

Equal Treatment Outside Employment: Access to Goods and Services

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**Council Directive 2004/113/EG 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 December 2007

Goods and Services

- Goods

... those within the meaning of the provisions of the TEU relating to the free movement of goods.

- ECJ: Everything of monetary value that can be the object of commerce
- Examples: Food, Electricity, Books

- Services

... activities within the meaning of Article 57 TFEU

- Examples: Access to public buildings, housing, transport, financial services, services of all kind, including insurance

Limitations of Scope

- Goods and services available to the public
- ⇔ offered outside the area of private and family life and the transactions carried out in this context
- **Freedom of religion** has to be respected (recital 3, preamble)
- **No application to:** content of media or advertising nor to public or private Education

Freedom of Contract?

- This Directive does not prejudice the individual's freedom to choose a contractual partner as long as an individual's choice of contractual partner is not based on that person's sex. (Article 3(2))
- But see also Article 3(1) h Council Directive 2000/43/EC – Prohibition of discrimination on the ground of racial or ethnic origin regarding access to and supply of goods and services which are available to the public

Principle of equal treatment (Art. 4) — selected subject areas

- **Prohibition** of direct discrimination, including less favourable treatment of women for reasons of pregnancy and maternity
- **Prohibition** of indirect discrimination
- **Permission** of favourable provisions concerning the protection of women as regards pregnancy and maternity
- **Permission** of 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

Direct Discrimination

- ... only in comparable situations
- “Accordingly, for example, 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.”
(Recital 12, Preamble)
- Example: Women’s or Men’s Health Centre



Insurances: “Unisex light”

- Insurances which are private, voluntary and separate from the employment relationship; new contracts
- **Rule** (Article 5(1)): sex as a factor in the calculation of premiums and benefits shall not result in differences in individuals’ premiums and benefits.
- all new contracts concluded after 21 December 2007 at the latest



Exceptions to this rule

- Art 5 (2) of the Directive
- Proportionate differences are **permitted**
 - where the use of sex is a determining factor
 - and the assessment of risk is based on **relevant and accurate actuarial and statistical data** (decision of MS before 21.12.2007).



Special status of pregnancy and maternity

- In any event, costs related to pregnancy and maternity shall not result in differences in individuals' premiums and benefits.
- Affected: Private insurance companies
- Ergo: the “risk of birth” must not be taken into account whereas other gender specific factors may be considered relevant

Association belge des Consommateurs Test-Achats ASBL, Yann van Vugt, Charles Basselier v Conseil des ministres

- Judgment of the Court, 1 March 2011, Case C-236/09
- Application of **unisex rules** on premiums and benefits
- A provision such as **Article 5(2)**, which enables the Member States to maintain **without temporal limitation** an exemption to this rule, works **against the achievement of the objective of equal treatment** between men and women.
- **Invalid** with effect from 21 Dec 2012

The Court's Reasoning in *Test-Achats*

Centrality of gender equality

- Art 6 (2) TEU
- Art. 21, 23 Charter of Fundamental Rights
- Art. 19 TFEU – competence of EU to take appropriate action to combat, among others, sex discrimination
- Art 3 (3) TEU (goal of gender equality)
- Art. 8 TFEU (gender mainstreaming)

Derogations?

- Premise: comparability of men and women regarding insurance ↔ equal treatment
 - Situation: widespread use of actuarial factors in insurance industry at time of adoption of directive
 - Permissibility of gradual implementation of principle of equal treatment
 - BUT: risk of indefinite persistence of derogation and therefore of unequal treatment has to be avoided
- ⇒ invalidation of Art. 5 (2)

European Commission: Guidelines

- ... on the application of Council Directive 2004/113/EC to insurance, in the light of Case C-236/09 (Test-Achats)
- 13.01.2012, 2012/C 11/01
- “As from 21 December 2012, the unisex rule contained in Article 5(1) must be applied without any possible exception in relation to the calculation of individuals’ premiums and benefits in new contracts.” (Para 5)

New Contracts...

- ...concluded for the first time as from 21 December 2012
 - No definition of “new contract” in the Directive; also no reference to national laws
 - Purposes of application of the Directive: autonomous concept of European Union law which must be interpreted uniformly throughout the Union. (Para 9)
- ↔ aim of the Directive: introduction of a unisex rule in the private insurance field

Commission Guidelines: “New Contract”

- Application of unisex rule pursuant to Article 5(1):
- whenever (a) a contractual agreement requiring the expression of consent by all parties is made, including an amendment to an existing contract and
- (b) the latest expression of consent by a party that is necessary for the conclusion of that agreement occurs as from 21 December 2012. (Para 11)

Examples for “new contracts”

- Contracts concluded for the first time as from 21 December 2012.
- ...also, offers made before 21 December 2012 but accepted as from that date will need to comply with the unisex rule
- agreements between parties, concluded as from 21 December 2012, to extend contracts concluded before that date which would otherwise have expired.

Examples not considered new contracts

- **Automatic extension** of pre-existing contract if no notice, e.g. a cancellation notice, is given by a certain deadline;
- **Adjustments** made to individual elements of an existing contract, such as premium changes, on the basis of predefined parameters, where **consent of policyholder is not required**;
- **Additional insurances** on the basis of modalities fixed before 21.12.2012
- The mere **transfer** of an insurance portfolio from one insurer to another which should not change the status of the contracts included in that portfolio.

Gender-related insurance practices which remain possible

- use of gender as a risk-rating factor in general
- in the calculation of premiums and benefits at the aggregate level
- as long as it does not lead to differentiation at individual level.



