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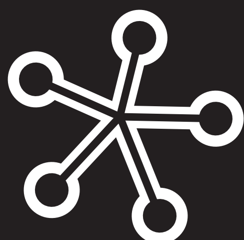
Gender Equality in the Netherlands

An Example of Europeanisation of Social Law and Policy

Nuria E. Ramos Martín



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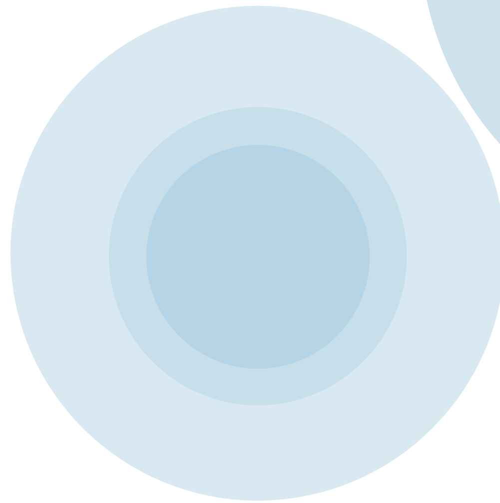

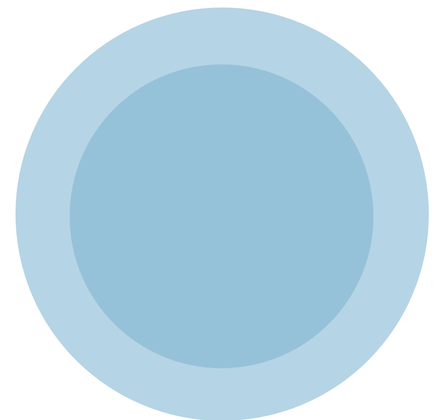

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Gender Equality in the Netherlands:

An Example of Europeanisation of Social Law and Policy

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WP 08/66

Abstract

The aim of this article is to present a legal analysis of how the legislation and social policies in the field of gender equality in the Netherlands have been influenced by the European integration process. This research is founded on an acknowledgement of the fact that the interaction between the European Union (UE) and member state levels is a two-way process, and considers the 'Europeanisation of social policy' as a cyclical process. In the context of the new EU governance discourse, this case study examines the question whether the use by the EU of different instruments of public intervention in social affairs produces different impacts on social legislation and policy at domestic level. This article focuses on the examination of how the European Community legislation on equal treatment for men and women in employment, occupation and on part-time work has been transposed to the domestic level ('downloading' or 'taking'). In addition, the article addresses the question of whether the Dutch actors have been able to upload their approaches and preferences in the area of gender equality legislation to the EU level ('uploading' or 'shaping'). On the 'uploading' perspective of the Europeanisation process, the main conclusion of this case study is that the Dutch have been fairly successful in bringing forward several ideas (i.e., a flexible and pro-active approach to part-time work) to the European social agenda. Concerning the 'downloading' dimension of the process, despite noticing some disparities in the conceptual field, the findings achieved show that the EU legislation as regards gender equality has been reasonably well transposed into the Dutch legal framework

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1. Introduction

This case study addresses the issue of Europeanisation[1] of legislation and social policy in the Netherlands as regards gender equality. The interaction between the European Union (hereinafter, EU) and the national level is a two-way process: Member States' governments and actors are not simply confronted with the rules and legislation emanating from EU institutions, but also have many opportunities to be actively involved in formulating these decisions. Similarly, the EU institutions do not operate autonomously in their contribution to the policy process, but are dependent on input and support from the Member States. Therefore, both the 'shaping' dimension of the Europeanisation process ('uploading' ideas and policies to the EU level) and the 'taking' dimension (implementation of legislation, ideas or policies in the Member States) deserve a parallel analysis.

Based on a cyclical approach to the Europeanisation process, this case study focuses on assessing the legislation and social dialogue instruments within the field of gender equality in the Netherlands. Concerning legislation, the analysis focuses on Dutch legislation as regards equal treatment and equal opportunities for men and women in employment and occupation. As regards social dialogue instruments, the case study focuses on establishing a comparison between the Council Directive 97/81/EC on part-time work[2] (derived from the European social dialogue) and the national regulation in this area. This last comparative analysis stresses the close relationship between part-time work and gender in the Netherlands.

1.1. Research questions, sources and methodology

This case study addresses several research questions. Firstly, attention has been paid to the question: To what extent have the Dutch actors been able to upload their approaches and preferences in the area of gender equality legislation and policies to the EU level? Secondly, the parallel question is: how efficiently have the rules coming from the EU in this field been transposed to the national level? The final question to be answered is: what are the critical factors that have supported and/

1 Europeanisation refers to the effect of the European integration process upon certain domestic policy areas that become increasingly subject to common policy-making at EU level. See Börzel, T. A., 'Shaping and Taking EU Policies: Member State Responses to Europeanisation', in Queen's Papers on Europeanization, 2/2003, Belfast: Queen's University.

2 Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time working concluded by UNICE, CEEP and the ETUC, OJ L 14 of 20.01.1998.

or constrained the development of a process of Europeanisation of gender equality legislation and policy in the Netherlands?

In order to answer the above-mentioned questions, the methodology has been to review the existing literature dealing with the implementation in the Netherlands of the European Community (hereinafter, EC) Directives in the fields of equal treatment for men and women and part-time work. At the same time, a comparative analysis of the relevant legislation and case law both at EU and national level, as well as of the significant opinions of the Dutch Equal Treatment Commission (*Commissie Gelijke Behandeling,* CGB), has been performed. The information provided by these sources has been complemented with several interviews with key policy-makers, civil servants from the Dutch and EU institutions, social partners' representatives, and members of associations involved in the field of gender equality.

2. European Union legal and policy framework on gender equality

2.1. EU governance and gender equality

When analysing EU social policy instruments as governance tools, two distinct modes or methods of governance can be distinguished: 'classic governance' or 'classic Community method' (primarily legislation) and 'new governance' ('soft-law' and Open Method of Coordination, OMC).[3] The European social dialogue procedures and techniques fall somewhere in between these two methods of governance due to the diverse routes available for the implementation of European framework agreements.

The 'classic Community method' implies the adoption of EU legal provisions that enjoy primacy over conflicting national law.[4] Several EC gender equality provisions grant individuals judicially enforceable rights.[5] For instance, many legally binding EC Treaty rules are directly effective and confer individual rights that may be relied upon before the national courts.[6] In contrast, the provisions contained in the Directives are only directly enforceable against those employers who are 'emanations of the state',[7] providing that certain conditions are fulfilled. However, where the alleged discriminator is another individual or private entity, national courts must give Directives 'indirect effect' and do everything possible to interpret national law in consistency with EC law (the so-called 'principle of conformed interpretation').[8] Moreover, the European Court of Justice (hereinafter ECJ) has, in the *Grimaldi* ruling,[9] also recognised the applicability of that principle to non-binding EU instruments such as the Recommendations. In addition, according to the so-called 'principle of State liability',[10]

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3 Scott, J. and Trubek, D. 'Mind the Gap: Law and New Approaches to Governance in the European Union', European Law Journal, 8, (2002), p.1.

4 Case 26/62, Van Gend en Loos/Administratie der Belastingen, [1963] ECR I-3 and Case 6/64, Costa/E.N.E.L., [1964] ECR I-1141.

5 Case 106/77, Amministrazione delle finanze dello Stato/Simmenthal, [1978] ECR I-629.

6 Case 43/75, Defrenne II, [1976] ECR I-455.

7 Case 152/84, Marshall/Southampton and South-West Hampshire Area Health Authority, [1986] ECR I- 723.

8 Case 14/83, Van Colson and Kamann/Land Nordrhein-Westfalen, [1984] ECR I-1891; Case 157/86, Murphy, [1988] ECR I-673; and Case 106/89, Marleasing, [1990] ECR I-4135.

9 Case 322/88, Grimaldi/Fonds des maladies professionnelle, [1989] ECR I-4407.

10 See: joined cases C-6/90, *Francovich* and C-94/95, *Bonifaci and others and Berto and others,* [1991] ECR I-5357.

Member States are liable for damages against those citizens harmed by a delay in the transposition of a Directive.[11] To sum up, the EU and the national legal orders of the Member States are related and the existence of supranational equality law challenges national legislation that contravenes it. In the Netherlands several cases in the field of gender equality serve to confirm this conclusion.[12]

In contrast to the 'classic' or 'Community method', the 'new EU social governance' constitutes a move towards non-coercive modes of governance that are claimed to be more reflexive, revisable and participatory. The paradigm of this so-called 'new governance' is the adoption of the OMC as the best way towards progress in the social field. The OMC is part of the so-called Luxembourg process of coordination of the national social policies of the Member States and, since 2000, has been defined as an instrument of the Lisbon strategy. The OMC provides a new framework for co-operation between the Member States, whose national policies in the social field (employment, social protection, social inclusion, education, and youth and training) can thus be directed towards common objectives. Under this intergovernmental method, the Member States are evaluated by one another (peer pressure), with the Commission's role being limited to surveillance and monitoring. Under the OMC the common objectives to be achieved are jointly defined and adopted by the Council. In addition, this method involves to jointly establish measuring instruments (statistics, indicators, guidelines); benchmarking; and exchange of best practices. Apart from the OMC, some other mechanisms can also be considered examples of 'new EU social governance', for instance: the use of non-binding legal instruments known as 'soft-law', and the adoption of a gender mainstreaming approach, as well as the long-standing use of methods of 'governance by dominium', such as the action programmes on equality and the structural funds (in particular the European Social Fund, ESF), in contrast to 'governance by imperium'.

According to Hervey, both 'classic' and 'new' governance mechanisms are part of the acquis communautaire.[13] In a similar way, Claire Kilpatrick estimates that paying attention to the full range of EU employment governance tools (legislation, expenditure, OMC, etcetera) and the objectives

11 For the State to be liable and the complainant entitled to monetary compensation, certain conditions must be satisfied: firstly, the aim of the Community provision which has been breached must be to grant rights to the individual; secondly, the breach must be sufficiently serious; thirdly, there must be a causal link between the State's failure and the damage suffered by the persons affected.

12 A paradigmatic example is the *Barber* case that affected the occupational social security system in the UK and also had an impact on occupational pensions in the Netherlands, see Case 262/88, *Barber/Guardian Royal Exchange Assurance Group*, [1990] ECR I- 1889.

13 Hervey, T.K., 'Thirty Years of EU Sex Equality Law: Looking Backwards, Looking Forwards', *Maastricht Journal of European and Comparative Law*, Vol. 12, 4, (2005), p. 307-325.

they are called upon to pursue is vital to understand EU governance properly and to assure economic growth and social progress.[14]

As regards social dialogue between management and labour at EU level, it has been argued that the results of this process can also be included in the list of 'soft-law' forms within the new governance discourse. Nevertheless, in my view, European social dialogue can better be described as a 'hybrid' instrument of 'reflexive governance'. 'Reflexive governance' refers to the method of intervention in the social policy field whereby the capacity of private and public organisations (social partners, firms, lawmakers, and monitoring agents) is enhanced so that these bodies are better able to define and to solve problems efficiently, according to varying European, national, sectoral, and local circumstances.[15] 'Reflexive governance' places its trust in the capacity and willingness of social partners to engage upon autonomous regulation, but within procedural guarantees that may have to be co-defined and co-monitored by the public authorities. From this point of view, *a priori,* the results of European social dialogue can only be described as 'hybrid' instruments whose legally or non-legally binding character depends on each particular case on an implementation decision in the hands of the actors involved in the process. These actors, the European social partners, are autonomous with respect to their bargaining process, their readiness to conclude agreements, and in their decisions concerning the implementation route for these agreements. However, the European Commission scrutinises their capacity to be engaged in that bargaining process, in the sense that they are admitted as valid social partners only when they fulfil strict representativity criteria.[16] Furthermore, there are other signs of their dependency on the EU institutional setting: the Commission in most cases, previously defines the bargaining issues and they are "bargaining in the shadow of the law".[17] This fact implies that the Commission might issue a legislative proposal whenever agreement between the social partners has not been reached on a certain issue. Moreover, there is an obvious connection between the social dialogue at EU level and 'hard-law', since the easiest way to ensure enhanced compliance

14 Kilpatrick, C., 'New EU Employment Governance and Constitutionalism', ESRC Seminar Series, Implementing the Lisbon Strategy: Policy Coordination Through 'Open' Methods.

