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LEGAL INSTRUMENTS FOR GENDER QUOTAS IN MANAGEMENT BOARDS

WORKSHOP

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DIRECTORATE GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT C: CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS

GENDER EQUALITY

Legal Instruments for Gender Quotas in Management Boards

WORKSHOP

Abstract

The note offers an analysis of the existing legal instruments for gender quotas on management boards. It addresses the range of companies that are targeted, the proportion of each gender to be represented, the timetable for implementation, the sanctions that can be applied and the nature of the legal regime within which the laws are developed. The focus is on legal instruments in the Member States of the EU.

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EXECUTIVE SUMMARY

This note offers a review and analysis of the range of existing legal instruments for gender quotas on management boards.

It starts with a summary review of the range of voluntary and legal mechanisms to narrow the gender gap in representation on corporate management boards, before moving on to focus on legal instruments.

It describes and discusses the variations between legal instruments in the companies targeted, the proportion of each gender to be represented, the timetable for implementation, the sanctions utilised, and the legal regime.

The target companies include those that are larger rather than smaller, and those that are state owned and publicly listed on the stock exchange rather than those that are privately owned and not listed.

The minimum proportion of each gender to be represented on the board is most frequently set at 40%, though there is a range from 30% to 40% in the EU.

There is phasing over time of implementation in most cases, with a warning period before the use of sanctions. In addition there is sometimes a phased increase in the minimum proportion of each gender to be represented.

The sanctions utilized vary significantly, including: the de-listing of the company, the annulment of board appointees, fines, loss of priority for government contracts, and a requirement to explain why the company did not comply.

More than one legal regime, or type of law, has been used, including both company law and employment law. There is variation in the extent to which the wider public interest is included within the legal justification for the introduction of the law. There are parallels with the use of quotas to achieve gender balance in political processes linked to elections to Parliamentary seats, where there is a clear public interest in gender balanced representation. The public interest is included in some instances of Company law. If the governance of companies is seen as a matter of the public interest, then there is greater justification for the use of quotas than if corporate boards are seen as a matter of private interests only.

Quotas on corporate boards have been justified on at least three grounds: justice (for women whose merit should earn them a place on boards), improved company performance (the use of the skills of women as well as of men), and democracy (the wider public interest). These three grounds are variously embedded in different legal regimes. The justice ground has more often been invoked through employment law, which allows for positive action when there are equally qualified women and men. Improved company performance and the wider public interest are more often invoked in company law, which determines the characteristics of corporate boards and hence permits quotas.

1. INTRODUCTION

The European Parliament and the European Commission have proposed legislative action to narrow the gender gap in corporate management boards. There is a specific proposal from the Commission to introduce a Directive to improve the gender balance among non-executive directors of companies listed on stock exchanges. This note is intended to inform the ongoing debate on this proposal for a Directive.

There is a wide range of both voluntary and legal mechanisms to narrow the gender gap in representation on management boards. These are briefly reviewed before moving on to focus on legal mechanisms. This draws on the work presented in Walby and Armstrong (2012).

There is a range of forms of legal instruments within the Member States of the EU and other Members of the European Economic Area to narrow the gender gap in the membership of corporate management boards. EU Member States that have enacted laws to introduce gender quotas on corporate management boards include: Austria, Belgium, Denmark, Finland, France, Ireland, Italy, Spain and the Netherlands (Davies, 2011; EC Network, 2011; Pande and Forde, 2011; Visser, 2011; Lombardo, 2012). Outside of the EU there are examples of legislation in: Norway, Iceland, Switzerland and Israel.

This note describes the differences in the type of companies that are targeted by legislation, the minimum proportion of each gender that is to be represented on the board, the timetable and phasing of the implementation of the law, the range of sanctions that can be applied within the legislation and the type of legal regime that is deployed. The note analyses the nature and implications of the different forms of quota legislation. There are further forms of legislative intervention that may have indirect effects on the gender composition of corporate boards, but these are outside the scope of this note.

