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Country report

Gender equality

Netherlands

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Country report

Gender equality

How are EU rules transposed into national law?

Netherlands

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Reporting period 1 January 2022 – 1 January 2023

2023 Directorate-General for Justice and Consumers

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1 Introduction

1.1 Basic structure of the national legal system

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

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

The Netherlands also has an equality body, the Netherlands Institute of Human Rights (NIHR), which gives opinions on equal treatment legislation. However, its opinions are not legally binding.

1.2 List of main legislation transposing and implementing the directives

- Act on the Institute for Human Rights.[1] This Act has partly been enacted to implement Resolution A/RES/48/134 of the General Assembly of the United Nations of 20 December 1993 on national institutes for the promotion and protection of human rights; Recommendation R (97) 14 of the Committee of Ministers of the Council of Europe of 30 September 1997 on the establishment of independent national human rights bodies; Directive 2000/43/EC on equal treatment on the basis of race or ethnic origin; Directive 2004/113/EC on equal treatment of men and women in the access to and supply of goods and services; and Directive 2006/54/EC on equal treatment of men and women in matters of employment and occupation.

- General Equal Treatment Act (GETA).[2] The GETA aims to implement Article 1 of the Dutch Constitution (the principle of equal treatment). Furthermore, parts of the GETA aim to implement EU law. Article 1a on harassment, for example, transposes Directive 2004/113; Article 6a on membership of employers' organisations and trade unions transposes (in part) Directive 2000/78; Article 7a on social protection aims to implement the Racial Equality Directive (2000/43); Article 8a on victimisation transposes Directive 2000/78; and Article 10 on the burden of proof also aims to implement Directive 2000/78.

- Act on Equal Treatment of Men and Women (ETA).[3] This Act was adopted in order to transpose Directive 76/207 on equal treatment of men and women. In 2006 the ETA was modified in order to transpose Directive 2002/73/EC.

- Civil Code, Article 7:646 (prohibiting sex discrimination in employment relationships) and Article 7:670(2) (prohibiting the termination of the employment relationship during pregnancy, maternity leave and six weeks after resuming work). Article 7:646 was adopted in order to transpose Directive 76/207 and was later revised in order to transpose Directive 2002/73.

[1] Act on the Institute for Human Rights (*Wet College Rechten voor de Mens*), 2012 Stb. 2011, 573.
[2] General Equal Treatment Act (*Algemene Wet Gelijke Behandeling*), 1994 Stb. 1994, 230.
[3] Act on Equal Treatment of Men and Women (*Wet Gelijke Behandeling van mannen en vrouwen*), 1980 Stb. 1980, 86.

- Work and Care Act.[4] This Act contains provisions on pregnancy leave, parental leave, care leave, adoption leave and paternity leave and implements in part Directive 2019/1158. Most provisions in the Work and Care Act already existed when the Directive was adopted, but a number of changes have been made following the Directive.

- Civil Code, Article 2:142b (obligation for listed companies to ensure that one-third of their supervisory boards consist of women and one-third of men), Articles 2:166(2) and 2:276(2)[5] (obligation for large corporations to set appropriate and ambitious objectives in the form of a target to make the numbers of men and women on the management board, the supervisory board and in senior positions more balanced) and Articles 2:166(4) and 2:276(4)(obligation for large companies to report in their annual report about their diversity policy and the extent to which the targets mentioned in Article 2:166(2) and Article 2:276(2) have been met). These articles do not implement Directive 2022/2381, as the Directive was adopted after their entry into force, but the Dutch legislature was inspired by draft Directive 2022/2381.[6]

1.3 Sources of law

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

- The Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW). CEDAW does not have direct effect as a whole, but courts have ruled that some articles – especially Article 11(2)(b) on maternity leave and Article 7 (right to vote and to be elected) – do have direct effect.

- EU law. EU Regulations apply directly in Dutch law; EU directives must be transposed into Dutch law.

- Article 1 of the Dutch Constitution. This Article stipulates that the Government must treat all citizens equally and forbids discrimination on all relevant grounds.

- General Equal Treatment Act.

- Act on Equal Treatment of Men and Women.

- Civil Code, Article 7:646 (prohibiting sex discrimination in employment relationships) and Article 7:670(2) (prohibiting the termination of employment relationships during pregnancy, maternity leave and six weeks after resuming work).

- Civil Code, Article 2:142b (obligation for listed companies to ensure that one-third of their supervisory boards consist of women and one-third of men), Articles 2:166(2) and 2:276(2)[7] (obligation for large corporations to set appropriate and ambitious objectives in the form of a target to make the numbers of men and women on the management board, the supervisory board and in senior positions more balanced) and Articles 2:166(4) and 2:276(4)(obligation for large companies to report in their annual report about their diversity policy and the extent to which the targets mentioned in Article 2:166(2) and Article 2:276(2) have been met).

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

5 Article 2:166 applies to public limited liability companies and Article 2:276 to private limited liability companies.

6 The explanatory memorandum to the law proposal which introduced the articles mentioned here into the Civil Code explicitly refers to EU law and EU policy. See the Parliamentary Documents (*Kamerstukken*) II, 35 628, No. 3, pp. 15-17, available at https://zoek.officielebekendmakingen.nl/kst-35628-3.html.

7 Article 2:166 applies to public limited liability companies and Article 2:276 to private limited liability companies.

- Work and Care Act.

- Case law by the civil and administrative courts.

- Opinions by the Netherlands Institute of Human Rights (NIHR). This is the main Dutch equality body. These opinions are not legally binding.

1.4 Main surveys, reports on gender equality and other issues

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

Peter Vas Nunes, a former attorney-at-law (now retired), published an extensive, 870-page handbook on almost all aspects of equality law in the Netherlands. The central concepts of gender equality are mentioned in this book, but the book is more practical than theoretical.[8]

In 2020 the Minister of Home Affairs submitted a draft law proposal for an online consultation. The law proposal aims to change the expression 'hetero- or homosexual orientation' in the General Equal Treatment Act and in the Criminal Code to 'sexual orientation'.[9] The proposal is, inter alia, based on three expert reports, by Marjolein van den Brink and Jet Tigchelaar from Utrecht University, Pieter Cannoot from Gent University (Belgium) and the NIHR.[10] In these reports, in particular those by Van den Brink & Tigchelaar and Cannoot, it was observed that people no longer recognise themselves in closely defined categories as being heterosexual or homosexual, but that gender and sexuality have become more and more fluid concepts. Gender is more often seen as a 'continuum', which may differ from one person to another and which can sometimes change over time, rather than as an unchangeable given. This view has now been endorsed by the Government.

The Government has created a subsidy scheme for the years 2022-2027 for activities that are directed at the achievement of gender equality or LGBTI+ equality. The scheme also contains a definition of LGBTI+: lesbian women, homosexual men, bisexual people, transgender persons, intersex persons and persons and groups who experience or wish to express a different sexual orientation or gender identity, not mentioned in the above terms, including those who regard themselves as non-binary, queer or asexual.[11]

In society there are several groups, mainly from the extreme right, who organise protests against anything that falls outside the binary distinction between men and women. They state that there are only two types of biological gender – male and female – and that children should not get information about other forms of gender. These groups also oppose the proposal for the Transgender Act, which would make it possible for people to change their gender in official documents, without a statement by an expert that their transition

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

9 Law proposal 'Modification of the GETA and the Criminal Code regarding the notion of sexual orientation and gender identity' (*Wijziging Awgb en WvSr t.a.v. seksuele gerichtheid en genderidentiteit*). Available at: https://www.internetconsultatie.nl/awgbseksuelegerichtheid.

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

11 'Subsidieregeling gender- en LHBTI+-gelijkheid 2022–2027', 7 February 2022, *Staatscourant* 2022, 4908.

is real.[12] 'Gender' in this way becomes more and more polarised. For example, organisations that provide information to children about homosexuality and about being transgender, non-binary or other forms of gender fluidity, are attacked on social media these days and are confronted with demonstrations. This debate is not yet mainstream, but it cannot be ruled out that this could happen in the future, as the conservative way of thinking is embraced by populist political parties and by political parties with a religious background. According to political scientist Eelco Harteveld, gender is the topic about which there is most polarisation at the moment.[13]

[12] Law proposal 'Modification of the Transgender Act' (*Wijziging Transgenderwet*), TK 2020-2021, 35825. Available at: https://zoek.officielebekendmakingen.nl/kst-35825-3.html.

[13] Harteveld, E. (2022) 'Polarisatie in Nederland: hoe verdeeld zijn we?' (Polarisation in the Netherlands: how divided are we?), interview on the website of the University of Amsterdam, 2 February 2022: https://www.uva.nl/shared-content/faculteiten/nl/faculteit-der-maatschappij-en-gedragswetenschappen/nieuws/2022/02/polarisatie-in-nederland-hoe-verdeeld-zijn-we.html.

2 General legal framework

2.1 Constitution

2.1.1 Constitutional ban on sex discrimination

Article 1 of the Constitution of the Netherlands stipulates that the Government must treat all citizens equally and forbids discrimination on, among other things, the ground of sex. The first part of the Article contains a commandment to the legislature, the administration and the judiciary to refrain from unequal treatment, whereas the second part can be seen as a reflection of the principle of equality. It is important to note that in the Netherlands, courts cannot judge whether laws are in conformity with the Constitution – this is forbidden by Article 120 of the Constitution. Therefore, Dutch courts often refer to international conventions when determining whether a statutory regulation violates the principle of non-discrimination.

2.1.2 Other constitutional protection of equality between men and women

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

2.2 Equal treatment legislation

The Netherlands has specific equal treatment legislation in regard to sex discrimination. Article 5 of the GETA[14] forbids discrimination in the field of employment, Article 6 GETA in the field of the liberal professions, Article 6a GETA in the area of associations of employers, employees and in professional organisations, Article 7 in the field of goods and services and Article 7a in the area of social protection, including social security and social advantages. The Act on Equal Treatment of Men and Women (ETA)[15] prohibits sex discrimination in the field of employment and pensions, both in the private and in the public sector. Article 7:646 of the Dutch Civil Code (DCC) specifically prohibits sex discrimination in the private sector.

The GETA also prohibits discrimination on other grounds: religion, beliefs, political affiliation, race/ethnic origin, nationality, hetero or homosexual orientation, and marital status. The Equal Treatment Act on the Ground of Age[16] prohibits age discrimination and the Equal Treatment Act on the Grounds of Disability or Chronic Illness[17] forbids discrimination on these grounds. The Dutch Civil Code contains specific articles that relate to discrimination on the grounds of full-time or part-time work (Article 7:648) and the temporary character of an employment agreement (Article 7:649).

[14] General Equal Treatment Act (*Algemene Wet Gelijke Behandeling*), 1994 Stb. 1994, 230.
[15] Act on Equal Treatment of Men and Women (*Wet Gelijke Behandeling van mannen en vrouwen*), 1980 Stb. 1980, 86.
[16] Equal Treatment Act on the Ground of Age (*Wet Gelijke Behandeling op grond van leeftijd*), 2003 Stb. 2004, 30.
[17] Equal Treatment Act on the Grounds of Disability or Chronic Illness (*Wet Gelijke Behandeling op grond van handicap of chronische ziekte*), 2003 Stb. 2003, 206.

3 Implementation of central concepts

3.1 Sex/gender/transgender

3.1.1 Definition of 'gender' and 'sex'

The terms gender and sex are not defined in the Dutch national legislation or in case law.

3.1.2 Protection of transgender, intersex and non-binary persons

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

Table 1: Protection of transgender, intersex and non-binary persons

Are gender identity/transgender status/intersex status/sex characteristic etc. specific grounds of prohibited discrimination?	**Is discrimination against transgender, intersex and non-binary persons forbidden on the basis of the existing prohibition on sex discrimination?**
Sex characteristics, gender identity and gender expression are explicitly mentioned in Article 1(2) GETA	Discrimination against transgender, intersex and non-binary persons is forbidden on the basis of Article 1(2) GETA. This Article applies to any person who occupies a place on the man/woman continuum that is difficult or impossible to translate into being a 'woman' or a 'man' in the classic conception of those terms.[18]

3.1.3 Specific requirements

Transgender persons are not required to undergo gender reassignment surgery before they are protected by non-discrimination law nor are they required to change their legal gender. They do have to submit an expert certificate, issued by a designated doctor or psychologist, which shows that they have a lasting conviction that they belong to the other sex. A law proposal has been submitted to Parliament in order to remove this requirement.[19]

3.2 Direct sex discrimination

3.2.1 Explicit prohibition

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

Direct sex discrimination, or as is stated in Dutch law, 'direct distinction', is defined as treating a person differently from another person in a comparable situation on the ground of sex. In the author's view this definition complies with the EU definition. The only

[18] Explanatory Memorandum to the Act on the clarification of the legal position of transgender persons and intersex persons (*Memorie van toelichting bij de Wet verduidelijking rechtspositie transgender personen en intersekse personen*), TK 2016-2017, 34650, No. 3, p. 11. Available at https://zoek.officielebekendmakingen.nl/kst-34650-3.html.

[19] Law proposal on Modification of the Transgender Act (*Wijziging Transgenderwet*), TK 2020-2021, 35825. Available at: https://zoek.officielebekendmakingen.nl/kst-35825-3.html.

difference is that Dutch law uses the term 'distinction' instead of 'discrimination', but this has no practical implications. See, for example, the judgments by the Supreme Court of 3 January 1997,[20] in a case dealing with indirect pay discrimination, and of 18 December 2015 on indirect discrimination in a pension scheme.[21]

3.2.2 General discrimination

The GETA and ETA forbid discrimination on the ground of sex in various areas. Neither law specifically addresses certain parties, but they both stipulate that discrimination on the ground of sex is prohibited in the field of employment, the liberal professions, in the area of associations of employers, employees and in professional organisations, in the field of goods and services and in the area of social protection, including social security and social advantages. As such, general discrimination is forbidden.

General gender discrimination has also been the subject of case law in the Netherlands. An example is the legal procedure against the SGP (Reformed Political Party) by Bureau Clara Wichmann[22] and other women's associations. The SGP is a conservative political party that bases its policies on the literal text of the bible. The SGP mentioned in its articles of association that it is not possible for women to be candidates for the party. No individual women who were members of the SGP dared to step forward and start legal proceedings. Therefore, Bureau Clara Wichmann and other organisations proceeded on the basis of Article 3:305a of the Dutch Civil Code, which makes it possible for associations or foundations with full legal capacity to submit a claim that aims to protect similar interests of other persons, insofar as these organisations represent these interests pursuant to their articles of association. The claim of Bureau Clara Wichmann and others was found admissible and after five years of legal procedures, the Supreme Court ruled that the Dutch state could not tolerate the discrimination practised by the SGP.[23] This opinion was confirmed by the European Court of Human Rights.[24] Since that judgment the SGP tolerates that women run for election – at least for local elections for the city council – but the official point of view is still that women are not suited for politics and the articles of association have not been adjusted. The Dutch State did not take any measures to enforce this. However, there have been changes in the SGP itself. More and more women step forward to run for a place in the city council and to plead for more political involvement of women.

A victim of general discrimination can complain to a court or to an equality body. Associations or foundations can also start legal proceedings. Possible claims are a request for a declaration in law, the fulfilment of an agreement, a ban on certain actions and/or damages. In addition, both individual victims of discrimination and associations can also ask the equality body (the NIHR) for an opinion.

3.2.3 Prohibition of pregnancy and maternity discrimination

Discrimination on the grounds of pregnancy and maternity is explicitly prohibited as a form of direct sex discrimination in Article 1(2) GETA, Article 1(2) ETA and Article 7:646(5)(b) of the Dutch Civil Code. These provisions comply with Article 2(2)(c) of Directive 2006/54.

[20] Supreme Court, 3 January 1997, *JAR* 1997/24.
[21] Supreme Court, 18 December 2015, ECLI:NL:HR:2015:3628.
[22] Bureau Clara Wichmann - formerly the Fund for Test Cases Clara Wichmann – is an NGO that strives for gender equality and a better social and legal position for women in the Netherlands. For more information, see https://clara-wichmann.nl/.
[23] Supreme Court, 9 April 2010, ECLI:NL:HR:2010:BK4549.
[24] Detailed information about the SGP case and further references to the relevant judgments can be found on the Bureau Clara Wichmann website: https://clara-wichmann.nl/rechtszaken/sgp-en-het-kiesrecht/.

3.2.4 Specific difficulties

There are no specific difficulties.

In the past the NIHR proposed to insert into the law an exception to the closed system of justification, because the application of this system sometimes produced too harsh results. However, in its evaluation of December 2017 the NIHR concluded that in the previous five years it had only been necessary to deviate from the closed system two or three times. In those cases, the NIHR was able to resolve the matter on the basis of a flexible interpretation of the existing legislation. According to the NIHR an exception to the closed system is therefore no longer necessary.[25]

An interesting example in this respect is the opinion of the NIHR in a case against the cosmetics company, Rituals. This company obliged female staff in the shops to wear Rituals make-up, whereas men did not have to do so. The NIHR took the view that this was direct discrimination. This could have been the end of the case, as there was no statutory exception, but the NIHR nevertheless examined whether the obligation to wear the make-up was necessary and functional and whether it impeded the access of women to the labour market. The NIHR stated that that is the way the national courts would judge such a case and that it wanted to follow the same approach. The NIHR subsequently concluded that there was no justification for the instruction and that therefore Rituals acted in breach of the law. In this way the NIHR created room to give a substantial opinion on the case, although strictly speaking the law does not allow for such an approach.[26]

3.3 Indirect sex discrimination

3.3.1 Explicit prohibition

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

Indirect sex discrimination, or as stated in Dutch law, 'indirect distinction', is deemed to exist where 'an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with other persons.'[27] In the author's view this definition complies with the EU definition. The only difference is that Dutch law uses the term 'distinction' instead of 'discrimination'. However, from the case law it is clear that a 'distinction' is interpreted in the same manner as 'discrimination'.

3.3.2 Statistical evidence

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

[25] NIHR (2017), *Vijf jaar College voor de Rechten van de Mens* (Five years of the Netherlands Institute for Human Rights). See pp. 57-58 about the closed system.
[26] NIHR, Opinion 2022-101: https://oordelen.mensenrechten.nl/oordeel/2022-101.
[27] Civil Code, Article 7:646(5)(b), Netherlands, GETA, Article 1(1)(c), Netherlands, ETA, Article 1(1)(c).
[28] Amsterdam Court of Appeal, *JAR* 2014/294, 7 October 2014, ECLI:NL:GHAMS:2014:4132.

Another example is the judgment by The Hague Court of Appeal[29] on the question of whether reducing the survivor's pension in the case of an age difference of more than 10 years between spouses is discriminatory, as women are more often the younger partner than men. The NIHR had applied the correlation test and the chi-square test, both statistical tests, and had ruled that these tests made it clear that more women than men were put at a disadvantage by the reduction. However, the defendant pension funds hired a professor of statistics, who stated that the NIHR's line of reasoning was not consistent. The court subsequently ruled that the applicants had not sufficiently disputed the adequacy of the professor's comments. This professor had been previously engaged by defendant parties in proceedings on discrimination in order to refute statistical evidence.[30]

The question of possible discrimination in cases involving reduction of the survivor's pension for a widow more than 10 years younger than her deceased spouse was brought before the Supreme Court in another case.[31] In that case, the Supreme Court ruled that The Hague Court of Appeal had not paid enough attention to the financial effects of abolition of the pension reduction and the consequences thereof for the resources of the fund and the benefits of other participants. The Supreme Court required a closer scrutiny of the proportionality of the reduction than the Court of Appeal had applied. However, the matter of statistics was not explicitly mentioned in this case.

3.3.3 Application of the objective justification test

The objective justification test is applied correctly in most cases.[32] An example is the case of healthcare workers who are paid on the basis of a personal budget (the 'PGB') that a disabled person is entitled to and which is granted by a Government agency. These workers are excluded from social security on the basis of the Regulation on Domestic Services, which applies to workers who work on less than four days a week in a private household. This exclusion was challenged by a PGB worker in a court procedure as being contrary to the ban on discrimination against women, given that 95 % of PGB workers are women. On 16 December 2021, the Rotterdam Administrative court ruled in the worker's favour.[33] The court took as a starting point that the Regulation was indirectly discriminatory. Subsequently it pointed out that the Regulation had two aims: stimulating the labour market for personal services and preventing illegal work. The court considered both aims to be legitimate. It referred to the judgments of the CJEU in *Megner and Scheffel* and *Čepelnik*.[34] Subsequently, the court looked into the question whether the means, i.e. the Regulation, chosen to reach these aims was suitable and necessary. The court took the view that this was not the case. In this respect the court referred to the report written by an advisory committee, which was set up to advise the Government on the Regulation on Domestic Services. In this report from 2014, the advisory committee concluded that the Regulation had not had the effect of increasing employment for PGB workers and that illegal work was not an issue in this area. The court referred to this report and found that there was no justification for the indirect discrimination, which meant that the exclusion from social security of the PGB worker was unjustified.

In the author's view the objective justification test was applied correctly in this case. It is true that the court did not explicitly distinguish between the criteria 'suitable' and 'necessary', but that did not affect the outcome of the proceedings, as the court ruled that the means chosen to reach the aims were 'neither suitable nor necessary'. The situation

[29] The Hague Court of Appeal, 9 June 2015, ECLI:NL:GHDHA:2015:1284.
[30] The Hague Court of Appeal, *JAR* 2011/71, 21 December 2010.
[31] Supreme Court, 18 December 2015, ECLI:NL:HR:2015:3628.
[32] See, for example, Netherlands, Supreme Court, *JAR* 1992/14, 24 April 1992: no justification for unequal pay.
[33] Rotterdam Administrative Court, 16 December 2021, ECLI:NL:RBROT:2021:12432. Also published in *USZ* 2022/3 with a comment by G.C. Boot.
[34] CJEU, judgment of 14 December 1995, *Megner and Scheffel*, C-444/93, EU:C:1995:442, points 27, 28 and 32 and CJEU, judgment of 13 November 2018, *Ćepelnik*, C-33/17, EU:C:2018:896, point 44.

would have been different if the means chosen had been suitable, but not necessary, but that was not the case here.

3.3.4 Specific difficulties

In some cases before the Dutch courts, there has been debate on how to interpret statistical evidence, as in the case before The Hague Court of Appeal (see Section 3.3.2 above). In addition, there is sometimes discussion about the extent to which general data may be used in discrimination cases. However, the general line in this respect appears to be that such data can be used, but only in combination with more specific evidence. See the judgment by the Amsterdam Court of Appeal mentioned in Section 3.3.2 above.[35]

Perhaps it is interesting to mention here that the dividing line between direct and indirect discrimination is not always sharp. An example is the decision by the The Hague District Court of 30 January 2020.[36] This case concerned an employee with an employment contract for seven months fulltime, with a trial period of two months. Before the start of the employment contract the employee informed her employer that she was pregnant and that after her maternity leave, she wanted to work 23.5 hours per week. On the last day of the trial period the employment was terminated by the employer with the argument that the flexibility in his enterprise could not be realised with a working week of 23.5 hours. The NIHR ruled that this was not a case of direct discrimination on the ground of pregnancy, since Dutch equal treatment law does not provide for a legal right to part-time work.[37]

The court took a different view and ruled that this was indirect discrimination for which there was no objective justification. The court presumed, on the basis of the facts established by the woman, that there was discrimination. The employer was not able to refute this presumption, since he only said that it was not the woman's lack of flexibility that was the reason for the dismissal, but her romantic involvement with the brother of the company director. This was an argument he had not expressed towards the employee. The court therefore ruled that the employer acted unlawfully (discriminatory) by terminating the employment on the ground of an argument connected with motherhood.[38]

3.4 Multiple discrimination and intersectional discrimination

3.4.1 Definition and explicit prohibition

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

There are no proposals pending in this respect.

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

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

[35] Amsterdam Court of Appeal, *JAR* 2014/294, October 2014, ECLI:NL:GHAMS:2014:4132.
[36] The Hague District Court, 30 January 2020, *JAR* 2020/37.
[37] NIHR, 26 July 2019, Opinion 2019-75: https://www.mensenrechten.nl/nl/oordeel/2019-75. See also *JAR* 2019/207 with a comment by M.S.A. Vegter. It is possible for workers to request to work part time, although not on the basis of the equality legislation, but on the basis of the Flexible Working Act. However, the NIHR can only give an opinion about the equality legislation, not about other laws.
[38] The Hague District Court, 30 January 2020, *JAR* 2020/37.

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

3.4.2 Case law and judicial recognition

There is hardly any case law from the courts that addresses multiple discrimination and/or intersectional discrimination (where gender is one of the grounds at stake). There is an old judgment from 2000, in which the employment agreement of a woman had been terminated following a conflict with her employer.[39] The employer had indicated that he did not expect the employee to return to her full working hours after maternity leave, as this would be too difficult for her, given that she was a Moroccan woman and was married to a traditional Moroccan man. The court ruled that this constituted discrimination on the grounds of sex and race and that the employer was seriously to blame in this respect. Therefore, a higher severance payment than usual was awarded.

There was also a case concerning a 10-year-old girl with a Turkish background who was hit by a motorcycle and suffered severe injury, including brain damage and partial paralysis. Because of this she would never be able to work and earn an income. In the legal procedure that followed, The Hague Court took as a starting point for the calculation of the loss of income that the girl, given her cultural background and personal circumstances, would have found a partner and would have had children around the age of 26. Therefore, she would have done paid work until the age of 26, would subsequently have stopped for 10 years and might have resumed part-time work after that.[40] The NIHR ruled that the insurer discriminated against the girl on the ground of sex by using statistical data that only referred to the labour market participation of women and that the data were also inadequate in other respects. The NIHR did not refer to ethnic background as a ground for discrimination, probably because the parents of the girl and their lawyer had based their case on sex discrimination and not on another form of discrimination or on multiple or intersectional discrimination.[41]

The NIHR has dealt more often with multiple and/or intersectional discrimination. In situations of multiple discrimination, the NIHR investigates all the grounds mentioned. An example is opinion 2014-160, in which the NIHR ruled that a hospital had discriminated against a woman of Iraqi origin on the grounds of both sex and race.[42] An employee of the hospital had rejected the woman's employment application with reference to her origins and family responsibilities. In opinion 2018-32 the NIHR ruled that no discrimination on the basis of sex and/or disability/chronic illness was at stake in the case of the non-extension of the employment contract of a pregnant woman who stated that she suffered from post-traumatic stress disorder.[43]

[39] District Court Schiedam, *JAR* 2000/180, 5 July 2000.
[40] The Hague Court, 23 July 2013, ECLI:NL:RBDHA:2013:9276.
[41] NIHR, Opinion 2014-97, https://mensenrechten.nl/nl/oordeel/2014-97.
[42] NIHR, Opinion 2014-160, www.mensenrechten.nl/nl/oordeel/2014-160.
[43] NIHR, Opinion 2018-32, www.mensenrechten.nl.

