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Country report

Gender equality

How are EU rules transposed into
national law?

Netherlands

Marlies Vegter

Reporting period 1 January 2019 – 31 December 2019

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CONTENTS

1	Introduction	5
1.1	Basic structure of the national legal system	5
1.2	List of main legislation transposing and implementing the directives	5
1.3	Sources of law	5
2	General legal framework	7
2.1	Constitution	7
2.2	Equal treatment legislation	7
3	Implementation of central concepts	8
3.1	General (legal) context.....	8
3.2	Sex/gender/transgender	9
3.3	Direct sex discrimination	9
3.4	Indirect sex discrimination	10
3.5	Multiple discrimination and intersectional discrimination	12
3.6	Positive action.....	14
3.7	Harassment and sexual harassment.....	16
3.8	Instruction to discriminate	19
3.9	Other forms of discrimination	19
3.10	Evaluation of implementation	19
3.11	Remaining issues.....	20
4	Equal pay and equal treatment at work (Article 157 of the Treaty on the Functioning of the European Union (TFEU) and Recast Directive 2006/54)	21
4.1	General (legal) context.....	21
4.2	Equal pay	23
4.3	Access to work, working conditions and dismissal	28
4.4	Evaluation of implementation	32
4.5	Remaining issues.....	33
5	Pregnancy, maternity, and leave related to work-life balance for workers (Directive 92/85, relevant provisions of Directives 2006/54 and 2010/18)	34
5.1	General (legal) context.....	34
5.2	Pregnancy and maternity protection	36
5.3	Maternity leave	40
5.4	Adoption leave	42
5.5	Parental leave	42
5.6	Paternity leave	46
5.7	Time off for <i>force majeure</i>	47
5.8	Care leave	47
5.9	Leave in relation to surrogacy	48
5.10	Flexible working time arrangements.....	48
5.11	Evaluation of implementation	51
5.12	Remaining issues.....	51
6	Occupational social security schemes (Chapter 2 of Directive 2006/54) ..	52
6.1	General (legal) context.....	52
6.2	Direct and indirect discrimination	53
6.3	Personal scope	53
6.4	Material scope.....	54
6.5	Exclusions	54
6.6	Laws and case law falling under the examples of sex discrimination mentioned in Article 9 of Directive 2006/54	54
6.7	Actuarial factors	55
6.8	Difficulties	55
6.9	Evaluation of implementation	56
6.10	Remaining issues.....	56
7	Statutory schemes of social security (Directive 79/7)	57

7.1	General (legal) context.....	57
7.2	Implementation of the principle of equal treatment for men and women in matters of social security.....	59
7.3	Personal scope	59
7.4	Material scope.....	60
7.5	Exclusions	60
7.6	Actuarial factors	60
7.7	Difficulties	60
7.8	Evaluation of implementation	60
7.9	Remaining issues.....	60
8	Self-employed workers (Directive 2010/41/EU and some relevant provisions of the Recast Directive).....	61
8.1	General (legal) context.....	61
8.2	Personal scope	62
8.3	Material scope.....	63
8.4	Positive action.....	64
8.5	Social protection	64
8.6	Maternity benefits.....	64
8.7	Occupational social security	65
8.8	Prohibition of discrimination	65
8.9	Evaluation of implementation	65
8.10	Remaining issues.....	66
9	Goods and services (Directive 2004/113)	67
9.1	General (legal) context.....	67
9.2	Prohibition of direct and indirect discrimination	68
9.3	Material scope.....	68
9.4	Exceptions	68
9.5	Justification of differences in treatment	68
9.6	Actuarial factors	69
9.7	Interpretation of exception contained in Article 5(2) of Directive 2004/113.....	69
9.8	Positive action measures (Article 6 of Directive 2004/113).....	69
9.9	Specific problems related to pregnancy, maternity or parenthood	69
9.10	Evaluation of implementation	70
9.11	Remaining issues.....	70
10	Violence against women and domestic violence in relation to the Istanbul Convention	71
10.1	General (legal) context.....	71
10.2	Ratification of the Istanbul Convention	73
11	Compliance and enforcement aspects (horizontal provisions of all directives)	74
11.1	General (legal) context.....	74
11.2	Victimisation	76
11.3	Access to courts	76
11.4	Horizontal effect of the applicable law	77
11.5	Burden of proof	77
11.6	Remedies and sanctions	77
11.7	Equality body	79
11.8	Social partners	80
11.9	Other relevant bodies.....	81
11.10	Evaluation of implementation	81
11.11	Remaining issues.....	82
12	Overall assessment	83
	Bibliography	85

1 Introduction

1.1 Basic structure of the national legal system

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

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

1.2 List of main legislation transposing and implementing the directives

- Act on the Institute for Human Rights.¹ This Act has partly been enacted to implement Resolution A/RES/48/134 of the General Assembly of the United Nations of 20 December 1993 on national institutes for the promotion and protection of human rights; Recommendation R (97) 14 of the Committee of Ministers of the Council of Europe of 30 September 1997 on the establishment of independent national human rights bodies; Directive 2000/43/EC on equal treatment on the basis of race or ethnic origin; Directive 2004/113/EC on equal treatment of men and women in the access to and supply of goods and services; and Directive 2006/54/EG on equal treatment of men and women in matters of employment and occupation.
- General Equal Treatment Act (GETA).² The GETA aims to implement Article 1 of the Dutch Constitution (the principle of equal treatment). Furthermore, parts of the GETA aim to implement EU law. Article 1a on harassment, for example, transposes Directive 2004/113; Article 6a on membership of employers' organisations and trade unions transposes (in part) Directive 2000/78; Article 7a on social protection aims to implement the Directive on Race/ethnic origin (2000/43); Article 8a on victimisation transposes Directive 2000/78; and Article 10 on the burden of proof also aims to implement Directive 2000/78.
- Act on Equal Treatment of Men and Women (ETA).³ This Act was adopted in order to transpose Directive 76/207 on equal treatment of men and women. In 2006 the ETA was modified in order to transpose Directive 2002/73/EC.
- Civil Code, Article 7:646 (prohibiting sex discrimination in employment relationships) and Article 7:670(2) (prohibiting the termination of the employment relationship during pregnancy, maternity leave and six weeks after resuming work). Article 7:646 was adopted in order to transpose Directive 76/207 and was later revised in order to transpose Directive 2002/73.

1.3 Sources of law

The main sources of gender equality law in the Netherlands are:

- The Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW). CEDAW does not have direct effect as a whole, but courts have ruled that

¹ Act on the Institute for Human Rights (*Wet College Rechten voor de Mens*), 2012 Stb. 2011, 573.

² General Equal Treatment Act (*Algemene Wet Gelijke Behandeling*), 1994 Stb. 1994, 230.

³ Act on Equal Treatment of Men and Women (*Wet Gelijke Behandeling van mannen en vrouwen*), 1980 Stb. 1980, 86.

some articles – especially Article 11(2)(b) on maternity leave and Article 7 (right to vote and to be elected) – do have direct effect.

- EU directives. EU directives must be transposed into Dutch law.
- Article 1 of the Dutch Constitution. This article stipulates that the Government must treat all citizens equally and forbids discrimination on all relevant grounds.
- General Equal Treatment Act.
- Act on Equal Treatment of Men and Women.
- Civil Code, Article 7:646 (prohibiting sex discrimination in employment relationships) and Article 7:670(2) (prohibiting the termination of employment relationships during pregnancy, maternity leave and six weeks after resuming work).
- Case law by the civil and administrative courts.
- Opinions by the Netherlands Institute of Human Rights (NIHR). This is the main Dutch equality body. These opinions are not legally binding.

2 General legal framework

2.1 Constitution

2.1.1 Constitutional ban on sex discrimination

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

2.1.2 Other constitutional protection of equality between men and women

The Constitution contains no other articles pertaining to equality between men and women.

2.2 Equal treatment legislation

The Netherlands has specific equal treatment legislation in regard to sex discrimination. Article 5 of the GETA⁴ forbids discrimination in the field of employment, Article 6 GETA in the field of the liberal professions, Article 6a GETA in the area of associations of employers, employees and in professional organisations, Article 7 in the field of goods and services and Article 7a in the area of social protection, including social security and social advantages. The Act on Equal Treatment of Men and Women (ETA)⁵ prohibits sex discrimination in the field of employment and pensions, both in the private and in the public sector. Article 7:646 of the Dutch Civil Code specifically prohibits sex discrimination in the private sector.

The GETA also prohibits discrimination on other grounds: race/ethnic origin, religion/beliefs, political affiliation, nationality and marital status. The Equal Treatment Act on the Ground of Age⁶ prohibits age discrimination and the Equal Treatment Act on the Grounds of Disability or Chronic Illness⁷ forbids discrimination on these grounds. The Dutch Civil Code contains specific articles that relate to discrimination on the grounds of full-time or part-time work (Article 7:648) and the temporary character of an employment agreement (Article 7:649).

⁴ General Equal Treatment Act (*Algemene Wet Gelijke Behandeling*), 1994 Stb. 1994, 230.

⁵ Act on Equal Treatment of Men and Women (*Wet Gelijke Behandeling van mannen en vrouwen*), 1980 Stb. 1980, 86.

⁶ Equal Treatment Act on the Ground of Age (*Wet Gelijke Behandeling op grond van leeftijd*), 2003 Stb. 2004, 30.

⁷ Equal Treatment Act on the Grounds of Disability or Chronic Illness (*Wet Gelijke Behandeling op grond van handicap of chronische ziekte*), 2003 Stb. 2003, 206.

3 Implementation of central concepts

3.1 General (legal) context

3.1.1 Surveys on the definition, implementation and limits of central concepts of gender equality law

In the Netherlands, surveys on the central concepts of gender equality law are infrequently published. Reports usually relate to the practical implementation of gender equality laws and the obstacles for such implementation. There are very few theoretical works.

In 2017, Janneke Gerards, a professor of Fundamental Rights at Utrecht University, gave her inaugural speech on fundamental rights in the present complex society. This speech can be seen as a theoretical publication, but did not specifically relate to gender.⁸

Peter Vas Nunes, a former attorney-at-law (now retired), published an extensive, 870-page handbook on almost all aspects of equality law in the Netherlands. The central concepts of gender equality are mentioned in this book, but the book is more of a practical than of a theoretical nature.⁹

In addition, attention was paid to the concept of transgender, in particular because of the law proposal accepted in 2019 by both Chambers of Parliament.¹⁰ This law proposal includes a prohibition on discrimination on the grounds of sex characteristics, gender identity and gender expression in the General Equal Treatment Act (GETA). In the explanatory memorandum, attention is paid to the question of how to define sex characteristics, gender identity and gender expression. The memorandum explains that the aim of the law is not to restrict the interpretation of the concept of gender to a binary division into women and men, but instead to see gender as a 'continuum'. The way a person expresses their gender does not have to be congruent with their gender identity. The explanatory memorandum also mentions that both the term 'gender identity' and the term 'gender expression' are inserted into the law, so as to make clear that the law offers protection against discrimination to all people who do not conform to stereotypes of the way men or women look, speak or act.

In line with the above the Minister of Home Affairs announced by letter of 8 July 2019 that she will submit a law proposal in order to change the expression 'hetero- or homosexual orientation' in the equality legislation into 'sexual orientation'.¹¹ The Minister based her decision inter alia on three expert reports, by Marjolein van den Brink and Jet Tigchelaar from Utrecht University, Pieter Cannoot from Gent University (Belgium) and the NIHR.¹² In these reports, in particular those from Van den Brink & Tigchelaar and Cannoot, it was observed that people no longer recognize themselves in closely defined categories as being heterosexual or homosexual, but that gender and sexuality have become more and more fluid concepts. Gender is more often seen as a 'continuum', which may differ from the one

⁸ Utrecht University, 'Oratie Janneke Gerards: Grondrechten onder spanning', 30 March 2017, at <https://www.uu.nl/nieuws/oratie-janneke-gerards-grondrechten-onder-spanning>.

⁹ Vas Nunes, P.C. (2019), *Gelijke behandeling in arbeid* (Equal Treatment in Employment), Den Haag, Boom Uitgevers.

¹⁰ https://www.eerstekamer.nl/wetsvoorstel/34650_initiatiefvoorstel_bergkamp.

¹¹ Minister of Home Affairs (2019), *Letter to Parliament*, 8 July 2019. Available at <https://zoek.officielebekendmakingen.nl/kst-34650-13.html#ID-893729-d36e93>.

¹² Van den Brink, M. and Tigchelaar, J. (2019), *Van bescherming van 'hetero- en homoseksuele gerichtheid' naar 'seksuele gerichtheid' in de AWGB en de Grondwet* (From the protection of 'hetero- and homosexual orientation' to 'sexual orientation' in the GETA and the Constitution); Cannoot, P. (2019), *Expert paper over de noodzaak tot vervanging van de term 'hetero- of homoseksuele gerichtheid' door 'seksuele gerichtheid' in de AWGB* (Expert paper on the need to replace the term 'hetero- or homosexual orientation' by 'sexual orientation' in the GETA); NIHR (2019), *Discussiepaper over wijziging van de non-discriminatiegrond seksuele gerichtheid in de AWGB* (Discussion paper on the change of the non-discrimination ground sexual orientation in the GETA). Available at: <https://www.tweedekamer.nl/kamerstukken/detail?id=2019D30333&did=2019D30333>.

person to the other and which can sometimes change over time, rather than as an unchangeable given.

3.1.2 Other issues

There are no other issues worth mentioning at this stage.

3.1.3 General overview of national acts

- General Equal Treatment Act;
- Act on Equal Treatment of Men and Women;
- Act on Equal Treatment on the Ground of Age;
- Act on Equal Treatment on the Grounds of Disability or Chronic Illness;
- Dutch Civil Code, Article 7:646.

3.1.4 Political and societal debate and pending legislative proposals

In the law proposal on the inclusion of the prohibition of discrimination on the grounds of sex characteristics, gender identity and gender expression – as part of the general concept of gender – in the General Equal Treatment Act (GETA), attention was paid to the meaning of sex characteristics, gender identity and gender expression. However, there was no (real) debate, as everyone agreed with the approach taken by the MPs who submitted the law proposal, i.e. that a binary approach to gender should not be chosen, but rather that gender should be treated as a 'continuum'.

This approach will also be followed in a legislative proposal that was announced by the Minister of Home Affairs on 8 July 2019. As explained above under 3.1.1, the legislative proposal is based on the idea that gender is a continuum.

3.2 Sex/gender/transgender

3.2.1 Definition of 'gender' and 'sex'

The terms gender and/or sex are not defined in the Dutch national legislation nor in case law.

3.2.2 Protection of transgender, intersex and non-binary persons

The General Equal Treatment Law (GETA) stipulates in article 1(2) that discriminating on the ground of sex also includes discriminating on the grounds of sex characteristics, gender identity and gender expression. This article was inserted into the GETA as of 1 November 2019 and explicitly aims to protect transgender, intersex and non-binary persons.

3.2.3 Specific requirements

Transgender persons are not required to undergo gender reassignment surgery before they are protected by non-discrimination law nor are they required to change their legal gender. The GETA applies to the entire spectrum of variations that are covered by the concept of sex, without specific requirements.

3.3 Direct sex discrimination

3.3.1 Explicit prohibition

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

Direct sex discrimination, or as is stated in Dutch law, 'direct distinction', is defined as treating a person differently from another person in a comparable situation on the ground of sex. In the author's view this definition complies with the EU definition. The only difference is that Dutch law uses the term 'distinction' instead of 'discrimination', but this has no practical implications. See, for example, the judgments by the Supreme Court of 3 January 1997,¹³ in a case dealing with indirect pay discrimination, and by the Supreme Court of 18 December 2015 on indirect discrimination in a pension scheme.¹⁴

3.3.2 Prohibition of pregnancy and maternity discrimination

Discrimination on the grounds of pregnancy and maternity is explicitly prohibited as a form of direct sex discrimination in Article 1(2) GETA, Article 1(2) ETA and Article 7:646(5)(b) of the Dutch Civil Code.

3.3.3 Specific difficulties

There are no specific difficulties.

In the past the NIHR proposed to insert into the law an exception to the closed system of justification, because the application of this system sometimes produced too harsh results. However, in its most recent evaluation of December 2017 the NIHR concluded that in the previous five years it had only been necessary to deviate from the closed system two or three times. In those cases, the NIHR was able to resolve the matter on the basis of a flexible interpretation of the existing legislation. According to the NIHR an exception to the closed system is therefore no longer necessary.¹⁵

3.4 Indirect sex discrimination

3.4.1 Explicit prohibition

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

Indirect sex discrimination, or as stated in Dutch law, 'indirect distinction', is deemed to exist where 'an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with other persons.'¹⁶ In the author's view this definition complies with the EU definition. The only difference is that Dutch law uses the term 'distinction' instead of 'discrimination'. However, from the case law it is clear that a 'distinction' is interpreted in the same manner as 'discrimination'.

3.4.2 Statistical evidence

Statistical evidence is sometimes used to establish a presumption of indirect sex discrimination. An example is a case before the Amsterdam Court of Appeal,¹⁷ in which the court ruled that the fact that 28 % of the applicants for a position at Amsterdam University were female, whereas the four persons placed on the short list were all male, was one of the relevant aspects in establishing a presumption of sex discrimination. Another relevant aspect was the fact that women were (and are) under-represented in academic positions in the Netherlands and especially so in the Department of Economics of the Faculty of Economics and Business, where there has even been a decline in the number of female academics.

¹³ Supreme Court, 3 January 1997, JAR 1997/24.

¹⁴ Supreme Court, 18 December 2015, ECLI:NL:HR:2015:3628.

¹⁵ College voor de Rechten van de Mens (2017), *Vijf jaar College voor de Rechten van de Mens* (Five years Netherlands Institute for Human Rights), See pp. 57-58 about the closed system.

¹⁶ Civil Code, Article 7:646(5)(b), Netherlands, GETA, Article 1(1)(c), Netherlands, ETA, Article 1(1)(c).

¹⁷ Amsterdam Court of Appeal, JAR 2014/294, 7 October 2014, ECLI:NL:GHAMS:2014:4132.

Another example is the judgment by the Court of Appeal of The Hague¹⁸ on the question of whether reducing the survivor's pension in the case of an age difference of more than 10 years between spouses is discriminatory, as women are more often the younger partner than men. The NIHR had applied the so-called correlation test and the chi-square test, both statistical tests, and had ruled that these tests made it clear that more women than men were put at a disadvantage by the reduction. However, the defendant pension funds hired a professor of statistics, who stated that the NIHR's line of reasoning was not consistent. The court subsequently ruled that the applicants had not sufficiently disputed the adequacy of the professor's comments. This professor had been previously engaged by defendant parties in proceedings on discrimination in order to refute statistical evidence.¹⁹

The question of possible discrimination in cases involving reduction of the survivor's pension for a widow more than 10 years younger than her deceased spouse was brought before the Supreme Court in another case.²⁰ In that case, the Supreme Court ruled that The Hague Court of Appeal had not paid enough attention to the financial effects of abolition of the pension reduction and the consequences thereof for the resources of the fund and the benefits of other participants. The Supreme Court required a closer scrutiny of the proportionality of the reduction than the Court of Appeal had applied. However, the matter of statistics was not explicitly mentioned in this case.

3.4.3 Application of the objective justification test

The objective justification test is applied correctly in most cases.²¹ However, there are only a few cases on sex discrimination. Most discrimination cases before the Dutch courts concern age discrimination. In these cases, the courts always first investigate whether the distinction made has a legitimate aim and subsequently whether the means chosen to attain that aim are suitable and necessary. An example hereof is the judgment by the Amsterdam Court of Appeal on the termination of an employment agreement with airline staff when they reached the age of 63.²² The court ruled that the termination constituted a form of age discrimination which could not be justified by the employer's wish to safeguard jobs for younger employees and to avoid the costs that would be related to the dismissal of younger employees.

3.4.4 Specific difficulties

There are few difficulties. There may be debate on how to interpret statistical evidence, as in the case before The Hague Court of Appeal (see Section 3.4.2 above). In addition, there is sometimes discussion about the extent to which general data may be used in discrimination cases. However, the general line in this respect appears to be that these data can be used, but only in combination with more specific evidence. See the judgment by the Amsterdam Court of Appeal mentioned in Section 3.4.2 above.²³

Perhaps it is interesting to mention here that the dividing line between direct and indirect discrimination is not always sharp. An example is the decision by the District Court The Hague of 30 January 2020.²⁴ This case concerned an employee with an employment contract for seven months fulltime, with a trial period of two months. Before the start of the employment contract the employee informed her employer that she was pregnant and that after her maternity leave she wanted to work 23,5 hours per week. The last day of the trial period the employment was terminated by the employer with the argument that

¹⁸ The Hague Court of Appeal, 9 June 2015, ECLI:NL:GHDHA:2015:1284.

¹⁹ The Hague Court of Appeal, *JAR* 2011/71, 21 December 2010.

²⁰ Supreme Court, 18 December 2015, ECLI:NL:HR:2015:3628.

²¹ See, for example, Netherlands, Supreme Court, *JAR* 1992/14, 24 April 1992: no justification for unequal pay.

²² Amsterdam Court of Appeal, *JAR* 2015/184, 2 June 2015, ECLI:NL:GHAMS:2015:2133.

²³ Amsterdam Court of Appeal, *JAR* 2014/294, October 2014, ECLI:NL:GHAMS:2014:4132.

²⁴ District Court The Hague, 30 January 2020, *JAR* 2020/37.

the flexibility in his enterprise could not be realized with a working week of 23.5 hours. The NIHR ruled that this was not a case of direct discrimination on the ground of pregnancy, since Dutch equal treatment law does not provide for a legal right to part-time work.²⁵

The Court took a different view and ruled that this was indirect discrimination for which there was no objective justification. The Court presumed, on the basis of the facts established by the woman, that there was discrimination. The employer was not able to refute this presumption, since he only brought forward that not a lack of flexibility of the woman was the reason for the dismissal, but a romantic involvement of the employee with the brother of the employer. This was an argument he had not expressed towards the employee. The Court therefore ruled that the employer acted unlawfully (discriminatory) by terminating the employment on the ground of an argument connected with motherhood.

3.5 Multiple discrimination and intersectional discrimination²⁶

3.5.1 Definition and explicit prohibition

Multiple discrimination and/or intersectional discrimination is not explicitly addressed in Dutch law.

There are no proposals pending in this respect.

It is possible for applicants to simultaneously invoke several grounds of discrimination in the same claim. All the grounds invoked will then be investigated separately.

The legislative architecture in the Netherlands does not favour the judicial recognition of multiple/intersectional discrimination, as each ground for discrimination is judged separately. However, the regimes used for each discrimination ground are nearly always the same, so in this respect the Dutch system does not impede the recognition of multiple/intersectional discrimination either.

Multiple discrimination appears not to be a problem, as in such cases it can be ruled that someone has been discriminated against on several grounds. Intersectional discrimination might be more difficult. The Constitution stipulates that discrimination on whatever ground is forbidden, i.e. the list laid down in law is open-ended and non-exhaustive. That leaves room for new forms of discrimination. However, in practice discrimination is judged more strictly if a ground is at stake that is explicitly mentioned in the equality legislation. If this is not the case, the discrimination can still be deemed to be unlawful, but there will be more room for justification. This is definitely the case if forms of discrimination which are not regulated are at stake, e.g. paying a higher salary to permanent personnel than to on-call workers or paying more to pilots who fly larger aeroplanes than to those who fly smaller aeroplanes. In cases of intersectional discrimination, however, the grounds mentioned in the equality legislation will probably also be at stake (they combine into a new form), which makes it likely that the same regime applied to the listed grounds will also be applied in such cases.

²⁵ NIHR, 26 July 2019, Opinion 2019-75: <https://www.mensenrechten.nl/nl/oordeel/2019-75>. See also JAR 2019/207 with a comment by M.S.A. Vegter.

²⁶ See for more information Fredman, S. (2016), *Intersectional discrimination in EU gender equality and non-discrimination law*, European network of legal experts in gender equality and non-discrimination, available at <https://www.equalitylaw.eu/downloads/3850-intersectional-discrimination-in-eu-gender-equality-and-non-discrimination-law-pdf-731-kb>.

3.5.2 Case law and judicial recognition

There is hardly any case law from the courts that addresses multiple discrimination and/or intersectional discrimination (where gender is one of the grounds at stake). There is an old judgment from 2000, in which the employment agreement of a woman had been terminated following a conflict with her employer.²⁷ The employer had indicated that he did not expect the employee to return to her full working hours after maternity leave, as this would be too difficult for her, as she was a Moroccan woman and was married to a traditional Moroccan man. The court ruled that this constituted discrimination on the grounds of sex and race and that the employer was seriously to blame in this respect. Therefore, a higher severance payment than usual was awarded.

There has also been a case concerning a 10-year old girl with a Turkish background who was hit by a motorcycle and suffered severe injury, both brain damage and partial paralysis. Because of this she would never be able to work and earn an income. In the legal procedure that followed, The Hague court took as a starting point for the calculation of the loss of income that the girl, given her cultural background and personal circumstances, would have found a partner and would have had children around the age of 26. Therefore she would have done paid work until the age of 26, would subsequently have stopped for 10 years and might have resumed part-time work after that.²⁸ The NIHR ruled that the insurer discriminated against the girl on the ground of sex by using statistical data that only referred to the labour market participation of women and that the data were also inadequate in other respects. The NIHR did not refer to ethnic background as a ground for discrimination, probably because the parents of the girl and their lawyer had based their case on sex discrimination and not on another form of discrimination or on multiple or intersectional discrimination.²⁹

The NIHR has dealt more often with multiple and/or intersectional discrimination. In situations of multiple discrimination, the NIHR investigates all the grounds mentioned. An example is opinion 2014-160, in which the NIHR ruled that a hospital had discriminated against a woman of Iraqi origin on the grounds of both sex and race.³⁰ An employee of the hospital had rejected the woman's employment application with reference to her origins and family responsibilities. In opinion 2018-32 the NIHR ruled that no discrimination on the basis of sex and/or disability/chronic illness was at stake in the case of the non-extension of the employment contract of a pregnant woman who stated that she suffered from post-traumatic stress disorder.³¹

Intersectional discrimination is a more difficult subject. Perhaps the following example is not directly applicable, because it concerns a conflict of fundamental rights rather than intersectional discrimination, but worth noting is an opinion by the NIHR in which it balanced the rights of a female Muslim employee of a youth care centre who did not shake hands with men because of her religion, and a father who visited the youth care centre with his son and felt discriminated against by the employee in question. The NIHR ruled that the youth care centre had correctly protected the employee rather than the father, as otherwise the centre would have discriminated on the basis of religion. In addition, the employee had explained to the father why she did not shake hands and had greeted him respectfully in another way.³²

On the basis of these few opinions, it can be said that, where several grounds of discrimination are invoked, these grounds are mostly judged separately. So far, no

²⁷ District Court Schiedam, *JAR* 2000/180, 5 July 2000.

