



**BREAKING THE GLASS CEILING: GENDER DIVERSITY IN
THE BOARD OF DIRECTORS**

Francisca Soromenho

LLM (Catolica Global School of Law)

Working Paper No. 2/2016

June 2016

This paper can be downloaded without charge from the Governance Lab website at:
www.governancelab.org.

The contents of this paper are the sole responsibility of its author.

Keywords: Gender diversity, board diversity, corporate governance, board of directors, boardroom diversity, parity quotas, positive-discrimination, soft-law, public policy.

BREAKING THE GLASS CEILING: GENDER DIVERSITY IN THE BOARD OF DIRECTORS

Francisca Soromenho

mfmcss@gmail.com

Abstract

Executive Summary

Once a taboo, the issue of equality has risen to the public debate for good reason. Western democracies are increasingly confronted with the underrepresentation of women and other minorities in high-rank corporate positions. For law thinkers this subject has an added dimension for it is up to us to discuss and design the legal framework and regulation to tackle these problems. This paper wishes to address corporate governance and gender diversity under new light, by discussing the substantive need for compulsory gender-quotas in the board of directors.

Too often in legal literature we stick to the economic arguments supporting women on boards, where we feel that this is in nature a matter of human rights and good corporate governance designed for a new and more equal generation. This paper branch out of *stricto sensu* corporate efficiency and into the domain of feminism as a theory of equality in the context of corporate governance.

We will briefly look into the composition of the board, discuss what diversity means in this context and then analyse affirmative action measures and equality. These concepts will then be applied to corporate governance, and we will end with a comparative exercise between the European response and some Member States in particular.

TABLE OF CONTENTS

1. THE BOARD OF DIRECTORS	5
2. ON DIVERSITY	5
3. EQUALITY AND QUOTAS	6
4. BOARD DIVERSITY, EFFICIENCY AND CORPORATE GOVERNANCE	7
5. EUROPE AND REGULATORY RESPONSE	8
6. CRITICAL ASSESSMENT AND CONCLUDING REMARKS	10
7. BIBLIOGRAPHY	11

1. THE BOARD OF DIRECTORS

In a corporation, the board of directors often operates as the central decision-maker body within its structure. It defines strategic goals, supervises the management and reports to shareholders.

Empirical studies have revealed an extremely low percentage of women on upper level positions even in Western countries¹, with the European average in October 2013 pointing to a proportion of 17,8 %, according to data collected by the European Commission². The several European initiatives of promoting women on boards have had an overall positive effect, effectively contributing to the increase of the pool of talent available for a company's highest management. Still we encounter a glass ceiling effect of more women graduating, and an inverse proportion of a majority of men in company careers, accentuated at the highest levels of management. As law thinkers the question we need to ask is whether regulation should pursue gender quotas.

Affirmative action defined as “(...) *the positive steps taken to increase the representation of minorities (...)*”³ can be translated into corporate governance through quotas, designed to rectify extreme and persistent gender imbalance on corporate boards⁴. Dworkin claimed that “[a]ffirmative action is one of the most effective weapons we have against racism (...)”⁵, and we hope that one day affirmative action through parity quotas will be viewed as the most successful measure to directly address gender-discrimination in boardrooms, considering that bottom-up strategies to tackle the reasons leading to the disparity are difficult to implement on the medium-term⁶.

2. ON DIVERSITY

Board diversity is in nature a matter of fundamental rights, inserted in the scope of *proprio sensu* constitutional rights in the national sphere and of fundamental rights of the European Union. In its structure it is presented as a question for corporate governance, being consensual that good management can be achieved with a diverse board in all

¹ SWEIGART 2012: 85^Λ.

² Commission (2014), ‘Improving the Gender Balance in Company Boardrooms’, available online at http://ec.europa.eu/justice/gender-equality/files/gender_balance_decision_making/boardroom_factsheet_en.pdf, last access: 2016/03/17 at 17h05 GMT+0.

³ FULLWINDER 2011.

⁴ SWEIGART 2012: 82^Λ.

⁵ DWORKIN 2000: 81

⁶ Which goes against what Karolien Pieters suggests (PIETERS 2012: 490-496).

senses, both in terms of gender, race and background, with some authors including age differences as well.

