Getting Women on Company Boards in the EU: A Tale of Power-Balancing in Three Acts

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Abstract Female under-representation on company boards has remained a persisting problem in most EU countries. Different regulatory and enforcement approaches have been taken across the EU to deal with it, ranging from self- and co-regulatory regimes to very stringent public law quota rules. The adoption of a common European approach has appeared complicated because of the different power plays occurring within the national and European Union context in this field. In three acts, this contribution will tell this power-balancing tale. The first act sets the scene by focussing on the existing inequalities between men and women on company boards, the second act concentrates on the legal tensions arising between public and private actors when it comes to finding an appropriate regulatory response to deal with this problem and the third act addresses the tensions that occur between the EU and the Member States in this regard. This will lay bare the dilemmas the Commission has faced in proposing a European response to the problem in the form of a directive proposal and how it has sought to accommodate the different national approaches.

The Prologue

In November 2014, after heated debates for years, the German government reached agreement on the introduction of a binding quota law to bring about more gender-balanced company boards. Therewith, Germany has followed the example of countries like Italy, Belgium, France and Spain, which also recently introduced such laws, since (the non-EU country) Norway set the tone for this in 2006. This move towards more stringent regulatory regimes can be taken as a sign of two things: firstly, that gender inequality on company boards is in an increasing number of countries considered a highly important problem and, secondly, that there is a growing conviction that hard law regimes are necessary to overcome the persisting inequality on these boards. Yet there are also still numerous EU countries that have not taken any (significant) action so far to deal with this issue, whereas others have

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adopted a soft public policy approach or have opted for self-regulatory or co-regulatory regimes leaving it mainly to companies themselves to solve the problem. Obviously, this huge variety of approaches complicates the development of a joint European approach, but this did not preclude the European Commission from tabling a proposal for a European directive on this issue in 2012. With the new Commission now in place since November 2014, the adoption of this directive is high on its agenda once again.

One can identify one common theme to the problem of female under-representation on company boards and the regulatory and enforcement approaches developed across and by the EU to deal with it, that of power balancing. In three acts, this contribution will tell the tale of the power-balancing dilemmas that have occurred within the national and European Union context in this field. The first act sets the scene by focussing on the existing inequalities between men and women on company boards, the second act concentrates on the legal tensions arising between public and private actors when it comes to finding an appropriate regulatory response to deal with the problem at issue and the third act addresses the tensions that present themselves in this regard between the EU and the Member States. As such, the three acts will lay bare the dilemmas the Commission has faced and still faces in the decision-making process and in its negotiations with the EP and the Council.[1] The analysis will highlight how the Commission has sought to accommodate the different national approaches in its directive proposal and will also identify the main bones of contention.

1 Act One: The Balancing Act Between Men and Women

1.1 The Current Gender Imbalance on Company Boards

The position of women in economic decision-making, as reflected amongst other things in the management positions they hold in companies, does not show a rosy picture, to say the least. Even if aggregate data on the position of women in middle, senior and top management positions are still lacking,[2] and as such the actual scope of the problem is difficult to establish in a conclusive way, it is evident that, overall, the level of female representation in such positions is still low. Moreover, the speed of change over the past decade also appears very slow. However, at the same time, there are also important differences to note between countries and between middle/ senior positions, on the one hand, and board member positions, on the other.[3]

[1] In doing so, this article draws on a number of previous publications, including in particular Senden and Visser (2013) and Senden (2014a, b).

[2] See Senden (2014a).

[3] It must be noted that the focus here is on the position of women on non-executive (or supervisory) company boards, and not on executive (or management) boards.

Focussing here on the representation of women in top management positions, in particular the percentage of women holding a supervisory board membership of the largest publicly listed companies,[4] the most recent figures concerning the EU Member States, dating from April 2014, range from 3 % (Malta) to 31 % (Latvia). But most importantly, the overall EU figure has remained at only 19 %, thereby not demonstrating even a 1 % annual growth since 2004. However, some Member States have demonstrated clear growth figures as from 2010 onwards: France moving from 13 to 30 %, Italy from 5 to 19 %, Germany from 13 to 22 % and the UK from 13 to 23 %. As for the first two countries, this growth figure is clearly linked to the adoption of a hard law approach,[5] whereas the latter two have adhered to a self-regulatory approach but which operates in the shadow of the law. Clearly, the political majority in Germany have considered progress on this basis to be too slow, now deciding to move towards a quota law. From a recently conducted study,[6] it has appeared that countries applying or sticking to a (very) soft regulatory approach do not manage to realise any further progress beyond a certain point. Sweden, relying strongly on a self-regulatory approach, has thus ground to a halt with a female share figure of about 27 % ever since 2005. By contrast, in the wake of its hard quota law, coupled with stringent sanctions, Norway has shown a remarkable 22 % increase in 10 years, bringing the female share up to some 40 %.[7]