²⁸ The Hague Court, 23 July 2013, ECLI:NL:RBDHA:2013:9276.

²⁹ College voor de Rechten van de Mens, Opinion 2014-97, <https://mensenrechten.nl/nl/oordeel/2014-97>.

³⁰ College voor de Rechten van de Mens, Opinion 2014-160, www.mensenrechten.nl/nl/oordeel/2014-160.

³¹ College voor de Rechten van de Mens, Opinion 2018-32, www.mensenrechten.nl.

³² College voor de Rechten van de Mens, Opinion 2015-76, www.mensenrechten.nl.

comparison-based tests have been used, but if that would be necessary, probably a separate test would be applied for each separate discrimination ground.

3.6 Positive action

3.6.1 Definition and explicit prohibition

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

In the author's view this definition does not fully comply with the EU definition found in Article 157(4) TFEU. The definition in Dutch law does not mention that the objective is to ensure full equality in practice between men and women in working life. Besides, the Dutch definition explicitly refers to female workers, while the EU definition is neutrally worded. Finally, the Dutch definition includes a reference to the principle of proportionality, while the EU definition does not.

3.6.2 Conceptual distinctions between 'equal opportunities' and 'positive action' in national law

Dutch law uses the terms 'preferential policy', 'positive action' or 'positive discrimination', but not the term 'equal opportunities', at least not as a legal concept. In an opinion of the NIHR on positive action within the University of Delft,³³ the NIHR refers to the concept of 'equal opportunities' in Article 2(4) of Directive 76/207. It mentions that this directive contained measures to promote 'equal opportunities', whereas the Recast Directive 2006/54 speaks about 'ensuring full equality in practice between men and women'. The NIHR took the view that the changed wording of Article 3 of the Recast Directive in comparison to Article 2(4) of Directive 76/207 means that somewhat more room was created for positive action. On the basis of this opinion it can perhaps be said that the NIHR is of the opinion that 'equal opportunities' is an older concept that is no longer in use, but as this is the only ruling whatsoever which mentions the concept, this might be too far-reaching a conclusion.

3.6.3 Specific difficulties

In the Netherlands there are specific difficulties in relation to positive action. They result from the way the case law of the CJEU is interpreted in the Netherlands. The CJEU ruled in the cases *Kalanke*,³⁴ *Marschall*,³⁵ *Badeck*³⁶ and *Abrahamsson*³⁷ that recruitment procedures must be open to both men and women and that reserving job positions for women only is not allowed. This case law has had the effect of practically terminating any affirmative action aimed at women. An example of this is the policy followed by the University of Groningen. This University wished to increase the number of female professors. With this aim in mind the University nominated 17 female senior lecturers for future appointment as professors. The NIHR ruled that this policy conflicted with the CJEU case law, as only female senior lecturers were asked to submit their files with a view to

³³ College voor de Rechten van de Mens, Opinion 2012-195, www.mensenrechten.nl. See also JAR 2013/41 with a comment by E. Cremers-Hartman.

³⁴ CJEU, C-450/93, *Kalanke vs Freie Hansestadt Bremen*, 17 October 1995.

³⁵ CJEU, C-271/91, *Marshall vs Southampton and South West Hampshire Area Health Authority*, 2 August 1993.

³⁶ CJEU, C-158/97, *Badeck and others*, 28 March 2000.

³⁷ CJEU, C-407/98, *Abrahamsson, Anderson and Fogelqvist*, 6 July 2000.

appointment as professors, whereas men could not do so.³⁸ However, in an opinion from December 2012 – this opinion is also mentioned in Section 3.6.2 of this report – the NIHR took a different view in a case concerning Delft University of Technology.³⁹ This case also concerned an increase in the number of female professors. The University had reserved ten tenure tracks for female academics. The NIHR ruled that in this specific case this was allowed, as the disadvantageous position of women at the University was persistent and structural and the University Board had already taken many measures to change this situation, but without any significant effect. The NIHR referred in its opinion to the wording of Article 157(4) TFEU on realising full equality in practice and stated that, when *Kalanke* and the other judgments were rendered, the starting point was still equal opportunities for men and women and not full equality in practice.

The opinion in the case of Delft University has been welcomed from the perspective of gender equality, but critics have claimed that the reasoning of the NIHR is not entirely valid, as Article 157(4) TFEU had already been referred to in the cases of *Badeck* and *Abrahamsson* (then still Article 141(4) EC).⁴⁰

The opinions in the two cases about universities have not been followed by other opinions or court judgments. However, Eindhoven University of Technology announced that, starting from 1 July 2019, it will offer academic jobs to women only for a period of six months. If after that period no suitable candidate has been found, men will also get the opportunity to apply, but the requirement then applies that faculties must put forward both a male and a female candidate for each vacancy and thus may not select male candidates only. The debate will thus continue.

3.6.4 Measures to improve the gender balance on company boards

The Netherlands took several measures with the aim of improving the gender balance in company boards. From 1 January 2013 until 1 January 2016 Articles 2:166, 2:276 and 2:391(7) of the Dutch Civil Code stipulated that at least 30 % of the members of the board of directors and the supervisory board of a joint-stock company and/or a private company must be female. If the 30 % requirement was not reached, the company was required to explain why this was the case and what measures it was taking to attain a 30 % representation of women on the board. These articles expired on 1 January 2016. Because the aim of the articles had not been achieved (indeed, far from it), the minister responsible decided to continue the regulation until 1 January 2020.

In 2018 and again in 2019 it was established that most companies had not reached the target of 30% and would not be able to do so before 1 January 2020. In view of this the Social-Economic Council (SER), which consists of representatives of employers and employees and independent experts, advised in September 2019 to introduce a binding quota for the number of women on Supervisory Boards.⁴¹ This advice was adopted by the Government. On 3 December 2019 Parliament accepted a motion that obliges government to introduce a quota for the number of women on Supervisory Boards.⁴² The quota will apply only to listed companies. These companies will be obliged to make sure that their Supervisory Boards consist for 30 % of women. If a man is appointed while this target has not yet been met, the appointment shall be declared null and void. In that case the 'chair'

³⁸ College voor de Rechten van de Mens, Opinion 2011-198, www.mensenrechten.nl. See also JAR 2012/78 with a comment by E. Cremers-Hartman.

³⁹ College voor de Rechten van de Mens, Opinion 2012-195, www.mensenrechten.nl. See also JAR 2013/41 with a comment by E. Cremers-Hartman.

⁴⁰ Veldman, A.G. (2013), 'Voorkeursbeleid en Unierechtelijke beperkingen: over het College, het konijn en de hoge hoed', in Holtmaat, R. et al. (Eds.), *Gelijke behandeling 2012*, Nijmegen, pp. 278-295.

⁴¹ SER (2019), *Diversiteit in de top, tijd voor versnelling* (Diversity at the top, time for acceleration), The Hague. Available at <https://www.ser.nl/nl/Publicaties/diversiteit-in-de-top>.

⁴² NOS (2019), 'Meerderheid kamer voor verplicht vrouwenquotum' (Majority of Lower House in favour of binding women's quota): <https://nos.nl/artikel/2313132-meerderheid-kamer-voor-verplicht-vrouwenquotum.html>.

on the Supervisory Board will remain empty until a female director is appointed. Government announced it will submit a law proposal to Parliament in May 2020 in order to implement the decision on women's quota.⁴³ Apart from this statutory regulation, there are various soft law initiatives. One of the more important of these is the Dutch Corporate Governance Code,⁴⁴ which aims to give guidelines for effective cooperation and management in listed companies. The idea is that compliance with these guidelines increases trust in good and responsible management by these companies. Article 2.1.5 of the Code stipulates that companies will draft a diversity policy for their boards and Article 2.1.6 states that, if less women are appointed in these boards than mentioned in the law (30 %), the company has to explain the present state of affairs and the measures that will be taken to improve the situation.

3.6.5 Positive action measures to improve the gender balance in other areas

Outside of the area of high-level positions in employment, there are a few other measures taken by the Netherlands to improve the gender balance. One of the measures is known as the 'Westerdijk⁴⁵ Talent Impulse', a subsidy of EUR 5 million provided by the Ministry of Education and Culture in 2017 for the appointment of 100 female full professors by universities, on condition that the applying university would offer the women concerned a permanent position as a full professor.⁴⁶ Through this programme the percentage of female full professors increased from 19.3 % in 2017 to 20.9 % by December 2018.

Eindhoven University of Technology announced that, starting from 1 July 2019, it will offer academic jobs to women only for a period of six months. If after that period no suitable candidate has been found, men will also get the opportunity to apply, but the requirement then applies that faculties must put forward both a male and a female candidate for each vacancy and thus may not select male candidates only.⁴⁷

In a letter of 2 July 2019 the Minister of Home Affairs set out three measures to increase the share of women in political decision-making to a percentage up to 40 to 60 %.⁴⁸ The first of these is to make selection procedures for public positions more inclusive, inter alia by requiring that for the position of King's Commissioner at least one woman must be nominated and that appointment committees for the position of mayor should ideally contain as many women as men. Secondly, vacancies for public positions will be specifically brought to the attention of women's organisations and, thirdly, new programmes have to be developed to support women in decision-making.

3.7 Harassment and sexual harassment

3.7.1 Definition and explicit prohibition of harassment

Harassment is explicitly prohibited in Dutch legislation. Article 7:646(6) of the Dutch Civil Code, Article 1a(1) GETA and Article 1a(1) ETA all stipulate that the prohibition of a direct distinction includes the prohibition of harassment and sexual harassment.

⁴³ News Report by the Government (2020), 'Kabinet aan de slag met diversiteit in de top' (Cabinet at work for diversity in the top): <https://www.rijksoverheid.nl/actueel/nieuws/2020/02/07/kabinet-aan-de-slag-met-diversiteit-in-de-top>.

⁴⁴ (Revised) Dutch Corporate Governance Code, available at <https://www.mccg.nl/?page=4738>. The last version was published in December 2016.

⁴⁵ Johanna Westerdijk was the first female full professor in the Netherlands. She was appointed in 1917.

⁴⁶ <https://www.nwo.nl/actueel/nieuws/2017/nwo-geeft-uitvoer-aan-regeling-100-hoogleraarposities-voor-vrouwen.html>.

⁴⁷ De Bruin, E. (2019), 'TU Eindhoven wil alleen nog vrouwen aannemen' (University Eindhoven wants to appoint only women), *NRC*, 17 June 2019. Available at <https://www.nrc.nl/nieuws/2019/06/17/tu-eindhoven-wil-alleen-nog-vrouwen-aannemen-a3964065>.

⁴⁸ Minister of Home Affairs (2019), 'Kamerbrief met reactie op rondetafelgesprek vrouwen in het openbaar bestuur' (Letter to the Lower House responding to round table discussion on women in the public administration): <https://www.rijksoverheid.nl/documenten/kamerstukken/2019/07/02/kamerbrief-met-reactie-op-rondetafelgesprek-vrouwen-in-het-openbaar-bestuur>.

In these articles, harassment is defined as conduct that is related to the sex of a person and which has the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment. This definition is almost the same as the definition found in Directive 2006/54. The only difference is that in the Dutch text the term 'unwanted' is lacking. The Dutch Government believes that this would place quite a heavy burden of proof on the victim. Instead, the Government wanted to emphasise that sexual harassment, objectively speaking, is always an offence. Therefore, omitting 'unwanted' does not seem to be a problem, since this offers more protection to potential victims of discrimination/sexual harassment. Notwithstanding the clear position of the Government that sexual harassment is, objectively speaking, an offence, the Dutch Supreme Court, in a judgment in 2009, left some room for the accused to adduce subjective arguments (concerning the motive for the behaviour in question). The Supreme Court ruled that the view that conduct must be seen as sexual harassment if the 'victim' experiences it as sexual harassment is not correct. According to the Supreme Court, the lower court therefore did not breach any legal rule by taking into account, when assessing the harasser's behaviour, that for him his conduct did not have a sexual meaning.⁴⁹ This judgment could have substantially lowered the protection against harassment if it had been followed by other judgments in which the intention of the harasser had been given considerable weight. Fortunately, this has not happened. In the case law of District Courts and Appeal Courts, the question of whether harassment has taken place is judged in an objective way, irrespective of the points of view of both the harasser and the victim. See, for example, a judgment by The Hague Appeal Court in 2018 that ruled that dismissal of an employee who had touched the breasts and buttocks of other employees was justified, even though the employee alleged to have harassed colleagues, stated that it was normal among colleagues to touch one another.⁵⁰

3.7.2 Scope of the prohibition of harassment

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

3.7.3 Definition and explicit prohibition of sexual harassment

Sexual harassment is explicitly prohibited in Article 7:646(6) of the Dutch Civil Code, Article 1a(1) GETA and Article 1a(1) ETA. These articles stipulate that the prohibition of a direct distinction includes the prohibition of sexual harassment.

Sexual harassment is defined as any form of verbal, non-verbal or physical conduct of a sexual nature, which has the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment. This definition is almost the same as the definition found in Directive 2006/54. The only difference is that in the Dutch text the term 'unwanted' is lacking. The Dutch Government believes that this would place quite a heavy burden of proof on the victim. See further information on this in Section 3.7.1 of this report (above).

⁴⁹ Supreme Court, JAR 2009/202, LJN:BI4209, 10 July 2009.

⁵⁰ The Hague Appeal Court, 13 February 2018, ECLI:NL:GHDHA:2018:223.

3.7.4 Scope of the prohibition of sexual harassment

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

3.7.5 Understanding of (sexual) harassment as discrimination

Dutch legislation specifies that (sexual) harassment, as well as any less favourable treatment based on the person's rejection of, or submission to, such conduct amounts to discrimination.

3.7.6 Specific difficulties

In 2017 there was a debate on the question whether (some) courts followed too mild an approach towards sexual harassment. In the *Financial Journal* (*Financieel Dagblad*) three lawyers, one of whom is also a professor of labour law, published an article in which they criticised the way judges treated sexual harassment.⁵¹ They said that the judges concerned took too mild an approach towards sexual harassment. In one of the cases they mentioned, the Appeal Court of The Hague concluded that a cook of almost 65 years of age had touched the buttocks and breasts of new young employees, but ruled that this was not a ground for summary dismissal, because the employer should have made it more clear to the cook that his conduct was not acceptable and should have given him a chance 'to improve his life'. The court took into account that there was a culture at the workplace in which touching/cuddling was seen as normal (*knuffelcultuur*).⁵² Another example involved a teacher who made sexual and ambiguous comments, such as 'I'm not looking at your tits' and 'don't stretch, because I will become hot' and had hit the buttocks of a pupil with a book. The employer wished to dismiss the employee, but the court ruled that the employer should have given the employee the chance to improve his conduct, since he had already been employed for 25 years and had not previously received any complaints about harassment. The court suggested that the teacher could give lessons to classes with mostly boys in them.⁵³

In 2018 and 2019, however, several judgments were published in which the courts took a stricter approach. Maybe the criticism of several lawyers and the #metoo movement have induced this more severe approach. An example thereof is a judgment by the District Court of the Mid-Netherlands.⁵⁴ This case concerned a 56-year-old employee who was given the task of accompanying and training a new female employee of 20 years of age. In the warehouse he had unexpectedly kissed her on her mouth and he had sent her messages with (inter alia) the text 'I miss you' and, in the middle of the night, the text '*konjo*', which has a sexual meaning in street language. The employer gave summary dismissal and the court upheld this. According to the court, the employee should have known what was

⁵¹ Govaert, M., Decoz, M., Sagel, S. (2017) 'Nederlandse rechter oordeelt veel te mild over seksuele intimidatie op de werkvloer' (Dutch courts too mild towards sexual harassment at the workplace), *Financieel Dagblad*, 3 January 2017.

⁵² The Hague Court of Appeal, 18 April 2017, ECLI:NL:GHDHA:2017:957.

⁵³ District Court North-Holland, 31 October 2017, ECLI:NL:RBNHO:2017:9753.

⁵⁴ District Court Mid-Netherlands, 14 November 2018, ECLI:NL:RBMNE:2018:5652.

acceptable and what was not, especially since the employer had recently discussed the code of conduct with its personnel. Another example is a judgment by the Appeal Court of The Hague in which it confirmed the earlier decision by the lower court (the District Court) to terminate the employment agreement of an employee in an amusement arcade. The employee had touched several female colleagues in an unwanted way. His defence, that it was normal at his workplace to touch one another, was rejected and he did not receive any severance payment.⁵⁵

3.8 Instruction to discriminate

3.8.1 Explicit prohibition

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

3.8.2 Specific difficulties

There are no specific difficulties in regard to the instruction to discriminate. The concept is, in fact, rarely used and there is no case law about it.

3.9 Other forms of discrimination

Other forms of discrimination, such as discrimination by association or assumed discrimination, are not explicitly prohibited in the Dutch legislation. In the case law these types of discrimination are considered to be discrimination on the (main) grounds involved, e.g. disability or religion. The Court of the Mid-Netherlands, for example, had to decide whether the dismissal of an employee, who had conducted a professional meeting with a colleague about a medical indication for a patient and had not informed her colleague that the patient was her own disabled daughter, could not be seen as discrimination (by association) on the ground of disability/chronic illness. The court did not differentiate between discrimination on the ground of disability/chronic illness on the one hand and discrimination by association on the other, but simply ruled that there had not been any discrimination at all.⁵⁶ Assumed discrimination was at stake in a case in which the employment agreement of an employee was not extended because he had had a heart attack. However, at the point of expiry of the first contract the employee was no longer ill, but the employer feared that he might fall ill again. The Appeal Court ruled that discrimination because the employer thinks the employee might fall ill again or still has his sickness is also discrimination on the ground of disability/chronic illness. This form of discrimination is not treated differently from discrimination on the ground of an existing illness.⁵⁷

3.10 Evaluation of implementation

In general, Dutch law satisfactorily implements EU law concepts, as discussed in this chapter. There are, of course, shortcomings, but they are not the consequence of the text of the law, but rather of a lack of implementation in practice.

Statistical evidence is sometimes problematic because of its complicated nature. If the opposing party (the employer) hires an expert in statistics, a battle of experts on statistics may arise rather than a debate on discrimination. Perhaps it would help if the European Commission could publish guidelines in this respect.

⁵⁵ The Hague Court of Appeal, 13 March 2018, ECLI:NL:GHDHA:2018:223.

⁵⁶ District Court of Mid-Netherlands, 13 March 2017, ECLI:NL:RBMNE:2017:2873.

⁵⁷ Appeal Court of Amsterdam, 10 November 2015, ECLI:NL:GHAMS:2015:4563.

Multiple and intersectional discrimination are not mentioned in the law. However, multiple discrimination appears to be handled correctly in practice, whereas there are hardly any examples yet of intersectional discrimination.

Positive action is a problem, but this is particularly the case because of the case law of the CJEU. It would be most welcome if the CJEU could revise its case law or if EU legislation could embrace the concept of substantive equality used by the CEDAW.

Both gender-based harassment and sexual harassment are clearly defined in the law. In practice, the provision on gender-based harassment is hardly ever used. Court cases almost always concern the question of whether conduct can be viewed as sexual harassment or not. This is not so much of a legal problem, but rather a matter of establishing the facts and assessing the seriousness thereof.

3.11 Remaining issues

There are no remaining issues of which the author is aware. Dutch law does not distinguish between formal and substantive equality.

4 Equal pay and equal treatment at work (Article 157 of the Treaty on the Functioning of the European Union (TFEU) and Recast Directive 2006/54)

4.1 General (legal) context

4.1.1 Surveys on the gender pay gap and the difficulties of realising to equal pay

Three reports have been published by the NIHR on pay differences within general hospitals, universities of applied sciences and insurance companies. The NIHR analysed the pay of men and women within these institutions and concluded that there were considerable gaps to the disadvantage of women. According to the NIHR, these gaps were to a large extent due to factors such as attaching insufficient weight to previous work experience, determining the salary on the last salary earned elsewhere, basing the salary on negotiations, granting extra benefits because an employee had reached the maximum of his/her scale, or granting a higher salary because of shortage in the labour market.⁵⁸

Research into pay differences between men and women is also carried out on a regular basis by the Central Bureau for Statistics (CBS). The last report of the CBS dates from November 2018 and describes the situation in 2016 and the developments in relation to the previous years (2008-2016).⁵⁹ The CBS found that pay differences have diminished over this period, but that there is a considerable difference between the public and the private sector. The gender pay gap was 16 % in the public sector in 2008 and 8 % in 2016. In the private sector the gender pay gap was 22 % in 2008 and 19 % in 2016. If these gaps are corrected for factors such as number of hours worked, education, etc., differences of 5 % in the public sector and 7 % in the private sector remain.

The CBS did further research into the causes of the unadjusted pay gap in the private sector. It found that the four main causes are: (1) age; (2) position in the household; (3) origin; and (4) type of employee. According to the CBS, employees earn more as they grow older, but for men this advantage is greater than for women. Employees who are part of a household with a partner and one or more children earn more than employees in other types of household, but here also the advantage is greater for men than for women. In respect of (3) the CBS found that people with a Dutch background earn more than people from other backgrounds. This factor is more important for male employees than for female, but it can still account for part of the pay gap, because Dutch men in particular earn relatively more. Finally, in regard to (4), 'normal' employees earn more than employees with flexible contracts (on-call workers, workers who are posted by an agency, payrollers)⁶⁰ and since more men than women have regular contracts, this also explains part of the difference.⁶¹

The CBS did not write about the obstacles for unequal pay nor about possible remedies.

⁵⁸ Commissie Gelijke Behandeling (2011), *Gelijke beloning van mannen en vrouwen bij de algemene ziekenhuizen in Nederland* (Equal pay for men and women in general hospitals in the Netherlands), Utrecht, 2011, available at <https://www.mensenrechten.nl/nl/publicatie/9898>; College voor de Rechten van de Mens, *Verdient een man meer? Gelijke beloning van mannen en vrouwen bij hogescholen* (Does a man earn more? Equal pay for men and women within universities of applied sciences), Utrecht, 2016, available at <https://www.mensenrechten.nl/nl/publicatie/36318>; College voor de Rechten van de Mens, *Rapport Gelijke beloning verzekerd?* (Report on Equal Pay Insured?), Utrecht, 2017, available at <https://www.mensenrechten.nl/nl/publicatie/38165>.

⁵⁹ Centraal Bureau voor de Statistiek (2018), *Monitor loonverschillen mannen en vrouwen, 2016* (Monitor Equal pay differences between men and women, 2016), November 2018, available at: <https://www.cbs.nl/nl-nl/maatwerk/2018/47/monitor-loonverschillen-mannen-en-vrouwen-2016>.

⁶⁰ In this context payrolling is the provision of workers to a customer where the workers have been recruited by the customer but are employees of the supplier providing the payroll services.

⁶¹ In the author's view these conclusions are not very helpful. They merely state that in various situations women nearly always tend to earn less than men, but it is not clear why this is the case.

The causes mentioned here by the CBS concern the undeclared gender pay gap. The largest part of the gender pay gap is caused by factors which can be explained. The most important of these are:

- Women interrupt their careers more often than men, or start working fewer hours in order to care for their children;
- Women work more often than men in sectors in which the hourly wage is lower (but it is easier for them to combine work and care);
- Pay differences that have their origin in the first half of women's careers have important consequences for the rest of their working lives;
- Employers unconsciously often treat men better.⁶²

On 7 March 2019 four opposition parties submitted a legislative proposal on equal pay for women and men.⁶³ In the explanatory memorandum to the draft law it is said that it is difficult to pinpoint exactly what the causes are of the gender pay gap. The proposers therefore refer to the research done by the NIHR – which was mentioned at the beginning of this paragraph – and state that it is necessary to take more concrete measures to try to tackle the gender pay gap.

4.1.2 Surveys on the difficulties of realising equal treatment at work

There have been surveys and reports on specific subjects such as equal pay, pregnancy discrimination and sexual harassment and there are surveys or reports on the situation of women in general, but there are no specific surveys or reports on equal treatment at work. Pregnancy discrimination and sexual harassment will be mentioned under Section 4.1.3 below. At this point, reference can be made to the 2018 emancipation monitor (*Emancipatiemonitor 2018*) of the Central Bureau for Statistics (*Centraal Bureau voor de Statistiek*) (CBS).⁶⁴ The CBS found that between 2015 and 2017 more women entered the labour market. The average number of working hours per week increased from 27 to 28 and the percentage of women who are economically independent increased from 58 % to 60 %. However, there are considerable differences between women. Women with little education and women with a non-Western migrant background are less often in paid work and are less often economically independent. These differences have not reduced in the past ten years.

