Member states without legislation on quotas: three case studies

- Workshop 20.03.2013 -
Abstract
The majority of the EU Member States does not have a legislation imposing a gender quota in corporate boards and top-management. The following notes present the main characteristics of the national situations regarding the gender balance in top management positions and corporate board diversity in three of these Member States: UK, Germany and Hungary. They analyse the corporate governance policy and the obstacles to a better gender diversity.
This document was requested by the European Parliament's Committee on Women's Rights and Gender Equality and the Committee on Legal Affairs.

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Abstract

This briefing paper examines the situation of women on boards in the UK. The paper outlines UK’s corporate governance context and its voluntary approach to board diversity, with an emphasis on the 2011 Davies Review. It then provides an overview of gender representation on FTSE boards, outlining recent progress. Efforts made by other stake-holders such as executive search firms are also discussed. At the current pace of change, the UK is likely to have gender balanced boards by 2020.
This document was requested by the European Parliament's Committee on Women's Rights and Gender Equality.

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EXECUTIVE SUMMARY

Background

In recent years, efforts to increase gender balance on board have intensified worldwide and at European level. Board diversity is being promoted not only for social justice reasons, but also as an integral part of better corporate governance. The business case for gender diversity on boards relates to four dimensions: improving performance, accessing the widest talent pool, being more responsive to the market and achieving better corporate governance (Davies, 2011).

There have been two approaches to increasing gender diversity on boards among European countries: corporate self-regulation (e.g. UK, Austria, Germany, and Poland) and national mandatory legislation or targets (e.g. Norway, Iceland, Spain, Italy, Belgium and the Netherlands). As a result of slow progress, the European Union increased legal pressure by proposing a EU wide quota of 40% women on boards by 2020, an initiative promoted by Viviene Redding, Vice-President of the EU and Commissioner for Justice, Fundamental Rights and Citizenship. However, there are immense differences across European countries in terms of current gender representation at managerial and board levels, corporate governance systems, as well as social and cultural values. For this reason, it is vital to have a contextualized understanding of the status quo and the levers for change in each country, in order to appreciate the need and the constraints of implementing gender quotas.

Aim

The current briefing paper aims to provide an overview of the situation of women on boards in the UK. While the UK has been a pioneer of monitoring gender diversity on boards and has had a sustained focus on this issue for over a decade, it preserved its voluntary approach to tackling women on boards, even as several European countries such as France, Italy and Spain adopted more drastic mandatory actions to increase board diversity. Therefore, a first aim of this brief is to outline the national regulatory approach and corporate governance system in the UK. The voluntary provisions related to board diversity are discussed, with emphasis on the recent 2011 Davies Review.

Second, this paper provides an overview of gender representation trends on the boards of FTSE 350 companies from 1999 to 2012, noting an accelerated pace of change after the Davies Review. This change has translated not only in increased percentages of women sitting on boards (currently 15% on FTSE 100 boards and 5.8% on FTSE 250 boards), but also in an increased rate of female appointments (25% of FTSE 100 board appointments and 19% of FTSE 250 board appointments going to women in 2012).

Third, the paper highlights that the multi-stakeholder approach adopted by the Davies Review has also resulted in increased involvement from other key players such as executive search firms and investors. In particular, it examines the impact of the Voluntary Code of Conduct adopted by search firms in 2011 on the inclusiveness of the board appointment process.

The evidence suggests that the voluntary approach has been effective in the UK and is likely to enable FTSE companies to achieve 40% women on board should the current pace of change carry on. However, further actions and enduring pressure are necessary.
1 UK CORPORATE GOVERNANCE CONTEXT

**KEY FINDINGS**

- **UK has a unitary board system and a voluntary rather than a mandatory approach to corporate governance.** Publicly listed companies are expected to comply with good governance principles stated by the Financial Reporting Council and systematized into a Code.

- The Code draws and prior rounds of corporate governance reforms and advises that companies pay attention to diversity. Over the last two years, the **Code has strengthened its diversity provisions**, as well as its requirements for a more rigorous and inclusive board appointment.

- **Efforts to improve gender balance on boards have been accelerated** by the recent **Davies Review** and its recommendations, published in the 2011 Davies Report. The Review engaged multiple stakeholders and recommended that companies set voluntary, individualized gender targets on boards.

- Overall, the **UK has had a consensual and collaborative approach** to the issue of women on boards for over a decade, marked by sustained collaboration between government, business, academics and media.

While there is international interest and action aiming to improve gender on boards, it is critical that studies adopt a contextualized approach, by considering each county's specific legislative system, corporate governance structures, cultural and social values. Therefore, this first section of the report will briefly outline the national regulatory context and corporate governance approach in the UK, discussing its relevance for understanding the conversation around board diversity.

### 1.1. Regulatory approach

The UK has a unitary board system that requires boards to be composed by executive and non-executive directors (EDs and NEDs)\(^1\). UK takes a voluntary rather than a mandatory approach to boardroom governance, by issuing a code of conduct listing good governance principles that publicly listed companies (PLCs) are expected to embrace. This principles-based approach differs from a rules-based approach in that the intention of the Code is to provide generic best practice guidelines, rather than rigid and detailed prescriptive rules. The underlying principle is 'comply or explain', which means that PLCs are expected to disclose in their annual reports how they have complied with the Code and why failed to do, if that is the case.

The code is issued by the Financial Reporting Council, UK’s independent corporate governance regulator, and has been subjected to several reviews over the last two decades. The current version of the Code published in 2010 is essentially a revision of previous reforms and reports that have tackled the key issues related to good corporate governance – the Cadbury report (1992), the Greenbury Report (1995), the Combined Code (1998), the Higgs Review and the Tyson Report (2003). These various reports underscored key principles of good governance, stressing among other things, the need to

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\(^1\) Executive and non-executive directors are also called inside and outside directors.
have more diverse boards and the need to have a more rigorous, fair and open process of appointing NEDs. UK’s revised Corporate Governance Code came into effect in June 2010 and included a principle which explicitly acknowledged the value of diversity in the boardroom (Supporting Principle B.2), which states that “the search for candidates should be conducted and appointments made on merit, against objective criteria and with due regard for the benefits of diversity on the board, including gender” (Financial Reporting Council (FRC), 2010: 13). In 2011, the FRC amended its Code in light of the Davies Review recommendations, requiring PLCs to report on their boardroom diversity policy, including gender-related objectives and on the progress made in achieving them. The FRC also required companies to provide an explanation if they did not use executive search firms nor publicized openings when recruiting board directors.

Therefore, throughout these multiple rounds of corporate reform, we have witnessed in the UK a gradual strengthening of provisions related to board diversity and to the board appointment process for NEDs. It is important to underscore that while UK’s approach to corporate governance is voluntary, it is by no means laissez-faire. In fact, for over a decade, there has been close collaboration between government departments, policy makers, academics, corporations and media in the UK, leading to concerted efforts to address the lack of women on boards. Across the years, Cranfield’s International Centre for Women Leaders has not only monitored the board composition of top 350 FTSE-listed companies, but also conducted quantitative and qualitative studies into board cultures, women’s aspirations to sit on boards, and the importance of human capital and social capital for getting onto boards. The recent European threat of quotas provided an added impetus for action, with efforts being galvanized nationally by the Davies Review into women on boards.

1.2. The Davies Review

The most recent and significant effort to achieve gender balance at the top levels of business was marked by UK’s government review into women on boards, set up in 2010 and led by Lord Davies of Abersoch. Several stakeholders were consulted, including senior business leaders, academic experts, search consultants, entrepreneurs, senior women and women’s networks. Following the consultation process, the Davies Steering Committee published its report in February 2011 (Davies, 2011). The Davies Report outlined the business case for increased board diversity and examined the major obstacles to having more women on boards. Importantly, the report put forward ten recommendations aimed at improving the gender balance on FTSE 350 boards. The main recommendations of the report proposed the following (see Annex I for full details on the Davies Report provisions):

- FTSE350 companies should set gradual aspirational targets for women on boards;
- FTSE100 companies should aim to have at least 25% women on boards by 2015
- Companies should monitor gender representation at all levels
- Companies should set policies and objectives regarding boardroom diversity, monitor, report and disclose progress
- Companies should provide more transparency into the board appointment process and explain how it addresses the need for more diversity
- Board openings should be advertised

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2 EDs are typically promoted from within the company, while NEDs are appointed from outside, nowadays often selected with the help of an executive search firm.

3 UK’s official ranking includes 350 companies listed in the Financial Times Stock Exchange (FTSE) and ranked based on market capitalization.
Executive search firms should draw up a Voluntary Code of Conduct addressing gender diversity and best practice for board level appointments

Investors should pay attention to how companies address board diversity

The development of the talent pipeline should focus on executives in the private sector and women from other sectors

The Davies Report (2011: 2) also stressed that: “Government must reserve the right to introduce more prescriptive alternatives if the recommended business-led approach does not achieve significant change”. The Davies Review was unique in its multi-stakeholder approach, targeting Chairmen, nomination committees, investors, and executive search firms. The review and its subsequent follow-up actions continue to raise awareness in UK’s business world. There is regular research conducted to monitor how companies implement the report’s provisions, robust media coverage and sustained public attention around these issues.

