

Corporate governance and women on the board of
directors : the legal framework towards a minimum
harmonisation in the European Union

Gouvernance d'entreprise et la représentation des femmes au conseil
d'administration : le cadre juridique vers une harmonisation minimale
dans l'Union européenne

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RESUME SUBSTANTIEL

Introduction

La thèse examine la réglementation de la gouvernance d'entreprise et la représentation des femmes dans les conseils d'administration des sociétés anonymes de l'Union européenne, suite aux crises financières mondiales de 2008-09, car des questions ont été soulevées quant à la composition du conseil d'administration. La recherche explique qu'il y a une nouvelle mise au point, concernant la gouvernance des entreprises, basée sur le développement durable et la responsabilité sociale des entreprises. Les principes de gouvernance d'entreprise incluent les pratiques de développement durable et de responsabilité sociale des entreprises, qui sont protectrices et à long terme. Selon l'agenda 2030 sur les objectifs de développement durable des Nations unies, la durabilité est fondée sur la création de valeur, plutôt que sur les gains à court terme, y compris les opérations des entreprises. Les entreprises et les parties prenantes (stakeholders) sont de plus en plus conscientes de l'impact d'une gouvernance d'entreprise durable sur les marchés. Les parties prenantes (stakeholders) attendent plus de transparence sur la composition du conseil d'administration. Selon la résolution du Parlement européen du 17 décembre 2020 sur la gouvernance d'entreprise durable, il incombe au conseil d'administration de "rendre la gouvernance d'entreprise plus axée sur la durabilité," en ajoutant des objectifs dans les codes d'entreprise et par le biais de rapports supplémentaires pour augmenter la représentation des femmes dans les conseils d'administration.

Pourtant, les femmes restent sous-représentées dans les conseils d'administration des sociétés anonymes de l'UE. Bien que "les femmes représentent environ soixante pour cent des nouveaux diplômés universitaires dans l'UE, ... elles sont fortement sous-représentées dans la prise de décision économique". La recherche comparative met en évidence le problème juridique, à savoir que l'UE ne dispose pas d'une approche standard pour réglementer l'inclusion des femmes dans les conseils d'administration, mais plutôt d'une multitude de politiques et de législations fragmentées. En plus des diverses législations européennes (qui remontent aux années 1990), les vingt-sept États membres (28 avec le Royaume-Uni, ancien État membre, inclus dans cette recherche) ont des législations nationales avec des systèmes juridiques différents. L'UE et les États

membres ont estimé que la 'soft law' était suffisamment efficace pour augmenter la représentation des femmes dans les conseils d'administration par le biais de programmes gouvernementaux et d'entreprises. Les codes de gouvernement d'entreprise sont des recommandations non contraignantes, qui peuvent avoir un effet juridique. Cependant, ils se sont avérés peu efficaces, à l'exception de quelques États membres. C'est pourquoi l'Union européenne est intervenue en proposant de faire entrer les femmes dans les conseils d'administration la directive, qui est une harmonisation minimale pour augmenter la représentation des femmes dans les conseils d'administration. Les institutions de l'UE ont utilisé l'argument du cas économique pour proposer la directive, affirmant que les affaires sont mondiales et transfrontalières. Le conseil d'administration est traité différemment dans chaque État membre, ce qui a un impact négatif sur la compétitivité de l'UE sur les marchés mondiaux. L'UE a appelé à l'entrée d'un plus grand nombre de femmes sur le marché du travail afin d'éviter la stagnation de l'économie de l'UE, à mesure que les 'baby-boomers' prennent leur retraite.

La recherche montre que les économies avancées mettent en œuvre une législation visant à accroître la représentation des femmes dans les conseils d'administration. Pourtant, l'inverse est également vrai, à savoir que les économies en développement ne disposent pas d'une approche non contraignante pour accroître la représentation des femmes dans les conseils d'administration, et la loi dure (hard law) est loin. La directive proposée est fondée sur l'article 157, paragraphe 3, du TFUE, qui garantit "le principe de l'égalité des chances et de l'égalité de traitement entre hommes et femmes en matière d'emploi et de travail, y compris les actions positives". L'appel à une proposition de directive est important, car il s'agit d'une législation contraignante, à laquelle tous les États membres devront se conformer. L'action positive comprend l'utilisation de quotas. Les gouvernements et les universitaires ont reconnu qu'une législation contraignante était nécessaire pour augmenter la représentation des femmes dans les conseils d'administration. Les gouvernements français, belge, allemand, italien et de la République d'Islande se sont tournés vers la législation norvégienne, qui est la première à avoir adopté une législation contraignante. Les institutions européennes ont calqué la proposition de directive sur l'harmonisation minimale sur la législation norvégienne, qui préconise l'utilisation de quotas et de sanctions. De nombreuses études affirment que la seule méthode efficace pour augmenter la représentation des femmes dans les conseils d'administration est la législation

contraignante et quotas. La directive proposée prévoit des sanctions, si les entreprises ne se conforment pas à la législation, qui peuvent inclure des amendes, l'exclusion des appels d'offres, le financement et l'annulation de l'élection des administrateurs non exécutifs. Le gouvernement norvégien a préconisé des sanctions extrêmes, qui consistent en la dissolution des sociétés. La législation française est allée au-delà des quotas de la directive proposée, en adoptant une législation contraignante sur les quotas, qui prévoit la représentation de quarante pour cent de femmes dans les conseils d'administration, alors que les autres membres de l'UE non sanctionnés n'ont pas atteint le quota de quarante pour cent. La réglementation de la représentation des femmes dans les conseils d'administration pose des problèmes. Les États membres peuvent utiliser un système de 'tie-break quotas' ou de 'strict quotas', en tant que droit constitutionnel, mais ils peuvent aussi s'opposer aux quotas pour des raisons idéologiques. Au Royaume-Uni, les politiques économiques de laissez-faire préféraient 'self-regulation', pas quotas. En France, il a fallu modifier la Constitution pour permettre une législation sur les quotas. En Allemagne, les quotas sont considérés comme anticonstitutionnels ou comme une "érosion inacceptable du pouvoir de propriété des actionnaires dans la répartition des sièges de la banque des actionnaires". Toutefois, cette notion a été jugée incompatible avec l'article 3, paragraphe 2, de la Constitution allemande, qui garantit le principe de la parité. C'est cette règle d'égalité qui a conduit à l'adoption de la législation 'Frauenquote', la législation contraignante des femmes dans les conseils d'administration, avec une représentation de trente pour cent de femmes dans les conseils de surveillance des sociétés anonymes et des sociétés soumises à la codétermination. Outre la fragmentation des politiques et de la législation, d'autres questions ont été soulevées, notamment celle de savoir si l'UE est l'autorité compétente pour proposer une directive sur les femmes dans les conseils d'administration. Les États membres s'y sont opposés, évoquant le principe de subsidiarité. En outre, la proposition de directive a également soulevé plusieurs questions concernant la souveraineté nationale et politique, ainsi que des problèmes de constitutionnalité. La directive sur les femmes dans les conseils d'administration a été proposée en 2012, afin de réglementer la représentation des femmes dans les conseils d'administration dans tous les États membres. Cependant, elle était bloquée au Conseil européen depuis plus de dix ans. Au début de l'année 2022, le président Emmanuel Macron, qui était également président du Conseil européen, a fait relancer la proposition de directive. Le nouveau

gouvernement allemand a finalement approuvé la proposition de directive au Conseil. Le vote allemand n'aurait peut-être jamais eu lieu sans la pression du président du Conseil européen.

Première partie : Politiques et législations fragmentées en matière de représentation des femmes aux conseils d'administration dans l'Union européenne

Titre Un Approches théoriques des questions de genre et des systèmes juridiques

Chapitre 1 : Différentes approches des notions

La recherche concernant les femmes dans les conseils d'administration nécessite une certaine compréhension des notions d'égalité et de parité entre les sexes, de parité, d'égalité, d'égalité de traitement et de la diversité, car ces termes sont importants et font partie des politiques et de la législation relatives aux femmes dans les conseils d'administration. La définition de la parité est la suivante : "Concept numérique lié à la parité. La parité concerne l'égalité relative en termes de nombres et de proportions de femmes et d'hommes... et est souvent calculée comme le rapport entre les valeurs féminines et masculines pour un indicateur donné". La notion de parité entre les sexes correspond à l'égalité politique et économique, par exemple, aux élections nationales ou aux postes de décision dans les conseils d'administration. La parité entre les sexes évalue l'inégalité entre les sexes dans 'la prise de décision économique' (economic decision-making), ce qui nécessite une action positive ou un pourcentage ou une masse critique de femmes dans les conseils d'administration. La masse critique (critical mass) exige qu'au moins trente-cinq pour cent des femmes soient représentées dans les conseils d'administration, ce qui est considéré comme un "groupe équilibré entre les sexes," suffisamment élevé pour influencer la prise de décision. Moins de trente-cinq pour cent réduit les femmes à un statut de représentation symbolique et symbolique. La théorie de la masse critique s'applique aux conseils d'administration des entreprises, où trois femmes ou trente pour cent doivent être considérées comme des membres actifs du conseil. Toutefois, l'UE est favorable à une masse critique plus élevée de quarante pour cent de femmes dans les conseils d'administration.

L'UE dispose d'un vaste arsenal législatif en matière d'égalité entre les sexes, qui comprend des politiques et une législation sur la représentation des femmes dans les conseils d'administration, ancrées dans le traité de l'Union européenne (traité de Maastricht), qui définit les objectifs et les valeurs de l'UE. L'article 2 du TUE stipule que l'égalité de traitement est un

droit fondamental. L'article 3.3 du TUE constitue le fondement de la cohésion des États membres. L'Union européenne "favorise [...] l'égalité entre les femmes et les hommes dans les États membres". Les traités sont des lois primaires et contraignantes (primary law and binding), tous les États membres doivent se conformer à la législation, tandis que les recommandations et les résolutions sont des lois secondaires et ne sont pas juridiquement contraignantes, même si elles peuvent avoir une "signification morale et politique". Par exemple, la recommandation de l'UE du 12 mars 2003(3) concernant la représentation équilibrée des femmes et des hommes à la prise de décision politique et publique et le Conseil européen ont demandé que quarante pour cent des femmes siègent dans les conseils d'administration et les comités de direction. La résolution du Parlement européen du 18 janvier 2001 et le Conseil européen ont fourni la base juridique des conseils d'administration équilibrés, en tant que principe démocratique et nécessité économique. L'acquis communautaire en matière d'égalité entre les hommes et les femmes comprend de larges interprétations économiques, sociales et juridiques. Il est contraignant pour tous les États membres et "comprend les principes et les objectifs politiques des traités, la législation ... et ... la jurisprudence, les déclarations et les résolutions ...". Les États membres sont tenus de transposer en droit national toute la législation communautaire contraignante à compter de la date d'entrée dans l'UE. L'article 157, paragraphe 4, du TFUE, la législation sur les actions positives, permet aux États membres d'utiliser des quotas ou d'autres mesures, comme "... des avantages spécifiques afin de faciliter l'accès du sexe sous-représenté... aux carrières professionnelles". Les quotas sont des mesures temporaires visant à atteindre les objectifs d'un groupe spécifique, par exemple, augmenter la représentation des femmes dans les conseils d'administration. Les États membres nordiques (Danemark, Finlande et Suède) ont réussi à atteindre une représentation élevée des femmes dans les conseils d'administration, par autorégulation (self-regulation), sans recourir aux quotas, à l'exception de la Norvège et de l'Islande. Le gouvernement finlandais a réussi à augmenter la représentation des femmes dans les conseils d'administration, grâce à de solides politiques d'égalité entre les hommes et les femmes et à l'effet contraignant de son code de gouvernance d'entreprise et du principe "comply or explain". En 2020, les conseils d'administration finlandais comptaient 35,1 % de femmes. En outre le gouvernement danois a utilisé des moyens et des objectifs volontaires. Législation danoise L'article 1 de la loi sur la parité stipule que les conseils d'administration doivent avoir une représentation égale des sexes. En 2020, il y avait 36,3 % de femmes dans

les conseils d'administration des plus grandes entreprises danoises cotées en bourse par des moyens autorégulateurs. Enfin, la préférence du gouvernement suédois pour les dispositions du code des sociétés, appelle les actionnaires à prendre des décisions en devenant membres du conseil d'administration de la société. En 2020, il y avait 38 % de femmes dans les conseils d'administration.

Toutefois, la plupart des États membres n'adhèrent pas aux politiques nordiques et utilisent une approche fondée sur les ressources économiques, et non une approche sociale-démocrate. La recherche explique qu'il existe deux approches juridiques de la parité, le modèle nordique et l'«economic resources business model» de l'UE. L'approche sociale-démocrate nordique a permis les plus grandes avancées en matière de la parité, qui donne à l'État la responsabilité de garantir un taux d'emploi élevé avec une législation forte en matière de la parité. Tous les pays nordiques partagent ces valeurs, bien qu'ils diffèrent lorsqu'il s'agit des femmes dans les conseils d'administration et des quotas. L'«economic resources business model», utilisé par l'Union européenne, soutient la nécessité d'accroître l'emploi des femmes pour que l'UE reste compétitive. La Norvège adopte une approche mixte sociale-démocrate et économique. Cette approche reconnaît qu'il existe un "...consensus en Europe... selon lequel les femmes, à compétences égales, devraient être représentées de manière égale aux «company leadership positions». La loi sur l'égalité entre les sexes, révisée en 1999, a d'abord inclus une législation sur la représentation des femmes dans les conseils d'administration, fondée sur des principes démocratiques, mais celle-ci a évolué vers un «economic business resources need». La Norvège n'est pas un État membre de l'UE, mais elle est connue pour être le premier pays à réglementer la représentation des femmes dans les conseils d'administration pour des raisons économiques. La législation est passée de l'article 21 de la section 13 de la loi sur la parité, qui prévoyait une proportion de 40 % de femmes et d'hommes, aux articles 6 à 11a. de la loi norvégienne sur les sociétés publiques à responsabilité limitée. Il s'agissait d'un changement juridique important, qui a créé un précédent, puisqu'il a fait progresser l'acceptation des femmes aux postes de décision économique dans les conseils d'administration des entreprises (economic decision-making positions on company boards). Les institutions de l'Union européenne ont calqué la proposition de directive sur les femmes dans les conseils d'administration sur cette législation, tout comme d'autres États membres. La principale

priorité de la politique économique de l'UE était de rester compétitive sur le marché mondial. Le programme macroéconomique de l'UE était axé sur l'augmentation du nombre de femmes sur le marché du travail afin d'accroître le PIB et de compenser le vieillissement de la population active. Cela permettrait de créer plus de 10,5 millions d'emplois d'ici 2050 et d'augmenter le PIB de 10 %. Cette politique était fondée sur la stratégie 2020 de l'UE pour une "croissance intelligente, durable et inclusive". La Commission a demandé une augmentation du taux d'emploi à 75% en 2020. Cependant, en 2021, le taux d'emploi global était de 68,69 %. Ce taux est inférieur à celui des principaux partenaires commerciaux de l'UE, comme les États-Unis avec 70,49 % en 2021 ou le Japon avec 77,87 % en 2021. Pourtant, les femmes sont plus nombreuses à entrer sur le marché du travail de l'UE, à l'exception des États membres de l'Union européenne de l'Est, notamment la Roumanie et la Hongrie, où le nombre de femmes employées est en baisse. La représentation de femmes dans les conseils d'administration fait partie d'une stratégie européenne d'entreprise durable. L'UE a restructuré le cadre juridique des politiques, recommandations et réglementations en matière de gouvernance, dans le but d'harmoniser le droit des sociétés pour unifier le marché unique, afin de rassurer les actionnaires. Les États membres ont des règles de gouvernement d'entreprise différentes, en raison de leurs contextes juridiques, historiques et politiques. Toutefois, malgré le principe "comply or explain", des codes de gouvernement d'entreprise et les pratiques des entreprises convergent. La recherche a comparé les dispositions des codes en ce qui concerne les femmes dans les conseils d'administration. Les systèmes de conseil d'administration des sociétés dans les États membres de l'UE varient également, allant de 'single boards to two-tier boards or mixed boards.' La Commission européenne a réglementé la composition du conseil de surveillance et des administrateurs non exécutifs (non-executive directors). Selon l'article 1.1 de la recommandation Green Paper, le conseil d'administration doit comprendre des administrateurs non exécutifs (non-executive directors), "sélectionnés sur la base d'un large éventail de critères [y compris] la diversité". La recommandation du 13 décembre 1984 sur la promotion d'actions positives en faveur des femmes "encourage la participation des femmes à la vie professionnelle là où elles sont actuellement sous-représentées, ... et à des niveaux de responsabilité plus élevés afin de parvenir à une meilleure utilisation de toutes les ressources humaines". La recommandation du 15 février 2005 demandait une mention spécifique des administrateurs non exécutifs (non-executive directors), qui doivent avoir l'expérience, les

compétences, la personnalité nécessaires, ce qui inclut le genre ou la diversité. Les recommandations restent du droit mou et ne sont pas contraignantes. Une théorie de la gouvernance d'entreprise oppose deux systèmes divergents aux femmes dans les conseils d'administration.. La théorie de l'agence déduit qu'il n'y aurait aucune différence, qu'il y ait plus de femmes dans les conseils d'administration ou non. En revanche, la théorie stakeholders estime que les entreprises ont tout à gagner à augmenter la représentation des femmes dans les conseils d'administration. Le conseil d'administration est composé d'administrateurs non exécutifs (non-executive directors), qui sont influencés à la fois par les actionnaires et les stakeholders. Les actionnaires peuvent ne pas se préoccuper du fonctionnement de l'entreprise ou de l'identité des (non-executive directors). Par conséquent, la théorie de l'agence révèle que dans une grande entreprise, les actionnaires peuvent être moins intéressés par la composition du conseil d'administration et la représentation des femmes dans les conseils d'administration et plus intéressés par les rendements financiers. Les entreprises des États membres de l'UE partagent la théorie stakeholders. Les stakeholders sont définies comme "...les employés, les fournisseurs, les clients, les créanciers, et les constituants sociaux, tels que les membres de la communauté dans laquelle l'entreprise est située, les intérêts environnementaux, les gouvernements locaux et nationaux, et la société dans son ensemble". Les nombreux programmes non contraignants (soft law), tels que l'engagement des femmes au conseil d'administration pour l'Europe ou la charte des femmes, n'ont pas permis d'accroître la représentation des femmes dans les conseils d'administration. La stratégie Europe 2020 a appelé à augmenter le nombre de femmes entrant dans la vie active, alors que la situation économique en Europe se détériorait. Il s'agissait notamment de "promouvoir [...] la participation égale des femmes et des hommes à la prise de décision à tous les niveaux et dans tous les domaines, afin d'utiliser pleinement tous les talents". La Commission européenne a appelé à une "nouvelle culture législative" et a confirmé qu'il n'était pas nécessaire d'adopter une législation stricte. À l'époque, l'UE a opéré un important changement de politique, passant d'une approche de droit dur à l'utilisation de droit mou, La Commission a émis des recommandations pour que les entreprises de l'UE se conforment aux codes de gouvernance d'entreprise et communiquent des informations sur la composition du conseil d'administration. Néanmoins, tous ces programmes et stratégies n'ont pas permis d'accroître la représentation

des femmes dans les conseils d'administration et la Commission a de nouveau changé de position avec l'intervention et la proposition d'une directive.

Titre deux : La classification des questions de genre et des systèmes juridiques

Chapitre 1 : Systèmes juridiques fondés sur le soft law

Le traité de Rome invitait la Communauté économique européenne (aujourd'hui UE) à développer des politiques économiques de marché unique. La législation sur la parité était inexistante à l'époque (1957), à l'exception d'une référence à l'égalité de rémunération. Il a fallu plus de quarante ans aux institutions de l'UE pour élaborer des politiques et une législation en matière de la parité par le biais de traités, de directives et d'autres textes législatifs. L'élaboration de politiques européennes unifiées est une tâche considérable, car il existe d'énormes différences entre les États membres de l'Est et de l'Ouest de l'UE.

Après avoir expliqué l'approche sociale-démocrate nordique et l'approche économique de l'UE concernant la représentation des femmes dans les conseils d'administration, la recherche s'intéressera aux politiques des États membres de l'Union européenne de l'Est. Le contraste est délibérément abordé dans cette recherche pour révéler l'ampleur du fossé de l'(in)égalité des sexes, des politiques et de la législation dans les États membres de l'Europe de l'Est, où les femmes ont des difficultés à être employées ou à accéder aux postes de conseils d'administration. Les études montrent qu'il existe une corrélation entre la représentation des femmes dans la population active et la parité, affirmant que plus de femmes dans l'emploi donnera lieu à plus de femmes dans les postes de décision. Les politiques économiques des États membres d'Europe de l'Est se caractérisent par un taux de chômage élevé et une économie de marché lente, qui ont progressivement écarté les femmes du marché de l'emploi. Alors que l'Europe de l'Ouest a connu une croissance économique, l'Europe de l'Est continue de décliner. Les femmes d'Europe de l'Est ont fait partie de l'économie du travail d'État, qui obligeait chaque homme et chaque femme à travailler, jusqu'en 1989. Aujourd'hui, il y a très peu de femmes dans les conseils d'administration des sociétés anonymes des États membres d'Europe de l'Est. En outre, des politiques ou des lois inefficaces ou inexistantes en matière d'emploi et de la parité constituent des obstacles sérieux, qui empêchent les femmes des États membres d'Europe de l'Est d'accéder à l'emploi. Tous les États membres d'Europe de l'Est ne

sont pas inclus dans cette recherche. L'intention n'était pas non plus de regrouper les États membres d'Europe de l'Est. Néanmoins, ils ont plusieurs points communs, notamment la faible représentation des femmes dans les conseils d'administration. En 2020, les États membres d'Europe de l'Est ayant la plus faible représentation des femmes dans les conseils d'administration étaient la République tchèque (17,2 %), l'Estonie (8,8 %), la Hongrie (9,9 %) et la Lituanie (14,3 %). Il existe des obstacles importants, qui empêchent les femmes d'accéder au marché du travail. Les gouvernements des États membres de l'Europe de l'Est seront obligés de développer des politiques de la parité, telles que la garde d'enfants, les conditions de travail flexibles, les incitations fiscales, le congé parental, la législation sur l'égalité des salaires, l'évaluation équitable des emplois et les augmentations de salaire. Comparativement, les femmes des États membres d'Europe de l'Ouest ont accès à ces politiques depuis les années 1980. Le modèle d'emploi des États membres d'Europe de l'Est est axé sur les politiques familiales traditionnelles. Les femmes ne sont pas représentées aux postes de prise de décision économique (economic decision-making on boards). En République tchèque, les femmes rencontrent des difficultés pour accéder aux postes à responsabilité, tant dans la sphère politique que dans le secteur privé. Le gouvernement tchèque est fortement opposé à la législation sur les femmes dans les conseils d'administration. Cependant, le gouvernement a reconnu l'article 157 (3) du TFUE, qui soutient le principe de l'égalité de traitement, en matière d'emploi, pour les femmes et les hommes. Selon l'avis du gouvernement tchèque, le déséquilibre entre les sexes dans la gestion est le résultat des difficultés rencontrées par les femmes pour concilier vie professionnelle et vie privée. Bien que de nombreuses femmes tchèques soient diplômées de l'université, elles ne peuvent pas prétendre à des postes au conseil d'administration, car l'âge des membres du conseil de surveillance est d'environ 58 ans. Le gouvernement a déclaré qu'il était impossible de trouver des femmes dans la même tranche d'âge des cadres supérieurs dans les entreprises, où les administrateurs sont recrutés. Le gouvernement de la République tchèque a estimé que le sujet des femmes dans les conseils d'administration était prématuré et inutile. Le gouvernement estonien a testé le principe de subsidiarité et la conformité de la proposition de directive de femmes dans les conseils d'administration. Le gouvernement s'est opposé à la directive, déclarant qu'il y avait trop de différences entre les États membres. Le gouvernement a recommandé une législation non contraignante (soft law), par le biais de recommandations, qui donnerait aux États membres le

temps de mettre en œuvre une politique en faveur des femmes dans les conseils d'administration. Le gouvernement estonien s'inquiète des "quota women". Les femmes sont à peine représentées dans le monde des affaires et ne constituent pas une priorité pour le gouvernement. Le nombre de femmes dans les conseils d'administration en Estonie est en baisse. En 2019, il y avait 9,4 % de femmes dans les conseils d'administration. En 2020, elles seront 8,8 %. En Hongrie, il existe un "quota non officiel" pour les hommes, qui leur permet d'accéder aux postes les plus élevés. Il n'y a pas de méritocratie. La Hongrie est classée 27e dans l'UE en matière d'égalité entre les sexes et continue de décliner. La situation "des femmes n'est qu'un souvenir du passé et nous pouvons maintenant parler non seulement de stagnation mais aussi de chute". La Roumanie dispose d'une législation de base en matière de la parité et d'une quantité de lois. Toutefois, elle n'est pas assez stricte, car aucune sanction n'est prévue en cas de non-respect. Le nombre de femmes dans les conseils d'administration reste assez faible en Roumanie, avec 12,8 % de femmes dans les conseils d'administration en 2020. Dans l'ensemble, la parité n'est pas un sujet important dans de nombreux États membres de l'Union européenne de l'Est. La République tchèque, l'Estonie, la Hongrie, la Lettonie, la Lituanie, la Pologne, la Slovaquie et la Slovénie sont devenues des États membres de l'UE en 2004. La législation sur la parité n'en est qu'à ses débuts dans les États membres d'Europe de l'Est, par rapport aux États membres de l'Union européenne de l'Ouest. Il faudra de nombreuses années à ces États membres pour élaborer une législation sur la parité et la représentation des femmes dans les conseils d'administration.

Les réglementations 'pure soft law' sont des programmes visant à accroître la représentation des femmes dans les conseils d'administration sur une base volontaire, qui peuvent être dirigés par le gouvernement ou par les entreprises. Le gouvernement britannique privilégie l'autorégulation (self-regulation) en fixant des objectifs, ainsi que la participation des entreprises et des normes sociales fortes. Le système britannique de gouvernance d'entreprise ne permet pas l'intervention de l'État dans les affaires des entreprises. Des mesures volontaires sont établies dans les économies de marché libérales, comme le Royaume-Uni. Toutefois, aucune sanction n'est prévue en cas de non-respect. Lorsque les entreprises ne se conforment pas, elles font référence au principe "comply or explain". Le gouvernement et les entreprises britanniques ont lancé des méthodes consistant à recenser les bonnes pratiques dans les

entreprises et les initiatives sectorielles interentreprises, qui comprenait des séminaires, des formations, des chartes, des prix et des bases de données. Le gouvernement allemand a soutenu les quotas flexibles, qui étaient des objectifs sans sanctions. Le gouvernement allemand a pris une position ferme contre la législation de quotas. Les sanctions en cas de non-respect n'étaient pas strictes et consistaient à contester la nomination d'un membre du conseil d'administration. Le quota flexible ne serait pas appliqué si les entreprises atteignaient trente pour cent de femmes dans les conseils de surveillance et de direction, par des moyens volontaires. Une approche semi-contraignante s'appuie sur le principe "comply or explain" des codes d'entreprise ; bien qu'il s'agisse d'une législation non contraignante, elle peut être considérée comme ayant un effet juridique. La structure hybride forme des règles qui, bien que non contraignantes, constituent des recommandations fortes auxquelles les entreprises doivent se conformer. La législation européenne reconnaît que le principe "comply or explain" des codes de gouvernement d'entreprise est une extension du droit contraignant. La composition des conseils d'administration dans les différents États membres de l'UE est comparable, dans une certaine mesure, en ce qui concerne le sexe, les dispositions relatives à la diversité, les objectifs et les obligations de rapport et les politiques. Avec le principe "comply or explain", les entreprises sont davantage disposées à respecter les dispositions. Le 'pure soft law' et l'approche semi-contraignante n'ont pas été suffisamment efficaces pour accroître la représentation des femmes dans les conseils d'administration, à l'exception du Royaume-Uni et des pays nordiques (à l'exception de la Norvège), où le soft law est efficace.

Chapitre deux : La classification du droit dur

Le droit dur (hard law) peut être assorti ou non de sanctions. Les sanctions peuvent être très strictes ou non contraignantes et comprennent la radiation d'une société, qui est la forme de sanction la plus sévère prévue par la législation norvégienne, l'obligation d'appliquer le principe "comply or explain" en cas de non-conformité, les amendes ou la chaise vide. Les sanctions ne visent généralement pas l'entreprise elle-même, mais le conseil d'administration et les directeurs visés, à l'exception des législations italienne et norvégienne. Les sanctions norvégiennes prévoient la dissolution de la société, tandis que les sanctions italiennes prévoient de lourdes amendes pour la société. Les sanctions françaises prévoient la suspension

de la rémunération des membres du conseil d'administration jusqu'à ce que celui-ci se conforme à la législation et l'annulation des discussions du conseil.

DEUXIÈME PARTIE

UN CADRE JURIDIQUE POUR UNE HARMONISATION MINIMALE DE LA REPRÉSENTATION DES FEMMES DANS LES CONSEILS D'ADMINISTRATION DES SOCIÉTÉS ANONYMES DE L'UNION EUROPÉENNE

TITRE PREMIER : LE DROIT DUR REMPLACE LE DROIT MOU

CHAPITRE UN : CADRE JURIDIQUE ACTUEL DE L'UE ET DIRECTIVES

Les États membres de l'UE adoptent des approches différentes, afin de définir le cadre juridique de la représentation des femmes dans les conseils d'administration des sociétés anonymes. Cette recherche a permis d'identifier 4 modèles de cadre juridique : 1. Les états membres de l'UE sans aucune mesure concernant les femmes dans les conseils d'administration, 2. Les états membres de l'UE ayant des politiques de base en matière de participation des femmes aux conseils d'administration, 3. Les états membres de l'UE ayant des 'business approaches (targets)', et 4. Les états membres de l'UE avec une législation contraignante. Le premier cadre est un problème, car sans droit mou ou droit dur, la représentation des femmes dans les conseils d'administration n'aura pas lieu. La deuxième approche est également un problème, car une soft law très basique n'augmentera pas la représentation des femmes dans les conseils d'administration, car elle manque de sanctions. Le troisième cadre des business approaches (targets) peut augmenter la représentation des femmes dans les conseils d'administration, mais pas jusqu'à la masse critique de 40 % demandée par l'UE.

Peu d'États membres disposent de politiques et de législations efficaces en matière de représentation des femmes dans les conseils d'administration sans avoir besoin de quotas. La recherche examine comment le gouvernement français a pu faire passer sa position d'une législation non contraignante à une législation contraignante. Pour ce faire, la Constitution française a été modifiée pour permettre une législation sur les quotas. Le Conseil constitutionnel a rejeté la législation proposée, déclarant que "la recherche d'un accès équilibré des femmes et des hommes aux responsabilités autres que les mandats politiques électifs n'est pas contraire aux exigences constitutionnelles... [mais] elle ne saurait faire prévaloir la considération du sexe sur celle de la capacité". La Copé Zimmermann a été considérée comme

une forme de discrimination positive, qui a été censurée, car les quotas de femmes vont au-delà de la définition habituelle de l'égalité formelle. L'amendement de 2008 a ajouté le mot "femmes" à la législation de 1999. La phrase se lit alors comme suit : "[l]a loi favorise l'égal accès des femmes et des hommes aux mandats et fonctions électoraux ainsi qu'aux postes à responsabilité professionnelle et sociale". La modification de l'article I de la Constitution a été à l'origine de la parité et a permis de mettre en place une loi dure. La loi Copé Zimmermann prévoyait un objectif de quota de 40 % en 2011. Cette loi s'applique aux administrateurs non exécutifs (non-executive directors) des plus grandes sociétés anonymes françaises et des sociétés non cotées. La loi a été adoptée en deux étapes : la première phase, en 2011, exigeait une représentation de vingt pour cent de femmes dans les conseils d'administration dans un délai de deux ans. La deuxième phase, à partir de janvier 2017, exigeait une représentation de quarante pour cent de femmes dans les conseils d'administration. Selon l'article L225-18-1, la législation concerne les entreprises de 250 salariés et d'un chiffre d'affaires de cinquante millions d'euros minimum. Les nominations irrégulières seront annulées et la rémunération des membres du conseil d'administration suspendue jusqu'à ce que le conseil se conforme à la législation. La loi PACTE est allée plus loin que la Copé Zimmermann en annulant les discussions.

Chapitre deux : Les échecs des institutions européennes et nationales

Étant donné que la législation non contraignante n'a pas permis d'augmenter la représentation des femmes dans les conseils d'administration, l'article 288 du TFUE a fourni la base juridique permettant aux institutions européennes d'intervenir par le biais d'une directive, laissant aux États membres "le choix de la forme et des méthodes". La proposition de directive sur les femmes dans les conseils d'administration prévoit un quota de quarante pour cent de femmes dans les conseils d'administration des administrateurs non exécutifs, sélectionnés sur la base du mérite, de l'expérience, des qualifications, de l'indépendance et de la diversité.

Cependant, la directive proposée n'a pas réussi à rassembler les États membres autour d'une approche standard. La France, l'Allemagne, le Danemark et la Suède ont adopté leur propre législation, qui allait au-delà de ce que demandait la directive. Le gouvernement allemand a

estimé que la directive proposée était incompatible avec le droit constitutionnel. L'Allemagne a appliqué une interprétation stricte de l'article 8 du TFUE, qui stipule que les relations avec les États membres sont "fondées sur les valeurs de l'Union et caractérisées par des relations étroites et pacifiques fondées sur la coopération [et]... les... accords peuvent contenir des droits et obligations réciproques ainsi que la possibilité d'entreprendre des activités conjointement". Cependant, la directive proposée était considérée comme une action positive, interdite par la loi allemande. Les quotas sont considérés comme inconstitutionnels et incompatibles avec la Constitution allemande en vertu de l'article 3, paragraphe 2, qui garantit le principe de la parité. C'est la règle de l'égalité qui a finalement conduit à l'adoption de la législation Frauenquote, la législation sur les femmes dans les conseils d'administration, appelant à une représentation de trente pour cent de femmes dans les conseils de surveillance des sociétés anonymes et des sociétés soumises à la codétermination.

La soft law n'a pas été efficace. La question de la représentation des femmes dans les conseils d'administration en tant que 'efficiency need', pour ne pas laisser les talents se gaspiller, mais pour soutenir l'économie, a donné lieu à une loi dure. Plusieurs exemples sont fournis, tels que l'association d'entreprises et le gouvernement norvégiens qui ont favorisé soft law jusqu'à ce la hard law soit adoptée. Le gouvernement allemand a soutenu les flexi-quotas, qui ont échoué et ont abouti à l'adoption de la Frauenquote, la hard law allemande sur la représentation de femmes dans les conseils d'administration. La loi allemande "Frauenquote" est entrée en vigueur en 2016 et exige une représentation de trente pour cent de femmes dans les conseils d'administration. La législation s'applique à plus de cent grandes sociétés allemandes cotées et codéterminées, avec la sanction du principe de la chaise vide, en cas d'irrégularités dans le processus de nomination des membres du conseil d'administration. La législation a été efficace dans une certaine mesure pour augmenter la représentation des femmes dans les conseils d'administration. Le pourcentage de trente pour cent reste en deçà du quota de quarante pour cent fixé par la proposition de directive européenne. La législation ne s'applique pas aux entreprises de taille moyenne, qui fixent des objectifs et non des quotas. Cette législation est la réponse à l'échec des initiatives de soft law. La législation est assez récente, les effets commencent tout juste à être connus, mais ont révélé un certain degré d'échec. En janvier 2021, le gouvernement allemand a adopté une nouvelle loi sur les femmes dans les conseils

d'administration, qui obligera les plus grandes entreprises allemandes à avoir au moins une femme dans leur conseil d'administration. À l'heure actuelle, trente entreprises ne comptent aucune femme dans leurs conseils d'administration, malgré la législation contraignante Frauenquote de 2015. La sanction douce de la chaise vide peut perturber le conseil d'administration, mais ce n'était pas une sanction assez dure. Par conséquent, cette nouvelle législation est censée remédier à la situation. Il peut être nécessaire de modifier les constitutions si elles ne mentionnent pas l'égalité des droits entre les femmes et les hommes. Cela a constitué un obstacle à l'adoption d'une législation de la représentation des femmes dans les conseils d'administration en France. C'est devenu un problème dans de nombreux pays, où les constitutions ont été modifiées pour permettre l'adoption d'une législation. Le gouvernement français a résolu cet obstacle juridique en modifiant la Constitution, ce qui a permis l'adoption de la loi Copé Zimmermann. La situation française est remarquable en raison de la complexité de l'adoption de la législation. La législation a d'abord été adoptée en tant que loi sur la parité politique, puis étendue au secteur privé. Cependant, la Constitution française devait être réformée. Le Conseil a fondé son raisonnement sur le fait qu'il ne pouvait pas accepter une législation sur les quotas, qui permettait aux femmes d'accéder à des fonctions électives ou à des postes professionnels, au motif qu'elle était inconstitutionnelle en vertu des articles 3 et 6 de la Déclaration des droits de l'homme et du citoyen du 26 août 1789, fondée sur le principe d'égalité. Le Conseil constitutionnel a censuré la proposition de loi en 1999. Puis, avec des modifications en 1999 et 2008, le Conseil a autorisé les 'actions positives' (positive action or quotas) dans les domaines électoral et politique, et dans le secteur privé, dans les entreprises, l'article 1 de la Constitution étant modifié comme suit : "Les lois favorisent l'égal accès des femmes et des hommes aux fonctions et mandats électifs ainsi qu'aux postes de responsabilité professionnelle et sociale". Les modifications apportées à la Constitution ont permis l'instauration de quotas dans les domaines politiques et dans les conseils d'administration des entreprises. Selon l'article L225-18-1, la législation sert de principe de référence aux femmes dans les conseils d'administration, qui dispose que

La proportion d'administrateurs de chaque sexe ne peut être inférieure à 40% à l'issue de la prochaine assemblée générale appelée à statuer sur les nominations, dans les sociétés qui, pour le troisième exercice consécutif, emploient un nombre moyen d'au moins deux cent cinquante salariés permanents et réalisent un chiffre d'affaires

net ou un total de bilan d'au moins 50 millions d'euros. Dans ces mêmes sociétés, lorsque le conseil d'administration est composé de huit membres au maximum, l'écart entre le nombre d'administrateurs de chaque sexe ne peut être supérieur à deux. Toute nomination faite en violation du premier alinéa et n'ayant pas pour effet de remédier à l'irrégularité de la composition du conseil est nulle. La législation a évolué depuis 2011, car auparavant le nombre d'employés était de cinq cents.

La proposition de directive de la représentation des femmes dans les conseils d'administration était la solution de droit dur pour rassembler les États membres. Cependant, elle est trop difficile à mettre en œuvre pour tous les États membres, comme les États membres de UE l'Est et du Sud-Est. Selon ces États membres, l'UE est responsable de l'échec, car elle n'a pas satisfait à un objectif politique concernant les préoccupations liées à la vie professionnelle et à la vie privée, comme l'aide aux enfants et les équipements familiaux, ce qui permettrait à davantage de femmes d'entrer sur le marché du travail. La baisse du taux d'emploi des femmes entraîne une baisse des revenus, ce qui se traduit par la perte de millions d'euros, qui auraient permis d'augmenter le PIB. Il en résulte des opportunités perdues pour la compétitivité de l'UE. La directive proposée ayant été votée par le Conseil européen et devant faire l'objet de négociations au Parlement, des recherches supplémentaires seront nécessaires pour savoir comment les États membres de UE l'Est et du Sud-Est se conforment à cette législation. Il est prématuré de le savoir maintenant. Le gouvernement espagnol a été inefficace avec la législation de la représentation des femmes dans les conseils d'administration introduite en 2007. La législation espagnole s'applique aux entreprises publiques et privées cotées en bourse. Toutefois, elle ne prévoit pas de sanctions en cas de non-respect, mais incite les entreprises espagnoles à se conformer à la législation pour obtenir des marchés publics. Cette "sanction douce" explique pourquoi la législation a échoué. En 2020, il y avait 29,3 % de femmes dans les conseils d'administration des sociétés anonymes en Espagne. Des lois strictes assorties de sanctions existent dans très peu d'États membres. Mais, dans les États membres, en général, les politiques de représentation des femmes dans les conseils d'administration donnent des résultats différents. La Norvège et la France ont atteint ou dépassé la représentation de quarante pour cent de femmes dans les conseils d'administration. Le gouvernement français a introduit une législation contraignante en 2011. En 2020, il y avait 45,1 % de femmes dans les conseils d'administration des sociétés anonymes. La loi française Copé Zimmermann a été très efficace pour augmenter la représentation des femmes dans les

conseils d'administration, en grande partie grâce aux sanctions. La Norvège, la France et l'Allemagne ont réussi à augmenter la représentation des femmes dans les conseils d'administration, grâce à l'utilisation de codes de gouvernance d'entreprise, qui interagissent avec les politiques et la législation gouvernementales.

Titre deux Harmonisation minimale

Chapitre 1 : Une réglementation globale et inclusive

La réglementation inclusive et complète fait référence à la législation existante et aux nouvelles propositions visant à accroître la représentation des femmes dans les conseils d'administration. La proposition de directive de la représentation des femmes dans les conseils d'administration a été introduite. Cette proposition de directive appelle à une harmonisation minimale, qui comprendrait des exigences en matière d'évaluations comparatives des candidats aux conseils d'administration et établirait un quota d'administrateurs non exécutifs (non-executive directors). Le non-respect de la législation entraîne des sanctions que chaque État membre définit.

CHAPITRE 2 : REGLEMENTATION EXCLUSIVE ET UNIQUE

Le règlement exclusif unique fait référence aux États membres qui ne sont pas d'accord avec les politiques de l'UE, comme la proposition de directive de la représentation des femmes dans les conseils d'administration, et qui ne font plus partie de l'UE (le Royaume-Uni). Le gouvernement danois s'est opposé à l'intervention de l'UE et à la législation sur les quotas. La loi danoise n° 1383 du 23 décembre 2012 exigeait des entreprises (cotées et non cotées) qu'elles développent des politiques de représentation des femmes dans les conseils d'administration, y compris des objectifs de vingt-cinq pour cent. pour les administrateurs exécutifs et non exécutifs. Les résultats devaient être communiqués dans un délai défini. Les entreprises ont eu recours à des programmes de mentorat et de mise en réseau en matière de droit mou pour atteindre l'objectif. En 2020, 33,6 % des conseils d'administration des sociétés anonymes danoises comptaient des femmes. Outre le Danemark, "les Pays-Bas, la Pologne, la Suède, le Royaume-Uni et une des chambres du Parlement de la République tchèque" se sont formellement opposés à la directive proposée. Ces États membres préféraient des mesures nationales et non des mesures non contraignantes de l'UE sur la base du principe de

subsidiarité. Les États membres d'UE de l'Est se sont opposés à la proposition de directive. Ces États membres ont peu de politiques de soft law en place et aucune législation contraignante sur la représentation des femmes dans les conseils d'administration. La culture d'entreprise est dominée par les valeurs traditionnelles et les normes sociales sont plus importantes que la loi. Dans les États membres de l'Europe de l'Est et du Sud-Est, les femmes sont stéréotypées en tant que porteuses d'enfants, gardiennes de la maternité et femmes de ménage. Les femmes n'ont que peu ou pas accès aux postes de décision de haut niveau. Dans plusieurs de ces États membres, les hommes pensent que les femmes sont trop incompetentes pour être autorisées à participer aux décisions économiques. La Commission européenne a lancé la proposition de directive de la représentation des femmes dans les conseils d'administration pour imposer un changement aux États membres. L'intervention était censée obliger les États membres à se conformer à la législation sur la parité et la représentation des femmes dans les conseils d'administration. Les politiques de l'UE étaient censées renforcer les institutions nationales dans les États membres de l'Union européenne de l'Est et du Sud-Est, dans le cadre de leur transition vers des économies de marché. D'un point de vue macroéconomique, ces États membres sont confrontés à une situation similaire (à l'exception de l'émigration) à celle des États membres d'UE de l'Ouest, avec une démographie en déclin, des personnes qui vieillissent et quittent la population active, un taux de natalité en baisse et une forte émigration. La législation sur la parité ne se développera peut-être jamais dans les États membres de l'Union européenne de l'Est, car des lois limitées sur l'égalité sont adoptées, mais ne sont pas respectées. La représentation des femmes dans les conseils d'administration est un sujet inexistant. La Croatie, Chypre, la République tchèque, la Hongrie, la Lettonie, la Lituanie, Malte et la Slovaquie ont des politiques ou une législation limitées en matière de la parité. La raison : "[a]près la chute du communisme, les promesses du libéralisme occidental de transformer l'Europe centrale ... n'ont jamais été pleinement réalisées..." a été donnée. Cependant, ce n'est pas seulement à cause du passage d'une économie centralisée à une économie de marché ou d'une croissance économique lente, ni à cause du manque de femmes dans l'emploi, parce qu'elles en ont été chassées. Le principal problème est le manque de soutien politique des gouvernements actuels de ces États membres. Ils ne soutiennent pas les politiques ou la législation en matière d'égalité entre les sexes et continuent de tenir les femmes à l'écart du marché du travail. La Commission européenne doit s'attaquer dès maintenant à la montée de

l'illibéralisme, car les femmes perdent leurs droits à l'égalité de traitement dans les États membres de l'Union européenne de l'Est. De plus, aussi récemment que le 25 mai 2020, neuf États membres s'opposent à la directive proposée (tant les États membres de l'UE de l'Ouest que les États membres d'UE de l'Est). La Croatie, le Danemark, la Grèce, la Hongrie, les Pays-Bas, la Pologne, la Suède et la Slovaquie restent fermement opposés à la directive proposée, affirmant qu'ils ont leur propre législation en place. D'autres raisons s'opposent à cette législation, notamment son caractère anticonstitutionnel et la remise en cause de la souveraineté.

Cependant, malgré l'opposition, l'adoption récente de la proposition de directive en mars 2022 est due au vote allemand. Le vote allemand n'aurait peut-être jamais eu lieu sans la pression du président du Conseil européen. Le texte de la proposition de directive comportait quelques modifications notables, telles que l'extension du quota de quarante pour cent d'administrateurs non exécutifs à trente-trois pour cent de l'ensemble des membres du conseil d'administration, la reformulation de la clause de suspension, ainsi que la fixation d'objectifs. Début 2022, le président Emmanuel Macron, qui était également président du Conseil européen a fait relancer la proposition de directive. En plus de la directive proposée, un programme d'harmonisation minimale accompagnera la directive, basée sur une version plus flexible de la loi Copé Zimmermann. Le programme inclura tous les États membres et fixera des objectifs communs, en utilisant des points de référence pour travailler à la création d'un cadre commun. La loi Copé Zimmermann a été la législation la plus efficace, augmentant la représentation des femmes dans les conseils d'administration et pourrait être proposée comme base juridique d'un programme d'harmonisation minimum. Une révision de la loi prévoit un minimum de 250 employés, cinquante millions d'euros de chiffre d'affaires, quarante pour cent de femmes dans les conseils d'administration, des sanctions, qui comprennent le gel de la rémunération des administrateurs, l'annulation de la position irrégulière et des discussions.

Une version plus flexible de la législation pourrait être adaptée à chaque État membre, ce qui permettrait de modifier le nombre d'employés ou le chiffre d'affaires, par exemple, pour se conformer à la directive proposée. Le Royaume-Uni, qui a quitté l'Union européenne le 31 janvier 2020, était un État membre actif de l'UE depuis le 1er janvier 1973. Alors que le

Royaume-Uni était un État membre, il était souvent en désaccord avec la législation européenne. On ignore encore si le gouvernement britannique laissera en place la législation européenne existante. Si une nouvelle législation britannique est proposée, il n'y a aucune obligation de prendre en compte le droit communautaire. La Cour suprême remplacera les institutions européennes en tant qu'autorité juridique. Les universitaires s'inquiètent de voir la législation européenne sur la parité (la parité) abrogée ou minimisée. Il faudra encore soixante-dix ans au Royaume-Uni pour atteindre la parité dans les conseils d'administration des 100 plus grandes entreprises britanniques sans quotas obligatoires. Cependant, la jurisprudence britannique a toujours rejeté les mesures d'action positive. L'idée de s'éloigner d'une approche formelle de l'égalité au Parlement suscite "confusion et anxiété". La directive proposée par l'UE s'éloignait d'une approche formelle de l'égalité, puisqu'elle préconisait des mesures d'action positive pour accroître la représentation des femmes dans les conseils d'administration, par le biais de 'tie-break quotas'. Le gouvernement britannique s'est toujours opposé à l'utilisation de quotas, préférant les mesures volontaires prises par les entreprises. Bien que le gouvernement britannique ait accepté que les administrateurs non exécutifs (non-executive directors) entrent dans le champ d'application de l'article 157(3). Toutefois, le gouvernement britannique a identifié une clause de dérogation, qui permettrait aux États membres d'éviter la directive proposée, si l'État membre a atteint l'objectif de 40 % par ses propres moyens. En outre, le Royaume-Uni s'est opposé à la directive proposée pour des raisons de "proportionnalité et de subsidiarité". Le Royaume-Uni s'est toujours abstenu de participer à la législation européenne visant à élargir ses protections pour des raisons de subsidiarité. Il n'est donc pas surprenant que le Royaume-Uni se soit opposé à la proposition de directive de la représentation des femmes dans les conseils d'administration. L'approche du gouvernement britannique à l'égard des femmes dans les conseils d'administration est très différente de celle de la Norvège, de la France, de l'Allemagne ou de l'Europe continentale, où les États membres ont des constitutions écrites, qui appellent explicitement à l'égalité entre les femmes et les hommes, alors que le Royaume-Uni n'a pas de constitution écrite. La loi sur l'égalité de 2010 (the Equality Act 2010) est la référence la plus proche des caractéristiques protégées, qui inclut le sexe (gender). Le droit à l'égalité au Royaume-Uni n'est pas protégé par une déclaration constitutionnelle des droits, mais... est entièrement régi par la législation parlementaire. Le gouvernement britannique a commandé des rapports sur le statut des femmes dans les

conseils d'administration, comme, par exemple, la revue Hampton-Alexander. L'objectif est passé à trente-trois pour cent de femmes dans les conseils d'administration du FTSE 350 en 2016, avec une échéance fixée à 2020, qui a été atteint avec succès en mai 2020. Selon le gouvernement, la directive proposée est une idéologie de l'UE, qui n'apporterait pas de changement. Le gouvernement a déclaré que les quotas ne devraient être utilisés qu'en dernier recours et a remis en question la base juridique de la directive proposée, au nom du principe de subsidiarité, étant donné que l'avis motivé de la Chambre des communes (House of Commons) s'est concentré sur les détails de la violation du principe de subsidiarité. Le Royaume-Uni a quitté l'UE le 31 janvier 2020, comme le prévoit l'article 50 du TUE, et a officiellement mis fin à la période de transition le 1er janvier 2021. Le Royaume-Uni ne participe donc plus aux affaires européennes et n'est plus tenu de se conformer à la nouvelle législation européenne. Les femmes du Royaume-Uni ont bénéficié des politiques et de la législation de l'UE en matière de la parité.

Le départ du Royaume-Uni de l'UE laisse des questions en suspens quant à l'effet qu'il aura sur la parité, car l'UE a mené presque toutes les initiatives en matière de la parité, transposées dans le droit britannique. La principale crainte est que la sortie de l'UE accroisse les inégalités entre les sexes au Royaume-Uni. L'existence même des questions de genre passera d'influences sociales-démocrates (UE) à une forme plus néolibérale (UK) de régime public de genre, et aura un impact négatif sur les progrès de l'égalité des genres et des femmes dans les conseils d'administration au Royaume-Uni. Bien que le Royaume-Uni ait connu une augmentation de la représentation des femmes dans les conseils d'administration des sociétés anonymes grâce à des objectifs et à l'autorégulation, aucun conseil d'administration n'a atteint 40 %. Après avoir quitté l'UE, la Financial Conduct Authority (FCA), l'autorité de réglementation des services financiers au Royaume-Uni, a présenté un document de consultation au gouvernement britannique afin de porter à 40 % l'objectif de représentation des femmes dans les conseils d'administration des sociétés anonymes.

Conclusion générale

Cette recherche a présenté les politiques et législations fragmentées concernant la représentation des femmes dans les conseils d'administration des sociétés cotées en bourse de l'Union européenne. Dans la première partie, nous avons examiné le cadre juridique pour une harmonisation minimale de la législation sur les femmes dans les conseils d'administration dans l'Union européenne afin de voir si la directive proposée résoudra le problème de la sous-représentation des femmes dans les conseils d'administration des sociétés anonymes dans l'Union européenne. Le champ d'application de cette recherche s'est concentré sur les femmes dans les conseils d'administration au centre de la gouvernance d'entreprise, puisque le conseil d'administration a un contrôle direct sur la prise de décision des opérations de l'entreprise. La recherche a examiné les différentes notions d'égalité et de la parité, le cadre juridique européen pour les femmes dans les conseils d'administration, le droit européen, la législation nationale, le droit des sociétés, les systèmes économiques et juridiques des États membres de l'UE. La Norvège, bien que n'étant pas un pays de l'UE (membre de l'EEE), a été incluse dans la recherche, car elle a été le premier pays à mettre en œuvre une législation contraignante sur les femmes dans les conseils d'administration pour des raisons économiques. La prise de décision au sein des conseils d'administration est devenue un enjeu économique dans l'UE, et nécessite la participation active des États membres pour mettre en œuvre des politiques et des législations visant à accroître la représentation des femmes. La législation non contraignante (soft law) s'est avérée la plupart du temps inefficace, ce qui a conduit l'UE à intervenir en proposant une directive d'harmonisation minimale. Après dix ans de stagnation, la proposition de directive a reçu l'approbation finale du Conseil européen en mars 2022 et est en passe de devenir une loi.