Intersectional discrimination is a more difficult subject. The following example is perhaps not directly applicable, because it concerns a conflict of fundamental rights rather than intersectional discrimination, but is worth noting. In 2015 the NIHR gave an opinion in which it balanced the rights of a female Muslim employee of a youth care centre who did not shake hands with men because of her religion, and a father who visited the youth care centre with his son and felt discriminated against by the employee in question. The NIHR ruled that the youth care centre had correctly protected the employee rather than the father, as otherwise the centre would have discriminated on the basis of religion. In addition, the employee had explained to the father why she did not shake hands and had greeted him respectfully in another way.[44]

On the basis of these few opinions, it can be said that, where several grounds of discrimination are invoked, these grounds are mostly judged separately. So far, no comparison-based tests have been used, but if that were necessary, a separate test would probably be applied for each separate discrimination ground.

3.5 Positive action

3.5.1 Definition and explicit prohibition

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

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

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

Dutch law uses the terms 'preferential policy', 'positive action' or 'positive discrimination', but not the term 'equal opportunities', at least not as a legal concept. In an opinion of the NIHR on positive action within the University of Delft,[45] the NIHR referred to the concept of 'equal opportunities' in Article 2(4) of Directive 76/207. It mentioned that this directive contained measures to promote 'equal opportunities', whereas the Recast Directive 2006/54 speaks about 'ensuring full equality in practice between men and women'. The NIHR took the view that the changed wording of Article 3 of the Recast Directive in comparison to Article 2(4) of Directive 76/207 means that somewhat more room was created for positive action. However, in later opinions from 2020 and 2021 about preferential policy at the University of Eindhoven, the NIHR made no reference to the changed wording in the Recast Directive. However, in the second opinion in the Eindhoven case, reference was made to the CEDAW and its aim to bring about real social equality of men and women.[46] Perhaps the conclusion can be that there is no conceptual distinction between 'equal opportunities' and 'positive action' in Dutch law, but there is a distinction between formal equality and substantial equality (real social equality).

[44] NIHR, Opinion 2015-76, www.mensenrechten.nl.
[45] NIHR, Opinion 2012-195, www.mensenrechten.nl. See also *JAR* 2013/41 with a comment by E. Cremers-Hartman.
[46] NIHR, Opinion 2020-53, https://mensenrechten.nl/nl/oordelen. See also *JAR* 2020/166 with a comment by M.S.A. Vegter. For the second opinion, see NIHR, Opinion 2021-19, https://mensenrechten.nl/nl/oordeel/2021-19.

3.5.3 Specific difficulties

In the Netherlands there are specific difficulties in relation to positive action. They result from the way the case law of the CJEU is interpreted in the Netherlands. The CJEU ruled in the cases *Kalanke,*[47] *Marschall*,[48] *Badeck*[49] and *Abrahamsson*[50] that recruitment procedures must be open to both men and women and that reserving job positions for women only is not allowed. This case law has had the effect of practically terminating any affirmative action aimed at women. Only universities still try to take affirmative action for women. Other Government institutions or companies restrict themselves to less binding measures.

In the last 10 years, the NIHR has issued four opinions on the preferential policies of universities. One relates to the University of Groningen, one to the University of Delft and two to the University of Eindhoven. The University of Groningen wished to increase the number of female professors and therefore nominated 17 female senior lecturers for future appointment as professors. The NIHR ruled that this policy conflicted with the CJEU case law, as only female senior lecturers were asked to submit their files with a view to appointment as professors, whereas men could not do so.[51] However, in an opinion from December 2012, the NIHR took a different view in a case concerning Delft University of Technology.[52] This case also concerned an increase in the number of female professors. The University had reserved 10 tenure tracks for female academics. The NIHR ruled that in this specific case this was allowed, as the disadvantageous position of women at the University was persistent and structural and the University Board had already taken many measures to change this situation, but without any significant effect. The NIHR referred in its opinion to the wording of Article 157(4) TFEU on realising full equality in practice and stated that, when *Kalanke* and the other judgments were rendered, the starting point was still equal opportunities for men and women and not full equality in practice.

Subsequently the NIHR was asked for an opinion on the preferential policy of the Eindhoven University of Technology. Eindhoven University had decided that, starting from 1 July 2019, academic jobs would be offered only to women for a period of six months. If no suitable candidate had been found after that period, men would also have the opportunity to apply, but under the condition that faculties had to put forward both a male and a female candidate for each vacancy and thus were not allowed to select male candidates only. In its first opinion about this policy, the NIHR ruled that the policy was contrary to equality law.[53] The NIHR cited the case law of the CJEU in *Kalanke*, *Marschall*, *Badeck* and *Abrahamsson* and concluded that, although the positive action programme had a legitimate aim, it did not meet the required standard of care, because the exceptions to the priority for women were so marginal that in fact female candidates were given absolute and unconditional priority. Furthermore, the University's policy did not meet the proportionality requirement, as less far-reaching measures appeared to be possible.

Following the opinion, Eindhoven University adapted its preferential policy. In the revised policy, vacancies are only included if the proportion of women in a particular job group within a department is less than 30 %. Furthermore, no more than 30-50 % of the relevant vacancies are covered by the policy. The NIHR was again asked to evaluate the policy. This time it concluded that the policy is in accordance with equality legislation. The two

[47] CJEU, C-450/93, *Kalanke vs Freie Hansestadt Bremen*, 17 October 1995.
[48] CJEU, C-271/91, *Marshall vs Southampton and South West Hampshire Area Health Authority,* 2 August 1993.
[49] CJEU, C-158/97, *Badeck and others,* 28 March 2000.
[50] CJEU, C-407/98, *Abrahamsson, Anderson and Fogelqvist*, 6 July 2000.
[51] NIHR, Opinion 2011-198, www.mensenrechten.nl. See also *JAR* 2012/78 with a comment by E. Cremers-Hartman.
[52] NIHR, Opinion 2012-195, www.mensenrechten.nl. See also *JAR* 2013/41 with a comment by E. Cremers-Hartman.
[53] NIHR, Opinion 2020-53, https://mensenrechten.nl/nl/oordelen. See also *JAR* 2020/166 with a comment by M.S.A. Vegter.

requirements that were added have the effect that no more than 15 % of the vacancies are included in the programme. This leaves men with enough opportunities to obtain an academic position at the University. The NIHR even took the view that the policy had been adjusted too far and recommended that the percentage of 30 % disadvantage of women in a job group be adjusted upwards and that it should be decided on a case-by-case basis whether it is possible to include 50 % of the vacancies in the policy instead of 30 %. In this second opinion, the NIHR also explicitly referred to the CEDAW and to its aim to reach real social equality of men and women, as opposed to the formal view on equality adhered to by the CJEU.

The various opinions of the NIHR show that Dutch organisations and also the NIHR itself are struggling with the EU concept of formal equality. Moreover, the effect of the CJEU's case law is that it is hard to predict when preferential policy is allowed and when not. This appears to be dependent on the precise details of a policy and its effect in practice. This might have a deterrent effect on preferential policies and might be one of the reasons why there is hardly any case law on positive action.

The NIHR issued an opinion in 2022 in which it decided that the preferential policy of the Safety Region Zaanstreek-Waterland with regard to the vacancy for a firefighter was allowed.[54] The Safety Region explicitly invited women and people with a migration background to apply for the job and it gave priority to female applicants if male and female candidates were equally suitable. The NIHR took the view that this policy met the criteria for an exception on the prohibition on discrimination, apart from the fact that the Safety Region had not made it clear in the job advertisement that it applied a preferential policy. In the author's view this case is another example of how complicated preferential policies have become. The policies must meet five criteria – legitimacy of the aim, clear underrepresentation of women, due diligence, proportionality and clarity about the policy – before they are allowed, which makes it hard to predict in advance whether such policies are in line with the law or not.

3.5.4 Measures to improve the gender balance on company boards

In 2021 the Dutch Parliament adopted a law proposal on 'diversity at the top of business'. The law (the Diversity Act) came into effect as of 1 January 2022.[55] The law introduced a 'growth quota' for the supervisory boards of listed companies. These companies are obliged to ensure that one-third of their supervisory boards consist of women and one-third men. If a man is appointed while this target has not yet been met, the appointment shall be declared null and void. In that case, the 'chair' on the supervisory board will remain empty until a female director is appointed. If a company has a one-tier board, the same rule will apply. The rule then applies to the non-executive members of the board.

In addition to the quota the law proposal obliges large corporations to set appropriate and ambitious objectives in the form of a target to make the numbers of men and women on the management board, the supervisory board and in senior positions more balanced. The idea is that, by increasing the number of women in senior positions, more of them will move on to the top. The companies will have to make a plan for realising these targets and to make this public.

Furthermore, the large companies will have to report in their annual report about their diversity policy and about the extent to which their targets have been met.

The Netherlands has thus adopted measures that aim to improve the gender balance on company boards, although this was prior to the entry into force of Directive 2022/2381.

[54] NIHR, Opinion 2022-40, https://oordelen.mensenrechten.nl/oordeel/2022-40.

[55] Law on making the relationship between the number of men and women on the management board and the supervisory board of large limited public liability companies and private companies more balanced (Diversity Act), *Staatsblad* 2021/495: https://zoek.officielebekendmakingen.nl/stb-2021-495.html.

In a letter of 22 December 2022, the Minister of Education, Culture and Science[56] indicated that, on the basis of the Female Board Index, the number of women in supervisory boards of listed companies in the Netherlands is 38 %, whereas Article 12 of Directive 2022/2381 requires a percentage of 30 %. In view of this and considering the fact that the Diversity Act entered into force on 1 January 2022, the minister announced that the Netherlands would invoke the exemption clause in the Directive (Article 12). As a result, the core provisions of the Directive are suspended. In practice, this means that no legislative changes will be made, and that the current Diversity Act will continue to apply.[57]

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

Outside of the area of high-level positions in employment, a number of other measures have been taken by the Netherlands to improve gender balance. In a letter dated 25 February 2022 to Parliament,[58] the Minister of Education, Culture and Science announced that the various ministries and their executive bodies aim to have 45 % to 55 % of women at the top or near the top of their organisations. Furthermore, the Government has set itself a target of 50 % women at the top for appointments in independent administrative bodies and advisory bodies. The Government will also engage in a dialogue with the High Colleges of State[59] to ensure that they also seek 50 % women in top positions. When the House of Representatives is involved in appointments, it is hoped that it will embrace this target as well. The ambition is to achieve the target of 50 % at the top of these organisations within five years. The targets will not be set legally, but the Government will report annually on progress to the House of Representatives. Finally, the Government will create a legal obligation for organisations in the (semi)public sector to set a target for the percentage of women at or near the top. The law proposal will be published in 2023. The Government also calls on this sector to work towards a situation where 50 % of its workforce is women. The Government does not want to introduce a legal quota, but if the number of women in top positions has not sufficiently increased three years after the law is presented, such a quota might yet be introduced.[60]

The Minister of Defence informed the House of Representative by letter of 29 March 2022 that the department will take several measures to increase the percentage of women in its field to at least 30 % and to appoint more women in senior management.[61] Other departments, including Home Affairs, External Affairs, Finance, Social Affairs and Employment and Education, have also taken or plan to take several measures to increase the number of women in their organisations and, in particular, the number of women in senior management.[62]

On 1 September 2020 the Dutch Minister for Education, Culture and Science presented a national action plan for greater diversity and inclusion in higher education and research. The plan contained objectives for 2025, but also three short-term objectives, including the setting of new targets to increase the number of female professors.[63] In a letter dated 9

[56] In the Netherlands the Minister of Education, Culture and Science is responsible for emancipation issues.

[57] Minister of Education, Culture and Science (2022), 'Progress on gender diversity in top positions' (*Voortgang genderdiversiteit in de top*), 22 December 2022, TK 2021-2022, 30420, no. 378, p. 3: https://www.rijksoverheid.nl/documenten/kamerstukken/2022/12/22/kamerbrief-voortgang-genderdiversiteit-in-de-top.

[58] Minister of Education, Culture and Science, Letter of 25 February 2022, TK 2021-2022, 35628, no. G: https://zoek.officielebekendmakingen.nl/kst-35628-G.html.

[59] High-level bodies within the national Government with a semi-independent status, such as the Council of State, the Netherlands Court of Audit and the National Ombudsman.

[60] Minister of Education, Culture and Science, Letter of 22 December 2022, TK 2022-2023, 30420, No. 378, p. 6: https://zoek.officielebekendmakingen.nl/kst-30420-378.html.

[61] Minister of Defence, Letter of 29 March 2022, TK 2021-2022, 35925-X, No. 71: https://zoek.officielebekendmakingen.nl/kst-35925-X-71.html.

[62] Minister of Education, Culture and Science, Letter of 22 December 2022, TK 2022-2023, 30420, No. 378, p. 6: https://zoek.officielebekendmakingen.nl/kst-30420-378.html.

[63] Ministry of Education, Culture and Science (2020), 'National Action Plan for greater diversity and inclusion in higher education and research': https://www.government.nl/documents/reports/2020/09/01/national-action-plan-for-greater-diversity-and-inclusion-in-higher-education-and-research.

July 2021, the minister reported on the progress made with the implementation of the action plan.[64] It is clear from the letter that not much has happened. An advisory committee has been established to advise on the implementation of the action plan. On 15 June 2021 the committee published its first advice. This advice provides guidance points, examples and best practice for the drawing up of a gender equality plan by research institutions, higher education institutions and Government institutions.[65] Drawing up a gender equality plan was made mandatory by the European Commission as of 1 January 2022 for public legal entities who want to become eligible for research funding from the Horizon Europe programme. Following this requirement from the European Commission, several universities and colleges started drafting these plans. However, they are also critical about what is called 'European interference'.

In a letter dated 2 July 2019, the Minister of Home Affairs set out three measures to increase the share of women in political decision-making to 40 to 60 %.[66] The first of these is to make selection procedures for public positions more inclusive, including by requiring that at least one woman must be nominated for the position of King's Commissioner and that appointment committees for the position of mayor should ideally contain as many women as men. Secondly, vacancies for public positions will be specifically brought to the attention of women's organisations and, thirdly, new programmes have to be developed to support women in decision-making. The measures seem to have had some effect. The number of women at almost all levels – the Government, the Dutch representation in the EU Parliament, the House of Representatives (Second Chamber), the Provincial Executive (Gedeputeerde Staten), mayors and city council members – has increased in recent years. However, 50 % has not yet been reached at any level.[67]

3.6 Harassment and sexual harassment

3.6.1 Definition and explicit prohibition of harassment

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

In these articles, harassment is defined as conduct that is related to the sex of a person and which has the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment. This definition is almost the same as the definition found in Directive 2006/54. The only difference is that in the Dutch text the term 'unwanted' is lacking. The Dutch Government believes that this would place quite a heavy burden of proof on the victim. Instead, the Government wanted to emphasise that harassment, objectively speaking, is always an offence. Therefore, omitting 'unwanted' does not seem to be a problem, since this offers more protection to potential victims of discrimination/(sexual) harassment. Notwithstanding the clear position of the Government that (sexual) harassment is, objectively speaking, an offence, the Dutch Supreme Court, in a judgment in 2009, left some room for the accused to adduce subjective arguments (concerning the motive for the behaviour in question).

[64] Ministry of Education, Culture and Science (2021), 'Science budget', TK 2020-2021, 29338, no. 250: https://zoek.officielebekendmakingen.nl/kst-29338-250.html.

[65] Adviescommissie Divers en Inclusief Hoger Onderwijs en Onderzoek (2021), 'Guidepoints for drawing up a gender equality plan' (Handreiking voor het opstellen van een gendergelijkheidsplan): https://www.dihoo.nl/documenten/adviezen/2021/06/15/handreiking-voor-het-opstellen-van-een-gendergelijkheidsplan.

[66] Minister of Home Affairs (2019), 'Letter to the Lower House responding to round table discussion on women in the public administration' (Kamerbrief met reactie op rondetafelgesprek vrouwen in het openbaar bestuur): https://zoek.officielebekendmakingen.nl/kst-30420-328.html.

[67] Emancipatiemonitor (2022), 6 December 2022, TK 2022-2023, 30420, no. 375, p. 74-75: https://zoek.officielebekendmakingen.nl/blg-1063538.

3.6.2 Scope of the prohibition of harassment

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

3.6.3 Definition and explicit prohibition of sexual harassment

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

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

The Supreme Court ruled that the view that conduct must be seen as sexual harassment if the 'victim' experiences it as sexual harassment is not correct. According to the Supreme Court, the lower court therefore did not breach any legal rule by taking into account, when assessing the harasser's behaviour, that for him his conduct did not have a sexual meaning.[68] This judgment could have substantially lowered the protection against harassment if it had been followed by other judgments in which the intention of the harasser had been given considerable weight. Fortunately, this has not happened. In the case law of district courts and appeal courts, the question of whether harassment has taken place is judged in an objective way, irrespective of the points of view of both the harasser and the victim. [69]

3.6.4 Scope of the prohibition of sexual harassment

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

[68] Supreme Court, *JAR* 2009/202, LJN:BI4209, 10 July 2009.
[69] See for example The Hague Court of Appeal, 13 February 2018, ECLI:NL:GHDHA:2018:223 and The Hague Court of Appeal, 16 June 2020, ECLI:NL:GHDHA:2020:1033.

3.6.5 Understanding of (sexual) harassment as discrimination

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

3.6.6 Specific difficulties

There is much debate about sexual harassment in the media, especially following several incidents in television programmes. This prompted the Dutch equality body, the NIHR, to urge the Government to include the following more detailed obligations for employers into the existing legal provisions:

- to draw up, together with employees, a code of conduct on preventing and combating sexual harassment at work;
- for employers to provide access to an (internal or external) independent and expert confidential advisor;
- to have a complaints procedure or to join an existing complaints procedure;
- to have or join an expert and independent complaints commission; and
- to provide criteria for a careful handling of complaints and apply these criteria in practice.

The NIHR also is of the opinion that the Government should ratify and implement ILO Convention No. 190 on sexual harassment.[70]

The Government responded to this advice and announced that it will draft a national action plan on how to tackle sexually unacceptable behaviour and sexual violence, and will appoint a Government commissioner to strengthen this approach and to promote a cultural change in this area.[71]

A point of concern is the way in which courts judge whether an employee who harassed a colleague and is subsequently dismissed, is entitled to a transition fee. Such a fee is not due when the dismissal is the result of seriously culpable conduct on the part of the harassing employee. However, in assessing whether this is the case, courts also take into account the behaviour of the employer. In a case that was brought before the Supreme Court twice and which concerned sexual harassment of a student by a teacher, the Appeal Court granted the transition fee to the perpetrator of the harassment, because in the eyes of the court the employer had not made it sufficiently clear to its students and teachers what conduct it considered to be (un)acceptable. The Supreme Court did not want to accept as a rule of thumb that sexual conduct in a dependency relationship, such as that of a teacher vis-à-vis a pupil, in principle constitutes serious culpable action within the meaning of Dutch dismissal law. The Supreme Court took the view that all circumstances of the case should be taken into account when assessing the culpability of the employee, including the action or omission of the employer.[72]

The judgment was received critically in academic literature, because of the protection offered to the harassing employee and the strict requirements that are imposed on an employer who wants to dismiss this employee. The result may mean that employers

[70] NIHR (2022), 'Employers' obligations with regard to sexual harassment not clear enough' (*Verplichtingen werkgevers rondom seksuele intimidatie onvoldoende duidelijk*): https://mensenrechten.nl/nl/nieuws/verplichtingen-werkgevers-rondom-seksuele-intimidatie-onvoldoende-duidelijk.

[71] The Minister of Education, Culture and Science and the Minister of Social Affairs and Employment (2022), 'Integrated approach to sexually unacceptable behaviour and sexual violence' (*Integrale aanpak seksueel grensoverschrijdend gedrag en seksueel geweld*): https://www.rijksoverheid.nl/documenten/kamerstukken/2022/02/08/integrale-aanpak-seksueel-grensoverschrijdend-gedrag-en-seksueel-geweld.

[72] Supreme Court, 24 June 2022, ECLI:NL:HR:2022:950.

become more reluctant to take measures against a perpetrator if they risk having to pay a severance payment. This might damage the position of the victim of the harassment.[73]

3.7 Instruction to discriminate

3.7.1 Explicit prohibition

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

3.7.2 Specific difficulties

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

3.8 Other forms of discrimination

Other forms of discrimination, such as discrimination by association or assumed discrimination, are not explicitly prohibited in the Dutch legislation. In the case law these types of discrimination are considered to be discrimination on the (main) grounds involved, e.g. disability or religion. The Court of the Mid-Netherlands, for example, had to decide whether the dismissal of an employee, who had conducted a professional meeting with a colleague about a medical indication for a patient and had not informed her colleague that the patient was her own disabled daughter, could not be seen as discrimination (by association) on the ground of disability/chronic illness. The court did not differentiate between discrimination on the ground of disability/chronic illness on the one hand and discrimination by association on the other, but simply ruled that there had not been any discrimination at all.[74]

Assumed discrimination was at stake in a case in which the employment agreement of an employee was not extended because he had had a heart attack. However, at the point of expiry of the first contract the employee was no longer ill, but the employer feared that he might fall ill again. The Appeal Court ruled that discrimination because the employer thinks the employee might fall ill again or still has his sickness is also discrimination on the ground of disability/chronic illness. This form of discrimination is not treated differently from discrimination on the ground of an existing illness.[75]

The law covers algorithmic discrimination, but there is no specific provision in this respect. If algorithmic discrimination leads to discrimination on the basis of sex, the legislation on sex discrimination will apply and the same holds true if algorithmic discrimination leads to discrimination on the grounds of race or on other grounds.

3.9 Evaluation of implementation

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

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

[73] See, for example, De Groot, L.C. (2022), 'Hoe (ernstig) verwijtbaar is seksuele intimidatie?' (How (seriously) culpable is sexual harassment), *Tijdschrift voor de Arbeidsrechtpraktijk* 2022(7), 229.
[74] District Court of Mid-Netherlands, 13 March 2017, ECLI:NL:RBMNE:2017:2873.
[75] Appeal Court of Amsterdam, 10 November 2015, ECLI:NL:GHAMS:2015:4563.

Multiple and intersectional discrimination are not mentioned in the law. However, multiple discrimination appears to be tackled correctly, whereas as yet there have been hardly any examples of intersectional discrimination in case law.

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

With respect to sexual harassment, academics and the NIHR take the view that it is necessary to include more specific provisions on sexual harassment in the law than is currently the case. It is recommended that the law specifies that employers are required to have a confidentiality advisor and a complaints procedure with a complaints commission, or to join an external advisor or commission. It is also recommended that employers have a code of conduct and draft criteria on the careful handling of complaints.[76] In 2020 a law proposal was submitted to Parliament by one of the opposition parties, introducing an obligation for employers to have a confidentiality advisor. The proposal was criticised by the Council of State, which did not find it necessary or desirable. The opposition party subsequently clarified the usefulness and necessity in the explanatory memorandum. The law proposal was not debated in the House of Representatives in 2022, but this will happen in 2023.[77]

In civil law the Supreme Court ruled that, when assessing whether a harasser is seriously culpable or not and is entitled to a severance fee or not, the conduct of the employer towards the harasser – for example if he was warned or if the complaints procedure was adequate – must be taken into account. This may have a chilling effect on the willingness of employers to take action against harassing employees.

3.10 Remaining issues

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

[76] See Section 3.7.6 and see also Rombouts, B. (2021), 'ILO-Conventie 190: een 'geïntegreerde aanpak' van geweld en intimidatie?' (ILO Convention 190: An 'integrated approach' to violence and harassment?), *Arbeidsrechtelijke Annotaties* 2021 (15) 1. See in particular Section 7.

[77] Law proposal 'Modification of the Working Conditions Act regarding the obligation to have a confidentiality advisor' (*Wijziging van de Arbeidsomstandighedenwet in verband met het verplicht stellen van een vertrouwenspersoon*). Available at: https://www.tweedekamer.nl/kamerstukken/wetsvoorstellen/detail?id=2020Z18100&dossier=35592.

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

4.1 General (legal) context

In the Netherlands it is rather complicated to claim equal pay for equal work and work of equal value, for several reasons. In the first place, most employees do not know what their colleagues earn. There is no right to information on this point and employers usually invoke privacy regulations when confronted with a request for information. The Netherlands has not implemented the European Commission Recommendation on Pay Transparency.[78] There is no obligation for employers to report on the gender pay gap and/or to provide individual employees with information.

If an employee finds out that her male colleague earns more for the same work or work of equal value, employers will usually come up with justifications for the difference. For example, they might state that the male employee has more relevant work experience or that the fact that a male employee receives a supplement that his female colleague does not has nothing to do with her sex. Furthermore, in the Netherlands it is still not forbidden to determine an employee's salary on the basis of their previous salary earned elsewhere. This system is still used in the judiciary, for example.

The Dutch system also makes it difficult to claim equal pay because it is left almost entirely to the individual person to do so. This means that the claimant (usually a woman) must involve a lawyer (because enforcing equal pay is complicated) and might have to pay considerable lawyer's fees and court fees.

Outsourcing is not a big problem, because outsourced workers are entitled to (nearly) the same pay as workers of the hiring company. This is regulated in legislation on agency workers, in particular in the Act on labour allocation through intermediaries (*Wet allocatie arbeidskrachten door intermediairs*).