2. GENDER TRENDS ON UK BOARDS BEFORE AND AFTER THE DAVIES REVIEW

**KEY FINDINGS**

- The 2012 Cranfield Female FTSE Report revealed that there are currently **15% women on FTSE 100 boards** and **5.8% women on FTSE 250 boards**.

- On **FTSE 100 boards**, there are **22.4% female NEDs** and **6.6% female EDs**. On **FTSE 250 boards**, the numbers are **11.4%** and **4.6%** respectively.

- While change has been incremental until 2010, the **pace of change has clearly picked up after the Davies Review**.

- Based on current trends, it is anticipated that **FTSE 100 boards will have 26.7% female directors by 2015 and 36.9% by 2020**.

2.1. FTSE 100 boards

The latest Cranfield report monitoring women’s presence on FTSE listed boards found that women currently occupy 15% of directorships on FTSE 100 boards, with 6.6% female executive directorships and 22.4% female non-executive directorships (Sealy & Vinnicombe, 2012). Looking back at how the percentage of women directors on FTSE boards has evolved, we observe a relatively slow but steady pace of progress based on the monitoring data provided by Cranfield’s International Centre for Women Leaders since 1999 (see Figure 1). Although progress appeared to have stalled between 2008 and 2010, the increase of women on boards has been steeper thereafter. Specifically, between 1999 and 2010, women’s representation on boards rose from 6.3% to only 12.5%, a modest increase of 6.2% overall. This translates into an average yearly increase of 0.56% over these 11 years. However, between 2010 and 2012, we have seen a 2.5% increase in the proportion of women directors, from 12.5% in 2010 to 15% in 2012. This translates into an average yearly increase of 1.25% over these last two years.
This **accelerated pace of change after the Davies Review** suggests that by and large, FTSE 100 companies responded adequately to the pressure exerted by this voluntary approach. An analysis per type of directorship suggests that progress is largely due to a **substantial increase in the proportion of women holding non-executive directorships**, reaching about 22% in 2012. However, the percentage of female executive directors remains stubbornly low and suggests that women fail to progress through the corporate ranks (see Figure 2).

Source: Cranfield Female FTSE Reports 1999-2012

**Figure 1: Women directors on FTSE 100 boards**
In addition to the overall percentage of women on boards, there are other encouraging trends across FTSE companies. The share of new board appointments going to women is a particularly important indicator because the board appointment process is a key vehicle for changing the landscape of boards. In 2011, the Davies Review suggested that about a third of new board appointments should go to women, for FTSE 100 companies to be able to meet the 25% target by 2020. The percentage of board appointments going to women increased from 13.3% in 2010, to 22.5% in October 2011, and to 25% by January 2012. Based on these numbers, and corroborated by a turnover rate of board seats of about 17%, it is anticipated that 26.7% of directors will be women by 2015 and 36.9% by 2020 (Sealy & Vinnicombe, 2012, p. 7). However, these figures will only be achieved if the momentum for changing the gender balance of boards remains constant.

There are additional signs of progress among FTSE 100 companies (Vinnicombe, Sealy, Graham & Doldor, 2010; Sealy & Vinnicombe, 2012):

- Companies with no female directors: 11 left in 2012, compared to 21 in 2010
- Companies with at least one woman on their board: 91 in 2012, compared to 79 in 2010
- Companies with more than one woman on their board: 50 in 2012, compared to 39 in 2010

### 2.2. FTSE 250 boards

The common assumption that women stand a better chance of holding directorships in smaller companies is yet again disconfirmed by last year’s trends: women currently hold only 9.4% of FTSE 250 board directorships, with 4.6% ED roles held by women, and 11.4% of NED roles held by women. Furthermore, 19% of new board appointments in the FTSE 250s went to women (Sealy & Vinnicombe, 2012). While these numbers remain
low, they do represent progress among FTSE 250 companies, where the proportion of women directors has always been lower. Progress among FTSE 250 is suggested by the following trends (Vinnicombe, Sealy, Graham & Doldor, 2010; Sealy & Vinnicombe, 2012):

- Companies with no female directors: 46% left in 2012, compared to 52.4% in 2010
- Companies with at least one woman on their board: 135 (54%) in 2012, compared to 119 (47.6%) in 2010
- Companies with more than one woman on their board: 47 (18.8%) in 2012, compared to 30 (12%) in 2010

Historically, FTSE 250 companies have been under less media scrutiny, which may account for the different pace of progress. While the Davies Review initially proposed more demanding for FTSE 100 companies, there is currently discussion of extending these targets to the FTSE 250.
3. VOLUNTARY EFFORTS AFTER THE DAVIES REVIEW

### KEY FINDINGS

- In addition to the sheer increase in the proportion of female directors and female appointments following the Davies Review, there are other indicators of efforts to increase gender balance on UK boards.

- **FTSE 100 companies have followed through with the Davies Report recommendations more than FTSE 250 ones.** There is more work to be done in terms of setting ambitious gender targets and being more specific and transparent about gender metrics, diversity policies and . Pressure need to extend to FTSE 250 companies.

- In particular, the executive search sector has made encouraging progress by passing a Voluntary Code of Conduct. A study conducted by Cranfield revealed several best practices in the sector and put forward recommendations for a more inclusive appointment process.

- There is a notable growth of the 30% Club, a club of Chairmen committed to increasing gender diversity, from 7 Chairmen in 2010, to 37 in 2013.

- There are also signs that the investor community is currently stepping up efforts to pressure companies into balancing their boards.

#### 3.1. Follow-up on Davies recommendations among FTSE companies

In October 2011, Cranfield was commissioned to conduct a six months monitoring report investigating how FTSE 350 companies have implemented recommendations 1, 2, 3 and 5 of the Davies Report, by examining their annual reports (Sealy, Doldor, Singh & Vinnicombe, 2011).

As expected, the report observed overall a more diligent follow-up of recommendations among the FTSE 100 companies, compared to the FTSE 250 ones. Companies had set gender targets almost exclusively at board level, neglecting the levels below, and the targets were generally not very ‘stretching’ compared to the gender representation on companies’ boards at that point in time. Furthermore, we noticed that boardroom diversity policies needed to be better supported by measurable targets and clearer reporting. Finally, while companies endeavoured to provide some transparency into the appointment process, they needed to demonstrate more explicitly how they will address the issue of gender diversity as related to the board appointment process.

A more detailed account of the report’s findings is provided in Table 1. Considering that the data was collected about a year and a half ago, it is expected that at present there is an even more active take-up of the Davies recommendations among FTSE listed companies.
Table 1: Follow-up of Davies recommendations among FTSE 350 companies

<table>
<thead>
<tr>
<th>Davies Report recommendation</th>
<th>FTSE 100</th>
<th>FTSE 250</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Recommendation 2 - Aspirational gender targets</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Board targets</td>
<td>33%</td>
<td>17%</td>
</tr>
<tr>
<td>Executive Committee targets</td>
<td>4%</td>
<td>0%</td>
</tr>
<tr>
<td><strong>Recommendation 2 - Gender diversity metrics</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Board gender metrics</td>
<td>32%</td>
<td>22%</td>
</tr>
<tr>
<td>Executive Committee gender metrics</td>
<td>28%</td>
<td>10%</td>
</tr>
<tr>
<td>Employees gender metrics</td>
<td>33%</td>
<td>5%</td>
</tr>
<tr>
<td><strong>Recommendation 3 - Boardroom diversity policies</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Boardroom diversity policy</td>
<td>56%</td>
<td>35%</td>
</tr>
<tr>
<td><strong>Recommendation 5 – Board appointment process</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Activity of Nomination Committee mentioned</td>
<td>96%</td>
<td>88%</td>
</tr>
<tr>
<td>Reasonable detail on board appointment process</td>
<td>73%</td>
<td>50%</td>
</tr>
<tr>
<td>Diversity addressed in board appointments</td>
<td>43%</td>
<td>10%</td>
</tr>
<tr>
<td>Gender addressed in board appointments</td>
<td>10%</td>
<td>7%</td>
</tr>
<tr>
<td>Use of executive search firms</td>
<td>73%</td>
<td>66%</td>
</tr>
</tbody>
</table>

*Source: Sealy, Doldor, Singh & Vinnicombe (2011)*

3.2. **Voluntary Code of Conduct in the executive search sector**

An encouraging initiative resulting from the Davies Review took place in the executive search sector. In July 2011, 20 leading search firms signed the **Voluntary Code of Conduct for Executive Search Firms**. The code set out seven key principles of best practice, covering the various steps of the appointment process, from defining the brief to induction on boards. The code also covered succession planning over the medium term; the setting of diversity goals; how the client brief can be defined to balance experience with relevant skills; the value of diverse long lists of candidates; and support during the selection process (see Annex II for full detail on the provisions of the Voluntary Code).

