as forms of direct sex discrimination?

Yes. Pregnancy and maternity discrimination are explicitly prohibited in Article 1(2) GETA, Article 1(2) ETA and Article 7:646(5)(b) of the Dutch Civil Code. These provisions comply with Article 2(2)(c) of Directive 2006/54.

3.2.3 Are there specific difficulties in your country in applying the concept of direct sex discrimination? If so, please explain these difficulties, with reference to legislation and/or (national) case law if relevant.

There are no specific difficulties. The only thing one could say is that, where sex-segregated services are concerned, the closed system of justification is unduly restrictive, as it rules out certain innocent forms of sex-segregated services as well. Examples thereof are offering free coffee only to mothers on mother's day¹ and a regulation that men should put their bikes in the highest rack in a bicycle storage unit.² In both cases the Netherlands Institute for Human Rights (NIHR) accepted the existence of direct discrimination.

3.3 Indirect sex discrimination

3.3.1 Is indirect sex discrimination explicitly prohibited in national legislation?

Yes. Indirect sex discrimination is explicitly prohibited in Article 1(1)(c) GETA, Article 1(1)(c) ETA and Article 7:646 of the Dutch Civil Code.

¹ NIHR, opinion 2013-163, www.mensenrechten.nl, accessed 5 October 2015.

² NIHR, opinions 2010-62 and 2010-63, www.mensenrechten.nl, accessed 5 October 2015.

Indirect sex discrimination, or as stated in Dutch law, 'indirect distinction', is deemed to exist: 'in case an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with other persons.' In my view this definition complies with the EU definition. The only difference is that Dutch law uses the term 'distinction' instead of 'discrimination'. However, from the case law it is clear that a 'distinction' is interpreted in the same manner as 'discrimination'. See question 3.2.1.

3.3.2 Is statistical evidence used in your country in order to establish a presumption of indirect sex discrimination? Please provide some examples of cases, if available.

Yes, sometimes.

In a case before the Amsterdam Court of Appeal³, the court ruled that the fact that 28 % of the applicants for a position at Amsterdam University were female, whereas the four persons placed on the short list were all male, was one of the relevant aspects in establishing a presumption of sex discrimination. Another relevant aspect was the fact that women were (and are) underrepresented in academic positions in the Netherlands and especially so in the Department of Economics of the Faculty of Economics and Business, where there has even been a decline in the number of female academics.

Another example is the judgment by the Court of Appeal of The Hague⁴ on the question whether reducing the survivor's pension in the case of an age difference of more than 10 years between the spouses is discriminatory, as women are more often the younger partner than men. The NIHR had applied the so-called correlation test and the chi-square test, both statistical tests, and had ruled that these tests made it clear that more women than men were put at a disadvantage by the reduction. However, the defendant pension funds hired a Professor of statistics who stated that the NIHR's line of reasoning was not consistent. The court subsequently ruled that the applicants had not sufficiently disputed the adequacy of the professor's comments. This professor has been previously engaged by defendant parties in proceedings on discrimination in order to refute statistical evidence.⁵

3.3.3 Is in your view the objective justification test applied correctly by national courts? Please provide some examples of cases, if available.

Yes, in general this test is applied correctly.

There are very few cases on sex discrimination, however. Most discrimination cases before the Dutch courts concern age discrimination. In these cases the courts always first investigate whether the distinction made has a legitimate aim and subsequently whether the means chosen to attain that aim are suitable and necessary. See for example the Amsterdam Court of Appeal on the termination of the employment agreement with airline staff at the age of 63.⁶

3.3.4 Are there specific difficulties in your country in applying the concept of indirect sex discrimination? If so, please explain these difficulties, with reference to legislation and/or (national) case law if relevant.

There are few difficulties. One of them is how to interpret statistical evidence (see question 3.3.2). Also sometimes there is a discussion about the extent to which general data may be used in discrimination cases. However, the general line in this respect appears to be

³ Amsterdam Court of Appeal, 7 October 2014, *JAR* 2014/294, ECLI:NL:GHAMS:2014:4132.

⁴ The Hague Court of Appeal, 9 June 2015, ECLI:NL:GHDHA:2015:1284.

⁵ The Hague Court, 21 December 2010, *JAR* 2011/71.

⁶ Amsterdam Court of Appeal, 2 June 2015, *JAR* 2015/184, ECLI:NL:GHAMS:2015:2133.

that these data can be used, but only in combination with more specific evidence. See the judgment by the Amsterdam Court of Appeal mentioned in the answer to question 3.3.2.⁷

3.4 Multiple discrimination and intersectional discrimination

3.4.1 Is multiple discrimination – i.e. discrimination based on two or more grounds simultaneously – and/or intersectional discrimination – i.e. discrimination resulting from the interaction of grounds of discrimination which interact to produce a new and different type of discrimination – explicitly addressed in national legislation?

No. There are no pending proposals in this respect.

3.4.2 Is there any case law that addresses multiple discrimination and/or intersectional discrimination (where gender is one of the grounds at stake)?

Yes, but there is hardly any case law from the courts. There is an old judgment from 2000, in which the employment agreement of a woman had been terminated following a conflict with her employer.⁸ The employer had indicated that he did not expect the employee to return to her full working hours after maternity leave, as this would be too difficult for her in view of her being a Moroccan woman and being married to a traditional Moroccan man. The court ruled that this constituted discrimination on the grounds of sex and race and awarded a higher severance payment than usual.

The NIHR has dealt more often with multiple and/or intersectional discrimination. In situations of multiple discrimination, the NIHR investigates all the grounds mentioned. An example is opinion 2014-160 in which the NIHR ruled that a hospital had discriminated against a woman of Iraqi origin on the grounds of both sex and race.⁹ An employee of the hospital had rejected the application of the woman with reference to her origins and the responsibility for her family.

Intersectional discrimination is a more difficult subject. Perhaps the following example is not accurate, because it concerns a conflict of fundamental rights rather than intersectional discrimination, but worth noting is an opinion by the NIHR in which it balanced the right of a Muslim employee of a youth care centre who did not shake hands with men because of her religion, and a father who visited the youth care centre with his son and felt discriminated against by the employee in question. The NIHR ruled that the youth care centre had correctly protected the employee rather than the father, as otherwise the centre would have discriminated on the basis of religion. Besides, the employee had explained to the father why she did not shake hands and had greeted him respectfully in another way.¹⁰

3.5 Positive action

3.5.1 Is positive action explicitly allowed in national legislation?

Yes. Article 7:646(4) of the Dutch Civil Code states that it is allowed to divert from the equality principle as laid down in Article 7:646(1) where provisions are concerned that aim to place female workers in a privileged position with a view to removing or reducing factual inequalities as long as there is a fair relation between the differences made and the objective. The same is stated in Article 5(1) ETA.

⁷ Amsterdam Court of Appeal, 7 October 2014, JAR 2014/294, ECLI:NL:GHAMS:2014:4132.

⁸ District Court of Schiedam, 5 July 2000, JAR 2000/180.

⁹ Opinion 2014-160, www.mensenrechten.nl, accessed 5 October 2015.

¹⁰ Opinion 2015-76, www.mensenrechten.nl, accessed 5 October 2015.

In so far as one can call this a definition, this is how positive action is defined in Dutch law. In my view this definition does not fully comply with the EU definition found in Article 157(4) TFEU. The definition in Dutch law does not mention that the objective is to ensure full equality in practice between men and women in working life. Besides, the Dutch definition explicitly refers to female workers, while the EU definition is neutrally worded. Finally, the EU definition does not include a reference to the principle of proportionality, as does the Dutch definition.

3.5.2 Are there specific difficulties in your country in relation to positive action? If so, please explain these difficulties, with reference to legislation and/or (national) case law if relevant.

Yes, there are specific difficulties resulting from the case law of the CJEU. As the CJEU has ruled in the cases *Kalanke*, *Marschall*, *Badeck* and *Abrahamsson*, recruitment procedures must be open to both men and women and it is not allowed to reserve job positions for women only. This case law has had the effect of practically terminating any affirmative action aimed at women. An example of this is the policy that was followed by the University of Groningen. This University wished to increase the number of female professors. With this aim in mind the University nominated 17 female senior lecturers for a future appointment as a professor. The NIHR ruled that this policy conflicted with the CJEU case law, as only female senior lecturers were asked to submit their file with a view to an appointment as a professor, whereas men could not do so.¹¹ In an opinion from December 2012, however, the NIHR reached a different view in a case concerning the (technical) University of Delft.¹² This case also concerned an increase in the number of female professors. The University had reserved ten tenure tracks for female academics. The NIHR ruled that in this specific case this was allowed, as the disadvantageous position of women at the University was persevering and structural and the University Board had already taken many measures to change this situation, but without any significant effect. The NIHR referred in its opinion to the wording of Article 157(4) TFEU on realising full equality in practice and stated that, when *Kalanke* and the other judgments were rendered, the starting point was still equal opportunities for men and women and not full equality in practice.

The opinion in the case of Delft University has been welcomed from the point of view of gender equality, but critics have claimed that the reasoning of the NIHR is not entirely valid, as Article 157(4) TFEU had already been referred to in the cases of *Badeck* and *Abrahamsson* (then still Article 141(4) EC).¹³

It is clear that the discussion is not over yet, but it is also clear that the case law of the CJEU forms a hindrance in the Netherlands for affirmative action for women.

3.5.3 Has your country adopted measures that aim to improve the gender balance in company boards?

From 1 January 2013 until 1 January 2016 it was stipulated in the Dutch Civil Code that at least 30 % of the members of the board of directors and the supervisory board of a joint-stock company and/or a private company had to be female. If the 30 % requirement was not reached, the company was required to explain why this was the case and what measures it was taking to attain a 30 % representation of women on the board. These articles expired on 1 January 2016. The aim of the regulation has not been met. The number of women on boards of directors had increased from 7.4 % to 9.6 % by the end

¹¹ Opinion 2011-198, www.mensenrechten.nl, accessed 5 October 2015. See also JAR 2012/78 with a comment by E. Cremers-Hartman.

¹² Opinion 2012-195, www.mensenrechten.nl, accessed 5 October 2015. See also JAR 2013/41 with a comment by E. Cremers-Hartman.

¹³ See Veldman, A.G. (2012), 'Voorkeursbeleid en Unierechtelijke beperkingen: over het College, het konijn en de hoge hoed', in Holtmaat, R. et al. (Eds.), *Gelijke behandeling 2012* (pp. 278-295), Nijmegen, 2013.

of 2014, which is far from the 30 % target. The number of women on supervisory boards increased in the same period from 9.8 % to 11.2 %.¹⁴ The Minister therefore decided in January 2016 to continue the regulation until 1 January 2020. A bill to extend the regulation was adopted by Parliament on 7 February 2017 and entered into force on 13 April 2017.

Also relevant is the Dutch Corporate Governance Code,¹⁵ which aims to give guidelines for effective cooperation and management in listed companies. The idea is that compliance with these guidelines increases trust in good and responsible management by these companies. Article 2.1.5 of the Code stipulates that companies will draft a diversity policy for their boards. If less women are appointed in these boards than mentioned in the law (30%), the company has to explain the present state of affairs and the measures that will be taken to improve the situation.

There is also a charter entitled '*Talent naar de Top*'.¹⁶ This charter has been signed by more than 250 companies and other organisations. These companies and organisations have committed themselves to appoint more women at the (sub-)top of their organisation. However, the effect of the charter has been small. Because of this – and because other initiatives have not worked well either – the Government introduced a new website (www.navigerennaardetop.nl)¹⁷ which announces when positions on boards in the 200 biggest companies in the Netherlands become free. On the website www.topvrouwen.nl 'board ready' women can register themselves so as to make it easier for companies to find a suitable female candidate.