The composition of the Dutch labour market is an important cause of the gender pay gap in the Netherlands, because the salaries are lower in sectors where many women work, notably healthcare, childcare and cleaning.[79]

Unequal treatment at work is still an issue in the Netherlands. One of the main forms of unequal treatment of women is pregnancy discrimination. This remains a problem, in spite of many campaigns by the Government, NGOs and the NIHR. In 2020, the NIHR reported that around 45 % of women in the labour market had been confronted with possible discrimination because of pregnancy or early motherhood. One out of five women were not hired because of their pregnancy, for 49 % a temporary contract was not extended and a quarter of the women concerned were put at a disadvantage with respect to working benefits (did not receive a bonus, could not participate in training, were not promoted, etc). The NIHR interviewed 1 150 women who had given birth during the last four years. Only 11 % of the women who had experienced discrimination took action.[80]

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[78] Commission Recommendation of 7 March 2014 on strengthening the principle of equal pay between men and women through transparency. Text with EEA relevance 2014/124/EU *OJ* 2014 L 69, pp. 112-116 available at https://publications.europa.eu/en/publication-detail/-/publication/b8668ea5-a69a-11e3-8438-01aa75ed71a1/language-en.

[79] CBS (2020), 'Monitor loonverschillen mannen en vrouwen' (Monitor pay differences between men and women), para. 5.2: https://www.cbs.nl/nl-nl/longread/aanvullende-statistische-diensten/2022/monitor-loonverschillen-mannen-en-vrouwen-2020/5-kenmerken-van-de-baan.

[80] NIHR (2020), *Zwanger en werk: dat baart zorgen. Derde onderzoek naar discriminatie op de arbeidsmarkt van zwangere vrouwen en moeders met jonge kinderen* (Pregnant and at work: that creates worries. Third study of discrimination on the labour market against pregnant women and mothers with young children), Utrecht 2020: https://mensenrechten.nl/nl/publicatie/5fb7dfef1e0fec037359c640. See also Burri, S. (2019), 'Combating Pregnancy Discrimination in the Netherlands; The Role of the Equality Body' in Barbara *Havelková & Mathias Möschel (ed.), Anti-Discrimination Law in Civil Law Jurisdictions*, Oxford University Press 2019.

In November 2022, the Government again granted funding to an NGO (Women Inc.) to provide information and communication to pregnant women and young mothers about their rights and to employers about their obligations.[81] Women Inc. will launch a website with online tools and other products. The Government also plans to collaborate with other organisations, such as the Municipal Public Health Service, 24baby.nl and the Royal Dutch Organisation of Midwives (KNOV).[82] However, in the author's view, it is doubtful whether these kind of measures will be effective, as they have not been so in the past.

Another obstacle for equal treatment at work is sexual and gender-based harassment. In 2021 the CBS[83] reported that approximately 1 in 5 employees have been confronted with some form of harassment. In particular, 21 % of young women aged between 15 and 25 have suffered from harassment from colleagues or customers/clients. When broken down by profession, medical workers are the hardest hit, especially those in the lower salary categories: 37 % have been harassed. The harasser is most often not a colleague, but rather a client or a patient. The NIHR decided to ask for specific attention to be given to sexual harassment following a number of incidents including in a talent show on television, a large football club (Ajax) and another television programme. The NIHR has urged the Government to ratify the ILO Violence and Harassment Convention (No. 190) and to include more detailed obligations for employers in the law.[84]

The Government responded to this advice and announced that it will draft a national action plan on how to tackle sexually unacceptable behaviour and sexual violence. It also appointed a Government commissioner to strengthen this approach and to promote a cultural change in this area.[85]

4.1.1 Political and societal debate and pending legislative proposals

There is a legislative proposal on equal pay for women and men.[86] This was submitted to Parliament on 7 March 2019.

The main contents of the proposal are the following:

- Reversal of the burden of proof. Employers with 250 or more employees should apply for a certificate which shows that they apply the standard for equal pay. If they do not have such a certificate and a person states that he or she is not paid equally, the assumption is that this is indeed the case. The employer may refute this assumption.

[81] For more information see the Women Inc. website: https://www.womeninc.nl/themes/werk.

[82] Appendix to the Empancipation Memorandum (*Maatregelen bij Emancipatienota*) (2022), 18 November 2022, p. 15-16: https://www.rijksoverheid.nl/onderwerpen/vrouwenemancipatie/documenten/kamerstukken/2022/11/18/bijlage-1-maatregelen-bij-emancipatienota.

[83] CBS (2021), 'Ongewenste seksuele aandacht klanten bij 1 op 5 jonge vrouwelijke werknemers' (1 out of 5 young female employees face unwanted sexual attention of customers), 20 April 2022: https://www.cbs.nl/nl-nl/nieuws/2022/16/ongewenste-seksuele-aandacht-klanten-bij-1-op-5-jonge-vrouwelijke-werknemers.

[84] NIHR (2022), 'Verplichtingen werkgevers rondom seksuele intimidatie onvoldoende duidelijk' (Employers' obligations with regard to sexual harassment not clear enough): https://mensenrechten.nl/nl/nieuws/verplichtingen-werkgevers-rondom-seksuele-intimidatie-onvoldoende-duidelijk.

[85] The Minister of Education, Culture and Science and the Minister of Social Affairs and Employment (2022), 'Integrated approach to sexually unacceptable behaviour and sexual violence' (*Integrale aanpak seksueel grensoverschrijdend gedrag en seksueel geweld*): https://www.rijksoverheid.nl/documenten/kamerstukken/2022/02/08/integrale-aanpak-seksueel-grensoverschrijdend-gedrag-en-seksueel-geweld.

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

- Obligation to provide information in the annual report by employers with 50 or more employees about differences in pay between employees who carry out work of (almost) equal value. If unequal pay exists, this must be reported in the annual report together with information on the way in which these differences will be eliminated.

- The Labour Inspectorate will be given the tasks of monitoring the application of the law and of imposing fines in cases of non-compliance.

- Employees of employers with 50 or more employees will get the right to ask for information about the salary of colleagues who do the same work or work of (almost) equal value.[87]

The proposal was debated in Parliament for the first time on 2 February 2021. Since then, nothing concrete has happened. In its Emancipation Memorandum of November 2022, the Government stated that it takes a positive stance towards the (then not yet adopted) EU directive on pay transparency and that, prior to the implementation of this directive, legislation on pay transparency would be prepared. However, no law proposal or other legislation has yet been published.

No steps have been taken yet in relation to the EU directive on adequate minimum wages. The Dutch minimum wage was increased by 10.15 % as of 1 January 2023, but this is not linked to EU Directive 2022/2041.

4.2 Equal pay

4.2.1 Implementation in national law

Article 7:646(1) of the Dutch Civil Code states that the employer is not allowed to make a distinction between men and women with respect to employment conditions. This includes equal pay for equal work or work of equal value. In Article 7(2) ETA[88] the concept of pay is defined as 'any remuneration owed by the employer to the employee in return for the labour of the latter.' In Article 7(1) ETA it is explained that, when comparing the pay of a male and a female employee, a comparison must be made with an employee of the other sex who does equal work or work of equal value.

4.2.2 Definition in national law

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

This definition is less elaborate than the definition in Article 157(2) TFEU, but the meaning is the same. The concept of pay in Dutch law is explained in a way similar to the TFEU definition of Article 157(2). The Supreme Court ruled that pay is the remuneration/compensation that the employer owes to the employee as a return for his employment.[89]

[87] It is remarkable that the text of the law proposal refers to work of 'virtually' equal value instead of 'work of equal value', which latter term is normally used in equality legislation. The explanatory memorandum does not give an explanation of the use of the word 'virtually' and so far there have been no questions about this by members of Parliament.

[88] Act on Equal Treatment of Men and Women (ETA).

[89] Supreme Court, *NJ* 1954/242, *Zaal/Gossink*, 18 December 1953; Supreme Court, LJN:ZC3681, *NJ* 2001/635, *JAR* 2001/217, *Huize Bethesda*, 12 October 2001.

Dutch national law does not include a definition of 'worker', but it does define 'employment agreement' in Article 7:610 DCC. An employment agreement is the agreement through which one party, the employee, undertakes to carry out work in the service of another party, the employer, during a certain period in return for a salary.

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

Dutch law does not explicitly implement Article 4 of the Recast Directive, but it stipulates that the employer is not allowed to make a distinction between men and women in respect of employment conditions (Article 7:646(1) DCC). This includes equal pay for equal work or work of equal value. It also relates to all forms of pay for the labour of the employee.

4.2.4 Related case law

There are two judgments by the Supreme Court[90] in which it is mentioned that pay is the remuneration owed by the employer in return for the labour of the employee. These cases did not concern discrimination but were related to the existence of an employment agreement. According to Dutch law, an agreement is an employment agreement when the employee must carry out work (personally), when a remuneration is paid and when there is relationship of authority between the employer and the employee. In this context there is some case law about the question of whether payments from an employer to a worker can justify the conclusion that the parties entered into an employment agreement. However, these judgments are not about gender equality. In the field of gender equality, the basic assumption is that the case law of the CJEU is leading, thus that discrimination must be eliminated in respect of all aspects of remuneration.

4.2.5 Permissibility of pay differences

Pay differences are allowed if they are not caused by discrimination or some other unjust reason. There have been several cases on the question of whether unequal pay for equal work or work of equal value is allowed if no discrimination is at stake. The Supreme Court ruled in this respect that the general principle that equal work must be paid equally is important, but not decisive.[91] If an employee wants to receive the same pay as a colleague, but there is no discrimination at stake (e.g. because both colleagues are male or female), the relevant interests must be balanced. The principle of equal pay is one of these interests and is important, but also relevant is whether the pay difference has its origin in a collective agreement (that is an argument for allowing the difference), differences in education levels, the situation at the time of the start of the employment differed, or a merger or some other type of reorganisation, etc. An employer is also entitled to introduce new regulations for new employees, even though these may lead to pay differences between the new and the old personnel.[92]

4.2.6 Requirement for comparators

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

A comparator is not required in situations of possible indirect discrimination in which the effects of a certain rule or practice, e.g. the granting of extra pay to workers who are prepared to work overtime, is that substantially more men than women receive an advantage. In these situations, it must be examined whether there is an objective

[90] Supreme Court, *NJ* 1954/242, *Zaal/Gossink*, 18 December 1953; Supreme Court, LJN:ZC3681, *NJ* 2001/635, *JAR* 2001/217, *Huize Bethesda,* 12 October 2001.
[91] Supreme Court, *JAR* 2004/68, 30 January 2004, (Parallel Entry).
[92] The Hague Court of Appeal, *JAR* 2005/113, 4 February 2005.

justification for the difference in pay. The normal (stringent) objective justification test is applicable here. In this approach no specific comparator is needed, as different pay systems can be compared with one another. In most cases these systems or practices will be used within one company or group of companies, but theoretically it is possible that a comparison could be made between systems or practices that appear in a collective agreement or a statutory arrangement.

There is not much case law about the use of a comparator. One case worth mentioning dates from 2010 and concerned equal pay at a secondary school.[93] A female teacher stated that she performed work of equal value compared to at least two male colleagues. One of these colleagues was graded on a higher scale. The court found that the colleague indeed did not do the work that he should have done on the basis of his salary scale/position and that his work was of equal value to that of the female employee. However, the court accepted the argument by the employer that the reason for this was that the male employee could not fulfil all his tasks because of health reasons and because of his age. He could not therefore act as a comparator.

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

In another case the comparison was more successful. The Court of Appeal of 's-Hertogenbosch ruled that an employer had not clarified why the work experience of the male comparator was of more value than the work experience of the female employee.[94] The employer also failed to explain why a reduction in the hours of the male employee justified a higher hourly wage. The fact that the employer was not transparent about his motives for paying the male worker a higher salary than his female colleague therefore led the court to rule that the employer had discriminated against the woman and had to pay her the same salary as it paid to the man.

In a case before the Overijssel district court, the employer did not dispute that the claimant, a female legal counsel, earned less than her male comparator, who was also a legal counsel. The employer argued that the comparator had more relevant experience than the claimant. This argument was accepted by the district court,[95] but it was rejected by the NIHR,[96] which was also asked to give an opinion about the case. The NIHR considered the argument of the employer to be invalid, as it had previously given another reason for the pay gap and had changed its position during the dispute. Furthermore, according to the NIHR, the employer had not made it clear why the experience of the comparator was worth more than the experience of the claimant and which objective standards were used in evaluating the experience. Even if the comparator had more relevant work experience, this did not explain the pay difference of EUR 1 000 per month. The claimant appealed against the judgment of the district court. On appeal the employer offered to pay all claims of the claimant, which she accepted.

The NIHR thus reviewed the case much more carefully than the district court did.[97] This happens more often. Due to their work load, district courts sometimes do not analyse a case as thoroughly as they should. It is quite likely that the appeal court would have reached a different decision to the district court in this case, but this is unknown, as a settlement was reached.

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93 The Hague Court of Appeal, LJN: BP3748, *JAR* 2011/71, 21 December 2010.
94 Court of Appeal 's-Hertogenbosch, *JAR* 2013/13, 13 November 2012 and *JAR* 2013/106, 5 March 2013.
95 District Court Overijssel, 21 February 2022, ECLI:NL:RBOVE:2022:590.
96 NIHR, Opinion 2022-91, 15 August 2022: https://oordelen.mensenrechten.nl/oordeel/2022-91.
97 For other opinions of the NIHR on equal pay and the use of a comparator, see Opinion 2012-142: unequal pay because male colleague has been graded three steps higher, because of shortages in the labour market, negotiations and previous work experience; Opinion 2021-111: higher pay of male colleague, shortages in the labour market, negotiations and the fact that another woman earns more than the claimant do not justify the pay difference between the claimant and her male colleague; Opinion 2018-30: no unequal pay because the comparators have a higher position.

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

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

4.2.8 Other relevant rules or policies

Parameters are not laid down in Dutch legislation or in other rules or policies. In a situation where an assessment is made in an individual case as to whether work is of equal value, all relevant aspects are taken into account.

4.2.9 Job evaluation and classification systems

In the Netherlands the general assumption is that all (relevant) job evaluation and classification systems are gender-neutral. There has been debate on these systems in the past, especially around 2000/2001. In that period an instrument was developed in order to create gender-neutral job evaluation and classification systems: '*de weegschaal gewogen*' ('the weighted scale').[98] Subsequently all systems that were acknowledged by the trade unions were tested on gender neutrality and have been found neutral. At present the debate mainly focuses on the incorrect use of job classification systems and on granting extra benefits outside of the systems.[99]

4.2.10 Wage transparency

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

In case law, reference is sometimes made to one of the standard considerations of the CJEU, i.e. that real transparency, which makes effective review possible, is ensured only when the principle of equal pay is applied to every element of the salaries of men and women. In this respect, the Supreme Court ruled on 12 April 2002 that a reversal of the burden of proof that work is of equal value is appropriate if a company applies a reward system that is characterised by a complete lack of transparency.[100] According to the Supreme Court this was not the case in this particular matter.

The Court of Appeal of 's-Hertogenbosch ruled in an equal pay case that the employer had not clarified why the work experience of the male comparator was of more value than the work experience of the female employee.[101] The employer also failed to make transparent why a reduction in the hours of the male employee justified a higher hourly wage. The fact that the employer was not transparent about his motives for paying the male worker a higher salary than his female colleague led the court to rule that the employer had discriminated against the woman and had to pay her the same salary paid to the man.

Employers must thus make clear in what way and on the basis of which standards they value the work of their employees. The NIHR follows the same approach. An example is the opinion in which the NIHR ruled that the employer had not made clear which part of

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

99 See the reports by the NIHR and its predecessor the Equal Treatment Commission: *Gelijke beloning van mannen en vrouwen bij de algemene ziekenhuizen in Nederland* (Equal pay for men and women in general hospitals in the Netherlands), Utrecht, 2011, available at: https://www.mensenrechten.nl/nl/publicatie/9898; *Verdient een man meer? Gelijke beloning van mannen en vrouwen bij hogescholen* (Does a man earn more? Equal pay for men and women within universities of applied sciences), Utrecht, 2016, available at: https://www.mensenrechten.nl/nl/publicatie/36318 and *Rapport Gelijke beloning verzekerd?* (Report on Equal Pay Insured?), Utrecht, 2017, available at https://www.mensenrechten.nl/nl/publicatie/38165.

100 Supreme Court, *JAR* 2002/101, 12 April 2002.

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

the extra pay a male worker received was related to labour shortage. The NIHR explicitly observed that the lack of a transparent salary system is the employer's own risk.[102]

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

The transparency measures set out by the European Commission's Recommendation of 7 March 2014 have not been implemented in the Netherlands.

4.2.12 Other measures, tools or procedures

In the Netherlands there is no obligation to carry out an equal pay audit and no certification systems are used for equal pay.

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

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

There are a number of soft law initiatives that aim to encourage equal pay:

- In September 2020 the Foundation for Labour (Stichting van de Arbeid) published an update of its checklist for equal pay. This checklist contains various tools which are targeted at four different groups: (1) large and medium-sized companies with a human resources department, (2) small companies, (3) works councils and employee representatives and (4) individual employees. These tools can help to ensure equal pay for men and women within companies.[103]

- There is a website called '*loonwijzer*' (Wage Indicator)[104] which makes it possible to compare wages. The website also gives substantive information about (equal) pay. The website receives a subsidy from the Dutch Government.

- The NIHR developed an equal pay Quickscan tool.[105]

- Women Inc. developed the Equal Pay Indicator (*Gelijke Beloningwijzer*), a tool to help employers with 150 employees or more to ensure equal pay in their organisation.[106]

- In two collective company-wide agreements the employers (Aegon and APG) committed themselves to carrying out an investigation into equal pay in its company. The outcome in one of these investigations was that pay differences do indeed exist within the company and that the main cause thereof appears to be the under-representation of women in higher positions. The company has announced that it will

[102] NIHR, Opinion 2012-142, 15 August 2012. See also Opinion 2009-76, 6 August 2009.
[103] Stichting van de Arbeid (Foundation for Labour) (2020), 'Je verdiende loon! Handreiking gelijke beloning mannen en vrouwen' (The salary you deserve! Guidance on equal pay for men and women), 21 September 2020, available at: https://www.stvda.nl/nl/thema/arbeid-zorg/gelijke-beloning.
[104] See: https://loonwijzer.nl/salaris/gelijkloon. The website is part of the international website, Wage Indicator, available at: https://wageindicator.org/.
[105] The Quickscan tool can be found on the website of the NIHR on recruitment: http://www.wervingenselectiegids.nl/.
[106] Women Inc. (2022), *Gelijke Beloningwijzer* (Equal Pay Indicator): http://www.gelijkebeloonwijzer.nl/wp-content/uploads/sites/36/2022/11/Gelijke-Beloonwijzer-2022.pdf.

discuss with the works council and the trade unions how to redress this situation.[107] In the other case, regarding a pension provider, the outcome was that women earned 2.2 % less than men (after corrections for number of hours worked etc). The company subsequently decided to increase the salary of 125 female employees as of 1 June 2019 and to carry out further research into the causes of the pay gap. This led to the conclusion that female employees are less often and less quickly promoted to a higher position. APG now wants to take measures to change this situation.[108]

It is hard to assess the extent to which these tools are effective. They will only work if an employer really wants to do something to tackle unequal pay. Those employers who do not want to take measures will not be reached by such initiatives; for those employers, more binding regulations are necessary.

4.3 Access to work, working conditions and dismissal

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

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

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

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

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

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

[107] AD (2019), 'Ondanks gelijke beloning bij Aegon krijgen mannen 900 euro meer' (Despite equal pay at Aegon men receive 900 Euro more), 11 February 2019. Available at: https://www.ad.nl/werk/ondanks-gelijke-beloning-bij-aegon-krijgen-mannen-900-euro-meer~a8c07601/#:~:text=Mannen%20en%20vrouwen%20horen%20bij,krijgen%20mannen%20900%20euro.

[108] APG (2020), 'APG pakt oorzaak beloningsverschil mannen en vrouwen aan' (APG tackles the root cause of the pay gap between men and women), 11 November 2020. Available at: https://apg.nl/publicatie/apg-pakt-oorzaak-beloningsverschil-mannen-en-vrouwen-aan/.

Article 3 ETA forbids unequal treatment in respect of offers of employment and conditions for recruitment and in respect of assistance in finding employment.
The relation between these three articles is as follows: Article 5 GETA is the basic article. Article 7:646 of the Dutch Civil Code specifically applies to men and women who work in the private sector and Article 1(b) ETA concerns the public sector.

The scope in relation to (access to) employment, vocational training, working conditions etc. in Dutch law is more or less the same as Article 14(1) of the Recast Directive, and thus it is neither broader nor more limited.

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

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

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

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

The legislation explicitly prohibits non-hiring, non-renewal of a fixed-term contract, non-continuation of a contract and dismissal of women connected to their state of pregnancy and/or maternity. However, in practice this is (still) a major problem.

The first cause has to do with the burden of proof. Even though the burden of proof shifts to the employer once the employee has stated facts from which it can be presumed that discrimination has taken place, in practice this is still difficult. This is particularly the case with non-hiring and non-extension/prolongation of contracts. Often no reason is given or, in cases of non-hiring, the candidate is told that there were better candidates, and in cases of non-prolongation, the employee is informed that there is no more budget or that her performance is not exactly as it should be. In such cases it is very hard for the woman involved to state sufficient facts that point to pregnancy/maternity as a reason. An example is provided by a case before the East-Brabant district court in 2019.[109] This court ruled that the employer had made it sufficiently clear that he had doubts about the employee's performance and that he did not expect that she would be able to meet the – changing – demands of her role. The court therefore accepted that this was the reason for the non-prolongation and not the pregnancy of the employee. This appears reasonable, but the real question in the author's view is whether it is fair to expect a pregnant employee to perform in such a way that she can persuade the employer that she is able to meet changing and challenging demands. Being pregnant demands energy and it is not a good combination with having to prove oneself in a new job at the same time. The question is, of course, whether this is the employer's responsibility, but it does not appear fair to put the burden entirely on such young women, particularly as many of them have to work on flexible contracts and therefore have little protection.

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

This brings us to the second problem, which, in the author's view, is the high number of people in the Netherlands who work on some form of flexible contract or as a (false) self-employed person. Flexible contracts, triangular relationships with agencies and the like, and contracts with self-employed persons can easily be terminated, also in cases of pregnancy. In particular, people with little education feel the consequences of this, including young women in lower-paid jobs. On paper there is protection against discrimination, but in practice achieving this is far more difficult. Besides, starting a court case in this respect is costly. The NIHR opened a hotline for reporting pregnancy discrimination from 22 May to 5 July 2017. During this period, 855 people contacted the hotline.[110] Almost all notifications of pregnancy/maternity discrimination concerned flexible contracts. The NIHR advised the Government to pay more attention to these groups of women. The Government announced plans to forbid zero-hour contracts and 'min-max' contracts, where an employee only gets paid for the hours worked or for a minimum of hours worked. However, temporary contracts will continue to exist, as will temporary agency work. The Government makes separate action plans for discrimination at work and for the labour market in general, and there is hardly any attention paid to the link between pregnancy discrimination and flexible contracts.

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

The third problem is the extent of the damages in cases of non-hiring or non-prolongation. There are pecuniary and non-pecuniary damages. Pecuniary damages can be claimed where the employee can make it sufficiently clear that he or she suffered loss of income or incurred costs because of discrimination. Sometimes this works well, for example in the judgment by the District Court of The Hague in which the court ruled that the employee would have been given a contract for a year, had she not been discriminated against. The court therefore awarded compensation of a year's salary (EUR 37 077.21).[111] Furthermore, employees whose temporary contract is not extended can claim for fair compensation if the employer's behaviour has been seriously culpable. If discrimination can be proven, this is in principle seriously culpable. For this reason, The Hague Court of Appeal granted fair compensation to an employee of twice the actual damage, because the employer had not been able to refute the assumption that he had not extended the employment contract of the employee because of her pregnancy.[112]

However, in many cases it is difficult to estimate the extent of the damage, as many employees in the Netherlands work on the basis of part-time contracts of six months or one year or are placed by temporary employment agencies, which means they cannot prove that their employment would have lasted for a considerable period of time. See, for example, the ruling by the District Court of Limburg, which decided that an employee whose contract had not been extended because of her pregnancy was not entitled to a compensation for material (income) damage, because it was likely, according to the court, that the contract would have been extended once more for one year and would have ended afterwards. During that year the employee had not worked, but had received a social security benefit and therefore had no income damage, according to the court.[113]

It would be better if the burden of proving that the contract would not have been extended would shift to lie with the employer instead of the other way round. At present the burden of proving that there has been no discrimination shifts to the employer once the employee

[110] NIHR (2017), *Analyse Meldpunt Zwangerschapsdiscriminatie op de arbeidsmarkt* (Analysis Hotline Pregnancy Discrimination on the Labour Market), Utrecht, October 2017. Available at: https://www.mensenrechten.nl/nl/publicatie/38032.

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

[112] The Hague Court of Appeal, 31 August 2021, ECLI:NL:GHDHA:2021:1638.

[113] District Court of Limburg, 13 December 2017, ECLI:NL:RBLIM:2017:12124.

has stated sufficient indications of discrimination; however, providing evidence of the extent of the damage is mostly seen as the task of the claimant.

In respect of non-pecuniary damages, Dutch courts are very restrained, if not stingy. It is a real exception if more than EUR 5 000 is granted, and even that is seen as quite generous. Sometimes courts consider that EUR 1 000 is sufficient.[114] Discrimination itself does not give a right to non-pecuniary damages. The Supreme Court ruled that the finding of a breach of a fundamental right is not sufficient in this respect. In order to qualify for non-pecuniary damages, the norm of gender equality must have been seriously violated with serious consequences.[115]

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

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

4.3.5 Particular difficulties

In the Netherlands there are considerable difficulties in relation to the protection of pregnant women and young mothers in the field of access to work and employment contracts. These difficulties are described in section 4.3.3 of this report.

