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

COUNTRY REPORT 2012

THE NETHERLANDS

RIKKI HOLTMAAT

State of affairs up to 1st January 2013

This report has been drafted for the **European Network of Legal Experts in the Non-discrimination Field** (on the grounds of Race or Ethnic Origin, Age, Disability, Religion or Belief and Sexual Orientation), established and managed by:

Human European Consultancy
Maliestraat 7
3581 SH Utrecht
Netherlands
Tel +31 30 634 14 22
Fax +31 30 635 21 39
office@humanconsultancy.com
www.humanconsultancy.com

Migration Policy Group
Rue Belliard 205, Box 1
1040 Brussels
Belgium
Tel +32 2 230 5930
Fax +32 2 280 0925
info@migpolgroup.com
www.migpolgroup.com

All reports are available on the website of the European network of legal experts in the non-discrimination field:
http://www.non-discrimination.net/law/national-legislation/country-reports-measures-combat-discrimination

This report has been drafted as part of a study into measures to combat discrimination in the EU Member States, funded by the European Community Programme for Employment and Social Solidarity – PROGRESS (2007-2013). The views expressed in this report do not necessarily reflect the views or the official position of the European Commission.

human european consultancy

MPG Strategic thinking equality and mobility
MIGRATION POLICY GROUP

TABLE OF CONTENTS

Short list of abbreviations / translations:

ADA = Age Discrimination Act
ADV = Anti-Discrimination Bureau
CERD = UN Convention on the Elimination of Racial Discrimination
DDA = Disability Discrimination Act
ETA = Equal Treatment Act for Men and Women in Employment
Equal treatment legislation = the ADA, DDA, ETA and GETA
ETC = Equal Treatment Commission (former equality body)
GETA = General Equal Treatment Act
NIHR = Netherlands Institute for Human Rights (current, new equality body)
Staatsblad = Law Gazette
Tweede Kamer = Dutch House of Representatives[1]
WIA = Labour Capacity Act

[1] Parliamentary papers, motions or amendments or letters from the Government to Parliament are referred to in the footnotes by the Dutch system of reference: Tweede Kamer, parliamentary years, number of the Bill and the number of order, followed by a page number.

0 INTRODUCTION[2]

0.1 The national legal system

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

In the Netherlands, there is only one level of (central) Government that issues anti-discrimination or equal treatment *legislation*. The principles of equality and non-discrimination are captured by various realms of the law. Of importance are: the Constitution, private and public employment law, criminal law and specific statutory equal treatment acts. Moreover, since the Netherlands' constitutional system adheres to a 'monist theory' of international law, international equality guarantees are automatically applicable in the national legal system (provided in Articles 93 and 94 of the Constitution). Private employment contracts are regulated by Book 7 of the Civil Code ("Burgerlijk Wetboek") and by specific statutory equal treatment acts. Moreover, regulation may occur via Collective Labour Agreements ("CAO") per sector or per employer. The employment of most public service employees is regulated by the Civil Servants Act ("Ambtenarenwet"). For each sector of public employment, there is normally also a Collective Labour Agreement. The main Equality Body is the Netherlands Institute for Human Rights (NIHR), which has a section that deals with complaints about unequal treatment.[3]

The following non-discrimination and equal treatment provisions / laws are of key importance.[4]

- Article 1 of the Constitution ("Grondwet") enshrines a constitutional equality and non-discrimination guarantee.
- International non-discrimination provisions (*e.g.* Article 26 ICCPR and Article 14 ECHR) can be directly applied in court proceedings. Sometimes provisions from UN CERD, UN CRPD or UN CEDAW are also called upon before Dutch courts.
- EU-Treaty provisions and Directives can be directly applied under certain conditions.[5]

[2] This report has been written and amended on the basis of two previous reports, one drafted by Marianne Gijzen and the other by Kees Waaldijk (on sexual orientation discrimination). The author thanks both of them for their permission to let her use their materials.
[3] The NIHR came into existence on 1 October 2012. It incorporates the former Equal Treatment Commission (ETC).
[4] These are the provisions and laws that are most relevant from the perspective of the EU Directives. There are also civil law provisions concerning discrimination on the ground of the duration of the employment contract (temporary / fixed) and the number of working hours (part time / fulltime). The NIHR is also competent to hear cases in these areas.
[5] These are the normal conditions for applicability of EU-Law in the Member States.

- The Criminal Code ("Wetboek van Strafrecht") entails specific provisions criminalizing discriminatory speech and publications (Articles 137d-137f) and discriminatory acts in the performance of one's job or one's enterprise (Articles 137g and 429quater).[6] Discrimination is defined in Article 90quater.[7] In addition, Article 137c forbids insulting groups of people because of their *race*, *religion/belief* and *homo-/heterosexual orientation*.
- The Civil Code ("Burgerlijk Wetboek") entails specific articles prohibiting sex discrimination and discrimination on employment duration and on permanent/fixed-term contract in labour contracts (Articles 7:646-7:649 BW). Employers are also liable if they fail to guarantee safe working conditions. This includes an environment free from discrimination and (sexual) harassment (Article 7:658 BW).
- The Civil Servants Act ("Ambtenarenwet") contains similar provisions for the public service sector(Articles 125g and 125h AW).
- The Act on Working Conditions ("Arbeidsomstandighedenwet") contains provisions concerning (sexual) harassment, aggression, violence and discrimination at the workplace. These provisions put a positive obligation on employers to prevent and combat discrimination and (sexual) harassment. The *Arbeidsinspectie* (Labour Inspectorate) can impose fines upon employers who are not complying with this obligation.[8]
- Race and ethnic origin, religion and belief and sexual orientation are covered together with 'political opinion', 'sex', 'nationality' and 'civil status' as grounds for discrimination since 1994 by the General Equal Treatment Act, or GETA ("Algemene Wet Gelijke Behandeling").[9] After adoption of the Directives, the GETA has been amended by the so-called EC Implementation Act.[10]

[6] Very few criminal law cases are brought to the Courts by the public prosecutor, and even fewer are successful. See Chrisje Brants, Renée Kool, & Allard Ringnalda, *Strafbare discriminatie,* Willem Pompe Instituut in opdracht van Ministerie van Justitie/WODC, Boom JU: Den Haag 2007. See for a publication on the use of criminal law procedures in discrimination cases: Marija Davidovic: 'Discriminatieverboden en de strafrechtelijke aanpak in 2009.In: Peter Rodrigues & Jaap van Donselaar, *Monitor Racisme en Extremisme, Negende Rapportage 2010*. Published by the Anne Frank Foundation and Pallas Publications, Amsterdam 2010, pp 210-232. (Also to be downloaded: http://www.annefrank.org/ImageVault/Images/id_11703/scope_0/ImageVaultHandler.aspx (last accessed on 13 March 2013).

[7]. The Criminal Code definition is in line with Article 1 of the UN CERD and therefore differs from the Directives' definition (see below).

[8] Tweede Kamer 2008-2009, 31 811 nr. A.

[9] Staatsblad 1994, 230.

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

This Act entered into force on the 1st of April 2004.[11] Importantly, the Dutch Government has deemed it desirable to extend many of the amendments that were legally required for the grounds covered both by the 1994 Act and the Directives (*i.e.*, 'race', 'religion/belief', 'sexual orientation') to other grounds that are also covered by the GETA.[12] Every 5 years, an evaluation of the GETA takes place in which both the equality body itself[13] and independent experts make an assessment of legal problems surrounding the implementation and the social effects of the equal treatment legislation.[14]

- The Equal Treatment Act for Men and Women in Employment Act ("Wet gelijke behandeling van mannen en vrouwen bij de arbeid"), hereinafter referred to as the ETA, which already existed when the GETA came into force, regulates, among others, the topic of equal pay and occupational pensions.[15]

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

[12] Explanatory Memorandum to the EC Implementation Act, Tweede Kamer, 2002-2003, 28 770, nr. 3, p. 3.

[13] Evaluation reports by the ETC (now NIHR) are published on its website: http://www.mensenrechten.nl/. The latest evaluation report (for the period 2004-2009) was published in May 2011. (Commissie Gelijke Behandeling: Derde Evaluatie AWGB, Wgb m/v en artikel 7: 646 BW (2004-2009); Utrecht mei 2011, from now on: ETC: 3rd Evaluation Report (2004-2009), May 2011). In the reaction of the Government to this evaluation report, it was openly discussed whether any such reports would be necessary in the future. See Tweede Kamer 2011-2012, 28 481 nr. 16. This was confirmed in a debate with Parliament, Tweede Kamer 2011-2012, 28 481 nr. 17, at p. 24.

[14] The reports by the independent experts that have been published thus far are: I.P. Asscher Vonk & C.A. Groenendijk, *Gelijke Behandeling: Regels en Realiteit*, The Hague: SDU Uitgevers 1999 and M.L.M. Hertogh en P.J.J. Zoontjens (red), *Gelijke behandeling, principes en praktijken. Evaluatieonderzoek Algemene Wet Gelijke Behandeling*. Wolf Legal Publishers, Nijmegen 2006. In 2009, the Government decided not to give an assignment for an independent expert report for the period 2004-2009 (See Tweede kamer 2011-2012, 28 481, nr 16 at p. 1). The Commission itself commissioned two reports, one from prof. Loenen on the issue of (in) compatibility of two or more equal treatment claims that are made at the same time (e.g. on grounds of religion vs on grounds of sex), and the second from prof. De Lange on problems arising from of a closed system of justifications in case of direct discrimination. See: 3rd Evaluation Report (2004-2009), May 2011, annexes 2 and 3. The report is available at: http://www.mensenrechten.nl/publicaties/detail/9895 (Last accessed 13 March 2013).

[15] Since this country report does not deal with the EU Directives in the area of sex discrimination, this Act will not be discussed in this report.

- The Act on Equal Treatment on the Ground of Age in Employment ("Wet Gelijke Behandeling op grond van Leeftijd bij de Arbeid"), hereinafter referred to as the Age Discrimination Act or ADA.[16] The ADA entered into force on 1 May 2004.[17] In 2009, a first 5-year period evaluation report, written by independent experts, was sent to Parliament.[18] The then ETC published its own evaluation report.[19]
- The Act on Equal Treatment on the Ground of Disability or Chronic Illness ("Wet Gelijke Behandeling op grond van Handicap of Chronische Ziekte") hereinafter referred to as Disability Discrimination Act or DDA.[20] The DDA entered into force on 1 December 2003.[21] In 2004 the DDA was amended by means of the EC Implementation Act.[22] The initial scope of the DDA was restricted to employment and vocational education, but in 2009 this has been extended to the fields of primary and secondary education (art. 5b DDA) and of housing (Article 6a, 6b and 6c DDA).[23] Public transport is covered in the Articles 7 and 8 of the law, and these Articles have entered into force on 9 May 2012. However, the Decree that has to give effect to these Articles, contains a complicated schedule of gradual implementation.[24] In fact, it will take until 2030 before the whole public transport sector (apart from transport on ferries) will actually fall under the scope of the DDA. In 2009, a first 5-year period evaluation report,

[16] Act of 17 December 2003, concerning the equal treatment on the ground of age in employment, occupation and vocational training ("Wet van 17 december 2003, houdende gelijke behandeling op grond van leeftijd bij de arbeid, beroep en beroepsonderwijs"), Staatsblad 2004, 30.
[17] Determined by Governmental Decree of 23 February 2004, concerning the establishment of a date of the entering into force of the Act on Equal Treatment on the Ground of Age in Employment ("Besluit van 23 februari 2004, houdende vaststelling van de datum van inwerkingtreding van de Wet gelijke behandeling op grond van leeftijd bij de arbeid"), Staatsblad 2004, 90.
[18] See Tweede Kamer 2008-2009, 30 347, nr. 2.
[19] This report is titled "*WGBL, geen symbool-wetgeving; evaluatie van de Wet gelijke behandeling op grond van leeftijd bij de arbeid."* The report can be downloaded from the website of the NIHR: http://www.mensenrechten.nl/publicaties/detail/9904 (Last accessed 13 March 2013).
[20] Act of 3 April 2003 regarding the establishment of the Act on Equal Treatment on the grounds of disability or chronic disease ("Wet van 3 april 2003 tot vaststelling van de Wet Gelijke Behandeling op grond van Handicap of Chronische Ziekte"), Staatsblad 2003, 206.
[21] Determined by Governmental Decree of 11 August 2003, concerning the establishment of a date of the entering into force of the Act on Equal Treatment on the Grounds of Disability or Chronic Disease ("Besluit van 11 augustus 2003, houdende vaststelling van het tijdstip van inwerkingtreding van de Wet gelijke behandeling op grond van handicap of chronische ziekte"), Staatsblad 2003, 329.
[22] See footnote 10.
[23] Wet van 19 jan. 2009, Staatsblad 2009-101, (effective from 1 August 2009) '*Wijziging van de Wet gelijke behandeling op grond van handicap of chronische ziekte in verband met de uitbreiding met onderwijs als bedoeld in de Wet op het primair onderwijs en de Wet op het voortgezet onderwijs en met wonen'* (= *Amendment to the Disability Discrimination Act concerning the extention to primary and secondary education and housing*).
[24] See the Decree of 19 April 2012, Staatsblad 2012, 199. The Decree is titled '*Houdende het tijdstip van inwerkingtreding van de artikelen 7 en 8 van de Wet gelijke behandeling op grond van handicap of chronische ziekte en inwerkingtreding van het Besluit toegankelijkheid van het openbaar vervoer*' (*Concerning the establishment of a date of the entering into force of Articles 7 and 8 of the Act on Equal Treatment on the Grounds of Disability or Chronic Disease and the entering into force of the Decree accessibility public transport*).

written by independent experts, was sent to Parliament.[25] The then ETC published its own evaluation report.[26]

NB: Integration of Equal Treatment Legislation The Dutch Government is in the process of developing a new General Equal Treatment Act in which the four different equal treatment laws (i.e. the existing GETA, The Equal Treatment Act for Men and Women in Employment Act, the DDA and the ADA), as well as the existing provisions in the Civil Code will be integrated. This is meant as a technical 'integration' of these laws as they stand now, including the last amendments concerning the definitions of direct and indirect discrimination; no substantive changes in the scope or content of these laws are foreseen. In addition, some small technical amendments that were proposed in the second evaluation report of the GETA in 2004 will be included in this new integrated GETA.[27] In 2010 the Government held an internet consultation on the draft law and also asked the then ETC for advice.[28] In January 2012, in a Commission Meeting in the House of Representatives about the GETA,[29] the Minister of the Interior and Kingdom Relations has announced that she will send a Memorandum about this issue to Parliament before the summer break. This legislative process has come to a stand-still however, as a consequence of the fall of the Government in the spring of 2012.[30] After the September elections, a new coalition government was formed, consisting of the two biggest parties, namely the social-democrats (PVDA) and the liberal party (VVD). It will take several months before it becomes clear what the newly formed Government's agenda is, where it comes to the integration of equal treatment legislation.

0.2 Overview/State of implementation

List below the points where national law is in breach of the Directives. This paragraph should provide a concise summary, which may take the form of a bullet point list. Further explanation of the reasons supporting your analysis can be provided later in the report.

[25] See Tweede Kamer 2008-2009, 29 355, nr. 39.
[26] The ETC report is titled: "Zonder vallen en opstaan; Evaluatie van de WGBHcz". It is published at http://www.mensenrechten.nl/publicaties/detail/10027 (Last accessed on 1 November 2012).
[27] These proposals were laid down in official reactions of the Government to the second evaluation report, to be found under number: Tweede Kamer 28 481, nrs 4-7.
[28] See the advice of the ETC at: http://www.mensenrechten.nl/publicaties/detail/9905 (Last accessed on 1 November 2012).
[29] TK 2011-2012, 28 481, nr 17 (Commission Meeting on 19 January 2012).
[30] In July 2012 the Minister of the Interior and Kingdom Relations has sent a letter to Parliament (TK 2011-2012, 28 481 nr 18, dd 11 Juli 2012) in which she explains that the interim Government has decided that the newly to be established Government will need to decide what it wants to do with respect to the integration of the equal treatment legislation. In the meantime, the Ministry of the Interior and Kingdom Relations is consulting the Ministry of Health whether an exception for public health needs to be included. See for a critical review on the draft law R. Holtmaat & G. Terpstra, Leve de pluriformiteit bij de discriminatiebestrijding; Een kritiek op het ideaal van een uniforme aanpak van verschillende discriminatiegronden. In: *NTM-NJCM-bulletin*, jrg 36 (2011), nr 2, pp 159-173.

This section is also an opportunity to raise any important considerations regarding the implementation and enforcement of the Directives that have not been mentioned elsewhere in the report.
This could also be used to give an overview on the way (if at all) national law has given rise to complaints or changes, including possibly a reference to the number of complaints, whether instances of indirect discrimination have been found by judges, and if so, for which grounds, etc.

Please bear in mind that this report is focused on issues closely related to the implementation of the Directives. General information on discrimination in the domestic society (such as immigration law issues) are not appropriate for inclusion in this report.

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

1. The accumulative conditions in the 'harassment' definition arguably fall short of the Directives' 'non regression' clause. [See section 2.4 of this report.]
2. Arguably, the Dutch Government interprets the prohibition of an 'instruction to make a distinction' unduly narrow. [See section 2.5 of this report.]
3. An unduly restrictive approach is also adopted by the Dutch Government as regards the 'scope of liability' for discrimination. [See section 3.1.3 of this report.]
4. Both Article 2(5) and Article 7(2) of the Framework Directive speak of national legislation or measures taken by the Member States Governments in order to protect health and safety. Article 3(1) sub (a) in the DDA provides for a justification on this ground, but it is disputable whether this provision is in line with the requirements of the Directive. (See section 4.6 of this report.)
5. The partially reversed burden of proof is not applicable in case of victimisation claims, which falls short of EU requirements. [See section 6.4 of this report.]
6. The requirement that sanctions need to be 'effective', 'dissuasive' and 'proportionate' seems not to be met by the Dutch legislation. [See section 6.5 of this report.]
7. Apart from this, at some points the equal treatment law has been worded in such a way that a rather wide interpretation of the provision is possible, leaving e.g. more room for justifications than would seem appropriate, considering the general rule of the CJEU that exceptions to the non-discrimination principle should be interpreted restrictively. [See e.g. section 4.2 of this report where the wording of the exceptions based on Article 4(2) of the Framework Directive is discussed. See also section 2.3 of this report and also below in this section, where we discuss the Infringement Procedure.]
8. It is highly questionable whether Dutch equal treatment legislation contains effective sanctions against discriminatory job advertisements. Although in theory there is a possibility to hold someone liable for discrimination and ask for material and immaterial damages, in practice it is very difficult to get especially immaterial damages The negative publicity of a condemnation for discriminatory

job vacancies might be deterrent to a certain degree. Only in seriously humiliating cases, the Criminal Code with corresponding sanctions, such as fines, may possibly be applied.

Infringement procedure

In 2008 the European Commission started an infringement procedure against The Netherlands for non-compliance with the Directives with respect to three different issues.[31] These issues were:

- the definitions of direct and indirect discrimination in the relevant Dutch equal treatment laws are not in accordance with the definitions thereof in the Directives;
- the ADA lacks an explicit prohibition of indirect discrimination;
- the exclusion of employment relations in the private sphere from the scope of the equal treatment legislation is too wide.

In all three respects, the relevant equal treatment laws have been amended in November 2011.[32]

The Commission, in its letter of December 2006, mentioned a fourth issue, but did not list this issue with the points for which it wanted clarification / amendments by the Dutch legislator. This concerned the exception clause as regards religious institutions in Article 3 and Article 5(2) sub (a) and (c) in the GETA. The exception to the prohibition on discrimination for legal relationships within religious communities may be phrased in too general terms. The Government is of the opinion that these exceptions are fully in line with Article 4(2) of Directive 2000/78/EC, but nevertheless considers amending these provisions in order to avoid any possible misunderstanding about their (restricted) meaning and scope.

Preliminary observation about terminology in Dutch equal treatment laws:

The use of the word 'distinction' instead of discrimination

In the Netherlands, the word 'distinction' is used in the equal treatment legislation, instead of 'discrimination'. Although the Government is taking the stance that there is no substantive difference between these words, this choice of terminology has raised a lot of critique by (among others) the Council of State [*Raad van State*], which is the most important (obligatory) advisor of the Government in the process of drafting new legislation. The Council has advised the Government to abandon the neutral word

[31] Letter dated 31 January 2008 (no. 2006-2444), with reference to the infringement procedure of 18 December 2006, infringement No. 2006/2444.
[32] Wet van 7 November 2011, Staatsblad 2011, 554.

'distinction'.[33] The main reason for this preference is to bring the terminology of Dutch equal treatment legislation in line with EU Equality Directives.[34]

In 2005, the Government commissioned an in-depth study on this matter. The conclusion of the report[35] was that the way in which the word distinction is used in the Dutch equal treatment legislation is in line with the meaning of the word discrimination in EU non-discrimination law. However, for other reasons, it might be preferable to change the terminology of the GETA, DDA and ADA. One of these reasons being that the word distinction might suggest that each and every differentiation between categories of people amounts to discrimination. The use of the word distinction, for that reason, is almost always immediately accompanied with the adjective 'unjustified'. The concept of an unjustified distinction is perfectly in line with what generally is conceived of as discrimination, however, it might suggest that also in a case of direct discrimination justifications may be brought forward (open system). The Government proposes that this wording will be changed in the (long awaited) "Integration Act", in which most of the existing equal treatment laws will be integrated into one new law. It is however still unknown when the Government will send such a bill to Parliament.

0.3 Case-law

*Provide a list of any <u>important</u> case-law in **2012** within the national legal system relating to the application and interpretation of the Directives. (The **older case-law mentioned in the previous report should be moved to Annex 3)**. This should take the following format:*

Name of the court
Date of decision
Name of the parties
Reference number (or place where the case is reported).
Address of the webpage (if the decision is available electronically)

[33] Advisory Opinion of the Council of State and Complementary Report ("Advies van de Raad van State en nader Rapport"), Tweede Kamer, 2001-2002, 28 169, B, p. 5-6 and Implementation of the Directives on Equal Treatment, Advisory Opinion of the Council of State and Complementary Report ("Implementatie van de richtlijnen inzake gelijke behandeling, Advies Raad van State en nader rapport"), Tweede Kamer, 2001-2002, 28 187, A, p. 4-5.
[34] The same advice had also been given by the Interdepartmental Commission European Law (ICER, "Interdepartementale Commissie Europees Recht"). See ICER, *Implementation of the Article 13 Directives, conclusions and recommendations* ("*Implementatie Richtlijnen op grond van Artikel 13 EG Verdrag, conclusie en aanbevelingen*"), ICER 2001/54, p. 2. (NB: Article 13 EC became Art. 19 TFEU after the Lisbon Treaty was adopted).
[35] See M.L.M. Hertogh & P.J.J. Zoontjens (eds): *Gelijke behandeling, principes en praktijken. Evaluatieonderzoek Algemene Wet Gelijke Behandeling*. Wolf Legal Publishers, Nijmegen 2006. The part of the report on the differences in meaning between the words 'distinction' and 'discrimination' (pp 3-113) was written by prof. Rikki Holtmaat.

Brief summary of the key points of law and of the actual facts (no more than several sentences).
➔Please use this section not only to update, complete or develop last year's report, but also to include information on important and relevant case law falling under both anti-discrimination Directives (Please note that you may include case-law going beyond discrimination in the employment field for grounds other than racial and ethnic origin)

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

Name of the court: ETC
Date of decision: 6 March 2012
Reference number: ETC Opinion 2012-47
Address of the webpage: http://www.mensenrechten.nl/publicaties/oordelen/2012-47
Held: Breach
Brief summary: All inhabitants of The Netherlands are insured under the statutory national insurance scheme for old age pensions (AOW). In order to be eligible for the full amount of state pension, one must have lived in The Netherlands between the ages of 15 and 65 years. For each year that one has lived outside the country, a deduction of 2% on the full amount will take place. At the age of 65, married or cohabiting persons get a pension which is set at 50% of the full amount for couples (married and cohabitating). Singles get 70% of this same amount. When one of the partners of a couple is not yet 65 years old and has no income of her/his own, the benefit of the person who is 65 may be supplemented to 100%.[36] In the case at hand, the man of the couple was eligible for 50% of the old age pension when he became 65 years old. He had a younger wife, who had only started to live in The Netherlands when she was 50 years old. Therefore, the supplementary benefit that the husband received for her was substantially reduced.

The man complained that this was discrimination on the ground of race/ethnic origin. Discrimination on this ground is prohibited in the area of social security, including national statutory social security schemes (Art. 7a General Equal Treatment Act). The Dutch government brought forward three aims for the rule that for each year that someone has not lived in the Netherlands a 2% deduction will take place. First, the rule is there to avoid that persons are doubly eligible both for an old age pension in the country of origin and in The Netherlands. Secondly, the rule is meant to avoid that persons who have not contributed will become fully eligible. And thirdly the rule is meant to avoid that the couple at first will receive 2 x 50%, but will only receive a reduced amount from the moment that the woman will become 65 (for then the deduction will be applied to her anyway). Only the second aim was legitimate

[36] This supplement will cease to exist in 2015. From then on, all persons are expected to have their own source of income and no longer to be dependent on the income of their partner.

according to the ETC. It accepted the fact that the rule is appropriate in order to keep the system financially sustainable. However, the ETC found indirect discrimination on the ground of race and concluded that in terms of proportionality (i.e. when weighing the interests at hand) the system could not be approved: the interests of the claimant to receive the full 50% supplement for his dependent spouse were deemed far more important than the interest of the Dutch State to save money. The Opinions of the ETC (now NIHR) are however not binding. The Highest Administrative Court (competent in social insurance cases) deems the 2% deduction rule to be based on objective reasons.[37]

Name of the court: ETC
Date of decision: 27 July 2012
Reference number: ETC Opinion 2012-129
Address of the webpage: http://www.mensenrechten.nl/publicaties/oordelen/2012-129
Held: No breach
Brief summary: This case is similar to Opinion 2012-47[38] which concerned the application of the same 2% deduction rule, used to determine the state pension (see above). In the case at hand, the applicant was born in Surinam where he lived until the age of 6. After that, he moved with his parents to Curacao from where he moved to the Netherlands at the age of 17. When he applied for the general old age pension (AOW), 4% was deducted from his pension as a consequence of that personal migration history (living 2 years abroad between the age of 15 and 65). The applicant has the Dutch nationality.

The applicant claimed that the deduction amounts to discrimination on the ground of race/ethnic origin. Discrimination on this ground is prohibited in the area of social security, including national statutory social security schemes according to Art. 7a General Equal Treatment Act (GETA). The ETC decides that the ground race is at stake because of the fact that people who have not continuously lived in the Netherlands between the ages of 15-65 most often will be of non-Dutch origin. Therefore this criterion is indirectly discriminatory on ground of race. The Dutch government and the social security fund have brought forward two reasons for the 2% deduction rule. First, the rule respects the right to autonomy of all States to make their own social security and pension arrangements for their inhabitants / citizens. Second, the rule is meant to secure that the system will be financially sustainable in the future. Both reasons are accepted by the ETC as legitimate aims. As far as the proportionality test is concerned, the ETC states that the government has a wide

[37] E.g. CRvB 28-05-29009, LJN: BI9049: “dat de regeling met betrekking tot de inkomensafhankelijk toeslag in de AOW berust op objectieve en redelijke gronden” (stating that the system of supplements is based on objective and reasonable grounds). In a number of cases the Court has dealt with the 2% reduction rule and rejected the claim that this was discriminatory. See LJN: AF7507, BG3608, AF2361, BJ2440, AW7288, AZ2594 (to be found at: http://zoeken.rechtspraak.nl/ type the LJN number in the search form. Last accessed in 3 May 2012.
[38] See NL-61-Flash Report 2012-3.

margin of appreciation of how to achieve its aims and that the ETC therefore should refrain from a strict interpretation. The measure is deemed to be appropriate and necessary to achieve the aforementioned two objectives. The conclusion is that the State and the social security fund do not discriminate on the ground of race against the complainant.

It is quite striking that in the previous case concerning the application of the 2% deduction rule to the right to a supplementary pension benefit (2012-47) the ETC evaluates the same aims that were brought forward by the government very strictly and rejects the first one of them as being non-legitimate, while in this case it quite easily accepts both aims as 'weighty reasons'.[39] Further, as regards the proportionality test, in this case (again in contrast to the previous case) the ETC also takes a rather lenient stance: it accepts that the government is allowed a wide margin of appreciation. The outcome of these cases consequently differs diametrically, even though they are comparable (both discrimination on the ground of race for example). Where the 2% deduction rule is deemed unjustifiable (ergo discriminatory) in the first case, it is deemed not to be discriminatory in the second one. Apparently the ETC acknowledges that the consequences of such a decision would be enormous: all persons who are present in The Netherlands when they become 65 years old would automatically have the right to a full state pension. In current times, when the financial sustainability of the pension system already is under great pressure, such a conclusion of the ETC would be dismissed by everyone.

Name of the court: ETC
Date of decision: 15 March 2012
Reference number: ETC Opinion 2012-50
Address of the webpage: http://www.mensenrechten.nl/publicaties/oordelen/2012-50
Held: Breach
Brief summary: This is one of the rare occasions where the question of validity of 'situation testing' was raised before the ETC. From these tests it appeared that all native Dutch couples were admitted to a bar, while among the other couples (consisting of two non-Dutch or one native Dutch plus one non-Dutch person) more than 50% were refused admittance. These results were brought to the attention of the police and the public prosecutor. A meeting was held between all parties involved, in which it was agreed that the owner of the bar would make his policies of admittance more transparent and non-discriminatory. Several months later, a renewed test took place from which it appeared that the results were still the same and that there was still not a clear notification with the house rules (regarding membership) at the entrance. The anti-discrimination agency then brought the case before the ETC.

[39] In 2012-47 a third aim was brought forward, directly related to the supplementary character of the benefit, which was not relevant in this case.

The owner defended himself by stating that it is his policy to have an equal representation of customers on the basis of ethnic origin. The ETC is of the opinion that this policy amounts to direct discrimination on the ground of race / ethnicity and then evaluates whether this policy is legally acceptable. A policy of equal representation cannot be equated with a positive action plan, since it is not the aim to put persons belonging to an underrepresented or systematically disadvantaged group in a better position. Therefore the exception of Art. 2(3) GETA is not applicable. Since there are no other legally acceptable justifications for this kind of policy, the ETC concluded that the owner directly discriminated.

Name of the court: CRvB
Date of decision: 5 June 2012
Reference number: LJN: BW7531
Address of the webpage: http://zoeken.rechtspraak.nl/detailpage.aspx?ljn=BW7531
Held: No breach
Brief summary: In 2004, local authorities, on the basis of a ministerial Letter of Instruction, took special measures to investigate the legality of welfare benefits granted to persons of Somali origin. The presumption was that within this group of welfare recipients on the minimum social income level, there was large scale fraud going on. One Somali person, who was spotted by the civil servants who were doing these investigations, first refused to tell his address. After being pressured to tell these civil servants where he lived, he refused to give them permission for a visit to his home to check whether he actually lived there. When the civil servants visited this address unannounced some time later, the persons who were present there made confusing statements. As a consequence of all that, the claimant lost his right to receive a welfare benefit.

In 2006, the ETC gave an opinion in this case, stating that the fact that the whole group of Somali recipients of welfare benefits was specifically targeted for investigations, including unannounced visits to their homes, was discriminatory and prohibited under Article 7a of the General Equal Treatment Act (GETA).[40] The ministerial Letter of Instruction was withdrawn as a consequence of that Opinion. After another court case, [41] the local authorities paid the benefits plus some interests, but not the extra expenses that had been made (in particular some medical costs. Thereafter, “these damages were claimed from the local government of Haarlem, plus an extra 2000 Euro for immaterial damages because he had suffered discrimination. These claims were all denied by the local authorities and subsequently by the (Administrative) District Court and now finally also by the Highest Administrative Court, the Centrale Raad van Beroep (CRvB). In the latter instance, the legal conflict concentrated on the immaterial damages that were claimed.[42] Both the District Court and the CRvB found that the discriminatory treatment had not caused ‘mental injury’ that had resulted in a ‘damaging of his

[40] ETC Opinion of 21 December 2006, 2006-257.
[41] Rechtbank Haarlem 8 May 2007, LJN BA5410.
[42] The judgment does not make clear what happened with the medical costs.

personhood or his personal well-being' as required by Article 6:106 of the Civil Code. The CRvB acknowledges that discrimination on the ground of race does constitute a serious infringement of a fundamental right. However, the facts of the case do not lead to the conclusion that honour or good name had been seriously injured.

This case demonstrates how difficult it is in The Netherlands to get compensation for damages after having been discriminated against. The equal treatment legislation as such does not contain any sanctions or possibilities to ask for damages. It is seriously doubted in academic legal circles, whether the range of remedies and sanctions available under the equal treatment legislation is in conformity with the EU law requirement that sanctions be 'effective, proportionate and dissuasive'.[43]

A victim of discrimination has to seek redress in a separate administrative or civil court proceeding. In the case at hand, it becomes clear that the criteria for getting such damages in the Civil Code are very strict and difficult to fulfil for a victim of discrimination. The individual victim has to prove that he/she has suffered a mental injury resulting in seriously damaging his personhood or personal well-being. This is standard case law,[44] but it is disputable whether the CRvB with this decision did not interpret this criterion too strict. The case demonstrates what experts of equal treatment legislation have argued for a number of years already: although in theory there is a possibility to hold someone liable for discrimination and ask for material and immaterial damages, in practice it is very difficult to get especially immaterial damages.

Name of the court: ETC
Date of decision: 4 May 2012
Reference number: ETC Opinion 2012-84
Address of the webpage: http://www.mensenrechten.nl/publicaties/oordelen/2012-84
Held: Breach
Brief summary: A Protestant Church (Baptist) owns four houses next to the Church building that are designated to be rented to young people. A young woman asked to be put on the waiting list. She indicates that she is not a Baptist. After a year, when she had still not got a house from the Church, she inquired how that was possible. She was then told that young people who are Baptists have priority and would get a house before her, even if they had signed up on the waiting list after she did. The woman brought a complaint to the ETC. The board of the Baptist Church defended itself by stating that the GETA does not apply to legal relationships *within* churches, other religious communities, or associations of a spiritual nature (I.e. a restriction of the scope of application of the Law as laid down in Article 3 (a) GETA.) These are considered to be internal affairs of these (religious) organizations. The rationale for

[43] See for references and a more elaborate discussion of this topic this Country Report, para 6.5.
[44] See e.g. Hoge Raad 13 januari 1995, LJN ZC1608 and Hoge Raad 18 maart 2005, LJN AR5213.

this limitation of the scope of the equal treatment legislation lies in the principles of *freedom of religion* and in the *division between state and church*.

The ETC took the stance that this exception needs to be interpreted in a restrictive way. Only when essentially religious affairs are at stake, the matter falls outside the scope of the equal treatment legislation. This is not the case when a Church organization takes part in social and economic life (especially when this concerns commercial activities) on the same basis as any other private party. In that case the Church, like any other private party, offers goods and services which fall under the scope of the GETA (Article 7 (1)). Renting houses is included in the concept of goods and services, especially when the offer is made publicly and the general public is invited to accept this offer. Indeed the situation of renting houses to people concerns a legal relationship *with* a Church, but not a legal relationship *within* a Church. The ETC found direct discrimination on the ground of religion and decided that the Baptist Church in this case could not rely on the restriction of the scope of the equal treatment legislation.

Name of the court: ETC
Date of decision: 7 May 2012
Reference number: ETC Opinion 2012-85
Address of the webpage: http://www.mensenrechten.nl/publicaties/oordelen/2012-85
Held: Breach
Brief summary: A pupil of a school for secondary education (HAVO) has a math learning disability called dyscalculia. She was officially diagnosed as such when she started at the school in 2007. The parents of the pupil tried to get permission both from the school board and the Education Inspectorate (a supervising body of the Ministry of Education) for their daughter to use the formula-charts during the final national written exams (CSE). This was refused. The reason given for this is that during exams no information which the pupil is supposed to know by heart should be on the table. According to the parents, the school is obliged to provide a reasonable accommodation and that failing to do so amounts to discrimination on the ground of disability.

The school defends itself by stating that according to the Exam Regulations (*Examenbesluit*) the director of a school may adapt the way in which an exam is taken, but may not change the content of the exam. Knowledge of the math formulas is part of the requirements. However, the chart may be used during all other tests and exams from the first to the fifth grade; the marks for school exams during the fifth grade also are taken into consideration for the final mark for math / the possibility to get the diploma. Therefore the policy to refuse usage of the charts during the CSE is inconsistent. The ETC concludes that usage of the charts during the CSE is a reasonable accommodation and that the school does not suffer an undue burden as a result of allowing this adaptation. A breach of Governmental Regulations (*Examenbesluit*; as to the scope of the authority of the school board) and Directions of the Exam Committee (as to the content of the exam requirements) cannot count as

an undue burden. These regulations are of a secondary order and cannot be used as an excuse to negate the requirement in the DDA (a formal law) to provide a reasonable accommodation. Also, 'breach of secondary regulations' is not mentioned as a possible justification ground for (direct) discrimination in the DDA.

Name of the court: Dutch Supreme Court
Date of decision: 13 July 2012
Reference number: LJN: BW3367.
Address of the webpage: http://zoeken.rechtspraak.nl/detailpage.aspx?ljn=BW3367
Held: No breach
Brief summary: KLM has a rule in its collective labour agreement that pilots are obliged to retire at the age of 56. Some pilots have contested the early retirement age and have brought a law suit against KLM. In its judgment the Dutch Supreme Court (SC) starts off with the explicit recognition that the principle of non-discrimination on the ground of age is a general principle of EU law, thereby referring to the Mangold (C-144/04) and Sweedex (C-555/07) cases. The SC continues by explaining the interpretation of Directive 2000/78/EC given by the CJEU in its case law on age discrimination.

From this case law, the SC concludes that Member States, including social partners, in formulating their policies as regards an obligatory pensionable age for certain categories of workers, have a wide margin of appreciation as to the social policy objectives that they want to achieve, as well as to the means chosen to reach these objectives. (Referring to the Rosenbladt case; C-45/09.) The relevant articles in the Dutch ADA need to be interpreted in the light of the Directive and the relevant case law of the CJEU. The SC then concludes that contrary to the Prigge case (C-447/09), in the case of the KLM collective agreement the objective of the early retirement rule is not to guarantee the safety of airline traffic, but that social policy objectives are at stake. The SC finds that the objectives brought forward by the defendants, such as a balanced personnel structure, are covered under Art. 6(1) of the Directive and Art. 7(1) of the ADA. Also, it finds that the means chosen to achieve these objectives are appropriate and necessary. In this context, the SC stresses that national judges have a wide margin of appreciation as to how to assess whether the means are appropriate and necessary (with reference to Fuchs and Köhler, C-159-10). The SC concludes that KLM does not discriminate on the ground of age.

Name of the court: ETC
Date of decision: 14 September 2012
Reference number: NIHR Opinion 2012-151
Address of the webpage: http://www.mensenrechten.nl/publicaties/oordelen/2012-151
Held: No breach
Brief summary: A father complains that the Children's Play Centre has placed his son on a waiting list. The Play Centre, in accordance with national education policy and with the local authority's apprehension, has formulated a policy that gives priority to children who have a language insufficiency and / or other problems with social

integration. Priority means that (a) these children can bypass the waiting list, and (b) these children are eligible for 4 half-days in the Centre instead of the regular 2 half days a week. In order to have this right to preferential treatment a child must fulfil one of the following 3 criteria: (1) his/her parents have attended less than 2 years of basic secondary education; (2) the language that is spoken at home is non-Dutch; (3) the local Youth Care should have indicated that the child needs to be placed in the Children's Play Centre. The aim of this policy is to give children from these categories a chance to develop their language and social capacities before entering primary education and thereby to increase their equal opportunities in education and in their future social and professional life. The claimant's son did not fulfil any of the three criteria. The claimant states that he/his son has been discriminated against on the ground of his background (race/ethnicity).

The ETC finds that the second criterion is suspect of possible indirect discrimination on the ground of race / ethnic origin because most children that do not have a chance to speak Dutch at home will have parents from a different (than Dutch) ethnic background. The preferential treatment policy is not directly aimed at children of a particular race or ethnic origin. Therefore, the exception concerning positive action in the GETA (Article 2 (3) GETA) is not applicable in this case. The ETC next examines whether the indirect discrimination can otherwise be objectively justified. The aim of the preferential treatment of "children with arrears" is legitimate and not discriminatory in itself. The means chosen (skipping the waiting list and placing the child 4 instead of 2 half days at the Centre) are appropriate and necessary to reach this aim. Besides, if the claimant's son did indeed need extra pre-school education, the father could have asked the Youth Care Centre to submit a request for preferential placement of his son at the Play Centre. Since there is an objective justification, the policy of the Centre is not discriminatory.

