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## The Multiplicity of Regulatory Responses to Remedy the Gender Imbalance on Company Boards

Linda Senden\*

### 1. Introduction

From the very foundation of the European Economic Community, now the European Union, the principle of equality and of equal treatment of men and women is one of the legal cornerstones of its underlying system of core values, yet the unequal representation of women in political and economic decision-making is still a huge problem throughout the EU. While women make up at least half of the population, their share in the exercise of political and economic power has remained at a very low level even in the 21<sup>st</sup> century. Focussing in this contribution on economic decision-making and in particular on the representation of women on company boards, the following figures are telling. The EU average for women in such top management positions of large listed company boards<sup>1</sup> is still at the very low figure of 17.8 %, while there are significant cross-country differences, the lowest figure concerning Malta (2.1%) and the highest being that in Finland (29.8%),<sup>2</sup> other countries ranging in between such as Greece (8.4%), Belgium (16.7%) and Germany (21.5%). The non-EU country Norway shows the highest figure: 42%. At CEO level, the figures are even far lower; less than three out of the hundreds of the largest listed companies in Europe are women.<sup>3</sup> From a special Eurobarometer poll conducted in 2011, there appears to be quite a large societal consensus in Europe that this is indeed problematic and that women, given their equal competence, should be equally represented in company leadership positions.<sup>4</sup> As will be discussed in more detail, three different normative justifications can be distinguished for holding this view and for taking action: there is the economic, business case argument; the private, individual fairness, equal opportunities and equal qualifications argument; and the general societal, public interest and fundamental rights rationale.<sup>5</sup> Yet, there are quite diverging views as to the methods and instruments

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\* Professor of EU Law at Utrecht University and affiliated to Utrecht University's Centre for Regulation and Enforcement in Europe (RENFORCE). E-mail: [L.A.J.Senden@uu.nl](mailto:L.A.J.Senden@uu.nl). This paper is partly based on the findings that were obtained while carrying out a 'Study on Promoting Women in Leadership – Comparative Study on Legal and Regulatory Approaches in Europe to Increase the Share of Women in Middle and Higher Management Positions', commissioned by the CEC and the European Commission. See further <[www.womeninmanagement.eu](http://www.womeninmanagement.eu)>.

1 It must be noted that figures may be considerably lower when including also non-listed companies.

2 See European Commission, *Improving the gender balance in company boards*, June 2014, <[http://ec.europa.eu/justice/gender-equality/files/gender\\_balance\\_decision\\_making/boardroom\\_factsheet\\_en.pdf](http://ec.europa.eu/justice/gender-equality/files/gender_balance_decision_making/boardroom_factsheet_en.pdf)>, last visited 24 November 2014.

3 European Commission, *Gender balance on corporate boards. Europe is cracking the glass ceiling*, March 2014, <[http://ec.europa.eu/justice/gender-equality/files/documents/140303\\_factsheet\\_wob\\_en.pdf](http://ec.europa.eu/justice/gender-equality/files/documents/140303_factsheet_wob_en.pdf)>, last visited 24 November 2014.

4 See the Special Eurobarometer 376 on Women in decision-making positions held in September 2011 in the EU, <[http://ec.europa.eu/public\\_opinion/archives/ebs/ebs\\_376\\_sum\\_en.pdf](http://ec.europa.eu/public_opinion/archives/ebs/ebs_376_sum_en.pdf)> (last visited 24 November 2014) view, p. 11; almost 9 out of 10 respondents hold this view.

5 Cf. also the Special Eurobarometer, *supra* note 4, pp. 13-14.

to be applied for achieving a (more) balanced representation of women and men. According to the mentioned Eurobarometer poll, only 8% of European citizens deem that no action is needed because a balance is not needed, while 15% do not know what action should be taken. Some 31% percent have a preference for self-regulation, 26% for binding legal measures and 20% for voluntary measures such as non-binding Corporate Governance Codes and Charters.<sup>6</sup> Such variation is in fact also visible in the national legal and regulatory systems of the Union's Member States, reflecting the non-alignment or disagreement as to the ways in which this problem should be dealt with (if at all) and by whom; by companies themselves, by the public regulator or jointly. But clearly, the introduction in Norway in 2006 of a hard law quota regime for bringing about gender balance in the boardroom has triggered the debate in quite a number of EU Member States and has led to important legislative changes in some of them. On the EU level as well, the European Commission has been shifting its soft law approach to a hard law approach, by putting forward a proposal for a directive on this topic in 2012,<sup>7</sup> leading to a – still ongoing – vibrant and heated discussion.

In this article the variation in regulatory and enforcement regimes, strategies and styles will be charted that have developed throughout Europe with a view to tackling the problem of the under-representation of women on company boards and to bring about actual change. Specifically, this comparative analysis seeks to offer insights into the following issues: how do public and private regulators and regulation interact with each other in this regard or what kind of co-regulation and/or co-enforcement regimes can one identify; what are relevant factors or principles that determine the chosen strategy and types of instruments; what are important conditions or factors for ensuring that the chosen instruments will be effective in the light of the goal to be achieved; what lessons can one draw when it comes to the (non-) effectiveness of the privatization of both regulation and enforcement in this area, also for policymakers? Can one single out certain factors for determining the optimal mix of regulation and enforcement arrangements for realizing the goal of a more balanced gender representation?

With a view to this, the article proceeds as follows. First, the multitude of regulatory responses will be presented, thus depicting the variety of possible approaches to addressing one and the same problem (Section 2). In the following section, the reasons that may explain this multitude of approaches will be discussed (Section 3) and next their (potential) effectiveness will be compared and a linkage will be made in this respect with the monitoring, enforcement and sanctioning mechanisms that have been put into place, relying on already available studies (Section 4). We will end the contribution with some conclusions and by identifying lessons that can be learned from the analysis (Section 5).

## **2. The multitude of regulatory responses**

Regulatory approaches to remedying the gender imbalance on company boards vary widely throughout the European Union (and beyond), ranging from no regulatory action whatsoever in still quite a number of Member States to hard quota legislation in others and softer – both public and private – regimes somewhere in between these two extremes. These regimes come in quite different forms as will be seen. Furthermore, it must also be noted that in some Member States self- or co-regulatory approaches and public law approaches may be both put into place, as a result of in particular the distinction that is being made between private companies and state-owned companies.

### **2.1. No specific regulatory action**

National law may allow for positive action measures, but specific measures for promoting women on company boards may not have been (so far) adopted. This holds true for many of the more recently acceded countries to the EU, where the legislator has not put any provisions or preference measures of any kind, including quota rules, into place with a view to promoting the number of women on company boards. This is the case for Bulgaria, Croatia, the Czech republic, Cyprus, Latvia, Lithuania, Malta and Slovakia. But also in some of the older Member States, such as Luxembourg and Portugal,

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<sup>6</sup> Ibid., pp. 15-17.

<sup>7</sup> COM(2012) 614 final.

no such measures have been taken either. In such countries, one can thus merely rely on the general gender equality law provisions. In some countries, like Estonia, the law limits itself to some general, declaratory provisions setting out the objective to promote the gender balance in personnel policy in both the public and private sector, but without as such imposing a legally binding obligation.<sup>8</sup> Croatian law only imposes a duty on private companies to respect the prohibition of sex discrimination and it is questionable to what extent it even allows such companies to autonomously adopt measures involving sex-related preferences or quotas, as the Croatian Sex Equality Act requires positive action measures to be first defined by statutory law. State-controlled companies are also not subject to a requirement to adopt any positive action measures of any kind, but must produce periodical equality action plans.<sup>9</sup>

## 2.2. Self-regulation

In some countries, business organizations have taken initiatives for promoting gender diversity in boardrooms. In the absence of binding public regulation, as is not only the case in the aforementioned countries but also for instance in Poland, Sweden and the United Kingdom, such initiatives are the closest thing to persuading corporations to pay some attention to the issue of women in the boardroom. Most often, this occurs through rules or recommendations included in corporate governance codes. However, the norms that these codes contain regarding gender diversity are usually phrased quite openly, without any hard rules or standards being imposed. This holds true for the British Corporate Governance Code, but also the Polish Code of Best Practice for WSE Listed Companies issued by the Warsaw Stock Exchange provides an example of this, recommending that shareholders and companies should ensure ‘a balanced proportion of women and men’ in management and supervisory positions, without elucidating what ‘balanced’ exactly means. It also requires companies to give information on an annual basis about the participation of women and men on the Management Board and on the Supervisory Board of the company in the last two years.<sup>10</sup> Only since 2012 do these recommendations fall under the ‘comply or explain’ mechanism.<sup>11</sup>