The number of flexible contracts and people working in (false) self-employment is also a problem, especially for women with little education. They have little or no income security, their working conditions are sometimes poor, and they have little opportunity to become economically autonomous. The Government announced plans to reduce some forms of flexible contracts, to make it less attractive for workers to work as a self-employed person, while actually being an employee, and to offer more legal protection to those who are false self-employed. Concrete proposals, which might make a difference in this respect, are expected to be announced in 2023.[116]

A particular problem exists in respect of predominantly female domestic workers who work on less than four days per week in a private household.[117] These workers may be dismissed unilaterally without permission from the employment agency or the district court, they are entitled to 6 weeks' pay during illness instead of 104 weeks,[118] and they fall outside the scope of the social security system. This reduced protection has been criticised by the European Commission and CEDAW, among others, but so far, the Dutch Government has not taken any concrete steps to improve the situation.[119]

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[114] District Court of Limburg, 13 December 2017, ECLI:NL:RBLIM:2017:12124.
[115] Supreme Court, 15 March 2019, ECLI:NL:HR:2019:376.
[116] Minister of Social Affairs and Employment (2022), 'Voortgangsbrief werken met en als zelfstandige(n)' (Progress letter on working with and as self-employed worker(s)), 16 December 2022: https://www.rijksoverheid.nl/documenten/kamerstukken/2022/12/16/voortgangsbrief-werken-met-en-als-zelfstandigen and Minister of Social Affairs and Employment (2022), 'Hoofdlijnenbrief arbeidsmarkt' (Framework letter labour market), 5 July 2022: https://www.rijksoverheid.nl/documenten/kamerstukken/2022/07/05/hoofdlijnenbrief-arbeidsmarkt.
[117] This topic is dealt with in more detail in Chapter 7, which deals with social security.
[118] According to Dutch law, employees are entitled to continuation of 70 % of their pay during the first two years of illness on the basis of Article 7:629 Dutch Civil Code.
[119] For more information about this group of workers, see: Cremers, E. and Bijleveld, L. W. (2010), *Een baan als alle andere?! De rechtspositie van deeltijd huishoudelijk personeel* (A job like all others?! The legal position of part-time household workers), Leiden, and the addendum by Bijleveld, L.W., Leiden, 2015.

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

As discussed in section 3.5.4, as of 1 January 2022 the law on 'diversity at the top of business' came into effect.[120] The law introduced a 'growth quota' for supervisory boards of listed companies. The law appears to have had an effect. Research from 2022 shows that the percentage of female members of boards of directors and female members of the supervisory boards has increased compared to the previous year, from 14 % to 15 % and from 33 % to 38 % respectively. Of newly appointed directors, however, a large majority (84 %) is still men. For the first time, a small majority (55 %) of newly appointed members of supervisory boards are women. The latter is a good step towards more gender diversity in senior management.[121]

The number of women in the top level of the (semi) public sector is also increasing. In 2022, there was an average increase in the proportion of women in top positions from 35 % to 37 %. However, there are major differences between sectors and organisations. For example, the proportion of women at the top of the healthcare and welfare sector increased to 11 %, but in top sports and recreation there were 5 % fewer women on boards compared to the previous year. The boards of more than half of the governing bodies in the (semi)public sector are still made up of less than 30 % women.

Thus the quotas appear to be effective, but so far results have only been published for one year (2022), so it is too early to draw conclusions.

4.4 Evaluation of implementation

In the view of the author, although Dutch law mainly implements EU law satisfactorily, it falls seriously short of EU law at a number of points. This is the case in the first place in respect of equal pay. Dutch law has implemented the prohibition on unequal pay but has completely neglected the Recommendation of the European Commission on Pay Transparency. This is also a serious problem in the Netherlands. Employees do not know what their colleagues earn, and it is not clear if there is a right to get information on this point. There is no obligation for employers to report on the gender pay gap, and equal pay is only made part of the bargaining process if the social partners both agree on this. The Government has announced legislative changes in this respect, but only following EU Directive 2023/970 on pay transparency.

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

[120] Law on making the relationship between the number of men and women on the management board and the supervisory board of large limited public liability companies and private companies more balanced, *Staatsblad* 2021/495: https://zoek.officielebekendmakingen.nl/stb-2021-495.html.

[121] Minister of Education, Culture and Science (2022), 'Kamerbrief over voortgang genderdiversiteit in de top' (Letter to Parliament about progress in gender diversity at the top), 22 December 2022: https://www.rijksoverheid.nl/documenten/kamerstukken/2022/12/22/kamerbrief-voortgang-genderdiversiteit-in-de-top.

In regard to positive action, EU law is an obstacle and subsequently CJEU case law in particular. This case law stands in the way of the application of positive action in the Netherlands, because the idea is that men must have equal opportunities (rather than substantive equality for the disadvantaged group). The NIHR allowed for preferential policies in two cases, in the technical universities of Delft and Eindhoven, but rejected policies in two other cases. The Dutch Government adopted a law on quotas for women, which is a step forward. This law also appears to have effect, as the number of women on boards is increasing, although rather slowly.

4.5 Remaining issues

Research on the COVID-19 crisis, and especially on the lockdowns, shows that work pressure and work-related stress have remained high for women. It was hard for parents to combine work and childcare, particularly during the time when primary schools were closed.[122] However, as the COVID-19 crisis appears to be over, there is now more attention available for other topics, such as shortages in the labour market, in particular in the public sector, in healthcare, childcare, police and education.

[122] Yerkes, M. and Remery, C. (Cogis-NL) (2020), *COVID gender (in)equality survey Netherlands. Tweede policy brief over de periode juni 2020* (COVID gender (in)equality survey Netherlands. Second policy brief for the period of June 2020), Utrecht. Available at: https://www.uu.nl/sites/default/files/Policyletter%20COGIS%20juni%202020%20def.pdf.

5 Pregnancy, maternity, and leave related to work-life balance for workers (Directive 92/85, relevant provisions of Directives 2006/54, and Directive 2019/1158)

5.1 General (legal) context

5.1.1 Overview of national acts on work-life balance issues

The Work and Care Act[123] contains provisions on pregnancy and maternity leave, parental leave, care leave, adoption leave, and paternity leave.

The Working Time Act[124] stipulates that employers must take into reasonable account the personal circumstances of employees, including their care responsibilities, when determining working hours and rest time.

The Working Conditions Act[125] contains provisions on protection of pregnant or breastfeeding women against health and safety risks at work.[126]

The Flexible Working Act[127] contains provisions on flexible working arrangements (FWA).

5.1.2 Political and societal debate and pending legislative proposals

There is debate on the number of women working part time and on the fact that a rather large group of women work in sectors with many part-time jobs and relatively low salaries and are therefore not financially independent. Also in view of shortages in the labour market, the Government wants women to carry out more paid work. In order to facilitate this, the Government planned to make childcare almost free (96 % reimbursed). However, these plans are being postponed, because of the perceived need to cut back on public expenditure.[128]

There are no other discussions on legal matters regarding work-life balance at the moment. Directive 2019/1158 has been implemented and it will become clear in the coming years what the effects of that will be.

5.2 Pregnancy and maternity protection

5.2.1 Definition in national law (Article 2 of Directive 92/85)

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

5.2.2 Obligation to inform employer (Article 2 Pregnancy Directive)

A pregnant worker must inform her employer of her condition not later than three weeks before the day on which she wants to take up her pregnancy leave.[129] No specific form is prescribed.

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123 Work and Care Act (*Wet Arbeid en Zorg*), 2011 Stb. 2001, 567.
124 Working Time Act (*Arbeidstijdenwet),* 1995 Stb. 1995, 598.
125 Working Conditions Act (*Arbeidsomstandighedenwet),* 1998 Stb. 1999, 184.
126 See also Burri, S. (2020), 'Care and the Workplace: The Dutch Approach to Part-time Work, Flexible Working Arrangements and Leave', in Loraine Gelsthorpe, Perveez Mody & Brian Sloan (ed.), *Spaces of Care*, Hart Publishing.
127 Flexible Working Act (*Wet flexibel werken*), 2015 Stb. 2015, 465.
128 In the 'Emancipatienota 2022-2025' it was announced that an income-independent childcare allowance of 96 % of the maximum hourly price, paid directly to childcare organisations, would be introduced. See the Emancipatienota 2022-2025 (Emancipation Memorandum), p. 17: https://www.rijksoverheid.nl/onderwerpen/vrouwenemancipatie/documenten/kamerstukken/2022/11/18/emancipatienota-2022-2025. However, in April 2023 this plan was postponed for at least two years.
129 Work and Care Act, 2001. See Article 3:3(1).

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

As far as the author knows, there is no case law on the definition of a pregnant worker, a worker who has recently given birth and/or a worker who is breastfeeding. There are opinions of the NIHR about IVF, in which it is stated that an IVF-treatment must be equated to pregnancy because the aim of IVF is to bring about a pregnancy. Putting a woman at a disadvantage because she has or will have IVF treatment is therefore considered as direct discrimination because of pregnancy.[130] In one of these opinions the NIHR referred to the *Dekker* case[131] in order to explain its decision that the fear of an employer that a pregnancy following IVF-treatment would lead to less effort on the part of an employee is directly discriminatory.

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

The protective measures mentioned in Articles 4-6 of Directive 92/85 are implemented in Dutch law. The Working Conditions Act (WCA)[132] and governmental decrees on the basis of the WCA[133] oblige employers to assess possible risks to the safety or health of pregnant or breastfeeding women and their children and to remove these risks. If the risks cannot be removed, the work must be adapted or the employee must be offered other work or, if that is not possible, she may be temporarily exempted from work while maintaining her salary. The prohibitions mentioned in Article 6 of Directive 92/85 are laid down in Articles 4:108 and 4:109 Working Conditions Decree. The Working Time Act (WTA) contains a regulation regarding night work for pregnant employees, in that pregnant women may ask to be exempted from doing night shifts, they have a right to periods of rest and a right to take leave for medical examinations.

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

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

There are a few judgments which relate to the protection of pregnant and/or breastfeeding women. The Arnhem Court of Appeal rendered a decision in 2003 about a conflict between employer and employee about breastfeeding. The employee worked as a nurse for an ambulance service. The service would stop one month after the end of the maternity leave of the employee and would not be in operation during this month. The employer therefore suggested that during this month the employee could work for another ambulance service where they would have a room for her, so she could breastfeed, or otherwise she could take leave days. When the employee did not agree, the leave days were not paid. The district judge thought this was fair, because, if the employee chose both to work and raise children, she had to solve the accompanying problems herself and could not offload these onto the employer(!). Fortunately, the appeal court was more sensible and ruled that the employer should have arranged a proper place for the employee to breastfeed (express breast milk). The fact that he was unable to arrange such a place, because he had terminated his ambulance service and therefore did not have a workplace anymore, came

[130] NIHR, Opinion 2007-120, 3 July 2007; Opinion 1999-33, 1 January 1999; Opinion 1994-2, 1 January 1994.
[131] CJEU, C-177/88, *Dekker vs Stichting Vormingscentrum voor Jongvolwassenen*, 8 November 1990.
[132] Working Conditions Act (*Arbeidsomstandighedenwet),* 1998 Stb. 1999, 184.
[133] In particular Article 1.42 of the Netherlands, Working Conditions Decree (*Arbeidsomstandighedenbesluit*), , 1997 Stb. 1997, 60.

at his own risk. The employer therefore had to pay wages to the employee for the days of unpaid leave taken.[134]

In 2008 The Hague Court of Appeal ruled in a case in which a female teacher had resigned from her job because she saw no possibility of combining care for her child – who had to be breastfed over a long period of time because of a food allergy – with her work, and because the employer insisted on clarity about the situation at short notice. One year later she resumed work, but she was graded on a lower salary scale than before. The district court and the appeal court ruled that this was discrimination, because the woman had had to resign because of reasons connected to sex/maternity/breastfeeding and therefore she had to be graded on the same salary scale as before.[135] The appeal court referred to the CJEU's decision in *Brown.*[136] In that case it was decided that a female employee who could not work during her pregnancy because of pregnancy-related illness, could not be compared to a male employee who was unable to work for a similar period for other health reasons. The Hague Court pointed out that in *Brown* it was thus decided that the application of a similar criterion to men and women who find themselves in different, non-comparable situations constitutes discrimination.

There are also several opinions by the NIHR in cases in which conflicts about expressing breast milk/breastfeeding at work led to the termination of employment relationships. In these opinions the NIHR concluded that the employers had acted in a discriminatory way.[137]

Case law on working conditions during pregnancy and maternity is rare. There are a few opinions by the NIHR, in which the conclusion was that employers had discriminated on the grounds of pregnancy by not, or not timeously or not sufficiently, adapting the work of pregnant employees.[138]

5.2.6 Prohibition of night work (Article 7 of Directive 92/85)

The Dutch Working Time Act (WTA) contains a regulation regarding night work for pregnant employees, to the effect that pregnant women may ask to be exempted from doing night shifts, have a right to periods of rest and can take leave for medical examinations. However, Article 4:5(5) WTA stipulates that, if an employer can prove that he cannot be required to exempt a pregnant woman from doing night shifts, the employer is not obliged to do so. So far there is no case law about this article.

5.2.7 Case law on the prohibition of night work

There is no case law by courts on the prohibition of night work for pregnant women or women who have recently given birth. The NIHR published a few opinions in this respect. In one opinion the NIHR ruled that an employer had discriminated against a pregnant woman by withdrawing an offer for a nursing job, inter alia on the ground that because of her pregnancy she would not be able to work night shifts.[139]

5.2.8 Prohibition of dismissal (Article 10(1) of Directive 92/85)

Dismissal from the beginning of pregnancy until the end of maternity leave is prohibited in Dutch law. Article 7:667(8) of the Civil Code stipulates that a contractual provision which states that the employment relationship will end in the event of pregnancy or childbirth is null and void. Article 7:670(2) of the Civil Code prohibits dismissal during pregnancy,

[134] Arnhem Court of Appeal, *JAR* 2003/198, 24 June 2003.
[135] The Hague Court of Appeal, *JAR* 2008/90, 22 February 2008.
[136] CJEU, C-394/96, *Brown vs Rentokil Ltd.*, 30 June 1998.
[137] NIHR, Opinion 2015-92, 10 August 2015, and Opinion 2016-122, 15 November 2016.
[138] NIHR, Opinion 2015-14, 18 February 2015.
[139] NIHR, Opinion 1996-84, 1 January 1996.

maternity leave and during six weeks after resuming work after maternity leave or after a period of illness caused by pregnancy or childbirth. Dismissal because of pregnancy, childbirth or motherhood is prohibited by Article 1 GETA.

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

In addition, a district court may terminate the employment agreement of a pregnant woman or a woman who has given birth if there is no connection with the pregnancy/childbirth or if the termination is in the interest of the employee. The procedure is similar to procedures regarding claims relating to other prohibitions on termination.

5.2.9 Redundancy and payment during maternity leave

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

5.2.10 Employer's obligation to substantiate a dismissal in writing (Article 10(2) of Directive 92/85)

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

5.2.11 Case law on the protection against dismissal

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

5.2.12 Protection against dismissal during pregnancy and maternity leave

Table 2: Protection against dismissal during pregnancy and maternity leave

Yes/no	**Protected period**	**Exceptions**	**Specific procedure?**
Yes	Beginning of the pregnancy until six weeks after the birth	Reasons not connected to the pregnancy and maternity leave, but when the reason is termination of the activities of the company, dismissal is prohibited during maternity leave	No

5.3 Maternity leave

5.3.1 Length (Article 8 of Directive 92/85)

Maternity leave lasts for at least 16 weeks. It may start on any date between six and four weeks before the expected date of confinement and is at least ten weeks after the birth. The leave can be longer if six weeks were taken before the expected date, but the child is born after the expected date. If the child has to remain in hospital for longer than eight days after the birth, the maternity leave may be extended. The maximum extension is ten weeks.[140]

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

5.3.2 Obligatory maternity leave

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

5.3.3 Legal protection of employment rights (Article 11(1) of Directive 92/85)

In Article 1:6(1) of the Work and Care Act, which took effect as of 2 August 2022, it is stipulated that an employee will keep his/her employment rights relating to his/her employment contract during his/her leave as mentioned in the law, thus including pregnancy and maternity leave. In the past, the Government did not deem it necessary to include such a provision in the law, but following the Work-Life Balance Directive, the Government changed its mind.

5.3.4 Legal protection of rights ensured from the employment contract (Article 11(2) of Directive 92/85)

In Article 1:6(1) of the Work and Care Act, which took effect as of 2 August 2022, it is stipulated that an employee will keep his/her employment rights relating to his/her employment contract during his/her leave as mentioned in the law, thus including pregnancy and maternity leave. In the past, the Government did not deem it necessary to include such a provision in the law, but following the Work-Life Balance Directive, the Government changed its mind.

5.3.5 Level of pay or allowance (Article 11(3) of Directive 92/85)

Pay during maternity leave is 100 % of the daily wage for social security purposes (Article 3:13 of the Work and Care Act). The daily wage is the same as the salary paid by the employer, but it has a maximum of EUR 228.76 per day (as of 1 January 2022). This maximum is revised twice a year. Women who earn more than EUR 4 975.53 gross per month therefore do not receive 100 % of their salary. The statutory pay during sick leave is 70 % of the salary, although, of course, employers may pay more than this. A higher pay than 70 % can also be agreed upon in a collective agreement.

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

[140] Work and Care Act, 2001. See Article 3:1(5).

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

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

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

Article 1:6(2) of the Work and Care Act stipulates that an employee has the right to return after the leave mentioned in the law, thus including maternity leave, to his/her job or to an equivalent job, on terms and conditions that are no less favourable to him/her, and to benefit from any improvement in working conditions to which he/she would have been entitled during his/her absence. In the past, the Government did not deem it necessary to include such a provision in the law, but following the Work-Life Balance Directive, the Government changed its mind.

5.3.8 Legal right to share maternity leave

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

5.3.9 Case law

There are some judgments that relate to maternity leave and especially to dismissal during maternity leave. The Rotterdam district court ruled that an employer acted in serious breach of the employment agreement by expressing strong criticism of an employee's performance in a meeting shortly after she had given birth. The employer therefore had to pay higher severance pay than he would otherwise have had to pay.[141]

The District Court of The Hague established a presumption of indirect discrimination in the situation of an employee who was dismissed on the last day of her probationary period, because she had announced that, after her pregnancy leave, she would like to work 23.5 hours per week instead of 40. The employer had told her he needed more flexibility. In the court case the employer came up with another reason for the dismissal, which was that the employee had had an affair with the director's brother, but the court did not accept this turnaround. The employee received five months' salary, as that was the period the employment agreement would have lasted without the discrimination. In addition, the court awarded her non-pecuniary damages of EUR 1 382.40 (10 % of the pecuniary damage).[142]

Interestingly, the NIHR had ruled that the employee had not been discriminated against, because the equality legislation does not give employees the right to work part-time and therefore the dismissal of the employee on the ground of her wanting to work part-time, could not be seen as discrimination. In a comment by the author of this report it was pointed out that this point of view is not correct if one takes into account that most employees who wish to work part-time after the birth of their child are women. Dismissal because of the wish to work part time after maternity leave thus constitutes indirect discrimination.[143]

It is worth mentioning the judgment by the Supreme Court of 6 November 2020, in which it ruled that the provision in the secondary education collective agreement, which states that the pregnancy and maternity leave of employees lapses when it overlaps with school

[141] District Court of Rotterdam, 26 April 2018, ECLI:NL:RBROT:2018:230.
[142] District Court of The Hague, 30 January 2020, *JAR* 2020/37.
[143] NIHR, 26 July 2019, opinion 2019-75. Published in *JAR* 2019/207 with a comment by M.S.A. Vegter. It is possible for workers to request to work part time, although not on the basis of the equality legislation, but on the basis of the Flexible Working Act (see par. 5.1.1.). However, the NIHR can only give an opinion about the equality legislation, not about other laws.

holidays other than the summer holiday, is contrary to the Equal Treatment Act and constitutes direct discrimination. The Supreme Court's decision differs from its judgment of 9 August 2002, in which it took the opposite view. In that case the Supreme Court ruled that there was no discrimination involved, because the provision in the collective agreement did not grant a specific number of holidays to employees, but only pointed out when holidays could be taken. However, in 2004 the CJEU rendered the *Gómez* judgment,[144] in which it made clear that Article 5(1) of Directive 76/207/EEC (old) must be interpreted as meaning that a worker must be able to take her annual leave during a period other than the period of her maternity leave, including in a case in which the period of maternity leave coincides with the general period of annual leave fixed by a collective agreement for the entire workforce. In its decision of 2020, the Supreme Court applied the *Gómez* judgment and decided on the basis thereof that it is contrary to both Dutch and EU law if maternity leave lapses if it overlaps with school holidays.[145]

With respect to employment rights during maternity leave, a judgment by the Amsterdam Appeal Court of 2010 is still relevant.[146] This judgment concerned the question whether an employer had the right to grant a lower amount of bonus to a female employee, because of her absence during maternity leave. The Appeal Court referred to the CJEU's judgment in *McKenna* and observed that a female employee is entitled during her maternity leave to the same employee benefits as a male employee who cannot work because of illness. This male employee would have received a lower bonus, because his absence because of illness would have been taken into account, and therefore the same held true for the female employee in this case. The Appeal Court also referred to Dutch labour law and argued that in this case the amount of pay was not based on hours worked, but on a certain achievement. That meant that there was no right to the bonus during the maternity leave.

This judgment met with quite some criticism, because one can also state that the employee in question was treated less favourably because of her maternity leave, which is contrary to the right to equal treatment. The Dutch equality body followed this view before the judgment of the Amsterdam Appeal Court, but after the decision by the Amsterdam Court, the equality body changed its mind and started applying the appeal court's approach.[147] Therefore there is currently no right to all employee benefits during maternity leave.

5.3.10 Table on Maternity leave

Table 3 Maternity leave:

Duration	Obligatory period	Possibility to share maternity leave?	Payment or allowance	Right to return after the end of maternity leave
16 weeks	14 weeks	No	Yes	Yes

5.4 Adoption leave

5.4.1 Existence of adoption leave in national law

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

The leave is at most six consecutive weeks and may be taken during a period of 26 weeks starting four weeks before the actual adoption. The leave is not subject to specific conditions. The only restriction is that, if two or more children are adopted simultaneously,

[144] CJEU, 18 March 2004, *Merino Gómez*, C-324/01, ECLI:EU:C:2004:160.
[145] Supreme Court, 6 November 2020, ECLI:NL:HR:2020:1748.
[146] Appeal Court of Amsterdam, 27 April 2010, ECLI:NL:GHAMS:2010:BM2034.
[147] Commission on Equal Treatment (the predecessor of the NIHR), 19 May 2011, *JAR* 2011/155, with a comment by E. Cremers-Hartman.

the leave will be granted only in respect of one of these children. The leave is paid leave. The payment is the same as in the case of maternity leave, thus 100 % of the daily wage for social security purposes, with a maximum of EUR 228.76 per day.

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

Dutch law provides protection against dismissal.

Article 7:670(7) of the Civil Code prohibits dismissal due to exercising the right to adoption leave. Article 1:6(2) of the Work and Care Act stipulates that an employee has the right to return after leave as mentioned in the law, thus including adoption leave, to his/her job or to an equivalent job, on terms and conditions that are no less favourable to him/her, and to benefit from any improvement in working conditions to which he/she would have been entitled during his/her absence.

5.4.3 Case law

There is very little case law on adoption leave. There has been a case before the Central Appeals Tribunal[148] about the question of whether a woman was entitled to adoption leave because she adopted the biological child of the woman she was married to or had a registered civil partnership with. The Court ruled that this is not the case. The situation of the woman in question is comparable to that of a father and therefore the woman could apply for birth leave, but not for adoption leave.[149]

5.5 Leave in relation to surrogacy

5.5.1 Prohibition of surrogacy

Surrogacy is not prohibited in the Netherlands, as long as it not carried out for commercial reasons. The surrogate mother is not allowed to receive money or other rewards for her services as a surrogate. In addition, the agreement must be approved in advance by the Foundation for Artificial Dissemination Donor Data (SDKB), which supervises compliance with the rules. The promotion of commercial surrogacy is prohibited in the Dutch Criminal Code, Articles 151b and 151c.

5.5.2 Leave in relation to surrogacy

Dutch legislation has no specific arrangement for the situation in which a woman carries and gives birth to a child for another woman/other parents who is/are going to raise the child. Parental leave may be granted to the legal parents of the child and to persons who live at the same address as the child, take permanent care of the child and raise the child as if that child was their own child in a legal sense.[150] On the basis of this regulation intended parents will have a right to parental leave if they become the legal parents of the child, e.g. through adoption, or if they take permanent care of the child and live at the same address. The surrogate mother might also be entitled to parental leave if she is still the legal mother of the child.

5.5.3 Case law on leave in relation to surrogacy

There is no case law on leave in relation to surrogacy.

[148] The highest court in administrative cases – Centrale Raad van Beroep.
[149] Central Appeals Tribunal, 27 August 2012, ECLI:NL:CRVB:2012:BX5312.
[150] Article 6:1 of the Work and Care Act.

5.6 Transposition of the Work-Life Balance Directive 2019/1158 in general

5.6.1 Provisions on leave as a result of the transposition of the WLB

The Work-Life Balance Directive was transposed into Dutch law as of 2 August 2022.

Most provisions of the WLB Directive applied already in the Netherlands, thus the implementation concerned relatively few areas of the law. The most important change was the introduction of paid parental leave in the Work and Care Act. Article 6:3 of the Work and Care Act now stipulates that an employee is entitled to nine weeks' paid leave during the first year after the birth of the child. The leave is paid at a rate of 70 % of the maximum daily wage in accordance with the social security laws.

Other changes in the Work and Care Act are:

- Introduction in Article 1:6(1) of the right of the employee to keep the employment rights relating to the employment contract during the periods of leave mentioned in the law;

- Introduction in Article 1:6(2) of the right of the employee to return after the leave mentioned in the law to his/her job or to an equivalent job, on terms and conditions that are no less favourable, and to benefit from any improvement in working conditions to which the employee would have been entitled during their absence;

- Introduction in Article 1:7 of the prohibition on less favourable treatment of employees on the ground that they have applied for, or have taken, a leave, provided assistance in doing so or lodged a complaint in this respect;

- Revision of Article 6:5(3) about the possibility of the employer to change the way in which the employee wants to take up the parental leave; and

- Revision of Article 6:6 about suspending the leave at the request of the employee.

The Flexible Working Act was also changed in some respects:

- Article 2:15 now contains the right to return to the previous work pattern after a period of change of the working hours, working place or working times;

- The employee can request to return to their original work pattern before the end of the agreed period in which this pattern would change, if the circumstances justify this request (Article 2:16); and

- In Article 3a a prohibition was introduced on less favourable treatment of employees on the ground that they used their rights under the Flexible Working Act, provided assistance in doing so or lodged a complaint in this respect.

