
ПРАВО ПРИВРЕДНИХ ДРУШТАВА

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MEASURES TOWARDS IMPROVING GENDER BALANCE IN THE BOARDROOMS OF LISTED COMPANIES IN THE EU AND IN GERMANY

Summary

The European Commission has adopted a Proposal 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”. Although the proposal is formulated in a neutral way, the intention is in particular to strengthen participation of women as the typically under-represented sex in the decision-making process of large enterprises. It is at this moment not possible to predict what will be the outcome of the Proposal for the Directive. In any case, the German experience shows that changes can be triggered not only by direct state intervention, but that it may be enough to announce the intention to adopt a directive to influence the recruitment policy of corporations.

Key words: *listed companies, EU, non-executive directors, gender balance, corporate governance.*

I Introductory remarks

The European Commission has on 14 November 2012 adopted a Proposal 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”. Although the proposal is formulated in a neutral way, the intention is in particular to strengthen participation of women as the typically under-represented sex in the decision-making process of large enterprises. The proposal is therefore discussed under the catchword of introduction of a “women’s quota”.

The initiative has been heavily influenced by experiences from Norway. As the first country in the world, Norway has introduced a women’s quota by law even in 2003, with entry into force in 2008. Since then, in the larger corporations, 40 per cent of non-executive directors must be women. Violations of the law are sanctioned very severely.

The recent initiative of the Commission has provoked very different reactions in the 27 Member States. In Germany, it can only be described as a highly controversial topic, and the media provide a continuous flow of contributions from supporters or opponents, as the case may be. Other Member States, as for example Sweden or France, take a more relaxed attitude.

So far, in Germany, the enterprises are totally free in the choice of board members. Therefore, adoption of the Directive would for them entail the obligation to introduce fundamental novelties in the national law. This would also mean a major change for German corporations. So far, 15.5 per cent of the members of the supervisory boards, and only 4.2 per cent of the members of the management boards of the large listed corporations in Germany are women.

In contrast to this, quite a number of other Member States (namely Belgium, France, Italy, the Netherlands, Spain, Portugal, Denmark, Finland, Greece, Austria and Slovenia) have already decided in favour of a women’s quota in their national law, so that for them, nothing much would change. For example, under French law the percentage of women in leading positions shall be raised step by step up to 40 per cent in 2017.

II Background of the recent Proposal for an EU-Directive on improving the gender balance in listed companies

Equal treatment of men and women for the European Union is considered a founding value and core aim (Articles 2 and 3(3) of the Treaty on European Union). According to Art. 8 of the Treaty on the Functioning of the European Union, “in all its activities, the Union shall aim to eliminate inequalities, and to promote equality, between men and women”. Art. 157(4) TFEU expressly authorizes the Member States to *adopt measures providing for specific advantages in order to make it easier for the underrepresented sex to pursue a vocational activity or to prevent disadvantages in professional careers,*

with a view to ensuring full equality in practice between men and women in working life.

Initially, the European Union has attempted to enhance gender equality by the use of soft law instruments. Examples for such an approach are the Council Recommendation 84/635/EEC of 13 December 1984 on the promotion of positive action for women, as well as the Council Recommendation 96/694/EC of 2 December 1996 on the balanced participation of women and men in the decision-making process.

However, these initiatives have proved to be of little effect in the practice. Comprehensive statistical data as well as a survey of legislative and other measures including voluntary initiatives on different levels can be found in the Progress report: “Women in economic decision-making in the EU, March 2012. A Europe 2020 initiative”. The Report has shown that in the EU, on a total average only 13.7 per cent of corporate seats in the large enterprises were held by women; among non-executive directors, women held 15 per cent of the seats.

III Summary of the Proposal

Declared aim of the Proposal is to ensure a more balanced representation of man and women among the non-executive directors of listed companies (Art. 1). The tool that has been chosen by the Commission is that of a directive. Unlike the regulations which have general application and are binding and directly applicable in all Member States, the directives are binding only upon the Member States as such and must be transposed in the respective national laws in the form and methods chosen as appropriate by the national authorities (Art. 288(3) TFEU).

