



**Legal Seminar 6 October 2009
on the implementation of EU law on equal opportunities and anti-discrimination**

**DISCUSSION PAPER
DISCRIMINATION IN ACCESS TO GOODS AND SERVICES**

The present discussion paper is based on the conclusions of two reports recently published by the European Network of Legal Experts in the field of Gender Equality on sex discrimination in the access to and supply of goods and services and on sex-segregated services.¹ It does not necessarily reflect the opinion or position of the European Commission, Directorate-general for Employment, Social Affairs and Equal Opportunities.

1. Sex Discrimination in the Access to and Supply of Goods and Services and the Transposition of Directive 2004/113/EC

The impact of Directive 2004/113/EC appears to have been relatively limited, notwithstanding comments by some experts about benefits in terms of raising awareness (**Austria, Latvia**) and improvements in other cases to pre-existing gender discrimination legislation (**Bulgaria, the UK, Ireland**). Limitations in impact may be attributed in part to the shortness of time which has elapsed. In addition, a number of countries already regulated gender discrimination in access to goods and services, so the transposition of the Directive would not be expected to yield dramatic results. Finally, a relative absence of case law has been attributed also to difficulties in bringing litigation in this area (in particular, problems of costs), and to the limited material scope of the Directive. It is useful to note in this context the fact that many equality bodies do not have standing to litigate on behalf of real or potential victims of discrimination in the area of goods and services, whereas the costs of individual litigation may well exceed any remedy that could reasonably be recovered by an individual in this context.

The survey conducted for the purposes of this report suggests that there is a relatively clear hierarchy between gender and race across the Member states with race discrimination being subjected to more extensive regulation, whether *de jure* or *de facto*, across around half of the member states, the bulk of the remainder (mainly former Eastern Block states) reporting no significant difference between the grounds. Many countries have adopted gender discrimination legislation which extends beyond the requirements of EU law. Even where this has happened, the hierarchical relationship created between race and gender by the exclusion from the scope of Directive 2004/113/EC of sex discrimination in education and in the content of media and advertising has been criticised by some experts as sending the wrong signals: **Bulgaria's** expert states, for example, that this 'generates serious problems of gender stereotyping as an irreversible tendency, which entails discrimination also in the other spheres of life'.

¹ European Network of Legal Experts in the Field of Gender Equality, S. Burri & A. McColgan, *Sex Discrimination in the Access to and Supply of Goods and Services and the Transposition of Directive 2004/113/EC*, July 2009, available at: <http://ec.europa.eu/social/main.jsp?catId=641&langId=en>
European Network of Legal Experts in the field of Gender Equality, S. Burri & A. McColgan, *Sex-segregated Services*, December 2008, available at: <http://ec.europa.eu/social/main.jsp?catId=641&langId=en&moreDocuments=yes>,

Luxembourg's expert draws attention to the possibility that gender will find itself at the bottom of the hierarchy if the further proposed EU legislation on sexual orientation, disability, religion or belief and age is adopted. It is worth noting that legislation in **Luxembourg, Cyprus, Portugal** and **Austria** leaves unregulated gender discrimination in education.

Generally, and leaving aside cases in which transposition has yet to occur, many experts criticised transposing legislation as vague or abstract. Much domestic legislation contains no explicit reference to discrimination on grounds of transsexualism, much less any effort to define the extent of such protection (for example, whether it applies only in relation to those who have undergone, are undergoing or intend to undergo surgical intervention, whether it applies to those who cross-dress some of the time). Also the subject of considerable criticism was a lack of specific provisions dealing with breastfeeding and with associative discrimination and/or discrimination on grounds of perceived status, and failures of transposing legislation to define 'goods' and 'services', though potential difficulties in relation to any requirement for a cross-border element appear not to have arisen because most transposing legislation goes beyond the requirements of the Directive. A broad conception of 'goods' and 'services' should be favoured in the anti-discrimination field, as a broad interpretation of 'pay' is adopted in relation to Article 141 EC (the article on equal pay of men and women in the EC-Treaty).

