



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

COUNTRY REPORT 2010

THE NETHERLANDS

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State of affairs up to 1st January 2011

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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.

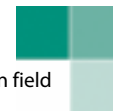


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Short list of abbreviations / translations:

ADA = Age Discrimination Act
 DDA = Disability Discrimination Act
 GETA = General Equal Treatment Act
 Equal treatment legislation = the ADA, DDA, GETA + the Equal Treatment Act for Men and Women in Employment
 ETC = Equal Treatment Commission
 Staatsblad = Law Gazette
 Tweede Kamer (der Staten Generaal) = Second Chamber (of Parliament)¹

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 (TK), parliamentary years, number of the Bill and the number of order, followed by a page number.



INTRODUCTION

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 automatically filter into 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 employees is regulated by the Civil Servants Act ("Ambtenarenwet"). For each sector of public employment, there is normally also a Collective Labour Agreement.

The following non-discrimination and equal treatment provisions / laws are of key importance:

- 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.
- EC-Treaty provisions and Directives can be directly applied under certain conditions.²
- 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). Discrimination is defined in Article 90quater.³ 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 in labour contracts (Articles 7:646-7:649).

² These are the normal conditions for applicability of EC-Law in the Member States.

³ This definition is substantially different from the definition in the Directives and from the definition of "onderscheid" (distinction) that is used in Dutch equal treatment legislation. The Criminal Code definition is more in line with the one in Article 1 of the UN CERD.

Employers are also liable if they fail to guarantee safe working conditions. This includes an environment free from discrimination and (sexual harassment (Article 7:658).

- The Civil Servants Act (“Ambtenarenwet”) contains similar provisions for the public service sector (Articles 125g and 125h).
- The Act on Working Conditions (“Arbeidsomstandighedenwet”) contains provisions concerning (sexual) harassment, aggression, violence and discrimination at the workplace. These provisions put a positive obligation on employers to prevent and combat discrimination and (sexual) harassment. The *Arbeidsinspectie* (Dutch Labour Inspectorate) can impose fines upon employers who are not complying with this obligation.⁴
- 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 by Dutch law since 1994 by the General Equal Treatment Act, or GETA (“Algemene Wet Gelijke Behandeling”).⁵ After adoption of the Directives, the GETA has been amended and complemented by the EC Implementation Act.⁶ This Act entered into force on the 1st of April 2004.⁷ 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.⁸ Every 5 years, an evaluation of the GETA takes place in which both the ETC and independent experts make an assessment of legal problems in the implementation and the social effects of the equal treatment legislation.⁹

⁴ Kamerstukken Tweede Kamer 2008-2009, 31 811 nr. A.

⁵ Staatsblad 1994, 230.

⁶ 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)”).

⁷ 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.

⁸ Explanatory Memorandum to the EC Implementation Act, Tweede Kamer, 2002-2003, 28 770, nr. 3, p. 3.

⁹ Evaluation reports by the ETC are published on its website: www.cgb.nl; 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.

- The Equal Treatment Act for Men and Women in Employment Act (“Wet gelijke behandeling van mannen en vrouwen bij de arbeid”), which already existed when the GETA came into force, regulates, among others, the topic of equal pay and occupational pensions.¹⁰
- 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.¹¹ The ADA entered into force on 1 May 2004.¹² In 2009, a first 5-year period evaluation report, written by independent experts, was sent to Parliament.¹³ The ETC issued its own evaluation report.¹⁴
- 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.¹⁵ The DDA entered into force on 1 December 2003 (except for Articles 7 and 8 which relate to public transport).¹⁶ In 2004 the DDA was amended by means of the EC Implementation Act.¹⁷ The initial scope of the DDA was restricted to employment and vocational education. The scope of the DDA has been extended to the fields of primary and secondary education (art. 5a DDA) and of housing (Article 6a, 6b and 6c DDA) in 2009.¹⁸

¹⁰ Since this Expert Network does not deal with the topic of gender discrimination, this Act will not be discussed in this Report.

¹¹ 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.

¹² 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.

¹³ See Tweede Kamer 2008-2009, 30 347, nr. 2.,

¹⁴ 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 ETC: www.cgb.nl

¹⁵ 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.

¹⁶ 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. A proposal for a bill amending the DDA in this respect has been made by some members of Parliament. See Tweede Kamer 2006-2007, 30878, nrs 1-3. This Bill was never discussed. In June 2009, the Government has announced that it will propose a Decree by which the Articles 7 & 8 of the Act will enter into force at the end of 2010. See Tweede Kamer 2008-2009, 29 355, nr. 39. This proposal was discussed between the government and Parliament in a special Committee meeting on 10 febr. 2010. See Tweede Kamer 2009-2010, 29 355, nr. 44.

¹⁷ See footnote 6.

¹⁸ 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 extension to primary and secondary education and housing).

In 2009, a first 5-year period evaluation report, written by independent experts, was sent to Parliament.¹⁹ The ETC also published its own evaluation report.²⁰

NB: Integration of Equal Treatment Legislation The Dutch Government is in the process of developing a new General Equal Treatment Act in which 4 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; 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.²¹ In 2010 the government held an internet consultation on the draft law and also asked the ETC for advise.²² The government is now in the process of preparing a Bill.

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.

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 Dutch legislator might need to bring the definition of 'indirect discrimination' more in line with the Directives' requirements. [See para. 2.3 of this report and also below in this section, where we discuss the Infringement Procedure.]

¹⁹ See Tweede Kamer 2008-2009, 29 355, nr. 39.

²⁰ The ETC report is titled: "Zonder vallen en opstaan; Evaluatie van de WGBHcz". To be found at www.cgb.nl

²¹ 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.

²² See the advice of the ETC at:

http://www.cgb.nl/publicaties/publicatie/221475/advies_2010_3_inzake_concept_wetsvoorstel_integratiewet (Last accessed on 10 March 2011.)

2. The accumulative conditions in the ‘harassment’ definition arguably fall short of the Directives’ ‘non regression’ clause. [See para. 2.4 of this report.]
3. Arguably, the Dutch government interprets the prohibition of an ‘instruction to make a distinction’ unduly narrow. [See para. 2.5 of this report.]
4. An unduly restrictive approach is also adopted by the Dutch government as regards the ‘scope of liability’ for discrimination. [See para. 3.1.3 of this report.]
5. Both Article 2(5) and Article 7(2) of the Framework Directive speak of national legislation or measures taken by the Member States government 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 para. 4.6 of this report.)
6. The partially reversed burden of proof is not applicable in case of victimisation claims, which falls short of EC requirements. [See para. 6.4 of this report.]
7. The requirement that sanctions be ‘effective’, ‘dissuasive’ and ‘proportionate’ seems not to be met by the Dutch legislation. [See para. 6.5 of this report.]
8. 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. para. 4.2 of this report where the wording of the exceptions based on Article 4(2) of the Framework Directive is discussed. See also para. 2.3 of this report and also below in this section, where we discuss the Infringement Procedure.]

Preliminary observation about terminology of Dutch equal treatment law:

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 advisor of the Government in the process of drafting new legislation.

The Council has advised the Government to abandon the neutral word ‘distinction’ and has demonstrated itself to be an advocate of using a more normative concept of discrimination.²³

²³ 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.

The main reason for this preference is to bring the terminology of Dutch equal treatment legislation in line with EC Equality Law.²⁴

In 2005, the Government has commissioned an in-depth study on this matter. This report was finalised in September 2006.²⁵ The conclusion of the author is 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 even in a case of direct discrimination justifications may be brought forward (open system). [See also para. 2.3 of this report and also below in this section, where we discuss the Infringement Procedure.]

0.3 Case-law

Provide a list of any important case law within the national legal system relating to the application and interpretation of the Directives. 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)

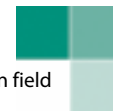
Brief summary of the key points of law and of the actual facts (no more than several sentences)

→ 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 concerning the equality grounds of the two Directives (also beyond employment on the grounds of Directive 2000/78/EC), even if it does not relate to the legislation transposing them - e.g. if it concerns previous legislation unrelated to the transposition of the Directives

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

²⁴ 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.)

²⁵ 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.



Case Law²⁶:

Race and ethnic origin:

Name of the court: Equal Treatment Commission (ETC)

Date of decision: 18 February 2005

Reference number: Opinion 2005-25²⁷

Address of the webpage: <http://www.cgb.nl/zoeken/?search=2005-25>

Held: Breach

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.²⁸ 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 then decides that this constitutes a form of 'hidden' direct discrimination on the ground of race for which the GETA allows no justification.²⁹ It is debated in the Netherlands whether the way in which the ETC constructs this category of hidden direct discrimination is the correct way. 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.³⁰

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.cgb.nl/zoeken/?search=2006-222>

Held: no breach

²⁶ 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 not 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 ETC. Opinions by the ETC are not binding. All publications of the ETC are available at www.cgb.nl and can easily be searched on the basis of the case's reference number. The parties' names are kept anonymous. The ETC gives more than a 100 Opinions a year. Due to limited space, only a few court cases and ETC Opinions can be presented in this overview.

²⁷ Also published in AB 2005, 230 with a case note of C.W. Noorlander.

²⁸ See also para 9 of this report under the heading of 'race'.

²⁹ This *Opinion* has also been discussed by B.P. Vermeulen in the annual '*Oordelenbundel*' of the ETC: '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.

³⁰ This method has been accepted in the case of pregnancy, which is equated with direct sex discrimination.

A family of travellers (people who live in caravans and travel around),³¹ 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.³²

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

The Dutch minister of Integration and Immigration policy had asked for and obtained an exemption under the Personal Details Protection Act from the competent authority (DDPA) in order to establish a database of Antillian youth (*'Verwijsindex Antillianen'*) without work or education and with criminal records. A complaint against this was lodged by a deliberative body of Dutch Antillians. According to the Minister and the DDPA, the database was required to trace the Antillian youth with problems in The Netherlands, which is particularly difficult, as young Antillians 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 Antillian 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).

³¹ 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.

³² The ECT did not openly refer to a more substantive notion of equality, like was done by the ECtHR in the *Thlimmenos* case. See: ECtHR, *Thlimmenos v. Greece* of 6 April 2000.

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.³³

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.cgb.nl/zoeken/?search=2009-112_and
<http://www.cgb.nl/zoeken/?search=2009-113>

Held: No breach

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 programme, which includes that they need to accept a 'family coach'. The goal of the programme 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 programme. 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 programme, 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 considered that a (local) government has the authority to develop special targeted programmes 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: ETC

Date of decision: 29 March 2010

Reference number: Opinion 2010-52

Address of the webpage: <http://www.cgb.nl/zoeken/?search=2010-52>

Held: Breach

(see below, next case)

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)

³³ More about this issue in par. 2.3.1. of this report.

**Held:** Breach

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, which subsequently threatened to lead to not extending her temporary contract (this decision was later repealed). The Equal Treatment Commission sees this as a clear case of victimisation. 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.cgb.nl/zoeken/?search=2010-79>**Held:** Breach

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 finds that the person with whom the applicant's pay may be compared is 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) work, nor that the quality of the work is taken into account. This can lead to pay differences between male and female workers and it may cause continuation of these differences. The new employer needs to investigate how the previous salary has been established (on what basis) and whether this salary is in accordance with the requirements for the new job (and expected job performance).³⁴ The criterion "previously earned salary" 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.

³⁴ See e.g. ETC 2010-44, to be downloaded from <http://www.cgb.nl/zoeken/?search=2010-44> (Last accessed on April 26, 2010)

**Age:****Name of the court:** ETC**Date of decision:** 3 October 2005**Reference number:** Opinion 2005-180**Address of the webpage:** <http://www.cgb.nl/zoeken/?search=2005-180>**Held: breach**

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 rumours 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 flows 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=ln&ln=AY9216>

Held: no breach.³⁵

The Federation of Trade Unions (FNV) and the Youth Organisation 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 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),³⁶ 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

³⁵ 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.

³⁶ 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.



Address of the webpage: <http://www.cgb.nl/zoeken/?search=2005-50> and <http://www.cgb.nl/zoeken/?search=2005-135>

Held: Breach in first two cases, no breach in the latter

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.³⁷

Name of the court: ETC

Date of decision: 19 December 2005

Reference number: Opinion 2005-240

Address of the webpage: <http://www.cgb.nl/zoeken/?search=2005-240>

Held: breach

In this case, a rejected applicant stated that he was rejected 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 public job offers. The criterion applied by the ETC is whether 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 ETC Opinion 2007-162

Address of the webpage: <http://www.cgb.nl/zoeken/?search=2007-158> and <http://www.cgb.nl/zoeken/?search=2007-162>

Held: breach (2007-158) and no breach (2007-162)

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".

³⁷ 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.

In a comparable 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 demands 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.cgb.nl/zoeken/?search=2007-148>

Held: Breach

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.

Disability and Chronic Illness:

Name of the court: ETC

Date of decision: 5 November 2004

Reference number: Opinion 2004-146

Address of the webpage: <http://www.cgb.nl/zoeken/?search=2004-146>

Held: breach

The respondent, a school, refuses a disabled job- applicant for the post of receptionist by reason of an alleged lack of authority / risk that the pupils would abuse him (the man suffered from hydrocefalie or ‘water head’). The Commission stresses that Article 17 of Directive 2000/78 explicitly states that employers cannot be obliged to hire candidates who cannot fulfil the essential requirements for the job.

If a disabled person cannot perform the essential job requirements and, if a reasonable accommodation cannot alter this situation, an employer may lawfully refuse her. However, in the case at hand it did not concern a person who was not suitable for the post at hand. The Commission took the view that none of the Article 3 exceptions of the DDA applied. Direct disability distinction. *Held: breach.*

Name of the court: ETC

Date of decision: 19 July 2005

Reference number: Opinion 2005-133

Address of the webpage: <http://www.cgb.nl/zoeken/?search=2005-133>

Held: no breach

The claimant stated that the employer had refused to change his temporary contract into a permanent contract because of his disability.

The ETC considered that the claimant had not notified the employer about the nature of his (psychological) problems (that caused malfunctioning) and therefore could not expect the employer to have taken measures (to provide a reasonable accommodation) in the period of his first temporary contract. This case touches upon the complicated matter whether an applicant for a job needs to notify the employer about the existence of a disability of chronic illness.

According to the Law on Medical Examinations [Wet Medische Keuringen] an applicant is not obliged to undergo medical examinations in the course of the application procedure. This can conflict with the DDA.³⁸

Name of the court: ETC

Date of decision: 13 December 2005

Reference number: Opinion 2005-234

Address of the webpage: <http://www.cgb.nl/zoeken/?search=2005-234>

Held: breach

The claimant 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.cgb.nl/zoeken/?search=2006-227>

Held: no breach

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 disablement 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.

³⁸ See W. Brussee & M. Kroes, 'Handicap en chronische ziekte' [Disability and Chronic Illness]. In: S.D. Burri (ed.) Oordelenbundel 2005. Kluwer, Deventer June 2006. The authors also discuss the following Opinions that deal with this same issue: 2005-40, 2005-41, 2005-44, 2005-186 and 2005-187. See about the conflict between the DDA and general labour law norms concerning the duty to inform the employer about disabilities Aart Hendriks NJB 2006, p. 1044.

The applicant did not prove that she herself had been disadvantaged as a consequence of disablement 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.cgb.nl/zoeken/?search=2007-26>

Held: no breach

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.cgb.nl/zoeken/?search=2010-11>

Held: no breach

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 Equal Treatment Commission (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.cgb.nl/zoeken/?search=2010-35>

Held: breach

In 2007, the scope of the DDA was extended to (inter alia) the field of housing.³⁹ In March 2010, the Equal Treatment Commission (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 his own apartment's front door, or (preferably) on a vacant spot in the joint car parking garage of the complex. This permission was denied to the applicant. The legislator has made it explicit that Owners Association's are among the organisations to whom the (personal) scope of the DDA applies. 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 ETC leaves 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. Refusing to grant permission to the applicant to put his scoot mobile on the landing near his 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 he himself 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 his 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 the scoot mobile in the garage.⁴⁰

³⁹Articles 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 extension to primary and secondary education and housing).

⁴⁰ See for a similar recent case, where the ETC also decided that an owners association had acted in breach of the DDA by refusing to make an adaptation in a garage in order for someone to be able to park a scoot mobile, ETC Opinion 2011-27.



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.cgb.nl/zoeken/?search=2010-112>

Held: breach

The respondent was a restaurant that conducted a policy according to which customers were prohibited from wearing headgear. As a consequence of this policy four Muslim women who by reason of their belief wear 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.cgb.nl/zoeken/?search=2005-67>

Held: breach

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 Osho⁴¹ 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'⁴² is that in the first a 'high authority' ('God') is central. Also, it should not be a mere individual opinion.⁴³ 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.cgb.nl/zoeken/?search=2006-51>

Held: breach

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.⁴⁴

⁴¹ The Bagwan Shree Rajneesh philosophy.

⁴² The other protected ground in the GETA. Belief is as such not a protected ground. See para 2.1.1. of this report.

⁴³ See also 2005-162 (Rastafarians) and 2005-22 (Nazireërs).

⁴⁴ See also ETC Opinions 1998-94, 1998-95 and 2002-22.

The ETC concluded that, since the school did not directly refer to the applicant's religion, the refusal amounted to indirect discrimination. By focussing 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.⁴⁵

Name of the court: ETC

Date of decision: 20 July 2006

Reference number: Opinion 2006-154

Address of the webpage: <http://www.cgb.nl/zoeken/?search=2006-154>

Held: no breach

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 is applicable and the case falls outside the scope of the equal treatment legislation.

Name of the court: Raad van State (Council of State, highest administrative court),

Date of decision: 5 December 2007

Reference number: LJN: BB9493

Address of the webpage:

<http://zoeken.rechtspraak.nl/resultpage.aspx?snelzoeken=true&searchtype=ljn&ljn=BB9493>

Brief summary: The political party SGP (Staatkundig Gereformeerde Partij) is founded on the Bible and a strict Reformed version of the Christian belief. In its view, women should not take part in political life, since their role and mission in life is not to lead over men. According to the statutes of the SGP, women can only become associate members of the party, which means that they cannot represent the party in Parliament or hold any other political position. A number of women's rights organizations issued a summons against the Dutch government, since in their view the government has failed to take steps against the discriminatory policy of the SGP.

⁴⁵ See also J. Tigchelaar, 'Respect! Handen schudden II), in: *NJCM-Bulletin* 2006, nr. 6, p. 833-843.

A District Court decided in 2005⁴⁶ that the government should take the necessary steps to ban discrimination of women in political and public life, as is prescribed by article 7 of CEDAW (previously, this case was found inadmissible before the ETC, which has no jurisdiction with regard to internal affairs of political parties, see *Opinion 2001-150*). This means inter alia that the government is not allowed to subsidize this party. As a consequence, the government stopped subsidizing the SGP.

However, in December 2007, the highest Administrative Court in the Netherlands (Raad van State) ruled that this decision of the Minister of Interior was illegal since the SGP had not breached Dutch criminal law provisions concerning discrimination, as was required by the law that governs the subsidizing of political parties. The government was ordered to give the subsidy back to the SGP.

A crucial underlying issue is whether the principle of democracy and the right to freedom of association are implying that political associations have the right to make (internal) rules and regulations whatever they want, even if these rules discriminate (in this case: against women). Secondly, the issue is complicated since the civil courts and the administrative courts appear to have different views on what the central government can or should do to here. There were also important civil court cases against the SGP, which will be discussed below.

