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DRAFT REPORT

on transposition and application of Council Directive 2004/113/EC
implementing the principle of equal treatment between men and women in the
access to and supply of goods and services
(2010/2043(INI))

Committee on Women's Rights and Gender Equality

Rapporteur: Zita Gurmai

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MOTION FOR A EUROPEAN PARLIAMENT RESOLUTION

on transposition and application of Council Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services (2010/2043(INI))

The European Parliament,

- having regard to Articles 19(1) and 260 of the Treaty on the Functioning of the European Union (TFEU),
 - having regard to 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 services¹,
 - having regard to the Commission's Guidelines of 22 December 2011 on the application of Council Directive 2004/113/EC to insurance, in the light of the judgment of the Court of Justice of the European Union in Case C-236/09 (Test-Achats)²,
 - having regard to the judgment of the Court of Justice of the European Union of 1 March 2011 in Case C-236/09 (Test-Achats)³,
 - having regard to the report of the European Network of Legal Experts in the Field of Gender Equality of December 2010 entitled 'EU Rules on Gender Equality: How are they transposed into national law?',
 - having regard to the report of the European Network of Legal Experts in the Field of Gender Equality of July 2009 entitled 'Sex Discrimination in the Access to and Supply of Goods and Services and the Transposition of Directive 2004/113/EC',
 - having regard to its resolution of 30 March 2004 on the proposal for a Council directive implementing the principle of equal treatment between women and men in the access to and supply of goods and services⁴,
 - having regard to Rule 48 of its Rules of Procedure,
 - having regard to the report of the Committee on Women's Rights and Gender Equality (A7-0000/2012),
- A. whereas the directive prohibits both direct and indirect discrimination based on sex in the access to and supply of goods and services that are available to the public, in both the public and private sectors;
- B. whereas the directive addresses aspects related to discrimination based on sex outside the

¹ OJ L 373, 21.12.2004, p. 37.

² OJ C 11, 13.1.2012, p. 12.

³ OJ C 130, 30.4.2011, p. 4.

⁴ OJ C 103, 29.4.2004, p. 34.

labour market;

- C. whereas less favourable treatment of women for reasons of pregnancy and maternity is also prohibited, as well as harassment and sexual harassment and instruction to discriminate wherever goods or services are offered or supplied;
 - D. whereas following the entry into force of the Lisbon Treaty, appropriate action to combat discrimination based on sex will be dealt through a special legislative procedure requiring unanimity in the Council and the consent of the European Parliament (Article 19(1) TFEU);
 - E. whereas according to the information available, the directive has been transposed in most of the Member States either through the adoption of new legislation, or by amending the existing legislation in this field;
 - F. whereas in some Member States transposition was incomplete or the deadline for transposition was delayed;
 - G. whereas in some cases national legislation goes further than required by the directive by also covering education or discrimination in relation to the media and advertising;
 - H. whereas the opt-out laid down in Article 5(2) of the directive created legal uncertainty and potential legal challenges in the long term;
 - I. whereas the Commission's application report, which, under the directive, was due in 2010, has been postponed until 2014 at the latest;
 - J. whereas the judgment of the Court of Justice of the European Union of 1 March 2011 in Case C-236/09 (Test-Achats) stated that Article 5(1) of this directive providing derogation to insurance and related financial services works against the achievement of the objective of equal treatment between men and women and is incompatible with the EU's Charter of Fundamental Rights;
 - K. whereas the provision concerned is consequently considered to be invalid upon the expiry of an appropriate transitional period, in this case with effect from 21 December 2012;
 - L. whereas, on 22 December 2011, the Commission published non-binding guidelines aimed at clarifying the situation with regard to insurance companies and related financial services;
1. Regrets the fact that the Commission has not presented its report on the application of Council Directive 2004/113/EC or published up-to-date data on ongoing national implementation processes;
 2. Acknowledges that the Test-Achats ruling may have had an impact on Member States' implementation processes, but notes that this alone cannot justify the failure to publish the report required by the directive in time;
 3. Calls on the Commission to publish its report and all available data with all possible dispatch;

