



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

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

EUROPEAN NETWORK OF LEGAL EXPERTS IN THE FIELD OF GENDER EQUALITY

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Part I

Executive Summary

1. Introduction

a. Aims of the report

The primary aim of this report is to contribute to the Commission's understanding of how Directive 2004/113/EC has been implemented in the Member States and the EEA countries.¹ The secondary aim is to analyse the extent of any remaining gaps between the scope of the existing gender equality directives and that of the Race Directive (2000/43/EC).² National experts were asked to address gender equality in the access to and supply of goods and services in the areas of health care, social services (including leisure services), housing, education, media and transport, both in the public and private sector, that is, in areas excluded from the Directive (education, media) and those whose coverage by the Directive is unclear (healthcare) as well as in areas clearly falling within the material scope of Directive 2004/113/EC. The report is intended to address existing anti-discrimination legislation and case law at the national level but issues already addressed in the report of the European Network of Legal Experts in the field of Gender Equality on Sex-segregated Services³ are outside the scope of the report as is access to and supply of services in the area of financial services and insurance,⁴ and the issue of social protection. The border between social services and social protection is perhaps unclear, but outside the scope of this report are matters such as occupational and state pensions and health insurance, together with protection from unemployment, invalidity etc.

b. Directive 2004/113/EC

Directive 2004/113/EC (a Directive 'implementing the principle of equal treatment between men and women in the access to and supply of goods and services') came into force on the 21st December 2004. Member States were given three years to implement its provisions. Chapter 1 of the Directive contains general provisions setting out (Article 1) the purpose of the Directive ('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'); (Article 2) definitions of discrimination and harassment; (Article 3) material scope; and (Article 4) the application of the principle of equal treatment in this context. Article 5 deals with the use of actuarial factors in insurance contracts and Article 6 with positive action. Article 7 provides that the Directive lays down minimum requirements only and prohibits regression by Member States in the implementation of the Directive.

¹ 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, OJ L 373, 21.12.2004, p. 37–43.

² Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L 180, 19.7.2000, p. 22–26.

³ European Network of Legal Experts in the field of Gender Equality, S. Burri & A. McColgan, *Sex-segregated Services*, available at: <http://ec.europa.eu/social/main.jsp?catId=641&langId=en&moreDocuments=yes>, accessed on 18 March 2009.

⁴ This area will be addressed in another study.

The Directive applies (Article 3) 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’. It covers services such as housing, banking and insurance, as well as goods ‘within the limits of the powers conferred upon the Community’, but does not apply ‘to the content of media and advertising nor to education’. These and other issues are considered in some detail below.

2. Transposition of the Directive

a. Nature and timing of transposition

The Directive has been transposed in most of the countries surveyed either by the adoption of fresh legislation designed to regulate sex discrimination in relation to goods and services (**Belgium, Cyprus, France, Germany, Luxembourg, Malta, Portugal, Romania, Spain**⁵) or, more commonly, by amendments to existing legislation (**Austria, Bulgaria, Denmark, Finland, Ireland, Italy, Latvia, Lithuania, the Netherlands, Norway, Slovakia, Slovenia, Sweden** and the **UK**⁶). **Hungary’s** comprehensive Equality Act⁷ was regarded as already in line with the Directive and has not been significantly amended.

This is not to say that transposition is complete or satisfactory in those states which have passed or amended legislation. Transposition in **Belgium** has been incomplete as a result of patchy implementation across the federal structure which has left gaps in relation to, in particular, the matters which fall within the German-speaking Community’s jurisdiction. Such transposition as has occurred in Belgium was delayed beyond the implementation deadline⁸ and transposition was also delayed in other states including **Portugal, Romania, Austria, France, Ireland** and **Malta** (2008), and **Finland** (January 2009). Transposing legislation is still to be implemented in the **Czech Republic** (where the draft Antidiscrimination Act has been vetoed by President Klaus who described it as ‘unnecessary, counterproductive and

⁵ Respectively the Gender Act (Belgium), Equal Treatment between Men and Women in the access to and supply of goods and services Law No. 18(I)/2008 (Cyprus); the Act of December 2007 (insurance) and the 2008 Act (goods and services) (France), the General Equal Treatment Act 2006 (Germany), Loi du 21 décembre 2007 (Luxembourg), Legal Notice 181 of 2008 of 1 August 2008 incorporating the Access to Goods and Services and Their Supply (Equal Treatment) Regulations 2008 (Malta), Law No. 14/2008 (Portugal), Governmental Ordinance 61 of 2008 (Romania) and Law 3/2007 on effective equality between women and men (Spain).

⁶ Respectively to the Equal Treatment Act and the Act on Insurance Contracts (Austria), to the Law on Protection against Discrimination 2004, the Code of Social Insurance and the Law of Health (Bulgaria), the Gender Equality Act 2000 (Denmark), the Act on Equality between Women and Men (Finland), the Equal Status Act 2000 (Ireland), the Equal Opportunities Code (Italy), the Social Security Laws and Law on Consumer Rights (Latvia), amendments also being planned to insurance law, to the Equal Opportunities Act of Women and Men Act (Lithuania), the General Equal Treatment Act 2004 (the Netherlands), the Gender Equality Act 1978 (Norway), the Antidiscrimination Act (Slovakia), the Act Implementing the Principle of Equal Treatment Act (Slovenia), the Discrimination Act 2008 (Sweden) and the Sex Discrimination Act 1975 (the UK).

⁷ Act No. CXXV of 2003 on Equal Treatment and Equal Opportunity.

⁸ Federal Gender Act 10 May 2007. Also the Flemish Community and Region *décret* and French-speaking Community *décret* of 10 July and 12 December 2008, Walloon Region *décret* of 6 November 2008, as amended by *décret* of 19 March 2009 and Brussels-Capital Region *ordonnance-ordonnantie* of 10 March 2009 amending that of 17 July 2007 (Brussels Code of Housing).

bad', particular objection being taken to its provisions on the burden of proof⁹); **Poland** (where there have been a number of draft Acts none of which have yet been passed¹⁰) and **Estonia**. Existing legislation in the Czech Republic regulates discrimination generally by sellers and libraries, and in relation to private pension insurance and education but is described by the national expert as partial and piecemeal, also 'often merely proclamatory with no sanctions'. Estonia's Gender Equality Act, by contrast, currently prohibits discrimination in all areas of social life, with minor exceptions relating to religion and private/family relations, but an amendment is required to bring a number of the Act's provisions into line with EC definitions (and the scope) of the burden of proof, protection from victimisation or instructions to discriminate, enforcement and remedies.

Greece has not taken any steps to transpose the Directive. As the Greek Constitution prohibits sex discrimination, vertically and horizontally, across all areas,¹¹ the courts have to put aside any legislation which discriminates on grounds of sex, including legislation in the area of goods and services. There is, however, no relevant case law. **Liechtenstein** and **Iceland**, which are not as yet obliged to transpose, have not done so though Iceland's Gender Equality Act of 2000 already covers some of the material scope of the Directive (notably not insurance or financial services).

b. Structure of national legislation

Directive 2004/113/EC is the latest in a succession of EU directives dealing with gender discrimination, with discrimination on grounds other than gender in relation to employment and (in the case of race/ethnicity) more broadly. A number of the states surveyed have adopted legislation dealing with multiple grounds of discrimination across a broad material scope which (at least in relation to gender) goes beyond current EU requirements. Typical of one such form is **Slovakia's** Antidiscrimination Act which regulates discrimination on multiple grounds including sex, religion, sexual orientation, marital and family status, in the areas, *inter alia*, of social protection, health care, education, as well as in access to goods and services, including housing, provided to the public.¹² **Sweden's** 2008 Discrimination Act similarly covers discrimination on seven different grounds (among them sex and 'transgender identity or expression') in multiple contexts including education, goods, services and housing, health and medical care, social services and transport. **Hungary's** Equality Act also combines multiple protected grounds with a broad material scope. It regulates discrimination uniformly on a large number of grounds in the performance of public functions. It also regulates discrimination by private actors in, *inter alia*, offers to contract or tender with 'an unspecified group of persons', in the provision of services or the sale of goods at premises open to customers, and in the context of relationships established by persons or bodies in receipt of public money in the utilisation of such funds. Also combining multiple protected grounds of discrimination with a broad

⁹ <http://www.eurofound.europa.eu/eiro/2008/06/articles/cz0806029i.htm> Eironline, June 2008, 'Anti-discrimination law still in limbo'.

¹⁰ The fourth version of the proposed legislation was produced in December 2008, gained acceptance by the Committee of Ministers and has been sent to the Governmental Legislative Committee for further elaboration.

¹¹ Art. 4(2) const. (1975); Art 25(1) const. 2001.

¹² Prior to the amendment to implement the Directive the only grounds on which discrimination was prohibited in these areas were sex, race and national or ethnic origin.

material scope are **Germany's** General Equal Treatment Act, **Poland's** draft law, and legislation in **Ireland, Bulgaria** and **Slovenia**.

Other jurisdictions surveyed deal with gender (explicitly including in some cases gender reassignment) in gender-specific legislation which, whether or not it regulates employment-related discrimination, exceeds the requirements of EU law as regards discrimination outside the broad area of employment. In the **UK**, for example, the Sex Discrimination Act 1975, as amended, regulates discrimination in connection with sex and gender reassignment in relation to goods, facilities and services, housing, education and the functions of public authorities, as well as imposing obligations on public authorities to promote gender equality. A similar approach is adopted in **Belgian** federal legislation and in **Estonia, Denmark, Cyprus, Lithuania, the Netherlands** and **Norway**. **Romania** combines the general (Ordinance No. 137 of 2000, which regulates discrimination on grounds including race, sex or sexual orientation, 'belonging to a disfavoured category' and 'any other criterion aiming to or resulting in the restriction or elimination of the recognition, use or exercise, in conditions of equality, of human rights and fundamental liberties or of rights granted by law in the political, economic, social and cultural field or in any other domains of public life') with the particular (Emergency Ordinance 61 of 2008, which transposes Directive 2004/113/EC and deals only with gender discrimination in relation to goods and services). Elsewhere, specific gender discrimination provisions broadly echo the material scope of the Directive as regards discrimination outside the employment context, whether or not they also regulate employment-related discrimination. These are considered immediately below.

c. Material scope of national provisions by comparison with Directive 2004/113/EC

As indicated above, in many states the material scope of the gender discrimination legislation goes well beyond that of Directive 2004/113/EC and, more generally, beyond EU minimum requirements. Only in a minority of states (**Austria, Cyprus, Luxembourg, Portugal, Romania**) does the transposing legislation echo the material scope of the Directive¹³ (and note that in Romania other legislation regulates all discrimination on numerous grounds including sex).

Article 3.3 of Directive 2004/113/EC provides that 'This Directive shall not apply to the content of media and advertising nor to education'. In a significant proportion of states the legislation covers the same material scope as the Race Directive (**Denmark, Germany, Latvia, Poland,**¹⁴ **Slovakia, Slovenia,** the **UK**); is described as being of general application (that is, prohibiting sex discrimination, or discrimination on multiple grounds, in more general terms (**Bulgaria, Estonia,**¹⁵ **Norway**¹⁶)); or, in the case of **Belgian** federal legislation, applies to the material scope of the Race Directive and in relation to 'access to, participation in and any other exercise of an economic, social, cultural or political activity available to the public' and 'any mention in an official document or record'. Gender discrimination in education is also regulated in **France, Greece, Ireland, Lithuania, Malta,** the **Netherlands,** and **Spain** and, in the case of post-16 education, in **Finland**) while

¹³ Austria's legislation applies also to social advantages outside the scope of education, which is not covered by domestic prohibitions on gender discrimination.

¹⁴ In the case of the draft legislation.

¹⁵ In 'all areas of social life' with exceptions relating to the profession or practise of faith or work as a minister of religion in a registered religious association; and to relations in family or private life.

¹⁶ In all areas of society with the minor exception of religious matters within religious communities.

Greece, Ireland, Lithuania,¹⁷ Malta and Spain regulate discrimination in relation to media and advertising. **Sweden's** legislation is generally of broad application also, although there is no express legislative control of discrimination in relation to media/advertising, this being covered only through self-regulation mechanisms.

Finland regulates discrimination in relation to social welfare¹⁸ and **Hungary** discrimination in relation to public functions.¹⁹ The material scope of the **Italian** legislation is unclear in that the legislation refers to all differences in treatment which give rise to, or are aimed at, hampering the enforcement of fundamental rights in the political, economic, social, cultural and civil field and in all other fields, but lacks any detailed provisions covering social protection, social advantages or education.

d. Adequacy of transposition – general remarks

A number of national experts regarded the transposition which had taken place in their states as (broadly) adequate (**Austria, Cyprus, Norway, Denmark** (though the Danish national expert pointed to the lack of any monitoring body)), **Hungary, Portugal, Slovakia, the UK, Finland** and the **Netherlands** (in the latter two states only relatively minor amendments to existing law having been required).

Criticism was voiced by the **Belgian, Polish, Italian, Luxembourg, French** and **Romanian** experts of a 'copy-out' approach which resulted in rather abstract or confusing legislative provisions²⁰ or, in the case of **Luxembourg** and **France**, in a 'minimalist' approach to transposition. The **Lithuanian, Bulgarian** and **Slovenian** experts commented on the abstract, unclear and 'incomprehensible' nature (respectively) of the transposing legislation.²¹ **Lithuania's** national expert, in particular, criticised that state's legislation for its lack of clarity as to indirect discrimination, the burden of proof, pregnancy and maternity and transsexuals 'which require more elaborated provisions for the sake of clarity and transparency', the recently amended Equal Opportunities for Women and Men Act imposing a general principle of non-discrimination across a very wide material scope and positive obligations on public authorities as regards sex equality, but not providing adequate enforcement mechanisms in relation to these duties outside the area of employment. He also drew attention to 'unnecessary complexity' arising from the fact that the gender equality legislation overlaps with a new multi-ground act regulating discrimination and the relationship between the two is 'totally unclear' while the **Spanish** expert suggested that the transposing legislation, though 'correct', was of questionable practical efficacy given an absence of detail as to what the prohibition on gender discrimination means in particular contexts.²² **Estonia's** national expert remarked that 'greater specificity in the wording of the [draft] legislation, and detailed regulation instead of abstract norms, would be more conducive to achieving the aims of the legislation'. By contrast, **Austria's** national expert suggested that 'any specification in legislation would have endangered the broad application of the law'.

¹⁷ Sections 5-1 and 7-1 particularly prohibit humiliating advertisements and encouragement of public attitudes that one sex is superior to another.

¹⁸ Though note that there are no sanctions for sex discrimination in this area other than the nullification of officials' decisions or their administrative reprimand.

¹⁹ The legislation including detailed coverage of social welfare, health care, housing and education *inter alia*.

²⁰ In the case of Poland, these comments related to the draft law's exception provisions.

²¹ The Lithuanian expert suggested in addition that the legislation did not protect legal as distinct from natural persons.

²² The Spanish expert suggested, for example, that harassment or sexual harassment could usefully have been defined as reasonable cause to terminate a property leasing agreement.

Malta's expert stated that there was potential for confusion in his country's decision to adopt its own definitions of discrimination, victimisation and harassment in the context of goods and services so that there is not full consistency with definitions used in other legislative contexts (such as employment law), and **Ireland's** Equal Status Act 2000, which has been amended on many occasions, is described by the national expert as 'fragmented and unclear'. The **UK's** Sex Discrimination Act 1975, similarly, has been amended many times to give effect to EU law, a minimalist approach to transposition resulting in a complex web of provisions with different definitions of indirect discrimination and the burden of proof, to name but a few examples, depending on whether discrimination falling within that Act is also covered by EU law. Finally, the **Swedish** national experts suggested that the structure of that country's legislation – which lists the prohibited grounds in one part while outlining the forbidden types of discrimination in another – could be more transparent.

3. Discrimination in access to goods and services

a. General

National experts reported few examples of gender discrimination in access to goods and services. One exception was **Malta**, whose national expert reported a number of recent complaints about gender discrimination in the provision of banking services as well as more generally in the provision of goods and services. He expressed concern that assumptions were frequently made about women being likely to take time out of the workforce in cases in which bank loans were applied for. He also refers to 'a distinct lack of provision of services (child care, for example) such as would allow women to participate more fully in the labour and other markets, and other activities and occupations', something which seems to be a general problem in the Union, and to the low levels of participation of women in sports. **Norway's** expert suggests that actuarial factors are relied upon more than necessary by insurance companies to discriminate on grounds of gender. This also seems to be the case in **Greece** and it seems that the delay in transposing the directive is mainly due to the resistance of insurance companies.

In **Latvia**, whose legislation prohibits discrimination across a wide spectrum of public functions including education,²³ the national expert draws attention to the persistence of 'study material (...) contain[ing] many stereotypes' with teaching staff 'hav[ing] many prejudices and not [being] aware of stereotypes'. She also reports the difficulties in regulating gender discrimination in advertising, which falls within the scope of Latvia's domestic legislation (though outside Directive 2004/113/EC):²⁴ 'it is indeed difficult to qualify legally which advertising is discriminatory on the grounds of sex if, for example, [the] advertisement depicts different social roles of the sexes which reinforce stereotypes'. **Luxembourg's** expert also complains of the use of sexual stereotyping in advertising, stating also that married women are almost invariably referred to by their husbands' names 'without their approval (...) in administrative matters even as in private matters such as hospital registration' and that 'economic and political power still remains unbalanced in Luxembourg.'

The **Spanish** expert reports that the prohibition of gender discrimination in the context of healthcare is significant. Although health policies and services are apparently equal between men and women, in reality such services are not accessed

²³ The Law on the State Governance, Law on Social Security, the Law on Judicial Power, the Law on Administrative Procedure, and the Law on Education.

²⁴ Law on Advertising OG No. 7, 10.01.2000.

similarly by men and women and equality in provision requires that gender be taken into account by providers. The expert also reports, however, that efforts have been made in a number of Spanish cities to shape service provision by public authorities, banks and shops etc. to shape opening hours more closely to peoples' needs. The **Romanian** expert reported decisions of the National Council for Combating Discrimination (NCCD) upholding challenges to refusals by hospitals to allow fathers to stay with hospitalised children.

b. Pregnancy-related discrimination

More examples were provided of discrimination in relation to pregnancy and maternity in particular, **Poland's** national expert reporting that such discrimination was a regular occurrence in the housing context with owners refusing to rent flats to pregnant women or families with small children because of concern that they might prove difficult to evict. She also pointed out 'structural gender discrimination in the access to medical goods and services' as evidenced by difficulties experienced by women in accessing legally available reproductive health care, contraception, antenatal diagnoses and abortion. These difficulties, commented upon by international human rights interventions by bodies such as CEDAW, the Human Rights Committee and the Committee on Economic, Social and Cultural Rights, are attributed significantly to the use of conscience clauses by medical personnel, and to the lack of an effective appeal from a doctor's refusal perform an abortion.²⁵ (They also resulted in a decision by the European Court of Human Rights in *Tysiac v Poland*,²⁶ in which that Court ruled that the denial of access to an abortion in circumstances where the abortion was legal violated Article 8 of the Convention.) Difficulties in accessing abortion were also commented upon by the **UK** expert, abortion being unlawful in Northern Ireland and sometimes difficult to access in practical terms for women elsewhere in the UK who are dependent on the national health service. While Community law does not require access to abortion or particular forms or healthcare as such, to the extent that Directive 2004/113/EC regulates discrimination in access to healthcare it will cover discriminatory refusal of access to healthcare services provided for by domestic law. It is at least arguable, therefore, that denials of access to healthcare services which are provided for by domestic law, where those services are required only by members of one sex, amounts to discrimination on the same reasoning as that employed by the European Court of Justice in connection with pregnancy discrimination.²⁷

Discrimination against self-employed pregnant women in access to insurance services was remarked upon by the **Dutch** expert, who drew particular attention to two-year waiting periods in private health insurance schemes. Meanwhile, the Dutch Government is taking legislative steps in order to fill this gap. The **Portuguese** expert also reported that the most common form of pregnancy/maternity discrimination in goods and services concerned private health insurance coverage, this again as a result of a 'waiting period', while in **Sweden** complaints about refusals to make payments under sickness insurance policies in the case of pregnancy-related illness are pending before the domestic courts. The Equal Treatment Commission of the Netherlands takes the view that income-replacement insurance schemes which pay out in the case

²⁵ This problem has been raised also by the EU network of independent experts on fundamental rights of 14.12.05 (CFR-CDF Opinion 4-2005. Doc., p.14).

²⁶ Case No. 5410/03 judgment of 20.3.07.

²⁷ See, for example, *Webb v EMO Air Cargo (UK) Ltd* Case C-32/93 [1994] ECR I-03567, *Mahlburg v Land Mecklenburg-Vorpommern* Case C-207/98 [2000] ECR I-00549.

of pregnancy only after two years discriminate on grounds of sex.²⁸ A number of Dutch courts have recently ruled, however, that maternity cover is distinct from disability cover with the effect that insurance schemes may impose additional criteria such as waiting schemes on pregnancy cover without sex discrimination.²⁹ In July 2008, further, the Netherlands' Supreme Court ruled that private insurance companies are not obliged to cover maternity as an instance of disability.³⁰ The **Danish** national expert suggested that discrimination in relation to pregnancy and maternity is 'probably particularly widespread in the financial sector', referring in particular to difficulties experienced by single mothers obtaining enterprise-related loans.

More widespread pregnancy-related discrimination was reported by the **Romanian** expert who highlighted, in particular, discrimination against pregnant girls in the context of education in the shape of informal exclusions and segregation of pregnant pupils as well as a more generalized problem of discrimination against pregnant women in receipt of social assistance 'who are young, single, who are Roma or who have a disability', and the inability on the part of many Roma women to access pregnancy-related or other health services as a result of their high levels of unemployment. While discrimination in education and in access to social assistance would fall outside the scope of Directive 2004/113/EC, that in relation to access to healthcare would fall within it. The concern about the plight of Roma women was not restricted to those who were pregnant, discrimination in access to goods and services being reported more generally as a problem for them by the Romanian expert.

Hungary's expert cited scattered examples of discrimination on grounds of pregnancy including discrimination by driving schools and (reported also by **Liechtenstein's** and **Ireland's** experts), refusals by airlines to allow pregnant women to travel by plane. Hungary's expert reports that the national airline prohibits pregnant women from air travel after 36 weeks and requires them to produce evidence of suitability to travel after 28 weeks, with doctors being reluctant to provide such certification. **Latvian** legislation allows the imposition of objectively justified restrictions on pregnant women in aviation as in other contexts. The **UK's** expert also drew attention to 'well-intentioned prohibitions on visibly pregnant women participating in certain activities regarded, rightly or wrongly, as threatening to the health of their unborn babies' and **Estonia's** expert referred to the withholding of some 'well-being' services from pregnant women on health grounds.

c. Discrimination against parents

The Directive does not in terms regulate discrimination against parents, though such discrimination may amount to indirect gender discrimination. A number of experts commented on difficulties in access to public spaces, transport etc. by those with children in prams or pushchairs (**Liechtenstein**, **Greece**, **Estonia**, the **UK** and **Norway**³¹), though the **UK** expert suggested that increased obligations on accommodation for disabled people have made things easier for heavily pregnant women and those with non-mobile children. **Liechtenstein's** expert reported the

²⁸ ETC 15 July 1997, Opinion 1997-87, ETC 25 June 2002, Opinion 2002-76, ETC 29.04.04, Opinion 2004-44 and ETC 2.05.05, Opinion 2005-80.

²⁹ District Courts of Utrecht on 35.06 LJN: AW7505 and 10.01.07 LJN: AZ7462; and of The Hague on 2.4.08 LJN: BC9833 and the Court of Appeal of Amsterdam on 19.10.06.

³⁰ Hoge Raad 11.7.08, LJN: BD1850. The Government has recently decided to reintroduce a maternity allowance for self-employed women in order to fill this gap (*Tweede Kamer* 2007-2008, 31 366 No. 1).

³¹ The Discrimination and Accessibility Act 2008 imposes duties of accommodation in relation to those who are functionally impaired including by pregnancy or responsibility for infants.

restriction of baby-changing facilities to women's toilets if they are provided at all. She also commented on difficulties generated by drivers of taxis both lacking child restraints and refusing to carry children without them while **Estonia's** expert drew attention to recent controversies concerning the advertising of 'children-free' hotel stays which she stated were contrary to the Estonian GEA in which less favourable treatment of persons on the grounds of parenthood or the fulfilment of family obligations is deemed direct discrimination on the grounds of sex.

d. Harassment/ sexual harassment

Article 4.3 of the Directive provides that:

'Harassment and sexual harassment within the meaning of this Directive shall be deemed to be discrimination on the grounds of sex and therefore prohibited. A person's rejection of, or submission to, such conduct may not be used as a basis for a decision affecting that person.'

Very few concrete examples have been provided of harassment/sexual harassment occurring outside the context of employment. Some appear to relate to isolated incidents of differential treatment (**Estonia**, whose expert reported a case involving a bus driver who prevented a woman with a pram from leaving his bus; **Austria**, whose expert reported a complaint of sexual harassment of a young woman by an electrician who was called out to her parents' house). Perhaps of more general interest are complaints about harassment/sexual harassment in schools/universities (the **Netherlands**, **Sweden**, **Greece** (where no cases seem to have been brought to court)); health or social care services (the **Netherlands**, **Slovakia**, **Poland**, the **UK**) and bars/restaurants etc. (**Slovenia**, the **UK**, **Poland**), or of tenants (**Slovenia**). Also of interest, though outside the scope of the Directive, are complaints about offensive, sexist advertisements (**Belgium**, **Bulgaria**, **Lithuania**, **Greece**) which, for example, objectify women or portray them as stupid.

e. Instructions to discriminate

Article 4.4 provides that:

'Instruction to direct or indirect discrimination on the grounds of sex shall be deemed to be discrimination within the meaning of this Directive.'

Examples of this type of discrimination in the context of goods and services were rarer still. **Austria's** national expert reported that a case is pending before the Equal Treatment Commission on the legality of providing free access to a nightclub to women (but not to men) in which the issue of instructions to discriminate was raised, as the owner of the club had instructed the employees at the cash desk. The **Luxembourg** expert also characterised instructions to discriminate in nightclubs as commonplace and the **Maltese** expert pointed out that discrimination in this context and in the context of discrimination by financial institutions will have to be implemented by management instructions.

Slovakia's expert reports cases of instructions to discriminate in the refusal of driving schools to take on female pupils and **Slovenia's** expert suggests that, while there are no reported cases in this context, 'we might find some cases where owners of apartments or houses give instructions to real estate agencies not to let them to pregnant women, women with young children or male students which are considered

to be rowdier and not too orderly'. The **Polish** expert reports public speeches by officials and Catholic clerics instructing medical staff to discriminate by refusing to perform legal abortions without fulfilling the requirement to refer women on to willing providers, and persuading pharmacists not to sell contraceptives registered on the Polish market, sometimes on pain of excommunication.³²

f. Victimisation

The only examples of victimization in the area of goods and services were suggested by the **Polish** expert and concerned social service institutions ('some social service institutions used to victimize persons lodging complaints aimed at enforcing compliance with the principle of equal treatment by hostile manifestations or postponing the fulfilment of their obligations'). The hope was expressed that the prohibition of this form of treatment by virtue of transposition might bring an end to these practices.

4. Definitions of gender

a. Pregnancy/ maternity

Directive 2004/113/EC provides that:

- '1. For the purposes of this Directive, the principle of equal treatment between men and women shall mean that
- (a) there shall be no direct discrimination based on sex, including less favourable treatment of women for reasons of pregnancy and maternity (...)'

Most states now explicitly regulate discrimination in connection with pregnancy and maternity in the area of goods and services (**Austria, Belgium, Cyprus, Estonia, Finland, France, Greece, Hungary, Ireland, Italy, Latvia, Malta, the Netherlands, Norway, Poland, Portugal,**³³ **Romania, Slovakia, Spain** and the **UK**). Other national experts report that discrimination in connection with pregnancy and maternity is implicitly regulated (**Denmark, Germany, Lithuania, Slovenia, Sweden**) in some cases indicating that this protection either is (**Denmark**) or is not (**Sweden, Slovenia**) satisfactory in the particular circumstances of the state. Other national experts report that there is no explicit regulation (the **Czech Republic, Germany, Iceland, Liechtenstein, Bulgaria**), the last-mentioned Constitution providing, however, a general protection for pregnant women and new mothers while statutory provisions in addition provide for 'accessible and qualitative health care, with priority for children, pregnant women and mothers of children up to one year'. The protection of maternity, marriage, the family and childhood is also a constitutional requirement in **Greece**.

Pregnancy and maternity themselves are not generally defined though **Slovakia's** Labour Code includes definitions of, *inter alia*, 'pregnant employee' and 'breastfeeding employee'. **Belgium** and the **Netherlands** define direct discrimination related to pregnancy, birth and maternity as direct sex discrimination, while indirect

³² Questions might be raised in this case as to whether the incitement to discriminate amounts to an 'instruction' for the purposes of the Directive in the absence of a contractual relationship between the clerics and the medical staff.

³³ Which also expressly prohibits any pregnancy-related inquiry concerning a woman seeking access to goods or services, except for reasons related to the protection of her own health.

discrimination on these grounds is thought to be implicitly included within indirect sex discrimination in Belgium.

Legislation in **Cyprus**, **Italy** and **Romania** explicitly define as ‘discrimination on ground of sex’ in the context of goods and services the less favourable treatment of women for reasons of pregnancy and maternity. **France** expressly prohibits direct and indirect discrimination based on pregnancy or maternity while **Poland’s** protection applies in relation to pregnancy and maternity *leave*, but not maternity itself. In **Finland**, where discrimination for reasons of pregnancy or childbirth is defined as direct gender discrimination, discrimination on grounds of parenthood or family responsibilities is further categorised as indirect gender discrimination. **Norway**, **Slovakia**, **Portugal** and the **UK** explicitly regulate discrimination on grounds of pregnancy or recently having given birth (in the case of the **UK** for a period of 26 weeks after the birth). **Estonia** defines as sex discrimination, discrimination on grounds of pregnancy and delivery, parenting and the fulfilment of family duties while **Ireland** prohibits discrimination on grounds of ‘family status’, which includes pregnancy and parenthood. **Hungary’s** Equality Act regulates discrimination on multiple grounds including sex, pregnancy, maternity and paternity. **Portuguese** law further prohibits a provider of goods and services from seeking information about pregnancy except for reasons related to the protection of a woman’s own health. **Spanish** law, which classifies discrimination on grounds of motherhood as direct discrimination, also permits pregnancy to be taken into account in the context of goods and services for ‘proven and proportionate due cause’ related to health.

No legislation regulating gender discrimination in access to goods and services expressly requires a comparator, though **Finland’s** national expert suggested that, in employment-related cases in which discrimination is alleged to have taken place in the context of short-term contracts, ‘it is often crucial to consider how the person would have been treated, had she not become pregnant’. In **Latvia** no comparator is required by law but this does not always reflect the practice, women’s claims in the social insurance sector having been rejected on occasion by reference to a comparator, and in **Lithuania** the national expert thought that a comparator requirement might be implicit in the requirement for ‘different’ treatment. In **Malta** the general definition of direct discrimination requires a comparison of the treatment received with that received, actually or hypothetically, by another person in a comparable situation. In **Sweden** the national expert reports that ‘the concept of direct discrimination does not require a comparator but applies whenever someone is being treated less favourably than someone else “is treated, has been treated or would have been treated” in a comparable situation’.

In the **UK** the use of the words ‘on the ground of’ and ‘less favourably’ in the context of pregnancy discrimination might be regarded as requiring some kind of comparison, but the previous explicit requirement for a comparator was abandoned after a decision of the High Court that it was inconsistent with EU law and the better view is that, properly interpreted, the legislation does not require a comparator.

The absence of any definition of pregnancy/maternity discrimination is regarded as unproblematic in **Austria** (where the concepts ‘will be interpreted in light of other laws and will cover all biological and legal mothers’ apply) and **Denmark**, but the **Czech** national expert stated that the absence of an explicit definition of pregnancy/maternity resulted in ‘insufficient clarity’ particularly given the absence of case law and **Bulgaria’s** national expert suggested that the provision of definitions would be helpful in relation, in particular, to the potential ‘overprotection’ of pregnant

women ‘since there is no explicit definition of the status and of the scope of the protection’.

b. Breastfeeding

At present only **Norway** provides an express right to breastfeed in the area of access to goods and services. The **Bulgarian** national expert mentioned that there was no explicit protection provided in relation to breastfeeding, as did the national experts of **Belgium**, the **Czech Republic**, **Cyprus**, **France**, **Germany**, **Italy**, **Liechtenstein**, **Lithuania**, **Luxembourg**, **Malta**, the **Netherlands**, **Poland**, **Portugal**, **Spain** and **Estonia**. Estonia’s expert did remark, however, that provision for breastfeeding is in practice common in public. Explicit protection for breastfeeding in the context of goods and services is planned imminently in the **UK**.

Breastfeeding in restaurants in **Poland** was said sometimes to provoke hostile reactions and special provision made in Warsaw has given rise to concern on the part of some that women will be required to breastfeed in these dedicated spaces or not at all. In **Romania**, breastfeeding is ‘rather discouraged (...) in public places (...) because of concerns that it is indecent’, while in **Liechtenstein** it is said to be ‘generally not so easy’. The only legal challenge related to breastfeeding was reported by **Ireland’s** national expert, though it concerned a complaint by a woman that her two-year old child, who was breastfed, was charged for a seat at a theatrical performance she wished to attend. Her claim, which was in respect of alleged harassment, failed.³⁴

c. Transsexual people

Explicit protection against discrimination on grounds connected with transsexualism is relatively rare (applying in **Belgium** (in relation to direct discrimination only), **Hungary**, **Norway** (where ‘sexual orientation’ is stated by the expert to include transsexualism), **Germany** (where ‘sex’ can also be understood as covering transsexualism), **Slovakia**, **Sweden**, the **UK**). Protection is granted in **Hungary** in respect of discrimination by reason of ‘sexual identity’, a concept which appears to be potentially wider than ‘transsexualism’, though Hungary’s national expert reports that the absence of any detailed legislative protection results in ‘numerous discriminatory situations for transsexuals’. Swedish legislation prohibits discrimination on grounds of transgender identity or expression, protecting ‘a person who intends to change or has changed the sex they belong to’ and provides that ‘someone does not identify herself or himself as a woman or a man or expresses by their manner of dressing or in some other way that they belong to another sex’. In the **UK** the legislation refers to discrimination ‘on the ground that B intends to undergo, is undergoing or has undergone gender reassignment’.

In a number of other states discrimination in connection with transsexualism is regarded as implicitly within the scope of the prohibition on sex discrimination in relation to goods and services (**Austria**, **Cyprus**, **Finland**, **Germany**, **Greece**, **Lithuania**, **Luxembourg**,³⁵ the **Netherlands**, **Portugal**, **Slovenia**, **Spain**) or probably so (**Denmark**, **Italy**). In **Romania** this form of discrimination is not covered by the legislation implementing Directive 2004/113/EC (Ordinance 61 of 2008) but is thought to fall within the general prohibition on discrimination in Ordinance 137 of 2000 which prohibits ‘any difference, exclusion, restriction or preference based on’

³⁴ *Stevens v The Helix Theatre*, <http://www.equalitytribunal.ie/index.asp?locID=140&docID=1783> (DEC – S2008 – 033).

³⁵ Here it is mentioned in the legislative comments.

multiple grounds including ‘belonging to a disfavoured category, as well as any other criterion aiming to or resulting in the restriction or elimination of the recognition, use or exercise, in conditions of equality, of human rights and fundamental liberties or of rights granted by law in the political, economic, social and cultural field or in any other domains of public life’. The **Finnish** Ombudsman has stated that discrimination against transsexuals falls within the prohibition on gender discrimination and, in connection with media coverage of a case concerning a Lutheran minister who has undergone gender reassignment, that a change of sex should not impact on the right of a person to remain in an office of the Church, which is open to both men and women. The Finnish Government is considering the explicit regulation of discrimination connected with gender reassignment. The **Lithuanian** expert remarks that the climate towards transsexuals is hostile and the **Spanish** expert regards the implied inclusion of this ground as inadequate.

In **Bulgaria**, the **Czech Republic**, **France**, **Iceland**, **Ireland**, **Latvia**, **Liechtenstein**, **Malta**, **Poland** discrimination on grounds of transsexualism is not regarded as falling within the scope of domestic gender discrimination law. According to the **Bulgarian** national expert, the general prohibitions on discrimination in the Constitution and the Law on Protection against Discrimination are inadequate in this context ‘given the particularly vulnerable situation of those people’.

5. Definitions of discrimination

a. Positive action

Directive 2004/113/EC provides (in Article 6) that:

‘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.’

Most transposing legislation provides scope for positive action along the lines set out by Article 6 of the Directive (**Austria**, **Cyprus**, the draft **Czech** and **Polish** legislation, **Germany**, **Ireland**, **Italy**, **Hungary**, **Luxembourg**, **Malta**, the **Netherlands**, **Norway**, **Poland**, **Portugal**, **Romania** and **Spain**). By way of example, the Czech draft law, which covers multiple grounds other than sex, provides that differential treatment may be provided to prevent or compensate for disadvantages linked to membership of a ‘protected group’ to secure equal treatment and opportunities. **Greece** has taken no steps as yet to transpose the Directive, but the Greek Constitution requires the taking of positive measures in all areas ‘to eliminate inequalities which exist in practice, in particular those detrimental to women’. In the **Netherlands** positive action may only be taken to assist women.

Legislation in a number of states is more cautious. **Romanian** and **Slovenian** legislation and **Estonia’s** draft legislation allow temporary special measures to be adopted, respectively, ‘to accelerate *de facto* achievement of equal opportunity between women and men’, to remedy under-representation or inequality by removing objective obstacles or providing incentives, where those incentives are justified and proportionate, and to promote gender equality. **Belgium** and **Lithuania** allow positive action only where it is authorised by decree, which has not as yet happened, and in the case of Lithuania the enabling legislation specifies that measures have to be temporary. **Finland** imposes positive obligations on public authorities, educational

institutions and employers (alone) and the statutory definition of discrimination does not contain a specific provision permitting positive discrimination along Article 6 lines. Further, positive action usually requires an equality plan and cannot be undertaken *ad hoc*. **Bulgaria** and **Sweden** allow positive action only in relation to education which, of course, falls outside the Directive's scope, though the Swedish expert points out that positive action measures may fall within the provision transposing Article 4.5 of the Directive.³⁶ **Latvia, Malta, Denmark, Slovakia, France** and the **UK** allow positive action not or almost not at all (except, where relevant, where it falls within the scope of Article 4.5), though the **UK** imposes positive obligations on public authorities to further gender equality, as does **Germany**.

Examples of positive action provided by national experts were limited except in the case of Germany: single-sex schools, defended recently on the basis that such schools 'may help girls (and boys) to develop their abilities in all areas free of gender-based stereotypes', and the development of women's universities (permanent or summertime only) and other mechanisms to encourage women to enter technical jobs.

b. More favourable treatment in relation to pregnancy

Article 4.2 of the Directive provides that:

‘This Directive shall be without prejudice to more favourable provisions concerning the protection of women as regards pregnancy and maternity.’

Article 4.2 was not transposed in **Austria, Bulgaria**, or in the **Czech Republic** (current or proposed legislation). **Cyprus**, on the other hand, permits more favourable treatment connected with pregnancy and maternity as do **Denmark, France, Italy, Greece, Lithuania, Luxembourg** (though examples of such treatment are said to be rare other than in the form of priority checkouts in supermarkets and seats in buses), **Malta**, the **Netherlands, Portugal, Romania**, the **UK, Estonia** and **Slovakia**. **Romanian** law permits special measures provided for by the law in relation to maternity, birth and breastfeeding but, according to the national expert, 'copying out' the Directive's provisions 'does not sufficiently provide clarity for pregnant women or women in their maternity, as well as for goods and service providers to know their rights and obligations'. **Slovakia's** Anti-Discrimination Act allows 'objectively justified differential treatment, the purpose of which is the protection of pregnant women or mothers' and **Portuguese** law also expressly allows more favourable regimes in the access to or supply of goods and services for women who are breastfeeding.

As the **Belgian** and **Hungarian** national experts suggest, statutory provisions aimed at the protection of pregnancy and maternity should not be regarded as examples of discriminatory treatment in need of a defence, but rather (in the words of the Belgian expert) as a 'condition for the achievement of equal treatment of men and women'.³⁷ This point is an important one and is endorsed by the network as a whole.

Latvia's expert suggests that, while in practice pregnant women enjoy favourable health care, the 'copy-out' approach to transposition has resulted in an absence of guidelines for the 'assessment of what special rights are to be provided to women during maternity periods must be provided taking into account her special needs in

³⁶ The prohibition on gender discrimination expressly does not apply to prevent the application of provisions concerning a widow's pension, a wife's supplement or the payment of child allowance.

³⁷ See *Dekker v Stichting (VJV-Centrum)* Case C-177/88 [1990] ECR I-03941.

order to ensure equal treatment.’ It is also interesting to note in this regard the fact that, while in **Germany** pregnancy/maternity ‘may be considered as special reasons that permit taking an exam at a time different from the ordinary schedule’ for university purposes ‘this is not a general rule prescribed by law’.

Relatively common examples of favourable treatment accorded to pregnant women included the right to a seat on public transport (**Germany, Belgium, Poland, UK**); preferential medical treatment (**Latvia**,³⁸ **Finland**,³⁹ **Estonia, Germany, Hungary** (where pregnant women are supported by ‘protective-nurses’ who provide physical and psychological support as well as information about pregnancy-related rights and are entitled to the choice of doctor and obstetrician, accompaniment during the delivery and accommodation with the baby in hospital unless medically contraindicated) and (‘in theory’) **Poland**).⁴⁰ In **Poland** some shops and supermarkets have special checkouts for pregnant women and mothers with small children and pregnancy may be taken into account in the allocation of some emergency accommodation. In **Hungary** pregnant women may avoid electronic security screening during air travel, being able to choose a physical search by a female security guard instead.

c. Associative discrimination/ perceived status

‘Associative’ discrimination is discrimination against someone which relates to (so far as relevant here) not to the gender of the person discriminated against, but to that of someone with whom they associate or are associated (as in *Coleman v Attridge Law*⁴¹). Discrimination on grounds of perceived status, so far as relevant here, is discrimination against someone who is thought to be of a particular sex, or is thought to be transsexual. These types of discrimination are expressly regulated in only a small number of states (**Hungarian** legislation applying to discrimination on grounds of perceived sex/gender but not to discrimination on grounds of association, **Irish** legislation expressly dealing with discrimination connected with perceived status and association with others). National experts in **Belgium, the Netherlands, Norway, Slovenia, Spain** and **Sweden** took the view that these types of discrimination were implicitly covered by the transposing legislation, generally as a result of the decision in *Coleman v Attridge Law*. Amendment of the UK’s legislation is under consideration as regards gender reassignment, but not sex.

6. Goods and services

a. Definitions

Transposing states have taken a variety of approaches to the definitions of ‘goods and services’. It is noteworthy, however, that a more generous approach has been adopted by most states than is required by the Directive, in particular by recital 11 thereof which provides that:

³⁸ Although no general measures have been taken to implement Article 4(2), the Law on Medical Treatment, which was in place prior to the implementation of the Directive, provides that medical assistance and treatment of pregnant women is a priority

³⁹ Pregnant women have to take advantage of these services to benefit from pregnancy-related financial and other subsidies. Some criticism has been voiced of the fact that non-medical services, in particular, are ‘too focused on mothers. There is no formal hindrance to the father sharing these services with the mother, but the participation is far from being gender neutral’.

⁴⁰ But see Section 3(d).

⁴¹ Case C-303/06 [2008] ECR I-0000.

‘(11) Such legislation should prohibit discrimination based on sex in the access to and supply of goods and services. Goods should be taken to be those within the meaning of the provisions of the Treaty establishing the European Community relating to the free movement of goods. *Services should be taken to be those within the meaning of Article 50 of that Treaty.*’ [emphasis added].

Many states do not define goods or services for the purposes of the transposing legislation (**Austria, Bulgaria, Cyprus, Denmark, Estonia, Finland, France, Germany, Luxembourg, Malta, Norway, Slovenia, Spain, Romania**), though frequently reference is made to EC definitions whether in accompanying explanations (**Austria, Estonia**) or by case law (**Norway**), or the concepts are defined in other legal contexts (**Bulgaria, the Czech Republic** in the case of services alone, **Lithuania, the Netherlands, Romania**).

An expansive approach to ‘goods and services’ has been adopted by **Portugal** whose Law No. 14/2008, which does not otherwise define goods or services, applies to access to and supply of goods and services regardless of remuneration, provided that they are for public use. **Slovakia’s** Consumer Protection Act prohibits discrimination in relation to goods and services, broadly defined, provided to the public regardless of remuneration and the **UK’s** Sex Discrimination Act prohibits discrimination in relation to ‘goods, facilities or services’ whether payment is involved or otherwise, as long as the provider is ‘concerned with the provision (for payment or not) of goods, facilities or services to the public or a section of the public’. The legislation provides many examples of ‘facilities and services’ and a significant body of case law has developed over the thirty-four years during which the Act has been in place. Some of the issues which have been raised in litigation include the Act’s application to ‘private members’ clubs’, legislation being planned to establish such coverage in the case of large clubs other than those which are genuinely single-sex. Similarly, **Ireland’s** Equal Status Act, which defines as ‘goods’ ‘any articles of movable property’ whether or not they have monetary value, provides examples of the services and facilities to which its prohibitions apply as long as they are ‘available to the public generally or a section of the public’, and regardless of payment.

The *travaux préparatoires* to the **Swedish** legislation define ‘services’ as ‘something someone does or performs for another person against remuneration’ but this concept has been broadly defined by the Equal Opportunities Ombudsman (now the Equality Ombudsman) to cover a ‘free’ (no fees) internet chatting community on the basis that the provider was paid indirectly through advertising. In any event, the Swedish legislation also explicitly regulates discrimination in health and medical care and social services. This means that the question whether such services are regarded as ‘services’ for the purposes of transposing Directive 2004/113/EC is not so significant in that Member State. The same is true in **Hungary**, whose legislation covers commercial contracting generally and actions carried out in pursuit of state subsidies, as well as public functions; the **UK** (where public functions are explicitly covered); and **Belgium** (whose federal legislation regulates discrimination in ‘access to, participation in and any other exercise of an economic, social, cultural or political activity available to the public’). **Norwegian** case law has applied the prohibition on sex discrimination in that state’s Gender Equality Act (which predates the Directive)

to publicly funded health services ‘without concern to whether or not it is a service or goods offered’.⁴²

The **Greek** expert considers that the Directive’s scope should and can be interpreted widely. Thus, social assistance can be considered to be included, since it is not explicitly excluded, while the ‘vague’ exclusion of ‘the content of media and advertising’ ‘cannot mean that offers of and information on supply of goods and services in the media are excluded, the more so as the directive concerns goods and services available to the public’.

The **Dutch** Civil Code defines goods at least as broadly as EC law (all things as well as all proprietary rights) while ‘services’ are defined in equality case law without ‘restrictions with regard to shape, manner or form’ and to include, for example, the opportunity to contribute to a blood bank and the supply by private associations of goods and services in a public way. **Italy’s** Civil Code defines as ‘goods’ ‘everything which is capable of being object of rights’, this being intended to cover those things which have a monetary value and are capable of being commercially traded, and otherwise consist of any tangibles (movable or immovable) other than means of payment or live human beings, as well as energy having an economic value. ‘Services’ are undefined but are taken to include those services of economic value whether or not they are actually remunerated.

Latvia defines as ‘goods’ anything which is offered or sold to a consumer and ‘services’ as the loan of a thing, the making of a thing, the improvement or transformation of an existing thing or its characteristics or performed work or an obtained immaterial result of a work according to the order of a consumer or consumer agreement, but only where this is performed within the framework of an economic or a professional activity for remuneration or without it. **Poland’s** draft legislation is narrow in a different way, defining ‘services’ by reference to Article 50 TEC as ‘services’ ‘normally provided for remuneration by the public or private subjects, which in particular include activities of an industrial or commercial character and activities for the professions’. **German** law restricts the operation of the prohibition on discrimination in access to goods and services to those which fall under civil (not public) law, and which are covered by ‘mass contracts’ (see below). The expert suggests, however, that this difference is not of enormous practical significance because the ‘mass contract’ restriction does not apply in relation to contracts of private insurance in which most sex discrimination in the goods and services context is thought to occur.

b. Shortcomings in transposition

The **Polish** expert suggests that the reference in the draft law only to ‘*access to goods and services*’ (emphasis added), without reference to their *supply*, and ‘the list of exceptions to the principle of equal treatment, copied out from different equality directives, may be misleading for persons applying the law. It also seems not to be fully applicable in the area of access and supply of goods’.

Latvia’s legislation applies only in respect of transactions between individuals acting within their professional activities, and **Germany’s** Equal Treatment Act regulates gender discrimination in access to goods and services only to the extent that the goods and services are covered by ‘mass contracts’ (that is, those concluded on similar terms with multiple parties, typically without reference to the identity of the

⁴² The Act has been applied to breast and prostate cancer screening, egg and sperm donation, differential pricing of sterilization procedures for men and women and reliance on sex as an actuarial factor in the calculation of health insurance premiums.

other party, or where the identity of that person is of little importance. The Act therefore does not apply to the sale of a single used car by its owner, or to a landlord who wishes to rent out fewer than 50 flats). The Equal Treatment Act further applies only to discrimination falling within the scope of private law (discrimination falling within the scope of public law being covered instead by the general rules of constitutional and administrative law which do not explicitly define harassment or sexual harassment as forms of discrimination and which provides a remedy only in cases in which the public body is at fault). It appears that Germany is in breach of the Directive as regards transposition.

c. Permitted differential treatment

Article 4.5 of the Directive provides that:

‘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.’

Much transposing legislation adopts this provision (**Austria, Cyprus, the Czech Republic, Estonia’s and Poland’s** draft legislation, **Denmark, Finland, France, Germany, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Norway, Romania, Slovakia, Slovenia, Spain and Sweden**). **Poland’s** draft law, which prohibits discrimination in access to ‘publicly available goods and energy’ including medical services, provides an exception in this context where ‘objectively justified by the specificity of medical intervention’.

No legislation specifically provides a defence based on Article 4.5 or of any similar nature in relation to transsexuals and in many of the states surveyed the most commonly mentioned example of differential treatment falling within the Article 4.5 exception related to the provision of services to women suffering domestic or sexual violence (**Austria, Estonia, Greece, Malta, Poland, Slovenia, Spain and Sweden**). In **Greece**, such services are regarded as constitutionally required positive measures rather than as exceptions.

In the case of **Germany** the requirement for proportionality is implicit rather than explicit. **Dutch** law permits differential treatment only in some cases in which it consists of the preferential treatment of women which is (1) necessary for the *protection of women and maternity* or (2) in a case in which ‘*sex is decisive*’. The Ministerial Order which lists acceptable instances of such differential treatment mentions cases of sanitary facilities, changing and sleeping rooms and saunas (all insofar as facilities are separately but equally available for both sexes), beauty and sports contests and life insurance (insofar as there is a relevant difference in sex), life insurances and in case of a difference in treatment for the protection of health and against sexual harassment and violence. Such sex-segregated services aimed at protection must be necessary and proportional. The **UK** provides for narrower exceptions than those permitted by Article 4.5, allowing differential treatment in a closed list of cases to the extent that it is (also) compatible with Article 4.5. **Irish** legislation also adopts a closed, if extensive, list of exceptions some of which may go beyond the scope of Article 4.5.

In **Estonia** the explanatory memorandum to the transposing legislation specifically mentions domestic violence services, and also mentions cases concerning privacy and decency such as where a room in a private home is rented, as well as

sporting events for men or women and the provision of gender-related health services. The comments accompanying **Luxembourg's** transposition of Article 4.5 refer expressly to services provided by hairdressers and situations where issues of personal privacy and decency arise (saunas, swimming pools) as well as to safety considerations (instancing service provision for victims of domestic violence), and non-profit organisations concerned with the promotion of gender equality.

The defence provided by **Hungarian** legislation appears to be broader than that permitted by Article 4.5, permitting treatment which is either 'inescapably necessary for the protection of the fundamental right of another person' as well as 'appropriate and proportionate' to the achievement of that aim, or which otherwise has an objectively reasonable explanation. **German** law provides an exception where the contract will bring the parties into close spatial contact or into a relationship of trust, in particular contracts which would lead to both parties being housed on the same piece of land. **Portuguese** law provides for an Article 4.5 defence only in relation to actuarial factors and **Bulgaria** only in relation to insurance while **Belgium** permits the utilisation of Article 4.5-like defences only with prior authorisation which has not as yet been granted.

7. Enforcement

a. Proving discrimination

Article 9 of Directive 2004/113/EC provides that:

- '1. Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment (...)
3. Paragraph 1 shall not apply to criminal procedures.'

All transposing legislation shifts the burden of proof in the context of goods and services etc. other than (as for example in **France** and **Portugal**) in the case of penal provisions. While **Estonia** does not at present shift the burden outside the employment context, the draft transposing legislation would go further than the Directive by requiring the provider of the goods or services to provide a written explanation to the person, who suspects that they have been discriminated against on grounds of gender, of the reasons for the disputed treatment. As to the importance of this shift in the context of goods and services, **Estonia's** national expert suggests that it may be difficult to apply in the context of goods and services given that there is likely to be a lapse of time between the alleged discrimination and a legal challenge, coupled with an absence of written records and/or personalised information as to the reason for any disputed treatment. The **Romanian** expert suggests that the shift in the burden of proof is important in the context of goods and services, a point of view shared by the **Austrian** expert. The **Greek** expert draws attention to the importance of the directive's rules on the burden of proof (which aim to remedy the unavailability of evidence), as well as to the *locus standi* of organisations to bring claims (see below), and stresses that the effective transposition of these rules requires that they be included in the procedural codes so that they are clear to the courts. This has not

happened in Greece with the other directives, with the result that procedural requirements imposed by those directives are virtually unknown.

b. Enforcement by the equality body

Article 8.3 of Directive 2004/113/EC provides that:

‘Member States shall ensure that associations, organisations or other legal entities, which have, in accordance with the criteria laid down by their national law, 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.’

Article 12 further provides that:

- ‘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. These bodies may form part of agencies charged at national level with the defence of human rights or the safeguard of individuals’ rights, or the implementation of the principle of equal treatment.
2. Member States shall ensure that the competencies of the bodies referred to in paragraph 1 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 (...)

The ability of equality bodies to challenge discrimination in the provision of goods and services, whether or not on behalf of particular individual victims, is crucial to the enforcement of the principle of equality in this area given the difficulties associated with individual litigation in this context. In particular, costs act as a significant deterrent where the sums to be recovered are (as is likely to be the case in goods and services cases) low. Notwithstanding this, equality bodies in **Austria**, the **Czech Republic**, **Germany**, **Greece**, **Liechtenstein**, **Lithuania**, **Norway**, **Poland**, **Portugal** and **Slovenia** have no standing before the courts while those in **Belgium**, **Cyprus**, **Denmark**, **France**,⁴³ **Romania**, **Slovakia** and **Spain** have or will have full competence to litigate even in the absence of an actual victim.

In **Slovakia** no compensation is payable in respect of litigation by the equality body in the absence of an actual victim, though the court in such cases may compel the discriminator to cease the discrimination complained of. The equality bodies in **Bulgaria** and **Hungary** also have the ability to litigate ‘in theory’, though doubts were expressed by **Bulgaria’s** national expert as to whether the court would allow this in practice in the absence of an actual victim. **Hungary’s** expert stated that the complexity of the relevant statutory provisions operated in practice to prevent the Equal Treatment Authority from using its power to initiate ‘public interest’ claims.⁴⁴

⁴³ Though this is stated with some uncertainty.

⁴⁴ Such claims require that the rights of a ‘concrete group’ are violated, but that the violation is not ‘limited to a group of identifiable persons’.

The position in the **Netherlands** is also unclear in the absence of an actual victim. The equality body in **Ireland** have limited competence (it may apply for an injunction or such other relief as the court may deem necessary to prevent the further occurrence of discrimination against, or harassment or sexual harassment of a person) while that in **Italy** has some scope for 'on behalf of' litigation. The **Italian** expert drew attention to a perceived lack of independence on the part of the equality body (the Equality Office, which is situated within the Prime Minister's Office and which does not have a budget allocation).

In **Finland** the Equality Ombudsman has limited competence (that is, s/he can assist but not take cases on behalf of victims except to the equality board which can impose fines). The **UK's** Equality and Human Rights Commission has exclusive powers of enforcement in relation to discriminatory practices, discriminatory advertisements, pressure to discriminate and instructions to discriminate, none of which require a victim as such. The Commission may also take judicial review proceedings in relation to unlawful actions by public authorities but cannot enforce on behalf of victims in the ordinary courts, although it can assist individuals to bring claims.

Malta's National Commission for the Promotion of Equality and **Sweden's** Equality Ombudsman can litigate only with the victim's approval. The same is true in **Latvia**. In **Portugal**, the Commission for Citizenship and Gender Equality does not have competence to litigate but allegations of discrimination can give rise to infringement procedures of a criminal and/or of an administrative nature by the relevant public inspectorate. In addition, gender equality or consumer rights NGOs and similar associations may participate in and promote legal action for the defence of collective interests, in absence of a concrete victim, as well as by representing individuals.

