



Gender-balanced company boards in the EU; state of play and future outlook

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Topics

(i) What problem of underrepresentation and what causes

(ii) Why is change necessary/desirable

(iii) How to address the problem;

- > national approaches vis-à-vis
- > the proposed EU approach



Equal representation: what problem and causes (i)

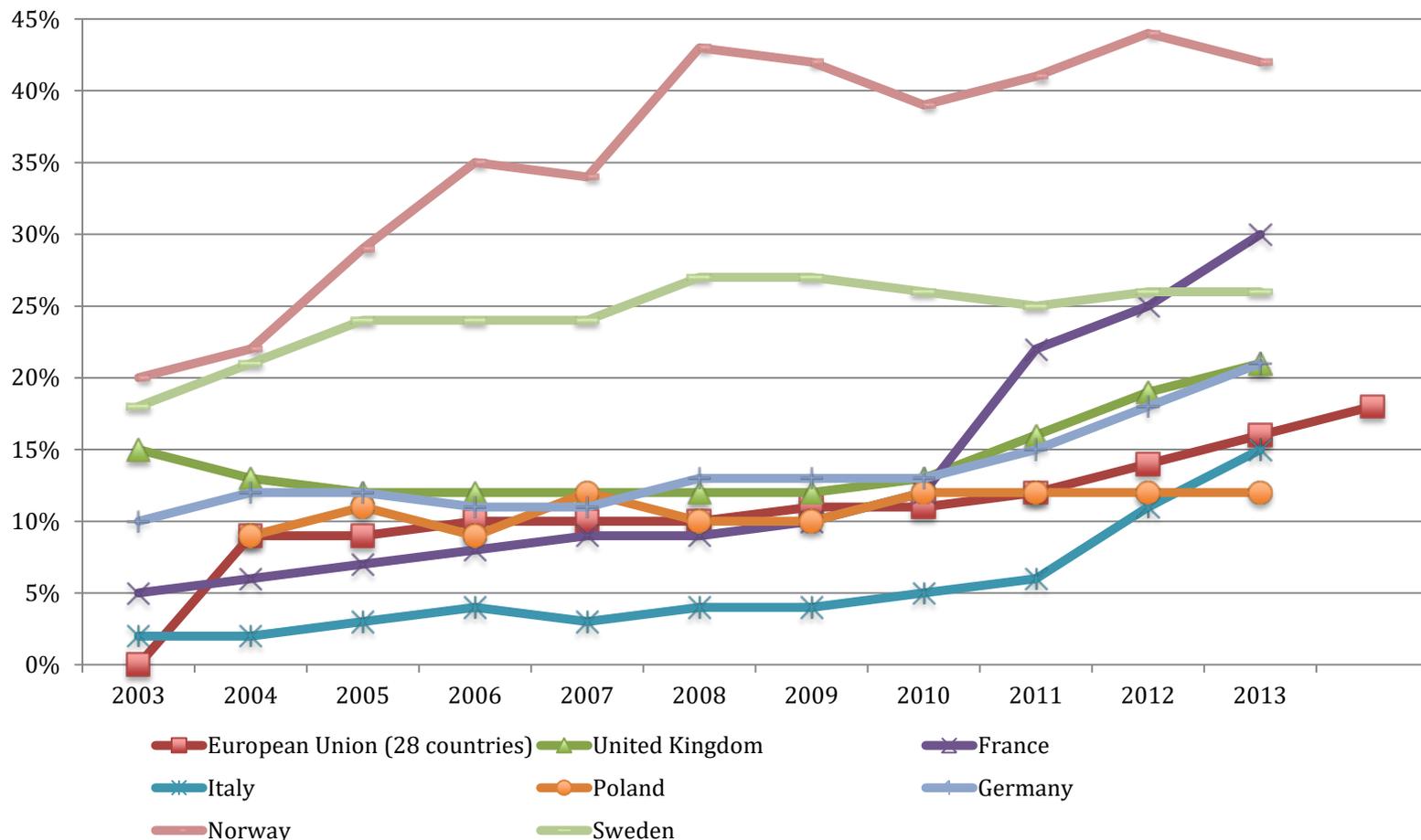
- The **% of women in middle, higher and top management positions is generally low**, but for middle and higher management the cross-country differences are less significant (27% v. 38%) than for top management (11% v. 42%);
- the **'speed of change' in middle and higher management positions** is generally low in all researched countries and all age categories;
- the **'speed of change' in top management**, at board level is rather high in some countries – as a result of recent regulation – but the EU average is still low (18%)

(see https://www.cec-managers.org/fileadmin/user_upload/PDF/Press_Room/Publications/Englisch/2010-2015/CEC-PWL_120115_ENGL.pdf)



