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Country report

Non-discrimination

The Netherlands
2018

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EUROPEAN COMMISSION

Directorate-General for Justice and Consumers
Directorate D — Equality and Union citizenship
Unit D.1 Non-discrimination and Roma coordination

*European Commission
B-1049 Brussels*

Country report

Non-discrimination

The Netherlands

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Reporting period 1 January 2017 – 31 December 2017

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Luxembourg: Publications Office of the European Union, 2018

PDF ISBN 978-92-79-85234-3

doi: 10.2838/62563

DS-04-18-394-3A-N

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EXECUTIVE SUMMARY

1. Introduction

The Netherlands is a representative democracy premised upon a bicameral system. King Willem-Alexander is the official head of state. The government always consists of a coalition of different political parties, since a multitude of parties are elected to Parliament and none of them has ever had an absolute majority. The political climate in the Netherlands in the past 15 years has been influenced considerably by the rise of far right-wing parties, such as the Party for Freedom (*Partij voor de Vrijheid, PVV*). Issues brought up by such parties, in particular concerning immigration and anti-Islam or anti-terrorism measures, now dominate political discourse in general. In 2017 a new coalition government was formed after a long period of negotiations. It consists of the People's Party for Freedom and Democracy (*Volkspartij voor Vrijheid en Democratie, VVD*) (liberal), the Christian Democrats (*Christen-Democratisch Appèl, CDA*), the Christian Union (*Christenunie, CU*) and the Democrats 66 (*Democraten 66, D66*).

The Netherlands is party to all the major international agreements relevant to combating discrimination, including the European Convention on Human Rights (including Protocol No. 12), the International Covenant on Civil and Political Rights (ICCPR), the Optional Protocol to the Covenant, the International Covenant on Economic, Social and Cultural Rights (ICESCR), the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), including the Optional Protocol to this Convention, the Convention on the Rights of the Child (UNCRC), and the Convention on the Rights of Persons with Disabilities (CRPD). The latter was ratified in 2016, thus enlarging the scope of the Disability Discrimination Act (DDA). The above-mentioned instruments constitute part of the domestic legal order after they have been published in the official Law Gazette and can be applied directly by domestic courts if the provision concerned is sufficiently clear and precise.

The Kingdom of the Netherlands has the second highest population density in the European Union, after Malta. People of immigrant origin predominantly come from Turkey, Morocco, Suriname and the Dutch Antilles (although people from the Dutch Antilles cannot really be described as 'immigrants'). The main religions are Roman Catholic 23.7 %, Protestant 15.5 %, Muslim 4.9 %, other 5.7 % and none 50.1 % (2016).¹

2. Main legislation

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

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

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

¹ Netherlands Statistics (2016), *De religieuze kaart van Nederland, 2010-2015* [Religious map of the Netherlands, 2010-2015], available at: www.cbs.nl/nl-nl/publicatie/2016/51/de-religieuze-kaart-van-nederland-2010-2015 (last accessed 23 March 2018).

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

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

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

In the context of the implementation of Directives 2000/43/EC and 2000/78/EC it is thought that the Dutch legislator has in some respects fallen short of EU requirements. In 2008, the European Commission started an infringement procedure, inter alia about the definitions of direct and indirect discrimination and about the fact that, in the case of religious organisations, the law allows too much room for justifications of direct discrimination. Most of these issues were resolved by an amendment to the equal treatment laws in 2011 and 2015. The procedure was closed by the Commission in 2013. In other respects the Dutch legislator has gone beyond what is strictly required by the directives. For example, the protection against discrimination on the grounds of religion and belief, sexual orientation and disability also applies in the area of goods and services.

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

3. Main principles and definitions

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

Direct discrimination – Since 2011, the definition of direct discrimination in the equal treatment laws has copied the wording of the directives, except for the use of the word 'distinction' instead of 'discrimination'. Although this is not explicitly included in the definition of direct discrimination in the directives or the (amended) Dutch equal treatment laws, the possibility of discrimination by association has been acknowledged by the Dutch equality body, the Netherlands Institute for Human Rights (NIHR), and its predecessor, the Equal Treatment Commission (ETC).²

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

² E.g. in ETC 2006-227 and ETC 2011-90.

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

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

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

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

As of 1 January 2017 a more general duty exists under the DDA to improve accessibility for people with disabilities in addition to the duty to provide reasonable accommodation in individual cases. This proactive, general duty entails the duty to ensure accessibility at least gradually ('geleidelijk') for people with disabilities, unless this creates a disproportionate burden.

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

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

taken into account, which effectively led to (for example) Christian schools refusing to hire or dismissing cohabiting homosexual teachers. In 2015, after several bills and advice from various NGOs, the Council of State and the (former) equality body, the Equal Treatment Commission, this sole ground construction was finally abolished.³

4. Material scope

The GETA applies to the areas of employment and occupation, provision of goods and services (including education) and, only in the context of racial discrimination, the areas of social security, social protection and healthcare. All guarantees flowing from the directives also apply in the area of the provision of goods and services. The DDA applies to employment, professional education, and goods and services. Some specific restrictions apply to the fields of housing and public transport. The ADA is most limited in its material scope: it only applies to employment and employment-related education.

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

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

The prohibition of age discrimination in the ADA is inapplicable with regard to (occupational) pension provision (supplementary to pension provision on the basis of social security law) and with regard to actuarial calculations for pension provision.⁴

5. Enforcing the law

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

The 'partially reversed burden of proof' applies in procedures before the courts and is applied by the NIHR as well. With regard to sanctions, the GETA, DDA and ADA only stipulate that discriminatory dismissals (and dismissals related to victimisation) shall be voidable and that contractual provisions which are in contravention of the equal treatment acts shall be null and void. Under the ordinary court procedures, if an employee has been

³ Tweede Kamer 2010-2011/2013-2014, 32 476, nos. 1-11.

⁴ No adjustments have been made to this exception in response to the Court's judgment in *HK Danmark* (CJEU 26 September 2013, C-476/11), in which age-related increases in pension contributions were found to be outside the scope of Article 6(2) of the Employment Equality Framework Directive.

dismissed contrary to equal treatment law, the termination of the contract can be invalidated and the employee can thereupon claim wages. They can also request to be reinstated in the job. Alternatively, they can claim compensation for pecuniary damages under the sanctions of general administrative, contract or tort law.

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

Furthermore, although this option has never been used, the NIHR may bring legal action with a view to obtaining a court ruling that conduct contrary to the relevant equal treatment legislation is unlawful, requesting that such conduct be prohibited or eliciting an order that the consequences of such conduct be rectified.

6. Equality bodies

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

In short, the NIHR (in contrast to the courts) operates both reactively and proactively in order to give full effect to the principles of equality and non-discrimination. The NIHR members are mostly legal experts and are independent of the government. The (expert) members are appointed by the government for a fixed period of six years. Members of staff have the same position as civil servants working for a ministry but are only accountable to the Director of the NIHR (not to a minister). The NIHR is funded by the government (from the budgets of a number of ministries). It is accountable to the government by means of an annual report and by independent financial auditing. Every five years an internal and external evaluation report is published (and submitted to the government and Parliament). The annual budget of the NIHR for 2016 amounted to around EUR 7 million. The NIHR has 12 Members and a Director and a staff of approximately 50-60 (mostly academic lawyers). The NIHR deals with all non-discrimination grounds in the GETA, DDA and ADA, as well as more specific equal treatment grounds (such as the type or duration of employment contracts). It is also responsible for monitoring the implementation of the CRPD. All reports, advice and Opinions (judgments in individual cases) are published on the Institute's website: www.mensenrechten.nl/.

A Dutch anti-discrimination NGO, Art.1, has also been designated by the government as an equality body in terms of the directives. This organisation covers all non-discrimination grounds mentioned in Article 19 TFEU. Art.1 does not hear and investigate cases, which is the NIHR's task. Its main role is to assist victims and to monitor developments with respect to (non-)discrimination in (Dutch) society in a broad sense, which includes reports,

independent surveys and recommendations. In addition, it co-ordinates and supports the work of many local anti-discrimination bureaux (ADV's), which are funded by local authorities. The NIHR and Art.1 thus fulfil different tasks, closely related but not overlapping.

All local authorities are obliged by law to have an anti-discrimination bureau (ADV) in place. The ADV's were designated as equality bodies in the Explanatory Memorandum to the Act on Local Anti-Discrimination Bureaux.⁵ The ADV's have two legal tasks: to assist people who have a discrimination complaint and to register all such complaints and bring them to the attention of the Minister of the Interior and Kingdom Relations. In addition to this, one of the functions that these organisations fulfil is situation testing, mostly with respect to bars and night clubs.

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

7. Key issues

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

- The accumulative conditions in the 'harassment' definition arguably fall short of the directives' 'non-regression' clause (see Section 2.4 of the report).
- Arguably, the Dutch government interprets the prohibition of an 'instruction to make a distinction' unduly narrowly, including in relation to the 'scope of liability' for this type of discrimination (see Section 2.5 of the report).
- Both Article 2(5) and Article 7(2) of the Employment Framework Directive talk about national legislation or measures taken by the Member States' governments in order to protect health and safety. Article 3(1)(a) of the DDA provides for a justification on this ground, but it is disputable whether this provision is in line with the requirements of the directive (see Section 4.6 of the report).
- The partially reversed burden of proof is not applicable in case of victimisation claims, which falls short of EU requirements (see Section 6.4 of the report).
- The requirement that sanctions need to be 'effective', 'dissuasive' and 'proportionate' seems not to be met by the Dutch legislation (see Section 6.5 of the report).
- Apart from this, at some points the equal treatment law has been worded in such a way that a rather wide interpretation of the provision is possible, leaving, for example, more room for justifications than would seem appropriate, considering the general rule of the CJEU that exceptions to the non-discrimination principle should be interpreted restrictively. However, the Dutch NIHR and the courts do seem to follow the CJEU in this regard, so in practice this is not really problematic.

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

- A revised National Action Programme against Discrimination was published in January 2016, bringing together under a single umbrella various existing programmes and plans to combat discrimination and exclusion, such as the nationwide action plan to combat labour market discrimination. It thus seeks: to achieve a better overall view and strategy across all grounds of discrimination; to create more synergy; and to improve cooperation between all the stakeholders involved. With the programme the government intends to respond to the current social context characterised by increasing tensions between various groups, which calls for a clear message from the government to combat exclusion and discrimination and improve cohesion.⁶

⁵ See Tweede Kamer, 2007-2008, 31 439, no. 3, p. 7.

⁶ *Nationaal Actieprogramma tegen discriminatie* (National action programme against discrimination), Tweede Kamer, 2015-2016, 30 950, no. 84

- Research shows that the number of racist incidents increased sharply from 2013 to 2015, including racism against Muslims. For an explanation of this stark increase the researchers refer to the increasing social tensions, in particular in the wake of the 2015 terrorist attacks in several European countries by Muslim extremists and to the unrest created by the large number of refugees coming to Europe, many of whom are from a Muslim background.⁷
- Research (among others by the SCP) shows time and again that discrimination in the labour market on the ground of religion and/or ethnic origin (in particular against non-Western people from a migrant background) is widespread.⁸ A recent study also found that ethnic minority students in particular face discrimination in finding internships that help prepare them for the labour market.⁹
- After a long process the Netherlands ratified the CRPD which entered into force on 14 June 2016.
- In the criminal proceedings against politician Geert Wilders for insulting Moroccans the District Court of The Hague accepted the claim that, under the circumstances, this constituted incitement to discrimination against a group of people on grounds of their race.¹⁰ The appeal against the verdict is still pending.
- Another salient and continuing issue has been the debate on the allegedly racist character of Black Pete (*Zwarte Piet*), one of the central figures in the Dutch Saint Nicholas festivities. The Dutch Ombudsman for Children has expressed the view that the traditional representation of Black Pete contributes to discrimination and exclusion of Black and minority ethnic children and should be modified.¹¹ This position ties in with recommendations made by the UN Committee for the Elimination of Racial Discrimination (CERD) in its Concluding Observations on the Netherlands in 2015.
- Wearing a headscarf, and specifically a face-covering niqab in schools or in public offices, is a sensitive matter. Another ongoing issue is the alleged right of Muslims to refuse to shake hands with people of the opposite sex on religious grounds in various contexts, such as applications for positions in public office.
- The recording of data on ethnicity and origin has also been a sensitive and much debated issue. Both privacy regulations and non-discrimination provisions are at issue here. However, in recent years this issue has seemed to attract less attention from politicians and legal experts.
- In relation to gender and ethnic and cultural minorities in particular, there is some discussion about the desirability or legal acceptability of positive action measures. The future of any positive action policy by the government itself has been uncertain since the 2010 Coalition Agreement (supported by the PVV) provided that the government would terminate all activities concerning positive action and diversity policies on the grounds of gender and race/ethnicity. The former and current government take a more positive stance regarding positive action measures, and in 2014 employers' organisations made a commitment to employ more people with

⁷ Verwey-Jonker Instituut, *Vijfde rapportage racisme, antisemitisme en extreemrechts geweld in Nederland* [Fifth report on racism, anti-Semitism and extreme-right-wing violence in the Netherlands], 2016. Available at: www.verwey-jonker.nl/doc/2016/116007_Vijfde_rapportage_racisme-antisemitisme_extreemrechts_geweld_Nederland_web.pdf (last accessed 23 March 2018).

⁸ SCP 2014, *Ervaren Discriminatie in Nederland*, available at: www.scp.nl/Publicaties/Alle_publicaties/Publicaties_2014/Ervaren_discriminatie_in_Nederland; SCP 2015, *Op Afkomst Afgewezen*, www.scp.nl/Publicaties/Alle_publicaties/Publicaties_2015/Op_afkomst_afgewezen (both last accessed 23 March 2018).

⁹ The report is available at: www.kis.nl/publicatie/mbo-en-de-stagemarkt-wat-de-rol-van-discriminatie (last accessed 23 March 2018).

¹⁰ District Court of The Hague 9 December 2016 (case Wilders) ECLI:NL:RBDHA:2016:15014 (in Dutch only) <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2016:15014>
Summary in English: <http://www.rechtspraak.nl/Organisatie-en-contact/Organisatie/Rechtbanken/Rechtbank-Den-Haag/Nieuws/Paginas/Wilders-found-guilty-of-insultment-of-a-group-and-incitement-to-discrimination.aspx> (last accessed 23 March 2018).

¹¹ The report, *Kinderombudsman: Zwarte Piet vraagt om aanpassing* [Children's Ombudsman: Black Pete requires modification], can be found at: www.dekinderombudsman.nl/70/ouders-professionals/nieuws/kinderombudsman-zwarte-piet-vraagt-om-aanpassing?id=667 (last accessed 23 March 2018).

disabilities on a voluntary basis. it was agreed that if the targets set are not met, a legal obligation to do so could be imposed. This has now been introduced for the public sector and took effect as of 1 January 2018.¹²

¹² This was done by a ministerial decree (*ministeriële regeling*) see *Regeling activering quotaheffing*, *Staatscourant* 2017 no. 58942, <https://zoek.officielebekendmakingen.nl/stcrt-2017-58942.html>.

RÉSUMÉ

1. Introduction

Les Pays-Bas sont une démocratie représentative fondée sur un système bicaméral. Le chef officiel de l'État est le roi Willem-Alexander. Le gouvernement est toujours formé d'une coalition, étant donné qu'une multitude de partis politiques différents obtiennent des sièges au Parlement mais qu'aucun d'entre eux n'a jamais eu la majorité absolue. Le climat politique a été considérablement influencé aux Pays-Bas ces quinze dernières années par la montée de partis de droite tels que le Parti pour la liberté (*Partij voor de Vrijheid*, PVV). Les questions soulevées par ces partis, concernant l'immigration et les mesures anti-islam ou anti-terrorisme en particulier, dominent désormais l'ensemble du discours politique. Une nouvelle coalition gouvernementale a été formée en 2017 à l'issue d'une longue période de négociation: elle comprend le Parti populaire pour la liberté et la démocratie (*Volkspartij voor Vrijheid en Democratie*, VVD) (libéral), l'Appel chrétien-démocrate (*Christen-Democratisch Appèl*, CDA), l'Union chrétienne (*Christenunie*, CU) et les Démocrates 66 (*Democraten 66*, D66).

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

Le Royaume des Pays-Bas affiche la densité de population la plus élevée de l'Union européenne, derrière Malte. Les personnes issues de l'immigration sont principalement originaires de Turquie, du Maroc, du Suriname et des Antilles néerlandaises (bien que les personnes en provenance de ces dernières ne puissent pas vraiment être désignées comme des «immigrants»). Les principales religions sont le catholicisme romain (23,7 %), le protestantisme (15,5 %) et l'islam (4,9 %); 5,7 % de la population pratiquent une autre religion et 50,1 % n'en pratiquent aucune (2016).¹³

2. Législation principale

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

La Constitution: l'article 1^{er} de la Constitution comporte une clause de non-discrimination. Cet article, qui couvre les motifs de la religion, de la philosophie de vie, des convictions politiques, de la race et du sexe ainsi que «tout autre motif», peut être invoqué par un requérant individuel contre des actes commis par le gouvernement et par des institutions privées; il peut également être invoqué entre personnes physiques.

¹³ Institut statistique des Pays-Bas [CBS] (2016), *De religieuze kaart van Nederland, 2010-2015* [La carte religieuse des Pays-Bas, 2010-2015], disponible sur: www.cbs.nl/nl-nl/publicatie/2016/51/de-religieuze-kaart-van-nederland-2010-2015 (consulté en dernier lieu le 23 mars 2018).

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

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

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

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

On considère que, dans la perspective de la mise en œuvre des directives 2000/43/CE et 2000/78/CE, le législateur néerlandais n'a pas satisfait à certains égards aux exigences de l'UE. La Commission européenne a engagé en 2008 une procédure d'infraction portant notamment sur les définitions de la discrimination directe et indirecte et sur la marge excessive laissée par la législation nationale aux organisations religieuses pour justifier une discrimination directe. La plupart de ces points ont été résolus par un amendement aux lois relatives à l'égalité de traitement, voté en 2011 et 2015. La Commission a subséquemment clôturé la procédure, en 2013. À d'autres égards toutefois, le législateur néerlandais a été au-delà de ce qu'exigent strictement les directives. C'est ainsi que la protection contre la discrimination fondée sur la religion et les convictions, l'orientation sexuelle et le handicap s'applique également dans le domaine des biens et des services.

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

3. Principes généraux et définitions

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

Discrimination directe – Depuis 2011, la définition de la discrimination directe figurant dans les lois sur l'égalité de traitement reproduit le libellé des directives, si ce n'est qu'elle utilise

le terme «distinction» au lieu de «discrimination». Sans être expressément incluse dans la définition de la discrimination directe – que ce soit dans les directives ou dans les lois néerlandaises (modifiées) sur l'égalité de traitement – la possibilité d'une discrimination par association a été admise par le principal organisme néerlandais en charge de l'égalité, à savoir le Collège pour les droits de l'homme (*College voor de Rechten van Mens* ou CRM), comme par son prédécesseur, la Commission pour l'égalité de traitement (*Commissie Gelijke Behandeling* ou CGB).¹⁴

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

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

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

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

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

Il existe depuis le 1^{er} janvier 2017, en vertu de la loi relative à la discrimination à l'égard des personnes handicapées, une obligation plus générale d'améliorer l'accessibilité pour ces personnes en sus de l'obligation de prévoir un aménagement raisonnable dans des cas individuels. Cette obligation générale et proactive comprend le devoir de garantir

¹⁴ Voir notamment CGB 2006-227 et CGB 2011-90.

progressivement au moins (*geleidelijk*) l'accessibilité à l'intention des personnes handicapées sauf si cela donne lieu à une charge disproportionnée.

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

L'exception visée à l'article 5, paragraphe 2 sous c), de la loi générale autorisant les organisations religieuses à exiger que les personnes travaillant pour elles souscrivent à leur éthique a également été mentionnée par la Commission. Cette exception très controversée avait pour but de supprimer la possibilité de pratiquer une discrimination exclusivement fondée sur l'opinion politique, la race, le sexe, la nationalité, l'orientation hétéro-ou homosexuelle ou sur l'état civil sous le couvert d'exceptions autorisées par la loi. Le «motif unique» de l'homosexualité d'une personne ne peut intrinsèquement entraîner un refus d'embauche ou un licenciement, mais la situation pourrait se présenter différemment si d'autres circonstances étaient prises en compte – lesquelles ont effectivement conduit (par exemple) des écoles chrétiennes à refuser d'engager, ou à licencier, des enseignants homosexuels cohabitant. Après plusieurs projets de loi et de nombreux conseils de la part de diverses ONG, du Conseil d'État et de l'(ex-)organisme pour l'égalité (la Commission pour l'égalité de traitement ou CGB), cette interprétation du concept de «motif unique» a finalement été abolie en 2015.¹⁵

4. Champ d'application matériel

La loi générale sur l'égalité de traitement s'applique aux domaines de l'emploi et du travail, à la fourniture de biens et de services (y compris l'enseignement) et, uniquement dans le contexte de la discrimination raciale, aux domaines de la sécurité sociale, de la protection sociale et des soins de santé. Toutes les garanties découlant des directives s'appliquent également à la fourniture de biens et de services. La loi relative à la discrimination à l'égard des personnes handicapées s'applique à l'emploi, à l'enseignement professionnel, et aux biens et services. Des restrictions spécifiques s'appliquent aux domaines du logement et des transports publics. La loi relative à la discrimination fondée sur l'âge a pour sa part un champ d'application matériel plus limité puisqu'elle vise uniquement l'emploi et la formation liée à l'emploi.

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

Les limites du champ d'application de la loi générale sur l'égalité sont de trois ordres. Premièrement, la loi ne s'applique pas aux affaires internes des Églises et des communautés religieuses; deuxièmement, elle reste sans préjudice de la loi existante en matière de discrimination sexuelle; et troisièmement, elle ne s'applique pas aux affaires

¹⁵ Tweede Kamer 2010-2011/2013-2014, 32 476, n° 1-11.

internes d'associations (ceci découlant implicitement de la liberté d'association garantie par la Constitution). De même, la loi ne s'applique pas aux actes unilatéraux de fonctionnaires publics ou d'organismes gouvernementaux (autrement dit aux actes réglementaires et législatifs) et à leurs actes d'exécution. Cette dernière restriction du champ d'application ne concerne pas les dispositions législatives en matière de sécurité sociale (seuls les motifs de la race et de l'origine ethnique étant couverts).

L'interdiction de discrimination fondée sur l'âge consacrée par la loi spécifique en la matière ne s'applique pas aux prestations de la retraite professionnelle (en complément de la prestation de pension prévue par la loi sur la sécurité sociale) ni aux calculs actuariels des prestations de pension.¹⁶

5. Mise en application de la loi

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

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

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

De surcroît, bien que cette possibilité n'ait encore jamais été utilisée, le CRM peut tenter une action en justice pour obtenir une décision judiciaire établissant le caractère illégal

¹⁶ Aucun ajustement n'a été apporté à cette exception par suite de l'arrêt de la Cour de justice de l'Union européenne dans l'affaire *HK Danmark* (C-476/11, 26 septembre 2013), qui dit pour droit que la progressivité des cotisations de retraite en fonction de l'âge ne relève pas de l'article 6, paragraphe 2, de la directive-cadre relative à l'égalité de traitement en matière d'emploi.

d'un comportement contraire à la législation pertinente en matière d'égalité de traitement, et pour réclamer l'interdiction de ce comportement ou une sommation d'en réparer les conséquences.

6. Organismes de promotion de l'égalité de traitement

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

En résumé, le CRM (contrairement aux tribunaux) agit à la fois de manière réactive et de manière proactive, afin de donner plein effet aux principes d'égalité et de non-discrimination. La plupart des membres du Collège sont des experts juridiques qui exercent leur fonction de façon autonome. Ces membres experts sont nommés par le gouvernement pour une période déterminée (six ans). Les membres du personnel ont pour leur part la même position que des fonctionnaires travaillant pour un ministère, si ce n'est qu'ils rendent uniquement compte au directeur du CRM (et non à un ministre). Le CRM est financé par le gouvernement (les fonds provenant du budget de plusieurs ministères). Il doit rendre compte de ses activités au gouvernement au moyen d'un rapport annuel et d'un audit financier indépendant. Un rapport d'évaluation interne et externe est publié tous les cinq ans (et présenté au gouvernement et au Parlement). Le budget annuel du CRM s'est élevé à 7 millions d'euros environ en 2016. Le Collège se compose de douze membres et d'un directeur ainsi que d'un personnel de 50-60 personnes environ (juristes universitaires pour la plupart). Le CRM traite tous les motifs de non-discrimination visés par la loi générale sur l'égalité de traitement, la loi relative à la discrimination à l'égard des personnes handicapées et la loi relative à la discrimination fondée sur l'âge, ainsi que de motifs d'égalité plus spécifiques (type ou durée du contrat de travail, par exemple). Il est également chargé du suivi de la mise en œuvre de la CDPH. Tous les rapports, conseils et avis (décisions dans des affaires individuelles) sont publiés sur le site Internet du Collège: www.mensenrechten.nl/.

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

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

De l'avis des auteurs du présent rapport, le CRM, «Article 1^{er}» et les ADV fonctionnent tous de manière indépendante.

7. Points essentiels

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

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

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

- un programme national révisé d'action contre la discrimination a été publié en janvier 2016: il regroupe dans une seule et même structure plusieurs programmes et plans existants destinés à combattre la discrimination et l'exclusion, tel le plan national d'action de lutte contre la discrimination sur le marché du travail. Il vise donc à améliorer la vision et la stratégie pour l'ensemble des motifs de discrimination; à créer davantage de synergies; et à renforcer la coopération entre

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

toutes les parties prenantes concernées. La volonté du gouvernement est de répondre, au travers de ce programme, à un contexte social actuellement caractérisé par une montée des tensions entre divers groupes – une situation qui réclame un message gouvernemental clair en matière de lutte contre l'exclusion et la discrimination et d'amélioration de la cohésion;¹⁸

- des études montrent que le nombre d'incidents racistes a fortement augmenté entre 2013 et 2015, y compris un racisme à l'encontre des Musulmans. Les experts attribuent cette intensification du phénomène à une montée des tensions sociales, suite en particulier aux attaques terroristes perpétrées par des extrémistes musulmans en 2015 dans plusieurs pays européens, ainsi qu'au malaise suscité par le nombre élevé de réfugiés qui arrivent en Europe et dont beaucoup sont d'origine musulmane;¹⁹
- des études (réalisées par le SCP [*Sociaal en Cultureel Planbureau*] notamment) montrent régulièrement que la discrimination (en particulier à l'égard de personnes non occidentales issues de l'immigration) est une pratique courante sur le marché du travail.²⁰ Une étude récente constate également que les étudiants appartenant à une minorité ethnique sont particulièrement visés par une discrimination lors de la recherche de stages destinés à les préparer au marché du travail;²¹
- à l'issue d'un long processus, les Pays-Bas ont ratifié la CDPH qui est entrée en vigueur le 14 juin 2016;
- dans le cadre des poursuites pénales à l'encontre du politicien Geert Wilders pour insultes aux Marocains, le tribunal de La Haye a admis le recours selon lequel il s'agit en l'occurrence d'une incitation à la discrimination envers un groupe de personnes en raison de leur race.²² L'appel de ce jugement est toujours en instance;
- une autre problématique de longue date concerne le débat sur le caractère prétendument raciste de l'un des personnages centraux de la fête de Saint-Nicolas, à savoir le Père Fouettard (*Zwarte Piet*). Le Médiateur néerlandais pour les enfants a fait savoir qu'à son avis la représentation traditionnelle du Père Fouettard contribue à la discrimination et à l'exclusion des enfants noirs et appartenant à des minorités ethniques, et qu'il conviendrait de la modifier.²³ Cette prise de position rejoint les recommandations formulées par le Comité des Nations unies pour l'élimination de la discrimination raciale (CERD) dans ses Observations finales de 2015 concernant les Pays-Bas;
- le port du voile, et plus spécifiquement d'un niqab couvrant le visage, dans les écoles et les services publics, est une question sensible. Une autre problématique porte actuellement sur le droit allégué par les Musulmans de refuser de serrer la main d'une personne du sexe opposé pour des motifs d'ordre religieux dans divers contextes, et notamment lors d'une candidature à un emploi dans la fonction publique;

¹⁸ *Nationaal Actieprogramma tegen discriminatie* (Programme national d'action contre la discrimination), *Tweede Kamer*, 2015-2016, 30 950, n° 84

¹⁹ Verwey-Jonker Instituut, *Vijfde rapportage racisme, antisemitisme en extreemrechts geweld in Nederland* [Cinquième rapport sur le racisme, l'antisémitisme et la violence d'extrême-droite aux Pays-Bas], 2016. Disponible sur: www.verwey-jonker.nl/doc/2016/116007_Vijfde_rapportage_racisme-antisemitisme_extreemrechts_geweld_Nederland_web.pdf (consulté en dernier lieu le 23 mars 2018).

²⁰ SCP 2014, *Ervaren Discriminatie in Nederland*, disponible sur: www.scp.nl/Publicaties/Alle_publicaties/Publicaties_2014/Ervaren_discriminatie_in_Nederland; SCP 2015, *Op Afkomst Afgewezen*, www.scp.nl/Publicaties/Alle_publicaties/Publicaties_2015/Op_afkomst_afgewezen (consultés l'un et l'autre en dernier lieu le 23 mars 2018).

²¹ Le rapport est disponible sur: www.kis.nl/publicatie/mbo-en-de-stagemarkt-wat-de-rol-van-discriminatie (consulté en dernier lieu le 23 mars 2018).

²² Tribunal de La Haye, 9 décembre 2016 (affaire Wilders) ECLI:NL:RBDHA:2016:15014 (en néerlandais uniquement): <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2016:15014> Résumé en anglais: <http://www.rechtspraak.nl/Organisatie-en-contact/Organisatie/Rechtbanken-Den-Haag/Nieuws/Paginas/Wilders-found-guilty-of-insultment-of-a-group-and-incitement-to-discrimination.aspx> (consulté en dernier lieu le 23 mars 2018).

²³ Le rapport *Kinderombudsman: Zwarte Piet vraagt om aanpassing* [Médiateur pour les enfants: l'heure du changement est venue pour le Père Fouettard] peut être consulté sur www.dekinderombudsman.nl/70/ouders-professionals/nieuws/kinderombudsman-zwarte-piet-vraagt-om-aanpassing/?id=667 (consulté en dernier lieu le 23 mars 2018).

- l'enregistrement de données relatives à l'ethnicité et l'origine a également été une question sensible et très controversée. Ce sont à la fois les réglementations en matière de protection de la vie privée et les dispositions en matière de discrimination qui sont au cœur de ce débat. Il semblerait cependant que la question mobilise moins l'attention des politiciens et des experts juridiques ces dernières années;
- des débats sont en cours sur le point de savoir s'il est souhaitable ou juridiquement admissible d'adopter des mesures d'action positive en rapport plus particulièrement avec le genre et avec les minorités ethniques et culturelles. L'avenir de toute politique d'action positive émanant du gouvernement lui-même est incertain du fait que l'accord de coalition de 2010 (soutenu par le PVV) prévoit que le gouvernement mettra fin à toutes les activités relevant de l'action positive et à toutes les politiques en faveur de la diversité en termes de genre et/ou de race/d'origine ethnique. Comme le précédent, le gouvernement actuel a une position plus constructive vis-à-vis des mesures d'action positive et, en 2014, des organisations d'employeurs se sont engagées à recruter volontairement davantage de personnes handicapées. Il était convenu que si tel n'était pas le cas, une obligation légale dans ce sens pourrait leur être imposée: elle a effectivement été introduite en ce qui concerne le secteur public avec entrée en vigueur le 1^{er} janvier 2018.²⁴

²⁴ Un décret ministériel (*ministeriële regeling*) a été promulgué à cet effet: voir *Regeling activering quotaheffing*, *Staatscourant* 2017 n° 58942 sur <https://zoek.officielebekendmakingen.nl/stcrt-2017-58942.html>.

ZUSAMMENFASSUNG

1. Einleitung

Die Niederlande sind eine repräsentative Demokratie mit einem Zweikammersystem. Offizielles Staatsoberhaupt ist König Willem-Alexander. Die Regierung besteht immer aus einer Koalition mehrerer politischer Parteien, weil viele Parteien ins Parlament gewählt werden und keine je die absolute Mehrheit erreichen konnte. Das politische Klima des Landes war in den letzten 15 Jahren vom Aufstieg rechtsextremer Parteien wie der Partei für die Freiheit (*Partij voor de Vrijheid, PVV*) geprägt. Die wichtigsten Themen dieser Parteien, insbesondere Einwanderung und der Kampf gegen Islam und Terrorismus, dominieren inzwischen auch den allgemeinen politischen Diskurs. 2017 wurde nach langwierigen Verhandlungen eine neue Koalitionsregierung gebildet. Sie setzt sich zusammen aus der Volkspartei für Freiheit und Demokratie (*Volkspartij voor Vrijheid en Democratie, VVD*) (liberal), den Christdemokraten (*Christen-Democratisch Appèl, CDA*), der Christlichen Union (*Christenunie, CU*) und den Demokraten 66 (*Democraten 66, D66*).

Die Niederlande sind allen wichtigen internationalen Übereinkommen beigetreten, die sich auf die Bekämpfung von Diskriminierung beziehen, darunter auch der Europäischen Menschenrechtskonvention (einschließlich des 12. Protokolls), dem Internationalen Pakt über bürgerliche und politische Rechte (ICCPR), dem Fakultativprotokoll zum Internationalen Pakt, dem Internationalen Pakt über wirtschaftliche, soziale und kulturelle Rechte (ICESCR), dem Internationalen Übereinkommen zur Beseitigung jeder Form von Rassendiskriminierung (ICERD), dem Übereinkommen zur Beseitigung der Diskriminierung von Frauen (CEDAW) einschließlich des Fakultativprotokolls zu diesem Übereinkommen, dem Übereinkommen über die Rechte des Kindes (UNCRC) und dem Übereinkommen über die Rechte von Menschen mit Behinderungen (UN-Behindertenrechtskonvention, kurz: UN-BRK). Letzteres wurde 2016 ratifiziert und damit der Geltungsbereich des Behindertengleichstellungsgesetzes (BGG) erweitert. Die oben genannten Rechtsinstrumente werden nach ihrer Veröffentlichung im Amtsblatt der Niederlande Teil des heimischen Rechtssystems und können von niederländischen Gerichten unmittelbar angewendet werden, sofern das Gericht ihre Bestimmungen ausreichend klar und präzise findet.