Section 2.1 introduces the range of voluntary and legal mechanisms. Section 2.2 offers a summary of the different legal mechanisms. Section 2.3 discusses the range of companies targeted, including by size and by ownership. Section 2.4 discusses the proportion of each gender to be represented. Section 2.5 discusses the use of delays and phasing during the implementation period. Section 2.6 discusses the sanctions that have been applied. Section 3 offers a discussion of the nature and implications of the wider legal regime within which the quota laws are located.

2. MAIN ASPECTS OF THE DIFFERENT LEGAL MECHANISMS

2.1 INTRODUCTION

The narrowing of the gender gap on corporate management boards has been addressed in debates on quotas as important for company performance (to ensure that companies access the best talent in order to improve the performance of their businesses) (McKinsey and Company, 2007), for justice (for women whose merit should earn them a place on boards), and for democracy (there is a public interest in good governance and in gender-balance in economic decision-making) (Storvik and Teigen, 2010).

A wide repertoire of both voluntary and legal mechanisms has been used in attempts to narrow the gender gap in representation on management boards (Visser, 2011; Walby and Armstrong, 2012).

Voluntary mechanisms include good practices at different levels: in companies; within an industry sector; and industry as a whole. Leading examples good practices include:

- Training, mentoring and sponsor programmes, which assist in the development of female talent;

- Industry awards and prizes, which encourage and reward innovative practices by companies;

- Data bases of women interested in and qualified to sit on boards, so as to make it easier for companies to find 'Board-ready' women;

- Codes of practice for industry self-regulation, which provide guidelines for good practice, and insist on reporting on progress towards these, on a basis of 'comply or explain'.

Compulsory mechanisms use legislation to enforce compliance. They use some forms of 'quota' for the proportion of the least represented gender on the board.

The effectiveness of both voluntary and legal mechanisms has been widely reviewed (Warth, 2009; Austrian Institute, 2010; Fagan et al, 2011; Hoel, 2008; Storvik and Teigen, 2010; Visser, 2011; Walby and Armstrong, 2012). The conclusion found in most reviews is that while voluntary mechanisms can have measureable effects, these are uneven and slow, and that legal quotas are the most successful mechanism to narrow the gender gap in corporate boards (Walby and Armstrong, 2012). For example, Visser (2011: 10) finds that progress on gender equality in economic decision-making has been 'glacially slow'. The only mechanism that has so far led to women constituting 40% of the membership of corporate boards is that of legal compulsion. Despite years of effort in the form voluntary initiatives in Norway, it was only with the implementation of a law with strong sanctions that rapid progress was achieved (Rasmussen and Huse, 2011). An impact assessment by the European Commission accompanying the recast Capital Requirements Directive reports on changes in board membership in countries implementing gender quotas and comments: 'If the goal is to accelerate the numbers of women on Boards in a short period of time, the figures… tend to show the effectiveness of legislated quotas in increasing the numbers of women directors' (European Commission, 2011c: 158).

The effectiveness of legal compulsion does not necessarily mean that voluntary mechanisms are irrelevant. Most of the countries that have introduced legal compulsion have done so alongside a variety of voluntary measures. The conclusion of the evaluations appears to be that while legal compulsion is the only method that has achieved the presence of women on management boards at the level of 40%, the additional use of voluntary mechanisms can be valuable.

A commonly held view is that voluntary means should be tried first, but that if they fail to narrow the gap, then quotas should be used. For example, in the UK, the Davies (2011: 2) report recommended that: 'Government must reserve the right to introduce more prescriptive alternatives if the recommended business-led approach does not achieve significant change'.

A range of international bodies has considered the issue of quotas. For example, the Council of Europe Parliamentary Assembly (2011), in Resolution 1825 'More women in economic and social decision-making bodies', stated that 'a balanced representation of women and men at all hierarchical levels, including top management, is a matter of justice, respect for human rights and good governance'. The text added that such representation was conducive to productivity and profitability. The Assembly considered quotas positively, believing that the experience of quotas in the political arena could be transposed into the private sector and socio-economic domain. The Resolution included a call for member states to:

7.11. adopt legislation requiring that public and private institutions achieve a minimum 40% representation of women in management and decision-making positions within a clearly defined time frame, and put in place the necessary mechanisms for monitoring the implementation of such legislation;

7.12. introduce the obligation for state-owned and large private companies to guarantee a minimum 40% representation of women on their governing and management boards;

And for member states to encourage companies, firms and associations in the private and voluntary sector to:

8.5. introduce rules aimed at ensuring balanced representation of women and men in top management and decision-making bodies, guaranteeing a minimum 40% representation of women on governing and supervisory boards.