At Cranfield we were commissioned by the Equality and Human Rights Commission to conduct a study examining the role of executive search firms (ESFs) in the board appointment process, with a particular emphasis on the effect of the Voluntary Code on making the process more gender inclusive. We interviewed 10 executive search firms who drafted and signed up to the Code. Together, these firms carry out approximately 80% of FTSE 100 board appointments. The ensuing report (Doldor, Vinnicombe, Gaughan & Sealy, 2012) identified six categories of **good practices among executive search firms**:

- Proactively putting diversity on the agenda in the appointment process.
- Challenging Chairmen and Nomination Committees when defining the brief, so that more importance is given to underlying competencies as opposed to prior experience.
- Finding creative ways to expand the talent pool and reach out to female candidates.
- Ensuring female representation on the long list and the short list.
- Supporting female candidates throughout the appointment process by taking on developmental and advocacy roles.
Supporting Chairmen in handling resistance to female candidates from other Board members.

The report also put forward **recommendations to make the appointment process more rigorous and inclusive**. Key aspects of these recommendations were:

- More transparency and documenting of best practice and initiatives around gender diversity by ESFs
- Clearer definition of the selection criteria applied to candidates. Chairmen and Nomination Committees were encouraged to shift the emphasis from prior experience to underlying competencies when recruiting candidates. However, the Voluntary Code used a vaguely defined term (‘intrinsics’) to refer to assessment criteria beyond experience; this arguably leaves room for subjective judgements around ‘fit’ and ‘chemistry’ in the appointment process and may inadvertently disadvantage female candidates.
- More rigorous and systematic interviewing practices used by search firms, Chairmen and Nomination Committees in the appointment process.
- A longer-term approach to engaging with the pipeline of female talent. ESFs need to invest more time into developing relationships with women in the pipeline, changing their approach from a typically transactional one, focused on short-term placements, to one focused on the longer-term potential of placing women in NED roles.
- A developmental approach to handling female candidates. ESFs and Chairmen need to be more willing to take on developmental roles during the appointment process and beyond (guidance, mentoring to female candidates or induction and ‘onboarding’ processes to newly appointed women).

The Voluntary Search Code has been recently revised in light of some of our recommendations and is currently being circulated for approval among its signatories. Additional search firms have signed up to the Code since its inception. This suggests that in the UK search firms have become active players in the landscape of women on boards, which should contribute to a more inclusive appointment process and ultimately more women on boards.

### 3.3. The 30% Club and the investor community

Finally, it is worth noting that other stakeholders increased their efforts to push for more gender balanced boards in the UK. The 30% Club is a group of Chairmen actively promoting more women on boards. The club started with only seven supportive Chairmen in November 2010, and then successfully engaged 37 Chairmen in 2012, having about 60 Chairmen supporters at present. The Club holds regular events to raise awareness of the issues pertaining to gender diversity on FTSE boards. In 2012, the 30% Club held a seminar with over 150 members of the fund management community, exploring ways in which investors could press companies for more rapid change on this issue of women on boards. One suggestion discussed was that shareholders abstain or vote against the annual re-election of Chairmen who make no efforts to address diversity on their boards. There is hope for further guidelines from the investor community.
4. CONCLUSIONS AND FUTURE ACTIONS

There is clear evidence that the multi-stakeholder approach adopted by the Davies Review has had a significant impact on the gender composition of FTSE listed boards in the UK. There are 15% women directors on FTSE 100 boards (22.4% NEDs and 6.6 EDs). While numbers may still seem relatively low for those hoping for more drastic change, estimates based on current trends suggest that UK stands a good chance of reaching 40% women on FTSE 100 boards by 2020 through this voluntary approach. It is however essential that all stakeholders remain involved and that the pressure from multiple points continues.

There remain a number of enduring challenges, particularly the need to have a more sustainable strategy to developing the pipeline of female talent. The latest Female FTSE Report revealed great variations in how FTSE companies manage the internal pipeline of women directors. Many companies failed to monitor female employees at junior, middle and senior level. While companies are able to attract women at entry levels, they need to do a better job at retaining, developing and promoting them (Sealy & Vinnicombe, 2012). Furthermore, there needs to be more pressure, monitoring and research among FTSE 250 companies and beyond. It appears that the EU directive on compulsory quotas would apply to companies below the FTSE 250, given the market capitalization threshold used.

In the upcoming months, we will see another round of monitoring and voluntary actions being reviewed, namely an update on the Davies Review and Cranfield’s Female FTSE Report (both to be launched in April 2013), and the revised version of the Voluntary Code by executive search firms. In addition, we are keen to see further action from other stakeholders, notably the investor community.

Approaches to women on boards should be country-specific, and it appears that the voluntary approach has been successful, albeit effortful, in the UK. Compulsory measures might be called for in other European countries. However, one should bear in mind that generally quotas run the risk of deflecting attention from the processes creating gender inequality (i.e. poor governance, non-inclusive selection practices, masculine board cultures) to the outcomes of gender inequality (i.e. the sheer inequality of numbers between men and women on boards). This distinction is critical because it reflects a difference between distributive justice arguments (related to fairness of outcomes) versus procedural justice arguments (related to fairness in the processes leading to those outcomes). Psychological research shows that people respond better to procedural justice arguments rather than distributive justice arguments. This would suggest that discussions of quotas should address more explicitly the underpinning causes and processes creating unequal gender outcomes on boards, rather than focusing excessively on changing those outcomes (i.e. the actual numbers of women on boards) (Doldor, 2012).
5. REFERENCES

- 30% Club website: [www.30percentclub.org.uk](http://www.30percentclub.org.uk)
ANNEX I: SUMMARY OF THE DAVIES REPORT RECOMMENDATIONS

1. All Chairmen of FTSE 350 companies should set out the percentage of women they aim to have on their Boards in 2013 and 2015. FTSE 100 Boards should aim for a minimum of 25% female representation by 2015 and we expect that many will achieve a higher figure. Chairmen should announce their aspirational goals within the next six months (by September 2011). Also we expect all Chief Executives to review the percentage of women they aim to have on their Executive Committees in 2013 and 2015.

2. Quoted companies should be required to disclose each year the proportion of women on the Board, women in Senior Executive positions and female employees in the whole organisation.

3. The Financial Reporting Council should amend the UK Corporate Governance Code to require listed companies to establish a policy concerning boardroom diversity, including measurable objectives for implementing the policy, and disclose annually a summary of the policy and the progress made in achieving the objectives.

4. Companies should report on the matters in recommendations 1, 2 and 3 in their 2012 Corporate Governance Statement whether or not the underlying regulatory changes are in place. In addition, Chairmen will be encouraged to sign a charter supporting the recommendations.

5. In line with the UK Corporate Governance Code provision B2.4, 'A separate section of the annual report should describe the work of the Nomination Committee, including the process it has used in relation to Board appointments'. Chairmen should disclose meaningful information about the company’s appointment process and how it addresses diversity in the company’s annual report including a description of the search and nominations process.

6. Investors play a critical role in engaging with company Boards. Therefore investors should pay close attention to recommendations 1-5 when considering company reporting and appointments to the Board.

7. We encourage companies periodically to advertise non-executive Board positions to encourage greater diversity in applications.

8. Executive search firms should draw up a Voluntary Code of Conduct addressing gender diversity and best practice which covers the relevant search criteria and processes relating to FTSE 350 Board level appointments.

9. In order to achieve these recommendations, recognition and development of two different populations of women who are well-qualified to be appointed to UK Boards needs to be considered:

   a. Executives from within the corporate sector, for whom there are many different training and mentoring opportunities; and
b. Women from outside the corporate mainstream, including entrepreneurs, academics, civil servants and senior women with professional service backgrounds, for whom there are many fewer opportunities to take up corporate Board positions.

10. A combination of entrepreneurs, existing providers and individuals needs to come together to consolidate and improve the provision of training and development for potential Board members.

11. This steering Board will meet every six months to consider progress against these measures and will report annually with an assessment of whether sufficient progress is being made.
ANNEX II: PROVISIONS OF THE VOLUNTARY CODE OF CONDUCT ISSUED BY SEARCH FIRMS

- **Succession planning:** Search firms should support Chairmen and their Nomination Committees in developing medium-term succession plans that identify the balance of experience and skills that they will need to recruit over the next two to three years to maximise Board effectiveness. This time frame will allow a broader view to be established by looking at the whole Board, not individual hires; this should facilitate increased flexibility in candidate specifications.

- **Diversity goals:** When taking a specific brief, search firms should look at overall Board composition and, in the context of the Board’s agreed aspirational goals on gender balance and diversity more broadly, explore with the Chairman if recruiting women directors is a priority on this occasion.

- **Defining briefs:** In defining briefs, search firms should work to ensure that significant weight is given to relevant skills and intrinsic personal qualities and not just to proven career experience, in order to extend the pool of candidates beyond those with existing Board roles or conventional corporate careers.

- **Long lists:** When presenting their long lists, search firms should ensure that at least 30 per cent of the candidates are women – and, if not, should explicitly justify to the client why they are convinced that there are no other qualified female options, through demonstrating the scope and rigour of their research.

- **Supporting selection:** During the selection process, search firms should provide appropriate support, in particular to first-time candidates, to prepare them for interviews and guide them through the process.

- **Emphasising intrinsics:** As clients evaluate candidates, search firms should ensure that they continue to provide appropriate weight to intrinsics, supported by thorough referencing, rather than over-valuing certain kinds of experience.

