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I. ARTICLES

GENDER BALANCE ON BOARDS: POTENTIAL AND CHALLENGES FOR REGULATION AT EU LEVEL*

Elena BRODEALĂ** and Marie-Hélène SPIESS***

Abstract

The European Union (EU) is making sustained efforts to promote gender equality in its Member States, as evidenced by the new EU Gender Equality Strategy 2020-2025. One of the central objectives of the mentioned strategy is the achievement of gender balance in decision-making. Against this background, the present article follows the evolution of the 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 ('the Proposal'), which was put forward by the European Commission in November 2012. In particular, this article aims to identify, explain, and evaluate the arguments in favour and against the Proposal that were developed over time. Moreover, this article discusses the Proposal's overall significance at EU level. Even though the Proposal has still not yet been adopted and despite its limited reach, the fact that such a proposal for a directive was initiated by the European Commission and discussed by different stakeholders over the last nine years had an important role. Arguably, the debate around the Proposal contributed to raising awareness about women's underrepresentation on boards and put hard law measures to address this pressing problem on the EU agenda.

Keywords: *business & human rights, gender equality, quotas, EU, corporate boards, listed companies*

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Résumé

L'Union européenne (UE) déploie des efforts considérables pour promouvoir la parité hommes-femmes au sein de ses États membres, comme en témoigne la nouvelle stratégie de l'UE en faveur de l'égalité hommes-femmes 2020-2025. L'un des objectifs centraux de la stratégie mentionnée est de parvenir à un équilibre hommes-femmes dans la prise de décision. Dans ce contexte, le présent article retrace l'évolution de la Proposition de directive du Parlement européen et du Conseil relative à un meilleur équilibre hommes-femmes parmi les administrateurs non exécutifs des sociétés cotées en bourse et à des mesures connexes (« la Proposition »), présentée par la Commission européenne en novembre 2012. Plus particulièrement, l'article vise à identifier, éclaircir et examiner les arguments en faveur et à l'encontre de la Proposition ayant été développés au fil du temps. En outre, la présente contribution traite de l'importance globale de la Proposition au niveau de l'UE. Même si la Proposition n'a pas encore été adoptée et malgré sa portée limitée, le fait qu'une telle proposition de directive ait été présentée par la Commission européenne et débattue par différentes parties prenantes au cours des neuf dernières années a joué un rôle important. Le débat autour de la Proposition a en effet certainement contribué à sensibiliser l'opinion publique à la sous-représentation des femmes au sein des conseils d'administration, ainsi qu'à inscrire à l'ordre du jour de l'UE des mesures concrètes afin de ce problème pressant.

Mots-clés: *entreprises et droits de l'homme, égalité des genres, quotas, UE, conseils d'administration, sociétés cotées*

1. Introduction

The European Union (EU) is making sustained efforts to promote gender equality in its Member States, as evidenced by its new EU Gender Equality Strategy 2020-2025.¹ One important objective of the EU, as underlined in the mentioned strategy, is to improve the number of women in business

¹ For more information see European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee of the Regions, A Union of Equality: Gender Equality Strategy 2020-2025*, COM/2020/152, Brussels March 5 (2020), <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020DC0152&from=EN> (last visited Oct. 15, 2021).

leadership.² As of 2012, only 2.5% of CEOs and 15.8% of board members of the largest publicly listed companies registered in the EU were women,³ despite the fact that soft law measures to address the underrepresentation of women in business leadership have been in place since 1984. In 2012, to redress the situation, the European Commission ('the Commission')⁴ put forward a *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* ('the Proposal').

The Proposal was adopted by the European Parliament ('the EP') in November 2013. Despite the EP's efforts, the Proposal is still pending before the Council of the European Union ('the Council'). In the past, the Commission had expressed several times its hope that the Proposal would pass a vote in the Council.⁵ In March 2020, the Commission further held that it would push for the adoption of the Proposal.⁶ In the same vein, the EP's resolution of January 21, 2021, on the new EU Gender Equality Strategy called on the Commission to continue working with the Member States and EU presidencies to 'break the deadlock' in the Council and finally adopt the Proposal.⁷ However, to date, there is still no consensus about the necessity and EU's competence to adopt such a directive among

² *Ibid*, pp. 13–15.