Iceland's legislation provides that regulations may make provision for full competence to be granted to the equality body, though this has not happened to date. Similarly, no required ministerial authority has been provided to date in **Luxembourg** to permit non-profit organisations including (but not limited to) the *Centre pour l'égalité de traitement* to litigate on behalf of victims, though the *Centre* may support victims and provide information on discrimination.

c. Case law

No enforcement action has been taken in any of the states surveyed as regards delayed or inadequate implementation with the sole exceptions of **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.

Otherwise there has been little or no case law of any sort arising in connection with the Directive, this being attributed by the **French**, **Luxembourg** and **Romanian** experts to a lack of knowledge of the relevant provisions, by the **Slovenian** expert to the fact that the domestic provisions are not 'useable' and by the **UK** expert 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.

d. Miscellaneous

The **Italian** expert remarked on the inclusion within the Equal Opportunities Code of detailed enforcement provisions in this context including emergency procedures for urgent cases and ‘in case of ascertained discrimination by public or private subjects which have contracts for public works, or services or supplies, the Public Administration can revoke financial or credit benefits allowed to them.’ By contrast, whereas much enforcement of equality law in **Belgium** takes place by a network of inspectorates, the transposing legislation there does not as yet provide for such enforcement in the context of goods and services, though provision is made for such regulation.

Ireland’s Equal Status Act 2000 is criticised by the national expert for its very short time-limits, claimants having to inform alleged discriminators within two months of an intention to sue with claims being brought to the Equality Tribunal or the Circuit Court within six months. In addition, the previous limit on compensation of 6,348 Euro in cases of discrimination in access to licensed premises appears to have remained untouched by implementing legislation.⁴⁵

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.⁴⁶ 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.

8. A hierarchy of protection?

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’,⁴⁷ and all EU institutions and organs must ‘actively promote’ it in all areas,⁴⁸ including when they enact legislation on the basis of Article 13 TEC, interpret such legislation or control its application.⁴⁹ Member States should also be considered as bound by the same obligation, by virtue of their Article 10 TEC duty of ‘sincere cooperation’. The significance of gender equality is referred to in Recitals 4 and 5 of the Directive which provide that:

‘(4) Equality between men and women is a fundamental principle of the European Union. Articles 21 and 23 of the Charter of Fundamental Rights of the European Union prohibit any discrimination on grounds of sex and require equality between men and women to be ensured in all areas.

(5) Article 2 of the Treaty establishing the European Community provides that promoting such equality is one of the Community’s essential tasks.

⁴⁵ This type of discrimination being governed by the Intoxicating Liquor Act 2003 whose provisions were not amended by the transposing legislation.

⁴⁶ See further the report on sex-segregated services.

⁴⁷ Preamble to Directive 2002/73, para. 4; preamble to Directive 2006/54 (recast), para. 2.

⁴⁸ AG Chr. Stix-Hackl, Case C-186/01 *Dory v Federal Republic of Germany* [2003] ECR I-2479.

⁴⁹ This is why the recitals to all Article 13 TEC directives refer to Art. 3(2) TEC: recital 5 to Directive 2004/113; recital 14 to Directive 2000/43, recital 3 to Directive 2000/78.

Similarly, Article 3(2) of the Treaty requires the Community to aim to eliminate inequalities and to promote equality between men and women in all its activities.’

The **Greek** expert points out that we cannot speak of a ‘hierarchy of grounds’ in this context, ‘as there can be no ‘hierarchy’ between different concepts’. Notwithstanding this, a hierarchy of protection appears to have been created between the race and gender directives. Thus Directive 2004/113/EC applies (Article 3):

‘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 (...)

By contrast, Directive 2000/43/EC (the Race Directive) applies (leaving aside employment, broadly defined):

‘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.’

In some states the domestic reflection of EU provisions has resulted in greater legal protection being afforded in respect of race than gender discrimination (**Latvia, Luxembourg**), though the **Latvian** expert stated that ‘we cannot conclude in the sense that race discrimination is considered more important than sex discrimination’ because of the cross-cutting nature of gender which ‘should be always taken onto account when tackling these other sources of discrimination.’ **Luxembourg’s** expert pointed out that, if the proposed directive implementing the principle of equal treatment on grounds of religion or belief, disability, age or sexual orientation is adopted, ‘gender will attract the lowest level of protection of all grounds in the field of goods and services. This suggests that gender equality, which concerns half of the population, is less important than the protection of minorities. This is not coherent and may as a result be perceived as a political message consisting in the statement that gender equality is not a priority any more’. She goes on to state that ‘It is a fact, at least in Luxembourg, that for example, advertising and media use sexual stereotypes more than they use race stereotypes for example’, sex stereotyping in this context however falling outside the Directive.

The **Finnish** national expert also reported a hierarchy with race attracting more protection from discrimination than sex (this is illustrated by the political willingness to use sex-based actuarial factors whereas ‘It is inconceivable that a similar argument

would be used to defend race or ethnic origin as criteria used in the insurance business'). In **France** sex is also said to be just below race in the hierarchy of protection but the lack of a coherent framework of legislation was criticised with a patchwork of legislation resulting in the application of differential rules to the various grounds. The **Belgian** expert reports that a wider range of penal as well as civil remedies is available in relation to race discrimination than to sex discrimination, this being of significance given the extent to which Belgium tends to rely on inspectorates for enforcement. And the **German** expert also reported that protection from discrimination on grounds of race exceeded that provided in relation to sex, the former applying to 'all contracts in the areas of social protection, social security and health services, social advantages and education, as well as goods and services' while sex discrimination is regulated in these spheres only in relation to 'mass contracts' (see above). While, as explained above, the expert does not regard the difference as being of enormous practical significance, she draws attention to the importance of the hierarchy in EC law in terms of 'the symbolic value of European Law for the public debate and perception of discrimination must not be underestimated, irrespective of the extent to which national law may have gone beyond it.' **UK** law similarly protects against discrimination on grounds of race more thoroughly than on any other ground including gender.

In **Sweden**, equal treatment among the different grounds has long been the ambition of legislators and according to the national expert was a driving force behind the 2008 Act. While differences occur between the regulation of sex and race discrimination no hierarchy exists between them except in relation to discrimination in insurance. The **Netherlands'** General Equal Treatment Act is in principle equally applicable to all protected grounds (religion, belief, political opinion, race, sex, nationality, heterosexual or homosexual orientation or civil status), though there is some variation as regards exceptions. As the national expert states: 'Different kinds of discrimination might need a different approach; some social characteristics of a particular kind of discrimination might be tackled by a specific legal approach. For instance, sex-segregated services such as changing rooms in sports halls are often desired by both sexes, but "race-segregated services" are by no means acceptable. This difference results from a different social manifestation of discrimination on a particular ground, but that does doesn't mean necessarily that race as a ground of discrimination is more serious than sex'. A similar legal situation prevails in **Hungary** (though note the situation in practice below).

In **Ireland** gender trumps race in the hierarchy of discrimination because the potential compensation is unlimited (in race it is capped at 6,348 Euro) but there is limited specific provision regarding pregnancy or maternity outside the employment context and the vast majority of goods and services claims concern discrimination against travellers and persons with disabilities. In **Denmark** no hierarchy is regarded as existing between sex and race though the national expert reports that prohibitions on gender discrimination in goods and services were slightly stronger than those relating to race, which were being brought up to the gender standard over time, enforcement mechanisms being equalised in January 2009 but positive obligations being imposed on public and semi-public bodies as regards mainstreaming on grounds of sex but not race. In **Greece** the constitutional guarantees of gender equality in all areas are very strong, in particular because of the requirement of positive action imposed.

Italian law prohibits all sex discrimination which 'give(s) rise to, or (is) aimed at, hampering the enforcement of fundamental rights in the political, economic, social,

cultural and civil fields and in all other fields', but detailed legislative provisions are more extensive in the case of race than of gender and different rules apply regarding justification. The Italian national expert suggests that the creation of a hierarchy of protection breaches the Constitution. A similar point is raised by the Estonian expert as regards **Estonia's** legislation which (like EU law) protects gender and race more extensively than disability, sexual orientation, religion or belief and age. Estonia's expert suggests that this hierarchy might, in addition, create difficulties in relation to cases of multiple discrimination. She suggests that EU law should be reviewed and differences permitted 'only in cases where the differentiation in treatment has a legitimate aim and is proportionate.'

Even where there is no significant difference between different protected grounds (in particular race and sex/gender), a number of national experts report the existence of a *de facto* hierarchy. Thus, for example, in **Poland** the national expert reports that more effective activities aimed at combating discrimination in access to and the supply of goods and services have been undertaken by the responsible governmental agencies in relation to discrimination on grounds of race and disability than in relation to gender. Similarly **Hungary's** national expert suggests a prioritisation by the state of the 'fight against racial and disability discrimination' over that against sex discrimination, referring to recognition of the discrimination experienced by Roma people in access to goods and services and drawing attention to Hungary's 'more traditional and gender biased public culture', to the role of the media in sustaining this culture, and to a lack of knowledge among lawyers about equality resulting from Hungary's 'pre-transition past'.

9. Conclusion

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'. **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.

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.

In the second part of this report the national contributions of the experts from the European Network of Legal Experts in the field of Gender Equality offer further information on developments and case law in the access to and supply of goods and services at national level.

Part II

Reports from the Experts of the Member States and EEA Countries

AUSTRIA – Anna Sporrer

PART I: DIRECTIVE 2004/113/EC

1. Transposition of Directive 2004/113/EC

Two acts have been passed aimed at transposing Directive 2004/113/EC:

Firstly, the Act on amending the law on insurances 2006 (*Versicherungsrechts-Änderungsgesetz 2006*, OJ I 95/2006), amending the Act on Insurance Contracts 1958 (*Versicherungsvertragsgesetz 1958*) and the insurance monitoring act (*Versicherungsaufsichtsgesetz*). These amendments are aimed at implementing Directive 2004/113/EC into the Austrian legal system in the field of private insurances.

Secondly, the Federal Act amending the Equal Treatment Act as well as the Act on the Equal Treatment Commission and the Equal Treatment Ombudsperson (*Bundesgesetz, mit dem das Gleichbehandlungsgesetz und das Bundesgesetz über die Gleichbehandlungskommission und die Gleichbehandlungsanwaltschaft geändert werden*), OJ I 98/2008.

2. Correct transposition?

In general, Austria has correctly transposed the relevant provisions of the Directive, and at first sight there are no concerns. The transposition merely resulted in the provisions being ‘copied out’, which seems to be justified, as any specification in legislation would have endangered a broad application of the law. The effectiveness of the new provisions will depend on their application by the courts and other legal bodies.

3. Definition of ‘goods’ and ‘services’

There is no definition of the terms ‘goods’ and ‘services’ in the law, but the terms are specified in the explanatory notes to the law, which are to be found in the parliamentary materials (see http://www.parlament.gv.at/PG/DE/XXIII/I/I_00415/fname_096505.pdf), which also refer to ECJ jurisdiction as a source of interpretation.

4. Protection of specific groups

Transgender people are implicitly protected by interpretation of the term ‘gender’ in the light of ECJ jurisdiction. In order to make this clear for the transgender community, the Federal Ombudswoman for Gender Equality Affairs held a meeting with the leading NGO named ‘Trans-X’ on questions of legal protection of transgender persons in employment and in the access to goods and services. Furthermore the Ombudsboddy on Equality Affairs is going to publish the new provisions in their publications, which are distributed *inter alia* to employers’ associations.

Pregnant women and women on maternity leave are expressly covered by the law, which states that discrimination of these persons constitutes direct discrimination on grounds of sex (§ 40b Equal Treatment Act).

5. Definitions of pregnancy and maternity

The terms ‘pregnancy’ and ‘maternity’ have not been further defined by law, but will be interpreted in the light of other laws (e.g. the Mothers Protection Act) and will cover all biological and legal mothers.

The prohibition of discrimination on grounds of pregnancy and maternity is distinct from the employment context and this is accentuated by the systematic placement of the relevant provisions in the chapter on equal treatment on the access of goods and services (Equal Treatment Act, Part IIIa).

Discrimination might occur in the context of access to housing e.g. as pregnant women/mothers might be refused when renting a house or an apartment, because the owner of the house might fear the noise caused by children.

6. Use of a comparator

Pregnancy and maternity by law are explicitly defined as *direct* discrimination (§ 40b Equal Treatment Act), and therefore no comparator is used.

7. Action against failure to implement the Directive

As the legal provisions on non-discriminatory access to goods and services only came into force on 3 July 2008, there has only been one person or group of predominately male persons, who informally complained about the delay in implementation at the Equality Body and the ministry. In the meantime, one male claimant from this group filed a claim on state liability against the Republic of Austria, claiming discrimination on grounds of sex when buying tickets for football games at higher prices than women need to pay. He claims damages of EUR 20 in total (case pending before the Constitutional Court A 1/09).

8. Enforcement by equality bodies

Any individual who feels discriminated in the context of access to goods and services on the grounds of sex can file an application with the Equal Treatment Commission to examine the case and deliver an expert opinion on the case, whether or not the law has been violated (§ 12 Paragraph 1 Act on the Equal Treatment Commission and the Equal Treatment Ombudsperson).

The Ombudspersons can file an application with the Equal Treatment Commission even without an actual victim of a violation of the law and the Equal Treatment Commission can deliver a non-binding legal opinion (§ 11 Paragraph 1 Act on the Equal Treatment Commission and the Equal Treatment Ombudsperson).

9. Discrimination based on association/perceived status

The law does not expressly prohibit discrimination on the basis of association with a transsexual person or a person or persons of a particular sex, and/or discrimination of perceived sex or transsexual status in access to goods and services.

10. Protection of women regarding pregnancy and maternity

Article 4(2) of the Directive has not been transposed; therefore there are no examples of more favourable provisions as regards pregnancy and maternity.

11. Exceptions to the principle of equal treatment (Article 4 (5))

The exception of Article 4(5) of the Directive has been implemented into national law (§ 40d Equal Treatment Act). In this context, the explanatory notes to the new provisions refer to organisations for the protection and support of victims of sexual

and domestic violence. Transsexual people are not explicitly mentioned, but will be covered implicitly by an interpretation of the term ‘gender’ in the light of ECJ jurisdiction.

12. Positive action

The permission of positive action has been implemented explicitly and is modelled after the relevant provisions in the field of combating gender discrimination in working relations (§ 40e Equal Treatment Act). The law and the explanatory notes to it do not refer to certain situations or examples.

13. Burden of proof

The shift of the burden of proof has also been implemented (§ 40g Paragraph 3 Equal Treatment Act). As a means of effective enforcement of equality law this is considered as important as it is in employment cases.

14. Harassment, instruction to discriminate and victimisation

The provisions on harassment and sexual harassment have been copied from the Directive into national legislation (§ 40f Equal Treatment Act). The Ombudsperson has informally reported on a case where an electrician, who came to the house of a family to do repair work, had harassed the daughter of the house. The Ombudsperson gave the father advice and in the end the electrician apologised for his discriminatory behaviour and provided for material compensation. No direct intervention of the Ombudsperson or any other formal procedure was needed. The Ombudsperson reported that in this case reference to the existing law, which provides for minimum damages of EUR 720, was sufficient to convince the electrician to comply with his obligations.

The instruction to discriminate is explicitly defined as a form of discrimination (§ 40c Paragraph 3 Equal Treatment Act).

A case is pending before the Equal Treatment commission on the question of free access of women to a night club (whereas men had to pay), where the question of instruction to discrimination is raised, as the owner of the club instructed the employees at the cash desk. The Ombudsperson also filed a request for an expert opinion with the Equal Treatment commission on cheaper tickets for women in public transport due to their earlier pensionable age.

In cases of discrimination, the law also prohibits discrimination of claimants or victims (§ 40h Equal Treatment Act). As up to now in general there have not been many cases concerning gender-specific discrimination in the field of access to goods and services, there are only a few cases pending before the Equal Treatment Commission. No cases of victimisation in this context have been brought to the attention of the courts or Equality Bodies.

15. Overall assessment

Directive 2004/114/EC and its implementing legislation have created a new field of law in Austria, which was not regulated and enforced before. In particular, there previously was no regulation obliging private individuals or enterprises to respect the principle of non-discrimination on grounds of gender beyond the labour world. This new body of legislation can also be regarded as a means to transpose the UN Convention on the Elimination of all Forms of Discrimination of Women (CEDAW) into Austrian law and to specify the principle of *de facto* equality between women and men, which is enshrined in Article 7 Paragraph 2 of the Austrian Federal Constitution.

Regarding the implementation of the Directive in insurance law there was great public interest and debate, in particular on the actuarial factors and equal access to goods and services as such. Depending on the outcome of pending and future cases, new public debate, and therefore raising awareness, are to be expected. It seems that the Directive will have a remarkable impact on Austrian law and society.

PART II: SCOPE OF NATIONAL LEGISLATION

1. Scope of national legislation beyond the scope of EU gender equality directives?

The new provisions are explicitly neither applicable to private law, family law, media and advertising, nor to public and private education. Social advantages outside these fields will be covered by these provisions. Therefore, the new legislation does not go beyond the material scope of Directive 2004/113/EC

2. ‘Hierarchy’ of grounds?

The requirements deriving from EC law create differences in legal protection concerning the different grounds of discrimination, but it also has to be emphasised that – when comparing the new anti-discrimination Directives with the Fundamental Rights Charter and the future Constitution of Europe – EC law itself creates or will create certain forms of differences between the various grounds.

Nevertheless, one should not regard this legal situation as re-establishment of a ‘hierarchy’ of grounds, but as an opportunity to upgrade the standards of legal protection piece by piece. When examining the development of EC legislation in the field of non-discrimination it turns out that for a long time there have only been regulations on equality between the sexes. As a consequence of the Fundamental Rights Charter, more grounds of discrimination were covered by the new Directives in 2000, followed by improvements in the field of gender discrimination by Directives in 2002, 2004 and 2006. It may also be assumed, that the legal developments in the field of non-discrimination of the various persons or groups of persons will develop further on a national, international and EC level.

In the meantime, different levels and scopes of discrimination regarding the different grounds will indeed exist. The practical problems arising from this situation, in particular the information for and legal support of affected individuals, have to be dealt with by the different actors like the Equality Bodies, the organisations dealing with the labour world and consumer protection, the courts and others.

3. Comments and/or suggestions

Regarding Recital no. 28 of the Directive, which explicitly refers to a common high level of protection against discrimination in all Member States, the different material scope of application of the Directive or different discriminated persons or groups of discriminated persons seems to be unsatisfactory. Therefore, on a national level, the Austrian Federation of Women’s Rights Organisations (*Österreichischer Frauenring*) proposed that legal measures against gender discrimination in media and advertising should be included in the Equal Treatment Act.

Therefore, new attempts should be considered in order to provide for a uniform common level of protection against discrimination, at least for all grounds covered by the current directives. With regard to a comprehensive human rights perspective, the European legislator should further consider how to handle all the other grounds covered by the Fundamental Rights Charter, but not (yet) included in the directives.

PART I: DIRECTIVE 2004/113/EC

Preliminary note

While most of the subjects included in the substantial scope of Directive 2004/113/EC fall within the Belgian federal authorities' jurisdiction, several important matters (such as culture in the most general sense, sport and public housing) must be regulated by the Regions and Communities.

So far, the following federate authorities have adopted legislation aimed at implementing Directive 2004/113 (among other 'gender' and 'anti-discrimination' directives):

- The Flemish Community and Region: *decreet* of 10 July 2008;
- The French-speaking Community: *décret* of 12 December 2008;
- The Walloon Region: *décret* of 6 November 2008, as amended by *décret* of 19 March 2009;
- The Brussels-Capital Region: *ordonnance/ordonnantie* of 17 July 2007 (Brussels Code of Housing), as amended by an *ordonnance/ordonnantie* of 10 March 2009.

It is immediately obvious that Directive 2004/113 has not been implemented at all in certain parts of the Member State as far as certain subjects are concerned, perhaps most blatantly in the German-speaking Community. Moreover, all the various pieces of legislation mentioned above were adopted well after the deadline of 21 December 2007.

Finally, concerning goods and services, the three 'federate' *décrets* simply copied the provisions of the federal Act of 10 May 2007. Consequently, the expert found that he could concentrate on the latter in his answers to the questionnaire.

1. Transposition of Directive 2004/113/EC

The Directive has been transposed within the federal Parliament's jurisdiction (see 'Preliminary note' above). Initially, the Anti-Discrimination Act of 25 February 2003, which quoted 'sex' among many criteria, included goods and services in its substantial scope. That first attempt was then repealed and replaced by the three Acts of 10 May 2007, one of which, aimed at combating discrimination between women and men (colloquially, the 'Gender Act'), purports to transpose all EU gender legislation, including Directive 2004/113.

2. Correct transposition?

The Directive requires a distinction between the substantive provisions and the procedural ones (on protection and remedies). As to the former, copying out was used; as to the latter, the procedural-law provisions, which apply to all matters covered by the Gender Act, are more imaginative.

In the absence of any case law, assessing the effectiveness of the transposition is impossible. However, one may recall that in its opinion n°83 of 12 March 2004, the Equal Opportunity Council criticized the proposal of a 'Good and Services' Directive for the abstract character of its substantive provisions; later on, in its opinion n°113 of 7 July 2006, the Council expressed the same criticism on the draft Gender Act. Thus, given that gender discrimination in the access to and supply of goods and services does not seem to have led to any recorded litigation in Belgium, it is hardly surprising that copying out was chosen as the safest method of transposition.

3. Definitions of ‘goods’ and ‘services’

Although Article 5 of the Gender Act provides definitions for a number of concepts, there is no definition for goods and services.

However, one should mention that the substantial scope of the Gender Act is broader than that of Directive 2004/113, and indeed that of all EU ‘gender’ legislation, as Article 6(1) includes not only access to and supply of goods and services available to the public (1°), but also ‘access to, participation in and any other exercise of an economic, social, cultural or political activity available to the public’ (8°).

4. Protection of specific groups

Under Article 4(2) of the Act, any ‘direct distinction’ based on transsexuality is regarded as a direct distinction based on sex; under Article 8, applicable to goods and services, the latter ‘direct distinction’ constitutes direct discrimination.

The same rules apply to pregnancy, giving birth and maternity, under Article 4(1) combined with Article 8. Thus, the legislation only deals with direct discrimination for these grounds. This does not preclude that an unfavourable treatment related to maternity might be identified as indirect discrimination.

5. Definitions of pregnancy and maternity

Given that Article 4(1) is a general substantive provision of the Act, there is no specific application to the field of goods and services,¹ and there certainly is no provision concerning discrimination related to breastfeeding. In the employment context, there is legislation on the protection of maternity. However, it does not provide any definition of maternity, pregnancy or giving birth (except that, to establish a distinction between a miscarriage and the delivery of a stillborn child, the notion of a period of 180 days following conception is used).

The expert is convinced that there is no common awareness of any risks of discrimination related to maternity in the access to or provision of goods and services. To give an elementary example: while the public transport regulations always (probably since the opening of the first railway line) provided for a number of seats the use of which was reserved to ‘aged persons, cripples, pregnant women and persons carrying small children’, one can hardly quote any instance of similar provisions in places where customers must queue frequently, such as post offices or busy groceries.

6. Use of a comparator

Article 4(1) of the Gender Act was copied from previous legislation on equal treatment of men and women in employment, i.e. the Act of 7 May 1999, now repealed; so was Article 17, under which the statutory provisions aimed at protecting pregnancy and maternity are not conducive to gender discrimination but are a condition for the achievement of equal treatment of men and women. Those provisions are firmly based on the ECJ’s *Dekker* case law (in case C-177/88 [1990-I-3941]), so that no comparator is needed.

¹ Except in Article 10(2), which is a copy of Article 5 (1) of the Directive, not covered by this report.

7. Action against failure to implement the Directive

There has never been any such action, given that insurances are not covered by this report.²

8. Enforcement by equality bodies

Under Article 34 of the Gender Act and Article 4 of its own foundation Act, of 16 December 2002, the Institute for Equality of Women and Men has competence to bring actions in all matters covered by the Gender Act. Such provisions are copies of those which concern the Centre for Equal Opportunities and Struggle against Racism, created by an Act of 15 February 1993 and made competent by the other two Acts of 10 May 2007, which transposed Directives 2000/43/EC and 2000/78/EC, respectively. After the ECJ, in case C-54/07 *Centrum voor gelijkheid van kansen en voor racismebestrijding c/Firma Feryn N.V.* [2008, unreported], answered the questions which the Labour Court of Appeal in Brussels had referred for a preliminary ruling after the Centre had brought an action against an employer for racial discrimination in job advertising, there is no doubt that the ECJ's interpretation also applies to the Institute³ including in the goods and services field.

9. Discrimination based on association/perceived status

There is no express prohibition of discrimination by association or perception, but the existing provisions of the Gender Act seem to be sufficient to cover such hypothetical situations,⁴ including the goods and services field.

10. Protection of women regarding pregnancy and maternity

There is nothing to add to the information given under 5 above.

11. Exceptions to the principle of equal treatment (Article 4 (5))

As mentioned above, under Article 8 of the Gender Act, any 'direct distinction' based on sex (or transsexuality) in the goods and services field constitutes direct discrimination. By way of exception, Article 9(1), a literal copy of Article 4(5) of the Directive, allows for situations in which the provision of and access to goods and services may be reserved to members of one sex. However, under Article 9(2), a comprehensive list of such situations must be provided in an ancillary Royal Decree, which so far has not been promulgated. Meanwhile, under Article 9(3), it was for the courts to assess if any exceptions could be allowed, but this power could only be exercised until 21 December 2007. Consequently, at the time of writing the prohibition of discrimination remains absolute.

Given the assimilation of discrimination based on transsexuality with sex discrimination (see above), Article 9 appears to be applicable to such a hypothetical situation, but the expert is unable to report on any possible application.

² *Test-Achats/Aankoop*, the main consumer defence association, has applied to the Constitutional Court for annulment of the Act of 21 December 2007, which modified Article 10 of the Gender Act so that the use of the exception allowed for in Article 5(2) of Directive 2004/113 became permanent. The Constitutional Court's judgment is expected in the first half of 2009.

³ See the comment of *Feryn* by L. Markey, *Chroniques de droit social*, 2009, p.119.

⁴ See C. Lardin, 'Harcèlement moral et discrimination pour autrui', *Chroniques de droit social*, 2009, p. 74.

12. Positive action

Article 16 of the Gender Act allows for positive action as a general motive of justification of ‘distinction’ in all matters covered by the substantive scope of the Act. In order to comply with the Constitutional Court’s previous case law (on a subject unrelated with gender), the wording of the provision is far more extensive (and forbidding) than Article 6 of Directive 2004/113, but it does not contradict the ECJ’s case law on positive action.

However, under Article 16(3) of the Act, a Royal Decree is required to define in what hypothetical situations and under what conditions positive action may be taken. No such Royal Decree has been adopted yet (and, indeed, no Royal Decree had been adopted under the similar provisions of the previous Act of 25 February 2003), so that there is no positive action to report in the goods and services field.

13. Burden of proof

Article 33(1) of the Gender Act complies with Article 9 of the Directive; it is applicable to proceedings initiated by persons who claim to be victims of discrimination, by interested associations or by the Institute.

Again, the absence of any case law in the goods and services field precludes any informed assessment. Tentatively, the expert would believe, as is true for employment cases, that EU law provisions will not exactly have earth-shattering effects in Belgium, given the existing domestic provisions: Article 1315 of the Civil Code, under which the party who claims to be the creditor of an obligation must prove it, and so must the party who claims to be free of an obligation; Article 870 of the Judicial Code, under which every party in the proceedings must contribute to the proof; and Article 871 of the same, under which the court may instruct every party to produce any element of proof in their possession.

14. Harassment, instruction to discriminate and victimisation

Article 5 of the Gender Act provides definitions of harassment (9°) and sexual harassment (10°) which are copied from the EU ‘gender’ directives, including Directive 2004/113 (Article 2, c and d). Under Article 19 of the Act (a general procedural provision), any form of discrimination is prohibited in the whole substantive scope of the Act, and the notion ‘discrimination’ includes harassment and sexual harassment.

That being said, there is extensive case law related with employment matters, but not a single reported occurrence of harassment or sexual harassment in the goods and services field. The expert can only mention one distantly related case in which after the Institute initiated proceedings, the Commercial Court of Brussels, ruled⁵ against a DVD rental firm and a publicity agency that suggested men to ‘Rent a Wife’ from a large selection available (for ‘wife’ the visitors of the related website then discovered they had to read ‘DVD’). However, the issue involved blatant sexism (or extremely bad taste), rather than discrimination or sexual harassment in the sense of the Directive.

Instructions to discriminate are dealt with in the same way as harassment and sexual harassment: a definition is given in Article 5, 12°; instructions to discriminate are mentioned in Article 19 as prohibited discrimination in all matters covered by the Act. There is not a single known example to report.

⁵ Commercial Court of Brussels, 26 September 2007, *Journal des tribunaux*, 2008, p. 107; *Rechtskundig Weekblad*, 2007-08, p. 1212 with comments by J. Vrielinck and S. Sottiaux.

The Gender Act was drafted with great attention for the anti-victimisation provisions. While Article 22 is applicable to employment cases, Article 21 deals with other situations, including complaints about discrimination in the goods and services field. Those provisions appear to comply with Article 10 of the Directive; however, it remains to be seen whether the minimum fixed damages (EUR 1 300, or EUR 650 if the perpetrator can demonstrate that the unfavourable treatment would have been applied even in the absence of discrimination) can produce the deterring effect required by Article 14. Again, it is impossible to report any example of victimisation.

15. Overall assessment

Apart from the issue of the use of gender-related actuarial factors in insurances, the transposition of the Directive does not appear to have produced any significant impact in Belgium.

According to the Institute for Equality of Women and Men's *Activity Report 2007*,⁶ during that year 27 persons filed complaints concerning the access to goods and services: 4 women and 23 men. The absolute figures have no real meaning, as the Institute is not widely known yet, but the gender breakdown suggests that there are men who complain about initiatives such as reduced prices for women in cafés and restaurants and at football matches and 'women and children only' hours in swimming pools, while very few women find reasons to grouse.

Assessing the impact of the Directive and its transposition might be easier if one of the existing inspectorates had been assigned to safeguard compliance with the provisions of the Gender Act, as required by its Article 38(1), and so could report on its findings. However, while an ancillary Royal Decree was promulgated belatedly on 24 October 2008, it only applies to employment matters.

PART II: SCOPE OF NATIONAL LEGISLATION

1. Scope of national legislation beyond the scope of EU gender equality directives?

Answering this question requires some elucidation on the aims and architecture of the three Acts of 10 May 2007. By 2006, it was found necessary to replace the existing bits of federal legislation with a more coherent and comprehensive set, conforming to the structure of EU law (i.e. the 'gender' directives; Directive 2000/43; and Directive 2000/78) without abandoning any of the national *acquis* even if it went beyond the scope of EU law. Maximal uniformity would be sought, so that the three new Acts would have the same substantive scope, unless differences were inevitable for various reasons (e.g. while all three mention harassment, only the Gender Act also covers sexual harassment).

Generally, this meant upward equalisation of the substantive scope, so that like the other two, the Gender Act (including its 'goods and services' provisions when relevant):

- is applicable to social protection including statutory and professional social security schemes and healthcare;
- is also applicable to social benefits in the sense of Article 7(2) of Regulation n°1612/68/EEC;

⁶ The Institute for Equality of Women and Men, *Activity Report 2007* (in French and Dutch), available at: <http://iefh.belgium.be> or igvm.belgium.be; 1 February 2009.

- does not exclude the contents of media, advertising or education (however, it should be remembered that radio and television on the one hand, and nearly all educational matters on the other, fall under the respective jurisdictions of the Communities⁷);
- is applicable to ‘access to, participation in and any other exercise of an economic, social, cultural or political activity available to the public’, i.e. as many fields not covered by the ‘Gender’ directives including Directive 2004/113;
- includes in its substantive scope ‘any mention in an official document or record’, a detail which does not appear in any EU directive.

2. ‘Hierarchy’ of grounds?

Again, the expert cannot give any ‘practical’ information (as there is no case law) but must stick to a theoretical level.

The notion of a hierarchy of grounds seems to have arisen from the ECJ’s decision in *Mangold* C-144/04 (2005-I-9981), which appeared to suggest that the prohibition of discrimination related to age was more fundamental in EU law than any other ground. The architecture of the three Acts of 10 May 2007, as described under Part II-1, precludes any construction of such a hierarchy in Belgian law, so that the level of protection against gender-related discrimination (including in access to and supply of goods and services) is the same as against discrimination based on other criteria.

However, history intervened in the following way. The previous two Acts (of 4 August 1978 and 7 May 1999) on equal treatment of men and women in employment both relied on civil and penal remedies, but the latter had been used very infrequently; the same applied (although for a much shorter period) to the Anti-Discrimination Act of 25 February 2003. Consequently, the three bills of law were drafted such as to strengthen the civil remedies and abandon nearly all penal provisions of the previous Acts. Now, as far as the struggle against racial discrimination was concerned, the original Act, of 30 July 1981, had an exclusively penal nature, and had given ground to some (but not much) penal case law. Thus, when the three bills of law were discussed in Parliament, the proposed reduction of the penal remedies to racial discrimination aroused a wave of indignant emotion in antiracist circles, and the Federal Government had to back down and reinstate the whole penal machinery in the draft ‘Race’ Act.

Thus, the choice of remedies against racial discrimination is indeed wider than when other grounds (including gender) are involved. As stated above, the much reduced availability of penal remedies should not result in any severe negative effects as far as gender discrimination in employment is concerned; whether the same applies in the goods and services field remains to be seen.

However, a last aspect should be pointed out. Under 15, it was mentioned that so far, there is no Royal Decree assigning one of the existing inspectorates to safeguard compliance with the ‘goods and services’ provisions of the Gender Act. Now, Belgium has instituted a large number of inspectorates, in employment and social security matters as well as in other fields, such as the Economic Inspectorate which,

⁷ As mentioned in the preliminary note, the Flemish *decreet* of 10 July 2008 and the *décret* of the French-speaking Community, of 12 December 2008, only paid lip service to Directive 2004/113. However, each of them is applicable to all matters which fall within its respective Community’s jurisdiction. Given such a casualness in the definition of their substantive scopes, one must wonder whether the two concerned parliaments were aware of what the application of the Directive to education and the content of audio-visual media might imply.

for instance, is competent to enforce the legislation on the protection of consumers' rights. But the effectiveness of those various inspectorates' actions relies heavily on the existence of penal provisions, as an inspector's report on an employer's (or a tradesman's) failure to comply may give rise to indictment. Of course, an inspector may still warn the same employer (or tradesman) that he is breaching civil provisions (e.g. of the Gender Act, e.g. in the goods and services field), but this is hardly an impressive sword to wield.

3. Comments and/or suggestions

For the reasons repeatedly stated above, maybe the expert will be excused for not finding any other comments or suggestions to express.

References:

- Three Federal Acts of 10 May 2007;
 - Flemish Community and Region, *decreet* of 10 July 2008;
 - French-speaking Community, *décret* of 12 December 2008;
 - Walloon Region, *décret* of 6 November 2008, as amended by *décret* of 19 March 2009;
 - Brussels-Capital Region, *ordonnance-ordonnantie* of 17 July (Brussels Code of Housing), as amended by *ordonnance-ordonnantie* of 10 March 2009.
- All available (in French or Dutch) at <http://www.juridat.be>.
- Opinions n°83 and n°113 of the Equal Opportunities Council, <http://www.conseildelegalite.be> or www.raadvandegelijkekansen.be;
 - Activity Report 2007 of the Institute for Equality of Women and Men, in French and Dutch), <http://iefh.belgium.be> or igvm.belgium.be

BULGARIA – Genoveva Tisheva

PART I: DIRECTIVE 2004/113/EC

1. Transposition of Directive 2004/113/EC

The Law on Protection against Discrimination (LPAD), in force since 1 January 2004, is in compliance with the Directive. Amendments were introduced to this law in late 2007 (SG No. 100/ 2007) for the transposition of the exclusion in Article 4 Paragraph 5 of the Directive.

Amendments to the Code of Social Insurance were made at the end of 2007, in order to explicitly introduce the principle of equality in the sphere of the voluntary social insurance.

Equal access to health services and equality in the provision of such services are stipulated in the Law of Health (Articles 2 and 81), in force since 1 January 2005.

2. Correct transposition?

The Directive has been correctly transposed. The LPAD was elaborated and passed prior to the adoption and the term for transposition of the Directive, so it does not represent, with some exceptions, a 'copy out' of the EU standard. We do not think the transposition itself is a problem. We do believe, however, that the very abstract formulation of the provisions and the limited scope of the Directive, also due to its exceptions, cause a lack of practice in the field.

3. Definitions of ‘goods’ and ‘services’

There is no special definition of goods and services in the context of the application of the Directive and in accordance with ECJ case law.

There are definitions of ‘goods’ and ‘services’ in the Law on Consumer Protection, in force since June 2006. The definitions proposed in this law are not related to the EU definitions, as they are valid only in the context of consumer protection.

4. Protection of specific groups

Explicit protection exists for pregnant women and for those who have recently given birth. This principle is enshrined in the Constitution, e.g. Article 14 declares that ‘The family, motherhood and children shall enjoy the protection of the state and society’, and Article 47 (2) that ‘Mothers shall be the object of special protection on the part of the state and shall be guaranteed prenatal and postnatal leave, free obstetric care, alleviated working conditions and other social assistance’.

The LPAD (Article 7 Paragraph 1 p. 7) declares as non discriminatory the ‘special protection of pregnant women and mothers established by law, unless a pregnant woman or a mother is not willing to make use of such protection and has duly, in writing, notified the employer of that’.

Articles 2 and 81 of the Law of Health confirm this principle of explicit protection in the health sphere: ‘(...) accessible and qualitative health care, with priority for children, pregnant women and mothers of children up to one year’.

No explicit or implicit protection is provided for transsexual people. The general ban on discrimination in the Constitution, in the LPAD and other special laws is not sufficient, given the particularly vulnerable situation of transsexual people.

5. Definitions of pregnancy and maternity

Such explicit definition does not exist in the law. There is no explicit protection for breastfeeding mothers. The general provisions on special protection are clear but it would be good to introduce these definitions into Bulgarian law. The scope of protection should also be more clearly defined. It is our opinion that sometimes women might suffer from overprotection, since there is no explicit definition of their status and of the scope of protection.

6. Use of a comparator

Not applicable.

7. Actions against failure to implement the Directive

There are no specific cases based on sex discrimination in the field of access and provision of services. As mentioned before, the scope is not clear enough and this is the reason why there are none.

There have been two areas where there is isolated court practice and practice of the equality body (the Commission for Protection against Discrimination). The first one is the sphere of the gender quota in university education which encourage persons from the underrepresented sex in order to achieve a balance of women and men. The case law on the issue is contradictory but the prevailing trend is to justify the quota in education if they have the potential to avoid future gender segregation of labour in the respective sector.

The other direction of the practice is related to discrimination and harassment of women through advertising. There are cases still pending before the Commission for PAD.

Another potential field of discrimination is harassment and sexual harassment in education. The LPAD has explicit provisions against harassment in the sphere of education.

8. Enforcement by equality bodies

In principle, the Commission has the power to bring enforcement actions in the public interest. According to the law, the Commission can initiate proceedings for discrimination. The practice of the Supreme Administrative Court where the decisions of the Commission can be appealed, shows that the Court requires, along with the general interest, the identification of a concrete victim as well.

9. Discrimination based on association/perceived status

There are no provisions on this matter.

10. Protection of women regarding pregnancy and maternity

No explicit reference is made to Article 4(2) of the Directive. The favourable treatment of pregnant women and mothers, especially in the field of access to health, has been described above.

11. Exceptions to the principle of equal treatment (Article 4(5))

No explicit reference is made to Article 4(5). The field of actuarial factors in insurance was the only one which was subject to some discussion. The exception is valid in this sphere.

12. Positive action

No explicit reference is made to positive action in the field. The only provision which existed in the LPAD prior to the Directive is related to positive measures in order to ensure gender balance in education.

13. Burden of proof

The alleviated burden of proof is provided for in the LPAD for all cases of discrimination and this is crucial also for proving discrimination in this sphere.

14. Harassment, instruction to discriminate and victimisation

There is a case pending before the Commission about sexist advertisements where the applicants also claim discrimination in the form of harassment and sexual harassment.

As mentioned above, harassment in the field of education is an important possible area.

There are no clear cases of instruction to discriminate. In the pending case for discrimination through sexist advertisements, the complainants claim instruction to discriminate by the media and the municipality that widely distributed the advertisements.

There are no cases of victimisation known.

15. Overall assessment

The Directive is relatively new and there is no substantial practice yet. If the scope is redefined and some limitations removed, e.g. in the area of media and advertising, it will introduce more substantial changes both in law and in practice.

PART II: SCOPE OF NATIONAL LEGISLATION

1. Scope of national legislation beyond the scope of EU gender equality directives?

The LPAD ensures protection against discrimination in all the spheres of life and from that point of view it goes beyond the scope of the Directive. On the other hand, the lack of explicit protection by EU law in some areas makes the cause less justifiable in courts and in the Commission. The areas of media, advertising and education should be included in the scope of the Directive as well.

2. ‘Hierarchy’ of grounds?

There is an evident hierarchy of grounds. As mentioned, the lack of protection of women in some important areas, like the media, education and advertising, generates serious problems of gender stereotyping as an irreversible tendency, which entails discrimination also in the other spheres of life.

The other areas that should be explicitly covered are also important and the protection by EU law and in practice is essential.

3. Comments and/or suggestions

Please see the above.

CYPRUS – Evangelia Lia Efstratiou-Georgiades

PART I: DIRECTIVE 2004/113/EC

1. Transposition of Directive 2004/113/EC

The Equal Treatment between Men and Women in the access to and supply of goods and services Law No. 18(I)/2008 was enacted by the House of Representatives of Cyprus for the purposes for transposing Directive 2004/113/EC into national law. This law was published in the Official Gazette of the Republic of Cyprus No. 4162, dated 2 May 2008, Appendix I(I).

2. Correct transposition?

The Law on Equal Treatment between Men and Women in the access to and supply of goods and services No. 18(I)/2008 has incorporated all the Articles of Directive 2004/113/EC.

The law applies to all persons who supply goods and services to the public, both in the public and the private sector and are offered outside private and family life. Every person is free to choose the person to make a contract with, provided the selection of the other contractual party is not made on the basis of sex. Also, the law does not prejudice any other more favourable provisions of any other law relating to pregnancy and maternity. The Law does not apply in education, in mass media and in advertising, in employment and in vocational activities. Any discrimination on the grounds of sex in applying the scope of the Law is forbidden, but the Law allows for

different treatment in providing goods or services to persons of one sex if there is a good justification for this. Also, positive actions are allowed if they serve the purposes of the Law. It also provides that persons who consider themselves wronged by failure to apply the principle of equal treatment can have access to judicial and/or administrative procedures, through which effective compensation or reparation can be obtained. Furthermore, the law provides penalties for infringement of the law in the form of a fine and/or imprisonment.

In my opinion, there has been substantive implementation of the provisions of Directive 2004/113/EC in Law No. 18(I)/2008, as outlined above, without any more favourable provisions than those of the Directive.

3. Definitions of ‘goods’ and ‘services’

The concepts of ‘goods’ and ‘services’ are defined in other national laws, depending on the scope and purpose of the relevant law and in some laws the definitions are broader.

Law No. 18(I)/2008 has no definition of the terms ‘goods’ and ‘services’ and there may be a need to fill this gap, taking into consideration the decisions of the ECJ on this matter.

There has not been any case law under Law No. 18(I)/2008 and so we cannot refer to any specific problems.

4. Protection of specific groups

As regards transsexual people, there is no explicit protection in Law No. 18(I)/2008, but there is implicit protection by virtue of Article 5 of the Law, which prohibits any discrimination on the grounds of sex against any person in the fields falling within the ambit of this Law. As regards pregnant women and women who have recently given birth, there is explicit protection in the Law under the definition of the term ‘discrimination on the ground of sex’, which means ‘any direct or indirect discrimination on the ground of sex, including less favourable treatment of women for reasons of pregnancy and maternity’.

In my opinion, the general prohibition in Article 5 of the Law gives sufficient protection to the above-mentioned groups and allows individuals to understand their rights and goods and services providers to understand their legal obligations.

5. Definitions of pregnancy and maternity

The definition of the term ‘discrimination on ground of sex’ in Article 2 of Law No. 18(I)/2008, includes every direct or indirect discrimination based on sex and explicitly includes the less favourable treatment of women for reasons of pregnancy and maternity, in relation to access to and supply of goods and services. This definition is not different from the definition of the same term in the Laws on the Equal Treatment of Men and Women in Employment and Occupational Training 2002-2007.

In Article 7(I) of Law No. 18(I)/2008, on the matter of contracts concluded after 21 December 2007, there is general prohibition for the use of sex as a factor in the calculation of premiums and benefits for the purposes of insurance and related financial services which results in differences in individual premiums and benefits, and where the Registrar of Insurance (who is responsible for inspecting and checking contracts of insurance companies) finds that there are such differences for reasons of sex, they will submit the matter to the Ombudsman for further examination. Also, in subsection 5 of the same Article 7, it is expressly stated that costs related to pregnancy

and maternity, which includes breastfeeding, shall not result in differences in individual premiums and benefits.

6. Use of a comparator

The Social Insurance Laws of 1980-2008, the Protection of Maternity Laws of 1997-2008, the Equal Treatment of Men and Women in Employment and Occupational Training Laws of 2002-2006 and the Equal Treatment between Men and Women in the access to and supply of services Law No. 18(I)/2008 use the words ‘pregnancy’ and ‘maternity’ in the same context. Each Law creates different rights in favour of women and different obligations on the employer and/or the services, so as to ensure the fulfilment of the purpose of each Law.

7. Actions against failure to implement the Directive

No action has been brought against Cyprus for failure to implement the Directive either by individuals, supporting them, or by the national equality body.

8. Enforcement by equality bodies

Persons who consider themselves wronged by failure to apply the principle of equal treatment to them under Law No. 18(I)/2008 can apply to the Ombudsman, who is the designated equality body in Cyprus. Also the Ombudsman has the competence to bring enforcement action in the public interest.

9. Discrimination based on association/perceived status

There is no such prohibition.

10. Protection of women regarding pregnancy and maternity

Law No. 18(I)/2008 gives protection to women as regards pregnancy and maternity in access to and supply of goods and services. Article 4(2) provides that the Law does not prejudice any more favourable provisions in other laws relating to pregnancy and maternity. Example of Laws giving more favourable provisions are the Protection of Maternity Laws No. 100(I)/1997 – 8(I)/2008, and the Safety and Health at Work Laws 1996-2002.

11. Exceptions to the principle of equal treatment (Article 4(5))

Cyprus has relied on the option of exceptions to the principle of equal treatment. Article 5(3) of Law No. 18(I)/2008 has fully transposed the provisions of Article 4(5) of the Directive, as mentioned under 2 above. Law No. 18(I)/2008 includes no provision or reference concerning transsexual people.

12. Positive action

Article 6 of Law No. 18(I)/2008 allows positive actions which serve the purposes of the Law. Also, Article 2 gives a definition of positive actions which complies with the provisions of Article 6 of the Directive. No reference is made to any specific situations.

13. Burden of proof

The burden of proof in goods and services cases is applied according to Article 9 of Directive 2004/113/EC. A relevant provision for the reversal of the burden of proof is included in Article 10 of Law No. 18(I)/2008. I consider this rule as important as in employment cases.

14. Harassment, instruction to discriminate and victimisation

Until now, there have been no examples of cases of harassment, instruction to discriminate and victimisation in the field of goods and services.

15. Overall assessment

There are no indications or information on any changes/improvements in terms of access to any supply of goods and services irrespective of a person's sex, so no assessment can be made of the impact the Directive has had in Cyprus on this matter.

PART II: SCOPE OF NATIONAL LEGISLATION

1. Scope of national legislation beyond the scope of EU gender equality directives?

The scope of national legislation goes beyond the scope of the EU directives. The Equal Treatment of Persons irrespective of Racial or Ethnic Origin Law of 2004 (No. 59(I)/2004) was voted in for the purpose of harmonizing national legislation with Directive 2000/43/EC. Law No. 59(I)/2004 applies in the private and in the public sector, including local authorities and public bodies in the fields of: a) social protection, b) medical treatment, c) social allowances, d) education, and e) access to and supply of goods and services which are available to the public, including accommodation. The Law does not apply in cases of different treatment because of nationality and does not prejudice the provisions and conditions which relate to the entry into and residence of third-country nationals and stateless persons in the Republic, nor the treatment which results from the legal position of such third-country nationals or stateless persons. Furthermore, it prohibits any direct or indirect discrimination or harassment against a person for reasons of racial or ethnic origin. Any different treatment or specific measures in order to prevent or compensate for disadvantages linked to racial or ethnic origin are not considered as discrimination.

The law provides for judicial and for out-of-court protection by the submission of complaints to the Ombudsman. The burden of proof is also reversed in this law. If the defendant is found guilty the court may impose just and reasonable compensation which may include all the damage, plus legal interest. The Law provides for penalties in cases of infringement of its provisions, in the form of a fine and/or imprisonment.

Comparing Law No. 59(I)/2004 to Law No. 18(I)/2008, we see that the first law covers areas not covered by the second law, such as education, social protection and social allowances.

The Ministry of Labour and Social Insurance of Cyprus administers a number of Laws which provide social protection to all citizens under specific schemes. The most important of these is the General Social Insurance Pension Scheme, the Special Allowance to Pensioners, the Public Assistance Scheme and the Social Pension Scheme. Whereas the first two Schemes cover people who have been employed and contributed to these Schemes and their dependants, the benefits under the other two Schemes are not linked to employment or contributions but reflect the Government's policy to provide to its citizens, especially elderly people, a decent standard of living. The Public Assistance Scheme provides financial assistance and/or social services to persons whose means are not sufficient to meet their basic and special needs. The Social Pension Scheme (SPS) ensures the universality of the pension system by providing non-means tested pensions to residents who, for any reason, did not participate in the labour market and as a consequence do not have a pension income from any source. The beneficiaries are mostly women (about 95%), who were either

urban housewives or non-insured wives or unmarried daughters of farmers engaged in family agricultural work.

Furthermore, the Ministry of Labour and Social Insurance provides the following social advantages for the welfare of mainly elderly people:

- Care for Elderly and Disabled persons in special homes;
- Grants to families for house extension and purchase of necessities for the care of their elderly and disabled members;
- Subsidy of holidays of elderly persons in Cyprus or abroad;
- Subsidy of self-employment of elderly persons;
- Free public transport for elderly people.

2. ‘Hierarchy’ of grounds?

As Law No. 18(I)/2008 was only recently enacted, we do not have experience or know of complaints relating to its application and there is no case law on this matter. As mentioned above, when comparing Law No. 59(I)/2004 to Law No. 18(I)/2008, we see that the first law covers areas not covered by the second law, such as education, social protection and social allowances.

Law No. 18(I)/2008 offers protection in access to and supply of goods and services by prohibiting any discrimination based on sex in the fields covered by this Law. The person who violates the law commits an offence and if found guilty may be sentenced to a fine or imprisonment. The person against whom a discrimination on ground of sex has been made, can go to Court or submit a complaint to the Ombudsman.

3. Comments and/or suggestions

No comments or suggestions.

CZECH REPUBLIC – *Kristina Koldinská*

PART I: *DIRECTIVE 2004/113/EC*

1. Transposition of Directive 2004/113/EC

The Directive has been transposed only partially. Some articles of the Directive have been transposed, at least partly, in separate pieces of legislation or by amendment to existing legislation. These amendments are very general, however, and they mostly just prohibit discrimination in the provision of goods and services, without any further concrete definition of such a ban.

For example, Article 6 of Act No. 634/1992 Coll. on consumer protection prohibits all discrimination by sellers in providing services and goods. Act No. 257/2001 Coll. on libraries and the operation of public library and information services states in Article 2 that all library and information services shall be provided with respect for equal access to those services without any exception. If a library does differ in its provision of service it cannot be entered into the register of public libraries administered by the Ministry of Culture.

Slightly more extensive and also more precise legislation seems to be Act No. 42/1994 Coll. on private pension insurance. Article 2a of this Act prohibits discrimination against any ‘insured person, especially on grounds of sex, race, colour, language, faith and religion, political and other beliefs, national or social origin,

partial nationality or membership of an ethnic minority, property, gender, health condition or age.’ The use of life tables for the purpose of pension calculation, specifically for men and women, is not considered to be discrimination on the grounds of sex.

Act No. 561/2004 Coll. on education in kindergartens, grammar schools, secondary schools and other schools, states as the first principle upon which it is based: ‘the equal access of all citizens of the Czech Republic and other EU Member States to education without any discrimination on grounds of race, colour, sex, language, faith and religion, nationality, ethnic or social origin, property, gender and health condition or other situation of the citizen.’

In the field of university education, Act No.111/1998 Coll. on schools for higher education (universities) states in Article 21 that any public school for higher education is obliged to take all possible measures in order to equalize opportunities to study at such school for higher education.

The Antidiscrimination Act, which should have been adopted already, had to implement the Directive in a more complex way (according to the legislator). As will be shown in the text below, even the proposed legislation is not as complex as it should be and there are some doubts about the effectiveness of the future legislation.

2. Correct transposition?

In general, the Czech Republic has not transposed the relevant provisions of the Directive correctly. Some articles have not been transposed at all (Articles 1-7, parts of Article 9, Article 13). Most articles that have been transposed in one way or other have been transposed only partially (Article 8, parts of Articles 9, 10, 12, 14).

Relevant articles have not been transposed with the ‘copy out’ method, as many of them have not been transposed properly at all. The transposition as such has not entered into force, as the legislator is still waiting for adoption of the Antidiscrimination Act. The Antidiscrimination Act will use the ‘copy out’ method to some extent, but actually only when it uses the possibility given by the Directive to allow differences in treatment in some situations (for example, Article 4 Paragraph 5 has been copied into Article 6 Paragraph 6 of the Antidiscrimination Act, Article 5 Paragraph 2 has been copied into amendments of actuarial regulations that will follow the adoption of the Antidiscrimination Act).

3. Definitions of ‘goods’ and ‘services’

Czech legislation does not define goods and services. There is some case law on discrimination on the grounds of race in access to goods and services, but none of these decisions includes any definition of goods or services. The only definition to be found, but a very general one, is in Act No. 634/1992 Coll., Article 2 Paragraph 1 j), according to which ‘a service is any entrepreneurial activity, aimed to be offered to a consumer’. The provision of such a service is to be supervised by bodies of consumer protection.

4. Protection of specific groups

The Czech Republic does not provide explicit protection in the provision of goods or services for transsexual people, pregnant women or women who have recently given birth.

5. Definitions of pregnancy and maternity

There is no definition of pregnancy or maternity in the context of goods and services, nor is there sufficient clarity in the legislation for pregnant women and goods and service providers. There are no known cases where a woman claims a right because she is pregnant or a young mother as regards the supply of goods and services. The Czech Republic does not even give rights to these women or to breastfeeding women, for example, as regards restaurant and bar services. There are no obligations for providers of such services in this regard.

6. Use of a comparator

No, no comparators are used in the definitions.

7. Actions against failure to implement the Directive

No action has been taken yet.

8. Enforcement by equality bodies

There is no real equality body designated in this area yet, as the Antidiscrimination Act has not been adopted. However, even when the Czech ombudsman (public defender of rights) is designated, s/he will not have the competence to bring enforcement actions. According to Act No. 349/1999 Coll. on the Public Defender of Rights, this institution only has consultative competence and even the new Antidiscrimination Act will not change this. The Act will be amended in such a way that the ombudsman will provide assistance to victims of discrimination when they want to seek court action, carry out research activities, publish reports and recommendations regarding discrimination matters, and ensure information exchange with other European bodies (future Article 21b of Act 349/1999 Coll.). No other, more comprehensive, competencies are envisaged for the ombudsman.

9. Discrimination based on association/perceived status

There is no express prohibition on this issue.

10. Protection of women regarding pregnancy and maternity

In Czech legislation, there are no favourable provisions concerning the protection of women in pregnancy or maternity as regards goods or services.

11. Exceptions to the principle of equal treatment (Article 4(5))

The Czech Republic has relied on the above-mentioned provision in the proposal of the Antidiscrimination Act. Its Article 6 Paragraph 7 states that 'Exclusive or primary provision of goods and services accessible to the public to members of one sex, if it is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary, is not discrimination on the ground of sex.' There is no further concrete definition; it is one of a small number of provisions of the Directive that have been copied into the Czech Antidiscrimination Bill. There is not even an interpretation of this provision in relation to transsexual people. The explanatory notes to the proposed act just list some examples of such measures that may constitute a difference of treatment (aerobics and similar sports, selling dresses, providing hair-dressing services, asylum housing and social housing etc).

12. Positive action

Positive action is regulated in Article 7 Paragraph 2 of the Antidiscrimination Act, as a general possibility to take measures to prevent or compensate for disadvantages linked to membership of a group of people defined by any of discriminatory grounds and to secure equal treatment and equal opportunities in this way.