Name of the court: NIHR (Former ETC)
Date of decision: 19 December 2012
Reference number: NIHR Opinion 2012-196
Address of the webpage: http://www.mensenrechten.nl/publicaties/oordelen/2012-196
Held: Breach
Brief summary: The Bar Association of the district of 's Hertogenbosch refused to appoint a supervisor for a 74 year law graduate who wanted to become an advocate. Such a supervisor is required to become an advocate. According to the NIHR, the Bar Association has taken its negative decision directly on the ground of age. The NIHR subsequently investigated whether there was any objective justification. The Bar Association has the task to supervise the quality of advocates' professional activities. This is a legitimate aim. One of the means to adequately fulfil this task could be that the Bar sets very strict entry requirements. However, in this case it was not necessary to refuse the candidate purely on the ground of age. The act on advocates leaves room for the Bar Association to make an individual assessment of the quality of the work of the candidates and of the conditions under which he/she works together with a supervisor during the 3 year training. These rules could have

been applied in the case at hand; therefore it was not necessary to reject his application purely on the ground of his age.

1 GENERAL LEGAL FRAMEWORK

Constitutional provisions on protection against discrimination and the promotion of equality

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

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

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

From 2001 onwards, there have been various proposals and studies into the issue whether the list of grounds mentioned in the Constitution should be extended, at least with sexual orientation and disability.[45] In 2006, a commission of experts concluded that it is not necessary to do this, since Article 1 of the Constitution has direct horizontal effect between citizens and can also be applied by judges in cases of disability, age or the other grounds of the GETA that are not mentioned (*e.g.* civil status).[46] The inclusion in the Constitution of such new grounds does not offer additional protection. The Minister presented the report to Parliament and subscribed to its conclusions.[47] In June 2010, three Members of the House of Representatives submitted a Bill,[48] in which they proposed to add disability and hetero- or homosexual orientation to the grounds mentioned in Article 1 of the Constitution.[49] In 2010, the Council of State has given an advice on the feasibility of this proposal, inter alia

[45] Motion Rouvoet of 6 December 2001, Tweede Kamer, 2001-2002, 28 000 XVI, nr. 63 ("Motie Rouvoet"). It should be noted that, in respect of 'disability and chronic disease', the discussion on an (explicit) expansion of Article 1 of the Constitution to include these grounds had already taken place during the Parliamentary debates on the GETA. See the amendment handed in by Groenman (Tweede Kamer, 1992-1993, 22 014, nr. 15), which did not receive sufficient Parliamentary support. See also the Letter of the Minister of the Interior and Kingdom Relations ("Brief van de Minister van Binnenlandse Zaken en Koninkrijksrelaties"), Tweede Kamer, 2001-2002, 28 000 XVI, nr. 112. And see ETC Opinion 2004-03 of 26 February 2004 as well of the reaction of the Cabinet in the Letter of the Minister of the Interior and Kingdom Relations, Tweede Kamer, 2003-2004, 29 355, nr.7.

[46] See Tweede Kamer, 2005-2006, 29 355, nr. 24, in which the Government announces the installment of an commission of experts. The report was written by a Committee of legal experts, headed by Prof. Alkema of Leiden University and may be downloaded from: https://zoek.officielebekendmakingen.nl/kst-29355-28-b1.html (last accessed 19 March 2013).

[47] Tweede Kamer 2005-2006, 29 335, nr. 28 of 1 May 2006.

[48] Namely a member of the Green Party (GroenLinks), the Liberal Democrat Party (D66) and the Labour Party (PvdA).

[49] Tweede Kamer 2009-2010, 32 411, nrs 1-3 of 11 June 2010.

stipulating the sober character of the Constitution.[50] The initiators published their reaction to it in the autumn of 2012, thereby setting in motion the discussion about the Bill in Parliament.[51] Proposals to change the Constitution take a special (rather lengthy) procedure in both Houses of Parliament, and at this moment, this proposal does not seem to reach a majority, let alone a two-third majority (which is prerequisite for a change in the Constitution).

b) Are constitutional anti-discrimination provisions directly applicable?

The Constitutional non-discrimination clause is beyond doubt directly applicable in *vertical* relations. However, there is a limitation to this: formal statutory Acts (i.e., Acts adopted by the Government in co-operation with Parliament) may not be subjected to Constitutional review by the Courts (according to Art 120 of the Constitution), and thus, also not to a Constitutional 'equality' review'.[52] However, Dutch courts do have the power to strike down legislation that violates any directly applicable provision of international law (under Articles 93 and 94 of the Constitution). With respect to discrimination, the Dutch courts have to consider rather frequently whether some piece of legislation violates Art. 14 of the European Convention on Human Rights, Art. 26 of the International Covenant on Civil and Political Rights, or any other international or European non-discrimination provision.

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

It is widely accepted that Article 1 of the Constitutional can be applied in horizontal relations.[53] However, since this is an 'open clause' it does not specify what the equal treatment or non-discrimination norm entails in concrete situations and how this norm should be weighed against other constitutional rights (e.g. freedom of speech/opinion or freedom of belief/religion). In order to ensure the applicability of the equality principle in horizontal relations, the Constitutional guarantee has been elaborated in criminal law provisions and in specific statutory Equal Treatment Legislation (ADA, DDA, GETA, ETA).

[50] This advice remained undisclosed until the initiators published their reaction. Both are accessible at http://www.denederlandsegrondwet.nl/9353000/1/j9vvihlf299q0sr/vj2zh53psuy9, last accessed on 20 February 2013.
[51] See Tweede Kamer 2011-2022, 32 411, nr. 5, 14 September 2012.
[52] There is a Bill (Initiative of Halsema) in which it is proposed to introduce Constitutional review in the Constitution (Tweede Kamer 2001-2002, 28 331, nrs 1-2 of 11 April 2001).
[53] E.g. *Hoge Raad* (Supreme Court) in Van Pelt/Martinair, 8 October 2004, NJ 2005, 117 and idem in KLM / Vereniging van Verkeersvliegers, LJN: AP0425 http://zoeken.rechtspraak.nl/ (search LJN: AP0425).

2 THE DEFINITION OF DISCRIMINATION

2.1 Grounds of unlawful discrimination

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

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

2.1.1 Definition of the grounds of unlawful discrimination within the Directives

a) How does national law on discrimination define the following terms: (the expert can provide first a general explanation under a) and then has to provide an answer for each ground)

The words *racial or ethnic origin*, *religion or belief*, *disability*, *age* and *sexual orientation* are not defined in Dutch equal treatment law.[54] Dutch equal treatment legislation applies symmetrically, in the sense that both persons of the dominant group (ethnic majority, religious majority, non-disabled people, young/old people[55] and heterosexuals) and the disadvantaged group (ethnic minority, religious minority, disabled people, old people/young people and homosexuals) are covered. However, as grounds of discrimination have to be interpreted in concrete cases, some indications about the definition of grounds can be derived from case-law (Please see below under section *b)* for an overview).

i) racial or ethnic origin,

The words *racial or ethnic origin* are not defined in Dutch equal treatment law

ii) religion or belief,

The words *religion or belief* are not defined in Dutch equal treatment law

iii) disability. Is there a definition of disability at the national level and how does it compare with the concept adopted by the Court of Justice of the European Union in Case C-13/05, Chacón Navas, Paragraph 43,

[54] Neither are the other grounds that are covered (see above) defined in the Law.
[55] Here it is difficult to establish who is the oppressed/dominant group in the context of age discrimination, because, as was observed by Veldman, with regard to 'age' one may distinguish many different groups (50+/50-/25+/30-/young people/old people). See A. Veldman, 'Wet Leeftijdsdiscriminatie gooit veel overhoop', in: *Sociaal Recht* 2003, p. 363-364, at p. 363.

according to which "the concept of 'disability' must be understood as referring to a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life"?

Since there is no definition of disability in the DDA we cannot compare it with the standards set by the CJEU in the Chacón Navas case. Dutch equality law does not define disability, but contrary to the EU level of protection, in addition to "disability" also "chronic disease" is explicitly included as a ground in the DDA.[56]

With regard to the definition, we can derive some guidelines from the *travaux préparatoires* of the DDA and the cases of the then ETC (now NIHR). Criteria mentioned during the preparation of the Law were (*inter alia*) the long duration of the disability or chronic disease and the fact that – in case of disability – the impairment is irreversible. This means that temporary disability as a consequence of accidents are excluded.[57]

According to the Explanatory Memorandum to the DDA, the concept of "handicap" (disability) may embrace not only physical, but also mental and psychological impairments.[58] The Government is of the opinion that the question what constitutes a disability is not only dependent on the physical or psychological features/characteristics of the individual, but also on the physical and social environment that allows/does not allow people to participate on an equal footing. The then ETC has accepted this line of reasoning and – considering the goal of the DDA – interprets the terms disability and chronic disease in an extensive way.[59]

iv) age,

Age is not defined in Dutch equal treatment law.

v) sexual orientation?

Sexual orientation is not defined in Dutch equal treatment law.

b) Where national law on discrimination does not define these grounds, how far have equivalent terms been used and interpreted elsewhere in national law (e.g. the interpretation of what is a 'religion' for the purposes of freedom of religion, or what is a "disability" sometimes defined only in social security

[56] For a comparison of the EU and Dutch level of protection against discrimination of disabillity, see L.B. Waddington and M.H.S. Gijzen, '(Her)definitie van het begrip 'handicap in de EG en Nederlandse gelijke behandelingswetgeving', NTER nummer 12, december 2006, p. 270-279.
[57] See Explanatory Memorandum to the ADA, Tweede Kamer 2001-2002, 28169, nr 3, p. 9 and p. 24 and nr. 5, p. 16. See also ETC Opinion 2005-234.
[58] Tweede Kamer 2001-2002, 28 169, nr 3, p. 24.
[59] See e.g. ETC Opinions 2005-234, 2006-227, 2007-25, 2009-62, 2009-102 and 2011-78.

legislation)? Is recital 17 of Directive 2000/78/EC reflected in the national anti-discrimination legislation?

i) racial or ethnic origin

The Explanatory Memorandum to the GETA[60] stresses that 'race' is a broad concept, which must be interpreted in line with the UN Convention on the Elimination of Racial Discrimination (CERD).[61] The concept embraces: *race*, *colour*, *descent* and *national*[62] or *ethnic origin*.[63] The Dutch Supreme Court as well as the NIHR (formerly ETC) use the CERD definition of race. In the EC Implementation Act of 2004, the Government has not deemed it necessary to explicitly include the notion of 'ethnic origin' in the law, since this is sufficiently captured by this interpretation of 'race'.[64] The NIHR uses as a yardstick whether the applicant belongs to *a coherent group with collective physical, ethnic, geographical or cultural characteristics and which distinguishes itself from other groups by common features or a common behaviour*.[65] However, sometimes it is difficult to draw the line between race, ethnicity and religion. If all three grounds were protected in the same sense (as far as personal and material scope of the legislation is concerned and the exceptions to the non-discrimination ground are similar for each of these grounds), that would be no problem. However, this is not the case in the Dutch legal system (where race and ethnicity are covered more broadly than religion). Another discussion concerns the exact borderline between 'race / ethnicity' and nationality (which is also covered under the GETA).[66]

ii) religion or belief

Religion is also not defined in the Constitution, in the GETA or anywhere else in the equal treatment legislation. In The Netherlands, the term belief is not used. In the Explanatory Memorandum to the EC Implementation Act, the Government has made

[60] Explanatory Memorandum to the GETA, Tweede Kamer, 1990-1991, 22 014, nr. 3 ("Memorie van Toelichting bij de Algemene Wet Gelijke Behandeling").
[61] International Convention on the Elimination of All Forms of Racial Discrimination (CERD) of 21 December 1965. Many indications of what constitutes a 'race' can also be found in the discussions between Government and Parliament during the drafting of the Criminal Code provisions against racial discrimination in 1971. It appears that the same interpretation has been given to these criminal law provisions as in equal treatment legislation, since both are meant to implement the UN CERD. See J.L. van der Neut, *Discriminatie en Strafrecht*, Arnhem: Gouda Quint 1986.
[62] It is to be noted that the notion of "national origin" only embraces nationality in an *ethnic* sense. Nationality in a *civic* sense is covered by the non-discrimination ground "nationality".
[63] Explanatory Memorandum to the GETA, Tweede Kamer, 1990-1991, 22 014, nr. 3, p. 13.
[64] Explanatory Memorandum to the EC Implementation Act, Tweede Kamer, 2002-2003, 28 770, nr. 3, p. 3. See also J.H. Gerards and A.W. Heringa, *Wetgeving Gelijke Behandeling,* Kluwer: Deventer 2003, p. 28-30.
[65] See, *e.g.*, Opinions 1997-119 and 1998-57.
[66] See, *e.g.,* Opinions 2011-97 and 2011-98, especially the note to both cases by A Böcker and S Dursum-Aksel, to be found in C.J.Foster e.a. (eds), *Oordelenbundel 2011*. Nijmegen: Wolf Legal Publishers 2012, pp.453-464.

it clear that it wishes to continue using the term "levensovertuiging" (philosophy of life), rather than to introduce the term "geloof" (belief), the term used by Directive 2000/78. According to the Government there is no material difference between these two terms.[67] Both *religion* and *belief* are defined and applied in a broad sense.

In cases that come before the NIHR and the courts (including cases concerning the freedom of religion), the Commission and the judges use a wide definition of religion and belief. The only restriction to the scope of the concept is that it should exceed a mere personal conviction or expression.[68] On the other hand, it is not necessary that all believers of a certain religion adhere to a certain conviction (e.g. the need of wearing a headscarf by women).[69] Finally, it is also established in (ETC-)case-law that the right not to be discriminated against on the ground of religion incorporates both the right to have religious beliefs or to adhere to a certain philosophy of life and the right to act in accordance with that religion or belief.[70] Since political opinion is also protected, no sharp line between belief and political opinion needs to be drawn. The interpretation of all of these terms is strongly inspired by case law of the European Court of Human Rights and other international organs (e.g. the Human Rights Commission).

iii) Disability

The concepts of 'disability' and 'chronic disease' have not been defined in the DDA. The Government has deemed it unnecessary and undesirable to do so.[71] Some guidelines as to the meaning of these words can be derived from the discussions that took place during the enactment procedure of the DDA. These are the long duration of the disability / chronic disease, the fact that no cure is possible and the fact that it covers both physical and mental or psychological impairments. (See also the answer to question *a)* in this section.) As far as there are definitions of "disability" in other than equal treatment legislation, these do not affect the scope of disability as a ground of discrimination. Recital 17 of Directive 2000/78/EC expresses that the Directive does not oblige employers to appoint individuals who are not capable or available for the essential functions of a post. Although this recital is not explicitly reflected in the DDA or GETA, its content is covered by Article 1 of the Dutch Constitution, which states that all inhabitants shall be treated equal "in equal cases". In case of an individual who is not capable to perform the essential tasks of a post,

[67] Since the Government does not seem to see a difference in meaning, we have translated "levensovertuiging" in belief in this report. The ETC, in the English translation of the GETA on its web site, also translates "levensovertuiging" into belief.
[68] See, *e.g.*, ETC Opinion 2007-207.
[69] See, *e.g.*, ETC Opinion 2008-12.
[70] See, *e.g.*, ETC Opinion 1997-46 and opinions 2004-112, 2004-148 and Explanatory Memorandum to the GETA, Tweede Kamer, 1990-1991, 22 014, nr. 3, p. 39-40. And, similarly, Memorandum in Reply to the GETA, 1990-1991, 22 014, nr. 5, p. 39-40 ("Memorie van Antwoord bij de Algemene Wet Gelijke Behandeling").
[71] Explanatory Memorandum to the DDA, Tweede Kamer 2001-2002, 28 169, nr. 3, p. 9.

the case is not considered as “equal”, and consequently there is no obligation to treat an incapable applicant equally.

Article 2 of the DDA equates the failure to make reasonable accommodations for employees with disabilities with discrimination itself. Accommodations are ‘reasonable’ for as long they do not impose ‘disproportional burdens’ upon the employer. The boundary between the case in which an applicant is not capable or available for “essential functions” and the case in which reasonable accommodations could be made, is to be drawn in case law.

iv) Age

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

v) sexual orientation[72]

The GETA employs the terminology ‘hetero- or homosexual orientation’, to cover the ground sexual orientation’ of Directive 2000/78. The Dutch Government opted for the term “gerichtheid” (orientation) rather than “voorkeur” (preference) The term ‘orientation’ expresses better that not only individual emotions are covered, but also concrete expressions thereof. A major other reason for the Government’s preference for the term ‘hetero- or homosexual orientation’ above ‘sexual preference’ or sexual orientation, has been that the latter term might possibly include ‘paedophile orientation’.

The notion ‘hetero- or homosexual orientation’ does cover ‘bisexual orientation’ but it excludes transsexuals or transgender persons. Under Dutch equal treatment law, discrimination on the ground of being a transsexual or transgender is regarded a form of sex discrimination.[73] In 2011-2012 some MP’s expressed the wish to explicitly include “gender identity” (genderidentiteit) and “expression of one’s gender” (gender expressie) as non-discrimination grounds in the GETA and in the Criminal Code. The

[72] See for a discussion of the meaning of ‘sexual orientation’ in Dutch equal treatment law: Kees Waaldijk, ‘The Netherlands’, in: Kees Waaldijk & Matteo Bonini-Baraldi (eds.), *Combating sexual orientation discrimination in employment: legislation in fifteen EU member states*, Report of the European Group of Experts on Combating Sexual Orientation Discrimination, Leiden: Universiteit Leiden 2004, p. 341-375, available online at https://openaccess.leidenuniv.nl/handle/1887/12587 (last accessed 19 March 2013).

[73] Court of Appeal Leeuwarden, 13 January 1995, *Nederlandse Jurisprudentie* 1995 nr. 243 and, *e.g.*, ETC Opinions 1998-12 , 2000-73, 2004-72/73, 2007-201,2009-108, 2010-175, 2012-146 and 2012-166.

suggestion to include these grounds in the Criminal Code has been rejected by the Minister of Security and Justice as being unnecessary, whereas the proposal to include the grounds in the GETA is still under investigation.[74]

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

The ADA does not imply any restrictions to the scope of this ground. It does not provide for a higher level of protection for certain age categories (such as 'the elderly') and there is no cut-off point (no minimum age for application of the ADA).

2.1.2 Multiple discrimination

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

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

The concept of multiple discrimination is not explicitly addressed in Dutch equal treatment legislation. Although the GETA contains a closed list of non-discrimination grounds, parliamentary history does not exclude the possibility of a combination of grounds. Moreover, including also the prohibition of discrimination based on a combination of grounds seems to be most in line with the legislator's objectives with this legislation. Nevertheless, the government does not feel like including an explicit provision in the equal treatment legislation.[75]

Multiple discrimination (or intersectional discrimination) was under discussion among equal treatment specialists in the years 2005-2007.[76] The problem was also discussed in the 2nd 5-year (internal) evaluation of the (then) ETC where the it announced to give more attention to the issue.[77]

In its 3rd 5-year evaluation report, the then ETC concluded that it may be desirable to include an explicit prohibition of multiple discrimination in the GETA and suggested to investigate in what way a provision concerning multiple discrimination could be

[74] Tweede Kamer 2011-2012, 28 481, nr 17, p. 18. It appears that in the course of 2012 (until the end of September), no further action has been taken as a consequence of the fall of the Government in the Spring of 2012.
[75] Tweede Kamer 2011-2012, 28 481, nr 16, p. 4.
[76] See e.g. Rodrigues & Van Walsum, Ras en Nationaliteit; in J.M. Gerards e.a. (eds), *Oordelenbundel 2006*. Nijmegen: Wolf Legal Publishers 2007.
[77] ETC 2005: Het verschil gemaakt (Making the difference), Utrecht 2005. At p. 39-40.

included in the GETA.[78] The Government does not deem such a provision necessary and renounced the suggestion for further research.[79]

See below (section b) for Dutch case-law dealing with intersecting grounds of discrimination.

b) How have multiple discrimination cases involving one of Art. 19 TFEU grounds and gender been adjudicated by the courts (regarding the burden of proof and the award of potential higher damages)? Have these cases been treated under one single ground or as multiple discrimination cases?

The ETC (now NIHR) followed an intersectional approach in a case where the grounds of disability and race intersected and it acknowledged the combined effect thereof. [80] However, this combined effect was no reason for a different sanction in this case.[81] In its 3rd evaluation report, the (then) ETC acknowledges that in some other cases more than one ground were at stake at the same time.[82]

The ETC has showed willingness to apply different grounds of discrimination coherently in some of these other cases (with gender aspects as well), but the petitioner failed to substantiate the (alleged) discrimination, as well as the combined effect of intersection grounds in these cases.[83] One group of cases in which the ETC could apply this approach would be the ones concerning Islamic headscarves for women. Those cases are almost always only seen as direct or indirect discrimination on the ground of religion. As far as the author knows, there have been no cases of multiple discrimination before Dutch civil or administrative courts.

[78] ETC: 3rd Evaluation Report (2004-2009), May 2011, p. 64.
[79] Tweede Kamer 2011-2012, 28 481, nr 16, p. 4.
[80] ETC Opinion 2006-256 concerning a complaint by a Turkish blind woman against an employment office for not being subjected to an adapted examination.
[81] Since the ETC (now NIHR) cannot impose sanctions, this is a somewhat misleading statement. There was the usual conclusion that the defendant had made an unlawful distinction.
[82] ETC: 3rd Evaluation Report (2004-2009), May 2011, p. 61-62.. Apart from the cases mentioned below, the ETC here also mentions Opinion 2008-25 (complaint about season tickets for football stadions, involving sex and civil status). In Opinion 2011-83, the grounds sex and age were at stake. Again the ETC did not take this fact explicitly into consideration.
[83] ETC Opinion 2006-67 (complaint from a divorced father against a hospital for not giving adequate information about his son; alleged intersecting grounds: sex and civil status; presumption not substantiated, no breach); ETC Opinion 2007-40 (complaint of a female cleaner about dismissal and (sexual) harassment; alleged intersecting grounds: sex and race; presumption not substantiated, no breach); ETC Opinion 2008-55 (complaint from an Iranian man complaining that his contract was not prolonged because it was presumed that an Islamic man would not accept any orders from female colleagues - presumption not substantiated, no breach); ETC Opinion 2008-107 (complaint by an elderly non-Dutch woman because she had not got a subsidy to start a company; presumption not substantiated, no breach).

2.1.3 Assumed and associated discrimination

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

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

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

Discrimination by association is not covered *explicitly* in national law. However, the wording of Article 1 sub (b) of the GETA (the legal definition of a 'direct distinction') do not explicitly require that the alleged distinction is *de facto* based on the race, religion/ belief, or sexual orientation *of the alleged victim.* [84] Therefore, in theory, it is possible that discrimination based on association is covered as well. The same line of reasoning can be followed as regards age (as protected in the ADA). Concerning disability and chronic illness, it is stated in the Parliamentary discussions on the DDA that what matters is not (actually) having a disability but being discriminated against as compared with a person who does have or does not have a disability. Some commentators have explained this to mean that persons associated with disabled people are protected as well.[85] In Opinion 2006-227 the ETC has considered an alleged case of disability discrimination by association and *implicitly* acknowledged that discrimination by association is also prohibited under the DDA. The case failed because there was no proof that the applicant had suffered any detriment because of the fact that someone in her environment was disabled. In Opinion 2011-90, the ETC, with reference to the CJEU in the *Coleman* case,[86] found that there was indeed a case of unlawful discrimination by association on the ground of disability. In that case, a temporary contract was not prolonged because the employee had called in sick several times because his wife had a chronic disease and he had to take care of her. (See Annex 3 of this report for a summary of this case.)

[84] See also Kees Waaldijk *supra* footnote 7272.
[85] However, in our view this passage refers to the fact that the DDA contains a symmetrical non-discrimination norm, both applying to disabled persons and non-disabled persons.
[86] CJEU 17 July 2008, C-303/06.

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

a) How is direct discrimination defined in national law? Please indicate whether the definition complies with those given in the directives.

Before 2011, Dutch Equal Treatment Legislation contained its own (different) definition of direct and indirect discrimination. In November 2011 the equal treatment legislation (GETA, ETA, DDA and ADA and some provisions in the Civil Code) was amended in order to bring the definitions of direct and indirect discrimination in all laws in line with the European Union's Directives.[87] This change of the Dutch legislation was required by the European Commission, who maintained that, as a consequence of the different wording of the definitions in the Dutch legislation, victims of discrimination were offered less protection than the EU Directives require.[88] The Government has always held that the latter was not the case,[89] but nevertheless has proposed this Amendment in 2008, in which the Directive's definitions are included word by word.[90] One difference between the language in the Directives and the Dutch legislation remains to exist. That is the usage of the word 'distinction' instead of the word 'discrimination'. (See section 0.2 of this report.)

Article 1 of the GETA now reads as follows:

> "*In this Act and in the provisions based upon this Act the following definitions shall apply:*
> *a. Distinction: direct and indirect distinction, as well as the instruction to make a distinction;*
> *b. Direct distinction: if a person is treated differently than another person in a comparable situation is or would be treated on the grounds of religion, belief, political opinion, race, sex, nationality, hetero-or homosexual orientation or civil status; (…)*"

Similar definitions now exist in the ETA, DDA and ADA. With this new wording, the definition of direct discrimination has been brought in line with the wording of the Directives, notwithstanding the continued usage of the word distinction.

Although the comparator element is now included in the definition, it is unclear from the definition of direct distinction in the DDA, with whom a disabled person must be compared in case of an alleged instance of direct distinction. In the Parliamentary

[87] Wet van 7 November 2011, Staatsblad 2011, 554.
[88] Letter dated 31 January 2008 (no. 2006-2444), with reference to the infringement procedure of 18 December 2006, infringement No. 2006/2444.
[89] Letter from the Dutch Government to Mr. Spidla, dated 18 March, *Reactie Nederlandse regering op het met redenen omkleed advies van de Europese Commissie; ingebrekestelling nr. 2006/2444* (reaction to letter dated 31 January 2008).
[90] See Tweede Kamer, 2008-2009, 31 832, nrs 1-3 and see Tweede Kamer, 2009-2010, 31 832, nrs 4-8.

discussions on the DDA it is stated that what matters is not (actually) having a disability but being discriminated against *as compared with* a person who does have or does not have a disability. It seems that this has to be decided on a case by case basis. There are some Opinions of the ETC (now NIHR) in which this topic has been discussed.[91]

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

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

It is highly questionable whether Dutch equal treatment legislation contains effective sanctions against discriminatory job advertisements. The negative publicity of a condemnation for discriminatory job vacancies might be deterrent to a certain degree. Only in seriously humiliating cases, the Criminal Code with corresponding sanctions, such as fines and/or community service, may possibly be applied.

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

Under the GETA and DDA, direct *distinctions* can only be justified if one of the legally prescribed justifications is applicable. These justifications are:

a. in cases in which sex is a determining factor (these cases are elaborated exhaustively by a Ministerial Decree, *Besluit Gelijke Behandeling*);[92]
b. in cases concerning the protection of women, notably in relation to pregnancy and maternity;
c. if the aim of the discriminatory measure is to place women or persons belonging to a particular ethnic or cultural minority group or disabled persons in a privileged position in order to eliminate or reduce existing inequalities connected with race or sex or disability and the discrimination is in reasonable proportion to that aim (positive action);
d. in cases where a person's outer racial appearance is a genuine and determining (occupational) requirement,[93] provided that the aim is legitimate

[91] See ETC Opinion 2005-234. Although in that case the Commission stated that the applicant should not compare himself with other disabled persons, according to many commentators it is possible that a disabled person compares himself with people who are otherwise disabled.
[92] Staatsblad 1989, 207; last changed in 2005: Staatsblad 2005, 529.
[93] See Art. 4 (2) GETA, cited in section 4.1 of this report.

and provided that the requirement is proportionate to that aim; (these cases are elaborated exhaustively by a Ministerial Decree, *Besluit Gelijke Behandeling*);[94]

e. if the discrimination is based on generally binding regulations or on written or unwritten rules of international law;

f. in cases where nationality is a determining factor (cases also elaborated by Ministerial Decree).

The then ETC has accepted in a few occasions that direct discrimination may be objectively justified when the prohibition of a certain distinction would be absolutely unacceptable or completely irrational, without the presence of one of the listed justification grounds. (See e.g. Opinion 2006-20 and Opinion 2007-85 (summarized in Annex 3 of this report); other cases are Opinion 2005-155 concerning pregnancy and Opinion 2010-62 concerning goods and services. The issue was discussed in the 3rd evaluation report of the ETC (over the years 2004-2009).[95] The ETC commissioned an in-depth study into this issue,[96] but concluded that no changes in the legal system are necessary at this point. If the Government would want to open up the closed system, the NIHR proposes to include a provision identical to Art. 2(5) of the Framework Equality Directive 2000/78/EC into the Dutch equal treatment laws. As far as such an exception or justification clause would apply to the protection of public health (volksgezondheid), the Government appears to agree with including it in the equal treatment laws.[97] In 2011, a case concerning discrimination on the basis of political convictions raised considerable discussion among equal treatment specialists, where the then ETC found that freedom of expression, as guaranteed in Article 10 ECHR, prevailed over the equal treatment norm.[98]

In the context of the ADA, both *direct* and *indirect* distinctions on the ground of *age* may be objectively justified. This follows from Article 7(1) sub (c) of the ADA. This Article intends to implement Article 6(1) of Directive 2000/78.

Given that the ADA also contains justification grounds that have been explicitly inserted by the legislator, this Act follows a '*half-open* system' of justifications. This differs fundamentally from the '*closed* system' included in the GETA and the DDA.

[94] Staatsblad 1994, 657. Initially, this Decree also allowed exceptions with respect to areas outside employment relations, i.e. in beauty contests and in the areas of providing goods and services. After the EU Commission had objected to this wide scope of the exception in 2009, the Decree was amended in 2010 (Staatsblad 201, 299).
[95] ETC: 3rd Evaluation Report (2004-2009), May 2011, p. 7.
[96] Prof. Roel de Lange: Knelpunten in het gesloten systeem. Annex 3 to idem, pp. 163-191.
[97] Tweede Kamer 2011-2012, 28 481, nr 16, p.. 9, referring to an earlier promise of the Government to include such an exception (Tweede Kamer 2008-2009, 28 481, nr 5, p. 4.).
[98] ETC Opinion 2011-69. See for a comments on this case Noorlander, C.W. (2012): Godsdienst, Levensovertuiging en Politieke Gezindheid. In: C. Forder (ed), Oordelenbundel Gelijke Behandeling 2011; Wolff Legal Publishers Nijmegen 2012, pp 159-178 and Terlouw, A.B. (2011), "De CGB en de algemene mensenrechtentoets", *MTM-NJCM-Bulletin*, 2011, pp 656-671.

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

The Dutch definition of direct discrimination in the ADA now contains the elements that are mentioned in the Directive's definition, i.e. if one person is treated less favourably than another, is/has been/would be treated in a comparable situation. It is not clear, neither from the legal text nor from the Explanatory Memorandum, with whom an alleged victim of direct age distinction has to be compared.

It follows explicitly from the Explanatory Memorandum to the ADA, that *direct* age distinction might not only occur if a person's age forms the basis of a given decision, but also where age categories are being used as the basis for a particular policy or practice.[99] In fact, in that case a distinction is made between *groups* of persons, rather than between persons.

A last question is when a distinction constitutes a distinction on the ground of age. It is established NIHR (former ETC) case law that the relevant ground(s) (*e.g.*, age) for an alleged distinction need(s) not be the *sole reason* for that distinction.

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

It is not clear, neither from the legal text (the ADA) nor from the Explanatory Memorandum, with whom an alleged victim of direct age distinction has to be compared.

2.2.1 Situation Testing

a) Does national law clearly permit or prohibit the use of 'situation testing'? If so, how is this defined and what are the procedural conditions for admissibility of such evidence in court? For what discrimination grounds is situation testing permitted? If not all grounds are included, what are the reasons given for this limitation? If the law is silent please indicate.

There are no provisions in the law that clearly permit or prohibit situation testing. However, according to case law, this is allowed both in case of civil procedures and in procedures before the NIHR, as well as in criminal procedures. In the latter case this needs to be prepared very carefully in order that this would not amount to "uitlokking" (provocation). As there is no legislation in this respect, no grounds are legally excluded from the possibility of situation testing. In practice, situation testing is most often used in the context of the ground of race / ethnic origin.

[99] For example, the Governmental decree on 'dismissal' ("ontslagbesluit") employs age categories in a situation of collective dismissal for the purpose of determining the order of who should be dismissed first.

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

Situation testing is frequently used in the Netherlands by NGOs and sometimes as an individual initiative.[100] It predominantly concerns job applications and admittance to bars and restaurants or discothèques. The non-Governmental organization 'Art.1' and local Anti-Discrimination Bureaus (ADVs)[101] most often use situation testing, but sometimes also the trade unions have used it. The NIHR never does, since its main task is to investigate complaints about discrimination that are brought to its attention, not to reveal instances of discrimination itself. In November 2004, the National Bureau against Racial Discrimination (LBR) and the National Association of Anti-Discrimination Bureaus (Landelijke Vereniging ADB's) published a report on 'discrimination in the bar and restaurant sector'.[102] [103]

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

There is some reluctance to use this method, especially where criminal sanctions can be imposed in case – as a result of this testing – it is shown that some categories of people are systematically excluded.

The criterion applied by the courts seems to be that the NGO who initiated the testing or the individual, who participated during the situation testing and became a victim of discrimination, had no personal interests that the accused would indeed commit the crime of discrimination. The author of this report is not aware that in this respect developments in other EU countries have influenced the Dutch policies or legal developments.

d) Outline <u>important</u> case law within the national legal system on this issue.

[100] See, *e.g.*, ETC Opinion 2011-99, 2012-50 (summarized in paragraph 0.3 (case-law)) and 2012-128.
[101] These organizations assist victims of discrimination and may be regarded as equality bodies under Article 13 of the Race Directive. See also Chapter 7 of the current report concerning equality bodies.
[102] LBR and LVADB, ' Geweigerd?! Discriminatoir deurbeleid in de horeca', Rotterdam, November 2004. These organizations have now merged into the new 'Art.1' equality body. As a reaction to this report, the Labour Party has published a plan to tackle the problems at hand and asked the Government for measures. The Government replied with a letter to Parliament in which it gave an analysis of the problems and in which it discussed *inter alia* the possibilities to use the instrument of situation testing. The Government recommends that these tests are carefully prepared and are executed in close co-operation between the Anti-Discrimination Bureaus, the Public Prosecutor's Office and the Police. See Tweede Kamer 2004-2005, 29 800 VI, nr. 165.
[103] See ETC Opinion 2012-50 for a recent example of situation testing in The Netherlands. See a recent report from the Social and Cultural Planning Bureau for another example (SCP: 'Op achterstand'. 17 December 2012. To be downloaded from http://www.scp.nl/Publicaties/Alle_publicaties/Publicaties_2012/Op_achterstand (last accessed on 22 February 2013).

The NIHR (the former ETC) has given several Opinions in the past about the criteria for situation testing.[104] Situation testing mostly occurs when two groups of youngsters want to be admitted to a discotheque.[105] One of the requirements is that the two groups are comparable in appearance – especially in clothing and hairdos. (Except, of course, for their ethnic or racial 'appearance'.)

Another requirement is that both groups actually try to get in under the same circumstances (*e.g.*, both groups don't have a membership card) and at the same night.[106] Also, there should not be a long time between the two test-situations.[107]

Courts in the Netherlands have accepted situational testing as a means to prove discrimination. Both in civil as well as in criminal litigation, situational testing has been allowed as sufficient evidence.[108]

Civil law:

In civil law, testing was allowed in a case in which a number of other people of different ethnic backgrounds, went in the course of an evening at different times to a discotheque, with the objective to test whether there existed a discriminatory door policy.[109] The ethnic minority persons were refused. However, similar couples of Dutch origin were allowed in. The case was brought before the court for preliminary ruling.

The defence brought forward that the NGO and its members had provoked the disco into a criminal offence. The court dismissed this line of reasoning, stating that "it is by no means plausible that the plaintiffs had an interest that the respondent in the pursuance of his profession would refuse services (…), on the grounds of racial discrimination." The court forbade the discotheque to refuse entrance on the grounds of race, skin colour or ethnicity.

Criminal law:

In criminal law, testing was allowed in a case where two persons, both with an ethnic minority background, and two native Dutch persons, separately asked to enter a disco.[110] The first two were refused on the pretext that they were not members,

[104] See, *e.g.*, Opinions 1997-62, 1997-64, 65 and 66, 1997-133, 1998-39 and 2009-15.
[105] Another case where situation testing was applied, in the situation of job application, is Opinion 2005-136 in which a young man with a foreign surname has applied for a job; a friend with a Dutch surname applied for the same job, sending more or less the same letter of application. The ETC accepted this as evidence of a case of discrimination.
[106] See Opinion 1997-133.
[107] See Opinion 1998-39.
[108] The following case law has been summarized by Dick Houtzager, at the time senior staff member of the National Bureau against Racial Discrimination (LBR) in Rotterdam.
[109] President District Court of Zutphen, 26 June 1980, NJ 1981, no. 29.
[110] Local Court of Amsterdam, 4 January 1982, RR no. 36.

whereas the other couple was allowed in a little time later, although they were not members of the club either. The case was reported as a criminal offence at the police, who investigated the case.

The public prosecutor brought the case before the local court. The victims joined in as civil parties and requested damages. The defence claimed that the plaintiffs had abetted a punishable offence. The court argued: 'We reject this defence. (…) none of the other witnesses has intentionally stimulated the discrimination and in no way it has been made plausible that they had an interest in the defendant's discriminatory behaviour.' The defendant was sentenced to a fine. The plaintiffs were awarded symbolic damages.

The validity of situational testing as evidence was also confirmed in a case where an anti-discrimination bureau (ADV) carried out the testing.[111] There exists no requirement in law that investigation by an ADV should be carried out under supervision of the Public Prosecutor. Apart from the courts, the then ETC has confirmed in a number of cases that situational testing is admissible as a way to prove discrimination, not only by individuals, but also by ADVs.[112] [113]

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

a) How is indirect discrimination defined in national law? Please indicate whether the definition complies with those given in the directives.

Before 2011, Dutch equal treatment laws contained their own (different from EU Directives) definition of direct and indirect discrimination. In November 2011 the equal treatment laws (GETA, ETA, DDA and ADA and some provisions in the Civil Code) were amended in order to bring the definitions of direct and indirect discrimination in these laws in line with the European Union's Directives, so that the definitions comply with those given in the directives.[114] (See also section 2.2. sub (a) of this report.)

Article 1 under (c) of the GETA now includes the following definition of 'indirect distinction': "*indirect distinction: Where an apparently neutral provision, criterion or practice would affect persons of a particular race (et cetera) in a particular way*".

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

[111] District Court of Amsterdam, 20 March 1992, RR no. 287.
[112] ETC 10 June 1997, no. 1997-65.
[113] A recent case in which an anti-discrimination bureau established a discriminatory policy of a café via situation testing is ETC Opinion 2012-50. In this Opinion the ETC partly confirms the criteria developed in its earlier case law as discussed above.
[114] Wet van 7 November 2011, Staatsblad 2011, 554.

b) *What test must be satisfied to justify indirect discrimination? What are the legitimate aims that can be accepted by courts? Do the legitimate aims as accepted by courts have the same value as the general principle of equality, from a human rights perspective as prescribed in domestic law? What is considered as an appropriate and necessary measure to pursue a legitimate aim?*

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

It is very hard to summarize the wide range of possible legitimate aims. However, it is clear that legitimate aims may not be in contradiction to the principle of equality. An example may be Opinion 2007-173, where the then ETC held that a language requirement in a fitness center in order to prevent customers having (false) feelings of being intimidated when others talk a different language, is not legitimate, because this aim fosters and affirms prejudices which are in contradiction to the principle of non-discrimination. The appropriateness and necessity of a measure is a sophisticated testing system which is also too sophisticated to summarize in short.[115] It is shaped by the case-law mentioned in section 0.3 and in Annex 3 of this report. .

c) *Is this compatible with the Directives?*

Yes it is.

