The role of the European Commission and current gender equality initiatives

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I. Role of the Commission as 'Guardian of the Treaties'

1. The Commission's main role is to ensure that EU law is properly applied - by individuals, national authorities and other EU institutions.

2. Monitoring transposition of EU law into national laws of the Member States. As regards gender equality law, the Commission is currently monitoring directive 2006/54 and directive 2004/113.
Monitoring: what does that mean?

EU directives lay down a framework. National authorities have to adapt their laws to meet these goals, but are free to decide how to do so. COM controls this process.

Member States notify their transposition measures in their national language to a shared database within the deadlines set by the directive.

COM with the help of legal experts translates and analyses the legal texts sent by Member States.
Infringement procedures

If no transposition measures are notified to the Commission database within the deadline, an so-called **non-communication infringement procedure** (Art 258 and 260(3) TFEU) starts automatically.

If transpositions measures have been notified but are deemed incorrect or incomplete by the Commission as a result of the monitoring process, a **non-compliance infringement procedure** (Art 258 TFEU) starts.
Stages of the infringement procedure

- **Pilot letter to Member State** (request for information)
- **Letter of formal notice** (presenting the legal view of the Commission)
- **Reasoned opinion** (inviting the Member State concerned to adopt the necessary legal measures in order to comply with EU law)

The Member States have two months to reply to those letters. New developments can be taken up by the Commission in a complementary letter of formal notice or a complimentary reasoned opinion.
Internal Procedure for issuing a Letter of formal notice or a Reasoned opinion

- The procedure is highly formalized as the documents have to be issued by the College of the Commissioners itself.

- In general, the issuing of infringement documents takes place once a month.

- The documents can be consulted by the Member states on the shared database.
Referral to the CJEU

If the replies provided by the Member States to the Reasoned Opinion are not considered legally convincing, the COM has to decide about a referral to the CJEU, Article 258(2)TFEU. COM has discretionary power in this respect (‘...may bring...’).

After a judgment of the CJEU finding a failure to comply in a Member State's law, the Court may impose a penalty payment (Art 260(2) third sentence TFEU).
Follow-up of CJEU judgments

• In case of failures to comply found by the CJEU, the COM has to ensure the follow-up in Member States (correction of laws, adoption of laws etc).

• If a Member State in view of the Commission fails to adopt corrected laws, a new infringement procedure will start.
CJEU decisions

- Biggest amount of referrals comes from Member State's Courts (in the area of equal treatment roughly 5 referrals per year)

- Duration of Court proceedings: currently in general between 16 and 24 months
II. The Commission's role in proposing new law

- The Commission is the only institution in the EU competent to propose new law.

I. Internal procedure in the COM

- Legislative action in the Workprogram of COM
- Consultations of stakeholders (social partners, Member States, citizens, NGOs a.s.o.)
- Impact Assessment
- Interservice Consultation within COM
- Adoption by College of Commisioners (written or oral)
II. Procedure after adoption in COM

In cases of ordinary legislative procedure, Art. 294 TFEU, the proposal is transmitted to Co-Legislators:
- To Council
- To European Parliament and
- To national Parliaments (8 weeks for subsidiarity assessment)

Acts are adopted following a first position, second reading and – if necessary – a conciliation and third reading procedure by the Co-Legislators.
COM is only mediating the process, can withdraw, give an opinion or alter the proposal.
III. Pending legislative proposals in the area of Equal Treatment

- Proposal to amend the maternity directive (Directive 92/85)

- proposal on an Equal Treatment Directive (Art. 19 TFEU)

- Women on boards proposal
Maternity Protection


Main points: prolongation from 14 to 18 weeks, pay stays at sick pay level, better protection against dismissals, more choice for design of leave.

Problems: far reaching first reading position of Parliamants including 20 weeks of leave paid at 100% of former salary, 2 weeks paternity leave fully paid). Council unwilling to adopt first reading position. Standstill since 2010.
Proposal for an Equal Treatment Directive, Art 19 TFEU

Adoption in COM in 2008.
Proposal requires **unanimity** in Council and assent from Parliament.

**Scope:** protection of discrimination on grounds of religion, disability, age or sexual orientation outside labour market (to close gap left by 2000/78 which only applies in the area of employment) including social security and health care, education and access to goods and services available to the public, including housing.

**Problems:** Some Member States voice concerns.
Directive to improve the gender balance among non-executive directors of listed companies

- Accelerating progress: with intelligent, not rigid, quota
- 40% target combined with binding rules on a transparent selection process
- Selection based on merit: a preference rule in case of equal qualification, with further safeguards
- High degree of flexibility for Member States and companies
- Gender equality measure – based on Article 157(3)TFEU) – with economic and business reasons and implications
Scope

- EU companies **listed** on EU stock exchanges - Art. 2(1),

- **Except**: small and medium-sized companies (SMEs) – Art. 3, definition in Art. 2(8),

- Estimated **5000 companies**,

- Privately or publicly owned (public undertakings as defined in Art. 2(9)).
Objective for non-executive directors

An obligatory quantitative objective of 40% for non-executive directors (supervisory boards), tied to procedural requirements on appointments - Art. 4(1)-(3);

33% (1/3rd) if applied to all directors - Art. 4(7);

Deadlines: by 1 January 2020 (or 2018 for public undertakings).
Procedural requirements

• Kick in only if 40% not achieved
• Preference rule → qualifications remain decisive

• Appointment procedure:
  • Criteria: pre-established, clear, neutrally formulated and unambiguous – Art. 4(1)
  • Comparative analysis of qualifications – Art. 4(1)
  • Preference rule in case of equal qualification - Art. 4(3)
  • Disclosure of assessment and burden of proof - Art. 4(4)-(5)
Objectives for executive directors

Companies have to set **individual targets** for executive directors/management board members.

Same **deadlines** and **reporting obligations apply**, but not the procedural obligations related to appointments.
Sanctions

- defined by the Member States (content and addressee)
- effective, proportionate and dissuasive
- examples

→ kick in in case of failing to implement obligations under directive:
- regarding non-executives: non-compliance with procedural obligations (not for not reaching 40%)
- regarding executives: non-compliance with obligation to set individual objectives
- regarding all: non-compliance with reporting/monitoring obligations
Subsidiarity and flexibility

Possibility of reaching the objective if 33% of all board members are of under-represented sex – Art. 4(7)

Possible exemption for companies where the under-represented sex makes up less than 10% of the workforce – Art. 4(6)

Temporary nature of the Directive – sunset clause – Art. 10(2)

Subsidiarity: persistent lack of progress – in a key field covered by EU competence – difficulty or unwillingness to take measures – national parliamentary check passed
Thanks for your attention!

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