The Proposal consists of an elaborate Explanatory Memorandum, a considerable number of recitals and altogether 11 provisions. Small and medium-sized enterprises do not fall under the scope of the Directive (Art. 3).

Art. 4 of the proposed Directive imposes on listed companies certain objectives with regard to non-executive directors. The Directive does not apply to the executive directors.

Non-executive directors are defined separately for companies with a unitary board system and for those with a dual board system. In the latter, the management and the supervisory functions of the company are carried out by separate bodies, whereas in the alternative, one single board combines the management and the supervisory functions. The German law traditionally follows the two-tier system, with “Vorstand” and “Aufsichtsrat” (management board and supervisory board). Some other Member States know only the one-tier system, whereas a growing number of States leaves the choice be-

tween dual or single board system to the companies themselves. The Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company provides for the *Societas Europaea* (“SE”) also the free choice between the single or the two-tier system.

For companies with a unitary board, non-executive director means any board member who is not engaged in the daily management of the company (in other words: any member other than an executive director), whereas in a dual-board system, the term designates any member of the supervisory board (Art. 2).

The Directive aims at securing for men and women a legal minimum of 40 per cent of the non-executive director positions. With regard to listed companies which do not fulfill the requirement, the Member States are obliged to institute positive actions in favour of the under-represented sex (Art. 4).

On the one hand, appointments shall be made “on the basis of a comparative analysis of the qualifications of each candidate, by applying pre-established, clear, neutrally formulated and unambiguous criteria”. But in order to attain the minimum of 40 per cent participation for either sex, “in the selection of non-executive directors, priority shall be given to the candidate of the under-represented sex if that candidate is equally qualified as a candidate of the other sex in terms of suitability, competence and professional performance, unless an objective assessment taking into account of all criteria specific to the individual candidates tilts the balance in favour of candidate of the other sex”.

The companies are granted an interval to make the necessary arrangements for improving the gender balance within their boards. The above-mentioned minimum of 40 percent for either sex must be attained at the latest by 1 January 2020; in case of listed companies which are public undertakings, it shall be ensured earlier, until 1 January 2018 (Art. 4(1)).

On the request of an unsuccessful candidate, the listed companies shall be under a duty of disclosure of their qualification criteria and of the considerations which have led to the decision in favour of a candidate of the other sex. In case of justified doubt, the burden of proof shall lie with the company and not with the candidate. To that purpose it suffices for the unsuccessful candidate to establish facts from which it may be presumed that the candidate was equally qualified as the appointed candidate from the opposite sex.

In certain sectors of the economy gender balance is difficult to achieve because the workforce consists almost entirely of members of the same sex. Member States may provide exemptions for those listed companies where the under-represented sex accounts for less than 10 per cent of the workforce.

Instead of a legal minimum of 40 per cent for non-executive directors, Member States may provide that the members of the under-represented sex hold at least one third of *all* director positions (executive or non-executive), Art. 4.

The Directive also imposes certain control mechanisms (Art. 5). In particular, the listed companies shall be obliged to provide the relevant information and to make yearly reports to their national authority.

For cases of infringement the Member States shall have to provide for “effective, proportionate and dissuasive” sanctions (Art. 6). These may include monetary fines, but also the declaration of nullity, by a judicial body, of an appointment of a non-executive director made in violation of the regime of the directive.

The requirements of the Directive are to be understood as minimum requirements (Art. 7). Minimum harmonization means that the Member States may even go further in ensuring a more balanced representation of men and women.

IV The discussion in Germany

1. Absence of legislative measures

In Germany, instruments for improving gender balance in companies' boards may *de lege lata* be found only in the soft law. The German Stock Corporations Act (Aktiengesetz) does not deal with the topic.

2. Gender balance as a soft law issue

Participation of women in top-ranking positions in the economy is in Germany far from satisfactory. Whereas this finding seems to be acknowledged by a broad majority, there is a sharp dispute on the question whether the state should intervene, and if yes, in which way? Especially the enterprises oppose any kind of regulatory intervention. In their opinion, the economy is already over-regulated. In order to avoid more state intervention, they have in recent years developed their own schemes for the advancement of women.