4.1.3 Other issues

Pregnancy discrimination is still an issue in the Netherlands and as such is an obstacle for equal positions of men and women at work. The NIHR published a report in 2016 on pregnancy discrimination.⁶⁵ The report is a follow-up of an earlier report of 2012. In the 2016 report the NIHR concludes that 43 % of the women on the labour market have been confronted with possible discrimination because of pregnancy or early motherhood. There has been no decline in this number since 2012. In 2017 the NIHR opened a hotline for reporting pregnancy discrimination during six weeks. During this period, 855 people contacted the hotline, which led to a peak in the number of reports of discrimination in

⁶² See also <https://loonwijzer.nl/vrouwenloonwijzer/beloningsverschillen-m-v#waarom-verdienen-vrouwen-gemiddeld-minder-dan-mannen->. Part of <https://wageindicator.org/>.

⁶³ Summary of a legislative proposal on equal pay for men and women: <https://www.tweedekamer.nl/kamerstukken/wetsvoorstellen/detail?cfg=wetsvoorstel&qry=wetsvoorstel%3A35157>.

⁶⁴ Portegijs, W. and van den Brakel, M. (2018), *Emancipatiemonitor 2018*, CBS 2018, Den Haag. The report is available at <https://digitaal.scp.nl/emancipatiemonitor2018/assets/pdf/emancipatiemonitor-2018-SCP.pdf>. A short video about the position of women in the Netherlands with English subtitles can be found at <https://www.cbs.nl/nl-nl/nieuws/2018/50/emancipatiemonitor-economische-positie-van-vrouwen-verbeterd>.

⁶⁵ NIHR (2016), *Is het nu beter bevallen? Vervolgonderzoek naar discriminatie op het werk van zwangere vrouwen en moeders met jonge kinderen* (Did it become better (giving birth)? Follow-up research into discrimination at work of pregnant women and mothers with young children), Utrecht 2016: <https://www.mensenrechten.nl/nl/publicatie/36883>.

that year.⁶⁶ In 2019 still three-quarters of all reports of sex discrimination to the NIHR related to pregnancy.⁶⁷

Another obstacle for equal treatment at work is sexual and gender-based harassment. In a report in 2017 the CBS mentioned that 1 in 5 employees reported that they had been confronted with some form of harassment. Social and medical workers are the hardest hit: approximately 50 %. The harasser is most often not a colleague, but a client or a patient. Employees in public administration, firemen, policy and security personnel also mentioned harassment by external persons, not so much sexual harassment, but more specifically mobbing and physical aggression. Mobbing was also mentioned relatively often by teachers in secondary education.⁶⁸

4.1.4 Political and societal debate and pending legislative proposals

There is a legislative proposal on equal pay for women and men.⁶⁹ This was submitted to Parliament on 7 March 2019. Since then it has been silent. The Council of State has been asked for advice on the proposal, but has not given its advice yet.

The main contents of the proposal are the following:

- Reversal of the burden of proof. Employers with 50 or more employees should apply for a certificate which shows that they apply the standard for equal pay. If they do not have such a certificate and a person states that he or she is not paid equally, the assumption is that this is indeed the case. The employer may refute this assumption.
- Obligation to provide information in the annual report by employers with 50 or more employees about differences in pay between employees who carry out work of (almost) equal value. If unequal pay exists, this must be reported in the annual report together with information on the way in which these differences will be eliminated.
- The Labour Inspectorate will be given the tasks of monitoring the application of the law and of imposing fines in cases of non-compliance.
- Employees of employers with 50 or more employees will get the right to ask for information about the salary of colleagues who do the same work or work of (almost) equal value.

Trade unions and the NIHR are positive about the proposal; employers fear an administrative burden and are of the opinion that the proposal does not address the real cause of unequal pay, the fact that women work substantially fewer hours than men. It is hard to predict whether the proposal will be adopted by the present Government, in view of the fact that it has been submitted by opposition parties and is probably not supported by the (majority of the) governing coalition parties.

4.2 Equal pay

4.2.1 Implementation in national law

⁶⁶ NIHR (2017), *Analyse Meldpunt Zwangerschapsdiscriminatie op de arbeidsmarkt* (Analysis Hotline Pregnancy Discrimination on the Labour Market). Available at <https://www.mensenrechten.nl/nl/publicatie/38032>.

⁶⁷ NIHR (2020), *Jaarverslag en Monitor Discriminatiezaken 2019* (Annual Report and Monitor Discrimination Cases 2019). Available at: <https://mensenrechten.nl/nl/publicatie/5ea1351a1e0fec037359c1f3>.

⁶⁸ This information is based on the Dutch National Inquiry into Working Conditions. A short video with information about what is called in the Netherlands 'undesirable behaviour in the workplace' is available at <https://www.cbs.nl/nl-nl/nieuws/2019/05/meeste-ongewenst-gedrag-in-zorg-en-welzijnsberoepen>.

⁶⁹ Summary of a legislative proposal on equal pay for men and women: <https://www.tweedekamer.nl/kamerstukken/wetsvoorstellen/detail?cfg=wetsvoorsteldetails&qry=wetsvoorstel%3A35157>.

Article 7:646(1) of the Dutch Civil Code states that the employer is not allowed to make a distinction between men and women with respect to employment conditions. This includes equal pay for equal work or work of equal value. In Article 7(2) ETA⁷⁰ the concept of pay is defined as 'any remuneration owed by the employer to the employee in return for the labour of the latter.' In Article 7(1) ETA it is explained that, when comparing the pay of a male and a female employee, a comparison must be made with an employee of the other sex who does equal work or work of equal value.

4.2.2 Definition in national law

The concept of pay is defined in Article 7(2) ETA as 'any remuneration owed by the employer to the employee in return for the labour of the latter. The same definition is used in labour law in general (Article 7:610 Dutch Civil Code).

This definition is less elaborate than the definition in Article 157(2) TFEU, but the meaning is the same. The concept of pay in Dutch law is explained in a way similar to the TFEU definition of Article 157(2). The Supreme Court ruled that pay is the remuneration/compensation that the employer owes to the employee as a return for his employment.⁷¹

4.2.3 Explicit implementation of Article 4 of Recast Directive 2006/54

Dutch law does not explicitly implement Article 4 of the Recast Directive, but it stipulates that the employer is not allowed to make a distinction between men and women in respect of employment conditions (Article 7:646(1) DCC). This includes equal pay for equal work or work of equal value. It also relates to all forms of pay for the labour of the employee. The only forms of pay which are excluded are compensation of expenses (e.g. travel costs), payments by third parties (tips), damages, and discretionary benefits which are paid by the employer without being obliged to do so (gratuity).

4.2.4 Related case law

There are two judgments by the Supreme Court⁷² in which it is mentioned that pay is the remuneration owed by the employer in return for the labour of the employee. These cases did not concern discrimination but were related to the existence of an employment agreement. According to Dutch law, an agreement is an employment agreement when the employee must carry out work (personally), when a remuneration is paid and when there is relationship of authority between the employer and the employee. In this context there is some case law about the question of whether payments from an employer to a worker can justify the conclusion that the parties entered into an employment agreement. However, these judgments are not about gender equality. In the field of gender equality, the basic assumption is that the case law of the CJEU is leading, thus that discrimination must be eliminated in respect of all aspects of remuneration.

4.2.5 Permissibility of pay differences

Pay differences are allowed if they are not caused by discrimination or some other unjust reason. There have been several cases on the question of whether unequal pay for equal work or work of equal value is allowed if no discrimination is at stake. The Supreme Court ruled in this respect that the general principle that equal work must be paid equally is important, but not decisive.⁷³ If an employee wants to receive the same pay as a colleague,

⁷⁰ Equal Treatment Act.

⁷¹ Supreme Court, *NJ* 1954/242, *Zaal/Gossink*, 18 December 1953, and Netherlands, Supreme Court, *LJN:ZC3681*, *NJ* 2001/635, *JAR* 2001/217, *Huize Bethesda*, 12 October 2001.

⁷² Supreme Court, *NJ* 1954/242, *Zaal/Gossink*, 18 December 1953, (and Netherlands, Supreme Court, *LJN:ZC3681*, *NJ* 2001/635, *JAR* 2001/217, *Huize Bethesda*, 12 October 2001).

⁷³ Supreme Court, *JAR* 2004/68, 30 January 2004, (Parallel Entry).

but there is no discrimination at stake (e.g. because both colleagues are male or female), the relevant interests must be balanced. The principle of equal pay is one of these interests and is important, but also relevant is whether the pay difference has its origin in a collective agreement (that is an argument for allowing the difference), if there are differences in education levels, if the situation at the time of the start of the employment differed, if there is a merger or some other type of reorganisation, etc. An employer is also entitled to introduce new regulations for new employees, even though these may lead to pay differences between the new and the old personnel.⁷⁴

4.2.6 Requirement for comparators

In the Netherlands a comparator is required in situations in which the salary of a person of one sex is compared with the salary of a person of another sex. A hypothetical comparator is not allowed. The comparator should be an existing person within the same company. This is the approach that is laid down in Article 7(1) ETA.

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

There is very little case law about the use of a comparator. One case worth mentioning dates from 2010 and concerned equal pay at a secondary school.⁷⁵ A female teacher stated that she performed work of equal value compared to at least two male colleagues. One of these colleagues was graded on a higher scale. The court found that the colleague indeed did not do the work that he should have done on the basis of his salary scale/position and that his work was of equal value to that of the female employee. However, the court accepted the argument by the employer that the reason for this was that the male employee could not fulfil all his tasks because of health reasons and because of his age. He could not therefore act as a comparator.

Such a line of reasoning makes it difficult for an employee to claim equal pay, because it gives the employer considerable room to make work non-comparable.

In another case the comparison was more successful. The Court of Appeal of 's-Hertogenbosch ruled that an employer had not clarified why the work experience of the male comparator was of more value than the work experience of the female employee.⁷⁶ The employer also failed to explain why a reduction in the hours of the male employee justified a higher hourly wage. The fact that the employer was not transparent about his motives for paying the male worker a higher salary than his female colleague therefore led the court to rule that the employer had discriminated against the woman and had to pay to her the same salary paid to the man.

The NIHR has published several opinions on equal pay. The NIHR examines – or asks a job classification and evaluation specialist to do so – whether a comparator does work of equal value. The outcome differs depending on the situation. Sometimes employees can

⁷⁴ The Hague Court of Appeal, *JAR* 2005/113, 4 February 2005.

⁷⁵ The Hague Court of Appeal, LJN: BP3748, *JAR* 2011/71, 21 December 2010.

⁷⁶ Court of Appeal 's-Hertogenbosch, *JAR* 2013/13, 13 November 2012 and *JAR* 2013/106, 5 March 2013.

indeed be compared,⁷⁷ but sometimes the conclusion is that the comparator chosen by the claimant does not perform the same work or work of equal value.⁷⁸

4.2.7 Existence of parameters for establishing the equal value of the work performed

In Dutch law there are no rules on parameters for establishing the equal value of work.

4.2.8 Other relevant rules or policies

Parameters are not laid down in Dutch legislation nor in other rules or policies. In a situation where an assessment is made in an individual case as to whether work is of equal value, all relevant aspects are taken into account.

4.2.9 Job evaluation and classification systems

In the Netherlands the general assumption is that all (relevant) job evaluation and classification systems are gender-neutral. There has been debate on these systems in the past, especially around 2000/2001. In that period an instrument was developed in order to create gender-neutral job evaluation and classification systems: 'de weegschaal gewogen' ('the weighted scale').⁷⁹ Subsequently all systems that were acknowledged by the trade unions were tested on gender neutrality and have been found neutral. At present the debate mainly focuses on the incorrect use of job classification systems and on granting extra benefits outside of the systems.

4.2.10 Wage transparency

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

In case law, reference is sometimes made to one of the standard considerations of the CJEU, i.e. that real transparency, which makes effective verification possible, is ensured only when the principle of equal pay is applied to every element of the salaries of men and women. In this respect, the Supreme Court ruled on 12 April 2002 that a reversal of the burden of proof that work is of equal value is appropriate if a company applies a reward system that is characterised by a complete lack of transparency.⁸⁰ According to the Supreme Court this was not the case in this particular matter.

In another case, the Court of Appeal of 's-Hertogenbosch ruled in an equal pay case that the employer had not clarified why the work experience of the male comparator was of more value than the work experience of the female employee.⁸¹ The employer also failed to make transparent why a reduction in the hours of the male employee justified a higher hourly wage. The fact that the employer was not transparent about his motives for paying the male worker a higher salary than his female colleague led the court to rule that the employer had discriminated against the woman and had to pay to her the same salary paid to the man.

Employers must thus make clear in what way and on the basis of which standards they value the work of their employees. The NIHR follows the same approach. An example is

⁷⁷ College voor de Rechten van de Mens, Opinion 2012-142, 15 August 2012: unequal pay because male colleague has been graded three steps higher, because of shortage at the labour market, negotiations and previous work experience.

⁷⁸ College voor de Rechten van de Mens, Opinion 2018-30, 30 March 2018: no unequal pay because the comparators have a higher position.

⁷⁹ Letter by the Secretary of State to Parliament (2011), no. 27099, no. 3 with annexes. Available at <https://zoek.officielebekendmakingen.nl/kst-27099-3.html>.

⁸⁰ Supreme Court, JAR 2002/101, 12 April 2002.

⁸¹ Court of Appeal 's-Hertogenbosch, JAR 2013/13, 13 November 2012 and JAR 2013/106, 5 March 2013.

the opinion in which the NIHR ruled that the employer had not made clear which part of the extra pay a male worker received was related to labour shortage. The NIHR explicitly observed that the lack of a transparent salary system is the employer's own risk.⁸²

4.2.11 Implementation of the transparency measures set out by European Commission's Recommendation of 7 March 2014 on strengthening the principle of equal pay between men and women

The Recommendation itself is not explicitly applied.

If pay discrimination is suspected, a worker can turn to the Dutch NIHR. This body can actively investigate and obtain necessary pay data from the employer.

In addition, companies are obliged, on the basis of Article 31d of the Works Councils Act, to submit data to works councils once a year about equal treatment of men and women and about the levels and the content of employee benefits (pay etc.) in the company. However, these data should be broken down by gender.

4.2.12 Other measures, tools or procedures

There are various soft law initiatives that aim to diminish/close the equal pay gap:

- The Foundation for Labour (*Stichting van de Arbeid*) is in the process of updating its checklist for equal pay, which dates from 2001. This checklist is meant for those who create, apply and evaluate systems for the payment of employees, thus trade unions, employers' organisations, employers, HR managers and works councils. It is not obligatory to use the checklist. It is a tool.⁸³
- There is a website called 'loonwijzer' (Wage Indicator)⁸⁴ which makes it possible to compare wages. The website also gives substantive information about (equal) pay. The website receives a subsidy from the Dutch Government.
- The NIHR developed an equal pay Quicksan tool.⁸⁵
- In two collective agreements the employer committed itself to carrying out an investigation into equal pay in its company. The outcome in one of these investigations was that pay differences do indeed exist within the company and that the main cause thereof appears to be the under-representation of women in higher positions. The company has announced that it will discuss with the works council and the trade unions how to redress this situation.⁸⁶ In the other case, regarding a pension provider, the outcome was that women earned 2,2 % less than men (after corrections for number of hours worked etc.). The company subsequently decided to increase the salary of 125 female employees as of 1 June 2019 and to take measures to ensure that the topic remains on the agenda in order to prevent new differences in salary.⁸⁷

⁸² College voor de Rechten van de Mens, Opinion 2012-142, 15 August 2012. See also Opinion 2009-76, 6 August 2009

⁸³ Stichting van de Arbeid (Foundation for Labour) (2001), 'Je verdiende loon! Checklist gelijke beloning mannen en vrouwen' (Your deserved salary! A checklist for equal pay for men and women), 19 July 2001, available at <https://www.stvda.nl/-/media/stvda/downloads/publicaties/2001/je-verdiende-loon.pdf>.

⁸⁴ <https://loonwijzer.nl/salaris/gelijkloon>. The website is part of the international website Wage Indicator, available at <https://wageindicator.org/>.

⁸⁵ The Quicksan tool can be found on the website of the NIHR on recruitment: <http://www.wervingenselectieids.nl/>.

⁸⁶ Aegon (2019), *Vrouwen bij Aegon gelijk beloond* (Equal pay for women and men at Aegon), 11 February 2019. Available at: <https://nieuws.aegon.nl/gelijke-beloning/>.

⁸⁷ APG (2019), *APG gaat vrouwelijke medewerkers gelijk belonen* (APG will pay women equal to men), 22 May 2019. Available at: <https://www.apg.nl/nl/artikel/APG-gaat-vrouwelijke-medewerkers-gelijk-belonen/1086?filter=all&query=gelijke+beloning>.

4.3 Access to work, working conditions and dismissal

4.3.1 Definition of the personal scope (Article 14 of Recast Directive 2006/54)

In Dutch law the personal scope in relation to access to employment, vocational training, working conditions etc. is in most cases not explicitly defined. In many provisions neither a norm addressee nor a rights holder is mentioned. The addressee/rights holder must in those cases be derived from the description of the material scope of the provision or act. For example, the definitions of direct discrimination on the ground of sex in Article 7:646(5) sub b DCC and in Article 1(2) ETA include direct discrimination on the grounds of pregnancy, giving birth/delivery and maternity. This means that pregnant workers and women who have (recently) given birth are explicitly protected. Under ETA, not only women with a civil law or public law employment relationship are protected, but also other categories of persons engaged in work (Article 1c ETA) and self-employed persons (Article 2 ETA). This provision is lacking in GETA. However, Article 4 of GETA stipulates that it leaves the provisions of the Civil Code and ETA intact, so the protection is still there.⁸⁸

For the purposes of protection against discrimination, only natural persons are considered to be rights holders.

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

4.3.2 Definition of the material scope (Article 14(1) of Recast Directive 2006/54)

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

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

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

Article 3 ETA forbids unequal treatment in respect of offers of employment and conditions for recruitment and in respect of assistance in finding employment.

⁸⁸ More information on this topic can be found in the part on the Netherlands in Countouris, N. and Freedland, M. (2012), *The Personal Scope of EU Sex Equality Directives*, European Network of Legal Experts in the Field of Gender Equality, European Commission, available at: http://ec.europa.eu/justice/gender-equality/document/index_en.htm#h2-8. Nothing has changed since.

The relation between these three articles is as follows: Article 5 GETA is the basic article. Article 7:646 of the Dutch Civil Code specifically applies to men and women who work in the private sector and Article 1(b) ETA concerns the public sector.⁸⁹

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

4.3.3 Implementation of the exception on occupational activities (Article 14(2) of Recast Directive 2006/54)

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

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

4.3.4 Protection against the non-hiring, non-renewal of a fixed-term contract, non-continuation of a contract and dismissal of women connected to their state of pregnancy and/or maternity

The legislation explicitly prohibits non-hiring, non-prolongation of contracts and dismissal because of pregnancy and/or maternity, but in practice this is (still) a major problem.

The first cause hereof has to do with the burden of proof. Even though the burden of proof shifts to the employer once the employee has stated facts from which it can be presumed that discrimination has taken place, in practice this is still difficult. This is particularly the case with non-hiring and non-extension/prolongation of contracts. Often no reason is given or, in cases of non-hiring, the candidate is told that there were better candidates, and in cases of non-prolongation, the employee is informed that there is no more budget or that her performance is not exactly as it should be. In such cases it is very hard for the woman involved to state sufficient facts that point to pregnancy/maternity as a reason. An example is provided by a case before the District Court of East-Brabant in 2019.⁹⁰ This court ruled that the employer had made it sufficiently clear that he had doubts about the employee's performance and that he did not expect that she would be able to meet the – changing – demands of her role. The court therefore accepted that this was the reason for the non-prolongation and not the pregnancy of the employee. This appears reasonable, but the real question in the author's view is whether it is fair to expect a pregnant employee to perform in such a way that she can persuade the employer that she is able to meet changing and challenging demands. Being pregnant demands energy and it is not a good combination with having to prove oneself in a new job at the same time. The question is, of course, whether this is the employer's responsibility, but it does not appear fair to put the burden entirely on such young women, particularly as many of them have to work on flexible contracts and therefore have little protection.

⁸⁹ For more detail, see: the section on the Netherlands in Countouris, N. and Freedland, M. (2012), *The Personal Scope of EU Sex Equality Directives*, European Network of Legal Experts in the Field of Gender Equality, European Commission, available at: <https://www.equalitylaw.eu/downloads/2822-eu-sex-equality-directives>.

⁹⁰ District Court East-Brabant, JAR 2019/64, 7 February 2019, with a comment by M.S.A. Vegter, ECLI:NL:RBOBR:2019:1281.

This brings us to the second problem, which, in the author's view, is the high number of people in the Netherlands who work on some form of flexible contract or as a (false) self-employed person. Flexible contracts, triangular relationships with agencies and the like, and contracts with self-employed persons can easily be terminated, also in cases of pregnancy. In particular, people with little education feel the consequences of this, including young women in lower-paid jobs. On paper there is protection against discrimination, but in practice achieving this is far more difficult. Besides, starting a court case in this respect is costly. The NIHR opened a hotline for reporting pregnancy discrimination from 22 May until 5 July 2017. During this period, 855 people contacted the hotline.⁹¹ Almost all notifications of pregnancy/maternity discrimination concerned flexible contracts. The NIHR advised the Government to pay more attention to these groups of women. However, policy documents about pregnancy discrimination so far fail to link pregnancy discrimination with flexible contracts, but treat these subjects separately, as if they were not related to one another. The Government often stresses the need for awareness, but this does not help if the legal position of these groups of women is not strengthened.

There are fewer problems with pregnancy discrimination against women with a permanent employment contract. They can claim nullity of a dismissal related to pregnancy or maternity and can claim reinstatement. These sanctions are far more effective than claiming compensation in case of non-hiring or non-prolongation of a contract.

The third problem is the extent of the damages in cases of non-hiring or non-prolongation. There are pecuniary and non-pecuniary damages. Pecuniary damages can be claimed where the employee can make it sufficiently clear that he or she suffered loss of income or incurred costs because of discrimination. Sometimes this works well, for example in the judgment by the District Court of The Hague in which the court ruled that the employee would have been given a contract for a year, had she not been discriminated against. The court therefore awarded compensation of a year's salary (EUR 37 077.21).⁹² However, in many cases it is difficult to estimate the extent of the damage, as many employees in the Netherlands work on the basis of part-time contracts of six months or one year or are placed by temporary employment agencies, which means they cannot prove that their employment would have lasted for a considerable period of time. See, for example, the ruling by the District Court of Limburg, which decided that an employee whose contract had not been extended because of her pregnancy was not entitled to a compensation for material (income) damage, because it was likely, according to the court, that the contract would have been extended once more for one year and would have ended afterwards. During that year the employee had also received a social security benefit and she therefore had no income damage.⁹³

It would be better if the burden of proving that the contract would not have been extended would shift to lie with the employer instead of the other way round. At present the burden of proving that there has been no discrimination shifts to the employer once the employee has stated sufficient indications of discrimination; however, providing evidence of the extent of the damage is mostly seen as the task of the claimant.

In respect of non-pecuniary damages, Dutch courts are very restrained, if not stingy. It is a real exception if more than EUR 5 000 is granted, and even that is seen as quite generous. Sometimes courts consider that EUR 1 000 is sufficient.⁹⁴ Discrimination itself does not give a right to non-pecuniary damages. The Supreme Court ruled that the finding of a breach of a fundamental right is not sufficient in this respect. In order to qualify for

⁹¹ College voor de Rechten van de Mens (2017), *Analyse Meldpunt Zwangerschapsdiscriminatie op de arbeidsmarkt* (Analysis Hotline Pregnancy Discrimination on the Labour Market), Utrecht, October 2017. Available at <https://www.mensenrechten.nl/nl/publicatie/38032>.

⁹² District Court The Hague, *JAR* 2019/60, 24 January 2019, with a comment by M.S.A. Vegter, ECLI:NL:RBDHA:2019:584.

⁹³ District Court Limburg, 13 December 2017, ECLI:NL:RBLIM:2017:12124.

⁹⁴ District Court Limburg, 13 December 2017, ECLI:NL:RBLIM:2017:12124.

non-pecuniary damages, the norm of gender equality must have been seriously violated with serious consequences.⁹⁵

4.3.5 Implementation of the exception on the protection for women in relation to pregnancy and maternity (Article 28(1) of Recast Directive 2006/54)

The exception on protection for women, in particular as regards pregnancy and maternity, has been implemented in Article 7:646(3) DCC, Article 2(b) GETA and Article 1b(3) ETA. These Articles state that derogation from the prohibition of discrimination is allowed in cases concerning the protection of women, particularly as regards pregnancy and maternity.

4.3.6 Particular difficulties

In the Netherlands there are considerable difficulties in relation to the protection of pregnant women and young mothers in the field of access to work and employment contracts. These difficulties have been described in Section 4.3.4 of this report.

The increase in flexible contracts and (false) self-employment is also a problem, especially for women with little education. They have little or no income security, their working conditions are sometimes poor, and they have little opportunity to become economically autonomous.

A particular problem exists in respect of predominantly female domestic workers who work four days a week or less in a private household. These workers may be dismissed unilaterally without permission from the employment agency or the district court, they are entitled to 6 weeks' pay during illness instead of 104 weeks,⁹⁶ and they fall outside the scope of the social security system. This reduced protection has been criticised by, inter alia, the European Commission and CEDAW, but so far, the Dutch Government has not taken any concrete steps to improve the situation.⁹⁷

4.3.7 Positive action measures (Article 3 of Recast Directive 2006/54)

The Netherlands did not use the opportunity to adopt positive action measures within the meaning of Article 157(4). The Netherlands follow the CJEU approach that recruitment procedures must be open to both men and women and that reserving job positions for women only is prohibited. This case law has had the effect of practically terminating any affirmative action aimed at women. There are a few exceptions. One of these is the policy adopted by Delft University of Technology of reserving ten tenure tracks for female academics.⁹⁸ The NIHR ruled that in this specific case this was allowed, as the disadvantageous position of women at the University was persistent and structural and the University Board had already taken many measures to change this situation, but without any significant effect. In June 2019 Eindhoven University of Technology announced that, starting from 1 July 2019, it would offer academic jobs to women only for a period of six months. If after that period no suitable candidate had been found, men would also get the opportunity to apply, but that for each job there must be both a male and a female candidate.⁹⁹ The debate thus continues.