Possible Gender-Related Insurance Practices

- **reserving and internal pricing**
- **reinsurance pricing**
- **marketing and advertising:** the Directive does not apply to the content of media and advertising (Article 3(3)). However, insurers may not refuse access to a specific product because of a person's sex, unless the conditions of Article 4(5) are met.
- **life and health underwriting:** risk factors e.g. health status or family history for the assessment of which insurers need to take gender status into account (↔ physiological differences)

Use of other risk-rating factors which correlate with gender

- Problem of indirect discrimination
- The use of risk factors which might be **correlated with gender** therefore remains possible, as long as they are **true risk factors in their own right**
- Example: price differentiation based on the size of a car engine in the field of motor insurance ...

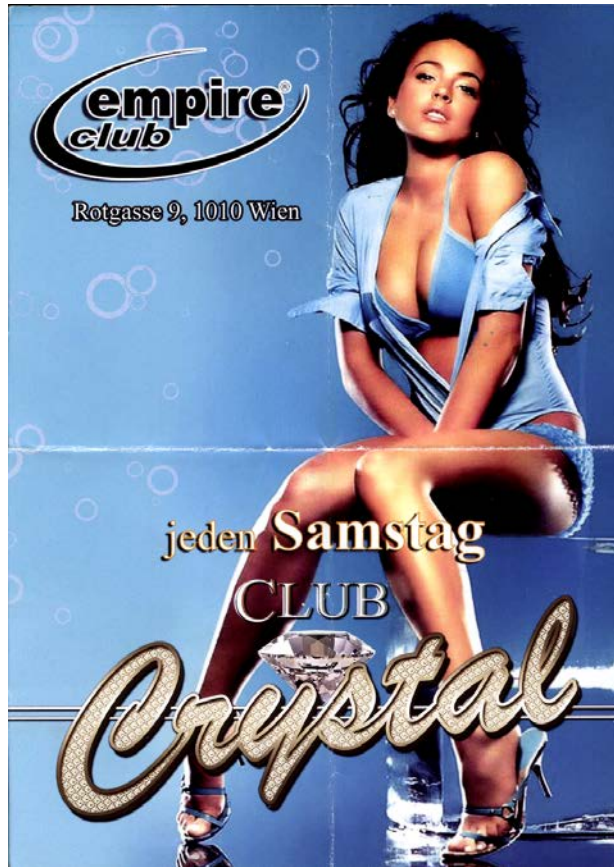
Discrimination or legitimate unequal treatment?

- Permission of 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. Article 4 (5).
- Recital 16, Preamble
 - protection of victims of sex-related violence
 - reasons of privacy and decency,
 - promotion of gender equality or of the interests of men or women,
 - freedom of association,
 - organisation of sporting activities.
- Recital 17, Preamble
 - „Separate but equal“

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.
- No discrimination of members of the other sex may ensue

Examples



01.30 - 02.30
HAPPY HOUR:
Vodka-Red Bull € 2,-

CLUB
Crystal

**absolut JEDEN Samstag gilt:
JEDE LADY erhält einen
20 Euro Getränkegutschein
+ FREIER EINTRITT
für Ladies bis 00.00 Uhr**

Absolut jeden Samstag gilt „Party Pur“ im Empire Club Wien.
Mit den heissten Club-Sounds und den unschlagbarsten
Specials wird gefeiert bis der Morgen graut...
Club Crystal - das Beste was einem Samstags passieren kann!

Beginn: 21.00 Uhr - Eintritt: € 8,-

EVENTTIPPS

Fr. 25.07.2008 - **DAVID GUETTA**
Empire Club Linz

Sa. 06.09.2008 - **CARL COX**
Sa. 25.10.2008 - **SVEN VÄTH**
jeweils in der Pyramide Vösendorf!

www.empire-club.at

für ABC SP Coca-Cola ERSTOFF Heineken

Examples of different treatment based on gender

- Different price structure at leisure facilities
 - Entry to a disco: free for women
 - Entry ticket for football match: free/cheaper for women
- Concessions for transport services
 - Senior citizen's fare for men: 65+; for women: 60+
- Different charges for hair cuts
- Women's housing project
- Private income protection insurance excludes compensation for gender reassignment measures.

Men, women and a dating website

County Court of Gießen, Judgement of 26.05.2011

- Premium membership: a fee for men, free of charge for women
- Practical reason to justify this unequal treatment (Art. 20 (1) Clause 2 (3) General Act on Equal Treatment):
- If particular advantages are afforded by the different treatment, and implementing equal treatment is not in anyone's interests.
- Attracting women to website
- In the interests of the men, who have to pay
⇔ "bigger choice of potential partners"

Review structure

- Is there a possibility of direct or indirect discrimination?
- Is a lawful aim being pursued by the differentiation?
- Are the means used for it appropriate and necessary?
- Does it concern, possibly, a positive measure to promote equality between men and women?

Interpretation proposal (Senate III, Austrian Equal Treatment Commission)

- A different price structure or different reductions for men and women cannot be deemed suitable means if they contribute to promoting stereotypical gender-based behaviour.
- ↔ Art. 5 CEDAW (Instructions for measures to bring about a change in social and cultural behavioural patterns & conventional practices of men and women that are based on the assumption of inferiority/superiority of either sex & stereotypes in terms of their roles.)

Other examples

- Different prize money for tennis tournaments
- Headscarf ban in a restaurant
- Women-only hotel
- Child-free hotel
- Women-only/men-only day in a sauna
- Only women can stay with their sick children in a hospital
- Women's Internet chat group
- Men-only evening pilgrimage on the Weizberg
(cf. Tobler, gender equality in regard to goods and services)