The personal scope of the Flexible Working Act and the Work and Care Act includes all employees, including part-time employees, fixed-term contract employees and temporary agency employees. An employee is defined as a person that works for another person (natural or legal) on the basis of an employment agreement (as defined in the Civil Code) or a public appointment. An employment agreement is any agreement which binds one person (the employee) to perform work under the authority of another person (the employer) in exchange for a salary.[151] All employees are included regardless of the size of the organisation. The only exception is that the right to request a reduction or extension of working hours, a change of the workplace or a change of the work pattern (the rights

[151] Article 7:610 Dutch Civil Code, Stb. 1822, 10.

mentioned in the Flexible Working Act) can only be exercised against employers with 10 or more employees. However, this exception does not apply to employees with children under eight years and employees who are also carers as meant in the Directive. These employees also have the rights to FWA as specified in the Directive, when their employer has fewer than 10 employees.

5.6.2 Child-related leave

The Work and Care Act contains four categories of child-related leave: pregnancy and maternity leave,[152] birth leave,[153] parental leave[154] and adoption leave.[155] These types of leave are discussed in more detail elsewhere in this report (maternity leave in section 5.3, paternity leave in section 5.7 and adoption leave in section 5.4). There have been no changes to these forms of leave since 2 August 2022, the date on which the WLB Directive was transposed into Dutch law.

5.7 Paternity leave

5.7.1 Paternity leave in national law (Article 16 Recast Directive and Article 3(a) and 4 WLB Directive)

Dutch legislation provides for paternity leave. Fathers (and other partners of the mother) have a right to attend the birth of their child (Article 4:1(2)(a) Work and Care Act) and the right to one week of paid birth leave to be taken during the four weeks after the birth of the child (Article 4:2 Work and Care Act). As of 1 July 2020, the father/partner of the mother is also entitled to a maximum of five weeks' leave to be taken during the first six months after the birth of the child. The taking of paternity leave is an individual right. The leave is the same in the public and in the private sector.

5.7.2 Paid paternity leave (Article 8(1) and (2) WLB)

Employers have to continue to pay fathers/other partners of the mother during the one week they can take leave during the period of four weeks after the birth of the child. The payment is the same as the normal salary (Article 4:2 Work and Care Act).

During the additional paternity leave of five weeks, the father/partner is entitled to an allowance, paid from collective funds, of 70 % of the (capped) last earned salary (Article 4:2(b) Work and Care Act).

The only qualifying conditions are that only employees are entitled to the payment (thus those who are self-employed do not qualify) and that the person who gave birth was the spouse, the registered partner or the person with whom the employee lives without being married to them, or that the employee has officially acknowledged the child.

5.7.3 Protection against unfavourable treatment and dismissal (Article 16 of the Recast Directive)

Article 1:6 of the Work and Care Act stipulates that an employee will keep the employment rights relating to his employment contract during the leave as mentioned in the law, thus including paternity leave, and has the right to return to his job or to an equivalent job, on terms and conditions that are no less favourable to him, and to benefit from any improvement in working conditions to which he would have been entitled during his absence. Dutch law also provides for protection against dismissal. Article 7:670(7) of the

[152] Article 3:1 WCA.
[153] Article 4:2 WCA.
[154] Article 6:1 WCA.
[155] Article 3:2 WCA.

Civil Code states that an employer may not terminate an employment agreement on the ground that an employee applies for paternity leave.

5.7.4 Case law

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

5.7.5 Table on paternity leave

Table 4: Paternity leave

Who is entitled?	Duration	Possibility to share paternity leave?	Payment or allowance	Qualifying conditions for allowance
Fathers and partners of the mother	One week regular birth leave and five weeks of extra birth leave	No	One week payment of the normal salary and five weeks of an allowance of 70 % of the (capped) daily wage	Status of employee and requirement either to live together with the mother (married or unmarried) or having acknowledged the child

5.8 Parental leave

5.8.1 Implementation of Directive 2019/1158 (Articles 3, 5, 8, 20(1) and 20(2) WLB Directive)

Most provisions on parental leave that result from Directive 2019/1158 already applied in the Netherlands. A few new provisions were added, in particular on paid parental leave and on protection against retaliation by the employer. These provisions are outlined above, in section 5.6.1 of this report. In the author's opinion, Articles 3, 5 and 8 of the WLB Directive have been implemented correctly. There have been no changes since 2 August 2022, the date as of which the WLB Directive was fully implemented.

5.8.2 Parental leave in national law (Article 5 (1) and (4) WLB Directive)

Parental leave is regulated in Articles 6:1-6:11 of the Work and Care Act.

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

All employees are entitled to parental leave until the child is eight years of age. There are no qualifying conditions such as period of work qualification or length of service. The only condition is that only employees are covered and that the right exists until the child is eight years of age.

5.8.3 Individual nature of the right to parental leave and transferability (Article 5(2) WLB Directive)

The right is individual for each of the parents. This is not explicitly stated in the law, but the Work and Care Act addresses 'the employee' and does not state anywhere that the leave can be transferred or taken by another person.

5.8.4 Period of notice (Article 5(3) WLB Directive)

An employee must give written notice of his/her wish to take leave two months in advance (Article 6:5 Work and Care Act). The employee must specify the period of the leave, the number of hours during the week and the distribution of the leave over the week. The employer has the right, after consulting the employee, to change how the hours are distributed over the week if there are compelling business or organisational reasons to do so. Such reasons may be that there is no other employee available on a busy Friday afternoon,[156] that the employee is needed on the hours when most clients visit the employer's shop[157], or, more in general, problems with scheduling of personnel. The basic assumption is that employer and employee should both act reasonably and try to reach a solution that works for both of them. The employer may change the distribution of the hours over the week until four weeks before the leave begins. The employer may not refuse the leave itself.

5.8.5 Postponement of parental leave (Article 5(5) WLB Directive)

The employee can ask the employer to agree with him/her not taking the leave or not to continue the leave because of unforeseen circumstances (Article 6:6). The employer may refuse such a request only for compelling business or organisational reasons. If the leave is postponed, it can be taken at a later time, as long as the child involved has not reached the age of eight years.

The Dutch legislature has not established circumstances in which the employer is allowed to postpone the granting of parental leave. The only thing employers can do is to adapt the spreading of the hours over the week. However, they cannot refuse or postpone the leave itself.

5.8.6 Forms of parental leave (Article 5(6) and (7) WLB Directive)

Parental leave can be taken in various forms (Articles 6:2 and 6:5(1) Work and Care Act). The starting point is that the leave is taken over a period of 12 months for half of the working hours per week, but the employee may ask to spread the leave over a longer period than 12 months, to split the leave into 6 or fewer separate periods of at least 1 month, or to take leave for more hours than half of the working hours per week. The employer may refuse these requests if there are compelling business or organisational reasons.

5.8.7 Special rules and exceptional conditions for parents of children with a disability or long-term illness (Article 5(8) WLB Directive)

There are no special rules/exceptional conditions for access and modalities of application of parental leave to allow for the needs of parents of children with a disability or a long-term illness. Parents can apply for unpaid long-term care leave of six weeks in situations in which temporary care is needed.[158]

5.8.8 Paid parental leave (Article 8(1) and (3) WLB Directive)

Parental leave is paid at a rate of 70 % of the maximum daily wage, as defined in the social security laws, during nine weeks (Article 6:3 Work and Care Act). The paid leave can only be taken in the first year after the birth of the child. The payment is an allowance, granted by the social security authorities (Article 6:3a). The employer has to make the request to the social security authorities on behalf of the employee.

[156] District Court of Bergen op Zoom, ECLI:NL:RBBRE:2010:BN9440, 22 September 2010.
[157] District Court of Nijmegen, *JAR* 2006/201, 7 July 2006.
[158] This is discussed in more detail in section 5.9.

5.8.9 Case law

There has been one case on unfavourable treatment in relation to parental leave. This case was decided by the Central Appeals Tribunal on 23 November 2017.[159] The court ruled that the police, in its capacity of employer, had breached the law by terminating the temporary assignment of a police officer because he had taken parental leave. The police officer had been placed in a higher position for the duration of one year. One month before the assignment was due to start, the police officer was granted parental leave for two days a week. He continued to work on the other three days. Three months after the start of the assignment, the police organisation terminated the assignment because, in its view, his parental leave caused problems in the work process. The police officer contested this point of view in court, but his claim was dismissed by the court of first instance. On appeal, the Central Appeals Tribunal ruled that the termination of the temporary assignment constituted less favourable treatment. In the first place the termination damaged the career of the police officer by limiting the period during which he could gain experience in a higher position, secondly, he suffered financial damage because his temporary allowance also stopped, and thirdly it was noted in his file that his attitude had not been constructive. The decision by the police to terminate the temporary assignment was therefore deemed to be invalid.

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

There are also a few cases on dismissal related to conflicts arising from the taking up of parental leave. In one of these cases the District Court of Amsterdam terminated the employment agreement of an employee because of his conduct in respect of parental leave. The employee had requested parental leave for one day per week. The employer, a secondary school, agreed to this. Subsequently the employee asked to take the leave on Fridays. The school said that this was not possible, but that Mondays or Wednesdays would be fine. The employee did not agree with this and did not come to work on three following Fridays. The court ruled that this conduct was unreasonable, as the school had made it sufficiently clear why the employee could not take leave on Fridays (in the interests of the pupils of the school) and the employee had not made clear why Mondays or Wednesdays would not be possible for him.[160]

In another case the District Court of Amsterdam also terminated the employment agreement because of a serious conflict between employer and employee about parental leave. In this case the court ruled that the employer was to blame for the conflict, because he had wrongly taken the view that a real estate broker could not fulfil his/her position part time and therefore could not take parental leave. The employee received a higher severance payment than she would otherwise have had.[161] She was not re-instated, because the relationship between the parties had deteriorated to such an extent that cooperation was no longer possible.

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

[159] Central Appeals Tribunal, 23 November 2017, ECLI:NL:CRVB:2017:4067.
[160] District Court of Amsterdam, *JAR* 2012/138, 30 November 2011.
[161] District Court of Amsterdam, *JAR* 2009/43, 18 December 2008.

5.8.10 Table on parental leave

Table 5: Parental leave

Duration and period	Possibility to share parental leave?	Flexibility (e.g. full-time, part-time, piecemeal)?	Payment or allowance?	Qualifying conditions for payment or allowance?
Six months	No	Yes, all forms are possible	Allowance of 70 % of the maximum daily wage during nine weeks	Status of employee and the child must be younger than eight years

5.9 Carer's leave

5.9.1 Carer's (or care) leave in national law (Articles 3(1)(c), (d) and (e) and 6 WLB Directive)

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

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

5.9.2 Payment or allowance

During short-term care leave the employee is entitled to at least 70 % of the normal salary, to be paid by the employer (Articles 5:6 and 5:7 Work and Care Act).

Long-term care leave is unpaid.

5.9.3 Case law

There is a judgment that dates back to 2005 on the question of whether it was necessary for an employee to take leave in order to care for his partner who had had an operation to remove her uterus. There was also a judgment from 2008 on the same question, but in relation to an abdominoplasty (tummy-tuck). In the first case the leave was found to be necessary and in the second case it was not.[162] The different outcomes are due in particular to the different medical situations. In the first case the court observed that there was a medical reason for the operation, whereas in the second case there was no medical necessity. This does not have to stand in the way of the right to care leave, but in the second case the request for the leave was also made at very short notice and according to the judge it was not clear that the care could not be provided by someone else. The difference in outcomes is thus not related to gender. There was no reference to case law of the CJEU.

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

5.9.4 Table on carer's leave

Table 6: Carer's leave

Purpose(s) of leave	Maximum period of leave	Compensation?	Beneficiaries (persons taken care of)	Other relevant information
Care for a family or household member or a close contact	Short-term leave maximum two weeks; long-term leave maximum six weeks	Short-term leave: 70 % of the daily wage; long-term leave no compensation	Members of the family and household and other close contacts	No

5.10 Time off for force majeure

5.10.1 Time off for *force majeure* (Article 7 WLB Directive)

Dutch law entitles workers to time off from work on grounds of *force majeure* for urgent family reasons in case of sickness or accident. This leave is regulated in Article 4:1 of the Work and Care Act. Article 4:1(1) gives employees the right to a short paid leave in the case of unforeseen circumstances that make an immediate interruption from work necessary, very special personal circumstances, the fulfilment of a duty imposed by the Government and the exercise of the right to vote. Article 4:1(2) adds that very special personal circumstances include in any case (a) the delivery of a child by the partner of the employee[163], (b) the death and burial of a household member or a close relative, (c) an urgent or unforeseen visit to the doctor or hospital or a visit to the doctor or hospital that could not be scheduled outside working hours by the employee himself or in order to accompany a sick relative, family member or other close contact if the employee is the best person to take care of him/her, and (d) providing necessary care on the first day of illness to the persons mentioned under (c).

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

During any time off for reasons of *force majeure* the employer must continue to pay the regular salary.

5.10.2 Case law

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

5.10.3 Table on time off for *force majeure*

Table 7: Time off for *force majeure*

Purpose of time off	Maximum period of time off	Compensation?	Other relevant information
Urgent family reasons	No time limit, but it must be short	Regular salary	No

[163] This is now also covered by the birth leave mentioned in section 5.6.2.

5.11 Flexible working time arrangements (FWA)

5.11.1 Right to adjust working patterns (Article 3(1)(f) and 9 WLB Directive)

Dutch law provides workers with a legal right to reduce or extend working time on request. This right can be found in Article 2 of the Flexible Working Act. This right cannot be exercised against employers with less than ten employees, unless the right is exercised by employees with children under eight years and employees who are also carers. This exception to the exception was included in Dutch law in order to comply with the WLB Directive.

Employers are obliged to comply with a request unless compelling business or organisational reasons justify its refusal. All employees are entitled to this right; is not limited to specific groups.

Employees must have been employed for at least 26 weeks before they file the request, apart from cases of *force majeure* (when no qualifying period applies).

The right can be exercised for any purpose. The employee is not obliged to specify the purpose.

There is no similar right to adjust working patterns, including through the use of remote working arrangements, and flexible working schedules.

5.11.2 Relative right (Article 9(2) WLB Directive) to FWA

Workers are entitled to request adjustment of their working time patterns and of their workplace, e.g. working from home or working remotely (Article 2 Flexible Working Act).

Employers can refuse a request for a specific pattern of working hours if it is reasonable for them to do so after having balanced the interests of both parties. They are thus not obliged to comply with a request, but must give it serious consideration and consult the employee when they refuse the request. The employer is also obliged to inform the employee in writing about the refusal of a request and must give the reasons for this refusal or for the decision to deviate in part from the request of the employee. This means that also in case of postponement of the implementation of the adjustment, this must be explained to the employee in writing, stating the reasons for the decision (Article 2:8 Flexible Working Act).

5.11.3 Absolute right to FWA

Workers do not have absolute rights to FWA. The most absolute right is the right to a reduction or extension of working hours. This may only be refused if compelling business or organisational reasons justify its refusal (Article 2:5 Flexible Working Act).

5.11.4 Duration (Article 9(1) and (3) WLB Directive) of FWA

There are no specific rules on the duration of FWA. FWA can last until the end of the employment agreement, but can also be for a shorter period of time. The duration depends on the request of the employee and on whether there are compelling business or organisational reasons (in case of a reduction or extension of working hours) or reasonable interests (in case of adaptation of working pattern or workplace) on the side of the employer which justify refusing or only partly allowing the request.

5.11.5 Other legal rights to flexible working arrangements

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

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

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

5.11.6 Case law

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

Case law on requests for a reduction of working hours usually focuses on the question of whether the employer has compelling business or organisational reasons for refusing such a request. The following reasons were not accepted as compelling:

- that an employee must always be available for the client;
- that a manager must be available for the team;
- that an employee has specific knowledge; and
- that granting the request will set a precedent.

For an employee, it is helpful if he/she has previously had leave, for example paternal leave, which has gone smoothly. Occasionally, requests for reduction of working hours have been denied, for example where an employee wanted to work only two days per week, which is not enough to keep her expertise up to date.[164]

Denials of requests for extension of working hours are more easily accepted by the courts. In most cases, the reason is that there are no hours available.[165] However, sometimes other arguments are considered, e.g. that granting extra hours to an employee would mean there would be no more hours for volunteers in a situation where volunteers are indispensable for the work of a museum.[166]

Requests for a different working pattern may be refused if the interests of the employer reasonably prevail over the interests of the employee. The employer does not need to have compelling reasons, as in the case of requests for adaptation of the working hours. An employer may, for instance, ask of a manager that she works one evening per week if

[164] See for an overview: Bevers, E. (2015), 'De wet modernisering regelingen voor verlof en arbeidstijden: noodzakelijk en nuttig?' (The Act on modernisation of regulations for leave and working hours: necessary and useful?), *TAP* 2015/60.
[165] See for example, District Court of The Hague, 28 April 2021, ECLI:NL:RBDHA:2021:130: Denial of request to work 40 hours per week instead of 36 because there was no vacancy and no hours available.
[166] District Court of Amsterdam, 1 December 2017, ECLI:NL:RBAMS:2017:771.

that is necessary for the work, even though she wants to stay at home to take care of her five children.[167] The interests of residents of a care home may require that the starting time of an evening shift is set at an earlier hour than before, even though this conflicts with the care tasks of an employee at home.[168]

A request to work remotely or work from home may be refused by an employer after careful consideration. Nevertheless, a court will weigh the interests of both parties. The basis thereof is the obligation for an employer to act as a good employer (Article 7:611 DCC). This general obligation means that the employer must take the interests of the employee into account when making a decision. The decision by an employer to ask an employee to work at the office on Fridays for a while instead of at home as he used to do, because of criticism of his performance, was deemed reasonable by the Appeal Court.[169]

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

5.11.7 Table on flexible working arrangements (FWA)

Table 8: FWA, including remote working arrangements, flexible working schedules, or reduced working hours

Right to adjust working patterns	**Workers entitled**	**Absolute or relative right**	**Limited duration and right to return to the original pattern**	**Qualifying conditions**
Yes	All employees	Relative	No	Length of service of 26 weeks or more

5.12 Legal protection provisions in the Work-Life Balance Directive 2019/1158

5.12.1 Maintenance of rights acquired or in the process of being acquired by the worker (Article 10(1) WLB Directive)

Rights acquired or in the process of being acquired by the worker on the date on which paternity, parental leave, carer's leave or time off starts will be maintained as they stand until the end of the leave. This is explicitly stated in Article 1:6(1) Work and Care Act. There is no difference between the types of leave.

5.12.2 Right to return to the same or an equivalent job (Article 10(2) WLB Directive)

Workers benefiting from paternity leave, parental leave or carer's leave have the right to return to their jobs or to equivalent jobs on conditions not less favourable than their previous conditions and to benefit from any improvement in working conditions to which they would have been entitled if they had not taken the leave. This is stated in Article 1:6(2) Work and Care Act.

5.12.3 Status of employment or employment relationship (Article 10(3) WLB Directive)

The employment relationship is maintained during paternity leave, parental leave, carer's leave and time off. Entitlements to social security remain intact during leave. The obligation to pay pension contributions is dependent on the obligation of the employer to pay the employee's salary during the leave. This obligation exists during almost all forms of leave. An exception is long-term care leave (when the leave is longer than two weeks annually), which is unpaid. During that leave there may not be an obligation to continue to pay pension contributions.

[167] District Court of North-Holland, 10 February 2017, *JAR* 2017/101.
[168] District Court of Utrecht, 27 April 2011, ECLI:NL:RBUTR:2011:BQ3288.
[169] Amsterdam Appeal Court, 30 January 2018, ECLI:NL:GHAMS:2018:3017.

5.12.4 Prohibition of discrimination (Article 11 WLB Directive)

Less favourable treatment of workers on the grounds that they have applied for, or taken, paternity leave, parental leave, carer's leave, time off or FWA, is prohibited under Article 1:7 of the Work and Care Act and Article 3a of the Flexible Working Act.

5.12.5 Protection from dismissal and burden of proof (Article 12 WLB Directive)

Dismissal of workers on the grounds that they have applied for, or taken, carer's leave or FWA, is prohibited in Article 3 of the Flexible Working Act. There is no separate prohibition on preparations of dismissal. This is part of the dismissal itself or can perhaps be considered to be contrary to being a good employer/good faith (Article 7:611 Dutch Civil Code), or as a form of less favourable treatment (Article 1:7 of the Work and Care Act).

In the Work and Care Act there is no similar provision with respect to workers who have applied for, or taken, paternity or parental leave. However, as dismissal can be seen as a form of less favourable treatment, these workers will be protected by the prohibition on less favourable treatment. Also, dismissal of employees (with a permanent contract or prematurely in case of a fixed-term contract) may only take place on a limited number of grounds that are mentioned in Article 7:669 of the Dutch Civil Code. Applying for or taking leave is not a valid ground for dismissal. There is no separate prohibition on preparations for dismissal. This is part of the dismissal itself or can perhaps be considered to be contrary to good employment practice/good faith (Article 7:611 Dutch Civil Code).

Employees have the right to request that the employer provide duly substantiated reasons for the dismissal in writing. This follows from Article 7:699 of the Dutch Civil Code.

There is no specific rule on the burden of proof, but the employer can only dismiss an employee for the reasons mentioned in Article 7:669 of the Dutch Civil Code and therefore will have to prove that such a reason exists. This obligation does not apply in the case of fixed-term contracts. Employers are not obliged to substantiate why they did not extend a contract. However, if an employee can state such facts from which it can be presumed that discrimination occurred, the burden of proof shifts to the employer and the employer has to prove that they did not discriminate. This also applies in case of temporary contracts. However, dismissal because of requesting or taking leave does not have to be discrimination on a protected ground, such as sex, ethnic origin, religion, etc. Nevertheless Article 8:1a of the Work and Care Act stipulates that, when employees assume that they are being treated less favourably because they applied for or took one of the forms of leave mentioned in the Act, they can ask the NIHR for an opinion. Therefore, such claims are treated more or less the same as claims on the basis of equality legislation. Nevertheless, one can say that Dutch law does not entirely conform with the WLB Directive in the situation where a fixed-term contract is not extended because an employee applied for or took leave, as in that case there is no reversal of the burden of proof.

In Dutch law no more favourable rules apply as meant in Article 12(4) WLB Directive.

5.12.6 Case law

Case law on parental leave is described in section 5.8.9 above.

There is no case law in relation to unfavourable treatment and/or dismissal related to paternity leave, carer's leave or time off.

With respect to FWA, the judgment which was mentioned in section 5.3.9 is also relevant here. The case concerned an employee who was dismissed on the last day of her probationary period, because she had announced that, after her pregnancy leave, she would like to work 23.5 hours per week instead of 40. The District Court of The Hague

considered this to be discrimination on the ground of sex (pregnancy) and granted the employee compensation of five months' salary, as that was the period the employment agreement would have lasted without the discrimination. In addition, the court awarded her non-pecuniary damages of EUR 1 382.40 (10 % of the pecuniary damage).[170]

The court could perhaps also have said that this was unfavourable treatment due to the wish to work fewer hours (FWA). That was the line that was followed earlier in this case by the NIHR. The NIHR took the view that the employee had not been discriminated against, because the equality legislation does not give employees the right to work part time and therefore the dismissal of the employee on the ground of her wanting to work part time, could not be seen as discrimination.[171] At the time of this opinion, the prohibition on less favourable treatment of Article 3a of the Flexible Working Act did not yet apply. However, the prohibition on dismissal because of applying for, or taking, leave, was already in force and could have been invoked (Article 3 Flexible Working Act).

5.13 Evaluation of implementation

In the author's view Dutch law has in general implemented EU law in a satisfactory way. Almost all rules on types of leave that are prescribed by EU law have been implemented in Dutch legislation. This does not mean that employees are always sufficiently protected, but that they are protected as far as EU law requires.

There is one relatively small gap in cases where a fixed-term contract is not extended because an employee applied for or took paternity leave, parental leave, care leave, time off or FWA. In such a case there is no reversal of the burden of proof, unless there is also discrimination on a recognised ground of discrimination. This is not in line with Article 12(3) WLB Directive, unless 'dismissal' in that Article does not refer to the non-prolongation of a fixed-term contract. In case C-438/99 (*Melgar*) the CJEU ruled that non-renewal of a fixed-term contract cannot be considered to be 'dismissal'. If that line of reasoning is applied here, the extent of protection that the WLB (and Dutch law) offers against the non-renewal of a fixed-term contract is less than the protection against dismissal.

In the author's view Dutch law does not exceed EU law. In almost all respects it offers more or less the same protection.

5.14 Remaining issues

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

[170] District Court of The Hague, 30 January 2020, *JAR* 2020/37.
[171] NIHR, 26 July 2019, opinion 2019-75. Published in *JAR* 2019/207 with a comment by M.S.A. Vegter.

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

6.1 General (legal) context

6.1.1 Issues related to gender equality and social security

The most important issue with regard to occupational social security schemes is the pension gap that exists between men and women. This does not concern the statutory pension, but the supplementary one, which is the pension which is accrued during one's working life. The Netherlands has one of the highest gender pension gaps in the EU: women receive approximately 40 % less pension than men.[172] The main reasons are that women often work fewer hours than men and do so in sectors where pensions are lower. Part-time work is particularly widespread in sectors where pay is generally lower, such as healthcare, childcare and cleaning. This system is hard to change, because it has become embedded in the Dutch labour market. In research it is said that a multilayered approach is necessary. This should include (1) making it more attractive financially to work more hours, (2) providing better information about the consequences of part-time work, including for pension income, and (3) creating more and better paid opportunities for leave and for flexibility during the entire career, so as to enable both men and women to combine work and care.[173]

In the Netherlands there is considerable debate about the position of self-employed people with no employees (solo self-employed). This is a group that has grown substantially over the years. The increase in the numbers of these workers – who do not pay social security contributions – is eroding the social system and there is concern that some of them are insufficiently protected against disability and old age risks. Therefore, the Government announced a couple of measures. One of these is the introduction of obligatory disability insurance for self-employed people with no employees. The Government is working out the details of such insurance, in cooperation with the social partners and executing bodies.[174] It is not clear whether, in doing so, the Government will take gender aspects into account. This is important, as approximately 40 % of self-employed persons with no employees are women,[175] but only around 60 % of them are economically independent, compared to 85 % of men. If women who are solo self-employed are forced to take out insurance and they do not have enough income to pay it, that will negatively affect their financial independence.

A third theme is the exclusion from social security of domestic workers who work on less than four days per week in private households. This point is addressed in Chapter 7, as it concerns statutory social security.

