



THE RELEVANCE OF GENDER DIVERSITY IN THE COMPOSITION OF THE BOARD OF DIRECTORS

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"I want to send a clear message to corporate Europe: women mean business"

Viviane Reding, EU Justice Commissioner

Abstract

Executive Summary

Gender diversity and gender equality are increasingly debated subjects, which cover a wide range of situations ranging from the workplace (private or public) to the private sphere at home. This paper will focus in particular on gender diversity on the board of directors and on initiatives taken in this regard by the European Commission.

Talking about gender diversity and solutions to close the gap is never easy and often leaves people confused in their opinions. We can see that in the EU itself most Member States have taken different approaches to solve this problem, which has resulted in large discrepancies. Therefore, the Commission has decided to take a more affirmative stance by proposing a directive on improving the gender balance among non-executive directors of companies listed on stock exchanges. The key element of this directive consists of the positive objective of reaching a 40% representation by 2020 for members of the under-represented sex.

In this paper, we shall look at the Commission's reasons for acting in this domain and discuss more largely the (economic) advantages of having more women on boards of directors. Finally, we shall also discuss the legal validity of this proposal by looking at the principles of subsidiarity, proportionality and the specific criteria for allowing positive discrimination.

1. INTRODUCTION

On the 14th of November 2012, the Commission adopted a proposal for a directive to improve the gender balance among non-executive directors of companies listed on stock exchanges ('the proposal'). This paper aims to identify the underlying reasons for this proposal and to explain the choices made.

First of all, I will look at the background of this proposal and the context in which it was adopted. Secondly, I will discuss and question the reasons that justify these measures. Thirdly, I will look at the legal requirements and evaluate whether the proposal satisfies them.

2. BACKGROUND

The protection of equality between men and women is one of the core values underlying the European Union. It can be found in articles 2 and 3(3) of the Treaty on European Union ('the TEU') and in article 8 of the Treaty on the Functioning of the European Union ('the TFEU'). In each of these articles, the equality of men and women is particularly emphasized. Since 2010, the EU, and the Commission in particular, has started focusing on equality in decision-making positions.

Viviane Reding, Vice- President of the Barroso Commission 2010-2014, was the leading Commissioner in this domain. She was part of the European Parliament's Committee for Women's Rights and Gender Equality and has vowed to increase awareness for gender diversity during her mandate.¹ When she took up her mandate in 2010, the share of women on boards consisted of 11.9% on average in the EU.² Following various initiatives, this average has slowly increased.

The first initiative taken by this Commission was the adoption of a Women's Charter.³ Through this charter, the Barroso II Commission wanted to reaffirm its commitment to promoting equal rights for men and women. The Commission, led by Viviane Reding, intended to strengthen its efforts and take specific measures to promote

¹ V. REDING, 'Opening Remarks at the European Parliament Hearing in the Committee for Women's Rights and Gender Equality', Brussels, 11 January 2012.

² Commission, 'Gender Balance on Corporate Boards: Europe is Cracking the Glass Ceiling', March 2014, 2.

³ Commission, 'Women's Charter', COM (2010) 78.

gender equality during its five-year term.⁴ This Charter was quickly followed by the ‘Strategy for Equality between Women and Men 2010-2015’.⁵ This Strategy represents, in a more concrete form, the Commission’s work program on gender equality. One of the thematic priorities identified was ‘equality in decision-making’.⁶

The second initiative was taken in March 2011 in the form of a call for self-regulation. The initiative was labeled: “Women on the Board Pledge for Europe”. This call for self-regulation asks publicly listed companies to voluntarily commit to increase the presence of women on boards. By signing the pledge, a company commits itself to reaching a quota of 30% by 2015 and 40% by 2020.⁷ By October 2011, the average share of women on boards had risen to 13.7%.⁸

