

EU Gender Equality Law



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Equal treatment in areas other than employment: access to goods and services

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Directive 2004/113/EC: Purpose and scope

★ Purpose (Article 1)

"The purpose of this Directive is to lay down a **framework for combating discrimination based on sex** 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."

★ Scope (Article 3)

- Public and private sector (providers of goods and services)
- Prohibition of all types of discrimination (direct, indirect, harassment, instruction)
- It shall not apply to matters of employment, occupation and self-employment
- It shall not apply to the content of media and advertising nor to education.

★ Deadline for implementation 21.12.2007

- ★ The Directive establishes a framework of **minimum conditions** giving discretion to Member States as to broader protection (article 7) and entitles them to **take positive action** to achieve the Directive's objectives (article 6)

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COUNTRY	COPY-OUT APPROACH	GOODS COVERED	SERVICES COVERED	FREE-ACHTA?Y	MEDIA-AND ADVERTISING	EDUCATION	COMMENT
Belgium	No	Yes	Yes	Yes	National law	National law	
Bulgaria	No	Yes	Yes	Yes	National law	National law	The non-discrimination principle only extends to education, but on basis of case law also to media and advertising. Scope is unclear.
Czechia	No	Yes	Yes	Yes	National law	National law	
Denmark	No	Yes	Yes	Yes	National law	National law	
Germany	No	partial	partial	Yes	---	---	Only contracts concluded under civil law and "liss contracts" only. The prohibition of sexual harassment is confined to the area of employment.
Estonia	No	partial	partial	No	unclear	unclear	Accepts exceptions and differences in treatments of persons due to their sex.
Ireland	No	Yes	Yes	Yes	National law	---	
Greece	Yes	Yes	Yes	Yes	---	---	
Spain	No	Yes	Yes	Yes	National law	National law	Two specific provisions to protect pregnant women and women on maternity leave.
France	No	Yes	Yes	Yes	National law	National law	Law allows for the organization of non-mixed schools.
Croatia	Yes	Yes	Yes	Yes	National law	National law	
Italy	Yes	Yes	Yes	Yes	---	---	
Cyprus	Yes	Yes	Yes	Yes	---	---	
Latvia	No	partial	partial	Yes	National law	National law	Law does not cover goods as services which are publicly offered by natural persons outside commercial activities. Non-profit associations are not covered.
Lithuania	No	partial	partial	Yes	National law	National law	Implementing law does not clarify if the access to goods as services is fully covered
Luxembourg	No	Yes	Yes	Yes	National law	National law	
Hungary	No	Yes	Yes	No	---	National law	Life, accident and sickness insurances allow gender discrimination.
Malta	No	Yes	Yes	Yes	National law	National law	Unspecific law
Netherlands	No	Yes	Yes	Yes	National law	National law	Allows exceptions for education.
Austria	Yes	Yes	Yes	Yes	---	---	
Poland	Yes	Yes	Yes	Yes	---	---	
Portugal	No	Yes	Yes	Yes	---	---	
Romania	No	Yes	Yes	Yes	National law	National law	Limited implementation of the directive inconsistent with other Romanian legislation exceeding scope of Directive.
Slovene	No	Yes	Yes	No	unclear	unclear	The terms goods and services are not defined.
Slovakia	No	Yes	Yes	Yes	National law	National law	
Finland	No	Yes	Yes	---	---	---	Few exceptions from unisex insurances.
Sweden	No	Yes	Yes	Yes	---	National law	
UK	No	Yes	Yes	Yes	National law	National law	Law covers 'facilities', too.

