

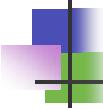
Introduction to EU gender equality legislation & key concepts

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outline

1. sex equality as an EU problem
2. legal instruments (Charter, treaties, directives)
3. key concepts (equality & discrimination, positive action, sex/gender)
4. the legal system (closed & open systems of exceptions)

 but first:

**why a prohibition on the
discrimination of sex in the first
place?**

 because



"Hi love, I've just come to clean your glass ceiling."

because:



*"Yes, this is a two career household.
Unfortunately I have both careers."*

and because:



questions?

Oh, so that explains the
difference in our salaries!

1. what's the EU got to do with sex equality?



1. the EU & sex-equality

- equal pay in the original treaty (art. 119, now art. 157 TFEU)
 - gap at the time:
 - France 10%, Germany 29%, Netherlands 31%
- from unfair competition in an internal market to social policy & employment rights
- 1999: Treaty of A'dam:
 - sex equality: core task of EU
 - (cf art. 3(3) TEU)



2. overview of legal instruments

- primary & secondary legislation:
 - primary: Charter & treaties:
 - TEU: Treaty on European Union
 - TFEU: Treaty on the Functioning of the EU
 - Charter (see art. 6 TEU)
 - secondary: directives
 - directives are binding as to the result (i.e. states are free to decide on the best way to implement directives) (art. 288 TFEU)

2. Legal instruments: TEU & TFEU

Treaty on European Union (TEU)

- basic structure & provisions
 - art. 2 TEU: sex equality = common value: thus, a yardstick for new candidates EU membership
 - art. 3(3) TEU: "The Union shall promote ... equality between women and men ..."
- Treaty on the Functioning of the EU (TFEU): more detailed provisions
 - art. 157
 - (1-2): equal pay
 - (3): promotion of equal opportunities and treatment
 - (4): positive action measures
 - art. 8: "In all its activities, the Union shall aim to eliminate inequalities, and to promote equality, between men and women." (*gender mainstreaming provision*)
 - art. 10: "In defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation."
 - art. 19: "...within the limits of the powers conferred by them upon the Union, the Council... may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation"

2. Legal instruments: Charter

- legal status:
 - adopted 2000 in Nice
 - legally binding since Treaty of Lisbon in 2009 (art. 6(1) TEU)
 - addresses: EU bodies + MS but the latter **only** when implementing EU law (art. 51(1) Charter)
- contents:
 - part 1: dignity
 - part 2: freedoms
 - **part 3: equality, esp. art. 23**
 - part 4: solidarity
 - part 5: citizen's rights
 - part 6: justice
 - part 7: general provisions



Scope Charter (art. 51)

"The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers."

(see also art. 6(1) TEU)

2. legal instruments directives

- sex-equality directives:
 - 'Recast directive' (2006/54): equal opportunities & equal treatment
 - 'Third directive' (79/7): statutory social security
 - 'Goods & services directive' (2004/113)
 - 'Self-employed directive' (2010/41)
- other relevant directives:
 - 'Pregnant workers directive' (92/85)
 - 'Parental leave directive' (2010/18)

3. key concepts: equality

- what is equal?
 - "equal is not 'identical'"
 - what does that mean?
 - (two) people are equal but never identical
 - men and women are not identical, but still are often sufficiently equal to be entitled to the same rights
 - ...?
 - when are people / situations comparable?
 - depends to a large extent on context
 - example: pregnancy: relevant in the case of entitlement to pregnancy leave, but not with regard to pension rights.
 - example: being male is (probably) relevant when auditioning for the role of James Bond and SuperWoman, but not when applying for a job as dentist assistant.

3. key concepts: equality

- formal equality: treating equals equally
 - emphasis on equality of [treatment](#)
- substantive equality: treating unequal cases unequally in accordance to the difference
 - emphasis on equality of [result](#) (50/50?)
- procedural equality:
 - emphasis on equality of [starting point / opportunities](#)