15 Van der Meer, M., Visser, J., and Wilthagen, A.C.J.M., 'Adaptive and Reflexive Governance: The Limits of Organized Decentralization', European Journal of Industrial Relations, vol. 11, 3, (2005), p. 347-365.

16 See: Communications from the European Commission: COM (93) 600, COM (96) 448, COM (98) 322.

17 Bercusson, B., European Labour Law, Butterworth, London, 1996, p. 538.

with the social partner's framework agreements is to take the second implementation route, as set out in Article 139.2 ECT (transformation of these agreements into a Council Directive).

On the one hand, it is important to point out some of the limitations and drawbacks of the new governance tools that address social policy matters. When compared to the traditional 'hard-law' instruments, experience shows that they do not usually have a strong impact on the definition of social policies at domestic level, e.g., the Council's resolutions on the balanced participation of women and men in family and working life[18] or on the promotion of equal opportunities for women.[19]

On the other hand, the impact of 'soft-law' instruments should not be underestimated. Sometimes 'soft-law' documents have served to clarify and reinforce the applicability of existing 'hard-law' provisions and/or to clear the path for the adoption of more stringent legal provisions establishing enforceable individual rights. An interesting example of the clarifying value of a 'soft-law' instrument is the Commission's code of conduct concerning the implementation of the principle of equal pay for women and men, for work of equal value.[20] A non-binding instrument that has recently given place to the prohibition of sexual harassment at work is the Council resolution on the protection of dignity of men and women at work.[21] Equally, the resolutions of the Council on the promotion of equal opportunities for men and women through actions subsidised by the European Structural Funds[22] and on mainstreaming gender equality into the European Structural Funds,[23] have, in spite of their non-binding character, had an undeniable impact on the definition of the national actions subsidised by these funds.

As mentioned above, the ECJ's decision on Grimaldi[24] highlighted the importance of traditional 'soft-law' instruments within the EU legal order: "recommendations cannot be regarded as having no legal effect at all, the national courts are bound to take them into consideration in order to decide disputes submitted to them, in particular where they cast light on the interpretation of national measures adopted in order to implement them or where they are designed to supplement binding

18 Resolution of the Council and the Minister for Employment and Social Policy of 29 June 2000, OJ C 218, 31.7.2000.

19 See: Council Resolution of 24 July 1986, OJ C 203, 12.08.1986.

20 Commission Communication of 17 July 1996 on the code of conduct concerning the implementation of equal pay for women and men for work of equal value (COM (96) 336 final - not published in the Official Journal).

21 Council Resolution of 29 May 1990, OJ C 157, 27.06.1990.

22 Council Resolution of 24 July 1994, OJ C 231, 20.08.1994.

23 Council Resolution of 2 December 1996, OJ C 386, 20.12.1996.

24 Case 322/88, [1989] ECR I-4407.

Community provisions." However, the European Parliament Committee of legal affairs has warned about the risk of spurious use of 'soft-law' instruments as a surrogate for legislation when the Community has competence to legislate. A report by this Committee maintains that the use of 'soft-law' in this way constitutes a breach of the principle of conferred powers and may reinforce the so-called 'democratic deficit' in the functioning of EU institutions.[25] Following this interpretation, 'soft-law' measures should only be used when the EU lacks the formal legislative power to produce binding norms. This argumentation begs a key question: What happens when there is no political will to adopt or amend legislation on a particular issue even when the Community has the competence for it? In the current state of affairs, with 27 Member States with veto power in several domains, this situation is likely to occur. The Committee of legal affairs has stressed that, in these cases, the use of 'soft-law' is likely to preclude "the principles of democracy and legality and may result in the Commission acting 'ultra vires'."[26] From my point of view, in a deadlock situation regarding EU social law and policy, the search for alternative forms of governance such as traditional 'soft-law', 'hybrid regulatory instruments', and the OMC should not only be tolerated but also encouraged as a way to put an end to this undesirable situation. Comella goes even further when suggesting that the main reason for the OMC's existence is to adopt common decisions at EU level at the lowest possible political cost where collaboration has proven difficult due to 'the cumbersome process of hard-law making'.[27]

Finally, it is worth noting that the EU 'classic' and 'new' governance methods are not necessarily mutually exclusive. Their apparent rivalry can lead to the transformation of one or the other giving place to 'hybrid'[28] or complementary systems of governance.[29] For instance, those EU framework Directives that leave discretion to actors within clear limits, and encourage the adoption of a certain policy without imposing a binding obligation could be seen as an example of this trend[30] (e.g., the Directive on part-time work based on the European social partners' framework agreement on part-time

25 Medina Ortega, M. (Rapporteur), Draft Report on institutional and legal implications of the use of 'soft-law' instruments of 15.03.2007, Committee of Constitutional Affairs, PE 386.336v01-00.

26 Dimitrov, P., Draft Opinion of the Committee on Constitutional Affairs and the Committee of Legal Effects on the institutional and legal implications of the use of 'soft-law' instruments. PE386.644v02-00.

27 Comella, R. 'New Governance Fatigue? Administration and Democracy in the European Union', *Jean Monnet Working Paper* 06/06, New York School of Law .

28 Ashiagbor, D., *The New European Strategy: Labour Market Regulation and New Governance*, Oxford University Press, Oxford, 2005.

29 See: Trubek, D. M., and Trubek, L. G., 'The Coexistence of New Governance and Legal Regulation: Complementarity or Rivalry?', *NewGov, New Modes of Governance,*< *http://www.eu-newgov.org/*>.

30 See: Scott, J. and Trubek, D., 'Mind the Gap: Law and New Approaches to Governance in the European Union', *European Law Journal*, Vol. 8, 1, (2002), p. 1-18.

work.) The main aim of that framework agreement is to eliminate discrimination against part-time workers and to improve the quality of part-time work. In addition, the secondary purpose of the agreement is to facilitate the development of part-time work on a voluntary basis and to contribute to the flexible organisation of working time. Apart from the provisions protecting part-time workers against discrimination in relationship to their full-time counter-partners and against dismissal, most of the dispositions of this framework agreement were merely recommendations to the Member States and the social partners to stimulate the use of part-time work, and to facilitate the transition between full-time and part-time work or vice versa. The implementing experience in several Member States proved that these recommendations were taken into account when transposing the Directive to the national legal order.[31] The Dutch legislation on working time adjustment (Wet Aanpassing Arbeidsduur, WAA)[32] clearly follows the path of flexible use of working time promoted by the Directive on part-time work.[33]

2.2. The EU setting regarding gender equality

Prior to the explanation of how EC law has influenced the evolution of gender equality legislation and policy in the Netherlands, it is important to describe this field briefly, within the EU context. This description is not intended to be complete and, concerning EC secondary legislation, focuses on the evolution of the Directive on equal treatment between men and women in employment and occupation,[34] and on the content of Directive 97/81/EC on part-time work.

2.2.1. EC legislation on equal treatment in employment and occupation

The very first expression of EU sex equality law was the recognition by the Treaty of Rome of the principle of equal pay for men and women. This provision responded to pressure by the French government and followed a purely economical argument: Avoiding 'social dumping'. After 1957 and

31 See: Sciarra, S, Davies, P. and Freedland, M., (Eds.), *Employment Policy and the Regulation of Part-time Work in the European Union,* Cambridge University Press, 2004.

32 *Wet Aanpassing Arbeidsduur* of 19/02/2000, Stb. 114.

33 The WAA was already preceded by several CGB opinions holding that objections to transitions from a full-time to a part-time work and *vice versa* were deemed to be indirect discrimination on grounds of sex.

34 Currently, Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), OJ L 204 of 26.07.2006.

for nearly two decades, there was no progress concerning the enforcement of this principle in the Member States. This situation changed dramatically after the ECJ's ruling in the *Defrenne II*[35] case, where the direct effect of Article 119 of the European Economic Community Treaty (currently Article 141 of the EC Treaty, hereinafter ECT) was recognised. Afterwards, the status of gender equality substantially changed, once the dual economic and social aim of this provision was recognised, and equality between men and women was acknowledged as a fundamental human right of EC law was acknowledged as a fundamental human right of EC law.[36] More recently, the ECJ has acknowledged that social goals must prevail over economic goals within EC gender equality law.[37]

Nowadays, the principle of equality between men and women is enshrined in several provisions of the ECT, namely: Article 2 that sets out equality between men and women as a community task; Article 3.2 that establishes the principle of gender mainstreaming (which implies that the gender perspective should systematically be taken into account in all EC policies and actions); and Article 141 that contains the legal basis for legislation on equal pay and equal treatment in employment and occupation for men and women. Moreover, vast EC secondary legislation has been enacted in the field of gender equality. Most of the existing legal texts have finally been codified in the new 'recast' Directive 2006/54/EC[38] that repeals, among others, the previous Directive 76/207/EEC on equal treatment between men and women in employment and occupation.[39] This 'recast' Directive is to be implemented in the Member States by 15 August 2008.

The principle of equal treatment for men and women in employment and occupation enjoys a privileged status within the EU fundamental rights and principles of law. On the one hand, the principle of equal treatment between men and women has a very broad personal and material scope. In particular, it can be invoked against public authorities and private parties[40] regarding access to employment,[41] working conditions,[42] every social and tax advantage (whether or not linked to a con-

35 Case 43/75, Defrenne II, *op. cit.,* note 7*, supra.*

36 Case 149/77, *Defrenne III*, [1978] ECR I-1365.

37 C-50/96, *Schröder,* [2000] ECR I-743.

38 Directive 2006/54/EC, op. cit., note 35, supra.

39 Directive 76/207/EEC OJ L 039, 14/02/1976, (amended by Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002, OJ L 269 of 5.10.2002 and finally, repealed by Directive 2006/54/EC, op. cit., note 35, supra.)

40 C-476/99, *Lommers,* [2002] ECR I-2891 and C-285/98, *Kreil,* [2000] ECR I-69.

41 C-100/95, *Kording,* [1997] ECR I-5289.

42 *Inter alia,* C-342/01, *Merino Gómez,* [2004] ECR I-2605.

tract of employment), termination of an employment relationship,[43] and professional training. Furthermore, this principle must also be respected within collective agreements.[44] On the other hand, the exceptions to the ban on discrimination on grounds of sex in employment and occupation have been strictly interpreted in consistency with the character of fundamental human right accorded to the equal treatment principle.[45]

2.2.2. EC legislation on part-time work

EC Law also provides protection for atypical or casual workers against discrimination in relationship to employees who have a full-time or permanent contract. The main legal instruments protecting atypical workers (part-time workers and workers under a fixed-term contract)[46] were first adopted by the social partners at EU level as EU framework agreements and later became Council directives. These Directives address the problem of the impact of the different forms of work on labour market segregation. It is undeniable that this problem has a gender dimension. There is an obvious relationship between atypical or causal work, parental leave forms, and gender discrimination. On the one hand, flexible employment possibilities, that seek to reconcile work and family life, are a potential solution for unemployment and could contribute to the improvement of economic and social cohesion and to enhance equal opportunities for men and women. On the other hand, flexible working may give rise to new forms of inequality.

