

Gender discrimination in goods and
services: Directive 2004/113/EC
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Scope of talk



- Introduction to the Directive
- Update on implementation
- Some thoughts on the role of national equality bodies
- Future developments?

Directive 2004/113



- Prohibition on gender discrimination in access to goods and services
- Modest ambitions
 - specific reference to contractual freedom (recital 14 & Art 3.2)
 - and to the “the protection of private and family life and transactions carried out in that context and the freedom of religion” (recital 3)

- Modest ambitions cntd...
 - no application to education/ content of media and advertising (Art 3.3)
 - limited application to insurance (recitals 18-20 & Art 5.2) – though see *Test Achats*
- “Services”
 - Article 50 TEC (recital 11)
- Significant scope for single sex provision
 - Art 4.5 & recitals 16 & 17)

Update on implementation



- Gender Network 2009 report, *Sex Discrimination in the Access to and Supply of Goods and Services and the Transposition of Directive 2004/113/EC*
- Commission report due 2010, then 2014...
 - Watch this space?
- Information also indirectly available through non-discrimination network
 - 2013 report *National protection beyond the two EU Anti-discrimination Directives*
 - Drafting of that report provided information on progress across the piste in the regulation of discrimination outside employment

What do we know?



- The 2009 report highlighted limited explicit coverage of transgender discrimination (though in a number of additional states coverage was regarded as implicit);
- Very limited express protection of breastfeeding;
- Positive action provisions relatively limited;
- Most states take a broader approach to “services” than recital 11 suggests;
- The 2009 report is being updated as I speak but one finding is of particular importance.

Where are the cases?



- The 2009 report suggested that cases had been brought only in Austria and Belgium:

“In the former a claim has been made for twenty euros, this as a result of a man having to pay for access to a football match to which women were allowed entry at a reduced fee. That case has not yet been decided. In Belgium there is an outstanding challenge to the exception provided in respect of insurance, which is not time-limited [*Test Achats*].

Otherwise there has been little or no case law of any sort arising in connection with the Directive, this being attributed by [some] experts to a lack of knowledge of the relevant provisions, by [others] to the fact that the domestic provisions are not ‘useable’ [or] to difficulties relating to the costs of litigation. The Swedish expert also remarked on the lack of case law despite many years of legislation regulating gender discrimination in access to goods and services in that country”.

Where are the cases?



- The 2013 mapping report also made reference to the dissuasive effect of legal expenses, complex law and procedure, delays and rules of procedure which impose liability on an unsuccessful claimant for the legal expenses of the other party;
- In 2013 concern was expressed about court fees and inadequate or unavailable legal aid;
- Ombud(smen)/ Equal Treatment Commission (NL) / Advocates (Slovenia) can provide alternative methods of enforcement but often can't award money (Norway, Netherlands, Lithuania)
- Monetary remedies, where they are provided, are typically low outside the employment field.

Defence of Rights



Recital 27

... effective, proportionate and dissuasive penalties ...

Article 8

2... shall introduce into their national legal systems such measures as are necessary to ensure real and effective compensation or reparation ... for the loss and damage sustained ... in a way which is dissuasive and proportionate to the damage suffered...

3. ... shall ensure that associations, organisations or other legal entities, which have ... a legitimate interest in ensuring that the provisions of this Directive are complied with, may engage, on behalf or in support of the complainant, with his or her approval, in any judicial and/or administrative procedure provided for the enforcement of obligations under this Directive.

Where are the cases?



- The 2009 study reported that:
 - “A considerable amount of differential treatment on the grounds of sex in the area of services in Sweden has become ‘untouchable’ because the Equal Opportunities Ombudsman refuses to take action where, as in one case involving differential pricing by hairdressers, the discrimination is seen as trivial. By contrast, Finnish legislation provides for a minimum 3,000 Euro compensation award, though this may be reduced or waived in cases in which the discriminator has made efforts to remedy the discrimination, and/or for reasons including those relating to the discriminator’s economic standing.
- There is a wider question concerning where scarce resources should be focused

Article 12

1. Member States shall designate and make the necessary arrangements for a body or bodies for the promotion, analysis, monitoring and support of equal treatment of all persons without discrimination on the grounds of sex...

2.... the competencies of the bodies referred to in paragraph 1 [shall] include:

- a) without prejudice to the rights of victims and of associations, organisations or other legal entities referred to in Article 8(3), providing independent assistance to victims of discrimination in pursuing their complaints about discrimination.
- b) conducting independent surveys concerning discrimination;
- c) publishing independent reports and making recommendations on any issue relating to such discrimination.

National Equality Bodies



- There is a need for sustained thinking about how to enforce legal provisions whose enforcement may not be attractive to individual victims of discrimination
- There may be no “one size fits all” model
 - What will work in the context of hairdressing charges or nightclub entrance fees may not be appropriate in considering the delivery of single sex services
- Representative/ class actions?
- Use of penal law?
- Consumer rights approaches?
- Advertising and awareness campaigns – harnessing the power of the market

National Equality Bodies



- There is a distinction to be drawn between cases in which differential treatment is not properly to be regarded as discriminatory
 - And those in which it is so to be regarded, but in which there is a legitimate debate to be had as to the best approach to enforcement
- Among the former fall cases where sex-differentiated treatment encourages the participation of the disadvantaged
 - There may be cases in which a balance has to be carefully struck between such encouragement, and “ghettoisation”
 - Important not to adopt a “knee jerk” approach which can serve further to entrench disadvantage

Future Developments



- The hierarchy of protection

- On the one hand:

Gender equality is a horizontal objective and task and a positive and proactive constitutional principle of the EU. This distinguishes it from the other grounds in respect of which discrimination is regulated by the EU. It is not just another ground of discrimination. Its promotion is a 'positive obligation', and all EU institutions and organs must 'actively promote' it in all areas, including when they enact legislation on the basis of Article 13 TEC, interpret such legislation or control its application. Member States should also be considered as bound by the same obligation, by virtue of their Article 10 TEC duty of 'sincere cooperation'.

- Race/ ethnicity, however, attracts greater protection than gender at EU level:

A hierarchy of protection



Article 3, 2004/113

'1. Within the limits of the powers conferred upon the Community (...) to all persons who provide goods and services, which are available to the public irrespective of the person concerned as regards both the public and private sectors, including public bodies, and which are offered outside the area of private and family life and the transactions carried out in this context (...)

3. This Directive shall not apply to the content of media and advertising nor to education (...)'

Council Directive 2000/43/EC applies (Art 3):

'1. Within the limits of the powers conferred upon the Community (...) to all persons, as regards both the public and private sectors, including public bodies, in relation to:

(e) social protection, including social security and healthcare;

(f) social advantages;

(g) education;

(h) access to and supply of goods and services which are available to the public, including housing'.

The relative weakness of gender protection may be entrenched by new Directive...

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