³ Věra Jourová, *Gender Balance on Corporate Boards* (European Commission, 2016), pp. 2, 4 https://ec.europa.eu/newsroom/document.cfm?doc_id=46280 (last visited Oct. 7, 2021).

⁴ The European Commission is the only institution in the EU that has the right to initiate legislation.

⁵ Lorna Hutchinson, *Women on Boards Directive Must be Unblocked in Council, MEPs argue*, in (2020) Oct. 6 *The Parliament Magazine*, <https://www.theparliamentmagazine.eu/news/article/women-on-boards-directive-must-be-unblocked-in-council-meps-argue> (last visited Oct. 7, 2021); Jennifer Rankin, *EU Revives Plans for Mandatory Quotas of Women on Company Boards*, in (2020) Mar. 5 *The Guardian*, <https://www.theguardian.com/world/2020/mar/05/eu-revives-plans-for-mandatory-quotas-of-women-on-company-boards> (last visited Oct. 8, 2021); Daniel Boffey, *EU to Push for 40% Quota for Women on Company Boards*, in (2017) Nov. 20 *The Guardian*, <http://www.theguardian.com/world/2017/nov/20/eu-to-push-for-40-quota-for-women-on-company-boards> (last visited Oct. 7, 2021).

⁶ European Commission, *A Union of Equality: Gender Equality Strategy 2020-2025*, COM/2020/152, Brussels March 5, 2020, <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52020DC0152&from=EN> (last visited Oct. 7, 2021).

⁷ *European Parliament resolution of 21 January 2021 on the EU Strategy for Gender Equality (2019/2169(INI))*, para. 75, https://www.europarl.europa.eu/doceo/document/TA-9-2021-0025_EN.html (last visited Oct. 15, 2021).

the Member States that have the decision-making power in the Council.⁸ This makes the future regulation of gender balance on corporate boards uncertain, although its adoption remains possible and much needed.

Even if some progress was made since 2012, women remain largely outnumbered by men in the leadership of large corporations in the EU. As of October 2020, 29.5% of members of the boards of the largest publicly listed companies registered in the EU were women.⁹ However, women still accounted for fewer than one in ten board chairs or chief executive officers (CEOs).¹⁰ Moreover, the most significant improvement is observed mainly in countries which have taken legislative measures to increase gender balance on boards of directors, the other countries still lagging behind.¹¹ This demonstrates the “clear impact” of legislative action¹² and strengthens the arguments for the adoption of legislative measures to increase gender balance on boards at EU level.

To understand the developments and challenges around the efforts to regulate gender balance on corporate boards at EU level, this article follows the evolution of the mentioned Proposal from the events that led to its drafting to present. In particular, it aims to identify, explain and evaluate the arguments pro and against this Proposal that were developed over time, as well as to discuss its overall significance at EU level. Ultimately, the main argument of this article is that even if the Proposal were not to be adopted, the fact that such a proposal for a directive was initiated by the Commission and discussed by different stakeholders over the last nine years is crucial. The Proposal gave rise to important debates and, arguably, changes with regard to women’s (under-)representation in economic decision-making positions. Moreover, it tested the limits of EU Law with regard to allowing measures to promote women on boards, linked the problem of gender imbalance in business leadership with EU’s

⁸ For some of the arguments brought by Member States against the proposal see Barbara Havelková, *Women on Company Boards: Equality Meets Subsidiarity*, in (2019) 21 *Cambridge Yearbook of European Legal Studies*, pp. 187–216.

⁹ European Institute for Gender Equality (EIGE), *Statistical Brief: Gender Balance in Corporate Boards 2020*, May 17, 2021, <https://eige.europa.eu/publications/statistical-brief-gender-balance-corporate-boards-2020> (last visited Oct. 7, 2021).