Das Königreich der Niederlande hat nach Malta die zweithöchste Bevölkerungsdichte in der Europäischen Union. Menschen mit Migrationshintergrund kommen vorwiegend aus der Türkei, Marokko, Surinam und den Niederländischen Antillen (obgleich Menschen von den Niederländischen Antillen nicht wirklich als „Zuwanderer“ bezeichnet werden können). Die wichtigsten Glaubensgemeinschaften sind Katholiken 23,7 %, Protestanten 15,5 %, Muslime 4,9 % und sonstige 5,7 %; 50,1 % der Bevölkerung gehören keiner Glaubensgemeinschaft an (2016).²⁵

2. Wichtigste Rechtsvorschriften

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

Verfassung: Artikel 1 der niederländischen Verfassung enthält ein Verbot von Diskriminierung. Es gilt für die Diskriminierungsgründe Religion, Weltanschauung, politische Überzeugung, „Rasse“ und Geschlecht sowie für „jeden anderen Grund“. Dieser

²⁵ Niederländisches Amt für Statistik (2016), *De religieuze kaart van Nederland, 2010-2015* (Religiöse Karte der Niederlande, 2010-2015), abrufbar unter: www.cbs.nl/nl-nl/publicatie/2016/51/de-religieuze-kaart-van-nederland-2010-2015 (letzter Zugriff am 23. März 2018).

Artikel kann zu Klagen von Einzelpersonen gegen Handlungen der Regierung oder privater Organisationen und auch bei Streitfällen zwischen Einzelpersonen geltend gemacht werden.

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

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

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

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

Allerdings muss man davon ausgehen, dass dem niederländischen Gesetzgeber die Umsetzung der Richtlinien 2000/43/EG und 2000/78/EG nicht vollständig gelungen ist. Im Jahr 2008 leitete die Europäische Kommission ein Vertragsverletzungsverfahren ein, unter anderem weil die Definition von unmittelbarer und mittelbarer Diskriminierung nicht den europäischen Vorgaben entspricht und weil das Gesetz religiösen Organisationen zu viel Spielraum bei der Rechtfertigung unmittelbarer Diskriminierungen einräumt. Die meisten dieser Probleme wurden durch Überarbeitungen der Gleichbehandlungsgesetze in den Jahren 2011 und 2015 gelöst. 2013 wurde das Verfahren von der Kommission eingestellt. In anderen Bereichen ist der niederländische Gesetzgeber sogar über die Anforderungen der Richtlinien hinausgegangen. Beispielsweise gilt der Schutz vor Diskriminierung aufgrund von Religion, Weltanschauung, sexueller Ausrichtung und Behinderung auch für den Zugang zu Gütern und Dienstleistungen.

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

3. Wichtigste Grundsätze und Begriffe

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

Unmittelbare Diskriminierung – Seit 2011 folgt die Definition von „unmittelbarer Diskriminierung“ in den Gleichbehandlungsgesetzen dem Wortlaut der Richtlinien, nur wurde der Begriff „Diskriminierung“ durch „Unterscheidung“ ersetzt. Obgleich eine mögliche Diskriminierung durch Assoziierung zwar in den Richtlinien oder den (überarbeiteten) niederländischen Gleichbehandlungsgesetzen nicht ausdrücklich erwähnt ist, haben die Niederländische Gleichbehandlungsstelle, das Niederländische Institut für Menschenrechte (NIM) und dessen Vorgänger, die Gleichbehandlungskommission (ETC), anerkannt, dass dies eine Form der Diskriminierung darstellt.²⁶

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

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

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

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

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

Seit dem 1. Januar 2017 besteht im Rahmen des BGG – zusätzlich zu der Pflicht, im Einzelfall angemessene Vorkehrungen zu treffen – eine allgemeinere Pflicht, die Zugänglichkeit für Menschen mit Behinderungen zu verbessern. Diese proaktive, allgemeine Pflicht beinhaltet die Aufgabe, die Zugänglichkeit für Menschen mit Behinderungen zumindest schrittweise („geleidelijk“) sicherzustellen, es sei denn, dies führt zu einer unverhältnismäßigen Belastung.

²⁶ Z. B. in ETC 2006-227 und ETC 2011-90.

Ausnahmen – AGBG, BGG und ADG sehen alle Ausnahmen von der Grundregel vor. In den ersten beiden Gesetzen werden Ausnahmen vom Verbot der unmittelbaren Diskriminierung ausdrücklich und vollständig vom Gesetzgeber aufgelistet. Diese Ausnahmen werden von den Gerichten und dem NIM sehr restriktiv ausgelegt. Das ADG erlaubt eine flexiblere (halb-)juristische Auslegung: sowohl mittelbare als auch unmittelbare Altersdiskriminierung kann „objektiv gerechtfertigt“ sein und im Gesetz selbst wurden nur bestimmte Ausnahmen *a priori* und ausdrücklich aufgezählt. Insgesamt entsprechen die Ausnahmen in den Gleichbehandlungsgesetzen, z. B. die Ausnahme für wesentliche berufliche Anforderungen, den Vorgaben der Richtlinien, insbesondere seit der Neufassung der Gesetze infolge des Vertragsverletzungsverfahrens der Europäischen Kommission.

Die Ausnahme in Artikel 5 Absatz 2 Buchstabe c AGBG, der zufolge religiöse Organisationen von ihren Mitarbeitern die Einhaltung des eigenen Ethos verlangen können, wurde ebenfalls von der Kommission beanstandet. Die heiß diskutierte Ausnahme sollte die Möglichkeit ausschließen, dass Ungleichbehandlung ausschließlich aufgrund von politischer Überzeugung, „Rasse“, Geschlecht, Nationalität, hetero- oder homosexueller Ausrichtung oder Familienstand stattfindet, sich aber hinter der gesetzlich erlaubten Ausnahmeregelung versteckt. Der „alleinige Grund“, dass eine Person z. B. homosexuell ist, darf *per se* nicht zur Ablehnung von Bewerbern oder zur Kündigung führen. Wenn weitere Umstände in Betracht gezogen werden, könnte ein Gericht jedoch zu dem Ergebnis kommen, dass z. B. christliche Schulen offen homosexuelle Lehrer nicht einstellen bzw. kündigen dürfen. 2015 wurde nach mehreren Entwürfen und auf Rat verschiedener NROs, des Staatsrats und der Gleichbehandlungskommission diese Konstruktion des „alleinigen Grundes“ schließlich abgeschafft.²⁷

4. Sachlicher Anwendungsbereich

Das AGBG gilt für die Bereiche Beschäftigung und Beruf, die Bereitstellung von Gütern und Dienstleistungen (mit Bildung) und in Bezug auf die Rassendiskriminierung auch für soziale Sicherheit, Sozialschutz und Gesundheitswesen. Der in den Richtlinien garantierte Gleichbehandlungsgrundsatz gilt in vollem Umfang für die Bereitstellung von Gütern und Dienstleistungen. Das BGG gilt für Beschäftigung, berufliche Bildung sowie Güter und Dienstleistungen. Einige spezielle Einschränkungen gelten für die Bereiche Wohnungswesen und öffentliches Verkehrswesen. Das ADG hat den am stärksten beschränkten Geltungsbereich: Es gilt nur für Beschäftigungsverhältnisse und berufliche Bildung.

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

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

²⁷ Tweede Kamer 2010-2011/2013-2014, 32 476, Nr. 1-11.

Das Verbot der Altersdiskriminierung durch das ADG gilt nicht für berufliche Rentensysteme (zusätzliche Rentenbestimmungen auf der Grundlage des Sozialrechts) und bei der versicherungsmathematischen Berechnung von Rentenbeiträgen.²⁸

5. Rechtsdurchsetzung

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

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

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

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

6. Gleichbehandlungsstellen

Das Niederländische Institut für Menschenrechte (NIM) ist die wichtigste offizielle Gleichbehandlungsstelle der Niederlande (auf der Grundlage von Artikel 13 der Richtlinie 2000/43/EG). Es verfügt über ein breites Menschenrechtsmandat, in dessen Rahmen es auch quasi-gerichtliche Funktionen ausübt und Rechtsgutachten zu

²⁸ Infolge des Urteils des EuGH in der Rechtssache *HK Danmark* (EuGH, 26. September 2013, C-476/11), in dem festgestellt wurde, dass altersbezogene Erhöhungen der Rentenbeiträge nicht unter Artikel 6 Absatz 2 der Gleichbehandlungsrahmenrichtlinie fallen, wurden an dieser Ausnahme keine Änderungen vorgenommen.

Diskriminierungsbeschwerden abgibt. Seine Entscheidungen sind nicht bindend, werden in der Praxis aber meist beachtet. Zu seinen Aufgaben gehören außerdem die Durchführung von Befragungen und die Veröffentlichung von Berichten und Empfehlungen. Das NIM hat nicht die Aufgabe, Opfer von Diskriminierung zu unterstützen. Diese Funktion wird von Art. 1 und den Antidiskriminierungsstellen (ADVs) (siehe unten) übernommen, weil die Niederlande die wichtigste Aufgabe der Gleichbehandlungsstelle darin sehen, Klagen gegen (mutmaßliche) diskriminierende Praktiken oder Verfahren entgegenzunehmen und zu prüfen. Diese Aufgabe nimmt einen wesentlichen Teil der Arbeitszeit und Ressourcen des NIM in Anspruch. Das NIM hat auch beratende Funktionen (z. B. wenn die Regierung Gleichstellungsgesetze entwirft oder überarbeitet oder ein Arbeitgeber neue Richtlinien erstellt) und führt Informationskampagnen und Studien durch (z. B. in den jährlichen Mitteilungen oder durch die Vergabe von Forschungsprojekten an unabhängige Institute).

Kurz gesagt arbeitet das NIM (anders als Gerichte) sowohl reaktiv als auch proaktiv für die Durchsetzung des Gleichbehandlungsgrundsatzes und den Kampf gegen Diskriminierung. Die Mitglieder des NIM sind größtenteils Juristen und nicht an Weisungen der Regierung gebunden. Die (Fach-)Mitglieder werden von der Regierung für eine Amtszeit von sechs Jahren ernannt. Die Mitarbeiter haben die Stellung von Ministerialbeamten, sind aber nur dem Direktor des NIM rechenschaftspflichtig (keinem Minister). Das NIM wird von der Regierung finanziert (aus den Budgets mehrerer Ministerien). Es muss der Regierung in einem Jahresbericht und einer unabhängigen Wirtschaftsprüfung Rechenschaft ablegen. Alle fünf Jahre wird ein interner und externer Prüfbericht veröffentlicht (und Regierung und Parlament vorgelegt). Der Haushalt des NIM für 2016 betrug rund 7 Mio. Euro. Das NIM hat zwölf Mitglieder, einen Direktor und einen Stab von rund 50-60 Mitarbeitern (zum Großteil Juristen). Das NIM ist für Diskriminierung aus den in AGBG, BGG und ADG genannten Gründen und speziellen Gleichbehandlungsgründen (z. B. Art und Dauer von Beschäftigungsverträgen) zuständig. Es ist auch für die Überwachung der Umsetzung der UN-BRK verantwortlich. Alle Berichte, Empfehlungen und Gutachten (Entscheidungen in einzelnen Fällen) werden auf der Website des Instituts veröffentlicht: www.mensenrechten.nl/.

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

Alle lokalen Behörden sind gesetzlich zur Einrichtung einer Antidiskriminierungsstelle (ADV) verpflichtet. In der Begründung zum Gesetz über lokale Antidiskriminierungsstellen sind die ADVs als Gleichbehandlungsstellen ausgewiesen.²⁹ Sie haben zwei gesetzliche Aufgaben: Unterstützung von Bürgern, die eine Diskriminierungsbeschwerde haben und Erfassung der Beschwerden für einen Bericht an den Minister für Inneres und die Beziehungen des Königreiches. Außerdem führen diese Stellen häufig Testing-Verfahren durch, vor allem bei Bars und Nachtclubs.

Nach Ansicht der Verfasserin dieses Berichts arbeiten NIM, Art. 1 und die ADVs unabhängig.

7. Zentrale Punkte

²⁹ Siehe Tweede Kamer 2007-2008, 31 439, Nr. 3, S. 7.

Die folgenden zentralen Punkte sind, was die Implementierung und Umsetzung der Richtlinien betrifft, im niederländischen Kontext am bedeutsamsten und/oder problematischsten:

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

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

- Im Januar 2016 wurde ein überarbeitetes Nationales Aktionsprogramm gegen Diskriminierung veröffentlicht, das verschiedene bestehende Programme und Pläne zur Bekämpfung von Diskriminierung und Ausgrenzung, z. B. den landesweiten Aktionsplan zur Bekämpfung von Diskriminierung auf dem Arbeitsmarkt, unter einem Dach zusammenführt. Ziel ist es, ein besseres Gesamtbild und eine bessere Gesamtstrategie für alle Arten von Diskriminierung zu erreichen, mehr Synergien zu erzeugen und die Zusammenarbeit zwischen allen beteiligten Akteuren zu verbessern. Mit dem Programm will die Regierung auf die aktuelle gesellschaftliche Situation reagieren, die durch zunehmende Spannungen zwischen verschiedenen Gruppen gekennzeichnet ist und eine klare Botschaft der Regierung erfordert, um Ausgrenzung und Diskriminierung zu bekämpfen und den Zusammenhalt zu stärken.³⁰
- Untersuchungen zeigen, dass die Zahl rassistischer Vorfälle, einschließlich Rassismus gegen Muslime, zwischen 2013 und 2015 stark gestiegen ist. Zur Erklärung dieses starken Anstiegs verweisen die Forscher auf die zunehmenden gesellschaftlichen Spannungen, vor allem infolge der Terroranschläge, die 2015 in verschiedenen europäischen Ländern von muslimischen Extremisten begangen wurden, und auf die Unruhe, die durch die große Zahl von Flüchtlingen entstand, die nach Europa kamen und von denen viele einen muslimischen Hintergrund haben.³¹
- Untersuchungen (u. a. seitens des Sozialkulturellen Planungsamtes SCP) zeigen immer wieder, dass Diskriminierung aufgrund der Religion und/oder der ethnischen

³⁰ Nationaal Actieprogramma tegen discriminatie (Nationales Aktionsprogramme gegen Diskriminierung), Tweede Kamer, 2015-2016, 30 950, Nr. 84.

³¹ Verwey-Jonker Instituut, *Vijfde rapportage racisme, antisemitisme en extreemrechts geweld in Nederland* (Fünfter Bericht über Rassismus, Antisemitismus und rechtsextreme Gewalt in den Niederlanden), 2016, abrufbar unter: www.verwey-jonker.nl/doc/2016/116007_Vijfde_rapportage_racisme-antisemitisme_extreemrechts_geweld_Nederland_web.pdf (letzter Zugriff am 23. März 2018).

- Herkunft (vor allem gegenüber nicht-westlichen Menschen mit Migrationshintergrund) am Arbeitsmarkt weit verbreitet ist.³² Eine aktuelle Studie kam außerdem zu dem Ergebnis, dass insbesondere Studierende, die einer ethnischen Minderheit angehören, bei der Suche nach Praktika, die ihnen helfen sollen, sich auf den Arbeitsmarkt vorzubereiten, diskriminiert werden.³³
- Nach einem langen Prozess ratifizierten die Niederlande die UN-BRK, die am 14. Juni 2016 in Kraft trat.
 - In dem Strafverfahren gegen den Politiker Geert Wilders wegen Beleidigung von Marokkanern gab das Bezirksgericht Den Haag der Klage statt, dass dies unter den gegebenen Umständen eine Anstiftung zur Diskriminierung einer Menschengruppe aufgrund ihrer „Rasse“ darstelle.³⁴ Die Berufung gegen das Urteil ist noch anhängig.
 - Ein weiteres herausragendes, ständiges Thema war die Debatte über den angeblich rassistischen Charakter des *Zwarte Piet* („Schwarzer Peter“), einer der zentralen Figuren des niederländischen Nikolausfestes. Der niederländische Kinderombudsman vertrat die Ansicht, dass die traditionelle Darstellung des *Zwarte Piet* zur Diskriminierung und Ausgrenzung von Schwarzen und Kindern, die einer ethnischen Minderheit angehören, beiträgt und angepasst werden sollte.³⁵ Diese Position stimmt mit den Empfehlungen des UN-Ausschusses zur Beseitigung der Rassendiskriminierung (CERD) in seinen Abschließenden Bemerkungen zu den Niederlanden von 2015 überein.
 - Das Tragen eines Kopftuchs – insbesondere des Niqab, der das Gesicht bedeckt – in Schulen oder öffentlichen Ämtern, ist ein sensibles Thema. Ebenfalls umstritten ist, ob Muslime es in bestimmten Situationen aus religiösen Gründen ablehnen dürfen, Personen des anderen Geschlechts die Hand zu geben, beispielsweise bei der Bewerbung um eine Stelle im öffentlichen Dienst.
 - Ebenfalls sehr sensibel und stark umstritten ist die Frage, ob Daten zur ethnischen Zugehörigkeit und Herkunft erfasst werden dürfen. Dies berührt sowohl das Thema Datenschutz als auch den Bereich der Diskriminierung. In den letzten Jahren scheinen Politiker und Juristen allerdings das Interesse an diesem Thema zu verlieren.
 - Vor allem im Hinblick auf Gender sowie ethnische und kulturelle Minderheiten wird darüber diskutiert, ob Fördermaßnahmen wünschenswert oder rechtlich möglich sind. Die Förderpolitik der Regierung steht insgesamt in Frage, seit im Koalitionsvertrag von 2010 (unterstützt von der PVV) vereinbart wurde, dass die Regierung alle Fördermaßnahmen und Diversitätsstrategien in Bezug auf Geschlecht und „Rasse“/ethnische Herkunft beendet. Die vorherige und jetzige Regierung steht Fördermaßnahmen positiver gegenüber, und 2014 verpflichteten sich die Arbeitgeberverbände, verstärkt Menschen mit Behinderung auf freiwilliger Basis einzustellen. Es wurde vereinbart, dass, sollten die gesteckten Ziele nicht erreicht werden, eine entsprechende gesetzliche Verpflichtung eingeführt werden könnte. Diese wurde nun für den öffentlichen Sektor eingeführt und ist am 1. Januar 2018 in Kraft getreten.³⁶

³² SCP 2014, *Ervaren Discriminatie in Nederland*, abrufbar unter: www.scp.nl/Publicaties/Alle_publicaties/Publicaties_2014/Ervaren_discriminatie_in_Nederland; SCP 2015, *Op Afkomst Afgewezen*, www.scp.nl/Publicaties/Alle_publicaties/Publicaties_2015/Op_afkomst_afgewezen (letzter Zugriff in beiden Fällen am 23. März 2018).

³³ Der Bericht ist abrufbar unter: www.kis.nl/publicatie/mbo-en-de-stagemarkt-wat-de-rol-van-discriminatie (letzter Zugriff am 23. März 2018).

³⁴ Bezirksgericht Den Haag, 9. Dezember 2016 (Rechtssache Wilders), ECLI:NL:RBDHA:2016:15014 (nur auf Holländisch) <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2016:15014>
Zusammenfassung auf Englisch:
<http://www.rechtspraak.nl/Organisatie-en-contact/Organisatie/Rechtbanken/Rechtbank-Den-Haag/Nieuws/Paginas/Wilders-found-guilty-of-insultment-of-a-group-and-incitement-to-discrimination.aspx> (letzter Zugriff am 23. März 2018).

³⁵ Der Bericht *Kinderombudsman: Zwarte Piet vraagt om aanpassing* (Kinderombudsman: Der „Schwarze Peter“ braucht eine Anpassung) ist zu finden unter: www.dekinderombudsman.nl/70/ouders-professionals/nieuws/kinderombudsman-zwarte-piet-vraagt-om-aanpassing/?id=667 (letzter Zugriff am 23. März 2018).

³⁶ Dies geschah mithilfe eines Ministerialerlasses (*ministeriële regeling*), vgl. *Regeling activeren quotaheffing*, *Staatscourant* 2017 Nr. 58942, <https://zoek.officielebekendmakingen.nl/stcrt-2017-58942.html>.

INTRODUCTION

The national legal system

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

List of main legislation transposing and implementing the directives

- Article 1 of the Constitution (*Grondwet*) enshrines a constitutional equality and non-discrimination guarantee.
- International non-discrimination provisions (e.g. Article 26 of the International Covenant on Civil and Political Rights (ICCPR) and Article 14 of the European Convention on Human Rights (ECHR)) can be directly applied in court proceedings. Sometimes provisions from the UN International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the UN Convention on the Rights of People with Disabilities (CRPD) or the UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) are also called upon before Dutch courts. The Netherlands ratified the International Convention on the Rights of Persons with Disabilities (UNCRPD) on 14 June 2016.
- EU Treaty provisions and directives can be directly applied under the normal conditions for applicability of EU Law in the Member States.
- The Criminal Code (*Wetboek van Strafrecht*) includes specific provisions criminalising discriminatory speech and publications (Articles 137d-137f) and discriminatory acts in the performance of an individual's job or enterprise (Articles 137g and 429quater). Discrimination is defined in Article 90quater, in line with Article 1 of the UN ICERD and therefore different from the definition in the directives. In addition, Article 137c forbids insulting groups of people because of their race, religion/belief or homo-/heterosexual orientation.
- The Civil Code (*Burgerlijk Wetboek*) includes specific articles prohibiting sex discrimination and discrimination in relation to the duration of employment contracts and whether they are permanent or fixed-term contracts (Articles 7:646-7:649). Employers are also liable if they fail to guarantee safe working conditions. This includes an environment free from discrimination and (sexual) harassment (Article 7:658).
- The Civil Servants Act (*Ambtenarenwet*) contains similar provisions for the public service sector (Articles 125g and 125h).
- The Act on Working Conditions (*Arbeidsomstandighedenwet*) contains provisions concerning (sexual) harassment, aggression, violence and discrimination in the workplace. These provisions put a positive obligation on employers to prevent and combat discrimination and (sexual) harassment. The Labour Inspectorate (*Arbeidsinspectie*) can impose fines on employers who do not comply with this obligation.

- Since 1994, race and ethnic origin, religion and belief and sexual orientation have been covered together with 'political opinion', 'sex', 'nationality' and 'civil status' as grounds for discrimination by the General Equal Treatment Act or GETA (*Algemene Wet Gelijke Behandeling*).³⁷ After the adoption of the directives, the GETA was amended by the EC Implementation Act.³⁸ This Act entered into force on 1 April 2004.³⁹ Importantly, the Dutch government deemed it desirable to extend many of the amendments that were legally required for the grounds covered both by the 1994 Act and the directives (e.g. 'race', 'religion/belief', 'sexual orientation') to other grounds that are also covered by the GETA.⁴⁰ Every five years, an evaluation of the GETA took place, but with the establishment of the NIHR this has been integrated into the wider evaluation of the latter.⁴¹ The NIHR has a broad human rights mandate and took over the supervisory role of the former Equal Treatment Commission (ETC) (*Commissie gelijke behandeling, CGB*) regarding the GETA and other non-discrimination legislation.
- The Act on Equal Treatment on the Ground of Age in Employment (*Wet Gelijke Behandeling op grond van Leeftijd bij de Arbeid*), hereafter referred to as the Age Discrimination Act or ADA.⁴² The ADA entered into force on 1 May 2004.⁴³ In 2009, an evaluation report, written by independent experts, was sent to Parliament.⁴⁴ The then ETC published its own evaluation report.⁴⁵
- The Act on Equal Treatment on the Ground of Disability or Chronic Illness (*Wet Gelijke Behandeling op grond van Handicap of Chronische Ziekte*) hereafter referred to as the Disability Discrimination Act or DDA.⁴⁶ The DDA entered into force on 1 December 2003.⁴⁷ In 2004 the DDA was amended by means of the aforementioned EC Implementation Act. The initial scope of the DDA was restricted to employment and

³⁷ Netherlands, Act of 2 March 1994, concerning the establishment of general rules protecting against discrimination on the ground of religion, belief, political opinion, race, sex, nationality, hetero- or homosexual orientation, or civic status (*Wet van 2 maart 1994 houdende algemene regels ter bescherming tegen discriminatie op grond van godsdienst, levensovertuiging, politieke gezindheid, ras, geslacht, nationaliteit, hetero- of homoseksuele gerichtheid of burgerlijke staat*), *Staatsblad* [Official gazette] 1994, 230.

³⁸ Netherlands, Act of 21 February 2004 regarding the amendment of the General Equal Treatment Act and some other Acts in order to implement Directive 2000/43/EC and Directive 2000/78/EC (*Wet van 21 februari 2004 tot wijziging van de Algemene Wet Gelijke Behandeling en enkele andere wetten ter uitvoering van richtlijn 2000/43/EG en richtlijn 2000/78/EG* (EG Implementatiewet AWGB)).

³⁹ Determined by Governmental Decree of 11 March 2004, concerning the establishment of the date for the entry into force of the Act of 21 February 2004 regarding the amendment of the General Equal Treatment Act and some other Acts in order to implement Directive 2000/43/EC and Directive 2000/78/EC (EC Implementation Act GETA) (*Besluit van 11 maart 2004, houdende vaststelling van het tijdstip van inwerkingtreding van de Wet van 21 februari 2004 tot wijziging van de Algemene Wet Gelijke Behandeling en enkele andere wetten ter uitvoering van richtlijn 2000/43/EG en richtlijn 2000/78/EG* (EG Implementatiewet AWGB)), *Staatsblad* 2004, 120.

⁴⁰ Explanatory Memorandum to the EC Implementation Act, Tweede Kamer, 2002-2003, 28 770, no. 3, p. 3.

⁴¹ The last evaluation report specifically dealing with the GETA was published in 2011 (hereafter: ETC (2011), *Third evaluation report (2004-2009)*) and is available at: www.mensenrechten.nl/publicaties/detail/9895 (last accessed 15 March 2018).

⁴² Netherlands, Act of 17 December 2003, concerning the equal treatment on the ground of age in employment, occupation and vocational training (*Wet van 17 december 2003, houdende gelijke behandeling op grond van leeftijd bij de arbeid, beroep en beroepsonderwijs*), *Staatsblad* 2004, 30.

⁴³ Determined by Governmental Decree of 23 February 2004, concerning the establishment of a date for the entry into force of the Act on Equal Treatment on the Ground of Age in Employment (*Besluit van 23 februari 2004, houdende vaststelling van de datum van inwerkingtreding van de Wet gelijke behandeling op grond van leeftijd bij de arbeid*), *Staatsblad* 2004, 90.

⁴⁴ See Tweede Kamer, 2008-2009, 30 347, no. 2.

⁴⁵ This report is entitled *WGBL, geen symbool-wetgeving; evaluatie van de Wet gelijke behandeling op grond van leeftijd bij de arbeid* (*The ADA – more than just symbolic legislation: evaluation of the Act on Equal Treatment on the Ground of Age in Employment*) and is available on the website of the NIHR: www.mensenrechten.nl/publicaties/detail/9904 (last accessed 22 March 2018).

⁴⁶ Netherlands, Act of 3 April 2003 regarding the establishment of the Act on Equal Treatment on the grounds of disability or chronic disease (*Wet van 3 april 2003 tot vaststelling van de Wet Gelijke Behandeling op grond van handicap of chronische ziekte*), *Staatsblad* 2003, 206.

⁴⁷ Determined by Governmental Decree of 11 August 2003, concerning the establishment of a date for the entry into force of the Act on Equal Treatment on the Grounds of Disability or Chronic Disease (*Besluit van 11 augustus 2003, houdende vaststelling van het tijdstip van inwerkingtreding van de Wet gelijke behandeling op grond van handicap of chronische ziekte*), *Staatsblad* 2003, 329.

vocational education, but in 2009 this was extended to the fields of primary and secondary education (Article 5b DDA) and housing (Articles 6a, 6b and 6c DDA).⁴⁸ Public transport is covered in Articles 7 and 8 of the law, and these Articles entered into force on 9 May 2012. However, the Decree giving effect to these Articles contains a complicated schedule of gradual implementation.⁴⁹ In fact, it will take until 2030 before the whole public transport sector (apart from transport on ferries) will actually fall under the scope of the DDA. In 2009, an evaluation report, written by independent experts, was sent to Parliament.⁵⁰ Upon ratification of the CRPD the scope of the DDA was further extended and now covers the field of goods and services in general. However, some specific restrictions still apply to public transport and housing.

- The Act on the establishment of the National Institute of Human Rights (NIHR Act). The Act entered into force on 1 October 2012.⁵¹ The tasks and functions of the former Equal Treatment Commission were taken over by the NIHR.

⁴⁸ Netherlands, Amendment to the Disability Discrimination Act concerning the extension to primary and secondary education and housing (*Wijziging van de Wet gelijke behandeling op grond van handicap of chronische ziekte in verband met de uitbreiding met onderwijs als bedoeld in de Wet op het primair onderwijs en de Wet op het voortgezet onderwijs en met wonen*), *Staatsblad* 2009, 101.

⁴⁹ See the Decree of 19 April 2012, *Staatsblad* 2012, 199. The Decree is entitled 'Concerning the establishment of a date for the entry into force of Articles 7 and 8 of the Act on Equal Treatment on the Grounds of Disability or Chronic Disease and the entry into force of the Decree on the accessibility of public transport' (*Houdende het tijdstip van inwerkingtreding van de artikelen 7 en 8 van de Wet gelijke behandeling op grond van handicap of chronische ziekte en inwerkingtreding van het Besluit toegankelijkheid van het openbaar vervoer*).

⁵⁰ See Tweede Kamer, 2008-2009, 29 355, no. 39. The then ETC published its own evaluation report, entitled *Zonder vallen en opstaan; Evaluatie van de WGBHcz* [Without trial and error: evaluation of the DDA], available at: www.mensenrechten.nl/publicaties/detail/10027 (last accessed 21 March 2018).

⁵¹ Netherlands, Act of 24 November 2011 containing the establishment of the Netherlands Institute for Human Rights (*Wet van 24 november 2011, houdende de oprichting van het College voor de rechten van de mens*); *Staatsblad* 2011, 573.

1 GENERAL LEGAL FRAMEWORK

Constitutional provisions on protection against discrimination and the promotion of equality

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

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

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

The constitutional anti-discrimination provision is directly applicable in vertical relations. There is a limitation to this: formal statutory Acts (adopted by the government in co-operation with Parliament) may not, according to Article 120 of the Constitution, be subjected to Constitutional review by the courts, and thus also not to a Constitutional ‘equality’ review.⁵² However, Dutch courts do have the power to revoke legislation that violates any directly applicable provision of international law (under Articles 93 and 94 of the Constitution). With respect to discrimination, the Dutch courts frequently have to consider whether a particular piece of legislation violates Article 14 of the European Convention on Human Rights, Article 26 of the International Covenant on Civil and Political Rights, or any other international or European non-discrimination provision.

The constitutional equality clause can be enforced against private actors.⁵³ However, since this is an ‘open clause’ it does not specify what the equal treatment or non-discrimination norm entails in concrete situations and how this norm should be weighed against other constitutional rights (e.g. freedom of speech/opinion or freedom of belief/religion). In order to ensure the applicability of the equality principle in horizontal relations, the Constitutional guarantee has been incorporated into criminal law provisions and specific statutory equal treatment legislation (ADA, DDA, GETA and ETA).

⁵² Over time several bills have been proposed to introduce Constitutional review into the Constitution, but so far none have been adopted.

⁵³ E.g. Supreme Court 8 October 2004, NJ 2005/117 (*Van Pelt/Martinair* and *KLM / Vereniging van Verkeersvliegers*), ECLI:NL:HR:2004:AP0425.

2 THE DEFINITION OF DISCRIMINATION

2.1 Grounds of unlawful discrimination explicitly covered

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

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

2.1.1 Definition of the grounds of unlawful discrimination within the directives

The words racial or ethnic origin, religion or belief, disability, age and sexual orientation are not defined in Dutch equal treatment law. Dutch equal treatment legislation applies symmetrically, in the sense that persons from both the dominant group and the disadvantaged group are covered. However, as grounds of discrimination have to be interpreted in concrete cases, some indications about the definition of grounds can be derived from case law.

Race and ethnic origin. The Explanatory Memorandum to the GETA⁵⁴ stresses that 'race' is a broad concept, which must be interpreted in line with the UN International Convention on the Elimination of Racial Discrimination (ICERD).⁵⁵ The concept embraces race, colour, descent and national or ethnic origin.⁵⁶ The Supreme Court, as well as the NIHR, uses the ICERD definition of race. In the EC Implementation Act of 2004, the government has not deemed it necessary to explicitly include the notion of 'ethnic origin', since this is sufficiently captured by this interpretation of 'race'.⁵⁷ The NIHR uses as a yardstick whether the applicant belongs to 'a coherent group with collective physical, ethnic, geographical or cultural characteristics and which distinguishes itself from other groups by common features or a common behaviour'.⁵⁸ Sometimes, however, it is difficult to draw the line between race, ethnicity and religion. If all three grounds were protected in the same sense (as far as the personal and material scope of the legislation is concerned and the exceptions to the non-discrimination ground are similar for each of these grounds), that would be no problem. However, this is not the case in the Dutch legal system (where race and ethnicity are covered more broadly than religion). Another discussion concerns the exact borderline between 'race / ethnicity' and nationality (which is also covered under the GETA).⁵⁹ In the criminal proceedings against politician Geert Wilders for insulting Moroccans the District Court accepted the claim that, under the circumstances, this constituted incitement to discrimination against a group of people on the ground of their race. The Court found insufficient evidence for incitement to hatred against Moroccans. The Court rejected the claim that a conviction would violate Article 10 ECHR (freedom of expression) as this

⁵⁴ Explanatory Memorandum to the GETA, Tweede Kamer, 1990-1991, 22 014, no. 3 (*Memorie van Toelichting bij de Algemene Wet Gelijke Behandeling*).

⁵⁵ International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) of 21 December 1965. Many indications of what constitutes a 'race' can also be found in the discussions between the Government and Parliament during the drafting of the Criminal Code provisions against racial discrimination in 1971. It appears that the same interpretation has been given to these criminal law provisions as in equal treatment legislation, since both are meant to implement the UN ICERD. See van der Neut, J. L. (1986), *Discriminatie en Strafrecht*, Arnhem, Gouda Quint.