The attempt of Council Directive 97/81/EC to fight gender discrimination by prohibiting discrimination of part-time workers has only been partially successful. The provisions establishing the prohibition of discrimination in Council Directive 97/81/EC on part-time work are not very strong; this is possibly due to its general character.[47] The main problem is that the obligation to treat part-time workers on an equal basis to full-time workers is very restricted, and that some categories of part-time workers are excluded from protection against discriminatory treatment (e.g., temporary agency workers). Furthermore, essential matters such as social security and the social protection of part-time workers are left to the Member States to regulate as they choose. Finally, the protection

43 Case 151/84, *Roberts,* [1986] ECR I-706 and Case 262/84, *Beets-Proper,* [1986] ECR I-773.

44 C-15/96, *Schöning,* [1998] ECR I-47.

45 Case 318/86, *Commission/France,* [1988] ECR I-3559 and C-222/84, *Johnston,* [1986] ECR I-1651.

46 Directive 97/81/EC, *op. cit.,* note 3, *supra* and Directive 1999/70/EC 1999, L 175, 10 July 1999, respectively.

47 Jeffery, M., 'Not Really Going to Work? The Directive on Part-time Work, 'Atypical Work' and Attempts to Regulate it', *Industrial Law Journal,* Vol. 27/3, (1998), p. 193-213.

offered by community law to part-time workers is also limited, because the cornerstone of Directive 97/81/EC is the principle of *'pro rata temporis',* which applies to all the rights and benefits granted to them. Regarding proportionality as a form of equality, the ECJ has concluded that the applicability of this principle conforms with the principle of equality for men and women.[48] In relationship to this issue, it has been pointed out that a strict applicability of the proportionality rule often has a detrimental effect on a part-time workers' position, i.e., the inability to reach the necessary thresholds to gain access to certain benefits or pensions.[49] From this point of view, part-time work, as long as it remains a predominantly female choice and is subjected to strict proportionality rules, will continue to be a precarious undertaking.[50] In this sense, other Directives in the field of equal treatment for men and women might, in certain circumstances, provide more effective protection for part-time workers than the Directive on part-time work, especially in relationship to social security, as this last field is excluded from the scope of that Directive.[51]

48 Joined cases C-4/02 and C-5/02, *Schönheit and Becker,* [2003] ECR I-12575.

49 García-Perrote Escartín, J. I., 'La protección social de los trabajadores a tiempo parcial', en Los contratos de trabajo a tiempo parcial, Lex Nova, Valladolid, 2000, p. 220-239 and Valdés Dal-Ré, F., (2002). 'El trabajo a tiempo parcial: la (im)posible connivencia entre flexibilidad y seguridad', Relaciones Laborales, 18, (2002), p. 1-8.

50 Gónzalez Pérez and Rodríguez-Piñero Royo, M. 'La voluntariedad en el trabajo a tiempo parcial', *Relaciones Laborales,* II, (1998), p. 1160.

51 See for instance: C-77/02, *Steinicke*, [2003] ECR I- 9027.

3. Gender equality in the Netherlands

3.1. Domestic setting

As a preamble to the analysis of how Dutch actors have influenced the EU social agenda in the field of gender equality and have implemented the legislation and policy guidelines coming from the EU, there follows a brief description of the structure of the Dutch legal and political framework. Attention is paid to the structure of Dutch politics, the processes of Dutch politics, and the legislative measures and policies related to gender equality.

As in other European countries, the Dutch population is ageing, leading to greater demands on the welfare system. The challenges relating to social protection and welfare systems bring up the question of which more effective ways can be found to increase female labour participation. Additionally, the women's emancipation movement has a long-standing tradition in the Netherlands. Nowadays, the Ministry of Education and culture is in charge of developing the policy on women's emancipation. As to the field of participation of women in the political arena: as long ago as 1918 the first woman was elected as a member of the First Chamber of the Dutch Parliament. However, universal suffrage was not introduced until 1922. In the Netherlands, women are treated socially as equals to men. Nevertheless, there are several challenges still to be met concerning the dimension of real or substantive equality between men and women in the division of household chores and the assumption of care tasks.[52] The case of the Netherlands concerning the debate around the so-called 'part-time paradox'[53] is especially interesting since there are high numbers of women that have chosen to work part-time, especially after having had children.

In general terms, the Netherlands can be defined as a parliamentary representative democracy and a constitutional monarchy. The legislative process in the Netherlands is based on a bicameral system with a Second Chamber (House of Representatives) that discusses and adopts the bills and a First

52 The principle of substantive equality has been acknowledged by the ECJ on several occasions. For instance, in its ruling C-136/95, *Thibault*, [1998], ECR I-2011, the ECJ recognised that the result pursued by Directive 76/207/EEC on equal treatment for men and women is substantive, not formal, equality. See also Prechal, S., 'Equality of Treatment, Non-discrimination and Social Policy: Achievements in Three Themes', *Common Market Law Review,* 41, (2004), p. 537;

53 Fuchs Epstein, C., Seron, C., Oglensky, B, and Sauté, R., *The Part-time Paradox: Time Norms, Professional Life, Family and Gender,* Routledge, 1998. The expression 'part-time paradox' refers to the difficulties that women face in building a career and a family at the same time, and the choice of part-time work as a solution.

Chamber (Senate) that assesses bills by reference to its own criteria after they have passed through the Second Chamber. When describing the legislative process in the Netherlands, it is important to mention the existence of some bi- and tripartite advisory boards. In fact, trade unions and employers are represented in the Social-Economic Council (*Sociaal Economische Raad*, SER),[54] the Labour Foundation *(Stichting van de Arbeid* - STAR), and the Council for Work and Income (RWI). Finally, the role of the specialised equality body, the Equal Treatment Commission (CGB), as advisory body in all initiatives for new legislation related to equal treatment between men and women, is crucial for this study.

When dealing with EU related matters, the Second Chamber does not usually adopt resolutions on EU proposals, nor does it give mandates to the government to take a certain position in the Council of the European Union. Instead, there is a consultation and reporting procedure, according to which ministers incorporate Parliament's views by discussing their position with MPs before every Council meeting. The government outlines its position on important EU proposals in explanatory memorandums (so-called BNC fiches) that are sent to the Standing Committee on European Affairs of the Parliament.[55] These include an assessment of the proposal's financial effects and other implications for the Dutch interests and regulations. In principle, the role of the Committee on European Affairs is limited mainly to 'horizontal' EU issues, such as the adoption of new treaties or the Lisbon process, and each specific committee (in the case at issue, the Committee of Social Affairs and Employment) deals with the EU proposals in its own area.

In the Netherlands, since 1983, the principle of equality and non-discrimination has been set out in the Constitution (*Grondwet*).[56] Article 1 of the Constitution contains a general equality and anti-discrimination clause that can be translated as follows: 'All who are in the Netherlands shall be treated equal in equal circumstances. Discrimination on the grounds of religion, belief, political opinion, race, sex or any other ground shall be prohibited.' This is an open clause that includes a list of prohibited grounds for discrimination, including sex, which are not '*numerus clausus*'. In relationship to the Dutch constitutional system it is also worth mentioning that it adheres to a 'monist theory' of international law. Therefore, according to Articles 93 and 94 of the Dutch Constitution, the international conven-

54 The SER is a tripartite advisory body, whose main task is to advise the government and the Parliament on socio-economic matters.

55 In 1986 the House of Representatives established a committee on European Affairs, which is now known as the Standing Committee on European Affairs. The committee's task is to play an 'initiating, signalling and coordinating' role for the purpose of parliamentary control of decision making in the European institutions, and particularly within the Council.

56 *Grondwet voor het koninkrijk der Nederlanden* of 24.08.1815, Stb. 45. Last reform: *Wet van* 9.04.2002, Stb. 200.

tions and treaties signed by the Netherlands that contain equality guarantees automatically percolate into the domestic legal system.

The European Directives related to gender equality have always been transposed in the Netherlands by means of legislation. In the context of this case study, it is important to note that the amendment of gender equality legislation in the Netherlands has often been driven by the progress in the EU legal framework on equal treatment and equal opportunities for men and women.[57] The first statutory law prohibiting discrimination on grounds of sex dates back to the 1970s and was a reaction to EC law.[58] The principle of equal treatment between men and women in access to employment and in the terms and conditions of the employment relationship is currently set out in the Dutch Civil Code (Sections 7:646 and 7:647 *Burgerlijk Wetboek,* BW[59]). These provisions only refer to private employment. The right to equal treatment for men and women is also regulated in the Equal Treatment for Men and Women Act (*Wet Gelijke Behandeling van Mannen en Vrouwen*, WGB) that has been amended several times (particularly, in 1989, 1994, 1998, and 2006).[60] The WGB establishes the right to equality for men and women both in private and public employment, as well as in vocational training, access to liberal professions, pensions, and membership of employer's organisations and trade unions. This Act has been amended several times and the main aim of these amendments has been to comply with the EC directives in the field.[61] In addition, the General Equal Treatment Act (*Algemene Wet Gelijke Behandeling,* AWGB)[62] also covers sex. This general law does not affect the protection against sex discrimination offered by the WGB. In general terms it can be said that sex discrimination in employment and occupation is governed by the WGB and the provisions of the

57 See: Prechal, S., Directives in European Community law, a Study on Directives and their Enforcement by National Courts, Oxford University Press, Oxford, 1995.

58 A comment on the first legal instruments in the field of equality can be found in: Asscher-Vonk, I. P., «Discrimination in Employment in the Netherlands», Bulletin of Comparative Labour Relations, 173, (1985).

59 Burgerlijk Wetboek, Wet van 11.12.1958, Stb. 590, reformed by: Wetten van 14.10.1993, Stb. 555; 2.06.1994, Stb. 405 (…) and 6.07.2004, Stb. 334.

60 The Wet gelijke behandeling van mannen en vrouwen van 1.03.1980, Stb. 86 has been reformed by Stb. 1989, 168; Wet van 2.03.1994, Stb. 230; Wet van 6.04.1994, Stb. 269; Wet van 13.04.1995, Stb. 231; Wet van 14.11.1996, Stb. 562; Wet van 6.11.1997, Stb. 510; 12.03.1998, Stb. 187; 1.04.1998, Stb. 190 (Tekstplaatsing) (Verbeterblad), Wet van 24.12.1998, Stb. 742; Wet van 14.09.2000, Stb. 391; 13.12.2000, Stb. 635 and Wet van 5.10.2006, Stb. 469.

61 On the transposition to the Dutch legal order of the EU directives on equal treatment between men and women see: Van der Heijden, P. F., et alter, «Labour Law and Social Policy within the EU: the Dutch Dimension», Tijdschrift voor Europees en economisch recht, Vol. 5, Mei, (1994), p. 321.

62 Algemene Wet Gelijke Behandeling van 2.03.1994, Stb. 230, houdende algemene regels ter bescherming tegen discriminatie op grond van godsdienst, levensovertuiging, politieke gezindheid, ras, geslacht, nationaliteit, hetero of homoseksuele gerichtheid of burgerlijke staat. Reformed by Acts of 6.04.1994, Stb. 269; 12.04.1995, Stb. 227; 13.04.1995, Stb. 231; 14.11.1996 Stb. 562; 17.12.1997, Stb. 660; 28.01.1999, Stb. 30; 21.12.2000, Stb. 625; 6.12.2001, Stb. 584; and 21.02.2004, Stb. 119.

