Gender Quota for Corporate Directors: a Task for the European Union? The Revival of the Directive on Gender Balanced Company Boards

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ABSTRACT

The ongoing debate on the necessity of EU legislation on gender balanced company boards gives rise to interesting questions in respect of the concepts of equality and subsidiarity. After the Council recently reached a common position on the matter, the renewed topicality of the draft directive of 2012 is cause for an analysis of both the original and amended draft text in view of these concepts. Do the originally proposed quota measures for private company boards meet the requirements of the principles of equality and subsidiarity? Following an analysis of the changes to the directive as proposed by the Council, this contribution will successively review in what manner controversies appear to have been addressed and with what probable implications for the directive's effectiveness.

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1 INTRODUCTION

How is gender equality to be mainstreamed in corporate responsibility and policies?[1] One way to contribute to this is achieving a 'critical mass' of women in board and executive positions that can bring women's issues onto companies' agendas.[2] This could help to increase the employment rate of women, reduce the gender pay gap, tackle gender segregation and improve the work-life balance for both women and men. Some EU Member States have already adopted national legally binding targets to achieve gender diversity on company boards. Since January 2022 a binding quota law has come into force in the Netherlands.[3] The law includes a mandatory quota measure of 33% of women among non-executive board members of publicly listed companies. As long as the target is not achieved, appointments of supervisory board members made contrary to reaching the set target will be sanctioned by nullity. Additionally, large companies should set 'appropriate and ambitious' targets, and develop complementary measures, for a gender balanced representation of women among all directors, as well as in the top management positions.

The Netherlands adopted a 'hard law' quota measure despite the fact that it had opposed, for almost a decade, a proposal set out by the European Commission in 2012 for a directive to similar effect. That opposition can be explained by the fact that the Netherlands followed a long road of trial and error by applying soft law and self-regulatory approaches which were, however, unsuccessful. In 2013 'aspirational' targets of 30% were already set by law for company and supervisory boards to be reached by 2016. When these targets were not reached, the legislative measure was extended until 2020. In 2018 it became clear that the targets would once again not be met in time. Among the listed companies 90% did not meet the quota for executive directors and 66% did not meet the target for non-executive directors.[4] The reporting system that legally applied (a 'comply or explain' regime) mostly resulted in vague explanations that could not be corroborated, or sometimes blatant rejection of quota measures.[5] The foregoing led to the binding women's quota of 33% for supervisory board members.

Several EU Member States had already used the same route as the Netherlands. In fact, the Netherlands is so far the last in line. Belgium, France and Italy preceded the Netherlands by adopting, in 2011, binding women's quotas for (supervisory) company boards, varying between 30% and 40%. Germany followed in 2015. All of these countries had experienced insufficient results or progress from earlier soft law or self-regulatory approaches before turning to hard law measures.[6] The same applies at the EU level before the European Commission proposed the 'Women on Boards' Directive in 2012. This proposal also followed a previous soft law course, maintained over decades, that stressed the need for positive action for women and for balanced participation by women in the decision-making process.[7] But unlike at the national level, where the Member States could step up legislative efforts, the EU proposal was blocked in the Council after an initial approval by the European Parliament. It met opposition from Central and Eastern Europe (CEE) Member States such as Poland, Estonia, Romania and the Czech Republic, which doubted the legality of a result-oriented approach in respect of equality and, remarkably, also by States such as the Netherlands, Sweden, France and Germany that argued,

1 This article was completed in June 2022 and includes, beside the original proposal of 2012, the last available text of the Directive on gender balanced company boards at that time, being the amended text of the Council of March 2022. The final text adopted by the Council and Parliament in November 2022 broadly follows this earlier draft but, where relevant, some brief updates on changes will be provided in the footnotes.

2 H Kowalewska, 'Bringing Women on Board: The Social Policy Implications of Gender Diversity in Top Jobs' (2020) 49 Journal of Social Policy 744.

3 Wet van 29 september 2021 tot wijziging van Boek 2 van het Burgerlijk Wetboek in verband met het evenwichtiger maken van de verhouding tussen het aantal mannen en vrouwen in het bestuur en de raad van commissarissen van grote naamloze en besloten vennootschappen (Act on Gender Balanced Company Boards), *Staatsblad* 2021, 495.

4 M Lückerath-Rovers, 'Een analyse van het 'pas toe of leg uit' van het streefgetal bij Nederlandse beursvennootschappen' in C Bulten et al. (eds), *Diversiteit. Een multidisciplinaire terreinverkenning* (Wolters Kluwer 2020) 217, 224.

5 ibid 228–232.

6 L Senden, 'Getting women on company boards in the EU: A tale of power balancing in three acts' in N Bodiroga-Vukobrat et al. (eds), *New Europe – Old values?* (Springer International Publishing 2016) 77, 85–86.

