

EQUAL TREATMENT OUTSIDE EMPLOYMENT: ACCESS TO GOODS AND SERVICES



EU GENDER EQUALITY LAW
WEBINAR FOR LEGAL PRACTITIONERS

15 DECEMBER 2020
ERA

AIM OF THE PRESENTATION

- ❑ **to assist** you in familiarizing with the content of **Goods and Services Directive** (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) 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 field
- ❑ **to create a room** for further discussion since the existing case law at EU level is scarce and **development** and **clarification** of certain EU legal provisions are highly needed

All images displaced 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

MAIN STRUCTURE OF THIS PRESENTATION



- Material scope
- Personal scope
- Different forms of discrimination
- Justified different treatment
- Actuarial factors

Cases from Belgium, Romania, Czechia, Ireland, Poland, Spain, Sweden, Austria, Germany, Romania etc.

Most case studies can be found in „Flash Reports“ elaborated by experts in the European Equality Law Network. Please go and see <https://www.equalitylaw.eu/>.

GOODS AND SERVICES



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



” Which goods and services does the Directive apply to? “

- 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**.
- A man (single father) claims that he feels discriminated against on grounds of his sex because he and his son cannot access the healthcare.

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GOODS AND SERVICES



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



” early bird catches the morning wood “

- 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>.

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PERSONAL SCOPE

Who is protected under the Directive 2004/113/EC?



”
Is man in this particular case protected?
“

- ❑ 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 store **with his child in a pram**. He was immediately asked **to leave the shop**.

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PERSONAL SCOPE

Who is protected under the Directive 2004/113/EC?



”
Transsexual
Transgender
Intersex
Non-binary
“

- ❑ 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.

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PERSONAL SCOPE

Who is protected under the Directive 2004/113/EC?



”Protection of legal persons against discrimination under EU law is yet to be developed.“

- NGO organized conference for high school students.
- Three days before the actual event the head of the conference venue decided to withdraw the approval to organise the event in the building.
- The reason for the decision was the presence of a trans man on the list of speakers.

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DIFFERENT FORMS OF DISCRIMINATION

Can public statement of the service provider amount to discrimination?



”Music festival marketed as *cis-man* free“

- 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.

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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.

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DIFFERENT FORMS OF DISCRIMINATION



” 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 the 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**.

Please note that in the real Austrian case it was an actual pregnant woman whose contract was terminated.

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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

“



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JUSTIFIED DIFFERENT TREATMENT UNDER ARTICLE 4.5



”

Women
only
facilities

“

- ❑ Fitness centre had been **previously** open to persons of both sexes.
- ❑ Later 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**.

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JUSTIFIED DIFFERENT TREATMENT UNDER ARTICLE 4.5



”

Differences
in pricing

“

- ❑ 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.

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ACTUARIAL FACTORS Article 5



”

Insurance
and gender
equality

“

- ❑ 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**.

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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

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SUMMARY FOR YOUR DAY-TO-DAY WORK



- Healthcare **falls** within the scope of the Directive. But keep in mind Recital 12 of the Directive.
- Advertising, media and education **are excluded** (Art. 3.3). However, vocational training falls under the scope of another Directive (2006/54/EC).
- Unfortunately, parenthood/fatherhood **is not explicitly protected under this Directive**. Check your national law.
- Gender identity **is (hopefully) protected**.
- Legal persons are **not protected** by the Directive (compare with Recital 16 of the Race Directive) – room for strategic litigation?
- 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 **prohibited**. How to deal legally with issue of **third-party perpetrator** (e. g. another consumer)?
- ❑ Bear in mind a ban of **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 – predominantly 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 YOUR FURTHER READING



- S. Burri, L. Senden and A. Timmer for the European network of legal experts in gender equality and non-discrimination, **A Comparative analysis of gender equality law in Europe 2019**, February 2020, DG Justice and Consumers, <https://www.equalitylaw.eu/downloads/5119-a-comparative-analysis-of-gender-equality-law-in-europe-2019-1-35-mb>
- 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>

LIST OF SELECTED CASES I including internet resources



- Austria: Cheaper football entry tickets for women (Leopoldstadt District Court 31 C 649/09z-9) <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52015DC0190> (page 7 and 8 of the Report)
- Belgium: “Women only” fitness center not illegal <https://www.equalitylaw.eu/downloads/27-11-be-ge-good-and-services-women-only-fitness>
- Belgium: “Girls only” housing illegal <https://www.equalitylaw.eu/downloads/2743-13-be-ge-girls-only-housing-illegal>
- Belgium: Gender discrimination in healthcare <https://www.equalitylaw.eu/downloads/3904-belgium-gender-discrimination-in-healthcare-pdf-134-kb>
- Czechia: A father’s stay with his children at a hospital https://www.ochrance.cz/fileadmin/user_upload/zpravy_pro_poslaneckou_snemovnu/Reports/2017/2017_1_Q_EN.pdf (page 13 of the Report)

LIST OF SELECTED CASES II including internet resources



- **Czechia: Discriminatory prohibition of entry into a store with a baby carriage** <https://www.ochrance.cz/en/news/press-releases-2018/discriminatory-prohibition-of-entry-into-a-store-with-a-baby-carriage/>
- **Estonia: Problems with equal pay campaign by the rideshare service provider** <https://www.equalitylaw.eu/downloads/5126-estonia-problems-with-equal-pay-campaign-by-the-rideshare-service-provider-119-kb>
- **Germany: Free use of a dating website for women** <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52015DC0190> (page 7 of the Report)
- **Ireland: Carroll v Gruaig Barbers (DEC-S2015-005), Carroll v Short Cuts (DEC-S2015-007)** <https://www.equalitylaw.eu/downloads/2906-ireland-carroll-v-gruaig-barbers-dec-s2015-005-carroll-v-short-cuts-dec-s2015-007-pdf-158-kb>

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LIST OF SELECTED CASES III including internet resources



- **Poland: Denying a woman the possibility to breast-feed in a restaurant constitutes discrimination** <https://www.equalitylaw.eu/downloads/4565-poland-denying-a-women-the-possibility-to-breast-feed-in-a-restaurant-constitutes-discrimination-final-court-decision-pdf-172-kb>
- **Poland: Alleged sex discrimination in a local aqua park** <https://www.equalitylaw.eu/downloads/4653-poland-alleged-sex-discrimination-in-a-local-aqua-park-pdf-107-kb>
- **Romania: Refusal to host conference due to the presence of a trans activist sanctioned by the equality body** <https://www.equalitylaw.eu/downloads/5180-romania-refusal-to-host-conference-due-to-the-presence-of-a-trans-activist-sanctioned-by-the-nccd-73-kb>
- **Spain: A court convicted a person for refusing access to a nightclub to two transsexual persons** <https://www.equalitylaw.eu/downloads/4298-spain-country-report-non-discrimination-2015-pdf-1-44-mb>
- **Sweden: Music festival marketed as cis-man free** <https://www.equalitylaw.eu/downloads/4835-sweden-music-festival-marketed-as-cis-man-free-pdf-92-kb>

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THANK YOU FOR YOUR ATTENTION!



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Public Defender of Rights



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