

Women on Corporate Boards of Public Listed Companies - a UK and EU Gender Diversity Conundrum

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1. Introduction

The case for gender diversity on corporate boards

Gender equality between men and women is a fundamental principle of European Union (EU) law and United Kingdom (UK) law. At EU level, gender equality is enshrined in treaties,¹ directives² and other protocols and declarations, such as the Charter of Fundamental Rights of the European Union (CFR).³ In the UK, gender equality is mainly embedded in the Equality Act 2010 (EA 2010)⁴ as a key principle of UK social policy. For example, the EA 2010 contains provisions on positive action as a

¹ See for example, European Union, Treaty on European Union, (Consolidated version), (1992), OJ C 325/5, Articles 2 and 3(3); European Union, Treaty on the Functioning of the European Union (Consolidated Version), (2008), OJ C 115/47, Article 157 (3) and (4). (Hereafter TFEU).

² Such as Directive 2004/113/EC *implementing the principle of equal treatment between men and women in the access to and supply of goods and services* [2004] OJ L 373/37; Directive 2006/54/EC of the European Parliament and the Council of 5 July 2006 on the *implementation of the principles of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast)* [2006] OJ L 204/23 (Equal Treatment Directive).

³ European Union, *Charter of Fundamental Rights of the European Union*, 18 December 2000, OJ C 364/1, Articles 21(1) and 23 (Hereafter CFR).

⁴ Equality Act 2010: <http://www.legislation.gov.uk/ukpga/2010/15/contents>.

measure of protecting people with certain characteristics that are disadvantaged or proportionately under-represented in various categories.⁵ The representation of women on corporate boards of public listed companies as a form of gender equality is one such category that positive action measures undertaken by both the UK and the EU seek to address.

For decades, it has been common practice in the EU and the UK that the boards of large public listed corporations are homogenously occupied by white, middle-class, middle-aged male directors with none or fewer female directors.⁶ The UK and the EU have both acknowledged that women are under-represented in higher executives and director roles on the boards of public listed companies.⁷ This level of homogeneity has created a degree of imbalance on corporate boards that has, arguably, contributed to boardroom stagnation, especially, in the expression of new ideas on the board that would enhance corporate performance.⁸ The two major factors influencing best performance on corporate boards have been identified as boardroom composition and power balance.⁹

⁵ Sections 158 and 159 EA 2010 on positive action measures. See on this: Howard, E. Affirmative action in the UK and South Africa. In: Baez, N; Dominguez Redondo, E. (Eds.) *The existence and efficacy of affirmative action measures in UK, South Africa, India, China, Latin America and Brazil*. Joacaba; Editora UNOESC, 2018. P.185 - 214; and the Chapter by Howard in this book.

⁶ Norburn, D. The CEO: a breed apart. 10 *Strategic Management Journal* (1989) P. 1 – 15; Westpal, J; Zajac, E. Who shall govern? CEO power, demographic similarities and director selection. 40 *Administrative Science Quarterly* (1995) P. 60 – 83.

⁷ Van Hoot, F. Key developments at national level in legislation, case law, and policy. 1 *European Equality Law Review* (2018) P. 60 – 107.

⁸ Ragins, B.R; Townsend, B; Mattis, M. Gender gap in the executive suite: CEOs and female executive report on breaking the glass ceiling. 12, 1 *Academy of Management Executives* (1998) P. 28 – 42.

It has been argued that the presence of female directors on corporate boards improves corporate performance as women employees exhibit excellent ethical and well informed market knowledge and views.¹⁰ Women tend to pay greater attention to matters such as preparing for meetings more conscientiously and they are willing to ask awkward questions where needed rather than having decisions nodded through.¹¹ Therefore, having female directors on corporate boards presents an additional voice in the boardroom. This additional voice presents different perspectives to boardroom debates and decision- making.¹² By having a broad range of directors from different backgrounds and experiences, better decision making on corporate issues is achieved.¹³

However, the presence of female directors on corporate boards of publicly listed companies in the UK and the EU has recently been seen as an opportunity to boost corporate reputation rather than as a policy towards gender equality and diversity. Corporate investors have shown preference to invest in gender-diverse corporations rather than in male-dominated corporations.¹⁴ In essence, the presence of women in higher positions in a company has been seen as a tool to convince other

⁹ Penrose, E. *The theory of the growth of the firm*. Oxford: Basil Blackwell, 1959.

¹⁰ Fondas, N; Salsalos, S. A different voice in the boardroom: how the presence of women directors affects board influence over management. 12 *Global Focus* (2000) P. 13 – 22.

¹¹ Huse, M; Solberg, A. G. Gender-related boardroom dynamics: how Scandinavian women make and can make contributions on corporate boards. 21,2 *Women in Management Review* (2006) P. 113 – 130.

¹² Zelechowski D; Bilimona, D. Characteristics of women and men corporate inside directors in the US. 12, 3 *Corporate Governance: An International Review* (2004) P. 337, 342.

¹³ Huse; Solberg (supra note 11).

