

GENDER QUOTA FOR SUPERVISORY BOARDS

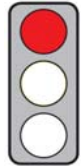
cep Policy Brief No. 2012-51 of 10 December 2012

KEY ISSUES

Objective of the Directive: Stock-listed companies are being forced to introduce a 40% gender quota for women on supervisory boards and a self-commitment for executive boards.

Affected parties: Stock companies, shareholders, supervisory boards, executive boards.

Pro: –



Contra: (1) EU law is being used to enforce a political ideology.

(2) The alleged “economic added value” of a quota for women is unfounded. On the contrary, it is at the expense of qualifications that the unconditional requirement of a 40% quota by 2020 resolves the possible trade-off between qualifications and the proportion of women on boards.

(3) The EU does not have the competence to introduce a gender quota for women.

(4) The Directive's intervention in fundamental rights is unjustified. It also represents a massive infringement of the principle of subsidiarity; all of the Commission's explanations are construed and serve merely as an excuse.

CONTENT

Title

Proposal COM(2012) 614 of 14 November 2012 for a Directive of the European Parliament and of the Council on improving **the gender balance among non-executive directors of companies listed on stock exchanges** and related measures

Brief Summary

Note: The proposal is actually about a gender quota for women; therefore, this term will be used hereinafter instead of “gender balance” as chosen by the Commission.

► Background and target

- In the EU, there are considerably more men (86.3%) than women (13.7%) sitting on company boards. This is linked above all to “insufficient market incentives” for companies to appoint women in such positions (p. 4).
- Therefore, the Commission wishes to increase the share of women on boards.

► Affected companies

- The Directive's requirements are to be complied with by all companies listed on stock exchanges with (Art. 2 No. 8 in conjunction with Art. 3)
 - at least 250 employees and
 - either an annual turnover of more than 50 million Euros or an annual balance sheet totalling more than 43 million Euros.
- Member States can exempt companies from the Directive where the under-represented sex represents less than 10% of the total workforce (Art. 4 (6)).

► Statutory quota for supervisory boards

- Each sex must be represented by at least 40% in supervisory boards.
- Such a quota is to be achieved (Art. 4 (1))
 - in public undertakings by 1 January 2018 and
 - in private companies by 1 January 2020.
- Where rounding up leads to a situation whereby the objective can only be met if more than 49% of the supervisory board members are women, then the 40% requirement may be dropped if the rounded off result is closer to the requirement than the one rounded up one. (Art. 4 (2)).
- Deviating from the 40% quota, Member States may also stipulate that the quota is deemed complied with if at least 30% of the supervisory board and the management board are represented by women (Art. 4 (7)).
- Priority is to be given to female candidates for seats on supervisory boards (Art. 4 (3)) if they
 - are at least as equally qualified in terms of suitability, competence and professional performance as the male candidates and
 - an objective assessment shows that no male candidate is to be given priority due to “specific criteria”.

► Self-commitment by managing boards

- Companies must commit themselves to a “gender-balanced representation of both sexes among executive directors” (Art. 5 (1)).

- The self-commitment must be complied with (Art. 5 (1))
 - in public undertakings by 1 January 2018 and
 - in private companies by 1 January 2020.
- ▶ **Economic advantages created by the gender quota for women (“economic added value”)**
 - According to the Commission, European companies that do not have a binding quota for women are at a competitive disadvantage to undertakings from third countries (p. 3).
 - According to the Commission, the presence of women on boards improves the profitability of a company and contributes to long-term sustainable growth (Recital 8).
 - According to the Commission, a higher share of women on boards leads to increased female labour force participation (Recital 15).
- ▶ **Sanctions**
 - Member States must provide for “effective, proportionate and dissuasive sanctions” for the enforcement of the quota rules and actually apply them (Art. 6 (1) and (2)).
 - The sanctions can also consist of fines and the annulment of the appointment of supervisory board members (Art. 6 (2) lit. a and b).
- ▶ **Legal protection through disclosure obligations for companies and reversal of burden of proof**
 - If a male candidate is appointed, unsuccessful female candidates must, on request, be provided with the criteria upon which the selection was based, the objective comparative assessment of those criteria and the considerations in favour of appointing the successful candidate (Art. 4 (4)).
 - If an unsuccessful female candidate was as equally qualified as the successful male candidate, the company must prove compliance with the objective selection criteria (Art. 4 (5)).
- ▶ **Maintaining stricter national rules**

Member States may introduce or maintain measures which are more favourable for women provided such measures are non-discriminatory and do not hinder a proper functioning of the internal market (Art. 7).