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Joy LAMY MARTIN

TABLE OF ABBREVIATIONS**Journals**

Acad. Manag. Rev	Academic Management Review
CMLR	Common Markets Law Report
ECR	European Court Records
ICR	Industrial Court Reports
ILJ	Industrial Law Journal
IRLR	Industrial Relations Law Reports
J Finance	Journal of Finance
JMG	Journal of Management and Governance
Maastricht J Eur & Comp L	Maastricht Journal of European and Comparative Law
OJ	Official Journal
Q J Econ	Quarterly Journal of Economics

Legislation

AGG	Allgemeines Gleichstellungsgesetz (The General Act on Equal Treatment)
Art	Article
C	Chapter
CFREU	Charter of Fundamental Rights of the European Union
Dir	Directive
EA	Equalities Act
EQA	Equality Act
En	Explanatory Notes
SDA	Sex Discrimination Act
SEA	Single European Act
TEC	Treaty Establishing the European Community
TEU	Treaty on the European Union
TFEU	Treaty on the functioning of the European Union

Case Names, Tribunals, Judges and Courts

AG	Advocate General
CEDAW	Committee United Nations Committee on the Elimination of Discrimination against Women
CJEU	Court of Justice of the European Union
ECJ	European Court of Justice
UKHL	United Kingdom House of Lord

Legal Procedures

COD	Ordinary Legislative Procedure (Ex Co-decision Procedure)
COM	European Commission Working Documents
COS	Procedure on a Strategy Paper (historic)
INI	Own Initiative Procedure

Member States

AT	Austria
BE	Belgium
BG	Bulgaria
CZ	Czech Republic
DK	Denmark
DE	Germany
EE	Estonia
EL	Greece
ES	Spain
FI	Finland
FR	France
GER	Germany
HR	Croatia
HU	Hungary
IE	Ireland
IT	Italy
LT	Lithuania
LU	Luxembourg
LV	Latvia
MT	Malta
NL	Netherlands
PL	Poland
PT	Portugal
RO	Romania
SE	Sweden
SI	Slovenia
SK	Slovakia

Former Member State

UK	United Kingdom

European Free Trade Association Members

IS	Iceland
LI	Liechtenstein
NO	Norway
CH	Switzerland

EU Candidate Countries

AL	Albania
ME	Montenegro
MK	North Macedonia
RS	Serbia
TR	Turkey

Potential EU Candidate Countries

BA	Bosnia and Herzegovina
XK	Kosovo

Other

AMF Authority)	Autorité des Marchés Financiers (<i>French</i>) (Financial Markets
c	case
c	council
CESIFO	Center for Economic Studies, IFO Institute – Leibnitz Institute for Economic Research at the University of Munich
CPO	Commissione Pari Opportunità (<i>Italian</i>) (Equal Opportunity Commission)
co	company
Coll	College
COE	Council of Europe
CONSOB	Control Commission for Listed Companies (Italy)
CSR	corporate social responsibility
DCGK	Deutscher Corporate Governance Kodex (German Corporate Governance Code)
DL	Decreto legge (Italian) (Act) (Law decree)
DIE	Deutsches Institut für Entwicklungs Politik (German Development Institute)
DIW	Deutsches Institut für Wirtschaftsforschung (German Institute for Economic Research)
EC	European Community
ECGI	European Corporate Governance Institute
EEA	European Economic Area
EEC	European Economic Community
ed	editor

eds	editors
edn	edition
EFTA	European Free Trade Association
EHNE	Encyclopédie pour une histoire numérique de l'Europe (<i>French</i>) (Encyclopedia for a Digital History of Europe)
et al	et alii (<i>latin</i>) and others
EIGE	European Institute for Gender Equality
en	English
ESF	European Social Fund
ESG	Environment, Social and Governance
ETUC	European Trade Union Confederation
EUR-Lex	EU Law
EUROSTAT	Statistical Office of the European Union
EWL	European Women's Lobby
EU	European Union
EUI	European University Institute
ex	example
FEMM	The Committee of Women's Rights and Gender Equality
FCA	Financial Conduct Authority
FIDAR	Frauen in Die Aufsichtsräte (<i>German</i>) (Women on Supervisory Boards)
Fr	French
GDP	gross domestic product
GEC	Gender Equality Commission
HCGE	Haut Comité de Gouvernement d'Entreprise (<i>French</i>) The High Committee for Corporate Governance
HCE	Haut Conseil à L'Egalité Entre les Femmes et les Hommes (<i>French</i>) The High Council of Equality between Women and Men
ibid	ibidem (<i>latin</i> for that which has already been mentioned)
IDEP	Institut Droit Ethique Patrimoine (<i>French</i>) (Institute of Law, Ethics and Heritage)
IGC	Intergovernmental Conference
ILO	International Labour Organisation
IMF	International Monetary Fund
IPOL	European Union's Economic Governance Support Unit
LTD	Limited
MS	Member State
MSCI	Morgan Stanley Capital International
n	number
n	noun
NHO	Næringslivets Hovedorganisasjon (<i>Norwegian</i>) (Confederation of Norwegian Enterprises)
no	number
nr	number (German)
OECD	Organization for Economic Cooperation and Development

OJ	Official Journal
OUP	Oxford University Press
para	paragraph
s	section
ss	sections
SI	Statutory Instrument
txt	text
UN	United Nations
UNDP	United Nations Development Programme
v	version
v	versus

PRINCIPAL INTERNATIONAL AND EUROPEAN LAW

INTERNATIONAL CONVENTIONS AND COVENANTS

UN Committee on the Elimination of Discrimination Against Women (CEDAW) General Recommendation No. 25, on Article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on Temporary Special Measures (2004)

UN Report of the Fourth World Conference on Women: Beijing 4-15 September 1995 (1996)

International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 7

ILO Convention on Discrimination (Employment and Occupation) 1958 C-111

UN Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A) (III) (UDHR) art 5 (1948)

UN Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A) (III) (UDHR) art 7 (1948)

UN General Assembly, Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) Adopted and Opened for Signature, Ratification and Accession by General Assembly Resolution 34/180 of 18 December 1979 entry into force 3 September 1981, in accordance with article 27(1) (UN, 1981)

CHARTERS

Charter of Fundamental Rights of the European Union [2012] C326/02

Charter of Fundamental Rights of the European Union [2008] OJ C326/02, Article 23

Charter of Fundamental Rights of the European Union [2007] C303/01, OJ C303/17 Explanation of Article 23

Charter of Fundamental Rights of the European Union (2007) Explanation of Article 16
Charter of Fundamental Rights of the European Union [2000] C364/01; Article 20

TREATIES

Consolidated Version of the Treaty on the Functioning of the European Union, Part Three – Union Policies and Internal Actions, Title X – Social Policy, Article 157 (former Article 141 TEC) [2016] OJ C202

Consolidated Versions of the Treaty on European Union and the Treaty on the Functioning of the European Union [2012] OJ C326/01

Treaty on the European Union (TEU) [2012] OJ C326/01

Treaty on the Functioning of the European Union (Treaty of Lisbon) [2009] OJ C115/47

Treaty of Nice [2002] OJ C325/01

Treaty of Amsterdam [1997] OJ C340/01

Treaty establishing the European Community/* Codified Version of the Treaty Establishing the European Community [1992] OJ C224/01

Treaty of Maastricht [1992] OJ C191/01

Treaty of Rome (EEC) [1957]

EUROPEAN UNION LEGISLATION EUROPEAN UNION ACTS

EU (EEC) The Single European Act (1987) No L 169 /1, art 130r (4)

EUROPEAN UNION DIRECTIVES

Directive (EU) 2017/828 of the European Parliament and of the Council of 17 May 2017 Amending Directive 2007/36/EC as regards the Encouragement of Long-Term Shareholder Engagement [2017] OJ L132

Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as Regards Disclosure of Non-Financial and Diversity Information by Certain Large Undertakings and Groups [2014] OJ L330

Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the Annual Financial Statements, Consolidated Financial Statements and Related Reports of Certain Types of Undertakings, Amending Directive 2006/43/EC of the European Parliament and of the Council and Repealing Council Directives 78/660/EEC and 83/349/EEC [2013] OJ L182

Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the Implementation of the Principle of Equal Opportunities and Equal Treatment of Men and Women in Matters of Employment and Occupation (Recast) [2006] OJ L204

Council Directive 2004/113 / EC of 13 December 2004 Implementing the Principle of Equal Treatment between Women and Men in the Access to Goods and Services and the Supply of Goods and Services (2004) OJ L 373 [2006] OJ L 153M

Directive (EC) 2002/73 amending Council Directive 76/297/EEC on the Implementation of the Principle of Equal Treatment for Men and Women as regards Access to Employment, Vocational Training and Promotion, and Working Conditions [2002] OJ L269/15

Council Directive 2000/78/EC of 27 November 2000 Establishing a General Framework for Equal Treatment in Employment and Occupation [2000] OJ L303

Council Directive (EEC) 76/207 on the Implementation of the Principle of Equal Treatment for Men and Women as Regards Access to Employment, Vocational Training and Promotion, and Working Conditions (Equal Treatment Directive).[1976] OJ L39

Council Directive 75/117/EEC of 10 February 1975 on the Approximation of the Laws of the Member States relating to the Application of the Principle of Equal Pay for Men and Women [1975] OJ L45

PROPOSAL FOR A DIRECTIVE

Proposal for a Directive of the European Parliament and of the Council on Improving the Gender Balance among Non-Executive Directors of Companies Listed on Stock Exchanges and Related Measures COM [2012] 0614 final, [2012] 0299 (COD)

SUMMARY

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INTRODUCTION

The world's financial crises 'exposed the limits of the present system of governance of financial institutions. The volatility of the global marketplace struck every developed economy...'¹ The European Union called into question corporate governance practices in public limited companies, with special attention given to the composition of the board of directors following the economic crisis.² It is well-known that the board of directors is one of the control forces of a company, 'operating ... to resolve ... problems',³ participating in decision-making and taking strategic direction of a company.⁴ Though, when taking a closer look at the composition of board directors of public listed companies in the European Union, it should be noted that women are missing, despite current policies and legislation.

Women on boards of directors is a legal problem, principally due to fragmented women on boards policies and legislation in the European Union. The research intends to demonstrate that the European Union, with an arsenal of women on boards policies and legislation, has been pursuing an economic strategic policy to increase the representation of women in economic decision-making positions (in companies *versus* political decision-making in government) to improve GDP in the European Union and counter a declining workforce. The objective of this research is to move from fragmented policies and legislation to a defined legal framework of a minimum harmonisation, which includes a quota of women on boards of directors in public listed companies.

¹ Veronique Magnier and Darren Rosenblum, 'Quotas and the Transatlantic Divergence of Corporate Governance' (2015) 34, *Northwestern Journal of International Law & Business* 282.

² *ibid.*

³ M. C. Jensen, 'The Modern Industrial Revolution, Exit, and the Failure of Internal Control Systems' (1993) 48 *The Journal of Finance* 23.

⁴ *ibid.*, 23.

Studies show that parity on corporate boards of public limited companies is directly linked to effective corporate governance⁵ and economic growth in the European Union. Public limited companies are defined as those companies traded on the stock market and are the focus of this research. 'A public company is also known as a listed company, as it raises capital and registers with the stock exchange. Once registered, it becomes a listed company'.⁶ In general, companies have used a rules-based corporate governance approach, which has included soft law, corporate governance principles and the use of corporate codes of governance.

This introduction provides an overview of the orientation of this thesis, which provides arguments, that a minimum harmonisation is needed to address the fragmented legal approaches of the EU and national institutions. It is divided in two parts: Part I Corporate Governance and Women on Boards and Part II Women on Boards and Legislation in the European Union.

Part I Corporate Governance and Women on Boards

- 1.1 Corporate governance and sustainability
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- 1.3 Targets, quotas or nothing at all
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- 2.2 Women on boards economic indicators and a fragmented legal approach in the EU

⁵ S. Terjesen, Couto E. Barbosa and Francisco P. Morais, 'Does the Presence of Independent and Female Directors Impact Firm Performance? A Multi-Country Study of Board Diversity' (2016) 20(3) Journal of Management and Governance 55.

⁶ Francesca Gennari, 'Women on Boards and Corporate Social Responsibility, Corporate Board: Role, Duties & Composition' (2016) 12(1-1) Corporate Board: Role, Duties & Composition 107; 'public limited company', Cambridge Dictionary <<https://dictionary.cambridge.org/fr/dictionnaire/anglais/public-liste-d-company>> accessed 25 November 2017; 'public listed company,' Paras Mehra, What is the Difference between a Listed Company and a Public Limited Company <<https://www.hubco.in/answers/what-is-the-difference-between-a-listed-company-and-a-public-limited-company>> accessed 29 May 2022.

2.3 EU Member States corporate governance and women on boards: the failure of soft and hard law

2.4 Obstacles to the proposed women on boards directive and national legislation

2.5 The European Union and board of directors: policies and legislation

2.6 Women on boards minimum harmonisation, an important EU corporate governance concern

Part One: Corporate Governance and Women on Boards

1.1 Corporate governance and sustainability

Corporate governance principles now include sustainable practices, which are protective and long-term.⁷ This new sustainable development movement is driving change in the global economy. The 2030 Agenda on UN Sustainable Development Goals advocates sustainability, based on creating value rather than short-term gains, which include company operations and a stakeholder approach.⁸ Companies and stakeholders have become aware of the importance that sustainable corporate governance has on markets. Stakeholders expect more transparency about the nomination procedures of board directors and how they are elected. The representation of women on boards is part of a sustainable EU economic strategy.⁹

EU institutions are the competent authority, under Article 50(1) and Article 50 (2)(g) of the Treaty on the Functioning of the European Union (TFEU), which guarantee company

⁷ Baker and McKenzie Report, 'Corporate Governance Concepts' (Baker and McKenzie, 2021)1.

⁸ UN Report, 'UN Sustainable Goals, Goal Number Five' (UN Report, 2020); EU Commission Report, Sustainable Corporate Governance (EU Commission, 2020) <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12548-Sustainable-corporate-governance_en> accessed 6 August 2021; European Commission, Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions The European Green Deal COM (2019) 640 final <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2019%3A640%3AFIN>> accessed 6 August 2021.

⁹ European Commission, Europe 2020: A European Strategy for Smart, Sustainable and Inclusive Growth COM (2010) 9 <<https://ec.europa.eu/eu2020/pdf/COMPLET%20EN%20BARROSO%20%20%20007%20-%20Europe%202020%20-%20EN%20version.pdf>> accessed 2 October 2018.

freedom of establishment to all stakeholders.¹⁰ Article 114 of the TFEU calls on European institutions, the Commission and Parliament, to pass legislation to ensure the internal market. France, the Netherlands and Italy have national sustainable corporate governance regulations in place. Other Member States, such as Germany, Finland, Sweden, Denmark, Belgium and Luxembourg are considering such legislation.¹¹

Top management of companies are paying closer attention to sustainable business practices, which include corporate social responsibility, by becoming more socially responsible towards their stakeholders.¹² The representation of women on boards is part of a stakeholder approach, rather than a shareholder approach of the company. This approach takes into account different backgrounds to avoid groupthink, which has been blamed for past corporate worldwide scandals. After the global financial scandals, many EU Member States changed their governance codes to include gender provisions to modify the composition and balance corporate boards. So, as not to discuss just women and boards in isolation, this multi-level research consists of the representation of women on company boards and aligning corporate governance practices of the Member States of the European Union. Naturally, soft and hard law at national and EU level shall be discussed. The legal obligations of governance of the board directors are founded in sources of law, EU law, OECD rules and national law. These laws and rules regulate companies in the EU. Companies comply or may face consequences, if non-compliant, which may be in the form of different sanctions.

¹⁰ European Union Law, Proposal for Legislation Fostering More Sustainable Corporate Governance in Companies, Document Ares 4034032, (2020) Initiative Summary <https://eur-lex.europa.eu/legal-content/EN/PIN/?uri=PI_COM%3AAres%282020%294034032> accessed 6 August 2021; n 8, European Commission, Sustainable Corporate Governance (2020) Summary.

¹¹ *ibid*, Proposal for Legislation Fostering More Sustainable Corporate Governance in Companies; *ibid*, Sustainable Corporate Governance.

¹² European Commission, The EU Corporate Governance Framework (Green Paper) COM (2011) 0164 final 2 <<https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A52011DC0164>> accessed 28 November 2017.

Today, there is greater concern regarding company reputation and corporate social responsibility with legal obligations towards stakeholders, which include employees, clients, customers and the community as a whole and addresses social responsibility in the company environment and its resources. Corporate governance is defined as a 'system by which companies are directed and controlled. The board of directors are responsible for the governance of their companies.'¹³ Furthermore, the OECD has defined corporate board structures and rules in Europe, as set out in the *Principles of Corporate Governance*.¹⁴ As a comparative law exercise, it is possible to measure outcomes of women on boards of public limited companies, referring to OECD principles in the EU Member States. Women on boards has become one of the most important corporate governance topics in recent years worldwide.

1.2 The importance of notions of different terms related to women on boards

When addressing the subject of women on the boards of directors, it is important to define the notions of different terms related to the women on boards directive, such as, gender equality, parity, *parité*, equality, equal treatment and diversity. Each approach will be examined to contribute to this research and to avoid misinterpretations. There are many approaches to the notions of gender equality, which may go beyond the scope of this research. The EU Member States have divergent regulations and lack a common approach. This research has identified four existing legal framework models of women on boards, which are:

1. EU Member States without any women on boards measures,
2. EU Member States with basic women on boards policies,
3. EU Member States with flexible business approaches (targets) and
4. EU Member States with binding legislation.

¹³ Adrian Cadbury, 'Report of the Committee on the Financial Aspects of Corporate Governance' The Committee on the Financial Aspects of Corporate Governance and Gee and Co. Ltd. (1992) 2.5 <<http://cadbury.cjbs.archios.info/report>> accessed 25 November 2017.

¹⁴ OECD Report, Principles of Corporate Governance (1999) 2 <[https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=C/MIN\(99\)6&docLanguage=En](https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=C/MIN(99)6&docLanguage=En)> accessed 5 July 2019.

This identification of framework models correlates with past research, which specified that EU Member States included compliance with outcomes (sanctions). The second choice was the use of 'comply or explain' self-regulation criteria set out by stock market exchanges or other financial institutions. The third choice was to make recommendations to comply with binding quotas with sanctions. The last choice was to make recommendations, but without passing any specific target of percentages or sanctions.¹⁵ This framework goes beyond the past research, as it includes binding legislation.

1.3 Targets, quotas or nothing at all

There is an important political aspect of the subject of women on boards on public limited companies, as Member States today may freely choose to implement targets (soft law), quotas (hard law) or do nothing at all (limited to no soft law), as national parliaments decide, not companies. Furthermore, the proposed directive, which includes the use of tie-break quotas to increase the representation of women, is a political tool by EU institutions to move Member States in the same direction. Therefore, the Member States will no longer be able to do nothing at all, when the directive enters into force or will face sanctions.

The key amendment in the proposed women on boards directive is an opportunity for the EU Commission to implement tie-break quotas¹⁶, while remaining compliant with CJEU case-law (and positive action). The key amendments would allow to select the underrepresented sex (women), should candidates be equally qualified and allow to

¹⁵ Gennari (n 6) 107.

¹⁶ European Parliament, Report on the Proposal for a Directive of the European Parliament and of the Council on Improving the Gender Balance among Non-Executive Directors of Companies Listed on Stock Exchanges and Related Measures, COM (2012) 0614, Amendment 4, Recital 6 (2011)] <https://www.europarl.europa.eu/doceo/document/A-7-2013-0340_EN.html> accessed 25 November 2017.

'tilt the balance in favour of a candidate of the other sex.'¹⁷ Tie-break quotas may look like hard quotas, but they are not hard quotas. Still, they are considered controversial measures in the European Union. The EU has historically been against the use of quotas, which are considered as a last resort measure.¹⁸ The use of hard quotas has always been considered incompatible with EU law.¹⁹ The European Parliament has called for binding legislation to regulate women on boards in public limited companies, as the only means to assure effectiveness.²⁰ Parliament calls '... on the need for such quotas to be binding, as this is the only way of guaranteeing their efficacy. EU Parliament proposed that an 'equality fund' be established, into which monies collected under resultant penalties would be paid for use in measures to promote and protect women'.²¹

1.4 Women on boards legislation and economic justification

Norway, a non-EU Member State and EEA member; was the first country to implement the use of gender quotas for economic reasons.²² The justification for the binding legislation in Norway was initially linked to 'societal reasons related to ...values and equality ... and ... need to shatter the glass ceiling...., before moving to company law.²³ Norwegian legislation is the absolute reference for EU institutions (the European Commission and Parliament) and Member States, when considering binding women

¹⁷ *ibid*, European Parliament, Report on the Proposal for a Directive, Recital 26, Amendment 37 and Recital 27.

¹⁸ Viviane Reding Speech, ex-EU Commissioner, The Tug-of-War over the Women Quota (DLD Women, Munich on 12 July 2012) <https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_12_547> accessed 5 July 2019.

¹⁹ Nicole Sagener, 'Germany Debates Bill to Set Gender Quota on Corporate Boards', Euractiv News, March 6, 2015 <<https://www.euractiv.com/section/all/news/germany-debates-bill-to-set-gender-quota-on-corporate-boards/>> accessed 5 July 2019.

²⁰ European Parliament Report on Eliminating Gender Stereotypes in the EU (2012/2116 (INI)) n 51 <https://www.europarl.europa.eu/doceo/document/A-7-2012-0401_EN.html?redirect> accessed 3 September 2018.

²¹ *ibid*.

²² UK Government, Department for Business, Innovation & Skills, Women on Boards (2011) 26.

²³ Silke Machold and others, Introduction, *Getting Women on to Corporate Boards, A Snowball Starting in Norway* (1st edn, Edward Elgar Publishing 2013) 2.

on boards legislation. This research addresses women on boards legislation in public limited companies, which represent the leading and wealthiest companies in the European Union, as these companies employ the largest number of women.²⁴ Though, there may be a large representation of women employed in these companies, this does not necessarily mean that a large number of women sit on boards of directors of those companies. Thus, the need to regulate the lack of representation of women on boards.²⁵ Politicians and academicians alike have been examining the topical subject of women on boards. Currently, there is a considerable amount of gender equality legislation and soft law dedicated to women on boards, which include changes and new legislation entering into force. According to the European Commission Report on Women and Men in Leadership Positions and Gender Equality Strategy Mid-Term Review in 2013, women represented 16.6 percent on boards of public limited companies in the European Union²⁶. In 2020, women represented 27.8 percent on boards of public limited companies in the EU and 30.6 percent in 2021.²⁷

According to the OECD 2008 Report, women in workforce in the EU composed more than twenty-five percent of economic growth in Europe. According to a Swedish Report, a gender balance in the employment market would raise GDP by more than twenty-seven percent.²⁸ The latest women on boards figures in the European Union

²⁴ OECD Statistics, Employment: Female Share of Seats on Boards of the Largest Publicly Listed Companies (OECD, 2022) <<https://stats.oecd.org/index.aspx?queryid=54753>> accessed 30 May 2022.

²⁵ European Commission Fact Sheet, Věra Jourová, Gender Balance on Corporate Boards, Europe is Cracking the Glass Ceiling (2016) 4 <https://ec.europa.eu/newsroom/document.cfm?doc_id=46280#:~:text=Women%20are%20outnumbered%20by%20men,in%20the%20EU%20are%20women> accessed 13 June 2018.

²⁶ European Commission Memo, Report on Women and Men in Leadership Positions and Gender Equality Strategy Mid-Term Review (2013) <https://ec.europa.eu/commission/presscorner/detail/en/MEMO_13_882> accessed 19 October 2020.

²⁷ European Institute for Gender Equality Statistics, Positions Held by Women in Senior Management Positions (Eurostat, 2022) <https://ec.europa.eu/eurostat/web/products-datasets/-/sdg_05_60> accessed 12 July 2022.

²⁸ Åsa Löfström, 'Gender Equality, Economic Growth and Employment' Umeå University Department of Economics Research Paper (2009) 26 <<http://umu.diva-portal.org/smash/record.jsf?pid=diva2%3A273648&dsid=-3120>> accessed 17 March 2019; Silvia Gomez Anson, 'Women on Boards in Europe: Past,

reveal that this is far from parity or the acceptable critical mass of forty percent of women and forty percent of men on boards of public limited companies, which was called for in the proposed women on boards directive.²⁹ The objective of the proposed directive was ‘...to strike not only an adequate balance between EU and national interests, but also between the public interest of gender equality and the private interest of business.’³⁰ The proposed directive is intended to include women in economic decision-making on company boards in the European Union, rather than purely addressing gender equality issues. EU intervention with the proposed directive has demonstrated that the situation continues to be problematic. EU Member States implement soft law, while other Member States have passed hard law. Other Member States have limited to no soft law in place.

Part Two: Women on Boards and Legislation in the European Union

2.1 The underrepresentation of women on boards of directors in public limited companies in the European Union

Women in the European Union have only recently become involved in decision-making positions in politics. In the private sector, the earliest participation dates back to the 1990s. Because of this late date, there are far fewer women on company boards in

Present and Future’ in Collette Fagan, Maria C Gonzalez Menendez and Silvia Gomez Anson (eds), *Women on Corporate Boards and in Top Management: European Trends and Policy*, Palgrave Macmillan, 2012) 18.

²⁹ European Commission, Proposal for a Directive of the European Parliament and of the Council on Improving the Gender Balance among Non-Executive Directors of Companies Listed on Stock Exchanges and Related Measures COM (2012) 614 final 2012/0299 (COD) <<https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2012:0614:FIN:en:PDF>> accessed November 9, 2018; Linda Senden, ‘The Multiplicity of Regulatory Responses to Remedy the Gender Imbalance on Company Boards’ (2014) 10(5) Utrecht Law Review, 51.

³⁰ Linda Senden and Sonja Kruisinga, ‘Gender-Balanced Company Boards in Europe, A Comparative Analysis of the Regulatory, Policy and Enforcement Approaches in the EU and EEA Member States’ (Publications Office of the European Union, 2018) 112.

public limited companies in Europe than men.³¹ According to the 2022 European Commission Report Gender Balance on Company Boards, the gap is widening within the EU Member States, as

Although progress has been made towards greater gender equality on corporate boards, this progress remains uneven. In October 2021, only 30.6% of board members and just 8.5% of board chairs were women. The gap between member states is wide. Those where measures have been put in place are making much faster progress than those in which they have not.³²

As a general rule, where no national binding women on boards legislation exists, women are likely to be absent from company boards. This may be understood when questioning the impact of binding legislation in several Member States. France increased from 14.4 percent to 26.8 percent, the Netherlands from 8.7 percent to 23.6 percent and Italy from 8.4 percent to 12.9 percent when each of these Member States passed binding legislation. Therefore, there are important results when there is regulation.³³ Women represent more than fifty percent of the population of the European Union and make up more than fifty percent of university graduates. Companies hire university graduates, who possess the necessary qualifications to become board directors and take decisions in the best interest of the company. However, in many EU Member States, women remain absent from company boards.³⁴

³¹ J. Grosvold and S. Brammer, 'National Institutional Systems as Antecedents of Female Board Representation: an Empirical Study' (2011) 19 (2) Corporate Governance: An International Review 36; Linda-Eiling Lee et al, 'Women on Boards: Global Trends in Gender Diversity on Corporate Boards' (MSCI ESG Research Inc., 2015).

³² European Council of the European Union, Member States Adopt a General Approach on an EU Directive Aiming to Strengthen Equality on Corporate Boards, Press Release (Council of the EU, 14 March 2022) <<https://www.consilium.europa.eu/en/press/press-releases/2022/03/14/les-etats-membres-arretent-leur-position-sur-une-directive-europeenne-visant-a-renforcer-l-egalite-entre-les-femmes-et-les-hommes-dans-les-conseils-d-administration/>> accessed 2 June 2022.

³³ n 26, Report on Women and Men in Leadership Positions and Gender Equality Strategy Mid-Term Review.

³⁴ European Commission, Former Vice-President of the European Commission, Viviane Reding, Women in Senior Positions: Key to Economic Stability and Growth (2010) 5.

European Union institutional policy had allowed Member States to self-regulate women on boards, through the use of recommendations and other soft law. Though, it is now understood, that this approach has created too many different regulatory frameworks concerning gender equality and women on boards among the Member States (currently 27, minus the UK, since Brexit) and has resulted in a lack of a common EU approach. The proposed women on boards directive had been blocked in Parliament for over ten years. However, at the beginning of 2022, the MEP and co-rapporteur, Evelyn Regner, called on Elisabeth Moreno, the French Minister in charge of Equality between Women and Men, Diversity and Equal Opportunities to convince President Emmanuel Macron, who was also President of the European Council to revive the proposed directive. Moreover, the new German government finally approved the proposed directive in the European Council. The German vote may have never happened without pressure from the President of the European Council.³⁵ Though, several Member States continue to oppose the proposed directive. Moreover, the text to the proposed directive carries notable modifications, such as, there should be a forty percent quota of non-executive directors and has been extended to allow thirty-three percent of executive and non-executive board directors by 2026. The suspension clause allows the Member States to suspend the directive, if there is equivalent national law in place, as well as describing target setting in annual reporting.³⁶ Though, during the ten years that the proposed directive was blocked, European Union institutions did not propose any other solution to unify the Member States with a common women on

³⁵ Gennari (n 6) 107; Inbar Preiss, 'Parliament Pushes for Gender Balance on Corporate Boards after Decade-long Deadlock on Legislation' Parliament Magazine (March 2022) <<https://www.theparliamentmagazine.eu/news/article/parliament-pushes-for-gender-balance-on-corporate-boards-after-decadelong-deadlock-on-legislation-23821>> accessed 7 May 2022; Harald Schumann and Sigrid Melchior, Investigate Europe, Secrets of the Council, German Liberals Block Women's Quota for Europe's Corporate Boards Investigate Europe, 17 January 2022) <<https://www.investigate-europe.eu/en/2022/german-liberals-block-womens-quota-for-europes-corporate-boards/>> accessed 7 May 2022.

³⁶ European Parliament, Legislative Train Schedule, Gender Balance on Boards (2020) <<https://www.europarl.europa.eu/legislative-train/theme-area-of-justice-and-fundamental-rights/file-gender-balance-on-boards>> accessed 13 July 2020; European Council Report, Gender Balance on Corporate Boards (2022) 6 <<https://www.consilium.europa.eu/en/policies/gender-balance-corporate-boards/>> accessed 6 July 2022.

boards policy.³⁷ Numerous studies affirm that the only effective method to increase the representation of women on boards is binding quota legislation.³⁸

2.2 Women on boards economic indicators and a fragmented legal approach in the EU

Employment figures have been provided in this research and have indicated that the EU workforce population is ageing, with fewer qualified men entering the workforce. At the same time, there is a need for Europe to be competitive in the global economy. Moreover, a greater number of women are entering the workplace than ever before.³⁹ Regardless of economic indicators, women still fail to become board directors at the same pace as men. To further complicate the issue, there is a lack of a standard approach among EU Member States to increase the representation of women on boards in public limited companies. The economic indicators reveal that women face considerable barriers to participate as board directors in certain Member States. In 2012, there were fourteen percent of women on boards in the largest public limited companies in Europe.⁴⁰ At the time, the EU faced a declining workforce with baby boomers leaving on retirement, which held the EU back from competing in the global economy. According to the European Commission, more women in the workforce would have provided economic opportunities for a more competitive Europe. Employing a greater number of highly educated women is considered an effective

³⁷ n 29, Proposal for a Directive.

³⁸ OECD Report, Conference on Improving Women's Access to Leadership (OECD, 2016); A. Ekin, 'Quotas get More Women on Boards and Stir Change from Within' Denmark in Horizon, the EU Research and Innovation Magazine (European Commission, 2018) <<https://ec.europa.eu/research-and-innovation/en/horizon-magazine/quotas-get-more-women-boards-and-stir-change-within>> accessed 5 July 2019; n 24, OECD Statistics, Employment : Female Share of Seats on Boards of the Largest Publicly Listed Companies.

³⁹ n 29, Proposal for a Directive.

⁴⁰ European Commission Report, Gender Balance in Business Leadership' (2012) (*document is archived, no longer in force*) <https://eur-lex.europa.eu/summary/EN/legisum:1710_2> accessed 5 July 2019; n 29, Proposal for a Directive.

solution for a weak EU economy, since women are considered an untapped and unexploited resource.⁴¹

The lack of a common women on boards policy among the Member States has been problematic from a macroeconomic viewpoint. EU Parliament called on the Commission to remove barriers to allow women equal access to the workforce, which would create macroeconomic outcomes, specifically, a greater number of employed women in the labour market. The Parliament called on public limited companies to accelerate and adopt the legislation. Legislation and norms would permit more women to be employed. However, for certain EU Member States, the legislation may be too difficult to implement.⁴² Parliament called for sanctions to accompany the legislation. According to Article 6 of a Proposal of a Directive, sanctions are applicable and 'must be effective, proportionate and dissuasive.'⁴³ Sanctions may be in the form of fines or annulling the appointment or election. Each Member State would decide on the sanction.⁴⁴

Yet, according to Article 8, Member States who have already passed equivalent legislation are exempt from the Directive, but must prove equal national legislation.⁴⁵ The lack of women in the workforce has led to negative consequences for the EU economy. 'The cost of a lower employment rate for women may be calculated by including their missing earnings and welfare contributions. Depending on a woman's educational level, the cost of exclusion from the labour market throughout their working life is estimated between EUR 1.2 million and EUR 2 million.'⁴⁶

⁴¹ European Commission Report, Women in Economic Decision-Making in the EU, Progress Report. A Europe 2020 Initiative (2012) 13.

⁴² European Parliament Report, Marcella Corsi, Economic Independence and the Position of Women on the Labour Market of the European Union (2014) 10.

⁴³ n 29, Proposal for a Directive, Article 6.

⁴⁴ *ibid*, Proposal for a Directive, Article 30.

⁴⁵ *ibid*, Proposal for a Directive, Article 8.

⁴⁶ EIGE Report, Economic Benefits of Gender Equality in the European Union (EIGE, 2017) 4.

There are several macroeconomic gains when more women enter the workforce. There would be an additional increase in job offers for women and men, including women in decision-making positions. Approximately 10.5 million more jobs would be created by 2050. Women would be employed in most of these jobs, which would then lead to an increase in GDP per capita of ten percent by 2050.⁴⁷

2.3 EU Member States corporate governance and women on boards: soft and hard law

From a EU and Member State legal framework, important differences remain, as only a few Member States have passed hard law to guarantee representation of women on boards of directors. The EU Member States are at different stages of development, when it comes to diversity and women on boards policies. In Norway and France, women are at parity with men on boards (parity defined as forty percent of women on boards). In Norway, France and Germany, corporate governance codes include provisions, which regulate recommendations to increase the representation of women on boards and mention binding legislation. The corporate codes interact with government policies and legislation, as a way for companies 'to achieve the highest sustainable ... growth... [and] to contribute to the development of the ...economy'.⁴⁸ The OECD Principles of Corporate Governance 1999 included the notion of sustainability, as a concern for long-term governance of companies. Investors are turning to responsible investments and sustainable business. Gender and diversity are part of sustainable business practices, despite the underrepresentation of women on boards of public limited companies.⁴⁹

⁴⁷ *ibid*; IMF Report, Katrin Elborgh-Woytek and others, 'Women, Work and the Economy, Macroeconomic Gains from Gender Equity' IMF Staff Discussion Note (2013).

⁴⁸ n14, OECD Principles of Corporate Governance (1999).

⁴⁹ OECD Investing in Gender Equality to Achieve Sustainable Development (2015) <<https://www.oecd.org/dac/gender-development/Addis%20flyer%20-%20Gender%20Equality%20FINAL.pdf>> accessed 23 December 2021.

Other Member States are drafting new soft law policies, which include provisions in corporate governance codes to address representation of women on boards. Though, several Member States do not recognise the lack of women on boards as an issue and refuse to comply with EU Commission soft law recommendations or hard law directives.

Soft law has been compared to 'stretching the law beyond its classic frontiers'. The legal positivists stated that law should either be hard law or not law at all.⁵⁰ The positivists considered the source of the rule as legal validity, as hard law.⁵¹ The term soft law has been given to everything else, such as, when a rule cannot be determined clearly or unrecognized by the law, then it is soft law.⁵² The different EU legal instruments to increase the representation of women on boards implement soft law, which is non-binding, and hard law, which refers to regulatory legislative means, and may be defined, as 'a compulsory form of state intervention through legislation [and]...sanctions'.⁵³

European Union institutions have set strategic political policy objectives to increase the representation of women on boards, as a way to contribute to a more competitive European Union economy. European public limited companies evaluate their corporate governance policies, diversity and corporate social responsibility policies, which include, as a first step, soft law programs to increase the representation of women on corporate boards.⁵⁴ The European Commission has taken strong measures to treat women in the workforce, as an economic resource. Increasing the number of women

⁵⁰ J. d'Aspremont, 'Softness in International Law: A Self-Serving Quest for New Legal Materials' (2008) 19(5) *European Journal of International Law*, 1083.

⁵¹ Bart van Klink and Olivier Lembcke; 'A Fuller Understanding of Legal Validity and Soft Law' in Pauline Westerman et al. (eds), *Legal Validity and Soft Law*, (Springer 1979) 145-164.; 'All laws have a source', Joseph Raz, 'The Authority of Law, Essays on Law and Morality' (Oxford University Press 1979) 153.

⁵² *ibid.*

⁵³ Senden (n 29) 51.

⁵⁴ n 41, European Commission Report, Women in Economic Decision-Making in the EU, Progress Report. A Europe 2020 Initiative (2012) 13.

in the workforce, including women on boards, is part of the EU strategy, as the European economy was heading towards a slowdown. The EU would have to wait at least fifty more years, before women will be represented equally on boards, if legislation is not passed.⁵⁵ Binding quota legislation is considered to be the most effective way to increase the representation of women on boards. Norwegian legislation was the first to pass women on boards legislation for economic reasons,⁵⁶ which brought rapid results, from twenty-five percent of women on boards in 2004 to forty-two percent of women on boards in 2009.⁵⁷ In the European Commission and Parliament, political and economic motivation are important factors, and responsible for the increase of the representation of women on boards in public limited companies in EU Member States. On a business level, much research has demonstrated that there is increased company performance with parity.⁵⁸ Even so, those studies are ongoing and not part of this research.

Past research has primarily focussed on women on boards and functions within the company or on financial gains linked to the increase of the representation of women on boards, but not on a legal approach of a minimum harmonisation of women on boards. This research is interested in the implementation of a Minimum Harmonisation Programme to accompany the directive to increase the representation of women on boards in public limited companies in EU Member States, which shall be led by EU institutions in concertation with each Member State.

⁵⁵ Viviane Reding Speech, ex-EU Commissioner; The European Commission's New Gender Equality Strategy: Towards Quotas for Women in the Boardroom (Speech at the European Central Bank Diversity Forum on 28 March 2011) <[http://europa.eu/rapid/press-release SPEECH-11-219_en.htm](http://europa.eu/rapid/press-release_SPEECH-11-219_en.htm)> accessed 3 January 2018.

⁵⁶ Agoth Storvik and Mari Teigen, 'Women on Board, The Norwegian Experience' (Friedrich Ebert Stiftung, 2010) 8.

⁵⁷ n 55, European Commission, Viviane Reding Speech.

⁵⁸ *ibid*; Sabina Nielsen and Morten Huse, 'The Contribution of Women on Boards of Directors: Going Beyond the Surface' (2010) 18(2) Corporate Governance, An International Review, 145.

2.4 Obstacles to the proposed women on boards directive and national legislation

The proposed directive called for sanctions, if companies are not compliant with the legislation, which may include fines, exclusion from tenders, funding and annulment of the election of non-executive directors. Member States may fix more extreme sanctions, including the dissolution of companies, such as the Norwegian legislation. In actual application, France went beyond the tie-break quotas, passing binding quota legislation calling for forty percent of women on boards, while other EU members did not reach the forty percent quota or implement neither soft law nor legislation. Even if EU Member States use tie-break or hard quotas as a constitutional right, they may be against quotas for ideological reasons. In the UK, laissez-faire economic policies preferred targets and not quotas. In France, it was necessary to amend the French Constitution to allow for quota legislation. In Germany, quotas have been regarded as unconstitutional or the 'unacceptable erosion of ownership authority among shareholders...' ⁵⁹ Though, this notion was found inconsistent with German Constitution in Article 3(2) which guarantees the principle of gender equality. It was the Rule of Equality which eventually led to the adoption of the *Frauenquote* legislation, the women on boards binding legislation, a thirty percent women on boards representation on supervisory boards of public limited companies and companies subject to co-determination. According to Article 3 (2) and (3) of the Rule of Equality of the Basic Law, 'Men and women shall have equal rights. The state shall promote the actual implementation of equal rights for women and men (3) No one shall be discriminated against or given preferential treatment on the grounds of sex...' ⁶⁰

⁵⁹ Sagener (n 19).

⁶⁰ German Constitution, Basic Law for the Federal Republic of Germany, 23 May 1949 (1949) <<https://www.refworld.org/docid/4e64d9a02.html>> accessed 17 March 2019.; German Legislation, Act for the Equal Participation of Women and Men in Leadership Positions in the Private and Public Sector, Federal Law Gazette online (Federal Law Gazette online, Nr. 17, 2015) <https://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBI&jumpTo=bgbl115s0642.pdf#_bgbl_%2F%2F*%5B%40attr_id%3D%27bgbl115s0642.pdf%27%5D_1613228005038> accessed 17 March 2019.

Soft law includes governance codes, targets, recommendations, as well as other non-binding measures. The use of soft law is non-regulatory, which focusses on setting rules for the company. Codes are at the centre of corporate governance. The provisions in the codes in Member States may vary, especially with reference to gender, diversity and women on boards.. The explanation for the differences are found in the economic, historical and political backgrounds of each Member State. Moreover, there are structural differences to account for, such as, the board nomination process, the board structure (one or two tier systems), the composition of board directors and shareholder interests.⁶¹ Corporate codes may include the mention of non-executive women directors on boards of directors. Nominations to the board are based on criteria, such as, merit, experience, qualifications, impartiality and diversity. It is possible to compare the different approaches and legal frameworks in the EU Member States, which demonstrate the great diversity of approaches, as well as the challenges, since there is not one EU standard. The EU Commission recognises the different board of directors systems in the Member States, which may be explained by diverse history, politics and legal systems. The most common boards in Europe are one-tier boards, composed of executive and non-executive directors. Two-tiered boards are composed of a management and supervisory board, such as in Germany. The supervisory board decides on company strategy.⁶² Corporate governance codes are first steps, which may advance the representation of women on boards. The codes are used in the private sector by individual companies, but they are remain soft law recommendations. The difficulty with soft law is that it does not increase the representation of women on

⁶¹ French Legislation, French National Assembly Commission for Constitutional Laws, Legislation and General Administration of the Republic, Report Number 29, Examination of the Bill by Mr Jean-François Copé and Ms Marie-Jo Zimmermann on the Balanced Representation of Women and Men on Boards of Directors and Supervisory Boards and on Professional Equality, Committee on Constitutional Laws, Legislation and General Administration of the Republic (2009) < <https://www.assemblee-nationale.fr/13/rapports/r2205.asp> > accessed 17 March 2019.

⁶² n 12, European Commission, The EU Corporate Governance Framework (Green Paper); Difference between One-Tier and Two-Tier Board of Directors (termscompared.com, 2019) <<https://www.termscompared.com/difference-between-unitary-and-two-tier-board-of-directors/>> accessed 5 July 2019.

boards fast enough.⁶³ Nevertheless, the codes remain important, as binding quota legislation is not the first or preferred political measure taken to increase the representation of women on boards of public limited companies in the EU.

Before France passed binding quota legislation, it relied on soft law, self-regulation and corporate codes, which failed to bring effective results. Soft law may even slow down the representation of women on boards, by staying within the *status quo* and even decrease the representation of women on corporate boards, as companies may stop at the required target and not go beyond it.⁶⁴ The move from soft law to binding quota legislation is the most effective way to rapidly increase the representation of women on boards in public limited companies and a means to keep the EU competitive. In the past, women on boards binding legislation had been considered a threat to economic systems (though, certain Member States may still believe this), but today it is supported by EU institutions to improve corporate governance systems, which have reached their limits.

Binding legislation is a means to regulate boards, since self-regulation did not effectively increase the representation of women on boards. The legislation is accompanied by the use of quotas.⁶⁵ The binding women on boards legislation was led by Ex-European Commissioner Reding, who stated that binding women on boards quotas would bring results. Soft law has not brought about fast enough change to

⁶³ Mari Teigen, 'Gender Quotas on Corporate Boards: On the Diffusion of a Distinct National Policy Reform' (2012) 29, *Firms, Boards and Gender Quotas: Comparative Perspectives*, Comparative Social Research, 138.

⁶⁴ n 61, French Legislation, French National Assembly Commission for Constitutional Laws, Legislation and General Administration of the Republic, Report Number 29, Examination of the Bill proposed by Mr. Jean-François Copé and Ms. Marie-Jo Zimmermann on the Balanced Representation of Women and Men on Boards of Directors and Supervisory Boards and on Professional Equality (no. 2140) (2009).

⁶⁵ Lena Hjelm-Wallén, 'The Implementation of Quotas: European Expériences Quota Report Series' in Julie Ballington and Francesca Binda (eds) (International IDEA Publications Office; Stockholm, 2005) 156.

ensure a critical mass of a forty percent minimum representation of women on boards.⁶⁶

The European Commission had advised the Member States to implement measures to increase the representation of women on boards. Otherwise, EU intervention would propose binding legislation, which would lead to a rapid increase in the representation of women on boards and results.⁶⁷ The European Commission was influenced by the Norwegian legislation, which remains the best example of increasing the representation of women on board to over forty percent within a short timeframe.⁶⁸

The proposed women on boards directive is a key piece of European legislation, which calls for the representation of forty percent of women, as non-executive board directors by 2027.⁶⁹ The EU Member States have opposing views about the legislation. Member States hostile to the proposed directive include the Parliaments of Denmark, the Netherlands, Poland, Sweden, the United Kingdom (when EU member) and one of the chambers of the Czech Republic.⁷⁰ Nevertheless, for other Member States, the proposed directive represents an opportunity to pass national legislation, which may go beyond what was originally intended in the directive. This is the situation with the French government response enacting the Copé Zimmermann Act, calling for a forty percent women on boards binding quota with sanctions.⁷¹ The timing of the proposed

⁶⁶ n 55, European Commission, Viviane Reding Speech.

⁶⁷ Euractiv Article, 'EU to Go for 40% Gender Quota on Company Boards' Euractiv Press, 4 September 2012 <<https://www.euractiv.com/section/justice-home-affairs/news/eu-to-go-for-40-gender-quota-on-company-boards/>> accessed 3 January 2018.

⁶⁸ Mari Teigen, 'Gender Quotas for Corporate Boards in Norway' EUI Department of Law Research Paper No. 2015/22 (European University Institute, San Domenico di Fiesole 2015) 1.

⁶⁹ n 36, European Parliament, Gender Balance on Boards.

⁷⁰ *ibid.*

⁷¹ French Legislation, Law No. 2011-103 of January 27, 2011 on the Balanced Representation of Women and Men on Boards of Directors and Supervisory Boards and Professional Equality (1) (Légifrance, 2011) <<https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000023487662>> accessed 3 January 2018; French Ministry of Equality, of Diversity and Equal Opportunities Report, Law of 2011: Is your company affected? (2011) <https://www.egalite-femmes-hommes.gouv.fr/dossiers/egalite-professionnelle/la-mi_xite-dans

directive to increase the representation of women on boards happened nearly at the same time as corporate social responsibility programs in EU companies. Corporate social responsibility principles engage with internal and external stakeholders of the company. Directors of boards are internal stakeholders and are responsible for sustainable decision-making in the best interest of companies.⁷² Corporate social responsibility principles define women on boards as an important concern for governance and business development.⁷³ Perhaps the timing of the corporate social responsibility agenda is a mere coincidence. However, more and more EU Member States are moving away from a pure soft law approach, influenced by corporate social responsibility principles, a mixed legal system approach, which includes soft and hard law to rapidly increase the representation of women on corporate boards in public limited companies. Soft law measures have mostly failed and there has been considerable pressure from European institutions for companies to address sustainability, which include the representation of women on the boards of directors in EU companies.

The proposed directive has only recently been voted in Council, as it had remained blocked for over ten years. Several Member States may not have means to implement a forty percent gender quota on boards by 2027. A Minimum Harmonisation Programme⁷⁴ would be able to accompany the directive. The advantage of having a Minimum Harmonisation Programme would ensure investors that there are no regulatory differences between the Member States. The comparative research reveals different Member States policies and legislation, the background of national legislation,

-les-conseils-dadministration_trashed/vous-etes-une-entreprise-a-la-recherche-dadministratrices/loi-de-2011-votre-entreprise-est-elle-concernee/> accessed 27 November 2018.

⁷² Fagan, Menendez and Anson (n 28) 25; Gennari (n 6) 107; European Commission Communication, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A Renewed EU Strategy 2011-14 for Corporate Social Responsibility COM (2011) OJ 0681 final, 3 <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52011DC0681>> accessed 26 December 2021.

⁷³ *ibid.*

⁷⁴ *ibid.*

the legal systems, the rules of the selection of board of directors in the corporate codes, which is essential to understand to what extent these means increase the representation of women on boards in EU Member States. The research includes the United Kingdom (and consequences of Brexit), France, Germany and Norway. The research shall cover European Union law, the proposed women on boards directive, binding quota legislation *versus* voluntary measures in the Member States, corporate governance codes and other soft law.

However, there are complications when EU institutional governance and Member States interact. Binding legislation may result in conflicts of interest under national law. The German government considered the proposed women on boards directive unacceptable and incompatible under German constitutional law. Germany applied a strict interpretation of Article 8 of the TFEU. The proposed directive was considered positive action, prohibited under German law. The EU position makes reference to Article 8 of the TFEU, whereas '...all [EU] activities...shall aim to eliminate inequalities, and to promote equality, between men and women.'⁷⁵ Article 23 of the Charter of Fundamental Rights of the European Union states, advances that '[e]quality between men and women must be ensured in all areas, including employment, work and pay. The principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the underrepresented sex.'⁷⁶

Nonetheless, the German government had not voted in favour in the European Council for the proposed women on boards directive. In 2013, the German government passed

⁷⁵ Consolidated Version of the Treaty on the Functioning of the European Union (2012) OJ C326/01, Article 8 <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT>> accessed 3 September 2018.

⁷⁶ Charter of Fundamental Rights of the European Union (2008) OJ C326/02, Article 23 <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12012P%2FTXT>> accessed 3 September 2018; German Government Legislation Draft, Women's Quota for the Appointment to Supervisory Boards and Management Boards of Listed Companies (2012) <<https://www.bundestag.de/resource/blob/421886/6c035d97367680a3062063a57557f75f/WD-3-383-11-pdf-data.pdf>> accessed 6 September 2021.

its own national quota legislation, following poor results of soft law initiatives. Moreover, the Government and business sector believed that there were not enough qualified women to become board directors and were against the notion of gender to determine board membership.⁷⁷ Despite being against EU binding quota legislation, the German government made the transition from soft to hard law. The pressure from the EU and Norwegian legislation influenced the German government to pass hard law.⁷⁸

The legal basis of the proposed women on boards directive may be found in international treaties and conventions. 'International human rights standards view positive action measures as permissible, if they are necessary, proportionate, and time-limited.'⁷⁹

According to the principle of proportionality, the women on boards directive 'should be limited in time and remain in force only until sustainable progress has been achieved...[However], the Directive is due to expire on 31 December 2028.'⁸⁰ The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)⁸¹ requires taking measures to advance the careers of women⁸² and has influenced EU legislation.⁸³

⁷⁷ *ibid.*

⁷⁸ Monika Schulz-Strelow, 'Women's Access to Boards in Germany – Regulation and Symbolic Change' in Seierstad, Gabaldon and Mensi-Klarsbach (eds) *Gender Diversity in the Boardroom: Volume 1: The Use of Different Quota Regulations*, (1st edn, Palgrave Macmillan, 2017) 225.

⁷⁹ Bob Hepple, 'The New Single Equality Act in Britain' (2010) 5 *The Equal Rights Review* 20.

⁸⁰ n 29, Proposal for a Directive of the European Parliament and of the Council on Improving the Gender Balance among Non-Executive Directors of Companies Listed on Stock Exchanges and Related Measures.

⁸¹ UN General Assembly, Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) Adopted and Opened for Signature, Ratification and Accession by General Assembly Resolution 34/180 of 18 December 1979 Entry into Force 3 September 1981, in Accordance with Article 27(1) (UN, 1981) <<https://www.ohchr.org/Documents/ProfessionalInterest/cedaw.pdf>> accessed 25 November 2017.

⁸² Hepple (n 79) 20.

⁸³ European Parliament, Violeta Neubauer, 'How Could the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) be Implemented in the EU Legal Framework,' IPOL-FEMM NT, 453193 (2011).

The proposed directive is minimum harmonisation, as

...[n]ational legislation and ... gender balance in economic decision-making vary across Member States. Eight Member States have adopted national gender quotas. Ten Member States have opted for softer non-binding measures, and nine have no substantial legislation on the issue.⁸⁴

This demonstrates the current fragmented legal approach, made up of soft and hard law or no legal approach at all among the Member States.

2.5 The European Union and board of directors: policies and legislation

The European Union is known as the leader of gender equality legislation, with a significant amount of progressive legislation over the past couple of decades. Despite this, Member States have been unable to increase the representation of women on boards by soft law means. The research has documented the relationship between gender equality and women on the boards of directors. Though, there are different arguments, such as, economic, business and justice. The economic argument states that business is global and cross-border.

However, the subject of the board of directors in companies in the EU internal market is treated differently in each Member State, which negatively impacts companies, stakeholders and the EU economy. The European Commission audited board practices in public limited companies in the EU and found that, there is an ongoing

- lack of diversity on boards,
- that Member States were not implementing soft law per EU recommendations
- and that women continue to be underrepresented on boards of directors.

⁸⁴ European Commission, Commission Welcomes Political Agreement on Gender Balance on Corporate Boards (7 June 2022) <https://ec.europa.eu/commission/presscorner/detail/en/IP_22_3478> accessed 3 September 2018.