1.2 Explaining the Gender Imbalance and the Variance in Approaches

In discussing a gender imbalance issue like the one at hand, often heard arguments are that women themselves do not aspire to such positions and that there are not enough suitable women available, or at least that they cannot be found. Obviously, matters are far more complex than this. There are different theories offering a host of explanations for the existing power imbalance and the low share of women in (top) management positions, which make clear that it is certainly not always a question of choice but results from a variety of factors, located not only at the employee level but also at firm/industry and societal levels. The socio-economic, political and cultural context within which employees and firms operate and function may thus have an important bearing on both the scope of the problem of

[4] See http://ec.europa.eu/justice/gender-equality/gender-decision-making/database/business-finance/supervisory-board-board-directors/index_en.htm (last accessed April 7, 2015). As this source indicates, 'Data cover all members of the highest decision-making body in each company (i.e. chairperson, non-executive directors, senior executives and employee representatives, where present). The highest decision-making body is usually termed the supervisory board (in case of a two-tier governance system) or the board of directors (in a unitary system)'.

[5] As regards France, see Masselot and Maymont (2014).

[6] Armstrong and Walby (2012), p. 12.

[7] See on the effectiveness of various regulatory approaches Senden (2014a), pp. 18–21.

under-representation in itself as well as the regulatory and enforcement strategies that countries adopt for dealing with it. Here I will just present a somewhat impressionistic, non-exhaustive view of this societal, contextual variety so as to underscore the complexity of the issue.

The cultural index Hofstede has developed is helpful in identifying relevant cultural aspects of a society that can have a bearing on the position of women in the workplace.[8] Such aspects include power distance and masculinity/femininity. Power distance is defined as 'the extent to which the less powerful members of institutions and organisations within a country expect and accept that power is distributed unequally'. This could have an impact on women's belief in overcoming barriers created by male senior gatekeepers on the corporate ladder; low power distance in a state's society could thus be seen as a positive cultural dimension for the female share in management positions. A society that would be typified as masculine would underscore that what motivates people is wanting to be the best and not so much liking what one does, which is considered more characteristic of a feminine society. A low level of masculinity might then be seen as a possible positive indicator for higher female board membership.

Such cultural aspects are also related to the different types of welfare systems that can be identified throughout the EU. The fact that the Member States of the EU represent different types of welfare systems, including in particular liberal, conservative-corporatist and social-democrat ones,[9] thus implies that there are also different (dominant) views on what the role of women in society actually is, in working life and in the raising of children and what the role of the state—and therewith of public policy and regulation—is in addressing gender imbalances. Clearly, such a question is dealt with in a different way in a liberal country in which the state's role in ensuring redistributive or social justice is considered to be more limited than in conservative and social-democrat systems. It is therefore not so surprising that in the UK, a country that is classified as having a liberal welfare system, it is left to business itself to deal with the issue of the balanced representation of women and men on company boards and in which self-regulatory action is deemed to fit in with the development of a corporate social responsibility policy. By contrast, social-democrat countries, like the Nordic ones, strive for the highest welfare standards for everybody and an egalitarian society, and governments may interfere more easily in the market and introduce regulation. Yet one can still identify interesting differences in approach between Sweden, Denmark and Finland on the one hand, and Norway on the other; whereas the latter has adopted a very stringent quota law, the other countries have devised a mixed and soft public law approach. In the literature, it has been underscored that this has to do with the varieties of capitalism that are in place even within the Scandinavian model.[10] Swedish business, in comparison with Norway, has thus been said to enjoy more

[8] See Hofstede et al. (2010).

[9] According to the categorisation made by Esping-Anderson (1990).

[10] Heidenreich (2012).

autonomy, and self-regulation has been considered an important component of the Swedish model.[11] Furthermore, it has been related to different—discursive—cultures concerning gender equality matters and the attitudes towards state intervention. In countries like France, Germany and Italy that are usually typified as conservative-corporatist welfare regimes, governments also interfere more easily with the market and social policies fit in with the redistributive role the state is considered to have. Central Eastern European (CEE) countries are more 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 homogeneous or unitary 'post-communist' welfare model, given the great welfare diversity in these countries.[12] The Slovenian welfare regime has actually been typified as a social corporatist regime that comes close to that of Western countries and even as a 'Scandinavian island' amongst CEE countries.[13] This may explain why in this country, and not in any other CEE country, some kind of quota rule for balanced representation on company boards has been established.

On the firm level and the individual employee level, there are other factors at play that explain the gender imbalance on company boards and why women experience (more) difficulties in advancing on the career ladder. Human capital theory emphasises diverging study choices and career paths as a primary cause for this; women thus do not build up sufficient human capital for reaching higher management positions.[14] This problem is reinforced by senior male gatekeepers who control the flow of employees entering training programmes and provide them with other opportunities to gain the working experience required to become a manager. This also links with discrimination theory, which emphasises that senior males who participate in prejudice stereotyping towards female employees could be an important underlying factor explaining why women do not gain enough human capital. Such stereotyping also concerns the assessment of certain status characteristics in recruitment processes; membership of or belonging to a certain group is then in fact taken as an indicator of a certain (in)competence. Consequently, simply because of belonging to the group of women, a female candidate will be less easily confirmed as being a suitable candidate for a management position.[15] This also brings with it that women experience a higher burden of proof than men when applying for such a function and that they may in fact be overqualified or higher qualified than comparable male group members. Besides that, it must also be observed that men actually set the benchmark of what is considered as a successful

[11] In this sense, 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, http://www.corporategovernanceboard.se/media/64821/gender%20qa.pdf (last accessed on April 7, 2015).