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

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

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

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

Yes. There are many cases from the ETC (now NIHR) where this subject is at stake.[116]

2.3.1 Statistical Evidence

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

Yes, this is permitted. There are no specific conditions for this kind of evidence to be admissible in court. The NIHR uses the standard consideration that the contested rule, practice, *etc*. has to affect a category of persons that is protected by one of the non-discrimination grounds "in overwegende mate", which can be translated as: the rule, *etc*. has to affect this category *predominantly*.[117] In this context the NIHR always stresses the point that this should not be calculated on the basis of absolute figures, but should be seen relatively.[118] In a number of cases, the then ETC has given the standard rule that people in the alleged indirectly discriminated group (*e.g.* women) should at least be disadvantaged by the apparently neutral rule or practice 1.5 times as often as people from the comparator-group (*e.g.* men). However, since 2004 the then ETC has not explicitly mentioned this standard or criterion anymore. Since then, it has started to use other methods of calculation, especially in cases where the (absolute) numbers are very small.[119]

This comes down to an extremely complicated way of calculating the chance that a particular group will have more negative effects than another group.[120] Facts of common knowledge are taken into account, either in the absence of relevant statistics or to support such statistics.[121] However, facts of common knowledge are not accepted as an *exclusive* means of evidence. Only in plainly clear cases does the NIHR *not* require statistical numbers or facts of common knowledge.

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

Yes, this kind of evidence is used quite often by the NIHR (see e.g. the above-mentioned cases), but it is not known to what extent this is done by the courts since

[116] See for example ETC Opinions 2012-55, 2012-56, 2012-108, 2012-109 and 2012-120 for cases where limited ability to speak Dutch plays a part. See also ETC opinions 2012-124 and 2012-18, where a language requirement is at stake.
[117] See, *e.g.*, Opinion 2003-91.
[118] See also J.H. Gerards & A.W. Heringa, *Wetgeving Gelijke Behandeling*, Deventer: Kluwer 2003, p. 45-49, especially at p. 46-47 with references to the case law.
[119] See, *e.g.*, Opinion 2003-91 and 2003-92.
[120] See Kees Waaldijk, *supra* footnote 72.
[121] J.H. Gerards & A.W. Heringa, *Wetgeving Gelijke Behandeling*, Deventer: Kluwer 2003, p. 45-49.

judgments on equal treatment cases that are issued by (district) courts are not registered (and therefore cannot be researched) separately.

No, there seems to be no reluctance to use statistical data. There are no (explicit) signs that evolutions in other countries in the EU influence Dutch case law or NIHR's Opinions in this respect.

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

There are many indirect discrimination cases in which data collection plays a role, especially in indirect discrimination cases that are dealt with by the NIHR (examples have been included in section 0.3 and in Annex 3 of this report). See for example, Opinion 2007-91, in which different local communities where compared with respect to their policies as regards granting subsidies to unemployed artists. Although in that case there was a certain statistical correlation between the harshness of the criteria and the compilation of the population (more or less inhabitants who were immigrants), the ETC held that local Governments should have a wide margin of appreciation in setting criteria for subsidies.[122] Another example is the case of a man complaining about indirect age discrimination in the area of pay. The then ETC, following the CJEU in Royal Copenhagen,[123] states that the single fact that there is a (slight) statistical difference between the salaries of certain age categories of workers is not in itself enough to conclude that there is a case of indirect discrimination. Such statistical evidence may give reason to suspect that there is indirect discrimination, but there needs to be other evidence as well.[124]

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

Statistical data can certainly be used to design and defend positive action measures. Most of the data is generated by the Central Cultural Planning Bureau ('SCP'; a Governmental research institute that collects data in many fields) and the Central Bureau of Statistics ('CBS'; a Governmental institute for many kinds of statistical data).[125] It must be noted that the collection of data can be restricted by privacy and non-discrimination law.

For the purpose of preventing data collection that might go against the non-discrimination principle, for some of the grounds there is the Personal Data Protection Act ("Wet Bescherming Persoonsgegevens"), hereinafter referred to as

[122] ETC 2 June 2007, ETC 2007-91.
[123] CJEU 31 May 1995, C-400/93.
[124] ETC 6 August 2009, ETC 2009-76.
[125] www.cbs.nl and www.scp.nl.

PDPA. According to Article 16 of the PDPA, information about someone's race, political convictions, religion or belief, health, sexual life and membership of a trade union are "special data" or "classified data". Registration of disability is not classified. Employers are allowed/not prohibited to register who is disabled. At the request of the Ministry of Health, the Social and Cultural Planning Bureau used to publish a so-called "Gehandicaptenmonitor". In order to assemble this overview, employers were asked to voluntary provide information about the number of disabled people in their workforce to the SCP. The last Gehandicaptenmonitor was however published in 2007.[126]

Besides, the Ministry of Social Affairs and Employment is responsible for the implementation of the Act 'Work and Income according to Labour Capacity' (WIA). This act nowadays comprises the former Act on the Reintegration of Disabled People in Employment (Wet REA). On this basis, the Ministry assembles information about employers that apply for subsidies that enable them to employ people with a handicap.

Also, information about criminal sentences is classified. This means that, for collecting and using these data, there are strict conditions and rules. These data can only be compiled and used by institutions that have been granted this authority by law or with the explicit permission of the persons whom it concerns. In Article 18 of the PDPA, an exception to this rule is made for the case of positive action. Under the strict condition of serving this particular goal and of proportionality and subsidiarity, the collection and use of data about people of non-Dutch origin is permissible. The supervision of this legislation is in the hands of the Dutch Data Protection Authority.[127]

However, in the Dutch legislation, these data protection laws are not always implemented in a sufficiently deterrent way. An example of this is legislation concerning the *Verwijsindex Risicojongeren,*[128] where it is made possible for a manifold of judiciary, social and health organizations, to register the ethnic origin of a so-called a 'risky youngster'.[129] (See also below, sub race/ethnicity).

---

[126] This document, in Dutch called 'Rapportage Gehandicapten', can be found at http://www.scp.nl/Publicaties/Alle_publicaties/Publicaties_2007/Meedoen_met_beperkingen (last accessed 19 March 2013).

[127] Information about their activities can be found at their web site: http://www.dutchdpa.nl/Pages/home.aspx (last accessed 19 March 2013).

[128] After first making explicit reference to the Antillean origin of the risk full youth, the law now more neutrally speaks of 'risk full youth'; however, this does not change the possibilities of the health care, judiciary, police and youth organizations to register their ethnic background.

[129] This registration is possible on the ground of the Wet op de Jeugdzorg (Law on Youth Care), lastly amended on 4 February 2010. In February 2011, the Dutch Data Protection Authority (*College Bescherming Persoonsgegevens – CBP)* prohibited a District Council in Rotterdam to continue registering the ethnic background of so-called young individuals at risk. The CBP declared such policy unlawful under the Personal Data Protection Act and has summoned the District Council of Rotterdam, to stop doing so. The District Council eventually lodged an appeal against the decision, which was

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

***Race*:** Allochtoon" is a word much used in the Netherlands, (as opposed to "autochtoon"). Both Government officials and academics tend (but are not obliged) to use the definition of "allochtoon" which is used by the Central Bureau for Statistics (CBS). "An autochtoon is someone of whom both parents were born in The Netherlands.[130] The category of 'allochtoon' persons is divided in Western and Non-Western. The CBS uses the word "herkomstgroepering" (grouping according to country of origin). This means: a distinguishing mark or feature that indicates with which country a person has a factual tie, considering the country of birth of the parents of his/her own country of birth. As far as the "herkomstgroepering" is concerned, the CBS makes the primary distinction between "autochtoon" and "allochtoon".

Next, it makes a further distinction within the category "allochtoon" by numbering the generations: a *first generation* "allochtoon" is categorized according to the country where he/she is born, a *second generation* "allochtoon" is categorized according to the country where his/her mother was born, unless this is also the Netherlands, in which case he/she will be classified as a second generation "allochtoon" from the country where his/her father was born. In this category of second generation "allochtone" people, a distinction is made between persons with one non-Dutch parent and persons whose parents both are of non-Dutch origin. In the third place, a distinction is made between "allochtone" people who are from *western* and *non-western* origin, because there are big differences in the social-economic and cultural situation in the countries of origin.

In the group of non-western origin, the four main categories are: Turkey, Morocco, Surinam and The Netherlands Antilles. Sometimes a more refined classification is used, according to the purpose of the survey or monitoring activity.

In 2009, it was announced that in official Government policies the term 'allochtoon' would no longer be used, because of the stigmatizing effects. Instead, the Government proposed to use the word 'new Dutchmen' ('nieuwe Nederlanders').[131]Still, until today, the Government uses the categorization, for it needs data that are segregated according to the country of origin in order to design adequate integration policies.[132]

---

rejected. Judgment is to be found at: http://zoeken.rechtspraak.nl/detailpage.aspx?ljn=BW5513 (Last accessed on 11 March 2013).

[130] Many 'autochtoon' persons are not ethnic Dutch (e.g. people from the former colonies) See for the official definition the web site of the Central Bureau for statistics: http://www.cbs.nl/nl-NL/menu/methoden/begrippen/default.htm?conceptid=88 (last accessed on 19 March 2013).

[131] See Tweede Kamer 2009-2010, 32 123 XVIII, nr. 28.

[132] See http://www.rijksoverheid.nl/nieuws/2012/05/08/leers-registratie-afkomst-van-allochtonen-blijft-nodig.html (last accessed 19 March 2013).

A 'trend' that used to become more and more popular is the so-called 'etno selection' for marketing and policy-development purposes. By 'etno selection' is meant: the construction and analysis of huge databases in which the behaviour of people[133] is matched with (*inter alia*) their ethnic or social background. The Dutch Government itself uses this instrument quite often, *e.g.* in the framework of its (migrant) integration policies, which has been criticized on the ground that the mechanism is more and more used for exclusionary purposes instead of for positive action purposes.[134]

Also, there are practices in the police force to register and monitor crimes and crime-suspects according to the ethnic origin of the persons involved. This is especially so, when young men from the Netherlands Antilles are involved. This practice is highly disputed among (criminal) lawyers.

Another example of laws and practices that might run against privacy and anti-discrimination law, is the history of the so-called *Verwijsindex Risicojongeren*.

After a previous law, which allowed the registration of so-called 'high-risk youth' on the ground of being of Antillean ancestry,[135] had not been declared unlawful by the highest Administrative Court,[136] (see Annex 3, ground 'Race': Verwijsindex Antillianen), the Government designed a new law called the Reference Index for Risky Young Persons (*Verwijsindex Risicojongeren)* in order to register 'high-risk youth' in a specific data system, accessible for many different educational, welfare and judicial bodies. This Bill however did originally not allow any reference to the ethnic origin.

However, as a result of a last minute amendment to the Bill at House of Representatives, all kinds organizations are now allowed to store and exchange information about these young persons, including their ethnic.[137] This means that the

[133] *E.g.*, buyers preferences, housing preferences, educational preferences, etc.
[134] See Corien Prins, 'Etno-selectie', in: *Nederlands Juristenblad* [Dutch Journal for Lawyers], 2005-8, p. 411. For more information about the increased usage of ICT and its consequences on privacy see Corien Prins 'Jeugdzorg via systemen. De Verwijsindex Risicojongeren als spin in een digitaal vangnet' in 'de Staat van Informatie', Scientific Council for Government Policy, report no. 86 (2011): pp. 293-348.
[135] This group was targeted because it appeared from *i.a*. police records and school registers that they had a high crime rate and a high dropout rate.
[136] Raad van State ['Council of State', = highest administrative judge] 3 September 2008, Ref. nr. 200706325/1, LJN: BE9698.
[137] See Bill 'Wijziging van de Wet op de jeugdzorg in verband met de introductie van een verwijsindex om vroegtijdige en onderling afgestemde verlening van hulp, zorg of bijsturing ten behoeve van jeugdigen die bepaalde risico's lopen te bevorderen (verwijsindex risico's jeugdigen)' Tweede Kamer 2008-2009, 31855. The amendment was proposed and accepted during the oral discussions on the Bill in July 2009. Although some members of the Senate had objections against the possibility of ethnic registration (see motion Engels, 31 855 H), the Bill was passed in the Senate on 17 Feb. 2010. See for a critical review about this decision making process Corien Prins, 'Discriminatiesignalen', in: *Nederlands Juristenblad* [Dutch Journal for Lawyers], 2010-2, p. 30 (also to be found at http://njblog.nl/2010/01/11/discriminatiesignalen/, last accessed on 11 March 2013).

new law allows the registration of individuals on the ground of ethnic origin, which may well be against the non-discrimination principle and against the Personal Data Protection Act. In practice, it appears that local Governments indeed register 'risky youth' (or troublemakers!) on the basis of their ethnicity in order to design specifically targeted programs.

The *College Bescherming Persoonsgegevens* (CBP) (Board for the Protection of Personal Data), in the beginning of 2011, has declared such policies unlawful under the Personal Data Protection Act (PDPA), and has ordered the local Government of a district of Rotterdam, to stop doing so.[138] However, the general City Council of Rotterdam did not agree, and declared that they will continue with the policy of registering the ethnic background in order to be able to design specific programs, targeted at certain groups of young persons.[139] Negative or damaging aspects, such as stigmatization, are consistently played down.

In addition, in 2010 it became known that several Local Councils of communities where a considerable number of Roma or Sinti people are living, maintain a special register for these persons, in which all kinds of information about them is stored. This includes information about the family situation, housing subsidies, welfare dependence, school drop outs, criminal activities, health situation, et cetera. Various organizations have access to such local registers. This ethnic registration is signalled in the media, but as yet not much legal action seems to be taken against this illegal practice.[140]

***Religion*:** It is not known whether there is a standard usage of a classification of various religions in official publications or statistics. The Central Bureau of Statistics (CSB) uses for the standard surveys of developments in the population the following categories: Roman Catholics, Protestants (divided in the main Churches in the Netherlands) and "other religions" (under which all other religions are captured). For other surveys – e.g. surveys on particular cultural or religious developments, more refined lists of religions or churches are used by the SCP.

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

[138] For all documentation on this issue see http://www.cbpweb.nl/pages/Zoekresultaten.aspx?k=charlois (last accessed on 4 November 2012).
[139] See e.g. http://4nieuws.nl/opinie/43160/gemeente-rotterdam-wil-etnische-registratie-behouden.html (Last accessed on 4 November 2012).
[140] See e.g. the article of V. Vroon in the Weekly Journal *De Groene Amsterdammer,* of 21 September 2010, p. 12-15. Source derived from: Marija Davidovic and Peter Rodrigues, 'Antiziganisme'. In: Peter Rodrigues & Jaap Van Donselaar, *Monitor Racisme en Extremisme, Negende Rapportage 2010*. Published by the Anne Frank Foundation and Pallas Publications, Amsterdam 2010, pp 153-179, at p. 157, fn 131. (Also to be downloaded from the web site of the Anne Frank Foundation: http://www.annefrank.org/ImageVault/Images/id_11703/scope_0/ImageVaultHandler.aspx (last accessed on 19 March 2013).

when compiling the data for the (abolished) "gehandicaptenmonitor", uses the International Classification of Functioning, Disability and Health (WHO, 2001).

2.4 Harassment (Article 2(3))

a) How is harassment defined in national law? Does this definition comply with those of the directives? Include reference to criminal offences of harassment insofar as these could be used to tackle discrimination falling within the scope of the Directives.

Pre-implementation of Directives 2000/43 and 2000/78, 'harassment' was not defined as a concept in Dutch equal treatment legislation. However, the then ETC's (now NIHR) case law provided that the right to equality and non-discrimination in regard to 'employment conditions', including 'working conditions', encapsulated a person's right to be free from 'ground-related' harassment in the workplace.[141] It also follows from case law that the employer's duty of care implies that he/she must have an *adequate complaints mechanism* in place.[142] This norm still applies after the implementation of the new 'harassment provision'.[143]

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

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

[141] See *inter alia* the following Opinions of the ETC: 96/88, 97/82, 97/91, 2001/131, 2003/138.
[142] I.P. Asscher Vonk & W.C. Monster, *Gelijke Behandeling bij de Arbeid,* Kluwer Deventer 2002, p. 165. Also, ETC opinion 99/48 25 May 1999 *AB 1999, nr. 353.*
[143] See, *e.g.*, ETC Opinion 2005-125, discussed by P. R. Rodrigues, 'Ras en nationaliteit', in: S.D. Burri (ed.), *Oordelenbundel 2005, Nijmegen: Wolf Legal Publishers 2006*. See for a critical review of the implementation of the harassment provisions R. Holtmaat, 'Sexual Harassment as Sex Discrimination: A Logical Step in the Evolution of EU Sex Discrimination Law or a Step Too Far?' In: Mielle Bulterman et al (eds): *Views of European law from the Mountain*; Liber Amicorum Piet Jan Slot. Kluwer – Law International 2009, pp. 27-40. See also R. Holtmaat, 'Sexual Harassment and Harassment on the Ground of Sex in EU Law: a Conceptual Clarification.' In: *European Gender Equality Law Review,* no 2, 2011, pp. 4-13.

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

b) Is harassment prohibited as a form of discrimination?

Yes, it is. See Article 1 sub (a) of the GETA, cited above.

From case law of the then ETC in 2005, it becomes clear that the specialized body differentiates between 'discriminatory treatment' and 'harassment'.[144] Discriminatory treatment, in the sense of offensive attitudes, hate speech or other 'maltreatment', can be examined besides harassment. According to Rodrigues, this indicates that the ETC sees harassment as an aggravated form of discriminatory treatment, for which no justifications can be brought forward. For instance: one single case of discriminatory insult is not enough to constitute a case of harassment, but nevertheless it can be qualified as (forbidden) direct discriminatory treatment.[145]

The norm-addressee of the prohibition of (sexual) harassment is the employer or anyone who acts in his/her behalf. This means that when the harassment is taking place between colleagues, the victim can (under the equal treatment law as such; though possibly under general tort law) not hold the colleague(s) accountable, but should address the employer. In that case, the victim should state that the employer has not taken enough preventive or protective measures and therefore violates the norm that working conditions should be free from discrimination, including (sexual) harassment. (See also section 3.1.3 of the current report.)

Even if the (sexual) harassment itself is difficult to prove (e.g. because it happened behind closed doors between colleagues), any complaint about this kind of behaviour should be investigated seriously by the employer and adequate protective measures should be taken. Otherwise the norm that the employer discriminates as regards (equal) working conditions is breached.[146]

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

In 1994 a definition of *sexual harassment* and of *aggression and violence* at the workplace was included in the Act on Working Conditions (WCA; Arbeidsomstandighedenwet), which is a public law instrument to regulate working conditions.[147] In the WCA, employers were instructed to provide safe working

[144] These are not synonyms, unlike the Government seems to suggest in the Explanatory Memorandum to the EC Implementation Act. See P.R. Rodrigues, 'Ras en nationaliteit', in: S.D. Burri (ed.), *Oordelenbundel 2005, Nijmegen: Wolf Legal Publishers 2006*.
[145] Rodrigues refers to ETC Opinions 2005-30, 2005-75 and 2005-167.
[146] See e.g. ETC Opinion 2011-148 and ETC Opinion 2011-156.
[147] Act on Working Conditions 1998 ("Arbeidsomstandighedenwet" 1998), which amended the 1994 Act in certain regards), Staatsblad 1999, 184.

conditions, including being safe from (sexual) harassment. The latter norm is formulated broadly: it offers protection against *ground-related* harassment and against mobbing more generally. This definition and the accompanying instruction-norm has been of great help not only for women (and men), but also for homosexual women and men.[148]

These provisions also offer protection to other groups, including racial and religious minorities, disabled people and elderly/young people, because judges concluded from the presence of the definition / instruction norm in the WCA that (sexual) harassment is legally prohibited and that employers who do not protect their workers from such offences are liable for any damages that result from them. Harassment may thus be litigated under the provisions of civil law, employment law (including laws that apply to civil servants) and tort law. If the harassment takes the form of physical abuse it can also be prosecuted as a criminal offence (*e.g.* rape, maltreatment or (sexual) assault). If the abuse takes the form of verbal offences, criminal procedures are also a possibility. However, these cases are rare. In many cases, e.g. concerning the damages that a victim can claim as against the employer who did not take preventive measures or who did not protect her effectively, or concerning the conditions that need to be met in order to lawfully dismiss a perpetrator, the judges have refined the concept of (sexual) harassment.[149]

In 2007, the WCA has been changed, and in order to harmonize the legislation it now refers to the equal treatment legislation, as far as the definition of harassment is concerned.[150] Since then, the WCA instructs employers more generally to avoid working conditions that might cause (psychological and social) stress at the workplace. (Sexual) Harassment, mobbing, violence and discrimination are all mentioned as situations that might cause such stress.[151]

Under the WCA, employers have an obligation to take preventive measures and to protect victims against such behaviour. Installing a complaints procedure / committee is not prescribed explicitly. Such procedures / committees are only obligatory in the education and health care sector (as regards pupils and clients). In many sectors (e.g. education and health care, the army, prisons, youth centres, etc.) and in many large companies, codes of conduct exist, in which the organization has given its

[148] See R. Holtmaat, Sexual Harassment as Sex Discrimination: A Logical Step in the Evolution of EU Sex Discrimination Law or a Step Too Far? In: Mielle Bulterman et al (eds): *Views of European law from the Mountain*; Liber Amicorum Piet Jan Slot. Kluwer – Law International 2009, pp. 27-40.
[149] For a complete overview of the legal norms with respect to sexual harassment, see R. Holtmaat, *Seksuele intimidatie ; de juridische gids*, Nijmegen; Ars-Aequi Libri 2009.
[150] *Wet van 30 november 2006, houdende wijziging van de Arbeidsomstandighedenwet 1998* (…); *Stb.* 2006, 673.
[151] See Staatsblad 2009-318. The Act talks about direct and indirect distinctions, but does not mention any specific grounds. See for a critical review of these developments R. Holtmaat, Het verbod op seksuele intimidatie in de WGB: een koekoeksei in het nest van de gelijkebehandelingswetgeving? In: J.H. Gerards (red): *Gelijke behandeling: Oordelen en Commentaren 2007*; Wolf Legal Publishers, Nijmegen 2008, pp 261-278.

owns definitions and norms as regards (sexual) harassment and mobbing, often related to non-discrimination norms. Also, many of these institutions and companies have complaints procedures / committees in place to which (also) the employees and clients / pupils who have been victim of harassment can take resort.

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

Not a single Article in the ADA, the DDA and the GETA specifies to whom the prohibition of making distinction, including harassment, victimisation and instruction to discriminate, is addressed.

Although all of the three Acts specify the areas of *social and economic life* to which each Act applies (material scope), the Acts remain silent on the matter of 'personal scope'.[152] With regard to the employment area, *i.e.*, the only area that is commonly covered by the three Acts, the central norm is addressed not only to *private* and *public* employers, but also to organizations of employers, organizations of workers, employment offices, (public) job agencies, pension funds, some external advisors, ('liberal') professionals, bodies of liberal professionals, training institutions, schools, universities, *etc*.[153] However, it is not clear from this whether only the official owner or managers of these enterprises or institutions, but also colleagues or third persons can be held liable under the Acts. Although Trade Unions do fall under the scope of the legislation, the law does not explicitly provide that trade unions or other trade/professional associations be held liable for actions of their members.

The matter of the personal scope was explicitly raised in Parliamentary discussions on the implementation of the Directives. It follows clearly from these discussions that the Government has not intended to render the equal treatment legislation applicable in relationships between colleagues, let alone in relationships with third persons.[154] The Government defended this by noting that between colleagues *inter se*, there is no contractual relationship or a relationship of authority. Victims of discrimination by colleagues or third parties can always bring a claim under tort law provisions in the general Civil Code and claim damages or a court injunction under this law.

---

[152] E. Cremers-Hartman, 'Werkingssfeer AWGB (Art. 3, 4 sub c, 5 lid 1, 6, 7 lid 1 AWGB)', in: I.P. Asscher Vonk & C.A. Groenendijk, *Gelijke Behandeling: Regels en Realiteit*, The Hague: SDU Uitgevers 1999, p. 29-88, at p. 33.
[153] *Ibid.*
[154] Explanatory Memorandum to the ADA, Tweede Kamer 2001-2002, 28169, nr 3, p. 19 (where this was said in the context of harassment). See also Parliamentary Papers Second Chamber of Parliament, 2002-2003, 28770, nr. 5, p. 28.

However, it was indicated by the Government that those employees who in the name of their employer exercise authority over their co-employees are addressees of the non-discrimination norm. *De facto*, such an employee functions in the capacity of employer.[155] The purported inapplicability of the Dutch Equal Treatment Acts in relationships between colleagues *inter se*, appears particularly problematic in the context of work-related *(sexual) harassment*. In its current format and in the light of the Parliamentary comments, the equal treatment laws prevent an alleged victim of harassment from holding a colleague or a third person directly liable for the contested behaviour under these laws. The only way to do this would be by seeking recourse to the general provisions of *tort law* enshrined in the Dutch Civil Code. The employer's vicarious liability for harassing acts by a third person was, for example, at stake in ETC Opinion 1997-82. The case concerned racial harassment of a nurse by a patient.[156]

The ETC repeated its stance that the employer is under a legal duty to prevent occurring acts of harassment by persons under his supervision. It took the view that, although the alleged harassing acts were not done by a colleague, but by a third person, this did not circumscribe whatsoever the employer's duty of care.[157] However, and this also follows from the ETC's case law pre-implementation of the Directives, there rests a *general duty of care* upon the employer to maintain a discrimination-free and safe workplace. An employee's right not to be discriminated against in his or her employment and working conditions, embraces the right to be free from discrimination and harassment at the workplace.[158]

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

[155] Explanatory Memorandum to the ADA, Tweede Kamer 2001-2002, 28169, nr 3, p. 19.
[156] Employers were equally held liable in some court cases. See Rikki Holtmaat, *Seksuele Intimidatie, De Juridische Gids*, Ars Nijmegen: Aequi Libri 2009, Chapter 6.
[157] Although and as will be explained under 'enforcement issues', the Commission's opinions are not binding, an opinion by the Commission that has been ruled in the victim's favour can still be valuable in terms of recognition of the complaint and of emotional satisfaction. See: A. Geers, 'Intimidatie op de werkplek', in: G. van Manen (ed.), *De rol van het aansprakelijkheidsrecht bij de verwerking van persoonlijk leed*, Den Haag: Boom 2003, p. 183-198, at p. 194.
[158] See, *e.g.*, ETC Opinion 2004-08 (race and religion). See also I.P. Asscher-Vonk and W.C. Monster, *Gelijke Behandeling bij de Arbeid*, Deventer: Kluwer 2002, p. 164.

regard mere psychological damage, rather than physical damage.[159] It is a fact that damage resulting from discriminatory treatment and harassment is most often of a psychological kind. In 2005 the Dutch Supreme Court did accept that Article 7:658 Civil Code can include psychological damage.[160]

Lower courts have accepted that, in cases of *sexual harassment,* this Article can form the basis for financial compensation of psychological damage resulting from such behaviour.[161]

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

2.5 Instructions to discriminate (Article 2(4))

a) *Does national law (including case law) prohibit instructions to discriminate? If yes, does it contain any specific provisions regarding the liability of legal persons for such actions?*

Prior to implementation of the Directives a prohibition of the instruction to make a distinction was implied within the GETA.[162] However, in order to avoid any

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

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

[161] See M.S.A Vegter, 'Aansprakelijkheid werkgever voor psychische schade werknemer als gevolg van seksuele intimidatie van de werknemer', in: *Aansprakelijkheid, Verzekering en Schade* nr. 5, October 2001, p. 133-140, at p. 134-135. See also Rikki Holtmaat, *Seksuele Intimidatie; De Juridische Gids*, Ars Aequi Libri: Nijmegen 2009.

[162] Explanatory Memorandum to the EC Implementation Act, Tweede Kamer, 2002-2003, 28 770, nr. 3, p. 7.

misunderstanding, Article 1 under (a) of the Act was included in the EC Implementation Act, with the phrase 'as well as the instruction to make a distinction'.

The counterpart provisions in the ADA and DDA are Article 1(2) and Article 1 under (a) respectively. The prohibition to make an instruction to discriminate is applicable for the whole scope of the equal treatment legislation (as far as the GETA is concerned, this covers more than employment and employment related education and training, but also goods and services and (with respect to race) social security and social benefits).[163]

It has been indicated by the Government that the notion of *instruction* refers to "opdracht" in the meaning of Article 7:400 of the Civil Code. This Article regulates the law on *contract for the provisions of services.*[164] In the Explanatory Memorandum to the ADA, the Government mentions the example of an employer who instructs a recruitment agency to select only persons under the age of 30 (in absence of a sound justification for this). According to the Explanatory Memorandum, in such a scenario, both the person who *gives* the contested instruction and the person who *carries out* the instruction, violate the non-discrimination norm. If the 'recipient' of the instruction refuses to abide by it and as a consequence thereof, he/she suffers damages, he/she can hold the person who *gave* the instruction liable for that.

The then ETC has suggested that the prohibition of instruction to make a distinction should also include a prohibition of the *passive toleration* of an existing discriminatory situation or act.[165] This advice has not been followed by the Government. It maintained its position that an instruction to make a distinction implies *active* rather than *passive* behaviour. This is a narrow interpretation of the verb *to instruct.* The Government has nevertheless indicated that the toleration of existing discriminatory conduct or acts might nevertheless be captured under the prohibition of making (direct or indirect) distinction.[166] The then ETC as well as the NIHR, has applied its own interpretation and has also captured situations where there was no explicit instruction and / or where an employer allowed a temporary work agency to discriminate, under this prohibition.[167]

b) Does national law go beyond the Directives' requirement? (e.g. including incitement)

[163] Examples of cases where the ETC found that there is a case of 'instruction to discriminate' are ETC 2006-82, 2007-211, 2009-40, 2010-95, 2010-179, 2012-30, 2012-37 and 2012-43.
[164] Explanatory Memorandum to the ADA, Tweede Kamer 2001-2002, 28169, nr 3, p.18.
[165] ETC Advice 2001-03, p. 6 and 2001-04, p. 4.
[166] Explanatory Memorandum to the ADA, Tweede Kamer 2001-2002, 28169, nr 3, p.18.
[167] ETC: 3rd Evaluation Report (2004-2009), May 2011, at p. 30. The ETC here mentions Opinion 2005-154 as an example of such a case. See also several opinions of the NIHR, 2012-175/176/177 dd 19 November 2012

According to the Government's explanation, an instruction which has been given *within the employment relationship* (*e.g.*, the scenario where a director instructs a member of the personnel department to merely recruit youngsters) is not covered by the prohibition of instruction to make a distinction.

In the Government's view, such a scenario is captured by the *exercise of authority* by the employer over the employee within the employment relationship ("gezagsuitoefening in het kader van de arbeidsovereenkomst"). Any *distinction* that might occur within this *exercise of authority* can only be attributed to the employer, to the exclusion of the employee.[168] This interpretation is followed by the ETC (now NIHR).[169]

This reasoning might fall short of what the EU legislator had in mind with the prohibition of instruction to discriminate. Arguably, the Dutch Government at this point interprets the prohibition of instruction to make distinction unduly narrow.

Besides, the instruction to discriminate on grounds of race, religion/belief, sex and homo- or heterosexuality can also be prosecuted criminally under Article 137d Criminal Code.

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

The employer may be held liable for discriminatory or harassing acts done by workers under employment law. The relevant Articles upon which a claim can be based are Article 7:611 of the Civil Code and Article 7:658 of the Civil Code. Both of these Articles are directed at the employer's liability for acts done by the employer himself, or by others over whom the employer has control. In 2005 the Dutch Supreme Court did accept that Article 7:658 Civil Code can include psychological damage.[170] Lower courts have accepted that, in cases of *sexual harassment,* this Article can form the basis for financial compensation of psychological damage resulting from such behaviour.[171]

---

[168] *Ibid*., p. 19.
[169] ETC: 3rd Evaluation Report (2004-2009), May 2011, at p. 30.
[170] HR 11 March 2005, RvdW 2005, 37 (ABN AMRO / Nieuwenhuys). See about this case: E.J. Houben: Schadevergoeding bij zuiver psychisch letsel. Arbeidsrecht 2006, nr 2. pp. 31-36.
[171] See M.S.A Vegter, 'Aansprakelijkheid werkgever voor psychische schade werknemer als gevolg van seksuele intimidatie van de werknemer', in: *Aansprakelijkheid, Verzekering en Schade* nr. 5, October 2001, p. 133-140, at p. 134-135. See also Rikki Holtmaat, *Seksuele Intimidatie; De Juridische Gids*, Ars Aequi Libri: Nijmegen 2009.

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

a) How does national law implement the duty to provide reasonable accommodation for people with disabilities? In particular, specify when the duty applies, the criteria for assessing the extent of the duty and any definition of 'reasonable'. For example, does national law define what would be a "disproportionate burden" for employers or is the availability of financial assistance from the State taken into account in assessing whether there is a disproportionate burden?

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

Instead of the term *reasonable,* which is the term used in Article 5 of the Directive, Article 2 of the DDA employs the term *effective (doeltreffende).* In the Government's view, the latter term reflects better than the term *reasonable,* that an accommodation must have the pursued *effect*.[172] The aspect of reasonableness is reflected in the second part of the provision, in the sense that there is no obligation to accommodate if doing so would constitute a disproportionate burden (i.e. would not be reasonable).

The test whether an employer is under a duty to provide an accommodation to a disabled person who so requires, runs as follows:[173]

A. Is the accommodation that has been asked for "effective"?

This means that two separate questions need to be answered:

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

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

The outcome of this first part of the test may be that *another* (*e.g.* cheaper) accommodation than the one that was asked for is also effective and that it will help

[172] Explanatory Memorandum to the DDA, Tweede Kamer 2001-2002, 28 169, nr. 3, p. 25.
[173] Concluded from the Explanatory Memorandum to the DDA, Tweede Kamer 2001-2002, 28 169, nr. 3.

the disabled person to stay in the job or to do the job. In that case, the second part of the test will focus on this particular cheaper accommodation.

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

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

According to the Explanatory Memorandum to the DDA, this 'balancing exercise' between the interests of the disabled person *v.* those of the employer must be carried out in the light of 'open norms' of civil law (*i.e.*, the duty of the good employer and the notion of 'reasonableness' in Civil Law).[174] If financial compensation (e.g. a State subsidy) exists for the realization of the effective accommodation, it cannot be regarded as 'disproportionate'.[175] Financial compensation is for example offered through Art. 36 of the Labour Capacity Act (WIA). The Government also underscored Consideration 21 of the Preamble to Directive 2000/78[176] and added as an additional criterion that the duration of the employment contract may be a weighty factor.[177]

b) Please also specify if the definition of a disability for the purposes of claiming a reasonable accommodation is the same as for claiming protection from non-discrimination in general, i.e. is the personal scope of the national law different (more limited) in the context of reasonable accommodation than it is with regard to other elements of disability non-discrimination law.

Disability is not explicitly defined in Dutch equal treatment law. There are no signs that the concept of disability is applied in different ways in cases of non-discrimination protection in general on the one hand and the right to claim a reasonable accommodation on the other hand.

A problem may arise when an employer on the one hand is prohibited to ask information about the physical and/or mental condition of an applicant during the selection procedure (according to the *Wet medische keuringen*, which has been made even been stricter in 2012),[178] but on the other hand needs to have this information in order to be able to provide a reasonable accommodation.

[174] Explanatory Memorandum to the DDA, Tweede Kamer 2001-2002, 28 169, nr. 3, p. 25-30.
[175] This follows from the Explanatory Memorandum to the DDA, Tweede Kamer 2001-2002, 28 169, nr. 3, p. 28. However, this is not explicitly mentioned in Article 2.
[176] On the factors to be considered when determining whether making a reasonable accommodation would amount to a disproportionate burden.
[177] It is submitted that this might, however, trigger indirect *sex* discrimination, since women are more likely than men to be employed on the basis of a fixed term contract.
[178] Wet aanscherping medische keuringen; Tweede Kamer 2011-2012, 330 50 and Staatsblad 2012, 146.

A final note concerns the explicit statement by the then ETC[179] that the employer's defence that he does not make a distinction in any way between disabled and non-disabled people does not mean that he is in compliance with the DDA. Equal treatment in unequal (labour) circumstances may lead to inequality, according to the then ETC. In many of the cases on the ground of disability that come before the equality body an appeal to the obligation to provide a reasonable accommodation is made. Often the ETC found that this duty indeed has been breached.[180]

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

Originally, the DDA only covered employment and vocational education. However, in 2009 the Dutch legislator passed Bills to extend the scope of the DDA to *housing* from 15 March 2009 and to *primary* and *secondary education* (new arts 6a-6c DDA) from 1 August 2009.[181] Regulations made by Owners Associations should not directly or indirectly discriminate on the ground of disability (Art. 1 DDA) and fall under the obligation to make reasonable accommodations (Art. 2 DDA). This includes providing immaterial accommodations.

The duty to provide a reasonable accommodation in the field of housing is restricted. Article 6c of the amended DDA states that Article 2 (concerning the duty to provide an effective accommodation) is not applicable in case this would require reconstruction or building work in or around a house (residence). In 2010, for the first time the ETC applied the reasonable accommodation standard also outside the area of employment (i.e. housing) (See ETC 2010-35, summarized in Annex 3 of this Report).[182] The ETC, in this case, leaves it in the middle whether the refusal to make the required accommodation constitutes direct or indirect discrimination on the ground of disability. However, it applies a justification ground explicitly written for direct discrimination. Article 3 of the DDA leaves room for justifying a case of direct discrimination whenever *the contested rule or measure is necessary for health and safety reasons.* Many cases that come before the NIHR concern reasonable

[179] ETC Opinion 2005-160.
[180] A quick search with the term 'doeltreffende aanpassingen' at the website of the NIHR reveals that in 2012 there were 28 of such cases decided by the ETC/NIHR and that in 17 of them the body came to the conclusion that this norm was violated.
[181] Kamerstukken Tweede Kamer, 2008-2009, 30 859 *Wijziging van de Wet gelijke behandeling op grond van handicap of chronische ziekte in verband met de uitbreiding met onderwijs als bedoeld in de Wet op het primair onderwijs en de Wet op het voortgezet onderwijs en met wonen.* Law enacted on 29 Jan. 2009, Staatsblad 2009, 101.
[182] In 2011 there was one other case, in which the ETC reached the same conclusion. See Opinion 2011-30.

accommodations in the area of (vocational) education.[183] This is caused (inter alia) by the fact that 'normal' schools are obliged to take in children with a disability unless they can prove not to be able to provide adequate education.

In the field of education, there also exist provisions which provide for a certain amount of money for parents of children with disabilities in order to make their schools able to provide for accommodation and special attention for their children.[184] From 2014 onwards, these provisions are changed. The money will no longer go to the parents, but will directly flow to the schools.

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

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

A failure to meet this duty in principle counts as a form of *distinction*, which is prohibited.[185] However, the text of Article 2, in conjunction with that of Article 1 (definitions of *direct* and *indirect* distinction) and Art. 3 DDA (regarding the exceptions to the central norm), does not shed light upon the question whether a failure to provide an *effective* accommodation, constitutes *direct*, *indirect* or a *third* way of distinction.[186] With regard to the duty to provide an effective accommodation, Article 2 of the DDA states that if this constitutes a disproportionate burden on the employer this duty does not exist (*cf.* Article 5 of Directive 2000/78). In the amended DDA, in article 6c the exception is made that Article 2 (concerning the duty to provide an effective accommodation) is not applicable in case this would require reconstruction or building work in or around a house (residence).

Article 3(1) DDA[187] enshrines three general *exceptions* to the central norm (*i.e.*, the prohibition to make distinction which according to Article 2 also includes the duty to

[183] In fact, 13 out of 39 cases on the ground of disability and chronicle illness in 2010 and 14 out of 41 on the ground of disability and chronicle illness cases in 2011 concerned education. See P.J.J. Zoontjes, in C Forder (ed); Oordelenbundel Gelijke Behandeling 2010; De Wolf Publishers: Nijmegen 2011, p. 223 and P.J.J. Zoontjes & J.A. Schoonheim, in C Forder (ed); Oordelenbundel Gelijke Behandeling 2011; De Wolf Publishers: Nijmegen 2012, p. 253.
[184] This provision is called *'het rugzakje'* (the rucksack).
[185] See ETC Opinion 2004-140, where it held: "*It concerns a sui generis form of (making a) distinction, which does not yet occur in the other equal treatment laws*". In this Opinion, the ETC seems to suggest that the duty to provide a reasonable accommodation should also be included in the sex equality laws, the GETA and the ADA.
[186] See Lisa Waddington and Aart Hendriks, 'The expanding concept of Employment Discrimination in Europe: From Direct and Indirect Discrimination to Reasonable Accommodation Discrimination', In: *International Journal of Comparative Labour Law and Industrial Relations*, Winter 2002, p. 403-427.
[187] Article 3(2), moreover, stipulates that indirect distinction can be objectively justified.

make effective accommodations). In brief, the exceptions are: *public security and health* (indent a), *supportive social policies* (indent b) and *positive action measures* (indent c).