In the EU strategies from gender equality stem from the need to render stability to a fragile economy. Traditional economic arguments for diversity underline that diversified opinions produce refined and innovative solutions, outperforming homogenous boards and, in turn, boosting general economic growth⁷. Gender-quota experiences point towards more focused and strategic decision-making⁸, rendering improved company performance, keener grasp of market, increased level of communication and less conflicts, improved corporate governance and ethics, and better use of the talent pool. A Swedish study⁹ points towards a 27% increase in overall productivity if men and women were equally represented on boards.

Statistics can be very deceptive¹⁰. The difficulty from keeping track of the number of females in the board of directors also occurs in countries with a two-tiered structure, such as Germany, compromising the accuracy of the analysis¹¹, with the added complexity of the so called endogeneity problem¹² to track firm value, and the different measurements used to connect board diversity to corporate efficiency. We should also be wary of '*trophy directors*', especially in North-American corporations, whereby a select group of women recurrently appointed, having one woman seat on a great number of boards¹³, which may cause discomfort in the work group and the token may feel pressured to outperform others due to constant scrutiny¹⁴.

3. EQUALITY AND QUOTAS

There are several possible explanations in literature for why women are underrepresented¹⁵. They can be issues related to (a) *merit* – women are not generally as competent or capable to sit in the boardroom, (b) *availability* – they can generally not be as interested or available for management and administration functions and/or the (c) *Glass-Ceiling* effect – women are in general as competent and as available and interested,

⁷ PELLENS 2015: 5-7.

⁸ SWEIGART 2012: 85^A.

⁹ LÖFSTRÖM 2009: 25-27.

¹⁰ SMITH 2014.

¹¹ BRANSON 2011.

¹² AHERN 2011, when discussing the difficult line between whether knowledgeable board members bring value to the firm or if highly valued firms simply attract highly qualified managers.

¹³ BRANSON 2011.

¹⁴ SWEIGART 2012: 94^A.

¹⁵ LEITE BORGES 2015: 167.

but struggle to break the glass ceiling blocking their way to the top, for historical and cultural reasons. Since the first two reasons are to be suspected, because in the EU women represent about 60% of college graduates, the glass-ceiling effect can here be seen as installing a vicious cycle: women are less likely to be picked for executive positions because they lack experience, and thus become less apt to being selected, even when compared to their male peers with equal levels of education¹⁶.

Even if the preference for male candidates may not be intrinsically misogynistic, there is a perceived fear that in higher levels of the corporate ladder that women's authority may not be as easily respected, thus aggravating the problem of equality. The narrative in countries perceived as progressive remains as eminently patriarchal: in Norway women on boards are often referred to as "*Golden Skirts*"¹⁷ for being there in virtue of quotas¹⁸, and not necessarily due to their own personal merits. Those who oppose these measures also note the excessively paternalist approach of the policy¹⁹.

The stigma of quotas falls heavily on women, who often oppose these measures for fears that they will be professionally discredited. Here lies the most relevant assessment: compulsory gender-based quotas are not focused on merit, neither they are directed to compensate women nor punish men, but simply to promote access to underrepresented and relevant minorities when so is necessary for the advancement of society as a whole.

4. BOARD DIVERSITY, EFFICIENCY AND CORPORATE GOVERNANCE

There has been a disturbing lack of progress with regards to the representation of women on boards in spite of significant female advances in education and workforce participation²⁰. Persistent inequality in the wage-gap and segregation between men and women²¹ is still keeping a huge slice of society from reaping the same social and economic benefits.

There are several regulatory options to increase women on boards, namely regulatory agency requirements for publicly held companies and/or "comply/explain" requirements for all corporations, certificate and pledge programmes, mentoring and

¹⁶ SWEIGART 2012: 85^A.

¹⁷ CLARK 2010.

¹⁸ SWEIGART 2012: 92^A.

¹⁹ SWEIGART 2012: 93^A.

²⁰ SWEIGART 2012: 82^A.

²¹ TIENARI 2009: 502.

education programmes²². However it is comprehensible that parity quotas are in nature the most effective means to achieve equal representation in the shortest amount of time and remaining flexible to adjust to different realities, and working more efficiently when paired with other instruments.

The measurement of economic performance in terms of efficiency can be made through a combination of market and accounting-based measures, namely the Tobin's Q ²³. Here we take efficiency to be overall performance in terms of profit. Norway's leading position in compulsory quotas was received with initial enthusiasm, but in time most measures only registered marginal improvements in corporate efficiency²⁴, while some studies found that they actually performed about 20%²⁵ worse²⁶.