¹⁰ *Ibid.*

¹¹ *Ibid.*

¹² *Ibid.*

broader democratic deficit and put the adoption of hard law measures to promote gender equality in the corporate world on the agenda of the EU. To achieve its aims, the article analyses primary sources related to the adoption of this Proposal, such as reports of the EU's institutions, transcripts of the political debates around the Proposal, as well as other explanatory materials issued by the EU (such as the explanatory memorandum of the Proposal, different press releases or fact sheets).

The present article is structured as follows. Part (2) outlines the history of the Proposal, its design and its content as first brought by the Commission. Part (3) explains how and why the Commission argued that a directive on gender balance on corporate boards was justified for economic reasons, the grounds for which the Commission argued that the EU is competent to regulate such a matter, some of the potential reasons for which the most gender equal Member States in the EU oppose the Proposal, as well as the debates around it in the EP. Part (4) reflects on the future and the significance of the Proposal for gender equality in the EU and Part (5) concludes.

2. The History, the Design and the Content of the Proposal for a Directive

A. The Soft Law 'Roots' of the Proposal

Already in 1984, the Council adopted a recommendation suggesting that Member States “adopt a positive action policy designed to eliminate existing inequalities affecting women in working life [...] [and] encourage the participation of women [...] at higher levels of responsibility”.¹³ Further, in 1996, the Council, at the proposal of the Commission, adopted a recommendation in which it specifically referred to the balanced participation of women and men in the decision-making process. Through this recommendation, Member States were urged, if necessary, to adopt legal measures to ensure the equal participation of both genders in

¹³ Point 1 (b) of 84/635/EEC: *Council Recommendation of 13 December 1984 on the Promotion of Positive Action for Women*, O. J. (L 331), <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31984H0635:EN:HTML> (last visited Oct. 7, 2021).

decision-making positions.¹⁴ The turning point, however, was in March 2010 when the Commission adopted the *Women's Charter* and set "equality in decision-making" as one of its priorities. It also expressed its "commitment to pursue the fairer representation of women and men in positions of power [...] and the economy" and mentioned explicitly that it intended to use its powers "to promote a greater share of women in positions of responsibility".¹⁵ In the same year, the Commission continued to express its concern about the underrepresentation of women on boards in its Strategy for Equality between Women and Men 2010-2015.¹⁶ The Commission was seriously concerned by the fact that women represented only 10% of board members and 3% of board chairs of the largest publicly listed companies in the EU. At the same time, the Commission underlined the connection between increasing women's representation in leadership and the economic prosperity of companies as well as of the EU more broadly.¹⁷

The person who ultimately committed herself to improve the representation of women on company boards was Viviane Reding, a center-right female politician from Luxembourg who was the European Commissioner for Justice, Fundamental Rights and Citizenship between 2010 and 2014. In July 2010, Reding warned that if companies did not voluntarily increase the representation of women on boards of directors, the Commission would proceed towards adopting legislation to correct the

¹⁴ Point 1 of 96/694/EC: Council Recommendation of 2 December 1996 on the Balanced Participation of Women and Men in the Decision-making Process, O. J. (L 319), <https://op.europa.eu/en/publication-detail/-/publication/d448b83d-12d4-4fec-bd38-1086c870fefa/language-en> (last visited Oct. 7, 2021).

¹⁵ See *Communication from the Commission. A Strengthened Commitment to Equality between Women and Men. A Women's Charter Declaration by the European Commission on the occasion of the 2010 International Women's Day in commemoration of the 15th anniversary of the adoption of a Declaration and Platform for Action at the Beijing UN World Conference on Women and of the 30th anniversary of the UN Convention on the Elimination of All Forms of Discrimination against Women*, COM/2010/0078 final Eur-lex, <http://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX:52010DC0078> (last visited Oct. 7, 2021).

¹⁶ European Commission, *Strategy for Equality between Women and Men 2010-2015*, COM(2010) 491 final, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0491:FIN:en:PDF> (last visited Oct. 7, 2021).