7 Council Recommendation 84/635/EEC on the promotion of positive action for women [1984] OJ L 331/34; Council Recommendation 96/694/EC on the balanced participation of women and men in the decision-making process [1996] OJ L 319/11.

among other issues, that the national level was the most appropriate level of regulation as they had demonstrated through their own legislation.[8]

Underlying the discussions about the need for EU legislation on women on company boards are interesting questions relating to the concepts of equality and subsidiarity in the context of EU law. The national legislative examples, on which the EU draft directive seems to draw, all involve stringent regulation. Firstly, this is because the French, Italian, Belgian, German and, starting this year, Dutch legislation encompasses *binding* quota measures, which are sanctioned by nullity or annulment by court decision of appointments made contrary to the quota measure, as well as, in some cases, heavy fines or the suspension of individual benefits of sitting directors.[9] Secondly, the legislation discussed intervenes in core business decisions made in the private sector. In addition to a potential infringement of the freedom to conduct a business (Article 16 EU Charter of Fundamental Rights) or the freedom of association in the case of 'employee directors' who are nominated by trade unions, some commentators also see a legal conflict with the ownership rights of the shareholders who, in the end, have to approve the appointment of the top executives of listed companies.[10]

An important question in respect of the equality concept applied – that was raised not only by national parliaments in relation to the European proposal, but also in the national legislative processes of, notably, Germany and France where it even necessitated an amendment of the French Constitution[11] – was whether striving for gender parity or equal representation by laying down binding quotas conforms with the EU law interpretation of the principle of equality, and particularly with the legal limits that the Court of Justice of the EU (CJEU) has set in the past on positive action measures. Clearly, despite this potential conflict with EU law, it did not stop the Member States from passing national legislation on gender quotas as described above.

At the EU level as well, the Commission and the Parliament have continued to push for progress and recently, after ten years, a breakthrough was made in the European Council. In March 2022 a qualified majority was reached in the Council in favour of an amended text, which opened the way for tripartite negotiations between the institutions in order to reach a final agreement on the text.[12]

The renewed topicality of the proposal for a directive on a women's quota has prompted this contribution to analyse the original as well as the recently amended text of the draft directive in view of the concepts of equality and subsidiarity. Is there a legislative task and competence for the EU to achieve equal gender representation in corporate boards through positive action measures? What objectives and concepts of equality underlie the proposal's texts? Are these compatible with EU equal treatment law as interpreted by the CJEU? Do quota measures for private company boards meet the requirements of the subsidiarity principle?

To address these questions, this contribution will firstly set out the current EU legal framework with regard to positive action measures and its underlying perceptions of equality and discrimination in society (Section 2). On the basis of a description of the main aims and legal obligations in the original draft of 2012, the proposed quota measures at EU level will then be assessed from the point of view of current EU equality law, the selected legal basis and the subsidiarity principle (Section 3). The following section, Section 4, will turn to the amended text

8 See for the communications issued by the national parliaments in respect of the draft directive (2012) the platform of the EU Interparliamentary Exchange < https://secure.ipex.eu/IPEXL-WEB > accessed 3 June 2022. For a summary and analysis: see B Havelková, 'Women on Company Boards: Equality Meets Subsidiarity' (2019) 21 Cambridge Yearbook of European Legal Studies 187.

9 M Lennarts, 'Meer vrouwen in de bestuurskamer via Boek 2 BW? Over streefcijfers, quota en de beperkingen van wetgeving' in C Bulten et al. (eds), *Diversiteit. Een multidisciplinaire terreinverkenning* (Wolters Kluwer 2020) 155.

10 See M Szydło, 'Constitutional values underlying gender equality on the boards of companies: how should the EU put these values into practice?' (2014) 63 International and Comparative Law Quarterly 167; and Havelková (n 8).

11 For Germany, see B Waas, 'Gender quota in company boards: Germany' in M de Vos et al. (eds), *Gender Quotas for Company Boards* (Intersentia 2014) 131; for France, see Senden (n 6) 85.

12 The final text was adopted in November 2022 (EU Directive 2022/2381 on improving the gender balance among directors of listed companies and related measures [2022] OJ L 315/44). For details on the legislative process up until the final adoption, see the 'Legislative Train Schedule' by the European Parliament, < https://www.europarl.europa.eu/legislative-train/theme-a-new-push-for-european-democracy/file-gender-balance-on-boards > accessed 3 June 2022.

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by the Council. Why did the Member States that secured a qualified majority in favour of the amended proposal withdraw their objections? Does this imply that the amended draft is more in line with EU equality and subsidiarity concepts compared to the original draft, and what will be the implications for the forthcoming directive in terms of its effectiveness? Section 5 closes with conclusions.

2 EUROPEAN LEGAL FRAMEWORK FOR POSITIVE ACTION

In this section, the relevant EU legislation as far as it concerns positive action is set out, and so is the way in which it has been interpreted in the past by the CJEU.[13] Originally, EU gender equality law was confined to the area of employment and occupation. The right to equal pay for men and women has been one of the provisions of the Treaty since the establishment of the EEC (Article 119 EEC, later 141 EC and now 157 TFEU). Later, in the 1970s, directives were added that prohibit sex discrimination in the entire employment process. Since 2000 EU equality law has also been supplemented with other (prohibited) grounds for discrimination, namely race, religion, age, disability and sexual orientation, and its material scope has in some instances been extended to social policy fields other than employment.

As already mentioned, in the 1970s directives were adopted that prohibited sex discrimination in (the access to) employment. This first generation of gender equality legislation was amended in 2006, particularly to bring it more in line with the second generation directives of 2000. The Treaty provision of what is now Article 157 TFEU has also been amended in the past. All of this is relevant because the CJEU's case law on positive action, although it encompasses several judgments, dates some twenty years back. Despite the changes in the legislation, the case law nevertheless also extends to the legal norms that currently apply. This was also endorsed by the European Commission when it proposed the directive on women's quota measures among company directors in 2012 (see Section 3.1). Whether the CJEU today would rule exactly the same is yet another question, which will be returned to later on.