Besides these corporate governance codes, which mostly only apply to stock listed companies, companies may also adopt other, more individually customized measures. These concern certificate and pledge programmes, and mentoring and education programmes. The Dutch ‘Talent to the Top’ programme is an example of this, providing a platform where companies can make a public pledge in which they commit themselves to promoting gender diversity. This is very much voluntary and its focus is on stimulating companies to work on an effective gender diversity policy. To date, 239 Dutch corporations have made this pledge.<sup>12</sup> There is no sanction in this system other than the fact that companies are put on the initiative’s website with their pledge, and thus can be held accountable for it by the public. An example of a large-scale mentorship programme is the United Kingdom FTSE 100 Cross-Company Mentoring Executive Programme, which is executed by the Mentoring Foundation. This Foundation offers mentoring and related services to high-potential women within the 100 highest-value stock companies on the London Stock Exchange. The programme brings together these women and Chief Executives and Chairmen in order to help women progress and also to teach those Chairmen and Chief Executives about women leadership. Since 2003, 136 mentoring pairs have been established.<sup>13</sup> Besides this, the United Kingdom also has the 30 percent club, which is a private initiative taken by investors to achieve 30% women on FTSE 100 boards by 2015. This group does not support mandatory quotas, and refers on its website to the experience in Norway where still only 3% of CEOs are female according to statistics on their website, in spite of the quota for board members there, thus arguing that

8 Art. 11(1) of the Gender Equality Act, as represented by A. Albi & A. Laas, ‘Estonia’, in G. Selanec & L. Senden, *Positive Action Measures to Ensure Full Equality in Practice between Men and Women, including on Company Boards*, Publication of the European Network of Legal Experts in the Field of Gender Equality, 2013, p. 72, available at: <[http://ec.europa.eu/justice/gender-equality/files/gender\\_balance\\_decision\\_making/report\\_gender-balance\\_2012\\_en.pdf](http://ec.europa.eu/justice/gender-equality/files/gender_balance_decision_making/report_gender-balance_2012_en.pdf)>, last visited 24 November 2014.

9 G. Selanec, ‘Croatia’, in Selanec & Senden 2013, supra note 8, pp. 54-55.

10 Warsaw Stock Exchange, *Code of Best Practices for WSE Listed Companies*, Art. 9, Art. 2 sub. a.

11 Provision No. 1 point 2a of Chapter II of Good Practices as amended by resolution No. 20/1287/2011 of 19 October 2011. See <<http://www.corp-gov.gpw.pl/publications.asp>>, last visited 24 November 2014.

12 See: <<http://www.talentnaardetop.nl/>> (last visited 24 November 2014) and D.M. Branson, ‘Initiatives to Place Women on Corporate Boards of Directors—A Global Snapshot’, 2012 *The Journal of Corporation Law* 37, no. 4, p. 806.

13 See: <[www.mentoringfoundation.co.uk](http://www.mentoringfoundation.co.uk)>, last visited 24 November 2014.

the ‘trickle down’ effect of mandatory measures is virtually non-existent.<sup>14</sup> In Hungary, some large private companies have introduced equality plans as part of their corporate policy, one of which also includes goals for female board membership; in 2011 Hungarian Telecom (under the German Telecom plan) adopted the goal of increasing the number of women in board positions to 30% by 2015.<sup>15</sup>

### **2.3. Conditioned self-regulation or co-regulation**

In a number of countries, it has not been fully left to industry how to deal with the problem of female under-representation on company boards in their corporate governance codes or otherwise, but the legislator or public regulator has set certain goals, norms or conditions for this. This is the case for instance in Germany, where in 2001 the Federal Government and the principal business associations concluded an agreement to promote the equality of women and men in the private sector, including the increase of women in decision-making positions. If successfully implemented, the Federal Government has promised not to introduce gender equality legislation unless it is obliged to do so under EU law.<sup>16</sup> This led inter alia to the introduction of a gender diversity provision in the German Corporate Governance Code, established by a semi-public committee, reading as follows: ‘When filling managerial positions in the enterprise the Management Board shall take diversity into consideration and, in particular, aim for an appropriate consideration of women.’<sup>17</sup> A similar provision applies to supervisory boards. But here again, one must note that nowhere in the Code is it explained what ‘appropriate’ entails or how the company should prove that it has complied with this rule. According to the original German wording (*soll*), this rule is not even binding. Perhaps not so surprisingly then, no significant changes came about until in 2011 most of the German stock listed companies (the DAX 30) set concrete targets, ranging from 20% to 30%.<sup>18</sup> In the subsequent three years this has led to an increase of 11% to about 22% female representation on the boards of these companies. There is also a legal ‘comply-or-explain’ duty contained in the German Stock Corporation Act (Section 161) which requires companies to report on the implementation of the Code’s standards in their annual reports.<sup>19</sup> In fact, most corporate governance codes rely on the ‘comply-or-explain’ mechanism, in which the explanation for a deviation from the code should be accounted for in the company’s annual report. The listing rules of the country where the code applies thus normally serve as its backbone, and reporting duties thus can often be traced back to public law statutes, such as the Civil Code.<sup>20</sup>

While the issue of quotas was discussed at a political level pursuant to their introduction in Norway in 2006 (see Section 2.5 below), Finland – aligning itself more with the Swedish approach – opted in 2008 for a self-regulatory approach through the Corporate Governance Code to be implemented in 2010. The Code provides that ‘both genders shall be represented on the board’, as such not necessarily recommending an equal distribution of board seats among the sexes. The Swedish Code on Corporate Governance applies to both listed private and public limited-liability companies and contains a – voluntary – rule that ‘the company is to strive for equal gender distribution on the board’, but there is also an obligation to justify the final proposal on the board’s composition. The Swedish Corporate Governance Board monitors compliance with the Code and there is a legal duty to provide an audit report, including on the Code. As regards state-owned companies there are also the ‘general owner policies’, which have long aspired to gender equal boards, meaning there should be 40% of each sex.

Co-regulatory regimes may also take other forms, such as the Charter for more women in the management of companies which the Danish Minister for Gender Equality launched in 2008. The Charter was drawn up jointly with public and private sector companies and applies to both types of companies.

14 See: <<http://30percentclub.org/>>, last visited 24 November 2014.

15 C. Kollonay Lehoczky, ‘Hungary’, in Selanec & Senden 2013, supra note 8, p. 107.

16 B. Rudolf & U. Lembke, ‘Germany’, in Selanec & Senden 2013, supra note 8, pp. 91-92. See also more generally, B. Waas, ‘Gender Quota in Company Boards: Germany’, in M. de Vos & Ph. Culliford (eds.), *Gender Quotas for Company Boards*, 2014, p. 131.

17 German Corporate Governance Code, May 2013, Art. 4.1.5.

18 See Waas 2014, supra note 16, p. 132.

19 See on this also K. Langenbacher, *Legal aspects of gender balance on corporate boards in Germany*, Note for the European Parliament, March 2013, p. 30.

20 See for instance Art. 2:391(5) of the Dutch Civil Code. In an *algemene maatregel van bestuur* (order in council), the Dutch Corporate Governance Code has been indicated as the Code of Conduct to which Article 2:391 refers, and which is thus a required section of the annual report for listed companies.

Companies that sign the Charter undertake to prepare a plan or strategy to attract more women into management positions and to set goals and/or target figures for the proportion of women at selected executive levels to be achieved within a fixed period of time. In 2011, 109 companies/authorities had signed the Charter, of which only 16 were private ones but they include Denmark's largest companies. The Charter takes account of corporate diversity and does not seek to impose a 'one size fits all' model but rather the identification and sharing of good and best practices.<sup>21</sup> Participating companies are under a duty to report on the actions they have taken.