¹⁷ *Ibid.*, p. 6.

situation.¹⁸ In early 2011, Reding launched a series of calls for companies to adopt voluntary measures to increase women's presence on boards. On March 1st, 2011, she held a meeting with chief executives and chairs of boards of publicly listed companies to discuss the problem of women's underrepresentation on corporate boards.¹⁹ As a result of this meeting, Reding challenged all publicly listed companies to sign the "Women on Board Pledge for Europe" by March 2012.²⁰ The pledge was meant to represent a voluntary commitment of companies to improve gender balance on boards. It read as following: "I pledge to reach the target of 30% female board members by 2015 and 40% by 2020 by *actively recruiting qualified women to replace outgoing male board members*".²¹ One year later, however, only 24 companies had signed this pledge²² and the overall representation of women on boards had increased by only around 2-3%. Reding found this unacceptable. Moreover, she pointed to the fact that companies could not claim that there were not enough qualified women to fill the company boards.²³ Not only did women represent 60% of university graduates across the EU, but in September 2011, two organizations, the European Business Schools and Senior Executive Women, started a list of "Board Ready Women" that by June 2012 comprised over 7,000 names.²⁴

The EP also supported the Commission in its effort to promote women in business leadership. In 2011 and 2012, the Parliament adopted two soft law documents in which it emphasized the need to adopt legislation to address

¹⁸ Leigh Phillips, *EU Rights Commissioner Warns of Laws to Put More Women in Boardrooms*, in (2010) Jul. 15 *The Guardian*, <http://www.theguardian.com/business/2010/jul/15/european-commission-women-on-boards-viviane-reding> (last visited Oct. 7, 2021).

¹⁹ See European Commission, *Press Release – EU Justice Commissioner Viviane Reding meets European Business Leaders to Push for More Women in Boardrooms*, http://europa.eu/rapid/press-release_IP-11-242_en.htm?locale=en (last visited Oct. 7, 2021).

²⁰ European Commission, *Press Release – EU Justice Commissioner Reding Challenges Business Leaders to Increase Women's Presence on Corporate Boards with "Women on the Board Pledge for Europe"*, http://europa.eu/rapid/press-release_MEMO-11-124_en.htm (last visited Oct. 7, 2021).

²¹ *Ibid.* Emphasis added.

²² European Commission, *Press Release – Women on Boards: Vice-President Viviane Reding Meets with Leaders of Europe's Business Schools and Industry*, http://europa.eu/rapid/press-release_IP-12-622_en.htm (last visited Oct. 7, 2021).

²³ *Ibid.*

²⁴ *Women on Board Initiative*, <https://www.edhec.edu/html/Communication/womenonboard.html> (last visited Oct. 7, 2021); *Ibid.*

the problem of women's underrepresentation on company boards. In a resolution on women and business leadership adopted in 2011, the Parliament encouraged the Commission to proceed and adopt legislation if companies do not meet the targets of increasing the representation of women on boards to 30% by 2015 and to 40% by 2020.²⁵ In the same resolution, the Parliament noted the effectiveness of gender quotas based on the Norwegian model²⁶ and it welcomed the introduction, or the intention of introducing measures, to increase gender balance on boards in countries such as France, the Netherlands, Spain, Belgium, Germany, Italy or Finland.²⁷ In 2012, the Parliament adopted another resolution on gender equality. This time, the Parliament underlined not only its regret regarding the slow progress in the field of increasing women on company boards, but also its "disappointment" that the Commission had not yet proposed legislation to address the situation.²⁸

The 2012 resolution of the EP was adopted after the Commission had issued a report that concluded that given the slow progress regarding gender equality in business leadership, it would take 40 years for publicly listed companies to reach balance on boards if no legal measures are taken.²⁹ However, instead of immediately initiating legislation, the Commission decided to launch a public consultation and seek for alternative solutions.³⁰ The consultations took place between March and May 2012. As expected, the majority of actors who participated in the public consultations agreed that the EU should adopt legal measures to

²⁵ Point 1 of *European Parliament Resolution of 6 July 2011 on Women and Business Leadership*, (2010/2115(INI)), <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2011-0330+0+DOC+XML+V0//EN> (last visited Oct. 7, 2021).