¹⁴ Maznevski, M.L. Understanding our differences: performance in decision-making groups with diverse members. 47, 5 *Human Relations* (1994) P. 531 – 552.

women in lower positions that their employer is conforming to equality and diversity recruitment practices rather than a corporate governance route to equality and diversity.¹⁵ Nevertheless, the motive is less important as long as it leads to gender diversity.

Despite the benefits or advantages of gender diversity on corporate boards in the UK and the EU, recruitment of female directors onto corporate boards has lacked pace for years. This has mainly been caused by orthodox recruitment practices by senior directors due to lack of confidence in female employees to fully execute the roles of board directors if appointed.¹⁶ Very often, these approaches would infer that there are not enough female employees to meet the criteria for promotion to senior executive and director roles.¹⁷ This in turn constricts female employees' opportunities to acquire corporate and boardroom skills and experience in preparation for promotion to senior executive or nonexecutive director roles. Nevertheless, both the EU and the UK have taken initiatives to address gender diversity concerns, especially on the boards of publicly listed companies.

2. Initiatives taken to improve gender diversity

The European Union

The proposed EU Directive on improving gender balance on corporate boards

On 14 November 2012, the EU Commission tabled a proposal for a Directive on improving gender balance among non-executive directors of companies listed on stock exchanges and related

¹⁵ Charan, R. *Boards at work: how corporate boards create competitive advantage*. San Francisco: Wiley, 1998.

¹⁶ Ragins. *et al.* (supra note 8).

¹⁷ R. J. Burke, R.J. Women on corporate boards: a needed resource. 16, 9 *Journal of Business Ethics* (1997) P. 909 – 915.

measures.¹⁸ The EU Commission is empowered by the TFEU to adopt measures to ensure the application of the principles of equal opportunities and equal treatment of men and women on matters of employment and occupation.¹⁹

Therefore, the proposed Directive provides that:

Member States shall ensure that listed companies in whose boards members of the under-represented sex holds less than 40 percent of non-executive director positions make the appointments to those positions on the basis of a comparative analysis of the qualifications of each candidate, by applying pre-established, clear, neutrally formulated and unambiguous criteria, in order to attain the said percentage at the latest by 1 January 2020...²⁰

To ensure that the recommendation in article 4(1) is implemented smoothly in Member States, upon adoption, the proposed Directive further mandates Member States to ensure that in the selection of non-executive directors, priority is given to candidates of the under-represented sex if that candidate is 'equally qualified' as the candidate of the other sex in terms of suitability, competence and professional performance.²¹ In addition, the proposed Directive provides that companies within Member States that fail to achieve the 40 percent objective by 2020 must provide satisfactory

¹⁸ European Commission, Proposal of 14 November 2012 for a directive on improving the gender balance among non-executive directors of companies listed on stock exchanges and other related measures. COM(2012) 614 final. (Hereafter Proposed Directive).

¹⁹ TFEU, article 157(3).

²⁰ Proposed Directive (supra note 18) article 4(1).

²¹ Ibid. article 4(3).

explanations for the failure or non-compliance with demonstrable measures put in place to ensure compliance in the future.²² Failure to do so would lead to sanctions being imposed.²³

The proposed Directive attained support of the European Parliament via a resolution issued on 20 November 2014 with minor amendment which was to ensure that appointments of non-executive directors were made from a gender diverse selection pool.²⁴ However, following this resolution, not much progress was achieved in relation to the adoption of the proposed Directive as there was no consensus reached within Member States on approaches on how to transpose the binding nature of the Directive within Member States.

On 18 – 19 June 2015, the proposed Directive was the subject of a debate by the Council of the EU under the theme of employment and social policy and the Council took note of the progress reports on women on company boards across the EU.²⁵ The Council further reiterated the need for Member States to oblige companies to introduce procedural rules on selection and appointment of non-executive board members to meet the 40 percent target by 2020. Following this debate, the proposed Directive was amended during the Luxembourg presidency between 1 July 2015 – 31

²² Ibid. article 5(3).

²³ Ibid. article 6.

²⁴ European Parliament, Legislative Resolution of 20 November 2013 on the proposal for a directive on improving the gender balance among non-executive directors of companies listed on stock exchanges and other related measures, 2012/0299(COD).

²⁵ European Commission, Press release, Outcome of the Council Meeting on 18 and 19 June 2015, 10088/15: <https://www.consilium.europa.eu/en/meetings/epsco/2015/06/18> (accessed 10 September 2019).

December 2015.²⁶ The rationale for the amendment was the need to incorporate a ‘flexibility’ clause which would allow Member States to choose their preferred measures for implementing the proposed Directive. However, despite these amendments, the proposed Directive did not progress to the next stage as the Council was unable to reach a consensus on the way forward.