2.1 THE 'MARSCHALL' STANDARD FOR POSITIVE ACTION

The case law of the CJEU was initially based on Directive 76/207/EEC. This directive, like its successor from 2006, prohibits any form of sex discrimination in (the access to) employment. Article 2(4) of Directive 76/207 includes the following exception ground: 'This Directive shall not preclude measures designed to promote equal opportunities for men and women, in particular by eliminating de facto inequalities which adversely affect women's opportunities (…)'. The provision seems to allow for preferential policies for women in order to reach substantive equality, although the wording is not very clear. When the goal of 'promoting equal opportunities for men and women' is understood in a formal sense, any sex distinction seems to be in conflict with it. On the other hand, however, the provision constitutes a ground for exception to the prohibition on sex discrimination laid down in the directive and thus suggests that making a distinction between the sexes is legally permissible in certain circumstances. *Kalanke* required the CJEU to decide for the first time on the meaning and scope of Article 2(4).

The case deals, more specifically, with the Equality Statute of Bremen. Pursuant to its provisions female civil servants take precedence, as regards appointment or promotion, when they are as equally qualified as male job applicants and the specific job class at hand consists of less than 50% of women. Following the application of this rule, Mr Kalanke was refused the position of head of the Parks Department of Bremen. Thereupon, he commenced legal proceedings and questions were referred to the CJEU. Advocate General Tesauro deemed that a rule of precedence aimed at equal representation puts the (desired) numerical result first. This is contrary to the directive which aims at an individual right to equal opportunities and not a right to equal representation of groups. According to the Advocate General, the equal qualifications of the two candidates, moreover, already provide for equal opportunities, thus precluding the applicability of Article 2(4).[14] It seems that a formal concept of equality is used that also

13 In doing so, this section draws on a previous publication, A Veldman, 'Europeesrechtelijke grenzen aan quotamaatregelen ter bevordering van diversiteit in (de top van) het bedrijfsleven?' in C Bulten et al. (eds), *Diversiteit. Een multidisciplinaire terreinverkenning* (Wolters Kluwer 2020) 373.

14 Case C-450/93 *Kalanke* [1995], Opinion of AG Tesauro ECLI:EU:C:1995:105, para 13.

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distances itself from social reality. This concept was endorsed by the CJEU which ruled that the policy 'in so far as it strives for equal representation of women within job levels, replaces the aim of equal opportunities, as laid down in Article 2(4), while this aim can only be achieved by ensuring such equal opportunities'.[15] The rule thus gives absolute or automatic priority to women, in the words of the CJEU, which is incompatible with the directive.

The *Kalanke* ruling appeared to exclude any form of positive action. After all, it concerned the most 'soft' mode of priority or preference, namely only in the exceptional case of equally suitable candidates of different sex. No places are reserved for women, all suitable candidates are involved in the selection procedure and the priority rule is in fact not absolute because every better qualified male candidate has to be accepted. Several Member States were dissatisfied with the ruling and seized the opportunity of the Amsterdam Intergovernmental Conference (1997) to amend the legislation on positive action. The Treaty of Amsterdam introduced Article 141(4) of the EC Treaty (now Article 157(4) TFEU):

> With a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the underrepresented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers.

The text clarifies that 'special advantages' may be given, not only with a view to promoting equal opportunities but with a view to ensuring 'full equality in practice'. However, unlike the former directive's provision, this later provision is formulated symmetrically, i.e. positive action is possible for both men and women. Nonetheless, a declaration to the Treaty of Amsterdam stated that Member States should primarily focus on improving the situation of women. In addition to the new provision, Article 2(4) of Directive 76/207 remained in force at the time. Being primary EU law however, a treaty provision must take precedence over a directive provision.

With the *Marschall* case the CJEU once again had the opportunity to rule on a preferential policy.[16] The positive action measure, stipulating priority for women in a case of equal qualifications, of the Land of North Rhine-Westphalia provided for an explicit exception clause. No precedence is given when individual reasons tip the balance in favour of the male candidate. Advocate General Jacobs believed that an exception clause does not remove the discriminatory character of the preferential policy because it still aims to achieve equal representation.[17] However, the CJEU took a different course. With reference to the European Council Recommendation on the promotion of positive action for women, it observed that male candidates tend to be promoted in preference to female candidates, particularly because of prejudices and stereotypes concerning the role and capacities of women in working life. 'For these reasons, the mere fact that a male and female candidate are equally qualified does not mean that they have the same chances' (para 30). Therefore, national rules which, subject to a saving clause, treat female candidates who are equally qualified preferentially, may fall within the scope of Article 2(4), if such a rule counteracts the effects mentioned. However, such national measures cannot guarantee an absolute and unconditional priority for women, according to the CJEU:

> It should therefore provide for male candidates, who are equally as qualified as female candidates, a guarantee that the candidates will be the subject of an objective assessment which will take account of all criteria specific to the individual candidates and will override the priority accorded to female candidates, where one or more of those criteria tilts the balance in favour of the male candidate (para 33).

This statement is difficult to reconcile with *Kalanke*, which in fact involved the same type of preferential policy. Perhaps the easing is due to the newly introduced provision of Article 141(4) in the Treaty of Amsterdam, which had already been adopted at that time but had not yet entered into force.

