

# Gender Equal Access to Goods and Services

Asoc.prof., Dr.iur. Kristīne Dupate  
University of Latvia



Funded under the Rights, Equality and Citizenship Programme 2014-2020  
of the European Commission

1

## Directive 2004/113/EC: the scope

- Prohibits discrimination based on sex in access to and supply of goods and services

The scope	Outside the scope
All publicly available goods and services (also provided outside commercial/professional activity)	<ul style="list-style-type: none"><li>• Goods and services not offered publicly</li><li>• Goods and services falling within the area of private and family life and the transactions carried out in this context.</li></ul>
The public and private sectors	<ul style="list-style-type: none"><li>• Except to the content of media and advertising and education</li></ul>
	<ul style="list-style-type: none"><li>• Social security as covered by Directive 79/7/EEC</li><li>• Access to and supply of goods and services to the self-employed persons covered by Directive 2010/41/EU</li></ul>

2

## Directive 2004/113/EC: the notions

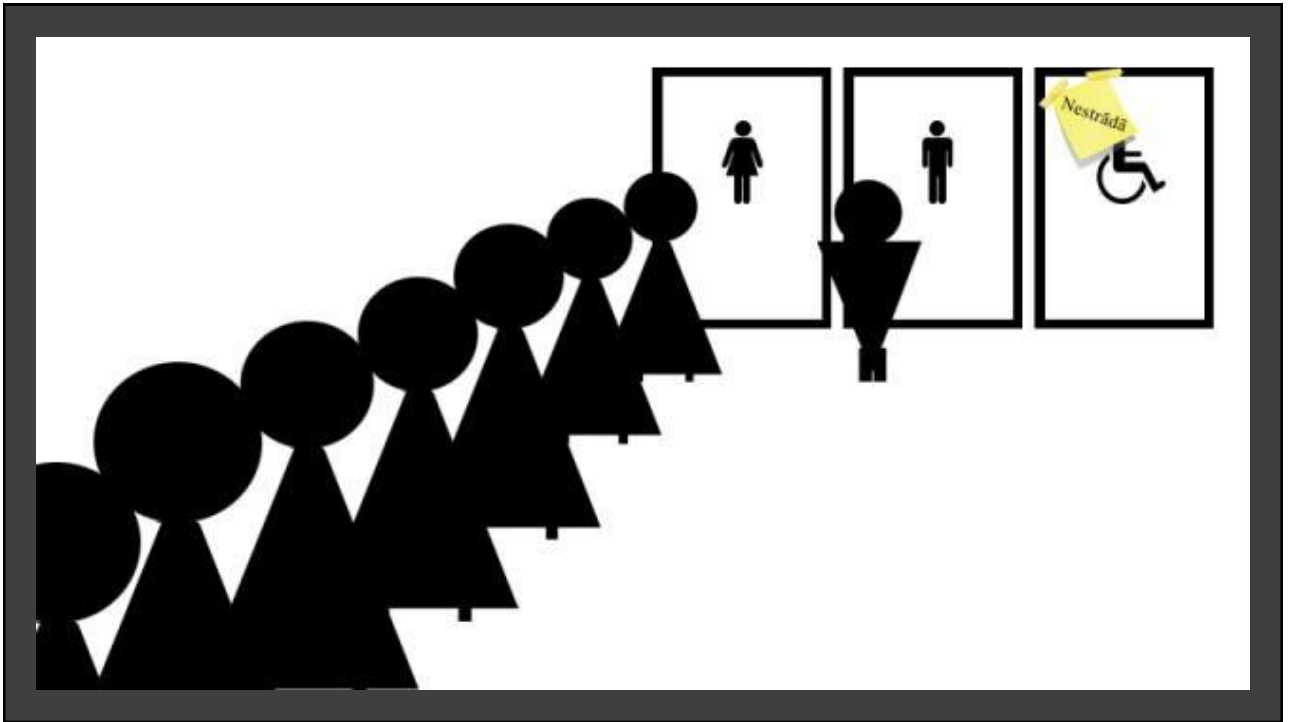
- Goods:
  - Article 28(2) TFEU - products originating in Member States and to products coming from third countries which are in free circulation in Member States
- Services:
  - Article 57 TFEU – an economic activity provided against remuneration
- Sex: gender reassignment (the CJEU decisions in cases C-13/94 *P v S* and *Cornwall County Council un C-423/04 Sarah Margaret Richards pret Secretary of State for Work and Pensions*)

