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Country report

Non-discrimination

Netherlands
2021
including summary



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Country report

Non-discrimination

Transposition and implementation at national level of
Council Directives 2000/43 and 2000/78

Netherlands

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EXECUTIVE SUMMARY

1. Introduction

The Netherlands is a representative democracy premised upon a bicameral system. King Willem-Alexander is the official head of state. The Government always consists of a coalition of different political parties, since a multitude of parties are elected to Parliament and none of them has ever had an absolute majority. The political climate in the Netherlands in the past 15 years has been influenced considerably by the rise of far right-wing parties, such as the Party for Freedom (*Partij voor de Vrijheid*, PVV). Issues brought up by such parties, in particular concerning immigration and anti-Islam or anti-terrorism measures, now dominate political discourse in general. From 2017 to 2020 the Government was based on a coalition between the People's Party for Freedom and Democracy (*Volkspartij voor Vrijheid en Democratie*, VVD) (liberal), the Christian Democrats (*Christen-Democratisch Appèl*, CDA), the Christian Union (*Christenunie*, CU) and the Democrats 66 (*Democraten 66*, D66). The coalition was led by Mark Rutte of the VVD who has been prime minister since 2010.

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

The Kingdom of the Netherlands has the second highest population density in the European Union, after Malta. On 1 January 2020, 24 % of the Dutch population had a migration background, with almost half of this group consisting of people who were born in the Netherlands (second generation migrants). The largest migrant groups are people of Turkish origin (2.4 %), followed by people of Moroccan (2.3 %), Surinamese (2.0 %) and Polish origin (1.1 %).¹ The main religions are Roman Catholicism (20 %), Protestantism (15 %) and Islam (5 %). Six per cent of the population subscribes to another religious faith and 51 % identifies as not religious.² In 2020, 22 % of the Dutch population were younger than 20, 25 % were between 20 and 40, 34 % between 40 and 65 and 20 % were 65 or older.³

2. Main legislation

International law: the Constitution bars the Dutch Supreme Court from exercising constitutional review of formal statutory acts. However, the Netherlands adheres to a 'monist theory' of international law. This means that international norms of equal treatment and non-discrimination can be applied directly by the Dutch courts and take precedence over statutory acts.

¹ Centraal Bureau voor de Statistiek (Statistics Netherlands), *Jaarrapport integratie 2020* (Annual report on immigrant integration), <https://longreads.cbs.nl/integratie-2020/bevolking/>, para 1.9.

² Statistics Netherlands, *Religie in Nederland* (Religion in the Netherlands), <https://www.cbs.nl/nl-nl/longread/statistische-trends/2020/religie-in-nederland/2-ontwikkelingen-in-religieuze-betrokkenheid>, para 2.1. The percentages cited are from 2019.

³ Statistics Netherlands, *Tabel: bevolking naar leeftijd* (Table: Population by age groups), <https://www.cbs.nl/nl-nl/visualisaties/dashboard-bevolking/leeftijd/bevolking>.

The Constitution: a non-discrimination clause is contained in Article 1 of the Dutch Constitution. It covers the grounds of religion, philosophy of life, political convictions, race and sex, as well as 'any other ground'.⁴ This article can be invoked by an individual applicant against actions by the Government and by private institutions and can also be invoked between individuals.

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

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

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

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

In the light of the implementation of Directives 2000/43/EC and 2000/78/EC the Dutch legislator has gone beyond what is strictly required by the directives. For example, protection against discrimination on the grounds of religion and belief, sexual orientation (defined as hetero- or homosexual orientation) and disability also applies in the area of goods and services.

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

3. Main principles and definitions

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

Direct discrimination – Since 2011, the definition of direct discrimination in the equal treatment laws has copied the wording of the directives, except for the use of the word 'distinction' instead of 'discrimination'. Although this is not explicitly included in the definition of direct discrimination in the directives or the (amended) Dutch equal treatment laws, the possibility of discrimination by association has been acknowledged by the Dutch

⁴ 'Any other ground' includes age, disability and sexual orientation. These grounds are expressly protected in the statutory equal treatment acts which have been adopted to implement the constitutional non-discrimination clause.

equality body, the Netherlands Institute for Human Rights (NIHR) and its predecessor, the Equal Treatment Commission (ETC).⁵

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

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

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

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

Reasonable accommodation – This concept has only been enshrined in the DDA. The law speaks of 'effective' instead of 'reasonable' accommodation: the accommodation sought must have the pursued effect(s), which means that the accommodation must be both 'appropriate' and 'necessary'. It must also be reasonable, in the sense that it may not impose a disproportionate (financial) burden upon the employer. The duty to make an 'effective accommodation' is not a generic obligation: it must be clear for the employer, for example, that an accommodation is needed and what kind of accommodation that should be. Lastly, the duty does not require employers to hire people who cannot fulfil essential job requirements.

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

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

⁵ E.g. in ETC 2006-227 and ETC 2011-90.

4. Material scope

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

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

The boundaries of the GETA's scope are threefold. First, the act is not applicable with regard to the internal affairs of churches and religious communities; secondly, it remains without prejudice to already existing sex discrimination law; and thirdly it is not applicable to the internal affairs of associations (this follows implicitly from the constitutionally guaranteed freedom of association). Furthermore, the law is not applicable to unilateral acts by public officials or Government bodies (i.e. acts of regulation and legislation and acts by which such rules are executed).⁶ The latter limitation to the scope does not apply to statutory social security provisions (which are only covered for the ground of race / ethnicity).

The prohibition of age discrimination in the ADA is inapplicable with regard to (occupational) pension provision (supplementary to pension provision on the basis of social security law) and with regard to actuarial calculations for pension provision.⁷

5. Enforcing the law

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

The 'partially reversed burden of proof' applies in procedures before the courts and is applied by the NIHR as well. With regard to sanctions, the GETA, DDA and ADA only stipulate that discriminatory dismissals (and dismissals related to victimisation) shall be voidable and that contractual provisions which are in contravention of the equal treatment acts shall be null and void. Under the ordinary court procedures, if an employee has been dismissed contrary to equal treatment law, the termination of the contract can be invalidated and the employee can thereupon claim wages. They can also request to be reinstated in the job. Alternatively, they can claim compensation for pecuniary damages under the sanctions of general administrative, contract or tort law.

⁶ As the directives do not require this, this is not an issue from an EU perspective.

⁷ No adjustments have been made to this exception in response to the Court's judgment in *HK Danmark* (CJEU 26 September 2013, C-476/11), in which age-related increases in pension contributions were found to be outside the scope of Article 6(2) of the Employment Equality Framework Directive.

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

Furthermore, the NIHR may bring legal action with a view to obtaining a court ruling that conduct contrary to the relevant equal treatment legislation is unlawful, requesting that such conduct be prohibited or eliciting an order that the consequences of such conduct be rectified. To date this competence has not been used (for more detail, see Section 7, g).

6. Equality bodies

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

In short, the NIHR (in contrast to the courts) operates both reactively and proactively in order to give full effect to the principles of equality and non-discrimination. The NIHR members are mostly legal experts and are independent of the Government. The (expert) members are appointed by the Government for a fixed period of six years. Members of staff have the same position as civil servants working for a ministry but are only accountable to the Director of the NIHR (not to a minister). The NIHR is funded by the Government (from the budgets of a number of ministries). It is accountable to the Government by means of an annual report and by independent financial auditing. Every five years an internal and external evaluation report is published (and submitted to the Government and Parliament). The NIHR has a minimum of nine and a maximum of twelve members and a Director and a staff of approximately 50-60 (mostly academic lawyers). The NIHR deals with all non-discrimination grounds in the GETA, DDA and ADA, as well as more specific equal treatment grounds (such as the type or duration of employment contracts). It is also responsible for monitoring the implementation of the CRPD. All reports, advice and Opinions (judgments in individual cases) are published on the Institute's website.⁸

The local Anti-Discrimination Services (ADV's) have also been designated by the Government as equality bodies in terms of the directives. All local authorities are obliged by law to have an ADV in place. The ADVs have two legal tasks: to assist people who have a discrimination complaint and to register all such complaints and bring them to the attention of the Minister of the Interior and Kingdom Relations. In addition to this, one of the functions that these organisations fulfil is situation testing, mostly with respect to bars and nightclubs.

⁸ www.mensenrechten.nl/.

The NIHR and ADVs thus fulfil different tasks, closely related but not overlapping. The NIHR and the ADVs all function independently.

7. Key issues

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

- The main, general issue of concern regards the increasing tensions in Dutch society between various minority and majority groups which seem to increase exclusion and discrimination, in particular in relation to racial/ethnic origin. Research shows that discrimination against people with a migration background is prevalent in many areas such as the labour market, housing and vocational training (internships).⁹ Racist speech is also a recurring problem, be it on the internet or in public spaces. The conviction of politician Geert Wilders for insulting Moroccans is a case in point. In 2016 the District Court of The Hague convicted Wilders for group insult and incitement to discrimination against a group of people on grounds of their race.¹⁰ In September 2020 the Court of Appeal upheld the conviction for group insult but acquitted Wilders of incitement to discrimination.¹¹
- In terms of the implementation and practical application of the anti-discrimination directives at national level, a major problem concerns the gap between the law in the books and realities on the ground. Overall, Dutch legislation to combat discrimination is up to European standards, but the prevalence of discrimination is still of grave concern. In December 2020, the Dutch Senate (*Eerste Kamer*) announced its intention to launch an investigation into the perceived lack of effectiveness of the Dutch equal treatment legislation.¹²
- A more specific issue of concern relates to the childcare benefits affair (*Toeslagenaffaire*) that caused a great political stir towards the end of 2020 (see Section 3.2.6). The issue arose when it became publicly known that thousands of parents receiving childcare benefits had been unduly accused of fraud. Among other problematic aspects, it emerged that parents had been selected for fraud investigations based on a risk profile that included 'dual nationality', which in the Netherlands is a proxy for racial or ethnic origin. The case presents an example of institutional discrimination and raises questions as to the use of similar risk profiles by other government agencies. Although the Netherlands stopped registering dual nationality in 2014, it turned out that the Tax Office had kept a data file in which second nationalities were still registered.

Some elements of Dutch legislation or practice do not seem to comply fully with the standards:

⁹ See e.g. SCP (2014), *Ervaren Discriminatie in Nederland* (Experience of discrimination in the Netherlands), available at: <https://www.scp.nl/binaries/scp/documenten/publicaties/2020/04/02/ervaren-discriminatie-in-nederland-ii/Ervaren+discriminatie+in+Nederland+II.pdf>; SCP (2015), *Op Afkomst Afgewezen* (Rejected due to origin): <https://www.scp.nl/publicaties/publicaties/2015/06/17/op-afkomst-afgewezen>; *Groene Amsterdammer* (2018) 'Onderzoek discriminatie woningmarkt. Rachid is ook gewoon een nette jongen' ('Investigation of discrimination in the housing market. Rachid is just an ordinary, decent man'), 28 March 2018: <https://www.groene.nl/artikel/rachid-is-ook-gewoon-een-nette-jongen>. Kennisplatform Integratie en Samenleving (2016) *Mbo en de stagemarkt: wat is de rol van discriminatie?* (MBO and the market for internships: what role for discrimination?): www.kis.nl/publicatie/mbo-en-de-stagemarkt-wat-de-rol-van-discriminatie.

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

¹¹ Court of Appeal of The Hague, 4 September 2020, ECLI:NL:GHDHA:2020:1606.

¹² https://www.eerstekamer.nl/kamerstukdossier/verslag_van_de_tijdelijke_4. See also the flash report on this issue, <https://www.equalitylaw.eu/downloads/5320-netherlands-parliamentary-investigation-into-the-effectiveness-of-dutch-anti-discrimination-legislation-91-kb>.

- The accumulative conditions in the 'harassment' definition arguably fall short of the directives' 'non-regression' clause (see Section 2.4 of this report).
- Arguably, the Dutch Government interprets the prohibition of an 'instruction to make a distinction' unduly narrowly, including in relation to the 'scope of liability' for this type of discrimination (see Section 2.5 of this report).
- The partially reversed burden of proof is not applicable in case of victimisation claims, which falls short of EU requirements (see Section 6.4 of this report).
- The use of risk profiles which include the criterion 'of non-Dutch origin' could be in contravention of Directive 2000/43/EC (see Section 3.2.5 of this report). These risk profiles are used by municipalities and the Social Insurance Institute (*Sociale Verzekeringsbank*) when investigating the foreign assets of welfare recipients. One risk is that in certain municipalities the criterion 'of non-Dutch origin' puts at a disadvantage persons who belong to one or more specific ethnic minorities which, in the view of the author and for the reasons explained below in Section 3.2.5, would amount to indirect ethnic discrimination contrary to the Racial Equality Directive (RED). According to case law of the Central Appeals Tribunal, investigations may also focus on persons of one particular ethnic origin provided that this forms part of a phased investigation in which other countries of origin are also investigated. It is as yet unclear, however, whether it is required for all countries of origin to be included in the investigation and whether sufficient guarantees exist against the singling out of a few specific countries. It is also unclear whether such 'phased investigation' of particular ethnic groups is allowed under the RED as there is not yet any CJEU case law on this point.

Positive developments and good practices that stand out in 2020 are the following:

- Integrated reporting on discrimination. The annual publication 'Discrimination reports' (*Discriminatiecijfers*) combines information on reports of discrimination received by the police, the local Anti-Discrimination Services, the NIHR and the Reporting Point for Internet Discrimination.¹³ By bringing together the information from these different actors a better picture is obtained of the occurrence of discrimination in the Netherlands.
- The National Action Plan for Greater Diversity and Inclusion in Higher Education and Research, which was presented in September 2020 (see also Section 2.3.1).¹⁴ One of the positive aspects of this action plan is the aim of monitoring the representation of students and staff with a migration background or who belong to ethnic minorities, with the objective of increasing their participation.
- Use of situation testing. Following reports of discrimination in the housing market (in particular on the ground of racial or ethnic origin) the Government has actively adopted the use of situation testing (including mystery shopping and 'correspondence tests') to monitor discrimination in this area.¹⁵
- The Black Lives Matter movement and protests following the death of George Floyd in the United States appear to have increased awareness of (institutional) racial discrimination in Dutch political debate. In July 2020, the Second Chamber of Parliament held a debate on institutional racism. At the end of the debate the

¹³ The latest report, on discrimination in 2019, was published as an Annex to Tweede Kamer 2019-2020, 30 950, no. 185.

¹⁴ National action plan on greater diversity and inclusion in higher education and research (*Nationaal actieplan voor meer diversiteit en inclusie in het hoger onderwijs en onderzoek*), published as Annex to Tweede Kamer 2019-2020, 29 338, no. 220.

¹⁵ Tweede Kamer 2020-2021, 30 950, no. 217, p. 42-43.

Chamber adopted several motions calling, *inter alia*, for the appointment of a national coordinator for discrimination and racism. The Government has said it will investigate this possibility (see Section 9 of the report).

INTRODUCTION

The national legal system

In the Netherlands, central Government is the only level of government that passes anti-discrimination or equal treatment legislation. The principles of equality and non-discrimination are covered by various areas of the law. Of importance are the Constitution, public and private employment law, criminal law and specific statutory equal treatment acts. Moreover, since the Dutch constitutional system adheres to a 'monist theory' of international law, international equality guarantees are automatically applicable in the national legal system and take precedence over national legislation, provided that they are sufficiently clear and precise to be justiciable in concrete cases (cf. Articles 93 and 94 of the Constitution). Private employment contracts are regulated by Book 7 of the Civil Code (*Burgerlijk Wetboek*), which contains equal treatment provisions, and by specific statutory equal treatment acts. Furthermore, regulation may occur through Collective Labour Agreements at the level of the sector or individual employer. For civil servants, a law was adopted to make their employment subject to the same rules as private sector employment, with the exception of certain specific categories including judges and military personnel.¹⁶ The main equality body is the Netherlands Institute for Human Rights (NIHR) (*College voor de Rechten van de Mens*), which has a section that deals with complaints about unequal treatment.

List of main legislation transposing and implementing the directives

- Article 1 of the Constitution¹⁷ enshrines a constitutional equality and non-discrimination guarantee.
- International non-discrimination provisions (e.g. Article 26 of the International Covenant on Civil and Political Rights (ICCPR) and Article 14 of the European Convention on Human Rights (ECHR)) can be directly applied in court proceedings. Sometimes provisions from the UN International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the UN Convention on the Rights of People with Disabilities (CRPD) or the UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) are also called upon before Dutch courts. The Netherlands ratified the CRPD on 14 June 2016.
- EU Treaty provisions and directives can be directly applied under the normal conditions for applicability of EU law in the Member States.
- The Criminal Code¹⁸ includes specific provisions criminalising discriminatory speech and publications (Articles 137d-137f) and discriminatory acts in the performance of an individual's job or enterprise (Articles 137g and 429quater). Discrimination is defined in Article 90quater, in line with Article 1 of the UN ICERD and therefore different from the definition in the directives. In addition, Article 137c forbids insulting groups of people because of their race, religion/belief or homo-/heterosexual orientation.¹⁹
- The Civil Code²⁰ includes specific articles prohibiting sex discrimination and discrimination in relation to the duration of employment contracts and whether they are permanent or fixed-term contracts (Articles 7:646-7:649). Employers are also liable if they fail to guarantee safe working conditions. This includes an environment

¹⁶ Act on the regularisation of the legal status of civil servants (*Wet normalisering rechtspositie ambtenaren*), *Staatsblad* 2017, 123. The Act entered into force on 1 January 2020. The exempted categories are listed in Article 3 Civil Servants Act (*Ambtenarenwet 2017*).

¹⁷ Constitution of the Kingdom of the Netherlands (*Grondwet voor het Koninkrijk der Nederlanden*), adopted 24 August 1815, *Staatsblad* 1815, 45. The '*Staatsblad*' is the Official Gazette of the Netherlands.

¹⁸ Criminal Code (*Wetboek van Strafrecht*), adopted 3 March 1881, *Staatsblad* 1881, 35.

¹⁹ The term 'homosexual or heterosexual orientation' was used instead of the more ordinary term 'sexual orientation' to make clear that it does not include paedophile orientation. To avoid confusion in this report 'sexual orientation' is used throughout unless otherwise indicated. There are no indications that the Dutch terminology covers a narrower range of sexual orientations than the Employment Equality Directive.

²⁰ Books 6 and 7 Civil Code (*Burgerlijk Wetboek*), adopted 22 November 1991, *Staatsblad* 1991, 600.

free from discrimination and (sexual) harassment (Article 7:658). Article 6:162 contains a general provision on tort which can also be invoked in case of discrimination.

- The Act on Working Conditions²¹ contains provisions concerning (sexual) harassment, aggression, violence and discrimination in the workplace. These provisions put a positive obligation on employers to prevent and combat discrimination and (sexual) harassment. The Labour Inspectorate (*Arbeidsinspectie*) can impose fines on employers who do not comply with this obligation.
- Since 1994, race and ethnic origin, religion and belief and sexual orientation have been covered together with 'political opinion', 'sex', 'nationality' and 'civil status' as grounds for discrimination by the General Equal Treatment Act or GETA.²² After the adoption of the directives, the GETA was amended by the EC Implementation Act which entered into force on 1 April 2004.²³ Importantly, the Dutch Government deemed it desirable to extend many of the amendments that were legally required for the grounds covered both by the 1994 Act and the directives (e.g. 'race', 'religion/belief', 'sexual orientation') to other grounds that are also covered by the GETA.²⁴ In 2019 a provision was added to the GETA specifying that the ground 'sex' covers sex characteristics, gender identity and gender expression.²⁵
- The Act on Equal Treatment on the Ground of Age in Employment, hereafter referred to as the Age Discrimination Act (ADA), entered into force on 1 May 2004.²⁶
- The Act on Equal Treatment on the Ground of Disability or Chronic Illness, hereafter referred to as the Disability Discrimination Act (DDA), entered into force on 1 December 2003.²⁷ In 2004 the DDA was amended by means of the aforementioned EC Implementation Act. The initial scope of the DDA was restricted to employment and vocational education, but in 2009 this was extended to the fields of primary and secondary education (Article 5b DDA) and housing (Articles 6a, 6b and 6c DDA).²⁸ Public transport is covered in Articles 7 and 8 of the law and these Articles entered into force on 9 May 2012. However, the Decree giving effect to these Articles contains a complicated schedule of gradual implementation.²⁹ In fact, it will take until 2030 before the whole public transport sector (apart from transport on ferries) will actually fall under the scope of the DDA. In 2009, an evaluation report, written by independent experts, was sent to Parliament.³⁰ Upon ratification of the CRPD the scope of the DDA was further extended and now covers the field of goods and services in general. However, some specific restrictions still apply to public transport and housing.
- The Act on the establishment of the Netherlands Institute for Human Rights, hereafter the NIHR Act, entered into force on 1 October 2012.³¹ The tasks and functions of the former Equal Treatment Commission were taken over by the NIHR.

²¹ Act on Working Conditions (*Arbeidsomstandighedenwet*), adopted 18 March 1999, *Staatsblad* 1999, 184.

²² General Equal Treatment Act (*Algemene wet gelijke behandeling*), adopted 2 March 1994, *Staatsblad* 1994, 230.

²³ EC Implementation Act (*EG Implementatiewet AWGB*), adopted 21 February 2004, *Staatsblad* 2004, 119. Entry into force *Staatsblad* 2004, 120.

²⁴ Explanatory Memorandum to the EC Implementation Act, Tweede Kamer, 2002-2003, 28 770, no. 3, p. 3.

²⁵ Act on the clarification of the legal status of transgender and intersex persons (*Wet verduidelijking rechtspositie transgender personen en intersekse personen*), adopted 30 August 2019, *Staatsblad* 2019, 302.

²⁶ Age Discrimination Act (*Wet gelijke behandeling op grond van leeftijd bij de arbeid*), adopted 17 December 2003, *Staatsblad* 2004, 30. Entry into force *Staatsblad* 2004, 90.

²⁷ Disability Discrimination Act (*Wet gelijke behandeling op grond van handicap of chronische ziekte*), adopted 3 April 2003, *Staatsblad* 2003, 206. Entry into force *Staatsblad* 2003, 329.

²⁸ Amendment to the Disability Discrimination Act concerning the extension to primary and secondary education and housing (*Wijziging van de Wet gelijke behandeling op grond van handicap of chronische ziekte in verband met de uitbreiding met onderwijs als bedoeld in de Wet op het primair onderwijs en de Wet op het voortgezet onderwijs en met wonen*), *Staatsblad* 2009, 101.

²⁹ Decree of 19 April 2012, *Staatsblad* 2012, 199.

³⁰ Tweede Kamer, 2008-2009, 29 355, no. 39. The then ETC published its own evaluation report, entitled *Zonder vallen en opstaan; Evaluatie van de WGBHcz* (Without trial and error: evaluation of the DDA), available at: www.mensenrechten.nl/publicaties/detail/10027.

³¹ Act on the establishment of the Netherlands Institute for Human Rights (*Wet College voor de rechten van de mens*), adopted 24 November 2011, *Staatsblad* 2011, 573.

1 GENERAL LEGAL FRAMEWORK

Constitutional provisions on protection against discrimination and the promotion of equality

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

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

This provision applies to all areas covered by the directives. Its material scope is wider than those of the directives, as there are no boundaries to the personal and material scope of this article, which means that the Constitutional provision applies to everybody in the country and to all fields of social and economic life. The term 'any other ground' is understood to include age, disability and sexual orientation: these grounds are expressly protected in the statutory equal treatment legislation which implements the constitutional non-discrimination clause. At the end of 2020, a proposal was pending in Parliament to explicitly mention the grounds of 'sexual orientation' and 'disability' in Article 1 of the Constitution.³² An amendment to also add the ground of 'age' was rejected.³³

The constitutional anti-discrimination provision is directly applicable in vertical relations. There is a limitation to this: formal statutory Acts (adopted by the Government in co-operation with Parliament) may not, according to Article 120 of the Constitution, be subjected to constitutional review by the courts and thus also not to a constitutional 'equality' review.³⁴ However, Dutch courts do have the power to revoke legislation that violates any directly applicable provision of international law (under Articles 93 and 94 of the Constitution). With respect to discrimination, the Dutch courts frequently have to consider whether a particular piece of legislation violates Article 14 of the European Convention on Human Rights, Article 26 of the International Covenant on Civil and Political Rights, or any other treaty provision on non-discrimination.

The constitutional equality clause can be enforced against private actors.³⁵ However, since this is an 'open clause' it does not specify what the equal treatment or non-discrimination norm entails in concrete situations and how this norm should be weighed against other constitutional rights (e.g. freedom of speech/opinion or freedom of belief/religion). In order to ensure the applicability of the equality principle in horizontal relations, the Constitutional guarantee has been incorporated into criminal law provisions and specific statutory equal treatment legislation (ADA, DDA, GETA and ETA).

³² Eerste Kamer 2019/2020, 32 411, A. The proposal was adopted by the Second Chamber of Parliament on 30 June 2020. Amendments to the Constitution are subject to an enhanced legislative procedure. To become law the proposal must be adopted by the First Chamber of Parliament and then again by both the Second and First Chamber with a two-thirds majority.

³³ *Handelingen II* (Parliamentary Proceedings of the Second Chamber) 2019/2020, no. 89, item 14.

³⁴ Over time several bills have been proposed to introduce constitutional review into the Constitution, but so far none have been adopted.

³⁵ E.g. Supreme Court 8 October 2004, NJ 2005/117 (*Van Pelt/Martinair and KLM / Vereniging van Verkeersvliegers*), ECLI:NL:HR:2004:AP0425.

2 THE DEFINITION OF DISCRIMINATION

2.1 Grounds of unlawful discrimination explicitly covered

The following grounds of discrimination are explicitly prohibited in the main legislation transposing the two EU anti-discrimination directives:

sex (including pregnancy, sex characteristics, gender identity and gender expression), religion or belief,³⁶ political opinion, race, nationality, sexual orientation,³⁷ civil (marital) status, age and disability or chronic disease.

2.1.1 Definition of the grounds of unlawful discrimination within the directives

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

a) Racial or ethnic origin

The Explanatory Memorandum to the GETA stresses that 'race' is a broad concept, which must be interpreted in line with the UN International Convention on the Elimination of Racial Discrimination (ICERD). The concept embraces race, colour, descent and national or ethnic origin.³⁸ In the EC Implementation Act of 2004, the Government did not deem it necessary to explicitly include the notion of 'ethnic origin', since this is sufficiently captured by the aforementioned interpretation of 'race'.³⁹

The Supreme Court and the NIHR (formerly the ETC) both subscribe to the ICERD definition of race.⁴⁰ Both the courts and the NIHR tend to interpret the definition of 'race' as referring to particular characteristics (e.g. colour, national origin or culture) rather than as a category resulting from processes of racialisation.⁴¹ To determine whether an applicant in an individual case can rely on the ground of 'race' (including ethnic origin) the NIHR uses as a yardstick whether the applicant belongs to 'a coherent group with collective physical, ethnic, geographical or cultural characteristics and which distinguishes itself from other groups by common features or a common behaviour'.⁴² It is commonly accepted in the case law of the NIHR that the ground of 'race' applies to persons belonging to so-called 'non-western' migrant minorities, for example persons of Turkish or Surinamese origin.⁴³ Travellers can also rely on the ground of race.⁴⁴

³⁶ The Dutch terms are '*godsdienst en levensovertuiging*', which would translate more closely as 'religion and philosophical conviction' rather than 'religion or belief'. As it definitely encompasses 'religion and belief' as envisaged in EU law the latter terminology is used in this report to avoid confusion.

³⁷ The Dutch terms used are 'homo- or heterosexual orientation' instead of sexual orientation for short. This terminology was adopted at the time when the GETA came into being in 1994 to make it clear that paedosexual orientation is not regarded as a protected ground. As it covers the same grounds as the terminology 'sexual orientation' under EU law this report uses the latter to avoid confusion.

³⁸ Explanatory Memorandum to the GETA, Tweede Kamer, 1990-1991, 22 014, no. 3, p. 13. The notion of 'national origin' only embraces nationality in an *ethnic* sense. Nationality in a *civic* sense is covered by the non-discrimination ground of nationality.

³⁹ Explanatory Memorandum to the EC Implementation Act, Tweede Kamer, 2002-2003, 28 770, no. 3, p. 3. See also Gerards, J. H. and Heringa, A. W. (2003), *Wetgeving gelijke behandeling (Equal treatment legislation)*, Deventer, Kluwer, pp. 28-30.

⁴⁰ E.g. Supreme Court 14 March 1978, ECLI:NL:PHR:1978:AC3463; ETC 1995-23.

⁴¹ E.g. Supreme Court 20 March 2016, ECLI:NL:HR:2016:510; NIHR 23 December 2019, 2019-135.

⁴² See, for example, ETC 1997-119 and 1998-57.

⁴³ E.g. NIHR 2020-100 and NIHR 2020-76.

⁴⁴ E.g. NIHR 2020-108, NIHR 2020-88.

In 2017 the NIHR explicitly stated that its interpretation of the ground of 'race' in Dutch equal treatment legislation is broader than the definition of 'racial and ethnic origin' provided by the CJEU in the case of *Jyske Finans*. Unlike the CJEU the NIHR does not require that persons belonging to a disadvantaged group must be of any particular ethnic origin. Hence, the ground of 'race' in the GETA also covers, for example, 'persons of non-Dutch origin'. In the NIHR's view, if the CJEU's interpretation of 'ethnic origin' were to be followed this would mean a significant lowering of the level of protection provided by the GETA.⁴⁵

It can be difficult to draw the line between race, ethnicity and religion.⁴⁶ If all three grounds were protected in the same sense (as far as the personal and material scope of the legislation is concerned and the exceptions to the non-discrimination ground are similar for each of these grounds), that would be no problem. However, this is not the case in the Dutch legal system where race is covered more broadly than religion.

Another discussion concerns the exact borderline between 'race/ethnicity' and nationality.⁴⁷ The GETA mentions nationality as a separate discrimination ground next to race, but race discrimination is covered more broadly (including the field of social security/social protection). In cases concerning hate speech and insults against a group (see Introduction) the Supreme Court does accept that the ground of 'race' covers references to nationality and immigration status (e.g. 'Surinamese', 'Moroccans' or 'asylum seekers').⁴⁸ In line with this case law, politician Geert Wilders was found guilty in 2016 of incitement to racial discrimination against 'Moroccans'. This verdict was upheld in 2020 by the Court of Appeal.⁴⁹

b) Religion or belief

Religion is also not defined in the Constitution, in the GETA or anywhere else in the equal treatment legislation. In the Netherlands the term 'belief' is not used. In the Explanatory Memorandum to the EC Implementation Act, the Government made it clear that it wished to continue using the term 'philosophy of life' (*levensovertuiging*), rather than to introduce the term belief (*geloof*), the term used by Directive 2000/78/EC. According to the Government, there is no material difference between the two terms.⁵⁰

'Religion or belief' is interpreted in a broad sense by the NIHR and by the courts (including in cases concerning freedom of religion). The interpretation of these terms is strongly inspired by the case law of the European Court of Human Rights (ECtHR) and other international institutions (e.g. the UN Human Rights Committee).⁵¹

The term 'religion' in the equal treatment legislation covers both the fact of having religious beliefs or adhering to a certain philosophy of life and the fact of acting in accordance with

⁴⁵ NIHR 2017-67.