- **Induction:** Search firms should provide advice to clients on best practice in induction and ‘onboarding’ processes to help new Board directors settle quickly into their roles.
Legal aspects of gender balance on corporate boards in Germany

Abstract

The German corporate governance code includes a recommendation as to diversity on corporate boards. Two draft bills on gender quotas are currently under way in legislative proceedings. However, the ruling coalition rejects those, advocating a “flexible quota”. Corporate law academic scholarship disapproves of gender quotas. This goes back to disapproval of the underlying policy and the fear of adverse consequences on corporate decision-making as well as the claim of incompatibility with European law and with German constitutional law.
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EXECUTIVE SUMMARY

Background

This note has been requested by the European Parliament’s Policy Department C “Constitutional Affairs and Citizens’ Rights”.

The underrepresentation of women on corporate boards has been a concern for legislators both at member states and at EU level. While there is widespread agreement as to the desirability of seeing more female directors – for reasons as diverse as enhancing shareholder value, reducing groupthink phenomena or improving social justice – no such agreement has been reached on the suitability of legislative measures. Suggestions on this issue range from legislative abstinence, over variations of “soft measures“ to the introduction of “hard” gender quotas.

Germany has been seeing a lively political debate on this topic for two years. The Christian-democratic government opposes “fix” quotas. Instead, it has been promoting a law obliging corporations to set their own “flexible” quota. However, no legislative procedure has yet been initiated by the government. The social-democratic party has introduced one far-reaching legislative proposal. Lately, it joined forces with the green party in order to bring about a much milder proposal including however “fix” quotas.

Aim

The aim of the present study is to provide an overview on legislative proposals currently presented and on academic scholarship on the issue. Taking it from there, legal obstacles to the introduction of a “fix” quota under German law are discussed and the “soft” version of “flexible” quotas is being advocated.
1. TERMINOLOGY AND LEGISLATIVE CHALLENGES

**KEY FINDINGS**

- For the purposes of this note, a gender “quota” is a figure detailing the proportion between men and women on a corporate board.

- Introducing legal rules on gender quotas requires carefully distinguishing the rule’s elements of application from its sanctions.

- As to elements of application, a legislator introducing gender quotas will have to decide upon (i) which type of corporation and (ii) which type of board is to be addressed as well as (iii) who sets the quota and (iv) to what extent exceptions from the rule will be granted.

- As to sanctions, any legislation on gender quotas requires a decision upon transparency requirements and/or nullity or revocability of boards which do not comply with the quota requirement. The latter choice triggers a number of complex questions of corporate law. Further sanctions for boards violating a quota rule include fines, negative impact on pay or ineligibility for state bidding procedures.

Discussing gender quotas requires using precise terminology as well as a number of careful distinctions when comparing rules in different Member States or deciding upon legislative steps to take.

1.1. Terminology: the gender “quota”

For the purposes of this note, the term gender “quota” will be understood quite broadly to encompass any figure detailing the proportion between men and women on a corporate board. It is worth noting that gender quotas do not necessarily need a fix number (i. e. 40%) or even a parameter set by the legislator (rather than by the corporation itself). Hence, I will speak of a country’s law including a gender quota, whenever there are legal rules in place which require the competent body voting on the board’s composition to specifically decide upon the number of women who should sit on that board. In the case of Germany, the competent body is the supervisory board when appointing the members of the management board (Vorstand). The shareholders general meeting is the competent body when voting for the supervisory board (Aufsichtsrat).

1.2. The elements of application

When we analyse legal rules it is helpful to distinguish the elements of applying the rule from the sanctions for not conforming to the rule. A rule on gender quotas will need to address a minimum of four elements of application (all of which are the object of debate in Germany).

- Taking into account the wide variety of business associations in Germany, ranging from private partnerships (Gesellschaft bürgerlichen Rechts) over commercial partnerships with full personal liability of at least one of the members (offene
Handelsgesellschaft/Kommanditgesellschaft) to companies with limited liability (Gesellschaft mit beschränkter Haftung) and stock corporations (Aktiengesellschaft) a choice of the type of corporation addressed is required. Obliging a private partnership to decide upon a gender quota might be seen as a more drastic intervention in private law matters than requiring the same from a public stock corporation.

Whenever a corporation has more than one type of board (dualistic system), a choice of the type of board addressed by a rule on gender quotas is required. It is a regular feature of companies with limited liability to separate owners (shareholders) from management. Managerial tasks may be executed by one board (monistic system) alternatively its tasks may be divided between a management and a supervisory board (dualistic system). German law allows for the dualistic system exclusively as far as stock corporations are concerned. While there is some feeble support for gender quotas as far as supervisory boards are concerned, both public opinion and academics seem to find it much harder to include management boards. Under German law, employee representatives are members of supervisory boards. Hence, the problem if and how employee representatives would need to be considered for a gender quota adds to complexity.

We have mentioned earlier that it is not necessarily the legislator who sets a quota. While countries such as France and Norway have enacted laws featuring a legal quota, the choice of who sets a quota is still quite open in Germany. The social-democratic and the green party advocate a legislative quota, the governing Christian-democratic party opts for each corporation to individually set the quota (see below 2.1.).

Granting exceptions to a legal rule is often required in order to avoid undue consequences. Of course, the choice of exceptions to the rule is an important one. The more numerous the occasions which allow to disregard the rule, the less substance remains.

1.3. The sanctions

The efficiency of a legal rule to a large extent depends on the sanctions associated with it. As to gender quotas there are a number of general and some rather company-law specific sanctions. More general sanctions, as seen e. g. in France or Spain, include fines for boards not in conformity with a legal quota, negative impact on board member’s pay or ineligibility for state bidding procedures. The German debate has focused on sanctions which more directly bear on company law.

An obvious sanction for non-compliance with a gender quota is transparency. A transparency rule could require corporations to annually issue a statement on the gender quota of their boards. The policy underlying transparency rules of this type will be that non-compliance leads to reputational damage hence will be avoided.

Significantly harsher are sanctions which entail implications for the proper composition of a board which is not in compliance with a quota. There are quite a number of possible strategies for a sanction of this type. All of them pose tricky questions under German law as far as supervisory board members are concerned. Those are not appointed, but elected by the shareholders. Hence, an election not in accordance with a quota would have to be nullified, should the legislator opt for implications for the proper composition of a board.
The law may altogether prevent a board not in compliance with a quota. The election (in the case of a shareholder vote on the board) or the appointment (in the case of the supervisory board appointing the management board) of such a board would be void or revocable. If a board composed in this non-compliant fashion nonetheless goes about its business, a number of complex questions of company law arise: Can actions of the non-compliant board bind the corporation? If not, will legitimate expectations of creditors be honoured? Will the body voting for/appointing the “wrong” board be liable for damages?

Instead of declaring a non-compliant board null and void altogether, the legislator may opt for limiting the consequences to some of its members. Imagine a German supervisory board comprising 20 people, all male. Imagine further, German law introduced a legal gender quota of 25% on 1st January 2014, i.e. then requires 5 female members. The A-Corporation will hold elections of its supervisory board on 10th January 2014. Under German law, the supervisory board is not constituted in its entirety each year. Instead, each member of the supervisory board is typically elected for a bit less than five years. Members leaving the board earlier will make place for new members. Consequently, when the board in our example will be elected on 10th January 2014, there won’t be 20 seats to fill, but less. If 5 seats will need to be filled on that day, there is a straightforward answer: We need 5 women. What happens if only 0 to 4 seats are empty? Even if more than 5 seats will need to be filled, the answer is tricky: German law offers two ways of electing supervisory board members. Option (1) is the election “en bloc”. A list is proposed to the shareholders, comprising the entirety of new members and the shareholders vote for the entire list. Let’s assume in our example there are 7 new members on the list, but only 4 of them are women – will the entire election be void? Option (2) for electing supervisory board members is to individually vote for each member. Let us again assume there are 7 new members to be elected on 10th January 2014. We said 5 of those will need to be female. What happens if the shareholders assembly votes for candidates 1-2 (female), 3-5 (male), 6 (female), 7 (male)? Will the election of all male candidates be void or should only two elections be void? If the latter is the case, which ones of the male candidates need to go? Will all elections be void, since there are too few women?

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1 Section 102 German Stock Corporation Act (Aktiengesetz), cf. Langenbucher (2011a) § 5 recital 42.
2 The answer obviously is: the legislator will need to provide for transitional arrangements.
2. LEGISLATIVE PROPOSALS IN GERMANY

KEY FINDINGS

- There is no legal quota for supervisory or management boards under German law.
- The German corporate governance code recommends “diversity” when appointing management board members and electing supervisory board members.
- The German government currently favours the family ministry’s “flexi-quota” proposal. This proposal requires corporations to set their own quota, flexibly adjusted to their needs.
- The Social-democratic party has introduced an ambitious draft bill. The Social-democratic and the green party have jointly introduced another, less ambitious draft bill, hoping for a compromise and a quick legislative procedure.