15 Case C-450/93 *Kalanke* [1995] ECLI:EU:C:1995:322, para 23.

16 Case C-409/95 *Marschall* [1997] ECLI:EU:C:1997:533.

17 Case C-409/95 *Marschall* [1997], Opinion of AG Jacobs ECLI:EU:C:1997:24, paras 32 and 34.

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The *Abrahamsson* case (2000) confirms the '*Marschall* standard'.[18] The relevant Swedish regulation provides that a person of the underrepresented sex who meets the job requirements may be given priority over a candidate of the opposite sex who would have been selected otherwise. The priority rule may not be applied if the difference in the qualifications of the candidates is so great that it threatens objectivity. The CJEU first checked against Directive 76/207. According to the CJEU, there is automatic priority for applicants of the under-represented sex. The exception rule does not break the automatic priority because it is insufficiently precise. As a result, the selection is to be made from all sufficiently suitable candidates on the sole ground of sex, even if there is a better qualified candidate.[19] Since the Swedish regulation was therefore in conflict with the provision of the directive, a further assessment against the new Treaty provision of Article 157(4) TFEU was necessary because it is of a higher order. The CJEU stated that,

> even though Article 141(4) EC allows the Member States to maintain or adopt measures providing for special advantages intended to prevent or compensate for disadvantages in professional careers in order to ensure full equality between men and women in professional life, it cannot be inferred from this that it allows [a preferential measure of the kind at issue] which appears on any view to be disproportionate to the aim pursued (para 55).

Finally, the CJEU also stated that all this would be no different even if the regulation only applies to a limited number of vacancies and/or these vacancies have been specially created in the context of a (temporary) positive action programme.

In 2006, Directive 76/207 was replaced by Sex Discrimination Directive 2006/54. The latter no longer contains its own formulation of a positive action standard but refers simply to the one laid down in Article 157(4) TFEU. The Racial Discrimination Directive 2000/43 and the Framework Directive for Equal Treatment in Employment 2000/78 do have their own exceptions for positive action.[20] Provisions are modelled on Article 157(4) TFEU. Article 23(2) of the EU Charter of Fundamental Rights, in force since 2009, also states an exception ground for positive action in favour of the under-represented sex, although not limited to the area of professional activity.

2.2 THE 'BADECK AND LOMMERS' STANDARD FOR POSITIVE ACTION

To conclude, the *Badeck* and *Lommers* judgments also deal with positive action but set much more lenient standards.[21] It is therefore important to point out that the relevant measures in these cases do not concern direct access to a job. They involve preferential measures such as reserving 50% of the training places for women or the preferential allocation of nursery places to female employees. These types of measures are distinguished by the CJEU because they are perceived as being *conditional* measures that facilitate the pursuit of a professional activity for women. In other words, they further equalise opportunities for women in finding and preserving professional jobs. Besides, in both cases, the CJEU emphasizes the importance of the fact that the employer does not have a monopoly on training or nursery places. Priority rules set by companies will therefore not deprive men of access to these types of 'social goods' as they will also be available on the (commercial) market.[22]

3 REVIEW OF THE 2012 DRAFT DIRECTIVE

3.1 THE ORIGINAL PROPOSAL BY THE COMMISSION

Company boards in the EU in 2012 were characterised by a gender imbalance. Only 13.7% of corporate seats in the largest listed companies were held by women and 15% among

18 Case C-407/98 *Abrahamsson and Anderson v Fogelqvist* [2000] ECLI:EU:C:2000:367.

19 ibid paras 52–53.

20 EU Directive 2000/43 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L 180/22; EU Directive 2000/78 establishing a general framework for equal treatment in employment and occupation [2000] OJ L 303/16.

21 Case C-158/97 *Badeck a.o.* [2000] ECLI:EU:C:2000:163; Case C-476/99 *Lommers* [2002] ECLI:EU:C:2002:183.

22 *Lommers* (n 21) para 44; *Badeck* (n 21) para 53.

non-executive directors.[23] This prompted the European Commission to propose a directive on improving the gender balance among non-executive directors of companies listed on stock exchanges.[24]

According to the original proposal of 2012, large listed companies on whose boards the members of the under-represented sex held less than 40% of non-executive director positions must have attained that percentage by 1 January 2020 at the latest, or by 1 January 2018 in the case of public undertakings (Article 4(1)).[25] For executive directors targets had to be set by the companies themselves.[26] In order to attain a quota of 40% of women among non-executive directors, Article 4(3) stipulates that priority must be given to an equally qualified female candidate, 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. Member States must lay down rules on sanctions applicable to infringements of the directive, which must be effective, proportionate and dissuasive 'and may include administrative fines and nullity or annulment declared by a judicial body of the appointment or of the election of non-executive directors made contrary to (…) Article 4(1)'.[27] Member States which before the entry into force of the directive had already taken measures to ensure a more balanced representation among the non-executive directors of listed companies can suspend these procedural requirements for appointing directors, provided that it can be shown that those measures are equally effective. If that is not demonstrated or the women's quota of 40% is not reached by 2020, the directive's obligations will again apply.[28]

The European Parliament strongly supported the proposal at first reading in 2013 and even went beyond the Commission's draft by calling for stronger penalties, such as the exclusion from public tenders of companies not meeting the gender balance obligations.[29]

3.2 UNDERSTANDING OF THE EQUALITY PRINCIPLE

When the aims and means of the proposal in respect of the equality principle are tested against the legal framework set out in Section 3.1, the original text sends out mixed signals. By prescribing procedural requirements for the selection of company directors in Article 4(3) that follow 'tipping point' or 'tie-break measures' as the only allowed means for attaining the gender quota, the draft directive complies with the *Marschall* standard. However, when sanctions applicable to infringements of the directive must be effective, proportionate and dissuasive and may include the rollback of appointments made contrary to the mandatory gender quota, one may argue that this de facto implies that, as long as women do not make up 40% of the positions, a woman must be appointed or the position must stay vacant. When that would be the case in practice, then any better male candidate is not being offered the guarantees required by the *Marschall* standard. Of course, the choice of sanctions belongs to the competence of the Member States and nullity or annulment of appointments or elections are given as an example. So, strictly speaking, the draft directive is in line with EU equality law. However, if the obligation to apply sanctions to the infringement of Article 4(1) that are effective, proportionate and dissuasive is taken seriously, then doubts may arise.