The necessity of gender quotas needs to be separated from classical neoliberal market arguments that feed the discussion, for it seems that the argument stemming from the increase of corporate efficiency may not only not be true as it may not even be necessary or especially relevant: those who argue (either by opposing the measure or justifying it) on the basis of efficiency, are leaving out the essential reason why this is a regulatory demand, the fact that it is a measure for *equality* first and foremost²⁷, in the context of economic regulation aimed at the prosecution of public interests.

5. EUROPE AND REGULATORY RESPONSE

Scandinavian countries are great supporters of gender-diversity both in public offices and boards. Norway is the prime example of gender quota requirement, which required 40% of women in boards by 2009 punishable by the dissolution of the corporation. Initially voluntary, in 2006 the targets became mandatory for publicly listed companies²⁸.

Looking at Europe, of the core values of the Union is the protection of gender equality, as enshrined in Articles 2 and 3(3) of the TEU and Article 8 of the TFEU. Since 2010 the EU has been committed to promoting the access of women to high, particularly

²² BRANSON 2011.

²³ DALE-OLSEN 2013: 115.

²⁴ SWEIGART 2012:84^A.

²⁵ DITTMAR 2010.

²⁶ AHERN 2011.

²⁷ This resistance to quotas reminds us of Brian Sims, LGBT Activist and Democratic Member of the Pennsylvania House of Representatives for the 182nd District, quote "*When you're accustomed to privilege, equality feels like oppression.*" (2012).

²⁸ SWEIGART 2012: 83^A.

through the European Commissioner Viviane Reding and the adoption of the Women's Charter²⁹, with its Article 3 committing to pursue "(...) *fairer representation of women and men in positions of power (...)*" and the "(...) *full access to the sharing of power and decision making in (...) economic life and in the (...) private [sector for the development of] a gender-aware knowledge-based society (...)*". This was followed by the five-year Strategy for equality between women and men, which draws from the Women's Charter, developing the European stance on the issue of Equality in decision-making³⁰ to combat the prevailing gender imbalance in all areas, but particularly in the boardroom. Following 2011's Woman on the Board Pledge for Europe, which asked pledging publicly listed companies to progressively increase the percentage of women on boards (30% by 2015, 40% by 2020) and 2012's Progress Report which deemed the results insufficient, the Commission pursued the Directive COM (2012) 614 final on improving gender balance. This Directive aimed at publicly listed companies, by reaching a quota of 40% of the underrepresented sex by 2020 and for public undertaking the same result by 2018. The average has been consistently rising. Two exceptions on the scope of application: member states may provide that listed companies where the members of the underrepresented sex represents less than 10 per cent of the workforce are not subject to the objective laid down in paragraph 1, with objective being met whenever companies proof that members of the underrepresented sex hold at least one third of all director positions.

Several member states have adopted parity measures in national legislation, namely France and Spain. Portugal has consistently presented fewer females on boards of publicly held corporations in comparison to the EU average³¹. The only existing compulsory rule in for gender diversity in Portugal targets regulatory agencies and establishes a quota of 33%, with the remainder consisting of soft-law instruments such as recommendations addressing publicly listed companies, and voluntary based for those companies that adhere to the Portuguese Corporate Governance Code³².

Statistical trends point towards a huge sensitivity to public policy, with the EU led by Norway's example having a dramatic increase in the representation between 2004-2010 whereas the US was in a state of stagnation for having pushed back the debate of

²⁹ Commission (2010) 'Women's Charter', available online at: http://ec.europa.eu/archives/commission_2010-2014/president/news/documents/pdf/20100305_1_en.pdf, last access: 2016/03/16 at 19h39 GMT+0.

³⁰ Commission (2010), 'Strategy for the Equality between Women and Men 2010-2015', available online at: http://ec.europa.eu/justice/gender-equality/files/documents/strategy_equality_women_men_en.pdf, last access: 2016/03/16 at 19h48 GMT+0, pages 19-22.

³¹ BRANSON 2011.

³² LEITE BORGES 2015: 161-164.

gender-equality, with the media operating as a drive to not only reflect but also construct the social and legal reality³³. This supports the historical argument that countries with recent movements for the empowerment of women have more women on corporate boards, such as Eastern European nations, than those with longstanding traditions of political power allotment for women like Ireland, Denmark and the Netherlands, whose paradoxically stagnant equality promotion may easily condone pre-determined gender roles³⁴ as well as keeping the equality dialogue in the political and public scope but out of business sphere.

