

Equal Treatment between men and women in the access to and supply of goods and services

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Introduction

1. Combating gender inequality has been a fundamental principle since the inception of the European Community². Initially, community law was only able to tackle gender discrimination in employment and vocational training. The Treaty of Amsterdam gave the EU competence to tackle wider forms of gender discrimination. Directive 2004/113/EC (also known as the Gender Directive) was the first gender equality Directive to look at the access to and supply of goods and services.

Implementation

2. Member States were required to implement the Directive by 21 December 2007. The Directive establishes a minimum level of protection for the principle of equal treatment and member states were permitted to go beyond the scope of the Directive or provide greater levels of protection when introducing legislation. The Directive also made it clear that the implementation of the Directive could not constitute grounds for reducing levels of protection already provided by member states under their domestic law³.
3. Under Article 13 member states were under an obligation to abolish any laws, regulations or administrative provisions contrary to the principles of equal treatment⁴.

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² Article 2 of the Treaty establishing the European Community provides that promoting equality between men and women is one of the community's essential tasks. Similarly Article 3(2) of the Treaty requires the community to aim to eliminate inequalities and promote equality between men and women in all its activities.

³ Article 7. Some member states such as the UK had outlawed gender discrimination in the provision of goods and services since the 1970s.

⁴ In the UK, this has led to the abolition of one legislative provision – Section 87 of the Public Health Act 1936. This allowed local authorities to charge for the provision of public conveniences except for urinals.

Dissemination of Information and Reports

4. Article 15 requires member states to disseminate information regarding the Directive.
5. Member states were required to report to the Commission on the compliance with the Directive by 21 December 2009 and every 5 years thereafter. A Commission report on the application of the Directive was finally published in 2015⁵. There have been a number of initiatives in recent years looking at the operation of the Directive including the European Network of Legal Experts in the Field of Gender Equality's review of Gender Equality Law in 33 European Countries 2013⁶ and Equinet's April 2014 High Level Seminar on Gender Equality in the Access to Goods and Services⁷.
6. The 2013 report prepared by the European Network of Legal Experts in the field of Gender Equality looked at the transposition of EU rules into national law in 33 Countries. The report concluded that overall, the central concepts of the Directive had been implemented into national law on a satisfactory basis. However, the writers noted that there were still widespread problems with discrimination in the access to and supply of goods and services. The Commission found that the Directive has been transposed into national law in all 28 Member States. However, the Commission had concerns about the restricted scope of the national legislation in 6 member states⁸
7. Studies undertaken by Equinet revealed that the sectors which attract most complaints are:
 - a. Access to gyms, hotels and restaurants
 - b. Healthcare (particularly for trans people)
 - c. Housing
 - d. Access to transport
 - e. Insurance and financial services

⁵ Available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52015DC0190&from=EN>

⁶ Available at http://ec.europa.eu/justice/gender-equality/files/your_rights/gender_equality_law_33_countries_how_transposed_2013_en.pdf

⁷ Reports from the seminar can be found online at www.equineteurope.org/-Events-

⁸ Belgium, Germany, Denmark, Latvia, Lithuania and Poland

- f. The excluded areas of education, advertisements and media content.
8. In this paper, I will consider the scope of the Directive, the implications of the Test-Achats case and issues relating to pregnancy and maternity. I will conclude by looking at how the Directive can be more effective.

Scope of the Gender Directive

Who is protected?

9. The Directive implements the principle of equal treatment between men and women in the access to and supply of goods and services. The concept of “equal treatment between men and women” was examined by the CJEU in *P v S and Cornwall CC*⁹. In that case the court was asked to consider whether the dismissal of a trans woman because she was undergoing gender reassignment was lawful under the Equal Treatment Directive (76/207). The Court held that the principle of equal treatment for men and women to which the Directive referred indicated that there should be “no discrimination whatsoever on grounds of sex”. The Court held that this could not be confined simply to discrimination based on the fact that a person is of one or other sex. In view of the purpose and the nature of the rights which it seeks to safeguard, the scope of Directive 76/207 was such as to apply to discrimination arising from the gender reassignment of the person concerned.
10. Directive 2004/113/EC does not expressly refer to gender reassignment. The 2015 Commission report confirms that the Directive provides protection against discrimination arising from gender reassignment and also confirms that a similar approach should be taken in relation to gender identity. Only 5 member states have express prohibitions on discrimination against trans people in the provision of goods and services. Other states restrict legal protection to people that have undergone surgery or gender recognition procedures. Consequently, if acting for trans clients you may have to rely directly on the Directive and EU case law.

