

Breaking the glass ceiling – proposal for ec directive on improving the gender balance among non-executive directors

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Abstract

Company boards in the European Union (EU) are characterized by persistent gender imbalances as evidenced by the fact that only 13.7% of corporate seats in the largest listed companies are currently held by women. As stated in the Progress report “Women in Economic Decision-making in the EU” the share of women varies across Member States between around 3% and 28% for non-executive directors and between 0% and 21% for executive directors. Recent surveys concludes that this under-utilisation of the skills of highly qualified women’s constitute a loss of economic growth potential and can be seen as a missed opportunity in terms of both corporate governance and financial company performance.

From another side, self-regulatory initiatives in a number of EU Member States have not yielded any noticeable change and it is evident that would take several decades to approach gender balance through the EU. Thus, on 14 November 2012 the European Commission (EC) proposed for a Directive on improving the gender balance among non-executive directors of companies listed on stock exchange and related measures. This paper is theoretical and qualitatively analyses the proposal from the perspective of promoting the equal participation of women and men in economic decision-making. Thus, acknowledging that gender equality policies are vital to economic growth, prosperity and competitiveness.

Keywords: *gender equality, companies, non-executive directors, positive action*

1. Introduction

Across the Europe boards are dominated by one gender: 85% of non-executive boards members and 91,8% of executive board members are men, while women make up 15% and 8,2% respectively. 96.8% of the chairpersons are men and only 3.2% are women (EC, Gender balance in business leadership, 2012, p.5). Thus, women continue to be significantly underrepresented in economic decision-making structure. Recent surveys concludes that this under-utilisation of the skills of highly qualified women’s constitute a loss of economic growth potential and can be seen as a missed opportunity in terms of both corporate governance and financial company performance. Making full use of the EU’s female workforce will contribute to sustainable growth and the competitiveness of the EU economy, particularly in face of demographic change and the current crisis (Credit Suisse, 2012; Catalyst, 2004; McKinsey, 2010; Deutsche Bank Research, 2010; Ernst & Young, 2012).

The Special Eurobarometer survey “Women in decision-making positions” shows that “76% of European respondents think the business community is dominated by men who do not have sufficient confidence in women” and “75% of Europeans are in favour of legislation to ensure a more balanced representation of men and women on company boards under the condition that their qualifications are taken into account, that is without automatically favouring one of either gender” (Eurobarometer 376, 2012, pp.29-46).

Till now, self-regulation has been the main strategy for the industry, but practice shows that no adequate result was delivered. Eleven Member-States of the EU introduced legal measures busting up the representation on women in the corporate boards. However, as emphasised by the EC this legally fragmented approach risks hampering the functioning of Europe's Single Market, as different company law rules and sanctions for not complying with gender balance laws can lead to complications for business and have a deterrent effect on companies' cross-border investments.

Thus in November 2012, the European Commission took action aiming at breaking the glass ceiling by proposing Directive on improving the gender balance among non-executive directors of companies listed on stock exchange and related measures. This legislation is proposed with the aim of attaining a 40% objective of the under-represented sex in non-executive board member positions in publicly listed companies, with the exception of small and medium size enterprises. This is being seen as a positive action measure.

2. Positive Action Measures

As De Vos in the analysis "Beyond Formal Equality, Positive Action under Directives 2000/43/EC and 2000/78/EC" rightly put positive action is a process to introduce a dynamic, result oriented approach that internalizes group dimensions into an equally static and individual formal equality model. It is important to distinguish between backward-looking positive action that seeks to compensate for past discrimination and pro-active, forward-looking positive action that aims at redistributive justice.

From practice it can be concluded that the European Union is allowing positive action, with a view to ensuring full equality in practice between men and women in working life, but seeing as an exception to be narrowly tailored to its justification (*Abrahamsson case, Briheche case*). The measures permitted should be designed to eliminate or counteract the prejudicial effects (*Commission v. France*, par.15) on women in employment or seeking employment which arise from existing attitudes, behavior and structures based on the idea of a traditional division of roles in society between women and men (*Kalanke case, Marschall case*). However, according to the case law of the Court of Justice of the EU the targets or quotas must be proportionate to the aim pursued (*Lommers case*, par.39, *Abrahamsson case, Briheche case*) and should not give automatic and unconditional preference to one sex (*Kalanke case*). Namely, as Burri and Prechal elaborated in the analysis "EU Gender Equality Law" targets and quotas can only be accepted if every candidature is the subject of an objective assessment, clear and unambiguous criteria, that takes the specific personal situation of all candidates into account (*Badeck case*, par.23) (Burri and Prechal, *EU Gender Equality Law*, 2010, pp.17-18). Till now hard selection quotas area in principle suspect and the Court of Justice of the EU has so far only conditionally admitted soft quota in a tie break situation.

