Executive Summary
Netherlands 2007 Country report on measures to combat discrimination
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1. Introduction

The Kingdom of the Netherlands has the highest population density in the European Union. Immigrants predominantly come from Turkey, Morocco, the Dutch Antilles (although, admittedly, people from the Dutch Antilles cannot really be described as 'immigrants') Surinam and Indonesia. The main religions are Roman Catholicism (about 30%), Protestantism (about 21 %), Islam (about 4%) and other religions (about 4%). About 40% of the population is not religiously affiliated.[2]

The Government type is that of a representative democracy premised upon a bicameral system. The official head of the State is the Queen (Beatrix). The Prime Minister is the leader of the government. Government always consists of a coalition of different political parties since there are a multitude of parties that get elected into Parliament.

The Netherlands is party to all of the important international agreements relevant for counteracting discrimination such as: The European Convention on Human Rights (including *inter alia* Protocol No. 12), the International Covenant on Civil and Political Rights ICCPR), the Optional Protocol to the Covenant; the Covenant on Economic, Social and Cultural Rights (ECOSOC), the Convention on the Elimination of All Forms of Racial Discrimination (CERD), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) (including the Optional Protocol to this Convention) and the Convention of the Rights of the Child. The above-mentioned instruments constitute part of the domestic legal order after they have been promulgated in the official Journal of Laws and can be applied directly by domestic courts if the provision at stake is sufficiently clear and precise for direct application.

[1] This report and its summary build on earlier reports written by Kees Waaldijk, Martin Zwamborn, Lisa Waddington and Marianne Gijzen.
[2] The World Factbook 2005.

2. Main legislation concerning equal treatment and non-discrimination

International law: The Constitution bars the Dutch Supreme Court from exercising Constitutional review of formal statutory acts. However, the Netherlands adheres to a 'monist theory' of international law. This means that the Dutch courts can apply international standards of equal treatment and non-discrimination directly. (E.g. Article 26 ICCPR and Article 14 ECHR.)

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

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

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

Statutory equal treatment acts: Amongst others the most important (civil law) equal treatment acts are the 1994 General Equal Treatment Act (GETA) as amended in 2004; the 1980 Equal Treatment Act for Men and Women in Employment Act, most recently amended in 1989 and currently under revision for the implementation of Directive 2002/78; the 2003 Disability Discrimination Act (DDA); and the 2004 Age Discrimination Act (ADA). The GETA covers the following grounds: religion, belief, political opinion, race, sex, nationality, hetero or homosexual orientation and marital status. The DDA covers disability and chronic disease, whereas the ADA provides protection from age discrimination. These acts flesh out Article 1 of the Constitution for horizontal relations. In addition, they must be perceived as transposition measures of equality guarantees contained in EC Directives.
In the context of the implementation of the Article 13 Directives it is presumed that the Dutch legislator has in some regards fallen short of EU requirements, e.g. by not adopting the definition of indirect discrimination from the Directives. However, in other respects the Dutch legislator has gone beyond what is strictly required by the Directives. For example, the protection against discrimination on the ground of religion and belief and sexual orientation also applies in the area of goods and services.

Given the scope of this report, the discussion hereinafter will be limited to GETA, the DDA and the ADA in the light of the implementation of the Article 13 Directives.

3. Main principles and definitions

The Dutch Equal Treatment Laws (GETA, DDA and ADA) cover the grounds mentioned in Article 13 and some other grounds, like nationality and marital status.
The above-mentioned statutory acts all contain a prohibition of direct and indirect distinction, harassment, the instruction to make a distinction, and a prohibition of victimisation. However, only the DDA explicitly enshrines a duty for the employer to bring about 'effective' [rather than 'reasonable'] accommodations for disabled people.

In contrast to any other realm of Dutch anti-discrimination law and in contrast to EC law, these Acts are centred around the concept of distinction ("onderscheid") in lieu of discrimination ("discriminatie"). The difference between the two concepts is that 'distinction' is a 'neutral' and 'discrimination' a 'pejorative' notion. The usage of the correct terminology was the subject of discussion during the implementation of the Article 13 Directives (Directives 2000/43/EC and 2000/78/EC). From a legal perspective the usage of the word 'distinction' seems compatible with the Directives' requirements.

Direct distinction – Direct distinction occurs, according to Dutch law, in cases where the contested behaviour takes place on grounds of a protected status or on grounds of a (wrongly) assumed protected status. This double dimension is only explicitly incorporated in the definition of direct distinction on grounds of disability in the DDA. For the other grounds it can be derived from Dutch Supreme Court case law.
In deviation from the GETA and DDA, the ADA makes no distinction between 'direct' and 'indirect' age distinction. The amalgamation of both legal concepts in one single provision is arguably in contravention of the Framework Directive (Directive 2000/78). Both 'direct' and 'indirect' age distinction can be 'objectively justified'. However, in the light of the Directive, some people have concluded that the 'objective justification test' in direct age distinction cases may differ from the one applied in indirect age distinction cases.

