

GENDER BALANCE OR IMBALANCE

More Women on Company Boards?

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Nowadays, we can read about the improvement of gender balance in corporations. Lots of alternatives – like affirmative actions, quotas, economic incentives and sanctions – have arisen in the media, but these ideas were not clear. In March 2011, listed companies in the EU were given a last chance to self-regulate for more women in board positions, when the Commission Vice-President called on them to sign the ‘Women on board pledge for Europe’. The EU Commission presented a legal instrument aimed at increasing gender balance on company boards in the EU. In October 2012, the Commission presented a legislative proposal to promote gender balance among non-executive directors of companies listed on stock exchanges. I elaborate on what gender balance really means in this article.

1. Introduction, general background – Everybody is equal

“All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.”¹ That is Article 1 of the United Nations Universal Declaration of Human Rights, proclaimed and adopted by the United Nations in 1948. Equality is the most important principle of the European Union as well, e.g. equality between women and men. However, contain of this principle is compound.

¹ <http://www.un.org/en/documents/udhr/>

Equality between men and women is one of the Union's founding values and core aims under Articles 2² and 3(3)³ TEU⁴. In accordance with Article 8⁵ TFEU⁶ the Union shall aim to eliminate inequalities, and to promote equality, between men and women in all its activities. Equality between women and men is one of the fundamental principles of Community law. The European Union's objectives on gender equality are to ensure equal opportunities and equal treatment for men and women and to fight any form of discrimination on the grounds of gender. Equality between women and men must be ensured in all areas, including employment, work and pay. The principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex.⁷ The EU has adopted a two-pronged approach to this issue, combining specific measures with gender mainstreaming⁸. Across affirmative actions and gender mainstreaming, EU-directives⁹ are very important and useful legal instruments as well. Directives are the third pillar of the framework against discrimination. These legal instruments do not have direct applicability in the EU-countries but the Member States have to implement the regulations into their legal system, thus these provisions can prevail in every country in the European Union. The issue also has a strong international dimension with regards to the fight against poverty, access to health services and

² “The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.”

³ “The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance.”

⁴ Treaty on European Union.

⁵ “In all its activities, the Union shall aim to eliminate inequalities, and to promote equality, between men and women.” [Article 3(2) TEC]

⁶ Treaty on the Functioning of the European Union.

⁷ Article 23: Equality between women and men (The Charter of Fundamental Rights of the European Union)

⁸ Gender mainstreaming is a policy, a strategy to achieve equality between women and men. It is used to integrate gender concerns into all policies, and programmes of the European Union institutions and Member States. Gender Mainstreaming within the EU was firstly defined by the European Commission in the Communication from the commission „incorporating equal opportunities for women and men into all community policies and activities” in 1996 (COM (96) 67 final) as: “[...] mobilising all general policies and measures specifically for the purpose of achieving equality by actively and openly taking into account at the planning stage their possible effects on the respective situations of men and women (gender perspective)”.

⁹ E.g. 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; Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin; Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

education, taking part in the decision-making process and in the economy, women's rights and human rights.

The EU Member States and the EU institutions have made numerous efforts in the course of several decades to promote gender equality in economic decision-making, notably to enhance female presence in company boards, by adopting recommendations and encouraging self-regulation. Two Council Recommendations (in 1984 and 1996)¹⁰ encouraged the private sector to increase the presence of women at all levels of decision-making, notably by positive action programmes, and called upon the Commission to take steps to achieve balanced gender participation in this regard. National self-regulation and corporate governance initiatives were aimed at encouraging companies to appoint more women into top-level positions.

The European Commission reaffirmed its support for an increased participation of women in positions of responsibility, both in its Women's Charter and its Strategy for Equality between Women and Men 2010-2015, whilst also publishing several reports taking stock of the situation.¹¹ In the European Pact for Gender Equality 2011-2020, adopted on 7 March 2011, the Council acknowledged that gender equality policies are vital to economic growth, prosperity, and competitiveness and urged action to promote the equal participation of women and men in decision-making at all levels and in all fields, in order to make full use of all the talents.

The European Parliament repeatedly called upon companies and Member States to increase female representation of women in decision-making bodies and invited the Commission to propose legislative quotas to attain the critical threshold of 30 per cent female membership of management bodies by 2015 and 40 per cent by 2020.¹² The European social partners have reaffirmed their commitment to further action in this area in their work programme for 2012-2014.

