

Equal Treatment outside Employment: Access to Goods and Services

**Rossen Grozev
European Commission**

Historical Development of the EU Legislation on Equal Access to Goods and Services

- Introduction of a relevant legal basis – the Treaty of Amsterdam
- Article 13 EC (at present Article 19 TFEU)
- Two sets of rules governing the equal access to goods and services (Directive 2000/43/EC and Directive 2004/113 EC):
 - non-discrimination on grounds of racial or ethnic origin;
 - non-discrimination on grounds of sex
- Guiding principle - establishing the notion of equality as a fundamental right (Articles 21 and 23 of the Charter of Fundamental Rights of the European Union)

Equal Access to Goods and Services under Directives 2000/43/EC and 2004/113/EC (a Brief Comparison)

- « Hierarchy of protection »?
- Material scope of the two Directives
- Personal scope of the two Directives
- Limitations and exceptions

Directive 2004/113/EC as a Set of Minimum Requirements

- Possibility for introducing or maintaining more favourable provisions
- Prohibition of any reduction in the level of already afforded protection

Basic Elements of Directive 2004/113/EC

- Notions of direct and indirect discrimination
- Harassment, sexual harassment and instruction to discriminate as forms of discrimination
- Notion of services and service providers
- Notion of goods

Gender-segregated Services: Examples and Proposed Justifications

- Gender segregation
- Differential pricing
- Decency
- Social segregation
- Safety
- Existing stereotypes

Scope of Discrimination Based on Sex

- Prohibition of gender unequal access to goods and services
- Scope of the principle of equal treatment for men and women

Excluded Sectors

- Education services
- Content of media and advertising
- Matters of employment, self-employment and occupation
- Justifications used for the exclusion of certain sectors
- Bases for criticism against the exclusion of certain sectors

Definition of Harassment

- Interpretative problems concerning the definitions of "harassment" and "sexual harassment"
- Burden of proof in harassment cases
- The prohibition of "harassment" and "sexual harassment" as reflected in different types of relationships:
 - between consumers and suppliers of goods or services;
 - between employers and employees;
 - between third parties in the context of access to goods and services

Protection of Pregnant and Breastfeeding Women

- Possible cases of discrimination in access to goods and services
- Forms of protection
- More favourable treatment of women as regards pregnancy and maternity

**General Derogation to the Principle of
Equal Treatment
in Access to Goods and Services
(Article 4(5) of Directive 2004/113/EC)**

- Objective justification
- Legitimate aim
- The principle of proportionality:
 - appropriate means;
 - necessary means

**Positive Action
(Article 6 of Directive 2004/113/EC)**

- Forms of positive actions in access to goods and services
- General and temporary positive action measures
- Distinction between permitted positive action and prohibited gender discrimination

The Principle of Equal Treatment as applied to Financial Services (Article 5 of Directive 2004/113/EC)

- The approach of gradually implementing the principle of equal treatment as regards actuarial factors
- Distinction between existing and "new" contracts
- The envisaged interaction between Article 5(1) and Article 5(2) of the initial version of Directive 2004/113/EC

The Unisex Rule - Substance

- Gender differentiated insurance products:
 - life insurance;
 - private health insurance;
 - motor vehicle insurance
- Gender differentiation for at least one type of insurance permitted in all EU Member States

The Unisex Rule - Applicability

- The unisex rule as applicable to all private insurance contracts covered by Directive 2004/113/EC
- The unisex rule applicable also to all statutory social security schemes covered by Directive 79/7/EEC (CJEU's Judgment of 3 September 2014 in Case C-318/13, X)
- All occupational social security schemes covered by Directive 2006/54/EC still outside the scope of application of the unisex rule

The "Test Achats" Ruling of the Court of Justice of the European Union (Case C-236/09, Judgment of 1 March 2011)

- Article 5(2) of Directive 2004/113/EC: differentiation of the unisex principle allowed under certain conditions
- Article 5(2) proclaimed invalid with effect from December 2012
- Purposive interpretation seeking the real intention of the legislator
- Consistency between the general (unisex) principle and the introduced derogation?
- Article 5(2) as impeding the achievement of the objective to ensure equal treatment in relation to the calculation of insurance premiums and benefits

Commission Guidelines of 2011 Supporting the Implementation of the "Test Achats" Judgment

- Contracts concerned by the "Test Achats" judgment
- Gender-related insurance practices which still remain permitted:
 - reserving and internal pricing;
 - reinsurance pricing;
 - marketing and advertising;
 - life and health underwriting
- Recourse to the general derogation under Article 4(5) of Directive 2004/113/EC (gender-specific insurance products remain possible – covering conditions which exclusively or primarily concern males or females)
- The general derogation excluded for pregnancy and maternity (the specific solidarity mechanism under Article 5(3) of Directive 2004/113/EC)

Commission Guidelines of 2011 Supporting the Implementation of the "Test Achats" Judgment

- Use of other risk-rating factors
 - factors correlated with gender;
 - factors not correlated with gender
- Insurance and occupational pensions

The Economic Impact of the "Test Achats" Ruling

- Still insufficient economic evidence
- Impact on consumers – gender neutral price setting?
- Impact on the insurance industry – changes in the market?
- Qualitative impact of the ban on the use of gender

Directive 2004/113/EC and the Development of the Goods and Services Sectors

- Economic impact for business
- Economic impact for consumers
- Practices affected by the application of Directive 2004/113/EC
 - different prices for the same service;
 - entries temporarily reserved to one sex only;
 - services provided to one sex only;
 - refusal to grant a product or a service

Mechanisms for Defence of Rights

- Availability of judicial and/or administrative procedures
- Real and effective compensation or reparation for the discrimination
- Role of associations and organisations which can be part of the proceedings
- Burden of proof – to the respondent who will have to prove that there has been no breach of the principle of equal treatment
- Protection against victimisation

Bodies for the Promotion of Equal Treatment

- Types of equality bodies in EU Member States
- Functions of the equality bodies:
 - to provide assistance to victims;
 - to conduct independent surveys;
 - to publish independent reports and make recommendations
- Proceedings before the equality bodies

Promotion of the Equality Principle

- Involvement of interested stakeholders (Article 11 of Directive 2004/113/EC)
- Social dialogue
- Dialogue with non-governmental organisations
- Information campaigns

Transposition and Implementation of Directive 2004/113/EC

- State of play of transposition by EU Member States
- Implementation of the "Test Achats" ruling
 - debates linked to the implementation of the judgment;
 - additional explanatory guidelines;
 - application of unisex rules to occupational pension schemes
- Best practices in EU Member States
- Report on the implementation of Directive 2004/113/EC and the follow-up of the "Test Achats" ruling

**Thank you
for your attention!**