EQUAL TREATMENT OUTSIDE EMPLOYMENT: ACCESS TO GOODS AND SERVICES

EU GENDER EQUALITY LAW
SEMINAR FOR LEGAL PRACTITIONERS
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TRIER

AIM OF THE PRESENTATION

- to assist you in familiarizing with the content of Goods and Services Directive through individual cases and specific examples
- to inform you how you can benefit from the Goods and Services Directive in your legal practice
- to raise awareness about existing limits and legal gaps at EU level in this particular realm
- to create a room for further discussion since the existing case law at EU level is scarce and development and clarification of certain legal provisions are highly needed

All images in this presentation are available at https://unsplash.com/.
BASIC FACTS

The Treaty of Amsterdam
competence to take the necessary measures to combat all types of
discrimination

Why?
Discrimination outside the labour market = barrier to the full and
successful integration of men and women into economic and social
life

Deadline for implementation
21. 12. 2007

Minimum requirements
- national legislation might provide greater protection
- no reduction in the level of current protection is possible

Horizontal Provisions
Burden of proof, Defence of Rights, Sanctions, Positive action
measures, Victimization, Dialogue, Equality Bodies

access to and supply of goods and services

GOODS AND SERVICES

Does this case fall in the scope of Directive 2004/113/EC?

- Hospital establishes internal rule and displays it on its webpage.
- The rule says that children cannot be hospitalized with their
  fathers, because there are not any wards for fathers.
- One man (single father) claims that he feels discriminated against
  on grounds of his sex because he and his son cannot access the
  healthcare.

What goods and services does the Directive apply to?
GOODS AND SERVICES
Does this case fall in the scope of Directive 2004/113/EC?

Entrepreneur running a sawmill business displaced adverts on his webpage, social media and rented several billboards in the city for a period of six months.

NGO considered his adverts sexist and full of negative gender stereotypes and asked him to remove the harmful content from public places which he denied.

Disclaimer: This image was downloaded merely with educational purpose from https://www.pasak.cz/cz/nase-reklamy.

PERSONAL SCOPE
Who is actually protected under the Directive 2004/113/EC?

Owner of the store prohibited entry with prams.

If persons accompanying a child in a pram do not want to leave the child and the pram in front of the store, they cannot use its services. According to the owner, the prohibition was implemented in order to ensure safety of consumers and sufficient space.

A man entered into store with his child in a pram. He was immediately asked to leave the shop.
PERSONAL SCOPE
Who is actually protected under the Directive 2004/113/EC?

- Two transgender persons wanted to enter a nightclub.
- The security guard responsible for the access to the club denied them access.
- First, he told them that the place was full; but as people kept coming and entering the club, they asked again why they could not get in, and he told them that "my boss does not want to mix environments", clearly referring to their gender identity.
- The next day victims reported the incident to the police.

DIFFERENT FORMS OF DISCRIMINATION
Can public statement of the service provider amount to discrimination?

- An association organised a music festival marketed as 'the world's first major music festival for women, non-binary and transgender only'.
- On the association's web side and in media, the organisers had explicitly stated that persons identifying themselves as men were excluded from participating in the festival, and that only women, non-binary and trans persons were welcome.
- Following reports and media attention, the Equality Body started an ex officio investigation.
- The Equality Body found no clear indication of discrimination in relation to a specific person in the carrying through of the festival. According to findings of Equality Body all persons (men and women) over the minimum age holding a valid ticket had been allowed to entry the festival.
DIFFERENT FORMS OF DISCRIMINATION

Does the breastfeeding result in denial of service?

- The young mother claimed that she felt discriminated against when the waiter in the restaurant forwarded a request of other restaurant guests to be more discrete while breastfeeding.
- The waiter asked her to move to a chair near the toilet, since this was a more appropriate place to breastfeed. The owner argued, it was solely a matter of comfort for the mother and the other restaurant guests.

Can be a man protected against discrimination on the grounds of pregnancy?