The German government has seen extensive debate between the minister of labour (Ursula von der Leyen) and the minister of family (Kristina Schröder), the former opting for a fix quota of 30%, the latter advocating a flexible quota to be introduced by the corporation itself (the so-called “flexi-quota”). Chancellor Merkel has backed the “flexi-quota” plan which includes a number of preliminary stages, leading up to legislative action at a later time only. The liberal-democratic party (coalition partner of the Christian-democratic party) opposes any quota.

Figure 1: Women in supervisory and management boards in Germany

<table>
<thead>
<tr>
<th>Year</th>
<th>Female Board Members (Supervisory Board)</th>
<th>Female Board Members (Managing Board)</th>
</tr>
</thead>
<tbody>
<tr>
<td>2009</td>
<td>11.7</td>
<td>0.5</td>
</tr>
<tr>
<td>2010</td>
<td>13.3</td>
<td>2.2</td>
</tr>
<tr>
<td>2011</td>
<td>13.3</td>
<td>3.7</td>
</tr>
<tr>
<td>2012</td>
<td>19.7</td>
<td>7.8</td>
</tr>
</tbody>
</table>

Source: Author and www.flexi-quote.de
2.1. The German corporate governance code

The German corporate governance code sets out standards of good corporate governance. Listed stock corporations are required to report on their application of the code under a “comply-or-explain” structure provided for in section 161 German stock corporation act. The code comprises (1) rules which are binding under the German stock corporation act, (2) recommendations which corporations may deviate from when providing an explanation why they do and (3) mere suggestions which may be disregarded without reporting.

4.1.2 of the code recommends for the management board to have due regard for the benefits of diversity, notably gender, when hiring executive staff. 5.1.2 of the code recommends the same for the supervisory board when appointing the members of the management board. 5.4.1 of the code recommends for the supervisory board to specify policies for its own composition including diversity. Special emphasis is placed on understanding the broader concept of “diversity” as focussed on gender.

The legal sanctions for not reporting on the application of the code at all or for falsely claiming to apply the code are a subject of hot debate under German law. Most authors agree that management and supervisory board members are liable for damages, yet losses which can be claimed are rare. In some cases, the false report may rule out formal approval of the board’s conduct by the shareholder’s assembly. Obviously, there are no sanctions for paying lip service only to the code provisions recommending diversity.

2.2. The “flexi-quota” proposal

The ministry of family has been advocating a law introducing a “flexi-quota”. According to the minister’s internet site www.flexi-quote.de, corporations will be required to individually set a gender quota. They will have to report on the quota chosen as well as on the point in time when the board plans to fully comply with the quota. Proponents of the flexi-quota point to the competitive advantage of catering to differences in female talent pools across industry sectors.

As to elements of application, the proposed quota covers companies which are listed and fall under the scope of mandatory employee representation. It applies to both, management and supervisory board.

With regard to sanctions, the proposal remains vague. The minimum sanction of transparency, i.e. reporting on the quota and its implementation, is a necessary component of the flexi-quota’s logic. The minister seems to hope that publicity and the fear of reputational damage will do most of the trick. Nevertheless, the proposal stipulates that both, failure to set a quota and non-compliance with the quota will be sanctioned, without specifying what type of sanction is being envisaged.

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1 Cf. Langenbucher (2011a) § 4 recital 112 et seq. with accompanying footnotes.
2 Cf Langenbucher (2011b) summarizing an expertise on preliminary plans for a „flexi-quota“.
3 http://www.flexi-quote.de/faq-zur-flexi-quote.html
2.3. The draft bill introduced by the social democratic party

A number of draft bills have been discussed in parliament,\(^1\) official hearings in January 2013 were held on two drafts, one of which introduced by the social democratic party,\(^2\) the other one put forward jointly by that party and the green party.

The social-democratic party’s draft bill addresses listed stock corporations as well as companies which fall under the German law of mandatory employee representation. The social democratic party’s draft bill encompasses supervisory boards as well as management boards. As far as supervisory boards are concerned, both, board members elected by the shareholders as well as employee representatives, fall under the proposed rule’s scope.

The law is to come into force immediately and require corporations to implement a quota of 30% as regards supervisory boards and 20% for management boards. Two years later, the quota is raised to 40% for both boards. There are no exceptions to the rule provided for.

The draft bill aims at company law specific sanctions when stipulating that an appointment of members of the management board and an election of members of the supervisory board “will only be possible” if in compliance with the quota. Appointments/elections not complying with the quota are to be regarded as legally void. Hence, the members appointed/elected are not members of a board in breach of the law. Instead, they do not become board members at all. It follows that actions of the management board are, with minor variations according to the corporation’s bylaws, void and cannot legally bind the corporation. The draft bill does not provide for specific remedies for third parties. As long as a compliant board has not been appointed, one will have to resort to the stock corporation act’s court procedure which allows a court to appoint suitable candidates in situations where the minimum number of legally required board members is not reached.

The drafters of the bill are not too worried by the threat of the corporation not being able to act in a legally binding fashion. They point to the fact that very often actions of the supervisory board may still be legally valid if a sufficient number of members take part in the decision. This goes back to section 108 of the German stock corporation act which stipulates that a supervisory board’s quorum may be defined in the corporation’s bylaws. Should there be no relevant provision in the bylaws, the stock corporation act stipulates a quorum of a minimum of one half of its members being present. Let us assume a quota of 30% is introduced. The B-corporation’s shareholder’s general meeting votes for men only. Let us further assume a sufficient number of vacancies could have been filled in order to meet the quota requirement. The election of the “wrong” candidates is legally void (we will leave aside the complexities of figuring out who is the wrong candidate out of a number of candidates). The supervisory board may still have a quorum since 70% of its members are proper members and section 108 requires a quorum of 50% only. However, according to the draft bill a supervisory board may be non-compliant for a maximum of one year. After lapse of 12 months, the draft bill stipulates that the supervisory board loses its capacity to act in a legally binding fashion.

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\(^2\) Bundestags-Drucksache 17/8878.
2.4. The draft bill jointly introduced by the social democratic party and the green party

The most recent bill was jointly introduced by the social democratic party and the green party in October of 2012.\(^1\) It advocates a significantly milder compromise, hoping to quickly introduce the bill. This rush is to be read against the background of 2013 being a so-called “super-election-year” for supervisory boards. Looking at corporations listed under the DAX 30 index alone, 77 open posts will need to be filled.

The draft bill’s scope encompasses listed stock corporations or corporations which fall under the German law of mandatory employee representation. It applies to supervisory boards only and covers the entirety of the board members.

The quota introduced is to come into effect on 1\(^{st}\) January 2018. It is set at 20\%, only on 1\(^{st}\) January 2023 it is to be raised to 40\%. Granting the considerable transition period of five years for the 20\% quota to apply and another five years for it to reach 40\%, accounts for perceived difficulties in finding suitable candidates.

The bill includes a mechanism in order not to compromise small boards where finding candidates may prove tricky: Boards with three to six members satisfy the quota when electing one candidate of the underrepresented gender. Boards with seven or eight members fulfill the quota when comprising two such candidates; the quota of 20\% applies only for boards comprising nine or more members. After 2023, requirements are to tighten. Boards with two to four members need one candidate of the underrepresented gender, boards with five to six members need two such members. Boards with seven or eight members need three “minority” members.

The proposed law stipulates a seemingly broad exception to the rule. Whenever the corporation shows that “in spite of considerable efforts” no suitable candidates could be found, the rule doesn’t apply. In the bill’s annotations, this rule appears to lose some of its vagueness. It is to be “interpreted very narrowly” and the drafters assess the probability of not finding suitable candidates as “extremely low”. A federal agency is to decide upon acceptance of the reasons put forward by the corporation.

Sanctions are quite mild. A federal agency is to testify compliance of a corporation with the legal rule and annually publish statistics, including a “naming-and-shaming“-mechanism. The corporation is required to annually report on the composition of their supervisory board and on compliance with the legal quota. Disregarding the reporting requirement entails the possibility of a fine. The corporation loses tax privileges for remuneration paid to the entirety of a non-compliant board, if the shareholders representatives’ side of the board is not in compliance with the quota requirement.

The draft bill proposes no further sanctions regarding the specifics of company law, thus avoiding the complex topics raised earlier (see above 1.3). Instead, the draft bill expressly stipulates that legal validity of a board’s actions is not hindered by that board disregarding the legal quota. Similarly, the draft bill does not allow for challenging the shareholder’s assembly’s election of a board on the grounds that it violates the legal quota.

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\(^1\) Bundestags-Drucksache 17/11139, 23.10.2012.
3. ACADEMIC SCHOLARSHIP

**KEY FINDINGS**

- A vast majority of academic scholarship is opposed to an introduction of gender quotas in corporate boards.

- Arguments against gender quotas mainly stem from (i) opposition to the underlying policy, (ii) concerns about the incompatibility with constitutional or European law and (iii) pragmatic worries about adverse consequences on corporate decision-making.

The introduction of a gender quota in corporate boards, it seems, is disapproved not only by public opinion in Germany but also by a majority of the legal community in general and corporate law academics more specifically.