[12] See Lendvai (2011) and Potucek (2008).

[13] In this sense, Lendvai (2011).

[14] Davidson and Burke (2011).

[15] See Terjesen et al. (2009).

career.[16] This has not only caused women moving into a corporate environment to assimilate to male preferences but has also as a possible consequence that women acting in accordance with their stereotype are perceived as incompetent and women acting like men are not taken seriously.[17] On top of that, there also remains the problem of the informal old boys networks of men that resist and exclude women and less powerful men from their network. As women are often perceived as advocates of change, a critical mass of powerful women in top management positions could mean that the status quo of an old boys network will be destroyed. To break the glass ceiling, there is a need not only for the removal of corporate barriers through training etc. but also—or in particular—for changing mindsets of business leaders allowing for the critical mass representation of women.[18]

1.3 Why Is the Gender Imbalance on Company Boards Problematic?

Having seen that there is a gender imbalance on company boards in all EU Member States, be it to a higher or a lesser extent, and that there is quite a multitude of explanations for this, we have not so far addressed the more fundamental question as to why this gender imbalance actually constitutes a problem that needs to be solved. While from a societal perspective there appears to be quite a large consensus amongst citizens in Europe that the current situation is indeed problematic and that women should be equally represented in company leadership positions, when equally qualified,[19] there are quite diverging views as to the methods and instruments to be applied for achieving more gender-balanced boards. Thus, 8 % of European citizens consider that no action is needed because a balance is not required, 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.[20]

The different regulatory and enforcement responses developed throughout the EU actually also reflect a different political weighing of the seriousness and urgency of the problem, which can be linked with the weight that is given to the

[16] Cf. O'Neil et al. (2008) and Vinnicombe et al. (2008).

[17] The so-called behavioural double bind, as described by Oakley (2000), p. 324: 'A double-bind is a behavioral norm that creates a situation where a person cannot win no matter what she does'.

[18] Cf. Oakley (2000).

[19] 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_en.pdf (last accessed April 7, 2015); almost nine out of ten respondents hold this view.

[20] 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_en.pdf (last accessed April 7, 2015), pp. 15–17.

three normative justifications that can be distinguished for taking action. Firstly, there is the economic justification, relying on the business case argument. This argument underscores the business need for (more) gender-balanced boards, submitting that this will lead to an improved performance of companies,[21] an enhanced quality of decision-making, an improved quality of corporate governance and ethics and a better utilisation of the talent pool. It is also considered a driver for innovation and a contribution to a better mirroring of the market, as women take most decisions on household spending.[22] Furthermore, a (more) balanced representation of women and men can be taken as a sign that a company truly engages in modern stakeholder management and social corporate responsibility. Secondly, there is the general societal, fundamental rights justification, considering the principle of equality and equality treatment as an important underpinning of our Western conception of a democratic society based on the rule of law. This rationale underscores the importance of balanced representation from the perspective of ensuring social justice and democratic legitimacy, being part of the core values underlying the EU as a political and economic system. In this system, not only political power but also economic power should be distributed and exercised in such a way that it respects these fundamental principles and core values. Thirdly, there is the private, individual rights' based justification and interpretation and application of the principle of equality and equal treatment. Addressing the power imbalance between women and men on company boards is then 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 private ones—that yield economic power and that affect the economic, financial and social life of all citizens.

In Member States where no specific regulatory action whatsoever has been taken, which includes most of the CEE countries and also a number of the older Member States of the EU, such as Luxembourg and Portugal, the problem of female under-representation on boards is apparently not (yet) considered to be sufficiently important to tackle at all. None of the identified normative justifications is apparently seen as a sufficient or convincing driver to take any specific action going beyond the generally applicable gender equality rules. Yet in an increasing number of Member States we see intensifying political and societal debates on what is the appropriate course of action, reflecting different views in particular as to who needs to engage in regulatory and enforcement action. Within states, this debate centres on what the role is for companies or the industry itself vis-à-vis that of the public regulator or of self-regulation vis-à-vis soft and hard public policies and rules. In this debate, it appears that much depends on the interpretation and weight that is given to the different fundamental rights that are at stake, which brings me to the second act of this power play.

[21] Even if one must note that causation, positive or negative, has so far not been unequivocally proven; see also on this Senden and Visser (2013), p. 21.

[22] See e.g. 'Women in Mature Economies Control Household Spending', available at http://www.marketingcharts.com/traditional/women-in-mature-economies-control-household-spending-12931/ (last accessed April 7, 2015).

