

# Equal treatment outside employment: access to goods and services

## EU GENDER EQUALITY LAW SEMINAR FOR MEMBERS OF THE JUDICIARY

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**Miroslaw Wróblewski**, attorney at law,  
director in the office of the Commissioner for Human Rights



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## Outline

- introduction/legal foundations
- EU secondary anti-discrimination legislation
- material and personal scope of the directives
- basic normative concepts
- effective legal protection against discrimination
- sanctions and remedies
- institutional protection



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## Legal foundations - *treaties*

- **Article 19 (1) TFEU** – legal basis for secondary legislation
- **TEU Articles: 2, 3(2), 8, 10**



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## Legal foundations *EU Charter of Fundamental Rights*

### **Article 20 Equality before the law.**

Everyone is equal before the law.

### **Article 21 Non-discrimination**

1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.

### **Article 23 Equality between women and men**

Equality between women and men must be ensured in all areas...



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## EU secondary legislation

- **Directive 2000/43/EC - non-discrimination on grounds of racial or ethnic origin**
- **Directive 2004/113/EC - non-discrimination as regards women and men**
- *directive – legal nature of EU legal instrument – role of MS*



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## **Legal nature of equal treatment**

***the principle of equal treatment requires that comparable situations must not be treated differently and different situations must not be treated in the same way, unless such treatment is objectively justified***

(p. 28, C-236/09, *Test –Achat*)



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## Shortcomings of EU Equality Law (I)

Different **levels of protection** for different grounds → “Hierarchy”

	Employment	Self-employed	Goods & Services
Sex	✓	✓	✓
Race/ethnic origin	✓		✓
Religion/belief	✓		
Age	✓		
Disability	✓		
Sexual Orientation	✓		
Gender reassignment	✓		

↳ Are these differences justified?

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### No progress in the adoption of the horizontal directive

*proposed directive on sexual orientation, religion, belief, disability and age (COM (2008) 426 final)*

## Directive 2000/43/EC v. Directive 2004/113/EC

- Material scope of the two Directives
  - *access to goods and services (as defined by treaties)*
- Personal scope of the two Directives
  - *all subjects providing goods and services/victims of special characteristics (gender, ethnic origin, race)*
- Limitations and exceptions: *Private and family life exception (Article 3(1)), education, media, advertising, employment etc. covered by other acts.*
- Mutual relations



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# Material scope

## Goods

- Reference to the definition in the context of the free movement – Article 28 TFEU
- Available to the public (private and public sector)
- Pecuniary value, can be the object of a commercial transaction

## Services

- Reference to free movement - Article 57 TFEU
- Economic activity/services which are normally provided for remuneration
- Not included in other freedoms



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# Personal scope

- **sex, race, ethnic origin**
- **also:**
  - maternity
  - pregnancy
  - gender reassignment (legislation, case law)
  - discrimination by association; multiple discrimination



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## Protection of pregnancy and maternity

- Art. 4.1. 2004/113: **prohibits** less favorable treatment of women for reasons of pregnancy and maternity.

### Problems - limitations imposed by service providers

- possibility to **breastfeed** in their facilities



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## Breastfeeding in a restaurant



- *A restaurant in Sopot*
- Appellate Court in Gdańsk judgment of 14.12.2017, I ACa 187/17
- 500 EUR compensation and public apologies
- gender discrimination

## Personal scope

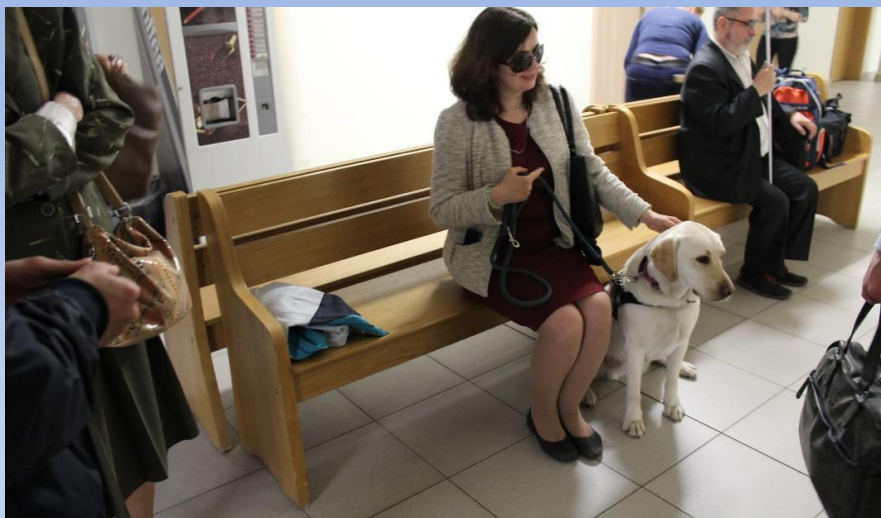


### *Shoe shop in Tarnobrzeg*

- women with prams?
- persons on a wheelchair?
- penalty: 50 EUR
- Poland: general prohibition – penalty up to 1200 EUR – Article 138 Code of Misdemeanor
- Art. 138 invalidated by the Constitutional Court – judgment of 26.06.2019

