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Research paper for the European Parliament on the
implementation across the Member States of Directive
2004/113/EC on the principle of equal treatment
between men and women in the access to and supply of
goods and services

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The context

- Research paper (co-authored with B. McLellan, University of Canterbury NZ) for the EU Parliament presented to the FEMM Committee on July 2016.
- The starting point:
 - Directive 2004/113/EC is over a decade old
- The Questions:
 - Is there discrimination on the ground of access and supply of goods and services?
 - To what types of situations it applies?
 - How has the Directive been interpreted in the Member States?
 - Is it effective?

EU Gender Equality Law and Directive 2004/113/EC

- Directive 2004/113/EC expands the concept of gender equality beyond employment and occupation to access and supply of goods and services. It recognises that discrimination based on sex, including harassment and sexual harassment, also takes place in areas outside the labour market and can be equally damaging, acting as a barrier to the full and successful integration of men and women into economic and social life. Thus, the Directive is potentially “gap-filling” (Prof. A.McColgan, 2004).
- Long and “troubled” history.
- The original proposed content was “watered down” in the final version.
- Adopted in December 2004; Member States had three years to implement it (December 2007).

- Modest ambitions
- specific reference to:
 - contractual freedom (recital 14 & Art. 3.2)
 - the “the protection of private and family life and transactions carried out in that context and the freedom of religion” (recital 3);
- it excludes:
 - media, advertising and education;
- derogations.

The Reporting so far

- First report: 2009, European Network of Legal Experts in the Field of Gender Equality, *Sex Discrimination in the Access to and Supply of Goods and Services and the Transposition of Directive 2004/113/EC*
- Commission Report 2015 (but already due in 2010 and 2014)
- Information also *indirectly* available through the European Commission European Network of Legal Experts in the Field of Gender Equality:
 - **2012:** *Fighting Discrimination on the Grounds of Pregnancy, Maternity and Parenthood, European Commission European Network of Legal Experts in the Field of Gender Equality*
 - **2013:** *National protection beyond the two EU Anti-discrimination Directives*
 - **2004:** European Network of Equality Bodies (Equinet), *Equality Bodies and the Gender Goods and Services Directive*
 - **2015:** *Country Reports – Gender Equality*

What do we know:

General: “copy-out” implementation or specific legislation drafted:

- “vague” implementation; *de facto* limited impact
- what are “goods” and “services”?
- education, media, advertisement

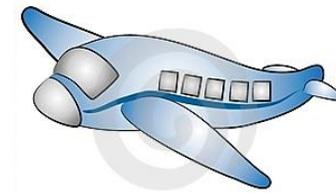
What do we know:

- Gender reassignment
 - The law *is not* always in place
 - Problems reported in banking and health services
- Sexual harassment
 - The law *is* in place
 - Problems reported concerning transport
 - Liability?
 - See also collaborative economy

What do we know:



- Pregnancy and maternity:
 - often rely on general principle of non-discrimination on the ground of sex;
 - discrimination is made “less visible and more difficult to tackle”;
 - problems with breastfeeding and access with baby carriage;
 - The case(s) of Mothercare
 - “fit to fly” airlines policies;
 - little case law;
 - very little discussion (Report to the Commission, 2012).
- Little awareness/lack of case law.
- Issues with Equality Bodies.
- Monetary remedies, where they are provided, are typically low (as compared with those in the employment field).



Issues where Directive 2004/113/EC might have an impact

Sexual
reproductive
Health

Occupational
Pensions

Collaborative
Economy

Sexual and Reproductive Health



- Health can be a “service” within the meaning of Article 57 TFEU;
- does this extend to sexual and reproductive health?
- link with education and advertising?
- who is the service provider discriminating against?
 - direct discrimination? *Dekker*-type situation
 - see recital 16 (justifications) as well as Art. 4(5)
- discrimination might not arise because of sex but because of other circumstances (eg. disability and religious belief): perhaps other Directives more effective in such cases?

- Recital 15 of the Directive states that it “should apply only to insurance and pensions which are private, voluntary and separate from the employment relationship”.
- Statutory and occupational pensions are traditionally dealt with under other legislative instruments, such as Council Directive 79/7/EEC and Council Directive 86/378/EEC.
- The 2015 Commission Report, however, notes that despite the fact that the *Test-Achats* ruling has no legal implications for occupational pensions, some Member States have applied it to occupational pension schemes to prohibit the use of gender in determining, for example, contribution rates, benefits and transfer values.

Occupational pensions



- Article 5(1):
 - Member States shall ensure that in all new contracts (...) the use of sex as a factor in the calculation of premiums and benefits for the purpose of insurance and related financial services shall not result in individuals' premium and benefits.
 - Art 5(2):
 - Member States might decide... to permit disproportionate differences in individuals' premiums and benefits where the use of sex is a determining factor in the assessment of the risk based on relevant and accurate actuarial and statistical data.
 - All MSs have amended their legislation.
 - However, the extent to which this has happened is questionable.
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- It applies to insurance and *private* pensions.
 - And *occupational* pensions?