Equal representation: what problem

% female board members (Source: EC database on gender balance in decision-making positions – Board members, 7.3.2014)



Causes/explanations for low representation

Employee

- **Human Capital Theory**
 - *Educational credits*
 - Training choices and opportunities
 - *Working experience*
 - Unpaid labour/work-family preferences
 - Competencies and skills





Firm

- **Human capital theory**

- *Working experience*

- Same entry level but diverging career paths

- *Educational credits*

- Senior male gatekeepers controlling training opportunities

- **Status characteristics theory**

- *Gender bias and confirmation standard*

- Higher burden of proof and overqualification

- **Discrimination theory**

- *Gender stereotyping*

- Working mothers not competent, serious, reliable enough...

- **Male defined benchmarks**

- *Male gatekeepers set the standards* for successful career

- Women who act like women, considered incompetent...

- Women who act like men, not taken seriously..



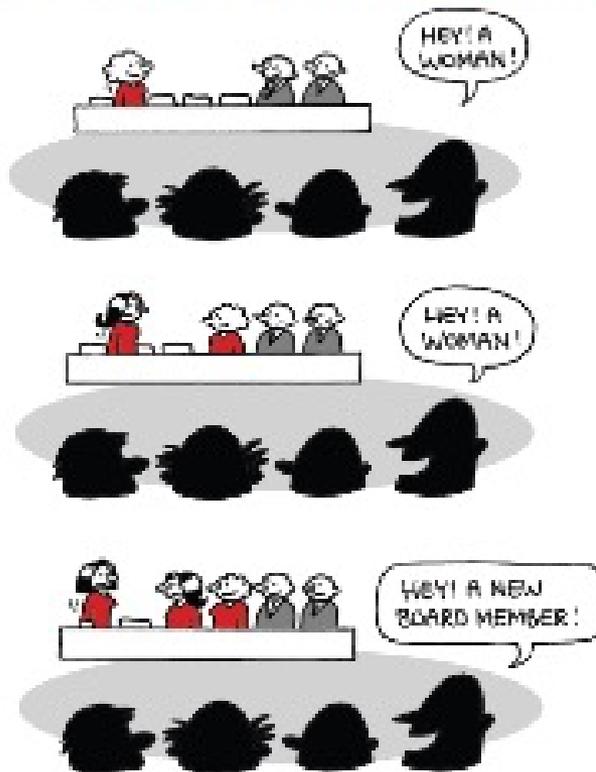
Top management

- The 'glass ceiling' effect
 - *'Objective' corporate barriers*
 - Training policies
 - Promotion policies
 - *'Subjective' cultural and behavioural barriers*
 - Gender stereotyping
 - Old boys network maintaining status quo





The ideal target for board gender diversity is three women or more





State

- **Different welfare systems**
 - Liberal (UK)
 - Conservative (Italy, France, Germany)
 - Social-democrat (Norway, Sweden)
 - plus: post-communist (Poland)
- **Cultural differences**
 - Individualism/collectivism
 - Masculinity/femininity
- **Different legal systems, cultures and traditions**



Equal representation: why (ii)

Societal rationales

- equality
- democracy
- social justice
- fairness



Company rationales

- enhanced performance, quality of decision-making and of corporate governance/ethics
- better use of the talent pool
- better reflection of market needs
- driver for innovation

ACTION!



Equal representation: how (iii)



National approaches

- **CEE-countries** -> left of the spectrum
- **Poland** -> pure self-regulation, but incentive for this in public regulation
- **UK** -> self-regulation for the private sector, but soft quota for public service
- **Sweden** -> self-regulation and soft public policy, but no quota rule or target
- **Netherlands** -> conditioned self-regulation and temporary legislation; legal target of 30% but no sanctions
- **Germany** -> recent introduction of 30% quota legislation
- **Italy, France, Belgium and Norway** -> varying hard quota regimes, including sanctions



Looking inside these regimes

Variety as to:

- Voluntary or binding nature;
- Temporary or unlimited duration;
- Non-executive and/or executive board members;
- Private, listed and/or state companies;
- Size of the companies covered;
- Level of ambition and target set;
- Time-limits for their realization;
- Implementing and monitoring mechanisms;
- Provision of sanctions and their harshness



