

Policy instruments to enhance compliance with equal treatment rules

Final report

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Preface

This report is the result of research, commissioned by the Dutch Ministry of Social Affairs and Employment. The Hugo Sinzheimer Institute (HSI), research centre of the Universiteit van Amsterdam on the field of 'labour and law', has analyzed eight policy instruments developed and used in five different EU Member States.

The instruments are described in their characteristics and analyzed for their effectiveness and for the conditions under which their relative effectiveness may have been reached. In this way the report may contribute to a better informed discussion on existing and potential ways of furthering the compliance with equal treatment rules in EU Member States, taking due account of, among others, their different legal systems and their different systems of industrial relations.

At the Hugo Sinzheimer Institute five researchers have been co-operating in the project: Tanja van den Berge, Marianne Grünell, Robert Knecht, Marian Schaapman and Ilse Zaal. Other duties finally prevented Marianne Grünell from contributing to this report. We like to thank Inge Piso, of the Ministry of Social Affairs and Employment, for her commentaries on draft versions of this report.

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Contents

- 1 Instruments aimed at furthering the compliance with rules on equal treatment: introduction
- 2 Gender equality plans in Sweden
- 3 The Equality Authority in Ireland
- 4 The legal obligation for social partners in France to negotiate on equal treatment for men and women
- 5 Equal Pay Reviews in the United Kingdom
- 6 Codes of Conduct (The Netherlands)
- 7 Covenants (The Netherlands)
- 8 Contract Compliance (The Netherlands)
- 9 Mainstreaming (The Netherlands)
- 10 Conclusions

1 Instruments aimed at Furthering the Compliance with Rules on Equal Treatment: Introduction

1.1 Introduction

While striving for equal treatment at the shop floor, we have to recognize that the principle of equal treatment is not self-evidently part of the logic of organisational action. Neither in enterprises, where the rationality of business economics may urge for differentiation rather than equal treatment, nor in public organisations where social mechanisms of selection and exclusion may result in practices which are undesirable from an equal treatment perspective. It is thus very important to counterbalance the logic of social practices, if and where they tend to result in unequal treatment, by setting rules and principles and thus create a moral and legal framework for organisational action. Although at the start this usually implies exerting external pressure on organisations to adapt their modes of operation, in the long run there is no necessary tension between principles of equal treatment and economic rationality. Enterprises and other organisations may learn to integrate, for instance, gender equality policies and only afterwards discover their economic advantages.

While issuing rules on equal treatment is one thing, assuring that they are being implemented is another, and reaching the effect of equality at the shop floor still another. The problem, however, is not so much that of a ‘gap’ between rules and actual behaviour, but rather how to ‘fill in’ the intermediate field, how to structure the course of actions that leads from rules to results. Policies that take ‘equal treatment’ seriously, should take notice of the complexity of the field of industrial or employment relations and attune their rules and instruments to its relevant peculiarities. Choices have to be made whether, and to what extent, for instance, to aim at dissemination of information, to mobilize social partners by providing funds for equality initiatives, to oblige enterprises to pay special attention to equality issues, to force them to take certain measures, to establish a special Equality Authority or to provide citizens with statutory remedies.

In EU Member States several policy initiatives have been, or are being taken to fill in this ‘intermediate field’. In this report we look at eight different policy instruments that are aimed at furthering compliance with equal treatment rules. From a wide array of instruments, the Dutch Ministry of Social Affairs and Employment has chosen eight instruments that seem to be promising and worth while to be analysed as to their characteristics, ways of implementation and effects. One might look at them, of course, as country-specific ways of attuning policies to as much specific peculiarities of the national industrial relations system. Here, however, we look at them as instruments that might, under certain conditions, lend themselves to a wider use than is now being made of them. Therefore part of our project, as reported here, has been to try to specify the conditions under which these instruments may be successful. The present project has been building upon the results of an international expert meeting, organized by the Dutch Ministry of Social Affairs and Employment at November 13th and 14th, 2003, on “How to stimulate the compliance and enforcement of the law on equal treatment”.

We will, in the second paragraph of this chapter, summarize the research questions and the design of our study. The third and final paragraph deals with the issue of the ‘effectiveness’ of instruments and the problems of getting reliable empirical information on this matter.

1.2 Design of the Study

The study focuses on eight different ‘instruments’:

1. Sweden: the ‘gender equality plan’;
2. Ireland: the Equality Authority;
3. France: social partners’ obligation to negotiate on equal treatment (Loi-Génisson);
4. United Kingdom: ‘equal pay audits’;

and the other four only as far as they are used in The Netherlands:

5. Codes of conduct and rights of complaint;
6. Covenants;
7. Contract compliance; and
8. Mainstreaming.

As ‘instruments’ of equal treatment policy these eight policy measures are rather diverse. As we will set out more extensively in the next chapters, some of them impose legal, or moral duties on employers, or on social partners to deal systematically with equal treatment issues. Others are oriented towards inspection of (the level of) compliance, or, to a certain extent, enforcement of equal treatment rules. In some of them government tries to negotiate arrangements with relevant actors in the field that should contribute to compliance with these rules.

On each of this instruments we have gathered relevant information on the characteristics of the instrument and on the way it has been, or is being implemented or applied. Besides we have tried to gain information on experience-based evaluations of the instrument by relevant actors like employers’ organisations, unions, representatives of equality-promoting organisations and independent experts.

We have in the course of our project made efforts to contact a substantial number of people representing different public bodies and organisations involved in, or affected by the implementation of these instruments. Our efforts have had varying success, which partly may be due to the time schedule of the project (they were concentrated in the summer months). Results of objective, empirical research on the effectiveness of instruments was available only in a few cases; an evaluation of the *Loi-Génisson*, due for this autumn, could not yet be used for this report.

The questions that have been guiding us in the project, are:

- (a) What are the characteristics of the instrument?
- (b) In what way, and to what extent is the instrument being implemented and what experiences have been gained in this process?
- (c) What have been the effects of implementing the instrument for equal treatment ‘at the shop floor’? What may be concluded about its effectiveness?
- (d) As far as the instrument has been successful, what conditions may be said to be particularly contributive to its success?

The ‘conditions’ (in question d) may refer to elements of the instrument itself or to elements of the context in which it is being implemented. The notion of ‘effectiveness’ (in question c) will receive special attention in the next paragraph.

1.3 Effectiveness of Instruments

When we talk about the ‘effects’ or the ‘effectiveness’ of equal treatment policy instruments, it is useful to make a distinction between several types of ‘effectiveness’.

First of all, each of the instruments is aimed at reaching a certain goal that is related to, but not necessarily identical with equality rules. ‘Equal pay’, the goal of the ‘equal pay audits’ in the UK for instance, is a particularization of the general principle of equal treatment.

Generally, an instrument may be ‘effective’ in three different senses, which will here be illustrated by reference to one of them, the French *Loi-Génisson*:

1. it may be said to be *formally* effective insofar as the means that the instrument provides, are actually used, for instance, in case of provision of a right of complaint, if employees do bring complaints. Thus the *loi-Génisson* is in this sense effective as far as it turns out that employers and unions do indeed put ‘equal treatment’ on the agenda of their yearly negotiations, and actually discuss it.
2. it may be said to be *behaviorally* effective insofar as the means that the instrument provides – regardless whether they are actually used or not – do lead to, or induce compliant behavior (‘compliant’ with the equal treatment rules at which the instrument has been aimed). Thus the *loi-Génisson* is in this sense effective as far as it turns out that employers and unions do enter into agreements on measures to improve equality within enterprises.
3. it may be said to be *substantially* effective insofar as the means that the instrument provides actually contribute to ‘equality’ at the shop floor. Thus the *loi-Génisson* is in this sense effective as far as it turns out that agreements, made between employers and unions under the influence of this law, bring about a higher level of actual equality in enterprises.

It may be clear that these three types form an ascending series when it comes to the difficulty of objectively establishing ‘effectiveness’.

We may further develop the way in which the ‘effectiveness’, in these three senses, of an instrument may be assessed by distinguishing three ‘points of application’: information, negotiation and compliance.

An instrument may be, among others, directed at the provision of *information* (for instance the instruments numbered above 1,2,5). The policy hypothesis behind these instruments may be formulated as follows: to the extent that private parties will be better informed on the goals and legal duties of equal treatment, they will be more prone to attach importance to these goals and duties while shaping employment relations in companies and organisations.

An instrument may in these cases be said to be formally effective to the extent that parties, as a consequence of the instrument, appear to be better informed about these goals and duties; behaviorally effective insofar as they translate this information into agreements on employment conditions; and substantially effective insofar as these agreements result in more equality at the shop floor.

An instrument may, secondly, be directed at changing some of the conditions under which *negotiation* on employment relations is taking place between private parties (instruments

1,3,5,6,7,8). The policy hypothesis behind these instruments may be formulated as follows: to the extent that private parties will be obliged or encouraged, in their negotiations on employment conditions, to meet certain external conditions related to equal treatment, their agreements will to a larger extent be in conformity with equal treatment rules and, as a consequence, there will be more equality at the shop floor.

An instrument may in these cases be said to be formally effective to the extent that parties take cognizance of these external conditions; behaviorally effective insofar as parties appear, as a consequence of the instrument, to adapt their agreements to these external conditions; substantially effective insofar as these agreements result in more equality at the shop floor.

An instrument may, finally, be directed at monitoring and enforcing *compliance* with equal treatment rules in individual cases (instruments 2,4,5). The policy hypothesis behind these instruments may be formulated as follows: to the extent that individual cases of non-compliance met with enforcement and imposition of legal measures ('repressive effect'), the knowledge and awareness of equal treatment rules and principles will be strengthened, and, as a consequence, careful action of employers in equality matters will be furthered ('preventative effect'). An instrument may in these cases be said to be formally effective to the extent that non-compliance is actually enforced and legally sanctioned; behaviorally effective insofar as careful action of employers appears to be enhanced; substantially effective insofar as this enhanced carefulness of employers results in more equality at the shop floor.

We will deal with the question of effectiveness at each of the eight instruments, to be exposed in the chapters 2 till 9 of this report. Each chapter starts with an introduction, followed by a description of the characteristics of the instrument. The goals of the instrument, and the policy theory behind it is set out, the way it has been, and is implemented as well as the reactions to that from those involved in, and affected by the consequences of the introduction of the instrument. Then we go into its effectiveness and we end by summing up the conditions we argue would, if realized, contribute to its success.

2 Gender equality plans in Sweden

2.1 Introduction

The gender equality issue has high importance in Swedish working life. Gender equality has been part of Swedish law since 1974. The government has taken extensive action in recent years to strengthen the position of women in employment and education by setting up vocational guidance programming and training programs. Despite this history of active equality policy the Swedish society is still characterized by a gender-based power structure that places men and women in a asymmetric relationship in which power is unequally divided.

Sweden has a population of nearly 9 million of which 4,4 million of the population belongs to the labour force. Women make up half of the population and almost half of the labour force¹. Although women have a great part in the labour force they are still paid significantly less than men. The average wages of men are 22 per cent higher than the wages of women². These wage differences are in part explained by the different breakdown between men and women as regards occupation, position, level of qualifications or age. Considering these factors an unwarranted pay differential of between 1-8 per cent remains³.

The Swedish labour market is segregated; women and men work in different categories, and do different jobs in the same sector. When a large group of women entered the labour market in the 1960's and 70's, they were mainly recruited to occupations and sectors reflecting traditional gender roles, such as child care, nursing elder care and office jobs. These years women still work mostly in these sectors. Other inequalities between men and women are that most of the women work part-time and there are less women in high functions⁴.

In 1980, the first Swedish Equal Opportunities Act became operative (Jämställdhetslagen)⁵. In 1991, a new Act was adapted transposing European Community legislation. The act prohibits sex discrimination in the labour market and requires that all employers shall actively promote equal opportunities for men and women. The Act consists of three parts. The first part requires all employers to strive actively and in a goal-oriented manner for equality between men and women at the workplace. Employers must seek to create a working environment free from sexual harassment. The second part prohibits sex discrimination in working life in connection with recruitment, work management, wage setting and termination of employment. The third part of the act contains provisions relating to damages liable in the event of breaches of the law as well as to the monitoring of compliance with the law and to litigation in discrimination disputes⁶. One of the concrete measures the Act provides for individual employers to achieve gender equality at the workplace, is the obligation to draw up an annual equality plan.

¹ Equality between men and women, Swedish institute, <http://www.sweden.se>

² Pay equity guide, Equality Opportunities Onbudsman

³ Report of the pay differential committee 1993

⁴ Equality between men and women, Swedish institute, <http://www.sweden.se>

⁵ The Equal Opportunities Act 199:433

⁶ What are the duties of the Equal Opportunities Ombudsman <http://www.jamombud.se>

2.2 Description of Instrument

The Annual Equality Plans are regulated in the Swedish Equal Opportunities Act 1991 (Jämställdhetslagen). The Equal Opportunities Act requires every public or private employer with more than ten employees to draw up an Annual Equal Opportunities Plan⁷ as well as an action plan for equal pay⁸. For larger companies it may be necessary to make partial plans adopted to the specific needs of each local branch; the plans should be locally secured among the employees and the local management.

Contents

The Annual Equal Opportunities Plan must contain three elements:

- The plan must list the active equality-promotion measures which are necessary in order to comply with the act.
- The plan must present a survey of existing differences in pay between men and women; employers are obliged to carry out and indicate the measures to be taken on this basis
- The plan must give a follow-up assessment of the success achieved in implementing the measures that were listed in both these respects in the preceding year's plan.

Under Section 2 of the Equal Opportunities Act, employers are required to co-operate with employees in seeking gender equality in working life. In practice, this usually means co-operating with the local trade union at the workplace. There are no model plans available that employers can copy.

Procedure

According to the Equal Opportunities Act the following procedure should be taken into account when drawing up an equality plan:

Step one:

The procedure starts with an annual examination of the current situation. Within the organisation a survey is held with the objective to explore the existing situation concerning equality at the workplace. The survey focuses on six matters:⁹

- Working conditions which are suitable for both women and men.
- Employment
- Combining employment with parenthood
- Prevention of sexual harassment
- Internal mobility
- Recruitment

Step two:

With the result of the survey the employer has to set out the measures that he will commence or implement during the coming year.

⁷ Section 13 of the Equal Opportunities Act (SFS 1991:433)

⁸ Section 11 of the Equal Opportunities Act (SFS 1991:433)

⁹ Section 4-9 of the Equal Opportunities Act (SFS 1991,433)

The employers must annually survey and analyse regulations and practise concerning pay and other terms of employment as well as pay differentials between men and women performing equal work or work of equal value. The results of this survey are to be concluded in a plan of action for equal pay.¹⁰ A summary of this plan of equal pay has to be included in the gender equality plan. The gender Equality Plan should also contain a report on how the measures outlined in the previous years' plan were implemented.

Monitoring

The Equality Plans should be monitored internally by the employer (or HR personnel) and, of January 2001, the local trade unions. Under the Equal Opportunities Act a special equal opportunities ombudsman was installed: Jämställdhetsombudsmannen (JämO). JämO is an independent governmental authority with 25 employees. It is in charge of different activities to promote and monitor equality at the workplace. One of its activities is to educate, advise and examine the companies and public authorities for their equal opportunity work and annual equity plans. One of its main tasks is to monitor compliance with the Act. It is responsible for ensuring that employers draw up equality plans and make reviews on the plan. The Equal Opportunities Ombudsman shall in first instance encourage employers to voluntarily comply with the provisions. He shall also otherwise participate in the endeavours to promote equality in work. To check that gender equality plans have in fact been drawn up and to ensure they meet the legal requirements the Ombudsman may requisite several hundred companies a year to send in their plans¹¹. Sample plans are selected to be assessed by experts. Usually employers are chosen at random or because they are statistically representative of a particular industry or geographical area. He is also entitled to visit the workplace in order to check compliance with the law.¹² If an employer fails to comply with the obligation to draw up an equality plan or refuses to make improvement to the plan at the direction of the ombudsman it may refer the matter to the equal opportunities commission who may order the employer to fulfil his obligations.¹³ Trade Unions are also authorised to request that the Equal Opportunities Commission order a defaulting employer to comply with the legal requirements or risk facing a conditional fine. Before 1994 the provisions of the Equal Opportunities Act could be replaced by the provisions of collective agreements. Since 1 July of that year the employers can no longer get round the law by signing collective agreements.

2.3 Goals of Instrument

The purpose of the Equal Opportunities Act is to promote equal rights for women and men in matters relating conditions of employment and other working conditions, and opportunities for development in work. The aim of the act is primarily to improve women's conditions in working life.¹⁴ This is because the labour market in Sweden is still segregated and women are paid less. The act encourages co-operation between the ombudsman which is a governmental authority and employees organisations government to encourage individual employers to comply with the obligations from the Act. The obligation for employers to draw up Annual Equality Plans is one of several active measures the Act provides to achieve equality at the workplace.

¹⁰ Section 10 of Equal Opportunities Act

¹¹ Section 31 of the Equal opportunities act (SFS 1991:433)

¹² What are the duties of the ombudsman <http://www.jamombud.se>.

¹³ Section 35 of the Equal Opportunities Act (SFS 1991:433)

¹⁴ Section 1 of the Equal Opportunities Act (SFS 1991:433)

2.4 Policy Theory

The goal of the equality plan is to raise awareness among employers of inequalities in their organisational environment and workplace. The procedure of drawing up an Equality Plan will help employers recognize obstacles¹⁵ With the information employers gather from the surveys they can take active steps to help creating a situation in which women and men are paid the same wage for equal value, in which sexual harassment does not occur, in which employees can reconcile work and family life, in which women and men occupy jobs that they have chosen out of interest and not because of their gender and in which the experience and skills of all are accorded proper recognition. A good gender programme is considered to be the best way to prevent discrimination at the workplace.¹⁶

2.5 Implementation of Instrument

The employer is responsible for the gender equality at the workplace but the Equal opportunities Ombudsman says that it is very important that there is backing from the workforce. Employer and employees have to work together to realise gender equality. In practice the employer works together with the Trade Unions to fulfil the obligation to draw up an Equality Plan. The ombudsman advises to set up a group with representatives from both sides. The Union's task is to help ensure that the views and wishes of the employees are incorporated into the plan. The Union also has a vital role in ensuring that the commitments made in the gender equality plan are translated into action.¹⁷

2.6 Reactions to the Implementation

Government

Gender equality is still a major subject for the Swedish government. On 16 June 2004 the ministry of industry, employment and communication published the national plan for gender equality¹⁸. One of the main aims of the plan is that the gender-based power structure must be combated because a gender-based power structure makes women subordinated to men. The government wants to promote gender equality internationally. For the current electoral period the Swedish government focuses on five areas:

- Representation; equal access to positions of power and influence
- Equal pay for equal work and work of equal value
- Violence committed by men against women, prostitution and trafficking in women for purposes of sexual exploitation
- Men and gender equality
- Sexualising in the public sphere.

¹⁵ What are the duties of the ombudsman <http://www.jamombud.se>

¹⁶ What are the duties of employers, union and universities <http://www.jamombud.se>

¹⁷ What are the duties of employers, Unions and Universities? <http://www.jamombud.se>

¹⁸ National action plan for gender equality, Ministry of industry, employment and communication, article number N4009

Other legislation on the subject of equality is the Act concerning the equal treatment of Students in higher education. This act prohibits discrimination on grounds of sex, ethnic background, disability or sexual orientation in universities¹⁹

Ombudsman

According to the Ombudsman the employee organisations and individual employers should start co-operating seriously to create equality in the work place The Equal Opportunities Ombudsman says that the biggest mistake is to let one single person make the plan. Such plans usually end up in vague policy documents leading nowhere.

The Swedish Equality Opportunities Act sets the initiative to draw up an Equality plan on the employer, but the initiative could also come from The Equal Opportunities Ombudsman or the local trade unions.

Employers

The confederation of Swedish enterprise has interviewed 58 of its member organisations. The results of these interviews show that most of the employers have a negative view on the equality plans. The most common reaction of the employers is that the plans are too prescriptive, complex and rigid. The plans are not suitable for each individual case. The employers would rather like to work with equality on a voluntary basis with the means of their own choice. The conclusion from a employers perspective is therefore that the equality plans can not be regarded as a efficient instrument for obtaining equality.

2.7 Effectiveness of the Instrument

In 1999 JämO ordered a survey from Sweden Statistics on the extent of equality plans. The results showed that 25% of the companies had equality plans according to the law and 75% of the public authorities. This means that 75% of the private employers doesn't fulfil the obligations of the Equality Opportunities Act. In 2002 JämO investigated eleven government authorities. At the end of the year only four plans had been accepted, however later in 2002 all the eleven plans were approved.²⁰ It seems that there are many companies (especially in the private sector) who are not fulfilling their obligations. So the implementation in practice is poor. JämO would welcome more research on the effectiveness of the equality plans but has no possibilities to undertake the studies on it's own. There is also a report on Swedish experiences with legislation concerning wage surveys, analysis and action plans for equal pay. This report is however not yet available in English. The Equality Opportunities Ombudsman is at this moment about to translate the report. In October 2005 a new report will be handed over to the government.

The Equal Opportunities Commissions has decided to order a fine in four cases of non-compliance with the obligation to draw a Equality plan.

¹⁹ Act concerning the equal treatment of students in higher education 2001,1286

²⁰ Questionnaire for EIRO comparative study on gender equality plans at the workplace-the case of Sweden, Annika Berg

2.8 Keys to Success

- Co-operation between trade Unions and employers; the ombudsman advises individual employers to co-operate with the Unions when drawing up their Equality Plans. Involving trade Unions has several advantages. First of all the employer can benefit from the experience and knowledge of the Unions in relation to equality plans. Secondly involving Union representatives will create bearing among staff and this might prove essential to the successful implementation of Equality plans.
- Installing an Equal Opportunities Ombudsman; Apart from monitoring compliance with the obligation to draw up an Equality Plan, it advises and trains employers about drawing up an Equality Plan.
- Drawing up a gender equality plan enables individual employers to assess progress on equality issues within their company and take specific measures to combat existing inequalities. It raises awareness of the necessity to commence diversity policy.
- A model Equality Plan could be useful to serve as an example for individual employers. Employers think that the plans are too prescriptive, complex and rigid and therefore it's difficult for them to draw a good plan.

3 The Equality Authority in Ireland

3.1 Introduction

The Equality Authority (EA) was set up with the enactment of the Irish Employment Equality Act 1998 on 18 October 1999²¹. This new independent state-funded body replaced the Employment Equality Agency which was established in 1977. The new Employment Equality Act enlarged the scope of the Equality Authority significantly from two to nine discrimination grounds. The 1998 Act outlaws discrimination on nine grounds in relation to pay and other aspects of and related to employment. It also defines sexual harassment and harassment.

The Equality Authority's mandate covers nine discrimination grounds:

- Gender
- Marital Status
- Family Status
- Disability
- Sexual Orientation
- Age
- Religion
- Race
- Membership of the Traveller Community

The Employment Equality Act 1998 originates from the Belfast Agreement of April 1998, an agreement between the Government of the United Kingdom and Northern Ireland and the Government of Ireland. The two governments agreed to grant the people of Northern Ireland a free choice with regard to their status and further declared "that whatever choice is freely exercised by a majority of the people of Northern Ireland, the power of the sovereign government with jurisdiction there shall be exercised with rigorous impartiality on behalf of all the people in the diversity of their identities and traditions and shall be founded on the principles of full respect for, and equality of, civil, political, social and cultural rights, of freedom from discrimination for all citizens, and of parity of esteem and of just and equal treatment for the identity, ethos and aspirations of both communities"²². Parties to the agreement affirmed their commitment to mutual respect, civil rights and the religious liberties of everyone in their community with a particular focus on the freedom of religion, political thought and aspirations, freedom of residence, the right to equal opportunities regardless of class, creed, disability, gender or ethnicity, freedom from sectarian harassment and the right of women to full and equal political participation. Subsequently Irish equality legislation needed to be amended to come into line with these matters agreed upon and at the same time European legislative developments were included.

In Northern Ireland a single equality body was set up to advise on, validate and monitor the statutory equality legislation and investigate complaints. The Government of Ireland committed itself to ensure at least an equivalent level protection of human rights as in

²¹ On 19 July 2004 the Employment Equality Act 2004 came into force transposing recent EU Equality Directives and amending Employment Equality Act 1998. Since provisions on the Equality Authority have not been amended we will speak of the 1998 Act as this is the Act which set up the Equality Authority.

²² Belfast Agreement 1998, Article 1.

Northern Ireland. Thus with the Employment Equality Act 1998 the Equality Authority was established to guard those human rights.

The agreement further included the obligation for Ireland to introduce equal status legislation. In 2000, the Equal Status Act was enacted. This expanded the role of the EA beyond employment: the Act addresses discrimination on the same nine grounds as the Employment Equality Act 1998 in the provision of goods, services, facilities, accommodation and education. The Irish equality legislation mandates the Equality Authority to promote equality and combat discrimination on a wide range of grounds and in a wide range of fields. These two Acts attribute various powers to the EA to enable them to reach these objectives.

In May 2003 the Minister of Justice, Equality and Law Reform announced the amendment of the two Acts to implement the employment and non-employment aspects of the Race Directive (2000/43/EC), the Framework Employment Directive (2000/78/EC) and the Gender Equal Treatment Directive (2002/73/EC). In July 2004 the Equality Act 2004 was enacted including amendments to both Acts.

3.2 Description of Instrument

According to the Employment Equality Act 1998 the EA is charged with a statutory duty to work towards the elimination of discrimination and the promotion of equality of opportunity in employment on the nine discriminatory grounds covered by the Act²³. The EA may prepare codes of practice which, if approved by the Minister, are admissible in evidence before the courts and may be taken into account in proceedings concerning equality legislation²⁴. Another important power attributed by the Employment Equality Act is the power to conduct Equality Reviews and draw up Action Plans²⁵. The EA has in 2004 over fifty staff members and the twelve member Equality Authority Board consists of experts who come from a wide range of backgrounds and disciplines.

Services

Under the legislation the Equality Authority has four main functions:

- To work towards the elimination of discrimination in relation to the areas covered by the legislation
- To promote equality of opportunity in relation to the areas covered by the legislation
- To provide information to the public on the working of the Employment Equality Act, 2004, The Equal Status Act, 2000, The Maternity Protection Act, 1994 and the Adoptive Leave Act, 1995
- To monitor and review the operations of the Employment Equality Act, 1998, The Equal Status Act, 2000, The Maternity Protection Act, 1994 and the Adoptive Leave Act, 1995 and to keep under review the working of the Pensions Act, 1990 as regards the principle of equal treatment.