The ambiguity of the draft text on the extent of the legal obligations proposed is reinforced by the explanations put forward in the document. The Commission opts for 'a binding objective of at least 40%', stressing the fact that soft law initiatives did not yield any noticeable changes and, without stepping up measures, it would take several decades to approach gender balance

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23 The numbers vary across Member States in 2012 between 3% and 28% for non-executive directors and between 0% and around 21% for executive directors, see European Institute for Gender Equality, Gender Statistics Database, *Largest listed companies: CEOs, executives and non-executives* < https://eige.europa.eu/gender-statistics > accessed 3 June 2022.

24 COM (2012) 614 final.

25 'Large' means a company which employs at least 250 persons and has an annual turnover of at least EUR 50 million or an annual balance sheet total of at least EUR 43 million.

26 COM (2012) 614 final, 8.

27 Article 6(2)(b) of the proposal.

28 Articles 8(3) and 9(2) of the proposal.

29 Position of the European Parliament adopted at first reading on 20 November 2013, P7_TA(2013)0488, < https://www.europarl.europa.eu/doceo/document/TA-7-20130488_EN.html?redirect > accessed 3 June 2022.

throughout the EU.[30] It has clearly taken the binding quota measures introduced by Member States like France, Belgium and Italy as an example when it points out that the most significant progress was noted in those Member States where binding measures had been introduced.[31] Possible sanctions like the rollback of appointments of male directors, as stated by the proposal, can be directly traced back to the national legislation of those particular countries. However, having binding gender quotas on the one hand and allowing just tie-break measures according to the *Marschall* standard on the other hand, seems incompatible. It thus appears that the Commission, in the drafting of the legal obligations, was caught between wanting to take a significant and effective step forward in achieving gender balance and the very small leeway provided for positive action by the CJEU.

Viewed from the perspective of effectiveness, one might even marvel at the fact that the Commission reckons that a gender balance can be attained in a limited number of years by applying just a tie-break measure in the unlikely case that exactly two candidates are left who happen to be of the opposite sex and who turn out to be precisely equally qualified.[32] This image of recruitment procedures seems detached from social reality, which makes a tie-break measure in practice rather ineffective because it does not account for facts such as: that merit and qualification are not gender-neutrally defined and applied; that women can be negatively socialized, presenting themselves sometimes with less confidence or ambition; that men are often assessed on their potential, women on experience and track record; and that decision-makers tend to hire those who are a mirror image of themselves, etc.[33] Besides the role that gender stereotypes and biases play in recruitment and assessment procedures, in particular the search for (non-)executive directors does not resemble regular employment hiring processes. There is no job advertisement to start with, but instead far more informal procedures apply to search for the 'ideal candidate', making use of (male dominated) business networks and professional executive search firms, which in general reduces the chances of capable women to be identified and invited.

In contrast, binding gender targets could possibly work as a temporary 'shock mechanism'. If the financial, economic or societal consequences of not meeting the target are considerable enough, this may reverse pre-existing pro-male biases and cultures and open up new and creative ways in finding and electing qualified female directors. This would even suggest that no priority rules, in a strict sense, need to be prescribed. Comparable to most of the national laws in place on gender quota measures, like in France or the Netherlands, the executive search itself, including the selection criteria applied, can be left to the discretion of the company. Only the final election or appointment of a (non)executive director contrary to the set quota is sanctioned by law. However, even if this were to imply that no priority rule in a strict sense is applied, a legally binding gender quota, certainly if sanctioned with the rollback of appointments, must nevertheless, in my opinion, be considered an infringement of the *Marschall* standard. A better qualified male candidate is not afforded the guarantees mentioned in *Marschall* as long as the gender target is not attained.

Interestingly, the CJEU did admit in *Marschall* that preferential policies may be used to counteract gender stereotypes and biases concerning the role and capacities of women in working life, and thus reducing actual instances of inequality which may exist in the real world.[34] That is exactly what a binding quota could possibly accomplish. However, due to a very strict proportionality requirement, such a preferential policy must be confined to a tie-break measure in the case of equal qualifications only, according to the CJEU. Maybe it is conceivable that, 20 years after these judgements, as there is still a lack of noticeable results even if tie-break measures applied, more far-reaching types of positive action could be thought to be proportional to the aim of reducing actual instances of inequality. It seems that such a relaxation of the *Marschall* standard is necessary to actually achieve gender balance in company boards.

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30 COM (2012) 614 final, 8.

31 ibid 2.

32 See Eva Cremers and Petra Oden, 'Voorkeursbeleid voor topvrouwen' (2015) Nederlands Juristenblad 146.

33 Extensive research references can be found at Havelková (n 8) 194.

34 *Marschal* (n 16) paras 29 and 31.

