

# LIGE ADGANG

JURIDISK ANALYSE AF  
KVINDERS OG MÆNDS  
ADGANG TIL VARER OG  
TJENESTEYDELSER

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# SUMMARY

The purpose of this report is to clarify the extent and scope of the prohibition against sex discrimination in access to and supply of goods and services which exists in Denmark since the adoption of the Equality Act in 2000 as mandatory for all sellers/service providers in both the private and public sectors. It is also the purpose of the report to clarify the duty to incorporate gender equality into all planning and management that applies in the public sector (the so-called mainstreaming duty). It will also be discussed to what extent Danish gender equality rules – within framework of existing EU rules – can and should be made stricter to provide better protection of the principle of equality.

Gender equality and non-discrimination are fundamental rights (human rights). In recent years, there is a trend towards increased interaction between elements of Danish law, stemming from EU level, from international law or from the national level. As a result, it is appropriate to regard rules of national origin, rules stemming from the EU and public international law, as one big legal system.

The focus of this report is on Danish law. The most important Danish rules are found in the Equality Act 2000. This applies in particular to § 2 prohibiting gender discrimination and § 4 of gender mainstreaming in the public sector. These rules are discussed in section 2 of the report.

The Danish rules are – in the form they have had since 2007, when the Equality Act was used to implement the EU directive on equal access for women and men to goods and services (2004/113) – significantly determined by underlying EU rules, which take precedence over Danish law. The Danish rules must be interpreted in conformity with the EU provisions. The main EU rules are Directive 2004/113/EC on equal access for women and men to goods and services and the discrimination prohibition in Article 21 of the EU Charter of Fundamental Rights. The EU rules are discussed in section 3

Section 4 reviews the relevant rules of public international law, in particular CEDAW, ie. UN Convention on the Elimination of All Forms of Discrimination against Women and the ECHR (European Convention on Human Rights). EU rules and the Danish legal sources on women's and men's equal access to goods and services are generally more precise than the rules of international law and provide a better opportunity for enforcement. In Denmark, the practical importance of the rules of international law is therefore modest in the areas covered by this report.

In Section 5 we discuss who are obligated and who enjoy rights under the provisions on equal access for men and women to goods and services and what the material scope of these provisions is. The Danish Gender Equality Act prohibits sex discrimination in all areas of society. In relation to the labour market the Gender Equality Act does not apply, but gives way to the special labour laws, in particular the Equal Pay Act and the Equal Treatment Act. The ban on gender discrimination in the Equality Act is binding on public authorities and institutions no matter in which role they are acting, e.g. exercising public authority or delivering services, e.g. health, education or social services. It is also binding upon private sellers and suppliers of goods and services.

In relation to the labour market, it is prohibited to discriminate on grounds of a number of different discrimination criteria (gender, ethnicity, age, religion, disability, sexual orientation, etc.). In relation to goods and services – a part from the criminal provision in the Racial Discrimination Act relating to race, color, national or ethnic origin, religion or sexual orientation – there is only a ban on gender discrimination in the Equality Act and against ethnic discrimination in the ethnic Equal Treatments. There is only a mainstreaming duty in the public sector. In Section 6, the relationship between the regulation of gender equality and other aspects of equality, in particular ethnic equality and the relationship between gender discrimination and discrimination against transpersons, are discussed.

Section 7 examines the cases the Equal Treatment Board has considered on gender discrimination in access to and supply of goods and services from its establishment 1 January 2009 until today (October 2012). Assessed solely on the basis of the legislative texts the rules prohibiting gender discrimination in the Equality Act are very similar to the old rules on equal pay and equal treatment prohibiting gender discrimination in the labour market and the underlying EU rules of the labour law directives. The study we have conducted of the case law of the Equality Board shows, however, that there are a number of differences between the cases on discrimination in relation to goods and services and in the labour market.

In relation to goods and services it is mostly men who complain. In relation to the labour market, it is mostly women who complain. In relation to goods and services almost all cases are about direct discrimination and almost none about indirect discrimination. In relation to the labour market a major part of the cases concerns indirect discrimination. In relation to goods and services the exception of the Gender Equality Act § 3 a on legitimate reasons to treat

women and men differently plays a major role, while the corresponding rules in regard to the labour market on gender as a genuine occupational qualification are interpreted very narrowly and almost never are used in practice.

Section 8 of the report is about women's and men's equal access to pension, insurance and related financial services. Until 21.12.2012 it is permissible to take into account the average differences between women and men, for example, differences in life expectancy or accident frequency, when calculating of individual women and men premiums and benefits. From that date the law will be amended as a consequence of a judgment for CJEU (the Test Achats case).

Finally, the conclusions of the report are formulated in Section 9. Here it is also considered whether the findings of this report provide the basis for recommending improvements in the Danish rules on gender equality in access to and supply of goods and services, including whether there is a lack of legislation and whether clarifications of the positive duties to promote gender equality can and should be made.

There is a tendency to use the exemption in the Equality Act § 3 a on legitimate reasons to treat women and men differently rather than the exemption on positive action in § 3 of the Act.

There seems to be a need to strengthen the link between the ban on gender discrimination and the mainstreaming duty in § 4 of the Equality Act. The case law of the Equality Board on discos clearly shows that a ban on gender discrimination, standing alone, is inefficient. It could probably be made more efficient by taking the mainstreaming duty of the authorities which grant alcohol licenses more seriously.

The current rules on public authorities to incorporate gender equality into all planning and management under the provisions of the Equality Act § 4, are very vague and their practical significance is highly dependent on political goodwill. There is an ongoing legal political discussion on strengthening gender equality, including by ensuring more women in management. Denmark has already prepared draft legislation to this effect in relation to the personal aspect of the mainstreaming competence. The proposed law introduces an obligation for the approximately 1100 largest companies in both the public and private sector to set targets for gender equality in leadership and report on the progress towards attaining the objectives. It seems obvious to impose similar duties relating to the service area and to expand the group of persons who should have a mainstreaming duty from public authorities alone to also include large private companies and listed companies, regardless of size.

Many – among others the Danish Institute for Human Rights – adopt a horizontal approach to discrimination issues and considers sex discrimination and other forms of discrimination as different aspects of the same more general problem. In relation to this point of view it is a problem that rules on different grounds of discrimination are different. Under Danish law, the rules concerning different grounds of discrimination in various areas of society are scattered in different laws and there are better legal protection against certain forms of discrimination than others. Thus, there is stronger legal protection of gender equality than ethnic equality. There is a mainstreaming duty in the public sector for gender equality, but not for ethnic equality. It would be tempting to use the Equality Act relating to sex as a lever for improving legal protection against ethnic discrimination. In current practice (the previously existing complaints body on ethnic equality) it is assumed that the prohibition of ethnic discrimination is the sole responsibility of professional traders, and

not e.g. private sellers of houses that will not sell to certain ethnic groups. That is probably a violation of the underlying EU rules. It is therefore an invalid interpretation, but there is a need for clarification of the legal position.

Several EU countries, including Germany and Sweden, have in recent years gathered their equality legislation into one comprehensive general law applicable for all grounds and in all areas of society. In the long term it will probably be an advantage if Danish law goes in this direction. This will make it easier to take intersectionality between different grounds of discrimination into account and make the problems of distinguishing between different grounds of discrimination smaller. Today, under current Danish law, transpeople fall between different laws. The ambiguities in their legal position, it can cause, would be smaller if all discrimination issues were subject to the same piece of legislation.