On 18 May 2016, the Federal Government published a press statement stating that it had met the target of 30 %. Since 2015, women have held 31 % of the positions which fall within the highest salary scale for civil servants

However, on 6 March 2018 new research was published that showed that the number of women in company boards is increasing extremely slowly, if at all.¹⁸ The Commission that monitors the number of women on boards therefore for the first time advised the introduction of a quota. The minister who is responsible for women's emancipation will take stock of the situation in the first quarter of 2019 and will then decide on further measures. Until then the soft law approach will be intensified, but no 'hard' measures will be taken.

3.5.4 Has your country adopted other positive action measures to improve the gender balance in some fields, e.g. in political candidate lists or political bodies? If so, please describe these measures.

No, the focus is on high-level positions in employment, both in the private and in the public sector.

3.6 Harassment and sexual harassment

3.6.1 Is harassment explicitly prohibited in national legislation?

¹⁴ Commissie monitoring talent naar de top (2015), '*Topvrouwen in de wachtkamer*', *Bedrijvenmonitor 2012-2015*, Zeist 2015. Available at: http://www.talentnaardetop.nl/uploaded_files/mediaitem/Bedrijvenmonitor_2012-2015_volledig_rapport_v2.pdf, accessed 18 May 2016.

¹⁵ <https://www.mccg.nl/?page=3763>. A revised version of the Code was published in December 2016.

¹⁶ www.talentnaardetop.nl, accessed 18 May 2016.

¹⁷ Website accessed 18 May 2016.

¹⁸ Letter to Parliament, 6 March 2018, ref. 1327715: available at: <https://www.rijksoverheid.nl/documenten/kamerstukken/2018/03/06/kamerbrief-over-het-aandeel-vrouwen-aan-de-top-van-het-bedrijfsleven>.

Yes. Articles 7:646(6) of the Dutch Civil Code, 1a(1) GETA and 1a(1) ETA all stipulate that the prohibition of a direct distinction includes the prohibition of harassment and sexual harassment.

Harassment is defined as conduct that is related to the sex of a person and which has the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment. This definition is almost the same as the definition found in Directive 2006/54. The only difference is that in the Dutch text the term 'unwanted' is lacking. The Dutch Government believes that this would place quite a heavy burden of proof on the victim. Instead, the Government wanted to emphasise that sexual harassment, objectively speaking, is always an offence. Therefore, omitting 'unwanted' does not seem to be a problem, since this offers more protection to potential victims of discrimination/sexual harassment. Notwithstanding this clear position by the Government that sexual harassment is, objectively speaking, an offence, the Dutch Supreme Court, in a judgment in 2009, interpreted the definition of sexual harassment in such a way that it left some room for the accused to adduce subjective arguments (concerning the motive for the behaviour in question).¹⁹

3.6.2 Please specify the scope of the prohibition on harassment (e.g. does it cover employment and access to goods and services; is it broader?).

The prohibition on harassment covers employment, access to goods and services and social protection. In the field of employment, all employment relations are included, thus also public servants, self-employed workers, contractors and so on. With respect to goods and services and social protection, no further specification of the scope is given. The prohibition on harassment has the same scope as the prohibition on discrimination in general. Harassment is always forbidden. If it would take place outside the areas of employment and access to goods and services, it would still be deemed to be unlawful on the basis of the general article in Dutch law on unlawful action/tort (art. 6:162 DCC), as it is considered to be conduct that is not socially acceptable. This only holds true of course if the judging body is of the opinion that harassment has actually occurred. Opinions may differ about the question whether specific behaviour constitutes harassment or not.

3.6.3 Is sexual harassment explicitly prohibited in national legislation?

Yes. Articles 7:646(6) of the Dutch Civil Code, 1a(1) GETA and 1a(1) ETA all stipulate that the prohibition of a direct distinction includes the prohibition of sexual harassment.

Sexual harassment is defined as any form of verbal, non-verbal or physical conduct of a sexual nature, which has the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment. This definition is almost the same as the definition found in Directive 2006/54. The only difference is that in the Dutch text the term 'unwanted' is lacking. The Dutch Government believes that this would place quite a heavy burden of proof on the victim. See further the answer to question 3.6.1.

3.6.4 Please specify the scope of the prohibition on sexual harassment (e.g. does it cover employment and access to goods and services; is it broader?).

See the answer to question 3.6.2.

3.6.5 Does national legislation specify that harassment and sexual harassment as well as any less favourable treatment based on the person's rejection of or submission to such conduct amounts to discrimination (see Article 2(2)(a) of Directive 2006/54)?

¹⁹ Supreme Court, 10 July 2009, *JAR* 2009/202, LJN:BI4209.

Yes.

3.7 Instruction to discriminate

3.7.1 Is an instruction to discriminate explicitly prohibited in national legislation?

Yes. Articles 7:646(5)(a) of the Dutch Civil Code, 1(1)(a) GETA and 1(1)(a) ETA state that a direct distinction is prohibited as well as the instruction to discriminate.

3.7.2 Are there specific difficulties in your country in relation to the concept of instruction to discriminate? If so, please explain these difficulties, with reference to legislation and/or (national) case law if relevant.

There are no specific difficulties. The concept is hardly used and there is no case law on this subject.

3.8 Other forms of discrimination

Are any other forms of discrimination prohibited in national law, such as discrimination by association or assumed discrimination?

No, there are no provisions in this respect. In the case law these types of discrimination are considered to be discrimination on the (main) grounds involved, e.g. handicap or religion.

4. Equal pay and equal treatment at work (Article 157 TFEU and Recast Directive 2006/54)

4.1 Equal pay

4.1.1 Is the principle of equal pay for equal work or work of equal value implemented in national legislation?

Yes. Article 7:646(1) of the Dutch Civil Code states that the employer is not allowed to make a distinction between men and women with respect to employment conditions. This includes equal pay for equal work or work of equal value. In Article 7(2) ETA the concept of pay is defined as 'any remuneration owed by the employer to the employee in return for the labour of the latter.' In Article 7(1) ETA it is explained that, when comparing the pay of a male and a female employee, a comparison must be made with an employee of the other sex who does equal work or work of equal value.

4.1.2 Is the concept of pay defined in national legislation?

Yes. See the answer to question 4.1.1 above.

The definition in Dutch law is less elaborate than the definition in Article 157(2) TFEU, but the meaning is the same. The concept of pay in Dutch law is explained in a way similar to the TFEU definition of Article 157(2).

4.1.3 Does national law explicitly implement Article 4 of Recast Directive 2006/54 (prohibition of direct and indirect discrimination on grounds of sex with regard to all aspects and conditions of remuneration)?

No, not as explicitly as in Article 4 of the Recast Directive. As pointed out above discrimination is prohibited with respect to, inter alia, employment conditions in the Dutch Civil Code, whereas in the ETA it is explained in what way a comparison must be made.

4.1.4 Is a comparator required in national law as regards equal pay?

Yes and no. In the Netherlands a two-way approach is used in order to combat unequal pay practices. The first approach is through a concrete comparison of the salary of a person of one sex with that of a person of another sex. No hypothetical comparator is allowed. The comparator should be an existing person within the same company. This is the approach that is laid down in Article 7(1) ETA.

The second approach is not specific for equal pay, but is an application of the concept of indirect discrimination. In this approach a certain practice, e.g. the granting of extra pay to workers who are prepared to work overtime, may be contested if the result of this practice is that substantially more men than women receive the extra pay. It then has to be examined whether there is an objective justification for the difference in pay. The normal (stringent) objective justification test is applicable here. In this approach no specific comparator is needed, as different pay systems can be compared with one another. In most cases these systems or practices will be used within one company or group of companies (a concern), but theoretically it is possible that a comparison is made between systems or practices that appear in a collective agreement or a statutory arrangement.

4.1.5 Does national law lay down parameters for establishing the equal value of the work performed, such as the nature of the work, training and working conditions?

No.

4.1.6 Does national (case) law address wage transparency in any way?

Yes. In Article 8 ETA it is laid down that work must be valued on the basis of a sound system of job evaluation. The idea behind this rule is that an employer should make his reward system transparent.

In the case law a reference is sometimes made to one of the standard considerations of the CJEU, i.e. that real transparency, which makes an effective verification possible, is ensured only when the principle of equal pay is applied to every element of the salaries of men and women. In this respect the Supreme Court ruled on 12 April 2002 that a reversal of the burden of proof, that work is of equal value, is appropriate if a company applies a reward system that is characterised by a complete lack of transparency.²⁰ In the particular matter, this was not the case, according to the Supreme Court.

In another case, the Court of Appeal of 's-Hertogenbosch ruled in an equal pay case that the employer had not clarified why the work experience of the male comparator was of more value than the work experience of the female employee.²¹ Also the employer failed to make transparent why a reduction in the hours of the male employee justified a higher hourly wage. The fact that the employer was not transparent about his motives to pay the male worker a higher salary than his female colleague therefore led the court to rule that the employer had discriminated against the woman and had to pay to her the same salary as to the man.

Employers thus have to make clear in what way and on the basis of which standards they value the work of their employees. The NIHR follows the same approach. An example thereof is the opinion in which the NIHR ruled that the employer had not made clear which part of the extra pay a male worker received was related to labour shortage. The NIHR explicitly observed that the lack of a transparent salary system is the employer's own risk.²²

4.1.7 Is the European Commission's Recommendation of 7 March 2014 on strengthening the principle of equal pay between men and women through transparency applied in your country? If so, how?

The Recommendation itself is not explicitly applied, but there are various initiatives that aim at reducing the differences in pay between men and women. An important initiative is the website www.gelijkloon.nl (part of www.wageindicator.org). The establishment of this website has been subsidized by the Dutch Government. The website makes it possible to compare wages. Also the site gives substantive information about (equal) pay. In addition, the NIHR has developed the equal pay Quicksan. This Quicksan can be found on the website on recruitment: www.wervingenselectiegids.nl.²³ On 21 April 2011 the NIHR published the results of extensive research into wage differences in general hospitals, on 18 January 2016 a similar report was published on research at six universities of applied sciences (www.mensenrechten.nl/dossier/gelijke-belonging-mv)²⁴ and on 28 November 2017 a report followed on wage differences in insurance companies (<https://mensenrechten.nl/publicaties/detail/38165>).²⁵ In all three sectors the NIHR found a considerable pay gap. The NIHR concluded that these gaps were (partly) due to the use of non-neutral criteria for determining the salary, such as attaching insufficient weight to previous work experience, determining the salary on the last-earned salary elsewhere and basing the salary on negotiations. The NIHR regularly gives workshops and other forms of

²⁰ Supreme Court, 12 April 2002, *JAR* 2002/101.

²¹ Court of Appeal of 's-Hertogenbosch, 13 November 2012, *JAR* 2013/13 and 5 March 2013, *JAR* 2013/106.

²² Opinion 2012-142, www.mensenrechten.nl, accessed 28 October 2015. See also Opinion 2009-76.

²³ Accessed 1 September 2015.

²⁴ Accessed 17 February 2017.

²⁵ Accessed 14 February 2018.

information about this topic to HR advisers and managers, in order to help them avoid unequal pay situations.