- A church-run student hostel terminated tenancy agreement with a student whose girlfriend (living in a different city) became pregnant.
- Termination of contract occurred shortly after the information of her pregnancy had become public in the hostel Facebook group. One of users expressed his indignation about the fact that couple was not married.
DIFFERENT FORMS OF DISCRIMINATION

Following rules of someone “much bigger”

- **Woman** entered into *barber shop* which is in a shopping centre and asked the female barber for an ‘*undercut*’ (i.e. to shave the side of her hair).
- The female barber stated that she could not perform the required action as the client was female.
- The owner of the barbers maintained that as it is a barbers shop it provides *a service to male customers*, and is therefore insured specifically for cutting the hair of male customers. All the staff are trained as barbers and are not trained to cut women’s hair.
- The owner added that under the terms of the *lease* they are not permitted to have a ladies’ hair salon as there is *a well-known women’s hairdressers* in another premises in the shopping centre.

Irish case: *Carroll v Gruaig Barbers*

JUSTIFIED DIFFERENT TREATMENT UNDER ARTICLE 4.5

- Fitness centre had been *previously* open to persons of both sexes.
- Later on it was converted into a “women only” facility.
- A male customer brought a claim against the fitness centre, complaining that this change constituted *discrimination on the ground of gender*.
JUSTIFIED DIFFERENT TREATMENT UNDER ARTICLE 4.5

- Provider of dating website allowed women to use his services for free.
- One male submitted complaint regarding different terms for the same service.
- Provider argued that difference in pricing pursued legitimate aim: to encourage women to register which would constitute an advantage for the men looking for a partner on the website.

ACTUARIAL FACTORS

- An insurance company started advertising campaign in the media.
- According to campaign young female drivers are more cautious and have less car accidents than male drivers. Thus women were eligible for a cheaper rate than men.
ACTUARIAL FACTORS

Article 5

Test Achats ruling C-236/09
- annulment of Article 5-2 of the Directive
- principle of equal treatment fully applicable to financial services
- to be implemented by 21.12.2012

Unisex rule
- Use of sex as a factor in the calculation of premiums and benefits shall not result in differences in individuals premiums and benefits.
- 2011 Commission guidelines to support the implementation of the Test Achats ruling

Unisex rules applicable to all new contracts concluded after 21.12.2012

Allowed practices:
- The use of gender is not prohibited (only differentiation at individual level)
- Possible to collect, store and use gender status

SUMMARY FOR YOUR DAY TO DAY WORK

- Advertising, media and education is excluded (Art. 3.3). However, vocational training falls under the scope of another Directive (2006/54/EC).
- Unfortunately, parenthood/fatherhood is not protected.
- Gender identity is hopefully protected.
- Public statement of service provider can amount to direct discrimination. CJEU judgement (C- 54/07 Firma Feryn) is also applicable in the context of provision of goods and services.
SUMMARY FOR YOUR DAY TO DAY WORK

- (Sexual) harassment is **definitely prohibited**. How to deal legally with issue of **third-party perpetrator** (e.g. another consumer)?
- Bear in mind **discrimination by association** (CJEU judgement C-303/06 Coleman) and **instruction to discrimination**.
- 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**. This derogation must be construed narrowly.
- Important interpretation guidelines: **recital 16 and 17**

SUMMARY FOR YOUR DAY TO DAY WORK

- Single sex facilities, spaces and activities – predominately considered **in line with the Directive**
- **Difference in prices** for the same service
  - it can include short time discounts, reduced or free admission for women to certain facilities or services
  - sometimes considered positive action measure under article 6
- **Impact of CJEU judgment** (C-236/09 Test-Achats) on the insurance market:
  - Unisex principle applicable to private insurance contracts
- Economic impact - lack of data, **neutral or very limited**, no indication of unjustified price developments
FOR FURTHER READING


THANK YOU FOR YOUR ATTENTION!