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As has already been said, the 2012 proposal for a directive on gender balanced company boards, while emphasizing the need for effectiveness by binding numerical targets, at the same time closely follows the limits set by the CJEU. The resulting opacity of the legal standards to be applied regarding the understanding of the equality concept that informs them, appears to be reflected in the divergent analyses made by academics[35] as well as national parliaments in this respect. In particular, CEE Member States, as already mentioned in Section 1, turned down the concept of what they called 'result-oriented' equality that would, allegedly, have invalidated the selection of candidates on the basis of merit and lowered the competitiveness of companies because women lack corporate skills and competences due to the life cycle choices which they tend to make.[36] Member States that had already developed national regulatory solutions did not so much oppose the more substantive understanding of equality but rather the need for EU procedural requirements, forcing the application of tie-break measures in the case of equal qualifications, which are deemed to be at odds with the national legislation already in place and contrary to the principle of entrepreneurial freedom. This leads on to the consideration of the objections that can be made to the proposed gender quota measures in view of EU competences including the subsidiarity principle.

3.3 EU COMPETENCES FOR GENDER QUOTA MEASURES AND THE PRINCIPLE OF SUBSIDIARITY

According to Article 5 TEU, the limits of EU competences are governed by the principle of conferral and the use of these EU competences is governed by the principles of subsidiarity and proportionality. The extent to which the proposal for a directive meets these requirements will be discussed successively below.

The proposal is based on the competence of Article 157(3) TFEU, allowing legislative measures to ensure the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation. This legal basis is challenged because of the aims and justifications that are put forward by the Commission. Although the Commission briefly mentions the fundamental right of gender equality in justifying the proposal, it is predominantly justified on economic grounds.[37] Gender parity is needed, according to the explanatory memorandum and preamble, to strengthen democracy in economic decision-making, to deliver on internal market benefits and to boost business performance and EU economic growth and competitiveness. The expectation was probably that these would prove to be more acceptable justifications than the fundamental equality of men and women, but it turned out that a number of Member States disputed the economic effects with good reason.[38] As a result, the need for an EU intervention and the chosen legal basis (confined to equality in employment and occupation) was also criticized.

It is doubtful whether gender parity in economic decision-making as an aim in itself can justify the permanent quota measures which are required in that case. It appears that gender parity can be justified at the very most when it concerns representative bodies where societal interests are at stake. In contrast, private company boards should primarily defend the economic interests of their stakeholders (shareholders, employees and society). To really fit with the tasks and competences of the EU, temporary positive action must aim for full equality in practice between men and women in working life by reducing actual instances of inequality which may exist in the real world (Article 157(3) *juncto* 157(4) TFEU). In this way, it implements the fundamental principle of equality between women and men, which is one of the EU's founding values and core aims (Articles 2 and 3(3) TEU). Gender balanced company boards may do this because they advance equal opportunities for women in the top management layers and facilitate the mainstreaming of gender equality in corporate decision-making by achieving a 'critical mass' of women in managerial positions.

However, when the quota measures are to be justified not by economic reasons but because of the fundamental value of gender equality, the competence provided by Article 157(3) was

35 For instance, Cremers and Oden (n 32); Havelková (n 8); Lennarts (n 9); Senden (n 6); Szydło (n 10).

36 See Havelková (n 8) for an extensive analysis of the objections of especially the new Member States.

37 Szydło (n 10) 179.

38 Senden (n 6) 89; Havelková (n 8).

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still challenged by some who regarded the scope of the legislative competence to be limited to dependent workers.[39] Company directors do not necessarily work on employment contracts but may be self-employed persons who work under a contract for services. In the past, the CJEU has ruled that Article 157, insofar as it relates to the right to equal pay, is limited to the employee.[40] Do company directors therefore fall outside the personal scope of Article 157 TFEU altogether? Even so, the legal basis in section 3 of Article 157, and the positive action provision of section 4, are both broadly formulated and refer not only to employment but also to 'occupation', 'vocational activity' and 'professional career'. Moreover, as far as access to employment and occupation is concerned, the self-employed do fall within the scope of the Sex Discrimination Directive 2006/54 that was adopted pursuant to Article 157(3) TFEU. This means that Article 157(3), and also the *Marschall* standard, can be understood to extend to the appointment of (non-)executive directors.

The subsidiarity principle, and in its wake proportionality, is challenged mostly by Member States that already have gender quotas for company boards in place, which are furthered either by hard or soft law measures. It is argued that because of this Member States can satisfactory regulate the matter themselves. 'New' Member States oppose, together with the result-oriented equality approach, in particular the need for hard law measures, putting forward that soft law measures are more appropriate and should be tried first.[41] In response to these arguments, however, the Commission seems to have satisfactorily pointed out that a soft law course had already been followed for over 30 years, but that these initiatives had not yielded any noticeable changes. Furthermore, a number of Member States do not show any willingness to act on their own initiative. Consequently, without stepping up measures at the EU level, it would take several decades to achieve gender balance throughout the EU.[42]

'Horizontal' subsidiarity is also disputed. New and old Member States alike raise doubts about the legitimacy of, and need for (detailed) interference in the private sector. Sweden and Germany, for example, refer to the self-regulatory role of the social partners. Detailed requirements for the appointment of 'employee directors' in particular may, moreover, interfere with the freedom of association. Others see a more fundamental infringement of the freedom to conduct a business or of the ownership rights of shareholders. Of course, the rights and freedoms mentioned are not absolute and will always be triggered in the case of employment legislation, but the objections made underscore again the need to properly define the aims and means of the proposal within the perspective of the fundamental principle and the EU value of equality and, in this case, its regulatory competence of Article 157(3). After all, the CJEU in its interpretation of the fundamental right of (gender) equality made it clear that both Article 157 TFEU and Article 21 of the EU Charter of Fundamental Rights have direct horizontal effect, making private actors such as companies equally responsible for respecting this right and refraining from discrimination as public actors.[43] It thus seems that the Commission did not overstep the scope of the gender equality principle.