Civil Code (BW) that deal with sex discrimination, whereas the AWGB protects citizens against sex discrimination in employment but also in other areas of social life (i.e., access to goods and services, running a business, housing, etcetera).

In the Netherlands, the Act on working time adjustments (WAA)[63] is, along with the Act prohibiting discrimination of part-time workers,[64] the national regulation implementing the EC Directive on part-time work. Taking into account that the Dutch economy has been considered a part-time economy[65] and that part-time work is mainly female work, an analysis of the impact of the Directive on part-time work in the Netherlands can prove to be very illuminating.

3.2. The shaping of EC gender equality law and policy

Here, we will attempt to highlight what influence, if any, Dutch actors have had in shaping and reforming the EU legislation on gender equality, in particular the Directive on equal treatment between men and women in employment and occupation. Moreover, the same assessment will be made regarding the adoption of the European social partners' Framework Agreement on part-time work. In short, the questions posed are the following: Did the Dutch try to push the introduction of a determine provision in these legal instruments and why? Is there any influence from the Dutch side on the compulsory introduction of equal treatment bodies in all the Member States? Is the flexible approach to part-time work of Directive 97/81/EC influenced by the Dutch context?

3.2.1. The Netherlands and the shaping of EC legislation on equal treatment for men and women

At the first stage of this study the 'uploading' or 'shaping' impact of the Dutch actors in the process of drafting and negotiating a specific directive is assessed. This analysis is important in order to discern whether implementation problems might be related to the decision-making process at the EU level. In this context, it is also relevant to take into account the pre-existing accommodation to EU standards.

63 *Wet aanpassing arbeidsduur* (WAA) of 19.02.2000, Stb. 2000, 114.

64 *Wet verbod op onderscheid naar arbeidsduur* (WOA) of 03.07.1996, Stb. 391.

65 Freeman, R.B., 'War of the models: which labour market institutions for the 21st century?' *Labor Economics*, Vol. 5, (1998), p. 1-24.

In the 'shaping' dimension of this study it is explored whether there was a case of uploading in the introduction of an obligation to create a body or bodies for the promotion, analysis, monitoring and support of equal treatment between men and women in Directive 2002/73/EC.[66] The hypotheses was that those countries where a body with these characteristics already existed, among them the Netherlands, might have encouraged the general introduction of equality bodies in all the Member States. According to the interview with a member of the permanent representation of the Netherlands to the EU, the Dutch position was favourable to the introduction of such equality bodies in all Member States as long as it would not affect the functioning and competences of the existing Dutch Equal Treatment Commission. However, there is no evidence that the idea of introducing an obligation to create an equality body came from the Dutch representatives. In fact, during the interview with an official from the European Parliament it was disclosed that the idea of including such an obligation in the Directive 2002/73/EC was mainly supported by the Nordic countries and by the Committee on Women Rights and Equal Opportunities of the European Parliament.

In contrast with the purely supportive role that Dutch representatives played in the introduction of an obligation to create an equality body in all the Member States, the interviews confirmed that the Dutch authorities played a major role in fostering the adoption of a 'recast' Directive in the field of gender equality in employment. In fact, during the Dutch Presidency of the EU in 2004, a conference was held in The Hague to discuss the state of affairs relating to equal treatment legislation, the formulas for improving the general awareness and efficiency of the EU legislation, and the future of equal treatment in the Member States.[67] The Commission proposal of 21 April 2004 on adopting a new 'recast' directive on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation[68] was under discussion during that conference. According to the conclusions of the General *'Rapporteur'* of the conference a new, more coherent legal framework was needed in order to efficiently tackle discrimination on grounds of sex and to enhance the general awareness about the EU equality legislation among citizens within the EU. In order to enhance the clarity and efficiency of the existing EU legislation on equal treat-

66 Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002, amending the Directive on equal treatment for men and women in employment and occupation, OJ L 269 of 5.10.2002.

67 Conference organized by the Ministry of Social Affairs and Employment, *Gelijkheid in een toekomsting Europa,* Scheveningen, 2004.

68 COM/2004/029 final.

ment between men and women one suggestion was to involve NGOs and interest groups more actively in the implementation process. Other participants in the conference supported an extension of the legal protection provided by EU law to cover multiple discrimination cases.[69] However, government representatives, in particular the Dutch ones, were opposed to this proposal and suggested focusing on the full and effective implementation of the existing directives. During the conference, the Dutch Vice-Premier and Minister of Internal Affairs and Kingdom Relations supported the strategy of stimulating information and awareness activities as well as stakeholders' involvement in order to combat discrimination based on sex. In the same line of reasoning, both the European Commissioner for Employment, Social Affairs and Equal Opportunities, Vladimir Spidla, and the European Parliament's representatives stressed the need to focus on ensuring a proper transposition and implementation of the existing legislation and to promote a new approach to equality based on mainstreaming. This approach was eventually reflected in the new 'recast' Directive on equal treatment and opportunities between men and women in employment and occupation,[70] and in further EU initiatives.[71] Therefore, the process officially launched during the 2004 conference in The Hague led to the approval in 2006 of the new 'recast' Directive. The objective of this 'recast' Directive is to simplify, modernise and improve Community legislation in the area of equal treatment for men and women in employment and occupation by bringing together in a single text most of the relevant provisions from the directives relating to this subject in order to make them clearer and improve their effective application.

3.2.2. The Netherlands and the shaping of the Directive on part-time work

Here attention is paid to whether there was some influence by Dutch actors on the adoption of the Framework Agreement on part-time work (later transformed into Directive 97/81/EC), in a response to the so-called 'Dutch miracle'. In addition, it is discussed whether the appearance of non-discrimination of part-time workers on the European agenda has provoked domestic actors to

69 The need for EU legislation to address 'multiple discrimination' cases was also pointed out in an Expert conference on the progress of gender equality law organised by the University of Leiden and E-Quality in November 2004. See also Schiek, D., 'Broadening the Norms and the Scope of Sex-Discrimination Law', *Maastricht Journal of European and Comparative Law*, Vol. 12, N. 4 (2005).

70 Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006, *op. cit.,* note 35*, supra.*

71 See the conclusions of the Equality Summit of the 2007 European Year of Equal Opportunities for all, Berlin 30-31 January 2007.

'seize the opportunity'[72] to bring about change at national level and to introduce a right to shift from full-time to part-time work and *vice versa* in the Act on Working Time Adjustments (WAA).[73]

From the interviews, it can be concluded that the provisions on non-discrimination of part-time workers included in the Directive 97/81/EC were to a large extent inspired by the Dutch anti-discrimination legislation protecting part-time workers.[74] Moreover, the flexible approach to part-time work in the provisions of this Directive recommending the Member States to facilitate the transitions from full-time to part-time work or *vice versa* were in line with the approach of Dutch policy-makers towards this form of work at the time.

In the opinion of the representative of the ETUC who was interviewed, the flexible and pro-active approach to part-time work adopted on the Framework Agreement on part-time work was clearly influenced by the successful Dutch experience with the use of this type of work as a way to improve the work-life balance of employees and to fight high rates of unemployment. The text of this Framework Agreement shows the positive approach of the European social partners towards part-time work as a modality of work that is not necessarily 'precarious' and that can lead to 'win-win' situations for both management and labour. The provisions of this Framework Agreement include a trade-off between labour protection in the form of an anti-discrimination clause for part-time workers and more flexibility in the use of working time.

Finally, it is worth mentioning that the implementation process of the Directive on part-time work in the Netherlands culminated in the adoption of the WAA, introducing a right for employees to request a shortening or lengthening of their regular working hours. The Dutch policy-makers favoured the flexible use of working time set up in the Directive on part-time work and this is evidenced by the promptness by which the recommendations included in that Directive were assimilated into domestic law. The implementation process of Directive 97/81/EC in the Netherlands is explained in more detail in section 3.3.2.

72 Visser, J., Wilthagen, T., Belzer, R., and Van Der Putte, E., 'The Netherlands: from atypicality to typicality', in Sciarra, S., Davies, P. and Freedland, M., (Eds.), Employment policy and the regulation of part-time work in the European Union, Cambridge University Press, 2004, p. 193.

73 *Wet aanpassing arbeidsduur, op. cit.,* note 64, *supra.*

74 A general prohibition of the discrimination of part-time workers compared to full-time workers was introduced in the Netherlands by the *Wet verbod op onderscheid naar arbeidsduur van* 3.07.1996, Stb. 1996.

3.3. The implementation (taking) of EC gender equality law

Here, the issue whether or not the Dutch regulatory framework has a certain degree of policy or institutional misfit in relationship to the EU regulation in the field of gender equality is under consideration. Most of the EU legal instruments in the field of gender equality are Directives that are not directly applicable but have to be implemented in national law. Examining the timing and correctness of their transposition to the internal legal order is, therefore, extremely interesting for this research.

There is some literature on the domestic impact of EU policies that proposes a list of explanatory factors that determine the promptness and correctness of implementation. These explanations can be divided into two main trends; the literature that sets the focus on the degree of misfit created by EU policies,[75] and that which highlights the existence of veto players.[76]

The fit-misfit approach concentrates on the degree of match or mismatch between European rules and existing national institutional and regulatory structures as the key factor for determining the implementation performance of a given Member State. However, empirical evidence suggests that the fact that a EU rule or policy does not match existing traditions is not always a serious obstacle to compliance with EU law, smoothly and in due time.[77] In a similar way, empirical analysis demonstrates that the veto player approach, based on the argument that the capacity of a country for introducing a reform is directly related to the number of distinct actors whose agreement is required to pass such a reform, has a limited explanatory power.[78]

The various weak points of the fit-misfit and veto players theories have been recently exposed by a third viewpoint that assesses the degree of compliance of EU Member States with a particular EU legal measure, taking into account a predefined range of country clusters delimited by the different typical modes of appraising and processing EU adaptation requirements.[79] This new ‘worlds of compliance’ theory attempts to overcome the limitations of the two other main explanations of the

75 Knill, C. and Lenschow, A., ‘Adjusting to the EU Environmental Policy: Change and Persistence of Domestic Administrators’, in Cowles, M. G., Caporaso, J., and Risse, T., (Eds.), *Transforming Europe: Europeanization and Domestic Change,* Cornell University Press, Ithaca, 2001, p. 116-136.

76 Harveland, M., ‘National Adaptation to European Integration: The Importance of European Institutional Veto Points’, *Journal of Public Policy,* 20, 1, (2000), p. 83-103.

77 Falker, G., Hartlapp, M., and Treib, O., ‘Worlds of Compliance: Why Leading Approaches to EU Implementation Are ‘Sometimes-True’ Theories’, *European Journal of Political Research,* Vol. 46, 22, May (2007), p. 395-416.

78 *Ibid.*

79 Falker, G., Treib, O, Hartlapp, M., and. Leiber, S., *Complying with Europe: EU Harmonization and Soft-law in the Member States,* Cambridge University Press, Cambridge, 2005.

Member States' performance on the compliance with EU legal standards, by focusing on the many idiosyncratic influences that can give rise to delays in the transposition of EU law. According to this last theory, the three distinct worlds of compliance are the following: a 'world of law observance', where the compliance goal overrides domestic concerns; a 'world of domestic politics', in those cases where obeying EU rules is only one of many goals and therefore a clash between EU requirements and domestic interests is likely to lead to poor compliance or resistance; and finally, the 'world of transposition neglect', where compliance with EU law is not a goal in itself and the transpositions of the obligations are neglected due to 'national arrogance' or administrative inefficiency until there is an exogenous pressure that triggers compliance (such as an infringement procedure initiated by the European Commission).