⁴⁶ In line with the interpretation by e.g. the European Court of Human Rights discrimination against Jews is put on a par with discrimination on grounds of race. Discrimination against Muslims is not approached in a similar way.

⁴⁷ See, for example, ETC 2011-97 and 2011-98, especially the note to both cases by A. Böcker and S. Dursum-Aksel, to be found in Foster, C. J. et al. (eds.) (2012), *Oordelenbundel 2011* ('NIHR Opinions 2011'). Nijmegen, Wolf Legal Publishers, pp. 453-464.

⁴⁸ E.g. Supreme Court 16 April 1996, ECLI:NL:PHR:1996:AD2525; Supreme Court 26 June 2012, ECLI:NL:HR:2012:BW9189.

⁴⁹ Court of Appeal The Hague, 4 September 2020, ECLI:NL:GHDHA:2020:1606.

⁵⁰ Since the government does not seem to see a difference in meaning, we have translated *levensovertuiging* as 'belief' in this report. The NIHR, in the English translation of the GETA on its website, also translates '*levensovertuiging*' as 'belief'.

⁵¹ E.g. Administrative Jurisdiction Division (AJD) of the Council of State 15 August 2018, ECLI:NL:RVS:2018:2715, para 9. In this case the AJD found that pastafarianism did not meet the requirements of 'seriousness' and 'cohesion' as formulated by the ECtHR in relation to Article 9 ECHR (freedom of religion).

that religion or belief.⁵² It is not necessary for a particular manifestation (e.g. the wearing of headscarves by women) to be a mandatory requirement of the religion or belief concerned⁵³ or that it is practised by all believers of the religion concerned.⁵⁴ The wearing of a headscarf and the wish not to shake hands with a person of the opposite sex are among the acts that are commonly accepted by the NIHR as manifestations of religion.⁵⁵

Since political opinion is protected in the same way as religion or belief, there is no need to draw a sharp line between the two discrimination grounds.

c) Disability

Dutch equality law does not define disability, as the Government deemed it unnecessary and undesirable to do so.⁵⁶ However, unlike the Employment Equality Directive, the DDA expressly mentions 'chronic disease' as a ground alongside 'disability'. Criteria mentioned during the parliamentary discussions on the DDA were, amongst others, the long duration of the disability or chronic disease and the fact that – in the case of disability – the impairment is irreversible. This means that a short-term disability is excluded.⁵⁷ According to the Explanatory Memorandum to the DDA, the concept of disability (*handicap*) covers not only physical, but also intellectual and psychological impairments.⁵⁸ The Government was of the opinion that differences in treatment on the ground of disability do not only result from the physical or psychological characteristics of the individual, but also from the physical and social environment that allows/does not allow a person to participate on an equal footing.⁵⁹

The NIHR accepts that the DDA implements the Employment Equality Directive for the ground of disability and follows the interpretation of 'disability' provided by the CJEU, including in the cases of *Ring and Skouboe Werge* (C-335/11 and C-337/11) and *Kaltoft* (C-354/13).⁶⁰

Dutch courts regularly refer to CJEU case law, amongst other sources, to determine whether an impairment qualifies as a disability within the meaning of the DDA.⁶¹ In a recent case concerning discrimination on the grounds of age and disability the Court of Appeal expressly referred to the definition of 'disability' provided by the CJEU in *Ring and Skouboe Werge*.⁶² Nevertheless, the assessment conducted by the Court focused on the applicant's physical impairment. The Court considered that the applicant had a shoulder injury which could in principle have resulted in a long-lasting limitation to the applicant's ability to perform his job. However, it emerged from the facts that the applicant had only been unable to work during the periods of recovery immediately following surgery and had been able to work normally in between. For this reason the Court of Appeal concluded that the applicant's injury did not amount to a disability.

⁵² Explanatory Memorandum to the GETA, Tweede Kamer, 1990-1991, 22 014, no. 3, p. 39-40 and Memorandum in Response to the GETA (*Memorie van Antwoord bij de Algemene Wet Gelijke Behandeling*), Tweede Kamer 1990-1991, 22 014, no. 5, p. 39-40. See also, *inter alia*, ETC 1997-46, 2004-112 and 2004-148.

⁵³ Administrative Jurisdiction Division (AJD) of the Council of State 15 August 2018, ECLI:NL:RVS:2018:2715, para 8.

⁵⁴ See, for example, ETC 2008-12.

⁵⁵ E.g. ETC 2007-173, NIHR 2018-102 and 2020-74.

⁵⁶ Explanatory Memorandum to the DDA, Tweede Kamer, 2001-2002, 28 169, no. 3, p. 9.

⁵⁷ Explanatory Memorandum to the DDA, Tweede Kamer, 2001-2002, 28169, no. 3, p. 24 and no. 5, p. 16. See also ETC 2005-234.

⁵⁸ Tweede Kamer, 2001-2002, 28 169, no. 3, p. 24.

⁵⁹ Tweede Kamer, 2001-2002, 28 169, no. 3, p. 7.

⁶⁰ See, for example, NIHR 2014-158, NIHR 2016-15, NIHR 2019-94 and NIHR 2020-71.

⁶¹ E.g. Court of Appeal Den Bosch, 30 June 2020, ECLI:NL:GHSHE:2020:1978, para 3.6.4 and District court Northern Holland 14 July 2020, ECLI:NL:RBNHO:2020:5426, para 4.8. In addition to CJEU case law the courts also rely on the CRDP and on the legislative history of the DDA.

⁶² Court of Appeal Den Bosch 30 June 2020, ECLI:NL:GHSHE:2020:1978. The Court of Appeal also referred to the CJEU judgments in *Daouidi* (C-395/15), *Ruiz Conejero* (C-270/16) and *Nobel* (C-397/18).

In another case a district court did find discrimination on the ground of disability but also focused its assessment on the impairments of the applicant.⁶³ The court established that the applicant's ability to work was limited due to severe injuries sustained in a work-related accident and therefore considered that the applicant could claim to have a disability. It found that the applicant had been dismissed because of his disability and ordered the employer to pay compensation.

A more social-contextual approach was taken by another district court in 2018, although the court did not expressly refer to the CRPD or to the CJEU's definition of disability.⁶⁴ The case concerned a bus driver who was able to work a maximum of 20 hours a week for medical reasons. This made him ineligible for a scheme created for older workers (*ouderenregeling*), as only workers who worked a minimum of 28 hours per week could participate in the scheme. The district court found that this amounted to indirect discrimination against the applicant on the ground of disability. In the judgment the court expressly stated that, for the applicant, a 20-hour working week was equivalent to full-time.

d) Age

The legislator has not defined the word 'age'. However, it is not only direct references to someone's age that are considered to be direct distinctions on this ground. The use of classifications like 'young', 'old', 'adult', 'pensioner' or 'student' may also be considered to cause age discrimination. The Court of Appeal recently established a presumption of age discrimination in the case of an applicant who believed that he had been denied a job because he had too much work experience (however, the employer was able to show that this had not been the reason why the applicant was rejected).⁶⁵ In another case an applicant claimed age discrimination because the company where he worked had given a rise only to employees on the lower salary scales. However, the court established that the salary scales were linked to the different functions performed in the company rather than to age-related factors, such as the number of service years, therefore no age discrimination was found to have taken place.⁶⁶

Since the ADA allows for objective justifications (open system) in case of both direct and indirect discrimination, the boundary between what kind of classification constitutes direct or indirect discrimination is not problematic.

e) Sexual orientation

The GETA employs the terminology 'hetero- or homosexual orientation', to cover the ground of 'sexual orientation' of Directive 2000/78/EC. It does not specify further what is covered by these terms. The Dutch Government opted for the term 'orientation' (*gerichtheid*) rather than 'preference' (*voorkeur*). The term 'orientation' reflects that it is not only individual emotions that are covered, but also concrete expressions thereof. The notion of 'hetero- or homosexual orientation' has been interpreted by the courts to cover bisexual orientation. One reason for the legislator's preference for the term 'hetero- or homosexual orientation' over 'sexual preference' or 'sexual orientation' was that the latter terms might possibly include 'paedophile orientation'. Nevertheless, in 2020 the Government announced its intention to replace the term 'hetero- or homosexual orientation' with 'sexual orientation' in both the equal treatment legislation (GETA) and in the Criminal Code.⁶⁷

⁶³ District court Northern Holland 14 July 2020, ECLI:NL:RBNHO:2020:5426.

⁶⁴ District court East Brabant 18 January 2018, ECLI:NL:RBOBR:2018:2005.

⁶⁵ Court of Appeal Den Bosch 1 September 2020, ECLI:NL:GHSHE:2020:2703.

⁶⁶ Court of Appeal The Hague 11 February 2020, ECLI:NL:GHDHA:2020:154.

⁶⁷ Tweede Kamer 2019-2020, 30 950, no. 185, p. 21.

2.1.2 Multiple discrimination

In the Netherlands, multiple discrimination is not prohibited by law. Although the GETA contains a closed list of non-discrimination grounds, parliamentary precedent does not exclude the possibility of a combination of grounds. Moreover, including the prohibition of discrimination based on a combination of grounds seems to be most in line with the legislator's objectives. In its third five-yearly evaluation report, the then ETC concluded that it may be desirable to include an explicit prohibition of multiple discrimination in the GETA.⁶⁸ The Government did not deem such a provision necessary and rejected a suggestion for further research.⁶⁹

In the Netherlands, there is limited case law dealing with multiple discrimination. The ETC (now the NIHR) followed an intersectional approach in a case where the grounds of disability and race intersected and it acknowledged the combined effect thereof.⁷⁰ However, this combined effect did not result in a different sanction in this case.⁷¹ Another example is a case where the ETC found that the applicant – a male nurse of colour – had suffered discrimination on the combined grounds of race and gender.⁷² More recently, the NIHR took an intersectional approach towards the complaint of a woman of Aruban origin who claimed that she was paid less because of her gender and race. The intersectional approach of the NIHR can be seen in the fact that it compared the applicant's situation to that of colleagues who were both male and of European-Dutch origin, rather than making a separate comparison for each of the grounds concerned.⁷³ The above cases did not contain any explicit references to intersectionality.

In its third evaluation report, the ETC acknowledged that there were other cases concerning multiple grounds at the same time.⁷⁴ The ETC showed willingness to apply different grounds of discrimination coherently in some of these other cases (with gender aspects as well), but in each case the claimant failed to substantiate the (alleged) discrimination as well as the combined effect of the intersection of grounds.⁷⁵ More recent cases also show that it is difficult to substantiate multiple discrimination.⁷⁶ One category of cases in which the NIHR could apply a more intersectional approach would be that concerning Islamic headscarves. Such cases are almost always seen only as direct or indirect discrimination on the ground of religion, which may also be due to the fact that applicants often rely only on this ground.⁷⁷

⁶⁸ ETC (2011), *Third evaluation report (2004-2009)*, p. 64.

⁶⁹ Tweede Kamer, 2011-2012, 28 481, no. 16, p. 4.

⁷⁰ ETC 2006-256, concerning a complaint against an employment office by a blind Turkish woman for not being entitled to an adapted examination. An example of a case in which multiple discrimination is at issue is NIHR 2013-33 concerning ethnic origin, age, disability, sex and economic status.

⁷¹ Since the ETC (now the NIHR) cannot impose sanctions, this is a somewhat misleading statement. There was the usual conclusion that the defendant had made an unlawful distinction.

⁷² ETC 2012-122.

⁷³ NIHR 2020-121. The NIHR found that the difference in salary was justified because the colleagues with whom it compared the applicant had either more work experience or more responsibilities.

⁷⁴ ETC (2011), *Third evaluation report (2004-2009)*, pp. 61-62. Apart from the cases mentioned below, the ETC here also mentions Opinion 2008-25 (complaint about season tickets for football stadiums, involving sex and civil status). In Opinion 2011-83, the grounds of sex and age were at issue. Again, the ETC did not take this fact explicitly into consideration.

⁷⁵ For example, ETC 2008-107 (complaint by an elderly non-Dutch woman because she had not received a subsidy to start a company; presumption not substantiated, no breach).

⁷⁶ E.g. NIHR 2017-72 (complaint by a man of Afghan origin who was rejected for a job as a receptionist at a motel; presumption not substantiated, no breach); NIHR 2019-109 (complaint by a Muslim man of Moroccan origin about discriminatory treatment by an occupational physician following his refusal to shake her hand; presumption not substantiated, no breach) and NIHR 2020-45 (the applicant claimed that he had been denied the possibility to do a PhD and to move to a higher function because of his race and age; presumption not substantiated, no breach).

⁷⁷ E.g. NIHR Opinions 2017-135, 2018-24 and 2019-57. In Opinion 2017-91 the NIHR treated the case as involving race as well as religion however the claim was deemed unsubstantiated.

2.1.3 Assumed and associated discrimination

a) Discrimination by assumption

In the Netherlands, discrimination based on a perception or assumption of a person's characteristics, is not prohibited in national law (GETA, ADA and DDA) in an explicit way, but such cases are covered implicitly as case law shows. Thus, for example, the NIHR treated the complaint of a man who alleged he had been refused a job because of his non-Dutch-sounding name as a case of potential racial discrimination.⁷⁸

b) Discrimination by association

In the Netherlands, discrimination based on association with people with particular characteristics is not prohibited in national law in an explicit way. However, the wording of Article 1 sub (b) of the GETA (the legal definition of 'direct distinction') does not explicitly require that the alleged distinction is based on the race, religion/ belief or sexual orientation of the alleged victim. It is therefore theoretically possible that discrimination based on association is covered as well. The same line of reasoning can be followed as regards age and disability, in respect of Articles 1 (b) ADA and DDA. In several opinions the ETC and later the NIHR indeed followed this line. In 2011, the ETC, with reference to the Court of Justice of the European Union (CJEU) in *Coleman*,⁷⁹ found that there was indeed a case of unlawful discrimination by association on the ground of disability. In that case, a temporary contract was not prolonged because the employee had called in sick several times because he had to take care of his wife, who was ill. The same approach to discrimination by association is applied where other grounds are concerned. Thus, when the owner of a house refused to rent it to a woman because her friend was dark-skinned, the NIHR regarded this as direct discrimination on grounds of race.⁸⁰

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

a) Prohibition and definition of direct discrimination

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

Before 2011, Dutch equal treatment legislation contained its own (different) definition of direct and indirect discrimination. In November 2011 the equal treatment legislation (including the GETA, DDA and some provisions in the Civil Code) was amended in order to bring the definitions of direct and indirect discrimination into line with the EU directives.⁸¹ This change was required by the European Commission, which maintained that, as a consequence of the different wording of the definitions, victims of discrimination were offered less protection than the EU directives require.⁸² The Government has always held that this was not the case,⁸³ but nevertheless proposed this Amendment in 2008, in which the definitions from the directives are included word for word.⁸⁴ One difference between the language in the directives and the Dutch legislation remains, namely, the usage of the word 'distinction' instead of the word 'discrimination'.

Article 1 of the GETA now reads as follows:

⁷⁸ NIHR 2018-87.

⁷⁹ Case C-303/06, *Coleman v Attridge Law* [2008], ECR I-5603.

⁸⁰ NIHR 2018-115.

⁸¹ Act of 7 November 2011 (Wet van 7 November 2011), Staatsblad 2011, 554.

⁸² Letter dated 31 January 2008, with reference to the infringement procedure of 18 December 2006, infringement no. 2006/2444.

⁸³ Letter from the Dutch Government to Vladimír Špidla, dated 18 March, entitled *Reactie Nederlandse regering op het met redenen omkleed advies van de Europese Commissie; ingebrekestelling no. 2006/2444* (response to letter dated 31 January 2008).

⁸⁴ See Tweede Kamer, 2008-2009, 31 832, nos. 1-3 and Tweede Kamer, 2009-2010, 31 832, nos. 4-8.

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

- a. Distinction: direct and indirect distinction, as well as the instruction to make a distinction;
- b. Direct distinction: if a person is treated differently from another person in a comparable situation is or would be treated on the grounds of religion, belief, political opinion, race, sex, nationality, hetero- or homosexual orientation or civil status; (...).⁸⁵

Although the comparator element is now included in the definition, it is unclear from the definition of direct distinction in the DDA with whom a disabled person must be compared in case of an alleged instance of direct distinction. In the Parliamentary discussions on the DDA it is stated that what matters is not (actually) having a disability but being discriminated against as compared with a person who does or does not have a disability. It seems that this must be decided on a case-by-case basis. There are some Opinions of the ETC (now the NIHR) in which this issue has been discussed.⁸⁶

b) Justification of direct discrimination

Under the GETA and DDA, direct distinctions can never be justified unless one of the exception clauses apply (see, for the latter, Sections 4 and 5 of this report).

On a few occasions, the former ETC accepted that direct discrimination may be objectively justified when the prohibition of a certain distinction would be absolutely unacceptable or completely irrational, without the presence of one of the listed grounds of justification.⁸⁷ Though the third evaluation report of the ETC (for the years 2004-2009) raised the question whether the closed system of justification should be opened up,⁸⁸ the issue was put to rest with the evaluation of the NIHR over the period 2012-2017: as it has manifested itself only very sporadically and was always resolved in a practical manner it was deemed unnecessary to amend the law by both the NIHR and the Government.⁸⁹

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

a) Prohibition and definition of indirect discrimination

In the Netherlands, indirect discrimination is defined and prohibited in national law. Before 2011, Dutch equal treatment laws contained a definition of direct and indirect discrimination that was different from the EU directives. In November 2011, the equal treatment laws (including the GETA, DDA, ADA and some provisions in the Civil Code) were amended in order to bring the definitions of direct and indirect discrimination into line with the directives.⁹⁰ Article 1(c) GETA now includes the following definition of 'indirect distinction':

'Indirect distinction: where an apparently neutral provision, criterion or practice would affect persons of a particular race (et cetera) in a particular way.'⁹¹

⁸⁵ The DDA and ADA contain similar definitions in Articles 1(a) and (b).

⁸⁶ See ETC 2005-234. Although in that case the Commission stated that the applicant should not compare himself with other disabled people, according to many commentators the possibility exists for a disabled person to compare themselves with people who have a different disability.

⁸⁷ See, for example, ETC 2006-20 and ETC 2007-85; other cases are ETC 2005-155 concerning pregnancy and ETC 2010-62 concerning goods and services.

⁸⁸ ETC (2011), Third evaluation report (2004-2009), p. 7.

⁸⁹ See Evaluation NIHR Act (*Evaluatie Wet College voor de rechten van de mens*), Tweede Kamer, 2017-2018, 34 338, no. 3, p. 11.

⁹⁰ Act of 7 November 2011 (Wet van 7 November 2011), Staatsblad 2011, 554.

⁹¹ Similar definitions are used in the DDA and ADA, in Article 1(c).

b) Justification test for indirect discrimination

Article 2(1) of the GETA contains an objective justification test for indirect distinction cases, which includes the elements of legitimate aim, appropriateness and necessity. The same applies to Article 3(2) of the DDA and Article 7(1) under (c) of the ADA. All three provisions mirror the core substantive elements of the objective justification test in indirect discrimination cases as laid down in Article 2(2)(b)(i) of Directive 2000/78/EC. This also reflects the case law of the CJEU in indirect discrimination cases, which is followed by the NIHR and the courts.⁹²

2.3.1 Statistical evidence

a) Legal framework

In the Netherlands, there is legislation regulating the collection of personal data. In 2018 the existing regulation was replaced by the EU General Data Protection Regulation (GDPR).⁹³ As a result, the GDPR standards (see in particular article 9 GDPR) regarding data collection of a sensitive nature, such as data on the grounds covered by the EU equality directives, are applicable as of May 2018.

Statistical data can certainly be used for the purposes and under the conditions outlined in the GDPR, including to design and defend positive action measures. Most of the data are generated by the Netherlands Institute for Social Research (*Sociaal en Cultureel Planbureau, SCP*), a governmental research institute that collects data in many fields, and Statistics Netherlands (*Centraal Bureau voor de Statistiek, CBS*).

As far as data collection regarding race is concerned, the Netherlands Institute for Social Research and Statistics Netherlands do not use racial or ethnic origin as statistical categories. Statistics Netherlands collects data on 'persons with a migration background', whereby a distinction is made between 'first generation persons with a migration background' (persons born outside the Netherlands and with at least one parent born outside the Netherlands) and 'second generation persons with a migration background' (persons born in the Netherlands with at least one parent born outside the Netherlands). Subcategories relate to country of origin as well as 'western' or 'non-western' migration background.⁹⁴ These data are used by the Netherlands Institute for Social Research, for example a 2019 report on poverty analysed the occurrence of poverty in the Netherlands including in relation to migration background. Sometimes other proxies are used, for example in a 2015 study on labour market discrimination the Netherlands Institute for Social Research conducted situation testing whereby surnames were used as indicators of racial or ethnic origin.⁹⁵

In September 2020, the Minister of Education presented a national action plan for greater diversity and inclusion in higher education and research.⁹⁶ The action plan states that

⁹² See, for example, NIHR 2020-100 (race discrimination) and NIHR 2020-120 (age discrimination). An extended – although somewhat older – overview of the Dutch justification tests in equal treatment cases can be found in: Gerards, J. H. (2005), *Judicial review in equal treatment cases*, Leiden/Boston, Martinus Nijhoff Publishers.

⁹³ General Data Protection Regulation Implementation Act (*Uitvoeringswet Algemene verordening gegevensbescherming*) of 16 May 2018, *Staatsblad* 2018, 144.

⁹⁴ See the explanations to Table 'Population according to migration background; sex, age, 1 January', updated 9 July 2019, <https://opendata.cbs.nl/statline/#/CBS/nl/dataset/70787ned/table?ts=1581946080498>. On 20 April 2021 Statistics Netherlands announced that it would no longer use the categories 'western' and 'non-western', see Heck, W. (2021) 'De socioloog zal 'westers' versus 'niet-westers' moeten afleren' (Sociologists will have to do without the 'western'/'non-western' distinction), *NRC Handelsblad* 20 April 2021.

⁹⁵ Sociaal en Cultureel Planbureau, *Op afkomst afgewezen* (Rejected due to origin), The Hague: SCP 2015, available at <https://www.scp.nl/publicaties/publicaties/2015/06/17/op-afkomst-afgewezen>.

⁹⁶ National action plan on greater diversity and inclusion in higher education and research (*Nationaal actieplan voor meer diversiteit en inclusie in het hoger onderwijs en onderzoek*), published as Annex to Tweede Kamer 2019-2020, 29 338, no. 220.

statistical data on the ethnic origin and migration background of students and staff of educational and research institutions are needed to monitor the inclusiveness of the research and higher education sector. It was suggested that such data may be obtained via the 'Cultural Diversity Barometer' of Statistics Netherlands or through voluntary and anonymised reporting by students and staff. It was stressed that personal data on ethnic origin and migration background should not be used for purposes other than research or monitoring with the aim of improving equality.⁹⁷

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

b) Practice

In the Netherlands, statistical evidence is used in practice in order to establish indirect discrimination. This kind of evidence is sometimes used in procedures before the NIHR and is accepted by this body. It is not known if this is also true for the courts, as court judgments on equal treatment cases are not registered as such and therefore cannot be researched separately. There seems to be no reluctance to use statistical data. There are no signs that developments in other countries in the EU influence Dutch case law or the NIHR's Opinions in this respect.

When using statistical evidence, the NIHR uses the standard consideration that the contested rule or practice predominantly (*'in overwegende mate'*) affects a category of people which is protected by one of the non-discrimination grounds.⁹⁸ In this context the NIHR stresses that this should not be calculated on the basis of absolute figures, but should be seen relatively. In earlier cases, the ETC used the standard rule that people in the group alleged to be indirectly discriminated against (e.g. women) should at least be disadvantaged by the apparently neutral rule or practice 1.5 times as often as people from the comparator group. However, from 2004 the ETC no longer explicitly mentioned this standard or criterion. Instead, it started to use more sophisticated statistical methods to calculate whether a particular group has a greater chance of experiencing negative effects than another group.⁹⁹

In 2020 the Court of Appeal decided a case in which the NIHR had previously found indirect age discrimination on the basis of statistical evidence. Remarkably, the Court did not follow the statistical analysis conducted by the NIHR. The case concerned a construction company that had been taken over by a different owner after going bankrupt. The new owner voluntarily kept on 24 employees who would have otherwise lost their jobs because of the bankruptcy. The NIHR had found a presumption of indirect age discrimination by comparing the proportion of employees aged 55 and over in the group that had been kept on to the proportion of this age group in the company before the bankruptcy. This comparison showed that only 27.3 % of the employees aged 55 and over had been allowed to stay on, versus 63.6 % of the employees under the age of 55.¹⁰⁰ However, the Court of Appeal used an apparently less relevant criterion by looking at the share of employees aged 55 and over within the group that had been allowed to stay on, without comparing this to the age distribution within the company before the bankruptcy. Even though this percentage was also low, the Court did not find a presumption of age discrimination.¹⁰¹

⁹⁷ National action plan, p. 10.

⁹⁸ See, for example, ETC 2003-91.

⁹⁹ Waaldijk, K. 'The Netherlands', in: Waaldijk, K. and Bonini-Baraldi, M. (eds.) (2004), *Combating sexual orientation discrimination in employment: legislation in fifteen EU member states*, report of the European Group of Experts on Combating Sexual Orientation Discrimination, Leiden, Universiteit Leiden, pp. 341-375, available online at: <https://openaccess.leidenuniv.nl/handle/1887/12587>. For an example from NIHR case law see NIHR 2017-11.

¹⁰⁰ NIHR 2017-19.

¹⁰¹ Court of Appeal Den Bosch 30 June 2020, ECLI:NL:GHSHE:2020:1978, para 3.5.6.

Facts of common knowledge are taken into account by the NIHR, either in the absence of relevant statistics or to support such statistics.¹⁰² However, facts of common knowledge are not accepted as an exclusive means of evidence. Only in clear-cut cases does the NIHR not require statistics or facts of common knowledge.

2.4 Harassment (Article 2(3))

a) Prohibition and definition of harassment

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

'1. The prohibition of distinction as laid down in this Act shall also include a prohibition of harassment.

2. Harassment as referred to in the first subsection shall mean conduct related to the characteristics or behaviour as referred to in Article 1(b) and which has the purpose or effect of violating the dignity of a person and creating an intimidating, hostile, degrading, humiliating or offensive environment.

3. Article 2, Article 5 subsections 2-6, Article 6a subsection 2 and Article 7 subsections 2 and 3 shall not apply to the prohibition of harassment contained in this Act.' *[These contain exceptions to the prohibition of unequal treatment; i.e. harassment is per se prohibited]*.¹⁰³

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

In the Netherlands, harassment explicitly constitutes a form of discrimination (see Article 1 sub (a) of the GETA, cited above). Discriminatory treatment, in the sense of offensive attitudes, hate speech or other 'mistreatment', can be examined in addition to harassment. According to Rodrigues, this indicates that the ETC sees harassment as an aggravated form of discriminatory treatment, for which no justifications can be brought forward. For instance, a single case of a discriminatory insult is not enough to constitute a case of harassment, but nevertheless it can be qualified as (prohibited) direct discriminatory treatment.¹⁰⁴

b) Scope of liability for harassment

Where harassment is perpetrated by an employee, in the Netherlands the employer is liable. The prohibition of (sexual) harassment is aimed at the employer or anyone who acts on their behalf. This means that if harassment takes place between colleagues, in principle the victim cannot (under the equal treatment legislation) hold their colleague(s) accountable, but should address the employer. In this case, the victim should state that the employer has not taken sufficient preventive or protective measures and therefore violates the norm that working conditions should be free from discrimination, including (sexual) harassment.

Even if the (sexual) harassment itself is difficult to prove (e.g. because it happened behind closed doors between colleagues), any complaint about this kind of behaviour should be investigated seriously by the employer and adequate protective measures should be taken. Otherwise, the norm that the employer should not discriminate as regards (equal) working conditions is considered to have been breached.¹⁰⁵

¹⁰² Gerards, J. H. and Heringa, A. W. (2003), *Wetgeving gelijke behandeling* ('Equal treatment legislation'), Deventer, Kluwer, pp. 45-49.

¹⁰³ Similar provisions are laid down in Article 1 (a) of the DDA and in Article 2 of the ADA.

¹⁰⁴ Rodrigues, P. R. 'Ras en nationaliteit' ('Race and nationality'), in: Burri, S. D. (ed.) (2006), *Oordelenbundel 2005* ('ETC Opinions 2005'), Nijmegen, Wolf Legal Publishers. An example can be found in NIHR 2018-114, in which the NIHR held that regularly addressing a dark-skinned employee as 'Black Pete' or just 'Black' constitutes direct discrimination on grounds of race.

¹⁰⁵ See, for example, ETC 2011-148 and ETC 2011-156.

The ADA, the DDA and the GETA do not specify to whom the prohibition of making a distinction, including harassment, victimisation and instruction to discriminate, is addressed. Although all three Acts specify the areas of social and economic life to which each Act applies (material scope), the Acts remain silent on the matter of 'personal scope'.¹⁰⁶ With regard to employment, the only area that is covered by all three Acts, the central norm is aimed not only at public and private employers, but also at employers' organisations, workers' organisations, employment offices, (public) recruitment agencies, pension funds, some external advisors, members of the liberal professions, bodies of liberal professionals, training institutions, schools, universities, etc. However, it is not clear from this whether only the official owner or managers of these enterprises or institutions can be held liable under the Acts or whether this also applies to colleagues or third parties.