#### 2.4. *Soft public law and target regimes*

The extent to which obligations have been imposed by way of public law to bring about a gender balance on company boards varies considerably in terms of scope and precision and thereby in terms of the discretion they leave to companies. Some of these public law regimes may in fact be very soft. The Hungarian Equality Act thus merely imposes a duty to adopt an equal opportunity plan, and this only for public employers. A failure to adopt such a plan is subject to a fine by the Equal Treatment Authority, but there is no scrutiny of its content and, generally speaking, such plans only contain soft provisions not conferring any rights on employees. In Portugal, the Fourth National Plan for Gender Equality covering 2011-2013 also aims to implement equality plans for companies in the public sector. In Ireland, some collaborative schemes have been designed for the implementation of positive action measures, such as the National Women's Strategy that seeks to increase the number of women on company boards by maintaining a database for competent women and by providing training.<sup>22</sup> Under Finnish law as well, an obligation was introduced in 2005 for both public and private companies with at least 30 employees to produce an annual gender equality plan, which entails a relatively detailed planning obligation of measures and follow-up actions to promote gender equality. Yet, the means to be used are left to the employers themselves. Upon the proposal of the Ombudsman for Equality, the Equality Board may impose a fine upon an employer failing in its equality planning duty within a certain deadline,<sup>23</sup> but the Parliamentary Committee has also noted that the Equality Ombudsman Office should have more resources to monitor equality planning and that there may be a need to reinforce the equality planning duty by imposing more precise, mandatory provisions.<sup>24</sup>

Denmark has recently hardened its approach somewhat, moving beyond the general provision in its Gender Equality Act that merely stipulated that boards of state-owned companies 'should have an equal gender balance'. By two laws of December 2012 the Gender Equality Act and the Companies Act were thus modified so as to include an obligation for both private and public enterprises (which covers the 1,100 largest Danish companies) to set concrete – realistic and ambitious – targets for enhancing the number of the under-represented sex on the companies' main governing body and to develop a recruitment policy with a view to their realization. It also entails a comply-or-explain approach, forcing companies to state in their annual reports how they have implemented this policy and, where appropriate, to explain why the objective was not realized. If it fails to report on this, a fine may be imposed.<sup>25</sup>

There are also initiatives by public authorities that seek to set some concrete quantitative targets, yet they are (very) soft in terms of their legally binding nature and the sanctioning in case of non-achievement and non-compliance. An example is the European Commission launching in March 2011 a voluntary pledge for companies to achieve 30% female representation on company boards by 2015 and 40% by 2020. However, this programme failed, as only 24 companies had signed the pledge a year after its announcement.<sup>26</sup> This has incited the Commission to come up with a proposal for a directive on the issue. Spain provides another example, introducing a law in 2007 that recommends that big companies

21 R. Nielsen, 'Denmark', in Selanec & Senden 2013, supra note 8, pp. 65-66.

22 F. Meenan, 'Ireland', in Selanec & Senden 2013, supra note 8, p. 118.

23 Section 21(4) of the Act on Equality in conjunction with Section 6a, as represented by K. Nousiainen in Selanec & Senden 2013, supra note 8, pp. 77-80.

24 *Ibid.*, p. 83.

25 Act. No. 1288 of 19 December 2012 amending the Gender Equality Act and Act No. 1383 of 23 December 2012 amending the Companies Act and certain other laws. Further on this, R. Nielsen, 'Denmark', 2013 *European Gender Equality Law Review*, no. 1, pp. 61-63.

26 European Commission Press Release, *Women on Boards: Commission Proposes 40% Objective*, 2012. See also <[http://ec.europa.eu/commission\\_2010-2014/reading/multimedia/news/2012/03/20120305\\_en.htm](http://ec.europa.eu/commission_2010-2014/reading/multimedia/news/2012/03/20120305_en.htm)>, last visited 26 November 2014.



ensure a representation of at least 40% of each gender on company boards before 2015.<sup>27</sup> However, there are no sanctions attached to this rule, only a duty for companies to state the gender composition of their board of directors in their annual reports.<sup>28</sup> Yet, the Government may take the performance of companies concerning this requirement into account in the issuing of the equality label and when deciding on public subsidies and state administration contracts.<sup>29</sup> The Netherlands initiated a similar measure a year earlier, when it amended its Civil Code in such a way that it now obliges privately and publicly-held limited companies and private limited companies to strive for a 30% representation of each sex on their boards.<sup>30</sup> This rule only applies to large corporations and companies which fulfil two of the following criteria will be exempted from it: the value of their assets is no more than EUR 17,500, their net annual turnover is no more than EUR 35,000 and they do not have more than an annual average of 250 employees. If a company does not achieve the balanced representation of at least 30% of each sex, it has to explain this in its annual report and what methods it has used to achieve a balanced representation and how it will achieve this goal in the future.<sup>31</sup> However, no sanctions for not following the norm are laid down. Moreover, the measure is only temporary and will expire on 1 January 2016 regardless of the results achieved.<sup>32</sup> In Ireland, the Labour Coalition Government set an aspirational target in 2011 of 40% of each gender for all state boards. Yet, this target does not have any legal standing and does not appear even to extend to state-owned commercial companies. The only specific legislative provision that can be found is the one in the Irish Broadcasting Act 2009, which requires public service broadcasting corporations to have a 12-person board comprising at least 5 men and 5 women.<sup>33</sup>

Some states have framed the target in a more open way, such as is the case for state-owned companies in Finland; according to the Finnish Equality Act (in Section 4a(2)) their boards must be comprised of ‘an equitable proportion of both women and men, unless there are special reasons to the contrary’. ‘Whenever possible’, both a woman and a man should be proposed for every membership position.<sup>34</sup> The Equality programmes of 2004-2007 and 2008-2011 crystalized this even further, setting a target for state-owned companies to realize 40% women on boards, thereby raising the target that had been set in the 1990s at 30%.<sup>35</sup> Nominations that have been made in contravention of the Act on Equality may be overturned by the administrative courts. In Sweden, a proposal was put forward in 2006 to introduce in the Companies Act a 40% quota rule for each sex on the boards of state-owned public and private limited-liability companies, providing for a fine of EUR 15,000 in the case of non-compliance.<sup>36</sup> Yet, this proposal was never adopted, but debates on the necessity of legislation in this area still emerge (see Section 4).

### **2.5. Hard public law and quota regimes**

In other countries, governments have moved towards more stringent approaches and have established mandatory quota regimes, yet these regimes may not apply to public and private companies in the same way. The first country in Europe to introduce such a quota was Norway in 2006, and requires a representation of 40% of both genders on company boards, but only of public limited companies, inter-municipal companies and state-owned companies.<sup>37</sup> The regime is (very) strict concerning compliance and enforcement: existing companies not complying with the rule may be liquidated after a court ruling

27 Art. 75 of Law 3/2007.

28 Royal Legislative Decree 1/2010, of 2 July, on the Law on Capital Companies, states that the report that accompanies the annual accounts shall include information on the gender distribution of the staff of such a company, breaking down the categories and levels, which shall include top executives and board members.

29 B. Valdés de la Vega, ‘Spain’, in Selanec & Senden 2013, supra note 8, p. 207.

30 *Staatsblad* 2011, 275; *Wet van 6 juni 2011 tot wijziging van boek 2 van het Burgerlijk Wetboek in verband met de aanpassing van regels over bestuur en toezicht in naamloze en besloten vennootschappen*.

31 See Art. 2:391(7) Civil Code.

32 See Art. VII of the Law amending the Civil Code and more in detail C. Remery, *The Dutch Solution: No Quota but Legal Targets*, in De Vos & Culliford 2014, supra note 16, pp. 159-170.

33 F. Meenan, ‘Ireland’, in Selanec & Senden 2013, supra note 8, p. 116.

34 Sections 4a(2) and 3 of the Act on Equality, as represented in Selanec & Senden, supra note 8, p. 78.

35 A. Kovalainen & L. Hart, *Role of self-regulation in listed companies recruitment of women into top positions in Finland*, in De Vos & Culliford 2014, supra note 16, p. 112.