²⁶ *Ibid.* at point 3.

²⁷ *Ibid.* at points 5 and 6.

²⁸ Points 27 and 28 of *European Parliament Resolution of 13 March 2012 on Equality between Women and Men in the European Union*, (2011/2244(INI)) (2012), https://www.europarl.europa.eu/doceo/document/TA-7-2012-0069_EN.html (last visited Oct. 15, 2021).

²⁹ European Commission, *Women in Economic Decision-Making in the EU: Progress Report. A Europe 2020 Initiative* (2012), <https://op.europa.eu/en/publication-detail/-/publication/8832ea16-e2e6-4095-b1eb-cc72a22e28df/language-en> (last visited Oct. 7, 2021).

³⁰ The Parliament was a harsh critic of this decision. Point 28 of *European Parliament Resolution of 13 March 2012 on Equality between Women and Men in the European Union*, *supra*, note 28.

correct the situation.³¹ Thus, in November 2012 the Commission put forward the Proposal.

B. The Design and the Content of the Proposed Directive

a) A Quota or Not a Quota?

The Proposal is often discussed as imposing a 'quota'. But while the Commission refers to the recommendation of the EP to introduce measures to increase the number of women on boards, including quotas, in the Proposal's recitals,³² there is no mentioning of what Anne Peters terms as "the Q-word"³³ in the body of the Proposal. This begs the following question: does the Proposal seek to introduce a quota or not? As demonstrated below, the mechanism advanced by the Proposal is neither as powerful as the quota system as famously in Norway, nor as weak as a 'comply or explain' mechanism used in countries such as Canada or Switzerland.³⁴ The Norwegian quota system requires 40% of company

³¹ Stakeholders included: "Member States, business or industry organisations, individual companies, civil society organisations with an interest in gender and/or social issues, trade unions, equality bodies, and other organisations or individuals." European Commission, *Consultation on Gender Imbalance in Corporate Boards in the EU* (on file with the authors).

³² See point 6 of the recital. NB. Recital is a term specifically used in EU Law to refer to the opening part of an act of the EU which contains the reasons that led to regulating the area that is subject to that act.

³³ Anne Peters, *Women on Board: The EU Commission's Proposal for a Directive on Improving the Gender Balance among Non-Executive Directors of Companies Listed on Stock Exchanges and Related Measures*, in (2012) Nov. 30 *EJIL: Talk!*, <https://www.ejiltalk.org/women-on-board-the-eu-commissions-proposal-for-a-directive-on-improving-the-gender-balance-among-non-executive-directors-of-companies-listed-on-stock-exchanges-and-related-measures/> (last visited Oct. 7, 2021).

³⁴ See e.g. the recent introduction of measures to boost gender balance in the executive management and the boards of directors of Swiss publicly listed companies (Article 734f of the Swiss Code of Obligations). The latter, based on a comply-or-explain approach, entered into force on Jan. 1st, 2021, see the *Federal Office of Justice's press release on thresholds for gender representation and transparency in the commodities sector from the beginning of 2021*, Sept. 11, 2020, <https://www.bj.admin.ch/bj/fr/home/aktuell/mm.msg-id-80358.html> (last visited Oct. 7, 2021); see also Daniel Raun & Annette Weber, *Changes for Listed Companies under the Corporate Law Reform: Gender Quotas and Say-on-Pay*, CapLaw-2020-55; and Anita Anand & Krupa Kotecha, *Canada's Approach to Board Diversity Needs a Rethink*, *The Globe and Mail*, Mar. 27, 2017, <https://www.theglobeandmail.com/report-on-business/rob-commentary/canadas-approach-to-board-diversity-needs-a-rethink/article34386450/> (last visited Oct. 7, 2021).

boards to be comprised of women, imposing serious sanctions to companies that do not comply.³⁵ The Canadian and Swiss models, on the other hand, only require businesses to either publicly disclose any policies they undertake to increase the representation of women on their boards, or to explain why such policies do not exist.³⁶ Thus, while quotas guarantee equality of results (i.e. a certain pre-established percentage of women on boards), ‘comply or explain’ mechanisms are soft ways of ‘incentivizing’ corporations to select women for their boards, but do not guarantee that more women will actually be selected for board positions.

