



Equal treatment between men and women in the access to and supply of goods and services: focus on the collaborative economy

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Overview

- The starting point:
 - Directive 2004/113/EC is over a decade old; certain areas were not contemplated, in particular the relationship between gender and the collaborative economy
- The main questions:
 - Does discrimination on the ground of access and supply of goods and services continue to occur?
 - Is Directive 2004/113/EC effective? Do we need a new Directive?
 - Can Directive 2004/113/EC be applied to the collaborative economy?

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.
- Gender Equal access to Goods and Services Directive 2004/113 EC – European Implementation Assessment (with H. Werner)
[http://www.europarl.europa.eu/RegData/etudes/STUD/2017/593787/EPRS_STU\(2017\)593787_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2017/593787/EPRS_STU(2017)593787_EN.pdf)
- Report for the Commission: Gender Equality and the Collaborative Economy (work in progress)

EU Gender Equality Law and Directive 2004/113/EC

- Prior to the Treaty of Amsterdam, non-discrimination only covered the area of employment; the ToA introduced 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 (Art. 19, previously Art. 13).
- 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.
- Adopted in December 2004; Member States had three years to implement it (December 2007). NB: It established minimum requirements (national legislation might provide greater protection/no reduction in the level of current protection is possible).

The Scope of Directive 2004/113/EC

The Directive lays down a framework for combating discrimination based on gender in access to and supply of goods and services, 'with a view to putting into effect in the Member States the principle of equal treatment between men and women' (Article 1). The Directive applies to all providers of **goods and services in the private and public sectors** (Article 3(1)) and prohibits **both direct and indirect discrimination** based on gender; the various forms of **harassment and instruction to discrimination** are also considered 'discrimination' (Articles 2 and 4).

- The original proposed content of the Directive was 'watered down' in the final version.
- specific reference to:
 - the protection of 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** - Article 3(3)
 - *'Consideration has also been given to the possibility of wider legislative action, covering fields such as taxation, education and the media. Consultation with the stakeholders, examination of the legal possibilities offered by the Treaty and respect for subsidiarity has led the Commission to conclude that the evidence was less clear-cut or that it was not apparent that the difficulties could be resolved through legislative means. The Commission has decided therefore that other means would be more appropriate to deal with these issues. (...) for example, to continue its contacts with the media industries to explore how far voluntary action to contribute to reducing and eliminating damaging sex stereotyping from the media and advertising.'* (SEC(2003) 1213 of 5 November 2003, extended impact assessment, accompanying the 'proposal for a Council directive implementing the principle of equal treatment for men and women in the access to and supply of goods and services'.)
- derogations

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.



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.

The role of the National Equality Bodies (Art.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.

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?

- ✓ ‘copy-out’ implementation or specific legislation drafted: this leads to ‘vague’ implementation and *de facto* limited impact
- ✓ what are ‘goods’ and ‘services’?
- ✓ education, media, advertisement
- ✓ 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?
- ✓ 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

Collaborative (Sharing) Economy



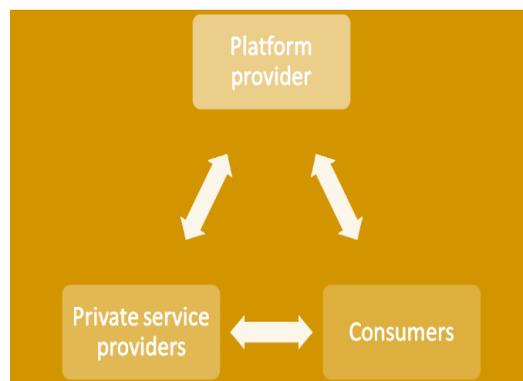
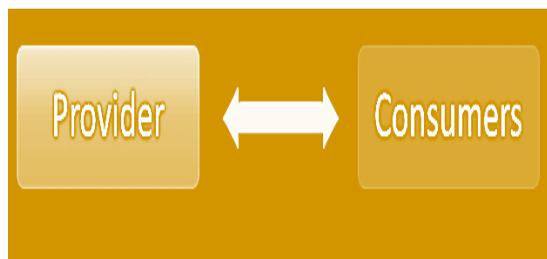
- **Definition:** Collaborative or sharing economy refers to a relatively new but rapidly expanding business model where activities are facilitated by online collaborative platforms that create an open market place for the temporary use of goods and services.
- Often provided and used by private individuals, 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 involves three key actors: (i) the service providers (ii) the users and the (iii) the intermediaries that connect providers with users ('collaborative platforms')

From the conventional business model



to the sharing economy business model



Source: EPRS, 2017

There might be difficulties linked to ...

