Responsible Capitalism

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The impossible case of EU gender legislation

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The proposal to improve the gender balance on the boards of listed companies in Europe dates to 2012 and was discussed in the European Council until the Maltese Presidency in 2017. After that, negotiations got stuck and were only revived by an initiative of the French Presidency in 2022. On 14 March 2022, the Council reached a **General Approach** on the proposal. This means that, in all likelihood, the project will become law via a fast-track procedure without any in-depth discussion in recent times. That by itself is deplorable. Even worse, a legislative process without further public discussion may lead to a flawed law.

The proposal aims to achieve a more balanced representation of men and women among directors of EU companies, whose shares are admitted to trading on a regulated market, by requiring member states to set quotas either for non-executive directors (40%) or for all directors, including executives (33%). That is a sensible proposal and the text could stop here.

> *If candidates are equally qualified, preference must be given to the candidate of the under-represented* sex, *i.e., typically the female one.*

However, article 4a goes on to stipulate procedural rules by which Member States shall ensure that listed companies meet these objectives: The selection of candidates for the board must be carried out based on a comparative analysis of the qualifications of each candidate. If candidates are equally qualified, preference must be given to the candidate of the under-represented sex, i.e., typically the female one. Upon request of a candidate the company is obliged to inform them of the objective comparative assessment of the candidates and the considerations tilting the balance in favour of a candidate of the other sex. Finally, if a candidate of the under-represented sex establishes that he or she was equally qualified as compared with the candidate of the other sex selected for the position, it shall be for the listed company to prove that it did not breach the Directive's requirements.

Looking at these requirements from a company law perspective, one cannot help wondering how the provisions are supposed to operate in practice, given that, typically, company boards are elected by the shareholders' meeting. In listed companies there are typically many thousands of (domestic and foreign, private and institutional) shareholders. Most of them exercise their voting rights electronically or by proxy. Of course, it is

possible to request the company to prepare a comparative analysis of the qualifications of each candidate as the basis for the shareholder vote. But requiring these shareholders to adhere to certain criteria when casting their votes seems a farfetched idea. Who should establish the criteria and monitor their application? Who is responsible if the vote does not follow the objective assessment?

> *Different shareholders might very well have different reasons for voting in favour (or against) a certain candidate.*

Even more obscure is the requirement that the company should inform unsuccessful candidates upon request of the objective comparative assessment, etc. This is simply not applicable to an election where thousands of shareholders cast votes, in most cases anonymously, and where there are no justifications given for a vote. Furthermore, different shareholders might very well have different reasons for voting in favour (or against) a certain candidate. There is, in practice, no way the general meeting as such can inform the company about the rationale for the election of a certain director. Did the Commission draftsmen think that boards are self-perpetuating bodies?

Hence, it is not surprising that Member States have not introduced comparable systems in their national rulebooks. Of course, this is not meant to imply that Member States have not introduced systems designed to improve the representation of women on boards. Some such systems operate with mandatory quotas, whereby any appointment violating the quota is void; under this more rigid approach, companies know precisely which rules to adhere to. **Other countries** encourage companies to set a policy, often pursuing broader aims of diversity apart from gender equality, but do not prescribe its contents; under this more flexible approach, each company can set the rules most appropriate for its situation. We do not want to argue which of these approaches is superior - but we are certain that either is superior to the one chosen in the General Approach.

> *Member States can opt out of the system and given the proposal's weaknesses they should probably do so.*

Its proponents do not seem to be sure of the effectiveness of these rules either. Otherwise, it would be hard to explain why the text empowers the Member States to deviate from these rules if equally effective measures have already been taken. Hence, Member States can opt out of the system and given the proposal's weaknesses they should probably do so.

Is this a good way of legislating? We do not think so. The European legislator should not introduce rules that are hard or impossible to apply in order to force Member States to take action on gender balance. This will not lead to meaningful harmonisation. Rather, one could understand the proposal's real aim as giving incentives to some Member States, the laggards, to act on the issue of gender balance, while others, where such measures are already in place, will not need to introduce new legislation.

MORE: A detailed critique by the EGLE group of the Proposal can be read here: ***"Gender Balance Broom Wagon - The resurrection of the Commission Proposal on improving the gender balance among board members".***

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