The Council further discussed the proposed Directive on 7 December 2015 and again, compromise could not be reached.²⁷ Nevertheless, the Commission continued to keep the subject of gender diversity and the proposed Directive on its agenda. At the Employment, Social policy, Health and Consumer Affairs Council (EPSCO) meeting on 15 June 2017, the then commissioner for Employment, Social Affairs, Skills and Labour Mobility, Marianne Thyssen, further reiterated her support for the proposed Directive. She said that it was a good example of subsidiarity-friendly legislation capable of bridging the gender gap within Member States and she hoped that there would be a break-through with the Directive.²⁸

²⁶ Council of the European Union, Presidency report from 30 November 2015, 14343/15: <http://data.consilium.europa.eu/doc/document/ST-14343-2015-INIT/en/pdf> (accessed 29 August 2019).

²⁷ Council of the European Union, Outcome of the Council Meeting on 7 December 2015, 14968/15: <https://www.consilium.europa.eu/en/meetings/epsco/2015/12/07/> (accessed 12 September 2019).

²⁸ Council of the European Union, Outcome of the Council Meeting 15 and 16 2017, 10376/17: <https://www.consilium.europa.eu/media/22163/st10376en17.pdf> (accessed 12 September 2019).

On 31 January 2019, the European Parliament held a debate on the proposed Directive during the plenary session and called again for it to be adopted.²⁹ However, despite these debates and numerous calls for its adoption, this has not happened.

The United Kingdom

As the EU was struggling to find consensus within its Member States for the adoption of the proposed Directive, the UK was also taking initiatives to improve gender diversity on the Financial Trading Stock Exchange (FTSE) listed companies. For example, through legislation, the UK government enacted the Equality Act 2010 as a legislative strategy to curb all forms of discrimination on the grounds of gender or sex among other grounds.³⁰

The UK government has also taken initiatives to commission independent enquiries through the appointment of professional personnel and agencies to undertake reviews of operational government policies and strategies in relation to gender diversity and to make recommendations for improvement where needed. The Davies Review,³¹ the Higgs Review,³² the Hampton–Alexander

²⁹ European Parliament, Council and the Commission, Debate on gender on company boards, Plenary session, 30 – 31 January 2019: https://multimedia.europarl.europa.eu/en/gender-balance-joint-debate_l167193-V_v (accessed 18 September 2019).

³⁰ Particularly, see EA 2010 (supra note 4) and Howard (supra note 5).

³¹ Lord Davies, *Women on boards – the Davies report (2011)*: <<https://ftsewomenleaders.com/wp-content/uploads/2015/08/women-on-boards-review.pdf>> (accessed 10 August 2019). (Davies Report, 2011).

³² Higgs, D. *Review of the role and effectiveness of non-executive directors*, CMND 809438, (London, DTI 2003): <https://web.archive.org/web/20080726222758/http://www.berr.gov.uk/files/file23012.pdf> (accessed 30 September 2019). (Higgs Review).

Review³³ and the Charlotte Sweeney Review are some of these independent reviews commissioned by the UK government to this effect. These are briefly analysed below.

The Davies Review 2011

In its attempt to make UK listed companies improve gender diversity on their boards, the UK government appointed Lord Mervyn Davies in 2011 to review its agenda on improving the appointment of women on corporate boards and to make recommendations for improvements and this became known as the Davies Review.³⁴ Following the review, Lord Davies and his team produced a report which identified and presented 10 business-led recommendations to improve gender diversity on the boards of FTSE 350³⁵ companies.³⁶ This was through the introduction of voluntary and inclusive approaches for business leaders and stakeholders to adopt corporate policies and strategies to improve gender balance on their boards. The recommendations sought to improve the balance of perspectives in corporate recruitment by ensuring that corporate recruitment practices were based on skills, experience and performance which would encourage women to play a role at the very top of corporate management.

³³ Hampton-Alexander review, *FTSE women leaders – improving gender balance in FTSE leadership*, (2016): <https://ftsewomenleaders.com/> (accessed 28 August 2019).(Hampton Alexander review 2016).

³⁴ Davies report (supra note 31).

³⁵ FTSE 350 refers to a market index by the Financial Times Stock Exchange (FTSE) incorporating the top 350 public listed companies in the UK. It is a combination of the top largest 100 companies (FTSE100) and the second largest top 250 companies (FTSE 250).

³⁶ Davies report (supra note 31) Summary of recommendations. P. 5.

Therefore, supported by the Department for Business, Energy and Industrial Strategy and, partly, by Cranfield University, the Davies Review team tracked progress on the recommendations of the original report through annual reviews highlighting improvements and setting key targets for subsequent years. For example in the 2015 review, the report identified that the percentage of women appointed to the boards of FTSE 100 companies had improved from 12 percent in 2011 to 25 percent in 2015. FTSE 250 boards had witnessed an increase from 9 percent in 2011 to 22 percent in 2015.³⁷ However, although some improvement in the appointment of female directors on corporate boards had been witnessed, the rate of appointment and progress was relatively slow and the conclusion was that it could take the UK longer than the originally anticipated 70 years to achieve gender diversity on corporate boards.³⁸

The Higgs Review

Alongside the Davies Review, the UK government appointed Derek Higgs in April 2002 to undertake an independent review of the role and effectiveness of non-executive directors in the UK.³⁹ The Review made several recommendations one of which was the need for tighter corporate governance (including the review of the combined corporate governance code) as a gateway to enhancing gender diversity on UK corporate boards.⁴⁰

³⁷ Davies review, *Women on boards – five-year summary*, (15 October 2015): <https://ftsewomenleaders.com/wp-content/uploads/2015/11/Davies-Review-Five-year-Summary-Oct-2015.pdf> (accessed 30 August 2019).