²³ Employment Equality Act 1998, section 38-39

²⁴ Employment Equality Act 1998, section 56

²⁵ Employment Equality Act 1998, section 69

According to its Strategic Plan 2003-2005 the Equality Authority is accorded explicit powers to implement its functions²⁶. These powers are:

- To provide assistance at its discretion to people taking proceedings under the equality legislation
- To prepare draft codes of practice for submission to the Minister for Justice, Equality and Law Reform
- To invite a business to carry out an equality review and to prepare and implement an equality action plan or carry out such a review or prepare such an action plan on its own initiative
- To conduct inquiries for any purpose connected with its functions
- To appoint advisory committees to advise it on matters relating to its functions
- To undertake or sponsor research
- To undertake or sponsor activities relating to dissemination of information

The EA has transposed its mandate and subsequent functions into the following services:

- Public information Centre
- Legal Service
- Development
- Research
- Communications
- Publications
- Events
- Library

Public Information Centre

The Public information Centre of the EA provides information to the public on the working of the Employment Equality Act 2004, the Equal Status Act 2000, the Maternity Protection Act 1994, the Adoptive Leave Act 1995 and the Parental Leave Act 1998. Information can be obtained by telephone or letter and from the website. All these services are free of charge.

Legal Service

The EA has an in-house legal service that provides free legal assistance to those making complaints of discrimination under the Employment Equality Act 2004 and the Equal Status Act 2000. Legal assistance can consist of legal advice, writing letters of complaint and notifications, advice and/or assistance with referral of a complaint to the Equality Tribunal and Labour Court, lodging of claims, advice on mediation and legal representation. It is not always necessary to bring a case to court, however, the EA may also communicate with an employer on behalf of a complainant and possibly settle the case on the base of this contact.

Given the limits on available resources, the EA only assists those cases which are of *strategic importance*. It set down Criteria which a potential case has to meet before the EA provides legal assistance²⁷. Whether a case has strategic importance depends on e.g.:

²⁶Strategic Plan 2003-2005: <http://www.equality.ie/stored-files/PDF/Strategic%20Plan%2003-05.pdf>

²⁷ Criteria for Section 67 (of Employment Equality Act 1998) Representation.

1. Criteria related to ability of the claimant:

- The capacity of the applicant to represent himself/herself
- The complexity of the case
- The availability of relevant material which will assist the claimant to represent himself/herself
- The availability to the claimant of other suitable legal assistance by e.g. Trade Union or advocacy.
- Possible availability of alternative remedies.

2. Criteria related to the case and infringement:

- The extent to which serious injustice has been perpetrated against the applicant
- The impact/effect of the discrimination on the applicant
- The proceeding will have beneficial impact:
 - . for other covered under the same or other grounds
 - . for change in practice by employers or service providers
 - . for the development of equality policies and practices
- The geographic spread of similar cases
- The matter involves multiple grounds of discrimination
- The matter raises issues that have the multi-ground relevance (in particular health, education, welfare, accommodation and transport)
- The matter raises issues that refer to grounds where significant case law has not been developed
- The extent to which a substantial body of precedent has already been established in relation to the matter
- The matter raises an issue which is appropriate to be dealt with in the Circuit Court.

3. Other criteria:

- The applicant is reasonably likely to succeed in the proceedings
- The resources available to the Legal Section
- Such other matter as may appear to be relevant to the exercise of assistance

Most cases are referred to the Legal Section from the EA Public Information Centre. Applications for legal assistance may be filed with the EA. The Chief Executive Officer (CEO) will consider the request and may at his/her discretion provide assistance to the claimant. The decision may be based on one or more of the above mentioned Criteria. The decision as to the level and type of assistance will be reported to the Claimant in writing. Claimants may apply to have the decision reviewed by the board. The CEO will review the pending cases regularly, at least once a year, and decide whether to continue assistance.

Due to its limited resources the EA provides legal assistance in only 10 per cent of the total of cases taken under Irish equality legislation. The EA only provides legal representation to cases which may establish new precedents. It is therefore concerned with supporting other sources of advocacy for claimants. It provides training and assistance for the trade union movement and community sector related to the provision of goods and services. It is also involved in development of an advocacy-pack enabling trade unionists to represent their members in cases. In a number of instances the EA can institute proceedings without a claimant e.g. where there is a general practice of discrimination, or in case a an individual has

not been able to refer a complaint for obvious reasons, or in case of discriminatory advertising under the equality legislation²⁸.

The EA represents claimants at the main organisation for hearing cases the Office of the Director of Equality Investigation (ODEI). It can also bring cases before the Labour Court, the District Court and the Circuit Court²⁹.

Development

The legislation provides the EA with powers to support the development of a pro-active approach to equal opportunities in the workplace and in the provision of goods, facilities and services. The Development Section is engaged in number of activities including:

- The support of equality strategies in the provision of education and health services
- Supporting the development of reasonable accommodation for people with disabilities
- Supporting equality/diversity aspects of the quality customer service initiative in the Civil Service
- Running an employment equality review and action plan scheme
- Initiating an annual anti-racism workplace initiative
- Building a planned and systematic approach to equality in employment and in service provision across the nine grounds of the equality legislation
- Supporting the development of work life balance initiatives

For example, in 2003, the EA launched a national Equality Review and Action Plan Scheme. The EA offered its assistance to public and private sectors to develop an equality review and action plan by placing an advertisement in the national press. The scheme provided funding for those organisations wishing to conduct such a review. This initiative was funded by the Government³⁰. The EA is further represented on various (national) committees.

Research

Irish equality legislation gives the EA the power to undertake or sponsor research to progress its functions. The Research Section plans and implements research related to the Strategic Plan of the EA³¹. Its activities involve:

- Planning, commissioning and managing externally contracted research projects
- Implementing the Equality Studies Unit, a technical assistance sub-measure of the Employment and Human Resources Development Operational Programme of the National Development Plan³²
- Carrying out research on an in-house basis

²⁸ Presentation by Niall Crowley, Chief Executive Officer of the Equality Authority), at the Irish Presidency Conference “Closing The Gap: Systematic Approaches to Promoting Equality and Diversity”, Limerick, Ireland, 27-28 May 2004

²⁹ Ireland is divided into eight circuits for the purposes of the Circuit Court, One Circuit Judge is assigned to each circuit. The Circuit Court acts as an appeal court from the District Court in both civil and criminal matters. The appeal takes the form of a re-hearing and the decision of the Circuit Court is final and not appealable.

³⁰ Tony Dobbins, *Comparative Study on gender equality plans at the workplace – the case of Ireland*, EIRO March 2004: <http://www.eiro.eurofound.eu.int/2004/02/word/ie0310202s.doc>

³¹ The Strategic Plan is a publication under which the EA focuses its mandate and resources across a limited and defined set of themes over a designated period of time. A new Strategic Plan is published every three years. So far: Strategic Plan 2000-2002 and Strategic Plan 2003-2005, The Equality Authority

³² More information on the National Development plan on:
http://www.ndp.ie/newndp/displayer?page=home_tmp

- Identifying policy implications of research findings and bringing these forward in relevant arenas
- Promoting initiatives seeking to develop a sound statistical base for research and policy
- Supporting the development of equality research and of the equality research infrastructure
- Developing linkages with relevant public bodies, research and academic organisations and institutions.

Communications

The EA Communication Unit is responsible for promoting the rights established by the legislation and disseminating information and materials on equality. It works to ensure that the public are informed about the work and services of the EA and seeks to raise awareness among employers and service providers of their obligations to the promotion of equality. This Unit is involved in the development of a pro-active media strategy, a public education campaign, an interactive website³³, information on relevant legislation and training materials such as guides and video's e.g. *Quality through Equality – how to build an equality infrastructure in the workplace*, a training video available free of charge for personnel managers and other executive staff. Two major campaigns have been carried out, one concerning family-friendly workplaces and one concerning the anti-racist workplace.

Publications

The EA publishes, both in hard copy and on its website, explanatory brochures on relevant legislation, a free quarterly newsletter and research and policy publications, codes of practice and good practice publications including a step-by-step guide for employers on how to establish an employment equality policy within their organisation. (Some of) the publications are available in various languages. It further publishes video's and a filling out form (ODEI5) by which a claim under the Equal Status Act can be prepared.

Events

Events include information stands, conferences, seminars, briefings, speakers and training on equality and discrimination developments.

Library

A reference library is available to the public at appointment.

Resources

In 2000, its first full year in operation, the EA received a budget of €1.56 million, these are non-pay costs only. In 2004 the budget was €3.149 million. Most of the budget goes on legal fees, research and development, publications and public awareness/publicity. Apart from this separate projects can apply for funding. In 2004, for instance, the EA was allocated €300,000 for its Equality Reviews and Action Plans, which is carrying out on behalf of the Government (National Economic and Social Forum). There are no self-generated financial resources.

³³ <http://www.equality.ie>

External Resources

The EA sometimes makes use of external legal expertise and researchers to conduct casework or assist in conducting surveys and research projects. It also calls for external input into other activities e.g. workshops and seminars.

Other Activities

Codes of Practice

One of its main functions is to draw up codes of practice on the elimination of discrimination on the nine grounds covered by the legislation and the promotion of equality of opportunity in employment³⁴. For example, it has drawn up a code on sexual harassment and harassment on other grounds in 2002.

Equality Review and Action Plan

The EA may, if it thinks appropriate, carry out an equality review or both an equality review and an action plan in relation to a particular business, group of businesses or the businesses making up a particular industry or sector providing that they have more than fifty employees. An Equality Review is an audit of the level of equality of opportunity which exists in employment in a particular business, group of businesses or the businesses making up a particular industry or sector thereof. An Action Plan is a programme of actions to be undertaken in employment in a business or businesses to further the promotion of equality of opportunity in that employment. The EA may also invite them to do an equality review and/or action plan themselves³⁵. The review or plan can either be directed at the generality of equality of opportunity or at a particular aspect of discrimination in an employment. The EA is authorised to require an employer to provide information for the purpose of an equality review or action plan. If the employer fails to implement any provision of the action plan the EA has the power to first serve a so-called advance-notice in writing to comply with the action plan and, if the employer continues to fail compliance, serve a substantive notice. The receiver may appeal to the Labour Court within 42 days of the date of service against the notice or any requirement of the notice This notice can be enforced before the High or Circuit Court³⁶.

Political Decision Making

The EA acts as an independent and strategic body and is involved with Government departments, social partner organisations, equality organisations, public and private sector organisations and individual trade organisations. It has a considerable influence on government policy through providing input to the national action plan on social exclusion and the employment action plan. This partnership is further evident in the involvement of the various stakeholders into e.g. research and development work of the EA.

The Equality Authority at European Level

At European level the EA is involved with the implementation of EU level strategies within Ireland, e.g. the social inclusion strategy and the employment strategy and involved in EU level structures such as the Advisory Committee on Equality of Opportunity between women

³⁴ Employment Equality Act 1998, part V, section 56

³⁵ Employment Equality Act 1998, part VI, section 69

³⁶ Employment Equality Act 1998, part VI, section 70-72

and men and with the RAXEN network of the European Union Monitoring Centre on Racism and Xenophobia. The EA further co-operates with specialised equality bodies across the European Union.

Staff

The EA board is appointed by the Minister for Justice, Equality and Law Reform, it consists of twelve members of which at least five are male and five are female. From its members one is appointed as chairperson and one as vice-chair. The Employment Equality Act 1998 explicitly states that there will be two members, one male one female drawn from both employer and employee organisations. The remaining members will be experts on consumer, social and equality issues, issues related to the provision of goods and services and other experts on relevant subject matter such as law, finance, management and administration. The members of the board serve not more than a four year period³⁷.

The five sections are staffed with people seconded from the Department of Justice, Equality and Law Reform with some externally recruited equality, research and legal experts. In 2003 a total of fifty-four people were working for the EA³⁸.

External Responsibility

According to section 54 of the Employment Equality Act 1998, the EA is obliged to submit an annual report to the Minister of Justice, Equality and Law Reform. It must include information on the performance of the functions of the EA in general and more specifically make account of any equality reviews it made in the preceding year and include information concerning the implementation of equality action plans.

3.3 Goals of Instrument

Goal and Functions

The EA was set up to work towards the elimination of discrimination and the promotion of equality of opportunity in employment and the provision of services and goods on the nine grounds covered by Irish equality legislation³⁹. Its mission is to promote and defend the rights established in the equality legislation and to provide leadership in building commitment to addressing equality issues, celebrating the diversity of Irish society and mainstream equality considerations across all sectors⁴⁰.

Strategic Plan

The EA is required to prepare and submit to the Minister for approval, a Strategic Plan for a three year period⁴¹. This plan states the main themes of focus of the EA activities. Due to limited resources and staff and its wide and complex range it is vital for the EA to manage and prioritise strategically. It needs to make hard choices in prioritising such themes. These choices have to fall within the nature of its mandate and before the themes can be established an intensive consultative process is held. This process involves trade unions, the community

³⁷ Employment Equality Act 1998, part V, section 44

³⁸ Equality Authority 2003 annual report, p. 90

³⁹ Equal Status Act 2000, part IV section 39 & Employment Equality Act 1994, part V section 39.

⁴⁰ Strategic Plan 2000-2002

⁴¹ Employment Equality Act 1994, part V section 40

and voluntary sector, women's organisations, equal opportunity practitioners, the business sector, farming organisations, the Equality Commission for Northern Ireland and other equality institutions. Initial ambitions are established by the EA itself and then the various stakeholders are invited to contribute to and discuss these ambitions during a series of consultations. Finally, a draft plan is developed into a final version which is submitted to the Minister. The Plan is further developed on an annual basis through the preparation of detailed business plans which set out the deployment of resources and the specific actions in pursuit of each objective for that year and those are accounted for in annual reports. The Strategic Plan is the foundational element to the planning of work by the EA⁴².

Whereas in its first Strategic Plan⁴³, *Equality in a Diverse Ireland*, which ran from 2000 to 2002, the EA took an open and expansive approach to its mandate, with its current Strategic Plan 2003-2005⁴⁴ the EA focuses its mandate and resources at a defined number of themes:

- Building equality in service provision that impacts on the quality of people's lives
- Contributing to a more accessible workplace and labour market
- Developing initiatives specific to the disability ground, to the issues of carers under the family status ground, and to the issue of racism
- Supporting the development of effective equality strategies at national and local level
- Addressing the specific situation and experience of those within the nine grounds faced with additional barriers of poverty and exclusion
- Maintaining and developing the internal structures and systems of the Equality Authority.

The Strategic Plan is presented in the Houses of Oireachtas, part of the Irish Parliament, before the Joint Committee on Justice, Equality, Defence and Women's rights. Common members can comment on the EA, its work and future plans.

3.4 Policy Theory

*An integrated approach holds new potential for creativity and action. It involves an exploration of strands of exclusion that are common across the nine grounds. Such strands include denial of difference, economic marginalisation and powerlessness. It involves taking multiple identities as a starting point for action*⁴⁵

With the enactment of the Employment Equality Act 1998 the range of discrimination grounds was expanded significantly for the first time in over twenty years. Since discrimination on the grounds of gender and marital status was outlawed in Ireland by the Employment Equality Act 1977, which was a response to European Legislation, there had been little legislative development in relation to other forms of discrimination. To come into line with obligations from the Belfast Agreement 1998⁴⁶ and European legislative developments as regards discrimination the 1977 Act had to be revised and updated. The Irish legislator chose to include all these nine grounds in one single Act and appoint a single

⁴² Equality Authority 2002 annual report

⁴³ Strategic Plan 2000-2002: <http://www.equality.ie/stored-files/PDF/Strategi.pdf>

⁴⁴ Strategic Plan 2003-2005: <http://www.equality.ie/stored-files/PDF/Strategic%20Plan%202003-05.pdf>

⁴⁵ *The Equality Authority Contributing To Gender Equality*, Presentation by Niall Crowley (CEO of EA) at National Women's Forum, June 2001

⁴⁶ see Introduction

independent state-funded body to inform the public on this new piece of legislation and its subsequent rights and monitor and review that same legislation. After long delays the new Act was finally approved and came into force in 1999. Part V, consisting of sections 38 to 61, subsumes the Employment Equality Agency, which was established under the Employment Equality Act 1977, into the Equality Authority. With the Equal Status Act 2000 the agenda of the EA went beyond employment and broadened to the provision of goods, services and facilities. According to the Chief Executive Officer of the EA it is necessary to have a broad focus on equality because the experience of discrimination is not confined to the workplace alone. The issue requires a more holistic approach and strategy. The EA thus takes a multiple identity approach as a starting point for action. In doing so the EA wishes to develop more effective equality strategies⁴⁷.

3.5 Reactions following Implementation

Government

Political commitment to the reduction of discrimination is evident. There is close co-operation between Government, social partners, the EA and other expert organisations. For example, the Government together with social partners set up the National Programme for Prosperity and Fairness which put equality and social inclusion at the agenda of enterprises. This programme ran from 2000 to 2003. Negotiating parties were nineteen organisations, including social partners and government. A national Framework Committee was established under this national programme bringing together the Irish Congress of Trade Unions (ICTU), the Irish Business and Employers Confederation (IBEC), the Department of Justice, Equality and Law Reform, the Department of Finance, the Health Service Employers Agency, the Equal opportunities Network and the Local Government Management Services Board. It is chaired and supported by the EA. It sought to assist employers and trade unions to respond to challenges arising from implementation of the Equality Act and to promote equality at the workplace. It also published a guide for employers on employment policies⁴⁸. Furthermore there is a political commitment to publish regular reviews of the operation of equality legislation and to ensure that the enforcement authorities are in a position to effectively carry out their duties.

Another example of partnership in combating discrimination is the National Economic and Social Forum which is the advisory body of Irish Parliament on equality and social inclusion policies. It includes representatives from e.g. government departments, social partners and public and private sector organisations. It regularly publishes reports on equality issues and makes recommendations related to e.g. equality legislation, the budgeting and staffing resources for equality institutions and the mainstreaming of equality issues.

Unions

The Union's commitment to improving equality has resulted in incorporating equality in successive centralised national agreements e.g. *Partnership 2000* and in May 2003 *Sustaining Progress*. The latter contained a commitment to equality proofing. This entails the proofing of

⁴⁷ *The Equality Authority Contributing To Gender Equality*, Presentation by Niall Crowley (CEO of EA) at National Women's Forum, June 2001

⁴⁸ *Guidelines for Employment Equality Policies in Enterprises*, The Equality Authority, IBEC and ICTU

policies and services in the public sector to avoid discrimination and ensure policy coherence. Furthermore, as a result of trade unionists' lobbying the Irish Congress of Trade Unions has adopted the document *Mainstreaming Equality*, which promotes the integration of equality issues within the trade union nationally and locally⁴⁹.

Employers

With respect to the work of the EA the Irish Congress of Trade Unions (ICTU) states that it values its two places at the board and it feels the work of the Authority helps to set the equality agenda in Ireland. There is close co-operation between ICTU and the EA. ICTU is very positive about its experience with them. The only disadvantage seems to be that most of the scarce resources available for equality initiatives in Ireland seem to go to the EA. It is sometimes difficult for other organisations to access funds independently to do their own initiatives⁵⁰.

3.6 Effectiveness

Formal Effectiveness

Enquiries

In the year 2002 a total of 10,978 of information enquiries were made to the EA, approximately 38,650 telephone calls were dealt with, there was a total of 195,900 hits to the EA web site and 46,000 publications were downloaded from the site. This is a significant increase since the year 2000 during which a total of only 9,318 enquiries were made. The number of enquiries made in 2003 remained more or less the same as in 2002 while downloads went up to 65,109. In 2000 most of the enquiries were under the Employment Equality Act 1998 (3,214) showing a slight decrease in 2003 when a total of 3,011 enquiries on this act were made.

Legal Assistance

In 2001 a total of 1,080 cases were being handled by the EA, a significant increase compared with only 202 cases during 2000, whereas in 2003 a total of 1,353 were worked on. The EA states that it is difficult to compare the number of cases in 2003 to the past situation since the criteria for taking on a case were revised in 2002, leaving a large amount of claims unsupported. Whereas most cases in 2000 were on gender discrimination, during the year 2003 discrimination on the grounds of race and Traveller Community dominated the case files⁵¹. During 2003 there were 43 applications for legal representation. A total of 36 was granted. There were 24 under the Employment Equality Act 1998 of which 8 on gender, 5 on race, 3 on disability, 3 on Traveller Community, 1 on age and 1 on victimisation, one case was a multiple ground case (gender and age) and two were refused. There were 14 cases

⁴⁹ Enda Hannon and Jackie Sinclair, *The implications of the Employment Equality Act 1998*, EIRO Sept 1999: <http://www.eiro.eurofound.eu.int/1999/09/feature/ie9909144f.html>

⁵⁰ Interview by e-mail with David Joyce of the Irish Congress of Trade Unions

⁵¹ Equality Authority 2000 annual report: <http://www.equality.ie/stored-files/RTF/AR2000.rtf>, Equality Authority 2001 annual report: <http://www.equality.ie/stored-files/PDF/Annual%20Report%202001.pdf>, annual report 2003: http://www.equality.ie/stored-files/PDF/Annual_Report_2003.pdf

under the Equal Status Act 2000 of which 6 on Traveller Community and 8 on disability. In seven cases legal representation was refused⁵².

Representation on Committees

During the year 2003 the EA was represented on a total of twenty-three policy committees such as the Educational Disadvantage Forum, Framework Committee for the Development of Equal Opportunities Policies at the level of the Enterprise, High Level Steering Group of Know Racism and Equality for Lesbian, Gay and Bisexual People. It was further represented at eleven National Development Plan and Community Framework Operational Programme Monitoring Committees.⁵³

Partnership Approach

That same year the EA co-operated with various government departments and organisations. The EA together with the Department of Education and Science developed information materials for schools. Together with the Irish Congress of Trade Unions and Irish Business and Employers Confederation it continued to work in the Equal Opportunities Framework Committee, the Work-Life Balance Framework Committee and the Anti-Racist Workplace Week. It worked with the Department of Enterprise, Trade and Employment to mainstream policy and practice learning from the EQUAL projects⁵⁴. It worked on reasonable accommodation of disabled people together with the national co-ordinating committee for the European Year of People with Disabilities. Finally it developed an new approach to equality proofing the National Action Plan on Social Inclusion together with the Office of Social Inclusion.

The EA is further involved in many projects related to the national agreements e.g. the development of models for equality proofing public sector policy and services⁵⁵. Another recent example is its work with social partners, government and other organisations in the Framework Committee on Equal Opportunities at the Level of Enterprise established under the National Programme for Prosperity and Fairness 2000-2003.

Behavioural Effectiveness

The EA has a broad working field. It deals with discrimination not only in the workplace, but also in other contexts of public life. As this analysis focuses on compliance with equality legislation at the workplace we only analyse material effectiveness related to employment.

In 2002, a survey among three hundred private sector, and one hundred public sector (excluding government departments) organisations, was conducted to identify what organisations are doing to promote equality⁵⁶. The survey shows that over 70 per cent of all organisations have got information on the equality acts, but only around 46 per cent know what they involve. Further key findings were that less than half of all organisations have a formal written policy to deal with equality issues. In the private sector 40 per cent of

⁵² 2003 EA Annual report, p. 48

⁵³ More information on Irish National Development Plan: www.ndp.ie

⁵⁴ The EQUAL Programme is funded by the European Social Fund (ESF) and tests new ways of tackling discrimination and inequality experienced by those in work and those looking for a job. More information on: http://europa.eu.int/comm/employment_social/equal/index_en.html

⁵⁵ National Agreement *Sustaining Progress*.

⁵⁶ Millward Brown IMS, *Towards a Workplace Equality Infrastructure*, An overview of the equality infrastructure in organisations with special reference to minority ethnic workers including members of the Traveller community, 2002

organisations and 63 per cent of the public sector claim to have a formal written policy. The approach tends to be a general written policy. Just over a quarter of all organisations claim to have one written policy that specifically covers anti-harassment and sexual harassment, employment equality and equal status equality. Only 12 per cent of all organisations have a specific anti-harassment policy. In the public sector 24 per cent of organisations have a separate anti-harassment policy compared with only 10 per cent in the private sector. Nearly 80 per cent of organisations in the public and 69 per cent in the private sector claim to have informal plans and procedures to deal with equality issues.

The same survey states that there is limited evidence of an equality infrastructure beyond a formal written policy. Just over half of all organisations have nominated a staff member to deal with equality issues. A similar percentage of all organisations have identified where change is needed. Only 36 per cent of all organisations have organised equality awareness and training for staff while a mere 15 per cent of all organisations have established a committee to deal with equality issues.

Conclusions on Effectiveness

When looking at the total amount of information enquiries to the EA, which in four years time increased from just 9,000 in 2000 to over more than 300,000 enquiries in 2003, it seems that the EA supplies a need. For instance, in the three months following the enactment of the Equal Status Act 2000 the EA received more than 900 enquiries on this piece of legislation⁵⁷. It thus seems to fulfil its informative task quite well. Especially the existence of an up-to-date, user-friendly and well stocked web site helps the EA to establish this goal. Nowadays the world wide web is a useful means to inform the public. The EA seems to make good use of it. In 2003 alone, over 65,000 publications, such as guides to equality legislation and research reports, were downloaded from the site by members of the public. Around 70 per cent of employers have information on equality legislation. Although it is not clear whether they received it from the EA or through other channels, the promotion of equality seems to be well on its way. The EA co-operates with many organisations to achieve its ambitions and is involved in many specialised committees. The EA seems to be on good working terms with many governmental departments, social partners and expert organisations and to have a considerable influence on the equality agenda of social partners and government equality policy.

3.7 Keys to Success

- The EA applies an integrated approach to the elimination of discrimination. The Irish legislator chose for a single institution to implement, monitor and review its equality legislation. Its mandate covers nine grounds of discrimination in various areas of the Irish society. Due to its representation on the committees of many specialised equality organisations it can draw knowledge and practical experiences with the legislation from those organisations and in reverse pass information and experience on to them.
- The board and staff of the EA are made up of people seconded from the Ministry, social partner organisations and people from experts organisations. This implicates joint and close co-operation of different stakeholders in the elimination of discrimination and promotion of equality. The drawing up of its three year Strategy

⁵⁷ Equality Authority Annual Report 2000: <http://www.equality.ie/stored-files/RTF/AR2000.rtf>

Plan actively involves all these stakeholders, which enables those stakeholders to influence the equality agenda and its focus.

- The EA only provides legal assistance to cases of *strategic importance*. This allows the EA able to focus on those cases which may establish precedents and subsequently have more impact on the elimination of discrimination in society as a whole. The remaining cases are referred to, for instance, the trade unions. The EA does assist the union representatives by providing necessary training.
- The EA develops initiatives with a multiple identity approach. The EA acknowledges the multiple identity held by many people and the fact that people can be located in more than one of the grounds named in the legislation. Because its mandate covers nine grounds it can therefore search to address parallels which seem to exist between discrimination on all nine grounds and progress these simultaneously.

