




UNIVERZITA KARLOVA
Právnická fakulta

Equal treatment outside employment: access to goods and services

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Equality in primary EU law

- Treaty on European Union
- *Article 2*
- The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.



Treaty on the Functioning of the European Union

- Article 1a: “The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.”
- Article 2: “It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child. It shall promote economic, social and territorial cohesion, and solidarity among Member States.”
- Article 6: “The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.”
- **Article 19: Without prejudice to the other provisions of the Treaties and within the limits of the powers conferred by them upon the Union, the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.**



Charter of Fundamental Rights of the European Union

- *Article 21*
 - Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.
- *Article 23*
 - Equality between men and women must be ensured in all areas, including employment, work and pay. The principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex
- Chapter III – also the rights of the elderly, the rights of the child, intergration of persons with disabilities



Equal access to goods and services

- With respect to men and women it came later compared to equal treatment regardless of race and ethnic origin
- Originally, it was proposed to include education and advertising in the material scope – not implemented
- **COUNCIL DIRECTIVE 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services**



Equal access to goods and services - practical points

- Different prices
 - insurance products
 - services (hair-dresser)
- Different access
 - to services (clubs, sauna, swimming, transport, entertainment – pregnant women)
- Education
- Advertising



Scope

- Within the limits of the powers conferred upon the Community, this Directive shall apply to all persons who provide goods and services, which are available to the public irrespective of the person concerned as regards both the public and private sectors, including public bodies, and which are offered outside the area of private and family life and the transactions carried out in this context.
- This Directive does not prejudice the individual's freedom to choose a contractual partner as long as an individual's choice of contractual partner is not based on that person's sex.
- This Directive shall not apply to the content of media and advertising nor to education.
- This Directive shall not apply to matters of employment and occupation. This Directive shall not apply to matters of self-employment, insofar as these matters are covered by other Community legislative acts.

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Equal access to goods and services

- Directive 2004/113/EC
 - “The use of actuarial factors related to sex is widespread in the provision of insurance and other related financial services. In order to ensure equal treatment between men and women, the use of sex as an actuarial factor should not result in differences in individuals' premiums and benefits. Less favourable treatment of women for reasons of pregnancy and maternity should be considered a form of direct discrimination based on sex and therefore prohibited in insurance and related financial services. Costs related to risks of pregnancy and maternity should therefore not be attributed to the members of one sex only.”
 - Member States shall ensure that in all new contracts concluded after 21 December 2007 at the latest, the use of sex as a factor in the calculation of premiums and benefits for the purposes of insurance and related financial services shall not result in differences in individuals' premiums and benefits.
 - Article 5 (2) Member States may decide before 21 December 2007 to permit proportionate differences in individuals' premiums and benefits where the use of sex is a determining factor in the assessment of risk based on relevant and accurate actuarial and statistical data.
 - 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. These bodies may form part of agencies charged at national level with the defence of human rights or the safeguard of individuals' rights, or the implementation of the principle of equal treatment.



C-227/04 P Lindorfer

- **Facts:**
- Maria-Luise Lindorfer, an Austrian national, entered the Council's service on 16 September 1996. On 16 June 1997, she was established in her post and classified in Grade A5, step 2. Before entering the Council's service, she had worked in Austria for 13 years and three months. During that period, she had contributed to the Austrian pension scheme.
- On 15 May 1999, Ms Lindorfer requested, on the basis of Article 11(2) of Annex VIII to the Staff Regulations, the transfer to the Community pension scheme of the redemption value of the retirement pension rights which she had acquired under the Austrian scheme.
- On 18 February 2000, the Austrian pension fund informed Ms Lindorfer that the redemption value of her Austrian pension rights had been provisionally determined, as at 1 March 2000, at ATS 1 306 712.23. It also informed her that she could not be entitled to a pension in Austria, since she had not contributed for the minimum period of 180 months. It nevertheless suggested that she 'purchase' the missing 21 months' affiliation by payment of a sum of ATS 237 963.6. Ms Lindorfer did not take up that suggestion.
- She brought an action for annulment.



- **Judgment:**
- Sets aside the original decision in the part where it did not identify any discrimination based on sex
- And annuls the decision in the part calculating the number of her years of pensionable service



C-326/09 Test-Achats

- **Facts:**
- The applicants in the main proceedings brought an action before the Cour constitutionnelle (Constitutional Court) (Belgium) for annulment of the Law of 21 December 2007 transposing Directive **2004/113** into Belgian law.
- They claimed that the Law of 21 December 2007, which implements the derogation provided for in Article 5(2) of Directive **2004/113**, is contrary to the principle of equality between men and women.
- The Cour constitutionnelle decided, on the view that the action before it raises an issue concerning the validity of a provision of an EU directive, to refer the following questions to the CJEU for a preliminary ruling.