³⁸ Davies report (supra note 31) Executive summary. P. 3.

³⁹ Higgs review (supra note 32).

⁴⁰ Ibid. Introduction, para. 1.2 and Annex A .

However, a key recommendation was for the establishment of nomination committees on corporate boards to improve the nomination and recruitment processes.⁴¹ This committee should be chaired by an independent non-executive director and companies should establish a wider pool of talent from which non-executive directors are appointed.⁴² The nomination committee would evaluate the balance of skills, knowledge and experiences on the board or prepare the description of the role and competences required for a particular appointment.⁴³ That would lead to greater gender diversity on corporate boards.

The Charlotte Sweeney Review

In 2014, the Department for Business, Innovation and Skills (BIS) made a strategic response to the recommendations made by the Davies Report in 2011 for UK listed companies to improve their recruitment processes. This was the appointment of Charlotte Sweeney, a Human Resource expert on equality and diversity, to conduct a review of the voluntary code of conduct which had been drawn up by executive search firms in 2011 as a strategy for supporting FTSE 350 companies to promote good recruitment and selection practices.⁴⁴

The Sweeney review looked into the voluntary code of conduct, its impact on diversity and ways to improve or strengthen the code. However, the review reported that while some executive search

⁴¹ Ibid. Summary of recommendations, para.10.9 and Annex F.

⁴² Ibid.

⁴³ Ibid. P. 40, para,10.9.

⁴⁴ BIS, *Women on boards: voluntary code for executive search firms – taking the next steps*, (BIS/14/640):

<https://www.gov.uk/government/publications/women-on-boards-voluntary-code-for-executive-search-firms>

(accessed 01 September 2019). (Sweeney Review).

firms had taken commitment to the provisions of the code very seriously, other search firms took the code as a profiling opportunity.⁴⁵ Only 25 percent of the voluntary signatories to the code were actively following and promoting the code and only 12 percent shared their impact information on the representation of women on the boards and their lists for securing an appointment.⁴⁶

The Hampton–Alexander Review

To further ‘pontificate’ the work done by the Davies Review and Higgs Review, the UK government appointed Sir Philip Hampton and the late Dame Helen Alexander in 2016 to chair an independent review into women on company boards and leadership positions below the board. This review became known as the ‘Hampton-Alexander Review’.⁴⁷ The main aim of the review was to ensure that talented women in UK FTSE listed companies’ top management were recognised and promoted to top board positions. The review also sought to increase female representation on FTSE boards, especially, women in senior executive positions; and, recommended that FTSE 100 companies aim to achieve a third of all important senior leadership roles below the boards occupied by women by year 2020.⁴⁸

The focus was to ensure that more women were appointed to the roles of chair, executive director and senior executive director.⁴⁹ All chief executive officers of FTSE 350 companies were tasked to take initiatives to improve the under-representation of women on layers below the boards which

⁴⁵ Ibid. P. 4.

⁴⁶ Ibid. P. 4–5.

⁴⁷ Hampton-Alexander review 2016 (supra note 33).

⁴⁸ Ibid. P. 10.

⁴⁹ Ibid. recommendation 1.1 and 1.2.

directly report to the executive committee.⁵⁰ In addition, FTSE 350 companies were tasked to voluntarily publish details of the number of women on their executive committees and those that report directly to the executive committees on an annual basis to improve transparency.⁵¹

This would ensure that institutional investors have a clear process in place for evaluating disclosures and progress as a policy on gender balance.⁵²

The review also recommended that executive search firms increase the support to FTSE 350 companies by ensuring that they consider extending the voluntary code of conduct to an enhanced code of conduct to include executive committees and those that report directly to executive committees.⁵³

However, in its 3rd annual review, in November 2018,⁵⁴ the report acknowledged that although there had been significant achievements in terms of increased female representation on boards, the intended targets were yet to be reached. The number of women on FTSE 100 boards had exceeded 30 percent for the first time since 2016 but was short of the 33 percent target.⁵⁵ Women on FTSE 100 executive committees were recorded at only 21 percent. The review reported a notable decline

⁵⁰ Ibid. recommendation 2.

⁵¹ Ibid. recommendation 2.4

⁵² Ibid. recommendation 4.2.

⁵³ Ibid. recommendation 5.2.

⁵⁴ Hampton-Alexander Review, *FTSE women leaders – improving gender balance in FTSE leadership*, (16 November 2018): <https://ftsewomenleaders.com/wp-content/uploads/2018/11/HA-Review-Report-2018.pdf> (accessed 9 September 2019).