2 Act Two: The Balancing Act Between Equality and Corporate Freedom

The huge variety of national regulatory and enforcement responses to deal with female under-representation on company boards has already been detailed elsewhere.[23] Furthermore, above I have already identified relevant contextual factors of a socio-economic, cultural and political nature that have a bearing on the course of action that is being taken. Here I will highlight first and foremost the main legal issues and controversies occurring in the national discussions as to whether the public regulator can and should step in or whether things can be left to the private actors involved, i.e. the industry and the firms themselves. In essence, what one can observe is that the main bone of contention in this legal discussion is the balancing of the public and private interests at stake and of the legal principles and rights that underlie them, that is to say of corporate freedom and equality. This balancing act has become a hot political topic in quite a few Member States pursuant to the introduction of the quota law in Norway and is being decided in an increasing number of states in favour of the latter. The chosen course of action thus reflects the outcome of this balancing act; where equality prevails, more stringent public hard law regimes are being developed, whereas in the countries in which corporate freedom outweighs equality, self-regulatory, co-regulatory or public soft policies are clearly preferred.

Especially in countries that are characterised by a strong self-regulation tradition, including the Nordic states like Sweden, Denmark and Finland,[24] and also the Netherlands and the UK, it appears that the balance is (still) tilted more towards the protection of ownership and corporate freedom, which are seen as the cornerstone of the market economy, than towards ensuring gender equality as regards specifically the position of women within corporate management. The proponents of corporate freedom argue that a public hard law approach prescribing a target or quota for female representation is too restrictive for business freedom and ignores the functioning logic of the business environment. This was also put forward by some national parliaments in response to the Commission's directive proposal, reasoning that national corporate law would not be suitable for such an approach and that a labour law view could not be applied to a corporate structure that is determined by ownership.[25] Clearly, such argumentation raises the issue as to what the scope of corporate freedom is or should be and what obligation can be imposed on companies so as to achieve equality, raising, in its turn, also the question of what human rights obligations can be imposed on private actors.[26] Yet the view that

[23] See Senden (2014b).

[24] See, inter alia, Kovalainen and Hart (2014), p. 112.

[25] See The platform for EU Interparliamentary Exchange for the different views expressed on the proposal by national parliaments: http://www.ipex.eu/IPEXL-WEB/result/simple.do?text=gender+balance&start= (last accessed April 7, 2015).

[26] I will come back in more detail on the issue of the horizontal effect of fundamental rights under Act Three.

company boards and company law are ‘special’ and somehow immune from human rights obligations has become quite a contested view these days, especially also in the light of the political and societal pressures on companies to develop corporate social responsibility policies. In some Member States, such as Belgium, a distinction has also been made in this regard between state companies and private companies, where some political parties have accepted that a quota obligation could be imposed on the former but not on the latter.

In the balancing act, not only the scope of the right of corporate freedom may give rise to questions, but also the scope of the principle of equality itself has appeared problematic in some Member States, in particular to what extent this can be considered to allow for a duty of positive action in relation to the promotion of the under-represented sex on company boards. Thus, the equality principle as contained in the French Constitution did not allow for the adoption of a quota rule and needed to be amended before the new law could enter into force. In Germany, similar constitutional concerns have been raised as to the constitutionality of quota rules in the light of the way in which the principles of equality and property and the freedom of association in the German Constitution are understood.[27] In other jurisdictions as well, such as in Croatia, legal hurdles have been identified for the adoption of any positive action measure of the kind, even if companies would proceed to this on a voluntary basis. This would call for prior definition by statutory law.[28] With respect to jurisdictions proceeding to such (constitutional) changes, one can say that the scope of the equality principle is in fact being enlarged in the sense that it now reflects a more substantive conception of equality rather than a formal one.

Regarding countries like Belgium and Germany that have for a long time relied upon self-regulatory, co-regulatory and soft public law approaches but have recently come to a different weighing of the two conflicting human rights at stake, it must be noted that the insufficient effectiveness of such approaches in terms of realising significant progress has clearly been an important motivator for this.[29] While soft public, co-regulatory and self-regulatory policies may bring about considerable progress, they have been found to realise an increase in the number of women on boards only up to a certain level and over a longer time frame. Furthermore, there are (at least) two important risk factors that have an important bearing on the level of progress that can be expected from them.[30] First of all, these policies, as expressed for instance in corporate governance codes, contain very open norms or targets, stipulating e.g. that ‘gender should be taken into account’, ‘sufficient diversity’ should be realised or an ‘appropriate number of women’ appointed, without any further specification. Second, self-regulatory and co-regulatory approaches lack, almost by definition, strong monitoring and

[27] See Waas (2014), p. 131.

[28] See Selanec and Senden (2013), pp. 54–55.

[29] For a detailed account of the political controversies involved, see Lambrecht (2014).