- possible absence of adequate rules in favour, or protecting interests of consumers on the one hand, as well as of individual service providers on the other;
- difficulty or impossibility for individual consumers to organise themselves with fellow consumers or to liaise with consumer protection organisations knowledgeable in the specific new business model;
- difficulty or impossibility for individual service providers to organise themselves with peers, and at the same time competitors, in syndicates, trade unions or other, adapted forms of appropriate defence of interests;
- lack of rules for protection of individual service providers and consumers against overreach or harassment by fellow service providers or consumers;
- a lack of social guarantees for individual service providers, and build-up of credits and rights for unavailability periods for service requests (e.g. absence of clients, sickness, unavailability, pregnancy, obligations for child care; however, in contrast, some of the collaborative business models may be in favour and supportive of the latter aspect);
- for public authorities, difficult or impossible taxation possibilities from the sharing/collaborative economy, in contrast to the established taxation of conventional businesses. (EPRS, 2017)

Should this be an issue for 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?

Two examples: UBER and AIRBNB (but there are many more)

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



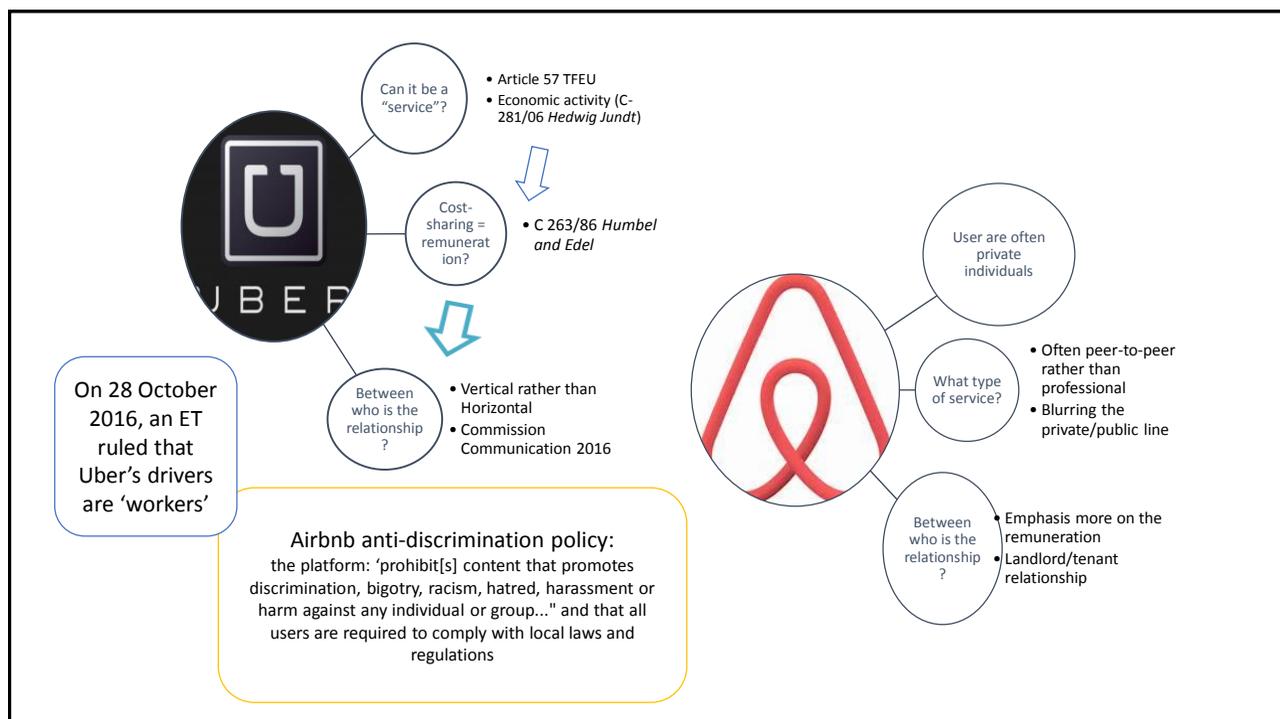
Uber began life as 'everyone's private driver. Today we're a transportation network spanning 400 cities in 68 countries that delivers food and packages, as well as people, all at a push of a button. And ... we've gone from a luxury to an affordable luxury, to an everyday transportation option for million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



They are crucial to disseminate information and to raise awareness.

- 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.

How can awareness of the consumers and companies be improved ?

- by ensuring an update knowledge of the gender *acquis*
- by better information of the consumers and companies via information campaigns, leaflets, newsletters ...
- by undertaking and publishing studies, law reviews, conference ...
- by encouraging victims to report
- by ensuring an effective support for the victims

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 (and we are nearly there!).
- The principle of gender equality should be taken into consideration when legislating on new situations, such as the shared economy.
- The place of the Directive within the EU Equality framework needs to be re-assessed; at the moment it still seems based on a hierarchy.

Further reading



- **V. Hatzopoulos, S. Roma**, Caring for Sharing? The Collaborative Economy under EU Law, (2017) 54 *Common Market Law Review* 81–128.
- **A. Timmer, L. Senden** for the European network of legal experts in gender equality and non-discrimination, *A Comparative analysis of gender equality law in Europe 2016*, December 2016, DG Justice and Consumers <http://www.equalitylaw.eu/downloads/3967-a-comparative-analysis-of-gender-equality-law-in-europe-2016-pdf-867-kb>
- **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)