

Gender balance broom wagon: The resurrection of the Commission Proposal on improving the gender balance among board members

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Introduction

Recent media information asserts that the Commission and the Council Presidency plan to reintroduce the old directive proposal on improving the gender balance among directors of companies listed on stock exchanges. The proposal dates from 2012¹ and was discussed in the Council until the Maltese presidency in 2017.² It seeks to achieve a more balanced representation of men and women among the board directors of EU companies whose shares are admitted to trading on a regulated market, essentially by obliging

Member States to set quotas either for non-executive directors (40%) or for all directors, including executives (33%).

The speculation is that, for fear of appearing to be opposing gender equality, Member States might be willing to enact the 2017 text with little further discussion. However, legislative processes without public discussion often lead to inferior laws. Hence, we would like to present a critique of the proposal.

To begin with, we would like to make clear that we view equal treatment of men and women as a core issue for a just society – irrespective of whether a balanced composition of company boards helps to improve decision-making, company's financial performance or profitability, as Recital 10 suggests rather bluntly. In any case, we are convinced that such a balanced composition is compatible with the core function of board appointments, that is to appoint the best person for the function to be exercised. That discussion, however, is not the subject of this article. Rather, as company law experts, we find the proposal very hard, or even impossible, to integrate into company legislation.

1. Commission Proposal for a Directive on improving the gender balance among non-executive directors of companies listed on stock exchanges and related measures COM(2012) 614 final (<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52012PC0614&from=EN>).
2. Latest publicly available text ("Presidency Compromise"): Proposal for a Directive on improving the gender balance among directors of companies listed on stock exchanges and related matters, 31 May 2017, 9496/17, Interinstitutional file 2012/0299 (COD) (https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CONSIL:ST_9496_2017_INIT&from=EN).

Gender balance or diversity?

Before going into this, we would like, however, to make a preliminary observation: The proposal for a Directive on gender balance on boards was adopted by the Commission in 2012. The compositional issue which it sought to address was fixed at that point and has not been enlarged since. At that time, the Directive accurately reflected the compositional issue which was driving changes and proposals for change in the Member States, i.e., the inequality of the representation of men and women on boards. Since then, however, the policy questions have widened to include board “diversity” more generally and not just gender balance, while the latter increasingly also deals with issues such as non-binary identities, identification etc.

This has occurred within the EU Member States and internationally. Thus, in most Member States, such as France (see L. 22-10-10 C. com.), listed companies are legally required, on a comply-or-explain basis, to produce a policy on diversity “with regard to criteria such as age, gender or professional qualifications and experience, as well as a description of the objectives of this policy, its implementation and the results obtained during the past financial year.” Such requirements are based on Art 20 Directive 2013/34/EU (as amended by Directive 2014/95/EU). The UK Corporate Governance Code’s Principle J, applicable also for companies listed on Euronext Dublin,³ requires that “both appointments and succession plans should be based on merit and objective criteria and, within this context, should promote diversity of gender, social and ethnic backgrounds, cognitive and personal strengths.” The Code is binding on Premium

3. See Euronext Dublin Rule Book 6.1.82 (6) (<https://www.euronext.com/sites/default/files/2019-07/Dublin%20Listing%20Rules%20Book%20II%20-%20Release%208.pdf>).

Segment listed companies on a comply-or-explain basis.

In the US, the Securities Exchange Commission has recently approved a rule change for the Nasdaq Exchange which, from 2025, will require listed companies on a comply-or-explain basis to have at least two directors who self-identify as diverse, including at least one director who self-identifies as female⁴ and at least one director who self-identifies as an “underrepresented minority”, or alternatively to explain why the company does not meet these board diversity objectives.⁵ Some US states have introduced similar requirements, such as California, where Assembly Bill 979 requires publicly held companies headquartered in the state to include board members from “underrepresented communities”.⁶

Thus, today’s discussion is much more multi-dimensional than back in 2012 and this should, of course, be reflected in a directive of 2022. The risk attached to confining the board composition directive to gender equality is that other groups will be disadvantaged. In order to avoid liability under the directive, boards are likely to play down the claims of other groups. Even when companies seek to