The matter of personal scope was raised in Parliamentary discussions on the implementation of the directives. It follows clearly from these discussions that the Government did not intend to make the equal treatment legislation applicable in relationships between colleagues, let alone in relationships with third parties.¹⁰⁷ However, it was indicated by the Government that the equal treatment legislation is aimed at those employees who, in the name of their employer, exercise authority over their co-employees. Such an employee functions *de facto* in the capacity of employer.¹⁰⁸ The purported inapplicability of the Dutch equal treatment acts in relationships between colleagues *inter se*, appears particularly problematic in the context of work-related (*sexual*) harassment. In its current format and in the light of the Parliamentary comments, the equal treatment laws prevent an alleged victim of harassment from holding a colleague or a third party directly liable for the contested behaviour under these laws. The only way to do this would be by seeking recourse to the general provisions of tort law enshrined in the Dutch Civil Code: 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. Furthermore, Article 429quater Criminal Code prohibits discrimination by individuals in the exercise of their function, profession or enterprise. This provision could be interpreted to cover harassment by colleagues or third parties and serve as a basis for criminal liability, however it is rarely invoked in practice and no relevant case law is available.

The employer's vicarious liability for acts of harassment by a third party was, for example, at issue in ETC Opinion 1997-82.¹⁰⁹ The ETC repeated its stance that the employer is under a legal duty to prevent acts of harassment by persons under their supervision. It took the view that, although the alleged acts of harassment were not perpetrated by a colleague, but by a third party, this did not in any way circumscribe the employer's duty of care. Moreover, and this also follows from the ETC's case law prior to the implementation of the directives, a *general duty of care* rests upon the employer to maintain a discrimination-free and safe workplace. An employee's right not to be discriminated against in his or her employment and working conditions embraces the right to be free from discrimination and harassment in the workplace.¹¹⁰

Beyond the scope of Dutch equal treatment legislation, it is essential that the following be taken into account. The employer may be held vicariously liable for discriminatory acts or harassment perpetrated by colleagues under employment law. The relevant articles upon

¹⁰⁶ Cremers-Hartman, E. 'Werkingsfeer AWGB (Article 3, 4 sub c, 5 lid 1, 6, 7 lid 1 AWGB)' ('The scope of the GETA'), in: Asscher-Vonk, I.P. and Groenendijk, C.A. (1999), *Gelijke behandeling: regels en realiteit* (Equal treatment: regulations and reality), The Hague, SDU Uitgevers, pp. 29-88, p. 33.

¹⁰⁷ Explanatory Memorandum to the ADA, Tweede Kamer, 2001-2002, 28169, no. 3, p. 19. See also Parliamentary Papers Second Chamber of Parliament, 2002-2003, 28770, no. 5, p. 28.

¹⁰⁸ Explanatory Memorandum to the ADA, Tweede Kamer, 2001-2002, 28169, no. 3, p. 19.

¹⁰⁹ This case concerned the racial harassment of a nurse by a patient. Employers were equally held liable in some court cases. See Holtmaat, R. (2009) *Seksuele intimidatie, de juridische gids* (Sexual harassment: legal guide), Nijmegen, Ars Aequi Libri, Chapter 6. See also ETC 2004-128 and NIHR 2012-197.

¹¹⁰ See, for example, ETC 2004-08. See also Asscher-Vonk, I. P. and Monster, W. C. (2002), *Gelijke behandeling bij de arbeid* (Equal treatment in employment), Deventer, Kluwer, p. 164.

which a claim can be based are (a) good employer practice (Article 7:611 of the Civil Code); and (b) the employer's general duty of care (i.e. the employer's liability for damages suffered by an employee in the performance of job-related duties, laid down in Article 7:658 of the Civil Code). Both of these articles are directed at the employer's liability for acts perpetrated by the employer themselves or by others over whom the employer has control.

In the past it was much disputed whether Article 7:658 of the Civil Code could form the legal basis for claims that concern mere psychological damage, rather than physical damage.¹¹¹ It is a fact that damage resulting from discriminatory treatment and harassment is most often psychological. In 2005 the Supreme Court accepted that Article 7:658 Civil Code can include psychological damage.¹¹² The lower courts have accepted that, in cases of sexual harassment, this article can form the basis for financial compensation of psychological damage resulting from such behaviour.¹¹³

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

2.5 Instructions to discriminate (Article 2(4))

a) Prohibition of instructions to discriminate

In the Netherlands, instructions to discriminate are prohibited in national law, but are not explicitly defined. Instructions to discriminate are covered by Article 1(a) GETA, Article 1(a) ADA and Article 1(a) DDA. The prohibition of issuing an instruction to discriminate is applicable for the whole scope of the equal treatment legislation (as far as the GETA and the DDA are concerned, this covers more than employment and employment-related education and training, extending also to goods and services and (with respect to race) social security and social benefits).¹¹⁴

In the Netherlands, instructions explicitly constitute a form of discrimination. Article 1(a) GETA and the counterpart provisions in the ADA and DDA define 'distinctions' as: 'direct or indirect distinctions, as well as instructions to make a distinction'. Prior to the implementation of the directives, a prohibition of the instruction to make a distinction was

¹¹¹ Geers, A. 'Intimidatie op de werkplek' ('Harassment in the workplace'), in: van Maanen, G. (ed.) (2003), *De rol van het aansprakelijkheidsrecht bij de verwerking van persoonlijk leed* (The role of liability law in processing personal suffering), Den Haag, Boom, pp. 183-198, at p. 188, with further references to the literature on this question. See also Vegter, M. S. A. 'Aansprakelijkheid werkgever voor psychische schade werknemer als gevolg van seksuele intimidatie van de werknemer' ('Liability of the employer for psychological harm to the employee caused by sexual harassment'), in: *Aansprakelijkheid, verzekering en schade* (Liability, insurance and damage) no. 5, October 2001, pp. 133-140, at p. 134. With regard to Article 7:611 of the Civil Code, the Supreme Court has decided that this article may be relied upon to claim compensation for damages of only a psychological nature. See Supreme Court, 11 July 1993, *NJ* 1993/667 (*Nuts/Hofman*), ECLI:NL:HR:1993:ZJ 1032.

¹¹² Supreme Court, 11 March 2005, *RvdW* 2005/37 (*ABN AMRO / Nieuwenhuys*), ECLI:NL:HR:2005:AR6657.

¹¹³ See Vegter, M. S. A. 'Aansprakelijkheid werkgever voor psychische schade werknemer als gevolg van seksuele intimidatie van de werknemer' ('Liability of the employer for psychological harm to the employee caused by sexual harassment'), in: *Aansprakelijkheid, verzekering en schade* (Liability, insurance and damage) no. 5, October 2001, pp. 133-140, at pp. 134-135. See also Holtmaat, R. (2009) *Seksuele intimidatie; de juridische gids* (Sexual harassment: legal guide), Nijmegen, Ars Aequi Libri.

¹¹⁴ Examples of cases where the ETC found that there was a case of 'instruction to discriminate' are ETC 2006-82, 2007-211, 2009-40, 2010-95, 2010-179, 2012-30, 2012-37 and 2012-43.

implied within the GETA. However, to avoid any misunderstanding, the phrase 'as well as instructions to make a distinction' was added through the EC Implementation Act.¹¹⁵

It has been indicated by the Government that the notion of instruction refers to '*opdracht*' in the meaning of Article 7:400 of the Civil Code. This article regulates the law on contracts for the provision of services.¹¹⁶ In the Explanatory Memorandum to the ADA, the Government mentions the example of an employer who instructs a recruitment agency to select only people under the age of 30 (without a sound justification for this). According to the Explanatory Memorandum, in such a scenario, both the person who gives the contested instruction and the person who carries out the instruction violate the non-discrimination norm. If the 'recipient' of the instruction refuses to abide by it and, as a consequence thereof, suffers damages, they can hold the person who gave the instruction liable for it.

According to the Government's explanation, an instruction which has been given within the employment relationship (e.g. if a director instructs a member of the personnel department to recruit only young people) is not covered by the prohibition of instruction to make a distinction. In the Government's view, such a scenario is covered by the exercise of authority by the employer over the employee within the employment relationship ('*gezagsuitoefening in het kader van de arbeidsovereenkomst*'). Any distinction that might occur within this exercise of authority can only be attributed to the employer and excludes the employee.¹¹⁷ This interpretation is followed by the ETC (now the NIHR).¹¹⁸ This reasoning might fall short of what the EU legislator had in mind with the prohibition of instruction to discriminate. Arguably, on this point the Dutch Government interprets the prohibition of an instruction to make a distinction unduly narrowly.

The then ETC suggested that the prohibition of instruction to make a distinction should also include a prohibition of the passive toleration of an existing discriminatory situation or act.¹¹⁹ This advice was not followed by the Government. It maintained its position that an instruction to make a distinction implies active rather than passive behaviour. This is a narrow interpretation of the verb 'to instruct'. The Government has nevertheless indicated that the toleration of existing discriminatory conduct or acts might still be covered by the prohibition of making (direct or indirect) distinctions.¹²⁰ The then ETC, as well as the NIHR, has applied its own interpretation and has also covered situations where there was no explicit instruction, and / or where an employer allowed a temporary work agency to discriminate, under this prohibition.¹²¹

In addition, the instruction to discriminate on grounds of race, religion/belief, sex or homo- or heterosexuality can also be subject to criminal prosecution under Article 137d of the Criminal Code.

b) Scope of liability for instructions to discriminate

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

¹¹⁵ Explanatory Memorandum to the EC Implementation Act, Tweede Kamer, 2002-2003, 28 770, no. 3, p. 7.

¹¹⁶ Explanatory Memorandum to the ADA, Tweede Kamer, 2001-2002, 28169, no. 3, p.18.

¹¹⁷ Explanatory Memorandum to the ADA, Tweede Kamer, 2001-2002, 28169, no. 3, p. 19.

¹¹⁸ ETC (2011), Third evaluation report (2004-2009), p. 30.

¹¹⁹ ETC Advice 2001-03, p. 6 and 2001-04, p. 4.

¹²⁰ Explanatory Memorandum to the ADA, Tweede Kamer, 2001-2002, 28169, no. 3, p.18.

¹²¹ ETC (2011) *Third evaluation report (2004-2009)*, p. 30. The ETC mentions Opinion 2005-154 as an example of such a case. See also several opinions of the NIHR, such as 2012-175/176/177.

include psychological damage.¹²² The lower courts have accepted that, in cases of sexual harassment, this article can form the basis for financial compensation of psychological damage resulting from such behaviour.¹²³ Individuals who perpetrate acts of discrimination because of an instruction to do so will normally fall under the scope of Article 7:658 of the Civil Code, i.e. the employer will be held liable. We have not found any case law indicating the contrary.

Article 429 quater Criminal Code prohibits discrimination by individuals in the exercise of their function, profession or enterprise. This provision could be interpreted to cover instructions to discriminate. However, it is rarely invoked in practice and no relevant case law is available.

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

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

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

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

Instead of the term ‘reasonable’, which is the term used in Article 5 of the directive, Article 2 of the DDA employs the term ‘effective’ (*doeltreffend*). In the Government’s view, the latter term reflects better than the term ‘reasonable’ the fact that an accommodation must have the desired effect.¹²⁴ The aspect of reasonableness is reflected in the second part of the provision, in the sense that there is no obligation to accommodate if doing so would constitute a disproportionate burden (i.e. would not be reasonable). In the remainder of this section the term ‘reasonable accommodation’ will be used unless the reference specifically concerns the requirement of effectiveness.

It follows from the legislative history of the DDA that a reasonable accommodation measure must be both appropriate (*geschikt*) and necessary (*noodzakelijk*).¹²⁵ Reasonable accommodation can be tangible (e.g. a special chair or adjustments to the accessibility of the building) or intangible (e.g. adjustments to working hours or supervision). The requirement of *appropriateness* means that the accommodation must actually have the effect of undoing any limitations experienced by the disabled person and contribute to their full and autonomous participation. The requirement of *necessity* means that the same effect cannot be achieved by means of another (cheaper) accommodation. It was expected that medical and occupational health expertise would play an important role in determining the effectiveness of proposed accommodation. The Government noted that the view of the disabled person him or herself should also be taken into account. Finally, it was observed that if a particular accommodation is eligible for reimbursement under the Labour

¹²² Supreme Court, 11 March 2005, *RvdW* 2005/37 (*ABN AMRO / Nieuwenhuys*), ECLI:NL:HR:2005:AR6657. See, on this case: Houben, E.J. ‘Schadevergoeding bij zuiver psychisch letsel’ (‘Compensation for exclusively psychological damage’) in *Arbeidsrecht* (Employment law) 2006, no. 2. p. 31-36.

¹²³ See Vegter, M. S. A., ‘Aansprakelijkheid werkgever voor psychische schade werknemer als gevolg van seksuele intimidatie van de werknemer’ (‘Liability of the employer for psychological harm to the employee caused by sexual harassment’), in: *Aansprakelijkheid, verzekering en schade* (Liability, insurance and damage) no. 5, October 2001, pp. 133-140, at pp. 134-135. See also Holtmaat, R. (2009) *Seksuele intimidatie; de juridische gids* (Sexual harassment: legal guide), Ars Aequi Libri, Nijmegen.

¹²⁴ Explanatory Memorandum to the DDA, Tweede Kamer, 2001-2002, 28 169, no. 3, p. 25.

¹²⁵ Explanatory Memorandum to the DDA, Tweede Kamer, 2001-2002, 28 169, no. 3, p. 8.

Reintegration Act (*Wet op de (re)integratie arbeidsgehandicapten*) this may be taken as an indication that it would be an effective accommodation.¹²⁶

To determine whether an effective accommodation constitutes a disproportionate burden, a balancing exercise must be undertaken whereby the interests of the person with a disability is weighed against the interests of the employer.¹²⁷ This balancing exercise must be carried out in the light of 'open norms' of civil law (i.e. the duty to act as a good employer and the notion of 'reasonableness').¹²⁸ The Government also highlighted the factors mentioned in Consideration 21 of the Preamble to Directive 2000/78/EC and added as an additional criterion that the duration of the employment contract may be a weighty factor. In the field of vocational education, additional criteria to determine the proportionality of the burden imposed on the educational institution include the effect of the accommodation on other students and the availability of comparable education within the same region.¹²⁹

If financial assistance for the realisation of the reasonable accommodation is provided by the state, the burden cannot be regarded as 'disproportionate'.¹³⁰ Financial assistance is available, for example, through Article 36 of the Work and Income according to Labour Capacity Act (*Wet werk en inkomen naar arbeidsvermogen*).

The duty to provide reasonable accommodation applies to existing employment relationships and in relation to access to employment (the 'pre-contractual phase').¹³¹

b) Case law

The NIHR is strict in its assessment of employers' efforts to provide reasonable accommodation. In practice, most cases that are brought before the NIHR do not start with a request for reasonable accommodation by a person with a disability. Instead it is often the case that a person with a disability is refused a job or an internship or the employment relationship is terminated because the employer finds that, because of the disability, the person concerned cannot do the job well enough or that workplace safety is at stake.¹³² The NIHR will then assess whether reasonable accommodation could have been provided that would have allowed the applicant to fulfil the job requirements or that could have removed the safety hazard.

The NIHR consistently holds that employers must actively investigate the possibilities of providing reasonable accommodation. A lack of proper investigation amounts to discrimination in violation of the DDA.¹³³ The obligation for employers (and vocational education institutions) to investigate the possibility of reasonable accommodation includes the obligation to actively involve the person with the disability by asking them what they consider to be reasonable accommodation.¹³⁴

In cases where a violation of the DDA is found, this is very often because the employer failed to investigate whether reasonable accommodation could have been provided that would have enabled a person with a disability to meet the job requirements or to perform the job in a safe manner. As a result there is not much case law (at least in the field of

¹²⁶ Explanatory Memorandum to the DDA, Tweede Kamer, 2001-2002, 28 169, no. 3, p. 25-26. The Labour Reintegration Act was replaced in 2005 by the Act on Work and Income according to Labour Capacity (*Wet werk en inkomen naar arbeidsvermogen*).

¹²⁷ Explanatory Memorandum to the DDA, Tweede Kamer, 2001-2002, 28 169, no. 3, p. 8.

¹²⁸ Explanatory Memorandum to the DDA, Tweede Kamer, 2001-2002, 28 169, no. 3, p. 27-30.

¹²⁹ Explanatory Memorandum to the DDA, Tweede Kamer, 2001-2002, 28 169, no. 3, p. 29. It is submitted that this might trigger indirect sex discrimination, since women are more likely than men to be employed on the basis of a fixed-term contract.

¹³⁰ This follows from the Explanatory Memorandum to the DDA, Tweede Kamer, 2001-2002, 28 169, no. 3, p. 28 but is not explicitly mentioned in Article 2.

¹³¹ Explanatory Memorandum to the DDA, Tweede Kamer, 2001-2002, 28 169, no. 3, p. 27.

¹³² E.g. NIHR 2020-26, 2020-77 and 2020-116.

¹³³ E.g. NIHR 2014-1 and 2014-2; 2018-148 and 2020-26.

¹³⁴ E.g. NIHR 2020-26, 2020-57 and 2020-71.

employment) that focuses on the question of what constitutes effective accommodation and/or a disproportionate burden.

One case decided by the NIHR in 2020 concerned a man who worked as an 'order picker' in the distribution centre of a supermarket and who had asked to be assigned a different task (working in the vegetable department) because a knee injury prevented him from walking the long distances involved in collecting orders. The NIHR found that the man had in fact asked for a different type of job, which went beyond reasonable accommodation.¹³⁵ In another case the NIHR held that the duty to provide reasonable accommodation did not extend so far as to oblige a university board to define the curriculum so that the applicant, an assistant professor with a visual impairment, could continue to teach the same courses even though the faculty's financial situation did not allow for this.¹³⁶ As in the previous case, the NIHR specified that the duty to provide reasonable accommodation is meant to enable persons with a disability to fulfil the tasks pertaining to their job – it does not require employers to change the content or nature of those tasks.

The duty to provide reasonable accommodation cannot be satisfied by offering an applicant an unpaid internship instead of a paid job.¹³⁷

Some additional guidance as regards the interpretation of 'effective accommodation' and 'disproportionate burden' can be found in case law from the courts. One illustrative judgment was issued in 2018 by the Amsterdam district court, which held that an employer had not discriminated against a candidate for an internship by refusing to make the office accessible for wheelchairs.¹³⁸ In reaching this conclusion the court considered a variety of circumstances pertaining to the case, including the fact that a large-scale renovation of the office building would be required, that the internship sought by the candidate was for five months only and that the employer had looked into the possibility of offering the candidate an internship in another office where she would be able to enter with her wheelchair.

The author of this report is not aware of any case law concerning the question of whether an employer is barred from arguing that a disproportionate burden exists if general accessibility and building regulations have not been complied with. However, it seems unlikely that any accommodation would be considered a disproportionate burden if it is required by planning or construction regulations.

c) Definition of disability and non-discrimination protection

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

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

In the Netherlands, failure to meet the duty of reasonable accommodation is recognised as a form of discrimination or, more specifically, as a form of prohibited distinction, for which the ordinary sanctions can be imposed.¹³⁹ However, the text of Article 2, in conjunction with that of Article 1 (definitions of direct and indirect distinction) and Article 3 DDA (regarding the exceptions to the central norm), does not shed light upon the question of whether a failure to provide reasonable accommodation constitutes direct,

¹³⁵ NIHR 2020-109.

¹³⁶ NIHR 2020-5.

¹³⁷ NIHR 2020-71.

¹³⁸ District court (*kantonrechter*) Amsterdam 26 January 2018, ECLI:NL:RBAMS:2018:1086.

¹³⁹ See ETC 2004-140, where it held: 'It concerns a sui generis form of (making a) distinction, which does not yet occur in the other equal treatment laws.' In this Opinion, the ETC seems to suggest that the duty to provide reasonable accommodation should also be included in the sex equality laws, the GETA and the ADA.

indirect or a third type of distinction.¹⁴⁰ With regard to the duty to provide reasonable accommodation, Article 2 of the DDA states that if making an accommodation constitutes a *disproportionate* burden on the employer, then the duty does not exist (cf. Article 5 of Directive 2000/78/EC). In the amended DDA, in Article 6c the exception is made that Article 2 (concerning the duty to provide reasonable accommodation) is not applicable if it would require reconstruction or building work in or around a residential building.

Article 3(1) DDA¹⁴¹ enshrines three general exceptions to the central norm (i.e. the prohibition of making a distinction, which on the basis of Article 2 also includes the failure to provide reasonable accommodation). In brief, the exceptions are public security and health, supportive social policies, and positive action measures. Thus, a textual reading of Article 3(1) DDA suggests that these three general exceptions could also 'lift' the reasonable accommodation duty, as this falls within the central norm. However, logically and in accordance with what the Government observed in its Explanatory Memorandum, only the exception concerning public security and health can have the effect of 'lifting' the duty enshrined in Article 2.¹⁴² Consequently, the other two exceptions mentioned cannot be invoked by employers with respect to their reasonable accommodation duty. It is indeed difficult to perceive in what ways the other exceptions could be applicable in a case concerning the failure to provide reasonable accommodation.

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

In the Netherlands, there is a duty to provide reasonable accommodation for people with disabilities outside the employment field. Originally, the DDA only covered employment and vocational education. However, in 2009 the Dutch legislator extended the scope of the DDA to housing as of 15 March 2009 and to primary and secondary education as of 1 August 2009.¹⁴³ In 2016 the DDA was extended further in parallel with the ratification of the CRPD and it now includes the entire field of goods and services, including public transport and public sector services such as healthcare.

A limitation to the duty to provide reasonable accommodation in the field of housing is laid down in Article 6c of the DDA. This provision states that no duty to provide reasonable accommodation exists if such accommodation would require reconstruction or building work in or around a residential building.

In the field of public transport, the adjustments that must be made in order to comply with the duty of reasonable accommodation are specified in the Decree on public transport accessibility (*Besluit toegankelijkheid van het openbaar vervoer*).¹⁴⁴ They include adjustments to vehicles and stations/stops as well as to the provision of travel information. Article 17 of the Decree contains a timeline providing for a phased implementation of the necessary adjustments. For example, buses and metros had to be adapted for people with disabilities as of 1 July 2011, bus stations as of 1 January 2016 and trams and tram stations as of 1 January 2020. At the moment the only remaining deadline is for trains: they have to be adapted as of 1 January 2030.

The first ETC opinion concerning the duty to provide reasonable accommodation outside the area of employment was issued in 2010.¹⁴⁵ Since then, many cases that have come before the NIHR have concerned reasonable accommodation in the area of (vocational) education. This is caused (inter alia) by the fact that mainstream schools are obliged to

¹⁴⁰ See Waddington, L. and Hendriks, A. 'The expanding concept of employment discrimination in Europe: from direct and indirect discrimination to reasonable accommodation discrimination', in: *International journal of comparative labour law and industrial relations*, Winter 2002, pp. 403-427.

¹⁴¹ Article 3(2), moreover, stipulates that indirect distinction can be objectively justified.

¹⁴² Explanatory Memorandum to the DDA, Tweede Kamer, 2001-2002, 28 169, no. 3, p. 33.

¹⁴³ Act of 29 January 2009, *Staatsblad* 2009, 101.

¹⁴⁴ *Staatsblad* 2011, 225.

¹⁴⁵ See ETC 2010-35, and ETC 2011-30, in which the ETC reached the same conclusion.

admit children with a disability unless they can prove they are unable to provide adequate education. There are no indications that the concepts of reasonable accommodation or disproportionate burden are interpreted differently from in employment cases.

The first opinion of the NIHR on the duty to provide reasonable accommodation in the wider field of goods and services dates from late 2016.¹⁴⁶ More opinions followed in subsequent years, providing an opportunity for the NIHR to further develop its jurisprudence in this area. Importantly, the NIHR applies the requirement of 'reasonable accommodation' in a very strict way and demands a high level of accommodation that ties in closely with the specific wishes of the person in need of the accommodation.

The case of a blind woman who wished to shop at a branch of Kruidvat, a large chain of drugstores, is a good example of this strict approach.¹⁴⁷ The woman asked to be taken by the arm and guided through the shop so she could browse and select from the range of products herself. However, the staff would not go further than offering to collect the things on her shopping list and bring them to her. The NIHR concluded that Kruidvat violated its duty of reasonable accommodation under the DDA. It held that the accommodation offered by Kruidvat was not sufficient, in particular because Kruidvat had not really investigated whether providing the accommodation in the way the blind woman preferred herself would indeed impose a disproportionate burden. In this respect, and referring to the Parliamentary discussion on the extension of the DDA in the context of the ratification procedure of the CRPD, the NIHR emphasised that the purpose of the obligation to provide reasonable accommodation is to realise the autonomy of disabled people to the greatest extent possible.¹⁴⁸

Arguments concerning public security and health are also met with strict review. Thus the NIHR did not accept the argument of a public transport company that a person in an electric wheelchair could be refused the right to use a regular bus service because the weight of the chair poses a health and safety risk. The company could not sufficiently substantiate its claim.¹⁴⁹

This is not to say there are no limits to what can be expected of the duty bearer. Thus, a school was not considered to violate its duty of reasonable accommodation towards a pupil with Down syndrome as its substantial efforts to accommodate the pupil's needs had been sufficient and further accommodation would pose a disproportionate burden on the school.¹⁵⁰ Nevertheless, a school violates its duty of reasonable accommodation if it refuses to accommodate pupils with Down syndrome as a matter of general policy without carefully examining each individual case.¹⁵¹

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

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

¹⁴⁶ NIHR 2016-136.

¹⁴⁷ NIHR 2017-104.

¹⁴⁸ A court judgment was later issued in the same case in which the court also found that the shop had failed to provide reasonable accommodation correctly (District Court of Central Netherlands, 24 December 2019, ECLI:NL:RBMNE:2019:6305), see Section 12.2.

¹⁴⁹ NIHR 2016-39.

¹⁵⁰ NIHR 2017-41. The pupil had received specific and individual help and guidance to facilitate his participation at a mainstream school for eight years. At some point his development deteriorated and he started to exhibit inappropriate behaviours, such as yelling, anger and running away. The way in which the pupil was supported was adjusted, but this did not improve the situation. After some time the school decided to refer the pupil to the special education system as the school considered it was no longer feasible to further accommodate the pupil's specific needs.

¹⁵¹ NIHR 2018-81.

It can be argued that the ETC/NIHR implicitly construed a duty of reasonable accommodation in respect of religion in several cases where it found that the applicants had suffered discrimination because they had not been permitted to express their religion, for example by wearing a headscarf or by choosing not to shake hands with a person of the opposite sex.¹⁵² It should be noted that the same approach is not always followed by the courts, which often allow more leeway for employers to refuse to accommodate religious expressions.¹⁵³ In a recent judgment, however, a district court did find that an employer had acted negligently by not allowing a Muslim woman to wear a long headscarf (*khimar*).¹⁵⁴

¹⁵² E.g. ETC 2006-202, NIHR 2016-45, NIHR 2017-135, NIHR 2020-96.

¹⁵³ See notably Central Appeals Tribunal (*Centrale Raad van Beroep*) 7 May 2009, ECLI:NL:CRVB:2009:BI2440.

¹⁵⁴ District court Amsterdam 10 January 2020, ECLI:NL:RBAMS:2020:575.

3 PERSONAL AND MATERIAL SCOPE

3.1 Personal scope

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

In the Netherlands, there are no residence or citizenship/nationality requirements for protection under the relevant national laws transposing the directives. The principle in Dutch law is that 'all persons in the Netherlands shall be treated equally in equal circumstances', as provided for in Article 1 of the Constitution. Thus, the protection against discrimination provided by criminal law, civil law, equal treatment legislation and administrative law covers any person on the territory of the Netherlands. This wide personal scope means that, in principle, migrants, regardless of their immigration status, are protected by the broad range of non-discrimination law if they encounter discrimination on grounds of, for instance, their race or ethnic origin, or their religion. An example can be found in a case brought to the NIHR, the national equality body, in which several people alleged they had been singled out by the local authorities because of their Egyptian and Somali origin for a fraud investigation regarding the social benefits they received. The NIHR accepted this could amount to discrimination on grounds of race.¹⁵⁵

However, whereas irregularised migrants are not expressly excluded from the scope of Dutch anti-discrimination law, they are excluded from legal employment¹⁵⁶ and are not entitled to public services such as housing, healthcare or social protection.¹⁵⁷ It follows that they do not have legal access to many of the fields in respect of which the anti-discrimination legislation applies. Limitations also exist with regard to the rights of migrants with temporary residence permits: their access to employment and public services depends on the purpose for which they have been admitted. These legislative restrictions on the rights of (irregularised) migrants are not themselves subject to the equal treatment legislation as the GETA covers nationality discrimination only in horizontal relationships (see further Section 4.4).

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

a) Protection against discrimination

In the Netherlands, the personal scope of anti-discrimination law does not cover (certain) legal persons for the purpose of protection against discrimination. For the purposes of protection against discrimination only natural persons are protected. This follows from the Memorandum of Reply to the GETA, where the Government explained that the definition of 'distinction' in Article 1 GETA refers to making a distinction *between persons*.¹⁵⁸ However, where a group of natural persons is collectively subject to discrimination (e.g. when an association of professionals, a political party or a religious organisation is refused a contract for hiring a meeting room in a hotel), their organisation may be seen as the rights holder, according to the then ETC in a number of its Opinions.¹⁵⁹ These cases all concerned access to and supply of goods and services. In one case, the then ETC allowed

¹⁵⁵ NIHR 2016-83. A similar example concerned a complaint from a man from Sudan who claimed he was refused a job because of his Sudanese origin, see NIHR 2016-60.

¹⁵⁶ Article 2(1) Aliens Employment Act (*Wet arbeid vreemdelingen*), *Staatsblad* 1994, 959, entered into force 1 September 1995.

¹⁵⁷ Article 10(1) Aliens Act 2000 (*Vreemdelingenwet 2000*), *Staatsblad* 2000, 495, entered into force 1 April 2001. The second paragraph contains some exceptions concerning, inter alia, emergency healthcare and legal assistance.

¹⁵⁸ Tweede Kamer, 1991-1992, 22 014, no. 5, p. 87-88. In addition, the new definition of a distinction in the GETA refers to 'where one person is treated less... etc.'

¹⁵⁹ See e.g. ETC 1996-110 and 1998-31 and, more recently, NIHR 2013-94 and 2014-109. In addition, there is a possibility for associations to act on behalf of victims of discrimination when this is a (statutory) goal of their organisation.

a company to submit a complaint against a customer.¹⁶⁰ Nevertheless, it is commonly held that legal persons (e.g. an association, foundation, institution or enterprise, etc.) do not fall under the personal scope (in the sense of being rights holders).

b) Liability for discrimination

In the Netherlands, the personal scope of anti-discrimination law covers natural and legal persons for the purpose of liability for discrimination (GETA, ADA and DDA, Article 1). This means that both natural and legal persons can be held accountable.