According to a recent survey, a minority of 30% of the German population regards the underrepresentation of women in “leading positions” as “unjust”.¹ The answer to the question “should a gender quota promote equal opportunities?” left even less room for doubt:

**Figure 2: “Should a gender quota promote equal opportunities?”**

<table>
<thead>
<tr>
<th>total population</th>
<th>female population</th>
</tr>
</thead>
<tbody>
<tr>
<td>yes</td>
<td>no</td>
</tr>
<tr>
<td>18</td>
<td>82</td>
</tr>
<tr>
<td>25</td>
<td>75</td>
</tr>
</tbody>
</table>

*Source: Institut für Demoskopie Allensbach (2013)*

The “Deutscher Juristentag“ (Association of German Jurists) on its latest forum in September 2012 just as clearly voiced opposition against introducing legal quotas.² While 71 out of 79 voters appreciate the corporate governance code’s efforts to promote diversity, 58 out of 76 voters oppose a legislative quota for management boards and 62 out of 80 voters oppose a legislative quota for supervisory boards. 54 out of 80 voters oppose the “flexi-quota” advocated by the ministry for family.

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¹ Institut für Demoskopie Allensbach (2013) p. 27.
3.1. The policies underlying a gender quota

Enhancing efficiency and shareholder value is often cited as the guiding policy underlying the introduction of gender quotas in business corporations. Most German academics do not subscribe to this view. If anything, they see gender quotas as a means to further fairness and social justice, loosely connected to discussions on corporate social responsibility.¹ This has important implications for justifying legal action. While enhancing shareholder value provides a good reason for reforming corporate law, it is certainly much more complicated to introduce corporate law rules because of fairness concerns of social justice.

3.2. Incompatibility with European law

Most legal scholars view the introduction of a specific form of gender quota, namely a strict and not performance-based quota, as violating art. 8 TFEU’s guarantee of equality between men and women as well as art. 23 of the Charter of Fundamental Rights of the European Union and art. 2 para. e subpara. 1, 4 of the equal treatment directive 2006/54/EC.²

Scholars point to the ECJ’s decisions in Kalanke, Badeck and Marshall, where the court opposed legal rules requiring automatic promotion of women irrespective of performance-based criteria. It is claimed that the introduction of a gender quota for boards falls into the category of strict, not performance based quotas. This argument refers to fix quotas (e.g. 40%) which need to be fulfilled even if we assume a case where it was undisputed that the available female candidates are less qualified than their male competitors. Hence, any quota to be introduced will need to take into account the court’s jurisprudence on this form of “reverse discrimination”. In the past, the ECJ accepted quotas including the requirement of female candidates being as qualified as male candidates (merit-based appointment) as well as a rule granting exceptions for certain cases of impossibility of finding a female candidate. It might be noted, however, that the ECJ’s jurisprudence so far concerns cases of employment. Few scholars have discussed to what extent this line of reasoning can be applied to the membership of a board which seems to display quite a number of features distinguishing it from employment situations.³

3.3. Incompatibility with German constitutional law

An overwhelming majority of German corporate law scholars oppose gender quotas for constitutional reasons. Interestingly, there is much less opposition from constitutional law scholars on that same point. There are two main lines of reasoning for this opposition. The first one refers to the concerns of reverse discrimination we have just outlined with equal protection of men and women granted by Art. 3 of the German constitution. The second line of reasoning is concerned with Art. 14’s protection of property rights.

According to Art. 14 of the German constitution shareholders are protected as owners of the corporation. Any rule limiting their rights flowing from this property position fall under scrutiny by the Constitutional Court. The right to elect the board, it is argued, constitutes a prime shareholder right. Hence, a rule limiting the shareholder’s freedom to choose whoever they consider fit possibly violates the constitution. Of course, there are a number

² Bachmann (2011a) p. 1131.
of legal rules which sensibly limit this freedom – rules requiring the required mental capacity, a minimum age or the absence of criminal offences provide good examples. Where do we draw the line? The German Constitutional Court acknowledges the high complexity of property rights being defined by the legislator ("what counts as a property right?") and that same legislator being bound by the constitution’s guarantee of property ("does a law redefining a property right violate the constitution?"). The test it applies is a proportionality test. Firstly, the law’s policy will be scrutinized: is the goal the legislator aims at when introducing the law a proper one? As to gender quotas, the legislator may point to both, enhancing shareholder value as well as fairness concerns of equality between men and women. Secondly, the legal instrument chosen will be tested against constitutional principles. The rule chosen by the legislator will need to qualify as apt, necessary and proportionate.

The Constitutional Court’s most important precedent concerns the establishment of co-determination on corporate boards in the 70s.\(^1\) The Constitutional Court accepted co-determination, pointing to the large discretion the legislator enjoys as well as the proportionality test being met. One argument in favour of the constitutionality of this rule was the fact that board members elected by the shareholders are granted the deciding vote. Consequently, whenever the “owner’s side” of a board votes unanimously, the “employee side” cannot overturn that vote.

Some corporate law scholars argue that (i) the legislator’s policy cannot be described as enhancing shareholder value but solely as promoting social justice and (ii) a rule promoting social justice may never justify reforming corporate law.\(^2\) Others point to a “cumulation effect”: The shareholder’s freedom to elect their preferred candidate is limited not only by co-determination but also by EU law requiring a financial expert. Piling a gender quota on top of those restrictions, it is argued, would violate the constitution’s guarantee of property rights.

It seems that the majority of constitutional law scholars do not share their corporate law colleague’s skepticism.\(^4\) They point to the German constitutional court’s decision upholding co-determination and claim that a gender quota might well pass the proportionality test – provided that the rule accounts for fears of reverse discrimination.

### 3.4. Lack of competence for the European legislator

Adding to constitutional concerns, most German corporate law scholars claim that there is no competence for the European legislator to pass a directive introducing gender quotas.\(^5\) This is based on general views on subsidiarity as well as on the more specific denial that art. 157 para. 3 TFEU or art. 50 para. 2 lit. g TFEU allow for a directive of this type. The latter requires a “safeguard [...] for the protection of the interests of members and others”. Gender quotas are viewed as a fairness measure of social justice, not providing competence for the European legislator to pass a company law directive. The former – picked by the Commission – applies to employment situations exclusively. It is doubtful

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\(^1\) BVerfGE 50, 290.
whether board members, even more so if supervisory board members are concerned, may be regarded as “employees” in that sense.¹

3.5. **Adverse consequences on corporate business**

While most corporate law scholars acknowledge the desirability of more female leadership in principle, they blame traditional role expectations, unwillingness of women to sacrifice family life to career concerns and insufficient childcare.² Against this background, rules on gender quotas in corporate boards are viewed as taking private companies hostage for a goal which is if not exclusively, at least primarily a concern of social fairness and fairness.³ Especially as regards management board seats, the generally accepted view seems to be that there are currently not enough qualified women available.⁴

4. **CONCLUDING REMARK**

It might have become apparent that the introduction of fixed quotas, even in the watered-down version introduced by the social-democratic and the green party, meets considerable opposition in Germany. This is true for corporate law scholars as well as for public opinion.

Against this background, flexible quotas seem a promising solution to accommodate both, concerns about shareholder’s rights and policies of enhancing gender balance on corporate boards.⁵ I have advocated elsewhere the broader concept of a “declaration of strategy”.⁶ It would require corporations to report on their strategy for board composition, on their current status quo and on the time-line they set for achieving their reported “ideal” board composition. Such declaration is not limited to gender but might include independence, professional qualification and the like.

Considering reputational effects of a declaration of this type, one might assume that as to sanctions, disclosure should suffice and eliminate the need for the more drastic measures of annihilating elections/appointments of corporate board members.

¹ Basedow (2013) p. 42.
⁴ Habersack (2012) p. 34.
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Abstract

In this note we will summarize the complex structural and cultural factors considered as the greatest barriers in women’s career. In addition to the collection of statistical and quantitative sociological data, we will present our most important qualitative findings related to the acceptance of women managers. These findings highlight the traditional gender order of the Hungarian society, which is continuously reinforced by various institutional systems of the society.
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1. INTRODUCTION

The examination of the gender situation is a marginal public and professional issue in Hungary today. In recent decades the country has only periodically met the formal expectations of gender equality, mostly subjected to external political and economic expectations, at least the ones concerning the legal and institutional framework. These steps, however, have not become important parts of people’s set of values; as a result, debates about gender equality were performed and decisions were made in a controversial manner. Be it the system of requirements set by the Soviet Union or the European Union, these issues have been regarded by the population, and even by the responsible leaders, as aims to tick in the checkbox rather than something that represents an important value in itself. Women’s political and economic emancipation became an empty slogan in the socialist era, remembered by many as the period of forced emancipation. However, it must be admitted that it contributed largely to women’s massive entry into the labour market. In this respect we could also see that the clear signs of a backlash were identifiable in the public opinion as well as in measures of social policy (Křižková et al., 2010). As a consequence, we can still see some tension between the principles of equality and the specific opportunities and intentions of implementation in Hungary, similarly to many other countries in Central and Eastern Europe.