⁵⁶ Explanatory Memorandum to the GETA, Tweede Kamer, 1990-1991, 22 014, no. 3, p. 13. It should be noted that the notion of 'national origin' only embraces nationality in an *ethnic* sense. Nationality in a *civic* sense is covered by the non-discrimination ground of nationality.

⁵⁷ Explanatory Memorandum to the EC Implementation Act, Tweede Kamer, 2002-2003, 28 770, no. 3, p. 3. See also Gerards, J. H. and Heringa, A. W. (2003), *Wetgeving gelijke behandeling* ('Equal treatment legislation'), Deventer, Kluwer, pp. 28-30.

⁵⁸ See, for example, ETC 1997-119 and 1998-57.

⁵⁹ See, for example, ETC 2011-97 and 2011-98, especially the note to both cases by A. Böcker and S. Dursum-Aksel, to be found in Foster, C. J. et al. (eds.) (2012), *Oordelenbundel 2011* ('NIHR Opinions 2011'). Nijmegen, Wolf Legal Publishers, pp. 453-464.

freedom is not absolute and is justifiably restricted in the case at hand.⁶⁰ The appeal against the verdict is still pending.

The allegedly racist character of Black Pete (*Zwarte Piet*), one of the central figures in the Dutch Saint Nicholas festivities, has been the topic of debate. In 2014, the highest administrative court of the Netherlands ruled that mayors, when deciding on whether or not to grant a permit, are not empowered to take into account whether Black Pete would stereotype black people. Instead, mayors are limited to evaluating the effects on public order and security.⁶¹ This debate was fuelled again after the UN Committee for the Elimination of Racial Discrimination (CERD), on 28 August 2015, published its Concluding Observations on the Netherlands, calling upon the State party to eliminate 'those features of Black Pete which reflect negative stereotypes', with the recommendation to 'find a reasonable balance, such as a different portrayal of Black Pete'.⁶² In reaction, Prime Minister Mark Rutte stated, as he did before, that it is not up to the Dutch government to decide on the content of any celebration or cultural manifestation. In a report regarding the Black Pete discussion the Dutch Ombudsman for Children expressed the view that the traditional representation of Black Pete contributes to discrimination and exclusion of Black and minority ethnic children and should be modified.⁶³

Religion or belief. Religion is also not defined in the Constitution, in the GETA or anywhere else in the equal treatment legislation. In the Netherlands the term 'belief' is not used. In the Explanatory Memorandum to the EC Implementation Act, the government has made it clear that it wishes to continue using the term 'philosophy of life' (*levensovertuiging*), rather than to introduce the term belief (*geloof*), the term used by Directive 2000/78/EC. According to the government, there is no material difference between these two terms.⁶⁴ Both *religion* and *belief* are defined and applied in a broad sense. In cases that come before the NIHR and the courts (including cases concerning the freedom of religion), the Institute and the judges use a wide definition of religion and belief. The only restriction to the scope of the concept is that it should exceed a mere personal conviction or expression.⁶⁵ On the other hand, it is not necessary that all believers of a certain religion adhere to a certain conviction (e.g. the wearing of headscarves by women).⁶⁶ Finally, it is also established in case law that the right not to be discriminated against on the ground of religion incorporates both the right to have religious beliefs or to adhere to a certain philosophy of life and the right to act in accordance with that religion or belief.⁶⁷ Since political opinion is also protected, no sharp line between belief and political opinion needs to be drawn. The interpretation of all of these terms is strongly inspired by the case law of the European

⁶⁰ District Court of The Hague 9 December 2016 (Wilders case) ECLI:NL:RBDHA:2016:15014 (in Dutch)

<https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2016:15014>

Summary in English:

www.rechtspraak.nl/Organisatie-en-contact/Organisatie/Rechtbanken/Rechtbank-Den-Haag/Nieuws/Paginas/Wilders-found-guilty-of-insultment-of-a-group-and-incitement-to-discrimination.aspx (last accessed 15 March 2018).

⁶¹ Netherlands, Administrative Jurisdiction Division of the Council of State, 12 November 2014, ECLI:NL:RVS:2014:4117.

⁶² The CERD's Concluding observations on the nineteenth to twenty-first periodic reports of the Netherlands are available at:

http://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/NLD/CERD_C_NLD_CO_19-21_21519_E.pdf (last accessed 15 March 2018).

⁶³ The report *Kinderombudsman: Zwarte Piet vraagt om aanpassing* [Children's Ombudsman: Black Pete requires modification], of 30 September 2016 can be found at: www.dekinderombudsman.nl/70/ouders-professionals/nieuws/kinderombudsman-zwarte-piet-vraagt-om-aanpassing/?id=667 (last accessed 15 March 2018).

⁶⁴ Since the government does not seem to see a difference in meaning, we have translated *levensovertuiging* as 'belief' in this report. The NIHR, in the English translation of the GETA on its website, also translates '*levensovertuiging*' as 'belief'.

⁶⁵ See, for example, ETC 2007-207.

⁶⁶ See, for example, ETC 2008-12.

⁶⁷ See, for example, ETC 1997-46, 2004-112 and 2004-148, as well as the Explanatory Memorandum to the GETA, Tweede Kamer, 1990-1991, 22 014, no. 3, p. 39-40. And, similarly, Memorandum in Response to the GETA, 1990-1991, 22 014, no. 5, p. 39-40 (*Memorie van Antwoord bij de Algemene Wet Gelijke Behandeling*).

Court of Human Rights (ECtHR) and other international institutions (e.g. the UN Human Rights Committee).

Disability. Dutch equality law does not define disability, as the government has deemed it unnecessary and undesirable to do so.⁶⁸ However, unlike the EU level of protection, in addition to 'disability', 'chronic disease' is also explicitly included as a ground in the DDA. With regard to the definition, some guidelines can be derived from the *travaux préparatoires* of the DDA and the cases of the then ETC (now the NIHR). Criteria mentioned during the preparation of the Law were, amongst others, the long duration of the disability or chronic disease and the fact that – in the case of disability – the impairment is irreversible. This means that temporary disability is excluded.⁶⁹ According to the Explanatory Memorandum to the DDA, the concept of disability (*handicap*) may cover not only physical, but also intellectual and psychological impairments.⁷⁰ The government is of the opinion that the question of what constitutes a disability is not only dependent on the physical or psychological characteristics of the individual, but also on the physical and social environment that allows/does not allow a person to participate on an equal footing. The NIHR has accepted this line of reasoning and – considering the goal of the DDA – interprets the terms disability and chronic disease in an extensive way.⁷¹

Age. The legislator has not defined the word 'age'. However, it is not only direct references to someone's age that are considered to be direct distinctions on this ground. The use of classifications like 'young', 'old', 'adult', 'pensioner' or 'student' may also be considered to cause age discrimination. Since the ADA allows for objective justifications (open system) in case of both direct and indirect discrimination, the boundary between what kind of classification constitutes direct or indirect discrimination is not problematic.

Sexual orientation. The GETA employs the terminology 'hetero- or homosexual orientation', to cover the ground of 'sexual orientation' of Directive 2000/78/EC. It does not specify further what is covered by these terms. The Dutch government opted for the term 'orientation' (*gerichtheid*) rather than 'preference' (*voorkeur*). The term 'orientation' reflects that not only individual emotions are covered, but also concrete expressions thereof. Another major reason for the preference for the term 'hetero- or homosexual orientation' over 'sexual preference' or 'sexual orientation' is that the latter terms might possibly include 'paedophile orientation'. The notion of 'hetero- or homosexual orientation' has been interpreted by the courts to cover bisexual orientation, but it excludes transsexuals or transgender people. Under Dutch equal treatment law, discrimination on the ground of being a transsexual or transgender person is regarded as a form of sex discrimination.⁷² In 2017 a legislative proposal was submitted to Parliament to clarify the position of transgender and intersex persons. To avoid any misunderstandings, it seeks to add a provision to the GETA that explicitly states that distinctions based on sex include distinctions based on gender characteristics, gender identity and gender expression.⁷³

2.1.2 Multiple discrimination

In the Netherlands, prohibition of multiple discrimination is not included in the law. Although the GETA contains a closed list of non-discrimination grounds, parliamentary precedent does not exclude the possibility of a combination of grounds. Moreover, including the prohibition of discrimination based on a combination of grounds seems to be most in line with the legislator's objectives. In its third five-yearly evaluation report, the then ETC

⁶⁸ Explanatory Memorandum to the DDA, Tweede Kamer, 2001-2002, 28 169, no. 3, p. 9.

⁶⁹ See the Explanatory Memorandum to the ADA, Tweede Kamer, 2001-2002, 28169, no. 3, p. 9 and p. 24 and no. 5, p. 16. See also ETC 2005-234.

⁷⁰ Tweede Kamer, 2001-2002, 28 169, no. 3, p. 24.

⁷¹ See, for example, ETC 2005-234, 2006-227, 2007-25, 2009-62, 2009-102 and 2011-78.

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

⁷³ The proposal was submitted by several parliamentarians. Tweede Kamer, 2016-2017, 34 650. No. 1-3 (*Wet verduidelijking rechtspositie transgender personen en intersekse personen*).

concluded that it may be desirable to include an explicit prohibition of multiple discrimination in the GETA.⁷⁴ The government did not deem such a provision necessary and rejected a suggestion for further research.⁷⁵

In the Netherlands, the following case law deals with multiple discrimination: the ETC (now the NIHR) followed an intersectional approach in a case where the grounds of disability and race intersected and it acknowledged the combined effect thereof.⁷⁶ However, this combined effect did not provide a reason for a different sanction in this case.⁷⁷ In its third evaluation report, the (then) ETC acknowledged that there were other cases concerning multiple grounds at the same time.⁷⁸ The ETC has shown willingness to apply different grounds of discrimination coherently in some of these other cases (with gender aspects as well), but in each case the claimant failed to substantiate the (alleged) discrimination, as well as the combined effect of the intersection of grounds.⁷⁹ One category of cases in which the ETC (now the NIHR) could apply this approach would be that concerning Islamic headscarves. Such cases are almost always seen only as direct or indirect discrimination on the ground of religion.

2.1.3 Assumed and associated discrimination

a) Discrimination by assumption

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

b) Discrimination by association

In the Netherlands, national law (including case law) prohibits discrimination based on association with people with particular characteristics. However, the wording of Article 1 sub (b) of the GETA (the legal definition of a 'direct distinction') does not explicitly require that the alleged distinction is factually based on the race, religion/ belief, or sexual orientation of the alleged victim. It is therefore theoretically possible that discrimination based on association is covered as well. The same line of reasoning can be followed as regards age (as protected by the ADA). Concerning disability and chronic illness, it is stated in the Parliamentary discussions on the DDA that what matters is not (actually) having a disability but being discriminated against as compared with a person who does or does not have a disability. In Opinion 2006-227 the ETC considered an alleged case of disability discrimination by association and implicitly acknowledged that discrimination by association is also prohibited under the DDA. The case failed because there was no proof that the applicant had suffered any damage because of the fact that someone in her

⁷⁴ ETC (2011), *Third evaluation report (2004-2009)*, p. 64.

⁷⁵ Tweede Kamer, 2011-2012, 28 481, no. 16, p. 4.

⁷⁶ ETC 2006-256, concerning a complaint against an employment office by a blind Turkish woman for not being entitled to an adapted examination. An example of a case in which multiple discrimination is at issue is NIHR 2013-33 concerning ethnic origin, age, disability, sex and economic status.

⁷⁷ Since the ETC (now the NIHR) cannot impose sanctions, this is a somewhat misleading statement. There was the usual conclusion that the defendant had made an unlawful distinction.

⁷⁸ ETC (2011), *Third evaluation report (2004-2009)*, pp. 61-62. Apart from the cases mentioned below, the ETC here also mentions Opinion 2008-25 (complaint about season tickets for football stadiums, involving sex and civil status). In Opinion 2011-83, the grounds of sex and age were at issue. Again the ETC did not take this fact explicitly into consideration.

⁷⁹ ETC 2006-67 (complaint from a divorced father against a hospital for not giving adequate information about his son. The alleged intersecting grounds were sex and civil status; presumption not substantiated, no breach); ETC 2007-40 (complaint from a female cleaner about dismissal and (sexual) harassment; alleged intersecting grounds: sex and race; presumption not substantiated, no breach); ETC 2008-55 (complaint from an Iranian man claiming that his contract was not prolonged because it was presumed that a Muslim man would not accept orders from female colleagues - presumption not substantiated, no breach); ETC 2008-107 (complaint by an elderly non-Dutch woman because she had not received a subsidy to start a company; presumption not substantiated, no breach).

environment was disabled. In 2011, the ETC, with reference to the Court of Justice of the European Union (CJEU) in *Coleman*,⁸⁰ found that there was indeed a case of unlawful discrimination by association on the ground of disability. In that case, a temporary contract was not prolonged because the employee had called in sick several times because he had to take care of his wife, who was ill.⁸¹

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

a) Prohibition and definition of direct discrimination

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

Before 2011, Dutch equal treatment legislation contained its own (different) definition of direct and indirect discrimination. In November 2011 the equal treatment legislation (GETA, ETA, DDA and ADA and some provisions in the Civil Code) was amended in order to bring the definitions of direct and indirect discrimination into line with the EU directives.⁸² This change was required by the European Commission, which maintained that, as a consequence of the different wording of the definitions, victims of discrimination were offered less protection than the EU directives require.⁸³ The government has always held that this was not the case,⁸⁴ but nevertheless proposed this Amendment in 2008, in which the definitions from the directives are included word for word.⁸⁵ One difference between the language in the directives and the Dutch legislation remains, namely the usage of the word 'distinction' instead of the word 'discrimination'.

Article 1 of the GETA now reads as follows:

'in this Act and in the provisions based upon this Act the following definitions shall apply:

- a. Distinction: direct and indirect distinction, as well as the instruction to make a distinction;
- b. Direct distinction: if a person is treated differently from another person in a comparable situation is or would be treated on the grounds of religion, belief, political opinion, race, sex, nationality, hetero- or homosexual orientation or civil status; (...).⁸⁶

Although the comparator element is now included in the definition, it is unclear from the definition of direct distinction in the DDA with whom a disabled person must be compared in case of an alleged instance of direct distinction. In the Parliamentary discussions on the DDA it is stated that what matters is not (actually) having a disability but being discriminated against as compared with a person who does or does not have a disability. It seems that this must be decided on a case-by-case basis. There are some Opinions of the ETC (now the NIHR) in which this issue has been discussed.⁸⁷

⁸⁰ CJEU, Case C-303/06, *Coleman v Attridge Law* [2008], ECR I-5603.

⁸¹ ETC 2011-90. In a more recent case on discrimination by association (NIHR 2013-129), it was judged that the Ministry of Defence did not discriminate against an applicant with a Turkish wife. He needed a certificate of conduct (*Verklaring omtrent gedrag*) to be appointed, but the activities of his wife over the last three years were unclear, therefore the certificate could not be granted. The NIHR deemed the requirement of a certificate of conduct necessary and proportionate.

⁸² Netherlands, *Wet van 7 November 2011, Staatsblad 2011, 554*.

⁸³ Letter dated 31 January 2008, with reference to the infringement procedure of 18 December 2006, infringement no. 2006/2444.

⁸⁴ Letter from the Dutch government to Vladimír Špidla, dated 18 March, entitled *Reactie Nederlandse regering op het met redenen omkleed advies van de Europese Commissie; ingebrekestelling no. 2006/2444* (response to letter dated 31 January 2008).

⁸⁵ See Tweede Kamer, 2008-2009, 31 832, nos. 1-3 and Tweede Kamer, 2009-2010, 31 832, nos. 4-8.

⁸⁶ The ETA, DDA and ADA contain similar definitions.

⁸⁷ See ETC 2005-234. Although in that case the Commission stated that the applicant should not compare himself with other disabled people, according to many commentators the possibility exists for a disabled person to compare themselves with people who have a different disability.

b) Justification of direct discrimination

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

1. if the aim of the discriminatory measure is to place people belonging to a particular ethnic or cultural minority group or disabled people in a privileged position in order to eliminate or reduce existing inequalities connected with race or disability and the discrimination is in reasonable proportion to that aim (positive action);
2. in cases where a person's external racial appearance is a genuine and determining (occupational) requirement, provided that the aim is legitimate and provided that the requirement is proportionate to that aim (these cases are detailed exhaustively by a Ministerial Decree, the *Besluit Gelijke Behandeling*);⁸⁸
3. in cases where nationality is concerned if the discrimination is based on generally binding regulations or on written or unwritten rules of international law;
4. in cases where nationality is a determining factor (cases also detailed in a Ministerial Decree).

On a few occasions, the former ETC accepted that direct discrimination may be objectively justified when the prohibition of a certain distinction would be absolutely unacceptable or completely irrational, without the presence of one of the listed grounds of justification.⁸⁹ The issue was raised in the third evaluation report of the ETC (for the years 2004-2009).⁹⁰ If the government should wish to open up the closed system, the equality body proposes including a provision identical to Article 2(5) of the Employment Equality Directive 2000/78/EC in the Dutch equal treatment laws. Insofar as such an exception or justification clause would apply to the protection of public health (*volksgezondheid*), the government appears to agree with including it in the equal treatment laws.⁹¹ So far, however, no amendments have been made. In 2011, a case concerning discrimination on the basis of political convictions triggered considerable discussion among equal treatment specialists, where the then ETC found that freedom of expression, as guaranteed in Article 10 ECHR, prevailed over the equal treatment norm.⁹²

2.2.1 Situation testing

a) Legal framework

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

⁸⁸ *Staatsblad* 1994, 657. Initially, this Decree also allowed exceptions with respect to areas outside employment relations, i.e. in beauty contests and in the provision of goods and services. After the EU Commission had objected to this wide scope of exceptions in 2009, the Decree was amended in 2010 (*Staatsblad* 2010, 299).

⁸⁹ See, for example, ETC 2006-20 and ETC 2007-85; other cases are ETC 2005-155 concerning pregnancy and ETC 2010-62 concerning goods and services.

⁹⁰ ETC (2011), *Third evaluation report (2004-2009)*, p. 7.

⁹¹ Tweede Kamer, 2011-2012, 28 481, no. 16, p. 9, referring to an earlier promise of the government to include such an exception (Tweede Kamer, 2008-2009, 28 481, no. 5, p. 4.).

⁹² ETC Opinion 2011-69. See for a comment on this case Noorlander, C.W. (2012) 'Godsdienst, Levensovertuiging en Politieke Gezindheid' ['Religion, belief and political opinion'] in: Forder, C. (ed), *Oordelenbundel 2011* [NIHR Opinions 2011], Nijmegen, Wolf Legal Publishers, pp. 159-178 and Terlouw, A.B. (2011), 'De CGB en de algemene mensenrechtentoets' ['The ETC and the general human rights test'], in *MTM-NJCM-Bulletin*, 2011, pp. 656-671.

legislation in this respect, no grounds are legally excluded from the possibility of situation testing.

b) Practice

In the Netherlands, situation testing is used in practice, most frequently by NGOs and sometimes as an individual initiative.⁹³ It predominantly concerns job applications and admission to bars and restaurants or night clubs, most often in the context of the ground of race / ethnic origin. The non-governmental organisation, Art.1, and local Anti-Discrimination Bureaux ((*Anti-discriminatievoorzieningen*, ADVs)⁹⁴ use situation testing, but trade unions have also sometimes used it. The NIHR never uses it, since its main task is to investigate complaints about discrimination that are brought to its attention, not to reveal instances of discrimination.

The NIHR (formerly the ETC) has issued several Opinions in the past about the criteria for situation testing.⁹⁵ Situation testing mostly occurs when two groups seek admission to a night club.⁹⁶ One of the requirements is that the two groups are comparable in appearance – especially in terms of clothing and hairdos (except, of course, for their ethnic or racial ‘appearance’). Another requirement is that both groups seek to be admitted under the same circumstances (e.g. neither group have membership cards) and on the same evening.⁹⁷ In addition, there should not be a long time between the two test situations.⁹⁸

Courts in the Netherlands have accepted situational testing as a means of proving discrimination. Both in civil⁹⁹ and criminal litigation,¹⁰⁰ situational testing has been allowed as sufficient evidence.

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

a) Prohibition and definition of indirect discrimination

In the Netherlands, indirect discrimination is defined and prohibited in national law. Before 2011, Dutch equal treatment laws contained a definition of direct and indirect discrimination that was different from the EU directives. In November 2011 the equal treatment laws (GETA, ETA, DDA and ADA and some provisions in the Civil Code) were amended in order to bring the definitions of direct and indirect discrimination into line with the directives.¹⁰¹ Article 1(c) of the GETA now includes the following definition of ‘indirect distinction’:

⁹³ See, for example, ETC 2011-99, 2012-50, 2012-128 and 2017-121. See more generally on this topic: Rodrigues, P. R. ‘Eén voor allen: collectieve acties en gelijke behandeling’ [‘One for all: collective action and equal treatment’], in: Forder C. (ed.) (2011), *Gelijke behandeling: oordelen en commentaar 2010* [‘NIHR Opinions 2010’], Nijmegen, Wolf Legal Publishers, pp. 309-324.

⁹⁴ These organisations assist victims of discrimination and may be regarded as equality bodies under Article 13 of the Racial Equality Directive. See also Chapter 7 of this report concerning equality bodies.

⁹⁵ See, for example, ETC Opinions 1997-62, 1997-64, 65 and 66, 1997-133, 1998-39, 2009-15 and 2012-50. The latter case is discussed by Rikki Holtmaat, ‘CGB oordeelt over deurbeleid café-dancing op basis van praktijktesten. Noot bij Commissie Gelijke Behandeling 15 maart 2012’ In *NTM-NJCM Bulletin*, 38 [2013] no. 1, p. 118-123. For another example, see a report by the Netherlands Institute for Social Research (*Op achterstand*), available at: www.scp.nl/Publicaties/Alle_publicaties/Publicaties_2012/Op_achterstand (last accessed 18 March 2018).

⁹⁶ Another case where situation testing was applied, in the situation of a job application, is ETC 2005-136 in which a young man with a foreign surname applied for a job; a friend with a Dutch surname applied for the same job, sending more or less the same letter of application. The ETC accepted this as evidence of discrimination.

⁹⁷ See ETC 1997-133.

⁹⁸ See ETC 1998-39.

⁹⁹ President District Court of Zutphen, 26 June 1980, *NJ* 1981, no. 29.

¹⁰⁰ Local Court of Amsterdam, 4 January 1982, *RR* no. 36.

¹⁰¹ Netherlands, *Wet van 7 November 2011*, *Staatsblad* 2011, 554.

'indirect distinction: where an apparently neutral provision, criterion or practice would affect persons of a particular race (et cetera) in a particular way.'¹⁰²

b) Justification test for indirect discrimination

Article 2(1) of the GETA contains an objective justification test for indirect distinction cases, which includes the elements of legitimate aim, appropriateness and necessity. The same applies to Article 3(2) of the DDA and Article 7(1) under (c) of the ADA. All three provisions mirror the core substantive elements of the objective justification test in indirect discrimination cases as laid down in Article 2(2)(b)(i) of Directive 2000/78/EC. This also reflects the case law of the CJEU in indirect discrimination cases, which is followed by the NIHR and the courts.¹⁰³

It is hard to summarise the wide range of possible legitimate aims. However, it is clear that legitimate aims may not be in contradiction with the principle of equality. An example may be Opinion 2007-173, where the then ETC held that a language requirement in a fitness centre in order to prevent customers from feeling intimidated when others talk a different language is not legitimate, because this aim fosters and affirms prejudices which are in contradiction with the principle of non-discrimination. The appropriateness and necessity of a measure is judged by a testing system shaped in case law, too sophisticated to summarise in brief.¹⁰⁴

c) Comparison in relation to age discrimination

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

2.3.1 Statistical evidence

a) Legal framework

In the Netherlands, there are no national rules permitting data collection, but statistical data can certainly be used to design and defend positive action measures. Most of the data is generated by the Netherlands Institute for Social Research (*Sociaal en Cultureel Planbureau, SCP*), a governmental research institute that collects data in many fields, and Netherlands Statistics (*Centraal Bureau voor de Statistiek, CBS*). It must be noted that the collection of data can be restricted by privacy and non-discrimination law. In general the author of this report is of the opinion that the purpose of data collection and the process of collecting data seem to be in compliance with EU law as far as EU non-discrimination norms are concerned.¹⁰⁵

For the purpose of preventing data collection that might go against the non-discrimination principle, some of the grounds are covered by the Personal Data Protection Act (PDPA) (*Wet Bescherming Persoonsgegevens*). According to Article 16 of the PDPA, information about someone's race, political convictions, religion or belief, health, sexual life and membership of a trade union are 'special data' or 'classified data'. Registration of disability is not classified. Employers are allowed to/not prohibited from registering who is disabled.

¹⁰² Similar definitions are used in the ETA, DDA and ADA.

¹⁰³ See, for example, NIHR 2014-44 and NIHR 2014-174.

¹⁰⁴ For a brief overview, see Gerards, J. H. (2003), 'Het toetsingsmodel van de CGB voor de beoordeling van indirect onderscheid' ['The ETC testing model for the assessment of indirect discrimination'], in: *Gelijke behandeling: oordelen en commentaar* [Equal treatment: opinions and commentary], Deventer, Kluwer, pp. 77-95. An extended overview of the Dutch justification tests in equal treatment cases can be found in: Gerards, J. H. (2005), *Judicial review in equal treatment cases*, Leiden/Boston, Martinus Nijhoff Publishers.

¹⁰⁵ It is beyond the scope of this report to test whether Dutch data collection legislation is in line with EU directives in this area.

However, in Dutch legislation, these data protection laws are not always implemented in a sufficiently deterrent manner. An example is legislation concerning the Register of Young People At-Risk (*Verwijsindex Risicjongeren*), by means of which a number of judicial, social and health organisations can record the ethnic origin of a young person at risk.¹⁰⁶

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

Race: 'Allochtoon' (as opposed to 'autochtoon') is a word which was widely used in the Netherlands until around 2016. Both government officials and academics tended (but were not obliged) to use the definition of 'allochtoon' which was used by Netherlands Statistics. An 'allochtoon' is someone one or both of whose parents were not born in the Netherlands. Because of the increasingly negative connotation of the term 'allochtoon' it has been discredited. The government and several important bodies, such as Netherlands Statistics, have established a new practice which seems to be being followed widely, by using the term 'inhabitants with a migrant background' (*inwoners met een migrantenachtergrond*) instead of 'allochtoon'.

A 'trend' which has become increasingly popular is the so-called 'etno-selectie' for marketing and policy-development purposes. 'Etno-selectie' refers to the construction and analysis of huge databases in which people's behaviour is matched with (amongst other factors) their ethnic or social background. The Dutch government itself quite often uses this instrument, for example in the framework of its (migrant) integration policies. This has been criticised on the ground that the mechanism is increasingly used for exclusionary ends instead of for positive action purposes.¹⁰⁷

In addition, there are practices in the police to record and monitor crimes and crime suspects according to the ethnic origin of those involved. The competences of the police in this area have been widened over the last decade, in response to increasing calls to intensify the fight against crime.¹⁰⁸ Ethnic profiling is highly disputed among lawyers and in Dutch society as a whole and leads to great indignation among those (who feel) targeted. In 2013, the Dutch branch of Amnesty International published a report that strongly condemned ethnic profiling.¹⁰⁹ The government reacted to this Amnesty report in a letter to Parliament, strongly condemning ethnic profiling, but also defending police practices based on 'objective criteria'.¹¹⁰

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

¹⁰⁶ This registration is possible on the basis of the Law on the Care of Young People (*Wet op de Jeugdzorg*). In February 2011, the Dutch Data Protection Authority (*College Bescherming Persoonsgegevens*) prohibited a District Council in Rotterdam from continuing to record the ethnic background of young people at risk. The Data Protection Authority declared the policy unlawful under the Personal Data Protection Act and ordered the District Council of Rotterdam to stop the policy. The District Council eventually lodged an appeal against the decision, which was rejected (ECLI:NL:RBROT:2012:BW5513).

¹⁰⁷ See Prins, C. (2005), 'Etno-selectie', in: *Nederlands juristenblad*, 2005-8, p. 411. For more information about the increased usage of ICT and its consequences on privacy see Prins, C. (2011), 'Jeugdzorg via systemen. De Verwijsindex Risicjongeren als spin in een digitaal vangnet' ['Youth welfare through systems. The Register of Young People at Risk as a spider in a digital safety net'] in *De Staat van Informatie*, Scientific Council for Government Policy (WRR), report no. 86: pp. 293-348.

¹⁰⁸ See on this development van der Leun, J. P. and Van der Woude, M. A. (2011), 'Ethnic profiling in the Netherlands? A reflection on expanding preventive powers, ethnic profiling and a changing social and political context' in *Policing and society*, vol. 21, no. 4, pp. 444-455.

¹⁰⁹ Amnesty International (2013) *Gelijkheid onder druk: de impact van etnisch profileren* [Equality under pressure: the impact of ethnic profiling], available at: www.amnesty.nl/content/uploads/2016/11/osf_ainl_gelijkheid_onder_druk_nov_2013.pdf?x71839 (last accessed 22 March 2018).

¹¹⁰ Tweede Kamer, 2013-2014, 29 628, no. 423.

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

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

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

b) Practice

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

When using statistical evidence, the NIHR uses the standard consideration that the contested rule or practice predominantly (*'in overwegende mate'*) affects a category of people which is protected by one of the non-discrimination grounds.¹¹¹ In this context the NIHR stresses that this should not be calculated on the basis of absolute figures, but should be seen relatively. In a number of cases, the then ETC used the standard rule that people in the group alleged to be indirectly discriminated against (e.g. women) should at least be disadvantaged by the apparently neutral rule or practice 1.5 times as often as people from the comparator group. However, from 2004 the ETC no longer explicitly mentioned this standard or criterion. Instead, it started to use other methods of calculation, especially in cases where the (absolute) numbers are very small. This comes down to an extremely complicated way of calculating the chance that a particular group will experience more negative effects than another group.¹¹² Facts of common knowledge are taken into account, either in the absence of relevant statistics or to support such statistics.¹¹³ However, facts of common knowledge are not accepted as an exclusive means of evidence. Only in clear-cut cases does the NIHR not require statistics or facts of common knowledge.

There are many indirect discrimination cases in which data collection plays a role, especially in indirect discrimination cases that were dealt with by the then ETC. One example is Opinion 2007-91, in which different local communities were compared with respect to their policies as regards granting subsidies to unemployed artists. Although in that case there was a certain statistical correlation between the harshness of the criteria and the compilation of the population (the percentage of the population of immigrant origin), the ETC held that local authorities should have a wide margin of discretion in setting criteria for subsidies.¹¹⁴ Another example is the case of a man complaining about indirect age discrimination in the area of pay. The then ETC, following the CJEU in *Royal Copenhagen*,¹¹⁵

¹¹¹ See, for example, ETC 2003-91.

¹¹² Waaldijk, K. 'The Netherlands', in: Waaldijk, K. and Bonini-Baraldi, M. (eds.) (2004), *Combating sexual orientation discrimination in employment: legislation in fifteen EU member states*, report of the European Group of Experts on Combating Sexual Orientation Discrimination, Leiden, Universiteit Leiden, pp. 341-375, available online at: <https://openaccess.leidenuniv.nl/handle/1887/12587> (last accessed 22 March 2018).

¹¹³ Gerards, J. H. and Heringa, A. W. (2003), *Wetgeving gelijke behandeling* ('Equal treatment legislation'), Deventer, Kluwer, pp. 45-49.

¹¹⁴ ETC 2007-91.

¹¹⁵ CJEU, Case C-400/93, *Royal Copenhagen* [1995], ECR I-1275.

states that the single fact that there is a (slight) statistical difference between the salaries of certain age categories of workers is not in itself enough to conclude that there is a case of indirect discrimination. Such statistical evidence may give reason to suspect that there is indirect discrimination, but there needs to be other evidence as well.¹¹⁶

2.4 Harassment (Article 2(3))

a) Prohibition and definition of harassment

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

1. The prohibition of distinction as laid down in this Act shall also include a prohibition of harassment.
2. Harassment as referred to in the first subsection shall mean conduct related to the characteristics or behaviour as referred to in Article 1(b) [*i.e. the grounds covered by the Act, including race, religion, sexual orientation*] and which has the purpose or effect of violating the dignity of a person and creating an intimidating, hostile, degrading, humiliating or offensive environment.
3. Article 2, Article 5 subsections 2-6, Article 6a subsection 2 and Article 7 subsections 2 and 3 shall not apply to the prohibition of harassment contained in this Act. [*These contain exceptions to the prohibition of unequal treatment; i.e. harassment is per se prohibited*].¹¹⁷

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

In the Netherlands, harassment does explicitly constitute a form of discrimination (see Article 1 sub (a) of the GETA, cited above). Discriminatory treatment, in the sense of offensive attitudes, hate speech or other 'mistreatment', can be examined in addition to harassment. According to Rodrigues, this indicates that the ETC sees harassment as an aggravated form of discriminatory treatment, for which no justifications can be brought forward. For instance, a single case of a discriminatory insult is not enough to constitute a case of harassment, but nevertheless it can be qualified as (prohibited) direct discriminatory treatment.¹¹⁸

b) Scope of liability for harassment

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

Even if the (sexual) harassment itself is difficult to prove (e.g. because it happened behind closed doors between colleagues), any complaint about this kind of behaviour should be investigated seriously by the employer and adequate protective measures should be taken. Otherwise the norm that the employer should not discriminate as regards (equal) working conditions is considered to have been breached.¹¹⁹

¹¹⁶ ETC 2009-76.

¹¹⁷ Similar provisions are laid down in Article 1 (a) of the DDA and in Article 2 of the ADA.

¹¹⁸ Rodrigues, P. R. 'Ras en nationaliteit' ('Race and nationality'), in: Burri, S. D. (ed.) (2006), *Oordelenbundel 2005* ('ETC Opinions 2005'), Nijmegen, Wolf Legal Publishers.

¹¹⁹ See, for example, ETC 2011-148 and ETC 2011-156.