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

a) Protection against discrimination

In the Netherlands, the personal scope of anti-discrimination law covers the private and public sectors, including public bodies, for the purpose of protection against discrimination (GETA, ADA and DDA, Article 1). The GETA does not apply to legal relationships within religious communities or to religious functions (Article 3 GETA).

b) Liability for discrimination

The personal scope of anti-discrimination law covers the private and public sectors, including public bodies, for the purpose of liability for discrimination (GETA, ADA and DDA, Article 1). The GETA does not apply to legal relationships within religious communities or to religious functions (Article 3 GETA).

3.2 Material scope

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

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

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

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

¹⁶⁰ ETC 2003-142. This concerned a company whose employee had been discriminated against by another company. The ETC decided that this situation was covered under the prohibition of discrimination in the area of goods and services and that, in the case at issue, the defendant had indeed discriminated against the complainant's employee. See also the contribution by Peter Rodrigues in: de Wolff, D. (ed.) (2004) *Gelijke behandeling, oordelen en commentaar 2003* ('ETC Opinions 2003'), Deventer, Kluwer.

h. working conditions (inserted by the EC Implementation Act).

The ADA and DDA have counterpart provisions in Articles 3 and 4 respectively. These articles reflect exactly the same material scope, although sometimes the sequence of subsections differs. Both public and private sector labour relations are covered. The central norm applies to the entire employment process, i.e. from the moment of notice being published of a vacancy, to the commencement of the employment relationship or public appointment and until its termination.¹⁶¹

In the GETA, self-employment is covered by Article 6. This Article provides that, 'it shall be unlawful to make distinctions with regard to the conditions for and access to the liberal professions and with regard to pursuing the liberal professions or for development within them'. Identical provisions are included in Article 4 ADA and Article 5 DDA. The term 'self-employment' is not used in the articles mentioned, which instead speak of the 'liberal professions' (*vrije beroepen*). The legislative history of the ADA confirms that the term 'liberal profession' covers all employment relationships where a relationship of authority between the employer and employee is absent.¹⁶² This includes the more traditional 'liberal professions' such as doctors and notaries as well as freelancers and entrepreneurs working in any other field.¹⁶³

A note on access to employment for disabled people: a major barrier may be that disabled or chronically ill people are asked questions about their physical or medical condition during the selection procedure and that their answers lead to a decision not to appoint them. In 2012 the law was amended in order to make the regulations in this regard stricter and to create a possibility for a complaints procedure at the national level.¹⁶⁴

In 2019 the Minister of Social Affairs and Employment presented a legislative proposal to oblige employers and intermediary agencies to develop policies for non-discriminatory recruitment and selection procedures. This obligation will be subject to enforcement by the labour inspection agency (*Inspectie SZW*).¹⁶⁵ The NIHR reviewed the proposal positively but observed that further specification was required.¹⁶⁶ The proposal was sent to Parliament in December 2020.¹⁶⁷

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

In the Netherlands, national legislation prohibits discrimination in working conditions including pay and dismissals, for all five grounds and for both public and private employment (see Article 5(1) c, d, e and h GETA; Article 4 b, c, e and h DDA; Article 3 c, d, e and h ADA).

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

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

¹⁶¹ Explanatory Memorandum to the DDA, Tweede Kamer, 2001-2002, 28 169, no. 3, p. 34. The same applies in the context of the ADA and the GETA.

¹⁶² Tweede Kamer 2001-2002, 28 170, no. 3, p. 22.

¹⁶³ See also, for example, NIHR 2012-122 and 2017-81.

¹⁶⁴ Medical Examinations Act (Wet aanscherping medische keuringen) Staatsblad 2012, 146.

¹⁶⁵ *Wetsvoorstel toezicht discriminatievrije werving en selectie* (Legislative proposal on supervision of non-discriminatory recruitment and selection), the proposal was published online for consultation on 7 October 2019, see: https://www.internetconsultatie.nl/wet_toezicht_discriminatievrije_werving_en_selectie.

¹⁶⁶ <https://mensenrechten.nl/nl/publicatie/5dc041f1b55daa48dd78bd53>.

¹⁶⁷ Tweede Kamer 2020-201, 35 673, nos. 1-2.

All three equal treatment laws (GETA, ADA and DDA) contain a prohibition against making a distinction with respect to giving permission for staff to receive education or training during or prior to the employment relationship (Article 5(1)(f)GETA, Article 3(f) ADA and Article 4(f) DDA).

Discrimination by providers of vocational training and professional guidance is prohibited in Article 7 GETA, Article 5b DDA and Article 5 of the ADA. Both Article 7 GETA and Article 5b DDA prohibit (in brief): distinctions made with regard to the supply of or access to goods or services, including all forms of education,¹⁶⁸ and with regard to vocational orientation and advice or information relating to the choice of an educational institution or career. The provisions furthermore specify that the prohibition applies to distinctions made:

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

Article 5 ADA prohibits distinctions on the ground of age with regard to:

- a. access to and the provision of vocational orientation and advice or information relating to career choice (*loopbaanoriëntatie en beroepskeuzevoorlichting*); and
- b. education aimed at entering and functioning in the labour market (*onderwijs gericht op toetreding tot en functioneren op de arbeidsmarkt*).

Subsection (b) covers education and training which form the final stage prior to entering the labour market, including retraining and further training courses.¹⁶⁹ In practice, this covers practical education (*praktijkonderwijs*, which forms part of 'secondary education'); technical and vocational training for 16-18-year-olds (*middelbaar beroepsonderwijs*); technical and vocational training for those aged 18+ (*hoger beroepsonderwijs*) and university education. 'Adult lifelong learning courses' are not mentioned specifically but are covered by Article 5 of the DDA as well. Subsections (a) and (b) of Article 5 ADA are not aimed at a specific group. The norm therefore applies to 'everyone' working within these institutions. With regard to subsection (b), this includes 'public education, private/belief-based education and education that is not publicly funded'.¹⁷⁰

Whereas Article 3(1)(b) Employment Equality Directive only prohibits discrimination at the stage of 'entry to' vocational training, Dutch equal treatment legislation covers the entire path from registration until the termination of the education or training.¹⁷¹ The scope of Dutch legislation is therefore broader than that of the Directive.

In addition, the protection offered by Dutch equal treatment legislation against discrimination in the field of vocational education and guidance extends to all grounds covered by the GETA. In this regard Dutch law goes far beyond the requirements of Directive 2000/78/EC. Of course, this is not to say that the reality on the ground always reflects the legal non-discrimination standards. Several studies show that ethnic minority students, in particular, face discrimination in finding internships to help prepare them for the labour market.¹⁷² In 2018 the Ministry of Education launched a policy initiative to

¹⁶⁸ The material scope of the GETA and DDA covers the entire field of education, including primary and secondary education. These acts thus offers wider protection than the directives.

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

¹⁷⁰ Explanatory Memorandum to the DDA, Tweede Kamer, 2001-2002, 28 169, no. 3, p. 37.

¹⁷¹ This follows from the formulation of the legislative provisions. See, in addition, Explanatory Memorandum to the DDA, Tweede Kamer, 2001-2002, 28 169, no. 3, pp. 37-38.

¹⁷² E.g. ROA, *Mbo stages en de migratieachtergrond van studenten* (Mbo internships and student's migration background), 2018/17; KIS, *Gelijke kansen op gelijke stages. Een vervolgonderzoek naar stagediscriminatie* (Equal opportunities for equal internships. A follow-up study of discrimination in internships), 2018.

promote equal internship opportunities, including by raising awareness of (unconscious) bias amongst employers and educational institutions and by lowering the threshold for students to signal discrimination experienced.¹⁷³

In 2020 an employer was held liable under civil labour law for having dismissed a young Muslim woman from her traineeship (*leer-werkovereenkomst*) because she chose to wear a khimar (long headscarf).¹⁷⁴ According to the court, the employer had not been able to show that the wearing of the khimar was not compatible with the tasks the woman had to perform as part of her traineeship. It was found that the employer had acted with considerable negligence in dismissing the woman on discriminatory grounds.

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

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

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

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

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

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

Discrimination in the field of social protection, including social security, is prohibited in Article 7a(1) GETA. This extension to social protection is restricted to racial discrimination. The other grounds can only rely on the more general, constitutional and international prohibitions of discrimination, in particular Article 14 ECHR and Article 26 ICCPR.¹⁷⁵

Discrimination in the field of healthcare is prohibited by Article 7 GETA which covers the entire field of goods and services, including healthcare. Article 7(1)(c) GETA specifies that the provision also covers discrimination by institutions working in the field of healthcare. Protection against discrimination in healthcare is not restricted to the ground of racial and ethnic origin but extends to all grounds listed in the GETA. Article 5b DDA prohibits discrimination in the field of healthcare on the ground of disability.

NIHR Opinion 2020-100 concerned a woman of Turkish origin who was refused treatment for pain because she was insufficiently proficient in Dutch. According to the healthcare provider (a rehabilitation clinic), the treatment required good communication between client and therapist and the use of an interpreter would hinder the treatment, amongst other reasons because it would hamper the building of trust between the woman and her therapist. The NIHR found that the refusal to treat the woman constituted an indirect

¹⁷³ Tweede Kamer 2019-2020, 31 524, no. 443.

¹⁷⁴ District court Amsterdam 10 January 2020, ECLI:NL:RBAMS:2020:575.

¹⁷⁵ See, for example, District Court of Amsterdam, 1 November 2018, ECLI:NL:RBAMS:2018:7835 (age discrimination, social assistance – no violation) and Central Appeals Tribunal (*Centrale Raad van Beroep*) 9 July 2019, ECLI:NL:CRVB:2019:2263 (age discrimination in relation to income supplement – no violation).

distinction on the ground of race, which was, however, justified because of the language requirement.

A recurring issue in case law on social assistance concerns investigations into foreign assets of persons with a migration background. Under Dutch law eligibility for social assistance is restricted to persons who do not have other means of subsistence. The municipalities, who are responsible for social assistance, are competent to investigate whether the information provided by recipients of social assistance regarding their income and other means/assets is correct. In this context, municipalities regularly conduct investigations abroad to determine whether welfare recipients possess real estate or other financial assets in other countries. During these so-called 'thematic investigations' (*themacontroles*) municipalities have relied on risk profiles to select social assistance recipients of specific national origins (amongst other criteria). This practice has given rise to numerous claims by people who stated that they had been selected for investigation on the basis of their national origin.

Since 2015 the Central Appeals Tribunal (*Centrale Raad van Beroep*) has developed a line of case law setting out the conditions under which investigations into the foreign assets of recipients of social assistance are justified. It is notable that in this case law only the non-discrimination provisions of Article 14 and Article 1 Twelfth Protocol ECHR are invoked. The RED is not referred to, which may be due to the fact that the GETA (which implements the RED) is not generally applicable to the field of social security, and courts (and applicants) are more familiar with the guarantees in the ECHR. Under the relevant case law, municipalities may use the criterion 'of non-Dutch origin' as part of their risk profiles, in combination with other criteria such as age and 'travelling patterns'.¹⁷⁶ According to the Central Appeals Tribunal, persons who are not of Dutch origin have lived part of their lives in a country other than the Netherlands and are therefore more likely to have assets in a foreign country.¹⁷⁷ In a more recent case the Tribunal added that municipalities may also apply different risk profiles to persons of non-Dutch origin as compared to persons of Dutch origin.¹⁷⁸ In these cases the Tribunal did not qualify 'being of non-Dutch origin' as a racial or ethnic criterion to which the 'very weighty reasons' test of Article 14 ECHR would have applied.

Although municipalities may thus select persons who are not of Dutch origin, they may not select persons of a specific foreign origin (e.g. Moroccan or Turkish origin).¹⁷⁹ However, municipalities may focus their investigation on persons of a particular national origin if such selection forms part of a phased investigation in which different countries of origin are investigated in sequence.¹⁸⁰ It is not clear whether such 'sequential selection' is only allowed if the municipality intends to investigate all countries of origin or if it is enough that several countries of origin have been or will be investigated.

It is doubtful whether the above-mentioned use of origin-related criteria by Dutch municipalities and the case law of the Central Appeals Tribunal are compatible with Article 3(1)(e) RED. In its judgments in the cases of *Jyske Finans* and *Maniero* the CJEU gave a narrow interpretation of the ground of 'racial or ethnic origin'.¹⁸¹ According to this

¹⁷⁶ It is not clear from the case law how 'being of non-Dutch origin' is determined. This is most likely by country of birth. Country of birth was explicitly used as a selection criterion in Central Appeals Tribunal 28 August 2018, ECLI:NL:CRVB:2018:2702. This case did not concern regular social assistance benefits but 'supplementary pension income', a specific form of social assistance granted to persons who do not receive a full state pension due to the fact of not having lived in the Netherlands for the full period between the ages of 16 and 65. Many recipients of 'supplementary pension income' are former labour migrants. The thematic controls described above are conducted in relation to added pension income as well.

¹⁷⁷ Central Appeals Tribunal 14 April 2015, ECLI:NL:CRVB:2015:1229.

¹⁷⁸ Central Appeals Tribunal 23 June 2020, ECLI:NL:CRVB:2020:1431 and ECLI:NL:CRVB:2020:1335.

¹⁷⁹ Central Appeals Tribunal 12 December 2017, ECLI:NL:CRVB:2017:4327 and Central Appeals Tribunal 14 August 2018, ECLI:NL:CRVB:2018:4329.

¹⁸⁰ E.g. Central Appeals Tribunal 6 August 2019, ECLI:NL:CRVB:2019:2611 and Central Appeals Tribunal 17 March 2020, ECLI:NL:CRVB:2020:835.

¹⁸¹ CJEU 6 April 2017, C-668/15, ECLI:EU:C:2017:278 (*Jyske Finans*) and CJEU 15 November 2018, C-457/17, ECLI:EU:C:2018:912 (*Maniero*).

interpretation, 'ethnic origin' is determined through a combination of objective and subjective factors and the single criterion of a person's country of birth cannot be decisive in establishing their ethnic origin.¹⁸² Moreover, the CJEU determined that indirect discrimination on the ground of racial or ethnic origin can only be taken to occur where the disadvantage incurred by the allegedly discriminatory measure is suffered by a person or persons belonging to a particular ethnic group.¹⁸³ This would seem to imply that the criterion 'of non-Dutch origin' is indeed not a racial or ethnic criterion, as held by the Central Appeals Tribunal. However, the CJEU requires a concrete, contextual analysis to determine whether a measure affects any particular ethnic group. This follows from the judgments in *Jyske Finans* and *Maniero*, where the CJEU clarified that the establishment of a presumption of indirect discrimination must be based on a specific, concrete comparison rather than a general, abstract one.¹⁸⁴

Although in *Jyske Finans* the criterion 'country of birth outside the EU/EFTA' did not indicate any particular ethnic group, this may be different depending on the circumstances of the case. For example, in a municipality where 90 % of the population of non-Dutch origin is of Moroccan origin, the general criterion 'non-Dutch origin' would still impose a disadvantage on a particular ethnic group. This happened in at least one of the cases decided by the Central Appeals Tribunal, where application of the 'non-Dutch origin' criterion (together with the criteria of age, travel behaviour and 'indications of fraud') resulted in a selection consisting of 15 people of Turkish origin, between 30 and 40 people of Moroccan origin and around 10 people of Central and Eastern European origin.¹⁸⁵

In summary, the Dutch case law suggests that there are cases where the general criterion of 'non-Dutch origin' results in indirect discrimination on the grounds of racial or ethnic origin, as defined by the CJEU, because it has the effect of putting particular ethnic groups at a disadvantage. In the view of the author this raises issues of compliance with the RED.¹⁸⁶

Moreover, in most of the cases that have come before the Central Appeals Tribunal the thematic controls conducted by Dutch municipalities were not directed at 'persons of non-Dutch origin' but at a specific ethnic group (most often people of Turkish origin) or in some cases at several specific ethnic groups (e.g. people of Turkish and Moroccan origin).¹⁸⁷ Both the Turkish and Moroccan communities are amongst the largest ethnic minority groups in the Netherlands and members of these groups are known to experience discrimination on the grounds of ethnic origin in various fields of daily life.¹⁸⁸

While it is true that the Central Appeals Tribunal found the targeting of specific ethnic groups to be contrary to the prohibition of racial and ethnic discrimination if it is not part of a 'phased investigation' in which other ethnic groups are also included (see above), CJEU case law on this point is lacking. It is therefore unclear whether the CJEU would also find

¹⁸² CJEU 6 April 2017, C-668/15, ECLI:EU:C:2017:278, paras 19-20.

¹⁸³ CJEU 6 April 2017, C-668/15, ECLI:EU:C:2017:278, para 31; CJEU 15 November 2018, C-457/17, ECLI:EU:C:2018:912 (*Maniero*), para 47.

¹⁸⁴ CJEU 6 April 2017, C-668/15, ECLI:EU:C:2017:278, para 32; CJEU 15 November 2018, C-457/17, ECLI:EU:C:2018:912, para 48.

¹⁸⁵ District court The Hague 7 July 2020, ECLI:NL:RBDHA:2020:6148. Following the case law of the Central Appeals Tribunal, the court did not find any discrimination. The possibility of indirect discrimination against a particular national origin was not assessed.

¹⁸⁶ A contextual assessment as described here would also allow reconciling the CJEU judgments in *Jyske Finans* and *Maniero* with the ECtHR Grand Chamber's judgment in *Biao/Denmark*. In that case, the Grand Chamber found that 'Danish citizens of foreign origin' did constitute an ethnic group (ECtHR (GC) 24 May 2016, app.no. 38590/10). Following Article 6(3) TEU and Article 52(3) CFR, this interpretation by the ECtHR is relevant to the interpretation of EU law and should be taken into account when determining the meaning of 'racial or ethnic origin' in the RED.

¹⁸⁷ See e.g. Central Appeals Tribunal 12 December 2017, ECLI:NL:CRVB:2017:4327 (Turkish and Moroccan origin); Central Appeals Tribunal 14 August 2018, ECLI:NL:CRVB:2018:4329 (Turkish origin); Central Appeals Tribunal 23 June 2020, ECLI:NL:CRVB:2020:1335 (Turkish origin).

¹⁸⁸ European Union Agency for Fundamental Rights, *Second European Union Minorities and Discrimination Survey. Main Results*, Luxembourg: Publications Office of the European Union 2017, Figure 4 (p. 26).

that a phased investigation involving sequential targeting of particular ethnic groups remains within the margins of the RED and, if so, whether it would agree with the Tribunal's approach to establishing whether the targeting in fact did form part of a phased investigation. It is not clear whether the standard set by the Central Appeals Tribunal requires that municipalities must, in the end, include all countries of origin in their investigations. However, if this is not the case, there is a chance that municipalities will continue to focus their investigations on people who belong to specific ethnic minority groups, which in the view of the author would be contrary to the RED.

a) Article 3(3) exception (Directive 2000/78)

Dutch law does not rely on the Article 3.3 exception. As mentioned, under Article 7a of the GETA, the extension to social protection is restricted to racial discrimination. The other grounds are only protected by the constitutional and international prohibitions of discrimination in the areas of social life mentioned above. The issue of the scope of the protection against discrimination in the area of social security and social benefits arises regularly in discussions about the possibilities for local providers of social assistance to cut or even refuse benefits for people who, as a consequence of certain behaviour (for example, a refusal to shake hands with a person of the opposite sex) or wearing specific religiously required dress (e.g. a burqa or a headscarf), do not succeed in their obligation to find paid work.¹⁸⁹

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

In the Netherlands, national legislation prohibits discrimination in social advantages as formulated in the Racial Equality Directive (Article 7a(1) GETA). This explicit provision on social advantages is restricted to racial discrimination, but here again the other grounds can also rely on the more general, constitutional and international prohibitions of discrimination.¹⁹⁰ In addition, protection against discrimination may be available under the GETA and DDA where social advantages overlap with providing goods and services in areas covered by these acts.

This ties in with the Government's view that the notion of 'social advantages' refers to advantages of an economic and cultural nature which may be granted by both public and private entities. These may include student grants, public transport reductions and reductions for cultural or other events. Advantages offered by private entities are, for example, reductions to entry prices for cinemas and theatres for certain categories of visitors.¹⁹¹

In 2020 it became known that the Dutch Tax Office (*Belastingdienst*) had wrongly accused thousands of families of fraud in relation to childcare benefits and forced them to repay large sums of money, in many cases resulting in huge debts. This scandal became known as the *Toeslagenaffaire*. A report by the Data Protection Authority (*Autoriteit Persoonsgegevens*) established that people with dual nationality had been unlawfully targeted by the Tax Office's fraud investigations.¹⁹² The Data Protection Authority found that this constituted discrimination on grounds of nationality, but not racial or ethnic origin. However, in 2014 (the last year in which second nationalities were registered in the

¹⁸⁹ The Central Appeals Tribunal has held that a person receiving a social, minimum subsistence benefit can be required to refrain from wearing a niqab to enhance her chances of finding paid work, see *Centrale Raad van Beroep* 9 May 2017, ECLI:NL:CRVB:2017:1639.

¹⁹⁰ See, for example, Court of Appeal of The Hague, 25 September 2019, ECLI:NL:GHDHA:2019:2541 (tax advantages and age discrimination).

¹⁹¹ Explanatory Memorandum to the EC Implementation Act, Tweede Kamer, 2002-2003, 28 770, no. 3, p. 15.

¹⁹² *Autoriteit Persoonsgegevens, Belastingdienst/Toeslagen. De verwerking van de nationaliteit van aanvragers van kinderopvangtoeslag* (Tax Office / benefits. The use of nationality when processing child benefit applications), July 2020, available at https://autoriteitpersoonsgegevens.nl/sites/default/files/atoms/files/onderzoek_belastingdienst_kinderopvangtoeslag.pdf.

Netherlands) three quarters of dual nationals had a 'non-western' migration background and half of all dual nationals were of either Turkish or Moroccan origin. The author of this report therefore submits that the selection by the Tax Office on the ground of dual nationality may well have amounted to indirect discrimination on the ground of racial or ethnic origin. The NIHR has not yet issued any opinions concerning discrimination in the course of the *Toeslagenaffaire* (nor have there been any court judgments), but it is likely that such opinions will be forthcoming.

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

In the Netherlands, national legislation prohibits discrimination in education as formulated in the Racial Equality Directive (Article 7 GETA). The GETA is integrally applicable to all aspects of education, including all types of schools. This provision applies to 'racial and ethnic origin' but also to 'religion/belief' and 'sexual orientation' (as well as all other grounds covered by the GETA). In this regard, Dutch law goes beyond the requirements set by the Directive.¹⁹³

Article 5b DDA prohibits discrimination in the field of education on the ground of disability. The scope of the DDA was extended to primary and secondary education in August 2009¹⁹⁴ and as of June 2016 it covers the entire field of education.¹⁹⁵

In 2014 a new law on special education for pupils and students with intellectual and physical disabilities, the Act on Tailored Education (*Wet Passend Onderwijs*), entered into force.¹⁹⁶ This act changed the way in which schools are compensated for the costs associated with teaching students with learning disabilities and includes severe austerity measures. Financing was moved from individual schools to groups of schools and the total budget available for schools that are solely open to students with learning disabilities was reduced, inevitably leading to more intellectually and physically disabled pupils applying for admission to mainstream schools. In 2015, the Ombudsman for Children (*Kinderombudsman*) published a report in which the new law was severely criticised.¹⁹⁷ Since then a large-scale evaluation project was initiated to closely monitor developments and new policy initiatives.¹⁹⁸ Throughout 2019 a policy aim has also been to improve the connection between education and healthcare for pupils with disabilities, to ensure adequate care arrangements within schools as well as education-oriented care for children unable to attend school.¹⁹⁹

Due to the COVID-19 pandemic all schools in the Netherlands closed on 16 March 2020. Schools for special education (for children with learning disabilities) reopened on 11 May, followed by secondary schools on 2 June and primary schools on 8 June (primary schools

¹⁹³ See also Memorandum concerning the Implementation of Directive 2000/78/EC and Directive 2000/43/EC (*Notitie over de Implementatie van Richtlijn 2000/78/EG en Richtlijn 2000/43/EG*), Tweede Kamer, 2001-2002, 28 187, no. 1, pp. 10-11.

¹⁹⁴ Amendment to the Disability Discrimination Act concerning the extension to primary and secondary education and housing (*Wijziging van de Wet gelijke behandeling op grond van handicap of chronische ziekte in verband met de uitbreiding met onderwijs als bedoeld in de Wet op het primair onderwijs en de Wet op het voortgezet onderwijs en met wonen*), Staatsblad 2009-101, Wet van 19 jan. 2009. See Articles 5b (education) and 6a, 6b and 6c (housing).

¹⁹⁵ Act to implement the Convention on the Rights of Persons with Disabilities (*Wet van 14 april 2016 tot uitvoering van het op 13 december 2006 te New York tot stand gekomen Verdrag inzake de rechten van personen met een handicap* (Trb. 2007, 169)), Staatsblad 2016-215.

¹⁹⁶ Act of 11 October 2012 concerning the amendment of several acts regarding education (*Wet van 11 oktober 2012 tot wijziging van enkele onderwijswetten in verband met een herziening van de organisatie en financiering van de ondersteuning van leerlingen in het basisonderwijs, speciaal en voortgezet speciaal onderwijs, voortgezet onderwijs en beroepsonderwijs*), Staatsblad 2012, 533.

¹⁹⁷ The report is available at: www.dekinderombudsman.nl/ul/cms/fck-uploaded/2015.KOM014.Werktpassendonderwijs.rapport.pdf.

¹⁹⁸ *Dertiende voortgangsrapportage passend onderwijs* (Thirteenth progress report on tailored education), Tweede Kamer 2018-2019, 31 497, no. 310; *Derde meting monitor Passend Onderwijs in het mbo* (Third monitor on tailored education in vocational education), published as Annex to Tweede Kamer 2018-2019, 31 497, no. 331.

¹⁹⁹ Tweede Kamer 2019-2020, 31 497 and 31 839, no. 334.

had already reopened part-time on 11 May). All schools closed again just before the Christmas holidays on 16 December 2020.²⁰⁰ Schools remained open for children in vulnerable situations, for example children at risk of domestic violence or who were already receiving support from youth care services. However, during the first school closure schools did not succeed in keeping in touch with all vulnerable pupils. It is estimated that approximately 430 primary school pupils and 725 secondary school pupils went 'off the radar' during this period. It is not known how many of these pupils belonged to racial or ethnic minority groups.²⁰¹

Research on the effects of the first school closure (March-June 2020) on primary school pupils indicates that on average pupils made less progress in the period when they were unable to go to school. This effect was more marked for pupils whose parents are not highly educated and pupils whose parents are on a low income. Pupils with a migration background also made less progress, although this effect was less marked than that of the parents' income and educational level.²⁰² These findings are preliminary and do not cover the effects of the second school closure which started on 16 December 2020 and remained in place well into 2021.

Because of the school closure between March and June 2020, the Minister of Education decided that children in the final year of primary school education would not take the final assessment normally scheduled in that school year. This assessment is considered to improve equal opportunities, as children from low socio-economic status backgrounds in particular are often advised to enrol at a level below their capacity and the final assessment is a means to correct this. It is estimated that in 2020 approximately 14 000 pupils received advice to pursue a lower level of secondary education due to the absence of the final assessment. These were relatively often pupils with a migration background, children whose parents are not highly educated and children whose parents are on a low income.²⁰³

With regard to measures to address this issue, the Minister of Education announced that there would be additional monitoring of children who started secondary education in 2020 for three years to assess whether they had enrolled at the right level and to correct any negative effects due to the absence of the final assessment for this group.²⁰⁴ Apart from this, measures taken in 2020 involved additional financial support and expertise provided to schools on how to compensate the learning backlogs incurred during the school closure. EUR 282 million was made available for 'recuperation and support programmes' to be organised by schools outside regular school hours, for example through summer schools. In addition, EUR 24 million was spent on devices and internet connections for pupils who had no access to these at home.²⁰⁵

a) Trends and patterns regarding Roma pupils

In the Netherlands, there are no specific patterns existing in education regarding Roma pupils, such as segregation. Therefore, in this respect it does not seem to be necessary to

²⁰⁰ Inspectie van het Onderwijs (Inspectorate of Education), *De Staat van het Onderwijs 2021* (The State of Education 2021), available at <https://www.onderwijsinspectie.nl/onderwerpen/s/staat-van-het-onderwijs>, p. 14.

²⁰¹ P. van Eck et al, *Samenvatting resultaten monitor 'Noodopvang en Kinderen, leerlingen en studenten in een kwetsbare positie' gedurende COVID-19 maatregelen (week 16 t/m 24)* (Summary of monitor results 'Emergency care and children, pupils and students in a vulnerable situation during the COVID-19 measures (week 16 to 24)'), published as Annex to Tweede Kamer 2019-2020, 35 300 VIII, no. 212.

²⁰² Inspectie van het Onderwijs (Inspectorate of Education), *De Staat van het Onderwijs 2021* (The State of Education 2021), available at <https://www.onderwijsinspectie.nl/onderwerpen/s/staat-van-het-onderwijs>, p. 19-20. The Inspectorate indicates that similar research results are not available for educational sectors other than primary education.

²⁰³ Inspectie van het Onderwijs (Inspectorate of Education), *De Staat van het Onderwijs 2021* (The State of Education 2021), available at <https://www.onderwijsinspectie.nl/onderwerpen/s/staat-van-het-onderwijs>, p. 23 – more specific numbers are not mentioned in the report.

²⁰⁴ Tweede Kamer 2020-2021, 31 293 and 31 289, no. 568.

²⁰⁵ Tweede Kamer 2020-2021, 35 570 VIII, no. 174 and Tweede Kamer 2020-2021, 31 293 and 31 289, no. 576.

put into effect legal instruments with regard to Roma and Traveller children. In the field of education, only one case of alleged discrimination regarding Roma is known. In this case, the board of an association of 14 (Christian) primary schools used a quota of 15 % per institution for pupils who speak the Dutch language as a second language, in order to combat segregation (the measure was not explicitly targeting Roma and Travellers, but also children with a migration background). This admissions policy was deemed to be an unlawful indirect distinction against Roma and Sinti communities, on the ground of race/ethnic origin.²⁰⁶

This is not to say that Roma do not face considerable difficulties regarding education. According to a report from 2018, their situation is generally evaluated as poor, although substantial differences exist between municipalities as well as within Roma communities.²⁰⁷ While the participation rate in primary education is reasonably good, secondary education reveals a different picture. In addition, the level of secondary education is much lower for Roma than the population in general. Many municipalities are devoting a great deal of energy and effort to improving this situation, in cooperation with Roma communities, but progress is slow.