4.1.8 Which justifications for pay differences are allowed in legislation and/or case law?

The NIHR makes a distinction between neutral and non-neutral criteria for determining the amount of the salary. Neutral criteria, i.e. justifications that are allowed, are, *inter alia*, work experience in previous positions with the same employer, labour shortages (in some circumstances) and relevant work experience from previous jobs with other employers. Non-neutral criteria are, according to the NIHR, seeking alignment with the last salary earned, pay negotiations, and guarantees that an employee will continue to receive a specific salary or supplement granted to him in the past. The Courts do not always follow this approach by the NIHR, however. For example, an alignment with the last salary earned is in principle considered to be a valid justification.²⁶

4.1.9 Are there specific difficulties related to the application of the principle of equal pay for equal work and work of equal value in practice? For example in case of outsourcing?

There are very few cases concerning equal pay, so it is difficult to make general statements. One of the problematic areas is to establish whether jobs can be compared at all, thus if the female employee and her comparator perform work of equal value. In a case concerning secondary school teachers various parts of the jobs concerned were compared, but finally the conclusion was that the work was not of equal value. This judgment was also based on the fact that apparently the comparator was not instructed to carry out all the tasks that formed part of his job description, because of illness. Therefore the court concluded that the work was not of equal value. In my opinion this approach is not a correct one, as it leaves room for the employer to make work non-comparable.²⁷

Also, the question of reliable statistics is a difficult one. See for example the judgment by the Court of Appeal of The Hague mentioned under question 3.3.2.²⁸

4.2 Access to work and working conditions

4.2.1 Is the personal scope in relation to access to employment, vocational training, working conditions etc. defined in national law (see Article 14 of Directive 2006/54)?

In many instances the personal scope is not explicitly defined in the law, i.e. neither a norm addressee nor a rights holder is mentioned. This must then be derived from the description of the material scope of a particular provision or Act. The definitions of direct discrimination on the ground of sex in Article 7:646(5) sub. b CC and in Article 1(2) ETA include direct discrimination on the grounds of pregnancy, giving birth/delivery and maternity. This means that pregnant workers and women who have (recently) given birth are explicitly protected. Under ETA, this is not only applicable to women with a civil law or public law employment relationship, but also to other categories of persons engaged in work (Article 1c ETA) and to self-employed persons (Article 2 ETA). This provision is lacking in GETA. However, Article 4 of GETA stipulates that it leaves the provisions of the Civil Code and ETA intact. For the purposes of protection against discrimination, only natural persons are considered to be rights holders.²⁹

²⁶ See for example the Central Appeals Tribunal (*Centrale Raad van Beroep*), 11 April 2013, ECLI:NL:CRVB:2013:BZ7299.

²⁷ The Hague Court of Appeal, 21 December 2010, LJN: BP3748, JAR 2011/71.

²⁸ The Hague Court of Appeal, 9 June 2015, ECLI:NL:GHDHA:2015:1284.

²⁹ More information on this topic can be found in the part on the Netherlands in Countouris N. and Freedland, M. (2012), European Network of Legal Experts in the Field of Gender Equality, *The Personal Scope of EU*

The national law does not include a definition of a worker, but it does define the employment agreement. An employment agreement is the agreement through which one party, the employee, undertakes to carry out work in the service of another party, the employer, during a certain period in return for a salary. This definition is fairly similar to the definition that is used in the case law of the CJEU. It is not derived from this case law, but is largely the same.

4.2.2 Is the material scope in relation to (access to) employment defined in national law (see Article 14(1) of the Recast Directive 2006/54)?

Yes. Article 7:646 of the Dutch Civil Code stipulates that an employer may not treat men and women differently with respect to the conditions for access to employment, vocational training, employment conditions, working conditions, promotion and dismissal.

Article 5 GETA states that making a distinction is prohibited with respect to the offer of employment and the conditions for recruitment, assistance in finding employment, entering into employment and the termination thereof, appointment as a civil servant and the termination of employment as a civil servant, employment conditions, (vocational) training during or prior to the employment relationship, promotion and working conditions. This article does not only apply to discrimination on the basis of sex, but also concerns the other forms of discrimination, such as race, ethnic origin, religion, etc.

Article 1(b) ETA stipulates that a employer in the public sector may not treat men and women differently with respect to appointment as a civil servant or appointment in the public sector on the basis of an employment agreement based on civil law, the employment conditions, working conditions, training, promotion and dismissal.

Article 3 ETA forbids unequal treatment with respect to the offer of employment and the conditions for recruitment and with respect to assistance in finding employment.

The relation between these three articles is as follows: Article 5 GETA is the basic article. Article 7:646 of the Dutch Civil Code specifically applies to men and women who work in the private sector and Article 1(b) ETA concerns the public sector.³⁰

In the view of the expert, the material scope in relation to access to employment is more or less the same as Article 14(1) of the Recast Directive.

4.2.3 Has the exception on occupational activities been implemented into national law (see Article 14(2) of Recast Directive 2006/54)?

Yes. Article 5(2) ETA and Article 7:646(2) of the Dutch Civil Code have the same wording as Article 14(2) of Directive 2006/54. The only difference is that a specification is added in Article 5(3) ETA – a specification which also applies to the exception in Article 7:646(2) of the Dutch Civil Code – being that the occupational activities and the training leading thereto are only exempted where Church Ministers are concerned or the occupational activities are explicitly mentioned in the Regulation on Professional Activities for which sex can be a decisive factor. Activities mentioned in this Regulation are inter alia: actor, singer and artist (in so far as necessary for specific roles), personal service, care and nursing and work for the Marine Corps and the Submarine service.

³⁰ *Sex Equality Directives*, European Commission, available at: http://ec.europa.eu/justice/gender-equality/document/index_en.htm#h2-8, accessed 9 September 2015. Nothing has changed since then. For more detail, see: the part on the Netherlands in Countouris N. and Freedland, M. (2012), *European Network of Legal Experts in the Field of Gender Equality, The Personal Scope of EU Sex Equality Directives*, European Commission, available at: http://ec.europa.eu/justice/gender-equality/document/index_en.htm#h2-8, accessed 9 September 2015.

The Regulation on Professional Activities was last changed in 2005. This change was of a technical nature only.

4.2.4 Has the exception on protection for women, in particular as regards pregnancy and maternity, been implemented in national law (see Article 28(1) of Recast Directive 2006/54)?

Yes.

4.2.5 Are there particular difficulties related to the personal and/or material scope of national law in relation to access to work, vocational training, employment, working conditions etc.?

It is worth noting that Dutch law does not explicitly cover the discriminatory termination of self-employment contracts by employers/clients. However, the NIHR interprets the phrase in Article 2 ETA and Article 6 GETA - that discrimination is prohibited with respect to, inter alia, the possibilities to exercise a liberal profession - in such a way that it includes the discriminatory termination of self-employment contracts.³¹

A particular problem exists with respect to predominantly female domestic workers who work four days a week or less in a private household. These workers may be dismissed unilaterally without permission from the Employment Agency or the District Court, they are entitled to six weeks' pay during illness instead of 104 weeks, and they fall outside the scope of the social security system. This reduced protection has been criticized by, inter alia, the European Commission and CEDAW, but so far the Dutch government has not taken any concrete steps to improve the situation.³²

³¹ NIHR, Opinions 2005-49, 2011-153 and 2012-27, www.mensenrechten.nl, accessed 5 October 2015.

³² See for more information inter alia <http://www.fnv.nl/sector-en-cao/alle-sectoren/flex/huishoudelijkwerk/>, accessed 17 February 2017.

5. Pregnancy, maternity, and leave related to work-life balance (Directive 92/85, relevant provisions of the Directives 2006/54 and 2010/18)

5.1 Pregnancy and maternity protection

5.1.1 Does national law define a pregnant worker?

No.

5.1.2 Are the protective measures mentioned in the Articles 4-7 of Directive 92/85 implemented in national law?

Yes. The Working Conditions Act (WCA) and Governmental Decrees on the basis of the WCA – in particular Article 1.42 Working Conditions Decree – oblige employers to assess possible risks to the safety or health of pregnant or breastfeeding women and their child and to remove these risks. If the risks cannot be removed, the work must be adapted or the employee must be offered other work or, if that is not possible, she may be temporarily exempted from work while maintaining her salary. The prohibitions mentioned in Article 6 of Directive 92/85 are laid down in Articles 4:108 and 4:109 Working Conditions Decree. The Working Time Act (WTA) contains a regulation regarding night work for pregnant employees in that pregnant women may ask to be exempted from doing night shifts, they have a right to periods of rest and to take leave for a medical examination.

With respect to breastfeeding Article 4:7 of the Working Time Act stipulates that the employer must arrange the work in such a way that the specific circumstances of breastfeeding women are taken into account. The employer also has the obligation, during the first nine months after birth, to give women the opportunity to interrupt their work in order to breastfeed or to extract breast milk. If necessary the employer has to provide for a suitable room where the door can be closed (Article 4:8(1) WTA). The interruptions may last for, at most, a quarter of the working hours.

In my view these articles amount to a correct implementation of the directive. The provisions of the directive have been inserted into the Dutch legislation (almost) literally.

5.1.3 Is dismissal prohibited in national law from the beginning of the pregnancy until the end of the maternity leave (see Article 10(1) of Directive 92/85)?

Yes. Article 7:667(8) of the Civil Code stipulates that a provision which states that the employment relationship will end in the case of pregnancy or delivery is null and void. Article 7:670(2) of the Civil Code prohibits dismissal during pregnancy, maternity leave and during six weeks after resuming work after the maternity leave or after a period of illness caused by the pregnancy or the delivery. Dismissal because of pregnancy, delivery or motherhood is prohibited by Article 1 GETA.

A dismissal is possible in cases not connected with the condition of the pregnant woman or the woman who has given birth (Article 7:670a (2 and 3) of the Civil Code). These cases are: with the written consent of the woman concerned, termination during the probationary period (but not when there is a relation between the condition of the employee and the dismissal), summary dismissal because of an urgent reason such as fraud, theft etc. and the termination of the activities of the company. In the latter case the prohibition of dismissal still applies when the woman is on maternity leave, but not during the period of pregnancy preceding the maternity leave.

In addition, a District Court may terminate the employment agreement of a pregnant woman or a woman who has given birth if there is no connection with the pregnancy/delivery or if the termination is in the interest of the employee.

During maternity leave the employee receives an allowance from the social security services. This payment continues until the end of the leave if the employment agreement ends during the leave.

- 5.1.4 In cases of dismissal from the beginning of pregnancy until the end of maternity leave, is the employer obliged to indicate substantiated grounds for the dismissal in writing (see Article 10(2) of Directive 92/85)?

Yes. The employer has to substantiate the grounds for the dismissal anyway, as he can only dismiss on the basis of the specific grounds mentioned in the law (Article 7:669 of the Civil Code). The only exception is the termination of a fixed term contract by law. As this contract ends automatically, the employer is not obliged to provide a reason.

5.2 Maternity leave

- 5.2.1 How long (in days or weeks) is maternity leave? Please specify the relevant legislation and Article(s).

Maternity leave lasts for at least 16 weeks. It may start on any date between six and four weeks before the expected date of confinement and is at least ten weeks after the birth. The leave can be longer if six weeks were taken before the expected date, but the child is born after the expected date. If the child has to remain in hospital for longer than eight days after the birth, the maternity leave may be extended. The maximum extension is ten weeks (Article 3:1(5) of the Work and Care Act).

The regulation can be found in the Articles 3:1 – 3:30 of the Work and Care Act.

- 5.2.2 Is there an obligatory period of maternity leave before and/or after birth?