Name of the court: Court of Appeal Den Haag

Date of decision: 20 December 2007

Reference number: Ljn: BC0619

Address of the webpage:

<http://zoeken.rechtspraak.nl/resultpage.aspx?snelzoeken=true&searchtype=lnj&lnj=BC0619>

Name of the court: Hoge Raad der Nederlanden (Supreme Court)

Date of decision: 9 April 2010,

Reference number: Ljn: BK4547

Address of the webpage: <http://zoeken.rechtspraak.nl/default.aspx> (search term: BK4547)

Brief summary: On appeal of the original District Court Judgment there were two subsequent judgments of the civil courts. First the Court of Appeal in The Hague, and in last instance the Dutch Supreme Court. The Court of Appeal decided that the SGP can indeed be compelled by the government to change its policies. In their view, in this case the prohibition on discrimination of women should prevail over the freedom of religion and association. Finally, the Supreme Court confirmed that indeed there is a breach of Article 7 CEDAW and that the government should take action against the SGP. However, it did not decide which action would be appropriate. Apparently, taking away the subsidy is not possible, without changing the law on subsidizing political parties. The government still has to decide what will be an appropriate action against the discriminatory policies of this political party.

⁴⁶ District Court of The Hague, 7 September 2005, Ljn: AU2088.



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

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 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 of 5 October 2006). 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.

In this case, the right to have a job as a civil servant without regard to religion is colliding with the right to be treated equally by civil servants. The case is complicated because 'shaking hands' is not a written right or obligation, but a custom, which might be considered as specific Western.

Name of the court: ETC

Date of decision: 23 October 2008

Reference number: Opinion 2008-123

Address of the webpage: <http://www.cgb.nl/zoeken/?search=2008-123>

Held: +/- breach

In this Opinion of the ETC Commission had to decide upon a recent change of policies of the Amsterdam-Amstelland police force. A police officer, who until that time had been performing her work in civilian clothes (her tasks were of administrative nature), had been ordered to wear the police uniform. This meant that she was no longer able to wear her headscarf (since the uniform instructions do not allow wearing anything else than the uniform cap). In the Opinion, 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 stating that wearing a uniform is obligatory. The ETC avoids taking a particular position in the delicate issue whether the police uniform dress code should be compatible or not with particular clothes or head gear that expresses some kind of religious belief. But in case of a police uniform which rules out religious signs such as a headscarf – a position to which the current government seems to incline to – 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

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.⁴⁷ 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 2007.⁴⁸ 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.

⁴⁷ ETC Opinion of 7 November 2006; Opinion 2006-220) <http://www.cgb.nl/zoeken/?search=2006-220>

⁴⁸ To be found at:

<http://zoeken.rechtspraak.nl/resultpage.aspx?snelzoeken=true&searchtype=ljn&ljn=BB2648>



Name of the court: Cantonal Court of Amsterdam (summary proceedings)

Date of decision: 14 December 2009

Reference number: LJN: BK6378

Address of the webpage:

<http://zoeken.rechtspraak.nl/resultpage.aspx?snelzoeken=true&searchtype=ljn&ljn=BK6378>

Held: no Breach

A Dutch 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) by the clothing requirements 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, who is a Christian from Egypt origin (Coptic), stated that wearing the 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. In *Kort Geding* (summary proceedings), the Cantonal Court of Amsterdam held that the 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 can not be worn in an invisible way. On the contrary, a cross can be worn underneath the clothes.

If it is considered necessary, the cross could be worn visibly on a ring or a bracelet, which the company had offered to pay for.

Name of the court: Cantonal Court of Amsterdam (summary proceedings)

Date of decision: 15 June 2010

Reference number: LJN: BM7410

Address of the webpage:

<http://zoeken.rechtspraak.nl/resultpage.aspx?snelzoeken=true&collection=rnl&querypage=../zoeken/zoeken.asp&searchtype=ljn&ljn=BM7410>

Held: no Breach

Contrary to the Cantonal Court, in June 2010, in the appeal case the Amsterdam Court of Appeal 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 judgement, 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 can not be compared to a Christian cross.

Name of the court: Equal Treatment Commission

Date of decision: 21 January 2010

Reference number: CGB 2010-10

Address of the webpage: <http://www.cgb.nl/zoeken/?search=2010-10>

Held: Breach

A man with a beard (appr. 1 cm length) applied for a job at the Immigration Office (Immigratie en Naturalisatie Dienst / IND), which falls directly under the authority of the Ministry of Justice in the Netherlands. 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 underlines 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

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

In a "Kort Geding" (summary proceeding), the Chairman of 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 Chairman judged different 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 Chairman 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: 27 February 2006

Reference number: Opinion 2006-20

Address of the webpage: <http://www.cgb.nl/zoeken/?search=2006-20>

Held: Breach

On the basis of national health policy, many Municipal Health Services supply cheap vaccinations against Hepatitis A and B to men with homosexual contacts, drug addicts and prostitutes on the ground of their increased risk of catching this illness. The applicant (male, heterosexual) requested a vaccination and had to pay far more than the above-mentioned groups.

The ETC considered this a direct discrimination on the ground of sexual orientation, because homosexuality is the distinguishing criterion. According to the ETC however, such direct discrimination may be justified when the prohibition of a certain measure would be unacceptable or completely irrational. In this case, public health interests can justify an inroad to the closed system of justifications.

The ETC advises the legislator to provide for such an exception by law as soon as possible.⁴⁹ This case is particularly interesting because for the first time the ETC decided (*contra legem*) that there was a possibility for an objective justification in a clear case of direct discrimination.

Thereby, the ETC – in a situation that application of this system would lead to outcomes that can in no way be deemed “rational” or “reasonable” – broke open the closed system of justification that has been laid down both in the Directives and in the Dutch equal treatment legislation.⁵⁰

Name of the court: ETC

Date of decision: 2 August 2007

Reference number: Opinion 2007-85

Address of the webpage: <http://www.cgb.nl/zoeken/?search=2007-85>

Held: no breach

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.

⁴⁹ This advise was already given to the government in the Evaluation Report of the ETC of the year 2000. The government has chosen not to follow up on that advise until now.

⁵⁰ See T. Loenen, ‘Doorbekende gesloten systeem AWGB’, in: *NJCM-Bulletin* 2006, nr. 6, p. 823-832.

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.cgb.nl/zoeken/?search=2008-40>

Held: breach

A municipality in the Netherlands (Gemeente *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 (Opinions 2002-25 and 2005-26), the Equal Treatment Commission (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.

In connection with this, less room is left for the individual religious conscience of the civil servant. It must be noticed that this Opinion of the ETC is opposing the intended policy of the government to ensure the rights of same-sex couples simultaneously with the rights of individual local registrars with conscientious objections. According to the government, every single municipality is obliged to perform same-sex marriages, but at the same time conscientious objections should be dealt with pragmatically. This means that every municipality is obliged to have one or more registrars who don't have objections towards same-sex marriage.

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).

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)

Held: no breach

Supreme Court judgement in a (tort law) case concerning sexual harassment that had 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 the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment*), the SC concluded that the intentions of the perpetrator were indeed relevant. In the present author's view, 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: Equal Treatment Commission

Date of decision: 1 February 2010

Reference number: ETC Opinion 2010-19

Address of the webpage: <http://www.cgb.nl/zoeken/?search=2010-19>

Held: breach

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 behavior 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: Equal Treatment Commission

Date of decision: 9 March 2010

Reference number: ETC Opinion 2010-32

Address of the webpage: <http://www.cgb.nl/zoeken/?search=2010-32>

Held: No breach

An organisation that organised 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. The ETC makes a comparison with a shop selling women's cloths; this shop can not be compelled to sell men's cloths as well. 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 ETC acknowledges that some people may take offence of the reason given by "X" for not wanting to deliver the requested towels.

However, it simply repeats its statement that Article 7 of the GETA does not compel any company to offer certain goods or services, *irrespective of the reason for this*. The claimants 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: Equal Treatment Commission

Date of decision: 6 September 2010

Reference number: ETC Opinion 2010-135

Address of the webpage: <http://www.cgb.nl/zoeken/?search=2010-135>

Held: breach

A male employee in a shop encountered constant 'joking' from his assistant manager and fellow employees (all males) about his sexual orientation. Also, he complained that the assistant manager had stroked over his leg while he stood very close to him at the Xerox machine. Some of the facts that were stated by the claimant were sufficiently counteracted by the defendant by means of testimonies to the contrary. However, it was well established by some witnesses that the assistant manager and the fellow workers had 'joked' about the sexual orientation of the claimant, inter alia by waving their hand in a very 'feminine' way during a meeting. 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 fulfilled 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

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 facts of the case were that 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.



Very few such criminal law cases are brought to the Courts by the public prosecutor, and even fewer are successful.⁵¹

⁵¹ 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 recent 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 from the web site of the Anne Frank Foundation: http://www.annefrank.org/ImageVault/Images/id_11703/scope_0/ImageVaultHandler.aspx (last accessed on 3 March 2011.)



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 that are covered by the Directives and beyond.

A Parliamentary motion to explicitly include ‘disability’ and ‘chronic disease’ in the list of grounds was accepted in 2001.⁵² According to the Government however, these grounds were covered by ‘any other grounds’. Nevertheless, it has investigated the possibility for an expansion of the list in Article 1.⁵³

In 2004, the ETC has advised to expand the list to all grounds covered by the GETA, the ADA and the DDA.⁵⁴ Subsequently, the Government announced that for the time being it would stick to its earlier opinion and commissioned at the same time an in-depth study into the matter by experts in constitutional law.⁵⁵ This commission of experts has published its report on April 12, 2006.⁵⁶ It concludes that it is not necessary to expand the list of grounds in Article 1 of the Constitution, since this provision 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 covered in the list of Article 1 (e.g. marital status).

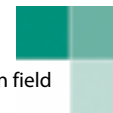
⁵² Motion Rouvoet of 6 December 2001, Tweede Kamer, 2001-2002, 28 000 XVI, nr. 63 (“Motie Rouvoet”). It should be noted that, in respect of ‘disability and chronic disease’, the discussion on an (explicit) expansion of Article 1 of the Constitution to include these grounds had already taken place during the Parliamentary debates on the AWGB. See the amendment handed in by Groenman (Tweede Kamer, 1992/1993, 22 014, nr. 15), which did not receive sufficient Parliamentary support.

⁵³ Letter of the Minister of Internal Affairs (“Brief van de Minister van Binnenlandse Zaken en Koninkrijksrelaties”), Tweede Kamer, 2001-2002, 28 000 XVI, nr. 112. See also Tweede Kamer, 2005-2006, 29 355, nr. 24, in which the Government announces the installment of the commission of experts.

⁵⁴ ETC Advice 2004/03 of 26 February 2004.

⁵⁵ Letter of the Minister of Internal Affairs, Tweede Kamer, 2003-2004, 29 355, nr.7.

⁵⁶ The report was written by a Committee of legal experts, headed by Prof. Alkema of Leiden University and may be downloaded from: <http://www.rijksoverheid.nl/documenten-en-publicaties/rapporten/2007/06/26/commissie-rechtsgevolgen-non-discriminatiegronden.html>



The inclusion in the Constitution of such new grounds does not offer additional protection. In addition, the commission remarks that, by endlessly extending the non-discrimination grounds in the Constitution, there is danger of inflation in the sense that discrimination will no longer be seen as a very serious matter (restricted to grave grounds). The Minister has presented the report to Parliament and subscribes to its conclusions.⁵⁷ In June 2010, three Members of Parliament of the Green Party, the Liberal Democrat Party and the Animal Party submitted a Bill, in which they propose to extend the grounds mentioned in Article 1 of the Constitution with disability and hetero- or homosexual orientation.⁵⁸ The Bill has not yet been discussed in Parliament. Proposals to change the Constitution take a special (lengthy) procedure in both Chambers of Parliament.

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 made by the Government and the Parliament) may not be subjected to Constitutional review by the Courts (according to Art 120 of the Constitution), and thus, neither to a Constitutional 'equality' review.⁵⁹

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 the Constitutional equality guarantee can be applied in horizontal relations as well.⁶⁰

However, there is some debate about what the equal treatment or non-discrimination norm entails in concrete situations and how this norm should be weighted 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 Acts (ADA, DDA, GETA).

⁵⁷ Tweede Kamer 2005-2006, 29 335, nr. 28 of 1 May 2006.

⁵⁸ Tweede Kamer 2009-2010, 32 411, nrs 1-3 of 11 June 2010

⁵⁹ 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 equality provision.

⁶⁰ 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/ResultPage.aspx> (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), discrimination on the grounds of employment duration, discrimination on the grounds of the employee's 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: racial or ethnic origin, religion or belief, disability, age, sexual orientation? Is there a definition of disability at the national level and how does it compare with the concept adopted by the European Court of Justice in case C-13/05, Chacón Navas, Paragraph 43, 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"?*

The words *racial or ethnic origin, religion, belief, disability, age and sexual orientation* are not defined in Dutch equal treatment law. The respective acts of Dutch equal treatment law apply symmetrically, in the sense that both persons of the dominant group (ethnic majority, religious majority, non-disabled people, young/old people⁶¹ 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).

Since there is no definition of disability in the DDA we can not 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, "chronic disease" is in addition to "disability" explicitly included as a ground in the DDA.⁶²

⁶¹ 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 Leeftijdscriminatie gooit veel overhoop', in: *Sociaal Recht* 2003, p. 363-364, at p. 363.

⁶² For a comparison of the EU and Dutch level of protection against discrimination of disability, 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.

With regard to the definition, we can derive some guidelines from the *travaux préparatoires* of the DDA and the cases of the ETC. Criteria mentioned during the preparation of the Law were (*inter alia*) the long duration of the disablement or chronic disease and the fact that – in case of disablement – the impairment is irreversible. This means that temporary disablements as a consequence of accidents are excluded.⁶³

According to the Explanatory Memorandum to the DDA, the concept of “handicap” (disability) may embrace not only physical, but also mental and psychological impairments.⁶⁴ 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 ETC has accepted this line of reasoning and – with a view to the goal of the DDA – interprets the terms disablement and chronic disease in a broad way.⁶⁵

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

Disability and Chronic Disease: 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.⁶⁶ Some guidelines as to the meaning of this word can be derived from the discussions that took place during the enactment procedure of the DDA. These are the long duration of the disablement / chronic disease, the fact that no cure is possible and the fact that it covers physical and mental or psychological impairments. (See also the answer to question *a*) in this section.)

National law on discrimination uses functional criteria like the duration, the seriousness and the irreversibility of the disablement. As far as there are definitions of “disability” in other legislation, these do not affect the material 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, the case is not considered as “equal”, and consequently there is no obligation to treat an incapable applicant equally.

⁶³ 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, summarized above.

⁶⁴ *Ibid.*, Tweede Kamer 2001-2002, 28169, nr 3, p. 24.

⁶⁵ See e.g. ETC *Opinions* 2005-234, 2006-227, 2007-25, 2009-62 and 2009-102.

⁶⁶ Explanatory Memorandum to the DDA, Tweede Kamer 2001-2002, 28 169, nr. 3, p. 9.

Article 2 of the DDA equates the failure to make reasonable adjustments for employees with disabilities with discrimination itself. Reasonable adjustments are under article 2 '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.

Race: The Explanatory Memorandum to the GETA⁶⁷ stresses that 'race' is a broad concept, which must be interpreted in line with the UN Convention on the Elimination of Racial Discrimination (CERD).⁶⁸ The concept embraces: *race, colour, descent and national⁶⁹ or ethnic origin.*⁷⁰ The Dutch Supreme Court as well as the ETC use the CERD definition of race. In the EC Implementation Act, which has amended the GETA, 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'.⁷¹ The ETC 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.*⁷² 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 the ground religion).

Religion / belief: Religion is also not defined in the Constitution, in the GETA or anywhere else in the anti-discrimination legislation. In the Netherlands, the term belief is not used. In the Explanatory Memorandum to the EC Implementation Act, the Government has made it clear that it wishes to stick to the term "levensovertuiging" (philosophy of life), rather than introducing the term "geloof" (belief), the term used by Directive 2000/78.

⁶⁷ Explanatory Memorandum to the GETA, Tweede Kamer, 1990-1991, 22 014, nr. 3 ("Memorie van Toelichting bij de Algemene Wet Gelijke Behandeling").

⁶⁸ International Convention on the Elimination of All Forms of Racial Discrimination 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.

⁶⁹ 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".

⁷⁰ Explanatory Memorandum to the GETA, Tweede Kamer, 1990-1991, 22 014, nr. 3, p. 13.

⁷¹ 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.

⁷² See, e.g., Opinions 1997-119 and 1998-57.

According to the Government there is no material difference between these two terms.⁷³ Both *religion* and *belief* are defined and applied in a broad sense.

In cases that come before the ETC 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.⁷⁴ On the other hand, it is not necessary that a certain conviction (the need of wearing a headscarf for women, for instance) is adhered to by all believers of a certain religion for protection under the ground of religion.⁷⁵ Finally, it is also established (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 behave in accordance with that religion or belief.⁷⁶ 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. Human Rights Commission).

Age: The legislator has not defined the word 'age'. However, it is not only direct references to someone's age that are considered to be direct distinctions on this ground. 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 boundaries between what kind of classification constitutes direct or indirect discrimination are not problematic.

Sexual orientation:⁷⁷ The GETA employs the terminology 'hetero- or homosexual orientation', to refer to the terminology (in English) used by Directive 2000/78 *i.e.*, 'sexual orientation'. 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 'preference' or simply sexual orientation, has been that the latter term might possibly include 'paedophile orientation'.

⁷³ 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.

⁷⁴ See, *e.g.*, ETC Opinion 2007-207.

⁷⁵ See, *e.g.*, ETC Opinion 2008-12.

⁷⁶ 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").

⁷⁷ The meaning of 'sexual orientation' in Dutch equal treatment law in the context of EC law has extensively been discussed by Kees Waaldijk in his sexual orientation report. See: 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, online at www.emmeijers.nl/experts and at www.eu.int/comm/antidiscrimination.

The notion 'hetero- or homosexual orientation' does cover 'bisexual orientation' but it excludes 'transsexuality' and 'transvestism'.

Under Dutch equal treatment law, discrimination on the ground of 'transsexuality' or 'transvestism' is regarded a form of sex discrimination.⁷⁸

- 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 makes no restrictions whatsoever to the scope of this ground for discrimination. The law applies symmetrically to abled and disabled persons. 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).

- d) *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 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 of discrimination, 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. See below (section e) for Dutch case-law dealing with intersecting grounds of discrimination.

Multiple discrimination (or intersectional discrimination) now is discussed more and more in the Dutch legal academic world and among equal treatment specialists.⁷⁹ The problem is also discussed in the second 5-year (internal) evaluation of the ETC.⁸⁰ There still seems to be too little knowledge about the actual extent of the problem. The authors are therefore not yet convinced if – and if so – what kind of special legal approach could be of added value.

- e) *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?*

⁷⁸ Court of Appeal Leeuwarden, 13 January 1995, Nederlandse Jurisprudentie 1995 nr. 243 and, e.g., ETC Opinions 1998-12, 2000-73, 2004-72/73, 2009-108 and 2010-175.

⁷⁹ See e.g. Rodrigues & Van Walsum, *Ras en Nationaliteit*; in J.M. Gerards e.a. (eds), *Oordelenbundel 2006*. Nijmegen: Wolf Legal Publishers 2007.

⁸⁰ ETC 2005: *Het verschil gemaakt (Making the difference)*, Utrecht 2005. At p. 39-40.

The ETC has accepted an intersectional approach in only one case.⁸¹ In this case, the grounds of disability and race intersected and the combined effect was acknowledged by the ETC. This combined effect was no reason for a different sanction in this case.⁸²

The ETC has showed willingness to apply different grounds of discrimination coherently in some 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 case in which the ETC could apply this approach would be the cases 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 are no instances of cases of multiple discrimination before Dutch civil or administrative courts.