[30] See Senden (2014a).

enforcement mechanisms and sanctions. At the very best, they provide for a duty to report in the annual report on compliance with the corporate governance code or for a comply-or-explain duty regarding the realisation of the target that has been set, without any sanction being imposed in the case of non-compliance. This means that the credibility and effectiveness of such approaches depend on other factors such as the existence of a strong media allowing for intensive public debate, as well as a strong role of the state and public companies that are to lead by example. While self-regulation and co-regulation can thus be seen as important mechanisms for bringing about more industry, political and public awareness of the problem itself, they have not so far proven to be sufficient steps to bring about truly balanced representation. Yet they can still be seen as rather indispensable steps towards creating a basis of support for this policy goal and for the adoption of a more forceful legal approach when sufficient progress is not being realised.

However, there is also the discussion which goes beyond states; what role, if any at all, is there for the EU to play in this field? The Commission's directive proposal and the ensuing political debate on this reveals another delicate balancing act, between Union powers and national powers, bringing us to the third and final act of this power play.

3 Act Three: The Balancing Act Between European Union and National Powers

Besides the differences in terms of the public and/or private nature and the voluntary or binding nature of the national regimes established, these regimes also show considerable variation as to the size and types of companies actually covered by them (private, listed and/or state companies), their duration (temporary or permanent), the level of ambition and the targets that are actually being set (appropriate representation, 30 %, 40 % etc.), the time limits for realising these, their implementation and monitoring mechanisms and the—harshness of the—means and sanctions to punish non-compliance. It is against the background of this huge national variation that one has to consider and evaluate the European Commission's attempt to develop a common EU approach and a legal framework for realising equality on company boards in the proposal for a Council and EP Directive, which it put forward in 2012.[31] Most importantly, in its Article 4(1) and 4(3) respectively, the proposal seeks to impose the following—procedural—obligations upon the Member States; they need to ensure that

> listed companies in whose boards members of the under-represented sex hold *less than 40 per cent* of the non-executive director positions make the appointments to those positions on the basis of a comparative analysis of the qualifications of each candidate,

[31] *COM*(2012)614 final, 14.11.2012, available at: http://ec.europa.eu/justice/gender-equality/files/womenonboards/directive_quotas_en.pdf (last accessed April 7, 2015).

> *by applying pre-established, clear, neutrally formulated and unambiguous criteria*,[32] in order to attain the said percentage at the latest by 1 January 2020 or at the latest by 1 January 2018 in case of listed companies which are public undertakings [emphasis added, LS].

With a view to attaining this objective,

> Member States shall ensure that, in the selection of non-executive directors, *priority shall be given* to the candidate of the *under-represented sex* if that candidate is *equally qualified* as a candidate of the other sex in terms of suitability, competence and professional performance, 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. [emphasis added, LS]

Article 6(1) provides that 'Member States shall lay down rules on sanctions applicable to infringements of the national provisions adopted pursuant to this Directive and shall take all necessary measures to ensure that they are applied', meaning that sanctions need to be provided and which have to be imposed on companies that do not comply with the procedural obligations and not as such for not reaching the target.

Paragraph 2 of Article 6 stipulates that these sanctions need to be effective, proportionate and dissuasive and that these 'may include' administrative fines and the nullity or annulment by a judicial body of the appointment or election of the non-executive director made contrary to the national provisions that were adopted to implement Article 4(1).

As such, the proposal puts very much to the fore the question of to what extent the EU can and should interfere in the Member States' powers and discretion to address the problem at hand. With a view to this, the following issues need consideration in particular: the legal basis of the proposal and the scope of Union powers that this legal basis can be said to entail; and the subsidiarity and proportionality of the proposal.

3.1 The Legal Basis Issue

The Commission's proposal has been based on Article 157(3) TFEU, which reads:

> The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, and after consulting the Economic and Social Committee, shall adopt measures to ensure the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, including the principle of equal pay for equal work or work of equal value.

[32] It must be noted that these requirements already ensue from the Court's case law and as such can be seen as a codification thereof. See Case C-407/98, *Abrahamsson*, ECLI:EU:C:2000:367, paras. 49–50.

Article 157 forms part of the social policy title in the TFEU, and therewith the regulation of gender equality on the basis of this provision concerns a shared competence between the Union and the Member States, which means that 'both the EU and the Member States may legislate and adopt legally binding acts in the area concerned, but that the Member States shall exercise their competence to the extent that the Union has not exercised its competence'.[33] More specifically, it was only by the Treaty of Amsterdam in 1999 that paragraph 3 was added to this provision (then Article 141(3) EC Treaty, previously Article 119 EEC Treaty) and that thereby a specific legal basis was created for enhancing equal treatment and equal opportunities for men and women in employment and occupation. As such, this can be seen as an explicit acceptance and recognition by the Member States of the fundamental rights' status that the European Court of Justice had given early on to the principle of equal treatment of men and women in the employment and occupation sphere.[34] Before the introduction of Article 157(3), most of the European gender equality directives were based on Article 100 EEC, now Art. 114 TFEU, and/or the 'catch all' legal basis of Article 235 EEC, now Art. 352 TFEU.[35] These legal basis provisions required a connection to the realisation of the internal market. While the post-Amsterdam Directives 2002/73 and 2006/54 (Recast) were based on Article 157(3) and have been tied to the goal of enhancing equal opportunities and equal treatment in employment and occupation and not to the functioning of the internal market, thereby underscoring that this article can provide a sufficient normative justification for EU legislative action in itself, the use of this legal basis for the Commission proposal on gender-balanced company boards has been disputed for various reasons. These will be considered in turn.