Shifting EU approach

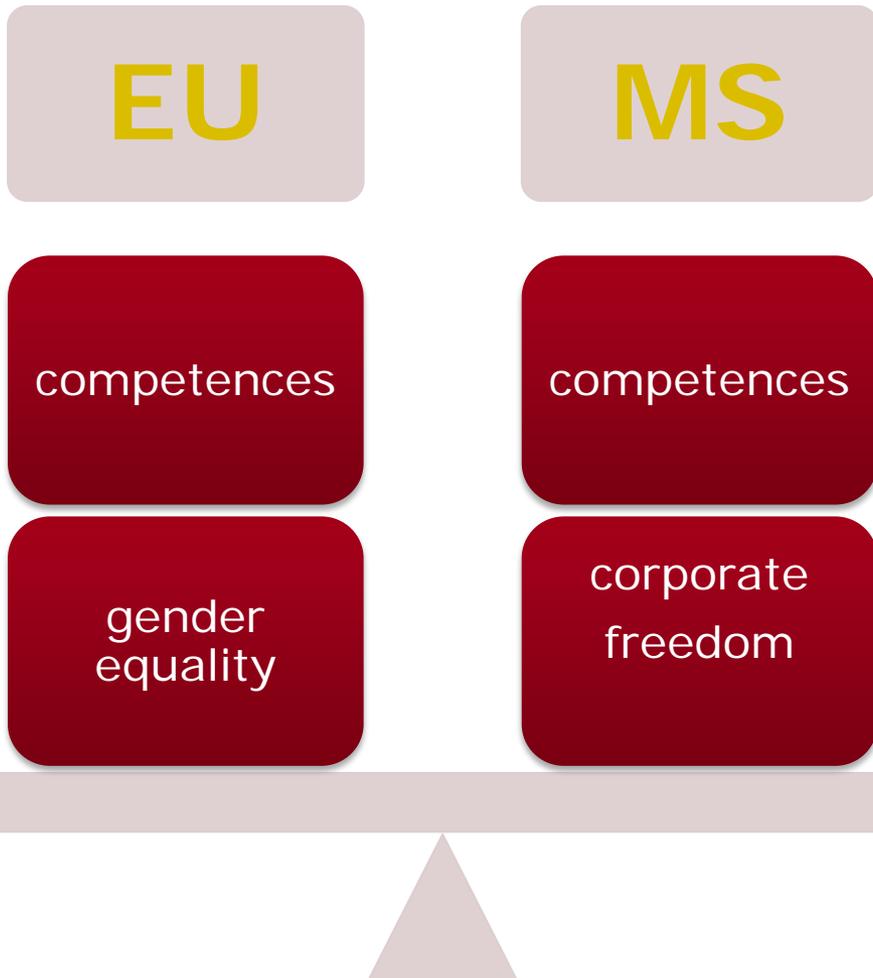
From soft law to hard law =>

Proposal for EU-Directive of the European Parliament and the Council '**on improving the gender balance among *non-executive* directors of companies *listed* on stock exchanges and related measures**' (2012)

- ***What obligations*** does it actually entail and what implications for the Member States?
- ***What state of play*** of this proposal, what to be expected, given also Member state objections?



Balancing act



Target and procedural obligation 1

Art. 4, par. 1:

Member States shall ensure that listed companies in whose boards members of the *under-represented sex* hold less than **40 per cent** of the *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 or at the latest by 1 January 2018 in case of listed companies which are public undertakings.



Procedural obligation 2

Art. 4, par. 3:

In order to attain the objective laid down in paragraph 1, Member States shall ensure that, 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 account of all criteria specific to the individual candidates tilts the balance in favour of the candidate of the other sex.



Procedural obligation 3

Art. 4, par. 4:

Member States shall ensure that listed *companies are obliged to disclose, on the request of an unsuccessful candidate,*

- the qualification criteria upon which the selection was based,
- the objective comparative assessment of those criteria and, where relevant,
- the considerations tilting the balance in favour of a candidate of the other sex.



Procedural obligation 4

Art. 4, par. 5:

Member States shall take the necessary measures, in accordance with their national judicial systems, to ensure that *where an unsuccessful candidate of the under-represented sex establishes facts* from which it may be presumed that that candidate was equally qualified as the appointed candidate of the other sex, *it shall be for the listed company to prove that there has been no breach of the rule laid down in paragraph 3.*



Sanctions

Art. 6:

- **Member States** shall lay down rules on sanctions applicable to infringements of the national provisions adopted pursuant to this Directive and shall **take all necessary measures to ensure that they are applied**.
- The sanctions must be **effective, proportionate and dissuasive** and **may** include the following measures:
 - **administrative fines**;
 - **nullity or annulment** declared by a judicial body of the appointment or of the election of non-executive directors made contrary to the national provisions adopted pursuant to Article 4(1).



Discretion for Member States

Art. 4, par. 6:

Member States may provide that listed companies *where the members of the under-represented sex represent less than 10 per cent of the workforce* are not subject to the objective laid down in paragraph 1.

Art. 4, par. 7:

Member States may provide that the objective laid down in paragraph 1 is met *where listed companies can show that members of the under-represented sex hold at least one third of all director positions*, irrespective of whether they are executive or non-executive.