2.2 LEGAL INSTRUMENTS (QUOTAS) TO NARROW THE GENDER GAP IN CORPORATE MANAGEMENT BOARDS IN EU MEMBER STATES

Country (Year introduced)	Companies targeted	Proportion of minority gender to be represented	Timetable for implementation	Sanctions for non-compliance
Austria (2011)	Companies owned 50%+ by state.	2 phases: 25% 35%	2 phases: 2013 2018	No sanctions.
Belgium (2011)	Phased timing by company legal status: State-owned companies Listed companies Small and medium sized listed companies; companies with less than 50% shares listed.	1/3	Phased timing by company legal status: 2012 2016 2018	Temporary loss of financial and non-financial benefits by board members.

Denmark (2000)	State-owned companies.	30%	Immediate	
Finland (2004)	State-owned companies.	40%	2005	
France (2011)	Listed companies; companies with 500+ employees or turnover/asset of €50m+.	2 phases: 20% 40%	2 phases: 2013 2016	Annulment of board appointments.
Ireland (2004)	State-owned companies.	40%	No deadline	
Italy (2011)	Listed companies; companies with public participation and state-ownership.	2 phases: 20% 33%	2 phases: 2012 2015	Admonishment by regulatory body (Consob); fine; annulment of board.
Netherlands (2010)	All companies (regardless of listing, ownership, private/public) with 250+ employees (or turnover criteria).	30% in boards and senior management	2016	No sanctions in law. Comply or explain in annual report and publish action plan to address.
Spain (2007)	Public limited companies with 250+ employees.	40%	2015	No penalties; incentive: potential priority status for government contracts.

Sources[1]

2.3 COMPANIES TARGETED

In most cases there are limitations on the type of company targeted by the legislation. There are two main variations: the size of the company; and the type of ownership of the company.

2.3.1 The size of the company.

[1] Davies, Lord (2011), *Women on Boards.* Pp 22-3; European Commission's Network to Promote Women in Decision-making in Politics and the Economy (2011), 'The Quota-instrument: Different approaches across Europe. Working Paper'. Annex 2; Lombardo, E. (2012), 'Gender quotas in corporate boards: Italy and Spain'. Note for research team; Pande, R. and Ford, D. (2011), 'Gender Quotas and Female Leadership'. World Development Report 2012, Gender Equality and Development, Background Paper. World Bank. Table 3; Visser, M. (2011), 'Advancing gender equality in economic decision-making', European Conference on *Equality between Women and Men* Brussels, September 19-20, 2011. Annex 2.

In some countries, small, or small and medium sized, firms are exempted from the legislation. This is the case in: Belgium (small and medium sized), France (less than 500 employees; turnover/asset of less than €50m), Spain (less than 250 employees), and the Netherlands (less than 250 employees).

2.3.2 The ownership of the company.

In some countries, private companies are exempted and the legislation applies only to state owned companies. There are variations as to where the boundary is drawn in firms that are part-state owned. There are variations as to whether the legislation applies only to those private companies that are publicly listed on the stock exchange, or whether non-listed firms (e.g. family firms, private equity) are included as well. In some cases the legislation is applied first to state owned companies, and later to private companies.

The legislation applies as follows: Austria (50%+ state owned), Belgium (state-owned companies, listed companies), Denmark (state owned), Finland (state owned), France (listed companies), Ireland (state owned), Italy (state owned and listed companies), the Netherlands (all), Spain (listed companies).

2.4 PROPORTION OF EACH GENDER TO BE REPRESENTED

The proportion of the less well represented gender that must be eventually represented on the board varies between 30% and 40% in EU Member States, with the most common proportion being 40% and the second most common being 30%. In some cases a lower proportion is introduced first, followed by a higher proportion later. The target is usually described in this gender neutral way, rather than referring specifically to women.