Thirdly, after a Progress Report showed that the call for self-regulation had not resulted in any significant improvement,⁹ the Commission decided to take more affirmative action by proposing the adoption of a directive imposing a procedural quota.¹⁰ The directive’s target is to reach a quota of 40% for the under-represented sex by 2020 – in line with previous initiatives. The quota only applies for non-executive members of the board in publicly listed companies. For public undertakings, the quota needs to be achieved by 2018.¹¹ In the meantime, the average has consistently been rising from 15.8% in October 2012 to 17.8% in October 2013.¹² The three frontrunners are Finland, Latvia and France with a respective 29.1%, 29.0% and 26.8% of board members that are women,¹³ and the ones that are closing the ranks are Malta, Portugal and Greece, with a respective percentage of 2.8, 7.1 and 7.3.¹⁴

⁴ V. REDING, ‘Women’s Charter: Our Commitment to Gender Equality’, Joint Press Conference with President Barroso, Brussels, 5 March 2010.

⁵ Commission, ‘Strategy for Equality between Women and Men 2010-2015’, COM (2010) 491 final.

⁶ Commission, ‘Gender Equality in the European Union’, 2011, 11.

⁷ Commission, ‘EU Justice Commissioner Reding challenges business leaders to increase women’s presence on corporate boards with “Woman on the Board Pledge for Europe”’, MEMO/11/124, Brussels, 1 March 2011.

⁸ Commission, ‘Gender Balance on Corporate Boards: Europe is Cracking the Glass Ceiling’, March 2014, 2.

⁹ Commission, ‘Women in Economic Decision-Making in the EU: Progress Report’, 2012, 15.

¹⁰ Commission, ‘Proposal for a Directive of the European Parliament and of the Council on improving the gender balance among non-executive directors of companies listed on stock exchanges and related measures’, COM (2012) 614 final, Brussels, 14 November 2012.

¹¹ Commission, *ibid.*, 5; Commission, ‘Women and Men in Leadership Positions in the European Union (2013)’, October 2013, 12.

¹² Commission, ‘Gender Balance on Corporate Boards: Europe is Cracking the Glass Ceiling’, March 2014, 2.

¹³ Commission, ‘Gender Balance on Corporate Boards: Europe is Cracking the Glass Ceiling’, March 2014, 1.

¹⁴ Commission, ‘Women and Men in Leadership Positions in the European Union (2013)’, October 2013, 6.

3. THE ADVANTAGES OF HAVING WOMEN ON BOARDS

The reason why gender diversity on boards is being focused on during this Commission's term lies within the EU 2020 Growth Strategy as a response to the economic crisis.¹⁵ Having women on boards can bring important economic advantages both from a micro- and macro-economic perspective. Addressing this issue may help revitalize the economy and render it more stable in the future.¹⁶

The strongest argument for having more women on boards is that a more diversified board leads to more diversified opinions, resulting in innovative and more refined solutions.¹⁷ This diversity is therefore likely to boost economic growth. On a micro-economic level, studies have pointed out the following – advantageous – effects: improved company performance; mirroring the market; better quality of decision-making; improved corporate governance and ethics; and better use of the talent pool.¹⁸ Europe's GDP would grow with 27% if the productivity of men and women were to rise to equal levels.¹⁹

Macro-economically speaking, in a time when European, skilled workers are falling short and the population is ageing, qualified women should no longer be overlooked in selection procedures.²⁰ The so-called glass ceiling deters women from fulfilling their full professional potential.²¹ Women now make up around 60% of university graduates in Europe.²² Not seeing this number reflected in leadership positions is a loss of valuable talent, which Europe cannot afford in a time of staggering economic growth. This underutilized talent pool represents opportunities for economic growth in the future.²³ Studies have shown that companies that have a more diversified board consistently outperform homogenous boards.²⁴

Put differently, the strength of the economy and the sustainability of pension schemes depend on the increase of women on the work floor and on the closing of the pay

¹⁵ Commission, 'Europe 2020: A Strategy for Smart, Sustainable and Inclusive Growth', COM (2010) 2020, Brussels, 3 March 2010.