This eventually led to intervention with the women on boards directive. The proposed directive will 'have a holistic understanding of stakeholder expectation...and move...business towards a more sustainable path'. The proposed directive calls for a forty percent representation of women on boards quota of non-executive board directors, selected on merit, experience, qualifications, independence and diversity.⁸⁵ A greater representation of women in decision-making on company boards is part of the competitive EU economic strategy, which includes increasing the number of women entering the workforce to avoid a stagnation of the EU economy. Economic indicators confirm that there are a sufficient number of women available to join the EU Member States workforce, who are highly competent and educated. There are qualified women, who have similar academic backgrounds, as men, and who may be considered for positions of directors on boards of public limited companies. Studies show that the level of gender equality and the role of economic development in the Member States play an important role in legislative reforms concerning women on boards. The study indicated that Member States with advanced economies implement legislation to increase the representation of women on boards. The opposite is also true, that developing economies may even lack a soft law approach to increase the representation of women on boards.⁸⁶ The economic argument demonstrates that companies improve their internal processes and productivity with the balanced representation of women and men on boards. The European Commission Women in Economic Decision-Making in the European Union Report stated that, 'one way to improve Europe's competitiveness is a more balanced representation of women and

⁸⁵ European Commission Final Report, Proposal for Legislation Fostering More Sustainable Corporate Governance in Companies, Directorate-General for Justice and Consumers, Study on Directors' Duties and Sustainable Corporate Governance : Final Report, Publications Office (2020) 37 <<https://op.europa.eu/en/publication-detail/-/publication/e47928a2-d20b-11ea-adf7-01aa75ed71a1/language-en>> accessed 6 August 2021.

⁸⁶ n 9, European Commission, Europe 2020: A European Strategy for Smart, Sustainable and Inclusive Growth, 9; Silke Machold and Katrin Hansen, 'Policy Approaches to Gender Diversity on Boards' in *Getting Women to Corporate Boards: A Snowball Starting in Norway* (1st edn, Edward Elgar Publishing, 2013) 172-173.

men in economic decision-making positions...[which] can contribute to a more productive...working environment'.⁸⁷

2.6 Women on boards minimum harmonisation, an important EU corporate governance concern

The subject of women on boards in public limited companies is a corporate governance concern in the European Union.⁸⁸ The change of EU policy from hard law to soft law and back to hard law demonstrates that there is a need for a common approach among the Member States to increase the representation of women on boards.⁸⁹ The basis for the most recent EU intervention in form of a women on boards directive may be found in the business case for a competitive and strong European economy.⁹⁰ Though, nine of the twenty-seven Member States are opposed to the directive. Nevertheless, after ten years, the proposed directive had finally passed in Council in March 2022.⁹¹ The scope of this research focuses on women on boards at the center of corporate governance, since the board of directors has direct control of decision-making of company operations.⁹² The Norwegian legislation pointed to economic reasons for increasing the representation of women on boards. Therefore, '[e]xpert legal opinion ... suggested that a quota law should be part of the Companies Act, not the Gender Equality Act.'⁹³ As a member of the European Economic Area, Norway implements EU regulations and policies, as it has close relations with neighbouring Sweden and

⁸⁷ European Commission, Directorate-General for Justice, Women in Economic Decision-Making in the EU : Progress Report. A Europe 2020 Initiative, Publications Office (2012) 7 <<https://data.europa.eu/doi/10.2838/65541>> accessed 2 October 2018.

⁸⁸ *ibid.*

⁸⁹ McKinsey Report, Georges Desvaux, Sandrine Devillard and Pascal Baumgarten, 'Gender Diversity Report: Women Matter' (McKinsey and Company, 2007) 12.

⁹⁰ n 41, European Commission Report, Women in Economic Decision-Making in the EU, Progress Report. A Europe 2020 Initiative (2012) 13.

⁹¹ Storvik and Teigen (n 56) 6; n 36, European Parliament, Gender Balance on Boards; Preiss (n 35).

⁹² Peter Sponbergs, 'Evaluation of Board Work in Fifteen Companies Belonging to the City of Stockholm' (2007) 15(2) Corporate Governance: An International Review 165.

⁹³ Storvik and Teigen (n 56) 6.

Denmark, both EU Member States.⁹⁴ The current women on boards situation in the European Union reveals that binding women on boards legislation is gaining ground, influenced by the Norwegian legislation. However, the gender gap on company boards in public limited companies is widening between EU Member States. Therefore, the EU Parliament had prioritised to 'improve gender balance on company boards' with the proposed directive.⁹⁵

However, several Member States continue to object to the proposed women on boards directive, considering it interferes with national sovereignty'.⁹⁶ Other Member States have little to no gender equality legislation in place and are unable to consider the subject of women on boards in their current situation. The different gender equality soft law policies and hard law legislation reveal important disparities among the Member States. In order to correct this situation, the proposed directive calls for minimum harmonisation of forty percent representation of women on boards. A Minimum Harmonisation Programme would permit individual Member States to gradually add gender equality policies and soft law, which would lead to binding legislation.⁹⁷ An EU-led Minimum Harmonisation Programme would involve all EU Member States to develop a common women on boards policy in the EU, which is currently lacking. This ongoing situation requires quick and firm EU-led measures. The current situation calls for structural change by EU institutions to lead the task of a new consolidated programme. The consequences of not taking full control means that the gap between Member States may widen even further, resulting in an even higher level of gender inequality and added difficulties for non-compliant Member States to

⁹⁴ Cathrine Seierstad and Morten Huse, 'Gender Quotas on Corporate Boards in Norway: Ten Years Later and Lessons Learned' in Cathrine Seierstad, Patricia Gabaldon and Heike Mensi-Klarbach (eds), *Gender Diversity in the Boardroom, Volume 1: The Use of Different Quota Regulations* (1st edn, Palgrave Macmillan, 2017) 13.

⁹⁵ n 36, European Parliament, Gender Balance on Boards.

⁹⁶ *ibid.*

⁹⁷ Gennari (n 6) 107.

implement EU gender equality policies and legislation in the future. The proposed directive is a strong measure, which will harmonise women on boards practices in public listed companies in the Member States. At first sight, the European Union single market economy includes increasing the number of women in the workforce and on company boards by use of soft law. However, soft law has been met with varied acceptance or resistance. EU intervention with a proposed directive has led to a further fragmented women on boards policies and legislation, as it has polarized the Member States. It is therefore essential that the European Union pass the proposed directive, while at the same time, implementing a Minimum Harmonisation Programme to accompany those Member States with limited soft law.

Therefore, the research will first present the fragmented women on boards policies and legislation in the European Union (Part One), before proceeding to the second part, which shall examine the legal framework of a minimum harmonisation of women on boards legislation in the European Union to confirm if the proposed directive will resolve the problem of the underrepresentation of women on boards of directors in public limited companies in the European Union (Part Two).

Part One

FRAGMENTED WOMEN ON BOARDS POLICIES AND LEGISLATION IN THE EUROPEAN UNION

The EU and Member States have adopted market-based economic policies calling for independent corporate governance boards, with a particular interest in women on the board of directors in public limited companies. There has been an important transformation of corporate governance policies set out to create more independent boards. The traditional model of corporate governance included the board of directors, management and shareholders.⁹⁸ Since the series of global financial crises and corporate governance scandals,⁹⁹ this traditional model has been called into question for several reasons. The board of directors do not participate in the daily activities of the company. Shareholders were not involved with decisions taken. The restructuring of corporate governance made an important change, by adding non-executive directors to the board, which involved the participation of shareholders, as well as a separation of functions of the CEO and Chairman.¹⁰⁰

The model has illustrated the limitations and rising importance of corporate governance and functioning of the board of directors. This has also raised questions about the composition of the board of directors, which includes the question of women on the board of directors. European Union institutions and Member States treat the subject of women on boards differently, as diverse legal systems lead to predictable outcomes.¹⁰¹

⁹⁸ OECD Report, Using the OECD Principles of Corporate Governance A Boardroom Perspective (2008) 64.

⁹⁹ OECD Report, Corporate Governance and the Financial Crisis: Key Findings and Main Messages (2009).

¹⁰⁰ A. Cadbury (n 13) 2.5; European Corporate Governance Institute, Viñot I Report (1995) <<https://ecgi.global/code/vienot-i-report>> accessed 20 March 2020.

¹⁰¹ This does not apply to Northern European countries (Norway is an exception), as is the UK.

EU market-based policies include, increasing the number of women entering the workforce, including the representation of women on boards for sustainable economic growth. Women on the boards of directors are part of an EU-led economic policy objective to make the EU market more competitive.¹⁰²

Gender equality in economic ... affairs is ... is necessary to ensure Europe's economic growth and the well-being of its citizens. To ensure that market policies benefit women and men equally, the European institutions have introduced a range of measures to assess, monitor and enhance their impact on gender equality...¹⁰³

The European Council is the regulatory coordinator and policy maker of economic governance and policies in the European Union.¹⁰⁴ Companies are not the initiators of corporate governance rules. These derive from EU institutions. Though, there is a great deal of interaction between corporate governance bodies in the Member States and EU economic institutions, responsible for governance policies. The relationship between corporate governance and women on boards policies depends, to a great extent, on political decisions from EU institutions, as 'post-Maastricht EU...Member State governments have resisted the further transfer of formal competences to the EU level and ... aim for greater policy coherence through intensified intergovernmental co-ordination... [T]his co-ordination system can best be conceptualized as deliberative intergovernmentalism'.¹⁰⁵ The intergovernmental policy, as from the Maastricht Treaty, demonstrates certain contradictions of the relationship between EU institutions and Member States. Member States may implement soft law and interact on the subject of

¹⁰² n 41, European Commission Report, Women in Economic Decision-Making in the EU, Progress Report. A Europe 2020 Initiative (2012) 9.

¹⁰³ EIGE Report, Economic and Financial Affairs, European Institute for Gender Equality, Economic and Financial Affairs (EIGE, 2021) <<https://eige.europa.eu/topics/economic-and-financial-affairs>> accessed 5 July 2019.

¹⁰⁴ European Council, The Council of the EU (2022) <<https://www.consilium.europa.eu/en/council-eu/>> accessed 19 June 2022.

¹⁰⁵ *ibid.*

gender equality on national level. However, gender equality policies in the EU has taken on an even larger scope, which includes not only women in the labour force, but also the participation of women in economic and political spheres.

Decision-making on boards of directors has become an economic subject in the EU, and has called on the active participation of the Member States to implement soft law policies to increase the representation of women to these positions. Soft law programmes consist of a wide range of government communications and recommendations to increase the representation of women on boards. EU institutions have addressed women on boards, with the most recent binding legislation being the proposed women on boards directive. Adding to the complexity of the subject of women on boards, there are twenty-seven different legal systems, which include different degrees of soft or hard law. The United Kingdom is also included in this research, notwithstanding Brexit, making it twenty-eight different legal systems to consider.

In order to examine these questions, the research makes a distinction between theoretical approaches of gender issues, which include the various approaches of notions and legal approaches of gender equality (Title One), and that of the classification of gender issues and legal issues (Title Two), which comprises the legal systems based on soft law and the classification of hard law.

Title One

THEORETICAL APPROACHES OF GENDER ISSUES AND LEGAL SYSTEMS

Under EU law, the word gender usually appears with the word equality, which is the European Union norm, despite the fact that 'the meaning of gender equality ... has been highly debated [and] is capable of generating continuous questions and dilemmas.'¹⁰⁶ There are many perceptions and beliefs concerning the word 'gender', what it is and what it is not, i.e., women, men, female, male or other. Gender will be defined from a political and legal framework and Europe, as the geographical scope for discussing specific policies. The different political contexts in EU Member States define 'the framing of gender [in]equality, due to the influence of specific culture[es], political histories and ideologies'.¹⁰⁷

Academicians greatly discuss the subject of gender, stating that geographical regions in the European Union account for the way gender [in]equality is perceived, i.e., Eastern *versus* Western European Union Member States and Northern *versus* Southern Europe.¹⁰⁸ There is also a considerable divide between the European Union institutions and the Member States. Member States have acted inconsistently concerning women on the boards of directors policies, by not increasing the representation of women on boards or not making significant increases, despite EU recommendations.

This has led to important policy differences between the Member States, as well as alienation from European Union institutions. The European Commission has acted in response with an interventionist plan, by way of the proposed women on boards

¹⁰⁶ Mieke Verloo and Emanuela Lombardo, 'Contested Gender Equality and Policy Variety in Europe: Introducing a Critical Frame Analysis Approach' in Mieke Verloo (editor) *Multiple Meanings of Gender Equality. A Critical Frame Analysis of Gender Policies in Europe* (1st edn, CEU Press, 2007) 21.

¹⁰⁷ *ibid*, 3-4.

¹⁰⁸ *ibid*.

directive, calling for binding legislation in the form of tie-break quotas. EU institutions (the Commission and Parliament) and Member States recognise this situation, which shall allow EU Member States to act individually. However, there is neither agreement nor a common EU approach to increase the representation of women on boards. The different legal approaches to gender equality and women on boards account for the diverse positions of the Member States and EU institutions.

This research does not include the philosophy of gender equality, human rights, ethics, human resources or socio-economics, as a whole. Instead, the focus shall lie on the importance of the subject matter of the underrepresentation of women on boards in public limited companies in the European Union and transition of gender equality legislation into national law. Many EU Member States are not increasing the representation of women on boards to the forty percent critical mass, called for by the Commission, which would lead to greater economic growth in the EU. A high percentage of representation of women on boards may only occur when binding legislation is in place. Though, there are exceptions. These exceptions consist of Member States that share strong social norms and traditions, which influence the legal basis of gender equality and women on boards. The social norms and traditions are strongest in Denmark, Sweden and Finland, where there is less regulation. These Member States show a high percentage of women on boards, using targets, as social norms guide the legal framework.¹⁰⁹

Member States with little or no women on boards legislation or policies, have limited numbers of women on boards, despite the support received from European Union

¹⁰⁹ Mari Teigen and Hege Skjeie, 'The Nordic Gender Equality Model' in Oddbjørn P. Knutsen (ed.) *The Nordic Models in Political Science. Challenged, but Still Viable?* (1st edn, Bergen : Fagbokforlaget, 2017) 143-147.

institutions,¹¹⁰ making this a complex issue to resolve, even if the proposed directive enters into force in the future. The research notes that, as a first step, it is necessary to apprehend the various approaches of notions (Chapter One), and then refer to the legal approaches of gender equality (Chapter Two).

¹¹⁰ L. Senden, and M. Visser, 'Balancing a Tightrope: The EU Directive on Improving the Gender Balance among Non-Executive Directors of Boards of Listed Companies'(2013) 1 European Gender Equality Law Review, 22.

Chapter One

VARIOUS APPROACHES OF NOTIONS

There are various approaches to the notion of gender equality, which may go beyond the scope of this paper. The research will begin with definitions and explanations, examined in the context of this research, such as, the words parity, '*parité*' (French), equality, equal treatment and diversity (Section 1), and then examine women on boards of directors' legislation (Section 2).

SECTION 1 PARITY VERSUS EQUALITY

In order to understand the notion of gender parity, it is important to differentiate between parity and equality in the context of women on the boards of directors. The notion of equality, includes gender equality, a concept which is not recognised in the same way by EU institutions or in individual Member State legal frameworks. The general notions of equality are quite large and may include subjects of discrimination, justice, fairness and inequality. Equality may also include gender diversity. The definition of parity is specific, or a '[n]umerical concept related to gender equality. Gender parity

concerns relative equality in terms of numbers and proportions of women and men ...and is often calculated as the ratio of female-to-male values for a given indicator'.¹¹¹

¹¹¹ 'parity', n (European Institute for Gender Equality) <<https://eige.europa.eu/thesaurus/terms/1195>> accessed 5 July 2019.

The research shall examine precise notions of gender equality, in relation to parity, critical mass and women on boards, which are key notions when referring to the subject of women on boards (§1), and then precisising EU notions of equality and diversity (§2).

§1: THE NOTION OF GENDER PARITY

The notion of gender parity stands for political and economic equalness.¹¹² Therefore, gender parity is a means to assess inequality on company boards. Economic decision-making statistics are used to reveal to what extent women participate on company boards and in the economy of the European Union as a whole. Economic decision-making is defined as

... the process of making business decisions involving money [and]...to come up with strategies that help to either make the company more valuable or to increase the owner's revenue. Those involved in the decision-making process must have access to the company's detailed financial reports and must have a good understanding of the company's economic climate.¹¹³

The term political decision-making is used in the sphere of politics, while the term economic decision-making has its origin in making financial decisions in the private sphere, in companies. Furthermore, gender parity, as a numerical measurement of equalness of gender equality may lead to understanding different notions of parity, critical mass, full gender parity, which may lead to the use of quotas. According to the critical mass theory, a critical mass is defined when there are at least thirty-five percent

¹¹²'equalness' (Collins online dictionary) <<https://www.collinsdictionary.com/dictionary/english/equalness>> accessed 5 July 2019.

¹¹³Aisa Manlosa and Denise Margaret Matias, 'From Gender Parity to Gender Equality: Changing Women's Lived Realities', The Current Column (German Development Institute, 2018) <<https://www.die-gdi.de/en/the-current-column/article/from-gender-parity-to-gender-equality-changing-womens-lived-realities/>> accessed 19 March 2019; OECD Yearbook Report, Güler Turan, Why Quotas Work for Gender Equality (2015) <<https://www.oecd.org/gender/quotas-gender-equality.htm>> accessed 19 June 2015.

of women represented on boards. This percentage is defined as, a 'gender-balanced group', which is high enough to influence decision making. Less than thirty-five percent would reduce women to a token and symbolic representation status. The critical mass theory applies to corporate boards and considers that three women on the board of directors or thirty percent shall be considered active board director performance by women. Though, the proposed EU women on boards directive sets the critical mass at forty percent. France and Germany had unsuccessfully called for full gender parity, at fifty percent critical mass.¹¹⁴ Full gender equality is defined, when fifty percent of women shall be represented on boards, which has never happened, even though women represent more than half of humanity. Therefore, women should be 'able to fully participate and contribute equally...[S]ociety suffers when women's contributions are not ... applied for greater benefit, including within the workplace.'¹¹⁵ ...[G]ender parity... enables a more productive and profitable workforce and economy'.¹¹⁶

According to the EU proposed women on boards directive with a forty percent quota,¹¹⁷ justification is found between a thirty percent critical mass and full gender parity of fifty percent.¹¹⁸ The Norwegian binding legislation called for forty percent of women on boards. The legislation was adopted in 2003 and for new companies by 2006, to be fully implemented by 2008.¹¹⁹ The research indicates that the notion of economic equalness goes a step further in gender equality, as it allows both sexes to participate in decision-making positions, by increasing the representation of women on the boards

¹¹⁴ M. Torchia and others, 'Critical Mass Theory and Women Directors' Contribution to Board Strategic Tasks' (2010) 6(3) Corporate Board: Role, Duties and Composition 42-51.

¹¹⁵ Accenture Report, Sarah Kruger, 'The Ultimate Guide to Gender Parity' (2019) <<https://financialservicesblog.accenture.com/the-ultimate-guide-to-gender-parity-2019-edition>> accessed 20 March 2020.

¹¹⁶ *ibid.*

¹¹⁷ n 29, Proposal for a Directive.

¹¹⁸ European Commission, Questions and Answers: Proposal on Increasing Gender Equality in the Boardrooms of Listed Companies (2012) <https://ec.europa.eu/commission/presscorner/detail/en/MEMO_12_860> accessed 3 January 2018.

¹¹⁹ M. Teigen, 'Gender Quotas for Corporate Boards in Norway: Innovative Gender Equality Policy' in Fagan, Gonzalez and Anson (eds) *Women on Corporate Boards and in Top Management* (1st edn, Palgrave Macmillan, 2012) 76.

of directors (I) and, by evoking the principle of equality as the legal basis for women to be represented on the boards of directors equally, as a fundamental right (II).

I. GENDER EQUALITY AND THE ECONOMY

Parity and equal treatment are fundamental principles of gender equality with different notions (A), anchored in EU gender equality legislation (B). Gender equality is an economic opportunity for the EU, while gender inequality has negative consequences on the economy. According to the former French Minister of Gender Equality, quotas for women on boards should not be at thirty or forty percent, when women represent fifty-two percent of the world population.¹²⁰

The former French Minister of Gender Equality Marlène Schiappa stated, not to accept quotas at thirty or forty percent, when women already represent fifty percent of humanity, making an argument for full parity, a fifty percent quota, which she considers a compromise. The Minister reminded us that, as of this date, no country has ever achieved full gender parity. Balanced boards require regulation, while there are few exceptions. Though, increasing the representation of women on boards is an economic imperative, as reported by the International Monetary Fund.¹²¹

¹²⁰ Era Dabla-Norris and Kalpana Kochhar, 'Closing the Gender Gap' (IMF Finance and Development 2019)11 <<https://www.imf.org/external/pubs/ft/fandd/2019/03/pdf/closing-the-gender-gap-dabla.pdf>> accessed 5 July 2019; Challenges Article, Anne-Marie Rocco, 'Marlène Schiappa Wants to Raise Female Quotas up to 50%' ... 'There is no reason to leave quotas at 30% or 40% when we represent 52% of humanity. 50% is already a compromise... No country has achieved parity and none of them will achieve it alone'. Making gender equality a reality is proving to be an economic opportunity. This is noted in a report by the International Monetary Fund, published in March 2019. It states that inequalities between women and men are a drag on the economy. Estimated losses are as high as 10% of GDP in developed countries and as high as 30% in developing countries'. *Challenges* (Paris, 1 June 2019) <https://www.challenges.fr/femmes/marlene-schiappa-veut-relever-les-quotas-feminins-jusqu-a-50_656953> accessed 25 January 2021.

¹²¹ *ibid*, Dabla-Norris and Kochhar, 11.

The absence of women in decision-making positions is a loss for the economy. Calculations of the loss of ten percent of GDP in developed countries and up to thirty percent in developing countries.¹²² Women on boards of directors of public limited companies are part of the EU Strategy 2020 to use all resources, as part of a social market economy,¹²³ which ‘sets out the vision of a social market economy in the 21st century...[by] transforming the EU into a smart, sustainable and inclusive economy with high levels of employment, productivity and social cohesion and at reinforcing the EU as an actor in global governance’.¹²⁴ The Europe 2020 Strategy followed UN Guiding Principles on Business and Human Rights, aimed at promoting environmental, labour and human rights standards in companies, with corporate law influencing business practices.¹²⁵

Having explained that economic equalness is an important notion in corporate governance and women on boards, the research examines the notion of parity (A) and equality and equal treatment legislation (B).

A. THE NOTION OF PARITY

There are diverse meanings of the word parity. It is essential to consider the range of notions to fully understand that, the subject of women on boards is a parity issue, which goes beyond equality, and, which includes the representation of women in decision-making in political and economic spheres.

¹²² *ibid.*

¹²³ Annette Bongardt and Francisco Torres, ‘Europe 2020, A Promising Strategy, The Competitiveness Rationale, Sustainable Growth and the Need for Enhanced Economic Coordination’ (2010) 45(3) (Intereconomics, ZBW- Leibniz Information Centre for Economics and CEPS– Centre for European Policy Studies) 136–170 <<https://www.intereconomics.eu/contents/year/2010/number/3/article/europe-2020-a-promising-strategy.html#:~:text=The%20Europe%202020%20Strategy%20sets,an%20actor%20in%20global%20governance>> accessed 13 July 2020.

¹²⁴ *ibid.*

¹²⁵ United Nations Report, Guiding Principles of Business and Human Rights (2011).

The research finds the word parity has a range of meanings in English and French (1), while parity democracy is rooted in the French definition (2).

1. Definitions of parity

The meaning of the word parity in English and French are not the same. In English, the definition is somewhat vague and not particularly aimed at women, referring more to equalness, or *par* in Latin (a), while the definition of the word parity in French is aimed at women and is used in a specific political and economic context (b).

a. The English definition of parity

The origin of the word parity, in English, is defined as 'maintaining equality between two entities'¹²⁶ or 'the state of being equal'.¹²⁷ The European Institute for Gender Equality defines parity as a '...[c]oncept and a goal that aims to acknowledge the equal value of women and men...'¹²⁸

b. The French notion of parity or 'parité' in the economy

The French government was the first to call for parity, or the French word, '*parité*', in the economy. Specifically, there was a need to be able to count heads of women in government or on boards, by publishing parity indicators of government, unions and business associations, as well as parity for directors on company boards.¹²⁹ The French definition of '*parité*' is the right reference to consider the subject of women on boards

¹²⁶ 'parity', n., The Law Dictionary <<https://thelawdictionary.org/parity/>> accessed 5 July 2019.

¹²⁷ 'parity', n., Cambridge Dictionary <<https://dictionary.cambridge.org/fr/dictionnaire/anglais/parity>> accessed 5 July 2019.

¹²⁸ 'parity', European Institute for Gender Equality <<https://eige.europa.eu/thesaurus/terms/1310>> accessed 5 July 2019.

¹²⁹ French Government Report, Ministry of the Economy, Acting Together for Gender Equality in the Economy (Ministry of the Economy 2019) <<https://www.economie.gouv.fr/agir-ensemble-egalite-femmes-hommes-economie>> accessed 3 September 2018.

(bb), and the further meaning of mathematical counting of genders makes perfect sense, when approaching the subject of women on boards (bbb).

bb. Definition of 'parité'

According to the French National Institute of Statistics and Economic Studies (INSEE),¹³⁰ the French word '*parité*' is defined as 'each gender [counted and]...represented equally.' The French definition of '*parité*' is large and encompasses equality granting the same rights, including equal access for women and men, who shall have the same opportunities with the freedom to choose (bbb). The use of the term 'gender parity', may also be translated in French as '*parité homme-femme*.'¹³¹

bbb. Usage of the word 'parité'

The usage of the French word '*parité*' or parity has a unique meaning, which is a notion of the counting of each gender to be represented equally, and which did not have the precise equivalency or definition in English. '*Parité*' does not stand only for a mathematical calculation of the number of women and quotas. It is much larger than this. '*Parité*' is the dynamic which transforms the society as a whole towards a sustainable gender equality approach. Parity brings innovation, as it allows women to participate actively with men in professional life, which, then, in turn, brings about structural changes in the company and society.¹³² The notion '*parité*' was first used in French politics, as in the 'Proposal for an Organic Law tending to establish real parity

¹³⁰ The French National Institute of Statistics and Economic Studies, Parity and Equality between Men and Women (2018) <<https://www.insee.fr/en/metadonnees/definition/c1296>> accessed 3 January 2018.

¹³¹ *ibid.*

¹³² The French definition of '*parité homme-femme*' (translation: parity men-women) <<https://www.linguee.fr/francais-anglais/traduction/parit%C3%A9+homme+femme.html>> accessed 5 July 2019; French Government HCE Report, Brigitte Grésy, The High Council for Equality between Women and Men Government Report, 10 Years of the Law Copé-Zimmermann 2011-2021, Women's Access to Responsibilities, From Parity to Professional Equality, (2021) <<https://www.economie.gouv.fr/files/files/brochure-10ans-loi-coppe-zimmermann.pdf>> accessed 25 July 2021.

between men and women in political life'.¹³³ The French meaning of real parity is aligned with the gender equality definition in the EU, which sets to combat discrimination between women and men, as witnessed by the extensive EU legislation passed in matters of gender equality in employment, political representation and economic power.¹³⁴

2. Parity and parity democracy

Parity democracy is defined as the 'full integration of women, on an equal footing with men, at all levels and in all areas of the workings of a democratic society, by means of multidisciplinary strategies.'¹³⁵ The research finds that, while the notion of parity democracy structures the notion of composition, representative bodies and government (a), it is even more appropriate, when applied to women in economic decision-making on boards (b).

a. *Parity democracy*

Parity democracy is a 'vision...A true democracy must be a parity democracy...as it is a structural prerequisite of the democratic state'.¹³⁶ Another view of parity democracy is a 'political expression...that humanity is composed of two gendered halves, and, therefore, its representative bodies must be analogously composed to be

¹³³ French Legislation, National Assembly, No. 1837, National Assembly Constitution of October 4, 1958, Eleventh Legislature Registered at the Presidency of the National Assembly on October 6, 1999, Proposal for a Law tending to Establish Real Parity between Men and Women in Political Life, Presented by Marie-Jo Zimmermann (1999) <<http://www.assemblee-nationale.fr/11/propositions/pion1837.asp>> accessed 27 November 2017.

¹³⁴ Réjane Sénac-Slawinski, Genesis of Parity Democracy in *La Parité* (1st edn, Presses Universitaires de France, 2008) 11-24.

¹³⁵ 'parity democracy', n (definition) (EIGE Glossary and Thesaurus, 2018) <<https://eige.europa.eu/thesaurus/terms/1311>> 3 September 2018.

¹³⁶ Blanca Ruiz Rodriguez and Ruth Rubio Marín, 'The Gender of Representation: On Democracy, Equality, and Parity' (2008) 6(2) International Journal of Constitutional Law 287-289.

democratically legitimate'.¹³⁷ The notion of parity democracy in the context of women on boards may be understood, as a 'balanced participation of women and men'. Balanced, in the context of this thesis, does not mean fifty percent, but a minimum of forty percent representation of women and men in decision-making positions in government and in the private sector. Forty percent is considered the quantitative and qualitative percentage critical mass, which allows women to effectively contribute in decision-making.¹³⁸ Parity democracy is defined as the 'full integration of women on an equal footing with men at all levels and in all areas of the workings of a democratic society, by means of multidisciplinary strategies.'¹³⁹ The concept of parity democracy derives from the 'democratic principle of equal representation'. The French equivalent of parity democracy or in French, known as, '*démocratie paritaire*', initially divided northern Europe from Southern Europe, bringing a new concept, which transcended gender equality.

Parity democracy affirms the relationship between equality and democracy. Specifically, most Scandinavian countries did not support quotas, because they believed political parties would regulate issues relating to gender. Quota policies in Scandinavia have been adopted since the 1970s, as a way to increase the representation of women in politics.¹⁴⁰

¹³⁷ *ibid*, 302.

¹³⁸ Council of Europe Recommendation, Recommendation (2003) 3 of the Committee of Ministers to Member States on Balanced Participation of Women and Men in Political and Public Decision Making (Committee of Europe, 2003) <<https://rm.coe.int/1680519084>> accessed 3 September 2018; Council of Europe Report, 'Parity Democracy, A Far Cry from Reality; A Comparative Study on the Results of the First and Second Rounds of Monitoring of Council of Europe Recommendation (2003) 3 on Balanced Participation of Women and Men in Political and Public Decision-Making (Council of Europe, 2003) <<https://rm.coe.int/1680519084>> accessed 17 October 2022.; Council of Europe Report, Analytical Report - 2016 Data, Gender Equality Commission (GEC) Balanced Participation of Women and Men in Decision-Making (Council of Europe, 2016).

¹³⁹ n 127, Definition of the word 'parity'.

¹⁴⁰ Council of Europe Report, Mariette Sineau, Genderware, the Council of Europe and the Participation of Women in Political Life (Council of Europe Publishing, 2003) 26 <https://www.coe.int/t/dgap/democracy/Activities/Key-Texts/03_Summaries_of_all_Publications/Genderware_en.pdf> accessed 17 March 2019.

The research shows that parity democracy began in the political sphere (aa), though, the notion is extended also to the boards of directors (bb).

aa. Parity democracy and women on boards

Parity democracy is the foundation of the women on boards quota legislation. It connects democratic principles and real equality between men and women, founded in the universality of human rights. The Council of Europe drafted strategic multidisciplinary guidelines for the full integration of women into political and public life.

The Council first focused on political participation, as 'the symbol of citizenship...recognising that parity democracy must eventually be extended to economic decision-making institutions, ...[such as]...companies, trade unions and banks'.¹⁴¹ Parity democracy allows for the use of quotas to reach objectives (aaa), although, there are different kinds of quotas and preferences (bbb).

aaa. Parity democracy and quotas

Parity democracy calls for quotas, as a means to ensure the full representation of women in all areas and in positions of decision-making. The political reasoning holds that 'quotas are the appropriate response by democracies, which have a duty to recognise gender difference'.¹⁴² Parity democracy is concerned with breaking down the barriers which prevent real equality, as real democracy cannot be achieved without equal participation of women and men in all areas. The terms real parity, real equality or real gender parity are based on the premise that each gender is equally

¹⁴¹ *ibid*, 28.

¹⁴² *ibid*, 14.

represented.¹⁴³ Quotas may be limited in time, while parity democracy is permanent. Parity democracy divides power equally to both sexes and is based on substantive equality.

b. Parity and binding legislation

Parity on boards incorporate the principles of equal treatment, which is the extension of the premise, that each gender is equally represented in the economic decision-making process on the board of directors. Balanced board representation has not happened naturally. It therefore needs to be enforced by binding legislation in the form of quotas. Increasing the representation of women participating on boards promotes the principle of substantive equality. These discussions began in 1979, and are included in the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), at the United Nations Fourth World Conference on Women in Beijing, where women and decision-making are supported as universal human rights.¹⁴⁴

The term economic gender parity may also be referred to as gender equality in this research. The notion of economic gender parity maintains that in order to boost an economy, all resources are needed, and consider women as a resource. Increasing the representation of women on boards would contribute to labour shortages, make use of talented and qualified women and counterbalance a declining workforce in the European Union.¹⁴⁵

The economic approach leads to higher levels of women in employment and on company boards, which lead to greater competitiveness and economic growth. The EU

¹⁴³ Full parity is fifty percent.

¹⁴⁴ n 81, UN Convention on the Elimination of All Forms of Discrimination Against Women; The United Nations Fourth World Conference on Women (1995).

¹⁴⁵ EIGE Report, Economic Gender Parity or Equality, Economic Case for Gender Equality in the European Union (2021) <<https://eige.europa.eu/gender-mainstreaming/policy-areas/economic-and-financial-affairs/economic-benefits-gender-equality>> accessed on January 14, 2021.

objective is to make use of women as a resource and increase the representation of women as board directors participating in economic decision-making. All of which will lead to a more competitive Europe.¹⁴⁶ However, this research does not take a microeconomic view of gender equality and women on boards to increase profits for the company (aa), but a macroeconomic view of including women, as a resource in the labour market (bb).

aa. Financial approach of gender equality

A financial approach of gender equality takes a microeconomic view that increasing the representation of women on boards, increases profits for the company.¹⁴⁷ There are several ways to measure performance and profitability. Business leaders from the corporate world and academicians hold different opinions on this subject. This research is not concerned with findings about women on boards performance, efficiency, shareholder value or financial results within companies, which is not the focus of this thesis.

bb. Political parity and economic gender parity

Political parity is infinitely linked to economic gender parity, as the first step towards women on boards, as support must come from democratic leadership. The proposed women on boards directive contributes to the notion of political inclusion by European Union institutions, such as the European Commission and Parliament. Economic gender parity in public and private companies in EU Member States are founded in the support from EU and Member States political institutions. The two are connected and

¹⁴⁶ n 41, European Commission Report, Women in Economic Decision-Making in the EU, Progress Report. A Europe 2020 Initiative (2012) 13.

¹⁴⁷ Catalyst Research Report, Appendix: Why Diversity and Inclusion Matter: Financial Performance (Catalyst, 2020) <<https://www.catalyst.org/research/why-diversity-and-inclusion-matter-financial-performance/>> accessed on January 14, 2021.

impossible to separate, as political institutions are fundamental in furthering women in decision-making positions in companies in the EU.¹⁴⁸ Yet, there is a limit to what soft law can actually accomplish in practice. Therefore, the research finds that the notion of parity is linked to the use of quotas, through hard law (aaa), though there are different kinds of quotas (bbb).

aaa. Notions of parity and women on boards

The study of the notions of '*parité*', parity, economic gender parity is essential in the context of women on boards in public limited companies in the EU. Parity is a controversial issue, as the underlying argument against parity and gender equality legislation is that they call for a numerical number of women on boards, and the use of quotas to reach the objective. Though, positive action legislation accepts that it is necessary to protect the underrepresented sex, it may be perceived as an unacceptable situation, as it may appear to be in conflict, as an equality issue. But, parity itself surpasses the time-limited use of quotas.

bbb. Different kinds of quotas and preferences

The different kinds of quotas and preferences are used in diverse ways.

- An absolute preference reserves certain benefits exclusively for members of the underrepresented sex.
- A strong preference grants advantage to members of the underrepresented sex who satisfy minimum eligibility criteria for a particular position.

¹⁴⁸ Women Lobby Report, Progress Program of the European Union Report, Women in Power and Decision-Making (2015) <https://www.womenlobby.org/IMG/pdf/factsheet_women_in_power_and_decision-making.pdf> accessed 5 July 2019.

- A tie-break preference grants an advantage to members of the underrepresented sex who are equally qualified for a particular position or equally deserving of particular benefit.¹⁴⁹

The basis of corporate governance and women on boards is founded on the notion of parity and equal treatment legislation, which will include tie-break quotas.

B. EU EQUALITY AND EQUAL TREATMENT LEGISLATION

The European Union has a long history of exemplary equality and equal treatment legislation. The research points to EU Treaties and Charters as the legal basis, which uphold the principle of equality between men and women (1), although, EU political strategies guide the subject of women on boards (2). Gender equality legislation progressed under Article 23 of the EU Charter of Fundamental Rights,¹⁵⁰ which ensures equality in an economic context of employment, work and pay in the EU.¹⁵¹

According to Article 23 of the Charter, '[t]he principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the underrepresented sex,'¹⁵² which is positive action legislation and associated with the use of quotas and preferences.

Having explained the importance of EU equality and equal treatment legislation, the research shall examine the legal basis of the principle of equality between women and men (1) and the definition of equality in a political context (2).

¹⁴⁹ European Commission Discussion Paper, Susanne Burri, 'Approaches to Equality and Non-Discrimination Legislation Inside and Outside the EU: Positive Action' (2011) 3 <<https://eurogender.eige.europa.eu/system/files/Positive%20Action%20-%20discussion%20paper.pdf>> accessed 3 July 2019.

¹⁵⁰ n 76, Charter of Fundamental Rights of the European Union, Article 23.

¹⁵¹ *ibid*, Article 20.

¹⁵² *ibid*, Article 23.

1. Legal basis of the principle of equality between women and men

The legal basis of the principle of equality between women and men is founded in Article 23 of the Charter and in Articles 2 and 3(2) of the Treaty on the European Union and Article 8 of the TFEU, Article 157(1) and Article 157(3) of the TFEU. Further reference is established in Article 20 of the European Social Charter. The principle of equal treatment for men and women in employment, promotion and working conditions may also be found in Article 2(4) of the Council Directive 76/207/EEC, which stated that positive action measures may be called for 'to promote equal opportunity...by removing existing inequalities which affect women's opportunities...'¹⁵³ The Equality Act 2006 in UK Legislation includes a definition of equality, calling for 'a mutual respect between groups based on understanding and valuing of diversity and on shared respect of equality and human rights'.¹⁵⁴ The research notes the importance of the legal framework of equality, founded in United Nations Conventions (a), which are included in the European Union Gender Equality Strategy (b).

a. Legal frameworks of equality and UN Conventions

The international legal framework of equality may be found in United Nations Conventions, which include the widest interpretation of gender equality and non-discrimination. The European Union institutions have been closely influenced by UN policies, especially, Article 7 of the United Nations Universal Declaration of Human

¹⁵³ Charter of Fundamental Rights of the European Union (2007) OJ C303/17, Explanation of Article 23 <<https://fra.europa.eu/en/eu-charter/article/23-equality-between-women-and-men#:~:text=Next%20article,Article%2023%20%2D%20Equality%20between%20women%20and%20men,of%20the%20under%2Drepresented%20sex.>> accessed 3 September 2018; Council Directive 76/207/EEC of 9 February 1976 on the Implementation of the Principle of Equal Treatment for Men and Women as Regards Access to Employment, Vocational Training and Promotion, and Working Conditions (Equal Treatment Directive) [1976] OJ L39, 40–42 <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A31976L0207>> accessed 3 September 2018.

¹⁵⁴ UK Legislation, Equalities Act 2006, s 3.; UK Public General Acts, 2006, c. 3., The Commission, Section 3 (EA, 2006) <<https://www.legislation.gov.uk/ukpga/2006/3/section/3>> accessed 3 September 2018; Bob Hepple, 'Equality, The New Legal Framework' (Hart Publishing, 2011) 12.

Rights, which defines equality, stating, that '[a]ll are equal before the law and are entitled without any discrimination to equal protection of the law.'¹⁵⁵

In addition, Article 23 of the United Nations Universal Declaration of Human Rights states, '[e]veryone has the right to work, to free choice of employment, to just and favourable conditions of work ...'¹⁵⁶

b. The European institutional legal framework of equality

The notion of equality is a core value of the European Union. It was founded on values of 'respect for human dignity, freedom, democracy, equality, the rule of law and ... human rights ... These values are common to Member States ... in which ... equality between women and men prevail'.¹⁵⁷ The notion of equality in the European Union includes the participation of women and men in economic life, which is ensured by equal treatment legislation.¹⁵⁸ There are two legislative frameworks concerning equality, found in the European Commission legislative framework and the Council of Europe framework, which are political and socio-economic.

2. The definition of equality in a political context

The research shows that the history of gender equality legislation in the EU, including women on boards legislation, has been politically motivated (a) and has resulted in structural and economic change in the European Union (b). The European Union 2020-2025 Gender Equality Strategy defines equality, as '...equal ... participation of both sexes

¹⁵⁵ UN Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A) (III) (UDHR) Article 7 (1948) < <https://www.un.org/en/about-us/universal-declaration-of-human-rights> > accessed 3 September 2018.

¹⁵⁶ *ibid.*, Article 23.

¹⁵⁷ Equinet Report, European Network of Equality Bodies, Equality in Europe (2019) <<https://equineteurope.org/equality-in-europe/#:~:text=Equality%20as%20a%20core%20European%20value&text=Equality%20as%20a%20core%20value,and%20a%20celebration%20of%20diversity.>> accessed 17 March 2019.

¹⁵⁸ *ibid.*

in all spheres of public and private life. Gender equality...aims to promote the full participation of women and men in society... to reach a better balance'.¹⁵⁹ Gender Equality in Decision-Making was part of the 2016-2019 Gender Equality Strategy.

The research notes the importance of including a political definition of the notion of equality (a), which shapes the legal framework of gender equality, as a vector of structural and socioeconomic change (b).

a. The political definition of equality

The political definition of equality calls for a Europe, 'where women and men... in all their diversity, are equal.'¹⁶⁰ This includes the strategy related to equality, as a gender equal economy, where women and men lead equally and include the empowerment of women. Political empowerment is defined, as the 'process of transferring various elements of power (resources, capabilities and positions) to those who do not have [and] requires inclusion in democratic decision-making processes.'¹⁶¹

b. Gender equality and socio-economic change

The European Union gender equality policies are the most progressive legislation in the world. From 1975 to the present, more than a dozen directives have addressed gender equality issues. Gender equality legislation represents the foundation of European values.¹⁶² These economic policies are aligned with the inclusion of an

¹⁵⁹ European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, A Union of Gender Equality Strategy 2020-2025 COM (2020) 152 final <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020DC0152>> accessed 21 January 2021.

¹⁶⁰ *ibid.*

¹⁶¹ 'political empowerment', D. Budryte, 'Political Empowerment' in A C Michalos (eds) *Encyclopedia of Quality of Life and Well-Being Research* (1st edn, Springer, Dordrecht, 2014).

¹⁶² Sophie Jacquot, 'European Union Gender Equality Policies since 1957', *Encyclopédie pour une Histoire Numérique de l'Europe* <<https://ehne.fr/en/node/12435>> accessed 17 March 2019.

increase of women entering the labour market, which contribute to important structural and economic changes in the European Union.¹⁶³

Having explained that economic equalness in a corporate governance context includes women on the boards of directors and the notion of parity, which is founded in EU equality and equal treatment legislation, the research examines the principle of equality and the legal basis.

II THE PRINCIPLE OF EQUALITY AND THE LEGAL BASIS

‘Equality does not mean that women and men will become the same, but that women’s and men’s rights, responsibilities and opportunities will not depend on whether they are born female or male’.¹⁶⁴ Women and men should be concerned about women being fully engaged in political and economic decision-making. Equality of the sexes is a fundamental freedom and the legal basis for women on boards.¹⁶⁵ The research affirms that the European Union legal basis to increase the representation of women on boards is founded in equal opportunities legislation (A), which goes beyond a formal equality approach (B).

A. THE LEGAL BASIS OF THE LEGISLATION AND EQUAL OPPORTUNITIES

The European Commission has a great amount of equal opportunity legislation to increase the representation of women on boards of directors, through a range of soft law policies.

¹⁶³ C. Fagan, M. González Menéndez and S. Gómez Ansón (n 28) 1.

¹⁶⁴ gender equality’, (EIGE, 2019) <<https://eige.europa.eu/thesaurus/terms/1168>> accessed 17 March 2019

¹⁶⁵ *ibid*, ‘gender equality’; UN Report, Equality Between Women and Men (Gender Equality) (2001) <<https://www.un.org/womenwatch/osagi/conceptsanddefinitions.htm#:~:text=Equality%20does%20not%20mean%20that,are%20born%20male%20or%20female.&text=Gender%20determines%20what%20is%20expected,man%20in%20a%20given%20context.>> accessed 23 December 2021.

The research finds that equal opportunities legislation, the principle of equal treatment, is founded in the Treaty on the Functioning of the European Union (1), as well as equality legislation (2).

1. Article 157(3) and Article 157(4) of the TFEU

The legal basis of the principle of equal treatment is founded in EU law. These articles guarantee women equal treatment in employment, including the notion of positive action. The research points out that Article 157(3) of the TFEU, is the legal basis for the principle of equal treatment (a) and Article 157(4), which provides the legal basis of equal opportunities (b).

a. Article 157 (3) of the TFEU

According to Article 157 (3) of the TFEU, the legislation pinpoints the legal basis and fundamental rights, which guarantee women equal opportunities to be part of corporate governance boards in public limited companies. The legislation calls on European institutions to 'adopt measures to ensure the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation...'¹⁶⁶

b. Article 157 (4) of the TFEU

Article 157 (4) of the TEU is a positive action provision, which allows Member States to adopt measures, which go beyond the principal of equal opportunities and equal

¹⁶⁶ Consolidated Version of the Treaty on the Functioning of the European Union, Part Three – Union Policies and Internal Actions, Title X – Social Policy, Article 157 (former Article 141 TEC) (2016) OJ C202; 117–118, Article 157(3) <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12016E157>> accessed 5 July 2020.

treatment to reach 'full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the underrepresented sex ... in professional careers.'¹⁶⁷

Having explained that Article 157(3) and 157(4) of the TFEU represent the legal basis of women on boards, the research examines equality legislation.

2. Equality legislation

The Treaty on the Functioning of the European Union contains several articles referring to gender equality legislation. These articles details how the EU upholds the notion of equal treatment in the labour market and employment. Women on boards legislation is founded on this legislation. The notion of equal treatment between men and women in working life and gender equality in the labour market is the foundation of women on boards. The following articles are a reminder of the EU legal framework of equality between men and women, in employment and at work.

According to Article 3 of the TFEU, the European Union ensures equality between women and men in employment and work.¹⁶⁸

According to Article 3(3) (ex-Article 2) of the TFEU, the values of the European Union uphold equality between men and women.¹⁶⁹

¹⁶⁷ *ibid*, Article 157(4).

¹⁶⁸ Treaty of the European Union, Consolidated Version of the Treaty on the European Union (2012) OJ C326, Article 2 <<https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12008M003>> accessed 5 July 2019.

¹⁶⁹ *ibid*, Article 3(3).

According to Article 8 of the TFEU, the European Union shall remove inequalities and promote equality between women and men.¹⁷⁰

According to Article 153 (1i) of the TFEU, the European Union will assist the Member States and promote equal treatment between men and women in the labour market and in employment.¹⁷¹

According to 157(4) of the TFEU, the European Union calls for 'full equality in practice between men and women in working life'.¹⁷² Though, it should be noted that no European Union Member State has reached full equality in practice.¹⁷³

Having shown the extent of EU equality legislation in employment and at work, the research explains the formal and substantive equality approach in EU case law.

B. FORMAL AND SUBSTANTIVE EQUALITY

The principles of formal and substantive equality are terms used in EU case and discrimination law. Formal equality calls for equal treatment of others in the same situation, without distinguishing between a man from a woman. Any derogation of equal treatment is not permitted.¹⁷⁴

¹⁷⁰ *ibid*, Article 8.

¹⁷¹ *ibid*, Article 153(1i).

¹⁷² Bob Hepple, 'Full Equality in Practice is the EU Jargon of Substantive Equality' in *The Transformation of Labour Law in Europe* (1st edn, Hart Publishing, 2009) 130; Consolidated Version of the Treaty on the Functioning of the European Union – Part Three: Union Policies and Internal Actions – Title X: Social Policy, Article 157 (3) and Article 157 (4) (former Article 141 TEC) (2008) OJ 115, 117-118.

¹⁷³ European Movement International, 'ALDE: Jourová Presents European Gender Equality Strategy' (9 March, 2020) <<https://europeanmovement.eu/news/alde-jourova-presents-european-gender-equality-strategy/>> 21 January 2021.

¹⁷⁴ Sandra Fredman, *Discrimination Law* (Oxford University Press, 2011) 8; Aristotle, *Nicomachean Ethics*, Book V(3) (1st edn, Oxford University Press, 2009) 84-85.

The research finds that the notion of a formal equality approach and women on boards is incompatible (1), while a substantive equality approach, which allows for positive action is compatible with this research (2). Though, the European Union and CJEU have taken a mainly formal equality approach, substantive equality is now recognised in positive action cases, when there are two qualified candidates of both sexes and when there is an objective assessment of criteria, the underrepresented sex may be selected.¹⁷⁵

1. Formal equality

The formal equality approach is defined as things alike are to be treated the same.¹⁷⁶ The principle of formal equality asks the question 'equal to what.' Aristotle replied with the doctrine, that 'alike should be treated alike.'¹⁷⁷ The research underlines that a formal equality reasoning, which does not recognise specific characteristics, such as the difference between the sexes (a), is in contradiction with EU legislation, which calls for accommodation for differences (b).

a. Formal equality reasoning

Under CEDAW, signatories should go beyond the limited formal equality reasoning. This is explicitly stated in Articles 1-5 and 24, that parties have a responsibility to go

¹⁷⁵ The following ECJ case law relates to positive action: C-450/93: Kalanke (1995 ECR I-3051), C-409/95: Marschall (1997 ECR I-6363), C-158/97: Badeck (2000 ECR I-1875), C-407/98: Abrahamsson (2000 ECR I-5539). The ECJ test was based on women being underrepresented and fully qualified for the position; G Selanec G and L Senden L, 'Positive Action Measures to Ensure Full Equality in Practice between Men and Women, including on Company Boards' (European Commission, 2011) 13 <https://eur-lex.europa.eu/resource.html?uri=cellar:6b4179c6-13e5-406f-b30e-048804d1bea3.0001.05/DOC_2&format=PDF> accessed 5 July 2019.

¹⁷⁶ *ibid.*

¹⁷⁷ *ibid*, 153.

beyond a formal equality reasoning, which remains limited in time, with the objective to reach *de facto* equality with men.¹⁷⁸

b. Accommodation for differences

The difficulty with 'things that are alike should be treated alike' does not recognise specific characteristics of individual or group differences and calls for equal treatment. European Union law upholds the principle of equal treatment, though allows accommodation for differences.¹⁷⁹

Having explained that the formal equality does not recognise specific characteristics, the research examines the substantive equality approach, which calls for the underrepresented to be included in legislation.

2. Substantive equality

The research specifies that a substantive equality includes the notion that the underrepresented should be included, as it goes beyond a formal equality approach (a), which the EU has incorporated into its non-discrimination legislation to accommodate women through structural change (b). Substantive equality is a 'four dimensional principle... to redress disadvantage, to address stigma, stereotyping, prejudice and violence, to enhance voice and participation...to accommodate difference and achieve structural change.'¹⁸⁰

¹⁷⁸ CEDAW, General Recommendation No. 25, on Article 4, Paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on Temporary Special Measures (2004) <[https://www.un.org/womenwatch/daw/cedaw/recommendations/General%20recommendation%2025%20\(English\).pdf](https://www.un.org/womenwatch/daw/cedaw/recommendations/General%20recommendation%2025%20(English).pdf)> accessed 5 July 2019.

¹⁷⁹ Aristotle (n 174) 84-85; S. Fredman, 'Substantive Equality Revisited' (2016) 14(3) International Journal of Constitutional Law 712-738.

¹⁸⁰ *ibid.*

a. Substantive equality and the underrepresented

The... 'formal equality approach judges the form of a rule, requiring that it treat women and men on the same terms without special barriers or benefits due to their sex, [while] a substantive equality approach looks to a rule's results or effects...' ¹⁸¹ Equality of opportunity recognizes that equal treatment may lead to further inequality by not considering the existing discrimination. Equal opportunity 'equalises the starting point.' This calls for removing barriers by providing resources to those in need. ¹⁸² Equality of opportunity defines the necessity to 'eliminate unlawful discrimination by accommodation and equal participation.' ¹⁸³

Substantive equality addresses disadvantages, stereotypes and prejudice, by passing legislation to accommodate women through structural change, ¹⁸⁴ which allows the law to 'treat differences differently' and allow for positive action in prescribed circumstances. ¹⁸⁵ Positive action under EU law encompasses the right to equality, as it 'includes measures attempting to increase the participation of particular groups defined in group terms, such as race, gender, or disability, in those contexts in which those groups are regarded as under-represented.' ¹⁸⁶

b. European Union non-discrimination law

European Union non-discrimination law acknowledges there are limitations to 'alike' treatment and there is a need to go beyond formal equality to improve conditions,

¹⁸¹ Katherine T. Bartlett, 'Gender Law' (1999) 1(1) Duke Journal of Gender Law and Policy 4.

¹⁸² Sandra Fredman and Sarah Spencer, 'Delivering Equality: Towards an Outcome- Focused Positive Duty' (2006) Cabinet Office Equality Review and to the Discrimination Law Review <https://www.compas.ox.ac.uk/wp-content/uploads/ER-2006-Equal_Opportunities_Review.pdf> accessed 5 July 2019.

¹⁸³ *ibid*, 10.

¹⁸⁴ Fredman (n 174) 8-14.; Aristotle (n 174) 84-85.

