

Equal treatment in access to goods and services

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This training session is funded under the 'Rights, Equality and Citizenship Programme 2014-2020' of the European Commission.

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Directive 2004/113/EC of 13 December 2004

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)

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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

Goods & services



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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)

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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

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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

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Areas segregated by gender

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

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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

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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!