From the point of view of the enterprises, the matter could just as well, or better be dealt with in instruments of the soft law. The topic of advancement of women in business has recently been brought up within the framework of the German corporate governance debate. In the year of 2002, Germany has adopted the Deutscher Corporate Governance Kodex (German Corporate Governance Code). Initially, gender has not been an issue, but the

Code is updated in regular intervals (the last version dating from 15 May, 2012).

A recent update, from 26 May 2010, has amended Art. 5 regarding the supervisory board of the listed stock corporations, which now reads as follows:

Art. 5, German Corporate Governance Code

5.4.1. The Supervisory Board has to be composed in such a way that its members as a group possess the knowledge, ability and expert experience required to properly complete its tasks.

The Supervisory Board shall specify concrete objectives regarding its composition which, whilst considering the specifics of the enterprise, take into account the international activities of the enterprise, potential conflicts of interest, the number of independent Supervisory Board members within the meaning of number 5.4.2, an age limit to be specified or the members of the Supervisory Board and diversity. *These concrete objectives shall, in particular, stipulate an appropriate degree of female representation.*

The German Code, like all Corporate Governance Codes, constitutes soft law and is not as such binding. However, Art. 5 of the Code is formulated as a “recommendation”. This means that the companies are free to deviate from it, but they are then under an obligation of disclosure. The companies must declare once a year which of the Code’s recommendations are being applied, and which or the Code’s recommendations are not being applied and for which reason (principle of comply-or-explain; § 161 AktG). The declaration shall be made permanently accessible to stockholders. The declarations of conformity of the companies listed on the DAX 30 and on the MDAX (that is: the declarations of the largest companies) can all be accessed very easily under one central link. The entries are supplied by the companies themselves.

Gender equality has also come into the focus of discussion on corporate social responsibility. The German Global Compact Network (GGCN) is coordinated by the Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH on behalf of the Federal Ministry for Economic Cooperation and Development.

3. The German concept of “Flexiquote” as an alternative to the Directive as proposed by the Commission?

The Proposal of the Commission has, apart from the Federal Ministry of Labour and Social Affairs, not found much support from the side of the

German government. The ruling coalition of conservatives and liberals advocates instead the concept of a flexible quote, which is called by the name of “Flexiquote”. The underlying idea is to leave it to each individual listed company to determine a minimum requirement (in the typical case: a women’s quota) of its own. Such minimum requirement may be rather high in sectors where men and woman are to be found in more or less equal proportion. In other branches of business which are at present dominated to a large extent by one sex, the quota of leading positions to be held by members of the other sex may be smaller. Practical examples in Germany for sectors where the workforce is predominantly male are engineering or the building industry. It is up to the companies to freely assess their needs and define their own solution.

However, once the quota has been determined by the respective company, it shall not be at the free discretion of the company to fulfill the quota or not. On the contrary, the company shall not only be obliged to disclose its individual target mark. In case the self-imposed minimum requirement is not met, the company may be sanctioned in a similar way as under the Directive. This means that the company will not only be under the threat of a pecuniary sanction, but that appointments that have been made in violation of the self-imposed quota may under certain conditions be nullified by the court.

The concept of “Flexiquote” has been acclaimed by leading representatives of the German economy. Many well-known German companies, as for example Deutsche Telekom, BMW, Daimler, Bosch or E.ON, have already adopted self-commitments for increasing the percentage of women in leading positions, not only with regard to the supervisory boards, but also in view of management functions.

It should be mentioned in this context that as of late, the German language has a special denomination for a female member of the management board, namely “*Vorständin*”, as a counterpart to the traditional “*Vorstand*”, which term may refer to male managers, or to managers of either sex. The practical need of the designation as “*Vorständin*” may not be affirmed by all. The issue of gender is today raised in all kinds of situations, maybe too many.