From another side, international human rights standards see the positive action in the form of 'temporary special measures' as an integral part of the concept of substantive equality. This may result in compulsory positive action that goes beyond the Union's optional standard. Namely, on level of the Council of Europe, Article 14 of the European Convention on Human Rights and Fundamental Freedoms (ECHR) can accept form of positive action including discrimination but it remains doubtful whether it can actually require states to take positive action. The same goes for Protocol no.12 of the ECHR. However the European Social Charter in its Part II presents overarching positive action duty. On universal level, the International Covenant on Civil and Political Rights in its Article 26 adopts an active approach suggestive

of positive action, but the International Covenant on Economic, Social and Cultural Rights does not appear to impose general obligation for States to adopt such measures. In addition, the Convention on the Elimination of All Forms of Discrimination Against Women and the International Convention on the Elimination of All Forms of Racial Discrimination are very explicit in its promotion of substantive equality through positive action measures. Finally, the Convention on the Rights of Persons with Disabilities in its Article 5 labels as non-discriminatory the measures which are necessary to accelerate or achieve *de facto* equality of persons with disabilities (De Vos, 2007, pp.50-59).

3. Gender Balance in Corporate Governance

The principle of equality between women and men dates back from the Treaty establishing the European Economic Community (1957) including the principle of equal pay between men and women for equal work in its Article 119. This principle was extended to combating gender discrimination by adopting secondary legislation and interpreting these principles by the Court of Justice of the EU. With the adoption of the Treaty of Lisbon the principle of equality become one of the five values on which the Union is founded enlisted in its Article 2, and one of the main aims of the Union presented in Article 3(3), where the Union is bound to strive for equality between women and men in all its activities.

In addition, the Charter of Fundamental Rights of the European Union, *inter alia*, prohibits discrimination on any ground including sex (Article 21); it recognizes the right to gender equality in all areas, thus not only in employment, and the possibility of positive action for its promotion (Article 23). Finally, the EU Strategy for Equality between Women and Men (2010-2015) builds on the Roadmap for equality between women and men 2006-2010, and the European Pact for Gender Equality through emphasizing five strategic area, one being the equality in decision-making. All these documents acknowledge that gender equality policies are vital to economic growth, prosperity and competitiveness.

3.1. Women in economic decision-making in the EU

A report by the European Commission “Gender balance in business leadership” in March 2012 showed that, across the EU, company boards are dominated by men. Despite representing around 45% of people employed in the EU and 56% of people in tertiary education, women only represent 13.7% of board members in the major publicly listed companies in the EU. Women occupy a quarter of the seats on boards of large listed companies in Finland, Latvia and Sweden and just over a fifth in France. But there are fewer than one in 10 in Ireland, Greece, Estonia, Italy, Portugal, Luxembourg and Hungary, fewer than one in 20 in Cyprus and around one in 30 in Malta (EC, Gender balance in business leadership, 2012, pp.7-8). According to the European Commission’s proposal “the reluctance to appoint female candidates to board positions is often rooted in gender stereotypes in recruitment and promotion, a male-dominated business culture and the lack of transparency in board appointment processes. These elements, which are often referred to in their entirety as a 'glass ceiling', undermine the optimal functioning of the labour market for top management positions throughout the EU” (EC, Proposal of a Directive, 2012, pp.3-4).

Thus, the EC in its progress report assessed slow rate of progress of just 0.6 percentage points over the past years and concluded that it would take more than 40 years before companies naturally reach gender balanced representation in boards.

Studies suggest that gender balanced boards have the potential to improve the financial performance of companies, create a more productive and innovative working environment, better management and controlling of risks, and improve company performance overall. In addition, as O'Donnell and Kennedy present, an increase in the presence of women on company boards will better reflect the needs of the market (O'Donnell and Kennedy, 2011). Furthermore, if women stay in the workforce will help to raise female employment rates thus achieving the targets set in the Europe 2020 Strategy for Smart, Sustainable and Inclusive Growth – to raise the employment rate aged 20-64 to 75% by 2020.

3.2. Self-regulatory and legal initiatives in a number of EU Member States

Several EU Member States have developed voluntary initiatives and tools to address the under-representation of women in senior leadership positions. These measures have the advantage of greater flexibility and a greater sense of ownership for the companies that undertake such measures, but despite promoting positive developments, they have not triggered marked progress. Furthermore, by shifting global governance away from the State, as primary protector and promoter of human rights, to non-state actors such as corporations we risk creating an accountability gap into which gender equality will inevitably fall.

In addition to voluntary initiatives, eleven Member States, Belgium, France, Italy, the Netherlands, Spain, Portugal, Denmark, Finland, Greece, Austria and Slovenia, have introduced legal instruments to promote gender equality on company boards. From another side, eleven EU countries have neither self-regulation measures nor legislation in place. As stated above this legally fragmented approach risks hampering the functioning of Europe's Single Market.