However, progress in increasing the presence of women on company boards has been very slow, with an average annual increase in the past years of just 0.6 percentage points. The most significant progress was noted in those Member States and other countries where binding measures had been introduced¹³. All the same the gender

¹⁰ Council Recommendation 84/635/EEC of 13 December 1984 on the promotion of positive action for women recommended that Member States should take steps to ensure that positive action includes, as far as possible, actions having a bearing on active participation by women in decision-making bodies. Council Recommendation 96/694/EC of 2 December 1996 on the balanced participation of women and men in the decision-making process recommended that Member States should encourage the private sector to increase the presence of women at all levels of decision-making, notably by the adoption of, or within the framework of, equality plans and positive action programmes.

¹¹ Commission report 'More women in senior positions', January 2010; Commission Staff Working Paper 'The Gender Balance in Business Leadership', March 2011 [SEC (2011) 246 final]; Progress Report 'Women in economic decision-making in the EU', March 2012; Commission Staff Working Document 'Progress on equality between women and men in 2011', April 2012 [SWD (2012) 85 final].

¹² E.g. resolution of 6 July 2011 on women and business leadership [2010/2115(INI)], Resolution of 13 March 2012 on equality between women and men in the European Union – 2011 [2011/2244(INI)].

¹³ Progress report: Women in economic decision-making in the EU, March 2012 (http://ec.europa.eu/justice/gender-equality/files/women-onboards_en.pdf).

imbalance is striking in all EU Member States, with national averages ranging from around 5%¹⁴ to around 25%¹⁵. The share of women varies across Member States between around 3% and around 28% for non-executive directors and between 0% and around 21% for executive directors¹⁶. Growing discrepancies between countries are likely to increase given the very different approaches pursued by individual Member States. Some countries have developed national legislation; some other Member States target listed companies, while others focused on large companies (regardless of listing) or state-owned companies only¹⁷. The divergence or the absence of regulation at national level does not only lead to the discrepancies in the number of women among executive and non-executive directors and different rates of improvement across Member States, but also poses barriers to the internal market by imposing divergent corporate governance requirements on European listed companies.

The current lack of transparency of the selection procedures and qualification criteria for board positions in most Member States represents an important barrier to more diversity of board members and negatively affects both board candidates' careers and their freedom of movement, as well as investor decisions. But what is the reason of the slight of women in the company boards? In my opinion, that is a complex problem, but the following factors seem to be sure. 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 European Union.

Why is it a problem that there are not too many women on the company boards? In boards with a predominance of members of one sex there is a considerably higher likelihood of a narrow 'groupthink'. This can contribute to the failure of an effective challenge of the management decisions, as the lack of diverse views, values, and competences may lead to less debate, ideas, and challenges in the boardroom. In this respect, inadequate recruitment practices for board members contribute to perpetuating the selection of members with similar profiles. The selection often draws on a too narrow pool of people, non-executive directors are still often recruited through an 'old boys' network' from among business and personal contacts of the current board members.¹⁸

¹⁴ In Malta, Cyprus, Hungary, Luxembourg, Portugal, Italy, Estonia and Greece.

¹⁵ In Sweden, Latvia and Finland.

¹⁶ Progress report: Women in economic decision-making in the EU, March 2012 There are several important legal measures in place to promote equal treatment and equal opportunities of men and women in matters of employment and occupation, including self-employment (http://ec.europa.eu/justice/gender-equality/files/womenon-boards_en.pdf)

¹⁷ Related regulatory competencies and legal restrictions of the countries and the EU, and the equality case law of the Court of Justice of the EU are discussed in the later part of the article.

¹⁸ The Bottom Line: Connecting Corporate Performance and Gender Diversity; McKinsey (reports of 2007, 2008 and 2010).

Clear requirements as regards the targets to be achieved by companies as regards the gender of the non-executive directors, the transparency of the recruitment process (qualifications criteria) and reporting obligations as regards gender diversity of boards are therefore necessary.

2. Proposal of the gender balance

The European Parliament has decided to prepare a proposal for solve the above mentioned problems. However, decision-makers did not know the construction of this proposal at this time. A 2011 Eurobarometer survey revealed that 88% of Europeans think that women should be equally represented in company leadership positions. Given the possibility to choose between three options to achieve gender balance on company boards, opinions are divided between self-regulation by companies (31%), by binding legal measures (26%), and by non-binding measures such as Corporate Governance Codes and Charters (20%). However, 75% of Europeans are in favour of legislation provided that it takes qualifications into account and does not automatically favour members of one sex.¹⁹

As a consequence, the Commission and the Council have drafted a suggestion²⁰ to promote gender equality in economic decision-making. The aim of the this is to substantially increase the number of women on corporate boards throughout the EU by setting a minimum objective of a 40% presence of the under-represented sex among the non-executive directors of companies listed on stock exchanges and by requiring companies with a lower share of the under-represented sex among the nonexecutive directors to introduce pre-established.