## Denial of access to Eye Clinic – protection?

judgment of Regional Court in Kraków of 31.7.2017 r. I C 2080/16/P



## Prohibition of discrimination

- Direct discrimination
- Indirect discrimination
- Harassment
- Sexual harassment
- Instruction to discriminate
- **minimum requirements** (Art. 7: 2004/113; Art. 6: 2000/43)
  - national legislation may provide greater protection
  - no reduction in the level of current protection is possible



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## Prohibition of discrimination

### **Direct discrimination (Article 2 point a)**

- Including pregnancy and maternity (article 4(1) point a)
- More favourable provisions on protection during pregnancy and maternity permitted (article 4(2))
- In relation to a comparator: “in comparison with”, “compared with”

### **Indirect discrimination (Article 2 point b)**

- Neutral criterion: Appearance of concealed discrimination
- Legitimate aim, suitability, requirement for demarcation function



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## Indirect discrimination - problems

- women, traditionally burdened with raising children and household, are disadvantaged compared to men.
- absence or inadequacy of childcare affecting mainly women
- accessibility - pregnant women or women with prams
- race/ethnic stereotypes (*Feryn* case C-54/07)



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## Justification

- Difference in treatment is justified by a **legitimate aim** and where the means of achieving that aim are appropriate and necessary.
- **Positive action** - specific measures to prevent or compensate for disadvantages linked to sex



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## EXCEPTIONS OF THE DIRECTIVE 2004/113

Difference 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 (Article 4.(5)).



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### Legitimate justification

Examples (recital 16, preamble):

- protection of victims of sex-related violence (*e.g. shelters*)
- reasons of privacy and decency
- promotion of gender equality or of the interests of men or women
- freedom of association (*e.g. private clubs*)
- organisation of sporting activities (*e.g. fitness centres*)

## Legitimate justification - problems

### Pricing discrepancy for the same service

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

## Article 5 (2004/113) : 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.*
- **derogation - Article 5 (2):** *Notwithstanding par. 1, 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 States concerned shall inform the Commission and ensure that accurate data relevant to the use of sex as a determining actuarial factor are compiled, published and regularly updated. These States shall review their decision five years after 21 December 2007, taking into account the Commission report referred to in Article 16, and shall forward the results of this review to the Commission.*

## Test-Achats case C-236/09

- In the area of **insurance premiums and benefits** the CJEU ruled (1.3.2011) that Article 5 (2) of **Gender Directive is invalid**:
- “Article 5(2) of Directive 2004/113 implementing the principle of equal treatment between men and women in the access to and supply of goods and services is invalid with effect from **21 December 2012.**”
- incompatibility with Articles 21 and 23 of the Charter



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## Prohibition of discrimination v. other rights and freedoms

- **protection of private and family life**
  - **freedom of economic activity**
  - **freedom of contracting**
  - **freedom of religion** (recital 3, preamble)
  - **freedom of conscience** (conscientious objection)
- also protected by Treaties/CFREU



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**Jack Phillips, Lakewood, Colorado, „Masterpiece Cakeshop”- David Mullins and Charlie Craig**

Colorado Civil Rights Commission claim

Appelate Court ruling of 13.8.2015 r., 2015 COA 115  
(*Masterpiece Cakeshop v. Colorado CRC*)

Supreme Court ruling of 4.6.2018 r.

**Discrimination v. freedom of speech**

[www.rpo.gov.pl](http://www.rpo.gov.pl)

Full judgment text of the Supreme Court:  
<https://www.theguardian.com/law/2018/jun/04/gay-cake-ruling-supreme-court-same-sex-wedding-colorado-baker-decision-latest>

## Effective legal protection - tools

- reversing the burden of proof
- sanctions and remedies
- real and effective compensation or reparation
- positive action
- representation by legal entities
- dialogue with relevant stakeholders
- protection against victimisation
- institutional support



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## Effective anti-discrimination – duties of Member States

### I. Anti-discrimination protection – SANCTIONS

- punitive character

### II. Providing relief for victims – REMEDIES

- reparative character (compensation, reparation)

**Similar claims (national and EU) must protected equally; test of effectiveness and equivalence**



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## Idea of sanctions

There is no legal system based solely on the moral power of norms. The sanctions and remedies must exist in order to enforce the law.

Even if antidiscrimination legislation is morally powerful (dignity!), the sanctions have to exist. Acting legally is thus more attractive than violation of norms/discrimination.