13. Burden of proof

The burden of proof has been regulated only for cases of general discrimination and for access to goods and services on the ground of race and ethnic origin (Article 133a of Act No. 99/1963 Coll., Civil Procedural Code).

Further amendment of the cited provision will take place with the adoption of the Antidiscrimination Act. According to the proposed act, 'if a plaintiff establishes before the court facts of which it may be assumed that there has been direct or indirect discrimination on the ground of sex in access to goods and services, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.'

The rule, as it is stipulated, seems to be of the same importance as in employment cases. It is not clear yet how it will be used in practice.

14. Harassment, instruction to discriminate and victimisation

In the Czech Republic, some known cases of instruction to discriminate in access to goods and services are based on race, not on gender. There have been some cases, already decided by the court, where Roma people were not let into a public swimming pool, a public discothèque, or were not served in a restaurant or bar. Already some years ago, Czech courts were deciding in favour of victims of such discrimination, ruling that the service or goods provider had broken consumer rights.

There are no concrete examples of harassment and victimisation cases known yet.

15. Overall assessment

As is clear from the text above, in the Czech Republic there are still gaps in the proper implementation of the Directive as such. Therefore, no substantial improvement in terms of access to and supply of goods and services irrespective of a person's sex can be reported.

PART II: SCOPE OF NATIONAL LEGISLATION

1. Scope of national legislation beyond the scope of EU gender equality directives?

From a strictly legal point of view, Czech legislation goes beyond existing equality directives, as it also falls into a broader material scope sometimes. A typical example is the field of education and library services.

From a realistic point of view however, even if also from the answer to question 1 it may be understood that in the Czech Republic there is quite a broad range of equality legislation in the field of providing goods and services, it cannot be said that Czech legislation goes beyond the scope of existing EC gender equality directives. This is because almost all the above-mentioned pieces of legislation are too general and therefore often merely proclamatory. As in the special laws, there often are no sanctions against breaches of equality principles, and concrete provisions remain without a direct impact on concrete rights and obligations.

2. ‘Hierarchy’ of grounds?

In the Czech Republic, it is difficult to say. There is not a very long (uninterrupted) tradition of equality legislation and, as can be seen from this report as well, there are still many areas where the Czech Republic simply has to implement the directives properly. So, in practice, I cannot see such a dramatic ‘competition’ of the above-mentioned grounds in the Czech Republic. In the Czech Republic, discriminatory behaviour against racial and ethnic minorities (especially against Roma and recently also against Vietnamese and Chinese) often occurs, but also against women (and in some cases also against men – for example as regards the upbringing of children after divorce). Both discriminatory grounds, however, do not very often interfere with each other and there is not a strong preference for the one or the other ground.

3. Comments and/or suggestions

No comments or suggestions.

DENMARK – *Ruth Nielsen*

PART I: *DIRECTIVE 2004/113/EC*

1. Transposition of Directive 2004/113/EC

Directive 2004/113/EC has been transposed. Denmark has had a Gender Equality Act since 2000. In 2007, Denmark adopted an amendment to the Gender Equality Act in order to implement Directive 113/04/EC partially, i.e. except Article 5 on gender equality and actuarial factors. The main content of the amendment was: clarification of the scope of application of the Gender Equality Act, re-wording of the definitions of discrimination in accordance with Directive 2004/113/EC and insertion of a new provision on invalidity of provisions in violation of the ban on sex discrimination in individual or collective agreements.

2. Correct transposition?

Directive 2004/113 has been merged into the pre-existing Danish Gender Equality Act and has not just been copied into Danish legislation.

In general, I consider that the definitions and substantive provisions of Directive 2004/113 are correctly transposed into Danish law but there is no monitoring body in Denmark as required by Article 12 of Directive 2004/113.

Similarly, there is no monitoring body in the sense required by Article 20 of the Recast Directive (2006/54/EC). The problem dates back to the failure to fully implement Article 8a inserted in the Equal Treatment Directive by Directive 2002/73/EC.

Under Article 12 of Directive 2004/113, Member States shall ensure that the competences of designated equality bodies include: (a) providing independent assistance to victims of discrimination in pursuing their complaints about discrimination; (b) conducting independent surveys concerning discrimination; and (c) publishing independent reports and making recommendations on any issue relating to such discrimination. Denmark has no gender equality bodies with the competences outlined in these Directives, only complaints boards with the competence required under (a) above. In connection with the implementation of the Equal Treatment Directive, a number of organisations including the Danish Confederation of Trade Unions (LO) expressed criticism on this point. The Government’s response was that

there are many institutions in Denmark which might analyse gender equality, for example the universities. In the view of the Government, there is no need for a special body with regard to gender equality. The parallel provision on ethnic equality in Article 13 of the Race Directive is implemented in Denmark by Section 10 of the Ethnic Equality Act which empowers the Danish Institute of Human Rights to promote ethnic equality.

By 1 January 2009 a new Equality Complaints Board for all prohibited grounds of discrimination was established. The new Complaints Board deals with discrimination in employment and in other areas, e.g. the provision of goods and services.

The previously existing Complaints Boards for Gender Equality and Ethnic Equality were abolished. Their tasks have been taken over by the new Complaints Board from 1 January 2009. The new general Complaints Board is modelled over the existing Complaints Board for Gender Equality. It is – like the previous gender equality complaints board – empowered to deal with complaints about discrimination from victims of discrimination. It has no competence to conduct independent surveys concerning discrimination, publish independent reports and make recommendations on any issue relating to such discrimination and it will not be able to start cases on its own initiative. It is therefore not a monitoring body in the sense required by Article 12 of Directive 2004/113,

3. Definitions of ‘goods’ and ‘services’

Goods and services have not been defined in Danish legislation or case law.

4. Protection of specific groups

Pregnant women and women who have recently given birth are only explicitly mentioned in Section 3a (2) of the Gender Equality Act which provides that it is not a violation of the Act to introduce or uphold more favourable provisions on protection of women in connection with pregnancy and maternity. There is thus no explicit prohibition on pregnancy discrimination but there is no doubt that discrimination on grounds of pregnancy is a violation of the general ban on discrimination on grounds of sex. In my view the protection is sufficiently clear. Transsexual people are not explicitly mentioned in the Act. Discrimination on grounds of transsexuality will probably be regarded as a violation of the Gender Equality Act.

5. Definitions of pregnancy and maternity

There are no separate definitions in the goods and services field. There is, however, probably sufficient clarity in the legislation for pregnant women or women in their maternity and goods and services providers to know their rights and obligations.

Discrimination in relation to pregnancy and maternity in the goods and services context is probably particularly widespread in the financial sector. In an analysis - The Relations of Banks to Women Entrepreneurs. The Analysis of The Danish Agency for Trade and Industry, available online at <http://www.ebst.dk/publikationer/rapporter/bankers.uk/index-eng.html> – published in 2000 (i.e. before the adoption of the Gender Equality Act) one of the respondents stated: ‘Single mothers do not have much chance of obtaining a loan for their enterprises’.

There is no protection for women from discrimination related to their breastfeeding.

6. Use of a comparator

No comparator is used in Danish legislation.

7. Actions against failure to implement the Directive

No such actions have been brought.

8. Enforcement by the equality bodies

There is no designated equality body in Denmark, see above, only a complaints board which can decide cases brought by individual victims of alleged discrimination.

9. Discrimination based on association/perceived status

There are no provisions on this matter.

10. Protection of women regarding pregnancy and maternity

As mentioned above, Section 3a (2) of the Gender Equality Act provides that it is not a violation of the Act to introduce or uphold more favourable provisions on protection of women in connection with pregnancy and maternity.

11. Exceptions to the principle of equal treatment

Section 3a (1) of the Gender Equality Act provides that it is not a violation of the Act to treat men and women differently if the different treatment has a legitimate aim and the means used to achieve the end are appropriate and necessary to achieve the aim.

12. Positive action

As mentioned above, Section 3a (2) of the Gender Equality Act provides that it is not a violation of the Act to introduce or uphold more favourable provisions on protection of women in connection with pregnancy and maternity. Apart from that there is nothing in the Danish Gender Equality Act on positive action.

13. Burden of proof

In principle the burden of proof is applied according to Article 9, but there is so little case law that it is too early to assess.

14. Harassment, instruction to discriminate and victimisation

I do not know of Danish examples of harassment, instruction to discriminate and victimisation in the context of goods and services.

15. Overall assessment

Denmark adopted only minor amendments to the Gender Equality Act in connection with the implementation of Directive 2004/113.

PART II: SCOPE OF NATIONAL LEGISLATION

1. Scope of national legislation beyond the scope of EU gender equality directives?

Education and the media fall within the scope of the Danish Gender Equality Act.

2. 'Hierarchy' of grounds

In respect of goods and services, the level of protection is probably the same as for race and sex under EU law.

In Denmark, the protection of gender equality and against sex discrimination in the provision of goods and services is a little bit stronger than the protection against ethnic discrimination. The trend in the historical development is that the protection

against ethnic discrimination is gradually being raised to the same level as the protection against sex discrimination. Until 1 January 2009, the protection for ethnic equality was lower than for the prohibition against sex discrimination as regards enforcement through a complaints board. Since 1 January 2009, the complaints system is the same for sex and race modelled over the 'old' gender equality Complaints Board.

There is a broad gender mainstreaming duty for all public or semi-public service providers in the Danish Gender Equality Act (Section 4) resulting in a duty to gender-mainstream all public services in Denmark. There is no similar mainstreaming rule regarding ethnic issues. In Denmark, special opening hours in swimming pools and similar institutions to accommodate women's – in principle all women's, in practice Muslim women's – needs are considered lawful under the Gender Equality Act. They would probably be unlawful under Danish law if assessed only under the Ethnic Equality Act.

If one compares Directive 2004/113 with the proposed Directive in COM(2008)426, I think that the level of protection in Directive 2004/113 is higher than the level of protection in COM(2008)426 which applies only to the supply of goods and services in respect of individuals who are performing a professional or commercial activity. That limitation does – in my view – not apply to the ban on gender discrimination in Directive 2004/113 which applies 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. Comments and/or suggestions

No comments or suggestions.

ESTONIA – *Anneli Albi*

PART I: *DIRECTIVE 2004/113/EC*

1. Transposition of Directive 2004/113/EC

Transposition of Directive 2004/113/EC is still ongoing in Estonia. The existing Gender Equality Act (hereinafter GEA) prohibits discrimination in all areas of social life. The Act contains two exceptions: the requirements of the GEA do not apply to (a) professing and practising faith or working as a minister of a religion in a registered religious association; and (b) relations in family or private life (Article 2(2) of the GEA). Thus the principle of gender equality and the prohibition of discrimination on the grounds of gender has to be observed in the access to and supply of goods and services under existing legislation.

A Draft Act to amend the Gender Equality Act, the Labour Contracts Act and the Civil Service Act (317 SE II-1; hereinafter Draft Act) is currently being processed by Parliament. One of the aims of the Draft Act is to transpose the requirements of Directive 2004/113/EC, in particular the following: the principle of shared burden of proof, the prohibition of victimisation and of giving instructions to discriminate, compensation for damage, and the exceptions for sex-segregated services. The Draft Act has passed its first reading in Parliament.

2. Correct transposition?

As noted above, the requirements of Directive 2004/113 have not yet been correctly transposed into the Estonian legal system at present.

The main inconsistencies with the requirements of the Directive are the following.

One area of concern is the principle of shared burden of proof. In its current version, the GEA provides that the principle of shared burden of proof applies to employment-related discrimination only.

Furthermore, the GEA in the present form does not regulate explicitly the right of recourse to courts in order to request compensation for damage or the termination of a harmful activity. The scope of the respective provision, Article 13 of the GEA, only covers employment disputes. However, despite the lack of a specific provision and consequent difficulties that individuals may face in protecting their rights effectively, it is, in principle, possible to submit a claim for compensation directly on the basis of Article 25 of the Estonian Constitution.

At present, the GEA does not regulate the issues of victimisation and giving instructions to discriminate in the field of goods and services.

The provisions of the Draft Act in many aspects ‘copy-paste’ the provisions of the Directive, such as the provisions allowing special protection of pregnant women and maternity and the provisions on positive action and sex-segregated services. There is no case law yet which would enable to indicate whether the abstract provisions are sufficiently clear so that the addressees of the Act would be able to understand which rights and duties derive from the Act. In the opinion of the expert, greater specificity in the wording of the legislation, and detailed regulation instead of abstract norms, would be more conducive to achieving the aims of the Directive.

3. Definitions of ‘goods’ and ‘services’

The concepts of ‘goods’ and ‘services’ are not defined in the GEA. The explanatory memorandum to the Draft Act refers to the preamble of the Directive; accordingly these concepts are to be defined in the same way as in EU law. One legislative act that is closely connected to the scope of the Directive, the Trading Act,⁸ provides a list of goods and services that are regulated under the scope of that Act. However, the

⁸ Article 1. Scope of application of Act

(1) This Act provides the grounds and procedure for trading, the organisation of supervision of trading and liability for violations of this Act.

(2) To the extent they are not regulated by other legislation, this Act applies to economic and professional activities within the framework of which the following takes place:

1) offer for sale and sale of movables and services concerning movables;

2) grant of possession, grant of use and the use of movables;

3) manufacture or alteration of movables in accordance with an order placed by a client;

3¹) maintenance or repair of movables;

3²) offer and provision of cleaning services for buildings;

4) offer and provision of beauty services and personal services;

5) catering;

6) organisation of street and market trading, and organisation of trading at public events.

(3) This Act also applies to cases where a person offers for sale and sells movables outside the economic or professional activities thereof by way of street or market trading or at a public event.

(...)

Article 2. Definitions

In this Act, the following definitions are used: (...)

4) ‘goods’ means movables offered for sale or being sold. (...)

scope of the concepts of goods and services under the GEA is wider and, as pointed out above, should be interpreted in conformity with the practice of the ECJ.

4. Protection of specific groups

The GEA establishes explicit protection of pregnant women and women who have recently given birth. According to Article 3(1)(3) less favourable treatment due to pregnancy and delivery, parenting and fulfilment of family duties is deemed to constitute direct discrimination on the grounds of sex. The GEA and the Draft Act do not stipulate any specific provisions on the protection of transsexual people.

5. Definitions of pregnancy and maternity

Discrimination on the grounds of pregnancy and maternity are regulated as part of the general concept of ‘direct discrimination’. There is no separate provision concerning pregnancy and maternity discrimination with regard to the provision of goods and services. There are separate provisions regulating discrimination in employment relations, which replicate the prohibition to treat women less favourably on the basis of these circumstances.

In the opinion of the expert, introduction of a separate reference to the GEA with regard to the prohibition of discrimination in the legislation that regulates the provision of goods and services (such as the Trading Act) would be beneficial to enhance the visibility of the prohibition of discrimination among the providers of goods and services.

There are no specific provisions concerning the protection of women in relation to breastfeeding in legislative acts. In practice, it is quite common that larger shopping centres in Estonia have a so-called ‘mother and baby’ room.

By way of examples of discrimination in the provision of goods and services in relation to pregnancy and maternity, the following may be noteworthy. One area of concern has been the accessibility of public places for baby carriages and the restriction of the provision of services to persons with children. In public transportation, many old-type vehicles still in use are inaccessible to persons with a baby carriage. At times, shops display signs that entry with a baby carriage is not allowed, even if the lay-out of the shop would not appear to justify such a restriction. By way of another example, in the beginning of 2007, two SPA-hotels in Estonia held a ‘children-free’ week. The campaigns were targeted to parents who wanted to rest a week without children and people who wanted to spend a tranquil holiday. Such campaigns, however, sparked a considerable public debate on their unethical and discriminatory nature.⁹ It is open to debate whether the less favourable treatment of persons with children falls within the scope of the protection in relation to maternity under EU law, as the primary purpose of EU provisions lies in the protection of women who have recently given birth. However, under the Estonian GEA, less favourable treatment of persons on the grounds of parenthood and fulfilment of family obligations are deemed direct discrimination on the grounds of sex. The

⁹ See L. Linnamäe. *Spaahotellid korraldavad lastevaba nädala*. (Spa hotels are organising a children-free week) – *Postimees*, 10 January 2007. Available at: www.postimees.ee/100107/esileht/majandus/238243.php (in Estonian, accessed 25 January 2009); S. Kõiv. *Lastevaba kasum* (Children-free profit) – *Postimees*, 10 January 2007. Available at: www.postimees.ee/100107/esileht/arvamus/238239.php (in Estonian, accessed 25 January 2009); V. Vooglaid. *Kampaania ‘Lastevaba Eesti’*. (A campaign ‘Children-free Estonia’) – *Postimees*, 15 January 2007. Available at: www.postimees.ee/150107/esileht/arvamus/239136.php (in Estonian, accessed 25 January 2009).

reasons for considering this as direct discrimination have not been explained in the explanatory text accompanying the Act; this approach thus appears to be a peculiarity of Estonian gender equality legislation.

6. Use of a comparator

The law does not specify whether in the case of pregnancy and maternity a comparator is required. Therefore this issue should be interpreted in accordance with the case law of the ECJ.

7. Actions against failure to implement the Directive

No case law exists yet with regard to actions against the state for failure to implement the Directive. The Gender Equality Commissioner (since 1 January 2009 the Gender Equality and Equal Treatment Commissioner) has pointed out that the GEA is in need of amendment in order to transpose the requirements of the Directive;¹⁰ however this has not led to any formal proceedings.

8. Enforcement by equality bodies

Following the adoption of the Equal Treatment Act (hereinafter ETA), the post of the Gender Equality Commissioner was merged with the position of the Gender Equality and Equal Treatment Commissioner. The amendments took effect on 1 January 2009. The ETA stipulates that the Commissioner has the power to initiate proceedings on her own initiative (Article 16(3) of the ETA). Earlier, the Commissioner did not have the competence to initiate proceedings on her own initiative. However, the Commissioner can only give an opinion whether discrimination has taken place; she cannot make any binding decisions or take action against individuals.

9. Discrimination based on association/perceived status

The Estonian legislation does not expressly prohibit discrimination on the basis of association with a transsexual person or persons, or persons of a particular sex, nor discrimination on the grounds of perceived sex or transsexual status in access to goods and services. The Draft Act does not deal with this issue either.

10. Protection of women regarding pregnancy and maternity

Article 5(2)(1) of the GEA stipulates that provisions that concern the protection of women as regards pregnancy and delivery of a baby shall not be considered discriminatory.

For example, the Health Insurance Act establishes that as of the twelfth week of pregnancy, pregnant women do not have to pay a visit fee to a person providing outpatient specialised medical care (Article 70(5)(1)).

By way of another example, some wellness services in Spas (such as some types of massage or saunas) are not recommended or provided to pregnant women.

11. Exceptions to the principle of equal treatment (Article 4(5))

Currently, the exception in Article 4(5) of the Directive is not used in Estonian law. However, the Draft Act amends Article 5(2) of the GEA, by providing that the provision of goods and services mainly or only to persons of one sex is not deemed to be discriminatory if it has a legitimate aim and the means used are proportionate in

¹⁰ Annual report of the Gender Equality Commissioner 2005/2006, p 37. Available at: www.svv.ee/failid/2006.pdf (in Estonian, accessed 25 January 2009).

relation to the objective. According to the explanatory memorandum to the Draft Act, such exceptions may be made in the following circumstances: provision of services for victims of gender violence (e.g. shelters for persons of one sex only), privacy and decency (e.g. renting a room in one's home), sports (e.g. sports events for one gender). The explanatory memorandum also points out that the provision of gender-related health services for men and women separately is not discriminatory. There are no provisions on transsexual persons in this respect.

12. Positive action

Article 5(2)(5) provides that it is not considered to be discriminatory to implement, with the aim of promoting gender equality, special measures that favour the underrepresented sex or reduce gender inequality. The Draft Act specifies that such special measures have to be temporary. However, no explanation is provided in the legislative acts and the explanatory memorandums on what might be the content of positive measures.

13. Burden of proof

Under the existing legislation, the principle of shared burden of proof does not apply to the provision of goods and services. The Draft Act aims to bring the principle of shared burden of proof in compliance with the requirements of the Directive, and to also apply it to the provision of goods and services.

Further, the Draft Act aims to amend the GEA by establishing the duty of the provider of the goods or services to give an explanation. Accordingly, the provider of the goods or services has to provide a written explanation about his or her activities to the person who finds that he or she has been discriminated against in the provision of goods and services on the grounds of gender. According to the explanatory memorandum, the duty to give an explanation is important to make the enforcement of the rights more effective. Without the knowledge of the facts it would be difficult for an applicant to prove a *prima facie* case of discrimination.

While the principle of shared burden of proof in the context of discrimination aims to enhance the effectiveness of the enforcement of one's rights, it might be more difficult to apply the principle in the context of the provision of goods and services than in the context of employment. As complaints are likely to be submitted some time after the incident, the respondents may find it harder to prove that discrimination has not occurred due to the unavailability of records and personalized information to be able to specify the reasons why the person was treated less favourably.

14. Harassment, instruction to discriminate and victimisation

No case law exists on harassment or sexual harassment in the provision of goods and services. However, the media have reported on an incident where a driver of a trolleybus did not let a mother with a baby carriage exit the bus. The driver closed the doors sharply in front of the woman, when she had stepped onto the last stair. At the next stop, the driver did not open the doors where the passenger with the baby carriage was waiting at all. At the final stop, the driver opened only one side of the doors, but it was impossible to pass through with the baby carriage. The woman telephoned the information service of the trolleybuses to seek help. An investigation

was launched by the police, with no further information available as of yet.¹¹ This incident would appear to be an example that could qualify as discrimination.

No information is available on cases of instructions to discriminate or victimisation in cases of goods and services.

15. Overall assessment

Overall, the Directive has not had a considerable impact in Estonia yet. There has been little public discussion about discrimination in access to goods and services or on potential justifications for different treatment. One exception to this is the issue of different entry fees for men and women to nightclubs, on which the Gender Equality Commissioner received several complaints. The Commissioner found in her non-binding opinion that the different entry fees were unjustified; however, despite her recommendation to the applicants to submit a complaint to the court, no action has been taken and the practice of different entry fees persists.

PART II: SCOPE OF NATIONAL LEGISLATION

1. Scope of national legislation beyond the scope of EU gender equality directives?

In Estonia, the scope of gender equality legislation goes beyond the requirements of EU gender equality directives. According to Article 2(1) of the GEA, the Act applies to all areas of social life, with two exceptions (see above under I.1). Thus, the scope of the GEA is even wider than the scope of the Race Directive 2000/43, as it does not provide for the specific list of areas where discrimination is prohibited. Therefore the scope of application of the GEA includes education, social protection, provision of goods and services, health care and housing.

2. ‘Hierarchy’ of grounds?

Article 12(1) of the Estonian Constitution stipulates that everyone is equal before the law. No one can be discriminated on the grounds of sex, race, national origin, colour, language, political or other beliefs, origin, social status or other grounds. There are two legislative acts that regulate the prohibition of discrimination. The GEA regulates the issues of gender equality and the ETA regulates the prohibition of discrimination on the grounds of race, ethnic origin, colour, disability, sexual orientation, religion or belief and age. As noted above, the scope of the GEA is wider than the scope of the respective EU directives. However, the ETA is limited to the minimum requirements of the EU directives. Accordingly, discrimination on the grounds of religion or belief, age, disability and sexual orientation is prohibited only in employment relations. The Chancellor of Justice (an ombudsman-type of national institution that also has the power to supervise the constitutionality of laws) has pointed out that creation of different levels of protection to different grounds of discrimination by a legal act might not be in conformity with the Constitution and international treaties applicable to Estonia. The members of the Parliament, however, have taken the view that (apart from the GEA, which was adopted prior to Estonia’s accession to the EU) it is sufficient to enact the requirements as set forth in EU directives, despite the fact that

¹¹ ‘*Trollijuht kiusas lapsekäruga reisijat*’ (Trolleybus driver hassles a passenger with a baby carriage), *Postimees*, 15 May 2008. Available at: www.postimees.ee/160508/esileht/siseuudised/tallinn/330668.php (in Estonian, accessed 25 January 2009).

the EU directives contain only minimum requirements and such a legislation might not be in compliance with the Constitution of Estonia.

Thus it seems that in practice a ‘hierarchy’ of grounds has emerged, despite there being no adequate justification for limiting the prohibition of discrimination on grounds other than gender and race to the field of employment only. Different standards of protection may leave some groups of persons without any protection against discrimination. This may well create greater injustice towards such groups, as it is difficult to explain why they have been left without protection. Different standards of protection might also make it more complicated to enforce the rights in cases of multiple discrimination.

3. Comments and/or suggestions

Taking into account that the so-called ‘hierarchy of grounds’ has arisen to a great extent due to different standards in EU legislative acts, the review and amendment of these acts would be beneficial in order to harmonize the scope of protection for different grounds of discrimination as far as possible. Differences in the scope of the protection should be allowed only in cases where the differentiation in treatment has a legitimate aim and is proportionate. It may also be worthy of consideration whether the content of exceptions to the principle of equal treatment could be clarified. This issue could be addressed by virtue of a background paper analyzing the practice in different Member States or in a soft law measure, in order to assist the national institutions in the correct application of the principles.

FINLAND – Kevät Nousiainen

PART I: DIRECTIVE 2004/113/EC

1. Transposition of Directive 2004/113/EC

The Directive has finally been transposed, by an amendment of the Act on Equality between women and men (609/1986). The amendment was adopted by the Parliament in December, and came into force in the beginning of 2009. The amendment consists of adding new provisions to the Act. The access of goods and services was brought under the prohibition of victimisation as discrimination. Under the new Section 8a Subsection 2, it is to be considered as discrimination that a provider of goods and services puts a person into a disadvantageous position or that s/he is the target of adverse consequences after s/he has claimed her rights or has become involved in a procedure concerning gender discrimination. The prohibition of discrimination in the provision of goods and services is stipulated in the new Section 8e. Although such discrimination was prohibited earlier under the general prohibition of discrimination under Section 7 of the Act, the new provision refers specifically to goods and services, and also refers to the justification allowed under Article 4(5) of the Directive. Discrimination in provision of goods and services was also brought under Section 11 on compensation. The main problem before the amendment was that although access to goods and services was under the general prohibition, compensation was not available.

Part of the Directive had been transposed before by amendments to three Acts concerning different types of insurance providers (1062/1979, 1250/1987, 398/1995). Finland has resorted to Article 5 (2) which allows the Member States to permit the use of sex as an actuarial factor in insurances also in the future.

2. Correct transposition?

The transposition created more resistance than was perhaps expected. Especially the representatives of the Confederation of Finnish Industries (EK) were heard at various points. Especially in the Employment and Equality Committee of the Parliament, EK considered the minimum compensation of EUR 3000 too high a sum for small enterprises, and doubted the need to sanction the prohibition in the first place. The Committee in its report¹² stressed that the compensation can, under the Act on Equality, be reduced or even waived if that is considered reasonable due the economic position of the perpetrator or his/her attempts to remove the impact of his/her act, or due to other circumstances (Section 11(3)). In the general discussion in Parliament, the mitigations contained in the report were received as important aspects of the legal preparatory work, to be taken into account in legal practice.

It is too early to assess whether the amendment was merely cosmetic or if it has copied the Directive to the necessary extent.

3. Definitions of ‘goods’ and ‘services’

‘Goods’ and ‘services’ are not defined in the text of the Act itself, except that Section 8e (3) explicitly excludes media, advertising and education from the prohibition, and Section 8e (4) refers to the provisions on actuarial factors which are placed elsewhere. The Government Bill¹³ discusses the personal and material scope of the Directive, but does not define what is meant by ‘goods’ or ‘service’, nor does it shed much light on the cross-border cases. There is no reference to problematic areas such as health care services or housing services. There is a short reference to cases handled by the Finnish Equality Ombudsman recently, but it is also assumed in the Bill that only in the most blatant cases of discrimination in access to goods and services the victim will resort to the remedy now provided. So far, it is impossible to predict if that will be the case.

4. Protection of specific groups

Section 7(2)2 defines discrimination for reasons of pregnancy or childbirth as direct gender discrimination, which also covers the provision of goods and services. Under 7(3)2 treating someone differently on the basis of parenthood or family responsibilities is defined as indirect gender discrimination. The definition covers also access to goods and services.

5. Definitions of pregnancy and maternity

The Subsections of Section 7 referred to above are separate from the provisions concerning discrimination in employment. The fact that discrimination of pregnant women or breastfeeding mothers in the goods and services context has not, to my knowledge, been discussed leads me to assume that the implications of those provisions have not been recognised.

6. Use of a comparator

Section 7(2)2 reads ‘treating someone differently for reasons of pregnancy or childbirth’. Much of the case law and academic literature on pregnancy and maternity discrimination considers the problem of time-limited employment contracts, and in those cases, it is often crucial to consider how the person would have been treated, had she not become pregnant.

¹² Report of the Employment and Equality Committee, *TyVM* 14/2008 vp.

¹³ *HE* 153/2008 vp.

7. Actions against failure of implement the Directive

There are no examples of actions for the failure to comply with the Directive although Finland did not implement the Directive in time. The media coverage as well as the discussions in Parliament were dominated by the allegedly unnecessary extension of protection to sex-segregated services or marketing practices that offer ‘ladies nights’ etc. Judging on the basis of the discussion in the Parliament sessions and committees, many MPs considered such marketing practices quite harmless. On the other hand, the number of enquiries and cases brought before the Equality Ombudsman in the context of goods and services has risen in recent years. Although victims of discrimination have no other remedies than to bring such discrimination to the attention of the Ombudsman, it does not seem to have led to demands being made concerning proper transposition of the Directive.

8. Enforcement by equality bodies

The Equality Ombudsman may assist the victim in court, but it cannot not take cases to court in the absence of a victim or without the consent of a victim. However, the Ombudsman may bring such cases to the Equality Board, and the amendment of the Act on Equality also extended the competence of the Board to fining a person who violates the Act in the context of goods and services in order to end discrimination or prevent him/her from repeating an act of discrimination.

9. Discrimination based on association/perceived status

There are no express provisions on the matter.

10. Protection of women regarding pregnancy and maternity

There are free public services meant for pregnant women, consisting of medical checks, consultations and advice, connected to maternity clinics and hospitals. In order to qualify for a subsidy in the form of goods or money on the birth of a child, the future mother has to undergo health checks. The free maternity clinic service continues after delivery, then with a focus on the child. These services have at times been considered as too focused on mothers. There is no formal hindrance to the father sharing these services with the mother, but the participation is far from gender neutral. These practices are often considered bad for gender equality, but they are not discussed in terms of discrimination.

Some other health checks, such as free screening for breast cancer for women of certain age groups have more often been seen as an issue of discrimination. No case law exists so far, however.

11. Exceptions to the principle of equal treatment (Article 4(5))

The Government Bill on amending the Act on Equality refers to Article 4(5) in a neutral manner, without giving any examples of situations where it is justified to provide sex-segregated services. However, the Equality Ombudsman has often been contacted on matters concerning such services since the Act on Equality was enacted in 1986. Now, some guidelines on sex-segregated services can be found in opinions of the Ombudsman on such cases. In cases where the Ombudsman found acceptable reasons for continuing a sex-segregated service, she required that similar services are offered to both sexes. The Ombudsman has published a few official statements on sex-segregated leisure-related services, which illustrate her guidelines. Special sports courses and activities are often marketed to women or men, but the practice has caused little comment in public debate. Certain services have traditionally been sex-

segregated, most typically sauna facilities offered for the general public or run by associations. Such services to the public are generally offered to men and women separately, but so that men and women are allocated different time slots. The practice as such is both accepted and acceptable, but critical comments are often offered on that the most desirable time slots are given to either men or women – in other words, the criticism has not been that the facilities should be shared, but that they should be provided on a basis that does not favour one sex.

There are no examples of applications relating to transsexual persons. No explicit regulation concerning discrimination of transsexuals has been adopted. Implicitly, transsexuals are covered by the Act on Equality. When the Government Bill leading to a previous amendment of the Act was discussed in the Employment and Equality Committee of the Parliament in 2005, the Committee stated that in a later review an explicit provision should be introduced to include persons who have undergone a sex change, either in the Act on Equality between Women and Men, or in the Non-Discrimination Act. The latest amendment of the Act on Equality, made in order to transpose Directive 2004/113, brought no such change, however. The issue was deferred to the more fundamental reform of equality law, which is presently under preparation.

Under the circumstances, the Equality Ombudsman considers that the preparatory works referred to, as well as the case law of the European Court of Justice, give her a mandate to monitor discrimination against transsexuals, both as to persons who have undergone a sex change and in relation to ‘expression of gender’. She has also given statements in concrete matters, as well as clarified her position in a recent speech (see <http://www.tasa-arvo.fi/Resource.phx/tasa-arvo/puhetrans.htm>).

At present, there has been a lot of media coverage concerning the desirability and right of a vicar of the Lutheran Church to remain in office after having undergone a sex change. She has not contacted the Ombudsman, but the Ombudsman has stated in general terms that the sex change must have no bearing as to the right of a person to remain in an office of the Church, which is open to both men and women. The head of the Church Employer Office has come to the same conclusion. A more problematic issue in the case concerns the right of the person involved to remain married to her spouse, if and when both are registered as women.

12. Positive action

Because positive action/positive duties by officials, educational institutions and employers are traditionally a recognized part of the Act on Equality, it would be odd if none of the positive actions would involve goods and services.

13. Burden of proof

Section 9a on the burden of proof in the Act on Equality, since an amendment in 2005, is formulated so as to be applicable in the context of goods and services: ‘If a person considers that she/he has been a victim of discrimination under the provisions of this Act and presents a matter referred to in the Act to a court of law or to a competent authority and the facts give cause to believe that the matter is one of gender discrimination, the defendant must prove that there has been no violation of the equality between women and men but that the action was for an acceptable reason and not due to gender.’

14. Harassment, instruction to discriminate and victimisation

It is difficult to find cases of (sexual) harassment, because until the amendment of the Act on Equality, all cases were channelled to criminal law, ethical monitoring of various professions, etc. Chapter 11 Section 9 of the Penal Code (1889/39) prohibits discrimination by a person who in his/her trade or profession, or service of the general public, refuses service or entry to someone or places someone in an unequal or essentially inferior position based on, among other grounds, the ground of sex. In some cases, harassment situations may even have been treated as sexual crimes. There is no explicit criminal-law provision against sexual harassment, however. In the context of housing harassment or medical services, cases that should be considered as discrimination in access to goods and services have been discussed in the media. Harassing landlords often come up in private discussions, but there are no official sources of information to draw upon to estimate how widespread the problem is.

No examples of instruction to discriminate or victimisation are known.

15. Overall assessment

The discussion in Parliament and the media coverage concerning the Bill designed to transpose the Directive show that the amendment was not considered important or even desirable. I could find no positive reference to the effects of the Directive in that discussion. Indeed, the Minister responsible for presenting the Bill had to defend the need to implement the Directive rather vigorously in Parliament. Hopefully, the impact will later prove itself in the practice of the Equality Ombudsman.

PART II: SCOPE OF NATIONAL LEGISLATION

1. Scope of national legislation beyond the scope of EU gender equality directives?

Education is covered by the Act on Equality, both for positive duties and for prohibition of discrimination. ‘Treating a person less favourably than others on the basis of gender in student selection, the organization of teaching, the evaluation of study performance or in any other regular activity of the educational institution or body’, or ‘otherwise in the manner referred to in Section 7’ constitutes discrimination. The Section does not apply to basic education, however. The positive duties under Section 6b contain a duty to equality planning, paying attention to attaining gender equality in student selection, when organizing teaching and evaluating study performance, as well as preventing and eliminating sexual and gender-based harassment. Again, basic education is not covered.

As to social welfare, the prohibition of discrimination under Section 7 of the Act on Equality covers this, but the Section lacks sanctions. The prohibition has effect because it is binding for public officials. A discriminatory decision can in many cases be nullified, or be officially reprimanded for discrimination.

2. ‘Hierarchy’ of grounds?

In Finland, the prohibition of discrimination based on ethnic origin goes further in protecting against discrimination in social protection than the Act on Equality does. At the moment, the ethnic discrimination prohibited under the Non-Discrimination Act (21/2004) is not very well-known or effectively implemented. In fact, it seems that in spite of the Act having been in place for some years, criminal-law provisions remain the main remedies used by victims of ethnic discrimination. In that sense, the ‘official’ hierarchy brought along when the Race Directive was implemented in

Finland has remained somewhat illusory. It is obvious, however, that the outcome is not satisfactory. Also the fact that gender can be used as a criterion to differentiate voluntary insurance schemes is problematic, as private insurance is gaining more ground. The unwillingness among politicians to prohibit use of sex as an actuarial factor shows that gender is considered as a biological sex that necessarily dominates the lives of men and women. It is inconceivable that a similar argument would be used to defend race or ethnic origin as a criteria used in the insurance business.

3. Comments and/or suggestions

No comments or suggestions.

FRANCE – Sylvaine Laulom

PART I: DIRECTIVE 2004/113/EC

1. Transposition of Directive 2004/113/EC

Directive 2004/113 was implemented by two Acts, both of which intended to implement various Directives, including the EC Directives on discrimination. The first Act of December 2007 copied Article 5 of the Directive.¹⁴ The 2008 Act also copied the scope and most of the exceptions in Directive 2004/113.¹⁵ It provides a general prohibition of direct or indirect discrimination based on sex in the access to and the supply of goods and services. The Act has also adopted the exception by using almost the same terms as the Directive.

2. Correct transposition?

The French transposition has merely resulted in ‘copy out’ of the provisions of the Directive. Formally, France has correctly transposed the relevant provisions of the Directive. However, there were no discussions on the possibility to adapt the European provisions to the French context and there is no clarification of the concept used by the Directive. All commentators of the Act criticize what appears to be a very poor transposition¹⁶ because there has been no reflection on the adaptation of the European provisions to the French context. Thus, Article 4(5) of the Directive has been reproduced in French legislation: the principle of non-discrimination shall not preclude differences based on sex when the provision of 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. It cannot be said that the transposition is not correct. However, until now, there has been no reflection or comments on the actual meaning of the scope of this exception and what could be a legitimate aim. There has been no confrontation of the scope of the exception with existing practices, for example discos or restricted access to certain clubs.

¹⁴ See the new Article 117-1 of the Code of Insurance, Article 12 of the *Loi n°2007-1774 du 17 décembre 2007, portant diverses dispositions d’adaptation au droit communautaire dans le domaine économique et financière*.

¹⁵ *Loi n°2008-496 du 27 mai 2008, portant diverses dispositions d’adaptation au droit communautaire dans le domaine de la lutte contre les discriminations*.

¹⁶ L. Péru-Pirotte, ‘La lutte contre les discriminations: loi n°2008-496 du 27 mai 2008’, JCP éd. S, 2008 1314.

3. Definitions of ‘goods’ and ‘services’

The 2008 Act does not define the concepts of ‘goods’ and ‘services’ and since then there has been no case law on sex discrimination in the access of goods and services that could have given a definition of these concepts.

4. Protection of specific groups

There is no specific protection for transsexual people. Concerning pregnant women, the 2008 Act specifically provides that any direct or indirect discrimination based on pregnancy, maternity or maternity leave is prohibited. Article 8 of the Act also includes a new provision in the Social Security Code and in the Mutuality Code according to which women should not receive any less favourable treatment in benefits and contributions because of the expenses due to pregnancy and maternity. However, the competent ministry shall set different levels of benefits based on sex when actuarial and statistical data are precise and reliable and establish that sex is a determining factor in the assessment of the risk insured.

5. Definitions of pregnancy and maternity

There is no specific definition for pregnancy and maternity discrimination in relation to access to and supply of goods and services. There is no specific protection for women from discrimination related to breastfeeding. In France, there is no general debate regarding sex-segregated services in general. There has been no interest in the implementation of the Directive in French law. As a consequence, it is difficult to know if women in general, and pregnant women and women in their maternity in particular, know their rights. Although the legislation seems clear enough, it is not very well known. For example, the Act does not codify the provisions related to the goods and services field and this could be criticized from the perspective of the security and clarity requirements.

6. Use of a comparator

There is no comparator used in France in defining pregnancy and maternity.

7. Actions against failure to implement the Directive

No actions have been brought for failure to implement the Directive, either by individuals or other parties. There have been some claims brought before the national equality body in relation to access to and supply of goods and services for other grounds of discrimination but not for sex discrimination. These cases are important as they show that the French Equality Body could act in this new field.

8. Enforcement by equality bodies

Considering the wide competences of the French Equality Body, the High Authority against Discrimination and for Equality (HALDE) should have the competence to bring enforcement action in the public interest where there are discriminatory statements or practices even in the absence of an actual victim. Thus, the HALDE may examine any case of direct or indirect discrimination that comes to its attention. It is specified that the victim should not oppose its actions and nothing is said about cases where there is no identified victim. But it could be interpreted as that there is no need to identify a specific victim. The HALDE can also pass a case on to a criminal court if the facts brought to its attention appear to constitute a crime or an offence, which is the case in discrimination.

9. Discrimination based on association/perceived status

France does not expressly prohibit discrimination based on association or discrimination on the grounds of perceived sex or transsexual status and thus there is no specific prohibition on the basis of association with a transsexual person or persons. However, in the field of discrimination in employment, there is a prohibition of discrimination based on family situation. In many cases, the prohibition of this specific discrimination can have the same effect as a prohibition of discrimination based on association. Thus, the HALDE has already recognized the prohibition of discrimination based on association¹⁷ in the case of trade union discrimination, and a Tribunal decision¹⁸ also includes the prohibition of a discrimination based on association with a trade unionist. The HALDE has required the Government to modify the Labour Code in order to explicitly prohibit discrimination based on association.¹⁹ Until now, no modification to legislation has been made but it seems possible for courts to include prohibition of discrimination on the basis of association.

10. Protection of women regarding pregnancy and maternity

France relies on Article 4(2) of the Directive and the 2008 Act states that the prohibition of sex discrimination shall be without prejudice to more favourable provisions based on pregnancy and maternity. However, concerning the access to and supply of goods and services, there are no evident examples of more favourable provisions.

11. Exceptions to the principle of equal treatment (Article 4(5))

The French Act copies Article 4(5) of the Directive and provides that the principle of non-discrimination shall not preclude differences based on sex when the provision of 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. For the moment, it is not known how this exception is going to be interpreted, particularly by the courts, in relation to transsexual people.

12. Positive action

The 2008 Act does not rely on positive action except for pregnant women and women in maternity, as the Act states that the prohibition of direct and indirect discrimination should not preclude the adoption of more favourable provisions for pregnant women, women in maternity and in maternity leave.

13. Burden of proof

According to the 2008 Act, the specific burden of proof applies in goods and services cases, except in penal procedures. This exception is explicitly allowed by the Directive. This burden of proof is particularly important. Like in employment cases, the proof of discrimination could be particularly difficult. Thus, with this system 'testing' is allowed, which is a method used by some associations that has been recognized by tribunals.

14. Harassment, instruction to discriminate and victimisation

There are no evident examples of harassment and sexual harassment, instruction to discriminate or victimisation in the goods and services field.

¹⁷ *Délibération n°2007-75, 26 mars 2007.*

¹⁸ *Conseil de Prud'hommes, 25 novembre 2008, n°06-120, Enault c/SAS ED.*

¹⁹ *Délibération n°2007-75, 26 March 2007.*

15. Overall assessment

Until now the impact of the Directive has been very limited. The Directive has been transposed but the enforcement of the principle of equal treatment between men and women in the access to and supply of goods and services does not seem to attract great interest. There has been no academic debate, for example, on the scope of the exception and how the courts are going to interpret it.

PART II: SCOPE OF NATIONAL LEGISLATION

1. Scope of national legislation beyond the scope of EU gender equality directives?

With the 2008 Act, it is true that the prohibition of discrimination based on race now has a more general scope, as it applies to employment, social protection, healthcare, social advantages, education, access to and supply of goods and services. However, in some aspects, French legislation in the field of gender equality goes beyond the scope of existing EC gender equality directives and particularly of the 2004 Directive. Thus the 2008 Act does not exclude, as the 2004/113 Directive does, the non-discrimination principle for the content of media or advertising. This exception was in the original proposal, but for the Senate, it would have provided a legal basis for the prohibition of sexist advertising. Thus the exception has been cancelled and the French legislation applies also in media and advertising. Concerning public or private education, the Act merely states that the non-discrimination principle does not prohibit the organisation of non-mixed schools but it leaves open the application of the principle of non-discrimination to education.

2. ‘Hierarchy’ of grounds?

There is some debate in France about the existence of a new hierarchy of grounds of discrimination. L. Péru-Pirotte²⁰ believes that there currently is a hierarchy of the grounds and that victims of discrimination based on race could be better protected than victims of other types of discrimination. In contrast, M.-Th. Lanquetin, is convinced that it cannot be said that a hierarchy of the grounds of discrimination has been established, even if different legal regimes exist depending on the type of discrimination.²¹ She also states that, after race, sex has almost the same scope even if it is more difficult to define sometimes. I agree with M.-Th. Lanquetin. The main aim of the legislator in 2008 was to complete the implementation of various Directives on discrimination and not to rewrite the legislation on discrimination in a coherent framework. Thus, different rules could apply to different grounds of discrimination, but this has more to do with the absence of a coherent legal framework than with an explicit recognition of a hierarchy between the different grounds of discrimination.

3. Comments and/or suggestions

No comments or suggestions.

²⁰ L. Péru-Pirotte, ‘La lutte contre les discriminations: loi n°2008-496 du 27 mai 2008’, JCP éd. S, 2008 1314.

²¹ ‘Discriminations: la loi d’adaptation au droit communautaire du 27 mai 2008’, *Droit Social* 2008, p. 778.

PART I: DIRECTIVE 2004/113/EC

1. Transposition of Directive 2004/113/EC

The German legislator transposed Directive 2004/113/EC (as well as all other European Anti-Discrimination Directives) through the General Equal Treatment Act (*Allgemeines Gleichbehandlungsgesetz*, AGG) of 14 August 2006, as amended on 2 December 2006.²²

2. Correct transposition?

The transposition in Germany has numerous shortcomings, the most important of which are listed below:

– Although the law applies to the areas of social protection, social security and health services, social advantages, education, and access to goods and services available to the public (Article 1(1) Nos. 5-8 AGG), it only contains a prohibition of sex discrimination in these areas if they fall under civil law. Thus, in the case of sex discrimination in these areas by a public authority, the general rules of public law (that is, constitutional and administrative law) apply. Public law does not explicitly consider harassment and sexual harassment as forms of discrimination. The general state liability law (*Amtshaftungsrecht*) contains a remedy in case of discrimination (right to cessation, non-repetition, and damages), but only in case of fault on the side of the public servant. The requirement of fault is not compatible with the requirements of Directive 2004/113/EC (and the other European Anti-Discrimination Directives).

– The definitions of direct discrimination and sexual harassment do not, or not fully, cover the areas of social protection, social security and health services, social advantages, education, and access to goods and services available to the public: The definition of direct discrimination (Article 3(1) AGG) states that a less favourable treatment because of pregnancy or maternity constitutes discrimination based on sex in the areas of employment and occupation. By doing so, the legislator intended to transpose the case law of the ECJ. However, by its clear wording, the provision excludes maternity-related and pregnancy-related discrimination in the areas of goods and services from the definition of direct discrimination, thus violating Article 4(1)(a) of Directive 2004/113/EC. Moreover, Article 3(4) AGG defines sexual harassment as discrimination only with respect to access to, and conditions of, employment, education, and training, as well as membership in an employers' or employees' association or any other professional organisation. Thus, sexual harassment in the other areas listed above, in particular goods and services, is excluded from the definition of discrimination. This infringes upon Article 4(3) of Directive 2004/113/EC.

– A prohibition of victimisation exists only in the area of employment and occupation (Article 16 AGG). A comparable provision for the areas of goods and services is lacking. Although courts have found with respect to employment relationships that such prohibition is rooted in general principles of German civil law,²³ the lack of an explicit transposition violates Article 10 Directive 2004/113/EC.

²² Official Journal of the Federal Republic of Germany (*Bundesgesetzblatt*, BGBl.) 2006 vol. I, p. 1897, as amended by the Law of 2 December 2006, BGBl. I, p. 2742.

²³ See Federal Labour Court, decision 2 AZR 227/86 of 2 April 1987, *Arbeitsrechtliche Praxis* no. 1 on § 612a BGB (the norm that transposed the prohibition of victimisation pursuant to Directive 76/207/EEC into German labour law).

– Under Article 20 AGG, a different treatment does not constitute discrimination if it can be justified by an objective reason (examples of which are then listed). The law does not explicitly set the requirement of proportionality, but this is read into the provision through the obligation to interpret the law so as to prevent any conflict with European law. However, according to the case law of the ECJ, explicit transposition is necessary.

– A more important point on which the AGG fails to meet the requirements of Directive 2004/113 is its definition of goods or services ‘available to the public.’ Pursuant to Article 19(1) No. 1 AGG, the prohibition of discrimination applies only to so-called ‘mass contracts,’ that is contracts which are concluded at comparable conditions in a number of cases and which are typically concluded irrespective of the identity of the other contracting party, or where the identity of that person is of little importance. Thus, a person that only wants to conclude one contract (e.g. sale of his used car) and advertises the good to the public is not covered. Also, a landlord who rents out up to 50 apartments is considered not to provide a service available to the public (Article 19(5)(3) AGG). These limitations do not find a basis in the Directive. Moreover, the AGG extends the exception under Article 3(1) of the Directive relating to goods and services ‘offered outside the area of private and family life’ to situations where the contract will bring the parties into close spatial contact or into a relationship of trust. It excludes, in particular, contracts that would lead to both parties being housed on the same piece of land (Article 19(5)(1) and (2) AGG). This is a wider understanding than the one used by the Directive.

– Private insurances are covered by the law (Article 19(1) No. 2 AGG), but actuarial factors may be used for justifying sex-based different treatment (with respect to the premiums and insurance benefits, Article 20(2)(1) AGG). Costs related to pregnancy and maternity must not lead to different treatment (Article 20(2)(2) AGG). However, the state authority supervising insurances (*Bundesanstalt für Finanzdienstaufsicht, BaFin*) does not carry out its own control, but bases its decisions on findings of independent experts paid by the insurance company in question. In addition, the information provided by insurance companies to their clients, and considered sufficient by the supervisory body, does not permit a court review.

– With respect to remedies, the victim of discrimination has the right that the discrimination be undone and that it will not continue in the future (Article 21(1) AGG); in addition, there is a right to damages, including moral damages, unless the perpetrator can show the absence of fault on his/her side (Article 21(2) AGG). This requirement of fault is not compatible with the requirements of Directive 2004/113/EC (and the other European Anti-Discrimination Directives).

The German legislator has not used the method of ‘copying out’: Some provisions are formulated closely to the wording of the Directive, but, as noted above, the legislator then left out some parts, or it restricted the provision to some substantive areas instead of covering all areas covered by the European Anti-Discrimination Directives.

3. Definitions of ‘goods’ and ‘services’

The AGG does not define ‘goods’ and ‘services.’ The explanatory report accompanying the draft law explained that the terms are taken from EC law, in particular Article 23 EC *et seq.* and Article 49 EC *et seq.*, and are identical with it.

4. Protection of specific groups

In the areas of goods and services, there is no explicit protection for transsexual people, pregnant women, or women having given birth recently. However, there is widespread agreement in academic writing that transsexual people are covered by the prohibition of discrimination based on sexual orientation. In the view of this expert, this is sufficiently clear for both parties to a contract to understand their legal obligations. In the same vein, there is agreement that discrimination against pregnant women and women who have recently given birth falls under sex discrimination. However, it is the view of this expert that this is not sufficient: by explicitly extending the definition of discrimination to pregnancy-related and maternity-related discrimination only to the areas of employment and occupation (Article 3(1) AGG, see above, under 2), readers of the law are led to conclude that the legislator wanted to exclude this definition from the areas of goods and services.

5. Definitions of pregnancy and maternity

Pregnancy discrimination and maternity discrimination are not defined. As explained above (under 4), this expert does not consider the general prohibition of sex discrimination sufficient. This expert is not aware of any cases of pregnancy-related or maternity-related discrimination having come before German courts so far. The same holds true for discrimination related to breastfeeding.

6. Use of a comparator

No comparator is used in the definitions of pregnancy and maternity.

7. Actions against failure to implement the Directive

There have been no actions against Germany, because it is still too early for this: the legal right for individuals to bring an action against the State for having failed to implement the Directive only arises when they have exhausted the legal remedies against the person alleged to have discriminated on the ground of sex. Neither (anti-discrimination) associations nor the Federal Anti-Discrimination Body have standing to bring such a claim.

8. Enforcement by equality bodies

The designated equality body does not have the competence to bring enforcement action in the public interest.

9. Discrimination based on association/perceived status

There are no provisions on this subject.

10. Protection of women regarding pregnancy and maternity

Pregnant women have the right to a seat in public transport; other passengers have to cede their seat in favour of a pregnant woman.

In health care, there are no more favourable provisions concerning the protection of women as regards pregnancy and maternity (other than the right to specific medical exams during and after pregnancy, or the right to a certain amount of support by a midwife after birth).

In the field of university education, pregnancy and maternity can be considered as special reasons that permit taking an exam at a time different from the ordinary schedule. This, however, is not a general rule prescribed by law, but may follow from the internal rules of each university.

11. Exceptions to the principle of equal treatment (Article 4(5))

Several social services are specifically directed towards women. This applies to domestic violence homes, which are generally open to women only. Equally, shelters for those escaping from an imminent forced marriage are mostly available only for girls and women. Only recently have authorities and private organisations realised that there is a need to protect young men from forced marriage, too. In the same vein, counselling services for victims of domestic violence are often only provided for women.

Only recently have private parties begun to build single-sex care homes for the elderly. Usually, these homes are intended to cater to the homosexual community, but there the homes are open to members of the particular sex irrespective of their sexual orientation (as they have to be under the AGG).

In the field of education, sex-segregated private schools do exist in Germany. They have existed for a long time and most of them are run by the Catholic Church. Because of their low number and the availability of public schools, the issue of sex discrimination was not raised in this context. However, in recent times, the argument is made more often that sex-segregates schools may help girls (and boys) to develop their abilities in all areas free of gender-based stereotypes. For the same reason, women's universities (summer universities or permanent ones, especially in the technical fields) were set up. The argument is also used to justify the organisation of a 'girl's day' each year, which is intended to encourage girls' interest in the technical professions.

In the area of transport, women's taxis or special women's parking spots are justified as means to enhance women's security in the public sphere.

In the area of the media, there are no examples of sex-based different treatment for which Germany relies on Article 4(5) of Directive 2004/113/EC.

Article 4(5) of Directive 2004/113/EC is not used with respect to transsexual persons.

12. Positive action

No reliance on the provision on positive action can be found in the area of goods and services.

13. Burden of proof

Article 9 of Directive 2004/113/EC is transposed by Article 24 AGG, which applies to employment and occupation cases and goods and services cases alike. In the view of this expert, the rule is as important as in employment cases because the (alleged) victim faces the same difficulties to establish that there has been discrimination.

14. Harassment, instruction to discriminate and victimisation

As explained above, the AGG does not contain a prohibition of victimisation in the area of goods and services. No cases of harassment, instruction to discriminate and victimisation have become public so far.

15. Overall assessment

It is too early to evaluate the impact of the Directive in Germany with respect to goods and services, as the law has been in force for a little more than two years. In the political debate before the adoption of the AGG, most examples of cases of discrimination in this area concerned discrimination based on ethnic origin. The only exception was the area of private insurances. In this area, the transposition of the

Directive has not brought any significant changes. The competent state authorities are unwilling to exercise meaningful control over insurances despite their obligation to do so under Article 5 of Directive 2004/113/EC.

PART II: *SCOPE OF NATIONAL LEGISLATION*

1. Scope of national legislation beyond the scope of EU gender equality directives?

The AGG goes beyond the areas covered by the gender equality directives as it applies a ‘horizontal’ approach modelled after the Race Directive. Thus, it covers not only ‘goods and services available to the public,’ but also the areas of social protection, social security and health services, social advantages and education. However, the prohibition of sex discrimination and the specific rules on remedies only apply to these areas under civil law. If a public authority, acting under administrative law in these areas, discriminates on the basis of sex, the general rules apply (constitutional prohibition of sex discrimination and fault-based state liability).

2. ‘Hierarchy’ of grounds?

Although the AGG takes a ‘horizontal approach,’ the protection against discrimination based on race or ethnic origin goes farther than that against sex discrimination. Racial discrimination is prohibited in all contracts in the areas of social protection, social security and health services, social advantages and education, as well as goods and services. Sex discrimination in these areas is only prohibited if the contract is a ‘mass contract’ (see above, under 2). In practice, this difference does not seem to be of relevance because the most relevant cases of sex discrimination are in the area of private insurances, for which the prohibition of sex discrimination applies irrespective of whether a ‘mass contract’ is in question (see Article 19(1) No. 2 AGG).

Nevertheless, women’s organisations in Germany consider that a ‘hierarchy’ of grounds is established through European law itself because the Commission’s proposal for a new Anti-Discrimination Directive (of July 2008) aims at a horizontal approach but leaves out sex discrimination. In the view of the present expert, the symbolic value of European Law for the public debate and perception of discrimination must not be underestimated, irrespective of the extent to which national law may have gone beyond it.

3. Comments and/or suggestions

No comments or suggestions.