¹⁸⁵ European Commission Report, Christopher McCrudden and Sacha Prechal, 'The Concepts of Equality and Non-Discrimination in Europe: A Practical Approach' (2009) European Commission, 38 <<https://ec.europa.eu/social/BlobServlet?docId=4553>> accessed 20 April 2021.

¹⁸⁶ *ibid*.

which include special measures.¹⁸⁷ The notion of fairness requires equal treatment¹⁸⁸ and equality rights.¹⁸⁹ The research has explained that formal equality approach does not recognise specific characteristics, though the substantive equality approach calls for the underrepresented group to be included in legislation.

CONCLUSION

According to the Council Recommendation of 13 December 1984 on the Promotion of Positive Action for Women, Member States have the duty to ...encourage the participation of women in working life where they are at present underrepresented, particularly in the sectors of the future, and at higher levels of responsibility in order to achieve better use of all human resources.¹⁹⁰

European Union law recognises the importance of the use of positive action, as a means for women to access the labour market, including the representation of women on boards of directors. Positive action may take different forms, such as soft law programmes, targets and also lead to the use of binding legislation with quotas.¹⁹¹ The subject of women on boards is not a gender equality issue in isolation. Though, the original notion may stem from gender equality, the legal framework is rooted in parity and company law.

¹⁸⁷ n 178, UN Committee on the Elimination of Discrimination Against Women (CEDAW) General Recommendation No. 25, on Article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on Temporary Special Measures (2004) 1-5, 18-24.

¹⁸⁸ Fredman (n 174) 8-14; Aristotle (n 174) 84-85.

¹⁸⁹ *ibid.*

¹⁹⁰ European Commission, Council Recommendation of 13 December 1984 on the Promotion of Positive Action for Women (84/635/EEC) (1984) OJ 331, 1b <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A31984H0635>> accessed 25 November 2017.

¹⁹¹ European Commission, Communication from the Commission to the European Parliament and the Council on the Interpretation of the Judgment of the Court of Justice on 17 October 1995 in Case C-450/93 Kalanke v Freie Hansestadt Bremen COM (1996) 88 final, 9-10 <<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:51996DC0088&from=DE>> accessed 25 November 2017.

§2: EQUALITY VERSUS DIVERSITY

The research finds that EU law allows special measures or soft law to increase the number of women on the board of directors, which is not binding or carry sanctions (I), compared to hard law, which is binding and may carry sanctions (II). European Union law guarantees women equal treatment as a fundamental right. According to Article 2 of the Treaty of the European Union, the values of the EU are

...respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.¹⁹²

Article 3.3 of the TEU forms the basis of the cohesion of Member States, and that the EU 'shall promote equality between women and men among Member States.'¹⁹³

I. EUROPEAN LAW AND SOFT LAW

European law allows for special measures, or soft law, which consist of recommendations and resolutions to increase the number of women in the labour market and on the board of directors. These measures are non-binding and carry no sanctions. As we will see later on in this thesis, binding quota legislation or hard law, with a forty percent representation of women on boards, is a significant change from a soft law approach. Articles 2 and 3(3) of the Treaty of the European Union specify that women have equal opportunities with full participation in the economy and decision-

¹⁹² n 168, Treaty of the European Union, Consolidated Version of the Treaty on European Union, Article 2.

¹⁹³ *ibid*, Article 3.3.

making, so as to contribute to a more competitive Europe. According to the European Law Recommendation of 12 March 2003(3) on Balanced Participation of Women and Men in Political and Public Decision Making, the Council Committee of Ministers agreed that 'balanced participation' should apply to all decision-making areas in political or public life and carry a minimum of forty percent of women and men.¹⁹⁴

According to the European Parliament Resolution of 18 January 2001, the European Council confirmed that the legal basis of balanced participation in the economy is a democratic principle and necessity, which should include women in decision-making positions in public and private life.¹⁹⁵ The EU gender equality *acquis* includes a vast array of primary and secondary legislation, as well as case law. Though, the research finds that careful consideration should be given to the EU framework of gender equality legislation, as Member States are obliged to implement binding legislation (A), compared with the more general notion of diversity (B).

Having shown the application of recommendations and resolutions in EU law, which consist of soft law, to increase the representation of women on boards, it is appropriate to refer to terms used in the legal framework of gender equality.

A. THE EUROPEAN UNION LEGAL FRAMEWORK OF GENDER EQUALITY

The European Union law gender equality *acquis* includes treaties, legislation and the European Court of Justice (now CJEU) case law. The term 'sex equality' was the only term used interchangeably with gender equality. However, the research shows it is no

¹⁹⁴ *ibid* Article 3.3; n 138, Balanced Participation of Women and Men in Political and Public Decision-Making, Council of Europe.

¹⁹⁵ European Parliament Legislation, Resolution on the Commission Report on the Implementation of Council Recommendation 96/694 of 2 December 1996 on the Balanced Participation of Women and Men in the Decision-Making Process COM (2000) 120 C5-0210/2000 2000/2117(COS) <<https://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P5-TA-2001-34>> accessed 27 November 2017.

longer used to refer to gender equality (1), as gender equality has taken on wider economic, social and legal interpretations (2).

1. Sex equality

The origin of the term 'sex equality' referred to the biological human condition, which differentiated men from women. Though the term sex discrimination is still actively used, it is mainly used in discrimination law, when a person is treated differently because of her or his sex.¹⁹⁶

2. Gender equality

The European Union gender equality *acquis* has evolved to include economic, social and legal interpretations as it

... is the body of common rights and obligations that are binding on all EU countries, as EU Members... and comprises the content, principles and political objectives of the Treaties; legislation adopted in application of the treaties and the case law of the Court of Justice... The *acquis* must be incorporated by applicant countries into their national legal order by the date of their accession to the EU and they are obliged to apply it from that date.¹⁹⁷

Member States and applicant Member States are under obligation to implement all binding EU legislation into national law from the date of membership to the EU.

¹⁹⁶ European Commission, EU Gender Equality Definitions' (2019) <https://ec.europa.eu/info/policies/justice-and-fundamental-rights/gender-equality_en> accessed 5 July 2019; Equality and Human Rights Commission, 'Sex Discrimination' <<https://equalityhumanrights.com/en/advice-and-guidance/sex-discrimination#what>> accessed 5 July 2019; Sex and Gender, UNDP Report, Christine Forster, Global Good Practices in Advancing Gender Equality and Women's Empowerment in Constitutions, Foreword (2016) 4.

¹⁹⁷ European Commission, Glossary of Summaries <<https://eur-lex.europa.eu/summary/glossary/acquis.html>> accessed 5 July 2019; European Commission, European Commission Gender Equality Strategy Report, Annual Report on Equality between Women and Men (2021) <https://ec.europa.eu/info/policies/justice-and-fundamental-rights/gender-equality/gender-equality-strategy_fr#rapport-annuel-sur-lgalit-entre-les-femmes-et-les-hommes> accessed 5 December 2021.

Though, having shown the application of the terms used and the importance of EU gender equality *acquis*, the research compares the notion of diversity to gender equality.

B. DIVERSITY AND DIVERSITY MANAGEMENT

European Union policy introduced the notion of fair treatment and diversity, along with equality and non-discrimination. The two main principles of the European Union are non-discrimination and equal opportunities. The research finds that the principles include all diversity initiatives (1),¹⁹⁸ though, the notion of gender diversity is specific, as it has a particular reference to women on the boards of directors (2).

1. The new notion of managing diversity

The EU Commission went beyond non-discrimination and equality legislation, by including a new notion of managing diversity in an inclusive workplace.¹⁹⁹ This results in companies designating diversity committees and having a company board diversity policy. Companies may agree or not to the notion of board diversity, without establishing or publishing a board diversity policy. However, these EU developments are no longer specifically aimed at gender, which must be questioned, since much legislation has been dedicated to increasing the representation of women on boards. The research calls attention to the definition of diversity, as it is wide (a) and therefore, would need to be understood in another context, such as, 'diversity of gender' (b).

a. The definition of diversity

The definition of the word diversity originates from Middle English with its origins in Old French, '*diversité*,' derived from Latin '*diversitas*.' Diversity is defined, as the 'quality

¹⁹⁸ n 196, EU Gender Equality Definitions, 1.2.1.

¹⁹⁹ *ibid*, 1.2.2.

of including or involving people from a range of different social and ethnic backgrounds and of different genders, sexual orientation...'²⁰⁰

b. Diversity of gender

Several Member States prefer the term diversity, instead of gender in their legislation or codes. The word diversity is a wider interpretation than the word gender. Women, then, become one within a group,²⁰¹ unless there is a specific reference to 'diversity of gender.'

2. Gender diversity and women on boards

Besides, the legal basis of the full participation of women on boards as a democratic principle, studies have shown that gender diversity leads to better board governance. Stakeholders with different backgrounds and viewpoints lead to more competitive boards.²⁰²

There are different legal approaches to managing gender diversity and women on boards in the European Union. The introduction of gender quotas on boards of companies are a means to increase the representation of women on boards rapidly, without having to wait too many years until it happens on its own.

²⁰⁰ 'diversity', n, Lexico dictionary online, Oxford English Dictionary <<https://www.lexico.com/definition/diversity>> accessed 17 March 2019.

²⁰¹ ILO Report, The Business Case for Diversity (2015) <https://www.ilo.org/wcmsp5/groups/public/---dgreports/---gender/documents/briefingnote/wcms_410200.pdf> accessed 17 March 2019.

²⁰² EU Law, Opinion of the European Economic and Social Committee on the Proposal for a Directive of the European Parliament and of the Council on Improving the Gender Balance among Non-Executive Directors of Companies Listed on Stock Exchanges and Related Measures COM (2012) OJ C133, 614 final, 68–76 <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52012AE2444>> accessed 3 September 2018; Credit Suisse Research Institute Report, Gender Diversity and Corporate Performance (2012); n 89, McKinsey Report, 12; Deutsche Bank Research Report, Towards Gender-Balanced Leadership (2010).

Having explained how the EU legal framework of gender equality and soft law interact,, it is appropriate to compare it with hard law.

II. HARD LAW

The legal basis for increasing the representation of women on boards includes passing binding quota legislation or hard law. As the research has shown, soft law is non-binding, while hard law consists of ' legal obligations that are binding on the parties ... and which can be legally enforced.'²⁰³ The research shows a move towards a hard law approach, founded in the EU proposed women on boards directive (A), which concerns non-executive directors (B), although, Member States may already have hard law in place (C).

A. THE LEGAL BASIS OF GENDER EQUALITY AND WOMEN ON BOARDS

The research confirms that the legal basis of gender equality and women on boards is found in the proposed directive, supported by a Minimum Harmonisation Programme (1), as European Union institutions have stated that the current fragmented approach is harmful to the EU economy (2).

Several Member States hesitate to pass binding legislation, though they will eventually be obliged to consider it. Academicians are also taking note that hard law is not a fatality. Senden stated that '[o]n the EU level ..., the European Commission has been shifting its soft law approach to a hard law approach, by putting forward a proposal for a directive ... in 2012.'²⁰⁴

²⁰³'hard law', 'soft law', European Center for Constitutional and Human Rights <<https://www.ecchr.eu/en/glossary/hard-law-soft-law/>> accessed 5 July 2019.

²⁰⁴ n 26, Senden, 51.

The intention to move towards hard law culminated with the proposed women on boards directive, as Member States had not increased the representation of women on boards through soft law means.

1. Minimum harmonisation and transition to hard law

All Member States would be obliged to comply with a women on boards directive. There is growing agreement by EU institutions, academicians and many Member States that a minimum harmonisation would be effective from a legal and economic standpoint. In addition, a Minimum Harmonisation Programme may accompany Member States transition from soft law to hard law, which will gradually increase the representation of women on boards. It is timely for the EU to consider such a solution, as there are Member States who have little soft law in place.

Having explained the motivation for minimum harmonisation, the research examines the effectiveness of a harmonised economic European Union.

2. Effectiveness of a harmonised economic European Union

EU institutions decided on intervention with the women on boards proposed directive, as a result of the extreme differences of notions and approaches of soft law, hard law with sanctions or even no law at all in the Member States. EU intervention is a part of the supervisory convergence strategy to return law to EU institutions, which is a 'gradual process of standardization in the rules of composition of corporate governance bodies'.²⁰⁵ EU intervention is a guarantee of a minimum harmonisation, which will increase the representation of women on boards in public limited companies in the EU, but also assure investors that there are not so many policies and legislation, which may incur costs, as regulatory differences may not attract investment.

²⁰⁵ Gennari (n 6) 103.

The lack of a harmonised EU women on boards policy adds to the complexity of the subject, Member States have a wide range of opinions about regulation and EU intervention, due to their diverse history, legal systems and economies.

Having shown the application of minimum harmonisation and women on boards, the research examines the role of non-executive board directors.

B. WOMEN ON BOARDS AND NON-EXECUTIVE BOARD DIRECTORS

The research point out that the Cadbury Report and Viènot Report have confirmed that the role of non-executive directors on the boards of directors is a corporate governance matter (1), and, is also part of European Union legislation, as the EU defines non-executive directors in the EU Recommendations (2).

Board directors participate in the long-term strategy of a company. Non-executive board directors are not directors in the same companies, where they are board directors, for the very reason that they are selected to avoid interfering with the 'freedom to conduct... business'.²⁰⁶ They are nominated to oversee companies and take decisions to avoid conflicts of interests. Non-executive board directors are vital for listed companies to re-establish trust in markets, since the past economic and financial crises raised questions of conflicts of interest.²⁰⁷ The directors must meet specific criteria, which attest to their independence.²⁰⁸ Independence implies that the

²⁰⁶ Charter of Fundamental Rights of the European Union (2007) Explanation of Article 16 <<https://fra.e.eu/en/eu-charter/article/23-equality-between-women-and-men#:~:text=Next%20article,icl%20between%20women%20and%20men,of%20the%20under%2Drepresented%20sex.>> accessed 25 November 2017.

²⁰⁷ European Commission (EC), Recommendation of 15 February 2005 on the Role of Non-Executive or Supervisory Directors of Listed Companies and on the Committees of the (Supervisory) Board EC (2005) 162, 9 <<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32005H0162=EN>> accessed 25 November 2017.

²⁰⁸ *ibid*, European Commission (EC), Recommendation of 15 February 2005, 11.

director does not have close relations to anyone in the company, neither to the management, nor to shareholders. The board shall define what independence means.²⁰⁹

1. The role of non-executive board directors

Non-executive directors are required to have the appropriate background. The wording 'appropriate background' is somewhat vague. This may be interpreted to have experience, skills, personality and include gender or diversity.²¹⁰ Having explained the role of non-executive board directors, it is appropriate to refer to the EU Commission Recommendation of 15 February 2005 concerning non-executive directors.

2. The EU and non-executive directors

According to Commission Recommendation of 15 February 2005, Member States are advised to implement provisions, which include the functioning of non-executive directors in companies. Member States may decide to pass hard law or use a comply or explain approach in the corporate governance codes.²¹¹

This recommendation leads to the next section, which shall examine the different women on boards policies and legislation in the Member States.

C. MEMBER STATES WITH DIFFERENT WOMEN ON BOARDS POLICIES AND LEGISLATION

The research confirms that the EU Member States have different women on boards policies, though Member States are choosing to regulate women on boards (1),

²⁰⁹ *ibid*, European Commission (EC), Recommendation of 15 February 2005, 18.

²¹⁰ *ibid*, European Commission (EC), Recommendation of 15 February 2005, 15.

²¹¹ *ibid*, European Commission (EC), Recommendation of 15 February 2005, 1.1.

although, there remains a great number of Member States who prefer voluntary measures, such as corporate codes or a self-regulatory approach (2).

1. Regulatory approach to women on boards

France passed binding legislation in 2011 with the objective to reach forty percent of the representation of women on boards by 2017. This applied to non-executive directors in public limited and non-listed companies.²¹² Germany passed binding quota legislation in 2016 to reach thirty percent of the representation of women on supervisory boards of public limited companies and companies subject to co-determination.²¹³

Iceland passed women on boards legislation in 2010, which was fully enforced in 2013. Although, there are no sanctions attached to the hard law for non-compliance. According to the Parliamentary Document no. 71/2009-2010, the purpose of the legislation was to 'work towards a more equal portion of women and men in influential positions.' The binding forty percent quota permitted a significant rise of women on boards in Iceland, even without sanctions.²¹⁴ Spain passed a forty percent women on boards quota legislation for public limited companies, with greater than 250 employees and within eight years to be implemented, by 2015. There are no formal sanctions for non-compliance. According to Article 34 of the Spanish Constitutional Act 3/2007 for the Effective Equality between Men and Women, an economic incentive and priority

²¹² Jourová (n 25) Gender Balance on Corporate Boards, Europe is Cracking the Glass Ceiling, 6; n 71, French Legislation, Law No. 2011-103 of January 27, 2011 on the Balanced Representation of Women and Men on Boards of Directors and Supervisory Boards and Professional Equality (1).

²¹³ n 60, German Legislation, Act for the Equal Participation of Women and Men in Leadership Positions in the Private and Public Sector, 17.

²¹⁴ Arna Audur and Throstur Olaf Sigurjonsson, 'Gender Diversity on Boards in Iceland: Pathway to Gender Quota Law Following a Financial Crisis', in Cathrine Seierstad, Patricia Gabaldon and Heike Mensi-Klarbach (eds), *Gender Diversity in the Boardroom; The Different Quota Regulations* (Palgrave Macmillan, 2017) 96-97.

status of government contracts would be extended to those companies who complied with the legislation.²¹⁵

There was much political and business opposition to binding quota legislation in Spain. Therefore, the Spanish government chose an ultra-soft approach to the legislation, which failed to increase the representation of women on boards.²¹⁶ There were 23.1 percent of women on boards in Spain in 2020. Spain missed the target and deadline of the recommended thirty percent by 2020, as established by the National Securities Market Commission. Twelve of the 128 public limited companies have no women on the board of directors and twenty-nine companies have just one woman on the board of directors.²¹⁷

On a basis of comparison, Iceland and Spain are examples of opposing women on boards policies, which demonstrate the ineffectiveness of the current EU approach. Permitting Member States to decide on soft law or hard law implementation has created a wide discrepancy in EU policy towards women on boards, leaving several Member States lagging far behind.

Having examined the regulatory approach, which shows that no Member State adheres to the same legal system, the research discusses the voluntary or self-regulatory approach.

²¹⁵ Spanish Constitutional Act 3/2007 of 22 March for Effective Equality between Women and Men (2007) Article 34 <<https://www.boe.es/buscar/pdf/2007/BOE-A-2007-6115-consolidado.pdf>> accessed 3 January 2020.

²¹⁶ Ruth Mateos de Cabo and others, 'Do 'Soft Law' Board Gender Quotas Work? Evidence from a Natural Experiment' (2019) 37(5) *European Management Journal* 612.

²¹⁷ Catedra Carmina Roca and Rafael Pich-Aguilera, 'Female Board Members Wanted: Spain is Still far from Gender Parity', IESE Business School Research Report (IESE, 2020) <<https://www.ieseinsight.com/doc.aspx?id=2286&ar=3>> accessed 14 January 2021.

2. Voluntary or self-regulatory approach

A voluntary or self-regulatory approach uses targets to increase the representation of women on boards. The Member States, which use this approach are Sweden, Poland and the United Kingdom, mainly through the use of corporate governance codes and programmes to increase the representation of women on boards.²¹⁸ There are several differences within the meaning of implementation of self-regulation. The UK government commissioned Lord Davies to propose recommendations. The Davies Review Annual Report recommended an increase in the representation of women on boards to a twenty-five percent target of women on boards on FTSE 100 companies, by the end of 2015. In 2015, there were 23.5 percent of women on boards on FTSE 100 board of directors and 18 percent on FTSE 250 board of directors. The Hampton-Alexander Review raised the target to 33 percent. In 2020, the targets were met on the FTSE 100, 250 and 350 with the representation of women exceeding the 33 percent target.²¹⁹

Soft law includes corporate governance codes and the comply or explain principle to increase the representation of women on boards. Soft law includes 'guidelines, recommendations, declarations and opinions,'²²⁰ whereas, hard law includes 'regulations, directives and decisions.'²²¹ Most importantly, soft law has limitations, as there are no sanctions. Member States may not have policies in place, as EU institutions allow Member States to decide on the kind of soft law they wish to implement. This

²¹⁸ Audur and Sigurjonsson (n 214) 96-97; UK Government Report, Davies Review Annual Report, Women on Boards (2015) 9.

²¹⁹ *ibid*; UK Government Report, Hampton Alexander Review (2016) 5; UK Government Press Release, The Rt Hon Kwasi Kwarteng MP and Baroness Berridge of The Vale of Catmose, 'The Changing Face of Business: Number of Women on FTSE Boards up by 50% in just 5 Years' (Department for Business, Energy & Industrial Strategy, Government Equalities Office, 23 February 2021) <<https://www.gov.uk/government/news/the-changing-face-of-business-number-of-women-on-ftse-boards-up-by-50-in-just-5-years>> accessed 10 October 2021.

²²⁰ 'soft law', Eurofound <<https://www.eurofound.europa.eu/observatories/eurwork/industrial-relations-dictionary/soft-law>> accessed 5 July 2019.

²²¹ *ibid*.

has become an ineffective method, as several Member States have little to no gender equality policies in place and there is no enforcement, as soft law is non-binding.²²² Soft law can also be too soft, as self-regulation is left up to companies to decide, whether they wish to adhere to the government recommendations or company soft law. The implementation of a soft law programme without enforcement has proven ineffective, in general.²²³

However, there are exceptions, such as the United Kingdom, Sweden and Finland. The United Kingdom has been able to reach targets without binding legislation, due to social norms and extremely active business policies, which are important explanations how the United Kingdom has managed to avoid binding legislation.

Sweden and Finland succeeded with self-regulating measures to increase the representation of women on boards. The two countries have high levels of gender parity to start with, though neither Member State has reached forty percent of women on boards. The Scandinavian exception was the Norwegian government, who chose to pass forty percent women on boards quota legislation and now has the highest level of gender parity on boards with France.²²⁴ We are reminded of the title of the research, which is focussed on the fragmented policies and legislation, which is the current approach of women on boards in the Member States and may include soft or hard law.

²²² Albertine d'Hoop-Azar and others, 'Gender Parity on Boards Around the World', Posted by Institutional Shareholder Services, Inc. on the Harvard Law School Corporate Governance Forum (HLS, 2017) <<https://corpgov.law.harvard.edu/2017/01/05/gender-parity-on-boards-around-the-world/>> accessed 5 July 2019.

²²³ n 26, Senden, 55; However, the following Member States are exceptions: Sweden, Finland and the UK (prior to Brexit), as soft law was effective in increasing the representation of women on boards.

²²⁴ EIGE Report, Statistical Brief, 'Gender Balance in Largest Listed Companies' (EIGE, 2020) <<https://eige.europa.eu/publications/statistical-brief-gender-balance-largest-listed-companies>> 3 January 2021.

SECTION 2 MEMBER STATES WITH WOMEN ON BOARDS OF DIRECTORS LEGISLATION

Quotas are used to reach objectives of a specific group, such as increasing the representation of women on boards. Women on boards quotas usually follow political and electoral quotas. Their use is specific and limited in time to increase incrementally the number of women on the board of directors. Quotas are effective when accompanied by sanctions.

Nonetheless, the research discusses the subject of soft law policies and measures to increase the representation of women on boards (§1), although most Nordic States, who have the most advanced approach to increase the representation of women on boards, do not find it necessary to use quotas, with the exception of Norway (§2).

§1: POLICIES TO INCREASE THE REPRESENTATION OF WOMEN ON BOARDS

In the European Union, the notion of positive action consists of policies or measures to increase the representation of women on boards within a specified timeframe. These measures may include the implementation of special programmes or preferential treatment through the use of quotas.²²⁵

²²⁵ 'positive action' n., definition of positive action (Eurofound, 2019) <<https://www.eurofound.europa.eu/observatories/eurwork/industrial-relations-dictionary/positive-action>> 3 January 2019; Hepple (n 154) 20.

The research finds that EU institutions made recommendations and resolutions, starting in the 1980s (I), while Member States were encouraged to pass gender equality soft or hard law (2).

I. DIVERSE FORMS OF POSITIVE ACTION

The Council Recommendation 84/635/EEC of 13 December 1984 on the Promotion of Positive Action for Women called to increase the representation of women on boards in the private sector. The Council Resolution of 27 March 1995 on the Balanced Participation of Men and Women in Decision-Making called on the European Commission to include special measures to increase the representation of women on boards.

Therefore, Member States may use positive action measures to propose binding legislation. The legislation should include a fixed number or a percentage of women, as a quota to increase the representation of women on boards.

In future legislation, companies would face sanctions, if non-compliant with the legislation. The research examines how quotas are used (A), and arguments in favour of the use of quotas (B).

A. THE USE OF QUOTAS

Quota legislation is not a finality, but a means to rapidly increase the representation of women on boards. Member States, with existing women on boards legislation have shown the largest and most rapid increases of representation of women on boards. The research examines the quotas, ranging from strict to soft quotas (1), which are used for business and political motives (2).

1. Types of quotas

The three types of quotas are strict, flexible and soft.²²⁶ Strict quotas are binding and require an exact number of women on the board. Nevertheless, it is not enough to be a woman, but to be qualified and hold the necessary qualifications for the position. Therefore, a tie-break quota calls on the same qualifications of a man or woman, but might agree to a lower number of women, if there are no qualified candidates. These are flexible quotas, which require a fixed number or percentage and may be subject to sanctions.

The legislation would allow the company to decide on the means to reach the quota. Soft quotas allow companies to use targets and timeframe. They do not include sanctions. Having explained the types of quotas, the research examines quotas in practice.

2. Quotas in practice

Strict quotas are most often used in electoral participation, to increase the representation of women on election lists. Flexible quotas are used in decision-making positions. Tie-break quotas, which are included in the proposed directive, are not hard quotas. Soft quotas are used in employment contexts.

The proposed directive sets a forty percent target tie-break quota. Companies in the Member States would nominate board directors, using strict and defined criteria. If two candidates have the same qualifications, the offer would go to the underrepresented sex. The definition of a 'tie-break preference grants an advantage to members of the

²²⁶ Selanec and Senden (n 175) 13.

underrepresented sex who are equally qualified for a particular position ...'²²⁷ Having explained quotas and their usage, the research shows how they are applied in business.

B. QUOTAS FOR BUSINESS AND POLITICAL MOTIVES

The use of quotas to balance the board of directors continues to raise questions among politicians and academicians. Having described the different types of quotas, the research shows the two arguments, which favour the use of quotas, such as the business argument, which states the use of quotas is an economic necessity (1), whereas, the political argument is based on democratic principles, though affirms the economic case for quotas (2).

1. Quotas and the business argument

The business case argument to increase the representation of women on boards using quotas has been supported by the world's leading consulting groups. The effects of the business case approach have resulted in an increase of the number of women on boards, a larger talent pool of women for board positions and value creation. Though, there is an argument against the use of quotas, as owners of companies may believe that shareholders should be allowed to choose board directors, without consideration of gender.²²⁸ Moreover, it may be perceived as an unfair advantage to the underrepresented group, which is the formal equality argument. It should be recalled that the use of tie-break quotas are not hard quotas. The use of quotas is a temporary measure, which is used to increase the representation of women on boards for business reasons and to keep the European Union competitive in the global market.

²²⁷ *ibid*; Selanec and Senden (n 175) 5.

²²⁸ Nini Høegh Nergaard, Merete Lütken, Thorhild Widvey, Ingild Ragna Myhre and Morten Huse, 'Stories from Norwegian Multi-Board Women' in Silke Machold and others (eds) *Getting Women on to Corporate Boards, A Snowball Starting in Norway* (1st edn, Edward Elgar Publishing 2013) 85.

Having shown the application of the use of quotas in business, the research explains that quotas are used for political and democratic reasons.

2. Quotas and democracy

The Norwegian situation has revealed that passing binding women on boards legislation was unpopular. Business and government stated that there were not enough qualified women in Norway to become board directors. However, there were plenty of women in senior leadership positions. At the time, board directors were not selected on merit. Criteria to become a board director consisted of having a university degree, twenty years of leadership experience as a CEO and board experience. This was problematic, as Norwegian women lacked CEO and board experience. Therefore, Norwegian women had great difficulty to become board directors.²²⁹

The Norwegian image of gender equalness was questioned, which eventually led to political intervention, which consisted of passing women on boards legislation for reasons of justice and utility. The utility argument is based on making use of women, as a resource. The justice argument is based on democratic values, as set out in the Norwegian Constitution. Though, initially, binding legislation passed for reasons of democracy or utility, the real reason for the women on boards legislation was for improving the Norwegian economy. Therefore, Norwegian social concerns led to economic justification for women to become board directors.²³⁰

²²⁹ Elin Hurvenes 'Professionalizing Boards: the Work of the Professional Boards Forum' in Silke Machold and others (eds.) *Getting Women on to Corporate Boards, A Snowball Starting in Norway* (1st edn, Edward Elgar Publishing 2013) 40-41.

²³⁰ Cathrine Seierstad, 'Gender Quotas on Corporate Boards in Norway' in Silke Machold and others (eds.) *Getting Women on to Corporate Boards, A Snowball Starting in Norway* (1st edn, Edward Elgar Publishing 2013) 140-142; Morton Huse, 'The Political Process Behind the Gender Balance Law' in Silke Machold and others (eds.) *Getting Women on to Corporate Boards, A Snowball Starting in Norway* (1st edn, Edward Elgar Publishing 2013) 13.

Having explained the arguments for the use of quotas, the research explains how quotas are used in national legislation.

II. GENDER EQUALITY POLICIES AT NATIONAL LEVEL

Before passing binding quota legislation, EU Member States implement national gender equality policies or soft law. Member States do not have the same gender equality legislation or policies in place. The research points to Article 157(4) of the TFEU, which allows Member States to adopt legislation to improve the professional situation of women (A), while confirming that Northern European countries have the highest employment rate of women and rate of economic growth in the region (B). Having explained gender equality policies at national level, the research explains how that Article 157(4) is the legal reference for Member States to pass national gender legislation.

A. ARTICLE 157(4) OF THE TFEU

Article 157(4) of the TFEU ‘... ensures full equality in practice between men and women in working life [and] providing for specific advantages in order to make it easier for the underrepresented sex ... in professional careers.’²³¹ The research takes a closer look at Member States, who have passed binding legislation (1) and the Member States who have passed hard law to increase the representation of women on boards (2).

1. Women on boards binding legislation in national legislation

At national level, several Member States have passed binding legislation to increase

²³¹ n 172, Consolidated Version of the Treaty on the Functioning of the European Union – Part Three: Union Policies and Internal Actions – Title X: Social Policy, Article 157(3) and Article 157(4).

the representation of women on boards. The Member States with binding quota legislation include Austria, Belgium, France, Germany, Greece, Italy, the Netherlands, Portugal and Spain. Though, these Member States have adopted different critical mass percentages and rules. The Netherlands and Portugal require thirty-three percent of women on boards, while France requires forty percent. The companies targeted have different requirements. The Netherlands targets public listed companies, while Portugal targets public and state-owned companies. France targets companies with more than 250 employees and 50 million euros in revenue.²³² Member States with binding legislation decide on variables, such as, the critical mass, which companies to target and rules pertaining to employee count and revenue. This demonstrates that significant differences exist, even when Member States pass hard law.

Having shown the application of binding legislation in national legislation, the research has found that not enough Member States are passing hard law.

2. Not enough Member States are passing hard law

Article 4(1) of the CEDAW called for Member States to pass national law to increase gender equality policies, which includes passing legislation to increase the representation of women on boards. The Convention states that ‘...temporary special measures [are] aimed at accelerating de facto equality between men and women [which] shall be discontinued when the objectives of equality of opportunity and treatment have been achieved.’²³³ These measures refer to the use of tie-break quotas.

²³² European Parliament Report, Anja Kirsch, ‘Women on Boards Policies in Member States and the Effects on Corporate Governance’ (2021) 51 < [https://www.europarl.europa.eu/thinktank/en/document/IPOLE_STU\(2021\)700556](https://www.europarl.europa.eu/thinktank/en/document/IPOLE_STU(2021)700556) > accessed 23 December 2021; Jacques Delors Institute Report, All Hands on Deck for More Gender Equality in Corporate Decision-Making (7 March 2022) < <https://institutdelors.eu/en/publications/cap-sur-la-parite-dans-les-instances-dirigeantes-des-entreprises-europeennes/> > accessed 11 June 2022; Senden and Kruisinga (n 30) 112.

²³³ n 178, UN Committee on the Elimination of Discrimination Against Women (CEDAW) General Recommendation No. 25, on Article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on Temporary Special Measures; 1-5, 18-24; Neubauer (n 83).

Though many EU Member States have strengthened their national soft law gender equality policies and may be moving towards binding legislation, this is not the situation in all Member States. There is an important regression of gender equality policies in certain Member States. Though Member States may acknowledge gender equality as a notion, it is not always transposed into practice or enforced. Having shown the scope of gender equality and women on boards in national legislation, it is appropriate to examine first gender equality policies in Northern Europe.

B. GENDER EQUAL LABOUR MARKETS IN NORTHERN EUROPE

The OECD Report on Gender Equality Policies in Northern Europe found that a strong employment rate of women contributed to high productivity and economic growth in the region. The Nordic countries have a high employment rate of women in the labour market. The research cites that more educated women are entering the labour market (1), however, Norway was the only Nordic country that passed binding women on boards legislation, which has had an influence on corporate governance worldwide (2).

1. Gender equality and high employment rates of women

The Nordic countries, composed of Denmark, Finland, the Faroe Islands, Greenland, Iceland, Norway and Sweden, are the leaders of gender equality policies and prosperous economies. A greater number of women in employment increase labour supply. More educated and qualified women have been entering the labour market, which has resulted in increases of productivity. The employment rate increased and has created growth.

The Nordic approach to a high employment rate may be seen in specific gender equality policies, which includes a full participation in employment for men and women. The State strategy is to provide services and paid leave, when needed in exchange for

employment of the entire population. Nordic countries were able to increase the representation of women on boards without binding legislation, with the exception of Norway.

Having explained gender equality policies and employment rates in Norway, the research examines the Norwegian women on boards legislation.

2. Norwegian women on boards legislation

At first, the Norwegian government was in favour of increasing the representation of women on boards by voluntary means. Legislation would enter into force, only if public limited companies failed to increase the representation of women on boards to forty percent by 2005. There was an important switch from gender equality legislation to company law, which was responsible for initiating the women on boards legislation.²³⁴ Having shown the specifics of gender equality policies and legislation in Norway, it is appropriate to examine the differences between the legislation in other Nordic countries.

§2: THE DIFFERENCES BETWEEN THE NORDIC COUNTRIES

All Nordic countries make use of soft law policies to increase the representation of women on boards. Norway and Iceland have put into place binding quota legislation,

²³⁴ OECD Report, 'Nordic Council of Ministers, Is the Last Mile the Longest? Economic Gains from Gender Equality in Nordic Countries' (OECD, 2018) 2 <<https://www.oecd.org/els/emp/last-mile-longest-gender-nordic-countries-brief.pdf>> accessed 5 July 2019; Nordic Council of Ministers Report, 'All About Business, Nordic Women on Boards and in Leadership' (Nordic Council of Ministers, 2016) 7; Eurofound, Government Proposes Gender Quotas on Company Boards (Eurofound, 24 June 2003) <<https://www.eurofound.europa.eu/publications/article/2003/government-proposes-gender-quotas-on-company-boards>> accessed 10 June 2022.

which has led to high percentages of women on boards in these countries. The Nordic countries support increasing the number of women in the labour market. However, the research has found that there are diverse strategies (I), and, as the study will point out, legislation in Sweden and Iceland support women on boards, but have different policies and legislation (II).

I. WOMEN ON BOARDS STRATEGIES IN THE NORDIC COUNTRIES

Nordic countries are acknowledged as leaders in gender equality, far ahead of most other countries due to their long history of governmental support of social and professional policies, which focus on increasing the number of women in the workplace.²³⁵ The research shows that, contrary to the Norwegian government decision to pass binding legislation to increase the representation of women on boards, Finnish women on boards policies (1) and Danish policies (2) have a preference for self-regulation to increase the representation of women on boards.

A. GENDER EQUALITY POLICIES IN FINLAND

The Finnish government has a preference to self-regulation to hard law. Finland has reached more than thirty percent of women on boards without the use of quotas, in comparison to Belgium, France or Norway. This is primarily due to strong gender equality policies.

The research indicates that corporate governance provisions in the Finnish Code of Corporate Governance are mainly used, (1) soft law policies have been effective in Finland to increase the representation of women on boards (2). The 2010 Finnish Code

²³⁵ World Economic Forum Communication, 'These 4 Nordic Countries Hold the Secret to Gender Equality' (UN, 2018) <<https://www.weforum.org/agenda/2018/12/nordic-countries-women-equality-gender-pay-gap-2018/>> accessed 21 January 2021.

of Corporate Governance makes use of a corporate code or recommendation to increase the representation of women on boards by use of the comply or explain principle. 'Listed companies shall issue a corporate governance statement once a year. This obligation ... cannot be departed from the basis of the 'comply or explain' principle.' Recommendation 8 require companies to include genders on boards.²³⁶ This includes executive and non-executive board directors. Soft law has been effective in Finland.

1. The Finnish Code of Corporate Governance

There are several corporate governance provisions, which make reference to women on boards, with reference to diversity and gender. According to the Finnish Code of Corporate Governance, companies define diversity 'for its own purposes, taking into account the scale of its business operations...[and] may include...gender.'²³⁷

According to the Recommendation 8 of the Code, the composition of the board of directors will be comprised of both genders.²³⁸

According to Recommendation 9 of the Code, the requirement for a diverse board includes gathering information about the company diversity policy and reporting information concerning the representation of women and men on the board.²³⁹

Having shown the corporate governance policies and legislation in the Finnish Code of Corporate Governance did not include precise numbers or percentages, the research examines the effectiveness of the soft law.

²³⁶ The Finnish Corporate Governance Code 2020 (Securities Market Association, 2020) 49, Recommendation 8.

²³⁷ *ibid*, The Finnish Corporate Governance Code 2020, Recommendation 9, Recommendation 26.

²³⁸ n 236, The Finnish Corporate Governance Code 2020, Recommendation 9, Recommendation 25.

²³⁹ n 236, Finnish Corporate Governance Code 2020.

2. Soft law effectiveness

Although the Finnish Code called for women and men on the board of directors, it was not required to include a critical mass, the exact percentage of women and men on boards, or state if an equal number of women and men were required. The Finnish Code is non-binding. The written recommendations are soft law and seem vague, as to the commitment to women on boards, since there are no numbers or percentages linked to increasing the representation of women on boards. However, as a result of these policies, the representation of women on boards in Finnish public limited companies rose from 51 percent to 91 percent in 2014. In 2010, there were 25.9 percent of women on boards. In 2015, this rose to 29.2 percent. In 2020, there were 35.1 percent of women on boards of the largest listed Finnish companies by self-regulatory means.²⁴⁰ This demonstrates the effectiveness of the Finnish Code provisions to increase the representation of women on boards by means of soft law.²⁴¹

Having examined the corporate governance policies and legislation in the Finnish Code of Corporate Governance and effectiveness of soft law, the research compares this with gender equality policies in Denmark.

B. DANISH GENDER EQUALITY POLICIES

Contrary to the Norwegian binding women on boards legislation, the Danish government position is against hard law. The research finds that the initial position of

²⁴⁰ EIGE Statistics, Largest Listed Companies: Presidents, Board Members and Employee Representatives (2020) <https://eige.europa.eu/gender-statistics/dgs/indicator/wmidm_bus_bus_wmid_comp_compbm/datatable> accessed 14 January 2021; European Women on Boards, Diversity Index (2020) <<https://europeanwomenonboards.eu/wp-content/uploads/2021/01/Gender-Equality-Index-Final-report-2020-210120.pdf>> accessed 14 January 2021.

²⁴¹ Deloitte Report, 'Women in the Boardroom' (Deloitte, 2015); n 24, OECD Statistics, Employment, Female Share of Seats on Boards of the Largest Publicly Listed Companies.

the Government was that soft law targets were sufficient (1), though, the Government changed its position to take a stricter view to increase the representation of women on boards by passing legislation (2).

1. The Danish Charter to increase the representation of women on boards

Denmark introduced the Charter to increase the representation of women on boards in 2008. The Government plan set women on boards targets with deadlines in Danish companies. By 2011, 16 private and 109 public companies had signed the Charter, representing the largest companies in Denmark. The Charter was a voluntary means, which allowed companies to decide on actions concerning the representation of women on the boards of directors and report on results.²⁴²

Having examined Danish Charter to increase the representation of women on boards, it is appropriate to examine Danish legislation..

2. The Danish Companies Act on Equality between Women and Men

The Danish government took a stricter view of women on boards, starting in 2008 by passing legislation. The Danish Companies Act on Equality between Women and Men includes gender obligations in the largest public and private companies by calling for voluntary means of targets in 2012.²⁴³ According to Chapter 1 §1 of the Gender Equality Act, the legislation calls to 'promote equality between women and men, including equal integration, equal influence and equal opportunities in all functions of society based on the equal value of women and men'.²⁴⁴

²⁴² Senden (n 29) 54; European Parliament Report, The Policy of Gender Equality in Denmark Update, Lise Rolandsen Agustin (2015) 10 < [https://www.europarl.europa.eu/RegData/etudes/IDAN/2015/510026/IPOL_IDA\(2015\)510026_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/IDAN/2015/510026/IPOL_IDA(2015)510026_EN.pdf) > accessed 3 June 2022.

²⁴³ *ibid*, 10, European Parliament Report.

²⁴⁴ Danish Legislation, The Gender Equality Act, LBK No. 1095 of 19/09/2007 (2007) Chapter 1 §1 < <https://www.retsinformation.dk/eli/lta/2007/1095> > accessed 3 June 2022.

According to Act No. 1383/2012 amending the Danish Companies Act and the Financial Statements Act, the largest Danish companies set women on boards targets and establish a policy, as of 2013. Companies set their own targets.²⁴⁵ The government Business Agency evaluates companies compliance and reports companies to the police, if they are not compliant with the legislation.²⁴⁶ In 2022, there were 38.7 percent of women on boards in the largest listed Danish companies by self-regulatory means.²⁴⁷ This is nearly the forty percent critical mass called for in the proposed directive.

Having examined the Danish Charter and Danish Companies Act on Equality between Women and Men legislation, the research turns to gender equality policies and legislation in Sweden and Iceland.

II. GENDER EQUALITY LEGISLATION IN SWEDEN AND ICELAND

The notion of gender equality in Sweden and Iceland are founded in Social Democratic ideology. These Nordic countries have the most advanced gender equality policies in the world. Their economies are based on full employment with the view of 'constructing a good society'. Though, Nordic countries share a common approach, they differ in actual practice concerning women on boards policies and legislation. They mostly adhere to soft law policies, with the exception of Norway.

The research has explained that the Norwegian government adopted binding quota legislation, while the Swedish government considered women on boards part of the

²⁴⁵ Danish Legislation, Act Amending the Companies Act, the Annual Accounts Act and Various other Acts, Retsinformation, LOV nr 1383 ad 23/12/2012 <<https://www.retsinformation.dk/eli/lta/2012/1383>> accessed 3 June 2022.

²⁴⁶ European Commission Report, Gender Equality Denmark (2020) 15 <http://www.diskrimineringslagen.se/uploads/2020-DK-GE-country_report-final_for_web.pdf> accessed 3 June 2022.

²⁴⁷ n 240, EIGE Gender Statistics.

corporate social responsibility policy, which includes sustainable targets (A), though, Iceland followed the Norwegian example of hard law (B). This shows that even in the Nordic states, the approach to women on boards is not fixed in soft law.

A. GENDER EQUALITY LEGISLATION IN SWEDEN

As the Swedish government has a preference for soft law, gender equality is part of corporate social responsibility and sustainable business practices. Gender equality and diversity are the responsibility of companies and have a direct impact on business. In the Swedish Corporate Governance Code, the provisions provide, that shareholders take decisions concerning matters of investment in companies. Gender equality principles are important to Swedish shareholders and investors. Gender equality is considered an obligation for a company and equated with the success of a company.

The research points out that, in Swedish companies, shareholders may also be owners of the company, which may influence board director selection (1), although, corporate governance rules and the comply or explain principle are complied with (2).

1. Shareholders as board directors

Swedish companies are owned by one or few shareholders, as in other EU Member States. However, Swedish shareholders carefully examine the composition of the board of directors to verify, if the owners of the company are men or women. Shareholders may force board decisions by becoming a board director of the company. This is viewed and interpreted favourably in Sweden. It is interpreted that shareholders are part of the company. This influences the selection of board directors of companies and gives shareholders extra power in decision-making and governance.²⁴⁸ Having examined

²⁴⁸ Swedish Code of Corporate Governance (Swedish Corporate Governance Board, 2016) 7-9.

unique Swedish corporate governance with shareholders who become board directors the research turns to gender equality policies and the Swedish Code on Corporate Governance.

2. Gender balance and Swedish Code on Corporate Governance provisions

The Swedish Code on Corporate Governance includes several references to women on boards. According to the Swedish Code on Corporate Governance, the nomination committee should include gender balance, when proposing candidates to the board.²⁴⁹ According to the Swedish Code, the board shall make every effort to be balanced between women and men with the rule of '... equal distribution among the sexes shall be the goal.'²⁵⁰ According to the Swedish Code, companies have the duty to report board composition. The board shall monitor compliance, by disclosing information in the annual report. The company shall use the comply or explain principle, with the obligation to provide explanations, in case of non-compliance.²⁵¹ In 2020, there were thirty-eight percent of women on boards of the largest listed Swedish companies by self-regulatory means.²⁵²

Having examined the Swedish approach to governance and gender balance provisions in the Swedish Code on Corporate Governance, the research compares this with gender equality policies and legislation in Iceland.

B GENDER EQUALITY AND WOMEN ON BOARDS IN ICELAND

Iceland has a long history of gender equality. According to Article 65 of the Constitution of the Republic of Iceland, women and men have the same rights. Women gained

²⁴⁹ *ibid.*, 2.1.

²⁵⁰ n 248, 4.1.1.

²⁵¹ n 248 10.1.

²⁵² n 240, EIGE Gender Statistics.

equality much earlier, than in Continental European countries, starting in 1850 with inheritance rights. Women on boards legislation No. 13/2010 was passed in 2010 and entered into force in 2013. Iceland was among the first European countries to enact this legislation. The research shows that the legislation went beyond the minimum harmonisation proposed directive, as it included state-owned and private limited companies (1), and, as a result, the legislation is considered most effective compared to EU national legislation (2).

1. Women on boards in public limited companies in Iceland

The women on boards legislation went beyond the proposed EU directive, and, even the Norwegian legislation, as Iceland called for forty percent of women on boards in public limited companies, as well as in state-owned enterprises and private limited companies with more than fifty employees. According to the Laws on Public Limited Companies No. 2/1995, the legislation concerned companies with more than fifty employees and includes a forty percent women on boards quota in companies with three or more board directors. If the company has more than three board directors, there should not be less than forty percent of women and men on the board. The added amendments in the legislation required companies to report on the percentage of women on boards in their annual financial statements.²⁵³

Having examined gender equality policies and legislation in Iceland concerning governance, it is appropriate to examine the effectiveness of the legislation.

²⁵³ n 24, OECD Statistics, Employment, Female Share of Seats on Boards of the Largest Publicly Listed Companies; Constitution of the Republic of Iceland (1999) <<https://www.government.is/Publications/Legislation/Lex/?newsid=89fc6038-fd28-11e7-9423-005056bc4d74>> accessed 3 September 2019; Audur and Sigurjonsson (n 214) 81; Iceland Legislation, Act Respecting Public Limited Companies No. 2/1995, as Amended up to 1 May 2011 (Amendments as from Act 43/2008 Indicated) (The Law Gazette, 2011) <<https://www.government.is/library/04-Legislation/Act%20No%202-1995.pdf>> accessed 3 September 2019; n 234, Nordic Women on Boards and in Leadership, 19.

2. Effectiveness of the legislation

The legislation has been effective in increasing the representation of women on boards by twenty-five points, which increased the representation of women on boards in public and private limited companies to 44.4 percent in 2020, the highest representation of women on boards in public limited companies in the world.²⁵⁴

Having examined the Swedish approach to governance and gender balance provisions and those of Iceland, it is appropriate to note that there are important differences, as the Swedish approach chose self-regulation, while Iceland chose hard law.

CONCLUSION

Nordic countries started off gender equality soft law policies in employment and on boards, with Norway and Iceland taking the strongest hard law measures. Though, the principal reason that gender equality policies are so effective in these countries is linked to wide-ranging government policies aimed at improving the economy. Nordic countries make use of soft and hard law to increase the representation of women on boards and consider women as an economic resource, which accounts for important productivity gains.²⁵⁵

²⁵⁴ *ibid.*

²⁵⁵ n 234, OECD Report, Nordic Council of Ministers, *Is the Last Mile the Longest? Economic Gains from Gender Equality in Nordic Countries*.

CONCLUSION OF CHAPTER ONE

The notions of gender equality and parity are the basis of understanding the subject of women on boards in public limited companies. The notions comprise diverse regulatory and non-regulatory measures in the European Union, including soft law policies, national law and the proposed directive. Though, Member States recognise Article 157(4) of the TFEU, as the legal basis of equality for women and men,²⁵⁶ many Member States have their own gender equality policies, while other Member States make use of corporate governance codes or pass binding legislation. Several Member States have a limited approach to women on boards in public limited companies. Therefore, despite the recognition of Article 157(4), there is not a standard legal framework for all Member States on the subject of representation of women on boards of directors of public limited companies.

²⁵⁶ *ibid.*

Chapter Two

LEGAL APPROACHES OF GENDER EQUALITY

There are two principal legal approaches of gender equality, which are found in national and EU law. The first approach is the Scandinavian Social Democratic approach, which may be referred to as the Nordic model with leading gender equality policies and legislation. This approach has made the greatest advances in gender equality, with social democratic ideology upholding the following:

- [A] commitment to equality and social solidarity through universal and comprehensive welfare benefits, and a redistributive taxation system
- [A] commitment to a mixed economy; toleration of a relatively large private sector, and full employment as the principal goal of economic policy.
- [A] strong state viewed as benign and desirable in constructing a 'good society' and maximising individual freedom.

With this approach, the state is responsible in guaranteeing a high employment rate, even guaranteeing full employment as economic policy. Though, the other Nordic countries share this policy, they differ somewhat when it comes to corporate governance and women on boards with the use of quotas.²⁵⁷ The social democratic approach supports gender equality policies through the use of soft law, with the exception of Norway, which takes a mixed social democratic and economic resources business approach. Gender equality as an economic and business case argument is founded in European Union law. This case recognises, that, there is a 'large ... consensus in Europe ...that women, given the equal competence, should be equally

²⁵⁷ Fagan, Menendez and Ansón (n 28) 10.

represented in company leadership'.²⁵⁸ Besides the economic and business case, other justification for women on boards are 'the private, individual fairness, equal opportunities and equal qualifications argument; and the general societal, public interest and fundamental rights rationale.'²⁵⁹ These approaches have great influence on women on boards discussions with academicians and government lawmakers today.

Despite this, the women on boards gap continues to widen in the EU Member States. Member States implement vastly different measures or even none at all to increase the representation of women on boards in public limited companies. The European Union is the only authority able to remedy this situation.²⁶⁰ The research shows that, besides the great influence of social democratic principles of gender equality on European Union institutions (Section 1), the EU is committed to sustainable corporate governance principles (Section 2).

SECTION 1 SOCIAL DEMOCRATIC PRINCIPLES OF GENDER EQUALITY

Europe has a history of left leaning governments with active state intervention in economic policies. The Social Democracy approach states that '[e]veryone ... in Norway should have equal opportunities to contribute and to participate in the community,

²⁵⁸ Senden (n 29) 51.

²⁵⁹ *ibid.*

²⁶⁰ European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Gender Balance in Business Leadership: a Contribution to Smart, Sustainable and Inclusive Growth COM (2012) 615 final <<https://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2012:0615:FIN:EN:PDF>> accessed 5 July 2019.; n 202, Credit Suisse Research Institute Report, n 89, McKinsey Report, 12; n 202, Deutsche Bank Research Report.

regardless of gender, ethnic background, sexual orientation and disability'.²⁶¹ Social democracy 'had roots in both the liberal and the socialist and reformist traditions.'²⁶² The Social Democratic principles of the Nordic model is based on an active employment policy, consisting of high taxes, substantial welfare assistance and a centralized government.

Though, through various policy interventions and social reforms, the development in Norway differed from the other Scandinavian countries. Sweden entered the EU, after an economic crisis of 1991-3, but Norway did not. Thus, policies between the Scandinavian countries were not focused on the same outcomes. Sweden was interested in the EU, as an economic saviour, with access to the EU market. Social democratic traditions diverged to an extent with the EU plan for European integration and the fear of the disappearance of a Nordic model. Thus, policies in these countries differ greatly.²⁶³

The Norwegian social-democratic model is based on a long history of employment and social policies, which includes gender equality legislation, established long before binding quota legislation was passed.²⁶⁴ Norwegian public interest in good governance and balanced boards for economic reasons were determining factors, which led to passing binding quota legislation. The research shows the importance of the Norwegian example, as it was the first country to pass women on boards legislation (§1) and the continuing influence of notions, such as, good governance and sustainable corporate governance (§2).

²⁶¹ Norwegian Government Ministry of Equality and Social Inclusion, Social Democratic Principles of Equality (2019) <<https://www.regjeringen.no/en/topics/equality-and-social-inclusion/id922/>> accessed 5 July 2019.

²⁶² Francis Sejersted, 'The Age of Social Democracy. Norway and Sweden in the Twentieth Century' (Book Review, 2011) <<https://reviews.history.ac.uk/review/1184>> accessed 20 March 2020.

²⁶³ *ibid.*

²⁶⁴ European Parliament Report, Colette Fagan, Women on Corporate Boards in Europe (2013); Siri A. Terjesen, Ruth V. Aguilera and Ruth Lorenz, 'Legislating a Woman's Seat on the Board: Institutional Factors Driving Gender Quotas for Boards of Directors' (2015) 128 *Journal of Business Ethics*.