Public policy and economic regulation should be aimed first and foremost at the prosecution of public interests³⁵. These interests may justify imposing burdensome duties on corporations and, so, corporate *efficiency* seen as firm performance occurs merely as a positive externality, especially in the context of measures promoting diversity. However, looking at the business case of corporate social responsibility, we see that corporations benefit for socially responsible practices for the way these practices reach consumers. Likewise good corporate governance serves as an autonomous brand, effectively signalling the market to the ethics of the corporation. Diverse boards have the same marketing power of attracting clients and business partners committed to responsible business practices.

In light of all available options, we need to ask whether mandatory gender-based quotas are the correct regulatory response. It is our belief that a public policy focused on quotas paired with diversified strategies for public awareness is the most adequate strategy combining short-term efficacy traits and pliability in terms of creativity for adding additional formal incentives, in the form of premiums or sanctions, empowering national legislators with the freedom to shape the measures according to their internal reality, thus constituting an adequate route fully capable to close the gap keeping women out of the boardroom.

6. CRITICAL ASSESSMENT AND CONCLUDING REMARKS

Diversity on boards is key for good corporate governance. The homogeneous composition of the boardroom across different states imposes a duty on legislators to take this matter seriously and address it accordingly, not only for the sake of efficiency but also in respect with the democratic values we hold dear. Breaking the glass ceiling for

³³ TIENARI 2009: 506.

³⁴ SWEIGART 2012: 86^A.

³⁵ PAZ FERREIRA 2009: 21-22.

underrepresented minorities, and women in particular, ensuring that all members of society can gain access to top executive positions and climb the corporate ladder will have a dramatic economic, social and political effect for the generations to come.

Gender-based quotas are the correct regulatory response regardless of *de facto* improvement on overall firm performance. Having positive steps to ensure the representation of gender minorities is of intrinsic value, especially in the context of a pluralist society committed to democracy by furthering equality and combating patriarchal bias that keeps pushing women out of high corporate ranks in spite of personal qualification.

*“Women belong in all places where decisions are being made [...] It shouldn't be that women are the exception.”*³⁶

7. BIBLIOGRAPHY

AHERN (2011), Kenneth R. and Amy K. Dittmar, ‘The Changing of the Boards: The Impact on Firm Value of Mandated Female Board Representation’, in *The Quarterly Journal of Economics*, 18 August 2011

BRANSON (2011), Douglas M., ‘Women on Boards of Directors: A Global Snapshot’, in *Legal Studies Research Paper Series*, Working Paper No. 2011-05, February 2011, Pitt Law, University of Pittsburgh, available online at <http://ssrn.com/abstract=1762615>, last access: 2016/02/10 at 18h06 GMT + 0

CLARK (2010), Nicola, ‘The Female Factor: Getting Women Into Boardrooms, by Law’, in the *New York Times*, Jan. 27 2010, available at http://www.nytimes.com/2010/01/28/world/europe/28iht-quota.html?_r=0, last access: 2016/02/10 at 19h21 GMT+0

DALE-OLSEN (2013), Harald, Pål Schøne and Mette Verner, ‘Diversity among Norwegian Boards of Directors: Does a Quota for Women Improve Firm Performance?’, in *Feminist Economics*, 19:4, pages 110-135, available online at <http://www.tandfonline.com/doi/abs/10.1080/13545701.2013.8301888>, last access: 2016/03/15 at 15h02 GMT+0

DITTMAR (2010), Amy, ‘The Norway Numbers, Room for Debate’ in *The New York Times*, 22 March 2010, available online at

³⁶ Justice Ruth Bader Ginsburg, before her appointment, in interviews with USA Today (May 2009).

<http://roomfordebate.blogs.nytimes.com/2010/03/22/using-quotas-to-raise-the-glass-ceiling/>, last access: 2016/03/20 at 00h12 GMT+0

DWORKIN (2000), Ronald, 'Affirmative Action: Is It Fair?', in *The Journal of Blacks in Higher Education*, No. 28, KBHE Foundation, available online at http://www.jstor.org/stable/2678715?seq=3#page_scan_tab_contents, last access: 2016/03/18 at 18h43 GMT+0, pages 79-88

FULLINWIDER (2011), Robert, 'Affirmative Action', The Stanford Encyclopaedia of Philosophy, substantive revision 2013, available online at <http://plato.stanford.edu/entries/affirmative-action/>, last access: 2016/03/15 at 14:48 GMT+0

LEITE BORGES (2015), Sofia, 'Designação Obrigatória de Administradores e Diversidade do Género', in Paulo Câmara et. al. *A Designação de Administradores*, Governance Lab, Coimbra: Editora Almedina.