[172] Kali, S., Been, M., Knoef, M. and Van Marwijk Kooy, A. (2021), *Gelijke rechten, maar geen gelijke pensioenen: de gender gap in Nederlandse tweedepijlerpensioenen* (Equal rights, but no equal pensions: the gender gap in the Dutch second pillar pensions), Leiden, Netspar Design Paper 178.

[173] McKinsey Global Institute (2018), 'The power of parity. Het potentieel pakken: de waarde van meer gelijkheid tussen mannen en vrouwen op de Nederlandse arbeidsmarkt' (Take the potential: the value of more equality between men and women on the Dutch labour market), September 2018. Available at https://wp-hetpotentieelpakken.s3.eu-central-1.amazonaws.com/2021/01/MGI-Power-of-Parity-Nederland-September-2018-Final-min.pdf.

[174] Minister of Social Affairs and Employment (2022), 'Voortgangsbrief werken met en als zelfstandige(n)' (Progress letter on working with and as self-employed worker(s)), 16 December 2022, p. 9: https://www.rijksoverheid.nl/documenten/kamerstukken/2022/12/16/voortgangsbrief-werken-met-en-als-zelfstandigen.

[175] CBS (2021), 'Wie zijn de zzp'ers?' (Who are the self-employed with no employees?). Available at: https://www.cbs.nl/nl-nl/faq/zzp/wie-zijn-de-zzp-ers-#:~:text=Zzp'ers%20zijn%20vaker%20man,is%2077%20om%2023%20procent.&text=Zzp'ers%20zijn%20in%20vergelijking%20met%20werknemers%20ouder.

6.1.2 Political and societal debate and pending legislative proposals

On 22 December 2022 the House of Representatives adopted the law proposal on the introduction of a different pension system. The new pension system only has premium schemes with an age-independent premium. This results in 'degressive pension accrual'. The loan agreement and its financing with the so-called average system in the current pension system will disappear. In 2021 the NIHR was asked to advise on the proposed system. The NIHR concluded that the new system will have an indirectly discriminating effect on the ground of sex, because the system is disadvantageous for young people who temporarily stop working or work less. Most of these young people are young women, as they more often than men work less in their younger years, due to care tasks, or enter the labour market at a later stage. This is especially disadvantageous as the largest part of the pension is accrued during a person's younger years. The NIHR is of the opinion that the indirect discrimination is removed only when women are compensated for the disadvantage.[176] However, the Government decided for a number of reasons not to follow the advice of the NIHR. The Government recognises that there is a problem with participation in the labour market, especially by younger women, but in the view of the Government this problem will solve itself because the number of women who do paid work outside the home is increasing. Besides it would be too complicated to give compensation to this group, because the group is hard to define.[177]

6.2 Direct and indirect discrimination

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

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

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

One case which does relate to gender was decided by the Supreme Court on 18 December 2015.[178] The case concerned the reduction of pension for widows/widowers who are more than 10 years younger than their deceased spouse. This is to the disadvantage of women, as substantially more women than men are more than 10 years younger than their spouse. The Court of Appeal ruled that the discrimination was justified by the fact that it was the outcome of negotiations by social partners and by the need for solidarity between the participants in the scheme, as the pension of younger widows is rather costly because of their age. The Supreme Court ruled that this decision was too general. The freedom of bargaining of the social partners could not in itself justify discrimination and, for the rest, the Court of Appeal should have examined more closely

[176] NIHR, 'Advies inzake conceptvoorstel Wet toekomst pensioen' (Advice on draft proposal Act on future pensions), 20 October 2021, ref. 2021/0088/JG/VB/HvE.
[177] Explanatory Memorandum to the Act on future pensions (*Memorie van toelichting bij de Wet toekomst pensioenen*), TK 2022-2023, 36067, no. 3, p. 277-279. Available at https://www.rijksoverheid.nl/documenten/kamerstukken/2022/03/30/memorie-van-toelichting-wet-toekomst-pensioenen.
[178] Supreme Court, 18 December 2015, ECLI:NL:HR:2015:3628.

what the financial effect of abolition of the pension reduction would be and what this would mean for the resources of the fund and the benefits of the other participants.

6.3 Personal scope

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

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

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

6.4 Material scope

Dutch law does not specify the material scope in the way Article 7 of the Directive does. The specific areas – sickness, invalidity, old age, accidents and diseases, unemployment – are not mentioned separately in Dutch law (apart from pension schemes, which are mentioned in Articles 12a-12f ETA). Dutch law instead prohibits discrimination in a more general sense, namely in all situations where a 'condition of employment' or, as referred to previously, an 'employee benefit', is concerned. All areas mentioned in Article 7(1) of the Directive can be considered to be conditions of employment as intended in Dutch law. Dutch law is thus less specific, but the scope is the same. One example is an arrangement to supplement the statutory invalidity benefit.[179]

6.5 Exclusions

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

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

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

Goods and Services Directive (2004/113), so the prohibition of discrimination applies through that route.

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

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

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

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

There are no longer any laws which fall under the examples in Article 9 of the Directive. However, there are some cases that result from past discriminatory laws. One example is a case, dating from 10 May 2016, which involved a woman who had not in the past participated in a pension fund, because at that time she did not work on the basis of an open-ended contract. The court ruled that, even if this were to be considered as indirect discrimination, the woman in question would not be entitled to claim participation in the fund, because the limitation period for her claim had expired. This expiry was not contrary to EU law, as the limitation period was not less favourable than the limitation period applied in similar national cases and did not make it impossible or excessively difficult to exercise the rights conferred by EU law, as the claimant could have brought her action earlier.[180]

Another example is the case of part-time workers who worked for one of the department stores that belong(ed) to the Vendex KBB group. These part-time employees were mainly women. Until 1986 they could only participate in the pension scheme after a waiting period of five years. From 1986 to 1992 the waiting period was reduced to one year. After 1992 the waiting period was abolished. It was possible to participate voluntarily. The question that was brought before the courts was whether the fact that the part-time employees were not automatically included in the scheme but had to indicate themselves that they wished to participate constituted discrimination. After a lengthy legal battle, in which the Supreme Court also rendered a decision, The Hague Court of Appeal ruled on 7 December 2010 that Vendex KBB had discriminated against these female part-time employees because they had been in a more disadvantageous position than full-time employees in regard to the pension.[181] The Court of Appeal attached particular importance to the fact that the women had not received sufficient or individual information about the possibility of participation.

6.7 Actuarial factors

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

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

[180] District Court of Amsterdam, no. 4578021 CV EXPL 15-30286, *JAR* 2016/135, 10 May 2016.
[181] The Hague Court of Appeal, *JAR* 2011/39, 7 December 2010.

6.8 Difficulties

There are no specific legal difficulties in the Netherlands in relation to occupational social security schemes. As mentioned before, occupational social security schemes are rare. Occupational schemes exist for pensions, but hardly for other forms of social security. In fact, most social security schemes are statutory.

Existing occupational social security schemes do not replace statutory schemes, but provide a supplement to these schemes, e.g. in the form of a longer-lasting benefit in the case of unemployment or a higher payment in the case of sickness than provided for in the statutory schemes. The same is true for occupational pension schemes. They also provide for benefits in addition to the statutory scheme and are not a replacement for the statutory scheme.[182]

A point of serious concern is the gender pension gap, thus the fact that women have much less occupational pension than men. It is not expected that this will be solved by the new pension scheme that will be introduced in 2023.[183]

6.9 Evaluation of implementation

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

6.10 Remaining issues

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

[182] It is noteworthy that occupational pensions are usually considerably higher than statutory pensions.
[183] See section 6.1, above.

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

7.1 General (legal) context

7.1.1 Overview of national acts

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

Social insurance for employees is financed by employers and (in case of the Work and Income According to Labour Capacity Act) employees and includes:

- the Unemployment Act;[184]
- the Sickness Act;[185]
- the Work and Income According to Labour Capacity Act (= invalidity insurance);[186] and
- the Work and Care Act.[187]

Social insurance for all citizens is financed by income-based premiums and by taxes and includes:

- the Long-term Care Act;[188]
- the Old-Age Pension Act;[189]
- the Surviving Dependants Act;[190] and
- the Work and Employment Support for Disabled Young Persons Act.[191]

Social services/social assistance is paid from taxes and includes:

- the Participation Act[192] (= social welfare and support in finding work);
- the Social Assistance Act for older and partly disabled workers;[193]
- the Social Assistance Act for older and partly disabled formerly self-employed persons;[194]
- the Supplement Act[195] (= supplements for people who receive a social benefit, but one below the social minimum); and
- the Child Benefits Act.[196]

7.1.2 Political and societal debate and pending legislative proposals

There is debate on the position of domestic workers who work on less than four days per week in a private household. These workers are, by law, excluded from the social security system. They are predominantly female. This reduced protection has been criticised by,

[184] Unemployment Act (*Werkloosheidswet*), 1986 Stb. 1986, 566.
[185] Sickness Act (*Ziektewet*), 1929 Stb. 1929, 374.
[186] Work and Income According to Labour Capacity Act (*Wet werk en inkomen naar arbeidsvermogen*), 2005 Stb. 2005, 572.
[187] Work and Care Act (*Wet arbeid en zorg*), 2001 Stb. 2001, 567.
[188] Long-term Care Act (*Wet langdurige zorg*), 2014 Stb. 2014, 494.
[189] Old-Age Pension Act (*Algemene Ouderdomswet*), 1956 Stb. 1956, 281.
[190] Surviving Dependants Act (*Nabestaandenwet*), 1995 Stb. 1995, 691.
[191] Work and Employment Support for Disabled Young Persons Act (*Wet arbeidsongeschiktheidsvoorziening jonggehandicapten),* 1997 Stb. 1997, 177.
[192] Participation Act (*Participatiewet*), 2003 Stb. 2003, 375.
[193] Social Assistance Act for older and partly disabled workers (*Wet inkomensvoorziening oudere en gedeeltelijk arbeidsongeschikte werknemers)*, 1986 Stb. 1986, 565.
[194] Social Assistance Act for older and partly disabled formerly self-employed persons (*Wet inkomensvoorziening oudere en gedeeltelijk arbeidsongeschikte gewezen zelfstandigen),* 1987Stb. 1987, 281.
[195] Supplement Act (*Toeslagenwet)*, 1986 Stb. 1986, 562.
[196] Child Benefits Act (*Algemene Kinderbijslagwet*), 1962 Stb. 1962, 160.

inter alia, the European Commission and the CEDAW Committee, but so far, the Dutch Government has not taken any concrete steps to improve the situation.[197]

The exclusion from social security not only concerns workers who are hired by individuals to clean the house, but also the 'PGB-ers', as they are known: healthcare workers who are paid on the basis of a personal budget (the 'PGB') that a disabled person is entitled to and which is granted by a Government agency. These PGB workers are thus paid with public money, but nevertheless lack social protection. This is because the Government has created a system in which they are not employed by a health institution, but by an individual household, which means that they fall under the regulation which excludes them from social security (the Regulation on Domestic Services). This exclusion was challenged by a PGB worker in a court procedure as being contrary to the ban on discrimination against women, as 95 % of PGB workers are women. On 16 December 2021 the Rotterdam administrative court ruled in the worker's favour.[198] The court took as a starting point that the Regulation was indirectly discriminatory. Subsequently it found that the justifications which were brought forward by the social security agency were insufficient. The agency had mentioned that the goal of the Regulation was to stimulate the labour market in the area of personal services and to prevent illegal work. However, an advisory committee, which was set up by the Government to advice on the Regulation on Domestic Services, had concluded in a report in 2014 that the Regulation had not had the effect of increasing employment for PGB workers and that illegal work was not an issue in this area. The court referred to this report and found that there was no justification for the indirect discrimination, which meant that the exclusion from social security of the PGB worker was unjustified.

The judgment was confirmed on appeal by the Central Appeals Tribunal on 30 March 2023.[199]

The judgment is a milestone in the battle to improve the position of domestic workers. It must be noted, however, that the judgment concerns only PGB workers, not all other domestic workers. It is not certain that the objective justification test would have the same outcome with respect to (other) domestic workers.

Another judgment by the Central Appeals Tribunal is also worth mentioning. This addressed the question of whether periods not worked because of pregnancy or giving birth must be considered to be periods worked within the meaning of the Unemployment Act or should not be taken into consideration at all.[200] The difference is relevant in a situation in which a woman has not worked long enough (26 weeks) in order to qualify for unemployment benefit, but would qualify if the weeks of pregnancy and maternity leave counted as periods worked. The Central Appeals Tribunal ruled that is not discriminatory not to consider the weeks of pregnancy and maternity leave as periods worked in this particular situation. The commentator Professor Boot is critical about this judgment. However, as the Central Appeals Tribunal did not find it necessary to ask preliminary questions of the CJEU, its ruling remains the applicable law.

There are no pending legislative proposals on social security which are relevant from the gender point of view.

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

[198] Administrative Court of Rotterdam, 16 December 2021, ECLI:NL:RBROT:2021:12432. Also published in *USZ* 2022/3 with a comment by G.C. Boot.

[199] Central Appeals Tribunal, 30 March 2023, ECLI:NL:CRVB:2023:481.The case is comparable to the Spanish case that was decided by the CJEU on 24 February 2022, ECLI:EU:C:2022:120 (TGSS).

[200] Central Appeals Tribunal, 12 August 2021, ECLI:NL:CRVB:2021:2097. See also *USZ* 2021/370, with a comment by G.C. Boot.

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

There is no specific national legislation prohibiting discrimination in statutory social security schemes. However, this is not a problem, as it is generally recognised that discrimination in social security matters is not allowed. This follows both from international law and from the Constitution.

There are no conditions regarding the affiliation to a scheme or entitlement to statutory benefits which are different for men and women or which indirectly put one gender/sex in a disadvantaged position. Earlier retirement for women than for men is no longer possible.

7.3 Personal scope

National law relating to statutory social security schemes covers employees and former employees, i.e. those who receive an invalidity pension or an unemployment benefit or a sickness benefit on the basis of one of the social security laws. In some cases, self-employed persons are included. Dutch law refers to what are termed *gelijkgestelden*, i.e. workers who do not qualify as a worker in the sense of the Civil Code (Article 7:610), but who work under similar conditions (quasi/para-subordinate workers). Examples of this are various types of flexi-workers or home workers. For some of these persons a threshold applies: their employment relationship must have lasted for at least 30 days and their income must amount to at least 40 % of the minimum income as regulated by law. In addition, for some employment relations the possibility of being covered under the social security schemes is restricted to those who work for at least two days per week (Article 1 and Article 5 of the Decision designating cases where an employment relationship is considered to be employment).[201] Insofar as these requirements disadvantage more women than men, this could be considered to be indirect discrimination.

Excluded from the scope of social security schemes are, among others, directors of a company who own a majority of the shares of that company and domestic staff who work on less than four days a week for the same employer. According to the Central Appeals Tribunal, the interpretation of 'domestic staff' includes not only domestic cleaners or child-minders and the like, but also 'professional carers' such as trained nurses providing medical care at home in the service of an individual employer.[202] This exclusion (also) leads to indirect discrimination, as considerably more women than men work as domestic staff.

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

7.4 Material scope

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

7.5 Exclusions

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

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

[202] Central Appeals Tribunal (CRvB), *RSV* 1996/247, 29 April 1996.

7.6 Actuarial factors

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

7.7 Difficulties

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

It is worth mentioning the situation of domestic staff, mentioned previously in this report. These workers are excluded from social security schemes. Without this exclusion they would be covered, as they are either working on the basis of an employment agreement or as *gelijkgestelden*, as they are economically dependent on their work. The consequences of this exclusion are that domestic staff are only entitled to sickness pay for six weeks (instead of two years), are not entitled to sickness benefit in the event of a pregnancy-related illness before or after maternity leave and are not entitled to unemployment benefit. There is no clear justification for this situation. It is in essence a financial matter. The Government does not want to pay extra to these workers, nor does it want to burden individual households (who are 'the employers'). There are plans to change the situation, but progress, if any, is slow because of the financial consequences. Change will probably be brought about by the judgment by the Rotterdam court, which is mentioned in section 7.1.1 above and which was upheld on appeal.[203] The judgment by the CJEU in *TGSS*, the Spanish case on social security for domestic workers might also have an impact.[204]

In the Netherlands all residents are entitled to statutory old-age pension (AOW), but the amount of pension will be lower for those who came to live in the Netherlands at an older age. The reason for this is that the old-age pension is accrued at 2 % annually. This accrual starts later for people who became a resident of the Netherlands at a later age. This particularly affects migrant people. It is not known if more migrant women than men are affected. In 2013 the NIHR ruled that this regulation indeed puts migrant citizens at a disadvantage, but that this was justified because of the aims of, first, respecting the autonomy of other states to realise their own systems of social security, and secondly, securing the financial basis and sustainability of the Dutch system.[205]

7.8 Evaluation of implementation

On the whole, Dutch law has satisfactorily implemented EU law on gender equality in statutory social security. There are two points of concern. The first of these is the continuing exclusion of domestic staff. This exclusion has existed for a long time and is mentioned in every report on gender equality, but so far Dutch Governments have not had the courage to tackle this matter. The second point is the growing number of self-employed people, including false self-employed, who are not covered by the employee insurance schemes and therefore are not entitled to unemployment benefit, sickness benefit, invalidity benefit and occupational pension. The Government announced plans to make the gap between employees and the self-employed smaller, to oblige self-employed people to take out insurance against disability and to make it easier for them to accrue pension. Concrete measures are expected in 2023.[206]

[203] This will be explained in more detail in next year's report.
[204] CJEU, 24 February 2022, *TGSS*, C-389/20, ECLI:EU:C:2022:120.
[205] NIHR, 12 September 2013, Opinion 2013-113.
[206] Minister of Social Affairs and Employment (2022), 'Voortgangsbrief werken met en als zelfstandige(n)' (Progress letter on working with and as self-employed worker(s)), 16 December 2022, p. 9: https://www.rijksoverheid.nl/documenten/kamerstukken/2022/12/16/voortgangsbrief-werken-met-en-als-zelfstandigen.

7.9 Remaining issues

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

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

8.1 Implementation of Directive 2010/41/EU

Directive 2010/41/EU has not been explicitly implemented in national law but it has been implemented to some extent. Article 2(1) ETA and Article 6 GETA prohibit discrimination in the 'liberal professions.' This is a wide concept that covers not only doctors, architects, lawyers etc. but also freelancers, sole traders, entrepreneurs, etc.[207] In addition, the Work and Care Act (pregnancy and maternity leave for self-employed women) contains provisions on self-employed workers.

8.2 Personal scope

8.2.1 Scope

Dutch law does not mention any norm addressees or rights holders in this area, nor does Dutch law contain definitions of self-employed persons or self-employment. Dutch equal treatment laws use the concept of the 'liberal professions'. This appears to cover the category of self-employed persons. There is no case law on the definition of the 'liberal professions', from which it can be deduced that this definition is more restrictive than the definition of self-employed persons in the Directive.

8.2.2 Definitions

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

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

8.2.3 Categorisation and coverage

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

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

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

8.2.4 Recognition of life partners

Dutch legislation recognises life partners. Like other self-employed persons, life partners can rely on the basic welfare benefits scheme, the Surviving Dependants Act[208] (*Algemene Nabestaandenwet*, ANW) and, from the pensionable age, receive the statutory old-age pension benefits based on the General Old-Age Pensions Act (*Algemene Ouderdomswet*, AOW).

8.3 Material scope

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

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

8.3.2 Material scope

The definition of 'liberal professions' which is used in Dutch law is not similar to the definition in the Directive, but so far there are no indications that the definition in Dutch law is more restrictive. The Dutch NIHR gives a broad explanation of this definition and follows the line that discrimination is also prohibited in those working relationships where the hierarchy between the 'organisation which gives an assignment to do the work' and the 'worker' is absent. This involves, in fact, all self-employed work. An example thereof is the opinion by the NIHR of 5 March 2012, where a franchiser was considered to fall under Article 2 ETA.[209] In civil law there are no or hardly any disputes concerning the question of whether a self-employed person falls under the definition of self-employed in Article 2 ETA or Article 6 GETA. Almost all disputes in civil law in which self-employed persons are involved concern the question of whether the self-employed person is not in practice an employee.

8.4 Positive action

The Dutch state has not used the power to take positive action within the meaning of Article 5 Directive 2010/41/EU. That does not mean that positive action is impossible. As long as possible action remains within the limits set by EU law, it could also be used with respect to self-employed women, in the same way as with respect to employees.[210]

8.5 Social protection

The Dutch state does not have a system for social protection specifically intended for self-employed workers. Self-employed persons are covered by the national insurance schemes, which provide for basic welfare benefits (*bijstand*),[211] by the Surviving Dependants Act (ANW)[212] and, from the pensionable age (67 years or older depending on one's date of birth), the General Old-Age Pensions Act (AOW).[213] They cannot, however, rely on employment-related insurance schemes, such as unemployment and disability benefits. They can choose to join these insurance schemes voluntarily (but will only benefit if they meet certain criteria, such as having paid contributions for at least three years) or they can take out private insurance or choose to remain uninsured. In addition, they do not

[208] Surviving Dependants Act (*Nabestaandenwet*), 1995 Stb. 1995, 691.
[209] NIHR, 5 March 2012, Opinion 2012-43, www.mensenrechten.nl.
[210] See section 3.5 of this report.
[211] The Participation Act provides for basic welfare benefits: Participation Act (*Participatiewet*), 2003 Stb. 2003, 375.
[212] Surviving Dependants Act (*Nabestaandenwet*), 1995 Stb. 1995, 691.
[213] Old Age Pension Act (*Algemene Ouderdomswet*), 1956 Stb. 1956, 281.

have access to an occupational pension scheme. In the near future self-employed persons will probably be obliged to take out disability insurance.

8.6 Maternity benefits

Articles 3:17 and 3:18 of the Work and Care Act[214] provide for maternity benefit for self-employed women. This benefit meets the requirement of sufficiency in Article 8(3)(c) of the Directive. The benefit is granted for 16 weeks (similarly to employees), provided that the self-employed woman has done paid work for at least 1 225 hours in the preceding year. The benefit is related to the income of the self-employed woman but has a maximum of 100 % of the statutory minimum wage. The maternity allowance is granted on a voluntary basis, i.e. self-employed women can apply to the Government agency UWV to receive maternity and pregnancy benefits. Maternity benefits are paid from general tax revenues (no specific contributions are levied here). As far as the author knows, there were no existing services supplying temporary replacements or national social services in this regard.

8.7 Occupational social security

8.7.1 Implementation of provisions regarding occupational social security

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

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

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

8.8 Prohibition of discrimination

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

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

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

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

8.9 Evaluation of implementation

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

8.10 Remaining issues

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

The Government introduced various schemes to compensate for the loss of income during the lockdowns. One of these schemes is especially directed at self-employed professionals (Tozo). Bureau Clara Wichmann, a women's rights NGO, drew attention to the fact that this scheme might be indirectly discriminatory, because it is not clear if and to what extent the scheme takes into account that the turnover of women in the period before the lockdown may have been lower for those who were pregnant or on maternity leave. In response, the Minister of Social Affairs and Employment said that the Tozo (and other schemes that applied during the COVID-19 crisis) is a very broad scheme and that it has not been possible to take customised measures. The plan is to evaluate the support schemes in April 2023. Bureau Clara Wichmann intends to monitor this closely and will then carry out further research into possibilities for legal proceedings.[215]

[215] Bureau Clara Wichmann, (2021), *Vrouwelijke ondernemers worden benadeeld door de corona steunmaatregelen: dit is hoe wij in actie komen* (*Female entrepreneurs put at a disadvantage by the corona support schemes: this is how we take action*), 10 February 2021. Available at: https://clara-wichmann.nl/nieuws/vrouwelijke-ondernemers-worden-benadeeld-door-de-corona-steunmaatregelen-dit-is-hoe-wij-in-actie-komen.

9 Goods and services (Directive 2004/113)

9.1 General (legal) context

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

Problems of discrimination in the online environment/digital market/collaborative economy were, among other things, described in an Article by Susanne Burri and Susanne Heeger-Hertter in 2018.[216] They mentioned the fact that for women with care tasks it is more difficult to be available during specific hours, such as the hours for taking children to school and picking them up at dinner time in the evening. This makes their daily schedule less flexible, whereas flexibility – and availability – are important determining factors for acquiring work in the gig economy. There is also a risk of sexual harassment in certain situations and a risk that platforms are especially directed at women in order to engage them for traditional female work, such as cleaning and caring.

The NIHR also asked for attention to be given to algorithmic discrimination, especially in recruitment.[217] In 2021 it published a report with the title *Recruiter or computer?*[218] in which it mentions four points of attention for employers:

1. Be aware of the fact that algorithms may lead to forbidden discrimination. For example, if an algorithm rejects CVs with a gap between periods of work, this may discriminate against women who temporarily stopped work to care for children.

2. The employer must be able to explain how an algorithm works in order to justify possible indirect discrimination. For example, if only employees who speak a certain language are recruited by the algorithm, the employer must be able to explain why this is necessary.

3. Algorithmic recruitment procedures must be transparent, accountable and systematic. Employers cannot refer to a 'black box' in order to explain why certain candidates were selected and others were not selected.

4. Employers are legally liable for the use of algorithms and cannot refer to the creator of the algorithm or to the computer itself.

Problems may arise if algorithms take decisions automatically without human intervention. In a case before the NIHR a student stated that she was discriminated by software used by the Vrije Universiteit Amsterdam to prevent fraud during an online exam. The student, who has dark skin, had problems trying to log in and also with obtaining access to the questions. She assumed that the software had problems recognising her because of her skin colour. The NIHR found that the student had stated sufficient facts from which it can be presumed there had been discrimination. Academic research shows that algorithms for detecting faces work less well with people with a dark skin. Besides, the University did not show data which made it clear that the software did not discriminate. The University has been ordered to provide evidence that there has not been any discrimination.[219]

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

[217] For more on this topic, see also the report by Women Inc (2021), 'AI, gender en de arbeidsmarkt' (AI, gender and the labour market), Amsterdam, 2021: https://open.overheid.nl/documenten/ronl-3d971a1a-ba16-4c56-ba1a-40f0f05989fd/pdf.

[218] NIHR, *Recruiter or computer?*, December 2021: https://mensenrechten.nl/nl/publicatie/61b03ed05d726f72c45f9e3a.