Yes. Four weeks before the expected date of confinement and ten weeks after the birth. See Article 3:1(3) of the Work and Care Act.

- 5.2.3 Is there a legal provision insuring that the employment rights relating to the employment contract are ensured in the cases referred to in Articles 5, 6 and 7 of Directive 92/85?

No, but the basic assumption is that this is the case.

- 5.2.4 Is there a legal provision that ensures the employment rights relating to the employment contract (including pay or an adequate allowance) during the pregnancy and maternity leave?

No.

- 5.2.5 Is pay or an allowance during the pregnancy and maternity leave at the same level as sick leave or is it higher?

Pay during maternity leave is 100 % of the daily wage for social security purposes (Article 3:13 of the Work and Care Act). The daily wage is the same as the salary paid by the employer, but it has a maximum of EUR 205,77 per day (as of 1 January 2017). This maximum is revised twice a year. Women who earn more than EUR 4 475,49 gross per month therefore do not receive 100 % of their salary. The statutory pay during sick leave is 70 %, although, of course, employers may pay more than this.

- 5.2.6 Are statutory maternity benefits supplemented by some employers up to the normal remuneration?

Yes, sometimes, but there is no adequate information on this subject. Sometimes a collective agreement obliges an employer to supplement the maternity benefit, but there is no overview of these collective agreements.

5.2.7 Are there conditions for eligibility for benefits applicable in national legislation (see Article 11(4) of Directive 92/85)?

No.

5.2.8 In national law, is there a provision that guarantees the right of a woman to return after maternity leave to her job or to an equivalent job, on terms and conditions that are no less favourable to her, and to benefit from any improvement in working conditions to which she would have been entitled during her absence (see Article 15 of Directive 2006/54)?

No. The European Commission instituted infringement proceedings against the Netherlands in this respect because of an incorrect transposition of the directive, but the CJEU rejected the appeal by the Commission on procedural grounds.³³

5.3 Adoption leave

5.3.1 Does national legislation provide for adoption leave?

Yes. Article 3:2 of the Work and Care Act.

The leave is at most four consecutive weeks and may be taken during a period of 18 weeks starting two weeks before the actual adoption. The leave is not subject to certain conditions. The only restriction is that, if two or more children are adopted simultaneously, the leave will be granted only with respect to one of these children. The leave is paid leave. The payment is the same as in the case of maternity leave, thus 100 % of the daily wage for social security purposes, with a maximum of EUR 203,85 per day. On 21 February 2018, the present Government presented a bill which extends the adoption leave and the leave for foster parents to six weeks.

5.3.2 Does national legislation provide for protection against dismissal of workers who take adoption leave and/or specify their rights after the end of adoption leave (see Article 16 of Directive 2006/54)?

Yes. Article 7:670(7) of the Civil Code prohibits dismissal due to exercising the right to adoption leave. Dutch law does not specify the rights of workers who take adoption leave to return to their jobs after the leave has ended. However, as a rule the taking of leave is not considered to be a valid reason for disadvantageous treatment.

5.4 Parental leave

5.4.1 Has Directive 2010/18 been explicitly implemented in your country?

Yes. Parental leave is regulated in Articles 6:1-6:9 of the Work and Care Act.

5.4.2 Is the national legislation applicable to both the public and the private sector (see Clause 1 of Directive 2010/18)?

Yes.

5.4.3 Does the scope of the national transposing legislation include contracts of employment or employment relationships related to part-time workers, fixed-

³³ CJEU, 22 October 2014, C-252/13, ECLI:EU:C:2014:2312.

term contract workers or persons with a contract of employment or employment relationship with a temporary agency?

Yes. The scope includes all employees.

5.4.4 What is the total duration of parental leave? If the provisions regarding duration differ between the public and the private sector, please address the two sectors separately.

The total duration of the leave is 26 weeks in both the public and the private sector. The leave may amount to 26 times the working hours per week, thus pro rata for part-time employees.

5.4.5 Is the right of parental leave individual for each of the parents, a family entitlement or a combination of the two? How many months are reserved for each parent on a take-it or leave it basis?

The right is individual for each of the parents. Each parent is entitled to 26 weeks of leave. The leave cannot be transferred to the other parent. Each parent is entitled to 26 weeks of leave on a take-it or leave-it basis.

5.4.6 What form can parental leave take (full-time or part-time, piecemeal, or in the form of a time-credit system)? Do the various available options allow taking into account the needs of both employers and workers and if so, how is that done (see Clause 3 of Directive 2010/18)?

Parental leave can be taken in various forms. The starting point is that the leave is taken within a period of twelve months for half of the working hours per week, but the employee may ask to spread the leave over a longer period than twelve months, to split the leave into six or less separate periods of at least one month or to take leave for more hours than half of the working hours per week. The employer may refuse these requests if there are compelling business or organisational reasons.

5.4.7 Is there a notice period and if so, how long is it? Does the national legislation take sufficient account of the interests of workers and of employers in specifying the length of such notice periods and how is that done? (see Clause 3 of Directive 2010/18)?

Yes, the employee must give notice of his/her wish to take leave two months in advance in writing. The employee must specify the period of the leave, the number of hours during the week and the spreading of the leave over the week. The employer has the right, after consulting the employee, to change how the hours are spread over the week if there are compelling business or organisational reasons to do so. The employer may do this until four weeks before the leave. The employer may not refuse the leave itself.

5.4.8 Did the Government take measures to address the specific needs of adoptive parents (see Clause 4 of Directive 2010/18)?

There is no specific legislation on this point, but there are several initiatives to support adoptive parents. One example is the website www.adoptie.nl³⁴ where information on many aspects of adoption is given. The website is run by the Foundation for Adoption Resources, which is subsidized by the Government.

5.4.9 Is there a work and/or length of service requirement in order to benefit from parental leave?

³⁴ Accessed 21 September 2015.

No. Until 1 January 2015 the employee had to have been employed for one year before requesting parental leave, but this requirement has now been abolished.

5.4.10 Are there situations where the granting of parental leave may be postponed for justifiable reasons related to the operation of the organisation?

No. The granting of parental leave itself may not be postponed, but, if an employee wants to digress from the standard option, i.e. taking parental leave for half of the working hours per week during 26 weeks, the employer may refuse such a request for compelling business or organisational reasons. See the answer to question 5.4.6.

5.4.11 Are there special arrangements for small firms?

No.

5.4.12 Are there any special rules/exceptional conditions for access and modalities of application of parental leave to the needs of parents of children with a disability or a long-term illness?

No.

5.4.13 Are there provisions to protect workers against less favourable treatment or dismissal on the grounds of an application for, or the taking of, parental leave (see Clause 5 of Directive 2010/18)?

Yes. It is prohibited to dismiss an employee because he/she applies for or takes parental leave and any dismissal for that reason may be declared null and void on the basis of Article 7:670(7) of the Civil Code, but it is not prohibited to dismiss an employee during parental leave. It is prohibited, though, to treat an employee less favourably because the employee has taken parental leave or has assisted someone else in taking parental leave (Article 6:1a of the Work and Care Act).

5.4.14 Do workers benefitting from parental leave have the right to return to the same job or, if this is not possible, to an equivalent or similar job consistent with their employment contract or relationship?

There is no explicit legal right to return to the same or a comparable job after having taken parental leave (nor is this the case after having taken pregnancy/maternity leave). The Government did not deem it necessary to implement these provisions in the Directive since this right is guaranteed under the right not to be treated unfavourably with respect to any condition of work, or the prohibition on dismissing somebody because of pregnancy, childbirth or motherhood. However, on 12 April 2012 Article 6:1a of the Work and Care Act came into force. This article explicitly stipulates that the employer may not treat an employee less favourably because he/she has taken parental leave or has assisted someone else in taking parental leave.

5.4.15 Are rights acquired or in the process of being acquired by the worker on the date on which parental leave starts maintained as they stand until the end of the parental leave?

Yes, the status of the employment contract or relationship remains unchanged during the leave.

5.4.16 What is the status of the employment contract or employment relationship for the period of the parental leave?

It remains unchanged.

5.4.17 Is there continuity of the entitlements to social security cover under the different schemes, in particular healthcare, during the period of parental leave?

Yes.

5.4.18 Is parental leave remunerated by the employer? If so, how much and in which sectors?

No, in principle it is not. It is possible that a collective agreement or a regulation in the public sector obliges the employer to pay (part of) the salary during parental leave. In the private sector this is rare, however.

5.4.19 Does the social security system in your country provide for an allowance during parental leave? If so, how much and in which sectors?

No.

5.4.20 In your view, regarding which issues does the national legislation apply or introduce more favourable provisions (see Clause 8 of Directive 2010/18)?

One could say that the abolition of the requirement of one year's service before parental leave could be requested is a more favourable provision. Also the fact that Dutch law allows for many varieties in the way leave is taken: part time, full time or in separate segments. For the rest the Dutch regulation is in conformity with the directive but, in my view, it is not more favourable.

5.5 Paternity leave

5.5.1 Does national legislation provide for paternity leave?

Yes. Fathers have a right to attend the birth of their child (Article 4:1(2)(a) Work and Care Act) and the right to an additional two days' leave which can be taken at any time within the following four weeks after the birth (Article 4:2 of the Work and Care Act). This leave is paid. Since 1 January 2015 fathers are also entitled to three days of unpaid leave following the two days of paid leave (Article 6:5(4)). This unpaid leave is actually parental leave and is regulated in that part of the Work and Care Act that concerns parental leave. The three days of unpaid paternity/parental leave are also deducted from the total of 26 weeks' leave. The only difference between these three days and parental leave in general is that the employer cannot refuse these three days. Compelling business reasons cannot negate this right of the employee.

On 25 November 2016, the Government submitted a bill to Parliament that aimed to extend the paid birth leave for fathers from two to five days. The three extra days would be paid from collective funds and would be granted as of 1 January 2019. However, the new Government, that took office in October 2017 (after the elections in March 2017) has withdrawn this bill and presented a new one, on 21 February 2018. The new bill also grants five days of birth leave to fathers, however not paid from collective funds, but by the employer. The proposed date of entry is 1 January 2019. As of 2020, the partner of the mother will be entitled to an extra five weeks during the first six months after the birth of the child. During these weeks the partner is entitled to an allowance, paid from collective funds, of 70% of the (capped) last earned salary. Adoption leave and leave for foster parents will also be extended, from the present four weeks to six weeks (with an allowance of 100% of the maximum daily wage as used in social security). The bill has not been submitted to Parliament yet, but this will be done shortly.

- 5.5.2 Does national legislation provide for protection against dismissal of workers who take paternity leave and/or specify their rights after the end of paternity leave (see Article 16 of Directive 2006/54)?

With respect to the two days of paid leave, there is no explicit statutory protection against dismissal nor are the rights at the end of the leave specified.

The three days of unpaid leave form part of the regulation on parental leave, so in that respect Article 7:670(7) of the Civil Code applies. This article prohibits the dismissal of an employee because he applies for or takes parental leave. Article 6:1a of the Work and Care Act is also applicable. This article prohibits less favourable treatment being given to an employee because he has taken parental leave or has assisted someone else in taking parental leave.

5.6 Time off/care leave

- 5.6.1 Does national legislation entitle workers to time off from work on grounds of force majeure for urgent family reasons in case of sickness or accident (see Clause 7 of Directive 2010/18)?