⁹⁵ Supreme Court, 15 March 2019, ECLI:NL:HR:2019:376.

⁹⁶ According to Dutch law employees are entitled to continuation of 70 % of their pay during the first two years of illness on the basis of Article 7:629 Dutch Civil Code.

⁹⁷ See about this group: Cremers, E. and Bijleveld, L. W. (2010), *Een baan als alle andere?! De rechtspositie van deeltijd huishoudelijk personeel* (A job like all others?! The legal position of part-time household workers.), Leiden, and the addendum by Bijleveld, L.W., Leiden, 2015.

⁹⁸ College voor de Rechten van de Mens, opinion 2012-195, 18 December 2012. This opinion has also been published in JAR 2013/41 with a comment by E. Cremers-Hartman.

⁹⁹ NRC (2019), 'TU Eindhoven wil alleen nog vrouwen aannemen' (University of Technology Eindhoven wants to appoint only women), 17 June 2019. Available at: <https://www.nrc.nl/nieuws/2019/06/17/tu-eindhoven-wil-alleen-nog-vrouwen-aannemen-a3964065>.

Worth mentioning is also that the Social-Economic Council (SER), which consists of representatives of employers and employees and independent experts, advised in September 2019 to introduce a binding quota for the number of women on Supervisory Boards.¹⁰⁰ This advice was adopted by the Government. On 3 December 2019 Parliament accepted a motion that obliges government to introduce a quota for the number of women on Supervisory Boards.¹⁰¹ The quota will apply only to listed companies. These companies will be obliged to make sure that their Supervisory Boards consist for 30 % of women. If a man is appointed while this target has not yet been met, the appointment shall be declared null and void. In that case the 'chair' on the Supervisory Board will remain empty until a female director is appointed. Government announced it will submit a law proposal to Parliament in May 2020 in order to implement the decision on women's quota.¹⁰²

Finally, there are some soft law initiatives, such as the subsidy for the appointment by universities of 100 female full professors.¹⁰³ This led to an increase in the percentage of female full professors from 19.3 % in 2017 to 20.9 % by December 2018.

4.4 Evaluation of implementation

In the view of the author, although Dutch law mainly implements EU law satisfactorily, it falls seriously short of EU law at a number of points. This is the case in the first place in respect of equal pay. Dutch law has implemented the prohibition on unequal pay but has completely neglected the Recommendation of the European Commission on Pay Transparency. This is also a serious problem in the Netherlands. Employees do not know what their colleagues earn, and it is not clear if there is a right to get information on this point. There is no obligation for employers to report on the gender pay gap, and equal pay is only made part of the bargaining process if the social partners both agree on this. So far, only two employers have been prepared to accept an obligation to pay equally. Not surprisingly, these two employers operate in the pension/insurance branch, a branch in which there is money for research into equal pay. The author of this report assumes that there are more problems with equal pay in health care, but less money to take appropriate measures.

Dutch law also offers insufficient protection against pregnancy discrimination, but this appears not to be the consequence of unsatisfactory implementation of EU law. There are practical problems in respect of proof/evidence and the sanctions are not sufficiently deterrent. In this latter respect EU law is not of much help, because there are no clear guidelines on the levels of penalties, compensation, etc. The idea is that compensation may not exceed the actual damage suffered, but sometimes it is difficult to assess the actual damage, especially in the case of flexible contracts. This works to the disadvantage of the employee. The main problem, in the author's view, is the large number of flexible contracts and (false) self-employment in the Netherlands, which makes it too easy for employers not to hire pregnant women and/or not to prolong an employment relationship in cases of pregnancy.

In regard to positive action, EU law is an obstacle and subsequently CJEU case law in particular. This case law stands in the way of the application of positive action in the Netherlands, because the idea is that men must have equal opportunities (rather than

¹⁰⁰ SER (2019), *Diversiteit in de top, tijd voor versnelling* (Diversity at the top, time for acceleration), The Hague. Available at <https://www.ser.nl/nl/Publicaties/diversiteit-in-de-top>.

¹⁰¹ NOS (2019), 'Meerderheid kamer voor verplicht vrouwenquotum' (Majority of Lower House in favour of binding women's quota): <https://nos.nl/artikel/2313132-meerderheid-kamer-voor-verplicht-vrouwenquotum.html>.

¹⁰² News Report by the Government (2020), 'Kabinet aan de slag met diversiteit in de top' (Cabinet at work for diversity in the top): <https://www.rijksoverheid.nl/actueel/nieuws/2020/02/07/kabinet-aan-de-slag-met-diversiteit-in-de-top>.

¹⁰³ See Section 3.6.5 of this report. <https://www.nwo.nl/actueel/nieuws/Type/awards/Programma/Westerdijk+Talentimpuls>.

substantive equality). Perhaps the announced women's quota will provide for new inspiration in this respect.

4.5 Remaining issues

There are no remaining issues that have not already been discussed.

5 Pregnancy, maternity, and leave related to work-life balance for workers (Directive 92/85, relevant provisions of Directives 2006/54 and 2010/18)¹⁰⁴

5.1 General (legal) context

5.1.1 Surveys and reports on the practical difficulties linked to work-life balance

In the Netherlands there is a continuous stream of publications on work-life balance issues. Most of these are of a popular nature; some are more serious. The paragraphs below mention several of the more serious ones.

Research by the SCP (Social Cultural Plan Bureau) of 2017 mentions that Dutch citizens spend on average 21 hours per week on care tasks. Most of this time is spent on cooking, tidying up, cleaning, washing and shopping. Those who have children also spend considerable time on them, especially if they are young. Parents with children under 4 years spend on average 14.5 hours per week on them.¹⁰⁵ There are considerable differences between men and women. In the age category of 20- to 64-year-old people with a partner and children, men spend on average 20.5 hours per week on care tasks (including household tasks) and women 35.8 hours. If there are no children in the household, women spend much less time on care tasks (26 hours), whereas for men the difference between those who have children and those who do not (18.8 hours) is smaller.

Other research has been done by the CBS (Central Bureau of Statistics). The CBS published a report in March 2019 on the fact that there has been hardly any increase in the extent to which fathers take leave to care for their children.¹⁰⁶ Almost 87 % of fathers took some sort of leave after the birth of their children. One in ten fathers with a child under 8 years took up parental leave. When asked why more fathers did not use this leave, the reply is usually that it is too costly, or that they are afraid of damaging their career. The CBS also reported that around 50 % of fathers work at home for one day per week.

The SCP *Emancipation Monitor 2018*¹⁰⁷ mentions that since the previous Emancipation Monitor of 2016 an increase can be seen in the number of hours women do paid work. Most women work part-time. Four out of ten of them indicate that they work part-time because of caring for children or grandchildren. Most fathers and mothers indicate that they would like to share the care for their children equally, but in practice this only happens in one out of eight families. If care tasks are divided unequally, the mother/woman almost always has a greater share of the tasks. There is a positive trend though in the sense that the number of men who do their share of housework and care tasks is slowly increasing.

Leonie van Breeschoten undertook sociological research. She published a Ph.D. thesis in April 2019 entitled *Combining a Career and Childcare, The Use and Usefulness of Work-*

¹⁰⁴ See Masselot, A. (2018), *Family leave: enforcement of the protection against dismissal and unfavourable treatment*, European network of legal experts in gender equality and non-discrimination, available at <https://www.equalitylaw.eu/downloads/4808-family-leave-enforcement-of-the-protection-against-dismissal-and-unfavourable-treatment-pdf-962-kb> and McColgan, A. (2015), *Measures to address the challenges of work-life balance in the EU Member States, Iceland, Liechtenstein and Norway*, European network of legal experts in gender equality and non-discrimination, available at <https://www.equalitylaw.eu/downloads/3631-reconciliation>.

¹⁰⁵ SCP, 'Zorg voor het huishouden en anderen' (Care for the household and for others), 21 December 2017. Available at <https://digitaal.scp.nl/eenweekinkaart1/zorg-voor-het-huishouden-en-andere/>.

¹⁰⁶ CBS (2019), 'Gebruik verlofregelingen vaders vrijwel onveranderd' (Use of leave by fathers almost unchanged), 2019. A short video with English subtitles is also available at the website <https://www.cbs.nl/nl-nl/nieuws/2019/13/gebruik-verlofregelingen-vaders-vrijwel-onveranderd>.

¹⁰⁷ SCP (2018), *Emancipatiemonitor 2018*, December 2018. Available at <https://digitaal.scp.nl/emancipatiemonitor2018/emancipatie-weer-in-de-lift/>.

Family Policies in European Organizations.¹⁰⁸ Van Breeschoten concludes, inter alia and not surprisingly, that for employees, and men in particular, to take up parental leave, it is essential that this leave is paid. This is more important than whether taking leave is seen as acceptable and normal within an organisation or not. Another conclusion is that men especially take parental leave if they have a manager who also does this and/or if they work within an organisation with relatively many women employees.

In this respect the position of self-employed women is interesting. Women sometimes choose to become self-employed so as to have more freedom in planning their working hours. They also experience this aspect as positive, but the downside is that sometimes little time remains for the women themselves, e.g. because during the day children or other family members ask for attention, whereas in the evening remaining work must be done.¹⁰⁹ In addition, in the Netherlands self-employed women are not entitled to care leave, parental leave or other forms of leave, apart from pregnancy leave. It is therefore hard for them to quit their work for a while. That might mean they lose work, lose clients, etc.

Some surveys focus especially on flexible working arrangements. However, the outcomes appear to be different. Most surveys are highly positive about flexible working. For example, research commissioned by Regus, a broker in workspaces, and carried out by the Development Economics bureau in July 2018 mentioned that, if flexible work continues to increase at the current pace in the Netherlands, the country will, after the US, be the 'champion' in flexible working by 2030.¹¹⁰ The survey also mentions that people with flexible work arrangements are twice as likely to be satisfied with their work as people who work in a more traditional environment. In another report of 2016, however, it is observed that 35 % of employees would like to have more flexible working arrangements, but do not feel free to ask for or to start working in this way because of the culture at work or social pressure. Only 20 % of employees experience support from their employer in this area.¹¹¹ There are, in short, different findings in this area, probably dependent on the type of questions asked and maybe also on the background of those commissioning the research.¹¹²

In regard to childcare, the most recent reports find that there is enough childcare available and that childcare centres are sufficiently flexible. In 2017, 882 000 children went to formal child care centres, the highest number ever.¹¹³ However the number of children of parents with a low income who go to child care is diminishing.¹¹⁴ The costs are one reason for this, but other reasons are traditional ideas about caring for children and about the mother as the ideal person to do so. These ideas appear to have become more popular (again), especially among people with little education and/or immigrant families.

5.1.2 Other issues

In the Netherlands a large number of women work part time. This is the case both for women with an employment agreement and for self-employed women. According to

¹⁰⁸ Van Breeschoten, L. (2019), *Combining a Career and Childcare, The Use and Usefulness of Work-Family Policies in European Organizations*, Utrecht 2019. Available at http://leonievanbreeschoten.nl/wp-content/uploads/2019/03/Combining-a-Career-and-Childcare_van-Breeschoten.pdf.

¹⁰⁹ Annink, A. and den Dunk, L. (2014) 'De positie van vrouwelijke zzp'ers in Nederland', *Atria*, § 4.5.

¹¹⁰ Regus, *Flexible Working, Solid Facts, a summary review of the socio-economic benefits of flexible working in 16 countries*, July 2018. Available at: http://vastgoedberichten.nl/wp-content/uploads/2018/10/181017-Regus_FlexibleWorkingSolidFacts_SummaryReport.pdf.

¹¹¹ Werk trends (2017), 'Anders werken: wat vindt werkend Nederland?', 2016. Available at <https://www.werktrends.nl/anders-werken-vindt-werkend-nederland/>.

¹¹² Regus, for example, offers 'solutions' for flexible working (workspaces and the like).

¹¹³ CBS (2018), 'Recordaantal kinderen met kinderopvangtoeslag' (A record number of children with childcare allowance), 3 July 2018. Available at <https://www.cbs.nl/nl-nl/nieuws/2018/27/recordaantal-kinderen-met-kinderopvangtoeslag>.

¹¹⁴ Roeters, A. and Bucx, F. (2016), *Beleidssignalement. Het gebruik van kinderopvang door ouders met lagere inkomens* (Use of childcare by parents with lower incomes). The Hague, SCP.

research published by McKinsey in September 2018, the Netherlands has a typical system that explains why, on the one hand, Dutch society has a solid base of gender equality, but on the other hand a rather low score on the number of hours worked by women, their income, the number of women in management positions and the number of female students in (technical) sciences. This system consists of three dimensions that appear to uphold and strengthen one another: 1) women predominantly work in sectors with many part-time jobs and relatively low salaries; 2) unequal distribution of work and care, with women carrying out most care tasks, and an infrastructure that puts women at a disadvantage in this respect; and 3) explicit ideas and social norms that influence the choices men and women make in regard to education, careers and care.¹¹⁵

According to McKinsey, progress can only be made if action is taken in all three areas and if all parties – the Government, social partners, employers, civil society organisations and academics – cooperate. The report gives several suggestions in this respect.

5.1.3 Overview of national acts on work-life balance issues

The Work and Care Act¹¹⁶ contains provisions on pregnancy leave, parental leave, care leave, adoption leave, and paternity leave.

The Working Time Act¹¹⁷ stipulates that employers must take into reasonable account the personal circumstances of employees, including their care responsibilities, when determining working hours and rest time.

5.1.4 Political and societal debate and pending legislative proposals

There has been some debate on paid birth leave (paternity leave) for the father or other partner of the mother. As of 1 January 2019, this leave has been extended from two days per week to one working week. The father/partner of the mother will also be given five weeks extra birth leave in the first six months after the birth of the child, paid at sickness pay level (70 %).

Debate on this paternity leave has not been very intense. Employers opposed the proposal because of the costs and women's organisations said it was too small a reform and the leave needs to be longer. The Netherlands was subsequently caught up by the European Directive on work-life balance, which obliges the Dutch Government to introduce ten days of paid birth leave. Here again employers worry about the costs. This might induce them to work even more with self-employed people rather than with employees. Self-employed people are not entitled to any form of birth leave.

5.2 Pregnancy and maternity protection

5.2.1 Definition in national law

National law does not define a pregnant worker or a worker who has recently given birth and/or a worker who is breastfeeding.

¹¹⁵ McKinsey & Company (2018), *Het potentieel pakken* (address the potential), September 2018. Available at <https://www.mckinsey.com/~media/McKinsey/Featured%20Insights/Europe/The%20power%20of%20parity%20Advancing%20gender%20equality%20in%20the%20Dutch%20labor%20market/MGI-Power-of-Parity-Nederland-September-2018-DUTCH.ashx>.

¹¹⁶ Work and Care Act (*Wet Arbeid en Zorg*), 2011 Stb. 2001, 567.

¹¹⁷ Working Time Act (*Arbeidstijdenwet*), 1995 Stb. 1995, 598.

5.2.2 Obligation to inform employer

A pregnant worker must inform her employer of her condition not later than three weeks before the day on which she wants to take up her pregnancy leave.¹¹⁸ No specific form is prescribed.

5.2.3 Case law on the definition of a pregnant worker, a worker who has recently given birth and/or a worker who is breastfeeding

As far as the author knows, there is no case law on the definition of a pregnant worker, a worker who has recently given birth and/or a worker who is breastfeeding. There are opinions of the NIHR about IVF, in which it is stated that an IVF-treatment must be equated to pregnancy because the aim of IVF is to bring about a pregnancy. Putting a woman at a disadvantage because she has or will have IVF treatment is therefore considered as direct discrimination because of pregnancy.¹¹⁹ In one of these opinions the NIHR referred to the *Dekker* case¹²⁰ in order to explain its decision that the fear of an employer that a pregnancy following IVF-treatment would lead to less effort on the part of an employee is directly discriminatory.

5.2.4 Implementation of protective measures (Article 4-6 Directive 92/85)

The protective measures mentioned in Articles 4-6 of Directive 92/85 are implemented in Dutch law. The Working Conditions Act (WCA)¹²¹ and governmental decrees on the basis of the WCA¹²² oblige employers to assess possible risks to the safety or health of pregnant or breastfeeding women and their children and to remove these risks. If the risks cannot be removed, the work must be adapted or the employee must be offered other work or, if that is not possible, she may be temporarily exempted from work while maintaining her salary. The prohibitions mentioned in Article 6 of Directive 92/85 are laid down in Articles 4:108 and 4:109 Working Conditions Decree. The Working Time Act (WTA) contains a regulation regarding night work for pregnant employees, in that pregnant women may ask to be exempted from doing night shifts, they have a right to periods of rest and a right to take leave for medical examinations.

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

5.2.5 Case law on issues addressed in Article 4 and 5 of Directive 92/85

There are a few judgments which relate to the protection of pregnant and/or breastfeeding women. The Arnhem Court of Appeal rendered a decision in 2003 about a conflict between employer and employee about breastfeeding. The employee worked as a nurse for an ambulance service. The service would stop one month after the end of the maternity leave of the employee and would not be in operation during this month. The employer therefore suggested that during this month the employee could work for another ambulance service where they would have a room for her, so she could breastfeed, or otherwise she could take leave days. When the employee did not agree, the leave days were not paid. The

¹¹⁸ Work and Care Act, 2001. See Article 3:3(1).

¹¹⁹ College voor de Rechten van de Mens, Opinion 2007-120, 3 July 2007, Opinion 1999-33, 1 January 1999 and Opinion 1994-2, 1 January 1994.

¹²⁰ CJEU, C-177/88, *Dekker vs Stichting Vormingscentrum voor Jongvolwassenen*, 8 November 1990.

¹²¹ Working Conditions Act (*Arbeidsomstandighedenwet*), 1998 Stb. 1999, 184.

¹²² In particular Article 1.42 of the Netherlands, Working Conditions Decree (*Arbeidsomstandighedenbesluit*), 1997 Stb. 1997, 60.

District Judge thought this was fair, because, if the employee chose both to work and raise children, she had to solve the accompanying problems herself and could not offload these onto the employer (!). Fortunately, the Appeal Court was more sensible and ruled that the employer should have arranged a proper place for the employee to breastfeed (express breast milk). The fact that he was unable to arrange such a place, because he had terminated his ambulance service and therefore did not have a workplace anymore, came at his own risk. The employer therefore had to pay wages to the employee for the days of unpaid leave taken.¹²³

In 2008 The Hague Appeal Court ruled in a case in which a female teacher had resigned from her job because she saw no possibility of combining care for her child – who had to be breastfed over a long period of time because of a food allergy – with her work, and because the employer insisted on clarity about the situation at short notice. One year later she resumed work, but she was graded on a lower salary scale than before. The District Court and the Appeal Court ruled that this was discrimination, because the woman had had to resign because of reasons connected to sex/maternity/breastfeeding and therefore she had to be graded on the same salary scale as before.¹²⁴ The Appeal Court referred to the CJEU's decision in *Brown*.¹²⁵ In that case it was decided that a female employee who could not work during her pregnancy because of pregnancy-related illness, could not be compared to a male employee who was unable to work for a similar period for other health reasons. The Hague Court pointed out that in *Brown* it was thus decided that the application of a similar criterion to men and women who find themselves in different, non-comparable situations constitutes discrimination.

There are also several opinions by the equality body in cases in which conflicts about expressing breast milk/breastfeeding at work led to termination of employment relationships. The NIHR concluded that the employers had acted in a discriminatory way.¹²⁶

Case law on working conditions during pregnancy and maternity is rare. There are a few opinions by the NIHR, in which the conclusion was that employers had discriminated on the grounds of pregnancy by not, or not timely or not sufficiently, adapting the work of pregnant employees.¹²⁷

5.2.6 Prohibition of night work

The Dutch Working Time Act (WTA) contains a regulation regarding night work for pregnant employees, to the effect that pregnant women may ask to be exempted from doing night shifts, have a right to periods of rest and can take leave for medical examinations. However, if an employer can prove that it cannot be required that it exempt a pregnant woman from doing night shifts, the employer is not obliged to do so. An exception is possible.

In the author's view, this is not an entirely correct implementation of Article 7 of the Directive, because there is no absolute prohibition on night work for pregnant women. However, in practice this will not create problems because, if it becomes clear that night work is detrimental to the health of a pregnant woman and/or her unborn child, the employer will not be able to prove that an exception must be made. The interests of the woman then have more weight. There is no case law in this respect and no debate whatsoever, so there does not appear to be a problem.

¹²³ Arnhem Court of Appeal, *JAR* 2003/198, 24 June 2003.

¹²⁴ The Hague Court of Appeal, *JAR* 2008/90, 22 February 2008.

¹²⁵ CJEU, C-394/96, *Brown vs Rentokil Ltd.*, 30 June 1998.

¹²⁶ College voor de Rechten van de Mens, Opinion 2015-92, 10 August 2015, and Opinion 2016-122, 15 November 2016.

¹²⁷ College voor de Rechten van de Mens, Opinion 2015-14, 18 February 2015.

5.2.7 Case law on the prohibition of night work

There is no case law by courts on the prohibition of night work for pregnant women or women who have recently given birth. The NIHR published a few opinions in this respect. In one opinion the NIHR ruled that an employer had discriminated against a pregnant woman by withdrawing an offer for a nursing job, inter alia on the ground that because of her pregnancy she would not be able to work night shifts.¹²⁸ No reference was made to EU law.

5.2.8 Prohibition of dismissal

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

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

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

5.2.9 Redundancy and payment during maternity leave

When an employee is made redundant during her maternity leave the payment for maternity continues until the end of the maternity leave.

5.2.10 Employer's obligation to substantiate a dismissal

An employer is obliged to indicate in writing substantiated grounds for a dismissal. This holds true for all grounds of dismissal, as an employer can only dismiss on the basis of the specific grounds mentioned in the law (Article 7:669 of the Civil Code). The only exception is the termination of a fixed-term contract by law. As this contract ends automatically, the employer is not obliged to provide a reason.

5.2.11 Case law on the protection against dismissal

There is no (additional) national case law in relation to the protection against dismissal of pregnant workers, workers who have recently given birth and/or workers who are breastfeeding that has not already been mentioned in Section 5.2. It is important to note here that the main problem in the Netherlands is not dismissal of women because of pregnancy and/or early maternity, but instead the non-hiring of women or not the non-extension of women's temporary contracts. In such cases the rules on dismissal do not apply, either because an employment agreement does not yet exist or it expires automatically without scrutiny by a court or another body.

¹²⁸ College voor de Rechten van de Mens, Opinion 1996-84, 1 January 1996.

5.3 Maternity leave

5.3.1 Length

Maternity leave lasts for at least 16 weeks. It may start on any date between six and four weeks before the expected date of confinement and is at least ten weeks after the birth. The leave can be longer if six weeks were taken before the expected date, but the child is born after the expected date. If the child has to remain in hospital for longer than eight days after the birth, the maternity leave may be extended. The maximum extension is ten weeks.¹²⁹

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

5.3.2 Obligatory maternity leave

There is an obligatory period of maternity leave of four weeks before the expected date of confinement and ten weeks after the birth. See Article 3:1(3) of the Work and Care Act.

5.3.3 Legal protection of employment rights (Article 5, 6 and 7 Directive 92/85)

There is no legal provision ensuring that the employment rights relating to the employment contract are protected in the cases referred to in Articles 5, 6 and 7 of Directive 92/85. However, the basic assumption is that this is the case and the general prohibition on discrimination on the ground of sex applies.

5.3.4 Legal protection of rights ensuing from the employment contract

There is no legal provision that ensures the employment rights relating to the employment contract (including pay or an adequate allowance) during the pregnancy and maternity leave are protected.

5.3.5 Level of pay or allowance

Pay during maternity leave is 100 % of the daily wage for social security purposes (Article 3:13 of the Work and Care Act). The daily wage is the same as the salary paid by the employer, but it has a maximum of EUR 214.28 per day (as of 1 January 2019). This maximum is revised twice a year. Women who earn more than EUR 4 660.59 gross per month therefore do not receive 100 % of their salary. The statutory pay during sick leave is 70 % of the salary, although, of course, employers may pay more than this.

5.3.6 Additional statutory maternity benefits

Sometimes employers supplement statutory maternity benefits, but there is no overview thereof. What happens regularly is that employers continue to pay 100 % of the salary during pregnancy leave, including when the employee involved has a higher salary than the maximum daily wage (see 5.3.5 above). In such cases the employer pays the difference between the maximum payment on the basis of social security and the salary of the employee.

5.3.7 Conditions for eligibility (Article 11(4) of Directive 92/85)

There are no conditions for eligibility for benefits applicable in Dutch legislation.

¹²⁹ Work and Care Act, 2001. See Article 3:1(5).

5.3.8 Right to return to the same or an equivalent job (Article 15 of Directive 2006/54)

There is no provision in Dutch law that guarantees the right of a woman to return after maternity leave to her job or to an equivalent job, on terms and conditions that are no less favourable to her, and to benefit from any improvement in working conditions to which she would have been entitled during her absence. The European Commission instituted infringement proceedings against the Netherlands in this respect because of an incorrect transposition of the Directive, but the CJEU rejected the appeal by the Commission on procedural grounds.¹³⁰ In practice this is not a major problem, because it is assumed that a woman has the right to return to her job or an equivalent job after maternity leave on the basis of the general prohibition on discrimination on the basis of sex.

5.3.9 Legal right to share maternity leave

National law does not provide a legal right to share (part of) maternity leave. The leave can only be transferred to the partner of the mother in case of her death during the birth or during maternity leave (Article 3:1a Work and Care Act).