LÖFSTRÖM (2009), Åsa, 'Gender Equality, Economic Growth and Employment', study financed by the Swedish Ministry of Integration and Gender Equality and prepared for the European Commission, available online at http://www.usbe.umu.se/digitalAssets/40/40275_eustudie_sidvis.pdf, last access: 2016/03/18 at 12h26 GMT+0

MAGNIER (2014), Véronique, and Darren Rosenblum, 'Quotas and the Transatlantic Divergence of Corporate Governance Culture' in Geneviève Hellering and Kai Purnhagen, *Towards a European Legal Culture*, Baden-Baden: Nomos, C.H. Beck and Hart Publishing, pages 165-208

MALLIN (2012), Christine A., *Corporate Governance*, 4th Edition, Oxford: Oxford University Press, pages 467-493

PAZ FERREIRA (2009), Eduardo and Luís Silva Morais, 'A Regulação Sectorial da Economia – Introdução e Perspectiva Geral', in Eduardo Paz Ferreira, Luís Silva Morais, Gonçalo Anastácio (eds.), *Regulação em Portugal: Novos tempos, Novo Modelo?*, Coimbra: Editora Almedina, pages 7-38

PIETERS (2012), Karolien, 'More Efforts Needed to Improve Gender Equality in Corporate Governance in the EU', in *European Business Organization Law Review*, Vol. 13, Issue no. 03, September 2012, pages 475-469

PELLENS (2015), Lieselotte, 'The Relevance of Gender Diversity in the Composition of the Board of Directors', Working Paper No.04/2015, June 2015 in *Governance Lab*, available online at

<http://www.governancelab.org/media/document/49/34/c503fd5c4c87deb8241f9482be01.pdf>, last access: 2016/03/10 at 16h00 GMT+0

SMITH (2014), Nina, 'Gender Quotas on Boards of Directors – little evidence that gender quotas for women on boards of directors improve firm performance', in *IZA World of Labour 2014*, Issue No. 7, available online at <http://wol.iza.org/articles/gender-quotas-on-boards-of-directors-1.pdf>, last access: 2016/03/15 at 14h48 GMT+0

SWEIGART (2012), Anne, 'Women on Board for Change: The Norway Model of Boardroom Quotas As a Tool For Progress in the United States and Canada', in *Northwestern Journal of International Law & Business*, Volume 32, Issue No. 4 *The Ambassador*, available online at <http://scholarlycommons.law.northwestern.edu/njilb/vol32/iss4/6>, last access: 2016/03/14 at 17h27 GMT+0

TIENARI (2009), Janne, Charlotte Holgersson, Susan Meriläinen and Pia Höök, 'Gender, Management and Market Discourse: The Case of Gender Quotas in the Swedish and Finnish Media', in *Gender, Work and Organization*, Vol. 16, No. 4, July 2009, available online at <http://onlinelibrary.wiley.com/doi/10.1111/j.1468-0432.2009.00453.x/epdf>, last access: 2016/03/14 at 16h47 GMT+0

TRICKER (2012), Bob, *Corporate Governance – Principles, Policies and Practices*, 2nd Edition, Oxford: Oxford University Press, pages 467-493

SUPPLEMENTARY MATERIAL

JOROUVÁ (2014), Věra, 'Opening Statement of Věra Jorouvá, Commissioner designate for Justice, Consumers and Gender Equality at European Parliament hearings', October 1st 2014, available online at http://ec.europa.eu/justice/newsroom/news/20141001_en.htm, last access: 2016/03/15 at 12h03 GMT+0

REDING (2010), Viviane, 'Women's Charter: Our Commitment to Gender Equality' in *Joint Press Conference with Durão Barroso*, Brussels, 5th March 2010, available online at http://www.event.europarl.europa.eu/hearings/static/commissioners/speeches/redding_speeches_en.pdf, last access: 2016/03/15 at 09h20 GMT+0