4 The legal obligation for social partners in France to negotiate on equal treatment for men and women

4.1 Introduction

The introduction of a legal obligation for social partners in France to negotiate on equal treatment for men and women must be seen both within the legal context of collective bargaining in France and within the historical context of French equality legislation and its implementation.

The Duty to bargain in French Collective Bargaining Law

According to a law of 13 November, 1982, collective bargaining in France is not merely a recognised freedom held by the social partners. Legal obligations relating to bargaining on specified issues have been introduced. Some of the obligations relate to the industry-wide context, for example the obligation to negotiate on pay on a yearly basis and the obligation to examine the need to revise job classifications every five years. In particular, however, these obligations relate to the context of the individual enterprise and cover subjects such as pay, working hours, patterns of working time, training. Besides the actual obligations to bargain on certain subjects, the law also mentions compulsory examinations to be conducted regularly and obligations to give notice of certain events, particularly in the public sector (termination of collective agreement, strike). The duty to bargain is directed at employers and employers' organisations, who are responsible for initiating the bargaining, proposing a timetable and providing the information required. It does not amount to an obligation to conclude a collective agreement. If negotiations happen to break down, a minute of failure to agree must be drawn up which records the respective proposals put forward by the parties and the measures which the employer unilaterally intends to adopt. The employer is then bound by these measures as a unilateral commitment.

French Equality Law and the Position of Women in the Labour Market

The introduction of an obligation to bargain with respect to equality between men and women in the labour market is closely related to the history of French equality law, more specifically to its lacking implementation and its poor results, that is the persistence of inequalities in the labour market between men and women.

After having introduced equal pay legislation in 1972, the law of 13 July 1983 (Roudy Act), inspired by the European Directive 76/207/EEC of 9 February 1976 (on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotions, and working conditions) was the first legislative instrument in France aimed at bolstering gender equality at work. It consolidated the principle of equal rights (non-discrimination) and opened the possibility to take positive action in favour of women with the aim to remedy existing inequalities by amending the Labour Code. The Act includes the obligation for companies with more than 50 employees to present an annual written report on the comparative employment situations of men and women to be assessed by the Works Council, or, if no such body exists, the staff delegates. It also opens the possibility for social partners to negotiate, at enterprise level, on equality between men and women.

In 1999, however, a report by Catherine Génisson, commissioned by the Prime Minister, Lionel Jospin, highlighted persistent gender inequalities in the workplace, in terms of recruitment, pay, access to training and career development.⁵⁸ Moreover, it turned out that the possibilities as well as the obligations of the Roudy Act were poorly applied in practice. Génisson recommended, among other things, not to make (too much) new legislation, but rather to reinforce the means provided by the Roudy Act especially by empowering the social partners.

4.2 Description of Instrument⁵⁹

The act of 9 May 2001, the Génisson Act⁶⁰, making new amendments to the Labour Code, aims to incorporate the concept of occupational equality into all bargaining. It therefore:

- makes bargaining, instead of a possibility that can be applied on a voluntary basis, an obligation for employers at both company and sector level;
- introduces sanctions in case of non-compliance;
- improves the content of the compulsory yearly comparative report, as a basis for the negotiations, by making extra demands on the report;
- creates the obligation for large companies (200 or more employees) to install an occupational equality committee, charged with the preparation of the deliberations of the Works Council on the comparative report;
- introduces the principle of proportional representation of men and women on the lists of candidates for the elections of the *conseils des prud'hommes*, the works council and the employee delegates.

The government has created different forms of financial incentives to support equality bargaining.

Specific and Integrated Negotiations at Two Different Levels

The Génisson Act makes bargaining on occupational equality between men and women compulsory. It creates two kinds of obligations for employers, both at sector level as well as at company level to bargain on occupational equality between men and women:

- The obligation to negotiate *specifically* on the issue of occupational equality between men and women (*negotiation spécifique*).

Individual employers of companies with 50 or more employees are obliged to enter into negotiations with union representatives at company level on the objectives with respect to occupational equality between men and women in the company as well as on the measures to be taken to attain that equality. These negotiations have to take place at a yearly basis. The obligation does not amount to a duty to conclude a collective agreement, but if such an agreement is made, the compulsory frequency of the negotiations drops to once in every three years. The negotiations are based on the compulsory yearly report on the comparative situations of men and women in the company.

⁵⁸ C. Génisson (1999), *Femmes, hommes : quelle égalité professionnelle ? La mixité professionnelle pour plus d'égalité entre hommes et femmes*, Paris : Ministère du Travail.

⁵⁹ This paragraph is based, beside the text of the Génisson Act, on information from the websites of the union confederations CFDT and CFTC, www.cfdt.fr and www.cftc.fr and on the French contribution to an EIRO comparative study on gender equality plans in the workplace: C. Meilland, 2001, *Gender equality plans at the workplace – the case of France*, www.eiro.eurofound.eu.int.

⁶⁰ Loi no 2001-397 du 9 mai 2001 relative à l'égalité professionnelle entre les femmes et les hommes.

In case of neglect by the employer to initiate the negotiations a year after the last ones have taken place, any representative union organisation can demand the negotiations to be started. The employer, then, has to inform the other representative unions and send them a convocation within a period of eight days.

If the negotiations are successful an agreement is signed between the employer and at least one union representative at company level, which has to be deposited at the Departmental Directorate of Labour, Employment and Vocational Training and at the Secretariat of the *conseil des prud'hommes*. If negotiations fail to amount to an agreement, a minute of failure to agree must be drawn up by at least one of the parties, which records the respective proposals put forward by the parties and the measures which the employer unilaterally intends to adopt. This minute of failure also has to be deposited at the offices mentioned.

The Génisson Act created the same obligation at *sector level*, however not on a yearly basis but with intervals of three years. The negotiations at sector level also have to take as a starting point a report on the comparative situations of men and women in the sector.

- The obligation to *integrate* the issue of occupational equality between men and women into other obligatory negotiations.

Individual employers thus have to take the issue into account within the context of their annual negotiations on pay, working hours, patterns of working time, training, etc. At *sector level* the issue of occupational equality between men and women has to be taken into account within the context of the obligatory annual negotiations on pay and the obligatory negotiations on job classification and training schemes every five years.

Preconditions and Supportive Measures

Comparative report

The companies that are obliged to engage in the negotiations as explained above – that is companies with at least 50 employees – have to draw up an annual report on the comparative situations of men and women in the company. The Génisson Act, as compared to the former Roudy Act, makes more demands on the content of the report. The report has to be based on an analysis of relevant variables, in figures, that are defined by a governmental enactment of 12 September 2001, and may eventually be completed by more specific variables that take into account the particular situation of the company.

The figures defined by the governmental enactment of 12 September 2001 have to give insight into the existing differences between men and women, and eventually, into factors that account for achieved changes or developments to anticipate on. They are divided into four categories:

- general employment conditions,
- wages (categorised both by sex as well as according to job categories)
- education and training (by sex)
- working conditions.

The specific variables mentioned in the Génisson Act, that take into account the particular situation of the company, see to its sector of activity, its culture and its geographic location. The comparative report has to be assessed by the Works Council (or, if no such body exists, the staff delegates) that has to give its well-motivated opinion. It also has to be made known to the employees in the workplace.

Occupational equality committee

In companies with 200 or more employees, the Works Council is obliged to install an occupational equality committee. It is charged with the preparations of the deliberations in the Works Council on the comparative report.

Financial Incentives to Equality Bargaining

Financial incentives have been created by the government to support equality bargaining both at sector and company level:

- Companies with less than 300 employees can benefit of advisory support (*aide au conseil*) to clarify the company's choices by doing research on the possibilities of ameliorating women's positions. A contract has to be signed between local government officials and the employer, after assessment by the Works Council.
- Companies with less than 600 employees can profit from financial aid in the context of gender balance contracts (*contrats de mixité*). They allow women, on an individual basis, to enter into traditionally male jobs. The contract may cover the funding of a training course, but also a complete overhaul of working conditions, equipment and facilities to increase levels of take-up of posts by women. The contracts are concluded between the (local) government, the employer and the female employee.
- Both specific as well as integrated collective agreements on occupational equality between men and women may be the object of financial support if they contain exemplary measures as to support women's positions. A contract has to be signed between the government and the sector or employer, after the assessment of the union organisations (*contrat d'égalité*).

Sanctions

The neglect of the obligation to negotiate on occupational equality is equated with the offense of obstructing the right to found a union. An employer risks criminal sanctions:

- If he neglects to take any initiative to negotiate within a period of twelve months after the former specific negotiations.
- If he does not convoke the union organisations within the term of 15 days after the demand to negotiate of one of them.

The sanctions are:

- One year of imprisonment
- And /or a fine of €3811,23.

4.3 Goals of Instrument

The objective of the legal obligation for social partners at sector and company level to negotiate on equal treatment in the labour market for men and women once in every three years is to integrate the equality issue into all bargaining. In other words, it is a measure aimed at gender mainstreaming in industrial relations, meant to lead to more gender-aware collective agreements. That is, collective agreements that take into account the specific situation of both women and men and that are not any longer based on the assumption of a male model of work.

Génisson stresses in her report⁶¹ the aim of equality legislation in France, that is, complete and real professional equality for women and men as well as the possibility to reconcile professional life with family life, both as contrasted with goals striven at or achieved in other countries, for example the adaptation of working conditions to the needs of women (Nordic countries, the Netherlands), the creation of possibilities to choose between family life and working life (Germany, Austria) or the possibility to enter into the higher professional ranks only at the expense of family life (Greece, Italy, Portugal).

4.4 Policy Theory

Experience with the Roudy Act proved that voluntary measures are not adequate to get social partners take up the issue of equality in collective bargaining in a satisfactory manner, that is, at a regularly basis, at all levels, with respect to all bargaining issues. It is assumed that by introducing an obligation for social partners to bargain on equality instead of the possibility to do so as formulated in the Roudy Act, the frequency of equality bargaining will rise. By creating both specific negotiations on the issue of occupational equality between men and women as well as integrating equality bargaining into all bargaining, the issue of equality bargaining cannot be tucked away in a few agenda items, but serves as an analytical tool in all negotiations (the gender mainstreaming principle).

4.5 Implementation of Instrument

National Level

Although the obligation to negotiate on occupational equality between men and women in the labour market, as formulated in the Génisson Act, has been directed at sector and company level, an important step in implementing it has recently been made at national level.⁶² On 7 April 2004, after nine months of negotiating, a national intersectoral agreement on gender equality and gender balance in workforce was signed by the main employers' organisations⁶³ and the five representative trade union confederations⁶⁴.

The agreement is intentional in character, not mentioning any statistical targets or sanctions. Its aim is to lay down parameters for future sector and company level bargaining. It is a framework agreement that must be adapted at sector and company levels.

The agreement means a reinforcement of the Génisson Act in that it stipulates issues that have to be negotiated on and it sets out certain methods for reaching equal treatment. For example,

⁶¹ Ibidem.

⁶² C. Meilland, *Intersectoral Agreement signed on gender equality*, www.eurofound.eu.int/2004/04/feature/fr0404104f.html

⁶³ The Movement of French Enterprises (*Mouvement des Entreprises de France*, MEDEF), the General Confederation of Small and Medium-sized Enterprises (*Confédération générale des petites et moyennes entreprises*, CGPME) and the Craftwork Employers' Association (*Union professionnelle artisanale*, UPA).

⁶⁴ The General Confederations of Labour (*Confédération générale du travail*, CGT), the French Democratic Confederation of Labour (*Confédération française démocratique du travail*, CFTD), the General Confederation of Labour Force ouvrière (*Confédération générale du travail-Force ouvrière*, CGT-FO), the French Christian Workers' Confederation (*Confédération française des travailleurs chrétiens*, CFTC) and the French Confederation of Professional and Managerial Staff-General Confederation of Professional and Managerial Staff (*Confédération française de l'encadrement-Confédération générale des cadres*, CFE-CGC).

it is agreed that motherhood may not hinder a women's career, and to ensure this, a link with the company must be maintained during the period of maternity leave, and the employer must offer a special interview before and after the period of leave. Furthermore, the agreement states that unjustified gender-based pay discrepancies must be corrected, stereotypes surrounding employment areas thought of as 'women's work' should be tackled, and access to training must be the same for everyone. By specifically focussing on these issues and methods, the national agreement is agenda-setting for the negotiations at sector and company level.

The absence of any statistical targets, especially on the reduction of pay inequalities, in the agreement was regretted heavily by one of the union confederations, the French Democratic Confederation of Labour (CFDT). The confederation points at a European Directive that imposes the obligation at the member states to diminish this difference with 50% before 2010. The agreement is supplemented by a jointly-drafted letter sent to the government on 7 July 2004, since some of the agreement's provisions require state intervention.

Sector and Company Level

Some firms had already begun implementing the measures provided for in the new intersectoral agreement, and also before the agreement was reached, equality has been an issue on the bargaining agenda of sectors and companies. But to the best of our knowledge, any reliable statistical data on the implementation of the obligations of the Génisson Act are not available as to date. Research of the French Ministry of Social Affairs, Labour and Solidarity on the decade of the nineties of the 20th century reveals that since 1990, 155 agreements in 125 sectors at all levels (national, regional and *départemental*), of which 118 were at the national level, have been signed on the issue of gender equality, out of a total of more than 12.000 agreements.⁶⁵

4.5 Reactions following implementation

Employers' Organisations

The employers' organisations recognise the problem of women's positions in the labour market as a problem of their own. The Movement of French Enterprises (*Mouvement des Entreprises de France*, MEDEF) states that companies need female employees to develop and to remain competitive. The organisation considers women's labour as a factor of social dynamism and economic growth. It points at expected demographic developments that will cause tension in the labour market and will make it necessary to develop women's labour at all levels of the organisation.

MEDEF is happy with the national intersectoral agreements because it aims at a mentality change that is necessary to integrate women at all levels of the organisation. The employers consider such a step necessary at the basis of the experiences with the Roudy Act that has not brought occupational equality. The employers also approve of the framework character of the agreement for it will not put needless constraints or burdens on the companies but makes it

⁶⁵ Ministry of Social Affairs, Labour and Solidarity, Une décennie de négociation collective sur l'égalité professionnelle dans les branches', *La négociation collective en 2002* ('A Decade of Collective bargaining on Gender Equality and Sector Level', *Collective Bargaining in 2002*), 2003, cited by Meilland, *Gender equality in the workplace – the case of France*, 2004, www.euro.eurofound.eu.

possible to take into account the specific characteristics of professions and situations. The measures proposed will be more effective than the law, according to the employers, because they are realistic.

Unions

The unions have reacted positively at the introduction of the Génisson Act, characterising it as a chance they have to leap at. To avoid the Act to stay a dead letter like the former Act of 1983, the unions have been active in promoting the implementation of the Act by disseminating information and developing strategies and instruments and by campaigning, for example at the occasion of International Women's Day at 8 March. The French Democratic Confederation of Labour (CFDT) for example developed a plan of action and an equality bargaining guide for negotiators and occupational equality instructions for activists at company level. Another example is a model agreement, developed by the General Confederation of Labour (CGT).

Less content were the unions, especially CFDT and CGT, with the character of the national intersectoral agreement. They point at the absence of any statistical targets as a missed chance to ameliorate women's positions in the labour market and in the same run to comply with agreements made in Europe as to reduce pay inequalities between men and women with 50% until the year 2010. Moreover, CGT has asked further talks on women's retirement. On the other hand, the unions consider the agreement a step forward, for it does fill in the so-called empty obligation of the Génisson Act by pointing at specific issues to bargain on and specific methods to be used.

Government

In the process of the negotiations on occupational equality of the social partners at national level that have recently resulted in the national, intersectoral agreement, government has played a supporting role, notably by organising a round table discussion on the subject in December 2002. After the signing of the agreement, the Minister of Occupational Equality has introduced the so-called Equality Label, meant to be a measure complementary to the demands of the law and the collective agreement. The label is developed in co-operation with the social partners. Companies – both public and private, small and medium size as well as large companies – can enter the procedure to obtain an equality label at a voluntary basis. The label is attributed by an independent organisation on the basis of 18 criteria. A tripartite commission advises on the attribution. The criteria see to different aspects of occupational equality:

- Actions of information and communication;
- The signing of an agreement on occupational equality;
- Measures to promote equal access of women and men to continuous vocational training;
- Policies aimed at equal representation of women and men in decision making;
- Taking into account parenthood.

4.6 Effectiveness

An evaluation of the effectiveness of the Génisson Act is currently being undertaken by the French government.⁶⁶

The reactions of the parties involved and the agreement being reached at national level point in the direction of at least a formal effectiveness of the measure. Methods for implementation are being developed by the union confederations, an intentional agreement between the social partners has been concluded at national level, and support is being given by government.

Behavioural effectiveness is to be expected as the national agreement has set standards for sector and company level by mentioning issues that have to be negotiated on and methods to be implemented.

4.7 Keys to Success

The instrument being of a rather recent date and evaluative research not having been completed yet, the formulating of keys to success is only possible at a hypothetical basis. First of all, we have to recall the fact that making certain issues obligatory to bargain on, is a common measure within the French collective bargaining system. Equality bargaining is just one of the many issues that the social partners are obliged to bargain on at a regularly basis. This characteristic of the French industrial relations system might well be a necessary condition for the success of the obligation to bargain on equality issues. If it is true that in the French system the duty to bargain on equality is in this sense nothing more than additional “business as usual”, this might be an important condition. It underlines the point that if we consider the conditions of implementing the measure in other EU-countries, we have to take careful account of the characteristics of national systems of industrial relations. It is important to raise the question whether or not the measure fits in with that national system or whether it needs to be adapted.

Further preconditions for the success of equality bargaining (be-it on a voluntary basis or at the basis of a legal obligation), more specifically the integration of equality issues into all bargaining (gender mainstreaming) have been formulated at the basis of a five-year research project on collective bargaining and equal opportunities in the EU by the European Foundation for the Improvement in Living and Working Conditions. Factors which may encourage the use of collective bargaining as an instrument for strengthening and mainstreaming equal opportunities and recommendations for action are listed in an analysis of this research project by the European Industrial Relations Observatory (EIRO)⁶⁷:

Social partners (at the appropriate levels) should:

- Improve their expertise on equality issues by establishing equality officers or expertise centres within their organisations at national, sector and/or company level.
- Take positive action to ensure women's proper representation within their organisations and to improve women's participation in the bargaining process both in terms of quantity (increasing the number) and quality (increasing women's influence).

⁶⁶ Laret-Bedel, *forthcoming*

⁶⁷ Mark Carley, *Equal opportunities, collective bargaining and the European employment strategy*, www.eiro.eurofound.eu.int/2000/05/study/tn0005402s.html. See for a more recent study on gender mainstreaming in industrial relations: M. Grünell & M.H.Schaapman, *Gender mainstreaming in industrial relations*, www.eiro.eurofound.eu.int, forthcoming, 2005.

- Develop equality guidelines or manuals for their negotiators, to promote equality on the bargaining agenda and to help mainstream equality in all agenda items.
- Provide training to develop equality awareness of negotiators.
- Develop an equal opportunities scan as an instrument for gender-proofing collective agreements.
- Ensure that agreements include provisions for implementation and monitoring of equality measures.
- Set up joint equality bodies on national, sector or company level with responsibility for overseeing the implementation and elaboration of equality provisions
- Conclude general framework agreements on equality issues, at European, sectoral and national level, as appropriate, to tackle, for example, the gender pay gap or sexual harassment.
- In order to integrate an equality perspective in all collective bargaining, focus, for example, on the creation of good quality new jobs and on the inclusion of flexible and part-time workers in all collective arrangements.

Action by others:

- National governments should seek to utilise (or establish) mechanisms to disseminate good practice in equality bargaining, for example by stimulating national expertise centres and expert groups and by ensuring that attention is paid to equality in the administrative collection and review of agreements.
- National Action Plans should report at least on quantitative developments on the decrease of the pay gap between the sexes, changes in horizontal and vertical sex segregation and the increase of female negotiators in collective bargaining.
- National governments should develop equality legislation and review how new and existing equality legislation requires action by the social partners, and facilitate and monitor such action.
- National governments should ensure action by the social partners to promote collective bargaining includes an equality dimension.
- The European Union, national Member States and local authorities should reserve funds for equality areas, for example, childcare facilities and care leave facilities, to guarantee equal opportunities for employees and self-employed persons with care responsibilities while they are undergoing training.
- The European Commission's technical and financial support to the social partners could involve funds for the appointment and/or training of equality officers or the creation of joint equality bodies on national, company or sectoral level.
- The European Commission should ensure equality is mainstreamed into legislative measures promoting social dialogue and collective bargaining, such as provisions relating to European Works Councils and the proposed national level consultation and information bodies.
- The European Commission should maintain a database on the results of equality bargaining throughout the EU

5 Equal Pay Reviews in the United Kingdom

5.1 Introduction

In 1999 The Equal Opportunities Commission (EOC) launched its three-year *Valuing Women* campaign in order to put the issue of equal pay between men and women back on the political agenda⁶⁸. Research showed that despite the fact that it was nearly thirty years since the Equal Pay Act 1970 came into force women working full-time still only earned 82 per cent of the income of men doing the same job. This means a gender pay gap of nearly 20 per cent. For women and men working part-time the pay gap was even wider; women earned, on average, only 60 per cent of the income of men; a gender pay gap of 40 per cent⁶⁹. This was unacceptable to the EOC and it published findings from three specifically commissioned studies on attitudes towards pay which showed there was already a broad consensus on taking action to close the gender pay gap⁷⁰.

That same year the EOC set up the employer-led Equal Pay Task Force. Its task was to define and measure the extent of the gender pay gap, find causes and consequences of the pay gap and identify ways to close this gap. One of its findings was that 25 to 50 per cent of the pay gap is due to pay discrimination. The Task Force came up with several recommendations to combat pay discrimination in its final report *Just Pay*⁷¹. The main recommendation was that the Equal Pay Act be amended and require all employers to conduct annual equal pay reviews (EPR). The report strongly recommended a partnership approach. Therefore since publication of the report the EOC has been encouraging employers to regularly conduct a pay review. It has been working together with and alongside Government, employers and trade unions to implement the recommendations of the Equal Pay Task Force and to try combat pay discrimination. Reviewing pay systems would reveal any unexplained pay inequalities, raise awareness amongst employers of the gender pay gap and encourage them to deal with it. This would be an essential step towards eliminating pay discrimination. Unions should put equal pay on the bargaining agenda and train union representatives to assist employers in carrying out equal pay reviews, employer organisations should take up action to equip their members to audit their pay systems⁷².

This view was welcomed by the EOC, Trade Union Congress (TUC) and unions, but according to the Confederation of British Industry (CBI) the introduction of mandatory pay reviews would impose excessive costs to businesses, especially the small and medium-sized firms⁷³. The Government then decided against mandatory pay reviews and took on the voluntary approach. Their objective was to encourage employers to conduct an equal pay review through intensive campaigning. The Department of Trade and Industry (DTI) subsequently provided the EOC with funding to prepare the model for voluntary pay reviews.

⁶⁸ www.eoc.org.uk

⁶⁹ *The Gender Pay Gap*, a Research Review, Research Findings, School of Management, UMIST, EOC 2001

⁷⁰ *Attitudes to Equal Pay*, EOC 2000 www.eoc.org.uk

⁷¹ The Equal Pay Task Force, *Just Pay*, EOC 2001

⁷² The Equal Pay Task Force, *Just Pay*, EOC 2001, p. 21

⁷³ Jane Parker, National report by on the United Kingdom for the EIRO comparative study *Gender equality plans at the workplace*, March 2004, www.eiro.eurofound.eu.int

There is a different approach for organisations in the public sector. In response to the publication of The Equal Task Force's final report *Just Pay*⁷⁴ the Government committed its own departments and agencies to review their reward systems and prepare equal pay action plans⁷⁵. The report put pressure upon public sector organisations by stating they should act as good practice employers and tackle equal pay problems⁷⁶. This obligation for public bodies is not put down in legislation but is part of Government policy.

5.2 Description of Instrument

The *Valuing Women* campaign, which was launched by the EOC in 1999 to raise attention for the 20 per cent gender pay gap, aimed at stopping pay discrimination, encouraging awareness, openness and transparency of pay by both employers and employees. As part of its *Valuing Women* campaign, the EOC set up the Equal Pay Task Force. The twelve member Task Force included employer and trade union representatives from the public and private sectors and independent experts in pay equality and gender issues. Its assignment was to identify concrete, workable solutions to close the gender pay gap while concentrating on that part of the gap which was due to pay discrimination. After close consultation with all relevant stakeholders, individuals and organisations, the Task Force published its final report *Just Pay* in 2001⁷⁷. It came up with a five-pronged approach on how to eliminate the enduring gender pay gap. Part of this approach is to reform and modernise the equal pay legislation. The Task Force recommended that the Equal Pay Act be amended and require all employers to conduct annual equal pay reviews (EPR). Public consultation revealed that many employers in Britain were confident that there was no gender pay gap in their organisation. Remarkably they had no information whatsoever on which they could base their confidence; they had not carried out an equal pay review. Their confidence seemed therefore complacent. This lack of awareness was one of the barriers to equal pay. An obligation to carry out an EPR would raise awareness among employers and help close the gender pay gap.

Since conducting an EPR is not mandatory, Government and the EOC are putting their efforts together to encourage employers to voluntarily conduct an EPR. The Government provided both the EOC and the Trades Union Congress (TUC) with funding to develop materials which can assist employers with conducting an EPR. The EOC developed the Equal Pay Review Kit which includes the EPR model. The TUC partially used the money to develop training materials for union representatives which is in line with the Equal Pay Review Kit.

The EOC finalised its Equal Pay Review Kit in 2002. The Kit is aimed at employers and gives them advice on good equal pay practice. It also includes a detailed Step-by-Step Guide to Equal Pay and the EOC equal pay review model. According to the Equal Pay Review Kit any EPR should involve comparing the pay of men and women, explaining any gaps and closing any gaps that cannot be explained on grounds other than sex. It stresses the employers' responsibility for providing equal pay and states that conducting a EPR is the most appropriate method of ensuring a pay system that is free from sex bias. In developing the EPR

⁷⁴ The Equal Pay Task Force, *Just Pay*, EOC 2001

⁷⁵ Women and Equality Unit, *Towards a Closing of the UK Gender Pay Gap*, 2003.

www.womenandequalityunit.gov.uk

⁷⁶ *We expect the Government and public service employers to take a lead on this issue. As a major employer, the Government should act as a role model and develop good practice, disseminating lessons learnt throughout the public sector*, *Just Pay*, p. xiv

⁷⁷ The Equal Pay Task Force, *Just Pay*, EOC 2001

model the EOC has tried to take away any barriers for employers to conduct an EPR. A simple tool with clear instructions should activate employers and convince them of the business sense carrying out an EPR makes. To raise awareness among employers of the need and advantages of reviewing their pay systems and including the female workforce fully, continuous campaigning and involvement of the key players in the labour market, employers, unions and government, is necessary.