In the EU the highest proportion was 40% in Finland, Ireland and Spain. Outside of the EU, it was 50% in the 2006 Icelandic legislation (though 40% in the later legislation in 2010).

Among the laws that have used a single level (to be directly reached once the law enters into force) one can find:
- 40% in Finland, Ireland and Spain. The same level was used in Norway with a detailed specification for smaller boards (if 2 or 3 members, then there should be 1 of each gender; if 4 or 5 members, at least 2 of each; if 6-8 at least 3 of each; if 9 or more then 40%).
- 33% in Belgium.
- 30% in Denmark and the Netherlands.

Dual levels, with the lower first, the higher later, were used by: Austria (25%, then 35%), France (20%, then 40%) and Italy (20%, then 33%).

2.5 TIMETABLE FOR IMPLEMENTATION

There are three types of variations in the timetable for implementation.

First, in almost all cases companies were given a period of time to achieve a higher proportion of the less represented gender before they were subject to sanctions. This waiting period varied in length and the extent of activity by the government in encouraging firms to comply, including the threat of invoking sanctions. The only exception was

Denmark (legislation only applies to state owned companies) where implementation was to be immediate.

Second, in some countries there was a phased implementation using a lower threshold first and a higher one later. This was the case in: Austria, France and Italy (as above).

Third, in some countries there was a complex phased process with some kinds of companies given a longer period of time to implement the increased proportion than other kinds. For example, in Belgium, state-owned companies were required to implement the one-third quota by 2012; larger publicly listed companies by 2016; while small and medium sized listed companies and also companies with less than 50% of their shares listed, were given until 2018.

There was sometimes a complex mix of phased application, waiting periods and threats to apply sanctions. For example, in the case of Norway, the law initially applied to all publicly listed companies and to state owned and inter-municipal companies, and was later extended to all municipal companies. Companies had 5 years, until January 2008, to comply (though new companies formed after 2006 had to comply from the start). The Act contained a clause that if the companies increased the proportion of the minority gender to the required level of 40% by 2005 the Act would not come into effect, but this did not happen (Teigen 2011). In January 2008, 77 companies (out of about 450) in breach received warning letters from the Bronnoysund Registration Center giving them 4 weeks to comply; in February 12 companies got a second letter; in April 2008 all were in compliance (Storvik and Teigen 2010).

The timetabling of implementation of a Directive is relevant to the concern that has been expressed that the proposed Directive does not meet the requirements of subsidiarity. The assessment by the UK House of Lords Select Committee on the European Union (House of Lords, 2012) suggests that the voluntary measures taking place at the national level are successfully raising the proportion of women, so the burden of implementation of the proposal would cause disproportionate administrative burdens and is not justified under the principle of subsidiarity. The frequent use of a waiting period before the sanctions provided for in the legislation come into effect means that voluntary methods have usually been given an opportunity to be effective before compulsion is applied.

In almost all instances of quota legislation, the use of legal compulsion only took place after a period of time, usually of several years duration, had been allowed for voluntary means to be attempted and was only implemented after voluntary means had failed to achieve their target.

2.6 SANCTIONS

In the different national legislation, there is a range of types of sanctions in the case of non-compliance. These include:

- annulment of board appointments (France);
- temporary loss of financial and non-financial benefits by board members (Belgium);
- admonishment by regulatory body, fine, annulment of board (Italy);
- no penalties; but an incentive in potential priority status for government contracts (Spain)
- no sanctions; requirement to ‘comply or explain’ in their annual report and to publish an action plan to address the issue (the Netherlands).

The staging of the process of the application of the sanctions is a further source of variance. For example, in the case of Italy, if there is non-compliance, the first step is that Consob, the official body that regulates the stock market, would advise the company to restructure its board; if after four months nothing happens, then the company will be fined an amount between 100,000 and 1 million Euros; if after three months there is still no compliance, the board and its elected members are annulled (Lombardo, 2012).