Thus, the assembly of the district of Friedrichshain-Kreuzberg in the city of Berlin has in 2005 adopted the decision that 50 per cent of all streets and squares in the district shall be named after women. Until this goal is reached, preference shall be given to women and only under exceptional circumstances may a street or square be named after a man. By chance, the Berlin Jewish Museum is located in that district, and proposals have been made to name the square in front of the Museum after the famous Jewish philosopher Moses Mendelssohn, who inter alia rendered outstanding serv-

ices to the emancipation of Jews in Germany and would more than anybody else deserve to be honoured in such manner. *Inter alia*, Moses Mendelssohn has to the author Gotthold Ephraim Lessing served as model for the main character in the famous drama “Nathan the Wise”. However, the assembly of Friedrichshain-Kreuzberg refused to name the square after him because of Mendelssohn’s being male. According to recent reports, as a compromise the square might be named after his wife and him as “Ehepaar-Fromet-und-Moses-Mendelssohn-Platz”, although nothing much is known about Fromet, in order to achieve at least 50 per cent female representation with regard to the square’s name.

4. The failure of a recent legislative initiative

In contrast to the Government, opposition parties consider the Proposal from Brussels as positive. What is more, they have recently started a legislative initiative in the German Bundestag as the Parliament of the Federal Republic for a reform, similar to the Directive, on the level of the German national law. Their bill included a minimum requirement of 20 per cent female representation in the supervisory boards starting from 2018, up to 40 per cent from 2023 on. On the voting which has taken place on 18 April 2013, the bill almost got the necessary majority, because a substantial number of women from the ruling coalition welcomed the initiative. In the end, the bill failed, but this is not the end of the story.

The dissenting (mostly female) deputies from the conservative party who were in favour of the initiative shied away from putting at risk the ruling coalition. But they have at least achieved a compromise in the sense that their party has agreed that it will support a 30 per cent quota for 2020 in the next election period. Elections will be held in September 2013. This means that in all probability, the German national reform is not stopped but only delayed.

5. Indirect effects of the European discussion on the policy of German corporations

Without the initiative from Brussels, it would be difficult to imagine the recent change of attitude in Germany. It seems that the threat of a directive is sufficient to trigger certain developments. Thus, the 30 DAX-enterprises (as the largest stock corporations in Germany) have on 17 October 2011 obliged themselves on a voluntary basis to enhance the percentage of women in leading positions. The results will be disclosed in annual progress reports. The First Progress Report has been delivered on 28 June 2012. It shows that in comparison to 2010, the year of 2011 has brought only moderate develop-

ments. But the women's quota has been identified as important for the public image of corporations, who can no longer afford to be regarded as indifferent on the issue of "gender management". The Second Progress Report has not been officially delivered, but some basic data have already leaked through. Thus, 26 out of 30 corporations have as of late increased the percentage of women in leading positions. The quota for the DAX-corporations currently ranges between 7 and 30 per cent.

V Conclusions

It is at this moment not possible to predict what will be the outcome of the Proposal for the Directive. In any case, the German experience shows that changes can be triggered not only by direct state intervention, but that it may be enough to announce the intention to adopt a directive to influence the recruitment policy of corporations.

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МЕРЕ ЗА УНАПРЕЂЕЊЕ БАЛАНСА ИЗМЕЂУ ПОЛОВА У УПРАВИ КОТИРАНИХ ДРУШТАВА У ЕУ И НЕМАЧКОЈ

Резиме

Евројска комисија је усвојила Предлој „Директивне о унапређењу баланса полова неизвршних директора у компанијама котираним на берзи и повезаним мерама“. Иако је предлој формулисан на неутралан начин, намера је била да се повећа учешће жена у постојећу доношења одлука у великим друштвима. У овом тренутку се не може предвидети какав ће бити исход овој Предлоја. У сваком случају, немачко искуство показује да се промене могу иницирати не само директном државном интервенцијом, већ и сама најављивања директиве може имати ефекта на постојећу именовања чланова управе великих друштва.

Кључне речи: *котирана друштва, ЕУ, неизвршни директори, полни баланс, корпоративно управљање.*