Collaborative Economy



- Collaborative or sharing economy refers to a relatively new but rapidly expanding business model where activities are facilitated by online collaborative platforms that create an open market place for the temporary use of goods and services.
- It involves three key actors:
 - (i) the *service providers*
 - (ii) the *users*
 - (iii) the *intermediaries* that connect providers with users ('collaborative platforms')
- Often provided and used by private individuals, it essentially involves borrowing or using assets owned by someone else. These assets can include vehicles, tools, food, a ride from A to B, short-term home swaps or renting in someone's private home.

- It has raised issues regarding the application of existing legal frameworks and the patchwork nature of regulations across the EU.
- The Communication from the Commission, *A European Agenda for the Collaborative Economy*, COM (2016) 356 final addresses:
 - type of market regulation that can be imposed,
 - liability,
 - consumer protection,
 - the relationship with employment law and tax regimes
 - But NOT gender equality
 - Could Directive 2004/113 apply in this context?

2 examples: UBER and AIRBNB

- Connects riders with drivers
- Started in 2009 and since expanded to 320 cities



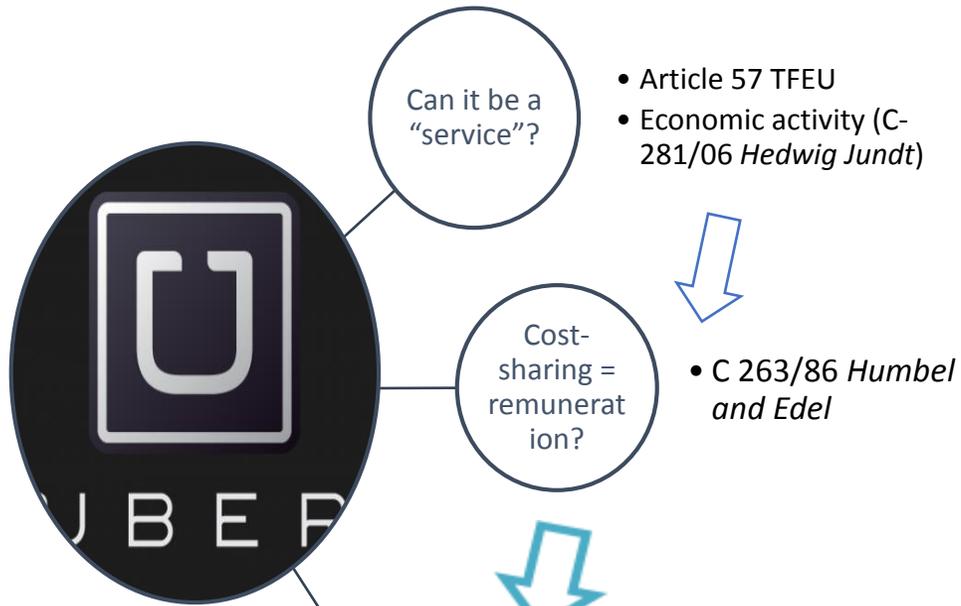
Uber began life as “everyone’s private driver. Today we’re a transportation network spanning 400 cities in 68 countries that delivers food and packages, as well as people , all at a push of a button. And ... we’ve gone from a luxury to an affordable luxury, to an everyday transportation option for million of people”