At the national level, the main actors who oversee the compliance of national law with EU obligations are the labour inspectorate and the national Courts. In the case of the Netherlands an additional actor plays a key role in the implementation of EU legislation in the field of gender equality; the Equal Treatment Commission. At the EU level, the European Commission is responsible for monitoring the implementation and compliance of EU law in its institutional role as 'guardian of treaties'. In relationship to this issue, it is worth noting that the Netherlands has never faced infringement proceedings for failing to fulfil its obligations under the treaty in the field of gender equality. However, the European Commission has delivered a reasoned opinion to the Dutch authorities requesting them to amend the legal definitions of direct and indirect discrimination in the existing legislation against discrimination on grounds of disability and age.[80] The main significance of this opinion for the case at issue is that the criticisms made by the Commission on the disparate EU and national definitions of direct and indirect discrimination are also applicable to the domain of gender equality law (as discussed in section 3.3.1).

In general terms, and despite the fact that the processes of implementation of the examined Directives in the Netherlands have often exceeded the transposition deadlines, following the 'worlds of compliance' theory, the Netherlands can be classified under the 'world of law observance'. The main arguments that sustain this conclusion are that the delays to the transposition of the Direc-

80 See: Commissie van de Europese Gemeenschappen, 2006/2444 C(2008) 0115, Brussels 31/01/2008.

tives have not been excessively long[81] and that an examination of the national provisions, despite some terminologixal clashes, evidences a reasonably accurate transposition of the EC legislation,[82] as explained below.

3.3.1. The implementation of the EC legislation on equality for men and women in the Netherlands

In the Netherlands several legislative instruments prohibiting discrimination on grounds of sex have been passed, in order to implement the EC legislation in this field. Along with the above-mentioned rules in the Constitution and the Civil Code establishing the right to equality and prohibiting discrimination between men and women as regards working conditions, several specific acts have been adopted in the field of gender equality. In particular, national measures have been passed in order to transpose the different versions of the Directive on equal treatment for men and women in employment and occupation into the Dutch legal order.

This research has focused on the study of the Equal Treatment for Men and Women Act (WGB)[83] because the enactment and successive amendments of this Act exemplify the downloading effect or 'taking' from the supranational to the national level.[84] The most recent example of the EU's influence within the domestic setting is the adoption of an Act on 5 October 2006, amending the WGB and the Civil Code (BW), in order to implement Directive 2002/73/EC in the Netherlands.[85] This Act introduces new definitions of direct and indirect discrimination on grounds of sex and a new definition of sexual harassment at the workplace. Thanks to this new Act both sexual harassment

81 For example, the final date for implementing Directive 2002/73/EC in the Member States was 05.10.2005, and the necessary amendments concerning this Directive were introduced in the Netherlands precisely one year later, under the Act of 5 October 2006 amending the Act on Equal Treatment for Men and Women and the Civil Code.

82 For a detailed explanation of the implementation in the Netherlands of the EC Directives in the field of gender equality see: Ramos Martín, N. E., 'Regulación de la igualdad y no-discriminación en el trabajo en los Países Bajos. Estudio de Derecho comparado desde el Derecho comunitario', *Revista del Ministerio de Trabajo y Asuntos Sociales,* 62, (2006), p. 185-210.

83 Wet gelijke behandeling van mannen en vrouwen van 1.03.1980, op. cit., note 61 , supra.

84 The impact of EC law in the legislation on gender equality in the Netherlands is highlighted by Pennings, F. J. L., in Nederlands arbeidsrecht in een internationale context, Kluwer, Deventer, 2007, p. 20-21.

85 Wet van 5.10.2006 tot wijziging van de Wet gelijke behandeling van mannen en vrouwen en het Burgerlijk Wetboek ter uitvoering van Richtlijn 2002/73/EG, Stb. 469, 2006.

and harassment based on sex are prohibited in the new version of the WGB in a similar way as in the current EC legislation.

In general terms, it can be said that the Dutch legislation on gender equality has been derived from the EC legal framework in the field. Thus, conforming with EC law, the personal scope of the principle of equal treatment for men and women comprises not only the cases of employees, civil servants (Article 1.a WGB)[86] and armed forces officials, but also individuals performing a job under a service contract and liberal professionals (Article 1.b WGB). With regard to access to employment, the reform of the WGB in 1989[87] made clear that the equality rule applies to both the announcement of job opportunities and to the selection process (Article 3), as well as promotion.[88] Concerning the announcement, the employment offer must make clear that applicants from both sexes should be considered for the job. Thus, distinctions based on sex are not permitted, except in the case of a genuine occupational requirement.[89] Hence, genuine occupational requirements can justify exceptions to the applicability of the sex equality rule, (professions such as model, singer or dancer) but they must be used restrictively (Article 7:646 (2) BW). Finally, positive discrimination measures for women can be adopted on the basis of Article 5 (1) WGB and Article 7:646 (4) BW but they have to comply with strict requirements, such as the existence of an objective assessment that takes account of all criteria specific to the candidates when a priority rule on access to employment or promotion in favour of women is to be considered legitimate.[90] Thus, the Dutch Equal Treatment Commission, in accordance with the ECJ, has adopted a strict test of proportionality in cases concerning positive action in promotion or access to employment.[91] Moreover, the influence of EC law has led to the derogation in the Netherlands of several obsolete legislative instruments, e.g., the prohibition

86 Article 125 g Ambtenarenwet van 12.12.1929, Stb. 530.

87 Stb. 1989, 168.

88 Van der Weele, J.J., Wet Gelijke Behandeling van Mannen en Vrouwen, Kluwer, Deventer, 1983 and Asscher-Vonk, I. P., 'Toegang tot de dienstbetrekking via gelijke behandeling', Schetsen voor Bakels, Kluwer, Deventer, 1987.

89 See: ruling 2003-156 of the Commissie Gelijke Behandeling.

90 See: C- 450/93, *Kalanke,* [1995] ECR I-3051 and C-409/95, *Marschall,* [1997] ECR I-6363. A Dutch case referred to the ECJ for preliminary ruling dealing with the admissibility of positive action policies in favour of female workers is C-476/99, *Lommers,* [2002] ECR I-2891. Here, the ECJ concludes that the principle of equal treatment for men and women as regards access to employment, vocational training and promotion and working conditions does not preclude an employer to reserve a limited number of subsidised nursery places for female workers alone whilst male workers may have access to them only in cases of emergency, at the employer's discretion. That is so, however, only in so far as the said exception in favour of male workers is construed as allowing male employees who take care of their children by themselves to have access to those nursery places under the same conditions as female workers.

91 See for instance: Opinions 2004-173; 1999-31; 2003-01; 2004-10; and 2004-36.

of night-time work for women.[92] Likewise, the exceptions to the ban on discrimination on grounds of sex in employment and occupation have been interpreted in strict consistency with the fact that equality for men and women is a fundamental principle of EC law. In this sense, protective legislation for women is restricted to pregnancy and maternity and this exception cannot be invoked to pass legislation that perpetuates a stereotyped vision of women at work. There are several legal instruments dealing with this sort of protection, e.g., the provisions of the Working-time Act (*Arbeidstijdenwet*)[93] prohibiting pregnant women from working night shifts and restricting overtime work during pregnancy. Besides, women have to take maternity leave at least four weeks before the estimated date of delivery and six weeks after it (Articles 4.5 and 4.6 of the Working-time Act). Moreover, the Work and Care Act of 2001 (*Wet Arbeid en Zorg*, WAZ)[94] sets up minimum rules on protection concerning maternity and parental leave. According to Article 3 WAZ female workers enjoy a right to 16 weeks of paid maternity leave.

On only a few occasions has the Dutch legislator preceded the EU lawmaker in adopting measures aimed at promoting equality for men and women. For instance, the WGB set up rules on equal treatment for men and women concerning remuneration,[95] pensions systems and working conditions, and also regulated the shift in the burden of the proof in sex discrimination cases previously to the 'recast' Directive, including each of these rules in a single text in 2006.[96]

When comparing the EU and the national setting regarding gender equality legislation, it is important to highlight that the WGB currently sets out a right to equal pay for men and women for the same or 'similar' work (Article 9 WGB). The Act on Equal Pay for Women and Men (*Wet Gelijk Loon voor Vrouwen en Mannen*) which has already been repealed made exclusive reference to equal work. The inclusion of the term "similar" was introduced in order to enhance the practical applicability of the legislation and as a result of the influence of EC law (Directive on equal pay for men and women).[97] However, the expression used in the Dutch law differs from the one traditionally used by the Direc-

92 In relationship to this prohibition the Netherlands had to denounce Convention N. 89 of the ILO. See Boonstra, K., *The ILO and the Netherlands,* Klara Boonstra, 1996, Amsterdam, p. 185.

93 *Wet van* 23.11.1995, Stb. 598 reformed by *Wet van* 30.11.2006, Stb. 632.

94 *Wet* van 16.11.2001, Stb. 567, modified by *Wet van* 9.10.2003, Stb. 376.

95 Since 1989, the right to equal pay between men and women is regulated in the General Equal Treatment for Men and Women Act and in the Civil Code.

96 See: Van den Brink, M. and Jacobs, M., 'The Wonderful Way They are Dealing with Women in the Netherlands', *NJCM-Bulletin, (*1994), p. 742-750.

97 Directive 75/117/EEC, 10.02.19975, OJ L 045, 19.02.1975, (repealed by Directive 2006/54/EC).

tive on equal pay and, nowadays, by the 'recast' Directive: "equal pay for work of equal value". From the employee's point of view, the Dutch legislation can be considered more protective than the EU provisions dealing with equal pay, in the sense that it equalises work of very similar value instead of "work of equal value". Furthermore, in the Netherlands, to be able to establish the similarity of two jobs, the value of the work performed must be measured through a clear job classification system.[98] Article 8 WGB, in compliance with EC law,[99] refers to the obligation for this kind of job classification system to be reliable. This means that the system must be objective and should not contain any discriminatory elements and must have been set up according to the parameters of the *bona fide*.[100]

In order to test the consistency of the Dutch legal framework with the EC legislation in the field of gender equality it is necessary to assess how several key concepts deriving from EC law, e.g., direct discrimination, indirect discrimination, harassment, and objective justification have been incorporated into the domestic legislation. The overall analysis of the implementing measures shows that the development of the national legal framework has been clearly influenced by EC law. However several differences in the conceptual field are worth noting. For example, in Dutch law the notion of 'discrimination' ('*discriminatie*' in the Dutch context bears a highly pejorative connotation) is reserved for the areas of constitutional and criminal law whereas statutory equality law is premised upon the neutral concept of 'distinction' ('onderscheid').[101] In principle, the prohibition of 'distinction' under Dutch law seems to be equivalent to the prohibition of 'discrimination' under EC law. However, there are conflicting opinions among the Dutch institutions on this point. On the one side, the Equal Treatment Commission maintains that when transposing the EU anti-discrimination legislation to the Dutch context, the use of the term 'discrimination' would wrongly imply that an alleged perpetrator of discrimination must have the intention to discriminate and to cause disadvantage. However, a proof of intent to discriminate in order to establish a sex discrimination case is only required in the

98 For an explanation on the operation of these systems see: Schippers, J.J., 'Job Evaluation Systems and Comparable Worth: Opportunities and Limitations', in Hessel, B., Schippeers, J.J. y Siegers, J.J., (Eds), *Labour Market Inequality between Men and Women. Current Issues in Law and Economics,* Amsterdam, 1996.