4. We understand that gender self-identification in this context may come into conflict with the aim of adequate representation of biological women on boards and, hence, do not take a position on the US approach.
5. See <https://listingcenter.nasdaq.com/assets/Board%20Diversity%20Disclosure%20Five%20Things.pdf>; see in detail C Posner, ‘SEC approves Nasdaq “Comply-or-Explain” Proposal for Board Diversity.’ <https://corpgov.law.harvard.edu/2021/08/26/sec-approves-nasdaq-comply-or-explain-proposal-for-board-diversity/>.
6. Defined as “an individual who self-identifies as Black, African American, Hispanic, Latino, Asian, Pacific Islander, Native American, Native Hawaiian, or Alaska Native, or who self-identifies as gay, lesbian, bisexual, or transgender.” For the text of AB 979 see <https://legiscan.com/CA/text/AB979/2019>.

take a broader approach, they may find that their freedom of action is restricted by the gender equality requirements, which will thus attain priority in the implementation of board diversity policies.

We also note that the proposal does not take into account the fact that today, in several Member States, not only individuals but also legal entities can be elected board members. How do they fit in to the quota calculation? What is the gender of directors that are legal entities? Does it depend on the gender of the legal entities' individual representatives? What, then, if these representatives change?

The legal basis for the directive proposal

To achieve a more balanced representation of men and women on the boards of EU listed companies, the proposal requires Member States to introduce certain procedural rules for the selection and election of board members (Art 4a Presidency Proposal). While this would clearly imply amending national company law, the Commission does not view the proposal as a company law measure as its legal basis is Art 157 (3) TFEU, which is normally used for directives in the field of labour law.

During the initial negotiations in the Council in 2013, Member States questioned the view of the Commission and asked the Council Legal Service (CLS) for an opinion on the matter. CLS concluded that the proposal cannot be based on Art 157 (3) TFEU since serving as a (non-executive) company board director is not in general "a matter of employment and occupation" as required by Art 157 (3). This reasoning was, however, not accepted by the Commission that insisted on the proposed legal basis and stated: "In no way, the proposal intends to harmonise company law."⁷ We find this statement quite astonishing. If a directive

on the composition of company boards is not a company law harmonisation instrument, what is? Hence, the proposed directive should be based on Art 54 TFEU. Although both Art 54 and Art 157 (3) TFEU require the Union to act in accordance with the ordinary legislative procedure, if the proposal were based on Art 54 TFEU, more company law specialists would be involved, both in the Commission and in the Council. Presumably, this would lead to better and more workable legislation on the appointment of board members.

We also think that Art 54 TFEU would allow adopting a broader approach to board diversity. But even apart from that provision, the Union would have a legal base for such broader rules. Recital 1 of the current gender balance draft states that „Equality between women and men is one of the Union's founding values and core aims under Article 2 and Article 3 (3) of the Treaty on European Union (TEU).“ This is undoubtedly correct as far as it goes, but Art 2 refers to „equality“ quite generally and specifically includes „the rights of persons belonging to minorities“ while Art 3 refers explicitly to combatting „social exclusion and discrimination“. As for the all-important legal base for a proposed Directive, it is correct that Art 157 TFEU embraces only discrimination between men and women. However, what is now Art 19 TFEU, adopted in the Amsterdam revisions of 1996, provides that the Council, acting unanimously, and the Parliament „may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation“. The wide-ranging Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial and ethnic origin was placed on this legal base.

The proposed procedural rules

At the heart of the directive are the procedural rules in Art 4a by which Member States shall

7. See Commission Staff Working Document 16.7.2013, SWD(2013) 278 final, p. 5.

ensure that listed companies meet the objective that women hold at least 40 % of non-executive director positions or at least 33 % of all director positions, including both executive and non-executive directors. The selection of candidates for appointment or election of boards members „is carried out on the basis of a comparative analysis of the qualifications of each candidate, by applying clear, neutrally formulated and unambiguous criteria established in advance of the selection process“ (Art 4a(1)). In this process Member States shall ensure that, „when choosing between candidates who are equally qualified in terms of suitability, competence and professional performance, 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“ (Art 4a(2)). Furthermore, „in response to a request from a candidate who has been considered in the selection for appointment or election, listed companies are obliged to inform that candidate of the following:

- (a) the qualification criteria upon which the selection was based,
- (b) the objective comparative assessment of the candidates under those criteria, and,
- (c) where relevant, the considerations tilting the balance in favour of a candidate of the other sex“ (Art 4a(3)).

