

Equal treatment outside employment: access to goods and services

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Directive 2004/113/EC

Council 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

- Transposition by 21 Dec 2007

Purpose of the Directive

Article 1:

- "... to lay down a framework for combating discrimination based on sex in access to and supply of goods and services, with a view to putting into effect in the Member States the principle of equal treatment between men and women".

Recital (9):

- "Discrimination based on sex, including harassment and sexual harassment, also takes place in areas outside of the labour market. Such discrimination can be equally damaging, acting as a barrier to the full and successful integration of men and women into economic and social life.

Principle of equal treatment

- Fundamental principle of EU law
- Arts. 2 and 3(2) TEU
- Art.21 Charter of Fundamental Rights
- Content of the principle:
 - 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 (para 28, C-236/09, *Test –Achat*)

Principle of equal treatment under the Directive

Art. 4 of the Directive:

- Direct discrimination
- Indirect discrimination
- Harrassment and sexual harrassment
- Instruction to direct or indirect discrimination
- Terms defined in Art. 2

Principle of equal treatment: examples

- Examples:
 - Direct discrimination
 - ◆ differences between men and women in the provision of healthcare services, which result from the physical differences between men and women, do not relate to comparable situations and therefore, do not constitute discrimination.
 - Indirect discrimination

Principle of equal treatment: exceptions

- Provisions protecting women in pregnancy and maternity: Art 4(2)
- Differences in treatment justified by legitimate aim where the means of achieving that aim are appropriate and necessary: Art 4(5)
 - For example as per recital (16):
 - ◆ the protection of victims of sex-related violence (the establishment of single-sex shelters),
 - ◆ reasons of privacy and decency (the provision of accommodation by a person in a part of their home),
 - ◆ the promotion of gender equality or of the interests of men or women (single-sex voluntary bodies),
 - ◆ the freedom of association (single-sex private clubs), and
 - ◆ the organisation of sporting activities (single-sex sports events)

Principle of equal treatment: exceptions

- The principle of equal treatment in the access to goods and services does not require that facilities should always be provided to men and women on a shared basis, as long as they are not provided more favourably to members of one sex: Recital (17)
- **Positive action:** 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: Art. 6

Material scope of Directive

Art. 3:

- Provision of goods and services available to the public
- Offered outside the areas of private and family life
- Not prejudice freedom of contract
- Not apply to content of media and advertising nor to education (public or private)

Material scope of Directive (contd)

Art. 3(4) and Recital (15):

- Does not apply to matters of employment or occupation – already covered by a number of existing legal instruments
- Nor to self employment “insofar as these matters are covered by other Community legislative acts”
- Applies “only to insurance and pensions which are private, voluntary and separate from the employment relationship”

Application of Directive to Insurance

- Art. 5(1):
 - After 21 Dec 07, the use of sex as a factor in the calculation of premiums and benefits should not result in differences in individual's premiums and benefits
- But – Art. 5(2):
 - MS may permit differences related to sex in premiums and benefits if sex is a determining risk factor that can be substantiated by relevant and accurate actuarial and statistical data
- Art 5(3):
 - In any event, costs related to pregnancy and maternity shall not result in differences in individual's premiums and benefits

Case C-236/09 *Test Achats*

- Reference from Belgium
- Is Art. 5(2) valid in light of the general principle of equal treatment?
- Court held that it was invalid with effect from 21 Dec 2012

Case C-236/09 *Test Achats*: the court's reasoning

- Court's reasoning:
 - Equal treatment is a fundamental right: Art. 6(2) TEU, Arts. 21 and 23 of the Charter
 - The Council is to legislate so as to achieve equal treatment between men and women, although it can provide for transitional periods or derogations *of limited scope*
 - The use of actuarial factors related to sex was widespread when Directive introduced: Recital (18)

Case C-236/09 *Test Achats*: the court's reasoning

- Therefore, it was permissible for the legislature to introduce the rule of unisex premiums and benefits gradually
- A transitional period to 21 Dec 07 was introduced by Art.5(1)
- Art. 5(2) allows MS to decide before 21 Dec 07 to permit proportionate differences in individual's premiums and benefits using sex based on relevant and accurate actuarial and statistical data

Case C-236/09 *Test Achats*: the court's conclusion

- Such a decision has to be reviewed five years after 21 Dec 07
- But MS can allow insurers to apply the different approach/ unequal treatment without any temporal limitation
- Rejected Council's argument that levels of insured risk may be different for men and women, so Art. 5(2) just makes it possible not to treat different situations in the same way

Case C-236/09 *Test Achats*: the court's conclusion

- But the comparability of situations must be assessed in the light of the subject matter and purpose of the EU measure which makes the distinction in question
- The purpose of the Directive is to introduce unisex rules on premiums and benefits
- So it assumes that the respective situations of men and women as to insurance premiums and benefits are comparable

Case C-236/09 *Test Achats* : the court's conclusion

- Therefore Art. 5(2) held to be contrary to Arts. 21 and 23 of the Charter
- And to be invalid “upon expiry of an appropriate transitional period”, i.e. 21 Dec 2012

Case C-236/09 *Test Achats*: questions arising

- Questions arising
 - ECJ rewriting legislation?
 - What about the reference in Art. 5(2) to relevant and accurate actuarial and statistical data?
 - And the role of the Commission in reviewing that data?
 - Would a more stringent interpretation of Art. 5(2) offered a more workable solution than an outright ban?

Case C-236/09 *Test Achats* : questions arising

- Art. 5(1) does not prohibit reference to sex as a risk factor, rather it provides that the use of sex as a factor in the calculation of premiums and benefits should not result in differences in individual's premiums and benefits
- Recital (19) expressly acknowledges that “[c]ertain categories of risks may vary between the sexes”

Case C-236/09 *Test Achats* : questions arising

- Questions the Court should have addressed?
 - gender equality is a fundamental right and derogations are possible *only if* compelling reasons exist: are actuarial factors that take gender into consideration, for the purpose of insurance contracts, compelling reasons?
 - the insurance industry would argue that insurance *assesses risk* in the most accurate possible way in order to offer a competent service; thus, are there any instances when gender should justifiably be part of such risk?

Thank You

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