The actual form of and the process in which an EPR has to be carried out is not prescribed. There are consequently many ways of conducting an EPR. Many employers seem to have designed their own pay review, some with the aid of external consultants or making use of other models or forms of guidance. Some of the alternative pay reviews are either based on or very similar to the EOC EPR model, but have been tailored to the specific needs of the sector or employer⁷⁸.

The EOC Equal Pay Review Model

The EOC EPR model is a good example of how a pay system can be reviewed. Many employer and employee organisations have adopted its five-step EPR model in member equal pay guides. The EOC recommends a five-step EPR model:

Step 1: Decide the scope of the review and identify the data required.

The Kit gives advice on which employees to include, who to involve in conducting the review (employees, trade union or employee representatives, experts from outside the organisation) and what information is needed to conduct a full EPR.

Step 2: Determine where men and women are doing like work/work rated as equivalent/equal value.

The Kit explains what is meant by 'like work', 'work rated as equivalent' and 'equal value' and which organisations should choose which check.

Step 3: Collect pay data to identify equal pay gaps.

The Kit explains how to calculate pay and how to compare pay data. It recommends to investigate any differences in pay between men and women performing equal work of 5 per cent or more, or patterns of differences of 3 per cent or more.

Step 4: Establish the causes of any significant pay gaps and assessing the reasons for these.

The Kit includes recommendations on what aspects of pay should be checked and assessment of the reasons for a significant gender pay gap.

Step 5: Develop an equal pay action plan and/or reviewing and monitoring.

The Kit explains when and how to make an equal pay action plan and review and monitor your pay system.

In conjunction with the EPR Kit the EOC's *Guidance Notes for the Equal Pay Review Kit* should be used⁷⁹. It gives more detailed information on reviewing pay systems and assessing pay data. It also includes useful checklists which can be used by the employer while conducting an EPR.

⁷⁸ Incomes Data Services, *Monitoring progress on equal pay reviews*, EOC 2004, p. 30-31

⁷⁹ EOC, 2003: www.eoc.org.uk

Conducting a pay review is voluntary for companies. There are no legal requirements for employers to carry out an equal pay review. Consequently there are no legal sanctions on employers not conducting a equal pay review. However, employees who think they are receiving less pay than their colleagues of the opposite sex can always file an equal pay claim in accordance with the Equal Pay Act 1970 before the Employment Tribunal. The Government has recently improved tribunal procedures following recommendations by the Equal Pay Task Force⁸⁰. The Government did amend several pieces of legislation after great pressure by the EOC. It amended time limits in the Equal Pay Act⁸¹ on bringing an equal pay case before the Employment Tribunal and replaced the previous 2 year limit on back pay with a 6 year limit e.g. where the employer has concealed the existence of unequal pay. It further enabled individual employees to request specific information from their employers to establish any pay inequalities⁸². The EOC gives detailed information on how to file such a claim on their website. This should encourage employers to act proactively and conduct EPR to protect themselves from these possible claims.

Although there is no statutory obligation for government departments and agencies to conduct a pay review, obviously more pressure is being put on public bodies to comply with the government's commitment to assess and deal with the gender pay gap in any sector of the labour market. There is the Ministers' responsibility for the progress their departments are making in conducting pay reviews. They are subject to close monitoring by Members of the Parliament and Ministers are regularly confronted with questions in the House of Commons⁸³. Apart from this there is also the pressure on public organisations from the public, media and non-governmental organisations.

Apart from setting up their own campaigns and measures⁸⁴ the Government provided TUC with funding to support the TUC Equal Pay Pilot Project⁸⁵. This project was designed to assist unions in updating the skills of their representatives in order to contribute to the Government's objective of closing the gender pay gap. The money was used to revise and update training materials in line with the EOC Equal Pay Review Kit, to brief tutors and train representatives on the new materials, provide a training programme on-line, produce newsletters and a final report and to many more activities to help close the gender pay gap, raise awareness and assist employers in conducting an EPR.

5.3 Goals of Instrument

Basically the EPR was introduced to reduce the gender pay gap. Since the introduction of the Equal Pay Act in 1970 the pay gap between sexes had reduced from 31 per cent to 18 per cent by April 2001, but was still existing. This was enough reason for the EOC to take up the matter seriously involving employers, unions and Government to combat pay discrimination.

⁸⁰ The Equal Pay Task Force, *Just Pay*, EOC 2001, p. 16

⁸¹ The Equal Pay Act 1970 (Amendment) Regulations (2003).

⁸² The Employment Act 2002, section 42 Equal Pay: questionnaires and the subsequent Equal Pay (Questions and Replies) Order 2003. See also: www.hmsso.gov.uk

⁸³ www.parliament.uk/hansard

⁸⁴ Appointment of "fair pay champions" from employer and union background which are to promote good practice and raise awareness amongst their peers, introduction of annual awards (Castle Awards) to promote good practice by employers

⁸⁵ For more information and results: TUC, *Equal Pay Pilot Project*, Final Report – Phase 2, 2003

EOC launched the *Valuing Women* campaign, assigned research into pay practices, set up the Equal Pay Task Force and consequently set targets for closing the pay gap.

In December 2001, the EOC set targets for employers to carry out pay reviews⁸⁶: 50 per cent of large firms (with over 500 employees) should have completed an equal pay review by the end of 2003 and 25 per cent of the rest of the firms should have reviewed their pay systems by the end of 2005⁸⁷. The Government recently set the target at 35 per cent of large companies have done pay reviews by 2006⁸⁸. This is now the official target.

In October 2003, the EOC commissioned Incomes Data Services to examine the extent of equal pay review activity across the British economy. The result *Monitoring Progress on Equal Pay Reviews* was published Spring 2004⁸⁹.

5.4 Policy Theory

The recommendation to implement a statutory obligation for employers to carry out an equal pay review is part of the multi-levered approach the Equal Pay Task Force proposes in its final report *Just Pay* in 2001⁹⁰. The Task Force believes that pay discrimination can be dealt with through:

- raising levels of awareness and developing a common understanding of what the pay gap means
- reforming and modernising the equal pay legislation
- capacity building to ensure employers and trade unions know how to implement equal pay
- enhancing transparency and developing accountability for delivering pay equality
- amending social, economic and labour market policies to complement equal pay measures

Research reveals that most employers are not aware of a gender pay gap in their pay systems and are therefore not planning on conducting an EPR⁹¹. Conducting further research, publishing statistics on the gender pay gap, actively campaigning for equal pay and forcing employers to carry out an EPR by introducing an obligation for every employer to check their pay system will eventually lead to greater awareness of the gender pay gap problem and understanding of the necessity of dealing with this problem. The only way an employer can know whether women receive equal pay is to carry out an EPR. Equal pay reviews should

⁸⁶ The Task Force stated in its 2001 report *Just Pay* that they believe it is perfectly feasible, with concerted action by all the key players, that the gender gap due to discrimination in the workplace should be reduced by 50% within the next 5 years and eliminated entirely within 8 years.

⁸⁷ Targets were arrived at by reference to the following sources: The EOC programme for capacity building, including the development of a model equal pay review that will be ready by summer 2002; *Gender Equality in Pay Practices*, NOP Business for EOC, 2000; Government's targets of April 2003 for departments and agencies to review pay systems and prepare action plans; The 1998 Workplace Employment Relations Survey Management Questionnaire (WERS 1998); The Small Business Service statistics on the number and size of enterprises in the UK.

⁸⁸ Women and Equality Unit, *Delivering on Gender Equality*, DTI June 2003; the report does not mention a target for small and medium sized companies.

⁸⁹ Incomes Data Services, *Monitoring Progress on Equal Pay Reviews*, EOC Spring 2004. www.eoc.org.uk

⁹⁰ The Equal Pay Task Force, *Just Pay*, EOC 2001, p. 14

⁹¹ The Equal Pay Task Force, *Just Pay*, EOC 2001

become an integral part of human resource and reward strategies. The government has to amend legislation and oblige employers to conduct and EPR.

For employers who are already planning an EPR the main barrier to actually carry one out seems to be the lack of knowledge and capacity to implement equal pay. In order to break this barrier the Task Force advised on capacity building to ensure that employers and trade unions know how to review pay systems. The EOC was advised to provide explanatory material and to work with pay experts, software companies to find ways to effectively help employers carry out an EPR. With Government funding the EOC developed the Equal Pay Review Kit including the EPR model. A clear and easy to use tool to check pay systems should encourage employers to conduct equal pay reviews.

The Confederation of British Industry (CBI), one of the largest employer organisations suggested the following approach: an appealing argument for employers to conduct an EPR is that it makes business sense. The CBI suggested this argument would be likely to find favour with employers. This approach should be taken when addressing employers to check their pay systems. The Government must act as an example to employers and take the lead on best practice.

5.5 Implementation of Instrument.

Since the *Valuing Women* campaign started in 1999 the EOC has taken various supportive measures to promote equal pay and raise awareness amongst employers. The EOC is the organisation mainly responsible for promoting the use of the equal pay review with employers. With DTI funding it developed the Equal Pay Review Kit which is the key instrument of a number of measures taken by the Equal Opportunities Commission to tackle the gender pay gap in the British labour market. The Equal Pay Review Kit can be ordered at the EOC or downloaded from their web site and the EOC has written guides and brochures to enable employers to carry out equal pay reviews⁹². Apart from this the EOC has taken other active measures to support tackle the gender pay gap e.g. the set up of an Equal Pay Forum for employers to promote and share good equal pay practice in co-operation with Opportunity Now⁹³, organize an annual conference (2002 & 2003) to assess progress and make plans to reduce the pay gap further and recently a poster campaign *It's time to get even*.

There is close co-operation with the Government and the unions. The Trades Union Congress (TUC) and other unions have launched their own campaigns for equal pay. They provide training for union representatives to help employers conduct pay reviews.

5.6 Reactions of parties involved

Unions

⁹² *Code of practice on Equal Pay* (EOC), *An Introduction to the Equal Pay Review Kit* (EOC), *Guidance Notes for the Equal Pay Review Kit* (EOC), *Are you providing equal pay?* (EOC). More on: www.eoc.org.uk/equalpay

⁹³ Opportunity Now is a business-led campaign launched in 1999 that works with employers to realise the economic potential and business benefits that women at all levels contribute to the workforce. More on: www.bitc.org.uk

The GMB? union has urged the government to force employers to undertake equal pay audits following a new report which revealed that the average pay gap between male and female workers has grown to £129 a week⁹⁴.

The unions' reaction to the introduction of pay reviews is positive, but they are disappointed that carrying out an EPR remains voluntary. The Trade Union Congress' (TUC) itself received funding from the Department of Trade and Industry to develop supporting materials to the EOC Equal Pay Review Kit⁹⁵. It organizes activities to support employers to conduct an EPR such as training union equal pay representatives to help tackle the gender pay gap. TUC regularly briefs union officers to look at new training materials and the EOC Equal Pay Kit and TUC changed rules so that all unions are under a positive duty to promote equality⁹⁶. The (TUC) and other unions have launched their own campaigns for equal pay. They continue to call for mandatory pay reviews.

Employers

The CBI believes pay inequality results from the different choices women make, the careers they choose and the time they spend out of the labour market because of childcare responsibilities⁹⁷.

The Confederation of British Industry (CBI) reacts strongly to the Task Force's recommendation for statutory pay reviews and argues that pay reviews will have little impact, but are an excessive administrative burden, particularly for small companies⁹⁸. After conducting their own research CBI found that pay discrimination is not the main factor responsible for the gender pay gap. Other factors play more important roles and therefore the responsibility for closing the gender pay gap should not lie solely with the employer. The key causes for pay inequalities are gender stereotyping throughout society, structural barriers in the labour market and individual choices and attitudes are key causes of the gender pay gap. The priority should be to address the structural barriers and promote good practice in pay. Statutory pay auditing would be disproportionate and impracticable for employers. In the eyes of CBI the best way to deal with these problems is to improve childcare facilities, promote flexible working and provide better careers advice. CBI is committed to working together with the EOC and others to promote the necessary changes, but finds that the principle responsibility to change the system lies with the Government⁹⁹.

⁹⁴ The GMB is a general union of 700,000 people of whom nearly 40% are women. The three capital letters GMB is the registered name of the union. The union today is the sum of a number of mergers of longstanding trades unions covering several production and service sectors and trades. That is why the Union's name is now just the letters "GMB" and is referred to as "Britain's General Union". Press release 14/01/2004, GMB website: www.gmb.org.uk

⁹⁵ *Equal Pay Pilot Project. Final report-Phase 2*, TUC London September 2003

⁹⁶ EOR June 2003a:12

⁹⁷ CBI, press-release, 27 March 2001 www.cbi.org.uk

⁹⁸ See: Jane Parker, National report by on the United Kingdom for the EIRO comparative study *Gender equality plans at the workplace*, March 2004, www.eiro.eurofound.eu.int and press-releases on www.cbi.org.uk

⁹⁹ CBI, *Tackling the Pay Gap between Men and Women*, CBI Evidence to the Equal Pay Task Force, CBI London, August 2000

Government

The Government's reaction to Equal Pay Task Force's recommendation to stimulate employers to conduct a yearly pay review was that it welcomes pay reviews, but that they should not be mandatory. This decision was mainly influenced by a strong rejection from the employer's organisations of what they consider as imposing costly measures on employers. Nevertheless the Department of Trade and Industry decided to encourage employers to carry out an EPR and they provided EOC with extra funding to develop a model for voluntary pay reviews. Alongside the EOC work on the pay reviews, the Government took steps of its own e.g. organize annual good practice awards, "fair pay champions" to raise awareness and build support amongst employers for pay reviews. In reaction to the Equal Pay Task Force's call to take on the role of example employer the government committed departments and agencies to conduct pay reviews.

The main contribution by the Government to encourage employers to conduct an EPR was amending several pieces of legislation¹⁰⁰. It introduced the statutory equal pay questionnaire in 2003. Employers are now obliged to respond to employees asking questions about their pay. The aim was to make pay systems more transparent and it enables employees to assess their pay and to take successive action if needed. The government held a public consultation *Towards equal pay for Women* on streamlining equal pay tribunal procedures which started in 2001 and was concluded in December 2003¹⁰¹. Amongst other stakeholders the EOC and social partners were consulted. The amended Employment Tribunal Regulations and Rules of Procedure should come into effect on 1 October 2004. This means an additional pressure upon employers to conduct EPRs: if they do not check their pay system themselves, employees will now be able to file a pay claim more easily.

The Government's Women and Equality Unit has published various pieces of research on the gender pay gap¹⁰². Another supportive measure to combat pay discrimination and encourage employers to carry out an EPR was funding TUC to develop a pilot programme to train full-time union officers and workplace representatives in carrying out pay reviews¹⁰³.

Public Discussion

*A voluntary approach has its limits: employers do not believe they have a pay gap and therefore do not believe an equal pay review is necessary*¹⁰⁴.

The public debate which followed the recommendation by the Equal Pay Task Force to require all employers to conduct an equal pay review was mainly about the fact whether or not EPRs should become mandatory. All parties concerned were positive about the introduction of voluntary EPRs. The EOC and trade unions felt that with the *Just Pay* report in hands they had enough arguments to convince the Government to make an EPR a statutory obligation. The main cause for the gender pay gap is pay discrimination. Research for the Task Force showed that employers do not feel the need to check their pay systems because

¹⁰⁰ See Note 14 and 15

¹⁰¹ More information on this consultation on www.dti.gov.uk/consultations

¹⁰² www.womenandequality.gov.uk

¹⁰³ *Equal Pay Pilot Project. Final report-Phase 2*, TUC London September 2003

¹⁰⁴ Jane Parker, *EOC urges new action on equal pay*, April 2001, European Industrial Relations Observatory Online (EIRO), www.eiro.eurofound.eu.int

they believe they already provide equal pay. The only way to combat this misplaced confidence is to force employers to conduct an EPR.

5.7 Effectiveness of Equal Pay Reviews

Formal Effectiveness

EPR activity

In October the EOC commissioned Incomes Data Services to examine the extent of equal pay review (EPR) activity across the British Economy¹⁰⁵. The results were published in the Spring of 2004 in a report called *Monitoring Progress on Equal Pay Reviews*. The report shows that EOC target with respect to large organisations, 50 per cent by the end of 2003, was not met. In November 2003, nearly half (45 per cent) of large organisations (those with 500 or more employees) had either completed an EPR, were in the process of carrying one out, or planned to start one before the end of 2004¹⁰⁶. Their target for small or medium-sized organisations is well on its way of being achieved; just under a third (31 per cent) of small or medium-sized (25-499 employees). More recently, in June 2003, the Government set its own target that 35 per cent of large organisations should have conducted an EPR by 2006¹⁰⁷. The report states that this should be achieved.

An important finding was that public sector organisations were almost twice as likely as firms in the private sector to have conducted an EPR, or to be planning one. Here the percentage of organisations planning an EPR had significantly fallen from 54 per cent in 2002 to 32 per cent in 2003. More important is the finding that the majority (57 per cent) of the respondents had no plans to carry out an EPR. This is not a big reduction compared with 2002 when 54 per cent had no plans to do an EPR.

Conducting an EPR

The main reasons for private sector firms to conduct an EPR was (1) the employer's wish to be considered a good practice employer (64 per cent) and (2) that an EPR was seen as good business sense (51 per cent). When asked what factors had influenced employers in 2003 to conduct an EPR 41 per cent mentioned Government policy and publicity, compared with 40 per cent in 2002, while 29 per cent stated that EOC policy and publicity had influenced them, compared with only 9 per cent in 2002. The latter seems to have gained significance since 2002 and appears to have become a growing stimulant for employers and the main responsible for the increase of employers conducting an EPR in 2003. A quarter of organisations that had conducted an EPR or were planning one had seen the EOC Equal Pay Review Kit. Not all had used it to conduct their EPR, but the majority had used elements of the toolkit to design their own review. According to the report this shows that among those organisations that have decided to do an EPR there is a greater awareness of changes in policy and an increased commitment to equal pay. The firms that had no plans for an EPR stated that the main reason for not doing so was that they believed they already provided equal pay¹⁰⁸.

¹⁰⁵ Sally Brett and Sue Milsome (Incomes Data Services), *Monitoring progress on equal pay reviews*, EOC Discussion Series, EOC Spring 2004

¹⁰⁶ 16 per cent of employers had completed an EPR, 6 per cent were in the process of conducting one, and 21 per cent had plans to do one (mostly within the next year), *Monitoring progress on equal pay reviews*, Incomes Data Services, EOC Research Discussion Series, EOC March 2003

¹⁰⁷ WEU, 2003

¹⁰⁸ Similar findings in: *Gender equality in pay practices*, EOC 2001

EPR process and results

Most organisations which had completed an EPR, or were conducting one had begun in 2002 or 2003. This indicates how awareness has been raised in the last two years. Three-quarters said they had designed their own pay review. A number of these had either used external consultants and used guides. More than 25 per cent had been motivated by EOC policy and publicity to carry out an EPR. Many public sectors organisation had used the EOC Equal Pay Review Kit or similar guidance when conducting an EPR, while the majority of private sector organisations had not sought any external advice¹⁰⁹.

Behavioural Effectiveness

A fifth of the organisations that had completed an EPR in 2003 had found a significant pay gap that could not be explained on grounds other than sex. These gaps varied from between 1 and 20 per cent. Almost all of those organisations had taken, or planned, action to either reduce or eliminate those gaps¹¹⁰. Most organisations that had carried out an EPR, or were in the process of doing one, planned to repeat the exercise on a regular basis. Only 10 per cent said they would not do one again. Of those employers planning to repeat an EPR, 56 per cent said they plan to conduct the EPR annually, 8 per cent planned to conduct one every two years and a further 9 per cent stated it was an ongoing process.

Material Effectiveness

All the efforts by the EOC, trade unions and Government have contributed to raising awareness amongst employers and employees of the existing of a gender pay gap. However, the size of the gender pay gap does not seem to have changed dramatically since the EOC put the issue back on the agenda in 1999 with its *Valuing Women* campaign. Research shows that the average pay of a woman working full-time compared with a man doing the same job was 81.6 per cent in April 2001. The gender pay gap then widened by 0.4 percentage points between April 2001 and April 2002 and narrowed down again with 1.0 percentage point between April 2002 and April 2003 to women earning on average 82.0 per cent of the equivalent average of men. This means a difference in pay between men and women of still 18 per cent in 2003. Although this is the narrowest pay gap since the New Earnings Survey began in April 1970¹¹¹, it is not major reduction.

Conclusions on Effectiveness

The main conclusion on the effectiveness of conducting pay reviews as a means to reduce the gender pay gap is that the targets EOC had set in 2001 for organisations to have conducted an EPR by the end of 2003 have not been met. Although nearly half of large organisations had conducted or was planning to conduct an EPR by the end of 2003, still 49 per cent had no plans to conduct one. This proportion was little improved since 2002. In spite of these figures

¹⁰⁹ Incomes Data Services, *Monitoring Progress on Equal Pay Reviews*, EOC Spring 2004

¹¹⁰ 11 out of 14: Incomes Data Services, *Monitoring Progress on Equal Pay Reviews*, EOC Spring 2004, p. 36

¹¹¹ Jamie Jenkins, *Patterns of pay: results of the 2001 New Earnings Survey* in: *Labour Market Trends*, vol 110, no 3, 2001. Joanna Bulman, *Patterns of pay: result of the 2002 New Earnings Survey* in: *Labour Market Trends*, vol 110, no 12, 2002 and *Patterns of pay: result of the 2003 New Earnings Survey* in: *Labour Market Trends*, vol 11X No. X, pp 14, 2003. www.statistics.gov.uk

the gender pay gap is still 18 per cent. The fact that half of these are not planning an EPR because they believe they have no gender pay gap, implicates there is still a lot of work to be done by the EOC together with Government and unions to raise awareness amongst these employers of the need for and benefits of conducting an EPR.

Positive findings are that more organisations are conducting an EPR every year. The responses from these organisations are encouraging. They show that the majority conduct EPR in line with EOC guidance and recommendations. Another encouraging finding is that most employers who detect a significant pay gap after carrying out an EPR take action to close it. Finally, a majority of those who have already conducted an EPR plan to repeat the exercise. This development stimulates the EOC to continue to launch advertising campaigns, seek media attention for the equal pay issue, assign research on the matter and continuously stress the importance of employers checking their pay systems. The Government provided the EOC with funding to develop an EPR model and supporting guides and the TUC to develop training materials for tutors and representatives and monitors its own departments and agencies conducting an EPR¹¹². Besides this serious efforts are made by the government to amend relevant legislation and simplify tribunal procedures.

5.9 Keys to Success

Although targets were not achieved, joint efforts of social partners, the Government and the Equal Opportunities Commission encouraged around 45 per cent of large organisations to either conduct or plan to conduct an EPR by the end of 2003. The efforts made to raise awareness of the existing of a gender pay gap and its negative consequences, to detect the pay gap at each individual organisation and to assist employers to close this gap have seemingly not led to a significant reduction of the pay gap, but raised awareness among many employers of the need to conduct such a pay review. Stakeholders mention various key factors which have contributed or will contribute to future use of the pay reviews:

- Leadership from the government; employers mention government as one of the main influences upon them in deciding to conduct an EPR. By trying to act as an example employer and by putting money and effort into policy and campaigning government contributes to the performance of EPR.
- Pressure and co-operation from the trade unions, especially by training union and workplace representatives in assisting employers to conduct an EPR.
- Close partnership by employers, unions, government, and a specialised equality body helps to convince society and economy of the importance of providing equal pay.

¹¹² *Equal Pay Pilot Project. Final report-Phase 2*, TUC London September 2003

- Transparency; pay systems often seem complex and obscure. Creating transparency enables employers to provide equal pay and employees to detect pay inequalities.
- The development and introduction of a workable Pay Review Model (EOC EPR model) and additional accessible information showed to be essential. By providing employers with clear and easy to use tools and guidance on EPRs, they are enabled either to conduct an EPR directly or use the tool as a model for designing their own EPR.
- Convincing employers of the possible positive results and benefits of paying more attention to a possible pay gap and to equal participation. If there is a significant business benefit in prospect, employers are stimulated to carry out a review.
- The use and development of additional material and measures to support the introduction of the EPR model is essential. Campaigning, training and written guidance on the need and use of an EPR contributes to raising awareness amongst employers of the existence of a gender pay gap and the need to combat pay discrimination.
- Convincing employers that conducting an EPR is good employment practice and that it makes good business sense. CBI suggested in its evidence to the Equal Pay Task Force that such an approach would be likely to find favour with employers and would build upon activities already undertaken in various sectors¹¹³.
- Government's support in encouraging employees to come forward and file pay claims before the Employment Tribunal. Amendments to existing legislation to enable them do this more easily. This puts the pressure on for employers to carry out an EPR.

Points of Consideration:

Employers lack of a proper understanding of, and/or commitment to, key principles which support the development of pay practices free of gender bias (Monitoring progress towards pay equality, 2003)

- There is no statutory obligation to carry out an equal pay review. Hence no judicial enforcement. Unions and the EOC identify this as the main barrier for employers to conduct a pay review.
- Not one EPR model prescribed by law; although the EOC has developed the EPR model, firms can design their own pay reviews. This entails the risk that the outcomes of EPRs can substantively differ. There is no objective measure and control mechanism that can detect incomplete and therefore useless EPRs.
- Not all parties seem convinced of the fact that pay discrimination is the main reason for the gender pay gap. The employer organisations especially seem reluctant to actively campaign for equal pay.
- Reasons for the pay gap are complex and interconnected. Key factors include differences in educational levels and work experience, for example due to time taken out of the labour market for childcare; part-time working; occupational segregation; and discrimination; and other factors including length and time of commute to work¹¹⁴.