The quantified objective of 40% set by the draft only applies to non-executive directors, because 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. A stronger presence of the under-represented sex among non-executive directors will therefore have positive ripple effects for gender diversity throughout the career ladder. The suggestion focuses on publicly listed companies, due to their economic importance and high visibility. They set standards for the private sector at large. Moreover, they tend to have larger boards and have a similar legal status across the EU, providing the necessary comparability of situations.

The proposed objective of 40% for the minimum share of both sexes is in line with the targets currently under discussion and set out in a number of EU Member States countries. This figure is situated between the minimum of the 'critical mass' of 30%, which has been found necessary in order to have a sustainable impact on board performance and full gender parity (50%).

The suggestion refrains from establishing a fixed binding objective for executive board members, due to the greater need for sector-specific knowledge and experience

¹⁹ Special Eurobarometer 376 (2012), Women in decision-making positions. (http://ec.europa.eu/public_opinion/archives/eb_special_379_360_en.htm#376).

²⁰ http://www.eumonitor.eu/9353000/1/j4nvhd fcs8bljza_j9vvik7m1c3gyxp/vj4ntf9n9lou#p1

in the day-to-day management of a company. However, companies should be obliged to make commitments in relation to executive directors that reflect their specific circumstances, and to report on the compliance with these commitments.

3. The legal background of the proposal

The proposal is consistent with the Charter of Fundamental Rights of the European Union ('Charter'). It will help to promote fundamental rights, particularly those related to equality between women and men (Article 23) and to the freedom to choose an occupation (Article 15). The suggestion is also inspired by the freedom to conduct a business (Article 16) and on the right to property (Article 17). In line with the principle of proportionality the proposal's focus is on non-executive board members who are not involved in the day to day running of operations.

The Court of Justice of the European Union (CJEU) has established the criteria²¹ that need to be met in order to reconcile the two concepts of formal equality of treatment and positive action aimed at bringing about de facto equality, both of which are recognised in the Charter as well as in Article 157 TFEU and in Article 3 of Directive 2006/54/EC. The criteria are: the measures must concern a sector in which women are under-represented; they can only give priority to equally qualified female candidates over male candidates: they must not give automatic and unconditional priority to equally qualified candidates, but must include a 'saving clause' which includes the possibility of granting exceptions in justified cases which take the individual situation into account, in particular the personal situation of each candidates. The proposal has to fit to the requirements of subsidiarity and proportionality as well.

3.1. Subsidiarity

The Founding Treaties intended to create a competitive level-playing field among Member States by enshrining the principle of equal pay and of gender equality on the labour market, to avoid any downward competition among Member States in labour and equal treatment matters. Member States may indeed hesitate to regulate in this area on their own, as they could perceive a risk of putting their own companies at a disadvantage with companies from other Member States. Furthermore, scattered and divergent regulation at national level is bound to create practical problems in the functioning of the internal market. Different company law rules and sanctions for not complying with a national binding quota, such as exclusion from public procurement, could lead to complications in business life and have a deterrent effect on companies' crossborder investments and the establishment of subsidiaries in

²¹ E.g. in the following cases: Case C-450/93, *Kalanke v Bremen*, European Court Reports (ECR), 1995, p. I-3051.; Case C-409/95 *Marschall v Land Nordrhein-Westfalen*, ECR 1997, p. I-6363.; Case C-407/98 *Abrahamsson* [2000] ECR I-5539. All judgments of the EU Court can be find here: <http://curia.europa.eu>

other Member States. The decision-makers of the EU think that only an EU-level measure can effectively help to ensure a competitive level-playing field throughout the Union and avoid practical complications in business life by means of minimum harmonisation of corporate governance requirements relating to appointment decisions based on objective qualifications criteria in order to attain gender balance among non-executives directors. It can therefore be concluded that the objectives of the envisaged action cannot be sufficiently achieved by the Member States on their own and may be better achieved through coordinated action at EU level rather than through national initiatives of varying scope, ambition, and effectiveness. The proposal therefore complies with the principle of subsidiarity.

3.2. Proportionality

Non-binding measures such as past EU-level recommendations and calls for self-regulation have not achieved and cannot be expected to achieve the objective of improving gender equality in economic decision-making throughout the EU. Further-reaching action to be taken at EU-level is therefore necessary to achieve those aims. This should, however, not go beyond what is strictly required to achieve sustainable progress in the share of women on company boards, without impinging on the functioning of private companies and the market economy.