99 See Cases 237/85, *Rummler*, [1986] ECR I-2101 and C-127/92, *Enderby,* [1993], ECR I-5535.

100 Some scholars have pointed out the difficulties arising in assessing the degree of accuracy of these systems. See Boelens, L. and Veldman, A., *Gelijke arbeid, gelijk gewaardeerd. Juridische middelen ter bestrijding van beloningsverschillen tussen vrouwenwerk en mannenwerk in Nederland, de EG en Canada,* (Onderzoek opdracht van de Commissie gelijke behandeling van mannen en vrouwen bij de arbeid), Utrecht, 1993.

101 Gijzen, M.H.S., *Selected Issues in Equal Treatment Law: a Multi-Layered Comparison of European, English and Dutch Law,* Intersentia Antwerpen-Oxford, 2006, p. 39. For a detailed description of the distinction of the notions of 'onderscheid en discriminatie' see: Asscher-Vonk, I.P. and Hendriks, A. C., *Gelijke Behandeling en Onderscheid bij de arbeid,* Kluwer, Deventer, 2005, 2nd ed., p. 53-57.

context of criminal law.[102] On the other side, the Council of State (*Raad van State*) has, on several occasions, advised the government to abandon the neutral concept of 'distinction' and adopt the more normative notion of 'discrimination' into domestic legislation.[103]

Furthermore, the definitions of direct and indirect discrimination in the WGB do not entirely fit with the definitions provided in the latest versions of the Directive on equal opportunities and equal treatment for men and women in employment and occupation. The Directive 2002/73/EC and the 'recast' Directive 2006/54/EC (Article 2) prohibit direct and indirect discrimination on grounds of sex according to the following definitions: (a) 'direct discrimination': where one person is treated less favourably on grounds of sex than another is, has been or would be treated in a comparable situation; (b) 'indirect discrimination': where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary. In contrast, Article 1 WGB and Article 7:646(5) BW, while also prohibiting direct and indirect 'distinction' on grounds of sex, include definitions of direct and indirect discrimination that differ from the notions provided by EC law. These definitions can be translated as follows: 'Direct distinction' shall be taken to mean distinction between men and women. 'Indirect distinction' shall be taken to mean distinction on grounds of other qualities than sex, such for example marital status or family circumstances, which results in distinctions on grounds of sex.

The comparison of the different legislative definitions of discrimination in EC and Dutch law reveals several inconsistencies. The most important are the following: Concerning the notion of 'direct discrimination', the definition provided by EC law is based on the notion of 'less favourable treatment' and might lead to the admission of a 'hypothetical comparator' in certain cases.[104] However, the possibility of admitting a hypothetical comparator is still a hypothesis, as the ECJ has not yet ruled on this new definition and, when dealing with the '*tertium comparationis*', it has only admitted a 'hypothetical comparator' in cases of discrimination against pregnant women.[105] In short, the defi-

102 See: *Commentaar van de Commissie Gelijke Behandeling inzake de Implementatie van de Gemeenschappalijke Bepalingen van de EG-Kaderrichtlijn (Richtlijn 2000/78/EG van 27 november 2000) en de EG Rassendiscriminatie Richtlijn (Richtlijn 2000/43/EG of 29 juni 2000)*, p. 3.

103 See: *Advies van de Raad van State en nadir Rapport, Tweede Kamer,* 2001-2002, 28 169, B, p. 5-6 and *Implementatie van de richtlijnen inzake gelijke behandeling, Advies Raad van State en nadir Raport, Tweede Kamer,* 2001-2002, 28 187, A, p. 4-5.

104 See: Prechal, S., 'Equality of Treatment, Non-Discrimination…', *op. cit.,* note 53*, supra,* p. 546.

105 See: case 177/88, *Dekker,* [1990], ECR I-03941.

nition of 'direct discrimination' in Dutch law is less elaborated and does not refer to the notion of 'less favourable treatment' set out by EC law. In the case of 'indirect discrimination' the main divergence is that the definition provided by the EC Directive refers to a possible 'particular disadvantage' which marks a departure from a statistical evidence analysis. The main feature of this new notion of 'indirect discrimination' is that statistical evidence is losing significance in favour of the 'particular disadvantage' test. This test entails that actual disadvantage does not need to be proven and that a mere risk of disadvantage suffices for the establishment of 'disparate impact' in indirect discrimination cases. According to this test an exclusionary rule is deemed to be indirectly discriminatory on grounds of sex when it is intrinsically liable to affect a substantially higher proportion of female or male workers in comparison to workers of the other sex.[106] In contrast, the domestic definition does not seem to contemplate the risk of a 'particular disadvantage' as sufficient for establishing an actual case of indirect discrimination. The Dutch legislative approach seems to be more stringent in the requirements for the establishment of a *prima facie* case of indirect discrimination and to rely on the 'old-fashioned' notion of 'disparate impact'. This domestic approach implies that in sex discrimination cases the complainant has to rely on statistical evidence in order to prove *prima facie* indirect sex discrimination. This tends to be the approach of the Dutch Equal Treatment Commission towards indirect discrimination cases. Nonetheless, the Dutch Equal Treatment Commission has deviated in some rulings from a statistical data analysis when a particular criterion or practice 'self-evidently' results in 'disparate impact'.[107]

The distinction between direct and indirect discrimination is extremely important. This is due to the fact that, generally speaking, only indirect discrimination on grounds of sex can be objectively justified.[108] Though discriminatory actions are affected by the prohibition of discrimination, it has been admitted that some can be objectively justified, providing that a number of strict conditions are fulfilled.[109] These conditions are: That indirect discrimination is objectively justified by a legitimate

106 This test was first adopted by the ECJ in the *O'Flynn* case (C-237/94, [1996] ECR I-2677) that dealt with non-discrimination on grounds of nationality. This ruling is also extremely important for the definition of indirect discrimination on other grounds (e.g., sex) since the Directive 2002/73/EC has also adopted the 'particular disadvantage' test in the definition of indirect discrimination.

107 Opinions of the Commissie Gelijke Behandeling 2002-122; 2005-153; and 2005-187.

108 Even though the ECJ has denied on several occasions the possibility of justifying direct sex discrimination there is a discussion taking place at the academic level whether or not to admit this kind of open justification in all discrimination cases, see: BROWERS, J. and MORAN, E., 'Justifications in Direct Sex Discrimination Law: Breaking the Taboo', *ILJ,* 21, (2002), p. 307 and BROWERS, J.; MORAN, E. and HONEYBALL, S., 'Justification in Direct Sex Discrimination: A Reply', *ILJ,* vol. 32, 3, September (2003), p. 185-187.

109 HERVEY, T. K., *Justifications for Sex Discrimination in Employment,* Butterworths, London, 1993, p. 55.

aim, and that the means employed to achieve that aim are appropriate and necessary.[110] Concerning this point, it is worth noting that the Dutch legislation on equal treatment of men and women, in particular Article 6 WGB, reproduces the notion of 'objective justification' set up by EC law. Moreover, in line with the ECJ's case law,[111] the Dutch Equal Treatment Commission has adopted a strict standpoint with respect to the admission of objective justifications in indirect discrimination cases.[112]

Equality is an abstract and complex concept, currently in development at both EU and Member States levels. The idea of equality is essentially a relative one, in the sense that it requires a comparative judgment between two different individuals, groups, situations, etcetera. The above-mentioned EC law notions of direct and indirect discrimination reveal a gradual transformation of the traditional model of equality that was intrinsically based on the comparability test. The new approach to gender equality introduced by Directive 2002/73/EC and maintained in the 'recast' Directive deviates from the traditional comparative test and establishes a presumption of indirect discrimination when a measure is deemed to be a potential disadvantage for a group of people characterised by its sex. Despite the novelty of this construction, an element of comparison is still present in the new argumentation. The presumption as mentioned contains a diluted comparative element, in the sense that establishing the likelihood of discriminatory treatment requires setting up a comparator who would have been treated in a more favourable way. The main difference with the previous legal reasoning is that the burden of proof is lightened, as the presumption of discrimination may operate in the case of mere probability, although a nuanced comparative element does persist. The essential improvement of this new approach is that it aims to improve the position of the victims of discrimination and enhance the effectiveness of the EC anti-discrimination provisions. This improvement has not been clearly reflected in Dutch legislation as yet.

Despite the evident disparities concerning the definition of direct and indirect discrimination on grounds of sex between the EC and domestic legal frameworks, all the interviewees were of the opinion that there are no substantial or institutional misfits between EC and Dutch law regarding gender equality provisions and that no urgent reforms are needed at the national level to fully comply with the EU standards. However, the European Commission has approached the Dutch authorities

110 See: case 170/84, *Bilka Kaufhaus GmbH v. Karin Weber von Hartz,* [1989] ECR I- 2743.

111 See: *inter alia,* C-343/92, *Roks and others/Bestuur van de Bedrijfsvereniging voor de Gezondheid, Geestelijke en Maatschappelijke Belangen and others,* [1994] ECR I-571.

112 See: Opinions 2003-91; 2004-143; 2005-144; 2005-154; and 2005-187.

urging for an amendment of these definitions in order to homogenize them with those provided by EC law.[113] The question that arises here is to which extent a slightly different definition of discrimination can be deemed to be a breach of the obligations imposed by EC law. Are not the Directives flexible legal instruments that only oblige Member States to achieve the desired results, while leaving ample freedom to adjust the actual non-discrimination provisions to the national legal framework and judicial system? In my opinion, as long as there is a recourse to a judicial procedure for the enforcement of obligations under the anti-discrimination Directives "available to all persons who consider themselves wronged by failure to apply the principle of equal treatment to them" and the interpretation of the concepts of direct and indirect discrimination by the Equal Treatment Commission and the national Courts conforms to the one provided by the ECJ for the same concepts, then, there is compliance with EC equality law in the Netherlands.

3.3.2. The implementation of the Directive on part-time work in the Netherlands

The second part of this study deals with the analysis of how the European framework agreements resulting from social dialogue at EU level have had an impact on Dutch policy making as regards equality between men and women. In particular, the implementation in the Netherlands of the Framework Agreement on part-time work (later transformed into Council Directive 97/81/EC[114]) is scrutinised.

The mechanism for transforming a framework agreement of the European social partners into a Council directive has served to adopt EC legislation on parental leave, part-time work and fixed-term work.[115] All these areas have a gender connotation, as they are likely to affect more female than male workers, given the existing patterns of childcare across the EU. The issues dealt with in the Framework Agreement on part-time work are clearly connected with gender equality and that relationship is particularly evident in the Dutch case. In the Netherlands, the shortage of available care facilities[116] entails that part-time work is the most suitable option for women who are acceding or reintegrating

113 See: Commissie van de Europese Gemeenschappen, 2006/2444 C(2008) 0115, *op. cit.,* note 80*, supra.*

114 Council Directive 97/81/EC, *op. cit.,* note 3*, supra.*

115 Directive 96/34/EG 1996, L 145/5 19/06/1996; Directive 97/81/EG 1998, L 014 20/01/1998 and Directive 1999/70/EG 1999, L 175, 10/07/1999, respectively.