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The concept of goods and services in Directive 2004/113/EC

- The Directive shall apply to all public and private sector goods and services **provided to the public** against payment
- The concept of service thus implies **economic activity** usually provided **against payment** (Recital 11 of the Explanatory Memorandum)
- **Not falling** within the scope of the Directive:
 - **Actions of the public sector entailing the exercise of official authority** (e.g. policing)
 - The field of private and family life
- *Especially in the **field of health services**, as established in case law, it is not required that the service be paid for by those for whom it is performed* (See Grounds 57 Case C-157/99 Smits and Peerbooms, 12 July 2001)

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Discrimination on grounds of sex and gender reassignment

- ✦ In accordance with the CJEU case-law, the scope of the principle of equal treatment between men and women and the prohibition of discrimination on grounds of sex shall also apply to discrimination on the grounds of gender reassignment.
- ✦ Some Member States have **explicitly included** gender reassignment in their Law as special grounds for discrimination (Belgium, United Kingdom, etc)
- ✦ In other Member States, **Courts** have included discrimination on the grounds of gender reassignment in the concept of sex discrimination (eg. Cyprus)
- ✦ The question arising is whether **gender identity** falls within the scope of protection on the grounds of sex. An interpretative approach could not but include it, since it is essentially similar.

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Protection of pregnant women and mothers

- Article 4 par.1 **explicitly prohibits** less favorable treatment of women for reasons of pregnancy and maternity
- In practice, problems occur due to limitations imposed by service providers :
 - As for the possibility to breastfeed in their facilities
 - Access to services
 - Financial service sectors
 - Accommodation

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Justified derogation for members of one sex

Article 4 par. 5 of the Directive

"This Directive shall not preclude differences in treatment, if the provision of the 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".

Indicative cases of legitimate aim: (See also BA. και Recital 16 of the Directive)

- victims of sex-related violence (in cases such as the establishment of single-sex shelters)
- the freedom of association (in cases of membership of single-sex private clubs)
- reasons of privacy / the promotion of gender equality or of the interests of men or women (for example single-sex voluntary bodies)
- the organisation of sporting activities (for example single-sex sports events)

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Implementation of article 4 par. 5

The implementation of article 4 par. 5 in practice:

Services provided to a single sex

- entry to a fitness centre exclusively to women,
- entry exclusively on a specific floor of a hotel

Pricing discrepancy for the same service

- o Different entry prices in the leisure sector (entry to bars, clubs, online dating sites, sport events)
- o Different pricing for hairdressing services

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Positive action (Article 6)

Definition:

“With a view to ensuring full equality in practice between men and women, 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”.

Positive action as derogation of equal treatment, in addition to what is laid down in article 4 par.5.

In the event of strict interpretation of article 4 paragraph 5, positive action could be the only case justifying different conditions for access to goods and services suggested to both sexes.

However, this option is always subject to a case-by-case assessment as for the **necessity** and the **proportionality** of the action taken.

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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.”

- **It concerns financial services**
- **It provides for a gradual transition of the equal treatment principle,**
- **It separates contracts into “existing” and “new” ones (see Recital 18)**
- **It provides for permitted derogation [see article 5(2) below]**

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Article 5 (2): Permitted 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.**
- ✦ **The derogation** of article 5(2) was annulled by the CJEU's ruling: Test Achats (C-236/09: Association Belge des Cosnommateurs Test-Achats ASBL and Others v Conseil des ministres [2011] ECR I-773 (Grand Chamber)).

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CJEU Test-Achats ruling

By that ruling, the Court annulled the provision of Article 5 par. 2, allowing the preservation of variations in the provision of insurance services on the grounds of sex, provided that this was based on relevant and accurate actuarial and statistical data.

The Court considered that by enabling Member States to maintain without temporal limitation an exemption from the unisex rule laid down in Article 5(1), Article 5(2) runs counter to achievement of the objective of equal treatment between men and women in relation to the calculation of insurance premiums and benefits, which is the purpose of the Directive in the insurance field.

- ✦ Article 5(2) is therefore incompatible with Articles 21 and 23 of the Charter of Fundamental Rights.