36 A. Numhauser-Henning, ‘Sweden’, in Selanec & Senden 2013, supra note 8, p. 218.

37 See the Norwegian Public Limited Liability Companies Act, in Section 6-11a.

on the matter.<sup>38</sup> In order for this court ruling to follow, a company must have failed to notify the Registrar of Business Enterprises that it complies with the quota requirement. The company then receives up to two warnings, after which the company can be dissolved. Companies registering as a public limited company may be denied registration by the Registrar of Business Enterprises if they do not comply with the quota law.<sup>39</sup> Interestingly, this law would not have become mandatory if all companies would have complied with it before July 2005. However, when it appeared that most companies had not complied with the rule by this time, the Norwegian Government gave companies another two years (from 2006 onwards) to comply, after which the sanctions stated above would follow. Companies registering from 2006 onwards had to comply with the quota immediately.<sup>40</sup> The law was extended in order to apply to cooperative companies with more than 1,000 members in 2008 and to private limited companies where municipalities own two-thirds or more of the shares in 2010, both with a two-year transition period. Overall, compliance with this mandatory quota has been good, with almost all companies complying within the two-year transition period.<sup>41</sup>

Other countries in Europe have followed suit, most notably France, Belgium and Italy. In France, a quota law passed in 2011, which states that listed companies or non-listed companies (with revenues or total assets of over EUR 50 million or employing at least 500 persons for the last three years) should have a proportion of men or women that is at least 40%.<sup>42</sup> The law, which applies to both private and state-owned companies, specifies that companies have six years from the implementation of the law onwards to reach this quota, although companies trading on a regulated market are obliged to reach a target of 20% by the end of three years after the implementation of the law. Moreover, companies with no female board members should fill any seat which becomes available within three years after the implementation of the law with a female candidate. The sanction for not complying with this law is the nullity of the appointment of any director which does not comply with the quota requirement.<sup>43</sup>

In Belgium, mandatory quota rules were established by the Law of 28 July 2011, after a fierce and intense political debate. As regards certain economic public undertakings,<sup>44</sup> this law requires that ‘at least a third of the members of the board of directors appointed by the Belgian State or by a company controlled by the Belgian State shall be of a different gender from the other members’.<sup>45</sup> A similar provision has been inserted in the Code of Company Law for listed companies.<sup>46</sup> In the case of non-compliance and the number of directors of a different gender does not meet the minimum laid down, the next director appointed shall belong to this gender failing which the appointment shall be invalid. For ensuring compliance with the one-third quota provision by listed companies, the Law provides for yet an additional rule stipulating that ‘the next general meeting after the entry into force of this provision must form a board of directors complying with the quota of at least one-third, failing which all the benefits [financial or otherwise – LS] of the members of the board of directors of the company concerned, in connection with the performance of their mandate, will be suspended’.<sup>47</sup> A transitional period during which the target should be realized has been allowed for both existing and newly established listed companies.

38 Norwegian Public Limited Liability Companies Act, Section 16-15, Subsection 2.

39 Norwegian Register of Business Enterprises Act, Section 5-2.

40 The Ministry of Children, Equality and Social Inclusion, *Press Release No. 05116: Rules regarding gender balance within boards of Public Limited Companies*, 8 December 2005.

41 P. Hastings, *Breaking the Glass Ceiling: Women in the Boardroom*, 2013, third edition, p. 96.

42 Law 2011-103 of 27 January 2011, *Journal Officiel*, 28 January 2011.

43 See in more detail on the French law, B. Gresy, ‘France: The Measures of Positive Discrimination within the Boards of Directors of Undertakings’, in De Vos & Culliford 2014, *supra* note 16, pp. 123-130; and A. Masselot & A. Maymont, ‘Balanced Representation between Men and Women in Business Law: The French ‘Quota’ System to the Test of EU Legislation’, *Centre for European Law and Legal Studies Online Paper Series* (University of Leeds) Volume 3, 2014, issue 2, available at: <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2459916](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2459916)>, last visited 26 November 2014.

44 These include Belgacom, SNCB Holding Infrabel, Societe nationale des Chemins de fer belges, bpost, Belgocontrol and the National Lottery.

45 Arts. 2 and 5 of the Law of 28 July 2011, as presented in Ph. Lambrecht, ‘The Law of 28 July 2011 to guarantee the presence of women on the decision-making bodies of autonomous public undertakings, listed companies and the National Lottery’, in De Vos & Culliford 2014, *supra* note 16, p. 101.

46 Art. 4 of the Law of 28 July 2011 inserting a new Art. 518a in the Code of Company Law. See in more detail Lambrecht 2014, *supra* note 45.

47 Lambrecht 2014, *supra* note 45, p. 105.

The Italian Act No. 120/2011 modified the Merchant Banking Code so as to provide for the obligation that company statutes must ensure that directors and auditors of one sex cannot be elected in a proportion greater than two-thirds compared to directors and auditors of the opposite sex. This rule is to be enforced for three periods of tenure for directors and auditors and this 33% rule must be ensured by 2015.<sup>48</sup> The obligation applies to the appointment of managing directors and auditors of both listed companies and state subsidiaries.<sup>49</sup> The Consob (the National Securities and Exchange Commission) has been made responsible for monitoring compliance and can issue a warning that the quota system must be applied within four months and, in the case of non-compliance, impose a fine of EUR 100,000 up to EUR 1 million (EUR 20,000 up to EUR 200,000 for auditors), together with a second warning that the quota must be achieved within three months. In the case of a failure to do so, this may result in the dissolution of the company board.<sup>50</sup>

Greek law also contains a binding quota rule, where it specifies that if the state or legal persons governed by public law appoint or designate members of boards of legal persons governed by public or private law, 'the number of members thus appointed or designated shall consist of at least one third of persons of each sex, provided that the appointees are more than one'.<sup>51</sup> Decisions which contravene this rule are liable to annulment by the competent administrative court. In Slovenia, the Government adopted in 2004 the Regulation on criteria for respecting the principle of gender-balanced representation which provides that nominations or appointments of government representatives in public enterprises, including supervisory and executive boards, must comprise at least 40% of either sex.<sup>52</sup>

### **3. Explaining the – diversity of – approaches**

The above analysis reveals a huge diversity in many aspects of the regulatory and enforcement approaches that have been and are still very much at the development stage in this area. Besides the differences in terms of the public and/or private nature and voluntary or binding nature of the regimes established, there is considerable variation as to the size and type of companies actually covered by them (private, listed and/or state companies); their duration (temporary or permanent); the level of ambition and targets that are actually being set; the time-limits for realising these targets; their implementation and monitoring mechanisms; and the – harshness of the – means and sanctions to punish non-compliance. The issue that then needs to be addressed in view of this is what factors can possibly explain this diversity in approaches and the choice for a particular course of action. In particular, how do the different approaches link with the various normative justifications for a – more – balanced representation of women and men on company boards and what other factors are at play in the establishment of the different regulatory and enforcement regimes?

As mentioned briefly in the introduction, three main normative justifications can be identified for taking regulatory action to tackle the gender imbalance on company boards. The economic, business case argument underscores the business need for (more) gender-balanced boards, submitting that this will lead to improved performance by companies<sup>53</sup> and to an enhanced quality of decision-making, that it will entail an improved quality of corporate governance and ethics, a better utilization of the talent pool, be a driving force for innovation and will also better mirror the market as women take most decisions on household spending.<sup>54</sup> The absence of women at the top of corporations also does not square well with companies seeking to show that they are taking their social responsibility seriously and that they engage in modern stakeholder management.<sup>55</sup> The individual, equal opportunities justification relies on the

48 S. Renga, 'Italy', in Selanec & Senden 2013, supra note 8, p. 125.

49 Ibid., p. 127.

50 Ibid., p. 125.

51 Art. 6(1) of Act 2839/2000, as represented in S. Koukoulis-Spilliotopoulos, 'Greece', in Selanec & Senden 2013, supra note 8, p. 101.

52 T. Koderman Sever, 'Slovenia', in Selanec & Senden 2013, supra note 8, pp. 200-201.

53 Even if one must note that causation, positive or negative, has so far not been unequivocally proven. See also on this L. Senden & M. Visser, 'Balancing a Tightrope: The EU Directive on Improving the Gender Balance among Non-Executive Directors of Boards of Listed Companies', 2013 *European Gender Equality Law Review*, no. 1, p. 21.

54 See e.g. 'Women in Mature Economies Control Household Spending' (<[www.marketingcharts.com/topics/asia-pacific/women-in-mature-economies-control-household-spending-12931](http://www.marketingcharts.com/topics/asia-pacific/women-in-mature-economies-control-household-spending-12931)>), last visited 26 November 2014.