5.3.10 Case law

There are some judgments that relate to maternity leave and especially to dismissal during maternity leave. The Rotterdam District Court ruled that an employer acted in serious breach of the employment agreement by expressing strong criticism of an employee's performance in a meeting shortly after she had given birth. The employer therefore had to pay higher severance pay than he would otherwise have had to pay.¹³¹

In other cases, courts ruled that maternity leave does not stand in the way of dismissal for reasons other than the leave, but an employment agreement cannot end before a period of six weeks after the end of the maternity leave has passed.¹³²

In addition, there are several judgments about employment rights during maternity leave. A debate is still going on in the Netherlands as to what extent employees in primary and secondary education are entitled to compensation for pregnancy and maternity leave that coincides with (school) holidays. In the past the Dutch Supreme Court ruled in a rather contrived way that these employees have no right to compensation for those days that coincide with their maternity leave because the legislation does not give them a right to a number of days of annual leave but instead stipulates that they take their annual leave during the school holidays. However, this is different in the situation where the employees must nevertheless spend time on work during the school holidays. In that situation it is possible that their free time is less than the free time of colleagues who do not go on maternity leave and that constitutes discrimination.¹³³ This issue is rather complicated, but it may result in a claim for compensation by female teachers who have been on maternity leave.¹³⁴

In a judgment of 31 December 2019¹³⁵ the District Court Mid-Netherlands deviated from the judgment of the Dutch Supreme Court mentioned above by ruling that an employee, who had taken up maternity leave, was entitled to compensation for that part of the leave that coincided with school holidays. The Court took into consideration that the applicable collective agreement was different from the collective agreement that applied in the case before the Dutch Supreme Court. The Court referred to the *Gómez* judgment by the CJEU, in which it was stated that an employee has the right to take up her holiday in another

¹³⁰ CJEU, 22 October 2014, C-252/13, ECLI:EU:C:2014:2312.

¹³¹ District Court of Rotterdam, 26 April 2018, ECLI:NL:RBROT:2018:230.

¹³² Amsterdam Appeal Court, 9 May 2017, ECLI:NL:GHAMS:2017:166.

¹³³ Supreme Court, JAR 2002/207, 9 August 2002.

¹³⁴ As was the case in the decision by the District Court of East Brabant, JAR 2019/28, 13 December 2018.

¹³⁵ District Court Mid-Netherlands, 31 December 2019, ECLI:NL:RBMNE:2019:6288.

period than during her maternity leave, also if the maternity leave coincides with the collective holiday that applies to the entire personnel.¹³⁶

The latter judgment is the only one in which reference was made to EU-law.

5.4 Adoption leave

5.4.1 Existence of adoption leave in national law

Dutch law provides for adoption leave in Article 3:2 of the Work and Care Act.

The leave is at most 6 consecutive weeks and may be taken during a period of 26 weeks starting 4 weeks before the actual adoption. The leave is not subject to specific conditions. The only restriction is that, if two or more children are adopted simultaneously, the leave will be granted only in respect of one of these children. The leave is paid leave. The payment is the same as in the case of maternity leave, thus 100 % of the daily wage for social security purposes, with a maximum of EUR 214.28 per day.

5.4.2 Protection against dismissal (Article 16 of Directive 2006/54)

Dutch law provides protection against dismissal.

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

5.4.3 Case law

There is very little case law on adoption leave. There has been a case before the Central Appeals Tribunal¹³⁷ about the question of whether a woman was entitled to adoption leave because she adopted the biological child of the woman she was married to or had a registered civil partnership with. The Court ruled that this is not the case. The situation of the woman in question is comparable to that of a father and therefore the woman could apply for birth leave, but not for adoption leave.¹³⁸

5.5 Parental leave

5.5.1 Implementation of Directive 2010/18

Directive 2010/18 has been explicitly implemented in the Netherlands.

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

5.5.2 Applicability to public and private sectors (Clause 1 of Directive 2010/18)

The Dutch legislation is applicable to both the public and the private sectors.

5.5.3 Scope of the transposing legislation

The scope of the Dutch legislation includes all employees.

¹³⁶ CJEU, 18 March 2004, C-342/01, JAR 2004/86.

¹³⁷ The highest court in administrative cases – Centrale Raad van Beroep.

¹³⁸ Central Appeals Tribunal, 27 August 2012, ECLI:NL:CRVB:2012:BX5312.

5.5.4 Length of parental leave

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

5.5.5 Age limits

Workers are entitled to parental leave until the child is eight years of age.

5.5.6 Individual nature of the right to parental leave

The right is individual for each of the parents.

5.5.7 Transferability of the right to parental leave

The leave cannot be transferred to the other parent. There is no specific provision in this respect. The Work and Care Act simply states in Article 6:1 that each employee who has a family relationship with a child is entitled to parental leave.

5.5.8 Form of parental leave

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

5.5.9 Work and/or length of service requirements (Clause 3(b) of Directive 2010/18)

There are no work and/or length of service requirements in order to benefit from parental leave. Until 1 January 2015 an employee had to have been employed for one year before requesting parental leave, but this requirement has now been abolished.

5.5.10 Notice period

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

5.5.11 Postponement of parental leave (Clause 3(c) of Directive 2010/18)

There is no regulation for postponement of parental leave. The leave is granted or it is not.

If an employee wants to digress from the standard option, i.e. taking parental leave for half of the working hours per week over a period of 26 weeks, the employer may refuse such a request for compelling business or organisational reasons.

5.5.12 Special arrangements for small firms (Clause 3(d) of Directive 2010/18)

There are no special arrangements for small firms.

5.5.13 Special rules and exceptional conditions for parents of children with a disability or long-term illness (Clause 3(3) Directive 2010/18)

There are no special rules/exceptional conditions for access and modalities of application of parental leave to allow for the needs of parents of children with a disability or a long-term illness. Parents can apply for unpaid long-term care leave of six weeks within a period of a year in order to care for child with an illness, but this provision is not intended for provision of care over several years, but rather for a situation in which temporary care is needed, e.g. because a family member is dying or has a temporary serious illness (Articles 5:9-5:16 Work and Care Act).

5.5.14 Measures addressing the specific needs of adoptive parents (Clause 4 of Directive 2010/18)

The Government has not taken any measures to address the specific needs of adoptive parents in addition to the measures described in Paragraph 5.4 on adoption leave. Adoptive parents are entitled to parental leave on the same footing as other parents.

5.5.15 Provisions protecting workers against less favourable treatment or dismissal (Clause 5(4) of Directive 2010/18)

Dismissing an employee because he/she applies for or takes parental leave is prohibited, and any dismissal for that reason may be declared null and void on the basis of Article 7:670(7) of the Civil Code. Dismissal of an employee during parental leave for other reasons not connected to the leave is not prohibited.

In addition, treating an employee less favourably because the employee has taken parental leave or has assisted someone else in taking parental leave is prohibited (Article 6:1a of the Work and Care Act).

5.5.16 Right to return to the same or an equivalent job (Clause 5(1) of Directive 2010/18)

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

5.5.17 Maintenance of rights acquired or in the process of being acquired by the worker (Clause 5(2) of Directive 2010/18)

Rights acquired or in the process of being acquired by a worker on the date on which parental leave starts are maintained as they stand until the end of the parental leave. The status of the employment contract or relationship remains unchanged during the leave, thus rights acquired or in the process of being acquired are maintained.

5.5.18 Status of the employment contract or relationship during parental leave

The status of the employment contract or relationship remains unchanged during parental leave.

5.5.19 Continuity of entitlement to social security benefits

There is continuity of the entitlements to social security cover under the different schemes, in particular health care, during the period of parental leave.

5.5.20 Remuneration

Parental leave is normally not remunerated by the employer. It is possible, however, that a collective agreement or a regulation in the public sector obliges the employer to pay (part of) the salary during parental leave. In the private sector this is rare.

5.5.21 Social security allowance

The social security system in the Netherlands does not provide for an allowance during parental leave. This will partly change as of 1 July 2020 when fathers, same-sex partners and comparable partners of the mother will acquire the right to a benefit of 70 % of the daily salary during five weeks of birth leave/parental leave, with a cap of 70 % of the maximum daily wage as defined in social security legislation. And of course, the Government will have to introduce two months of paid parental leave in line with the recently adopted EU work-life balance Directive.¹³⁹

5.5.22 More favourable provisions (Clause 8 of Directive 2010/18)

Dutch law does not require a period of service before parental leave can be requested. This can be seen as a more favourable provision.

In addition, Dutch legislation provides for many variations in the way leave is taken – part time, full time or in separate segments. This might also be considered a more favourable provision.

Otherwise, the Dutch provisions are in conformity with the Directive but are not more favourable.

5.5.23 Case law

There has been one case on unfavourable treatment in relation to parental leave. This case was decided by the Central Appeals Tribunal on 23 November 2017.¹⁴⁰ The court ruled that the police, in its capacity of employer, had breached the law by terminating the temporary assignment of a police officer because he had taken parental leave. The police officer had been placed in a higher position for the duration of one year. One month before the assignment was due to start, the police officer was granted parental leave for two days a week. He continued to work on the other three days. Three months after the start of the assignment, the police organisation terminated the assignment because, in its view, his parental leave caused problems in the work process. The police officer contested this point of view in court, but his claim was dismissed by the court of first instance. On appeal, the Central Appeals Tribunal ruled that the termination of the temporary assignment constituted less favourable treatment. In the first place the termination damaged the career of the police officer by limiting the period during which he could gain experience in a higher position, secondly he suffered financial damage because his temporary allowance also stopped, and thirdly it was noted in his file that his attitude had not been constructive. The decision by the police to terminate the temporary assignment was therefore deemed to be invalid.

¹³⁹ Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019 on work-life balance for parents and carers and repealing Council Directive 2010/18/EU, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELLAR:4119596d-a475-11e9-9d01-01aa75ed71a1>.

¹⁴⁰ Central Appeals Tribunal, 23 November 2017, ECLI:NL:CRVB:2017:4067.

The court did not refer to case law by the CJEU, but it did refer explicitly to the prohibition of unfavourable treatment in Clause 5 of Directive 2010/18/EU.

There are also a few cases on dismissal related to conflicts arising from the taking up of parental leave. In one of these cases the District Court of Amsterdam terminated the employment agreement of an employee because of his conduct in respect of parental leave. The employee had requested parental leave for one day per week. The employer, a secondary school, agreed to this. Subsequently the employee asked to take the leave on Fridays. The school said that this was not possible, but that Mondays or Wednesdays would be fine. The employee did not agree with this and did not come to work on three following Fridays. The court ruled that this conduct was unreasonable, as the school had made it sufficiently clear why the employee could not take leave on Fridays (because of interests of the pupils of the school), the employee had not made clear why Mondays or Wednesdays would not be possible for him and he had not asked for a court ruling on the case, but had instead escalated the situation.¹⁴¹

In another case the District Court of Amsterdam also terminated the employment agreement because of a serious conflict between employer and employee about parental leave. In this case the court ruled that the employer was to blame for the conflict, because he had wrongly taken the view that a real estate broker could not fulfil his/her position part time and therefore could not take parental leave. The employee received a higher severance payment than she would otherwise have had.¹⁴² She was not re-instated, because the relationship between the parties had deteriorated to such an extent that cooperation was no longer possible.

No reference was made to CJEU cases in the cases on dismissal.

The basic assumption is that the taking of parental leave may not lead to unfavourable treatment or to dismissal, but sometimes it is possible that parties have ended up in such a serious disagreement that cooperation is no longer possible, and dismissal is inevitable. The employee will then receive compensation unless he/she is to blame for the conflict.

5.6 Paternity leave

5.6.1 Existence of paternity leave in national law

Dutch legislation provides for paternity leave. Fathers (and other partners of the mother) have a right to attend the birth of their child (Article 4:1(2)(a) Work and Care Act) and the right to one week of paid birth leave to be taken during the four weeks after the birth of the child (Article 4:2 Work and Care Act). As of 1 July 2020, the father/partner of the mother will also be entitled to a maximum of five weeks' leave to be taken during the first six months after the birth of the child. During these weeks the father/partner is entitled to an allowance, paid from collective funds, of 70 % of the (capped) last earned salary. Of course, the Netherlands will also have to introduce ten days of paid paternity leave, in order to implement the Work-Life Balance Directive.

5.6.2 Protection against unfavourable treatment and/or dismissal (Article 16 of Directive 2006/54)

Dutch law does not provide for (explicit) protection against unfavourable treatment of workers who take paternity leave, nor does it specify that they may benefit from improvements in working conditions that took place during their absence.

¹⁴¹ District Court of Amsterdam, *JAR* 2012/138, 30 November 2011.

¹⁴² District Court of Amsterdam, *JAR* 2009/43, 18 December 2008.

Dutch law does provide for protection against dismissal. Article 7:670(7) of the Civil Code states that an employer may not terminate an employment agreement on the ground that an employee applies for paternity leave.

5.6.3 Case law

There is no case law in relation to unfavourable treatment and/or dismissal related to paternity leave.

5.7 Time off for *force majeure*

5.7.1 Time off for *force majeure*

Dutch law entitles workers to time off from work on grounds of *force majeure* for urgent family reasons in case of sickness or accident. This leave is regulated in art. 4:1 of the Work and Care Act. Article 4:1(1) gives employees the right to a short paid leave in the case of unforeseen circumstances that make an immediate interruption from work necessary, very special personal circumstances, the fulfilment of a duty imposed by the government and the exercise of the right to vote. Article 4:1(2) adds that very special personal circumstances include in any case (a) the delivery of a child by the partner of the employee, (b) the death and burial of a household member or a close relative, (c) an urgent or unforeseen visit to the doctor or hospital or a visit to the doctor or hospital that could not be scheduled outside working hours by the employee himself or in order to accompany a sick relative, family member or other close contact if the employee is the best person to take care of him/her, and (d) providing necessary care on the first day of illness to the persons mentioned under (c).

No other criteria of eligibility and remuneration apply nor has the entitlement to time off for *force majeure* been limited to a certain amount of time. Article 4:1(1) stipulates that the leave is granted for a short time and that the length of this time must be established in a reasonable way.

5.7.2 Case law

There is no case law in the Netherlands in relation to unfavourable treatment and/or dismissal related to time off for *force majeure*.

5.8 Care leave

5.8.1 Existence of care (or carers') leave in national law

Dutch law distinguishes between short-term care leave and long-term leave. Short-term care leave is regulated in Articles 5:1-5:8 of the Work and Care Act. This leave can be taken in order to care for a sick relative, family member or other close contact if the employee is the best person to take care of him/her. The leave duration is of a maximum of two times the working week per year. The employer can refuse the leave in the case of serious business reasons that outweigh the interests of the employee in taking the leave. During the leave the employee is entitled to at least 70 % of the normal salary.

Long-term leave is regulated by Articles 5:9-5:16. The leave can be taken in order to care for a family or household member or other close contact with a life-threatening illness, or for a seriously ill person who is dependent upon the employee. The leave may extend to six weeks per year. This leave can also be refused by the employer in the case of serious business reasons that outweigh the interests of the employee in taking the leave. The leave is unpaid.

5.8.2 Case law

There is a judgment that dates back to 2005 on the question of whether it was necessary for an employee to take leave in order to care for his partner who had had an operation to remove her uterus, and a judgment from 2008 on the same question, but in relation to an abdominoplasty (tummy-tuck). In the first case the leave was found to be necessary and in the second case it was not.¹⁴³ The different outcomes are due in particular to the different medical situations. In the first case the court observed that there was a medical reason for the operation, whereas in the second case there was no medical necessity. This does not have to stand in the way of the right to care leave, but in the second case the request for the leave was also made at very short notice and according to the judge it was not clear that the care could not be provided by someone else. The difference in outcomes is thus not related to gender. There was no reference case-law of the CJEU.

5.9 Leave in relation to surrogacy

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

5.10 Flexible working time arrangements

5.10.1 Right to reduce or extend working time

- Dutch law provides workers with a legal right to reduce or extend working time on request. This right can be found in Article 2 of the Act on Flexible Working.
- All employees are entitled to this right; is not limited to specific groups.
- Employees must have been employed for at least 26 weeks before they file the request, apart from cases of force majeure (when no qualifying period applies).
- The right can be exercised for any purpose. The employee is not obliged to specify the purpose.
- There is no time limit for requesting the right, but the request must be made two months before the envisaged starting date, apart from force majeure.
- The right is not tied to a specific trigger.
- The size of the employer is relevant, as the Act on Flexible Working does not apply to employers with fewer than 10 employees. However, these employers must create their own arrangements for adjustment of working hours. In the (sparse) case law on this subject, it has been determined that if a small employer has not created its own regulation, criteria similar to those for larger companies apply.¹⁴⁴
- Employers are obliged to comply with a request unless compelling business or organisational reasons justify its refusal.
- Employers can refuse a request due to compelling business or organisational reasons. In the case of an extension of working hours, the request may also be refused for serious financial reasons, e.g. if there is not enough work or if the personnel budget does not allow for the extension.
- There is no legal right to return to prior working arrangements. If working hours are reduced, the employment agreement has been changed and no right to return to

¹⁴³ District Court The Hague, *JAR* 2005/86, 24 February 2005 and District Court Haarlem, *JAR* 2008/211, 9 July 2008.

¹⁴⁴ District Court Eindhoven, *JAR* 2002/88, 5 March 2002.

previous arrangements exists. The same applies to an extension of hours, although the employee can file a new request for the reduction of hours.

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

5.10.2 Right to adjust working time patterns

Dutch law provides workers with a legal right to request adjustment of working time patterns. There is no right as such to adjustment, but a right to ask for adjustment exists.

- Article 2 of the Act on Flexible Working gives employees the right to ask for adjustment.
- All employees are entitled to this right; is not limited to specific groups.
- Employees must have been employed for at least 26 weeks before they file a request for adjustment of working time, apart from cases of force majeure (when no qualifying period applies).
- The right can be exercised for any purpose. The employee is not obliged to specify the purpose.
- There is no time limit for requesting the right, but the request must be made two months before the envisaged starting date, apart from cases of force majeure.
- The right is not tied to a specific trigger.
- The size of the employer is relevant, as the Act on Flexible Working does not apply to employers with fewer than 10 employees.
- Employers are obliged to comply with a request unless it is reasonable for them to refuse after having balanced the interests of both parties.
- Employers can refuse a request for a specific pattern of working hours if it is reasonable for them to do so after having balanced the interests of both parties.
- There is no legal right to return to prior working patterns.
- There are no measures in place specifically to encourage men to make use of the right to request adjustment of working time patterns.

5.10.3 Right to work from home or remotely

Dutch law provides workers with a legal right to work from home or remotely on request. There is no right as such to work from home or remotely, but a right to request this.

- This right is regulated in Article 2 of the Act on Flexible Working.
- All employees are entitled to this right; is not limited to specific groups.
- Employees must have been employed for at least 26 weeks before they file the request, apart from cases of force majeure (when no qualifying period applies).
- The right can be exercised for any purpose. The employee is not obliged to specify the purpose.
- There is no time limit for requesting the right, but the request must be made two months before the envisaged starting date, apart from cases of force majeure.
- The right is not tied to a specific trigger.
- The size of the employer is relevant, as the Act on Flexible Working does not apply to employers with fewer than 10 employees.
- The employer is not obliged to comply with the request. It must give serious consideration to the request and must consult the employee when it refuses the request.
- Employers can refuse a request if they think it is reasonable to do so.
- There is no legal right to return to a prior workplace.
- There are no measures in place specifically to encourage men to make use of the right to request working from home or remotely.

5.10.4 Other legal rights to flexible working arrangements

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

In addition to this, a growing number of collective agreements include arrangements for determining working time hours and patterns over a period of a year instead of a week. This means that over the course of the year an employee may work for less time in a certain period and more in another period. In general, these working patterns must be agreed between the employee and his/her direct manager. Employees can also sometimes work extra hours which may then offset non-working hours taken at a later date. However, these hours must usually be taken within the year in which they were acquired.

Finally, there are some arrangements for older employees, e.g. working fewer hours from a certain age onwards. However, these arrangements are sometimes criticised from the perspective of age discrimination.

5.10.5 Case law

There are quite a few judgments on requests for flexible working arrangements. Most of these judgments concern requests by employees for reduced working hours, but there are also several judgments on requests for extended working hours, for adjusted working patterns or for working from home.

Case law on requests for a reduction of working hours usually focuses on the question of whether the employer has compelling business or organisational reasons for refusing such a request. As such reasons do *not* usually specify that an employee must always be available for the client, that a manager must be available for the team or for a transfer of work, that an employee has specific knowledge and that granting the request will set a precedent. For an employee, it is helpful if he/she has previously had leave, for example paternal leave, which has gone smoothly. Occasionally, requests for reduction of working hours have been denied, for example where an employee wanted to work only two days per week, which is not enough to keep her expertise up to date.¹⁴⁵

Denials of requests for extension of working hours are more easily accepted by the courts. In most cases, the reason is that there are no hours available. However, sometimes other arguments are considered, e.g. that granting extra hours to an employee would mean there would be no more hours for volunteers in a situation where volunteers are indispensable for the work of a museum.¹⁴⁶

Requests for a different working pattern may be refused if the interests of the employer reasonably prevail over the interests of the employee. The employer does not need to have compelling reasons, as in the case of requests for adaptation of the working hours. An employer may, for instance, ask of a manager that she works one evening per week if that is necessary for the work, even though she wants to stay at home to take care of her five children.¹⁴⁷ The interests of residents of a care home may require that the starting time of an evening shift is set at an earlier hour than before, even though this conflicts with the care tasks of an employee at home.¹⁴⁸

¹⁴⁵ See for an overview: Bevers, E. (2015), 'De wet modernisering regelingen voor verlof en arbeidstijden: noodzakelijk en nuttig?' ('The Act on modernisation of regulations for leave and working hours: necessary and useful?'), *TAP* 2015/60.

¹⁴⁶ District Court of Amsterdam, 1 December 2017, ECLI:NL:RBAMS:2017:771.

¹⁴⁷ District Court North-Holland, *JAR* 2017/101, 10 February 2017.

¹⁴⁸ District Court Utrecht, 27 April 2011, ECLI:NL:RBUTR:2011:BQ3288.

A request to work remotely or work from home may be refused by an employer after careful consideration. Nevertheless, a court will weigh the interests of both parties. The basis thereof is the obligation for an employer to act as a good employer. This general obligation means that the employer must take the interests of the employee into account when making a decision. The decision by an employer to ask an employee to work at the office on Fridays for a while instead of at home as he used to do, because of criticism of his performance, was deemed reasonable by the Appeal Court.¹⁴⁹

CJEU case law is rarely mentioned in such cases. They are based on national law.

5.11 Evaluation of implementation

In the author's view Dutch law has in general implemented EU law in a satisfactory way. Almost all rules on leaves that are prescribed by EU law have been implemented in Dutch legislation. A few provisions are missing and should, in the author's view, be added. These are:

- a provision that guarantees the right of a woman to return after maternity leave to her job or to an equivalent job, on terms and conditions that are no less favourable to her, and to benefit from any improvement in working conditions to which she would have been entitled during her absence.
- a provision that guarantees the rights of workers who take adoption leave to return to their jobs after the leave has ended.
- a provision that guarantees the right to return to the same or a comparable job after having taken parental leave.
- a provision that provides for protection against unfavourable treatment of workers who take paternity leave nor are the rights at the end of the leave specified.

However, in practice, the lack of these provisions does not create problems, because, if a case arises in respect of these, one can fall back on the general prohibition of discrimination because of pregnancy/maternity, etc., or on the good qualities of employers. This is a general obligation for employers to take the interests of their employees into account when making a decision.

On paper there are thus no serious problems. However, in practice the rules on paper do not always provide protection. A serious problem exists in particular in regard to protection against non-hiring or termination of an employment relationship, particularly a temporary one, in cases of pregnancy. This has to do with proof/evidence and with a lack of deterrent sanctions. The large number of flexible contracts and the amount of (false) self-employment in the Netherlands add to the problem. If employers avoid references to pregnancy, they can terminate such contracts very easily, thus leaving employees without protection. This also makes it more difficult for workers to assert their rights to a fair work-life balance.

5.12 Remaining issues

There are no remaining issues regarding the law on work-life balance that have not already been discussed.

¹⁴⁹ Amsterdam Appeal Court, 30 January 2018, ECLI:NL:GHAMS:2018:3017.

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

6.1 General (legal) context

6.1.1 Surveys and reports on the practical difficulties linked to occupational and/or statutory social security issues

Over the last five years, there have been no surveys and/or reports about gender issues in social security. There are debates on the fact that self-employed, including false self-employed, persons are not covered by social security, but this concerns both men and women. A gender perspective may arise in respect of domestic workers who work four days or less per week in private households. These workers are, by law, exempted from the social security system. They are predominantly female. This reduced protection has been criticised by, inter alia, the European Commission and the Committee on the Elimination of Discrimination against Women (CEDAW), but so far, the Dutch Government has not taken any concrete steps to improve the situation.¹⁵⁰

6.1.2 Other issues related to gender equality and social security

There is much debate on the position of self-employed people with no employees. This is a group that has grown substantially over the years. Employers like to engage them, because they are cheaper than employees and are not entitled to protection against dismissal or against sickness etc. The workers themselves have a favourable fiscal position, which means they receive on a net basis more than employees who do comparable work. Some of them work in small jobs and/or have irregular work, so their income is quite low. The increase in the numbers of these workers – who do not pay social security contributions – is eroding the social system and there is concern that some of them are insufficiently protected against disability and old age risks.

In June 2019 the social partners and the government reached an agreement in principle on pensions and on the introduction of an obligatory disability insurance for self-employed people with no employees. In February 2020 the social partners entered into a more detailed agreement.¹⁵¹ It is not clear yet when the insurance will enter into force. In addition, the fiscal benefits of self-employed persons will be gradually reduced.

These discussions are not conducted from a gender equality perspective, but of course they will affect women as well, since approximately 40 % of self-employed persons with no employees are women. The income of self-employed women is considerably lower than that of men. In 2015, 55 % of self-employed women earned less than EUR 25 000 per year compared to 18 % of the men. The reasons for this are mainly that self-employed women work more often in sectors in which benefits are lower, especially health care and other forms of care, and that women work fewer hours. The obligation to take out insurance and the reduction of fiscal benefits will therefore affect these women considerably. However, it is possible, and this is also the political aim, that more self-employed persons will be employed on the basis of an employment agreement.