⁹ C-13/94.

What goods and services does the Directive apply to?

11. The Directive covers access to and supply of goods and services within the public and private sectors¹⁰. The Directive is applicable to all persons who provide goods and services to the public at large¹¹. The Commission report highlighted that there were concerns about the restrictive interpretation of what amounted to goods and services in some member states. Similarly some states only applied protection to consumers as recipients of services.
12. “Goods” means products originating from Member States and products from third countries which are in free circulation in Member States¹². It should be noted that the Directive does not prevent the sale of items which are discriminatory or sexist in themselves.
13. “Services” means services provided against payment¹³. This can encompass services provided by religious communities and amateur sports associations. It may be possible to argue that certain services provided by the state such as healthcare fall within this category. The European Parliament highlighted that there are problems with regard to access to reproductive healthcare and gender reassignment and has called on the Commission to consider this in its report¹⁴. The Commission did not go that far but did reiterate that the directive applied to healthcare and that services do not necessarily have to be paid for by those for whom it is performed¹⁵
14. The Directive does not apply to media content, advertising or education. The European Parliament has questioned whether these areas should be excluded.
15. Public sector actions that involve the exercise of public authority without the element of provision of a service e.g. policing fall outside the scope of the Directive.

¹⁰ Article 3.

¹¹ i.e. irrespective of the circumstances of the individual consumer

¹² Article 23 of the Treaty of the EC

¹³ Article 50 of the Treaty of the EC

¹⁴ <http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A7-2013-0044&language=EN>

¹⁵ C-157/99 Smits and Peerbooms, 12 July 2001, para.57

16. Principles of “Freedom of Contract” are expressly recognised in Article 3(2) which makes it clear that an individual has the right to choose a contractual partner provided that the choice is not based on grounds of sex.

Prohibited conduct under the Directive

17. Article 2 of the Directive defines 4 types of unlawful discrimination – direct discrimination, indirect discrimination, harassment and sexual harassment. The definitions are the same as those found in the Recast Directive. Member states are also required to introduce measures to protect people from victimisation as a result of raising complaints of unlawful discrimination. Under Article 9 the burden of proof is defined in the same way as in the Burden of Proof Directive¹⁶.

Direct Discrimination

18. There are many common practices which amount to a breach of the Directive. These include:

- a. Differential pricing arrangements
 - i. hairdressers charging men and women different prices for haircuts,
 - ii. nightclubs giving women free admission at certain times,
 - iii. internet dating sites charging men membership fees but not women
- b. Refusal to provide a service
 - i. Clothes shops refusing to allow trans people to try on clothes before buying
 - ii. Asking breastfeeding mothers to leave restaurants
 - iii. Refusing to sell women tickets to a football match due to fears of crowd violence¹⁷.

¹⁶ Once the claimant has established facts from which it may be presumed that discrimination has taken place, it is for the respondent to prove that there has been no breach of the principle of equal treatment.

¹⁷ In 2012 the Romanian National Council for Combating Discrimination sanctioned a service provider for refusing to sell tickets to women due to a fear of crowd violence. The CNCD considered that the measure did not serve a legitimate aim as football matches should not be violent in the first place. In addition, addressing

- c. Providing a service on less favourable terms
 - i. Where single-sex facilities are used by both sexes at different times, providing services on an unequal basis
 - ii. Refusing to serve women at the bar in a wine bar¹⁸
 - iii. Insisting that a trans woman uses the men's toilets
 - iv. Making breast feeding mothers sit facing the wall
 - v. Reducing the percentage of mortgage loan to property value available for women who have recently taken maternity leave.

Indirect Discrimination

19. Examples of indirect discrimination in the provision of goods and services may include:

- a. Height restrictions
- b. Dress codes
- c. Refusal to provide financial services to part time workers
- d. Provision of concessions based on receipt of state pensions¹⁹
- e. Asking mortgage applicants if they "know of any reasons why their income may reduce" in the next few years.

Harassment

20. The Commission report highlighted that few complaints have been raised regarding harassment in the provision of goods and services. However, issues have arisen in some member states regarding the application of the Directive in circumstances of third party harassment e.g. between users of social media services.