3.2.1. Comparative overview of specific national regulation

Legislation prescribing quotas in company boards in different EU Member States has been modeled on the Norwegian example. Namely, a target of 40% representation of both genders among board members was made obligatory in 2006 applying the rules to boards of all public limited companies, state and municipality owned companies and corporative companies. These rules are enforced according to company legislation and a company that does not have a board that fulfils the statutory requirements may be dissolved by a court order.

Belgium

The Act amending the Company Code and the laws regulating state-owned enterprises of 28 July 2011 introduced a fully fledged binding gender quota, providing that at least one third of board members of publicly-listed companies and state-owned companies needs to be of the under-represented sex. However, due to a longer implementation period ranging from six to eight years the amendments will be fully applicable only in 2019. The Law provides that as long as the quota is not fulfilled, a person belonging to the under-represented sex must be appointed to any vacant position, and goes even further stating that any appointment which does not comply with this rule will be void.

France

The rules regulating 20% of boardroom seats from the under-represented sex by 2014 and 40% by 2017 were introduced by the Law of 27 January 2011. These requirements apply to companies listed on stock exchange, state-owned companies and non-listed companies with at least 500 workers and revenue of over 50 million Euros over the previous three consecutive years. Non-compliant companies face nullification of their board elections and suspension of benefits of directors.

Italy

The rules regulating at least one third representation of each sex among members of management board and supervisory boards by 2015 were introduced by the Law 120 of 12 July 2011. These requirements apply to companies listed on stock exchange and state-owned companies. For listed companies the enforcement of the rules is ensured by the National Securities and exchange Commission which can apply progressively from warning and fine to forfeiture of the offices of elected board members for non-compliance.

Having in mind these examples, the propose Directive assesses that without EU action the female representation in boards of publicly listed companies is expected to evolve from 13.7% in 2012 to 20.4% in 2020 and only France will have achieved a 40% female representation in boards by 2020 as the result of national binding quota legislation. The EU as a whole is not expected to even achieve 40% of women on boards by 2040.

4. Proposal for EC Directive on Improving the Gender Balance among Non-executive Directors of Companies Listed on Stock Exchange and Related Measures

4.1. Legal base

As stated in the proposal for the Directive on improving the gender balance among non-executive directors of companies listed on stock exchange and related measures, the legislative measure is based on Article 157(3) and Article 157(4) from the Treaty on the Functioning of the European Union. This article is the legal basis for any binding measures aimed at ensuring the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, including positive action (EC, Proposal for a Directive, 2012, pp.8-9).

It can be stated that the proposal complies with the principle of subsidiarity and proportionality due to the fact that sets common objective, the aim will be better achieved through coordinated action at EU level rather than through national initiatives of varying type, and it is a measure of temporary nature (according to Article 10 of the proposed Directive) with expiry date on 31 December 2028.

4.2. Explanation of the specific provisions with critical overview

The proposed Directive sets a minimum objective of 40% by 2020 for members of the under-represented sex for non-executive members of the boards of publicly listed companies in Europe, or 2018 for listed public undertakings. This measure aims at accelerating progress towards gender balance while allowing companies sufficient time to make the necessary arrangements (Article 1).

As provided in the proposal the 40% objective applies to publicly listed companies due to their economic importance, visibility and impact on the EU market. Listed companies that are small and medium-sized enterprises (SMEs) are exempted according to Article 3, with argumentation that the obligation to reach the target could create a disproportionate administrative burden for them. In addition to their economic importance - with a total turnover equivalent to 68% of the EU GDP - listed companies are also highly visible. They set standards for the whole economy and they can expect their practices to be followed by other types of companies (recital 17 of the proposed Directive). However, SMEs account for 99% of EU enterprises, of which 92% are micro-enterprises, an enterprise with less than 10 employees and an annual turnover of 2 million Euros or less (EC, Minimizing regulatory

burden for SMEs, 2011). Thus, the author strongly agrees with Studiorum's contribution to the public consultation stating that any measure aiming at correcting the gender imbalance on EU company boards that only applies to large publicly listed companies, would have little effect on the promotion of substantive gender equality in EU (Studiorum, 2012, p.8).

In the opinion of the author the proposed Directive should cover all enterprises, big, medium, small, micro included if we want to see improvement in the gender equality thus breaking the glass ceiling. Furthermore, as the women control about 70% of global consumer spending having more women in management positions in SMEs including can therefore provide a broader insight in economic behavior and consumers' choices making all products and services more respondent to consumers' needs and preferences. However, non-compliance with the proposed Directive quota should not be forced with sanctions only, but incentives as well especially for the small and micro enterprises.