The ADA, the DDA and the GETA do not specify to whom the prohibition of making a distinction, including harassment, victimisation and instruction to discriminate, is addressed. Although all three Acts specify the areas of social and economic life to which each Act applies (material scope), the Acts remain silent on the matter of 'personal scope'.¹²⁰ With regard to employment, the only area that is covered by all three Acts, the central norm is aimed not only at private and public employers, but also at employers' organisations, workers' organisations, employment offices, (public) recruitment agencies, pension funds, some external advisors, members of the liberal professions, bodies of liberal professionals, training institutions, schools, universities, etc. However, it is not clear from this whether only the official owner or managers of these enterprises or institutions can be held liable under the Acts or whether this also applies to colleagues or third parties.

The matter of personal scope was raised in Parliamentary discussions on the implementation of the directives. It follows clearly from these discussions that the government did not intend to make the equal treatment legislation applicable in relationships between colleagues, let alone in relationships with third parties.¹²¹ Victims of discrimination by colleagues or third parties can always bring a claim under tort law provisions in the general Civil Code and claim damages or a court injunction under this law.

However, it was indicated by the government that the non-discrimination laws are aimed at those employees who, in the name of their employer, exercise authority over their co-employees. Such an employee functions *de facto* in the capacity of employer.¹²² The purported inapplicability of the Dutch equal treatment acts in relationships between colleagues *inter se*, appears particularly problematic in the context of work-related (*sexual*) harassment. In its current format and in the light of the Parliamentary comments, the equal treatment laws prevent an alleged victim of harassment from holding a colleague or a third party directly liable for the contested behaviour under these laws. The only way to do this would be by seeking recourse to the general provisions of tort law enshrined in the Dutch Civil Code.

The employer's vicarious liability for acts of harassment acts by a third party was, for example, at issue in ETC Opinion 1997-82.¹²³ The ETC repeated its stance that the employer is under a legal duty to prevent acts of harassment by persons under their supervision. It took the view that, although the alleged acts of harassment were not perpetrated by a colleague, but by a third party, this did not in any way circumscribe the employer's duty of care. Moreover, and this also follows from the ETC's case law prior to the implementation of the directives, a *general duty of care* rests upon the employer to maintain a discrimination-free and safe workplace. An employee's right not to be discriminated against in his or her employment and working conditions embraces the right to be free from discrimination and harassment in the workplace.¹²⁴

Beyond the scope of Dutch equal treatment legislation, it is essential that the following be taken into account. The employer may be held vicariously liable for discriminatory acts or harassment perpetrated by colleagues under employment law. The relevant Articles upon which a claim can be based are (a) good employer practice (Article 7:611 of the Civil Code); and (b) the employer's general duty of care (i.e. the employer's liability for damages suffered by an employee in the performance of job-related duties, laid down in Article

¹²⁰ Cremers-Hartman, E. 'Werkingsfeer AWGB (Art. 3, 4 sub c, 5 lid 1, 6, 7 lid 1 AWGB)' ['The scope of the GETA'], in: Asscher-Vonk, I.P. and Groenendijk, C.A. (1999), *Gelijke behandeling: regels en realiteit* [Equal treatment: regulations and reality], The Hague, SDU Uitgevers, pp. 29-88, p. 33.

¹²¹ Explanatory Memorandum to the ADA, Tweede Kamer, 2001-2002, 28169, no. 3, p. 19. See also Parliamentary Papers Second Chamber of Parliament, 2002-2003, 28770, no. 5, p. 28.

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

¹²³ This case concerned the racial harassment of a nurse by a patient. Employers were equally held liable in some court cases. See Holtmaat, R. (2009) *Seksuele intimidatie, de juridische gids* [Sexual harassment: legal guide], Nijmegen, Ars Aequi Libri, Chapter 6. See also ETC 2004-128 and NIHR 2012-197.

¹²⁴ See, for example, ETC 2004-08. See also Asscher-Vonk, I. P. and Monster, W. C. (2002), *Gelijke behandeling bij de arbeid* [Equal treatment in employment], Deventer, Kluwer, p. 164.

7:658 of the Civil Code). Both of these Articles are directed at the employer's liability for acts perpetrated by the employer themselves or by others over whom the employer has control.

In the past it was much disputed whether Article 7:658 of the Civil Code could form the legal basis for claims that concern mere psychological damage, rather than physical damage.¹²⁵ It is a fact that damage resulting from discriminatory treatment and harassment is most often psychological. In 2005 the Supreme Court accepted that Article 7:658 Civil Code can include psychological damage.¹²⁶ The lower courts have accepted that, in cases of sexual harassment, this Article can form the basis for financial compensation of psychological damage resulting from such behaviour.¹²⁷

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

2.5 Instructions to discriminate (Article 2(4))

a) Prohibition of instructions to discriminate

In the Netherlands, instructions to discriminate are prohibited in national law, but are not explicitly defined. Prior to the implementation of the directives, a prohibition of the instruction to make a distinction was implied within the GETA.¹²⁸ However, in order to avoid any misunderstanding, Article 1(a) of the Act was included in the EC Implementation Act, with the phrase 'as well as the instruction to make a distinction'. The counterpart provisions in the ADA and DDA are Article 1(2) and Article 1(a) respectively. The prohibition to make an instruction to discriminate is applicable for the whole scope of the equal treatment legislation (as far as the GETA and the DDA are concerned, this covers more than employment and employment-related education and training, extending also to goods and services and (with respect to race) social security and social benefits).¹²⁹

It has been indicated by the government that the notion of instruction refers to '*opdracht*' in the meaning of Article 7:400 of the Civil Code. This Article regulates the law on contracts for the provisions of services.¹³⁰ In the Explanatory Memorandum to the ADA, the

¹²⁵ Geers, A. 'Intimidatie op de werkplek' ['Harassment in the workplace'], in: van Maanen, G. (ed.) (2003), *De rol van het aansprakelijkheidsrecht bij de verwerking van persoonlijk leed* [The role of liability law in processing personal suffering], Den Haag, Boom, pp. 183-198, at p. 188, with further references to the literature on this question. See also Vegter, M. S. A. 'Aansprakelijkheid werkgever voor psychische schade werknemer als gevolg van seksuele intimidatie van de werknemer' ['Liability of the employer for psychological harm to the employee caused by sexual harassment'], in: *Aansprakelijkheid, verzekering en schade* [Liability, insurance and damage] no. 5, October 2001, pp. 133-140, at p. 134. With regard to Article 7:611 of the Civil Code, the Supreme Court has decided that this Article may be relied upon to claim compensation for damages of only a psychological nature. See Supreme Court, 11 July 1993, *NJ* 1993/667 (*Nuts/Hofman*), ECLI:NL:HR:1993:ZJ 1032.

¹²⁶ Supreme Court, 11 March 2005, *RvdW* 2005/37 (*ABN AMRO / Nieuwenhuys*), ECLI:NL:HR:2005:AR6657.

¹²⁷ See Vegter, M. S. A. 'Aansprakelijkheid werkgever voor psychische schade werknemer als gevolg van seksuele intimidatie van de werknemer' ['Liability of the employer for psychological harm to the employee caused by sexual harassment'], in: *Aansprakelijkheid, verzekering en schade* [Liability, insurance and damage] no. 5, October 2001, pp. 133-140, at pp. 134-135. See also Holtmaat, R. (2009) *Seksuele intimidatie; de juridische gids* [Sexual harassment: legal guide], Nijmegen, Ars Aequi Libri.

¹²⁸ Explanatory Memorandum to the EC Implementation Act, Tweede Kamer, 2002-2003, 28 770, no. 3, p. 7.

¹²⁹ Examples of cases where the ETC found that there was a case of 'instruction to discriminate' are ETC 2006-82, 2007-211, 2009-40, 2010-95, 2010-179, 2012-30, 2012-37 and 2012-43.

¹³⁰ Explanatory Memorandum to the ADA, Tweede Kamer, 2001-2002, 28169, no. 3, p.18.

government mentions the example of an employer who instructs a recruitment agency to select only people under the age of 30 (without a sound justification for this). According to the Explanatory Memorandum, in such a scenario, both the person who gives the contested instruction and the person who carries out the instruction violate the non-discrimination norm. If the 'recipient' of the instruction refuses to abide by it and, as a consequence thereof, suffers damages, they can hold the person who gave the instruction liable for it.

According to the government's explanation, an instruction which has been given within the employment relationship (e.g. if a director instructs a member of the personnel department to only recruit young people) is not covered by the prohibition of instruction to make a distinction. In the government's view, such a scenario is covered by the exercise of authority by the employer over the employee within the employment relationship ('*gezagsuitoefening in het kader van de arbeidsovereenkomst*'). Any distinction that might occur within this exercise of authority can only be attributed to the employer and excludes the employee.¹³¹ This interpretation is followed by the ETC (now the NIHR).¹³² This reasoning might fall short of what the EU legislator had in mind with the prohibition of instruction to discriminate. Arguably, on this point the Dutch government interprets the prohibition of an instruction to make a distinction unduly narrowly.

The then ETC suggested that the prohibition of instruction to make a distinction should also include a prohibition of the passive toleration of an existing discriminatory situation or act.¹³³ This advice was not followed by the government. It maintained its position that an instruction to make a distinction implies active rather than passive behaviour. This is a narrow interpretation of the verb 'to instruct'. The government has nevertheless indicated that the toleration of existing discriminatory conduct or acts might still be covered by the prohibition of making (direct or indirect) distinctions.¹³⁴ The then ETC, as well as the NIHR, has applied its own interpretation and has also covered situations where there was no explicit instruction, and / or where an employer allowed a temporary work agency to discriminate, under this prohibition.¹³⁵

In addition, the instruction to discriminate on grounds of race, religion/belief, sex or homo- or heterosexuality can also be subject to criminal prosecution under Article 137d of the Criminal Code. Moreover, 'scornful blasphemy' ('*smalende godslastering*') used to be prohibited in a separate article, namely Article 147 of the Criminal Code, but this provision was revoked in 2013.¹³⁶ The significance of this repeal lies in its symbolic meaning more than in its practical effects, as the provision had already been a 'dead letter' for decades.

b) Scope of liability for instructions to discriminate

In the Netherlands, the instructor is liable, but the discriminator is not. The employer may be held liable under employment law for discriminatory acts or harassment perpetrated by workers. The relevant articles upon which a claim can be based are Articles 7:611 and 7:658 of the Civil Code. Both of these Articles are directed at the employer's liability for acts perpetrated by the employer themselves or by others over whom the employer has control. In 2005 the Supreme Court accepted that Article 7:658 of the Civil Code can include psychological damage.¹³⁷ The lower courts have accepted that, in cases of sexual harassment, this article can form the basis for financial compensation of psychological

¹³¹ Explanatory Memorandum to the ADA, Tweede Kamer, 2001-2002, 28169, no. 3, p. 19.

¹³² ETC (2011), *Third evaluation report (2004-2009)*, p. 30.

¹³³ ETC Advice 2001-03, p. 6 and 2001-04, p. 4.

¹³⁴ Explanatory Memorandum to the ADA, Tweede Kamer, 2001-2002, 28169, no. 3, p.18.

¹³⁵ ETC (2011) *Third evaluation report (2004-2009)*, p. 30. The ETC mentions Opinion 2005-154 as an example of such a case. See also several opinions of the NIHR, such as 2012-175/176/177.

¹³⁶ Tweede Kamer, 2012-2013, 32 203, no. 8.

¹³⁷ Supreme Court, 11 March 2005, *RvdW 2005/37 (ABN AMRO / Nieuwenhuys)*, ECLI:NL:HR:2005:AR6657. See, on this case: Houben, E. J. 'Schadevergoeding bij zuiver psychisch letsel' ['Compensation for exclusively psychological damage'] in *Arbeidsrecht* [Employment law] 2006, no. 2. p. 31-36.

damage resulting from such behaviour.¹³⁸ Individuals who perpetrate acts of discrimination because of an instruction to do so will normally fall under the scope of Article 7:658 of the Civil Code, i.e. the employer will be held liable. We have not found any case law indicating the contrary.

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

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

In the Netherlands, the duty to provide reasonable accommodation is included in the law. It is defined in Article 2 of the DDA, which reads as follows:

‘the prohibition of making a distinction also includes the duty for the person to whom the prohibition is addressed, to make effective accommodations in accordance to the need for this, unless doing so would constitute a disproportionate burden upon him or her.’

Instead of the term ‘reasonable’, which is the term used in Article 5 of the directive, Article 2 of the DDA employs the term ‘effective’ (*‘doeltreffend’*). In the government’s view, the latter term reflects better than the term ‘reasonable’ the fact that an accommodation must have the desired effect.¹³⁹ The aspect of reasonableness is reflected in the second part of the provision, in the sense that there is no obligation to accommodate if doing so would constitute a disproportionate burden (i.e. would not be reasonable).

- b) Practice

The test of whether an employer is under a duty to provide accommodation for a disabled person who requires it, runs as follows:¹⁴⁰

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

This means that two separate questions need to be answered:

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

If the conclusion is that no accommodation could be effective to help the disabled person do the job properly, the request will be denied. If the answer to both questions is ‘yes’, the second part of the test will follow. The outcome of this first part of the test may be that another (e.g. cheaper) accommodation than that requested could also be effective and would help the disabled person to stay in the job or to do the job.¹⁴¹ In this case, the second part of the test will focus on this particular cheaper accommodation.

¹³⁸ See Vegter, M. S. A., ‘Aansprakelijkheid werkgever voor psychische schade werknemer als gevolg van seksuele intimidatie van de werknemer’ [‘Liability of the employer for psychological harm to the employee caused by sexual harassment’], in: *Aansprakelijkheid, verzekering en schade* [Liability, insurance and damage] no. 5, October 2001, pp. 133-140, at pp. 134-135. See also Holtmaat, R. (2009) *Seksuele intimidatie; de juridische gids* [Sexual harassment: legal guide], Ars Aequi Libri, Nijmegen.

¹³⁹ Explanatory Memorandum to the DDA, Tweede Kamer, 2001-2002, 28 169, no. 3, p. 25.

¹⁴⁰ Concluded from the Explanatory Memorandum to the DDA, Tweede Kamer, 2001-2002, 28 169, no. 3.

¹⁴¹ Indeed this approach was followed by the NIHR in Opinion 2016-18. The case concerned a civil servant who could not access the Ministry of Finance through the main, secured door because of his obesity. Though he did not agree with the solution provided by the Ministry (that is to use a side door available for disabled persons) the NIHR held the accommodation provided was effective. The Ministry did not have to provide the much costlier alternative preferred by the employee.

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

This concerns the question of whether supplying the accommodation puts a disproportionate burden on the employer. National law does not define what this would be. However, there are some indicators. According to the Explanatory Memorandum to the DDA, this 'balancing exercise' between the interests of the disabled person versus those of the employer must be carried out in the light of 'open norms' of civil law (i.e. the duty of the good employer and the notion of 'reasonableness' in civil law).¹⁴² If financial compensation (e.g. a subsidy) exists for the realisation of the effective accommodation, it cannot be regarded as 'disproportionate'.¹⁴³ Financial compensation is, for example, offered through Article 36 of the Work and Income according to Labour Capacity Act (WIA). The government also highlighted Consideration 21 of the Preamble to Directive 2000/78/EC¹⁴⁴ and added as an additional criterion that the duration of the employment contract may be a weighty factor.¹⁴⁵ The NIHR held in one of its opinions that the employer must actively investigate the possibilities of providing effective accommodation. A lack of proper investigation also amounts to discrimination in violation of the DDA.¹⁴⁶

c) Definition of disability and non-discrimination protection

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

A final note concerns the explicit statement by the then ETC¹⁴⁷ that the employer's defence that they do not make a distinction in any way between disabled and non-disabled people does not mean that they comply with the DDA. Equal treatment in unequal (labour) circumstances may lead to inequality, according to the ETC. In many of the cases on the ground of disability that come before the equality body an appeal to the obligation to provide reasonable accommodation is made. Often the ETC found that this duty had indeed been breached.¹⁴⁸

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

In the Netherlands, there is a duty to provide reasonable accommodation for people with disabilities outside the employment field. Originally, the DDA only covered employment and vocational education. However, in 2009 the Dutch legislator passed laws to extend the scope of the DDA to housing from 15 March 2009 and to primary and secondary education (Articles 6a-6c DDA) from 1 August 2009.¹⁴⁹ In 2016 the DDA was extended further in parallel with the ratification of the CRPD and now includes the entire field of goods and services, although some specific restrictions still apply to public transport (Article 7 DDA, see below sub g) and housing (Articles 6a-c DDA).

¹⁴² Explanatory Memorandum to the DDA, Tweede Kamer, 2001-2002, 28 169, no. 3, p. 25-30.

¹⁴³ This follows from the Explanatory Memorandum to the DDA, Tweede Kamer, 2001-2002, 28 169, no. 3, p. 28. However, this is not explicitly mentioned in Article 2.

¹⁴⁴ On the factors to be considered when determining whether making a reasonable accommodation would amount to a disproportionate burden.

¹⁴⁵ It is submitted that this might, however, trigger indirect sex discrimination, since women are more likely than men to be employed on the basis of a fixed-term contract.

¹⁴⁶ NIHR opinions 2014-1 and 2014-2.

¹⁴⁷ ETC 2005-160.

¹⁴⁸ A quick search for the term '*doeltreffende aanpassingen*' (effective adjustments) reveals that in 2015 16 such cases were decided by the NIHR; in six of these cases the body found that the norm had been violated.

¹⁴⁹ Tweede Kamer, 2008-2009, 30 859.

The duty to provide reasonable accommodation in the field of housing is restricted. Article 6c of the DDA states that Article 2 (concerning the duty to provide effective accommodation) is not applicable if it would require reconstruction or building work in or around a residential building.

The ETC started using the reasonable accommodation standard outside the area of employment in 2010.¹⁵⁰ The ETC, in this case, did not decide whether the refusal to make the required accommodation constitutes direct or indirect discrimination on the ground of disability. However, it applies a justification ground explicitly written for direct discrimination. Article 3 of the DDA leaves room to justify a case of direct discrimination if 'the contested rule or measure is necessary for health and safety reasons'.

Many cases that come before the NIHR concern reasonable accommodations in the area of (vocational) education. This is caused (inter alia) by the fact that mainstream schools are obliged to admit children with a disability unless they can prove they are unable to provide adequate education.

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

The first opinion of the NIHR on the duty to provide effective accommodation in the wider field of goods and services dates from late 2016. It concerned a notary office charging additional costs to a hearing-impaired client as it was claimed doing business with her would be more time-consuming. The NIHR concluded the notary office violated the duty of reasonable accommodation set out in the DDA as there was not sufficient evidence that the additional time needed would be so much as to pose a disproportionate burden on the notary office.¹⁵¹ More opinions followed in 2017, thus providing the opportunity for the NIHR to further develop its jurisprudence in this area. Importantly, the NIHR applies the requirement of 'reasonable accommodation' in a very strict way and demands a high level of accommodation that ties in closely with the specific wishes of the person in need of the accommodation.

The case of a blind woman who wished to shop at a branch of Kruidvat, a big chain of drugstores, is a good example of this strict approach.¹⁵² The woman asked to be taken by the arm and guided through the shop so she could browse and select from the range of products herself. However, the staff would not go further than offering to collect the things on her shopping list and bring them to her. The NIHR concluded that Kruidvat violated its duty of reasonable accommodation under the DDA. It held that the accommodation offered by Kruidvat was not sufficient, in particular because Kruidvat had not really investigated whether providing the accommodation in the way the blind woman preferred herself would indeed impose a disproportionate burden. In this respect, and referring to the Parliamentary discussion on the extension of the DDA in the context of the ratification procedure of the CRPD, the NIHR emphasised that the purpose of the obligation to provide reasonable accommodation is to realise the autonomy of disabled persons to the greatest extent possible.

This is not to say there are no limits to what can be expected of the duty bearer. Thus a school was not considered to violate its duty of reasonable accommodation towards a pupil

¹⁵⁰ See ETC 2010-35, and ETC 2011-30, in which the ETC reached the same conclusion.

¹⁵¹ NIHR 2016-136.

¹⁵² NIHR 2017-104.

with Down syndrome as its substantial efforts to accommodate the pupil's needs had been sufficient and further accommodation would pose a disproportionate burden on the school.¹⁵³

An interesting and important extension of the duty to provide reasonable accommodation to *individuals* regards a duty to also provide for accommodation more *generally*. As of 1 January 2017, the DDA puts a more general duty on all those bound by the DDA to improve accessibility for people with disabilities in addition to the duty to provide reasonable accommodation in individual cases (Article 2a (1)).¹⁵⁴ See for more details below under g).

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

In the Netherlands, failure to meet the duty of reasonable accommodation does count as discrimination or, more specifically, as a form of prohibited distinction, for which the ordinary sanctions can be imposed.¹⁵⁵ However, the text of Article 2, in conjunction with that of Article 1 (definitions of direct and indirect distinction) and Article 3 DDA (regarding the exceptions to the central norm), does not shed light upon the question of whether a failure to provide an effective accommodation constitutes direct, indirect or a third type of distinction.¹⁵⁶ With regard to the duty to provide an effective accommodation, Article 2 of the DDA states that if making an accommodation constitutes a *disproportionate* burden on the employer, then the duty does not exist (cf. Article 5 of Directive 2000/78/EC). In the amended DDA, in Article 6c the exception is made that Article 2 (concerning the duty to provide an effective accommodation) is not applicable if it would require reconstruction or building work in or around a residential building.

Article 3(1) DDA¹⁵⁷ enshrines three general exceptions to the central norm (i.e. the prohibition of making a distinction, which on the basis of Article 2 also includes the duty to provide effective accommodations). In brief, the exceptions are: public security and health, supportive social policies, and positive action measures. Thus, a textual reading of Article 3(1) DDA suggests that these three general exceptions could also 'lift' the effective accommodation duty, as this falls within the central norm. However, logically and in accordance with what the government observed in its Explanatory Memorandum, only the exception concerning public security and health can have the effect of 'lifting' the duty enshrined in Article 2.¹⁵⁸ Consequently, the other two exceptions mentioned cannot be invoked by employers with respect to their effective accommodation duty. It is indeed difficult to perceive in what ways the other exceptions could be applicable in a case concerning the failure to provide effective accommodation. As far as the public security and health exception is concerned, the NIHR has been strict in its review. Thus it did not accept the argument of a public transport company that a person in an electric wheelchair could be refused the right to use a regular bus service because the weight of the chair poses a health and safety risk. The company could not sufficiently substantiate its claim.¹⁵⁹

¹⁵³ NIHR 2017-41. The pupil had received specific and individual help and guidance to facilitate his participation at a regular school for eight years. At some point his development deteriorated and he started to exhibit inappropriate behaviour such as yelling, anger and running away. The way in which the pupil was supported was adjusted, but this did not improve the situation. After some time the school decided to refer the pupil to the special education system as the school considered it was no longer feasible to further accommodate the pupil's specific needs.

¹⁵⁴ This amendment of the DDA was already adopted in 2016 as part of the acts on ratification and implementation of the Convention on the Rights of Persons with Disabilities, but its entry into force was postponed to 1 January 2017. See <https://zoek.officielebekendmakingen.nl/stb-2016-215.html>.

¹⁵⁵ See ETC 2004-140, where it held: 'It concerns a sui generis form of (making a) distinction, which does not yet occur in the other equal treatment laws'. In this Opinion, the ETC seems to suggest that the duty to provide reasonable accommodation should also be included in the sex equality laws, the GETA and the ADA.

¹⁵⁶ See Waddington, L. and Hendriks, A. 'The expanding concept of employment discrimination in Europe: from direct and indirect discrimination to reasonable accommodation discrimination', in: *International journal of comparative labour law and industrial relations*, Winter 2002, pp. 403-427.

¹⁵⁷ Article 3(2), moreover, stipulates that indirect distinction can be objectively justified.

¹⁵⁸ Explanatory Memorandum to the DDA, Tweede Kamer, 2001-2002, 28 169, no. 3, p. 33.

¹⁵⁹ NIHR 2016-39.

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

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

However, when (in the case of indirect discrimination) the proportionality of a certain unequal treatment (with a legitimate aim) is tested in case law, an implicit duty might sometimes be identified to provide reasonable accommodation, although this is not made explicit. This is of particular interest in relation to the accommodation of religious expression by people with a migrant background. Thus it has been established that, as a general rule, employers must accommodate the wishes of their employees to wear a headscarf or other religious symbol at work. The NIHR reviews strictly any objective justification put forward for not allowing this.¹⁶⁰ The 2017 preliminary rulings of the CJEU in the cases *Achbita* and *Bouagnaoui* regarding a headscarf ban by a private employer¹⁶¹ do not seem to induce the NIHR to adjust this approach, even if the Dutch media generally reported that the rulings would allow employers to prohibit the wearing of a headscarf at work.¹⁶² In its response to the rulings the NIHR emphasised the they should not be interpreted as giving employers a free hand to ban headscarves from the workplace.¹⁶³

Similarly, in ETC Opinion 2006-202 it was considered that a municipality had failed to seek alternative ways of greeting people within the organisation. Therefore, the applicant could not be rejected for a job solely because he refused to shake hands when greeting people of the opposite sex because of his Muslim faith. This opinion was very controversial and was not followed by the District Court of Rotterdam, which considered that, given the important role the applicant would have as a contact person between citizens and the local authority, the municipality could require its personnel 'to observe the usual rules of etiquette and of greeting customs in the Netherlands'. In this setting the court held that the refusal to employ the applicant was justified.¹⁶⁴

Similarly controversial is the wearing of a face-covering veil such as a niqab. A proposal for prohibiting face-covering clothing in a number of specific areas, such as education, public transport, public buildings and healthcare, was adopted by a large majority in the Second Chamber and is now pending with the Senate.¹⁶⁵

Refusals to accommodate religious attire in public employment for reasons of state neutrality are also submitted to a strict test by the NIHR. Thus it held that a district court violated the GETA by not allowing an external law clerk to assist in court sessions while

¹⁶⁰ The standards developed in the jurisprudence of the former ETC have been laid down in several guidelines, see e.g. *Advies 2004/06 inzake Arbeid, religie en gelijke behandeling* (Advice 2004/06 concerning Employment, religion and equal treatment); *Advies 2008/03 inzake gelijke behandeling in het onderwijs: 'Naar een discriminatie vrije school'* (Advice 2008/03 concerning equal treatment in education: 'Towards a discrimination-free school'). Available on the website of the NIHR. See <https://www.mensenrechten.nl/publicaties/detail/9929>. Subsequent opinions by the NIHR confirm it keeps applying the objective justification test strictly, as is borne out by Opinion 2016-45 discussed below, in which it did not accept the arguments regarding state neutrality as a justification for not allowing a law clerk to wear a headscarf in court.

¹⁶¹ CJEU 14 March 2017, C-157/15 (*Achbita v. G4S*); CJEU 14 March 2017, C-188/15 (*Bouagnaoui and ADDH v. Micropole*).

¹⁶² See e.g. one of the main Dutch national newspapers, www.nrc.nl/nieuws/2017/03/14/europees-hof-staat-hoofddoekverbod-op-werk-toe-a1550188 (last accessed 22 March 2018).

¹⁶³ NIHR 'Uitspraak Hof van Justitie geen vrijbrief om hoofddoek van werkvloer te weren' [Court of Justice judgment is not a licence to ban the headscarf from the workplace], www.mensenrechten.nl/berichten/uitspraak-hof-van-justitie-geen-vrijbrief-om-hoofddoek-van-werkvloer-te-weren (last accessed 22 March 2018).

¹⁶⁴ Translation by the author; Rechtbank Rotterdam, 6 August 2008, ECLI:NL:RBROT:2008:BD9643. On appeal this outcome was confirmed by Gerechtshof's-Gravenhage, 10 April 2012, ECLI:NL:GHSGR:2012:BW1270.

¹⁶⁵ Proposal for a partial prohibition of face-covering clothing (*Wetsvoorstel gedeeltelijk verbod gezichtsbedekkende kleding*) Kamerstukken II, 2015-2016, no. 34 349), <https://zoek.officielebekendmakingen.nl/dossier/34349>.

wearing a headscarf. The NIHR reasoned that as a law clerk does not belong to the judiciary as such the prohibition was not objectively justified.¹⁶⁶ The judiciary does not accept this approach and abides by its policy. Regarding police officers, the NIHR also applies a strict test to assess whether a ban on the wearing of a headscarf with the police uniform can be justified because of police policy to strive for a 'lifestyle neutral' appearance. In a case it dealt with in 2017 the complainant was employed as an 'intake and service assistant'. As such she recorded statements by citizens who want to file a police report through a 3D video connection. The NIHR accepts the legitimacy of the goals put forward for the dress policy, but given the specific circumstances of the case it does not consider the application of this policy necessary and thus deems it to be not objectively justified. The NIHR considers, in particular, that in view of the administrative character of the work performed the argument of neutrality is of limited relevance.¹⁶⁷ The police leadership has indicated it will not follow this outcome.

In a similar vein, the then ETC required local councils to provide 'solutions' for civil servants who have religious objections to celebrating same-sex marriages.¹⁶⁸ However, it reversed this position in Opinion 2008-40. After much debate, several bills and advice from the Council of State, an amendment to Article 1:16 of the Civil Code was adopted in 2014 which made it impossible to appoint new civil servants who refuse to serve as registrars to same-sex couples.¹⁶⁹ The priority to be given in a case like this to non-discrimination on grounds of sexual orientation over religious freedom was also confirmed in a ruling of the Administrative High Court of 2016.¹⁷⁰

g) Accessibility of services, buildings and infrastructure

In the Netherlands, national law requires services available to the public, buildings and infrastructure to be designed and built in a disability-accessible way. However, no general legal obligation exists to always guarantee accessibility for disabled people or to take anticipatory measures (for example, structural adaptations of buildings). Nevertheless, since 1 January 2017, the DDA has provided for a duty to ensure accessibility for people with disabilities at least gradually ('geleidelijk'), unless this creates a disproportionate burden. This provision is discussed in more detail below. With regard to public spaces and buildings in which public offices and social services are located (education, healthcare and other general services), there are some specific regulations. The Ministry of Infrastructure and the Environment issued a decree stipulating construction requirements (*Bouwbesluit*). This decree contains some requirements about the accessibility of public buildings. A similar decree exists relating to the construction of buses and trains. The Ministry of Education, too, has issued detailed instructions as to how to build schools, as did the Ministry of Health, concerning hospitals and medical centres.

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

¹⁶⁶ NIHR 2016-45. This opinion in fact confirmed an earlier opinion by the then ETC, opinion 2001-53.

¹⁶⁷ NIHR 2017-135.

¹⁶⁸ ETC 2002-25 and 2006-26.

¹⁶⁹ This Act also provided for a provision conveying the same message to be included in the GETA (Article 5(2a)); See Law Gazette (*Staatsblad*) 2014, 260.

¹⁷⁰ Administrative High Court, 29 February 2016, ECLI:NL:CRVB:2016:606, <http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:CRVB:2016:606>.

Regarding public transport, this area was included in the DDA, but the respective Articles 7 and 8¹⁷¹ did not enter into force immediately. In 2011, a Decree elaborating Articles 7 and 8 DDA was adopted.¹⁷² Articles 7 and 8 of the DDA entered into force in 2012, meaning that the DDA effectively came to cover public transport as well. However, the Decree that gave effect to these articles contains a complicated schedule of gradual implementation.¹⁷³ In fact, it will take until 2030 before the entire public transport sector (apart from transport on ferries) will actually fall under the scope of the DDA.

In the Netherlands, national law contains a general duty to provide accessibility by anticipation for people with disabilities. As of 1 January 2017, the DDA puts a more general duty on all those bound by the DDA to improve accessibility for people with disabilities in addition to the duty to provide reasonable accommodation in individual cases (Article 2a (1)).¹⁷⁴ As the DDA covers not just employment, but also access to goods and services including housing and education, the scope of this provision is wide. Inclusion in the DDA does not imply that the NIHR has the competence to receive individual complaints regarding the implementation of this provision, as this competence is expressly limited to assessing discrimination claims as such.¹⁷⁵ This is not to say, of course, that the NIHR cannot play a monitoring function under its general human rights mandate.

The proactive, general duty entails the duty to ensure accessibility for people with disabilities at least gradually ('geleidelijk'), unless this creates a disproportionate burden. To further implement this provision a Ministerial Decree was adopted and entered into force on 21 June 2017.¹⁷⁶

The Decree stipulates in Article 6 that the duty of gradual ensuring accessibility entails at least the duty to provide 'simple' facilities ('voorzieningen van eenvoudige aard'), that is easily implemented facilities in terms of effort and cost, and gradually to provide for general accessibility for people with disabilities, unless this entails a disproportionate burden. The former means that easily implemented measures to ensure accessibility must be taken immediately. As regards the latter, the crucial question is how much leeway the 'disproportionate burden' criterion will leave for justifying exceptions to the general duty to ensure accessibility. In addition, the Decree requires the Minister of Justice and Security to promote the development of action plans to ensure general accessibility in all the sectors covered by the DDA in cooperation with representative organisations of people with disabilities (Article 2), to monitor the gradual implementation of general accessibility, and to report to Parliament on the progress made on a yearly basis.

h) Accessibility of public documents

The general duty for the gradual implementation of accessibility introduced in 2017 also applies to access to information and communication. Many public websites feature the possibility to have the text read out loud (using the 'read' button). The government has

¹⁷¹ Article 7 defines the term 'public transport'. In Article 8, unequal treatment in public transport is prohibited. Article 8 section 2 contains an obligation to make adaptations in order to make public transport accessible for disabled people.

¹⁷² Netherlands, Decree on accessibility in public transport (*Besluit toegankelijkheid van het openbaar vervoer*), *Staatsblad* 2011, 225.

¹⁷³ See the Decree of 19 April 2012, *Staatsblad* 2012, 199, entitled 'Concerning the establishment of a date of the entry into force of Articles 7 and 8 of the Act on Equal Treatment on the Grounds of Disability or Chronic Disease and the entry into force of the Decree on accessibility public transport' (*Houdende het tijdstip van inwerkingtreding van de artikelen 7 en 8 van de Wet gelijke behandeling op grond van handicap of chronische ziekte en inwerkingtreding van het Besluit toegankelijkheid van het openbaar vervoer*).