¹⁶ Commission, 'Women in Economic Decision-Making in the EU: Progress Report', 2012, 7.

¹⁷ Commission, 'Women on boards – Factsheet 1: The economic arguments', 1.

¹⁸ Credit Suisse, 'Gender Diversity and Corporate Performance', Zurich, August 2012, 17;

McKinsey&Company, 'Women Matter: Gender diversity, a corporate performance driver', 2007, 10;

Deutsche Bank Research, 'Towards Gender-Balanced Leadership: What has not worked – and what may', 24 November 2010, 3.

¹⁹ A. LOFSTROM, 'Gender Equality, Economic Growth and Employment', 2009, 26.

²⁰ Commission, 'Women on boards – Factsheet 1: The economic arguments', 2.

²¹ Commission, 'Women in Economic Decision-Making in the EU: Progress Report', 2012, 7.

²² Commission, 'Report on Equality between Men and Women', COM (2009) 77, Brussels, 27 February 2009.

²³ Ernst&Young, 'Groundbreakers. Using the Strength of Women to Rebuild the World Economy', 2009, 2 and 16.

²⁴ Commission, 'Women in Economic Decision-Making in the EU: Progress Report', 2012, 15.

gap.²⁵ As a result of the economic crisis that started in 2008, employment rates have gone down substantially. The Commission wants to reach a target of 75% for both women and men by 2020. In order for this target to be reached, women, in particular, need to be given incentives to stay in the workforce. One of these incentives should be a credible prospect of career progress and the elimination of the glass ceiling for top management positions.²⁶

Lastly, the Commission argues that the differences in national rules regarding this subject hinder the functioning of the internal market. Legal uncertainty can create obstacles for companies with seats in more than one Member State. Harmonizing at the EU level can solve this problem and eliminate this barrier to the four freedoms.²⁷ The Commission argues that without EU intervention, there is a risk of a widening gap between states that do address this important matter and those that leave it unattended.

4. LEGAL ASPECTS OF THE COMMISSION'S PROPOSAL

According to the Court of Justice, positive action in order to create *de facto* equality needs to meet a number of specific criteria in order to be permissible. First of all, the measure must concern a sector in which women are under-represented.²⁸ Secondly, the measure can only require the employer to give priority to equally qualified female candidates over male candidates.²⁹ Lastly, this priority may never be given automatically or unconditionally. The selection must allow for exceptions in individual cases when this is justified. For instance, an exception can be based on a candidate's personal situation.³⁰

The Commission asserts that these criteria are fulfilled. It refers to article 4(3) of the Proposal, which states that preference will only be given to an equally qualified candidate of the under-represented sex. The selection should be based on objective criteria that allow for a comparative analysis that is neutral, clear and unambiguous.³¹ The proposal also leaves the possibility open to select the candidate from the other sex, when

²⁵ OECD, 'Employment Outlook', 2008, 140.

²⁶ Commission, 'Women in Economic Decision-Making in the EU: Progress Report', 2012, 7.

²⁷ Commission, *Ibid.*, 7.

²⁸ Case C-450/93, *Kalanke v. Bremen*, 1996 E.C.R. I-3051.

²⁹ Case C-407/98, *Abrahamsson and Anderson v Fogelqvist*, 2000 E.C.R. I-5562.

³⁰ Case C-409/95, *Marschall v Land Nordrhein-Westfalen*, 1997 E.C.R. I-6363; Commission, 'Proposal for a Directive of the European Parliament and of the Council on improving the gender balance among non-executive directors of companies listed on stock exchanges and related measures', COM (2012) 614 final, Brussels, 14 November 2012, 6.

