

Equal treatment outside employment: access to goods and services

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Everyday sexism (Laura Bates)

<http://everydaysexism.com/>

Oh, your doing a politics course? You must be very smart, things like that are really hard for girls

A friend of mine was told by her dad that 'it is better to be dumb than look un-pretty'

I am currently travelling around Europe & am amazed by the amount of men that are compelled to tell me I have large breasts. It's as if they think I need a reminder or something

During a tour of the Houses of Parliament a male guide commented that MPs were not allowed to change their mind once they had entered the voting lobby and he added 'surprisingly the rule was not changed [...] even when women became MPs'

I was told by my chemistry professor that 'I was too pretty to do science'

Slide
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Goods and Services Directive

- Sets **minimum requirements** only, Member States can go further (art 7)
- Prohibits **direct discrimination** (article 4(1)(a)), **indirect discrimination** (art 4(1)(b)), **harassment and sexual harassment** (art 4(3)), **instruction to discriminate** (art 4(4))
- Covers goods and services available to the public in **both public and private sectors**, as long as they are offered outside the area of private and family life (art 3(1))
- Allows **more favourable provisions** concerning the protection of women as regards pregnancy and maternity (art 4(2))
- Provides against **victimisation** (art 10)
- Allows for **positive action** (art 6)
- Applies to discrimination on the ground of **gender reassignment** (C-13/94 *P v S and Cornwall County Council* [1996] ECR I-2143; C-423/04 *Richards v Secretary of State for Work and Pensions* [2006] ECR)
- Discrimination on ground of **gender identity**? Yes, see: COM(2015) 190

Article 4(5)

This directive shall not preclude differences in treatment, if the provision of goods and services exclusively or primarily to members of one sex is **justified** by a **legitimate aim** and the **means of achieving that aim are appropriate and necessary**

- Single sex provision should not result in **disproportionate** disadvantage for the opposite sex

Equivalent rather than ***uniform***
goods and services provision

Commission Report

- **COM(2015) 190**, 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
- As exception of the principle of equal treatment, this derogation must be construed narrowly (point 4.1)

‘there are still challenges relating to the implementation of the Directive concerning in particular the derogation provided by Article 4(5) which permits the provision of goods and services exclusively or primarily to members of one sex under certain conditions’ (point 2)

Article 4(5)

- allows for **sex segregation**, subject to a **proportionality test**
- **sex segregation:**
 - can encourage a ‘separate spheres’ approach
 - Might reinforce sex stereotyping
 - Might produce gendered differences
 - can entrench inequalities by facilitating male networking
 - proportionality test must be applied rigorously
 - might be designed to further a socially beneficial end by trying to encourage full participation of women in public sphere

Conclusion:

- there is nothing intrinsically hostile to sex equality (as distinct from race equality) in providing separate services in some cases for women and men, but **there should not be any unjustifiable disparity** in the levels of access provided to men or women
- **Equivalent** rather than **uniform** goods and services provision

Article 3 Material scope of Directive

1. *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.*
2. *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.*
3. *This Directive shall not apply to the content of **media** and **advertising** nor to **education**.*
4. *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.*

Article 5: Actuarial factors

Article 5(1): 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

- Applicable to **financial services**
- Approach was taken of **gradually implementing** the principle of equal treatment as regards actuarial factors (recital 18)
- Distinction between 'existing' and 'new' contracts (recital 18)
- **Derogation** granted in Article 5(2) (see next slide)

Article 5(2) Derogation

Notwithstanding paragraph 1, 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 ...

Derogation in Article 5(2) annulled by CJEU in *Test Achats* ruling (C-236/09: *Association Belge des Consommateurs Test-Achats ASBL and Others v Conseil des ministres* [2011] ECR I-773 (Grand Chamber))

Commission guidance

COM (2011) 9497: Guidelines on the Application of Council Directive 2004/113/EC to Insurance, in the light of the judgment of the Court of Justice of the European Union in Case C-236/09 (*Test Achats*)

- Not legally binding
- *'as from 21 December 2012, the unisex rule contained in Article 5(1) must be applied without any possible exception in relation to the calculation of individuals' premiums and benefits in new contracts'*
- Use of gender as risk-rating factor in general terms is not prohibited, as long as they are true risk factors
- The use of gender in the calculation of individuals' benefits and premiums is prohibited: premiums and benefits cannot be different between individuals for the same insurance policy simply because their gender is not the same
- As set out in the guidance, the *Test Achats* ruling only concerns private insurance contracts falling within the scope of the Goods and Services Directive. It does not have direct legal implications for occupational pensions which are covered by the Recast Directive 2006/54/EC

Remedies and enforcement

- Article 8 **Defence of rights:**
 - judicial and/or administrative procedures
 - Real and effective compensation and/or reparation
 - Role of associations and organisations as part of the proceedings
- Article 9: **Burden of proof** – reversed
- Article 12: **Bodies for the promotion of equal treatment**
- Article 14: penalties for discrimination must be **effective, proportionate and dissuasive**

Further reading

- **S. Burri and A. McColgan**, *Sex Discrimination in the Access to and Supply of Goods and Services and the Transposition of Directive 2004/113/EC*, EU Commission, 2009
- **S. Burri and A. McColgan**, *Sex Segregated Services*, EU Commission, 2009
- **A. McColgan**, The Goods and Services Directive: a curate's egg or an imperfect blessing? *European Gender Equality Law Review*, 2009, 1, 16- 24
- **E. Ellis and P. Watson**, *EU anti-discrimination law* (2nd ed 2012), Oxford University Press, pages 361-379
- **E. Caracciolo di Torella**, No Sex Please: We're Insurers. *European Law Review*, 2013, 38, 5, 638-654
- **European Parliamentary Research Service**, *Gender Equal Access to Goods and Services Directive 2004/113/EC, European Implementation Assessment*, PE593.787, January 2017