The variation in the sanctions is partly due to variations in the form of legal regime used in the legislation. The use of company law includes the possibility of strong sanctions such as de-listing thereby closing the company and the annulment of board appointments that do not comply, although it can also be used to invoke 'softer' responses, such as merely the requirement to 'comply or explain'. The use of employment law has usually meant less severe penalties, such as fines.

3. EMPLOYMENT LAW, PUBLIC REPRESENTATION AND COMPANY LAW

Equality between women and men is one of the EU's founding values and this aim is embedded in Article 2 and 3(3) of the Treaty of the European Union. In different legal regimes, there are variations in the way that concepts of equality, quotas and positive discrimination are understood and applied. There are variations in the use of employment law or of company law as the relevant legal regime to regulate company boards in Europe, which have implications for the legitimacy of quotas. The proposed EU Directive draws on employment law. The successful application of quotas in Norway used company law. This section discusses employment law and company law in the EU.

The legal regime in EU and Member States that concerns issues of equality and quotas is different in the field of employment from that in the fields of public representation and company law. In employment, the principle of equal treatment is held, though with some occasional use of quotas. In the field of public and political representation, quotas are frequently used (as, for example, in France[2]). The legal context and national legal frameworks may have implications for the introduction of quotas on corporate boards, for example, the French legislation on corporate boards was delayed by discussion of the constitutionality of affirmative action before quotas were enacted in January 2011 (Leelere and Paddock, 2011).[3] If the non-executive directors of corporate boards have features that belong to public representation and company law rather than employment, then there is a stronger basis for the use of quotas.

The EU legislates for equal treatment in employment, but permits the use of quotas in some circumstances:

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[2] Loi n° 2000-493 du 6 juin 2000 tendant à favoriser l'égal accès des femmes et des hommes aux mandats électoraux et fonctions électives

[3] European Network of Legal Experts in the Non-Discrimination Field, workshop on positive action, annual conference, 4 October 2011, notes a forthcoming report on positive action (including company boards) by Selanec and Senden.
See Burri, S. (2011) 'Discussion Paper, Workshop 1, Positive Action' Available at: http://www.non-discrimination.net/content/media/Positive%20Action%20-%20discussion%20paper.pdf
The concept of positive action is also discussed in: Burri, S. and Prechal, S. (2008) *EU Gender Equality Law*, Available at: http://www.jafnretti.is/D10/_Files/Evr%C3%B3pul%C3%B6g.pdf and Fredman, S. (2009) *Making Equality Effective: the Role of Proactive Measures.* Available at: http://ec.europa.eu/justice/gender-equality/files/makingequalityeffectivefinal2009_en.pdf

- Article 157 TFEU states: "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."
- Within EU employment law, positive discrimination towards the least represented group is sometimes allowed in the case of equally qualified candidates. An example can be found in the UK, where Section 159 of the 2010 Equality Act allows employers to select someone from an under-represented group when faced with two candidates of equal merit. This has been described as a 'tie-breaker' concept of positive discrimination, which can be contrasted to that of a 'threshold' form (Noon, 2012).
- At the point of intersection of EU immigration law and employment law, the 'threshold' form of discrimination is allowed, which permits an EU citizen that has reached a threshold level of qualification to be appointed in preference to a non-EU citizen that might be better qualified[4].

Within public and political representation in EU Member States, quotas are widely used. They take a variety of forms, including voluntary political party quotas and legislated quotas for candidates for election to national parliaments. Most EU Member States have voluntary party quotas, including: Austria, Cyprus, Czech Republic, France, Germany, Greece, Hungary, Italy, Lithuania, Luxembourg, Malta, Netherlands, Romania, Slovakia, Slovenia, Spain, Sweden and the UK. Some EU Member States have legislated quotas for candidates for election to national parliaments: Belgium, France, Greece, Ireland, Poland, Portugal, Slovenia and Spain. Almost all Member States have either voluntary party quotas or legislated candidate quotas (Denmark is an exception) (International IDEA, 2010).