[219] NIHR, Opinion 2022-146: https://oordelen.mensenrechten.nl/oordeel/2022-146.

This case is interesting, because it is the first time that the burden of proof has been shifted in a case about algorithmic discrimination. The possible discrimination did not concern gender, but ethnic origin, but similar problems may arise with regard to gender or a combination of gender and race (intersectionality).

9.1.2 Political and societal debate

There are significant debates on discrimination in the online environment.

In 2022 the Ministry of Home Affairs published a handout (a kind of impact assessment) for project leaders of AI systems with the aim of helping them to prevent the creation of discrimination in an AI system by identifying the right stages, bringing the right people together at the right times, and asking them the right questions. The handout suggests questions that can be brought up when the technical experts and the data analysts sit down with the lawyers and the data protection officer, supplemented by relevant stakeholders, domain experts and data stewards, in order to discuss the AI system.[220]

In Parliament a motion was passed calling on the Government to make it mandatory to carry out an impact assessment, like the one developed by the Ministry of Home Affairs, prior to the use of algorithms and to make these assessments public.[221] This motion has not yet been implemented.

On 10 December 2020 a law proposal was submitted to Parliament that obliges employers to draw up a procedure for recruitment and selection of workers and intermediaries that is free from discrimination. In this respect employers must also pay attention to possibly discriminating algorithms. The Netherlands Labour Inspectorate will monitor the presence and application of the procedure. The law proposal was debated in Parliament in 2022 and adopted in 2023.[222]

9.2 Prohibition of direct and indirect discrimination

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

There is some case law on non-binary persons who want to have an 'X' in their passport: a gender-neutral registration. This is not yet possible on the basis of the law, but more and more courts take the view that non-binary persons have the right to have a gender-neutral registration in official documents, even though the law has not yet changed. In addition, courts do not require these persons to submit an expert statement, although the law still requires this. Although this matter falls within the scope of equal access to services

[220] 'Handreiking non-discriminatie Artificial Intelligence' (Handout on non-discrimination in Artificial Intelligence), "Non-discrimination by design", 5 December 2022: https://www.rijksoverheid.nl/documenten/rapporten/2022/12/05/handreiking-non-discriminatie-artificial-intelligence-ai.

[221] Motion by MP's Bouckallikh and Dekker-Abdulaziz about mandatory impact assessments prior to the use of algorithms for evaluations of or decisions about people, TK 2021-2022, 26643, no. 835, 29 March 2022: https://www.tweedekamer.nl/kamerstukken/moties/detail?id=2022Z06024&did=2022D12329.

[222] Law Proposal on the Act on monitoring of equal opportunities in recruitment and selection (*Wetsvoorstel Wet toezicht gelijke kansen bij werving en selectie*), TK 2020-2021, 35673. Available at https://www.eerstekamer.nl/wetsvoorstel/35673_wet_toezicht_gelijke_kansen.

in the meaning of Directive 2004/113, in most cases the Directive is not invoked, but instead reference is made to Article 8 ECHR and the protection of private life.[223] It is expected that a legal change will be implemented soon. On 30 November 2021 a proposal was made to Parliament to give non-binary persons the right to have a gender-neutral registration in official documents without having to go through a court procedure and without having to submit an expert statement. The law proposal is still being debated.[224]

Some opinions by the NIHR are also worth mentioning. In 2020 an opinion of the NIHR attracted some attention, when the NIHR took the view that asking a higher price for hairdressing services for women than for men constitutes direct discrimination.[225] This opinion is part of a broader debate about the so-called 'pink tax', i.e. the fact that women usually have to pay more for toiletries, such as shampoo, body lotion or shower gel, than men. Experts calculated that the difference between what men and women have to pay for so-called male or female products can amount to 7 % of the monthly salary.[226] If the products are comparable, this would constitute direct discrimination as set out in Directive 2004/113/EC.

On 29 August 2022 the NIHR found that the cosmetics company Rituals acted in violation of equality legislation by requiring female shop assistants to wear Rituals make-up, whereas male shop assistants did not have to do so.[227]

9.3 Material scope

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

There is no relevant case law, other than the case law mentioned in section 9.2 above.

9.4 Exceptions

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

9.5 Justification of differences in treatment

Discrimination in the field of the provision of goods and services is not treated differently from other forms of discrimination. This means that sex-segregated services are usually regarded as direct distinctions on the ground of sex, which means that these are forbidden unless one of the explicit legal justifications or exceptions can be applied. In practice, this

[223] See, for example, District Court of Zeeland-West-Brabant, 29 December 2022, ECLI:NL:RBZWB:2022:8445 and 8447; Appeal Court of Arnhem-Leeuwarden, 15 september 2022 ECLI:NL:GHARL:2022:8003; District Court of Amsterdam, 12 July 2022, ECLI:NL:RBAMS:2022:4836, 4834 and 4835.
[224] Law proposal 'Modification of the Transgender Act' (*Wijziging Transgenderwet*). TK 2020-2021, 35825, no. 2.
[225] NIHR, Opinion 2020-94. See: https://mensenrechten.nl/nl/oordelen.
[226] Nu.nl (2019), *Vrouwen betalen meer voor hetzelfde product met de 'pink tax'* (Women pay more for the same product because of the 'pink tax'). Available at: https://www.nu.nl/geldzaken/5973802/vrouwen-betalen-meer-voor-hetzelfde-product-met-de-pink-tax.html.
[227] NIHR, Opinion 2022-101: https://oordelen.mensenrechten.nl/oordeel/2022-101.

means that sex-segregated services may only be justified if the sex segregation: (1) can meet the criteria of preferential treatment (under the GETA only allowed for the benefit of women, Article 2(3) GETA); (2) can be established as necessary for the protection of women and maternity (Article 2(2)(b) GETA); or (3) can be established as a case in which 'sex is decisive.'

In regard to this phrase, Section 6 of Article 2 delegates the definition of such cases to a Ministerial Order. This Equal Treatment Order[228] lists examples such as sanitary facilities, changing and sleeping rooms and saunas (all insofar as facilities are equally available for both sexes), beauty and sports contests (insofar as there is a relevant difference in sex), life insurance where the premium depends on the life expectancy of men and women and the insurance has been entered into or has been changed on or after 21 December 2012, the protection from or combating of sexual violence and harassment, and aid for the victims of sexual violence and harassment (insofar as it is necessary that this protection, measures to combat such behaviour or aid is provided for a person of a specific sex). Such sex-segregated services aimed at protection must be necessary and proportional. As exceptions must always be interpreted in a strict sense in non-discrimination legislation, GETA makes it fairly difficult to render sex-segregated services apart from in cases that fall under the exemptions (from the scope) or that are mentioned in the Equal Treatment Order.

There is hardly any case law in this respect, but there are some opinions by the NIHR. For example, the NIHR found that asking a higher price for hairdressing services for women than for men constitutes direct discrimination.[229] It also considered that the cosmetics company Rituals acted in violation of equality legislation by requiring female shop assistants to wear Rituals make-up, when male shop assistants did not have to do so.[230] Remarkable in this case is that the NIHR took the view that this was direct discrimination and that no legal exception applied, but nevertheless the NIHR examined whether the obligation to wear the make-up was necessary and functional and whether it impeded the access of women to the labour market. The NIHR stated that this is the way national courts judge a case like this and that it wanted to follow this approach. In this way the NIHR actually created an extra-judicial exception to the right of discrimination. This approach can be seen as practical, but formally it is not in line with equality legislation.

9.6 Actuarial factors

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

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

Test-Achats[231] induced the legislature to amend the Equal Treatment Order in such a way that the use of sex as a factor in the calculation of premiums in life insurance is no longer allowed as of 21 December 2012 (Article 1(h) of the Equal Treatment Order). This only applies to insurance schemes that are entered into on or after that date or are modified on or after that date, thus not to already existing insurance schemes that have not been modified.

[228] Equal Treatment Order, Royal Decree (*Besluit Gelijke Behandeling, Koninklijk Besluit*), 18 August 1994.
[229] NIHR, Opinion 2020-94. See: https://mensenrechten.nl/nl/oordelen.
[230] NIHR, Opinion 2022-101: https://oordelen.mensenrechten.nl/oordeel/2022-101.
[231] CJEU, C-236/09, *Association Belge des Consommateurs Test-Achats ASBL and Others vs Conseil des ministres*. 1 March 2011.

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

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

9.9 Specific problems related to pregnancy, maternity or parenthood

In the past there has been discussion about the difficulties that self-employed women have encountered when trying to obtain insurance against the risk of maternity leave. There have been several legal procedures in this respect, mainly concerning the fact that private disability insurance schemes only paid out an insurance benefit in the case of maternity leave if a qualifying period of (usually) two years had been fulfilled. The Supreme Court ruled on 11 July 2008 that there is no obligation in the law nor in Directive 2004/113 that obliges private insurance companies to treat pregnancy as equal to disability and that therefore insurance companies have the right to make use of a qualifying period.[232] During that time – between 2004 and 2008 – there was no public insurance for self-employed pregnant women either. The Government reintroduced a maternity allowance for self-employed women as of 4 June 2008. Currently various insurance companies also offer insurance during maternity leave without a qualifying period. However, it is quite possible that this has consequences for the amount of the premium.

9.10 Evaluation of implementation

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

9.11 Remaining issues

There are no remaining issues regarding goods and services that have not already been discussed. The COVID-19 pandemic has not raised specific issues regarding access to goods and services in the field of gender.

[232] Supreme Court, LJN: BD1850, 11 July 2008.

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

10.1 General (legal) context

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

There are many surveys and reports on violence against women and domestic violence. An overview can be found on the Government's website: https://www.huiselijkgeweld.nl/. This website contains surveys, policy documents, plans from various organisations, etc.[233] It is difficult to make a distinction between findings related to the Istanbul Convention or findings relating to violence against women and domestic violence in general. Surveys and reports do not distinguish in this respect. Mostly they relate to specific areas of violence against women, for example violence against migrant women or children or online violence, etc.

From April 2018 to the end of December 2021 a programme called '*Geweld hoort nergens thuis*' (Violence does not belong anywhere) was in operation regionally. The aim was to facilitate cooperation between many organisations, like municipalities, the police, Veilig Thuis (Safe at Home), health services, etc. in order to reduce domestic violence and abuse of children. A framework document was produced that is now used in many municipalities and a policy was developed on working cooperatively with the families involved. A report by the Verwey Jonker Institute notes that this way of working together with all the professionals and organisations involved and the families themselves has had positive results.[234] However, it is a long-term issue and things are made difficult by the shortage of professional social workers, waiting lists for treatment and the fact that budgets are often limited.

The 'Geweld hoort nergens thuis' programme will be followed by the 'Future Scenario Child and Family Protection' programme, which will outline how children and families should be protected in the future (2026-2031).[235] The idea is that the present system must be simplified, as there are too many organisations and professionals who do comparable work and who do not always consult each other, which leads to people being sent from one department to the next and back without getting the help they need. Children and women in dangerous home situations should get the help of a local team with a person who can function as a single point of contact.

With respect to the Istanbul Convention it is interesting to mention the debate on contact arrangements between children and fathers who have acted violently towards their ex-partner (the mother). Until recently the line of thinking was (and in many respects still is) that the interests of children are served best when they have regular contact with their father and also regularly visit him and stay over at his house, even if the children have witnessed their father's violence against their mother and indicate that they do not want to go to their father. The starting point is that parents get joint authority over their children, regardless of violent behaviour by the father. An example of this approach can be found in a judgment by the Appeal Court 's-Hertogenbosch of 20 October 2022, where parents were given joint authority, even though the father had been convicted under the Criminal Code for violence against the mother and even though the children had been witnesses of the violence.[236]

[233] See: https://www.huiselijkgeweld.nl/. The website also has an English page: https://www.huiselijkgeweld.nl/english.

[234] Verwey Jonker Instituut (2020), 'Een kwestie van lange adem' (A long-term matter), Utrecht. Available at: https://www.verwey-jonker.nl/wp-content/uploads/2021/02/216037_Kwestie_van_lange_adem-WEB.pdf.

[235] Letter by the Minister of Justice and Security (2021), 'Toekomstscenario kind- en gezinsbescherming' (Future scenario protection of child and family), 30 March 2021. Available at: https://open.overheid.nl/documenten/ronl-c4864460-0573-4f18-8a18-c92a82e69bf5/pdf.

[236] Appeal Court of 's-Hertogenbosch, 20 October 2022, ECLI:NL:GHSHE:2022:3625.

This approach was criticised by Grevio in its 2020 report on the Netherlands. Grevio pointed out that domestic violence is frequently decriminalised in the Netherlands, because the prosecution prefers not to pursue such cases under criminal law. Furthermore, parents are obliged to draw up a parenting plan in the event of divorce, even in cases of domestic violence; family courts often take the view that violence will stop after a divorce and that therefore joint custody over the children is not a problem. Grevio pointed out that this approach is not in line with the Istanbul Convention. There is not enough attention in criminal law to women who have suffered domestic violence and the Istanbul Convention is violated in situations where the fact that there has been domestic violence in the past and the children have witnessed it, is not taken into account in decisions about joint authority and contact arrangements.[237]

Following the Grevio report and other publications, the Arnhem-Leeuwarden Appeal Court changed its approach. In two judgments from 2021, the appeal court took the view that being the witness of aggression and/or violence by their father is equal (in terms of impact) to being a victim of it.[238] This also applies if the children have not seen the violence itself, but have been a witness to its consequences. Article 31 of the Istanbul Convention obliges the Contracting Parties to ensure that an access arrangement or guardianship is not at the expense of the rights and safety of the victim or children. Dutch legislation in the field of authority and association does not explicitly mention that violence against women or domestic violence is a factor that the judge takes into account when making his decision, but it goes without saying that the Dutch judge must do this. In the first case the appeal court therefore decided that only the mother would be the guardian of the children and that there would be no contact arrangement with the father. In the second case the appeal court confirmed the decision by the district court not to grant the father access to the children.

Hopefully the approach by the Arnhem-Leeuwarden Appeal Court will be followed by other courts and also by governmental bodies, such as the Council for the Protection of Children (Raad voor de Kinderbescherming).

Grevio also mentioned other points of concern in its report and made a large number of recommendations. The Government indicated that it will follow up on the recommendations by Grevio, but its plans are not always concrete.[239] Some of the more concrete plans are mentioned in section 10.1.4 below.

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

The Social Support Act[240] states that one of the aims of the municipalities is to prevent and combat domestic violence. Each municipality is obliged to have an advice and contact point for domestic violence and child abuse. The tasks of this contact point are outlined in the Social Support Act. The same obligation is inserted into the Youth Act.[241]

The Code on domestic violence and child abuse[242] obliges professionals to use a specific code in cases where they have suspicions of domestic violence. The code applies in healthcare, education, childcare, social support, youth care and justice.

[237] Grevio (Group of Experts on Action against Violence against Women and Domestic Violence) (2020) *Evaluation Report, Netherlands*, 20 January 2020: https://open.overheid.nl/documenten/ronl-d8dba9a9-888b-4364-aa16-2b43af0765e1/pdf.
[238] Appeal Court of Arnhem-Leeuwarden, 21 January 2021, ECLI:NL:GHARL:2021:771 and 10 June 2021, ECLI:NL:GHARL:2021:5781.
[239] Letter by the Minister of Health, Welfare and Sport, 16 January 2021. Available at: https://open.overheid.nl/documenten/ronl-8ec1a5ab-804c-4b45-ae45-352c8bae4c82/pdf.
[240] Social Support Act (*Wet maatschappelijke ondersteuning*), 2015 Stb. 2014, 280.
[241] Youth Act, 2014 Stb. 2014, 105.
[242] Decree on Mandatory reporting Code for domestic violence and child abuse (*Besluit verplichte meldcode huiselijk geweld en kindermishandeling)*, 2013 Stb. 2013, 324.

The Temporary Restraining Order Act[243] makes it possible for the mayor of a municipality to prohibit the perpetrator of domestic violence from entering the perpetrator's home and contacting his family (spouse and children).

In addition, domestic violence is punishable under criminal law.

10.1.3 National provisions on online violence including online harassment

The preparation and distribution of imagery of a sexual nature of young people under 18 years old is deemed to be child pornography and is punishable under criminal law. Child grooming, i.e. establishing an emotional relationship with a child with a view to sexual abuse, is also punishable. There is not yet a separate provision in the Criminal Code[244] on online gender-based and sexual harassment. This conduct may be qualified as defamation, slander or extortion (blackmail). Provisions on discrimination or threat can also be used.

Online sexual harassment will become punishable under criminal law when the law proposal on sexual offences enters into force. This law proposal was submitted to Parliament in October 2022. It takes as a starting point that sexually unacceptable behaviour online is just as punishable by law as unacceptable behaviour offline.[245] Thus online sexual abuse (for example sexually oriented comments via social media or the unwanted sending of nude photos and sex films) and online sexual harassment will become punishable.

10.1.4 Political and societal debate

This is a very actively debated topic. There is an ongoing stream of research and many policies are being developed and adapted, both by the Government and by NGOs. Relevant information can be found on the website of the Ministry of Health, Welfare and Sport: https://www.huiselijkgeweld.nl/.

On 22 May 2019 the Minister of Justice announced that he wanted to include the offences of 'sex against the will' (i.e. sex without consent) and 'sexual harassment' into the Criminal Code, in order to make it easier for victims to press charges. The first draft law proposal met with fierce criticism, because a distinction was made between rape and 'sex against the will'. In the revised law proposal of 8 March 2021 all forms of sex without consent are considered to be rape, including when it cannot be proven that force or threats have been used. It will become obligatory under criminal law to verify if a person consents to a sexual act. In addition, sexual harassment in public and online becomes punishable under the Criminal Code.[246]

On 10 October 2022 the law proposal on sexual offences was submitted to Parliament.[247] The Government aims to bring the new law into force in 2024. Because the law will entail many changes, it will be accompanied by a programme for implementation, which will start in 2022. In the years 2022-2024, all parties involved will work together to train and recruit the necessary specialist staff throughout the criminal justice system. This includes the police, judicial authorities, local authorities involved in sexual harassment on the streets, etc.

[243] Temporary Restraining Order Act (*Wet tijdelijk huisverbod*), 2008 Stb. 2008, 421.
[244] Criminal Code (*Wetboek van Strafrecht*, 1881 Stb. 1881, 35.
[245] Law proposal on sexual offences, submitted for internet consultation on 8 March 2021. Available at: https://www.rijksoverheid.nl/onderwerpen/seksuele-misdrijven/documenten/kamerstukken/2021/03/08/wetsvoorstel-seksuele-misdrijven.
[246] Law proposal on sexual offences, submitted for internet consultation on 8 March 2021. Available at: https://www.rijksoverheid.nl/onderwerpen/seksuele-misdrijven/documenten/kamerstukken/2021/03/08/wetsvoorstel-seksuele-misdrijven.
[247] Law proposal on sexual offences, TK 2022-2023, 36222, no. 2: https://www.eerstekamer.nl/wetsvoorstel/36222_wet_seksuele_misdrijven.

The NIHR is positive about the law proposal, but emphasises that changes in the law are not enough. It is important that there is a change in society's views on violence against women and that there is sufficient capacity and expertise in police, justice and aid organisations to help victims of sexual violence.[248]

Furthermore, a new provision has been inserted into the Criminal Code as of 1 January 2020. This Article criminalises the abuse of sexual material, such as 'revenge pornography'. Offenders can be sentenced to a maximum of two years in prison. 'Revenge pornography' includes the creation of sexual images of someone else without permission, possessing these images and disseminating and disclosing them in the knowledge that this may be detrimental to that person.[249]

On 8 July 2022 a law proposal was sent to Parliament on 'doxing', which, according to the legislator, is "the use of personal data to intimidate someone".[250] Examples are the sharing of address data in chat groups, after which someone is frightened at home, or putting an ex-partner's photo and phone number on an online forum to frighten them. In the law proposal such conduct is made punishable under criminal law.

Since the start of the COVID-19 pandemic much research has been done into domestic violence, sexual violence and child abuse. The expert institute, Movisie, produced an overview of the research and concluded that there is no evidence of an increase in domestic violence. From practical experience it has become clear, however, that incidents of domestic violence have become more serious. Moreover, those children who were vulnerable suffered particularly during lockdowns, because there was more fighting at home and problems with schoolwork. Organisations which offer help to parents reported more requests. There were also more requests for online help, e.g. talking with social workers. In addition, an increase was reported of online sexual abuse of girls. It was difficult during the lockdowns (and still is) for professionals to have insight into possible dangerous situations in families.[251]

10.2 Ratification of the Istanbul Convention

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

[248] NIHR (2021), 'Wetsvoorstel seksuele misdrijven belangrijke stap vooruit' (Law proposal on sexual offences – important step forward), 11 June 2021: https://mensenrechten.nl/nl/nieuws/wetsvoorstel-seksuele-misdrijven-belangrijke-stap-vooruit.

[249] Rijksoverheid (2020), *Wraakporno* (Revenge pornography). See https://www.rijksoverheid.nl/onderwerpen/seksuele-misdrijven/wraakporno.

[250] Law proposal on the use of personal data to intimidate someone, TK 2022-2023, 36171, no. 2: https://www.eerstekamer.nl/wetsvoorstel/36171_strafbaarstelling_gebruik.

[251] Movisie (2021), 'Een overzicht van onderzoeken naar huiselijk geweld, seksueel geweld en kindermishandeling. De impact van corona' (An overview of research into domestic violence, sexual violence and child abuse. The impact of coronavirus.). Available at: https://www.movisie.nl/artikel/overzicht-onderzoeken-naar-huiselijk-geweld-seksueel-geweld-kindermishandeling.

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

11.1 General (legal) context

11.1.1 Issues related to the pursuit of a discrimination claim

There are many issues in relation to pursuing a discrimination claim for victims. In 2021, the Senate (the First Chamber of Parliament) established a Parliamentary Research Committee in order to carry out research into the reasons for the difference between non-discrimination law on paper and its effects in practice – or rather the lack of effect – and into the question of why anti-discrimination provisions in legislation are not sufficiently effective. The Committee published its report in 2022.[252]

The main question of the study was: 'What can the legislature do to combat discrimination?' In order to answer this question the Committee asked why the existing anti-discrimination legislation is not sufficiently effective. In this respect the Committee noted the following important points:

- Discrimination is often a result of prejudices and (organisational) cultures that are difficult to change with laws.

- For the implementers of the law, such as employers and educational institutions, it is not clear enough what the law requires of them. In addition, they usually have other priorities (to make a profit or meet other requirements that the Government sets).

- There is too little attention and insight into structural and institutional discrimination.

The Committee analysed which measures against discrimination are successful and which are not. According to the Committee the most important successful measure is to impose legal accountability on implementing organisations and employers. For example, they should report annually on what they have done to prevent or combat discrimination. In addition, an effective measure is to introduce a quota policy, preference policy or a policy of targets. Since such measures can provoke resistance, they must go hand in hand with measures to promote inclusion, they should only be temporary and there should actually be a backlog in relation to the group for which the measure is intended. Thirdly the Committee notes that it is important to remove fears or concerns about the costs or disadvantages of diversity and inclusion, for example, by providing information or by offsetting costs.

The following measures were considered to be unsuccessful:

- To leave it entirely to people who experience discrimination to tackle discrimination. These people encounter (too) many obstacles on the way to justice.

- To limit the discretionary space of executive officers. Executive officers need decision space to provide customisation. It is important for them to be accountable for what they have done to combat discrimination.

- Sanctions are also unsuccessful. This is primarily because the criminal justice route is complex and discrimination is difficult to prove. A motivation to achieve something works better than fear of sanctions if you do not act in accordance with a regulation.

[252] Netherlands Senate, 'Gelijk recht doen' (To do equal justice), 14 June 2022. Available at https://www.eerstekamer.nl/behandeling/20220614/brief_aan_de_voorzitter_van_de/meta.

At the same time, sanctions can send the important signal that discrimination does not go unpunished.

Common features of successful measures include:

- The standard – i.e. the prohibition of discrimination or the equal treatment norm – and the aim must be clearly defined. Measures are more effective if they are taken simultaneously with other measures.
- The more concrete the non-discrimination goal is and the better it is attuned to the domain to which it will apply, the greater the chance of cooperation within this domain.
- Strict requirements must be imposed on the use of algorithms. Profiling and decision making based on algorithms and exchange of data must be transparent, controllable and efficient.
- Organisations that implement rules need sufficient experimental space and time.
- Mandatory periodic evaluations and follow-up of the results are also required.

On 27 September 2022, the Senate passed a motion asking the Government to respond to the recommendations of the Committee and requesting the President of the Senate to (1) make a proposal on how to turn the proposals of the Committee into a working method of the Senate when examining new legislation and (2) share the report with the House of Representatives.[253] The Government's response is expected in 2023.

In the author's view the report is interesting. In particular, it is important that the Committee points out that at present it is too often left to individual people to tackle discrimination and that that is not successful. Also the recommendation to take a more comprehensive approach is important.

Meanwhile another committee was established at the request of the Second Chamber of Parliament (the House of Representatives): the State Commission against Discrimination and Racism.[254] This is a one-off advisory board that has been established for four years. The State Commission will conduct scientific research and is part of a package of initiatives to tackle discrimination and racism in the Netherlands more effectively. The work of this Commission appears – at least in part – to overlap with that of the Committee established by the Senate. It is to be hoped that the Government will take more concrete steps in 2023 and the years to come, as it does not appear to be useful to spend so much time doing research, especially twice.

11.1.2 Political and societal debate and pending legislative proposals

On 10 December 2020 a law proposal was submitted to Parliament with respect to discrimination in recruitment and selection.[255] The proposal obliges employers with 25 or more employees to draft a policy for recruitment and selection which is free from discrimination. Intermediaries, such as temporary employment agencies which place employees with organisations, will also need to have such a policy. Employers and intermediaries must also pay attention to possibly discriminating algorithms. The Labour Inspectorate will be given the authority to check whether organisations have an appropriate policy. There has been considerable criticism of the law proposal as the fear is that it will be a 'paper tiger'. The debate was suspended after the collapse of the cabinet in the beginning of 2021. In 2022 the debate continued.[256]

[253] Motion by MP Rosenmöller and others, 13 September 2022, EK 2021-2022, CXLVI: https://www.eerstekamer.nl/motiedossier/cxlvi_y_motie_rosenmoller.