116 See: *Wet Kinderopvang* of 09/07/2004, Stb. 2004, 55, 29/10/2004, that transfers to families most of the cost of minor's care. This growth in family expenditures is compensated by a system of tax deductions. This Act has recently been amended, in 2007.

to the labour market and who have young children or are in charge of dependants.[117] Therefore, many working mothers exhibit a preference for part-time work above parental leave as a good option for combining paid work and motherhood.[118] According to Visser, this trend has led to a 'normalisation' of part-time work in the Netherlands.[119]

In the case of the Netherlands, discrimination against part-time workers was prohibited in 1993 and 1998 in the Minimum Wage and Minimum Holidays Act[120] and in the Works Councils Act[121], respectively. Furthermore, since 1996, the Act on Non-discrimination on Grounds of Working Time[122] prohibits the discrimination of part-time workers. The underlying principle of this Act is that part-time work is equivalent to full-time work. This Act prohibits any sort of discrimination between full-time and part-time employees in working conditions, access to training and promotion unless there is an objective justification for a difference in treatment (Article 7:648 Civil Code, BW). Despite the existence of this legal framework of protection, the attempts to eradicate unjustified discriminatory treatment of part-time workers have encountered difficulties in the Netherlands.[123]

In the Netherlands, the principle of pro rata temporis, also included in the part-time Directive, is applicable to the statutory labour rights set out in the Civil Code. Therefore, a part-time worker enjoys pro rata rights to equal pay, equal social benefits, equally paid holidays and leave related to that enjoyed by a full-time colleague. In the field of social security, it is worth mentioning that in the Netherlands part-time workers' contributions to statutory and occupational social security are calculated on a pro rata basis and they obtain benefits and accrue pensions accordingly.[124]

117 EUROSTAT, *News Release* 49/2005, 12 April 2005.

118 Visser, J., Wilthagen, T., Belzer, R., and Van Der Putte, E., 'The Netherlands: from atypicality...', *op. cit.,* note 73, *supra,* p. 193.

119 Visser, J. and Yerkes, M., 'Women's Preferences or Delineated Policies? The development of part-time work in the Netherlands, Germany and the UK.' AIAS Working Paper, 05-36, 2005.

120 *Wet minimumloon en minimumvakantiebijslag* (WML).

121 Wet op de Ondernemingsraden of 29/01/1971, Stb. 1971, 54.

122 *Wet verbod op onderscheid naar arbeidsduur* (WOA),

123 See: Opinions 2003-7 and 2003-155 of the *Commissie Gelijke Behandeling* and Ministry of Social Affairs and Employment, *Equal treatment in the Netherlands*, The Hague, March 2003, p. 24.

124 See Article 7:629 BW *and Werkloosheidswet* of 19/12/2003. Stb. 544.

In February 2000, the Working Time Adjustment Act (*Wet Aanpassing Arbeidsduur,* WAA) was passed, giving employees the right to request a decrease or increase of their regular working hours. This legislation is weighted in favour of the employee.[125] As a rule, employers are obliged to grant a working time adjustment request unless a substantive business reason to refuse it exists, and they should arrange the pattern of working time in line with the employee's wishes unless the employer proposes an alternative pattern, which would better suit operational needs. In this case employees should be 'reasonable and fair' in trying to accommodate to the employer's request.

In the Netherlands, the shortage of care facilities and the high percentage of part-time female workers who have chosen this type of employment relationship as a way to conciliate working and family life has led to the enactment of the WAA that, in fact, institutes an individual right to adjust working time in accordance with the employee's wishes.[126] Despite the strength of this worker's prerogative, the due respect to the organisational authority enjoyed by the employer, funded on the right to property and the freedom of undertaking, is preserved by subjecting this right to modulation when the worker's wishes clash with serious and proven business interests.[127] The WAA improves protection for those workers who decide to request a change in their working time schedule, irrespective of the reasons behind that request. The principal aim of this Act is to reinforce the legal position of the employee as regards the reconciliation of work and family life, by means of supporting the position of those who wish to decrease or increase their working hours.[128] In this sense, the WAA is informed by the expectation that the outcome of more freedom to adjust working time will be a more balanced assumption of paid and unpaid work by men and women. Then, the need to assimilate social protection rights for part-time and full-time workers would be reduced thanks to a less gender segregated part-time labour market. The studies and evaluations assessing the success of this legislative policy are not yet conclusive. For instance, the evaluation report about the law, as presented to Parliament in

125 This conclusion can be inferred from the case law interpreting this Act: Rechtbank Zwolle, Sector Kanton, 12/10/200, KG 200, p. 235; Rechtbank Haarlem, sector Kanton, 12/05/2001, JAR 2001, p. 117; Kantonrechter (Ktr.) Groningen 23/03/2001, JAR 2001, p. 87; Ktr. Haarlem 17/05/2001, JAR 2001, p. 117; Ktr. Breda 30/03/2001, JAR 2001, p. 85; Ktr. Maastricht 02/02/2001, JAR 2001, p. 49 and Rechtbank Groningen, sector Kanton, 23/03/2001, JAR 2002, p. 140. See also: Jacobs, A. and Schidt, M., 'The Right to Part-time Work: The Netherlands and Germany Compared', *International Journal of Comparative Labour Law and Industrial Relations,* Vol. 17/3, (2001), p. 374.

126 Verhulp, E. and Kuip, S. W. *Wet Aanpassing Arbeidsduur,* SDU, The Hague, 2000, p. 5.

127 Burri, S. et al. 'Work-family policies on working time put into practice. A comparison on the Dutch and German Case Law on Working Time Adjustment', *International Journal of Comparative Labour Law and Industrial Relations,* vol. 19, 3, (2003), p. 321.

128 This Act is an attempt to respond to workers' preferences as regards working time adjustments, reflected in certain reports about the labour market. See: *Trendarapport aanbod arbeid,* OSA, The Hague, 1999.

2004, concludes that the WAA has had, overall, a positive effect on the promotion of labour market participation by women.[129] However, a more recent study shows that the number of hours that Dutch women work is not increasing, and that the working hours of men have also not appeared to have varied significantly in recent years.[130]

3.4. Enabling/constraining factors

Table 1. Factors defining the capacity of shaping and taking EU policies

Political capacity	Administrative capacity
• Political fragmentation ▶ number of veto players ▶ institutional jealousy	• Administrative fragmentation ▶ dispersion of competencies ▶ coordination mechanisms ▶ technocratic capture potential
• Political resources ▶ votes in the council ▶ EU budget contribution ▶ institutional capacity	• Administrative resources ▶ financial means ▶ staff-power ▶ expertise ▶ communication and continuity
• Political legitimacy ▶ support for European integration ▶ issue-salience ▶ trust in political institutions ▶ political adaptation pressure ▶ legitimating political discourse	• Administrative legitimacy[131] ▶ perceived corruption ▶ 'Europeanisation' of elites

A number of hypotheses for the selected case study can be formulated concerning some of the facilitating and constraining factors mentioned in the table above, created according to the method-

129 Evaluation *Wet Aanpassing Arbeidsduur (WAA), Tweede Kamer, vergaderjaar* 2003-2004, 29503, N. 1. This report was accompanied by two further research studies by the Labour Inspectorate on the impact of the WAA on collective agreements and on the case law related to the WAA. See also Burri, S. D. 'Aanpassing van de arbeidsduur: Evaluatie en rechtspraak', *SMA,* n. 11/12, November/December (2004), p. 502-512.

130 According to the study of Portegijs, W., Hermans, B., and Lalta, V., *Emancipatiemonitor 2006*. Den Haag: Sociaal en Cultureel Planbureau/Centraal Bureau voor de Statistiek, the average working hours of female employees has dropped slightly from 25.2 hours per week in 2003 to 24.9 hours in 2005.

ology as proposed by Börzel of linking the top-down and bottom-up dimension of Europeanisation.[131]

3.4.1. Political capacity

As far as political capacity is concerned, our attention is again drawn to the large number of actors involved in the Europeanisation process who can, time and again, determine whether and how the EU legal and social dialogue instruments find their translation at national level.

Firstly, due to the predominance of dualism in Dutch politics, the *number of veto players* at the domestic level is not very high. Moreover, equality between men and women is a field where there has not been any serious ideological clash between the constituent parties of the various coalition governments in the Netherlands. Therefore, the so-called phenomenon of *'institutional jealousy'* (the fact that for strategic reasons co-ordination is not always desired) has not occurred in this context.

As far as *'European awareness'* is concerned, the main hypotheses, confirmed by the interviews performed, is that, of the actors involved in the process of Europeanisation of gender equality legislation and policy in the Netherlands, the Equal Treatment Commission is more familiar with the EU setting than the domestic Courts.[132]

In addition, the role of the unions as a pressure group in equal opportunities affairs (the '*political adaptation pressure*' factor) deserves attention. The adoption of the European Framework Agreements on parental leave and part-time work, addressing the issue of the flexible use of working time in order to improve the work-life balance of employees, illustrates the concern of the European social partners about gender issues. This concern is more visible at EU level than at national level. The lobbying activities of trade unions for an improvement of the working conditions of female employees is essentially a recent trend in domestic industrial relations as, for many years, unions in the Netherlands have predominantly represented the interests of their own members, (mainly males) while women and minority groups have been under-represented.

131 Börzel, T. A., 'Shaping and Taking EU…', *op. cit.,* note 2*, supra,* p. 7.

132 This is also the opinion of Docksey, C. and Fitzpatrick, B., «Equal treatment. The Dutch Equal Treatment Commission», *Industrial Law Journal* (hereinafter, ILJ*),* Vol. 24, 1, (1995), p. 84-90.

In this context, it is important to note the current debate in the Netherlands concerning the link between the high number of women working part-time and the quality and availability of childcare facilities. There is a discussion at polity/politics level on whether to support the *'anderhalfverdienersmodel'* (one and a half earners, with women mostly working part-time) as the ideal model for reconciliation of work and family life or whether to enact legal and polity measures aimed at increasing the average number of working hours of women participating in the labour market. A report from the *Sociaal en Cultureel Planbureau* (SCP) and *het Centraal Bureau voor de Statistiek* (CBS) about women's equality in the labour market states that working mothers in the Netherlands consider that combining a part-time job (around 20 hours) with taking care of their children is their ideal situation.[133] In contrast, the trade union confederation FNV argues that the decision of female employees to work part-time is directly connected with the availability and cost of childcare. Therefore, they have been lobbying for putting the regulation of public subsidized childcare onto the Dutch government's agenda as a means of fostering the participation of women in the labour market. This discourse relates to the debate going on at European level on the measures needed to improve the reconciliation of work and family life, e.g., the 2002 Barcelona Summit's targets relating to childcare and the first-stage consultation process of the European social partners on the reconciliation of professional, private and family life launched by the Commission on 12 October 2006.[134]

In addition, it is worth noting the existence of long-standing women' rights lobbying groups, set up both at EU (e.g., European Women' Lobby) and national level (e.g., E-quality and Clara Wichmann Foundation), that have played a major role in the development of the legislation on equality between men and women. At the domestic level, the task performed by the *Proefprocessfonds Clara Wichmann* is especially interesting; an initiative supported by private donations that supports victims of discrimination on grounds of sex and helps them to bring their cases to the courts of justice.

133 Emancipatiemonitor 2006.

134 Communication from the Commission, first consultation of European Social Partners on Reconciliation of Professional, Private and Family Life, Brussels 12.10.2006, SEC (2006) 1245.

3.4.2. Administrative capacity (The role of the Equal Treatment Commission)

As far as administrative capacity is concerned, the issue deserving special attention is whether *co-ordination mechanisms* operate in such a way that they ensure timely interventions in each stage of European-level policy making. This, to a large extent, depends on the '*institutional capacities'* of the actors involved: Are they sufficiently informed? Do they (especially the Equal Treatment Commission) have enough competencies to have a real impact in 'shaping' EU legislation? Do they dispose of sufficient expertise, and if so, are they able to deploy these capacities at the European level, so as to influence the agenda-setting and decision-making phases?

Given dispersed competencies, a particular point of attention is the communication and continuity between 'uploaders' and 'downloaders'. In fact, those who are uploading policy preferences to the EU-level are not the same as those responsible for the transposition of the EU legislation and policy guidelines at national level. From the interviews with Dutch officials from the Ministries of Social Affairs and Employment and the Dutch permanent representation at the EU, it can be deduced that the communication channels between these two administrative bodies are open and appear to work reasonably well.