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

In the Netherlands, national legislation prohibits discrimination in access to and the supply of goods and services as formulated in the Racial Equality Directive. This is covered by Article 7 of the GETA. Subsection 1 of Article 7 provides as follows:

‘It is unlawful to make a distinction in offering goods or services, in concluding, implementing or terminating agreements thereon, and in providing educational or career guidance if such acts of making a distinction are committed:

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

This is applicable to all grounds covered by the GETA and, since June 2016, also to disability (Article 5b(1) DDA). In this regard, Dutch law extends beyond the directives’ requirements. Unilateral administrative decisions and acts (e.g. a decision not to grant a subsidy) do not fall under the scope of Article 7.²⁰⁸

a) Distinction between goods and services available publicly or privately

In the Netherlands, national law distinguishes between goods and services available to the public (e.g. in shops, restaurants or banks) and those only available privately (e.g. limited to members of a private association). From Article 7(1)(d) GETA and Article 5b(1)(d) DDA, it is clear that the distinction between goods and services that are available privately and those that are available publicly is of importance only insofar as supply by private individuals is concerned. It follows from parliamentary precedent (and from case law) that this similarly applies to private associations. The latter is the result of the balancing of

²⁰⁶ See ETC 2003-105.

²⁰⁷ *Monitor Sociale Inclusie: meting 3. Tweede vervolgmeting naar de woon- en leefomstandigheden van Roma en Sinti in Nederland* (Social inclusion monitor: measurement 3. Second follow-up measurement of the housing and living situation of Roma and Sinti in the Netherlands), 2018: www.rijksoverheid.nl/documenten/publicaties/2018/11/16/monitor-sociale-inclusie-meting-3.

²⁰⁸ NB: Article 7a, which concerns social security and social services, does include unilateral actions by government or government agencies.

interests of the Constitutional right to freedom of association and the right to equal treatment.

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

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

In the Netherlands, national legislation prohibits discrimination in the area of housing as formulated in the Racial Equality Directive. Housing is covered under Article 7(1) GETA and also under Article 6a-c DDA. Thus it covers all grounds except age. The duty to make reasonable accommodations in relation to housing only exists in the case of disability discrimination. An exception to this duty applies if the adaptations would require building or reconstruction work in or around a house (on the basis of Article 6c of the DDA).

The prohibition of discrimination applies to all aspects of housing. No specific exceptions apply as regards housing other than those which will be dealt with below. The Rotterdam Act (*Rotterdamwet*),²⁰⁹ which grants local authorities the right to refuse to let subsidised houses in certain areas to people or households with a low income or without stable employment and to refer them to other areas, in order to avoid the emergence of 'ghettos', has now been in place for a couple of years and has not been found discriminatory.²¹⁰ The current minister responsible for housing plans to give municipalities even more scope to set strict requirements.²¹¹ A complaint regarding this type of policy was brought to the European Court of Human Rights. The Grand Chamber ruling held that the policy did not violate the ECHR.²¹²

In 2018, situation testing initiated by a group of journalists brought to light a high prevalence of discrimination in housing against people with a migration background.²¹³ The researchers approached 50 estate agents to act on their behalf to rent out accommodation they pretended to have available. They also indicated they would prefer not to rent it to people with a migration background (*allochtonen*). Of the 50 agents, 46 went along with this condition. The NIHR regards this type of discrimination as discrimination on grounds of race.²¹⁴ In November 2019 the minister responsible for housing set out a list of policy measures that are being taken to combat discrimination in housing. These include awareness raising, including through training for real estate agents, the use of mystery shoppers and situation testing, and increasing awareness of the possibilities to signal discrimination.²¹⁵

a) Trends and patterns regarding housing segregation for Roma

In the Netherlands, there are patterns of housing segregation against the Roma. Roma and Traveller people tend to live in caravans or trailers which are situated in officially designated 'trailer parks' (*woonwagenkampen*). The lack of systematic data makes it difficult to give exact numbers on the housing situation of Roma and Travellers, but it has been observed that a shortage of caravan sites makes it impossible for family members to live in the same encampment, something of paramount importance to Roma and Sinti.²¹⁶

²⁰⁹ Tweede Kamer, 2004-2005, 30 091. Law of 20 December 2005, *Staatsblad* 2005, 726.

²¹⁰ Although the ETC (now the NIHR) thought that it could amount to indirect discrimination on grounds of race as people of non-Dutch or more generally non-western origin would be particularly affected. See Advice 2005/03.

²¹¹ Tweede Kamer, 2013-2014, 30 798.

²¹² ECtHR (Grand Chamber) 6 November 2017, *Garib v. The Netherlands* (application no. 43494/09).

²¹³ 'Onderzoek discriminatie woningmarkt. Rachid is ook gewoon een nette jongen' ('Investigation of discrimination in the housing market. Rachid is just an ordinary, decent man'), *Groene Amsterdammer* 28 March 2018: www.groene.nl/artikel/rachid-is-ook-gewoon-een-nette-jongen.

²¹⁴ See e.g. NIHR Opinion 2018-54.

²¹⁵ Tweede Kamer 2019-2020, 32 847, no. 577.

²¹⁶ See the Social Inclusion Monitor of 2018, which also indicates that many differences also exist between Roma. *Monitor Sociale Inclusie: meting 3. Tweede vervolgmeting naar de woon- en leefomstandigheden van*

In failing to provide enough caravan sites, the Government makes it impossible for Roma and Sinti to sustain their cultural identity. Several opinions from the NIHR emphasise the importance of providing sufficient caravan sites. The NIHR found that policies implemented by local authorities to eventually put an end to 'trailer parks' (so called 'extinction policies') amounted to discrimination on the ground of race.²¹⁷ This position was confirmed in more recent cases.²¹⁸ According to the NIHR, municipalities should pay attention to the specific needs of this category of residents in their housing policies.²¹⁹ In a report published in 2017 the National Ombudsman also concluded that many municipal authorities discriminated against Roma and Travellers in their housing policies by not making available sufficient caravan or trailer sites and urged the national and local governments to develop non-discriminatory housing policies for these groups.²²⁰

These concerted efforts, in conjunction with strong EU involvement with the situation of Roma, have been successful. In 2018 the Minister of the Interior issued a new policy framework on housing for Roma, Sinti and Travellers.²²¹ The framework is directed at preventing discrimination against Roma, ensuring their cultural rights and providing legal security in the area of housing. It provides guidelines for municipal authorities, which are in charge of housing policies at the local level. More specifically the policy framework requires municipalities to give Roma more space to live according to their own cultural identity and to ensure they have the opportunity to acquire a place to live on a trailer park within a reasonable timeframe. Most importantly, municipalities are no longer allowed to pursue an 'extinction policy'.

Roma en Sinti in Nederland (Social inclusion monitor: measurement 3. Second follow-up measurement of the housing and living situation of Roma and Sinti in the Netherlands), 2018:

www.rijksoverheid.nl/documenten/publicaties/2018/11/16/monitor-sociale-inclusie-meting-3.

²¹⁷ NIHR 2014-165, 2014-166 and 2014-167.

²¹⁸ NIHR 2015-6, 2016-19, 2016-22, 2016-71, 2016-72; 2017-55; 2017-103; 2017-136; 2017-137.

²¹⁹ NIHR 2016-19.

²²⁰ *Woonwagenbewoner zoekt standplaats. Een onderzoek naar de betrouwbaarheid van de overheid voor woonwagenbewoners* (Trailer resident seeks trailer site. An investigation into the reliability of the public authorities for trailer inhabitants): www.nationaleombudsman.nl/system/files/bijlage/DEF%20Rapport%202017060%20Woonwagenbewoner%20zoekt%20standplaats.pdf.

²²¹ *Beleidskader Gemeentelijk woonwagen- en standplaatsenbeleid* (Policy framework for municipal trailer and campsite policy): www.rijksoverheid.nl/documenten/rapporten/2018/07/02/beleidskader-gemeentelijk-woonwagen-en-standplaatsenbeleid.

4 EXCEPTIONS

4.1 Genuine and determining occupational requirements (Article 4)

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

Race, sex. In the GETA, the exception for genuine occupational requirements ('GOR exception') only exists for the grounds of *race* and *sex*. As far as race is concerned, this has been laid down in Article 2(4) of the GETA:

'The prohibition of making distinctions on the grounds of race as it is contained in this Act, shall not apply:

- a. in cases where a person's racial appearance is a determining factor, provided that the aim is legitimate and the requirement is proportionate to that aim;
- b. if the distinction concerns a person's [outward] racial appearance and constitutes, by reason of the nature of the particular occupational activity concerned, or of the context in which it is carried out, a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate to that objective.'²²²

In contrast to Article 4 of Directive 2000/43/EC, which speaks of a characteristic related to racial or ethnic origin, the Dutch provision specifies that only outward racial appearances may constitute a genuine occupational requirement.²²³ This means that 'race' as such is not regarded as a permissible ground for a particular distinction.²²⁴ Only physical differences (skin colour, hair type, etc.) may form the basis for a distinction, to the exclusion of sociological differences. The GETA does not, for example, allow a care institution, which looks after the well-being of young offenders of Moroccan origin, to express in a job advertisement a preference for a social worker of Moroccan origin.²²⁵ On the basis of Article 4(6) GETA, these exceptions have been set out in a Governmental Decree of 1994.²²⁶ The Decree exhaustively indicates to which professional activities the Article 2(4) exceptions apply. These are:

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

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

²²² Subsection b was inserted by the EC Implementation Act. With this amendment the government intended to follow the wording of the directive more closely. See Explanatory Memorandum to the EC Implementation Act, Tweede Kamer, 2002-2003, 28 770, no. 3, p. 10. However, prior to implementation the 'genuine occupational requirement exception' was also covered by the more general wording of subsection a of Article 2(4).

²²³ Explanatory Memorandum to the EC Implementation Act, Tweede Kamer, 2002-2003, 28 770, no. 3, p. 10.

²²⁴ Gerards, J. H. and Heringa, A. W. (2003), *Wetgeving gelijke behandeling* (Equal treatment legislation), Deventer, Kluwer, p. 129.

²²⁵ See ETC 1997-51.

²²⁶ Governmental Decree on Equal Treatment (*Besluit Gelijke Behandeling*), *Staatsblad* 1994, 657, last amended in 2012: *Staatsblad* 2012, 565.

constitutional right to equality with other constitutional rights, namely the freedom of religion and the freedom of education, as well as the freedom of political opinion. Although the rationalisation is different, in practice this exception is compatible with Article 4(1) of the Employment Framework Directive. The requirements that are set on this ground need to be closely linked to the nature and content of the job in this particular context (of an institution of a specific religious faith).²²⁷ 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.²²⁸ For further details see also below under Section 4.2.

Disability. The GOR exception was not included in the DDA. In the Government's view, in contrast to 'race' and 'sex', no scenario is imaginable in which 'disability' would constitute a genuine occupational requirement.²²⁹ An amendment submitted by a Member of Parliament in this respect was rejected.²³⁰

Age. Since the ADA does not differentiate between 'direct' and 'indirect' distinction, an 'objective justification' is possible for both types (see Article 7(1)(c) ADA), and the Government considered it unnecessary to include the GOR exception.²³¹

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

In the Netherlands, national law provides for an exception for employers with an ethos based on religion or belief, in Article 5(2) GETA. Employers with an ethos based on religion or belief can only rely on this exception in the case of an accusation of discrimination based on religion/belief and political conviction. Typical cases that have come to the NIHR and former ETC concern schools and other organisations based on a Christian denomination which require their personnel to adhere to the specific tenets of the denomination concerned and act accordingly. Article 5(2) GETA is interpreted strictly by the NIHR. An organisation has to show that its identity is indeed manifested in its actual practice and is consistently upheld. It must also show that the requirements are necessary to fulfil the specific function held by the employee in the organisation. Thus the Salvation Army may refuse to employ a man as a salary administrator for not adhering to the Christian religion as the job also includes external contacts and contacts with colleagues in which this is a functional requirement.²³²

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

Article 3 GETA:

'This Act does not apply to:

- a. legal relations within religious communities, independent sections or associations thereof and within other associations of a spiritual nature;

²²⁷ It may be useful to note that the exception thus does not apply to 'ordinary' private companies such as involved in the *Achbita* case, CJEU 14 March 2017, C-157/15 (*Achbita v. G4S*).

²²⁸ These criteria were explained by the ETC in its Opinion 1996-118.

²²⁹ Explanatory Memorandum to the DDA, Tweede Kamer, 2001-2002, 28 169, no. 3, p. 35.

²³⁰ Amendement Terpstra, Tweede Kamer, 2001-2002, 28 169, no. 11. This amendment was rejected.

²³¹ Explanatory Memorandum to the ADA, Tweede Kamer, 2001-2002, 28169, no. 3, p. 35.

²³² NIHR opinion 2015-68; for a sample of older cases see e.g. ETC 2000-67, 2003-145, 2005-102, 2006-218, 2006-93, 2012-68, 2013-36.

- b. the office of minister of religion.'

It should be noted that only purely internal affairs of religious organisations fall outside the scope of the GETA. Thus, for example, the employment relationship between a gardener and a religious community falls within the scope of the GETA. The more the legal relationship is disconnected from the rationales of freedom of religion and the division between church and state, the less likely it is to be considered a purely internal affair.²³³

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

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

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

As a reaction to the European Commission's infringement procedure against the Netherlands, where this issue was mentioned by the Commission,²³⁴ and after several bills and advice from various NGOs, the Council of State and the ETC, the sole ground construction was finally abolished in 2015.²³⁵ The new text of Article 5(2) GETA corresponds closely to the wording of the exception in Article 4(2) of Directive 2000/78/EC. In its opinion 2016-10 the NIHR applied the amended provision and held that the refusal of an employer to accept a person for an internship because they are homosexual constitutes direct discrimination for which no justification can be put forward under the GETA.²³⁶

4.3 Armed forces and other specific occupations (Article 3(4) and Recitals 18 and 19, Directive 2000/78)

In the Netherlands, national legislation does not provide for an exception for the armed forces in relation to age or disability discrimination. Article 17 of the ADA enshrined an exception (which was of a temporary kind): until 1 January 2008, the ADA did not apply to military service. There have never been any limitations to the scope of the DDA and the GETA concerning the armed forces.

4.4 Nationality discrimination (Article 3(2))

- a) Discrimination on the ground of nationality

²³³ Gerards, J. H. and Heringa, A. W. (2003), *Wetgeving gelijke behandeling* (Equal treatment legislation), Deventer, Kluwer, p. 105.

²³⁴ Letter dated 31 January 2008 (no. 2006-2444), with reference to the infringement procedure of 18 December 2006, infringement no. 2006/2444. Article 5(2) GETA was mentioned, however, in the end the Commission did not ask the government to change this provision.

²³⁵ Tweede Kamer 2010-2011/2013-2014, 32 476, nos. 1-11.

²³⁶ NIHR opinion 2016-10.

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

In the Netherlands nationality (as in citizenship) is explicitly mentioned as a protected ground in national anti-discrimination law. Besides discrimination on the ground of race, the GETA also prohibits nationality discrimination. Thus, the Act goes beyond the requirements stemming from Directive 2000/43/EC. The material scope of the prohibition of nationality discrimination is, in principle, the same as for the other grounds covered by the GETA (with the exception of race). However, Article 2(5) enshrines some exceptions: the prohibition on the grounds of nationality shall not apply if the distinction is based upon *generally binding rules* (i.e. Statutory Acts and Acts by the administration such as governmental decrees) or on *written or unwritten rules of international law*.²³⁷ 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).²³⁸ Nationality discrimination does include stateless status.

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

In the GETA nationality and race/ethnicity are mentioned as separate discrimination grounds. However, in practice different treatment on the ground of nationality may often result in indirect discrimination on the ground of race/ethnicity. The legislative history of the GETA shows that the ground of nationality was included at the instigation of civil society organisations, notably the National Bureau for the Elimination of Racism (*Landelijk Bureau Racismebestrijding*), to ensure that nationality-based distinctions could not be used as a guise for racial discrimination.²³⁹ Yet it was also considered that in some contexts distinctions based on nationality are legitimate. Therefore, in respect of nationality discrimination, more 'exceptions' (or justifications) are allowed, especially when the differential treatment is related to issues concerning immigration and nationality legislation. In cases where indirect discrimination on the ground of race/ethnicity is suspected, the regular objective justification test applies.

There is an overlap between nationality and race/ethnicity in the context of indirect discrimination. Sometimes, a case of direct nationality discrimination can be qualified as a case of indirect racial discrimination. Because both grounds of discrimination are covered in the GETA, this does not cause great difficulties in the case law insofar as the areas that are covered by the non-discrimination principle (material scope) are the same. However, for race/ethnicity, the scope of the prohibition of discrimination is wider as it also includes social protection (Article 7a GETA.) When a complaint concerns social protection, including social security, the NIHR is inclined to adopt a broad interpretation of the concept of race/ethnicity, including situations that at first glance clearly refer to nationality as the ground for making a distinction. The NIHR seems to equate the concepts of national origin and ethnic origin and also equates ethnic origin and race.²⁴⁰

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

Exceptions in relation to disability and health/safety

²³⁷ See e.g. ETC 1997-13, 1998-81 and 2002-61.

²³⁸ See e.g. ETC 1996-77.

²³⁹ Notably Tweede Kamer 1990/1991, 22 014, no. 4 and Tweede Kamer 1992/1993, 22 014, no. 36.

²⁴⁰ For two cases in which the (former) ETC concluded that a distinction on the ground of nationality amounted to direct discrimination on the ground of race/ethnicity, see Opinion 2011-97 and 2011-98. A critical note to these Opinions was written by Böcker, A. and Dursun-Aksel, S. in Forder, C. J. (2012), *Oordelenbundel 2011* ('NIHR Opinions 2011'), Wolf Legal Publishers, pp. 460-464.

In the Netherlands there are exceptions in relation to disability and health and safety (Article 7(2), Directive 2000/78/EC). The DDA contains a provision that mirrors Article 7(2) of the directive.²⁴¹

Article 3(1) of the DDA provides:

‘The prohibition of making a distinction shall not apply if:

- a) the distinction is necessary for the protection of safety and health;
- 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.’

The exception in Article 3(1)(a) DDA must be interpreted narrowly. It follows from the legislative 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 or safety, they must duly substantiate their claim.²⁴² If there is a possibility of removing the risk by means of an effective accommodation, the exception cannot be relied upon.²⁴³

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

No exception regarding health and safety is included in the GETA. However, safety and security issues may come to the surface in the ‘objective justification test’ for indirect discrimination cases. For example, a prohibition of headscarves during gymnastics for reasons of health and safety can be objectively justified.²⁴⁴

There has been some debate about the question of whether the lack of a specific health and safety exception is a shortcoming of the GETA.²⁴⁵ In the third evaluation report of the equal treatment legislation it was suggested that a general exception concerning public health and security (*gevaaren voor de volksgezondheid*) be included in the GETA.²⁴⁶ Yet, the evaluation of the NIHR for the period 2012-2017 led to a different conclusion. As the need for an exception only surfaced sporadically and was always resolved in a practical manner it was deemed unnecessary to amend the law by both the NIHR and the Government.²⁴⁷

²⁴¹ This provision often seems to be confused with Article 3 (1)(a) of the DDA, which mirrors Article 2(5) of the directive, which is aimed at national legislation that is necessary for reasons of public health and safety. This exception is discussed later in this report in Section 4.8.

²⁴² The NIHR applies a strict test, see e.g. Opinions 2016-9 and 2020-116.

²⁴³ E.g. NIHR 2016-9, 2020-77.

²⁴⁴ The ETC (now the NIHR) applies this exception (strictly) in inter alia the context of religious discrimination, where sometimes it is argued that a prohibition of the Islamic headscarf must be allowed for reasons of safety. See e.g. ETC 2011-195.

²⁴⁵ See ETC Opinion 2006-20 and ETC Opinion 2007-85, in which the ETC deemed a measure which rejects homosexual blood donors legally justified, in spite of the lack of a legal provision to justify directly a distinction based on sexual orientation because of public health risks. In NIHR Opinion 2015-46, however, the NIHR found the protection of public health cannot justify the measure (in doing so it seems to be more strict than CJEU Case C-528/13 *Léger*, 12 June 2015 ECLI:EU:C:2015:288).

²⁴⁶ ETC (2011) Third evaluation report (2004-2009), p. 8.

²⁴⁷ See *Evaluatie Wet College voor de rechten van de mens* (Evaluation of the NIHR Act), Tweede Kamer, 2017-2018, 34 338, no. 3, p. 11.

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

4.6.1 Direct discrimination

- a) Exceptions to the prohibition of direct discrimination on the ground of age

In the Netherlands, national law provides for specific exceptions for direct discrimination on the ground of age.

Section 3 of the ADA is entitled 'Exceptions to the prohibition of making distinctions'. Within this section, Article 7 is entitled 'Objective justifications'. It follows that the ADA does not draw a clear distinction between 'exceptions' and 'justifications'. Article 7(1) ADA reads:

'The prohibition of making a distinction shall not apply if the distinction:

- a) is based on employment or labour market policies to promote employment in certain age categories, provided such policies are laid down by or pursuant to an Act of Parliament;
- b) relates to the termination of an employment relationship because the person concerned has reached the pensionable age under the General Old Age Pensions Act (AOW), or a more advanced age laid down by or pursuant to an Act of Parliament or agreed between the parties;
- c) is otherwise objectively justified by a legitimate aim and the means used to achieve that aim are appropriate and necessary.'

For the purposes of this report, the provisions of Article 7(1)(a) and (b) are understood as exceptions whereas Article 7(1)(c) is understood as a justification and will be discussed in the following subparagraph.

The exception in Article 7(1)(a) ADA corresponds to Article 6(1)(a) of the Directive. In the Netherlands, special benefits in the field of vocational education are available to people under 30 years of age with a view to promoting their position on the labour market. Such benefits are compatible with the justification ground in Article 7(1)(a) ADA, provided that they are based on a formal statutory act (see further Section 4.6.2).

The exceptions in Article 7(1)(a) and (b) ADA apply to direct as well as indirect distinctions on the ground of age. They do not apply with regard to harassment (Article 7(2) ADA).

- b) Justification of direct discrimination on the ground of age

In the Netherlands, national law provides for justifications of direct discrimination on the ground of age. As mentioned above, Article 7(1)(c) ADA provides that distinctions based on age may be objectively justified by a legitimate aim, provided the means used to achieve that aim are appropriate and necessary

Both direct and indirect age distinctions may be 'objectively justified' under Article 7(1) ADA. Thus the NIHR held that the employment agency 65+, which mediates exclusively for people who have reached the statutory pensionable age (*AOW-leeftijd*) did not violate the ADA by refusing to mediate for a man aged 64, who had not yet reached this age. It accepted that the weak labour market position of the group concerned provided an objective justification.²⁴⁸ In another case an insurance company had rejected a job candidate because she had too many years of work experience and was considered overqualified. The NIHR found that the company had made an indirect distinction on the ground of age but considered this justified because it could reasonably have assumed that

²⁴⁸ NIHR Opinion 2018-107.

the woman would quickly become demotivated.²⁴⁹ Both the NIHR and the courts apply the test as prescribed in Article 7(1)(c) ADA.²⁵⁰

A recurring issue in case law concerns clauses in social plans, drawn up after re-organisations, which exclude workers who have reached the statutory pensionable age from eligibility for transition severance pay. The Supreme Court held that such exclusion is objectively justified. The Court explicitly considered this issue in the light of Directive 2000/78/EC and assessed whether the exclusion served a legitimate aim and was appropriate and necessary to achieve that aim. As transition severance pay is meant to support employees who depend on paid work to provide for themselves and people who reach the statutory pension age become eligible for pension benefits, the Court concluded that this was indeed the case.²⁵¹

In a more recent judgment the Supreme Court further refined the test to be applied.²⁵² While confirming that distinctions on the ground of age must have a legitimate aim and meet the requirements of appropriateness and necessity, the Supreme Court held that a certain level of deference is required regarding distinctions in social plans that are the result of negotiations and a balancing of interests by the social partners (employers and trade unions). In the case at hand the Supreme Court judged that the scrutiny performed by the Court of Appeal had been too intense. In addition, the Supreme Court found that, in assessing the appropriateness and the necessity of the measures at stake, the Court of Appeal should have taken account of each of the legitimate aims pursued by the social plan. In its decision the Court of Appeal had only looked at the aim of equal distribution of means in relation to the employees who were dismissed, while it had not taken into account the aims of limiting the financial consequences of the re-organisation for the company and its remaining employees and of limiting the financial disadvantage for employees who had lost their jobs. The test formulated by the Supreme Court has subsequently been followed by the Courts of Appeal.²⁵³

c) Permitted differences in treatment based on age

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

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

Subsection (b) provides that the prohibition of age distinction shall not apply if the distinction regards the termination of the employment relationship, by reason of having reached either the statutory pensionable age or a *higher* (not lower!)²⁵⁴ age than that,

²⁴⁹ NIHR 2020-103.

²⁵⁰ See, for example, NIHR 2020-84 and 2020-103. For case law from the courts see, for example, Central Appeals Tribunal (*Centrale Raad van Beroep*) 18 July 2016, ECLI:NL:CRVB:2016:2614 and Supreme Court (*Hoge Raad*) 24 January 2020, ECLI:NL:HR:2020:114.

²⁵¹ Supreme Court 20 April 2018, ECLI:NL:HR:2018:651.

²⁵² Supreme Court 24 January 2020, ECLI:NL:HR:2020:114.

²⁵³ Court of Appeal Den Bosch 28 January 2020, ECLI:NL:GHSHE:2020:247 and Court of Appeal Arnhem-Leeuwarden 24 November 2020, ECLI:NL:GHARL:2020:9672.

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

provided this higher age has been laid down by statutory act or governmental decree, or has been mutually agreed on by the parties involved.

d) Fixing of ages for admission to occupational pension schemes

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

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

4.6.2 Special conditions for younger or older workers

In the Netherlands, there are special conditions set by law for younger workers in order to promote their vocational integration. Article 7(1)(a) ADA enshrines an exception for policies that are aimed at the promotion of labour market participation by certain age categories (see Section 4.6.1. above).

In the Netherlands special benefits in the field of vocational education are available to people under 30 years of age with a view to promoting their position on the labour market. These benefits include the possibility of deducting study costs from tax payments as well as the availability of study grants and facilities for disabled students. In the *De Lange* judgment the CJEU considered that the Dutch tax advantages for students under 30 fell within the scope of Article 3(1)(b) Employment Directive (access to vocational training), and that such advantages were justified in view of the objective of 'promoting the position of young people on the labour market' and therefore compatible with the exception of Article 6(1)(a) of the Directive.²⁵⁷ The same justification was accepted by the Dutch courts with regard to other facilities that are only available to people under 30, in particular study grants and the option to use publicly funded sign language interpreters.²⁵⁸

4.6.3 Minimum and maximum age requirements

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

4.6.4 Retirement

a) State pension age

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

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

²⁵⁷ Judgment of 10 November 2016, *J.J. de Lange*, C-548/15, EU:C:2016:850, Paragraph 27.

²⁵⁸ District Court of Amsterdam 16 October 2017, ECLI:NL:RBAMS:2017:7691; Central Appeals Tribunal 8 September 2017, ECLI:NL:CRVB:2017:3229.

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

If an individual wishes to work beyond the state pension age, the pension cannot be deferred. Every citizen receives a state pension on the basis of the General Old Age Pensions Act (*Algemene Ouderdomswet*) from the statutory pensionable age onwards.

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

b) Occupational pension schemes

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

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

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

c) State imposed mandatory retirement ages

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

d) Retirement ages imposed by employers

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

Many employment contracts contain an automatic dismissal clause (*pensioenontslagbeding*), which stipulates that the contract ends automatically upon the employee reaching the statutory pensionable age. There have been many legal proceedings on the question of whether these dismissal clauses are valid, but in 2012 it was decided by the Dutch Supreme Court that such a clause is valid, even if it concerns a permanent employment contract.²⁵⁹ Since 2015, Article 7:669(4) Civil Code also provides that

²⁵⁹ Supreme Court 13 July 2012, ECLI:NL:HR:2012:BW3367.

employers may terminate the employment contract if the employee has reached the statutory pensionable age.

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

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

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

e) Employment rights applicable to all workers irrespective of age

The law on protection against dismissal and other laws protecting employment rights apply to all workers irrespective of age, even if they remain in employment after attaining pensionable age or any other age.²⁶⁰ As long as someone is an employee with a permanent contract, according to the definitions of these laws, they are protected by the civil laws regulating employment rights and by the ADA, regardless of age. Employees with temporary contracts have no protection against dismissal when the contract ends. However, it is prohibited not to renew a temporary contract on discriminatory grounds.²⁶¹ It should be noted that employers who do allow people who have reached the statutory pensionable age to continue working for them do so mostly on the basis of a temporary contract.

f) Compliance of national law with CJEU case law

In the Netherlands, national legislation is in line with the CJEU case law on age regarding mandatory retirement.

4.6.5 Redundancy

a) Age and seniority taken into account for redundancy selection

In the Netherlands, national law permits age or seniority to be taken into account in selecting workers for redundancy. The Explanatory Memorandum to the ADA explicitly mentions that the use of the 'last in, first out principle' (which works to the advantage of older workers) could be objectively justified under Article 7(1)(c) of the Act. This is, however, not the principle provided by Dutch employment law, which by default stipulates that the employer, in case of a collective dismissal, should select redundant employees on the basis of a balancing principle, the so-called 'mirror image rule' (*afspiegelingsbeginsel*), under which account must be taken of the age balance of the workforce.²⁶²

b) Age taken into account for redundancy compensation

In the Netherlands, national law provides compensation for redundancy. A major overhaul of Dutch labour law in 2015 introduced a system of 'transitional severance pay' (*transitievergoeding*).²⁶³ In this system, the compensation is solely based on the

²⁶⁰ This is without prejudice to the fact that the employer may terminate the employment contract if the employee has reached the statutory pensionable age as mentioned above under d).

²⁶¹ However, there are many examples in the case law of the ETC (now the NIHR), especially relating to women not receiving an extension of a temporary contract once the employer discovers they are pregnant. The author of this report assumes that similar cases may exist for the grounds of race/ethnicity and age.

²⁶² Article 11 Dismissal Decree 2015 (*Ontslagregeling 2015*), *Staatscourant* 2015, 12685.

²⁶³ Labour and Security Act (*Wet Werk en Zekerheid*), *Staatsblad* 2014, 216.

employee's number of years of service. The system reduces inequalities between older and younger employees, although a difference remains.

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

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

It should be noted that the GETA, concerning inter alia the grounds of religion, race and ethnicity, sexual orientation and sex, does not contain any such public health and security exception.