Factual information about the number of self-employed persons and their income can be found on the website of the Central Bureau for Statistics (CBS).¹⁵²

¹⁵⁰ See about this group: Cremers, E. and Bijleveld, L. W. (2010), *Een baan als alle andere?! De rechtspositie van deeltijd huishoudelijk personeel* (A job like all others?! The legal position of part-time household workers.), Leiden, and the addendum by Bijleveld, L.W., Leiden, 2015.

¹⁵¹ Wolzak, M. (2020), 'Akkoord over verzekering arbeidsongeschiktheid van zzp'ers' (Agreement on insurance for self-employed persons), *Financieel Dagblad*, 26 February 2020.

¹⁵² CBS, 'Wie zijn de zzp'ers?' (Who are the self-employed with no employees?). Available at: <https://www.cbs.nl/nl-nl/faq/zzp/wie-zijn-de-zzp-ers->. More information available at <https://opendata.cbs.nl/statline/#/CBS/nl/dataset/82309NED/table?ts=1536920549163>.

6.1.3 Political and societal debate and pending legislative proposals

There is debate on the position of self-employed persons. There is no serious debate on the position of domestic staff. There are no pending legislative proposals.

6.2 Direct and indirect discrimination

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

There is no case law on occupational social security schemes. These schemes are not common in the Netherlands. Social security is offered mainly through statutory schemes. There are a few regulations which offer extra social security benefits to employees, for example a supplement to their statutory benefit, but there are not many of them and there is no debate or case law in this respect.

Occupational pensions are more common, but there is not much case law which is relevant for this report. Case law usually concerns explanation of provisions of a pension scheme or the responsibilities of a pension fund in a more general sense, unrelated to gender.

One case which does relate to gender was decided by the Supreme Court on 18 December 2015.¹⁵³ The case concerned the reduction of pension for widows/widowers who are more than 10 years younger than their deceased spouse. This is to the disadvantage of women, as substantially more women than men are more than 10 years younger than their spouse. The Court of Appeal ruled that the discrimination was justified by the fact that it was the outcome of negotiations by social partners and by the need for solidarity between the participants in the scheme, as the pension of younger widows is rather costly because of their age. The Supreme Court ruled that this decision was too general. The freedom of bargaining of the social partners could not in itself justify discrimination and, for the rest, the Court of Appeal should have examined more closely what the financial effect of abolition of the pension reduction would be and what this would mean for the resources of the fund and the benefits of the other participants.

6.3 Personal scope

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

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

¹⁵³ Supreme Court, 18 December 2015, ECLI:NL:HR:2015:3628.

who are assigned to do community work while receiving a social security or welfare benefit and persons who participate in in-house training (an internship or traineeship).

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

6.4 Material scope

Dutch law does not specify the material scope in the way Article 7 of the Directive does. The specific areas – sickness, invalidity, old age, accidents and diseases, unemployment – are not mentioned separately in Dutch law (apart from pension schemes, which are mentioned in Articles 12a-12f ETA). Dutch law instead prohibits discrimination in a more general sense, namely in all situations where a ‘condition of employment’ or, as referred to previously, an ‘employee benefit’, is concerned. All areas mentioned in Article 7(1) of the Directive can be considered to be conditions of employment as intended in Dutch law. Dutch law is thus less specific, but the scope is the same. One example is an arrangement to supplement the statutory invalidity benefit.¹⁵⁴

6.5 Exclusions

Dutch law has not implemented the exclusions insofar as occupational social security schemes can be considered to be a ‘condition of employment’ or an employee benefit. In that case, the general prohibition of discrimination under Article 7:646 of the Civil Code, Article 1b or 1c ETA and/or Article 5(1)(e) GETA applies.

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

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

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

The author is not aware of any relevant case law or collective agreements in this respect.

6.6 Laws and case law falling under the examples of sex discrimination mentioned in Article 9 of Directive 2006/54

There are no longer any laws which fall under the examples in Article 9 of the Directive. However, there are some cases that result from past discriminatory laws. One example is a judgment of 15 December 2009 from the District Court of Roermond, which concerned the earlier exclusion of married women from a pension scheme.¹⁵⁵ The pension fund had rectified the pension benefits of a female claimant over the period of her employment from 1972-1987, but had not granted her a non-contributory pension after termination of her employment due to incapacity for work. The woman was not granted the pension because she had never participated in the pension scheme. The court ruled that this constituted

¹⁵⁴ Supreme Court, *JAR* 2005/272, 21 October 2005, in respect to equal pay in general.

¹⁵⁵ District Court of Roermond, *JAR* 2010/29, 15 December 2009.

direct discrimination. If the employee had been a man, she would also have been entitled to the non-contributory continuation of the pension.

In another case, dating from 10 May 2016, a woman had not in the past participated in a pension fund, because at that time she did not work on the basis of an open-ended contract. The court ruled that, even if this were to be considered as indirect discrimination, the woman in question would not be entitled to claim participation in the fund, because the limitation period for her claim had expired. This expiry was not contrary to EU law, as the limitation period was not less favourable than the limitation period applied in similar national cases and did not make it impossible or excessively difficult to exercise the rights conferred by EU law, as the claimant could have brought her action earlier.¹⁵⁶

Another example is the case of part-time workers who worked for one of the department stores that belong(ed) to the Vendex KBB group. These part-time employees were mainly women. Until 1986 they could only participate in the pension scheme after a waiting period of five years. From 1986 to 1992 the waiting period was reduced to one year. After 1992 the waiting period was abolished. It was possible to participate voluntarily. The question that was brought before the courts was whether the fact that the part-time employees were not automatically included in the scheme but had to indicate themselves that they wished to participate constituted discrimination. After a lengthy legal battle, in which the Supreme Court also rendered a decision, the Court of Appeal of The Hague ruled on 7 December 2010 that Vendex KBB had discriminated against these female part-time employees because they had been in a more disadvantageous position than full-time employees in regard to the pension.¹⁵⁷ The Court of Appeal attached particular importance to the fact that the women had not received sufficient or individual information about the possibility of participation.

6.7 Actuarial factors

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

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

6.8 Difficulties

There are no specific difficulties in the Netherlands in relation to occupational social security schemes. As mentioned before, occupational social security schemes are rare. Most social security schemes are statutory. Existing occupational social security schemes do not replace statutory schemes, but provide a supplement to these schemes, e.g. in the form of a longer-lasting benefit in the case of unemployment or a higher payment in the case of sickness than provided for in the statutory schemes. The same is true for occupational pension schemes. They also provide for benefits in addition to the statutory scheme and are not a replacement for the statutory scheme. This does not create specific difficulties. Of course, there are court cases on the explanation of provision of the existing schemes, but these cases are in the main unrelated to gender but are of a more general nature.

¹⁵⁶ District Court of Amsterdam, no. 4578021 CV EXPL 15-30286, *JAR* 2016/135, 10 May 2016.

¹⁵⁷ The Hague Court of Appeal, *JAR* 2011/39, 7 December 2010.

6.9 Evaluation of implementation

In the view of the author, Dutch law on gender equality in occupational social security schemes and occupational pension schemes is satisfactory. There are no specific areas in which Dutch law exceeds EU law or falls short of EU law.

6.10 Remaining issues

There are no remaining issues regarding occupational social security that have not already been discussed.

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

7.1 General (legal) context

7.1.1 Surveys and reports on the practical difficulties linked to statutory schemes of social security (Directive 79/7)

There are no surveys and/or reports over the last five years about gender issues in social security. There are debates on the fact that self-employed people, including false self-employed workers, are not covered by social security, but this concerns both men and women. A gender perspective may arise in regard to domestic workers who work four days a week or less in a private household. These workers are, by law, excluded from the social security system. They are predominantly female. This reduced protection has been criticised by, inter alia, the European Commission and CEDAW, but so far, the Dutch Government has not taken any concrete steps to improve the situation.¹⁵⁸

A relevant development is the increase in flexible employment. Between 2005 and 2015 the percentage of women with a flexible contract increased from 14 % to 20 %. For men these percentages are 10 % and 16 %.¹⁵⁹ In 2016, 20 % of women had a flexible contract compared to 16 % of men. On-call contracts in particular are more often used for women than for men. An important explanation for this is that these contracts are frequently used in the health care branch, a sector in which many women work.

In itself, flexible employment does not need to be a problem for social security rights, since these rights are related to the number of hours worked. In order to qualify for unemployment benefit, workers must have lost five working hours per week. Workers will thus have to make clear that they worked at least five hours a week and that they lost these hours. The unemployment benefit is calculated on the basis of the salary that had been earned in the previous year. In this way on-call workers can also qualify for unemployment benefit if their work stops. However, if the work is less in one week compared to the previous one, this decrease in income is not covered by the unemployment benefit. The loss of income must have some continuity permanence. If a worker resumes on-call work during a period of unemployment, their benefit will be reduced by their earned income. If the work income is more than 87.5 % of the former wage, the unemployment benefit stops.

The situation is, of course, different for self-employed people. They are not entitled to any social security for workers if their work stops. Apart from schemes for Dutch residents, such as health care, old-age and survivors' schemes and voluntary insurance, they can only fall back on social assistance. However, the social partners reached an agreement on the introduction of a compulsory disability insurance for self-employed people without personnel. The government has asked the social partners to present a proposal in this respect before the summer of 2020.¹⁶⁰

7.1.2 Other relevant issues

Social security rights are calculated on an individual basis. Social assistance and the general old-age pension are lower per person where two people are married or living together than twice the individual rate. The old-age pension for an individual is 70 % of the net minimum wage, whereas for married people or people living together it becomes

¹⁵⁸ See about this group: Cremers, E. and Bijleveld, L. W. (2010) *Een baan als alle andere?! De rechtspositie van deeltijd huishoudelijk personeel* (A job like all others?! The legal position of part-time household workers.), Leiden, and the addendum by Bijleveld, L.W., Leiden, 2015.

¹⁵⁹ SCP/CBS (2016), *Emancipatiemonitor 2016*, pp. 75-76: https://www.scp.nl/Publicaties/Alle_publicaties/Publicaties_2016/Emancipatiemonitor_2016.

¹⁶⁰ Rijksoverheid, *Verplichte arbeidsongeschiktheidsverzekering voor zelfstandigen* (Compulsory disability insurance for self-employed persons): <https://www.rijksoverheid.nl/onderwerpen/pensioen/toekomst-pensioenstelsel/verplichte-arbeidsongeschiktheidsverzekering-voor-zelfstandigen>.

50 % of the net minimum wage for each person. There is no debate in this respect, since a couple is assumed to have economic advantages as a result of their cohabitation.

7.1.3 Overview of national acts

In the Netherlands there are social insurances specifically for employees, social insurances for all citizens, social assistance and some specific regulations for the support of vulnerable groups.

Social insurances for employees are financed by employers and (in case of the Work and Income According to Labour Capacity Act) employees and include:

- The Unemployment Act;¹⁶¹
- The Sickness Act;¹⁶²
- Work and Income According to Labour Capacity Act (= invalidity insurance);¹⁶³
- Work and Care Act.¹⁶⁴

Social insurances for all citizens are financed by income-based premiums and by taxes and include:

- The Long-term Care Act;¹⁶⁵
- The Old Age Pension Act;¹⁶⁶
- The Surviving Dependants Act;¹⁶⁷
- Work and Employment Support for Disabled Young Persons Act.¹⁶⁸

Social Services/Social Assistance is paid from taxes and includes:

- The Participation Act¹⁶⁹ (= social welfare and support in finding work);
- The Social Assistance Act for older and partly disabled workers;¹⁷⁰
- The Social Assistance Act for older and partly disabled formerly self-employed persons;¹⁷¹
- The Supplement Act¹⁷² (= supplements for people who receive a social benefit, but one below the social minimum);
- Act on Child Benefits.¹⁷³

7.1.4 Political and societal debate and pending legislative proposals

There is no political and/or societal debate, apart from the debate on self-employed people and social security. There are no pending legislative proposals on this topic.

¹⁶¹ Unemployment Act (*Werkloosheidswet*), 1986 Stb. 1986, 566.

¹⁶² Sickness Act (*Ziektewet*), 1929 Stb. 1929, 374.

¹⁶³ Work and Income According to Labour Capacity Act (*Wet werk en inkomen naar arbeidsvermogen*), 2005 Stb. 2005, 572.

¹⁶⁴ Work and Care Act (*Wet arbeid en zorg*), 2001 Stb. 2001, 567.

¹⁶⁵ Long-term Care Act (*Wet langdurige zorg*), 2014 Stb. 2014, 494.

¹⁶⁶ Old Age Pension Act (*Algemene Ouderdomswet*), 1956 Stb. 1956, 281.

¹⁶⁷ Surviving Dependants Act (*Nabestaandenwet*), 1995 Stb. 1995, 691.

¹⁶⁸ Work and Employment Support for Disabled Young Persons Act (*Wet arbeidsongeschiktheidsvoorziening jonggehandicapten*), 1997 Stb. 1997, 177.

¹⁶⁹ Participation (*Participatiewet*), 2003 Stb. 2003, 375.

¹⁷⁰ Social Assistance Act for older and partly disabled workers (*Wet inkomensvoorziening oudere en gedeeltelijk arbeidsongeschikte werknemers*), 1986 Stb. 1986, 565.

¹⁷¹ Social Assistance Act for older and partly disabled formerly self-employed persons (*Wet inkomensvoorziening oudere en gedeeltelijk arbeidsongeschikte gewezen zelfstandigen*), 1987 Stb. 1987, 281.

¹⁷² Supplement Act (*Toeslagenwet*), 1986 Stb. 1986, 562.

¹⁷³ Act on Child Benefits (*Algemene Kinderbijslagwet*), 1962 Stb. 1962, 160.

7.2 Implementation of the principle of equal treatment for men and women in matters of social security

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

There is one court case worth mentioning. This case was decided by the Supreme Court on 18 December 2015.¹⁷⁴ The case concerned the reduction of pension for widows/widowers who are more than 10 years younger than their deceased spouse. This is to the disadvantage of women, as substantially more women than men are more than 10 years younger than their spouse. The Court of Appeal had ruled that the discrimination was justified by the fact that it was the outcome of negotiations by social partners and by the need for solidarity between the participants in the scheme, as the pension of younger widows is rather costly because of their age. The Supreme Court ruled that this decision was too general. The bargaining freedom of the social partners could not in itself justify discrimination and for the rest the Court of Appeal should have examined more closely what the financial effect of abolition of the pension reduction would be and what this would mean for the resources of the fund and the benefits of the other participants.

The case concerns occupational pensions, not the statutory old-age pension, but it can be deduced from the case that the same line of reasoning would have to be applied in the case of discrimination within the statutory system.

7.3 Personal scope

National law relating to statutory social security schemes covers employees and former employees, i.e. those who receive an invalidity pension or an unemployment benefit or a sickness benefit on the basis of one of the social security laws. In some cases, self-employed persons are included. Dutch law refers to what are termed *gelijkgestelden*, i.e. workers who do not qualify as a worker in the sense of the Civil Code (Article 7:610), but who work under similar conditions (quasi/para-subordinate workers). Examples of this are various types of flexi-workers or home workers. For some of these persons a threshold applies: their employment relationship must have lasted for at least 30 days and their income must amount to at least 40 % of the minimum income as regulated by law. In addition, for some employment relations the possibility of being covered under the social security schemes is restricted to those who work for at least two days per week (Article 1 and Article 5 of the Decision designating cases where an employment relationship is considered to be employment.¹⁷⁵ Excluded from the scope of social security schemes are, among others, directors of a company who own a majority of the shares of that company and domestic staff who work on fewer than four days a week for the same employer. According to the Central Appeals Tribunal, the interpretation of 'domestic staff' includes not only domestic cleaners or child-minders and the like, but also 'professional carers' such as trained nurses providing medical care at home in the service of an individual employer.¹⁷⁶

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

¹⁷⁴ Supreme Court, 18 December 2015, ECLI:NL:HR:2015:3628.

¹⁷⁵ Decree designating cases where employment relationship is considered to be employment (*Besluit aanwijzing gevallen waarin arbeidsverhouding als dienstbetrekking wordt beschouwd*), 2008 Stb. 2008, 574.

¹⁷⁶ Central Appeals Tribunal (CRvB), RSV 1996/247, 29 April 1996.

7.4 Material scope

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

7.5 Exclusions

Dutch law has not applied the exclusions from the material scope as specified in Article 7 of Directive 79/7.

7.6 Actuarial factors

Sex is not used as an actuarial factor in the statutory social security schemes in the Netherlands.

7.7 Difficulties

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

It is worth mentioning the situation of domestic staff, mentioned previously in this report. These workers are excluded from social security schemes. Without this exclusion they would be covered, as they are either working on the basis of an employment agreement or as *gelijkgestelden*, as they are economically dependent on their work. The consequences of this exclusion are that domestic staff are only entitled to sickness pay for six weeks (instead of two years), are not entitled to sickness benefit in the event of a pregnancy-related illness before or after maternity leave and not to unemployment benefit. There is no clear justification for this situation. It is in essence a financial matter. The Government does not want to pay extra to these workers, nor does it want to burden individual households (who are 'the employers'). There are plans to change the situation, but progress is slow, if any, because of the financial consequences.

7.8 Evaluation of implementation

On the whole, Dutch law has satisfactorily implemented EU law on gender equality in statutory social security. There are two points of concern. The first of these is the continuing exclusion of domestic staff. This exclusion has existed for a long time and is mentioned in every report on gender equality, but so far Dutch governments have not had the courage to tackle this matter. The second point is the growing number of self-employed people, including false self-employed, who are not covered by the employee insurance schemes and therefore are not entitled to unemployment benefit, sickness benefit, invalidity benefit and occupational pension. The position of this group is now being intensely debated, also because the fact that they do not pay social premiums threatens to erode the social security system: in this respect, therefore, political measures are to be expected.

7.9 Remaining issues

There are no remaining issues regarding statutory social security that have not already been discussed.

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

8.1 General (legal) context

8.1.1 Surveys and reports on the specific difficulties of self-employed workers

There have been surveys and reports on the difficulties self-employed workers face, but also reports which make it clear that most self-employed people are in fact quite satisfied with their situation.

Much information can be found on the website of the Central Bureau for Statistics (CBS).¹⁷⁷ In a report of March 2019 the CBS mentioned that self-employed with no employees (in the Netherlands referred to as *zzp'er*) have the highest risk of poverty, compared to self-employed persons with employees and employees. In 2017, 8.6 % of the *zzp'ers* ran the risk of poverty compared to 1.9 % of employees.¹⁷⁸

Approximately 60 % of self-employed persons cease trading as a company within five years, the CBS reported in 2018. 46 % of the men were still working as a *zzp'er* after five years and 38 % of the women.¹⁷⁹ Of those who stop working as *zzp'ers* most return to a job working as an employee. Financial insecurity appears to be an important reason for this. In a review carried out by an organisation for self-employed in 2019, 43 % of the *zzp'ers* reported that they worry about their lack of pension; 35.7 % mentioned that they were anxious whether they would get new assignments; and 24 % worried about falling ill.¹⁸⁰ In the Netherlands there are no regulations for protection of self-employed people against the risks of sickness, invalidity and unemployment, so the self-employed have to take out insurance themselves or remain uninsured. They are entitled to the general old-age pension, but this is relatively low (70 % of the minimum wage for singles and 50 % of the minimum wage for people who live together). Self-employed people are not entitled to an occupational pension, unless they arrange for a pension themselves.

There is an arrangement for pregnancy leave for self-employed women, thanks to the CEDAW Convention and EU legislation, but there is no regulation for the situation in which a self-employed woman falls ill due to pregnancy-related reasons, either before or after pregnancy leave.

Self-employed women also report that they experience difficulties in reconciling work and family, especially if they have to work irregular hours (e.g. in health care).¹⁸¹ On the positive side, it is mentioned that their work in a self-employed capacity gives them more freedom to work at the hours they choose. The trap is that too little time remains for themselves, e.g. because they tend to work in the evenings in order to compensate for the time that was spent on care tasks during the day.¹⁸²

¹⁷⁷ This CBS website refers to various reports on self-employed people: <https://www.cbs.nl/nl-nl/zoeken?query=keyword%3a%22zelfstandigen%22>.

¹⁷⁸ CBS (2019), 'Van werkenden loopt *zzp'er* meeste risico op armoede' (From the working population the self-employed with no employees are the most at risk of poverty), 5 March 2019. Available at: <https://www.cbs.nl/nl-nl/nieuws/2019/10/van-werkenden-loopt-zzp-er-meeste-risico-op-armoede>.

¹⁷⁹ CBS (2018), '4 op de 10 *zzp'ers* vijf jaar na start nog *zzp'er*' (4 out of 10 self-employed with no employees five years after their start still self-employed), 27 November 2018. Available at: <https://www.cbs.nl/nl-nl/nieuws/2018/48/4-op-de-10-zzp-ers-vijf-jaar-na-start-nog-zzp-er>.

¹⁸⁰ ZBP Barometer (2019), *Merendeel *zzp'ers* onzeker over financiën* (majority of self-employed with no employees uncertain about finances), 21 May 2019. Available at: <https://zzpbarometer.nl/2019/05/21/onderzoek-merendeel-zzpers-onzeker-financien/#.XQ3xB-qzY2w>.

¹⁸¹ See also: Annink, A. and den Dunk, L. (2014), 'De positie van vrouwelijke *zzp'ers* in Nederland' ('The position of female self-employed with no employees in the Netherlands'), *Atria*, 2014, pp. 22-23. https://www.atria.nl/epublications/IAV_B00110957.pdf.

¹⁸² Annink, A. and den Dunk, L. (2014), 'De positie van vrouwelijke *zzp'ers* in Nederland', *Atria*, 2014, § 4.5.

It is worth noting that approximately one third of the nearly one million self-employed with no employees are women. Almost half of these (46 % in 2016) work part-time. In addition, work in a self-employed capacity is segregated by sector: many women work in health care and many men in construction.¹⁸³ There is also a gender wage gap for self-employed workers: in 2015 self-employed women earned approximately EUR 49 per hour and men an average of EUR 60 per hour. The combination of a lower hourly rate and working fewer hours causes a considerable difference in the annual income of male and female self-employed workers. In 2015, 55 % of female *zzp'ers* earned less than EUR 25 000 compared to 18 % of male *zzp'ers*.¹⁸⁴

In many respects the situation of female self-employed workers thus mirrors the situation of female employees.

8.1.2 Other issues

Relevant issues have been described in Section 8.1.1.

8.1.3 Overview of national acts

The Work and Care Act (pregnancy and maternity leave for self-employed women) contains provisions on self-employed workers. For the rest there are no specific laws for self-employed workers. The general rules on contracts apply, as do as tax laws.

8.1.4 Political and societal debate and pending legislative proposals

At this time there are no pending legislative proposals on the position of self-employed workers. The social partners reached an agreement on the introduction of a compulsory insurance against disability for self-employed workers. This agreement has yet to be converted into legislation. The government has asked the social partners to present a proposal before the summer of 2020.¹⁸⁵ Also the government decided to gradually reduce the benefits of self-employed people in the coming years. Implementation of Directive 2010/41/EU

Directive 2010/41/EU has not been explicitly implemented in national law but it has been implemented to some extent. Article 2(1) ETA and Article 6 GETA prohibit discrimination in the 'liberal professions.' This is a wide concept that covers not only doctors, architects, lawyers etc. but also freelancers, sole traders, entrepreneurs, etc.¹⁸⁶

8.2 Personal scope

8.2.1 Scope

Dutch law does not mention any norm addressees or rights holders in this area, nor does Dutch law contain definitions of self-employed persons or self-employment. Dutch equal treatment laws use the concept of the 'liberal professions'. This appears to cover the

¹⁸³ Kamer van Koophandel, *Bedrijfsleven 2016. Jaaroverzicht ondernemend Nederland* (Business 2016, Annual overview of enterprising Netherlands), 2016. Available at: https://www.kvk.nl/download/Jaaroverzicht%20Bedrijfsleven%20Nederland%202016%20versie%20US7_tcm109-433766.pdf.

¹⁸⁴ Panteia, *Vrouw steeds vaker parttime zzp'er* (Women more often part-time self-employed with no employees), 6 March 2015. Available at: <https://www.panteia.nl/nieuws/vrouw-steeds-vaker-parttime-zzper/#.VP2iDPyG9SL>.

¹⁸⁵ Rijksoverheid, *Verplichte arbeidsongeschiktheidsverzekering voor zelfstandigen* (Compulsory disability insurance for self-employed persons): <https://www.rijksoverheid.nl/onderwerpen/pensioen/toekomst-pensioenstelsel/verplichte-arbeidsongeschiktheidsverzekering-voor-zelfstandigen>.

¹⁸⁶ Insofar as this cannot be read in the provision itself, this interpretation has been deduced from the definition of *vrije beroepsbeoefenaren* in the Netherlands, Self-employed Persons' Disability Insurance Act (*Wet Arbeidsongeschiktheidsverzekering Zelfstandigen - WAZ*), 24 April 1997. See *Tweede Kamer* 1995-1996, 24 758 no. 3, p. 2.

category of self-employed persons. There is no case law on the definition of the 'liberal professions', from which it can be deduced that this definition is more restrictive than the definition of self-employed persons in the Directive.

8.2.2 Definitions

Dutch law does not define self-employed persons or self-employment, but instead uses the term 'liberal professions' in the equality legislation. Outside of the equal treatment legislation a self-employed person is mostly defined as a person who carries out services, but who is not an employee. Self-employment is thus defined as the contrary of being an employee. An employee is a person who carries out work personally during a certain period for an employer, receives an income in return and works under the authority of the employer (Article 7:610 Dutch Civil Code). A self-employed person is someone who does not (always) have to do the work personally, does receive a fee but not a salary and – most importantly – does not have a 'relationship of authority' with the work provider/client/employer.