Statement on Subsidiarity by the Commission

- Several Member States are “hesitating” to introduce a gender quota “on their own” since they “perceive a risk” of putting “their own companies at risk”. This jeopardises the achievement of the Commission’s objective. Therefore, EU action is necessary.
- Inconsistent gender quotas for women throughout the EU lead to competition between Member States in questions regarding labour and equal treatment. Such competition is not intended by the European Treaties. Only the EU can eliminate this by means of EU-harmonised regulations.
- Different national regulations hinder the proper functioning of the internal market.
 - Investors, for instance, could view the lack of a quota for women negatively.
 - Companies from countries without a gender quota could be excluded from public tenders in countries which do have one if such a quota requirement is not complied with. This could prevent such countries from participating in public tenders in such countries.

Policy Context

In Member States and at EU level there have been various initiatives in recent years targeted at getting companies to commit themselves to a gender balance on executive and supervisory boards. However, only a few companies have done so. Although the share of women on boards has gradually increased, the Commission holds that this increase is not happening fast enough. For this reason, after many announcements, the Commission has taken legislative action.

Legislative Procedure

14 November 2012	Adoption by the Commission
Open	Adoption by the European Parliament and the Council, publication in the Official Journal of the European Union, entry into force

Options for Influencing the Political Process

Leading Directorate General:	DG Legal Affairs, Freedom and Security
Committees of the European Parliament:	Gender Equality (leading), rapporteur (to be named); Economic Affairs; Internal Market; Legal Affairs; Employment
Committees of the German Bundestag:	Legal Affairs (leading); Labour; EU Affairs; Family; Economy
Decision mode in the Council:	Qualified majority (rejection with 91 of 345 votes; Germany: 29 votes)

Formalities

Legal competence:	Art. 157 (3) TFEU (Professional gender equality)
Form of legislative competence:	Shared competence (Art. 4 (2) TFEU)
Legislative procedure:	Art. 294 TFEU (ordinary legislative procedure)

ASSESSMENT

Economic Impact Assessment

There is no objection to increasing the presence of women on boards. Gender equality corresponds to the common conception of society in all Member States, which, amongst other things, is characterised by basic values and fundamental rights.

The EU has already provided for comprehensive gender equality in its Directive on equal treatment in employment and occupation (2000/78/EC), the Directive on equal treatment in the access to and supply of goods and services (2004/113/EC) and the Directive on equal treatment in matters of employment and occupation (2006/54/EC).

The Commission's proposal for a gender quota is mere political ideology. A quota for women, whether on executive or supervisory boards, restricts entrepreneurial freedom for no objective reason.

More importantly, such a quota – contrary to what the Commission claims – does not generate any “economic added value” for companies in the form of competitive advantages, higher profits or more growth. Firstly, such an added value for companies with a high share of female board members cannot be proved empirically, at least not on a broad basis. The Commission even admits this itself – thereby contradicting itself – with the statement that the lack of market incentives is the reason for the lower number of women on boards. **Secondly, competitive pressure and the companies' pursuit of profit lead not only to selecting the most suitable employees but also the most suitable executives.**

Accordingly, the composition of executive and supervisory boards is based on profit-oriented management. The Commission admits this implicitly, for it argues that Member States which choose to forgo the introduction of a national gender quota for women are doing so due their having identified a risk for national companies. The fact is that if – and to what extent – a higher percentage of women on boards created economic added value, companies would implement it voluntarily in order to gain a competitive edge and to increase their profits, so a statutory provision would not be necessary.

And should individual companies decide not to profit from this added value, then that is their business; it is not the task of politicians to force companies to exploit profit potential.

By prescribing a gender quota, the efficiency of supervisory board appointments basically decreases. For by prescribing gender, a criterion is defined for the recruiting procedure that is simply not decisive for the question of who is best qualified. On the contrary, **it is at the expense of the qualifications that the unconditional requirement of a 40% quota by 2020 solves the possible target conflict between supervisory board qualifications and the share of women on these boards, for the quota must be complied with even if not enough women with the necessary qualifications are available.** Companies which do not comply with the quota due to this problem must also be sanctioned.

The aim that the Commission has set itself to prevent competition between Member States with its labour law requirements misjudges the very nature of competition: effective solutions for existing problems are found and established. If the better solution were statutorily prescribed requirements for gender balance in executive boards and supervisory boards, this would be reflected by higher productivity in French companies, which have a quota, than in German companies, which do not; however, the reality proves otherwise. Therefore, the following holds true: the State is not the better entrepreneur.

The prescribed executive board self-commitment is less detrimental, for although non-compliance is sanctioned, it is measured against the benchmark it sets itself. However, for the aforementioned reasons, from an ordoliberal point of view, it is wrong to prescribe self-commitment to companies.

The companies to which the Directive applies are being burdened with additional administrative costs and data protection problems. The reversal of the burden of proof leads to the situation whereby a company must deliver the personal data of a successful applicant. The delivery of personal data to third parties infringes the principle of confidentiality and the protection of personal data. With every new bureaucratic regulation that does not deliver economic added value, the quality of Europe as a business location is diminished. Even though the proposed Regulation on the gender quota for women will not be of relevance to where a company has its headquarters, it is however a clear signal for the increased restriction of entrepreneurial freedom in the European Union.