GREECE – *Sophia Koukoulis-Spiliotopoulos*

PART I: *DIRECTIVE 2004/113/EC*

1. Transposition of Directive 2004/113/EC

No legislation transposing Directive 2004/113/EC has been adopted in Greece. The Greek Constitution has always contained a general non-discrimination provision covering all grounds: ‘Greeks are equal before the law’ (Article 4(1)), which, however, has proved insufficient to eradicate gender discrimination and ensure equal rights for men and women. This is why a specific provision requiring gender equality

was introduced into the Constitution in 1975: ‘Greek men and women have equal rights and obligations’ (Article 4(2)).

The norms contained in the above provisions cover all areas, including, but not limited to, the areas covered by the gender equality and non-discrimination directives. They are binding on all state authorities (the legislature, the Administration and the judiciary) and, like all constitutional provisions relating to human rights, they have, by virtue of Article 25(1) of the Constitution, direct vertical and horizontal effect.

Article 4(2) was originally combined with another constitutional provision, which allowed derogations from the gender equality norm (Article 116(2)). In a landmark judgment, the Council of State (the Supreme Administrative Court), also invoking Directive 76/207²⁴ and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), held that Article 4(2) guarantees not only formal, but also substantive gender equality, and that positive measures in favour of women are necessary in order to remedy their inferior position in society.²⁵ Following that judgment and a strong campaign by women’s NGOs, the original provision of Article 116(2) was replaced in 2001 by a provision which reads: ‘Positive measures aiming at promoting equality between men and women do not constitute discrimination on grounds of sex. The State shall take measures to eliminate inequalities which exist in practice, in particular those detrimental to women’.

Since the Constitution allows no derogations from gender equality,²⁶ Act 3488/2006²⁷ transposing Directive 2002/73 does not allow them either. Moreover, according to well-established case law, the new provision of Article 116(2) requires that all state authorities take the positive measures in favour of women that are necessary and pertinent for achieving substantive equality where women are in an inferior position. Thus, under the Greek Constitution, positive measures are a ‘must’.²⁸

Article 21(1) of the Constitution proclaims that ‘the family, marriage, maternity and childhood are under state protection’, while Article 21(5) (a provision also introduced into the Constitution in 2001) stipulates that ‘the planning and implementation of a demographic policy, as well as the taking of all necessary measures constitute an obligation of the State’. These provisions are also binding on all state authorities and apply in all fields, including but not limited to those covered by Community law on gender equality and pregnancy/maternity protection. They are used, *inter alia*, in conjunction with Article 4(2) of the Constitution, the general principle of Community law on the reconciliation of family and professional life and

²⁴ Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, OJ L 39, 14 February 1976, p. 40.

²⁵ Council of the State (CS) judgment No. 1933/1998 (Plen.).

²⁶ On the constitutional developments relating to gender equality see in particular S. Koukoulis-Spiliotopoulos ‘Greece: From Formal to Substantive Gender Equality; the Leading Role of Jurisprudence and the Contribution of Women’s NGOs’ in: A. Manganas (ed.) *Essays in Honour of Alice-Yotopoulos-Marangopoulos* pp. 659-700, Athens/Brussels, Nomiki Bibliothiki/Bruylant 2003 vol. A; and ‘Gender equality in Greece and effective judicial protection: issues of general relevance in employment relationships’ *Neue Zeitschrift für Arbeitsrecht* Beilage 2/2008, pp. 74-82.

²⁷ Act 3488/2006 ‘Implementation of the principle of equal treatment of men and women regarding access to employment, professional training and evolution, terms and conditions of work and other related provisions’, OJ A 191/11 September 2006.

²⁸ Council of State judgments Nos. 2831, 2832, 2833/2003, 192/2004, 2388/2004. See also S. Koukoulis-Spiliotopoulos ‘Greece’, *European Gender Equality Law Review* No. 1/2008: http://ec.europa.eu/employment_social/gender_equality/docs/2008/egelr_2008_final_en.pdf, accessed 25 January 2009.

the Parental Leave Directive (96/34)²⁹ as the supra-legislative legal basis of the right of all workers (men and women) to measures facilitating the ‘harmonization’ of family and working life, such as parental leave.³⁰

Thus, the matters governed, as well as those not governed, by Directive 2004/113 fall within the scope of Articles 4(2), 116(2) and 21(1) and (5) of the Constitution³¹. There is also legislation dealing with matters not governed by the Directive. Examples include the following: Act 1566/1985 imposing co-education in primary and high schools; legislation prohibiting sexist advertisements and sexist discourse (Decree 100/2000 transposing Directive 97/36, Act 2328/1995 on private TV, Act 2251/1994 on consumer protection, Act 2644/1998 on cable TV). Moreover, the National Radio-Television Council (ESR),³² an independent authority provided by Article 15(c) of the Constitution and established by Act 2863/2000, which grants permits for the functioning of radio stations and TV channels and controls the application of relevant legislation, issues Codes of Deontology for journalists and TV and radio programmes that prohibit, *inter alia*, gender discrimination. There is also a Code of Deontology of the Union of Journalists of Daily Athens Newspapers (ESIEA), which condemns, *inter alia*, gender discrimination.³³

Regarding the personal scope of the constitutional gender equality principle, it must be noted that, while Article 4(2) refers to ‘Greek’ men and women only, Article 116(2) refers to ‘men and women’ in general, thus covering even non-European Union nationals who are under the jurisdiction of the Greek State. Since Article 116(2) expresses the character of the principle proclaimed in Article 4(2) as a principle of substantive gender equality, it reflects on the personal scope of Article 4(2), which must thus be considered as covering even non-European Union nationals. There is no case law yet on this aspect of Article 4(2).

The personal scope of the general anti-discrimination provision of Article 4(1) of the Constitution is deemed to cover Greek citizens and European Union nationals; moreover, all persons under the jurisdiction of the Greek State, including third-country nationals, are protected by international conventions ratified by Greece to the extent that they fall within their scope.³⁴

All Greek courts review the conformity of statutes to the provisions of the Constitution, Community law and ratified international conventions and set aside those that they consider contrary to these provisions. Moreover, they often interpret constitutional provisions, including those of Articles 4(2) and 116(2), in the light of Community law and ratified international conventions, in particular the CEDAW and the Covenant on Civil and Political Rights.

However, the constitutional guarantee of gender equality does not seem sufficient to achieve the objective of Directive 2004/113. More detailed legislation is necessary, the more so as it does not seem that there is case law or general awareness of the scope and content of the particular rules embodied in this Directive.

²⁹ Council Directive 96/34/EC on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC, OJ L 145, 19 June 1996, p. 4.

³⁰ Council of State judgments Nos. 3618/2003 (Plen.), 1 and 2/2006.

³¹ See all constitutional provisions mentioned in this report on the Greek Parliament’s website, in English: <http://www.parliament.gr/english/politeuma/syntagma.pdf>, accessed 25 January 2009.

³² <http://www.esr.gr/arxeion-xml/pages/esr/esrSite/get-index>, accessed 2 May 2009.

³³ <http://www.esiea.gr/gr/index.html>, accessed 2 May 2009.

³⁴ Council of State judgments Nos. 1381, 1382/2008.

It seems that a bill transposing Directive 2004/113 is being elaborated, but no such bill has yet been made public, probably due to difficulties with the insurance sector.

2. Correct transposition?

Since there is yet no legislation transposing Directive 2004/113, there is nothing to report regarding the correctness or incorrectness of the transposition.

3. Definitions of ‘goods’ and ‘services’

The concepts of ‘goods’ and ‘services’ are not defined in national legislation and/or in case law. Article 4(1)(h) of Act 3304/2005,³⁵ which transposes Directives 2000/43³⁶ and 2000/78³⁷ simply refers to ‘access and supply of goods and services which are available to the public, including housing’, without any further specification. There is no relevant case law.

4. Protection of specific groups

Transsexuals are covered by both Article 4(1) of the Constitution and relevant international conventions (see *supra* 1). There is no explicit protection for them, but it can be considered that they are covered by Act 3304/2005 transposing Directives 2000/43 and 2000/78, which prohibits, *inter alia*, discrimination on grounds of sexual orientation; there is no relevant case law. Pregnant women and women who have recently given birth are covered by the combined provisions of Article 21(1) and 21(5) of the Constitution, which protect them in all fields (*supra* 1). There is also legislation protecting them in matters of employment and occupation, including Act 1483/1984,³⁸ which protects persons with family obligations and prohibits, *inter alia*, the dismissal of women during pregnancy and maternity leave, or for one year after childbirth in cases of illness due to the childbirth (Article 15), Decree 176/1997, as amended by Decree 41/2003,³⁹ which implements Directive 92/85,⁴⁰ and Act 3488/2006 which transposes Directive 2002/73. There is, however, no explicit protection in matters covered by Directive 2004/113 and no relevant case law. Thus, in this respect, the protection is not sufficiently clear and precise so as to allow individuals to understand their rights and goods and services providers to understand their legal obligations.

³⁵ Act 3304/2005 ‘on the application of the principle of equal treatment regardless of racial or ethnic origin, religious or other beliefs, disability, age, or sexual orientation’, OJ A 16/27 January 2005.

³⁶ Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L 180, 19 July 2000, p. 22

³⁷ Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation, OJ L 303, 2 December 2000, p. 16.

³⁸ Act 1483/1984 ‘protection and facilitation of workers with family responsibilities’, as amended by Act 2639/1998, OJ A 205/02 September 1998.

³⁹ Presidential Decree 176/1997 ‘measures for the improvement of the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding in compliance with Directive 92/85/EEC,’ OJ A 150/15 July 1997 as amended by Decree 41/2003, OJ A 44/21 February 2003.

⁴⁰ Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC), OJ L 348, 28 November 1992, p. 1.

5. Definitions of pregnancy and maternity

Pregnancy discrimination and maternity discrimination (including discrimination related to breastfeeding) are not explicitly defined in relation to access to and supply of goods and services as distinct from the employment context. Maternity protection in the latter context is provided by the courts mainly on the basis of specific legislation and Article 21(1) of the Constitution (*supra* 1 and 4). However, there is a recent tendency in civil cases to consider unfavourable treatment related to pregnancy/maternity as gender discrimination, in the light of Community law.⁴¹ There is no case law on pregnancy/maternity discrimination related to access to and supply of goods and service and it does not seem that there is sufficient clarity as to the rights of women in this context and the obligations of goods and services providers. There are no data on actual discrimination in relation to pregnancy and maternity in the goods and services context. There is neither specific legislation nor case law regarding the protection of women from discrimination related to their breastfeeding in the access to or supply of goods and services.

6. Use of a comparator

Since there is neither specific legislation nor case law on pregnancy and maternity discrimination in relation to goods and services, we cannot know whether a comparator will be needed.

7. Actions against failure to implement the Directive

No actions against Greece for failure to implement Directive 2004/113 seem to have been brought.

8. Enforcement by equality bodies

The Greek equality body which controls the implementation of Directives 2002/73, 2000/78 and 2000/43 (viz. of the legislation transposing them), is the Ombudsman, but this body has no competence to bring enforcement actions either on behalf of individuals or in the public interest. As Directive 2004/113 has yet to be transposed, we do not know whether the same body will be designated for controlling the implementation of this Directive and what particular powers it will have.

9. Discrimination based on association/perceived status

There is no explicit prohibition of discrimination on the basis of association with a transsexual person or persons, or a person or persons of a particular sex, and/or discrimination on grounds of perceived sex or transsexual status in access to goods and services.

10. Protection of women regarding pregnancy and maternity

Since there is neither legislation nor case law on pregnancy/maternity protection in matters covered by Directive 2004/113, there is nothing specific to report regarding Article 4(2) of the Directive. However, any legislation restricting pregnancy/maternity protection in this area, as in any other area, would be contrary to Article 21(1) of the Constitution, hence not applicable.⁴² In practice, it is difficult for parents carrying children in prams or otherwise to use means of transportation or even to circulate in

⁴¹ Supreme Civil Court judgment No. 37/2004 (unfavourable modification of working conditions upon return of the woman from maternity leave).

⁴² See Council of State judgment No. 1095/2001.

the city, due to the design of buses and trolley buses and to the condition of pavements.

11. Exceptions to the principle of equal treatment (Article 4(5))

Since there is no transposition of Directive 2004/113, there is nothing to report regarding Article 4(5) of the Directive (possibility to allow differences of treatment in certain circumstances). It must, however, be recalled that the Greek Constitution allows no derogations from gender equality anymore and that, consequently, Act 3488/2006 transposing Directive 2002/73 allows no derogations either (*supra* 1).

12. Positive action

There are no positive measures related to Article 6 of Directive 2004/113, but it must be recalled that Article 116(2) of the Constitution obliges state authorities to take such measures in all areas, in cases where women are disadvantaged, i.e. even in areas and for persons not covered by Community law (*supra* 1). The General Secretariat for Gender Equality (GSGE), which is the governmental agency competent to plan, implement, and monitor the implementation of policies on equality between women and men in all sectors, operates two counselling centres, in Athens and Piraeus, which provide free of charge psycho-social support and legal advice to women victims of violence. The Centre for Research on Equality Issues (KETHI), a legal person governed by private law, under the supervision of the GSGE, whose objective is to conduct social research on matters of gender equality and to promote women in all areas of political, social and social life within the framework of the policy determined by the GSGE, operates another five counselling centres, in Athens and in the cities of Thessaloniki, Patra, Herakleion (Crete) and Volos. The GSGE also operates a shelter for battered women in Athens, in cooperation with the Municipality of Athens. Such shelters are also operated by the Ministry of Health and Social Solidarity. There are also some other counselling centres in Athens and other Greek cities, as well as a few shelters which are operated by municipalities and NGOs.⁴³

13. Burden of proof

Since there is neither legislation nor case law on matters covered by Directive 2004/113, there is nothing to report regarding the application of the burden of proof rule in goods and services cases, as embodied in Article 9 of the Directive. As this rule is as important as it is in employment cases, it should be transposed in a clear and effective way, so that transparency and legal certainty are created, i.e. it should be clearly formulated and included in the Codes of Civil and Administrative Procedure, not merely in the legislation transposing the Directive. The burden of proof rule, as embodied in the Burden of Proof Directive (97/80/EC),⁴⁴ and in Directives 2000/43 and 2000/78 has been copied out in the transposing legislation, without being incorporated in the procedural codes; as a result, this rule is virtually unknown to judges, lawyers, interested individuals and organizations; the same has happened with the transposition of the provisions of Directives 2002/73, 2000/43 and 2000/78 requiring the *locus standi* of organizations to bring claims of aggrieved individuals to

⁴³ For information on counselling centres and shelters see the website of the GSGE: <http://www.isotita.gr/en/index.php>, and the website of KETHI: <http://www.kethi.gr>, both accessed 25 January 2009.

⁴⁴ Council Directive 97/80/EC on the burden of proof in cases of discrimination based on sex, OJ L 14, 20 January 1998, p. 6.

courts and other authorities⁴⁵; this requirement is repeated in Article 8(3) of Directive 2004/113 and we are afraid that it will be transposed in the same inadequate way.

14. Harassment, instruction to discriminate and victimisation

There is no case law on harassment and sexual harassment in the goods and services field, but there seem to be such cases in practice, *inter alia*, in universities.

We are not aware of concrete examples of instructions to discriminate in the area of goods and services.

We do not know of any examples of victimisation regarding goods and services.

15. Overall assessment

The Directive does not seem to have any impact in Greece.

PART II: SCOPE OF NATIONAL LEGISLATION

1. Scope of national legislation beyond the scope of EU gender equality directives?

As already noted (*supra* 1, 4), the Greek Constitution goes beyond the scope of the gender equality directives and of the directives on discrimination on other grounds (2000/43 and 2000/78), as it covers all areas.

2. ‘Hierarchy’ of grounds?

The scope of Directive 2004/113 is narrower than the scope of the Race Directive (2000/43), indeed narrower than the scope of the Commission’s initial directive proposal (2002), which covered ‘social assistance, including health care and social advantages’ and education and taxation, and required that ‘without prejudice to the principle of freedom of expression, media must not contain any discrimination based on sex, nor any incitement to hatred on grounds of sex, and advertising respects human dignity’ (Article 4). However, social assistance can be considered as included in the Directive’s scope, since it is not explicitly excluded, while the vague exclusion of ‘the content of media and advertising’ (Article 3(3)) cannot mean that offers of and information on the supply of goods and services in the media are excluded, the more so as the Directive concerns goods and services available to the public.

Furthermore, the Race Directive allows differences in treatment as regards access to employment only where this is justified by a genuine occupational requirement (Article 4). It does not allow them in respect of goods and services, as Directive 2004/113 does (Article 4(5)). It is hoped that the Court will interpret Article 4(5) narrowly and restrictively, as it does with all exceptions from fundamental rights.

However, I do not think that we can speak of a ‘hierarchy of grounds’, as gender is not just another ground of discrimination. More particularly: Under Community law, gender equality has a privileged position. The Treaty (Articles 2 and 3(2)) makes gender equality a mission and a horizontal objective of the Community in all areas. It also makes the elimination of gender inequalities and the promotion of gender equality a ‘positive obligation’ in all areas, as it is recalled in the preamble of all recent gender equality directives and of the non-discrimination directives (2000/43

⁴⁵ See Sophia Spiliotopoulos ‘Greece’, in European Network of legal Experts in the Field of Gender Equality, *European Gender Equality Law Review* No. 1/2008: http://ec.europa.eu/employment_social/gender_equality/docs/2008/egelr_2008_final_en.pdf, accessed 25 January 2009; same author ‘Gender equality in Greece and effective judicial protection: issues of general relevance in employment relationships’ *Neue Zeitschrift für Arbeitsrecht* Beilage 2/2008, pp. 74-82.

and 2000/78).⁴⁶ It is thus clear that all Community institutions, in exercising their respective powers of elaborating, interpreting, implementing and controlling the implementation of Community law, must ‘actively promote’⁴⁷ substantive gender equality, in all areas. I think that we must consider that Member States are also bound by this obligation *via* their duty of ‘sincere cooperation’ (Article 10 TEC).

Moreover, Article 3(2) TEC requires the elimination of gender ‘inequalities’, not merely of gender discrimination. The concept of ‘inequality’ is different in nature from, and broader than, the concept of ‘discrimination’. It covers *de facto* situations affecting mainly women, due to prejudices and stereotypes which infiltrate socioeconomic structures. Inequalities survive the repeal of discriminatory provisions. Furthermore, women are neither a group nor a minority, but one of the two forms of the human being and half of mankind, and they often suffer multiple inequalities. This is why the Treaty makes gender equality a positive and pro-active constitutional principle, a horizontal objective and a fundamental right and does not limit itself to prohibiting gender discrimination.⁴⁸

Consequently, there can be no ‘hierarchy’ between different concepts. Moreover, the Treaty requires that the competent Community institutions interpret existing Community gender equality provisions teleologically, in the widest way, and that they adopt further gender equality instruments as soon as possible, in order to cover at least the areas covered by non-discrimination directives.

In Greece, we cannot speak of a ‘hierarchy’ in the field of goods and services, as there are strong constitutional guarantees of substantive gender equality in all fields (*supra* 1). As regards practice, there is nothing to report at the moment.

3. Comments and/or suggestions

No comments or suggestions.

HUNGARY – Csilla Kollonay Lehoczky

PART I: DIRECTIVE 2004/113/EC

1. Transposition of Directive 2004/113/EC

No specific legislation transposing Directive 2004/113/EC has been adopted. Act no. CXXV of 2003 on Equal Treatment and Equal Opportunity (hereafter ‘Equality Act’) has been considered to be in compliance with the Directive, since its scope also covers access to and supply of goods and services, and in this respect the prohibition of discrimination was uniformly extended to all grounds without distinction, including sex, pregnancy and maternity (or paternity), sexual orientation and sexual identity as separate grounds.

The material scope of the Act is designed in a quite specific way, using two tiers: First, it lists the organizations with public functions governed by the obligation of equal treatment as part of their legal relationships, procedures and measures taken. Although these organizations are mainly but not exclusively public organizations, the

⁴⁶ See the preambles of Directives 2002/73, Paragraph 4; 2006/54 (recast), Paragraph 2; 2004/113, Paragraph 5; 2000/43, Paragraph 14; 2000/78, Paragraph 3.

⁴⁷ AG Chr. Stix-Hackl, Case C-186/01 *Dory v Federal Republic of Germany* [2003] ECR I-2479.

⁴⁸ See S. Koukoulis-Spiiotopoulos ‘The Amended Equal Treatment Directive (2002/73): An Expression of Constitutional Principles/Fundamental Rights’, *Maastricht Journal of European and Comparative Law* (2005) 12 MJ 4, 327-368.

list is carefully restricted to providers of public services financed from the public budget.⁴⁹ Second, Article 5 supplements this list with a number of private parties, who, in certain specified activities, also have to observe the equal treatment principle. Such parties/activities are:

- parties that make offers to enter into a contract or tender for an unspecified group of persons;
- parties that provide services or sell goods at their premises that are open to customers;
- private entrepreneurs, legal entities and organizations without legal personality who receive state subsidies, with respect to the elements of their activities for which they use the state subsidy;
- employers in employment relationships and related or similar relationships aimed at the use of labour.

Further, in Part III (Articles 24 to 30), the Act gives detailed guidance on the interpretation of the principle of equal treatment in services of certain specified areas, such as social welfare, health care, housing, education and training as well as the trading of goods and the sale of services.

Even if there is no evident transposition of the Directive, placing the issue on the agenda put the spotlight on minor differences, such as equalizing the age-differentiated entitlement of men and women to price-reduced train tickets for senior citizens.

2. Correct transposition?

Regarding the scope of the Equality Act, even if reflecting a cautiousness to avoid infringing upon areas of private autonomy, the transposition not only goes beyond what is required by the Directive (clearly with respect to education), but also includes services whose coverage by the Directive is not clear from its narrow wording (such as health care and social welfare) or is expressly excluded.

This is in part a result of the high priority given to the problem of the Roma population, most exposed to discrimination and even segregation in services. The growing attention paid to the disabled also helps the spread of the requirement of equal treatment in services. Although sex discrimination in services has not been given such importance, on the coattails of the well-targeted and detailed regulation on services, women also can proceed towards more equality. It appears that – in contrast to employment relationships where the subordinate relationship and the concern about keeping a job can be an intimidating factor – in services there is more courage and readiness to go for the enforcement of equal treatment by Romas and the disabled. Several cases have already reached the Equal Treatment Authority on such issues, hopefully paving the way for sex-discrimination cases as well.

A ‘copying’ transposition could not be the case in the transposition of this Directive, considering the time factor. On the other hand, a large part of the existing

⁴⁹ According to Article 4 of the Equality Act, the principle of equal treatment shall be observed by a) the Hungarian State; b) local and minority governments and all bodies thereof; c) organisations exercising powers as authorities; d) armed forces and policing bodies; e) public foundations, public bodies; f) organisations performing public services; g) institutions of elementary and higher education; h) persons and institutions providing social care and child protection services, and child welfare service; i) museums, libraries, institutions serving public culture; j) voluntary mutual insurance funds, private pension funds; k) entities providing health care; l) political parties; and m) budgetary bodies not belonging to subsections a)-l) in the course of their transactions, procedures and measures.

provisions, especially its definitions were ‘copied’ from Directive 2002/73. This was motivated by the intention of maximum compliance on the one hand and lack of confidence and knowledge on the other.

In spite of the obvious cautiousness of the Equality Act to avoid any possible interference with private autonomy (reflected by the narrow personal scope and the broad options for justification and defence, let alone the reluctance to define sexual harassment correctly) the Equality Act results in correct transposition.

3. Definitions of ‘goods’ and ‘services’

Hungarian law addresses the concept of ‘goods’ and ‘services’ primarily with respect to issues of fair (domestic) competition, advertising, and, not in the last place, taxation. The concept of goods (commodities) is defined identically in the law on the prohibition of unfair conduct *vis-à-vis* customers and in the law on advertising activities,⁵⁰ and therefore might be considered as reflecting a general definition. According to both provisions referred to here, the term of ‘good’ covers any tangible item accessible for possession and trading – including money, securities, monetary means as well as natural energies that can be utilized similarly to things (all these together ‘products’) as well as services, real estate and intangible rights.

The law on general turnover taxes,⁵¹ taxing both ‘products’ and ‘services’, seems to confirm the above definition by defining the ‘provision of services’ as ‘any transaction except the sale of products’. Apart from these general definitions, the laws and also the scarce case law cover the various kinds of services, predominantly telecommunication and information services, rather than the abstract concept of services. Public interest services are an exception, however, as these are not defined in the law either. The interpretation and case law regarding Article 50 of the EC Treaty does not seem to cover Hungarian law.

In contrast to the Directive that wants the two terms ‘goods’ and ‘services’ to cover a host of activities, Hungarian legislation mentions ‘goods and services’ as only one from among a host of areas and activities where the equal treatment principle is to be applied, thereby simplifying the issue of interpretation of the concept of goods and services.

4. Protection of specific groups

Pregnant women are automatically entitled to the services of the state’s pregnancy-care network, which not only includes physical and psychological care by a designated nurse, but also information and assistance in legal, social and other matters including, if necessary, arranging hospitalization, accommodation in a mothers’ centre or social assistance. At airport security checks, pregnant women are entitled to avoid screening.

In health care, pregnant women and women giving birth receive preferential treatment. They have the right to choose their doctor (obstetrician) without extra payment. At the time of the delivery, they have the right to have an accompanying adult person accommodated in the hospital free of charge and to be in the same ward room with their newborn baby. If necessary, they are entitled to baby milk free of charge until the baby is 8 months old.

Transsexuals have no special or express protection besides the general protection that sexual identity cannot be a ground for discrimination. Although sex-reassignment

⁵⁰ Act XLVII of 2008, Article 2 (c) and Act XLVIII of 2008, Article 3 respectively.

⁵¹ Act LXXVII of 2007, Article 13.

surgery and even the change of the name and sex in the official registry have recently become available, both the medical and the legal factors are lacking clear regulation causing numerous discriminatory situations for transsexuals.

5. Definitions of pregnancy and maternity

No definition of pregnancy and maternity is given by the law. Maternity (together with paternity) as a prohibited ground of discrimination thus means protection with respect to the parental role and is not limited to the post-natal status. No explicit legal provisions relate to pregnant women and mothers to distinguish this protection from the one relating to employees. Some discrimination in the area reflects the old paternalistic approach when 'protective discrimination' dominated, to guarantee protection without touching freedom and autonomy.

Discriminatory restrictions prevail in airline companies' policies, and similar scattered cases are known from driver schools (with the difference that the latter are many minor service providers), making it difficult to make a general statement. The official policy of MALEV Hungarian airlines company does not permit women over the 36th week of pregnancy to take a plane, and even before that, over the 28th week they have to produce a bilingual (Hungarian-English) medical certificate certifying that travelling on the given day of travel is free of risk. This rule applied by airline companies, especially the requirement of the medical certificate, is a limitation of the personal autonomy of the pregnant women and therefore discrimination. (Even in an earlier stage of pregnancy, doctors would be reluctant to issue such a certificate and thereby take the risk of anything happening and facing liability.) Although there might be a risk both for the mother and for the baby, this should be left within the autonomy and responsibility of the mother. The risk of the airline company in the event of a complication is not greater than the risk of anyone with certain other health problems (who is not required to present any medical certificate) getting sick and needing emergency service etc..

6. Use of a comparator

No comparator is used for the definitions of pregnancy and maternity, either in the Equality Act or in the other rules mentioned.

7. Actions against failure to implement the Directive

No action brought against the State is known of. The Equal Treatment Authority ('ETA' hereafter) is a public administrative organ, not an independent judicial body. It reports to the Government and is entitled to cooperate with the Government in order to promote equality. Its actions might be directed against concrete parties (individuals, organs, organizations) in concrete cases of violations of existing norms.

8. Enforcement by equality bodies

The ETA has the right to initiate a so-called 'public interest claim', in cases when there is a concrete situation violating the rights of a concrete group, but it cannot be limited to a group of identifiable persons. The complexity of the statutory requirement (combination of general and concrete, collective and individual elements) seems to prevent the ETA from using this power. (The Parliamentary Commissioner of Human Rights intervened using its power in some cases that raised public attention and where the ETA remained silent.)

9. Discrimination based on association/perceived status

Article 8 of the Equality Act defines the concept of discrimination as treating unfavourably someone due to an ‘existing or *presumed*’ attribute enumerated in the list of prohibited grounds of discrimination contained in this article. Thus, the *perceived sex* (similar to perceived race or religion) is a prohibited ground for differentiation between persons with respect to access to goods and services.

No explicit provision prohibits discrimination specifically on the ground of being associated with a transsexual person.

10. Protection of women regarding pregnancy and maternity

This includes provisions mentioned under 4. The meaning of Article 4(2) is unclear, since the expression ‘more favourable’ suggests permission of affirmative (positive) action, but, on the other hand, the measures mentioned under 4 above – and supposedly those contemplated by Article 4(2) – are not provisions establishing positive action, but simply allow reasonable accommodation, and therefore are nothing more than equal treatment with respect to the specific nature of the state of pregnancy and childbirth.

11. Exceptions to the principle of equal treatment (Article 4(5))

Under Article 7(2) of the Equality Act, differential treatment does not violate the principle of equal treatment if it is inevitably necessary for the protection of the fundamental right of another person, provided that the limitation of the right to equal treatment is appropriate and proportionate for achieving the aim. This defence is available in all cases covered by all situations outside the employment context.

12. Positive action

Positive action is permitted by law.

A former example of affirmative action (reaching back to the pre-accession period) promoting opportunities for persons on childcare leave granted reimbursement of tuition fees for those who were admitted to a fee-paying form of higher education (including postgraduate education). The tuition fee was reimbursed by the State. On the face of it, this was gender neutral, but in reality it promoted the studying and therefore the labour market opportunities of women, since those taking childcare leave were predominantly women, even if the opportunity was equally open for men. This was – in addition to its substantive advantage – an example of well-designed and well-targeted affirmative action. For budget reasons, this opportunity was abolished, and as a reaction to the revolt generated by this cut, a ‘cheap’ form of affirmative action – which is indeed clearly sex-discriminatory – has been introduced: women being pregnant or on childcare leave when applying to university – can get 8 additional study points for this status (the same reversed discrimination is applied in favour of Roma, disabled and otherwise socially disadvantaged students).

In certain cases, entrepreneurship or similar activities are supported and promoted by various training and other courses preparing mothers to become autonomous market actors.

13. Burden of proof

The principle has been applied, even if interpreted by the Authority (and also the courts) with some uncertainty. Its importance is necessarily less vital, considering the more equal position of the parties in comparison to employment.

14. Harassment, instruction to discriminate and victimisation

No legal actions have been initiated for harassment based on sex, or for sexual harassment. Reports, fiction and literature indicate that harassment occurs in a large variety of situations where the provision of services or goods creates elements of dependence between the client/customer and provider (e.g. trainer and trainee in any form of physical or other training, with special regard to driving school trainer and trainee, taxi driver and passenger, doctor and patient.)

There is no information on cases of instruction to discriminate and victimisation.

15. Overall assessment

The impact is obvious, not because of the application of the sex equality principle in the access to goods and services, but rather due to the close relationship with the application of the same principle in employment and also the equality in access to goods, services and other areas for the Roma and the disabled – all these together have exerted some positive influence.

PART II: SCOPE OF NATIONAL LEGISLATION

1. Scope of national legislation beyond the scope of EU gender equality directives?

The law in force since January 2004 extends the principle of equal treatment (prohibiting not only on the basis of sex, but on the basis of any listed grounds) to public services, social, health, childcare institutions and education, including all kinds of services (e.g. dormitory, stipend, placement services etc.) connected to education. In that sense, Hungarian legislation provides almost identical regulations for the grounds of sex and race regarding access to services. The differences are not in the scope, but rather in the permitted exceptions – such exceptions, in the right approach, are less permitted on the ground of race. E.g. exceptions in the law permit single-sex classes under not very restrictive measures, while such separation is not permitted regarding race or disability, which would qualify as segregation. (The wording of the expression ‘provided that it is voluntary’ raises the question: voluntary for whom?)

2. ‘Hierarchy’ of grounds?

In Hungary there clearly is a hierarchy of grounds. In Hungary, there has clearly been ‘differential treatment’ of the various grounds, prioritizing the fight against racial and disability discrimination. While this might have good reason, in the last two decades it has resulted in too little attention being paid to gender discrimination and pushing it behind in all terms and instruments necessary to achieve effective equality.⁵²

3. Comments and/or suggestions

Hungary has taken considerable steps in gender equality law in the past twenty years. On the other hand, the questions and topics raised by the questionnaire seem to be designed for countries with a more developed and more sophisticated approach to sex discrimination and gender roles than is the case in Hungary, where ‘Europeanized’ gender equality law has to operate in a society with a more traditional and gender-biased public culture, including the opinions of the ‘man in the street’ and the people in power.

⁵² For more information, see Section 7 of the PRIP report.

Two important deficiencies blocking effective improvement should be pointed out here. First, the role of the public media and advertising as well as the tone of public discourse are significant in preserving traditional stereotypes and gender relations. Second, the country is still trying to catch up regarding the lack of knowledge on equality inherited from its pre-accession past. The gap has not yet been bridged. Equality studies (let alone gender studies) are not part of the curriculum of legal education; they have only recently been introduced and are taught as optional courses (surrounded by slight bias). This means that generations of law graduates – future lawmakers, court judges or public servants – still get their diploma without having a clear idea of gender equality and are infected by the slight bias surrounding this area.

ICELAND – *Herdís Thorgeirsdóttir*

PART I: *DIRECTIVE 2004/113/EC*

1. Transposition of Directive 2004/113/EC

Directive 2004/113/EC is applicable to the non-EU Member States of the European Economic Area following a decision of the EEA Joint Committee. The Directive is not a part of the EEA agreement and the EEA Joint Committee has not yet made its decision whether to implement the Directive or not. Directive 2004/113/EC was discussed at a meeting of the EEA sub-committees II-IV on 22 January 2009, where Iceland gave a material consent that the Directive be sent to the Commission and subsequently adopted in the EEA agreement. It is expected that the EEA Joint Committee will make a decision regarding this Directive soon. The Directive is seen to fall outside the scope of the EEA Treaty as its source is in Article 13 in the Treaty of Rome, amended by the Amsterdam Treaty. From a constitutional point of view, all additions or amendments made to the Agreement by the EEA Joint Committee require legal amendments in Iceland and are subject to the Althing's final consent. Therefore any such additions are accepted on behalf of Iceland in the EEA Joint Committee with a constitutional reservation. This does not, however, apply to amendments or additions which can be adopted by way of ministerial rules or regulations.

The Gender Equality Act no. 96/2000 covers the areas of Directive 2004/113/EC which prohibits any gender-based discrimination, including indirect discrimination in the access to and supply of goods and services. What is, however, different in Directive 2004/113 is the access to insurance and related financial services.

2. Correct transposition?

See point 1.

3. Definitions of 'goods' and 'services'

See point 1.

4. Protection of specific groups

There is no explicit protection for the groups described, apart from the Gender Equality Act No. 10/2008 with regard to pregnant women and the Act on Working Environment, Health and Safety in the Workplace, No. 46/1980, with subsequent amendments. There is no explicit protection for transsexuals in this regard; only the non-discrimination provisions in the Constitution and the European Convention on Human Rights which has the status of domestic law, as well as the General Penal

Code (Article 233 a. Anyone who by means of ridicule, calumny, insult, threat or otherwise assaults (a person or group of persons)¹⁾ on account of their nationality, colour, (race, religion or sexual inclination)¹⁾ shall be subject to fines²⁾ or imprisonment for up to 2 years.³⁾⁵³

5. Definitions of pregnancy and maternity

Pregnancy discrimination and maternity discrimination has not been defined other than in the employment context.

6. Use of a comparator

No comparators are used in the definitions of pregnancy and maternity. See point 5.

7. Actions against failure to implement the Directive

See under 1.

8. Enforcement by equality bodies

With the amended Gender Equality Act No. 10/2008, the monitoring role of the Centre for Gender Equality has been increased. The Centre is given more scope to gather information and investigate in cases regarded as infringing the law. In special circumstances it may request that the Complaints Committee examine a specific case. According to the law, the Minister of Social Affairs will issue regulations with further instructions on the conditions under which the Centre of Gender Equality shall be justified to initiate legal proceedings. No such regulation has been issued since the provision was first adopted with the GEA No. 96/2000. The Centre for Gender Equality can impose fines on those that have been found in breach of the Gender Equality Act by the Complaints Committee, if they do not act according to the decisions of the Committee.

9. Discrimination based on association/perceived status

There are no provisions on this issue.

10. Protection of women regarding pregnancy and maternity

See under 1.

11. Exceptions to the principle of equal treatment (Article 4(5))

See under 1.

12. Positive action

See under 1.

13. Burden of proof

See under 1.

14. Harassment, instruction to discriminate and victimisation

There are no examples of harassment. Also see under 1.

15. Overall assessment

See under 1.

⁵³ Act 135/1996, Article 2, ²⁾ Act 82/1998, Article 126, ³⁾ Act 96/1973, Article 1.

PART II: SCOPE OF NATIONAL LEGISLATION

1. Scope of national legislation beyond the scope of EU gender equality directives?

The Gender Equality Act No. 10/2008 does not go beyond the scope of existing EC gender equality directives.

2. ‘Hierarchy’ of grounds

There is no hierarchy of grounds in Iceland.

3. Comments and/or suggestions

No comments or suggestions.

IRELAND – Frances Meenan

PART I: DIRECTIVE 2004/113/EC

1. Transposition of Directive 2004/113/EC

The Equal Status Act 2000 was amended by the Equality Act 2004 and the Civil Law (Miscellaneous Provisions) Act 2008⁵⁴ in order to give effect to Directive 2004/113. There was also an amendment of the Act of 2000 in respect of claims against licensed premises by the Intoxicating Liquor Act 2003. The Equal Status Acts 2000 to 2008 provide that there cannot be discrimination (direct, by association, by imputation or indirect) with respect to the provision of goods and services on grounds of gender, marital status, family status (the definition includes pregnancy), age, disability, race, religion, sexual orientation or the Traveller ground (people with a shared history, culture and traditions including, historically, a nomadic way of life on the island of Ireland). There is the defence of objective justification where the apparent discrimination is justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.⁵⁵ There cannot be gender or sexual harassment. The Acts cover the disposal of goods and services and *inter alia* activities of clubs registered under the Registration of Clubs Acts 1904 to 1999. The 2008 Act⁵⁶ has implemented Article 5 in respect of actuarial factors to include the deferring of implementation until 21 December 2009.

It must be noted that in respect of case law in Ireland, out of a total of 185 cases referred to the Equality Tribunal⁵⁷ in 2007 only six were on the gender ground, four on the family status ground and one on the marital status ground. There were 86 cases on the disability ground, ten on race and 17 on the Traveller community ground.⁵⁸ The vast majority of cases have been on the Traveller ground in respect of access to licensed premises, hotels, dance halls etc. Since the legislation was changed in 2003 and the reference in respect of licensed premises is now to the District Court, one

⁵⁴ <http://www.irishstatutebook.ie/2000/acts.html>, <http://www.irishstatutebook.ie/2003/acts.html>, <http://www.irishstatutebook.ie/2004/acts.html>, <http://www.irishstatutebook.ie/2008/acts.html>, accessed 26 January 2009.

⁵⁵ Section 3(1)(c).

⁵⁶ Section 76 of the 2008 Act.

⁵⁷ Claims are heard by an equality officer.

⁵⁸ Annual Report of the Equality Tribunal 2007. <http://www.equalitytribunal.ie/index.asp?locID=156&docID=-1>, accessed 27 January 2009.

cannot have as easy access as before to information on the number of claims, but it has been very seriously reduced.

2. Correct transposition?

The Irish legislation predates the Directive. There were amending provisions in the Equality Act 2004 which mainly meant to amend the Employment Equality Act 1998 in order to comply with the provisions of Directive 2000/43/EC and Directive 2000/78/EC and also to amend both the 1998 Act and the 2000 Act in the light of the operation of the Acts. The amendments to the Act of 2000 were mainly for clarification purposes. The Civil Law (Miscellaneous Provisions) Act 2008 brought into effect any provisions of Directive 2004/113/EC. However there was delay in the implementation of the compensation provisions of the Directive until the 2008 Act which only came into effect on 20 July 2008.⁵⁹

3. Definitions of ‘goods’ and ‘services’

‘Goods’ means any articles of movable property.⁶⁰ This is a broad definition and logically may or may not involve goods valued for money.

‘Service’ means a service or a facility of any nature which is available to the public generally or a section of the public, and without prejudice to the generality of the foregoing, includes –

- (a) access to and the use of any place,
- (b) facilities for –
 - (i) banking, insurance, grants, loans, credit or financing,
 - (ii) entertainment, recreation or refreshment,
 - (iii) cultural activities, or
 - (iv) transport or travel,
- (c) a service or facility provided by a club (whether or not it is a club holding a certificate of registration under the Registration of Clubs Acts, 1904 to 1999) which is available to the public generally or a section of the public, whether on payment or without payment, and
- (d) a professional or trade service,

but does not include pension rights (within the meaning of the Employment Equality Act, 1998) or a service or facility in relation to which the Act applies.

There is a general provision that a person shall not discriminate in the disposing of goods to the public generally or a section of the public or in providing a service, whether the disposal or provision of the service is for consideration or otherwise and whether the service provided can be availed of by a section of the public.⁶¹ There are exceptions to this rule. There are certain exemptions on the grounds of gender in respect of cosmetic services requiring physical contact between the service provider and the recipient, in relation to providing or organising sporting facilities or events but only if the differences are reasonably necessary and are relevant. Differences in the treatment of persons on the gender ground where embarrassment or infringement of privacy can reasonably be expected to result from the presence of a person of another gender. Dramatic performances and other entertainment are also excluded on the gender ground for reasons of authenticity, aesthetics, tradition and custom. Gifts and testamentary dispositions are excluded. Accommodation in a person’s home is

⁵⁹ SI No. 274 of 2008; http://www.justice.ie/en/JELR/Pages/SI_274_of_2008, accessed 26 January 2009.

⁶⁰ Section 2 of the Act of 2000.

⁶¹ Section 5 of the Act of 2000.

excluded where the provision of accommodation affects the person's private or family life or that of any other person residing in the home. There is also an exclusion where premises/accommodation are reserved for religious purposes, a refuge, nursing home, retirement home, home for persons with a disability or a hostel for homeless persons or for a similar purpose. Housing authorities are permitted to provide different treatment in relation to housing accommodation based on family size, family status (e.g. single parents) marital status, disability, age and being a Traveller.

In respect of educational establishments, there are provisions for different treatment on the gender ground in respect of single-sex schools. There is also a provision for an exception on the gender and religion grounds where institutions established for providing training to ministers of a particular religion may admit students of one gender or religious belief. There is also an exception to allow universities or third level institutions to provide different treatment in the allocation of places to mature students and also in respect of the granting of scholarships, bursaries, etc. Educational establishments may also provide different treatment on grounds of gender, age and disability in relation to the provisions or organisation of sporting events or facilities, but only to the extent that the differences are necessary having regard to the nature of the facilities or events.

In *Donovan v Garda Donnellan*,⁶² the equality officer considered the definition of services within the context of a case concerning the investigation and prosecution of an alleged crime by An Garda Síochána (police force). The equality officer stated '(...) The services which are covered by it (the definition) are services which are available to the public or a section of it. A number of examples of such services are mentioned in the Act but it does not purport to be an exhaustive list. While state services are not specifically mentioned as being covered, they are not specifically excluded either, and I believe it is clear that certain services provided by the State are available to the public and are covered by the Act, e.g. social welfare services, health services'. Certain services provided by An Garda Síochána would fall within the definition of service, e.g. witnessing passport applications, giving directions or taking a complaint. It was held that the investigation and prosecution of a crime are not services which are available to the public, or a section of it, within the meaning of the definition of service. The equality officer considered that these are state functions which are carried on for the benefit of the public and society as a whole.

4. Protection of specific groups

- (a) There is no provision for transsexual people;
- (b) The definition of 'family status' includes being pregnant or having responsibility as a parent or as a parent *in loco parentis* in relation to a person who has not attained the age of 18 years.

5. Definitions of pregnancy and maternity

There is no precise definition other than as stated in the definition of 'family status' above. A theatre insisted that a mother breastfeeding a two-year old child must pay for a ticket for the child, which was held not to be discriminatory.⁶³ It was considered that the mother and child were not one and the same and thus the claimant did not succeed in her claim. There is no similar provision which allows employers to provide for

⁶² DEC – S2001 – 011 (Traveller ground); <http://www.equalitytribunal.ie/uploadedfiles/Decisions/DEC-S2001-011.pdf>, accessed 27 January 2009.

⁶³ *Stevens v The Helix Theatre* DEC – S2008-033; <http://www.equalitytribunal.ie/index.asp?locID=140&docID=1783>, accessed 27 January 2009.

benefits for women in connection with pregnancy and maternity (including breast feeding) or adoption.⁶⁴

6. Use of a comparator

A comparator is not used in the definition of pregnancy and maternity. However, the concept of hypothetical comparator has been used in a number of cases.⁶⁵

7. Actions against failure to implement the Directive

The writer is not aware of any case where a claim has been made against the State for the non-implementation of the Directive. However, the Equality Authority has brought proceedings against the Trustees of Portmarnock Golf Club pleading that the Club's refusal to allow women to be members is discriminatory. In the case originally brought in the District Court the practice was held to be discriminatory, but on appeal in the High Court, the Court considered that it was not discriminatory. The appeal to the Supreme Court is presently at hearing. In linked proceedings, the Trustees of the Club brought proceedings against the Equality Authority, Ireland and the Attorney General which are also at hearing before the Supreme Court.⁶⁶

8. Enforcement by equality bodies

In the event that there is prohibited conduct or discriminatory advertising (*inter alia*), the Equality Authority may apply to court⁶⁷ for an injunction or such other relief as the court may deem necessary to prevent the further occurrence or contravention. 'Prohibited conduct' means 'discrimination against, or sexual harassment or harassment of, or permitting the sexual harassment or harassment of, a person in contravention of the Act'.

9. Discrimination based on association/perceived status

There is a provision that where a person is associated with another person and by virtue of that association is treated less favourably than a person who is not so associated, this may constitute discrimination on any of the nine discriminatory grounds. Likewise, a person can be treated less favourably by imputing one of the discriminatory grounds to them. Discrimination may also be perceived by a person.

The Equality Authority noted in its Annual Report of 2007 that in 2004 it stated that it was clear from the developing jurisprudence of the Court of Justice that it was obliged to introduce legislation to give legal recognition to the position of transsexuals and that discrimination of persons with a gender identity disorder and/or transsexual people constitutes discrimination on the gender ground. In 2007 there were two settlements relating to transgender/gender identity disorder; one in employment and one concerned the reissuing of the Leaving Certificate (final school examination) to reflect the present gender. In the case of *Foy v An T- Ard Chlaraitheoir, Ireland* (Registrar General of Births, Marriages and Deaths) and the

⁶⁴ Section 26(1) of the Employment Equality Act 1998; <http://www.irishstatutebook.ie/1998/en/act/pub/0021/index.html>, accessed 27 January 2009.

⁶⁵ E.g. *Conroy v Carney* DEC-S2001-002 (Traveller ground); <http://www.equalitytribunal.ie/uploadedfiles/Decisions/DEC-S2001-002.PDF>, accessed 27 January 2009.

⁶⁶ *In the matter of Section 2 of the Summary Jurisdiction Act, 1857 as amended by Section 51 of the Courts (Supplemental Provisions) Act, 1961, the Equality Authority v Portmarnock Golf Club and Others and Robert C. Cuddy and David Keane v The Equality Authority, Ireland and the Attorney General* [2005] IEHC 235 (10 June 2005); at hearing before Supreme Court on 18 December 2008 and adjourned to a date in January 2009.

⁶⁷ Section 23(3).

Attorney General et al.,⁶⁸ the High Court noted the difficulty in Ireland in respect of registering under a different gender and that it was a matter for parliament to change the law as had been done in the United Kingdom.

The Equality Authority led a working group with representatives from the Health Services Executive, the Department of Health and Children and organizations of transsexual people/people with a gender identity disorder to promote and develop an appropriate health care response to transsexual people. There was a joint Equality Authority/Health Services Executive research report on Recognising LGB Sexual Identities in Health Services: The Experiences of Lesbian, Gay and Bisexual People with Health Services in North West Ireland.⁶⁹

10. Protection of women regarding pregnancy and maternity

A housing authority or approved body may provide for different treatment in accommodation to persons based on family size, family status, marital status (*inter alia*).⁷⁰ Imposing or maintaining a reasonable preferential fee, charge or rate in respect of anything offered or provided to or in respect of persons together with their children, married couples, persons in a specific age group or persons with a disability does not constitute discrimination or a discriminatory rule, policy or practice.⁷¹ A person may also be treated differently on grounds of clinical judgment.⁷²

11. Exceptions to the principle of equal treatment (Article 4(5))

There is reliance on Article 4(5). This is a defence which is justified by a legitimate aim, for example single-sex education. There is no interpretation in respect of transsexual people.

12. Positive action

Section 14(1)(b) of the Act provides that there is nothing prohibiting preferential treatment or the taking of positive measures which are *bona fide* intended to promote equality of opportunity for persons who are disadvantaged or who have been or are likely to be unable to avail themselves of the same opportunities as those as those other persons, or to cater for the special needs of persons who because of their circumstances may require facilities, arrangements, services or assistance not required by persons who do not have special needs. This is a general positive action provision and in reality it is to ensure that persons who may have special needs are looked after, e.g. persons with a disability.

Whilst it is not precisely positive action, the clarity in respect of vicarious liability is a welcome provision. Section 42 expressly provides for the vicarious liability of an employer in respect of the conduct of their employee which leads to proceedings being brought under the Act.

13. Burden of proof

It is provided that if the claimant can establish facts from which it may be presumed that prohibited conduct has occurred in relation to him or her, it is for the respondent to prove the contrary. This Section is without prejudice to any other enactment or rule

⁶⁸ [2002] IEHC 116 and [2007] IEHC 470.

⁶⁹ Equality Authority Annual Report 2007 on pp. 96 – 97; <http://www.equality.ie/index.asp?locID=136&docID=732>, accessed 27 January 2009.

⁷⁰ Section 6(6).

⁷¹ Section 16(1).

⁷² Section 16 (2)(a).

of law in relation to the burden of proof which may be more favourable to the claimant. This provision⁷³ also applies where the Equality Authority brings proceedings in respect of prohibited conduct on behalf of a person who has not made a claim or could not be reasonably expected to bring a claim or where there is prohibited advertising.⁷⁴

In *Kelly v Panorama Holiday Group Limited*⁷⁵ the claimant states that she was discriminated against when she was refused passage on a return flight because she was pregnant, following a holiday which she had booked with the respondent. The respondent replied that she was refused by the air carrier and that it was not the respondent's decision. In this case, the equality officer first considered as to whether there was a *prima facie* case established by the claimant. There are three key elements which need to be established to show that a *prima facie* case exists. These are:

- (a) applicability of a discriminatory ground (e.g. the family status ground);
- (b) evidence of specific treatment of the claimant by the respondent;
- (c) evidence that the treatment received by the claimant was less favourable than the treatment someone, not covered by that ground, would have received in the same, or similar circumstances.

If and when these elements are established, the burden of proof shifts, meaning that the difference in treatment is assumed to be discriminatory on the relevant ground. If they succeed in establishing a *prima facie* case, the burden of proof then shifts to the respondent to rebut the inference of discrimination.

In this case, the claimant was pregnant on the date in question so this fulfils (a) above, i.e. the applicability of the discriminatory ground. However, the respondent states that it was the airline carrier that did not provide clearance and not the respondent. At the hearing the claimant could not clearly indicate the identity of the employer of the representative who relayed the information to her in relation to the refusal to clear her for the flight. The claimant did not seek clarification at the time as to the precise nature of the refusal to provide clearance for her to fly, or the requirement for her to provide medical documentation. She did not seek to find out the precise identity of the person or the company who was refusing clearance to her. Therefore in the circumstances it is uncertain as to whether the named respondent is the correct respondent. Therefore (b) above has not clearly been fulfilled. However, it became clear that the claimant was refused clearance to board the flight not simply because she was pregnant but because someone had indicated that she was over 28 weeks pregnant. This raises issues of safety for everybody involved. It was for this reason that medical clearance was required. As the airline could take similar precautions in a range of situations involving medical difficulties, the key element (c) has not been fulfilled. In addition, as the precise identity of the person who refused clearance is not clear and in circumstances where pregnancy is not the primary cause of the refusal but rather the particular stage of pregnancy which could lead to medical difficulties on the flight, the equality officer was satisfied that the claimant had not established a *prima facie* case of discrimination on the family status ground. Therefore, the respondent did not have to provide a rebuttal.

⁷³ Section 38A.

⁷⁴ Section 12.

⁷⁵ DEC-S2008-007.

14. Harassment, instruction to discriminate and victimisation

In *Stevens v The Helix Theatre*,⁷⁶ the claimant argued that she was harassed on the gender ground because she was requested to pay for two tickets, for herself and her child, even though she was breastfeeding her child. The claim failed.

I am not aware of any precise examples of instruction to discriminate in gender-related cases. There are numerous cases where Travellers have not been permitted to go into hotels or licensed premises, presumably on the instructions of the owners.

The writer is not aware of any precise examples of victimisation in the context of goods and services.

15. Overall assessment

The Irish legislation was enacted prior to the Directive and was meant to be similar to the Employment Equality Act of 1998. However, it was delayed due to constitutional challenges to the Employment Equality Bill 1996. The main impact of the Directive, however, is to provide for a reference to the Circuit Court and the amendment of the options available for redress. The redress that may be awarded is an order for compensation for the effects of the prohibited conduct concerned (including loss and damage suffered) in a way that is dissuasive and proportionate to the loss and damage suffered and/or an order for a certain specified course of action to be taken. This is virtually open-ended compensation, compared to the original redress of EUR 6,348. However, there appears to be a *lacuna* in that the 2008 Act does not explicitly amend the limit on compensation in Section 19 of the Intoxicating Liquor Act 2003 for gender discrimination in respect of alleged discrimination in relation to access to licensed premises.⁷⁷ It has been noted above that the vast majority of claims have been brought on the Traveller and disability grounds. On the basis of claims, the major impact of the Irish legislation would appear to be on the age (e.g. car loans⁷⁸) and disability grounds (education of persons⁷⁹).

PART II: SCOPE OF NATIONAL LEGISLATION

1. Scope of national legislation beyond the scope of EU gender equality directives?

The Irish Equal Status Acts goes beyond the provisions of Directive 2004/113/EC in that, for example, there cannot be discrimination in relation to the provision of education. However, it is somewhat limited in that for example in second level schools there is a provision for single-sex schools. Furthermore, there is a provision that there cannot be discriminatory advertising, which in this writer's opinion is very important so that stereotyping may be avoided. The Employment Equality Act 1998 provided *inter alia* that there could not be discrimination on the race ground in employment and access to vocational education, and there has been a similar provision in respect of the provision of goods and services from 2000 onwards. However, there is a problem in that it is arguable that Ireland has not properly

⁷⁶ DEC – S2008 – 033; <http://www.equalitytribunal.ie/index.asp?locID=140&docID=1783>, accessed 29 January 2009.

⁷⁷ <http://www.irishstatutebook.ie/2003/en/act/pub/0031/sec0019.html#partiv-sec19>, accessed 26 January 2009.

⁷⁸ E.g. *Fahey v Ulster Bank* DEC-S2008 – 049; <http://www.equalitytribunal.ie/index.asp?locID=140&docID=1814>, accessed 27 January 2009.

⁷⁹ *Hallinan v Mayo Education Centre* DEC-S2008-063; <http://www.equalitytribunal.ie/index.asp?locID=140&docID=1867>, accessed 27 January 2009.

transposed the Race Directive 2000/43 in that there are limits on compensation for a claim on the race ground in respect of goods and service of EUR 6 348, whilst on gender it is open ended (provided the claimant refers the matter to the Circuit Court). The EU Commission sent Ireland a Reasoned Opinion on 27 June 2007 stating that Ireland had not fully complied with the Race Directive.

2. 'Hierarchy' of grounds

In Ireland, the overall protection on gender grounds is better in that there is a provision for unlimited compensation. However, there appears to be little specific protection for women in respect of pregnancy and maternity (other than in employment). If there is a 'hierarchy', gender would appear to be 'at the top'. However, the vast majority of claims have been on the Traveller or disability ground. In particular, considerable attention has been paid to claims by Travellers under the Race Directive and also under the Housing Acts in respect of accommodation. In particular, in a number of cases the Equality Authority has successfully applied to be joined as an *amicus curiae*.⁸⁰

3. Comments and/or suggestions

The Irish legislation has suffered from numerous amendments to its original Act of 2000. This has resulted in fragmented and unclear legislation. For example, there are extremely short time limits. Section 21(2) of the Act provides that within 2 months of the alleged prohibited conduct the proposed claimant shall notify the respondent of the nature of the allegation and the claimant's intention, if not satisfied with the respondent's response to the allegation to seek redress under the Act. There may be an extension of time where it is 'just and equitable'. Then there is a six-month time limit for the bringing of proceedings to the Equality Tribunal or the Circuit Court. The definition of discrimination is comparator-based in that the reference in the definition refers to where a person 'is treated less favourably than another person is, has been or would be treated in a *comparable situation*'. The same *comparable situation* applies where there is discrimination by association.⁸¹

ITALY – Simonetta Renga

PART I: DIRECTIVE 2004/113/EC

1. Transposition of Directive 2004/113/EC

EC Directive 2004/113 has recently been implemented by Decree no. 196/2007, which adds ten articles to the Code of Equal Opportunities.