2.1.2 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.

⁸¹ ETC Opinion 2006-256 (complaint of a Turkish blind woman against an employment office for not being subjected to an adapted examination), accessible in Dutch on www.cgb.nl.

⁸² Since the ETC can not impose sanctions, this is a somewhat misleading statement. There was the usual conclusion that the defendant had made an unlawful distinction.

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 marital 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), accessible in Dutch on www.cgb.nl.

However, wordings 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). With regard to 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. *Implicitly* the ETC acknowledges in this case that discrimination by association is also prohibited under the DDA. However, in that case there was no proof that the applicant had suffered any detriment because of the fact that someone in her environment was disabled.

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

a) *How is direct discrimination defined in national law?*

NB: in the Netherlands the word *distinction* is being used, instead of *discrimination*. See par. 0.2 of this Report.

Direct discrimination under the General Equal Treatment Act (inter alia: race, religion and belief, sexual orientation)

Article 1 of the GETA 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: distinction between persons on the grounds of religion, belief, political opinion, race, sex, nationality, hetero- or homosexual orientation or marital status; (...)"

The element of comparison, or explicit mentioning of the element of *unfavourable treatment* is lacking in this definition. The Dutch Government, as a result of the fact that the European Commission has started an infringement procedure, has proposed to amend the legislation and adopt the definitions of discrimination as provided in the Directives, but it proposes to retain the word 'distinction'.⁸⁶

⁸⁴ See also Kees Waaldijk *supra* footnote 77.

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 See *Kamerstukken II*, 2008-2009, 31 832, nrs 1-3 and See *Kamerstukken II*, 2009-2010, 31 832, nr 4-8.



The Bill in order to implement these amendments is now ready to be discussed in Parliament.⁸⁷ (See also Par. 0.2. of this Report.)

Direct discrimination under the Disability Discrimination Act

Article 1 of the DDA reads as follows:

"In this Act the following definitions shall apply:

- a. *Distinction: direct and indirect distinction as well as the instruction to make distinction;*
- b. *Direct distinction: distinction between persons on the ground of an actual or an assumed disability or chronic disease; (...)"*

As for the element of 'unfavourable treatment' the same applies as in the case of the GETA. It is unclear from the definition of direct distinction in the DDA, with whom a disabled person must be compared in case of an alleged instance of direct distinction. In the Parliamentary discussions on the DDA it is stated that what matters is not (actually) having a disability but being discriminated against *as compared with* a person who does have or does not have a disability.

There is case law of the ETC in which this topic has been discussed.⁸⁸ It seems that this has to be decided on a case by case basis.

Direct discrimination under the Age Discrimination Act

Article 1(1) of the ADA defines a 'distinction' as follows:

"In this Act, distinction shall mean distinction on the grounds of age or on the grounds of other characteristics or conduct that results in distinction on the grounds of age".

Article 1(1) transposes Articles 2(1) and 2(2) under (a) and (b) of Directive 2000/78 (regarding the concepts of direct and indirect discrimination). Clearly, *direct* discrimination is implemented by the phrase 'distinction on the grounds of age', and *indirect* discrimination by the phrase '[distinction] on the grounds of other characteristics or conduct that results in distinction on the grounds of age'.

In contrast to the conventional approach adopted in the Dutch equal treatment legislation, no distinction has been made in the ADA as between *direct* and *indirect* distinction. In this regard the legal approach for 'age' differs, compared with the other grounds for discrimination.⁸⁹

⁸⁷ The latest document dates from 16 December 2010 (31 832, nr 8; Report of a meeting between the Parliamentary Commission and the Minister).

⁸⁸ See ETC Opinion 2005-234. Although in that case (see summary in par. 02) 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.

⁸⁹ Explanatory Memorandum to the ADA, Tweede Kamer 2001-2002, 28169, nr 3, p. 17.



The Government has pointed out that Article 6 of Directive 2000/78 provides for a possibility of 'objective justification' for instances of direct age discrimination.⁹⁰ Given that both direct and indirect age discrimination may be 'objectively justified',⁹¹ in the Government's view, any distinction between these two concepts becomes redundant.⁹²

In its commentary on the *bill* for the ADA the ETC has advised the Government to make the conventional schism between direct and indirect distinction in the law.

In the ETC's view, the sort of distinction (direct or indirect) that is at stake in a given case may have an impact upon the modus of review and upon the burden of proof.⁹³

However, the advice of the ETC has not altered the Government's approach.⁹⁴ Although there has been some debate on this issue in academic literature⁹⁵, it seems that in practice this does not cause any difficulties.

As a result of the infringement procedure by the European Commission, the Government has proposed a Bill in which both direct and indirect discrimination in the ADA will be explicitly prohibited.⁹⁶ The Bill in order to implement these amendments is now ready to be discussed in Parliament.⁹⁷ (See par. 0.2 of this report.)

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 Law is rescission of a (legal) transaction, it is uncertain which sanction is to be imposed upon the perpetrator in cases of absence of an actual victim.

⁹⁰ 'Objective justification' as well as the other exceptions to the prohibition of age discrimination shall be dealt with in paragraph 4.7. of this report in much detail. In this paragraph, the objective justification test is only mentioned, in order to explain the absence of a distinction in the Dutch ADA as between 'direct distinction' and 'indirect distinction'.

⁹¹ *Indirect* age discrimination can be 'objectively justified' on the basis of Article 2(2) b under i of Directive 2000/78. *Direct* age discrimination can be 'objectively justified' on the basis of Article 6 of Directive 2000/78.

⁹² Explanatory Memorandum to the ADA, Tweede Kamer 2001-2002, 28169, nr 3, p. 17.

⁹³ Commentary by the Equal Treatment Commission on the Bill for the Act on Equal Treatment on the ground of age ("Commentaar van de Commissie Gelijke Behandeling inzake het voorstel voor een Wet gelijke behandeling op grond van leeftijd") 2001, at www.cgb.nl.

⁹⁴ See Follow-up Memorandum to the Bill on Equal Treatment on the Ground of Age, ("Wet Gelijke Behandeling op grond van leeftijd, Nota naar aanleiding van het verslag"), Tweede Kamer, 2001-2002, 28170, nr. 5, p. 26-27.

⁹⁵ F.B.J. Grapperhaus, 'Het verbod op onderscheid op grond van leeftijd in arbeid en beroep', *Ondernemingsrecht* 2002-12, p. 356-363.

⁹⁶ See *Kamerstukken II*, 2008-2009, 31 832, nrs 1-3 and See *Kamerstukken II*, 2009-2010, 31 832, nr 4-8.

⁹⁷ The latest document dates from 16 December 2010 (31 832, nr 8; Report of a meeting between the Parliamentary Commission and the Minister).

It is highly questionable whether Dutch Equal Treatment law 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 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 does apply. These justifications are:

- a. in cases in which sex is a determining factor (these cases are elaborated limitatively by Ministerial Decree, *Besluit Gelijke Behandeling*)
- 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 in a privileged position in order to eliminate or reduce existing inequalities connected with race or sex and the discrimination is in reasonable proportion to that aim;
- d. in cases where a person's racial appearance is a genuine and determining requirement, provided that the aim is legitimate and provided that the requirement is proportionate to that aim;
- e. if the discrimination concerns a person's racial appearance and constitutes, by reason of the nature of the particular occupational activity in question or of the context in which it is carried out, a genuine and determining occupational requirement, provided that the aim is legitimate and the requirement is proportionate to that aim.
- f. if the discrimination is based on generally binding regulations or on written or unwritten rules of international law;
- g. in cases where nationality is a determining factor (cases also elaborated by Ministerial Decree).
- h. finally, these strict justifications only applies within the scope of the GETA and the DDA. Outside these scopes, all distinctions may be justified in principle.

The ETC has accepted on one occasion 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 ETC *Opinion* 2006-20, summarized in par. 0.3. of this report).

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' underpinning the GETA and the DDA.

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?*

The words "less favourable treatment' (as yet) do not appear in the definition of a prohibited distinction on the ground of age.

In the view of the ETC a 'less favourable treatment' implies the existence of a *detriment* ("nadeelsvereiste") and of a *test* whether cases can be *compared* ("vergelijkbaarheidstoets"). With regard to the detriment part, the case law by the ETC indicates that an applicant must, in order to successfully lodge a complaint, have suffered a sufficiently *measurable* ("meetbaar") and *real* ("werkelijk") detriment. Moreover, the alleged detriment must be *protected by law* ("door het recht beschermd belang").⁹⁸

The sub elements contained in the Directive's definition, *i.e.*, 'one person', 'treated', 'less favourably than another', 'is/has been/would be treated', 'comparable situation', may, if an extensive reading is adopted, all be embraced by the single word 'distinction' in the Dutch equal treatment legislation. However, this depends on its interpretation by the courts and the ETC. The Dutch definition leaves it in a state of uncertainty whether or not a past or a hypothetical comparator is permitted for. It is clear neither from the legal text nor from the Explanatory Memorandum, with whom an alleged victim of direct age distinction is to be compared.

In order to avoid any misunderstandings, the Dutch government meanwhile has proposed a Bill in which all sub elements of the Directive's definition of discrimination are incorporated in the Dutch definition (but retaining the word 'distinction').⁹⁹ The Bill in order to implement these amendments is now ready to be discussed in Parliament.¹⁰⁰ (See par. 0.2 of this report.) However, the broad interpretation of the current Dutch definition could guarantee that all the elements enshrined in the Directive's definition of direct discrimination are duly covered already.¹⁰¹

⁹⁸ See the detailed analysis by 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, and J.H. Gerards and A.W. Heringa, *Wetgeving Gelijke Behandeling*, Deventer: Kluwer 2003, p. 43-44. A recent case in which this approach is demonstrated is Opinion 2006-227. The ETC leans on Article 12 sub 1 of the GETA, where it is defined who have access to the ETC: only those people who have suffered from a disadvantage on the ground of unlawful distinction and who have a real interest in upholding the law.

⁹⁹ See *Kamerstukken II*, 2008-2009, 31 832, nrs 1-3 and See *Kamerstukken II*, 2009-2010, 31 832, nr 4-8.

¹⁰⁰ The latest document dates from 16 December 2010 (31 832, nr 8; Report of a meeting between the Parliamentary Commission and the Minister).

¹⁰¹ Which is confirmed by the government, stating that this act 'does not change anything in substantive law'; see Tweede Kamer 2008-2009, 31 832, nr 3 (explanatory memorandum), p. 2.

The ADA's definition of *direct* distinction only mentions the word 'distinction', whereas its counterpart definitions in the GETA and the DDA use the wording 'distinction between persons' (Article 1 b of both last-mentioned Acts) 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 employed in a given decision-making process.¹⁰² In fact, then a distinction is made between *groups* of persons, rather than between persons.

A last question is when a distinction is a distinction on the ground of age? It is established 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.

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 of the courts, this is allowed both in case of civil procedures and in procedures before the ETC 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 situational testing. In practice, situation testing is most often used in the context of the ground of "race".

- 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.¹⁰³ Mostly it concerns job applications and admittance to bars and restaurants or discothèques. The equality body 'Art.1' and local anti-discrimination bureaus most often use situation testing, sometimes also the trade unions have used it. The Equal Treatment Commission never does, since its main task is to assist victims who bring complaints, 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 ("horeca") sector'.¹⁰⁴

¹⁰² 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.

¹⁰³ See, e.g., ETC Opinion 2005-136.

¹⁰⁴ LBR and LVADB, 'Geweigerd?! Discriminatoire deurebeleid in de horeca', Rotterdam, November 2004. These organisations have now merged into the new 'Art.1' equality body.

As a reaction to this, the Labour Party (then opposition) has published a “plan van aanpak” (plan how to tackle this problem) and asked the Government for measures. The Government replied with a letter to Parliament in which it gave an analysis of the problem and in which it discussed *inter alia* the possibilities to use situation testing.¹⁰⁵ The Government recommends that these tests are carefully prepared and are executed in close co-operation between the Anti-Discrimination Bureaus, the Public Prosecutors Office and the Police.

- 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 in cases where criminal sanctions can be imposed in case – as a result of this testing – it is shown that some categories of people are systematically disadvantaged.

The criterion applied by the courts seems to be that the NGO who initiated the testing or the individual who has been a victim of discrimination during the testing, did have no real interest 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 important case law within the national legal system on this issue.*

The ETC has given several Opinions in the past about the criteria for situation testing.¹⁰⁶ Situation testing mostly occurs when two groups of youngsters want to be admitted to a discotheque.¹⁰⁷ 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.¹⁰⁸ Also, there should not be a long time between the two test-situations.¹⁰⁹

The following case law has been summarised by Dick Houtzager, at the time senior staff member of the National Bureau against Racial Discrimination (LBR) in Rotterdam. His text is included in this report with his explicit permission.

¹⁰⁵ See Tweede kamer 2004-2005, 29 800 VI, nr. 165.

¹⁰⁶ See, e.g., Opinions, 1997-62, 1997-64-66, 1997-133 and 1998-39 .

¹⁰⁷ A recent case where this 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.

¹⁰⁸ See Opinion 1997-133.

¹⁰⁹ See Opinion 1998-39.



Test litigation in the Netherlands, text by Dick Houtzager:

“Courts in the Netherlands have accepted situational testing as a method to prove discrimination. Both in civil as well as in criminal litigation, testing has been allowed as sufficient proof.

Civil law:

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

Facts: A., a member of the NGO ‘Open Doors’, and a number of other people of different ethnic background and skin colour, went in the course of an evening at different times to Discotheque X, with the objective to test whether the discothèque had a discriminatory door policy. The ethnic minority persons of the NGO were refused; they were told they were not members of the discotheque.

Similar couples of Dutch origin were allowed in; they were not checked on their membership. The NGO brought the case before the court for preliminary ruling. On the request of A. and the NGO ‘Open Doors’, the President of the Court, in a preliminary decision, forbids Discotheque X to refuse entrance to mr A. on the grounds of his race or his skin colour or his belonging to an ethnic minority group. The defence brought forward that the NGO and its members had provoked the disco into a criminal offence. The President 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 to members of the NGO Open Doors, on the grounds of racial discrimination.”

Criminal law:

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

Facts: T. and B., both with an ethnic minority background, and H. and B., both native Dutch persons, separately asked to enter Disco Y. T. and B. were refused on the pretext that they were not members. The other couple, H. and B., were allowed in a little time later, although they were not members of the club. T. and B. reported this as a criminal offence at the police, who investigated the case.

The public prosecutor brought the case before the local court. T. and B. joined in as civil parties and requested damages. The defence claimed that the plaintiffs had abetted a punishable offence, which had gone to Y in order to see whether Y discriminated, and to prove that through the use of witnesses. The court argued: ‘We reject this defence. Nor T. and/or B. nor one 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 against T. and/or B.’ The defendant was sentenced to a fine of Euro 240. The plaintiffs were awarded symbolic damages of Euro 0.50 each.



District Court of Amsterdam, 20 March 1992, RR no. 287

Situation testing of a number of discotheques, carried out by the Anti-discrimination agency (ADA) in Hilversum. The defence claimed that the proof was inadmissible, because the test had been carried out as an investigation by the ADA, without guidance and supervision of the police or the public prosecutor. The court dismissed this defence, stating that the police had made up a report after the reporting of the offence by the ADA. The requirement that investigation by an ADA should be carried out under supervision of the Public Prosecutor finds no basis in the law.

Apart from the courts, the Equal Treatment Commission (CGB)¹¹⁰ has confirmed in a number of cases that situational testing is admissible as a way to prove discrimination. See: ETC 10 June 1997, no. 1997-65. The Anti discrimination agency (ADA) in the town of Enschede has carried out a situational test at a number of discotheques. The persons of ethnic minority background, included in the test couples, were refused, whilst the native Dutch persons were allowed in.

In the complaint, submitted before the CGB, the ADA stated that the groups, participating in the test could be assumed to be average discotheque visitors.

They had no relationship with the ADA; they had no criminal past; they could not be distinguished from the average discothèque visitor as far as hairdo, clothing, shoes etcetera were concerned; the persons participating did have a sufficient command of the Dutch language to communicate with the doorman. The CGB considered: ‘the Commission is of the opinion that by means of situational testing, depending on the circumstances, proof of unequal treatment can be given’.

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

a) How is indirect discrimination defined in national law?

Article 1 under (c) of the GETA enshrines the following definition of ‘indirect distinction’: “*indirect distinction: distinction on the ground of other qualities or acts than those meant by indent b [i.e., inter alia, religion, belief, (..), race, (...)] hetero- or homosexual orientation (...)] which result in direct distinction*”..

Article 1 under (c) of the DDA defines ‘indirect distinction’ as follows: “*indirect distinction: distinction on the ground of other qualities or acts than those meant by indent b which results in direct distinction*”. Indent b defines ‘direct distinction’ as follows: “*distinction between persons on the ground of an actual or an assumed disability or chronic disease*”. In addition, it can be observed that, according to the Directive’s definition, an applicant who claims an instance of indirect disability discrimination must have a *particular disability*.

¹¹⁰ The CGB acts as the Dutch specialised body, in accordance with the Racial Equality Directive. It is a semi-court, which delivers opinions in discrimination cases. The Opinions are non-binding.

This requirement does not explicitly follow from the wordings of the definition in the DDA. It may thus be argued that the DDA provides greater protection than the Employment Framework Directive.

Article 1(1) of the ADA reads as follows: *"In this Act, distinction shall mean distinction on the grounds of age or on the grounds of other characteristics or conduct that result in distinction on the grounds of age"*. Indirect discrimination is covered in the phrase *"distinction (...) on the grounds of other characteristics or conduct that results in discrimination on the grounds of age"*.¹¹¹

In the Directive's definition of indirect discrimination, the justification element is included (unless...). In the Netherlands, this element is set apart from the definition. It is included (by means of the 2004 EC Implementation Act¹¹², in Art. 2(1) GETA, Art. 3(2) DDA and Art. 7(1) sub c ADA. (See below, question *b* of this paragraph.) A comparative analysis of the Dutch definition with the definition given in the Directive warrants the following comments:

1. The Directive's definition unequivocally enshrines a *detriment* element as follows from the phrase 'at a particular disadvantage'. This is not the case with the Dutch definition. However, the ETC's case law indicates that a *measurable* and *real* detriment as regards an interest which is *protected by law* is called for in the establishment of a claim. Even if this did not follow from the case law, the Dutch definition would still be in conformity with that of the Directive, since the former would then adopt a wider standard than the latter. This is permitted since the Directive only lays down *minimum standards*. (See also Article 8(1) of Directive 2000/78).¹¹³
2. It might be argued that under the Directive's definition of indirect discrimination, an applicant can more easily establish a case of indirect discrimination than under the Dutch definition. Under the Directive's definition, an applicant needs to establish that the group to which the applicant belongs (e.g., in the case of age: persons between over 60 years old) would be put *at a particular disadvantage*. Under Dutch law – at least in the way it is applied by the ETC – an applicant must in most instances establish a case of indirect distinction on the basis of numbers and statistics. Although facts of common knowledge can be forwarded to support statistical evidence, these are generally not accepted as an exclusive means of evidence. Only in very obvious cases does the ETC *not* require statistical numbers or 'common knowledge facts'.¹¹⁴

¹¹¹ In paragraph 2.2. section *B*, under question *a*, it has been explained that no clear-cut distinction has been made in the ADA as between *direct* and *indirect* distinction. For reasons extensively dealt with before, this is in my view in contravention of the requirements imposed by Directive 2000/78. Similarly, the absence of the conventional schism has been criticised by the ETC and in academic literature.