¹⁷⁴ This amendment of the DDA was already adopted in 2016 as part of the acts on ratification and implementation of the Convention on the Rights of Persons with Disabilities, but its entry into force was postponed to 1 January 2017. See <https://zoek.officielebekendmakingen.nl/stb-2016-215.html>.

¹⁷⁵ Article 12 DDA.

¹⁷⁶ Decree General accessibility for persons with a disability or chronic illness (*Besluit algemene toegankelijkheid voor personen met een handicap of chronische ziekte*) of 7 June 2017, *Staatsblad* 2017, 256 of 20 June 2017. <http://wetten.overheid.nl/BWBR0039653/2017-06-21>.

indicated the need to strive for accessibility,¹⁷⁷ but in 2015 a report commissioned by the NIHR found that many local council websites still did not adhere to the accessibility standards.¹⁷⁸ The general impression of the author of this report is that sign language interpreting is often available, yet there remains room for improvement.

¹⁷⁷ Tweede Kamer 2012-2013, 26 643, no. 260 and no. 276.

¹⁷⁸ Tweede Kamer 2014-2015. 26 643, no. 366, attachment 2015D20740.

3 PERSONAL AND MATERIAL SCOPE

3.1 Personal scope

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

In the Netherlands, there are no residence or citizenship/nationality requirements for protection under the relevant national laws transposing the directives. The principle in Dutch law is that 'all persons in the Netherlands shall be treated equally in equal circumstances', as provided for in Article 1 of the Constitution. Thus, the protection against discrimination provided by criminal law, civil law, equal treatment legislation and administrative law covers any person on the territory of the Netherlands.¹⁷⁹ This wide personal scope means that migrants, regardless of their specific legal status, are also protected by this broad range of non-discrimination law if they encounter discrimination on grounds of, for instance, their race or ethnic origin, or their religion. An example can be found in a case brought to the NIHR, the national equality body, in which several people alleged they had been singled out by the local authorities because of their Egyptian and Somali origin for a fraud investigation regarding the social benefits they received. The NIHR accepted this could amount to discrimination on grounds of race.¹⁸⁰

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

a) Protection against discrimination

In the Netherlands, the personal scope of anti-discrimination law does not cover (certain) legal persons for the purpose of protection against discrimination. For the purposes of protection against discrimination only natural persons are protected. This follows from the Memorandum of Reply to the GETA, where the government explained that the definition of 'distinction' in Article 1 GETA refers to making a distinction *between persons*.¹⁸¹ However, where a group of natural persons is collectively subject to discrimination (e.g. when an association of professionals, a political association / party or a religious organisation is refused a contract for hiring a meeting room in a hotel), their organisation may be seen as the rights holder, according to the then ETC in a number of its Opinions.¹⁸² These cases all concerned access to and supply of goods and services. In one case, the then ETC allowed a company to submit a complaint against a customer.¹⁸³ Nevertheless, it is commonly held that legal persons (e.g. an association, foundation, institution or enterprise, etc.) do not fall under the personal scope (in the sense of being rights holders).

b) Liability for discrimination

¹⁷⁹ In Article 2(5) of the GETA in case of nationality discrimination (also covered by the GETA), the following exception exists: 'The prohibition on discrimination on the grounds of nationality contained in this Act shall not apply: (a) if the discrimination is based on generally binding regulations or on written or unwritten rules of international law and (b) in cases where nationality is a determining factor.' This clause is generally understood to mean that immigration law and nationality law, in particular, are exempted from the equal treatment legislation.

¹⁸⁰ NIHR 2016-83. Another similar example concerned a complaint from a man from Sudan who claimed he was refused a job because of his Sudanese origin, see NIHR 2016-60.

¹⁸¹ Tweede Kamer, 1991-1992, 22 014, no. 5, p. 87-88. In addition, the new definition of a distinction in the GETA refers to 'where one person is treated less... etc.'

¹⁸² See e.g. ETC 1996-110, 1998-31 and 1998-45. In addition, there is a possibility for associations to act on behalf of victims of discrimination when this is a (statutory) goal of their organisation.

¹⁸³ ETC 2003-142. This concerned a company whose employee had been discriminated against by another company. The ETC decided that this situation was covered under the prohibition of discrimination in the area of goods and services and that, in the case at issue, the defendant had indeed discriminated against the complainant's employee. See also the contribution by Peter Rodrigues in: de Wolff, D. (ed) (2004) *Gelijke behandeling, oordelen en commentaar 2003* ('ETC Opinions 2003'), Deventer, Kluwer.

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

3.1.3 Private and public sector including public bodies (Article 3(1))

a) Protection against discrimination

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

b) Liability for discrimination

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

3.2 Material scope

3.2.1 Employment, self-employment and occupation

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

3.2.2 Conditions for access to employment, to self-employment or to occupation, including selection criteria, recruitment conditions and promotion, whatever the branch of activity and at all levels of the professional hierarchy (Article 3(1)(a))

In the Netherlands, national legislation prohibits discrimination in the following areas: conditions for access to employment, to self-employment or to occupation, including selection criteria, recruitment conditions and promotion, whatever the branch of activity and at all levels of the professional hierarchy for the five grounds in both private and public sectors, as described in the directives.

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

- a. public advertising of employment and procedures leading to the filling of vacancies;
- b. the employment of a worker via an employment agency or job placement (inserted by the EC Implementation Act);
- c. the commencement or termination of an employment relationship;
- d. the appointment and dismissal of civil servants;
- e. terms and conditions of employment;
- f. permission for staff to receive education or training during or prior to the employment relationship;
- g. promotions;
- h. working conditions (inserted by the EC Implementation Act).

The ADA and DDA have counterpart provisions in Articles 3 and 4 respectively. These articles reflect exactly the same material scope, although sometimes the sequence of subsections differs. Both public and private labour relations are covered. The central norm applies to the entire employment process, i.e. from the moment of notice being published of a vacancy, to the commencement of the employment relationship or public appointment and until its termination.¹⁸⁴

In the GETA, self-employment is covered by Article 6. This Article provides that, 'it shall be unlawful to make distinctions with regard to the conditions for and access to the liberal professions and with regard to pursuing the liberal professions or for development within them'. For identical provisions, see also Article 4 ADA and Article 5 DDA. It is to be noted that the term 'self-employment' is not used in the articles mentioned, which instead speak of the 'liberal professions'. The term 'liberal profession' ('free occupation') may be slightly narrower than 'self-employment' (the term used in the directives). However, the problem can easily be circumvented by interpreting the term 'liberal profession' in a broad way in order to guarantee that not only doctors, architects etc. are covered, but also freelancers, sole traders, entrepreneurs, etc. This may seem odd to some readers, since in English the term 'liberal profession' is interpreted more narrowly than self-employment and could not easily be approximated. However, in the context of Dutch equality legislation, the use of 'liberal profession' has not led to problems. Discrimination is thus also prohibited in any working relationships where a relationship of authority between the employer and employee is absent.

A note on access to employment for disabled people: a major barrier may be that disabled or chronically ill people are asked questions about their physical or intellectual condition during the selection procedure and that their answers lead to a decision not to appoint them. In 2012 the law was amended in order to make the regulations in this regard stricter and to create a possibility for a complaints' procedure at the national level.¹⁸⁵

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

In the Netherlands, national legislation prohibits discrimination in the following areas: working conditions including pay and dismissals, for all five grounds and for both private and public employment.

3.2.3.1 Occupational pensions constituting part of pay

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

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

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

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

¹⁸⁴ See the Explanatory Memorandum to the DDA, Tweede Kamer, 2001-2002, 28 169, no. 3, p. 34. The same applies in the context of the ADA and the GETA.

¹⁸⁵ Netherlands, Medical Examinations Act (*Wet aanscherping medische keuringen*) *Staatsblad* 2012, 146.

The prohibition against making a distinction in the areas of vocational training and professional guidance is laid down in Article 5 of the ADA and in Article 6 of the DDA. Both Articles are identical. Subsection (a) lays down the prohibition of distinctions with regard to vocational guidance (*loopbaanoriëntatie en beroepskeuzevoorlichting*). Subsection (b) renders the central norm applicable to education aimed at entry to and functioning in the labour market (*onderwijs gericht op toetreding tot en functioneren op de arbeidsmarkt*). Subsection (b) covers education and training which form the final stage prior to entering the labour market, including retraining and further training courses.¹⁸⁶

In practice, this covers practical education (*praktijkonderwijs*, which forms part of 'secondary education'); technical and vocational training for 16-18-year-olds (*middelbaar beroepsonderwijs*); technical and vocational training for those aged 18+ (*hoger beroepsonderwijs*) and university education. 'Adult lifelong learning courses' are not mentioned specifically but are covered by Article 5 of the DDA as well.

Mainstream secondary education (*voortgezet onderwijs*), as well as general primary education, has been covered under the DDA since August 2009. The institutions that are covered are not only those which are recognised or subsidised by the Ministry of Education, but also those which are not recognised or subsidised by the Ministry or whose regulation is left to the market.¹⁸⁷

Subsections (a) and (b) of Articles 5 and 6 of the ADA and DDA are not aimed at a specific group. This norm therefore covers 'everyone' working within these institutions'. With regard to subsection (b), this is aimed at 'state education, private / denominational education, and education that is not publicly funded'.¹⁸⁸ Subsection (b) covers a wider range of education and training than Article 3(1)(b) of the Employment Framework Directive.

The directive only prohibits discrimination at the stage of 'entry to' vocational training. Dutch legislation covers the entire path from registration until the termination of the education or training.¹⁸⁹ In the GETA, Article 7 renders the prohibition against making a distinction applicable to (in brief): the supply of or access to goods or services which also embraces all forms of education;¹⁹⁰ the provision of career orientation and guidance; and advice or information regarding the choice of an educational institution or career.

It is furthermore specified in Article 7 that the Act only applies to the above-mentioned areas if the alleged discriminatory acts are committed:

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

This covers what is mentioned in Article 3(1)(b) of the directives; beyond that, general primary and secondary education are also covered by this provision.

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

¹⁸⁶ Explanatory Memorandum to the DDA, Tweede Kamer, 2001-2002, 28 169, no. 3, p. 38.

¹⁸⁷ Explanatory Memorandum to the DDA, Tweede Kamer, 2001-2002, 28 169, no. 3, p. 38.

¹⁸⁸ Explanatory Memorandum to the DDA, Tweede Kamer, 2001-2002, 28 169, no. 3, p. 37.

¹⁸⁹ Explanatory Memorandum to the DDA, Tweede Kamer, 2001-2002, 28 169, no. 3, pp. 37-38.

¹⁹⁰ The material scope of the GETA covers the entire field of education. It thus offers wider protection than the directives.

2000/78/EC. Of course, this is not to say that the reality on the ground always reflects the legal non-discrimination standards. Thus a 2016 study found that ethnic minority students, in particular, face discrimination in finding internships that help prepare them for the labour market.¹⁹¹ Where internships are part of the compulsory curriculum schools have a duty to provide practical training by organising internships. Generally speaking, they do ultimately find internships for their students (although these are probably not always the best possible placements).

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

In the Netherlands, national legislation prohibits discrimination in the following areas: membership of and involvement in workers' or employers' organisations as formulated in the directives for all five grounds and for both private and public employment. Article 6a of the GETA provides the following:

'it shall be unlawful to make distinctions with regard to the membership of or involvement in an employers' organisation or trade union, or a professional occupational organisation, as well as with regard to the benefits which arise from that membership or involvement.'

Article 5a of the DDA and Article 6 of the ADA are identical to this provision.

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

In the Netherlands, national legislation prohibits discrimination in the following areas: social protection, including social security and healthcare as formulated in the Racial Equality Directive.

3.2.6.1 Article 3.3 exception (Directive 2000/78)

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

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

In the Netherlands, national legislation prohibits discrimination in the following fields: social advantages as formulated in the Racial Equality Directive.

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

¹⁹¹ The report is available at: www.kis.nl/sites/default/files/bestanden/Publicaties/mbo-stagemarkt-rol-van-discriminatie.pdf (last accessed 19 March 2018).

No such decree has been adopted thus far. However, the interpretative tools regarding the meaning of 'social advantages' are laid down in the Explanatory Memorandum to the EC Implementation Act. In addition, its relationship with 'social security' is explained in the Memorandum. 'Social security' concerns the statutory social insurance schemes which cover the risks that occur if a person loses their income as a result of, for example, unemployment, illness, disability, age or death. Moreover it covers child benefits.¹⁹² With regard to the notion of 'social advantages', it is observed by the government that this notion must be interpreted in the light of CJEU case law rendered in the context of Regulation 1612/68 on free movement of workers.¹⁹³

In the government's view the notion of 'social advantages' refers to advantages of an economic and cultural nature which may be granted by both private and public entities. These may include student grants, public transport reductions and reductions for cultural or other events. Advantages offered by private entities are, for example, reductions to entry prices for cinemas and theatres for certain categories of visitors.¹⁹⁴ Thanks to this view, in the Netherlands the lack of definition of social advantages does not cause problems.

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

In the Netherlands, national legislation prohibits discrimination in the following areas: education as formulated in the Racial Equality Directive. The GETA is integrally applicable to all aspects of education, including all types of schools. This provision applies to 'race' and 'ethnic origin' but also to 'religion/belief' and 'sexual orientation' (as well as to all other grounds covered by the GETA). In this regard, Dutch law goes beyond the requirements set by the directive.¹⁹⁵ Vocational training given before or during the employment relationship is regulated by Article 5(1) sub f of the GETA. The scope of the DDA was already extended to general primary and secondary education in August 2009,¹⁹⁶ but since June 2016 it has covered the entire field of education.¹⁹⁷

One problem that has been dealt with in the framework of equal treatment legislation is the fact that many school boards (or local authorities in charge of state-funded schools) have designed or are in the process of designing regulations to increase the distribution of children from different cultural backgrounds across schools, in order to avoid the development of 'black schools' (i.e. schools with a great majority of pupils of immigrant origin). There has been some discussion in the Netherlands about whether local government has the right to 'disperse' people of non-Dutch descent or people with low incomes as far as housing and schools are concerned, in order to prevent 'black neighbourhoods' or 'black schools' from emerging. In relation to housing, the then ETC strongly advised against such policies.¹⁹⁸ The policy of a local authority to disperse pupils of different origins across various state-funded schools was also deemed to be directly discriminatory on the ground of ethnic origin.¹⁹⁹ In the past there has been some academic

¹⁹² Explanatory Memorandum to the EC Implementation Act, Tweede Kamer, 2002-2003, 28 770, no. 3, p. 14.

¹⁹³ Explanatory Memorandum to the EC Implementation Act, Tweede Kamer, 2002-2003, 28 770, no. 3, p. 15.

¹⁹⁴ Explanatory Memorandum to the EC Implementation Act, Tweede Kamer, 2002-2003, 28 770, no. 3, p. 15.

¹⁹⁵ See also Memorandum concerning the Implementation of Directive 2000/78/EC and Directive 2000/43/EC (*Notitie over de Implementatie van Richtlijn 2000/78/EG en Richtlijn 2000/43/EG*), Tweede Kamer, 2001-2002, 28 187, no. 1, pp. 10-11.

¹⁹⁶ Netherlands, Amendment to the Disability Discrimination Act concerning the extension to primary and secondary education and housing (*Wijziging van de Wet gelijke behandeling op grond van handicap of chronische ziekte in verband met de uitbreiding met onderwijs als bedoeld in de Wet op het primair onderwijs en de Wet op het voortgezet onderwijs en met wonen*), *Staatsblad* 2009-101, Wet van 19 jan. 2009. See Articles 5b (education) and 6a, 6b and 6c (housing).

¹⁹⁷ Act to implement the Convention on the Rights of Persons with Disabilities (*Wet van 14 april 2016 tot uitvoering van het op 13 december 2006 te New York tot stand gekomen Verdrag inzake de rechten van personen met een handicap* (*Trb.* 2007, 169), *Staatsblad* 2016-215.).

¹⁹⁸ See ETC Advice 2005/03.

¹⁹⁹ ETC 2005-25. The ETC came to this conclusion as the pupils subjected to the policy consisted *de facto* exclusively of pupils of non-Dutch origin.

debate about the question of whether equal treatment legislation is unduly restrictive with regard to the possibilities for local government to develop such policies.²⁰⁰ In 2015, a campaign ('Is this white enough for you?'), launched by two Amsterdam primary schools with a large share of pupils with an immigrant background aiming for more 'white' children to attend, received wide media coverage.²⁰¹

One of the reasons for 'black schools' developing is the fact that, in the Netherlands, schools run on a religious or other special basis (such as a specific educational philosophy, e.g. anthroposophy) have the constitutional freedom to develop their own identity and to conduct their own admissions policies. As long as such schools comply with the general quality requirements for education, public funding for them is guaranteed.²⁰² Of course, they also have to comply with the boundaries placed by non-discrimination law on the freedom of ethos-based organisations to protect their identity, as discussed before. Thus any restrictions on the admission of pupils must be closely linked to preserving the identity of the organisation and must be part of a consistently applied policy.²⁰³ Nevertheless, a restrictive admissions policy among state-funded Christian schools is alleged to be one cause of the growth of 'black' state schools.²⁰⁴ Currently, only 30 % of schools are state-run, while the remaining 70 % are overwhelmingly Christian.²⁰⁵

Generally speaking, migrants have a right to equal treatment in relation to education. There is no significant case law regarding discrimination against migrants as such under non-discrimination law. The right to equal treatment extends to undocumented minors, who have a right to education notwithstanding their lack of legal residence status.

a) Pupils with disabilities

In the Netherlands, the general approach to education for pupils with disabilities does not cause problems. Several provisions are made with regard to people with disabilities in the field of education (Article 5b(1)(c) in conjunction with Article 2 DDA). The issue of the accessibility of (school) buildings has already been addressed above (Section 2.6 et seq.). In addition, people with disabilities have certain rights to accommodation of the education itself. Parents can request accommodations for their children with disabilities. Another example is the right to have adaptations made to state exams, such as large-print exam papers or an extension of the time allowed for an exam, in order to meet the needs of students with dyslexia or other disabilities.²⁰⁶ There are several forms of special primary education for pupils with certain cognitive impairments in the Netherlands. However, these schools are only accessible for pupils in cases of absolute necessity. A primary aim of the Dutch school system remains to educate as many pupils as possible in mainstream schools.

²⁰⁰ See, e.g. Bovens, M. and Trappenburg, M., 'Segregatie door Anti-Discriminatie' ['Segregation through Anti-Discrimination'], in: Holtmaat, R. (2004), *Gelijkheid en (andere) grondrechten* ['Equality and (other) fundamental rights'], Deventer, Kluwer, pp. 171-186. See also the report by the Council for Public Administration (*Raad voor openbaar bestuur*) (2006) *Vershil moet er zijn; bestuur tussen discriminatie en differentiatie* ['There must be difference; administration between discrimination and differentiation'], The Hague.

²⁰¹ See e.g. www.nrc.nl/handelsblad/2015/05/22/amsterdam-actie-van-bedreigde-scholen-1499907, (last accessed 22 March 2018).

²⁰² See Article 23 of the Constitution.

²⁰³ For more detail, see Section 4.2.

²⁰⁴ I.e. schools that are governed by local authorities.

²⁰⁵ See Statistics Netherlands, www.cbs.nl/nl-nl/nieuws/2017/38/ruim-70-procent-leerlingen-naar-bijzonder-onderwijs (last accessed 19 March 2018), p. 74.

²⁰⁶ In 2012, a case was brought before the then ETC (2012-85) about maths charts, needed by a pupil with dyscalculia. She requested permission to use a maths chart during her final exam, which was refused on the ground that the regulations had prohibited this since 2009. However, the ETC rightfully pointed to the ranking of the legislation at issue and stated that, the prohibition notwithstanding, the school should still have offered the pupil a reasonable accommodation. It thereby complements the general directions, given in an earlier Opinion, about what schools need to do in order to fulfil their obligation to provide reasonable accommodation for pupils with (learning) disabilities (for example, ETC 2011-75, para 3.15).

In 2014 a new law on special education for pupils and students with intellectual and physical disabilities, the Act on Tailored Education (*Wet Passend Onderwijs*), entered into force.²⁰⁷ This new act changed the way in which schools are compensated for the costs associated with teaching students with learning disabilities and includes severe austerity measures. Financing was moved from individual schools to groups of schools and the total budget available for schools that are solely open to students with learning disabilities was reduced, inevitably leading to more intellectually and physically disabled pupils applying for admission to mainstream schools. In 2015, the Ombudsman for Children (*Kinderombudsman*) published a report in which the new law was severely criticised.²⁰⁸

b) Trends and patterns regarding Roma pupils

In the Netherlands, there are no specific patterns existing in education regarding Roma pupils, such as segregation. Therefore, in this respect it does not seem to be necessary to put into effect legal instruments with regard to Roma and Traveller children.²⁰⁹ In the field of education, only one case of alleged discrimination is known. In this case, the board of an association of 14 (Christian) primary schools used a quota of 15 % per institution for pupils who speak the Dutch language as a second language, in order to combat segregation (the measure was not explicitly targeting Roma and Travellers, but also children with an immigrant background). This admissions policy was deemed to be unlawful indirect distinction against Roma and Sinti communities, on the ground of race/ethnic origin.²¹⁰

The Dutch government initiated an exchange of information / policies within a network of municipalities with a considerable proportion of Roma inhabitants. The aim was (amongst others) to develop measures to reduce the number of Roma children who drop out of the school system.²¹¹ Such measures were developed in 2009 by the Association of Dutch Local Councils (*Vereniging van Nederlandse Gemeenten*) for a number of local communities with considerable numbers of Roma residents.²¹² In relation to the agreement in the European Council of June 2011 to enhance a national policy on the integration of Roma people in each Member State, the Dutch government sent a letter to Parliament in which it sketched the outlines of the current problems and the policies to address these problems, including with regard to the education of Roma and Sinti children.²¹³ In early 2014 it became known that several of the municipalities with a considerable proportion of Roma inhabitants were cooperating with the police in a programme that specifically targeted shoplifting by Roma children. Earlier complaints that the policy was developed without consultation with Roma organisations were reiterated.²¹⁴ In 2016 the National Ombudsman initiated an investigation into whether the Dutch government at the local and central level guarantees the human rights of Travellers, in particular their rights as a cultural group. The report focuses on guarantees regarding their housing needs and is dealt with below (3.2.10).

²⁰⁷ Netherlands, Act of 11 October 2012 concerning the amendment of several acts regarding education (*Wet van 11 oktober 2012 tot wijziging van enkele onderwijswetten in verband met een herziening van de organisatie en financiering van de ondersteuning van leerlingen in het basisonderwijs, speciaal en voortgezet speciaal onderwijs, voortgezet onderwijs en beroepsonderwijs*), *Staatsblad* 2012, 533.

²⁰⁸ The report is available at: www.dekinderombudsman.nl/ul/cms/fck-uploaded/2015.KOM014.Werktpassendonderwijs.rapport.pdf (last accessed 22 March 2018).

²⁰⁹ There are special measures aimed at avoiding school drop-out by Roma children. See Tweede Kamer, 2008-2009, 31 700 XVIII, no. 90.

²¹⁰ See ETC 2003-105.

²¹¹ See Tweede Kamer, 2008-2009, 31 700 XVIII, no. 90.

²¹² See Vereniging van Nederlandse Gemeenten (VNG) (2010) *Projectvoorstellen Platform Roma-Gemeenten* [Project proposals – Roma Communities Platform], Den Haag. See also Jaarnota Integratiebeleid 2007-2011, Tweede Kamer, 2009-2010, 31 268, no. 34, pp. 11-12. Sources derived from Davidovic, M. and Rodrigues, P. 'Antiziganisme' in Rodrigues, P. and van Donselaar, J. (2010), *Monitor racisme en extremisme. Negende rapportage 2010* [Racism and extremism monitor. Ninth report 2010], Anne Frank Foundation and Pallas Publications, Amsterdam, pp. 153-179. Available at: <http://web.annefrank.org/nl/Educatie/monitor/Monitor-racisme/Vijftien-jaar-Monitor-Racisme-en-Extremisme/> (last accessed 12 August 2018).

²¹³ Letter from the Minister of Immigration, Integration and Asylum, Tweede Kamer, 2011-2012, 21501-20, no. 599.

²¹⁴ www.nrc.nl/handelsblad/van/2014/januari/27/het-meisje-van-10-ging-met-opa-uit-stelen-1341979 (last accessed 22 March 2018).

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

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

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

This is applicable to all grounds covered by the GETA and, since June 2016, also to disability under the DDA (Article 5b(1)). In this regard, Dutch law extends beyond the directives' requirements. Unilateral governmental decisions and acts (e.g. a decision not to grant a subsidy) do not fall under the scope of Article 7.²¹⁵

3.2.9.1 Distinction between goods and services available publicly or privately

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

It should be noted that the area of access to goods and services in general is not covered by the ADA.

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

In the Netherlands, national legislation prohibits discrimination in the following areas: housing as formulated in the Racial Equality Directive. Housing is covered under Article 7(1) subsection c of the GETA and also under Article 5b(1)(c) and Articles 6a-c of the DDA. The duty to make reasonable accommodations in relation to housing only exists in the case of disability discrimination. However, this provision is not applicable in as far as the adaptations would require building or reconstruction work in or around a house (on the basis of Article 6c of the DDA).

The prohibition of discrimination applies to all aspects of housing. No specific exceptions apply as regards housing other than those which will be dealt with below. The Rotterdam Act (*Rotterdamwet*),²¹⁶ which grants local authorities the right to refuse to let subsidised houses in certain areas to persons or households with a low income or without steady jobs and to refer them to other areas, in order to avoid the emergence of 'ghettos', has now

²¹⁵ NB: Article 7a, which concerns social security and social services, does include unilateral actions by government or government agencies.

²¹⁶ Tweede Kamer, 2004-2005, 30 091. Law of 20 December 2005, *Staatsblad* 2005, 726.

been in place for a couple of years and has not been found discriminatory.²¹⁷ The current minister responsible for housing plans to give municipalities even more scope to set strict requirements.²¹⁸ A complaint regarding this type of policy was brought to the European Court of Human Rights. The Grand Chamber ruling held that the policy did not violate the ECHR.²¹⁹

Generally speaking, migrants have a right to equal treatment with regard to public (social) and private housing. There is no significant case law regarding discrimination of migrants as such under non-discrimination law.²²⁰

3.2.10.1 Trends and patterns regarding housing segregation for Roma

In the Netherlands, there are patterns of housing segregation and discrimination against the Roma. Roma and Traveller people tend to live in caravans or trailers which are situated in officially designated 'trailer parks' (*woonwagenkampen*). The lack of systematic data in this respect makes it difficult to give exact numbers on the housing situation of Roma and Travellers, but it has been observed that a shortage of caravan sites makes it impossible for family members to live in the same encampment, something of paramount importance to Roma and Sinti.²²¹ In failing to provide enough caravan sites, the government makes it impossible for Roma and Sinti to sustain their cultural identity. This violates the requirement to provide housing without distinguishing by ethnic background, as established in the Racial Equality Directive. Several opinions from the NIHR emphasise the importance of providing sufficient caravan sites. The NIHR found that a policy implemented by a local authority that would eventually put an end to 'trailer parks' amounted to discrimination on the ground of race (ethnic identity).²²² This position has been confirmed in more recent cases.²²³ According to the NIHR, municipalities should include attention to the specific needs of this category of residents in their housing policies.²²⁴

In a report published in 2017 the National Ombudsman also concludes that many municipal authorities discriminate against these groups in their housing policies by not making available sufficient caravan or trailer sites. According to the Ombudsman, instead of treating them the same as other people looking for housing, the principle of equality requires municipal governments to treat them differently in order to respect their cultural identity and accommodate the specific housing needs this identity brings along. The Ombudsman urges the government to take the human rights framework for Roma into account as developed in, among others, the jurisprudence of the European Court of Human Rights and the NIHR and makes several recommendations to both the national and local governments to develop non-discriminatory housing policies that will cater to the needs of Roma, Sinti and Travellers by making available sufficient trailer locations.²²⁵

²¹⁷ Although the ETC (now the NIHR) thought that it could amount to indirect discrimination on grounds of race as persons of non-Dutch or more generally non-western origin would be particularly affected. See Advice 2005/03.

²¹⁸ Tweede Kamer, 2013-2014, 30 798.

²¹⁹ ECtHR (Grand Chamber) 6 November 2017, *Garib v. The Netherlands* (application no. 43494/09).

²²⁰ In opinion 2017-67 the NIHR considered that a private association that makes housing available to its members discriminates on grounds of national descent by limiting membership to the children of members.

²²¹ van Donselaar, J. and Rodrigues, P. (eds.) (2006), *Monitor racisme and extremisme. Zevende rapportage* [Racism and extremism monitor. Seventh report], Amsterdam, Anne Frank Stichting/Leiden, Leiden University, available at: <https://web.annefrank.org/nl/Educatie/monitor/Monitor-racisme/Hedendaags-rechtsextremisme-vergt-nieuwe-aanpak/> (last accessed 22 March 2018).

²²² NIHR 2014-165, 2014-166 and 2014-167.

²²³ NIHR 2015-6, 2016-19, 2016-22, 2016-71, 2016-72; 2017-55; 2017-103; 2017-136; 2017-137.

²²⁴ NIHR 2016-19.

²²⁵ 'Woonwagenbewoner zoekt standplaats. Een onderzoek naar de betrouwbaarheid van de overheid voor woonwagenbewoners' [Trailer resident seeks trailer site. An investigation into the reliability of the public authorities for trailer inhabitants], www.nationaleombudsman.nl/system/files/bijlage/DEF%20Rapport%202017060%20Woonwagenbewoner%20zoekt%20standplaats.pdf.

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

4 EXCEPTIONS

4.1 Genuine and determining occupational requirements (Article 4)

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

Race, sex. In the GETA, the exception for genuine occupational requirements ('GOR exception') only exists for the grounds *race* and *sex*. As far as race is concerned, this has been laid down in Article 2(4) of the GETA: 'The prohibition of making distinctions on the grounds of race as it is contained in this Act, shall not apply:

- a. in cases where a person's racial appearance is a determining factor, provided that the aim is legitimate and the requirement is proportionate to that aim;
- b. if the distinction concerns a person's [outward] racial appearance and constitutes, by reason of the nature of the particular occupational activity concerned, or of the context in which it is carried out, a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate to that objective.'²²⁶

In contrast to Article 4 of Directive 2000/43/EC, which speaks of a characteristic related to racial or ethnic origin, the Dutch provision specifies that only outward racial appearances may constitute a genuine occupational requirement.²²⁷ This means that 'race' as such is not regarded as a permissible ground for a particular distinction.²²⁸ Only physical differences (skin colour, hair type, etc.) may form the basis for a distinction, to the exclusion of sociological differences. The GETA does not, for example, allow a care institution, which looks after the well-being of young offenders of Moroccan origin, to express in a job advertisement a preference for a social worker of Moroccan origin.²²⁹ On the basis of Article 4(6) GETA, these exceptions have been set out in a Governmental Decree of 1994.²³⁰ The Decree exhaustively indicates to which professional activities the Article 2(4) exceptions apply. These are:

- a. The profession or activity of actor, dancer or artist insofar that the profession or activity regards the performance of a certain role (elaboration of subsection b);
- b. Mannequins, models for photographers, artists, etc., insofar as requirements can reasonably be imposed on outward appearances (elaboration of subsection b).

Religion, belief, sexual orientation. Although Article 4(1) of Directive 2000/78/EC would have allowed for it, no GOR exception has been enshrined in the GETA for these grounds. However, in the context of the exceptions of Article 5(2) of the GETA, institutions founded on religious principles, or on political principles, or schools founded on the basis of a religious denomination may impose requirements in relation to the occupancy of a post which, in view of the organisation's purpose, are necessary to uphold its founding principles. However, the Article 5(2) GETA exceptions were not rationalised by the idea of 'genuine occupational requirements'. They were regarded as necessary in order to reconcile the constitutional right to equality with other constitutional rights, namely the freedom of religion and the freedom of education, as well as the freedom of political opinion. Although

²²⁶ Subsection b was inserted by the EC Implementation Act. With this amendment the government intended to follow the wording of the directive more closely. See Explanatory Memorandum to the EC Implementation Act, Tweede Kamer, 2002-2003, 28 770, no. 3, p. 10. However, prior to implementation the 'genuine occupational requirement exception' was also covered by the more general wording of subsection a of Article 2(4).

²²⁷ Explanatory Memorandum to the EC Implementation Act, Tweede Kamer, 2002-2003, 28 770, no. 3, p. 10.

²²⁸ Gerards, J. H. and Heringa, A. W. (2003), *Wetgeving gelijke behandeling* [Equal treatment legislation], Deventer, Kluwer, p. 129.

²²⁹ See ETC 1997-51.

²³⁰ Governmental Decree on Equal Treatment (*Besluit Gelijke Behandeling*), *Staatsblad* 1994, 657, last amended in 2012: *Staatsblad* 2012, 565.

the rationalisation is different, in practice this exception is compatible with Article 4(1) of the Employment Framework Directive. The requirements that are set on this ground need to be closely linked to the nature and content of the job in this particular context (of an institution of a specific religious denomination).²³¹ This means that only functions that are related to the 'mission' of the organisation can be exempted from the equal treatment norm (i.e. the exception is not applicable when it concerns a gardener for a church). It is also a requirement that the organisation applies a consistent policy in this respect.²³²

Disability. The GOR exception was not included in the DDA. In the government's view, in contrast to 'race' and 'sex', no scenario is imaginable in which 'disability' would constitute a genuine occupational requirement.²³³ An amendment submitted by a Member of Parliament in this respect was rejected.²³⁴

Age. Since the ADA does not differentiate between 'direct' and 'indirect' distinction, an 'objective justification' is possible for both types (see Article 7(1)(c) ADA), and the government considered it not to be necessary to include the GOR exception. In this view, in cases in which 'age' is considered a genuine occupational requirement, this can be assessed via the objective justification test.²³⁵

Conceptually speaking, this is open to criticism. In this view, the Article 4(1) exception of the directive is regarded as a species of the Article 6 exception of the directive.²³⁶ In that light it would have been preferable, had the government explicitly included the GOR exception.