2. Correct transposition?

The Decree repeats the text of the Directive literally, including the provisions on its substantive scope and on the allowed exceptions. The Decree also repeats the text of the Directive where it would not be necessary at all and as such it may cause confusion. For instance, Article 55 *quinquies* Paragraph 2 specifies that 'the action can be brought to court also after the cessation of the relationship which is deemed to

⁸⁰ *Doherty and Doherty v South Dublin County Council, the Minister for the Environment, Heritage and Local Government, Ireland and the Attorney General, The Equality Authority*; [2007] 2 IR 696.

⁸¹ Section 3 (1) and (2).

be affected by discrimination, within the limit of prescription': this is a superfluous provision, as it adds nothing to general principles of civil law. At any rate, the copying out of directives in our system can be regarded as a bad practice, which certainly does not ensure the necessary coordination with other existing provisions.

One of the provisions which is slightly different from the text of the Directive regards the body that is to promote equal treatment. On this specific item, it can be observed that, on the one hand, some doubts have risen regarding the real independence of the Equality Office provided by Article 12 of Decree no. 196/2007, as it comes under the General Division of the Equal Opportunities Department, part of the Prime Minister's Offices, without any budget allocation. On the other hand, Article 12 adds the promotion of studies, research, professional training and exchange of good practices, also aimed at working out guidelines on fighting discrimination, to the other functions expressly provided for by the Directive as regards equality bodies. It also states that, for this purpose, the General Division mentioned above can team up with associations, organizations or other legal entities which have a legitimate interest in ensuring that the provisions of the Directive are complied with and which are entitled on this ground to engage, on behalf or in support of the claimant, with his or her approval, in any judicial and/or administrative procedure.

It must also be noted that the provisions of the Decree on actions to be brought to court are quite detailed and represent a substantive implementation of the Directive, following the model of other interventions, such as those in the employment field: a special procedure is provided in case of urgency; the ruling of the court can order the refund of both patrimonial and non-patrimonial damages; and in case of ascertained discrimination by public or private subjects which have contracts for public works, or services or supplies, the Public Administration can revoke financial or credit benefits allowed to them.

At present, we have no examples at all of cases regarding the implementation of Directive 113/2004, which is very recent. Neither were there any reported cases of gender discrimination regarding goods and services before the implementation of the Directive. So it is not easy to detect any possible weaknesses of the text.

From a general point of view, we can underline that in Italy there is no debate as regards differences in access or prices of services based on sex, and that such differential treatment is, as far as we know, very rare. So substantive implementation may need measures aimed at making people and institutions aware of the importance of this issue. The sector where discrimination is more likely to take place is that of insurances and financial services

3. Definitions of 'goods' and 'services'

The concept of goods is described by Article 810 of the Civil Code, according to which goods is 'everything which is capable of being the object of rights'. Similarly to EC law, the concept of 'goods' is intended as a notion where they can be assigned a monetary value and can be commercially traded, and otherwise be tangible (movable or immovable) other than means of payment or live human beings. But the notion is slightly wider as it also includes natural energies, if they have an economic value, i.e. are generated by man and sold by the producer to the consumer.

In contrast, we do not have a legal definition of services. The supply of services which is relevant in the legal system refers to services which can be valued from an economic point of view, which does not necessarily involve that they are actually remunerated. Article 22 of Act no. 241/1990 on Administrative Procedures states that public services consist in the production of goods and services aimed at achieving

social goals and at promoting the economic and civil development of local communities.

No cases on this ground have been recorded. Indeed, as the definition of both goods and services is very wide, we do not have any specific problem from this point of view.

4. Protection of specific groups

Similarly to EC law, Italian legislation on equal opportunities never expressly refers to gender reassignment, although the latter can probably be included in a wide concept of sex discrimination.

Specific protection is provided for pregnant women in the National Health System, as all clinical tests related to pregnancy as well as the majority of other clinical tests are free of charge. Specific exemption from fees is also provided for fathers for tests linked to the health of the child.

5. Definitions of pregnancy and maternity

There is no definition of pregnancy and maternity discrimination as regards the access and supply of goods and services in our legislation. Neither is specific protection provided for women against discrimination related to breastfeeding. Less favourable treatment of women for reasons of pregnancy and maternity are, however, expressly equalized to direct gender discrimination by Decree no. 196/2007, following the copying out of the Directive, which in this case has produced positive results. The situation is different in employment legislation, where there is a failure to make this equalization explicit: the consequence is that women who have suffered less favourable treatment on grounds of pregnancy and maternity cannot benefit of the more favourable treatment reserved to sex discrimination.

Nevertheless, it must be said that in Italy there is no special attention to rights and obligations linked to pregnancy and maternity in the goods and services sectors. The effectiveness of women rights provided by legislation mainly depends on the efficiency of Health and Social Services at the local level. As we have underlined regarding other factors of discrimination, in Italy sex-segregated services are regarded as a very marginal problem; the general opinion is that it could only have a slight indirect influence on the achievement of gender equality at work, by avoiding social stereotypes. However, in our country, discrimination as regards the access and supply of goods and services is actually negligible.

6. Use of a comparator

We do not use a comparator for discrimination related to pregnancy and maternity.

7. Actions against failure to implement the Directive

At present, no cases of this kind are to be recorded.

8. Enforcement by equality bodies

The equality body does not have the competence to bring enforcement actions in the public interest. Nevertheless, Article 55 *septies* Paragraph 2 of the Code of Equal Opportunities between Men and Women provides that, also in case of absence of an actual victim, the case of discrimination can be brought to court by the associations which are included in a list approved by a Decree of the Prime Minister; this list includes the associations constantly promoting the respect of the principles stated by Directive 113/2004.

9. Discrimination based on association/perceived status

These cases of discrimination are not expressly covered by national legislation.

10. Protection of women regarding pregnancy and maternity

Article 4(2) has been applied to maintain the exemption from fees for all clinical tests related to pregnancy and for certain clinical tests during the same period. Moreover, having children is regarded as a preferential ground to have access to public housing, while having more than one child is a preferential ground to gain access to a public kindergarten.

11. Exceptions to the principle of equal treatment (Article 4 (5))

The exception provided by the Directive has been copied by Decree no. 196/2007. No express examples or specific exceptions have been provided by the national legislator. At present, neither the implementation of the Directive has given rise to any debate among scholars or in public opinion, nor do we have case law on the issue. This is also true in relation to transsexual people.

12. Positive actions

Decree no. 196/2007 expressly provides for positive actions by literally repeating the text of the Directive, but such initiatives have not yet been tested in this field.

13. Burden of proof

The partial reversal of the burden of proof has been copied literally from the Directive. It is difficult to assess the efficiency of this rule, also comparing it with employment cases, because there has been little debate and experience concerning this kind of discrimination, which is still a marginal problem in Italy. From a theoretical point of view, it can be deemed equally important as it is in employment cases, considering that discrimination also seems difficult to detect in the goods and services field.

14. Harassment, instruction to discriminate and victimisation

There are no concrete examples of harassment and sexual harassment in the goods and services field or of any case law.

There are no concrete examples or case law for the issue of instruction to discriminate.

At present, there are no examples of or case law for cases of victimisation.

15. Overall assessment

In Italy, there is no debate regarding discrimination in the access to or prices of services based on sex, and such differential treatment is very rare. The sector where discrimination is more likely to take place is that of insurances and financial services, and with respect to this, the Directive can be crucially important also in Italy. No changes have taken place after the implementation of the EC Directive 2004/113 by Decree no. 196/2007. There is no case law on its enforcement and there is no debate among scholars or any other initiatives aimed at spreading the knowledge of the Directive. This is probably both the cause and the effect of the merely formal implementation of the Directive.

PART II: SCOPE OF NATIONAL LEGISLATION

1. Scope of national legislation beyond the scope of EU gender equality directives?

Article 1 of the Code of Equal Opportunities determines – as a general provision – the material scope of the Code, which expressly includes in the definition of gender discrimination all the differences of treatment which give rise to, or are aimed at, hampering the enforcement of fundamental rights in the political, economic, social, cultural and civil fields and in all other fields. However, the Code then combines all the already existing operative provisions on gender equality, mainly without any changes to the text of the various articles. The problem there is that the legislation then in force did not include social protection, social advantages and education in its material scope. So, from this point of view, national legislation is a good reflection of EC legislation.

2. ‘Hierarchy’ of grounds?

Actually, the definition of direct discrimination on the ground of race is more comprehensive than the analogous definition in gender equality law, as the latter does not allow any kind of possible justification out of the employment field.

In my opinion, a uniform level of protection for all the grounds of discrimination would be desirable and this should be the objective to be pursued. A hierarchy of grounds is not acceptable, as any case of discrimination, independently from its ground, is a violation of the principle of equality stipulated by Article 3 of our Constitution. Therefore, it would become very difficult, as well as incorrect from the perspective of the constitutional values involved, to grade the infringement of the equality principle based on the ground of discrimination.

3. Comments and/or suggestions

None.

LATVIA – Kristīne Dupate

PART I: DIRECTIVE 2004/113/EC

1. Transposition of Directive 2004/113/EC

The laws in force are the following:

– Law on the Protection of Consumer Rights⁸²

This law covers consumer rights defined by the EU consumer protection law. Consequently, scope of the said law covers consumers as the protected party and goods and services suppliers as the responsible party regarding the goods and services provided by the supplier acting within his/her professional capacity.

– Law on Social Security⁸³

This law is an umbrella law covering the whole statutory social security system of Latvia. It covers state and municipal allowances, the statutory social insurance system and state and municipal social services.

⁸² OG No. 104/105, 01 April 1999, related amendments OG No.104, 09 July 2008.

⁸³ OG No. 144, 21 September 1995, related amendments OG No.205, 22 December 2005 and OG No. 47, 26 March 2008.

Latvia also has some draft laws:

– A law on the prohibition of discrimination of natural persons performing economic activities (self-employed)⁸⁴

This law is intended to implement the Directive with regard to self-employed persons. It prohibits discrimination on the grounds of sex in relation to the supply of goods and services necessary for the performance of the self-employed activities. Currently, this law is in the initial stage of the legislative procedure. It must be accepted by the Cabinet of Ministers as draft law in the near future before it is submitted to Parliament for the adoption (the normal procedure includes three readings and there is no time limit for the adoption of a draft law).

– Amendments to the Law on Insurance Companies and their Supervision⁸⁵

These amendments envisage the implementation of Article 5 of the Directive. The Latvian Parliament has adopted this law in the first reading on 18 December 2008.

2. Correct transposition?

The Directive has not been correctly transposed in relation to both the ‘personal’ and the material scope. Transposing measures do not cover transactions between natural persons acting outside their professional activities or, in other words, transactions falling outside the scope of the Law on the Protection of Consumer Rights (implementing EU consumer protection law).

The ‘personal’ scope of the Directive has been subject of a heated discussion among private-law lawyers, which finally turned out as the position of the Ministry of Justice that the scope of the Directive does not cover any transactions between individuals acting outside their professional activities, because that would be a too excessive interference with the principle of the autonomy of the parties governing private contract law.

With regard to the Law on the Protection of Consumer Rights, the transposition has resulted in mere ‘copy out’.

‘Copy out’ also concerns the Amendments to the Law on Insurance Companies and their Supervision concerning equal treatment relating to pregnancy and maternity.

One particular problem relates to Article 5(3) of the Directive. First, amendments to the Law on Insurance Companies are not just related to actuarial factors, but to all insurance agreements. Second, amendments copying out Article 5(3) of the Directive do not give an answer to the one very important question: whether in relation to health insurance, equal treatment must be observed not only in relation to individuals’ premiums and benefits, but also to the risk insured? It is especially important in relation to natal medical services. For example, health insurance may exclude natal health services. Thus, in relation to pregnancy, birth and after-birth medical services, it is important to clarify whether according to the Directive the equal prohibition of discrimination also includes the obligation to provide not only equal premiums and benefits, but also equal coverage of risks, taking into account the need for special medical treatment (services) due to pregnancy and child-birth?

The Directive itself does not answer this question, while Latvian insurance companies are already discussing this issue and have asked the National Equality Body for an opinion.

⁸⁴ Available on the home page of the Cabinet of Ministers, www.mk.gov.lv, <http://www.mk.gov.lv/lv/mk/tap/?dateFrom=2008-01-10&dateTo=2009-01-09&text=1486&org=0&area=0&type=0>

⁸⁵ Available on the home page of Parliament www.saeima.lv, [http://titania.saeima.lv/LIVS/SaeimaLIVS.nsf/0/c1addf042783aa24c22574fa004bd6a3/\\$FILE/Lp0958_0.doc](http://titania.saeima.lv/LIVS/SaeimaLIVS.nsf/0/c1addf042783aa24c22574fa004bd6a3/$FILE/Lp0958_0.doc)

3. Definitions of ‘goods’ and ‘services’

There is no generally applicable definition of ‘goods’ or ‘services’.

In private law, the following applies:

Latvian Civil law⁸⁶ defines what could be the object of a sale. Within the meaning of rights to things, ‘things’ could be material or immaterial, while within the meaning of contract law, the object of the contract may be an action or lack of action with the aim to create or give back the right to a thing (Article 1412). Object of the contract could be any object which is in civil circulation.

At the same time, special laws may give definitions of the concept of ‘goods’ and ‘services’ within the meaning and for the purpose of such special law itself.

For example, the Law on the Protection of Consumer Rights defines ‘goods’ and ‘services’ within the meaning of this law. ‘Goods’ are anything which is offered or sold to a consumer. ‘Services’ are a loan for a thing, making of a thing, improvement or transformation of an existing thing or its characteristics, or performed work or obtained immaterial result of a work according to the order of a consumer or consumer agreement performed within the framework of an economic or a professional activity for remuneration or without it.

In public law, the following applies:

There is no general definition of ‘public services’. In the field of the social security system, the Law on Social Security does not provide a definition of ‘social services’. What social services are within the meaning of this law can be detected only from its content.

In the same way, the Law on Medical Treatment fails to provide a definition of medical services.

There has not been any discussion as regards the reference to the concept of services or goods within the meaning of the EC Treaty requiring a cross-border element and the character of the economy in Latvia. No one has ever raised the question of the definition of services provided by Point 11 of Preamble of the Directive. In addition, definitions of goods and services provided in the field of private law, for example by the Law on the Protection of Consumer Rights, are wider than those provided by EC Treaty, because they do not require remuneration or, obviously, cross-border elements. Also the interpretation of the object of a sale or right to a thing provided by civil law is broader.

In both fields – private and public law - there is no general definition, and in relation to the specific definitions intended to define special kinds of goods and services, regulation is fragmentary and does not cover all fields.

4. Protection of specific groups

There is no explicit regulation with regard to transsexual people.

The Law on Social Security does not provide for the prohibition of pregnancy and maternity discrimination, while Article 3¹(9) of the Law on the Protection of Consumer Rights copies Article 4(1)(a) of the Directive and Article 5¹(5) of the Draft Amendments to the Law on Insurance Companies and their Supervision copies Article 5(3) of the Directive.

The protection is not sufficiently clear as to allow individuals to understand their rights and goods and service providers to understand their legal obligations. Latvian law only provides for the main principle, namely, that less favourable treatment for reasons of pregnancy and maternity constitutes discrimination. It does not provide for

⁸⁶ OG No.29 30 July 1992.

more precise regulation with regard to comparators and comparable situations. This, as our national court practice shows (see under 6 below), does not ensure correct application of this right in practice.

Consequently, if application of this right is not clear for the national courts, it is most likely that it is even less clear for sellers of goods and for service providers.

5. Definitions of pregnancy and maternity

At the moment, Latvian labour law does not contain any explicit provisions on the prohibition of discrimination on the grounds of pregnancy and maternity.

Provisions stipulating a prohibition of discrimination on the grounds of pregnancy and maternity are provided by the Law on the Protection of Consumer Rights and the Draft Amendments to the Law on Insurance Companies and their Supervision, but none of those laws explains these concepts in detail.

Consequently, in the context of Latvian law there is no ground to distinguish between the field of employment and the access to and supply of goods and services.

The definitions are not sufficiently clear in the legislation for pregnant women or women in their maternity leave and for goods and service providers to know their rights and obligations.

Discrimination takes place, first, in less favourable treatment due to prejudice. Where women during their maternity leave are denied access to and supply of the goods and services, this is only due to stereotypes.

Second, less favourable treatment is due to a lack of reasonable accommodation measures. Where women during their maternity leave are refused access to or supply of goods or services, this is because the environment or the goods or services are not accommodated to her special needs in this period. The question here is again what kind of obligations the concept of reasonable accommodation includes? How far does the obligation of ‘universal design’ go?

Third, there is discrimination based on objectively justified restrictions, which, however, are often disproportionate. For example, with regard to the aviation services, where all pregnant women have similar restrictions and special requirements although the course of a pregnancy and the effect of the use of aviation services on it are very individual.

Fourth, there is no general point of departure for the assessment of what special rights women have during their maternity leave, taking into account their special needs in order to ensure equal treatment.

6. Use of a comparator

In Latvian law no comparator is used, but in practice this may prove to be a problem. For example, national case law in the field of statutory social insurance, where women experienced less favourable rights to child-care allowance due to the use of the right to maternity leave, indicates that the courts misapply the concept of discrimination on the grounds of maternity, because they looked for a comparator.⁸⁷

Most probably, the same mistake is made regarding the supply of goods and services.

⁸⁷ Decision of the District Administrative court in case No.A42619207 A3692-08/3, adopted on 16 December 2008, available in Latvian on http://c4.vds.deac.lv/files/AL/2008/12_2008/16_12_2008/AL_1612_raj_A-3692-08_3.pdf.

7. Actions against failure to implement the Directive

There is no data on whether any individuals have brought cases against Latvia for failure to implement the Directive. Most probably no cases have been brought, because, first, so far there is no information that anyone has ever brought a case against Latvia for failure to implement any directive, second, there is no national legal regulation on the enforcement of the principle of state liability under EC law. Consequently, it is unclear under Latvian law, in case of such an action, which court (administrative or regular) would have jurisdiction, which body would represent the Republic of Latvia and in what procedure such case must be reviewed.

The National Equality body (Ombudsman Office of the Republic of Latvia) has not brought any case before national courts for failure to implement the Directive.

8. Enforcement by equality bodies

According to the Ombudsman Law,⁸⁸ the National Equality body (Ombudsman Office of the Republic of Latvia) has the right to represent the interests of an individual bringing discrimination cases in civil proceedings. Under Civil Procedure Law, the claim may be brought by the individual only.

The National Equality body has no legally binding enforcement instruments. The Ombudsman Office itself may initiate investigations. However their judgments on the results of investigations have no binding force. They are only recommendations.

9. Discrimination based on association/perceived status

There are no specific provisions prohibiting discrimination based on association or perceived status.

10. Protection of women regarding pregnancy and maternity

No special measures have been taken in order to implement Article 4(2) of the Directive. However, the Law on Medical Treatment,⁸⁹ which was adopted before the Directive was, provides that medical assistance and treatment of pregnant women has priority.

11. Exceptions to the principle of equal treatment (Article 4(5))

Article 3¹(2) of the Law on the Protection of Consumer Rights copies Article 4(5) of the Directive. There are no special legal regulations in relation to goods or services in particular.

None of the legal acts of Latvia deal with the rights of transsexuals.

12. Positive action

Latvia has not taken any positive action in any particular field.

13. Burden of proof

The rules regarding the burden of proof have the same importance in the field of access to and supply of goods and services as they have in the field of employment.

Since respective amendments to the Law on the Protection of Consumer Rights came into force in July 2008, there have been no particular examples of how the national courts would apply it. Court practice in the field of employment demonstrates

⁸⁸ OG No. 65, 01 January 2007.

⁸⁹ OG No. 167/168 01 July 1997.

that the principle of reversed burden of proof is applied ineffectively, partially because of a lack of more detailed legal regulation.

14. Harassment, instruction to discriminate and victimisation

With regard to gender, no cases on harassment can be mentioned. Examples of instruction to discriminate include: difficulty to identify harassment by the general public and lawyers, difficulty to gather evidence, ineffective enforcement mechanisms (the only instrument is to bring a claim before a court).

No information on practical examples of victimisation is available yet, because of the recent and partial implementation of the Directive.

15. Overall assessment

My assessment is positive. Complaints received by the National Equality body demonstrate that discrimination in the field of access to and supply of services exists and that society is concerned about it.

There have not been substantial improvements yet in terms of access to and supply of goods and services irrespective of a person's sex, because of the recent and partial implementation of the Directive. However, there now is a legal basis to contest discrimination in this field.

The National Equality body has started activities to raise awareness among the general public and goods and service providers regarding the prohibition of discrimination.

PART II: SCOPE OF NATIONAL LEGISLATION

1. Scope of national legislation beyond the scope of EU gender equality directives?

Our national legislation goes beyond the material scope of the Directive. Almost all umbrella laws in almost all fields provide for the general principles, including the principle of non-discrimination. For example, the Law on State Governance, the Law on Social Security, the Law on Judicial Power and the Law on Administrative Procedure.

Education

Article 3 of the Law on Education⁹⁰ (umbrella law on the entire educational system of Latvia) provides for the prohibition of discrimination on the grounds of sex too. In practice, there are no problems with regard to the access to education as such, because of Soviet heritage, where almost all educational establishments were open to both sexes. Exceptions which no longer exist, at least by law, concerned military and navy education. However, discrimination in the field of education concerns many aspects: first, access; second, content of the study material (research in Latvia shows that it contains many stereotypes); third, the composition of staff (predominantly women); and fourth, qualifications of staff (local research shows that staff (teachers and lecturers) have many prejudices and are unaware of stereotypes).

⁹⁰ OG No. 343/344 17 November 1998.

Advertising

Article 4 of the Law on Advertising⁹¹ prohibits discrimination on the grounds of sex with regard to the content of advertisements. However, enforcement is problematic, because it is indeed difficult to give a legal qualification of which advertisement is discriminatory on the grounds of sex if, for example, a advertisement depicts different social roles of the sexes which reinforces stereotypes.

Social security

Although the Law on Social Security as an umbrella law provides for the prohibition of discrimination on the grounds of sex in the entire system of social security in Latvia, it is of little importance in practice, because it does not exclude the possibility that discriminatory special legal acts are adopted to regulate rights to social benefits in more detail. Besides, national court practice shows that it is difficult to contest any misapplication of the principle of non-discrimination as provided by the umbrella law in the context of special legal acts. This is because national courts and administrative institutions are not familiar with the concept of indirect discrimination and they frequently lack the skills to interpret and apply special legal acts in conformity with the general principles of law and hierarchy of legal acts (although it is clearly provided by the Law on Administrative Procedure).

2. ‘Hierarchy’ of grounds?

No hierarchy of grounds has been established, because Latvian legal regulations on the prohibition of discrimination on the grounds of sex cover all the fields provided by Directive 2000/43.

No practical problems have been identified so far with regard to the lower level of protection of race as compared to gender. Except in cases of harassment, where expressions of hate on the grounds of race is a criminal offence under criminal law.

3. Comments and/or suggestions

No comments or suggestions.

LIECHTENSTEIN – *Nicole Mathé*

PART I: *DIRECTIVE 2004/113/EC*

1. Transposition of Directive 2004/113/EC

No legislation transposing the Directive exists at the moment. Existing legislation cannot be considered as meeting the requirements of the Directive. According to information of the staff position for gender equality, Liechtenstein intends to take over the Directive in the near future.

2. Correct transposition?

See under 1.

3. Definitions of ‘goods’ and ‘services’

To my knowledge, these concepts have not been defined, neither in national legislation nor in case law.

⁹¹ OG No.7 10 January 2000.

4. Protection of specific groups

I am not aware of such explicit protection of the groups mentioned: transsexual people, pregnant women and women who have recently given birth.

5. Definitions of pregnancy and maternity

In my opinion pregnancy and maternity discrimination occurs in the following situations:

Some airlines refuse to allow pregnant women to travel by plane; changing tables are often only present in public toilets for women and not for men or do not exist at all, e.g. on trains, airplanes; public toilets are too small to enter with a baby carriage; public toilets (also in restaurants) are not always accessible because there is no lift and you cannot climb steep stairs with a baby carriage; in taxis, a children's car seat is not available, so taxis refuse to transport parents with babies; public transport is extremely difficult to enter with a baby carriage, on your own it is not possible at all, especially (international) trains; trains, especially night trains, are too narrow to travel with a baby carriage; in restaurants there is often not enough place to take a seat and to put a baby carriage next to the table; in parking places outside and in parking garages, there is not enough place to open the car door correctly to put the baby into the children's car seat; breastfeeding in public is generally not so easy, e.g. in restaurants, shops or trains and airplanes there are no adequate and discrete places to breastfeed or to pump down breast milk.

I am not aware of any protection for women from discrimination related to breastfeeding in Liechtenstein.

6. Use of a comparator

No comparator is used in the definitions of pregnancy and maternity.

7. Actions against failure to implement the Directive

To my knowledge no actions have been brought.

8. Enforcement by equality bodies

See under 1.

9. Discrimination based on association /perceived status

None, to my knowledge.

10. Protection of women regarding pregnancy and maternity

See under 1.

11. Exceptions to the principle of equal treatment (Article 4(5))

See under 1.

12. Positive action

See under 1.

13. Burden of proof

See under 1.

14. Harassment, instruction to discriminate and victimisation

Clients can be harassed by the personnel of swimming pools, fitness centres, saunas, car repair garages, restaurants or by doctors, taxi drivers, masseurs, crafts persons who repair things in private households in the presence of the residents of the house or apartment; one can imagine any action covered by the definitions of (sexual) harassment.

See under 1 and 5.

15. Overall assessment

See under 1.

PART II: *SCOPE OF NATIONAL LEGISLATION*

1. Scope of national legislation beyond the scope of EU gender equality directives?

See under I.1.

2. ‘Hierarchy’ of grounds?

See under I.1.

3. Comments and/or suggestions

I would like to draw attention to a brochure edited by the governmental office for social services informing families with minor children about their rights.⁹² It also concerns the context outside the workplace.

Furthermore, I wish to draw attention to a short report from December 2007 being the result of an empirical study that was conducted by the University of Zurich in the framework of the European Year 2007 for equal opportunities for all concerning the discrimination of homosexual persons in Liechtenstein.⁹³ In my opinion, it shows that in a very conservative context, Liechtenstein is at least sensitive to the problem and has started becoming aware of problems that will have to be regulated in the future.

LITHUANIA – *Tomas Davulis*

PART I: *DIRECTIVE 2004/113/EC*

1. Transposition of Directive 2004/113/EC

In view of implementing the principle of equal treatment between men and women in access to and supply of goods and services the Equal Opportunities Act of Women and Men of 1 December 1999 (EOAWM)⁹⁴ was first amended on 18 June 2002 when the Lithuanian legislator introduced the new Section 5-1 that substantially extended the scope of application of the principle of non-discrimination.⁹⁵ Section 5-1 called ‘Implementation of Equal Opportunities for Women and Men in the Field of

⁹² http://www.llv.li/pdf-llv-asd-merkblatt-familienfoerderung_fl_5sept08.pdf, accessed 20 January 2009.

⁹³ http://www.llv.li/pdf-llv-scg-kurzbericht_formatiert_02.06.08-4.pdf, accessed 20 January 2009.

⁹⁴ State Gazette, 1998, no. 112-3100.

⁹⁵ State Gazette, 2002, no. 68-2761.

Protection of Consumers' Rights' now states that salespersons, producers and service providers:

- 1) must apply equal conditions of payment and guarantees for the same products, goods and services or those of equal value to all consumers irrespective of their sex;
- 2) when providing information on their products, goods and services or advertising them must assure that there is no expression of humiliation, scorn or any restriction of rights or extension of privileges based on sex and the public attitudes that one sex is superior to another.

In addition, Article 7(1) of the EOAWM lists the actions of a seller or producer of goods or a provider of services that shall be treated as violating equal rights for women and men and thus invoking possible administrative sanction. These are actions where on the grounds of a person's sex:

- 1) different conditions of payment or guarantees for the same goods, services or products of equal value or different opportunities for selecting goods and services are established;
- 2) information or advertisement about products, goods and services is provided or public opinion is formed that one sex is superior to another, and the consumers are also being discriminated against on grounds of sex;
- 3) a person who has filed a complaint concerning discrimination is being persecuted.

The Office of the Equal Opportunities Ombudsman is responsible for supervision of the said provisions, as is the implementation of the principle of equality in other areas of social life or prohibition of discrimination based on other grounds.

After Directive 2004/113/EC was adopted, two new amendments to the EOAWM have been registered which contain explicit reference to Directive 2004/113/EC. On 5 July 2005⁹⁶ Section 2(4) of the Equal Opportunities Act of Women and Men that defines direct discrimination was amended adding additional grounds to the list of allowed exceptions to the principle of non-discrimination: there will be no direct discrimination if the sale of goods or provision of services to a person of a certain sex or to the majority of a certain sex is justified by a legitimate aim, provided these restrictions are appropriate and necessary (Section 2(4) p. 8 EOAWM).

In addition, the Law on Insurance⁹⁷ was amended on 19 July 2006 to allow certain exceptions to the principle of gender equality in the evaluation of risks. The newly introduced Section 231 of the law sets the temporary rules of the use of the sex as a factor in the calculation of contributions according to official actuarial and statistical data.

It is important to note that the adoption on 17 June 2008 of the new version of the Equal Opportunities Act⁹⁸ covering a long list of grounds of prohibited discrimination resulted in dual and overlapping regulation of the issue.⁹⁹ Alongside the grounds of race, ethnic origin, age, disability, sexual orientation, religion and belief, the new grounds of nationality, language and social origin were introduced together with the ground of sex. As a result, the Equal Opportunities Act in Section 8 'Implementation of Equal Opportunities in the Sphere of Consumer Protection' contains provisions which are analogous to those of Section 5-1 EOAWM, i.e. prohibiting salespersons, producers and service providers from applying unequal conditions of payment and guarantees on the grounds of *inter alia* sex. Furthermore, the humiliation, scorn and

⁹⁶ State Gazette, 2005, no. 88-3281.

⁹⁷ State Gazette, 2003, no. 94-4246.

⁹⁸ State Gazette, 2008, no. 76-2998.

⁹⁹ See *Flash Report* 2008-08-LT-03.

restriction of rights or extension of privileges on the grounds of *inter alia* sex or public attitudes that one person is superior to another are prohibited in the advertising of or information on their products, goods and services. The relationship of the Equal Opportunities Act with another instrument (Equal Opportunities for Women and Men Act) has become totally unclear.

2. Correct transposition?

The ‘copy-out’ approach was not necessary since the national law was composed as having a general nature and including many spheres of social life. Perhaps the main problem as regards the practical implementation pertains to the poor understanding of what kind of practical situations are prohibited by the rather brief statements of the EOAWM or the Directive. These statements can hardly be considered sufficiently clear and precise so as to allow individuals to understand their rights and providers to understand their legal obligations.

Another structural deficit of the law can be attributed to the fact that the law includes different definitions of the duties of individuals (in Chapter II ‘Implementation of Equal Rights for Women and Men’) and their actions which violate the principle of equal opportunities (in Chapter III ‘Violation of Equal Rights of Women and Men’).

The EOAWM does not make it clear whether the access to goods and services is covered in its full extent. Section 7-1 of the EOAWM defines the ‘different opportunities’ for *selecting* goods and services as a violation of the equal treatment that can invoke an administrative responsibility of up to 4000 Litās (approx. 1 558 EUR). However, Section 5-1 of the EOAWM does not prohibit situations where the refusal to supply goods or provide services is based on the consumer’s sex (the payment conditions and guarantees are included in the scope of the principle of non-discrimination). The already criticized inconsistency of the Lithuanian legislator when describing duties of private persons and the administrative breaches of the principle of discrimination leads to a different evaluation of the action in private and public sphere.

Another example of such incoherence is related to the scope of application of Sections 5-1 and 7-1 of the EOAWM. In Section 5-1 of the EOAWM ‘Implementation of Equal Opportunities for Women and Men in the Field of Consumer Protection’ the term ‘consumer’ plays a central role. In accordance with Section 6.350 of the Civil Code, the consumer is always perceived as a physical person only. The supply of goods or provision of services can be denied to legal persons who are represented by physical persons of a certain sex.

Since it is not very clear from the Directive the national legislation remains silent on the question whether the harassment or sexual harassment of an employee by third parties (such as clients or customers) is covered and whether the employers are liable if they fail to take reasonably practicable steps to prevent the repeated harassment.¹⁰⁰

3. Definitions of ‘goods’ and ‘services’

There is no definition of ‘goods’ or ‘services’ in the EOWMA and therefore other national legal acts shall be explored. There are a number of concepts depending on the scope of application or the purpose of the relevant act.

¹⁰⁰ See also Answer to Question 14.

The first definition can be found in the Law of 5 March 2002 on Value Added Tax.¹⁰¹ Section 2 (23) of this Law defines a good as any possible thing (including notes and coins of numismatic interest), including electricity, gas, heat and other types of energy. The Law on Value Added Tax gives no definition of ‘services’ but defines the concept of ‘provision of services’ instead. In Section 7 of the Law, ‘provision of services’ shall mean any transaction in respect of any civil rights object, provided this transaction is not treated as supply of goods within the meaning of this Law. Such transactions shall include, *inter alia*: sale or other transfer of non-standardised software, lease, assignment of intangible property and title, construction works, including the handing over of a constructed new building or structure to the client/contractor, and the obligation to refrain from an act or to tolerate an act or situation.

The Law of 6 September 1997 on Public Procurement¹⁰² distinguishes between goods, services and works.¹⁰³ Since the activities recognised as ‘works’ or ‘services’ are listed in an Annex to the Law they constitute the narrow autonomous definition for the purpose of this Law.

The Civil Code of the Republic of Lithuania¹⁰⁴ does not include any definitions of ‘goods’ or ‘services’. The concepts of contract of sale in Section 6.305¹⁰⁵ or the concept of the contract of services (Section 6.716)¹⁰⁶ are provided for by the Code but they seem to be too narrow to reflect the variety of commercial or public contractual interactions. The Code establishes a long list of other types of contracts having a good or service as an object of the contract.

4. Protection of specific groups

The EOWMA does not explicitly address transsexual people, pregnant women or women who have recently given birth. The implicit protection shall be provided instead by way of interpretation. However, the lack of complaints and absence of public debates indicate the difficulties in understanding the whole scope of possible discriminatory actions prohibited by the Directive and EOAWM. The protection is not sufficiently clear and precise so as to allow individuals to understand their rights and goods and services providers to understand their legal obligations as far as transsexual people, pregnant women and women who have recently given birth are concerned.

5. Definitions of pregnancy and maternity

In general, in Lithuania there is no legislation or specific court practice related to the definition of discrimination on the ground of pregnancy or maternity. The less favourable treatment of a woman by reason of her pregnancy or pregnancy-related

¹⁰¹ State Gazette, 2002, no. 35-1271.

¹⁰² State Gazette, 2006, no 4-102.

¹⁰³ ‘Work’ means the outcome of building or civil engineering, works taken as a whole that is sufficient in itself to fulfil an economic and technical function. Related activities include construction, building, insulation, painting, installation, etc.

¹⁰⁴ State Gazette, 2000, no. 74-2262.

¹⁰⁵ Concept of the contract of purchase-sale: a contract of purchase-sale is a contract by which one person (the seller) obligates himself to transfer ownership or trust of the thing (good) to another person (the buyer) and the latter obligates himself to accept the thing (good) in exchange of a fixed money consideration (price).

¹⁰⁶ Concept of the contract for services: a contract by which one party to the contract (the provider of services) undertakes to provide to the other party to the contract (the client) by commission of the latter certain services of a non-material nature (intellectual) or other types which are not related to the creation of a material object (to perform certain actions or pursue certain activities), and the client undertakes to pay for the services provided.

illness or by reason of her taking maternity leave shall be considered direct discrimination. However, this statement lacks public awareness since this implication is not expressly pinpointed by the legislator and the higher courts. There are no specific deviations in the context of goods and services. The law does not provide for protection for women from discrimination related to their breastfeeding in the access to or supply of goods and services.

6. Use of a comparator

Comparators for the establishment of discrimination on the ground of pregnancy or maternity are not required by the law. However, one should take into account the possible situation that the court will require a comparison (or information on the ‘difference’ of payment conditions) as the law prohibits the ‘different conditions of payment’ or ‘different opportunities for selecting goods and services’. Court practice lacks here.

7. Actions against failure to implement the Directive

Some individual complaints were brought in the sphere of consumer lease contracts or purchase of goods in installments. A pensioner¹⁰⁷ filed a complaint against a telecommunication company because of its refusal to sell him a computer with a mobile internet connection for 1 Litas (approx. 0.28 EUR). A woman on parental leave until the child reaches three years of age was refused a consumer’s credit to finance the purchase of domestic electric appliances. These complaints were dismissed by the Equal Opportunities Ombudsperson on the grounds that there was no evidence that the related companies had the intention to discriminate pensioners or women on parental leave.

The even quotas for boys and girls in the access to a Jesuit grammar school were also justified by the Opportunities Ombudsperson, who saw this as a ‘creditable’ proportionate representation of both sexes.

For a long time, Lithuania has been criticized for not allowing transsexual people to change gender-related records (ID code where the first digit indicates the gender of the person and the section ‘gender’ in the passport) because of gender reassignment. These barriers were lifted in 2007.

8. Enforcement by equality bodies

The designated equality body does not have the competence to bring enforcement actions in the public interest. In accordance with Section 12 of the EOAWM, the Equal Opportunities Ombudsperson shall investigate complaints related to direct and indirect discrimination, harassment and sexual harassment and impose administrative sanctions. As far as judicial litigation is concerned, the Equal Opportunities Ombudsperson is entitled to provide objective and unbiased consultations to victims of discrimination. The court may take the initiative to invite the Equal Opportunities Ombudsperson as a qualified institution to give expert advice on a matter.

9. Discrimination based on association/perceived status

There is no explicit provision prohibiting discrimination on the ground of gender reassignment or linking discrimination based on sex to gender reassignment. In general, the Lithuanian legislator is more than reluctant to address the issue of

¹⁰⁷ The retirement age under the statutory pension system is different for women and men.

transsexuality. As mentioned before,¹⁰⁸ the question of gender reassignment sparks intensive public debates. The Republic of Lithuania was already convicted in 2007 by the ECHR for practical impediment of reassignment but the situation is not likely to change in the near future.

10. Protection of women regarding pregnancy and maternity

In principle, Lithuania uses the exception provided for in Article 4(2) of the Directive. There is no corresponding provision in Section 5-1 or Section 7-1 of the EOAWM, but the general exception consolidated in the definition of ‘direct discrimination’ applies: direct discrimination shall mean one person being treated less favourably on grounds of sex than another is, has been or would be treated in a comparable situation, except for ‘(...) special protection of women during pregnancy, childbirth and nursing’ (Section 2(4) p. 1 EOAWM).

11. Exceptions to the principle of equal treatment (Article 4(5))

Section 2(4) p. 8 EOAWM establishes the said exception in the general definition of direct discrimination – there will be no discrimination in the different treatment ‘where the sale of goods or the provision of services solely to, or in particular to, persons of one sex is justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary’. There are no specific rules or examples of interpretation as far as transsexual people are concerned.

12. Positive action

Another exception to the definition of ‘direct discrimination’ is provided in Section 2(4) p. 6 EOAWM: the special temporary measures set forth by laws, aimed at accelerating the guarantee of factual equal rights for women and men, and which must be repealed upon implementation of equal rights and equal opportunities for women and men, would not constitute direct discrimination. As indicated before¹⁰⁹, the EOAWM itself does not allow for such positive special temporary measures – they shall be provided for in special laws. So far no such law have been adopted. In July 2008, when approving the annual report of 2007 of the Equal Opportunities Ombudsperson, the Lithuanian Parliament in its Resolution expressed commitment to adopting such a law.

13. Burden of proof

There is no special rule on the burden of proof for cases of discrimination in the sphere of supply of goods and provision of services. The general provision of Section 2-1 of the EOAWM ‘Burden of proof’ would be applicable in all cases of discrimination based on sex. The provision reads: ‘When investigating the complaints or applications of natural persons, as well as the disputes of persons concerning discrimination on grounds of sex, in courts or other competent institutions, it shall be presumed that the fact of direct or indirect discrimination occurred; a person or institution against which a complaint was filed must prove that the principle of equal rights has not been violated.’

14. Harassment, instruction to discriminate and victimisation

The great majority of examples of harassment cases were related to the content of advertisements, i.e. in the area which is not covered by Directive 2004/113/EC. Some

¹⁰⁸ See Lithuanian Report on the Implementation of the Recast Directive.

¹⁰⁹ See Lithuanian Report on Positive Actions Measures, 2007.

cases have been examined by the Equal Opportunities Ombudsperson in which the advertisement contained a gender stereotype, e.g. some parts of the female body were exposed, the physical weakness of women was underlined or women were portrayed as light-minded and striving to tempt men. In some cases, women were compared to certain things or goods whilst in other the opinion was formed that they are less valuable persons than men are or that they are the opposite of intellectually developed males. For example, the picture of half-naked women in an advertisement for meat products with the suggestion: 'When you want some meat (...)'. Another example, from the advertisement of a telecommunications company: 'Who is a man's best friend – a book or a blond girl?'. An advertisement inviting a visit to a popular national chain of restaurants with the text 'The sexy little red hats are waiting for you' was also recognized as a violation of equal treatment.

No examples of cases concerning instructions to discriminate in the area of goods and services are known in Lithuania.

No examples of victimisation are known. Section 7-1 of the EOAWM explicitly qualifies persecution of a person who has filed a complaint concerning discrimination as a violation of equal rights for women and men.

15. Overall assessment

The legal standards required by the Directive had largely been introduced before adoption of the Directive in 2003. The requirement of implementation of the Directive lifted national provisions to the level of 'Community matter'. However, the absence of complaints shows that in EOAWM there are some other 'grey areas' which require more elaborated provisions for the sake of clarity and transparency (e.g. indirect discrimination, burden of proof, pregnant women or women on maternity or parental leave, transsexual people).

PART II: SCOPE OF NATIONAL LEGISLATION

1. Scope of national legislation beyond the scope of EU gender equality directives?

Article 3(3) of the Directive provides that both the content of media/advertising and education lie outside the material scope of the Directive. Lithuanian legislation does not contain such an exception. Quite the opposite: Sections 5-1 and 7-1 specifically prohibit humiliating advertisements and formation of public attitudes that one sex is superior to another.

Since the adoption of the EOAWM in 1998, the principle of non-discrimination has been consolidated as a general principle with a very wide scope of application. First of all, the active role of the state and municipal institutions and agencies was consolidated in Section 3 of the EOAWM. They must *inter alia* ensure that equal rights for women and men will be guaranteed in all the legal acts drafted and enacted by them. However, the EOAWM does not contain parallel provisions on the possible violations of this principle or investigation of complaints by the Equal Opportunities Ombudsperson.¹¹⁰ Thus, individuals may not engage in judicial disputes with the authorities unless it is an employment matter or other breach of the principle of equal treatment.

¹¹⁰ The Equal Opportunities Ombudsperson may act on the ground of Section 12(2) EOAWM that provides it with the right to submit conclusions about the implementation of the EOAWM and recommendations to state and municipal institutions and agencies on improvement of legal acts and the priorities in the policy of the implementation of equal rights.

Secondly, the principle of non-discrimination was prescribed for all private and public educational establishments and institutions of sciences or education. Pursuant to Section 4 of the EOAWM, they must ensure equal conditions for women and men when:

- 1) admitting to vocational education institutions and schools of higher education, improving their qualifications, developing their professional skills and acquiring practical work experience;
- 2) awarding grants and granting loans for studies;
- 3) selecting the curricula;
- 4) assessing their knowledge.

These establishments and institutions also shall ensure that the curricula and textbooks do not propagate discrimination of women and men. Furthermore, Section 7 of the EOAWM defines actions which shall be treated as violating equal rights for women and men as:

- 1) different requirements and conditions when admitting for studies, preparing the curricula, assessing knowledge, improving the qualification, developing professional skills or acquiring practical work experience;
- 2) different opportunities for choosing the disciplines.

2. 'Hierarchy' of grounds?

All stipulations regarding gender equality issues in the sphere of supply of goods and provision of services are based on the ground of gender in Lithuania. The overwhelming majority of cases is related to equal treatment between men and women.

After the adoption of the new version of the Law on Equal Opportunities, there is no difference with the prohibition of discrimination on other grounds, simply due to the fact that the Law on Equal Opportunities addresses sex in the same way and manner as other grounds like race, disability etc.

The more relevant practical problem currently pertains to the implementation of the principle of equal treatment of persons irrespective of other protected grounds such as religion or belief, disability, age or sexual orientation non-discrimination in the access to goods and services, including housing.

3. Comments and/or suggestions

Apart from my previous suggestions for the national legislator,¹¹¹ I would like to advise the Community legislator not to avoid more elaborated or detailed regulation where the list of prohibited discriminatory measures or actions or the scope of protection is concerned. An intensive exchange of best practices or fact sheets among Member States would contribute to an increase of public awareness which is currently lacking.

From a Lithuanian perspective there would be no objection against inclusion of areas such as advertisement, education and housing in the scope of application of the Directive.

¹¹¹ See Answers to Questions 2, 15.

PART I: DIRECTIVE 2004/113/EC

1. Transposition of Directive 2004/113/EC

On 18 December 2007, the Parliament adopted the law which transposes Directive 2004/113/EC¹¹². The law entered into force on 21 December 2007. According to this law, discrimination between women and men is prohibited in the access to and supply of goods and services which are available to the public and which are offered outside the area of private and family life. This prohibition does not apply to the content of media and advertising nor to education.

2. Correct transposition?

Luxembourg legislators tend to implement EU law by textually conforming to the provisions to be transposed (copy out). As a result, Luxembourg gender equality law generally meets European standards. This minimalist approach implies that the national provisions seldom go beyond the minimum criteria contained in the European directives.

3. Definitions of ‘goods’ and ‘services’

The concepts of goods and services are not clearly defined, neither by national legislation, nor by national case law. Concerning goods, some indications may be found in specific regulations which summarily define movable, real, tangible and intangible goods.

4. Protection of specific groups

The implementing law provides explicit protection to pregnant women and maternity. There is no specific mention of women who have recently given birth, but this should be part of the concept of maternity. Transsexuality is not mentioned at all in the law, but it can be considered as having implicit protection, as gender reassignment is mentioned in the comments attached to the draft of the implementing law presented to Parliament. These comments specify that, according to the ECJ, discrimination on the ground of gender reassignment must be considered as discrimination on the ground of sex.

Until January 2009, there was no case law relating to equal treatment between women and men in the area of access to and supply of goods and services. One may assume that people are not aware of this specific legislation and therefore not of their rights and obligations in this area. Furthermore, as the protection of transsexual people is not mentioned at all in the law, people are probably even less aware of the protection given to this group.

5. Definitions of pregnancy and maternity

As mentioned below, pregnancy and maternity are explicitly protected by the implementing law, but no definition is given. The legislator has copied out the

¹¹² *Loi du 21 décembre 2007 portant 1. transposition de la directive 2004/113/CE du Conseil du 13 décembre 2004 mettant en oeuvre le principe de l'égalité de traitement entre les femmes et les hommes dans l'accès à des biens et services et la fourniture de biens et services; 2. modification du Code pénal; 3. modification de la loi modifiée du 27 juillet 1997 sur le contrat d'assurance* ([Mém. A – 232 du 21 décembre 2007](#)).

provisions given by the Directive. This protection is well-known in its application in the employment context, but one may assume that this is not true in the field of access to and supply of goods and services. One may find it difficult to figure out what would constitute discrimination in this area. The legislator or even the equality body could provide examples to raise awareness on this subject. The area of public transport or access to leisure services could provide some pertinent examples. Breastfeeding women are not mentioned at all by the implementing law.

6. Use of a comparator

As there is no explicit definition of pregnancy and maternity given by law in Luxembourg, no comparators are included.

7. Actions against failure to implement the Directive

Luxembourg has transposed the Directive in time. Until now, no actions have been brought.

8. Enforcement by equality bodies

The national equality body, the *Centre pour l'égalité de traitement*, is allowed to support victims and provide information on discrimination based on race and ethnic origin, disability, age, religion or belief, sexual orientation and sex. The body has no competence to bring enforcement actions. Non-profit associations can be empowered to engage in proceedings on behalf or in support of any victim. With this intention, associations should obtain a ministerial approval which will be given under certain conditions. Moreover, the law institutes platforms of dialogue between the ministries concerned and the entities having a legitimate interest to contribute to the fight against discriminations based on sex.

Until January 2009, no regulations had been adopted in order to determine the procedure regarding the ministerial approval for non-profit associations. Moreover, no dialogue has taken place since the adoption of the law in December 2007.

9. Discrimination based on association/perceived status

There is no explicit legal prohibition regarding discrimination on the basis of association with a transsexual person or persons, or a person or persons of a particular sex, and/or discrimination on the grounds of perceived sex or transsexual status. It has to be mentioned that the *Coleman* case was widely criticised in Luxembourg by persons who are involved in the anti-discrimination field. This case has probably raised awareness on the issue.

10. Protection of women regarding pregnancy and maternity

Article 3(5) of the implementing law reproduces the terms of Article 4(2) of the Directive. There are no legal provisions that are more favourable concerning the protection of women as regards pregnancy and maternity. But there are a few practical examples, such as priority lines at supermarket cash registers or priority seats on buses.

11. Exceptions to the principle of equal treatment (Article 4(5))

Article 4 of the implementing law reproduces the terms of Article 4(5) of the Directive. There is no indication of any situation which could fall into the scope of this article. Transsexual people are not mentioned. Once more, one has to refer to the comments to the draft in order to identify which kind of situations are meant by the

legislator related to sex-determined goods and services (hairdressers), personal privacy and decency (saunas, swimming pools), safety considerations (victims of domestic violence), promotion of gender equality (non-profit associations).

12. Positive action

Article 5 of the implementing law is about positive action. It results in a copy out of Article 6 of the Directive. As for other provisions, there are no situations mentioned in the law. The comments to the draft itself do even not provide examples of positive actions in the field of access to and supply of goods and services. It only refers to Article 11(2) of the Constitution which allows the State to implement positive actions.

13. Burden of proof

The burden of proof in the area of goods and services as regulated by Article 8 of the implementing law complies with Article 9 of the Directive. Even if, until now, no actions have been initiated in the area covered by the law one must consider this rule important. Providing consistent proof in the field of discrimination is not only difficult but also implies monetary costs. One may assume that one of the reasons why people hesitate to initiate actions in the field of gender discrimination is based on financial considerations. Another reason may be that people who feel discriminated against just want to get rid of the situation without prolonging the matter by a legal action. As non-profit organisations will be allowed to engage in proceedings, the rule concerning the burden of proof may encourage them to proceed because of the lower costs. This rule may indeed help to fill the lack of case law in Luxembourg.

14. Harassment, instruction to discriminate and victimisation

Regarding harassment, the comments to the draft refer to disparaging or insulting remarks addressed to a client or a worker, and regarding sexual harassment to behaviour with sexual connotations presented in the context of housing. Furthermore, the comments specify that harassment and sexual harassment can occur by words and behaviour, and by production and dissemination of images or texts even electronically.

Concrete examples of instruction to discriminate are difficult to identify, as Luxembourg case law does not provide any examples. In Luxembourg, it is common for bars or nightclubs to offer free drinks or entry for women. Nightclubs also often select who to allow entry, in order to ensure that there are 'enough' single women in the club. Such strategies are meant to encourage men to visit the clubs and reinforce stereotypes. People who work in such places are instructed to select the clients on the basis of sex.

There are no concrete examples of victimisation.

15. Overall assessment

The implementation of Directive 2004/113/EC has hardly had any impact at all in Luxembourg. During the legislative procedure, non-profit organisations tried to raise awareness, especially concerning the establishment of a hierarchy in discrimination grounds. It seems that the insurance lobby was active in order to include the proportionate differences in individual premiums and benefits. In fact, the press mainly reported on that particular subject. Even in Parliament, the bill was mentioned as 'concerning equality in the field of insurance'. As a result, it is very difficult to publicize that legal protection exists in the field of access to and supply of goods and services. As a result, no improvement can be identified.

PART II: SCOPE OF NATIONAL LEGISLATION

1. Scope of national legislation beyond the scope of EU gender equality directives?

Luxembourg legislation complies with EC gender equality directives, but generally does not exceed the European standards. Concerning Directive 2004/113/EC, the implementing law was published on 21 December 2007, just in time in order to permit proportionate differences in individual premiums and benefits for the purpose of insurances and related financial services. The law does not apply to the content of media and advertising nor to education. Regarding education, Bill No. 5759 on basic education, which will probably be adopted in late January 2009, does not mention the principle of equality between women and men. The promotion of gender equality in the field of education does appear in the *Plan d'action national d'égalité des femmes et des hommes* (National Action Plan for equality between women and men) which contains five measures regarding education. One measure is about gender mainstreaming in politics and actions in the field of education. The four other measures are about promotion of gender equality regarding orientation, educational staff, administrative staff and life-long learning.

Media and advertising are not regulated at all. The *Commission luxembourgeoise d'éthique en publicité* (Luxembourg Commission on ethics in advertising) has not been operational for several years and the *Conseil National des Programmes* (National Council on programming) which is in charge of television and radio media, does not mention the subject very often. There are two measures concerning the media in the *Plan d'action national d'égalité des femmes et des hommes*, and both propose sensible actions in order to promote gender equality.

2. 'Hierarchy' of grounds?

The subject of a hierarchy of grounds was raised in Luxembourg during the adoption procedure of the law implementing Directive 2004/113/EC. The National Council of Women and the Council of State both expressed their concerns on this matter in their opinions on the draft. In fact, legal protection on the ground of grounds covered by Directive 2000/43/EC and Directive 2000/78/EC is currently stronger than protection on sex in Luxembourg. Sex has the lowest protection level in the field of goods and services. This suggests that gender equality, which concerns half of the population, is less important than the protection of minorities. This is not coherent and may as a result be perceived as a political message meaning that gender equality is no longer a priority. It is a fact, at least in Luxembourg, that advertising and media, for example, use sexual stereotypes more often than they use other stereotypes. Furthermore, advertising is, according to a survey¹¹³ of the National Council of Women, perceived as containing sexual discrimination by a large public. About 49 % of the respondents are in favour of the implementation of constraining rules. Enhanced protection against sex discrimination in these fields could even contribute to raising awareness in other areas of access to and supply of goods and services. It could also be useful to include marital and family status in the scope of any further protection in the field of gender equality. Married women are nearly automatically registered under the name of their husbands without their approval. This occurs in administrative matters and in private matters such as hospital registration.

¹¹³ www.cnfl.lu, accessed 21 January 2009.

3. Comments and/or suggestions

In Luxembourg, regarding discrimination in general, people hesitate to go to court. One may assume that, now that the national equality body, the *Centre pour l'égalité de traitement*, is operational, people will address the equality body in order to get advice and information. Currently, the equality body can only provide support and advice in the field of education, media and advertising to people who call on the ground of race. It is very important to supplement the legal framework by according the same protection to all grounds of discrimination.

Finally, the subject of decision making is very important in the field of gender equality. The economic and political power still remains unbalanced in Luxembourg. It could be interesting to proceed on the subject on EU level.

MALTA – Peter Xuereb

PART I: DIRECTIVE 2004/113/EC

1. Transposition of Directive 2004/113/EC

The Directive was sought to be transposed by subsidiary legislation, in the form of Legal Notice 181 of 2008 of 1 August 2008, that is after the deadline of 21 December 2007 stipulated in the Directive. The Legal Notice therefore incorporates the Access to Goods and Services and their Supply (Equal Treatment) Regulations, of 2008 (henceforth, 'the Access Regulations' or 'the Regulations'). The Access Regulations are made under powers conferred on the Minister by the Equality for Men and Women Act of 2003 (Chapter 456, Laws of Malta, henceforth 'EMWA'). Regulation 1(2) provides that these Regulations give effect to the relevant provisions of Council Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to goods and services and their supply. Regulation 1(5) specifies that the Regulations do not apply to matters of employment and occupation, nor to matters of self-employment, 'insofar as these matters are covered by other laws and regulations'. This rider leaves it open to the courts, if faced with a lacuna in other legislation, to apply the provisions of these Regulations in order to fill the gap, within the scope of the Directive.

2. Correct transposition?

The Regulations involve a broadly faithful textual reproduction of much of the Directive. For example Regulation 4 contains verbatim the definitions set out in Article 2 of the Directive (except for the ubiquitous but probably innocuous phrase 'shall be deemed to occur where', as in 'Direct discrimination shall be deemed to occur where etc.'). The prohibition is framed in terms of a prohibition against subjecting another person to discriminatory treatment (Regulation 4(1)). Aside from such departures, the language is faithful to that of the Directive. The same applies to the scope of the Directive, mirrored in the scope of the Regulations (Article 3 and Regulation 1(3), which, however, appears to use a comma in the wrong place, thus possibly changing the ordinary meaning of the text of the Directive and inviting corrective interpretation from the courts: 'it is provided that the Regulations apply to all persons who provide goods and services made available to the public (...) and which are offered outside the area of private and family life, and to all transactions carried out in this context'.