¹¹³ Equal Pay Task Force, *Just Pay*, EOC 2001, p. 24

¹¹⁴ Women and Equality Unit, *Delivering on the equality agenda*, London DTI, 2003

6 Codes of Conduct (The Netherlands)

6.1 Introduction

The use of codes of conduct as a means to control, change and influence (un)wanted behaviour by employees gained popularity in The Netherlands during the eighties of the last century. It set about as an instrument to reduce corporate criminality. When it showed to be an effective tool in doing this, it became a rather popular instrument and in 1987 the first code of conduct to prevent and combat race discrimination was formulated¹¹⁵. In the early nineties the Minister of the Interior commissioned research on the use of codes of conduct to prevent and combat race-discrimination. The final report was published in 1992¹¹⁶. Its main conclusion was that in Dutch organisations codes of conduct were rare and limited in scope. In reaction to this the Minister called for government departments, political parties and non-governmental organisations (NGO's) to take their joint responsibility and create a society free from discrimination. The parties involved signed the *Algemene Verklaring tegen Rassendiscriminatie*¹¹⁷ and agreed on using codes of conduct as an instrument to combat race-discrimination. The rationale behind this agreement was that all organisations are actively part of a common social environment. The values and standards from that social environment should become integrated in each individual organisation¹¹⁸. Many model codes of conduct have since been developed in public and private sector organisations to prevent and reduce discrimination and promote equal treatment and diversity. Some codes are general in kind and include some provisions on discrimination. Other codes are specifically aimed at the prevention and elimination of discrimination. The increasing use of codes of conduct by Dutch organisations over the last few years is partially due to the efforts and influence of non-governmental organisations who have been encouraging organisations to take their social and ethical responsibility and make it an integral part of company policy and proceedings¹¹⁹.

Although Dutch legislation does not provide a statutory obligation for organisations to draw up a code of conduct to eliminate discrimination at the workplace, the Dutch Working Conditions Act and the General Equality Act do include the obligation for any employer to protect its employees from sexual harassment, aggression and violence within and by the organisation¹²⁰. Discrimination is seen as either aggression or violence. The Acts do not prescribe a specific instrument the employer should employ to meet this obligation. The existence of the Act, however, should encourage employers to adapt company policy to meet this obligation actively. A code of conduct could be part of that company policy.

In 2000, the Companies Care¹²¹ project was launched. This Dutch project focuses on the effectiveness of codes of conduct as an instrument to eliminate discrimination and promote diversity and was funded by EQUAL which is part of the European Social Fund (ESF) and

¹¹⁵ ABU Code of Conduct covering agency work, 1987

¹¹⁶ Landelijk Bureau ter bestrijding van Rassendiscriminatie (LBR), *Gedragscodes Ter Voorkoming en Bestrijding van Rassendiscriminatie*, 1992

¹¹⁷ Translates as: General Declaration against Race discrimination, 1992

¹¹⁸ *Model Gedragscode Rijksoverheid tegen Rassendiscriminatie*, Den Haag: Ministerie van Binnenlandse Zaken, 2001

¹¹⁹ L. Paape and H. Hummels, *Sociaal en ethische verantwoording: keurslijf of lijfbehoud?*, PriceWaterhouseCoopers & Universiteit Nyenrode, 2000

¹²⁰ Arbeidsomstandigheden Wet 1998, section 1, subsection f and Algemene Wet Gelijke Behandeling, section 5

¹²¹ CARE stands for Companies Apply Rules for Equality. More information about this Dutch project on: www.e-quality.nl

stimulates equal opportunities on the labour market. In the last few years Companies CARE have commissioned various studies on the existence, experiences with and effectiveness of codes of conduct in Dutch organisations¹²².

6.2 Description of Instrument

A code of conduct is an official description of (oftentimes) moral rules or values which an organisation wishes to aspire to, and according to which all persons subject to the code should conduct oneself¹²³.

There are many different definitions of a code of conduct¹²⁴. Three main categories can be distinguished. A code of conduct can be either a:

- set of rules or
- a description of values and principles or
- a combination of values, principles and rules¹²⁵.

Various categories of codes of conduct can be distinguished depending on the organisational level at which they are established:

- the company code, the code is established at company level;
- the professional code, the code is established within professionals associations;
- the sectoral or industrial code, established by a co-ordinate industrial organisation and/or trade unions;
- the governmental code, established at either central or de-central level¹²⁶.

Regardless of the exact composition of and category a code of conduct belongs to, in general, its main objective should be to prevent and eliminate discriminatory behaviour from the organisation and to promote equality and diversity. Usually a code of conduct consists of a mix of provisions on wanted, equality and diversity, and unwanted behaviour, discrimination.

There are various stages of development before a code of conduct can be introduced in the organisation. First of all the code of conduct has to be developed; an organisation needs to consider the objective, the scope, definition of core concepts and further contents of the code. Then the code has to be implemented; this is the most crucial part. A code shows to be only effective if the organisation has taken the right time and effort to implement it successfully. The third stage concerns the enforcement and monitoring of implementation of the code. Finally there is the issue of external responsibility; how and to whom does the organisation account for the code's functioning¹²⁷?

¹²² Companies CARE has kindly let us use these reports before they were published.

¹²³ TNO-arbeid, *Succesfactoren bij de ontwikkeling, implementatie en handhaving van gedragscodes rond non-discriminatie en diversiteit*, Report to Companies CARE, TNO Hoofddorp, 2004

¹²⁴ See for a summary of definitions: Ing. D.J. de Koning, *Vooronderzoek Gedragscodes*, report to Companies Care, E-quality, experts in gender en ethnicity, Spring 2003, p. 6

¹²⁵ Ing. D.J. de Koning, *Vooronderzoek Gedragscodes*, report to Companies Care, E-quality, experts in gender en ethnicity, Spring 2003, p. 6

¹²⁶ The first three are mentioned in: Ing. D.J. de Koning, *Vooronderzoek Gedragscodes*, report to Companies Care, E-quality, experts in gender en ethnicity, Spring 2003

¹²⁷ Ing. D.J. de Koning, *Vooronderzoek Gedragscodes*, report to Companies Care, E-quality, experts in gender en ethnicity, Spring 2003, p. 9

Development of a Code of Conduct

Organisations should be dissuaded from copying a code of conduct. A good code of conduct should be tailored to the specific organisation. It should fit the goals, tasks and functions of each individual company¹²⁸.

Responsibility

The responsibility for developing a code of conduct is dependent on the organisational level at which the code is established. The responsibility for a company code should lie with the board of an organisation, for a professional code with the relevant association and for the industrial code the responsibility should lie with the relevant industrial organisation. This responsibility entails the task to initiate the development of the code, to monitor progress of development and a proper and successful implementation of the code within the organisation.

Project Group

Some organisations appoint a project group who is in charge of the whole process of planning, formulating and implementing the code of conduct. In this group representatives from every layer of the organisation can be united. At company level the works council or staff representatives can be involved in composing the project group, above company level it is useful to ask trade unions to co-operate. Sometimes external experts are attracted to participate in the project group.

Before a project group can start functioning properly the exact tasks of the group should be made clear. Agreements have to be made on e.g. a time path in which the code has to be completed and implemented, competencies of the group (members) and informing and involving employees in the process. Some group members might need additional training before they can actively take part in the development of the code.

Objective and Definitions

Recent reports on the use and effectiveness of codes of conduct conclude that the set up of a special project group which manages the development and introduction of a code of conduct will contribute to its successful implementation within the organisation¹²⁹. The project group should start the development of a code of conduct with enunciating the code's objective. A code of conduct is a useful and effective instrument for organisations to combat discrimination and promote diversity in their own specific field and manner. All members of the organisation should be invited to take part in an open discussion within the organisation: what conduct exactly is desired? What behaviour is acceptable and tolerable within this specific organisation and what not? An open consultation including every member of staff should be encouraged. It is very important to draw close attention to this matter. This company standard will be developed into rules of conduct and guidelines. The code should match and represent the organisational culture and internal and external policy. This is

¹²⁸ Ing. D.J. de Koning, *Vooronderzoek Gedragcodes*, report to Companies Care, E-quality, experts in gender en ethnicity, Spring 2003, p. 9

¹²⁹TNO-arbeid, *Succesfactoren bij de ontwikkeling, implementatie en handhaving van gedragcodes rond non-discriminatie en diversiteit*, Report to Companies CARE, TNO Hoofddorp, 2004; Ing. D.J. de Koning, *Vooronderzoek Gedragcodes*, report to Companies Care, E-quality, experts in gender en ethnicity, Spring 2003

essential to the proper functioning of the code at a later stage. Consultation can be performed for instance by conducting a survey. This of course depends on the size of the organisation.

The core message of a code of conduct as an instrument to encourage compliance with equality legislation should be that discrimination on any ground is not tolerated. Not on the work floor, not in contacts with and/or between other persons in and/or outside the company. Nowadays discrimination is a broader concept than twenty years ago. In 2004, European legislation prohibits discrimination at the workplace on a number of grounds: employers should treat all employees alike regardless of gender, race, ethnic background, religion or belief, sexual orientation, disability or age. This means that an organisation who wishes to develop a code of conduct which aims at combating discrimination should consider all these grounds when defining core concepts e.g. desired conduct and discrimination. Codes of conduct often include a reference to national and international non-discrimination legislation. Full text of relevant provisions can be enclosed in a special annex.

Scope

The scope of the code is dependent on the type of organisation. Who should be subject to the code? Some codes of conduct are internally orientated; they focus on company policy and are aimed at regulating behaviour between colleagues. Other codes of conduct are externally orientated; they focus mainly on behaviour between employees and e.g. clients, guests, students, visitors, patients, suppliers or costumers. This means that some codes should include rules on contact with external/ third parties. Codes of conduct in the public sector tend to have a predominantly external focus while private sector codes have a more internal focus. Another point of consideration is the level of ambition. Does the code wish to set a minimum standard of desired conduct or does the code consist of declaration of aspired conduct? Either way, persons subject to the code should be able to identify themselves with the ambition of the code.

Content of the Code of Conduct

A code of conduct can either be a general code including some specific provisions on non-discrimination and diversity, or a code specifically on non-discrimination and diversity at the workplace. A code of conduct is usually put down in writing and varies in size from a one page set of rules to a voluminous professional code. Some organisations combine a complete and extensive code of conduct on the one hand with summaries of the same code in clear and short brochures on the other. These summaries are frequently illustrated with cartoons to make the code more comprehensive and appealing those subject to the code.

The code of conduct should start with enunciating its objective. Introducing the code with a comprehensible statement of its objective is part of a the implementation process. Core concepts such as (un)desired conduct, and direct and indirect discrimination should be clear and comprehensive to all subject to the code¹³⁰. Some codes of conduct start with a general clause on the objective of the code which is followed by the definitions of these core concepts. The code's objective is formulated in a formal or less formal tone depending on the specific organisation. Codes sometimes start with a more general declaration on the organisation's ambition on desired behaviour. Every organisation should fit the contents to their own culture and needs, essential is that the code is clear and comprehensive. The code preferably bears the message that all conduct is debateable. If a code of conduct consists of a

¹³⁰ To come in line with current EU Directives *harassment* and *the instruction to discriminate/ victimisation* is also regarded discrimination. See: Race discrimination Directive 2000/48, General Framework Directive 2000/78 and Equal Treatment Directive 2002/73.

set of rigid rules it will inevitably lead to adversary comments within the organisation. This does not contribute to a successful implementation.

This organisation considers the prevention and suppression of aggression, sexual harassment and discrimination of great importance. Discrimination on the grounds of race, age, religion or belief, political orientation, gender, nationality, sexual orientation, civil status and disability will not be tolerated by this organisation. The organisation wishes to demonstrate this through this code of conduct. The objective is, besides the prevention and suppression of aggression, sexual harassment and discrimination, also to encourage a discussion on these matters¹³¹.

There are several criteria for the content of a good code which any organisation should bear in mind when developing one. First of all a code of conduct should be *comprehensive*, the code should contain clear definitions which are the result of extensive internal discussion. The code can also include visual aids to illustrate the meaning of certain definitions. Secondly the code should be *authentic*, each company should tailor its own code to fit the specific business policy and needs. Thirdly, the code has to *be able to survive developments*, not only current but also future company circumstances should be taken into consideration when deciding on the contents of the code. Another important criterion is the *level of ambition*. What does the code intent? Does it provide minimum standards of desired behaviour or does it set a maximum goal? The code should be *measurable*, it has to be monitored and the company should account for the code. Besides this the code should be *flexible*, avoid rigid and detailed provisions on unwanted behaviour (prohibitions), but a good code should contain positive instructions, ambitions, aspirations. Finally there should be a *relational coherence* between the code of conduct and company policy, the code should become an integrated part of company proceedings¹³².

Sanctions and Rewards

Another essential condition to the successful implementation of the code of conduct is that it must have clear section on the sanctions to infringements of the code. Again sanctions should fit general company policy. The code should be of a binding nature.

In The Netherlands several models of a code of conduct have been developed. The following Table of contents of the LBR model code¹³³ might serve as an example:

- Section 1: Definitions
- Section 2: Objective
- Section 3: Status of code
- Section 4: Scope of code
- Section 5: Publication of the code
- Section 6: Compliance
- Section 7: Monitoring compliance
- Section 8: Guidelines on conduct:

¹³¹ Modelgedragscode Welzijnswerk

¹³² http://www.minjust.nl/b_organ/npc/beroepsm/art_kk_effectiviteit_van_eeen_code.htm

¹³³ Najat Bochhah, *Van must tot lust*, LBR Rotterdam 2002

- Situations to which the code applies e.g. recruitment and selection, contract of employment and working conditions, promotion and circulation, training, policy on sickness absenteeism, dismissal
- Right of complaint
- The appointment of an intermediary, tasks, responsibilities and competencies
- The appointment of a complaints committee
- Complaint procedure
- Sanctions

6.3 Implementation of the Code of Conduct

Implementation Plan

There is not one successful or correct method to implement a code in an organisation. As well as the contents, the implementation of the code should fit the specific organisation. It is crucial to take the time and effort to draw up a plan and to monitor the implementation process carefully. The code is a means to create a culture in which conduct can be discussed, not an end in itself. A code can only be effective if it raises awareness of the problem discrimination can imply for a person and subsequently for the organisation. It is meant to influence the mentality at the workplace and preferably change discriminatory behaviour within or by the organisation. This can only be reached if the code appeals to the users and its contents are comprehensive. The project group, possibly together with the works council, must decide on the best way to implement the code.

Management plays a vital role in this process. They have to see to the practical implementation of the code in the various departments of the organisation. The success of a code starts with management being involved and determined to implement the code. This can be achieved by adjusting the implementation method to organisational procedures. Another way to encourage commitment of management is to stress the fact that a code of conduct can contribute to the primary process of the organisation.

Executing Implementation

The introduction of the code should be done in such a manner that the code gets full attention from all persons subject to the code. According to a report on the development, implementation and enforcement of codes of conduct it is essential to the embedding of the code within the organisation to employ a creative and frivolous manner of implementing the code. Some organisations arrange discussions hosted by stand-up comedians, others start poster campaigns on the issues covered by the code. Some codes have a eye-catching lay-out or include cartoons and stimulating statements. It is useful to provide training for management on discrimination and unwanted conduct¹³⁴. This will increase their commitment to the objective of the code and enable them to actively assist the implementation of the code of conduct within their specific departments. Involving people actively in the implementation of the code is the only way to create commitment within the organisation to the values subscribed by the code¹³⁵.

¹³⁴ Stichting FNV Pers, *Op weg naar een werkvloer zonder racisme*, Amsterdam, Oktober 2003, p. 32-33

¹³⁵ TNO, *Succesfactoren bij de ontwikkeling, implementatie en handhaving van gedragscodes rond non-discriminatie en diversiteit*, TNO Hoofddorp, 2004

In large organisations it is useful to adapt the initial company code to the functions and tasks of individual departments within the organisation. This increases the chances of a successful implementation. The same can be done with professional and industrial codes. For example, a model code to prevent race discrimination was developed for the Dutch public sector in 2001¹³⁶. This code was drawn up at central governmental level but is formulated in such a way that it can be adapted to the specific tasks and organisational structure of each individual government department and agency. The same is done at de-central government level in e.g. the municipalities of Amsterdam¹³⁷ and Rotterdam¹³⁸. The model codes include step-by-step explanatory comments to enable organisations to develop their own organisational code. An example of a model trade code is the Model Gedragscode Welzijnswerk¹³⁹, this model code was established through close co-operation between employer and employees organisations. The obligation for individual employers to develop a code of conduct was included in the collective agreement. Subsequently a model code was designed to enable individual organisations to meet with this obligation. An example of a model industrial code of conduct is the NVP-sollicitatiecode¹⁴⁰. This code, designed by the NVP (Dutch Association for Personnel Management), is specifically aimed at prevention of discrimination during application and selection procedures. It includes rules on equal opportunities and non-discrimination. Individual companies can adjust and personalise this industrial code in order to fit their individual business structure and needs.

Monitoring Implementation of the Code of Conduct

Right of complaint

Finally, the code should include a proper right of complaint and clear procedures on the monitoring of the code¹⁴¹. A right of complaint is the whole of formally determined provisions on the grounds of which complaints about discriminatory behaviour can be handled. Most companies set up a special complaint committee who handle the complaints. Employees or others subject to the code who feel they have been discriminated against can file a complaint with this body in a pre-described way.

The contents of a right of complaint are dependent on organisational policy. A good right of complaint should include the admissibility of a complaint; who can file a complaint where and in what time limit, provisions on the competencies and compilation of a (internal) complaint committee and on the complaint procedure. Many organisations have an intermediary, he or she can be appointed with the care of complainants and assist them during the complaints procedure. Research points out that employees find it easier to file a complaint with an intermediary than with a complaint committee. They fear negative reactions from colleagues and management and find an independent intermediary more approachable¹⁴². Organisations should consider before appointing a complaint committee. They can overcome this initial fear with future complainants by adjusting the complaint procedure. It can be

¹³⁶ *Model Gedragscode Rijksoverheid tegen Rassendiscriminatie*, Den Haag: Ministerie van Binnenlandse Zaken, 2001

¹³⁷ *Amsterdamse gedragscode ter voorkoming en bestrijding van rassendiscriminatie*, 10 januari 1996

¹³⁸ *Rotterdamse gedragscode ongewenst gedrag Circulaire 94 / 7; P & O 94 / 185* (Rotterdam 4 februari 1994)

¹³⁹ Model Gedragscode Welzijnswerk

¹⁴⁰ The NVP-Sollicitatiecode, 2003 http://www.stvda.nl/uploads/2003_nvp_sollicitatiecode.pdf

¹⁴¹ Stichting FNV Pers, *Op weg naar een werkvloer zonder racisme*, Amsterdam, October 2003, p. 27

¹⁴² Boonstra, Knegt, Tros (Hugo Sinzheimer Instituut), *Regelingen inzake een individueel klachtrecht van werknemers in bedrijven*, Ministerie van Sociale Zaken en Werkgelegenheid Den Haag, September 2000

decided that either management or the intermediary is the initial person to address depending on the who the complaint is about.

After implementation of the code management is to supervise the integration of the code into daily company proceedings. Close monitoring is essential to the successful functioning of the code. Management plays a vital role here. It has to set an example and act as a stimulator and corrector. Management together with the works council or staff representatives can decide when and how to evaluate the code and see whether it needs adjusting.

External responsibility

An organisation can decide to publish information on the use and functioning of the code of conduct in its annual (social) report.

Remedies

The (legal) status of a code of conduct depends on the level at and sector in which the code of conduct is established. The decision to develop and introduce a code of conduct at company level is a mere voluntary one, there is no national statutory obligation to develop a code of conduct to prevent and combat discrimination. There are, however, sanctions for individual employers to non-compliance with the obligation from the Working conditions Act. Non-compliance with this act is considered a criminal offence and employers can be fined and in persistent infringements the employer may end up in court. In case of a code established by professional associations there will obviously be more pressure on the professionals /organisations/ companies within that same profession to adapt and introduce the code within their organisations. It might even be a condition for membership. When the code is established at industrial level trade unions and employer organisations (might) bargain the development of a code of conduct within each individual member organisation in a collective agreement. In the case of non compliance with that stipulation by an individual employer employees can turn to the union. Public sector codes of conduct however are seen as administrative rules. Enforcement of these codes at central or decentralised governmental level is done within each individual governmental department or agency. Complaints of discriminatory behaviour should be filed with the complaint committee according to the procedures prescribed in the code. Often they do not contain any sanctions on non-compliance. Disciplinary measures can be taken at infringements of the code's rules. External enforcement is also a possibility. The administrative Court has competency. Administrative procedures will have to be followed.

6.4 Goals of Instrument

The main goal of a code of conduct should be to start a serious internal discussion on (un)wanted behaviour within and/or by the organisation¹⁴³. Recent research within Dutch organisations on the development and implementation of codes of conduct shows that a code is more effective when it aims at encouraging a discussion on discriminatory behaviour including. What does discrimination entail? What forms of discrimination can be distinguished in what parts and proceedings of this specific organisation? How does it

¹⁴³ TNO-arbeid, *Gewenst beleid tegen ongewenst gedrag: Voorbeelden van goed beleid tegen ongewenste omgangsvormen op het werk*, TNO Hoofddorp, 2002

manifest itself? How can it be avoided? An open discussion will raise awareness of the necessity and advantages of equal treatment among employer and employees. If compliance with national and international equality legislation is the only motive for the development and introduction of the code, a code will have no bearing with those subject to the code and proper implementation within the organisation will not succeed. This is the reason why organisations need to invest sufficient time and serious efforts into the development and implementation of a code of conduct. Simply copying a model code and distributing it among employees is not sufficient and will only be a waste of time and money. A code of conduct is a means not an end in itself!

6.5 Policy Theory

Developing a code of conduct is a useful means for organisations to meet with national and international obligations to combat unwanted behaviour discrimination actively within and by their organisations. These national and international obligations are often formulated in general terms. A code of conduct can transfer those general prohibitions into practical rules tailored to the specific needs, culture and policy of an organisation, profession or industry¹⁴⁴. Domestic rules are more accessible and this will encourage compliance.

A code of conduct is a self-regulation instrument. Organisations can set their own rules and standards and deal with conflicts internally without the interference of external bodies or government. Internal rules prove to be more effectively complied with than above- company regulation. The code of conduct provides the organisation with continuity; no more *ad hoc* problem solving.

Using a code of conduct can work preventively. The existence of a clear and accessible code of conduct comes benefits all subject to the code. Employees know what conduct is tolerated and what not in contacts with other colleagues, clients and consumers. This will create a pleasant and safe working environment. This will influence individual performance and absenteeism through illness will decline. In such an environment potential conflicts can be dealt with at an early stage internally and complex time and cost consuming legal procedures can be avoided.

In case any conflicts do arise the existence of a properly published code of conduct is admissible in evidence and may be taken into account in proceedings on dismissal and suspension. The existence of a code of conduct can serve as an indication that the employer has done enough to inform employees on company rules and procedures.

Having a code of conduct might serve as a good PR instrument. It can improve the social image and reputation of an organisation and this might attract potential employees and clients. It is a necessary tool for organisations who preach diversity management, and it will increase external and internal credibility.

Through the process of developing a code of conduct the organisation will gain knowledge on its own organisation and working environment. Involving staff in the discussion on the objective of the code and defining wanted behaviour will create a positive environment which will help implement the code of conduct at a later stage.

¹⁴⁴ Najat Bochhah, *Van must tot lust*, LBR Rotterdam 2002

6.5 Reaction of Parties involved

Government

Since the Minister of the Interior called for the use of codes of conduct in the fight against discrimination in the workplace model codes of conduct have been drawn up at national and local governmental level: Model Gedragscode Rijksoverheid and the Model Gedragscode voor ambtenaren bij gemeenten¹⁴⁵. The first model is specifically on discrimination while the latter refers to discrimination only marginally.

After the 2001 Convention on Race Discrimination and Intolerance the Netherlands drew up a National Action Plan which was published in 2003. One of its themes of focus is equality in the labour market. It specifically mentions that the use of codes of conduct can prevent and eliminate discrimination in an organisation. It further states that the Ministry of Foreign Affairs will draw up a model code on integrity which will integrally include the Government code against race discrimination. The government declares to involve expert centres on discrimination in the discussion and jointly work together to eliminate discrimination. Ministry of Social Affairs organised an expert meeting in 2003 to explore the possibilities to reduce unwanted behaviour at the workplace. The outcomes of this meeting will be used in the development of working condition policy¹⁴⁶.

In 2000, the Companies CARE Project in the Netherlands started. It was funded with EQUAL money which is part of the European Social Fund (ESF)¹⁴⁷. Companies CARE is a product of close co-operation between E-Quality, (expert centre on gender and ethnicity), LBL (experts on age and society), COC (the national organisation for lesbian and gay interest) and LBR (National Bureau against Race discrimination). The project is managed and supported by the *Agentschap SZW*¹⁴⁸. Its main focus is on the effectiveness of codes of conduct as a tool to combat discrimination and promote diversity. The objective is to improve the quality and effectiveness of codes of conduct and rights to complaint. In this context it assigned various research on the use and effectiveness of codes of conduct on discrimination and diversity¹⁴⁹. With the results it will develop training material for organisation that want to start using codes of conduct. In October Companies CARE presented a special web site: www.diversiteitscode.nl. It offers practical tools to help organisations promote diversity and combat discrimination at the workplace. The site consist of a database with means and publications to enable employers to adapt diversity policy and draw up codes of conducts on the matter.

¹⁴⁵ At central level the *Model Gedragscode Rijksoverheid tegen Rassendiscriminatie*, Den Haag: Ministerie van Binnenlandse Zaken, 2001 and more recently at decentralised level: *Modelgedragscode voor gemeenteambtenaren*, VNG, 2004

¹⁴⁶ National Action Plan The Netherlands , 2003

¹⁴⁷ For more information on EQUAL projects in the Netherlands:

http://agentschap.szw.nl/index.cfm?fuseaction=dsp_document&link_id=27808&menu_item=4766 or in general: http://europa.eu.int/comm/employment_social/equal/index_en.html

¹⁴⁸ The Agentschap SZW is in charge of subsidies in the field of social economical policy, especially on work and income. It is also responsible for executing subsidies measures by the European Social Fund (ESF).

¹⁴⁹ See e.g.: Ing. D.J. de Koning, *Vooronderzoek Gedragscodes*, report to Companies Care, E-quality, experts in gender en ethnicity, Spring 2003 and TNO arbeid, *Succesfactoren bij de ontwikkeling, implementatie en handhaving van gedragscodes rond non-discriminatie en diversiteit*, TNO 2004.

Employers and employees organisations

In 2003, the Stichting NCW, a centre related to the employer organisation VNO-NCW, published 2003 a brochure on company codes it does not specifically address discrimination. It speaks of core values and rules for employees.

In 2001, the agriculture employers organisation LTO drew up a code of conduct together with FNV for the horticulture industry. It states that since the introduction of the code in 2001 examination of individual annual reports shows that hardly any complaints have been registered with the specially installed complaints committee. Only three formal complaints were registered, but they were not on discriminatory behaviour. Trade union describes this to the fact that employees have difficulty in approaching the committee. LTO draws a different conclusion: it concludes that apparently there are no problems with discrimination at the workplace in this specific industry.