21. Examples of harassment include:

violence by excluding women from events may give rise to the idea that women should generally be excluded from football CNCD decision 489 of 21 November 2012

¹⁸ Gill v El Vino [1983] 1 All ER 398

¹⁹ This is an issue in countries which have different retirement ages for men and women. James v Eastleigh BC [1990] 2 AC 751

- a. Service providers verbally abusing customers in sexist terms
- b. Offering someone a discount if they perform sexual services
- c. Disclosing that a service user is undergoing gender reassignment

Victimisation

22. Examples of victimisation include:

- a. Barring a woman from a cafe because she complained about being asked to breastfeed in the toilet
- b. Providing poor quality services to a customer who complained about being subjected to sexist comments by a member of staff.

Exceptions

23. The Directive does not prohibit all gender based discrimination.

24. Article 6 permits states to adopt positive action measures to prevent or compensate for disadvantages linked to sex.

25. Article 4(5) permits 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 are appropriate and necessary. The Commission had some concerns about national legislation which has an overly broad scope for justification of unequal treatment in the pricing of services. The preamble gives a number of examples such as:

- a. the protection of victims of gender based violence through the provision of single sex refuges;
- b. issues of privacy and decency through the provision of accommodation in a person's home;
- c. promoting gender equality or the interests of one particular gender e.g. single sex voluntary bodies such as organisations working with male survivors of breast cancer;

- d. freedom of association e.g. single sex private clubs such as the freemasons²⁰;
and
- e. the organisation of sporting activities e.g. women's tennis tournaments.

26. The Commission is of the view that this derogation must be construed narrowly. Furthermore it should only cover situations in which the goods and services are available exclusively or primarily to members of one sex without providing for a possibility to offer goods and services to the general public. The preamble also makes it clear that principles of equal treatment do not require that facilities should always be provided to men and women on a shared basis. The key issue is that facilities should not be provided more favourably to members of one particular sex.

27. The Commission found that problems seem to repeatedly arise in relation to the question whether the requirements for a legitimate objective are fulfilled. Thus, for example, with regard to women-only gyms, fitness or beauty clubs, equality bodies seem to have reached different conclusions on whether the limitation of access to members of one sex only is allowed or not²¹

28. Similarly, national courts have taken different views on the legitimacy of differential pricing. In Austria, a court held that the objective of extending the football fan base and promoting women football justified cheaper entry tickets for women. In Germany, a court ruled that the free use of a dating website for women was justified by the need to encourage women to register which would constitute an advantage for the men looking for a partner on the website. The Austrian Constitutional Court ruled that a different age limit for men and women concerning the access of senior citizens to ticket discounts in public transport linked to the different statutory retirement ages for men and women in Austria constitutes discrimination and that the exemption corresponding to Article 4(5) does not apply to services offered to both sexes. In Finland, the Employment and Equality Committee of the Finnish

²⁰ In Ireland, a decision that a male-only golf club was not discriminatory gave rise to some controversy ***Equality Authority v Portmarnock Golf Club and others [2009] IESC 73***

²¹ In Belgium, it was held unjustified to reserve the entry to a fitness centre to women exclusively. Similarly, in Denmark a Court considered it discriminatory that a hotel reserved one furnished floor to women only

Parliament proposes to only allow promotions targeted at either of the sexes alone in connection with rare and special occasions such as Mother's Day or Father's Day and only if the monetary value of the promotion is relatively minor.

Application of the Directive – Test-Achats

29. In *Association Belge des Consommateurs Test-Achats ASBL and others v Council of Ministers* (Case C-236/09) the Grand Chamber of the CJEU was asked to consider whether article 5(2) of Directive 2004/113 is valid in the light of the principle of equal treatment for men and women. This is to date, the only consideration of the Directive by the CJEU.

30. Article 5(1) of Directive 2004/113 stated:

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.

31. Article 5(2) set out a derogation from Article 5(1) whereby Member States could 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. Where this was done, the Member States concerned was required to notify the Commission and ensure that accurate data relevant to the use of sex as a determining actuarial factor was compiled, published and regularly updated. The derogation was to be reviewed in 2012 and the results forwarded to the Commission.

32. Numerous member states made use of that derogation in respect of one or more types of insurance, most notably in relation to car insurance, life insurance, pensions and health insurance.