3

## Directive 2004/113/EC: prohibition of discrimination

- The concept of discrimination:  
«[...] 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[...].»  
(the CJEU decision in case C-236/09 *Association belge des Consommateurs Test-Achats ASBL and Others*, para.28)
  - Obligation to provide equal access irrespective of the sex of a person (comparable situations)
  - Obligation to provide services adjusted to the different needs depending to the sex of a person (different situations)

4



5

## Directive 2004/113/EC: prohibition of discrimination

- Prohibits direct, indirect discrimination, harassment, sexual harassment, instruction to discriminate, victimization
- Direct discrimination – less favourable treatment of women for reasons of pregnancy and maternity
  - Examples of discrimination:
    - Differential pricing (hairdressing, beauty services, nightclubs)
    - Ban on entry in a shop with baby carriage, asking breastfeeding mother to leaving restaurant

6

## Directive 2004/113/EC: the exceptions

- Article 4(5)

*'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'*

- Absence of the CJEU case-law
- National practices:
  - Exception must be interpreted narrowly
  - Exceptions, in substance, are permitted for the protection of other human rights, for example:
    - Freedom of association (private clubs)
    - Privacy, dignity (segregates changing rooms, different slots of attendance in saunas, swimming pools)
    - Person's security (taxi services for women only)
  - Commercial interest is not accepted as justification

7

## Discrimination: the reasons

- Sex
- Gender
- Sex vs. gender– ever changing (sliding scale)

8

## Directive 2004/113/EC: insurance services

- *Article 5(1). Actuarial factors*

*'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.'*

- the CJEU decision in case C-236/09 *Association belge des Consommateurs Test-Achats ASBL and Others* – differential treatment on the grounds of sex is permitted till 21 December 2012
- European Commission's 2021 Guidelines after *Test-Achats* judgement:
  - Article 5(1) prohibits any result whereby differences arise in individuals' premiums and benefits due to the use of gender as a factor in the calculation of premiums and benefits.
  - Article 5(1) does not prohibit the use of gender as a risk-rating factor in general. Such use is allowed in the calculation of premiums and benefits at the aggregate level, as long as it does not lead to differentiation at individual level.

9

## Directive 2004/113/EC: insurance services

- *Article 5(1). Actuarial factors*

*'In any event, costs related to pregnancy and maternity shall not result in differences in individuals' premiums and benefits.'*

- If all insurance programmes must include the rights related to pregnancy and maternity?
  - For example, travel insurance, private health insurance

10

# Sources

- Report from the Commission of the European Union to the European Parliament, the Council and the European Economic and Social Committee, 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/2015/0190 final, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52015DC0190&from=EN>
- Guidelines on the application of Council Directive 2004/113/EC to insurance, in the light of the judgment of the Court of Justice of the European Union in Case C-236/09 (Test-Achats), available at [https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52012XC0113\(01\)&from=en](https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52012XC0113(01)&from=en)
- Maria Y. Lee, Sex-segregated services – their place in EU anti-discrimination law and their relationship to positive action measures, E.L.Rev, 2019, 44(5)
- Eugenia Caracciolo di Torella, Gender Equal Access to Goods and Services Directive 2004/113/EC. European Implementation Assessment, European Parliament, 2017
- Susanne Burri, Aileen McColgan, European Network of legal experts in the field of gender equality, Sex-segregated Services, European Commission, 2008, available at <https://www.equalitylaw.eu/downloads/4555-sex-segregated-services-pdf-1-134-kb>
- Susanne Burri, Aileen McColgan, European Network of legal experts in the field of gender equality, Sex Discrimination in the Access to and Supply of Goods and Services and the Transposition of Directive 2004/113/EC, European Commission, 2008 available at <https://www.equalitylaw.eu/downloads/3855-sex-discrimination-in-the-access-to-and-supply-of-goods-and-services-and-the-transposition-of-directive-2004-113-ec-pdf-1-38-kb>