Although the legal conditions of equal opportunities and equal treatment have been created, the issue of equal opportunities has become simplified, deflated and removed from the political agenda since the country’s accession to the European Union (Juhász, 2012). This has been especially true for equal gender opportunities, as women apparently suffer much less discrimination and disadvantages than members of other protected groups. In the last few years, inseparably from the general conservative turn, the importance of issues on the economic and decision-making problems of women has become relative only. This strange situation received an especially interesting appearance during Hungary’s presidency of the EU, when this issue was practically formulated in terms of a contrast between gender mainstreaming and family mainstreaming (Juhász, 2012).
2. WOMEN IN THE LABOUR MARKET AND IN MANAGEMENT AROUND THE TIME OF THE POLITICAL CHANGE

Before analysing the current situation in Hungary, let us take a brief look at the past twenty years. While the whole economy almost collapsed and the industry lost its most important markets in the period of the political change, the situation of the restructured economy had a different effect on women and men. Given the invariably significant gender segregation in the labour market, women suffered fewer short-term disadvantages resulting from the failure of industrial activities. Therefore, while segregation temporarily saved some women from unemployment, it locked them into the ghetto of low-paid jobs with fewer perspectives (healthcare, public administration, etc.) At the same time, it institutionalised an alternative exit for women from the labour market, notably the long-term childcare leave, which legitimised women’s absence from the labour market (Frey 1997). Despite the significant structural change in the labour market and women’s policy in socialism, also the vertical segregation has been sustained, reserving the most important and best-paid leading positions for men (Nagy, 2001).

If we compare the current situation to the conditions of twenty years ago, we find that women and women managers in Hungary were in a more advantageous situation at the moment of the political change than today from various points of view. A greater proportion of working-age women worked than today, an increasing proportion of women were represented in the management positions year by year, the welfare systems (childcare institutions, maternity leave, public catering, whole day childcare), the image of the working woman rearing her children became socially accepted although, we must add, the role of men, and especially that of fathers, was outside the scope of policy and research activities. Due to their increasing professional and language skills, the highly qualified women obviously became the labour force sought after by the new international companies in Hungary. A brilliant example of this is illustrated by the development of the two-tier banking system and the women managers gaining more ground in these banks.

The economic positions occupied by women at the time of the political change were high on the international scale and stable on the national level because women made large human capital investments in the earlier decades, e.g. in business administration, financial and legal higher education, which empowered them to occupy management positions and made them indispensable due to their English and German language skills. Women, therefore, formed a significant part of the elite pool used by companies to select their managers. For this reason, the international companies “rewarded” women, who could have expected considerably less professional promotion beforehand, with high positions and a fast career (Nagy, 2001). At the same time, the management positions remained clearly segregated; women gained positions in the second and lower levels of the management hierarchy, mainly in feminized sectors, where most of the subordinates were women, so they rarely disturbed the social status quo. Such sectors included finance, where hardly any women were represented in Western Europe at that time. We can clearly see vertical and horizontal segregation within the management, which also stabilized managers’ gender pay gap (Nagy, 2001).

Later we will show that the relatively advantageous situation of women is only a thing of the past and now we can speak about not only stagnation but also about a fall. Although a significantly higher proportion of graduates are women than men, and women’s majority in
higher education is unquestionable, apart from the technical field; this significant increase, however, is not converted into profit in the labour market processes. In 2012 women were represented by 56% in higher education, 40% in management jobs, 7% in board membership and 0% in board leadership in Hungary (EC, 2012a; HCSO, 2013). We must also say that in Hungary too there is a very strong “male quota” in the most influential positions in the economic life. Therefore, if we consider a meritocratic system, we cannot be satisfied with the situation in Hungary. Before taking a look at the most up-to-date data, we will briefly summarize what barriers prevent women from becoming managers.

3. BARRIERS IN WOMEN’S WAY

I will not summarize the numerous different categorizations of barriers but the understanding of the complexity of the Hungarian situation is best facilitated by the following models: Powell’s GOS-approach (1999), and the systematic Eagly-Carli labyrinth model focusing on social (rather than individual) barriers (Eagly-Carli, 2007)28. While the most important feature of Powell’s approach is that it simultaneously focuses on the individual, the organizations and the whole society and defines the barriers as their result, Eagly and Carly deduce the most important factors from social, macro-level factors. However, both models attribute relatively little significance to the possible variations in individual motivation and set out from the even distribution of abilities, skills and the patriarchal organization of society. Powell’s model identifies the following factors: gender/person-centered explanations (e.g. socialisation, motivation, career attitudes, types of education, work-life balance, family background, demographic factors); organization/situation-centered explanations (structured promotion, token position, similarity attraction paradigm, flexible working arrangement, training, parental leave), and social-system-centered explanations (patriarchy, expectations, gender roles, segregated labour market, lack of networking). On the other hand, Eagly and Carli identify four main barriers that women employees must continuously overcome if they are to be promoted: prejudices, resistance, leadership style, family demand, and the low networking activity resulting from these, especially from the last, factors. The barriers listed above are clearly present also in the life of Hungarian women managers.

4. STABILITY OF THE PYRAMID STRUCTURE

As mentioned previously, the Hungarian labour market can also be characterized by vertical segregation; while women and men are represented in equal proportions on the lower levels of organizations; promotion is much more difficult for women than it is for men. As we see from the data in Table 1, the distribution of the two genders is very uneven in the different major occupational groups; management is the only non-manual occupational category where women are under-represented. It is also remarkable to see that as a result of the 2008 crisis the composition of the genders in major occupational group 1 underwent a significant change; the proportion of women rose to 40.2% from 35%. The cause of this, however, is not that the number of women rose within the group between 2007 and 2011 but that the number of men working in this category in the critical years dropped by over a third. This means that women's position remained relatively advantageous only. Women's proportion, however, decreased in all other non-manual occupational groups. Until now the increase of the proportion of women in occupational group 1 has not had any influence on the frequency of women occupying higher management positions.

28 A good overview of the main elements of the discussion can be read in González Menéndez et al., 2012.)
Table 1: The number of employees according to major occupational groups by gender

<table>
<thead>
<tr>
<th>Major occupational group</th>
<th>Number of female employees (1000)</th>
<th>Number of male employees (1000)</th>
<th>Share of women (%)</th>
<th>Share of women (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Legislators, senior officials and managers</td>
<td>99.7</td>
<td>88.2</td>
<td>183.4</td>
<td>130.5</td>
</tr>
<tr>
<td>2. Professionals</td>
<td>297.8</td>
<td>324.2</td>
<td>232.4</td>
<td>281.4</td>
</tr>
<tr>
<td>3. Technicians and associate professionals</td>
<td>364.5</td>
<td>344.3</td>
<td>202.1</td>
<td>230.7</td>
</tr>
<tr>
<td>4. Clerks</td>
<td>235.8</td>
<td>229.2</td>
<td>20.3</td>
<td>48.5</td>
</tr>
<tr>
<td>Non-manual workers</td>
<td>997.8</td>
<td>985.9</td>
<td>638.2</td>
<td>691.1</td>
</tr>
<tr>
<td>5. Service workers and shop and market sales workers</td>
<td>361.1</td>
<td>346.7</td>
<td>277.9</td>
<td>239.7</td>
</tr>
<tr>
<td>6. Skilled agricultural and forestry workers</td>
<td>27.6</td>
<td>31.0</td>
<td>74.8</td>
<td>76.7</td>
</tr>
<tr>
<td>7. Craft and related workers</td>
<td>104.9</td>
<td>46.4</td>
<td>650.3</td>
<td>520.2</td>
</tr>
<tr>
<td>8. Plant and machine operators and assemblers</td>
<td>127.7</td>
<td>164.0</td>
<td>347.7</td>
<td>350.6</td>
</tr>
<tr>
<td>9. Elementary occupations</td>
<td>158.2</td>
<td>179.0</td>
<td>123.9</td>
<td>168.7</td>
</tr>
<tr>
<td>Manual workers</td>
<td>779.5</td>
<td>767.1</td>
<td>1,474.6</td>
<td>1,355.9</td>
</tr>
<tr>
<td>10. Armed forces</td>
<td>5.9</td>
<td>1.7</td>
<td>30.2</td>
<td>10.4</td>
</tr>
<tr>
<td>Employed persons together</td>
<td>1,783.2</td>
<td>1,754.6</td>
<td>2,143</td>
<td>2,057.4</td>
</tr>
</tbody>
</table>

Source: HCSO (2013) Table 2.3.2
After the political change, women were represented in about one sixth of the top level management positions, typically in the second line, in deputy positions (Nagy, 2001). The 2009-2010 representative surveys on the elites led Czibere to the conclusion that women are represented in 17% in the whole cultural, political and economic elite (Czibere, 2011). As no systematic data recording was performed in Hungary, with no longitudinal data recording, we can only rely on the data of the companies quoted on the stock exchange, which is available on the website of the European Commission (Table 2). These data show the decreased presence of women in board positions in Hungary (EC, 2012a), so Hungary performs poorly not only in international comparison but it also repeatedly performs more poorly than its own previous results. It is clear, however, that the number of companies in the sample shows great fluctuation; while the data of supposedly all companies quoted on the stock exchange was considered in the first period, the data for the last five years relate only to a much smaller fraction of such quoted companies.