Unfortunately, no further information was available on the involvement and experiences of the trade unions in the development of anti-discrimination codes of conduct or the experiences with the FNV code.

6.6 Effectiveness of Codes of Conduct

Formal Effectiveness

Since the Minister of the Interior called for all public and private sector organisations to develop codes of conduct to prevent race discrimination many codes have been developed. In 2000, research was done into the social and ethical responsibility of 2,500 Dutch large organisations. It showed that 34 per cent of those large private sector organisations had introduced a code of conduct, 50 per cent was either in the process of developing one or planning to do so in the near future. Only 17 per cent stated it did not need a code of conduct. Where nearly half of large organisations (more than 1000 employees) have a code of conduct, only a third of medium-sized (between 300 and 1000 employees) and just over 25 per cent of small (300 and less employees) organisations have a codes. Since this study focused on codes of conduct in general it did not specifically refer to codes on discrimination¹⁵⁰. At the moment the Dutch Arbo Act is being evaluated with a special focus on knowledge of the concept of unwanted behaviour with individual employers and the existence of a code of conduct regulating this behaviour. The results of the evaluation will be presented to the Minister of Social Affairs at the end of October. Unfortunately no results were public at the time this publication was printed.

A handful of codes of conduct specifically aimed at the elimination (race) discrimination have been developed at various levels. At trade and industrial level there are codes for e.g. insurance (1992), sports industry (1994) small firms, FNV trade union (1993), health sector (1995), care (2000) and horticulture industry (2001)¹⁵¹. There is little information on the implementation of these codes.

¹⁵⁰ L. Paape and H. Hummels, *Sociaal en ethische verantwoording: keurslijf of lijfbehoud?*, PriceWaterhouseCoopers & Universiteit Nyenrode, 2000

¹⁵¹ <http://www.lbr.nl>

In 2001, the Dutch government published the Model Gedragscode Rijksoverheid¹⁵². All central governmental departments and agencies are subject to the code. It is specifically aimed at preventing and combating race discrimination.

Behavioural Effectiveness

In 2000, an evaluation was conducted of the legal obligation for employers to have an active policy against aggression and violence, sexual harassment and mobbing. This obligation was included in the Working Conditions Act. 40 per cent of the employees stated to have been confronted with aggression and violence, 10 per cent with sexual harassment and 16 per cent with mobbing at their workplace. A significant part of the employees confronted with aggression and violence (75 per cent), sexual harassment (42 per cent) and mobbing (56 per cent) files a complaint with the appointed complaint person or committee. Complaining does often not lead to changes at the workplace or the personal situation of the complainant. An important finding is that most incidents regarding sexual harassment do not turn into a formal complaint. Conflicts are either solved at an early stage or complainants prefer to change jobs rather than file an official complaint¹⁵³. Another report on company policy on unwanted behaviour shows that in practice employers do not tend to evaluate their policy. Therefore information on the effectiveness of such policy is scarce¹⁵⁴.

Material Effectiveness

The main conclusion of the evaluation of the 1994 Rotterdam and 1996 Amsterdam anti-discrimination code of conduct for local civil servants is that codes of conduct do not work. Most local authorities are familiar with the code but they have not yet introduced or implemented the code. This is mainly due to the fact that the codes are not properly published and presented. There is hardly any referral to the code, employees do not complain, and no bearing for the code with management. As a reason for the lack of bearing management mention time pressure and the fact they think the discrimination issue is old fashioned. They thus do not actively contribute to the implementation of the code. Furthermore, most departments do not have a clear procedure in case a employee complains of discriminatory behaviour¹⁵⁵.

Conclusions on Effectiveness

It is not possible to draw a conclusion on the effectiveness from the few information we have on experiences with codes of conduct in relation to the elimination of discrimination. Although quite a few codes of conduct have been developed since 1992, few to no information on the effectiveness is available. The scarce information that is available is not very encouraging. In most organisations the code of conduct seems to remain a useless piece of paper. Bad or no active implementation guarantees the failure of a code. Employers do not actively carry out their duty to eliminate discrimination from the workplace. A project such as Companies CARE might help change this situation by providing concrete information on the

¹⁵² *Model Gedragscode Rijksoverheid tegen Rassendiscriminatie*, Den Haag: Ministerie van Binnenlandse Zaken, 2001

¹⁵³ Regioplan Onderzoek Advies en Informatie, *Evaluatie Arbo-Wet inzake seksuele intimidatie, agressie en geweld en pesten op het werk*, Amsterdam, maart 2000

¹⁵⁴ TNO-arbeid, *Gewenst beleid tegen ongewenst gedrag: Voorbeelden van goed beleid tegen ongewenste omgangsvormen op het werk*, TNO Hoofddorp, 2002

¹⁵⁵ P. Stevens, *Anti-discriminatiecodes*, Universiteit Utrecht, 2003

development and implementation and assist organisations in complying with equality legislation.

6.7 Keys to Success

The introduction of a code of conduct can be to the benefit of the employer, employee and of the organisation as a whole. A code of conduct may protect employers and employees from unwanted behaviour and it helps them avoid long and complex legal procedures. A successful code of conduct is tailored to the goals, tasks, policy of the specific organisation. The right of complaint inextricably forms part of a good code of conduct.

A summary of the main keys to the development and implementation of a successful code of conduct:

- Each organisation should design its own code of conduct, tailored to individual business needs. Points of consideration are: size of the organisation, organisational culture and policy, main goals, tasks and strategies, match existing (quality) protocols, the use of language, form and lay-out of code of conduct, presentation and implementation of the code
- Pay special attention to the content of the code and the procedural factors when developing and implementing the code
- Publicity around the introduction of a codes of conduct is essential; there are many creative ways of raising attention to the objective and contents of the code bringing such as seminars, leaflets and the lay-out of code
- Partnership between social partners and the government might help raise awareness of the need for codes of conduct at the workplace
- Management play an important role in implementing the code of conduct and preventing unwanted behaviour i.e. discrimination. Regularly drawing attention to the matter, i.e. during staff meetings, will keep making the objective of the code an issue¹⁵⁶. They should take complaints about discrimination serious and point out the existence of a right of complaint and related procedures
- Set up a committee of complaints and design clear complaint procedures

¹⁵⁶ TNO-arbeid, *Gewenst beleid tegen ongewenst gedrag: Voorbeelden van goed beleid tegen ongewenste omgangsvormen op het werk*, TNO Hoofddorp, 2002

7 Covenants (The Netherlands)

7.1 Introduction

In the last decade The Netherlands has become a diverse society, in demographic, social and cultural respect. The change in composition of the Dutch population has significant consequences for Dutch labour market policy. Despite the diverse composition of the Dutch labour force, many minority groups experience difficulties to enter the labour market. Society as a whole needs to become aware of this diversity and its implications, but employers especially must recognize that multicultural company policy is needed. In the early nineties the first initiatives to stimulate labour market participation of minority groups came from the Dutch social partners. In 1991 employer and employee organisations in the Stichting van de Arbeid (STAR)¹⁵⁷ agreed on a framework on minority policy by social partners. This framework was documented in *Meer Werk voor Minderheden*¹⁵⁸. As results of this policy were disappointing, the government decided to enact legislation on the matter. In 1994 the minority labour participation Act came into force and was replaced by the SAMEN Act of 1998¹⁵⁹. The latter was a result of the evaluation of the second STAR Framework agreement¹⁶⁰. The SAMEN Act is meant to support the recommendations of that social partner agreement and to increase labour market participation of minorities.

In 1999, the Taskforce Minderheden en Arbeidsmarkt¹⁶¹ was installed by the Minister of Social Affairs and the Minister of the Interior, to stimulate labour market participation of minorities and abolish possible obstacles. It came with three recommendations to adopt policy to unite job seekers from minority groups and potential employers:

- Unite offer and demand in the most direct and fastest manner possible
- Involve top management of large companies
- Aim at trade level

These recommendations led to several projects. Two of those, the small and medium sized company covenant (MKB Covenant) and the Raamconvenant Grote Ondernemingen (RGO), will be analysed in this chapter. Both projects aim at greater inclusion of ethnic minorities in the labour market. As these initiatives involved multiple parties, covenants were used to put down agreements on objectives and procedures on the matter. The projects have all been evaluated and similar policy projects have been adopted for other unemployed groups such as the covenant to stimulate labour market participation of women who return to work after a career break¹⁶². The following analysis is on the use and effectiveness of covenants as an instrument to create equal opportunities for minority groups.

7.2 Description of Instrument

¹⁵⁷ The Stichting van de Arbeid is a consultation body of central employer and employee organisations which occasionally advises government on social and economical policy. More information on: www.stvda.nl

¹⁵⁸ Stichting van de Arbeid, *Méer werk voor minderheden*, November 1990: (1991-1996)

¹⁵⁹ Wet SAMEN (Stimulering Evenredige Arbeidsdeelname Minderheden), 1998

¹⁶⁰ Stichting van de Arbeid, *Met Minderheden meer Mogelijkheden*, November 1996: (1997-2001)

¹⁶¹ Translates as: “Task Force Minorities and Labour market”. In this Taskforce representatives of minorities, employer and employee organisations, trade and industry, and employment agencies were united

¹⁶² Ruim baan voor vrouwen project: www.ruimbaanvoorvrouwen.nl

A covenant can be defined as a formal agreement between a central public body and one or more parties which aims at realising government policy. The agreement is legally binding, unless parties decide otherwise. Goals, rights and obligations of parties involved are formulated clearly. The covenants further consist of agreements on execution of that objective, the monitoring, dispute procedures, specific measures concerning compliance with the covenant, evaluation, regulations on modification of the contents of the covenant and regulations on cancellation by a party and its consequences.

Since 1999 the Dutch government has implemented several projects to increase labour market participation of ethnic minorities. The following is a description of two such projects in which agreements and proceedings were put down in covenants. Both projects resulted from the recommendations made by the Taskforce Minderheden en Arbeidsmarkt. The first recommendation –unite offer and demand- led to the Covenant inzake de instroom van etnische minderheden in het midden- en kleinbedrijf (MKB-covenant). The second recommendation –involve management of large companies- led to the Raamconvenant Grote Ondernemingen (RGO).

MKB-convenant

In April 2000 the Chair of the small and medium sized employer organisation (MKB-Nederland) took the initiative to draw up a covenant involving the Ministry of Social Affairs, the Ministry of the Interior, the MKB-Nederland and the Centre for Work and Income (CWI¹⁶³): the MKB-covenant. The objective of the covenant was to mediate between job-seeking minorities to vacancies in small and medium sized companies. Ethnic minorities should thus be enabled to enter the labour market and employers of small and medium sized companies should be able to fill their so-called difficult vacancies. The project was finalised in December 2002.

CWI installed a national and regional project infrastructure to achieve the objective of the covenant. At regional level project teams were created with a total of 250 MKB Consultants who exclusively worked on the MKB-covenant. These project teams were made up of ethnic minorities mediation experts who assist employers with recruitment and selection. Part of these MKB Consultants had an immigrant background. The project teams were supervised by regional project managers who were subsequently supervised by a national project manager. The project teams had clear targets: each region had the obligation to fulfil a set number of small and medium sized company vacancies in a set period of time.

In mediating immigrant job seekers a one-on-one approach was taken. Every immigrant client who registered with the CWI¹⁶⁴ was invited to a preliminary consultation. People who receive unemployment benefits are formally obliged to visit the CWI for consultation every other week. During these consultations competencies and possibilities of the job-seeker were explored. Through this approach immigrant job-seekers were closely monitored into a job. Additional training was provided if needed. Each MKB Consultant was responsible for its own case load; this one-on-one approach was supposed to enable the consultants to work more effectively.

¹⁶³ The Centre for Work and Income (CWI) is the first stop for job-seekers and employers in the Netherlands. Employers can contact CWI for placement services and information on the labour market. CWI can help job-seekers find work or to apply for unemployment or supplementary benefits. The centre also issues dismissal and employment permits and provides information relating to labour law.

¹⁶⁴ See note 7.

The MKB-covenant accommodated several specific measures for employers. A national telephone number was put into operation through which employers could communicate their vacancies. Those vacancies were immediately redirected to the relevant region and a MKB Consultant would contact the employer. Within three days the MKB Consultant should nominate at least one job candidate and within a week there should be clarity on the fulfilment of the vacancy. The CWI was also allowed to refer a case to a commercial intermediary if it was not able to comply with this obligation internally. The MKB Consultant should monitor its client up to two months after placement. Close monitoring of clients should help them to stay on the job.

Raamconvenant Grote Ondernemingen (RGO)

A second project resulting from the recommendations of the Taskforce Minderheden en Arbeidsmarkt¹⁶⁵ is the RGO. This covenant, signed in June 2000, covered multicultural staff policy. The covenant was finalised in June 2004. The objective of this covenant was to involve top management of large companies in increasing labour market participation of minorities. The RGO-project consisted of one framework covenant between the Minister of Social Affairs, the Minister of Large City and Integration Policy and the boards of fourteen large Dutch companies, such as KLM, ABN AMRO and Randstad Groep Nederland BV. This framework covenant put down the intention of parties to make a serious effort to implement multicultural staff policy. A project organisation was set up, Ruim Baan voor Minderheden (RBvM), to support individual organisations to implement the covenant. Parties agreed on the use of so-called implementation covenants between the above mentioned Ministers and individual organisations containing detailed agreements and subsequent measures. A total of 110 large companies from various industries signed this covenant. An average of one in ten large Dutch non-profit organisations and one in seven large organisations in the profit sector are party to an implementation covenant. The implementation covenants contained agreements on the following themes:

- Multicultural staff policy and intercultural management; raising commitment and bearing at the workplace, training staff on the subject and other diverse concrete measures
- Recruitment and selection; create vacancies for the target group and raise awareness of culture and background during job application procedures
- Influx of minorities; create and offer work experience positions and trainee-ships
- Preservation and flow; professional and language training, monitoring and coaching
- Other measures and activities to support the objective of the covenant

Each implementation covenant was tailored to fit the policy and structure of the specific organisation who is party to the covenant. Neither the framework covenant nor the individual implementation covenants are legally binding.

7.3 Goals of Instrument

As mentioned in the Introduction the two projects described in this chapter were the results of the recommendations made by the Taskforce Minderheden en Arbeidsmarkt. This task force,

¹⁶⁵ See Introduction and note 5.

installed by the Minister of Social Affairs and the Minister of the Interior, was set up to stimulate labour market participation of minorities and to abolish possible obstacles.

MKB-Covenant

The main target was to mediate 20,000 minorities into jobs within small and medium sized companies before the end of May 2001. Small and medium sized employers were supposed to provide the CWI with 30,000 vacancies. The covenant was prolonged twice and was finalised in January 2003. With the first prolongation which ran from April 2001 to December 2001 parties to the covenant agreed to mediate a further 13,000 ethnic minorities and provide the CWI with the equivalent in vacancies. The second prolongation entailed the mediation of another 23,000 ethnic minorities between December 2001 and December 2002, and 20,000 vacancies were to be provided by employers.

Raamconvenant Grote Ondernemingen (RGO)

With the signing of the framework covenant by the Minister of Social Affairs, the Minister of Large City and Integration Policy and the boards of fourteen large Dutch companies a first step was set by the Dutch government to involve top management in government policy to improve the social and economical position of minority groups on the Dutch labour market and to reduce unemployment figures of these groups by 50 per cent. Both Ministers' target was to involve at least one hundred of Dutch large companies in the RGO project and to reach an agreement on specific measures for each company to adapt a multicultural staff policy. These measures agreed upon were to be put down in implementation covenants with each individual company.

7.4 Policy theory

Government policy regarding the labour market position of minorities can be described as part of a broader integration policy. Its primary objective is to create active citizenship for members of ethnic groups. Public authorities, non-governmental organisations, the commercial industry and minority organisations carry a joint responsibility to create equal opportunities and as well as obligations for newcomers. Procedures in economical, labour and social policy need to be amended to enable ethnic minorities to participate equally in Dutch society¹⁶⁶.

MKB-covenant

The MKB-covenant specifically aimed at reaching immigrant job-seekers and at assisting them, by way of one-on-one consultation and close monitoring, in finding and keeping a job. Past experiences with this specific group showed they were hard to reach and mediate into a job. Under the MKB covenant immigrants were actively involved in their search for a job by means of publicity, such as advertising campaigns and brochures on the matter and a one-on-one approach of the CWI. Personal and regular contact with one case consultant would enable consultant, client and employer to find a perfect match.

¹⁶⁶ KPMG, "De partners aan het woord" *Evaluatie Wet SAMEN – feiten, ervaringen en visie*, TK 2002-2003, 27 223 nr. 44, 26-09-2003, p. 24.

Raamconvenant Grote Ondernemingen (RGO)

The RGO-project was initiated to involve top management of large companies to implement government policy related to the economic and social position of ethnic minorities. This policy was based on the fact that existing labour market instruments did not have the desired effects. Nationwide measures showed to be too general in kind; problems of specific minority groups could not be dealt with effectively. Those general policy agreements needed to be transposed into specific measures. Using implementation covenants, which are the practical implementation of the framework covenant, would enable an individual organisation to set specific targets related to multicultural staff policy. The decision to involve top management was made to create commitment. Through signing the framework covenant the board of large companies would commit themselves to deal with the underdeveloped economic position of ethnic minorities and to increase labour market participation of this specific group. Involvement of important Dutch companies would serve as a good practice example and should have a significant influence on individual employers to adopt a similar approach.

7.5 Implementation of Instrument

MKB-covenant

The implementation of the MKB-covenant was supported by various additional measures to inform employers on the project, such as:

- An intensive communication campaign; the campaign is aimed at encouraging communication of vacancies and increasing participation of migrant job-seekers
- The MKB vacancy line; vacancies are immediately redirected to MKB Consultants
- The MKB vacancy bus; an active approach to inform employers across the country on possible candidates
- A regional vacancy journal (*de AanBodkrant*); this journal is regularly distributed and offers insight in the pool of candidates and is meant to unite offer and demand per region
- Brochures; information brochures for employers and job-seekers
- A MKB Newsletter; informs employers on recent developments of the covenant
- Seminars and information stands at conferences; during the covenant period a total of 300 seminars were organised to inform employers on the project
- Information campaign (*Entree in mkb*); in 2002 parties to the covenant together with national and local minority organisations launched this campaign to reach migrant groups through advertising on satellite and regional television channels
- Other activities; mainly regional activities aimed at employers

Raamconvenant Grote Ondernemingen (RGO)

With the signing of the RGO framework covenant, parties set up a special project organisation whose task was to support individual organisations to implement and monitor progress of the agreements in the covenant, Ruim Baan voor Minderheden (RbVM). Furthermore a special website was designed which registered participants to the project,

contents and parties of each covenant¹⁶⁷. It gave detailed information on the progress and results of the individual covenants.

7.6 Reactions to the Implementation

Government

Both the Ministries of Social Affairs and Large Cities and Integration, the Ministry of Justice and the CWI are positive about the results of the MKB covenant. They feel that the use of covenants has contributed significantly to the increase of labour participations of the target group. In the future, however, covenants should focus more on influx and flow into higher positions within the same company of target groups. Other points of consideration are the enforcement of agreements in the (implementation) covenants and the inclusion of positive (financial) incentives. It might encourage compliance with covenants if employers can be held responsible for progress of the covenant, the achieved results and receive compensation in the expenses made to achieve their individual targets. According to the government the use of covenants is a temporary measures until companies have commenced self-regulation and responsibility to solve diversity issues¹⁶⁸.

In succession to the minority covenants more covenants have been closed on increasing labour market participation of other minority groups such as women who return to the labour market after a career break, women with a migrant background and older workers.

Employers

The majority of the (110) companies who were party to a RGO (implementation) covenant, 60 per cent, were positive about this instrument. Around 40 per cent claim to experience concrete improvement of the position of migrant workers within the organisation and 60 per cent state that awareness of this position has increased. 15 per cent of participating companies feel the RGO covenant has created a broader understanding and insight into the position of minority groups within their organisation which has led to a reduction of prejudice about these groups. Only few organisations, 5 per cent, feel that a covenant is a good incentive for companies to start taking action to increase labour participation of ethnic minorities¹⁶⁹.

Unions

No employee organisations were party to either of the above mentioned covenant projects. One of the main central employee organisations, the Federatie Nederlandse Vakbeweging (FNV), was invited in 2002 by the Ministry of Social Affairs to join the evaluation committee of the RGO project, but refused since they had not been involved in the set up of the covenants. In relation to the MKB project the FNV mentions the fact that the CWI found that most participants from ethnic minority groups who were matched to a job in a small and medium sized company received a temporary contract. Dutch labour law allows temporary contracts to be extended only twice by another temporary contract which makes placement

¹⁶⁷ www.rbvm.nl

¹⁶⁸ KPMG, "De partners aan het woord" *Evaluatie Wet SAMEN – feiten, ervaringen en visie*, TK 2002-2003, 27 223 nr. 44, 26-09-2003

¹⁶⁹ SEOR B.V., *Monitoring en evaluatie Convenant Grote Ondernemingen –tussenrapportage (eindversie)*, Rotterdam, June 2002

into a permanent job through the MKB project quite difficult. According to the FNV, the CWI counted each extension as a new match or placement. Thus the genuine total of filled vacancies appears to be at least tripled¹⁷⁰.

7.6 Effectiveness

Formal Effectiveness

MKB-covenant

Between 2000 and 2003 a total of 78,000 vacancies were communicated to the CWI by employers (target was 63,000), a total of 44,000 vacancies were filled (target was 53,000) and a total of 70,000 job-seekers were placed, of which 62,000 ethnic minorities after mediation by the CWI (target was 56,000). One of the reasons that the target of 53,000 filled vacancies was not reached is the fact that a discrepancy remained between offer and demand. For example, 23 per cent of the communicated vacancies were related to the technical industry while only 15 per cent of immigrant job-seekers were qualified to work in that specific area. On the other hand, 25 per cent of job-seekers were registered as production employee compared with only 6 per cent of vacancies available. In spite of this discrepancy results were positive, mainly due to the efforts of the MKB Consultants who actively searched for matching vacancies and supported employers in formulating practical job profiles.

Research further shows that organisations who have a relatively high influx of ethnic minorities at the same time are faced with a relatively high efflux of this target group¹⁷¹. An independent report on the endurance of the placement of ethnic workers through the CWI shows that six months after placement around 64 per cent has a job of which 33 per cent with the same employer. This is roughly the same after twelve months. Efflux among ethnic workers is the greatest in the first six months after placement. Once a worker has passed these six months he or she is more likely to stay in that job¹⁷².

Raamconvenant Grote Ondernemingen (RGO)

In March 2002, one hundred and ten companies were party to a covenant with the government¹⁷³. There had been contacts with a total of 155 companies and finally 70 per cent agreed on signing a covenant. The fact that the target of one hundred companies involved in the RGO project was reached is mainly due to the efforts of the project organisation RvBM. In most cases the RvBM took the initiative and approached each individual company. Initially most companies were not eager to co-operate, but eventually they were convinced of the need for an active approach of the target group. Reasons for co-operation were divers. Companies mentioned among others: social responsibility, combating labour shortages, competition motives and social image of the organisation. The main reason, however, was that organisations were concerned of the continuity of inflow of workers and thus the continuity of the organisation itself. Developing a multicultural staff policy enabled them to address an extra pool of potential staff.

¹⁷⁰ Information obtained through interview by mail with Leontien Bijleveld from the FNV vrouwensecretariaat.

¹⁷¹ KPMG, "De partners aan het woord" *Evaluatie Wet SAMEN – feiten, ervaringen en visie*, TK 2002-2003, 27 223 nr. 44, 26-09-2003

¹⁷² Regioplan, *Minderheden aan het werk?*, Amsterdam, June 2002

¹⁷³ SEOR B.V., *Monitoring en evaluatie Convenant Grote Ondernemingen –tussenrapportage (eindversie)*, Rotterdam, June 2002

During the RGO project many measures were taken by individual employers to develop a multicultural approach but they can not all be attributed to the working of the covenant. Other factors such as the positive economical climate, the fact that many participating organisation had already started implementation of diversity policy before the actual start of the RGO covenant and other autonomous developments have contributed significantly to the success of the covenant. Nevertheless, by the end of 2003, the majority of the 110 organisations planned to renew the covenant of which 95 eventually did.

While the RvBM spent most of its time informing and convincing companies to co-operate, there was little time left for the organisation to fulfil its remaining tasks. In 2002, the RvBM had not yet been able to monitor, encourage and /or support companies in the implementation of agreements from the covenants. The RvBM stated in the RGO evaluation report of 2002 it was confident that there would remain sufficient time to deal with this backlog.

Behavioural Effectiveness

MKB covenant

The MKB covenant has had a positive effect on CWI procedures. The one-on-one approach in relation to ethnic job seekers as well as employers appeared to be quite effective. Although the MKB covenant was terminated at the end of 2002, the CWI has adopted this approach in mediating migrant job seekers and its regular mediating function. The experiences with the MKB covenant seem to have contributed to this development. Although most employers were reluctant to co-operate with the CWI at first, the personal approach of MKB consultants and regular personal contact with those employers have changed this attitude.

Raamconvenant Grote Ondernemingen (RGO)

External research shows that the number of employees from ethnical backgrounds in companies who participate in the RGO-project is above the national average¹⁷⁴. The target group was reached more than proportionally. Awareness of the need for multicultural policy rose among top management of large companies. Commitment increased to the goals of the RGO-project and parties contributed to regular monitoring and evaluation of the covenants. Independent evaluation of the RGO project concludes that the project accelerated multicultural staff policy mainly with those companies who already took an active approach towards attracting and involving ethnic minorities. For other companies it created conditions which will aid such acceleration in the near future. The covenant seems to have functioned as an incentive for companies to work actively towards multicultural policy and management within the organisation¹⁷⁵.

Material Effectiveness

During 2002, the share of ethnic minorities on the Dutch labour market rose from 8.5 to 9.1 per cent. This percentage reflects the share of ethnic minorities in the total of the Dutch labour force which is 10 per cent. The number of individual organisations who actually reached this 10 per cent standard decreased from 25 per cent in 2000 to 19 per cent in 2002. The services industry has the largest share of ethnic minorities: 13.1 per cent, whereas the construction industry has the smallest share with less than 6 per cent of the total of workers. The number of

¹⁷⁴ SEOR B.V., *Monitoring en evaluatie Convenant Grote Ondernemingen –tussenrapportage (eindversie)*, Rotterdam, June 2002

¹⁷⁵ SEOR B.V., *Monitoring en evaluatie Convenant Grote Ondernemingen –tussenrapportage (eindversie)*, Rotterdam, June 2002

ethnic minorities in full-time jobs rose from 8.7 per cent in 2001 to 9.5 per cent in 2002. These figures indicate an improvement of the position of ethnic minorities on the Dutch labour market¹⁷⁶.