§1: THE WOMEN ON BOARDS PRECURSOR - NORWAY

Norway was the first country in the world to pass women on boards legislation calling for forty percent of women and men on boards. The legislation was passed in 2003 and went into effect in 2008. The research shows that employment and social policies in Norway have always made reference to gender equality (I), though there was a big and historic step to move gender equality legislation to company law (II).

I. EMPLOYMENT AND SOCIAL POLICIES IN NORWAY

The Norwegian employment rate of women is among the highest in the world, with more than seventy percent of women working. The figure is just under that of men. Most women work part-time and in public sector jobs. The research shows the transition from social policy to binding legislation (A), though, there were many obstacles in passing women on boards binding legislation (B).

A. BACKGROUND TO GENDER EGALITARIANISM

Strong social feminism movement in Norway demanded more employment rights, starting in the 1970s. This was led by the Norwegian Party, the 'Women's Front', which influenced gender equality legislation passed in 1978.²⁶⁵ The research points to employment and social policies as key factors, which led to the passing of the women on boards binding legislation (1), though, as a Norwegian economic policy, the Government supported a greater number of women to enter the labour market (2).

²⁶⁵ Norwegian Legislation, The Act Relating to Gender Equality 1978 (1978) <<https://www.regjeringen.no/en/dokumenter/the-act-relating-to-gender-equality-the-/id454568/>> accessed 3 January 2018.

1. Norwegian employment and social policies

Employment and social policies were the leading factors in passing binding quota legislation, as Norway had a very high rate of working women at that time. Binding legislation was more acceptable in Norway and France, than in the UK, because of specific gender equality policies already in place, the historical context and a greater degree of state control of institutions.²⁶⁶

The research has shown that gender egalitarianism was one of the reasons the binding legislation could pass (a), while the Norwegian government controls the major economic and political institutions (b), and called to increase the number of women in the workplace, as the solution to a stable economy (c).

a. Norwegian gender policies

The definition of gender egalitarianism is defined as '... the degree which a collective minimizes gender inequality.'²⁶⁷ Norway leads in gender egalitarianism.²⁶⁸ It is important to note, that Norway, a non-EU Member State,²⁶⁹ was the first country in the world to pass women on boards binding quota legislation. Other explanations may be cited, such as, the social democratic model and understanding how policies and legislation are passed in Norway.²⁷⁰

²⁶⁶ Kilden Gender Research, Ida Roland Birkvad, 'The Secret behind Norway's Gender Quota Success' (Kilden Gender Research, 2016) <<http://kjonnsforskning.no/en/2016/10/secret-behind-norways-gender-quota-success>> accessed 17 March 2019.

²⁶⁷ Norwegian Legislation, Norwegian Gender Equality Act of 1978 and 1981 (2007) <<https://www.regjeringen.no/no/dokumenter/likestillingsloven/id454568/>> accessed 17 March 2019; Norwegian Legislation, The Gender Equality and Discrimination Act, Act of 16 June 2017 no. 51 on Equality and Prohibition of Discrimination (2017) <<https://www.regjeringen.no/no/dokumenter/likestillings-og-diskrimineringsloven/id2583238/>> accessed 17 March 2019.

²⁶⁸ *ibid.*

²⁶⁹ European Commission Statistics, European Economic Area (2020) <[https://ec.europa.eu/eurostat/statistics-explained/index.php/Glossary:European_Economic_Area_\(EEA\)](https://ec.europa.eu/eurostat/statistics-explained/index.php/Glossary:European_Economic_Area_(EEA))> accessed 20 March 2020.

²⁷⁰ Senden (n 29) 52.

b. Egalitarianism and economics

Left leaning governments in Europe hold the belief, that all people, women and men, have the same rights.²⁷¹ These progressive governments hold a greater degree of state control of major economic and political institutions, than in more conservative governments. Therefore, more progressive gender equality policies could be implemented, including the transition to hard law.²⁷²

c. Human capital and a competitive economy

Norway has a long history of gender equality legislation. The Gender Equality Act of 1978 merged with the Equality and Anti-Discrimination Act. This is the foundation of Norwegian gender equality which ensures that women have the same opportunities in professional life.²⁷³

The employment policy to increase the number of women in the workplace was seen as the solution to a stable economy. Human capital represented eighty percent of national wealth in Norway at the time of discussions to pass quota legislation. Binding quota legislation would offer equal opportunities for all Norwegians, based on democratic values and the economy, as a 'modern, competitive economy needs all talents, and the best brains regardless of gender.'²⁷⁴ Economic indicators present an increased number of women, who have entered the workplace over the last 15 years.²⁷⁵

²⁷¹ 'egalitarianism', n., Cambridge Online Dictionary <<https://dictionary.cambridge.org/fr/dictionnaire/anglais/egalitarianism>> accessed 17 March 2019.

²⁷² 'left', n., referring to politics <<https://www.britannica.com/topic/left>> accessed 17 March 2019.

²⁷³ Norwegian Legislation, Equality and Anti-Discrimination Act (2020) <<https://lovdata.no/dokument/NLE/lov/2017-06-16-51>> accessed 17 March 2019.

²⁷⁴ Kirsti Bergstoe, 'Women Mean Business: Why and How Norway Legislated Gender Balance on the Boards of Listed Companies' in Silke Machold and others (eds) *Getting Women on to Corporate Boards, A Snowball Starting in Norway* (1st edn, Edward Elgar Publishing 2013) 21.

²⁷⁵ Statistics Norway, Norway, World Leader in Gender Equality (2003) <<https://www.ssb.no/en/befolkning/artikler-og-publikasjoner/norway-world-leader-in-gender-equality>> accessed 3 June 2022.

2. The Norwegian labour market

Women occupied an important place in Norwegian employment market, based on the employment statistics. According to the 2003 Official Statistics of Norway, at the time of the passing of the binding quota legislation, seventy percent of Norwegian women were employed, including seventy-five percent of married women, compared to seventy-seven percent of men.²⁷⁶ The numbers reveal that, despite the high level of women in employment, the level of women on boards was very low (a). After the binding legislation entered into force, the level of women on boards greatly increased (b).

a. Before binding quota legislation

Before binding quota legislation entered into force, there were nearly four percent of women on boards in Norway in 2002. Despite employment policies to increase the representation of women on boards by soft law means, the numbers remained low. In the past, Norwegian company practice relied on self-regulatory policies, without interference from the State.²⁷⁷

b. After binding quota legislation

In 2009, the participation level of women on boards reached the forty percent objective, due to the hard law.²⁷⁸ Before hard law, figures were at almost four percent of women on boards versus, though, after hard law entered into force, the figures reached forty

²⁷⁶ Norwegian Government Official Statistical Yearbook, Statistical Yearbook of Norway 2003 (Norges offisielle statistikk) Persons in the Labour Force by Sex, Marital Status and Age. Annual average. 2002. <https://www.ssb.no/a/en/histstat/aarbok/2003_en.pdf> accessed 3 January 2018.

²⁷⁷ Teigen (n 119) 70-78.

²⁷⁸ Aagoth Storvik, 'Women on Boards-Experience from the Norwegian Quota Reform' (CESifo DICE Report 1, 2011) <<https://www.ifo.de/DocDL/dicereport111-rm2.pdf>> accessed 3 January 2018.

percent, which was called for in the legislation. Having examined the situation in Norway before women on boards national legislation, it is appropriate to understand the context and difficulties to pass this legislation.

B. OBSTACLES IN PASSING QUOTA LEGISLATION

When quota legislation entered into force, there were suddenly fewer public limited companies in Norway. There were 650 public limited companies, when the legislation was first debated in 2002. By 2006, there were 450 public limited companies and by 2016, there were only 200 public limited companies in Norway.

Women on boards legislation was cited as the reason for the decline. Other reasons were that investors did not want interference in appointing board directors. The research shows that not only the Norwegian business community was against the binding legislation (1), but there was a problem to identify women board directors (2).

1. At the beginning the Government and business against binding legislation

Though Norway has always had a strong egalitarian focus with gender equality legislation, business associations did not believe that there were enough women to become board directors. There were many public debates on the subject. After the legislation entered into force, women were recruited from the same professional networks as men. The question remained why women were not recruited from those networks prior to the legislation.²⁷⁹

Having examined the background to binding legislation, the research examines the Norwegian contradiction.

²⁷⁹ *ibid*, 72; Seierstad and Huse (n 94) 29.

2. The Norwegian contradiction

Norway has one of the highest employment rates of women in the world and the highest when it comes to women in politics. However, Norwegian women have had a very low representation in decision-making positions in companies. The women on boards directive was a breakthrough for women in Norway to participate in economic decision-making on company boards.²⁸⁰

Having examined the situation of a low percentage of the representation of women on boards before binding legislation passed, the research examines the problem to situate the legislation.

II. FROM GENDER EQUALITY LEGISLATION TO COMPANY LAW

Norwegian women on boards legislation was initially placed in gender equality legislation, before moving to company law. The research points out that this type of legislation included the private sector, which until then, had not been part of national law (A) and could not exist on its own without becoming a governance subject, which included strict sanctions (B).

A. GENDER EQUALITY LEGISLATION

The Gender Equality Act was reviewed in 1999. It was at that time when women on boards was first introduced, based on democratic principles that women should be equally represented and as an economic necessity. The argument shifted from a gender equality necessity to that of good corporate governance. This study has found that the

²⁸⁰ Storvik (n 278).

Norwegian legislation passed the Gender Equality Act to reinforce the representation of women on boards for reasons of equality (1), however, the main reason for passing the legislation was to improve the Norwegian economy (2).

1. The Gender Equality Act 2007

The Gender Equality Act 2007 furthered gender equality for women and men. The research examines that Section 13 of the Gender Equality Act 2007, which called for both genders to be included on the boards of directors (a), while the definition of equality was included in the legislation (b).

a. Section 13 of the Gender Equality Act 2007

According to Section 13 of the Gender Equality Act 2007, 'Gender balance on public committees,' legislation called for both genders to be represented, which would apply to public body appointments, committees, governing boards and councils.²⁸¹ The exact number of genders is specified:

- If the committee has two or three members, both genders shall be represented.
- If the committee has four or five members, each gender shall be represented by at least two members.
- If the committee has six to eight members, each gender shall be represented by at least three members.
- If the committee has nine members, each gender shall be represented by at least four members.
- If the committee has more members, each gender shall be represented by at least 40 percent of the members.²⁸²

²⁸¹ n 273; Norwegian Legislation, Equality and Anti-Discrimination Act; Norwegian Legislation, Gender Equality Act (GEA) of 21 June 2013 No. 59 (2014) <<http://www.ub.uio.no/ujur/ulovdata/lov-20130621-059-eng.pdf>> accessed 3 January 2018; n 265, Norwegian Legislation, The Act Relating to Gender Equality (2007) ch. 1, s 1.

²⁸² *ibid.*

The Norwegian Equality Act referred used the wording 'genders', instead of the usual references to women and men.

Having examined Section 13 of the Gender Equality Act 2007, we will look into the definition of equality in the Gender Equality Act 2007.

b. Definition of equality in the Gender Equality Act 2007

According to the Gender Equality Act 2007, equality was defined to mean 'equal status, equal opportunities and rights, accessibility and accommodation.'²⁸³ The legislation cited both genders and is regarded as positive action legislation. Norway allowed for lawful differential treatment, which was not in conflict with the definition of equality. Lawful differential treatment is positive action. Discrimination on the basis of gender is forbidden.²⁸⁴ The Gender Equality Act 2007 is an example of positive action policies and characteristic of Norwegian law.²⁸⁵

Having examined Section 13 of the Gender Equality Act 2007 and the definition of equality in the Gender Equality Act 2007, we shall examine the economic and business reasons for binding legislation.

2. The economic and business argument for women on boards

Norway did not pass binding women on boards quota legislation only for upholding individual rights of women or for other social democratic reasons, but for economic reasons, as Norwegian women would contribute to the workplace and business, which

²⁸³ *ibid.*

²⁸⁴ *ibid.*, ch. 2, 5-7.

²⁸⁵ Teigen and Skjeie (n 109) 125-126.

would bring financial benefits to Norway.²⁸⁶ This legislation was aimed at improving the position of women in the Norwegian economy, but also, for economic reasons.

Having analysed examined Section 13 of the Gender Equality Act 2007 and the definition of equality in the Gender Equality Act 2007, including the reasons for binding legislation, it is necessary to consider the effectiveness of the legislation.

B. THE EFFECTIVENESS OF THE NORWEGIAN LEGISLATION

The Norwegian quota legislation applies to state-owned companies, inter-municipal enterprises and public limited companies. The legislation has been effective in increasing the representation of women on boards due to the severe sanctions. The representation of women on boards rapidly increased, from seven percent in 2002 to over forty percent in 2020.²⁸⁷ The research points out that Norwegian quota legislation has been questioned by legislators and academicians about regulating women on boards (1), though, the unique regulation in Norway led to the drafting of the proposed directive and also influenced Member States drafting of national legislation (2).

1. Regulation in the private sector

Binding quota legislation in Norway was not automatically accepted, even if Norway has a tradition of using quotas. The introduction of quota legislation to regulate the representation of women on boards in public limited companies created a debate among EU Member States legislators and academicians. The Norwegian legislation led to the proposed directive and binding quota legislation in France and Germany. The

²⁸⁶ Morten Huse, 'The Political Process behind the Gender Balance Law,' in Silke Machold, Morten Huse, Katrin Hansen, and Marina Brogi (eds) *Getting Women on to Corporate Boards, A Snowball Starting in Norway* (1st edn, Edgar Elgar, 2013) 13.

²⁸⁷ Seierstad and Huse (n 94) 12; n 24, OECD Statistics, Employment, Female Share of Seats on Boards of the Largest Publicly Listed Companies.

Norwegian legislation has had tremendous influence in corporate governance worldwide.²⁸⁸

Having examined how a government can regulate women on boards in the private sector, the research seeks to understand the Norwegian unique legal environment.

2. The Norwegian unique legal environment

Norway was the first country to pass binding women on boards legislation. The legislation influenced EU Member States to take action and turn to legislative measures. The Norwegian example is unique. Member States have passed their own legislation, which included diverse quota targets. The Norwegian legislation sets the quota at forty percent. The Norwegian political environment and legal systems are anchored in a long history of gender equality, which led to Norwegian binding quota legislation.²⁸⁹

Having examined regulating women on boards in the private sector and the Norwegian unique legal environment, we will turn to women on boards, as an EU economic policy.

§2: WOMEN ON BOARDS AND EU ECONOMIC POLICY

Increasing the number of women in the workforce is an economic EU policy. The gender equality policies are intended to increase the participation of women in the

²⁸⁸ n 234, Eurofound Report, Government Proposes Gender Quotas on Company Boards (2003); French Government Ministry of Equality between Women and Men, Gender Equality, A Norwegian Lesson (2018) <<https://www.egalite-femmes-hommes.gouv.fr/?s=conseils+d%27administration>> accessed 3 January 2018; Huse (n 286) 13.

²⁸⁹ Silke Machold, 'Institutionalizing Women's Representation on Boards: an Introduction to the Advocacy Movement' in Silke Machold, Morten Huse, Katrin Hansen, and Marina Brogi (eds) *Getting Women on to Corporate Boards, A Snowball Starting in Norway* (1st edn, Edgar Elgar, 2013) 33.

labour market and to contribute to economic growth in the EU. With a greater number of women entering the labour market, more than 10.5 million jobs will be created by 2050, which will increase GDP by 10 percent. '[P]romoting gender equality and...the different perspectives of women and men into the policy areas of [the] labour market ... is essential ... for smart, sustainable and inclusive growth'.²⁹⁰ Macroeconomic indicators have shown an increase of the number of women entering the workforce and an increase of the representation of women on boards will have a positive effect on GDP to offset an ageing and retiring workforce in the Member States.²⁹¹ The research has found that EU strategic soft law policies set to increase the representation of women on boards, as a means to improve the EU economy (I), while, EU institutions worked on modernising the legal framework of corporate governance policies and legislation to unify the single market (II).

I. ECONOMIC DECISION-MAKING AND WOMEN ON BOARDS

The European Commission has been discussing the subject of women on boards, as a means to improve the economy since 2010, calling on companies in Member States to include women on boards targets and to increase the representation of women in research, by twenty-five percent and forty percent on committees.²⁹² The Europe 2020 Strategy specifically calls for increasing the representation of women in decision-making positions. 'In economic decision-making, the proportion of women is lower than that of men...Women represent only one in ten board directors of the largest publicly listed companies in the EU.'²⁹³

²⁹⁰ n 46, EIGE Report, Economic Benefits of Gender Equality in the European Union.

²⁹¹ *ibid.*

²⁹² European Commission Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Strategy for Equality Between Women and Men 2010-2015 COM (2010) 491 final, 3 <<https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0491:FIN:EN:PDF>> accessed 2 October 2018.

²⁹³ *ibid.*, 7.

The research shows that women on boards are founded in the economic and business argument (A), and positive action legislation to increase the representation of women on boards (B).

A. THE ECONOMIC GENDER EQUALITY ARGUMENT

The economic gender equality argument sustains that by increasing the representation of women in the labour market and on company boards, the EU will become a more competitive market. This macroeconomic framework to increase the economic growth rate in the EU²⁹⁴ identified women as the solution. Though, women face a glass ceiling, which stops them from becoming economic decision-makers on boards. This slows down economic growth in the European Union. The lack of women in decision-making positions has widened the gap, to the point, that it will be too late in certain EU Member States. In the Europe 2020 Strategy, the European Commission called for an ambitious increase to seventy-five percent of the employment rate from the existing sixty-four percent to keep the European Union competitive in the global market. The Europe 2020 Strategy targets a greater number of women to join the labour market. Special programmes would be created to keep women in the labour market, as well as to accompany them to reach top-management positions.

EU soft law policies have allowed Member States to regulate their own labour markets and women on boards policies. However, diverse national rules and lack of rules will have a negative effect on the EU internal market. The lack of a standard policy could create legal uncertainty and conflicting rules between the Member States over gender equality policies and hard law.²⁹⁵

²⁹⁴ n 41, European Commission Report, Women in Economic Decision-Making in the EU, Progress Report. A Europe 2020 Initiative (2012) 9.

²⁹⁵ *ibid.*

EU institutions favour increasing the number of women in the workplace and the representation of women on boards, which would increase GDP in the Eurozone by between 14 and 45 percent.²⁹⁶ The study has revealed that macroeconomic performance indicators point to reasons to worry about the EU economy (1), as a result, EU institutions support all means to improve the failing EU economy (2).

1. The European Union and the economy

The European Commission strategy to boost the economy coincided with increasing the number of qualified women in the workforce. This increase would compensate for labour shortages and a decreasing birthrate in Europe. The economic gender equality argument²⁹⁷ is founded in the poor performance of the European Union economy, with financial crises, an ageing population and a shortage of qualified labour.²⁹⁸

Having examined the EU and economy, the research examines EU economic policy with the Europe 2020 employment strategy.

2. The Europe 2020 employment strategy

EU institutions launched the Europe 2020 Strategy to strengthen the EU economy, by increasing the employment rate, with a large number of women entering the workforce, including in decision-making positions. The Strategy has been effective in several Member States.²⁹⁹ The Strategy set out to 'develop ... a smarter, knowledge-based,

²⁹⁶ Löfström (n 28) 26.

²⁹⁷ European Commission Press Release, More Women in Top Jobs Key to Economic Growth, IP/10/362 (Brussels, 25 March 2010) <https://ec.europa.eu/commission/presscorner/detail/en/IP_10_362> accessed 17 March 2019.

²⁹⁸ European Commission Memo, EC Commissioner Reding Welcomes the European Parliament's Strong Support for More Women in Economic Decision-Making Positions, MEMO/11/487 (Brussels, 6 July 2011) <https://ec.europa.eu/commission/presscorner/detail/en/MEMO_11_487> accessed 17 March 2019.

²⁹⁹ EuroStat, Europe 2020 Indicators – Employment (EuroStat, 2014) <<https://ec.europa.eu/eurostat/data/browser/view/tesem010/default/table?lang=en>> accessed 4 June 2022.

greener economy, growing fast and sustainably, creating high levels of employment and social progress.’³⁰⁰

The research shows that EU institutions called on a higher level of employment of women in the labour market and on boards by 2020 (a), while the EU Commission created an EU-wide database of boardable women to prepare an increase in the representation of women on boards in public listed companies (b).

a. An employment rate of 75 percent by 2020

The EU employment rate was planned to increase to 75 percent by 2020, as more than 24 million people were leaving the work force in all sectors. There were increasingly more women employed in all the EU Member States, except for Romania and Hungary.³⁰¹ The objective was to encourage more women to enter the workforce, including the representation of women in decision-making positions.³⁰² The Commission advanced that increasing the representation of women on company boards would increase profitability, which would lead to EU economic growth.³⁰³ However, the 75 percent objective was not reached in 2020.

Overall, in 2013 the EU was 6.6 percentage points below its target value of 75 %, to be met by 2020...[T]he European Commission expects the EU employment rate to only reach about 72 % in 2020. Even if all countries were to meet their national Europe 2020 targets, the overall EU employment rate would only grow to 74 %, just below the 2020 target. To reach the 75 % target an extra

³⁰⁰ Eurostat Statistics, EU 2020 Strategy (2020) <https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Glossary:EU_2020_Strategy> accessed 13 July 2020.

³⁰¹ *ibid.*

³⁰² European Commission Policies, EU Action to Promote Gender Equality in Decision-Making (2020) <https://ec.europa.eu/info/policies/justice-and-fundamental-rights/gender-equality/equality-between-women-and-men-decision-making/eu-action-promote-equality-decision-making_en_> accessed 13 July 2020; Jensen (n 3) 23.

³⁰³ European Commission Report, EC Justice Commissioner Reding Challenges Business Leaders to Increase Women’s Presence on Corporate Boards with Women on the Board Pledge for Europe (2011) <https://ec.europa.eu/commission/presscorner/detail/en/MEMO_11_124> accessed 5 July 2019.

16 million people would need to enter employment [and] require greater use of the potential labour force, including women...³⁰⁴

After considering the EU employment rate, the research examines the calculation of numbers of boardable women.

b. Qualified and boardable women

According to the European Commission, women continued to be underrepresented on corporate boards in 2011 in the EU³⁰⁵, although sixty percent of university degree holders were women.³⁰⁶ More than 7000 qualified and boardable women were identified across Europe at the time. Therefore, the argument that there were no qualified women is disputed.³⁰⁷ Trade unions called on the European Commission for '[m]ore effort to achieve gender equality at work with legislation and policies' to increase the representation of women on boards'.³⁰⁸ According to the unions, women made up a large percentage of the workforce, therefore, they should be represented on boards.³⁰⁹ The unions were among the first to call for the increase of the representation of women on boards and before the financial crisis in 2008. In 2005, they were the first to call for an increase in the representation of women on boards in the largest public limited companies in EU Member States.³¹⁰ According to Article 7 of the ETUC Manifesto, the priority is to have women represented at the top level of decision-making positions of companies.³¹¹

³⁰⁴ n 299, EuroStat, Europe 2020 Indicators – Employment.

³⁰⁵ n 89, McKinsey Report, 4.1.3.

³⁰⁶ *ibid.*

³⁰⁷ n 29, Proposal for a Directive, 7; n 89, McKinsey Report, 4.1.3.

³⁰⁸ European Trade Union Confederation (ETUC Manifesto, Brussels, 2019) Article 7.

³⁰⁹ *ibid.*

³¹⁰ n 202, EU Law, Opinion of the European Economic and Social Committee on the Proposal for a Directive of the European Parliament and of the Council on Improving the Gender Balance among Non-Executive Directors of Companies Listed on Stock Exchanges and Related Measures, 68–76.

³¹¹ n 89, McKinsey Report, 4.1.3.

Having analysed EU economic policy with the Europe 2020 employment strategy and boardable women, the research turns to women on boards positive action legislation.

B. WOMEN ON BOARDS POSITIVE ACTION LEGISLATION

According to the McKinsey Report on Gender Diversity, it was predicted that greater numbers of women will access decision-making positions on corporate boards, which will serve for a more competitive and stronger Europe. The business case argument was developed in the McKinsey Report, affirming that an increase in the representation of women on boards contributes to economic competitiveness.³¹²

EU institutions policy recommendations encourage Member States to include positive action programmes and increase the number of women in the workforce.³¹³ It is necessary to point out that Article 1 of Council Recommendation of 13 December 1984 called for the use of positive action policies to increase competitiveness in the EU (1), while Article 4 of Council Recommendation called for more specific positive action, with specific reference to women on boards (2).

1. Article 1 of Council Recommendation of 13 December 1984

The Article called for positive action measures to include women in the workplace. According to Article 1 of the Council Recommendation of 13 December 1984³¹⁴ on the promotion of positive action for women, EU Member States should promote equal

³¹² *ibid.*

³¹³ n 225, Eurofound.

³¹⁴ n 190, European Commission (EC), Council Recommendation of 13 December 1984 on the Promotion of Positive Action for Women, 1b; EU Law, n 195, Council Recommendation of 2 December 1996 on the Balanced Participation of Women and Men in the Decision-Making Process 96/694/EC (1996) OJ L319, 0011-0015 <<https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31996H0694:EN:HTML>> accessed 5 July 2019.

opportunities for women and implement positive action to keep the European Union economically competitive.

According to Article 1 of the Recommendation, adoption of non-binding specific and general positive action policies for women in the workplace are called for to comply with national law.³¹⁵

Having examined EU positive action recommendations, the research investigates Article 4 of Council Recommendation of 13 December 1984, calling for active participation of women in decision-making positions.

2. Article 4 of Council Recommendation of 13 December 1984

Article 4 of Council Recommendation of 13 December 1984 called for women to be included on the boards of directors. According to Article 4 of the Recommendation, 'active participation by women in decision-making bodies, including those representing workers, employers and the self-employed'³¹⁶ is the first EU legislation calling on Member States to include women in decision-making bodies. Then, twelve years later, the Council issued Recommendation 96/694/EC of 2 December 1996, calling for the 'balanced participation of women and men in the decision making process'.³¹⁷

Having examined EU recommendations calling for the active participation of women in decision-making positions, the research considers the importance of the role of corporate governance in the EU economy.

³¹⁵ n 190, European Commission (EC), Council Recommendation of 13 December 1984 on the Promotion of Positive Action for Women, Article 1.

³¹⁶ *ibid*, Article 4.

³¹⁷ n 314, EU Law, Council Recommendation of 2 December 1996 on the Balanced Participation of Women and Men in the Decision-Making Process, 0011-0015.

II. CORPORATE GOVERNANCE AND THE EUROPEAN UNION ECONOMY

Following a series of financial crises, the European Union worked towards modernising the legal framework of corporate governance policies, regulations, which were more transparent practices to keep the EU economy competitive. EU institutions decided on intervention to find a solution to legally harmonise company law in the Member States to unify the single market and assure shareholders.³¹⁸ Company law, especially the rules concerning the board of directors and reporting remain different at national level. The subject of board composition and good corporate governance are of interest to stakeholders and investors.³¹⁹ Though board structures in Member States differ, the composition of the board, which include non-executive directors, are central to effective company supervision and governance.³²⁰

The European Commission investigated corporate governance practices in the Member States on a microeconomic and macroeconomic level, always with a view to assure a competitive European Union to shareholders and stakeholders.³²¹ The research has found that while the European Union issued corporate governance policies, such as, Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 calling for companies to include a corporate governance statement in the management report, including a diversity policy (A), there are different corporate governance approaches to women on boards in the Member States (B).

³¹⁸ European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Action Plan: European Company Law and Corporate Governance - a Modern Legal Framework for more Engaged Shareholders and Sustainable Companies, COM (2012) 740 <<https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A52012DC0740>> accessed 5 July 2019; European Commission Memo, A Comprehensive EU Response to the Financial Crisis: Substantial Progress Towards a Strong Financial Framework for Europe and a Banking Union for the Eurozone (2014) <https://ec.europa.eu/commission/presscorner/detail/en/MEMO_14_244> accessed 5 July 2019.

³¹⁹ *ibid.*

³²⁰ *ibid.*, 2.1.

³²¹ Magnier and Rosenblum (n 1) 282.

A. EUROPEAN UNION CORPORATE GOVERNANCE POLICIES

According to Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013, the legislation requires public and private limited liability companies to issue a corporate governance statement, included in the management report with the following:

- The relevant corporate governance codes applied
- Corporate governance practices which go beyond national law
- Where there is non-compliance with a code, the comply or explain principle shall apply, with the description of the code and reasons for non-compliance
- Reporting of the supervisory and management boards and committees, including details of the members.
- The company diversity policy on the supervisory and management board should include gender. The word gender is used in the directive. The objectives of the diversity policy and results. If the company has no diversity policy, a reason should be provided in the Annual Corporate Governance Report to be compliant with Directive 2006/43/EC.³²²

The study has found there are different corporate governance approaches (1), and women on boards may be referred to in different terms in corporate governance (2).

1. Corporate governance approaches

EU Member States have different corporate governance rules, due to their legal and political situations. EU institutions have not called for a common code, but have made recommendations for Member States to use the comply or explain principle in their corporate governance codes, as a way to converge company practices.³²³ For those

³²² EU Law, Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the Annual Financial Statements, Consolidated Financial Statements and Related Reports of Certain Types of Undertakings, Amending Directive 2006/43/EC of the European Parliament and of the Council and Repealing Council Directives 78/660/EEC and 83/349/EEC (2013) OJ L182, 19-76, Article 20, Corporate Governance Statement <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32013L0034>> accessed 20 March 20 2020.

³²³ n 12, European Commission, The EU Corporate Governance Framework (Green Paper).

Member States using corporate codes, the comply or explain principle may be useful in comparing the results of certain elements in company reporting, such as the composition of board directors.

The EU focus on transparency and board disclosure was part of the 2012 Action Plan, which called for companies in the Member States to disclose their corporate board and management policies. Though, public limited companies may have single boards, two-tier board systems or a mixed system in the EU, the Commission accepted all of the different systems.³²⁴

Having explored the different corporate governance approaches, the research examines corporate governance and women on boards policies.

2. Governance and women on boards policies

The European Commission focused especially on the composition of the board. It is an accepted notion that the selection of board directors determines the governance of a company. The board of directors refers to the supervisory board and includes non-executive directors, who are independent from the management of a company.³²⁵

According to Article 1.1 of the Green Paper, the board should include non-executive board directors, who are selected based on diversity and other characteristics.³²⁶ The term diversity, indirectly refers to women on boards, per the recommendations of the Green Paper.

³²⁴ European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, A Union of Gender Equality Strategy 2020-2025, 2.1.

³²⁵ n 12, European Commission, The EU Corporate Governance Framework (Green Paper).

³²⁶ *ibid.*

Having examined explained governance and women on boards policies, the research examines corporate governance principles and approaches.

B. CORPORATE GOVERNANCE PRINCIPLES AND APPROACHES

The Commission called for greater diversity on boards, stating that a lack of diversity has led to groupthink, which is considered one of the principal reasons the financial crises occurred.³²⁷ According to the Green Paper 2011,³²⁸ diversity on boards leads to increased transparency. The diversity initiative would be implemented, in parallel with the women on boards proposed directive, which proposes to increase the representation of women on boards, as non-executive directors of public limited companies,³²⁹ and advocate change.³³⁰

The research has found the OECD Principles of Corporate Governance rules and procedures for decision-making in companies very important (1), as well as the Cadbury Report, which established recommendations for companies to avoid governance risks (2).

1. OECD Principles and corporate governance rules

EU Member States adhere to OECD principles, as reflected in the corporate governance codes.³³¹ There are two approaches to corporate governance rules, the Cadbury Report with a standard of corporate governance rules and the OECD Principles, which take a

³²⁷ n 22, UK Government, Department for Business, Innovation & Skills, Women on Boards (2011) 8.

³²⁸ n 12, European Commission, The EU Corporate Governance Framework (Green Paper).

³²⁹ *ibid.*

³³⁰ Beate Sjøfjell and Irene Lynch Fannon, 'Corporate Sustainability: Gender as an Agent for Change?' in Beate Sjøfjell and Irene Lynch Fannon (eds) *Creating Corporate Sustainability: Gender as an Agent for Change* (1st edn, Cambridge University Press, 2018) 307.

³³¹ OECD Report, Bill Witherell, 'Corporate Governance and Responsibility Foundations of Market Integrity' (2002) <<http://search.oecd.org/daf/ca/corporategovernanceprinciples/1840502.pdf>> accessed 5 July 2019.

broader corporate governance rule approach, which include ‘...rights and responsibilities among the...participants in the organisation– such as the board, managers, shareholders and other stakeholders– and lays down the rules and procedures for decision-making’.³³² Having examined the approaches, the research examines the importance of governance, as found in OECD Principles and Cadbury Report.

2. The Cadbury Report and OECD Principles

The Cadbury Report uses the term ‘managed and controlled’ companies, while the OECD Principles refer to ‘directed and controlled’ companies. The Cadbury Report are recommendations for companies to follow to avoid governance risks and includes rules for the board of directors. Corporate governance does not consist of a single-fixed definition, but may include different theories and systems of governance.³³³ The different legal theories interact with the economy to define the rules which will develop in the future. This interaction explains the governance system and business practices in place in the Member States.³³⁴

Having examined corporate governance as found in OECD Principles and the Cadbury Report, the research examines the interaction of women on boards policies and sustainable corporate governance.

³³² ‘corporate governance’, n, OECD, 2005 <<https://stats.oecd.org/glossary/detail.asp?ID=6778>> accessed 3 January 2018.

³³³ OECD Report, Maria Maher and Thomas Andersson, ‘Corporate Governance: Effects on Firm Performance and Economic Growth’ (1999) 25 <<https://www.oecd.org/sti/ind/2090569.pdf>> accessed 14 January 2021.

³³⁴ Nina K. Cankar, Simon Deakin and Marko Simonetti, ‘Law and Economics Approaches to Corporate Governance’ (2009) 1(2) *LeXonomica - Journal of Law and Economics* 167.

SECTION 2 WOMEN ON BOARDS AND SUSTAINABLE CORPORATE GOVERNANCE

The European Union is committed to supporting a progressive sustainable corporate governance policy. Equality in decision-making has been a priority of the EU, as included in the Strategic Engagement for Gender Equality 2016-2019.³³⁵ Moreover, it will be demonstrated that, in the Report Modernising Company Law and Enhancing Corporate Governance in the European Union, the EU recognised that the Member States have different corporate governance systems (§1), while diverse corporate governance systems are also part of wider gender equality policies in the Member States (§2).

§1: CORPORATE GOVERNANCE SYSTEMS AND COMPANY LAW

According to the Report Modernising Company Law and Enhancing Corporate Governance in the European Union,³³⁶ the Commission recognised that EU Member States have different corporate governance systems, along with distinct company law requirements. The research shows that there are consequences when different company law and corporate governance exists (I), while EU institutions started to

³³⁵ European Commission Report, Towards a Sustainable Europe by 2030 (2017) 82 <https://ec.europa.eu/info/sites/default/files/rp_sustainable_europe_30-01_en_web.pdf> accessed 17 March 2019; European Commission Communication, Strategic Engagement for Gender Equality 2016-2019 (2015) <https://ec.europa.eu/anti-trafficking/eu-policy/strategic-engagement-gender-equality-2016-2019_en> accessed 17 March 2019.

³³⁶ European Parliament Communication from the Commission to the Council and the European Parliament - Modernising Company Law and Enhancing Corporate Governance in the European Union - A Plan to Move Forward (2003) <<https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52003DC0284>> accessed 17 March 2019.

include corporate social responsibility principles to interact with company operations (II).

I. IMPLICATIONS OF DIFFERENT COMPANY LAW AND CORPORATE GOVERNANCE

According to UN Guiding Principles, corporate law governs corporate governance codes to bring about change and determine how a business is carried out. Though, according to the Principles ' there is a lack of clarity in corporate and securities law, regarding what [l]aws and policies in this area should provide ... with due regard to the role of existing governance structures such as corporate boards.³³⁷ EU Member States have a disjointed approach of women on boards in company law and corporate governance. The legal consequences result in a weakening of the European Single Market, which also leads to economic consequences. Gender equality and women on boards should be legislated at EU level with the women on boards directive, which considers the different approaches, but sets a minimum harmonisation standard.

Member States have different company laws and approaches to corporate governance, which may prove damaging to the largest European multinationals, who establish subsidiaries and invest EU cross-border.³³⁸ The study shows a few corporate governance theories related to women on boards (A), however, corporate governance codes include direct and indirect reference to women on boards (B).

A. THEORIES OF CORPORATE GOVERNANCE

There are two corporate governance theories, which demonstrate opposite approaches and concern the importance of increasing the representation of women on boards. The Agency Theory infers, that it would not make a difference, whether there were more

³³⁷ United Nations Human Rights Report, Guiding Principles on Business and Human Rights (2011) 10.

³³⁸ n 118, European Commission Press Release, Questions and Answers: Proposal on Increasing Gender Equality in the Boardrooms of Listed Companies.

women on boards or not. Whereas, the Stakeholder Theory takes the position that companies benefit from increasing the representation of women on boards. The board of directors is composed of non-executive board directors, influenced by shareholders and stakeholders.³³⁹ The Agency Theory supports the owners of the company and focuses on the rules of the company (1), while the Institutional Theory states that economic and political institutions play a role in the decision-making process in governance of companies (2) and the Stakeholder Theory includes all partners internally and externally, influenced by corporate social responsibility (3).

1. The Agency Theory

The Agency Theory is a corporate governance instrument, which monitors activities of the board of directors, to support the company owner(s), the principal, directors, managers, and agents, with the objective to avoid crises. The directors assure that company rules are enforced, so as to avoid agency costs from abuse of power and agent opportunism.³⁴⁰

According to the EC Recommendation 8,

... to ensure that the management function will be submitted to an effective and sufficiently independent supervisory function, the (supervisory) board should comprise a sufficient number of committed nonexecutive or supervisory directors, who play no role in the management of the company or its group and who are independent in that they are free of any material conflict of interest. In view of the different legal systems existing in Member States, the proportion of (supervisory) board members to be made up of independent directors should not be defined precisely at Community level.³⁴¹

³³⁹ Claude Francoeur, Réal Labelle, and Bernard Desgagné Sinclair, 'Gender Diversity in Corporate Governance and Top Management' (2008) 81(1) *Journal of Business Ethics* 83-95 <<https://www.jstor.org/stable/25482199?seq=1>> accessed 20 March 2020.; C. Fagan, M. González Menéndez and S. Gómez Ansón (n 24) 7.

³⁴⁰ Christine A. Mallin, *Corporate Governance* (3rd edn, Oxford University Press, 2010) 15.

³⁴¹ n 207, Commission Recommendation of 15 February 2005 on the Role of Non-Executive or Supervisory Directors of Listed Companies and on the Committees of the (Supervisory) Board, Recommendation 8.

Non-executive board directors do not have the same behaviour, as management directors, who may not put the interest of the shareholder first.³⁴² According to the Agency Theory, independent directors assure to look after shareholders' interests. The representation of women on boards may be perceived, as very important to shareholders. One disadvantage of very large public limited companies is that the ownership is spread out. This may lead to a greater loss of control of the governance of the company. When there are too many shareholders, there is little knowledge of how the company is run and a greater distance from the non-executive board directors. Shareholders may not be concerned about company operations or the non-executive directors. Therefore, the agency theory may reveal, that in a large company, the shareholders may be less interested in the composition of the board of directors and the representation of women on the boards of directors and more interested in financial returns.³⁴³

Having examined the Agency Theory of corporate governance and how it interacts with women on boards, the research shall examine the Institutional Theory.

2. The Institutional Theory

According to the Institutional Theory, institutions and their specific governance may influence decision-making processes. This may include governmental institutions of a country and their economic and political institutions. Greater representation of women on boards would have an influence on the economy, which then could be explained by the changed perception of how investors see companies. The institutional theory holds

³⁴² R. V. Aguilera and others, 'An Organizational Approach to Comparative Corporate Governance: Costs, Contingencies, and Complementarities' (2008) 19(3) *Organization Science* 475-492 <https://openaccess.city.ac.uk/id/eprint/6210/5/OS-06-1222_paper_FINAL.pdf> accessed 20 March 2020.

³⁴³ *ibid.*

that 'organizations are strongly influenced by external belief systems that construct the way in which an organization behaves and how it is understood.'³⁴⁴

Having examined the Institutional Theory and interaction with women on boards, the research shall examine Outsider and Insider Market-based Systems, as well as the Stakeholder Theory.

3. Outsider/Insider Market-based Systems and the Stakeholder Theory

EU Member States have diverse corporate governance structures. This includes differences in ownership and control of companies, which is determined by the degree of ownership, control and identity of shareholders.³⁴⁵ Outsider market based systems are³⁴⁶ characterized by developed and strong financial markets in liberal market economies,³⁴⁷ with focus on shareholders rights.³⁴⁸ The shareholder model of corporate governance is a formal relationship between the management of a company and the shareholders. The shareholder model is a more restricted relationship, as it is focused on creating value for shareholders, though, it may acknowledge that business practices of a company, ethics and stakeholder involvement play a positive role.³⁴⁹ The outsider system is principally interested in maximising return to investors. This system

³⁴⁴ J Goldenstein and P Walgenbach, 'An Institutional Perspective on Open Strategy: Strategy in World Society' in D. Seidl, G. von Krogh and R. Whittington (eds) *Cambridge Handbook of Open Strategy* (1st edn, Cambridge University Press online, 2019) 294 <<https://www.cambridge.org/core/books/cambridge-handbook-of-open-strategy/an-institutional-perspective-on-open-strategy-strategy-in-world-society/0C9DCBFDF0DA25958E6452732FF28900>> accessed 5 July 2019; Val Singh, Susan Vinnicombe and Siri Terjesen, 'Women Advancing onto the Corporate Board' in *Handbook of Women in Business and Management*, Diana Bilimoria and Sandy Kristin Piderit (eds) (1st edn, Edward Elgar Publishing Ltd, 2007) 319.

³⁴⁵ n 333, OECD Report, n 2.

³⁴⁶ *ibid.*

³⁴⁷ Howard Gospel and Andrew Pendleton, 'Finance, Corporate Governance and the Management of Labour: A Conceptual and Comparative Analysis' (2003) 41(3) *British Journal of Industrial Relations* 11.

³⁴⁸ J. Siepeland and P. Nightingale, 'Anglo-Saxon Governance: Similarities, Difference and Outcomes in a Financialised World' (2014) 25(1) *Critical Perspectives on Accounting* 27-35.

³⁴⁹ 'shareholder primacy', Corporate Finance Institute (2015) <<https://corporatefinanceinstitute.com/resources/knowledge/other/what-is-shareholder-primacy/>> accessed 5 July 2019.

is not interested in the running of the company, as the interest is on financial returns. UK corporate governance is based on this theory.³⁵⁰ This theory would not consider the subject of women on boards, as value for shareholders, since it has a restricted view of value, which is mainly focused on financial returns.

An insider market based system is characterized by a weaker financial market and coordinated market economies, as found in most continental European countries. The insider market based model shows that the control of the company and ownership are held by a small group of insiders with long term relationships with the company.³⁵¹ Most EU Member States governance is based on the stakeholder theory.³⁵² The influence of stakeholders is a great concern to companies with a stakeholder approach. Stakeholders are defined as '... contractual partners such as employees, suppliers, customers, creditors, and social constituents such as members of the community in which the firm is located, environmental interests, local and national governments, and society at large'.³⁵³ As corporate governance relies on interactions between the company and stakeholders, good corporate governance consists of financial responsibility and being concerned with the composition of the board of directors, who are accountable to shareholders and stakeholders. The company acts in the interests of its stakeholders and would communicate to investors, who are taking more interest in gender diversity on boards of directors.³⁵⁴ Therefore, women on boards has become

³⁵⁰ Michael C. Jensen, A Theory of the Firm: Governance, Residual Claims and Organizational Forms (1976) 3(4) *Journal of Financial Economics* 305-360 <https://www.jstor.org/stable/725104?read-now=1&refreqid=excelsior%3A9918e4a9b3e886645e963617ae379120&seq=1#page_scan_tab_contents> accessed 5 July 2019; Eugene F. Fama and Michael C. Jensen. 'Separation of Ownership and Control' *The Journal of Law & Economics* (1983) 26(2) (University of Chicago Press, Booth School of Business, University of Chicago, University of Chicago Law School) 301-25 <<http://www.jstor.org/stable/725104>> accessed 5 July 2019.

³⁵¹ OECD Report, Stilpon Nestor and John K. Thompson, 'Corporate Governance Patterns in OECD Economies: Is Convergence Under Way?' (2000) 9 <<https://www.oecd.org/corporate/ca/corporategovernanceprinciples/1931460.pdf>> accessed 5 July 2019.

³⁵² S. Turnbull, 'Corporate Governance: Its Scope, Concerns and Theories' (1997) 5(4) *Corporate Governance: An International Review* 180-205.

³⁵³ Maher and Andersson (n 333) 25.

³⁵⁴ n 14, OECD Principles of Corporate Governance; n 89, McKinsey Report, 4.1.1.

of great interest to stakeholders. Women on corporate boards is an indicator, that companies are more socially responsible and progressive.³⁵⁵ The corporate image of the company and corporate social responsibility approach based on gender equality improves relationships with investors.³⁵⁶ Furthermore, investors are composed of women. As consumers, women make up more than 70 percent of purchasing decisions.³⁵⁷

In essence, the insider market based system includes stakeholders though, part of the shareholder model.³⁵⁸ The research focus of women on boards is part of the stakeholder model, which upholds that women on boards influence corporate governance.³⁵⁹ Though, this may be the case, stakeholder theories are not the focus of the research.

Having examined several corporate governance theories and how they interact with women on boards, the research examines the use of soft law, corporate governance codes in the EU Member States.

B. CORPORATE GOVERNANCE CODES IN EU MEMBER STATES

Corporate governance codes play a significant role in the representation of women on boards. The findings in the Report Modernising Company Law³⁶⁰ found there was a considerable degree of convergence within EU Member States and corporate

³⁵⁵ *ibid.*

³⁵⁶ *ibid.*, McKinsey Report, 4.1.1.

³⁵⁷ *ibid.*

³⁵⁸ Maher and Andersson (n 333) 25, 27-28.

³⁵⁹ S Terjesen S, R Sealy R and V Singh, 'Female Presence on Corporate Boards: A Multi-Country Study of Environmental Context' 83(1) (Journal of Business Ethics, 2008) 57.

³⁶⁰ n 336, European Parliament Communication from the Commission to the Council and the European Parliament - Modernising Company Law and Enhancing Corporate Governance in the European Union - A Plan to Move Forward.

governance codes. Companies are obliged to include a corporate governance statement in their management reports. This shared and common approach among the Member States includes the comply or explain principle, reporting of the supervisory and management boards/committees and company diversity policy.³⁶¹ Therefore, despite different board structures and codes, corporate governance disclosure requirements converge to an extent.³⁶² The research has found, that, if the company does not comply with the provisions, the comply or explain principle will apply (1) and, non-executive directors have a responsibility to the company, though they are not employed by the company (2).

1. Non-compliance with code provisions

When a company is non-compliant with national law measures or with code provisions, the comply or explain principle shall apply. Though, governance codes are limited, as they remain soft law recommendations. Several Member States have limited corporate governance codes, which do not directly address gender. For example, in the Malta Corporate Governance Code, the closest reference may be found in Composition of the Boards, §3i, which states: 'The board should ensure that it is composed of members who, as a whole, have the required diversity of knowledge, judgment and experience to properly complete their tasks'. The reference is very indirect, that it may also be understood to not include gender.³⁶³ As it has been shown, corporate governance

³⁶¹ *ibid.*

³⁶² Few Eastern European Union Member States mention women on boards or diversity in their corporate governance codes.

³⁶³ n 322, EU Law, Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the Annual Financial Statements, Consolidated Financial Statements and Related Reports of Certain Types of Undertakings, Amending Directive 2006/43/EC of the European Parliament and of the Council and Repealing Council Directives 78/660/EEC and 83/349/EEC; Corporate Governance Statement; The Code of Principles of Good Corporate Governance of Malta (2011) <<https://www.mfsa.mt/wp-content/uploads/2019/02/Code-of-Principles-of-Good-Corporate-Governance-for-Listed-Entities.pdf>> accessed 20 March 20 2020.

codes include the composition of the board of directors (a), though the EU Commission recommended modernising the composition of the board of directors (b).

a. The limitations of corporate governance codes are recommendations

Corporate governance codes are recommendations and remain non-binding. They do not guarantee results. Therefore, the Commission recommended modernising the role of the board of directors, in order to avoid conflicts of interests of sensitive subjects, such as board of directors' remuneration and auditing the company accounts. Having understood that corporate governance codes remain soft law, the research examines that the Commission recommendation to include non-executive directors, who would be responsible for economic decision-making of the company.

b. Modernising corporate governance and non-executive directors

The European Commission recommended modernising the composition of the board of directors, by appointing non-executive board directors, who would independently take decisions, considered a conflict of interest. The role of these independent directors would be to take decisions concerning audits and remuneration of company directors. In addition, the Commission determined that economic decisions of the company should be made by non-executive directors, because they are independent.³⁶⁴

The Commission modernized corporate governance with recommendations to include non-executive directors, who would be responsible for economic decision-making of the company, while the UK Davies Report elaborated the function of non-executive directors in FTSE companies.

³⁶⁴ n 336, European Parliament Communication from the Commission to the Council and the European Parliament - Modernising Company Law and Enhancing Corporate Governance in the European Union - A Plan to Move Forward, 11-12.

2. UK Davies Report and the role of non-executive directors

The UK Davies Report confirmed that women non-executive board directors would 'enhance board independence,³⁶⁵ since directors have different qualifications, experiences and backgrounds.³⁶⁶ They 'bring an independent judgement to bear on issues of strategy, performance and resources including key appointments and standards of conduct.'³⁶⁷ Though, non-executive board directors do not manage the company, as executive directors, they have the same responsibilities to the board.³⁶⁸

Having examined corporate governance codes, which provide rules of appointments of non-executive directors and responsibilities, which include economic decision-making of the company, the research examines the notion of corporate social responsibility and company engagement.

II. CORPORATE SOCIAL RESPONSIBILITY AND COMPANY ENGAGEMENT

As early as 2011, the European Commission began to refer to corporate social responsibility, defining it as 'a concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis.'³⁶⁹ While this involves companies fulfilling legal

³⁶⁵ n 22, UK Government, Department for Business, Innovation & Skills, Women on Boards (2011) 8.

³⁶⁶ *ibid*; M. Huse and A. G. Solberg, 'Gender-Related Boardroom Dynamics: How Scandinavian Women make and can make Contributions on Corporate Boards' (2006) 21(2) Women in Management Review 113–30 <https://www.researchgate.net/profile/Morten-Huse/publication/237455788_Gender_related_boardroom_dynamics_How_women_make_and_can_make_contributions_on_corporate_boards/links/00b7d529ecdd4384db000000/Gender-related-boardroom-dynamics-How-women-make-and-can-make-contributions-on-corporate-boards.pdf> accessed 5 July 2019.

³⁶⁷ Cadbury (n 13)

³⁶⁸ Institute of Directors Report, 'The Role of Non-Executive Directors' (2010).

³⁶⁹ n 72, European Commission Communication, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A Renewed EU Strategy 2011-14 for Corporate Social Responsibility.

obligations and responsibility of their actions (A), the example of Sweden as a leader of corporate social responsibility, demonstrates that this notion includes gender equality and employment of women as priorities (B).

A. CORPORATE SOCIAL RESPONSIBILITY AND WOMEN ON BOARDS POLICIES

Having a corporate social responsibility strategy in place increases the competitiveness of a company and improves stakeholder relations internally and externally. Companies may adapt their strategies, as necessary, to implement new policies, which, in turn, allow for development and growth. Companies with corporate social responsibility strategy policies create long-term relations and build on sustainable models. The research examines the Europe 2020 Strategy, which calls for 'sustainable growth' in the labour market, including increasing the number of women in the labour force (1), but, goes a step further, by requesting companies to include specific reference in provisions, such as, gender equality, diversity and women on boards (2).

1. Corporate social responsibility and the Europe 2020 Strategy

The corporate social responsibility model is aligned with the Europe 2020 Strategy, which calls on 'sustainable growth' and a 75 percent of employment rate by 2020. The EU corporate social responsibility policy was a means to improve business confidence following the 2008-9 economic and financial crisis.³⁷⁰ Sustainability has become anchored in EU economic strategy, as a means to increase employment. A more active labour market would increase the employment rate, and, in turn, drive economic growth.³⁷¹ In the 1990s, the European Employment Strategy was based on interaction between the economy, the labour market in the Member States and EU social policies.

³⁷⁰ *ibid*, 1-3.

³⁷¹ J. Goetschy, 'The European Employment Strategy: Genesis and Development'(1999) 5(2) European Journal of Industrial Relations 118.

Social policies were included, as a way to bring women to the labour market.³⁷² More recently, the European Parliament has specifically called for corporate boards to align with sustainable governance through EU legislation.³⁷³

According to the European Parliament Resolution of 17 December 2020 on Sustainable Corporate Governance, it is the responsibility of the board of directors to 'make corporate governance more sustainability-oriented. The subject of the proposed women on boards directive is included in the Parliament Resolution, as it '...stresses the importance of diversity and inclusiveness in companies, which leads to better business performance.'³⁷⁴

Having examined corporate social responsibility policies and the European Parliament Resolution of 17 December 2020 on Sustainable Corporate Governance, which encouraged companies to increase the representation of women on boards, the research examines the notion of corporate social responsibility and gender equality.

2. Corporate social responsibility and gender equality

Corporate social responsibility and corporate governance principles include a wide range of subjects, which include gender equality. A deciding element of corporate governance is 'diversity of thought', or persons with different backgrounds, including women.³⁷⁵ 'Diversity of Thought' refers specifically to corporate boards, which take into account '... a range of personalities, characters, skills and backgrounds if they are to

³⁷² European Commission Report, European Employment Strategy (1997) <<https://ec.europa.eu/social/main.jsp?catId=101&langId=en>> accessed 5 July 2019.

³⁷³ European Parliament Resolution of 17 December 2020 on Sustainable Corporate Governance (2020/2137(INI)) (2020) (R) <https://www.europarl.europa.eu/doceo/document/TA-9-2020-0372_EN.html> accessed 23 December 2021.

³⁷⁴ *ibid*, 15.