Finally, „Member States shall take the necessary measures (...) to ensure that where a candidate of the under-represented sex establishes facts from which it may be presumed that he or she was equally qualified as compared with the candidate of the other sex selected for appointment or election, it shall be for the listed company to prove that there has been no breach of Article 4a(2)“ (Art 4a(4)).

Looking at these requirements from a company law perspective, one cannot help won-

dering how the provisions are supposed to operate in practice, given the way company boards are elected. Leaving national details and differences aside, in general⁸ non-executive board members are elected by the shareholders' meeting. In listed companies there are typically many thousands of shareholders. In today's global stockmarkets many of them are foreign institutional investors like pension funds, mutual funds, etc. Most of them exercise their voting rights electronically or by proxy. Of course, it is possible and probably even feasible to request the company to prepare a comparative analysis of the qualifications of each candidate as the basis for the shareholder vote as Art 4a(1) requests. But requiring these shareholders to adhere to certain criteria when casting their votes (see Art 4a(2)) is a farfetched idea. Who should establish the criteria and monitor their application? Who is responsible if the vote does not follow the objective assessment?

Even more obscure is the requirement that the company should inform unsuccessful candidates upon request of the qualification criteria used, the objective comparative assessment, etc (Art 4a(4)). This is simply not applicable to an election where votes are cast by thousands of shareholders, in most cases anonymously, and where there are no justifications given for a vote. Furthermore, different shareholders might very well have different reasons for voting in favour (or against) a certain candidate. There is, in practice, no way the general meeting as such can inform the company about the rationale for the election of a certain director. Did the Commission draftsmen think that boards are self-perpetuating bodies?

8. Of course, in some Member States employee representatives to the board are appointed by a body such as the works council, which makes the application of the rules easier for these representatives.

The exemptions

Hence, it is not surprising that – as far as we can ascertain – Member States have not introduced comparable systems in their national rulebooks. That alone should give the European legislator pause to think as no such system has proven to be practicable.

Of course, this is not meant to imply that Member States have not introduced systems designed to improve the representation of women on the boards. Some such systems operate with mandatory quotas (e.g., 40% in France for the board of directors, 30% in Germany and Austria for the supervisory board), whereby any appointment violating the quota is void; under this more rigid approach, companies know precisely which rules to adhere to. Other countries encourage companies to set a policy, often pursuing broader aims of diversity apart from gender equality, but do not prescribe its contents (e.g., France as to other diversity aspects than Gender and, more generally, Spain, Sweden, and the United Kingdom); under this more flexible approach, each company can set the rules most appropriate for its situation.

We do not want to argue which of these approaches is superior – but we are certain that either is superior to the one chosen by the Commission proposal.

The proponents of the proposal do not seem to be sure of the effectiveness of rules proposed in Art 4a themselves. Otherwise, it would be hard to explain why Art 4b empowers the Member States to “suspend the application of Art 4a” if “equally effective measures have already been taken with the aim of attaining a more balanced representation of women and men among the directors of listed companies”. One such “equally effective measure” is national legislation requiring “that members of the under-represented sex hold at least 30 % of non-executive director positions” (Art 4b (“)) – 30% seem to be equal to the 40% aimed at by the proposal, which is

not completely convincing. The proposal contains similar, numerically “softer” aims which are also deemed to be “equally effective”.

Hence, Member States can opt out of Art 4a. Given the impossibility to apply the proposal in a meaningful way, they should probably do so and design their own solutions in order to avoid these unworkable provisions. Hence, one could understand the proposal’s real aim as giving incentives to some Member States to act on the issue of gender balance, while others, where such measures are already in place, will not need to introduce new legislation.

Conclusion

Is this a good way of legislating? We do not think so. The European legislator should not introduce rules which are hard or impossible to apply in order to force Member States to take action on gender balance. This will not lead to meaningful harmonisation.

Of course, there is always another alternative. Art 288(3) TEUF states that a “directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.” Would it not be more straightforward and in line with the original concept of a directive to mandate a quota for non-executive and/or executive directors and leave the methods to the Member States? Taking Art 4a out of the current proposal would not be a loss anyway.

In any case, the aims pursued by the proposal feel slightly outdated. The current state of discussion has moved on to wider concepts of diversity. Of course, this does not mean that gender equality in board appointments has been achieved. But the requisite legal instruments are in place in most if not in all Member States. From that point of view, the current proposal at best would operate as a broom wagon, which sweeps up stragglers who are unable to make it to the finish line without help.