A first issue that needs to be signalled here is the discrepancy that actually exists between the choice of the legal basis and the substantive underpinning of the proposal. As becomes apparent from its preamble, the Commission still relies almost exclusively on economic, internal market arguments for defending its proposal, while the promotion of gender equality from a social and human rights perspective is hardly mentioned. It may have been the Commission's expectation that both the Member States and companies would more readily accept the obligations that the proposal seeks to impose if they could be convinced of the economic necessity thereof, rather than by emphasising the desirability thereof from an

[33] See respectively Articles 4 and 2 TFEU.

[34] In Case 43/75, *Defrenne*, ECLI:EU:C:1976:56 and Case C-50/96, *Schröder*, ECLI:EU:C:2000:72, para 57, in which the Court held that '*the economic aim* pursued by Article 119 of the Treaty, namely the elimination of distortions of competition between undertakings established in different Member States, *is secondary to the social aim* pursued by the same provision, which constitutes the *expression of a fundamental human right*' [emphasis added, LS]. Articles 2 and 3 (3) TEU, 8 and 10 TFEU and 21 and 23 of the Charter of Fundamental Rights now also confirm the equality of women and men as a fundamental principle of Union law.

[35] This goes for Directive 75/117 (equal pay): Art. 100 EEC; Directive 76/207 (equal treatment in employment): Art. 235 EEC; Directive 79/7 (statutory social security): Art. 235 EEC; Directive 86/378 (occupational social security): Art. 100 and 235 EEC; Directive 86/613 (independent workers): Art. 100 and 235 EEC; Directive 96/97 (Barber directive): Art. 100 EEC.

equality and social justice point of view. Yet this approach seems to have worked rather counterproductively, as it has led quite a number of national governments and parliaments to contest the Commission's reasoning in this regard, thereby also casting doubt on the lawfulness of the proposal. It has thus been put forward that the positive effects on the functioning of the internal market are insufficiently demonstrated, that the cross-border effects are not so great that regulation at the EU level is justified, that it is unclear how the internal market is distorted without this legislation and that it is not proven that corporate performance will increase as a result of this proposal. While these aspects would be relevant to consider if Article 114 would have been chosen as a legal basis, they do not in fact matter with regard to a legitimate use of Article 157(3). The latter provision does not require that Union legislation adopted on this basis contributes to a better functioning of the internal market, nor is its use premised on a requirement of intra-state effect, as it allows for the adoption of European rules that are applied to purely domestic situations. Yet it can be noted that the proposed directive concerns only listed companies of over 250 employees with an annual turnover of over EUR 50 million and/or an annual balance sheet of over EUR 43 million. These companies will usually operate on a cross-border scale.

A second reason for contesting the lawfulness of the proposal has resided in the argument that the principles of equal treatment and equal opportunities as contained in Article 157(3) cannot be interpreted in such an extensive way so as to allow the EU to impose positive action measures of the kind proposed. Yet this is not a strong argument as quite a few (stronger) counter-arguments can be raised against it. To begin with, given that Article 157(3) explicitly refers to ensuring equal opportunities, it can be said to imply the recognition 'that the effects of past discrimination can make it very difficult for members of particular groups to even reach a situation of "being alike" so that the right to like treatment becomes applicable'.[36] Remedying such a situation, and in particular of the disadvantages some groups suffer, asks for more than just realising formal equality; it may very well be said to require positive action measures for the disadvantaged group.[37] The European Court of Justice itself has also clearly linked the notions of equality of opportunity and preferential treatment to combating gender stereotypes, by holding that preferential rules may be used 'if such a rule may counteract the prejudicial effects on female candidates of prejudices and stereotypes concerning the role and capacities of women in working life'.[38] As also ensues from its case law, preferential treatment may be needed with a view to reducing 'actual instances of inequality which may exist in the real world', because prejudices and stereotypes often remain well concealed during a decision-making process.[39] Even if this case law concerned national positive action measures, allowed for under Article 157(4), why would this

[36] In this sense, Howard (2008), p. 171.

[37] Howard (2008), p. 172.

[38] Case C-409/95, *Marschall*, ECLI:EU:C:1997:533, para. 29.