³⁷⁵ Heidrick and Struggles Press Release, 'Dynamic Governance the Next Horizon for High-Performing Companies' (Heidrick and Struggles, 2014) <<https://heidrick.gcs-web.com/news-releases/news-release-details/dynamic-governance-next-horizon-high-performing-companies>> accessed 21 June 2021.

function successfully...Yet, female representation is still lacking -- Europe's worst performers are Poland and Portugal with 40 percent and 30 percent of company boards without any female directors.'³⁷⁶ Corporate social responsibility engages companies to improve recommendations to their codes by adding specific targets, reporting, quotas to increase the representation of women on boards.³⁷⁷ These principles remain soft law, which is non-binding.

Having examined corporate social responsibility policies in the European Union, the research takes a closer look at the notion of corporate social responsibility in Sweden.

B. CORPORATE SOCIAL RESPONSIBILITY IN SWEDEN

The Swedish government has ambitious industrial policies to become more competitive and increase employment figures by job creation. The research gives context to the Swedish approach of corporate social responsibility, which includes gender equality and diversity. Swedish companies participate in governmental programmes, which focus on gender equality and employment of women. Public limited companies in Sweden must have at least forty percent of women on boards. Before explaining the Swedish corporate governance programme, it is necessary to explain more information about the guidelines followed (1) and then, give details about the Swedish corporate social responsibility programme (2).

1. Corporate social responsibility guidelines

The Swedish government turned to 'the OECD's Guidelines for Multinational Enterprises, the UN Global Compact, the UN Guiding Principles on Business and Human Rights, the International Labour Organisation's Convention and the UN's 2030 Agenda

³⁷⁶ *ibid.*

³⁷⁷ OECD Report, G20/OECD Principles of Corporate Governance (OECD Publishing, Paris, 2015) E4.

for Sustainable Development'. Companies use these guidelines, as principles, including the notion of gender equality and a forty percent target of women on boards. Innovation and new sustainable business models are comprised of updated corporate governance codes and new transparent practices, which include reporting the diversity policy, as found in EU Directive 2014/95/EU.³⁷⁸

Having explained the Swedish corporate social responsibility approach, the research describes the Swedish corporate social responsibility programme.

2. Swedish corporate social responsibility programme

The Swedish government made recommendations for companies to implement a corporate social responsibility programme, which consists of three steps.

1. The company has to establish a corporate social responsibility policy, which consists of core values, including sustainability and a system which respects the international corporate social responsibility rules established by OECD Guidelines, the UN Principles and ILO declarations.
2. The corporate social responsibility procedure involves due diligence, an objective setting, communications, the 2030 Agenda, ISO standards and corporate governance codes.
3. Companies should report and include working with all stakeholders...³⁷⁹

The Swedish government is the leader of corporate social responsibility in the EU. The Government has notified its Embassies in foreign countries to work with Swedish companies abroad and implement corporate social responsibility policies.

³⁷⁸ Swedish Government Fact Sheet, The Swedish Government Policy for Corporate Social Responsibility (2016) <https://www.government.se/49f384/contentassets/639ce39f69eb48ec931258a4de0a08eb/fakta_blad_hallbart_foretagande_160520_eng_webb.pdf> accessed 21 June 2021.

³⁷⁹ *ibid.*

CONCLUSION OF §1

The Scandinavian Social Democratic approach, or the Nordic model has made the greatest advances in gender equality. With the exception of Norway, the Nordic model has been effective in increasing the representation of women on boards through corporate social responsibility and soft law.

Having examined the Swedish corporate social responsibility approach and corporate social responsibility programme, the research shall examine EU and Member States gender equality policies.

§2: EU AND MEMBER STATES GENDER EQUALITY POLICIES

European Union institutions made recommendations inviting Member States to put into place national gender equality policies. These programmes would not only serve to increase employment, including woman on boards (I), but, they would have an economic impact on the EU and increase GDP (II).

I. EUROPEAN UNION EMPLOYMENT POLICIES

Despite gender equality policy advances, women continue to be underrepresented in the European labour market. There are 73.2 percent of the population in the labour market in 2020, still short of the 2020 EU objective of 75 percent. Women represent 66.9 percent of the working population in 2020. Therefore, EU institutions focussed on increasing the number of women in the workforce. The economic loss due to fewer women result in over 370 billion euros a year. A greater number of women in the labour market would impact the EU economy and increase GDP to more than 3.15 trillion

euros by 2050.³⁸⁰ To be able to capitalise on this development, EU institutions introduced programmes to increase the number of women in the labour market, including women on boards. While the research points out that Member States created a number of programmes to increase the representation of women on boards (A), the soft law programmes have mainly been ineffective in increasing the representation of women on boards (though, there are several exceptions) (B).

A. PROGRAMMES TO INCREASE THE REPRESENTATION OF WOMEN ON BOARDS

EU institutions interact with the Member States and have proposed different soft law programmes to increase the representation of women on boards. These gender equality initiatives include, work life balance and child care programmes, maternity and paternity leave, as well as other programmes.³⁸¹ Though, the programmes principal aim was to keep women in employment. Though, the programmes failed to increase the representation of women on boards, despite numerous recommendations asking Member States to prioritize these programmes.³⁸² European Union institutions have a long history of gender equality policies, such as recommendations, to promote gender equality and positive action programmes for women in the workplace.³⁸³ According to the Council Recommendation of 2 December 1996 on the Balanced Participation of Women and Men in the Decision-Making Process, Member States should 'devise,

³⁸⁰ Eurostat Statistics, Employment and Activity by Sex and Age-Annual Data (2020) <<http://appso.eurostat.ec.europa.eu/nui/submitViewTableAction.do>> accessed 21 April 2021; European Commission Report, Women's Situation in the Labour Market (2021) <https://ec.europa.eu/info/policies/justice-and-fundamental-rights/gender-equality/women-labour-market-work-life-balance/womens-situation-labour-market_en#gender-balance-in-decision-making> accessed 21 April 2021; European Commission Report, Achieving Gender Balance in Decision Making (2021) <https://ec.europa.eu/info/policies/justice-and-fundamental-rights/gender-equality/equality-between-women-and-men-decision-making/achieving-gender-balance-decision-making_en> accessed 21 April 2021.

³⁸¹ Terjesen et al (n 264) 239.

³⁸² EU Law, Council Conclusions of 7 March 2011 on European Pact for Gender Equality 2011-2020 (2011) OJ C155, n9, 10-13 <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52011XG0525%2801%29>> accessed 5 July 2019.

³⁸³ n 190, EU Law, Council Recommendation of 13 December 1984 on the Promotion of Positive Action for Women, 34-35.

launch and promote public campaigns to alert public opinion to the usefulness and advantages for society as a whole of balanced participation by women and men in decision-making.³⁸⁴ Though, there were many soft law programmes proposed by the European Commission to increase the representation of women on boards (I), the European Parliament wanted to go beyond soft law and propose binding legislation (2).

1. Diverse soft law initiatives

The European Commission was committed to increasing the representation of women on boards and launched many gender equality programmes, such as, the Women on the Board Pledge for Europe Program and the Woman's Charter. The soft law programmes were recommendation for the Member States to implement under national law. The soft law programmes launched consisted of voluntary methods to increase the representation of women on boards (a), while the Commission Europe 2020 strategy focused on increasing the number of women in the workplace for economic reasons (b).

a. Women on the Board Pledge for Europe Program and other programmes

The European Commission launched the Women on the Board Pledge for Europe Program,³⁸⁵ with voluntary targets³⁸⁶ to increase women on boards, by thirty percent in 2015 and by forty percent in 2020.³⁸⁷ Though, the programme did not bring results.

³⁸⁴ n 314, EU Law, Council Recommendation of 2 December 1996 on the Balanced Participation of Women and Men in the Decision-Making Process, 1(f).

³⁸⁵ n 303, EC Justice Commissioner Reding Challenges Business Leaders to Increase Women's Presence on Corporate Boards with Women on the Board Pledge for Europe; n 41, European Commission Report, Women in Economic Decision-Making in the EU, Progress Report. A Europe 2020 Initiative (2012) 7.

³⁸⁶ *ibid.*

³⁸⁷ n 303, EC Justice Commissioner Reding Challenges Business Leaders to Increase Women's Presence on Corporate Boards with Women on the Board Pledge for Europe; n 41, European Commission Report, Women in Economic Decision-Making in the EU, Progress Report. A Europe 2020 Initiative (2012) 7;

There were only twenty-four EU listed companies that signed the Pledge.³⁸⁸ The targets were unmet, resulting in twelve percent of women nominated to boards, far from the established thirty percent target.³⁸⁹

The European Commission then drafted a Women's Charter to show recognition and commitment to gender equality in the European Union. The European economy would be seriously disadvantaged, if women did not fully participate. The Charter called on equality in the labour market and economic equality for women and men, with reference to Europe 2020. The Charter called on strengthening EU law to include women on boards.³⁹⁰

b. The Europe 2020 Strategy

The Europe 2020 Strategy³⁹¹ was based on an increase of the number of women entering the labour market to strengthen the EU economy. The growth rate was lower in Europe, compared to the largest trading partners. This was attributed to the lack of investment and innovation, which was harmful to the business sector. The employment

European Commission Press Release, EC Justice Commissioner Viviane Reding Meets European Business Leaders to Push for more Women in Boardrooms, IP/11/242 (Brussels, 1 March 2011) <https://ec.europa.eu/commission/presscorner/detail/en/IP_11_242> accessed 3 September 2019.

³⁸⁸ n 29, European Commission, Proposal for a Directive of the European Parliament and of the Council on Improving the Gender Balance among Non-Executive Directors of Companies Listed on Stock Exchanges and Related Measures, 9.

³⁸⁹ European Commission Memo; European Commission Report, Gender Balance in Business Leadership (2015) <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=LEGISSUM:1710_2&from=EN> accessed 3 September 2019.

³⁹⁰ EU Law, European Commission, A Strengthened Commitment to Equality between Women and Men A Women's Charter Declaration by the European Commission on the Occasion of the 2010 International Women's Day in Commemoration of the 15th Anniversary of the Adoption of a Declaration and Platform for Action at the Beijing UN World Conference on Women and of the 30th Anniversary of the UN Convention on the Elimination of All Forms of Discrimination against Women COM (2010) 0078 final <<https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52010DC0078>> accessed 3 September 2019; European Commission Press Release, European Commission Strengthens its Commitment to Equality between Women and Men, IP/10/237 (Brussels, 5 March 2010) <https://ec.europa.eu/commission/presscorner/detail/en/IP_10_237> accessed 3 September 2019.

³⁹¹ n 9, European Commission, Europe 2020: A European Strategy for Smart, Sustainable and Inclusive Growth 9.

rate was also lower than in other economies, with sixty-nine percent on average (ages 20-64), where women represented sixty-three percent and men seventy-six percent. The lack of women in the labour market revealed economic and substantive issues. The working population was ageing in the European Union starting in 2013. Overall, the demographic and economic situation in Europe was in a bad state. Many people were leaving on retirement and fewer people were entering the labour market. The European welfare system was under pressure. European institutions found the solution, which consisted of a greater number of women entering the labour market to improve the economy.³⁹²

Having examined women on boards programmes and the Europe 2020 Strategy, the research will detail the recommendation for binding legislation.

2. The European Parliament and binding legislation

The European Parliament made recommendations to the Commission for Member States to implement a range of measures to increase the representation of women on boards. These measures included soft law, such as, corporate governance codes and the comply or explain principle. Peer pressure was an acceptable means to incite companies to increase the representation of women on boards.³⁹³ The European Parliament wanted to go further than just the use of soft law. It called on the Commission to pass binding legislation to increase the representation of women on boards, The European Commission called for equality in decision-making in the Strategy for Equality between Women and Men 2010-2015. Parliament stated that,

³⁹² *ibid*; n 46, EIGE Report, Economic Benefits of Gender Equality in the European Union.

³⁹³ EU Law, European Commission, Official Journal of the European Union, Women and Business Leadership, C33/139 (2013) <<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:2013:033E:FULL&from=DA>> accessed 5 July 2019; European Parliament, Women and Business Leadership European Parliament Resolution of 6 July 2011 on Women and Business Leadership (2013) OJ C33E, 134-139 <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52011IP0330>> accessed 5 July 2019.

despite much legislation dedicated to equal treatment in employment, gender equality developments were too slow.³⁹⁴ The Council supported women on boards policies and legislation, as a priority to 'promote the equal participation of women and men in decision-making at all levels and in all fields, in order to make full use of all talents'.³⁹⁵

After describing women on boards programmes, the Europe 2020 Strategy and the recommendation for binding legislation, the research points to the ineffectiveness of the soft law in increasing the representation of women on boards.

B. SOFT LAW INEFFECTIVENESS

EU Member States were unable to increase the representation of women on boards, without EU interference or hard law. The various EU policies and legislation have proven ineffective. Therefore, the Commission changed its soft law position and threatened intervention with a women on boards directive. Member States would have to comply with EU rules. The Ex-Commissioner for Justice, Fundamental Rights and Citizenship and ex-Vice-President of the European Commission, Viviane Reding, supported '...a competitive economy [through smart and inclusive growth,...to make better use of women's talents and skills. Gender equality is therefore at the heart of our *Europe 2020 Strategy*. getting women into work will help us get out of the crisis'.³⁹⁶ The *Europe 2020 Strategy* was a voluntary programme and represented the last soft law measure that the European Commission implemented to allow Member States to self-regulate, before public consultation and intervention. The Programme was expected to promote equal opportunities in the workplace, compete in the global marketplace and tackle gender equality in employment. The findings revealed that 'a balanced gender

³⁹⁴ EU Law, Council of Europe Conclusions on the European Pact for Gender Equality for the Period 2011-2020 (Council of Europe, 2011) 2 <https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/lsa/119628.pdf> accessed 5 July 2019; Sineau (n 140) 31.

³⁹⁵ *ibid.*, 4f.

³⁹⁶ *ibid.*

representation among non-executive board directors ... will not be achieved by Member States acting individually at any point in the foreseeable future.³⁹⁷

The Commission turned to an EU interventionist approach with the proposed women on boards directive, in the attempt to unify Member States with a common approach.³⁹⁸ The research shows that even though the *Europe 2020* strategy and other EU-led programmes were soft law failures (1), the Commission did not immediately propose hard law, but, instead, put pressure on the Member States to step up national soft law programmes (2).

1. Europe 2020 Strategy

According to Europe 2020 strategy,³⁹⁹ the Member States would set targets to increase the employment of women, calling for 'greater involvement'. This was a call for more women to enter the labour force in the European Union.⁴⁰⁰ Though, the meaning of 'greater involvement' is ambiguous. Moreover, it was left to the Member States to decide how to interpret the wording 'greater involvement'.⁴⁰¹ While calling on the Member States to focus on various employment programs (a), the European Parliament called to increase the representation of women in decision-making positions on boards (b).

³⁹⁷ Council of the European Union Progress Report, Proposal for a Directive of the European Parliament and of the Council on Improving the Gender Balance among Directors of Companies Listed on Stock Exchanges and Related Measures - Progress Report (2012) 0299 (COD) <<https://data.consilium.europa.eu/doc/document/ST-9496-2017-INIT/en/pdf>> accessed 5 July 2019.

³⁹⁸ *ibid.*

³⁹⁹ European Commission, Taking Stock of the Europe 2020 Strategy for Smart, Sustainable and Inclusive Growth COM (2014) 130 final/2 <https://ec.europa.eu/info/sites/info/files/europe2020stocktaking_annex_en.pdf> accessed 3 September 2019.

⁴⁰⁰ n 9, European Commission, Europe 2020: A European Strategy for Smart, Sustainable and Inclusive Growth, 9.

⁴⁰¹ *ibid.*, 13.

a. Employment strategy programmes

Employment strategy programmes began in 1997, where Member States had agreed to establish a common employment policy to create jobs in the EU. The employment strategy programmes were included in the Europe 2020 strategy.⁴⁰²

Having examined employment strategy programmes, the research shall examine the call to increase the representation of women on boards and economic impact.

b. EU Parliament call for women on boards

The EU Parliament requested the Commission to create programmes to combat the lack of women in the workplace,⁴⁰³ calling for a Resolution to increase the representation of women in decision-making positions at all levels of the company, which would boost the EU economy.⁴⁰⁴

Having exposed the need for more women on boards for economic reasons, the research examines the Commission recommendations to increase the representation of women on boards by way of national soft law programmes.

⁴⁰² n 372, European Commission, European Employment Strategy, no. 4.

⁴⁰³ Commission (EC), Council Decision of 20 December 2000 Establishing a Programme Relating to the Community Framework Strategy on Gender Equality (2001-2005) (2001) OJ L17, 22–29 (*No longer in force/ Date of end of validity: 31/12/2006*) <<https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32001D0051>> accessed 3 September 2019.

⁴⁰⁴ European Parliament, Vera Jourova, Gender Balance (Video extracts from the Joint Debate) (2019) <https://multimedia.europarl.europa.eu/en/gender-balance-joint-debate I167193-V_v> accessed 3 September 2019.

2. Commission recommendations for national soft law programmes

The European Commission called for non-binding soft law to offer alternatives⁴⁰⁵ and create 'a new legislative culture'.⁴⁰⁶ The European Commission 'view[ed]... the complexity of ... the issues at stake [and confirmed] the adoption of detailed binding rules, [was] not necessarily the most desirable and efficient way of achieving the objectives pursued.'⁴⁰⁷ The Commission decided that Member States should decide on soft law. The Commission would make recommendations.⁴⁰⁸

The EU-led soft law programmes were ineffective. The Commission changed its strategy, by placing the responsibility on the Member States and issued recommendations. Proposal Number 38 of the Green Paper followed Member States soft law programmes and reporting (a), while the Commission recommended Member States take a corporate social responsibility approach to governance issues and pass women on boards legislation (b), though, the Open Method of Coordination allowed Member States to consult with each other in view of improving policies and legislation (c).

a. Proposal Number 38 of the Green Paper

Proposal Number 38 of the Green Paper, initiated by the European Commission, was a public consultation of corporate governance activities in the Member States. Its

⁴⁰⁵ European Commission, White Paper on European Governance COM (2001) 428 4, 22 <https://ec.europa.eu/governance/docs/comm_results_en.pdf> accessed 3 September 2019; Linda Senden, 'Soft Law, Self-Regulation and Co-Regulation in European Law, Where Do They Meet' (2005) 9(1) Electronic Journal of Comparative Law 11 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=943063> accessed 27 November 2017.

⁴⁰⁶ *ibid.*

⁴⁰⁷ n 207, Commission Recommendation of 15 February 2005 on the Role of Non-Executive or Supervisory Directors of Listed Companies and on the Committees of the (Supervisory) Board, Recommendation 4.

⁴⁰⁸ n 405, European Commission (EC), White Paper on European Governance, COM (2001) 428, 4, 22; Senden (n 405) 11.

objective was to facilitate company disclosure of information about social, environmental and human rights, which would be transposed into legislation. The Commission called on the Member States to call on companies to implement corporate social responsibility principles for employees, shareholders and society as a whole, taking on a stakeholder approach of government.

Having explained that Proposal Number 38 of the Green Paper called for EU companies to include corporate social responsibility principles, the research examines the European Commission Recommendation Towards a Single Market Act, which called for increasing the representation of women on the board of directors for economic reasons.

b. Political involvement and the composition of the board of directors

The European Commission Recommendation Towards a Single Market Act For a Highly Competitive Social Market Economy requested the Member States to improve diversity on the board of directors to include women.⁴⁰⁹ The priority was to increase the workforce for economic reasons to stay competitive and make use of all human resources.⁴¹⁰ 'Policies to promote gender equality will be needed to increase labour force participation...adding to growth...' ⁴¹¹

Despite the recommendation, demographics show that the EU workforce was contracting at the time. Sixty-six percent of the working population were employed,

⁴⁰⁹ European Commission, Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, Towards a Single Market Act For a Highly Competitive Social Market Economy, 50 Proposals for Improving our Work, Business and Exchanges with One Another, COM (2010) 608 final/2, 27 <<https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0608:REV1:EN:PDF>> accessed 5 July 2019.

⁴¹⁰ n 9, European Commission, Europe 2020: A European Strategy for Smart, Sustainable and Inclusive Growth COM (2010) 9.

⁴¹¹ *ibid*, 20.

with a low employment rate of women.⁴¹² The EU called for employment to rise from sixty-nine percent to seventy-five percent by 2020.⁴¹³ The recommendation called on increasing the number of women in the labour market and on the boards of directors.

Having explained that the European Commission Recommendation Towards a Single Market Act called for increasing the employment of women, the research examines the Open Method of Coordination, which delegates powers to the Member States to pass soft law to increase the representation of women on boards.

c. The Open Method of Coordination

The Open Method of Coordination was a soft law governance means for the EU to allow Member States to take action on diverse subjects, including gender equality, by providing employment opportunities to women, considered a group at risk.⁴¹⁴ The Open Method became the preferred approach used by Member States,⁴¹⁵ as an alternative to hard law.⁴¹⁶ This was a significant change in European legislative policy, a transition away from directives to soft law. The Open Method of Coordination reduced the amount of existing legislation, as it encouraged Member States to put into effect soft law and corporate governance, which were non-binding means of policy making.⁴¹⁷ The Open Method of Coordination did not lead to binding measures, nor would it oblige Member States to reform existing legislation or adopt new legislation, as it was non-governmental means.

⁴¹² *ibid.*

⁴¹³ *ibid.*, 12.

⁴¹⁴ *ibid.*, 22.

⁴¹⁵ 'Open Method of Coordination', European Commission <https://eur-lex.europa.eu/summary/glossary/open_method_coordination.html> accessed 5 July 2019; Burkard Eberlein and Dieter Kerwer, 'Theorising the New Modes of European Union Governance' (2002) 6(5) European Integration Online Papers <<http://eiop.or.at/eiop/texte/2002-005a.htm>> accessed 5 July 2019.

⁴¹⁶ *ibid.*, S. Walby, 'The European Union and Gender Equality: Emergent Varieties of Gender Regime' (2004) 11(1) Social Politics 4-29.

⁴¹⁷ Senden (n 405) 11.

The European Commission recommended soft law by way of action programmes to increase the representation of women in the workplace. According to EU law, soft law may be proposed, when Member States oppose binding legislation.⁴¹⁸ This was the situation in the EU with the proposed women on boards directive, which left Member States with an ultimatum. Member States were strongly encouraged to pass national law, as a way to avoid the EU passing binding legislation. Non-compliance with EU law would lead to infringement procedures. This would bring legal action against the EU Member State in the Court of Justice, which would result in paying heavy penalties.⁴¹⁹ Member States would be able to compare policies without direct involvement from the Commission.⁴²⁰ This policy change altered the relationship between the European Commission and Member States. It formed a non-EU top-down solution in addressing relevant policies. It was considered a 'third way' as... it addressed a new governance opposed to 'regulatory harmonization and fragmentation'.⁴²¹ EU institutions had made important policy changes, from a hard law policy to soft law with the Open Method of Coordination.⁴²² Though, the Commission continued to issue recommendations for companies to comply with corporate governance codes, to disclose information about the representation of women on the board and include the composition of the board of directors.⁴²³

⁴¹⁸ 'soft law", EurWork, European Observatory of Working Life (Eurofound, 2021) <<https://www.eurofound.europa.eu/observatories/eurwork/industrial-relations-dictionary/soft-law>> accessed 5 July 2019.

⁴¹⁹ EU Law, Infringement Procedure (European Commission, 2019) <https://ec.europa.eu/info/law/law-making-process/applying-eu-law/infringement-procedure_en> accessed 5 July 2019.

⁴²⁰ n 415, Open Method of Coordination, European Commission.

⁴²¹ Charles F Sabel and Jonathan Zeitlin, 'Learning from Difference: The New Architecture of Experimentalist Governance in the European Union' (2008) 14(3) European Law Journal 271-327.

⁴²² Simon Deakin, 'Reflexive Governance and European Company Law' Comparative Research in Law and Political Economy. Research Paper No. 20/2007 (2007) <<http://digitalcommons.osgoode.yorku.ca/clpe/237>> accessed 5 July 2019.

⁴²³ n 207, European Commission (EC), Commission Recommendation of 15 February 2005 on the Role of Non-Executive or Supervisory Directors of Listed Companies and on the Committees of the (Supervisory) board, 4.

Having introduced Proposal Number 38 of the Green Paper, public consultation and the European Commission Recommendation Towards a Single Market Act, calling for increasing the representation of women on the board of directors and the Open Method of Coordination, the research takes a look at European Union economic policy interaction to increase the representation of women on boards.

II. EUROPEAN UNION ECONOMIC POLICY

The EU economic policy and legislation passed in EU institutions have an economic impact on the Member States.⁴²⁴ And, Member States economic policy and developments are dependent on EU institutional government policies. Therefore, EU institutions have a key role in debating subjects, which become law. The proposed women on boards directive, led by the European Parliament and Commission, will have a far-reaching effect and would no longer leave Member States to decide, whether or not to increase the representation of women on boards. Soft law initiatives to increase the representation of women on boards have failed and were meant to improve the economy, Therefore, EU institutions adopted a new supervisory role, which included managing economic policy in the name of Member States sovereignty (A), though sovereignty is defined differently, according to a particular Member State (B).

A. THE NEW EU SUPERVISORY ROLE AND INTERVENTION

On the subject of women on boards, EU institutions began taking more interest in managing economic policy in the name of Member States sovereignty. This raises questions if EU interests should be greater than the individual Member States. Prior to the Treaty of Lisbon, EU institutions had little influence or control of economic policy

⁴²⁴ Peter Becker, 'A European Economic Policy in the Making', Stiftung Wissenschaft und Politik Research Paper RP 13, 2020 <<https://www.swp-berlin.org/en/publication/a-european-economic-policy-in-the-making/#hd-d16392e282>> accessed 21 April 2021.

in Member States affairs. The role of the European Commission has been to coordinate EU policies. Moreover, the EU economic women on boards policy mentioned in the proposed directive is not as up-to-date, as several Member States policies, since there is not a standard women on boards policy for all Member States under EU law.⁴²⁵ Nonetheless, the European Commission, was committed to economic gender equality and set out to regulate women on boards, by way of the proposed women on boards directive.⁴²⁶

The research has found that this has created ambiguity, as EU institutions refer to the Treaty of Lisbon, where Article 3.3 of the TEU, focuses on the EU economy, employment and equality between men and women (1), and yet, inversely, Member States question the legality of EU governance and the notion of sovereignty (2).

1. European integration and the Treaty of Lisbon

The EU has been going through different crises since the 1990s. However, the crisis of sovereignty is a considerable conflict of interest.⁴²⁷ According to Article 3.3 of the TEU, the main concern of EU institutions is to improve the economy, full employment and equality between women and men.⁴²⁸

The research found that EU institutions prioritise a Single Market economic policy (a), though, if a Member State is in disagreement, Article 50 of the TEU, Treaty of Lisbon, defines the terms for a Member State to leave the European Union (b).

⁴²⁵ *ibid.*

⁴²⁶ n 29, Proposal for a Directive.

⁴²⁷ Nathalie Brack, Ramona Coman and Amandine Crespy, 'Sovereignty Conflicts in the European Union'(2019) 4(4) *Les Cahiers du Cevipol* 21.

⁴²⁸ n 168, Treaty of the European Union, Consolidated Version of the Treaty on European Union, Article 3.3.

a. The European Single Market

In the 1980s and 1990s, the Single Market became a priority through treaties, which set out economic policies. At that time, the Commission took on a new supervisory role, under the guidance of Jacques Delors, ex-President of the Commission. The priority was the creation of a European Single Market. It was at this time that the European Commission began to detach from past strategies and started its own agenda with intervention in national affairs. According to academicians, 'European integration would happen through law and spill-over effect'.⁴²⁹

Having introduced the effects of the European Single Market, the research also examines when a Member State may decide to leave the European Union.

b. Terms for a Member State to leave the European Union

The Treaty of Lisbon amended past treaties with clear goals for the European Union, including when a Member State disagreed with economic policies and the Single Market. According to Article 50 of the TEU, 'any Member State may decide to withdraw from the Union, in accordance with its own constitutional requirements.'⁴³⁰ The EU shall negotiate the leaving terms with the Member State, which would take immediate effect, according to the date of entry or may be extended for two years.

The principle of sovereignty and democratic values are in contradiction with EU terms, as Member States may relinquish or defend sovereignty, transfer it to the EU institutions, or acknowledge EU sovereignty on a particular matter. Therefore, from a

⁴²⁹ *ibid*; Brack, Coman and Crespy (n 427) 11; W.G. Werner and J. H. De Wilde, 'The Endurance of Sovereignty' (2001) 7(3) *European Journal of International Relations* 283-313.

⁴³⁰ EU Treaty, Article 50 of the TEU, Withdrawal from the EU, Consolidated Version of the Treaty on European Union, Title VI - Final Provisions, Article 50 (2012) OJ C326, 43-44 <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12012M050>> accessed 26 June 2021.

legal viewpoint, the procedure is clear. Though, from a political standpoint, the Treaty of Lisbon made it possible for a Member State to leave the EU at any time, without opposition from the EU. The EU is 'a voluntary association between states, which remain sovereign as to the question of whether or, not they remain in that association.'⁴³¹ The objective of the Treaty of Lisbon was to improve the system, which includes principles based on negotiations.⁴³²

Having explained the relevance of the European Single Market and when a Member State may decide to leave the European Union, the research examines the legality of EU governance and the notion of sovereignty.

2. The legality of EU governance and the notion of sovereignty

The voluntary association between Member States raises questions about the sovereignty of each Member State. The question is asked about how sovereign a Member State is, when the EU, an external organization, governs and the Member States are obliged to meet conditions, unless they wish to leave the EU immediately and cancel their membership. Several Member States view EU involvement 'as something which happened to them and not by them.'⁴³³

Several Member States' governments no longer believe in the EU role to intervene, concerning the subject of women on boards and the proposed directive in national affairs. These conflicts of interests lead to asking the question, to what extent would Member States agree to give up their national sovereignty for the common good to develop the European Union. Then, from a legal and political point of view, sovereignty

⁴³¹ Lorna Griffiths, 'A Critical Analysis of EU Member State Sovereignty under the Treaty of Lisbon. Sovereignty v Democracy', The Student Journal of Law (2010) <<https://sites.google.com/site/349924e64e68f035/issue-4/a-critical-analysis-of-eu-member-state-sovereignty-under-the-treaty-of-lisbon-s-overeignty-v-democracy>> accessed 26 June 2021.

⁴³² *ibid.*

⁴³³ *ibid.*

and the proposed women on boards directive becomes a complex subject, which will continue to divide Member States even more.⁴³⁴

Having explained raised questions about the legality of EU governance and the notion of sovereignty, the research turns to the different degrees of sovereignty.

B. DIFFERENT DEGREES OF SOVEREIGNTY

Sovereignty is defined as 'the authority of a state to govern itself or another state.'⁴³⁵

The European Union is not composed of a homogenous group of Member States, but of Member States with different policy objectives, going in different directions and several Member States going much faster than others. The notion of sovereignty in the EU is a topical subject. There are different notions related to sovereignty, which 'imply different visions of power relations between the EU Member States...and types of policies to be...centralized at...EU level.'⁴³⁶

The interests of Member States range from taking part in a single market economy to full economic integration. There are different interpretations of the word sovereignty in the European Union, which

... are complex, since positive and negative ideas of it coexist.. [F]ormer dominant States like France and the UK, ...are still attached to certain attributes of sovereignty...[T]here are smaller States that are more oriented towards taking greater advantage of cooperation...[T]his model conceals the complexity of views regarding sovereignty, it does however tend to explain the existence of different political agendas and ways of exercising power in Europe. Hence, sovereignty does not appear to be considered in a uniform manner. It opposes those who see it as an opening to those who see it as a means to closure, both

⁴³⁴ Brack, Coman and Crespy (n 427) 7.

⁴³⁵ 'sovereignty' (n) Oxford Lexico online dictionary <<https://www.lexico.com/en/definition/sovereignty>> accessed 26 June 2021.

⁴³⁶ Brack, Coman and Crespy (n 427) 11; S. Fabbrini, 'Which European Union? Europe after the Euro Crisis' (Cambridge University Press, 2015).

on a national and European political level, which can seriously affect policy in Europe.⁴³⁷

Competences are shared between EU institutions and Member States, recognising national sovereignty of the Member State. At the same time, the EU position affirms the right to intervention in Member States policies. This may lead to conflicts of interest, as the European Union is composed of sovereign Member States, but the EU is not a sovereign state itself.⁴³⁸

Sovereignty, therefore, becomes an important subject, when Member States claim its own authority over that of the EU. These rival claims are a source of conflict. There are several ideas about sovereignty, which are:

- Member States defend their own sovereignty
- Member States accept the transfer of sovereignty to the EU to be effective in its policies
- and EU sovereignty without a debate.

Within the notions, there may be ideas of shared sovereignty. This will depend on the rules, whether they are policy soft law or constitutional hard law.⁴³⁹ As the research will show, the notion of sovereignty may bring certain advantages to a Member State (1) or disadvantages (2).

1. Sovereignty and advantages for the Member States

The treaties are a reminder that EU legislation cannot be forced on Member States, but must be accepted by them. Member States transfer sovereignty in particular contexts,

⁴³⁷ Fondation Robert Schuman Report, François Frigot and Ester Bonadonna 'Europe and Sovereignty: Reality, Limits and Outlook' Conference Report, European Issue, 2016, 410 <<https://www.robert-schuman.eu/en/european-issues/0410-europe-and-sovereignty-reality-limits-and-outlook>> accessed 23 April 2021.

⁴³⁸ Brack, Coman and Crespy (n 427) 15; Fabbrini (n 436).

⁴³⁹ *ibid*: Werner and De Wilde (n 429) 283-313.

when they have the same outlook, as EU institutions. This pluralistic approach is based on negotiations, with the objective of integration.⁴⁴⁰ Member States decide on their national women on boards soft law policies, hard law or none at all. Smaller Member States of the EU choose to be part of the EU to take advantage of greater policies, than what they would be able to put forward on their own.

Having introduced notion of sovereignty and advantages for the Member States, the research examines sovereignty and disadvantages for the Member States.

2. Sovereignty and disadvantages for the Member States

Member States are obliged to transfer their sovereignty to the EU in a number of areas, following rulings of the CJEU, which are then transposed into national law. Member States are subject to law originating in the Treaty and must ensure there is no opposing national law. The rise of the EU as a supra-national power⁴⁴¹ may result in the loss of sovereignty. This may affect the larger EU Member States to a greater extent or those with advanced women on boards policies, as they seek to keep authority over their own national rules.

The proposed women on boards directive was voted in Council in March 2022 to become a directive. Parliamentary discussions will commence. It will be interesting to see if those Member States opposed to the proposed directive, accept the transfer of sovereignty or oppose it. Soft law recommendations from the European Commission did not lead to significant increases in the representation of women on boards in the Member States. Soft law policies have proven ineffective. This ineffectiveness led the Commission to a policy switch, which allowed Member States to decide on their own form of soft law, to a return to supervisory intervention with the objective of

⁴⁴⁰ Frigot and Bonadonna (n 437) 410.

⁴⁴¹ L Griffiths (n 431).

convergence by hard law. This has resulted in Member States objecting to EU interference for reasons of sovereignty and has become a source of conflict between the Member States and the EU.

Having examined the notion of sovereignty and advantages and disadvantages for the Member States, the research has found that this subject remains a source of conflict, when regulating women on boards.

CONCLUSION OF SECTION 2

European institutions have implemented every kind of soft law at their disposition to increase the representation of women on boards. From an anchored soft law position to hard law intervention, the EU Parliament and Commission changed its policy, believing the proposed women on boards directive is the only way to increase the representation of women on boards among all Member States. In 2020, there were only twenty-nine percent of women on boards in public limited companies in the EU. The Commission affirmed that the 'most significant improvement is observed in countries that have taken legislative measures to increase gender balance on boards'.⁴⁴² EU intervention has a cost. Many Member States do not agree with the decision that EU institutions become involved in national affairs, by proposing binding women on boards legislation.

⁴⁴² European Commission, Policies, Achieving Gender Balance in Decision-Making (European Commission, 2020) <https://ec.europa.eu/info/policies/justice-and-fundamental-rights/gender-equality/equality-between-women-and-men-decision-making/achieving-gender-balance-decision-making_en> accessed 23 April 2021.

CONCLUSION OF CHAPTER TWO

There are different legal approaches to gender equality. The Social Democracy Approach calls for equality in society, full employment and a large private sector. The State is responsible for a 'good society'.⁴⁴³ While EU gender equality law calls on the economic and business case, which includes the full participation of women in employment and in economic-decision making. Both of the approaches support the economic case for the need to increase the representation of women on boards and, may include soft law, gender equality recommendations or revert to hard law, as in the case of the Norwegian legislation.

Differences between the Member States are becoming more noticeable, as various legal systems and measures are implemented or none at all, which is widening the gap even further. EU institutions have decided to address this situation with intervention and the proposed women on boards directive as a minimum harmonisation among the Member States.

⁴⁴³ *ibid.*

CONCLUSION OF TITLE ONE

The theoretical approaches of gender issues and legal systems provide a necessary foundation and solid background to the topical subject of women on boards. The notions of gender equality and parity are essential to understand, before referring to legislation and policy measures. The long history of gender equality legislation in the EU is the legal basis of the topic of the representation of women on boards. The EU and Member States have different policies in place. Article 157(4) of the TFEU is the EU legal basis for equality in the workplace for men and women for all Member States. Several Member States have no gender equality policies in place or limited policies. The EU is greatly lacking a single legal framework to manage the subject of women on boards, since Member States have diverse legal systems in place, which include various degrees of soft or hard law measures.

TITLE TWO

THE CLASSIFICATION OF GENDER ISSUES AND LEGAL SYSTEMS

Company law is regulated by directives and company acts in the Member States, which are constantly updated. This allows companies in the EU to keep current with legislation and corporate governance guidelines, with the objective of developing cross-border business in the EU.⁴⁴⁴ Under the First Company Law Directive, the harmonisation processes with minimum standards for different company structures in the Member States were defined.⁴⁴⁵ Public limited companies represent the wealthiest companies in the EU economy by market capitalization and are the most visible companies, employing the greatest number of women. These are the EU largest companies with influential business practices in their national economies.

Nine EU Member States have quota legislation in place: Austria, Belgium, France, Belgium, Germany, Italy, the Netherlands, Portugal and Greece.⁴⁴⁶ Six more Member States use soft law, target quotas or the comply or explain principle in corporate governance codes: the United Kingdom (before Brexit), Sweden, Finland, the Netherlands and Spain.

⁴⁴⁴ European Parliament Fact Sheet, Company Law (2020) <<https://www.europarl.europa.eu/factsheets/en/sheet/35/company-law>> accessed 13 July 2020.

⁴⁴⁵ *ibid*, A1.

⁴⁴⁶ European Parliament, Women on Boards: Committees Give Green Light for Negotiations with Member States (Press Release, 16 March 2022) <<https://www.europarl.europa.eu/news/en/press-room/20220314IPR25412/women-on-boards-committees-give-green-light-for-negotiations-with-member-states>> accessed 16 May 2022.

Public limited companies comply with corporate governance codes and may have their own gender equality policies in place. Therefore, this is the right basis to be able to compare women on boards practices in the Member States.

The research has found that women on boards legislation may be divided into two principal systems. On the one hand, the legal systems based on soft law may also include a semi-binding approach (Chapter 1), while, on the other hand, it is possible to classify different types of hard law, which may or may not carry sanctions (Chapter Two).

Chapter One

LEGAL SYSTEMS BASED ON SOFT LAW

Different women on board policy approaches are closely dependent on the political systems of a Member State. This should not be underestimated, as governments pass legislation that companies implement or do not pass legislation. Despite different approaches in the Member States, the representation of women on boards has performed below the forty percent critical mass, called for in the proposed women on boards directive, with the exception of a few Member States.⁴⁴⁷ In 2020, France was the only EU Member State that exceeded the forty percent representation of women on boards, with 45.1 percent. Norway and Iceland, non-EU Member States, affiliated with the EU through the EEA Agreement, reached 40.4 percent of women on boards and 44.4 of women on boards respectively.⁴⁴⁸ These Member States were able to meet the forty percent representation of women on boards due to binding quota legislation. The percentages demonstrate that, there is an ongoing underperformance of the representation of women on company boards in the EU Member States, as gender equality soft law and individual Member States' policies are unable to increase the critical mass, since there are no sanctions to forcefully convince them to do so.

It is therefore possible to contrast the soft law systems, as systems with no action, where soft law has not increased the representation of women on boards (Section 1) from different soft law approaches, which are able to increase the representation of women on boards (Section 2).

⁴⁴⁷ Marek Szydło, 'Constitutional Values Underlying Gender Equality on the Boards of Companies: How Should the EU Put These Values into Practice'(2014) 63(1) The International and Comparative Law Quarterly 167-196.

⁴⁴⁸ n 24, OECD Statistics, Employment : Female Share of Seats on Boards of the Largest Publicly Listed Companies.

SECTION 1 SYSTEMS WITH NO ACTION

Examining soft law instruments and rules in EU Member States in the previous section, this section validates the position that, the European Union has the most advanced political system, which has constantly promoted gender equality legislation.⁴⁴⁹ However, European history has proven that this has not always been the situation. It is necessary to examine the history of the rights of women in Europe and the current situation in Eastern Europe, where there is still little to no gender equality legislation in place, to comprehend the developments and challenges of gender equality legislation in the European Union. The research examines the development of gender equality legislation, which includes the representation of women on boards policies and legislation, economies, histories of each Western European Union Member State (§1), though, Eastern European Union Member States, have not shared these gender equality developments, due to the relatively recent admission to the European Union and the specific history of the region (§2).

§1: GENDER EQUALITY SUMMARY IN THE EUROPEAN UNION

Each Member State has their own history and development of gender equality policies. There are no two Member States with the same gender equality legislation. Although there may be similarities between Member States in the development of gender

⁴⁴⁹ Jacquot (n 162).

equality legislation with universal suffrage, soft law programmes leading to hard law, flexible business approaches and comparable economic situations. The research points out the difficulties over the centuries for women to have equal rights and enter the work force in the European Union (I), and precises the difficulties leading up to gender equality policies in the United Kingdom (II).

I. BACKGROUND TO WOMEN ON BOARDS IN THE EUROPEAN UNION

Women in Western Europe obtained the right to work and earn a wage starting in the nineteenth century. Employment legislation set out to protect women, but created additional social problems. Factories hired women, who had previously stayed at home to take care of family. The legal basis of paying women for work was questioned, whether women should have the same rights as men to work and be paid. Certain professions remained closed to women. Over the centuries, gender equality policies have defined ⁴⁵⁰ 'a tolerated access to professions requiring a higher education (1880-1920), a formal gender diversity (1920-1970), and ... equality (from 1980 up to now), even though parity for the sharing of responsibilities has still not been completely achieved.'⁴⁵¹

The research shows that the European Union Member States faced similar difficulties for women to have access to equal rights and equal treatment (A), though, Norway, not a member of the EU, had a democratic tradition of gender equality much earlier than continental European Union Member States (B).

⁴⁵⁰ Marie-Thérèse Letablier, 'Legislation on Women's Work in Europe' (2019) Encyclopédie pour une Histoire Nouvelle de l'Europe <<https://ehne.fr/fr/encyclopedie/th%C3%A9matiques/genre-et-europe/gagner-sa-vie-en-europe/l%C3%A9gislation-sur-le-travail-des-femmes-en-europe>> accessed 5 July 2019; Sylvie Schweitzer, 'Women and the Professions: a Very Long Road' (2020)) Encyclopédie pour une Histoire Nouvelle de l'Europe <<https://ehne.fr/en/encyclopedia/themes/gender-and-europe/earning-a-living/women-and-professions-a-very-long-road>> accessed 5 July 2019.

⁴⁵¹ *ibid.*

A. LEGAL DIFFICULTIES FACED BY WOMEN IN THE MEMBER STATES

Despite barriers, French women gradually obtained better social protection, as they entered the workforce. The work day was redefined. Night work was not permitted for women in France in the late 1800s. The European Commission declared an end to this law, nearly one hundred years later, in 1990. This was met with resistance from several Member States, who remained hostile to women working at night. France was condemned in the *Stoeckel* decision in 1991 for not ending the ban.⁴⁵² France was also condemned for other work-related policies. The Commission objected that women with children were offered different employment terms under collective bargaining agreements, with two procedures for recruitment, one for men and one for women in the public sector.⁴⁵³ These restrictions created additional difficulties for French women to enter the workforce.

The research points to case law, which ruled against women working at night, stating it was for their own good by protecting them and citing physiological differences (1), though this legislation ended in the 1970s, when gender equality legislation entered into force (2).

1. European case law and employment of women

In European Case Law, the *Stoeckel* case, the Court had to consider, whether French legislation prohibited women to work at night, which was meant to protect them, and if it was justified under EU law. The French and Italian governments referred to physiological differences between women and men, which showed women weaker

⁴⁵² European Court Reports, Judgment of the Court of 25 July 1991. Criminal Proceedings against Alfred Stoeckel. Reference for a Preliminary Ruling: Tribunal de Police d'Ilkirch, France, Equal Treatment for Men and Women; Legislation Prohibiting Nightwork by Women, Case C-345/89, I-04047 (1991) <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61989CJ0345>> accessed 5 July 2019.

⁴⁵³ Letablier (n 450).

than men and the need to protect them from night work. Advocate General Tesaro stated 'Female workers were ...physically weaker and thus more vulnerable to certain consequences of nightwork, such as the possibility of physical or mental problems. It was considered 'somewhat inappropriate that women should undertake nightwork in the company of workers of the opposite sex.'⁴⁵⁴

Article 119 (art. 157 of the Treaty on the Functioning of the EU) was the first and only legal basis for gender equality in the European Union from 1957 to 1997. The legislation is an important reference, even if it was the only one. The EU refers to Article 119 to promote gender equality and contest inequality. However, the German government did not immediately agree that Article 119 of the Treaty of Rome 1957⁴⁵⁵ was the legal basis and did not transpose it into Länder law in the public sector until the 1990s, forty years after the establishment of the Treaty. The notion of equal treatment was passed in 2006 German legislation, Section 1 of the General Act on Equal Treatment, which prohibits discrimination based on gender, specifically stating that 'the aim of the law is to prevent or eliminate discrimination based on ... gender..⁴⁵⁶ Therefore, Article 119 was not given consideration that, '[e]ach Member State shall ... ensure and ... maintain the application of the principle that men and women should receive equal pay for equal work. ...Equal pay without discrimination based on sex ...'.⁴⁵⁷ The lack of recognition may have been responsible for a setback to gender equality initiatives in Germany, since implementation and recognition of Article 119 may have advanced gender equality policies more rapidly. Though, Article 119 of the Treaty of Rome was considered a minor reference at the time, it has become the legal and historical basis

⁴⁵⁴ EU Law, Opinion of Mr. Advocate General Tesaro delivered on 24 January 1991, I 4055 (1991) n5 <<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61989CC0345&from=IT>> accessed 5 July 2019.

⁴⁵⁵ Treaty of Rome, Article 119 (Article 157 of the Treaty on the Functioning of the EU; Jacquot (n 162); Letablier (n 450).

⁴⁵⁶ Letablier (n 450); German Legislation, General Act on Equal Treatment (Law to Implement the European Directive on the Realization the Principle of Equal Treatment) (Allgemeine Gleichbehandlungsgesetz) (2006) <www.gesetze-im-internet.de/agg/index.html> accessed 5 July 2019.

⁴⁵⁷ n 455, EU Treaty, Treaty of Rome, Article 119 (Article 157 of the Treaty on the Functioning of the EU.

of European gender equality legislation. It was the first time women were cited in legislation, stating the '...principle [of] equal pay for equal work'.⁴⁵⁸

Having introduced the background to a minimum harmonisation by referring to case law, the employment of women in the EU and Article 119 (art. 157 of the Treaty on the Functioning of the EU), as the first and only legal basis for gender equality in the EU from 1957 to 1997, the research examines how gender equality policies have developed in the European Union.

2. The development of gender equality policies in the European Union

The Treaty of Rome called on the European Economic Community (now the European Union) to develop economic single-market policies. Gender equality legislation was non-existent at the time, except for a reference to earnings. It took more than forty years for EU institutions and Member States to develop gender equality policies and legislation through diverse treaties, directives and other legislation.⁴⁵⁹ Council Directive 75/117/EEC of 10 February 1975 on the Approximation of the Laws of the Member States relating to the Application of the Principle of Equal Pay for Men and Women upholds Article 119 of the Treaty of Rome and reaffirmed the principle that women and men receive equal pay. This legislation was considered fundamental in the creation of the EEC.⁴⁶⁰ In the 1970s, discrimination case law developed with the employer responsible for the protection of rights of women in the workplace. Since the 1980s, seven directives have provided the legal basis for women in employment in the European Union. In the 1990s, the European Commission focused on the advancement of gender equality to improve the European economy.

⁴⁵⁸ *ibid.*

⁴⁵⁹ Jacquot (n 162).

⁴⁶⁰ EU Law, Council Directive 75/117/EEC of 10 February 1975 on the Approximation of the Laws of the Member States relating to the Application of the Principle of Equal Pay for Men and Women (1975) OJ L45, 19-20 <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A31975L0117>> accessed 5 July 2019.

The Treaty of Amsterdam 1997 made gender equality a pillar of the EU, along with a strong single economy and unity. It was the first treaty to declare equality between women and men, which '... acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex ...'⁴⁶¹ The Treaty of Amsterdam established that Member States should comply with EU fundamental rights, principles and values, such as democracy and equality. The Treaty went further, than what had been originally founded in EU competences. This inclusion allowed the EU to intervene in national law, when Member States diverge from EU values.

The Treaty of Nice furthered the Treaty of Amsterdam by adding EU intervention in national law, only if serious divergence from EU values occur. These amendments had an effect on the Member States, as they started to pass women on boards soft and hard law. The EU treaties influenced the European Commission to make women on boards a priority. According to the European Community Framework Strategy on Gender Equality (2001-2005), the recommendation referred to 'improving the gender balance in economic ... decision-making'.⁴⁶²

...[T]he Commission recommends monitoring and evaluating ... recruitment and career development for potential female top managers. It ...

⁴⁶¹ Treaty Establishing the European Community (Amsterdam Consolidated Version) - Part One: Principles - Article 13 (1997) OJ C340 <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A11997E013>> accessed 5 July 2019.

⁴⁶² European Parliament Report, Ottavio Marzocchi, The Protection of Article 2 TEU Values in the EU (2021) <<https://www.europarl.europa.eu/factsheets/en/sheet/146/the-protection-of-article-2-teu-values-in-the-eu>> accessed 27 September 2021; n 403, EU Law, Community Framework Strategy on Gender Equality; European Commission Report, EU Communication, Report from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions - Annual Report on Equal Opportunities for Women and Men in the European Union COM (2002) COM (2003) 0098 final <<https://eur-lex.europa.eu/legal-content/lv/TXT/?uri=CELEX:52003DC0098>> accessed 5 July 2019.

proposes to establish and maintain a full set of regularly updated statistics on women in decision-making positions.⁴⁶³

The European Commission called on women to 'play a full role' to enter the workforce in numbers and in economic decision-making positions.⁴⁶⁴ The European Commission offered a specific programme to Eastern European Union Member States, who had recently joined the EU. Women were invited to join seminars to become board-ready and participate in economic decision-making, starting in 2003, with stakeholders, and then, with other Member States. The European Commission recommended action to increase gender equality measures in the European Union, by improving decision-making and selection processes of board directors.⁴⁶⁵

Article 157(3) is cited as the legal basis for the proposed directive, which 'shall adopt measures to ensure the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, including the principle of equal pay for equal work or work of equal value'. Article 157(4) '[ensures] full equality in practice' and grants the Member States the possibility of 'adopting measures providing for specific advantages in order to make it easier for the underrepresented sex to pursue ... or to prevent or compensate for disadvantages in professional careers.'⁴⁶⁶ Having explained the development of gender equality policies in the European Union, the research points to the democratic tradition of gender equality in Norway.

⁴⁶³ *ibid*; European Commission Report, EU Communication, Report from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions - Annual Report on Equal Opportunities for Women and Men in the European Union COM (2002) COM (2003) 0098 final.

⁴⁶⁴ n 462, European Commission Report.

⁴⁶⁵ European Commission, Opinion of the European Economic and Social Committee on the Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions A Roadmap for Equality between Women and Men 2006-2010, COM (2006) OJ C318, 92 final, 173-179 <<https://eur-lex.europa.eu/legal-content/GA/TXT/?uri=CELEX:52006AE1174>> accessed 5 July 2019.

⁴⁶⁶ n 172, Consolidated Version of the Treaty on the Functioning of the European Union – Part Three: Union Policies and Internal Actions – Title X: Social Policy, Article 157(3) and Article 157(4).

B. THE SOCIAL DEMOCRATIC TRADITION OF GENDER EQUALITY IN NORWAY

Norway has a social democratic tradition of successive left governments and a long history of gender equality. Though Norwegian women obtained the vote in 1907, they had already obtained a degree of equality with men in the 1870s. The Norwegian situation was considerably in advance, compared to EU Member States.⁴⁶⁷ Norway was an exception, as women and men were considered legal adults, from 1888 onwards. The research takes a look at Norwegian gender equality history, dating back to the Constitution(1), which shows that, Norwegian women were granted political and economic rights starting from 1839 (2).

1. Norwegian gender equality history

Norwegian gender equality policies and principles of equality date back to the Norwegian Constitution of 1814. It is the oldest written Constitution in Europe and still in effect. In 1994, the Constitution was amended to include the responsibility of the authorities of the State to respect and ensure human rights.⁴⁶⁸ After noting the long and democratic tradition of gender equality in Norway, the research focuses on political and economic rights for women.

2. Political and economic rights for women

In 1839, before most EU Member States allowed women to access the workforce, Norwegian women were authorized to work as master craftsmen, if over forty years of age. In 1842, widows and spinsters were permitted to open businesses. In 1854, Norwegian women were allowed to inherit. Before this time, a sister could only inherit

⁴⁶⁷ Letablier (n 450).