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

In the Netherlands, national law provides for an exception for employers with an ethos based on religion or belief, in Article 5(2) GETA. Employers with an ethos based on religion or belief can only rely on this exception in the case of an accusation of discrimination based on religion/belief and political conviction. Typical cases that have come to the NIHR and former ETC concern schools and other organisations based on a Christian denomination which require their personnel to adhere to the specific tenets of the denomination concerned and act accordingly. Article 5(2) GETA is interpreted strictly by the NIHR. An organisation has to show that its identity is indeed manifested in its actual practice and is consistently upheld. It must also show that the requirements are necessary to fulfil the specific function held by the employee in the organisation. Thus the Salvation Army may refuse to employ a man as a salary administrator for not adhering to the Christian religion as the job also includes external contacts and contacts with colleagues in which this is a functional requirement.²³⁷

Although formally not an exception to the prohibition of discrimination, one should be aware that the GETA does not apply to legal relationships within churches, other religious communities or associations of a spiritual nature and excludes the application of equal treatment norms to 'ministers of religion', as these are considered to be internal affairs. This means a restriction of the scope of application (see Article 3 GETA), for which the

²³¹ It may be useful to note that the exception thus does not apply to 'ordinary' private companies such as involved in the *Achbita* case, CJEU 14 March 2017, C-157/15 (*Achbita v. G4S*).

²³² These criteria were explained by the ETC in its Opinion 1996-118.

²³³ Explanatory Memorandum to the DDA, Tweede Kamer, 2001-2002, 28 169, no. 3, p. 35.

²³⁴ Amendement Terpstra, Tweede Kamer, 2001-2002, 28 169, no. 11. This amendment was rejected.

²³⁵ Explanatory Memorandum to the ADA, Tweede Kamer, 2001-2002, 28169, no. 3, p. 35.

²³⁶ See Grapperhaus, F. B. J. (2002), 'Het verbod op onderscheid op grond van leeftijd in arbeid en beroep' ['The prohibition of discrimination on the ground of age in employment and occupation'], in *Ondernemingsrecht* [Company law], 2002-12, pp. 356-363, at p. 362.

²³⁷ NIHR opinion 2015-68; for a sample of older cases see e.g. ETC 2000-67, 2003-145, 2005-102, 2006-218, 2006-93, 2012-68, 2013-36.

rationale lies in the constitutional right of freedom of religion and in the division between church and state.

Article 3 GETA:

‘this Act does not apply to:

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

It should be noted that only purely internal affairs of religious organisations fall outside the scope of the GETA. Thus, for example, the employment relationship between a gardener and a religious community falls within the scope of the GETA. The more the legal relationship is disconnected from the rationales of freedom of religion and the division between church and state, the less likely is it to be considered a purely internal affair.²³⁸

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

In the Netherlands, there are specific provisions or case law in this area relating to conflicts between the rights of organisations with an ethos based on religion or belief and other rights to non-discrimination. Specific provisions in this area are Articles 3 and 5(2) of the GETA, which have been discussed above.

In addition, in the Netherlands, the now abolished ‘sole-ground construction’ (*enkelefeitconstructie*) included in Article 5(2) has played an important role with regard to the question of whether a Christian school may lawfully refuse to employ a cohabiting homosexual in a teaching position. While the ‘sole ground’ that a person is homosexual could not *per se* lead to the refusal to employ such a person or to dismiss them, the situation might be different if ‘additional circumstances’ were taken into account. This could be any ‘behaviour’ inside and/or outside the school from which it is apparent that the teacher does not subscribe to the particular religious belief or even contests this belief openly. The wording of Article 4(2) of Directive 2000/78/EC seemed not to permit that ‘additional circumstances’ play a material role *unless* such circumstances coincide with the organisation’s religion or belief.

As a reaction to the European Commission’s infringement procedure against the Netherlands, where this issue was mentioned by the Commission,²³⁹ and after several bills and advice from various NGOs, the Council of State and the (former) equality body, the sole ground construction was finally abolished in 2015.²⁴⁰ The new text of Article 5(2) GETA corresponds closely to the wording of the exception in Article 4(2) of Directive 2000/78/EC. In its opinion 2016-10 the NIHR applied the amended provision and held that the refusal of an employer to accept a person for an internship because he is homosexual constitutes direct discrimination for which no justification can be put forward under the GETA.²⁴¹

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

In the Netherlands, national legislation does not provide for an exception for the armed forces in relation to age or disability discrimination. Article 17 of the ADA enshrined an exception (which was of a temporary kind): until 1 January 2008, the ADA did not apply

²³⁸ Gerards, J. H. and Heringa, A. W. (2003), *Wetgeving gelijke behandeling* [Equal treatment legislation], Deventer, Kluwer, p. 105.

²³⁹ Letter dated 31 January 2008 (no. 2006-2444), with reference to the infringement procedure of 18 December 2006, infringement No. 2006/2444. Article 5(2) GETA was mentioned, however, in the end the Commission did not ask the government to change this provision.

²⁴⁰ Tweede Kamer 2010-2011/2013-2014, 32 476, nos. 1-11.

²⁴¹ NIHR opinion 2016-10.

to military service. There have never been any limitations to the scope of the DDA and the GETA concerning the armed forces.

4.4 Nationality discrimination (Article 3(2))

a) Discrimination on the ground of nationality

In the Netherlands, national law does not include exceptions relating to difference of treatment based on nationality. Article 1 of the Constitution provides that, 'all persons in the Netherlands shall be treated equally in equal circumstances'. Protection against discrimination offered by Article 1 of the Constitution, by criminal law, by civil law and under the specific statutory equal treatment acts is not tied to any nationality requirement.

In the Netherlands nationality (as in citizenship) is explicitly mentioned as a protected ground in national anti-discrimination law. Besides discrimination on the ground of race, the GETA also prohibits nationality discrimination. Thus, the Dutch General Equal Treatment Act goes beyond the requirements stemming from Directive 2000/43/EC. Distinction on the grounds of nationality is, in principle, prohibited as follows from Article 1. However, Article 2(5) enshrines some exceptions: the prohibition on the grounds of nationality shall not apply if the distinction is based upon *generally binding rules* (i.e. Statutory Acts and Acts by the administration such as governmental decrees) or on *written or unwritten rules of international law*.²⁴² Moreover, the prohibition shall not apply in such cases where 'nationality' is a determining factor (e.g. nationality requirements imposed upon players for the national football team).²⁴³ Nationality discrimination does include stateless status.

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

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

There is an overlap between nationality and race/ethnicity in the context of indirect discrimination. Sometimes, a case of direct nationality discrimination can be qualified as a case of indirect racial discrimination. Because both grounds of discrimination are covered in the GETA, this does not cause great difficulties in the case law insofar as the areas that are covered by the non-discrimination principle (material scope) are the same. However, for race/ethnicity, the scope of the prohibition of discrimination is wider, also including social protection (Article 7a GETA.) When a complaint concerns social protection, including *inter alia* social security rights, the NIHR is inclined to interpret the concept of race/ethnicity in a wide sense, including situations that at first glance clearly refer to nationality as the ground for making a distinction. The NIHR seems to equate the concepts of national origin and ethnic origin and also equates ethnic origin and race.²⁴⁴

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

a) Benefits for married employees

²⁴² See e.g. ETC 1997-13, 1998-81 and 2002-61.

²⁴³ See e.g. ETC 1996-77.

²⁴⁴ For two cases in which the (former) ETC concluded that a distinction on the ground of nationality amounted to direct discrimination on the ground of race/ethnicity, see Opinion 2011-97 and 2011-98. A critical note to these Opinions was written by Böcker, A. and Dursun-Aksel, S. in Forder, C. J. (2012), *Oordelenbundel 2011* ('NIHR Opinions 2011'), Wolf Legal Publishers, pp. 460-464.

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

b) Benefits for employees with opposite-sex partners

In the Netherlands, it would constitute unlawful discrimination in national law if an employer only provided benefits to those employees with opposite-sex partners: this would be considered to be a direct distinction on the ground of sexual orientation. This follows not only from the Parliamentary documents but has also been confirmed by the former ETC in several of its Opinions.²⁴⁵ Since 1998, the Netherlands has had the possibility for couples to register a same-sex partnership and, since 2001, legal marriage is also open to same-sex couples. The GETA prohibits distinctions from being made between same-sex and opposite-sex partners who have the same civil status.

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

Exceptions in relation to disability and health/safety

In the Netherlands there are exceptions in relation to disability and health and safety (Article 7(2), Directive 2000/78/EC). The DDA contains a provision that mirrors Article 7(2) of the directive.²⁴⁶

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

‘the prohibition from making a distinction shall not apply if:
(...)

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

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

‘the prohibition from making a distinction shall not apply if:

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

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

The exception made by Article 3 (1)(a) of the DDA must be interpreted narrowly. It follows from parliamentary precedent that a high threshold is set for any successful reliance upon this exception. If an employer claims that a distinction on the ground of disability is necessary for reasons of health, safety or security, they must duly substantiate their claim.²⁴⁷ If there is a possibility of removing the risk by means of an effective and reasonable accommodation, it is not possible to rely on the exception.²⁴⁸ There are a few

²⁴⁵ See Opinions 1997-47 and 48, Opinion 1999-08 and Opinion 1999-13. More recent Opinions could not be found, which may be due to the fact that legal marriage has also been open to same-sex couples since 2001.

²⁴⁶ This provision often seems to be confused with Article 3 (1)(a) of the DDA, which mirrors Article 2(5) of the directive, which is aimed at national legislation that is necessary for reasons of public health and safety. This exception is discussed later in this report in Section 4.8.

²⁴⁷ The NIHR applies a strict test, see e.g. opinion 2016-9.

²⁴⁸ See also Hendriks, A. C. (2003), *Wet gelijke behandeling op grond van handicap of chronische ziekte* [The Act on equal treatment on the ground of disability or chronic illness], Deventer, Kluwer, pp. 66-67. Again, this is the line taken by the NIHR, see opinion 2016-9.

points that need further clarification. Under the Working Conditions Act and under civil employment law, the employer has a duty to eliminate/reduce, as far as possible, any risk to the health and well-being of their employees. It is not fully clear from parliamentary precedent or from case law whether an employer can exclude a disabled person on the ground that the work will pose a risk to the disabled person's own health or safety (but not the health and safety of others). Neither is it clear whether a disabled individual can decide for themselves that they wish to accept such a risk. Moreover, it is not clear whether the employer would be excluded from liability should the disabled individual suffer harm in such circumstances. Further judicial interpretation is therefore needed.

The exception regarding health and safety can also be applied to age (see Article 3(1)(a) of the ADA). A similar counterpart exception has not been included in the GETA. However, safety and security issues may come to the surface in the 'objective justification test' for indirect discrimination cases. For example, a prohibition of headscarves during gymnastics for reasons of health and safety can be objectively justified.²⁴⁹

It should be noted that there has been some debate about the question of whether this is a shortcoming in the GETA.²⁵⁰ In the framework of the third evaluation report of the equal treatment legislation it was suggested that a general exception concerning public health and security (*gevaren voor de volksgezondheid*) be included in the GETA.²⁵¹ The then ETC proposed the inclusion of a provision identical to Article 2(5) of Directive 2000/78/EC in the Dutch equal treatment laws. Insofar as such an exception or justification clause would apply to the protection of public health, the government appears to agree with including it in the equal treatment laws, but no change has yet been made.²⁵²

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

4.7.1 Direct discrimination

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

'The prohibition of making a distinction shall not apply if the distinction: a) is based on employment or labour market policies to promote employment in certain age categories, provided such policies are laid down by or pursuant to an Act of Parliament; b) relates to the termination of an employment relationship because the person concerned has reached the pensionable age under the General Old Age Pensions Act (AOW), or a more advanced age laid down by or pursuant to an Act of Parliament or agreed between the parties; c) is otherwise objectively justified by a legitimate aim and the means used to achieve that aim are appropriate and necessary.'

a) Justification of direct discrimination on the ground of age

²⁴⁹ The ETC (now the NIHR) applies this exception (strictly) in inter alia the context of religious discrimination, where sometimes it is argued that a prohibition of the Islamic headscarf must be prohibited for reasons of safety. See e.g. ETC 2011-195.

²⁵⁰ See ETC Opinion 2006-20 and ETC Opinion 2007-85, in which the ETC deemed a measure which rejects homosexual blood donors legally justified, in spite of the lack of a legal provision to justify directly a distinction based on sexual orientation because of public health risks. In NIHR Opinion 2015-46, however, the NIHR found the protection of public health cannot justify the measure (contrary to CJEU Case C-528/13 *Léger*, 12 June 2015 ECLI:EU:C:2015:288).

²⁵¹ ETC (2011) *Third evaluation report (2004-2009)*, p. 8.

²⁵² Tweede Kamer, 2011-2012, 28 481, no. 16, p. 9, referring to an earlier promise by the government to include such an exception (Tweede Kamer, 2008-2009, 28 481, no. 5, p. 4).

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

Both direct and indirect age distinction may be 'objectively justified' under Article 7(1)(c) of the ADA. The situation in this respect is in line with the requirements set out by the CJEU in *Mangold*.²⁵³

b) Permitted differences in treatment based on age

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

Subsection (a), which is the transposition of Article 6(1) of the directive, provides that the prohibition of age distinction shall not apply if the distinction is based on employment or labour market policies which are aimed at promoting labour participation of certain age categories, provided that such policies are enshrined in a Statutory Act or in a Governmental Decree.

Subsection (b) provides that the prohibition of age distinction shall not apply if the distinction regards the termination of the employment relationship, either by reason of having reached the statutory retirement age, or, of a *higher* (not lower!)²⁵⁴ age than that, provided this higher age has been laid down by statutory act or governmental decree, or has been mutually agreed on by the parties involved.

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

In the Netherlands, national law allows occupational pension schemes to fix ages for admission to the scheme or entitlement to benefits, taking up the possibility provided for by Article 6(2). Article 8 of the ADA provides that the prohibition against making a distinction is not applicable with regard to (occupational) pension schemes and actuarial calculations for pension provision. Article 8(2) provides, in essence, that the prohibition of a distinction on the ground of age shall not apply to the admission or entitlement to pension provision,²⁵⁵ nor to the fixing under such provision of different ages for employees or categories of employees. Article 8(3) of the ADA renders this norm non-applicable with regard to the use of age criteria in actuarial calculations. This has not been changed in response to a preliminary ruling of the European Court of Justice concerning the interpretation of Article 6(2) of the Employment Equality Directive.²⁵⁶

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

²⁵³ Case C-144/04, *Mangold v Helm* [2005], ECR I-9981.

²⁵⁴ It follows from the Explanatory Memorandum that subsection b does not apply to dismissals based on reaching a pensionable age which is *lower* than 65 years. See Explanatory Memorandum to the ADA, Tweede Kamer, 2001-2002, 28 169, no. 3, p. 32.

²⁵⁵ A concept defined in Article 8(1) of the ADA.

²⁵⁶ CJEU, Case C-476/11, *HK Danmark v Experian A/S*, 26 September 2013, n.y.r.

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

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

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

4.7.3 Minimum and maximum age requirements

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

4.7.4 Retirement

a) State pension age

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

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

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

b) Occupational pension schemes

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

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

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

c) State imposed mandatory retirement ages

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

d) Retirement ages imposed by employers

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

Many employment contracts contain an automatic dismissal clause (*pensioenontslagbeding*), which stipulates that the contract ends automatically upon the employee reaching the statutory retirement age. There have been many legal proceedings on the question of whether these retirement dismissal clauses are valid, but in 2012 it was decided by the Dutch Supreme Court that such a clause is valid, even if it concerns a permanent employment contract.²⁵⁷ Since 2015, Article 7:669(4) Civil Code also provides that employers may terminate the employment contract if the employee has reached the statutory retirement age.

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

'The prohibition on the making of a distinction shall not apply if the distinction: (b) relates to the termination of an employment relationship because the person concerned has reached pensionable age under the General Old Age Pensions Act (AOW), or a more advanced age laid down by or pursuant to an Act of Parliament or agreed between the parties; (...).'

The government holds the view that this exception is fully in compliance with the directive. This view has not been contested in Parliament or in academic literature, as far as the author of this report is aware.

e) Employment rights applicable to all workers irrespective of age

The law on protection against dismissal and other laws protecting employment rights are applicable to all workers, without exception. As long as someone is an employee with a permanent contract, according to the definitions of these laws, they are protected by the civil laws regulating employment rights and by the ADA, regardless of age. Employees with temporary contracts have no protection against dismissal when the contract ends. However, it is prohibited not to renew a temporary contract on discriminatory grounds.²⁵⁸ It should be noted that employers who do allow people who have reached the statutory retirement age to continue working for them, do so mostly on the basis of a temporary contract.

f) Compliance of national law with CJEU case law

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

²⁵⁷ Supreme Court, 13 July 2012, ECLI:NL:HR:2012:BW3367.

²⁵⁸ However, there are many examples in the case law of the ETC (now the NIHR), especially relating to women not receiving an extension of a temporary contract once the employer discovers they are pregnant. The author of this report assumes that similar cases may exist for the grounds of race/ethnicity and age.

4.7.5 Redundancy

a) Age and seniority taken into account for redundancy selection

In the Netherlands, national law permits age or seniority to be taken into account in selecting workers for redundancy. The Explanatory Memorandum to the ADA explicitly mentions that the use of the 'last in, first out principle' (which works to the advantage of older workers) could be objectively justified under Article 7(1)(c) of the Act. This is, however, not the principle provided by Dutch employment law, which by default stipulates that the employer, in case of a collective dismissal, should select redundant employees on the basis of a balancing principle, the so-called 'mirror image rule' (*afspiegelingsbeginssel*), under which account must be taken of the age balance of the workforce.²⁵⁹

b) Age taken into account for redundancy compensation

In the Netherlands, national law provides compensation for redundancy. This was previously affected by the age of the worker as it was calculated on the basis of the so-called 'cantonal court formula' (*kantonrechttersformule*): $a \times b \times c$. This formula consisted of three variables, namely a) the employee's number of years of service, b) the monthly gross salary and c) a 'correction factor' dependent on the individual circumstances of the case. The first two variables were clearly connected to the employee's age and this was made even less favourable for younger workers in 2009, as from then on a higher factor was used for older workers.²⁶⁰ The other factor was age-neutral, and a social plan that made a distinction between younger and older employees in relation to the correction factor was considered to constitute unlawful age discrimination.²⁶¹

However, a major overhaul of Dutch labour law has led to the abolishment of the cantonal court formula. In 2015, this formula was replaced by a system of 'transitional severance pay' (*transitievergoeding*).²⁶² In the new system, the compensation is solely based on the employee's number of years of service. For the first ten years, an employee receives one third of the monthly gross salary, after ten years, one half of the monthly gross salary, to a maximum amount of EUR 75 000 (or, if the annual salary is higher, to a maximum amount of the annual salary). The new system reduces the inequalities between older and younger employees, although a difference remains.

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

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

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

²⁵⁹ Article 11 Dismissal Decree 2015 (*Ontslagregeling 2015*), *Staatscourant* 2015, 12685.

²⁶⁰ For people aged 35-45, every full year of service counted as one, for those aged 45-55 as 1.5, and aged 55 years and older as two. Below the age of 35, an employee only got a 0.5 a-factor.

²⁶¹ District Court Leeuwarden, 31 May 2005, ECLI:NL:RBLLE:2005:AT7230.

²⁶² Netherlands, Labour and Security Act (*Wet Werk en Zekerheid*), *Staatsblad* 2014, 216.

4.9 Any other exceptions

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

1. Article 5(3) of the GETA contains an exception regarding the private nature of the employment relationship. Article 7(3) of the GETA, concerning the provision of goods and services, contains an exception regarding the private nature of the circumstances in which the legal relationship takes place (for example, a woman who rents out a room in her own house may lawfully require that the person who rents the room is a woman).²⁶³ The Commission, in the infringement procedure against the Netherlands, held that the wording of these exceptions in the GETA was too wide and that, in the case of goods and services, it unjustifiably also applied to discrimination on the ground of race. In response to this, in November 2011 the government changed the GETA.²⁶⁴ The exception clauses in the GETA now expressly state that it is only possible to rely on this exception when the aim is legitimate and when the means are appropriate and necessary. With respect to discrimination in the area of goods and services, the exception no longer applies to the ground of race.
2. Article 7(2) of the GETA grants private educational institutions (which are generally funded by the state on an equal basis with state schools) the freedom to impose requirements governing admission to or participation in the education that the institution provides. Denominational schools based on both Christian and non-Christian or philosophical beliefs are equally funded. Article 7(2) is in accordance with the exception in Article 5(2)(c) of the GETA. However, this Article 7(2) applies to the admission of pupils to denominational schools and thus not to employment.
3. The internal affairs of associations fall outside the scope of the GETA. This follows from Parliamentary precedent and is not explicitly provided for in the GETA.²⁶⁵

²⁶³ This topic has been discussed in great detail in the second evaluation report about the functioning of the GETA. See Hertogh, M. L. M. and Zoontjens, P. J. J. (eds.) (2006), *Gelijke behandeling: principes en praktijken. Evaluatieonderzoek Algemene wet gelijke behandeling* [Equal treatment: principles and practice. Evaluation report on the General Equal Treatment Act], Nijmegen, Wolf Legal Publishers. The part about the relationship between equality and freedom of association and the right to privacy was written by Professor Paul Zoontjens. See pp. 175-216.

²⁶⁴ *Staatsblad* 2011, 554.

²⁶⁵ This topic has also been discussed in great detail in the second evaluation report about the functioning of the GETA. See www.mensenrechten.nl/publicaties/detail/10026.

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

a) Scope for positive action measures

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

However, positive action schemes, including more narrowly tailored preferential treatment, are – to a certain extent – only possible with respect to the grounds of sex, race and disability. The government defends the position that positive action in this form is only possible with respect to sex, race and disability with the reasoning that only on those grounds do groups of people suffer from *structural disadvantages* in society. Structural disadvantage is defined as 'suffering disadvantages in several social fields at the same time which are not temporary in nature'.²⁶⁶

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

1. the initiative must be a *specific measure*;
2. the measure is intended to confer a preferential position on women or people belonging to ethnic or cultural minorities;²⁶⁷
3. the measure is intended to *remove* or *reduce* actual inequalities;
4. there must be a *proportionate* relationship between the measure and the objective pursued. This last element is not required by Directive 2000/43/EC.

The Dutch definition leaves less room for positive action policies and programmes, since it does not allow measures which aim to *prevent*, in addition to *removing* or *reducing* disadvantages.²⁶⁸

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

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

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

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

The general point of view is that – at least when the positions that are at stake are to be considered as employment relationships – EU legislation and case law (most notably the *Kalanke* case) prohibit a system of fixed quota and require an individual assessment of any job applicant's capabilities and suitability for the job in the context of sex.²⁶⁹ Any policy in which a company or organisation strives for *proportional representation* of various ethnic groups in proportion to their prevalence in society is seen as direct discrimination. When the aim of such a policy is simply achieving 'proportionality' or 'diversity' (i.e. when the

²⁶⁶ See Tweede Kamer, 2001-2002, 28 169, no. 5, p. 17.

²⁶⁷ The concept of 'ethnic or cultural minority group' is not defined in Dutch law, but it is usually applied as 'being of non-Dutch descent'.

²⁶⁸ See Explanatory Memorandum to the EC Implementation Act, Tweede Kamer, 2002-2003, 28 770, no. 3, p. 9.

²⁶⁹ CJEU, Case C-450/93 *Kalanke v Freie Hansestadt Bremen* [1995], ECR I-3051.

aim is not to put people belonging to an under-represented or systematically disadvantaged group in a better position), the specialised body will not apply the positive action exception (and therefore the policy will be illegal).²⁷⁰ At the same time, several other cases show the equality body is not always as strict where positive action regarding ethnic minorities is at stake. Thus in two cases where a city council asked explicitly for members of ethnic minorities to apply for jobs as social workers and excluded people of Dutch origin, it ruled that the preferential treatment of ethnic minorities was allowed.²⁷¹

In its third evaluation report the ETC (now the NIHR) concludes that the provisions concerning positive action in the GETA and DDA are adequate and do not need revision. The equality body defends its restrictive interpretation of this exception with reference to CJEU case law and maintains that, when overcoming structural disadvantages of certain groups is deemed necessary, general social policy measures should be developed that can address these disadvantages effectively.²⁷² However, in December 2012 the NIHR applied a less strict criterion and accepted 'exceptional circumstances' in a sex discrimination case.²⁷³

As far as the DDA is concerned, in addition to the positive action measures as set out in Article 7(1) of the Employment Framework Directive, there are also general supportive measures for disabled people, as set out in Article 7(2) of the directive. This provision has been transposed by Article 3(1)(b) of the DDA, which enshrines the possibility of supportive social policies for disabled people. In contrast to 'positive action measures', these measures are not time-restricted. In recent years, the government has introduced several supportive measures designed to promote the (re)integration of disabled people into society. To encourage employers to employ disabled people concrete targets for job creation for this category of workers were set in 2015.²⁷⁴ These targets apply to employers with over 25 employees in both the public and private sectors. If employers do not meet these targets a 'quota charge' (*quotumheffing*) may be levied. So far the targets for 2016 were met by the private sector, but not by the public sector. As a consequence, in 2017 the quota charge was introduced for the latter sector, taking effect as of 1 January 2018.²⁷⁵

The ADA does not contain a positive action exception clause,²⁷⁶ but since unequal treatment on the ground of age may be objectively justified (open system of justifications) in any case the defence that the unequal treatment is in fact a positive action measure may be put forward and will be tested in the same way as described above.

b) Main positive action measures in place at national level

Although many private companies and public organisations take positive action measures, only a few general (and legal) measures exist. Insofar as such plans exist they mainly concern the field of employment. With regard to public employment, such policies are often restricted to inserting notes in advertisements that women and people from ethnic minorities are especially invited to apply. In general, there is a lot of resistance to positive action measures that go further (e.g. preferential treatment of certain categories). In line with this, the 'diversity policy' (*diversiteitsbeleid*) embraced by the governmental sector is

²⁷⁰ See ETC Opinion 1998-105 and ETC Opinion 2012-50.

²⁷¹ ETC 1999-31 and 1999-32.

²⁷² ETC (2011) *Third evaluation report (2004-2009)*, 7.

²⁷³ NIHR 2012-189.

²⁷⁴ The private sector is to create 100,000 extra jobs by 2026, the public sector 25,000.

²⁷⁵ This is done by a ministerial decree (*ministeriële regeling*) see *Regeling activering quotaheffing*, *Staatscourant* 2017 no. 58942, <https://zoek.officielebekendmakingen.nl/stcrt-2017-58942.html>.

²⁷⁶ One might read a positive action exception in Article 7(1) of the ADA, which states: 'The prohibition of discrimination shall not apply if the discrimination: a) is based on employment or labour market policies to promote employment in certain age categories, provided such policies are laid down by or pursuant to an Act of Parliament.'

directed at promoting a diverse and inclusive workforce without resorting to such measures.²⁷⁷

The National Action Programme against Discrimination which was launched in 2016 includes the promotion of diversity in the labour market more generally as one of its four main starting points. Again, the goals set do not include hard quota but are directed at stimulating broad, general policies by both public and private employers to improve diversity. (For more information on the programme see below in Section 9.) The programme does not pay specific attention to positive action regarding migrants.

With regard to Roma people, no specific positive action measures are taken in the Netherlands. However, it should be noted that Roma people who live in trailer camps (as well as other Travellers) do receive special attention from local authorities, as their specific housing situation in many regards demands a specific policy. In 2010, the government initiated extensive cooperation and exchange of information between local municipal authorities in towns that have a considerable number of Roma residents in order to increase the effectiveness of their policies.²⁷⁸ In relation to the agreement in the European Council of 24 June 2011 to enhance a national policy on the integration of Roma people in all Member States, the Dutch government sent a letter to Parliament in which it outlined the current problems and policies to address them.²⁷⁹ However, this policy document does not contain any positive action measures.

²⁷⁷ See for a brief description of this policy the government website, www.rijksoverheid.nl/documenten/brieven/2016/11/03/diversiteitsbeleid-rijk.

²⁷⁸ See Tweede Kamer, 2008-2009, 31 700 XVIII, no. 90.

²⁷⁹ Letter from the Minister of Immigration, Integration and Asylum of 21 December 2011, Tweede Kamer, 2011-2012, 21501-20, no. 599.

6 REMEDIES AND ENFORCEMENT

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

a) Available procedures for enforcing the principle of equal treatment

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

The principle of non-discrimination can be enforced by means of criminal law procedures. Criminal law provisions may be applied in as far as the offences / discrimination fall under the definition of discrimination in Article 90quater of the Criminal Code. In 2016, for example, Geert Wilders MP, the leader of the right-wing Party for Freedom (*Partij voor de Vrijheid*, PVV) was convicted for insulting Moroccans. The District Court accepted the claim that, under the circumstances, this constituted incitement to discrimination against a group of people on the ground of their race, as prohibited by Article 137c of the Criminal Code. It rejected the claim of incitement to hatred. The Court did not impose a punishment, considering that the most important question at issue was whether Wilders crossed a line and that justice was done by means of the judgment itself.²⁸⁰ The appeal against the verdict is still pending.

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

The GETA, DDA and ADA do not entail compulsory judicial procedures. If discrimination occurs in the sphere of private employment, civil (labour) law procedures apply. If it occurs in public employment, the procedures of administrative employment law apply. The civil courts also have competence in cases in which discriminatory contractual agreements (goods and services supplied by private parties or the government) are concerned. Outside the area of contract law, an instance of discrimination (e.g. harassment) can be considered as tort and be dealt with in a civil law court procedure. The administrative courts have competence with respect to public employment contracts (civil servants) and when government actions in the sphere of public services amount to discrimination. This does not include unilateral government decisions (e.g. to grant a subsidy). Government actions can also be considered as tort (*onrechtmatige overheidssdaad*) in which case a civil court is competent to hear the case.²⁸¹

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

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

²⁸⁰ District Court of The Hague 9 December 2016 (case Wilders) ECLI:NL:RBDHA:2016:15014 (in Dutch only) <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2016:15014>.

Summary in English:

www.rechtspraak.nl/Organisatie-en-contact/Organisatie/Rechtbanken/Rechtbank-Den-Haag/Nieuws/Paginas/Wilders-found-guilty-of-insultment-of-a-group-and-incitement-to-discrimination.aspx (last accessed 22 March 2018).

²⁸¹ Such a case is based upon Article 6:162 of the Civil Code.

There are no specific legal rules requiring courts / the NIHR premises to be physically accessible for people with disabilities; general rules about accessibility do apply to these buildings. Neither is it specified anywhere that information must be provided in Braille. However, the information on the legal system which is provided on the internet and in special brochures conforms with standards set by blind people's organisations. No special procedures exist for dealing with individuals with a learning disability. There is no legal obligation to provide sign language interpreting. However, information from the Ministry of Justice and Security states that special internal procedures for accessibility for people with disabilities do, in fact, exist in a handbook and that, in practice, sign language interpreting is available.

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

Barriers and other deterrents faced by litigants seeking redress

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

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

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

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

b) Number of discrimination cases brought to justice

In the Netherlands, there are statistics available on the number of cases related to discrimination brought to justice. An internal report of the National Expertise Centre on Discrimination, which forms part of the Public Prosecution Service, was examined by a television programme. The report discusses the handling of discrimination by the Public Prosecutor, and its conclusions are worrying: out of 1 600 cases of discrimination reported to the police in 2013, only 83 were taken on by the Public Prosecutor – the lowest number since registration began in 1998. Yet there is no reason to assume that the actual prevalence of discrimination is lower than before. Most cases concern the discrimination ground of race/ethnic origin.²⁸² Similar conclusions were drawn in respect of internet discrimination cases: such cases are hardly ever prosecuted and deserve more attention.²⁸³

²⁸² See www.nrc.nl/nieuws/2015/03/29/aangifte-van-discriminatie-belandt-vaak-niet-bij-om/ (last accessed 22 March 2018).

²⁸³ www.recht.nl/nieuws/ict/150116/online-discriminatie-vereist-steviger-aanpak-van-justitie (last accessed 6 March 2017).

In 2016, the Verwey-Jonker Institute (a social science research institute) published its fifth report on racism, anti-Semitism and extreme-right-wing violence in the Netherlands.²⁸⁴ The report found that the number of racist incidents increased sharply, from 2 077 in 2012 to 2 732 in 2015 (an increase of over 30 %). Racism against Muslims amounted to 466 of these incidents, as compared to 35 incidents in 2013 and 142 in 2014. The real prevalence of this kind of discrimination is, however, difficult to estimate, especially because the police only started to register such incidents separately in 2013. For an explanation of this stark increase the researchers refer to the increasing social tensions, in particular in the wake of the 2015 terrorist attacks in several European countries by Muslim extremists and to the unrest created by the large number of refugees coming to Europe, many of whom are from a Muslim background. The rate of anti-Semitism was about the same in 2015 (57 reported incidents of intentional anti-Semitism) as in 2012 (58 incidents) after an increase in 2014 (76 incidents). The increase in racist and anti-Semitic incidents is commonly linked to Israel's military actions against Hamas in the summer of 2014. The report did not cover incidents concerning LGBT people.

c) Registration of discrimination cases by national courts

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

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

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

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

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

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

Before an organisation can act, two conditions must be met. Firstly, the organisation must represent 'similar interests'. This means that the interests represented must be similar to the interests of the organisation. Secondly, the organisation must (before taking the case to court) have tried to obtain satisfactory compensation or rebuttal from the perpetrator

²⁸⁴ Verwey-Jonker Instituut, *Vijfde rapportage racisme, antisemitisme en extreemrechts geweld in Nederland* [Fifth report on racism, anti-Semitism and extreme-right violence in the Netherlands], 2016. Available at: www.verwey-jonker.nl/doc/2016/116007_Vijfde_rapportage_racisme-antisemitisme_extreemrechts_geweld_Nederland_web.pdf (last accessed 22 March 2018).

or otherwise have tried to come to an agreement (see Article 3:305a (2) and Article 3:305b(2) of the Civil Code).