4.8 Any other exceptions

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

1. Article 5(3) of the GETA contains an exception regarding the private nature of the employment relationship. Article 7(3) of the GETA, concerning the provision of goods and services, contains an exception regarding the private nature of the circumstances in which the legal relationship takes place (for example, a woman who rents out a room in her own house may lawfully require that the person who rents the room is a woman).²⁶⁴ It expressly states that it is only possible to rely on this exception when the aim is legitimate and when the means are appropriate and necessary. With respect to discrimination in the area of goods and services, the exception is not applicable to the ground of race.²⁶⁵
2. Article 7(2) of the GETA grants faith schools and schools based on a philosophical belief (which are generally funded by the state on an equal basis with state schools) the freedom to refuse to admit pupils on the ground of their religious or philosophical belief. This freedom is subject to strict requirements, to the effect that the differentiation must be essential for the school to be able to maintain its faith-based or philosophical character. Schools may not refuse to admit pupils because of their sexual orientation. Article 7(2) is similar to the exception in Article 5(2)(c) of the GETA. However, Article 7(2) applies to the admission of pupils to belief-based schools and thus not to employment.
3. The internal affairs of associations fall outside the scope of the GETA. This follows from Parliamentary precedent and is not explicitly provided for in the GETA.²⁶⁶

²⁶⁴ This topic has been discussed in great detail in the second evaluation report about the functioning of the GETA. See Hertogh, M. L. M. and Zoontjens, P. J. J. (eds.) (2006), *Gelijke behandeling: principes en praktijken. Evaluatieonderzoek Algemene wet gelijke behandeling* (Equal treatment: principles and practice. Evaluation report on the General Equal Treatment Act), Nijmegen, Wolf Legal Publishers. The part about the relationship between equality and freedom of association and the right to privacy was written by Professor Paul Zoontjens. See pp. 175-216.

²⁶⁵ The current provisions were adopted in 2011 after an infringement procedure by the Commission. The former provisions included broader exceptions than EU law allows for.

²⁶⁶ This topic has also been discussed in great detail in the second evaluation report about the functioning of the GETA. See www.mensenrechten.nl/nl/publicatie/10026.

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

a) Scope for positive action measures

In the Netherlands, positive action is permitted in national law in respect of sex, racial or ethnic origin and disability (Article 2(3) GETA; Art. 3(1)(c) DDA).

The Government defends the position that positive action is only possible with respect to sex, race and disability with the reasoning that only on those grounds do groups of people suffer from *structural disadvantages* in society. Structural disadvantage is defined as 'suffering disadvantages in several social fields at the same time which are not temporary in nature'.²⁶⁷

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

1. the initiative must be a *specific measure*;
2. the measure is intended to confer a preferential position on women or people belonging to ethnic or cultural minorities;²⁶⁸
3. the measure is intended to *remove* or *reduce* actual inequalities;
4. there must be a *proportionate* relationship between the measure and the objective pursued. This last element is not required by Directive 2000/43/EC.

The Dutch definition leaves less room for positive action policies and programmes, since it does not allow measures which aim to *prevent*, in addition to *removing* or *reducing* disadvantages.²⁶⁹

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

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

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

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

The general point of view is that – at least when the positions that are at stake are to be considered as employment relationships – EU legislation and case law (most notably the *Kalanke* case) prohibit a system of fixed quotas and require an individual assessment of any job applicant's capabilities and suitability for the job in the context of sex.²⁷⁰ Any policy in which a company or organisation strives for *proportional representation* of various ethnic groups in proportion to their prevalence in society is seen as direct discrimination. When the aim of such a policy is simply achieving 'proportionality' or 'diversity' (i.e. when the aim is not to put people belonging to an under-represented or systematically disadvantaged group in a better position), the specialised body will not apply the positive

²⁶⁷ See Tweede Kamer, 2001-2002, 28 169, no. 5, p. 17.

²⁶⁸ The concept of 'ethnic or cultural minority group' is not defined in Dutch law, but it is usually applied as 'being of non-western origin'.

²⁶⁹ See Explanatory Memorandum to the EC Implementation Act, Tweede Kamer, 2002-2003, 28 770, no. 3, p. 9.

²⁷⁰ Case C-450/93 *Kalanke v Freie Hansestadt Bremen* [1995], ECR I-3051.

action exception (and therefore the policy will be illegal).²⁷¹ At the same time, several other cases show the equality body is not always as strict where positive action regarding ethnic minorities is at stake. Thus in two cases where a city council asked explicitly for members of ethnic minorities to apply for jobs as social workers and excluded people of Dutch origin, it ruled that the preferential treatment of ethnic minorities was allowed.²⁷²

In its third evaluation report the ETC (now the NIHR) concludes that the provisions concerning positive action in the GETA and DDA are adequate and do not need revision. The equality body defends its restrictive interpretation of this exception with reference to CJEU case law and maintains that, when overcoming structural disadvantages of certain groups is deemed necessary, general social policy measures should be developed that can address these disadvantages effectively.²⁷³ However, in December 2012 the NIHR applied a less strict criterion and accepted 'exceptional circumstances' in a sex discrimination case.²⁷⁴

As far as the DDA is concerned, in addition to the positive action measures as set out in Article 7(1) of the Employment Framework Directive, there are also general supportive measures for disabled people, as set out in Article 7(2) of the directive. This provision has been transposed by Article 3(1)(b) of the DDA, which enshrines the possibility of supportive social policies for disabled people. In contrast to 'positive action measures', these measures are not time-restricted. In recent years, the Government has introduced several supportive measures designed to promote the (re)integration of disabled people into society.

The ADA does not contain a positive action exception clause,²⁷⁵ but since unequal treatment on the ground of age may be objectively justified (open system of justifications) in any case the defence that the unequal treatment is in fact a positive action measure may be put forward and will be tested in the same way as described above.

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

In 2016 the MP Joram van Klaveren, a former member of the extreme right Freedom Party (PVV), introduced a legislative proposal to eliminate the possibility for positive action measures from the Dutch equal treatment legislation.²⁷⁶ To date the proposal has not been debated, which can be taken as a sign that it will never be adopted.

b) Quotas in employment for people with disabilities

In the Netherlands, national law provides for quotas for the employment of people with disabilities. To encourage employers to employ disabled people, concrete targets for job creation for this category of workers were set in 2015: the private sector is to create 100 000 additional jobs by 2026, the public sector 25 000.²⁷⁷ These targets apply to employers with over 25 employees in both the public and private sectors. The target group

²⁷¹ See ETC Opinion 1998-105 and ETC Opinion 2012-50.

²⁷² ETC 1999-31 and 1999-32.

²⁷³ ETC (2011) Third evaluation report (2004-2009), 7.

²⁷⁴ NIHR 2012-189.

²⁷⁵ One might read a positive action exception in Article 7(1) of the ADA, which states: 'The prohibition of discrimination shall not apply if the discrimination: a) is based on employment or labour market policies to promote employment in certain age categories, provided such policies are laid down by or pursuant to an Act of Parliament.'

²⁷⁶ Tweede Kamer 2015/2016, 32 521, no. 2.

²⁷⁷ Act putting in place an agreement on jobs and quota for people with a disability in employment (*Wet banenafpraak en quotum arbeidsbeperkten*), Staatsblad 2015, 154.

of this legislation consists of people with 'employment disabilities' (*arbeidsbeperkten*). These are people who, because of an illness or disability, have trouble finding or keeping a job that would allow them to earn at least the minimum wage or who require support that regular employers are unable to offer.²⁷⁸

If employers do not meet these targets a 'quota charge' (*quotumheffing*) may be levied. While the private sector has thus far succeeded in creating the required number of extra jobs, this has not been true for the public sector. As a consequence, the quota charge was introduced for this sector, taking effect as of 1 January 2018.²⁷⁹ In April 2019 the government and education sectors agreed to jointly step up their efforts to create more public sector jobs for people with disabilities.²⁸⁰

An evaluation of the quota system conducted in 2019 confirmed that up to the end of 2018 the targets for job creation were met, largely on account of the private sector.²⁸¹ The positive results were partly ascribed to the favourable economic climate. It was observed that the setting of targets had also increased awareness of the need to make jobs available to people with disabilities.²⁸² However, at an earlier stage the Government had already announced that doubts existed, including among some of the social partners, as to the effectiveness of the quota charge as an instrument to stimulate the creation of additional jobs in the public sector.²⁸³ A law was subsequently adopted to de-activate the quota charge for the period 2019-2022.²⁸⁴ A simplification of the quota system legislation was announced for 2022 but the legislative proposal has been delayed due to the overburdening of several of the administrative bodies involved because of the coronavirus crisis.²⁸⁵

²⁷⁸ See <https://www.uwv.nl/particulieren/arbeidsbeperkt/index.aspx>. The target group is defined in Article 38b Act on the financing of social insurance schemes (*Wet financiering sociale verzekeringen*), Staatsblad 2005,36.

²⁷⁹ This is done by a ministerial decree (*ministeriële regeling*). The quota charge amounts to EUR 5 000 for each 'missing' job, see *Regeling activering quotaheffing*, Staatscourant 2017 no. 58942: <https://zoek.officielebekendmakingen.nl/stcrt-2017-58942.html>.

²⁸⁰ Tweede Kamer 2018-2019, 34 352, no. 165.

²⁸¹ Eerste Kamer 2019-2020, 33 981, O. See also Tweede Kamer 2018-2019, 34 352, no. 166.

²⁸² Eerste Kamer 2019-2020, 33 981, O.

²⁸³ Tweede Kamer 2017-2018, 34 956, no. 3.

²⁸⁴ Act of 13 November 2019, Staatsblad 2019, 440.

²⁸⁵ Tweede Kamer 2020-2021, 35 394, no. 19, p. 2-3.

6 REMEDIES AND ENFORCEMENT

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

a) Available procedures for enforcing the principle of equal treatment

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

The principle of non-discrimination can be enforced by means of criminal law procedures. Prosecution under criminal law is only possible if the discriminatory behaviour falls under one of the provisions of the Criminal Code. These provisions mostly concern hate speech (see the introduction to this report) but they also cover discriminatory acts committed in the performance of someone's office, job or enterprise (Articles 137g and 429quater Criminal Code). The term 'office' was added in 1991 to include discrimination by public servants.²⁸⁶

For the purposes of criminal law, 'discrimination' is defined in Article 90quater (based on Article 1 CERD) as 'any distinction, exclusion, restriction or preference which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life'. Transgressions of the equal treatment legislation (GETA, ADA and DDA) cannot be prosecuted under criminal law.

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

The GETA, DDA and ADA do not entail compulsory judicial procedures. If discrimination occurs in the sphere of private employment, civil (labour) law procedures apply. If it occurs in public employment, the procedures of administrative employment law apply. The civil courts also have competence in cases in which discriminatory contractual agreements (goods and services supplied by private parties or the Government) are concerned. Outside the area of contract law, an instance of discrimination (e.g. harassment) can be considered as tort and be dealt with in a civil law court procedure. The administrative courts have competence with respect to public employment contracts (civil servants) and administrative decisions.²⁸⁷ Government actions can also be considered as tort (*onrechtmatige overheidsdaad*) in which case a civil court is competent to hear the case.²⁸⁸

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

b) Barriers and other deterrents faced by litigants seeking redress

Costs

The costs facing litigants seeking redress are limited, as it is not mandatory to instruct a lawyer for proceedings in civil law, administrative law or with the NIHR. For civil law and administrative law court procedures there is a system of free legal aid for people on very

²⁸⁶ Staatsblad 1991, 623.

²⁸⁷ However, it should be borne in mind that, in principle, 'unitary legislative acts' (*eenzijdig overheidshandelen*) are not covered by the equal treatment legislation, see Section 3.2.1.

²⁸⁸ Such cases are based on Article 6:162 of the Civil Code.

low incomes. It should be noted, however, that this system is currently under pressure from economic cutbacks. A recent survey amongst so-called 'social lawyers' (*social advocaten*) showed that many of them are struggling to make ends meet and an increasing number of social lawyers have quitted their role or are considering doing so.²⁸⁹ It is unclear whether a new system of legal aid, which is in preparation and should become operational in 2024, will succeed in turning the tide.

The procedure before the NIHR is free of charge. However, fees to gain access to court procedures have been increased in recent years. Many commentators fear that this will raise the threshold for victims of (inter alia) discrimination seeking redress in court.

Time limits

Administrative law procedures: Article 6:7 of the General Act on Administrative Law (*Algemene wet bestuursrecht*) provides that, in principle, an appeal must be lodged within six weeks of the day after the day on which the contested decision was delivered.

Civil law procedures: in case of a discriminatory dismissal or dismissal related to victimisation, proceedings before the civil court (*kantonrechter*) must be initiated within two months of the termination of the employment contract (Article 7:686a(4)(a) *jo.* 7:681(1)(c) Civil Code). A procedure based on tort law must be initiated before the general five-year limitation period under Article 3:310 Civil Code has expired.

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

Accessibility

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

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

c) Number of discrimination cases brought to justice

In the Netherlands, statistics on the number of cases related to discrimination brought to justice are available.

The National Expertise Centre on Discrimination (*Landelijk Expertise Centrum Discriminatie*, LECD), which forms part of the Public Prosecution Service, publishes statistics on criminal discrimination cases, including both discrimination offences (hate speech and exclusion) and regular offences committed with a discriminatory motive. In 2019, 123 discrimination offences were submitted to the Public Prosecution Service, as

²⁸⁹ Vereniging Sociale Advocatuur Nederland (*Netherlands Association of Social Lawyers*), 'VSAN-enquete aanleiding tot opstellen Zwartboek', www.vsanadvocaten.nl, 27 November 2020.

well as 221 offences with a discriminatory motive.²⁹⁰ The majority of discrimination offences (41 %) concerned racial/ethnic discrimination, closely followed by anti-Semitism (40 %). The majority of regular offences with a discriminatory motive (59 %) concerned individual insults related to the discrimination ground of racial/ethnic origin. The LECD report also includes information on, inter alia, the nature of offences, numbers of offences per region and characteristics of the perpetrators.

According to the same report, 60 court judgments were issued in 2019 in cases involving discrimination offences. In 47 of these cases the suspect was convicted for one or more offences.²⁹¹

In the context of the National Action Programme against Discrimination initiated in 2016 (see Section 9 for more detail) a measure has been implemented to bring together the data dealing with reports of discrimination to the police, the Public Prosecutor, the Reporting Point for Internet Discrimination (MIND in Dutch) and the equality bodies. In 2019 there was an increase in reports to each of these bodies, whereas 2018 had seen a reduction in reports to the police, the MIND and the local Anti-Discrimination Services (*Anti-Discriminatievoorzieningen*, ADVs) and an increase only in reports to the NIHR.²⁹² The reports to the NIHR and ADVs are dealt with in more detail in Chapter 7.

d) Registration of national court decisions on discrimination

In the Netherlands, court decisions on discrimination are not registered as such by national courts.

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

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

In the Netherlands, associations, organisations and trade unions are entitled to act on behalf of victims of discrimination. Under Article 3:305a of the Civil Code interest groups in the form of an 'association or foundation' with full legal powers can take legal action in court on behalf of people whose (similar)²⁹³ interests have been damaged; i.e. also on behalf of victims of discrimination.

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

A law was adopted in 2019 which has significantly increased the requirements to be met by foundations or associations seeking to engage in proceedings on behalf of victims of

²⁹⁰ Openbaar Ministerie, *Cijfers in beeld 2019. Overzicht discriminatiecijfers Openbaar Ministerie* (Figures for 2019. Overview of discrimination figures from the Public Prosecution Service), available at: <https://www.om.nl/onderwerpen/discriminatie/documenten/publicaties/discriminatie/lecd/cijfers-in-beeld/cijfers-in-beeld>.

²⁹¹ Openbaar Ministerie, *Cijfers in beeld 2019. Overzicht discriminatiecijfers Openbaar Ministerie* (Figures for 2019. Overview of discrimination figures from the Public Prosecution Service), available at: <https://www.om.nl/onderwerpen/discriminatie/documenten/publicaties/discriminatie/lecd/cijfers-in-beeld/cijfers-in-beeld>, p. 27. Where a suspect has been prosecuted for multiple offences, the conviction may not have been for the discrimination offence. The report does not contain information on court decisions concerning common offences with a discriminatory motive.

²⁹² *Discriminatiecijfers in 2018*, published as Annex to Tweede Kamer 2018/2019, 30 950, no. 174 and *Discriminatiecijfers in 2019*, published as Annex to Tweede Kamer 2019/2020, 30 950, no. 184

²⁹³ That is, similar to the organisation.

discrimination.²⁹⁴ This act has made it possible for such foundations or associations to claim pecuniary damages on behalf of those represented, whereas previously damages could only be claimed by individual victims. However, foundations and associations engaging in collective action on the basis of Article 3:305a Civil Code now have to meet a series of conditions, including procedures for the representation of the persons on whose behalf they are acting and a generally accessible website providing information about, inter alia, the foundation or association itself, the proceedings it is engaged in and the possibilities for membership.²⁹⁵ Additional requirements have also been introduced as to the admissibility of collective action claims, including the requirement that the claim must be sufficiently connected with the Dutch legal order.²⁹⁶

Courts may accept collective action claims made by foundations or associations that do not meet the newly imposed requirements if the claim is of an idealistic (non-commercial) nature and the financial interests involved are very limited. In that case, however, no pecuniary damages may be sought.²⁹⁷

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

Before an organisation can act, two conditions must be met. Firstly, the organisation must represent 'similar interests'. This means that the interests represented must be similar to the interests of the organisation. Secondly, the organisation must (before taking the case to court) have tried to obtain satisfactory compensation or rebuttal from the perpetrator or otherwise have tried to come to an agreement (see Article 3:305a(3)(c) and Article 3:305b(2) of the Civil Code).

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

b) Engaging in proceedings in support of victims of discrimination (joining in existing proceedings)

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

²⁹⁴ Act on the settlement of damages in collective action cases (*Wet afwikkeling massaschade in collectieve actie*), *Staatsblad* 2019, 130. The Act entered into force on 1 January 2020.

²⁹⁵ Article 3:305a(2) Civil Code.

²⁹⁶ Article 3:305a (3) Civil Code. Article 3:305a (3)(b) specifies that the requirement of a sufficient connection with the Dutch legal order is met if the majority of the persons in whose interest the claim is made are usually resident in the Netherlands, or the person against whom the claim is made is usually resident in the Netherlands and additional circumstances indicate a sufficient connection with the Dutch legal order, or the claim concerns an event or events that have taken place within the Netherlands.

²⁹⁷ Article 3:305a (6) Civil Code.

c) Actio popularis

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

These cases are called 'general interest actions' (*algemeen belangacties*). Even if no victims have come forward, or if victims are not known, this action is possible if it is in the public interest. The interest may be quite diffuse (e.g. 'combating racial stereotypes'). This procedure is allowed under Articles 3:305a(1) and 3:305b(1) of the Civil Code (discussed above) and Article 1:2(3) of the General Act on Administrative Law (AWB). The law speaks of 'bringing legal action to protect similar interests of other persons'. Case law shows that in practice it appears difficult to meet the admissibility criteria for this type of action. Courts seem to be reluctant to grant admissibility without a specific victim being involved in the proceedings.²⁹⁸

The same types of organisations (associations and foundations) as mentioned above have this possibility. They may use the court procedures (excluding criminal procedures), as described above and may seek the same remedies (i.e. injunctions, legal declarations ('*verklaring voor recht*') or pecuniary damages, if the conditions are met). The burden of proof is also the same as in any other discrimination case. These organisations also have the right to ask the NIHR to start an investigation into (alleged) discriminatory practices. Again, the organisation must have full legal powers and it must follow from its statutes that it represents the interests of those whose protection is the objective of the statutory equality acts (Article 10(2)(e) NIHR Act). However, if the claim mentions specific individuals who are believed to have suffered discrimination, the case can only be investigated by the NIHR if those individuals agree to it (Article 10(3) NIHR Act).

d) Class action

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

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

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

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

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

Article 10(1) GETA reads as follows:

²⁹⁸ For a brief overview of relevant case law see *De ontvankelijkheid van belangengroepen bij rechtszaken* ('The admissibility of interest groups in legal proceedings') by the Strategic Interest Litigation Project (PILP): <https://pilpnjcm.nl/wp-content/uploads/2015/10/De-ontvankelijkheid-belangengroepen-bij-rechtszaken-26102015.pdf> (only available in Dutch).

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

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

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

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

Article 8 of the GETA reads as follows:

'If an employer terminates an employee's contract of employment in contravention of Section 5, or on the ground that the employee has invoked Section 5, either in a court procedure or otherwise, or has assisted others in this respect, Article 681 of Book 7 of the Civil Code applies.'

The latter provision renders the termination voidable.²⁹⁹

Article 8a(1) GETA reads as follows:

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

The provision means that people who assist a victim of discrimination are also protected by Articles 8 and 8a of the GETA, not just the victims (the same applies in the context of the ADA and DDA). The shifting of the burden of proof does not apply to victimisation.³⁰⁰ According to Monika Ambrus, the ETC offered two ways for the claimant to prove that victimisation took place. Firstly, the claimant may prove that the complaint about discrimination led to a chain of events that eventually resulted in disruption of the labour relationship or even termination of the employment contract; secondly, the claimant may prove that the complaint was the only reason for the dismissal.³⁰¹ In its 2011 evaluation report, the ETC stated that, in practice, the burden of proof is not too arduous for the complainant. It therefore made no recommendations to change the law on this point. However, at the same time it appears from the figures that in only seven out of 19 victimisation cases did the claimant win.³⁰² The ETC made it clear that in a case of

²⁹⁹ The term 'voidable' (*vernietigbaar*) means that it is not automatically void but that this may be established during a court procedure.

³⁰⁰ See also Ambrus, M. 'The concept of victimisation in the racial equality directive and in the Netherlands: a means for effective enforcement of the right to equal treatment' in *Nederlands tijdschrift voor de mensenrechten, NJCM-bulletin*, 2011 (1), pp. 9-23, at p. 20.

³⁰¹ Ambrus, M. 'The concept of victimisation in the racial equality directive and in the Netherlands: a means for effective enforcement of the right to equal treatment' in *Nederlands tijdschrift voor de mensenrechten, NJCM-bulletin*, 2011 (1), p. 21.

³⁰² ETC (2011) *Third evaluation report (2004-2009)*, p. 25. This report is the latest detailed evaluation of the GETA.

victimisation the prohibition is absolute, i.e. that no (objective) justification may be put forward.³⁰³

In 2008-2009, a study of the issue of victimisation was conducted on behalf of the ETC.³⁰⁴ It was the first large-scale research into this topic in the Netherlands. Previous smaller studies had shown that complaining about discrimination often led to serious negative consequences, but also that many victims did not make official complaints for fear of victimisation. These findings were confirmed. The researchers found that serious forms of victimisation occurred most often in cases of discrimination on the grounds of race, sex or disability, where they concerned discriminatory treatment in the workplace by colleagues and direct supervisors and where the claimant was in an isolated position at work. The report shows that it is certainly not enough to have established a prohibition of victimisation, but that much more needs to be done in terms of having in place an informal complaints procedure, having counsellors in the workplace who can deal with complaints confidentially, and giving training to people working for personnel departments and managers.³⁰⁵ In 2019 a guideline was developed, at the request of the state secretary for Social Affairs and Employment, on the positioning and functioning of confidential counsellors to address undesirable behaviour within the workplace.³⁰⁶

A rather narrow interpretation of the prohibition of victimisation was given by the District Court of Amsterdam in the case of a young Muslim woman whose traineeship was not continued after she refused to stop wearing a khimar (long headscarf). The employer had told the woman that she had 'crossed a line' by reporting her situation to an Anti-Discrimination Service (see Section 7 below) and that it would not continue the employment relationship because of this. In an otherwise carefully argued judgment the court considered that, despite this statement, the employer had given the woman 'a last chance to adjust to a more neutral clothing style' after she had reported her case to the equality body. From this the court deduced that the reporting had not been the reason for not continuing the employment relationship and therefore the employer's reaction to the reporting did not constitute 'seriously negligent behaviour' (the court did find that the employer had been seriously negligent in failing to continue the employment relationship on discriminatory grounds – see also Section 3.2.3 above).³⁰⁷

Of the NIHR Opinions issued in 2020 concerning the grounds covered in this report, two cases dealt with victimisation, both in relation to the ground of race.³⁰⁸ In one case the victimisation claim was successful, in the other it was rejected.

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

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

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

³⁰³ Ambrus mentions ETC Opinion 2006, 34, para. 3.19. See Ambrus, M. 'The concept of victimisation in the racial equality directive and in the Netherlands: a means for effective enforcement of the right to equal treatment' in *Nederlands tijdschrift voor de mensenrechten, NJCM-bulletin*, 2011 (1), pp. 9-23, at p. 20.

³⁰⁴ See van Genugten, M. and Svensson, J. (2010), *Dubbel de dupe? Een studie naar de benadeling van werknemers die gelijke behandeling aan de orde stellen* (Victim twice over? A study of disadvantages experienced by employees who raise the issue of equal treatment), University of Twente/ETC. The full report, as well as an English summary, are available at: www.mensenrechten.nl/publicaties/detail/10028.

³⁰⁵ In 2018 the NIHR dealt with three victimisation complaints, only one of which concerned a ground covered in this report. Victimisation was not considered to have been present (NIHR 2018-99).

³⁰⁶ *Leidraad voor het positioneren en functioneren van vertrouwenspersonen ongewenste omgangsvormen op het werk*, published as Annex to Tweede kamer 2019/2020, 25 883, no. 365.

³⁰⁷ District court Amsterdam 10 January 2020, ECLI:NL:RBAMS:2020:575.

³⁰⁸ NIHR 2020-45 and 2020-40.

Articles 11(2), 11(3) and 13 of the NIHR Act mention some specific (mostly soft law) sanctions that may be imposed by the NIHR. Under Article 11(2), the NIHR may make recommendations when forwarding its findings (in an Opinion) to the party found to have made an unlawful distinction. Under Article 11(3) the NIHR may also forward its findings to the ministers concerned, and to organisations of employers, employees, professionals and public servants, to consumers of goods and services and to relevant consultative bodies. Under Article 13(1), the NIHR may bring legal action with a view to obtaining a court ruling that a particular conduct contrary to the relevant equal treatment legislation is unlawful, requesting that such conduct be prohibited or eliciting an order that the consequences of such conduct be rectified.³⁰⁹ This power must be regarded in light of the fact that the NIHR's Opinions are not binding (see further Section 7, under g). If a case is brought by an interest group, the sanctions under the GETA are similar.

Any other sanctions in discrimination cases must be imposed by a court. The system is such that, in case of criminal offences, fines and sentences may be imposed by a criminal court. This happened, for example, in 2014 in a case concerning a discriminatory email that was mistakenly sent to a job applicant (community sentence and fine),³¹⁰ and in 2015 for discriminatory remarks made on Facebook (the perpetrators were offered the possibility of settling their case by paying a fine).³¹¹

In the case of civil lawsuits, the main remedies to be granted by the courts include an injunction to comply with existing legal obligations (Article 3:296 Civil Code), a legal declaration (Article 3:302 Civil Code) and the award of pecuniary damages (Article 3:310 Civil Code). The availability of specific remedies depends on the legal relationship concerned, for example in employment cases an employer may be held accountable to pay pecuniary damages, to take preventive measures or to reinstate an employee who was unlawfully dismissed (Article 7:681 Civil Code). In case of tort, an injunction may be imposed, as well as pecuniary sanctions. In case of collective actions the courts may decide that the judgment is to be made public (Articles 3:305a(4) and 3:305b(2) Civil Code). Administrative courts can annul administrative decisions found to be contrary to the law (Article 8:72(1) General Administrative Law Act) and award pecuniary damages in respect of unlawful administrative decisions or other unlawful conduct by administrative bodies (Article 8:88(1) General Administrative Law Act).

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

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

b) Compensation – maximum and average amounts

In civil court cases there is no ceiling for the amount of damages or compensation that may be sought. Compensation for both material and non-material damages can be requested. The maximum amount of damages to be claimed before an administrative court

³⁰⁹ This applies, unless the person affected by the alleged discriminatory conduct has imposed conditions (Article 13(2) of the NIHR Act). In theory this could amount to a court order, e.g. to make a desegregation plan for schools; however, the Dutch courts are very careful not to interfere with what they call the discretionary powers of the administration and the government.

³¹⁰ District Court of Gelderland 27 August 2014, ECLI:NL:RBGEL:2014:5457.

³¹¹ Official press release from the Public Prosecution Service regarding the three fines imposed.

is EUR 25 000, if the claim exceeds this amount the case will fall under the competence of the civil courts.³¹² In criminal procedures, the Public Prosecutor is bound to the level of the fines set out in the criminal law provisions concerning discrimination.

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

c) Assessment of the sanctions

Monetary compensation is very rarely granted. This only occurs when, for example, the judge agrees with the dismissal since employment relationships have been disrupted and, in that case, they set a relatively high sum to compensate for the termination of the contract.

No information can be given on the topic of sanctions without an extensive examination of the case law of the district courts. Generally, such cases are not published in official law journals. In addition, the registration of cases within the court system is not done systematically on the basis of the legal provisions at stake. Thus it might very well be that many cases are registered under the heading of a general provision like 'breach of labour contract' (with no specification about the reasons for this) or tort. Very generally speaking, it can be noted that Dutch courts are restrictive in granting damages that are not strictly material damages (e.g. unpaid wages). Non-material damages (e.g. hurt feelings) will only be compensated for minimally.

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

³¹² Article 8:89(2) General Administrative Law Act (*Algemene wet bestuursrecht*), Staatsblad 1992, 315, entered into force 1 January 1994. This is the case unless the administrative decision concerned falls within the exclusive or final competence of the Central Appeals Tribunal (*Centrale Raad van Beroep*) or the Supreme Court (*Hoge Raad*). Article 8:89(1) General Administrative Law Act.

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

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

In the Netherlands, there are two types of equality body. First, there is a quasi-judicial (or tribunal type) body assigned with the tasks of hearing complaints about unequal treatment, drafting reports, giving advice to the Government and investigating possible instances of structural discrimination on its own accord. The material scope of the Netherlands Institute for Human Rights (NIHR) (*College voor de rechten van de mens*) mandate covers all areas covered by the General Equal Treatment Act (GETA), the Disability Discrimination Act (DDA) and the Age Discrimination Act (ADA), that is *grosso modo* employment and goods and services. This function is currently fulfilled by a department of the NIHR.³¹³ In 2012, the NIHR assumed all the tasks of the former Equal Treatment Commission (ETC) (*Commissie Gelijke Behandeling, CGB*) in this regard.³¹⁴ The ETC was the first officially designated body through which the Government implemented Article 13 of the Racial Equality Directive, although it was not officially appointed as such by a separate law or decree.³¹⁵ The status as an equality body follows from the tasks given to the NIHR in the NIHR Act (Articles 9-13 of the NIHR Act; originally Articles 11-21 of the GETA). Other equal treatment acts also assign these tasks to the NIHR (see Article 12 DDA and Article 14 ADA). On the basis of the NIHR Act, decrees have been adopted in order to regulate the legal status of members of the Institute and its staff³¹⁶ and the internal procedures of the department of the NIHR that deals with complaints about unequal treatment.³¹⁷

The Dutch Government established the NIHR after long discussions about the best way to implement the Paris Principles.³¹⁸ The role of the former ETC regarding investigating complaints is fully integrated into the new NIHR and as such has not been changed. The establishment of the Institute also does not change the competences of the ADVs (see below) as regards their role in assisting victims. The role of assisting victims was never part of the ETC's work and is not part of the work of the NIHR, because it is deemed to be incompatible with the role of independently issuing legal opinions about discrimination complaints. The NIHR refers victims to the Anti-Discrimination Facilities (see below) for such assistance. In addition to the nine members of the previous ETC, three additional members were appointed to the NIHR.