Thus, a textual reading of Article 3(1) DDA suggests that these three general exceptions could also 'lift' the effective accommodation duty, as this falls within the central norm. However, logically and in accordance with what the Government has observed in its Explanatory Memorandum, *only* the exception in indent a (*public security and health*) can have the effect of 'lifting' the duty enshrined in Article 2.[188] Consequently, the exceptions mentioned in indents b and c cannot be invoked by employers with respect to their effective accommodation duty. It is indeed difficult to perceive in what ways the exceptions in indents b and c could be applicable in a case concerning the failure of bringing about an effective accommodation.

The DDA, in Art. 17, includes an exception in regard to the armed forces, as allowed for by Article 3(4) of Directive 2000/78 until the first of January 2008. A Bill to adjust the already existing Act Military Functionaries (Militaire Ambtenarenwet) to the new European requirements was passed in 2007.[189]

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

The duty to provide reasonable accommodations officially is only applicable with respect to disability. Perhaps the NIHR or the Courts will extend this in the future, but we have seen no case law until now. Recently, there is one case in which the NIHR seems to extend the applicability of the concept where, in a case on the ground of religion, it ruled that an educational institution has a positive duty to encourage other institutions to comply to equal treatment law such as the GETA.[190]

However, when (in cases of indirect discrimination) the proportionality of a certain unequal treatment (with a legitimate aim) is tested in case law, one sometimes might distinguish an implicit duty to provide reasonable accommodation, although this is not made explicit. For instance, in ETC Opinion 2006-202 the then ETC considered that a municipality had failed to search for alternative ways of greeting people within their organization. Therefore, the applicant couldn't be rejected for a job solely because he refused to shake hands when greeting with people of the other sex because of his Islamic belief.[191] In a similar vein, the then ETC required from local councils to provide 'solutions' for civil servants who have religious objections to celebrate same sex marriages. (ETC Opinion 2002-25 and 2006-26.) However, the then ETC reversed this position in Opinion 2008-40 (summarized in Annex 3 of this report).

[188] Explanatory Memorandum to the DDA Tweede Kamer 2001-2002, 28 169, nr. 3, p. 33.
[189] Staatsblad 480, 11 December 2007.
[190] Opinions of the NIHR, 2012-175/176/177 dd 19 November 2012.
[191] See however the judgment of the District Court of Rotterdam, 6 August 2008, LJN: BD9643 (summarized in Annex 3 of this report).

f) Please specify whether this is within the employment field or in areas outside employment

i) race or ethnic origin

Not yet applicable.

ii) religion or belief

The case mentioned above was within an area outside the employment field, namely the educational field.

iii) Age

Not yet applicable.

iv) sexual orientation

Not yet applicable.

g) Is it common practice to provide for reasonable accommodation for other grounds than disability in the public or private sector?

No, it is not (see also 2.6, section 3).

h) Does national law clearly provide for the shift of the burden of proof, when claiming the right to reasonable accommodation?

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

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

Yes, it does. However, there exists no general legal obligation to always grant accessibility to disabled persons or to take anticipatory measures (i.e. making structural adaptations to buildings etc.). As far as public spaces and buildings in which public offices and social services are located (education, health care and other general services) are concerned there are some specific regulations. The Ministry for Infrastructure and the Environment has a so-called “Bouwbesluit” [a decree on how to build houses and offices, etc.] This decree contains some requirements about accessibility of public buildings. A similar decree exists as how to build buses and trains. Also the Ministry for Education has issued detailed instructions as to how to build schools. Idem the Ministry for Health, concerning hospitals and medical service centres.

For some time it was expected that transport by buses and trains would be fully accessible in 2010 and 2030 respectively. The present author is not familiar with the details of this type of specialized legislation (which is very technical; *e.g.* specifying the height of steps and the breadth of doorways).

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

Regarding the area of public transport, this area was included in the DDA, but the respective Articles 7 and 8[192] did not enter into force immediately. In 2009, the Government drafted the text of a Decree (AMVB) by which the Articles 7 and 8 DDA were elaborated.[193] This Decree was adopted on 31 March 2011.[194]

The Articles 7 and 8 of the DDA have finally entered into force on 9 May 2012, meaning that the area of public transport got effectively covered by the DDA as well. However, the Decree that gave effect to these Articles, contains a complicated schedule of gradual implementation.[195] In fact, it will take until 2030 before the whole public transport sector (apart from transport on ferries) will actually fall under the scope of the DDA.

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

Besides the rights and obligations that were described above, national law does not contain a general duty to provide accessibility for people with disabilities.

[192] Article 7 defines the term 'public transport'. In Article 8, unequal treatment in public transport is prohibited. Article 8 section 2 contains an obligation to make adaptations in order to make public transport accessible for disabled persons.
[193] The Decree is titled: *Besluit toegankelijkheid van het openbaar vervoer (Decree accessibility public transport).*
[194] Staatsblad 2011, 225.
[195] See the Decree of 19 April 2012, Staatsblad 2012, 199. The Decree is titled '*Houdende het tijdstip van inwerkingtreding van de artikelen 7 en 8 van de Wet gelijke behandeling op grond van handicap of chronische ziekte en inwerkingtreding van het Besluit toegankelijkheid van het openbaar vervoer*' (*Concerning the establishment of a date of the entering into force of Articles 7 and 8 of the Act on Equal Treatment on the Grounds of Disability or Chronic Disease and the entering into force of the Decree accessibility public transport*).

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

Apart from the DDA (which covers employment and (vocational) education, and housing and public transport) there is a wide range of social rights and facilities for people with disabilities. Some of them consist in general (monetary) subsistence allowances for people with disabilities, while many others are granting rights to financial or material support for people with disabilities (such as wheelchairs and special adaptations at home). Also a great amount of facilities for people with disabilities is rendered by local Governments.
The main laws in this respect are:

- *Wet Maatschappelijke Ondersteuning (WMO)*: Social Support Act
  This act addresses a broad range of financial facilities, and the availability of care facilities and practical aids for – among others – people with disabilities and elderly people. Many responsibilities are delegated to local Governments by this act.
- *Wet Arbeidsongeschiktheidsvoorziening Jonggehandicapten (Wajong)*:
  Law on Disability Provisions for Young Disabled Persons.
  This act provides for a minimum subsistence allowance for young people with disabilities who were never able to participate in paid labour. In 2009, the Government proposed to strengthen the duty for young disabled persons to accept paid work.[196] In the course of 2010, the Government announced severe budget cuts and reforms in the system of allowances for young people with disabilities. In the future, only youngsters who are 100% disabled to do paid work will get a minimum subsistence allowance (70% of the minimum wage).[197] These reforms have been accepted in Parliament in 2011. The government has been planning to integrate the Wajong with various other social security acts, but so far this has not been accomplished.
- *Wet Sociale Werkvoorziening (WSW)*: Sheltered Employment Act.
  This act provides for sheltered (or semi-sheltered) workplaces for workers with disabilities. See below under 2.7 a) for a more detailed description.
- *Algemene Wet Bijzondere Ziektekosten (AWBZ)*: General Law for Special Medical Care: Under this Act, expenses for special medical care can be declared. This facility could be used pre-eminently for special care that is

[196] See Tweede Kamer 2009-2010, 31 780, nr. 48.
[197] See Tweede Kamer 2009-2010, 31 780, nr. 57. The plans were discussed in a meeting with the Parliamentary Committee on Social Affairs on 1 December 2010 and met with a loft of resistance of the opposition. See Tweede Kamer 2009-2010, 31 817, nr. 59. See also Tweede Kamer 2010-2011. 29 461, nr 58, in which the governmentGovernment gives it reaction on a SCP report on the possibilities of youngsters with disabilities to participate in paid labour. (SCP: Beperkt aan het werk. 20 May 2010. To be downloaded from http://www.scp.nl/Publicaties/Alle_publicaties/Publicaties_2010/Beperkt_aan_het_werkhttp://www.scp.nl/Publicaties/Alle_publicaties/Publicaties_2010/Beperkt_aan_het_werk (last accessed on 4 Febr. 201119 March 2013).

needed due to disabilities and chronic illnesses, like e.g. making adaptations to the house or obtaining special transport (scoot mobile, wheelchair). In the course of the last couple of years, many of the facilities that formerly were covered under the AWBZ, now have been transposed to the local Governments, who under the *Wet Maatschappelijke Ondersteuning (WMO; see above)* have a duty to give adequate support to people with disabilities.

2.7 Sheltered or semi-sheltered accommodation/employment

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

The aim of sheltered employment is to help disabled people find a suitable job that enables them to gain an independent income (from paid work) as far as possible. These are generally people who are unable to work in the regular labour market because of mental or physical disabilities.

In the first years of the new Millennium, around 90.000 full time places were available for people with an occupational disability under the terms of the Sheltered Employment Act (*Wet Sociale Werkvoorziening*, '*WSW*'). After a series of reforms in the years 2004 – 2007 that were aimed at outplacing these workers to regular jobs and were also aimed at cutting the budget for the sheltered workplaces, in 2008, a committee of experts has evaluated the WSW and made further recommendations for reform.[198] In 2010, the Government announced that it intended to amend the law, and to (again) limit the numbers of people who are eligible for a place in a sheltered work environment and to stimulate them to accept a 'normal' job.[199] These plans- that caused a lot of vehement social protests – were implemented in 2011 and the beginning of 2012. The new government is planning to include the WSW in a new act, the Participation Act.[200]

b) Would such activities be considered to constitute employment under national law- including for the purposes of application of the anti-discrimination law?

Sheltered employment is being seen as employment. This means that the equal treatment laws (including the DDA) fully apply to this type of employment. The wages are according to the norms set in Collective Agreements for the relevant sectors. Nevertheless, this work cannot be equated fully to work on the regular labour market. It falls under the exception that is made in Article 3 para 1, sub (b) of the DDA. This

[198] Report "Werken naar vermogen" (to work according to one's abilities),", dd. 9 Oct 2008 (Commissie De Vries). To be downloaded from: www.gemeenteloket.minszw.nl/binaries/live/gemeenteloket/hst%3Acontent/documents/gemeenteloket/documenten/dossiers/werk-en-inkomen/wsw/kamerstukken/kamerstuk[24]/Werken-naar-vermogen-Advies-van-de-commissie-fundamentele-herbezinning-Wsw (Last accessed on 4 November 2012).
[199] See Tweede Kamer 2008-2009, 29 817, nr 40 and See Tweede Kamer 2009-2010, 31 780, nr. 57.
[200] See Tweede Kamer 2012-2013, 29 817, nr 98.

provision enshrines for a possibility for *supportive social policies* for disabled people. (Compare art. 7(2) of the Framework Directive.) This means that if working conditions are relatively more favourable in sheltered employment, non-disabled persons cannot claim that they are discriminated against.

3 PERSONAL AND MATERIAL SCOPE

3.1 Personal scope

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

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

The principle in Dutch law is that "all persons in the Netherlands shall be treated equally in equal circumstances", as provided for in Article 1 of the Constitution. Thus, the protection against discrimination provided by criminal law, civil law, equal treatment legislation and administrative law covers *any person on the territory of the Netherlands*.[201]

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

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

For purposes of protection against discrimination only natural persons are protected. This follows from the Memorandum of Reply to the GETA, where the Government explained that the definition of 'distinction' in Art. 1 GETA refers to making a distinction *between persons*.[202] However, where a group of natural persons is collectively victim of discrimination (e.g. when an association of professionals, a political association / party or a religious church is refused to conclude a contract for hiring a meeting room in a hotel) their organization may be seen as the rights holder, according to then ETC in a number of its Opinions.[203] These cases all concerned access to and supply of goods and services.

[201] In Article 2(5) of the GETA in case of nationality discrimination (also covered by the GETA), the following exception exists: "*The prohibition on discrimination on the grounds of nationality contained in this Act shall not apply:*
(:(a) if the discrimination is based on generally binding regulations or on written or unwritten rules of international law and (b) in cases where nationality is a determining factor." This clause is generally understood in such a way that especially immigration law and nationality law is exempted from the equal treatment legislation.
[202] Tweede Kamer 1991-1992, 22 014, nr 5, p. 87-88. Also, the new definition (as of November 2011) of a distinction in the GETA refers to ' where one person is treated less… etc.'
[203] See e.g. ETC Opinions 96-110, 98-31 and 98-45. Besides this there is a possibility for associations to act on behalf of victims of discrimination when they have this as a (statutory) goal of their organization. See par. 6.2 of this Report.

In one case, the then ETC allowed a company to submit a complaint against a customer.[204] Nevertheless, it is commonly held that legal persons (e.g. an association, a foundation, an institution, an enterprise, etc.) do not fall under the personal scope (in the sense of being rights holders). As far as liability for discrimination is concerned (i.e. the personal scope in the sense of who is the norm addressee), no such distinction is made. This means that both natural and legal persons can be held accountable.

b) Is national law applicable to both private and public sector including public bodies?

National law is applicable to both private and public sector.

3.1.3 Scope of liability

Are there any liability provisions than those mentioned under harassment and instruction to discriminate? (e.g. employers, landlords, tenants, clients, customers, trade unions)

Not a single Article in the ADA, the DDA and the GETA specifies to whom the prohibition of making distinction, including harassment, victimisation and instruction to discriminate, is addressed.

Although all of the three Acts specify the areas of *social and economic life* to which each Act applies (material scope), the Acts remain silent on the matter of 'personal scope'.[205] With regard to the employment area, *i.e.*, the only area that is commonly covered by the three Acts, the central norm is addressed not only to *private* and *public* employers, but also to organizations of employers, organizations of workers, employment offices, (public) job agencies, pension funds, some external advisors, ('liberal') professionals, bodies of liberal professionals, training institutions, schools or vocational training institutes, universities, etc.[206] However, it is not clear from this whether only the official owner or managers of these enterprises or institutions, but also colleagues or third persons can be held liable under the Acts. Although Trade Unions do fall under the scope of the legislation, the law does not explicitly provide that Trade Unions or other trade/professional associations be held liable for actions of their members.

[204] ETC Opinion 2003-142. It concerned a company who'swhose employee had been discriminated against by another company. The ETC decided that this situation was covered under the prohibition of discrimination in the area of goods and services and that in the case at hand the defendant had indeed discriminated the employee of the complainant. SeealsoSee also the contribution of Peter Rodrigues in: D. de Wolfff (ed): *Gelijke behandeling, Oordelen en Commentaar 2003*. Kluwer, Deventer 2004.
[205] E. Cremers-Hartman, 'Werkingssfeer AWGB (Art. 3, 4 sub c, 5 lid 1, 6, 7 lid 1 AWGB)', in: I.P. Asscher Vonk & C.A. Groenendijk, *Gelijke Behandeling: Regels en Realiteit*, The Hague: SDU Uitgevers 1999, p. 29-88, at p. 33.
[206] *Ibid.*

The issue of the personal scope was explicitly raised in Parliamentary discussions on the implementation of the Directives. It follows clearly from these discussions that the Government has not intended to render the equal treatment legislation applicable in relationships between colleagues, let alone in relationships with third persons.[207] The Government defended this by noting that between colleagues *inter se*, there is no contractual relationship or a relationship of authority. Victims of discrimination by colleagues or third parties can always bring a claim under tort law provisions in the Civil Code and claim damages or a court injunction under this legislation.

However, it was indicated by the Government, those employees who in the name of their employer exercise authority over their co-employees are addressees of the non-discrimination norm. *De facto*, such an employee functions in the capacity of employer.[208] The purported inapplicability of the Dutch Equal Treatment Acts in relationships between colleagues *inter se*, appears particularly problematic in the context of work-related (sexual) harassment. In its current format and in the light of the Parliamentary comments, the equal treatment laws prevent an alleged victim of harassment from holding a colleague or a third person directly liable for the contested behaviour under these laws. The only way to do this would be by seeking recourse to the general provisions of tort law enshrined in the Civil Code. The employer's vicarious liability for harassing acts by a third person was, for example, at stake in ETC Opinion 1997-82. The case concerned racial harassment of a nurse by a patient.[209] In the case at hand, the ETC repeated its stance that the employer is under a legal duty to prevent occurring acts of harassment by persons under his supervision. It took the view that, although the alleged harassing acts were not done by a colleague but by a third person, this did not limit the employer's duty of care.[210] There rests a *general duty of care* upon the employer to maintain a discrimination-free and safe workplace. An employee's right not to be discriminated against in his or her employment and working conditions, embraces the right to be free from discrimination and harassment at the workplace.[211]

Beyond the scope of Dutch equal treatment legislation the employer may be held vicariously liable for discriminatory or harassing behaviour of colleagues under employment law. The relevant Articles upon which a claim can be based are 1. the

[207] Explanatory Memorandum to the ADA, Tweede Kamer 2001-2002, 28169, nr 3, p. 19 (where this was said in the context of harassment). See also Parliamentary Papers, Tweede Kamer, 2002-2003, 28770, nr. 5, p. 28.
[208] Explanatory Memorandum to the ADA, Tweede Kamer 2001-2002, 28169, nr 3, p. 19.
[209] Employers were equally held liable in some court cases. See Rikki Holtmaat, *Seksuele Intimidatie, De Juridische Gids*, Ars Nijmegen: Aequi Libri 2009, Chapter 6.
[210] Although and as will be explained under 'enforcement issues', the Commission's opinions are not binding, an opinion by the Commission that has been ruled in the victim's favour can still be valuable in terms of recognition of the complaint and of emotional satisfaction. See: A. Geers, 'Intimidatie op de werkplek', in: G. van Manen (ed.), *De rol van het aansprakelijkheidsrecht bij de verwerking van persoonlijk leed*, Den Haag: Boom 2003, p. 183-198, at p. 194.
[211] See, *e.g.*, ETC Opinion 2004-08 (race and religion). See also I.P. Asscher-Vonk and W.C. Monster, *Gelijke Behandeling bij de Arbeid*, Deventer: Kluwer 2002, p. 164.

good employer's practice (Article 7:611 of the Civil Code); 2. the employer's general duty of care (*i.e.*, the employer's liability for damages suffered by an employee in the performance of job-related duties, laid down in Article 7:658 of the Civil Code). Both of these Articles are directed at the employer's liability for acts done by the employer himself, or by others over whom the employer has control. In the past is was much disputed in legal circles whether Article 7:658 of the Civil Code could form the legal basis for claims that regard mere psychological damage, rather than physical damage.[212] It is a fact that damage resulting from discriminatory treatment and harassment is most often of a psychological kind. In 2005 the Dutch Supreme Court accepted that Article 7:658 Civil Code can include psychological damage.[213] Lower courts have (even earlier than that) accepted that, in cases of *sexual harassment,* this Article can form the basis for financial compensation of psychological damage resulting from such behaviour.[214]

In the light of the presumed broad personal scope of Directives 2000/43 and 2000/78, it appears that the Dutch Government's view that the Dutch non-discrimination Acts are directed to employers and other organizations but not to employees (and third persons) is unduly restrictive. According to case law of the ETC (now NIHR) the person *exercising authority* in the company / institution may be held responsible for acts of distinction, including harassment done by employees or third persons (provided they do not take appropriate action against such offences). According to case law of the Dutch Civil Courts (including the Supreme Court), these persons can also be held responsible and accountable under Civil Law.

3.2 Material Scope

3.2.1 Employment, self-employment and occupation

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

---

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

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

[214] See M.S.A Vegter, 'Aansprakelijkheid werkgever voor psychische schade werknemer als gevolg van seksuele intimidatie van de werknemer', in: *Aansprakelijkheid, Verzekering en Schade* nr. 5, October 2001, p. 133-140, at p. 134-135. See also Rikki Holtmaat, *Seksuele Intimidatie; De Juridische Gids*, Ars Aequi Libri: Nijmegen 2009.

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

Yes, it does, except for *holding statutory office* in the public administration sector. In the latter case, in case the discriminatory treatment consists of a so-called 'unitary legislative act' the person or organization who issues such acts cannot be held accountable for that under the equal treatment legislation. This is the case, for example, when a civil servant on behalf of a local council refuses to grant someone a permit (e.g. to open a café) or a subsidy.

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

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

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

The ADA and DDA have counterpart provisions in Articles 3 and 4 respectively. These Articles reflect exactly the same material scope, although sometimes the sequence of subsections differs. Both public and private labour relations are covered. The central norm applies to the entire employment process, *i.e.*, from the moment of notice of a vacancy, to the commencement of the employment relationship or public appointment, until its termination.[215]

In the GETA, self-employment is covered by Article 6. This Article provides that "*it shall be unlawful to make distinctions with regard to the conditions for and access to*

[215] See the Explanatory Memorandum to the DDA, Tweede Kamer 2001-2002, 28 169, nr. 3, p. 34. The same applies *eo ipso* in the context of the ADA and the GETA.

the liberal professions and with regard to pursue the liberal professions or for development within them". See for identical provisions also Article 4 ADA and Article 5 DDA. It is to be noted that the term "self-employment" is not used in the mentioned Articles which instead speak of the "liberal profession". The term "liberal profession" ("free occupation") might be slightly narrower in scope than "self-employment" (the term used in the Directives). However, the problem can easily be circumvented by interpreting the term "liberal profession" in a broad way in order to guarantee that not only doctors, architects etc. are covered, but also free lancers, solo traders, entrepreneurs, etc. This might seem odd for a British reader since in English the term 'liberal profession' is quite a lot narrower than self-employment and could not easily be approximated. However, in the Dutch equality legislation context the usage of 'liberal profession' has not led to problems. Discrimination is thus also prohibited in any working relationships where a relationship of authority between the 'employer' and 'employee' is absent.

A note on access to employment for disabled persons: A major barrier may be that disabled or chronically ill persons are asked questions about their physical or mental condition during the selection procedure and that their answers are used as an excuse not to appoint them. In 2012 the law (*Wet medische keuringen*) was amended in order to make the regulations in this regard stricter and to create a possibility for a complaints procedure at the national level.[216]

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

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

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

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

[216] Wet aanscherping medische keuringen; Tweede Kamer 2011-2012, 330 50 and Staatsblad 2012, 146.

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

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

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

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

Subsection (b) of these Articles covers education which is a last step prior to entering the labour market including retraining and further training courses.[217]

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

Regular secondary education' ("voortgezet onderwijs") (as well as general primary education) is covered under the DDA from 1 August 2009 onwards. The institutions that are covered are not only those which are recognized or subsidized by the Ministry, but also those which are not recognized or subsidized by the Ministry or whose regulation is left to the market.[218]

[217] Explanatory Memorandum to the DDA, Tweede Kamer 2001-2002, 28 169, nr. 3, p. 38.
[218] Explanatory Memorandum to DDA, Tweede Kamer 2001-2002, 28 169, nr. 3, p. 38.

Subsections (a) and (b) of Articles 5 and 6 of the ADA and DDA respectively, are not directed to a specific norm addressee. His norm is therefore directed to "all persons" working within these institutions.

As to subsection (b), this is addressed to *public education*, *private / denominational education*, and *education that is not publicly funded*.[219] Subsection (b) covers more than Article 3(1)(b) of the Employment Framework Directive.

The Directive only prohibits discrimination at the stage of 'entry to' vocational training. The Dutch Acts cover the entire path from registration until termination of the education.[220]

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

- The supply of or permission of access to goods or services which also embraces all forms of education;[221]
- The provision of career orientation and guidance ("loopbaanoriëntatie");
- Advice or information regarding the choice of an educational institution or career.

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

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

[219] Explanatory Memorandum to the DDA, Tweede Kamer 2001-2002, 28 169, nr. 3, p. 37.
[220] Explanatory Memorandum to the DDA, Tweede Kamer 2001-2002, 28 169, nr. 3, p. 37-38.
[221] The material scope of the GETA covers the entire field of education. It thus offers a wider protection than the Directives.

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

Article 6a in the GETA provides the following:

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

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

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

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

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

No, it does not. Under art 7a of the GETA, the extension to social protection is restricted to racial discrimination. The other grounds are only protected by the constitutional and international prohibitions of discrimination in the above areas of social life. The issue of the scope of the protection against discrimination in the area of social security and social benefits, regularly arises in discussions about the possibilities for local social assistance and social benefits offices to cut down on benefits or even refuse benefits for citizens who, as a consequence of certain behaviour[222] or of wearing specific religiously required dress (*e.g. a burqa)* or headscarves, do not succeed in their obligation to find paid work.

Until January 2011, the Act on Labour and Social Assistance (*Wet Werk en Bijstand*) only allowed for a certain *reduction* of the right to benefits in such cases. The Government that came into office in 2010, included a statement in the Coalition Agreement that it planned to make it legally possible to withdraw a right to social benefit altogether, but it failed to pass such a measure. However, it is remarkable that this statement was included in the paragraph on integration, instead of in the paragraph on social policies. This may be an indication that in fact this new policy is a form of indirect discrimination on the ground of religion and/or ethnic origin, and in that way breaching the requirements of Article 3(1) of Directive 2000/43. There was

[222] E.g. the refusal to shake hands with a person of the other sex.

some academic criticism in this regard, but until now no legal action against the (proposed) measures was taken.[223] The newly installed Coalition Government announced in its Coalition Agreement that it (like its predecessor) planned to enable municipalities to withdraw the right to social benefit altogether, in case of behaviour that prevents benefit recipients from finding a job, for example wearing a burqa.[224]

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

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

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

No such decree has been adopted thus far. However, the interpretative tools regarding the meaning of 'social advantages' are laid down in the Explanatory Memorandum to the EC Implementation Act. Also, its relationship with 'social security' is explained in the Memorandum. 'Social security' concerns the statutory social insurance schemes which cover the risks that occur if a person loses his income as a result of (*e.g.*) unemployment, illness, disability, age and decease. Moreover it covers child benefits.[225] With regard to the notion of 'social advantages' it is observed by the Government, that this notion must be interpreted in the light of CJEU case law rendered in the context of Regulation 1612/68 on free movement of workers.[226]

In the Government's view the notion of 'social advantages' refers to advantages of an economic and cultural kind which may be granted both by private and public entities. These may include student grants, public transport reductions and reductions for

[223] See *Nederlands Juristenblad*, 2011-06, p. 337.
[224] See Chapter IX (p. 31) of the 2012 Coalition Agreement, which may be found at http://www.kabinetsformatie2012.nl/actueel/documenten/regeerakkoord.html (last accessed on 27 February 2013). Burqas were not specifically mentioned though.
[225] Explanatory Memorandum to the EC Implementation Act, Tweede Kamer, 2002-2003, 28 770, nr. 3, p. 14.
[226] See the CJEU's case law in Case C-261/83 (*Castelli*) of 12 July 1984 and Case C-249/83 (*Hoecx*) of 27 March 1985, as referred to in the Explanatory Memorandum to the EC Implementation Act, Tweede Kamer, 2002-2003, 28 770, nr. 3, p. 15.

cultural or other events. Advantages offered by private entities are for example reductions to entry prices for cinema and theatre for certain categories of visitors.[227]

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

This covers all aspects of education, including all types of schools. Please also consider cases and/ or patterns of segregation and discrimination in schools, affecting notably the Roma community and people with disabilities. If these cases and/ or patterns exist, please refer also to relevant legal/political discussions that may exist in your country on the issue.
Please briefly describe the general approach to education for children with disabilities in your country, and the extent to which mainstream education and segregated "special" education are favoured and supported.

The GETA is integrally applicable to all aspects of education, including all types of schools (Article 7; see above, section 3.2.4). This provision applies to 'race' and 'ethnic origin' but also to 'religion/belief' and 'sexual orientation' (as well as to all other grounds covered by the GETA). In this regard, Dutch law goes beyond the requirements imposed by the Directive.[228] Vocational training that is given before or during the employment relationship is regulated by Article 5(1) sub f of the GETA. From 1 August 2009, the scope of the DDA is extended to general primary and secondary education as well.[229]

A problem that has been dealt with in the framework of anti-discrimination or equal treatment legislation, is the fact that many boards of schools (or local governments that are in charge of publicly funded schools) have designed / want to design rulings that enhance a spreading of children of different cultural background over schools, in order to avoid the coming into existence of 'black schools' (*i.e.*, schools with a great majority of immigrants). In the beginning of the century there was some discussion in the Netherlands about the issue whether local governments had the right to spread people of certain non-Dutch descent or people with low incomes as far as housing and schools are concerned, in order to prevent 'black ghetto's' or 'black schools' to emerge. In relation to housing the then ETC has strongly advised against such policies.[230] A policy of a local gGovernment to spread pupils of different origin over various publicly funded schools was also deemed to be directly discriminatory on the

[227] Explanatory Memorandum to the EC Implementation Act, Tweede Kamer, 2002-2003, 28 770, nr. 3, p. 15.
[228] See also Memorandum concerning the Implementation of Directive 2000/78/EC and Directive 2000/43/EC ("Notitie over de Implementatie van Richtlijn 2000/78/EG en Richtlijn 2000/43/EG"), Tweede Kamer, 2001-2002, 28 187, nr. 1, p. 10-11.
[229] Staatsblad 2009-101, Wet van 19 jan. 2009, '*Wijziging van de Wet gelijke behandeling op grond van handicap of chronische ziekte in verband met de uitbreiding met onderwijs als bedoeld in de Wet op het primair onderwijs en de Wet op het voortgezet onderwijs en met wonen'* (= *Amendment to the Disability Discrimination Act concerning the extention to primary and secondary education and housing*). See Articles 5b (education) and 6a, 6b and 6c (housing).
[230] See ETC Advice 2005/03.

ground of ethnic origin.[231] In the past there has been some academic debate about the question whether equal treatment legislation is unduly restrictive as far as the possibilities for local government are concerned to develop such policies.[232]

One of the reasons for 'black schools' to develop is the fact that, in the Netherlands, schools on a religious or other 'denotative' basis (such as a special pedagogical view on education) have the freedom - guaranteed by the Constitution - to develop their own identity and to conduct their own admittance policies. As long as such schools are complying with the general quality requirements for education, public funding for these schools is guaranteed (see Article 23 of the Constitution). A restricting admittance policy of publicly funded Christian schools (to only Christian pupils) is supposed to be (inter alia) a cause of the growth of 'black' public schools.[233]

In 2005, some Members of Parliament therefore initiated a bill in which this 'freedom of education' was to be restricted for all publicly funded schools, including those on a religious or philosophical basis. This proposed law would grant pupils an unrestricted right to admittance to virtually any school and would pose a corresponding obligation to these schools to accept everybody. Only schools that – during at least 10 years – have followed a very strict policy to only admit their 'own' pupils would be exempted from this obligation.[234] It is highly disputable whether this would be in line with the constitutional guaranteed freedom for religious groups to have their own schools. Some commentators think that Article 23 of the Constitution needs to be abolished first before such a law could be enacted. The bill has still not yet been discussed in Parliament.[235] The issue became renewed topic of debate in Parliament when in 2009 two independent expert institutes issued reports in which they analysed the factual and legal situation.[236] The freedom of education remains a highly controversial topic, especially since it is deemed crucial by religious political parties, such as the Christen Union and the Reformed Political Party (SGP).

---

[231] ETC Opinion 2005-25.

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

[233] *I.e.*, schools that are governed by local authorities.

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

[235] The latest document in this dossier is Tweede Kamer, 2009-2010, 30 417, nr 9 (dated 8 April 2010). In this document questions concerning the proposal were raised. As by now, this bill does not seem to be on the political agenda.

[236] See Tweede Kamer 2008-2009, 31 293 / 31 289, nr. 53. In this letter to Parliament the Minister of Education gave her reaction to the reports: Kenniscentrum Gemengde Scholen:"Leerlingen, basisscholen en hun buurt, een onderzoek naar de samenstelling van schoolpopulaties en buurtpopulaties"; 22 April 2009; and: SCO-Kohnstamm Instituut in opdracht van Forum: "Bestrijding van segregatie in het onderwijs in gemeenten, Verkenning van lokaal beleid anno 2008"; 18 April 2009.

With respect to Roma and Travellers, the patterns of segregation in the Dutch school system don't seem to affect these minorities in particular. Therefore, in this respect[237] it does not seem to be necessary to put into effect *legal* instruments with regard to Roma and Travellers' children. In the field of education, only one case of alleged discrimination is known. In this case, a board of an association of 14 primary (Christian) schools used a quota of 15 % per institution for pupils who speak the Dutch language as a second language, in order to combat segregation.

This admittance policy was deemed to be unlawful indirect distinction against Roma and Sinti communities, on the ground of race/ethnic origin.[238] The Dutch Government has initiated exchange of information / policies within a network of local Governments that have a considerable amount of Roma inhabitants. The aim is (inter alia) to develop measures to decrease the number of Roma children that drop-out of the school system.[239] Such measures have been developed in 2009 by the Association of Dutch Local Councils (*Vereniging van Nederlandse Gemeenten, VNG*) for a number of local communities where a considerable number of Roma are living.[240] In 2009, the Government promised to make available 600.000 Euro for that purpose, under the condition that the money has been allocated in relation to other innovative activities that aim at enhancing the implementation of the Act on Obligatory Education (*Leerplichtwet*).[241] In relation to the agreement in the European Council of 24 June 2011 to enhance a national policy on the integration of Roma people in each Member State, the Dutch Government has sent a letter to Parliament in which it sketches the outlines of the current problems and the policies to address these problems, also in regard to education of Roma and Sinti children.[242] Roma and Sinti non-governmental organizations are quite critical about this policy document, which in their view puts too much emphasis on compliance with school regulations and implementing criminal procedures; they state that the NGOs did not have an opportunity to deliver input and that the Government does not include their

[237] There are special measures aimed at avoiding school drop out of Roma children. See Tweede Kamer 2008-2009, 31 700 XVIII, nr. 90.
[238] See ETC Opinion 2003-105.
[239] See Tweede Kamer 2008-2009, 31 700 XVIII, nr 90 dd 26 June 2009.
[240] See *Projectvoorstellen Platform Roma-Gemeenten*, Den Haag: Vereniging van Nederlandse Gemeenten (VNG) 2010. See also Jaarnota Integratiebeleid 2007-2011, Tweede Kamer 2009/10, 31 268, nr. 34, p. 11-12. Sources derived from: Marija Davidovic and Peter Rodrigues, 'Antiziganisme'. In: Peter Rodrigues & Jaap van Donselaar, *Monitor Racisme en Extremisme, Negende Rapportage 2010*. Published by the Anne Frank Foundation and Pallas Publications, Amsterdam 2010, pp 153-179. (Also to be downloaded from the web site of the Anne Frank Foundation: http://www.annefrank.org/ImageVault/Images/id_11703/scope_0/ImageVaultHandler.aspx (last accessed on 19 March 2013).
[241] Tweede Kamer 2009-2010 31 268, nr 34, p. 11-13 and Tweede Kamer 2009-2010, 32 123 XVIII, nr 27, p. 43. (Source: Davidovic & Rodrigues 2010, *op cit*, p. 1157).
[242] Letter of the Minister of Immigration, Integration and Asylum of 21 December 2011, Tweede Kamer 2011-2012, 21501-20, nr. 599.

experiences with (best) practices that have been developed at local level in co-operation with them.[243]

Several provisions are made with regard to people with disabilities in the field of education. The issue of accessibility of (school) buildings is already addressed above (Section 2.6 et seq.)). Besides all this, people with disabilities have certain rights to accommodation of education itself. Parents can request accommodations for their children with disabilities. The school can claim the extra expenses from the Government. Another example is the right to take the state exams in adapted ways, such as a big letter exam or an extension of time for an exam in order to meet dyslexia or other disabilities.[244] There are several forms of special primary education for pupils with certain cognitive impairments in the Netherlands. These schools however are only accessible for pupils in case of absolute necessity. The primary aim of the Dutch school system remains to educate as many pupils as possible in the regular schools.

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

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

The access to and supply of goods and services is covered by Article 7 of GETA. Subsection 1 of Article 7 provides as follows: It is unlawful to make a distinction in offering goods or services, in concluding, implementing or terminating agreements thereon, and in providing educational or careers guidance if such acts of making a distinction are committed:

a. in the course of carrying on a business or practicing a profession;
b. by the public sector;
c. by institutions which are active in the fields of housing, social services or welfare, health care, cultural affairs or education, or

[243] Kemal Rijken, 'Nieuw beleid Leers valt Roma zwaar', *Republiek Allochtonië* 5 januari 2012; see http://www.republiekallochtonie.nl/nieuw-beleid-leers-valt-roma-zwaar . Last accessed on 15 March 2012.

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

d. by private persons not engaged in carrying on a business or practicing a profession, insofar as the offer is made publicly.

This is applicable to all grounds covered by the GETA. In this regard, Dutch law extends beyond the Directives' requirements. Unilateral Governmental decisions and acts (e.g. a decision not to grant a subsidy) do not fall under the scope of Article 7.[245]

From art 7 subsection d) it is clear that the distinction between goods and services available privately and those that are available publicly is of importance in as far as the supply by private persons is concerned. It follows from the parliamentary history (and from case-law) that this similarly holds for private *associations*. The latter is the result of the balancing of interests between on the one hand the Constitutional right to freedom of association and on the other hand the right to equal treatment.[246]

NB: the area of access to goods and services in general is not covered under the ADA and the DDA. However, under the DDA the areas of education (which may be seen as a good or service) housing and public transport are covered.

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

In general, providing financial services is not covered under the DDA and ADA. These laws do (therefore) not provide for specific exceptions on the general prohibitions of discrimination in this area. However, there is Art 8 ADA which exempts distinctions with regard to age-based provisions in occupational and statutory pension schemes.

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

To which aspects of housing does the law apply? Are there any exceptions? Please also consider cases and patterns of housing segregation and discrimination against the Roma and other minorities or groups, and the extent to which the law requires or

[245] J.H. Gerards and A.W. Heringa, *Wetgeving Gelijke* Behandeling, Deventer: Kluwer 2003, p. 72-73, with references to ETC case law. NB: Art. 7a concerning social security and social services, does include unilateral actions by Government or Governmental agencies.

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

promotes the availability of housing which is accessible to people with disabilities and older people.

Housing is covered under article 7(1) subsection c of the GETA, and from 15 March 2009 also by articles 6a, 6b and 6c of the DDA. [247] The duty to make reasonable accommodations in relation to housing only exists in the case of disability discrimination. However, this provision is not applicable in as far as the adaptations would require building or reconstruction work in or around a house. (Art. 6c DDA)

The prohibition to discriminate applies to all aspects of housing. No specific exceptions apply as regard housing other than those which will be dealt with below. It remains to be seen whether the 'Rotterdamwet',[248] in which local authorities got the right to refuse to rent subsidized houses in certain area's to persons or households with a low-income or without steady jobs and to refer them to other areas in order to avoid the emergence of "ghettos", will be deemed indirectly discriminatory on the ground of ethnic origin when a case is brought to the attention of the courts.[249] Until now (January 2013) no case in which this law is being contested has been decided by the Courts.

Roma and Traveller people tend to live in caravans or trailers which are situated on officially designated 'trailer parks' (woonwagenkampen). The lack of systematic data in this respect makes it difficult to give exact numbers on the housing situation of Roma and Travellers. In the 2006 edition of the (yearly) *Monitor Racism and Extremism*[250] there is a quite critical assessment of the situation concerning the housing of these people in trailer parks. The Report states that the most important issue for Roma and Sinti in the area of housing is policymaking related to caravan sites. In this respect, the authors of the *Monitor* observe a shortage of caravan sites that is estimated at somewhere around 3,000 sites.[251] "This often makes it impossible for family members to pitch on the same encampment, something of great importance to the Roma and Sinti.[252] In failing to provide enough caravan sites, the Government makes it impossible for Roma and Sinti to sustain their cultural identity.

---

[247] Kamerstukken Tweede Kamer, 2008-2009, 30 859 *Wijziging van de Wet gelijke behandeling op grond van handicap of chronische ziekte in verband met de uitbreiding met onderwijs als bedoeld in de Wet op het primair onderwijs en de Wet op het voortgezet onderwijs en met wonen.* Law of 29 January 2009, Staatsblad 2009, 101.