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

b) Engaging in support of victims of discrimination

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

c) Actio popularis

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

These cases are called 'general interest actions' (*algemeen belangacties*). Even if no victims have come forward, or if victims are not known, this action is possible if it is in the public interest. The interest may be quite diffuse (e.g. 'combating racial stereotypes'). This procedure is allowed under Articles 3:305a (1) and 3:305b (1) of the Civil Code (discussed above) and Article 1:2(3) of the General Act on Administrative Law (AWB). The law speaks of 'bringing legal action to protect similar interests of other persons'. However, if a concrete victim of certain discriminatory behaviour does come forward and objects to the action, the association or foundation or public body cannot go ahead with the proceedings insofar as this particular victim's interests are under discussion (see Article 3:305a(4) of the Civil Code). The judgment of the court will have no effect as regards victims who have objected to the procedure, unless it is impossible to individualise the effects of the judgment (see Article 3:305a(5) of the Civil Code). Anyway, case law shows that in practice it appears difficult to meet the admissibility criteria for this type of action. Courts seem to be reluctant to grant admissibility without a specific victim being involved in the proceedings.²⁸⁵

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

d) Class action

²⁸⁵ For a brief overview of relevant case law see *De ontvankelijkheid van belangengroepen bij rechtszaken* ['The admissibility of interest groups in legal proceedings'] by the Strategic Interest Litigation Project (PILP), <https://pilpnjcm.nl/wp-content/uploads/2015/10/De-ontvankelijkheid-belangengroepen-bij-rechtszaken-26102015.pdf> (last accessed 22 March 2018; available in Dutch only).

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

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

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

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

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

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

Article 10(1) GETA reads as follows:

'If a person who considers themselves to have been wronged through "distinction" as referred to in this Act establishes before a court facts from which it may be presumed that distinction has taken place, it shall be for the respondent to prove that the contested act was not in contravention of this Act.'

The equivalent Articles in the DDA and ADA are Articles 10(1) and (2) and 12(1) respectively. Subsection 2 of these three Articles provides that the partially reversed burden of proof also applies in collective actions and general interest actions under Article 3:305a of the Civil Code and Article 1:2(3) of the General Act on Administrative Law. These rules apply for all forms of discrimination, including harassment. It should be noted that these rules do not apply in the case of victimisation (see the next section of this report).

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

In the Netherlands, there are legal measures of protection against victimisation. All three Acts (GETA, DDA and ADA) protect against dismissal related to victimisation and against other forms of disadvantage as a result of the fact that a person has invoked the statutory equality act or has otherwise assisted in proceedings under these Acts, for example, by means of a testimony. See Articles 8 and 8a of the GETA. Equivalent articles are included in the DDA (Articles 9 and 9a) and in the ADA (Articles 10 and 11).

Article 8 of the GETA reads as follows:

'if an employer terminates an employee's contract of employment in contravention of Section 5, or on the ground that the employee has invoked Section 5, either in a

court procedure or otherwise, or has assisted others in this respect, Article 681 of Book 7 of the Civil Code applies.²⁸⁶

The latter provision renders the termination voidable.

Article 8a sub 1 of the GETA reads as follows:

‘it is unlawful to disadvantage persons because they have invoked this Act, either in or out of court, or have assisted others in this respect.’

The provisions mean that people who assist a victim of discrimination are also protected by Articles 8 and 8a of the GETA, not just the victims. The shifting of the burden of proof does not apply to victimisation.²⁸⁷ According to Monika Ambrus, the (then) ETC offered two ways for the claimant to prove that victimisation took place. Firstly, the claimant may prove that the complaint about discrimination led to a chain of events that eventually resulted in disruption of the labour relationship or even termination of the employment contract; secondly, the claimant may prove that the complaint was the only reason for the dismissal.²⁸⁸ In its evaluation report, the ETC stated that, in practice, the burden of proof is not too heavy for the complainant. It therefore makes no recommendations to change the law on this point. However, at the same time it appears from the figures that only in seven out of 19 victimisation cases did the claimant win.²⁸⁹ The (then) ETC made it clear that in a case of victimisation the prohibition is absolute, i.e. that no (objective) justification may be put forward.²⁹⁰

In 2008-2009, a study of the issue of victimisation was conducted on behalf of the then ETC.²⁹¹ It concerns the first large-scale research into this topic in the Netherlands. Previous smaller studies had shown that complaining about discrimination often leads to serious negative consequences, but also that many victims do not make official complaints for fear of victimisation. These findings were confirmed. The researchers found that serious forms of victimisation occurred most often in cases of discrimination on the ground of race, sex or disability, where they concerned discriminatory treatment in the workplace by colleagues and direct supervisors and where the claimant was in an isolated position at work. The report shows that it is certainly not enough to have a prohibition of victimisation in place, but that much more needs to be done in terms of having in place an informal complaints procedure, having counsellors in the workplace who can deal with complaints confidentially, and giving training to people working for personnel departments and managers. In 2015, five victimisation complaints were lodged with the NIHR; in one case, victimisation was found proven.²⁹²

²⁸⁶ The term ‘voidable’ (*vernietigbaar*) means that it is not automatically void but that this may be established during a court procedure.

²⁸⁷ See also Ambrus, M. ‘The concept of victimisation in the racial equality directive and in the Netherlands: a means for effective enforcement of the right to equal treatment’ in *Nederlands tijdschrift voor de mensenrechten*, *NJCM-bulletin*, 2011 (1), pp. 9-23, at p. 20.

²⁸⁸ Ambrus, M. ‘The concept of victimisation in the racial equality directive and in the Netherlands: a means for effective enforcement of the right to equal treatment’ in *Nederlands tijdschrift voor de mensenrechten*, *NJCM-bulletin*, 2011 (1), p. 21.

²⁸⁹ ETC (2011) *Third evaluation report (2004-2009)*, p. 25.

²⁹⁰ Ambrus mentions ETC Opinion 2006, 34, para. 3.19. See Ambrus, M. ‘The concept of victimisation in the racial equality directive and in the Netherlands: a means for effective enforcement of the right to equal treatment’ in *Nederlands tijdschrift voor de mensenrechten*, *NJCM-bulletin*, 2011 (1), pp. 9-23, at p. 20.

²⁹¹ See van Genugten, M. and Svensson, J. (2010), *Dubbel de dupe? Een studie naar de benadeling van werknemers die gelijke behandeling aan de orde stellen* [Victim twice over: a study of disadvantages experienced by employees who raise the issue of equal treatment], University of Twente/ETC. The full report, as well as an English summary, are available at: www.mensenrechten.nl/publicaties/detail/10028, last accessed 22 March 2018.

²⁹² NIHR 2015-34, NIHR 2015-43, NIHR 2015-75, NIHR 2015-77, NIHR 2015-105. Victimisation was found proven in NIHR 2015-75.

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

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

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

Articles 11(2), 11(3) and 13 of the NIHR Act mention some specific (mostly soft law) sanctions that may be imposed by the NIHR. Under Article 11(2), the NIHR may make recommendations when forwarding its findings (in an Opinion) to the party found to have made an unlawful distinction. Under Article 11(3) the NIHR may also forward its findings to the ministers concerned, and to organisations of employers, employees, professionals and public servants, to consumers of goods and services and to relevant consultative bodies. Under Article 13(1), the NIHR may bring legal action with a view to obtaining a court ruling that a particular conduct contrary to the relevant equal treatment legislation is unlawful, requesting that such conduct be prohibited or eliciting an order that the consequences of such conduct be rectified.²⁹³ This power must be regarded in light of the fact that the NIHR's Opinions are not binding. The ETC never made use of this possibility. If a case is brought by interest groups, the sanctions under the GETA are similar. In legal academic circles, there is serious doubt as to whether the range of remedies and sanctions available under the equal treatment legislation is in conformity with the requirement that sanctions be 'effective, proportionate and dissuasive'.²⁹⁴

Any other sanctions in discrimination cases must be imposed by a court. The system is such that, in case of criminal offences, fines and sentences may be imposed by a criminal court. This happened, for example, in 2014 in a case concerning a discriminatory email that was mistakenly sent to an applicant (community sentence and fine),²⁹⁵ and in 2015 for discriminatory remarks made on Facebook (suspects were offered the possibility of settling their case by paying a fine).²⁹⁶ In the case of civil lawsuits or administrative procedures, the normal sanctions in these areas of law are applicable. In case of employment cases, for instance, an employer may be held accountable to pay pecuniary damages,²⁹⁷ to take preventive measures or to reinstate an employee who was unlawfully dismissed. In case of tort, an injunction may be imposed, as well as pecuniary sanctions. It is impossible to give an overview of all of the possibilities in this regard.

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

²⁹³ Unless the person affected by the alleged discriminatory conduct has imposed conditions (Article 13(2) of the NIHR Act). In theory this could amount to a court order, e.g. to make a desegregation plan for schools; however, the Dutch courts are very careful not to interfere with what they call the discretionary powers of the administration and the government.

²⁹⁴ See Waaldijk, K. 'The Netherlands', in Waaldijk, K. and Bonini-Baraldi, M. (eds.) (2004), *Combating sexual orientation discrimination in employment: legislation in fifteen EU member states*, Report of the European Group of Experts on Combating Sexual Orientation Discrimination, Leiden, Universiteit Leiden, pp. 341-375, available online at <https://openaccess.leidenuniv.nl/handle/1887/12587> (last accessed 22 March 2018) and Holtmaat, R. 'Uit de Keuken van de Europese Unie: de Gelijkebehandelingsrichtlijnen op grond van Artikel 13 EG Verdrag' ['The Equal Treatment Directives on the basis of Article 10 EC Treaty'], in T. Loenen *et al.* (eds.) (2001), *Gelijke behandeling: oordelen en commentaar 2000* [Equal treatment: opinions and commentary], Deventer, Kluwer, pp. 105-124 and Asscher-Vonk, I. P. 'Sancties' ['Sanctions'] and 'Conclusie juridische analyse' ['Conclusion legal analysis'], in Asscher-Vonk, I. P. and Groenendijk, C. A. (eds.) (1999), *Gelijke behandeling regels en realiteit* [Equal treatment: regulations and reality], Den Haag, SDU, pp. 202-234 and pp. 301-319.

²⁹⁵ District Court Gelderland, 27 August 2014, ECLI:NL:RBGEL:2014:5457.

²⁹⁶ Official press release from the Public Prosecution Service regarding the three fines imposed: www.om.nl/actueel/nieuwsberichten/@88544/reacties/ (last accessed 22 March 2018).

²⁹⁷ Associations and foundations that bring cases on behalf of victims or bring collective or public interest actions before a civil or administrative court may not seek pecuniary damages (see Article 305(a) para. 4 of the Civil Code).

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

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

b) Ceiling and amount of compensation

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

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

c) Assessment of the sanctions

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

As to the question of whether the available sanctions have been shown to be - or are likely to be - effective, proportionate and dissuasive, as is required by the directives, it can be observed that the sanctions do not seem to be very dissuasive. It has never been properly investigated whether they are effective and proportionate, neither by the equality body, nor by any other institution.

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

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

In the Netherlands, there are two types of equality body. First, there is a quasi-judicial (or tribunal type) body assigned with the tasks of hearing complaints about unequal treatment, drafting reports, giving advice to the government and investigating possible instances of structural discrimination on its own accord. The material scope of the Netherlands Institute for Human Rights (NIHR) (*College voor de rechten van de mens*) mandate covers all areas covered by the General Equal Treatment Act (GETA), the Disability Discrimination Act (DDA) and the Age Discrimination Act (ADA), that is *grosso modo* employment and goods and services. This function is currently fulfilled by a department of the NIHR.²⁹⁸ In 2012, the NIHR assumed all the tasks of the previous Equal Treatment Commission (ETC) (*Commissie Gelijke Behandeling, CGB*) in this regard.²⁹⁹ The ETC was the first officially designated body through which the government implemented Article 13 of the Racial Equality Directive, although it was not officially appointed as such by a separate law or decree.³⁰⁰ The status as an equality body follows from the tasks given to the NIHR in the NIHR Act (Articles 9-13 of the NIHR Act; originally Articles 11-21 of the GETA). Other equal treatment acts also assign these tasks to the NIHR (see Article 12 DDA and Article 14 ADA). On the basis of the NIHR Act, decrees have been adopted in order to regulate the legal status of members of the Institute and its staff³⁰¹ and the internal procedures of the department of the NIHR that deals with complaints about unequal treatment.³⁰²

The Dutch government established the NIHR after long discussions about the best way to implement the Paris Principles.³⁰³ The role of the new NIHR as regards investigating complaints about unequal treatment has not been changed. The establishment of the Institute also does not change the competences of the ADVs (see below) as regards their role in assisting victims. The role of assisting victims was never part of the ETC's work and is not part of the work of the NIHR, because it is deemed to be incompatible with the role of independently issuing legal opinions about discrimination complaints. The NIHR refers victims to the Anti-Discrimination Bureaux (see below) for such assistance. In addition to the nine members of the previous ETC, three additional members were appointed to the NIHR.³⁰⁴

²⁹⁸ Netherlands, Act of 24 November 2011 containing the establishment of the Netherlands Institute for Human Rights (*Wet van 24 november 2011, houdende de oprichting van het College voor de rechten van de mens*); *Staatsblad* 2011, 573. The Act entered into force on 1 October 2012.

²⁹⁹ The provisions of the General Equal Treatment Act in which the former ETC was regulated were repealed in the NIHR Act. Instead, the same tasks and authorities are now regulated in a specific chapter of the NIHR Act: 'Chapter 2: Investigations and findings relating to equal treatment' (Articles 9-13).

³⁰⁰ This designation follows from statements from the government in various Parliamentary papers. See e.g. Explanatory Memorandum to the bill which led to the *EG-Implementatiewet Awgb* (EC Implementation law Equal Treatment Law) Tweede Kamer, 2002-2003, 28 770, nos. 1-3 at page 20, where it is mentioned in the Appendix, at page 20, that the implementation of Article 13 of the Racial Equality Directive has already been completed because of the existence in the Netherlands of the ETC (*EG Implementatiewet Awgb*: Law of 21 February 2004, *Staatsblad* 2004, 119).

³⁰¹ *Besluit van 28 augustus 2012, houdende regels over de rechtspositie van de leden van het College voor de rechten van de mens en de tot het bureau behorende ambtenaren (Besluit rechtspositie College voor de rechten van de mens)* [Decree on the legal position Netherlands Institute for Human Rights], *Staatsblad* 2012, 389.

³⁰² *Besluit van 31 augustus 2012, houdende nadere regels over de werkwijze van de afdeling, bedoeld in hoofdstuk 2 van de Wet College voor de rechten van de mens (Besluit werkwijze onderzoek gelijke behandeling)*, *Staatsblad* 2012, 394.

³⁰³ Principles relating to the Status of National Institutions Adopted by UN General Assembly resolution 48/134 of 20 December 1993.

³⁰⁴ Regrettably, the evaluation of the NIHR after its first five years of existence was not yet publicly available at the time of writing of this report. It will be published as soon as the current government has formulated its response to the evaluation in a formal letter to Parliament. The 2017 NIHR annual report was not yet available either.

Secondly, there are the Anti-Discrimination Bureaux (*Anti-discriminatievoorzieningen*, ADVs) at local level.³⁰⁵ The ADVs have a legal basis in the Act on Local Anti-Discrimination Bureaux (*Wet gemeentelijke antidiscriminatievoorzieningen*).³⁰⁶ All 390 municipalities are obliged to establish and subsidise an ADV and receive an amount of money per resident for this purpose. The main task of the ADVs is to assist victims of discrimination and to monitor the situation in this regard. The ADVs work together within an overarching association called the National Association against Discrimination (*Landelijke Vereniging tegen Discriminatie*) and are supported by the expert institute, Art.1, named after the constitutional non-discrimination provision. The ADVs and Art.1 cover all of the Article 19 TFEU non-discrimination grounds and are officially recognised as equality bodies (in terms of Article 13 of the Racial Equality Directive).³⁰⁷ The ADVs, the NIHR and Art.1 thus fulfil different tasks that are closely related but not overlapping.

In the following the main focus is on the NIHR as the primary designated equality body, unless otherwise indicated.

b) Political, economic and social context for the designated body

Overall there is political support for the NIHR, which is not to say that all political parties have a positive attitude to it. Right wing and populist parties are overall (much) less positive than parties towards the other end of the political spectrum. This is particularly the case where the NIHR gives opinions in controversial discrimination cases that support the complainant.³⁰⁸

Financially speaking, after an initial increase in terms of budget and staff for the NIHR compared to the resources allocated to the former ETC, in 2015 the budget for the NIHR was back to the level that was allocated to the former ETC, due to the overall budget cuts during the economic crisis.³⁰⁹ To monitor the implementation of the CRPD since its ratification in 2016 the NIHR receives additional funding.

Similar to the political debate mentioned above, the popular debate surrounding equality and diversity is also mixed. Yet, stakeholders and experts are positive overall about the functioning of the NIHR.³¹⁰

c) Institutional architecture

As mentioned, the competence and functions of the former ETC are now included in the much broader mandate of the NIHR as the national human rights institution that complies with the Paris Principles. This mandate includes the following tasks:³¹¹

³⁰⁵ The ADVs were designated as equality bodies in the Explanatory Memorandum to the Act on Local Anti-discrimination Bureaux; Tweede Kamer, 2007-2008, 31 439, no. 3, p. 7.

³⁰⁶ *Wet gemeentelijke antidiscriminatievoorzieningen*, *Staatsblad* 2009, 313. On the basis of this law, a Decree was adopted in which more detailed regulation of the local ADVs is laid down. It contains provisions concerning the independence, competency and procedures which must be followed when the ADVs provide information and assist victims of discrimination (see *Besluit gemeentelijke antidiscriminatievoorzieningen*, *Staatsblad* 2009, 373, *Besluit gemeentelijke antidiscriminatievoorzieningen*).

³⁰⁷ In 2004, for the first time the government recognised these organisations as equality bodies in the sense of Article 13 of the Racial Equality Directive. See Tweede Kamer, 2003-2004, 28 770, no. 5.

³⁰⁸ See for example the newspaper article of 26 November 2017 'The NIHR comes time and again under attack' (College voor de Rechten van de mens ligt steeds weer onder vuur), www.ad.nl/politiek/college-voor-de-rechten-van-de-mens-ligt-steeds-weer-onder-vuur~aabb31cd/. (last accessed 14 February 2018).

³⁰⁹ See the financial evaluation of the NIHR of November 2015, Tweede Kamer, 2015-2016, 34 338, no.1 attachment 2015D43169.

³¹⁰ *Idem*, p.2. The evaluation report mentions more specifically that experts are positive regarding the priorities set by the NIHR and their implementation. They are somewhat more critical regarding the NIHR's tasks concerning human rights education and providing information.

³¹¹ The following tasks are specified in the Annual Report 2016, p. 9, see <https://www.mensenrechten.nl/nl/publicatie/37449>.

1. Opinions: giving opinions in cases relating to discrimination on the basis of equality legislation.
2. Research: carrying out and stimulating research into the protection of human rights
3. Reporting: reporting and making recommendations about the protection of human rights, including the annual report on the human rights situation in the Netherlands, to the government and Parliament.
4. Advice: advising the government, Parliament or administrative bodies about laws and regulations which relate directly or indirectly to human rights, either in response to a written request or proactively.
5. Information provision: providing information about human rights.
6. Education: stimulating and coordinating education about human rights.
7. Collaboration: structured collaboration with social organisations and national, European and other international institutions.
8. Encouragement: encouraging the ratification and implementation of and compliance with international conventions on human rights and the removal of reservations in such conventions. Encouraging the implementation of and compliance with binding decisions by organisations under international law about human rights and encouraging compliance with European or international recommendations about human rights.
9. Supervising the implementation of the CRPD.

To deal efficiently with the large number of cases handled under the quasi-judicial complaints procedure the equality and non-discrimination mandate is executed by a specific department of the NIHR, under the responsibility of one of its two vice-presidents.³¹² As all commissioners are collectively responsible for carrying out the broad mandate of the NIHR, none of them deal exclusively with the equality and non-discrimination mandate, though some spend more time on this part of the work of the NIHR than others, as more complex cases may require specialised knowledge. The same holds true for most staff members. The budget does not set apart a specified percentage of resources and budget for the equality mandate.

The integration of the equality mandate of the former ETC into the much broader human rights mandate of the NIHR has inevitably led to a relative reduction in attention to the equality mandate in the work of the NIHR. In terms of resources, by making the process of handling discrimination complaints more efficient the NIHR has been able to considerably reduce resources spent on its equality mandate without compromising the overall quality of its work in this area. A positive consequence of the broader mandate is the way it has been made easier to link equality and other human rights issues and thus to address the wider context which often contributes to discriminatory attitudes and practices. In addition, the NIHR included 'discrimination and stereotyping in the labour market' as one of its four priority themes in its strategic plan 2015-2019.³¹³ Since 2016 it has also devoted specific attention to its equality mandate by publishing a separate annual report, 'Discrimination cases monitor', in which it analyses its work under its equality mandate in more detail than is allowed for in the annual report.³¹⁴

All in all, the level of specific visibility of the equality mandate is significantly reduced by the establishment of the broader mandate of the NIHR as the institute now addresses all kinds of human rights issues. At the same time, the opinions of the NIHR in discrimination cases still receive quite a lot of attention in the media, in particular when they tie in to political and public controversies and discussions.

³¹² The organisation of the NIHR consists of three departments: Front office & case opinions; Studies, recommendations and communications; Operations staff department.

³¹³ The other themes regard topics that also include equality and non-discrimination issues: human rights education, human rights at a local level and monitoring of the CRPD, see Annual Report 2016, now available in English on the website of the NIHR, www.mensenrechten.nl/publicaties/detail/38213.

³¹⁴ Discrimination cases monitor 2016, www.mensenrechten.nl/publicaties/detail/37450.

d) Status of the designated body/bodies – general independence

i) Status of the body

The NIHR is an independent quasi-judicial body whose status is regulated in the NIHR Act. For further details on its independence see below under ii. It consists of nine members.³¹⁵ There is also an Advisory Council, which advises the NIHR on its (strategic) plans and advises the Minister of Justice and Security on the appointment of members of the NIHR. The Advisory Council consists (*qualitate qua*) of the National Ombudsman, the chair of the Data Protection Agency, the chair of the Council for the Judiciary and a minimum of four and a maximum of eight members drawn from civil society organisations concerned with the protection of one or more human rights, from organisations of employers and employees and from the academic world (Article 15 (2) of the NIHR Act.) Apart from the aforementioned *qualitate qua* members, the members of the Council are appointed by the Minister of Justice and Security, after consultation with the Minister of the Interior and Kingdom Relations, the NIHR, the Ombudsman, the chair of the Data Protection Agency and the chair of the Council for the Judiciary (Article 15 (3)).

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

The selection and appointment of members of the NIHR is regulated in Article 16 of the NIHR Act. Vacancies are to be published and communicated to relevant organisations working in the field of human rights. In accordance with the NIHR, the Advisory Council makes suggestions to the Minister of Justice and Security, who then makes a recommendation to appoint them by decree for a period of six years. Reappointment is possible (Article 17 (2) NIHR Act).

The NIHR is fully funded by the central government, but it can independently allocate its resources to its various tasks. It also has full power to recruit and manage its own supporting staff. Article 18 of the NIHR Act regulates the position of the staff of the Institute. Staff are appointed by the Institute (represented by the Director). Their employment conditions are similar to those of civil servants in national and local government. The Institute as a whole is the 'competent authority' as stipulated in the Central and Local Government Personnel Act, which means that all matters, such as promotion, dismissal, salary, etc. are decided by the Director of the Institute. In this respect, there is a major difference compared to the situation under the GETA, where staff were appointed by the Ministry of Justice and Security. Members and staff members of the former ETC all automatically became members and staff of the NIHR.

In terms of accountability, the NIHR must publish an annual report with an overview of its investigations, advice and other activities (Article 21 NIHR Act). It must also send this report to the National Ombudsman, the Data Protection Agency and relevant organisations working in the field of human rights. Every five years the NIHR must report on the functioning in practice of the NIHR Act and the relevant non-discrimination legislation. This report is sent to the

³¹⁵ The maximum number is 12; most members are part-time commissioners and hold another part-time job elsewhere.

Minister of the Interior and Kingdom Relations and subsequently, with the Minister's response, to Parliament (Article 22 NIHR Act).³¹⁶

ii) Independence of the body

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

In addition, Article 17 of the NIHR Act gives a detailed regulation of the legal status of the members in terms of the duration of their appointment, their working conditions, salary, possibility of disciplinary sanctions and dismissal, etc. To emphasise the independence of the members, subsection 1 states that, apart from a few exceptions, the provisions of the Judicial Officers Legal Status Act concerning dismissal, suspension and disciplinary measures apply *mutatis mutandis* to them.³¹⁷ This provision contains a few changes compared to the former Article 16 (4) of the General Equal Treatment Act, all of which are intended to emphasise / strengthen the independence of the members of the Institute. The independence is not only formally stipulated in the law but, according to the assessment of the author of this report, is reflected in the realities on the ground.

e) Grounds covered by the designated body/bodies

Under its specific mandate in the field of non-discrimination, the NIHR deals with all the non-discrimination grounds mentioned in the GETA, DDA and ADA, as well as some more specific grounds: religion and belief, political opinion, hetero- or homosexual orientation, sex, nationality and civil (or marital) status, disability, age, plus 'working time' and 'type of labour contract'.

The NIHR's principal function in the field of non-discrimination is to investigate alleged cases of discriminatory practices or conduct. In 2016 the majority of complaints regarded discrimination on grounds of race (23 %), sex (20 %) and disability/chronic illness (18%), closely followed by age (17 %).³¹⁸ Because of the broad personal scope of the non-discrimination legislation, anyone residing in the Netherlands, including migrants, can bring a complaint if they are discriminated against on any of the grounds covered. In addition, the NIHR may investigate structural instances of discrimination of its own accord³¹⁹ and may advise organisations (including governmental organisations) who want to know

³¹⁶ At the time of writing the first report of this kind was still pending with the Minister for his response. It will become publicly available when it is sent to Parliament.

³¹⁷ One important difference with the position of judges is that members of the NIHR are appointed for a period of six years with the possibility of re-appointment, while judges are appointed for life.

³¹⁸ Discrimination cases monitor 2016, p. 17, available on the website of the NIHR, www.mensenrechten.nl/publicaties/detail/37450.

³¹⁹ The scope for this was extended by the *Evaluatiewet AWGB* [*Wet tot wijziging van de Algemene Wet Gelijke Behandeling; Evaluatiewet Awgb*] of 15 September 2005, *Staatsblad 2005*, 516. (This is the law which amended the GETA on the basis of proposals stemming from the first evaluation of the Act during the period 1994-1999).

whether their policies or practices are in compliance with the law. It may also advise the government on discrimination issues, including advice about proposals for new legislation or proposals for amendments to legislation. The NIHR sometimes conducts research (or assigns experts to do this on its behalf) into specific issues, such as victimisation or discrimination in the workplace on the ground of sexual orientation. In the composition of its members and supporting staff the NIHR strives for sufficient diversity to ensure relevant expertise regarding all the grounds covered is present.

Furthermore, the NIHR has the general purpose and task of promoting human rights and investigating human rights violations and providing advice about improving the protection of human rights etc. It does not have the competence and authority to hear individual complaints about human rights violations beyond the scope of the equal treatment legislation. Under its broad human rights mandate it can and does include the position of migrants whether or not the problems they encounter are also covered by non-discrimination law as such.

In its strategic reports, the NIHR indicates its focus areas. So far these include specific non-discrimination themes. In the strategic report for the period 2013-2015 the NIHR identified several themes for a proactive promotion of human rights: care for the elderly and human rights; migration and human rights; discrimination regarding access to the labour market; ratification and implementation of the CRPD; human rights education; and ratification of other treaties relevant for the protection of human rights in the Netherlands.³²⁰ Its strategic report for 2016-2019 singles out four themes or programmes to focus on: human rights education; discrimination and stereotyping in the labour market; human rights at the local level; and monitoring of the implementation of the CRPD. Discrimination in the labour market thus remains prominently on the agenda for this period. The NIHR emphasises the fact that setting priorities for the themes that will receive particular attention in a certain period does not imply that former themes are no longer addressed; in this regard it specifically mentions refugees and migrants.³²¹

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

All in all, the impression of the author of this report is that the attention paid by the NIHR to all the grounds of discrimination included in its mandate is quite balanced, with disability receiving considerably more attention than previously, in view of the specific task entrusted to the NIHR to monitor the implementation of the CRPD, which was ratified in 2016.

- f) Competences of the designated body/bodies – and their independent and effective exercise
 - i) Independent assistance to victims

In the Netherlands, the NIHR does not have the competence to provide independent assistance to victims. The role of assisting victims is seen as being in conflict with the role of independently investigating individual complaints and

³²⁰ NIHR Strategic plan 2012-2016, www.mensenrechten.nl/nl/publicatie/35930.

³²¹ NIHR Strategic plan 2016-2019, www.mensenrechten.nl/nl/publicatie/37005.

giving an authoritative opinion on them. The same applies to the NIHR's official competence to bring cases of unequal treatment to the attention of the courts; even if it has this competence, the NIHR never makes use of it as it would conflict with its own quasi-judicial function.

However, Art.1 and the local ADVs fulfil this function. The role of the latter organisations is mainly to assist victims of discrimination and to monitor developments with respect to discrimination in society. They bring many cases of discrimination to the attention of the NIHR and the courts.

- Independence

The ADVs operate largely independently in assisting victims of discrimination. Their independence is guaranteed in the 2009 Act establishing the ADVs, mentioned above under a) and this is also the case in practice for the ADVs covering the vast majority of municipalities (86 %).³²²

- Effectiveness

There is a large variety in the way ADVs are organised and function, but research suggests the vast majority of municipalities (86 %) is serviced by ADVs that meet requirements of quality and professionalism. Overall, the larger and regionally organised ADVs perform better in terms of effectiveness than small ADVs.³²³

- Resources

Municipalities are obliged to fund the ADVs, but they do not always actually spend the financial resources they receive for this purpose on these organisations. In many municipalities the economic crisis has resulted in budget cuts also affecting the ADVs. On the other hand, some municipalities devote more resources to the ADVs than required.³²⁴ Overall 86 % of the municipalities are covered by ADVs that meet quality standards in terms of staff and professionalism.³²⁵

ii) Independent surveys and reports

In the Netherlands, the NIHR has the competence to conduct independent surveys and publish independent reports.

- Independence

³²² A minority of small ADVs are sometimes staffed by employees of the municipality concerned, which conflicts with the requirements of independence. See the report on the functioning of the ADVs in practice (*Onderzoek naar de werking van ADV's in de praktijk*), March 2017, p. 48.

www.rijksoverheid.nl/documenten/rapporten/2017/03/01/onderzoek-naar-de-werking-van-de-adv's-in-de-praktijk (last accessed 16 February 2018).

³²³ Report on the functioning of the ADVs in practice (*Onderzoek naar de werking van ADV's in de praktijk*), March 2017, p. 51.

www.rijksoverheid.nl/documenten/rapporten/2017/03/01/onderzoek-naar-de-werking-van-de-adv's-in-de-praktijk.

³²⁴ Report on the functioning of the ADVs in practice (*Onderzoek naar de werking van ADV's in de praktijk*), March 2017, p. 48. www.rijksoverheid.nl/documenten/rapporten/2017/03/01/onderzoek-naar-de-werking-van-de-adv's-in-de-praktijk.

³²⁵ Report on the functioning of the ADVs in practice (*Onderzoek naar de werking van ADV's in de praktijk*), March 2017, p. 48. www.rijksoverheid.nl/documenten/rapporten/2017/03/01/onderzoek-naar-de-werking-van-de-adv's-in-de-praktijk.

The NIHR operates in a fully independent way, both *de jure* and *de facto*.³²⁶

- Effectiveness

The NIHR and its predecessor have made extensive use of their competence in this regard. They have conducted a large number of surveys and produced reports on a wide variety of equality issues regarding the grounds of discrimination covered by the EU directives and beyond. In 2017, for instance, it issued reports on equal pay, pregnancy discrimination, access to voting for disabled people and access to public transport for this group. All surveys and reports are published on the website of the NIHR and are often referred to in policy documents.³²⁷

Interestingly, the NIHR Act provides that the Minister concerned must give the NIHR the opportunity to discuss its surveys, reports, recommendations or advice with him/her (Article 8 NIHR).

The NIHR also sends its own, independent reports on the human rights situation in the Netherlands to the UN human rights treaty bodies for consideration in the context of the reporting procedures.

Other organisations also publish very informative reports about the prevalence and causes of discrimination. The main (publicly funded) research institution in this regard is the Netherlands Institute for Social Research (*Sociaal Cultureel Planbureau, SCP*). In 2013, an SCP study revealed that harassment at work is one of the greatest problems encountered by LGBT people.³²⁸ In 2014, the SCP published a report on the way people perceive discrimination, followed in 2015 by a report on labour market discrimination in The Hague.³²⁹ In addition, it publishes an annual Integration Report regarding migrants in cooperation with Netherlands Statistics.³³⁰

- Resources

There is no specific part of the resources or staff allocated for surveys and reports, but the number of reports suggests resources to fulfil this task are adequate.

iii) Independent recommendations

³²⁶ This conclusion is corroborated by the fact that the independence of the NIHR does not figure as an issue in the financial evaluation of the NIHR of November 2015, Tweede Kamer, 2015-2016, 34 338, no.1 attachment 2015D43169.

³²⁷ <https://www.mensenrechten.nl/nl/publicaties>

³²⁸ See the SCP Report, *Seksuele oriëntatie en werk. Ervaringen van lesbische, homoseksuele, biseksuele en heteroseksuele werknemers* [Sexual orientation and work. Experiences of lesbian, gay, bisexual and heterosexual employees]. In December 2013, the Minister of Education, Culture and Science sent a letter to Parliament on the topic of discrimination against LGBT employees, see Tweede Kamer, 2013-2014, 30 420, no. 204

³²⁹ SCP 2014, *Ervaren Discriminatie in Nederland*, available at: www.scp.nl/Publicaties/Alle_publicaties/Publicaties_2014/Ervaren_discriminatie_in_Nederland; SCP 2015, *Op Afkomst Afgewezen*, www.scp.nl/Publicaties/Alle_publicaties/Publicaties_2015/Op_afkomst_afgewezen (both last accessed 6 March 2017).

³³⁰ See e.g. the latest one of December 2016, which covers the integration of migrants in eight areas. www.scp.nl/Publicaties/Alle_publicaties/Publicaties_2016/Integratie_in_zicht.

In the Netherlands, the NIHR has the competence to issue independent recommendations on discrimination issues.³³¹

- Independence

In respect of this competence the NIHR also operates independently both *de jure* and *de facto*. Under the NIHR Act it has the competence to advise the government, Parliament or administrative bodies about all laws and regulations directly or indirectly related to human rights issues, either in response to a request or of its own volition (Article 5).