When assessing the performance of the administrative bodies dealing with the implementation of the equal treatment legislation in the Netherlands, the important role played by the Dutch Equal Treatment Commission (*Commissie Gelijke Behandeling*, CGB) should be noted. The operation and the competencies of the CGB are set out in the General Equal Treatment Act (AWGB).[135] The CGB is an independent organisation with competencies in the equality field that was established by the Dutch government in 1994. Before that there was a sectoral institution: the *Commissie Gelijke Behandeling Mannen en Vrouwen,* exclusively specialised in giving advice in the field of equality between men and women. Nowadays, any person who thinks that he or she has been discriminated against on any of the following grounds: religion, belief, political orientation, race, sex, nationality, sexual preference, marital status, disability or chronic illness, age, full-time or part-time work, and temporary or permanent employment, can file a petition in writing for an opinion to the CGB.[136] The CGB's members are independent experts who examine, free of charge, at the request of an individual worker, an

135 *Algemene Wet Gelijke Behandeling, op. cit.,* note 63, *supra.*

136 For more information on the work of this organisation see: Goldschmidt, J. E., Goncalves Ho Kang You, L., *et alter* 'Enforcement of Equal Treatment: the Role of the Equal Treatment Commission in the Netherlands', in, McEwen, M., (Ed.), *Antidiscrimination Law Enforcement: a Comparative Perspective,* Ashgate, 1998 and Docksey, C. and Fitzpatrick, B., 'Equal treatment. The Dutch Equal Treatment Commission', *ILJ,* Vol. 24, N. 1, (1995), p. 84-90.

employer, a trade union or a works council or services committee, the compliance with equal treatment laws pertaining to certain types of conduct, practices or regulations. The CGB is also entitled to investigate, at its own initiative, in specific areas where systematic or persistent patterns of discrimination are suspected. In addition, the CGB is also entitled to initiate legal proceedings with a view to obtaining a court ruling stating that certain conduct is contrary to the equal treatment legislation and therefore unlawful.

In some aspects, the Equal Treatment Commission can function as a semi-judicial body. After being asked to give an opinion, the CGB decides whether or not it is competent to investigate the case. When the CGB decides to start an investigation, both parties (the complainant and the defendant) are interviewed and they are given the opportunity to respond to the other parties' allegations. The Commission can also obtain information from witnesses. After the investigation, there is a hearing of the case. Both parties are entitled to testify and to bring an expert along. After the hearing, the CGB gives an opinion that is not legally binding. However, in practice, the parties follow the CGB's opinions in a high percentage of the cases heard.[137] The foregoing explains why binding legislation strategies are rarely used in practice in the Netherlands. A victim of alleged discrimination can decide to request an opinion from the CGB before or during legal proceedings. Notwithstanding that the courts are not obliged to follow the advice issued by the CGB, the Dutch Supreme Court has ruled that their opinions are of great value and should be taken into account in any subsequent judicial process. Thus, a judgment contrary to the Commission's rulings can only be based on extremely well-founded arguments.[138]

In principle, the CGB derives its competence exclusively from the national equal treatment laws. This implies that the CGB's opinions cannot directly be based on international non-discrimination provisions. However, due to the special relationship between EU commitments and national transposition procedures (the principle of primacy of EC law), the CGB has the duty to interpret the national legislation in consistency with EC law. This rule also applies to the use of definitions, such as of direct and indirect discrimination, sexual harassment, objective justification, positive action, etcetera. This linking of the CGB to EC legislation in the equality field has been reinforced since the

137 According to the *'Jaarverslag 2006 van de Commissie Gelijke Behandeling'*, the CGB issued 17 recommendations and 261 opinions in 2006. In 46% of the cases the decision was that there was a case of unlawful discrimination. In 67 % of the cases the opinion of the CGB was followed.

138 Ruling of the Supreme Court (Hoge Raad) of 13.11.1987, St. Bavo, (NJ 1989, 689).

inclusion of a reference to the key role that equal treatment bodies must play, in the implementation of the EC legislation in the last version of the Directive on equal treatment for men and women in employment and occupation.[139]

From the interview with the CGB's representative, we can conclude that, while the contact channels, exchanges of information and collaboration with other national administrative bodies, including ministries, are open and running, the same cannot be said about the communication with the Dutch officials in the permanent representation at the EU or with Dutch representatives within the European institutions. Nevertheless, this does not mean that the CGB is not a qualified actor within the Europeanisation process. In practice, the CGB decides most of the cases of alleged discrimination in the Netherlands and, when doing so, this institution monitors the compliance of the Dutch legislation with the EU legal framework. The CGB closely follows the evolution of the EU legislation and case law and its implications for the domestic setting, discussing these in periodical internal meetings. Moreover, at the present time a member of the CGB is chairing a network of co-operation between specialised equality bodies in Europe, supported by the European Commission; the so-called European Network of Equality Bodies (EQUINET).[140] EQUINET "seeks to develop the cooperation between specialised equality bodies in Europe (EU Member States, Turkey, and the EEA country Norway) and to facilitate an effective exchange of their experiences and expertise with the aim of enhancing the uniform application of the EU equal treatment legislation and improving the protection for victims of discrimination.

Despite the important role played by the CGB in the implementation of anti-discrimination legislation in the Netherlands, its capability to shape the EU legal and policy approach to gender equality issues is limited. In the past it has been suggested that the competencies and the operation of the CGB should be changed. On the one hand, the convenience of conferring to the CGB the competence to act on behalf of complainants in legal procedures has been stressed. On the other hand, there have been proposals pointing out the possibility of turning the CGB into an information

139 Directive 2006/54/EC, op. cit., note 35, supra.

140 See: 'EQUINET, the European Network of Equality Bodies', Equality News, spring (2006) <http://www.equality.ie/index.asp?locID=110&docID=558>, acceded on 30.01.2008.

and assistance organisation for victims of discrimination.[141] Another suggestion has been to grant a more obligatory status to the CGB's opinions.

In the conference on the progress of EU equality legislation that took place in The Hague during the Dutch presidency of the EU in 2004, it was mentioned that one of the fundamental problems for the enforcement of equal treatment law in Europe is that semi-judicial bodies whose decisions are not binding (as in the case of the Dutch Equal Treatment Commission) do not have recourse to the European Court of Justice. The flexible approach offered by the Dutch legal system in discrimination cases, providing victims an alternative route to the judicial process for enforcing their rights to equal treatment, has the disadvantage that the institution that actually rules on most of these cases is not entitled to ask for the interpretation of EC law. This is a 'misfit' of the Dutch system of protection against discrimination. Regarding this problem, the former president of the CGB advocates conferring on the CGB the competence to request a preliminary ruling from the ECJ on those cases where an EC law provision is at stake.[142] However, this could only be done should the CGB's opinions be simultaneously conferred legally binding status. In order to determine whether a body is a court or a tribunal, for the purposes of being entitled to make a reference on preliminary ruling to the ECJ, this court takes a number of factors into account, such as whether the body is established by law, is permanent, its jurisdiction is binding, its procedure is *inter partes*, it applies rules of law and is independent.[143] It is clear from the examination of the AGWB that the CGB is established by law and is a permanent and independent body which, although an administrative authority, is vested with semi-judicial functions. What is more, the CGB applies rules of law and the procedure before it is *inter partes*. However, the fact that the 'jurisdiction' of the CGB is by no means compulsory and its decisions are not binding would likely hinder the acceptance of its competence to refer a question on preliminary ruling to the ECJ.

141 Expert meeting on equal treatment 13 and 14 November 2003, The Hague, The Netherlands, p. 3.

142 Goldschmidt, J., 'Implementation of equality law: a task for specialists or for human rights experts? Experiences and developments in the supervision of equality law in the Netherlands', *Maastricht Journal of European Comparative Law,* Vol. 13, 3, (2006), p. 323-338.

143 See: Case C-407/98, *Abrahamsson,* [2000] ECR I-5539 and Joined Cases C-110/98 and C-147/98 *Gabalfrisa and Others* [2000] ECR I-1577.

4. Conclusions

Carrying out an assessment of the anti-discrimination legislation of the Dutch legislation on gender equality in relationship with EC law requires paying attention to a series of key concepts: i.e., direct and indirect discrimination, statistical evidence, objective justification, harassment, and positive action. The analysis of how these concepts, which constitute the core of EC anti-discrimination legislation, are set out within the Dutch legal system, allows an evaluation of whether the transposition into national law has been successful or whether there are still some weaknesses or legislative gaps. The conclusion reached is that most of these legal definitions and concepts, as well as other aspects related to the scope of the process, such as the shift in the burden of proof, have been assimilated by national legislation and are mostly applied accurately in the CGB's opinions as well as in domestic courts' rulings.[144] In a nutshell: In general terms the Dutch legislation on gender equality faithfully and sufficiently implements the relevant EC legislation. Nevertheless, despite the general conformity with EC law, several shortcomings have been observed in the transposition of certain EC law provisions, notably in the definition of direct and indirect discrimination.

From a historical point of view, there are two clearly demarcated periods in the evolution of gender equality law in the Netherlands. During the first stage, at the end of the 1970s and during the early 1980s, the Dutch legislator adopted legislation in the field of gender equality as a result of EC law. During this period, there was a direct and clear influence of EC legislation and case law on the development of the national rules on equality of treatment and non-discrimination on grounds of sex, giving rise to numerous legislative changes to adapt the Dutch legal system to EC law. The second phase of the anti-discrimination legislation started in the mid-1990s with the adoption of the General Equal Treatment Act (AWGB). The realisation of this Act was not motivated by the need to comply with the relevant EC standards. On the contrary, it was a forward step taken by the national legislator due to a deadlock in the adoption of a framework equality directive. Furthermore, the adoption in the 1990s of several texts prohibiting discrimination of part-time workers in relationship to

144 See for instance: the ruling of the *Hof den Haag van* 22 *februari* 2008, C05/01780.

similar full-time workers is also a sign of the more advanced character of the national legislation on equal treatment at the time.

This examination of gender equality legislation in the Netherlands, taking as a reference EC law, has revealed that in the Netherlands there is a long-standing tradition of protection against discrimination on grounds of sex and that the tolerance to unjustified sex discrimination in employment and occupation is low. The work of the CGB during the last decades has contributed to achieving this goal. Yet the absence of binding nature of the CGB's opinions and the lack of competencies to act judicially in representation of the victims of an alleged discrimination diminishes its effectiveness. It has been suggested that lending a more binding character to the CGB's opinions and increasing its capabilities to act in the process could correct these drawbacks. In any case, the risk is that these reforms might undermine the current good performance of the CGB and perhaps what it is needed is that the CGB makes increased use of its competence to publicly denounce cases of discrimination.

In general terms, it can be concluded that the Dutch legal and judicial system fulfils the obligations imposed by the Directives on equal treatment for men and women and on part-time work, concerning the introduction into the national legal system of all the measures necessary to enable all persons who consider themselves wronged by failure to apply to them the principle of equal treatment to pursue their claims by judicial means.

The overall conclusion of this case study is that, concerning the taking dimension, the research confirms the hypotheses that the EU legal framework has triggered the legislative developments in the field of equality between men and women in the Netherlands and that the EU legislation and policies in this field have been reasonably well received and implemented into the Dutch legal and political framework. In the case of the shaping dimension, the findings of the study are less conclusive. Nevertheless, evidence has been found that the Dutch have been relatively successful in bringing their flexible and pro-active approach to part-time work to the EU social agenda by means of the European social dialogue.

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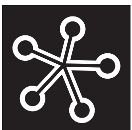

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