4 THE 2022-DRAFT DIRECTIVE: A NEW UNITED FRONT?

In March 2022, 10 years after the initial proposal of the directive, the French Presidency achieved a breakthrough in the European Council. The Member States agreed on a common position in respect of EU legislation aiming to improve the gender balance among non-executive directors of listed companies. This cleared the way for negotiations with the European Parliament with a view to the final adoption of the directive. This section addresses the amendments made to

39 See Veldman (n 13).

40 Case C-256/01 *Allonby* [2004] ECLI:EU:C:2004:18. See concerning the EU concept of the employee in EU equality law: S Burri and A Veldman, 'Gelijke behandeling als grondrecht' in F Pennings and S Peters (eds), *Europees arbeidsrecht* (Wolters Kluwer 2016) 151, 166.

41 See Szydło (n 10) 189–190.

42 COM (2012) 614 final, 9–10.

43 Respectively, Case C-43/75 *Defrenne* [1976] ECLI:EU:C:1976:56 and Case C-414/16 *Egenberger* [2018] ECLI:EU:C:2018:257.

the draft directive that have led to consent in the Council.[44] In what way have the controversies that were discussed in respect of the principles of equality and subsidiarity apparently been addressed and what are the implications for the expected effects of the directive?

Although progress has been made towards greater gender equality on corporate boards in the last 10 years, this progress remains uneven. In 2021, 30.6% of all board members and 8.5% of board chairs in EU-27 were women. The gap between Member States is wide. The number of female board members in 2021 across Member States ranged between 8.5% (Cyprus) and 45.3% (France).[45] Member States where legally binding targets have been put in place in the past are making much faster progress than those in which they have not (in 2021 France 45.3%, Italy 38.8%, Belgium 37.9% and Germany 36%).

The preamble to the amended draft directive reflecting the Council's position again stresses that the rate of improvement has differed in Member States and that much more significant progress was noted in those Member States where binding quota measures had already been introduced. Growing discrepancies between Member States are likely to increase given the very different approaches pursued by individual Member States (recital 11).While some Member States have introduced binding measures, others have encouraged self-regulation with mixed results. The majority of Member States, however, have not taken action or indicated their willingness to act in a way that would bring about sufficient improvement. Therefore, the gender balance on corporate boards across the EU can only be improved through a common approach (recital 37).[46] Yet, the changes made to the directive's provisions seem to largely contradict the need for more uniform regulation or for more binding types of measures that can bring about sufficient improvement. Both aspects will be discussed next.

The recitals (especially 1-3a) of the proposal were redrafted in order to strengthen the justification of gender balanced company boards in view of the fundamental value of equality.[47] The business case for quota measures is curtailed and instead objectives such as the closing of the gender gap in employment and the need for positive action in that regard are emphasized, thereby also strengthening the link with the proposed legal basis of Article 157(3).

In respect of the understanding of the equality concept that is applied, the ambiguity of the original proposal is clarified by openly declaring that the approach proposed is that of setting quantitative objectives rather than binding quotas.[48] This is reflected in the amendment of Article 4 that now states that companies should *aim to attain* by 31 December 2027 the objective that members of the under-represented sex hold at least 40% of non-executive director positions (or at least 33% of all director positions).[49] Any reference to possible sanctions, like the rollback of appointments made contrary to achieving the gender quota, has been deleted from the proposal.[50] To further clarify the matter the (binding) procedural requirements are now regulated separately in Article 4a.[51] This provides for the obligations to apply clear and neutral criteria and to give priority to women when choosing between equally qualified candidates. The amended draft directive hereby fully endorses the *Marschall* standard of equality. As has been explained above, one may doubt the effectiveness of tie-break measures to bring about sufficient improvement. The chances are low that companies will be confronted with the rather theoretical case of two exactly equally suitable candidates of different sex. So too

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44 Proposal on improving the gender balance among directors of companies listed on stock exchanges, and related measures – General approach, 2012/0299(COD), No Doc 6468/22, Brussels 4 March 2022. As was mentioned earlier, after the completion of this article the directive was adopted in November 2022 (n 12). The research discussed is confined to the then available text that was agreed upon by the Council before tripartite negotiations started. The final text of the directive that was adopted by the Council and the Parliament in November broadly follows this earlier draft, but, where relevant changes have been made, some brief updates will be provided in the foot notes.

45 Gender Statistics Database, *Largest listed companies: CEOs, executives and non-executives* < https://eige.europa.eu/gender-statistics > accessed 3 June 2022.

46 Comparable to recitals 20 and 52 of the final text (n 12).

47 Comparable to recitals 1–6 of the final text (n 12).

48 General approach (n 44) 3.

49 Article 5 of the final text (n 12). The date has been changed to 30 June 2026.

50 Article 8 of the final text (n 12) reintroduces the examples of annulment or nullification of appointments but now explicitly limits these possible penalties to the violation of the procedural requirements only.

51 Article 6 in the final text (n 12).

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are the chances of the actual enforcement of a priority rule by potential female top directors due to the certain risk of harm to their careers when litigating against large listed companies.[52] Although the need for a directive is justified by a lack of results from former soft law measures, nevertheless gender quota obligations seem to have been weakened after the amendments that have been made.