In 1998, 16 per cent of ethnic minorities were unemployed while unemployment under Dutch natives was only 4 per cent. In 2003, unemployment figures of ethnic minorities are still around three times higher than figures on Dutch natives: around 4 per cent of Dutch natives are unemployed by the end of 2003 compared with 14 per cent of ethnic minorities¹⁷⁷.

Conclusions on Effectiveness

The use of covenants in the mentioned projects seem to have had a stimulating effect on organisations to actively co-operate with the government to encourage labour market participation of ethnic minorities. Although in both projects targets have been met, the difficulty remains to keep the target group in the jobs. Since efflux shows to be high and the economical situation has changed during the past few years the governments attention will need to focus on offering minorities outlook to a more permanent job. Most organisations feel the covenant is mainly an instrument which raises awareness of the backward position of ethnic minorities on the labour market and relatively few feel it actually works as an incentive for employers to commence active multicultural policy within the organisation. Future use of this instrument will focus on a more integral approach of increasing labour participation of minorities. Diversity will become the starting point. The use of covenants appears to be a successful formula to involve various parties to achieve a mutual goal: equal opportunities for all and continuity on the labour market

7.7 Keys to Success

MKB-covenant

- Formulate concrete and ambitious goals; a result-oriented approach stimulates and involves parties to the covenant.
- Public monitoring of results; from day one vacancies and placements were made public on a specially designed website, www.werkzaken.nl. Publicity appears to be a successful incentive for parties to co-operate actively.
- Joint co-operation; during the preparation and implementation of the covenant parties gathered regularly to discuss and monitor the taken approach and the results achieved. Swift action could thus be taken to adjust implementation of the covenant.
- Take sufficient time to build a proper project infrastructure; members of the target groups –employers and immigrant job-seekers- need time to prepare for the actual implementation of the project.
- Registration process of job-seekers (at the CWI) should connect with the project infrastructure.
- One-on-one approach of migrant job-seekers; the obligation for immigrants to attend regular consultations at the CWI as well as the personal contact with their MKB Consultant seems to have positive results.

¹⁷⁶ Letter of the State Secretary of Social Affairs M. Rutte to the Parliament of 28 April 2004: www.minszw.nl

¹⁷⁷ Sabine Lucassen, *Groei werkloosheid bij allochtonen iets sterker*, in: *Sociaal economische trends*, eerste kwartaal 2004, CBS 2004: www.cbs.nl

- Publicity; clear publicity on Dutch job-seeking procedures and employment possibilities aimed at immigrant workers in brochures and through advertising is necessary to reach and involve the target group.

Raamconvenant Grote Ondernemingen (RGO)

- Commitment and bearing within the organisation is essential, especially with (top) management; individual companies should invest in informing staff on the contents of the covenants and the objectives and create bearing within the organisation.
- There should be a continuous process of implementing agreements from the covenants; assigning a special project manager or group contributes to this continuity
- Government should create a continuous supply of ethnic workers to aid employers to meet their targets.
- The ethnic workers should receive proper language training; poor language skills appear to be a major obstacle for employers and employees to implement the covenants successfully.
- External experts should be made available against little costs to employers to help implement the covenants.

8 Contract Compliance (The Netherlands)

8.1 Introduction

Since the use of orthodox legal methods (legislation and other measures) proved to be little effective in preventing social exclusion of certain groups and stimulating equality of opportunities in The Netherlands and elsewhere, the Dutch government searched for other more practical and effective instruments¹⁷⁸. One of those instruments is the use of contract compliance by national, regional or local governments to promote equality in the workplace and stimulate labour market participation. Contract compliance can be described as the stipulation of additional social conditions in public contracts with private sector organisations. These social conditions often aim at promoting labour market participation of specific target groups or improving working conditions. The legality of the use of contract compliance has often been questioned. Dutch and international research claim to have found a legal base for the use of contract compliance in national and international legislation¹⁷⁹. At national level the Dutch Constitution, Penal Code and Equal Treatment Act allow the use of contract compliance¹⁸⁰. At European level Article 5 of the Race Directive (2000/43), Article 7 of the Framework Directive (2000/78) and Article 2 (7 and 8) of the amended Equal Treatment Directive (2002/73) provide that the anti-discrimination requirements of the Directive “shall be without prejudice to measures to promote equal opportunities” for the target groups in the areas covered by the directives i.e. employment, promotion, vocational training and working conditions. Those measures are also regularly defined as positive action measures. The Treaty of Amsterdam added a subsection to Article 141 EC which explicitly allows for positive action policy to promote equality of men and women in employment. At international level the UN Convention on the Elimination of All Forms of Discrimination against Women and the UN Convention on the Elimination of all Forms of Racial Discrimination provide a legal base for positive action¹⁸¹. Article 1 of ILO Labour Clauses (Public Contracts) Convention number 94 specifically addresses governments to eliminate discrimination in relation with employment such as working conditions¹⁸². Contract compliance appears to draw its legal status from positive action policy which is part of national and international equality legislation. While equality legislation often focuses on only one or a limited number of grounds of discrimination, a parallel to the legitimate application of contract compliance can

¹⁷⁸ Wilthagen et al, *Onder sociale voorwaarden*, Ministerie van Sociale Zaken en Werkgelegenheid, Den Haag, oktober 2000; Christopher McCrudden, *Public Procurement and Equal Opportunities in the European Community: A study of “contract compliance” in the member states of the European Community and under European Community Law*, Oxford University, December 1994

¹⁷⁹ Wilthagen et al, *Onder sociale voorwaarden*, Ministerie van Sociale Zaken en Werkgelegenheid, Den Haag, oktober 2000; Christopher McCrudden, *Public Procurement and Equal Opportunities in the European Community: A study of “contract compliance” in the member states of the European Community and under European Community Law*, Oxford University, December 1994

¹⁸⁰ A general prohibition of discrimination in Article 1 of the Dutch Constitution; a prohibition of race discrimination in Article 429 sub 4 of the Penal Code and a provision on positive action for women in Article 5 of the General Equal Treatment Act

¹⁸¹ UN Convention on the Elimination of All Forms of Discrimination against Women, General Assembly resolution 34/180 of 18 December 1979 (entry into force 3 Sept 1981); UN Convention on the Elimination of All Forms of Racial Discrimination, 660 U.N.T.S. 195 (entered into force Jan. 4, 1969)

¹⁸² Article 3 of ILO Labour Clauses (public contracts) Convention, 1949 (No. 94) states: *Where appropriate provisions relating to the health, safety and welfare of workers engaged in the execution of contracts are not already applicable in virtue of national laws or regulations, collective agreement or arbitration award, the competent authority shall take adequate measures to ensure fair and reasonable conditions of health, safety and welfare for the workers concerned.*

be drawn from positive action policy in case of gender equality as assumed by Wilthagen et al¹⁸³.

Political interest in The Netherlands in the use of contract compliance for securing equality first arose in the seventies of the last century when women called for the use of positive action inspired by developments in the United States. In the eighties positive action found a legal base in the Dutch Equal Opportunities Act. The debate on contract compliance became a political issue in the early nineties in relation to the discrimination of women and ethnic minorities. Serious attempts by the Government to explore the possible use of contract compliance have failed. In 1989, the Ministry of Social Affairs presented the document *Meer kansen afdwingen* which investigates legal possibilities for the use of contract compliance. Many ngo's reacted positively, but employer organisations and trade unions rejected this document¹⁸⁴. In 1995, however, the first Dutch independent empirical study was performed on the use of contract compliance by Dutch Government in relation to building contracts. In 1999, a renewed interest was taken into the matter and the Dutch Government started a pilot project *Sociaal Bestek* on the use of contract compliance by the national Government in the context of its activating labour market policy¹⁸⁵. That same year, the Ministry of Social Affairs commissioned new research on contract compliance. This resulted in the publication *Onder sociale voorwaarden* which reports on the use of contract compliance by regional and local governments, the marginal conditions and results. This report was published October 2000. The 1999 pilot was evaluated and a final report on the project was published in July 2003.

8.2 Description of Instrument

The term contract compliance originates in the United States (US) and due to experiences with the instrument in the US and Canada it has become associated with the use of government contracts to achieve racial and gender equality. McCrudden adopts a broad approach and defines contract compliance as the “use of public procurement as an instrument of social policy, particularly for the purpose of achieving equality of opportunity between different groups”¹⁸⁶. In his view the term contract compliance may include:

- situations in which the opportunity to bid for government contracts is used as an incentive to achieve a particular social aim which goes beyond that for which the contract is primarily being awarded, setting the achievement of a social aim as a *pre-award requirement*;
- the imposition of obligations on the contractor which must be complied with *during* the carrying out of the contract, with some sanction being available for non-compliance with those obligations;
- situations in which the order of preference for tenderers is, at the *award* stage, determined on the basis of social rather than purely economic considerations;

¹⁸³ Wilthagen et al, p. 16.

¹⁸⁴ Wilthagen et al

¹⁸⁵ *Pilot Sociaal Bestek Rijksoverheid 1999* which aims at stimulating labour market participation, in the construction sector, of the unemployed including minorities.

¹⁸⁶ Christopher McCrudden, *Public Procurement and Equal Opportunities in the European Community: A study of “contract compliance” in the member states of the European Community and under European Community Law*, Oxford University, December 1994, p. 7

- the withdrawal of the opportunity to bid for a contract as a *sanction* against a contractor who has breached social obligations in the past¹⁸⁷.

In The Netherlands research into and the political debate on contract compliance has mainly focused on the use of contract compliance as an incentive to employers to adopt positive action policies. This use of contract compliance corresponds with McCrudden's second situation: contractors under public contracts have to comply with certain social obligations during the execution of the contract. The Dutch researchers, Wilthagen et al, therefore define contract compliance as the inclusion of additional social clauses which goes beyond the main objective of the contract in the context of regular or occasional governmental activities¹⁸⁸. They make a further distinction. Contract compliance in the Netherlands can entail:

1. additional social clauses introduced, encouraged or demanded (stipulated) by government in its public identity (extension of collective bargaining agreements, certification, residential policy, subsidies schemes and other administrative tasks)
2. additional social clauses applied by national, regional or local government in its (mainly) private identity (tenders, investments, supplies, purchase of services and goods)
3. additional social clauses applied by private organisations in contracts with other private organisations e.g. contractor – subcontractor relation.

In the following analysis we focus on the second, the private identity of the governments, since it focuses on the contractual relationship between public bodies and private contractors. In doing this we bear in mind the broader view on contract compliance of McCrudden. The following analysis will start with a description of the general experience with contract compliance of regional and local governments adopted from the Dutch report *Onder sociale voorwaarden*¹⁸⁹. Secondly, there will be a description of the central government pilot we mentioned in the introduction¹⁹⁰.

Legal Limitations

The Dutch researchers focus on the use of contract compliance economy-wide by regional and local governments. They see possibilities for governments to use contract compliance in putting up tenders for public works. At the same time they detect a number of legal limitations which have to be taken into account when governments apply such an instrument in their contractual relationship and private contractors. In that context governments act as a private corporation and such contractual relationships are subject to legal limitations deriving from domestic private and public law and European legislation.

National Legal Limitations

Governments acting as a private corporation are subject to limitations from both private and public law. The freedom of contract is one of the basic principles of Dutch contract law. This likewise applies to a government acting as a private entity. There are, however, limitations to this freedom: the Dutch Civil Code states that a party to a contract may not include a

¹⁸⁷ McCrudden p. 8

¹⁸⁸ Wilthagen et al, *Onder sociale voorwaarden*, 2000, p. 11

¹⁸⁹ Wilthagen et al, *Onder sociale voorwaarden*, Ministerie van Sociale Zaken en Werkgelegenheid, Den Haag, oktober 2000

¹⁹⁰ *Pilot Sociaal Bestek Rijksoverheid* 1999 which aims at stimulating labour market participation, in the construction sector, of the unemployed including minorities

stipulation which is unreasonably onerous to the other party¹⁹¹ and it may not abuse circumstances when closing the contract¹⁹². This significantly limits the possibilities for a government to include social stipulations. A public body should weigh interests of all relevant parties before it includes any (social) clause in the contract to practice positive action. The public interest might not always prevail.

Dutch Public law may limit the use of contract compliance by prescribing that governments are only allowed to conclude contracts in areas in which they have a so-called administrative freedom. Besides, they are not entitled to use private contracts when they may achieve the same objective by using one of its public law competencies. Explaining this any further would lead us too far into the specifics of Dutch administrative law. It is only relevant insofar as the concurrence of private and public law might imply a rather complex obstacle for the use of contract compliance by governments. Other administrative obstacles are the principles of good administration which any public body has to obey in its proceedings. Principles of relevance to the use of contract compliance are the principle of legal certainty, the prohibition of arbitrariness and the equality principle.

European Legal Limitations

Contracting out by governments is further governed by European legislation. When stipulating social clauses a public body firstly must comply with the principle of non-discrimination on the grounds of nationality, the principle of freedom of residence and the principle of freedom of services. Besides that contracting out by governments is subject to various European Directives, namely the Public service contracts Directive¹⁹³, the Public supply contracts Directive¹⁹⁴, the Public works contracts Directive¹⁹⁵ and the Procurement procedures Directive¹⁹⁶. There is no general European prohibition of the use of contract compliance by public bodies: the inclusion of additional social clauses in public contracts is possible provided that public bodies comply with provisions from the above mentioned European legislation¹⁹⁷. There are a few conditions. First of all, in the Beentjes case the ECJ states that social clauses should be formulated as conditions to the execution of the contract. Although this case was specifically on positive action on behalf of the long-term unemployed, the Commission has drawn a parallel to social clauses which aim at elimination of discrimination¹⁹⁸. Another condition is that contract compliance policy should be transparent: conditions for execution must be published when public contracts are put out to tender. A third limitation is the fact that those conditions may never be (in)directly discriminating. The public body involved must provide a guaranteed supply of the target groups. Furthermore, foreign contractors must be able to bring in their own workers and those contractors cannot be obliged to hire workers from the domestic target group. Wilthagen et al conclude that contract

¹⁹¹ Civil Code section 6:233 jo. 6:236 & 6:237

¹⁹² Civil Code section 3:44 sub 1 and 4

¹⁹³ Council Directive 92/50/EEC of 18 June 1992 relating to the co-ordination of procedures for the award of public service contracts, OJ 1992, L 209/1

¹⁹⁴ Council Directive 93/36/EEC of 14 June 1993 co-ordinating procedures for the award of public supply contracts, OJ 1993, L 199/1

¹⁹⁵ Council Directive 93/37/EEC of 14 June 1993 concerning the co-ordination of procedures for the award of public works contracts, OJ 1993, L 199/54

¹⁹⁶ Council Directive 93/38/EEC of 14 June 1993 co-ordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, OJ 1993, L 199/84

¹⁹⁷ Case 31/87, Beentjes, European Court reports 1988, p. 4635

¹⁹⁸ Communication of the European Commission of 22 September 1989, OJ 1989, C 311/46, § 46

compliance is allowed, but no concrete rules on the practice of contract compliance have been formulated yet. In the present situation the risk of breaking rules and competencies remains¹⁹⁹.

Contract Compliance by Dutch Local Governments (Wilthagen et al)

In 1998, Wilthagen et al conducted a survey under all (569) regional and local governments on their experiences with the use of contract compliance to achieve increasing labour market participation. They focused on the period from 1994 to 1998. A total of 152 governments responded, mostly local governments. Of the 9 governments who had actually put contract compliance into effect the following pattern could be distinguished:

- target groups are: long term unemployed (unemployed longer than 6 months), persons registered at the social security offices, job seekers and school leavers
- the majority uses contract compliance in public works contracts, and some in the contracting out of services or goods
- social clauses consisted of the obligation for contractors to spend a certain percentage (2 or 3 per cent) of the total labour costs on the training or hiring of people of the target groups
- in most cases social clauses were included in covenants: agreements between several parties
- parties involved are employer organisations, trade unions, training institutions, local governmental agencies, temporary employment agencies and social services
- the agreement includes a sanction on non-compliance with the social clauses, the sanction consisted of a cut in the sum contracted for equivalent to the sum which was, contrary to the social clause, not spend on the target group(s)

Pilot Project Sociaal Bestek

In 1999, the Pilot project *Sociaal Bestek Rijksoverheid* was launched. The pilot was a joint venture involving several government departments and agencies, trade unions and the employer organisation for local governments. It aims at stimulating labour market participation, in the construction sector, of long standing unemployed workers including minorities. The government decided in 1997 that by way of experiment public construction tenders from different governmental departments (with private constructors) would have to include a social clause. This clause urges competing constructors to spend two to five per cent of the contracted sum on hiring long-term unemployed to work on the project. Contractors may only employ unemployed who are publicly registered under the *Wet inschakeling werkzoekenden*²⁰⁰. The long term unemployed receive training, preferably through existing training facilities in the construction sector, and will thus be offered better job perspectives. With this experiment the government aimed at increasing participation of the unemployed in public works. Participating government departments are the Ministry of National Health, Environmental Planning and Management, the Ministry of Traffic, and the Ministry of Defence. The Ministry of Social Affairs co-ordinates the projects and is responsible for the evaluation. This evaluation took place in 2003. The results will serve as a starting point for discussion on the possible permanent wider use of social clauses in other public tenders.

¹⁹⁹ Wilthagen et al, p. 92

²⁰⁰ Job seekers employment Act.

8.3 Goals of Instrument

The objective of implementing contract compliance by governments varies. It is mainly used as an instrument of social policy to increase labour market participation of specific groups of unemployed people and subsequently decrease unemployment figures. Other reasons for the use of contract compliance are e.g. improve city economy and life, enlarge social responsibility of organisations and financial advantage for the local governments.

8.4 Policy Theory

In the early eighties of the last century there is very little labour participation of specific groups such as women, ethnic minorities, disabled people and the long-term unemployed in general in the Netherlands. Compared internationally, The Netherlands experiences labour market inactivity of large parts of the labour force. The Dutch government subsequently adapts an activating labour market policy. High unemployment figures of ethnic minorities are due to lack of education on one side and discrimination by employers on the other side. Since neither legislation nor other initiatives seem to have any effects on this reality the Dutch government searches for new instruments to deal with discrimination in the workplace and increase labour market participation. One of those is the use of contract compliance in public contracts. Experiences with this instrument in the United States and Canada are quite promising so the Dutch government decides to explore its possibilities for Dutch social policy²⁰¹. During the nineties Dutch - national and local - governments start implementing contract compliance as part of their labour market policy. The inclusion of additional social clauses in public contracts is mainly used to increase labour market participation of members of certain target groups who would otherwise experience major obstacles in finding a job. Those target groups may consist of Contract compliance is used as a form of positive action for those target groups: by forcing private contractors to hire workers from the target group pool, the government helps those people to enter the labour market. By training and hiring them, parties to the public contracts try to create equal starting positions for people and enable them to participate actively in the labour market. Contract compliance is used as an instrument in realising and implementing social and labour market policy. Motives for implementing contract compliance are social as well as an economical.

8.5 Implementation of Instrument

Wilthagen et al

The survey conducted by Wilthagen et al showed that in The Netherlands between 1994 and 1998 contract compliance was implemented in various manners. Additional social clauses on training and hiring workers from target groups were included in either individual contracts between local governments and private contractors and/or incorporated in covenants between local governments and other organisations e.g. industrial organisations. Some public bodies had set a percentage of labour or other costs of a project that needed to be spend on labour market participation of (a) specific target group(s). Others had set a quota on participants of (a) specific target group(s) which should be hired during the project²⁰².

²⁰¹ Wilthagen et al, p. 5

²⁰² Wilthagen et al, p. 94

Pilot Sociaal Bestek Rijksoverheid

After the formal decision was made to start the pilot a Technical Commission was appointed formulated a plan of action. Many organisations were involved into the pilot. The Ministry of Social Affairs was the initiator and held final responsibility. Another three Ministries would provide the public contracts. Other organisations involved were public service agencies, local governments, trade unions and employer organisations. From these parties a monitoring commission was formed. Arrangements were made on the projects, recruitment and training of members of the target group (the long term unemployed) and in 1999 the pilot was launched.

8.6 Reaction to the implementation

Wilthagen et al

Most of the local governments who had actually implemented contract compliance, were in the progress or were planning to use the instrument were positive about this instrument. They expected the use of contract compliance would contribute significantly to the reduction of long term unemployment, creation of employment and the increase of labour market participation. Since the survey was among local governments, we do not know how other parties involved experienced the use of contract compliance.

Sociaal Bestek

The Ministry of social Affairs found it difficult to involve employer organisations actively in the project. These organisations were reluctant at first, as they could not envisage the target group and were not convinced of the advantages. This was mainly due to the fact that contract compliance in this specific pilot project meant obligations for the individual contractors with no direct benefits such as subsidies. The individual contractors, however, adapted a positive attitude towards the experiment and this is the main reason the employer organisations finally decided to co-operate.

In reaction to the evaluation report of the Pilot project Sociaal Bestek the State Secretary of Social Affairs concluded that although the evaluation has resulted in some insight in the conditions for the successful application of contract compliance, the use of covenants is preferred. This is remarkable since the most governments use covenants as a form of contract compliance.²⁰³

8.7 Effectiveness

Formal Effectiveness

Wilthagen et al

²⁰³ Letter of the State Secretary of Social Affairs at the presentation of the evaluation report *Evaluatie Pilot Sociaal Bestek Rijksoverheid*, Den Haag, 11 juli 2003

Contract compliance as an instrument to social policy is mainly used by larger municipalities and mostly in the construction industry. In most cases the local government involves many organisations such as employer organisations, trade unions, training institutions, local governmental agencies and temporary employment agencies. Contract compliance policy and responsibilities are in most cases put down in covenants between the parties involved. Oftentimes, additional training policy is initiated to train potential participants from the target group and the possibility is created to apply for grants to be able to comply with the social clauses. Between 1994 and 1998, 17 per cent of all (569) Dutch local governments have considered the use of contract compliance but only nine, mainly large municipalities have actually put contract compliance into practice. Those 9 municipalities have together applied contract compliance to a total of 13 projects. The number of participants from the target groups went from 0 to around 80 per project. Most of those projects have not yet been finalised.

Sociaal bestek

After the launch in 1999 the pilot did not get off: the actual construction projects started later than expected and alternative projects were scarce. Hardly any job seekers could be found to participate. The pilot was formally ended in 2002 without any significant results. Evaluation of the project by an independent research agency showed that only three construction projects actually worked under a public contract including a social clause²⁰⁴. They only attracted five candidates from the unemployed pool who had not received training prior to the project due to lack of time. A few of them withdrew from the project at a premature stage. Both participants to the project and the national co-ordinator mention two key factors which they held responsible for the failure of the pilot. First, they blame labour market developments; in 1997, when the government decided on the pilot, there was a large pool of unemployed, but this changed during the pilot and finally the pilot was operating in a tight labour market and the pool had narrowed down significantly. As a second external factor the slow pace of implementation of the projects was mentioned. The two key factors lead to the same conclusion: there is too much time between the drawing up of the project and its implementation. Many factors can change in the mean time, especially when working on large and long construction projects. The report states however that many lessons were drawn from the experiences with this pilot. Those lessons focus on the methods of contract compliance, the approach, recruitment and selection of potential candidates, and management and co-ordination.

Behavioural Effectiveness

Although most projects of local governments have not yet been ended, the majority of participants to the projects who made use of contract compliance are positive to the functioning of contract compliance (seven out of nine). Those same governments are planning future use of this instrument. The remaining local governments state to have either never thought of the possibility of contract compliance and or claim that (the lack of) labour market participation is not a problem in their municipality. These are the two main reasons for not using contract compliance.

Material Effectiveness

²⁰⁴ Regioplan, *Evaluatie Sociaal Bestek – eindrapport-*, Amsterdam, March 2003.

Between 1994 and 2002 labour market participation of ethnic minorities in The Netherlands has increased significantly. In 2003 around 50 per cent of ethnic minorities have a job compared to just over 35 per cent in 1994. Participation of Moroccan women on the Dutch labour market has risen from 20 to 30 per cent and that of Moroccan men from 36 to 59 per cent. Participation of Turkish women doubled from 16 to 36 per cent while in 2002 around 59 per cent of Turkish men was working compared to 41 per cent in 1994. The unemployment figure of minorities fell from 20 to 30 per cent in 1994 to less than 10 per cent in 2002. During 2003 this figure went up again²⁰⁵.

During the nineties of the last century labour market participation of Dutch women rose from 39 to 52 per cent in 2001 compared with around 70 per cent of Dutch men.

Conclusions on Effectiveness

Both the evaluation of the use of contract compliance by local governments and the report on experiences of national government conclude that contract compliance is effectively applied by just a few public bodies in a small number of cases and only if certain conditions are being fulfilled. This use of contract compliance cannot be held responsible for the increasing labour market participation of women of ethnic minorities in The Netherlands. Subsequently little can be said about the effectiveness of the use of contract compliance by governments to stimulate labour market participation of certain target groups. Participants to individual projects with contracts including social clauses were nevertheless positive about the experiences with the instrument, especially when agreements were documented in covenants. Most governments have not yet been able to evaluate their contract compliance policy. According to Wilthagen et al, it has substantial potential provided that several (legal) conditions are taken into account. Both the Dutch report and pilot resulted in a list of recommendations for future use of contract compliance.

8.9 Keys to Success

- Inclusion of social clauses in public contracts is more suitable for local, small scale and short term projects
- It is essential to include into the contract executable and effective sanctions on non-compliance with the social clause.
- Attract field experts and experts on relevant initiatives to advise on contract compliance policy and legal limitations
- Commitment and serious involvement of the parties involved is essential
- Connect contract compliance policy with structural regional/local labour market policy
- Sufficient preparation and planning time is essential to the successful implementation of instrument
- The public body involved must provide for a large pool of potential participants from target groups
- Potential participants need to be properly trained and schooled before or during the project
- Enough proper technical and social guidance for the participants before and during the project

²⁰⁵ J. Dagevos, M. Gijsberts, C van Praag (eds.), *Rapportage minderheden 2003: onderwijs, arbeid en sociaal-culturele integratie*, Sociaal en Cultureel Planbureau, Den Haag, oktober 2003

- Assign a project manager and make one department responsible for contract compliance policy
- Contract compliance policy is formally documented internally and is monitored by the accountant department of a public body. Proper internal and external publicity of this policy is essential
- Contract compliance is preferably initiated from the economics departments, not by social departments. This will increase bearing with trade and industry
- Involve employer organisations, trade unions, field experts and organisations, employment agencies and relevant social services actively
- Involve all relevant parties from the start and convince them of the benefits of contract compliance
- Draw up covenants between relevant parties and include a general declaration as well as detailed agreements on the specifics of contract compliance

9 Mainstreaming equal treatment into companies' general policies (The Netherlands)

9.1 Introduction

'Mainstreaming equal treatment' is not so much a policy instrument, but rather a strategy in which different kinds of instruments can – and should - be applied. Moreover, it is a strategy that stems from government policymaking rather than that it has been designed to be applied in other arenas in society²⁰⁶, notably within the context of compliance with equal treatment regulation at company level. Finally, the strategy originally has been designed to acquire equality between men and women (gender mainstreaming), not taking into account the other grounds of today's equal treatment legislation.