55 Senden & Visser, supra note 53.



argument that addressing the power imbalance between women and men on company boards is simply a matter of individual fairness; women, who have equal qualifications, should have the same opportunities as men to be part of bodies – even if they are private bodies – that yield economic power and that affect the economic, financial and social life of all citizens. The societal, public interest and fundamental rights argument underscores the importance of a balanced representation from the more general perspective of ensuring social justice and democratic legitimacy, which are part of the core values underlying the EU as a political and economic system and which in legal terms translates into the principle of equality and of equal opportunities.<sup>56</sup>

A first observation in this regard is that in a number of Member States where no – specific – regulatory action whatsoever has been taken, the problem is apparently not (yet) considered to be sufficiently important to be at all tackled. Clearly, in those countries none of the identified normative justifications is seen as a sufficient or convincing driver – not in itself, nor in conjunction – to take any action, not by the public regulator or by industry. In these countries, there may be a mere reliance on the operationalization or enforcement of the general principle of equality and of equal opportunities and there is no movement (as yet) towards the development of a more proactive approach to overcome persisting inequalities in this domain.<sup>57</sup>

Where specific action has been taken or is being considered, the above normative justifications play varying roles. Self-regulatory approaches may be induced first and foremost by the business case rationale and developed in particular as part of corporate social responsibility policy, as reflected in corporate governance codes. This is quite explicit, for example, in the recommendation of the Polish Warsaw Stock Exchange Management Board which links the balanced participation of men and women to the strengthening of the creativeness and innovativeness of companies' economic activities. The Swedish Corporate Governance Board has pointed to the necessity for companies to behave in a responsible and sustainable way, which is said to include gender equality, with a view to earning the trust of the general public. But it has also noted the increasing emphasis that shareholders are putting on gender equality.<sup>58</sup>

The other two rationales appear more prominently in the discussion on and the establishment of hard quota rules. The Norwegian quota model thus finds its primary justification not in the business case rationale, but in the argument that 'reaching balanced participation is a question of democracy' and 'the Government regards the legislation on women in boards as an important step towards equality between the sexes, a fairer society and a more even distribution of power, and as an important factor in the creation of wealth in society'.<sup>59</sup> But interestingly, it is actually through amendments to company law that the quota rules were imposed and not through equality law.

Also in a number of other Member States, politicians have started to give more weight to equal opportunities, individual fairness and social justice considerations, as a result of which political pressure and support has accrued for more stringent, legally binding measures because of insufficient progress. In some states this has led to the establishment of either soft targets or hard quota rules. Such developments may have come about only after intense and polarised debates, as the Belgian case illustrates. In Belgium there has thus been fundamental political disagreement on the hard quota law that was proposed. Whilst there was a certain acceptance that the Government could impose such a quota on state companies, it was fiercely contested by some political parties as regards private sector companies. They were proponents of a more liberal view of society and that this matter should be dealt with through corporate policy and by voluntary means, following the recommendations of the Code of Corporate Governance.<sup>60</sup> The battle was won by those who were of the opinion that such a hard legislative approach is justified because progress has so far been much too slow, that voluntary approaches have not proven to be sufficiently effective

56 See on this in more detail A. Buijze, I. de Koning & L.A.J. Senden, 'Efficiency or justice? Correcting for power imbalances under EU telecommunications, air transport and gender equality law', to be published by Intersentia in 2015, now on file with the author.

57 Cf. L. Warth, 'Gender Equality and the Corporate Sector', *UNECE Discussion Paper Series*, No. 2009.4, p. 16.

58 The Swedish Corporate Governance Board, 'Questions and answers regarding the Swedish Corporate Governance Board's efforts to improve gender balance on the boards of listed companies', document dating from 30 May 2014, available at: <<http://www.corporategovernanceboard.se/media/64821/gender%20qa.pdf>>, last visited 26 November 2014.

59 The website of the Norwegian Ministry for Children, Equality and Social Inclusion as quoted by G. Selanec, 'Executive Summary', in Selanec & Senden 2013, *supra* note 8, p. 26.

60 See extensively on this debate, Lambrecht 2014, *supra* note 45.

and that companies have an important societal responsibility in this matter not only as regards their shareholders but also other stakeholders; more women on boards allows for a broader representation of the views and interests of all stakeholders which will lead to more optimal decision-making.<sup>61</sup>

In other countries, like Denmark, one witnesses different, 'softer' or more intermediate outcomes of such political and societal discussions and the political rejection of mandatory quota rules, yet supporting the introduction of soft targets and a comply-or-explain approach. More generally, co-regulatory regimes or conditioned self-regulation, as contained in certain corporate governance codes and charters, reflect a certain degree of awareness and a sense of urgency on the part of the Government to put pressure on the private sector to enhance individual fairness and social justice in this regard, while still leaving it very much to industry itself as to how to actually deal with the problem. The Swedish approach fits in with this; the Swedish Government's gender equality policy aims to 'ensure [that] power and resources are distributed fairly between the sexes, and to create the conditions that give women and men the same power and opportunities'. Its soft approach regarding a balanced representation of women and men on company boards is clearly also grounded on these rationales. While Swedish business, as represented by the Swedish Corporate Governance Board, is supportive of this goal as well from the perspective of enhancing gender equality and corporate social responsibility, it is very much opposed to a legislative quota or a quota rule in the corporate governance code because of the restriction on proprietary rights that this is considered to entail. It also deems that such a general rule would disregard legitimate differences that may exist between companies.<sup>62</sup>

At a more fundamental level, other factors can and must be identified that have a certain bearing on the regulatory and enforcement choices made and which can also explain cross-country divergences to a certain extent. These relate in the first place to the type of political and welfare system prevailing in a Member State and to cultural differences. The different political, socio-economic and cultural context within which companies and employees operate not only has consequences for the scope of the problem of under-representation as such, but also for the type of regulatory solutions and instruments that are resorted to for resolving it. Thus, a higher level of the masculinity of society is considered to have a negative impact on the participation of women on boards.<sup>63</sup> Furthermore, one can see a correlation in a country like the UK, typified as a liberal welfare system,<sup>64</sup> and the self-regulatory approach which still prevails there. The top-down imposition by public law of hard quota rules does not square well with such a system, as it sees the encouragement of the market as the major role of the state and hence such rules as being too restrictive on business freedom. Yet, self-regulatory action is deemed to fit in with the development of a corporate social responsibility policy. Only if self-regulation will not produce the expected results may a hard law approach be considered. So, self-regulation is opted for under the 'threat' of public regulation or it operates in the shadow of the law.

By contrast, social-democrat countries strive for the highest welfare standards for everybody and the Government may interfere in the market and introduce binding regulations with a view to realising this. The Nordic countries fit within this category, but while there are significant similarities between the social, political and economic structure of these countries<sup>65</sup> and they all strive for the establishment of an egalitarian society, Sweden, Denmark and Finland have devised a mixed and soft public law approach whereas Norway has developed a very hard law quota approach. In the literature, the difference between the Swedish and Norwegian approach has been related to two main reasons,<sup>66</sup> the first being the varieties of capitalism being in place even within the Scandinavian model. In Norway, the capacity of the state

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61 See the proposal for the Law: *Kamerstukken 2010 – 2011, no. 53 - 211/2, 4, 5 - 7* and also *Advies nr. 108 van 12 mei 2006 van het bureau van de raad voor de gelijke kansen van mannen en vrouwen met betrekking tot quota in raden van bestuur*, approved on 13 October 2006, available at: <<http://www.raadvandegelijkekansen.be/media/products/33/706/Advies108RaadGelijkeKansenQuota.pdf>>, last visited 27 November 2014.

62 Swedish Corporate Governance Board 2014, *supra* note 58, p. 3.

63 A. Carrasco et al., 'Appointing women to boards: Is there a cultural bias?', *Journal of Business Ethics*, April 2014, DOI 10.1007/s10551-014-2166-z.

64 According to G. Esping-Anderson, *The Three Worlds of Welfare Capitalism*, 1990.

65 J. Armstrong & S. Walby, *Gender Quotas in Management Boards*, 2012, PE 462.429, p. 12, available at: <<http://www.europarl.europa.eu/document/activities/cont/201202/20120216ATT38420/20120216ATT38420EN.pdf>>, last visited 27 November 2014.