In respect of the (binding) means of attaining the (non-binding) targets, the amended draft, moreover, considerably extends the possibilities for the suspension of legal obligations and even de facto opt-outs. It appears that the pleadings for more subsidiarity by introducing the possibility to set own national standards, which were made by both the old and new Member States, have been successful. As discussed above, the recitals speak of highly divergent approaches in the individual Member States pushing for a common approach. Nonetheless, the Council establishes the need for a 'flexibility clause' in order 'to respect the different situations and starting points of Member States'.[53] A newly inserted Article 4b allows in this respect the suspension of the directive's procedural requirements until at least 31 December 2029, provided that equally effective measures have been taken or progress has been made on coming close to the quantitative objectives. To secure the lawfulness of the national legislation already in place, Article 4b(1) defines the scenarios which would be deemed by law to guarantee 'equal effectiveness'. This includes national measures that set a target of at least 30% for female non-executive directors (or 25% for all directors) or progress coming close to achieving those objectives has been attained.[54] It seems inconsistent that the applicable gender quota is substantially lower for those Member States that can be considered 'front runners' because they had already taken effective action in the past. It would seem that this can only be explained by the fact that the 40% target for non-executive directors (respectively 33% for all directors) does not coincide with the various actual quotas that had already been set at the national level. As mentioned in the introduction, the Netherlands, for example, has just introduced a women's quota of 33% for supervisory board members. Finally, the 2022 proposal also adds the possibility to make the suspension of the directive's main obligations permanent if the national legislation already in place remains applicable or the target of respectively 30% or 25% is reached by 2029.[55]

It appears that not only those Member States with stringent regulation in place, but also those that did not take any action at all, can profit to some extent from the flexibility clause. The amended draft directive changes the date by which equivalent national measures must have been taken, from the date that the directive will be adopted to the date of implementation, which will be three years after the directive enters into force (the implementation period was two years in the original draft).[56]

5 CONCLUSIONS

Underlying the discussions about European legislation on women in company boards are interesting questions relating to the concepts of equality and subsidiarity. The renewed topicality of the draft directive on women's quotas after the Council in 2022 succeeded in reaching a common position after 10 years, was cause for an analysis of both the original and amended draft text in view of these concepts. It may be concluded that a directive setting gender quotas for corporate directors, despite objections in the past, does fit with the tasks and competences of the EU. It implements the fundamental principle of equality between

52 Although Article 6(3) of the final directive (n 12) provides (rejected) candidates with an information right in order to improve enforcement chances, this does not appear to take away the risk mentioned.

53 General approach (n 44) 3. Compare recital 45 of the final text (n 12).

54 See Article 12 of the final text (n 12). The same conditions for suspension are set (at least 30% of non-executive directors or 25% of all directors) but the possibility for suspension is no longer bound to a specific time period. Where a Member State suspends the application of the procedural requirements on the basis of either of the conditions set out, the objectives of Article 5 (40% women in the case of non-executive directors, respectively 33% of all directors) shall be deemed to have been achieved in that Member State.

55 Article 4b(2). According to Article 12(3) of the final text (n 12) the suspension can be made permanent as long as the national law setting an effective quota of at least 30% or 25% remains applicable, or an actual progress of at least 30%, respectively 25%, is maintained. When this would no longer be the case, the directive will take effect after 6 months at the latest.

56 This has been reversed in the final directive (n 12). Alternative national measures must be in place by 27 December 2022 at the latest. The implementation period is returned to two years (28 December 2024).

women and men, which is one of the EU's founding values and core aims. Gender balanced company boards may do this because they break the glass ceiling for women and advance the mainstreaming of gender equality in employment by achieving a 'critical mass' of women in corporate decision-making positions. Article 157(3) TFEU provides the right legal basis for harmonizing measures in this regard.

Regrettably, however, the equality concept underlying the directive does not challenge the *Marschall* standard. Yet it can be argued that, 20 years after this decision, due to a lack of noticeable results achieved by tie-break measures only, more far-reaching types of positive measures could be thought to be proportional to the aim of reducing actual instances of inequality. The omission of clear *legally binding* targets in the 2022 proposal for a directive seems all the more a missed opportunity because a growing number of Member States already have put such quota legislation in place despite the *Marschall*-standard. All of these countries experienced insufficient results or progress from earlier soft law or self-regulatory approaches before turning to hard law quota measures. This was also the exact reason why the EU Commission originally proposed binding quotas.

The compromise reached by the Council 10 years later, which is also reflected in the final directive, makes an unbalanced impression. Unlike the original 2012 proposal, the final text clearly does not want to penalise the situation in which the stated objectives in respect of gender balance are not reached or not reached in time. It only penalizes the company's decision not to apply the prescribed tie-break measure in the (theoretical) case of two final candidates of opposite sex who are equally qualified. The directive seems therefore fully in line with the *Marschall* standard. At the same time, however, by way of a suspension clause for Member States with effective quota legislation already in place, the directive seems to indirectly sanction binding national quota law that is contrary to the *Marschall* standard. Consequently, as long as new case law by the CJEU is not forthcoming, it cannot be ruled out that the suspension clause is perhaps unlawful in itself. Nevertheless, without this political compromise the directive would probably not have been adopted; but it seems this success comes at a price. Not only do different rules apply to different EU Member States, but it also seems plausible that the types of rules that apply to Member States that lag behind will be less effective in achieving gender balance in practice.

COMPETING INTERESTS

The author has no competing interests to declare.

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