⁵⁵ Ibid. P.5.

in the appointment of women to chair roles and CEO roles. Despite an ever increasing pool of talented women with substantial board experience, only 22 female chairs and 12 female CEO roles were recorded in FTSE 350 companies.⁵⁶

In addition, the review reported that board homogeneity was still a concern as there were still 74 FTSE 350 companies that were male dominated with only 1 woman on the board and 5 FTSE 350 with all male boards. Therefore, even if FTSE 350 companies were able to add one female director on their boards by the end of 2019, this would push FTSE 350 companies to achieving only 33 percent and thus fall short of the 40 percent target by 2020.

In its latest report released in November 2019, the Hampton – Alexander Review 2019⁵⁷ reported that FTSE 350 companies have not made significant improvement in the appointment of women on their executive committees to achieve the recommended 33 percent target by 2020. According to this report, around 65 percent of executive committee appointments within FTSE 100 companies went to men, while 73 percent was recorded for FTSE 250 companies.⁵⁸ In addition, 44 executive committees of FTSE 350 companies are still occupied by men. Overall, 175 companies are well short of the 33 percent target.⁵⁹

3. Gender diversity – policy and procedural stagnation

⁵⁶ Ibid.

⁵⁷ Hampton-Alexander, *FTSE women leaders – improving gender balance in FTSE leadership*, (20 November 2019): <https://ftsewomenleaders.com/wp-content/uploads/2019/11/HA-Review-Report-2019.pdf> (accessed 05 December 2019).

⁵⁸ Ibid. Executive Summary. P. 8.

⁵⁹ Ibid. Appendix D.

Why the proposed directive has Stalled

Although the subject of gender diversity on corporate boards has been on the EU's agenda for years, the proposed Directive remains on the discussion table. Member States across the EU have yet to find consensus on the binding nature of the Directive and its implementation. Some of the factors that are inhibiting the adoption of the proposed Directive are analysed below.

The principle of subsidiarity

The aim of the proposed Directive is clear. It aims to ensure a balanced representation of men and women on corporate boards of listed companies across the EU as a model of its commitment to gender diversity. However, some Member States do not consider the proposed Directive as the best tool for solving gender diversity concerns on corporate boards in their national jurisdictions. Some Member States do not support the idea that the proposed Directive should be adopted with binding measures at EU level as currently proposed. Some Member States prefer their national measures for advancing gender diversity imperatives on corporate boards rather than legislation at EU level.⁶⁰

For example, the UK, the Netherlands, Poland and Sweden, in their opinions to the EU Commission's proposal for this Directive reasoned that the proposed Directive may infringe the principle of subsidiarity.⁶¹ This principle provides that the EU cannot take actions or interfere with Member States' implementation of EU law measures or policies unless such action or interference, if taken, is

⁶⁰ Leszczynska, M. Mandatory quotas for women on boards of directors in the European Union: harmful or good for company performance? 19 *European Business Organizations Law Review* (2018) P. 35 – 61.

⁶¹ Teasdale, N; Fagan, C; Shepherd, C. Women's representation on the boards of UK listed companies. In: Fagan, C; Gonzalez Menendez, M; Gomez Anson, M. (eds) *Women on corporate boards and in top management*, Basingstoke: Palgrave MacMillan, 2012. P. 128 – 149.

more effective than that taken by the Member States at national or local level.⁶² This is to ensure that actions taken at EU level are justifiable in light of those available at national or local level. The UK has on several occasions been in favour of a self-regulatory approach as the best way to mandating FTSE listed companies to disclose the gender composition on their boards.⁶³

It is envisaged that through the principle of subsidiarity, Member States would be able to devise and implement measures at national level to deal with the issue of gender balance on corporate boards rather than being bound by the 40 percent target proposed in the Directive. For example, France, Italy and Germany have recently adopted measures at national level for imposing mandatory quotas to be attained by publicly listed companies with corresponding sanctions.⁶⁴ Therefore, the issue of subsidiarity is still a major concern amongst EU Member States and affects their stance on the adoption of the proposed Directive.

The Principle of Proportionality

Another concern within EU Member States in relation to the proposed Directive lies in the principle of proportionality within the functioning framework of the EU. The principle of proportionality states that any policy measure proposed or passed needs to be suitable or necessary to achieve its objectives without infringing other EU treaties or any rule of law already established.⁶⁵ Because the proposed Directive is recommending a mandatory quota of 40 percent on corporate boards,

⁶² TFEU, Art. 5.

⁶³ Teasdale *et al.* (supra note 61) P. 128 – 149.

⁶⁴ Van Hoot (supra note 7).

⁶⁵ Rose-Ackerman, S; Egidy, S; Fowkes, J. *Due process of law making: the United States, South Africa, Germany and the European Union*. 1st edn, New York: Cambridge University Press. 2015. P. 220.

compliance with, or implementation of this recommendation may infringe shareholders' or companies' rights and interests already established by the rule of law in respective Member States.