Table 2: Largest quoted companies

<table>
<thead>
<tr>
<th>Year</th>
<th>President Covered</th>
<th>President Members</th>
<th>Highest decision Covered</th>
<th>Highest decision Members</th>
</tr>
</thead>
<tbody>
<tr>
<td>2003</td>
<td>35</td>
<td>35</td>
<td>4</td>
<td>96</td>
</tr>
<tr>
<td>2004</td>
<td>38</td>
<td>35</td>
<td>2</td>
<td>98</td>
</tr>
<tr>
<td>2005</td>
<td>39</td>
<td>29</td>
<td>5</td>
<td>95</td>
</tr>
<tr>
<td>2006</td>
<td>39</td>
<td>28</td>
<td>5</td>
<td>95</td>
</tr>
<tr>
<td>2007</td>
<td>39</td>
<td>0</td>
<td>0</td>
<td>100</td>
</tr>
<tr>
<td>2008</td>
<td>14</td>
<td>14</td>
<td>0</td>
<td>100</td>
</tr>
<tr>
<td>2009</td>
<td>13</td>
<td>13</td>
<td>0</td>
<td>100</td>
</tr>
<tr>
<td>2010</td>
<td>13</td>
<td>13</td>
<td>8</td>
<td>92</td>
</tr>
<tr>
<td>2011</td>
<td>5</td>
<td>5</td>
<td>0</td>
<td>100</td>
</tr>
<tr>
<td>2012 January</td>
<td>11</td>
<td>11</td>
<td>0</td>
<td>100</td>
</tr>
<tr>
<td>2012 October</td>
<td>11</td>
<td>11</td>
<td>0</td>
<td>100</td>
</tr>
</tbody>
</table>

Source: EC, 2012a; EC, 2013a; EC, 2013b

For this reason, we receive a more relevant picture, although related to only one particular time, from the sociological analysis which examined the data of the quoted companies for year 2009. We used the public database of the companies included in the research to compile the information related to boards as operative executive bodies (Table 3). These data distinguish between companies in categories A and B on the Budapest Stock Exchange. Category A includes companies with more liquidity and a wider circle of investors. Category B includes companies with medium or small capitalization. The data clearly show the further fragmentation of the very low presence of women. The most striking difference can be seen in the fact that while the proportion of women in the largest companies (Category A) was not more than 4.3%, the relevant numbers for small companies (Category B) are unprecedentedly high. Therefore, women have only a near zero chance to obtain board member positions in the largest and most influential

29 Examples of companies in Category A in 2009 included Állami Nyomda, EGIS, FHB, Graphisoft, MOL, ORCO, OTP, Rába, Richter, Magyar Telekom, TVK, Zwack. Category B included some less known companies such as Bookline, Budapesti Elektromos Művek Nyrt., ÉMASZ, Externet, Csepel Holding, Kulcs-Soft, etc.
companies quoted on the Hungarian stock exchange, and the same clearly applies to the president positions of boards.

The other striking feature is that women occupy primarily executive (16.5%) and not independent (2.4%) positions in the companies surveyed. This might imply that women have a bigger than average opportunity to be accepted in the board after they have proved their fitness in the given company and they have previously worked in top-level management positions in the same company. On the other hand, their presence in independent positions is negligible among those invited from other organizations, which can be traced back to, among other factors, the lack of care of their social relationships and a lower level of networking activity.

Table 3: The proportion of women on boards in Hungary 2009

<table>
<thead>
<tr>
<th></th>
<th>Total</th>
<th>9.5%</th>
</tr>
</thead>
<tbody>
<tr>
<td>Category A</td>
<td>4.3</td>
<td></td>
</tr>
<tr>
<td>Category B</td>
<td>20</td>
<td></td>
</tr>
<tr>
<td>Independent</td>
<td>2.4</td>
<td></td>
</tr>
<tr>
<td>Category A</td>
<td>2.2</td>
<td></td>
</tr>
<tr>
<td>Category B</td>
<td>3.3</td>
<td></td>
</tr>
<tr>
<td>Executive</td>
<td>16.5</td>
<td></td>
</tr>
<tr>
<td>Category A</td>
<td>6.2</td>
<td></td>
</tr>
<tr>
<td>Category B</td>
<td>30.0</td>
<td></td>
</tr>
</tbody>
</table>

Source: Nagy, 2012: 238

5. SOCIAL SET OF VALUES - GENDER CULTURE

Now let us examine what kind of gender culture and what accepted social order lie under the structure. The quantitative and qualitative surveys point to the contradictory nature of the acceptance of women managers. Several surveys on gender equality and on roles in the family have shown that the Hungarian society has a traditional system of expectations. Although we have seen some increase in the acceptance of women’s wage-earning and the support of women with young children to return to the labour market, the opinions continue to support the traditional division of gender roles (Pongráczné-S. Molnár, 2011).

This is especially true for the social acceptance of the women managers. Together with my colleague I have carried out research activities in local governments and profit-oriented organizations as well in recent years. In both types of organizations we asked what image the employees had about women and men managers and who they considered to be fit to fulfil the managerial role. In the focus group discussions carried out at the local governments in 2004 women managers received very strong rejection; they were characterized as carrier-minded, masculine, single and lonely. Special rejection came from men. The attributes associated with women managers were always negative; unpredictable, easy-to-influence, emotion-driven. The investigated organization’s employees preferred the traditional gender order; the man should be the manager and the woman should be the subordinate (Nagy-Vicsek, 2008).

Although the image of women in management positions was more subtle in the profit-oriented organization in 2011, acceptance was not much stronger in this case either
(Vicsek-Nagy, 2011). The following findings deserve special attention from the point of view of this issue; the professional competences of women were recognized, or even considered higher than those of men in the company surveyed. However, despite the recognition of the women’s professional competences their managerial abilities were repeatedly questioned. Women managers received especially strong attacks in two cases; when they returned to work some months after childbirth since the Hungarian legal regulations allow paid childcare leave for up to three years. This was also the basis of the attacks when the women with young children returned to work in reply to the invitation by their company. Women also received sharp criticism if they fulfilled top-level manager roles. Men continue to be welcome in top-level management positions, so the acceptance of “think manager – think male” concept is still strong in Hungary.

If, however, we look at the research done in 2011 by Eurobarometer 376 (Women in decision-making positions), we do not find a marked difference between the EU average and the opinion of the Hungarian public in the poll (EC, 2012b). 86% of the population believe that given equal competence, women should be equally represented in positions of leadership in companies. Those asked in the poll, especially men (39%), trust mostly in the self-regulation of the companies, while legal regulations mean the second most accepted option. Regulation on the favourable treatment is accepted by far more Hungarians on average (83%) than the whole of Europe (75%), which is a remarkable finding. (Are you in favour or opposed to legislation on this matter under the condition that qualification is taken into account without automatically favouring one of either gender?)

In this case the greatest supporters were (middle-aged) women (86%). People in Hungary also selected two factors as the biggest barriers in women’s careers; men and family duties. In both cases this was considered to be a problem in far more instances than the European Union average; The business community is dominated by men who do not have sufficient confidence in women, EU: 76%; HU: 85%. Women have less freedom because of their family responsibilities, EU: 68%, HU: 83%.

6. HUNGARIAN RESPONSE TO THE EUROPEAN QUOTA INITIATIVE

We find here a truly contradictory situation; the data from the opinion poll show that while the Hungarian society has a very traditional set of values regarding family duties, people are sensitive to such duties as barriers to managerial positions and consider them problematic. The organizational focus group investigations, however, showed the deeply rooted rejection of the figure of women managers. The contradictory opinions reveal that the Hungarian population does not necessarily have a mature and/or widely debated point of view of the issue. For this reason, political messages and measures play an important role in forming the public opinion. Currently there are no laws or regulations about the representation of women in top management. We find no relevant information in the news about the Budapest Stock Exchange; the Hungarian government endeavoured to ensure the European Commission that it could not back the proposal on quotas. Neither did the Hungarian quoted companies deal with the proposals made by the European Commission in previous years30. (At most twenty Hungarian companies are estimated to fall under the scope of the quota regulation; therefore this measure would primarily have a symbolic significance.)

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Nobody is enthusiastic about quotas - we can make this statement with certainty, and we can see the small signs of this in the press releases about the Hungarian economy. The opponents fear that the gender of the applicant, instead of their fitness, will be considered for the positions, thus creating a dysfunctional system. Many consider it wrong that the state or any other organization should instruct the companies “from above”, and that a non-market actor should intervene in the market situation. However, more and more people assert that the patriarchal system is unfair, in which women are pushed to the background and neither the principle of equal opportunities nor that of meritocracy are enforced.

Hungary has become known about the striking negligence of women’s points of view and their support, the lack of social dialogue and the routine shifting of responsibility by the masculine system without the involvement of women’s or professional organizations, as if they knew what is right for women (and men).

The companies in foreign ownership are beginning to be active in this topic. The extent of their effectiveness will not only depend on them but also on the openness of the society. It would be wrong to underestimate the role of governmental messages in the formation of such openness.
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EC (2012b) Women in decision-making positions, Eurobarometer 376, March 2012


ROLE

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- Justice, Freedom and Security
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