3. Definitions of ‘goods’ and ‘services’

There is no attempt at a definition of ‘goods’ and ‘services’ in the Regulations. In my view, the courts would interpret these concepts in the light of applicable Community Law, in accordance with the general ‘national’ approach to the interpretation of national rules implementing Community Law. A wide interpretation at Community level would lead to a wide interpretation at national level.

4. Protection of specific groups

There is no explicit reference to transsexual people in the Access Regulations. Rights during pregnancy and maternity are safeguarded in general terms by the EMWA and the Employment and Industrial Relations Act of 2002 (Chapter 452, Laws of Malta, henceforth ‘EIRA’), but also expressly as regards access to goods and services by Regulation 4(1) of the Access Regulations. Regulation 1(6) dutifully safeguards any more favourable rights of women during pregnancy and maternity. Regulation 4(8) provides that the regulations do not preclude differences in treatment if the provision of 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. In my opinion, the legislation is clear in terms; however, in my view it remains open to question whether the setting out of major principles of this kind is most effectively done – in terms of legal certainty and knowledge of rights – by their inclusion in delegated/subsidiary legislation rather than in the principal legislation itself. Regulation 5 seeks to implement Article 5 of the Directive, but does not in terms prohibit the costs related to pregnancy and maternity from resulting in differences in individuals’ premiums and benefits. It is not clear that any notification to the Commission has been made as required by Article 5 Paragraph 3 of the Directive. Moreover, Regulation 5(2) places the burden of notifying the Commission of any rationale for using sex as an actuarial factor and of the ‘actuarial statistical’ (sic, no comma used) data directly on the provider of the service, while it is arguable that the Directive intended the State to shoulder the burden of collecting and notifying this information.

5. Definitions of pregnancy and maternity

The Access Regulations contain their own definitions of direct and indirect discrimination (as well as of harassment and sexual harassment) in Regulation 4, which treats the concept of discriminatory treatment on grounds of sex, including discriminatory treatment related to pregnancy or maternity. In all cases, it is provided that the definitions are ‘without prejudice to the provisions of the Equality for Men and Women Act and the Employment and Industrial Relations Act’, and the definitions in EMWA and the EIRA are not exactly on all fours with those in the Access Regulations. Unfortunately, we do not have case law interpreting the respective provisions and this lack of total textual synchrony could become a source of misunderstanding and contention. In the employment context, the Equal Treatment in Employment Regulations (Legal Notice 461 of 2004 as amended) also provide their own definitions for direct and indirect discrimination and harassment (in an employment context), and these definitions come closer to the Directive’s definitions, without spelling out the situation as regards pregnancy and maternity but in the context of ‘sex’. The Access Regulations do not specifically refer to breastfeeding mothers. As to how discrimination in relation to pregnancy and maternity takes place in the goods and services context, it appears that this is part of a study to be carried out by the NCPE (the equality body).

6. Use of a comparator

The comparison in the Access Regulations (e.g. Regulation 4) is with the treatment received or receivable by another person in a comparable situation.

7. Actions against failure to implement the Directive

No actions have been brought for failure to implement the Directive, whether on the ground that it was done out of time or that it was not done properly, and whether by individuals or by the Equality Body (National Commission for the Promotion of Equality). There could be an issue with Article 5(2) of the Directive in view of the fact that the Access Regulations (and therefore, Regulation 5 thereof) were not in place by 21 December 2007, although a decision could well have been made by Malta 'before 21 December 2007 to permit etc.' in accordance with Article 5 of the Directive.

8. Enforcement by equality bodies

The EMWA provides that the NCPE (the equality body) shall, if it results that a complaint is proved and that the action complained of constitutes an offence, make a report to the Commissioner of Police for action on his part (Section 18(1)). Section 18 also provides that the Minister may make regulations whereby the NCPE might itself take legal action, including by laying down the arrangements whereby the NCPE may itself refer the matter to the competent civil court or to the industrial tribunal. These regulations have not been made. Otherwise, Regulation 8 of the Access Regulations provides that any entity with a legitimate interest, which includes the NCPE, may engage itself either on behalf of or in support of the complainant, but this only with the approval of the victim complainant in any judicial or administrative procedure as is provided for the enforcement of obligations (arising) under the Regulations.

9. Discrimination based on association/perceived status

The legislation does not expressly prohibit discrimination on the basis of association etc.

10. Protection of women regarding pregnancy and maternity

Regulation 1(6) reproduces Article 4(2) verbatim, except for the substitution of the words 'These regulations' for the words 'This Directive'. There are no examples given of more favourable provisions.

11. Exceptions to the principle of equal treatment (Article 4(5))

Article 4(5) is reproduced verbatim in Regulation 4(8). However, it does not appear to have been relied upon thus far by the State. There is no official interpretation of the provision in relation to transsexual people. However, in a recent case a person who had had a gender re-assignment was denied publication of the banns for the marriage which she wished to contract, by the Director of the Public Registry, on the grounds that marriage is only permitted by law (the Marriage Act) between two persons of opposite sex. The civil court ultimately upheld the decision of the Director and the case was taken by the plaintiff to the Constitutional Court (case pending at the moment, with possible later recourse to the European Court of Human Rights). In the light of Directive 2004/113 and its transposition in 2008, the question arises whether we are speaking here of a 'service' to be regarded by analogy with, say, medical services for which no payment or token payment or even proper payment is made by the receiver of the service. It would make a major difference to such a plaintiff if they

were able to bring the case within the Regulations/Directive. This could raise difficult questions of Community/Member State competence. It is arguable that the 'service' in question in this case occurs in the area of private and family life, thus falling outside the scope of the Directive.

12. Positive action

Malta has not relied on the positive action provision as yet. It should be noted that while Article 6 permits the Member States to maintain or adopt specific measures etc., it seems *prima facie* as if the Maltese legislator does not regard the maintenance or adoption of such measures as its direct responsibility or active remit, for Regulation 6 provides that 'with a view to ensuring full equality in practice between men and women, the principle of equal treatment shall not prevent *any person* from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to sex'. In my opinion, it needs to be clarified as a matter of Community law whether/that the idea behind Article 6 of the Directive is that the Member States have a responsibility and a positive obligation to ascertain whether such measures are required in any particular cases and to implement them, possessing this faculty 'with a view to ensuring full equality in practice'.

13. Burden of proof

Article 9(1) is reproduced verbatim in Regulation 7(3), which also applies to those cases envisaged by Article 8(3) of the Directive. Undoubtedly, this rule is at least as important here as in employment cases. It may be even more so in this context in view of the relatively informal situations in which the request for, and the very transactions relating to, the provision of goods and services often occur.

14. Harassment, instruction to discriminate and victimisation

Regarding harassment, the NCPE opened new cases in 2007 related to discrimination in the provision of banking services. More generally, it has reported that it opened new cases relating to discrimination in the provision of goods and services. This much is disclosed, but otherwise the NCPE report for 2007 did not give details. I am told that one complaint is that a number of banks treat (for example, as to an application for a loan) couples who are partners on the assumption that the female partner will become economically inactive due to pregnancy and maternity at some point during the term of the financial agreement between the bank and the couple. (NCPE Annual Report 2007 Paragraph 3.3, available on NCPE website, www.equality.gov.mt)

I am not aware of any cases of instruction to discriminate having been documented. However, it could well be that this applies where a bank or financial institution etc. has a policy that needs to be implemented through line management. Also, where nightclub and similar venue employees restrict access, for example to coloured and/or gay persons, this is likely to have involved the giving of instructions to such employees. It is unlikely that such cases occur without instructions from higher up.

I am not aware of any victimisation cases that have been documented.

15. Overall assessment

It is near impossible to say, as the extent of any 'problem' was not documented, so that no accepted benchmark existed against which to monitor impact. The law is now in place, when before it was not. Also, the NCPE has conducted information campaigns in this regard. Such campaigns tend to raise consciousness, which also has

the effect that complainants can be expected to come forward, when previously they might not have done so, or to do so in greater numbers. A perusal of the NCPE annual reports indicates that complaints have been few in number up to 2007 and we wait to see from the next report if the number has increased since the promulgation of the Access Regulations in 2008. The NCPE report for 2008 should be published around February/March 2009.

PART II: SCOPE OF THE NATIONAL LEGISLATION

1. Scope of national legislation beyond the scope of EU gender equality directives?

Directive 2004/113 deals with discrimination outside or beyond employment, but expressly excludes media and advertising, and education. It also refers to actuarial factors, but only applies to insurance and pensions which are private, voluntary and separate from the employment relationship. In Malta, the Equality for Men and Women Act of 2003 (Chapter 456, Laws of Malta, henceforth EMWA), goes beyond the equality acquis on employment and social security. The employment and self-employment aspects (including the position of spouses participating in the activities of a self-employed partner) are covered partly by the same Act, but also by the Employment and Industrial Relations Act of 2002 (Chapter 452, Laws of Malta) and the Equal Treatment in Employment Regulations of 2004 as amended.

There is no provision equivalent to Article 3(3) of the Directive in the Access Regulations, and the scope of the principal legislation (the EMWA) is wide, so that it appears that the content of media and advertising, as well as education, are included within the scope of the Regulations, despite being excluded from the scope of the Directive.

Indeed, the prohibition against discrimination on grounds of sex as related to access to all types of education is laid down in the Education Act (Chapter 327, Laws of Malta; for example, Articles 3, 9 and 48 of the Act). Furthermore, the National Minimum Curriculum stems directly from the Education Act and applies to state, church, and independent schools alike. It states that boys and girls should follow the same curriculum, be catered for in a manner that ensures equal access to the same work opportunities, be exposed to the same educational experiences, and have the opportunity to effectively choose the subjects they want to learn on the basis of an informed choice (Creating the Future together – National Minimum Curriculum, 1999). All students at all levels are to be provided with facilities related to the learning and practice of music, drama, art and sport, by implication on an equal basis (Articles 59 and 60 of the Education Act). Moreover, Article 8 of EMWA expressly prohibits discrimination in education under various heads, including the failure to suppress sexual harassment, and the failure to ensure that curricula and textbooks do not propagate discrimination. Further, Article 9(2) provides that persons responsible for any workplace, educational establishment or entity providing vocational training or guidance or for any establishment at which goods, services or accommodation facilities are offered to the public, shall not permit other persons who have a right to be present in or to avail themselves of any facility, goods or services provided at that place, to suffer sexual harassment. As pointed out above, the Access Regulations made under EMWA do not exclude the application of the regulations to education. The greatest problem in regard to education is not unequal access for males and females but rather that the entire culture, including among teachers, still works towards promoting traditional gender roles and occupational stereotypes.

EMWA (Article 6) prohibits banks, financial institutions or insurance companies from discriminating (defined as including less favourable treatment on grounds of sex or family responsibilities) in the grant of any facility in respect of the establishment, equipment or in the launching or extension of any business or the launching or extension of any form of self-employment or the insurance of that business or the person in self-employment. However, it is provided that there shall be no discrimination under this provision in so far as the conditions under which the facility of the insurance cover is offered or withheld reflect genuine considerations based on the financial risk in the grant of such facilities or such insurance cover. The National Commission for the Promotion of Equality (the equality body) has, in its annual reports, recorded complaints made under this head, but details have not been made public.

Article 10(1) prohibits discriminatory advertising. In the employment context, it provides that it shall be unlawful for persons to publish or display or cause to be published or displayed any advertisement, or, otherwise, to advertise a vacancy for employment which discriminates between job seekers or to request from job seekers information concerning their private life or family plans (unless the employer proves that the work in connection with the situation advertised can only be performed by a person of a specific sex). Advertising includes disseminating information about the vacancy by word of mouth. Then, beyond this, and generally, Article 10(2) makes it unlawful to publish or display or cause to be published or displayed any advertisement which promotes discrimination or which otherwise discriminates. This rather wide provision does not appear to have been invoked before the courts as yet.

2. 'Hierarchy' of grounds

It is true to say that in general, Maltese equality law has been evolving in line with the evolution of the equality *acquis* of the Union. If anything, there is an awareness in NGO circles and in political circles that the general legal provisions, including those in the Constitution of Malta, require full elaboration and application of the equality principle across grounds and in full. Moreover, the question of multiple discrimination is coming into the general consciousness at decision-making levels. Social security legislation is currently being reviewed from an equality perspective. The gender pay gap persists and needs to be addressed through new and focused efforts. Women's lack of participation in the labour market and in the higher echelons of decision-making in all spheres similarly needs to be addressed with greater vigour. It is not necessarily a case of discrimination in access to services but there is a distinct lack of provision in the first place of such services (child care, for example) that would allow women to participate more fully in the labour and other markets, and other activities and occupations. One such activity appears to be the practice of sport and involvement in the leadership and management of sport and sport-related organisations. Despite the provision made in the Education Act for sport and sport education for boys and girls on an equal basis, it has been recorded that only about 12.5 % of the full-time sport committee members in Malta were female (National Statistics Office 2006, 'Sport Organisations 2005', cited in *Living Equality – A Gender Sensitivity Manual*, published by the NCPE, September 2008 p. 64).

Another area in which it appears to be more a case of the prevailing culture of misplaced loyalty and sense of obligation coupled with the 'social stigma culture' and outright fear, leading to reluctance to report abuse and make use of such services, rather than lack of provision of the service or discrimination in access to such, is the area of domestic violence and of access to refuge and single-sex homes and

counselling. The Government and its agencies provide support, and also some facilities, as does the Church. What is not clear is how much of a hidden problem this is in Maltese society, but that it is a problem is not in doubt.

The Malta Gay Rights Movement, among others, has often referred to the 'hierarchy' evolving in Maltese law, not least as a result of gaps in Community law (see for example, www.maltagayrights.net/node/47 accessed 21/01/2009). The phenomenon of irregular migration is politically salient in Malta and brought to the fore social issues regarding ethnic minorities in terms of housing, education, healthcare and employment. The Equal Treatment of Persons Order 2007 (Legal Notice 85 of 2007, adopted under the European Union Act, Chapter 460 Laws of Malta) transposed the Race Equality Directive, and prohibits discrimination on the basis of race in a number of areas including social security, healthcare, education, and the provision of goods and services. On the other hand, sexual orientation is not referred to in the constitutional provisions prohibiting discrimination. The only legal prohibition against discrimination on this ground is to be found in legislation enacted under the EIRA, namely in Legal Notice 461 of 2004, which amended the EIRA to include sexual orientation, as well as religion or belief and age, as a prohibited ground in the employment context. Maltese law still does not prohibit it in other contexts (healthcare, education, housing, etc.). Nor, as the bill stands, would the rent reform legislation currently going through Parliament make provision for the protection of tenancy interests of same sex couples. Sexual orientation is therefore the least catered for in Maltese legislation. Disability discrimination and race discrimination are in terms provided for by law. In the case of disability, comprehensive legislation, including protection in the area of goods and services, dates back to the Equal Opportunities (Persons with Disability) Act of 2000 (Chapter 413 of the Laws of Malta). While it is still perhaps early to tell, it is thought that the adoption of the Access Regulations now redresses the imbalance for gender in terms of protection in the area of goods and services. As far as the official reaction to the Commission proposal for a new Anti-discrimination Directive is concerned (COM 2008 426), the Government has gone on record as saying that the adoption of such a Directive would be 'premature'. In a meeting of the Malta and EU Steering and Action Committee, it was said that the text as proposed raises certain difficulties in particular in regard to the competences in that although there are attempts to introduce safeguards, the text does not seem to go far enough. However, it was also said during the ensuing discussion that although 'family matters' are regulated by national law, Maltese society has to take into consideration new concepts that are developing within Maltese society, and that a discussion must be instigated within Maltese society in order to attempt to come to some sort of agreement on how the family can be defined in the context of present-day social realities (www.meusac.gov.mt; accessed on 26 January 2009).

3. Comments and/or suggestions

As I flagged earlier in this report, there is particular uncertainty at the moment as to the right to marry after gender reassignment surgery.

Also, it appears that there is a large hidden problem relating to sexual orientation. A survey carried out (but not yet published) by the Malta Gay Rights Movement reportedly shows that discrimination against gay, bisexual and transgender people has increased in recent years as the LGBT community has become more visible. The survey details a high percentage of interviewees from the LGBT community wishing to emigrate if they could, stories of violence (physical and psychological) perpetrated

both in the family (at home) and outside the family, for example in schools and other educational establishments and in the workplace as well as, allegedly, by members of the police force on occasion. It reports discrimination in various contexts. The survey was due to be published in early 2009 (*The Sunday Times* 7 December 2008; see www.timesofmalta.com, accessed 20 January 2009; see also www.maltagayrights.net, accessed 20 January 2009; see also Malta Gay rights Movement, *Sexual Orientation Discrimination in Malta*, 2003). Moreover, discrimination in the labour market still persists, according to a recent report by the Gay Rights Movement, *Inclusion of Transgender Individuals in the Labour Market*, 2008).

As to the use of actuarial factors, a deeper study is needed. I understand that the insurance industry continues to lobby hard to retain their practices in the matter. As things now stand, Malta has sought to transpose Article 5 of Directive 2004/113 through Regulation 5 of the Access Regulations which, however, could have been drafted more carefully (the word ‘differences’ was unaccountably omitted in both the Maltese and English language versions) although the sense can be made out especially when read in the light of Article 5 of the Directive.

The political and public focus appears to be on immigration and race issues, mixed up as these are with religion and culture, and fuelled by a sense of fear and suspicion. It is least empathetic to issues of sexual orientation. Despite the legislation, a paternalistic attitude still prevails in regard to the disabled and the aged. Gender issues have taken a step forward with the adoption of Legal Notice 181 of 2008 (the Access to Goods and Services Regulations), and one could say that this has brought the law on gender onto a par with race and disability legislation in this regard, but there is yet to be a proper debate on the Commission Proposal for a new Anti-discrimination Directive.

NETHERLANDS – Rikki Holtmaat

PART I: DIRECTIVE 2004/113/EC

1. Transposition of Directive 2004/113/EC

On 13 December 2004, when Directive 2004/113/EC was issued, the Dutch General Equal Treatment Act (*Algemene Wet Gelijke Behandeling*, hereinafter ‘GETA’) already covered the prohibition of discrimination on the grounds of sex with regard to the access to and supply of goods and services (Article 7 GETA). The scope of the GETA was and still is broader than the Directive, as it also covers the field of education. Also, under the GETA, the prohibition of discrimination with regard to the access to and supply of goods and services is not restricted to the grounds of sex, but it applies to all grounds of the law.

The Government therefore only found it necessary to amend the GETA in two respects, namely the prohibition of sexual harassment and the protection against victimisation.¹¹⁴

¹¹⁴ See for this position, the explanatory memorandum of the transposition bill: *Kamerstukken II*, 2006-2007, 30 967, no. 3 (accessible (in Dutch) at <http://parlando.sdu.nl/cgi/login/anonymous>); accessed 20 March 2009.

2. Correct transposition?

As stated above, Dutch equal treatment legislation has covered the field of supply of and access to goods and services since the GETA came into force (which was enacted in 1994). Generally speaking, we believe that the provisions of Directive 2004/113 are covered by the GETA. As the GETA is from an earlier date, the question about ‘substantive implementation’ versus ‘presentational implementation’ is not applicable to the Dutch situation. For comments on the implementation of the issues of the prohibition of sexual harassment and the protection against victimisation, see below under 11.

3. Definitions of ‘goods’ and ‘services’

The concepts of ‘goods’ and ‘services’ are not defined in non-discrimination legislation. Under the Dutch Civil Code (*Burgerlijk Wetboek*) however, goods are defined in a very broad way, namely as all things as well as all proprietary rights. This definition is to be interpreted at least as broad as the ECJ does.

‘Services’ are not defined in Dutch legislation, but there is a definition of this concept in case law. The national equality body, the Equal Treatment Commission (hereinafter: ETC) has stated that Dutch equal treatment law does not give any restrictions with regard to shape, manner or form of ‘services’.¹¹⁵ The concept of ‘services’ in the GETA therefore should be understood in a broad way. For instance, the ETC judged that the possibility to contribute to the national supply of blood at a blood bank can be regarded as a ‘service’ in the sense of Article 7(1) GETA.¹¹⁶ As far as goods and services are offered in a public way, the supply of goods and services by (private) associations also falls within the scope of Article 7 of the GETA.

4. Protection of specific groups

Pregnant women and women who have recently given birth are explicitly protected by the GETA: Under Article 1(2) GETA, distinctions on grounds of pregnancy, childbirth or maternity are to be regarded as *direct* discrimination on the ground of sex. This can be regarded as an extra protection, as in Dutch equal treatment law direct discrimination (contrary to indirect discrimination) can only be justified by one of the explicit exceptions provided by the law.

The prohibition of discrimination based on a transsexual status is implicitly covered in Dutch equal treatment law, as being covered by the ground of sex.¹¹⁷ Although no studies or figures about the knowledge of Dutch non-discrimination law of transsexual people are available, the author regards this implicit protection sufficient. To the author’s knowledge, there are no examples of a lack of knowledge by victims of discrimination based on a transsexual status in this respect.

5. Definitions of pregnancy and maternity

Pregnancy discrimination and maternity discrimination are not defined specifically in relation to access to and supply of goods and services in Dutch equal treatment legislation: the scope of the general prohibition of discrimination of Article 1 GETA is extended to the context of goods and services by (the abovementioned) Article 7 GETA.

¹¹⁵ ETC Opinion 1997-36.

¹¹⁶ ETC Opinion 2007-85.

¹¹⁷ See Equal Treatment Commission Opinions of 9 March 2006 (2006-33) and 17 November 2003 (2003-139).

Pregnancy and maternity discrimination ‘usually’ takes place in the sphere of employment. It is (again) difficult here to assess to what extent women who might be discriminated in relation to the access to and supply of goods and services are aware of this legislation.

In the goods and services context, pregnancy and maternity discrimination could mainly occur in relation to insurance services. Several cases are known in this respect. There are several cases of self-employed women complaining about the supply of (private) disability insurances which only pay out in case of pregnancy after a qualifying period of 2 years. The ETC found that in such cases the insurance company’s conditions are discriminatory on the ground of sex (ETC 15 July 1997, Opinion 1997-87, ETC 25 June 2002, Opinion 2002-76, ETC 29 April 2004, Opinion 2004-44 and ETC 2 May 2005, Opinion 2005-80). However, the District Courts of Utrecht on 3 May 2006¹¹⁸ and 10 January 2007¹¹⁹ and of The Hague on 2 April 2008¹²⁰, as well as the Court of Appeal of Amsterdam on 19 October 2006 did not agree with the ETC Opinions. They ruled that a maternity provision of an insurance company must be seen separated from a normal disability insurance policy. Consequently, as maternity can only happen to women, specific conditions with regard to the maternity policy do not constitute discrimination on the ground of sex. Finally, the Supreme Court (*Hoge Raad*) ruled on 11 July 2008 that there is no obligation in the law nor in Directive 2004/113 that obliges private insurance companies to treat pregnancy equal to disability.¹²¹ Recently, the Government has decided to fill this omission and to re-introduce a maternity allowance for self-employed women.¹²²

With regard to discrimination related to breastfeeding in the context of the access to or supply of goods and services, no additional protection is provided in the Netherlands. Discrimination related to breastfeeding seems to be regarded mainly a concern of the employment context.

6. Use of a comparator

No use is made of a comparator in the definitions of pregnancy and maternity.

7. Actions against failure to implement the Directive

As far as the author knows, no such actions have been brought against the Dutch Government yet.

8. Enforcement by equality bodies

The Dutch Equal Treatment Commission has the competence to bring enforcement actions against practices that violate the GETA and certain separate equal treatment provisions¹²³ in other laws before the Court. This competence is provided by Article 15 GETA. However, the ETC has never used this competence until now.¹²⁴ It is therefore not sure whether the Court will accept a case in the absence of an actual victim.

¹¹⁸ District Court (*Rechtbank*) Utrecht, LJN: AW7505.

¹¹⁹ District Court (*Rechtbank*) Utrecht, LJN: AZ7462.

¹²⁰ District Court (*Rechtbank*) ’s-Gravenhage, LJN: BC9833.

¹²¹ *Hoge Raad* 11 July 2008, LJN: BD1850.

¹²² *Tweede Kamer* 2007-2008, 31 366 no. 1.

¹²³ Such as Article 7:646 Civil Code concerning equal pay.

¹²⁴ The ETC itself seems to see friction between using this competence and their reputation as an impartial intermediary body.

9. Discrimination based on association/perceived status

Discrimination by association with a person and perceived status are not expressly prohibited in Dutch law, but the author considers these grounds implicitly covered. There is only one case in which the ETC implicitly acknowledged that discrimination by association is also prohibited under the Disability Discrimination Act (*WGBH/CZ*): In ETC Opinion 2006-227 a student stated that the refusal for her to become a trainee at a University Medical Centre was based on the fact that her mother had a chronic disease. However, in the relevant case there was no proof.

10. Protection of women regarding pregnancy and maternity

Article 2(2)(b) of the GETA explicitly states that the general prohibition of discrimination is not applicable to distinctions on the ground of sex ‘in cases concerning the protection of women, notably in relation to pregnancy and maternity’.

11. Exceptions to the principle of equal treatment (Article 4(5))

The extension of the general prohibition in GETA to cover the context of goods and services has the result that sex-segregated services should usually be regarded as *direct* distinctions on the ground of sex, which means that these are forbidden *unless* one of the explicit legal justifications or exceptions can be applied. In practice, this means that sex-segregated services may only be justified if the sex segregation:

- can meet the criteria of preferential treatment (under the GETA only allowed for the benefit of women):¹²⁵

- can be established as necessary for the protection of women and maternity:¹²⁶

- can be established as a case in which ‘sex is decisive’. With regard to this phrase, Section 6 of Article 2 delegates the definition of such cases to a Ministerial Order. This ‘Equal Treatment Order’ (*Besluit Gelijke Behandeling*¹²⁷) lists examples such as sanitary facilities, changing and sleeping rooms and saunas (all insofar facilities are equally available for both sexes), beauty and sports contests (insofar as there is a relevant difference in sex), life insurances (*idem*) and difference in treatment for the protection of health and against sexual harassment and violence. Such sex-segregated services aimed at protection must be necessary and proportional.

As exceptions always have to be interpreted in a strict sense in non-discrimination legislation, the GETA makes it quite difficult to render sex-segregated services apart from cases that fall under the exemptions (from the scope) or that are mentioned in the Equal Treatment Order.

Article 4(5) of the Directive has not specifically been interpreted in relation to transsexual people yet. There are no cases known yet in the Netherlands of transsexual people in relation to the withholding of goods or services that were reserved exclusively or primarily to one sex.

12. Positive action

The GETA has formulated preferential treatment as a general exception to the prohibition on discrimination as an asymmetric norm, i.e. only with regard to women. Article 2(3) GETA allows women to be placed in a privileged position in order to eliminate or reduce existing inequalities connected with sex, if this positive discrimination is in reasonable proportion to that aim. This exception is also

¹²⁵ See Article 2(3) GETA.

¹²⁶ Article 2(2)(b) GETA.

¹²⁷ *Besluit Gelijke Behandeling*, Koninklijk Besluit of 18 August 1994, *Stb.* 657.

applicable to the context of goods and services, but there are no examples yet for this context.

13. Burden of proof

The burden of proof in the GETA (Article 10(1)) is applied in accordance with Article 9 of the Directive. This rule also applies to cases in the context of goods and services, as the supplier of goods or services can be obliged to justify any differences in treatment with regard to their supply.

14. Harassment, instruction to discriminate and victimisation

Harassment and sexual harassment are serious problems in schools, universities and in the area of (physical and mental) healthcare services. There are many surveys showing that it is mainly women who are the victims of sexual harassment. Harassment and sexual harassment in the spheres of education and healthcare were prohibited under Dutch legislation long before the implementation of the Goods & Services Directive in the Equal Treatment laws. However, in this regard in the Netherlands, one must distinguish between two different norms/prohibitions and two ways to approach this problem:

(A) There are many legal norms directed at the boards/directors of educational or healthcare institutions stating that they are obliged to provide a 'safe environment' not only for their employees, but also for pupils, students and patients or clients. This means that people who use these services have the right to be safe from harassment/bullying and sexual harassment (either by personnel or by third parties). For that purpose, these institutions need to have a policy of *prevention* and *protection* of victims of harassment and sexual harassment. This norm has been included in a variety of (public and administrative) laws concerning health & safety regulations and pseudo legal norms (e.g. a code of conduct) in the areas of education and healthcare. Boards/directors can be held accountable or even punishable under administrative criminal laws, and are liable for damages (also in relation to the victims; see below sub (B) when they breach these norms and do not address this phenomenon in an adequate way. There are a few examples in our case law, where these norms have been applied and led to (criminal or administrative) sanctions for boards/directors of schools or healthcare institutions.

(B) The second approach to the combat of (sexual) harassment is through general civil-law provisions. Pupils (or their parents on their behalf), students, clients or patients who are the victim of (sexual) harassment can choose between two options (or can even use both at the same time):

- (i) bring a court case against the board/director of a school or healthcare institution that has not taken enough effort to prevent this from happening or has not given them enough protection, and make them pay for material or immaterial damages;
- (ii) sue the perpetrator (e.g. a teacher, a fellow student or a doctor/fellow patient) through general tort actions.

In addition to this, boards/directors of schools or healthcare institutions can take action against a perpetrator (on the basis of their obligations under (A)) and ask e.g. for a court permission to remove someone from school or the hospital or to hold this person liable for damages.

Often, claims are not brought before a court, but before a complaints commission (which educational and healthcare institutions are obliged to have on the basis of the legislation that we discussed under (A)). With respect to both approaches ((A) and (B)), we have seen, since the middle of the 1980s, a large number of cases brought

before the courts and before complaints commissions. In general, we can observe that the courts and Commissions – although somewhat reluctant in the beginning – are implementing these norms ((A) and (B)) in a very serious manner and very often victims get paid (also immaterial) serious amounts in damages.

The fact that since the implementation of the Directive (sexual) harassment has also been included in equal treatment legislation does not add much to this protection. However, it has put a stop to discussions whether the Equal Treatment Commission is the body competent to hear such cases (provided that there is a relationship with a non-discrimination ground, i.e. sex).

No cases of instruction to discriminate are known by the author. Even in general, cases of instruction to discriminate are very uncommon in the Netherlands.

Victimisation does not seem to be very common in the context of goods and services. Contrary to the field of employment, there often is no long-term or close relation between perpetrator and victim in the context of goods and services, nor is there a relation of dependence. Consequently, there are simply less ‘opportunities’ for the perpetrator to victimize. There are no cases known to the author that are based on Art 8a GETA (prohibition of victimisation) .

15. Overall assessment

The GETA already covered discrimination in the context of goods and services, since 1994. This Directive 2004/113 therefore has not had any additional impact in this field. As stated under 11, the only issue that needed actual implementation (sexual harassment) has hardly been affected, as this issue was dealt with in other laws.

PART II: SCOPE OF NATIONAL LEGISLATION

1. Scope of national legislation beyond the scope of EU gender equality directives?

As stated under 1 in Part I, the scope of Dutch national legislation was already broader at the time that Directive 2004/113 was introduced.

2. ‘Hierarchy’ of grounds?

As stated under part I, section 1, the GETA is, in principle, equally applicable to all protected grounds (religion, belief, political opinion, race, sex, nationality, heterosexual or homosexual orientation or civil status). Some differentiation is provided with regard to the legal exceptions. Although there might be a different approach to different grounds of discrimination in this respect, this is not necessarily a problem, nor a danger to non-discrimination law. Different kinds of discrimination might need a different approach; some social characteristics of a particular kind of discrimination might be tackled by a specific legal approach. For instance, sex-segregated services such as changing rooms in sports facilities are often desired by both sexes, but ‘race-segregated services’ are by no means acceptable. This difference results from a different social manifestation of discrimination on a particular ground, but that does not necessarily mean that race as a ground of discrimination is more serious than sex.

3. Comments and/or suggestions

No comments or suggestions.

PART I: DIRECTIVE 2004/113/EC

1. Transposition of Directive 2004/113/EC

Existing legislation is considered as meeting the requirements of the Directive, based on the Gender Equality Act of 9 June 1978 no. 45 (GEA); see Sections 1, 2 and 3. Section 1 states that the Act shall promote gender equality, and aims in particular at improving the position of women. Section 3 states that direct or indirect differential treatment of women and men is not permitted. Section 2 states that the Act shall apply to all areas, except for the internal affairs of religious communities. The GEA is thus not limited to the employment market.

In addition, the Act on Prohibition of Discrimination on the basis of reduced abilities (the Discrimination and Accessibility Act) of 20 June 2008 no. 42, has been in force since 1 January 2009. The Act states that its aim is to ensure equal rights and possibilities to participate in society for all and to reduce barriers limiting people due to their level of ability/disability (Section 1). The Act applies to all people who have reduced abilities, presume to have reduced abilities, have had reduced abilities or may have reduced abilities, and in addition, the Act applies to cases of discrimination of a person because of this person's relationship to a person with reduced abilities/disabilities (Section 4). Both direct and indirect discrimination due to reduced abilities/disabilities is prohibited (Section 4). Both private and public enterprises have the obligation to ensure universal accessibility for the public (Section 9). 'Universal accessibility' means the design and accommodation of the main functions in the physical environment in such a way that the enterprise's usual functions may be enjoyed by as many as possible (Section 9). The requirement of universal accessibility also applies to information and communication technology, with a gradually increased requirement from 2011 until 2021 (Section 11). Employers have the obligation, within reasonable effort, to make individual adaptations for employees at the workplace (Section 12, first paragraph). Schools and education institutions as well as kindergartens have an obligation equal to that of employers to ensure that students with a reduced ability/disability receive appropriate adaptations so they can have the same access to proper education (Section 12, second and third paragraphs).

The Discrimination and Accessibility Act will also apply to pregnant women and parents on paternity leave.

2. Correct transposition?

The relevant provisions of the Directive are covered by the GEA, but according to our traditional legal technique it is not a 'copy out'. Whether or not the transposition is sufficient to make the wording of the Directive known to the public might be discussed.

3. Definitions of 'goods' and 'services'

The concepts of 'goods' and 'services' are not defined in national legislation. Case law will follow the approach taken by the ECJ as faithfully as possible. However, the prohibition against discrimination on the basis of sex under the GEA has also been applied to health services, which are all publicly funded, without concern to whether or not they concern services or goods. Some examples are the cases of the Tribunal: 2/2006 (routine tests for breast cancer vs. prostate cancer), 9/2006 (egg donation vs. sperm donation), 4/2003 (different prices for sterilization of men and women) and

1/2004 (sex as actuarial factor in calculation of insurance premium covering income loss due to sickness and accidents).

4. Protection of specific groups

Explicit protection is provided in the following provisions:

- for transsexual people: the Working Environment Act Section 13-1; the term in Norwegian legislation is ‘sexual orientation’ which includes transsexual people;
- for pregnant women: GEA Section 3; and
- for women who have recently given birth: GEA Section 3.

The Discrimination and Accessibility Act applies to all people who chronically or temporarily have a reduced ability/disability.

Even though explicit provisions exist, further information is needed to make people aware of their rights and providers understand their legal obligations.

5. Definitions of pregnancy and maternity

Norway has not defined pregnancy and maternity in relation to access to and supply of goods and services distinctly from the employment context.

However, there is sufficient clarity for women to know their rights and obligations, as I see it. The Equality and Anti-Discrimination Ombudsperson has done a good job in the media emphasising the prohibition of sex discrimination of pregnant women or women on maternity leave.

The law also provides protection in relation to breastfeeding. The Working Environment Act Chapter 12 provides the right to up to an hour of leave every day for breastfeeding. In general, there is an acceptance of breastfeeding as a natural phenomenon and it is also seen at cafés and restaurants.

From my own experience, travelling by train with a baby pram is a practical problem because of poor access to the platforms, limiting my access to that means of transportation. The problem is also that to some train stations the only access is by climbing steep stairs, and no lift or path for wheelchairs or baby prams is available. In the winter, with ice and snow it is impossible to take the train, simply because of poor accessibility. Likewise, some shops and restaurants in old buildings have poor if not impossible access for wheelchairs and baby prams.

6. Use of a comparator

No comparator is used in the definitions of pregnancy and maternity.

7. Actions against failure to implement the Directive

No actions against Norway have been taken. (I have found no examples.)

8. Enforcement by equality bodies

The designated equality body does not have the competence to bring enforcement actions in the public interest. The Ombudsperson, however, may provide its opinion in white papers as well as written evaluations as to the effect of legal regulations. No such white papers or evaluations from the Ombudsperson exist regarding the issue at stake here.

9. Discrimination based on association/perceived status

Norwegian law does not expressly prohibit discrimination based on association or perceived status, but will be interpreted that way as a result of the *Coleman* case.

10. Protection of women regarding pregnancy and maternity

Women are entitled to three months of unpaid leave during their pregnancy. There is a parental leave of 46 weeks of full pay, nine weeks of which are compulsory for the mother, and six weeks compulsory for the father. The rest may be divided between the parents as they see fit. In addition, one of the parents may have an additional leave of one full year without pay. The long periods of leave may result in less seniority, in lower pay raises and/or lack of bonus.

11. Exceptions to the principle of equal treatment (Article 4(5))

As to Article 4(5), I refer to my answer under 12. In relation to transsexual people, I am not familiar with any examples or interpretations. Affirmative action in favour of one of the sexes may be permitted according to Section 3a in the GEA which states: ‘Different treatment that promotes gender equality in conformity with the purpose of this Act is not in contravention of Section 3 (prohibiting direct and indirect discrimination). The same applies to special rights and rules regarding measures that are intended to protect women in connection with pregnancy, childbirth and breastfeeding’. Differential treatment is allowed along the lines permitted by Article 4(5).

12. Positive action

To my knowledge, Norway has not relied on the positive action provision in Article 6, as Section 3a GEA already allows positive action. However, the latest example of deliberations on whether to apply Section 3a or not was the discussion on the legality of a requirement to make the ‘shelters for battered women’ only accessible for women and to only have female employees at these shelters.

13. Burden of proof

The burden of proof applies through Section 16 GEA. I consider this rule as important as it is in employment cases due to the fact that efficient pressure is necessary in order to change the norms which most people take for granted due to traditional views but might still be discriminatory.

14. Harassment, instruction to discriminate and victimisation

I am not aware of examples of harassment, victimisation or instruction to discriminate. However, I suspect that insurance companies discriminate on the basis of gender by referring to actuarial factors far more often than they would need to. This presumption is only based on the cases referred to under 3. There is, to my knowledge, no research available regarding this problem.

15. Overall assessment

From a formal legal point of view, the impact of the Directive is not tremendous, as the existing legislation already covers areas outside the employment context. However, I believe that the Directive is important, especially regarding the insurance area, and the Ombudsperson could actively use the Directive to attract attention to certain areas of society.

PART II: SCOPE OF NATIONAL LEGISLATION

1. Scope of national legislation beyond the scope of EU gender equality directives?

In Norway, national legislation goes beyond the scope of existing EC gender equality directives and falls under the material scope of the Race Directive (2000/43). The Gender Equality Act applies to all areas of society (Section 1), with a minor exception made for religious matters within religious communities (Section 2).

2. ‘Hierarchy’ of grounds?

No, I have not noticed a ‘hierarchy’ of grounds being re-established.

3. Comments and/or suggestions

I believe information and awareness campaigns from the Ombudsperson are necessary in order to create changes. Focus on special services might be another way, for example that the Ombudsperson starts a dialogue with the insurance companies. At present, the Ombudsperson has addressed two types of insurances where sex has been found to be an invalid factor for actuarial calculations. However, I am not familiar with a full and complete evaluation of all kinds of insurance services where sex may be one factor among many.

POLAND – Eleonora Zielińska

PART I: DIRECTIVE 2004/113/EC

1. Transposition of Directive 2004/113/EC

There have been several attempts to transpose Directive 2004/113/EC. However, none of them has proved to be successful so far.¹²⁸ On 26 June 2008 in *Grefe*, the Commission (SG–Grefe (2008) D/204205)¹²⁹ found the existing legislation, as indicated by Polish Government, to be unsatisfactory with respect to meeting the requirements of this Directive. The last draft law of 22 December 2008, entitled ‘Law on transposition of selected EU provisions on equal treatment’.¹³⁰ prepared by the Department of Women, Family and Counteracting Discrimination at the Ministry of Labour and Social Policy,¹³¹ was accepted on 22 January 2008 by the Committee of Ministers and has been sent to the Governmental Legislative Committee for further elaboration.¹³² There is no information as to the time of its presentation to the Parliament.

The draft law describes the way in which respect for the principle of equal treatment of persons (natural or legal, as well as units not equipped with legal

¹²⁸ In 2006-2008, three versions of the law on equal treatment were published on the website of the Ministry of Labour and Social Policy and were publicly discussed.

¹²⁹ As stated in the explanatory notes to the penultimate version of the draft, p. 3; http://www.mps.gov.pl/bip/download/rownosc_25wrz_uzasad.pdf, accessed 15 January 2009. The last version of the draft has not been published on the website yet.

¹³⁰ These directives are 76/207/EEC, 86/613/EEC, 2000/43/WE, 2000/78/EC, 2002/73/EC 2004/113/EC and 2006/54/EC.

¹³¹ http://www.mps.gov.pl/bip/download/rek%20krm_rowne%20traktowanie_24-10-08.pdf, accessed 15 January 2009.

¹³² According to the information provided for by the Department mentioned above on 23 January 2009.

personality) will be accomplished, indicates areas of protection and designates equality bodies with their mandates. It reproduces the general prohibition of discrimination for any ground (including sex) and indicates the main fields where such discrimination is prohibited. As an admissible exception of the principle of equal treatment, the draft law provides for the differentiation of the situation of persons if the access to services or goods, as well as the acquiring of rights and energy, exclusively or mainly by the representatives of one sex only, is objectively and rationally justified by a legitimate aim. The means of achieving that aim should be appropriate, necessary and proportionate.

2. Correct transposition?

The scope of regulation of the draft law is broader than the content of Directive 2004/113/EC, since it also covers other anti-discriminatory directives. Therefore, the protected fields also exceed the areas provided in the Service Directive. In reference to the Service Directive, the draft law explicitly ‘prohibits discrimination in access to publicly offered services such as housing and in access to publicly available goods and energy’. The prohibition of discrimination also concerns medical services ‘unless it is objectively justified by the specificity of medical intervention’. In addition, the draft law covers areas such as social security and education and all aspects of the sphere of work and employment (without prejudice to the provisions provided for in other legal regulations). One of the shortcomings of the draft is that it exclusively refers to the access to goods and services, without even mentioning their supply, and the fact that the list of exceptions to the principle of equal treatment is copied out from different equality directives may be misleading for persons applying the law. It also seems that it does not fully apply to the area of access and supply of goods. Another deficiency of the draft may be that it overlooks Article 4 (2) of the Service Directive and that Article 6, referring to the positive actions, has been transposed rather clumsily¹³³. The draft law also maintains the duality of equality bodies, regardless of the criticism expressed in this matter with respect to earlier drafts, arguing that such ‘division of work’ creates the risk that none of those bodies will feel fully responsible for the combat of discrimination. According to the last version of the draft law of 22 December 2008, the implementation of the tasks provided for in this draft shall belong to the ‘Government Plenipotentiary for the Matters of Equal Treatment’, which is part of the office of the Minister of the Matters of Equal Treatment. Its mandate includes undefined tasks such as ‘take appropriate action after being informed of alleged violation of the principle of equal treatment in particular regarding legal persons and units not possessing legal personality’¹³⁴. At the same time, the draft law changes the law on the Commissioner for Civil Rights

¹³³ Article 7 of the draft reads as follows: ‘Does not constitute a violation of the principle of equal treatment :1) the undertaking of the actions to prevent or compensate for different treatment of the persons on one or several grounds listed in Article 5(1), by diminishing the factual inequalities on the benefit of such persons; 2) (...)’

¹³⁴ The competence of this organ will also include the initiation of the draft laws related to the matter of equal treatment, monitoring of the situation in this respect, requesting public bodies and other units to take action in this field, gathering, providing and spreading information about the implementation of the principle of equal treatment and combating discrimination, ordering surveys concerning discrimination and cooperation with public bodies, social partners, NGOs and international organisations in matters connected with equal treatment (Article 9 of the draft law).

Protection¹³⁵ by adding that the Commissioner shall especially safeguard the observation of the prohibition of discrimination on all possible grounds and ‘should be considered as the independent body in the meaning of international treaties or laws issued by international organisations (...)’ It is worth pointing out that the Plenipotentiary cannot be considered as an independent body, since it constitutes a part of the governmental structure. The Commissioner, however, possesses the attribute of independence, but has not shown any awareness of gender discrimination, although his present mandate already covers this issue.

3. Definitions of ‘goods’ and ‘services’

The draft law does not contain a definition of ‘goods’. In its definition of ‘services’ the draft law first of all states that this term should have the meaning that it has in Article 50 of the Treaty establishing the European Community and later, referring to the content of this provision, adds that the term ‘services’ means ‘services normally provided for remuneration by public or private subjects, which in particular include activities of an industrial or commercial character and professional activities’.

The draft law does not contain definitions of terms such as ‘access’ and ‘supply’.

The Law transposing the Service Directive should include a definition of ‘goods’, since the definition of goods (things) in Article 45 of the Polish Civil Code as ‘material object’ is rather narrow. Therefore e.g. currency, stocks, bonds, securities, credit cards, energy and computer programs are not considered to be ‘things’, unless explicitly provided for in a specific law (which is the case for theft in the Criminal Code).

The Civil Code also includes no general definition of ‘services’. Only in Article 750 does it include some information, stating that ‘in reference to services, which are not regulated by other provisions, its provisions regulating the contract of commission (assignment), shall be respectively applied’. Some other legal acts explain what should be understood under the term ‘supply’ with respect to goods and services. For example, the law of 11 March 2004 on taxes for goods and services¹³⁶ takes ‘supply’ to mean ‘the transfer of the right to decide about a commodity (wares, merchandise, goods) as owner, including (...) surrender of commodity on the basis of lease (tenancy), rental or lease contracts or other similar contracts’. According to this law, ‘supply of services’ should be understood as ‘every rendering of services on behalf of a physical or legal person or an organizational unit not equipped with legal personality, which does not constitute the supply of goods’.

It is worth mentioning that in the practice of the President of the Office for the Protection of Competition and Consumers the question came up whether public universities providing paid educational courses for the public should be considered as service providers, similar to private universities.¹³⁷ In the end, the Law on Higher Education of 27 July 2005¹³⁸ gave both institutions equal status in this respect.

Taking into consideration these different meanings in Polish legislation of the terms used in the Service Directive, it would be advisable to include a legal definition of all relevant concepts in the future law transposing this Directive.

¹³⁵ The law on the Commissioner for Civil Rights Protection of the Republic of Poland (*Rzecznik Praw Obywatelskich* (RPO) of 15 July 1987, Dz.U. 2001 no. 14 item 147, unified text with further amendments.

¹³⁶ Dz.U. 2004 No. 54, item 535.

¹³⁷ Decision No. RŁO 37/2005 of 24 November 2005, <http://uokik.gov.pl> (accessed 26 May 2009). In this decision, referring among other things to the judgment of the Supreme Court of 26 September 2002 (III CKN 466/20) it is argued that the basis for the admission to a public university is the administrative decision, which cannot be the subject of court scrutiny in civil proceedings.

¹³⁸ Dz.U. 2005 No. 164 item 1365.

4. Protection of specific groups

Neither the draft law nor the law currently in force explicitly refer to transsexual people. The draft law has a provision explaining that violation of the principle of equal treatment may, in particular, consist of less favourable treatment of a person related to pregnancy or maternity leave (all kinds of such a leave provided in the Labour Code are listed there). By referring to maternity leave, this provision of the draft law directed the reader's attention to the employment context. Therefore, it does not sufficiently inform individuals or goods and services providers as to their rights and obligations deriving from the Service Directive.

5. Definitions of pregnancy and maternity

The Labour Code does not provide for a similar clause, referring to pregnancy and maternity discrimination, as proposed in the draft law transposing the Service Directive as mentioned under 4. Therefore, it is important that such a clause be included (after reformulation consisting of deleting the word 'leave').

In Poland, discrimination in relation to pregnancy and maternity often takes place in the housing context. Owners refuse to rent flats to pregnant women or families with small children, being afraid that if they stop paying the rent, the law will protect them against eviction. However, in most of these cases, the real reasons for refusal to rent out the flat/house are not disclosed by the owner, and it is therefore difficult to bring a discrimination claim against them.

The draft law does not provide women with any protection against discrimination in access to goods and services related to their breastfeeding. The need for explicit prohibition of discrimination connected with breastfeeding may be illustrated by the hostile reaction of restaurant personnel toward a female client breastfeeding her child. The problem has been discussed publicly in reference to the initiative of the city of Warsaw's authorities to build special places for breastfeeding in parks, often frequented by mothers with children. In respect to this proposal, the fear has been expressed that after such facilities are created, women will be denied breastfeeding in public outside these facilities.¹³⁹

6. Use of a comparator

The draft law, while stating that the violation of the principle of equal treatment may, in particular, consist of any less favourable treatment of a person related to pregnancy and maternity, does not refer to any comparator. However, the author of the expert document prepared before the elaboration of the draft law, stressed that this norm allows applying the protection against discrimination even in cases where there is no male comparator and the contra-candidate will be another woman who is not pregnant.¹⁴⁰

¹³⁹ <http://miasta.gazeta.pl/warszawa/1,95194,4878594.html>

¹⁴⁰ This expert document was written by Irena Boruta on the transposition of Directive 2004/113/WE introducing the principle of equal treatment for women and men in access to goods and services and in supply of goods and services. Unpublished material received from the Department of Family and Counteracting Discrimination at the Ministry of Labour and Social Policy. In this expert document, the ECJ ruling in *Dekker* (case- C-177/88) is mentioned.

7. Actions against failure to implement the Directive

No cases have been brought against Poland before the ECJ for failure to implement the Service Directive.¹⁴¹

Gender discrimination in access to some medical services has been the subject of intervention of equality bodies within the reporting procedures several times. The Committee on the Elimination of Discrimination against Women,¹⁴² the Human Rights Committee¹⁴³ and the Committee of Economic, Social and Cultural Rights¹⁴⁴ in their concluding comments or recommendations urged the Polish Government to take concrete measures to enhance women's access to health care, in particular to sexual and reproductive health services. They also drew the Government's attention to the difficult access to legal abortion (limited by the use of the conscience clause by medical staff¹⁴⁵) and the limited access to prenatal diagnosis and contraceptives, despite the existence of legal guarantees. The lack of effective remedies to appeal against a doctor's decision to refuse an abortion endangering a woman's health has been considered as a violation of Article 13 ECHR by the European Court of Human Rights in its judgment in *Tysiąc v Poland*.¹⁴⁶ The reluctance of the Polish Government to improve the situation and the delay in the introduction of an appeal mechanism against a doctor's negative decision may be considered as the evidence of structural gender discrimination in the access to medical good and services, since the situation concerns women only.

8. Enforcement by equality bodies

At present, the equality body has no competence to bring enforcement actions in the public interest, but the draft law seems to provide it. The Commissioner for Civil Rights Protection¹⁴⁷ and the President of the Office of Competition and Consumer Protection such a general competence.¹⁴⁸

9. Discrimination based on association/perceived status

Polish legislation includes no explicit prohibition of discrimination on the basis of association with a transsexual person or persons, with a person or persons of a particular sex or on grounds of perceived sex or transsexual status in access to goods and services. The draft law also does not provide for such prohibition.

10. Protection of women regarding pregnancy and maternity

Some shops and supermarkets have special cashier's isles for pregnant women and mothers with small children, which are supposed to accelerate the procedure of payment. In public transport there are specially marked seats for women with small

¹⁴¹ Some deputies from the opposition party (SLD) have used the instrument of deputy interpellation to ask the Government about the reasons why the Service Directive has not yet been formally transposed in a satisfactory manner; http://lewica.kluby.sejm.pl/test/index.php?option=com_content&task=blogcategory&id=40&Itemid=74&limit=9&limitstart=36.

¹⁴² CEDAW/C/Pol./20/6 (2 February 2007 (p.25)).

¹⁴³ HRC CCPR/C/Pol/2004/5 (27 October 2004) (p.8).

¹⁴⁴ CESCR Concluding recommendations (4 November 2002) (pp. 28, 29, 50, 51).

¹⁴⁵ This problem has also been addressed by the EU network of independent experts on fundamental rights of 14 December 2005 (CFR-CDF Opinion 4-2005. Doc, p. 14).

¹⁴⁶ Case No. 5410/03, judgment of 20 March 2007. This case referred to a physician's refusal to carry out an abortion for health reasons.

¹⁴⁷ As mentioned earlier, the draft contains appropriate amendments to the law on the Commissioner for Civil Rights Protection of the Republic of Poland.

¹⁴⁸ Act of 16 February 2007 on Competition and Consumer Protection, Journal of laws 2007, No. 50 item 331.

children. In some long-distance trains there even are special compartments for parents with small children. There are also special seats for disabled persons, but it is unclear whether pregnant women are allowed to use them. According to the Traffic Code¹⁴⁹ disabled persons who have been granted a special parking card are allowed to park in specially reserved places and may ignore traffic signs prohibiting or limiting stopping of the car. Only a person with an officially established appropriate degree of disability or the caretaker of such a person can apply for such a card. Mothers of small children are not allowed to apply for it. In most car parks of supermarkets, for example, special places are reserved for disabled people. In many places, however, the sign only features a wheelchair and parking guards do not allow persons with baby carriages to stop there.¹⁵⁰ In some regions of Poland, the allocation of communal flats for poor person takes into account pregnancy or having many children as additional factors. There are provisions guaranteeing pregnant women a more favourable treatment in the access to medical services.¹⁵¹ However, practice shows that they are often ignored.

11. Exceptions to the principle of equal treatment (Article 4 (5))

As an example of cases where Poland has relied on Article 4(5) one may mention the shelters for battered persons. According to the Act of 2005¹⁵² on counteracting the family violence, local authorities have the obligation to create support centres for victims of family violence. As part of those centres special shelters for battered persons are created. Although the law does not explicitly provide for such a condition in all of those shelters, only women with children have the right to stay for a certain period of time (usually up to 3 months). Such a limitation is justified by safety reasons. There is no information on how these provisions would be interpreted in relation to transsexual people.

12. Positive action

There is no information on the Polish Government taking any positive action in accordance with Article 6 of the Directive in the described areas, aimed at prevention or compensation of disadvantages linked to sex.

13. Burden of proof

Since the Service Directive has not yet been transposed in Poland, the reversed burden of proof may not be applied in the areas covered by the Directive. The draft law includes a provision similar to Article 9 of the Directive.

14. Harassment, instruction to discriminate and victimisation

From time to time, the media report on cases of harassment (sexual harassment included) experienced by people working on trains (conductors), in restaurants and in social security agencies. Several cases of sexual harassment of students by professors have been punished by the university disciplinary organs.

¹⁴⁹ Article 8 of the Traffic Code of 20 June 1997, with further amendments. Unified unofficial text updated in 2008 with notes, Annex to *Rzeczpospolita* of 13 January 2009.

¹⁵⁰ *Gazeta Wyborcza- Lublin*, <http://grupaimage.pl/?s=prd&i=informacja&id=9739>; accessed 20 January 2009.

¹⁵¹ Such guarantees are provided in the Act of 7 January 1993 on family planning, protection of the fetus and the conditions of admissibility of abortion; Journal of Law 1993 No. 17 item 78, with further amendments.

¹⁵² Journal of Laws 2005.

There have been and still are many cases of harassment of women while giving birth. In reaction to the humiliating conditions in many public hospitals in which Polish women had to deliver, and in reaction to frequent cases of harassment experienced by medical staff (nurses and midwives included),¹⁵³ one of the NGOs,¹⁵⁴ with support by the media, initiated a campaign using the slogan ‘*Rodzić po ludzku*’ (Giving birth like a human). This campaign has resulted in a general improvement of the situation in many obstetrics departments in hospitals. However, in most of them, only those women who have paid for medical services are guaranteed complete respect for the patient’s rights. The most recent move in this respect consisted of the elaboration and promotion by NGOs of the ‘Charter of the right of women giving birth’, supported by the Commissioner for Citizens’ Rights.¹⁵⁵

Many public speeches given by officials (hierarchy) or common clerics of the Catholic Church may be qualified as instructing to discriminate. According to Polish law, physicians have the right to refuse to perform medical intervention contradictory to his/her conscience. However, while denying their own service, they are obliged to indicate another real possibility to obtain this service elsewhere.¹⁵⁶ Therefore, church officials who urged medical staff to refuse to perform legal abortion without indicating another service provider should be considered as inciting abuse of the conscience clause and therefore instructing to discriminate. The same may be said in case of inciting pharmacists not to sell contraceptives registered on the Polish market and sometimes even threatening them with excommunication. Since their activities lead to limitation of the access to medical services or pharmaceutical goods for many women, in particular those who are poor and live in small towns, and because the problem concerns only women, they may be perceived as discrimination under the analyzed Directive. Similar actions undertaken by some officials of the chamber of physicians can sometimes be qualified as instruction to discriminate as well.