While the examples of discrimination/harassment provided by experts were perhaps not numerous, it is evident that areas of concern include insurance/financial services, which are outside the scope of this report; education and the content of advertising, which are currently outside the scope of EU law; healthcare (in particular, perhaps, reproductive health); and discrimination against pregnant women in the form of restrictions imposed in relation, for example, to air travel and access to services regarded by service providers as not in the best interests of the pregnant woman and/or the foetus. Interesting questions arise as to whether any such (paternalistic) restrictions may be permitted if the same approach to pregnancy discrimination is adopted in this area as in the area of employment. Most states regulate pregnancy discrimination explicitly, but there appears little evidence of engagement with the question when differential treatment on grounds of pregnancy which takes the form of restrictions imposed on the pregnant woman may be justified under domestic legislation.

2. Sex-segregated Services

Council Directive 2004/113 prohibits discrimination on grounds of sex in access to goods and services. Having defined discrimination to encompass both less favourable treatment on grounds of sex (direct discrimination) and the application of 'an apparently neutral provision, criterion or practice [which] would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary', the Directive provides that:

Article 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 (...)

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

Examples of differential treatment:

The report found a number of instances where exceptions to the principle of equal treatment based on sex exist:

1. differential pricing of services:

- 1.1. designed to encourage greater participation by an under-represented sex (as in the case of differential pricing of gyms, or weight-lifting clubs);
- 1.2. designed to encourage greater participation by persons of one sex *in order to* attract greater numbers of persons of the opposite sex;
- 1.3. which operates (as in the case of hairdressing services) as a proxy for the greater time typically expended on women or men or (possibly) the greater willingness of women (or men) to pay

2. sex segregation of services utilised by both men and women:

- 2.1. where the segregation is for reasons of decency (as in the case of saunas or, in cases where cultural sensitivities are at issue, swimming pools and other exercise facilities). This type of segregation may be structured so as to provide single-sex facilities for women but not for men (see 3.1 below), as distinct from 'separate-but-equal' provision (that is, different but equivalent areas or time slots for men and women);
- 2.2. where the segregation is designed to avoid embarrassment (as may be the case for single-sex facilities within gyms), the embarrassment being connected either with typically different levels of strength or skill in a particular context (as in the case of weight lifting, for example) or the potentially sexual nature of male-female relationships (as where women wish to avoid appearing sweaty and unattractive in front of men). This type of segregation may also be directed at protecting women from sexual harassment, and may be structured so as to provide single-sex facilities for women but not for men (see 3.2 below).

3. single-sex provision of services:

- 3.1. where single-sex services are provided for reasons of decency (see 2.1 above);
- 3.2. where the provision of single-sex facilities is designed to avoid embarrassment or sexual harassment (as at paragraph 2.2 above) in the context of, in particular, physical exercise;
- 3.3. where the segregation has its roots in the differential exercise of skill in respect of 'male' and 'female' services (as in the case of male 'barbers' and women's hairdressing shops or beauty salons), whether or not the gender distinctions in the nature of the services have eroded over time;
- 3.4. where single-sex provision is connected with safety issues, as where taxi services are provided especially for women, or special female parking areas are provided, or women-only accommodation is provided for women fleeing violence;
- 3.5. where single-sex provision is designed to counter stereotyping of women (or men) or its effects (as for example in the case of a women's driving school, or the provision of women-specific training in IT, or (hypothetically) a woman-only trekking or mountain-climbing holiday) or a men-only course in cooking with children;

- 3.6. where single-sex provision is designed for essentially social reasons, as in the case of male-only golf clubs or women's cafés, or women-only holidays;
- 3.7. where single-sex provision is associated with the provision of facilities targeted at lesbian women or gay men, as in the case of single-sex nightclubs. Here the rationale may relate to maximising the opportunities for gay men or lesbians to socialise amongst themselves, and may in addition be designed to keep out potentially hostile visitors (in particular, in either case, heterosexual men); and
- 3.8. where services are designed specifically for and delivered only or primarily to persons of one sex and are connected with sex (as in the case of 'gentlemen's' lap-dancing clubs, in the event that such clubs refuse to admit women), or women-only access to male striptease events or 'sex parties' (where 'sex toys' etc are marketed).