The Court, finally, concluded that from **21 December 2012**, the unisex rule shall be applied without exception with respect to the calculation of individuals' premiums and benefits in new contracts

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Indirect Discrimination: article 2 b

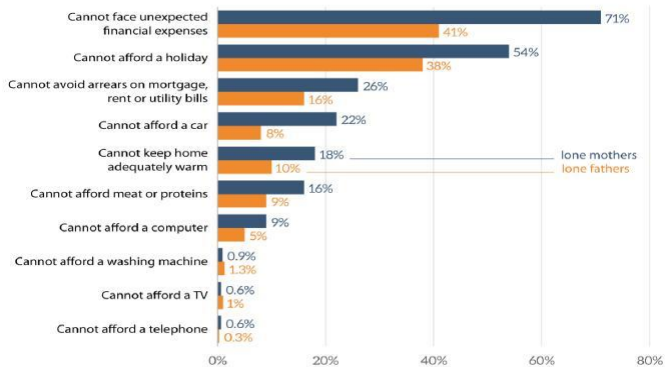
Definition:

“where an apparently neutral provision, criterion or practice would **put persons of one sex at a particular disadvantage compared with persons of the other sex**, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary”

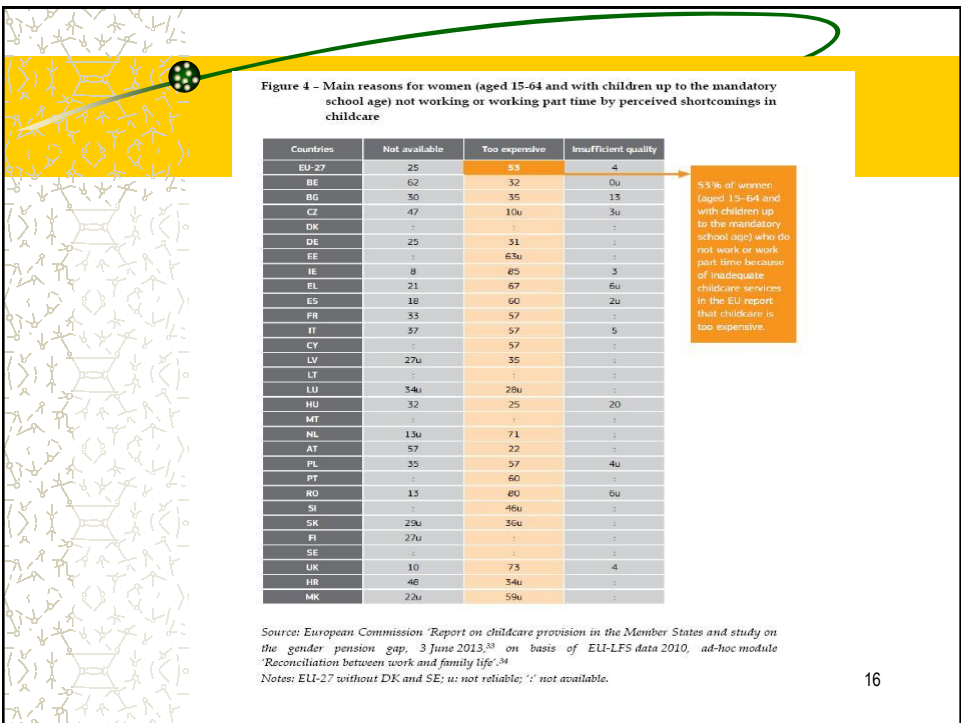
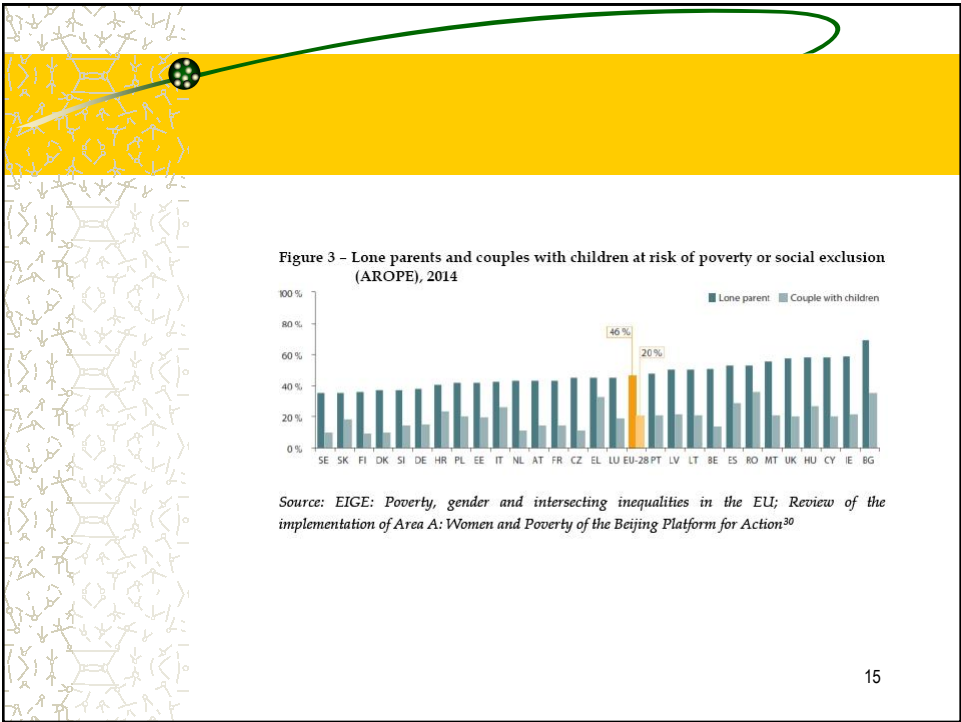
Considerations:

- ✦ Access to goods and services often involves financial ability and available time. However, women, traditionally burdened with raising children and household are disadvantaged compared to men.
- ✦ *Female poverty*
- ✦ Absence or inadequacy of childcare affecting mainly women
- ✦ Access to transport means (not only difficult for the disabled and elderly, but also for pregnant women or women with prams)

Figure 2 – Deprivation items among lone mothers and lone fathers (EU-28, 2014)



Source: EU-SILC, calculations on 2014 micro data, adapted by EPRS on basis of EIGE: Poverty, gender and intersecting inequalities in the EU²⁸, p.67



Protection provided to discrimination victims

- **Courts**
- **Stakeholders promoting the principle of equal treatment**
(Providing independent assistance, investigating individual complaints, conducting an independent investigation, making recommendations, publishing independent reports (article 11))

Institutional protection tools

- ✦ Reversing the burden of proof
- ✦ Penalties (effective, proportionate, dissuasive)
- ✦ Positive action and measures
- ✦ Representation by legal entities
- ✦ Dialogue with relevant stakeholders
- ✦ Protection against victimisation

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Summarizing (1)

- **Health services** fall within the scope of employment (attention to recital 12 of the preamble)
- **Advertising, media and education are excluded** (article 3 par. 3).
- Vocational training falls within the protective scope of Directive 2006/54/EC
- **Gender identity** is protected
- **Harassment and sexual harassment** are prohibited. A question arises when the harasser is not the provider him/herself, but a third person

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Summarizing (2)

- ✦ The Directive does 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 for the achievement of that aim are appropriate and necessary. The provision shall be interpreted strictly and under the interpretative guidelines of recitals 15 and 16 of the preamble.
- ✦ **Differentiation in rates** for the same service may include: **temporary promotions** only for one gender, **limited or free access** to certain activities or services only to one sex. Sometimes, these differences can constitute **positive action**.

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Summarizing (3)

- ✦ **The public declaration of a service provider** can be considered direct discrimination (See Case C-54/07 Firma Feryn)
- ✦ **Discrimination by association** is also prohibited (CJEU C-303/06 Coleman)
- ✦ **Financial impact** of the ruling (CJEU C-236/09 Test Achats) **on the insurance market**
- ✦ Neutral or limited financial impact of the Directive (lack of evidence)

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Indicative literature

- Timmer, L. Sendfor the European network of legal experts in gender equality and non-discrimination, A Comparative analysis of gender equality law in Europe 2018, January 2019, DG Justice and Consumers, <https://www.equalitylaw.eu/downloads/4829-a-comparative-analysis-of-gender-equality-law-in-europe-2018-pdf-807-kb>
- Helmut Werner, Gender Equal Access to Goods and Services Directive 2004/113/EEC European Implementation Assessment, European Parliament, 2017, [http://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_STU\(2017\)593787](http://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_STU(2017)593787)
- 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-Bodiesand-the-Gender>