⁴⁶⁸ Norwegian Constitution, The Constitution of the Kingdom of Norway (Lovdata, 2017) <<https://lovdata.no/dokument/NLE/lov/1814-05-17>> accessed 5 July 2019.

half of what her brother inherited. In the 1860s, women could become craftsmen. In 1869, single women were considered legally independent at twenty-one years of age. Married women had to wait until 1888. In 1884, women were permitted to attend university. The Norwegian Women's Rights Movement was founded in 1884. Wealthy women were allowed to vote in local elections in 1901. In 1907, they could vote in parliamentary elections and run for office. All women were allowed to vote in 1913. Though, women were gaining political and employment rights, property ownership remained as joint ownership until 1927, when a statute proclaimed equality in marriage, giving the wife full equal rights.⁴⁶⁹

Having shown that women have had strong political and economic rights in Norway, the research compares the situation with that of the United Kingdom.

II. BACKGROUND TO GENDER EQUALITY POLICIES IN THE UNITED KINGDOM

In the United Kingdom, women obtained the vote in 1918 and in 1928. Women's movements had been active starting in 1867, campaigning for the right to vote. It was only in 1918 that women over thirty years old had the right to vote. In 1928, all women obtained the right to vote.⁴⁷⁰ The research shows that the background to gender equality in the United Kingdom dates back to the eighteenth century with the struggle for women to have the right to vote (A), and, despite gender equality progress in the twentieth century, the twenty-first century witnessed the Brexit (B). It is too early to know how this will affect gender equality and women on boards in the United Kingdom.

⁴⁶⁹ Karin Bruzelius Heffermehl, 'The Status of Women in Norway' (1972) 20(4) *The American Journal of Comparative Law* 630-646.

⁴⁷⁰ Women in the City Communication, *The Women's Timeline* (Women in the City, 2014) <<https://www.citywomen.co.uk/wp-content/uploads/2014/04/gender-equality-timeline.pdf>> accessed 3 September 2019.

A. THE RIGHT TO VOTE IN THE UNITED KINGDOM

Women in the United Kingdom lobbied for equality and voting rights, as early as the eighteenth century, which led to political reforms in the nineteenth century. The Industrial Revolution brought about social change and notions of equality. Women lobbying for the vote were suffragists. The definition of a suffragist is 'an advocate of voting rights to women,' whereas, the definition of a suffragette is 'a women advocate of women's rights to vote, especially a militant advocate in the United Kingdom at the beginning of the 20th century.'⁴⁷¹ The suffragists and the suffragettes were responsible for women gaining voting rights, though, it happened in two steps. The research shows that, despite the difficulties women had to have equal treatment (1), by the end of the twentieth century, women were granted important rights (2).

1. Earlier gender equality

During the early 1900s, women went on strike against poor wages and employment conditions. Ironically, women could be elected mayor, but they did not have the right to vote. In 1918, women were allowed to become Members of Parliament (MPs). In 1920, women were allowed to enter the legal and accounting profession. In 1923, the Matrimonial Causes Act granted women the same divorce rights as men, with its legal basis in the Influential Acts of 1857, which became the foundation of civil rights. Non-working women received allowances from their husbands. Legislation was passed to allow women to keep half the savings given by their husbands in 1964. The Equal Pay Act was passed in 1968, after massive strikes by women in production sites, which made it illegal to pay women less than men for equal work. In the 1970s, women were refused

⁴⁷¹ 'suffragist' 'suffragette' (n) The Free Dictionary <<https://www.thefreedictionary.com/suffragist>> accessed 20 October 2021; UK Parliament Report, Early Suffragist Campaigning <<https://www.parliament.uk/about/living-heritage/transformingsociety/electionsvoting/womenvote/overview/earlysuffragist/>> accessed 20 October 2021.

mortgages, since few women worked. Women needed the signature from a man for banking matters.⁴⁷²

After noting that early gender equality began later in the UK than in Norway, the research turns to 20th century gender equality policies and legislation in the United Kingdom.

2. 20th century gender equality policies and legislation

In the 1970s, the Women's Liberation Movement was founded. In 1975, the Sex Discrimination Act forbade discrimination at work. In 1979, Margaret Thatcher became the first woman British Prime Minister. In 1980, women were allowed to apply for a loan on their own. In 1981, the first woman, Baroness Young, led the House of Lords. In 1982, women could be served a drink at a bar. In 1985, the Equal Pay (Amendment) Act permitted women to be paid the same as men. In 1986, the Sex Discrimination (Amendment) Act allowed women to retire at the same age as men. The Equality Act 2010⁴⁷³ protects women from discrimination based on sex.⁴⁷⁴ After providing background to 20th century gender equality policies and legislation in the United Kingdom, the research examines the uncertainties concerning women on boards in the United Kingdom post-Brexit.

B. UNCERTAINTIES POST-BREXIT

The Brexit has raised important questions about the future of women and gender equality in the United Kingdom. The Conservative Government and policies will have a

⁴⁷² n 470, Women in the City Communication, The Women's Timeline.

⁴⁷³ The Equality Act 2010 (2010) <<https://www.gov.uk/guidance/equality-act-2010-guidance>> accessed 3 September 2019.

⁴⁷⁴ n 470, Women in the City Communication, The Women's Timeline.

long-term impact on the position of women in the labour market and on company boards. The United Kingdom has always been in disaccord with almost all EU employment and social policies for the last two decades. This can be seen in the most recent proposed women on boards directive, which the UK has been fiercely against. Not surprisingly, the UK has systematically ruled against statutory gender equality legislation to address women in the workplace and positive regulations. The Brexit also means that, there are no EU minimum requirements to comply with. The most recent example is the proposed women on boards directive, which calls for forty percent of women on boards. The research is uncertain about how the Brexit will impact women on boards policies in public limited companies in the United Kingdom (1), though, there is much uncertainty about women on boards policies and legislation in Eastern European Union Member States (2).

1. Background to women on boards policies in the United Kingdom

Women faced massive difficulties to enter employment or to have the same rights as men in the 20th century, which have continued into the 21st century. Women on boards policies are proposed for economic gain, not to support gender equality or for reasons of parity. It remains unknown what will happen after Brexit.

Having explained that women continue to face difficulties in employment and the difficulty to confirm the future of women on boards in the United Kingdom post-Brexit, the research points to extreme policy approaches in the EU concerning gender equality and women on boards.

2. Contrast between Eastern and Western EU Member States

Despite what will occur post-Brexit, there remains a stark contrast between Eastern and Western EU Member States. This contrast is purposely addressed in this research, to

reveal the enormous gap of gender (in)equality, policies and legislation related to women on boards in the EU Member States. Too often, research compares Nordic countries to other Western European countries. It is this author's intention to bring attention to the situation, which women face in Eastern European Union Member States, in employment and the tremendous difficulty for women to access the boards of directors. Studies show that there is a correlation between women in the labour force and gender equality. Research suggests that more women in employment equal more women in decision-making positions.⁴⁷⁵ Then, the opposite is also true, that less women employed means less women in decision-making positions, as the next Section investigates.

Having explained the unknown future of women on boards in the United Kingdom and the various policy approaches in the EU, the research shall explain the research in connection to gender equality policies and legislation in Eastern European Union Member States.

§2: DIFFERENT POLICY APPROACHES IN EASTERN EUROPEAN UNION MEMBER STATES

Economic policy approaches are most alarming in Eastern European Union Member States. These Member States face high unemployment and economic difficulties, with women forced out of the employment market, while transitioning to market economies. While there has been economic growth in Western Europe, Eastern Europe is witnessing a steep decline.⁴⁷⁶

⁴⁷⁵ S. Terjesen S, R. Sealy R and V. Singh (n 359) 55-63.

⁴⁷⁶ United Nations Report, The Story behind the Numbers: Women and Employment in Central and Eastern Europe and the Western Commonwealth of Independent States (United Nations Development Fund for Women, 2006) 6.

The research indicates a lack of gender equality policies and legislation in Eastern and South East European Union Member States (I), though, there are several Eastern European Union Member States with limited gender equality policies and legislation, such as, the Czech Republic (II).

I. EASTERN AND SOUTH EAST EUROPEAN UNION MEMBER STATES WITHOUT ACTIVE GENDER EQUALITY POLICIES

As Eastern European Union Member States transition from centrally managed economies to free market economies. There are EU Member States, who have inactive or limited gender equality policies in place, despite mention of gender in their corporate governance codes, such as, in the Cyprus Corporate Governance Code. These Member States include Eastern and South East European Union Member States, and include, Malta and Cyprus.⁴⁷⁷

This may be explained as women in Eastern Europe were part of the State work economy, which obliged every man and woman to work. However, there are few women on boards of directors in public limited companies in Eastern Europe. The number of women on boards is an effective way to measure gender equality in Eastern Europe.⁴⁷⁸ However, gender equality policies and legislation in Eastern Europe are very different among the Eastern European Union Member States. The research has found that these Member States share the same challenges, since they are recent entrants in

⁴⁷⁷ Paula Arndt and Katharina Wrohlich, 'Gender Quotas in a European Comparison: Tough Sanctions most Effective' (2019) 9(38) DIW Weekly Report, 337-344; Corporate Code of Governance, A.1.12, 'is recommended that the companies' Board of Directors be sufficiently diversified in terms of age, gender and educational and professional background...' (Cyprus Corporate Governance Code, 2019) < <https://www.cse.com.cy/CMSPages/GetFile.aspx?guid=b77dda20-8bfb-4ab6-86c7-84cdcc6df050> > accessed 22 October 2022.

⁴⁷⁸ n 476, United Nations Report, The Story behind the Numbers: Women and Employment in Central and Eastern Europe and the Western Commonwealth of Independent States, 55.

the market economy (A), and have great difficulty aligning with Western European Union Member States' gender equality policies and legislation (B).

A. POLICIES AND LEGISLATION IN EASTERN EUROPEAN UNION MEMBER STATES

Despite the transition from state economies to market economies, gender inequality remained at nearly the same level prior to 1989 in Eastern Europe. In the 1980s, in Eastern and Western Europe, a great number of women entered the workforce. Though, women in Western Europe received better pay, due to equal treatment legislation. In Eastern Europe, women were given longer maternity leave, but they did not return to their jobs. By the 1990s, the gap in employed women widened between the East and the West. At the same time, many more women in Western Europe entered the workforce.

The labour market has greatly improved for women in Western Europe. Gender inequality in Eastern Europe has been attributed to the end of centrally managed economies to free market economies. The economic restructuring in Eastern Europe resulted in many women leaving the workforce, staying at home or unemployed.⁴⁷⁹

However, there are certain limitations to the research, as not all of the Eastern European Union Member States have been included. Eastern Europe is a region, though, Member States in this region have their own specific legal systems.

The research indicates that, there are limited gender equality policies and no women on boards legislation in Eastern European Union Member States (1), and explains that, women on boards policies and legislation are not a priority, as the European Union calls for (2).

⁴⁷⁹ *ibid*, 6-8.

1. Limitations to focus on Eastern European Union Member States as a region

The lack of gender equality soft and hard law remains an obstacle in the Eastern European Union Member States. Although, not all Eastern European Union Member States have the same gender policies or legislation. It is necessary to focus on individual Member States in Eastern Europe to grasp the limitations to gender equality employment measures in a particular Member State. Due to the lack of identifying policies, several Member States have not been included. It is not the intention to group the Eastern European Union Member States together as being one and the same. Nevertheless, they have several points in common. The legal and historical context of Eastern Europe needs to be considered. There is a general lack of political will in most Eastern European Union Member States to pass and enforce gender equality policies and legislation. Even when legislation is passed, it is very difficult to enforce. Moreover, the ongoing disagreement between Eastern European Union Member States and the European Commission, have resulted in hostile relations between them. Eastern European Union Member States are far from balanced gender parity in politics or in the private sector, such as, on the boards of directors in public limited companies. The Eastern European Union Member States joined the EU, starting in 2004:

- In 2004: Poland, Czech Republic, Slovakia, Hungary, Slovenia, Estonia, Latvia, Lithuania and South East European Union countries: Malta and Cyprus joined the European Union.
- In 2007: Romania and Bulgaria joined the EU.
- And, finally, in 2019, Croatia became an EU member.

Further research is required to investigate how EU gender equality policies and legislation will develop in these Member States and over a longer period of time. In 2020, the Eastern European Union Member States had the lowest representation of

women on boards; Estonia with 8.8 percent, Hungary with 9.9 percent and Lithuania with 14.3 percent.⁴⁸⁰

Having explained the limitations in researching gender equality policies and legislation in Eastern European Member States, the research points to the disjointed policy approaches concerning gender equality and women on boards in the Eastern European Union Member States.

2. Priorities other than gender equality and women on boards legislation

There is no binding quota legislation in place among the Eastern European Union Member States. Though, Eastern European Union Member States may have gender equality policies and legislation in place, women in decision-making positions and on boards are not a priority. Moreover, the subject of gender equality is on the decline in Romania, Slovakia and Slovenia. Before Eastern European women will be able to become board directors, a greater number of women in Eastern Europe will need to return to work. Gender equality legislation will be required to develop new policies, such as, childcare, flexible work conditions, tax incentives, parental leave, equal pay legislation, fair job evaluations and pay increases.⁴⁸¹ Comparatively, women in Western European Union Member States have had access to this specific gender equality legislation, since the 1980s.⁴⁸²

⁴⁸⁰ n 24, OECD Statistics, Employment, Female Share of Seats on Boards of the Largest Publicly Listed Companies.

⁴⁸¹ ILO Report, Gender Equality (2019) <<https://www.ilo.org/moscow/areas-of-work/gender-equality/lang--en/index.htm>> accessed 20 March 2020.

⁴⁸² The Equality Law Network Report, Gender Equality Legislation since the 1980s in the European Union, Key EU Directives in Gender Equality and Non-Discrimination (2020) <<https://www.equalitylaw.eu/legal-developments/16-law/76-key-eu-directives-in-gender-equality-and-non-discrimination>> accessed 5 July 2020.

Today, European Post-Socialist countries employment model continues to focus on traditional family policies. Women are often not represented in top management decision-making positions.⁴⁸³ Paradoxically, the economic case for gender equality in the Eastern European labour market is strong, as women are an important resource for the Eastern European market. Women in decision-making positions would contribute greatly to the economy. Regardless, the situation remains unbalanced, as no Eastern European Union Member States is close to parity on boards.⁴⁸⁴ In Lithuania, there were 12 percent of women on boards in 2019. In Hungary 12.9 percent, Estonia 9.4 percent and the Czech Republic 18.2 percent, which represents a decline in the representation of women on boards in Eastern Europe.⁴⁸⁵

Having explained the different policy approaches in Eastern European Member States, the research examines obstacles to gender equality and women on boards for these Member States.

B. OBSTACLES TO GENDER EQUALITY AND WOMEN ON BOARDS

The market economy of Eastern Europe is developing very slowly, which does not permit a rapid increase of gender equality. Furthermore, ineffective or non-existent labour law and gender equality law are major hurdles. This also prevents women in Eastern European Union Member States from becoming board directors in public limited companies.⁴⁸⁶ According to the research, Eastern European Union Member States have limited gender equality policies and legislation in place and there is no enforcement mechanism in place for governments to ensure compliance (1). As a result,

⁴⁸³ C. Fagan, M. González Menéndez and S. Gómez Ansón (n 28) 11.

⁴⁸⁴ European Commission Report, Diversity Management in Eastern and Central Europe (2017) <<https://ec.europa.eu/newsroom/just/items/606999>> accessed 20 March 2020.

⁴⁸⁵ n 24, OECD Statistics, Employment : Female Share of Seats on Boards of the Largest Publicly Listed Companies.

⁴⁸⁶ n 481, ILO Report, Gender Equality.

the lowest representation of women on boards are found in Eastern European Union Member States (2).

1. Ineffective or limited gender equality policies and legislation

According to a recent study of gender equality in Eastern European Union Member States, there are different opinions about gender equality and women on boards. Overall, gender equality policies in place in Eastern European Union Member States remain far behind those of Western European Union Member States. Another study demonstrated the implementation of gender equality policies in the Czech Republic, Bulgaria, Poland and Latvia. Poland and Bulgaria implemented a greater number of gender equality policies compared with Latvia or the Czech Republic. All four Member States have difficulties in enforcing gender equality policies. EU law forms gender equality policies and legislation based on UN legal frameworks, such as, UN Guiding Principles, the Universal Declaration of Human Rights, the CEDAW and other recognised principles, such as social rights, human rights and freedoms.

Many Eastern European Union Member States do not recognise or have any legislation based on UN principles. The legal basis for UN-related gender equality may be found in the Constitution of a Member State. Not all Eastern European Union Member States have equal treatment legislation in place. Eastern European Union Member States with a reference to gender in their Constitutions are Romania, Slovenia, the Czech Republic and Poland.

According to Article 4(2) of the Romanian Constitution, Romania does not discriminate on the basis of sex. The Slovenian Constitution guarantees equal treatment to women and men before the law. The Preamble of the Constitution of the Czech Republic guarantees all citizens equal rights. Article 3 of the Constitution represents the Charter of Fundamental Rights and Basic Freedoms, which is part of the Constitution.

According to Article 3(1) of the Charter guarantees basic rights and freedoms to men and women.⁴⁸⁷ According to Article 32 of the Polish Constitution, '[a]ll persons shall be equal before the law. All persons shall have the right to equal treatment by public authorities'.⁴⁸⁸ Article 33 states women and men have equal rights in family matters, society, economy, politics and 'have equal rights, in particular, regarding education, employment and promotion, and shall have the right to equal compensation for work of similar value, to social security, to hold offices, and to receive public honours and decorations.'⁴⁸⁹

Member States such as Croatia, Slovenia, Lithuania and Latvia have soft law diversity programmes. Though, UN Guiding Principles and EU law call for greater representation of women in decision-making and management positions, none of the Eastern European Union Member States have policies or binding women on boards quota legislation in place. Having shown ineffective or limited policies in the Eastern European Member States, the research points to results of such inaction, with the lowest percentages of women on boards of all European Union Member States.

2. The lowest percentages of women on boards in the European Union

Eastern European Member States with the lowest percentage of women on boards included Estonia with 8.3 percent in 2022, Hungary with 10.5 percent and Romania with 17.2 percent, Malta with 14.4 percent and Cyprus with 9.8 percent of women on

⁴⁸⁷ Ekaterina R. Rashkova; 'Talking the Talk, but not Walking the Walk: Gender Equality in Eastern Europe' (2017) 33(2) East European Politics 309-315 <[10.1080/21599165.2016.1260552](https://doi.org/10.1080/21599165.2016.1260552)> accessed 15 April 2021; The Constitution of Romania (1991) <<http://www.cdep.ro/pls/dic/site.page?id=371>> accessed 15 April 2021; Republic of Slovenia Report, Equal Opportunities <<https://www.gov.si/en/policies/state-and-society/human-rights-and-equal-opportunities/>> accessed 15 April 2021; The Czech Republic Constitution (1993) <https://www.constituteproject.org/constitution/Czech_Republic_2013.pdf?lang=en> accessed 15 April 2021; The Czech Republic Charter of Fundamental Rights and Freedoms (1992) <https://www.usoud.cz/fileadmin/user_upload/ustavni_soud/www/Pravni_uprava/AJ/Listina_English_version.pdf> accessed 15 April 2021.

⁴⁸⁸ *ibid.*

⁴⁸⁹ *ibid.*

boards.⁴⁹⁰ The Czech Republic has lapsed from 23 percent in 2021 to 21.3 percent in 2022. Hungary has also regressed from 29 percent in 2021 to 26.9 percent in 2022. Bulgaria has also lost headway from 21.7 percent in 2021 to 16.9 percent in 2022.⁴⁹¹

II. LACK OF WOMEN ON BOARDS LEGISLATION IN THE CZECH REPUBLIC

Estonia, Lithuania, Czech Republic, Slovakia and Hungary have no women on boards quota legislation in place. It is doubtful that these Member States will pass quota legislation anytime soon. There is a great difference between Member States' approaches to gender equality. The governments of Romania and Bulgaria are considering passing women on boards hard law. This is surprising as, the representation of women on boards in public listed companies in Bulgaria has regressed from 21.7 percent to 16.9 percent. Other Member States, such as, Poland, Slovenia and Croatia have quotas for women in electoral positions, but no women on boards legislation. Overall, several Eastern European Union Member States' governments consider general equality legislation is sufficient and women on boards legislation is unnecessary.⁴⁹² The research has examined the limited gender equality employment policies in the Czech Republic (A), though, no women on boards legislation exists in this Member State (B).

A. LIMITED GENDER EQUALITY EMPLOYMENT POLICIES IN THE CZECH REPUBLIC

It is important to understand the background why there are limited gender equality policies in the Czech Republic. The Czech Constitution included gender equality and

⁴⁹⁰ n 27, European Institute for Gender Equality Statistics, Positions Held by Women in Senior Management Positions.

⁴⁹¹ European Commission Publication, Report on Equality between Women and Men in the EU (2019) 29; n 240, EIGE Statistics, Largest Listed Companies: Presidents, Board Members and Employee Representatives.

⁴⁹² European Commission Communication, Diversity Management in Central and Eastern Europe - Lesson Learned and Potential for Growth (2019) <<https://ec.europa.eu/newsroom/just/items/606999>> accessed on 20 March 2020.

the right for women to vote in 1920. Under Communism, women were encouraged to have children and forced to work, in exchange of generous state benefits. Communist propaganda showed women, as 'socialist women ...employed full-time, [using] institutional, day-long (sometimes even week-long) childcare services, [who] were politically active and managed to run the household efficiently'.⁴⁹³ The employment rate increased from thirty-six percent in 1948 to forty-six percent in 1984. Employment of women did not increase for equality reasons, but due to poverty, as women were forced into the market. Government policies included building schools and nursery schools, which would allow women to stay working. Women received generous maternity leave packages, which allowed them to stay at home for up to three years and still have a job to return to.⁴⁹⁴ The research has found that despite new social policies, women face difficulties to access employment in the Czech Republic (1), and despite existing gender equality legislation (2).

1. Government policies and difficulties for women to access labour market

Despite EU equality legislation, women face numerous difficulties to access the labour market in the Czech Republic. The market economy was supposed to offer women opportunities, although, it has had the opposite effect. After the Fall of the Wall in 1989, the employment situation of women deteriorated. This continued into the 1990s. Women face difficulties due to gender discrimination in the labour market and gender segregation. The employment gap between women and men is one of the widest of any EU Member State with eighteen percentage points of difference with men.⁴⁹⁵

⁴⁹³ European Parliament Report, Kristina Koldinská, The Policy of Gender Equality in the Czech Republic (2015) 8 <[https://www.europarl.europa.eu/RegData/etudes/IDAN/2015/510009/IPOL_IDA\(2015\)51000_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/IDAN/2015/510009/IPOL_IDA(2015)51000_EN.pdf)> accessed 5 July 2019.

⁴⁹⁴ *ibid.*

⁴⁹⁵ *ibid.*, 12.

Having explained the difficulties women face to access the labour market, the research examines the specific case of the Czech Republic.

2. Czech Republic gender equality legislation

There is little gender equality legislation in the Czech Republic, which call for equality in the labour market. According to Article 3 of the Czech Charter of Fundamental Rights and Basic Freedoms (Act No. 2/1993 Coll.), women were granted equality with men. In the Anti-Discrimination Act 2009 (Act No. 198/2009 Coll.) definitions of discrimination address positive action and different treatment (Section 6). The Ombudsman Public Defender of Rights enforces the Anti-Discrimination Act. The Czech Labour Code (Act No. 262/2006 Coll.) and the Employment Act (Act No. 435/2004 Coll.) also granted women equal rights with men in employment.⁴⁹⁶ Despite the existing legislation and governmental bodies that support gender equality in the Czech Republic, women face difficulties in the political sphere and private sector to access decision-making positions, whether it be on electoral lists or on boards of directors. The Czech government is strongly against women on boards binding legislation and disagrees firmly with the European Union values and the EU proposed women on boards directive. The Government published a strategic Action Plan for Balanced Representation of Women and Men in Decision-Making positions 2016-2018, which included a list of measures to convert to legislation. However, the following measures to raise awareness about women on boards in state and private companies, positive action, reporting data of number of women on boards in annual reports have not

⁴⁹⁶ n 487, Czech Republic Charter of Fundamental Rights and Freedoms; Czech Republic Legislation, 198/2009 Coll. Act of 23 April 2008 on Equal Treatment and on the Legal Means of Protection against Discrimination and on Amendment to some Laws (the Anti-Discrimination Act) Act No. 198/2009 Coll. (2009) <https://www.ochrance.cz/uploads-import/DISKRIMINACE/pravni_predpisy/Anti-discrimination-Act.pdf> accessed 5 July 2019; The Czech Republic Ombudsman (2020) <[https://adsdatabase.ohchr.org/IssueLibrary/PUBLIC%20DEFENDER%20OF%20RIGHTS%20\(Ombusman\)%20\(Czech%20Republic\).pdf](https://adsdatabase.ohchr.org/IssueLibrary/PUBLIC%20DEFENDER%20OF%20RIGHTS%20(Ombusman)%20(Czech%20Republic).pdf)> accessed 5 July 2019.

become legislation. As of the date of this research, there is no women on boards legislation in the Czech Republic.⁴⁹⁷

Having explained the lack of gender equality legislation in the Czech Republic, the research examines the Czech government opposition to the proposed women on boards directive.

B. THE CZECH REPUBLIC AND LACK OF WOMEN ON BOARDS POLICIES

The Reasoned Opinion of the Czech Republic (2013) provides an example of the disagreement between the Czech Republic and the European Commission concerning gender equality policies. The research shows that the Czech Government recognises Article 157(3) of the TFEU (1), though, there continues to be widespread gender inequality in Czech Republic companies, which do not allow women to access board positions (2).

1. Recognition of Article 157(3) of the TFEU

Though, the Czech Republic government remains opposed to the proposed women on boards directive, the Government recognized the legal basis of Article 157 (3) of the TFEU, which upholds the principle of equal opportunities and equal treatment, in matters of employment for women and men.⁴⁹⁸

Though, the Czech Reasoned Opinion sent to the Commission explained that gender imbalance in top management was the fault of women, as they had difficulties to manage work-life balance. Gender stereotypes were also to blame. Still, women

⁴⁹⁷ *ibid*, The Czech Republic Ombudsman; Senden and Kruisinga (n 30) Gender Balance Company Boards in Europe, 104.

⁴⁹⁸ n 166, Consolidated Version of the Treaty on the Functioning of the European Union; Article 157(3).

represented the majority of university graduates in the Czech Republic, the idea of Czech women on supervisory boards was met negatively.⁴⁹⁹

Having explained that the Czech government recognised Article 157 (3) of the TFEU, the research found gender inequality a major theme in Czech companies.

2. Gender inequality in Czech companies

According to the Czech Republic government, there were reasons why women could not become board directors. Supervisory board directors in the Czech Republic were 58 years of age on average. According to the Czech government, it was impossible to find women in the same segment of senior management in companies, where board directors were recruited. Moreover, the Czech government explained that it was not interested in women on boards legislation. Instead, the Government asked the Commission to concentrate on discrimination-related issues. The Czech government took an even a stronger position, by denouncing women on boards legislation in Norway and in France. The topic of women on boards was considered premature and ineffective in the Czech Republic.⁵⁰⁰ Despite the official government position, women as a group in the Czech Republic have benefited greatly from EU gender equality

⁴⁹⁹ Czech Government Final Statement by Czech Senate and Czech Commission on EU Affairs (*in Czech*), Proposal for a Directive of the European Parliament and of the Council, on Improving the Gender Balance among Non-Executive Directors of Companies listed on Stock Exchanges and Related Measures <<https://secure.ipex.eu/IPEXL-WEB/document/COM-2012-0614>> and <<https://secure.ipex.eu/IPEXL-WEB/document/COM-2012-0614/czsen>> accessed 5 July 2019; The Parliament of the Czech Republic, Senate, 9th Term, Committee on EU Affairs, 64th Resolution delivered on the 8th Meeting held on 6th March 2013 on the Proposal for a Directive of the European Parliament and of the Council on Improving the Gender Balance among Non-Executive Directors of Companies listed on Stock Exchanges and Related Measures (Senate Press no.) No. 006/09 <https://www.senat.cz/xqw/xervlet/pssenat/webNahled?id_doc=68152&id_var=57342> accessed 5 July 2019; The Office of the Government of the Czech Republic, Government Strategy for Equality of Women and Men in the Czech Republic for 2014-2020 (2014) <https://www.vlada.cz/assets/ppov/rovne-prilezitosti-zen-a-muzu/Projekt_Optimalizace/Government_Strategy_for-Gender_Equality_2014_2020.pdf> accessed 5 July 2019; European Parliament Notice to Members (20/2013) <https://www.europarl.europa.eu/meetdocs/2009_2014/documents/juri/cm/927/927381/927381en.pdf> accessed 5 July 2019.

⁵⁰⁰ *ibid.*

legislation. Although EU and Czech gender equality legislation exists, there remain barriers for women to be represented on the board directors. Since the Czech government is strongly against the use of women on boards quota legislation, there seems to be no way to significantly increase the representation of women on boards in any foreseeable future. In 2021, there were twenty-three percent of women on boards on the largest 100 Czech companies.⁵⁰¹

Despite recognition of Article 157 (3) of the TFEU by the Czech government, the research found the Czech government and companies are responsible for not enforcing existing EU and Czech legislation to increase the representation of women on boards. Though, the situation will need to be followed closely, as to what will happen when the proposed directive enters into force.

III. GENDER EQUALITY POLICIES AND LEGISLATION IN ESTONIA

There is little gender equality legislation or women on boards legislation in Estonia, as figures show Estonia with 9.1 percent of women on boards in 2021, one of the lowest representations of women on boards in the EU.⁵⁰² The Estonian Gender Equality Act set out to 'ensure equal treatment of men and women, as provided for in the Constitution of the Republic of Estonia and to promote equality of men and women as a fundamental human right and for the public good in all areas of social life.'⁵⁰³ The Act is a declaration, which is non-binding soft law.⁵⁰⁴ Additional soft law exists in the form of the Estonian Corporate Governance Recommendations and the Estonian Corporate

⁵⁰¹ n 240, EIGE Statistics, Largest Listed Companies: Presidents, Board Members and Employee Representatives.

⁵⁰² n 24, OECD Statistics, Employment, Female Share of Seats on Boards of the Largest Publicly Listed Companies.

⁵⁰³ Estonian Legislation, Estonian Gender Equality Act (2004) §1(1) <<https://www.riigiteataja.ee/en/eli/530102013038/consolide#:~:text=2009%5D,all%20areas%20of%20social%20life.>> accessed 20 March 2020.

⁵⁰⁴ Senden (n 29) 52.

Governance Code. Of the ten largest companies in Estonia, five have a single woman on the board. There are five women on boards out of a total of fifty-three board directors.⁵⁰⁵

The research confirms that women on boards is problematic in Estonia. The Estonian government wrote a letter to the European Commission, asking to change the proposed directive to soft law (A), though, the number of women on boards in Estonian companies has been decreasing (B). In 2019, there were 9.4 percent of women on boards and in 2022, there are 8.3 percent of women on boards.⁵⁰⁶

A. CALL FOR PROPOSED DIRECTIVE AS NON-BINDING

The Estonian government tested the principle of subsidiarity and conformity of the proposed women on boards directive. The Government disagreed with the Commission for the need of a women on boards directive, stating that there were too many differences to consider among the Member States. Their suggestion was to make the proposal non-binding national law recommendations, which would allow more time for the Member States to implement a women on boards policy.

The research found that the reasons that the Estonian government remains opposed to the proposed directive for fear that unqualified quota women access the board (1), and also, because the Estonian government found the proposed directive 'unfair and discriminatory' (2).

⁵⁰⁵ European Bank for Reconstruction and Development Report, Gian Piero Cigna; Yaryna Kobel and Alina Sigheartau, 'Corporate Governance in Transition Economies, Poland' (EBRD, 2017) 9 <<https://www.ebrd.com/sites/Satellite?c=Content&cid=1395252273659&pagename=EBRD%2FContent%2FDownloadDocument>> accessed 20 March 2020.

⁵⁰⁶ n 240, EIGE Statistics, Largest Listed Companies: Presidents, Board Members and Employee Representatives.

1. Quota women

The Estonian Parliament European Union Affairs Committee did not draft a Reasoned Opinion about the EU women on boards proposal. Instead, the Estonian government discussed the women on boards proposal internally. The Government wrote a letter to the European Commission explaining its position. The Estonian government did not believe a directive was necessary, nor did it want EU interference in Estonian business matters. It suggested proposing soft law recommendations, instead of a directive.

According to Estonian companies, the implementation of binding quota legislation would not bring results. Although, the proposed women on boards directive mentioned no fewer than eighteen references of qualified women, as candidates to boards, not quota women.⁵⁰⁷ Nevertheless, the overwhelming concern of the Estonian government was that 'quota women' or 'compulsory quotas might create a situation where women were elected into leadership teams of companies to fill a quota and not on the strength of their abilities or prior achievements'.⁵⁰⁸ This was not founded, as the proposed women on boards directive defined the nomination process with the

... preference rule provides that, in the presence of equally qualified candidates of both sexes priority shall be given to the candidate of the underrepresented sex 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. This procedural requirement is necessary to ensure

⁵⁰⁷ n 202, EU Law, Opinion of the European Economic and Social Committee on the 'Proposal for a Directive of the European Parliament and of the Council on Improving the Gender Balance among Non-Executive Directors of Companies Listed on Stock Exchanges and Related Measures, 68–76; Reasoned Opinion of the Estonian Government, Estonia, Proposal for a Directive of the European Parliament and of the Council on Improving the Gender Balance among Non-Executive Directors of Companies Listed on Stock Exchanges and Related Measures, Scrutiny Details, Subsidiarity Details (IPEX, 2013) <<https://secure.ipex.eu/IPEXL-WEB/document/COM-2012-0614>> accessed 5 July 2019; Estonian Parliament Scrutiny of Proposal for a Directive of the European Parliament and of the Council on Improving the Gender Balance among Non-Executive Directors of Companies Listed on Stock Exchanges and Related Measures (2012) <<https://secure.ipex.eu/IPEXL-WEB/document/COM-2012-0614/eerii>> accessed 5 July 2019.

⁵⁰⁸ *ibid.*

that the objectives comply with the case-law⁵⁰⁹ of the Court of Justice of the European Union concerning positive action. The requirements laid down ... should be met at the appropriate stage of the selection process depending on national law and the articles of association of listed companies.⁵¹⁰

Compliance with CJEU (previously ECJ) case law notably refers to the *Kalanke* case, where a German state law gave women 'absolute and unconditional' priority in the labour market. Positive action programmes with automatic preferences to one sex, where the qualifications are equal, are considered discriminatory and inconsistent under EU law, as one sex cannot have priority over the other. The proposed directive includes a tie-break quota, which guarantees equality of opportunity and not an unconditional hard quota of absolute preference. If a Member State disagrees with the proposed directive and according to the precedence principle, European law is superior to national laws of Member States. All European acts are to be applied with binding force. According to the principle of supremacy (primacy) and the CJEU, 'laws issued by European institutions are to be integrated into the legal systems of the EU Member States, who are obliged to comply with them.'⁵¹¹ Having shown that the Estonian government opposition to quotas, the research has found an extremely low percentage of women on boards in Estonia.

2. An unfair and discriminatory directive

The Estonian government called the proposed women on boards directive 'unfair and discriminatory'. The opinion did not explain further or give reasons why it was unfair

⁵⁰⁹ ECJ case law related to positive action include: C-450/93: *Kalanke* (1995 ECR I-3051), C-409/95: *Marschall* (1997 ECR I-6363), C-158/97: *Badeck* (2000 ECR I-1875), C-407/98: *Abrahamsson* (2000 ECR I-5539). The ECJ test was based on women being underrepresented and fully qualified for the position; *Selanec and Senden* (n 175) 13.

⁵¹⁰ n 202, EU Law, Opinion of the European Economic and Social Committee on the Proposal for a Directive of the European Parliament and of the Council on Improving the Gender Balance among Non-Executive Directors of Companies Listed on Stock Exchanges and Related Measures, 68–76.

⁵¹¹ EU law, Law of Precedence or Primacy of EU law (2019) <https://eur-lex.europa.eu/summary/glossary/primacy_of_eu_law.html> accessed 5 July 2019.

and discriminatory. The underrepresented sex normally refers to women, since there were only 9.1 percent of women on boards in Estonia in 2021. It could not refer to men, who made up the majority of directors on boards. The objective of the proposed directive is to increase the representation of women on boards to a level of parity, which the European Commission has set at forty percent. Therefore, the comment of unfair and discriminatory must refer to men, who were the represented sex making up 90.9 percent on boards. In 2018, there were eight percent of women on boards of public limited companies or 92 percent of men on boards. The increase of women on boards from 2018 to 2021 shows barely a point of difference.⁵¹²

The Estonian government is against binding quota legislation, stating that it would restrict business freedom. According to the Government, EU institutions 'ignore the functioning logic of the business environment' in Estonia.⁵¹³ In addition, the Estonian government found that, the proposed EU women on boards directive conflicted with the principle of subsidiarity. Therefore, the Government remained hostile to binding quota legislation, initiated by the European Commission for conflicting reasons consisting of unfairness, discrimination and subsidiarity.

Having shown strong disapproval of minimum harmonisation, the research has found the percentage of women on boards is decreasing in Estonia.

B. LOW REPRESENTATION OF WOMEN ON BOARDS IN ESTONIA

The research found that with such a low representation of women on boards, it is clear that, women are excluded from top management positions in Estonia (1), and points

⁵¹² European Commission Report, Gender Equality, Country Report Estonia (2020) 20.

⁵¹³ n 507, Reasoned Opinion of the Estonian Government; n 507, Estonian Parliament Scrutiny of Proposal for a Directive of the European Parliament and of the Council on Improving the Gender Balance among Non-Executive Directors of Companies Listed on Stock Exchanges and Related Measures (2012).

out that the Estonian government did not comply with Europe 2020 recommendations to increase the number of women in the labour force and on company boards(2).

1. Exclusion from top management positions

As the business environment excludes women in top management positions in Estonia, women on boards binding quotas are not a priority for the Estonian government. The number of women on boards in Estonia has been decreasing, as in 2019 there were 9.4 percent of women on boards, 9.1 in 2021 and 8.3 in 2022.⁵¹⁴

Having shown the exclusion of women in top management is reflected in the low percentages of women on boards in public listed companies in Estonia. The research has found that the Estonian government and businesses do not consider women on boards important and are excluding women from accessing board positions.

2. Non-compliance with EU Strategy 2020

The Estonian government ignored the EU Strategy 2020 recommendation. The recommendation called for increasing the number of women in the labour market, including women on the boards of directors, as an economic necessity. Having shown that women are unable to access boards of directors in public listed companies in Estonia, the research has noted that the Government ignores EU policy recommendations.

⁵¹⁴ n 24, OECD Statistics, Employment : Female Share of Seats on Boards of the Largest Publicly Listed Companies; n 507, Reasoned Opinion of the Estonian Government; n 508, Estonian Parliament Scrutiny of Proposal for a Directive of the European Parliament and of the Council on Improving the Gender Balance among Non-Executive Directors of Companies Listed on Stock Exchanges and Related Measures (2012).

IV. GENDER EQUALITY POLICIES IN HUNGARY

The situation of gender equality in Hungary is disconcerting. The research shows that Hungarian gender equality policies and legislation are at odds with the political reality in Hungary (A), and despite governance and women on boards policies (B). Hungary is a conservative country, rooted in deep traditions, where women are encouraged to stay at home and raise children. Though, recently, there has been a slight change, which encourages women to work and raise a family at the same time. Hungarian society has strong gender identification. Men are considered the natural leaders, even if, women are recognised for being competent in their work. Women are criticized, if they return to work too early, because their company asks them to return after several months of childbirth. This may be explained by the fact that, the Hungarian government grants women three years of maternity leave. Though, women are also criticized if they hold a top management job, as those jobs are supposed to go to men.⁵¹⁵

A. GENDER EQUALITY POLICIES AND LEGISLATION IN HUNGARY

Article XV of the Fundamental Law of Hungary, which is part of the Constitution, was last amended in 2013 and mentions that women and men have the same rights.⁵¹⁶ The research points out further that the Act of Equal Treatment and Promotion of Equal Opportunities (2003), which is gender equality legislation, shows that women have equal status as men (1), however, this is not reflected in the representation of women on boards in public limited companies in Hungary, as the number has been decreasing in recent years (2).

⁵¹⁵ Beata Nagy, Women in Management: The Hungarian Case, in Fagan C., González Menéndez M.C., Gómez Ansón S. (eds) *Women on Corporate Boards and in Top Management. Work and Welfare in Europe* (1st edn, Palgrave Macmillan, London, 2012) 221-244.

⁵¹⁶ The Hungarian Constitution (Constitution 2011 with updated amendments 2013) <https://www.constituteproject.org/constitution/Hungary_2013.pdf?lang=en> accessed 22 May 2022.

1. The Act of Equal Treatment and Promotion of Equal Opportunities

According to the Act of Equal Treatment and Promotion of Equal Opportunities (2003), men and women are declared equal. It is noteworthy that the passing of this legislation was a condition for Hungary to join the EU in 2003. The Equal Treatment Authority, founded in 2005, was a gender equality governmental agency, which investigated inequality, work-life issues, unequal pay and employment conditions of women. The Hungarian government closed the Equal Treatment Authority permanently at the beginning of 2021, as the Government continues to be in conflict with EU values and gender equality. This action has further reduced the rights and equal treatment of women in Hungary.⁵¹⁷

When Hungary joined the EU, gender equality was at a stagnation point. The Hungarian government published the National Gender Strategy in 2010. Nevertheless, too little progress has been made. In a speech by the Hungarian Minister in 2011, women in decision-making positions were considered important, because of demographics, an ageing population, low birthrate and the economic landscape. Therefore, there are many contradictions about the role of women in the economy. Past history showed that Hungarian women entered the labour market by force and massively under Socialism. Women had gained certain equality rights. However, post-Socialism witnessed the opposite trend, which is a comparable situation for women in other Eastern European Union Member States. The collapse of the state economy led to restructuring, sending women to low paid jobs and leaving the employment market massively to take care of their children. Women held management level positions during the transition period, but this is no longer true. Fifty-six percent of Hungarian

⁵¹⁷ European Network of Legal Experts in Gender Equality and Non-Discrimination Report, András Kádár, Legislation Adopted Abolishing the Equal Treatment Authority and Transferring its Tasks to the Ombudsman (10 February 2021) <<https://www.equalitylaw.eu/downloads/5345-hungary-legislation-adopted-abolishing-the-equal-treatment-authority-and-transferring-its-tasks-to-the-ombudsman--kb>> accessed 26 December 2021.

women hold university degrees. Despite this, there is a non-official quota for men, which gives them the top positions in the economy. There is no meritocracy in Hungary.⁵¹⁸ Hungary is ranked 27th in the EU in gender equality and the situation is declining rapidly. The subject of gender equality in general and in employment are not considered of great importance in Hungary. As Nagy explains, the situation 'of women is only a thing of the past and now we can speak about not only stagnation, but also about a fall'.⁵¹⁹ Having shown that, despite the existence of gender equality policies in Hungary, the research found there is a decrease of women on boards.

2. A continuing decrease of women on boards

There were 9.4 percent of women on boards in 2021, 9.9 in 2020 and 12.9 percent in 2019.⁵²⁰ The figures demonstrate that the decrease of women on boards is a result of the political and social policies working against gender equality, the suppression of gender equality authorities, a lack of legislation and non-recognition of women becoming directors of companies or on boards.⁵²¹ Having explained that there is a decrease of women on boards in Hungary, the research turns to governance policies.

B. GOVERNANCE AND WOMEN ON BOARDS POLICIES

Despite the steady decrease of women on boards in the Hungarian economy, women are advancing in the business sector, more than in politics. There are many qualified professional women entering the workforce. Multinationals have created programmes

⁵¹⁸ Hungarian Constitution (2013) Article XV <https://www.constituteproject.org/constitution/Hungary_2013.pdf?lang=en> accessed 5 July 2019; Nagy (n 515) 221-244; EIGE Report, Gender Equality Index 2019: Hungary (2019) <<https://eige.europa.eu/publications/gender-equality-index-2019-hungary>> accessed 5 July 2019.

⁵¹⁹ Nagy (n 515).

⁵²⁰ n 24, OECD Statistics, Employment : Female Share of Seats on Boards of the Largest Publicly Listed Companies.

⁵²¹ EIGE Report, Progress in Gender Equality in Hungary since 2010 (2021) <<https://eige.europa.eu/gender-equality-index/2021/country/HU>> accessed 23 December 2021.

for women, such as, 'the GE Women's Network, the Shell Diversity Project for Female Leaders or the Proctor and Gamble Women's Advancement Programmes ' to align with diversity policies'.⁵²² These programmes represent the future of qualified women entering the job market.

The research shows that, despite these soft law programmes to increase the representation of women as leaders, there is a lack of gender equality policies and no women on boards legislation(1), and, moreover, the Hungarian Government refuses to accept EU gender equality recommendations and the proposed directive, explaining that the European Union does not understand the uniqueness of the Hungarian economy (2).

1. The lack of gender equality policies and legislation in Hungary

There are serious issues about the role of women in top management and decision-making positions in Hungary. The traditional society rejects the notion of women in top management positions, with a preference for them to stay at home. Family policies in companies and old boys networks keep women out. Corporate governance policies and recommendations do not make any reference to gender, gender equality, diversity or women.

Instead of a glass ceiling, in Hungary the labyrinth is composed of a male preference, a dislike for women in management positions, a conflict of leadership styles and a lack of work-life balance....[W]omen face more than one obstacle. The labyrinth walls in Hungary are further strengthened by a public and political climate that does not encourage women to become managers at all.⁵²³

⁵²² n 518, Hungarian Constitution (2013) Article XV; Nagy (n 515) 240-241, 244.

⁵²³ *ibid*, n 518, Hungarian Constitution Article XV; *ibid*, Nagy (n 515) 240-241, 244.

Due to this situation, there is neither gender equality legislation, nor policies about women on boards. The Hungarian government informed the Commission that it did not support the proposed women on boards directive. However, public limited companies might have to comply with the proposed directive one day, when it enters into force. Even if few gender equality policies in Hungary exist, they are soft law recommendations.

The research has found there is a quantified male presence on boards of directors for cultural and historical reasons and a seemingly unsurmountable flagrant conflict of interests with EU law.

2. The uniqueness of the Hungarian economy

Several reasons may explain the position of the Hungarian government and companies. They are against women on boards quotas, convinced that it means that women will be parachuted into positions and not selected based on merit. The Government does not want interference from the European Commission, stating that the Commission does not understand how the Hungarian economy works. At the same time, there are views that neither gender equality or employment are based on merit.⁵²⁴ Gender equality legislation is developing very slowly in Hungary. Though, it is an economic priority to increase the employability of women, there remain many obstacles, which demonstrate that the representation of women on boards remains very far off.

Having explained the difficulties to implement gender equality policies and legislation in Hungary, the research has found other Eastern and South East European Union Member States with limited gender equality policies.

⁵²⁴ European Parliament Report, Beáta Nagy, 'Gender on Corporate Boards and in Top Management in Hungary' (2013); Nagy (n 515) 221-227.

V. EASTERN AND SOUTH EAST EUROPEAN UNION MEMBER STATES' POLICIES

Malta and Romania have basic gender equality policies or legislation in place. Gender equality and women on boards legislation are not priorities in these Member States.⁵²⁵

The research has found that, despite the fact that, Malta grants women equal rights in its Constitution, there is a considerable lack of gender equality policies (A), while Romania grants equal rights in its Constitution and has an excessive amount of gender equality legislation, though it remains unenforced (B).

A. BASIC GENDER EQUALITY POLICIES IN MALTA

The Constitution of Malta, in Chapter Two of the Declaration of Principles 14, grants equal rights to women and men. The Equality for Men and Women Act 2003 is the primary gender equality legislation.

The research finds that, though, Malta has no women on boards legislation in place (1), the Maltese Government is currently examining new gender equality soft law, as well as the proposed women on boards directive (2).

1. The lack of women on boards legislation

Malta has no binding women on boards legislation. Malta has a very low percentage of women on boards compared to other Member States.⁵²⁶ In 2022, there were 10.9 percent of women on boards.⁵²⁷ With twenty-three public listed companies in Malta,

⁵²⁵ The Constitution of Malta (2016) < <https://legislation.mt/eli/const/eng> > accessed 3 January 2021; Maltese Legislation, The Equality for Men and Women Act (2003) < <https://legislation.mt/eli/cap/456/eng> > accessed 3 January 2021; Senden and Kruisinga (n 30) 48.

⁵²⁶ Senden and Kruisinga (n 30) 51.

⁵²⁷ EIGE Gender Statistics, Malta (2020) < https://eige.europa.eu/gender-statistics/dgs/indicator/wmidm_bus_bus_wmid_comp_compbm > accessed 3 January 2021.

only nine had one woman on the board of directors.⁵²⁸ Having explained that there is a lack of women on boards legislation in Malta, despite support from the European Social Fund, the research notes that various soft law exists and a low percentage of women on boards.

2. Malta and gender equality policies

The Maltese government is examining several projects, jointly supported by the National Commission for the Promotion Equality and the European Social Fund and various soft law initiatives.⁵²⁹ Having explained that soft law has not improved the representation of women on boards in Malta, the research turns to examine gender equality policies in Romania.

B. BASIC GENDER EQUALITY POLICIES IN ROMANIA

The Constitution of Romania Article 4(2) accords equality to women and men. Article 16 of the Constitution is gender equality legislation, which grants equal access to employment and positions. Despite basic soft law, Romanian women have difficulties accessing certain professions (1), as the Government has no means to enforce gender equality legislation (2).

1. Unequal access to employment

The employment rate in Romania exposes important differences between women and men in the labour market. According to the Romanian National Institute of Statistics,

⁵²⁸ Maltese Chamber of Commerce, Just 9 Out Of 23 Major Maltese Companies Have Women On Their Board Of Directors (2017) <<https://www.maltachamber.org.mt/en/just-9-out-of-23-major-maltese-companies-have-women-on-their-board-of-directors>> accessed 3 July 2019.

⁵²⁹ European Commission Country Report Gender Equality, Malta (Equality Law, 2018) 60; Malta, European Equality Law Network (2019) <<https://www.equalitylaw.eu/country/malta>> accessed 3 July 2019.

women do not have equal access to all professions.⁵³⁰ Women are barely present in politics, with an average of ten percent of women represented in Parliament.⁵³¹ There were 17.5 percent of women on boards in 2021.⁵³² The research finds that there is a great deal of gender equality legislation in Romania (a), but none concerning women on boards (b).

a. More gender equality legislation

Equal treatment and opportunities for women and men gender equality legislation has been in existence since the 1980s. Women started participating greatly in economic life, though, this continues to be in decline, since the last economic crisis. Moreover, there is no women on boards legislation in Romania. Having explained that there is a considerable amount of gender equality legislation in Romania, the research found that there is an issue, which prevents women from accessing employment in general.

b. The contradiction of the legislation

Despite the contradiction of more gender equality legislation, there are fewer women in top management and even fewer women on boards.⁵³³ This has been attributed to strong gender identification and a patriarchal mentality towards gender equality, considering women are property and good for domestic chores.⁵³⁴

⁵³⁰ The Constitution of Romania (2003) <<https://www.presidency.ro/en/the-constitution-of-romania>> accessed 5 July 2019; Adriana-Anca Cusmir, 'Gender Equality in Romania, Statistical Data and Cultural Norms' (2015) 2 Romanian Journal of Sociological Studies, New Series, 137–148 <<https://journalofsociology.ro/wp-content/uploads/2016/01/03-ACusmir.pdf>> accessed 5 July 2019.

⁵³¹ Deloitte Communication, Women on Board Survey: Gender Diversity on Boards Doubled in Organizations with Female Leadership (2017) <<https://www2.deloitte.com/ro/en/pages/about-deloitte/articles/deloitte-women-boardroom.html>> accessed 5 July 2019.

⁵³² EIGE Gender Statistics, Romania (2020) <https://eige.europa.eu/gender-statistics/dgs/indicator/wmidm_bus_bus_wmid_comp_compbm> accessed 3 January 2021.

⁵³³ Valentina Vasile, 'Demographic Change and the Labour Market in Romania', Institute of National Economy (Romanian Academy, 2004) <https://www.researchgate.net/publication/46473743_Demographic_Changes_and_Labour_Market_in_Romania> accessed 5 July 2019.

⁵³⁴ Cusmir (n 530) 143.

Having explained that due to strong gender identification, it is difficult for women to have equal treatment in Romania,, the research turns to examine the legislation.

2. Gender equality legislation

The Romanian government has passed an excess of gender equality legislation in Romania, despite an absence of women on boards legislation. According to Article 1 of Law no. 202 of April 19, 2002 on Equal Opportunities and Equal Treatment for Women and Men, the legislation calls ' to eliminate all forms of discrimination based on sex.'⁵³⁵ Article 4(e) of Law no. 202 of April 19, 2002 on Equal Opportunities and Equal Treatment for Women and Men called for 'positive action...[and] special action which is taken temporarily to accelerate the actual achievement of equal opportunities between women and men...'⁵³⁶

According to Article 21 of Law no. 202 of April 19, 2002 on Equal Opportunities and Equal Treatment for Women and Men, the legislation guarantees balanced participation in leadership and decision-making between men and women in public, political and economic areas, as well as trade unions.⁵³⁷

⁵³⁵ Romanian Legislation, Article 1 of Law no. 202 of April 19, 2002 on Equal Opportunities and Equal Treatment for Women and Men (2002) <<http://legislatie.just.ro/Public/DetaliiDocument/35778>> accessed 5 July 2019.

⁵³⁶ *ibid*, Romanian Legislation, Article 4(e).

⁵³⁷ Women's Non-Governmental Organizations of Romania Report, V. Employment, Economic and Social Benefits (Art. 11, 13) Women's Status in Romania, A Shadow Report to the CEDAW 23rd Session (Women's Non-Governmental Organizations of Romania, 2000) 14 <https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/ROU/INT_CEDAW_NGO_ROU_27790_E.pdf> accessed 5 July 2019; European Commission Report, Linda Senden and Kruisinga Sonja, Romania and Soft Law, Gender Balanced Company Boards in Europe (European Commission, 2018) 163.