The proportionality principle *stricto sensu*⁶⁶ applicable under EU law requires assessment of burdens that may impact individual or stakeholder interests in the furtherance of the policy measures. The concern might be that, trying to implement the 40 percent quota on corporate boards of EU listed companies might adversely impact the functioning or running of these companies, yet one of the objectives of the proposed Directive is to improve corporate governance. From this perspective, the proportionality test would require weighing up of competing stakeholder interests (including the companies' interests) against those that the proposed Directive is trying to achieve. If the proposed Directive presents excessive burdens to the parties disproportionate to those of the proposed Directive, it may be challenged.⁶⁷

Corporate Theory Debates

Corporate theory dictates that one of the key factors that drive a company's substratum⁶⁸ is the ability to operate successfully, make profits and produce a positive return to shareholders.⁶⁹ This is

⁶⁶ Craig, P. *EU administrative Law*. 2nd edn, Oxford: Oxford University Press. 2012. P. 591 – 592.

⁶⁷ See further on this point, Protocol (No.2) on the application of the principles of subsidiarity and proportionality, Article 5: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12016E/PRO/02> (accessed 24 September 2019).

⁶⁸ A Company's substratum refers to the reasons, the objectives or the foundation upon which the company was formed.

⁶⁹ Baysinger, B; Butler, H. The role of corporate law in the theory of the firm. (1985) 28 *Journal of Law and Economics* (1985) P. 179.

arguably the main concern to the corporate board rather than its composition or whether, or not, there is a degree of diversity on its board. A company is seen as 'nexus of contracts' amongst shareholders and extant stakeholders such as suppliers, employees, the state, et cetera.⁷⁰ This is the contractual theory of corporation which is premised on the notion that a corporation is founded on private contractual undertakings between stakeholders.⁷¹

From this perspective, the role of the state is limited as a company has its own constitution that dictates and directs the company's object clause or substratum, board composition and how internal and external disputes are handled. Moreover, freedom of contract culture dictates that parties to the contract must be allowed to structure and manage their relationships as they desire.⁷² The state may retain supervisory and regulatory powers, and the ability to intervene where necessary as it grants corporations licences to operate. However, corporate decision-making on who to employ and how and where to invest remains a choice of the corporation.⁷³

Therefore, when a state passes legislation, directive or regulation that interferes with the company's corporate structure such as the composition of the board, this could be seen as interfering with a company's freedom of contract as the company as a whole is best suited to decide on who to appoint to the board based on qualification, experience and essential skill set.

Positive Discrimination or Affirmative Action?

⁷⁰ Bratton, W. The 'nexus of contracts' corporation. 74 *Cornell Law Review* (1989) P. 407.

⁷¹ Cheung, S. The contractual nature of the firm. (1983) 26 *Journal of Law and Economics* (1983) P. 1.

⁷² Bratton (supra note 70).

⁷³ Campbell, D. The role of monitoring and morality in company law. 7 *Australian Journal of Corporate Law* (1997) P. 343.

Gender diversity is a societal concern within the EU and any endeavours to address this concern is highly welcome. However, the proposed Directive ought to ensure that it coheres to and respects established fundamental rights within the EU. Member States that have to implement the proposed Directive upon adoption, are also bound by other EU and national legislative obligations, such as rights established under the CFR of the EU under article 51.⁷⁴ Article 51 (1) requires institutions and bodies of the EU and Member States to give due regard to the principle of subsidiarity and to observe and respect rights and principles while implementing EU law.

There are concerns of potential infringement of the rights such as freedom to conduct a business⁷⁵ and the right to property⁷⁶ which have been recognised and upheld by the EU legal system and courts.⁷⁷ The legal obligation requiring listed companies within the EU to give priority to a candidate of the under-represented sex, although equally qualified, during selection and recruitment of non-executive directors on their boards may be seen as an interference with the rights of the male candidate who is not selected and with the rights of the employer company itself. This may be seen as some form of positive discrimination.

Although the EU may support positive discrimination in the form of positive action, a male candidate who is not selected in favour of a female candidate has a right not to be discriminated against on the ground of gender guaranteed under the CFR of the EU.⁷⁸ Therefore, to justify this potential form of

⁷⁴ CFR (supra note 3).

⁷⁵ CFR, article 16.

⁷⁶ CFR, article 17.

⁷⁷ For example see, Case C-236/09 *Test-Achats v Council of Ministers* [2011] ECLI:EU:C:2011:100.

⁷⁸ CFR, articles 21 and 23.

positive discrimination, Member States and their listed companies have to ensure that priority given to a candidate of the under-represented sex is based on a legitimate objective and is proportionate.⁷⁹ Although the proposed Directive recommends that priority should only be given to 'equally qualified' female candidates, this recommendation is indispensable for the balancing of competing objectives, otherwise it may be deemed a form of positive discrimination.

Implementation methodology

Voluntary institutionalism – 'comply or explain' model

The UK and the EU have both taken various initiatives to improve gender diversity on corporate boards of listed companies. However, it may be argued that the approaches through which these initiatives have been implemented across both jurisdictions may not have been rigorous enough to achieve the intended outcomes. Both the UK and the EU employ a voluntary approach to enforcing policy and legislative compliance by institutions.