¹¹² See footnote 6.

¹¹³ See also Consideration 28 of Directive 2000/78. And, as for Directive 2000/43, Article 6(1) and Consideration 25 of that Directive.

¹¹⁴ 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.

3. As has been observed by Waaldijk¹¹⁵, the Directive's wording 'apparently neutral provision, criterion or practice', is (problematically) reduced in the Dutch definition to 'other [i.e., other than ... the particular ground at stake] characteristics or conduct that result in discrimination on [that ground]'. The difference seems to be that whereas under the Dutch definition, a prohibited distinction can only be the result of a *characteristic* or *conduct* that already makes a certain distinction on the basis of a non-prohibited ground, under the Directive indirect discrimination might also arise out of a general (non distinguishing) provision or practice. This indeed appears to be falling short of the Directive's requirements. Moreover, it is not quite clear why the Dutch definition speaks of *characteristics* or *conduct*, whereas the Directive makes use of the wording 'apparently neutral provision, criterion or practice'.
4. In order to be complete, it is submitted that with regard to *indirect* distinction, the focus is upon the *effects* of the contested 'behaviour'. It is thus irrelevant whether or not the alleged perpetrator had the *intent* to discriminate.¹¹⁶ This is both recognised in EC and Dutch law.

In the infringement procedure against The Netherlands (see par. 0.2. of this report), the European Commission has requested that the Dutch legislator bring the definition of 'indirect age distinction' in line with the definition of indirect discrimination in Directive 2000/78. The Government has proposed to amend the definition of indirect discrimination in all equal treatment laws, i.e. to include a definition which is similar to the definition in the Directives.¹¹⁷ The Bill in order to implement these amendments is now ready to be discussed in Parliament.¹¹⁸ (See par. 0.2 of this report.)

- 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?*

¹¹⁵ See footnote 77. Waaldijk has made his argument in the context of the concept of indirect sexual orientation discrimination. However, it can be extrapolated to the current discussion on indirect age distinction.

¹¹⁶ I.P. Asscher-Vonk, 'Towards one Concept of Objective Justification', in: T. Loenen and P.R. Rodrigues, *Non-Discrimination Law – Comparative Perspectives*, The Hague: Kluwer Law International 1999, p. 39-51, at p. 43.

¹¹⁷ See *Kamerstukken II*, 2008-2009, 31 832, nrs 1-3 and See *Kamerstukken II*, 2009-2010, 31 832, nr 4-8.

¹¹⁸ The latest document dates from 16 December 2010 (31 832, nr 8; Report of a meeting between the Parliamentary Commission and the Minister).



Article 2(1) of the GETA, as amended by the EC Implementation Act, entails an objective justification test for indirect distinction cases, which mirrors the well-known elements of legitimate aim, appropriateness and necessity.¹¹⁹

Article 3(2) of the DDA, after having been amended by the EC Implementation Act, explicitly enshrines all the elements of the objective justification test as laid down in Article 2(2)(b) under (i) of Directive 2000/78: legitimate aim, appropriateness, necessity

Article 7(1) under (c) of the ADA provides that: “*The prohibition of distinction [i.e., direct and indirect distinction as well as the instruction to make distinction] does not apply if the distinction: (...) c.) is otherwise objectively justified by a legitimate aim and the means to reach that aim are appropriate and necessary*”.

All three provisions mirror the core substantive elements of the objective justification test in indirect discrimination cases as laid down by Article 2(2)(b) under (i) of Directive 2000/78. This also reflects the stance taken by the European Court of Justice in indirect discrimination cases, which is being followed by the ETC and the Dutch courts.

It is very hard to summarise 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 in this occasion may be Opinion 2007-173, where the ETC held that a language requirement in a fitness centre 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 summarise in short.¹²⁰ It is shaped by the case-law mentioned in para 0.3.

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?*

¹¹⁹ Before the amendments brought about by the *EC Implementation Act*, these 3 elements of the test had not been *explicitly* enshrined. The amendment was made by *Article 1, under E subsection 1* of the *EC Implementation Act*, which amended Article 2(1) of the GETA 1994. However, the ETC anyhow adhered to these 3 elements in its case law, also before the implementation of the Article 13 EC (now 19 TFEU) Directives.

¹²⁰ 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.

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?*

Yes, language requirements are perceived as (potential) indirect discrimination on the ground of race (and in practice also on nationality – a prohibited ground in the Netherlands). A considerable amount of cases in this respect are brought to the ETC in the last years. The ETC employs a strict functionality test to language requirements.¹²¹ Generally speaking, language requirements imposed upon employees may only be justified if strictly functional to a certain job. This therefore results in different standards for e.g. cleaners and librarians. Dismissal or not employing persons because they are speaking with an accent doesn't seem to be justified in any case whatsoever. Also, a number of cases outside the sphere of employment have been brought to the attention of the ETC, e.g. language requirements in education and in sport-schools (fitness-centres). There the same criteria apply.

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 ETC 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*.¹²² In this context the ETC always stresses the point that this should not be calculated on the basis of absolute figures, but should be seen relatively (as a percentage).¹²³ In a number of cases, the 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 ETC has not explicitly mentioned this standard or criterion anymore. Recently, it has started to use other methods of calculation, especially in cases where the (absolute) numbers are very small.¹²⁴

¹²¹ See for example ETC Opinion 1996-29, 2003-18, 2001-12, 2006-231, 2007-173, 2008-12, 2008-78, 2008-95, 2009-88, 2010-20, 2010-54, and 2010-154.

¹²² See, e.g., Opinion 2003-91.

¹²³ 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.

¹²⁴ See, e.g., Opinion 2003-91 and 2003-92.

This comes down to an extremely complicated way of calculating the chance that a particular group will have more negative effects than another group.¹²⁵ Facts of common knowledge are taken into account, either in the absence of relevant statistics or, to support such statistics.¹²⁶ However, facts of common knowledge are not accepted as an *exclusive* means of evidence. Only in plainly clear cases does the ETC *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?*

Yes, this kind of evidence is used quite often by the ETC (see e.g. the above-mentioned cases), but it is not known to what extent this is done by the courts since judgements 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 ETC 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 ETC (which has been discussed above, para 0.3). See for example, Opinion 2007-91, in which different local communities were compared with respect to their policies as regards granting subsidies to unemployed artists.

Although 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 the criteria for subsidies.¹²⁷ Another example is the case of a man complaining about indirect age discrimination in the area of pay. The ETC, following the CJEU in *Royal Copenhagen*,¹²⁸ 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.¹²⁹

¹²⁵ See Kees Waaldijk, *supra* footnote 77.

¹²⁶ J.H. Gerards & A.W. Heringa, *Wetgeving Gelijke Behandeling*, Deventer: Kluwer 2003, p. 45-49.

¹²⁷ ETC 2 June 2007, ETC 2007-91.

¹²⁸ ECJ 31 May 1995, C-400/93.

¹²⁹ ETC 6 August 2009, ETC 2009-76.

- 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 Dutch 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).¹³⁰ It must be noticed 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 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 (VWS), the Social and Cultural Planning Bureau publishes a so-called "Gehandicaptentmonitor".¹³¹ In order to assemble this overview, employers are asked to voluntarily provide information about the number of disabled people in their workforce to the SCP. Besides, the Ministry of social Affairs and Employment is responsible for the implementation of the Law for the Reintegration of Disabled People ("Wet REA").

In this framework, the Ministry assembles information about employers that apply for subsidies that help 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.¹³²

¹³⁰ www.cbs.nl and www.scp.nl

¹³¹ Officially called *Rapportage Gehandicaptent*, to be found at: <http://www.scp.nl/publicaties/boeken/9037701043.shtml>.

¹³² Information about their activities can be found at their web site: <http://www.dutchdpa.nl/Pages/home.aspx> (last accessed 25 Febr. 2011.)

However, in the Dutch legislation, these rights are not always implemented in a sufficiently deterrent way. An example of this is legislation concerning the *VerwijsIndex Risicjongeren*¹³³, where it is made possible for a manifold of judiciary, social and health organisations, to register the ethnic origin of a so-called a 'risky youngster'.¹³⁴ (See below, sub race/ethnicity)

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

Race: In the Netherlands, both Government and academics tend (but are not obliged) to use the definition of "allochtoon" which is used by the Central Bureau for Statistics (CBS).

"Allochtoon" is a word much used in the Netherlands, (as opposed to "autochtoon" – indigenous), roughly meaning: someone who is not born in the Netherlands or who does not have parents who are of Dutch origin.) This definition can be found on their web site: <http://www.cbs.nl/nl-NL/default.htm>. Also notice again current discussion about the final judgement of the Council of State in the case '*VerwijsIndex Antillianen*', as discussed above in section 0.3 on case law.

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 categorised according to the country where he/she is born, a *second generation* "allochtoon" is categorised 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 "allochtoon" 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 "allochtoon" 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.

¹³³ 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 organisations to register their ethnic background.

¹³⁴ This registration is possible on the ground of the Wet op de Jeugdzorg (Law on Youth Care), lastly amended on 4 February 2010. (To be downloaded from: <http://lexius.nl/wijzigingswet-wet-op-de-jeugdzorg-verwijsindex-risicjongeren> (last accessed on 5 Febr 2011). See also Corien Prins, 'Discriminatie Signalen', *Nederlands Juristenblad* 2010, 2, p. 59. Corien Prins argues that this amendment is in breach of Directive 2000/43/EC.

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 November 2009, the Labour Minister of Integration has announced that in official government policies the term 'allochtoon' will no longer be used, because it has a stigmatising effect. Instead, the government proposes to use the word 'new Dutchmen' ('nieuwe Nederlanders').¹³⁵

A 'trend' that becomes more and more popular, also with the government, 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 people¹³⁶ 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.¹³⁷ One of the conclusions of this author is that this mechanism is more and more used for exclusionary purposes instead of for positive action purposes.

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 Risicjongeren*.

After a previous law, which allowed the registration of so-called 'high-risk youth' on the ground of being of Antillean ancestry in order to develop specific policies for them¹³⁸, had not been declared unlawful by the highest Administrative Court in 2008,¹³⁹ (see above under para 0.3 Case-law, ground 'Race': *Verwijsindex Antillianen*), the government nevertheless designed in 2009 a new law called the Reference Index for Risky Young Persons (*Verwijsindex Risicjongeren*) in order to register 'high-risk youth' in a specific data system, accessible for many different educational, welfare and judicial bodies. The Bill did not allow any reference to the ethnic origin.

¹³⁵ See Tweede Kamer 2009-2010, 32 123 XVIII, nr. 28.

¹³⁶ *E.g.*, buyers preferences, housing preferences, educational preferences, *etc.*

¹³⁷ This is described and criticized by Corien Prins, 'Etno-selectie', in : *Nederlands Juristenblad* [Dutch Journal for Lawyers], 2005-8, p. 411.

¹³⁸ 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 drop out rate.

¹³⁹ Raad van State ['Council of State', = highest administrative judge] 3 September 2008, Ref. nr. 200706325/1, LJN: BE9698.

However, as a result of a last minute amendment to the Bill at the Second Chamber of Parliament, all kinds of social and judiciary organisations are now allowed to store and exchange information about these young persons, with their ethnic origin also taken into account.¹⁴⁰ This means that the 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 do indeed register 'risky youth' (or troublemakers!) on the basis of their ethnicity in order to design programs that are specifically targeted at particular ethnic groups and their cultural background. 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, and has ordered the local government of a district of Rotterdam (called Charlois), to stop doing so.¹⁴¹ The appeal to the 'positive action measures' exception clause in the Data Protection Act was not successful. 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.¹⁴² The majority of the Local Council does not see any danger of stigmatising or discriminating against certain ethnic groups, but stresses the necessity of such registration in order to make their policies and programs to 'help' these youngsters and to protect society against them, more effective. In the public debate, that took place after the City Council of Rotterdam adopted the motion, this aim was stressed as well: registration is deemed necessary in order to make such policies more effective.

Negative or damaging aspects are very much 'down played', and do not come to the foreground as much anymore as was the case in 2007-2008, when the earlier '*Verwijsindex Antilianen*' was subject of discussion and was contested (successfully) in court.

Also, 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 public and (semi)private organisations have access to such local registers.

¹⁴⁰ 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 has been passed in the Senate on 17 Febr. 2010.

¹⁴¹ See http://www.cbpreweb.nl/Pages/pb20110204_dwangsom_charlois.aspx (last accessed on 25 Febr 2011)

¹⁴² See e.g.

http://www.joop.nl/politiek/detail/artikel/gemeente_rotterdam_wil_etnische_registratie_behouden/ (Last accessed on 25 February 2011.)

This ethnic registration is signalled in the media, but as yet not much legal action seems to be taken against this illegal practice.¹⁴³

Religion: It is not known whether there is a standard usage of a classification of various religions in official publications or statistics. The CBS 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. For other surveys, more refined lists of religions or churches are used.

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'. (See above, where the definitions are discussed.) The SCP, in constituting the "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? 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 ETC's case law provided that the right to equality and non discrimination in regard to 'employment conditions', including 'working conditions', encapsulates a person's right to be free from 'ground-related' harassment in the workplace.¹⁴⁴

It also follows from the ETC's case law that the employer's duty of care brings with it that he/she must have in place an *adequate complaints mechanism*.¹⁴⁵ This norm still applies after the implementation of the new 'harassment provision'.¹⁴⁶

¹⁴³ 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 3 March 2011).)

¹⁴⁴ See *inter alia* the following Opinions of the ETC: 96/88, 97/82, 97/91, 2001/131, 2003/138.

¹⁴⁵ 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.

¹⁴⁶ 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 also R. Holtmaat, (Seksuele) Intimidatie en (on)gelijke behandeling: nieuwe normen, nieuwe praktijken? Enkele overwegingen bij de nieuwe EG-Richtlijnen op dit terrein en de wijze waarop deze in Nederland worden geïmplementeerd. In: D. de Wolff: *Gelijke behandeling, Oordelen en Commentaar 2003*. Kluwer, Deventer 2004, pp. 89-106.



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

1. *The prohibition of distinction 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 central norm. Harassment is *per se* prohibited].*

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), cited above.

From the case law of the ETC in 2005, it becomes clear that the ETC differentiates between 'discriminatory treatment' and 'harassment'.¹⁴⁷ 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 case of discriminatory insult is not enough to constitute a case of harassment, but nevertheless it can be qualified as (forbidden) direct discriminatory treatment.¹⁴⁸

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 (Arbeidsomstandighedenwet).¹⁴⁹ In the same Act, employers were instructed to provide safe working 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.¹⁵⁰

¹⁴⁷ 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.

¹⁴⁸ Rodrigues refers to ETC Opinions 2005-30, 2005-75 and 2005-167.

¹⁴⁹ Act on Working Conditions ("Arbeidsomstandighedenwet" 1998, which amended the 1994 version in certain regards), Staatsblad 1999, 184. It has also been defined in the Schools Inspectorate Act ("Wet op het Onderwijs toezicht"), Staatsblad 2002, nr. 387.

¹⁵⁰ See Rikki Holtmaat: *Seksuele Intimidatie; de Juridische Gids*. Nijmegen: Ars Aequi Libri 2009.

These provisions offers 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 Act on Working Conditions that (sexual) harassment is legally prohibited and that employers who do not protect their workers from such offences are liable. 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 be prosecuted as a criminal offence (e.g. maltreatment or assault). If the abuse takes the form of verbal offences, criminal procedures are also a possibility. In many cases, e.g. concerning the damages that a victim can claim as against the employer who did not take precaution 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.¹⁵¹

In 2007, the Working Conditions Act has been changed, and in order to harmonise the legislation it now refers to the Equal Treatment Act, as far as the definition of harassment is concerned.¹⁵² Since then, the Act 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.¹⁵³

The obligations for employers to prevent harassment and to protect victims remained in the Act on Working Conditions. 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 organisation has given its own definitions and norms as regards (sexual) harassment and mobbing, often related to non-discrimination norms.

2.5 Instructions to discriminate (Article 2(4))

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?

¹⁵¹ A complete overview of the legal norms with respect to sexual harassment has been given in: R. Holtmaat, *Seksuele intimidatie; de juridische gids*, Nijmegen; Ars-Aequi Libri 2009.

¹⁵² *Wet van 30 november 2006, houdende wijziging van de Arbeidsomstandighedenwet 1998 (...); Stb. 2006, 673.*

¹⁵³ 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: 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, and 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.

Prior to implementation of the Directives a prohibition of the instruction to make a distinction was implied within the GETA.¹⁵⁴ However, in order to avoid any misunderstanding, Article 1 under (a) of the Act was complemented 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).¹⁵⁵

It has been indicated by the Government that the notion of *instruction* (“opdracht”), refers to “opdracht” in the meaning of Article 7:400 of the Dutch Civil Code. This Article regulates the law on *contract for the provisions of services*.¹⁵⁶ In the Explanatory Memorandum to the ADA, the Government mentions the example of an employer who instructs a recruitment agency to select for a given job only persons under the age of 30 (in absence of a sound justification for this). According to the Explanatory Memorandum, in a scenario such as this one, both the person who *gives* the contested instruction and the person who *carries out* the instruction, act in contravention of the central norm. If the ‘recipient’ of the instruction refuses to abide by it and as a consequence thereof, he/she suffers damage, he/she can hold the person who *gave* the instruction liable for that.

The 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.¹⁵⁷ This advice has not been followed by the Government. The latter defended its own stance by saying that an instruction to make a distinction implies *active* rather than *passive* behaviour.

This mirrors 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 embraced by the prohibition of making (direct or indirect) *distinction*.¹⁵⁸

According to the Government’s explanation on the issue of instruction to make distinction, 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.

¹⁵⁴ Explanatory Memorandum to the EC Implementation Act, Tweede Kamer, 2002-2003, 28 770, nr. 3, p. 7.

¹⁵⁵ Recent examples of cases where the ETC found that there is a case of ‘instruction to discriminate’ are ETC 2010-95 and ETC-2010-179.

¹⁵⁶ Explanatory Memorandum to the ADA, Tweede Kamer 2001-2002, 28169, nr 3, p.18.

¹⁵⁷ ETC Advice 2001-03, p. 6 and 2001-04, p. 4.

¹⁵⁸ Explanatory Memorandum to the ADA, Tweede Kamer 2001-2002, 28169, nr 3, p.18.

In the Government's view, such a scenario is embraced 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.¹⁵⁹

This reasoning might fall short of what the EC legislator in mind with the prohibition of instruction to make distinction. In the present author's view, the Dutch Government at this point interprets the prohibition of instruction to make distinction unduly narrow.

The instruction to discriminate on grounds of race, religion/belief, sex and homo- or heterosexuality can also be prosecuted criminally under the Penal Code, art 137d (*Wetboek van Strafrecht*).

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? 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.*

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*. In the Government's view, the latter term reflects better than the term *reasonable*, that an accommodation must have the pursued *effect*.¹⁶⁰ One can see that 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.

¹⁵⁹ *Ibid.*, p. 19.

¹⁶⁰ Explanatory Memorandum to the DDA, Tweede Kamer 2001-2002, 28 169, nr. 3, p. 25.



The test whether an employer is under a duty to provide an accommodation to a disabled person who so requires, runs as follows:¹⁶¹

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 two-fold test may be that *another* (e.g. cheaper) accommodation than the one that was asked for is also effective and that it will help 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.

