

# Equal treatment in access to goods and services



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# The development of the principle of equality in the EU

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## Case 149/77 *Defrenne*

“There can be no doubt that the elimination of discrimination based on sex [is] part of (...) fundamental rights”

- Article 119 EEC (now 141 EC)
- first generation Directives
  - Equal Pay; Equal Treatment; Social Security
- second generation Directives
  - Race Directive (2000/43); Disability Directive
- third generation Directives
  - Recast Directive; amended Equal Treatment Directive; Goods and Services Directive (2004/113); proposed Directive on sexual orientation, religion, belief, disability and age

# The relevant legal framework

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- Race Directive (2000/43)
- Goods and Services Directive (2004/113)
- proposed Directive on sexual orientation, religion, belief, disability and age (COM (2008) 426 final)

# Directive 2004/113

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- legal base: Article 13 EC
- it prohibits discrimination based on gender, in the access areas of goods and services [Art. 3(1)] which are offered outside the area of *private and family life* [(Art. 3(2))]
- *media, advertising and education* are excluded by the material scope of the Directive [Art. 3(3)]
- the Directive was adopted in December 2004 and was due to be implemented by the Member States by 21 December 2007

# The exception/positive action

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## □ Article 4(5)

The Directive shall not preclude differences in treatment, if the provision of the goods and services exclusively or primarily to member of one sex is justified by a legitimate aim and the means of achieving that aim are justified

## □ Article 6

With a view to ensuring full equality in practice between men and women, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to sex

# When differences are permitted?

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- differential pricing for services
- sex segregation of services utilised by both men and women
- single sex provisions of services

# The application of the principle of gender equality to insurance (1)

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- gender is often used as a rating factor for a number of insurance products.
- on the one hand, the insurance industry highlights the fact that a total ban on using gender when calculating insurance premiums would have a considerable detrimental effect on companies' competitiveness and, ultimately, on consumers who would be forced to pay more.

# The application of the principle of gender equality to insurance (2)

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□ on the other hand, it has been argued that there are a number of factors, which are not linked to sex, that are equally important in establishing life expectancy (socio-economic, marital status, the region where a person lives ...).

Furthermore, EU equality law focuses on *individual* rather than *group* characteristics.

Thus, to allow the use of sex as a criteria, would violate a fundamental right.

# Article 5(1): the principle

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The principle enshrined in Article 5 is that:

“Member States shall ensure that in all new contracts (...) the use of sex as a factor in the calculation of premiums and benefits for the purpose of insurance and related financial services shall not result in individuals’ premium and benefits”

# Article 5(2): the exception

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In order to achieve the above, Member States are given two options:

- ❑ to ban all differential treatment based on gender in the provisions of insurance products
- ❑ to allow gender-based treatment, subject to conditions regarding the relevance and accuracy of the data on which the differences are based and the publication of gender-related data.

# Relevant Case Law (1)

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□ to date very little litigation to date on goods and services

□ *Lindorfer v Council of the European Union C-277/04P* (opinion of AG Jacob)

“In order to see such discrimination in perspective, it might be helpful to imagine a situation in which (as is perfectly plausible) statistics might show that a member of one ethnic group lived on average longer than those of another. To take those differences into account when determining the correlation between contributions and entitlements under the Community pension scheme would be wholly unacceptable, and I cannot see that the use of the criterion of sex rather than ethnic origin can be more acceptable”

# Relevant Case Law (2)

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## BUT

Such rules should not therefore treat members differently, unless the difference in treatment can be objectively justified

In addition, the fact that the same equilibrium can be attained with “unisex” actuarial factors is also shown by the fact that, subsequently to the events giving rise to the case, the Council decided to use such factors. The ECJ consequently decided that the Court of First Instance was wrong in holding that Ms Lindorfer had not suffered discrimination on account of her sex.

- Case 103/2009 referred on 18 June 2009 *Test Achat v Belgian State* (Compatibility of Article 5(3) of Directive 2004/113 with Article 6(2) EU Treaty)

# The case of the UK

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- the UK industry uses gender as a rating factor for a number of insurance products (motor, critical illness cover, private medical insurance)
- the Directive has been implemented into UK law through the Sex Discrimination (Amendment of Legislation) Regulation 2008
- most impact on motor and life insurance
- *Guide on the Publication of data associated with the use of gender in the assessment of insurance risks* – HM Treasury, 2008

# Core issues

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- general remarks:
    - problems with implementation; *de facto* limited impact
    - what are “goods” and “services”?
    - education/advertising/media
    - private and family law
    - hierarchy of equalities
  - the Directive in the general context of the EU equality framework
  - insurance: the impact of Article 5
- What is discrimination and when discrimination matters?*

# Different types of insurance

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- life insurance
- health insurance
- critical illness
- motor
- travel
- employer liability
- annuity

# Insurance and gender: the way forward?

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We need to reconcile the “philosophical commitment” (House of Lords, 2003-04) to gender equality with specific difficulties and practicalities.

- to delete the exception
  - it justifies direct discrimination
- to rephrase article 5
  - it hinders the reality of life
  - to introduce an obligation to publish actuarial and statistical data
    - reliable
    - frequent

# The proposed Directive

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- scope of application

- (social protection, including social security and health care, social advantages, education, access to and supply of public goods and services *including* housing)

Yet, “within the limits of the powers conferred upon the European Community”

- broad definitions of discrimination

- (harassment and denial of reasonable accommodation)

- permitted differential treatment

- (age, financial services and religious schools)

# Relevant Reports

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- ❑ European Network of Legal Experts in the Field of Gender Equality, *Sex-Segregated Services*, December 2008
- ❑ European Network of Legal Experts in the Field of Gender Equality, *Sex Discrimination in the Access and Supply of Goods and Services and the Transposition of Directive 2004/113*, July 2009
- ❑ A. MCColgan, *The Goods and Services Directive: a curate's egg or an imperfect blessing?* European Gender Equality Law Review 1/2009