4. Considers that the Test-Achats ruling has created ongoing uncertainty on the insurance market;
5. Considers that the guidelines published by the Commission – in the absence of a binding or legislative effect – have not fully dispelled this uncertainty;
6. Calls on the Commission to take practical steps to address the problem by proposing a new legislative text that is fully in line with the guidelines;
7. Notes that the insurance industry ought to make a considerable effort to rethink its pricing system, to rebuild its risk assessment system and to find suitable replacement data for gender proxies;
8. Calls on the Commission to open informal negotiations with the insurance industry concerning the statistical methods used for personalised risk assessment;
9. Calls on the Commission to create, for the purposes of personalised risk assessment, an indicative list of all necessary statistical data that are currently not available in the European Union;
10. Calls on the Commission to present the methodology it will use to measure the effects of the Test-Achats ruling on insurance pricing;
11. Calls on the Commission to analyse the issue with a focus on consumer protection policy as well;
12. Calls on the Commission to closely follow developments on the insurance market, and if there are any signs of de facto indirect discrimination, to take all necessary measures to address the problem;
13. Notes that the provision relating to the shift in the burden of proof has been implemented in most national legislation in the of Member States; calls on the Commission to monitor the application of this provision in all Member States;
14. Calls on the Commission to take into consideration cases of discrimination in relation to pregnancy and maternity as regards, for instance, the housing sector (renting) or difficulties in obtaining loans, as well as access to medical goods and services, in particular as regards access to legally available reproductive healthcare;
15. Calls on the Commission to monitor particularly closely any discrimination related to breastfeeding;
16. Calls on the Commission to consider including media and advertising content in the scope of the directive, taking into account their significance, as well as the significance of education, in the creation, retention and development of gender-based stereotypes;
17. Calls on the Commission to gather best practices and make them available to Member States in order to provide the necessary resources for supporting positive action and ensuring better implementation of the respective provisions at national level;

18. Calls on the Commission to properly and accurately monitor the situation of the "equality bodies" established following the entry in force of the directive, and to check whether all the conditions laid down by the EU legislation have been met; places particular emphasis on the fact that the current economic crisis cannot be used as a justification for shortcomings as regards the proper functioning of equality bodies;
19. Underlines the need for data and more transparency from the Commission on ongoing infringement procedures and actions;
20. Calls on the Commission to establish a public database of legislation and case law related to discrimination on gender; insists on the need to improve protection for victims of gender-based discrimination;
21. Points out the need for financial support and EU coordination for further training for legal practitioners active in the field of gender-based discrimination, taking into account the role played by national courts;
22. Points out the need for the directive to be transposed in a timely manner in all Member States;
23. Instructs its President to forward this resolution to the Council and the Commission, and to the governments of the Member States.

EXPLANATORY STATEMENT

General Background

The Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services" (hereafter referred as "the Directive") marked an important step in the development of EU gender equality laws when it entered in force on the 21 December 2004.

In fact, the Directive addresses gender equality and discrimination based on sex outside the field of employment for the first time at EU level. This Directive prohibits both direct and indirect discrimination based on sex in the access to and supply of goods and services that are available to the public, in both the public and private sectors. Less favourable treatment of women for reasons of pregnancy and maternity is also prohibited, as well as harassment and sexual harassment and instruction to discriminate wherever goods or services are offered or supplied. The legal basis of the Directive was the former Article 13 of the EC Treaty.

The Member States had until 21 December 2007 to implement the Directive and according to Article 17 of the text; the European Commission had to draw up a summary report in order to assess this implementation no later than the 21 December.

However, after several delays, the European Commission informed the rapporteur that such an implementation report would not be drafted before 2014. Despite the fact that the rapporteur repeatedly expressed her disappointment and underlined the urgent need for an implementation report as well as accurate and recent data's in order to assess the transposition of the Directive, this postponement has been confirmed. The European Commission explained that the consequences of the Test-Achats case (see below) shifted the priorities and that the changes induced for the insurance sector made an implementation report premature. In the view of the rapporteur, such a report was still very much needed, as many other aspects of the transposition of the Directive require a proper analysis in due time.

Insurance and financial related services and the Test-Achats case

The Directive proved to be controversial when it comes to the use of sex as a factor in the calculation of premiums and benefits for the purposes of insurance and related financial services. The Article 5(1) of the Directive provides that it shall not result in differences in individuals' premiums and benefits. However, by way of derogation from the general rule, Article 5(2) gave Member States the option of deciding before 21 December 2007 to allow proportionate differences in individuals' premiums and benefits where the use of sex is a determining factor in the assessment of risks based on relevant and accurate, actuarial and statistical data. This exemption was provided without any temporal limitation.

All Member States have made use of that derogation in respect of one or more types of insurance (in particular in life insurance/annuities). However, a dispute about the legality of Belgium's derogation for life insurances in its national legislation led to the European Court of Justice ruling in the Test-Achats case (C-236/09) of 1st March 2011.

According to this ruling, Article 5(2) of this Directive works against the achievement of the objective of equal treatment between men and women and is incompatible with the EU's

Charter of Fundamental Rights. As a consequence, the respective provision is considered to be invalid upon the expiry of an appropriate transitional period, respectively with effect from 21 December 2012.

This ruling has significant economic consequences which are difficult to be assessed; the relationship between sex, gender and insurance products becomes more complicated taking into account also the plurality of products on the market; differentiated treatment in insurance pricing is in principle done on the grounds of objective determining factors, and gender was up to now considered to be such a factor by the industry.