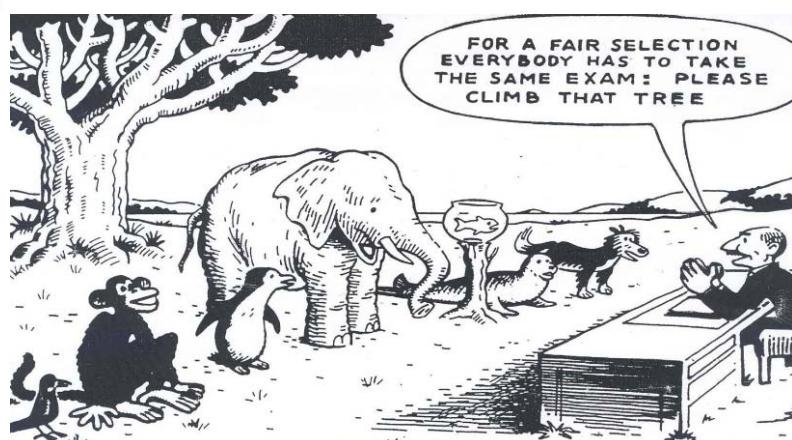
3. formal equality



3. key concepts: discrimination

- direct discrimination:
 - '... where one person is **treated less favourably on grounds of sex** than another is, has been or would be treated in a comparable situation' (art. 2(1)(a) Recast Directive)
 - 'negative discrimination' and 'positive discrimination' (*positive action*: art. 157(4) TFEU, art. 3 Recast)
- indirect discrimination:
 - '... where an **apparently neutral provision**, criterion or practice would put **persons of one sex at a particular disadvantage** compared with persons of the other sex...'
 - *NB: 'disadvantage' is sometimes debatable, e.g. protective provisions may be helpful but nevertheless also have negative effects (e.g. former ILO prohibition of night work for women)*
- (sexual) harassment: regarded as a form of sex discrimination (art. 2(1)(c) Recast
 - **harassment**: unwanted conduct related to the sex of a person, violating dignity and creating an intimidating environment
 - **sexual harassment**: unwanted conduct of a sexual nature, violating dignity, esp. when creating an intimidating environment

3. direct or indirect?



3. key concepts: direct/indirect sex discrimination

not always easy to
distinguish:
direct or indirect?



3. key concepts: direct/indirect sex discrimination

not always easy to
distinguish:
direct or indirect?

direct: they wouldn't
(probably) have said that about
a man
indirect: criterion stated is 'just
married', not 'female'



3. key concepts: intersectionality

not being hired because of
headscarf:
discrimination on the basis of
sex, religious conviction,
both or none?



3. key concepts: sex/gender

- mostly understood as:
 - **sex** referring to biological difference
 - male & female
 - **gender** referring to socially constructed roles (expected behaviour of men & women etc.)
 - masculine & feminine
- however, in practice often used as synonyms, encompassing both aspects

3. sex or gender?



3. key concepts: positive action

prohibition to discriminate:

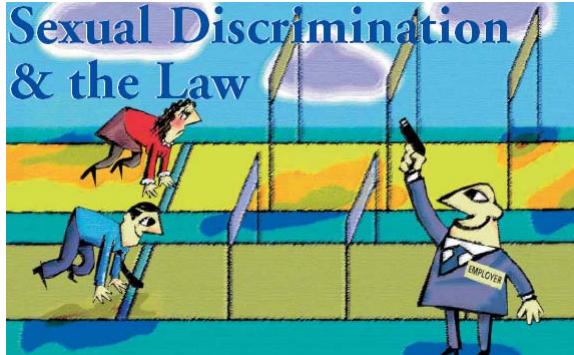
- purpose: stop treating women less well than men (or vice versa)

but what if:

- purpose: to relatively improve the position of the underrepresented or disadvantaged group?

"With a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the underrepresented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers." (art. 157(4) TFEU)

3. distinction allowed or not?



3. key concepts: symmetry

- prohibition of sex discrimination symmetrical:
 - e.g. art. 5 Recast:

"Without prejudice to Article 4, there shall be no direct or indirect discrimination on grounds of sex in occupational social security schemes.."
- however, some exceptions a-symmetrical:
 - e.g. art. 2(2)(c) Recast:

"... discrimination includes ... any less favourable treatment of a woman related to pregnancy or maternity leave within the meaning of Directive 92/85/EEC"

NB up to MS whether they want to make use of exceptions

4. the legal system: closed & open system of exceptions

- closed system: distinctions based directly on sex (direct discrimination) only allowed if exception provided for in directive (esp. '2nd' or 'equal treatment' directive 76/207, now included in Recast)
 - exceptions:
 - pregnancy & maternity
 - positive action incl. preferential treatment
 - genuine occupational requirement
- open system: direct discrimination may be objectively justified (objective justification test)

4. the legal system: closed system of exceptions

- closed system test:
 - distinction based directly on sex?
 - if yes: exception provided in directive?
 - if so: purpose of distinction legitimate & measure proportionate?
- ratio of the system
- NB re pregnancy: pregnancy regarded as direct discrimination of women on ground of sex - no comparator needed
 - *Dekker v VVV* (1990)

4. the legal system: open system test: objective justification

- test:

- discriminating measure / criterion / provision
 - corresponds to a real need of the undertaking (business), or serves a necessary purpose of social policy (govt)
 - is appropriate to achieve that purpose / need
 - and is necessary to attain that purpose
 - same test applies to **indirect** sex-discrimination, i.e. to assess the acceptability of an apparently neutral provision, criterion or practice that nevertheless puts persons of one sex at a disadvantage in comparison with persons of the other sex