- Connects travellers with hosts for short term accommodation
- Started in 2008

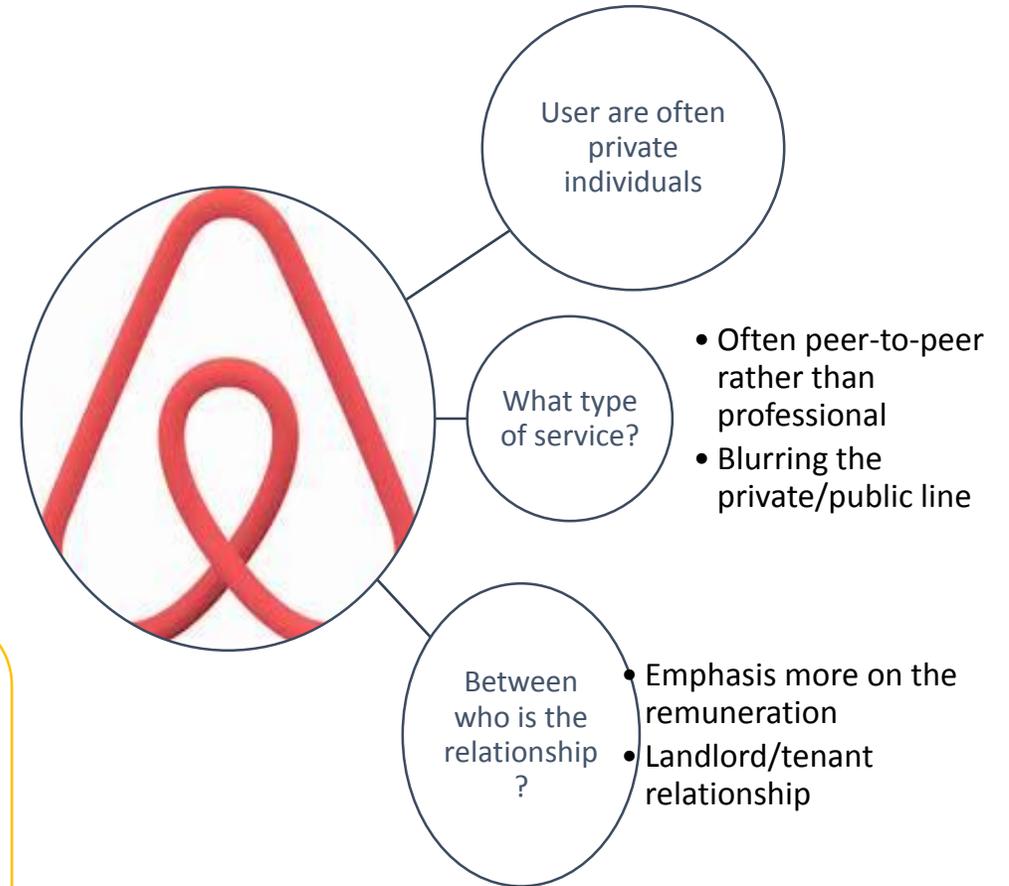
The collaborative economy has the potential to offer significant benefits and opportunities for entrepreneurs, businesses and consumers alike. It enables entrepreneurs and businesses to offer new and extensive services, opening flexible employment opportunities and generating new sources of income. Consumers also benefit from new services, an extensive supply of existing services and, consequently, lower prices.
The EU must be ready to embrace this model.

BUT ...



On 28 October 2016, an ET ruled that Uber's drivers are "workers"

Airbnb anti-discrimination policy:
 the platform: "prohibit[s] content that promotes discrimination, bigotry, racism, hatred, harassment or harm against any individual or group..." and that all users are required to comply with local laws and regulations



When can differences be permitted? Derogations are the most problematic areas in the implementation of the Directive

- differential pricing for services;
- sex segregation of services utilised by both men and women;
- single sex provisions of services
- needs to be justified by a legitimate aim and the means of achieving that aim are justified;
- different interpretation.



The role of the National Equality Bodies



Article 12

1. Member States shall designate and make the necessary arrangements for a body or bodies for the promotion, analysis, monitoring and support of equal treatment of all persons without discrimination on the grounds of sex...

2.... the competencies of the bodies referred to in paragraph 1 [shall] include:

- a) without prejudice to the rights of victims and of associations, organisations or other legal entities referred to in Article 8(3), providing independent assistance to victims of discrimination in pursuing their complaints about discrimination.
- b) conducting independent surveys concerning discrimination;
- c) publishing independent reports and making recommendations on any issue relating to such discrimination.