³¹ Commission, *Ibid.*, 12.

there are criteria specific to the individual's case, even though both candidates were equally qualified in terms of suitability, competence and professional performance.³²

In addition to these criteria, the proposal also needs to respect the principles of subsidiarity and proportionality. With regard to subsidiarity, the Commission gives two reasons why action at EU level is preferable. First of all, the Commission has evaluated the situation in the Member States and has concluded that most states have undertaken action, but that approaches vary significantly. This results in large discrepancies between the proportions of women on boards from country to country. Secondly, the Commission argues that the Member States are not capable on their own, without coordinated action, to solve this issue in a way that benefits economic growth. Because of reasons of scale, the Commission considers itself better placed to take the initiative.³³

For the measure to be proportionate, it may not go beyond what is strictly necessary to achieve its objective. In this regard, it is important to evaluate alternatives to see whether there are other less intrusive measures available. The objective of the measure is to improve gender-equality in economic decision-making. In my opinion, the Commission has remained modest in its proposal to respect this principle. The directive is a minimum harmonization directive, which means that Member States retain a large margin of discretion as to how they want to implement it. Secondly, the quota only applies to non-executive members, and small- and medium size enterprises (SME) are excluded from its scope. Doing otherwise would interfere too much in the daily management of the company and would represent a disproportionately heavy burden on SMEs.³⁴

Norway was one of the first and far-going countries to undertake legislative action. In 2003, a law was adopted which requires commercial companies (both state- as privately owned), which are publicly listed, to reach a minimum of 40% representation of both genders. Companies that do not comply with this quota face severe repercussions, even dissolution by Court order.³⁵ This example was followed by a number of EU Member States such as Belgium, Italy and France. In Belgium, for example, the quota is 1/3 and applies to companies quoted on the stock exchange and state-owned enterprises. Non-compliance can result in a suspension of benefits for all the other board members.³⁶ Since

³² Commission, 'Women on Boards – Factsheet 3: Legal Aspects', 2.

³³ Commission, *Ibid.*, 3.

³⁴ Commission, 'Proposal for a Directive of the European Parliament and of the Council on improving the gender balance among non-executive directors of companies listed on stock exchanges and related measures', COM (2012) 614 final, Brussels, 14 November 2012, 10.

³⁵ Commission, 'Positive Action Measures to Ensure full Equality in Practice between Men and Women, including on Company Boards', 2012, 1.

³⁶ Commission, 'Women in Economic Decision-Making in the EU: Progress Report', 2012, 17

there are many countries in the EU which have not taken any particular or strong measures, the progress that has been made so far, mostly comes from five countries alone.³⁷

Even in countries, such as Japan, where traditionally the role of women has been to stay at home, the government is taking action on this front. Mr. Abe, Japan's prime minister, wants 30% of top positions to be taken by women by 2020. In 2011, only 1% of the most senior, executive positions were women. For this quota to be achieved, Mr. Abe focuses mostly on supporting measures, such as providing adequate day-care.³⁸

³⁷ France, Netherlands, Italy, Germany and the UK. Commission, 'Women and Men in Leadership Positions in the European Union (2013)', October 2013, 7.

³⁸ 'The Economist, 'Japanese women and work: Holding back half the nation', Tokyo, 29 March 2014.

5. CONCLUSION

There are many arguments in favor of gender-diversity on boards of companies. In this paper I have only discussed the economic relevance. Even though the human rights claim is equally valid, the prospect of significant economic growth in itself provides a strong incentive for businesses to become more gender-diversified. By focusing on this aspect the Commission hopes to see the most progress.

The Commission's Proposal is a first step towards a more harmonized solution for this problem. However, in order for the measure to be proportionate and yet most effective, there are other steps that can be taken to help speed up the process. Inspired by the diverse approaches taken at Member State level, the Commission has proposed a set of accompanying measures to support the Member States in attaining the quota.³⁹

³⁹ Commission, 'Gender Balance in Business Leadership: a Contribution to Smart, Sustainable and Inclusive Growth', COM (2012) 615 final, Brussels, 14 November 2012.

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