[254] Staatscommissie tegen discriminatie en racisme (State Commission against Discrimination and Racism), established by Decision of 3 May 2022, *Staatscourant* 11 May 2022, No. 11349.

[255] Law Proposal on the Act on monitoring of equal opportunities in recruitment and selection (*Wetsvoorstel Wet toezicht gelijke kansen bij werving en selectie*), TK 2020-2021, 35673. Available at https://www.eerstekamer.nl/wetsvoorstel/35673_wet_toezicht_gelijke_kansen.

[256] The law proposal was adopted in 2023. This will be explained in more detail in the 2023 report.

nother law proposal which also relates to remedies for discrimination is the one on equal pay for men and women. This proposal has been explained in detail in section 4.1.1 of this report, above.

11.1.3 Gender mainstreaming

Gender mainstreaming is not legally mandated in the Netherlands. However when new policies and regulations are introduced, their effects on gender equality must be assessed. For this purpose the 'Integrated Consideration Framework for Policy and Regulations' (*Integraal Afwegingskader voor Beleid en Regelgeving*, IAK) is used. In this framework seven central questions are used to help policy officers and legislative lawyers to draft good policies and regulations.[257] As of 24 January 2019, one of the requirements for good policies and regulations relates to gender equality. How a policy or laws and regulations contribute to reducing the existing inequality between women and men in all their diversity or how they ensure that the current level of equality between women and men does not decrease must be examined.

However, in practice, the gender test is not always applied, or at least it is not reported in the parliamentary documents. The Minister of Education, Culture and Science therefore reported in a letter of 29 October 2020 that he wants to examine how to promote gender mainstreaming within the whole Government.[258] In addition, the Emancipation Memorandum (*Emancipatienota*) 2022-2025 notes that the minister wants to pay more attention to whether the gender test is actually applied, and to talk to the other ministers about how they assess the effects of new policies on systemic inequality.[259] However, there is still no obligation in this respect. Two Members of Parliament submitted a motion in order to make the gender test mandatory, but it was rejected by the majority of Parliament.[260]

The Dutch Ministry of Education, Culture and Science (OCW) is responsible for the national emancipation policy. As the Government gender equality body, its coordinates overarching policy and responsibility for the theme across ministries. The Directorate for Emancipation was established in 1978 and brought under the OCW in 2007. Gender equality is a special portfolio, in addition to the other themes of education and science. The OCW promotes equality and the emancipation of women, while the Directorate also covers the rights of LGBTQI+ people. Many ministries have civil servants who focus on gender equality from a specific perspective (international women's rights, within the Ministry of Foreign Affairs, for example, or women's employment, within the Ministry of Social Affairs and Employment).

11.2 Victimisation

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

[257] Integrated Consideration Framework for Policy and Regulations (*Integraal afwegingskader voor Beleid en regelgeving*), June 2022: https://www.kcbr.nl/sites/default/files/70174-jenv-iak_waaier_wcag.pdf.
[258] Letter by the Minister of Education, Culture and Science (OCW), 29 October 2020, TK 2020-2021, 30 420, No. 352.
[259] 'Emancipatie, een opdracht voor ons allen' (Emancipation, a task for all of us), Emancipatienota 2022-2025 (Emancipation Memorandum 2022-2025), p. 12: https://open.overheid.nl/documenten/ronl-9442234d31a1e83aaed7b1a7dece2205bb92e2fe/pdf.
[260] Motion by the MP's Westerveld and Mutluer, 5 December 2022, 36200-VII, No. 162.

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

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

As a result of the implementation of the Directive on Work-Life Balance, new provisions on victimisation were introduced in the Work and Care Act and the Flexible Working Act. Article 1:7 of the Work and Care Act prohibits less favourable treatment of employees on the ground that they have applied for, or have taken, a leave, provided assistance in doing so or lodged a complaint in this respect. The same provision is found in Article 3a of the Flexible Working Act.

There is not much case law on victimisation. An example is the case that is mentioned in section 5.8.9, above, which concerned unfavourable treatment in relation to parental leave. In this case the Central Appeals Tribunal ruled that the police, in its capacity as employer, had breached the law by terminating the temporary assignment of a police officer because he had taken parental leave. The decision by the police to terminate the temporary assignment was therefore deemed to be invalid.[261]

Another case concerned the non-extension of a temporary contract. The employee stated that the reason thereof was that she had submitted a claim for equal pay. The employer disputed this and said that the reason was that the employee did not perform well. The district court ruled that there was not enough evidence of victimisation.[262] The equality body took a different view and pointed out that the performance of the employee was criticised for the first time directly after her last meeting with the human resources manager about the equal pay claim.[263] Besides, her performance had always been evaluated in a positive way in the past. In addition, the employee was told to improve her style of communication and her attitude, but it is quite possible that there was a connection between this criticism of the employer and the fact that the employee persisted in her equal pay claim. The employee appealed against the decision by the district court. Subsequently the parties reached a settlement.

It is not clear whether there is a shift of the burden of proof in cases of victimisation. The shift of the burden of proof in cases of discrimination appears not to apply here. That means that courts in general demand full proof from the claimant. Hopefully this will be clarified in future EU directives or in changes to current ones or in case law of the CJEU.

In the author's view, the protection in Dutch law complies with the protection mentioned in the directives. The directives also do not offer a shift of the burden of proof.

11.3 Access to courts

11.3.1 Difficulties and barriers related to access to courts

In itself, access to the courts for alleged victims of sex discrimination is sufficiently safeguarded. They can bring a claim before a civil court, or an administrative court if they are a civil servant, or can press charges with the police in cases involving a criminal offence. Nevertheless, in practice starting a court case is not easy. Discrimination claims

[261] Central Appeals Tribunal, 23 November 2017, ECLI:NL:CRVB:2017:4067.
[262] District Court of Overijssel, 21 February 2022, ECLI:NL:RBOVE:2022:590.
[263] NIHR, 15 August 2022, Opinion 2022-91.

might be quite complicated, which makes it necessary to involve a specialist lawyer/attorney. These lawyers, however, usually have hourly rates of EUR 200 or more. People with a low income are entitled to subsidised legal aid but will have to pay a contribution and the legal costs if they lose their case. These costs may amount to approximately EUR 1 000 in first instance and around EUR 4 000 on appeal. Members of a trade union can receive legal assistance from their union and people who have taken out insurance for legal assistance can turn to their insurer. However, there are many people who are not members of a trade union and do not have insurance cover.

This situation is problematic, in particular, because in Dutch law, it is often left to individual people to tackle discrimination.[264] These individuals then meet with obstacles in the form of complex legal rules and sometimes high costs, which is one reason why there is not much case law on gender discrimination.

11.3.2 Availability of legal aid

Victims of gender discrimination may apply for legal aid if their annual income is less than EUR 25 300 for a single person and EUR 35 900 for a person living with others (in that case the family income is the basis). They must pay a contribution which varies from EUR 218 to EUR 747.[265] They can also go to the NIHR, which is free of charge, but this body cannot give binding decisions.

11.4 Horizontal effect of the applicable law

11.4.1 Horizontal effect of relevant gender equality law

In gender equality law a possible lack of horizontal effect does not pose a particular problem, since (almost) all relevant EU provisions on gender equality have been correctly implemented. Besides, most EU-provisions on gender equality have horizontal effect because of the *Bauer* jurisprudence.

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

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

11.5 Burden of proof

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

In cases of (sex) discrimination the NIHR or the courts investigate whether sufficient facts have been established in order to shift the burden of proof to the employer/other discriminating party. The fact that a party refuses to provide information, as in the *Kelly*[266] and *Meister*[267] cases may be considered an indication of discrimination as long as it is not the only indication.

[264] See also section 11.1.1 of this report.
[265] Raad voor Rechtsbijstand, 'Income, assets and own contribution 2022' (*Inkomen, vermogen en eigen bijdrage 2022*): https://www.rvr.org/@7797/inkomen-vermogen-eigen-bijdrage-2022/.
[266] CJEU, 21 July 2011, *Kelly* v. *National University of Ireland (University College, Dublin)*, C-104/10, ECLI:EU:C:2011:506.
[267] CJEU, 19 April 2012, *Meister* v. *Speech Design Carrier Systems GmbH*, C-415/10, ECLI:EU:C:2012:217.

In the author's view, the protection in Dutch law complies with the protection mentioned in the directives. It would be good if there were a shift of the burden of proof in cases of victimisation as well, as set out in section 11.2, but this is also not prescribed by Article 19 of Directive 2006/54/EC.

11.6 Remedies and sanctions

11.6.1 Types of remedies and sanctions

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

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

As of 1 July 2015, what is known as 'transitional benefit' has been introduced. All employees are entitled to this benefit in the event of the termination of their employment, unless the termination is the result of serious misconduct by the employee. This may be of help to the many women whose temporary contracts are not extended because of pregnancy. However, the transitional benefit is modest, especially in the case of short-term contracts: one sixth of the monthly salary for each six months worked.

All persons who have been discriminated against because of their gender can claim pecuniary damages under the system of sanctions in general administrative law, contract law and/or tort law. Pecuniary damages can be claimed in the case of material damage. In addition, non-pecuniary damages can be requested where the norm of gender equality has been seriously violated. Violation of the norm does not in itself entitle the victim/claimant to compensation. The claimant must make it clear why the violation is serious and what the consequences are.[268]

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

The Act on the Netherlands Institute of Human Rights (NIHR)[269] mentions some additional sanctions. Sanctions under these laws are imposed by the NIHR, not by the courts. Under Article 11(2) of this Act, the NIHR may make recommendations to the party found to have made an unlawful distinction. Under Article 11(3) the NIHR may also forward its findings in advice to the ministers concerned, and to organisations of employers, employees, professionals, public servants, consumers of goods and services and to relevant consultative bodies. Under Article 13(1) of the Act on the NIHR, the NIHR may initiate legal action with a view to obtaining a court ruling that conduct contrary to the relevant equal treatment legislation is unlawful, requesting that such conduct be prohibited or requesting an order that the consequences of such conduct be rectified. This power must

[268] Supreme Court, 15 March 2019, ECLI:NL:HR:2019:376.
[269] Act on the Institute for Human Rights (*Wet College Rechten voor de Mens*), 2012 Stb. 2011, 573.

be considered in light of the fact that the opinions of the NIHR are not binding. The NIHR has never made use of this possibility.

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

Compensation for non-pecuniary damages is notoriously low in the Netherlands. It rarely exceeds EUR 10 000 and most payments do not come close to that amount.[270]

11.6.2 Effectiveness, proportionality and dissuasiveness

It is seriously doubted in academic legal circles whether the range of sanctions available under the equal treatment legislation is in conformity with the requirement that sanctions be 'effective, proportionate and dissuasive.' This is particularly the case because non-pecuniary damages are usually rather low. They rarely exceed EUR 10 000 and most payments do not come close to that amount.[271]

Pecuniary damages are related to the extent of the damage. If an employee can make it sufficiently clear that he/she suffered a loss of income because of discrimination, this loss will be compensated. One example of this is the judgment of 26 April 2016 by the District Court Zwolle, in which the employee was awarded compensation of EUR 21 000 because the court considered it plausible that the employment agreement would have lasted for another five years if it had not been terminated because of pregnancy.[272] Compensation of EUR 5 000 was also granted for non-pecuniary damage. The Hague District Court awarded damages equal to one year's salary in the case of an applicant who seemed to have been accepted for a job but was then turned down after she told the employer she was pregnant. The court decided that she would have been given a contract, but that this contract would probably not have lasted longer than one year, which is why the compensation was fixed at one year's salary (EUR 37 077.21).[273]

In many cases, however, it is difficult to estimate the extent of the damage as in the Netherlands many employees work on the basis of part-time contracts of six months or one year or are placed by temporary employment agencies, which means they cannot prove that their employment would have lasted for a considerable period of time. For example, the District Court of Limburg decided that an employee, whose contract had not been extended because of her pregnancy was not entitled to compensation for material (loss of income) damage, because it was likely, according to the court, that the contract would have been extended once for one more year and would have ended thereafter. During that year the employee had not worked, but had received a social security benefit and therefore had incurred no income damage.[274]

11.7 Equality body

The NIHR (Netherlands Institute for Human Rights) is the main officially designated equality body.[275]

[270] See on this subject: Roozendaal, W. L. (2014), 'Geen verlenging wegens zwangerschap, wat nu?' ('No extension because of pregnancy. What now?'), *TAP* 316.
[271] See on this subject: Roozendaal, W.L. (2014), 'Geen verlenging wegens zwangerschap, wat nu?' ('No extension because of pregnancy. What Now?'), *TAP* 316.
[272] District Court of Zwolle, *JAR* 2016/143, 26 April 2016.
[273] District Court The Hague, 24 January 2019, ECLI:Nl:RBDHA:2019:584.
[274] District Court Limburg, 13 December 2017, ECLI:NL:RBLIM:2017:12124.
[275] See: www.mensenrechten.nl.

The NIHR covers all grounds of discrimination: race, sex, age, religion, belief, sexual orientation, nationality, disability or chronic illness, marital status, working hours, the temporary character of employment agreements and political beliefs. It is also competent to examine whether workers suffered less favourable treatment on the ground that they have applied for, or have taken, a leave or a FWA, as understood in the WLB Directive.

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

It is hard to assess the impact of the body. It is quite well known and respected for its opinions and knowledge. The Government asks its advice when formulating new policies, and many individuals and organisations also ask it for information/advice. In 2022 there were 1 811 questions or reports.[276] Most questions related to discrimination on the ground of race, followed by disability and sex. With respect to the ground of sex, more than 50 % of the reports related to pregnancy discrimination. The NIHR issued 160 substantial rulings in 2022. These rulings are non-binding. The NIHR states that in 2022 in 74 % of the cases in which it found discrimination, measures were taken by the discriminating party. However, in cases which are subsequently brought before the courts, it regularly happens that the opinion of the NIHR is not followed. An explanation might be that the more controversial cases in particular are brought before the courts. What also happens is that one party (employers in particular) prepares their case much better when going to court, which is why there is a different outcome.

The NIHR is seen as an expert institute. Courts are not obliged to follow an opinion by the NIHR. The basic assumption is that if courts do not follow an opinion by the NIHR, they have to indicate why. However, courts do not always do this on their own initiative. It is therefore important that the party who wants to rely on an opinion by the NIHR, explicitly invokes this opinion in court.[277]

11.8 Social partners

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

Trade unions and employers' organisations consult each other in institutions like the Labour Foundation and the Social-Economic Council (SER). These institutions sometimes publish tools with the aim of promoting gender equality within organisations. For example, on 21 September 2020 the Labour Foundation published a revised version of the Checklist for equal pay 2001 with tools for organisations, works councils, employee representatives and individual employees.[278]

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

[276] NIHR (2022) *Monitor Discriminatiezaken 2022* (Monitor of discrimination cases 2022). Available at: https://publicaties.mensenrechten.nl/publicatie/fa21a1f1-4efd-402e-a868-784b45e2b93f.

[277] Van Vleuten, C.E. and Willems, L. (1999), 'Commissie gelijke behandeling in de AWGB (art. 11-21 AWGB)' (The Equality Body in the GETA (art. 11;21 GETA)) in Asscher-Vonk, I.P., and Groenendijk, C.A. (eds) *Gelijke behandeling: regels en realtiteit* (Equal treatment: rules and reality), pp. 277-288.

[278] Stichting van de Arbeid (Foundation for Labour) (2020), *Je verdiende loon! Handreiking gelijke beloning mannen en vrouwen* (The salary you deserve! Guidance on equal pay for men and women), 21 September 2020, available at: https://www.stvda.nl/nl/thema/arbeid-zorg/gelijke-beloning.

unions and the works council, especially in regard to increasing the number of women in higher positions.[279]

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

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

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

11.9 Other relevant bodies

There are other agencies or bodies that are engaged in the enforcement of gender equality law. In the first place there are several anti-discrimination bureaux. At the national level, there is the organisation called 'Article 1', which refers to Article 1 of the Constitution (the principle of equality). This organisation covers all the Article 19 TFEU non-discrimination grounds, including sex discrimination, and is officially designated as one of the equality bodies. It mainly has a role in assisting victims and in monitoring the occurrence of discrimination. At the local level there are local anti-discrimination bureaux (or ADVs). In 2009, these local ADVs were given a legal basis in the Act on Local Anti-Discrimination Bureaux.[280] All municipalities are obliged to establish and subsidise an ADV. The main task of these bureaux is to assist victims of discrimination and to monitor the situation in this regard. Sometimes they act as a party to court proceedings in addition to the victim him/herself, but this is rare.

Apart from these organisations, there are several equality interest groups. The most well-known is the Bureau Clara Wichmann – formerly the Fund for Test Cases Clara Wichmann – which supports court cases in the area of sex discrimination.[281] PILP (Public Interest Litigation Project), which forms part of the Dutch lawyers' Committee on Human Rights (NJCM), is another example. PILP also engages in strategic litigation, not only about women's rights, but about human rights. Other foundations are established for a single-issue cause, for example in order to help women with health-threatening silicone implants to obtain redress from the pharmaceutical industries and/or from the doctors and hospitals who treated them, or to combat marital 'imprisonment' or to support freedom of choice in relation to abortion. They also carry out campaigns and sometimes litigate on behalf of the specific interest they pursue. There are also various organisations that represent the interests of LGBTI+ persons, such as COC (for all LGBTI+ persons), Transgender Network (specifically for transgender people) and NNID (for sex diversity and in particular for intersex persons).[282]

These associations or foundations can submit a claim before the courts on the basis of Article 3:305a of the Dutch Civil Code, which stipulates that an association or foundation with full legal capacity may submit a claim which aims to protect the similar interests of

[279] AD (2019), 'Ondanks gelijke beloning bij Aegon krijgen mannen 900 euro meer' (Despite equal pay at Aegon men receive 900 Euro more), 11 February 2019. Available at: https://www.ad.nl/werk/ondanks-gelijke-beloning-bij-aegon-krijgen-mannen-900-euro-meer~a8c07601/#:~:text=Mannen%20en%20vrouwen%20horen%20bij,krijgen%20mannen%20900%20euro.

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

[281] See: https://www.clara-wichmann.nl/.

[282] For more information, see https://coc.nl/, https://www.transgendernetwerk.nl and https://nnid.nl/.

other persons, insofar as they represent these interests pursuant to their articles of association. A claim may only be brought before the courts if the association or foundation has first tried to reach its goal through dialogue.

The actions/procedures by these organisations may have quite some impact, as they try to address fundamental questions, such as the right of women to run for election (which was not possible within a fundamentalist Christian party),[283] the possibility for general practitioners and pharmacists to prescribe the pill Mifepristone, which can be taken instead of an abortion in the case of an unwanted pregnancy,[284] sexism in commercials[285] and the right of (in this case, Turkish) women to use their maiden name again after their divorce.[286]

11.10 Evaluation of implementation

On paper Dutch law satisfactorily implements EU law on remedies and sanctions, but in practice there are quite a few shortcomings. The first of these is that it is difficult to start a court case, especially because of the costs involved. Due to austerity measures, fewer people are entitled to legal aid than in the past and there are fewer and fewer lawyers who take on legal aid cases because the remuneration they receive for this is rather low and often not even cost-effective. Secondly, remedies are not always effective. It is not always easy to prove the extent of pecuniary damage, especially not for those women who work on a flexible contract or as a (false) self-employed person. This happens especially to women in lower positions or with lower education levels, thus a group which is already vulnerable and often not aware of their rights. Thirdly, compensation for non-pecuniary damage is low, if it is granted at all. Fourthly, it would be good if the Labour Inspectorate could play a larger role, because at present it is completely up to a victim to decide whether she will take legal action, and this may be a heavy burden. It would be better if there were more responsibility on the part of organisations and if the Labour Inspectorate could be given more competence and means to monitor and enforce equality legislation.

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

11.11 Remaining issues

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

[283] Supreme Court, 9 April 2010, ECLI:NL:HR:2010:BK4549. See Section 3.2.2.
[284] The Hague Court of Appeal, 12 February 2019, ECLI:NL:GHDHA:2019:21.
[285] Reclame Code Commissie (Commercials Code Committee), 13 October 2016: https://www.reclamecode.nl/uitspraken/resultaten/kleding-schoenen-en-accessoires-2016-00286/159616/.
[286] Council of State, 7 November 2018, ECLI:NL:RVS:2018:3629.

12 Overall assessment

The following transposition problems were mentioned in this report:

- The exclusion from social security schemes of domestic staff.

- The fact that the transparency measures set out by the European Commission's Recommendation of 7 March 2014 have not been implemented.

The author's overall impression is that implementation of the EU gender equality *acquis* has been largely satisfactory. The Netherlands ranks third in the EU on EIGE's Gender Equality Index with 77.3 out of 100 points. Its score is 8.7 points higher than the overall EU score and is higher than it was in 2021. According to EIGE, the reason for this is the increase in gender equality in economic decision making. This probably relates to the adoption of the law on quotas for women in 2021. A step backwards was taken in the domain of money, due to higher levels of gender inequality in the sub-category of economic situation. EIGE also asks for attention to be paid to gender segregation in education.[287]

Nevertheless, there are points of concern. On paper the Dutch system seems to work very well, but in practice this is not always the case.

A point which returns every year is the position of predominantly female domestic staff who work on less than four days per week in a private household. These workers have significantly fewer employment and social security rights than other workers. They may be dismissed unilaterally without the permission of employment agencies or the district courts, they are entitled to six weeks' pay during illness instead of 104 weeks, and they fall outside the scope of the social security system. This reduced protection has been criticised by, inter alia, the European Commission and the CEDAW Committee, but there is still no political will to tackle the situation. On 16 December 2021, the Rotterdam Administrative Court ruled in such a worker's favour.[288] The court took as a starting point that the Regulation was indirectly discriminatory and found, subsequently, that this discrimination could not be justified. The judgment was upheld in appeal (this will be explained in detail in the 2023 report). It is not yet clear what the consequences of this will be.

Another point of concern is the vulnerable employment situation of pregnant women and young mothers. This matter has also been troubling for a long time and there does not seem to have been any improvement. There are practical problems in respect of proof/evidence and the sanctions are not a sufficient deterrent. The idea is that compensation may not exceed the actual damage suffered, but sometimes it is difficult to assess the actual damage, especially in the case of flexible contracts. This works to the disadvantage of the employee. The main problem, in the author's view, is the large number of flexible contracts and (false) self-employment in the Netherlands, which makes it too easy for employers not to hire pregnant women and/or not to prolong an employment relationship in cases of pregnancy. The Government announced measures to reduce the number of flexible contracts, but in the author's view it is doubtful whether these measures will have an effect on the extent of pregnancy discrimination.

[287] European Institute for Gender Equality (EIGE), 'Gender Equality Index, Index Score for the Netherlands for 2022'. Available at: https://eige.europa.eu/gender-equality-index/2022/country/NL.

[288] Administrative Court of Rotterdam, 16 December 2021, ECLI:NL:RBROT:2021:12432. Also published in *USZ* 2022/3 with a comment by G.C. Boot.

Many female workers face harassment at work. On paper there are many rules that aim to protect workers against harassment and to oblige employers to take measures, but in practice they are not always complied with. In 2021, the CBS[289] reported that approximately one in five young female employees have been confronted with some form of harassment. The NIHR has urged the Government to ratify ILO Convention No. 190 and to include more detailed obligations for employers in the law,[290] but what is most needed is a shift of consciousness, rather than more rules and regulations.

Even more worrying is violence against women and domestic violence, as explained in Chapter 10 of this report. The main issues in this context are the increase in online sexual violence against girls, an increase in the severity of domestic violence since the Covid lockdowns, and a continued presumption towards joint child custody even in cases of domestic violence. The gender pay gap is tenacious in the Netherlands and the gender pension pay gap is one of the largest in the EU. It is still almost entirely up to individual workers to tackle this, although some trade unions make efforts in this respect. An important reason for the gender pay gap and the gender pension pay gap is the large number of women in the Netherlands who work part time. Sometimes this is voluntary, but the extent of part-time work of predominantly women is also the result of a self-sustaining system that is hard to change. A worrying trend in the Netherlands, as in other countries, is the rise – or perhaps one should say return – of populist movements and political parties which, in general, have a very conservative view on matters of gender equality.

A positive trend is that the number of women in leading positions increased in 2022 and will probably increase further due to the entry into force as of 1 January 2022 of the law on 'diversity at the top of business', which introduced a growth quota for supervisory boards of listed companies.[291]

There is also a trend towards more rights for transgender and non-binary persons. Courts more easily accept their wish to have an X in their passport instead of being labelled as a man or a woman and a law proposal to this extent was submitted to Parliament. However, there is also quite some opposition in society against rights for LGBTQI+-people, especially by populist political parties and by political parties with a religious background.

It is also positive that, following the WLB Directive, paid parental leave (lasting nine weeks) was introduced in the Netherlands.

Finally, a number of law reforms which may have a positive effect on the position of women have been announced:

- law proposal on equal pay for men and women (submitted to Parliament, still to be debated);

- law proposal which will make all forms of sex without consent punishable under criminal law and will ensure that sexually unacceptable behaviour online will be treated in the same way as offline behaviour;

[289] CBS (2021), 'Ongewenste seksuele aandacht klanten bij 1 op 5 jonge vrouwelijke werknemers'(1 out of 5 young female employees face unwanted sexual attention of customers), 20 April 2022: https://www.cbs.nl/nl-nl/nieuws/2022/16/ongewenste-seksuele-aandacht-klanten-bij-1-op-5-jonge-vrouwelijke-werknemers.

[290] NIHR (2022), 'Verplichtingen werkgevers rondom seksuele intimidatie onvoldoende duidelijk' (Employers' obligations with regard to sexual harassment not clear enough): https://mensenrechten.nl/nl/nieuws/verplichtingen-werkgevers-rondom-seksuele-intimidatie-onvoldoende-duidelijk.

[291] Law on making the relationship between the number of men and women on the management board and the supervisory board of large limited public liability companies and private companies more balanced, *Staatsblad* 2021/495: https://zoek.officielebekendmakingen.nl/stb-2021-495.html.

- law proposal with respect to discrimination in recruitment and selection (submitted to Parliament, to be debated); and

- law proposal which aims to make it easier for transgender persons to change their gender on their birth certificate, and an amendment which gives non-binary persons the right to have a gender-neutral registration in official documents without having to go through a court procedure (submitted to Parliament, to be debated).

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