66 V. Heidenreich, 'Why Gender Quotas in Company Boards in Norway – and not in Sweden?', in F. Engelstad & M. Teigen, *Firms, Boards and Gender Quotas: Comparative Perspectives*, 2012, pp. 147-183.

to interfere in business life has thus been considered larger because the state was a dominant capitalist itself when compared to Sweden, where a strong and traditionally socially responsible business life enjoyed more autonomy than its Norwegian counterpart. It has thus been argued that it has been more difficult for the Swedish Government to interfere in business life. As the Swedish Corporate Governance Board itself put it, self-regulation is a model that has served Sweden well for decades and introducing 'legislation on the composition of company boards would be a dangerous departure from the Swedish model'.<sup>67</sup> Secondly, it has been related to different cultures concerning gender equality and the attitudes towards state intervention. In Norway, there was already an established gender quota tradition since 1981 and also rather positive attitudes towards state intervention. This has been said to lead to a different discursive climate in gender equality matters, which was quite positive in Norway in accepting women as a group being different from men as a group and rather hostile in Sweden. Swedish feminists have been found to be more active and conflict-oriented, thereby creating a polarized gender equality discussion.<sup>68</sup> Moreover, it has been found that the previous resistance among business leaders in Norway to appoint women to their boards has now disappeared as a result of the quota law and that it is 'back to business as usual'.<sup>69</sup>

In countries that are usually typified as conservative-corporatist welfare regimes, like France, Germany and Italy, governments interfere more readily with market mechanisms and introduce social policies as the state is considered to have a redistributive role as well.<sup>70</sup> When it comes to the Central Eastern European (CEE) countries, so far these are quite difficult to classify because of their still rather recent transition from a communist to a capitalist system, yet it is clear that they cannot be fitted into a homogenous or unitary 'post-communist' welfare model, given the great welfare diversity in these countries.<sup>71</sup> But interestingly, in recent research the Slovenian welfare regime has been typified as a social corporatist regime that comes close to that of Western countries and even as a 'Scandinavian island' in the CEE.<sup>72</sup> This may explain why in Slovenia, and not in any other CEE country, some kind of quota rule for a balanced representation on company boards has been established (see Section 3).

While the above differences are clearly relevant aspects to take into account, it must also be acknowledged that there is still an ongoing academic debate as to how significant the link is between the wider social, political and economic context and the level of women's representation on corporate boards.<sup>73</sup> Terjesen and Singh have thus argued, based on a 43-country study, that there is a strong link and that higher levels of women on corporate boards correlate with higher levels of women in management jobs and with lower levels of gender inequalities in pay.<sup>74</sup> Yet, other studies come to less positive conclusions. Storvik and Teigen thus found that while the proportion of women on corporate boards has risen, this has not been the case for the number of female chairpersons of boards or of women in other top management positions (see also Section 4).<sup>75</sup>

Another factor which the diversity of approaches can to some extent be related to concerns the different regulatory and legal systems and traditions of the Member States. It has thus become clear that in some Member States there is less legal – constitutional – room for the establishment of quota rules,

67 Swedish Corporate Governance Board 2014, supra note 58, p. 4.

68 In this sense Heidenreich 2012, supra note 66.

69 M. Teigen, 'Gender Quotas for Corporate Boards in Norway: Innovative Gender Equality Policy', in C. Fagan, et al. (eds.), *Women on Corporate Boards and in Top Management: European Trends and Policy*, 2012.

70 Cf. Esping-Anderson 1990, supra note 64, p. 28.

71 It must be noted that the Esping-Andersen categorization falls short in respect of the CEE countries for the simple reason that they did not take these countries into account. More recent studies have distinguished three types of systems in relation to the CEE countries: neo-liberal; dual welfare; and social corporatist welfare regimes. See in particular N. Lendvai, 'EU Integration and Post-Communist Welfare: Catch-up Convergence before and after the Economic Crisis', in *Converging Europe: Transformation of Social Policy in the Enlarged European Union and in Turkey*, 2011, pp. 181-207; M. Potucek, 'Metamorphoses of Welfare States in Central and Eastern Europe', in M. Seeleib-Kaiser (ed.), *Welfare State Transformations Comparative Perspectives*, 2008, pp. 79-96. I thank Ivana Palinkas for bringing this point to my attention.

72 In this sense Lendvai 2011, supra note 71.

73 Armstrong & Walby 2012, supra note 65, p. 11.

74 S. Terjesen & V. Singh, 'Female presence on corporate boards: a multi-country study on environmental context', 2008 *Journal of Business Ethics* 83, no. 1, pp. 55-63.

75 A. Storvik & M. Teigen, *Women on board: the Norwegian experience*, Friedrich Ebert Stiftung, International Policy Analysis, 2010, p. 8. The proportion of female chairpersons rose from 3% in 2002 to only 5% in 2009; only 2% of CEOs are women and only 10% of top management of the largest companies are female.

even through self-regulation. It has thus appeared that in some countries positive action may only come about after rather stringent legal procedures or positive action are simply not part of the legal and political tradition and have therefore never been applied. In other countries, legislative and even constitutional checks and changes – such as has been the case in France – may be required before any quota rules may be adopted. In Germany, the debate on the possible introduction of quota rules by legislation is also being blighted by doubts as to the constitutionality thereof. In particular, it is doubtful whether such rules would be in conformity with the way in which the freedom of property, the freedom of association and the principle of equality are understood under the German Constitution.<sup>76</sup> In Finland, the currently applicable constitutional provision would only allow for a soft quota system.<sup>77</sup> It has also been seen that in Norway the introduction of such rules was less controversial (at least when compared to other Member States) given that quota rules were not alien to the existing legal system and were already practised in other areas, so their constitutionality was beyond doubt.

More generally and as an extension to the above observations, the preference – and pressure – from both political parties and business to stick to soft private or public regimes rather than introducing (binding) quota rules is clearly also induced by a different balancing of two conflicting fundamental, human rights; equality versus ownership and corporate freedom, which is seen as a cornerstone of the market economy. Not only in Sweden, but also in other states the balance is tilted towards the latter, relying on arguments such as that quota rules ignore the functioning logic of the business environment; that there is more need to deregulate than to regulate business in the light of global competition; that a labour law view cannot be applied to a corporate structure that is determined by ownership; that quota rules should only be used when the business sector has shown an unwillingness to change; and that the effectiveness of a binding target figure is not demonstrated. Such arguments have clearly come to the fore in the debates on the European Commission's proposal for a directive.<sup>78</sup> At the same time, the non- or too limited effectiveness of voluntary commitments appears to be a strong trigger for the debate on and louder calls for quota rules, either soft or hard, and thus to slowly tilt the balance in the other direction. This can be seen, for instance, in Germany.<sup>79</sup> This brings us to the question as to how the different regulatory and enforcement regimes compare in terms of effectiveness.

#### **4. Comparing their effectiveness**

How are effectiveness and regulatory approaches, including their implementation, monitoring and sanctioning mechanisms, related to one another? This assessment will depend on what one sees as the ultimate goal to be achieved: equality in terms of outcome or rather the creation of equal opportunities? The former takes the main policy goal to be to ensure a balanced representation of women and men on company boards and the actual result is then what counts. By considering the current figures and the speed of change in relation to the regimes that were developed at a certain point in time in a number of countries, one can then assess whether such regimes have been effective or not. An equal opportunities approach is more oriented towards offering the same possibilities to have access to a corporate board function for both men and women and is less focused on the realization of a specific outcome. One can say that the hard quota law regimes are more top-down outcome-oriented and that self-regulatory and co-regulatory approaches are more bottom-up opportunities-oriented.

From the perspective of realizing equality of outcome, the hardest regulatory and enforcement regimes, with the most stringent and binding targets or quotas, indeed appear to be the most effective ones. A recent report that was produced at the request of the European Parliament and that reviewed the evidence on the effectiveness of legal instruments as compared with voluntary regimes, thus concluded

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<sup>76</sup> See on this Waas 2014, *supra* note 16.

<sup>77</sup> See K. Nousiainen, 'Finland', in Selanec & Senden 2013, *supra* note 8, p. 78.

<sup>78</sup> See <[www.ipex.eu](http://www.ipex.eu)> for an overview of the concerns that have been uttered by national parliaments concerning this proposal.