The Proposal does not impose a quota like Norway as it does not guarantee that its implementation will bring a certain representation of women on boards. Nor does the Proposal advance a soft mechanism like in Canada or Switzerland only to ‘encourage’ companies to ensure gender diversity on boards. The Proposal makes a distinction with regard to the means required to improve the presence of the under-represented sex (i.e. generally women) in the case of executive³⁷ and non-executive directors.³⁸ In the case of executive directors, the Proposal requires Member States to merely “ensure that listed companies undertake individual commitments regarding gender-balanced representation of both sexes [...]”.³⁹ The mechanism for achieving gender balance among non-executive directors is more complex. To ensure gender balance on boards of listed companies *where the representation of one of the sexes does not reach 40%*, Member States have to ensure that these companies “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”.⁴⁰ Further, Member States need to require

³⁵ The Norwegian quota system is a standard example. For a brief description see Aaron Dhir, *Challenging Boardroom Homogeneity*, (Cambridge: Cambridge University Press, 2015), pp. 76–77.

³⁶ Ontario Securities Commission, *Amendment Instrument for NI 58-101 Disclosure of Corporate Governance Practices*, http://www.osc.gov.on.ca/en/SecuritiesLaw_csa_20141211_58-101_amd-governance-practices.htm (last visited Oct. 7, 2021).

³⁷ Article 2 (4) defines an executive director as “any member of a unitary board who is engaged in the daily management of the company and any member of a managerial board in a dual board system”.

³⁸ Article 2 (5) defines a non-executive director as “any member of a unitary board other than an executive director and any member of a supervisory board in a dual board system”.

³⁹ Article 5 (1).

⁴⁰ Article 4 (1).

companies to give priority in hiring to the candidates belonging to the underrepresented sex, if these are equally qualified “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”.⁴¹

The Proposal does not indicate to the Member States what sanctions to apply if companies fail to comply with the measures adopted to transpose the directive into the national legislation. Instead, the Proposal only requires that such sanctions be “effective, proportionate and dissuasive” and suggests that these might include fines, or the nullity or annulment of the election of non-executive directors that does not respect the principle of gender balance.⁴² Nonetheless, although the Proposal leaves the decision on appropriate sanctions to the Member States, it does, arguably, offer a mechanism that might render its provisions effective. The Proposal requires Member States to oblige companies to disclose “the qualification criteria upon which the selection was based, the objective comparative assessment of those criteria and, where relevant, the considerations tilting the balance in favour of a candidate of the other sex”⁴³ if an unsuccessful candidate so requires. Furthermore, like in EU antidiscrimination law more broadly, the Proposal establishes the reverse burden of proof in case an unsuccessful candidate challenges the fairness of the procedure to appoint non-executive directors before a court. This means that in such a case, the company must prove either that the unsuccessful candidate was not equally qualified (so that she or he could not have been given priority) or that “an objective assessment taking into account of all criteria specific to the individual candidates tilts the balance in favour of the candidate of the other sex”.⁴⁴

⁴¹ Article 3 (3).

⁴² Article 6.

⁴³ Article 4 (4).

⁴⁴ Articles 4 (3) and (5). N.B. This provision was amended after the debate of the Proposal in the European Parliament as to become more effective. See amendments 51 and 52. P7_TA(2013)0488 *Gender Balance Among Non-executive Directors of Companies Listed on Stock Exchanges*, European Parliament legislative resolution of 20 November 2013 on the 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)0614 — C7-0382/2012 — 2012/0299(COD)) Eur-lex, <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52013AP0488> (last visited Oct. 7, 2021).