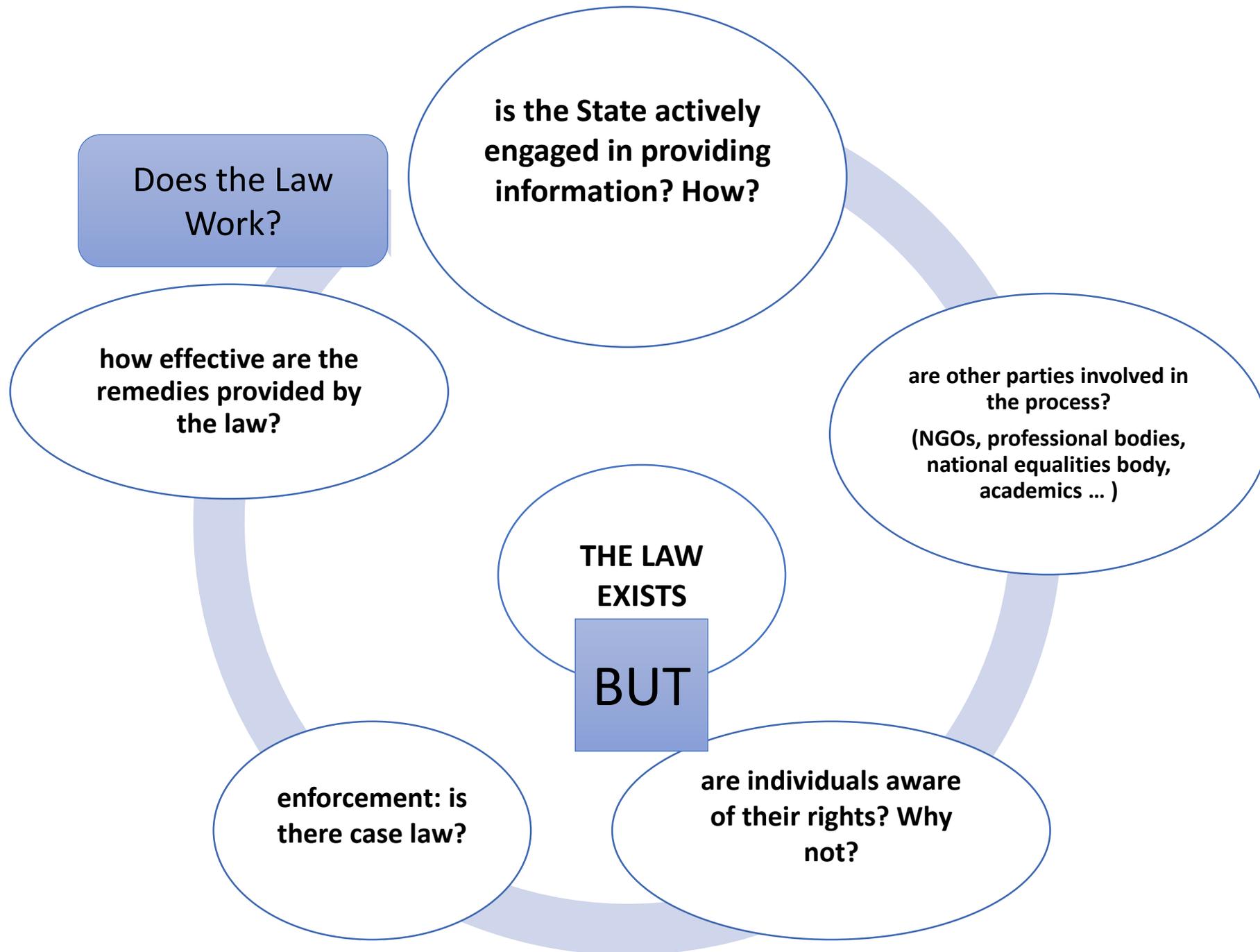
- Equality bodies play a key role and their importance cannot be underestimated.
- They ensure and promote the effective implementation of the gender equality Directives and have a significant potential in assisting victims of discrimination, empowering civil society, supporting good practice by employers and service providers, raising awareness of rights and obligations, and contributing to quality public policy making.
- They are essential to ensure the move from “the law on paper to the law in practice” and to build and support a culture of rights and equality across the Member States.

Positive Action

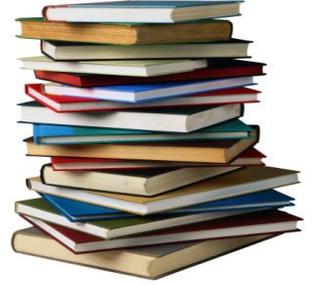
- Article 6 states that “the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to sex”.
- Not all MS have adopted positive action.
- Very little case law available.

Where next? A Few Thoughts

- More than a decade has passed since Directive 2004/113/EEC entered into force and new situations have arisen.
- A new comprehensive report is needed.
- The principle of gender equality should be taken into consideration when legislating on the shared economy.
- The place of the Directive within the EU Equality instruments needs to be re-assessed; at the moment it still seems based on a hierarchy.



Further reading



The research paper is available at:

[http://www.emeeeting.europarl.europa.eu/committees/agenda/201607/FEMM/FEMM\(2016\)0711_1/sitt-2813047](http://www.emeeeting.europarl.europa.eu/committees/agenda/201607/FEMM/FEMM(2016)0711_1/sitt-2813047) (item 10)

- **European Commission**, Report on the application of Council Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services COM(2015) 190 final.
- **European Network of Equality Bodies (Equinet)**, *Equality Bodies and the Gender Goods and Services Directive*, November 2014 (<http://www.equineteurope.org/Equality-Bodies-and-the-Gender>)
- **A. McColgan**, *Sex-Segregated Services*, European Commission 2008 and European Network of Legal Experts in the Field of Gender Equality (http://ec.europa.eu/justice/gender-equality/document/index_en.htm#h2-9)
- **E. Caracciolo di Torella**, “No Sex Please: We’re Insurers” (2015) 38 *European Law Review*
- **E. Caracciolo di Torella**, “The Principle of Equality, the Goods and Services Directive and Insurance”, (2006) 13 *The Maastricht Journal*, 339.

thank you!