The case law on self-employed persons mainly focuses on the question of whether a self-employed person is working on the basis of an employment agreement or an agreement for provision of services.

8.2.3 Categorisation and coverage

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

There are no specific categories, such as agricultural workers, who are not covered.

8.2.4 Recognition of life partners

Dutch legislation recognises life partners. Like other self-employed persons, life partners can rely on the basic welfare benefits scheme, the Surviving Dependents Act¹⁸⁷ (*Algemene Nabestaandenwet*, ANW) and, from the pensionable age, receive the statutory old-age pension benefits based on the General Old-Age Pensions Act (*Algemene Ouderdomswet*, AOW).

8.3 Material scope

8.3.1 Implementation of Article 4 of Directive 2010/41/EU

Dutch law uses the term 'liberal professions' to describe the scope of the principle of equal treatment as regards self-employed workers. Article 2 ETA and Article 6 GETA prohibit discrimination in respect of 'the conditions for access to and the possibilities for exercising and developing oneself within a liberal profession.'¹⁸⁸

8.3.2 Material scope

The definition of 'liberal professions' which is used in Dutch law is not similar to the definition in the Directive, but so far there are no indications that the definition in Dutch law is more restrictive. The Dutch NIHR gives a broad explanation of this definition and follows the line that discrimination is also prohibited in those working relationships where

¹⁸⁷ Surviving Dependents Act (*Nabestaandenwet*), 1995 Stb. 1995, 691.

¹⁸⁸ *Voorwaarden voor de toegang tot en de mogelijkheden tot uitoefening van en ontplooiing binnen het vrije beroep.*

the hierarchy between the 'organisation which gives an assignment to do the work' and the 'worker' is absent. This involves, in fact, all self-employed work. An example thereof is the opinion by the NIHR of 5 March 2012, where a franchiser was considered to fall under Article 2 ETA.¹⁸⁹ In civil law there are no or hardly any disputes concerning the question of whether a self-employed person falls under the definition of self-employed in Article 2 ETA or Article 6 GETA. Almost all disputes in civil law in which self-employed persons are involved concern the question of whether the self-employed person is not in practice an employee.

8.4 Positive action

The Dutch state has not used the power to take positive action in the meaning of Article 5 Directive 2010/41/EU.

8.5 Social protection

The Dutch State does not have a system for social protection specifically intended for self-employed workers. Self-employed persons are covered by the national insurance schemes, which provide for basic welfare benefits (*bijstand*),¹⁹⁰ by the Surviving Dependents Act (ANW)¹⁹¹ and, from the pensionable age (66 years or older depending on one's date of birth), the General Old-Age Pensions Act (AOW).¹⁹² They cannot, however, rely on employment-related insurance schemes, such as unemployment and disability benefits. They can choose to join these insurance schemes voluntarily, but will only benefit if they meet certain criteria, such as having paid contributions for at least three years, or they can take out private insurance or choose to remain uninsured. In addition, they do not have access to an occupational pension scheme. In the near future self-employed persons will be obliged to take out disability insurance.

8.6 Maternity benefits

Articles 3:17 and 3:18 of the Work and Care Act¹⁹³ provide for maternity benefit for self-employed women. This benefit meets the requirement of sufficiency in Article 8(3)(c) of the Directive. The benefit is granted for 16 weeks (similarly to employees), provided that the self-employed woman has done paid work for at least 1 225 hours in the preceding year. The benefit is related to the salary of the self-employed woman but has a maximum of 100 % of the statutory minimum wage. The maternity allowance is granted on a voluntary basis, i.e. self-employed women can apply to the government agency UWV to receive maternity and pregnancy benefits. Maternity benefits are paid from general tax revenues (no specific contributions are levied here). As far as the author knows, there were no existing services supplying temporary replacements or national social services in this regard.

In the period from 2004 to 2008 self-employed women were excluded from the statutory scheme that provides pregnancy and maternity benefits. Following a complaint by a group of women who gave birth during this period, the UN CEDAW Committee ruled that the Dutch state had violated the CEDAW Convention by abolishing the maternity leave scheme applicable to self-employed women up to 2004 and advised the Dutch state to compensate women who had given birth between 2004 and 2008. At first, the Dutch Government refused to follow the recommendation of the CEDAW Committee, but finally, after the Central Appeals Tribunal in social security matters ruled that the state had violated the CEDAW Convention by not giving compensation,¹⁹⁴ the state decided that these women

¹⁸⁹ NIHR, 5 March 2012, Opinion 2012-43, www.mensenrechten.nl.

¹⁹⁰ The Participation Act provides for basic welfare benefits: Participation Act (*Participatiewet*), 2003 Stb. 2003, 375.

¹⁹¹ Surviving Dependents Act (*Nabestaandenwet*), 1995 Stb. 1995, 691.

¹⁹² Old Age Pension Act (*Algemene Ouderdomswet*), 1956 Stb. 1956, 281.

¹⁹³ Work and Care Act (*Wet arbeid en zorg*), 2001 Stb. 2001, 567.

¹⁹⁴ Central Appeals Tribunal, 27 July 2017, ECLI:NL:CRVB:2017:2461.

could apply for a benefit. Applications could be made between 15 May and 1 October 2018 and gave the right to a benefit of EUR 5 600. According to the Social Security Authorities 18 695 applications were made for this benefit.¹⁹⁵

8.7 Occupational social security

8.7.1 Implementation of provisions regarding occupational social security

Dutch law implemented the provisions regarding occupational social security for self-employed persons in the ETA. Arrangements or regulations for organisations of professionals (the liberal professions) are covered by Article 12a ETA. The term 'liberal professions' refers to the self-employed (see Sections 8.2 and 8.3 of this report).

8.7.2 Application of exceptions for self-employed persons regarding matters of occupational social security (Article 11 of Recast Directive 2006/54)

Dutch law has not made use of the exceptions for self-employed persons regarding matters of occupational social security as mentioned in Article 11 of Recast Directive 2006/54.

8.8 Prohibition of discrimination

Article 14(1)(a) has not been implemented in detail, but the general prohibition of discrimination in the 'liberal professions', as laid down by Article 2(1) ETA and Article 6 GETA, covers discrimination in the fields of access to employment, self-employment and occupation as mentioned in Article 14(1)(a) of Directive 2006/54.

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

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

8.9 Evaluation of implementation

In the view of the author, on the whole, Dutch law satisfactorily implements the EU law on self-employed workers as discussed in this section. The Dutch legislator could have used wording that is more in line with the expressions used in EU law, but in practice the fact that other wording has been used has no negative consequences.

In the author's opinion self-employed workers could make use of more protection in the area of social security and occupational pension (which then also means they would have to pay premiums), but this is not an area which is regulated by EU (gender equality) law.

¹⁹⁵ Rtlz (2018), 'Ruim 16 000 vrouwen vragen zvp-zwangerschapscompensatie aan bij het UWV' (More than 16 000 women apply to the social security authorities for a maternity benefit), 15 October 2018. Available at: <https://www.rtlz.nl/life/personal-finance/artikel/4451211/uwv-zvp-zwangerschap-rechten-compensatie-vergoeding-5600>.

8.10 Remaining issues

It is worth mentioning that, following the introduction of paternity leave for employees as of 1 January 2019, the question was raised of whether self-employed fathers should not also be entitled to some form of paternity leave. In Belgium, for example, paternity leave has also been introduced for self-employed fathers. This could be a model for the Netherlands to follow. There are, however, no plans in this respect.

9 Goods and services (Directive 2004/113)¹⁹⁶

9.1 General (legal) context

9.1.1 Surveys and reports about the difficulties linked to equal access to and supply of goods and services

There are few surveys and/or reports about equal access to and supply of goods and services that concern equal treatment of men and women. Much is written about the removal of obstacles for people with disabilities. Race/ethnic background is a topic covered, as is religion, especially in respect of access to goods and services of people with a Muslim background. In the field of gender equality, attention is given to discrimination in the collaborative economy, as will be outlined in the Section 9.1.2 below. Attention is also given to the situation of transgender people.

In 2018 the Transgender Network Netherlands (TNN) reported that discrimination against transgender people had increased by 25 %.¹⁹⁷ Part of this discrimination is related to access to goods and services. For example, from cases brought before the NIHR it appears that transgender or intersex people face difficulties in using the facilities of sports clubs, saunas, fitness institutes, etc. There are insurances which do not cover certain treatments that transgender people undergo.

9.1.2 Specific problems of discrimination in the online environment/digital market/collaborative economy

Problems of discrimination in the online environment/digital market/collaborative economy were, inter alia, described in an article by Susanne Burri and Susanne Heeger-Hertter in 2018.¹⁹⁸ They mentioned the fact that for women with care tasks it is more difficult to be available during specific hours, such as the hours for taking children to school and picking them up at dinner time in the evening. This makes their daily schedule less flexible, whereas flexibility – and availability – are important determining factors for acquiring work in the gig economy. There is also a risk of sexual harassment in certain situations and a risk that platforms are especially directed at women in order to engage them for traditional female work, such as cleaning and caring. Women also tend to ask for and get a lower rate for their work; because they themselves ask less and it is also not clear who is responsible for the pay rate. Algorithms may also entail more hidden discrimination, as they tend to follow the preferences of the majority, preferences which might be rather discriminatory. It is not yet clear to what extent these forms of discrimination will indeed arise. Much is written about the possibilities and risks of the collaborative economy, but how it will really work out in practice has yet to become clear.

9.1.3 Political and societal debate

There is debate on the topic of discrimination and the digital market, but so far these debates are predominantly of a theoretical nature. One more practical example is the use of algorithms to track down discrimination in job advertisements. To do this a computer was given a quantity of discriminatory texts in the field of age discrimination. Subsequently it searched through approximately 2 million job advertisements to check whether they were discriminatory. It found more than 40 000 discriminatory sentences. The method will

¹⁹⁶ See e.g. Caracciolo di Torella, E. and McLellan, B. (2018), *Gender equality and the collaborative economy*, European network of legal experts in gender equality and non-discrimination, available at <https://www.equalitylaw.eu/downloads/4573-gender-equality-and-the-collaborative-economy-pdf-721-kb>.

¹⁹⁷ Transgender Network Nederland (2019), *Meldingen transgender discriminatie 2018* (Reports on transgender discrimination 2018), 2019. Available at: <https://www.transgendernetwerk.nl/wp-content/uploads/20190423-discriminatiemonitor-2018.pdf>.

¹⁹⁸ Burri, S. and Heeger-Hertter, S. (2018), 'Discriminatie in de platformeconomie juridisch bestrijden: geen eenvoudige zaak' (To combat discrimination in the platform economy legally: No simple matter), *Ars Aequi*, 2018(12), pp. 1000-1008.

probably now be used by the Labour Inspectorate to track down more forms of labour market discrimination, not only age discrimination.¹⁹⁹

9.2 Prohibition of direct and indirect discrimination

Article 7 GETA lays down the prohibition of making a distinction which is applicable to (in brief): the supply of or access to goods or services, which also includes all forms of education; the provision of career orientation and guidance; and advice or information regarding the choice of an educational establishment or career. Furthermore, this article specifies that GETA only applies to the above-mentioned areas if the alleged discriminatory acts are committed (a) in the course of conducting a business or exercising a profession; (b) by the public service; (c) by institutions which are active in the field of housing, social services, healthcare, cultural affairs or education; or (d) by private persons not engaged in carrying on a business or exercising a profession, but only insofar as the offer is made publicly.

9.3 Material scope

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

9.4 Exceptions

Dutch law has not applied the exceptions from the material scope as specified in Article 3(3) of Directive 2004/113, regarding the content of media, advertising and education. Instead Dutch law covers those categories. However, where education is concerned, an institution for special education may make a distinction on the basis of religion, belief or sex in regard to access to the school and participation in the education it provides, as long as these characteristics of religion, belief or sex are an essential, legitimate and justified requirement considering the founding principles of the institution (Article 7(2) GETA). Discrimination on the basis of sex is only justified if equal resources are available for both male and female pupils. This exception is made in order to give institutions for special education some room to follow their own beliefs.

9.5 Justification of differences in treatment

Dutch law prohibits discrimination in general. Discrimination in the field of the provision of goods and services is not treated differently from other forms of discrimination. This means that sex-segregated services are usually regarded as direct distinctions on the ground of sex, which means that these are forbidden unless one of the explicit legal justifications or exceptions can be applied. In practice, this means that sex-segregated services may only be justified if the sex segregation: (1) can meet the criteria of preferential treatment (under the GETA only allowed for the benefit of women, Art. 2(3) GETA); (2) can be established as necessary for the protection of women and maternity (Article 2(2)(b) GETA); or (3) can be established as a case in which 'sex is decisive.' In regard to this phrase, Section 6 of Article 2 delegates the definition of such cases to a Ministerial Order. This Equal Treatment Order²⁰⁰ lists examples such as sanitary facilities, changing and sleeping rooms and saunas (all insofar as facilities are equally available for both sexes), beauty and sports contests (insofar as there is a relevant difference in sex), life insurances where the premium depends on the life expectancy of men and women and the insurance has been entered into or has been changed on or after 21 December 2012,²⁰¹ and the

¹⁹⁹ NOS (2019), 'Algoritmes moeten discriminatie in vacatureteksten opsporen' (Algorithms have to track down discrimination in job advertisements), 10 August 2019. Available at: <https://nos.nl/artikel/2296998-algoritmes-moeten-discriminatie-in-vacatureteksten-opsporen.html>.

²⁰⁰ Equal Treatment Order, Royal Decree (*Besluit Gelijke Behandeling, Koninklijk Besluit*), 18 August 1994.

²⁰¹ See Sections 9.6 and 9.7 below.

protection from or combat sexual violence and harassment, and aid for the victims of sexual violence and harassment (insofar as it is necessary that this protection, combat measures or aid is provided for a person of a specific sex). Such sex-segregated services aimed at protection must be necessary and proportional. As exceptions must always be interpreted in a strict sense in non-discrimination legislation, GETA makes it fairly difficult to render sex-segregated services apart from cases that fall under the exemptions (from the scope) or that are mentioned in the Equal Treatment Order.

9.6 Actuarial factors

Dutch law ensures that the use of sex as a factor in the calculation of premiums and benefits for the purposes of insurance and related financial services does not result in differences in the premiums and benefits of individuals. Article 1(h) of the Equal Treatment Order stipulates that the use of sex as a factor in the calculation of premiums in insurances that are dependent on the life of a person may not result in differences in premiums paid by individuals, insofar as insurances entered into or modified on or after 21 December 2012 are concerned. There is no (leading) case law in this respect.

9.7 Interpretation of exception contained in Article 5(2) of Directive 2004/113

*Test-Achats*²⁰² induced the legislator to adapt the Equal Treatment Order in such a way that the use of sex as a factor in the calculation of premiums in life insurances is no longer allowed as of 21 December 2012 (Article 1(h) of the Equal Treatment Order). This only applies to insurance schemes that are entered into on or after that date or are modified on or after that date, thus not to already existing insurance schemes that have not been modified.

9.8 Positive action measures (Article 6 of Directive 2004/113)

The GETA has formulated preferential treatment as a general exception to the prohibition of discrimination as an asymmetric norm, i.e. only in regard to women. Article 2(3) GETA allows women to be placed in a privileged position in order to eliminate or reduce existing inequalities connected with sex, if this positive discrimination is in reasonable proportion to that aim. This exception is also applicable in the context of the provision of goods and services, but as yet there are no examples. These measures have not so far been contested in case law, because none have been taken.

9.9 Specific problems related to pregnancy, maternity or parenthood

In the past there has been discussion about the difficulties that self-employed women have encountered when trying to obtain insurance against the risk of maternity leave. There have been several legal procedures in this respect, mainly concerning the fact that private disability insurances only paid out an insurance benefit in the case of maternity leave if a qualifying period of (usually) two years had been fulfilled. The Supreme Court ruled on 11 July 2008 that there is no obligation in the law nor in Directive 2004/113 that obliges private insurance companies to treat pregnancy as equal to disability and that therefore insurance companies have the right to make use of a qualifying period.²⁰³ During that time – between 2004 and 2008 – there was no public insurance for self-employed pregnant women either. The Government reintroduced a maternity allowance for self-employed women as of 4 June 2008. Currently various insurance companies also offer insurance during maternity leave without a qualifying period. However, it is quite possible that this has consequences for the amount of the premium.

²⁰² CJEU, C-236/09, *Association Belge des Consommateurs Test-Achats ASBL and Others vs Conseil des ministres*. 1 March 2011.

²⁰³ Supreme Court, LJN: BD1850, 11 July 2008.

9.10 Evaluation of implementation

In the author's view Dutch law satisfactorily implements EU law in the field of goods and services. At some points Dutch law even exceeds EU law, as Dutch law also prohibits discrimination in education and the content of media and advertising, whereas EU law does not extend to these areas.

9.11 Remaining issues

There are no remaining issues regarding goods and services that have not been already been discussed.

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

10.1 General (legal) context

10.1.1 Surveys and reports on issues of violence against women and domestic violence

There are many surveys and reports on violence against women and domestic violence.

The issue of violence against women is presented as a priority in the national Emancipation Plan 2018-2021, which is the central document on emancipation.²⁰⁴ The Emancipation Plan mentions a number of plans and projects in the area of violence against women, but it does not give an entire overview.

In a separate strategic document entitled 'Violence does not belong anywhere: tackling domestic violence and child abuse, 2018-2021' the programme to combat violence against women and child abuse for the years 2018-2021 is outlined.²⁰⁵ The document describes domestic violence and child abuse as physical forms of violence and emotional abuse, such as humiliation, neglect and financial exploitation. It states that domestic violence, including abuse of the elderly and child abuse, is one of the biggest problems in our society.

The programme is built up along three lines of action: (1) to get violence in the picture faster and better, (2) to put a quick and lasting stop to violence, and (3) attention for specific groups. With the first line of action, the government is striving to speed up the discovery of domestic violence and child abuse. Measures that will be taken in this respect are, inter alia, starting a public campaign to encourage people to report domestic violence and child abuse, alerting employers to signals of domestic violence, strengthening the skills of professionals who work with the code for reporting domestic violence and strengthening the centres for advice on and the reporting of domestic violence and child abuse, the so-called 'Safe at Home centres'. These measures thus target the general population, employers and professionals working in the area of domestic violence. No specific targets are established, and impact assessment has not been carried out yet, since the programme started in 2018.

The second line of action is directed at stopping the violence and creating lasting solutions. Concrete measures that are announced are, amongst others, the increase of the penalties for systematic child abuse and the extension of the limitation period in the sense that the limitation period shall start on the day a child becomes 18 years of age. In addition, victims will be brought to safe places faster than before and they will be given more accurate professional help. For this purpose, professionals from different branches will have to cooperate closer than before. More cooperation is also needed in the treatment of the perpetrator. Further, more information will be given to schools to enable them to support abused children. These measures mainly target the professionals in the area of domestic violence. No specific targets are established, and impact assessment has not been carried out yet, since the programme started in 2018.

The third line of action addresses specific groups which need protection. The strategic document specifically mentions victims of loverboys, abuse of the elderly, sexual violence and children in a precarious family situation, including complex divorces. Here too, the government wishes to ensure that victims and perpetrators come into view as quickly as

²⁰⁴ Minister of Education, Culture and Science (2018), Emancipatienota 2018-2021 (Emancipation Plan 2018-2021, Kamerstukken (Parliamentary Papers) 2017-2018, no. 30420, 270, 29 March 2018. Available at <https://zoek.officielebekendmakingen.nl/kst-30420-270.html>.

²⁰⁵ Minister of Health, Welfare and Sport and Minister of Judicial Protection (2018), *Geweld hoort nergens thuis: aanpak van huiselijk geweld en kindermishandeling 2018-2021* (Violence does not belong anywhere: tackling domestic violence and child abuse, 2018-2021). Available at <https://www.rijksoverheid.nl/documenten/beleidsnota-s/2018/04/25/geweld-hoort-nergens-thuis-aanpak-huiselijk-geweld-en-kindermishandeling>.

possible and that the victim's safety is restored quickly and sustainably. Here too, no specific targets are established and there has not yet been an impact assessment specifically in this respect.

10.1.2 Overview of national acts on violence against women, domestic violence and issues related to the Istanbul Convention

The Social Support Act²⁰⁶ states that one of the aims of the municipalities is to prevent and combat domestic violence. Each municipality is obliged to have an advice and contact point for domestic violence and child abuse. The tasks of this contact point are outlined in the Social Support Act. The same obligation is inserted into the Youth Act.²⁰⁷

The Code on domestic violence and child abuse²⁰⁸ obliges professionals to use a specific code in cases where they have suspicions of domestic violence. The code applies in health care, education, childcare, social support, youth care and justice.

The Temporary Restraining Order Act²⁰⁹ makes it possible for the mayor of a municipality to prohibit the perpetrator of domestic violence from entering his home and contacting his family (spouse and children).

In addition, domestic violence is punishable under criminal law.

10.1.3 National provisions on online violence and online harassment

The preparation and distribution of imagery of a sexual nature of young people under 18 years old is deemed to be child pornography and is punishable under criminal law. Child grooming, i.e. establishing an emotional relationship with a child with a view to sexual abuse, is also punishable. There is no separate provision in the Criminal Code²¹⁰ on online gender-based and sexual harassment. This conduct may be qualified as defamation, slander or extortion (blackmail). Provisions on discrimination or threat can also be used.

Thus, online violence and online harassment of women and girls is regulated under general criminal law provisions, but not under specific provisions.

10.1.4 Political and societal debate

This is a very actively debated topic. There is an ongoing stream of research and many policies are being developed and adapted, both by the Government and by NGOs. Relevant information can be found on the website of the organisation *Huiselijk geweld.nl* (Domestic violence). Under the heading 'policy' references can be found to policies of municipalities, national policy and EU policy.²¹¹

On 22 May 2019 the Minister of Justice announced that he wants to include the offences of 'sex against the will' (i.e. sex without consent) and 'sexual harassment' into the Criminal Code. The aim of this is to make it easier for victims to press charges. At present it is sometimes not possible to press charges, because the requirements for assault and rape cannot be met, e.g. in a situation where a victim 'freezes' and therefore cannot resist the assault or in cases in which there is no violence. It will become obligatory under criminal law to verify if a person agrees with a sexual act. In the coming months an analysis will be made of the consequences of the law with a view to its implementation and the costs thereof; after that a law proposal will be drafted.

²⁰⁶ Social Support Act (*Wet maatschappelijke ondersteuning*), 2015 Stb. 2014, 280.

²⁰⁷ Youth Act (*Youth Act*), 2014 Stb. 2014, 105.

²⁰⁸ Decree on Mandatory reporting Code for domestic violence and child abuse (*Besluit verplichte meldcode huiselijk geweld en kindermishandeling*), 2013 Stb. 2013, 324.

²⁰⁹ Temporary Restraining Order Act (*Wet tijdelijk huisverbod*), 2008 Stb. 2008, 421.

²¹⁰ Criminal Code (*Wetboek van Strafrecht*, 1881 Stb. 1881, 35.

²¹¹ <https://www.huiselijkgeweld.nl/beleid> (domestic violence/policy).

10.2 Ratification of the Istanbul Convention

Authorisation for ratification was given by the First Chamber of Parliament (*de Eerste Kamer*) on 9 June 2015 and the Netherlands ratified the Convention on 18 November 2015. The Convention took effect on 1 March 2016. As the legal framework in the Netherlands was considered to comply with the obligations under the Convention, no legal changes were necessary.

11 Compliance and enforcement aspects (horizontal provisions of all directives)

11.1 General (legal) context

11.1.1 Surveys and reports about the particular difficulties related to obtaining legal redress

One topic which has attracted attention lately is discrimination in the process of recruitment and selection. Several reports appeared in which risks were mentioned, such as bias by the employer and/or recruiters, advertisements that do not reach certain groups and a lack of transparency during the recruitment procedure.²¹² Discrimination between men and women is not the main theme. More attention is paid to discrimination on the basis of ethnic background (e.g. research shows that people with a 'foreign name' are less likely to be invited for a job interview) and to age discrimination.

What becomes clear from surveys and reports is that obtaining legal redress is not always easy. There are, broadly speaking, three ways in which redress can be obtained: through civil law, through administrative law and through criminal law.

In civil law victims of discrimination must start court proceedings themselves. There are very few women who do so. More women (and sometimes men) go to the NIHR, but this body cannot give binding rulings. There are several reasons why so few women start a court case. One is the risk of victimisation, especially if the person is still employed by the alleged perpetrator. Another is the costs of the procedure. These are especially high if one has to involve an attorney; court fees may also be high. Thirdly, the burden of proof may be a problem. The burden of proof will shift when facts are established from which discrimination may be assumed, but even this is not always easy if the other party (the employer) completely denies the discrimination. Lastly, the sanctions are not always deterrent. It might be difficult to prove pecuniary damage and Dutch courts are rather stingy when it comes to non-pecuniary damages. Pregnancy discrimination, for example, is a serious problem in the Netherlands, but as a rule no more than two or three cases reach the courts annually and, in some years, even fewer (as far as is known; if judgments are not published, they remain unknown).²¹³

The prohibition of discrimination can to some extent also be enforced by the Labour Inspectorate. Since 2009 the Labour Inspectorate has a role in respect of discrimination. It monitors whether companies have an anti-discrimination policy and whether this policy is put into practice. If not, companies receive an instruction to take appropriate steps. If they do not follow this instruction, they may be fined. This happened once in 2017 and two or three times in 2018. The chances of redress are thus small. In any case, the Labour Inspectorate does not itself judge whether an employer discriminates or not, only if it has a policy against discrimination. It is up to the NIHR or the courts to decide whether an employer unlawfully discriminates against an employee. There are plans for extending the role of the Labour Inspectorate in the area of recruitment and selection (see Section 11.1.3).²¹⁴

²¹² See, inter alia, TNO (2018), *Risico's voor discriminatie bij werving en selectie. Huidige gang van zaken en trends* (Risks for discrimination within recruitment. Present state of affairs and trends), at <http://publications.tno.nl/publication/34627249/puJbur/TNO-2018-R11086.pdf>.