Particularly in the DDA context, it is not transparent whether a person claiming an instance of direct distinction on grounds of disability must be compared with a non-disabled person or with another disabled person (with the same, a comparable or a different disability). The Dutch definitions of direct distinction in the GETA, DDA and ADA do not explicitly provide for the possibility of 'hypothetical comparisons'. Only a broad interpretation of 'direct distinction' by the courts and the Equal Treatment Commission (hereinafter: ETC) guarantees that all elements of the definition of direct discrimination in the Directives are covered. 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. Some commentators have explained this to mean that persons associated with disabled people are protected as well. In *Opinion* 2006-227 the ETC implicitly acknowledges that discrimination by association is also prohibited under the DDA. However, this acknowledgement is still not commonly recognized. Neither the DDA, nor the GETA or ADA does cover the issue of 'discrimination by association explicitly.

Indirect distinction – Indirect distinction is defined in the GETA and DDA as: "distinction on the grounds of other characteristics or behavior than those meant under b [i.e., the provision summing up the grounds for direct distinction], resulting in direct distinction". From the case law it follows that indirect distinction occurs when a neutral behaviour (e.g., a policy, provision or practice) has the effect of disproportionately affecting members belonging to a certain group. The lack of intent bears no impact upon the establishment of indirect (nor direct) distinction.
The Directives require that the applicant in a case of indirect discrimination establishes that the group to which he or she belongs would be put at a particular disadvantage. The definitions of indirect distinction in the GETA and DDA do not accurately reflect this 'softer' EU standard in cases of indirect discrimination. The ETC's (non-binding) case law reveals quite a strong reliance on statistical evidence. So-called 'facts of common knowledge' are often supportive of statistical evidence, but they are generally not accepted as exclusive evidence. It appears that Dutch law is compatible with the Directives as regards the test for 'objective justification' of indirect discrimination.

Harassment – Before the implementation of the Directives, the ETC treated 'harassment' as an instance of direct distinction with regard to 'employment conditions'. Post implementation, 'harassment' is explicitly defined as a form of 'distinction' which can never be justified. The current definition of 'harassment' in the GETA, DDA and ADA requires that an applicant establishes: (1) that the harassment is 'ground-related' (harassment by reason of a person being very fat or ugly is thus not tackled by the Acts) **and** (2) that it has the purpose or effect of violating the person's dignity **and** (3) that it has the purpose or effect of creating an intimidating, hostile, degrading, humiliating or offensive environment. In all, this test is stricter than that adopted by the ETC in its pre-implementation case law. Hence, the Dutch approach falls short of the Directives' *non-regression clause*.

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

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

Exceptions – The GETA, DDA and ADA all enshrine exceptions to the central norm. In the first two Acts these exceptions are explicitly and exhaustively listed by the legislator within the Acts themselves as far as direct distinctions is concerned. These exceptions are interpreted restrictively by the courts and the ETC. The ADA more flexibility for (semi-)judicial interpretation: both direct and indirect age distinction may be 'objectively justified' and only certain exceptions have been *a priori* and explicitly listed within the Act itself.

In the context of the GETA the main exceptions are the following: the genuine occupational requirement exception; positive action (for race and sex only); and exceptions for employers, educational establishments and organisations/associations with an ethos based on religion or belief. An exception regarding the private nature of the employment relationship and an exception regarding the private nature of the circumstances of the particular contract are also included in the GETA.

In the context of the DDA the following exceptions apply: the public security and health exception; the pursuance of supportive (social) policies for disabled people and positive action measures. The genuine occupational requirement exception has not been enshrined in the DDA.

Under the ADA both direct and indirect age distinction are susceptible to objective justification. However, the legislator has enshrined various exceptions within the ADA itself. These are thus *a priori* justified. This applies to: 1. age distinctions which are based on employment market policies which aim at promoting labour participation of people within certain age categories; 2. dismissal by reason of a person having reached the statutory pensionable age (65) or a higher (not lower) age, provided this higher age has been laid down by statutory act or governmental decree or has been mutually agreed on by the parties involved. Until 2 December 2006 the following 'transition' rule applies: if it has been agreed in the employment contract that an employee's contract shall be terminated once he/she reaches an age lower than the pensionable age and provided this was agreed before the ADA entered into force (before 01 May 2004), the Act shall not apply. After this 'transition period' justification shall be called for.

Multiple discrimination – There are no legal rules dealing with multiple discrimination. Neither are there any plans to construct such rules. The ETC deals with a lot of cases in which various non-discrimination grounds are at stake. Multiple (or intersectional) discrimination is now discussed more and more in the Dutch legal academic world and among equal treatment specialists. The fact that not all grounds are covered in exactly the same way makes it crucial which ground is brought forward by the claimant.

