Equal treatment in access to goods and services

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implementing the principle of equal treatment between men and women in the access to and supply of goods and services

• Came into force 31/12/2004
• Deadline for transposition 21/12/2007
• In principle directive has indirect operation → Those affected have recourse to transposed national laws
• More extensive protection by MS permitted (article 7)
Other characteristics

• For race or ethnic origin, directive 2000/43/EC (Anti-Racism directive)
  – Broader protection than for gender (education, media and advertising)

• For other characteristics (religion/ideology, disability, age, sexual orientation): draft directive in preparation since 2008
  – Directive 2000/78/EC (Equal treatment directive)
  – Only applies to employment and occupation

Goods and services (directive article 3)

• Goods
  – Reference to the definition in the context of the free movement of goods
  – Everything that has a monetary value and can be the object of a commercial transaction

• Services
  – Reference to Article 57 TFEU
  – Services which are normally provided for remuneration
  – Not included in freedom of movement for goods, capital and persons
  – Economic activity normally provided for remuneration
  – Includes payment from third parties

• Not: Media and advertisement, education
Public versus private and family life

“...which are available to the public ... and which are offered outside the area of private and family life...” (article 3(1))

• e.g. offer only to family members, friends, colleagues, other acquaintances → excluded

• e.g. offer on publicly accessible website, newspaper advertisement → applicable

• Publicly offered room to let in own home → excluded (Commission communication)
Ban in discrimination (article 49(1) in conjunction with article 2)

- **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

Examples

- Women not permitted to stand at the bar
- Pricing
- Men have to pay for admission to a nightclub, women go free
- Bank refuses to recognise change to the personal status of a transsexual person
- Ban on breastfeeding babies in a cafe
- Pregnant businesswoman who is unable to get credit
- Doctor’s certificate from week 28 of pregnancy in order to travel by air?
- Dress codes for meetings
Instructions to discriminate = discrimination (Article 4(4))

- e.g. café operator instructs staff to ask breastfeeding mother to leave the premises
- e.g. instructions to nightclub doorman
- e.g. instruction not to accept any female learner drivers
- Instruction to agent not to let property to pregnant women

Harassment = discrimination (Article 4(3))

- Harassment and sexual harassment (article 2)
- e.g. Builder harasses female contractors
- e.g. sexist remarks by a service provider about a female customer
- e.g. offering discounts in return for sexual favours
Harassment by a third party?

- Is the provider responsible for discriminatory conduct by a third party?
  - Unresolved
  - Case in Austria: racist graffiti on shelters in a station. Graffiti was voluntarily removed
  - Any contractual duty to protect?
- Is a third party responsible for discriminatory conduct?
  - Wording Art.3 para. 1: "...this Directive shall apply to all persons who provide goods and services..."

Permissible differentiated treatment

- Pregnancy or maternity (article 4(2))
- Gender-specific provision (article 4(5))
- Positive measures (article 6)
- Actuarial factors (article 5(2))
  - But Test-Achats (C-236/09)
Test-Achats and its consequences

• CJEU C-236/09 *Test-Achats*: Article 5(2) of the directive is invalid
  – Position of women and men regarding premiums and services comparable
  – No time limit on exemption clause
  – → article 5(1) applicable from 21/12/2007 without exception

• Gender-neutral actuarial tables and prices

Test-Achats and its consequences

• Gender criterion in risk calculation
• No individually differentiated prices and services
• Gender-specific insurance products: e.g. prostate cancer, breast cancer, cervical cancer
  – But not pregnancy and maternity (article 5(3))

• Guidelines on the application of Directive 2004/113/EC 9 in the light of the judgment in CJEU C-236/09 (*Test-Achats*)
  OJEU 2012/C 11/01, 31/01/2012
Positive measures (article 6)

- to guarantee full equality in practice
- specific measures
- to prevent or compensate
- for gender-specific disadvantages

Gender-specific provision (article 4(5))

- differentiated treatment
- justified by a legitimate aim → recital 16
  - protection of victims of sexual violence
  - protection of privacy and decency (e.g. subletting of a room)
  - promotion of gender equality or interests of men and women
  - freedom of association (private clubs)
  - organisation of sporting activities
- non-exhaustive list
Cases: Differentiated pricing

• Ladies’ nights at clubs
  – No legitimate aim
  – economic benefits for operator
  – sexualisation of women
  – but: advertising permitted

• Cheaper tickets for sporting events

• Discounts from pension age
  – No connection between disadvantage and public transport

• Hairdresser’s prices
  – If cost is the same → same price

• Different prizes at tennis tournaments

Areas segregated by gender

• Toilets
• Changing rooms
• Women’s parking
• Women’s areas in a fitness centre
  – Same price for women and men
  – Surface areas
  – Training equipment
• Women’s computers in a library
  – Pay ratios
  – Waiting times
  – Privacy, decency, reasonable leisure activities
Areas segregated by gender

- Women’s taxis
- Ladies’ day at a sauna
- Women-only swimming

Provision exclusively for women or men

- Courses for women: IT, technology, buildings trades, mountain biking
- Courses for men: Cookery, needlework, yoga
- Women’s fitness centre
- Meeting places for women or girls, boy’s clubs, advice centres for men
- Men’s clubs
- Lesbian and gay hangouts
- Women’s housing project
Differentiation between positive measures and offers exclusively or primarily to members of one sex?

• Different pricing: no gender specific offer (Art 4 para 5)
• Differentiation related to the aim
• Positive measures (Art 6): equality
• Gender specific offers (Art 4 para 5): other legitimate aims
  ○ E.g. Freedom of association
  ○ E.g Protection from (domestic) violence
  ○ E.g. Protection of privacy and intimacy
  ○ E.g. Being together in a gender grouping

Thank you for your attention!