[248] Tweede Kamer, 2004-2005, 30 091. Law of 20 December 2005, Staatsblad 2005, 726.

[249] The ETC thinks this might be the case. See Advice 2005/03.

[250] Jaap *van* Donselaar and Peter Rodrigues (eds.), *Monitor Racisme & Extremisme. Zevende rapportage (*Monitor Racism & Extremism. Seventh report*),* Amsterdam: Anne Frank Stichting/Leiden: Leiden University 2006 http://www.annefrank.org/ImageVaultFiles/id_11493/cf_21/Monitor2006-7.pdf., last accessed 19 March 2013.

[251] K. Sikkema, *Roma and Sinti in Nederland, Een onderzoek naar de algemene levensomstandigheden,gezondheidssituatie en toegang tot de gezondheidszorg van de Roma and Sinti in Nederland.* Amsterdam: Dokters van de Wereld*,* February 2004, p.10.

[252] See also the questions to the Government, *Aanhangsel Handelingen II* (Appendix parliamentary questions II), 2002/03, no. 32 and no.199.

This violates the requirement to provide housing without distinguishing by ethnic background, as established in the European Racial Equality Directive".[253]

From the 2010 edition of the Monitor, it appears that the situation has not improved since then.[254] The Monitor reports of discrimination, not only of Roma and Sinti living on caravan sites, but also of those who live in 'ordinary' houses. Often, for them it is more difficult e.g. to get a mortgage or to be accepted by their neighbours. Problems as regards housing also occur in relation to Eastern European Roma people who come to the Netherlands to work. They are often the victim of severe exploitation. An example is the case of the Amsterdam police discovering 26 Roma people in one apartment, where each of them was required to pay a rent of 50 Euro per week.[255] In relation to the agreement in the European Council of 24 June 2011 to enhance a national policy on the integration of Roma people in each Member State, the Government has sent a letter to Parliament in which it sketches the outlines of the current problems and the policies to address these problems, also as regards housing of Roma and Sinti people.[256] However, this topic does not get much attention in the policy document, which focuses strongly on education and combating criminal behaviour. [257]

After searching case law, we were able to find one recent case dealing with housing of Traveller people.[258] In addition, two older cases exist, both brought before the then ETC, as regards to the housing situation of Roma and Sinti people.[259]

The GETA and the DDA do not specifically address the special housing needs of older people. There is general social assistance legislation (*De Wet*

[253] Monitor Racisme & Extremisme. Zevende rapportage, *op cit*, p. 53.
[254] Marija Davidovic and Peter Rodrigues, 'Antiziganisme'. In: Peter Rodrigues & Jaap van Donselaar, *Monitor Racisme en Extremisme, Negende Rapportage 2010*. Published by the Anne Frank Foundation and Pallas Publications, Amsterdam 2010, pp 153-179, at p. 158. (Also to be downloaded from the web site of the Anne Frank Foundation: http://www.annefrank.org/ImageVault/Images/id_11703/scope_0/ImageVaultHandler.aspx (last accessed on 19 March 2013.) The 2011edition of the Monitor will be published in the course of 2012.
[255] Reported in the newspaper *Het Parool* of 29 August 2009. Source: Davidovic & Rodrigues, op cit, p. 159, fn 40.
[256] Letter of the Minister of Immigration, Integration and Asylum of 21 December 2011, Tweede Kamer 2011-2012, 21501-20, nr. 599. In addition to this letter, the Dutch government drafted a set of policy measures to foster social inclusion of Roma and Sinti people, as requested by the European Commission. This policy paper, dd 16 Dec. 2011, can be found at http://ec.europa.eu/justice/discrimination/files/roma_nl_strategy_en.pdf (last accessed 18 March 2013).
[257] Kemal Rijken, 'Nieuw beleid Leers valt Roma zwaar', *Republiek Allochtonië* 5 januari 2012; see http://www.republiekallochtonie.nl/nieuw-beleid-leers-valt-roma-zwaar . Last accessed on 15 March 2012.
[258] See ETC, 2012-12. In this case, the ETC decided that no distinction had been made on the ground of race.
[259] The then ETC decided in these cases that the ground race or ethnic origin was at stake. Some of the Travellers involved are Roma or Sinti, but not all of them. See ETC Opinion 2006-5 and ETC Opinion 2006-222. The last case is also included and summarized in Annex 3 of this report.

Maatschappelijke Ondersteuning, WMO) which provides that elderly and disabled people can get special facilities (e.g. adaptations in their house or get preference when they need to live in a specially designed institution) from the local Government. It goes beyond the scope of this report about the implementation of the Directives to describe the details of this kind of social assistance legislation.

4 EXCEPTIONS

4.1 Genuine and determining occupational requirements (Article 4)

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

Race

In the GETA, the 'GOR-exception' only exists for the grounds *race* and *sex.* As far as race is concerned, this has been laid down in Article 2(4) of the GETA:[260] "*The prohibition of making distinctions on the grounds of race as it is contained in this Act, shall not apply:*

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

In contrast to Article 4 of Directive 2000/43/EC that speaks of a *characteristic related to racial or ethnic origin*, the Dutch provision specifies that only *outer racial appearances* may constitute a *genuine occupational requirement*.[261] This means that 'race' *in se* is not regarded as a permissible ground for a given distinction.[262] Only *physical differences* (skin colour, hair type, etc.) may form a basis for a distinction, to the exclusion of *sociological differences*. E.g., the GETA does not allow a care institution, which looks after the well-being of young Moroccan delinquents, to express in a job advertisement a preference for a *Moroccan* social worker.[263] On the basis of Art. 4(6) GETA, these exceptions have been elaborated in a Governmental Decree of 1994.[264]

[260] Subsection b was inserted by the EC Implementation Act. With this amendment the Government has intended to follow more closely the wordings of the Directive. See Explanatory Memorandum to the EC Implementation Act, Tweede Kamer, 2002-2003, 28 770, nr. 3, p. 10. However, pre-implementation the 'genuine occupational requirement exception' was also covered by the more general wording of subsection a of Article 2(4).
[261] Explanatory Memorandum to the EC Implementation Act, Tweede Kamer, 2002-2003, 28 770, nr. 3, p. 10.
[262] J.H. Gerards & A.W. Heringa, *Wetgeving Gelijke Behandeling,* Kluwer Deventer 2003, p. 129.
[263] See ETC Opinion 1997-51.
[264] Governmental Decree on Equal Treatment ("Besluit Gelijke Behandeling"), 18 August 1994, Staatsblad 1994, 657. This Decree has been amended on 21 June 1997, Staatsblad 1997, 317. The Decree was amended again in 2010, whereby two exceptions (beauty contests and the area of goods and services where deleted. See Staatsblad 2010, 299.

The Decree exhaustively indicates to which professional activities the Article 2(4) exceptions apply. These are:

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

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

***Disability*:** The GOR-exception has not been included in the DDA. In the Government's view, in contrast to 'race' and 'sex', no scenario is imaginable in which 'disability' would constitute a genuine occupational requirement.[265] An amendment was submitted by a Member of Parliament in this respect; however, without any effect.[266]

***Age*:** Since the ADA does not differentiate between 'direct' and 'indirect' distinction and 'objective justification' is possible for both types of 'distinction' (see Article 7(1)(c) ADA), the Government considered including the GOR-exception not necessary. In this view, in cases in which 'age' is considered a genuine occupational requirement, this can be assessed via the objective justification test.[267]

[265] Explanatory Memorandum to the DDA, Tweede Kamer 2001-2002, 28 169, nr. 3, p. 35.
[266] Amendement Terpstra, Tweede Kamer, 2001-2002, 28 169, nr. 11. This amendment was rejected.
[267] Explanatory Memorandum to the ADA, Tweede Kamer 2001-2002, 28169, nr 3, p. 35.

Conceptually speaking, this is open to criticism. In this view, the Article 4(1) exception of the Directive is regarded as a species of the Article 6 exception of the Directive.[268] In that light it would have been preferable, had the Government explicitly included the GOR-exception.

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

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

In this section, we will first describe the exceptions in part A. We will describe whether this is in compliance with Art. 4 (2) of Directive 2007/78 in part B.

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

Part A: Exceptions for employers with an ethos based on religion or belief

Boundaries to the scope of application.

Although formally not an exception to the prohibition to discriminate, one should be aware that the GETA does not apply to legal relationships *within* churches, other religious communities, or associations of a spiritual nature and excludes the application of equal treatment norms to 'ministers of religion" (priests, ministers, imams, et cetera). (I.e. a restriction of the scope of application of the Law; see Article 3 GETA.) These are considered to be internal affairs of these (religious) organizations. The rationale for this lies in the constitutional right to of *freedom of religion* and in the *division between state and church*.

Article 3 GETA:

This Act does not apply to:

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

[268] See F.B.J. Grapperhaus, 'Het verbod op onderscheid op grond van leeftijd in arbeid en beroep', *Ondernemingsrecht* 2002-12, p. 356-363, at p. 362.

It is to be noted that only purely *internal* affairs of Churches fall outside the scope of the GETA. Thus, for example, the employment relationship between a gardener or cleaner with a Church or a religious community falls within the scope of the GETA. As has been observed by Gerards & Heringa, the more the legal relationship is disconnected from the rationales of freedom of religion and the division between state and church, the less likely is it to be considered as a purely internal affair.[269] The question whether the autonomy of churches should be limited with a view to respecting the equal treatment principle was subject of a study by independent academic experts in 2005. An extensive review was made of the international and national human rights norms that are at stake (ICCPR, ECHR, EU-legislation and the Dutch Constitution). The experts concluded that Article 3 of the GETA does not exceed the criteria set by the constitutional guarantee of the freedom of religion and the protection against discrimination. Also, this Article was deemed to be in line with the exceptions that are possible under the Directives.[270]

Exceptions for employers on the ground of religion and belief

In this regard two provisions in the GETA are important:[271]

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

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

Article 5(2)(c) GETA provides that distinctions may lawfully be made by private educational institutions founded on religious or ideological principles. It reads as follows:

" the freedom of an educational institution founded on religious or ideological principles to impose requirements on the occupancy of a post which, in view of the institution's purpose, are necessary for it to live up to its founding principles; such

[269] J.H. Gerards and A.W. Heringa, *Wetgeving Gelijke Behandeling*, Deventer: Kluwer 2003, p. 105.
[270] M.L.M. Hertogh & P.J.J. Zoontjens (eds): *Gelijke behandeling: principes en praktijken. Evaluatieonderzoek Algemene wet gelijke behandeling*. Wolf Legal Publishers Nijmegen 2006. The part about the exemption of the Churches was written by prof. Ben Vermeulen. See pp. 219-248.
[271] NB: at this point we discuss the implementation of Article 4(2) of Directive 2000/78. Therefore, we concentrate on provisions in the GETA that cover the same scope as this Directive (in general: employment related activities). However, Art. 7(2) of the GETA contains a similar exception for the field of goods and services, especially directed at access to primary and secondary education.

requirements may not lead to discrimination on the sole ground of political opinion, race, sex, nationality, heterosexual or homosexual orientation or civil status.

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

Institutions that fall under sub (c) may even impose requirements upon the behaviour or acts of (would be) employees which take place *outside* the sphere of the institution, if this is necessary for the effective realization of the institution's founding principles.[272]

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

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

The exception under sub (a) is formulated in a slightly different way than its counterpart in the Directive. The Directive uses as the main yardstick whether, while having regard to the organization's ethos, a person's religion or belief constitutes a *genuine, legitimate and justified occupational requirement,* by reason of the nature of the occupational activities or of the context in which they are carried out. Within the context of the GETA, it is of prime interest that the distinction is necessary for the *fulfilment of duties* attached to a post. From the wording of this provision it follows that the imposed requirements need necessarily be linked up with a person's *job performance*. In the light of case law, it appears that the Dutch law thus is in conformity with the Directive. The word 'necessary' implies that the requirements must be legitimate and justified.

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

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

From the wording of this provision it follows that the imposed requirements need not necessarily be linked up with a person's *job performance*. The personal situation

[272] J.H. Gerards and A.W. Heringa, *Wetgeving Gelijke Behandeling*, Deventer: Kluwer 2003, p. 109.

(e.g. living together without being married or living together with a same-sex partner) may as well be a factor that can be taken into account by the institution in its decision as to whether or not a particular person complies with the founding principles underlying the institution.[273] Requirements must however be 'necessary' for the effective realization of the institution's founding principles. The NIHR looks at the institution's statutes and at what the institution does in practice, in order to realize its religious and ideological foundations. It seems that, in the light of the quite broad wording of Article 4(2) of the Directive, this exception is in line with EU law.

The 'sole ground' construction in the articles 5(2) sub (a) and (c).[274]

This so-called 'sole ground construction' (Dutch 'het enkele feit') is equivalent to the clause in Article 4(2) of Directive 2000/78.

The 'sole ground construction' aims at eliminating the possibility that a distinction is exclusively made on the ground of political opinion, race, sex, nationality, hetero-or homosexual orientation or civil status, under the guise of exceptions which are permitted by the law (i.e., the exceptions enshrined under Articles 5(2) sub (a) and (c) for the grounds religion and belief). [275]

This construction has played an important role with regard to the question whether a Christian School may lawfully refuse cohabitating homosexuals for a teaching position. It is stated clearly in the Parliamentary Documents that the 'sole ground' that a person is homosexual, may *per se* not lead to the refusal to hire such a person or to dismiss him or her.[276] However, this may be different if 'additional circumstances'[277] are taken into account.[278] In the course of Parliamentary debates about the GETA, the Government explained that it could be any 'behaviour' inside

[273] See e.g. Opinion 1999-38.
[274] A similar construction exists in Article 7(2) GETA, where it concerns access of pupils to general primary and secondary education.
[275] The Explanatory Memorandum points out that, in respect of the grounds 'race' and 'sex', it is difficult to see how 'accessory circumstances' or 'concomitant' behaviour could possibly result in the justification of a discriminatory act. The Memorandum only gives one example of justified discrimination on the grounds of race. The example given is that of Jewish associations which impose differentiating requirements on the ground of Jewish descent. The differentiation is a direct consequence of the Jewish belief. The special relationship in this example between *descent* on the one hand and *religion and belief* on the other hand may at certain instances justify the discriminatory act. See Explanatory Memorandum to the GETA, Tweede Kamer, 1990-1991, 22 014, nr. 3, p. 19.
[276] Parliamentary Documents EK 1992-1993, 22 014, nr. 212c, p. 10-11.
[277] In the Parliamentary Documents, the example is given of a teacher in social studies at a denominational school. This teacher is homosexual and cohabitates with a same sex partner. According to the example, the teacher may in reasonableness be expected to elaborate in his classes upon the concept of "marriage". See Parliamentary Documents 1990-1991 Memorandum in Reply, p. 41.
[278] Explanatory Memorandum to the GETA, Tweede Kamer, 1990-1991, 22 014, nr. 3, p. 18-19. See also ETC Opinion 1996-39 and 1999-38 and J.H. Gerards and A.W. Heringa, *Wetgeving Gelijke Behandeling*, Deventer: Kluwer 2003, p. 105.

and/or outside school from which it is apparent that the teacher does not subscribe to the particular religious belief or even contests this belief openly. The Directive's wording in Article 4(2) seems not to permit that 'additional circumstances' play a material role *unless* such circumstances coincide with the organization's religion or belief.

Examples given by the Government during the parliamentary discussions of the GETA (1994) and ETC-Opinions regarding 'additional circumstances' are all related to behaviour or circumstances that have a relationship with the religious ethos of the organization. Therefore, this 'sole ground construction' seems to be in conformity with the Directive. However, as a reaction to the European Commission's infringement procedure against The Netherlands, where this issue was mentioned by the Commission[279] (see section 0.2 of this report), the Government has asked for an advice of the Council of State and on that basis has announced that it will rephrase the exception in such a way that the wording is more closely reflecting the wording of the Directive.

In 2009, the Government announced that it wanted to submit a Bill to Parliament with such an amendment in the Autumn of 2010.[280] At the same time, the Government announced that the proposal would be such that *de facto* not much would change. Until now (Spring 2013) such a Bill has not yet been submitted. Several Members of Parliament (of the Liberal Democratic Party and Green Party) therefore in 2010 introduced their own Bill to take the sole ground provision completely out of the GETA and thereby make the law more in compliance with the Directive.[281] Nevertheless, it is remarkable that these MPs did not propose to copy literally the wording of the exception in the Directive. They only proposed to take out the words 'on the sole ground' from the current legislation. Requirements, included in the Directive, regarding a genuine *legitimate* and *justified* occupational requirement, are not included in the current Dutch exception clause and would still be lacking when this Amendment were to be accepted. The Bill is not treated yet by Parliament.

Among equal treatment experts, the sole ground construction, and especially the way it is handled by the ETC (now NIHR) results in severe criticism.[282]

b) Are there any specific provisions or case law in this area relating to conflicts between the rights of organizations with an ethos based on religion or belief and

[279] Letter dated 31 January 2008 (no. 2006-2444), with reference to the infringement procedure of 18 December 2006, infringement No. 2006/2444. Article 5(2) GETA was mentioned, however, in the end the Commission did not ask the Government to change this provision.
[280] See Letter of the Ministry of the Interior and Kingdom Relations dd 29-09-2009, Tweede Kamer 2009-2010, 28 481, nr. 7.
[281] See Tweede Kamer 2009-20101, 32 476, nr 1..
[282] See G. Terpstra, 'Commissie Gelijke Behandeling verslikt zich in oordeel over enkele-feitconstructie' in: *NTM-NJCM-bulletin*, jrg 37 (2011), nr5, pp 582-600.

other rights to non-discrimination? (e.g. organizations with an ethos based on religion v. sexual orientation or other ground).

Specific provisions in this area are Article 3 GETA and Article 5(2) GETA, which have been discussed extensively above under section a). As for case law, there are a number of cases of the ETC in which these Articles are at stake. Quite often, this concerns questions related to Islamic faith, e.g. whether the Islamic headscarf is allowed or whether a person can be obliged to shake hands.[283] In 2011, the ETC (again) made it very clear that the exception needs to be interpreted narrowly.[284] Only when a certain measure or policy is really necessary for maintaining the institution's ethos, it may be used to justify a distinction based on religion. As far as the "sole ground" construction is concerned, see ETC Opinions 1996-39 and 1999-38 in which the ETC examined the 'sole ground construction' in the context of Article 5(2) under c. In 1998-38 the ETC concluded that the *a priori* refusal of a homosexual person without granting her a chance to express her viewpoints makes that the Article 5(2)(c) exception cannot be successfully relied upon.[285] In 2011, for the first time a civil court gave a decision in a case where the exception clause of Article 5(2) sub (c) of the GETA was invoked by a school board.[286] It concerned a case of a homosexual teacher who was dismissed by a (fundamentalist) protestant school after he had announced that he had left his wife and children and went to live together with his new male partner. In that case (summarized in Annex 3 of this report) the Court found that the school board could not rely on the exception, therefore had discriminated against the teacher.

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

All educational institutions are financed (on a basis of equality; see Article 23 of the Constitution) by the State on the condition that they fulfil certain basic legal requirements in regard of the curriculum, professional standards, etc. All schools are covered by the equal treatment legislation. This includes schools based on religion or other 'convictions' (e.g. educational or pedagogical principles). The latter kind of schools have independent boards which decide on the school's policies, including hiring / firing people who do / do not subscribe to the schools denomination. Schools

[283] See e.g. 2006-218, 2006-144, 2006-128, 2006-93, 2006-63, 2005-222, 2005-102, 2005-19, 2004-160, 2004-138, 2003-145, 2003-114, 2001-01 and 2000-67. Some of these cases have been reported in the framework of the thematic study concerning religion and belief. See: Lucy Vickers: *Religion and Belief Discrimination in Employment – the EU Law.* European Commission, November 2006.
[284] ETC Opinion 2011-2 of 7 January 2011.
[285] J.H. Gerards and A.W. Heringa, *Wetgeving Gelijke Behandeling*, Deventer: Kluwer 2003, p. 109.
[286] Judgment of Cantonal Court The Hague 2-11-2011.

without a particular religious denomination belong to the 'openbaar onderwijs' (i.e. public / secular education); in that case the board is part of the local Government. In such schools it is impossible that anybody is hired/fired because he/she is not accepting a certain religious ethos/principles or that religious organizations (like the Holy See) have any influence on the school's policies. In schools that are based on a certain religious ethos, a difference in treatment is only acceptable when meeting the Directive's requirements for such justification (implemented in Article 5(2) of the GETA). The same applies for other institutions (e.g. health care institutions which are based on a religious denomination).

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

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

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

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

No, there are not.

4.4 Nationality discrimination (Art. 3(2)

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

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

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

Beside discrimination on the ground of race, nationality discrimination is prohibited by the GETA. Thus, the Dutch General Equal Treatment Act goes beyond the requirements stemming from Directive 2000/43. Distinction on the grounds of nationality is in principle prohibited as follows from Article 1 of the Act. However, Article 2(5) of the Act enshrines some exceptions to this: The prohibition on the grounds of nationality shall not apply if the distinction is based upon *generally binding rules* (*i.e.*, Statutory Acts and Acts by the administration such as Governmental decrees) or on *written or unwritten rules of international law*.[287] Moreover, the prohibition shall not apply in such cases where 'nationality' is a determining factor (*e.g.*, nationality requirements imposed upon players for the national football team).[288] Nationality discrimination does indeed include stateless status.

What is the relationship between 'nationality' and 'race or ethnic origin', in particular in the context of indirect discrimination?

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

Is there overlap in case law between discrimination on grounds of nationality and ethnicity (i.e. where nationality discrimination may constitute ethnic discrimination as well?

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

[287] See e.g. ETC Opinion 2002-61, 1998-81 and 1997-13.
[288] See e.g. ETC Opinion 1996-77.

way of reasoning are the two NIHR cases concerning the old age pension system that were decided in 2012 (see section 0.3 Case Law).[289]

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

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

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

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

a) Would it constitute unlawful discrimination in national law if an employer provides benefits that are limited to those employees who are married?

Yes, this will be regarded as a distinction based on civil status, which is prohibited under the GETA.

b) Would it constitute unlawful discrimination in national law if an employer provides benefits that are limited to those employees with opposite-sex partners?

Yes, this will be considered to be a direct distinction on the ground of sexual orientation. This follows not only from the Parliamentary Documents but it has also been confirmed by the then ETC in several of its Opinions.[290] Since 1998 the Netherlands has a possibility for registered same sex partnership and since 2001 legal marriage is also open for same-sex couples. The GETA prohibits to make distinctions between same-sex and opposite-sex partners who have the same civil status.

[289] See for two cases in which the (former) ETC concluded that a distinction on the ground of nationality amounted to direct discrimination on the ground of race/ethnicity: ETC Opinion 2011-97 and 2011-98. A critical note to these Opinions was written by A. Böcker & S. Dursun-Aksel, in: C.J. Forder, Gelijke Behandeling: Oodelenen Commentaren 2011, Wolff Legal Publishers 2012, pp. 460-464.

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

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

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

Yes, the DDA contains a provision that is mirroring Article 7(2) of the Directive.[291]

See Article 3(1) section b. of the DDA:

"*The prohibition of making a distinction shall not apply if:*
(…)
b) the distinction relates to a regulation, standard or practice which is aimed at creating or maintaining specific provisions and facilities for the benefit of persons with a disability or chronic illness;"

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

"*The prohibition of making a distinction shall not apply if:*
a) the distinction is necessary for the protection of public security and health; (…)".

It is sometimes stated that this latter provision also forms an implementation of Article 7(2) of the Directive (only applicable to disability). We hold that it is the implementation of (the more generally applicable) Article 2(5) of the Directive and therefore also deal with this particular provision in section 4.8 of this Report (see below).

The exception of Article 3 (1) sub (a) in the DDA must be interpreted narrowly. It follows from Parliamentary history that a high threshold is set for any successful reliance upon this exception. If an employer claims that a distinction on the ground of disability is necessary for reasons of health, safety of security, he must duly motivate his claim. If there is a possibility to remove the risk by means of an effective and reasonable accommodation, it is not possible to rely on the exception.[292] There are a few points that need further clarification. Under the 1998 Working Conditions Act and under civil employment law, the employer has a duty to eliminate/reduce much as possible any risk to the health and well-being of his employees. It is not totally clear from the Parliamentary history or from existing case law whether an employer can exclude a disabled person on the ground that the work will pose a risk to the disabled person's own health or safety (but not the health and safety of others). Neither is it clear whether a disabled individual can decide for him/ herself that he/ she wishes to

[291] This provision seems often to be confused with the Article 3 (1) sub (a) DDA, that mirrors Article 2(5) of the Directive, which aims at national legislation that is necessary for reasons of public health and safety. This exception is discussed later in this report under the heading 4.8.
[292] See also A.C. Hendriks, *Wet Gelijke Behandeling op grond van handicap of chronische ziekte* (Actualiteiten Sociaal Recht), Deventer: Kluwer 2003, p. 66-67.

accept such a risk. Moreover, it is not clear whether the employer would be excluded from liability should the disabled individual suffer harm in such circumstances.

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

The exception regarding health and safety can only be applied to age (see Article 3(1) sub (a) of the ADA). A similar counterpart exception has not been included in the GETA. However, safety and security issues may come at the surface in the 'objective justification test' for indirect discrimination cases. For example, a prohibition of headscarves during gymnastics for reasons of safety and security can be objectively justified. [293]

It has to be noted that there has been some debate about the question whether this is a shortcoming in the GETA.[294] In the framework of the 3rd periodical Evaluation of the equal treatment legislation it has been suggested to include a general exception concerning public health and security (*gevaren voor de volksgezondheid*) in the GETA.[295] The then ETC proposed to include a provision identical to Art. 2(5) of 2000/78/EC into the Dutch equal treatment laws. As far as such an exception or justification clause would apply to the protection of public health (volksgezondheid), the Government appears to agree with including it in the equal treatment laws, but no change has been made until now (Spring 2013).[296]

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

4.7.1 Direct discrimination

Is it possible, generally, or in specified circumstances, to justify direct discrimination on the ground of age? If so, is the test compliant with the test in Article 6, Directive 2000/78, account being taken of the Court of Justice of the European Union in the Case C-144/04, Mangold and Case C-555/07 *Kucukdeveci?*

Article 7(1) ADA reads: "1. The prohibition of making a distinction shall not apply if the distinction: a) is based on employment or labour-market policies to promote employment in certain age categories, provided such policies are laid down by or

[293] The ETC (now NIHR) applies this exception (strictly) in inter alia the context of religious discrimination, where sometimes it is argued that a prohibition of the Islamic headscarf must be prohibited for reasons of safety. See e.g. ETC Opinion 2011-195.
[294] See ETC Opinion 2006-20, (also referred to in section 0.3: case-law) in which the ETC deemed a measure which rejects homosexual blood donors legally justified, in spite of the lack of a legal provision to justify direct a distinction based on sexual orientation because of public health risks.
[295] ETC: 3rd Evaluation Report (2004-2009), May 2011, at p. 8.
[296] Tweede Kamer 2011-2012, 28 481, nr 16, p.. 9, referring to an earlier promise of the Government to include such an exception (Tweede Kamer 2008-2009, 28 481, nr 5, p. 4.).

pursuant to an Act of Parliament; b) relates to the termination of an employment relationship because the person concerned has reached the pensionable age under the General Old Age Pensions Act (AOW), or a more advanced age laid down by or pursuant to an Act of Parliament or agreed between the parties; c) is otherwise objectively justified by a legitimate aim and the means used to achieve that aim are appropriate and necessary."

From this, it follows that in two specific circumstances direct discrimination may be justified (see art. 7(1) sub a) and sub b)).

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

The Dutch Government, until now, more or less assumed that whenever the legislator had laid down a criterion based on age, this was objectively justified as soon as the legislator had given some 'good reasons' for doing this.[297] The case law of the CJEU means that every legal norm that contains a differentiation based on age needs to be justified. This seems to be in line with the Mangold judgment of the CJEU. The Government made a start with this during 2004-2005. Every Department of the Government was obliged to make a report in which it gives an inventory of age criteria in its legislation and has to give the reasons why these criteria exist.[298]

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

Yes, it does. *Article 7(1)* sub sections (a) and (b) ADA enshrine two exceptions that are deemed *a priori* to be 'objectively justified' because, according to the Government, they are closely linked to the justifications mentioned in the Directive.

Subsection (a) provides that the prohibition of age distinction shall not apply if the distinction is based on employment- or labour market policies which are aimed at promoting labour participation of certain age categories provided that such policies

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

[298] This was requested by the House of Representatives; see the letter to the Minister of Social Affairs and Employment, dd 14 June 2004, 85-04-SZW. The answers were sent to Parliament in the course of 2005. See Tweede Kamer 2004-2005, 28 170, nr 30: Inventory of the Ministry of Social Affairs and Employment; *ibid.*, nr. 31: Inventory of the Ministry of Housing; *ibid.*, nr. 32: Inventory of the Ministry of Finance; *ibid.*, nr. 33: Inventory of the Ministry of Foreign Affairs; *ibid.*, nr. 34: Inventory of the Ministry of Health; *ibid.*, nr. 35: Inventory of the Ministry of Education; *ibid.*, nr. 36: Inventory of the Ministry of Transport and Water Management; *ibid.*, nr. 38: Inventory of the Ministry of Agriculture and Nature; *ibid.*, nr. 39 + 44: Inventory of the Ministry of the Interior and Kingdom Relations; *ibid.*, nr. 41: Inventory of the Ministry of Justice.

are enshrined in a Statutory Act or in a Governmental Decree.[299] [Transposition of Art. 6(1) of Directive 2000/78].

Subsection (b) provides that the prohibition of age distinction shall not apply if the distinction regards the termination of the employment relationship, either by reason of having reached the statutory retirement age (65), or, of a *higher* (not lower!)[300] age than that provided this higher age has been laid down by Statutory Act or Governmental decree, or has been mutually agreed on by the parties involved. [Transposition of Art. 6(2) of Directive 2000/78].

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

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

Yes, it does. Article 8 of the ADA provides that the prohibition to make a distinction is not applicable in regard to (occupational) pension schemes and in regard to actuarial calculations for pension provision. Article 8(2) provides in essence, that the prohibition of age distinction shall not apply to the admission or entitlement to pension provision,[301] nor to the fixing under such provision of different ages for employees or categories of employees. Article 8(3) renders this norm not applicable in regard to the use of age criteria in actuarial calculations. [Transposition of Art. 6(2) of Directive 2000/78.] The Directive states that this exception may not lead to discrimination on the ground of sex. This clause has not been added in the Dutch ADA. However, this is regulated in the sex-discrimination legislation. (See Article 12b and 12c of the ETA.)

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

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

[301] A concept defined in Article 8(1) of the ADA.

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

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

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

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

4.7.3 Minimum and maximum age requirements

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

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

4.7.4 Retirement

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

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

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

Please note: the following provisions are to be applied equally to women and men under Dutch law.

The right to receive a state pension on the basis of the General Old Age Pensions Act (AOW) at the statutory pensionable age is independent from the question

whether the person has (or has had) a paid job or not. (NB: the statutory pensionable age used to be 65 but will be raised gradually, starting in the beginning of 2013. In 2023 the pensionable age for everyone will be 67.)

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

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

The ADA leaves room for social partners to agree - if required - on a higher age, until which employees can continue working after they turned 65. The ADA prohibits compulsory retirement (dismissal) *before* the age of 65, unless the distinction made on ground of age is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

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

b) Is there a normal age when people can begin to receive payments from occupational pension schemes and other employer-funded pension arrangements? Can payments from such occupational pension schemes be deferred if an individual wishes to work longer, or can an individual collect a pension and still work?

The date on which benefits can be collected under these schemes depends on the conditions under which such schemes are contractually agreed. Some schemes are more flexible than others as far as an individual's wishes to work longer are concerned. It is possible for an individual to collect a pension under the occupational pension scheme and on top of that to have other income, e.g. from a paid job.

c) Is there a state-imposed mandatory retirement age(s)? Please state whether this is generally applicable or only in respect of certain sectors, and if so please

state which. Have there been recent changes in this respect or are any planned in the near future?

No, there is not a state imposed mandatory retirement age in any part of the Dutch (labour) laws that regulates the possibilities of dismissal of workers.

However, in some professions there are age limitations that are regulated by law or by the professional organization (e.g. the National Organization or General Practitioners). These are also regularly included in a Collective Labour Agreement ("Collectieve Arbeidsovereenkomst"). Furthermore, in an employment contract it can be determined that it ends at the age of 65 (when one becomes eligible for a State pension).

A complete overview of such regulations cannot be given here. The NIHR (formerly ETC) decides on a case by case basis whether there is sufficient objective justification for such a fixation of a retirement age or the age on which another contractual relationship will be ended. See e.g. ETC-Opinion 2005-49, where a General Practitioner (GP) aged 80 contested being excluded by an insurance company, the ETC concluded that there were solid methods available to test whether elderly GP's are still able to do their job properly. In fact a Registration Committee of Medical Doctors and the National Association of Medical Doctors apply these methods. Following the results of these tests the insurance company can decide whether or not to conclude a service contract with a doctor who is over the age of 65. Therefore the conclusion was that there is no objective justification for the exclusion of this particular doctor. A recent NIHR-Opinion on this topic can be found in paragraph 0.3 of this Country Report.[302]

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

Yes, see article 7(1) sub (b) ADA. This article reads as follows: "*1. The prohibition on the making of a distinction shall not apply if the distinction:*

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

The Government holds the view that this exception is fully in compliance with the Directive. This view has not been contested in Parliament, nor in academic literature, as far as we know.

[302] NIHR Opinion 2012-196, see also http://www.mensenrechten.nl/publicaties/oordelen/2012-196, last accessed 12 March 2013.

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

Yes, these laws are applicable to all workers, without any exception. As long as someone is an employee with a permanent contract according to the definitions of these laws, they are protected by the civil laws regulating employment rights and by the ADA, regardless of his/her age. Employees with temporary contracts have no protection against dismissal when the contract ends. However, it is prohibited not to renew a temporary contract on discriminatory grounds.[303] It should be noted that employers who do allow persons over 65 to continue working for them, mostly do this on the basis of a temporary contract.

f) *Is your national legislation in line with the CJEU case law on age (in particular Cases C-229/08 Wolf, C-499/08 Andersen, C-144/04 Mangold and C-555/07 Kücüdevici C-87/06 Pascual García [2006], and cases C-411/05 Palacios de la Villa [2007], C-488/05 The Incorporated Trustees of the National Council on Ageing (Age Concern England) v. Secretary of State for Business, Enterprise and Regulatory Reform [2009], C-45/09, Rosenbladt [2010], C-250/09 Georgiev, C-159/10 Fuchs, C-447/09, Prigge [2011] regarding compulsory retirement.*

According to commentators on these cases and on national legislation, it is.[304]

4.7.5 Redundancy

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

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

The principle works to the advantage of older workers (and constitutes 'indirect distinction' of younger workers). The principle has also been accepted in case law. The Explanatory Memorandum to the ADA explicitly says that the use of this principle may be "objectively justified" under Article 7(1) (c) of the Act. It is noted that the 'last

[303] There are however many examples in the case law of the ETC (now NIHR), especially relating to women not getting an extension of a temporary contract once the employer discovers her pregnancy. We assume that similar cases exist for the grounds of race/ethnicity and age.
[304] See for example the yearly comments of legal experts on ETC Opinions and national and European case law in the area of age discrimination, as included in the *Oordelenbundel Gelijke Behandeling*; published by Wolff Legal publishers but also available online at the web-site of the NIHR: www/Mensenrechten.nl (search for publikaties). (Last accessed 28 April 2013.)

in, first out' principle sometimes forms object of debate in the Dutch Parliament.[305] However, until now this has not led to an amendment of the ADA.

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

Yes, it is. Compensation is calculated on the basis of the so-called 'cantonal courts formula' ("kantonrechtersformule"), *i.e.*, *a* x *b* x *c*.[306]

The factor *a* stands for the employee's number of years of service. This a-factor is connected to the employee's age. In 2009, the formula was changed and made more unfavourable for younger workers.

From then on, for workers from 35- 45 years old, every full year of service counts for 1, between 45-55 years old it counts for 1.5, and, from 55 years old it counts for 2. Below the age of 35, a (dismissed) employee gets a 0.5 a-factor. Factor *b* reflects a remuneration component (monthly gross salary) and factor *c* is a 'correction factor', dependent on the individual circumstances of the case. In 2005 the Cantonal Court of Sneek decided that a 'Social Plan' whereby the Trade Unions and the Management of a Company, in a case of a large scale reorganization, agreed to make an age distinction whereby this 'cantonal courts formula' was 'neutralized' (correction factor *c* = 1) only for employees under the age of 57 (while for the employees over 57 there was a general wage compensation scheme in place) amounted to unlawful age discrimination.[307]

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

[305] On 18 December 2003 the House of Representatives accepted a Motion (Motion Verburg, Weekers, Bakker and Noorman den Uyl) which begged the Government to reconsider the usage of the 'last in, first out' principle in cases of dismissal for reasons related to the economic situation of a company. See Tweede Kamer, 2003-2004, 29 200, XV, nr. 48. See also the *Note on Reconsideration of the Last In First Out Principle* in cases of dismissal for reasons related to the economic situation of a company, available at http://www.rijksoverheid.nl/ministeries/szw#ref-szw.

[306] See H.L. Bakels, I.P. Asscher Vonk, W.J.P.M. Fase, *Schets van het Nederlands Arbeidsrecht*, Deventer: Kluwer 2003, p. 179.

[307] Cantonal Court Sneek, 31 May 2005, LJN: AT7230.

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

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

It can be maintained that the Articles 3(1) sub (a) of the ADA and of the DDA are (also) implementing Article 2(5) of the Directive. (See *section* 4.6 of this report where it was stated that Article 3(1) sub (a) DDA probably implements Article 7(2) of the Directive as well.) However, in that case the requirement that any such health and safety measures need to be *based on a law* is not posed in the Dutch equal treatment legislation.

It is to be noted that the GETA, concerning *inter alia* the grounds religion, race and ethnicity, sexual orientation and sex, does not contain any such public health and security exception. In the framework of the 3rd Periodic Evaluation, a proposal has been made to include such a general exception into the equal treatment laws. (See par. 4.6 above.)

4.9 Any other exceptions

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

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

1. Article 5(3) of the GETA contains an exception regarding the private nature of the employment relationship. Article 7(3) concerning providing goods and services of the GETA contains an exception regarding the private nature of the circumstances at which the legal relationship sees (*e.g.*, a woman who rents a room in her own house may lawfully require that the person who rents the room is a woman).[308] The Commission, in the infringement procedure against The Netherlands, held that the wording of these exceptions in the GETA was too wide and that in case of goods and services it unjustly also applied to discrimination on the round of race. In reaction to this, the Government has changed the GETA in November 2011.[309] The exception clauses in the GETA now expressly state that it is only possible to rely on this exception when the aim is legitimate and when the means are appropriate and necessary. With

[308] This topic has been discussed in great detail in the second evaluation report about the functioning of the GETA. See M.L.M. Hertogh & P.J.J. Zoontjens (eds): *Gelijke behandeling: principes en praktijken. Evaluatieonderzoek Algemene wet gelijke behandeling*. Wolf Legal Publishers Nijmegen 2006. The part about the relationship between equality and freedom of association and the right to privacy was written by prof. Paul Zoontjens. See pp. 175-216.
[309] Staatsblad 2011, 554.

respect to discrimination in the area of goods and services, the exception no longer applies to the ground race.

2. Article 7(2) of the GETA grants private educational institutions the freedom to impose requirements governing admission to or participation in the education that the institution provides. Article 7(2) accords with the exception in Article 5(2)(c) of the GETA, however, Article 7(2) applies to the entry of pupils to denominational schools and thus not to employment.
3. The internal affairs of associations fall outside the scope of the GETA. This follows from the Parliamentary history and is not explicitly provided for in any Article of the GETA.[310]

[310] This topic has also been discussed in great detail in the second evaluation report about the functioning of the GETA. See footnote 307.

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

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

Positive action schemes are – to a certain extent – only possible with respect to the grounds sex, race, and disability. The Government defends the fact that positive action is only possible with respect to sex, race and disability with the reasoning that only on those grounds groups of people suffer from *structural disadvantages* in society. Structural disadvantage is being defined as 'suffering disadvantages on several social fields at the same time which are not temporary in nature'.[311]

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

1. the initiative must be a *specific measure*;
2. the measure is aimed at the conferral of a preferential position for women or for people belonging to ethnic or cultural minorities;[312]
3. the measure is aimed at the *removal* or the *reduction* of factual inequalities;
4. there must be a *proportionate* relationship between the measure and the objective pursued. This last element is not required by Directive 2000/43.