Legal Assessment

Competence

The EU does not have the competence for this project. Art. 157 (3) TFEU provides – contrary to what the Commission alleges – **no legal basis** for the introduction of a gender quota. Although the proposal constitutes a positive measure that benefit the under-represented gender, such measures are explicitly subject to the Member States. This follows from the unambiguous wording of Art. 157 (4) TFEU (see cep Standpunkt, in German only).

Subsidiarity

The Proposal represents a massive infringement of the principle of subsidiarity. The Commission's justification for its alleged compatibility with the principle of subsidiarity are without exception construed and serve merely as an excuse.

Firstly, **the fact that a Member State has not introduced a quota for women does not provide a legal basis for EU action.** It is contradictory to the principle of national sovereignty if political objectives can no longer be pursued according to the approaches chosen by each Member State. Just because the Commission does not like national approaches, it cannot and must not simply turn to full harmonisation. To assume that it can undermines the principle of subsidiarity.

Secondly, **the Commission's allegation that the intention of the European Treaties is not to support competition between Member States through national labour laws is completely unfounded.** If such a thesis were correct, then labour law would have to be completely harmonised, which is something the Member States, as governors of the Treaties, have always categorically refused to do.

Thirdly, **the allegation that the internal market would be impeded without a quota for women is wrong.** There would only be a danger to the freedom of services if a Member State were to set compliance with its national gender quota as a requirement for public procurement, as then companies from countries that do not have a gender quota for women could be excluded. However, such infringements are currently unknown. But even if they did exist, the Commission could not use them as an opportunity for full harmonisation. Instead, it would have to make sure they were avoided, and be it by way of infringement proceedings before the ECJ.

There is also no risk to the freedom of establishment, for companies are still free to choose in which Member State they wish to establish a company. One of many criteria for choosing might be the existence or non-existence of a statutory gender quota, but this does not justify a common EU rule. For all economic differences in national legal systems play a role in the criteria for making decisions about location. If all such differences are deemed an impediment to the freedom of establishment, the diverging national legal systems would have to be completely eliminated as a logical consequence.

Proportionality

According to the Directive on the principle of equal opportunities and the equal treatment of men and women in matters of employment and occupation (RL 2006/54/EC), it is already the case that every unsuccessful applicant can call for a judicial examination of whether a rejection was based on gender discrimination. Thus the EU has already taken sufficient precautions to ensure that sexual discrimination does not occur in relation to the labour market. Any further regulations are not necessary.

Compatibility with EU Law

The quota constitutes an unjustified degree of intervention in entrepreneurial Freedom (Art. 16 ChFR) and the property law (Art. 17 ChFR) of stakeholders. **For it can only be achieved if firstly, by 2020 almost all resigning supervisory board members are replaced by women, and secondly, if expiring contracts are not extended even if the supervisory board concerned has proved its worth.** Thus stakeholders are extremely restricted in the appointment of their control boards.

Compatibility with German Law

The quota represents an unjustified degree of intervention in the property law (Art. 14 GG) of stakeholders of German stock companies with more than 500 employees. For in Germany their property right is already very restricted through the equal representation in supervisory boards of shareholders and employees (§ 7 MitbestG, § 4 DrittelbG). A gender quota for women would further burden shareholders in a double sense: firstly, they would no longer be free to name and select the supervisory board members as they wished; secondly, they would be held liable if the employees infringed compliance with the quota – that is if the German legislator even obliges employees to comply with the quota at all. If this were not the case, the shareholders would have to ensure compliance with the quota alone through their share on the supervisory board. This would mean having to fill 80% at a ½-½ parity (§ 7 MitbestG) and/or 60% at a ⅔-⅓ parity (§ 4 DrittelbG) of their seats with women.

Conclusion

The Proposal for a gender quota for women is pure political ideology. Such a quota restricts entrepreneurial freedom for no objective reason. In particular, the quota does not provide any "economic added value" in the form of competitive advantages, higher profits or growth. Firstly, added value cannot be proved empirically; secondly, competitive pressure and the pursuit of profit lead to the selection of the most suitable executives. It is only at the expense of qualifications that the 40% quota requirement for 2020 resolves the possible target conflict between qualifications and the of share women sitting on the supervisory board. The EU does not have the competence for this project and infringes the principle of subsidiarity massively. The fact that a Member State has not introduced a gender quota does not constitute a legal basis for EU action. The allegation that the European Treaties do not foresee competition between national labour systems is wholly unfounded. The allegation that the internal market is impeded without a gender quota is wrong. The quota interferes with fundamental laws without any justification.