This voluntary approach can be seen as a 'comply or explain' approach without the coercive element of regulatory enforcement. This approach may be persuasive but not compelling to institutions or companies to adopt recommended initiatives. Therefore, whenever recommended initiatives or targets are not met, these institutions are afforded opportunities to explain their inability to achieve the recommended targets. They are then given more opportunities to try again. The concern is that without the coercive element of the law, a company or an institution may fail to comply with recommended initiatives and this may lead to procedural paralysis in the state's intended policies which renders the soft-law voluntary approach a weaker approach.

⁷⁹ See for example, European Court of Human Rights (Grand Chamber), *Konstantin Markin v Russia*. App. No. 30078/06. Judgment 22 March 2012. Para. 127.

The UK's recommendatory approach to achieving gender diversity on corporate boards is based on the soft-law voluntary approach.⁸⁰ This approach is premised on institutionalism based on the institution theory⁸¹ where initiatives are set as authoritative guidelines by the state to be adopted by institutions or organisations over a period of time.⁸² These initiatives are either normative, coercive or voluntary and can be adopted by institutions or organisations and evolve with other institutional practices, eventually getting institutionalised.⁸³

For example, in the UK, Lord Davies' first report recommended that FTSE 100 listed companies voluntarily aim to achieve 25 percent female directors on their boards by 2015.⁸⁴ This recommendation was swiftly adopted by FTSE 100 companies and the target was met. However, in its 3rd annual review in 2014, the Davies Review recommended that FTSE 350 companies voluntarily achieve a target of 40 percent female directors on their boards by 2020. This recommendation was not favourably adopted by the FTSE 350 companies as, by 2016, the corporate world witnessed the

⁸⁰ Goyal, R; Kakabadse, N; Kakabadse, A. Achieving gender balance on British boards with the soft-law approach: directors' perspective. 18, 1 *Journal of Business Diversity* (2018) P. 29 – 39.

⁸¹ Meyer, J; Rowen, B. Institutionalized organizations: formal structures as myth and ceremony. *American Journal of Sociology* (1977) P. 340 – 363; Meyer, J. Reflections on institutional theories of organizations. In: Greenwood, R; Oliver, C; Lawrence, T.B; Meyer, R.E. (eds) *The Sage handbook of organizational institutionalism*. 2nd edn, London: Sage Publications, 2017. P. 790 – 811.

⁸² Scott, R.W. Institutional theory. 11 *Encyclopaedia of Social Theory* (2004) P. 408 – 414.

⁸³ Terjesen, S; Aguilera, R.V; Lorenz, R. Legislating a woman's seat on the board: institutional factors driving gender quotas for boards of directors. 128, 2 *Journal of Business Ethics* (2015) P. 233 – 251.

⁸⁴ Davies report (supra note 31) Recommendation 1.

lowest appointment rate of female directors on corporate boards since 2011.⁸⁵ Therefore, with the uncertainty within this approach, questions are asked whether the voluntary soft-law approach employed by the UK and the EU is the best approach to remedying gender homogeneity on corporate boards to achieve the gender balance needed.⁸⁶

4. Conclusion - Remedying Gender Homogeneity

The Need for Statutory Intervention

The soft-law approach has led to some improvement in gender diversity on corporate boards in the UK and the EU. For example, in the UK, in the years before 2015, FTSE 100 companies embraced this approach by implementing the recommended target of 33 percent female representation on boards. However, the soft-law voluntary approach has witnessed slow progress towards the attainment of the state recommended 40 percent female representation on boards of FTSE 350 companies to be achieved by 2020.⁸⁷ This slow progress has meant that viable chances of achieving the 40 percent target by 2020 are relative low. It is therefore contented that to boost corporate compliance, the UK government and the EU at large ought to review their implementation approaches and adopt a more regulatory or statutory approach.

⁸⁵ Vinnicombe, S; Sealy, R; Humbert, A.L. The female FTSE board report 2017: women on boards – back on track? Cranfield University Report 2017: <file:///C:/Users/Hamiisijunior1/Downloads/Cranfield%20Female%20FTSE%20report%202017.pdf> (accessed 24 August 2019).

⁸⁶ Terjesen *et al.* (supra note 83).

⁸⁷ Cadman, E. Female UK board appointments hit a five-year low. *Financial Times*, 7 July 2016: <https://www.ft.com/content/4a903bb4-4364-11e6-b22f-79eb4891c97d> (accessed 07 September 2019).

A country's institutional policies and processes are interlinked and influenced by path-dependent initiatives such as statutes and regulations. As law is the most important component of governance, society and its institutions are more influenced by it than by recommendations.⁸⁸ Therefore, institutional factors that may, for example, influence gender diversity on corporate boards, such as improving the gender pay gap,⁸⁹ objective recruitment practices, et cetera, ought to be approached in a more statutory and mandatory approach rather than being voluntary.