The categorisation above does not claim to capture all forms of sex-segregation and sex-differentiated pricing but it does serve to bring into focus the significant issues for discussion that arise in connection with such practices, in particular the extent to which they should be considered compatible with Council Directive 2004/113/EC.

A number of reasons can be found for sex-segregated services:

- **Decency**

For example sex-segregated sessions provided in swimming pools can enable participation by those who would otherwise be prevented by cultural or religious attitudes to decency, or by embarrassment, or fear of sexual harassment, from taking part. Permitting such practices does not appear to be inconsistent with considerations of sex equality, and indeed may further substantive equality between women and men by encouraging women's full access to the public sphere, thus falling within both Article 4(5) and Article 6 of the Directive. Differential treatment in this context may be objectionable under Article 4(5) where, for example, single-sex provision for one sex is not adequately balanced by the provision of appropriate opportunities for persons of the other sex to access the facility or service at issue.

- **Safety**

Sex-segregation for reasons of safety or personal security, which arises particularly in the context of women's taxi services, parking facilities, and accommodation, may be regarded as resting on negative stereotypes about male sexual and other violence. It is undoubtedly the case, however, that male-female violence is commonplace, frequently involves sexual assault, and (almost invariably) is inflicted on women by men, rather than vice-versa. Again subject to considerations of proportionality as regards the provision of services to men, where such services are required, there ought to be no principled objection to services whose sex-segregation is based on reasonable considerations regarding safety. Here it is perhaps useful to refer to the German approach which, in applying the personal security exception, does not require that a specific danger exists, but rather that fear of violence etc is rational and not merely subjectively perceived. Under such circumstances it would appear that Article 4(5) and Article 6 are both engaged in the legitimating process.

- **Counteracting stereotypes**

Sex-targeted services designed to counter stereotyping of women (or men), or the effects of such stereotyping, should be regarded as furthering the legitimate aim of sex equality rather than being inconsistent with it and as a result being justified under Article 6 as well as Article 4(5), in each case subject to reasonable considerations of proportionality.

- **Social segregation: an 'asymmetric' approach?**

More problematic is sex-segregation designed for essentially social reasons, such as male-only golf clubs or women's cafés. On the one hand, when the target group is women, such segregation can be seen as allowing a retreat from a male-dominated social space, escape from sexual harassment and the threat of sexual harassment and other forms of sexual violence, and the opportunity to create networks which can begin to counter the differential power wielded by men in society. On the other hand, male-only preserves allow the perpetuation of power imbalances through networking.

- **Using sex as a proxy for effort etc**

Practices of differential prices for women's and men's haircuts may have their roots in the disproportionate number of women and men respectively having hair which is more or less time-consuming to style, but they are indefensible when the obvious alternative exists of pricing services on the basis of the effort required to be expended on them.

- **Differential pricing of services**

Article 4(5) permits differential pricing of services only where such pricing is intended to result in the 'provision of the goods and services exclusively or primarily to members of one sex, and where such provision is justified by a legitimate aim and the means of achieving that aim are appropriate and necessary'. It is hard to see how differential pricing could result in the provision of services exclusively to persons of one sex so article 4(5) would appear, in practice, to apply to situations in which the goods or services are provided more cheaply to members of one sex with a view to providing those goods or services primarily to persons of that sex, where such 'targeted' provision is justified, and where the means of achieving it (i.e., differential pricing) is appropriate and necessary.