Can the employer reasonably be expected to pay 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’).¹⁶² If financial compensation exists for the realisation of the effective accommodation, it cannot be regarded as ‘disproportionate’.¹⁶³

The Government also underscored Consideration 21 of the Preamble to Directive 2000/78¹⁶⁴ and added as an additional criteria that the duration of the employment contract may be a weighty factor.¹⁶⁵

¹⁶¹ Concluded from the Explanatory Memorandum to the DDA, Tweede Kamer 2001-2002, 28 169, nr. 3.

¹⁶² Explanatory Memorandum to the DDA, Tweede Kamer 2001-2002, 28 169, nr. 3, p. 25-30.

¹⁶³ 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.

¹⁶⁴ On the factors to be considered when determining whether making a reasonable accommodation would amount to a disproportionate burden.

¹⁶⁵ 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.

As stated above, disability is not explicitly defined in Dutch equal treatment law. As far as the authors know, there are no signs that the concept of disability is applied in different ways in cases of non-discrimination protection in general on the one hand and the right to claim reasonable accommodation on the other hand.

A final note concerns the explicit statement by the ETC¹⁶⁶ 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 such unequal (labour) circumstances leads to inequality, according to the ETC.

- b) *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 has 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 2009.¹⁶⁷ 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 (housing). (See ETC 2010-35, summarized in section 0.3 of this Report.) A lot of cases that come before the ETC concern reasonable accommodations in the area of (vocational) education.

In the field of education, there also exist social security 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.¹⁶⁸

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.

- c) *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?*

¹⁶⁶ ETC Opinion 2005-160.

¹⁶⁷ 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.

¹⁶⁸ This provision is called '*het rugzakje*' (the rucksack).

A failure to meet this duty in principle counts as a form of *distinction*, which is prohibited.¹⁶⁹ However, the text of Article 2, in conjunction with that of Article 1 (definitions of *direct* and *indirect* distinction) and 3 (regarding the exceptions to the central norm), does not shed light upon the question whether an omission to bring about an *effective* accommodation, constitutes *direct*, *indirect* or a *third* way of distinction.¹⁷⁰ With regard to the duty to provide an effective accommodation, Article 2 of the DDA provides 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) DDA¹⁷¹ 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 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) 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 2.¹⁷² Consequently, the other two exceptions 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.

It is noted that the DDA does not enshrine an exception in regard to the armed forces, which would have been allowed for by Article 3(4) of Directive 2000/78.

d) *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 ETC or the Courts will extend this in the future, but we have seen no case law until now.

¹⁶⁹ 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.

¹⁷⁰ 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.

¹⁷¹ Article 3(2), moreover, stipulates that indirect distinction can be objectively justified.

¹⁷² Explanatory Memorandum to the DDA Tweede Kamer 2001-2002, 28 169, nr. 3, p. 33.

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 of 5 October 2006 the ETC considered that a municipality had failed to search for alternative ways of greeting within their organisation. Therefore, the applicant couldn't be rejected for a job solely because he refused to shake hands when greeting others because of his Islamic belief¹⁷³. In a similar vein, the ETC required from local councils to provide 'solutions' for civil servants who had religious objections to celebrate same sex marriages. (ETC 2002-25 and 2006-26.) However, the ETC reversed this position in ETC 2008-40 (summarized in par. 0.3. of this report).

e) *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.

f) *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. There exists no general legal obligation to grant accessibility to disabled persons in a general and anticipatory manner.

As far as public spaces and buildings (in which public offices and social services are located), education, health care and infrastructures are concerned there are some specific regulations.

The Ministry for Housing, Environmental Planning and Milieu has a so-called "Bouwbesluit" [a decree on how to build houses and offices, etc.] This decree contain some requirements about accessibility of public buildings. Also the Ministry for Education has detailed instructions as to how to build schools. Idem the Ministry for health, concerning hospitals and medical service centers. The Ministry for Transport has regulations as to how buses and trains should be constructed.

For some time it was expected that transport by busses and trains would be fully accessible in 2010 and 2030 respectively. In 2006 the government has sent letters to Parliament from which it becomes clear that these targets will not be met.¹⁷⁴

¹⁷³ See however the judgment of the District Court of Rotterdam, 6 August 2008, LJN: BD9643 (summarized in par. 0.3. of this report).

¹⁷⁴ See Letter of the Minister of Transport, DGP/MDV/ U.05.02732, 17 May 2006 with appendixes , And Letter containing the "stappenplan NS en Prorail" DGP/SPO/U.0.602435, September 2006. The content of these documents is described in the Memorandum of Explanation to the Bill about extending the scope of the DDA to transport: Tweede Kamer 2006-2007, 30878, nrs 1-3.

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 stoops and the breadth of doorways).

A failure to comply with such legislation can not 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. 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”. In this framework it is noteworthy that the Government has still not decided when the Articles 7 and 8 of the DDA will enter into force.¹⁷⁵ The Government now has drafted the text of a Decree (AMVB) by which these Articles will be declared to be in force. In December 2009, the draft-Decree was sent for approval to the first Chamber of Parliament; after approval, it will have to be sent to the Council of State for advice, after which the Government can publish the Decree. In the draft the proposed date of entry into force is the 1st of December 2010. However, the government did not succeed in doing so. The Draft Decree has been sent to various Ministries and interest groups for consultation and still has to be reviewed by the Council of State, before it will be sent to Parliament. It is now expected that it will enter into force in the Summer of 2011.

- g) *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 provide for a general duty to provide for accessibility for people with disabilities.

- h) *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) the Netherlands have developed a wide range of social rights and facilities for people with disabilities in the past centuries. Some of them consist in general (monetary) 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:

¹⁷⁵ Article 7 defines the term ‘public transport’. In Article 8, unequal treatment in public transport is prohibited.

- *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. Many responsibilities are delegated to local governments by this act.
- *Wet Arbeidsongeschiktheidsvoorziening Jonggehandicapten (WAJONG): Law Disablement Allowance for Young Disabled people.*
This act provides for an allowance for young people with disabilities, who were never able to participate in paid labour. Such an allowance is needful, as a general allowance for disability under the WAO (*Wet op de Arbeidsongeschiktheid, Work Disablement Act*) can only be claimed with a certain employment history. In 2009, it was announced that this Act would be amended in 2010; the government then proposes to strengthen the duty for young disabled persons to accept paid work.¹⁷⁶ However, in the course of 2010, the newly established government has announced severe cuts and reforms in the system of allowances for young people with disabilities. The proposals for law reform will be sent to Parliament in the beginning of 2011.¹⁷⁷
- *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 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)* 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 work independently as far as possible.

¹⁷⁶ See Tweede Kamer 2009-2010, 31 817, nr. 48.

¹⁷⁷ See Tweede Kamer 2009-2010, 31 817, nr. 57. The plans were discussed in a meeting with the Parliamentary Committee on Social Affairs on 1 December 2010 and met with a lot 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 government gives its 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_werk (last accessed on 4 Febr. 2011.)

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 are available for people with an occupational disability under the terms of the Sheltered Employment Act (*Wet Sociale Werkvoorziening*, 'WSW'). Most of the people in this group worked in a sheltered work company. The Government's aim is to get more people in the WSW target group into jobs with regular employers (supported employment). The first phase of modernisation of the WSW started in 2004. One of the first steps is, that as of 2005 the Centre for Work and Income (CWI)¹⁷⁸ will assess who is eligible for a job in a sheltered workplace. Local authorities are responsible for the creation of the workplaces. The yearly budget for this is 2.2 million Euro. From 1 January 2007 onwards the governments spent another 18 million Euro extra on a yearly basis for the implementation of this law. The second phase was aimed at increasing the number of disabled people who find work outside of sheltered workplaces. This means finding supervised jobs with regular employers who receive a subsidy for each disabled person who works for her/him. In 2008, a committee of experts has evaluated the WSW and made further recommendations for reform.¹⁷⁹ In 2010, the new government announced that it intends to amend the law, and to 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.¹⁸⁰

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) apply fully to this type of employment. The wages are according to the norms set in Collective Agreements for the relevant sectors. Nevertheless, this work can not 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 provision enshrines for a possibility for *supportive social policies* for disabled people. (Compare art. 7(2) of the Framework Directive.) It means that if working conditions are relatively more favourable in sheltered employment, non-disabled persons cannot claim that they are discriminated against.

¹⁷⁸ From January 2009 onwards, this institution is called UWV Werkbedrijf.

¹⁷⁹ Report "Werken naar vermogen" (to work according to one's abilities), dd 9 Oct 2008 (Commissie De Vries). To be downloaded from <http://www.werken-naar-vermogen.nl/advies/Advies.pdf> (last accessed on 4 Febr 2011.)

¹⁸⁰ See Tweede Kamer 2008-2009, 29 817, nr 40 and See Tweede Kamer 2009-2010, 31 817, nr. 57.



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 protective scope provided by criminal law, civil law, equal treatment legislation and administrative law covers *any person on the territory of the Netherlands*.¹⁸¹

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

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, there is some discussion whether only natural persons are protected or that legal persons (e.g. an association, an institution or an enterprise) is also protected. Since the laws mainly see at labour relations, in fact it is mostly natural persons who enjoy the protection of these laws. As far as liability for discrimination is concerned, no such distinction is made. This means that both natural and legal persons can be held accountable.

3.1.3 Scope of liability

What is the scope of liability for discrimination (including harassment and instruction to discriminate)? 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?

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.

¹⁸¹ 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.

Although all of the three Acts specify the areas of *social and economic life* to which each Act applies, the Acts remain silent on the matter of 'personal scope'.¹⁸² 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 organisations of employers, organisations of workers, employment offices, (public) job agencies, pension funds, some external advisors, ('liberal') professionals, bodies of liberal professionals, training institutions, schools, universities, *etc.*¹⁸³ 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.¹⁸⁴ 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.

However, it was indicated by the Government that those employees who in 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.¹⁸⁵ The purported inapplicability of the Dutch Acts in relationships between colleagues *inter se*, appears particularly problematic in the context of work-related *harassment*. In its current format and in the light of the Parliamentary comments, the equal treatment laws prevents an alleged victim of harassment from holding a colleague or a third person directly liable for the contested acts 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.

¹⁸² E. Cremers-Hartman, 'Werkingsfeer 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.

¹⁸³ *Ibid.*

¹⁸⁴ 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.

¹⁸⁵ Explanatory Memorandum to the ADA, Tweede Kamer 2001-2002, 28169, nr 3, p. 19.

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.¹⁸⁶ 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.¹⁸⁷

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 it 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.¹⁸⁸ 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.¹⁸⁹

¹⁸⁶ 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.

¹⁸⁷ 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.

¹⁸⁸ A. Geers, 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, 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.

¹⁸⁹ 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.



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.¹⁹⁰

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 organisations but not to employees (and third persons) is unduly restrictive. According to case law of the ETC 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.

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?

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 / organisation who issues such acts can not 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).

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.

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:

¹⁹⁰ See M.S.A Vegter, 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.

- 1) public advertising of employment and procedures leading to the filling of vacancies;
- 2) the employment of a worker via an employment agency (inserted by the EC Implementation Act);
- 3) the commencement or termination of an employment relationship;
- 4) the appointment and dismissal of civil servants;
- 5) terms and conditions of employment;
- 6) permission for staff to receive education or training during or prior to the employment relationship;
- 7) promotions;
- 8) 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.¹⁹¹

In the GETA, self-employment is covered by Article 6. This Article provides that “*it shall be unlawful to make distinctions with regard to the conditions for and access to the liberal professions and with regard to pursue the liberal professions or for development within them*”. The counterpart Articles reflecting an identical content are Article 4 of the ADA and Article 5 of the 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 attaching a broad interpretation to the term “liberal profession” in order to guarantee that not only doctors, architects etc are covered, but also free lancers, solo traders, entrepreneurs, *etc.*¹⁹² 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. The ETC has at all times attached a very broad meaning to this notion. Discrimination is thus also prohibited in such working relationships where the hierarchy between the ‘employer’ and ‘employee’ is absent.

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

¹⁹¹ See, *e.g.*, 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.

¹⁹² See Kees Waaldijk, *supra* footnote 77.

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.

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 life long 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. All what will be said about the DDA hereinafter applies *eo ipso* to the ADA.

Subsection b of these Articles covers education which is a last step prior to entering the labour market including retraining and further training courses.¹⁹³

¹⁹³ Explanatory Memorandum to the DDA, Tweede Kamer 2001-2002, 28 169, nr. 3, p. 38.

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 life long learning courses’ are not mentioned specifically but are covered by Article 5 DDA too.

So regular ‘secondary education’ (“voortgezet onderwijs”) (as well as primary education) are not yet covered at the cut-off date of this report, but as mentioned above, these fields will be covered from 1 August 2009 on. The establishments that are covered are not only those which are recognised or subsidised by the Ministry, but also those which are not recognised or subsidised by the Ministry or whose regulation is left to the market.¹⁹⁴ Subsections a and b of Articles 5 and 6 of the ADA and DDA respectively, are not directed to a specific addressee. These subsections are therefore directed to “all persons”.

As to subsection b, this is addressed to *public education, private/denominational education, and education that is not publicly funded*.¹⁹⁵ 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 education.¹⁹⁶

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;¹⁹⁷
- The provision of career orientation and guidance (“loopbaanoriëntatie”);
- Advice or information regarding the choice of an educational establishment 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 does entirely cover what is mentioned in Article 3(1)(b) of the Directives.

¹⁹⁴ Explanatory Memorandum to DDA, Tweede Kamer 2001-2002, 28 169, nr. 3, p. 38.

¹⁹⁵ Explanatory Memorandum to the DDA, Tweede Kamer 2001-2002, 28 169, nr. 3, p. 37.

¹⁹⁶ Explanatory Memorandum to the DDA, Tweede Kamer 2001-2002, 28 169, nr. 3, p. 37-38.

¹⁹⁷ The material scope of the GETA covers the entire field of education. It thus offers a wider protection than the Directives.

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

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

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’ organisation or trade union, or a professional occupational organisation, as well as with regard to the benefits which arise from that membership or involvement*”. Article 5a of the DDA is identical to this provision, as well as article 6 of the ADA.

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 Social 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. 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.¹⁹⁸

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 behaviour¹⁹⁹ or of wearing specific religiously required dress 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 allows 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 plans to make it legally possible to withdraw a right to social benefit altogether. 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.

¹⁹⁸ See Kees Waaldijk, *supra* footnote 77.

¹⁹⁹ E.g. the refusal to shake hands with a person of the other sex.

There was some academic criticism in this regard, but until now no legal action against the (proposed) measures was taken.²⁰⁰

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. A governmental decree determined pursuant to the first sentence, shall not be recommended earlier than four weeks after which the draft has been submitted to both Chambers of the Parliament"*.

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 legal 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.²⁰¹ 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.²⁰²

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 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.²⁰³

²⁰⁰ See *Nederlands Juristenblad*, 2011-06, p. 337

²⁰¹ Explanatory Memorandum to the EC Implementation Act, Tweede Kamer, 2002-2003, 28 770, nr. 3, p. 14.

²⁰² See the ECJ'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.

²⁰³ Explanatory Memorandum to the EC Implementation Act, Tweede Kamer, 2002-2003, 28 770, nr. 3, p. 15.



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). This thus 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 Directives.²⁰⁴ 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 primary and secondary education as well.²⁰⁵

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). There is some discussion going on in the Netherlands about the issue whether local governments have the right to spread people of certain non-Dutch decent 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 fact this is also the topic of the discussion about the so-called "Rotterdamwet" in which local governments get the possibility to refuse subsidised housing to certain categories of poor people in order to avoid the emergence of "ghettos".²⁰⁶ The ETC has strongly advised against such policies.²⁰⁷

²⁰⁴ 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.

²⁰⁵ 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 extension to primary and secondary education and housing). See Articles 5b (education) and 6a, 6b and 6c (housing).

²⁰⁶ Tweede Kamer, 2004-2005, 30 091. Law of 20 December 2005, Staatsblad 2005, 726.

²⁰⁷ See ETC Advice 2005/03 and Opinion 2005-25 (Tiel).

There is considerable 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.²⁰⁸

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 an 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 in the Netherlands (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.²⁰⁹

In December 2005, some Members of Parliament have 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.²¹⁰ 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.²¹¹

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.²¹²

²⁰⁸ 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): *Verskil 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.

²⁰⁹ I.e., schools that are governed by local authorities.

²¹⁰ 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.

²¹¹ The latest document in this dossier is Tweede Kamer, 2009-2010, 30 417, nr 9, a report of a Committee meeting in which the MP's who submitted the proposal defended it against MP's of the opposition..

²¹² See Tweede Kamer 2008-2009, 31 293 / 31 289, nr. 53. In this letter to Parliament the vice 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 respect²¹³ 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 establishment 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.²¹⁴ 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.²¹⁵ 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.²¹⁶ The government has 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*).²¹⁷

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 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. 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 necessity. The primary aim of the Dutch school system remains to educate as many pupils as possible in regular schools.

²¹³ There are special measures aimed at avoiding school drop out of Roma children. See Tweede Kamer 2008-2009, 31 700 XVIII, nr. 90.

²¹⁴ See ETC Opinion 2003-105.

²¹⁵ See Tweede Kamer 2008-2009, 31 700 XVIII, nr 90 dd 26 June 2009.

²¹⁶ *Zie Projectvoorstellen Platform Roma-Gemeenten*, Den Haag: Vereniging van Nederlandse Gemeenten (VNG) 2010. Zie ook de 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, footnote 27. (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 3 March 2011.)

²¹⁷ 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.)

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 shall be unlawful to make distinctions in offering or permitting to goods and services, in concluding, implementing or terminating agreements on the subject (...), if such acts of distinction are committed."*²¹⁸

- a) *In the course of carrying on a business of 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 is applicable to all grounds covered by the GETA. In this regard, Dutch law extends beyond the Article 13 (now 19 TFEU) Directives' requirements. Unilateral governmental decisions and acts do not fall under the scope of Article 7.²¹⁹

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 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 right of freedom of association and on the other hand the right to equal treatment.²²⁰

- 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?*

²¹⁸ It should be noted that the limitations to follow under a-d are also applicable with regard to the remainder of areas covered by Article 7, i.e., 2. the provision of career orientation and guidance ("loopbaanoriëntatie"); 3. advice or information regarding the choice of an educational establishment or career, and which have been analyzed above.

²¹⁹ J.H. Gerards and A.W. Heringa, *Wetgeving Gelijke Behandeling*, Deventer: Kluwer 2003, p. 72-73, with references to ETC case law.

²²⁰ 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.

Dutch equal treatment legislation does not provide for specific exceptions on the general prohibitions of discrimination with regard to financial services, other than art 8 ADA (regarding *age*) which exempts distinctions with regard to age-based provisions in pension regulations.

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

Housing is captured by article 7(1) subsection c of the GETA, and from 15 March 2009 also by articles 6a, 6b and 6c of the DDA.²²¹ 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)

It 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', in which local authorities get the right to refuse to rent houses in certain area's to persons or households with a low-income or without steady jobs and to refer them to other areas, will be deemed indirectly discriminatory on the ground of ethnic origin when a case is brought to the attention of the courts. As the measure may only be applicable to certain poor districts, it most probably will not result in homelessness. Until now (Jan 2011) no cases in which this law is contested has been issued at the Courts.

Roma and traveler 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 travelers. In the 2006 edition of the (yearly) *Monitor Racism and Extremism*²²² there is a quite critical assessment of the situation concerning the housing of these people in trailer parks.

²²¹ 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.