Yes. Workers are entitled to (paid) time off from work on grounds of force majeure for urgent family reasons in case of sickness or an accident. If it concerns a temporary problem (for example, a sick child) then urgent leave (*calamiteitenverlof*) is available and cannot be refused by the employer (Article 4.1 of the Work and Care Act). This urgent leave can range from a couple of hours to a few days. For more prolonged problems, it is possible to take short-term or long-term care leave. The entitlement to urgent leave has not been limited, but this kind of leave is only intended for unexpected and grave events. The conditions for entitlement to such time off from work or more detailed rules may be specified in the various collective labour agreements.

5.7 Leave in relation to surrogacy

- 5.7.1 Is parental leave available in case of surrogacy?

I assume that with surrogacy the situation is meant in which a woman carries and gives birth to a child for another woman/other parents who is/are going to raise the child. Dutch legislation has no specific arrangement for this situation. Parental leave may be granted to the legal parents of the child and to the persons who live at the same address as the child, take permanent care of the child and raise the child as if that child was their own child in a legal sense (Article 6:1 of the Work and Care Act). On the basis of this regulation intended parents will have a right to parental leave if they become the legal parents of the child, e.g. through adoption, or if they take permanent care of the child and live at the same address. The surrogate mother might also be entitled to parental leave if she is still the legal mother of the child. For legal parents the requirement of living at the same address as the child does not apply.

5.8 Leave sharing arrangements

- 5.8.1 Does national law provide a legal right to share (part of) maternity leave?

Dutch law does not provide a legal right to share (part of) the maternity leave. Only in the case of the death of the mother may her partner, being the one with whom she is married or has a civil partnership or the one who has acknowledged the child, take the remaining maternity leave (Article 3:1a of the Work and Care Act).

5.8.2 Is there a possibility for one parent to transfer part of the parental leave to the other parent?

No. Both parents have an individual right to parental leave. This right cannot be transferred to the other parent.

5.9 Flexible working time arrangements

5.9.1 Does national law provide workers with a legal right (temporarily or otherwise) to reduce working time on request?

Yes. This right can be found in Article 2 of the Act on Flexible Working, which entered into effect on 1 January 2016. The right is not limited to specific groups. All employees are entitled to this right, provided they have been employed for at least 26 weeks before they request a reduction of the working hours (Article 2(1)).

The employer may only refuse a request to reduce working time in case of compelling business or organisational reasons.

The request to reduce working time may be made for any purpose. The employee is not required to justify the request. There is no time limit for requesting the right. The only limitation is that the request may only be made once a year after a refusal by the employer to allow the request. The request must be made two months before the desired starting date (Article 2(3)).

The right to reduced working time is not tied to a specific triggering event. The size of the employer is relevant as the Act on Flexible Working does not apply to employers with less than 10 employees (Article 2(16)). However, these employers have to create their own arrangements for the adjustment of working hours. In the – sparse – case law on this subject, it has been determined that if a small employer has not created its own regulation, similar criteria apply as with respect to larger companies.³⁵

There is no legal right to return to prior working arrangements. If the working hours are reduced, the employment agreement is changed and no right to a return exists. However, in principle the employee does retain her/his job. Also an employee may ask for an increase in working hours. This type of request may only be refused for serious financial reasons, if there is not enough work or if the personnel budget does not allow for this.

There are no measures specifically in place to encourage men to make use of the right to reduce working hours.

5.9.2 Does national law provide workers with a legal right to adjust working time patterns (temporarily or otherwise) on request?

Yes. Under Dutch law employers are required to take into account employees' wishes and their personal circumstances in determining working-time schedules and employees may request an adaptation of working-time schedules for the year following any parental leave. The employer is not legally obliged, however, to grant such a request (Article 4:1 of the Working Hours Act). In addition, employees with six months' service may request adaptations to the pattern as well as the hours of work. Insofar as the hours of work and the schedule adaptation is concerned, the employer may only refuse the request for compelling business or organisational reasons (Article 2(5) of the Act on Flexible Working).

The request can be made for any reason. The qualifying period of employment does not apply in cases of force majeure (Article 2(1) and 2(3) of the Act on Flexible Working).

³⁵ District Court of Eindhoven, 5 March 2002, *JAR* 2002/88.

The request must be made two months or longer before the desired date when the adjustment should take effect. This requirement also does not apply in the case of force majeure.

The Act on Flexible Working also provides for a right to changes in the organisation of working time (as distinct from a reduction in working hours) subject to the employer's right to refuse where it is reasonable to do so (having balanced the interests of the employer and the employee).

The requests may be made for any purpose. Since the employer has to balance the interests of the company and of the employee, it does matter for what purpose the employee wishes to change the working time schedule.

The Act on Flexible Working does not apply to employers with less than 10 employees. Employers with less than 10 employees will have to create their own arrangements for the adjustment of working hours and working time.

There is no right to return to prior working arrangements and there are no measures in place specifically to encourage men to make use of the right to request an adjusted working time pattern or a different place of work.

5.9.3 Does national law provide workers with a legal right to work from home or remotely (temporarily or otherwise) on request?

Yes, the Act on Flexible Working introduced this right on 1 January 2016. The act gives the employee the right to ask for a different place of work (Article 2(6) of the Act on Flexible Working). The idea is to support telework and working from home, so as to improve the reconciliation of work and private life. The employer is not legally obliged to grant a request to change the place of work and it is sufficient if they give serious consideration to such a request.

There is no right to return to prior working arrangements and there are no measures in place specifically to encourage men to make use of the right to request an adjusted working time pattern or a different place of work.

5.9.4 Are there any other legal rights to flexible working arrangements, such as arrangements by which workers can "bank" hours to take time off in the future?

Yes, more or less.

Employees have the right to save their 'extra-statutory' vacation leave, i.e. the days that have been granted to them in addition to the obligatory number of days by law. They may save these days during a maximum of five years and can thus take them at a later stage in their career. In that way they can 'bank' some hours. The days that were accrued first must be taken first (Article 7:642 of the Civil Code).

Besides this, arrangements can be found in a growing number of collective agreements for determining the working time hours and patterns over a period of a year instead of a week. This means that during the year an employee may work for less in a certain period and more in another period. In general these working patterns must be agreed upon between the employee and his/her direct manager. Also employees can sometimes work extra hours which may be taken at a later date. However, these hours must usually be taken in the same year in which they were acquired. Finally, there are some arrangements for older employees, e.g. working less hours as from a certain age onwards. However, these arrangements are sometimes criticized from the point of view of age discrimination.

6. Occupational social security schemes (Chapter 2 of Directive 2006/54)

6.1 Is direct and indirect discrimination on grounds of sex in occupational social security schemes prohibited in national law?

Yes. In so far as the occupational scheme can be considered as an employee benefit ('a condition of employment') as mentioned in Article 7:646(1) of the Civil Code and Article 5(1)(e) GETA, it falls under the general prohibition on discrimination. In addition, there is a specific arrangement in Articles 12a-12f ETA for occupational pension schemes.

6.2 Is the personal scope of national law relating to occupational social security schemes the same, more restricted, or broader than specified in Article 6 of Directive 2006/54? Please explain and refer to relevant case law, if any.

All employees and civil servants who fall under the Civil Code provisions and Article 1b ETA have a right to equal treatment as regards occupational pension schemes. Persons whose activities are interrupted by pregnancy or maternity leave are explicitly covered under Article 12b(2) ETA. This article states that occupational pension schemes may not provide that participation in the fund is interrupted during such leave. Other categories that are mentioned in Article 6 of Directive 2006/54 are not explicitly mentioned in the ETA.

If the occupational social security scheme can be seen as a 'condition of employment' (or an employee benefit, see also question 6.1), the personal scope includes not only ordinary employees and civil servants, but also persons who fall under Article 1c ETA or Article 5(1)e GETA, being all persons who 'work' on a basis other than the regular employment contract or employment as a civil servant, e.g. volunteers, apprentices, persons working in sheltered employment, home workers, teleworkers, persons employed/paid by a manpower agency but actually working under the authority of another employer, persons who have been delegated to/stationed at another organisation, persons who are assigned to do community work while receiving a social security or welfare benefit and persons who follow in-house training (an internship or traineeship).

All things considered the personal scope of national law appears to be more or less the same as the scope of Article 6 of Directive 2006/54.

6.3 Is the material scope of national law relating to occupational social security schemes the same, more restricted, or broader than specified in Article 7 of Directive 2006/54? Please explain and refer to relevant case law, if any.

Dutch law does not specify the material scope in the way Article 7 of the Directive does. The specific areas - sickness, invalidity, old age, accidents and diseases, unemployment - are not mentioned separately in Dutch law (apart from pension schemes, see question 6.4 below). Instead Dutch law prohibits discrimination in a more general sense, namely in all situations where a 'condition of employment' or, as referred to previously, an 'employee benefit', is concerned. All areas mentioned in Article 7 (1) of the Directive can be considered to be conditions of employment as meant in Dutch law. Dutch law is thus less specific but the scope is the same. An example is an arrangement to supplement the statutory invalidity benefit.³⁶ There are not many examples, though, as most social security schemes are statutory and not occupational.

6.4 Has national law applied the exclusions from the material scope as specified in Article 8 of Directive 2006/54?

National law has not implemented the exclusions in so far as occupational social security schemes can be considered to be a 'condition of employment'/employee benefit. In that

³⁶ Supreme Court, 21 October 2005, JAR 2005/272 with respect to equal pay in general.

case the general prohibition on discrimination under Article 7:646 of the Civil Code, Article 1b or 1c ETA and/or Article 5(1)(e) GETA will apply.

A specific regulation has been drafted in Article 12a-12f ETA for occupational social security schemes. Article 12a ETA determines that an occupational pension scheme in ETA is a scheme for the benefit of one or more persons, 'exclusively in connection with their work in a company, branch of industry, professional branch or public service, as a supplement to a statutory social scheme and, in the case of a scheme for the benefit of one person, other than created by this person himself.' A scheme that is entered into by a person himself and to which the employer is not a party is therefore excluded from the prohibition on discrimination. However, such a scheme will be covered under the Directive on goods and services, so the prohibition on discrimination applies through that route.

There is no specific regulation on optional provisions (Article 8(1)(d) of the Directive).

Pension arrangements or regulations that are created by organisations of professionals (the liberal professions) are also covered by Article 12a. Self-employed persons are therefore not excluded where a collective arrangement is concerned.

6.5 Are there laws or case law which would fall under the examples of sex discrimination as mentioned in Article 9 of Directive 2006/54?

There are no longer any laws which fall under the examples of Article 9 of the Directive, but there are still some cases that result from past discriminatory laws. An example is a judgment from 15 December 2009 from the District Court of Roermond, which concerned the exclusion of married women from the pension scheme in the past.³⁷ The pension fund had rectified the pension benefits of the female employee over the period of her employment from 1972-1987, but had not granted her a non-contributory pension after the termination of her employment due to incapacity for work. The woman was not granted the pension because she had never participated in the pension scheme. The court ruled that this constituted direct discrimination. If the employee had been a man, she would also have been entitled to the non-contributory continuation of the pension.