There are signals indicating that, in particular, some social service institutions used to victimize persons lodging complaints aimed at forcing compliance with the principle of equal treatment, by hostile activities or by postponing the fulfilment of their obligations. It also happens that the goods or service provider *ex parte* (unilaterally) broke the contract in revenge. Introducing a prohibition corresponding to the one in Article 10 of the Directive may prevent such situations, and should therefore be considered effective.

15. Overall assessment

Since in Poland the Directive has not been transposed yet, it would be premature to make any assessments.

¹⁵³ Evidenced e.g. by letters from women sent to the Foundation ‘*Rodzić po ludzku*’ in connection to the protest against liquidation of the last ‘birth chamber’ in Poland, in Łędziny, run by midwives. The National Health Fund now refuses to cover the costs of deliveries in this chamber unless it meets the same organisational requirements as the ones that apply to hospitals. (knowing that this is unrealistic). <http://www.petycje.pl/petycjePodglag.php?petycjeid=3532>, accessed 21 January 2009.

¹⁵⁴ <http://www.rodzicpoludzku.pl>; accessed 20 January 2009.

¹⁵⁵ http://lewica.kluby.sejm.pl/test/index.php?option=com_content&task=blogcategory&id=40&Itemid=74&limit=9&limitstart=36; <http://www.rpo.gov.pl> accessed 20 March 2009.

¹⁵⁶ Decision of the Supreme Court of 9 January 2004, IV CK 339/02, unpublished.

PART II: SCOPE OF NATIONAL LEGISLATION

1. Scope of national legislation beyond the scope of EU gender equality directives?

The draft of the law transposing all anti-discriminatory directives including the Race Directive, and therefore the scope of protection, is rather broad and also includes social protection and education on all levels. In addition, the list of protected areas according to the Polish draft law remains open. This is evidenced by Article 5 of the draft law, containing the list of possible areas where the prohibition of discrimination is binding¹⁵⁷, using the words ‘in particular’, as well as Article 3 that prohibits the application of the draft law from the sphere of private/family life (and the contracts connected with those spheres) only.

2. ‘Hierarchy’ of grounds?

The draft law treats all grounds for discrimination together on the same basis (as does the Labour Code). The practical consequence of this is that multiple discrimination suffered by women may often be overlooked and, as a result, that gender equality may not be mainstreamed.

In Poland, the overall level of protection against discrimination on grounds of race and disability in the access to- and supply of goods and services seems to be higher now, but not because of differences in legal regulations, which are non-existent, but mainly due to the more effective campaigns aimed at combating discrimination, organised by the responsible governmental agencies (in particular, by the Ministry of the Interior and Administration) and some NGOs.

3. Comments and/or suggestions

Gender discrimination in access to goods and services is often practised by state bodies, courts included. The judgment of the Supreme Court in which a claim of gender discrimination was considered as ill-founded will serve as a good example. The claim was connected with a lower-court decision in the case of the division of property after a divorce. The Court granted the house to the man, obliging him to pay the woman. In justification of its approval of this decision, the Supreme Court argued that since the house was in a bad condition, ‘in commonly known cultural circumstances, the probability of pursuing simple renovation or conservatory works by the man being cheaper and more effective is higher, and the decision should therefore be respected, unless specific evidence to the contrary is presented. Perception and respect for differences between women and men deriving from biological and culture diversity should not be considered as discrimination’. Although the situation described is not typical for the area covered by the Directive, this court decision shows other possible areas of gender discrimination in access to goods.

¹⁵⁷ Access to professional education, undertaking professional activities, access to instruments and services offered by labour market institutions, access to activities in trade unions, organisations of employers and professional self-governing organisations, social security, health services, access to publicly offered services, including housing, goods, rights and energy.

PART I: DIRECTIVE 2004/113/EC

1. Transposition of Directive 2004/113/EC

Directive 2004/113 was only transposed in March 2008, by Law No. 14/2008 of 12 March,¹⁵⁸ therefore with some delay regarding the deadline imposed by the Directive.¹⁵⁹

2. Correct transposition?

In general, Portugal has correctly transposed the relevant provisions of the Directive, even if the transposition mainly follows the ‘copy out’ method. However, at least in this case, this ‘copy out’ method has not just resulted in a merely presentational transposition of the Directive, for two main reasons: on the one hand, this legislation covers all the issues regulated by the Directive, and its provisions have the same substantive content; on the other hand, this legislation develops certain concepts and rules of the Directive which in a sense, even go beyond it, e.g. the national legislation indicates several examples of discriminatory practices in the access to and supply of goods and services (Article 4, No. 2) that are helpful to tackle and define these practices.

Nevertheless, the fact that this transposition is more than just presentational does not mean that the implementation of the Directive in our country has necessarily been effective, since only a few months have elapsed since the relevant Law was published.

3. Definition of ‘goods’ and ‘services’

In Law No. 14/2008 of 12 March, ‘goods’ and ‘services’ are referred to but not defined (Article 2, No. 1). However, in several provisions of this Law we find elements that contribute to clarifying these concepts.

The Law indicates that its provisions are applicable to the access to and supply of goods and services with or without charge, provided these goods or services are for public use (Article 2, No. 1). In this sense, the concept of services for the purpose of this legislation is broader than some interpretations given by the ECJ regarding the similar notion in the Treaty. On the other hand, Article 4 No. 1 explicitly indicates that discriminatory practices can arise from material actions or omissions, as well as from clauses inserted in contracts regarding the access to or supply of goods and services. Finally, Article 4 No. 2 includes some examples of discriminatory practices or contractual clauses (considering as such the refusal or the imposition of limits in access to goods or services, the refusal or the imposition of limits to the conclusion of contracts such as buying and selling or renting of real estate, and the refusal of access to or the imposition of less favourable conditions in access to health care services both in public and private health facilities) and these examples clarify not only the notion of discrimination in this area but also the concept of goods and services for the same purpose.

Apart from this legislation, the notions of ‘goods’ and ‘services’ are developed in other areas and for other purposes in our legal system: in commercial and company

¹⁵⁸ L. n° 14/2008, de 12 de Março (this legislation can be found in the Official Journal of the same date – www.dre.pt).

¹⁵⁹ We described the process regarding this transposition and the main content of this new Law in our contribution to the Flash Report - Issue March 2008.

law, for example, these notions are attached to commercial activity; in civil law, the notion of ‘goods’ has a wide meaning (as a possible object of rights and contracts) which does not depend on any economic function; finally, the notion of ‘service’ is also developed in contract law, in relation to some contracts. However, we think that these notions are not very useful for the purposes of Directive 2004/113, or for the purposes of Law No. 14/2008 of 12 March, since the concepts of ‘goods’ and ‘services’ are, in this context, mainly of an economic nature.

In this second sense, we are not aware of national case law dealing with these notions.

4. Protection of specific groups

Law No. 14/2008, of 12 March provides specific protection for pregnant women and women who have recently given birth, in Article 4 No. 6 (which is equivalent to Article 4 No. 2 of the Directive), in Article 7 (which corresponds to Article 5 No. 3 of the Directive) and in Article 5. This last provision, which goes beyond the Directive, explicitly prohibits any request for information made to a woman requiring access to goods and services concerning her possible state of pregnancy, except for reasons related to the protection of her own health.

Transsexual people are not specifically addressed by this legislation. However, given the recognition of discriminatory practices based on gender reassignment as gender discrimination by the ECJ, the protection of these persons falls under the general provision regarding gender discrimination in this legislation as well (Article 3 a) and b), which correspond to Article 2 a) and b) of the Directive).

The protection granted by the rules that concern pregnant women and women that have recently given birth is sufficiently clear and precise in order to allow individuals to understand their rights and goods and services providers to understand their legal obligations.

5. Definition of pregnancy and maternity

In Law No. 14/2008 of 12 March, there is no specific definition of pregnancy or maternity discrimination. As a matter of fact, in this respect, the national legislation is not as clear as the Directive regarding the formal qualification of maternity and pregnancy discrimination as direct discriminatory practices, since the rules in Article 4 No. 1 a) of the Directive (which establishes this relation very clearly) have not been transposed into the corresponding national rule with the exact same content (Article 4 No. 1).

This being the case, one has to conclude that this Portuguese law relies on the general prohibition of sex discrimination inserted in other national legislation (where the formal qualification of pregnancy/maternity discrimination as gender discrimination is established) for the purpose of these rules.

In this context, and even considering the other provisions of this legislation regarding the protection of pregnant women or women in their maternity leave (Article 4 No. 6, Article 5 and Article 7), we think that this question should have been addressed more clearly in the law, mainly as a general qualification provision such as the Directive includes. The lack of this provision may even create the wrong impression that these women are only to be considered discriminated against when treated differently in the areas specifically covered by those provisions (information regarding pregnancy and clauses of insurance and financial contracts).

Discrimination in relation to pregnancy and maternity in the goods and services context mainly occurs in the access to health services attached to insurance contracts,

given the widespread practice of establishing an initial period during which the contract has no effect, also if period includes pregnancy.

Article 4 No. 6 of Law No. 14/2008 of 12 March explicitly allows more favourable regimes in the access to or supply of goods and services for women that are breastfeeding.

6. Use of a comparator

As stated above, there are no specific definitions of pregnancy and maternity for the purposes of this law. The only definitions that exist are for the purpose of employment law and do not need a comparator.

7. Actions against failure to implement the Directive

There is no information on this issue.

8. Enforcement by equality bodies

The implementation of the rules of Law No. 14/2008 of 12 March is to be monitored by the CIG (Commission for Citizenship and Gender Equality),¹⁶⁰ which is one of the public agencies with competence in gender equality issues. This Commission accompanies all the procedures regarding the application of sanctions attached to these rules and will organize registration of all these procedures (Articles 14 and 17 of L. No. 14/2008). However, this Commission does not have the competence to initiate other enforcement actions.

Discriminatory practices in this area give a right to infringement procedures of a criminal nature and/or an administrative nature. These procedures are to be conducted by the public inspection service that is competent in the area where the discriminatory practice has occurred (Article 12 No. 1 and Article 15 of Law 14/2008 of 12 March).

On the other hand, ONGs and other associations related to gender rights or to consumer protection have the right to participate in and to initiate legal actions regarding these issues (Article 11), both to defend collective interests (and in this case, in the absence of a concrete victim) and to represent individuals.

9. Discrimination based on association/perceived status

There is no express prohibition in this area.

10. Protection of women regarding pregnancy and maternity

Article 4 No. 6 of Law No. 14/2008 of 12 March is equivalent to Article 4 No. 2 of the Directive, except in the final reference of the national law to breastfeeding women. There are no examples of more favourable protection practices regarding these women in this area.

11. Exceptions to the principle of equal treatment (Article 4(5))

Article 4(5) has not been transposed into national legislation by Law No. 14/2008 of 12 March in such a general way.

Only in what concerns insurance and financial contracts, and more specifically in what regards actuarial factors (Article 6° of L. n. 14/2008), does the law allow differences in individual obligations and prices regarding these contracts, provided that they are based on objective and proportional reasons, which must be confirmed

¹⁶⁰ *Comissão para a Cidadania e Igualdade de Género.*

by actuarial data certified by the Portuguese Assurance Institute¹⁶¹ and must be reviewed every five years.

There is no information regarding the interpretation of these clauses in insurance contracts in relation to transsexual people.

12. Positive action

Article 4 No. 7 of Law 14/2008 is equivalent to Article 6 of the Directive. However, the Law does not indicate any concrete situations in which positive actions may be taken, and until now there have been no examples of any positive action taken under the scope of this rule.

13. Burden of proof

Article 9 No. 1 of Law 14/2008 of 12 March is the national equivalent to Article 9 of the Directive, with only one exception: the reversal of the burden of proof does not apply in criminal procedures.

Even in what concerns actions regarding civil rights and damages, this rule may be disproportionate, since the victim is usually not under the authority of the offender and therefore the risk of coercion or menace from the offender in order to prevent her from going to court or complaining to public inspection services is low. Unlike in employment cases, where the employer's power, the material subordination of the worker and the labour contract in itself are important factors that may keep the victims from going to court, here the situation is quite different, so the substantive justification of the rule is more difficult to accept.

14. Harassment, instruction to discriminate and victimisation

There are no examples of harassment, instruction to discriminate and victimisation. However, the fact that Article 4 No. 2 of Law 14/2008 of 12 March lists examples of discriminatory practices in the area of instruction to discriminate can make it easier to detect these situations in the future.

15. Overall assessment

The impact of this Directive in Portugal is mainly in the area of insurances and financial contracts, due to the new rules introduced by the Directive, especially regarding actuarial factors and pregnancy and maternity.

However, even in the insurance area it should be noticed that gender issues are difficult to deal with, since the new legislation regarding insurance contracts (Decree Law No. 72/2008 of 16 April¹⁶²) establishes a general prohibition of discriminatory clauses in these contracts on all grounds (Article 15) with the exception of gender (Article 15 No. 9). Although gender issues did not need to be considered there (because they are already dealt with in Law No. 14/2008), this omission may give the wrong impression that gender equality is not an important issue in the insurance area.

In other areas, it is still too soon to evaluate the impact of the Directive, given the fact that it was only transposed into national legislation last year.

¹⁶¹ *Instituto Português de Seguros.*

¹⁶² We reported on this piece of legislation in our contribution to the Flash Reports - Issue 4/2008. This piece of legislation can be found in the Official Journal (www.dre.pt).

PART II: SCOPE OF NATIONAL LEGISLATION

1. Scope of national legislation beyond the scope of EU gender equality directives?

The answer to this question is affirmative. Directive 2000/43 was transposed into national legislation by Law No. 18/2004 of 11 May 2004,¹⁶³ and for the purposes of race discrimination, this Law covers more areas than Law No. 14/2008 of 12 March, which transposed Directive 2004/113.

Article 2 No. 1 of Law No. 18/2004 of 11 May covers race discrimination in the area of education and social protection, as well as in health services and the access to goods and services for public use (and in this last area, the access to housing is specifically addressed). In a word, the fields covered are more comprehensive when race discrimination is involved.

Finally, this same Law gives examples of race discriminatory practices in the areas covered (Article 3 No. 2) and the examples are much more detailed than in the similar provision of Law No. 14/2008.

2. ‘Hierarchy’ of grounds?

In Portuguese legislation, the overall level of protection for gender in the access to and supply of goods and services is, in fact, lower than that for race, , due to the more extensive coverage of the Race Directive.

However, this does not mean that there is a formal hierarchy of discrimination grounds, since it cannot be concluded that race discrimination is considered more important than sex discrimination.

3. Comments and/or suggestions

The legal developments regarding any source of discrimination are very important, since they are essential to the combat of these practices.

Nevertheless, it would be essential to include in this development (meaning not only the legal instruments concerning other sources of discrimination but also the relevant case law) what I would call ‘the gender factor’ - meaning a factor that crosses other sources of discrimination and that should always be taken into account when tackling these other sources of discrimination.

The consideration of this gender factor would have two advantages. On the one hand, it would clarify that gender discrimination crosses all other sources of discrimination, in the sense that it often occurs in combination with other sources of discrimination, but that when this happens, the discriminatory practice is more serious than if it does not (for instance, religious discrimination combined with discrimination against women has, in general, more serious consequences than religious discrimination in itself). On the other hand, the systematic consideration of the gender factor would avoid the necessity of ‘choosing’ the main factor when combating discriminatory practices and of comparing the level of protection granted to each discriminatory factor.

¹⁶³ This piece of legislation can be found in the Official Journal (www.dre.pt), of the date on which it was published.

PART I: DIRECTIVE 2004/113/EC

1. Transposition of Directive 2004/113/EC

On 21 May 2008, the Governmental Ordinance¹⁶⁴ 61 of 2008 was adopted to transpose the EU legal standards regarding equal access to goods and services. Its legal provisions are applicable to all persons who provide goods and services available to the general public irrespective of the person concerned, regarding both the public and the private sectors, including public bodies. These goods and services are offered outside the area of private and family life concerning transactions carried out in this context.

2. Correct transposition?

The transposition of the Directive into the national legal framework resulted in copying out the Directive's provisions. In EC law, recitals are supposed to be rather general and are meant to express the relevant instrument's purpose. Although they do not have an independent legal value, they are important guidelines for determining the scope of the Directive's provisions. The Romanian legislator did not consider the content of the recitals, but merely transposed the Directive's provisions. Recital 11 of the Directive refers to defining the concepts of 'goods' and 'services' within the meaning of the provisions of the Treaty establishing the European Community. However, no attention was paid during transposition to analyzing the existence of such concepts defined in the Romanian legal framework.

3. Definitions of 'goods' and 'services'

The concept of 'goods' is not defined in the national legal framework or in national case law. Detailed analysis¹⁶⁵ of national legislation has not revealed any definitions applicable as within the meaning of Article 50 TEC. The closest definition found in the national legal framework is contained in the Annex to Law No. 296 of 2004 on the consumer code¹⁶⁶ and refers to 'products' (point 29). The concept of 'products' is defined as 'material goods that have consumption as final purpose, no matter if the consumption is individual or collective'. According to the same legal provisions, electricity, thermal energy, water and natural gas are considered products. The same Annex defines, in point 41, the concept of 'service' as representing 'the activity distinct from the one resulting in generating products that is carried out for the purpose of satisfying the needs of the consumers'. Such a definition is extremely vague and general and it does not allow assessment of the extent to which it falls under the meaning of the Article 50 EC.

¹⁶⁴ Emergency Ordinance No. 61 of 2008, referring to the application of principle of equal treatment for men and women with regard to access to goods and services, and supply of goods and services, published in the Official Gazette No. 385 of 21 May 2008.

¹⁶⁵ It should be mentioned that an exhaustive search of the Romanian national legal framework was impossible, as my expertise does not cover the entire system. Only the main pieces of legislation have been analyzed, including the legal provisions of the Fiscal Code and finance-related legislation, commercial law and civil law.

¹⁶⁶ Law No. 296 of 2004 on consumption's code published in the Official Gazette No 593 of 1 June 2004.

4. Protection of specific groups

The Romanian legal framework does not explicitly provide for protection of transsexual people. However, Article 2(1) of Ordinance No. 137 of 2000 on preventing and sanctioning all forms of discrimination¹⁶⁷ stipulates that ‘In accordance with the ordinance herein, discrimination encompasses any difference, exclusion, restriction or preference based on race, nationality, ethnicity, language, religion, social category, beliefs, sex or sexual orientation, age, handicap, non-contagious chronic disease, HIV infection, belonging to a disfavoured category, as well as any other criterion aiming to or resulting in the restriction or elimination of the recognition, use or exercise, in conditions of equality, of human rights and fundamental liberties or of rights granted by law in the political, economic, social and cultural field or in any other domains of public life’.

With regard to pregnant women and women who have recently given birth, Article 6(5)a of Emergency Ordinance No. 61 of 2008 stipulates that the special measures provided for by the law for maternity, birth and breastfeeding protection are not considered forms of discrimination.

5. Definitions of pregnancy and maternity

The Romanian legal framework in the field of equal access to goods and services does not define pregnancy and maternity discrimination in relation to access to and supply of goods and services as distinct from the employment context. Article 5 of Ordinance 61 of 2008 stipulates that the ‘equal treatment principle should be understood as the absence of any direct discrimination based on sex, including a less favourable treatment applied to women due to pregnancy and maternity’. Furthermore, according to the legal provisions of Article 6(5)a, special measures provided for by law with regard to maternity, birth and breastfeeding are not considered discrimination. The current legal framework resulting in a copying out of the Directive’s provisions does not provide sufficient clarity for pregnant women or women on maternity leave, or for goods and service providers, to know their rights and obligations.

Cases of pregnant students brought to the attention of the mass media have shown that a significant proportion of pregnant pupils and young mothers feel they have been informally excluded from school, denied the opportunity to continue their usual attendance, and isolated when taking exams. Pregnant women who receive social assistance, who are young, single, who are Roma or who have a disability, are often more vulnerable and therefore more likely to be subject to discriminatory behaviour than pregnant women who are in a traditional family structure.

Numerous studies have demonstrated the benefits of breastfeeding for mothers, children, and their communities, in terms of physical and emotional health and development. Women should not be disadvantaged in services, accommodation or employment because they have chosen to breastfeed their children. In Romanian society, women are rather discouraged by others from breastfeeding in public places because of concerns that it is indecent. Breastfeeding is really a health issue and not one of public decency and women should have the choice to feed their baby in the way that they feel is most dignified, comfortable and healthy. Public spaces in

¹⁶⁷ Ordinance No. 137 of 31 August 2000, republished, on preventing and sanctioning all forms of discrimination, published in the Official Gazette No. 99 of 9 February 2007. Republishing is based on Article IV of Law No. 324 of 2006 amending and completing Ordinance No. 137 of 2000, published in the Official Gazette No. 626 of 20 July 2006, the articles being given new numbers.

Romania such as restaurants and entertainment spaces are not provided with facilities designed to allow breastfeeding.

6. Use of a comparator

With regard to definitions of pregnancy and maternity, no comparator is provided by the national legal framework.

7. Actions against failure to implement the Directive

There are no examples of actions brought against Romania with regard to the implementation of Directive 2004/113/EC.

8. Enforcement by equality bodies

According to the legal provisions of Article 19(2) of Ordinance No. 137 of 2000, the National Council for Combating Discrimination exercises its legal authority based on petitions and complaints from a natural or legal person or takes action *ex officio*.

In addition to this, persons who consider themselves wronged because the principle of equal treatment has not been applied to them with regard to access to goods and services are entitled to formulate complaints against the goods or services provider, if the provider is directly involved. If such a complaint is not addressed, the person has the right to notify the National Council for Combating Discrimination and to engage in a judicial procedure before a competent court to have the consequences of the discriminatory action removed.

9. Discrimination based on association/perceived status

The Romanian legal framework does not contain explicit measures prohibiting discrimination on the basis of association with a transsexual person or persons, or a person or persons of a particular sex, or discrimination on the grounds of perceived sex or transsexual status.

10. Protection of women regarding pregnancy and maternity

According to the legal provisions of Article 18 of Ordinance 61 of 2008, legal provisions concerning equal treatment for men and women with regard to equal access to goods and services shall be without prejudice to more favourable provisions concerning the protection of women as regards pregnancy and maternity. No examples are available in this regard.

11. Exceptions to the principle of equal treatment (Article 4(5))

Article 6(5)b of Ordinance 61 of 2008 stipulates that differences in treatment based on certain sex characteristics are not considered discrimination 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.

12. Positive action

Article 6 of the Directive has no corresponding article in Ordinance 61 of 2008. The concept of 'positive discrimination' is defined in the legal provisions of Law No. 202 of 2002 as 'those special measures adopted for a temporary period in order to accelerate *de facto* achievement of equal opportunity between women and men and which are not

considered discriminatory actions'.¹⁶⁸ No examples are available concerning the existence of positive discrimination measures.

13. Burden of proof

According to Article 12(1) of Ordinance No. 61 of 2008, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them present to the court facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment. The value of the principle of reversing the burden of proof itself in such cases is without any doubt very important. Currently, the legal provisions of the national legal framework concerning the equal access to goods and services are not well-known by the general public and consequently case law in this area is lacking.

It is still very early to assess the impact of the legal framework concerned in the matter of equal access to goods and services. Equality bodies in Romania have not initiated any campaigns or any related awareness programmes in this field. However, it is to be estimated that once these legal provisions are brought to public attention, the principle of reversing the burden of proof will represent an important instrument towards accelerating the legislation implementation in this field.

14. Harassment, instruction to discriminate and victimisation

No particular examples are available for Romania with regard to harassment and sexual harassment, instruction to discriminate and victimisation in the goods and services field.

15. Overall assessment

The impact of Directive 2004/113/EC in Romania is not very substantial yet, as Romania does not traditionally represent a society emphasizing the role and importance of access to services and goods. Romanian citizens are not aware of their rights in this area.

However, early signs of change can be detected. The National Council for Combating Discrimination (NCCD) issued two decisions in favour of the Antidiscrimination Alliance of All Fathers (TATA) in the case against two Bucharest hospitals, which were accused of discriminative practices against fathers. The two hospitals, 'Grigore Alexandrescu' and 'Victor Gomoiu' were criticised by the Alliance for not allowing fathers to accompany their children when the latter are ill and admitted to the medical unit. The hospitals only allowed mothers to be hospitalised together with their sick children. The NCCD also fined the Grigore Alexandrescu Children Hospital RON 600 (EUR 139) and issued a warning to the Victor Gomoiu Hospital, urging the units to eliminate all discriminative practices. The Council ruled that, under current law, standard accommodation services in a hospital are available for any of the parents of the sick child, regardless of their gender.

¹⁶⁸ Article 4e of Law No. 202 of 2002 on equal opportunities between women and men, reissued on the basis of Article V of Governmental Ordinance No. 84/2004 for amendment and supplementation of Law No. 202/2002 on equal opportunities between women and men, published in the Official Gazette of Romania, Part I, No. 799 of 30 August 2004 and approved, with subsequent amendments, by Law No. 501 of 2004, published in the Official Gazette of Romania, Part I, No. 1.092 of 24 November 2004, giving the text new numbers. Law No. 202 of 2002 on equal opportunities between women and men was published in the Official Gazette of Romania, Part I, No. 301 of 8 May 2002.

PART II: SCOPE OF NATIONAL LEGISLATION

1. Scope of national legislation beyond the scope of EU gender equality directives?

With regard to transposition of Directive 2004/113/EC, Romanian legislation does not go beyond the scope of existing EC gender equality directives.

2. ‘Hierarchy’ of grounds?

The overall level of protection for gender in access to and supply of goods and services cannot be assessed as being lower than that for race. This assessment is based on the fact that the national legislation transposing Directive 2004/43/EC, namely Governmental Ordinance No. 137 of 2000 on preventing and sanctioning all forms of discrimination in Romania, covers all grounds of unlawful discrimination, including sex¹⁶⁹. On the other hand, it should be emphasised that sex-based discrimination in access to goods and services tends to be more intense for Roma women. Pregnant Roma women, for instance, have lower access to medical services. One of the obstacles for Roma women to benefit from adequate medical treatment during pregnancy and maternity is also derived from the fact that the unemployment percentage in the Roma community is high and, consequently, pregnant Roma women cannot register in the family doctors medical system.

3. Comments and/or suggestions

The national legal framework with regard to equal treatment for men and women in access to goods and services is relatively unknown to the general public. Despite the fact that national legislation complies with the EC standards related to the competencies of the bodies for promotion of equal treatment, including conducting independent surveys concerning discrimination and publishing independent reports in this area, no action has been taken either by NCCD or by the National Agency on Equal Opportunities. Such a lack of having an active mandate in the field of anti-discrimination significantly jeopardizes any future implementation capital of the law concerned.

SLOVAKIA – Zuzana Magurová

PART I: DIRECTIVE 2004/113/EC

1. Transposition of Directive 2004/113/EC

Directive 2004/113/EC has been transposed within the required term by a second major amendment to the Antidiscrimination Act¹⁷⁰ (*Antidiskriminačný zákon*)

¹⁶⁹ Article 2 of Governmental Ordinance No. 137 of 2000 defines discrimination as ‘any difference, exclusion, restriction or preference based on race, nationality, ethnic origin, language, religion, social status, beliefs, sex, sexual orientation, age, disability, chronic disease, HIV positive status, belonging to a disadvantaged group or any other criterion, aiming to or resulting in a restriction or prevention of the equal recognition, use or exercise of human rights and fundamental freedoms in the political, economic, social and cultural field or in any other fields of public life.’

¹⁷⁰ Act No. 365/2004 Coll. on Equal Treatment in Certain Areas and on Protection Against Discrimination and on amendment of certain acts (Antidiscrimination Act), as amended.

included in Act no. 85/2008 Coll. and partially also by the Insurance Act¹⁷¹ (*Zákon o poisťovníctve*) and the Consumer Protection Act¹⁷² (*Zákon o ochrane spotrebiteľa*).

The Antidiscrimination Act is a general act on equal treatment and protection against discrimination. The grounds on which discrimination should be prohibited are: sex, religion, or belief, race, national or ethnic origin, disability, age, sexual orientation, marital status, family status, colour of skin, language, political or other opinion, national or social origin, property, ancestry or other status. The above-mentioned second amendment to the Antidiscrimination Act extends the protection against discrimination in the area of social protection, health care, education, as well as in access to goods and services, including housing, that are provided to the public by legal entities and individuals (entrepreneurs). In previous legislation, the only grounds on which discrimination was prohibited in these areas were sex, race and national or ethnic origin.

The prohibition of discrimination in access to goods and services is limited to the sale of goods and provision of services carried out in public and targeted at the public. The provisions of the Antidiscrimination Act do not apply to goods and services offered or provided on a private basis (e.g. providing and offering goods to the members of a private association, family etc.)

Under the Consumer Protection Act, when providing goods and services to consumers, the seller has the obligation to comply with the principle of equal treatment set in the Antidiscrimination Act.

Slovakia decided to maintain gender-differentiated differences in insurance premiums and benefits. Such regulation is contained not only in Antidiscrimination Act but also in the Act on Insurance.

2. Correct transposition?

It may be stated that the Directive has been transposed correctly.

3. Definitions of ‘goods’ and ‘services’

The concepts of ‘goods’ and ‘services’ are legally defined in line with the approach taken by the ECJ in the area of the free movement of goods and within the meaning of Article 50 TEC. The Consumer Protection Act contains the following definitions: ‘A product is a new, used or modified movable that is manufactured, extracted (mined) or otherwise obtained and that will be offered to the consumer or that may be assumed to be used by the consumer, if this movable is delivered with or without payment; a product also means a movable that is a part or accessory of another movable or immovable, electricity, gas, water or heat intended for the consumer; a service is any activity or performance that is offered to the consumer for a remuneration or without remuneration.’

4. Protection of specific groups

Slovakia provides for the protection of transsexual people, pregnant women and women who have recently given birth. According to the Antidiscrimination Act, discrimination based on sex also means discrimination for reasons of pregnancy or maternity, as well as discrimination on the ground of the sexual or gender identification.

¹⁷¹ Act No. 8/2008 Coll. Insurance Act.

¹⁷² Act No. 250/2007 Coll. Consumer Protection Act.

5. Definition of pregnancy and maternity

The Antidiscrimination Act does not distinguish between the definitions of discrimination for reasons of pregnancy and maternity for the area of employment and for the area of provision of goods and services. The Slovak national Parliament has adopted relevant amendments to the Labour Code,¹⁷³ more in particular in 2002 and 2003 when extensive and significant amendments introduced definitions of ‘pregnant employee’, ‘breastfeeding employee’ and of ‘parental leave’.

6. Use of a comparator

No comparator is used in the definitions of maternity and pregnancy.

7. Actions against failure to implement the Directive

There is no information available about actions brought against Slovakia for the breach of the principle of equality in the provision of goods and services on the ground of sex. Only actions for racial reasons have been brought.

8. Enforcement by equality bodies

The designated equality body has the competence to bring enforcement actions in the public interest. The third amendment of the Antidiscrimination Act, included in Act no. 384/2008 Coll., introduced the possibility to bring actions in the public interest. In cases where the breach of the principle of equal treatment might infringe rights of several persons or endanger the public interest, the right to request the protection of the right to equal treatment is also granted to a legal entity or non-government organisation whose aim is the protection against discrimination and to the Slovak National Centre for Human Rights (as ‘equality body’). Such person may demand that the person violating the principle of equal treatment refrains from such conduct and, if possible, remedies the unlawful situation. This means that such entity may not demand appropriate compensation (adequate redress).

9. Discrimination based on association/perceived status

As mentioned under 4, the only general provision relating to the prohibition of discrimination of transsexuals is contained in the Antidiscrimination Act. According to the expert (who has commented on the Antidiscrimination Act) this provision explicitly also protects those who associate with or are perceived to be persons of a particular sex/transsexual persons.

10. Protection of women regarding pregnancy and maternity

There are no available examples of more favourable provisions relating to the protection of women in respect of pregnancy and maternity in the area of provision of services and goods. More favourable provisions concern the protection of women in the access to employment.

11. Exceptions to the principle of equal treatment (Article 4 (5))

The Antidiscrimination Act allows an objectively justified different treatment, the purpose of which is the protection of pregnant women or mothers, whereby it particularly refers to employment legislation. The Labour Code contains some protective measures for women because of their pregnancy or early motherhood (such

¹⁷³ Act No. 311/2001 Coll. of 2 July 2001, effective from 1 April 2002, as amended by Acts Nos. 165/2002 Coll., 408/2002 Coll., 413/2002 Coll., 210/2003 Coll., 461/2003 Coll., 5/2004 Coll. and 365/2004 Coll.

as prohibition of night shifts). Some protective measures (such a special protection in terms of working time or dismissal) are guaranteed to them with regard to their parenting responsibilities and are equally granted to men who are performing childcare and are also applied to public service relationships. (Article 4(2) is transposed.)

Further exceptions consist in the provision of goods and services exclusively or preferentially to members of one sex, if they pursue a legitimate aim and if the means for the achievement of this aim are adequate and necessary. Such legitimate aim may be e.g. protection of the victims of sexual violence (e.g. opening of shelters exclusively for women), reasons of privacy and decency (in cases where accommodation is provided by a person in a certain part of his or her household).

The Antidiscrimination Act specifies no exceptions in the provision of goods or services that would concern transsexuals.

12. Positive action

Neither the Antidiscrimination nor any other Act provide for the possibility of taking positive action on the basis of sex.

13. Burden of proof

The Antidiscrimination Act allows the use of reversed burden of proof for all cases involving discrimination.

14. Harassment, instruction to discriminate and victimisation

The definition of sexual harassment was only introduced into our national legislation in April 2008 by the second amendment to the Antidiscrimination Act. All known cases of harassment and sexual harassment occurred particularly in employment relations. Two cases of sexual harassment in the provision of health services (a general practitioner sexually harassed his patient) and in the area of education (a teacher sexually harassed his students) were publicized in the media. An example of instruction to discriminate is incitement to unfavourable evaluation or exclusion from drivers' schools. No concrete examples of victimisation are available.

15. Overall assessment

One year is a very short period to register any significant changes. No cases have been brought before a court, nor have any cases been reported by the Slovak National Centre for Human Rights (as 'equality body').

PART II SCOPE OF NATIONAL LEGISLATION

1. Scope of national legislation beyond the scope of EU gender equality directives?

The scope of protection against sex and racial discrimination is equally regulated in the Antidiscrimination Act. As mentioned under 1 of Part I, the amendment to the Antidiscrimination Act extends the protection against discrimination in the area of social protection, health care, education, as well as in access to goods and services. This means that the protection in these areas is now the same as in the area of employment.

2. 'Hierarchy' of grounds?

There is no hierarchy between the different grounds.

3. Comments and/or suggestions

No comments or suggestions.

SLOVENIA – Tanja Koderman Server

PART I: DIRECTIVE 2004/113/EC

1. Transposition of Directive 2004/113/EC

Legislation has been adopted to transpose Directive 2004/113/EC. It was transposed with the amended Act Implementing the Principle of Equal Treatment¹⁷⁴ (hereinafter the AIPET-UPB1). In addition, there is a provision of existing legislation in the Consumers Protection Act¹⁷⁵ (hereinafter the CPA) that is applicable as well.

2. Correct transposition?

Firstly, the main transposing provision (Article 2) of the AIPET-UPB1 is very general, incomprehensible, short and not a 'copy out' of the provisions of the Directive.

Secondly, I believe that the transposition of provisions of the Directive regarding Article 8 (Defence of rights) is satisfactory, but merely presentational and that this will not lead to a more effective legal protection or to an effective application of the principle of equal treatment. This is also one of the reasons that there is no case law in relation to gender equality or equal treatment legislation.

Thirdly, there are two 'copy outs' of Articles 4(2) and 4(6) of the Directive regarding exceptions to the principle of equal treatment. They result in Article 2.a(3) of the AIPET-UPB1 which allows different treatment based on gender regarding access to and supply of goods and services exclusively or primarily to members of one sex when different treatment is justified by a legitimate aim and the means of achieving that aim are appropriate and necessary, and which includes more favourable protection of women with regard to pregnancy and motherhood.

3. Definitions of 'goods' and 'services'

The concepts of 'goods' and 'services' are not defined, neither in national legislation nor in case law. Even the word 'goods' is not translated using the same word in the Directive, the AIPET-UPB1 and the CPA. While the Directive and the CPA use the Slovene word 'blago' for 'goods', the AIPET-UPB1 uses 'dobrine' which is considered to have a much broader meaning. So obviously, the transposition is rather incomprehensible from the start, due to such imprecise basic definitions.

4. Protection of specific groups

Slovene legislation provides explicit protection for pregnant women and women who have recently given birth in relation to the employment context but not in relation to access to and supply of goods and services. The AIPET-UPB1 only contains a general provision which provides for equal treatment of all people in the access to and supply of goods and services irrespective of gender, sexual orientation etc. This provision

¹⁷⁴ Act Implementing the Principle of Equal Treatment (*Zakon o uresničevanju načela enakega obravnavanja*), Official Gazette RS, No. 93.

¹⁷⁵ Article 25 of the Consumer Protection Act (*Zakon o varstvu potrošnikov*, Official Gazette RS, Nos. [98/2004](#), [126/2007](#)) which obliges enterprises to sell goods and provide services to all consumers under equal conditions.

gives some protection to transsexual people, pregnant women and women who have recently given birth, but is in my opinion and in the opinion of other professional far too general and therefore not sufficiently clear and precise for individuals to understand their rights and for goods and services providers to understand their legal obligations. So as a result of the Directive, which had to be transposed, we now have some provisions which are not used in practice and which do not result in actions being brought against offenders and therefore do not help to strengthen the protection against discrimination.

5. Definitions of pregnancy and maternity

Pregnancy and maternity discrimination in relation to access to and supply of goods and services is only defined in the employment context, in the Employment Relationship Act.¹⁷⁶ The same is true for the protection from discrimination related to breastfeeding. Slovenia relies on a general prohibition of sex discrimination in the AIPET-UPB1, which in my opinion would be sufficient if it were not so general. It would at least have to be mentioned that less favourable treatment of women related to pregnancy and maternity is deemed to be discrimination on the grounds of sex.

I think discrimination in relation to pregnancy and maternity in the area of goods and services context is rare. It could occur in bars, restaurants etc. where the owners would not allow women in who would want to breastfeed their child, or women with young children, or who would refuse service to women for those reasons, or it could be caused by owners of a flat or tourist apartment who would not let it to a pregnant woman or to a woman with young children etc.

6. Use of a comparator

No comparator is used in the definition of pregnancy and maternity since there is no definition in relation to access to and supply of goods and services.

7. Actions against failure to implement the Directive

No actions have been brought against Slovenia for failure to implement the Directive.

8. Enforcement by equality bodies

The Slovene equality body, the Office for Equal Opportunities, is not competent to bring an enforcement action in the public interest. The Advocate for Equal Opportunities for Women and Men (hereinafter the Advocate) can only issue non-binding written opinions.

9. Discrimination based on association/perceived status

The AIPET-UPB1 does not expressly prohibit discrimination on the basis of association with a transsexual person or persons, or a person or persons of a particular sex, and/or discrimination on grounds of perceived sex or transsexual status in access to goods and services. It is covered by the prohibition of discrimination due to sex and sexual orientation.

10. Protection of women regarding pregnancy and maternity

The AIPET-UPB1 allows for different treatment in the fields of social protection, including social security and health care, and in the fields of social benefits, education

¹⁷⁶ Employment Relationship Act (*Zakon o delovnih razmerjih*), Official Gazette RS, Nos. 42/2002,103/07.

and access to and supply of goods and services on the grounds of sex concerning more favourable protection of women with regard to pregnancy and motherhood. Despite this provision, I have not found any examples of more favourable provisions concerning the protection of women as regards pregnancy and maternity, other than those in the employment context.

11. Exceptions to the principle of equal treatment (Article 4(5))

Slovenia has relied on Article 4(5) of the Directive. Article 2.a(3) of the AIPET-UPB1 allows different treatment based on gender in the fields of social protection, including social security and health care, and in the fields of social benefits, education and access to and supply of goods and services regarding access to and supply of goods and services exclusively or primarily to members of one sex when different treatment is justified by a legitimate aim and the means of achieving that aim are appropriate and necessary. As concrete examples of this provision, I can mention safe houses, shelters, maternity homes and shelters and counselling services, which are available only to female victims of domestic violence. According to the Social Security Act¹⁷⁷ and the Resolution on the National Programme of Social Protection for the Period 2006-2010¹⁷⁸ those social welfare development programmes are carried out by NGOs and Social Work Centres and are co-financed and supervised by the Ministry of Labour, Social and Family Affairs.

No interpretation has been given in relation to transsexual people.

12. Positive action

Slovenia has relied on the positive action provision in Article 6 of the Directive. Special measures (positive action measures and encouraging measures) are explicitly permitted and defined by Articles 6 and 10a of the AIPET-UPB1 and Article 7 of the Act on Equal Opportunities for Women and Men.¹⁷⁹ They are temporary measures aimed at establishing actual equal opportunities for women and men as well as promoting gender equality in specific fields of social life, in which a non-balanced representation of women and men or unequal status of persons of one gender is ascertained. They may be used to remove objective obstacles that bring about a non-balanced representation of women and men or an unequal status of persons of one gender as well as to give special benefits in the form of incentives to the underrepresented gender or to the gender experiencing unequal status. These incentives must be justified and in proportion to the purpose of the special measure. Special measures may be adopted by state authorities, employers, education and training institutions, political parties, civil society organisations, etc.

13. Burden of proof

The burden of proof in goods and services is applied according to Article 9 of the Directive. I consider this rule as important as it is in employment cases since they have in common a breach of the principle of equal treatment and protection of an economically weaker party in a dispute.

¹⁷⁷ Social Security Act (*Zakon o socialnem varstvu*), Official Gazette RS, Nos. 3/07, 23/07, 41/07.

¹⁷⁸ Resolution on the National Programme of Social Protection for the Period 2006-2010 (*Resolucija o nacionalnem programu socialnega varstva za obdobje 2006-2010*), Official Gazette RS, No. 39/06.

¹⁷⁹ Act on Equal Opportunities for Women and Men (*Zakon o enakih možnostih žensk in moških*), Official Gazette RS, Nos. 59/02, 61/07.

14. Harassment, instruction to discriminate and victimisation

We do not have any examples of cases of harassment or sexual harassment that would have been made public yet. But we can certainly find some examples of harassment and sexual harassment of customers by owners or employees of bars, restaurants, pubs, hotels and other venues providing various services, and of harassment of tenants and potential purchasers by owners of real estate or by real estate agencies, etc.

No cases have been brought for instruction to discriminate in the area of goods and services, although we might find some cases where owners of apartments or houses give instructions to real estate agencies not to let them to pregnant women, women with young children or male students who are considered to be rowdy and disorderly. There certainly are some cases of instructions to employment agencies by owners of companies or their human resources departments asking for women with children or only for men, or by private households demanding workers of a particular sex although the nature of the work does not allow different treatment, etc.

No cases have been brought regarding victimisation in the context of goods and services.

15. Overall assessment

I must say that the amendments to AIPET were necessary and constitute a step forward in terms of access to and supply of goods and services irrespective of gender. Unfortunately, some provisions are too general and therefore cannot lead to substantial changes or improvements.

PART II: SCOPE OF NATIONAL LEGISLATION

1. Scope of national legislation beyond the scope of EU gender equality directives?

Slovene national legislation goes beyond the scope of existing EC gender directives and falls under the material scope of the Race Directive (2000/43). Article 2 of the AIPET-UPB1 is in fact a 'copy out' of Article 3(1) of the Race Directive and therefore covers not only the area of employment, but also the area of education, social advantages, social protection, including social security and healthcare, and membership of and involvement in an organization of workers or employers, or any organization whose members carry on a particular profession, including the benefits provided for by such organizations.

2. 'Hierarchy' of grounds?

Slovene legislation covers discrimination on both grounds in the goods and services field in the AIPET-UPB1, in the same provision (Article 2). Both grounds are dealt with equally and therefore no 'hierarchy' of grounds applies. The level of protection for race and gender in the access to and supply of goods is the same.

3. Comments and/or suggestions

I have no other comments or suggestions.

PART I: DIRECTIVE 2004/113/EC

1. Transposition of Directive 2004/113/EC

Directive 2004/113/EC was transposed by Law 3/2007 on effective equality between women and men (Articles 69 to 72). The right not to be discriminated in the access to a service or benefit is also protected in Article 512 of Law 10/1995 of the Penal Code. This rule prohibits the refusal to a person of a benefit to which he/she is entitled because of, among other grounds, sex or sexual preferences.

2. Correct transposition?

The relevant provisions of the Directive have been correctly transposed. Even though some provisions seem to be a ‘copy out’ of the provisions of the Directive, it is a substantive implementation. Admittedly, the adaptation effected is correct but not very useful for practical application. It would be desirable to have a more detailed regulation of the prohibition of sexual discrimination related to contract agreements or particular services. An example would be to define harassment – sexual or gender – as a justified reason to terminate a property lease agreement

3. Definitions of ‘goods’ and ‘services’

Although there is no specific statutory definition of the terms ‘goods’ and ‘services’, they are used in a broad sense and linked to business activities and business concepts. The market setting (the marketplace and the manufacturing and distribution business of goods and services) is an important factor for a proper definition of the nature of the goods and services, regardless of the parties (Public Administration or private companies) providing the goods or services or to whom goods or services are provided.

4. Protection of specific groups

There is no specific protection for transsexuals in the regulations that transpose the Directive. The Constitutional Court considers this as one of the discrimination causes prohibited by the Spanish Constitution, although different from discrimination on the grounds of sex. The courts have rarely ruled on issues involving discrimination of transsexuals and the protection provided is not sufficiently clear and precise when applied to a transsexual’s right to obtain goods and services and to the obligations of the suppliers of such goods and services.

Where pregnant women are concerned, specific protection is provided in Article 70 of Law 3/2007 regarding equal rights for women and men in the matter of access to goods and services and their supply. It refers to the prohibition to check a woman’s pregnancy when she purchases goods and services, except for health protection reasons. This prohibition will affect all contractors, being persons or entities, providing goods or services in public and private sectors. Inquiries on the state of pregnancy would only be lawful if the good or service may be detrimental to the health of the pregnant woman or of the foetus.

Protection for women who have recently given birth is the general protection stipulated by Article 8 of Law 3/2007 on equal rights for women and men, whereby unfavourable treatment on account of motherhood is deemed to be direct discrimination

5. Definitions of pregnancy and maternity

The definitions of discrimination on the grounds of pregnancy and motherhood are laid down in Spanish law and are applicable both to workplace issues and to the access to and supply of goods and services. The terms of the regulation are not very specific, which can complicate a precise definition of discriminating acts on the grounds of pregnancy and motherhood, as well as hinder the clear definition of women's rights and the supplier's obligations. The limited case law on discrimination makes it difficult to determine how and in what way discrimination takes place. In the access to or supply of goods and services there is no specific protection for women from discrimination related to breastfeeding.

6. Use of a comparator

Article 8 of Law 3/2007 on equal rights for women and men establishes as direct discrimination any adverse treatment of women in pregnancy or motherhood situations when said treatment is without good reason, which is proven and proportionate. Thus, a comparator is not used.

7. Actions against failure to implement the Directive

As far as I know, there has been no action against Spain for failure to implement the Directive.

8. Enforcement by equality bodies

The competences conferred on the Women's Institute are, among others, those provided in Article 12.2 of the Directive 2004/113, i.e. to assist the victims of discrimination in the filing of discrimination claims and the handling of the procedures involved. Article 12 Law 3/2007 states that any person (physical or legal) having a legitimate interest can bring proceedings, except in cases of harassment and sexual harassment. When the people affected by the right to equality is an undefined group of people, the Women's Institute has the competence to defend their interests (Article 11 *bis Ley de Enjuiciamiento Civil* and Article 19.1 *Ley reguladora de la Jurisdicción Contenciosos Administrativa*)

The Women's Institute is also authorized to receive and process, at the administrative level, complaints filed by women, in specific cases of discrimination of fact and law on the grounds of sex. Article 12 of Law 1/2004 of comprehensive protection measures against gender-based violence authorizes the Women's Institute to bring before court actions to cease and desist illegal publicity giving women a humiliating or degrading image

9. Discrimination based on association/perceived status

There is no specific prohibition, but the general constitutional provisions of Article 14 prohibit any discrimination on different grounds (race, religion, birth, sex, opinion), including a general clause related to 'any other personal or social condition or circumstance' which should cover such situations.

10. Protection of women regarding pregnancy and maternity

Almost all provisions that are more favourable for women concerning their protection as regards pregnancy and maternity are in the field of employment, and no general provision at national level in the access to and supply of goods and services has been adopted.

11. Exceptions to the principle of equal treatment (Article 4(5))

Article 4(5) is transposed in Article 69.3 Law 3/2007 on equality between women and men.

The State Housing Plan for 2009-2012 gives priority to certain protected groups, including women suffering gender-based violence, single parents, dependent or disabled persons and the families taking caring of them. The protection enables the purchase or rental of housing under more favourable terms by establishing special conditions such as maximum prices for purchase or rental, financial aid or maximum interest rates for bank loans. This preferential protection may be applied to transsexuals when they are in one of the aforementioned situations, or when so decided by the Autonomous Communities, should it come to be considered a socially marginalized group.

The right to social welfare assistance under Article 19 of Law 1/2004, of comprehensive protection measures against gender-based violence, covers emergency,¹⁸⁰ support and accommodation services. The accommodation resources (emergencies, temporary shelters, etc) are handled by each autonomous region¹⁸¹ and to this end a biannual state-aided fund has been created.

As regards public transport, there are no national state measures to ensure that men and women are treated equally when using this service. On the other hand, one can find some local initiatives seeking to analyse factors concerning the use, needs, time and costs pertaining to private transport (cars) and to public transport (buses or trains). The study of these factors differentiating women's and men's preferences may enable public transport to be planned equitably in order to meet the needs of both groups.¹⁸²

12. Positive action

The possibility of implementing positive actions is regulated in general for all kinds of social situations in Article 11 Law 3/2007 for effective equality between women and men, both for public administration and the private sector. This Article states that public powers and private physical or legal persons can implement positive actions in order to fight inequality and discrimination.

13. Burden of proof

The burden of proof in goods and services cases is applied according to Article 9 of the Directive 2004/113. Article 13 of Law 3/2007 on equal rights for women and men provides for the shifting of the burden of proof in legal procedures, except criminal proceedings where discrimination on the grounds of sex is alleged. The rule on evidence is important and I think it will be very useful in the future, but so far there have not been many cases on access to goods and services.

¹⁸⁰ A mobile Telehomecare service is available to victims of gender-based violence, equipped with communication and locating devices to prevent aggression and promote a normal lifestyle.

¹⁸¹ Decree 5/2000 of 13 January, for instance, sets forth the terms and conditions pertaining to the shelters in the Autonomous Community of Castilla y Leon. These centres are intended to provide alternative accommodation to women who are in a situation of helplessness due to violence or family abandonment, and to the children in their care. The shelters provide accommodation, protection, maintenance, social assistance, health, psychological and legal assistance; the length of stay shall not exceed six months and may be extended for a period of three months in exceptional cases. In the Autonomous Community of Catalonia, mechanisms are being sought in order to oblige the aggressor to leave the family home.

¹⁸² This is a field study conducted by the urban transport company in the city of Gijón by means of 4500 surveys among the urban transport users and drivers of private vehicles.

14. Harassment, instruction to discriminate and victimisation

There are no examples of harassment, instructions to discriminate and victimisation.

15. Overall assessment

The Directive's impact on the areas covered by this report has been rather limited despite its proper implementation. This is not due to the absence of discrimination issues, but rather due to the lack of initiatives on behalf of the authorities, the lack of a specific regulation of the rights and obligations in the various areas and contract agreements, as well as of court claims concerning specific discrimination issues. This reduced impact is also clear from the small number of specialized studies conducted on equal rights between the sexes when obtaining or supplying goods and services.

PART II: SCOPE OF NATIONAL LEGISLATION

1. Scope of national legislation beyond the scope of EU gender equality directives?

The principle of equality and the prohibition of discrimination of Article 14 of the Spanish Constitution in general cover all kinds of fields (from the point of view of the material scope) and the protection is, among others, both for sex discrimination and for race discrimination.

Spanish national legislation goes beyond the scope of Directive 2004/113, especially in the areas of education and media. Law 3/2007 establishes the integration of the principle of equality in the policy of education in primary, secondary and higher education. The progressive integration of the objectives of coeducation aims to promote the real and effective equality between women and men in all centres of education.

The principle of equality must be applied to social, public and private mass media, avoiding any form of discrimination. Public media must also promote the knowledge and the distribution of the principle of equality between women and men. Publicity including discriminatory conduct will be considered illegal.

2. 'Hierarchy' of grounds?

It is not easy to say if there is a hierarchy of grounds because of the small number of cases presented to the courts. There are some examples, however, of case law and studies dealing with race discrimination.¹⁸³

3. Comments and/or suggestions

The equality principle will have to be integrated in Spanish health policy, and the public administration must guarantee the right to health services without discrimination between women and men. The access to health services in equal conditions has improved and can be considered satisfactory, but nevertheless the results could still improve¹⁸⁴. Although in the majority of cases, health policies and services apparently supply equality to men and women, the services are not used in the same way. There are differences in the way that women and men are hospitalised and medicines are prescribed to them. Health plans include equality provisions, but

¹⁸³ *STS 29.9.1998*: An authorized car dealer refused entry and supply of service to a person of black racial origin. The Supreme Court considered the refusal to be a crime because of discrimination according to Article 512 of the Penal Code. Also, a study of the Permanent Observation Post of Immigration is analysing the difficulties of immigrants to succeed in renting a house in Spain.

¹⁸⁴ Strategic Plan of Equal Opportunities (2008-2011).

only formally, because they do not include concrete objectives or suitable measures. In order to carry out Law 3/2007 in the field of health, a gender approach is now a common objective in all levels of the public health system.¹⁸⁵ Still, there are few available studies in Spain on gender-based discrimination in the matter of access, use and quality of health care services, and in connection with scientific and technical improvements in diagnostic and therapeutic procedures.

In relation to the access to goods and services, there are some regional initiatives of public policies on ‘city opening hours’. A pioneering example is Galician Law 2/2007 of Work in Equality of the Women of Galicia, which regulates the ‘municipal banks of time’ and the ‘plans to programme city hours’. The purpose of the ‘banks of time’ is to facilitate the combination of multiple tasks, one of which is the access to services such as commerce, banks or administrative proceedings. The ‘plans to programme city hours’ try to coordinate the schedules of the city (opening hours of public offices, commerce, public services, etc) with citizens’ personal, family and labour duties.

SWEDEN – Ann Numhauser-Henning

PART I: DIRECTIVE 2004/113/EC

1. Transposition of Directive 2004/113/EC

Directive 2004/113/EC has now been transposed by the new Discrimination Act (2008:567), which entered into force on 1 January 2009. Previously, the Directive was implemented by amendments to the Prohibition of Discrimination Act (2003:307),¹⁸⁶ but this Act ceased to exist with the introduction of the 2008 Discrimination Act.

2. Correct transposition?

The 2008 Discrimination Act covers discrimination on seven different grounds (among them sex and transgender identity or expression) in ten different areas of society, including the ones covered by this report, and is truly horizontal in character. Chapter 2 contains the prohibitions of discrimination area by area. Of significant interest to this report are the rules on prohibition of discrimination in the area of education (Sections 5-8), goods, services and housing, etc. (Section 12), as well as health and medical care and social services etc. (Section 13). Transport is covered by Sections 12 and 13. There are no express rules on media and discrimination and sex discrimination is not covered by the general Marketing Act. A governmental inquiry committee recently presented a proposal to introduce a special act banning sex discriminatory commercial advertising.¹⁸⁷ There seems to be no political will within the current government to act upon this proposal, though. However, since 1998 Sweden has had the ERK (*Näringslivets Etiska Råd mot Könsdiskriminerande Reklam*)¹⁸⁸, initiated by the commercial organisations themselves. This council gives (not legally binding) opinions in individual cases which are published widely. Chapter 3 of the 2008 Discrimination Act contains rules on active measures in working life and education, whereas Chapter 4 contains the rules on supervision, Chapter 5 the

¹⁸⁵ In ‘Recommendations to lay down a gender approach in health programmes’; report by Sara Aryan Velasco, published by the Women’s Health Observatory, Madrid 2008.

¹⁸⁶ Swedish Code of Statutes 2005:480.

¹⁸⁷ SOU 2008:5, *Könsdiskriminerande reklam – kränkande utformning av kommersiella meddelanden*.

¹⁸⁸ www.etiskaradet.org

rules on compensation and invalidity and, finally, Chapter 6 the rules on legal proceedings including the rule on a reversed burden of proof.

The method of implementation cannot be labelled as ‘copying out’. The design of the 2008 Discrimination Act is too complicated for this; it is truly horizontal in nature, intertwining the ban on sex discrimination with prohibitions of discrimination on a number of other grounds. In my opinion, the Directive has been implemented correctly. With regard to pregnant women and women who have recently given birth, they can be said to be only ‘implicitly’ protected since the categories as such are hidden under the concept of sex discrimination. In my opinion, this deserves to be criticized as a less transparent way of regulation. The implementation in this respect was also questioned by the European Commission.¹⁸⁹

3. Definitions ‘goods’ and ‘services’

The 2008 Discrimination Act does not include an express definition of the concepts of ‘goods’ and ‘services’. However, there are some guiding statements on the content of these concepts in the *travaux préparatoires*.¹⁹⁰ ‘Goods’ are said to be ‘objects apt to circulation’ whereas ‘service’ is said to be ‘something someone does or perform for another person against remuneration’.