²²² 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/upload/downloads/monitor2006-7.pdf>

It is stating 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.²²³ "This often makes it impossible for family members to pitch on the same encampment, something of great importance to the Roma and Sinti."²²⁴

In failing to provide enough caravan sites, the government makes it impossible for Roma and Sinti to sustain their cultural identity. This violates the requirement to provide housing without distinguishing by ethnic background, as established in the European Racial Equality Directive."²²⁵ From the 2010 edition of the *Monitor*, it appears that the situation has not improved since then.²²⁶ 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 neighbors. Problems as regards housing also occur in relation to Eastern European Roma people that 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.²²⁷

The only case law we found about the housing situation of Roma and Sinti people concerns the case that was decided by the ETC (Opinion 2006-222 of 6 November 2006; see section 0.3 of this Report).

A family of travelers,²²⁸ consisting of three generations, complained that a local government who had decided not to continue a special waiting list for persons who want to live in a caravan or trailer because there were hardly any applications for this type of housing.

²²³ 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.

²²⁴ See also the questions to the government, *Aanhangsel Handelingen II* (Appendix parliamentary questions II), 2002/03, no. 32 and no.199.

²²⁵ *Monitor Racisme & Extremisme*. Zevende rapportage, *op cit*, p. 53.

²²⁶ 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 3 March 2011.)

²²⁷ Reported in the newspaper *Het Parool* of 29 August 2009. Source: Davidovic & Rodrigues, *op cit*, p. 159, fn 40.

²²⁸ 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 of them. See also ETC Opinion 2006-5.



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.²²⁹

The GETA and the DDA do not specifically address the special housing needs of older people. There is general social assistance legislation (*De Wet 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 house) from the local government. It goes beyond the scope of this report about the implementation of the Directives to describe this kind of social assistance legislation.

²²⁹ The ECT did not openly refer to a more substantive notion of equality, like was done by the ECtHR in the *Thlimmenos* case. See: ECtHR, *Thlimmenos v. Greece* of 6 April 2000.

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?

In the GETA, the 'GOR-exception' only exists for the grounds *race* and *sex* (the latter ground is not dealt with in this report). As far as race is concerned, this has been laid down in Article 2(4) of the GETA²³⁰: *"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 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*.²³¹ This means that 'race' *in se* is not regarded as a permissible ground for a given distinction.²³² 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.²³³ Under art 4(6) GETA, these legal exceptions have been elaborated in a Governmental Decree of 1994.²³⁴ The Decree exhaustively indicates to which categories 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);

²³⁰ Subsection b was inserted by the EC Implementation Act. With the insertion of a new subsection b 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).

²³¹ Explanatory Memorandum to the EC Implementation Act, Tweede Kamer, 2002-2003, 28 770, nr. 3, p. 10.

²³² J.H. Gerards & A.W. Heringa, *Wetgeving Gelijke Behandeling*, Kluwer Deventer 2003, p. 129.

²³³ See Opinion 1997-51 of the Dutch Equal Treatment Commission.

²³⁴ Governmental Decree on Equal Treatment ("Besluit Gelijke Behandeling"), 18 August 1994, Staatsblad 1994, 657. This Decree has been updated on 21 June 1997, Staatsblad 1197, 317.

- b. Mannequins, models for photographers, artists, etc., insofar as in reasonableness requirements can be imposed upon outer appearances (elaboration of subsection b);
- c. Participation in beauty contests insofar as appearances connected with a person's race, are vital in the light of the contest's aims (elaboration of subsection a);
- d. The provision of services that can only be provided to persons having certain outer appearances (elaboration of subsection a).
(The examples given by the Government are special hair dress services for people with 'afro-hair' or skin treatment for persons with a particular skin type).

Religion, belief, sexual orientation: Although Directive 2000/78 would have allowed for it (Article 4(1) of the Directive), 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 organisation's purpose, are necessary to live up to its founding principles. The Article 5(2) exceptions are not rationalised by the idea of 'genuine occupational requirements' though. They were regarded necessary in order to reconcile the constitutional principle of equality with other constitutional principles, 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. This means that only functions that are related to the "mission" of the organisation can be exempted from the equal treatment norm. (I.e. the exception is not applicable when it concerns a gardener for a church.) It is also a requirement that the organisation applies a consistent policy in this respect. The criteria have been explained by the ETC in its Opinion 1996-118.

Disability: The GOR-exception has not been included in the DDA. The Government's view is that, in contrast to 'race' and 'sex', no scenario is imaginable in which 'disability' would constitute a genuine occupational requirement.²³⁵ An amendment was submitted by a Member of Parliament in this respect; however, without any effect.²³⁶

Age: Since the ADA does not differentiate between 'direct' and 'indirect' distinction and 'objective justification' is provided for both types of 'distinction' (Article 7(1)(c) ADA), the Government considered including the GOR-exception a redundant exercise. In this view, in cases in which 'age' is considered a genuine occupational requirement, this can be assessed via the objective justification test.²³⁷

²³⁵ Explanatory Memorandum to the DDA, Tweede Kamer 2001-2002, 28 169, nr. 3, p. 35.

²³⁶ Amendment Terpstra, Tweede Kamer, 2001-2002, 28 169, nr. 11. This amendment was rejected.

²³⁷ Explanatory Memorandum to the ADA, Tweede Kamer 2001-2002, 28 169, 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.²³⁸ 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?*

With regard to the exception of religious ethos, the GETA on the one hand sets *boundaries* to its scope of applicability; on the other hand it provides for *exceptions*.

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).

Boundaries to the scope of application.

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). (See Article 3 GETA.) These are considered to be internal affairs of these (religious) organisations. The rationale for this lies in the principle 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.*

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.²³⁹

²³⁸ 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.

²³⁹ J.H. Gerards and A.W. Heringa, *Wetgeving Gelijke Behandeling*, Deventer: Kluwer 2003, p. 105.

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 who were appointed by the Government to conduct the second (external) 5-year term evaluation of the functioning of the GETA. 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 conclusion of these experts was 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 is in line with the exceptions that are possible under the EC-Directives.²⁴⁰

Exceptions for employers on the ground of religion and belief

In this regard two provisions in the GETA are important²⁴¹:

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 grounds 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 establishments founded on religious or ideological principles. It reads as follows:

the freedom of an educational establishment 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 requirements may not lead to discrimination on the sole grounds 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 under the exception under sub c must (only) be necessary in order for the establishment to *effectively realise its founding principles*. This implies, that establishments under c are granted more leeway in making distinctions than institutions under a.

²⁴⁰ 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.

²⁴¹ 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.

After all, establishments under sub c may impose requirements that are not directly linked up with the performance of a person's duties within that establishment.

Establishments that fall under sub c may even impose requirements upon the acts of (would be) employees which take place *outside* the sphere of the establishment, if this is necessary for the effective realisation of the establishment's founding principles.²⁴²

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 form than its counterpart definition in the Directive. The Directive uses as the main yardstick whether, while having regard to the organisation'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 the case law of the ETC, it appears to us 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 ETC. The Commission looks at the institution's statutes and at what the institution does in practice, in order to realise its religious and ideological foundations. The ETC'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*. Also behaviour outside the establishment (e.g. living together without being married or living together with a same-sex partner) might be a factor that can be taken into account by the establishment in its decision as to whether or not a given person complies with the founding principles underlying the establishment.²⁴³ Requirements must however be 'necessary' for the effective realisation of the institution's founding principles. The ETC looks at the institution's statutes and at what the institution does in practice, in order to realise 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 EC law.

²⁴² J.H. Gerards and A.W. Heringa, *Wetgeving Gelijke Behandeling*, Deventer: Kluwer 2003, p. 109.

²⁴³ See e.g. Opinion 1999-38.



The 'sole ground' construction in the articles 5(2) sub (a) and (c)²⁴⁴

This so-called 'sole ground construction' is equivalent to the clause in Article 4(2) of the Employment Framework Directive.

The 'sole ground construction' aims at eliminating the possibility that a distinction is exclusively made on the grounds 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 sub a and c for the grounds religion and belief).²⁴⁵

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 fact' that a person is homosexual, may per se not lead to the refusal to hire such a person or to dismiss him.²⁴⁶ However, this may be different if 'additional circumstances'²⁴⁷ are taken into account.²⁴⁸

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 organisation'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 organisation. Therefore, this 'sole ground construction' seems to be in conformity with the Directive. However, as a reaction to the European's infringement procedure (see par 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.

²⁴⁴ A similar construction exists in Article 7(2) GETA, where it concerns access of pupils to general primary and secondary education.

²⁴⁵ 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.

²⁴⁶ Parliamentary Documents First Chamber of Parliament, 1992-1993, 22 014, nr. 212c, p. 10-11.

²⁴⁷ In the Parliamentary comments, 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.

²⁴⁸ 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.

In 2009, the government announced that it wanted to submit a Bill to Parliament with such an amendment in the Autumn of 2010.²⁴⁹ However, due to the fall of the government in the beginning of 2010 and elections in March, as well as the long duration of cabinet formation, a Bill has not yet been submitted. In 2009, the government also announced that the proposal would be such that in fact nothing much would change. Several Members of Parliament (of liberal democrat and green party origin) therefore in 2010 have introduced their own Bill to take the sole fact provision completely out of the GETA and thereby make the law more in line with the Directive.²⁵⁰ Nevertheless, it is remarkable that these MP's do not propose to copy literally the wording of the exception in the Directive. They only propose 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 will still be lacking when this Amendment will be accepted.

- b) *Are there any specific provisions or case law in this area relating to conflicts between the rights of organisations with an ethos based on religion or belief and other rights to non-discrimination? (e.g. organisations 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 quite 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.²⁵¹ Quite recently, the ETC (again) made it very clear that the exception needs to be interpreted narrowly.²⁵² Only when a certain measure or policy is really necessary for maintaining the school'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 can not be successfully relied upon.²⁵³

- 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)?*

²⁴⁹ See Letter of the Ministry of Interior and Kingdom Affairs dd 29-09-2009, Tweede Kamer 2009-2010, 28 481, nr. 7.

²⁵⁰ See Parliamentary Papers: TK 2009-20101, 32 476, nr 1. See also <https://zoek.officielebekendmakingen.nl/kst-32476-3.html> (in Dutch). Last accessed 17 Sept. 2010.

²⁵¹ 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.

²⁵² Equal Treatment Commission Opinion 2011-2 of 7 January 2011.

²⁵³ J.H. Gerards and A.W. Heringa, *Wetgeving Gelijke Behandeling*, Deventer: Kluwer 2003, p. 109.



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 by the State if 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 without a particular religious denomination belong to the 'openbaar onderwijs' (i.e. public / secular education); in that case the board is 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 organisations (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. The same applies for other institutions (e.g. health care institutions, the army, prisons, etc.).

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 at the latest, the ADA did not apply to the military service. In the DDA and the GETA there have never been any limitations to the Acts' 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?*

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 Anti-Discrimination 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 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*.²⁵⁴ 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).²⁵⁵ 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. Because both grounds of discrimination are covered in Dutch Equal treatment law, this fact does not cause difficulties in the case law. However, if the Court is convinced that race (in the wide sense of the term) is involved, this will lead to a more strict juridical review than if a treatment was solely based on nationality. As stated above, if a certain treatment was based on the ground of nationality but could not in any way related to the ground of “race”, further exceptions may be applied on the prohibition of discrimination.

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

²⁵⁴ See e.g. ETC Opinion 2002-61, 1998-81 and 1997-13.

²⁵⁵ See e.g. ETC Opinion 1996-77.



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?*

No, this will be regarded as a distinction based on marital or 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?*

No, 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 ETC in several of its Opinions.²⁵⁶ Besides, since 1998 the Netherlands has a possibility for registered same sex partnership and since 2001 legal marriage is also open for same-sex couples. According to the GETA, it is prohibited to make distinctions between same-sex and opposite-sex partners, with the same civil status.

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.²⁵⁷

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

*"The prohibition of making a distinction shall not apply if:
(...)*

²⁵⁶ See Opinions 1997-47 and 48, Opinion 1999-08 and Opinion 1999-13.

²⁵⁷ 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.

- 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 for disablement). We hold it 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.²⁵⁸ There are a few points that need further clarification. Under the 1998 Working Conditions Act and under private 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 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)?*

Except for age (see Article 3(1) sub a of the ADA, the exception regarding health and safety is not to be applied to other grounds. A similar counterpart exception has not been enshrined in the GETA. However, safety and security issues may come at the surface in the 'objective justification test' for indirect discrimination cases.

²⁵⁸ See also A.C. Hendriks, *Wet Gelijke Behandeling op grond van handicap of chronische ziekte* (Actualiteiten Sociaal Recht), Deventer: Kluwer 2003, p. 66-67.

For example, a prohibition of headscarves during gymnastics for reasons of safety and security can be objectively justified. It has to be noticed that there has been some debate about the question whether this is a shortcoming in the GETA.²⁵⁹

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

4.7.1 Direct discrimination

- a) *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 European Court of Justice in the Case C-144/04, Mangold?*

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 pursuant to an Act of Parliament; 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; 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.²⁶⁰ The case law of the Court 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 judgement of the CJEU. The Government made a start with this during 2004-2005.

²⁵⁹ 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 health risks.

²⁶⁰ 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.

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.²⁶¹

b) *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)* subsections (a) and (b) enshrine two exceptions that are deemed *a priori* to be 'objectively justified'.

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 are enshrined in a Statutory Act or in a Governmental Decree.²⁶² [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!)²⁶³ 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). Since that time, 'objective justification' had been called for.

²⁶¹ This was requested by the Second Chamber of Parliament; see the letter to the Minister of Social Affairs, 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 Internal Affairs and Kingdom Relations; *ibid.*, nr. 41: Inventory of the Ministry of Justice. The report of the Ministry of Social Affairs and Employment is available on the internet; see www.minszw.nl.

²⁶² 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 persons 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.

²⁶³ 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.

- c) *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 renders the prohibition to make a distinction inapplicable 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 provision²⁶⁴, nor to the fixing under such provision of different ages for employees or categories of employees. Article 8(3) renders this norm inapplicable 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 Equal Treatment Male/Female in Employment Act.)

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) 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).

²⁶⁴ A concept defined in Article 8(1) of the ADA.



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 age of 65 is independent from the question whether the person has (or has had) a paid job or not.

The Dutch government is of the opinion that dismissal on the age on which one is entitled to an AOW pension is objectively justified. The explanatory statement (MvT) tot 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 are entitled to an income (a pension under the General Old Age Pensions Act), 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 as others as far as an individual's wishes to work longer are concerned.

- 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 general a mandatory retirement age in any provision in the Dutch law 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 organisation (e.g. the National Organisation or General Practitioners).²⁶⁵ 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 can not be given here. The 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 exclusion 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.

- 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?*

²⁶⁵ See <http://www.leeftijd.nl/vragen/binnenkort65>.

Yes, see article 7(1) sub (b) ADA. This article reads as follows: “1. The prohibition on discrimination shall not apply if the discrimination:

- (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 it is known.

- 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 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.

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 in, first out’ principle sometimes forms object of debate in the Dutch Parliament.²⁶⁶ 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?*

²⁶⁶ On 18 December 2003 the Second Chamber of Parliament 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 recent 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 www.szwn.nl.

Yes, it is. Compensation is calculated on the basis of the so-called 'cantonal courts formula' ("kantonrechttersformule"), i.e., $a \times b \times c$.²⁶⁷

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 reorganisation, agreed to make an age distinction whereby this 'cantonal courts formula' was 'neutralised' (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.²⁶⁸

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 (reorganisation-dismissals). In practice, the formula is still being used in individual cases of dismissal.

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 par. 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.

²⁶⁷ See H.L. Bakels, I.P. Asscher Vonk, W.J.P.M. Fase, *Schets van het Nederlands Arbeidsrecht*, Deventer: Kluwer 2003, p. 179.

²⁶⁸ Cantonal Court Sneek, 31 May 2005, LJN: AT7230.

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 health and security exception.

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. (The scope of this exception has been criticized by the European Commission, see also section 0.2)
2. Article 7(2) of the GETA grants private educational establishments the freedom to impose requirements governing admission to or participation in the education that the establishment 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. 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 female).²⁶⁹
4. 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.²⁷⁰

²⁶⁹ 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.

²⁷⁰ This topic has also been discussed in great detail in the second evaluation report about the functioning of the GETA. See the previous footnote.



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 sex, race, and disability. Article 2(3) of the GETA in its post-implementation format 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 minorities²⁷¹;
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 affirmative action policies and programmes, since it does not allow measures which aim at *preventing*, in addition to *removing* or *reducing* disadvantages.²⁷²

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 Equal Treatment Commission (ETC), the following aspects of the positive action plan need to be tested:

- is there a clearly described aim of the plan? (which of course 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 of distinction under that Act. The same conditions as described above apply here.

In practice, any contested positive action plan is tested by the ETC according to the standards that are set out in the case law of the CJEU. The Equal Treatment Commission on 31 January 2011 has issued a News Letter, in which it summarizes the legal guidelines, which in turn it has derived from the case law of the CJEU.²⁷³

²⁷¹ 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'.

²⁷² See Explanatory Memorandum to the EC Implementation Act, Tweede Kamer, 2002-2003, 28 770, nr. 3, p. 9.

²⁷³ See

http://www.cgb.nl/nieuws/bericht/100000537/31_01_2011_over_voorkeursbeleid_voor_ouder_meer_vrouwen (last accessed on 16 February 2011).

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 famous Kalanke case) prohibit a system of fixed quota and require an individual assessment of any job applicant’s capabilities and suitability for the job.

In 2005 there was some discussion on the question whether the possibility to develop and apply positive action schemes should be extended to the other grounds that are covered in the GETA and to age discrimination.²⁷⁴ The Government has published a draft report and got comments from, *inter alia*, the ETC. Although the ETC recognises that in Dutch society there is hardly any structural disadvantage 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 (now 19 TFEU) EC Treaty. 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.²⁷⁵ 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.

Political discussion about the scope of the positive action clauses in the GETA, DDA and ADA may again arise when the government proposes to integrate these laws into one new (integrated) GETA. (See about the proposal for an Integrated GETA, par 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 people, 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 people. 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 people in society over the past years. The 1998 Act on the Reintegration of Disabled People in Employment (“Wet op de (Re)integratie Arbeidsgehandicapten”), or REA²⁷⁶ is of particular importance. This Act aims at creating a coherent set of measures which facilitate the (re)integration of ‘employment disabled people’ (“arbeidsgehandicapten”) in employment.

²⁷⁴ 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.

²⁷⁵ Memorandum on Preferential Treatment (“Nota Voorkeursbehandeling”), Tweede Kamer, 2004-2005, 28 770, nr. 11.

²⁷⁶ Act on the Reintegration of Disabled People in Employment (“Wet op de (Re)integratie Arbeidsgehandicapten”) of 23 April 1998, Staatsblad 1998, 290, most recently amended by Act of 15 December 1999, Staatsblad 1999, 564.

The means to achieve this objective are in essence: faster payment of expenses (related to (re)integration) to employers; flexible application of qualifications for benefits and, a reduction of the risks for employers.²⁷⁷ The REA also has the purpose of achieving a clear allocation of responsibilities between the various actors involved with (re)integration. The REA enshrines the *possibility* for prescribing a *quota, i.e.*, the obligation for employers to employ a certain number of ‘employment disabled persons’. However, this possibility has not been made use of so far. In essence the REA aims at reducing or taking away objections by employers to the employment of disabled persons.

The Age Discrimination Act (ADA)²⁷⁸ does not contain a positive action exception clause²⁷⁹, but since unequal treatment on the ground of age may be objectively justified (open system of justifications) in any case, the defense that the unequal treatment is in fact a positive 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 companies and governmental organisations do take measures of positive action, just a few general (and legal) measures can be mentioned.²⁸⁰ 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 quite a bit of resistance against positive action measures that are stronger than this (e.g. against preferential treatment with 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.