As regards consumers, the main concerns are: an immediate increase of premiums for life assurance and motor-vehicle liability insurances should be expected, in particular for women.

What social consequences will derive from this as a consequence to the potential increase of costs? This ruling might also have a significant impact on private pensions and saving schemes and to have in general an impact on the larger discussion on pensions' adequacy.

Given the short transitional period, the Commission underlined that in its view; a modification of the legislation is not necessary and issued implementation guidelines in the form of a communication at on 22 December 2011.

In the view of the rapporteur, there is a clear need for legal certainty and the guidelines are not sufficient to ensure the necessary certainty and coherence in application in the long run.

General overview as regards transposition

According to the information available¹, the Directive has been transposed in most of the Member States either through the adoption of new legislation, either by amending the existing legislation in this field. In some cases the national legislation goes further than the Directive requires by covering also education or discrimination in relation to the media and advertising².

For some Member States the transposition was incomplete or the deadline for transposition was delayed. The lack of clarity of the national legislation or even its abstract and vague character was also raised as problematic aspects.

Sex related discrimination in access to and supply of goods and services

There are a number of issues that would need particular attention as there are significant differences between Member States regarding discrimination in access to and supply of goods and services, concerning interpretation of the definitions or concerning the degree of enforcement that is reflected also in the national case law.

Cases of discrimination in relation to pregnancy and maternity were reported as regards for

¹ Report on 'Sex Discrimination in the Access to and Supply of Goods and Services and the Transposition of Directive 2004/113/EC' of the European Network of Legal Experts in the Field of Gender Equality, July 2009, commissioned by the Commission.

² Report on EU Rules on Gender Equality: How are they transposed into national law? of the European Network of Legal Experts in the Field of Gender Equality, update 2010, commissioned by the Commission.

instance the housing sector (renting) or difficulties in obtaining loans. Also access to medical goods and services proved to be problematic, in particular as regards access to legally available reproductive health care.

One aspect that still has to be addressed in several national legislations is breastfeeding related discrimination. Even if the Directive itself does not regulate discrimination against parents, this form of discrimination closely related to maternity was underlined as problematic, in particular as regards access to public spaces, public transport or lack of facilities for parents with small or disabled children.

According to the information available, few cases were reported of harassment/ sexual harassment (outside employment). Also the content of media and advertising, for the moment outside the scope should be assessed from this perspective, taking into account the importance of these fields regarding education and the major role they play in the creation, sustaining, revival and development of gender-based stereotypes.

Positive action, more favourable treatment in relation to pregnancy

Most of national legislations provide scope for positive action, but the degree and extent to which this positive action is allowed is variable. Gathering best practices and making them available to Member States and providing the necessary resources for supporting positive action would ensure a better implementation at national level of the respective provisions.

More favourable provisions concerning the protection of women as regards pregnancy and maternity exist in several Member States, but one of the problems underlined is that in some cases only copying the provisions of the Directive in national legislation leads to ambiguity as regards implementation.

Burden of proof, equality bodies

The Directive provides for a shift in the burden of proof, the respondent being the one that has to prove that there has been no breach of the principle of equal treatment based on the evidence brought by the victim. This provision was implemented in most of the national legislations in the context of access to goods and services and gave place to case law at national level.

This Directive establishes equality bodies for the promotion of equal treatment.

The main issue encountered is even if most of the member states have established "equality bodies", not all the conditions provided by the EU legislation are met (in term of their capacity to perform the tasks independently, their competences etc.).

Recommendations

The aim of this report is to assess the consequences and the degree of implementation of Directive 2004/113/EC in the Member States, to identify the existing gaps and to recommend possible solutions in order to overcome them.

The importance of information and reliable data should be underlined; more transparency

from the Commission on ongoing infringement procedures and actions taken is needed. Establishing a public database of legislation and case law related to discrimination on gender could be a tool to improve protection of victims of gender based discrimination.

Taking into account the role played by national courts, financial support and EU coordination for further training for the legal practitioners, active in this field is also a prerequisite for an effective implementation.

As regards national Equality Bodies, a better monitoring of how these bodies are fulfilling their tasks and whether they are meeting the requirements set at EU level are necessary, along with the promotion of exchange of best practices between these bodies.

The timely transposition of directives is also essential and the rapporteur considers that in the future Commission should make full use of its powers to encourage Member States to transpose directives within the deadlines laid down by the legislator (Article 260 TFEU).

The information of EU citizens about their rights represents an important aspect in benefitting from these rights and ensuring a better implementation. Measures such as organizing information campaigns at EU and national level should be strongly encouraged.

Taking into account the existing case law, at European level and at national one, which emerged in the process of implementation, as regards future legislation at EU and national level, the accent should be put on the need for timely actions, in view of achieving legal certainty and clear, unambiguous provisions.