In another case, dating from 10 May 2016, a woman could not participate in a pension fund in the past, because at that time she did not work on the basis of a contract for an indefinite period of time. The court ruled that, if this should be considered as indirect discrimination, the woman in question could not claim participation in the fund as yet, because her claim had expired. This expiry was not contrary to EU law as the limitation period was not less favourable than the limitation period applied in similar national cases and did not make it impossible or excessively difficult to exercise the rights conferred by EU law, as the claimant could have brought her action earlier.³⁸

Another example is the case of part-time workers who worked for one of the department stores that belong(ed) to the Vendex KBB group. These part-time employees were mainly women. Until 1986 they could only participate in the pension scheme after a waiting period of five years. From 1986 to 1992 the waiting period was reduced to one year. After 1992 the waiting period was abolished. It was possible to participate voluntarily. The question that was brought before the courts was whether the fact that the part-time employees were not automatically included in the scheme, but had to indicate themselves that they wished to participate, constituted discrimination. After a lengthy legal battle, in which also the Supreme Court rendered a decision, the Court of Appeal of The Hague ruled on 7 December 2010 that Vendex KBB had discriminated against these part-time women because they had been in a more disadvantageous position than full-time employees with regard to the pension.³⁹ The Appeal Court especially attached importance to the fact that

³⁷ District Court of Roermond, 15 December 2009, *JAR* 2010/29.

³⁸ District Court of Amsterdam, 10 May 2016, no. 4578021 CV EXPL 15-30286, *JAR* 2016/135.

³⁹ The Hague Court of Appeal, 7 December 2010, *JAR* 2011/39.

the women had not received sufficient or individual information about the possibility to participate.

6.6 Is sex used as an actuarial factor in occupational social security schemes?

Yes. Article 12c(1) ETA states that the use of different actuarial factors related to sex is allowed in the case of pension schemes in which the amount of the pension is calculated on the basis of the length of service and the final or average salary. The fact that women as a rule live longer than men may be accounted for in the premium the employer has to pay. The premiums due by the employees themselves must however be equal for men and women.

The use of sex as an actuarial factor is not allowed in defined contribution pension schemes. In that case either the pension benefit must be made equal at the time of the payment thereof or the pension premium that is paid by the employer must be calculated in such a way that in the end, at the time the pension starts, men and women receive an equal amount (Article 12c(2) ETA).

6.7 Are there specific difficulties in your country in relation to occupational social security schemes, for example due to the fact that security schemes in your country are not comparable to either statutory social security schemes or occupational social security schemes? If so, please explain with reference to relevant case law, if any.

No.

7. Statutory schemes of social security (Directive 79/7)

7.1 Is the principle of equal treatment for men and women in matters of social security implemented in national legislation?

No, there is no specific national legislation prohibiting discrimination in statutory social security schemes. This is not a problem though, as it is generally recognised that discrimination is not allowed in social security. This follows both from international law and from the Constitution. At this moment there are no complaints on sex discrimination in relation to social security pending before the national authorities nor are specific forms of discrimination in this respect mentioned in the relevant literature.

7.2 Is the personal scope of national law relating to statutory social security schemes the same, more restricted, or broader than specified in Article 2 of Directive 79/7? Please explain and refer to relevant case law, if any.

National law relating to statutory social security schemes covers employees and former employees, i.e. those who receive an invalidity pension or an unemployment benefit or a sickness benefit on the basis of one of the social security laws. However, self-employed persons are not always included. Dutch law refers to the so-called '*gelijkgestelden*', i.e. workers who do not qualify as a worker in the sense of the Civil Code (Article 7:610), but who work under similar conditions (quasi/para-subordinate workers). Examples thereof are various types of flexi-workers or home workers. For some of these persons a threshold applies: their employment relationship must have lasted for at least 30 days and their income must amount to at least 40 % of the minimum income as regulated by law. Also for some employment relations the possibility of being covered under the social security schemes is restricted to those who work for at least two days per week (Articles 1 and 5 *Besluit aanwijzing gevallen waarin arbeidsverhouding als dienstbetrekking wordt beschouwd (Rareitenbesluit)*, Stb. 2008, 574). Excluded from the scope of social security schemes are, among others, directors of a company who own a majority of the shares of the company and domestic staff who work on less than four days a week for the same employer. According to the Central Appeals Tribunal, the interpretation of 'domestic staff' includes not only domestic cleaners or child-minders and the like, but also 'professional carers' such as trained nurses providing medical care at home in the service of an individual employer.⁴⁰

The personal scope of national law thus appears to be more restricted than the personal scope of Directive 79/7.

7.3 Is the material scope of national law relating to statutory social security schemes the same, more restricted, or broader than specified in Article 3 par. 1 and 2 of Directive 79/7? Please explain and refer to relevant case law, if any.

The material scope of national law extends to the same categories as mentioned in Article 3 paras 1 and 2 of Directive 79/7.

7.4 Has national law applied the exclusions from the material scope as specified in Article 7 of Directive 79/7? Please explain (specifying to what extent the exclusions apply) and refer to relevant case law, if any.

No, Dutch law does not apply these exclusions.

7.5 Is sex used as an actuarial factor in statutory social security schemes?

No.

⁴⁰ Central Appeals Tribunal (CRvB), 29 April 1996, RSV 1996/247.

7.6 Are there specific difficulties in your country in relation to implementing Directive 79/7? For example due to the fact that security schemes in your country are not comparable to either statutory social security schemes or occupational social security schemes? If so, please explain with reference to relevant case law, if any.

In the Netherlands there are some schemes that are not comparable to either statutory social security schemes or occupational social security schemes, such as the compensation an employer has to pay in the case of an industrial accident or occupational illness, but there are no specific difficulties in this field relating to Directive 79/7.

Worth mentioning is the situation of domestic staff which was also mentioned under questions 7.2 and 4.2.5. These workers are excluded from social security schemes. Without this exclusion they would be covered, as they are either working on the basis of an employment agreement or as '*gelijkgestelden*', as they are economically dependent on their work. The consequence of this exclusion is that domestic staff are only entitled to sickness pay for six weeks (instead of two years), are not entitled to sickness benefit in the event of a pregnancy-related illness before or after maternity leave, are not entitled to unemployment benefit and are not insured on the basis of employment under the Act on Sickness Costs. There is no clear justification for this situation. It is in essence a financial matter. The Government does not want to pay extra for these workers and it does not want to burden individual households ('the employers') either. There are plans to change the situation, but progress is slow, if any, because of the financial consequences (see question 4.2.5).

8. Self-employed workers (Directive 2010/41/EU and some relevant provisions of the Recast Directive)

8.1 Has Directive 2010/41/EU been explicitly implemented in national law?

No. Article 2(1) ETA and Article 6 GETA prohibit discrimination in the 'liberal professions.' This is a wide concept that covers not only doctors, architects, lawyers etc. but also freelancers, sole traders, entrepreneurs, etc.⁴¹

8.2 What is the personal scope related to self-employment in national legislation? Has your national law defined self-employed or self-employment? Please discuss relevant legislation and national case law (see Article 2 Directive 2010/41/EU)

Dutch law does not mention any norm addressees or right holders in this area. Dutch law does not define self-employed persons or self-employment either. As mentioned under question 8.1, Dutch legislation uses the concept of the 'liberal professions'. This appears to cover the category of self-employed persons. There is no case law on the definition of the 'liberal professions' from which it can be deduced that this definition is more restricted than the definition of self-employed persons in the Directive.

The case law on self-employed persons mainly focuses on the question whether a self-employed person is working on the basis of an employment agreement or an agreement for services. In the latter case, the person involved is usually self-employed. In this case law a self-employed person is one who does not fulfil the criteria for having an employment agreement, i.e. carrying out work personally during a certain period for an employer, receiving an income in return and working under the authority of the employer. The criterion of the 'relationship of authority' especially marks the difference between a self-employed person and an employee.

8.3 Related to the personal scope, please specify whether all self-employed workers are considered part of the same category and whether national legislation recognises life partners.

Yes, all self-employed workers are considered to be part of the same category. The Dutch equal treatment legislation does not make a distinction between the various categories of self-employed workers. Still, in practice there is a distinction between self-employed persons with employees and self-employed persons without employees, a distinction which is relevant for tax purposes but not in the field of equal treatment.

Dutch legislation recognises life partners. Like other self-employed persons, life partners can rely on the basic welfare benefits scheme, the Surviving Dependents Act (*Algemene Nabestaandenwet*, ANW) and, from the pensionable age (which will become 67 years), receive the statutory old-age pension benefits based on the General Old-Age Pensions Act (*Algemene Ouderdomswet*, AOW).

8.4 How has national law implemented Article 4 Directive 2010/41/EU? Is the material scope of national law relating to equal treatment in self-employment the same, more restricted, or broader than specified in Article 4 Directive 2010/41/EU?

As mentioned above Dutch law describes the scope of the principle of equal treatment as regards the self-employed with the term 'liberal professions'. Article 2 ETA and Article 6

⁴¹ Insofar as this cannot be read in the provision itself, this interpretation has been deduced from the definition of *vrije beroepsbeoefenaren* in the Netherlands, Self-employed Persons' Disability Insurance Act (*Wet Arbeidsongeschiktheidsverzekering Zelfstandigen* - WAZ), 24 April 1997. See *Tweede Kamer* 1995-1996, 24 758 no. 3, p. 2.

GETA prohibit discrimination with respect to 'the conditions for access to and the possibilities to exercise and to develop oneself within a liberal profession.' This definition is not completely the same as the definition in the Directive, but so far there are no indications that the definition in Dutch law is more restricted. The NIHR gives a broad explanation of this definition and follows the line that discrimination is also prohibited in those working relationships where the hierarchy between the 'organisation which gives an assignment to do the work' and the 'worker' is absent. This involves, in fact, all self-employed work. An example thereof is the opinion by the predecessor of the NIHR of 5 March 2012, where a franchiser was considered to fall under Article 2 ETA.⁴² In civil law there are no or hardly any disputes concerning the question whether a self-employed person falls under the definition of self-employed in Article 2 ETA or Article 6 GETA. As pointed out above, almost all disputes in which self-employed persons are involved concern the question of whether the self-employed person is not actually an employee (see the answer to question 8.2).

8.5 Has your State taken advantage of the power to take positive action (see Article 5 Directive 2010/41/EU)? If so, what positive action has your country taken? In your view, how effective has this been?

The Dutch State has not used the power to take positive action for the benefit of self-employed persons of the underrepresented sex.

8.6 Does your country have a system for social protection of self-employed workers (see Article 7 (Directive 2010/41/EU)?

The Dutch State does not have a system for social protection specifically intended for self-employed workers. Self-employed persons are covered by the national insurance schemes, which provide for basic welfare benefits ('*bijstand*'), by the Surviving Dependents Act (ANW) and, from the pensionable age (65 years and 6 months in 2016), the General Old-Age Pensions Act (AOW). They cannot, however, automatically rely on employment-related insurance schemes, such as unemployment and disability benefits. Instead, they can choose to join these insurance schemes voluntarily (but will only benefit if they meet certain criteria, such as having paid contributions for at least three years), to take out (generally more costly) private insurance or choose to remain uninsured. Also, they do not (yet) have access to a supplementary collective pension scheme.

8.7 Has Article 8 Directive 2010/41/EU regarding maternity benefits for self-employed been implemented in national law?

Yes. Article 3:17 and 3:18 of the Work and Care Act provide for maternity benefit for self-employed women. This benefit meets the requirement of sufficiency in Article 8(3)(c) of the Directive. The benefit is granted for 16 weeks (similar to employees), provided that the self-employed woman has done paid work for at least 1225 hours in the preceding year. The benefit is related to the salary of the self-employed woman, but has a maximum of 100 % of the statutory minimum wage. The maternity allowance is granted on a voluntary basis, i.e. self-employed women can address the government agency UWV to receive maternity and pregnancy benefits. The maternity benefits are paid from general tax revenues (no specific contributions are levied here). As far as I know, there were no existing services supplying temporary replacements or national social services in this regard.