Discretion for Member States

Art. 8:

[...] *Member States which before the entry into force of this Directive have already taken measures* to ensure a more balanced representation of women and men among the non-executive directors of listed companies *may suspend the application of the procedural requirements relating to appointments* contained in Article 4(1), (3), (4) and (5), *provided* that it can be shown that those measures enable members of the under-represented sex to hold at least 40 per cent of the non-executive director positions of listed companies by at the latest 1 January 2020, or at the latest 1 January 2018 for listed companies which are public undertakings.



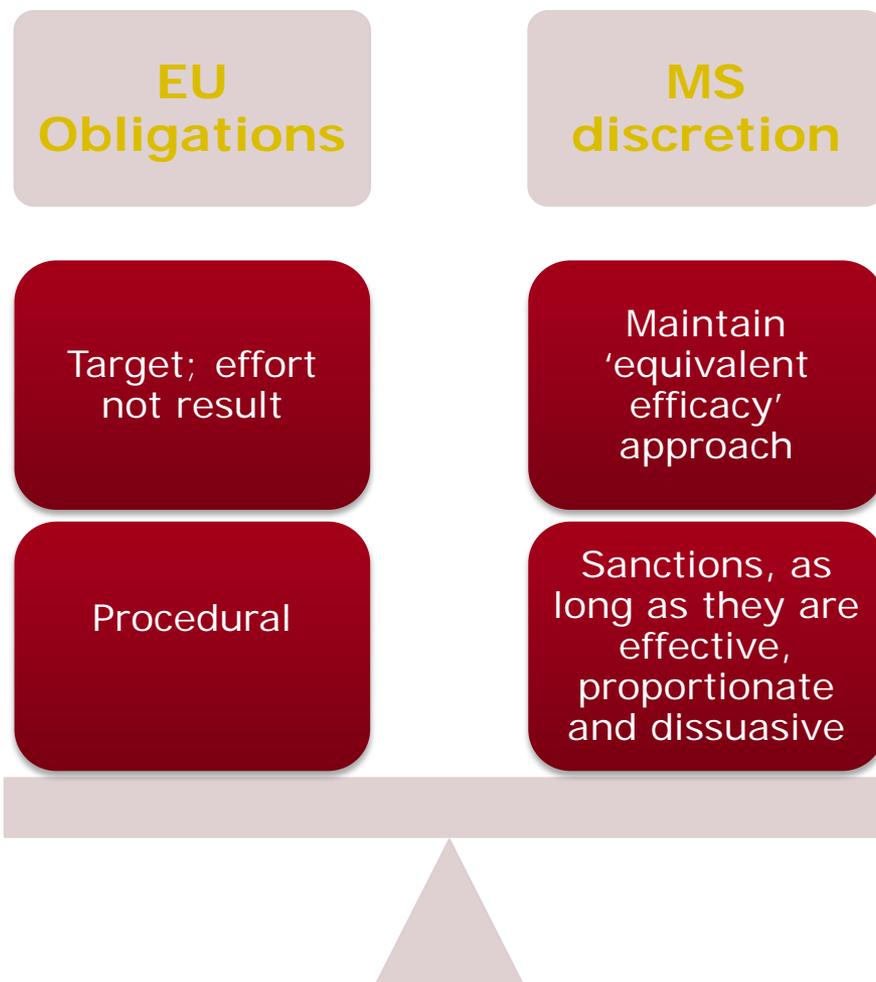
Assessment of the proposal

High compromise nature, reflected in its limits:

- No hard quorum
- Sanctions regard non-fulfilment of the procedural requirements, not the non-achievement of the target
- Only stock-listed companies
- Only supervisory/non-executive board members (but some reporting obligation in art. 5)
- No duty for SME (more than 250 employees; art. 2(8) and 3)
- Discretion re the use of existing national approaches



EU proposal balancing on a tightrope



But not all gold that glitters....

Room for clarification/improvement on:

- Clearer statement of the purpose of the directive;
- Refine the exact legal obligation in art. 4 (1);
- Define more clearly what 'equivalent efficacy' entails of national approaches;
- Transparency requirement of the evaluation process (cf Case C-407/98, Abrahamsson, par. 49);
- Other possible measures, such as duties to establish gender equality plan, report in annual company reports, including on compliance, selection process, results.



What to expect

- Negotiations in Council yesterday...
- **Blocking arguments:**
 - Competence/legal basis
 - Subsidiarity
 - Corporate freedom
- **Likely changes:**
 - Clarification of the target rule; effort not result
 - Reduction of the target (cf German approach)
 - Framing of national discretion; what is 'equally effective' approach





THANK YOU FOR YOUR ATTENTION

QUESTIONS?



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