[39] Case C-409/95, *Marschall*, ECLI:EU:C:1997:533, para. 31.

logic not also apply as regards the normative justification of EU positive action rules under Article 157(3)? Secondly, it must be observed that the two obligations as contained in the proposed directive do not seek to impose equality of results, as the priority rule only applies subject to the condition of equal qualifications and provides for a saving clause, meaning that it does not automatically apply in each and every case but demands an individual assessment of each case.[40] Furthermore, the proposal merely imposes an obligation of effort for the Member States to reach the 40 % (aspirational) target, as there are no sanctions for the non-achievement thereof but only sanctions for infringements by companies of the national provisions that implement these obligations, for instance if a company fails to put non-discriminatory recruitment procedures into place. In that sense, the proposal also very much respects the conditions and limits the ECJ has already imposed in its case law.

A third reason for contesting Article 157(3) as a legal basis has centred on the argument that appointment to a company board cannot be seen as a matter of employment and/or occupation. Even if 'occupation' has so far remained undefined in EU law, this argument is again not a very strong one. Directive 2006/54, in particular its Article 14, thus shows that Article 157(3) has already been used as a legal basis for imposing obligations on Member States with a view to covering different types of professional activity—including employment, self-employment and occupation—at all levels of the professional hierarchy and whatever the branch of activity and be it in the public or private sectors. Furthermore, equating 'occupation' with 'employment' and/or 'self-employment', as some argue, would entail that 'occupation' would be devoid of any proper meaning. Its explicit insertion in Article 157(3) would then also be devoid of any legal relevance, which does not seem to make sense. A more logical interpretation would be that its added value lies precisely in covering those situations of professional activity that are not captured by the notions of (self-)employment (conditions), including also the professional activity of non-executive board membership. Aside from that, the ECJ has also not ruled out the possibility that a board member falls within the scope of the notion of 'worker'; 'it is necessary to consider the circumstances in which the Board Member was recruited; the nature of the duties entrusted to that person; the context in which those duties were performed; the scope of the person's powers and the extent to which he or she was supervised within the company; and the circumstances under which the person could be removed'.[41] These legal developments—at the Treaty, legislative and judicial levels—are more indicative of a wide interpretation of the personal scope of the equality provisions rather than of a narrow one. Moreover, even if non-executive company board membership may be difficult to fit in exclusively in one of these three categories—employment, self-employment or occupation—it can be said to combine elements of each of these categories.

[40] See Case C-450/93, *Kalanke*, ECLI:EU:C:1995:322, Case C-409/95, *Marschall*, ECLI:EU:C:1997:533 and Case C-407/98, *Abrahamsson*, ECLI:EU:C:2000:367, paras. 49–50.

[41] Case C-232/09, *Danosa*, ECLI:EU:C:2010:674.

A fourth reason ties in with the point that was already raised earlier, namely that the Commission's interpretation of Article 157(3), as exemplified in the obligations it seeks to impose, is too restrictive of business freedom, ignores the functioning logic of the business environment and cannot be applied to a corporate structure that is determined by ownership. Again, this argumentation fails to be convincing because of the already existing legal framework and the way in which this has been interpreted. At an early stage, in the Defrenne Case, the ECJ thus already recognised that Article 119 EEC, now 157 TFEU, has horizontal direct effect, imposing a legal duty upon private companies and the social partners to respect the principle of non-discrimination.[42] One can refer here also to the aforementioned Article 14 of Directive 2006/54, which was declared to be explicitly applicable to the private sector as well.[43]

In the light of the above considerations, the Commission cannot be said to have overstepped the scope of the powers attributed to the Union by putting forward its proposal on gender-balanced company boards on the basis of Article 157(3) TFEU. Yet the proposal also needs to be assessed in the light of the subsidiarity and proportionality principles.

3.2 Subsidiarity and Proportionality

When it comes to the subsidiarity and proportionality of the Commission's proposal, manifold objections have been raised regarding its necessity, form and contents. According to Article 5(3) TEU, '[. . .] the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, [. . .] but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level'. According to Article 5(4), EU action should both as regards form and contents not exceed what is necessary to achieve the pursued objective. Given that the assessment of both principles often goes hand in hand, they are discussed here in conjunction. Quite a few national governments and parliaments have thus argued that EU action is not necessary because they are capable of dealing with the problem themselves and that they have already taken measures to deal with it, that the Commission has not sufficiently made the case that these are not working and that it should await whether these will have the desired results. It has also been put forward that the justification for the proposal is too weak

[42] Case 43/75, *Defrenne*, ECLI:EU:C:1976:56, para 39. Later confirmed e.g. in Case C-127/92, *Enderby*, ECLI:EU:C:1993:859, paras. 20–23 and Case C-33/89, *Kowalska*, ECLI:EU:C:1990:265, paras. 17–20.

[43] It reads in full: '1. There shall be no direct or indirect discrimination on grounds of sex in the *public or private sectors*, including public bodies, in relation to:

(a) conditions for access to *employment, to self-employment or to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy*, including promotion'; [emphasis added].

when balanced against the financial burdens it imposes and that it does not take the different cultural contexts and practices within the Member States into account. It has also been considered that not all other options have yet been exhausted, that EU action should be limited to a soft law measure such as a recommendation, that quotas should only be used when the business sector has shown an unwillingness to change and that the 40 % target is too ambitious and is not sufficiently justified.