In the period from 2004 until 2008 self-employed were excluded from the statutory scheme that provides women with pregnancy and maternity benefits. Following a complaint by a group of women who gave birth during this period, the UN CEDAW Committee ruled that the Dutch State had violated the CEDAW Convention by abolishing the maternity leave scheme applicable to self-employed women up to 2004 and advised

⁴² NIHR, 5 March 2012, Opinion 2012-43, www.mensenrechten.nl, accessed 5 October 2015.

the Dutch State to compensate women who had given birth between 2004 and 2008. At first, the Dutch Government refused to follow the recommendation of the CEDAW, but finally, after the Central Appeals Tribunal in social security matters ruled that the State had violated the CEDAW Convention by not giving compensation, the State decided that these women can apply for a benefit. Applications can be made between 15 May and 1 October 2018 and give right to a benefit of EUR 5 600.⁴³

8.8 Has national law implemented the provisions regarding occupational social security for self-employed persons (see Article 10 of Recast Directive 2006/54)?

Yes. Arrangements or regulations for organisations of professionals (the liberal professions) are covered by Article 12a ETA. The term 'liberal professions' refers to the self-employed (see question 8.1). In so far as collective arrangements are entered into for the self-employed, discrimination is forbidden.

8.9 Has national law made use of the exceptions for self-employed persons regarding matters of occupational social security as mentioned in Article 11 of Recast Directive 2006/54? Please describe relevant law and case law.

No.

8.10 Is Article 14(1)(a) of Recast Directive 2006/54 implemented in national law as regards self-employment?

Yes, but not explicitly.

Article 2 ETA covers the liberal professions, which is more or less the same as the self-employed. This article does not mention any norm addressees/right holders. However, on the basis of Article 1b and 1c, all employers, both public and private, and also those which have someone working for them 'under their authority' on another basis than the Civil Code provisions or a civil servants' contract, are bound by the prohibitions on discrimination mentioned in ETA.

Article 2 ETA refers to the conditions for access to and the possibilities to exercise and develop oneself within a liberal profession. Article 3 ETA specifically prohibits discrimination relating to the offering of employment, the way in which a vacancy is fulfilled and assistance in finding employment. This article thus covers the categories mentioned in Article 14(1)(a) of the Directive, i.e. access to employment, including selection criteria and recruitment conditions.

⁴³ <https://www.uwv.nl/particulieren/actueel/aanvragen-compensatie-zwangere-zelfstandigen.aspx>, accessed 15 March 2018.

9. Goods and services (Directive 2004/113)

9.1 Does national law prohibit direct and indirect discrimination on grounds of sex in access to goods and services?

Yes. Article 7 GETA lays down the prohibition of making a distinction which is applicable to (in brief): the supply of or access to goods or services, which also includes all forms of education; the provision of career orientation and guidance; and advice or information regarding the choice of an educational establishment or career. It is furthermore specified in this article that GETA only applies to the above-mentioned areas if the alleged discriminatory acts are committed either (a) in the course of conducting a business or exercising a profession, (b) by the 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, but only insofar as the offer is made publicly.

9.2 Is the material scope of national law relating to access to goods and services more restricted or broader than specified in Article 3 of Directive 2004/113? Please explain and refer to relevant case law, if any.

The material scope of Dutch law is broader than the scope of the Directive, as Dutch law also covers education and the content of media and advertising, while the Directive does not (Article 7 GETA).

9.3 Has national law applied the exceptions from the material scope as specified in Article 3(3) of Directive 2004/113, regarding the content of media, advertising and education?

No. Dutch law covers both categories. However, where education is concerned, an institution for special education may make a distinction on the basis of religion, belief or sex with respect to access to the school and participation in the education, as long as these characteristics of religion, belief or sex are an essential, legitimate and justified requirement considering the foundation of the institution (Article 7(2) GETA). Discrimination on the basis of sex is only justified if equal resources are available for both male and female pupils. This exception is made in order to give institutions for special education some room to follow their own beliefs.

9.4 Have differences in treatment in the provision of the goods and services been justified in national law (see Article 4(5) of Directive 2004/113)? Please provide references to relevant law and case law.

Dutch law prohibits discrimination in general. Discrimination in the field of the provision of goods and services is not treated differently from other forms of discrimination. This means that sex-segregated services are usually regarded as direct distinctions on the ground of sex, which means that these are forbidden unless one of the explicit legal justifications or exceptions can be applied. In practice, this means that sex-segregated services may only be justified if the sex segregation: (1) can meet the criteria of preferential treatment (under the GETA only allowed for the benefit of women, Art. 2(3) GETA), (2) can be established as necessary for the protection of women and maternity (Article 2(2)(b) GETA), or (3) can be established as a case in which 'sex is decisive.' With regard to this phrase, Section 6 of Article 2 delegates the definition of such cases to a Ministerial Order. This 'Equal Treatment Order'⁴⁴ lists examples such as sanitary facilities, changing and sleeping rooms and saunas (all insofar as facilities are equally available for both sexes), beauty and sports contests (insofar as there is a relevant difference in sex), life insurances where the premium depends on the life expectancy of men and women and the insurance

⁴⁴ Netherlands, *Besluit Gelijke Behandeling*, Koninklijk Besluit of 18 August 1994, *Stb.* 657.

has been entered into or has been changed on or after 21 December 2012,⁴⁵ and the protection from or fight against sexual violence and harassment, and aid for the victims of sexual violence and harassment (insofar as it is necessary that this protection, fight or aid is provided for by a person of a specific sex). Such sex-segregated services aimed at protection must be necessary and proportional. As exceptions always have to be interpreted in a strict sense in non-discrimination legislation, GETA makes it fairly difficult to render sex-segregated services apart from cases that fall under the exemptions (from the scope) or that are mentioned in the Equal Treatment Order.

9.5 Does national law ensure that the use of sex as a factor in the calculation of premiums and benefits for the purposes of insurance and related financial services shall not result in differences in individuals' premiums and benefits (see Article 5(1) of Directive 2004/113)?

Yes. Article 1(h) of the Equal Treatment Order stipulates that the use of sex as a factor in the calculation of premiums in insurances that are dependent on the life of a person may not result in differences in individuals' premiums, where insurances entered into or modified on or after 21 December 2012 are concerned.

9.6 How has the exception of Article 5(2) of Directive 2004/113 been interpreted in your country? Please report on the implementation of the C-236/09 *Test-Achats* ruling in national legislation.

See question 9.5. *Test-Achats* has induced the legislator to adapt the Equal Treatment Order in such a way that the use of sex as a factor in the calculation of premiums in life insurances is no longer allowed as of 21 December 2012. This only applies to insurance schemes that are entered into on or after that date or are modified on or after that date, thus not for already existing insurance schemes that have not been modified.

9.7 Has your country adopted positive action measures in relation to access to and the supply of goods and services (see Article 6 of Directive 2004/113)?

The GETA has formulated preferential treatment as a general exception to the prohibition on discrimination as an asymmetric norm, i.e. only with regard to women. Article 2(3) GETA allows women to be placed in a privileged position in order to eliminate or reduce existing inequalities connected with sex, if this positive discrimination is in reasonable proportion to that aim. This exception is also applicable in the context of the provision of goods and services, but as yet there are no examples.

9.8 Are there specific problems of discrimination on the grounds of pregnancy, maternity or parenthood in your country in relation to access to and the supply of goods and services? Please briefly describe relevant case law.

In the past there has been quite some discussion about the difficulties that self-employed women have encountered when trying to obtain insurance against the risk of maternity leave. There have been several legal procedures in this respect, mainly concerning the fact that private disability insurances only paid out an insurance benefit in the case of maternity leave if a qualifying period of, usually, two years had been fulfilled. The Supreme Court ruled on 11 July 2008 that there is no obligation in the law nor in Directive 2004/113 that obliges private insurance companies to treat pregnancy equal to disability and that therefore insurance companies have the right to make use of a qualifying period.⁴⁶ During that time – between 2004 and 2008 – there was no public insurance for self-employed pregnant women either. As of 4 June 2008 the Government reintroduced a maternity allowance for self-employed women. Also today there are various insurance companies

⁴⁵ See the answers to questions 9.5 and 9.6 below.

⁴⁶ Supreme Court, 11 July 2008, LJN: BD1850.

that offer insurance during maternity leave without a waiting period. However, it is quite possible that this has consequences for the amount of the premium.

10. Violence against women and domestic violence in relation to the Istanbul Convention

10.1 Has your country ratified the Istanbul Convention?

Yes. Authorisation for ratification was given by the House on 9 June 2015 and the Netherlands ratified the Convention on 18 November 2015. The Convention took effect on 1 March 2016. As the legal framework in the Netherlands is considered to be in compliance with the obligations under the Convention, there will be no legal changes.

There have been no concerns over the financial impact of the Convention. The procedure for authorisation for ratification has taken quite some time because research had made it clear that drastic measures are necessary for the implementation of the Convention in the Caribbean part of the Netherlands. Because of this, it has been decided to split the implementation of the Convention. Authorisation for the Convention has been given and the Convention will now be implemented in the European part of the Netherlands (insofar as necessary), but implementation in the Caribbean part will take place at a later time.⁴⁷

⁴⁷ See EK 2015-2016, 34039, C, pp. 1-3.

11. Enforcement and compliance aspects (horizontal provisions of all directives)

11.1 Victimisation

11.1.1 Are the provisions on victimisation implemented in national legislation and interpreted in case law?

Yes. Provisions on victimisation can be found in Article 7:646(9) and 7:646(14) Civil Code with respect to employees. Article 7:646(9) stipulates that an employee may not be treated in an adverse way because he/she rejects or endures (sexual) harassment and Article 7:646(14) states that an employer may not treat an employee in an adverse way because the latter has relied on his right to equal treatment, either within or outside legal proceedings, or has assisted someone else in doing so.

Article 1a(4) ETA stipulates that a decision regarding a person may not be founded on the fact that this person rejects or endures (sexual) harassment. This article applies to employees. Article 1b(4) ETA states that a public employer may not dismiss an employee or treat him/her in an adverse way because the civil servant has relied on his/her right to equal treatment, either in or outside legal proceedings, or has assisted someone else in doing so.

In the third place the provision on victimisation is implemented in Article 8a GETA. This article contains the same prohibitions as the ones in the Civil Code and ETA. GETA also applies to equal treatment in the field of the provision of goods and services.

In my view this protection complies with the protection mentioned in the Directives.

11.2 Burden of proof

11.2.1 Does national legislation and/or case law provide for a shift of the burden of proof in sex discrimination cases?

Yes. The shifting of the burden of proof in the event that a person who considers himself or herself to have been wronged establishes facts from which it may be presumed that there has been direct or indirect sex discrimination, is laid down in Article 7:646(12) of the Civil Code, Article 6a ETA and Article 10 GETA.

The cases of *Kelly* and *Meister* have not led to a change in the way the burden of proof is applied in Dutch law. In cases of (sex) discrimination the NIHR or the courts investigate whether sufficient facts have been established in order to shift the burden of proof onto the employer/other discriminating party. The fact that a party refuses to provide information, as in *Kelly* and *Meister*, may be an indication of discrimination as long as it is not the only indication. As far as I know, there have not been any cases similar to *Kelly* or *Meister* in Dutch law.

11.3 Remedies and Sanctions

11.3.1 What types of remedies and sanctions (e.g. compensation, reinstatement, criminal sanctions, administrative fines etc.) exist in your country for breaches of EU gender equality law? Please specify the applicable legislation.