²⁷⁷ D. Beekman and E.J. Kronenburg Willems, *Wet op de Re(integratie) arbeidsgehandicapten, PS Special Wet REA*, 1998.

²⁷⁸ The ADA only applies to the areas of employment, self employment and vocational training.

²⁷⁹ 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.”

²⁸⁰ Under Dutch Equal Treatment law, it is not necessary that a positive action has a specific legal basis.

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 General Equal Treatment Act.²⁸¹ 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 people are concerned, in 2004 the Government started a trajectory called ‘inclusive policy’ (*“inclusief beleid”*). The Government made a start with this policy with an action plan called “Equal Treatment in Practice” (*“Actieplan gelijke behandeling in de praktijk”*).²⁸² 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 for Health) to send in their policy plans.²⁸³ 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 measures of positive action are taken in the Netherlands. However, it must be noticed that Roma people who are living on trailer camps (as well as other travellers) do have special attention from local governments, as their specific housing situation in many regards demands for a specific policy. Recently, 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.²⁸⁴

However, it seems that the Equal Treatment Commission is inclined to accept that in the case of racial or ethnic discrimination there should be more room for positive action plans. This conclusion can be derived from some (we must admit quite old!) case law of the ETC. The Commission issued opinions in two similar cases, where a city council asked explicitly for members of ethnic minorities to apply for jobs as social workers (case no. 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.

Although the Equal Treatment Act holds the principle that positive action for women and ethnic minorities should be implemented in the same way, the Commission was of the view that this principle does not need to be effected in the same way.

²⁸¹ See TK 28 770 2003-2004, EG-implementatiewet Awgb, nr 7: amendement Luchtenveld (VVD) dd 8 October 2003.

²⁸² Tweede Kamer 2003-2004, 29 355, nr. 1.

²⁸³ See Tweede Kamer 2004-2005, 29 355, nr. 11, 14 and 15. It concerns the Ministries of Internal Affairs and Kingdom Relations, Education, Social Affairs and Employment, Transport and Water Management, Housing, and the Ministry of Healthcare.

²⁸⁴ See Tweede Kamer 2008-2009, 31 700 XVIII, nr. 90.

The effectuation of positive action depends, according to the Commission, on its legal and social context. In this regard, the Act on the stimulation of labor participation of ethnic minorities (Wet SAMEN) had to be taken into account.²⁸⁵ The Wet SAMEN requires organizations to reach a proportionate participation of ethnic minorities in their staff. Because the Wet SAMEN is an implementation of section 2.2 of the ICERD, the Equal Treatment Act needs to be interpreted in conjunction with this Convention. This means, according to the Commission, that the criteria for positive action should not be interpreted too narrowly. The objectives of the various laws include reaching de facto equality of minority groups on the labor market.

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.²⁸⁶ This Code²⁸⁷ is a Governmental Regulation (Algemene Maatregel van Bestuur), issued by the government on the basis of Article 2:391, par. 5 of the Civil Code. The regulations give instructions for the content of the Annual Report of Private and Public Limited Companies.

The Dutch Corporate Governance Code of 2004²⁸⁸, was amended in 2009. In the new code, (inter alia) two *diversity* clauses were included.²⁸⁹ 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.²⁹⁰

²⁸⁵ This law has since been abolished.

²⁸⁶ This discussion led to the acceptance by the Second Chamber of Parliament of a motion that urged the government to stimulate to include diversity targets into the Code. See Kamerstukken II, 2007-2008, 31083, nr 17. Adopted on 24 April 2008.

²⁸⁷ The Code originally was developed by a Committee of experts and is often named after its Chair; de Code Tabaksblat. See <http://nl.wikipedia.org/wiki/Code-Tabaksblat> (last accessed on February 17 2011).

²⁸⁸ Nederlandse Corporate Governance Code, Staatscourant 27-12- 2004, 25035.

²⁸⁹ Staatscourant 3-12-2009, 18499. The text of the amendments may be downloaded from: <https://zoek.officielebekendmakingen.nl/stcrt-2009-18499> (last accessed on 10 February 2011).

²⁹⁰ See e.g.

<http://www.veb.net/content/HoofdMenu/Home/Nieuwsoverzicht/Persberichten/Persbericht15012009.aspx> or see: <http://www.goedbestuur.nl/index.php/actualiteiten/16-afm-naleving-code-tabaksblat-moet-substantieel-beter> (last accessed on 10 February 2011)

In a recent interview, the current 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.²⁹¹ Most companies do not report on that issue, or report that they do not meet their own targets in this respect

The most recent debates about positive action (or a system of quota) concern positive action schemes for women in company boards. In December 2009, the Second Chamber of the Dutch parliament unanimously has passed an amendment²⁹² to two Articles in the Dutch Civil Code (which contains a regulation concerning the monitoring of the board of directors of large companies in general) which oblige privately and state owned public limited companies (in Art. 2:266 Civil Code) and private limited companies (Art. 2:276 Civil Code) to establish a share of at least 30% of both sexes in the company's board of executive directors (bestuurders) and in the supervisory board (raad van commissarissen) when they have

- assets worth > € 17,500,00,-
- an annual turnover of > € 35,000,000.-.
- and > 250 employees

If a company does not reach these quota, this must be explained in the annual report, accompanied by an introduction of new measures which will be applied by the company in order to reach the target.²⁹³ This amendment is not yet in force, as the First Chamber of Parliament still has to decide about it.

The future of any positive action policy of the government itself is uncertain. It is important to know that the Coalition Agreement concluded between the Liberal Party (VVD) and the Christian Democrats Party (CDA) in September 2010, explicitly provides that the government will terminate all activities and programmes concerning positive action and diversity policies on the grounds of race/ethnicity and gender. Selection of personnel has to take place on the basis of the quality of the candidates.²⁹⁴

²⁹¹ See the interview with Mr. Jos Streppel on 25 January 2011 in Management Scope, to be downloaded from <http://managementscope.nl/magazine/artikel/557-jos-streppel-corporate-governance-code-tabaksblat> (last accessed on 10 February 2011).

²⁹² Kamerstukken II, 2009-2010, 31763 nr. 14, <http://www.geencommentaar.nl/parlando/index.php?vars=/cgi/showdoc/session=anonymous@3A5095179133/action=bib/query=1/pos=0>.

²⁹³ Kamerstukken II, 2009-2010, 31763 nr. 14.

²⁹⁴ 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, p. 26, under the heading "integratie" (integration). The text may be found at: <http://www.rijksoverheid.nl/regering/het-kabinet/regeerakkoord/immigratie> (last accessed on 18 Oct 2010)

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.

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).

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

- 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 and non-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 equal treatment legislation.

The GETA, DDA and ADA do not entail *compulsory* judicial procedures.²⁹⁵ If discrimination occurs in the sphere of private employment, the conventional civil (labour) law procedures apply. If it occurs in public employment, the ordinary procedures of administrative law apply. The civil court has also competence in cases in which discriminatory contractual agreements (goods and services supplied by private parties or the Government) are at stake. The Administrative Court has competence, with regard to unilateral governmental decisions, e.g., concerning the allocation of social security benefits/social advantages, administrative procedures apply. If discrimination occurs in the sphere of public services (with the exclusion of unilateral acts or decisions of the administration or legislator) it can be dealt with in administrative procedures. Apart from all that, an instance of discrimination (e.g. harassment) can be considered a tort and be dealt with in a civil law procedure.

In addition to all this, the equal treatment legislation provides for a special (non compulsory) procedure before the ETC. The ETC is a semi-judicial body which renders non-binding Opinions. After it has rendered an Opinion, a complaint may still be lodged before the conventional civil/ administrative courts if the applicant wishes to obtain a *binding* judgment. The ETC is a low threshold body: no legal representation is required. Moreover, the procedure before this Commission does not cost anything. As for civil law and administrative law procedures in court there is a system of free legal aid for people with low incomes. To the current author's knowledge, no specific rules exist requiring courts/ETC to be physically accessible.

²⁹⁵ See K. Waaldijk, *supra* footnote 67.

Neither is it specified anywhere to the author's knowledge that information must be provided in Braille. No special procedures exist for dealing with individuals with a learning disability. There is no legal obligation to provide sign language interpretation, to the author's knowledge. The person who feels discriminated against can file a petition at the ETC in writing (Article 12 GETA).

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 Commission's office. By analogy, special measures might be taken for persons with a disability.²⁹⁶

Numbers of cases dealt with by the ETC²⁹⁷

<i>Tabel 11 – Opinions in 2008, 2009, 2009</i>				
	Total 2008		Total 2009	
	Absolute	%		
Sex	25	16	21	16
Race	19	12	28	14
Nationality	4	3	0	0
Religion	15	10	6	5
Sexual Orientation	3	2	2	2
Civil status	0	0	2	2
Political conviction	0	0	1	1
Philosophy of life	0	0	0	0
Working hours	2	1	4	3
Temporary/permanent employment	3	2	1	1
Disability/Chronic Illness	17	11	13	10
Age	45	29	39	30
Several grounds ²⁹⁸	22	14	22	17
Total	155	100	129	100

Numbers of cases dealt with by courts

No statistics on these numbers are available.

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

²⁹⁶ See the web site of the ETC, where all annual reports are being published. Some reports have a summary in English. They are available at http://www.cgb.nl/publicaties/publicatie/221054/jaarverslag_2009.

²⁹⁷ In 2009 the ETC received a total of 473 requests for an opinion, a slight increase as compared to 2008, when there were 432 requests. In that year there were 83 fewer requests than in 2007. Statistics of 2010 were not yet available at the cut-off date of this report. They will be released in the annual report of the ETC of 2010 (to be expected in June 2011.) The annual report gives a detailed overview of what happened with all these requests. As the next table shows, only appr. 25% results in an Opinion of the ETC.

²⁹⁸ 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.



The normal judicial procedures lead to a legally binding judgement. The ETC is a semi-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 *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).²⁹⁹ 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).

Equal Treatment Commission procedures: Article 14(1)(c) of the GETA only sets a requirement of reasonableness. (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).

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).*

Under Article 3:305a of the Dutch 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 who's (similar) interests³⁰⁰ 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 organisations, like e.g. the State itself, local Councils or public bodies like e.g. the Bar Association. The Law does not mention 'in support' of victims, only 'on behalf' of them.

²⁹⁹ J.H. Gerards and A.W. Heringa, *Wetgeving Gelijke Behandeling*, Kluwer Deventer 2003, p. 199.

³⁰⁰ It is an important requirement that the interests of the individuals on who's behalf the action is taken, are similar to each other.

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

- Associations and Foundations can only have full legal powers³⁰¹ 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

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 prosecutors 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.

³⁰¹ 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.

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 a victims is that (before taking the case to court) they must have tried to come get 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 Article 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 organisations (like e.g. 'Art1', a national expert centre in this area, and local anti-discrimination bureaus – who often have the legal form of a Foundation – who get a subsidy from the 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 proceedings³⁰², 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 organisation 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 is being accused of inter alia 'hate speech'.³⁰³

All organizations who have the power to act in civil and administrative procedures, may also ask the Equal Treatment Commission (ETC) 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 12(2) sub d and e, contain provisions concerning some other organisations that have the right to bring a situation / regulation to the attention of the ETC and ask for an Opinion whether this situation / regulation is in compliance with the equal treatment legislation. Under Article 12(2) sub d this concerns any natural person, any organisation 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?*

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.*

³⁰² See Art. 3:305a and 3:305b of the Dutch Civil Code and Art. 1:2(3) of the General Act on Administrative Law.

³⁰³ 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 17 February 2011.)

These cases are called “general interest actions’ (algemeen belang acties) 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’).³⁰⁴ 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 behavior does come forward and objects against the procedure, the Association or Foundation or public body can not 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 against 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) have 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 organisations also have the right to ask the ETC to start an investigation about (presumed) discriminatory practices. The organisation 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 12(2)(e) of the GETA). 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 ETC when this/these individual(s) agree(s) with that. (Art. 12(3) GETA.)

- 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’.

³⁰⁴ A most famous general interest case is the one that was directed against the Dutch State by several gender equality and human rights interests groups, in which they asked the judge to summon the State to stop subsidizing a political party that openly discriminated against women. See the SGP-cases which were summarized in case law section 03 of this Report (under the heading ‘religion and belief’.)

However, when a concrete victim of certain discriminatory behavior 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 against 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) 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 ETC and a few times in cases before the regular courts. Recently, Peter Rodrigues has investigated this.³⁰⁵ He concludes that in the last years around 8% of the cases that are decided by the 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 concludes that there is indeed a breach of the equal treatment legislation. The most famous public interest case that was brought before a civil and an administrative court is the so-called SGP-case, which was described in section 0.1 of this report.

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 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.

³⁰⁵ Peter Rodrigues: 'Eén voor allen: Gelijke behandeling en collectieve acties. In: Caroline Forder (ed); Oordelenbundel Gelijke Behandeling 2010; De Wolf Publishers: Nijmegen 2011 (forthcoming).



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. Article 8(1) reads as follows:

"If an employer terminates an employee's contract of employment in contravention of section 5 or on the grounds that the employee has invoked section 5, either at law or otherwise, such termination is voidable".³⁰⁶

Article 8a GETA reads as follows:

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

Persons who assist the victim are protected by Article 8a. Equivalent Articles are enshrined in the DDA (Articles 9(1) and 7a respectively) and in the ADA (Articles 11(2) and 10 respectively). The reversed burden of proof does not apply to victimisation.³⁰⁷ According to Ambrus, the ETC offers 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.³⁰⁸ The 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.³⁰⁹

In 2008-2009, a study into the issue of victimisation was conducted on behalf of the Equal Treatment Commission.³¹⁰ It concerns the first *large-scale* research into this topic in the Netherlands.

³⁰⁶ The term 'voidable' ("vernietigbaar") means that it is not automatically void but that this may be established during a court procedure.

³⁰⁷ See also M. Ambrus, 'The concept of victimization 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.

³⁰⁸ Ambrus, *op cit*, at p. 21.

³⁰⁹ Ambrus, *op cit*, mentions i.a. ETC Opinion 2006, 34, Par. 3.19.

³¹⁰ See Marieke van Genugten & Jörgen Svensson: *Dubbel de dupe? Een studie naar de benadeling van werknemers die ongelijke behandeling aan de orde stellen*. University of Twente/ CGB, 2010. To be downloaded from:

<http://cgb.nl/publicaties/onderzoeken>

Previous smaller studies in 1985, 1999 and 2006, had shown that victimisation indeed is a problem. Not only does complaining about discrimination often lead to serious negative consequences for the victims, but also many victims do not make official complaints out of fear for victimisation. The new research confirms these findings. The research was done by the University of Twente (in Enschede) and consisted of 4 different empirical studies. The first concerned a quantitative research done in relation to 132 persons who had filed a complaint at the Equal Treatment Commission about discrimination in the area of employment (on all grounds) in the years 2004-2006. The second concerned a qualitative research, done by means of in-depth interviews with 6 victims of victimisation. Thirdly, a questionnaire was sent out to 824 members of an internet panel, all having a paid job. Finally, a questionnaire was filled in by 61 professionals who work in functions where they might have to advise people about whether or not to file a complaint about discrimination. The general outcome out of these studies is that in a considerable number of cases people are victimised as a consequence of (in-officially or officially) complaining about discrimination. Also, a great number of people abstain from making any complaints out of fear for negative consequences. Out of the 824 employees 14% had experiences with discrimination. 60% of them in the end did not succeed in what they hoped to achieve with their complaints. 19% experienced outright negative consequences of making complaints about discrimination, varying from maltreatment to dismissal. Of the persons who had filed a complaint at the ETC 90% say to be happy to have been engaged in this procedure. However, only one third of these persons stated that they had not experienced any kind of victimisation. The qualitative research (in-depth interviews and questionnaires with professionals) revealed that a number of factors determine the seriousness and the prevalence of victimisation. These are most importantly the (long) time it takes to deal with a complaint and taking the route of a formal complaints procedure. The researchers found that serious forms of victimisation most often occurred in case of discrimination on the 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 ETC can only declare that a certain situation is in breach of the equal treatment legislation.

Articles 13(2), 13(3) and 15 of the GETA mention some specific sanctions that may be imposed by the ETC. Under Article 13(2), the ETC may make recommendations when forwarding its findings (in an Opinion) to the party found to have made unlawful distinction. Under Article 13(3) the ETC may also forward its findings in an Advise to the Ministers concerned, and to organisations of employers, employees, professionals, public servants, (consumers of goods and services) and to relevant consultative bodies. Under Article 15(1) the ETC 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.³¹¹ This power must be regarded in light of the fact that the ETC's Opinions are not binding.

The Commission 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 sanctions available under the equal treatment legislation is in conformity with the requirement that sanctions be 'effective, proportionate and dissuasive'.³¹²

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 penal 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 damages³¹³, to take preventive action, or to take someone back who was unlawfully dismissed. In case of tort cases, 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" ("vernietigbaar").³¹⁴ 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.

³¹¹ 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.

³¹² See the report by Kees Waaldijk, *supra* footnote 77 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.

³¹³ 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.

³¹⁴ The term 'voidable' ("vernietigbaar") means that it is not automatically void but that this may be established during a court procedure.

He can also claim to be reinstated in the job. Or, he can claim compensation for pecuniary damages under the sanctions of general administrative/ contract 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 material and immaterial damages 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:
the average amount of compensation available to victims
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:

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 because of 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. This means that such a survey would extend far beyond the time that is available for up-dating this country report. Very generally speaking it can be noticed 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.

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.)*

The Equal Treatment Commission (ETC) is the first officially designated body by which the governments implements Article 13 of the Race Directive, although it was not officially designated as such by a separate law or decree. It was installed in 1994 when the GETA came into force.³¹⁵ Its status as an equality body follows from the tasks given by the GETA to the ETC to hear complaints about discrimination, to draft reports and give advice (see Articles 11-21 GETA). Other equal treatment acts also assign these tasks to the ETC (see art.12 DDA and Art.14 ADA).

Besides this, on the first of January 2007 two non-governmental organizations, the Landelijk Bureau Racismebestrijding (LBR) and the national association co-ordinating local Anti-Discriminatie Bureaus (Landelijke Vereniging ADB's)³¹⁶ have been merged into one new organization called "Art. 1".³¹⁷ (Called after Article 1 of the Constitution.) This new organization now covers all of the Art. 13 ECT non-discrimination grounds and is also officially designated as one of the equality bodies (in terms of Art. 13 of the Race Directive). It has the form of an Association; their members are the local Anti-Discrimination Offices (Anti- discriminatievoorziening, ADV) that are installed and funded by local governments.³¹⁸

³¹⁵ Before 1994 there was an Equal Treatment Commission only for the field of sex discrimination, on the basis of the sex discrimination legislation (including equal pay).

³¹⁶ In 2009 the name of the local ADB's has changed in anti-discriminatievoorziening: ADV)

³¹⁷ Information on this organization (In English) may be found at: <http://www.art1.nl/artikel/73-English> (last accessed on 28 February 2011).

