



## Gender quality in access to goods and services – EU Directive 2004/113/EC

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## 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)

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)

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## Introduction Directive 2004/113/EC

- **Adoption of the directive as a major step**
  - Prior to the Treaty of Amsterdam, the legal basis only covered the area of employment.
  - The Treaty of Amsterdam gave competence to take the necessary measures to combat all types of discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.
- **Deadline for implementation 21.12.2007**
  - Minimum requirements (national legislation might provide greater protection/no reduction in the level of current protection is possible)

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## 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

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## Main features of Directive 2004/113/EC

**Objective:** to ensure equal treatment to men and women in the access to and supply of goods and services

### 1. Scope of application

- Notion of goods and service providers,
- Are excluded: media content, advertisement and education,
- Not applicable to employment matters,

### 2. Principle of equal treatment

- Prohibition of direct and indirect discrimination (including harassment and sexual harassment and instruction to discriminate)

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## Main features of Directive 2004/113/EC 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 employees and associates;
- between third parties in the context of access to goods and services

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## Main features of Directive 2004/113/EC

### 1. Possible derogation to the principle of equal treatment : article 4-5

- Differences in treatment are not precluded *if* the provision of the goods and services exclusively or primarily to members of one sex is justified by a legitimate aim and the means of achieving it are appropriate and necessary.
- Derogation to be implemented by the Member States

### 2. Positive action

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## 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

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## Main features of Directive 2004/113/EC

- **Defence of right**
- **Protection against victimisation**
- **Burden of proof**
- **Compliance and penalties**
- **Role assigned to equality bodies**
  - Provide assistance to victims,
  - Conduct independent surveys,
  - Publish independent reports and make recommendations.

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## Directive 2004/113/EC the implementation

- **All 28 MS have implemented the Directive**
- **Main challenges linked to the implementation**
  - A restricted scope of application (notion of goods and services / protection granted only to consumers)
  - Wide derogations provided to the application of the equal treatment principle
  - Right to compensation
- **No citizen's complaint received about incorrect transposition or application**

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## Scope of application of the Directive

- **Notion of services**
  - Article 57 TFEU as clarified by case-law: good or service provided against remuneration
  - goods and services available to the public and offered outside the area of private and family life
- **Sex discrimination – gender reassignment**
- **Protection against harassment**
- **Protection of pregnant women and mothers**

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## Derogation to the principle of equal treatment

- **Article 4-5 → access to goods and services exclusively for members of one sex or on different terms for men and women**
  - Services provided to members of one sex (gym services, sauna...)
  - Differential in prices for the same service provided (hairdresser' services...)
  - Challenges linked to the implementation at national level
- **Article 6 → positive action**

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## Implementation of the Directive in the financial services area

- **Test Achats ruling C-236/09**
  - Annulment of Article 5-2 of the Directive → Principle of equal treatment fully applicable to financial services
  - to be implemented by 21.12.2012
- **Unisex rule**
  - Use of sex as a factor in the calculation of premiums and benefits shall not result in differences in individuals premiums and benefits.
- **State of play of the implementation**
  - Implementing measures notified by nearly all the MS.
  - Ongoing implementation in the EEA countries

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## Financial services – article 5-

- **2011 Commission guidelines to support the implementation of the Test Achats ruling**
  - Unisex rules applicable to all new contracts concluded after 21.12.2012
  - Allowed practices:
    - The use of gender is not prohibited (only differentiation at individual level)
    - Possible to collect, store and use gender status,
- **Use of article 4-5 → gender specific insurance products remain possible (for conditions exclusively/primarily concerning one sex)**
- **Exception: solidarity mechanism of Article 5-3 for pregnancy and maternity costs.**

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## Impact of the Test Achats ruling in the insurance industry

- **Unisex principle applicable to private insurance contracts**
  - However some MS have applied this principle also to occupational pension schemes
- **Significant repercussions on price levels were predicted: reality?**
  - Lack of data
  - On balance, although the picture does not appear to be identical across the board the impact on the market seems to have been rather neutral or very limited,
  - No indication of unjustified price developments

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## 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

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## Conclusions

- **Follow-up of the Test Achats ruling**
  - Economic impact limited
  - To assess the consequences of the Test achats and "X" ruling for the occupation pension schemes
- **Follow-up of the implementation of the Directive**
  - To continue intensive dialogue with MS where implementation's issues remain
  - Further enforcement work at national level to ensure a full protection of victims of discrimination.

[http://ec.europa.eu/justice/  
gender-equality](http://ec.europa.eu/justice/gender-equality)