The Dutch definition leaves *less room* for positive action policies and programs, since it does not allow measures which aim at *preventing,* in addition to *removing* or *reducing* disadvantages.[313]

NB: the proportionality principle is explicitly mentioned in the Dutch GETA, which means that in each case that is brought before the courts or before the NIHR, the following aspects of the positive action plan need to be tested:

- Is there a clearly described aim of the plan? (which must be legitimate in itself);
- Is the plan appropriate and necessary to reach this aim? (Is it possibly effective and / or could the aim be reached with less damaging/ discriminatory means?)

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

[311] See Tweede Kamer 2001-2002, 28 169, nr 5, p. 17.
[312] The concept of 'ethnic or cultural minority group' is not defined in Dutch law, but it is usually applied as 'being from another descent than Dutch'.
[313] See Explanatory Memorandum to the EC Implementation Act, Tweede Kamer, 2002-2003, 28 770, nr. 3, p. 9.

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

The general point of view is that – at least when the positions that are at stake are to be considered as employment relationships – EU legislation and case law (most notably in the Kalanke case) prohibit a system of fixed quota and require an individual assessment of any job applicant's capabilities and suitability for the job. Any policy in which a company or organization strives for *proportional representation* of various ethnic groups in proportion to their prevalence in society is seen as direct discrimination. When the aim of such a policy is simply achieving 'proportionality' or 'diversity', ergo: when the aim is not to put persons belonging to an underrepresented of systematically disadvantaged group in a better position, the specialized body will not apply the positive action exception (and therefore the policy will be illegal).[314]

In 2005 there was some discussion on the question whether the possibility to develop and apply positive action schemes should be extended to all other grounds that are covered in the GETA and to age discrimination.[315] The Government published a draft report and got comments from, *inter alia*, the then ETC. Although the ETC (now NIHR) recognizes that in Dutch society there is hardly any structural disadvantage[316] on the ground of age, religion or sexual orientation, the ETC is of the opinion that positive action measures should in principle be possible for all groups that are protected in Article 13 ECT (now 19 TFEU). The main reason for this is that it is important that the equal treatment legislation is consistent and transparent and contains the same system of exceptions for all non-discrimination grounds. In May 2005, a final Memorandum was sent to Parliament.[317] The Government concluded that it is not necessary to change the Dutch equal treatment legislation in view of the case law of the CJEU and the implementation of Directives 2000/43, 2000/78 and 2002/73. In this Memorandum, the measures that the Government employs in this respect are described in great detail.

The ETC (now NIHR), in its 3rd Evaluation report (2009), concludes that the provisions concerning positive action in the GETA and DDA are adequate and do not need to be revised. The NIHR defends its restrictive interpretation of this exception with reference to CJEU case law and maintains that, when overcoming structural disadvantages of certain groups is deemed necessary, general social policy measures should be developed that can address these disadvantages effectively.[318]

[314] See ETC Opinion 1998-105 and ETC Opinion 2012-50.
[315] One could argue that art 7(1)(a) ADA already offers the possibility to develop positive action plans with regard to age; in that case, however, a measure must be laid down in a statutory act.
[316] See previous page.
[317] Memorandum on Preferential Treatment ("Nota Voorkeursbehandeling"), Tweede Kamer, 2004-2005, 28 770, nr. 11.
[318] ETC: 3rd Evaluation Report (2004-2009), May 2011, at p. 7.

However, in December 2012 the NIHR has applied a less strict criterion and accepted 'exceptional circumstances' in a sex discrimination case.[319]

Political discussion about the scope of the positive action clauses in the GETA, and DDA may again arise when the Government proposes to integrate these laws into one new (integrated) GETA. (See section 0.1 of this report.)

As far as the DDA is concerned, apart from positive action measures as meant in Article 7(1) of the Framework Directive, there are also general supportive measures for disabled persons, as meant in Article 7(2) of the Directive. This provision has been transposed in Article 3(1) sub (b) DDA, which enshrines a possibility for supportive social policies for disabled persons. In contrast to 'positive action measures', these measures are not 'time restricted'. The Dutch Government has introduced several supportive measures designed to promote the reintegration of disabled persons in society over the past years. The 1998 Act on the Reintegration of Disabled People in Employment ("Wet op de (Re)integratie Arbeidsgehandicapten"), or REA[320] is of particular importance. This Act aimed at creating a coherent set of measures which facilitate the (re)integration of 'employment disabled people' ("arbeidsgehandicapten") in employment. However, this Act was repealed in 2005.[321] The REA was replaced by inter alia the Work and Income according to Labour Capacity Act (WIA).[322] the Coalition Agreement contained a proposed 5% quota, a positive action measure reserving jobs for disabled people.[323] This quota is, however, off the table for the next couple of years, as employers promised to hire more disabled workers in the so-called Social Accord. Only if they fail to do so, a legal obligation may be imposed after all in 2017.[324]

The ADA does not contain a positive action exception clause,[325] but since unequal treatment on the ground of age may be objectively justified (open system of justifications) in any case the defence that the unequal treatment is in fact a positive

[319] NIHR Opinion 2012-189.
[320] Act on the Reintegration of Disabled People in Employment ("Wet op de (Re)integratie Arbeidsgehandicapten") of 23 April 1998, Staatsblad 1998, 290, amended by Act of 15 December 1999, Staatsblad 1999, 564.
[321] Law of 20 December 2005, Staatsblad 2005, 659.
[322] Wet van 10 November 2005, Staatsblad 2005, 572, lastly changed in 2010, Staatsblad 2010, 867. The Act was supplemented by the Wet Invoering en Financiering van de Wet Werk en Inkomen naar Arbeidsvermogen. Staatsblad 2005, 573. See for information on the complicated variety of applicable legislation http://www.arbo-advies.nl/Rea.php (last accessed on 19 March 2013).
[323] About this plan, see http://nos.nl/artikel/454347-quotum-werk-gehandicapten.html (last accessed 13 March 2013).
[324] The Accord may be retrieved using http://www.stvda.nl/~/media/Files/Stvda/Convenanten_Verklaringen/2010_2019/2013/20130411-sociaal-akkoord.ashxlink (last accessed 27 April 2013).
[325] One might read a positive action exception in Art. 7(1) of the ADA, reading: "The prohibition on discrimination shall not apply if the discrimination: a) is based on employment or labour-market policies to promote employment in certain age categories, provided such policies are laid down by or pursuant to an Act of Parliament."

action measure may be brought forward and will be tested in the same way as described above.

b) *Do measures for positive action exist in your country? Which are the most important? Please provide a list and short description of the measures adopted, classifying them into broad social policy measures, quotas, or preferential treatment narrowly tailored. Refer to measures taken in respect of all five grounds, and in particular refer to the measures related to disability and any quotas for access of people with disabilities to the labour market, any related to Roma and regarding minority rights-based measures.*

Although many private companies and Governmental organizations do take positive action measures, just a few general (and legal) measures exist in the country.[326] In as far as such plans actually exist they mainly concern the field of employment. As far as public employment is concerned such policies are often restricted to making remarks in advertisements that women and persons from ethnic minorities are especially invited to apply for the job. In general, there is a lot of resistance against positive action measures that are stronger than this (e.g. against preferential treatment which gives automatic or strong preference to a certain category like women or ethnic minorities).

Until 2003, a special Act (the so called '*Wet SAMEN')* regarding an obligation for employers to register the increase of numbers of employees from minorities and to set up a certain minorities policy was operative. Partly due to debate about the effectiveness of this Act, it has been repealed. In the past there has been some debate about this topic in Parliament when one member of the Liberal Party (VVD) proposed to abolish the positive action exception in the GETA.[327] The VVD called this 'positive discrimination' and wanted to abolish this type of policies because of the resistance it evokes among groups that are not targeted by such policies. On the other hand the same party is strongly in favour of positive action measures that are aimed at disabled persons.

As far as disabled persons are concerned, in 2004 the Government started a trajectory called 'inclusive policy' (*"inclusief beleid"*). The Government started this policy with an action plan called "Equal Treatment in Practice" (*"Actieplan gelijke behandeling in de praktijk"*).[328] This forms a kind of mainstreaming of specific (permanent) social policies concerning the improvement of the position of disabled people. Five Departments of the Government were requested (by the Ministry of

[326] Under Dutch Equal Treatment law, it is not necessary that a positive action measure has a specific legal basis.
[327] See Tweede Kamer 2003-2004, 28 770, EG-implementatiewet Awgb, nr 7: amendement Luchtenveld (VVD) dd 8 October 2003.
[328] Tweede Kamer 2003-2004, 29 355, nr. 1.

Health) to send in their policy plans.[329] The proposals covered a wide range of measures, from making electronic voting machines that can be handled by blind persons, to adaptation of houses to the needs of old people and people with wheelchairs.

With regard to Roma people, no specific positive action measures are taken in The Netherlands. However, it must be noted that Roma people who are living on trailer camps (as well as other Travellers) do get some special attention from local Governments, as their specific housing situation in many regards demands for a specific policy. In 2010, the Government has initiated extensive co-operation and exchange of information between local Governments of towns that have a considerable number of Roma inhabitants in order to make their policies more effective.[330] In relation to the agreement in the European Council of 24 June 2011 to enhance a national policy on the integration of Roma people in all EU Member States, the Dutch Government has sent a letter to Parliament in which it sketches the outlines of the current problems and the policies to address these problems.[331] However, this policy document does not contain any positive action measures as regards Roma and Sinti people.

In the past, the ETC (now NIHR) was inclined to accept that in the case of racial or ethnic discrimination there should be more room for positive action plans (i.e. a more lenient test should be applied than in case of sex). This conclusion could be derived from some case law of the ETC in 1999. The Commission then issued opinions in two similar cases, where a city council asked explicitly for members of ethnic minorities to apply for jobs as social workers (Opinions 1999-31 and 1999-32). People from Dutch origin could not apply. On the complaint of a Dutch citizen, the Commission ruled that the preferential treatment of ethnic minorities was allowed. The ETC made these decisions in the light of the so-called Wet SAMEN, which (until 2003) required organizations to reach a proportionate participation of ethnic minorities in their staff. Because the Wet SAMEN was an implementation of Article 2(2) of the ICERD, the Equal Treatment Act needed to be interpreted in conjunction with this UN Convention. This meant, according to the ETC, that the criteria for positive action should not be interpreted too narrowly. However, since the Wet SAMEN was abolished in 2003, the NIHR in fact does deal with positive action schemes in respect to race and sex in a similar way.[332]

[329] See Tweede Kamer 20042005, 29 355, nr. 11, 14 and 15. It concerns the of the Interior and Kingdom Relations, Education, Social Affairs and Employment, Transport and Water Management, Housing, and Health.
[330] See Tweede Kamer 2008-2009, 31 700 XVIII, nr. 90.
[331] Letter of the Minister of Immigration, Integration and Asylum of 21 December 2011, Tweede Kamer 2011-2012, 21501-20, nr. 599.
[332] ETC 2008-143. See also ETC: 3rd Evaluation Report (2004-2009), May 2011, at p. 72.

In 2008-2009, some debate about the desirability of 'diversity politics' took place in the framework of the development of a so-called Corporate Governance Code.[333] This Code[334] is a Governmental Decree (Algemene Maatregel van Bestuur), issued on the basis of Article 2:391 (5) 5 of the Civil Code. The Dutch Corporate Governance Code of 2004,[335] was amended in 2009. In the new code, *(inter alia*) two *diversity clauses* were included.[336] One concerns the characterization or profile of the Supervisory Board (Raad van Commissarissen) in terms of the number of board members, their expertise, their capacities, etc.; the other provision concerns the actual composition of the Board. In both fields, the Code stresses that diversity in the compilation of the Board in terms of age, nationality, gender, expertise and societal background is necessary. It is requested that the Company makes public what its targets in this respect are and that in the annual report to the shareholders the policies in this respect are described. The Code does not contain 'hard' quota's, nor is there any sanction foreseen when companies do not live up to the standards that are set in the Code. There is a general complaint that the Code of Conduct is not followed by many companies.[337] In an interview, the Chair of the Monitoring Committee of this Code admitted that especially the diversity provisions in the Code are not adequately implemented by almost all companies.[338] Most companies do not report on that issue, or report that they do not meet their own targets in this respect.

In 2010-2011, political and academic debates about positive action (or a system of quota) mostly concerned positive action schemes for women in company boards. In that regard, some rather soft quota measures have been adopted in 2011.[339]

The future of positive action policies of the Government itself became uncertain in 2010. The Coalition Agreement concluded between the Liberal Party (VVD) and the Christian Democrats Party (CDA), explicitly provided that the Government would terminate all activities and programs concerning positive action and diversity policies on the grounds of race/ethnicity and gender. Selection of personnel had to take place

[333] This discussion lead to the acceptance by the House of Representatives of a motion that urged the Government to stimulate to include diversity targets into the Code. See Tweede Kamer, 2007-2008, 31083, nr 17. Adopted on 24 April 2008.
[334] The Code was developed by a Committee of experts and is named after its Chair; Tabaksblat. See http://www.rijksoverheid.nl/onderwerpen/corporate-governance/corporate-governance-code-code-tabaksblat (last accessed on 13 March 2013).
[335] Nederlandse Corporate Governance Code, Staatscourant 27-12- 2004, 25035.
[336] Staatscourant 3-12-2009, 18499.
[337] See also http://www.accountant.nl/Accountant/Nieuws/VEB+Naleving+Code+Tabaksblat+licht+verbeterd+door.aspx (last accessed on 13 March 2013).
[338] See http://managementscope.nl/magazine/artikel/557-jos-streppel-corporate-governance-code-tabaksblat for an interview with Jos Streppel (last accessed on 19 March 2013).
[339] Law of 6 June 2011, published in the *Staatsblad* 2011, 275. *(Wet van 6 juni 2011 tot wijziging van boek 2 van het Burgerlijk Wetboek in verband met de aanpassing van regels over bestuur en toezicht in naamloze en besloten vennootschappen)*. The Law will enter into force after a special Decree is published in the Official Journal (Staatsblad), which is foreseen at 1 June 2012.

on the basis of the quality of the candidates.[340] However, this has not led to any concrete measures, and no new measures have been announced in the latest Coalition Agreement.

[340] The clause in the agreement is (in Dutch): "Het kabinet beëindigt het diversiteits/voorkeursbeleid op basis van geslacht en etnische herkomst. Selectie moet plaatsvinden op basis van kwaliteit". See Regeerakkoord 2010, p. 26, under the heading “integratie” (integration).

6 REMEDIES AND ENFORCEMENT

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

In relation to each of the following questions please note whether there are different procedures for employment in the private and public sectors.

a) What procedures exist for enforcing the principle of equal treatment (judicial/ administrative/alternative dispute resolution such as mediation)?

The principle of non-discrimination can be enforced by means of criminal law procedures. Criminal law provisions may be applied in as far as the offences / discriminations fall under the definition of discrimination in Article 90quater of the Criminal Code. In this report, we leave aside these offences and concentrate on civil law equal treatment norms and their enforcement.

The GETA, DDA and ADA do not entail *compulsory* judicial procedures. If discrimination occurs in the sphere of private employment, the civil (labour) law procedures apply. If it occurs in public employment, the procedures of administrative employment law apply. The Civil Courts also have competence in cases in which discriminatory contractual agreements (goods and services supplied by private parties or the Government) are at stake. Outside the area of contract law, an instance of discrimination (e.g. harassment) can be considered as tort and be dealt with in a civil law court procedure. Administrative Courts have competence with respect to public employment contracts (civil servants) and when Governmental acts that take place in the sphere of public services amount to discrimination. This does not include unilateral Governmental decisions (e.g. to grant a subsidy).[341] Governmental actions can also be considered as tort (onrechtmatige overheidsdaad) in which case a Civil Court is competent to hear the case.[342]

In addition to this, the equal treatment legislation provides for a special (non-compulsory) procedure before the ETC, since 1 October 2012 the NIHR, which has a section that deals with complaints about discrimination. This NIHR-section (from here on: the NIHR) is a pseudo-judicial body which renders non-binding Opinions. After it has rendered an Opinion, a complaint may still be lodged before a conventional civil/ administrative court if the applicant wishes to obtain a *binding* judgment. The NIHR is a low threshold body: no legal representation is required.

[341] See section 3.2.9. of this report.
[342] Such a case is based upon Art. 6:162 of the Civil Code.

Moreover, the procedure before the NIHR is free of charge.[343] As for civil law and administrative law procedures in court there is a system of free legal aid for people with very low incomes. Fees to get access to Court procedures will be increased in the near future. Many commentators fear that his will increase the threshold for victims of (inter alia) discrimination to seek redress in Court.

There are no specific legal rules requiring court houses / the NIHR-premises to be physically accessible for persons with disabilities; general rules about accessibility also apply to these buildings. Neither is it specified anywhere that information must be provided in Braille. However, the information on the legal system which is provided on the Internet and in special brochures is in conformity with standards set by organizations of blind persons. No special procedures exist for dealing with individuals with a learning disability. There is no legal obligation to provide sign language interpretation. However, information of the Ministry of Security and Justice (anno 2012) shows that for the accessibility for persons with disabilities internal special procedures do in fact exist in a handbook and that in practice sign language interpretation is available.

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

Numbers of requests for an Opinion by the NIHR:[344]

Year	Number of requests
2008	432
2009	398
2010	423
2011	719

[343] See for a detailed study on the functioning of the (then) ETC as an Equality Body with as main task dealing with (individual) complaints about discrimination: Howard, E. (2012), 'Equality Bodies and Individual Victims: an Example of Good Practice from the Netherlands', *E-Journal of International and Comparative Labour Studies* 1 (1-2) (March- June 2012): available at: http://www.adapt.it/currentissue/ (last accessed on 6 March 2013).

[344] Annual report 2011, table 3. See the website of the NIHR, where all annual reports are published, also available in English: http://www.mensenrechten.nl/publicaties/detail/17602 (last accessed on 11 March 2013). Statistics of 2012 were not yet available at the cut-off date of this report. They will be released in the annual report of the NIHR of 2012 (to be expected in June 2013). The annual report gives a detailed overview of what happened with all requests. As the table below shows, only approximately 25% of all requests result in an Opinion of the NIHR. Others are not admissible (outside the scope of the legislation) or manifestly ill founded. Also, some people just want information and do not want to submit a formal complaint.

Numbers of Opinions given by the ETC:[345]

Ground	2010		2011	
	Absolute	%	Absolute	%
Sex	32	16	38	17
Race	29	14	22	10
Nationality	7	3	4	2
Religion	13	6	17	8
Sexual Orientation	6	2	1	0
Civil status	3	1	1	0
Political conviction	0	0	6	3
Philosophy of life	1	0	1	0
Working hours (*)	4	2	7	3
Temp/perm. employment(**)	1	0	4	2
Disability/Chronic Illness	35	17	37	17
Age	38	19	53	24
Several grounds***	34	17	30	14
Total	**203**	**100**	**221**	**100**

(*) Working hours = p.t. / f.t. employment contract, covered under a specific equal treatment act and the Civil Code.
(**) Distinction on the ground of temporary or permanent employment contract; covered under a specific equal treatment act and the Civil Code.
(***)I.e. cases in which the complainant claimed to be discriminated against on more than one ground. This does not necessary concern cases of multiple (intersectional) discrimination.

Numbers of cases dealt with by the courts

No statistics available.

b) *Are these binding or non-binding?*

The normal court procedures lead to a legally binding judgment. The NIHR (former ETC) is a pseudo-judicial body which renders non-binding 'Opinions'.

c) What is the time limit within which a procedure must be initiated?

Administrative law procedures: the General Act on Administrative Law provides that in principle an appeal must be lodged *within 6 weeks* counted as from the day *after the day* on which the contested decision has been made known.

Civil law procedures: *Ex* Article 8(2) of the GETA (Art. 9(2) DDA and Art. 11(3) ADA) an applicant who wishes to contest the lawfulness of the termination of an employment contract (discriminatory dismissal/victimisation dismissal) must do so

[345] Annual Report 2011, table 6.

within 2 months after the termination of the employment contract. (See also: Articles 7:647(2), 7:649(2) and 7:648(1) of the Dutch Civil Code).[346] A legal claim with regard to the nullification of the employment contract can no longer be made after 6 months have passed after the day on which the employment contract was terminated (Article 8(3) of the GETA; Art. 9(3) DDA; Art. 11(4) ADA). A procedure based on tort law must be initiated before the general 5-year period under Civil Law has expired. NIHR procedures: Article 14(1)(c) of the GETA only sets the requirement that a complaint must be lodged within a reasonable period. (This also applies in the context of procedures lodged under the DDA and ADA).

d) Can a person bring a case after the employment relationship has ended?

Yes, this is possible, taking into consideration the time limits (see above).

e) In relation to the procedures described, please indicate any costs or other barriers litigants will face (e.g. necessity to instruct a lawyer?) and any other factors that may act as deterrents to seeking redress (e.g. strict time limits, complex procedures, location of court or other relevant body).

The costs are limited, as it is not mandatory to instruct a lawyer at both proceedings in civil law, administrative law and at the NIHR.

f) Are there available statistics on the number of cases related to discrimination brought to justice? If so, please provide recent data.

See above.

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

Please list the ways in which associations may engage in judicial or other procedures

a) What types of entities are entitled under national law to act on behalf or in support of victims of discrimination? (please note that these may be any association, organization, trade union, etc.).

Under Article 3:305a of the Civil Code interest groups that have the form of an association or foundation with full legal powers can take legal action in court on behalf of people whose (similar) interests[347] have been damaged ; ergo also on behalf of victims of discrimination. According to Article 3:305b of the Civil Code, this possibility also exists for public law organizations, like e.g. the State itself, local

[346] J.H. Gerards and A.W. Heringa, *Wetgeving Gelijke Behandeling,* Kluwer Deventer 2003, p. 199.
[347] It is an important requirement that the interests of the individuals on whose behalf the action is taken, are similar to each other.

Councils or public bodies like e.g. the Bar Association. The Law does not mention 'in support' of victims, only 'on behalf' of them.

Therefore, the following is only applicable to associations and foundations and public law bodies acting on behalf of victims. (Victims in general have the possibility in most court procedures to bring a person or persons who can support them during the court procedure.)

b) What are the respective terms and conditions under national law for associations to engage in proceedings on behalf and in support of complainants? Please explain any difference in the way those two types of standing (on behalf/in support) are governed. In particular, is it necessary for these associations to be incorporated/registered? Are there any specific chartered aims an entity needs to have; are there any membership or permanency requirements (a set number of members or years of existence), or any other requirement (please specify)? If the law requires entities to prove "legitimate interest", what types of proof are needed? Are there legal presumptions of "legitimate interest"?

As far as public bodies are concerned, Art. 305(b) par. 1 of the Civil Code requires : 'in as far as these interests are entrusted to the particular organization.' Protection against discrimination can be seen as an important general task of most public bodies. However, we are not familiar with any such body taking concrete legal action against discrimination. Therefore, we will give most attention to private associations or foundations.

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

Associations and Foundations can only have full legal powers[348] when they have

- been established formally by means of a notarial deed or act (Art. 2:4 (1) Civil Code);
- which deed includes inter alia the place where it has its domicile, the names of the founders, the internal regulations (e.g. governing voting about the budget) and the goal or purpose of the association or foundation.

[348] The requirements for that are extensively circumscribed in Book 2 of the Civil Code; it is impossible to describe all requirements here; therefore a selection of the most relevant provisions has been made.

When the activities or the goals of an association or foundation run against 'public order', the District Court can dissolve it at the request of the public prosecutor's office. (Art. 2:20 Civil Code).

All associations that fulfil these requirements are obliged to register at the Chamber of Commerce, no matter whether their main goal or purpose is commercial or not. There are no membership or permanency requirements in terms of a set number of members or years of existence.

There is no previous Governmental or administrative permission needed for setting up an association or foundation. (Art. 8 of the Constitution guarantees the freedom of association.) Public law organizations are listed in Article 2:1 of the Civil Code.

An important condition is that the organization needs to represent 'similar interests'. This means that the interests of several individuals must be at stake and that it must be possible for the judge to deal with them in one case; i.e. there is no need of a specific investigation of the facts of each separate case.

A further important condition for any organization to take action on behalf of victims is that (before taking the case to court) they must have tried to obtain satisfactory compensation or rebuttal from the perpetrator or otherwise have tried to come to an agreement. See Art. 305a (2) and Art. 3:305b(2) of the Civil Code.

c) *Where entities act on behalf or in support of victims, what form of authorization by a victim do they need? Are there any special provisions on victim consent in cases, where obtaining formal authorization is problematic, e.g. of minors or of persons under guardianship?*

If Associations or Foundations act on behalf of (a) concrete victim(s), they need authorization by the victim(s) to do so. For proof of this the Court will require a written and signed statement by the victim(s). In case of minors or persons under guardianship, the guardian needs to approve of taking action on behalf of them.

Associations or Foundations must abstain from taking action when a victim objects against them taking the case to court on behalf of them. See Art. 305(a) par. 4 of the Civil Code.

d) *Is action by all associations discretionary or some have legal duty to act under certain circumstances? Please describe.*

Actions are discretionary. There are no associations or public bodies that have a specified legal duty to take legal action against discrimination or to act on behalf of victims of discrimination. There are some organizations (like e.g. 'Art1', a national expert center in this area, and local Anti-Discrimination Bureaus (ADVs) – who often have the legal form of a Foundation – who get a subsidy from the (local) Government, provided that they fulfil the function of assisting victims of

discrimination. However, this may certainly not be regarded as a *legal duty* to start legal actions on behalf of victims.

e) *What types of proceedings (civil, administrative, criminal, etc.) may associations engage in? If there are any differences in associations' standing in different types of proceedings, please specify.*

Associations and Foundations may engage in civil and administrative proceedings,[349] not in criminal proceedings. However, in the latter case there is one possibility to enhance that a criminal proceeding against a suspect of discrimination takes place. Associations and Foundations may bring discriminatory acts to the attention of the police and/or the public prosecutor. When the public prosecutor decides not to bring the case before the (district) criminal court, the organization has a right to ask the Court of Appeal to reverse this decision and to oblige the public prosecutor to press charges and bring the case to court. (Art. 12 Criminal Procedures Act). This, for instance, has successfully been done in the case against Mr. Wilders, the leader of the Freedom Party (PVV), who was being accused of inter alia 'hate speech'.[350]

All organizations who have the power to act in civil and administrative procedures, may also ask the NIHR for an Opinion about discriminatory acts. (This right used to be included in the GETA, but was removed from that Act in 1994, when articles 3:305a and 3:305b were included in the Civil Code.) Apart from that, Article 10(2) NIHR Act sub d and e, contain provisions concerning some other organizations that have the right to bring a situation / regulation to the attention of the NIHR and ask for an Opinion whether this situation / regulation is in compliance with the equal treatment legislation. Under Article 10(2) NIHR Act sub d this concerns any natural person, any organization or any public body. Under sub e, this concerns workers councils.

f) *What type of remedies may associations seek and obtain? If there are any differences in associations' standing in terms of remedies compared to actual victims, please specify.*

Associations and Foundations acting on behalf of victims may ask for the same remedies as actual victims, apart from pecuniary damages. See Art. 3:305a (3) Civil Code.

g) *Are there any special rules on the shifting burden of proof where associations are engaged in proceedings?*

[349] See Art. 3:305a and 3:305b of the Dutch Civil Code and Art. 1:2(3) of the General Act on Administrative Law.
[350] See the judgment of the Amsterdam Court of Appeal, dd. 21 January 2009. LJN: BH0496, http://zoeken.rechtspraak.nl/resultpage.aspx?snelzoeken=true&searchtype=ljn&ljn=bh0496 (last accessed 19 March 2013).

The rules concerning the partially reversed burden of proof are applicable in these cases as well.

*h) Does national law allow associations to act in the public interest on their own behalf, without a specific victim to support or represent (**actio popularis**)? Please describe in detail the applicable rules, including the types of associations having such standing, the conditions for them to meet, the types of proceedings they may use, the types of remedies they may seek, and any special rules concerning the shifting burden of proof.*

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

The same type of organizations (associations and foundations) as described under question b) has this possibility. They may use the same court procedures (excluding criminal procedures), as described above and may ask for the same remedies (i.e. excluding pecuniary damages). The burden of proof is also the same as in any other discrimination case.

The same organizations also have the right to ask the NIHR to start an investigation about (presumed) discriminatory practices. The organization must again have full legal powers (they must be an association or foundation according to the law) and it must follow from its statutes that it represents the interests of those whose protection is the objective of the statutory equality acts. (Article 10(2)(e) of the NIHR Act). However, when the case is based on a concrete action from which (a) concrete individual(s) has / have suffered, the case can only be investigated by the NIHR when this/these individual(s) agree(s) with that. (Art. 10(3) NIHR Act.)

*i) Does national law allow associations to act in the interest of more than one individual victim (**class action**) for claims arising from the same event? Please describe in detail the applicable rules, including the types of associations having such standing, the conditions for them to meet, the types of proceedings they may use, the types of remedies they may seek, and any special rules concerning the shifting burden of proof.*

This is called a 'collective action' (collectieve actie) in the Netherlands. This kind of legal action is possible when a group of people suffers from the same rules / events / acts and when a Foundation or Association brings one case on behalf of all of them (without specifying the names of the victims). It is possible under Article 3:305a of the Dutch Civil Code and Art. 1:2 (3) of the General Act on Administrative Law (AWB). The law speaks of 'bringing legal action to protect similar interests of other persons'.

However, when a concrete victim of certain discriminatory behaviour does come forward and objects against the procedure, the Association or Foundation can no longer go ahead with the procedure in as far as this particular victim's interests are under discussion. (See Art. 3:305a (4) of the Civil Code.) The judgment of the Court will have no effect as regards victims who have objected to the procedure, unless it is impossible to individualize the effects of the judgment. (See Art. 3:305a (5) of the Civil Code.)

The same type of organizations (associations and foundations) as descried under question b) have this possibility. They may use the same court procedures (excluding criminal procedures), as described above and may ask for the same remedies (excluding pecuniary damages). The burden of proof is also the same as in any other discrimination case.

Concluding remark:

The possibility to bring a public interest action is used in quite a lot of cases in procedures before the (then) ETC / NIHR and a few times in cases before the regular courts.[351] Peter Rodrigues found that in the past couple of years around 8% of the cases that are decided by the (then) ETC are instigated by 'public interest groups'. Most of these cases concern the grounds race and sex. In around 80% of these cases, the ETC concluded that there is indeed a breach of the equal treatment legislation.

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

Does national law require or permit a shift of the burden of proof from the complainant to the respondent? Identify the criteria applicable in the full range of existing procedures and concerning the different types of discrimination, as defined by the Directives (including harassment).

Article 10(1) GETA reads as follows:

> "*If a person who considers himself to have been wronged through 'distinction' as referred to in this Act established before a court facts from which it may be*

[351] Peter Rodrigues: 'Eén voor allen: Gelijke behandeling en collectieve acties. In: Caroline Forder (ed); Oordelenbundel Gelijke Behandeling 2010; De Wolf Publishers: Nijmegen 2011.

> *presumed that distinction has taken place, it shall be for the respondent to prove that the contested act was not in contravention of this Act*".

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

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

What protection exists against victimisation? Does the protection against victimisation extend to people other than the complainant? (e.g. witnesses, or someone who helps the victim of discrimination to bring a complaint).

All three Acts (GETA, DDA and ADA) protect against victimisation dismissal and against other forms of disadvantage as a result of the fact that a person has invoked the statutory equality act or has otherwise assisted in proceedings under these Acts, *e.g.*, by means of a testimony. See Articles 8(1) and Article 8a GETA. Equivalent Articles are included in the DDA (Articles 9(1) and 7a respectively) and in the ADA (Articles 11(2) and 10 respectively).

Article 8(1)GETA reads as follows:

> "*If an employer terminates an employee's contract of employment in contravention of section 5, on the ground that the employee has invoked section 5, either in a court procedure or otherwise, such termination is voidable*".[352]

NB: until the amendments of the EC Implementation Act in 2004 (and still so in the Civil Code) this provision included the word 'or' instead of a comma in between 'section 5' and 'on the ground of…'. In the current text it looks as if dismissal is only voidable when this occurs in relation to complaints about discrimination (i.e. victimisation), ergo that discriminatory dismissal as such is not voidable. In its third 5-year term evaluation report, the then ETC recommends to put the word 'or' back into this provision.[353] The Government, in its reaction to the report, acknowledges that this has been an editorial mistake and that with the next amendment of the GETA this will be corrected.[354]

Article 8a GETA reads as follows*:*

[352] The term 'voidable' ("vernietigbaar") means that it is not automatically void but that this may be established during a court procedure.
[353] ETC: 3rd Evaluation Report (2004-2009), May 2011, at p. 24.
[354] Tweede Kamer 2011-2012, 28 481, nr 16, p. 2.

> "*It is unlawful to disadvantage persons because they have invoked this Act, either in or out of court, or have assisted others in this respect*."

Article 8a GETA does not explicitly mention dismissal as a specific way of disadvantaging persons who have made complaints about discrimination. In its third 5-year term evaluation report (2009), the ETC recommended to incorporate Article 8a GETA (and equivalent provisions in the DDA and ADA) into one new Article 8, which begins (in par. 1) by explicitly prohibiting dismissal and causing any other disadvantage on the ground that someone has made a complaint about discrimination, and that (in par. 2) includes the old Article 8(1) (concerning the fact that any such dismissal is voidable).[355] The Government does not see pressing reasons for such changes and proposes to maintain the two separate provisions (8(1) and 8a GETA).[356]

Persons who assist a victim of discrimination are protected by Article 8a GETA as well. The shifting of the burden of proof does not apply to victimisation.[357] According to Ambrus, the (then) ETC offered two ways of proving to the claimant that victimisation has taken place. First, the claimant may prove that the complaint about discrimination led to a chain of events that eventually ended up in upsetting the labour relationship or even termination of the employment contract; second the claimant may prove that the complaint is the only reason for the dismissal.[358] In its third 5-year term evaluation report, the ETC stated that in practice the burden of proof is not too heavy for the complainant. It therefore makes no recommendations to change the law at this point. However, at the same time it appears from the figures that are provided that only in 7 out of 19 victimisation cases the claimant won the case.[359] The (then) ETC has made it clear that in a case of victimisation the prohibition is absolute, i.e. that no (objective) justification may be brought forward.[360]

In 2008-2009, a study into the issue of victimisation was conducted on behalf of the (then) ETC.[361] It concerns the first *large-scale* research into this topic in the Netherlands. Previous smaller studies in 1985, 1999 and 2006, had shown that complaining about discrimination often leads to serious negative consequences for the victims, but also that many victims do not make official complaints out of fear for victimisation. The new research confirms these findings. The researchers found that serious forms of victimisation most often occurred in case of discrimination on the

---

[355] ETC: 3rd Evaluation Report (2004-2009), May 2011, p. 25.
[356] Tweede Kamer 2011-2012, 28 481, nr 16, p. 2.
[357] See also M. Ambrus, 'The concept of victimisation in the racial equality directive and in the Netherlands: a means for effective enforcement of the right to equal treatment. In: *Nederlands Tijdschrift voor de Mensenrechten, NJCM-bulletin,* 2011 (1), pp 9-23., at p. 20.
[358] Ambrus, *op cit*, at p. 21.
[359] ETC: 3rd Evaluation Report (2004-2009), May 2011, p. 25.
[360] Ambrus, *op cit*, mentions i.a. ETC Opinion 2006, 34, Par. 3.19.
[361] See Marieke van Genugten & Jörgen Svensson: *Dubbel de dupe? Een studie naar de benadeling van werknemers die gelijke behandeling aan de orde stellen.* University of Twente/ CGB, 2010. To be found at: http://www.mensenrechten.nl/publicaties/detail/10028, last accessed 19 March 2013 .

ground of race, sex or disability, where it concerned a case of discriminatory treatment at the work floor by colleagues and direct supervisors, and where the claimant was in an isolated position at work. The report shows that it is certainly not enough to have a prohibition of victimisation in place, but that much more needs to be done in terms of having in place an informal complaints procedure, having counsellors at the workplace who can confidentially deal with complaints, and giving training to persons working for personnel departments and for managers.

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

a) What are the sanctions applicable where unlawful discrimination has occurred? Consider the different sanctions that may apply where the discrimination occurs in private or public employment, or in a field outside employment.

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

Articles 13(2), 13(3) and 15 of the GETA mention some specific sanctions that may be imposed by the NIHR. Under Article 13(2), the NIHR may make recommendations when forwarding its findings (in an Opinion) to the party found to have made unlawful distinction. Under Article 13(3) the NIHR may also forward its findings in an Advise to the ministers concerned, and to organizations of employers, employees, professionals, public servants, (consumers of goods and services) and to relevant consultative bodies. Under Article 15(1) the NIHR may bring legal action with a view to obtaining a court ruling that a particular conduct contrary to the relevant equal treatment legislation is unlawful, requesting that such conduct be prohibited or eliciting an order that the consequences of such conduct be rectified.[362] This power must be regarded in light of the fact that the NIHR's Opinions are not binding. The (then) ETC has never made use of this latter possibility. In case the case has been brought by interest groups the sanctions under the GETA are similar. It is seriously doubted in academic legal circles, whether the range of remedies and sanctions available under the equal treatment legislation is in conformity with the requirement that sanctions be 'effective, proportionate and dissuasive'.[363]

[362] Unless the person affected by the alleged discriminatory conduct has made reservations (Article 15(2) GETA). In theory this could amount to a court order, *e.g.*, to make a desegregation plan for schools; however, the Dutch courts are very careful not to interfere with what they call the discretionary powers of the administration and the Government.

[363] See the report by Kees Waaldijk, *supra* footnote 72 and R. Holtmaat, 'Uit de Keuken van de Europese Unie: de Gelijkebehandelingsrichtlijnen op grond van Artikel 13 EG Verdrag', in T. Loenen *et al.* (eds.), *Gelijke Behandeling: Oordelen en Commentaar 2000,* Deventer Kluwer 2001, pp. 105-124 and I.P. Asscher-Vonk, 'Sancties' & Conclusie Juridische Analyse', in I.P.Asscher-Vonk & C.A. Groenendijk (eds.) *Gelijke Behandeling Regels en Realiteit,* Den Haag SDU 1999, pp. 202-234 and pp. 301-319.

Any other sanctions in case of discrimination have to be imposed by a Court. The system is such that in case of criminal offences fines may be imposed by a Criminal Court. In case of civil law suits or administrative procedures, the normal sanctions in these areas of law are applicable. In case of employment cases, for instance, an employer may be held accountable to pay pecuniary damages,[364] to take preventive measures, or to take someone back who was unlawfully dismissed. In case of tort, an injunction may be imposed, as well as pecuniary sanctions. It is impossible to give an overview of all of the possibilities in this regard.

The following sanctions are specifically mentioned in the equal treatment legislation: According to Article 8(1) of the GETA, Article 11(1) ADA, and Article 9(1) DDA, discriminatory dismissals and victimisation dismissals are “voidable”. This applies both with regard to public and private employment. The employee can ask the court to invalidate the termination of the contract and can thereupon claim wages.
He can also claim to be reinstalled in the job. Or, he can claim compensation for pecuniary damages under the sanctions of general administrative/ (labour) contract law or tort law.

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

b) Is there any ceiling on the maximum amount of compensation that can be awarded?

In civil and administrative court cases there is no ceiling for the amount of damages or compensation that may be asked for. Both compensation for material and immaterial damages can be asked for. In criminal procedures, the public prosecutor is bound to the level of the fines mentioned in the criminal law provisions concerning discrimination.

The sanctions that are mentioned in the equal treatment legislation, are not in terms of (money) compensation but offer other ‘remedies’ (see above).

c) Is there any information available concerning:
- *i) the average amount of compensation available to victims?*
- *ii) the extent to which the available sanctions have been shown to be - or are likely to be - effective, proportionate and dissuasive, as required by the Directives?*

This information is not available for two reasons:

[364] Associations and Foundations that bring cases on behalf of victims or that bring collective or public interest actions before a civil or administrative court, may not ask for pecuniary damages. See Art. 305(a) par. 4 of the Civil Code.