Mandatory Regulatory Quotas as a pathway

In its first report, the Davies Report in 2011 deliberated on the possibility of introducing regulatory quotas for UK listed companies to achieve within a certain timeframe as a strategy to improve gender diversity on corporate boards.⁹⁰ However, this possibility was abandoned as only 11 percent of the 2,654 professionals consulted showed interest in the subject of regulatory quotas. Lord Davies and his committee therefore concluded that the introduction of regulatory quotas was not the preferred option as it would lead to tokenism.⁹¹ Other researchers on this topic are of the view that

⁸⁸ Peters, B.G. *Institutional theory, The new institutionalism*. New York: Bloomsbury Publishing 2011.

⁸⁹ According to the Fawcett Society's Gender Pay Gap and Causes briefing for 2019 released in October 2019, the gender pay gap in England, Scotland and Wales has increased. The mean gender pay gap for women in fulltime employment was recorded at 13.1 percent and 16.2 percent for women in part time employment. See: <https://www.fawcettsociety.org.uk/gender-pay-gap-and-causes-briefing-2019> (accessed 04 December 2019).

⁹⁰ Davies Report (supra note 31) P. 18.

⁹¹ Ibid. Foreword. P. 2.

regulatory quotas would render women less competitive in achieving progression on merit.⁹² However, mandatory regulatory quotas is the preferred model favoured by the EU through the proposed Directive although with a binding effect.

It should be noted that the strategy of mandatory regulatory quotas has been instrumental in achieving gender diversity on corporate boards in some EU Member States. For example, in Norway, the government introduced a system of quotas in 2002 for private listed companies to achieve 40 percent female representation on their boards by 2005. While companies were struggling to achieve this target voluntarily, the government passed legislation in 2006 mandating all listed companies to comply and meet the target by 2008. Failure to do so would result in fines or closures, and full compliance was attained by 2009.⁹³

Other countries such as Spain, Finland and Iceland have all followed suit by introducing mandatory regulatory quotas. In 2010, Iceland enacted a law that required all publicly owned companies with more than 50 employees to have 40 percent representation of gender diversity on their boards by 2013.⁹⁴ The actions taken by these countries and the success achieved so far is an indication that a

⁹² Kakabadse, N; Figueira, C; Nicolopoulou, K; Hong Yang, J; Kakabadse, A. Ozgilbin, M. Gender diversity and board performance: women's experiences and perspectives. 54, 2 *Human Resource Management* (2015) P. 265 – 281; Adams M; Borsellino, G. The unspoken reality of diversity on boards. 67, 2 *Governance Directions* (2015) 78 – 81.

⁹³ Matsa, D; Miller, A. A female style in corporate leadership: evidence from quotas. 5, 3 *American Economic Journal: Applied Economics* (2013) P. 136 – 169.

⁹⁴ S. Terjesen, S; Sealey, R. Board gender quotas: exploring ethical tensions from a multi-theoretical perspective. 26, 1 *Business Ethics Quarterly* (2016) P. 23 – 65.

move away from the voluntary ‘comply or explain’ model to a ‘mandatory regulatory quotas model’ may remedy gender imbalance on the boards of public companies in the UK and the EU and may lead to consensus on the adoption of the proposed Directive.

To this effect, the EU ought to consider revising the binding nature of the mandatory quotas in the proposed Directive and perhaps opt for Member States to employ their preferred measures on introducing mandatory quotas to attain the 40 percent prescribed by the Directive. Member States such as Norway, Spain, Finland and Iceland have witnessed some compliance based on national mandatory measures without the binding effect of the EU Directive.

The proposed Directive does not provide for harmonisation of the laws of the Member States on selection, recruitment, and qualification thresholds. It provides that measures employed by Member States to achieve the 40 percent target by 2020 should be ‘pre-established, clear, neutrally formulated and unambiguous’,⁹⁵ which is still a major concern to Member States. Therefore, Member States should have mandatory measures, but they can decide for themselves what these are or what form they are going to take.

Mandatory Non-financial Board Disclosures

Another approach to improving gender diversity on the boards of public companies in the EU and the UK may be in the form of periodic non-financial board disclosures. For example, in the UK, FTSE 350 listed companies should be required to submit annual non-financial reporting on issues such as diversity on board composition, recruitment and selection processes and how female employees / executives have been nurtured into a diverse talent pool from which senior executives and director

⁹⁵ Proposed Directive (supra note 18) at 5 and 19, para. 22.

positions may be filled. This process may improve transparency in corporate governance imperatives which also promotes openness.⁹⁶

It is also envisaged that adopting non-financial period disclosures would remedy the 'comply or explain' inefficiencies by ensuring that attained progress, or lack of it, is openly accessible by regulatory bodies, extant stakeholders, investors, policy makers and lobbyists who would, in return, push for better approaches to gender diversity on corporate boards. Besides transparency and openness, non-financial periodic disclosures would improve the nomination and recruitment processes within UK / EU listed companies.

In the UK, one of the key factors inhibiting gender heterogeneity on corporate boards has been the lack of objectivity in the nomination and recruitment practices employed by UK listed companies which has in turn led to institutional discrimination against women, a position that can be improved through openness.⁹⁷

⁹⁶ Goyal *et al.* (supra note 80).

⁹⁷ Ibid.