The first evaluation of the functioning of the NIHR (covering 2012-2017) was positive. Of particular relevance for this report is the conclusion that its semi-judicial role regarding

³¹³ Act of 24 November 2011 containing the establishment of the Netherlands Institute for Human Rights (*Wet van 24 november 2011, houdende de oprichting van het College voor de rechten van de mens*); Staatsblad 2011, 573. The Act entered into force on 1 October 2012.

³¹⁴ The provisions of the General Equal Treatment Act in which the former ETC was regulated were repealed in the NIHR Act. Instead, the same tasks and authorities are now regulated in a specific chapter of the NIHR Act: 'Chapter 2: Investigations and findings relating to equal treatment' (Articles 9-13).

³¹⁵ This designation follows from statements from the government in various Parliamentary papers. See e.g. Explanatory Memorandum to the bill which led to the *EG-Implementatiewet Awgb* (EC Implementation law Equal Treatment Law) Tweede Kamer, 2002-2003, 28 770, nos. 1-3 at page 20, where it is mentioned in the Appendix, at page 20, that the implementation of Article 13 of the Racial Equality Directive has already been completed because of the existence in the Netherlands of the ETC (*EG Implementatiewet Awgb*: Law of 21 February 2004, Staatsblad 2004, 119).

³¹⁶ Decree on the Legal position of the Netherlands Institute for Human Rights (Besluit van 28 augustus 2012, houdende regels over de rechtspositie van de leden van het College voor de rechten van de mens en de tot het bureau behorende ambtenaren (Besluit rechtspositie College voor de rechten van de mens)), Staatsblad 2012, 389.

³¹⁷ Decree working method investigation equal treatment (Besluit van 31 augustus 2012, houdende nadere regels over de werkwijze van de afdeling, bedoeld in hoofdstuk 2 van de Wet College voor de rechten van de mens (Besluit werkwijze onderzoek gelijke behandeling), Staatsblad 2012, 394.

³¹⁸ Principles relating to the Status of National Institutions Adopted by UN General Assembly resolution 48/134 of 20 December 1993.

discrimination complaints is perceived as being high-quality and authoritative ('*kwalitatief hoogstaand en daarmee gezaghebbend*').³¹⁹

Secondly, there are the Anti-Discrimination Services (*Anti-discriminatievoorzieningen*, ADVs) at local level which have a legal basis in the Act on Local Anti-Discrimination Services (*Wet gemeentelijke antidiscriminatievoorzieningen*).³²⁰ According to the legislative history, the ADVs are equality bodies in the sense of Article 13 Directive 2000/43/EC.³²¹ All 355 municipalities are obliged to have an ADV. In practice many (smaller) municipalities do not have their own ADV but are served by a larger, regional ADV. Probably the largest ADV is RADAR, which serves 51 municipalities with a total of 3.2 million inhabitants.³²² The main task of the ADVs is to assist victims of discrimination and to monitor the situation in this regard.³²³ The ADVs and the NIHR thus fulfil different tasks that are closely related but not overlapping.

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

b) Political, economic and social context of the designated bodies

Overall there is political support for the NIHR, which is not to say that all political parties have a positive attitude to it. Right-wing and populist parties are overall (much) less positive than parties towards the other end of the political spectrum. This is particularly the case where the NIHR gives opinions in controversial discrimination cases that support the complainant.³²⁴

Financially speaking, after an initial increase in terms of budget and staff for the NIHR compared to the resources allocated to the former ETC, in 2015 the budget for the NIHR was back to the level that was allocated to the former ETC, due to the overall budget cuts during the economic crisis.³²⁵ The NIHR has received additional funding to monitor the implementation of the CRPD since its ratification in 2016.

Similar to the political debate mentioned above, the popular debate surrounding equality and diversity is also mixed. Yet stakeholders and experts are positive overall about the functioning of the NIHR.³²⁶

Regarding the ADVs, a 2017 evaluation report stated that the financial support received by the municipalities for the ADVs did not match the increasing costs of the core ADV tasks (assisting victims and registering discrimination complaints). The report also found that

³¹⁹ *Evaluatie Wet College voor de rechten van de mens* (Evaluation of the National Institute of Human Rights Act), Tweede Kamer 2017-2018, 34 338 no. 3, p. 2.

³²⁰ Act on Local Anti-Discrimination Services (*Wet gemeentelijke antidiscriminatievoorzieningen*), *Staatsblad* 2009, 313. On the basis of this law, a Decree was adopted in which more detailed regulation of the local ADVs is laid down. It contains provisions concerning their independence, competence and procedures to be followed when the ADVs provide information and assist victims of discrimination (see *Besluit gemeentelijke antidiscriminatievoorzieningen*, *Staatsblad* 2009, 373, *Besluit gemeentelijke antidiscriminatievoorzieningen*).

³²¹ See Tweede Kamer, 2007-2008, 31 439, no. 3, p. 7.

³²² <https://radar.nl/over-radar/werkgebied-radar/>.

³²³ The ADVs also work together within an overarching association called the National Association against Discrimination (*Landelijke Vereniging tegen Discriminatie*) and are supported by the expert institute, Art.1, named after the constitutional non-discrimination provision. The ADVs and Art.1 cover all of the Article 19 TFEU non-discrimination grounds and were officially recognised as equality bodies (in terms of Article 13 of the Racial Equality Directive) in 2004, see Tweede Kamer, 2003-2004, 28 770, no. 5.

³²⁴ See, for example, the newspaper article of 26 November 2017, 'College voor de Rechten van de mens ligt steeds weer onder vuur' ('The NIHR comes time and again under attack'): www.ad.nl/politiek/college-voor-de-rechten-van-de-mens-ligt-steeds-weer-onder-vuur~aabb31cd/.

³²⁵ See the financial evaluation of the NIHR of November 2015, Tweede Kamer, 2015-2016, 34 338, no.1 attachment 2015D43169.

³²⁶ See the financial evaluation of the NIHR of November 2015, Tweede Kamer, 2015-2016, 34 338, no.1 attachment 2015D43169, p.2. The evaluation report mentions more specifically that experts are positive regarding the priorities set by the NIHR and their implementation. They are somewhat more critical regarding the NIHR's tasks concerning human rights education and providing information.

differences in the functioning of ADVs, in particular the extent to which ADVs are also active in preventing discrimination, were linked to a lack of financial support. Municipalities receive financial support for the ADVs from the central Government, however these contributions are not earmarked and therefore the ADVs budgets differ depending on the priority accorded to anti-discrimination policy (and the role of ADVs therein) in different municipalities.³²⁷ Nevertheless, the Minister of the Interior, responsible for the ADVs, declared in 2019 that the contributions for ADVs would not be earmarked as this was considered contrary to the principle of local autonomy.³²⁸

c) Institutional architecture

In the Netherlands, the designated body forms part of a body with multiple mandates. As mentioned, the competence and functions of the former ETC are now included in the much broader mandate of the NIHR as the national human rights institution that complies with the Paris Principles. This mandate includes the following tasks:³²⁹

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

To deal efficiently with the large number of cases handled under the quasi-judicial complaints procedure, the equality and non-discrimination mandate is executed by a specific department of the NIHR, under the responsibility of one of its two vice-presidents.³³⁰ As all commissioners are collectively responsible for carrying out the broad mandate of the NIHR, none of them deal exclusively with the equality and non-discrimination mandate, though some spend more time on this part of the work of the NIHR than others, as more complex cases may require specialised knowledge. The same holds true for most staff members. The budget does not set apart a specified percentage of resources and budget for the equality mandate.

³²⁷ Smit, W. et al (2017), *Onderzoek naar de werking van ADV's in de praktijk* (Report on the functioning of the ADVs in practice), Amsterdam: Regioplan March 2017, p. v. The report is available at: <https://www.regioplan.nl/wp-content/uploads/2018/10/16146-Eindrapport-Onderzoek-naar-de-werking-van-de-adv's-in-de-praktijk-Regioplan-29mrt17-BV.pdf>.

³²⁸ Tweede Kamer 2019-2020, 30 590, no. 179, p. 3.

³²⁹ As specified in the Annual Report 2018, p. 9, see <https://mensenrechten.nl/nl/publicatie/5caf4b8be19c2154958b119c>. The listing reflects the mandate of the NIHR laid down in Article 3 NIHR Act.

³³⁰ The organisation of the NIHR consists of three departments: Front office & case opinions; Studies, recommendations and communications; Operations staff department.

The integration of the equality mandate of the former ETC into the much broader human rights mandate of the NIHR has inevitably led to a relative reduction in attention to the equality mandate in the work of the NIHR, but in the first overall evaluation of the NIHR that became available in 2018 it is concluded that the NIHR has found 'a good balance' between both mandates.³³¹ In terms of resources, by making the process of handling discrimination complaints more efficient the NIHR has been able to considerably reduce resources spent on its equality mandate without compromising the overall quality of its work in this area. A positive consequence of the broader mandate regards the improved possibilities of linking equality and other human rights issues and thus addressing the wider context which often contributes to discriminatory attitudes and practices. In addition, the NIHR included 'discrimination and stereotyping in the labour market' as one of its four priority themes in its strategic plan 2015-2019.³³² Since 2016 it has also devoted specific attention to its equality mandate by publishing a separate annual report, 'Discrimination cases monitor', in which it analyses its work under its equality mandate in more detail than is allowed for in the annual report.³³³

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

d) Status of the designated bodies – general independence

i) Status of the bodies

The NIHR is an independent quasi-judicial body whose status is regulated in the NIHR Act. For further details on its independence see below under ii. It currently consists of ten members and four substitute members.³³⁴ There is also an Advisory Council, which advises the NIHR on its (strategic) plans and advises the Minister of Justice and Security on the appointment of members of the NIHR. The Advisory Council consists (*qualitate qua*) of the National Ombudsman, the chair of the Data Protection Agency, the chair of the Council for the Judiciary and a minimum of four and a maximum of eight members drawn from civil society organisations concerned with the protection of one or more human rights, from organisations of employers and employees and from the academic world (Article 15 (2) of the NIHR Act.) Apart from the aforementioned *qualitate qua* members, the members of the Council are appointed by the Minister of Justice and Security, after consultation with the Minister of the Interior and Kingdom Relations, the NIHR, the Ombudsman, the chair of the Data Protection Agency and the chair of the Council for the Judiciary (Article 15 (3)).

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

³³¹ *Evaluatie Wet College voor de rechten van de mens* (Evaluation of the National Institute of Human Rights Act), *Tweede Kamer* 2017-2018, 34 338 no. 3, p. 3.

³³² The other themes relate to topics that also include equality and non-discrimination issues: human rights education, human rights at a local level and monitoring of the CRPD, see Annual Report 2016, now available in English on the website of the NIHR: <https://mensenrechten.nl/nl/publicatie/38213>.

³³³ The latest available issue is the Discrimination cases monitor 2019 (*Monitor Discriminatiezaken 2019*), available at <https://mensenrechten.nl/nl/publicatie/5ea1351a1e0fec037359c1f3>.

³³⁴ The maximum number of ordinary members is 12; most members are part-time commissioners and have another part-time job elsewhere. The composition of the NIHR is made public at: <https://mensenrechten.nl/nl/collegeleden>.

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

In terms of accountability, the NIHR must publish an annual report with an overview of its investigations, advice and other activities (Article 21 NIHR Act). It must also send this report to the National Ombudsman, the Data Protection Agency and relevant organisations working in the field of human rights. Every five years the NIHR must report on the functioning in practice of the NIHR Act and the relevant non-discrimination legislation. This report is sent to the Minister of the Interior and Kingdom Relations and subsequently, with the Minister's response, to Parliament (Article 22 NIHR Act).³³⁵

The status of the local Anti-Discrimination Services or ADVs is that of independent non-governmental organisations (NGOs), although they are subsidised by the local authorities. The legal regulation of the local ADVs is set out in a law which came into force in 2009 (the Act on Local Anti-Discrimination Services, *Wet gemeentelijke antidiscrimatievoorzieningen*, hereafter ADV Act). The ADVs have two legal tasks: to assist people with discrimination complaints and to record all such claims and bring them to the attention of the Minister of the Interior and Kingdom Relations (Article 2(1) ADV Act).

There is considerable variation in the way ADVs are organised and function, but research suggests that the vast majority of municipalities (86 %) are serviced by ADVs that meet the requirements for quality and professionalism. Overall, the larger and regionally organised ADVs perform better in terms of effectiveness than smaller ADVs.³³⁶

ii) Independence of the bodies

Article 4 of the NIHR Act explicitly stipulates that, 'The Institute is independent in the performance of its duties'. Independence is further guaranteed in several provisions of the NIHR Act. In a number of them, reference is made to the Autonomous Administrative Bodies Framework Act (AABF) (*Kaderwet Zelfstandige Bestuursorganen*),³³⁷ the Advisory Bodies Framework Act (ABFA) (*Kaderwet Adviescolleges*),³³⁸ the Judicial Officers Legal Status Act (*Wet Rechtspositie Rechterlijke Ambtenaren*)³³⁹ and the Act on the Organisation of the Judiciary (*Wet op de Rechterlijke Organisatie*),³⁴⁰ in which a detailed regulation is given of the status of independence, accountability, incompatibilities etc. of people who work directly or indirectly for the Government. In many respects the members of the NIHR, its Advisory Council and its staff are covered by these laws. In some other respects, these laws are exempted precisely in order to guarantee the independence of the Institute.

³³⁵ The first report of this kind became publicly available in 2018 when it was sent to Parliament together with the Government's response, see *Evaluatie Wet College voor de rechten van de mens* (Evaluation of the National Institute of Human Rights Act), *Tweede Kamer* 2017-2018, 34 338 no. 3.

³³⁶ Smit, W. et al (2017), *Onderzoek naar de werking van ADV's in de praktijk* (Report on the functioning of the ADVs in practice), Amsterdam: Regioplan March 2017. The report is available at: <https://www.regioplan.nl/wp-content/uploads/2018/10/16146-Eindrapport-Onderzoek-naar-de-werking-van-de-adv's-in-de-praktijk-Regioplan-29mrt17-BV.pdf>.

³³⁷ *Staatsblad* 2006, 587, entered into force 1 February 2007.

³³⁸ *Staatsblad* 1996, 378, entered into force 1 January 1997.

³³⁹ *Staatsblad* 1996, 590, entered into force 1 January 1997.

³⁴⁰ *Staatsblad* 1827, 20, entered into force 1 October 1838.

In addition, Article 17 of the NIHR Act gives a detailed regulation of the legal status of the members in terms of the duration of their appointment, their working conditions, salary, possibility of disciplinary sanctions and dismissal, etc. To emphasise the independence of the members, subsection 1 states that, apart from a few exceptions, the provisions of the Judicial Officers Legal Status Act concerning dismissal, suspension and disciplinary measures apply *mutatis mutandis* to them.³⁴¹ This provision contains a few changes compared to the former Article 16 (4) of the General Equal Treatment Act, all of which are intended to emphasise / strengthen the independence of the members of the Institute. The independence is not only formally stipulated in the law but, according to the assessment of the author of this report, is reflected in the realities on the ground.

The ADVs are instated by local government (*colleges van burgemeester en wethouders*), in accordance with Article 1 ADV Act. The Act expressly provides in Article 2(1)(a) that it is the task of the ADVs to provide independent assistance to victims of discrimination. Article 2 of the Decree on the local anti-discrimination services (*Besluit gemeentelijke antidiscrimatievoorzieningen*)³⁴² sets out guarantees to ensure that ADV staff members who treat complaints of discrimination are independent of the local government, for example they may not simultaneously be a member of the local government or be hierarchically inferior to the local government in any other way. The Decree further provides that the ADVs must also be impartial regarding the fulfilment of their tasks and that they must ensure that complaints of discrimination are not treated by staff members who have a personal interest in the case.³⁴³ An evaluation conducted in 2017 found that the requirement of impartiality was not always met, as in some municipalities the ADV tasks were performed by civil servants working under the responsibility of the local government.³⁴⁴ In 2019 the Minister of the Interior announced that the Decree on ADVs would be amended to give more clarity about the condition of impartiality.³⁴⁵

e) Grounds covered by the designated bodies

Under its specific mandate in the field of non-discrimination, the NIHR deals with all the non-discrimination grounds mentioned in the GETA, DDA and ADA, as well as some more specific grounds. Thus it covers race, religion and belief, political opinion, hetero- or homosexual orientation, sex, nationality and civil (or marital) status, disability, age, plus 'working time' and 'type of labour contract'. In the composition of its members and supporting staff the NIHR strives for sufficient diversity to ensure that relevant expertise regarding all the grounds covered is present.

Because of the broad personal scope of the non-discrimination legislation, anyone residing in the Netherlands, including migrants, can bring a complaint if they are discriminated against on any of the grounds covered.

In its strategic programmes the NIHR indicates its focus areas which can include specific non-discrimination themes. In the strategic report for the period 2013-2015 the NIHR identified several themes for a proactive promotion of human rights: care for the elderly and human rights; migration and human rights; discrimination regarding access to the labour market; ratification and implementation of the CRPD; human rights education; and ratification of other treaties relevant for the protection of human rights in the Netherlands.³⁴⁶ The strategic programme for 2016-2019 singled out four themes or

³⁴¹ One important difference with the position of judges is that members of the NIHR are appointed for a period of six years with the possibility of re-appointment, while judges are appointed for life.

³⁴² *Staatsblad* 2019, 373.

³⁴³ Article 2 (5) and (6) Decree on the local anti-discrimination facilities.

³⁴⁴ W. Smit et al, *Onderzoek naar de werking van ADV's in de praktijk* (Report on the functioning of the ADVs in practice), Amsterdam: Regioplan March 2017, p. 47. The report is available at [https://www.regioplan.nl/wp-content/uploads/2018/10/16146-Eindrapport-Onderzoek-naar-de-adv's-in-de-praktijk-Regioplan-29mrt17-BV.pdf](https://www.regioplan.nl/wp-content/uploads/2018/10/16146-Eindrapport-Onderzoek-naar-de-werking-van-de-adv's-in-de-praktijk-Regioplan-29mrt17-BV.pdf).

³⁴⁵ Tweede Kamer 2019-2020, 30 590, no. 179, p. 3.

³⁴⁶ NIHR Strategic plan 2012-2016, available in English: www.mensenrechten.nl/nl/publicatie/35930.

programmes to focus on: human rights education; discrimination and stereotyping in the labour market; human rights at the local level; and monitoring of the implementation of the CRPD. Discrimination in the labour market thus remained prominently on the agenda for this period. The NIHR emphasised the fact that setting priorities for the themes that will receive particular attention in a certain period does not imply that former themes are no longer addressed; in this regard it specifically mentioned refugees and migrants.³⁴⁷ For the period 2020-2023 the NIHR's strategic programme comprises two focus areas, namely 'digitalisation and human rights' and 'gender equality and human rights'.³⁴⁸

All in all, the impression of the author of this report is that the attention paid by the NIHR to all the grounds of discrimination included in its mandate is quite balanced, with disability receiving considerably more attention than previously, in view of the specific task entrusted to the NIHR to monitor the implementation of the CRPD, which was ratified in 2016.

The mandate of the ADVs covers all of the grounds mentioned in the Equality Directives, as well as the other grounds covered by Dutch equal treatment legislation (e.g. civil status, political opinion and nationality).³⁴⁹

- f) Competences of the designated bodies – and their independent and effective exercise
 - i) Independent assistance to victims

In the Netherlands, the NIHR does not have the competence to provide independent assistance to victims. The role of assisting victims is seen as being in conflict with the role of independently investigating individual complaints and giving an authoritative opinion on them. The same applies to the NIHR's official competence to bring cases of unequal treatment to the attention of the courts; even though it has this competence, the NIHR never makes use of it as it would conflict with its own quasi-judicial function.

However, the local ADVs do fulfil this function.³⁵⁰ The role of these organisations is mainly to assist victims of discrimination and to monitor developments with respect to discrimination in society. They bring many cases of discrimination to the attention of the NIHR and the courts, including in the form of general interest actions or collective actions. They also set up situation testing processes, in order to bring systemic discrimination to light, especially in the area of cafés and nightclubs (see Section 6.2 of this report).³⁵¹

- ii) Independent surveys and reports

In the Netherlands, the NIHR has the competence to conduct independent surveys and publish independent reports. It may investigate structural instances of discrimination of its own accord³⁵² and may advise organisations (including governmental organisations) who want to know whether their policies or practices are in compliance with the law.

³⁴⁷ NIHR Strategic plan 2016-2019, available in English: www.mensenrechten.nl/nl/publicatie/37005.

³⁴⁸ NIHR Annual report 2020 (*Jaarverslag 2020*), p. 10. The Annual report is available at <https://mensenrechten.nl/nl/publicatie/607f92051e0fec037359cb27>.

³⁴⁹ Article 2(1)(a) Act on Local Anti-Discrimination Services.

³⁵⁰ Article 2(1)(a) Act on Local Anti-Discrimination Services. The expert centre Art.1 may also support victims.

³⁵¹ The national expert centre Art.1 supports the work of the local ADVs by, for example, offering training to employees working for the local ADVs. Art.1 mainly has a role in monitoring developments in society with regard to (non-) discrimination and bringing instances of (structural) discrimination to the attention of the general public and politicians. The grounds covered are religion and belief, political opinion, hetero- or homosexual orientation, sex, nationality and civil (or marital) status, disability and age.

³⁵² The scope for this was extended by the GETA Evaluation Act or *Evaluatiewet AWGB* (*Wet tot wijziging van de Algemene Wet Gelijke Behandeling; Evaluatiewet Awgb*) of 15 September 2005, *Staatsblad* 2005, 516. (This is the law which amended the GETA on the basis of proposals stemming from the first evaluation of the Act during the period 1994-1999).

The NIHR operates in a fully independent way, both *de jure* and *de facto*.³⁵³ The NIHR and its predecessor have made extensive use of their competence in this regard. They have conducted a large number of surveys and produced reports on a wide variety of equality issues regarding the grounds of discrimination covered by the EU directives and beyond. In 2020, for instance, the NIHR issued reports on age discrimination in recruitment, people living with a (very) severe mental impairment, algorithms and discrimination in recruitment and selection, and pregnancy discrimination. All surveys and reports are published on the website of the NIHR and are often referred to in policy documents.³⁵⁴

Interestingly, the NIHR Act provides that the Minister concerned must give the NIHR the opportunity to discuss its surveys, reports, recommendations or advice with him/her (Article 8 NIHR).

The NIHR also sends its own, independent reports on the human rights situation in the Netherlands to the UN human rights treaty bodies for consideration in the context of the reporting procedures.

Other organisations also publish very informative reports about the prevalence and causes of discrimination. The main (publicly funded) research institution in this regard is the Netherlands Institute for Social Research (*Sociaal Cultureel Planbureau, SCP*). In 2013, an SCP study revealed that harassment at work is one of the greatest problems encountered by LGBT people,³⁵⁵ followed in 2015 by a report on labour market discrimination in The Hague.³⁵⁶ The SCP also publishes reports on the way people perceive discrimination.³⁵⁷

The ADVs do not have competence to conduct independent surveys and publish reports.

iii) Recommendations

In the Netherlands, the NIHR has the competence to make recommendations on discrimination issues.³⁵⁸ In respect of this competence the NIHR also operates independently both *de jure* and *de facto*. Under the NIHR Act it has the competence to advise the Government, Parliament or administrative bodies about all laws and regulations directly or indirectly related to human rights issues, either in response to a request or on its own initiative (Article 5). The NIHR makes use of its advisory competence on a regular basis by formulating recommendations in its reports or providing advice in response to specific issues.³⁵⁹

The ADVs do not have competence to issue recommendations.

iv) Other competences

³⁵³ This conclusion is corroborated by the fact that the independence of the NIHR does not figure as an issue in the financial evaluation of the NIHR of November 2015, Tweede Kamer, 2015-2016, 34 338, no. 1 Annex 2015D43169.

³⁵⁴ www.mensenrechten.nl/nl/publicaties.

³⁵⁵ See the SCP Report, *Seksuele oriëntatie en werk. Ervaren van lesbische, homoseksuele, biseksuele en heteroseksuele werknemers* (Sexual orientation and work. Experiences of lesbian, gay, bisexual and heterosexual employees). In December 2013, the Minister of Education, Culture and Science sent a letter to Parliament on the topic of discrimination against LGBT employees, see Tweede Kamer, 2013-2014, 30 420, no. 204.

³⁵⁶ SCP 2015, *Op Afkomst Afgewezen* (Rejected due to origin): <https://www.scp.nl/publicaties/publicaties/2015/06/17/op-afkomst-afgewezen>.

³⁵⁷ For the latest report see SCP 2020, *Ervaren Discriminatie in Nederland* (Experience of discrimination in the Netherlands), available at: <https://www.scp.nl/publicaties/publicaties/2020/04/02/ervaren-discriminatie-in-nederland-ij>.

³⁵⁸ For an overview of the many recommendations it issues, see the website of the NIHR, e.g. under the category 'adviezen' ('advice'): www.mensenrechten.nl/nl/publicaties. Recommendations are also included in its research reports and annual reports, also available on the website.

³⁵⁹ For an example of a recommendation issued following an individual complaint see Opinion 2019-45.

Other competences and tasks of the NIHR include its quasi-judicial role in relation to discrimination complaints (see below for more details); provision of information and education on human rights; and collaboration with social organisations and national, European and other international institutions working in the area of human rights. Another particular task concerns encouraging the implementation of and compliance with international conventions on human rights and with European or international recommendations on human rights (Article 3(h) NIHR).

g) Legal standing of the designated bodies

In the Netherlands, the NIHR has legal standing to bring discrimination complaints on behalf of identified victim(s) and *ex officio* to court (Article 13 NIHR Act). The NIHR can make three types of claims: a declaration that the allegedly discriminatory act was unlawful; a prohibition on engaging in such an act; or an order to undo the consequences of an allegedly discriminatory act. A claim can only be made if the person affected by the disputed act does not object (Article 13 (2) NIHR). To date the NIHR has not made use of its competence to bring discrimination cases before the courts. In 2019 a claim was brought concerning pregnancy discrimination, however this case was discontinued.³⁶⁰

In 2016 the NIHR intervened for the first time as a third party in proceedings at the European Court of Human Rights through an *amicus curiae* submission, but this was not in a non-discrimination case.³⁶¹

The expert centre Art.1 and the local ADVs can bring claims to court within the framework of the general rules of Dutch civil law concerning actions on behalf of victims and general interest actions or collective actions. (No data on numbers of class actions are available.) See Section 6.2 of this report.

h) Quasi-judicial competences

In the Netherlands, the NIHR is a quasi-judicial institution (Articles 3 (a) and 10 NIHR Act). Its decisions and recommendations are not binding and it does not have the power to impose sanctions. No appeal is possible in relation to the opinions of the NIHR itself, but a case can be brought to a (civil or administrative) court in order to obtain a binding judgment. On the basis of an Opinion of the NIHR in which a certain practice or conduct has been declared discriminatory, a defendant (or their organisation) may also take voluntary measures to put an end to the discrimination or take action to prevent it from happening in the future.

The NIHR keeps track of the follow-up to its opinions in its annual reports and in particular in its more detailed annual 'Discrimination cases monitor'.³⁶² According to this monitor, when the NIHR issues an Opinion or recommendation this results, in around four out of five cases, in a measure being taken by the defendant company or institution. This may be an individual measures (applicable only to the complainant), a structural measure or a combination of both. In 2018 12 % of NIHR Opinions/recommendations were followed by an individual measure, 32 % by a structural measure and 33 % by a combination of measures. In total a follow-up measure was taken in 77 % of all cases.³⁶³ In 2019 an

³⁶⁰ NIHR Annual report 2019, <https://mensenrechten.nl/nl/publicatie/5ea1351a1e0fec037359c1f3>, at p. 25.

³⁶¹ *Maassen v. The Netherlands*, ECtHR 9 February 2021, app.no. 10982/15; *Zohlandt v. The Netherlands*, ECtHR 9 February 2021, app.no. 69491/16 and *Hasselbaink v. The Netherlands*, ECtHR 9 February 2021, app.no. 73329/16.

³⁶² The most recent one covers 2019, see *Monitor Discriminatiezaken 2019*: <https://mensenrechten.nl/nl/publicatie/5ea1351a1e0fec037359c1f3>.

³⁶³ *Monitor Discriminatiezaken 2018 – Tabellen* (Discrimination cases monitor 2018 – Tables), p. 19, available at: <https://mensenrechten.nl/nl/publicatie/5caf4b8be19c2154958b119>.

individual measure was taken in 5 % of all cases, a structural measure in 38 % of all cases and a combination of measures in 43 % of all cases (total follow-up 86 %).³⁶⁴

The local ADVs are not a (quasi) judicial institution. They do not hear complaints, but they may assist victims to bring complaints before the NIHR or the courts.

i) Registration by the bodies of complaints and decisions

In the Netherlands, the NIHR registers the number of complaints of discrimination and decisions (by ground, field, type of discrimination, etc.). These data are easily available to the public on the NIHR website.

The tables below show the number of requests for ETC/NIHR Opinions and the number of Opinions issued.

Number of requests for an ETC/NIHR Opinion³⁶⁵	
<i>Year:</i>	<i>Number of requests:</i>
2011	719
2012	634
2013	498
2014	463
2015	422
2016	463
2017	416
2018	510 ³⁶⁶
2019	541

In 2019 the majority of requests for an opinion related to discrimination on grounds of disability and chronic illness (25 %) and sex (22 %), followed by race (18 %), age (11 %) and nationality and religion (5 % each).³⁶⁷ Many requests do not result in an opinion, they may be declared inadmissible, closed or withdrawn by the claimant (sometimes after an agreement has been reached).