Sanctions in the event of discrimination are imposed by the civil or administrative courts. Criminal sanctions for discriminatory offences are hardly ever imposed, especially not in the case of sex discrimination. According to Article 7:646 of the Civil Code, GETA and the ETA, discriminatory dismissals and dismissals due to victimisation are voidable. The employee can request the courts to invalidate the termination of the contract and can

thereby claim wages. In that situation he/she can also demand to be reinstated in the post. Instead of requesting the court to invalidate the termination, the employee can also request compensation. This is a new rule that exists as of 1 July 2015. The employee can also claim pecuniary damages under the system of sanctions in general administrative law, contract law and/or tort law. This has not changed.

Until 1 July 2015 damages were hardly ever claimed (let alone awarded) in cases of discrimination. The expectation is that this will change now that the law has explicitly determined that in a case of discrimination an employee may claim reasonable compensation on the basis of employment law.

Also, the so-called 'transitional benefit' has been introduced as of 1 July 2015. All employees who have been employed for two or more years, whether on the basis of a permanent contract or a fixed-term contract, are entitled to this benefit in the event of the termination of their employment, unless the termination is the result of serious misconduct by the employee. This may be of help to the many women whose temporary contract is not extended because of pregnancy. However, the transitional benefit is modest in the case of short contracts: 1/6 of the monthly salary for each six months worked. If the employment contract has lasted for more than ten years the transitional payment becomes ¼ of the monthly salary for each six months worked after the initial ten-year period.

Contractual provisions which are found to be in conflict with the GETA and the ETA shall be considered null and void. If the claim or complaint has been brought by interest groups the sanctions are similar.

GETA and ETA mention some additional 'sanctions'. Sanctions under these laws are imposed by the NIHR, not by the courts. Under Article 13(2) GETA, the NIHR may make recommendations to the party found to have made an unlawful distinction. Under Article 13(3) the NIHR may also forward its findings in an Advice to the Ministers concerned, and to organisations of employers, employees, professionals, public servants (consumers of goods and services) and to relevant consultative bodies. Under Article 15(1) the NIHR may initiate a 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 requesting an order that the consequences of such conduct be rectified. This power must be considered in light of the fact that the NIHR's opinions are not binding. The NIHR has never made use of this possibility.

11.3.2 In your opinion, do the remedies and sanctions meet the standards of being effective, proportionate and dissuasive? Please explain, if possible referring to relevant legislation or case law.

It is seriously doubted in academic legal circles whether the range of sanctions available under the equal treatment legislation is in conformity with the requirement that sanctions be 'effective, proportionate and dissuasive.' This is especially the case because non-pecuniary damages are usually rather low. They hardly ever exceed EUR 10 000 and most payments do not come near to that amount.⁴⁸

Pecuniary damages are – of course – related to the extent of the damage. If the employee can make it sufficiently clear that he/she suffered a loss of income because of discrimination, this loss will be compensated. One example of this is the judgment of 26 April 2016 by the District Court Zwolle, in which case the employee was awarded compensation of EUR 21 000 because the court considered it plausible that the employment agreement would have lasted for another five years if it had not been

⁴⁸ See on this subject: Roozendaal, W.L. (2014), 'Geen verlenging wegens zwangerschap, wat nu?' (No extension because of pregnancy. What Now?), *TAP* 316.

terminated because of pregnancy.⁴⁹ Also a compensation of EUR 5 000 was granted for non-pecuniary damage. However, in many cases it is difficult to estimate the extent of the damage as, in the Netherlands, many employees work on the basis of part-time contracts of six months or a year or are placed by temporary employment agencies, which means they cannot prove that their employment would have lasted for a considerable period of time. See for example the ruling by the District Court of Limburg, that decided that an employee, whose contract had not been extended because of her pregnancy, was not entitled to a compensation for material (income) damage, because it was likely, according to the court, that the contract would have been extended one more time for one year and would have ended afterwards. During that year the employee had also received a social security benefit and therefore she had no income damage. The court furthermore granted compensation for non-pecuniary damage of EUR 1 000.⁵⁰ This is of course not an effective, proportionate and dissuasive sanction as intended by EU-law.

11.4 Access to courts

- 11.4.1 In your opinion, is the access to courts safeguarded for alleged victims of sex discrimination? Please explain and discuss particular difficulties and barriers victims of sex discrimination have encountered. Refer to relevant legislation and case law.
- 11.4.2 In your opinion, is the access to courts safeguarded for anti-discrimination/gender equality interest groups or other legal entities? Please explain and refer to relevant legislation and case law.
- 11.4.3 What kind of legal aid is available for alleged victims of gender discrimination?

Access to the courts is ensured for victims of discrimination. Also, interest groups whose aim is to help victims of discrimination or to combat discrimination have access to the courts. There is a system of legal aid for persons with a low income, although this has been restricted in recent years as part of austerity measures. Access to the NIHR is free of charge.

11.5 Equality body

- 11.5.1 Does your country have an equality body that seeks to implement the requirements of EU gender equality law?

Yes. The NIHR is the main officially designated equality body. See: www.mensenrechten.nl. In addition to being the National Human Rights Institute, its task is to hear complaints (from individuals and organisations) about discrimination (and to give non-binding opinions), to give advice to organisations that want to revise their policies, to monitor developments and to advise the Government with respect to the implementation of anti-discrimination legislation and/or any necessary revision of this legislation. The NIHR covers all grounds of discrimination: race, sex, age, religion, belief, sexual orientation, nationality, handicap or chronic illness, marital status, working hours, the temporary character of the employment agreement and political beliefs.

In addition, there are other organisations, e.g. 'Art. 1' (referring to Article 1 of the Constitution). This organisation now covers all of the Article 19 TFEU non-discrimination grounds, including sex discrimination, and is officially designated as one of the equality bodies. It mainly has a role in assisting victims and in monitoring the occurrence of discrimination. At the local level there are so-called Anti-Discrimination Bureaux (*anti-discriminatievoorziening*, ADV). In 2009, these local ADVs were given a legal basis in the

⁴⁹ District Court of Zwolle, 26 April 2016, JAR 2016/143.

⁵⁰ District Court Limburg, 13 December 2017, ECLI:NL:RBLIM:2017:12124.

Act on Local Anti-Discrimination Bureaux.⁵¹ All municipalities are obliged to establish and subsidise an ADV. The main task of these bureaux is to assist victims of discrimination and to monitor the situation in this regard.

11.6 Social partners

11.6.1 What kind of role do the social partners in your country play in ensuring compliance with and enforcement of gender equality law? Are there any legislative provisions in this respect?

Social partners play an important role, although this has not been regulated in the equal treatment laws. As regards sex discrimination the trade unions play an especially active role in the field of equal pay. Also, they stimulate the discussion on positive action (e.g. by means of quotas).

11.7 Collective agreements

11.7.1 To what extent does your country have collective agreements that are used as means to implement EU gender equality law? Please indicate the legal status of collective agreements in your country (binding/non-binding, usually declared to be generally applicable or not).

Collective agreements are used as a means to supplement the legal rules governing employment contracts. A collective agreement is binding on all employers who are (represented by the) parties to the collective agreement and all employees of an employer that is a party to the collective agreement (regardless of membership of a trade union). In addition, the collective agreement can be declared binding by the Minister for Social Services and Employment. In the case of a binding collective agreement, all arranged regulations are binding on all contracts: individual employment contracts may only differ in favour of the employee. The length of the validity of collective agreements is at most five years. In collective agreements one can find rules concerning inter alia the (supplementary) right to childcare facilities, supplementary rights to care leave (including parental leave), et cetera.

⁵¹ Netherlands, Act on Local Anti-Discrimination Bureaux (*Wet gemeentelijke antidiscriminatievoorziening*), 27 June 2009, *Law Gazette* (2009), 313.

12. Overall assessment

The overall impression of the author is that the implementation of the EU gender equality acquis is to a great extent satisfactory.

There are a few issues that are still debatable. There is still no explicit right to return to the same or a comparable job after having taken pregnancy or maternity leave. Now that the European Commission has lost the infringement procedure that it had started on this point,⁵² it is not to be expected that any change will occur in this respect. However, this is not a serious problem, as the basic assumption in Dutch law is that a woman has a right to return to her job after maternity leave, as another approach would entail discrimination on the basis of pregnancy. There have so far not been any judgments in which it was determined that an employer had the right to change or to remove the job from a female employee because she was on pregnancy or maternity leave. Inserting an explicit right in the law in this respect would therefore probably not have made (much) difference.

A more serious point of discussion is the position of the, predominantly female, domestic staff who work on four days or less per week in a private household. As pointed out in this report these workers have significantly less employment and social security rights than other workers. They may be dismissed unilaterally without the permission of the Employment Agency or the District Court, they are entitled to six weeks' pay during illness instead of 104 weeks, and they fall outside the scope of the social security system. This reduced protection has been criticized by, inter alia, the European Commission and the CEDAW Committee, but so far the Dutch Government has not taken any concrete steps to improve the situation.⁵³

Furthermore, it can be argued that the current closed system of justifications regarding sex-segregated services is unduly restrictive, as it rules out certain favourable and desirable forms of sex-segregated services as well. As pointed out under question 3.2.3 and question 9.4, Dutch equal treatment law in principle forbids sex-segregated services unless one of the legal exceptions that are listed in the Equal Treatment Order (a Ministerial Decree) applies. That means that more innocent forms of segregated services – such as offering free coffee only to mothers on mother's day⁵⁴ and a regulation that men should place their bikes on the highest rack in a bicycle storage unit⁵⁵ – are not allowed either. This is not always desirable. An open system of justifications (as is reflected in Article 4(5) of Directive 2004/113) would be more appropriate, as it leaves sufficient room for favourable forms of sex-segregated services, but at the same time is adequate in ruling out discriminatory and undesirable kinds of sex-segregated services.

Finally, the requirement that is found in the CJEU jurisprudence and in the Directives that sanctions should be 'effective, dissuasive and proportionate',⁵⁶ has certainly not been met by Dutch legislation. This is a serious shortcoming of the implementation of EU law. Perhaps the changes in the law on dismissals will help somewhat (see question 11.3.1 of this report), but probably not enough, as the newly introduced transitional benefits are rather modest and it remains to be seen whether substantial 'reasonable allowances' (in Dutch: '*billijke vergoeding*') will be awarded by the courts in cases of discrimination.

⁵² CJEU, 22 October 2014, C-252/13, JAR 2014/282, ECLI:EU:C:2014:2312 (Commission v. The Netherlands).

⁵³ See for more information inter alia <http://www.fnv.nl/sector-en-cao/alle-sectoren/flex/huishoudelijkwerk/>, accessed 15 September 2015. See also Bijleveld, L. and Cremers, E. (2010), *Een baan als alle andere?! De rechtspositie van deeltijd huishoudelijk personeel* (A job like any other?! The legal position of part-time domestic staff), Leiden 2010.

⁵⁴ NIHR, opinion 2013-163, www.mensenrechten.nl, accessed 5 October 2015.

⁵⁵ NIHR, opinions 2010-62 and 2010-63, www.mensenrechten.nl, accessed 5 October 2015.

⁵⁶ Inter alia in CJEU 8 November 1990, no. 177/88, NJ 1992/224 (Dekker), CJEU 2 August 1993, C-271/91 (Marshall II) and CJEU 22 April 1997, no. C-180/95, NJ 1998/436 (Draehmpaehl). This requirement is also included in the directives on equal treatment. See for example Article 25 of Directive 2006/54 (Recast).

Annexes

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