One more exemption is provided within recital 31 and Article 4 par. 6 of the proposed Directive stipulating that since the gender composition of the workforce has a direct impact on the availability of candidates of the under-represented sex, Member States may provide that where the members of the under-represented sex make up less than 10 per cent of the workforce the company concerned should not be required to meet the objective laid down in this Directive. On this issue author's opinion is that for these companies the quota should be flexible and can benefit from the Belgian example explained above, e.g. as long as the quota is not fulfilled, a person belonging to the under-represented sex with fulfilled qualification and merit criteria for a job on the board must be appointed to any vacant position.

In addition to the above stated the 40% objective is focused on non-executive director posts thus balancing between increasing gender diversity of boards and the need to minimize interference with day-to-day management of a company. Due to the fact that non-executive directors and supervisory boards have an essential role in appointing the highest level of management and shaping the company's human resources policy, having more gender diversity will have a positive ripple effect throughout the career ladder. However, in the opinion of the author the proposed Directive should cover executive and non-executive board members thus extending the principle of equality across all areas of decision-making in a corporation as a way forward in breaking the glass ceiling using the Italian example explained above.

In this regard the proposed Directive as complementary measure includes a flexi quota, an obligation for listed companies to set themselves individual, self-regulatory targets regarding the representation of both sexes among executive directors to be met by 2020. Companies will have to report annually on the progress made and such information should be published and include description of the undertaken measures (recital 34 and Article 5 of the proposed Directive).

In accordance with the principle of proportionality, the Directive is drafted as a temporary measure providing for a 'sunset close', stipulated to expire on 31 December 2028 (recital 39 and Article 10 par. 2 of the proposed Director). Article 8 provides for the Member States an obligation to adopt the relevant transposition measures within two years from the date of adoption of the Directive and those countries which before the entry into force of this proposed Directive have already taken measures to ensure a more balanced gender representation among the non-executive directors of listed companies should continue with

those measures, if the measures taken are of equivalent efficacy in order to attain the aim of the proposed Directive.

It is very important to stress that qualification and merit will remain the key criteria for a job on the board. The proposed Directive establishes that an appointment decision will have to be based on pre-established, clear, neutrally formulated objective qualifications criteria and there should be no unconditional, automatic promotion of the under-represented sex (recital 22, recital 25 and Article 4 par. 1 of the proposed Directive). Examples of types of selection criteria that companies could apply include professional experience in managerial and/or supervisory tasks, knowledge in specific relevant areas such as finance, controlling or human resources management, leadership and communication skills and networking abilities (recital 26 of the proposed Directive).

According to the author it is very important that this solution is in accordance with the case law of the Court of Justice of the EU on positive action presented above, stating that preference shall be given to the equally qualified under-represented sex, unless an objective assessment taking into account all criteria specific to the individual candidates tilts the balance in favour of the candidate on the other sex (Article 4 par. 3 of the proposed Directive). Member States remain free to introduce measures that go beyond the proposed system (Article 7 of the proposed Directive).

Finally, Member States should provide for effective, proportionate and dissuasive sanctions for companies in breach of the proposed Directive and in accordance with the case law of the Court of Justice of the EU (*Harz case*, par.23) must have real deterrent effect on the employer. In recital 30 and Article 6 par. 2 of the proposed Directive some example of sanctions was given, *inter alia*, administrative fines and nullity or annulment declared by a judicial body of the appointment or of the election of non-executive directors. In addition to imposing sanctions, as stated above the author proposes including provision that stipulates offering incentives in tax benefits especially for small and micro enterprises.

5. Conclusions

Based on the above stated at this moment women in the EU still do not have full access to the sharing of power and decision-making in economic life. In contrary to that, survey shows that presence of women on boards improves corporate governance. Namely, there is a positive relationship between gender diversity at top management level and a company's financial performance and profitability. Thus, enhancing female representation on the boards can have a positive impact on their performance.

From the paper it can be concluded that scattered and divergent regulation or the absence of regulation at national level in the EU Member States poses barriers to the internal market by imposing divergent corporate governance requirements on European listed companies, especially to those that operates across borders. Thus, the European Commission took action aiming at breaking the glass ceiling in November 2012 by proposing Directive on improving the gender balance among non-executive directors of companies listed on stock exchange and related measures. This legislation is proposed with the aim of attaining a 40% objective of the under-represented sex in non-executive board-member positions in publicly listed companies, with the exception of small and medium size enterprises.

The proposed Directive is a positive action measure that in principle is well reasoned. The critique is that the proposed Directive sets a 40% objective that applies to publicly listed companies only excluding the small and medium-sized enterprises that account for 99% of all

enterprises in EU. Furthermore, this benchmark is only for non-executive positions thus excluding the executive board members. In the opinion of the author the proposed Directive should cover all managerial positions, executive and non-executive board members, and all enterprises, big, medium, small, and micro included if we want to see improvement in the gender equality thus breaking the existing glass ceiling.

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