Number of opinions per ground (one opinion may cover multiple grounds)												
	2014		2015		2016		2017		2018		2019	
	N	%	N	%	N	%	N	%	N	%	N	%
Sex	43	24	23	15	30	20	32	20	41	28	22	16
Race	28	16	30	19	34	23	32	20	28	19	25	74 ³⁶⁸
Nationality	11	6	6	4	7	5	4	2	2	1	8	6
Religion	18	10	12	8	13	9	8	5	9	6	9	6
Sexual orientation	7	4	4	3	1	1	1	1	1	1	3	2
Civil status	0	0	0	0	0	0	0	0	1	1	2	1
Political beliefs	0	0	0	0	0	0	3	2	2	1	3	2
Philosophy of life	0	0	0	0	1	1	0	0	0	0	1	1
Part-time / full-time	3	2	0	0	1	1	2	1	2	1	4	3
Temp/perm. Employment	0	0	0	0	0	0	0	0	0	0	0	0
Disability/chronic illness	26	14	28	18	27	18	49	30	51	34	36	26
Age	31	17	32	21	25	17	41	25	22	15	32	23

³⁶⁴ *Monitor Discriminatiezaken 2019 – Tabellen* (Discrimination cases monitor 2019 – Tables), p. 18-19, available at <https://mensenrechten.nl/nl/publicatie/5ea1351a1e0fec037359c1f3>.

³⁶⁵ Discrimination cases monitor 2019 – Tables, p. 6. See the NIHR website, where all the annual reports are published, including case monitors and tables: www.mensenrechten.nl/nl/publicaties.

³⁶⁶ According to the NIHR, in 2018 there was an increase of complaints from Travellers, probably following the policy change on Traveller sites (<https://mensenrechten.nl/nl/discriminatiemonitor>).

³⁶⁷ Discrimination cases monitor 2019 – Tables (see footnote 360), p. 6.

³⁶⁸ This percentage is taken from the NIHR Discrimination cases monitor 2019 (footnote 360) but appears to be an error – 25 out of a total number of 140 opinions would amount to 18 % (25 opinions).

Number of opinions per ground (one opinion may cover multiple grounds)						
	2014	2015	2016	2017	2018	2019
Total number of opinions:	179	155	151	161	149	140

j) Roma and Travellers

The NIHR does not treat Roma and Travellers as a specific priority issue. A possible explanation could be that the social situation of Roma and Travellers in the Netherlands may not be so precarious (compared to other European countries) that it demands priority treatment. This is not to say Roma are not on the agenda of the NIHR. In recent years quite a number of successful complaints regarding housing (lack of trailer facilities) have been brought to the NIHR. In its Opinions the NIHR has consistently held that the 'extinction policy' pursued by many municipalities constitutes discrimination on grounds of race and violates the GETA (see above, Section 3.2.9). In 2018 the NIHR issued an advice to the Minister of the Interior and Kingdom Relations concerning trailer facilities for Travellers.³⁶⁹

Roma, Sinti and Travellers are not specifically mentioned in overviews of discrimination complaints by the ADVs.

³⁶⁹ *Advies aan minister van Binnenlandse Zaken en Koninkrijksrelaties inzake Woonwagen- en standplaatsenbeleid*, 28 March 2018, available at: <https://mensenrechten.nl/nl/publicatie/5b46fcdf748c2212a54517da>.

8 IMPLEMENTATION ISSUES

8.1 Dissemination of information, dialogue with NGOs and between social partners

- a) Dissemination of information about legal protection against discrimination (Article 10 Directive 2000/43 and Article 12 Directive 2000/78)

The equality bodies described in Section 7 (the local ADVs and the NIHR) play a core role in the dissemination of information about legal protection against discrimination. They have been provided with a specific legal mandate to do so.

An evaluation of the ADVs conducted in 2017 concluded that they were not always easy to find. In more than half of the municipalities the ADV was not (clearly) mentioned on the municipality's website. Several practical measures have been implemented, such as instructions to the municipalities, to increase public awareness of the ADVs.³⁷⁰

- b) Measures 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)

The Ministry of the Interior and Kingdom Relations (Department of Constitutional Affairs) co-ordinates all activities in the area of EU law implementation issues, since all equal treatment legislation is (also) seen as part of the general principle of equality and non-discrimination included in Article 1 of the Constitution. In this capacity and in cooperation with other ministries it often draws on the work and activities of NGOs. The NIHR also plays an important role in encouraging dialogue with NGOs with a view to promoting the principle of equal treatment.

- c) Measures to promote dialogue between social partners to give effect to the principle of equal treatment within workplace practices, codes of practice and workforce monitoring (Article 11 Directive 2000/43 and Article 13 Directive 2000/78)

The Ministry of Social Affairs and Employment is responsible for activities to enhance compliance with the equal treatment legislation, as far as this legislation applies to employment relationships. This Ministry has taken the initiative for a variety of activities to inform the general public about existing legal standards, to inform social partners and to stimulate their involvement in the implementation of the legal non-discrimination norms. In addition, the Ministry is actively engaged in promoting studies and surveys in this field.

- d) Addressing the situation of Roma and Travellers

No official body or agency exists that is specifically appointed to address Roma and Traveller issues at national level. However, in 2009-2010 the Government initiated co-ordination, mutual support and exchange of information between local authorities in which a substantial number of Roma people live.³⁷¹ A set of policy measures was drafted by the Dutch Government in 2011 to foster the social inclusion of Roma and Sinti people, as requested by the European Commission. In addition, the Dutch Government developed a qualitative monitoring instrument to measure the social inclusion of Roma and Sinti in the Netherlands. This instrument includes indicators such as education, employment, healthcare, housing and dialogue with local authorities. This monitor is updated every few years. From the latest report it appears that the social integration of Roma is still very problematic.³⁷²

³⁷⁰ Tweede Kamer 2019-2020, 30 590, no. 179, p. 4.

³⁷¹ See Tweede Kamer, 2008-2009, 31 700 XVIII, no. 90.

³⁷² See *Monitor Sociale Inclusie: meting 4. Derde vervolgmeting naar de woon- en leefomstandigheden van Roma en Sinti in Nederland* (Monitor on social inclusion: measurement 4. Third follow-up measurement of the housing and living situation of Roma and Sinti in the Netherlands), 2020:

8.2 Measures to ensure compliance with the principle of equal treatment (Article 14 Directive 2000/43, Article 16 Directive 2000/78)

a) Compliance of national legislation (Articles 14(a) and 16 (a))

To the author's knowledge there are no laws, regulations or administrative provisions in the Netherlands that are contrary to the principle of equal treatment, although this cannot be said with certainty where (potential) indirect discrimination could be concerned.

No specific measures have been taken to implement Article 14(a) Directive 2000/43/EC and Article 16(a) 2000/78/EC. However, any regulations or administrative provisions that are contrary to the norms laid down in the equal treatment legislation can be declared invalid by the courts because of their incompatibility with statutory legislation.³⁷³ If a provision contrary to the principle of equal treatment is laid down in a statutory act, it can be declared invalid if the courts find that the act is incompatible with the provisions of the Equality Directives or with non-discrimination provisions in international law (e.g. Article 14 ECHR or Article 26 ICCPR).

b) Compliance of other rules/clauses (Articles 14(b) and 16(b))

Article 9 GETA, Article 13 ADA and Article 11 DDA stipulate that 'agreements' (*bedingen*) which are in contravention of the equal treatment legislation shall be null and void. This also concerns collective agreements. The author of this report is not aware of any cases where agreements have been challenged on this ground.

<https://www.rijksoverheid.nl/documenten/rapporten/2020/02/29/monitor-sociale-inclusie-meting-4>. It must be noted that the researchers who wrote the report warned that significant differences exist between groups of Roma and Sinti in the Netherlands and that the findings in the report cannot be considered representative for all Roma in the Netherlands.

³⁷³ Dutch administrative law does not allow judicial review of legislation, however the validity of a legislative act can be assessed in the course of administrative proceedings directed against administrative decisions based on that act.

9 COORDINATION AT NATIONAL LEVEL

For various (legislative) procedures and the development of policies, frequent co-operation exists between the Ministries of the Interior and Kingdom Relations; Social Affairs and Employment; Education, Culture and Science; Health, Welfare and Sport; and Justice and Security. For some specific projects other ministries may be involved. The division of tasks is organised in the following way:

1. Equal treatment in employment: (inter alia: GETA, ADA, DDA and Equal Treatment Act Men/Women): Ministry of Social Affairs and Employment.
2. Age discrimination in employment: Ministry of Social Affairs and Employment.
3. General policies against racism: Ministry of Social Affairs and Employment.
4. Disability discrimination: Ministry of Health, Welfare and Sport.
5. General Equal Treatment Act, Constitutional provisions, general coordination of anti-discrimination policies: Ministry of the Interior and Kingdom Relations.
6. Criminal law provisions regarding discrimination, anti-discrimination policies for the police/public prosecution: Ministry of Justice and Security.
7. Emancipation policies for women and LGBT people: Ministry of Education, Culture and Science.³⁷⁴

The Ministry of the Interior and Kingdom Relations co-ordinates all the legislative activities because it is responsible for the implementation of the Constitution, which in Article 1 contains a general non-discrimination provision.

The anti-discrimination policies are also coordinated by the Ministry of the Interior and Kingdom Relations. The Ministry is responsible for municipal anti-discrimination services.

The latest National Action Programme against Discrimination was published in January 2016.³⁷⁵ This action programme brings together under a single umbrella various existing programmes and plans to combat discrimination and exclusion, such as the programmes mentioned above. It thus seeks to achieve a better overall view and strategy across all grounds of discrimination, including but not limited to those covered by the EU directives, to create more synergy and to improve cooperation between all the stakeholders involved.

With this programme the Government intends to respond to the current social context characterised by increasing tensions between 'various groups', as it is formulated, which calls for a clear message from the Government to combat exclusion and discrimination and improve cohesion. Which groups are meant is not specified.³⁷⁶ The programme identifies four main starting points: prevention and awareness-raising to promote an inclusive society, including the promotion of diversity in the labour market and combating stereotypes; strengthening cooperation and infrastructure to combat discrimination; paying more attention to policies and action at the local level; and supporting policies and actions through interdisciplinary knowledge and research on the causes of discrimination and the effectiveness of interventions.

The Government regularly informs parliament about its activities in the field of eradicating discrimination. For the past few years it has sent an annual letter on the 'Cabinet's

³⁷⁴ Emancipation is not defined, but in recent periods emphasis has been placed on promoting the norms and values of gender equality and LGBTI rights, including for women a focus on economic independence, 'women to the top' and a socially safe environment, and for LGBTI people social acceptance, in particular in bicultural and religious communities. See Minister of Education, Culture and Science, 20 January 2017, *Opbrengsten Emancipatiebeleid 2013-2017* ('Results of Emancipation policy 2013-2017'): <http://www.vrouwenbelangen.nl/cms/wp-content/uploads/2013/01/kamerbrief-over-opbrengsten-emancipatiebeleid-2013-2017-1.pdf>.

³⁷⁵ *Nationaal Actieprogramma tegen discriminatie* (National action programme against discrimination), Tweede Kamer, 2015-2016, 30 950, no. 84.

³⁷⁶ *Nationaal Actieprogramma tegen discriminatie* (National action programme against discrimination), Tweede Kamer, 2015-2016, 30 950, no. 84.

approach to discrimination' (*Kabinetsaanpak discriminatie*), indicating several focus areas and measures being taken. In 2020 these measures included:³⁷⁷

- strengthening the local Anti-Discrimination Services (ADVs) and local anti-discrimination policies, *inter alia* by increasing awareness of the ADVs and cooperation with the police to ensure that complaints of discrimination are registered with the correct body;
- continuing the Reporting Point for Internet Discrimination (*Meldpunt Internet Discriminatie*);
- improving the cooperation between the police, Public Prosecutor's Office, local Anti-Discrimination Services and the NIHR to ensure low-threshold procedures for reporting discrimination;
- implementation of a 'diversity and inclusion' perspective within the police;
- a variety of measures to combat discrimination in education (especially in primary and secondary education), for example the distribution of learning materials about themes such as diversity, stereotypes and discrimination; participation of schools in 'Gender & Sexuality Alliances' (together with associations of LGBTIQ+ people) and a website on how to improve the accessibility of technical and vocational education for students with a disability (www.mbotogankeljk.nl);
- measures to combat discrimination in the housing market, including awareness-raising measures and continued monitoring through the use of mystery shopping and situation testing;
- projects and policies to combat specific forms of discrimination, in particular anti-Semitism, racism in football, racism against people of African descent and discrimination against Muslims.

In addition to the general national action plan against discrimination, a comprehensive action plan against labour market discrimination has been in place since 2014, targeting discrimination on the grounds of age, disability, race/ethnic origin, sex and sexual orientation.³⁷⁸ The plan comprised dozens of measures, ranging from pre-existing Government policies and already proposed legislative changes to new policy proposals. In 2018 a new action plan was published for the period 2018-2021.³⁷⁹ This plan focuses on combating discrimination in recruitment and selection processes, but also addresses the pay gap and pregnancy discrimination. The Minister of Social Affairs and Employment reports regularly to parliament on the implementation of the action plan. The latest report dates from 6 July 2020.³⁸⁰

Action plans and programmes also exist for discrimination related to specific grounds, such as the Unlimited Participation Programme! (*Programma Onbeperkt Meedoen!*) (for people with disabilities) and the Action Plan on Safety for LGBTI people (*Actieplan Veiligheid LHBTI's*).³⁸¹

In December 2020, the Minister of the Interior announced that she would investigate the possibility of instituting a national coordinator on discrimination and racism as well as a state commission (*staatscommissie*) on discrimination and racism.³⁸² During a debate on institutional racism held in July 2020 the Second Chamber of Parliament had adopted several motions asking the Minister to look into new mechanisms to strengthen the Government's efforts to tackle (racial) discrimination.³⁸³

³⁷⁷ Tweede Kamer 2019-2020, 30 950, no. 185.

³⁷⁸ Tweede Kamer 2013-2014, 29 544, no. 523.

³⁷⁹ Tweede Kamer 2017-2018, 29 544, no. 834.

³⁸⁰ Tweede Kamer 2019-2020, 29 544, no. 1018.

³⁸¹ Brief updates on these action plans were included in the 2020 letter to Parliament on the Cabinet's approach to discrimination, see Tweede Kamer 2019-2020, 30 950, no. 185, p. 19-21. The latest separate update on the action plan on disability was published in 2019, see Tweede Kamer 2018-2019, 24 170, no. 172.

³⁸² Tweede Kamer 2020-2021, 30 950, no. 216.

³⁸³ Handelingen 2019-2020, no. 90, item 8.

10 CURRENT BEST PRACTICES

- Integrated reporting on discrimination. The annual publication 'Discrimination reports' (*Discriminatiecijfers*) combines information on reports of discrimination received by the police, the local Anti-Discrimination Services, the NIHR and the Reporting Point for Internet Discrimination.³⁸⁴ By bringing together the information from these different actors a better picture is obtained of the occurrence of discrimination in the Netherlands.
- The National Action Plan for Greater Diversity and Inclusion in Higher Education and Research, which was presented in September 2020 (see also Section 2.3.1).³⁸⁵ One of the positive aspects of this action plan is the aim of monitoring the representation of students and staff with a migration background or who belong to ethnic minorities, with the objective of increasing their participation.

Use of situation testing. Following reports of discrimination in the housing market (in particular on the ground of racial or ethnic origin) the Government has actively adopted the use of situation testing (including mystery shoppers and 'correspondence tests') to monitor discrimination in this area.³⁸⁶

- The Dutch Government has been quite active in developing guarantees against discrimination resulting from the use of artificial intelligence.³⁸⁷ Most policy initiatives in this area aim to increase knowledge about the risks involved in the use of artificial intelligence and translate such knowledge into guidelines for (public) organisations. One notable initiative concerns the development of a Guideline on non-discrimination by design (*Handreiking AI-systeemprincipes voor non-discriminatie*) which will translate legal non-discrimination norms into design principles for systems based on artificial intelligence. The Guideline, which will be ready in 2021, is being developed by one of the Dutch universities on request of the Ministry of the Interior and in cooperation with the NIHR.³⁸⁸
- The Black Lives Matter movement and protests following the death of George Floyd in the United States appear to have increased awareness of (institutional) racial discrimination in Dutch political debate. In July 2020, the Second Chamber of Parliament held a debate on institutional racism. At the end of the debate the Chamber adopted several motions calling, *inter alia*, for the appointment of a national coordinator for discrimination and racism. The Government has said it will investigate this possibility (see Section 9 above).

³⁸⁴ The latest report, on discrimination in 2019, was published as an Annex to Tweede Kamer 2019-2020, 30 950, no. 185.

³⁸⁵ National action plan on greater diversity and inclusion in higher education and research (*Nationaal actieplan voor meer diversiteit en inclusie in het hoger onderwijs en onderzoek*), published as Annex to Tweede Kamer 2019-2020, 29 338, no. 220.

³⁸⁶ Tweede Kamer 2020-2021, 30 950, no. 217, p. 42-43.

³⁸⁷ See for example Tweede Kamer 2019-2020, 26 643, no. 641 and Tweede Kamer 2020-2021, 26 643, no. 726.

³⁸⁸ See <https://www.digitaleoverheid.nl/nieuws/handreiking-voor-ontwikkeling-niet-discriminerende-ai/>.

11 SENSITIVE OR CONTROVERSIAL ISSUES

11.1 Potential breaches of the directives at the national level

- The accumulative conditions in the 'harassment' definition may be considered to fall short of the directives' 'non-regression' clause (see Section 2.4 of the report).
- Arguably, the Dutch Government interprets the prohibition of an 'instruction to make a distinction' unduly narrowly, including in relation to the 'scope of liability' for this type of discrimination (see Section 2.5 of the report).
- The use of risk profiles which include the criterion 'of non-Dutch origin' could be in contravention of Directive 2000/43/EC (see Section 3.2.5 of the report). These risk profiles are used by municipalities and the Social Insurance Institute (*Sociale Verzekeringsbank*) when investigating the foreign assets of welfare recipients. One risk is that in certain municipalities the criterion 'of non-Dutch origin' puts at a disadvantage persons who belong to one or more specific ethnic minorities which, in the view of the author and for the reasons explained in Section 3.2.5, would amount to indirect ethnic discrimination contrary to the RED. According to case law of the Central Appeals Tribunal, investigations may also focus on persons of one particular ethnic origin provided that this forms part of a phased investigation in which other countries of origin are also investigated. It is as yet unclear, however, whether it is required for all countries of origin to be included in the investigation and whether sufficient guarantees exist against the singling out of a few specific countries. It is also unclear whether such 'phased investigation' of particular ethnic groups is allowed under the RED as there is not yet any CJEU case law on this point.

11.2 Other issues of concern

- A general issue of concern remains the polarisation in Dutch society between various minority and majority groups which seems to exacerbate exclusion and discrimination, in particular on the ground of racial/ethnic origin. At the end of 2020 two political parties with openly xenophobic agendas were represented in the Dutch Parliament (*Partij voor de Vrijheid* and *Forum voor Democratie*); youth members of the latter party are also known to have shared anti-Semitic conspiracy theories and other extremist ideas on internal social media fora.³⁸⁹
- Another general issue of concern regarding the implementation and practical application of the anti-discrimination directives at national level is the gap between the law in the books and realities on the ground. Overall Dutch legislation to combat discrimination is up to European and international standards, but the prevalence of discrimination is still of grave concern. At the end of 2020, the Dutch Senate announced that it would start a parliamentary investigation into the effectiveness of the Dutch equal treatment legislation.³⁹⁰
- A more specific issue of concern relates to the childcare benefits scandal (*Toeslagenaffaire*) (see Section 3.2.6). During this scandal recipients of childcare benefits were selected for fraud investigations based on a risk profile that included 'dual nationality', which in the Netherlands is a proxy for racial or ethnic origin. The case presents a clear example of institutional discrimination and raises questions as to the use of similar risk profiles by other government agencies. Although the Netherlands stopped registering dual nationality in 2014, it turned out that the Tax Office had kept a data file in which second nationalities were still registered.
- The partially reversed burden of proof is not applicable in case of victimisation claims, which falls short of EU requirements (see Section 6.4 of the report).

³⁸⁹ Hendrickx, F. (2020) 'Onrust bij Forum over racisme en antisemitisme in jongerenclub', *De Volkskrant* 22 November 2020.

³⁹⁰ <https://www.eerstekamer.nl/commissies/tcvpo>.

12 LATEST DEVELOPMENTS IN 2020

12.1 Legislative amendments

- None (various legislative amendments have been announced, but none were adopted in 2020).

12.2 Case law

Relevant discrimination ground(s): age

Name of the court: Supreme Court (*Hoge Raad*)

Date of decision: 24 January 2021

Name of the parties: ABN AMRO v. X.

Reference number: ECLI:NL:HR:2020:114

Link: <http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:HR:2020:114>

Brief summary: In this judgment the Supreme Court refined the objective justification test in cases of presumed age discrimination resulting from a social plan (*sociaal plan*). Such social plans often stipulate that employees who reach the statutory pensionable age are no longer eligible for transition severance pay. In the present judgment, the Supreme Court held that a certain level of deference is required when applying the objective justification test (including the requirements of legitimate aim, appropriateness and necessity) to distinctions in social plans that are the result of negotiations and a balancing of interests by the social partners (employers and trade unions). The Supreme Court also found that, in assessing the appropriateness and the necessity of the measures at stake, the Court of Appeal should have taken account of each of the legitimate aims pursued by the social plan instead of just one of those aims.

Relevant discrimination ground(s): disability

Name of the court: Court of Appeal Den Bosch (*Gerechtshof Den Bosch*)

Date of decision: 30 June 2020

Name of the parties: n/a

Reference number: ECLI:NL:GHSHE:2020:1978

Link: <http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:GHSHE:2020:1978>

Brief summary: The Court of Appeal found that the shoulder injury suffered by the applicant did not qualify as a disability, as the applicant had been able to perform his job normally with the exception of the periods of recovery following surgery. Regarding the question of what constitutes a disability, the Court of Appeal referred extensively to CJEU case law, as well as to the CRPD and to the legislative history of the DDA. Nevertheless, the Court's reasoning focused on the medical factors relating to the applicant's impairment (see also Section 2.1.1 under c).

Relevant discrimination ground(s): disability

Name of the court: District court Northern Holland (*Rechtbank Noord-Holland*)

Date of decision: 14 July 2020

Name of the parties: n/a

Reference number: ECLI:NL:RBNHO:2020:5426

Link: <http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBNHO:2020:5426>

Brief summary: In another case a district court did find discrimination on the ground of disability but also focused its assessment on the impairments of the applicant.³⁹¹ The court established that the applicant's ability to work was limited due to severe injuries sustained in a work-related accident and therefore considered that the applicant could claim to have a disability. It found that the applicant had been dismissed because of his disability and ordered the employer to pay compensation.

³⁹¹ District court Northern Holland 14 July 2020, ECLI:NL:RBNHO:2020:5426.

The applicant in this case was a bus driver whose ability to work was limited due to severe injuries sustained in a work-related accident. The applicant was dismissed and was able to establish a presumption of discrimination on the ground of disability. The employer was not able to show that the dismissal had been based on objective and reasonable grounds. The applicant was awarded EUR 7 500 'reasonable compensation' (*billijke vergoeding*) because of the discriminatory dismissal (see also Section 2.1.1 under c).

Relevant discrimination ground(s): racial or ethnic origin

Name of the court: Central Appeals Tribunal (*Centrale Raad van Beroep*)

Date of decision: 23 June 2020

Name of the parties: n/a

Reference number: ECLI:NL:CRVB:2020:1431

Link: <http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:CRVB:2020:1431>

Brief summary: This case concerned investigations by municipal authorities responsible for social assistance into the foreign assets of welfare recipients. The Central Appeals Tribunal found that municipalities may apply different risk profiles to persons 'of Dutch origin' and persons 'of non-Dutch origin' when investigating foreign assets. The Tribunal referred to earlier case law where it had already decided that municipalities may differentiate between persons of Dutch origin and persons of non-Dutch origin when determining the target group of an investigation (ECLI:NL:CRVB:2015:1229 and ECLI:NL:CRVB:2019:2613). In this judgment the Tribunal specified that this means that municipalities may also differentiate in the application of risk profiles.

Relevant discrimination ground(s): religion

Name of the court: District court Amsterdam (*Rechtbank Amsterdam*)

Date of decision: 10 January 2020

Name of the parties: n/a

Reference number: ECLI:NL:RBAMS:2020:575

Link: <http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBAMS:2020:575>

Brief summary: The applicant was awarded over EUR 3 200 'reasonable compensation' (*billijke vergoeding*) after the court found that she had been dismissed from her traineeship because of her religion. The employer had asked the applicant to remove her headscarf, which she had refused to do. The court found that the employer had not acted with 'serious negligence' (*ernstige verwijtbaarheid*) when it told the applicant that she had 'crossed a line' and that her traineeship would not be prolonged after she had made a report to the local Anti-Discrimination Service.

Relevant discrimination ground(s): religion

Name of the court: District court Central Netherlands (*Rechtbank Midden-Nederland*)

Date of decision: 7 October 2020

Name of the parties: n/a

Reference number: ECLI:NL:RBMNE:2020:4307

Link: <http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBMNE:2020:4307>

Brief summary: A dental surgeon refused to continue to treat the applicant (who had already been anaesthetised) after she indicated that she did not wish to shake his hand because of her religious beliefs. The court found that the dental surgeon had discriminated against the applicant because of her religion and issued a declaration to the effect that the surgeon had acted unlawfully. The court did not award compensation because the damages claimed by the applicant could not be substantiated or had already been paid by the surgeon.

Relevant discrimination ground(s): racial or ethnic origin

Name of the court: Netherlands Institute for Human Rights

Date of decision: 19 March 2020

Name of the parties: n/a

Reference number: NIHR 2020-24

Link: <https://mensenrechten.nl/nl/oordeel/2020-24>

Brief summary: The complainant, a Traveller, had been on a waiting list for a caravan site in the region of Holland Rijnland for six years and had no indication as to how much longer she would have to wait. In 2018 the Minister of the Interior issued a new policy framework on caravan sites, under which local authorities are no longer allowed to maintain 'extinction policies' aimed at eliminating caravan sites within their localities (see further Section 3.2.9). In this case the local authorities argued that they had allocated the available caravan sites according to the applicable priority rules and this meant that the woman was not yet eligible for a site. However, the NIHR found that the authorities should have investigated the need for caravan sites within their locality and, if necessary, should have adopted a policy aimed at the creation of additional sites. By failing to do so the authorities had discriminated against the complainant on the ground of her racial or ethnic origin.

Relevant discrimination ground(s): disability

Name of the court: Netherlands Institute for Human Rights

Date of decision: 27 July 2020

Name of the parties: n/a

Reference number: NIHR 2020-62

Link: <https://mensenrechten.nl/nl/oordeel/2020-62>

Brief summary: An advertising company refused to hire a woman for an internship because of her disability. The woman had Ehlers-Danlos syndrome, a chronic illness which required her to take extra breaks. The company considered that its tight planning did not allow for this and considered that the work would be too onerous for the complainant. The NIHR found discrimination on the ground of disability because the company failed to ask the complainant about her needs and did not involve her in determining what type of accommodation, she would have needed to be able to do the job.

Relevant discrimination ground(s): racial or ethnic origin

Name of the court: Netherlands Institute for Human Rights

Date of decision: 27 August 2020

Name of the parties: n/a

Reference number: NIHR 2020-76

Link: <https://mensenrechten.nl/nl/oordeel/2020-76>

Brief summary: The complainant was required by her employer to participate in a coaching course. As part of this course, she was assessed by means of a 'cultural screening' test, whereby personal characteristics were linked to specific nationalities. The test aimed to give participants a better insight into their own personality and ways of relating to others. The employee complained that she had been assessed as 'too Surinamese' for her job and that this had been a reason for not extending her employment contract.

The NIHR found no evidence that the test results had played a role in the decision to end the complainant's contract, but it did find discrimination on the grounds of racial or ethnic origin because the employer had failed to adequately address the complaint made by the employee. The NIHR further issued a recommendation, in which it pointed out the risk of stereotyping involved in the use of 'cultural screening' tests such as the one at issue and stressed the need to use such tools carefully and with adequate communication as to how they work. Although the foundation had already indicated that it would no longer use the cultural screening test, the NIHR stated that such tests are commonly used which was the reason to issue the recommendation, nevertheless.

ANNEX 1: MAIN TRANSPOSITION AND ANTI-DISCRIMINATION LEGISLATION

Country: Netherlands
Date: 31 December 2020

Title of the Law: General Equal Treatment Act

Abbreviation: GETA

Date of adoption: 2 March 1994

Entry into force: 1 September 1994

Latest relevant amendments: 1 November 2019

Web link: <http://wetten.overheid.nl/BWBR0006502>

Grounds covered: Race, religion & belief, political opinion, hetero- or homosexual orientation, sex (including gender), nationality and civil (or marital) status

Civil

Material scope: Employment relationships (both civil and public), occupational training and education, goods and services (including general education) + liberal professions

Principal content: Prohibition of direct and indirect discrimination

Title of the Law: Disability Discrimination Act

Abbreviation: DDA

Date of adoption: 3 April 2003

Entry into force: 1 December 2003

Latest relevant amendments: 14 June 2016

Web link: <http://wetten.overheid.nl/BWBR0014915>

Grounds covered: Disability and chronic disease

Civil

Material scope: Employment relationships (both civil and public), occupational training and education + liberal professions + goods and services (including general education)

Principal content: Prohibition of direct and indirect discrimination

Title of the Law: Age Discrimination Act

Abbreviation: ADA

Date of adoption: 17 December 2003

Latest relevant amendments: 10 July 2014

Entry into force: 1 May 2004

Web link: <http://wetten.overheid.nl/BWBR0016185>

Grounds covered: Age

Civil

Material scope: Employment relationships (both civil and public), occupational training and education + liberal professions

Principal content: Prohibition of direct and indirect discrimination

ANNEX 2: INTERNATIONAL INSTRUMENTS

Country: Netherlands
Date: 31 December 2020

Instrument	Date of signature	Date of ratification	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	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	NA	Yes
International Covenant on Economic, Social and Cultural Rights	25.6.1969	11.12.1978	No	No	Yes
Convention on the Elimination of All Forms of Racial Discrimination	24.10.1966	10.12.1971	No	Yes	Yes
ILO Convention No. 111 on Discrimination	unknown	15.3.1973	No	NA	Yes
Convention on the Rights of the Child	26.1.1990	6.2.1995	No	No	Yes
Convention on the Rights of	30.3.2007	14.6.2016	No	No	Yes

Instrument	Date of signature	Date of ratification	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?
Persons with Disabilities					

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