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## General purpose of sanctions and remedies in EU law

- **Enforcing *effet utile* of EU law** (*Commission v. Greece, case 66/68, p. 23* „Article 5 requires MS to take all measures necessary to guarantee application and effectiveness of Community law”)
- **Securing coherence of EU law**
- **Protection of EU fundamental rights**

Sanctions and remedies may be seen as an instrument of EU law implementation



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## Sanctions in EU anti-discrimination law must meet criteria:

- established by CJEU jurisprudence,
  - codified in EU legislation:
- Article 15 Race Equality Directive 2000/43/EC
- Article 17 Employment Equality Directive 2000/78/EC
- Article 25 Equal Treatment Directive 2006/54 (recast)
- Article 14 Goods/Services Directive 2004/113/EC



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## Sanctions in EU anti-discrimination law

### Sanctions must be:

- **EFFECTIVE** and
- **DISUASIVE** and
- **PROPORTIONATE**

*(Commission v. Greece, case 66/68; von Colson and Kamann, C-14/83)*



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## EFFECTIVE SANCTIONS

- sanctions **cannot be purely symbolic** (ACCEPT, C-81/12)
- legislation should not set **any upper limits** (Marshall, C-271/91)
- sanctions may be applied even if there is no individual discriminated against (Firma Feryn, C-54/07): **the public declaration of a service provider can be considered direct discrimination**



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## DISUASIVE SANCTIONS

- sanctions must have a **real deterrent effect** (Decker, C-177/88)
- sanctions can comprise an element of punitive damages over and above the damage incurred (María Auxiliadora Arjona Camacho v Securitas Seguridad España, SA; C-407/14)
- the severity of sanctions must be commensurate to the seriousness of the breaches for which they are imposed (ACCEPT, case C-81/12)



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## PROPORTIONATE SANCTIONS

- case von Colson and Kamann (C-14/83):
- **need of balancing** between law violation, its character, weight and consequences, and the amount and a kind of a sanction
- sanction is proportionate if it ensures optimal protection of legally recognized values and does not cause unnecessary burden
- sanction protecting public and private interest may not overweight other private interest
- appropriate to the situation at issue (Firma Feryn, C-54/07) – as regards the type of sanction



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## Type of sanctions

- fine
- finding the fact of discrimination by a court or competente public authority, with a adequate level of publicity
- prohibitory injunction
- award of damages to the body bringing proceedings (Firma Feryn, C-54/07)



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## Remedies in EU anti-discrimination law

EU Charter of Fundamental Rights

### Article 47:

Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the **right to an effective remedy before a tribunal** in compliance with the conditions laid down in this Article.



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## Remedies in EU anti-discrimination law

Article 17 Framework Directive 2000/78/EC

Article 15 Race Directive Directive 2000/43/EC

Article 14 Goods/Services Dir. 2004/113/EC

Article 25 Recast Directive 2006/54/EC

Obligation addressed to MS to establish an effective system of legal remedies



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## Remedies in EU anti-discrimination law

Means of redress and enforcement of the right when it is violated

- judge-made remedies
- *effet utile* (Frankovich and Bonifaci C-6/90 and C-9/90)
- equivalence test
- enforcement of EU law



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## National legal framework

- Compensation for material and immaterial damage
- Penalties (.e.g. administrative penalty)
- Persuasive measures (e.g. recommendations)
- Restitution of non-discriminatory situation
- Publication of a decision or judgment regarding a discriminatory action



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## How compensation can be calculated?

Factors to be taken into account:

- the status of the perpetrator (private/public, natural/legal person)
- gravity and frequency of discriminatory acts
- financial situation of the perpetrator
- extent of the discrimination (multiple discrimination)

- **COMPARE – Article 83.2 GDPR**



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## The role of the National Equality Body/Bodies

*Article 12 (2004/113), Article 13 (2000/43)*

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 (...) These bodies may form part of agencies charged at national level with the defence of human rights or the safeguard of individuals' rights, or the implementation of the principle of equal treatment.



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# The role of the National Equality Bodies

*Article 12 (2004/113), Article 13 (2000/43)*

2. Member States shall ensure that the **competencies** of the bodies referred to in paragraph 1 include:

(a) without prejudice to the rights of victims and of associations, organisations or other legal entities, **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.



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# Recommendation on Standards for Equality Bodies

- **Recommendation on Standards for Equality Bodies, June 2018:** [https://ec.europa.eu/info/policies/justice-and-fundamental-rights/combating-discrimination/tackling-discrimination/network-experts-field-anti-discrimination\\_en](https://ec.europa.eu/info/policies/justice-and-fundamental-rights/combating-discrimination/tackling-discrimination/network-experts-field-anti-discrimination_en)
- **ECRI: Revised General Policy Recommendation No.2 on Equality bodies to combat racism and intolerance at national level, December 2017:** <https://hudoc.ecri.coe.int/eng#%7B%22ECRIIdentifier%22:%7B%22REC-02rev-2018-006-ENG%22%7D>
- **Equinet Working Paper on Developing Standards for Equality Bodies, November 2016:** <http://equineteurope.org/2016/11/04/equinet-working-paper-on-developing-standards-for-equality-bodies/>



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**Thank you!**

**Mirosław Wróblewski**

mail: [mirekwroblewski@tlen.pl](mailto:mirekwroblewski@tlen.pl)

@MiroWróblewski

