Equal treatment outside employment: access to goods and services

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Outline of talk

• introduction to Directive 2004/113
• issues arising
• transposition into national law
• extent of discrimination
• difficulties regarding enforcement
Introduction to Dir. 2004/113

- existing material scope of EU law
- Directive 2000/43: scope
- gender goods and services Directive
  - proposal
  - final text

Issues arising

- material scope:
  - exclusion of education
  - content of advertising/ media*
- permitted differential treatment
  - insurance
  - other: Article 4.5

* This despite recognition that "The representation of the sexes in the media and advertising ... poses serious questions about the protection of the dignity of men and women... Practices in the field of education, where girls or boys continue to be discouraged from pursuing non-traditional paths"
Critique

• “The Committee of the Regions calls on the Commission to propose an equal opportunities directive which, in addition to goods and services, also includes areas such as taxation, education, social security including social insurance and health-care, violence against women and images in the media and advertising”.

General exception

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.
Insurance

- Commission proposal:
  - “All insurance is based on the pooling of risk and the solidarity which is created between the insured… equal treatment for men and women is a fundamental right and the Commission believes that the freedom to set tariffs must be subject to that right… The Commission concludes … that differences of treatment based on actuarial factors directly related to sex are not compatible with the principle of equal treatment…”
  - Suggested six year additional transition period in respect of insurance

- The Directive (Art 5)
  - “2. … Member States may decide before 21 December 2007 to permit proportionate differences in individuals’ premiums and benefits where the use of sex is a determining factor in the assessment of risk based on relevant and accurate actuarial and statistical data…”
  - 3. In any event, costs related to pregnancy and maternity shall not result in differences in individuals’ premiums and benefits.

Comparison with Dir. 2000/43

- generally broader as regards, in particular:
  - “services”
  - education
  - media/ advertising
- exceptions
- recitals

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recitals

• Directive 2000/43
• Directive 2004/113

(3) “While prohibiting discrimination, it is important to respect other fundamental rights and freedoms, including the protection of private and family life and transactions carried out in that context and the freedom of religion.”

(14) Reference to freedom of contract

findings on Directive 2004/113

• Sex-segregated Services (December 2008)

transposition into national law

• sometimes delayed and/or patchy
• abstract/ vague and/or “copy-out”
• particular difficulties with:
  – (lack of) definitions of “goods” and/or “services”
  – definitions of pregnancy discrimination
  – application in connection with gender-reassignment
• complexity

extent of differential treatment

• general
• insurance/ finance
• pregnancy-related
• sex-segregated services
• sex-related pricing
sex-segregated services/pricing

• extent
• nature
• rationale
  – decency
  – safety etc
  – counteracting stereotypes
  – sex as a proxy for effort etc
  – services with a sexual component
  – differential exercise of skill
  – social reasons

a “hierarchy” of protection?

• proposed Directive on religion, sexual orientation, disability and age
  – social protection, including social security and health care, social advantages, education, access to and supply of public goods and services including housing
  – “within the limits of the powers conferred upon the European Community”
• unique position of gender
  – gender as a proactive and positive constitutional principle of the EU
paucity of litigation

– costs and risks of litigation;
– relatively low stakes;
– ignorance of the law;
– relative unavailability of “representative actions”

• But see A-G Kokott’s Opinion in *Association Belge des Consommateurs Test-Achats & Ors (Case C-236/09)*