33. The Grand Chamber held that the principle of equal treatment required that comparable situations should not be treated differently, and different situations should not be treated in the same way, unless such treatment was objectively justified. The question of whether situations were comparable had to be assessed in the light of the subject matter and the purpose of the EU measure which made the distinction. The Directive sought to apply unisex rules in relation to premiums and benefits and was based on the premise that for the purposes of applying the principle of equal treatment the respective situations of men and women seeking insurance were comparable.
34. The Grand Chamber noted that the Directive was silent as to the length of time for which differences in individuals' premiums and benefits could continue to be applied. Consequently, member states could allow insurers to perpetuate unequal treatment indefinitely under the Directive. The Court held that the absence of a temporal limitation worked against the achievement of the objective of equal treatment which was the whole point of the Directive and was therefore incompatible with Articles 21 and 23 of the Charter of Fundamental Rights of the European Union. Consequently, Article 5(2) became invalid with effect from 21 December 2012.
35. The decision in **Test Achats** is of constitutional significance as the ECJ considered that the Charter was the primary source to consider when protecting fundamental rights in member states. This was a departure from the traditional approach of firstly looking at Article 14 of the European Convention on Human Rights and the jurisdiction of the Strasbourg court.
36. The Commission produced guidelines regarding application of the Directive to insurance in light of the **Test Achats** ruling. These can be found online at: [http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52012XC0113\(01\):en:NOT](http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52012XC0113(01):en:NOT)
37. It is important to note that the guidance is not definitive and could potentially be overturned by the CJEU.

38. The Commission guidance highlights a number of issues

- a. The use of gender as an actuarial feature is not prohibited but it is unlawful to differentiate between men and women at an individual level.
- b. It is possible to collect, store and use gender status
- c. It is still possible to have gender specific insurance products for conditions which exclusively or primarily concern one sex²² However, costs related to pregnancy and maternity may not result in differences in individual premiums and benefits²³.
- d. The Test Achats ruling only applies to pensions that are “private, voluntary and separate from the employment relationship”

Impact of Test Achats on occupational pensions

39. In the UK we have two forms of occupational pension.

- a. Trust based schemes whereby contributions are held on trust by the employer. Upon retirement, a defined benefit is paid to the employee which may be funded from the trust’s investments or the purchase of an annuity.
- b. There are also contract based arrangements such as group personal pensions and stakeholder schemes where contributions are paid to a third party insurer who manages the investment without the involvement of the employer. On retirement, members are obliged to purchase an annuity without the involvement of the employer.

40. Trust based schemes where funds are held by the employer are not subject to Directive 2004/113/EC but are instead subject to Directive 3006/54/EC. The Commission report indicated that these schemes may be subject to review.

41. Contractual schemes are subject to Directive 2004/113/EC and the Test Achats ruling. Consequently, pricing arrangements for these schemes need to treat men and

²² Article 4(5)

²³ Article 5(3)

women equally. The UK Pensions Industry has expressed the view that this may make contractual schemes less attractive for men which could have implications for their financial security in retirement. In the UK there have been a number of complaints to the Financial Ombudsman from men who were not notified that pricing arrangements were changing with effect from December 2012 and therefore paid more for their annuities.

Lawful financial services trading practices following Test Achats.

42. Insurers can legitimately target advertising at a particular sex in order to influence the proportion of men and women in a pool. For example, young men tend to be at greater risk of car accidents than middle aged women. In order to increase the number of women in a pool and therefore lower the level of shared risk, a car insurer cannot refuse to insure young men or offer discounts to women over 40. It could lawfully try to influence the composition of the pool by advertising in a stereotypically gendered way to dissuade male applicants or could place an advertisement in a women's magazine with a voucher offering 10% off a customer's first policy with the company to encourage female applicants. However, the company could not lawfully refuse to give the discount to a man using the voucher

Maternity and pregnancy

43. The Directive includes protection for women in relation to discrimination on grounds of pregnancy and maternity. The Directive does not define "maternity". Consequently each member state can take its own view as to the extent of the protection provided. In the UK, women are only protected from maternity discrimination in the provision of goods and services for a period of 26 weeks following the birth of their baby²⁴.

²⁴ The period of 26 weeks was chosen as it mirrors a woman's entitlement to ordinary maternity leave in the employment context. Section 17 Equality Act 2010. Section 17 also provides protection for breast feeding mothers and protection for women who had still births.