<sup>79</sup> See for Germany e.g. the Berlin Declaration, an initiative of MPs of six major political parties and of six leading women's organizations, calling for binding legislation for ensuring a minimum of 30% women on the supervisory boards of listed, public companies; see <<http://www.womenlobby.org/get-involved/take-action-today/article/germany-join-the-berlin?lang=de>>, last visited 27 November 2014; and also the *First Report on Gender Equality* of 16 June 2011, presented by the German Federal Government, <<http://www.bmfsfj.de/BMFSFJ/Service/Publikationen/publikationen,did=174358.html>>, last visited 27 November 2014.

that 'legal instruments to enforce quotas are an effective and fast means of achieving change.'<sup>80</sup> The use of voluntary regimes has led to some increase in the proportion of women on corporate boards, but the effects are significantly smaller and slower. The only instance of achieving 40% of each gender was through the use of legal instruments to enforce quotas.<sup>81</sup> The authors also underscore the variation in the legal mechanisms for the implementation of quotas and that 'it may be that these make considerable difference to the effectiveness of the law.' The fact that in Norway the quota rules were introduced in company law rather than equality law has thus enabled the imposition of the very strong sanction of the dissolution of non-compliant companies. If sanctions are limited to the imposition of a fine, the issuance of warnings or, even less, the willingness to comply could be very different.<sup>82</sup> Furthermore, as an extension to what has already been observed in Section 3, whether a certain regulatory and enforcement approach will be successful will also depend on the extent to which this approach fits in with already existing (legal) culture; or, what works well in one state will not necessarily be effective in another. The Norwegian case also illustrates this; the quota approach was already well engrained and the hard sanction for its non-realization – warnings, fines, the delisting of a company from the Stock Exchange in case of persistent non-compliance – as such was met with (relatively) limited resistance, while precisely the sanctioning mechanism led to quite some opposition or even hostile positions concerning quota regimes in other countries.

Other studies have also come to the conclusion that in Norway quick and true progress was only achieved after the implementation of a quota law coupled with strong sanctions, while the preceding voluntary initiatives were deemed not to bring about much progress.<sup>83</sup> Yet, the Norwegian success has not only been related to the – harshness of the – quota regime, but also to voluntary measures that were coupled with it, especially professional training programmes for qualified female candidates and stakeholder cooperation with a view to creating support systems. The availability of female role models has also been identified as a relevant factor.<sup>84</sup> Such an approach concurs with the views in the literature that a regulatory strategy relying on a mix of instruments will most often work better with a view to realizing specific policy goals and be more effective if it also includes a broader range of participants that are capable of implementing them.<sup>85</sup> Soft and hard law measures may thus rather be seen as complementing each other than as alternatives to one another.<sup>86</sup>

Yet, it appears that countries that have adopted soft regimes have realised positive results as well, so factors other than a legal binding character and strict sanctions are at play and have a bearing on the outcome effectiveness of regulatory regimes. Noteworthy is thus the progress that has been realised in Finland, which shows a 10% increase in the female board membership of private companies in a four-year period; from 12% in 2008 to 22% in 2012. This positive result has been explained by the underlying strategy being based on the following elements: the Government leading by example by setting the target at a minimum of 40% women on boards of state-owned companies and the realization of this figure; the establishment of a corporate governance code including the recommendation that both sexes should be represented on the board; conducting and publishing studies supporting the business case; but in particular also an active and positive role by the media, putting pressure on companies to make the necessary changes and to avoid negative publicity. So, it has been a combination of political pressure, intensive public debate and substantive argumentation that has contributed to making this progress and in lending credibility to the self-regulatory approach. Yet, the figures also reveal that the biggest

80 With reference to Storvik & Teigen 2010, *supra* note 75 and M. Hoel, 'The quota story: five years of change in Norway', in S. Vinnicombe et al. (eds.) *Women on Corporate Boards of Directors: International Research and Practice*, 2008.

81 Armstrong & Walby 2012, *supra* note 65.

82 *Ibid.*

83 See J.A. Rasmussen & M. Huse, 'Corporate governance in Norway: women and employee-elected board members', in C.A. Mallin (ed.), *Handbook on International Corporate Governance. Country Analyses, Second Edition*, 2011; M. Teigen, 'Gender Quotas on Corporate Boards', in K. Niskanen (ed.), *Gender and Power in the Nordic Countries – with a focus on politics and business*, 2011, available at: <<http://www.west-info.eu/files/nordic1.pdf#page=88>>, last visited 27 November 2014.

84 See the Working Paper 'The Quota-instrument: different approaches across Europe', European Commission's Network to Promote Women in Decision-Making in Politics and the Economy, 2011, p 11, available at: <[http://ec.europa.eu/justice/gender-equality/files/quota-working\\_paper\\_en.pdf](http://ec.europa.eu/justice/gender-equality/files/quota-working_paper_en.pdf)>, last visited 27 November 2014.

85 N. Gunningham & P. Grabosky, *Smart Regulation. Designing Environmental Policy*, 1998, pp. 14-15.

86 Cf. also Warth 2009, *supra* note 57.



companies have witnessed the highest increase and that the smallest companies have lagged behind. For bigger companies the cost of public reputation being affected or lost in the case of non-compliance is clearly higher than for smaller companies. It has been argued that the comply-or-explain principle as contained in the Corporate Governance Code 'works effectively in those cases where companies' public reputation in the eyes of the investors, shareholders and public is on line: consumer business gets easily damaged through the bad publicity, and the importance of the public image management goes for any large cap company'.<sup>87</sup>

However, it has also been established that progress is significantly less and slower in the case of sticking to soft, voluntary measures and that it may grind to a halt at some point in time. Soft law recommendations contained in Corporate Governance Codes have thus been found to have had some effect in Norway, Spain and Finland, but no major impact in others.<sup>88</sup> The situation in Sweden and the UK would indeed seem to underscore such a finding, at least as regards listed private companies, as both countries have initially realised some progress following the adoption of a voluntary regime but are now no longer showing any significant improvements. In Sweden, one must also note a rather huge gap between state-owned and private listed companies; as a result of the 'general owner policies' concerning state-owned companies (see Section 2), the goal of 40% female representation on boards had already been realised in 2003 and as of 2008 it stood at 49%, compared to 19% in private companies.<sup>89</sup> Since 2008, the overall figure has however halted at about 26%.

So, even if some countries have (initially) realized relatively high increases in the number of women on corporate boards with the mere establishment of soft, voluntary rules and with the state leading by example, it can be doubted whether the soft approach will be sufficient to realize the desired outcome.<sup>90</sup> Very recently, the Swedish Corporate Governance Board itself explicitly acknowledged that 'the development towards equal gender distribution has proceeded too slowly, and that a number of nomination committees have not taken the requirement to report on their work regarding diversity and gender balance seriously'.<sup>91</sup> Specific problems to be solved are 'the reluctance to work methodically with the issue and report properly on how it is being addressed'. It has thus considered it necessary to establish clearer principles, to tighten the regulation and to develop supporting activities. The regulatory requirements for nomination committees led by shareholders now include the obligation to analyse the board evaluation in a gender balance perspective, to explain and justify the candidates they propose for board positions in the light of the Corporate Governance Code's requirement to seek an equal gender distribution and to make it an agenda item for the shareholders' meeting to report on how they have worked to achieve an equal gender distribution on the board. Some<sup>92</sup> see these steps as an attempt to prevent the Swedish legislator from moving towards the adoption of quota rules as some politicians advocate.<sup>93</sup> On a more general note, the reluctance on the part of industry to truly address the problem may also have to do with the fact that there is no conclusive scientific evidence supporting the business case for more women on boards.<sup>94</sup> If the industry is not convinced of the need to bring about change from this perspective and does not commit itself to the goals of equal opportunities and social justice, this will work against the credibility and thereby the effectiveness of a self-regulatory approach.

In other cases self-regulatory codes contain (very) little promise as to the impact they can actually have and the contribution they can make to achieving the desired result, by not setting any specific or hard goals for companies to achieve and by not providing for any sanctions (besides giving an explanation)

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87 Kovalainen & Hart 2014, *supra* note 35, pp. 115-116 and 119.

88 Armstrong & Walby 2012, *supra* note 65. The other countries included in their study are Slovenia, France, Sweden, the UK and Hungary.