In response, one could first of all put forward that the EU has already pursued a soft law course of action for the past 30 years,[44] without however achieving the desired result. While a soft law or self-regulatory approach has produced positive results in some Member States (such as Finland), the number of women on boards also in such states does not go beyond 30 %, and certainly this approach has fallen short in realising significant progress EU-wide. It has also appeared that in 11 Member States no action whatsoever is being taken to tackle this problem.[45] In that sense, there is quite a strong argument for now moving towards a more stringent European approach.

From the perspective of the effect that the Directive would have on Member States' powers in this field, a first thing to note is that the national discretion of all Member States is indeed being limited as the proposal fixes the (aspirational) target of gender balance at the level of 'at least 40 %'. This is a minimum requirement as Article 7 of the proposal makes clear; there is national discretion for Member States to the extent that they can prescribe a higher target but not a lower one. This indeed remains one of the biggest bones of contention in the ongoing negotiations on the proposal. As Germany recently set the target of its own national quota rule at 30 %, it is to be expected that the 40 % target in the directive proposal will be lowered, as it is highly unlikely that the German government would agree to a higher target in the EU context. Yet Germany's support for the proposal is vital with a view to its adoption.

A second important observation to make here is that otherwise the directive proposal actually leaves considerable discretion to those Member States that have already developed their own course of action, by allowing them to maintain the rules and policies they have already put in place, provided they demonstrate that these are of 'equivalent efficacy' to attain the directive's objective.[46] This equivalent efficacy rule thus enables them to comply with the target the proposal sets by relying on their own policies and rules. So then there is in fact no obligation to impose the priority rule on companies. Quite logically, however, the proposal requires Member States to communicate to the Commission the results of such national policies and to demonstrate their effectiveness.[47] If by 2020 Member States having availed themselves of this rule have not met the 40 % target, then

[44] See Council Recommendation 84/635/EEC of 13 December 1984 on the promotion of positive action for women, OJ 1984, L331/34; and Council Recommendation 96/694/EC of 2 December 1996 on the balanced participation of women and men in the decision-making process, OJ 1996, L319/11.

[45] See Selanec and Senden (2013) and Senden (2014a, b).

[46] Articles 4(7), 7 and 8(3).

[47] Article 8(3) in conjunction with Article 9(2).

the procedural obligations contained in the directive will still have to be complied with.[48] Also when it comes to the sanctions for which the proposal provides, it must be stressed once more that these do not concern the non-achievement of the target but, rather, non-compliance with the procedural obligations that should contribute to realising the target. So in that sense the target itself can be said to be only aspirational in nature. Furthermore, the proposal merely suggests two types of sanctions that would be considered as effective, proportionate and dissuasive but leaves it up to the Member States whether to adopt these or to retain their own sanctions or to put other sanctions into place that would meet those general requirements. The Member States are already under an obligation to comply with these general requirements on the basis of the consistent case law of the ECJ,[49] so in themselves these do not in fact add anything to the already applicable EU law obligations. As such, the proposal can thus be said to have certainly taken into account national powers and concerns. Given the national discretion that the proposal leaves, the financial burden it entails will in fact also be limited for those countries that have already developed their own policy and legal framework. But when adopted, the directive would certainly make for an additional incentive to ensure the effectiveness of existing national approaches. At the same time, national discretion will be curtailed for those Member States that are lagging (too far) behind and that have so far not made any regulatory and enforcement effort to bring about a more balanced representation on company boards.

Epilogue

The power play as sketched in this contribution is not the end of the story, and there will certainly be a next episode revealing the final outcome. As mentioned, the negotiations on the Commission's proposal are still ongoing and to obtain political agreement thereon, even if by a qualified majority, will undoubtedly require some amendments. Yet one can conclude that in its proposal the Commission has made an effort up front to address quite some subsidiarity and proportionality concerns of the Member States. While such concerns and objections were raised by a number of parliaments within the framework of the early warning mechanism, this number did not meet the threshold for requiring the Commission to reconsider or withdraw its proposal.[50] One may also see this as confirmation that in a fair number of countries national parliaments do not share these concerns. The fact that the proposal on the one hand allows Member States to maintain and pursue already existing policies, subject to their effectiveness, and on the other hand obliges others to put rules in place where these are still lacking can be seen as the Commission striking a right balance. In a European Union that is truly committed to the core values that are at its foundations and of which the principle of equality forms a central part,[51] then

[48] For listed companies that are public undertakings, the time limit is set at 1 January 2018.

[49] See, inter alia, Case 14/83, *Von Colson and Kamann*, ECLI:EU:C:1984:153, and for a detailed account of this case law, Tobler (2005).

[50] See Protocols 1 and 2 attached to the Treaty of Lisbon.

[51] See in particular Articles 2, 3 and 6 TEU.

progress should be secured not only on the home market but also on an EU-wide scale. This is where its true added value lies and why it would also deserve the support of Member States that have already developed their own approach.

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