1. There hardly ever is compensation in terms of money. This only occurs when, for example, the judge agrees to the dismissal since employment relationships have been disturbed, and in that case sets a relatively high sum for compensation for the termination of the contract.
2. No information can be given on this topic without an extensive survey into the case law of the Cantonal Courts and the District Courts. Most of the time, such cases are not published in official law journals. Also, the registration of cases within the court system is not systematically done on the basis of the legal provisions at stake. So, it might very well be that a lot of cases are registered under the heading of a general provision like 'breach of labour contract' (with no specification about the reasons for this) or tort. Very generally speaking it can be noted that Dutch courts are restrictive in granting damages that are not strictly material damages (e.g., wages not paid). Immaterial damages (e.g., hurt feelings) will only minimally be compensated for.

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

7 SPECIALISED BODIES, Body for the promotion of equal treatment (Article 13 Directive 2000/43)

When answering this question, if there is any data regarding the activities of the body (or bodies) for the promotion of equal treatment, include reference to this (keeping in mind the need to examine whether the race equality body is functioning properly). For example, annual reports, statistics on the number of complaints received in each year or the number of complainants assisted in bringing legal proceedings.

a) *Does a 'specialised body' or 'bodies' exist for the promotion of equal treatment irrespective of racial or ethnic origin? (Body/bodies that correspond to the requirements of Article 13. If the body you are mentioning is not the designated body according to the transposition process, please clearly indicate so).*

In the Netherlands there are two types of Equality Bodies. First there is a pseudo juridical (or tribunal type of) body that has been assigned with the tasks of hearing complaints about unequal treatment, drafting reports, giving advice to the government and investigating possible instances of structural discrimination on its own accord. This function is currently being fulfilled by a section of the newly established Netherlands Institute for Human Rights (NIHR).[365] Per 2 October 2012, the NIHR in this regard has taken over all of the tasks of the previous Equal Treatment Commission (ETC).[366] *The ETC was the first officially designated body by which the* Government *implemented Article 13 of the Race Directive, although it was not officially* appointed *as such by a separate law or decree.*[367] The *status as an* Equality Body *follows from the tasks given to* the NIHR in the NIHR Act (Articles 9-13 NIHR Act; originally *Articles 11-21 GETA). Other* Equal Treatment Acts *also assign these tasks to the* NIHR *(see* Art*.12 DDA and Art.14 ADA).* On the basis of the NIHR Act, (Royal) Decrees have been adopted in order to regulate the legal status of Members

[365] Act of 24 November 2011 containing the establishment of the Netherlands Institute for Human Rights. (*Wet van 24 november 2011, houdende de oprichting van het College voor de rechten van de mens*); Staatsblad 2011, 573. The Act entered into force on 1 October 2012.
[366] The provisions of the General Equal Treatment Act in which the former ETC was regulated were repealed in the NIHR Act.[366] Instead the same tasks and authorities are now regulated in a specific Chapter 2 of the NIHR Act: 'Investigations and findings relating to equal treatment' (Articles 9-13).
[367] This designation follows from statements from the Government in various Parliamentary Papers. See e.g. Explanatory Memorandum to the bill that has led to the EG-Implementatiewet Awgb (EC-Implementation law Equal Treatment Law) Tweede Kamer 2002-2003, 28 770, nrs. 1-3 at page 20, where it is mentioned in the Appendix, at page 20, that the implementation of Article 13 of the Race Directive is already completed because in the Netherlands we had the (then) ETC. (EG Implementatiewet Awgb: Law of 21 February 2004, Staatsblad 2004, 119.)

of the Institute and its staff[368] and the internal procedures of the section of the NIHR that deals with complaints about unequal treatment.[369]

The Dutch Government has installed the NIHR after long discussions about the best way to implement the Paris Principles. [370] In first instance, the proposed name of the new Institute was *College voor Mensenrechten en Gelijke Behandeling*. (Board for Human Rights and Equal Treatment). The name now is: *College voor de Rechten van de Mens*. This means that equal treatment is no longer outwardly visible as one of the tasks of this Institute. However, according to the law, the role of the new NIHR as regards investigating complaints about unequal treatment has not been changed as compared to the former ETC. The establishment of the institute also does not change the competencies of the ADVs (see below) as regards their role to assist victims. The role of assisting victims has never been part of the ETCs work and will also not be a part of the work of the NIHR because it is deemed to be incompatible with the role of independently giving legal opinions about complaints about discrimination. In addition to the 9 members of the previous ETC, 3 extra members have been appointed in the NIHR. In terms of budget and staff, there has also been an extension.[371] The NIHR is located in Utrecht, at the premises of the former ETC.

Secondly there are so-called Anti-Discrimination Bureaus (*anti-discriminatievoorziening*, ADV) on the local level.[372] In 2009, these local ADVs got a legal basis in the Act on Local Anti-Discrimination Bureaus (*Wet gemeentelijke antidiscriminatievoorziening).[373]* All 430 municipalities are obliged to install and subsidize an ADV. The main task of these Bureaus is to assist victims of discrimination and to monitor the situation in this regard. The ADVs work together in an association called National Association of Anti-Discrimination Bureaus *(Landelijke Vereniging ADB's)* and are supported by the expert institute 'Art.1', called after the constitutional non-discrimination provision.[374] The ADVs and 'Art.1' cover all of the

[368] Besluit van 28 augustus 2012, houdende regels over de rechtspositie van de leden van het College voor de rechten van de mens en de tot het bureau behorende ambtenaren (Besluit rechtspositie College voor de rechten van de mens), Staatsblad 2012, 389.
[369] Besluit van 31 augustus 2012, houdende nadere regels over de werkwijze van de afdeling, bedoeld in hoofdstuk 2 van de Wet College voor de rechten van de mens (Besluit werkwijze onderzoek gelijke behandeling), Staatsblad 2012, 394.
[370] Principles relating to the Status of National Institutions Adopted by UN General Assembly resolution 48/134 of 20 December 1993.
[371] For adjustments of the budget, see below under question b.
[372] The ADVs were designated as Equality Bodies in the Explanatory Memorandum to the Act on Local Anti-discrimination Bureaus; Tweede Kamer 2007-2008, 31 439, nr. 3, p. 7.
[373] *Wet gemeentelijke antidiscriminatievoorzienin*g, *Staatsblad* 2009, 313. On the basis of this law, there isAct, a Decree has been adopted in which a more detailed regulation of the local ADV's isADVs has been laid down. It contains provisions concerning the independence, the competency and the procedures that need to be followed when the officesADVs provide information and assist victims of discrimination. SeeSee *Besluit gemeentelijke antidiscriminatievoorzieningen*, Staatsblad 2009, 373**,** *Besluit gemeentelijke antidiscriminatievoorzieningen*.
[374] (English) information on this organization may be found at http://www.art1.nl/artikel/73-General_information_about_Art1 (last accessed on 19 March 2013).

Art. 19 TFEU non-discrimination grounds and are officially recognized as being equality bodies (in terms of Art. 13 of the Race Directive).[375] The ADVs, the NIHR and 'Art.1' thus fulfill different tasks that are closely related but not overlapping.

b) Describe briefly the status of this body (or bodies) including how its governing body is selected, its sources of funding and to whom it is accountable. Is the independence of the body/bodies stipulated in the law? If not, can the body/bodies be considered to be independent? Please explain why.

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

Article 16 regulates how Members of the Institute are appointed. The Advisory Council gives advice to the Minister of Security and Justice, who will then make a recommendation to appoint them by Royal Decree (*Koninklijk Besluit*) for a period of 6 years (Art. 17 (2) NIHR Act).

Article 17 NIHR Act gives a detailed regulation of the legal status of the Members in terms of the duration of their appointment, their working conditions, salary, possibility of disciplinary sanctions and dismissal, et cetera. To emphasize the independence of the members and alternate members of the Institute, subsection 1 states that, save for a few exceptions, the provisions of the Judicial Officers (Legal Status) Act concerning dismissal, suspension and disciplinary measures apply *mutatis mutandis* to them (MoE, p. 50.).[376] This provision contains a few changes as compared to the former Article 16 (4) of the (General) Equal Treatment Act, all of which are meant to underline / strengthen the independence of the Members of the Institute.

Article 18 NIHR Act regulates the position of the Staff of the Institute. Staff is appointed by the Institute (represented by the Chair). Their employment conditions are similar to those of civil servants for the national and local governments. The

[375] In 2004, for the first time the Government recognized these organizations as equality bodies in the sense of Art. 13 Race Directive. See Tweede Kamer 2003-2004, 28 770, nr. 5.
[376] One important difference with the position of judges is that Members of the NIHR are appointed for a period of 6 years with the possibility of re-appointment, while judges are appointed for life.

Institute as a whole is the 'competent authority' as meant in the Central and Local Government Personnel Act, which means that all matters like promotion, dismissal, salary, et cetera will be decided by the Chair of the Institute. In this respect, there is a major difference with the situation under the GETA, where staff was appointed by the Ministry of Security and Justice. Members and staff members of the former ETC all automatically became Members and staff of the NIHR on 1 October. (Article 35 NIHR Act.)

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

The NIHR Act contains no provisions about the budget / budgetary autonomy of the Institute. Instead, the Memorandum of Explanation (MoE) to the NIHR Bill, states that this issue is regulated in the annual Budget Act.[377] From the MoE it becomes clear that the NIHR in fact will be paid for by four ministries. Contributions are made by (as was the case with the ETC) the Ministry of the Interior and Kingdom Relations, the Ministry of Security and Justice, the Ministry of Education and the Ministry of Health.[378] The Minister of Security and Justice is ultimately responsible for the budget (as was the case with the ETC).[379] The NIHR annually submits a draft budget which needs to be approved by the Minister of Security and Justice. The Minister will publish the draft budget of the NIHR together with his/her budget Bill, which will be discussed in Parliament. As compared to the ETC, the NIHR got a 600.000 Euro structural addition to its annual budget; in the first three years of its existence the additional budget is 900.000 annually. In the third year of the existence of the NIHR it will be evaluated whether structural budgetary adjustments are necessary.

The Status of the organization 'Art.1' and that of the local ADVs is that of an independent non-Governmental organization (NGO), (although the ADVs are subsidized by the local Governments). The legal regulation of the local bureaus

[377] Tweede Kamer 2009-2010, 32 467, nr 3, at p. 15.
[378] Each of these ministries cover areas that fall under the material scope of the Equal Treatment Legislation. The Ministry of the Interior and Kingdom Relations is primary responsible for all constitutional issues. The Ministry of Security and Justice is responsible for the personnel and financial issues.
[379] The costs of the Institute will appear on the annual budget of this Ministry. Other ministries have agreed to contribute and will be invoiced by the Ministry of Security and Justice.

(ADVs) has been regulated by a law that came into force in 2009.[380] The ADVs have two legal tasks: to assist persons who complain about discrimination and to register all such claims and bring them to the attention of the Minister of the Interior and Kingdom Relations.

c) *Describe the competences of this body (or bodies), including a reference to whether it deals with other grounds of discrimination and/or wider human rights issues.*

The NIHR deals with all non-discrimination grounds that are mentioned in the GETA, DDA, ADA as well as some more specific grounds (like the type or the duration of the employment contract). The NIHR's principal function is to investigate alleged cases of discriminatory practices or behaviours. Besides, the NIHR may investigate structural instances of discrimination on its own accord[381] and may advise organizations (including Governmental organizations) who want to know whether their policies or practices are or are not in accordance with the law. It may also give advice to the Government in discrimination issues, including advice about proposals for new legislation or proposals for amendments of legislation. The NIHR sometimes does some research (or assigns experts to do this on its behalf) into specific issues, like e.g. victimisation or discrimination on sexual orientation at the workplace.[382] On top of that, the NIHR has the general purpose and task of promoting human rights and investigating human rights violations, to give advice about improving the situation as regards the protection of human rights, et cetera. It does not have the competence and authority to hear individual complaints about human rights violations beyond the scope of the equal treatment legislation.

'Art.1' mainly has a role in monitoring developments in society with regard to (non-) discrimination and bringing instances of (structural) discrimination to the attention of the general public and to politics. 'Art.1' also functions as the national expert center that supports the work of the local ADVs. They do so e.g. by offering trainings to employees working for the local ADVs. The local ADVs have as their main function to assist victim of discrimination and they do bring many complaints about discrimination to the NIHR and to the Courts in support or on behalf of victims, and also in the form of general interest actions or collective actions. They also sometimes set up situation testing, in order to bring systemic discrimination to light, especially in the area of café's and discotheques. (See section 6.2 of this report.)

[380] See for the legal stature of these organizations supra footnote 369 and 370.
[381] The possibilities to do so have been extended by the so-called Evaluatiewet AWGB [*Wet tot wijziging van de Algemene Wet Gelijke Behandeling; Evaluatiewet Awgb*] of 15 September 2005, *Staatsblad* 2005, 516. (The law that amended the GETA on the basis of proposals that stemmed from the first evaluation of the Act over the period 1994-1999).
[382] The report on the situation of homosexuals in the workplace is published as: *Discriminatie is het woord niet - Lesbische vrouwen en homoseksuele mannen op de werkvloer: bejegening en beleid*; Research done by the Hilda Verweij Jonker Institute, Utrecht, April 2009. The report can be downloaded from: http://www.mensenrechten.nl/publicaties/detail/9989. (last accessed 6 March 2013).

d) Does it / do they have the competence to provide independent assistance to victims, conduct independent surveys and publish independent reports, and issue recommendations on discrimination issues?

The NIHR has the task to investigate complaints about discrimination, conduct independent surveys, publish reports and give recommendations to organizations and advice to the Government. The number of surveys/advices varies heavily. As for 2012, the NIHR (then ETC) only produced one advice, whereas it produced seven advices in 2011.

The role of assisting victims is seen to be conflicting with the role of independently investigating individual complaints and giving an authoritative opinion about them. The same applies for the NIHR's official competence to bring cases of unequal treatment to the attention of the courts; the NIHR never makes use of this competency for this would conflict with its own pseudo-juridical function. However, 'Art.1' and the local ADVs effectively fulfil these functions. The role of the latter organizations is mainly to assist victims of discrimination and to monitor developments with respect to discrimination in society. They bring many cases of discrimination to the attention of the NIHR and the courts.[383]

From the last published annual report of 'Art.1' (about 2011), it appears that the number of complaints about discrimination raised again. In 2011, a number of 6391 complaints were received, 317 more than in 2010.[384] Still, this increase is relatively small, especially when compared to 2009, when 23,4% more complaints were received (as to 5,2% more in 2011). The notable changes are probably caused by external factors such as the large advertisement campaign about discrimination in 2009. It remains to be seen whether discrimination actually occurs more or less frequent. Apart from assisting victims and assisting and training the local Anti-Discrimination Bureaus (ADV), 'Art.1' also conducts independent surveys and gives comments and advice (mostly to local Governments) about combating discrimination. 'Art.1' can be considered as a non-governmental 'watchdog', whereas the NIHR is an independent state body which has as its most important task to deal with equal treatment cases.

The Local Anti-Discrimination Bureaus (ADVs) have submitted a report to Parliament about the complaints that they have received in 2010.[385] From this report it appears that 400 out of 430 Municipalities have indeed registered complaints about discrimination. In 2010, 6.074 complaints were registered. Most of these (2.572) were about race / ethnicity. That is more than 42% of all complaints. Other grounds were

[383] 'Art.1' regularly publishes a report about the number of complaints that have been received by the local ADVs, called "kerncijfers'. These reports may be found at: http://www.art1.nl/artikel/10029-Kerncijfers_jaaroverzicht_discriminatieklachten (last accessed on 6 March 2013.)
[384] The numbers of 2012 are not yet available at the cut-of date for this report (1 January 2013).
[385] Tweede Kamer, 13 December 2011, 2010-2011, 31 439 nr. 19 (+ annex: Report by M. Coenders, University of Utrecht).

age (675), sex (478), sexual orientation (475) and disability and chronic illness (440). One third of all complaints were about employment relations. Quite often, the complaint concerned discrimination in the neighbourhood or in another public space. More than half of them concerned unequal treatment, one third concerned hostile discriminatory treatment or harassment. In more than half of the cases the ADV gave information and advice. In one third of all complaints, the ADVs supported victims in a procedure (judicial or otherwise). In the beginning of 2012, 'Art.1", together with the European Forum for Migration Studies, has published a comparative study about systems of registration of complaints about discrimination in The Netherlands and Germany.[386]

e) Are the tasks undertaken by the body/bodies independently (notably those listed in the Directive 2000/43; providing independent assistance to victims of discrimination in pursuing their complaints about discrimination, conducting independent surveys concerning discrimination and publishing independent reports).

All tasks are taken care of independently by the NIHR. See about the independent status of the NIHR above, esp. section b of this chapter.

'Art. 1' is an independent NGO, although in the past it has received some subsidy from the national Government. Local Anti-Discrimination Bureaus (ADVs) are also independent and receive subsidies from local Governments. Their existence is guaranteed by the (National) law.[387] There is no interference with any of their tasks by the national or local Government(s).

f) Does the body (or bodies) have legal standing to bring discrimination complaints or to intervene in legal cases concerning discrimination?

The NIHR does have this competence (in Article 13 NIHR Act), but it never makes use of this possibility because this conflicts with its main task to investigate individual complaints about discrimination in a neutral and objective manner.

'Art.1' and the local ADVs can bring claims before courts in the framework of the general rules concerning actions on behalf of victims and general interest actions or collective actions, that exist under Dutch civil law. (No data of numbers of class actions are available.) See section 6.2. of this Report.

[386] Saskia van Bon and others: Registration of Complaints about Discrimination in The Netherlands and Germany; published by: 'Art.1' Rotterdam and European Forum for Migration Studies Bamberg, 2012.

[387] See *Wet gemeentelijke antidiscriminatievoorziening Staatsblad* 2009, 313. On the basis of this law, there is a Decree in which a more detailed regulation of the local ADVs is laid down. It contains provisions concerning the independence, the competency and the procedures that need to be followed when the offices provide information and assist victims of discrimination. See *Staatsblad* 2009, 373**,** *Besluit gemeentelijke antidiscriminatievoorzieningen*.

g) Is / are the body / bodies a quasi-judicial institution? Please briefly describe how this functions. Are the decisions binding? Does the body /bodies have the power to impose sanctions? Is an appeal possible? To the body itself? To courts?) Are the decisions well respected? (Please illustrate with examples/decisions).

The NIHR is a pseudo-judicial institution. Its decisions and recommendations are not binding and it does not have the power to impose sanctions. There is no appeal possible to the NIHR itself, but a case can always be brought to a (civil or administrative) court in order to obtain a binding judgment. On the basis of an Opinion of the NIHR in which a certain practice or behaviour has been declared discriminatory, a defendant (or his organization) may also take measures voluntarily to put an end to the discrimination or to take action to prevent this from happening in the future.

According to the Annual Reports of the (then) ETC of 2009, 2010 and 2011, in 6.1% / 8% /8% of the cases only an individual measure was taken by the defendant / company or institution, in 39.2% / 40% /33% only a structural measure, and in 27% / 27%/ 27% both an individual and a structural measure. Measures were taken in 74% / 74%/68% of all cases as a result of the Opinion or recommendation.

It is not always possible to take an individual measure. As regards Opinions where this was possible, individual measures were implemented in 2009, 2010 and 2011 in 43% / 45% / 43% of such cases. As regards the opinions for which structural measures are possible, structural measures were taken in 74% / 67% / 62 % of the cases".[388] From these figures it appears that in 2011, defendants seemed to be less inclined to take structural measures than the year before, which seems to be a continuing trend, as we already stipulated in 2011's Country Report.

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

h) Does the body treat Roma and Travellers as a priority issue? If so, please summarize its approach relating to Roma and Travellers.

The NIHR does not treat Roma and Travellers as a priority issue. Reasons for the absence of complaints could include the distrust of the authorities by Roma and Sinti people, language barriers and the idea that complaining about discrimination or unequal treatment may make their situation worse (fear of victimisation). In addition, a possible explanation may be that the social situation of Roma and Travellers in the

[388] ETC Annual Report 2009, p. 29, ETC Annual Report 2010, p. 40, ETC Annual Report 2011, p. 32. Figures for 2012 are not yet available. All annual reports are accessible at: http://www.mensenrechten.nl/publicaties/zoek?categorie[0]=434555 (last accessed on 6 March 2013).

Netherlands might be not so precarious (compared to other European countries) that it demands priority treatment.

Roma, Sinti and Travellers are not specifically mentioned in overviews of discrimination complaints by the 'Art.1' and the ADVs. According to a search on its web site 'Art.1', has no specific programs concerning Roma or Sinti or Travellers. As for the local ADVs this is hard to say since there are hundreds of such local bureaus. The organization in the Netherlands that in the past was most active in gathering and disseminating information on Roma and Sinti people is the Anne Frank Foundation in Amsterdam. See e.g. their report Monitor Racism and Extremism of 2009.[389] Besides this, there is also the organization called "Forum" that gathers information on the situation of Roma in the Netherlands.[390]

[389] This report of the Anne Frank Stichting may be found at: http://www.annefrank.org/nl/Wereldwijd/Monitor-Racisme-Homepage/Onderzoeken/Monitor-Rassendiscriminatie-2009/ (last accessed on 6 March 2013).
[390] See their website for publications and programs: http://www.forum.nl/Zoek_resultaten?start=0&q=roma (last accessed on 6 March 2013).

8 IMPLEMENTATION ISSUES

8.1 Dissemination of information, dialogue with NGOs and between social partners

Describe briefly the action taken by the Member State

a) to disseminate information about legal protection against discrimination (Article 10 Directive 2000/43 and Article 12 Directive 2000/78)

The Ministry of the Interior and Kingdom Relations (Department of Constitutional Affairs) co-ordinates all activities in the area of EU law implementation issues, since all equal treatment legislation is (also) seen as a specification of the general principle of equality and non-discrimination that is included in Article 1 of the Constitution. The Ministry of Social Affairs and Employment is responsible for activities to enhance compliance with the equal treatment legislation, as far as this legislation applies to employment relationships. This Ministry has taken the initiative for many different activities to inform the general public about the (new) legal standards, to inform social partners and to stimulate their involvement in the implementation of the legal non-discrimination norms. Also the Ministry is actively engaged into promoting studies and surveys in this field. The same goes for the Ministry of Health as far as discrimination on the ground of disability is concerned and the Ministry of Education as far as discrimination in this area is concerned.[391]

Finally, the Ministry of Foreign Affairs plays a role in assembling and disseminating the information that is needed to issue periodical reports to the International Monitoring bodies (CEDAW and CERD Committee, Human Rights Committee).

b) to encourage dialogue with NGOs with a view to promoting the principle of equal treatment (Article 12 Directive 2000/43 and Article 14 Directive 2000/78) and

There are several NGOs in the field of non-discrimination and minority rights, including the aforementioned NGO 'Art.1'. Art. 1's mission is to promote the principle of non-discrimination in its broadest sense. Art.1 offers advice to (Governmental) organizations, provides public information about non-discrimination and supplies training sessions. Also, it assists the local Anti-Discrimination Bureaus (ADVs) in their work and supports them with training and educational activities. Whereas Art. 1 does not receive any governmental subsidy, several NGOs with as that have the objective of combating discrimination and/or encouraging dialogue are subsidized. An example is the COC, the main LGTB organization in the Netherlands, advocating for LGTB

[391] Information about their activities can be found at: www.szw.nl and http://www.rijksoverheid.nl/ministeries/vws.

rights. Next to this, the Ministry of Social Affairs and Employment consults the MBO Raad[392] where it comes to equal treatment of youngsters with a disability.

c) *to promote dialogue between social partners to give effect to the principle of equal treatment within workplace practices, codes of practice, workforce monitoring (Article 11 Directive 2000/43 and Article 13 Directive 2000/78)*

The Ministry of the Interior and Kingdom Relations co-ordinates a network of professionals and experts on equal treatment and discrimination issues, consisting of civil servants from the most relevant ministries (such as 'Social Affairs and Employment', 'Education', 'Health', 'Security and Justice', and national labour and employers' organizations and other NGOs that are active in this field (e.g. the Dutch Council of Chronically Ill and Disabled Persons and the COC).

d) *to specifically address the situation of Roma and Travellers. Is there any specific body or organ appointed on the national level to address Roma issues?*

No official body or organ exists that is specifically appointed to address Roma and Travellers' issues on the national level.

However, in 2009-2010 the Government has stimulated co-ordination, mutual support and exchange of information between local Governments that have a substantive number of Roma people living in their territory.[393] In relation to the agreement in the European Council of 24 June 2011 to enhance a national policy on the integration of Roma people in all EU Member States, the Dutch Government has sent a letter to Parliament in which it sketches the outlines of the current problems and the policies to address these problems.[394] This policy paper focuses on problems such as school drop-out of Roma children and crime issues (including the method proposed by the Government to implement existing legislation in a more stringent way).

As stipulated in paragraph 3.2.10. of this Report, a set of policy measures was drafted by the Dutch government in December 2011 to foster social inclusion of Roma and Sinti people, as requested by the European Commission.[395] In addition, the Dutch Government has developed a qualitative monitoring instrument to measure the social inclusion of Roma and Sinti in the Netherlands. This instrument includes indicators such as education, employment, health care, housing and dialogue with local authorities. Results are expected in Spring 2013.

[392] The 'MBO Raad' is the Dutch association of vocational education and training colleges. It represents all colleges for secondary vocational education and training and adult education.
[393] See Tweede Kamer 2008-2009, 31 700 XVIII, nr. 90.
[394] Letter of the Minister of Immigration, Integration and Asylum of 21 December 2011, Tweede Kamer 2011-2012, 21501-20, nr. 599.
[395] This paper can be found at http://ec.europa.eu/justice/discrimination/files/roma_nl_strategy_en.pdf (last accessed 18 March 2013).

Some NGOs (partly subsidized by the Government) give special attention to Roma and Travellers. Most importantly, this task is taken up by the national expert center on multi-cultural issues, FORUM (Utrecht).[396] This organization conducted several studies and issued reports on the situation of Roma and Travellers (or 'woonwagenbewoners'). Also, the Anne Frank Stichting (AFS) regularly gives special attention to the situation of Roma in its "*Monitor Racisme en Extremisme'*.[397]

8.2 Compliance (Article 14 Directive 2000/43, Article 16 Directive 2000/78)

a) Are there mechanisms to ensure that contracts, collective agreements, internal rules of undertakings and the rules governing independent occupations, professions, workers' associations or employers' associations do not conflict with the principle of equal treatment? These may include general principles of the national system, such as, for example, "lex specialis derogat legi generali (special rules prevail over general rules) and lex posteriori derogat legi priori (more recent rules prevail over less recent rules).

Article 9 of the GETA, Article 13 of the ADA and Article 11 of the DDA stipulate that 'agreements' which are in contravention of the equal treatment legislation shall be null and void. This also concerns collective agreements.

b) Are any laws, regulations or rules that are contrary to the principle of equality still in force?

Apart from some regulations in Dutch Family Law, which might be contrary to the principle of sex equality in CEDAW, to the author's knowledge this is not the case.

[396] See www.forum.nl (last accessed 19 March 2013).
[397] See http://www.annefrank.org/ImageVaultFiles/id_12099/cf_21/RomaSintiUK.PDF for a Special Cahier on the situation of Roma and Sinti , published by the Anne Frank Stichting & the University of Leiden in 2004 (last accessed 19 March 2013). Due to budget cuts, the AFS has stopped producing the Monitor in 2011. This work will be continued (in 2012) by the Hilda Verwey Jonker Institute, but so far no report is published.

9 CO-ORDINATION AT NATIONAL LEVEL

Which government department/ other authority is/ are responsible for dealing with or co-ordinating issues regarding anti-discrimination on the grounds covered by this report?

For various (legislative) procedures and development of policies, frequent co-operation exists between the Ministries for 'Social Affairs and Employment', 'Education', 'Health' and 'Security and Justice'. For some specific projects, the Ministries of 'Housing, Planning and Environment' and 'Infrastructure and Environment' are also involved. The division of tasks is organized in the following way:

1. Equal Treatment in Employment: (inter alia: GETA, ADA, DDA and Equal Treatment Act Men/Women): Ministry of Social Affairs and Employment.
2. Age Discrimination: Ministry of Social Affairs and Employment.
3. Disability Discrimination: Ministry of Health
4. General Equal Treatment Act outside employment + Constitutional provisions: Ministry of the Interior and Kingdom Relations.
5. Criminal law provisions regarding discrimination: Ministry of Security and Justice.

The Ministry of the Interior and Kingdom Relations co-ordinates all this legislative activities because it is responsible for the implementation of the Constitution, which in Article 1 contains a general non-discrimination provision.

Is there an anti-racism or anti-discrimination National Action Plan? If yes, please describe it briefly.

There does not exist a recent anti-racism or anti-discrimination National Action Plan. The Dutch Government drafted such a plan in the aftermath of the 2001 World Conference Against Racism (WCAR, a conference held under United Nations auspices that became more commonly known as Durban 1). In 2003, a National Action Plan was published,[398] but no follow-up has been published so far, despite calls from several NGOs and political parties to draft a new one.[399]

[398] This National Action Plan can be found at http://www.recht.nl/doc/kst29200-vi-121-bijlage.pdf , last accessed 20 March 2013.
[399] Such calls can for example be found in an NGO report, dd. 28 October 2009, titled 'Joint Parallel Report to the Combined Fourth and Fifth Periodic Report of the Netherlands on the International Covenant on Economic, Social and Cultural Rights', http://www.njcm.nl/site/treaty_reports/list, last accessed 20 March 2013. This report was signed by a variety of NGOs, including 'Art.1'.

ANNEX

1. **Table of key national anti-discrimination legislation**
2. **Table of international instruments**
3. **Previous case-law**

ANNEX 1: TABLE OF KEY NATIONAL ANTI-DISCRIMINATION LEGISLATION

Please list below the main transposition and Anti-discrimination legislation at both Federal and federated/provincial level

Name of Country: The Netherlands **Date: 18 March 2013**

Title of Legislation (including amending legislation)	Date of adoption: Day/month/ year	Date of entry in force from: Day/month/ year	Grounds covered	Civil/Admini-strative/ Criminal Law	Material Scope	Principal content
Title of the Law: General Equal Treatment Act Abbreviation: GETA Latest amendments: 7 November 2011	Date of adoption: 2 March 1994	Entry into force: 1 Sept. 1994	Race, religion & belief, political opinion, hetero- or homosexual orientation, sex, nationality and civil (or marital) status	Civil	Employment relationships (both civil and public), occupational training and education, goods and services (including general education)+ liberal professions	Prohibition of direct and indirect discrimination

Title of the Law: Disability Discrimination Act Abbreviation: DDA Latest amendments: 7 November 2011	Date of adoption: 3 April 2003	Entry into force: 1 December 2003	Disability and Chronic disease	Civil	Employment relationships (both civil and public), occupational training and education + liberal professions + education + housing	Prohibition of direct and indirect discrimination
Title of the Law: Age Discrimination Act Abbreviation: ADA Latest amendments: 7 November 2011	Date of adoption: 17 December 2003	Entry into force: 1 May 2004	Age	Civil	Employment relationships (both civil and public), occupational training and education + liberal professions	Prohibition of direct and indirect discrimination

ANNEX 2: TABLE OF INTERNATIONAL INSTRUMENTS

Name of country: The Netherlands **Date: 28 April 2013**

Instrument	Date of signature (if not signed please indicate) Day/month/year	Date of ratification (if not ratified please indicate) Day/month/year	Derogations/ reservations relevant to equality and non-discrimination	Right of individual petition accepted?	Can this instrument be directly relied upon in domestic courts by individuals?
European Convention on Human Rights (ECHR)	Date of signature: 4/11/1950	Date of ratification: 31/8/1954	No	Yes	Yes
Protocol 12, ECHR	Date of signature: 4/11/2000	Date of ratification: 28/7/2004	No	Yes	Yes
Revised European Social Charter	Date of signature: 23/1/2004	Date of ratification: 3/5/2006	No	Yes	Yes
International Covenant on Civil and Political Rights	Date of signature: 25/6/1969	Date of ratification: 11/12/1978	No	Yes	Yes
Framework Convention for the Protection of National	Date of signature: 1/2/1995	Date of ratification: 16/2/2005	No	N/A	Yes

Instrument	Date of signature (if not signed please indicate) Day/month/year	Date of ratification (if not ratified please indicate) Day/month/year	Derogations/ reservations relevant to equality and non-discrimination	Right of individual petition accepted?	Can this instrument be directly relied upon in domestic courts by individuals?
Minorities					
International Convention on Economic, Social and Cultural Rights	Date of signature: 25/6/1969	Date of ratification: 11/12/1978:	No	Yes	Yes
Convention on the Elimination of All Forms of Racial Discrimination	Date of signature: 24/10/1966	Date of ratification: 10/12/1971	No	Yes	Yes
Convention on the Elimination of Discrimination Against Women	Date of signature: 17/7/1980	Date of ratification: 23/7/1991	No	Yes	Yes
ILO Convention No. 111 on Discrimination	Date of signature: unknown	Date of ratification: 15/3/1973	No	NA	Yes
Convention on the Rights of the Child	Date of signature: 26/1/1990	Date of ratification: 6/2/1995	No	NA	Yes

Instrument	Date of signature (if not signed please indicate) Day/month/year	Date of ratification (if not ratified please indicate) Day/month/year	Derogations/ reservations relevant to equality and non-discrimination	Right of individual petition accepted?	Can this instrument be directly relied upon in domestic courts by individuals?
Convention on the Rights of Persons with Disabilities	Date of signature: 30/3/2007	Date of ratification: not yet ratified	No	No	No

ANNEX 3 PREVIOUS CASE-LAW

Name of the court
Date of decision
Name of the parties
Reference number (or place where the case is reported).
Address of the webpage (if the decision is available electronically)
Brief summary of the key points of law and of the actual facts (no more than several sentences).

Case Law[400]

***Race and ethnic origin*:**

Name of the court: ETC
Date of decision: 18 February 2005
Reference number: Opinion 2005-25
Address of the webpage: http://www.mensenrechten.nl/publicaties/oordelen/2005-25
Held: Breach
Brief summary: The local Government of Tiel (a small town in the Netherlands) conducts a policy to spread the (aspirant) pupils whose parents are of non-Dutch origin, who have lower or no education and who do manual labour.[401] This means that each publicly funded primary school in this town should not have more than a certain percentage of such pupils. If a school already has reached this percentage the child will not be accepted and will have to go to another school, even if this is outside its own neighbourhood. The ETC first establishes that the 'service' to provide education falls under the scope of the GETA. Next it examines the practice of this policy and finds that the first factor (non-Dutch origin of the parents) in fact is decisive. It than decides that this constitutes a form of 'hidden' direct discrimination on the ground of race for which the GETA allows no justification.[402] It is debated in the Netherlands whether the way in which the ETC constructs this category of hidden

[400] Apart from a few exceptions, the following overview contains cases that are dealt with on the basis of the ADA, DDA and GETA. (We can notcannot provide an overview of criminal law cases or cases that have been decided upon with the use of Constitutional or International Law provisions.) Relatively few cases are brought to the attention of the Dutch Civil Courts. Most cases are brought before the Equal Treatment Commission (ETC).), which was replaced by the NIHR in October 2012. Opinions by the ETC (now NIHR) are not binding. All publications of the ETC/NIHR are available at http://www.mensenrechten.nl/ and can easily be searched on the basis of the case's reference number (Oordeel: year-number). The parties' names are kept anonymous. The ETC gives more than a 100 Opinions a year. Due to limited space, only a small selection of court cases and ETC Opinions can be presented in this overview.
[401] See also section 3.2.8 of this report.
[402] This Opinion raised some academic discussion. See B.P. Vermeulen, 'De toelaatbaarheid van spreidingsbeleid en aanverwante maatregelen in het onderwijs' [The admissibility of policies to spread pupils.] . In: S.D. Burri (ed.) Oordelenbundel 2005. Kluwer, Deventer June 2006. It was also published in *AB* 2005, 230 with a case note of C.W. Noorlander.

direct discrimination is the correct way.[403] The ETC does so by equating a neutral criterion (national origin) with a suspect criterion (race) and then concluding that this is unjustifiable direct discrimination.[404]

Name of the court: District Court Amsterdam
Date of decision: 23 February 2006
Name of the court: ETC
Date of decision: 6 November 2006
Reference number: Opinion 2006-222
Address of the webpage: http://www.mensenrechten.nl/publicaties/oordelen/2006-222
Held: No breach
Brief summary: A family of Travellers (people who live in caravans and travel around),[405] consisting of three generations, complains that a local Government discriminates on the ground of race (ethnic identity) by not taking their special interests into account in its housing policy. The local Government decided not to continue a special waiting list for persons who want to live in a caravan because there were hardly any applications for this type of housing. The ETC concludes that it is competent to assess this housing policy on the basis of Article 7a GETA. The assessment whether there is a case of unlawful distinction is - contrary to other areas – marginally, as a consequence of the local Government's margin of appreciation to formulate its social policies, including those concerning housing. Although in this particular case there is an objective justification because the local Government has proven that the measure (to abolish the special waiting list) was legitimate and that the means chosen (the general waiting list) were proportionate and effective, the ETC recommends the local Government to prevent indirect discrimination in the future by giving more attention to the special needs of people who prefer housing in caravans.

Name of the court: Raad van State ['Council of State', = highest administrative judge]
Date of decision: 3 September 2008
Reference number: 200706325/1, LJN: BE9698
Address of the webpage: http://zoeken.rechtspraak.nl/resultpage.aspx?snelzoeken=true&searchtype=ljn&ljn=BE9698
Held: No breach
Brief summary: The Dutch minister for Integration and Immigration policy had asked for and obtained an exemption under the Personal Details Protection Act from the

[403] This construction seems to be incidental; no (recent) examples of this way of reasoning are known to the present author.
[404] This method has been accepted in the case of pregnancy, which is equated with direct sex discrimination.
[405] The ETC decided that this group of people falls under the ground race or ethnic origin. Some of the Travellers are Roma or Sinti, but not all. See also ETC Opinion 2006-5.

competent authority (DDPA) in order to establish a database of Antillean youth (‘*Verwijsindex Antillianen’*) without work or education and with criminal records. A complaint against this was lodged by a deliberative body of Dutch Antilleans. According to the Minister and the DDPA, the database was required to trace the Antillean youth with problems in The Netherlands, which is particularly difficult, as young Antilleans are often moving between Dutch municipalities without registering themselves. According to these municipalities and the Minister, the registrations system is required for an effective approach to the high rates of social deprivation and criminality among the Antillean youth in The Netherlands.

The Council of State (highest administrative court) held that – although registration based on *race* can only be justified by very weighty reasons - the Government had proved sufficiently that this database had a justified and weighty aim and was necessary to pursue that aim (the database was not treated as a positive action).

Proportionality of the means was established by the Council of State by pointing at the serious nature of the problems being tackled and the fact that the lack of adequate registration was part of the specific problems of the group concerned.[406]

Name of the court: ETC
Date of decision: 30 Nov. 2009
Reference number: Opinion 2009/112 and Opinion 2009/113
Address of the webpage: http://www.mensenrechten.nl/publicaties/oordelen/2009-112 and http://www.mensenrechten.nl/publicaties/oordelen/2009-113
Held: No breach
Brief summary: An NGO of Roma people and a Roma family complained about the social assistance system of a municipal authority. In this system, Roma families with multiple problems (e.g. financial, health, educational and pedagogical problems) are placed in a special program, which includes that they need to accept a ‘family coach’. The goal of the program is, *inter alia*, to improve the participation in education of Roma children and to decrease dependency on social benefits of Roma families. According to the NGO, 10 Roma families had suffered damages since their benefits were cut, because they had refused to participate in the program. However, the NGO could not substantiate this claim, because the families refused to identify themselves, and therefore the ETC could not check whether any such damage really had occurred. In the second case, a family claimed that their benefits were withdrawn because of the program, but according to the ETC in that case the cause of the refusal to grant the social assistance benefit was that the family had not supplied the authorities with all the necessary information about its income and property.

The ETC rejected the claim that – considering the position and culture of Roma people – these families had a right that the rules of the Act on Labour and Social Assistance should be applied more leniently in their case. Besides, the ETC also

[406] More about this issue in section 2.3.1. of this report.

considered that a (local) Government has the authority to develop special targeted programs for certain groups in society, as long as it stays within the limits of the equal treatment legislation, i.e. as long as this policy does not amount to racial or ethnic discrimination.