89 A. Numhauser-Henning, 'Sweden', in Selanec & Senden 2013, *supra* note 8, p. 213.

90 'Slow pace of board room equality 'deplorable'', *The Local*, 4 June 2014, <<http://www.thelocal.se/20140604/more-swedish-women-on-company-boards>>, last visited 27 November 2014.

91 Swedish Corporate Governance Board 2014, *supra* note 58.

92 See the document mentioned in note 58, *supra*.

93 'Swedish minister open to boardroom quotas', *The Local*, 24 June 2013, <<http://www.thelocal.se/20130624/48648>>, last visited 27 November 2014.

94 See e.g. R. Adams & D. Ferreira, 'Women in the Boardroom and their Impact on Governance and Performance', 2008, available at: <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1107721](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1107721)>, last visited 27 November 2014; and Women Matter, *Women at the top of corporations: Making it happen*, McKinsey & Company report, pp. 6-8, available at: <[http://www.asx.com.au/documents/media/2010\\_mckinsey\\_co\\_women\\_matter.pdf](http://www.asx.com.au/documents/media/2010_mckinsey_co_women_matter.pdf)>, last visited 27 November 2014.

when companies deviate from the recommendation of a gender-balanced representation. In addition, as the Polish case illustrates, specific criteria as to how the explanation for deviant company policies should be published may be lacking and it is also unclear who is actually in charge of checking these explanations, as neither the Code nor the website of the Warsaw Stock Exchange point to any supervisory authority. Statistics on compliance with codes are also difficult to find. Clearly, besides the substantive vagueness of the target itself, the implementation, monitoring and enforcement mechanisms provided – or rather the lack thereof – may thus be important reasons why there is no significant progress in certain states. But it must also be noted that the application and monitoring of Corporate Governance Codes has been found to be generally problematic.<sup>95</sup> In particular, it has been concluded that while the comply-or-explain approach which the European Commission formally adopted in 2006 enjoys wide acceptance by the corporate community, its practical implementation still suffers from certain deficiencies, mainly as regards the level and quality of information on deviations by companies, which is deemed unsatisfactory. Furthermore, there is also a low level of shareholder monitoring.<sup>96</sup>

The above should not lead one to conclude that the voluntary, self-regulatory approaches and measures are devoid of any relevance; they can make important contributions to raising awareness among the public, employees and company management of the need to change organizational practices and also to consensus-building on further measures that are needed to address power imbalances between men and women at the level of company boards.<sup>97</sup> Furthermore, relevant factors for ensuring that initiatives bring about (cultural) change in a company's organizational structure and in promoting company acceptance thereof have been found to be flexibility (such as sensitivity to company size); professionalism in the organisation of the initiatives; a positive framing thereof rather than in terms of punishment; clear monitoring and evaluation criteria; publicity; and binding commitments with the engagement of management.<sup>98</sup>

On a final note, so far it has not been possible to establish that the imposition of the quota system in Norway has led to an increase in other, lower, middle and top management positions.<sup>99</sup> As Armstrong and Walby conclude, the increase in the number of women on corporate boards has thus not been part of a general change in the position of women in senior management.<sup>100</sup> In that sense, the expected 'trickle down' effect of the quota regime has not materialized and one could thus maintain that while it has proven effective in terms of realizing the desired numerical outcome, it has apparently not contributed significantly in enhancing equal opportunities for women in management positions more generally. To bring about such a change, it can be said to be essential for both self- and co-regulatory approaches and command-and-control approaches to be coupled with the further development of supporting measures and corporate best practices for enhancing gender diversity in management positions. Best practices that have been deemed most important in this regard relate to the creation of transparency by implementing gender diversity key performance indicators; the adoption and implementation of measures that facilitate the work-life balance; the adaptation of the human resources process so as to make sure that this does not work against women's career advancement; and to help women in mastering dominant company codes and to nurture their ambition through network-building and mentoring.<sup>101</sup>

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95 European Commission in its Green Paper on the EU Corporate Governance Framework (European Commission, COM(2011) 164 final).

96 RiskMetrics Group, *Study on Monitoring and Enforcement Practices in Corporate Governance in the Member States*, 2009, p. 188, available at: <[http://ec.europa.eu/internal\\_market/company/ecgforum/studies\\_en.htm](http://ec.europa.eu/internal_market/company/ecgforum/studies_en.htm)>, last visited 27 November 2014.

97 Cf. Warth 2009, supra note 57.

98 Armstrong & Walby 2012, supra note 65, p. 13.

99 But this also holds true for self-regulatory regimes such as the Finnish one; the number of women in top management positions has shown only a minor increase since the Corporate Governance Code was changed in 2008 (from 16% in 2008 to 17% in 2011).

100 Armstrong & Walby 2012, supra note 65, p. 12.

101 McKinsey & Company, which has based the identification of these best practices on interviews with 12 companies that have realized noteworthy progress when it comes to women's representation in the boardroom and in top management positions. See its report 'Women Matter – Gender diversity, a corporate performance driver', 2007, available at: <<http://www.mckinsey.com/search.aspx?q=women+matter%202007>>, last visited 4 December 2014.

## 5. Conclusions and lessons

The EU Member States show a huge variety in regulatory, monitoring and enforcement regimes and strategies when it comes to addressing the problem of the power imbalance that persists between men and women in economic decision-making, specifically as this manifests itself in women's under-representation on company boards. What emerges in particular from the analysis is that in an increasing number of states self- and co-regulatory regimes have proven to be stepping-stones for the establishment or consideration of command-and-control approaches in the form of hard law quota regimes, an important reason for this being the insufficient level of progress the former manage to bring about. Norway has played a trend-setting role in this regard, but the quota approaches in other countries have been tailor-made when it comes to their level of bindingness and compliance and enforcement mechanisms. Yet, what these states have in common is that they have all recognized the need to move beyond the mere establishment of the formal right to equal treatment and equal opportunities and beyond the mere reliance on industry, with a view to overcoming persisting gender inequalities in the boardroom. Hence, they have introduced proactive legislation.<sup>102</sup> In doing so, these states have given more weight to considerations of individual fairness and social justice – and thus that women should have an equal share in the exercise not only of political but also of economic power and decision-making – than to business and shareholders' freedom, especially where these quota rules also apply to private companies. The shareholders' interest in economic profit making, efficiency and value creation<sup>103</sup> has as such been offset or balanced with another important societal interest and fundamental right. In other states, this balancing act has been seen to lead to different outcomes that are more to the benefit of corporate freedom. This national diversity and different balancing of the interests and fundamental rights involved also explains the different levels of support for the Commission's proposal for a directive on promoting gender balance on corporate boards and the difficulties there are in reaching a political agreement thereon.

There are also some important lessons that can be drawn from the analysis. First of all, it has appeared that for any regulatory and enforcement approach to be successful, it needs to fit in with – legal – culture and have broad societal, public and shareholder and stakeholder support. Yet, it has also appeared that culture is not a static phenomenon in this regard. More in particular, as a result of changing societal views over time, political and public pressure may accrue and lead to changes in – even constitutional – law so as to be able to move from a laissez-faire industry approach to a more forceful command-and-control approach to bring about the desired balanced representation. Secondly, as self- and co-regulatory approaches lack, almost by definition, strong enforcement mechanisms and sanctions for non-compliance, their credibility and effectiveness depends on other factors. These have been seen to include, in particular, intensive public debate, and thus a strong role for the media, as well as a strong role for the state and public companies, which are to lead by example. As such, these factors can be a strong incentive for bringing about the required corporate changes in attitude and a commitment to gender equality issues and therewith for the further development of CSR policies, also from the point of view of otherwise suffering from a loss of reputation. Finally, in view of the regulatory and enforcement developments as witnessed in an increasing number of states, self- and co-regulatory approaches may on the one hand be seen as insufficient steps to bring about the full equality strived after, but on the other hand as rather indispensable steps towards creating a basis of support for this policy goal and for the adoption of a more forceful legal approach by which to realize it. Self- and co-regulation can thus indeed be seen as important mechanisms for creating more industry, political and public awareness of the problem itself and for rethinking appropriate and effective responses thereto. In the end, such responses often entail a mixed toolbox of instruments, the exact contents of which may however depend on context, time and place. ¶

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<sup>102</sup> In this sense Warth 2009, *supra* note 57.

<sup>103</sup> Cf. Kovalainen & Hart 2014, *supra* note 35, pp. 119-120.