- Landmark case CJEU: Bilka Kaufhaus 1986



4. the legal system: exception: pregnancy & maternity

- NB pregnancy regarded as direct discrimination of women on ground of sex - no comparator needed
 - *Dekker v VJV* (1990)
- art. 2(2)(c) Recast: "... discrimination includes ... any less favourable treatment of a woman related to pregnancy or maternity leave ..."
- art. 28(1): "This Directive shall be without prejudice to provisions concerning the protection of women, particularly as regards pregnancy and maternity"
- but what if:

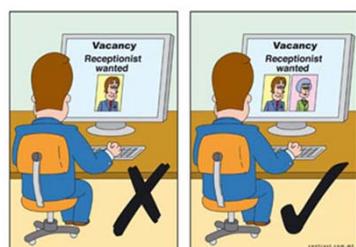
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- but what if:



4. the legal system: exception: occupational requirements

- genuine occupational requirement (art. 14(2) Recast)



4. the legal system: exception: positive action

- positive action: *Lommers* 2002

- regards: equal starting points

specific form of positive action:

- preferential treatment: Kalanke (1995)

- access to scarce goods (i.e. jobs, promotion etc.); very strict conditions apply

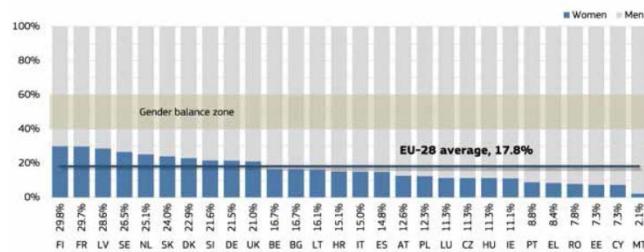


Oh, I can tell by looking at you
that your typing will be perfect.

4. the legal system: exception: quota

- Commission proposal to improve gender balance on company boards

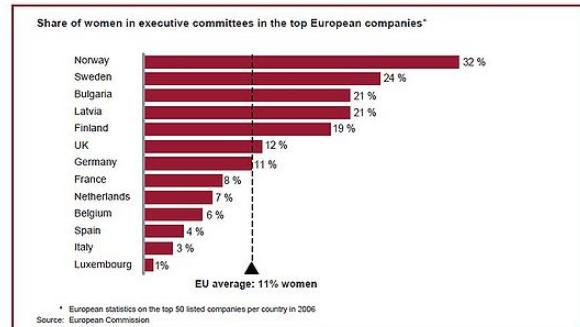
Representation of women and men on the boards of large listed companies in the EU, October 2013



4. quota

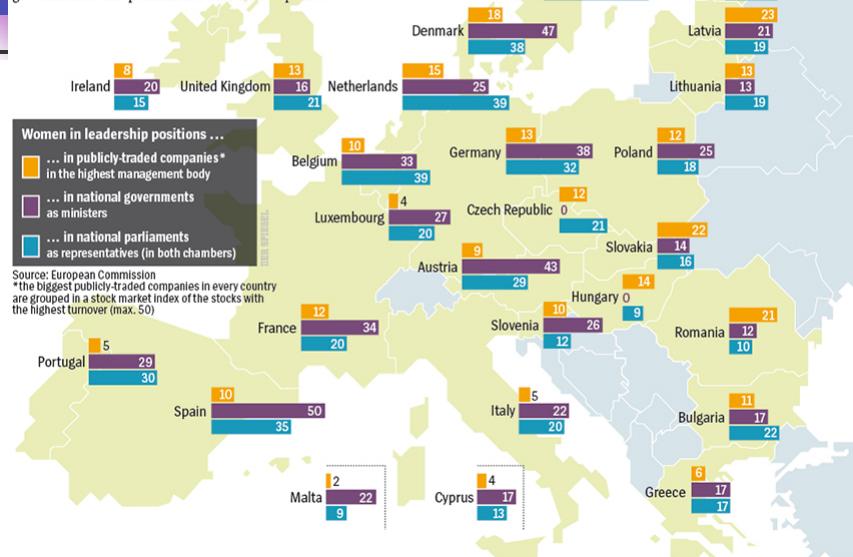
does the situation demand action? why?
what would be an effective measure?

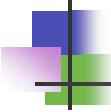
Exhibit 1
Women represent only 11% of the membership of governing bodies of listed companies in Europe



Gender Quotas in the EU

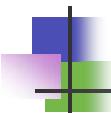
In inland and Sweden are clearly ahead when it comes to female representation in both business and politics. In general in Europe, women have made significantly more progress in governments and parliaments than in companies.





tip:

- website of the EU network of legal experts on gender equality:
- http://ec.europa.eu/justice/gender-equality/tools/legal-experts/index_en.htm



that's it - thank you

any questions?



"Harris, when I said 'any questions' I was using only a figure of speech."



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