44. The 2013 legal experts report noted that there was discrimination against pregnant women and women with young children in insurance, financial services, aviation and housing despite express prohibition of discrimination on grounds of pregnancy and maternity in many states. The authors also considered that the absence of specific provisions in the Directive dealing with breastfeeding as a form of discrimination was a matter of concern. The Commission also noted that there were widespread practical problems regarding restrictions by service providers concerning breastfeeding on their premises. In the UK maternity discrimination includes breastfeeding²⁵.
45. The 2013 Legal Experts report also noted that a form of discrimination closely linked to maternity discrimination was discrimination against parents who can face difficulties in access to public space and transport. The Commission also picked up on problems with parents trying to access services whilst using prams.
46. In addition, the Legal Experts noted that there was often discrimination between parents e.g. mothers being treated more favourably than fathers.
47. During the consultation on the UK's Equality Act, the aviation sector expressed concerns that policies prohibiting carriage of late term pregnant women on flights would be directly discriminatory even if they were applied for health and safety reasons. The UK government decided to introduce a provision for reasons of legal certainty which permits different treatment of pregnant women on health and safety grounds²⁶. However, this is only permissible in circumstances where it was reasonable for the service provider to hold the view that there was a health and safety risk and equivalent policies were applied to people who were not pregnant²⁷. The impact of this provision remains to be tested but there is an increasing climate of pregnant women's behaviour being scrutinised.

²⁵ Section 17(4) Equality Act 2010

²⁶ Paragraph 14 of Schedule 2 to the Equality Act 2010

²⁷ The examples given in the Explanatory notes relate to things like gyms restricting the use of particular exercise equipment by pregnant women or airlines refusing to fly heavily pregnant women if they would also restrict the use of the service by other people with medical conditions.

Enforcement

48. Article 8 requires member states to put in place judicial or administrative mechanisms to enable individuals to enforce their rights under the Directive. This should include measures to ensure “real and effective” compensation or reparation to compensate for the loss and damage arising out of discrimination in a way which is “dissuasive and proportionate” to the damage suffered. The 2015 Commission report has highlighted that there are some concerns about the limited compensation available for example due to the lack of entitlement to compensation for “immaterial damages”.

49. Member states are also under an obligation to ensure that organisations with a legitimate interest in ensuring compliance with the Directive can support claimants in proceedings which enforce the obligations under the Directive.²⁸

Equality Bodies

50. States are required to designate equality bodies to promote, analyse, monitor and support equal treatment on grounds of sex. The bodies should be competent to:

- a. provide independent assistance to complainants in pursuing complaints of discrimination
- b. undertake independent surveys regarding discrimination
- c. produce independent reports and make recommendations on issues relating to discrimination.

51. Generally the UK’s Equality and Human Rights Commission has been proactive in supporting goods and services cases outside employment. The Commission also produce a range of briefings on goods and services equality laws which include briefings on finance, gyms, pubs, hotels and trades services such as plumbing.

²⁸ Article 8(3)

Enforcement of the Directive

52. The Equinet seminar highlighted that there were very few cases being brought. In addition, it was noted that there was a high level of underreporting and a low general awareness that gender discrimination in the provision of goods and services was unlawful. Equinet's experience mirrors that of many equality law practitioners.
53. A major disincentive to bringing claims is that the likely level of compensation in most cases will be low as many examples of goods and services discrimination relate to single incidents. Often those incidents will be seen as examples of poor service rather than unlawful sex discrimination. However, in relation to high cost services where there is an ongoing relationship such as pensions or healthcare, levels of financial loss will be higher.
54. For many complainants, the cost of litigation is expensive in proportion to the likely level of compensation recoverable. For the Directive to be effective, Equality Bodies need to be better resourced to raise awareness of the Directive and fund cases. They also need to consider different modes of enforcement. In addition to compensation claims, consideration should be given to using options such as criminal law or consumer protections. Another option would of course be to use ADR approaches such as mediation.
55. Despite the fact that the Directive has not generated a large number of cases, I do not believe the legislation to be irrelevant. I also believe that there is likely to be an increasing interest in non-employment discrimination particularly in relation to trans people and parents' rights.
56. The willingness of the public to support ethical consumer practices is also likely to have an impact in relation to the sexist provision of goods and services. The growth in social media sites such as mumsnet also paves the way for more challenges relating to the treatment of pregnant and breastfeeding women.

57. On balance, the legislation in this field is largely sound and provides real opportunities to promote gender equality outside employment. However, governments and equality bodies still have a crucial role to play in raising awareness of the legislation amongst the general public.

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