Company law offers a different legal basis for gender quotas on corporate boards than that of employment law. This relates to the public duties of these boards. The proposals for narrowing the gender gap in the membership of corporate boards have usually concerned the non-executive directors, rather than the executive directors. Executive directors are employed full-time (usually) to run the companies. Non-executive directors have a supervisory function, to ensure that a company is properly run, but not to actually run it. Most companies are limited liability companies, meaning that shareholders are not personally liable if the company is not able to pay its debts. Shareholders in a limited liability company are privileged in not being personally responsible for the debts of the company, if the company should fail. This privilege is given by Parliament to shareholders. Non-executive directors have a responsibility to the public as well as to the share-holders to ensure that a company is properly run. Regulation of the form and gendering of the governance of corporate boards would be an explicit recognition of the public duty aspects of board responsibility.

Company law increasingly recognises the interests of the wider public as well as that of owners. The company is given duties and responsibilities that are wider than the immediate interests of shareholders. This may be considered either a balance between two sets of competing interests (owners and public), or an articulation of the complementary nature of the interests of the long-term interests of the company and the interests of the public (Cameron McKenna, 2007). This latter interpretation has been conceptualised as 'Enlightened Shareholder Value' (Medhurst, 2008). For example, the UK Company Act 2006 imposes a duty on directors to 'have regard to the impact of the company's operations on the community and the environment' (s.172 1 d). Section 172 (1) of this Act states: '172

[4] Thanks to Daniel Muzio, Jenny Tomlinson and David Sugarman for discussions on this point.

Duty to promote the success of the company: (1) A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to— (a) the likely consequences of any decision in the long term, (b) the interests of the company's employees, (c) the need to foster the company's business relationships with suppliers, customers and others, (d) the impact of the company's operations on the community and the environment, (e) the desirability of the company maintaining a reputation for high standards of business conduct, and (f) the need to act fairly as between members of the company. (2) Where or to the extent that the purposes of the company consist of or include purposes other than the benefit of its members.'[5] Further, Company law can regulate the nature and composition of Company Boards. For example, the UK Companies Act 2006, Part 10, Chapter 1, lists prescriptions for Directors of a UK Company, including the number of Directors and their minimum age (UK Companies Act 2006).

The aim of equality between women and men, a founding value of the EU embedded in the Treaty of the European Union, can be applied to corporate boards using either or both of employment law and company law. Employment law allows for positive action for equally qualified female candidates in contexts where women are under-represented, unless there are exceptional circumstances. Company law allows for quotas on corporate boards on the grounds of both the effective running of the company for its shareholders and of its wider duties to the public. In practice, the use of quotas to implement the principle of gender equality is most widely found in public bodies and parliamentary politics, with most EU member states using quotas either in political parties or in national legislatures. When public decision-making is the focus, quotas are widely used to achieve gender balance.

The conclusion drawn here is that the legal principle that is most likely to be effective in the achievement of gender balance in economic decision-making, on corporate boards, is one that invokes the public interest, not only private interests. The development of legislative mechanisms to achieve 40% of each gender on corporate boards may be more effectively achieved via company law than employment law insofar as company law embeds the principle of public interest in economic governance to a greater extent than does employment law.

[5] Thanks to David Sugarman for drawing my attention to this Article.

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ANNEX: LEGAL INSTRUMENTS (QUOTAS) TO NARROW THE GENDER GAP IN CORPORATE MANAGEMENT BOARDS IN OTHER OECD COUNTRIES

Country (Year introduced)	Companies targeted	Proportion of minority gender to be represented	Timetable for implementation	Sanctions for non-compliance
Iceland (2006)	State-owned and municipal-owned companies.	50% (or as close as possible)	Immediate	
Iceland (2010)	Public and private limited companies with 50+ employees.	40%	2013	
Israel (1993)	State-owned companies.	30%	No deadline	
Norway (2003)	Public limited companies; state-owned companies; inter-municipal companies.	40%	2008	Official warning; fines; ultimate delisting and dissolution.
Switzerland (2006)	State-owned companies.	30%	2011	

Note: Iceland and Norway are members of the European Economic Area, to which the proposed Directive will be applicable, following a decision of the EEA Joint Committee.

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