²¹³ See for information on court cases Section 4.3.4 of this report. See for research (inter alia) the report by the NIHR of 2016 on discrimination against pregnant women: NIHR (2016), *Is het nu beter bevallen? Vervolgonderzoek naar discriminatie op het werk van zwangere vrouwen en moeders met jonge kinderen* (Did the delivery go better? Follow-up research on discrimination at work against pregnant women and mothers with young children): <https://www.mensenrechten.nl/nl/publicatie/36883>.

²¹⁴ See for more information in this respect the policy documents about discrimination on the labour market which were published in 2018: Letter to Parliament by the Secretary of State for Social Affairs and Employment, 'Broad outline Action Plan on labour market discrimination 2018-2021', 19 June 2018: <https://www.rijksoverheid.nl/documenten/kamerstukken/2018/06/19/hoofdpijnenbrief-actieplan-arbeidsmarktdiscriminatie-2018-%E2%80%93-2021> and the follow-up document of 22 November 2018,

It is also possible to press charges of discrimination with the police. Subsequently the prosecution decides whether to pursue these charges. If the case is brought before the criminal court, it is possible for the victim to claim compensation for damage suffered. The compensation awarded is usually not very high: around EUR 1 000 for material damage and less for non-pecuniary damage. This is partly because the room for providing evidence is limited. More complex cases are usually brought before the civil courts.²¹⁵ In practice, not many cases on discrimination are handled through criminal law, possibly because they are often too complex. In the Netherlands civil law is generally considered to be the best way to tackle discrimination, not criminal law.

11.1.2 Other issues related to the pursuit of a discrimination claim

An interesting development is that more and more people are inclined to secretly record a meeting or a telephone conversation so as to have proof of discrimination or other unlawful behaviour. Courts tend to see this as unlawful evidence, but nevertheless often use it, because they rule that the importance of finding the truth outweighs the unlawful way in which the evidence has been gathered. Sometimes damages are granted because of the breach of privacy that has been made in this way. The NIHR also uses this type of evidence for its opinions.

There is also debate about the use of mystery guests and mystery calls by the Labour Inspectorate as part of enforcing the equality norms in the process of recruitment and selection. The Government is not very enthusiastic about this means of enforcement, but it may be used in serious cases, if this is done in a proportional way. The temporary employment industry also sometimes uses the means of mystery calls in order to combat labour market discrimination.²¹⁶

11.1.3 Political and societal debate and pending legislative proposals

As pointed out above, in 2018 the Secretary of State²¹⁷ for Social Affairs and Employment published two documents in which she outlines how she wants to combat discrimination in the labour market.²¹⁸ In the documents she mentions three pillars: (1) monitoring and enforcement, (2) research and instruments (such as tools and programmes to combat discrimination) and (3) knowledge and creating awareness. However, the emphasis throughout the documents is very much on creating awareness and on developing non-binding policy instruments.

One more concrete plan is the law proposal which has been announced in order to give the Labour Inspectorate the power to check whether organisations have a policy for

entitled 'Plan of implementation on labour market discrimination 2018-2021':

<https://www.rijksoverheid.nl/documenten/kamerstukken/2018/11/22/kamerbrief-implementatieplan-arbeidsmarktdiscriminatie-2018-2021>.

²¹⁵ See Kool, R. S. B. and others (2016), *Civiel schadeverhaal via het strafproces* (Civil damages through criminal proceedings), Utrecht, University of Utrecht: <https://www.wodc.nl/onderzoeksdatabase/2569-schadeverhaal-door-civiele-voeging-in-het-strafproces.aspx>.

²¹⁶ Information can be found in the letter by Secretary of State of 22 November 2018, entitled 'Plan of implementation on labour market discrimination 2018-2021': <https://www.rijksoverheid.nl/documenten/kamerstukken/2018/11/22/kamerbrief-implementatieplan-arbeidsmarktdiscriminatie-2018-2021>.

²¹⁷ A secretary of state is the second person who is responsible for a ministry, after the minister.

²¹⁸ Letter to Parliament by the Secretary of State for Social Affairs and Employment, 'Broad outlines Action Plan on labour market discrimination 2018-2021', 19 June 2018: <https://www.rijksoverheid.nl/documenten/kamerstukken/2018/06/19/hoofdpijnenbrief-actieplan-arbeidsmarktdiscriminatie-2018-%E2%80%93-2021> and the follow-up document of 22 November 2018, entitled 'Plan of implementation on labour market discrimination 2018-2021': <https://www.rijksoverheid.nl/documenten/kamerstukken/2018/11/22/kamerbrief-implementatieplan-arbeidsmarktdiscriminatie-2018-2021>.

recruitment and selection which is free from discrimination.²¹⁹ If organisations do not have this, the Labour Inspectorate will have the competence to impose a fine. The Labour Inspectorate will receive more money in order to do this work. Further research will also be done into giving the labour inspectorate the additional power to effectively monitor discrimination by third parties who are engaged by employers to carry out the recruitment and selection process, such as temporary agencies, assessment bureaus and online platforms.

11.2 Victimisation

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

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

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

In the author's view this protection complies with the protection mentioned in the Directives.

11.3 Access to courts

11.3.1 Difficulties and barriers related to access to courts

In itself, access to the courts for alleged victims of sex discrimination is sufficiently safeguarded. They can bring a claim before a civil court, or an administrative court if they are a civil servant, or can press charges with the police in cases involving a criminal offence. Nevertheless, in practice starting a court case is not easy. Discrimination claims might be quite complicated, which makes it necessary to involve a specialist lawyer/attorney. These lawyers, however, usually have hourly rates of EUR 200 or more. People with a low income are entitled to subsidised legal aid but will have to pay a contribution and the legal costs if they lose their case. These costs may amount to approximately EUR 1 000 in first instance and around EUR 4 000 on appeal. Members of a trade union can receive legal assistance from their union and people who have taken out insurance for legal assistance can turn to their insurer. However, there are many people who are not members of a trade union, nor do they have insurance cover.

11.3.2 Availability of legal aid

Victims of pay discrimination may apply for legal aid if their annual income is less than EUR 27 300 for a single person and EUR 38 000 for a person living with others (in that case the family income is the basis). They must pay a contribution which varies from

²¹⁹ The law proposal was announced in the 'Plan of implementation on labour market discrimination 2018-2021': <https://www.rijksoverheid.nl/documenten/kamerstukken/2018/11/22/kamerbrief-implementatieplan-arbeidsmarktdiscriminatie-2018-2021>.

EUR 199 to EUR 835. They can also go to the NIHR, which is free of charge, but this body cannot give binding decisions.

11.4 Horizontal effect of the applicable law

11.4.1 Horizontal effect of relevant gender equality law

In gender equality law a possible lack of horizontal effect does not pose a particular problem, since almost all relevant EU provisions on gender equality have been correctly implemented. Where this is not the case, for example in respect of the right of a woman to return to her job or to an equivalent job after maternity leave, this does not create problems, because it is possible to fall back on the general prohibition of discrimination.

11.4.2 Impact of horizontal direct effects of the charter after *Bauer*

Bauer has effects in other fields, for example the legislation on holiday leave, but not in the field of gender equality law, since the EU law on gender equality has in most aspects been implemented correctly.

11.5 Burden of proof

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

In cases of (sex) discrimination the NIHR or the courts investigate whether sufficient facts have been established in order to shift the burden of proof to the employer/other discriminating party. The fact that a party refuses to provide information, as in the cases *Kelly*²²⁰ and *Meister*,²²¹ may be considered an indication of discrimination as long as it is not the only indication.

11.6 Remedies and sanctions

11.6.1 Types of remedies and sanctions

Sanctions in the event of discrimination are imposed by the civil or administrative courts. Criminal sanctions for discriminatory offences are hardly ever imposed, especially not in the case of sex discrimination. It is possible to press charges of discrimination with the police and if it comes to prosecution, the victim of discrimination can request compensation for damage suffered. However, such compensation awards are usually not high, because the criminal courts do not as a rule deal with complex claims for compensation. In addition, the discriminatory behaviour must fit within the description of the specific criminal offence and this is not always the case. Lastly the police and the prosecution service must decide whether to start prosecution.

Civil or administrative courts (if the person involved is a civil servant) deal with discriminatory dismissals and dismissals due to victimisation. These dismissals are voidable on the basis of Article 7:646 of the Civil Code, the GETA and the ETA. The employee can request the courts to invalidate the termination of contract and can thereby claim wages. In such situations he/she can also demand to be reinstated in the post. Instead of requesting the court to invalidate the termination, the employee can also request compensation.

²²⁰ CJEU, C-104/10, *Kelly vs National University of Ireland (University College, Dublin)*, 21 July 2011.

²²¹ CJEU, C-415/10, *Meister vs Speech Design Carrier Systems GmbH*, 19 April 2012.

As of 1 July 2015, what is known as 'transitional benefit' has been introduced. All employees who have been employed for two or more years,²²² whether on the basis of a permanent contract or a fixed-term contract, are entitled to this benefit in the event of the termination of their employment, unless the termination is the result of serious misconduct by the employee. This may be of help to the many women whose temporary contracts are not extended because of pregnancy. However, the transitional benefit is modest in the case of short-term contracts: one sixth of the monthly salary for each six months worked. If an employment contract has lasted for more than 10 years, the transitional payment becomes one quarter of the monthly salary for each six months worked after the initial ten-year period.²²³

All persons who have been discriminated against because of their gender can claim pecuniary damages under the system of sanctions in general administrative law, contract law and/or tort law. Pecuniary damages can be claimed in the case of material damage. In addition, non-pecuniary damages can be requested where the norm of gender equality has been seriously violated. Violation of the norm does not in itself entitle the victim/claimant to compensation. The claimant must make it clear why the violation is serious and what the consequences are. Until recently the rule applied that the claimant had to prove that he/she had suffered mental illness, which was only the case if there had been a psychiatric injury. However, from a recent judgment by the Dutch Supreme Court it follows – though the judgment is rather vague in this respect – that this requirement no longer applies.²²⁴

Apart from damages, the starting point in Dutch law is that contractual provisions which are found to conflict with the GETA and the ETA shall be considered null and void.

The Act on the Netherlands Institute of Human Rights (NIHR)²²⁵ mentions some additional sanctions. Sanctions under these laws are imposed by the NIHR, not by the courts. Under Article 11(2) of this Act, the NIHR may make recommendations to the party found to have made an unlawful distinction. Under Article 11(3) the NIHR may also forward its findings in an advice to the ministers concerned, and to organisations of employers, employees, professionals, public servants, consumers of goods and services and to relevant consultative bodies. Under Article 13(1) of the Act on the NIHR, the NIHR may initiate legal action with a view to obtaining a court ruling that conduct contrary to the relevant equal treatment legislation is unlawful, requesting that such conduct be prohibited or requesting an order that the consequences of such conduct be rectified. This power must be considered in light of the fact that the opinions of the NIHR are not binding. The NIHR has never made use of this possibility.

As in respect of the level of remedies and sanctions, a distinction must be made between material (pecuniary) and non-pecuniary damage. If a person has suffered pecuniary damage as a result of discrimination, he/she is in principle entitled to compensation for this damage. The level of the compensation depends on the damage suffered and on the extent to which the damage can be proved. Compensation for pecuniary damage is never higher than the damage itself. The Netherlands has no system of punitive damages.

Compensation for non-pecuniary damages is notoriously low in the Netherlands. It rarely exceeds EUR 10 000 and most payments do not come close to that amount.²²⁶

²²² This time limit will disappear as of 1 January 2020.

²²³ This will also change as of 1 January 2020, thus as of then there will no longer be higher compensation in the case of longer employment agreements.

²²⁴ Supreme Court, 15 March 2019, ECLI:NL:HR:2019:376.

²²⁵ Act on the Institute for Human Rights (*Wet College Rechten voor de Mens*), 2012 Stb. 2011, 573.

²²⁶ See on this subject: Roozendaal, W. L. (2014), 'Geen verlenging wegens zwangerschap, wat nu?' ('No extension because of pregnancy. What now?'), *TAP* 316.

11.6.2 Effectiveness, proportionality and dissuasiveness

It is seriously doubted in academic legal circles whether the range of sanctions available under the equal treatment legislation is in conformity with the requirement that sanctions be 'effective, proportionate and dissuasive.' This is particularly the case because non-pecuniary damages are usually rather low. They rarely exceed EUR 10 000 and most payments do not come close to that amount.²²⁷

Pecuniary damages are related to the extent of the damage. If an employee can make it sufficiently clear that he/she suffered a loss of income because of discrimination, this loss will be compensated. One example of this is the judgment of 26 April 2016 by the District Court Zwolle, in which the employee was awarded compensation of EUR 21 000 because the court considered it plausible that the employment agreement would have lasted for another five years if it had not been terminated because of pregnancy.²²⁸ Compensation of EUR 5 000 was also granted for non-pecuniary damage. The Hague District Court awarded damages equal to one year's salary in the case of an applicant who seemed to have been accepted for a job but was then turned down after she told the employer she was pregnant. The court decided that she would have been given a contract, but that this contract would probably not have lasted longer than one year, which is why the compensation was fixed at one year's salary (EUR 37 077.21).²²⁹

In many cases, however, it is difficult to estimate the extent of the damage as in the Netherlands many employees work on the basis of part-time contracts of six months or one year or are placed by temporary employment agencies, which means they cannot prove that their employment would have lasted for a considerable period of time. For example, the District Court of Limburg decided that an employee, whose contract had not been extended because of her pregnancy was not entitled to compensation for material (loss of income) damage, because it was likely, according to the court, that the contract would have been extended once for one more year and would have ended thereafter. During that year the employee had also received a social security benefit and therefore had incurred no income damage.²³⁰

11.7 Equality body

The NIHR (Netherlands Institute for Human Rights) is the main officially designated.²³¹

The NIHR covers all grounds of discrimination: race, sex, age, religion, belief, sexual orientation, nationality, handicap or chronic illness, marital status, working hours, the temporary character of employment agreements and political beliefs.

The NIHR hears complaints (from individuals and organisations) about discrimination and gives non-binding opinions, it gives advice to organisations that want to revise their policies, it monitors developments, it gives its opinion in the media on discrimination and it advises the Government in regard to the implementation of anti-discrimination legislation and/or any necessary revision of this legislation.

It is hard to assess the impact of the body. It is quite well-known and respected for its opinions and knowledge. The Government asks its advice when formulating new policies and many individuals and organisations also ask for information/advice. In 2019 there were 4 730 questions or reports. Most questions related to sex discrimination. The NIHR gave 140 rulings in 2019. These rulings are non-binding. The NIHR states that in 2019 in

²²⁷ See on this subject: Roozendaal, W.L. (2014), 'Geen verlenging wegens zwangerschap, wat nu?' ('No extension because of pregnancy. What Now?'), *TAP* 316.

²²⁸ District Court of Zwolle, *JAR* 2016/143, 26 April 2016.

²²⁹ District Court The Hague, 24 January 2019, ECLI:NI:RBDHA:2019:584.

²³⁰ District Court Limburg, 13 December 2017, ECLI:NL:RBLIM:2017:12124.

²³¹ See: www.mensenrechten.nl.

86% of the cases in which it found discrimination, measures were taken by the discriminating party.²³² However, in cases which are subsequently brought before the courts, it regularly happens that the opinion of the NIHR is not followed. An explanation might be that the more controversial cases in particular are brought before the courts. What also happens is that one party (employers in particular) prepare their case much better when going to court, which is why there is a different outcome.

11.8 Social partners

Social partners do not set equality standards and there are no legislative provisions on their role in respect of gender equality.

Trade unions and employers' organisations consult each other in institutions like the Labour Foundation and the Social-Economic Council (SER). The Labour Foundation is working on a revised version of the Checklist for equal pay 2001. This checklist, which is a tool to use on a voluntary basis, is meant for those who create, apply and evaluate systems for the payment of employees, thus trade unions, employers' organisations, employers, HR managers and works councils.²³³

In addition, the social partners may enter into agreements on the prevention of discrimination within collective agreements. An example thereof is the collective labour agreement that was concluded with the insurer Aegon, in which it was agreed that Aegon would carry out research into the pay of men and women. This has indeed been done; following the research Aegon announced that it would discuss further steps with the trade unions and the works council, especially in regard to increasing the number of women in higher positions.²³⁴

The collective agreement with Aegon was a company agreement, which means it applies only to Aegon. Collective agreements are also concluded for an entire sector of industry. These agreements can be declared generally binding.

It also happens that collective labour agreements contain discriminatory provisions. The social partners then act in breach of the equality legislation. In the Netherlands this is a particular issue in regard to age discrimination, more specifically forced early retirement of older employees.

Trade unions provide individual legal assistance to their members and sometimes they take cases to court themselves. Most of these cases concern compliance with provisions of a collective labour agreement. These provisions may concern gender discrimination, but this is rarely the case.

Examples of good practice by social partners are the checklist on equal pay and the agreement the trade unions entered into with the insurer Aegon.²³⁵ A similar agreement was entered into with a pension company (APG).²³⁶ The biggest trade union, FNV, has a separate union for women (FNV Vrouw) that specifically addresses themes that women encounter on the labour market.²³⁷

²³² NIHR, *Jaarverslag 2019* (Annual Report 2019). Available at: <https://mensenrechten.nl/nl/publicatie/5ea1351a1e0fec037359c1f3>.

²³³ Stichting van de Arbeid (Foundation for Labour) (2001), 'Je verdiende loon! Checklist gelijke beloning mannen en vrouwen' (Your deserved salary! A checklist for equal pay for men and women), 19 July 2001, available at <https://www.stvda.nl/-/media/stvda/downloads/publicaties/2001/je-verdiende-loon.pdf>.

²³⁴ Aegon (2019), 'Vrouwen bij Aegon gelijk beloond' (Equal pay for women and men at Aegon), 11 February 2019. Available at: <https://nieuws.aegon.nl/gelijke-beloning/>.

²³⁵ Aegon (2019), 'Vrouwen bij Aegon gelijk beloond' (Equal pay for women and men at Aegon), 11 February 2019. Available at: <https://nieuws.aegon.nl/gelijke-beloning/>.

²³⁶ APG (2019), 'APG gaat vrouwelijke medewerkers gelijk belonen' (APG will pay an equal wage to female employees), 22 May 2019. Available at: <https://www.apg.nl/nl/artikel/APG-gaat-vrouwelijke-medewerkers-gelijk-belonen/1086>.

²³⁷ <https://www.fnvvrouw.nl/>.

11.9 Other relevant bodies

There are other agencies or bodies that are engaged in the enforcement of gender equality law. In the first place there are several anti-discrimination bureaux. At the national level, there is the organisation called 'Article 1', which refers to Article 1 of the Constitution (the principle of equality). This organisation covers all the Article 19 TFEU non-discrimination grounds, including sex discrimination, and is officially designated as one of the equality bodies. It mainly has a role in assisting victims and in monitoring the occurrence of discrimination. At the local level there are local anti-discrimination bureaux (or ADVs). In 2009, these local ADVs were given a legal basis in the Act on Local Anti-Discrimination Bureaux.²³⁸ All municipalities are obliged to establish and subsidise an ADV. The main task of these bureaux is to assist victims of discrimination and to monitor the situation in this regard. Sometimes they act as a party to court proceedings in addition to the victim him/herself, but this is rare.

Apart from these organisations, there are several equality interest groups. The most well-known is the Bureau Clara Wichmann – formerly the Fund for Test Cases Clara Wichmann – which supports court cases in the area of sex discrimination.²³⁹ PILP (Public Interest Litigation Project), which forms part of the Dutch lawyers' Committee on Human Rights (NJCM), is another example. PILP also engages in strategic litigation, not only about women's rights, but about human rights. FNV Vrouw (FNV Woman, a trade union) also sometimes engages in litigation. Other foundations are established for a single-issue cause, for example in order to help women with health-threatening silicone implants to obtain redress from the pharmaceutical industries and/or from the doctors and hospitals who treated them, or to combat marital 'imprisonment' or to support freedom of choice in relation to abortion. They also carry out campaigns and sometimes litigate on behalf of the specific interest they pursue.

These associations or foundations can submit a claim before the courts on the basis of Article 3:305a of the Dutch Civil Code, which stipulates that an association or foundation with full legal capacity may submit a claim which aims to protect the similar interests of other persons, insofar as they represent these interests pursuant to their articles of association. A claim may only be brought before the courts if the association or foundation has first tried to reach its goal through dialogue.

The actions/procedures by these organisations may have quite some impact, as they try to address fundamental questions, such as the right of women to run for election (which was not possible within a fundamentalist Christian party), the possibility for general practitioners and pharmacists to prescribe the pill Mifepristone, which can be taken instead of an abortion in the case of an unwanted pregnancy, sexism in commercials and the right of, in this case Turkish, women to use their maiden name again after their divorce.

11.10 Evaluation of implementation

On paper Dutch law satisfactorily implements EU law on remedies and sanctions, but in practice there are quite a few shortcomings. The first of these is that it is difficult to start a court case, especially because of the costs involved. Due to austerity measures fewer people are entitled to legal aid than in the past and there are fewer and fewer lawyers who take on legal aid cases, because the remuneration they receive for this is rather low and often not even cost-effective. Secondly, remedies are not always effective. It is not always easy to prove the extent of pecuniary damage, especially not for those women who work on a flexible contract or as a (false) self-employed person. This happens especially to women in lower positions or with lower education levels, thus a group which is already vulnerable. Thirdly, compensation for non-pecuniary damage is low, if it is granted at all. Fourthly, it would be good if the Labour Inspectorate could get a larger role, because at

²³⁸ Act on Local Anti-Discrimination Bureau (*Wet gemeentelijke antidiscriminatievoorziening*), 27 June 2009.

²³⁹ <https://www.clara-wichmann.nl/>.

present it is completely up to a victim to decide whether she will take legal action, and this may be a heavy burden. It would be better if there were more responsibility on the part of organisations and if the Labour Inspectorate could be given more competence and means to monitor and enforce equality legislation.

In many cases people and organisations proceed in a spirit of goodwill and things go well. Nevertheless, the points mentioned here deserve attention.

11.11 Remaining issues

There are no remaining issues regarding enforcement and compliance that have not already been discussed.

12 Overall assessment

The following transposition problems were mentioned in this report:

1. The exclusion from social security schemes of domestic staff;
2. The fact that the transparency measures set out by the European Commission's Recommendation of 7 March 2014 have not been implemented;
3. The absence of a provision that guarantees the right of a worker to return to his/her job or to an equivalent job after returning from maternity leave, adoption leave and/or parental leave.

The overall impression of the author is that implementation of the EU gender equality acquis is to a great extent satisfactory. The Netherlands ranks sixth in the EU on the EIGE's Gender Equality Index with 72.1 out of 100 points. Its score is 4.7 points higher than the EU's score. The Netherlands' scores are higher than the EU's scores in all domains, except the domain of power. In this domain there is work to be done. Hopefully the ongoing publicity and the announced women's quota will be helpful in this respect.²⁴⁰

The EU work-life balance requirements will oblige the Dutch legislator to introduce a legal right to two months paid parental leave. So far this leave is unpaid, unless the social partners have made a different agreement. In addition, paternity leave will have to be extended from 5 paid days to 10 paid days. For the rest, the Directive will probably have no effect on the Dutch situation.

There are points of concern.

A point which returns every year is the position of predominantly female domestic staff who work on four days or fewer per week in a private household. These workers have significantly fewer employment and social security rights than other workers. They may be dismissed unilaterally without the permission of employment agencies or the district courts, they are entitled to 6 weeks' pay during illness instead of 104 weeks, and they fall outside the scope of the social security system. This reduced protection has been criticised by, inter alia, the European Commission and the CEDAW Committee, but there is still no political will to tackle the situation.

Another point of concern is the vulnerable employment situation of pregnant women and young mothers. This matter has also been troubling for a long time and there does not seem to have been any improvement. On the contrary, the situation has deteriorated, mainly because of the tremendous increase in flexible working arrangements and work as a self-employed person in the Netherlands.

The increase in flexible working also leads to precarious employment, especially for people with lower education levels and people in more basic positions. These include people from third countries who come to the Netherlands to work temporarily. This is not specifically a matter of gender inequality, but of course women are also affected by this. Equal pay for equal work throughout the EU would help greatly, but this is a complex matter.

A worrying trend in the Netherlands, as in other countries, is the rise – or perhaps one should say return – of populist movements. During the last elections in the Netherlands a new populist party, *Forum voor Democratie* (Forum for Democracy), gained many votes. In general, these parties are not positive about women's rights and the Netherlands is no exception in this respect. The leader of the latest populist party said in an interview that because women are so involved in career-making they do not have enough children, he criticised the right to abortion, said that women do not have ambition and that they want

²⁴⁰ European Institute for Gender Equality (EIGE), *Gender Equality Index, Index Score for the Netherlands for 2019*. Available at: <https://eige.europa.eu/gender-equality-index/2019/NL>.

to be overpowered sexually by men.²⁴¹ This of course raised a lot of comment,²⁴² but nevertheless many people are attracted by this party and its leader.

As for positive trends, more and more women do paid work, and the number of women in leading positions is increasing, although very slowly.

²⁴¹ See inter alia <https://www.youtube.com/watch?v=MYDHM3rcZVQ> and https://americanaffairsjournal.org/2019/05/houellebecqs-unfinished-critique-of-liberal-modernity/#.XOJe0g0yP_c.twitter.

²⁴² See among many more: <https://joop.bnnvara.nl/nieuws/audet-wil-de-vrouw-terug-achter-het-aanrecht-af-van-abortus-en-euthanasie> ('Audet wants the women back behind the sink and wants to get rid of abortion and euthanasia') and <https://www.rtlnieuws.nl/nieuws/politiek/artikel/4719121/verbazing-en-woede-over-standpunt-audet-over-vrouwen-abortus-en> ('Amazement and anger about statements Audet about women and about abortion and euthanasia').

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