- Effectiveness

The NIHR makes use of its advisory competence on a regular basis by formulating recommendations in its reports or providing advice in response to specific issues.

- Resources

There is no specific part of the resources or staff allocated for this part of the work of the NIHR, but the frequent use made of this competence suggests resources to fulfil this task are adequate.

iv) Other competences

Other competences and tasks of the NIHR regard its quasi-judicial role in relation to discrimination complaints (see below for more details); provision of information and education on human rights; and collaboration with social organisations and national, European and other international institutions working in the area of human rights. Another particular task concerns encouraging the implementation of and compliance with international conventions on human rights and with European or international recommendations on human rights (Article 3 NIHR).

v) Positive duties

The equality and non-discrimination legislation does not explicitly contain positive duties for duty bearers in relation to promoting equality and preventing discrimination. As far as the equality body is concerned, under its broad human rights mandate such promotion is part of the competence of the NIHR.

g) Legal standing of the designated body/bodies

In the Netherlands, the NIHR has legal standing to bring discrimination complaints on behalf of identified victim(s) and *ex officio to court*. It can also intervene in legal cases concerning discrimination. Although the NIHR has this competence (in Article 13 NIHR Act), it never makes use of it because it conflicts with its main task of investigating individual complaints about discrimination in a neutral and objective manner.³³²

Art.1 and the local ADVs can bring claims to court within the framework of the general rules that exist under Dutch civil law concerning actions on behalf of victims and general

³³¹ For an overview of the many recommendations it issues, see the website of the NIHR, e.g. under the category 'adviezen' ('advice'), <https://www.mensenrechten.nl/nl/publicaties> . Recommendations are also included in its research reports and annual reports, also available on the website.

³³² In 2016 the NIHR intervened for the first time as a third party in proceedings for the European Court of Human Rights through an *amicus curiae* submission, but this was not in a non-discrimination case.

interest actions or collective actions. (No data on numbers of class actions are available.) See Section 6.2 of this report.

h) Quasi-judicial competences

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

The NIHR keeps track of the follow-up to its opinions and reports on this in its annual reports and in particular in its more detailed annual 'Discrimination cases monitor'.

According to the NIHR annual reports for 2012, 2013, 2014, 2015 and 2016, in 16 %/ 11 %/ 12 %/ 11 %/ 12 % of cases an individual measure was taken by the defendant / company or institution, in 26 %/ 33 %/ 36 %/ 39 % / 35 % a structural measure and in 28 %/ 32 %/ 36 %/ 31 % / 26 % both an individual and a structural measure. Measures were taken in 70 %/ 77 %/ 83 % / 81 % / 73 % of all cases as a result of the Opinion or recommendation.

It is not always feasible to take an individual measure. As regards Opinions where this was possible, individual measures were implemented in 2012, 2013, 2014, 2015 and 2016 in 49 %/ 53 %/ 53 %/ 47 %/ 43 % of such cases. With regard to the opinions for which structural measures are possible, structural measures were taken in 55 % / 66 % / 72 % / 71 %/ 61 % of cases.³³³ From these figures it appears that in 2014 and 2015 defendants were more inclined to take structural measures than in the previous years, but 2016 does not show the same positive trend.

NB: at time of writing the NIHR had not yet published its annual report for 2017.

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

i) Registration by the body/bodies of complaints and decisions

In the Netherlands, the NIHR registers the number of inquiries, complaints and decisions (by ground, field, type of discrimination, etc.). These data are easily available to the public on the NIHR website.

Number of inquiries as can be inferred from the number of contacts with the front Office:³³⁴

	Equal treatment	Human rights	Equal treatment & human rights	Other	Total
2014	1 615	543	171	--	2 329
2015	2 083	568	65	380	3 096
2016	2 781	415	362	372	3 930

³³³ All Annual Reports are available in Dutch and English; the annual Discrimination cases monitor is available in Dutch only (last accessed 18 February 2018) www.mensenrechten.nl/nl/publicaties.

³³⁴ Annual report 2016, p. 31, see www.mensenrechten.nl/nl/publicatie/38213.

Number of requests for an ETC/NIHR Opinion: ³³⁵	
<i>Year:</i>	<i>Number of requests:</i>
2010	423
2011	719
2012	634
2013	498
2014	463
2015	422
2016	463

Number of opinions

	2011		2012		2013		2014		2015		2016	
	<i>N</i>	<i>%</i>	<i>N</i>	<i>%</i>	<i>N</i>	<i>%</i>	<i>N</i>	<i>%</i>	<i>N</i>	<i>%</i>	<i>N</i>	<i>%</i>
Gender	38	17	44	21	40	22	43	24	23	15	30	20
Race	22	10	27	13	27	15	28	16	30	19	34	23
Nationality	4	2	12	6	14	8	11	6	6	4	7	5
Religion	17	8	16	8	18	10	18	10	12	8	13	9
Sexual orientation	1	0	2	1	0	0	7	4	4	3	1	1
Civil status	1	0	3	1	2	1	0	0	0	0	0	0
Political beliefs	6	3	8	4	3	2	0	0	0	0	0	0
Philosophy of life	1	0	1	0	0	0	0	0	0	0	1	1
Part-time / full-time	7	3	14	7	5	3	3	2	0	0	1	1
Temp/perm. employment	4	2	0	0	0	0	0	0	0	0	0	0
Disability/chronic illness	37	17	39	18	31	17	26	14	28	18	27	18
Age	53	24	34	16	32	17	31	17	32	21	25	17
Multiple grounds ³³⁶	30	14	11	5	11	6	6	12	20	13	12	8
Total:	221		212 ³³⁷		183		179		155		151	

j) Planning

The NIHR has a strategic plan, the current one covering 2016-2019.³³⁸ The organisation publishes an annual report on its activities and, since 2016, has produced a specific annual report dealing with its equality mandate, the 'Discrimination cases monitor'.³³⁹ The annual reports are usually not considered by Parliament, but the NIHR Act specifically provides that a five-yearly evaluation must be submitted to Parliament on how the Act and the equality and non-discrimination legislation covered by the NIHR mandate functions in practice. At the time of writing the first evaluation of this kind for the period 2012-2016 was not yet publicly available, but it will be published when the government has formulated its response to it. This evaluation was conducted by the NIHR itself. It maps the experiences of the Institute with the functioning of the NIHR Act.

In addition to this evaluation of the NIHR Act, the NIHR is subjected to a periodic evaluation (every five years) of its functioning as an autonomous administrative authority, on the

³³⁵ *Annual report 2014*, Table 3 and Discrimination cases monitor 2016 Table 2 combined. See the NIHR website, where all the annual reports are published: www.mensenrechten.nl/nl/publicaties (last accessed 6 March 2017). As shown in the table below in this text ('Numbers of opinions given by the ETC/NIHR'), only a minority of all requests result in an Opinion from the NIHR. Others are not admissible (outside the scope of the legislation) or are manifestly ill-founded. Furthermore, some people just want information and do not want to submit a formal complaint.

³³⁶ I.e. cases in which the complainant claimed to have been discriminated against on more than one ground. This does not necessarily concern cases of multiple (intersectional) discrimination.

³³⁷ One case was labelled 'no ground' by the NIHR.

³³⁸ NIHR, *Strategisch plan 2016-1029* [Strategic plan 216-2019], available at: www.mensenrechten.nl/publicaties/detail/36378.

³³⁹ NIHR, Monitor Diskriminatiezaken [*Discrimination cases monitor*], available at: www.mensenrechten.nl/publicaties/detail/37450.

basis of the Autonomous Administrative Authorities Framework Act (AAAF) (*Kaderwet Zelfstandige Bestuursorganen*). This evaluation is conducted by an independent research organisation.

So far the Annual Reports and the Discrimination Cases Monitors are very informative and provide a good overview of the activities of the NIHR, including references to its strategic plan. In this way a satisfactory implementation cycle has been put in place.

k) Stakeholder engagement

The NIHR engages with a wide variety of stakeholders, including civil society associations, business/employer/service provider networks and organisations, public bodies, local government entities, trade unions or employee's associations, ADVs and academics. Thus, for instance, the members of the NIHR regularly participate in and/or visit all sorts of activities and events organised by these stakeholders. The NIHR Act also specifically provides that the Advisory Council is composed of members from a variety of such backgrounds, thus guaranteeing some level of institutional engagement with stakeholders. The Advisory Council consists (*qualitate qua*) of the National Ombudsman, the chair of the Data Protection Agency, the chair of the Council for the Judiciary and a minimum of four and a maximum of eight members drawn from civil society organisations concerned with the protection of one or more human rights, from organisations of employers and employees and from the academic world (Article 15 (2) of the NIHR Act).

In the absence of relevant research, it is hard to assess how intensive engagements with each of these stakeholders are in practice.

l) Accessibility

The NIHR has an accessible and publicly visible office located in the centre of the country. It does not have local or regional offices. It does not as such conduct outreach actions to local areas or communities. However, the NIHR regularly contributes to meetings or presentations in all parts of the country in order to inform the public of the mandate of the NIHR and the procedures individuals can start with the Institute. Furthermore, the Netherlands is a small country with good public transport and communication facilities, so in general there are ample possibilities for people from all parts of the country to reach the NIHR or get in contact with the NIHR.

The NIHR has procedures in place to identify and respond to the access needs of specific complainants, including people with disabilities, people speaking different languages, people with literacy issues and people with caring responsibilities.

Its policy is accommodating. The information on the website of the Institute is adapted and processed in order to make it accessible for people with visual disabilities. For people with hearing impairments the NIHR can provide sign language interpreters during a hearing, free of charge. If travelling to the hearing is too much of a burden for the applicant, he/she can ask the NIHR to come to an opinion without a hearing, considering only the written documents and statements of the parties.

Complaints should be submitted in Dutch, but in oral contacts the use of English is allowed. Individuals who cannot express themselves in writing in either Dutch or English are often guided towards an ADV, which can help them, free of charge, in formulating a complaint in Dutch. The same is true for people with literacy issues. For people who speak other languages, the NIHR can provide an interpreter during hearings in discrimination cases, also free of charge. The NIHR does not have special arrangements for people with caring responsibilities. However, the planning of a hearing is arranged according to the availability of both parties.

m) Roma and Travellers

The NIHR does not treat Roma and Travellers as a specific priority issue. A possible explanation could be that the social situation of Roma and Travellers in the Netherlands may not be so precarious (compared to other European countries) that it demands priority treatment. In recent years quite a number of successful complaints regarding housing (lack of trailer facilities) have been brought to the NIHR (see above, Section 3.2.10).

Roma, Sinti and Travellers are not specifically mentioned in overviews of discrimination complaints by Art.1 and the ADVs. According to a search on its website, Art.1 has no specific programmes concerning Roma, Sinti or Travellers. As for the local ADVs, this is hard to say since there are hundreds of such local bureaux.

8 IMPLEMENTATION ISSUES

8.1 Dissemination of information, dialogue with NGOs and between social partners

The Ministry of the Interior and Kingdom Relations (Department of Constitutional Affairs) co-ordinates all activities in the area of EU law implementation issues, since all equal treatment legislation is (also) seen as part of the general principle of equality and non-discrimination included in Article 1 of the Constitution. The Ministry of Social Affairs and Employment is responsible for activities to enhance compliance with the equal treatment legislation, as far as this legislation applies to employment relationships. This Ministry has taken the initiative for many different activities to inform the general public about the (new) legal standards, to inform social partners and to stimulate their involvement in the implementation of the legal non-discrimination norms. In addition, the Ministry is actively engaged in promoting studies and surveys in this field. The same goes for the Ministry of Health, as far as discrimination on the ground of disability is concerned, and the Ministry of Education in relation to discrimination in this area. The latter Ministry is also responsible for general policies concerning sex/gender and LGBT issues.

Finally, the Ministry of Foreign Affairs plays a role in assembling and disseminating the information that is needed to issue periodic reports to the international monitoring bodies (CEDAW, the CERD Committee and the UN Human Rights Committee).

There are several NGOs in the field of non-discrimination and minority rights, including the aforementioned Art.1. Art.1's mission is to promote the principle of non-discrimination in its broadest sense. Art.1 offers advice to (governmental) organisations, provides public information about non-discrimination and supplies training sessions. In addition, it assists the local ADVs in their work and supports them with training and educational activities. Whereas Art. 1 does not receive any government subsidy, several NGOs with the objective of combating discrimination and/or encouraging dialogue are subsidised. An example is the COC, the main LGBT organisation in the Netherlands advocating for LGBT rights. The Ministry of Social Affairs and Employment also consults the MBO Raad³⁴⁰ in relation to equal treatment of young people with disabilities.

The Ministry of the Interior and Kingdom Relations co-ordinates a network of professionals and experts on equal treatment and discrimination issues, consisting of civil servants from the relevant ministries (such as Social Affairs and Employment, Education, Health, and Justice and Security) and national labour and employers' organisations and NGOs which are active in this field (e.g. the Dutch Council of Chronically Ill and Disabled Persons and the COC).

No official body or agency exists that is specifically appointed to address Roma and Traveller issues at national level. However, in 2009-2010 the government-initiated co-ordination, mutual support and exchange of information between local authorities in which a substantial number of Roma people live.³⁴¹

As stated above, a set of policy measures was drafted by the Dutch government in 2011 to foster the social inclusion of Roma and Sinti people, as requested by the European Commission. In addition, the Dutch government developed a qualitative monitoring instrument to measure the social inclusion of Roma and Sinti in the Netherlands. This instrument includes indicators such as education, employment, healthcare, housing and dialogue with local authorities.

³⁴⁰ The MBO Raad is the Dutch association of vocational education and training colleges. It represents all colleges for secondary vocational education and training and adult education.

³⁴¹ See Tweede Kamer, 2008-2009, 31 700 XVIII, no. 90.

Some NGOs (partly subsidised by the government) pay special attention to Roma and Travellers. The Anne Frank Foundation regularly covers the situation of Roma in its *Racism and extremism monitor* reports. In 2013, a *Monitor* on Roma inclusion was published. From this report it appears that the social integration of Roma is still very problematic.³⁴²

8.2 Compliance (Article 14 Directive 2000/43, Article 16 Directive 2000/78)

a) Mechanisms

Article 9 of the GETA, Article 13 of the ADA and Article 11 of the DDA stipulate that 'agreements' which are in contravention of the equal treatment legislation shall be null and void. This also concerns collective agreements.

b) Rules contrary to the principle of equality

Apart from some regulations in Dutch family law, which might be contrary to the principle of sexual equality in the CEDAW, to the author's knowledge there are no rules in the Netherlands which are contrary to the principle of equality.

³⁴² See Movisie (2013) *Monitor Inclusie: Nulmeting. Ervaringen en opvattingen van Roma, Sinti en professionals over de sociale inclusie van Roma en Sinti op de domeinen onderwijs, arbeid, wonen, gezondheid en veiligheid* [Inclusion monitor: Baseline assessment. Experiences and opinions of Roma, Sinti and professionals in relation to the social inclusion of Roma and Sinti in the areas of education, work, housing, health and security], Utrecht. The Minister of Social Affairs and Employment responded to this report in a letter to Parliament, see Tweede Kamer, 2013-2014, 32 824, no. 46. A follow-up research report concludes that, despite small improvements, the overall social position of these groups is still concerning, see www.movisie.com/news/roma-and-sinti-netherlands-still-badly (last accessed 22 March 2018).

9 COORDINATION AT NATIONAL LEVEL

For various (legislative) procedures and the development of policies, frequent co-operation exists between the Ministries of the Interior and Kingdom Relations, Social Affairs and Employment, Education, Culture and Science, Health, Welfare and Sport, and Justice and Security. For some specific projects other ministries may be involved. The division of tasks is organised in the following way:

1. Equal treatment in employment: (inter alia: GETA, ADA, DDA and Equal Treatment Act Men/Women): Ministry of Social Affairs and Employment.
2. Age discrimination in employment: Ministry of Social Affairs and Employment.
3. General policies against racism: Ministry of Social Affairs and Employment.
4. Disability discrimination: Ministry of Health, Welfare and Sport
5. General Equal Treatment Act, Constitutional provisions, general coordination of anti-discrimination policies: Ministry of the Interior and Kingdom Relations.
6. Criminal law provisions regarding discrimination, anti-discrimination policies for the police/public prosecution: Ministry of Justice and Security.
7. Emancipation policies for women and LGBT people: Ministry of Education, Culture and Science

The Ministry of the Interior and Kingdom Relations co-ordinates all the legislative activities because it is responsible for the implementation of the Constitution, which in Article 1 contains a general non-discrimination provision.

The anti-discrimination policies are also coordinated by the Ministry of the Interior and Kingdom Relations. The Ministry is responsible for municipal anti-discrimination services.

The Dutch government enacted a national anti-discrimination action programme in 2010, which included monitoring, prevention and prosecution measures (for instance to combat discrimination in education), guidelines for website moderators on keeping websites free of discriminatory content that violates the criminal law, and methods for identifying and prosecuting perpetrators of discrimination. This anti-discrimination action programme covered all grounds of discrimination, including racism and racial discrimination.

A comprehensive action plan against labour market discrimination, targeting discrimination on the grounds of age, disability, race/ethnic origin, sex and sexual orientation was published in 2014.³⁴³ The plan comprised dozens of measures, ranging from pre-existing government policies and already proposed legislative changes to new policy proposals. In September 2015, a report on the progress made in implementing the action plan's measures was published.³⁴⁴ The opposition was critical of the progress made and called for further action.

A revised National Action Programme against Discrimination was published in January 2016.³⁴⁵ Basically, this action programme brings together under a single umbrella various existing programmes and plans to combat discrimination and exclusion, such as the programmes mentioned above. It thus seeks: to achieve a better overall view and strategy across all grounds of discrimination, including but not limited to those covered by the EU directives; to create more synergy; and to improve cooperation between all the stakeholders involved.

With this programme the government intends to respond to the current social context characterised by increasing tensions between 'various groups', as it is formulated, which calls for a clear message from the government to combat exclusion and discrimination and

³⁴³ Tweede Kamer, 2013-2014, 29 544, no. 523.

³⁴⁴ Tweede Kamer, 2014-2015, 29 544, no. 649.

³⁴⁵ *Nationaal Actieprogramma tegen discriminatie* [National action programme against discrimination], Tweede Kamer, 2015-2016, 30 950, no. 84.

improve cohesion. Which groups are meant is not specified.³⁴⁶ The programme identifies four main starting points: prevention and awareness-raising to promote an inclusive society, including the promotion of diversity in the labour market and combating stereotypes; strengthening cooperation and infrastructure to combat discrimination; paying more attention to policies and action at the local level; and supporting policies and actions through interdisciplinary knowledge and research on the causes of discrimination and the effectiveness of interventions.

The government informs parliament regularly about its activities, for example in the annual 'discrimination letter'. The National Action Programme against Discrimination introduced in 2016 similarly provides for a yearly update of such measures. The 2017 progress report includes an overview of concrete measures taken or envisaged to further implement the National Action Programme. Some of these specifically target discrimination on grounds of race/ethnic origin and discrimination against Muslims.³⁴⁷

³⁴⁶ *Nationaal Actieprogramma tegen discriminatie* [National action programme against discrimination], Tweede Kamer, 2015-2016, 30 950, no. 84.

³⁴⁷ Overview of measures from the National Action programme against Discrimination, www.rijksoverheid.nl/documenten/publicaties/2017/03/23/overzicht-maatregelen-uit-het-nationaal-actieprogramma-tegen-discriminatie.

10 CURRENT BEST PRACTICES

- The inclusion of an overview of concrete measures taken or envisaged to implement the National Action Programme against Discrimination in the 2017 progress report for this programme.³⁴⁸
- Monitoring implementation of the CRPD by publishing the first annual report by the NIHR on compliance with the CRPD in the Netherlands since its ratification in 2016.³⁴⁹ Although the report concludes that Dutch society is by no means yet sufficiently organised as to allow disabled people to participate fully, monitoring progress is an important tool for realising improvements.³⁵⁰
- The involvement of the National Ombudsman in the housing issues faced by Roma, Sinti and Travellers. In his 2017 report the National Ombudsman concludes that many municipal authorities discriminate against these groups in their housing policies by not making available sufficient caravan or trailer sites. He makes several recommendations to develop non-discriminatory housing policies.³⁵¹

³⁴⁸ www.rijksoverheid.nl/documenten/publicaties/2017/03/23/overzicht-maatregelen-uit-het-nationaal-actieprogramma-tegen-discriminatie.

³⁴⁹ NIHR 1 December 2017, *VN-Verdrag handicap in Nederland 2017*, <https://mensenrechten.nl/publicaties/detail/38166>; in 2016 the NIHR published a study on the situation of people with disabilities which it will use as the point of departure for measuring progress. NIHR *Inzicht in inclusie. Werk, wonen en onderwijs: participatie van mensen met een beperking* [Insight into inclusion. Employment, housing and education: participation of people with disabilities], 2016 (last accessed 22 March 2018).

³⁵⁰ See press release at <https://mensenrechten.nl/berichten/vn-verdrag-handicap-nog-onvoldoende-ge-implementeerd-nederland>.

³⁵¹ 'Woonwagenbewoner zoekt standplaats. Een onderzoek naar de betrouwbaarheid van de overheid voor woonwagenbewoners' [Trailer resident seeks trailer site. An investigation into the reliability of the public authorities for trailer inhabitants], www.nationaleombudsman.nl/system/files/onderzoek/DEF%20Rapport%202017060%20Woonwagenbewoner%20zoekt%20standplaats.pdf.

11 SENSITIVE OR CONTROVERSIAL ISSUES

11.1 Potential breaches of the directives (if any)

- The accumulative conditions in the 'harassment' definition arguably fall short of the directives' 'non-regression' clause (see Section 2.4 of the report).
- Arguably, the Dutch government interprets the prohibition of an 'instruction to make a distinction' unduly narrowly, including in relation to the 'scope of liability' for this type of discrimination (see Section 2.5 of the report).
- Both Article 2(5) and Article 7(2) of the Employment Framework Directive talk about national legislation or measures taken by the Member States' governments in order to protect health and safety. Article 3(1)(a) of the DDA provides for a justification on this ground, but it is disputable whether this provision is in line with the requirements of the directive (see Section 4.6 of the report).
- The partially reversed burden of proof is not applicable in case of victimisation claims, which falls short of EU requirements (see Section 6.4 of the report).
- The requirement that sanctions need to be 'effective', 'dissuasive' and 'proportionate' seems not to be met by the Dutch legislation (see Section 6.5 of the report).
- Apart from this, at some points the equal treatment law has been worded in such a way that a rather wide interpretation of the provision is possible, leaving, for example, more room for justifications than would seem appropriate, considering the general rule of the CJEU that exceptions to the non-discrimination principle should be interpreted restrictively. However, the Dutch NIHR and the courts do seem to follow the CJEU in this regard, so in practice this is not really problematic.

11.2 Other issues of concern

- The main, more general issue of concern regards the increasing tensions in Dutch society between various minority and majority groups which seem to increase exclusion and discrimination, in particular in relation to race/ethnic origin and migrant background.
- The principal issue of concern with regard to the implementation and practical application of the anti-discrimination directives at national level is the huge gap between the prevalence of discrimination that appears in research and the comparatively low number of cases that come before the courts, either in the context of the equal treatment legislation or in the context of the criminal law provisions prohibiting discrimination.

12 LATEST DEVELOPMENTS IN 2017

- An overview of concrete measures to implement the 2016 National Action Programme against Discrimination has been included in the 2017 progress report of 2017 (see Section 9).
- The National Ombudsman published a report concluding that many municipal authorities discriminate against Roma, Sinti and Travellers in their housing policies by not making available sufficient caravan or trailer sites. According to the Ombudsman, instead of treating them the same as other people looking for housing, the principle of equality requires municipal governments to treat them differently in order to respect their cultural identity and accommodate the specific housing needs this identity entails. The Ombudsman makes several recommendations to both national and local government to develop non-discriminatory housing policies that will cater to the needs of Roma, Sinti and Travellers by making available sufficient trailer locations (see Section 3.2.10.1).
- In its response to the rulings of the CJEU in the cases of *Achbita* and *Bougnaoui* the NIHR emphasised the fact that these decisions should not be interpreted as giving employers a free hand to ban headscarves from the workplace. Though such statements have no legally binding status, the interpretations of the NIHR regarding non-discrimination law are authoritative (see Section 2.6(g)).

12.1 Legislative amendments

As of 1 January 2017 the DDA puts a more general duty on all those bound by the DDA to improve accessibility for people with disabilities in addition to the duty to provide reasonable accommodation in individual cases (Article 2a (1)).³⁵² As the DDA covers not just employment, but also access to goods and services including housing and education, the scope of this provision is wide. This proactive, general duty entails the duty to ensure accessibility, at least gradually ('geleidelijk'), for people with disabilities, unless this creates a disproportionate burden. To further implement this provision a Ministerial Decree was adopted and entered into force on 21 June 2017 (see Section 2.6(g)).³⁵³

A 'quota charge' was introduced for public sector employers for failure to meet the targets set for the creation of extra jobs for people with disabilities. The charges will be levied as of 1 January 2018 (see Section 5(a)).

12.2 Case law

A few interesting cases are briefly summarised below.

Name of the Court: Netherlands Institute for Human Rights

Date of decision: 4 April 2017

Reference number: 2017-41

Address of the webpage: www.mensenrechten.nl/nl/oordeel/2017-41

Brief summary: A pupil with Down syndrome attended a regular primary school for eight years, receiving specific and individual help and guidance to facilitate this. At some point his development deteriorated and he started to exhibit inappropriate behaviour such as yelling, anger and running away. The way in which the pupil was supported was adjusted, but this did not improve the situation. After some time the school decided to refer the pupil to the special education system as the school considered it was no longer feasible to further accommodate the pupil's specific needs. The NIHR found that the school did not violate its

³⁵² This amendment of the DDA was already adopted in 2016 as part of the acts on ratification and implementation of the Convention on the Rights of Persons with Disabilities, but its entry into force was postponed to 1 January 2017. See <https://zoek.officielebekendmakingen.nl/stb-2016-215.html>.

³⁵³ Decree on general accessibility for persons with a disability or chronic illness (*Besluit algemene toegankelijkheid voor personen met een handicap of chronische ziekte*) of 7 June 2017, *Staatsblad* 2017, 256 of 20 June 2017. <http://wetten.overheid.nl/BWBR0039653/2017-06-21>.

duty of reasonable accommodation as laid down in Article 2 in conjunction with Article 3 of the DDA as its efforts to accommodate the pupil's needs had been sufficient. Further accommodation would pose a disproportionate burden on the school.

Name of the Court: Netherlands Institute for Human Rights

Date of decision: 7 September 2017

Reference number: 2017-104

Address of the webpage: <https://mensenrechten.nl/publicaties/oordelen/2017-104/detail>

Brief summary: A blind woman wished to shop at a branch of Kruidvat, a big chain of drugstores. To be able to do so herself she asked for staff to take her by the arm and guide her through the shop. This was refused. The staff instead offered to collect the things on her shopping list and bring them to her. As this arrangement would not enable her to browse and select from the range of products available, she did not consider this a satisfactory form of reasonable accommodation. The NIHR concluded that Kruidvat violated its duty of reasonable accommodation under the DDA. It held that the accommodation offered by Kruidvat was not sufficient, in particular because Kruidvat had not consulted any further with the person concerned and had not really investigated whether providing the accommodation in the way the blind woman preferred herself would indeed impose a disproportionate burden. In this respect the NIHR emphasised that the purpose of the obligation to provide reasonable accommodation is to realise the autonomy of disabled persons to the greatest extent possible. This opinion shows the NIHR applies the requirement of 'reasonable accommodation' in a very strict way and demands a high level of accommodation that ties in closely with the specific wishes of the person in need of the accommodation themselves.

Name of the Court: Netherlands Institute for Human Rights

Date of decision: 20 November 2017

Reference number: 2017-135

Address of the webpage: www.mensenrechten.nl/nl/oordeel/2017-135

Brief summary: The complainant is a Muslim woman working with the police. She wears a headscarf for religious reasons. The dress code of the police is based on so called 'lifestyle neutrality'. The policy is informed by the goal of achieving a neutral and uniform appearance to enhance the authority and safety of police officers. As a consequence, all sorts of expressions of personal identity, including not just headscarves and other symbols of personal conviction but also conspicuous tattoos, haircuts and piercings, are prohibited.

The complainant is employed as an 'intake & service assistant' and has two main tasks. She has to answer the service number of the police and she records statements by citizens who want to file a police report through a 3D video connection. In the latter situation she has visual contact with citizens. Usually police personnel recording statements do so in uniform, but the complainant is not allowed to wear her headscarf with the uniform. Instead, she has been allowed to wear her headscarf if she does record the statements in civilian clothes. The complainant is not satisfied with this as this sets her apart and the prohibition on wearing a headscarf with a uniform will limit her career opportunities within the police.

The NIHR finds that not allowing the woman to wear her headscarf with a uniform constitutes indirect discrimination on grounds of religion. Although the NIHR accepts the legitimacy of the goals put forward for the dress policy, in the specific circumstances of the case it does not consider application of this policy necessary and thus not objectively justified. As for the safety argument, it is clear that this is not at risk as the recording is done through a video link. with regard to the neutrality argument, the NIHR considers that, in view of the administrative character of the work performed, this argument is of limited relevance. The woman just records the statements, but does not decide on any further steps to be taken by the police. For this reason, the NIHR considers the limitation on the

freedom of religion to go beyond what is strictly necessary, which is the standard of review required by equality law.

This is an important opinion from NIHR regarding a very sensitive issue. The NIHR accepts the argument of 'state neutrality' to prohibit the wearing of religious dress and other symbols in public functions, but seeks to limit such restrictions to what can be regarded as strictly necessary.

Cases regarding Roma, Sinti and Travellers

In several cases the NIHR has reiterated its opinion that a policy implemented by a local authority that would eventually put an end to 'trailer parks' amounts to discrimination on the ground of race (ethnic identity).³⁵⁴ According to the NIHR municipalities should include attention to the specific needs of this category of residents in their housing policies.³⁵⁵

³⁵⁴ NIHR 2016-19, 2016-64, 2016-68, 2016-72, 2016-139; 2017-55; 2017-103; 2017-136; 2017-137.

³⁵⁴ NIHR 2016-19.

³⁵⁵ NIHR 2016-19.

ANNEX 1: TABLE OF KEY NATIONAL ANTI-DISCRIMINATION LEGISLATION

The **main transposition and anti-discrimination legislation** at both federal and federated/provincial level.

Country: the Netherlands
Date: 1 January 2018

Title of legislation (including amending legislation)	Title of the Law: General Equal Treatment Act Abbreviation: GETA Date of adoption: 2 March 1994 Entry into force: 1 September 1994 Latest amendments: 15 June 2015 Web link: http://wetten.overheid.nl/BWBR0006502 Grounds covered: Race, religion & belief, political opinion, hetero- or homosexual orientation, sex, nationality and civil (or marital) status
	Civil
	Material scope: Employment relationships (both civil and public), occupational training and education, goods and services (including general education) + liberal professions
	Principal content: Prohibition of direct and indirect discrimination
Title of legislation (including amending legislation)	Title of the Law: Disability Discrimination Act Abbreviation: DDA Date of adoption: 3 April 2003 Entry into force: 1 December 2003 Latest amendments: 14 June 2016 Web link: http://wetten.overheid.nl/BWBR0014915 Grounds covered: Disability and chronic disease
	Civil
	Material scope: Employment relationships (both civil and public), occupational training and education + liberal professions + goods and services (including general education)
	Principal content: Prohibition of direct and indirect discrimination
Title of legislation (including amending legislation)	Title of the Law: Age Discrimination Act Abbreviation: ADA Date of adoption: 17 December 2003 Latest amendments: 10 July 2014 Entry into force: 1 May 2004 Web link: http://wetten.overheid.nl/BWBR0016185 Grounds covered: Age
	Civil
	Material scope: Employment relationships (both civil and public), occupational training and education + liberal professions
	Principal content: Prohibition of direct and indirect discrimination

ANNEX 2: TABLE OF INTERNATIONAL INSTRUMENTS

Country: the Netherlands

Date: 1 January 2018

Instrument	Date of signature (if not signed please indicate) Dd/mm/yyyy	Date of ratification (if not ratified please indicate) Dd/mm/yyyy	Derogations/ reservations relevant to equality and non-discrimination	Right of individual petition accepted?	Can this instrument be directly relied upon in domestic courts by individuals?
European Convention on Human Rights (ECHR)	Date of signature: 4.11.1950	Date of ratification: 31.8.1954	No	Yes	Yes
Protocol 12, ECHR	Date of signature: 4.11.2000	Date of ratification: 28.7.2004	No	Yes	Yes
Revised European Social Charter	Date of signature: 23.1.2004	Date of ratification: 3.5.2006	No	Yes	Yes
International Covenant on Civil and Political Rights	Date of signature: 25.6.1969	Date of ratification: 11.12.1978	No	Yes	Yes
Framework Convention for the Protection of National Minorities	Date of signature: 1.2.1995	Date of ratification: 16.2.2005	No	NA	Yes
International Covenant on Economic, Social and Cultural Rights	Date of signature: 25.6.1969	Date of ratification: 11.12.1978	No	No	Yes
Convention on the Elimination of All Forms of Racial Discrimination	Date of signature: 24.10.1966	Date of ratification: 10.12.1971	No	Yes	Yes
Convention on the Elimination of Discrimination Against Women	Date of signature: 17.7.1980	Date of ratification: 23.7.1991	No	Yes	Yes

Instrument	Date of signature (if not signed please indicate) Dd/mm/yyyy	Date of ratification (if not ratified please indicate) Dd/mm/yyyy	Derogations/ reservations relevant to equality and non-discrimination	Right of individual petition accepted?	Can this instrument be directly relied upon in domestic courts by individuals?
ILO Convention No. 111 on Discrimination	Date of signature: unknown	Date of ratification: 15.3.1973	No	NA	Yes
Convention on the Rights of the Child	Date of signature: 26.1.1990	Date of ratification: 6.2.1995	No	No	Yes
Convention on the Rights of Persons with Disabilities	Date of signature: 30.3.2007	Date of ratification: 14.6.2016	No	No	Yes

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