All of this does not imply that it would not be appropriate to apply the strategy at company level, and that mainstreaming could not be taking into account all legal anti-discrimination grounds instead of just sex. It does mean however, that the development of an equality mainstreaming strategy at company level is still in its infancy. This, in turn, has consequences for the way in which we deal with the question of how the mainstreaming strategy can be effectively applied at company level. We cannot draw on a whole range of experiences with equality mainstreaming at company level and therefore we will build our review of this instrument on the development of the concept of gender mainstreaming in government policy making, broaden it with the other anti-discrimination grounds by making use of insights from diversity policies, and explore its possibilities to be applied at company level by getting into a few examples of mainstreaming practices at company level.

Historical Background

The concept of gender mainstreaming is first used in discussions on the role of women in development in the context of the United Nations third World Conference on Women in Nairobi in 1985 and got a broader basis during the nineties, especially by way of the *Platform for Action*, the final document of the United Nations fourth World Conference on Women in Beijing (1995).²⁰⁷ The concept was inscribed in the missions of the European Union since the ratification of the Treaty of Amsterdam in 1997, which has made it a priority in all its member states.

In the Netherlands, as well as in other member states, the World Conference on Women in Beijing and the EU mission statement have given an impulse to the mainstreaming strategy. Since the turn of the century, a whole range of policy documents was brought out aimed at developing the mainstreaming of gender within the departments and the interdepartmental organisation and policy, as a second track alongside with specific emancipation policies.²⁰⁸

²⁰⁶ This does not imply that the concept could not be taken up in other arenas. An example is the arena of collective bargaining, of which this book provides an example in chapter 3, the case of France.

²⁰⁷ Paragraphs 79, 105, 123, 141, 164, 189, 202, 229, 238, 252,273, *Platform for Action*, Beijing, 1995, cited in: Council of Europe, *Gender mainstreaming: Conceptual framework, methodology and presentation of good practices*, Strasbourg, 1998, p.13.

²⁰⁸ *Interdepartmental Plan of Action on Gender Mainstreaming 1998 – 2002*, Lower House, 1998-1999, 26 206, no. 11; *Cabinet's Position on Gender Mainstreaming*, Lower House, 2000-2001, 27 061, no. 15. *Medium Term Emancipation Policy Plan 2001-2010*, The Hague, 2000. *Multi-Year Plan on Emancipation Policy*, the Hague, 2000. *Gender Mainstreaming. A Strategy for Quality Improvement. Advisory Report by the Interdepartmental*

Equality between men and women is the objective of the mainstreaming policy, although the other discrimination grounds are taken into account as well. The *Multi-Year Policy Plan* (2000) states that its main objective is:

*“the creation of conditions for a pluralistic society in which everyone regardless of sex, and in interaction with other social organising principles such as ethnical identity, age, marital status, handicap and sexual orientation, has the opportunity to create an independent existence for him-/herself and in which both women and men can enjoy equal rights, opportunities, freedoms and (social) responsibilities.”*²⁰⁹

This objective of gender mainstreaming within a multicultural society is also supported by E-Quality, the main government funded expertise centre for policy makers (at various levels) on emancipation issues. In an explanation of its gender mainstreaming strategy at its website, it states that mainstreaming refers not only to sex, but to all non-discrimination grounds, in other words, to diversity.²¹⁰

Most government initiatives are aimed at mainstreaming gender in government organisation and policies, be it at a central level or at the provinces or municipalities, but the principle of collective responsibility is explicitly recognised in the *Multi-Year Policy Plan* (2000)²¹¹ and co-operation with private parties is mentioned as a priority for the first decennium of the 21st century. Though still in its infancy, as explained above, the issue of measures aimed at equality mainstreaming at company level can be seen in the context of this co-operation.

9.2 Definition of Strategy

Gender mainstreaming has turned out to be a concept easily to be misunderstood and numerous are the discussions on what it entails and what not, not seldom resulting in the conclusion that the concept is not useful at all and it would lead gender issues to disappear from the policy agenda altogether. To avoid the misunderstandings that have surrounded the concept ever since it came up, it is important to pay attention both to its definition as well as to the complementary character of gender mainstreaming as related to specific emancipation policies.

A group of specialists on mainstreaming of the Council of Europe, set up in 1995, paid ample attention to these issues in its Final Report.²¹² It agreed on the following definition that is still broadly accepted:

“Gender mainstreaming is the (re)organisation, improvement, development and evaluation of policy processes, so that a gender equality perspective is incorporated in all policies at all levels and at all stages, by the actors normally involved in policymaking.”

Working Group on Mainstreaming to the State Secretary for Social Affairs and Employment, A.E. Verstand-Bogaert, The Hague, 2001.

²⁰⁹ *Multi-Year Plan on Emancipation Policy*, The Hague, 2001.

²¹⁰ <http://www.e-quality.nl/e-quality/pagina.asp?pagkey=21302>.

²¹¹ *Multi-Year Plan on Emancipation Policy*, The Hague, 2001.

²¹² Council of Europe, *Gender mainstreaming, conceptual framework, methodology and presentation of good practices*, Strasbourg, 1998.

This definition of gender mainstreaming highlights:

- The goal of mainstreaming: integrating a gender equality perspective in all policies (with the final aim of achieving gender equality).
- The process of mainstreaming: (re)organisation, improvement, development and evaluation of policy processes.
- The objects of mainstreaming: all policies at all levels and all stages.
- The subjects of mainstreaming: the actors normally involved in policymaking.

The gender mainstreaming approach ties in with the fact that a policy – even if it is apparently neutral from the point of gender – always has a different effects on men and women respectively. The main aim is to evaluate and correct the different impacts which legislative measures, policies and programmes of action can have on men and women, taking into account their different positions in life, and their different socio-economic situations. The mainstreaming strategy is not aimed at changing women and helping them fit in with the existing, male-oriented organisations and institutions, but accepts their situations, priorities and needs as *normal*, that is, takes them, at the same level as men, as a starting point for (re)designing organisations and institutions in all areas and at all levels of society.

It is very important to recognise the fact that gender mainstreaming is complementary to specific gender equality policies, it builds on the knowledge and lessons learnt from these policies and can by no means replace them. According to the group of specialists on mainstreaming of the Council of Europe, they are two different strategies to reach the same goal, i.e. gender equality, and must go hand in hand, at least until there is a real culture and consensus regarding gender equality in the whole of society. The main difference between mainstreaming and specific gender equality policies is the actors involved and the policies that are chosen to be addressed. The starting point for “traditional” forms of equality policies is a specific problem resulting from a gender inequality. A specific policy for that problem is then developed by an equality machinery. The starting point for mainstreaming is a policy which already exists. The policy process is then reorganised so that the actors usually involved take a gender perspective into account and gender equality as a goal is reached. Mainstreaming is a fundamental strategy – it may take some time before it is implemented, but it has a potential for a sustainable change. Traditional forms of equality policy can act much faster, but they are usually limited to specific policy areas.²¹³

9.3 Description of Instruments

The instruments to be applied in a mainstreaming strategy are not new or specially conceived for that aim. Gender mainstreaming strategies can start from the techniques and tools generally used in the policy process, provided that they are redesigned and adapted to the needs of mainstreaming. They are basically aimed at the creation and dissemination of knowledge and awareness-raising, for the problem with equality issues is that in most cases the problem itself is not recognised as such and the mainstream policy actors lack expertise on equality issues. Creating knowledge and raising awareness includes not only the problem of inequality and the way to handle it, but should always be completed by the monitoring and assessing of the organisation’s own policies from an equality perspective.

²¹³ Ibidem.

Both the group of experts of the Council of Europe in their final report²¹⁴ as well as the Dutch government in its policy document *Gender Mainstreaming: A Strategy for Quality Improvement*²¹⁵ list a whole range of instruments categorised along three lines:

- Analytical instruments, such as statistics, surveys and forecasts, cost-benefits analyses, research, checklists, guidelines and terms of reference, gender impact assessment methods, monitoring
- Educational instruments, such as awareness-raising and training courses including follow-up action, mobile expertise providing education at the level of a unit or department, manuals and handbooks, booklets and leaflets.
- Consultative and communicative instruments, such as working or steering groups and think tanks, directories, databases and organisational charts, participation of both sexes in decision-making, conferences and seminars, hearings.

The instruments can also be categorised along the phases of the policy process:

- Detecting, for example:
 - a strategic information system aiming to list relevant information from a variety of sources and make it accessible for use (analytical);
 - a gender and/or diversity checklist or quick scan to check whether gender/diversity is relevant to the policy matter at hand (analytical);
 - meetings to promote alertness and gender / diversity sensitivity and shed light on the gender /diversity aspects of certain policy matters (consultative/communicative);
- Agenda setting, for example:
 - Investigation and analysis of the existing situation in a particular policy area (analytical);
 - Policy calendar with all important dates including those on which action on gender / diversity should be taken ((consultative/communicative)
- Implementing, for example:
 - Ex ante test, such as the Gender Impact Assessment to check whether a policy intention will have unacceptable effects (analytical);
 - Gender sensitive budgeting which assesses gender effects and analyses distribution effects (analytical);
 - Needs assessment of the policy's target group (analytical)
 - Information provision (consultative/communicative)
 - Reports (consultative/communicative)
- Monitoring and assessing, for example:
 - Monitoring: target figures, ratios and indicators (analytical)
 - Ex post assessment (analytical)
 - Benchmarking, seals of approval, supervision and audit (consultative/communicative)
 - Peer reviews, exchange of best practices (consultative/communicative)
 - Discussion rounds (consultative/communicative)
- All phases:
 - Promotion of expertise by way of training, courses, workshops (educational)
 - Promotion of expertise by way of handbooks, manuals, guidelines, and the dissemination of good practices (educational).

²¹⁴ Council of Europe, *Gender mainstreaming, conceptual framework, methodology and presentation of good practices*, Strasbourg, 1998.

²¹⁵ *Gender Mainstreaming. A Strategy for Quality Improvement. Advisory Report by the Interdepartmental Working Group on Mainstreaming to the State Secretary for Social Affairs and Employment, A.E. Verstand-Bogaert*, The Hague, 2001.

Development of Instruments for Company Level

(Gender) mainstreaming is a complex concept not in the least because it applies to all areas and all levels of society, and therefore analyses of the mainstreaming strategy often remain at a theoretical, general level. It is necessary to make the concept concrete in the context in which it is implemented. In the context of the compliance with equal treatment legislation by companies, mainstreaming comes down to the anchoring of an equality perspective in their human resources policies. This means that in their human resources management companies pay attention to relevant differences between (categories of) people. Some examples are available of good practices in this respect (Shell, Delta Loyd, IBM, ING), often detected by so-called diversity awards, that in the Netherlands the employers' organisation VNO-NCW has installed. Other examples usually concern the application of one single instrument, for example an audit or a checklist.

We have been looking however for government initiatives to promote mainstreaming at company level, which are rare. One good example however is "Mixed", a co-operative project of the Directorate Co-ordination Emancipation Policy (DCE) of the Ministry of Social Affairs and Employment and seven expert organisations, funded by the Equal-programme of the European Social Fund.²¹⁶ Though aimed at the specific purpose of breaking the glass ceiling and bringing women into the higher segment of the labour force of companies and organisations (a specific problem resulting from gender inequality), and though hardly explicitly named as such, it includes, beside the development of specific measures to deal with this, also clear mainstreaming elements in its strategy. The project shows the importance of tailored solutions, the development of instruments for the specific contexts they are meant for, i.e. human resources management in companies.

Within the context of the project, nine instruments have been developed divided in three tracks:

- Culture and organisation: the creation of preconditions for the better use of female talent in companies and organisations (measures aimed at recruitment, the assessment and change of organisational culture, part-time work assessment, work/life balance)
- Talent: creating more female talent in companies and organisations and making it visible
- Anchoring: the anchoring of measures that stimulate the promotion of women by way of the international method of Investors in People (IiP).

In all three tracks, elements of mainstreaming are to be found, but in the first two tracks specific instruments are developed while some attention is paid to their implementation (mainstreaming), whereas in the third track mainstreaming itself is the subject. We therefore limit ourselves to a description of this third track.

Building on the method of Investors in People aimed at a process of improving organisations based on the development of its employees, a specific module has been developed in the context of the Mixed project to assess the way in which a company has integrated a policy of equal treatment in its human resources management policies. The characteristics of this module are the same as all modules of the Investors in People method to assess a company's HRM policies. Different from other assessment methods, the IiP assessment of a company's

²¹⁶ *Mixed Management - Handboek diversiteit m/v*, Den Haag: Ministerie van Sociale Zaken en Werkgelegenheid, 2004.

policy as regards the development of its human resources is based first and foremost on experiences and results rather than on paper tigers such as policy plans, plans of actions, yearly reports, etc.

The specific equal treatment module contains criteria to be met in all phases of the policy cycle (commitment – planning – action – evaluation) to check whether or not equal treatment is implemented. The module has the following characteristics:

- Evidence is based primarily on the experiences of the people concerned (and only partly on plans and reports).
- Attention is paid to awareness the notion of diversity in every phase of the policy process.
- Attention is paid to knowledge of the measures taken in every phase of the policy process.
- Attention is paid to the results of the measures taken.

9.5 Implementation and Effectiveness

Mainstreaming equal treatment at company level has not become a widespread practice yet, only few examples exist, usually not even considering a comprehensive mainstreaming strategy but rather the implementation of one or two mainstreaming instruments. Consequently, it is too early to draw any conclusions on effectiveness. An advantage of the equal treatment module developed in the context of the Mixed project in co-operation with Investors in People, is that it assesses effectiveness at different levels. Not only is a check being made whether or not equal treatment is being implemented in organisational plans (formal effectiveness), but also is being assessed what the experiences with the implementation of these plans, and what its behavioural effects have been.

9.6 Keys to Success

Sophisticated instruments can be developed, but they do not work unless some important preconditions are met. In the context of equality mainstreaming at company level, the following are important:

- **Commitment:**
The *management* of a company should recognise the problem of equality as a problem of the company and have the will to do something about it. It must make this absolutely clear to the rest of the company, not only by formulating a *clear* policy plan, but also by underlining its urgency by giving it explicit priority. The top of the company can make this clear, among other things, by giving the good example. It also can stimulate mainstreaming by explicitly giving its appreciation to mainstreaming activities at all levels of the organisation.
Middle management is generally recognised as an important segment in processes of organisational change. This is also the case with respect to equality mainstreaming. Though not determining the goals and content of a strategy, managers at the middle level are very important in implementing it. It is important that they are backed up by the management of the company, not only by way of a clear story (elaborated policy plan); they also have to be consulted about the way in which equality policies are to be implemented, and they have to be given the necessary powers and means.

Finally, the commitment of *employees* should not be neglected. It is important to inform them on the strategy and explain its backgrounds and means.

- Expertise:
Expertise can be organised within the company both by installing an equality machinery and by means of training. Expertise can also be hired from expert centres.
- Participation of women and people from minority groups in decision making:
The various values, interests and life experiences of women and people belonging to a minority group are much easier integrated in the company's policies when people representing those values, interests and experiences are participating in decision making. Not anyone of them is necessarily an advocate of their groups interests, but, as a matter of fact, most advocates for equality are usually women and/or members of a minority group. This principle goes for all levels of management and also for representative bodies of employees.

10 Conclusions

In this report we have been examining eight ‘instruments’ of equal treatment policy:

- (1) the ‘gender equality plan’ (Sweden);
- (2) the Equality Authority (Ireland);
- (3) the obligation of social partners’ to negotiate on equal treatment (France);
- (4) ‘equal pay audits’ (United Kingdom);
- (5) codes of conduct and rights of complaint (as far as used in The Netherlands: NL);
- (6) covenants (NL);
- (7) contract compliance (NL); and
- (8) mainstreaming (NL).

The questions guiding us in the project, have been:

- (a) What are the characteristics of the instrument?
- (b) In what way, and to what extent is the instrument being implemented and what experiences have been gained in this process?
- (c) What have been the effects of implementing the instrument for equal treatment ‘at the workplace’? What may be concluded about its effectiveness (distinguishing between formal, behavioral and substantial effectiveness)?
- (d) As far as the instrument has been successful, what conditions may be said to be particularly contributive to its success?

As we already noted in the introduction to this report, the eight ‘instruments’ of equal treatment policy that we have been analyzing, are of a rather diverse character. Some of them impose legal duties on employers, others try to further negotiations and agreements on equal treatment between social partners, still others are more oriented towards inspection and enforcement of equal treatment rules. There are differences as to the extent of the ‘reactive’ or ‘proactive’ character of the instruments. These differences might be relevant in the light of a gradual development of the elements of ‘combating discrimination’ and ‘furthering equal opportunities’ into a European policy of ‘promoting diversity’.

The analysis of the eight instruments is to be found in the chapters 2 to 9. In this final chapter we make a comparison between the eight instruments and highlight some of their common, or diverging elements. We end by raising some questions that are still open to debate and might be the subject of further explorations in the future.

10.1 Different Ways of Influencing

In all cases governments are using instruments to bring about changes in the conditions under which decisions in labour organisations are being made. Employers are, therefore, always, whether directly or indirectly, targeted by the instruments, but other parties are called into account as well: unions, work councils, individual employees. The influencing which should bring about these changes, may take mainly three different forms.

A Information and Employee Empowerment

The conception implicated in some of the instruments is that legal rules are the ultimate normative framework for ‘equality relevant’ behaviour within labour organisations; their points are mainly (1) to inform employers and employees on their current position relative to

their legal duties and rights and (2) to further compliance with these rules. This applies to the Equal Pay Audits (UK) and activities of the Equality Authority (Ireland).

Apart from the usual dissemination of information on duties and rights, the means of a *review* is being deployed. In a review organisational practice is gauged by the standards of equality rules. Employers are not obliged, but invited, encouraged, and supplied with technical means to do the review by themselves. In fact, reviews are somewhere in between information and enforcement: the idea is that an employer who has been urged to do a review, will become aware of equality deficiencies in his organisation and thus take systematic measures that bring behaviour at least closer to compliance with the rules.

In Ireland, the Equality Authority has an additional power: it may invite employers to do a review and, in case they fail to do so, do the review and make the action plan on its own initiative. But generally, it is expected that employers, without additional pressure put upon them, may be convinced of the advantages of doing reviews and making action plans, in terms of economic rationality (e.g. personnel recruitment) of company image ('best practice' as an employer), of corporate social responsibility, of preventing legal actions against them, or of combinations of them.

Typically, introduction of these instruments goes along with a strengthening of the powers of individual employees to bring actions in case of infringement of equality rules. In this sense, these instruments may be said to respect an external position of the state vis-à-vis the market. In comparison to other instruments they may also be said to take account of limited possibilities to mobilize an intermediate field of institutionalized industrial relations. Unions and employers' organisations are, however, involved in the 'Equal Pay Task Force' (UK) and in the board of the Equality Authority (Ireland).

B Negotiating and Contracting with Organisations

A second category consists of instruments that are applied by governments not taking the line of imposing legal duties, but that of using contractual means to reach goals of equal treatment policy. Governments may be in a position to negotiate on these matters due to their status of commissioner of civil works ('contract compliance'), but also due to its control over sources of state authority (covenants), for instance its power to withhold 'sticks' (to refrain as yet from imposing or enforcing legal duties) or to distribute 'carrots' (to subsidize compliant behaviour).

Contract compliance, where the state in fact operates as an authority hiding in contractual clothes, seems to be less effective, partly because it fails to generate a shared consciousness of the urge of the measures that the other party should take. Covenants, on the other hand, seem to be more successful, provided that they are meeting mutual interests. They tend to be agreements between government and employers, however, in which participation of employees' representatives is not always guaranteed.

C Generating Co-operation and Learning within Organisations

In the third and final category instruments aim at generating a reflexive process in the social field of labour organisations, presupposing that they ought to become *learning* organisations, become aware at what points they are lagging behind in realizing equal and fair internal relations, and conscious of their own interest in doing something about it. Some of these instruments also make an appeal to the means of a review, and a plan to be made, but they tend to stress the importance of close co-operation of the social partners in making it. They

are based on the dual expectation that the more the content of the rules or policy has been determined in close co-operation with the target groups, (1) the more it will be attuned to specific, sectoral or local features and the better applicable it thus will be; and (2) the more it will have the support of these groups and will thus be effective. This category comprises the ‘equality plans’(Sweden), the legal obligation of social partners to negotiate on equal treatment (France), the codes of conduct and ‘mainstreaming’ (both, in this report: The Netherlands).

The ‘equality plans’ in Sweden are also based on the idea that a review at enterprise level, followed by a systematic action plan to remedy deficiencies is a good way to further compliance with equality rules. In Sweden, employers (with 10 or more employees) are legally obliged to make an equality plan, and to do that in co-operation with employees’ representatives. The unions as well as the independent Ombudsman have been assigned a task in monitoring the action plans and enforcing the duty in case an employer fails to comply. Although the set-up is clearly one of an employer’s duty, and of enforcement of this duty, the Ombudsman stresses the vital importance of co-operation between employer and employees’ representatives in making the equality plan.

In both other cases too there is, to a certain extent, an employers’ obligation involved²¹⁷, but it has been more clearly subordinated to what the instrument really aims at: to get a process going in the course of which those involved are co-operatively taking stock of, and evaluating the state of affairs regarding equality and making plans to remedy deficiencies.

A multi-levered structure of a framework agreement that, in a next step, is translated into more detailed agreements and codes at local level seems to be appreciated by all parties involved, and in particular by employers who tend to prefer ‘tailored’ measures.

A further development in the direction of organisational learning is represented by the instrument of ‘mainstreaming’ (in this report: The Netherlands), by which equality or diversity policies should be integrated into normal company decision-making procedures. Although this topic, understandably, is currently attracting a lot of attention, the sources on actual implementation and effectiveness are still scarce.

10.2 Infrastructure

A survey of the instruments shows that the ‘intermediate field’ between government policies on the one hand, and changing workplace practices on the other hand, is being structured either by making use of existing organisational infrastructure or by introducing new types of organisation. For the implementation of the Swedish equality plans and of the French duty to negotiate on equality matters, for instance, trust has been put in the existing organisational infrastructure. In some of them however special ‘task forces’ or ‘project groups’ are created to take care of the development, the introduction, and/or the organisation of the implementation of the measures. The equal pay reviews in the UK, for instance, have been set up by a special employer-led Equal Pay Task Force, codes of conduct in The Netherlands have been formulated and implemented by special project groups.

²¹⁷ An employer’s neglect of the duty to negotiate specifically on equality issues is punishable in France, duties in The Netherlands may flow from employers’ duties resulting from health & safety legislation.

In light of EU Directives²¹⁸, and policies (Green Paper 2004), e.g. the call for a more integrated approach to combat discrimination on all grounds, the Irish Equality Authority represents an interesting infrastructural development. As a single body it aims at combating a broad spectrum of types of discrimination and for that purpose has at its disposal a broad range of powers. It has, among others, the tasks of providing information, in all kinds of forms, on equality rules, of monitoring equal treatment legislation and of preparing draft codes of conduct. Participation of different stakeholders in the board of the EA guarantees their involvement in the Authority's policies. As noted before, its way of operation may, however, be said largely to be external to business; it does not interfere with company-internal co-operation but leaves that to the process of local industrial relations, and put its trust mainly in the mechanism of individual legal actions. The only exception to be noted is that the EA takes care of training union members in equality matters.

10.3 Stimulating Co-operation

Other instruments are explicitly aiming at furthering the social dialogue, partly at national and sector level, but particularly at the local level of companies. Advantages of this approach are to be found in the involvement of social partners in reviewing and making plans so as to change existing inequalities, in the consequent 'tailor-made' qualities of these plans, in the involvement in the implementation of these plans and in the consequent level of compliance with equality rules.

A multi-levered structure, in which general rules or agreements may be 'translated' into, and 'attuned' to local, concrete rules and plans, may reckon on support, at least from employers. The existence of some kind of 'model', though preferably of a still rather general character, seems to help to persuade stakeholders at local level to make a plan for, or get to some kind of agreement in their own organisation. The Swedish 'equality plans' seem in this respect to be affected in their effectiveness by the lack of such a model. It might be that the existence of a model generates rather less than more complaints about the inadequacies of the plans that employers are required to draw up.

Other forms of co-operation are at stake in covenants. Government and, usually, employers are jointly taking measures to combat discrimination or to further employment opportunities of target groups. To realize this co-operation, one of two conditions needs to be fulfilled: employers have an economic interest in the result that the covenant is expected to generate, or employers have reason to fear more directive government measures if they fail to reach an agreement. The latter condition is also relevant as to codes of conduct, where the threat ('stick') of legislative measures - which may be more rigid and less adapted to the needs of industry - may act as an inducement to reach an agreement at industry level.

10.4 Subjects for Discussion

The concluding points, noted above, lead to some propositions that may be subjects for further discussion or research:

²¹⁸ E.g. the duty to set up specialized bodies or extend the mandate of existing equality bodies, laid down in Art. 13 of the Race Directive 2000/43, or the duty to promote social dialogue with a view to fostering equal treatment, including the monitoring of workplace practices, codes of conduct and good practices, laid down in Art. 13 of that on equality in employment.

- Instruments differ as to the extent to which they dare to interfere, and are in fact interfering with the way in which stakeholders at company level come to agreements on matters relevant to equality rules. Measures that aim at influencing the character of the decision-making process itself are more effective than measures that only add external constraints to this process.
- Co-operation between stakeholders is an important key to success, because it enhances the level of involvement, the quality of the content of agreements and the chances of successful implementation.
- Multi-levered structures, in which there is room to attune general plans at national, or sector level to specific features of individual companies, may further the implementation and enhance the effectiveness of agreements, codes or plans on matters of equality.
- Providing models and tool-kits may significantly contribute to lowering thresholds that employers perceive when they are confronted with some of the duties that flow from equality rules and policy.
- One single body, like the Irish Equality Authority, may, by uniting expertise on different grounds of discrimination and by combining diverse powers, significantly strengthen the effectiveness of equality legislation.
- Pay reviews, or equality reviews in general, should be integrated in the normal annual reporting of companies.