This proposal is limited to setting common objectives, giving Member States sufficient freedom to determine how they should be best achieved at national level, taking into account national, regional or local circumstances including national company law and company board recruitment practices. In particular, the proposal requires only such changes to national company law that are strictly necessary for the minimum harmonisation of requirements for the appointment decisions and it respects the different board structures across Member States. It does not cover small and medium-sized enterprises (SMEs), furthermore establishes quantitative objectives only for non-executive board members, thereby considerably limiting interference in the daily management of the company. The temporary nature of the proposed Directive (see Article 10)²² underpins its compliance with the principles of subsidiarity and proportionality.

3.3. The chosen legal instrument

Maybe a directive is the best choice to solve the problem of the gender imbalance, because this kind of legal instrument allows Member States to adjust the detailed regulation to their specific situations in terms of national company law and to choose the most appropriate means of enforcement and sanctions. It also allows individual Member States to go beyond the minimum standards, on a voluntary basis.

²² This Directive shall enter into force on the [twentieth] day following that of its publication in the Official Journal of the European Union. It shall expire on 31 December 2028.

4. The proposal

The proposal includes only ten sections. As a consequence it contains only the most important regulations related to the above mentioned problems. Therefore, it provides facilities for the Member States to fit this regulation to their legal system. The proposal disposes about the subjects and definitions of the regulation, the additional measures, the sanctions, the minimum requirements, the implementation, the review, the entering into force and expiry, and the addressees.

Article 1 lays down the subjects and aims of the directive.²³ Then the suggestion sets out the key definitions, which are based on those in Commission Recommendation 2005/162/EC on the role of non-executive or supervisory directors of listed companies and of the Committees of the (supervisory) board, on Commission Recommendation 2003/361/EC of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises in relation to the definition of SMEs, and on Commission Directive 2006/111/EC of 16 November 2006 on the transparency of financial relations between Member States and public undertakings, as well as on financial transparency within certain undertakings in relation to the definition of public undertakings.²⁴ The definitions ensure in particular that the Directive is equally applicable to various systems of board structures for listed companies that exist in the Member States, i.e. to a dual ('two-tier') system in which there are separate management and supervisory boards, to a unitary ('one-tier') system combining the management and supervisory functions in one single board, as well as to mixed systems featuring elements of 'one-tier' and 'two-tier' systems or giving companies an option between different models.²⁵

The proposal²⁶ imposes on listed companies which do not have a presence of the under-represented sex of at least 40 per cent of non-executive directors an obligation to make the appointments to those positions on the basis of a comparative analysis of the qualifications of each candidate, by applying pre-established, clear, neutrally formulated, and unambiguous criteria, in order to attain the above mentioned percentage at the latest by 1 January 2020.

²³ „This Directive lays down measures to ensure a more balanced representation of men and women among the non-executive directors of listed companies by establishing measures aimed at accelerated progress towards gender balance while allowing companies sufficient time to make the necessary arrangements.” (Article 1 of the proposal)

²⁴ The Article 2 of the legal provisions includes the definitions of listed company, board, director, executive director, non-executive director, unitary board, dual board system, small and medium sized enterprises and public undertaking as well.

²⁵ In Hungary there is a dual board system.

²⁶ Article 4, Paragraph (1): Member States shall ensure that listed companies in whose boards members of the under-represented sex hold less than 40 per cent of the non-executive director positions make the appointments to those positions on the basis of a comparative analysis of the qualifications of each candidate, by applying pre-established, clear, neutrally formulated and unambiguous criteria, in order to attain the said percentage at the latest by 1 January 2020 or at the latest by 1 January 2018 in case of listed companies which are public undertakings.

The proposal contains a preference rule as well. This rule provides that, in the presence of equally qualified candidates of both sexes, priority shall be given to the candidate of the under-represented sex unless an objective assessment taking account of all criteria specific to the individual candidates tilts the balance in favour of the candidate of the other sex. This procedural requirement is necessary to ensure that the objectives comply with the case-law²⁷ of the Court of Justice of the European Union concerning positive action. The proposal can also be met where the members of the under-represented sex hold at least one third of all director positions, irrespective of whether they are executive or non-executive.

In accordance with the sanctions, the suggestion obliges Member States to lay down rules on sanctions applicable in case of breach of this Directive. These sanctions must be effective, proportionate, and dissuasive. The directive lets the Member States to create their own rules keeping the above mentioned requirements.