Name of the court: District Court Haarlem
Date of decision: 27 April 2010
Reference number: LJN: BM5906
Address of the webpage: http://zoeken.rechtspraak.nl/Default.aspx (search: LJN: BM5906)
Held: Breach
Brief summary: An air stewardess complained to the management that she had been discriminated against on ground of her race. The airline dealt with the complaint, but failed to inform the stewardess about the outcome of the procedure. In fact, it remained unclear what measures the airline had taken against the offender.

The refusal of the stewardess to 'mediate' with the offender was seen by the management as a refusal to co-operate. The airline subsequently threatened not to extend her temporary contract (this decision was later repealed). The ETC saw this as a clear case of victimisation.[407] The civil court judge, in a later dismissal case, condemns the practice of the airline (which it evaluates in terms of 'disturbing the good working relations') and makes explicit that complaints about discriminations should be dealt with in a timely and transparent manner, always giving feedback to the complainant on the outcome of the complaint (e.g. in terms of sanctions against the offender).

Name of the court: ETC
Date of decision: 25 May 2010
Reference number: Opinion 2010-79
Address of the webpage: http://www.mensenrechten.nl/publicaties/oordelen/2010-79
Held: Breach
Brief summary: A female teacher of Surinam origin complained about pay discrimination on ground of race or ethnic origin. The ETC found that cases of pay discrimination on ground of race are comparable and need the same methodological approach as cases of pay discrimination on ground of sex. The ETC found that the person with whom the applicant's pay could be compared was indeed being paid a higher salary. According to the school, this was because of the previously earned salary of the comparator. The Commission, in sex discrimination cases, has expressed doubts about the usage of the criterion "previously earned salary" because this does not guarantee that this is in accordance with the value of the (new)

[407] ETC 29 March 2010, Opinion 2010-52.Web page: http://www.mensenrechten.nl/publicaties/oordelen/2010-52.

work, nor that the quality of the work is taken into account.[408] This criterion is suspect of possibly neglecting relevant work experience of an applicant or of (positively) taking into consideration non-relevant factors. In the case at hand, the ETC finds that the pay policy of the school is not consistent and not transparent, and that therefore there is a suspicion of unequal pay. The school has not succeeded in taking away this suspicion, therefore the ETC finds a case of unlawful pay discrimination on the ground of race/ethnicity.

***Age*:**

Name of the court: ETC
Date of decision: 3 October 2005
Reference number: Opinion 2005-180
Address of the webpage: http://www.mensenrechten.nl/publicaties/oordelen/2005-180
Held: Breach
Brief summary: A temporary contract of a young employee in a supermarket was not substituted into a permanent contract. According to the applicant this decision was due to her age. The ETC applied the rules of the (partial) reversal of the burden of proof (Article 10 GETA, also applicable in ADA cases). The applicant stated that she had heard rumors that the management found 18 and 19 year old employees 'too expensive'. According to the ETC, this 'fact' is reflected in the general picture that exists in the media about the human resource policies of super markets and that also is apparent from other complaints that are brought to the attention of the ETC. All together this 'picture' is enough to substantiate the criterion "*if a person who considers herself to have been wronged*"). The supermarket did not succeed to prove that there was no discrimination.

Name of the court: Hoge Raad der Nederlanden (Supreme Court)
Date of decision: 10 November 2006
Reference number: LJN: AY9216
Address of the webpage:
http://zoeken.rechtspraak.nl/resultpage.aspx?snelzoeken=true&searchtype=ljn&ljn=AY9216
Held: No breach[409]
Brief summary: The Federation of Trade Unions (FNV) and the Youth Organization of the Christian Federation of Trade Unions (CNV) claimed that the Kingdom of the Netherlands was discriminating on the ground of age without any justification, by distinguishing between 15-year old children and 13- and 14-year old children. For the former, there is minimum-wage legislation. For the latter there is not, notwithstanding

[408] See e.g. ETC 2010-44, to be downloaded from http://www.mensenrechten.nl/publicaties/oordelen/2010-44 (Last accessed on 1 November 2012).
[409] Earlier, the Court of Appeal in The Hague had held that there was a breach of the non-discrimination principle entailed in these international provisions. See: Hof Den Haag [Court of Appeal, the Hague] 24 March 2005, JAR 2005, 98.

the fact that they are allowed to work under restricted conditions. The Supreme Court stated that, in the light of international provisions (Art. 26 ICCPR; Art. 7 European Social Charter; Art. 7 ICESCR and Directive 94/33/EC),[410] there must be an objective and reasonable justification to treat these cases differently. It assessed the legitimacy of the aim of this distinction and the effectiveness and proportionality of the means used positively. More in general, education deserves priority over the regular employment of young children.

Name of the court: ETC
Date of decision: 25 March and 21 July 2005
Reference number: Opinions 2005-49, 2005-50 and 2005-135
Address of the webpage: http://www.mensenrechten.nl/publicaties/oordelen/2005-50 and http://www.mensenrechten.nl/publicaties/oordelen/2005-135
Held: Breach in first two cases, no breach in the latter
Brief summary: These three cases concerned age discrimination in the liberal professions. Doctors and psychiatrists only get paid for their work by medical insurance companies when they have a service contract with one of these companies.

The ETC is of the opinion that in general it can be accepted as an argument that elderly people (over 65) will sometimes have trouble in performing their medical profession accurately. Whether this needs to be tested in every individual case depends on the question whether there are valid methods available to carry out such testing.[411]

Name of the court: ETC
Date of decision: 19 December 2005
Reference number: Opinion 2005-240
Address of the webpage: http://www.mensenrechten.nl/publicaties/oordelen/2005-240
Held: Breach
Brief summary: In this case, an applicant stated that he was rejected for a job because of his age by pointing at the wording of the job advertisement. The ETC held that a job advertisement, describing the team as 'young and dynamic', constituted a presumption of discrimination which has to be refuted by the defendant. The ETC hereby applied Article 12(1) ADA concerning the burden of proof. Article 3(a) of the Age Discrimination Act (ADA), read in conjunction with Article 1, prohibits age discrimination in publicly made job offers. The criterion applied by the ETC is whether

[410] At the time when these court proceedings were initiated, the ADA was not yet in force. However, under the ADA it would most probably have been decided the same way.
[411] A similar conclusion can be drawn from case law of the Centrale Raad van Beroep [the Highest Social Security Court] and Hof Den Bosch [the Court of Appeal Den Bosch]: CRvB 17 februari 2005, *TAR* 2005, 70; Hof Den Bosch 10 mei 2005, *JAR* 2005, 149. These were cases concerning 'functional age dismissal' in the (voluntary) fire departments. At the time that these cases were initiated before the courts the ADA was not yet in force. The Courts therefore use Article 26 ICCPR.

the job description implies that only or preferably people of a certain age category will be employed. As the defendant did not succeed in proving that the selection had not taken place on the basis of the applicant's age, this rejection was in breach with the ADA.

Name of the court: ETC
Date of decision: 27 August 2007 and 4 September 2007
Reference number: Opinion 2007-158 and Opinion 2007-162
Address of the webpage: http://www.mensenrechten.nl/publicaties/oordelen/2007-158 and http://www.mensenrechten.nl/publicaties/oordelen/2007-162
Held: Breach (2007-158) and no breach (2007-162)
Brief summary: In the first case, a maximum work experience requirement of 3 years for a vacancy for 'junior policy advisor' at the Ministry of Foreign Affairs was deemed unjustifiable indirect distinction on the ground of age. A 38 year old man who had complained for not being invited for an interview was told by representatives of the Ministry that "applicants above 30 years would have a problem".

In the second case, a local Government managed to justify indirect distinction on ground of age by demanding a certain work experience for a "prospective policy advisor". The local Government had argued successfully that the nature of the work activities demanded for an applicant who is not over-qualified.

Name of the court: ETC
Date of decision: 2 August 2007
Reference number: Opinion 2007-148
Address of the webpage: http://www.mensenrechten.nl/publicaties/oordelen/2007-148
Held: Breach
Brief summary: A professional oboist was demoted by his employer (an orchestra) because of reaching the age of 60, according to a regulation arranged in the collective agreement for Dutch Orchestras. The ETC deemed the procedure of the orchestra as well as the regulation in the collective agreement unlawful, for it is a direct distinction on the ground of age.

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

Name of the court: District Court of Amsterdam (Summary proceedings) / ETC
Date of decision: District Court 21 February 2011 and ETC 22 March 2011
Reference number: LJN: BP6875 / Opinion 2011-38
Address of the webpage: District Court of Amsterdam: www.rechtspraak.nl (last accessed 24 March 2011); use as search term: LJN: BP6875

ETC: http://www.mensenrechten.nl/publicaties/oordelen/2011-38 (last accessed 1 November 2012)
Brief summary: According to the Collective Agreement, KLM may terminate a permanent employment contract with air stewards/stewardesses on the date that they reach the age of 60. The employee may then ask for continuation of the contract until the age of 65. KLM may only refuse prolongation in case of 'special circumstances', including disability to do the work and shortcomings in the functioning of the employee. A KLM air stewardess, born in 1950, worked for KLM on a permanent employment contract since 1993. It was established that no regular evaluations of the functioning of this air stewardess had taken place over the last years. However, some incidents had led to formal warnings and to instigating coaching trajectories with this employee in order to improve her communication skills. After she had asked for continuation until the age of 65, she was offered a temporary contract for one year. This contract would expire in March 2011, and KLM had announced that it would not again offer her a temporary contract (for 4 more years).

The District Court found that the relevant provisions in the Collective Agreement are a prima facie case of direct discrimination on the ground of age for which no objective justification appears to exist. In that regard, the Court held that KLM had not succeeded in showing that it had a *reasonable interest* in terminating employment contracts with its air stewardesses at this early age. KLM had not shown statistics about the increase of sickness leave, nor had demonstrated that specific physical requirements must be met (and that elderly people could not meet them). On this ground, the measure was already considered not to be justifiable. Therefore, the appropriate and necessary test did not need to be applied.

In the same case (decided by the ETC one month later), the ETC first notes that Art. 7(1) sub (a) ADA contains an exception to the prohibition to discriminate in respect to termination in case of the employee reaching the age of 65 (pensionable age). For any termination on an earlier age there must be an objective justification (Art. 7(1) sub (c) ADA). According to the ETC. the reason given by KLM, namely that it wants to avoid that it has to continue to employ badly functioning employees until the age of 65, may count as a legitimate aim. As far as the temporary contract for only one year is concerned, the aim was to give the stewardess an opportunity to improve her functioning, which is also legitimate in the eyes of the ETC. The means chosen are also considered to be appropriate to reach these aims. However, the ETC states that the means are not necessary. Under the Dutch labour laws, KLM has other means to terminate an employment contract with permanent employees who do not function properly (anymore). A general clause concerning the termination at the age of 60 therefore is not necessary. The ETC concluded that indeed there is a breach of the equal treatment norm in the ADA.

***Disability and Chronic Illness*:**

Name of the court: ETC
Date of decision: 13 December 2005

Reference number: Opinion 2005-234
Address of the webpage: http://www.mensenrechten.nl/publicaties/oordelen/2005-234
Held: Breach
Brief summary: The claimant in this case had a whiplash as a consequence of a car accident. As a consequence of that he has been absent from work several times and he has not received several bonuses, which he did get in the past and which were given to his co-workers even when they had also been absent from work for the same duration of time. The ETC *inter alia* interpreted the word ' disability' in a broad way. It states that the overall goal of the DDA asks for a 'broad minded' interpretation. Also, the ETC stated that the comparison to be made is between disabled persons and non-disabled persons. The complainant had compared himself to other disabled persons, who (as the employer proved) did indeed get equal treatment. However, the fact that the employer treated all disabled persons equally did not mean that he could not have treated the applicant unequally as compared to people who are not disabled.

Name of the court: ETC
Date of decision: 23 November 2006
Reference number: Opinion 2006-227
Address of the webpage: http://www.mensenrechten.nl/publicaties/oordelen/2006-227
Held: No breach
Brief summary: A student has been refused to become a trainee at a University Medical Centre and states that this refusal is based on the fact that her mother has a chronic disease. Implicitly the ETC acknowledges in this case that discrimination by association is also prohibited under the DDA. However, in the case at hand there was no proof of this. As for the possibility that her own (possible) future disability could play a role, the applicant had not proven that the Medical Centre has refused to give her this position because they were afraid that she would get the same disease or that she would be mentally incapable of doing the work as a consequence of the stress caused by her mother's condition.

The applicant did not prove that she herself had been disadvantaged as a consequence of disability or association with a disabled person.

Name of the court: ETC
Date of decision: 12 February 2007
Reference number: Opinion 2007-26
Address of the webpage: http://www.mensenrechten.nl/publicaties/oordelen/2007-26
Held: No breach
Brief summary: The applicant was dismissed from a course for beautician, due to suffering of narcolepsies. The main features of this disease are an incapacity to concentrate and to stay awake during the day. The dismissal constituted a distinction on ground of chronic disease, which is forbidden by Article 6 of the DDA.

Nevertheless, the ETC deemed the dismissal justified, for the applicant failed to ask for and to consult about a possible reasonable accommodations. Furthermore, the narcolepsies could be a threat to the health of third persons, namely customers, since a beautician has to handle risky apparatus and tools.

Name of the court: ETC
Date of decision: 27 January 2010
Reference number: Opinion 2010-11
Address of the webpage: http://www.mensenrechten.nl/publicaties/oordelen/2010-11
Held: No breach
Brief summary: A university student who needed to use a wheel chair for transportation complained that the university where he studied had not made reasonable accommodations to make it possible for him to attend all lectures and exams and visit libraries and other student facilities. The University explained that it had taken all appropriate measures to make it possible for the student to participate as fully as possible. At the request of this particular student, it had (inter alia) adjusted a ramp, had put separate tables in the auditoriums, and had made many more adaptations. Also, it provided some immaterial accommodations, like e.g. personal assistance in the library. The student also complained that the University did not comply with the general regulations in the so-called *Bouwbesluit* (Decree on Building). The ETC concluded on the basis of an expert's report that there was no breach of this Decree. Also, the ETC found that the University had indeed provided several reasonable accommodations and that the extra's that the student still requested (i.a. full access to the library, where personal assistance to bring books to a separate room next to the library was provided for) were not proportionate to the amount of investments that this would require from the university.

Name of the court: ETC
Date of decision: 5 March 2010
Reference number: Opinion 2010-35
Address of the webpage: http://www.mensenrechten.nl/publicaties/oordelen/2010-35
Held: Breach
Brief summary: In 2007, the scope of the DDA was extended to (inter alia) the field of housing.[412] In March 2010, the ETC for the first time gave an Opinion on this new provision. It concerned a case against a private Association of Owners of an Apartment complex. The applicant (one of the owners) had to use an electric scoot mobile as the only possible means for her own transportation. She requested the board of the Owners Association to get permission to park this vehicle near her own

[412] Articles 6a, 6b and 6c were included in the DDA. See Staatsblad 2009-101, Wet van 19 jan. 2009, (effective from 1 August 2009) '*Wijziging van de Wet gelijke behandeling op grond van handicap of chronische ziekte in verband met de uitbreiding met onderwijs als bedoeld in de Wet op het primair onderwijs en de Wet op het voortgezet onderwijs en met wonen'* (= *Amendment to the Disability Discrimination Act concerning the extention to primary and secondary education and housing*).

apartment's front door, or (preferably) on a vacant spot in the joint car parking garage of the complex. Refusing to grant permission to the applicant to put a scoot mobile on the landing near her own front door could be reasonable when this would lead to serious risks, e.g. the risk that people would be obstructed to leave the building in case of fire. It is the applicant's duty to make clear that he needs a reasonable accommodation and which accommodation would be appropriate and necessary, which in this case was done properly. The defendant then has to prove that the required accommodation is not reasonable (i.e. is not appropriate and necessary and/or putting an undue burden on the defendant). The latter may be also the case when the accommodation is not feasible for health and safety reasons. The defendant had argued that it was only obliged to provide an accommodation when the applicant had proved that she herself could in no way find a proper solution. This is not a correct understanding of the law. The applicants own means to solve the problem do come into play within the framework of the proportionality test, but they are not decisive. The suggestion that the applicant could rebuild her own storage room therefore was not reasonable, since there existed another (less costly and more convenient – for not taking away the applicant's possibilities to store things) possibility to park her scoot mobile in the garage.[413]

Name of the court: ETC
Date of decision: 15 June 2011
Reference number: Opinion 2011-90
Address of the webpage: http://www.mensenrechten.nl/publicaties/oordelen/2011-90
Held: Breach
Brief summary: A man working on a 6 month-term temporary contract got a first extension of 6 months and a positive job evaluation two weeks before this second term expired. In the same period, he reported ill several times because he could no longer cope with the stress at home, where he had to take over all household and care activities of his wife, who had become partly paralyzed because of an unsuccessful hernia operation. After he got a letter stating that his contract would not be prolonged, the man had a meeting with a company director, who told him that indeed the situation at home played a role in this decision. This conversation was recorded with a mobile phone, without the director's consent. The ETC stated that the complainant brought sufficient elements to suspect a discrimination case for the burden of proof to shift to the defendant. Although economic reasons may also have played a role, the defendant did not contest that the complainants 'situation at home' was indeed mentioned as a reason not to prolong the contract. Disability does not need to be the sole reason for a dismissal or non-prolongation of a contract. With reference to the CJEU *Coleman* case,[414] the ETC found that there was indeed a case of unlawful discrimination by association on the ground of disability.

[413] See for a similar case, ETC Opinion 2011-30.
[414] CJEU 17 July 2008, C-303/06.

***Religion and Belief*:**

Name of the court: ETC
Date of decision: 8 September 2004
Reference number: Opinion 2004-112
Address of the webpage: http://www.mensenrechten.nl/publicaties/oordelen/2004-112
Held: Breach
Brief summary: The respondent was a restaurant that conducted a policy according to which customers were prohibited from wearing any head covering. As a consequence of this policy four Muslim women who by reason of their belief were wearing headscarves were refused entry into the restaurant. Discrimination on the ground of religion in the area of goods and services are covered under the GETA.

According to the ETC this is a prima facie indirect religious distinction which could not be objectively justified. Although the respondent's aim was legitimate, the means used to achieve it were neither appropriate nor necessary.

Name of the court: ETC
Date of decision: 15 April 2005
Reference number: Opinion 2005-67
Address of the webpage: http://www.mensenrechten.nl/publicaties/oordelen/2005-67
Held: Breach
Brief summary: A complainant stated that a distinction on the ground of 'belief or philosophy of life' was made because she did not get a job on the ground that the employer suspected that she was a member of a certain religious group. Is the ' belief' of Osho[415] to be considered as a religion? In this Opinion the ETC gives a general guideline as to what is to be considered as a religion. Central in the distinction between ' religion' and ' philosophy of life'[416] is that in the first a ' high authority' ('God') is central. Also, it should not be a mere individual opinion.[417] However, the employer did make an unlawful distinction on the ground of philosophy of life; the way the employer asked questions about her beliefs even could be qualified as harassment.

Name of the court: ETC
Date of decision: 27 March 2006
Reference number: Opinion 2006-51
Address of the webpage: http://www.mensenrechten.nl/publicaties/oordelen/2006-51
Held: Breach

[415] The Bagwan Shree Rajneesh philosophy.
[416] The other protected ground in the GETA. Belief is as such not a protected ground. See para 2.1.1. of this report.
[417] See also 2005-162 (Rastafarians) and 2005-22 (Nazireërs).

Brief summary: An Islamic woman was refused admittance to a school where she wanted to be trained as an educational assistant, because she had indicated that she did not want to shake hands with men. This is, according to the ETC, an expression of religious belief.[418] The ETC concluded that, since the school did not directly refer to the applicant's religion, the refusal amounted to indirect discrimination. By focusing on the behavioural codes of Dutch society, the school excluded pupils from minority cultures. There were other ways of showing respect than by means of shaking hands. Equality of men and women fundamental principle could also be upheld by asking the applicant to shake hands with neither men nor women.[419]

Name of the court: ETC
Date of decision: 20 July 2006
Reference number: Opinion 2006-154
Address of the webpage: http://www.mensenrechten.nl/publicaties/oordelen/2006-154
Held: No breach
Brief summary: A former student of an institute that provides education and training for religious spokesmen or leaders for a particular Christian Church (so-called 'Pentecostalism') wanted to spend some more time there in order to be able to pass some exams, but had already expressed his feeling that he did not fully subscribe to the beliefs and convictions of his Church anymore. He also wanted to live together with his girlfriend. The institute refused (re)admission. The ETC examined whether the institute could be seen as an independent section of a Church. This appeared to be the case, since the institute was very closely related to the Church in question and was instrumental in obtaining the main goals of the Church. The requirement that students should not have sexual relationships outside marriage was considered of central importance for the internal affairs of this institute. The admittance policy and educational functions were closely linked to its religious identity and was applied equally to all students. Therefore Article 3a of the GETA (i.e. an exception to the scope of the GETA) is applicable and the case falls outside the scope of the equal treatment legislation.

Name of the court: District Court Rotterdam
Date of decision: 6 August 2008
Reference number: LJN: BD9643
Address of the webpage:
http://zoeken.rechtspraak.nl/resultpage.aspx?snelzoeken=true&searchtype=kenmerken&vrije_tekst=hand+schudden
Held: No breach
Brief summary: A male Muslim applicant was rejected for the position of 'Customer Manager' at the Social Services department of the city of Rotterdam because he refused to shake hands with individuals of the opposite sex. The applicant claimed

[418] See also ETC Opinions 1998-94, 1998-95 and 2002-22.
[419] See also J. Tigchelaar, 'Respect! Handen schudden II), in: *NJCM-Bulletin* 2006, nr. 6, p. 833-843.

that this was because of his Islamic belief. The municipality stated in defence that they had to protect women against discrimination by a civil servant. In the specific job of customer manager, the applicant would be receiving many people, and therefore 'greeting' should be regarded as an essential aspect of the position.

In earlier instance, the ETC decided that the protection of women against discrimination constituted a legitimate aim, but that the municipality had failed to seek alternative ways of showing respect to both male and female clients equally, as the applicant had offered not to shake hands with both men and women. (See ETC Opinion 2006-202). The District Court, however, judged that a customer manager is an important contact person between the local authorities and their citizens. The Court ruled that the community has the right to choose 'to observe the usual rules of etiquette and of greeting customs in the Netherlands'. As a result, the Court considered it necessary and proportional to reject a candidate for the specific position who is not willing to observe those rules of etiquette.

Name of the court: ETC
Date of decision: 23 October 2008
Reference number: Opinion 2008-123
Address of the webpage: http://www.mensenrechten.nl/publicaties/oordelen/2008-123
Held: +/- breach
Brief summary: A police officer of the Amsterdam-Amstelland police force, who previously had been performing her work in civilian clothes (her tasks were of administrative nature), had been ordered to wear the police uniform as a result of a change in the police force's dress code regulations. This meant that she was no longer able to wear her headscarf. The ETC acknowledges the right of the Ministry / Head of Police to require that police officials who are in contact with the general public should wear a uniform.

However, for some functions where there is no such contact, they should be restrictive in providing that wearing a uniform is obligatory. In case of a police uniform which rules out the wearing of religious signs such as a headscarf, the ETC recommends a restrictive use of the requirement of wearing the uniform, especially in cases when there is no contact between a police officer and the general public.

Name of the court: Central Council of Appeal (Highest administrative judge)
Date of decision: 11 May 2009
Reference number: LJN: BI2440
Address of the webpage:
http://zoeken.rechtspraak.nl/resultpage.aspx?snelzoeken=true&searchtype=ljn&ljn=BI2440&u_ljn=BI2440
Held: No Breach

Brief summary: A female teacher decided not to shake hands with male persons anymore, and was subsequently dismissed. In 2006, the ETC gave at its opinion that this constituted indirect discrimination on the ground of religion.[420] The case was also dealt with in the administrative courts (since she was a civil servant). The school said they had dismissed her on ground of a breach of confidence between employer and employee. In first instance the dismissal was accepted by the District Court of Utrecht on 30 August 2007.[421] The Court held that neither the freedom of religion nor any other fundamental principle was at stake in this case: in the view of the Court, the case was simply about the reasonableness of continuing the employment contract.

In the appeal case the Central Council of Appeal ('Centrale Raad van Beroep'), decided that the fact that there was a prima facie case of indirect discrimination on the grounds of religion/belief in this case could not be set aside by just applying general labour law norms. However, the Central Council of Appeal stated that the school had a legitimate aim in demanding their teachers to shake hands irrespective of sex, as they wanted to comply with prevailing customs in the Dutch society. This was deemed particularly important, as the school had many pupils and teachers of multi-ethnic descent. Pupils have to be prepared for a society in which shaking hands is the prevailing custom for greeting and showing respect. The teacher also had refused to accept an administrative position within the school in which she would not have to shake hands with other people. The dismissal of the teacher was judged lawful as it pursued a legitimate aim and the dismissal was deemed necessary and proportional.

Name of the court: Cantonal Court of Amsterdam (summary proceedings + appeal)
Date of decision: 14 December 2009 / 15 June 2010
Reference number: LJN: BK6378 / LJN: BM7410
Address of the webpage:
http://zoeken.rechtspraak.nl/resultpage.aspx?snelzoeken=true&searchtype=ljn&ljn=BK6378
http://zoeken.rechtspraak.nl/resultpage.aspx?snelzoeken=true&collection=rnl&querypage=../zoeken/zoeken.asp&searchtype=ljn&ljn=BM7410
Held: No Breach
Brief summary: A Dutch (Coptic) Christian tram driver was forbidden to wear a necklace with a cross on top of his uniform by his employer, the (privatized) city transportation company of Amsterdam. The wearing of necklaces was forbidden in general (regardless its religious significance) in the dress code of the transportation company. According to the company, this prohibition was necessary for a professional appearance of the personnel as well as for safety reasons (since a necklace can be used to strangle a person). The tram driver stated that wearing the

[420] ETC Opinion of 7 November 2006; Opinion 2006-220) http://www.mensenrechten.nl/publicaties/oordelen/2006-220, (Last accessed 1 November 2012).
[421] To be found at: http://zoeken.rechtspraak.nl/resultpage.aspx?snelzoeken=true&searchtype=ljn&ljn=BB2648. (last accessed 19 March 2013).

cross visibly was significant for his belief. He argued that he was discriminated against on the grounds of his religion/belief, all the more as the new uniform of the transportation company also consisted in headscarves for Muslim women. The Court held that he clothing requirements of the transportation company was not unreasonable and constituted neither direct nor indirect discrimination on the ground of religion. The prohibition to wear necklaces was very general, therefore was not only addressing people with religious symbols. According to the Court, a headscarf as it is worn by Muslim women is not comparable with a necklace, as the headscarf simply cannot be worn in an invisible way. On the contrary, a cross can be worn underneath the clothes. If considered necessary, the cross could be worn visibly on a ring or a bracelet, which the company had offered to pay for.

Contrary to this judgment, in June 2010, in the appeal case the Court decided that on first view the prohibition to wear the cross does indeed amount to indirect discrimination on the ground of religion. However, the Appeal Court found that the goal of the transport company to have a professional and neutral appearance is legitimate and that the means chosen to achieve this goal are appropriate and necessary. The Court concludes that therefore there were objective justifications for the indirect discrimination, and confirmed the judgment of the president of Cantonal Court that there was no discrimination.

In addition to the arguments in the Cantonal Court's judgment, the Appeal Court states that the Muslim headscarf is part of the transport company's uniform, since it has the same colours and the logo of the company is printed on it, and therefore it cannot be compared to a Christian cross.

Name of the court: ETC
Date of decision: 21 January 2010
Reference number: ETC 2010-10
Address of the webpage: http://www.mensenrechten.nl/publicaties/oordelen/2010-10
Held: Breach
Brief summary: A man with a beard (approximately 1 cm length) applied for a job at the Immigration Office (Immigratie en Naturalisatie Dienst / IND), which fell directly under the authority of the Ministry of Justice in the Netherlands (in 2010). The man was asked whether the beard was an expression of his religious beliefs. Upon a positive answer, he was denied the job. The justification given for this was that the people seeking asylum in the Netherlands need to have a feeling that the officials who evaluate their applications are absolutely neutral, in terms of their religion or political beliefs. Therefore, it was deemed objectively justified not to appoint the bearded man for this function. The ETC considered that since this is a case of direct discrimination on the ground of religion, there is only place for justifications which are allowed under the law. However, none of these had been brought forward by the Ministry. The ETC under scribes the necessity of having a neutral appearance. However, the Ministry wants to reach this goal by making very general assessments of applicants on the basis of their outer appearances, not on the basis of a genuine

individual assessment of the applicant's real beliefs and attitudes. Therefore the Ministry is in breach of the Equal Treatment Law.

***Sexual Orientation*:**

Name of the court: Chairman of District Court The Hague (Summary Proceedings)
Date of decision: 26 July 2006
Reference number: LJN: AY5005
Address of the webpage:
http://zoeken.rechtspraak.nl/resultpage.aspx?snelzoeken=true&searchtype=ljn&ljn=AY5005
Held: No breach
Brief summary: The Court ruled that the Dutch General Federation for Dancing Sports did not unlawfully exclude a homosexual couple from participation in national dancing contests. With this, the Court judged differently from an earlier ETC Opinion (2004-116 of 21 September 2004) which stated that the exclusion of this couple constituted direct discrimination on the ground of sex, as well as direct discrimination on the ground of sexual orientation, for which there was no legally acceptable justification. The Court judged that although the dancing sports federation discriminated between sexes, this was justified under the clause in article 2(2) of the GETA which allows for 'gender specific requirements'.

In the case of sport competitions, a requirement could be, on the basis of a decree by the Government, the fact that there is a relevant difference in physical strength between men and women. Homosexual persons can actually participate in dancing contests, provided that they are prepared to dance with a partner of the opposite sex.

Name of the court: ETC
Date of decision: 2 August 2007
Reference number: Opinion 2007-85
Address of the webpage: http://www.mensenrechten.nl/publicaties/oordelen/2007-85
Held: No breach
Brief summary: Men who have had homosexual intercourse were rejected as blood donors by a blood bank on the basis of national and EU health directives. The ETC judged that rendering the possibility to donate blood, has to be regarded as rendering a service in the sense of the GETA.

The ETC held again (as it did before in opinion 2006-20) that there was an extralegal objective justification for a case of direct discrimination. The ETC considered the severe consequences of the risk of blood recipients for getting HIV infected blood as an objective justification, for there is still no blood test that is 100 % scientifically reliable on detecting HIV. This case is also of great importance for Dutch equal treatment law in general, as the ETC breaks through the closed system of legally prescribed justifications that might possible justify forms of direct discrimination in this case.

Name of the court: ETC
Date of decision: 15 April 2008
Reference number: Opinion 2008-40
Address of the webpage: http://www.mensenrechten.nl/publicaties/oordelen/2008-40
Held: Breach
Brief summary: A municipality in the Netherlands (*Langedijk*) had rejected an applicant for the position of registrar, for the reason that he was not willing to marry same-sex couples (same-sex couples have a right to marry under Dutch law since 1998). The applicant stated that he had religiously based conscientious objections against same-sex marriage, and therefore he was indirectly discriminated against on the ground of religion. In earlier occasions (ETC Opinions 2002-25 and 2005-26), the ETC found that municipalities should search for 'practical solutions' in time-tables, in order to employ applicants with conscientious objections against same-sex marriages and at the same time have same-sex marriages performed by colleagues without such objections. In this case however, the ETC judged that the rights of third persons (namely same-sex couples) were at stake.

The ETC deemed it "hard to justify" that a municipality allowing a registrar to discriminate between same-sex and heterosexual couples. Therefore, the rejection of the applicant constituted indirect discrimination on the ground of religion, but this decision was objectively justified. In this case, the general principle of non-discrimination is conflicting with the principle of the equal right to be employed in public office. The ETC now seems to attach more importance to the exemplary role of a (local) Government in combating discrimination.

However, as the Opinions of the ETC are not binding, it is not sure how such a case would be judged by the Court, which has deemed a dismissal by a municipality unlawful in the past in similar circumstances on the basis of general provisions in labour law (District Court of Leeuwarden 24 June 2003, LJN: AH8543).[422]

Name of the court: Hoge Raad der Nederlanden (Supreme Court)
Date of decision: 10 July 2009
Reference number: LJN: BI4209
Address of the webpage: www.rechtspraak.nl (search: BI4209)

[422] The issue continues to raise considerable debate in The Netherlands. On 9 November 2011, the Government announced that it had asked the Council of State to give advice in this matter and that no new legislation would be proposed before this advice would be published. The Green-Left Party then proposed a motion in Parliament in which the Government was requested to propose new legislation in which it will become impossible for local governmentsGovernments to employ marriage registrars who are not willing to marry same sex couples from 1 January 2012 onwards. Motie van Gent c.s., Tweede Kamer 2010-2011, 27017, nr 77.This motion was accepted by a majority of Parliament on 15 November 2011. No legislation is proposed by the governmentGovernment thus far (March 2012). Instead the governmentGovernment has asked the Council of State for advice on this issue, which decision raised a lot of criticism from the side of Parliament. See Tweede Kamer 2011-2012, 28 481, nr. 17.

Held: No breach
Brief summary: Supreme Court judgment in a (tort law) case concerning sexual harassment; the incident occurred between two presumably gay men (a director/perpetrator and a member of staff/victim of a small foundation). The staff member claimed damages, stating that the sexual harassment was tort and that both the director and the board of the foundation were liable for that. After having lost the case in first instance and in appeal, the victim appealed at the Supreme Court, stating that the Court of Appeal had misinterpreted the Dutch legal definition of sexual harassment by taking the director's motives into consideration and by not taking his own interpretation/feelings about the incident into consideration. The SC dismissed the case, stating that the Court of Appeal had applied the definition correctly. The definition applied in this case is the EU definition from the amended Equal Treatment Directive (2002/73/EC) and the Goods and Services Directive (2004/113/EC). This definition and the prohibition of sexual harassment was included in the General Equal Treatment Act (GETA), and consequently became applicable for *all* grounds that are covered under this Act. This includes inter alia sexual orientation. The Dutch definition of sexual harassment is identical to the definition in the Directives, apart from one single word; the word "unwanted" is left out by the Dutch legislator, because it wanted to avoid that the evaluation of the facts depended on the subjective experiences of the victim.

The SC confirmed that these experiences are not relevant, i.e. that an objective standard should be applied. However, contrary to the wording of the definition (which speaks of a conduct with a sexual connotation with a *purpose or effect of violating et cetera*), the SC concluded that the intentions of the perpetrator were indeed relevant. This interpretation goes against the wording and spirit of the legal definition (and the definition in the EC Directives as well).

Name of the court: ETC
Date of decision: 1 February 2010
Reference number: ETC Opinion 2010-19
Address of the webpage: http://www.mensenrechten.nl/publicaties/oordelen/2010-19
Held: Breach
Brief summary: A Beach Club organized 'parties' and had as a house rule that a party could only be visited by men who were accompanied by a woman.

A complaint was made by an organization of homosexuals, who stated that this was discrimination on the ground of sex and/or sexual orientation. The ETC concluded that the contested house rule makes a direct distinction on the ground of sex because male visitors are required to bring a woman to the party, while the same requirement does not apply to female visitors. For this direct discrimination no (legally accepted) justification ground can be brought forward. As for the claim that this (also) constitutes indirect discrimination on the ground of sexual orientation, the ETC concluded that indeed the particular house rule (negatively) affects homosexual men, where they cannot visit the party with their partner, while heterosexual men can do

so. The Beach Club had given as an objective justification that the house rule contributed to the good atmosphere and to avoiding aggressive behaviour on the side of the (male) visitors. Since the club did not strictly apply the rule and since other means of achieving the goal of a good atmosphere are possible, this defence was not accepted by the ETC.

Name of the court: ETC
Date of decision: 9 March 2010
Reference number: ETC Opinion 2010-32
Address of the webpage: http://www.mensenrechten.nl/publicaties/oordelen/2010-32
Held: No breach
Brief summary: An organization that organized Gay Sports Games wanted to order bath towels with the imprint “Gay Sports Nijmegen PINK Tournament 2009”. It asked a company “X” to give a price for this. However, “X” previously had made it clear on its web site that it would not do any print work that according to its own views was blasphemous or in any other way offensive to the good morals. On this ground, “X” refused to print the towels for the Gay Sports Games. Article 7 GETA, governing access to goods and services, only rules that when a certain good or service is offered to the general public, this may not be done in such a way that certain groups are excluded on the basis of a prohibited ground. However, Article 7 does not compel a company or owner of an enterprise to offer certain goods that are equally useful for everybody. According to the ETC “X” has made it clear on its web site that it only offers goods that in its own opinion are morally correct. This restriction does not make a direct distinction on a prohibited ground. The applicant’s claim that “X” thereby makes an indirect distinction on the ground of sexual orientation because mostly homosexual people will suffer the consequences of this policy of “X” , is not accepted by the ETC. The claimant’s position would lead to the view that the prohibition to discriminate in the area of goods and services would mean that any person could claim any good or service to be delivered as soon as this could in any way be linked to a non-discrimination ground.

Name of the court: ETC
Date of decision: 6 September 2010
Reference number: ETC Opinion 2010-135
Address of the webpage: http://www.mensenrechten.nl/publicaties/oordelen/2010-135
Held: Breach
Brief summary: A male employee in a shop encountered constant ‘joking’ from his assistant manager and fellow employees (all males) about his sexual orientation, which well established by some witnesses. The ETC concluded that thereby the dignity of the claimant had been violated and that a disrespectful environment had been created. The acts of the assistant manager may directly be attributed to the employer, who is therefore accountable and responsible for this discrimination. Also, it was established that the employer had not fulfiled his duty to provide working conditions that are free from discrimination, especially by failing to protect the

claimant against harassment / discrimination and by not taking his complaints seriously. Instead, the employer had not prolonged the temporary contract of the claimant. The ETC concluded that the complaints about (sexual) harassment had contributed to this decision, and that therefore this decision was discriminatory as well.

Name of the court: Cantonal Court Arnhem / Wageningen
Date of decision: 9 September 2010
Reference number: LJN: BN8113
Address of the webpage: http://zoeken.rechtspraak.nl/ (Search: LJN: BN8113)
Held: Breach
Brief summary: The Cantonal Court held that a building contractor had breached the criminal law provisions that prohibit discrimination in the course of one's professional activities (Art. 429quater Criminal Code). The defendant was fined with 1500 Euro fine, 750 Euro of which was provisional. The defendant, who owns a building company, had e-mailed to a homosexual person that he did not want to bring an offer for reconstruction work at this person's house, since he thought that there was no chance of a fruitful co-operation between them. The defendant stated that on grounds of his religious beliefs, he could not work for or with homosexual people. The Court stated that freedom of religion was indeed at stake, but that this freedom may be restricted by other interests, e.g. the right not to be discriminated against on grounds of sexual orientation. The legislator has balanced these rights when it adopted a legal provision prohibiting discrimination on grounds of sexual orientation. Therefore, this prohibition prevails over the freedom of religion.

Name of the court: The Cantonal Court of The Hague
Date of decision: 2 November 2011
Reference number: LJN: BU3104
Address of the webpage: http://zoeken.rechtspraak.nl/ (Search: LJN: BU3104)
Held: Breach
Brief summary: A homosexual teacher was dismissed by a (fundamentalist) protestant school after he had announced that he had left his wife and children and went to live together with his new male partner. On the basis of Article 5(2) of the GETA by way of an exception to the non-discrimination principle (Compare Art. 4(2) of Directive 2000/78/EC) a school that is based on a religious denomination has the right to require that its personnel subscribes to the particular religious convictions and contributes to maintaining the particular religious identity of the school. However, the exception-clause provides that any such requirements that are necessary for the fulfilment of a function, may not lead to unequal treatment which is based *on the sole ground* that someone is (inter alia) a homosexual. Additional circumstances must contribute to the conclusion that someone is not able to maintain / is in fact not maintaining the institution's religious ethos.

In the case at hand for the first time a Dutch court had to decide whether the particular circumstances of the case included such 'additional circumstances' or that the teacher had been dismissed on the basis of the sole fact that he was living

together with a male partner / i.e. being a homosexual. The judge concludes that the school has not really investigated whether the fact that the teacher had started to live together with a man indeed meant that he could no longer function as an 'identity bearer'. It appeared that the sole fact that he had done so was enough for the board to dismiss him. The fact that the teacher had discussed his homosexual relationship with parents and pupils and that he had made his dismissal public could not count as 'additional circumstances'. The same facts also could not lead to the conclusion that the working relations between the school board and the teacher were seriously disturbed and that the teacher had to be dismissed for that reason.