4. Material scope

The GETA applies to the areas of employment and occupation, provision of goods and services (including education) and, only in the context of racial discrimination, the area of social security, social protection, and healthcare. All guarantees flowing from the Directives also apply in the area of the provision of goods and services. The DDA currently applies only to employment. However, the Act provides that on a date still to be determined by the legislator it shall also apply to the area of public transport. Also, there are proposals to include housing and (general) education into the scope of the DDA. The ADA is most limited in its material scope: it only applies to employment and employment related education. It is noted that until 1 January 2008 at the latest, the ADA shall not apply to the military service. 'Employment' in all three Acts must be understood broadly: it covers both public and private sector employment; it ranges from the recruitment stage to dismissal including *inter alia* promotion, employment conditions, employment mediation and (vocational) training. In addition, self-employment is covered by all three Acts.

The boundaries to the GETA's scope are: 1. its inapplicability with regard to the internal affairs of churches and religious communities; 2. it remains without prejudice to already existing sex discrimination law (mentioned in the Introduction above); and 3. its inapplicability to the internal affairs of associations.

As far as the ADA is concerned, the prohibition of age distinction is inapplicable with regard to (occupational) pension provision (supplementary to pension provision on the basis of social security law) and with regard to actuarial calculations for pension provision.

5. Enforcing the law

Neither the GETA, nor the DDA or ADA contains compulsory judicial procedures. Normal civil or administrative procedures can be used to enforce the equal treatment standards. All of these procedures lead to a legally binding decision. In practice, the equality norm is in most cases enforced through a special low threshold procedure before the ETC. The ETC is a semi-judicial independent body (see also the next section) whose case law is *non-binding* but nevertheless authoritative. No legal representation in cases before the ETC is required. Both under the ordinary civil and administrative law procedures and the ETC procedure interest groups (NGO's and other associations) have legal standing. Besides, the ETC may conduct an investigation on its own initiative. All parties involved in any investigation by the ETC are under the duty to provide the ETC with all requested information. A failure to do so may result in criminal law proceedings. Both the ETC and the ordinary courts accept situations testing.

The 'partially reversed burden of proof' applies in procedures before the courts and is applied by the ETC as well. With regard to sanctions, the GETA, DDA and ADA only stipulate that discriminatory dismissals (and victimisation dismissals) shall be void and that contractual provisions which are in contravention of the equal treatment acts shall be null and void. Under the ordinary court procedures, if an employee has been dismissed contrary to equal treatment law, the termination of the contract can be invalidated and the employee can thereupon claim wages. He or she can also claim to be reinstated in the job. Alternatively, he or she can claim compensation for pecuniary damages under the sanctions of general administrative, contract or tort law.
The law's limited arsenal of sanctions raises doubts about whether the Directives' requirement that sanctions be 'effective', 'proportionate' and 'dissuasive' is met. In addition, the statutory non-discrimination acts contain (softer) 'sanctions' which can only be imposed by the ETC and not by the courts. Thus, the ETC can make *recommendations* to the party found to have made an unlawful distinction. It may also forward its findings in an Opinion to the Minister concerned and to organisations of employers, employees, professionals and the like.
Moreover, but this has never been used, the ETC may bring legal action with a view to obtaining a court ruling that conduct contrary to the relevant equal treatment legislation is unlawful, requesting that such conduct be prohibited or eliciting an order that the consequences of such conduct be rectified.

6. Equality bodies

The ETC is the main officially designated equality body (on the basis of article 13 of the Race Equality Directive). Its mandate covers conducting surveys and issuing reports and recommendations, but it does not cover the task of assisting victims of discrimination. This latter function is seen as contradictory to the main task of the ETC, which is to hear and investigate cases of (alleged) discriminatory practices or behaviours. This task takes most of the time and resources of the ETC. (See above for a description of this role.)
The ETC also operates in a consultative fashion (e.g. to the government when drafting equality laws) and it performs informative and research activities (e.g. through its annual bulletins, see www.cgb.nl). In short, the ETC (in contrast to the courts) operates both reactively and proactively in order to give full effect to the principles of equality and non-discrimination. The ETC Members are all legal experts and all have an independent status. The (expert) Members are installed by the government for a fixed period of time (5 years). Members of the staff have the same position as civil servants working for a Ministry but are only accountable to the Director of the ETC (not to a Minister).The ETC 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 send 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 ETC deals with all non-discrimination grounds in the GETA, DDA, ADA as well as more specific equal treatment grounds (like the type of duration of the employment contract). All reports, advices and *Opinions* (judgements in individual cases) are published on the Commission's web site: http://www.cgb.nl
On the first of January 2007, two non-governmental organizations, the Landelijk Bureau Racismebestrijding (LBR) and the local Anti-Discrimiantie Brueaus (ADB's) have been merged into one new organization called "Art. 1". (After Article 1 of the Constitution.) The organization now covers all of the Art. 13 ECT non-discrimination grounds and is officially designated as one of the equality bodies (in terms of Art. 13 of the Race Directive). It has mainly a role in assisting victims and in monitoring developments with respect to (non-)discrimination in (Dutch) society in a broad sense.