The directive lets the Member States to execute this regulation considering the following: Member States are under an obligation to adopt the relevant transposition measures within two years from the date of adoption of the Directive. It cannot be overemphasized that, the directive contains only minimum requirements.²⁸ The Directive imposes a reporting obligation on Member States. The Commission is obliged to review and report on the application of the Directive every two years, in particular on whether the aims of the Directive have been achieved. The objectives remain in power only until sustainable progress in gender composition of boards has been achieved and the Directive includes a 'sunset clause' to that effect.²⁹

5. Brief summary of the position of Hungary, conclusions

The Hungarian Basic Law guarantees the equality between men and women³⁰. However, the EU Commission needs more warrant than this. The Hungarian government declared that the gender balance in this area should be achieved through

²⁷ C-450/93: Kalanke (1995 ECR I-3051), C-409/95: Marschall (1997 ECR I-6363), C-158/97: Badeck (2000 ECR I-1875), C-407/98: Abrahamsson (2000 ECR I-5539).

²⁸ „Member States may introduce or maintain provisions which are more favourable than those laid down in this Directive to ensure a more balanced representation of men and women in respect of companies incorporated in their national territory, provided those provisions do not create unjustified discrimination, nor hinder the proper functioning of the internal market.” (Article 7)

²⁹ „This Directive shall enter into force on the [twentieth] day following that of its publication in the Official Journal of the European Union. It shall expire on 31 December 2028.” (Article 10)

³⁰ Article XV of the Constitution of Hungary:

- (1) Everyone shall be equal before the law. Every human being shall have legal capacity.
- (2) Hungary shall guarantee the fundamental rights to everyone without discrimination and in particular without discrimination on grounds of race, colour, sex, disability, language, religion, political or other opinion, national or social origin, property, birth or any other status.
- (3) Women and men shall have equal rights.

(From: <http://www.kormany.hu/download/e/2a/d0000/THE%20FUNDAMENTAL%20LAW%20OF%20HUNGARY.pdf>)

national measures instead of EU legislation. In the Hungarian government's opinion the regulation of the gender balance on the company boards is not a part of the competence of the EU. However, it is a task for all the Member States. All the same if the above analysed draft will be accepted by the relevant bodies, Hungary must execute these provisions in its legal system as well.

In Hungary, women represent 7.4% of the board members of the largest publicly listed companies. This is significantly below the EU average (15.8%).³¹ Hungary is the last but one with its 7% in the rank of the percentage of woman in company boards across the EU. The last is Malta with 4%, in turn the first is Finland with 29%. The average value is 16% in the EU. The proportion of women on boards in Hungary fluctuated over the period, the highest point 16.3% coming in 2008 and the lowest point, 5.3%, in 2011.³² 86% of people in Hungary think that, women should be equally represented in positions of leadership in companies and 83% are in favour of legislation on this matter under the condition that qualification is taken into account without automatically favouring one or other gender.³³

It can be concluded that the equality between men and women is a very important and actual question. There are numerous kinds of measures and activities to achieve the effective gender equality, not only equal opportunity. The above mentioned and analysed suggestion and initiation is a clear indication of this tendency this. In my opinion the situation in Hungary shall be improved. The aim is to achieve the factual equality between women and men on the company boards and in other areas – e.g. legislation, workplaces – as well. However, it is important that not only one measure, but lots of measures and affirmative actions have to be applied to achieve this goal. In my view, the regulation for improving gender balance on boards of corporations listed on stock exchanges is one of the possible measures but not more. In my judgement this initiation is in accordance with the Hungarian constitutional and legal system, because our constitution allows making positive measures or affirmative actions³⁴. The Hungarian equality law is very similar to the EU law; as a consequence, this suggestion will fit to the Hungarian legal system and to the practice of the ordinary and constitutional courts. The question is whether this is the optimal key to solve the gender imbalance on boards, maybe yes. In my opinion, we have to try to achieve the gender balance with every means, because to achieve this goal is important not only for women but for the whole society as well.

³¹ http://ec.europa.eu/justice/gender-equality/gender-decision-making/database/business-finance/executives-non-executives/index_en.htm

³² http://ec.europa.eu/justice/gender-equality/gender-decision-making/database/index_en.htm

³³ http://ec.europa.eu/public_opinion/archives/ebs/ebs_376_fact_hu_en.pdf

³⁴ Section (4) Article XV of the Constitution of Hungary: „By means of separate measures, Hungary shall promote the achievement of equality of opportunity and social inclusion.” (<http://www.kormany.hu/download/e/2a/d0000/THE%20FUNDAMENTAL%20LAW%20OF%20HUNGARY.pdf>)