³¹⁸ These local ADV's have a legal basis in de *Wet gemeentelijke antidiscriminatievoorziening Staatsblad 2009, 313* Wet van 25 juni 2009, houdende regels met betrekking tot voorzieningen op gemeentelijk niveau voor de behandeling en registratie van klachten over discriminatie. On the basis of this law, there is a ruling in. gives procedural instructions which a more detailed regulation of the local anti-discrimination offices is laid down. It contains provisions concerning the independency, 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 van 25 augustus 2009, houdende regels betreffende de inrichting van en de onafhankelijke bijstandsverlening door antidiscriminatievoorzieningen alsmede de verslaglegging over de door de antidiscriminatievoorziening geregistreerde klachten door gemeenten (Besluit gemeentelijke antidiscriminatievoorzieningen).*

- 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.*

The ETC is an independent quasi-judicial body; its members are installed by the Government for a fixed period of time (of a maximum of 6 years). See Article 16 par 3 and 5 GETA. Their independency is comparable with that of the judiciary (see Art. 16 par. 4 GETA). It is funded by the Government (from the budget of five Ministries). It is accountable to the Government by means of an annual report and by independent financial auditing. Every 5 years an internal and an external evaluation report is published (and was sent to government and parliament). The annual budget of the ETC amounts to 5 million Euro. It has 9 Members and a Chair and a staff of approximately 45 persons (mostly academic lawyers).

The Status of the organization "Art. 1" and that of the local ADV's is that of an independent non-governmental organization, (although they are subsidized by the national respectively the local government). The legal regulation of 'Art. 1' and the local bureaus that are coordinated and supported by it, has been regulated by a law that has come into force in 2009.³¹⁹

- 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 ETC deals with all non-discrimination grounds that are mentioned in the GETA, DDA, ADA as well as more specific grounds (like the type or the duration of the employment contract). The Equal Treatment Commission's principal function is to investigate alleged cases of discriminatory practices or behaviours. Besides, the ETC may investigate structural instances on its own accord³²⁰ and may advise organisations (including governmental organisations) who want to know whether their policies are or are not in contravention to the law. It may also give advice to the government in discrimination issues, including proposals for new legislation or proposals for amendments of legislation. The ETC sometimes does research (or assigns experts to do this on their behalf) into specific issues, like e.g. victimisation or discrimination against homosexuals in the workplace.³²¹

³¹⁹ See for the legal stature of these organisations the previous footnote.

³²⁰ 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, Stb 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.)

³²¹ For the victimisation report see footnote 310. 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 Verweij Jonker Institute, Utrecht, April 2009. The report can be downloaded from: <http://cgb.nl/publicaties/onderzoeken>

In 2009, the Government announced that it wanted to establish a national Human Rights Institute (which up to date is missing in the Netherlands), and that the ETC would be incorporated into this Institute.³²²

In first instance, the proposed new name was *College voor Mensenrechten en Gelijke Behandeling*. (Institute for Human Rights and Equal Treatment). The proposed name of the new Institute now is: *College voor Mensenrechten*. This means that *gelijke behandeling* (= equal treatment) is no more visible in the name. However, according to the Bill, the role of the new Institute in investigating concrete complaints about unequal treatment will not change as compared to the ETC. The government in the beginning of 2011 has published a draft Decree for the organization of such procedures within the new national Human Rights Institute.³²³

'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 function as the national expert-centre that supports the work of the local ADV's. They do so e.g. by offering trainings to employees working for the local ADV's. The local ADV's have as their main function to assist victim and they do bring many complaints about discrimination to the ETC and to the Courts in support or on behalf of victims, and also in the form of general interest actions or collective actions. (See par. 6.2 of this report.)

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 ETC formally has all of these roles (assisting victims, conducting independent surveys, publishing reports and issuing recommendations to organizations). However, with regard to assisting victims and bringing cases to courts, it has to be noticed that the ETC never makes use of this competences in practice. This role is seen to be conflicting with the role of independently investigating individual complaints and giving an authoritative opinion about them. However, 'Art. 1' and the local ADV's effectively fulfil this role. The role of the latter organizations is mainly to assist victims of discrimination and to monitor developments with respect to discrimination in society.³²⁴

³²² The Government, in December 2009, has sent a draft Bill to a number of organisations, among others the ETC, for comments. In Sept. 2010, a Bill was sent to Parliament. After exchange of written reports, the Bill is now ready for public debate in the Second Chamber. See TK 2009-2010, 32 467, nrs 1-5. The latest developments can be found at <http://www.rijksoverheid.nl/documenten-en-publicaties/wetsvoorstellen/2010/10/04/wetsvoorstel-college-voor-de-rechten-van-de-mens-bzk> (last accessed on 28 Febr. 2011.)

³²³ An internet consultation for this Draft Decree was opened on 24 January 2011. See <http://www.internetconsultatie.nl/onderzoekgelijkebehandeling> (last accessed on 28 Febr. 2011.)

³²⁴ Each year, 'Art.1' publishes a report about the number of complaints that have been received by the local ADV's, called "kerncijfers". The reports may be found at: http://www.art1.nl/artikel/10029-Kerncijfers_jaaroverzicht_discriminatieklachten (last accessed on 28 Febr. 2011.)

From the latest report (about 2009), it appears that the number of complaints about discrimination (again) has raised considerably. In 2009, a number of 5931 complaints had been received, 1123 more than in 2008.³²⁵ Especially the number of complaints about sexual orientation and disability discrimination increased in that year.³²⁶ Apart from assisting victims and assisting and training the local anti-discrimination bureaus, 'Art.1' also conducts independent surveys and gives comments and advice (mostly to local governments) about combating discrimination.

- e) *Does the body (or bodies) have legal standing to bring discrimination complaints or to intervene in legal cases concerning discrimination?*

The ETC does have this competence, but it never makes use of this possibility because it conflicts with their competence to investigate complaints about discrimination independently. "Art. 1" can bring claims before courts just like any other NGO, in the framework of the general rules concerning actions on behalf of victims and general interests actions or collective actions, that exist under Dutch civil law. (No data of numbers of class actions are available.) See par. 6.2. of this Report.

- f) *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) 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 ETC is a quasi-judicial institution. Their decisions and recommendations are not binding and they have no power to impose sanctions. There is no appeal possible to the ETC itself, but a case can always be brought to a (civil or administrative) court in order to obtain a binding judgement. On the basis of an Opinion of the ETC in which a certain practice or behaviour has been declared discriminatory, a defendant (or his organisation) can take voluntary measures. Example: a sports school that was accused of unlawfully prohibiting a headscarf may decide that the individual complainant will be allowed to wear the scarf in the future, but it may also decide to abandon their prohibition on headscarves, and / or to offer sporting-proof headscarves, after a recommendation of the ETC.

According to the Annual Report of the ETC of 2008 and 2009, in 6% / 6.1% of the cases only an individual measure was taken by the defendant / company or institution, in 43% / 39.2% only a structural measure, and in 30% / 27% both an individual and a structural measure. Measures were taken in 79% / 74% of cases in total as a result of the opinion or recommendation.

³²⁵ The numbers of 2010 are not yet available at the cut-of date of this report (28 March 2011.)

³²⁶ See <http://www.art1.nl/artikel/10246->

[Kerncijfers_2009_forse_stijging_discriminatieklachten_dankzij_campagne](#) (last accessed on 28 Febr. 2011.)

It is not possible in all cases to take an individual measure. As regards Opinions where this was possible, individual measures were implemented in 2008 and 2009 in 53% / 43% of such cases. As regards the opinions for which structural measures are possible, structural measures were taken in 75% / 74% of the cases.³²⁷ From these figures it appears that in 2009, defendant seemed to be less inclined to comply with the Opinions of the ETC than the year before.

The independence of the ETC is described in the GETA, where reference is made to the legal position of the judiciary and the relevant articles in that Law are declared applicable for all members of the ETC. See art. 16.4 GETA.

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

- g) *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 undertaken independently, both by the ETC and by 'Art.1' and the ADV's. The ETC has a position as a semi-judicial body and the experts that are Members of the Commission all have an independent status. "Art. 1" is an independent NGO, although it receives subsidy from the national government. Local anti-discrimination bureaus (ADV's) are also independent, but receive subsidies from local governments. Their existence is guaranteed by the (National) law. There is no interference with any of their tasks by the national or local government(s).

However, there is some public debate about especially the Opinions of the ETC. In particular the Freedom Party of Mr Wilders (PVV) quite often contests these Opinions, especially in headscarf and hand-shaking cases.³²⁸ It maintains that the ETC is too 'soft' on Islamic people, protecting their different status. This party, however, even contests the independency of the Courts, and has publicly made proposals to regularly evaluate the work of individual judges and, in case they do not punish criminals severely enough, dismiss them! Mr Wilders often asks the government when the ETC will be abolished!

- h) *Does the body treat Roma and Travellers as a priority issue? If so, please summarise its approach relating to Roma and Travellers.*

³²⁷ ETC annual Report 2008, p. 36 and ETC annual Report 2009, p. 29. Figures for 2010 are not yet available. All ETC annual reports are accessible at: <http://www.cgb.nl/publicaties/jaarverslag> (last accessed on 28 February 2011.)

³²⁸ See e.g. the questions asked to the Minister of Interior and of Security and Justice after the Opinion 2011-2 ETC was issued. See Questions and Answers Parliamentary Papers, Code 2011Z00252, to be found at: <http://ikregeer.nl/document/kv-tk-2011Z00252>



The ETC does not treat Roma and Travellers as a special or priority issue. It has to be noticed here that Roma, Sinti and Travellers are not represented in overviews by the 'Art.1' and the ADV's. Furthermore, according to the figures, Roma and Sinti hardly ever file their complaints with the ECT or the Public Prosecutor's Office.

Reasons for the absence of complaints could include the distrust of the authorities by Roma and Sinti, language barriers and the idea that complaining about discrimination or unequal treatment may make their situation worse. With that, the social situation of Roma and Travellers in the Netherlands might be not so precarious (compared to other European countries) that it demands for priority treatment.

According to a search on their web site "Art. 1", has as yet no specific programs concerning Roma or Sinti or travellers. Art.1' does put information of other organisations and reports on their website or signals this in their news letters. As for the local ADV's this is hard to say since there are many of local bureaus. The organisation in the Netherlands that is 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 2009.³²⁹ Besides this, there is also the organisation called "Forum" that gathers a lot of information on the situation of Roma in the Netherlands.³³⁰

³²⁹ 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 28 Febr. 2011.)

³³⁰ See publications and programmes concerning their web site:
http://www.forum.nl/Zoek_resultaten?start=0&q=roma (last accessed on 3 March 2011)

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 for Social Affairs and Employment is primarily responsible for activities to enhance compliance with the equal treatment legislation, esp. 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 and Welfare 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.³³¹ The Ministry of Interior and Kingdom Relations is also involved in implementation issues, in as far as the 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.

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*

Several NGO's in the field of non-discrimination and minority rights get subsidy from the government. The goal of the already mentioned NGO *Art.1* is promoting the principle of non-discrimination in the broad sense. *Art.1* gives advise to (governmental) organisations, and it provides public information about non-discrimination and training sessions. Also, it assists the local anti-discrimination bureaus (ADV's) in their work and supports them with training and educational activities. Besides this, several NGO's with a view to combating discrimination on a particular ground are subsidized in order to encourage dialogue, such as the COC (which advocates for LGTB rights).

- 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)*

³³¹ Information about their activities can be found at: www.szw.nl and www.vws.nl

The Ministry of Social affairs has established a network of professionals on equal treatment issues, consisting of representatives (civil servants) from the most important ministries (see above, sub question a) and national labour and employers' organisations and other NGO's that are active in this field (e.g. the Dutch Council of Chronically Ill and Disabled Persons).

d) *to specifically address the situation of Roma and Travellers*

No specific official measures are addressed to Roma and Travellers. However, lately 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.³³² Some NGO's (partly subsidised by Government) give special attention to Roma and Travellers. Most importantly, this is the national expert centre on multi-cultural issues, FORUM (Utrecht).³³³ This organisation conducted several studies and issued reports on the situation of Roma and travellers (or 'woonwagenbewoners').³³⁴ Also, the Anne Frank Stichting regularly gives special attention to the situation of Roma in its "*Monitor Racisme en Extremisme*".³³⁵

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 authors' knowledge this is not the case.

³³² See Tweede Kamer 2008-2009, 31 700 XVIII, nr. 90.

³³³ See www.forum.nl

³³⁴ See the web site of Forum: <http://www.forum.nl/> (last accessed on 28 Febr. 2011.)

³³⁵ See <http://www.monitorracisme.nl/content.asp?lid=1&pid=1> See also the Special Cahier on the situation of Roma and Sinti, published by the Anne Frank Stichting & the University of Leiden in 2004: <http://www.annefrank.org/upload/downloads/roma%20en%20sinti%20engels.pdf> (last accessed on 28 Febr. 2011.)



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 of: *Interior and Kingdom Affairs, Security and Justice, Education/Culture/Science, Social Affairs and Labour and Health/Welfare/Sports*. For some specific projects, the Ministries of *Housing, Planning and Environment and Traffic and Water* are also involved. The co-ordination is organised in the following way:

1. Equal Treatment in Employment: (inter alia: GETA, ADA, DDA and Equal Treatment Act Men/Women): *Ministry of Social Affairs and Labour*.
2. Age Discrimination: *Ministry of Social Affairs and Labour*.
3. Disability Discrimination: *Ministry of Health Welfare and Sports*
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*.

Is there an anti-racism or anti-discrimination National Action Plan ? If yes, please describe it briefly.

No there is no such national action plan.



ANNEX

- 1. Table of key national anti-discrimination legislation**
- 2. Table of international instruments**



ANNEX 1: TABLE OF KEY NATIONAL ANTI-DISCRIMINATION LEGISLATION

Name of country: the Netherlands

Date : 1 January 2011

Title of Legislation (including amending legislation)	Date of adoption:	Date of entry in force from:	Grounds covered	Civil/Administrative / Criminal Law	Material Scope	Principal content
This table concerns only key national legislation; please list the main anti-discrimination laws (which may be included as parts of laws with wider scope). Where the legislation is available electronically, provide the webpage address.		Please give month / year			e.g. public employment, private employment, access to goods or services (including housing), social protection, social advantages, education	e.g. prohibition of direct and indirect discrimination, harassment, instruction to discriminate or creation of a specialised body
Article 1 of the Constitution	28 January 1983	17 February 1983	Religion, belief, political opinion, race, sex or on any other ground (open ended clause).	Constitutional Law	Predominantly vertical relations but might also have an effect in horizontal relations	Obligation of equal treatment and prohibition of discrimination



Title of Legislation (including amending legislation)	Date of adoption:	Date of entry in force from:	Grounds covered	Civil/Administrative / Criminal Law	Material Scope	Principal content
The Act on Equal Treatment between Women and Men in Employment	1 March 1980 NB: after that year the Act has been amended several times.	15 March 1980 Law Gazette 1989, 168, lastly amended in 2007, Stbl 2007, 321.	Sex	Civil labour law and administrative law (civil servants)	Grosso modo: Access to employment (public and private), remuneration, the liberal profession, vocational training and pension provision. (pension provision since 1999).	Prohibition of direct and indirect distinction. Includes right to equal pay, sexual harassment and instruction to discriminate. Protection against victimisation.
Articles 7:646 and 7:647 of the Civil Code.	1992	1992	Sex	Civil Law	Equal Treatment between men and women within employment (7:646) and protection against victimisation dismissal (7:647).	Prohibition of direct and indirect distinction. [also includes pregnancy/maternity]. Protection against discriminatory and victimisation dismissal.



Title of Legislation (including amending legislation)	Date of adoption:	Date of entry in force from:	Grounds covered	Civil/Administrative /Criminal Law	Material Scope	Principal content
General Equal Treatment Act (GETA)	2 March 1994	1 Sept. 1994, Staatsblad 1994, 230, lastly changed in 2008, Staatsblad 2008, 100.	Religion, belief, political opinion, race, sex, nationality, hetero-or homosexual orientation, civil status.	Civil and administrative law.	Employment, goods and services (which includes housing), education, health, and, <i>social security and advantages</i> (for the ground 'race' only).	Prohibition of direct and indirect distinction, instruction to discriminate, prohibition of harassment, protection against victimisation.
Act on Prohibition of Distinction on the ground of Employment Duration (Article 7:648 of the Civil Code and 125g of the Civil Servants Act	3 July 1996	1 November 1996, Staatsblad 1996, 361	Employment duration (arbeidsduur).	Civil and administrative law	Employment (private and public)	Prohibition of distinction (no distinction is made between <i>direct</i> and <i>indirect</i> distinction). Both are susceptible for 'objective justification'. Protection against discriminatory and victimisation dismissal.



Title of Legislation (including amending legislation)	Date of adoption:	Date of entry in force from:	Grounds covered	Civil/Administrative /Criminal Law	Material Scope	Principal content
Act amending the Act on Equal Treatment between men and women and Title 7.10 of the Civil Code in order to implement the EC Burden of Proof Directive in cases of discrimination on the ground of sex.	13 December 2000	Dec. 2000 (Staatsblad 2000, 635).	Sex	Civil and administrative law	Employment and Pension Schemes	Introduction of the partially reversed burden of proof.
Act on the Prohibition of Distinction on the ground of the employee's temporary contract/permanent contract (Article 7: 649 of the Civil Code).	7 November 2002	22 November 2002 (Staatsblad 2002, 560)	Temporary contract/permanent contract	Civil Law	Conditions of Employment	Prohibition of distinction, . Protection against discriminatory and victimisation dismissal.
Act on Equal Treatment on the ground of disability or chronic disease (DDA); Amended in 2009, when the scope was extended to housing and education (Staatsblad 2009-101)	3 April 2003	1 December 2003, Staatsblad 2003, 206.	Disability and chronic disease	Civil and administrative law	Employment (public and private) and transport (not in force yet), housing and education	Prohibition of distinction, instruction to discriminate, harassment, victimisation



Title of Legislation (including amending legislation)	Date of adoption:	Date of entry in force from:	Grounds covered	Civil/Administrative / Criminal Law	Material Scope	Principal content
Act on Equal Treatment on the ground of Age in Employment (ADA)	17 December 2003	1 May 2004. (Staatsblad 2004, 30)	Age (both young and old age)	Civil and administrative law	Employment (public and private).	Prohibition of distinction, instruction to discriminate, harassment, victimisation,
EC Implementation Act / Amending the General Equal Treatment Act and the DDA and ADA.	21 February 2004	1 April 2004 (Staatsblad 2004, 120)	Amends (inter alia) the General Equal Treatment Act + the Disability Discrimination Act with a view to compliance with the Article 13 EC Directives (now Art 19 TEU)	Civil and administrative law	See GETA (above)	Implementing various aspects of Directives 2000/43 and 2000/78



ANNEX 2: TABLE OF INTERNATIONAL INSTRUMENTS

Name of country: the Netherlands

Date: 1 January 2011

Instrument	Date of signature (if not signed please indicate))	Date of ratification (if not ratified please indicate)	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)	4/11/1950	31/8/1954	No	Yes	Yes
Protocol 12, ECHR	4/11/2000	28/7/2004	No	Yes	Yes
Revised European Social Charter	23/1/2004	3/5/2006	No	Ratified collective complaints protocol? Yes	Yes
International Covenant on Civil and Political Rights	25/6/1969	11/12/1978	No	Yes	Yes
Framework Convention for the Protection of National Minorities	1/2/1995	16/2/2005	No	Not applicable	Not applicable



Instrument	Date of signature (if not signed please indicate))	Date of ratification (if not ratified please indicate)	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?
International Convention on Economic, Social and Cultural Rights	25/6/1969	11/12/1978	No	Not applicable	Yes
Convention on the Elimination of All Forms of Racial Discrimination	24/10/1966	10/12/1971	No	Yes	Yes
Convention on the Elimination of Discrimination Against Women	17/7/1980	23/7/1991	No	Yes	Yes
ILO Convention No. 111 on Discrimination	unknown	15/3/1973	No, not to the author's knowledge	Not applicable	Yes
Convention on the Rights of the Child	26/1/1990	6/2/1995	No	Not applicable	Yes
Convention on the Rights of Persons with Disabilities	30/3/2007	No	No	Not applicable	Yes