There is no case law on these issues directly related to the discrimination legislation. However, there is some relevant case law from the Administrative Supreme Court concerning the concept of services in the area of health and medical care in connection with the application of Regulation 1408/71/EEC, see cases *RÅ* 2004 ref. 41 and *RÅ* 2004 note 13. The service concept in these judgments is in compliance with that of the ECJ in the cases *Kohll and Decker* (C-158/96, C-120/95) and *Smits and Peerbooms* (C-157/99) and the judgments also make references to the cases *Luisi and Carbone* (C-286/82 and 26/83), *Muller-Fauré* (C-385/99) and *Watts* (C-372/04). There is also an opinion by the former Equal Opportunities Ombudsman (since 1 January 2009 replaced by a single Equality Ombudsman covering all grounds¹⁹¹) concerning the concept of services. The EOO found that a ‘free’ (no fees charged) chatting community on the Internet was a service under the Prohibition of Discrimination Act (2003:307), since the provider was paid indirectly through advertising. The opinion makes reference to the ECJ’s case law such as the cases *Giuseppe Sacchi* (155/73), *Bond van Adverteerders et al.* (352/85), *Deliège* (C-51/96 and C-191/97) and *Smits and Peerbooms* (C-157/99). Otherwise there is no case law to guide us concerning the application of the ban on discrimination as regard goods and services. It should be noted, though, that as regards services in the area of health and medical care, the service concept is not crucial to the application of discrimination law because the 2008 Discrimination Act - apart from the discrimination ban on goods, services and housing (Chapter 2 Section 12) - contains an explicit ban in relation to health and medical care (and social services) (Chapter 2 Section 13).

4. Protection of specific groups

The 2008 Discrimination Act covers, as stated above, among other grounds discrimination on the grounds of sex and transgender identity and expression. The latter is defined as ‘that someone does not identify herself or himself as a woman or a man or expresses by their manner of dressing or in some other way that they belong to

¹⁸⁹ MEMO/08/69, 31701/2008.

¹⁹⁰ Prop. 2007/08:95 p. 518.

¹⁹¹ Swedish Code of Statutes 2008:568.

another sex' (Chapter 1 Section 5.2). As regards gender reassignment it is expressly stated that 'a person who intends to change or has changed the sex they belong to is also covered by sex as a grounds of discrimination' (Chapter 1 Section 5 Paragraph 2). The ban on discrimination in Chapter 2 of the 2008 Discrimination Act as such does not make explicit reference to the different grounds, however, but it is in this respect 'implicit' in their design. This legal technique may be considered to make the law less transparent. This is a general remark, however, and not something that especially concerns sex and the other groups referred to here. With special reference to pregnant women and women who have recently given birth they can be said to be generally covered by the concept of sex discrimination and thus literally only 'implicitly' protected. In my opinion, this deserves to be criticized as a less transparent way of regulation. The implementation in this respect was also questioned by the European Commission.¹⁹²

5. Definitions of pregnancy and maternity

Sweden has not defined pregnancy and maternity in relation to access to and supply of goods and services as distinct from sex as the general ground. Pregnancy and maternity are only implicitly covered by the general ban on discrimination in relation to goods and services on (among other grounds) the grounds of sex in Chapter 2 Section 12 of the 2008 Discrimination Act – see further above. The construction of the ban on discrimination in general, without explicit reference to any ground whatsoever, makes it less transparent. This is much more the case as regards pregnancy and maternity protection being 'hidden' behind the general ground 'sex'. Despite this, the design of the 2008 Discrimination Act is thus to state separate bans for each and every covered area of society – employment, goods and services, etc.

Having said this, there is, to my knowledge, nothing to confirm discriminatory practices of greater concern as regards pregnant or breastfeeding women in Swedish society. However, a number (8) of claims of alleged discrimination as regards (the denial of) payment of sickness benefits in cases of health problems during pregnancy are currently pending before the Swedish domestic courts, the victims being represented by the EOO. The opposing party is the Swedish Social Insurance Agency (*Försäkringskassan*) applying the general social insurance sickness benefits scheme in an allegedly discriminatory way. The cases are expected to be settled in late 2009.

6. Use of a comparator

The direct discrimination concept used in the 2008 Discrimination Act, generally speaking, does not require a comparator but applies whenever someone is being treated less favourably than someone else 'is treated, has been treated or would have been treated' in a comparable situation (Chapter 1 Section 4.1).

7. Actions against failure to implement the Directive

To my knowledge, there are no examples of actions which have been brought against Sweden for failure to implement the Directive.

8. Enforcement by equality bodies

The competence of the Equality Ombudsman is quite broadly formulated. She (as is the case) may bring a court action on behalf of an individual victim who consents to this, but also has the duty to supervise compliance of the 2008 Discrimination Act

¹⁹² MEMO/08/69, 31701/2008.

more generally. To this end, there is an obligation on any (natural or legal) person who is subject to the prohibitions of discrimination to provide the information requested by the Ombudsman in relation to supervision with a possibility of financial penalty in cases of non-compliance. However, the Ombudsman is expected to 'try in the first instance to induce those to whom the Act applies to comply with it voluntarily'. Non-compliance with the duties on active measures in Chapter 3 of the 2008 Discrimination Act can be brought before the special Board against Discrimination and is sanctioned by a financial penalty. In other cases the Ombudsman may give an opinion. Such an opinion is not legally binding, however, nor linked to any sanctions. A legal claim requires an actual victim.

9. Discrimination based on association/perceived status

There are no express rules that prohibit the discrimination based on association or perceived status. However, the ban on discrimination (on all covered grounds) applies to any discriminatory practice 'associated with' sex, etc. This covers both the situations referred to in the question, i.e. association with a covered person as well as perceived sex or transsexual status.

10. Protection of women regarding pregnancy and maternity

The ban on discrimination in the area of goods, services and housing in Chapter 2 Section 12 of the 2008 Discrimination Act has an express exception with reference to sex – implicitly covering pregnancy and maternity – which reads: 'The prohibition of discrimination associated with sex does not (...) prevent women and men being treated differently with regard to other services or housing if there is a legitimate purpose and the means that are used are appropriate and necessary to achieve that purpose'. There is a corresponding exception to the ban on discrimination in the area of health and medical care and social services in Chapter 2 Section 13. These national exception rules seem to be intrinsically based on Articles 4(2), 4(5) and 6 in the Directive.

11. Exceptions to the principle of equal treatment (Article 4(5))

The ban on discrimination in the area of goods, services and housing in Chapter 2 Section 12 of the 2008 Discrimination Act has an express exception with reference to sex – implicitly covering pregnancy and maternity – which reads: 'The prohibition of discrimination associated with sex does not (...) prevent women and men being treated differently with regard to other services or housing if there is a legitimate purpose and the means that are used are appropriate and necessary to achieve that purpose'. This rule (as indicated above) seems to be based on Articles 4(2), 4(5) and Article 6 in the Directive in an intrinsic way.

In the *travaux préparatoires*, sheltered living for female victims of domestic violence is especially mentioned as an example when the exception rule concerning housing/services can be applied. The exception rule concerning health and medical care including social services is exemplified by special institutions/care units for 'battered' women. There is no case law concerning transsexual people but here it can be mentioned that the Equal Opportunities Ombudsman in one particular case found the need to create 'a sheltered zone' for lesbian women to justify a 'ladies only' night at a night club. A man being denied entrance was thus not found to amount to discrimination.

12. Positive action

As regards education there is an express rule in Chapter 2 Section 6.1 stating that the prohibition of discrimination does not prevent ‘measures that contribute to efforts to promote equality between women and men in admissions to education other than basic schooling’. Otherwise, compare the information under 11 above. There is thus no express reference to positive action in the areas of goods and services and health and medical care, respectively, but an exception to the ban on discrimination much in the wording of Article 4(5) of the Directive also covering – in my opinion – positive action measures.

13. Burden of proof

The principle of the reversed burden of proof is regulated in Chapter 6 Section 3 of the 2008 Discrimination Act and applies generally in cases of alleged discrimination. Generally speaking, this is a principle of the utmost importance as regards the possibility to prove any form of discrimination. This also goes for the area of goods and services, in my opinion. There is, however, little experience so far in the form of case law etc. to build on.

14. Harassment, instruction to discriminate and victimisation

Harassment on the grounds of sex and/or sexual harassment in the area of education under the Discrimination of Children and Pupils Act (2006:67) were the subject of a number of complaints to the EOO during the period 2006-2008.¹⁹³ There are, however, to my knowledge, no examples of alleged harassment in the area of goods and services.

There are, to my knowledge, no concrete examples of instructions to discriminate that have been brought to justice.

To my knowledge, there are no concrete examples of victimisation in the context of goods and services.

15. Overall assessment

It is only natural that the 2008 Discrimination Act – entered into force on 1 January 2009 – so far has had little or no impact in Swedish society. However, with regard to of this report, much the same legislation was previously found in the Prohibition of Discrimination Act (2003:307) as well as two other acts (also) prohibiting sex discrimination in education. Still, case law of relevance is scarce or non-existent.

However, over the years a number of complaints have been presented to the former Equal Opportunities Ombudsman. Parts of these complaints and their outcome were presented in *Sex-segregated Services* (Swedish national report).¹⁹⁴ Of relevance to this report is the considerable number of complaints by women having been denied use of public and private swimming-pool facilities when bathing top-less. The EOO’s decision in Case 998/2007 (2007-11-30) concerns top-less swimming by two women in a public swimming-pool facility. The EOO found that not allowing top-less swimming in the facility was within the exception in Section 9 Paragraph 2 of the 2003 Act and referred to the ‘reasons of privacy and decency’ argument on p. 16 of the preamble to the 2004/113/EC Directive. Another complaint with the EOO concerned a boy who was denied the purchase of a ‘leisure-activities card’ from his

¹⁹³ JämOs ‘testamente’ – en kort sammanfattning av 29 års verksamhet, Stockholm 2009, p. 15.

¹⁹⁴ European Network of Legal Experts in the field of Gender Equality, *Sex-segregated Services*, December 2008, European Commission, Directorate-General for Employment, Social Affairs and Equal Opportunities, Unit G/2.

municipality. This card gave free access for a limited period to try different leisure activities provided in the municipality by both private and public organisations and was available only to girls between 13 and 20 years old for the price of about EUR 5 (50 SEK). The general aim was to encourage larger numbers of girls, who were underrepresented, to participate in various sports activities. The practice was found to be within the exception rule in Section 9 of the Prohibition of Discrimination Act (2003:307) (now Chapter 2 Section 12 Paragraph 3 of the 2008 Discrimination Act). It should also be mentioned that the scope for positive action as regards sex and the admission to higher education is now the subject of pending cases at the Stockholm Local Court as well as with the EOO. Eight claims of discrimination as regards (the denial of) payment of sickness benefits in cases of health problems during pregnancy are also pending, the victims being represented by the EOO.

PART II: SCOPE OF NATIONAL LEGISLATION

1. Scope of national legislation beyond the scope of EU gender equality directives?

Swedish legislation goes beyond the requirements of the Directive 2004/113 in that discrimination is prohibited in the area of education not only on the grounds of ethnicity but also sex (among a number of other grounds, i.e. transgender identity and expression, religion or other belief, disability, sexual orientation and age). As regards higher education, this was previously regulated in the Equal Treatment of Students at Universities Act (2001:1286) and as regards other parts of the educational system such as basic education in the Act Prohibiting Discriminatory and Other Degrading Treatment of Children and Pupils (2006:67). Now, it is thus regulated in Chapter 2 Sections 5-8 in the 2008 Discrimination Act. According to Section 5 any natural or legal person conducting educational activities is prohibited to discriminate on the grounds of (among other grounds) sex, against any child, pupil or student participating in or applying for the activities. Section 6 provides exceptions for measures that contribute to efforts to promote equality between women and men in admissions to education other than basic education as well as differential treatment on the grounds of age. There is in this area also a legal obligation to investigate and take measures against harassment and a right to information about the qualifications of potential comparators (Sections 7 and 8). Chapter 3 contains rules on the duties to take active measures in the area of education such as equal treatment plans (Sections 14-16).

According to Chapter 2 Sections 13 and 14 of the 2008 Discrimination Act discrimination on the grounds of sex (among other grounds) is prohibited not only with regard to health and medical care (dealt with above) but also with regard to other social services and support (Section 13) as well as social insurance and related benefit systems, unemployment insurance, and state financial aid for studies (Section 14). As regards Section 14 the prohibition does not prevent the application of provisions concerning widow's pension, wife's supplement or payment of child allowance.

2. 'Hierarchy' of grounds

Equal treatment related to the various grounds with regard to the protection against discrimination has long been the ambition of the Swedish legislator. This argument was in fact an important one when merging all existing discrimination acts into the 2008 Discrimination Act, covering all grounds and areas of society. Despite this ambition, there are still considerable differences between the various grounds, as

regards the protection against discrimination, also according to the 2008 Discrimination Act. Generally speaking, however, sex as a ground is as well-protected as ethnicity, with the reservation that the scope for positive action is somewhat broader with regard to sex. The Swedish legislator has also made use of the possibility for exceptions as regards sex and insurance services, as well as with regard to widow's pensions, etc. (see above). The weakest protection applies to discrimination on the grounds of age.

Despite the ambitions of the Swedish legislator there are therefore obvious differences in the protection against discrimination on the various grounds. However, it is not the general picture that sex is less well-protected than any other ground, including ethnicity. On the contrary, the broader scope for positive action as regards sex, in my opinion, rather adds to the importance of coming to terms precisely with sex differentials in society. As regard the express exceptions with regard to insurance, etc., these are of course to the detriment of equal treatment on the grounds of sex.

3. Comments and/or suggestions

A worrying issue in the Swedish setting is the fact that a considerable number of examples of differential treatment on the grounds of sex in the area of services has become 'untouchable' due to the fact that the discrimination at hand is not found severe enough to prosecute or to render indemnification. An example is Case 833/2006(2006-12-20) before the Equal Opportunities Ombudsman where differential prices at a hairdresser were found to amount to discrimination but no action was taken since the damage caused upon the alleged victim was too small to render indemnification. Such practice calls into question whether Article 14 of the Directive is correctly implemented. To make Community law effective it seems to me that also when the economic damage is minor, the 'offence' suffered by the victim must be remedied.

UNITED KINGDOM – *Aileen McColgan*

PART I: *DIRECTIVE 2004/113/EC*

1. Transposition of Directive 2004/113/EC

The Sex Discrimination Act 1975, which is the legislation dealing with gender discrimination both in employment and more broadly, has been amended to implement Council Directive 2004/113/EC. This has consisted, for the most part, of amending definitions of indirect discrimination and the burden of proof, explicitly regulating harassment and sexual harassment, and extending the prohibition on sex discrimination to cover discrimination connected with gender reassignment, in each case where (broadly) the existing provisions of the Sex Discrimination Act 1975 overlap with the material scope of the Directive. Where the provisions of the SDA clearly go further than the Directive (in their application, for example, to education), the definition of indirect discrimination previously utilised by the SDA and the burden of proof remain unaffected, harassment and sexual harassment are not explicitly regulated and there is no prohibition on discrimination connected with gender reassignment. For this reason the amendments to the SDA, while improving protections in some areas, have only added to the complexity of the legislation.

2. Correct transposition?

The Government's view is that the legislation is in line with Council Directive 2004/113/EC and the approach has not been 'copied out' but instead (as above) has taken the form of amendments to the existing legislation. The Sex Discrimination Act in its pre-2007 form included a prohibition on sex discrimination in relation to goods and services and education *inter alia*, and on sex discrimination by public authorities in the carrying-out of their functions. The Sex Discrimination (Amendment of Legislation) Regulations 2007 amended the SDA as regards burden of proof, definition of indirect discrimination and the prohibition of harassment, but only (broadly speaking) within the material scope of Council Directive 2004/113/EC (employment-related discrimination having already been similarly dealt with by previous amending legislation). In distinguishing that which is and that which is not subject to the amended definition of indirect discrimination/burden of proof and prohibition on harassment, the 2007 amending Regulations defined a category of 'excluded matters' and otherwise followed (in broad terms) the EC approach to gender discrimination in the area of goods, services etc. regardless of whether such services etc. would in fact fall within the material scope of the Directive. This is further discussed in the following section. It should be noted, however, that the 2007 Regulations were adopted under the European Communities Act 1972 which provides for the amendment of primary legislation by Regulations (only) to the extent that the amendment is reasonably necessary to implement EC law. It follows that the courts will interpret such amending legislation narrowly insofar as it appears to go beyond that necessary for the transposition of the relevant EC provision(s).

3. Definitions of 'goods' and 'services'

Neither 'goods' nor 'services' are defined save as follows. Section 29 SDA, subsections (1) and (3) of which prohibit discrimination and harassment in connection with the provision of 'goods, facilities or services' by a person concerned with the 'provision (for payment or not) of goods, facilities or services to the public or a section of the public', provides (s.29(2)) 'examples of the facilities and services mentioned in subsection (1)' as follows:

- (a) access to and use of any place which members of the public or a section of the public are permitted to enter;
- (b) accommodation in a hotel, boarding house or other similar establishment;
- (c) facilities by way of banking or insurance or for grants, loans, credit or finance;
- (d) facilities for education;
- (e) facilities for entertainment, recreation or refreshment;
- (f) facilities for transport or travel;
- (g) the services of any profession or trade, or any local or other public authority.

The prohibition on harassment does NOT apply, however, in respect of any 'excluded matter', defined by Section 35ZA SDA to comprise:

- (a) education (including vocational training);
- (b) the content of media and advertisements;

- (c) the provision of goods, facilities or services (not normally provided on a commercial basis) at a place (permanently or for the time being) occupied or used for the purposes of an organised religion.

Discrimination on grounds of pregnancy and gender reassignment are generally prohibited by the SDA, but are not prohibited in relation to these 'excluded matters'.

Sections 30 and 32 prohibit discrimination and harassment in the disposal (whether by sale, renting or sub-letting) of premises subject to exceptions (Section 32) governing small premises in which the owner or a close relative will share common space with others.

'Goods' are limited not by any requirement as to payment, but by the restriction of the prohibition on discrimination to those who are involved in their supply (as with the provision of services or facilities) 'to the public or a section of the public'. This is a broad concept which includes service in wine bars (*Gill v El Vino Co Ltd* [1983] QB 425 CA, in which a woman was refused service unless she sat at a table when men were entitled to service at the bar); access to a private members' club to which non-members were admitted on payment of a fee (*Hector v Smethwick Labour Club and Institute* (29 November 1988) Lexis, CA); care provided by foster parents for a public authority (*Applin v Race Relations Board* [1975] AC 259 HL¹⁹⁵) and prison inmates' access to prison work (*Alexander v Home Office* [1988] 1 WLR 968, CA). 'The public or a section of the public' does not, however, include members of a club which imposes selection criteria (as in the case, for example, of a Conservative Club: *Charter v Race Relations Board* [1973] AC 868, HL, or a 'working men's club': *Dockers' Labour Club and Institute Ltd v Race Relations Board* [1976] AC 285, HL). The gap which was regarded as unacceptable in the context of the Race Relations Act 1968 was filled, in the RRA 1976, by a provision applicable to clubs having in excess of 25 members. No such provision is contained in the SDA though the Government has indicated its intention to amend the sex discrimination legislation so as to apply to large clubs, while permitting to exist those which are single sex. (In other words, a golf club which admits women will have to treat them as it treats men, but it will remain lawful for a golf club to refuse to admit women as long as it provides services only to its members.)

Over and above the prohibitions on discrimination in relation to 'goods, facilities and services' and premises, the SDA regulates discrimination by public authorities in the carrying out of their functions (Section 21A). The reason for this additional provision is an old decision by the House of Lords (*in Re Amin* [1983] 2 AC 818, HL) that Section 29 SDA applied only to acts of public authorities 'which are of a kind similar to acts that might be done by a private person'. Section 21A SDA now prohibits discrimination and harassment by public authorities subject to a number of exceptions which are explicitly stated NOT to permit (Section 21A(4)) 'anything which is prohibited by virtue of any Community law relating to discrimination'. Otherwise the exceptions cover, *inter alia*, legislative and functions, some decisions connected with criminal proceedings, the provision of some sex-segregated services and positive action.

4. Protection of specific groups

See point 5 below.

¹⁹⁵ This case arose under the materially identical provisions of the Race Relations Act 1976 which was subsequently amended (Section 23(2)) to provide an exemption for foster parents.

5. Definitions of pregnancy and maternity

As amended, the SDA now provides (Section 2A) that:

- (1) A person ('A') discriminates against another person ('B') in any circumstances relevant for the purposes of (...)
- (aa) Section 29, 30 or 31, except in so far as it relates to an excluded matter (...)
if he treats B less favourably than he treats or would treat other persons, and does so on the ground that B intends to undergo, is undergoing or has undergone gender reassignment.

Section 3B of the Act as amended provides as follows:

- (1) In any circumstances relevant for the purposes of a provision to which this subsection applies, a person discriminates against a woman if he treats her less favourably—
 - (a) on the ground of her pregnancy, or
 - (b) within the period of 26 weeks beginning on the day on which she gives birth, on the ground that she has given birth.
- (2) A person (P) is taken to discriminate against a woman on the ground of her pregnancy if—
 - (a) P refuses to provide her with goods, facilities or services because P thinks that providing them would, because of her pregnancy, create a risk to her health or safety, or
 - (b) P provides or offers to provide them on conditions intended to remove or reduce such a risk because P thinks that provision of them without the conditions would create such a risk.
- (3) Subsection (2) does not apply if—
 - (a) it is reasonable for P to think as mentioned in paragraph (a) or (b), and
 - (b) P applies an equivalent policy.
- (4) An equivalent policy is—
 - (a) for the purposes of subsection (2)(a), refusing to provide the goods, facilities or services to persons with other physical conditions because P thinks that to do so would, because of such physical conditions, create a risk to the health or safety of such persons;
 - (b) for the purposes of subsection (2)(b), imposing conditions on the provision of goods, facilities or services to such persons which are intended to remove or reduce the risk to their health or safety because P thinks that the provision without the conditions would create such a risk.
- (5) Subsection (1) applies to Sections 29 to 31, except in so far as they relate to an excluded matter.

Explicit protection is, therefore, accorded in relation to pregnancy/maternity and gender reassignment, though only in the case of maternity for a period of six months and not, as yet explicitly in relation to breast feeding. The Government has however announced its intention to prohibit bans on breast feeding in public places.

It is hard to give a general answer to the question: How does in my opinion discrimination in relation to pregnancy and maternity take place in the goods and services context. On the one hand, the general expectation (increasingly ignored by

some) is that visibly pregnant women ought to be offered seats on public transport, and that those with pushchairs ought to be accommodated on buses and in restaurants etc. On the other hand, society can make it difficult for heavily pregnant women and those with babies (and with small children generally) to have physical access to public spaces. Increased obligations on accommodation for disabled people have probably made things easier for heavily pregnant women and those with non-mobile children. It is rare in my view for the providers of goods or services to discriminate directly on grounds of pregnancy or maternity, though it is probable that some discrimination takes place in the form of well-intentioned prohibitions on visibly pregnant women participating in certain activities regarded, rightly or wrongly, as threatening to the health of their unborn babies. Also arguably a form of pregnancy discrimination is the fact that abortion is unlawful in Northern Ireland, and can be difficult for women elsewhere to access on the NHS.

6. Use of a comparator

In the definitions of pregnancy and maternity, a comparator is not explicitly used. The words ‘on the ground of’ and ‘less favourably’ might be regarded as requiring some kind of comparison. On the other hand, Section 3B is in materially similar terms to Section 3A (which defines pregnancy discrimination in employment) and which was amended following legal action by the-then Equal Opportunities Commission (now absorbed into the Equality and Human Rights Commission) to give effect to a judicial decision to the effect that no comparator was required for a pregnant woman (*Equal Opportunities Commission v Secretary of State for Trade and Industry* [2007] IRLR 327). Section 3A had previously provided for a comparison between the treatment accorded a pregnant woman and that she would have received had she not been pregnant. When the Administrative Court ruled that the SDA had to be amended (in relation to employment) ‘so as to eliminate the statutory requirement for a comparator who is not pregnant or who is not on maternity leave’ the explicit requirement for a comparator was abandoned in the text of Section 3A SDA and Section 5(3)(2) of the SDA, which deals with appropriate comparators, does not refer to Section 3A or 3B of the Act. The better view is that, properly interpreted, Section 3B SDA does not require a comparison.

7. Actions against failure to implement the Directive

No cases have been brought to date against the UK for the failure to implement the Directive as far as I am aware. The fact that such cases have to be brought in the County Court, in which losers are responsible not only for their own costs but for those of their opponents, is a significant deterrent to litigation in this area while the absorption of the Equal Opportunities Commission (which was concerned only with sex discrimination) into the Equality and Human Rights Commission (which deals also with discrimination on grounds of race, disability, religion or belief, sexual orientation and age, as well as with human rights) may have had an impact on the prioritisation of funding and encouragement of goods and services cases under the SDA. There are no obvious gaps as far as transposition goes, though the definition of indirect discrimination utilized in the SDA are arguably incorrect as a matter of EC law (Section 1(2) SDA, which applies to goods and services as well as to employment, provides that ‘In any circumstances relevant for the purposes of a provision to which this subsection applies, a person discriminates against a woman if (...) (b) he applies to her a provision, criterion or practice which he applies or would apply equally to a man, but— (i) which puts or would put women at a particular

disadvantage when compared with men, (ii) which puts her at that disadvantage, and (iii) which he cannot show to be a proportionate means of achieving a legitimate aim'. It is possible that this definition provides for easier justification than the Directive, though it must be interpreted in conformity with EC law).

8. Enforcement by equality bodies

In some cases the designated equality body has the competence to bring enforcement actions in the public interest. Sections 37-40 SDA prohibit, respectively, discriminatory practices, discriminatory advertisements, pressure to discriminate and instructions to discriminate. These sections may only be enforced by the Commission. None of them require a victim as such. A 'discriminatory practice' is defined by Section 37(1)(a) SDA so as to apply only to *indirectly* discriminatory practices ('the application of a provision, criterion or practice which results in an act of discrimination which is unlawful by virtue of (...) Section 1(2)(b) or 3(1)(b) [indirect discrimination] or which would be likely to result in such an act of discrimination if the persons to whom it is applied were not all of one sex'). A discriminatory advertisement is defined by Section 38 SDA(1) as 'an advertisement which indicates, or might reasonably be understood as indicating, an intention by a person to do any act which is or might be unlawful by virtue of' the SDA. Section 39 provides that '(1) It is unlawful for a person— (a) who has authority over another person, or (b) in accordance with whose wishes that other person is accustomed to act, to instruct him to do any act which is unlawful by virtue of [the SDA], or procure or attempt to procure the doing by him of any such act'. Finally, Section 40 SDA provides that '(1) It is unlawful to induce, or attempt to induce, a person to do any act which contravenes [the SDA] by— (a) providing or offering to provide him with any benefit, or (b) subjecting or threatening to subject him to any detriment'. While Sections 39 and 40 (which have given rise to almost no litigation) may be taken to require that there is a victim, albeit not one who is required him or herself to litigate, it seems clear from the text of Sections 37 and 38 SDA that they can be breached regardless of whether anyone is actually discriminated against. In addition, there have been a number of cases in which the EOC has successfully brought proceedings in judicial review (i.e., challenge to the actions of a public authority) seeking declarations that the actions of a public authority are contrary to the SDA. These cases, which have not always involved a named individual victim, have included *R v Birmingham City Council ex parte EOC* [1989] AC 1155, HL, in which the EOC challenged the practice of operating different examination pass marks for girls and boys.¹⁹⁶ The SDA prohibited direct and indirect sex discrimination by local education authorities, direct discrimination being defined in the context of education (as elsewhere) as occurring where 'on the ground of her sex [the discriminator] treats [a woman] less favourably than he treats or would treat a man'. Similarly in *Re EOC for Northern Ireland's Application* [1989] IRLR 64 Northern Ireland's High Court ruled that the local equivalent of the SDA was breached by the operation by the Northern Ireland Government of differential pass marks for girls and boys in the '11 plus' exam, where such discrimination was intended to ensure similar numbers of girls and boys progressing to grammar school. And in *R v Secretary of State for Employment ex parte EOC* [1994] ICR 317 the House of Lords confirmed that the EOC had standing

¹⁹⁶ This where there were more places available for boys than for girls at the academically selective schools operated by the Council.

on its own behalf to challenge subordinate legislation which discriminated, contrary to EC law, on grounds of sex.

9. Discrimination based on association/perceived status

Discrimination based on association or perceived status has not as yet been prohibited. The Government has indicated its intention to extend the prohibition on discrimination on grounds of gender reassignment to discrimination arising from the victim's perceived sexual status *but NOT perceived sex*. The implications of *Coleman* are under review as regards associative discrimination at least in relation to gender reassignment.

10. Protection of women regarding pregnancy and maternity

The SDA provides (Section 2(1)) that 'special treatment afforded to women in connection with pregnancy or childbirth' does not amount to sex discrimination against men. This provision has been in place since the SDA was passed.

11. Exceptions to the principle of equal treatment (Article 4(5))

The United Kingdom has exceptions to the principle of equal treatment. Section 29(3) provides that:

- (3) For the avoidance of doubt it is hereby declared that where a particular skill is commonly exercised in a different way for men and for women it does not contravene subsection (1) for a person who does not normally exercise it for women to insist on exercising it for a woman only in accordance with his normal practice or, if he reasonably considers it impracticable to do that in her case, to refuse or deliberately omit to exercise it.

In addition there is the small premises exception provided to the prohibition on discrimination in connection with premises (mentioned above) together with further exceptions provided by Sections 34 and 35 SDA:

34 Exception for voluntary bodies

- (1) This section applies to a body—
 - (a) the activities of which are carried on otherwise than for profit, and
 - (b) which was not set up by any enactment.
- (2) Sections 29(1) and 30 shall not be construed as rendering unlawful—
 - (a) the restriction of membership of any such body to persons of one sex (disregarding any minor exceptions), or
 - (b) the provision of benefits, facilities or services to members of any such body where the membership is so restricted, even though membership of the body is open to the public, or to a section of the public.
- (3) Nothing in Section 29 or 30 shall—
 - (a) be construed as affecting a provision to which this subsection applies, or
 - (b) render unlawful an act which is done in order to give effect to such a provision.
- (4) Subsection (3) applies to a provision for conferring benefits on persons of one sex only (disregarding any benefits to persons of the opposite sex)

which are exceptional or are relatively insignificant), being a provision which constitutes the main object of a body within subsection(1).

- (5) Subsections (2) to (4) do not apply to discrimination under section 1 or 2A in its application to Sections 29 to 31 unless the treatment mentioned in those subsections is—
 - (a) a proportionate means of achieving a legitimate aim, or
 - (b) for the purpose of preventing or compensating for a disadvantage linked to sex.

35 Further exceptions from Sections 29(1) and 30

- (1) A person who provides at any place facilities or services restricted to men does not for that reason contravene Section 29(1) if any of the conditions in subsections (1A) to (1C) is satisfied.
 - (1A)The condition is that the place is, or is part of—
 - (a) a hospital, or
 - (b) any other establishment for persons requiring special care, supervision or attention.
 - (1B)The condition is that the place is (permanently or for the time being) occupied or used for the purposes of an organised religion, and the facilities or services are restricted to men so as to comply with the doctrines of that religion or avoid offending the religious susceptibilities of a significant number of its followers.
 - (1C)The condition is that the facilities or services are provided for, or are likely to be used by, two or more persons at the same time, and—
 - (a) the facilities or services are such, or those persons are such, that male users are likely to suffer serious embarrassment at the presence of a woman, or
 - (b) the facilities or services are such that a user is likely to be in a state of undress and a male user might reasonably object to the presence of a female user.
- (2) A person who provides facilities or services restricted to men does not for that reason contravene Section 29(1) if the services or facilities are such that physical contact between the user and any other person is likely, and that other person might reasonably object if the user were a woman.
- (2A)In their application to discrimination falling within Section 2A, subsections (1A), (1C) and (2) shall apply to the extent that any such discrimination is a proportionate means of achieving a legitimate aim (...)

No special provision is made in this connection with transsexual people.

12. Positive action

The United Kingdom has, as such, not used the positive action provision. Positive action is generally unlawful under the SDA.

13. Burden of proof

The same reversal of proof is applied as in Article 9 of the Directive. There has not been any litigation to speak of, so the importance of this provision is difficult to assess.

14. Harassment, instruction to discriminate and victimisation

I am not aware of any concrete examples of harassment or sexual harassment, and there has been no reported litigation in this area as yet. It is commonplace, however, for women to be subject to unwanted attention in bars and clubs etc. (though this generally at the hands of customers rather than staff). There are reports from time to time of unwanted sexual contact between women and professionals such as doctors, counsellors etc. but I can't provide any specific examples of use.

I am not aware of any concrete examples of instructions to discriminate in the context of sex discrimination. There have been a number of cases under the RRA involving the issue of racist instructions to customer-facing staff.

I am not aware of any concrete examples of victimisation in the context of goods and services.

15. Overall assessment

The impact in my view has been limited to date because of the exceptions relating to insurance, the existing legislation and the difficulties of litigating in this area.

PART II: *SCOPE OF NATIONAL LEGISLATION*

1. Scope of national legislation beyond the scope of EU gender equality directives?

The national legislation of the United Kingdom goes beyond the scope of existing EC gender equality directives insofar as the SDA regulates discrimination in education, to a degree at least, discrimination in relation to the contents of media and advertising, and (in express terms) discrimination in relations to goods, services and facilities which are not provided on a commercial basis. The area of social advantages is more difficult because the concept is uncertain. To the extent that such advantages fall within the functions of public authorities they are covered by the prohibition on discrimination in Section 21A SDA, subject to the (many) exceptions thereto (see above). In particular, other legislation, including subordinate legislation, can override the prohibition on sex discrimination.

2. 'Hierarchy' of grounds?

There is a hierarchy of grounds inasmuch as race attracts more protection than any other ground including sex. The practical problems resulting from this concern, mainly, the complexity of anti-discrimination legislation. In the UK sex and disability discrimination occupy the rung below race in terms of protection from discrimination, with sexual orientation and religion or belief below and age at the bottom of the hierarchy as regards protection from discrimination.

3. Comments and/or suggestions

No further comments and/or suggestions.

Annex I

Questionnaire for the report *Gender Equality in the Access to and Supply of Goods and Services in the areas of Health Care, Social Services, Housing, Education, Media and Transport*

Drafted by Susanne Burri, Aileen McColgan and Sybe de Vries

Introduction

This report by the European Network of Legal Experts in the field of Gender Equality should address, in particular, the issue of gender equality in the access to and supply of goods and services in the areas of health care, social services¹ (including leisure services), housing, education, media and transport, both in the public and private sector. This report should cover existing anti-discrimination legislation and case law at the national level. It will address issues which have not yet been dealt with in recent reports published by the European Commission on the principle of equal treatment between men and women in areas outside the field of employment.² In particular, issues raised in the report of the European Network of Legal Experts in the field of Gender Equality on Sex-segregated Services; the access to and supply of services in the area of financial services and insurances;³ and social protection as far as it is addressed in a report for which the European Commission issued a tender⁴ do **not** need to be covered. As regards gender reassignment, this issue will be covered by a specific report by the anti-discrimination network and will therefore to a large extent be omitted in this report.

The report will include a general introduction with a review of existing EU law and an analysis of the main findings and the national contributions of the legal experts.

The report has two aims. The **primary aim** is to deepen the Commission's understanding of how Directive 2004/113 has been implemented in the Member

¹ The Commission would particularly like to receive information regarding the provision of homes for those who have suffered domestic violence, counselling services provided to victims of domestic violence and single-sex care homes.

² See in particular the report: Aileen McColgan, Jan Niessen & Fiona Palmer, December 2006 *Comparative Analyses on National Measures to Combat Discrimination outside Employment and Occupation*. Mapping study on existing national legislative measures – and their impact in – tackling discrimination outside the field of employment and occupation on the grounds of sex, religion or belief, disability, age and sexual orientation, VT/2005/062, December 2006, available at: http://ec.europa.eu/employment_social/fundamental_rights/pdf/pubst/stud/mapstrand1_en.pdf, accessed 11 December 2008.

³ This area will be addressed in another study.

⁴ See the tender for a *Study on gender dimension and on discrimination in social protection* at: http://ec.europa.eu/employment_social/emplweb/tenders/tenders_en.cfm?id=3805, accessed 15 December 2008. This study will cover issues like pensions and unemployment benefits. See also, in relation to healthcare, the Eurostudy report at http://www.ilga-europe.org/europe/publications/non_periodical/transgender_eurostudy_legal_survey_and_focus_on_the_transgender_experience_of_health_care_april_2008, accessed 16 December 2008.

States and the EEA countries.⁵ The **secondary aim** is to analyse the extent of any remaining gaps between the scope of the existing gender equality directives and that of the Race Directive (2000/43).⁶ The outcomes of this analysis will ultimately also help the Commission to assess whether modifications to the Directive are desirable.

Taking first the **primary aim** of the report, the analysis is intended to assist the Commission in drafting the implementation report on Directive 2004/113, as required according to Article 16 (2) and (3) of this Directive. The report of the European Network of Legal Experts in the field of Gender Equality should provide an overview on how Directive 2004/113 has been implemented in the Member States in order to help the Commission to analyse whether it would be necessary to take the first steps towards infringement proceedings. This analysis by the Commission may include proposals for a modification of the Directive, or identify problem areas in the Directive where reform may need to be considered. In this part of the report, the information provided by the legal experts in the *Extended ad hoc request Directive 2004/113/EC* {REF EMPL REG/EMPL/H/3/ARC(2007)D/4654} will be updated and completed.⁷ This part of the report should provide an overview of the current situation and identify possible gaps as regards the transposition of Directive 2004/113. Member States were obliged to implement the Directive by 21 December 2007.⁸

It is difficult to delimit precisely the scope of the obligations of the Member States as regards the transposition of Directive 2004/113 in relation to the scope of the existing provisions and other gender equality directives. The scope of the existing provisions is not yet clear. Directive 2004/113, for example, provides (in recital 11) that ‘Goods should be taken to be those within the meaning of the provisions of the Treaty establishing the European Community relating to the free movement of goods. Services should be taken to be those within the meaning of Article 50 of that Treaty.’ Determining the precise scope of the ‘goods’ and ‘services’ falling within the Directive requires an analysis of the case law of the ECJ, a brief outline of which follows.⁹

Goods:

The ECJ has ruled that ‘by goods, within the meaning of (Article 23 EC, *SdV*), there must be understood products which can be valued in money and which are capable, as such, of forming the subject to commercial transactions’.¹⁰ ‘Goods’, then, can be assigned a monetary value and commercially traded, and otherwise consist of any

⁵ 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, OJ L 373, 21.12.2004, p. 37–43.

⁶ Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L 180, 19.7.2000, p. 22–26.

⁷ Commission’s Network of legal experts in the field of employment, social affairs and equality between men and women, Access to Goods and Services: Implementation of Directive 2004/113/EC, March 2007, available at: <http://ec.europa.eu/social/main.jsp?catId=641&langId=en&moreDocuments=yes>, accessed on 28 May 2009.

⁸ Though note that a further two-year implementation period was permitted in respect of Article 5(3) of the Directive concerning insurance and related costs relating to pregnancy and maternity.

⁹ This summary was provided by Dr Sybbe de Vries, Associate Professor at the Faculty of Economics, Law and Governance, Utrecht University, the Netherlands.

¹⁰ Case 7/68, *Commission v Italy (Italian Arts Treasures)*; see also Case C-2/90, *Commission v Belgium (Walloon Waste)*. See more generally about the meaning of goods: P. Oliver (assisted by Malcolm Jarvis), *The Free Movement of Goods in the European Community* (Oxford University Press, Oxford, 2003), pp. 16–23.

tangibles (movable or immovable) other than means of payment or live human beings.¹¹ Depending on their commercial value, for example, cultural goods such as paintings or other works of art, goods such as narcotic drugs,¹² and waste products (whether recyclable or not) are considered goods within the meaning of the Treaty. It appears from the case law that electricity amounts to ‘goods’ for the purposes of EC law,¹³ whereas television signals are instead classified as ‘services’.

Services

‘Services are provided for remuneration and, for the purposes of Article 49, include even activities of particularly sensitive character such as lotteries’. In *Schindler* the ECJ stated that ‘like amateur sport, a lottery may provide entertainment for the players who participate. However, that recreational aspect of the lottery does not take it out of the realm of the provision of services. Not only does it give the players, if not always a win, at least the hope of a win, it also yields a gain for the operator (...)’.¹⁴

From cases such as *Luisi and Carbone*, *Grogan*¹⁵ and, in particular, *Kohll*, *Smits & Peerbooms*, *Müller-Fauré* and *Watts* it is clear that, for example, medical activities are generally considered to be services within the meaning of Articles 49 and 50 EC.¹⁶ In the *Smits and Peerbooms* judgment the ECJ ruled that Dutch hospital services constituted economic activities within the meaning of Article 50 EC,¹⁷ the special nature of certain services not removing them from the ambit of the fundamental principle of free movement.

Article 50 EC does not require that the service be paid for by those for whom it is performed. In *Müller-Fauré* the ECJ made clear that medical services are not excluded from the scope of EC law because they are paid for by a national health service or by a system providing benefits in kind. What is relevant is that the patient goes to his or her medical service provider of choice in a Member State other than that of his or her affiliation. The ECJ also held that there was no need, in determining whether the principle of free movement of services applied, to distinguish cases in which the patient pays the costs incurred and subsequently applies for their reimbursement, from those in which the sickness fund or the national budget pays directly to the provider.¹⁸

It is not surprising, therefore, that the ECJ in *Watts* concluded that ‘Article 49 EC applies where a patient such as Mrs Watts receives medical services in a hospital

¹¹ Oliver (assisted by Malcolm Jarvis), op. cit., p. 23.

¹² Case C-324/93, *Evans Medical*, paragraph 20: ‘According to the Court’s case law, goods taken across a frontier for the purposes of commercial transactions are subject to Article 30 of the Treaty, whatever the nature of those transactions. Since they have those characteristics, the drugs covered by the Convention and marketable under it are subject to Article 30.’

¹³ E.g. Case C-393/92, *Almelo v Energiebedrijf IJsselmij*. Oliver (assisted by Malcolm Jarvis), op. cit., p. 23.

¹⁴ Case C-275/92, *Schindler*, paragraph 34.

¹⁵ Joined Cases 286/82 and 26/83, *Luisi and Carbone*; case C-159/90, *The Society for the Protection of Unborn Children Ltd./Stephen Grogan a.o.*

¹⁶ In the *Grogan* case the ECJ held that a medical termination of pregnancy, performed in accordance with the law of the state in which it is carried out, constitutes a service within the meaning of Article 50 of the Treaty; the provision of information about the identity and location of clinics in Member States providing abortions, though, was not considered to be an economic activity because it was not distributed on behalf of an economic operator established in another Member State, but by a students’ union: see Case C-159/90, *Grogan*.

¹⁷ With regard to the applicability of the freedom of services to public health care: annotation of Case C-385/99, *Müller-Fauré* by M. Flear, *CMLRev.*, 2004, pp. 217-223; S.A. de Vries, *Patiëntenzorg in Europa na Watts; wiens zorg?*, SEW 2007, pp. 132-140.

¹⁸ Case C-385/99, *Müller-Fauré*, para. 103.

environment for consideration in a Member State other than her State of residence, regardless of the way in which the national system with which that person is registered and from which reimbursement of the cost of those services is subsequently sought operates'. The fact that the reimbursement of the hospital treatment in question is subsequently sought from a national health service which is funded from the public purse (e.g., the NHS in the United Kingdom) is, according to the ECJ, irrelevant.¹⁹

Since the case law concerns cross-border provision of medical services, it is unclear whether, for example, hospital services provided in the context of the NHS in the UK would be considered services within the meaning of Articles 49 and 50 EC, since they are provided 'free of charge' and the NHS is organised as a wholly public system. After all, the Treaty provisions on free movement will only apply if intra-Community trade is affected. In other words, for a national measure to fall within the scope of the prohibitive provisions on free movement, like Article 49 EC, a transfrontier element should be established. The question of whether NHS services provided to UK citizens in the UK should be excluded from the ambit of the EC Treaty has not been addressed by the ECJ. According to AG Geelhoed in *Watts*, though, the special nature of the service, or the fact that certain services are provided in a wholly public context are not reasons in themselves to exclude them from the scope of Article 49 EC.²⁰ Furthermore, he held that irrespective of whether NHS services are services within the meaning of EC law, it is not the NHS services that are at issue here, but the cross-border provision of medical care.²¹

Brief assessment

The text above illustrates a difficulty in the case law, namely, that services provided in the national context only (such as by the NHS) may not be regarded as 'services' for the purposes of the Treaty, but that the same services become 'services' for the purposes of the Treaty as soon as there is a cross-border element. The reference in the preamble to Directive 2004/113 to Article 50 of the Treaty suggests, but (we suggest) it should not in fact be taken to mean that gender discrimination is prohibited only in relation to cross-border services.

The other difficulty posed by the case law concerns the meaning of 'remuneration'/ economic character of services. There is some case law on education (which is largely outside the material scope of the directives) which can provide some general guidance on this issue. The *Humbel* case, for instance, involved the payment of a fee (the minerval) charged to nationals of other Member States (other than Belgium) for access to a State educational establishment. The question was whether courses taught in a technical institute, which formed part of the secondary education provided under the national education system, were to be regarded as 'services' within the meaning of Article 49 EC. The Court held that the essential characteristic of remuneration was absent in the case of courses provided under the national education system. 'First of all, the State, in establishing and maintaining such a system, is not seeking to engage in gainful activity but is fulfilling its duties towards its own population in the social, cultural and educational fields. Secondly, the system in question is, as a general rule, funded from the public purse and not by pupils or their parents.'²² In *Wirth* the Court took a similar approach, but made it clear that, when courses are given in establishments of higher education which are financed essentially

¹⁹ Case C-372/04, *Watts*, para. 90.

²⁰ See the Opinion of AG Geelhoed in Case C-372/04, *Watts*, para. 58.

²¹ Opinion of AG Geelhoed, op. cit., para. 60.

²² Case 263/86, *Humbel*, paragraph 18.

out of private funds, in particular by students and their parents, and which seek to make a profit, they become ‘services’ within the meaning of Article 50 EC.²³ The *Neri* judgment, however, seems to suggest that the free movement rules can be relevant in a more general sense to the organization of education. The Court held that the organization for the remuneration of university courses is an economic activity falling within the scope of the freedom of establishment, Article 43 EC.²⁴

In other case law, in particular in the *Deliège* case concerning rules for the sport of judo, the Court held with respect to the meaning of ‘remuneration’ that it is not always necessary for services to fall within the scope of Articles 49 and 50 EC, i.e., that they are paid for by those for whom they are performed. In the case of competition rules applicable to judo, the ECJ held that ‘an organizer of such a competition may offer athletes an opportunity of engaging in their sporting activity in competition with others and, at the same time, the athletes, by participating in the competition, enable the organizer to put on a sports even which the public may attend, which television broadcasters may retransmit and which may be of interest to advertisers and sponsors’.²⁵ The ECJ also held that the work performed (or service provided) ‘must be genuine and effective and not such as to be regarded as purely marginal and ancillary’.²⁶

Lastly, it is important to note that in the *Jany* case the ECJ considered that prostitution, irrespective of whether it can be regarded as a commercial activity, ‘is an activity by which the provider satisfies a request by the beneficiary in return for consideration without producing or transferring material goods. Consequently, prostitution is a provision of services for remuneration, (...) which falls within the concept of ‘economic activities’.’²⁷ In defining the concept of economic activity, the ECJ referred to *Deliège* and held that ‘the provision of services for remuneration must be regarded as an economic activity within the meaning of Article 2 of the EC Treaty, provided that the work performed is genuine and effective and not such as to be regarded as purely marginal and ancillary’.²⁸

What becomes apparent from these cases is that the Treaty provisions on services are either triggered by the cross-border nature of the activity as a result of which the (even non-economic) service has to be paid for (and this should not be a relevant point for the purposes of Directive 2004/113); or by the service provider itself being engaged in economic activities, a concept which has been broadly defined by the ECJ.²⁹

The two factors on which the ECJ relied in *Humbel* to exclude the education there at issue from the scope of Article 49 (the absence of gainful intent and the fact of public funding) raise the question of how to classify ‘borderline’ services (e.g. social welfare services) for which some consideration is paid, but which are as such not really gainful or are, for instance, heavily subsidized.

In conclusion as regards what kind of activities should be considered to be services in the light of Directive 2004/113, as far as the concept has been developed by the ECJ,

²³ Case C-109/92, *Wirth*, paragraph 17.

²⁴ Case C-153/02, *Valentina Neri*, paragraph 39. This suggests that it is at least questionable whether *Humbel* is still standing case law, as AG Geelhoed remarked in his Opinion in *Watts*, para. (?)

²⁵ Joined Cases C-51/96 and C-191/97, *Deliège*, paras. 56 & 57.

²⁶ Joined Cases C-51/96 and C-191/97, *Deliège*, para. 54.

²⁷ Case C-268/99, *Jany*, paras. 48 & 49.

²⁸ Case C-268/99, *Jany*, para. 33.

²⁹ It is perhaps important to mention that also the Services Directive (hereafter: SD) defines ‘service’ as ‘any self-employed economic activity, normally provided for remuneration, as referred to in Article 50 of the EC Treaty’.²⁹ The above-mentioned case law of the ECJ is thus relevant for the scope of the SD; however, some activities which would normally fall within the scope of Article 49 EC have been expressly excluded from the scope of the SD (Article 2).

the law is still rather uncertain. In the field of anti-discrimination it is submitted that it cannot be correct to condition the prohibition of sex discrimination as regards the scope of Directive 2004/113 on the cross-border element. One of the aims of the report is to flush out how Member States have transposed this inherently difficult concept.

The **secondary aim** of the report is to analyse which gaps remain as regards the scope of all the existing gender equality directives, on the one hand, and that of the Race Directive (2000/43), on the other.³⁰ The material scope of the Race Directive is broader than that of the gender directives in relation to social protection (covered by Directive 2000/34 but not by Directive 79/7); social advantages (to the extent that they fall outside Article 141 EC, Directive 76/207 as amended, Directive 2006/54 and/or Directive 79/7); and access to and the supply of goods and services as far as they are not covered by Directive 2004/113 (e.g. education). According to the report *Comparative Analyses on National Measures to Combat Discrimination outside Employment and Occupation*,³¹ however, most Member States have legislation extending beyond the EU requirements in relation to sex discrimination.³² In order to identify remaining ‘gaps’ it is useful to have a clear overview of the areas in which the national legislation goes beyond existing gender equality EC legislation. For this reason it is necessary to adopt a broad approach to ‘goods and services’ in the questionnaire so as to include, in particular, health, social services, leisure services, housing, transport, and education and the media. The content of media and advertising and education are explicitly excluded from Directive 2004/113 (Article 3(3)), but it is not clear what is meant by ‘the content of media and advertising’ and gender equality directives (Directive 76/207 as amended by Directive 2002/73, and the Recast Directive (2006/54)) apply to vocational and occupational training, thereby bringing some sex discrimination in education within the scope of EC law.

Questions for the experts:

PART 1: TRANSPOSITION OF DIRECTIVE 2004/113

Directive 2004/113 had to be transposed by 21 December 2007.³³

The report should cover:

- Existing relevant national anti-discrimination legislation in relation to Directive 2004/113
- An overview of the most important and interesting existing case law in relation to such legislation
- An analysis of the particular difficulties which are met as regards the transposition of Directive 2004/113 and areas of concern.

1. Has legislation transposing Directive 2004/113/EC been adopted in your Member State/country? If yes, please identify that legislation. If no, please indicate if existing legislation is already considered to meet the requirements of the Directive or if

³⁰ Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L 180, 19.7.2000, p. 22–26.

³¹ Mapping study on existing national legislative measures – and their impact in – tackling discrimination outside the field of employment and occupation on the grounds of sex, religion or belief, disability, age and sexual orientation, *supra* note 2.

³² *Supra* note 2, p. 5.

³³ Except for Article 5(3) of the Directive, but Article 5 will not be explored in this paper.

legislation has been proposed and what stage it has reached in the legislative procedure.

2. In general, do you consider that your respective Member State/country has correctly transposed the relevant provisions of the Directive?

Has the transposition merely resulted in the provisions of the Directive being ‘copied verbatim’? If that is the case, do you consider this to be a substantive implementation or merely a presentational transposition? Please illustrate, if relevant, with specific examples where ‘a verbatim copy’ is not working.

3. Are the concepts of ‘goods’ and ‘services’ defined in the national legislation and/or in case law? If there is a definition, is it broader or narrower than the approach taken by the ECJ in the area of the free movement of goods and within the meaning of Article 50 TEC (see the short summary of the case law above)? Please identify any specific problems in relation to the national approach to the concepts of ‘goods’ and ‘services’.

4. Does your Member State/country provide for explicit protection for the following groups: transsexual people, pregnant women, women who have recently given birth? If implicit protection is provided, do you consider that the protection is sufficiently clear and precise so as to allow individuals to understand their rights and for goods and service providers to understand their legal obligations?

5. Has your Member State/country defined pregnancy discrimination and maternity discrimination in relation to access to and the supply of goods and services as distinct from the employment context? If not, and if your Member State is relying on a general prohibition of sex discrimination in its legislation, do you think there is sufficient clarity in the legislation for pregnant women or women in their maternity and goods and service providers to know their rights and obligations? How, in your opinion, does discrimination in relation to pregnancy and maternity take place in the goods and services context? In the access to or supply of goods and services, does your Member State provide any protection for women from discrimination related to their breastfeeding?

6. Is a comparator used in your Member State’s definitions of pregnancy and maternity?

7. Could you provide any details of any actions which have been brought against your Member State for failure to implement the Directive either by individuals, those supporting them, or the national equality body?

8. Does the designated equality body in your Member State have the competence to bring enforcement action in the public interest e.g. where there are discriminatory statements or practices hindering the access to and supply of goods and services, even in the absence of an actual victim?

9. Does your Member State expressly prohibit discrimination on the basis of *association with* a transsexual person or persons, or a person or persons of a particular

sex, and/or discrimination on grounds of *perceived* sex or transsexual status in access to goods and services?³⁴

10. Has your Member State sought to rely on Article 4(2) of the Directive? What examples do you have of more favorable provisions concerning the protection of women as regards pregnancy and maternity?

11. What concrete examples do you have of harassment and sexual harassment in the goods and services field?

12. Has your Member State relied on Article 4(5), and if so, in relation to which kind of situations? How is Article 4(5) interpreted in relation to transsexual people?

13. Has your Member State relied on the positive action provision in Article 6 and, if so, for which situations?

15. Please provide any concrete examples, of which you are aware, of instructions to discriminate cases in the area of goods and services?

16. Is the burden of proof in goods and services cases applied according to Article 9 and do you consider this rule to be just as important as in employment cases?

17. Please provide any concrete examples of victimisation in the context of goods and services?

18. What is your overall assessment of the impact which the Directive has had in your Member State? Has there been any substantial changes/improvement in terms of access to and the supply of goods and services irrespective of a person's sex?

PART 2: AREAS NOT YET COVERED BY GENDER EQUALITY DIRECTIVES

1. Do you consider that the national legislation of your Member State/country goes beyond the scope of existing EC gender equality directives and falls under the material scope of the Race Directive (2000/43)? Please describe these areas and provisions. (For example, education is explicitly omitted from the scope of Directive 2004/113 but is included in Directive 2000/43. You may also cover the area of social advantages, although note that a separate study will be conducted on protection against discrimination in the area of social protection³⁵.)

2. Some people suggest that a 'hierarchy' of grounds is being re-established, in that the overall level of protection for gender in access to and the supply of goods and services is lower than for race (and, in some respects, to that proposed in relation to

³⁴ The ECJ ruled in the *Coleman* (case C-303/06) that a mother of a disabled child enjoyed protection against discrimination on the ground of handicap (Directive 2000/78). The question here is whether Member States already cover associative and perceived sex and gender reassignment discrimination, or whether this is even considered to be a problem in terms of gender discrimination.

³⁵ See the detailed terms of reference and specifications under: http://ec.europa.eu/employment_social/emplweb/tenders/tenders_en.cfm?id=3805, accessed 15 December 2008.

the other protected grounds).³⁶ Do you consider this to be true in practice in your Member State/country? If so, what, in your view, are the practical problems resulting from this difference?

3. Do you have any other comment or suggestion?

³⁶ See COM 2008 (426).

Annex II

Selected Bibliography

Articles

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- D. SCHIEK, L. WADDINGTON and M. BELL eds., *Cases, materials and texts on national, supra-national and international non-discrimination law*, (Oxford: Hart Publishing 2007).

Links

See also for information on Gender equality the website of the European Commission:
<http://ec.europa.eu/social/main.jsp?catId=641&langId=en>
<http://ec.europa.eu/social/main.jsp?catId=418&langId=en>

See also for further information on anti-discrimination legislation and policies the website of the European Commission:

<http://ec.europa.eu/social/main.jsp?catId=423&langId=en>

See for other documents the database Eurlex available at:

<http://eur-lex.europa.eu/en/index.htm>