- Questions referred for a preliminary ruling:
- 1) Is Article 5(2) of Directive **2004/113** ... compatible with Article 6(2) [EU] and, more specifically, with the principle of equality and non-discrimination guaranteed by that provision?
- 2) If the answer to the first question is negative, is Article 5(2) of the Directive also incompatible with Article 6(2) [EU] if its application is restricted to life assurance contracts?'



- Ruling of CJEU
- **Article 5(2) of Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services is invalid with effect from 21 December 2012.**



C-318/13 X

- **Facts of the case**
- X, born in 1953, was injured in an accident at work which occurred on 27 August 1991. The vakuutusoiikeus (Insurance Court), by a decision issued on 18 October 2005, held that he was entitled to a lump-sum payment of compensation for long-term disability, pursuant to the Law on accident insurance.
- Following that decision, the competent insurance company, by decisions issued on 16 December 2005, granted X the lump-sum amount of EUR 4 197.98, including all interest, in respect of that compensation.
- X brought an action against those decisions, submitting that the compensation paid as a lump sum for long-term disability ought to be calculated on the basis of the same criteria as those laid down for women. The action was dismissed on 31 August 2006 by the Board of appeal for accidents at work. That decision was upheld by the vakuutusoiikeus on 27 May 2008.
- In a letter sent on 13 October 2008 to the Ministry, X claimed that the lump sum paid to him as compensation for his long-term disability had been determined in disregard of the provisions of EU law on equal treatment of men and women. X therefore claimed EUR 278.89, together with late-payment interest thereon. That amount corresponds to the difference between the compensation received by X and that payable to a woman of the same age and in a comparable situation. On 27 May 2009, the Ministry refused to pay the sum claimed.



- **Questions referred for a preliminary ruling**
- '1) Is Article 4(1) of Directive [79/7] to be interpreted in such a way that it precludes national legislation on the basis of which the different life expectancies of men and women are applied as an actuarial calculation criterion for a statutory social benefit payable due to an accident, when, by applying this criterion, the lump sum benefit paid to a man is smaller than that paid to a woman of the same age and in a similar situation in other respects?
- 2) If the answer to the first question is affirmative, does the case involve a sufficiently serious breach of EU law, this being a condition for Member State liability, particularly when account is taken of the following:
 - in its case-law, the Court of Justice has not taken a specific position on the question of whether sex-based actuarial factors may be taken into account in the determination of statutory social security benefits falling within the scope of application of Directive [79/7];
 - in its judgment issued in *Association belge des Consommateurs Test-Achats and Others* (Case C-236/09, [EU:C:2011:100](#)), the Court of Justice has stated that Article 5(2) of Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services ([OJ 2009 L 373, p. 37](#)), which allows such factors to be taken into consideration, is invalid but has stipulated a transitional period prior to the provision becoming invalid; and
 - in Directives [2004/113] and 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunity and equal treatment of men and women in matters of employment and occupation ([OJ 2006 L 204, p. 23](#)) the EU legislature has allowed, on certain conditions, sex-based actuarial factors to be taken into account in the calculation of benefits referred to in these directives, and on the basis of this the national legislature has assumed that these factors can also be considered in the area of statutory social security referred to in this case?



- Ruling of CJEU
- Article 4(1) of Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security must be interpreted as precluding national legislation on the basis of which the different life expectancies of men and women are applied as an actuarial factor for the calculation of a statutory social benefit payable due to an accident at work, when, by applying this factor, the lump-sum compensation paid to a man is less than that which would be paid to a woman of the same age and in a similar situation.
- 2. It is for the referring court to assess whether the conditions for the Member State to be deemed liable are met. Similarly, as regards whether the national legislation at issue in the main proceedings constitutes a 'sufficiently serious' infringement of EU law, that court will have to take into consideration, inter alia, the fact that the Court has not yet ruled on the legality of taking into account a factor based on average life expectancy according to sex in the determination of a benefit paid under a statutory social security system and falling within the scope of Directive 79/7. The national court will also have to take into account the right granted to the Member States by the EU legislature, set out in Article 5(2) of Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, and Article 9(1)(h) of Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation. In addition, that court should bear in mind that the Court has held, on 1 March 2011 (C-236/09, [EU:C:2011:100](#)), that the first of those provisions is invalid, since it infringes the principle of equal treatment between men and women.



Conclusion

- Equal access to goods and services - more content than it may seem at first sight
- It is about:
 - Money
 - Human dignity
 - Choice
- EU law promotes equality in this area but it could have done so to a greater extent

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