According to the Report to the CEDAW, though Romania is committed to harmonise national law with EU law, there are serious concerns, that Romanian governmental institutions are unable to ensure gender equality, as they lack means and policies.⁵³⁸

According to Act no. 202/2002, policies linked to equal opportunities in Romania were considered ineffective. The reasons for this included, 'weak execution [of] the legislation and due ineffectiveness to apply the law'. The CEDAW Committee called on the Romanian government to provide the means to enforce the legislation, including reporting and sanctions.⁵³⁹ The same year as the legislation, the Committee made recommendations to address the situation of women in the labour market. The recommendations included to "facilitate women's entry into new growth sectors of the economy,...women's entrepreneurship, ... equal opportunities for women".⁵⁴⁰ Romanian gender equality legislation obliged companies to draft policies to increase the representation of women on boards. The legislation is non-binding and carries no sanctions. There are three points to know about women on boards in Romania, also called women in decision-making.

1. [There is a]...[c]ertain reluctance... in appointing women in decision making position[s]. This occurs ... in male dominated staff and is based on assumptions regarding women's attitudes rather than on competence. In 1998, the number

⁵³⁸ *ibid.*

⁵³⁹ n 537; Romanian Legislation, Equal Opportunities Legislation between Women and Men, Government Decision no. 1054/2005, Official Gazette of Romania, Part I, no. 850 of September 20, 2005 (2005) (*in Romanian*) <<http://www.mmuncii.ro/j33/images/Documente/Legislatie/HG774-2017.pdf>> accessed 5 July 2019; Romanian Legislation, Gender Equality Legislation (2016) (*in Romanian*) <<http://anes.gov.ro/wp-content/uploads/2017/09/HG-177-din-2016-organizare-si-functionare-ANES.pdf>> accessed 5 July 2019; Romanian Legislation, Gender Equality Legislation (2014) (*in Romanian*) <<http://anes.gov.ro/wp-content/uploads/2017/09/HG-Nr-250-din-2014-organizare-si-functionare-DES-FB.pdf>> accessed 5 July 2019; Dentons Communication, News on Gender Equality Treatment in Romania (Dentons, 2019) <<https://www.dentons.com/en/insights/alerts/2019/may/29/news-on-gender-equality-treatment-in-romania>> accessed 5 July 2019; n 536, Women's Non-Governmental Organizations of Romania Report.

⁵⁴⁰ UN Report, Consideration of Reports of States Parties, Romania, Combined Fourth and Fifth Periodic Report Committee on the Elimination of Discrimination against Women, Twenty-Third Session (2000) 37 <<https://www.un.org/womenwatch/daw/cedaw/cedaw23/Romania%20as%20adopted.html>> accessed 5 July 2019.

of women in decision-making positions was four times lower than the number of men. Private companies do not promote equal opportunity policies in recruiting their personnel.⁵⁴¹

2. The Romanian corporate governance code includes a single gender diversity reference, which remains a voluntary recommendation.⁵⁴²
3. According to the 2018–2021 National Strategy for the Promotion of Equal Opportunity and Treatment between Women and Men, the participation of women in decision-making processes and balanced participation are objectives of the Romanian government.⁵⁴³

According to the Government Decision no. 262/2019, provisions of Law no. 202/2002 on Equal Opportunity and Treatment of Women and Men called for gender equality in the workplace, but this legislation carried no sanctions.

According to the CEDAW Committee interview in 2017, the Romanian government officially supports equality between women and men in its legislation. Despite the equality legislation and due to deeply rooted history, women are not effectively considered equal to men.⁵⁴⁴ Along with gender equality policies, the National Strategy is examining the proposed women on boards directive and considering quota legislation to increase the representation of women on boards.

The 2018-2021 National Strategy for the Promotion of Equal Opportunity and Treatment between Women and Men called to '... increase the level of participation of women in decision-making in the economic sphere, ...in ... supervisory boards of private companies, ... by introducing quotas in the boards of ... companies listed on the

⁵⁴¹ n 537, Women's Status in Romania, A Shadow Report to the CEDAW 23rd Session (2000) V. Employment, Economic and Social Benefits (Art. 11, 13), Women's Non-Governmental Organizations of Romania.

⁵⁴² Romanian Code of Corporate Governance (2015) <<https://ecgi.global/code/code-corporate-governance-romania-2015>> accessed 5 July 2019.

⁵⁴³ European Institute for Gender Equality Romania Report, Legislative and Policy Framework (2019) <<https://eige.europa.eu/gender-mainstreaming/countries/romania>> accessed 5 July 2019.

⁵⁴⁴ CEDAW Committee Report, Liliana Pagu Asociatia Femeilor Din Romania (Liliana Pagu Romanian Women's Association), Afri Imoreuna (2017) <https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/ROU/INT_CEDAW_NGO_ROU_27676_E.pdf> accessed 5 July 2019.

Bucharest Stock Exchange'.⁵⁴⁵ Having examined gender equality legislation in Romania, the research has found there is a conflict of interests between EU gender equality policies and the Romanian government.

CONCLUSION

Despite gender equality legislation in Romania, it will take a long time for real gender equality and a forty percent representation of women on boards. Romania faces important cultural challenges, which reflect the actual situation of women in the employment market and on boards. Gender equality legislation, the revised Romanian Constitution in 2003 and ratification of ILO Conventions demonstrate that the legal framework exists, but government initiatives are missing to implement gender equality legislation to increase the representation of women on boards.⁵⁴⁶

Though, the Romanian government declares it would like more women to enter the labour market and on company boards, playing an active role in the economy, but this is not the reality.⁵⁴⁷ Though, Romania has basic gender equality legislation and despite the quantity of legislation, it has not been strict enough with the legislation, as there are no sanctions for non-compliance. Therefore, the number of women on boards remains quite low in Romania.⁵⁴⁸

⁵⁴⁵ Romanian Government, National Strategy on Equal Opportunities and Treatment of Women and Men and on Preventing and Combating Domestic Violence 2018–2021 (2018) 5 <[Strategia națională privind promovarea egalității de șanse și de tratament între femei și bărbați și prevenirea și combaterea violenței domestice pentru perioada 2018–2021](#)> accessed 5 July 2019; CEDAW Concluding Observations, Committee on the Elimination of Discrimination against Women (2017) 4 <[Concluding observations. CEDAW/C/ROU/CO/7-8](#)> accessed on 5 July 2019.

⁵⁴⁶ n 532, EIGE Gender Statistics, Romania.

⁵⁴⁷ Irina Budrina, 'Phenomenon of Women-Leaders in Romania and Russia: Equal Gender Opportunities in Emerging Markets'(2012) 13(5) Review of International Comparative Management 851 <<http://www.rmci.ase.ro/no13vol5/14.pdf>> accessed 3 July 2019.

⁵⁴⁸ n 240, EIGE Statistics, Largest Listed Companies: Presidents, Board Members and Employee Representatives.

Yet, there are contradictions, as the Romanian government is consulting with National Strategy and examining the proposed women on boards directive. Gender equality is reduced to the strict minimum and not an important subject in many of the Eastern European Union Member States, such as, in the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia and Slovenia.

The four countries became Member States of the EU in 2004.⁵⁴⁹ Gender equality legislation in these Member States is in its infancy stage, compared to Western European Union Member States. It will take many years for Eastern European Union Member States to develop legislation, which includes women on boards.

SECTION 2 DIFFERENT ACTIVE SOFT LAW POLICY APPROACHES

The soft law approach to women on boards may be understood, as just a stepping stone⁵⁵⁰ to hard law. Member States begin with soft law instruments, such as recommendations, programmes or corporate governance codes, as a necessary *rite de passage*, before moving on to binding quota legislation. It should be stated that soft law measures have increased the representation of women on boards, in the majority of Member States, and are an important means for companies to implement rules to increase the representation of women on boards. However, soft law has not brought fast enough results, as it does not carry sanctions.⁵⁵¹

⁵⁴⁹ EU Communication, Further Expansion (2020) <https://europa.eu/european-union/about-eu/history/2000-2009_en#:~:text=1%20May%202004,and%20Malta%20also%20become%20member%20s> accessed 3 January 2021.

⁵⁵⁰ 'stepping stone', 'an action or event that helps one to make progress towards a specified goal', Lexico powered by Oxford English Dictionary <https://www.lexico.com/definition/stepping_stone> accessed 3 September 2018.

⁵⁵¹ Teigen and Skjeie (n 109) 125-126.

The European Commission consulted with the Member States and sent a recommendation for companies in the European Union to establish a women on boards policy.⁵⁵² The Commission informed the Member States that, failure to adopt a women on boards policy would result in stronger measures, such as a directive. Though, a directive would be too difficult for most Member States to transpose into national law within a timeframe and to report to the Commission.⁵⁵³ It was in this context that Member States began to implement soft law and add provisions to existing corporate governance codes.

The research confirms that EU Member States have very different legal systems, which determine women on boards policies (§1), including a semi-binding approach, which may have legal effect and include targets, the comply or explain principle and reporting obligations (§2).

§1: SPECIFIC LEGAL SYSTEMS AND INSTRUMENTS

EU Member States may agree to increase the representation of women on boards of directors in principle. In practice, it is quite complex, as each Member State has a different legal system, which reflects national law, political systems, history, legal and cultural traditions, which determine policies or legislation to implement.⁵⁵⁴ There are

⁵⁵² n 12, European Commission, The EU Corporate Governance Framework (Green Paper).

⁵⁵³ EU Law, Regulations, Directives and other Acts (2020) <https://europa.eu/european-union/law/legal-acts_en> accessed 20 March 2020.

⁵⁵⁴ AMF Report, Comparative Study: Corporate Governance Codes in 10 European Countries (2016) 7.

four principal legal systems,⁵⁵⁵ which determine the way Member States implement women on boards policies. They are:

- non-intervention, which indicates that the Member State has not taken any action
- voluntary action or the implementation of soft law
- a semi-binding approach⁵⁵⁶ (a hybrid of soft and hard law), which uses self-regulation and the comply or explain principle
- and binding quota legislation or hard law, which may consist of different degrees⁵⁵⁷

A particular approach indicates, whether a Member State relies on soft law, hard law or a combination or none of these. The research has found that a pure soft law legal system has been around since the 1980s (I), as pure soft law programmes were introduced on a voluntary basis, which were government-led or business-led.

I. SYSTEMS RELYING ON PURE SOFT REGULATION

The European Council has been calling for soft law recommendations since 1984 to increase the representation of women on company boards by 'encouraging women candidates and the recruitment and promotion of women in sectors and professions ...

⁵⁵⁵ Heike Mensi-Klarbach and Cathrine Seierstad, 'Gender Quotas on Corporate Boards: Similarities and Differences in Quota Scenarios' (2020) 17(3) *European Management Review* 615-631.

⁵⁵⁶ '...soft law does not necessarily lack coercive enforcement, but when a strong enforcement mechanism has been set up in combination with soft obligation, soft law comes very close to hard law.' Fabien Terpan, 'Soft Law in the European Union, The Changing Nature of EU Law' (2015) 21(1) *European Law Journal* 68-96.

⁵⁵⁷ *ibid*; S. Karlsson-Vinkhuyzen and A. Vihma, 'Comparing the Legitimacy and Effectiveness of Global Hard and Soft Law: An Analytical Framework' (2009) 3 *Regulation & Governance* 400-42 <https://www.researchgate.net/publication/229867258_Comparing_the_Legitimacy_and_Effectiveness_of_Global_Hard_and_Soft_Law_An_Analytical_Framework> accessed 5 July 2019; Katrin Hansen and Silke Machold, 'Concluding Remarks in Part V' in *Getting Women to Corporate Boards: A Snowball Starting in Norway* (1st edn, Edward Elgar Publishing, 2013) 210.

at levels where they are underrepresented, particularly as regards positions of responsibility...'⁵⁵⁸

The majority of EU Member States favour a soft law approach, with the use of corporate governance codes or other soft law instruments, which are non-binding, nor top-down and restrictive. The research confirms that the German government tried to keep a soft law voluntary system in place with flexi-quotas, which were ineffective in increasing the representation of women on boards (A), while other Member States introduced government or business-led pure soft law programmes (B).

A. SOFT LAW PROGRAMMES IN GERMANY

Soft law programmes in Germany date back to 1980, when the Government launched the 'Situation der Frauen' Programme,⁵⁵⁹ which consisted of recommendations for companies to increase the representation of women in top management of companies. The research has examined the long history of pure soft law programmes in Germany (1), though, additional means to increase representation of women on boards were the German Corporate Governance Code (2).

1. Voluntary women on boards programmes

The voluntary programmes launched by the largest German companies included, the 'Female Leadership Project' by the Commerzbank, 'Leading Across Cultures' and 'Genders Programme' by Bayer, a mentoring programme by Allianz and the

⁵⁵⁸ EU Law, Council Recommendation 84/635/EEC of 13 December 1984 on the Promotion of Positive Action for Women (1984) OJ L331, 0034, n4 <<https://op.europa.eu/fr/publication-detail/-/publication/2c756080-da95-498c-b11d-ee26443f2281/language-en>> accessed 5 July 2019; EU Law, Second Council Resolution of 24 July 1986 on the Promotion of Equal Opportunities for Women (1986) OJ C203/0002 <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A31986Y0812%2801%29>> accessed 20 March 2020.

⁵⁵⁹ *ibid.*

'Reconcilable Programme' by Deutsche Bahn.⁵⁶⁰ Despite the many private business initiatives, soft law proved ineffective in increasing the representation of women on boards.⁵⁶¹ The research points to German governmental programmes, which introduced flexi-quotas to increase the representation of women on boards (a), though, gender diversity provisions in the corporate governance codes was another soft law means to increase the representation of women on boards (b).

a. Governmental Programmes

The German government flexi-quotas were targets without sanctions, as the Government took a firm position against binding quota legislation.⁵⁶² Public limited companies and companies with employee representatives would be obliged to set a fixed quota and legally comply by making it public. The flexi-quota would enter into force in 2013, if companies had not increased the representation of women on boards by voluntary means. The sanctions for non-compliance were not strict. They consisted of contesting the appointment of a board directors. Furthermore, the flexi-quota would not be enforced, if companies reached thirty percent of women on boards in supervisory and management boards through voluntary means.⁵⁶³ Since soft law programmes were ineffective and not led to a significant increase in the representation of women on boards, binding quota legislation entered into force in 2016.

Having explained that the German government supported soft law programmes to increase the representation of women, the research has found that besides

⁵⁶⁰ European Commission Report, Linda Senden and Kruisinga Sonja, *Gender Balanced Company Boards in Europe*, German Soft Law Policies (2018) 91.

⁵⁶¹ M. Schulz-Strelow, 'Women on Boards: Lessons Learnt from Norway' in S. Machold, M. Huse, K. Hansen and M. Brogi (eds) *Getting Women on to Corporate Boards-A Snowball Starting in Norway* (Cheltenham UK, Edward Elgar, 2013) 179-183; Cathrine Seierstad et al, 'Increasing the Number of Women on Boards: The Role of Actors and Processes' (2017) *Journal of Business Ethics*.

⁵⁶² n 41, European Commission Report, *Women in Economic Decision-Making in the EU*, Progress Report. A Europe 2020 Initiative (2012) 20.

⁵⁶³ *ibid*, 20-21.

programmes, the corporate governance framework may also include gender diversity provisions in corporate governance codes to increase the representation of women on boards.

b. The corporate governance framework

Corporate governance policies vary in the Member States. Policies include rules and decisions for top management of the company. In 2018, the following Member States included gender diversity in corporate governance code provisions: Austria, Denmark, Finland, Germany, Luxembourg, Poland, Slovenia Sweden, and the UK.⁵⁶⁴

Having explained that the corporate governance policies with gender diversity provisions, which are rules for the company to follow, the research also found that corporate governance codes may include legislation and reporting obligations to increase the representation of women on boards.

2. Legislation and the German Corporate Governance Code

The KODEX, the German Corporate Governance Code, provides an important means for companies to increase the representation of women on boards. There was also specific mention of women on boards in the Stock Corporation Act. Under German statutory law, the Stock Corporation Act (*Aktiengesetz*) requires mention of the legislation in the corporate governance code provisions concerning the composition of executive and supervisory boards of public limited companies.⁵⁶⁵ The German Corporate Governance Code required companies to report women on boards data in

⁵⁶⁴ European Women's Lobby Report, Women on Boards in Europe: From a Snail's Pace to a Giant Leap (2012) 6.

⁵⁶⁵ German Legislation, §161 (1) (2) German Stock Corporation Act (*Aktiengesetz*) Declarations of Compliance, German Corporate Governance Code, Regierungskommission Deutscher Corporate Governance KODEX (2017) <<https://www.dcgk.de/en/declarations-of-compliance.html>> accessed 5 July 2019.

their annual reports. §161 of the German Code of Corporate Governance requires companies to report compliance of women on boards legislation (management and supervisory boards) on an annual basis in a declaration published in the Federal Gazette. If the company does not comply, the company shall use the comply or explain principle. This information shall be available on the company website.⁵⁶⁶

The code also included reference to diversity, women, targets and board appointments. The wording of 4.1.5 of the German Corporate Governance Board (2017), 'board composition shall include diversity and 'an appropriate consideration of women'.⁵⁶⁷ According to the German Corporate Governance Code 2019, §A, Principle 3, the representation of women on management boards is accompanied by target values. Recommendation A1 accompanies the Principle stating that diversity will be taken into consideration when making appointments to the board.⁵⁶⁸ According to the KODEX 2019 §C Composition of the Supervisory Board, Principle 11, the 'composition of the Supervisory Board has to ensure that its members collectively possess the knowledge, skills and professional expertise required to properly perform their duties, furthermore, the legal gender quota must be considered'.⁵⁶⁹

German companies are obliged to adhere strictly, only when binding legislation is cited in the code. According to 5.41 of the German Corporate Governance Code 2017,

... listed companies to which the Co-Determination Act, the Montan Co-Determination Act or the Co-Determination Supplementary Act applies, the Supervisory Board shall be composed of at least 30 % women and at least 30 %

⁵⁶⁶ *ibid.*

⁵⁶⁷ The German Corporate Governance Code 2017, 4.1.5 <https://www.dcgk.de/files/dcgk/usercontent/de/download/kodex/170424_Kodex.pdf> accessed 5 July 2019; European Parliament Report, Jo Armstrong and Sylvia Walby, Gender Quotas in Management Boards, Effects of Voluntary Regimes (2012) 14.

⁵⁶⁸ The German Corporate Governance Code 2019, §A; Principle 3 <<https://www.dcgk.de/en/code/current-version/a-management-and-supervision.html>> assessed 3 January 2020.

⁵⁶⁹ *ibid.*, §A; Principle 11.

men. For the other companies covered by the Equal Opportunities Act, the Supervisory Board shall set targets for the proportion of women.⁵⁷⁰

The German Corporate Governance Code adapted its provisions with the legislation. The research indicates that equality in provisions was not explicit (a), though, the language regarding board composition, became clearer in the latest corporate codes, due to the inclusion of the hard law in the soft law (b).

a. The German Corporate Code Provisions

The German Corporate Governance Code includes provisions, which refer to the representation of women on boards, though the language needs to be interpreted to understand this, as the reference is somewhat vague. According to provision 4.1.5 of the German Corporate Governance Code 2015, it is recommended that companies 'take diversity into consideration and...aim for an appropriate consideration of women.'⁵⁷¹ According to Section C, Principle 11 of the KODEX, the supervisory board shall ensure that board directors have appropriate professional experience and skills, as well as meeting the 'legal gender quota'.⁵⁷² The quota legislation is embedded in the corporate governance codes. Therefore, hard law is part of the corporate governance code soft law.

Board directors are appointed by shareholders and employee representatives on German supervisory boards. In 2006, the majority of women board directors were elected by employee representatives. In 2016, women were appointed almost equally, by shareholders and employee representatives. In 2018, employee representatives

⁵⁷⁰ Walby (n 416) 10; n 567, The German Corporate Governance Code 2017, 5.4.1.

⁵⁷¹ The German Corporate Governance Code 2015, 4.1.5. < https://www.dcgk.de/files/dcgk/usercontent/—/en/download/code/2015-05-05_Corporate_Governance_Code_EN.pdf > accessed 5 July 2019.

⁵⁷² *ibid.*

represented approximately fifty percent.⁵⁷³ According to the Co-determination Act and the Co-determination Act for the Coal, Iron and Steel Industry, known as the *Montan-Mitbestimmungsgesetz*, the Supervisory Board shall be comprised of at least thirty percent of women and at least thirty percent of men.⁵⁷⁴

Having explained that German corporate code provisions included gender diversity, the research has found that besides gender diversity, the corporate governance code also included composition of the board.

b. Composition of the board

The German Governance Code was amended in 2017. The provision changed to ‘{w}hen appointing the company's executives, the Management Board shall consider the principle of diversity, and in particular endeavour to achieve the appropriate consideration of women for such positions’.⁵⁷⁵ The 2017 code provision called for the representation of women on boards, though, the provision does not explicitly explain what is meant by ‘endeavour to achieve the appropriate consideration of women for such positions’. Each Company was left to interpret the meaning of this provision.⁵⁷⁶ The 2019 Corporate Governance Code changed format, as well as language used in the provisions. Provision number 4.1.5 has been replaced in A. Management and Supervision, Principle 3, which stated, ‘[t]he Management Board stipulates target values

⁵⁷³ DIW Weekly Report, Elke Holst and Katharina Wrohlich; ‘Increasing Number of Women on Supervisory Boards of Major Companies in Germany; Executive Boards Still Dominated by Men’ German Institute for Economic Research/Deutsches Institut für Wirtschaftsforschung (DIW, Berlin, 2019) n3 <https://www.diw.de/documents/publikationen/73/diw_01.c.612031.de/dwr-19-03-1.pdf> accessed 5 July 2019.

⁵⁷⁴ German Legislation, Artikel 1, §4(1) and Artikel 3(4)§96b, Act for the Equal Participation of Women and Men in Leadership Positions in the Private and Public Sector, Federal Law Gazette, no. 17, 642 [2015] <<http://dipbt.bundestag.de/extrakt/ba/WP18/643/64384.html>> accessed 17 March 2019.

⁵⁷⁵ Armstrong and Walby (n 567) 10; n 567, The German Corporate Governance Code 2017, 4.1.5.

⁵⁷⁶ *ibid.*

for the share of women in the two management levels below the Board.⁵⁷⁷ The German Corporate Governance Code makes reference in its provisions to compliance with the gender quota in the company annual reports. The legal effect of the Code is much greater with the inclusion of the hard law in the provisions.

Having explained that, though, the German government supported soft law programmes and corporate governance codes to increase the representation of women on boards, the research found that many pure soft law programmes, were not effective in increasing the representation of women on boards.

B. PURE SOFT LAW PROGRAMMES

Pure soft law programmes were introduced to increase the representation of women on boards on a voluntary basis, without government intervention. In the Member States, these programmes were either government-led or business-led. The different methods consisted of pure soft law programmes, which are divided into two categories: good practices in companies and cross-company sector initiatives.⁵⁷⁸ Soft law is most widely used, as a means for Member States to avoid binding legislation. The research found that Norwegian government and business associations offered seminars and courses to facilitate board-ready women (1), and the Female Futures Programme offered courses for women to become board directors (2).

1. Seminars, Training and Mentoring Programmes in Norway

The Norwegian government and business associations put into place various programmes, seminars and courses to accompany women to become board directors.

⁵⁷⁷ n 568, The German Corporate Governance Code 2019, Section A. Management and Supervision, Principle 3.

⁵⁷⁸ Armstrong and Walby (n 567) 10.

The research found that, these programmes were offered on a voluntary basis, such as, Women to the Top Programme (a), while the government sponsored Government Board Ready seminars (b) and training women to become board directors (c).

a. Women to the Top Programme

The Women to the Top Programme, sponsored by the Confederation of Norwegian Enterprise, provides leadership seminars to women. The Confederation is the principal employer organisation in Norway. The programme trains women to become board directors. Employers choose the participants to the programme.⁵⁷⁹

b. Government Board Ready Seminars

The Norwegian Director of Equality offered board director training seminars to increase the representation of women on boards.⁵⁸⁰

c. Training women for the board of directors

The different Norwegian initiatives were aimed at training and preparing women for the board, as well as to recruit women to join the board.⁵⁸¹

1. The Female Futures Programme

The Female Futures Programme is a recruitment programme, run by the Confederation of Norwegian Enterprises, where board readiness courses were offered.⁵⁸² The

⁵⁷⁹ Huse (n 286) 14-15.

⁵⁸⁰ *ibid.*

⁵⁸¹ *ibid.*

⁵⁸² Teigen (n 119) 75; Elbjørg Gui Standal, 'Competence at Board Level: The Norwegian Case' in Silke Machold, Morten Huse, Katrin Hansen, and Marina Brogi (eds) *Getting Women on to Corporate Boards – A Snowball Starting in Norway* (1st edn, Edward Elgar Publishing, 2013) 38.

Norwegian government introduced the Female Future Programme at the same time as binding quota legislation in 2003. Companies identified qualified women for board positions from within their organisation. Companies and candidates were obliged to sign a statement of intent, which was an engagement, but not binding law. The candidates were trained to become board-ready. The companies targeted were public limited companies, obliged to comply with the quota legislation and starting from 2003. Since this date, one-thousand eight hundred women participated in the Female Future Programme from Norwegian public limited companies.⁵⁸³ The programme still exists, with fewer companies participating. Companies send two women per year and per region to the programme. Candidates are selected by their company. The candidates should be interested in senior management, in board positions and fully participate to the end of the programme. There are twenty-six women participating each year.⁵⁸⁴

Having explained the different Norwegian government and business training seminars and programmes, the research examines similar programmes in the Member States to increase the representation of women on boards.

II. OTHER SOFT LAW PROGRAMMES

Soft law programmes were led by government and business associations in the Member States were initiatives destined to increase the representation of women on boards. The choice of soft law to be selected should meet the objectives, taking into account the proportionality principle and considers that, 'action should not go beyond what is necessary to achieve the objective. Proportionality... [matches]... the policy

⁵⁸³ Confederation of Norwegian Enterprise, 'The Female Future Programme, Being a Leader can be for Most People, but it is an Art to be a Good Leader <<https://www.nho.no/tema/arbeidsliv/artikler/femalefuturealumni/>> accessed 5 July 2019.

⁵⁸⁴ Storvik and Teigen (n 56) 9; Confederation of Norwegian Enterprise; 'Who can Participate in the Female Future Programme?' (2019)

intervention to the size and nature of the identified problem and its EU (subsidiarity) dimension in particular.’⁵⁸⁵

Corporate governance codes are usually the first step before hard law, with governments using threats to pass hard law, if soft law is not implemented. Soft law instruments also include recommendations or pure self-regulation. The research found other soft law programs existed, such as, Charters (A), Targets and other programmes (B) and a database of board ready women (C).

A. CHARTERS AND OTHER PROGRAMMES

The Charter for More Women in Management invited companies to hire more women in management positions and evaluate their participation every two years.⁵⁸⁶ The research notes that the Danish government proposed another Charter Programme (1), and other programmes to increase the representation of women in management and executive management positions (2).

1. Charter Programmes in Denmark

The Danish government and companies put into place Charter programmes, which were voluntary measures. The research cites the Charter of Women in Executive Management to increase the representation of executive women in companies (a), though, other joint government and business initiatives were proposed to increase the representation of women on boards (b). It may be said that the soft law has been relatively effective.

⁵⁸⁵ European Commission Report, Tool n. 18. The Choice of Policy Instruments (2017) <https://ec.europa.eu/info/sites/default/files/file_import/better-regulation-toolbox-18_en_0.pdf> accessed 5 July 2019; Machold and Hansen (n 86) 170.

⁵⁸⁶ Viviane Reding, ‘Winning the Board Game: Europe’s Economy Needs More Women in Business’, *A Snowball Starting in Norway*, Silke Machold, Morten Huse, Katrin Hansen, and Marina Brogi (eds) (1st edn, Edgar Elgar, 2013) 207.

a. The Charter of Women in Executive Management

The Ministry of Gender Equality launched the Charter for more Women in Executive Management Programme,⁵⁸⁷ which consisted of targeting one-hundred Danish companies to sign the government Charter in 2011. However, sixty-six companies actually signed the Charter.

b. Joint government and business initiatives

The Danish government developed the Charter with the Confederation of Danish Industry and the business community. It was meant to be a sustainable action. Quotas were not an option, as the Danish government preferred voluntary measures based on qualifications. Having introduced the Charter Programmes in Denmark, the research shows joint government and business-led programmes consisted of soft law to increase the representation of women on boards and were followed by Danish companies without binding legislation.

2. Other Programmes

Danish companies sponsored different soft law programmes to increase the representation of women on boards. The research found that, these programmes consisted of soft law and carried no sanctions, such as, Operation Chain Reaction Charter (a), the Ambassador Programme for more Women in Executive Management (b) or the Executive Relay Programme (c).

⁵⁸⁷ Danish Government Communication, Lykke Friis, 2011 Perspective and Action Plan (2019) 13 <https://bm.dk/media/17084/ph_plan_eng_2011.pdf> accessed 5 July 2019.

a. The Operation Chain Reaction Charter

The Operation Chain Reaction Charter proposed companies to increase the representation of women on boards of directors. Twelve public limited companies signed the Charter.

b. The Ambassador Programme for more Women in Executive Management

The Ambassador Programme for more Women in Executive Management was launched in 2011 by the Danish government and the Confederation of Danish Industry. The programme included ten executives, men and women, who would participate in debates about women on boards, organize events and propose programmes about women on boards.⁵⁸⁸

c. The Executive Relay Programme

The Executive Relay Programme launched with the Ambassador Programme to hear from a woman candidate about her experience on the board of directors.⁵⁸⁹

Having introduced other soft law programmes in Denmark, the research shows there were also awards and other gender equality programmes in the Netherlands to increase the representation of women on boards.

B. AWARDS AND OTHER PROGRAMMES

Several Member States have put into place charters with targets and awards, to increase the representation of women on boards, such as the Dutch government

⁵⁸⁸ *ibid*, 13-14.

⁵⁸⁹ *ibid*.

awards (1), charters (2) and other programmes (3). These initiatives are either government-led or business-led and remain soft law.

1. Joke Smit Award for Gender Equality

The Dutch government presents the Joke Smit Award, an award for women and gender equality. The award of 10,000 euros is given every 2 years to a person or a group, who has contributed to womens' rights in society and in employment.

The award is named after Joke Smit, who was a feminist and played a major role in advancing the cause of women in the Netherlands.⁵⁹⁰

2. Women in Finance Charter

The UK government launched the Women in Finance Programme to address gender equality in the Finance industry. More than two hundred companies signed the Charter, led by the Government of the former Prime Minister, Teresa May.⁵⁹¹

3. Other Awards and Programmes

The Dutch government and company initiatives launched several incentive awards and programmes to increase the representation of women on boards.. The research finds these programmes bring attention to women in business and on corporate boards (a), including a talent programme (b).

⁵⁹⁰ The Netherlands Government Communication, Joke Smit Award for Gender Equality (2019) <<https://www.gwi-boell.de/en/2011/05/06/netherlands>> accessed 5 July 2019.

⁵⁹¹ UK Government Press Release, Prime Minister Backs Women in Finance as Charter Tops 200 Signatories (UK government, 16 March 2018) <<https://www.gov.uk/government/news/prime-minister-backs-women-in-finance-as-charter-tops-200-signatories>> accessed 5 July 2019.

a. The Incentive Award for Women's Advancement

The Dutch government presented the Incentive Award for Women's Advancement to people, groups or institutions, who have improved the lives of women in society. The award winner receives 1000 euros and a work of art.⁵⁹²

b. The Charter Talent to the Top Programme

The Netherlands launched the Charter Talent to the Top Programme, which published guidelines to increase the representation of women on boards in companies. Two hundred and sixty companies signed the Charter Talent to the Top in 2019. The Talent to the Top Programme also offers board training to women and an executive search service.⁵⁹³ Having introduced various soft law programmes, which included awards and Charters in the Netherlands and the United Kingdom, the research examines how the Norwegian government used other soft law means to increase the representation of women on boards with a database of future women board directors.

C. DATABASES OF BOARD READY WOMEN AND TARGET PROGRAMMES

The research has found that, in addition to Charters, the Norwegian government created a database of board ready women (1), and, also, launched target programmes to identify board ready women (2).

1. Database of future board directors

The Norwegian Director of Equality created a database of future board directors. The

⁵⁹² Talent to the Top Foundation, Charter Talent to the Top, Talent to the Top Foundation (2019) <<https://talentnaardetop.nl/en/charter-talent-top>> accessed 5 July 2019.

⁵⁹³ *ibid.*

database included more than three thousand board ready women.⁵⁹⁴ The Norwegian soft law programme was a government and business initiative to increase the representation of women on boards.

2. EU recommendations to launch Target Programmes

Governments and business communities implemented Target Programmes to increase the representation of women on boards. These programmes were considered economic initiatives to improve competitiveness. Investors were informed about the companies complying with the voluntary women on boards policies.⁵⁹⁵ Having explained different soft law programmes, including the database of future board directors, the research shows target programmes were used to increase the representation of women on boards, which consist of a semi-binding approach.

§2: A SEMI-BINDING APPROACH: SELF-REGULATION OR COMPLY OR EXPLAIN

While soft law is non-binding, a semi-binding approach may have legal effect, such as when using targets, reporting and the comply or explain principle found in corporate codes. This hybrid approach forms rules, which are situated between soft and hard law, though non-binding, this approach consists of strong recommendations for companies to comply with. EU law⁵⁹⁶ recognises that, the comply or explain principle in corporate governance codes may have legal effect, as hard law.⁵⁹⁷ The comply or explain principle

⁵⁹⁴ Huse (n 286) 14-15.

⁵⁹⁵ EU Law, Commission Recommendation of 9 April 2014 on the Quality of Corporate Governance Reporting (Comply or Explain) (2014) OJ L109, 43–47, n1 <<https://eur-lex.europa.eu/eli/reco/2014/208/oj>> accessed 5 July 2019.

⁵⁹⁶ *ibid.*

⁵⁹⁷ *ibid.*

is a central corporate governance obligation for companies.⁵⁹⁸ According to Article 20 of Directive 2013/34/EU,⁵⁹⁹ companies are required to use the comply or explain principle and provide a statement of reasons for non-compliance.⁶⁰⁰ The research finds that Member States with a semi-binding approach use the corporate codes and comply or explain principle (I), while rules concerning the composition of the board of directors are examined in the Cadbury Report and OECD Principles of Corporate Governance (II).

I. MEMBER STATES WITH A SEMI-BINDING APPROACH: SELF-REGULATION AND COMPLY OR EXPLAIN

The comply or explain principle is an important feature of corporate governance, found in corporate governance codes.⁶⁰¹ Though, the principle may have legal effect, the codes remain non-binding recommendations. The use of the comply or explain principle is a midway point between pure soft law and hard law. There are advantages for companies to use the comply or explain principle, as it provides a flexible approach, which corresponds with company policies. Fifteen Member States have included specific reference to gender, diversity or board composition in their corporate governance codes.⁶⁰² The provisions are drafted, according to the development of gender equality or parity policies in existing national legislation. As Member States have different provisions, this reflects an uneven approach to corporate governance and women on boards.⁶⁰³ The different provisions and timetables of the EU Member

⁵⁹⁸ European Commission Press Release, Corporate Governance: European Forum Clarifies 'Comply or Explain' Principle and Issues Annual, Report, IP/06/269 (2006) <https://ec.europa.eu/commission/presscorner/detail/en/IP_06_269> accessed 5 July 2019.

⁵⁹⁹ n 322, EU Law, Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the Annual Financial Statements, Consolidated Financial Statements and Related Reports of Certain Types of Undertakings, Amending Directive 2006/43/EC of the European Parliament and of the Council and Repealing Council Directives 78/660/EEC and 83/349/EEC.

⁶⁰⁰ *ibid.*

⁶⁰¹ n 598, European Commission Press Release, Corporate Governance: European Forum Clarifies 'Comply or Explain' Principle and Issues Annual, Report.

⁶⁰² OECD Report, Comply or Explain Principle, Corporate Governance Factbook (2019) <<http://www.oecd.org/corporate/Corporate-Governance-Factbook.pdf>> 20 March 2020.

⁶⁰³ n 554, AMF Report, 15.

States show variations of interpretations of the representation of women on boards in public limited companies in the EU. Member States without specific mention of women on boards in code provisions corresponds to a lack of representation of women on boards. Corporate governance codes remain soft law guidelines, even though, they may make use of the comply or explain principle in company annual reports.⁶⁰⁴ The research confirms that, the United Kingdom is the best example of a government favouring self-regulation to binding legislation (A), and does this, by setting ambitious targets, involving business and social norms. This may explain how the United Kingdom has managed to avoid binding legislation.⁶⁰⁵

A. SELF-REGULATION: WOMEN ON BOARDS AND THE UK ECONOMY

The UK government justified increasing the representation of women on boards to make use of skills, experience and talents of women for business reasons.⁶⁰⁶ 'Better use of women's skills could be worth billions of pounds to our economy each year.'⁶⁰⁷ The Government stated that, it was premature to use '...heavy-handed measures, such as mandatory targets'... '[R]egulation and legislation would fail to fix the problem.'⁶⁰⁸

The research explains that, the UK government is in favour of increasing the number of women in the labour force and on company boards, as a resource to improve the UK economy (1) and favours business-led programmes (2).

⁶⁰⁴ Armstrong and Walby (n 567) 10; European Parliament Workshop, Sylvia Walby, 'Legal Instruments for Gender Quotas in Management Boards' (2013).

⁶⁰⁵ n 224, EIGE Statistical Brief.

⁶⁰⁶ UK Government Communication, Women at the Heart of Plans for Economic Growth (2011) <<https://www.gov.uk/government/news/women-at-the-heart-of-plans-for-economic-growth>> accessed 5 July 2019.

⁶⁰⁷ *ibid.*

⁶⁰⁸ UK Parliament Report, Twenty-Eighth Report of Session 2013-14 (2013) 3.3 <<http://www.publication.s.parliament.uk/pa/cm201314/cmselect/cmeuleg/83-xxv/83xxv.pdf>> accessed 3 September 2018.

1. Economic justification and women on boards

The Government took the position that selection and appointment of board directors should be based on meritocracy, or 'business needs, skills and ability,' not by quota legislation. The Government was confident that a business self-regulatory approach would increase the representation of women on boards rapidly.⁶⁰⁹ The UK government supported women on boards policies to 'make full use of the wealth of talented women in the United Kingdom, [as]...there is also a clear benefit to businesses for a more diverse boardroom'.⁶¹⁰

Having explained that the UK government supported increasing the representation of women through self-regulation, the research analyses the problem of proposing binding legislation and the way the UK does business.

2. Business justification in support of self-regulation

One more reason against the use of binding legislation was that it interfered with companies to adapt quickly to market and reporting to shareholders.⁶¹¹ This does not mean that companies excluded working with stakeholders to increase the representation of women on boards, but a preference for targets, not quotas. The Government favoured business-led programmes to increase the representation of

⁶⁰⁹ n 22, UK Government, Department for Business, Innovation & Skills, Women on Boards (2011) 18.

⁶¹⁰ UK Government Response to the House of Lords European Union Committee Report on Women on Boards, House of Lords Report (2012) <<https://www.parliament.uk/documents/lords-committees/eu-sub-com-b/GenderImbalanceintheBoardroom/GovresponseWomenonBoards.pdf>> accessed 27 November 2017.

⁶¹¹ UK Government Report, Department for Business and Innovation, Women on Boards, UK Response to the European Commission Consultation on Gender Imbalance in Corporate Boards in the EU, Government Equalities Office (2012) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/31713/12-867-women-on-boards-response-ec-consultation-on-gender-imbalance.pdf> accessed 5 July 2019.

women on boards. The UK government remained convinced that EU legislation was 'unnecessary and inappropriate.'⁶¹²

As the UK is hostile to quota legislation, the research shows that with soft law instruments and non-legal sanctions, the government would effectively be able to increase the representation of women on boards.

B. THE USE OF SOFT LAW INSTRUMENTS AND NON-LEGAL SANCTIONS IN THE UK

Soft law includes the self-regulation approach and voluntary means to increase the representation of women on boards. European Union Member States may use non-legal sanctions to incite companies to address the lack of women on boards in companies, since they are non-binding. Interaction between EU law and private initiatives is considered a form of self-regulation, which may best be described, as interaction between binding legislation and voluntary agreements.⁶¹³ According to Point 22 of the Interinstitutional Agreement, self-regulation is defined as, 'the possibility for economic operators, ... social partners, non-governmental organisations or associations to adopt amongst themselves and for themselves common guidelines at European level (particularly codes of practice or sectoral agreements).'⁶¹⁴

Soft law instruments, such as, codes of conduct or recommendations, may be used by self-regulation processes. The EU and Member States implement these.⁶¹⁵ The comply or explain principle allows companies to self-regulate, while complying with EU recommendations. Member States may decide to apply sanctions for non-compliance,

⁶¹² *ibid.*

⁶¹³ Senden (n 405) 11.

⁶¹⁴ *ibid.*, 12.

⁶¹⁵ *ibid.*, 22.

but this remains non-binding.⁶¹⁶ The self-regulation approach includes a code of conduct, using legal instruments, such as,

- reporting
- the comply or explain principle based on compliance of the corporate government codes disclosure
- and the use of soft law programmes to increase the representation of women on boards.

The research points out that the United Kingdom government favours a liberal principles-based approach to allow companies to self-regulate (1) and uses targets to increase women on boards (2).

1. The UK liberal principles-based approach

The UK liberal principles-based approach supports non-intervention in business affairs by government, other than state regulation, leaving companies to self-regulate. Although, this model results in high unemployment rates for women, with limited resources to resolve the situation.⁶¹⁷ UK companies have been obliged to disclose information about women on boards in their annual reports since 2013.⁶¹⁸ The UK government commissioned a series of reports which made recommendations about how to increase the representation of women on boards. The Women on Boards Report, called the Davies Report 2011, was the reference for strategy and policy making. It reviewed one hundred of the largest companies, recommending that companies apply a twenty-five percent voluntary target to increase the representation of women on boards. In the Women on Boards 2015 Review, the findings from 2011

⁶¹⁶ UK Financial Reporting Council Report, 'What Constitutes an Explanation under 'Comply or Explain' Report of Discussions between Companies and Investors (UK Financial Reporting Council, 2012) <<https://www.frc.org.uk/getattachment/a39aa822-ae3c-4ddf-b869-db8f2ffe1b61/what-constitutes-an-explanation-under-comply-or-explain.pdf>> accessed 20 March 2020.

⁶¹⁷ C. Fagan, M. González Menéndez and S. Gómez Ansón (n 28) 10.

⁶¹⁸ UK Government Report, Department for Business, Innovation & Skills, Women on Boards: Two Years On (2013) Recommendation 2.

were analysed. The UK had doubled the number of women on boards on the FTSE 250. There were no longer all-male boards on the FTSE 100, though sixteen boards remained without any women on the board in the FTSE 250 companies. The voluntary target recommendations rose from twenty-five percent to thirty-three percent for FTSE 350 companies.⁶¹⁹ Results on the FTSE 350 confirmed that soft law is bringing results.⁶²⁰

The self-regulation approach has been quite effective in the UK, even though forty percent of women on boards on any of the FTSEs has never been reached, per the EU recommendation. As companies do not have the same policies, the comply or explain principle is a means to facilitate convergence of Member States governance codes.⁶²¹ The UK system of corporate governance does not permit state intervention in company business. Self-regulation and voluntary measures are more established in liberal market economies, such as the UK.⁶²²

Furthermore, there are no sanctions in case of non-compliance.⁶²³ If companies do not comply with recommendations set out in the Report, they refer to the comply or explain principle.⁶²⁴ Companies are obliged to include information about the process of board appointments and diversity policies, as they are accountable for reporting to shareholders in the Annual Report. Quotas are prohibited in the UK. Targets remain the

⁶¹⁹ n 22, UK Government, Department for Business, Innovation & Skills, Women on Boards, 18.

⁶²⁰ UK Government Communication, Women Make up More than a Third of all Board Members Across the FTSE 350 for the First Time (2020) <<https://www.gov.uk/government/news/women-make-up-more-than-a-third-of-all-board-members-across-the-ftse-350-for-the-first-time>> accessed 14 January 2021; UK Government Communication, Record Number of Women on FTSE 100 Boards (2018) <<https://www.gov.uk/government/news/record-number-of-women-on-ftse-100-boards>> accessed 14 January 2021.

⁶²¹ *ibid.*

⁶²² Machold and Hansen (n 86) 169.

⁶²³ *ibid.*, 175.

⁶²⁴ n 618, UK Government Report, Department for Business, Innovation & Skills, Women on Boards: Two Years On.

legal approach, even when targets are not met.⁶²⁵ However, the use of the 'complain or explain' principle in corporate governance codes are not uniform in the Member States.

Some... comply-or-explain obligations are of a somewhat more compelling nature, given their status in the CGC or as a result of sanctions that may be imposed (Austria, France). The Austrian CGC¹⁷⁵ distinguishes between rules which contain mandatory legal requirements (L) and rules which apply on a 'comply-or-explain' basis (C). C rules must be followed and the reasons for any deviation must be stated in order to be in compliance with the Code.⁶²⁶

The UK government commissioned Lord Davies to encourage stakeholders to improve gender balance on the boards of directors.⁶²⁷ The Lord Davies Report⁶²⁸ set a goal to achieve at least twenty-five percent of the representation of women on boards by 2015 or the threat of quotas would follow.⁶²⁹ Initially, the approach of women on boards included recommendations for companies to set targets and resulted in the increase of the representation of women on boards, which has structurally changed UK companies and the economy.

The Davies Report 2011 has been very effective, as it included many stakeholders to increase the representation of women on boards.⁶³⁰ The year after the Davies Report, there was an increase from 12.5 percent of women on boards in 2011 to 15.6 percent in 2012.⁶³¹ In 2019, there were 32.6 percent of women on boards.⁶³²

⁶²⁵ Senden and Krusinga (n 30) 82.

⁶²⁶ Financial Reporting Council, The UK Corporate Governance Code 2016.

⁶²⁷ n 22, UK Government, Department for Business, Innovation & Skills, Women on Boards, 8.

⁶²⁸ *ibid.*

⁶²⁹ Ruth Sealy and; Susan Vinnicombe, 'The Female FTSE Board Report 2013: False Dawn of Progress for Women on Boards', Cranfield International Centre for Women, Cranfield School of Management (2013).

⁶³⁰ n 22, UK Government, Department for Business, Innovation & Skills, Women on Boards, 8.

⁶³¹ UK Government Report, Women on Boards Report, House of Lords, European Union Committee, 5th Report of Session 2012-13 (2013) no. 53.

⁶³² n 24, OECD Statistics, Employment, Female Share of Seats on Boards of the Largest Publicly Listed Companies.

The voluntary targets of twenty-five percent of the representation of women on boards were met.⁶³³ Lord Davies shifted his focus to FTSE 350 companies, increasing the target to thirty-three percent. In February 2020, the FTSE 100 reached its target of thirty-three percent of women on boards of a total of 1 046), which now accounts for three-hundred and forty-nine women on the FTSE 100 board.⁶³⁴ In November 2019, there were almost thirty percent of women on boards on the FTSE 250.⁶³⁵ In February 2020, the FTSE 350 had nearly twenty percent of women on boards, though ten all male boards remain.⁶³⁶

Having shown that self-regulation was the preferred legal system, the research has noted that the UK government managed to increase the representation of women on boards using targets and the comply or explain principle, which are soft law means.

2. Targets and soft law programmes

The UK took a very different approach to women on boards, distinct from the hard and soft law approaches of the EU Member States. The business-centred approach recommended targets and the use of the comply or explain principle in the corporate governance code. Companies are expected to achieve targets or be held accountable.⁶³⁷ The soft law carries no sanctions. If a company does not comply with the measures, one option was to send letters, citing that the company lacked women on boards. Sixty-three FTSE 350 companies have been asked to ensure that the thirty-

⁶³³ UK Government Report, Department for Business, Innovation & Skills, Women on Boards Davies Review: 5 Year Summary, Improving the Gender Balance on British Boards (UK Government, 2015)

⁶³⁴ UK Government Report, The Hampton-Alexander Review, FTSE Women Leaders (2016) 5; CIPD Briefing, Rachel Suff, 'EU Briefing: Gender Diversity on Boards: Do Quota Systems Work' (The Chartered Institute of Personnel and Development, 2015) <https://www.cipd.co.uk/Images/gender-diversity-on-boards-quota-systems-work_june-2015_tcm18-14173.pdf> accessed 5 July 2019.

⁶³⁵ *ibid*, UK Government Report, The Hampton-Alexander Review, 5.

⁶³⁶ UK Government Press Release, The FTSE 350 Urged to Step up to Meet 2020 Women on Boards Targets (2020) <<https://www.gov.uk/government/news/ftse-350-urged-to-step-up-to-meet-2020-women-on-boards-targets>> accessed 20 March 2020.

⁶³⁷ n 626, The UK Corporate Governance Code 2016.

three percent targets be met by the end of 2020. One fifth of FTSE 350 companies were reprimanded in writing for lack of gender diversity at senior leadership levels,⁶³⁸

The United Kingdom and German governments have taken a flexible self-regulatory business approach to increase the representation of women on boards. In comparison, the UK has a long history of self-regulation of its business activities,⁶³⁹ while in Germany, the voluntary approach failed and was replaced with binding legislation. The notion finds its source in the Basic Law, which encompasses gender equality in its Constitution.⁶⁴⁰ Article 3, 'Equality before the law', states:

- All persons shall be equal before the law.
- Men and women shall have equal rights. The state shall promote the actual implementation of equal rights for women and men and take steps to eliminate disadvantages that now exist.
- No person shall be favoured or disfavoured because of sex...⁶⁴¹

In Germany, business and government spheres initially preferred self-regulation over quota legislation to increase the representation of women on boards. Despite intense feminist activism in Germany to move toward quota legislation, the Government had constantly resisted giving in to hard law. National women on boards legislation was finally passed, as influenced by the effective Norwegian quota legislation and proposed EU women on boards directive.⁶⁴²

⁶³⁸ The Investment Association Press Release, One Fifth of FTSE 350 Companies Cautioned for Lack of Gender Diversity at Senior Leadership Levels (2020) <<https://www.theia.org/media/press-releases/one-fifth-ftse-350-companies-cautioned-lack-gender-diversity-senior-leadership>> accessed 3 January 2021.

⁶³⁹ n 631, UK Government Report, Women on Boards Report, House of Lords, European Union Committee, 5th Report of Session 2012-13, 4.

⁶⁴⁰ German Constitution, The Basic Law, Article 3 (2) (2019) <<https://www.btg-bestellservice.de/pdf/80201000.pdf>> accessed 5 July 2019.

⁶⁴¹ *ibid.*

⁶⁴² European University Institute Working Paper, Sabine Lang, 'Thirty Years of Gender Quotas in Germany: Policy Adoption between Mainstreaming and Minimal Compliance' (EUI Working Paper, 2015) <https://blogs.eui.eu/genderquotas/wp-content/uploads/sites/24/2015/07/Germany_LAW2015_21.pdf> accessed 5 July 2019.

The research shows that in the UK, there were many soft law programmes to increase the representation of women on boards, including training and mentoring programmes in various companies of the FTSE (a), the Opportunity 2000 BBC Programme (b), sponsorship schemes preparing women as future business leaders (c), networking events to assist women with their careers (d), a board ready database (e) and the 30 Percent Club supporting a thirty percent target of women on boards (f).

a. Training and mentoring programmes

UK FTSE companies offered a range of soft law mentoring and talent identification programmes to women executives to accelerate the advancement of joining the board of directors.⁶⁴³ These effective voluntary soft law programmes develop skills and competencies preparing women to become board-ready.⁶⁴⁴ The UK 'FTSE 100 Cross-Company Programme', launched in 2003, was a Foundation Programme, which was supported by leading companies. The Chairs of the FTSE companies acted as mentors to women executives, who were interested in joining boards. Companies would offer women managers the opportunity to become future leaders and participate in board training.⁶⁴⁵ The 'Mentoring Foundation Next Generation Women Leaders Programme', created in 2011, was an extension of the FTSE 100 Cross-Company Programme, which offered mentoring to boardable women. The Programmes received government support and remain extremely active today.⁶⁴⁶ The Chairmen and Chief Executive Officers of FTSE 100 companies are trained to work with the women on boards programmes.⁶⁴⁷ However, the opposite method was employed in Norway, France and Germany, where state institutions regulated and intervened in business affairs. Though,

⁶⁴³ n 22, UK Government, Department for Business, Innovation & Skills, Women on Boards, 5.

⁶⁴⁴ *ibid*, 5-7.

⁶⁴⁵ n 638, The Investment Association Communication.

⁶⁴⁶ n 631, UK Government Report, Women on Boards Report, House of Lords, European Union Committee, 5th Report of Session 2012-13, no.144.

⁶⁴⁷ PricewaterhouseCoopers Report, Mining for Talent (PWC, 2015) 29; Senden (n 29) 53.

initially, business associations preferred a voluntary approach, binding quota legislation eventually passed,⁶⁴⁸ which carried sanctions.⁶⁴⁹

While, the United Kingdom government multiplied soft law initiatives to maintain its preference for voluntary women on boards efforts. As a warning to companies, the government stated, '...if the voluntary business-led approach does not work, we will need to look at all options, and that includes quotas. But the Government's clear view is it believes that the voluntary approach will work'.⁶⁵⁰ Targeted schemes were launched, such as, training and mentoring programmes, the Opportunity 2000 Programme, accompanying company sponsorship programmes, networking events, the compilation of databases of boardable women and the 30 Percent Club.

The voluntary method to increase the representation of women on boards consists of mixed soft law approaches, which includes name and shame programmes, as well as, the comply or explain principle in the corporate governance codes. The 'name and shame' programmes consist of 'the activity of saying publicly that a person or a company has behaved in a bad or illegal way'.⁶⁵¹ This was done by the use of stakeholder pressure to show there is a problem with company culture, but did not involve a legal problem.⁶⁵²

⁶⁴⁸ Machold and Hansen (n 86) 170-171.

⁶⁴⁹ *ibid*, 175.

⁶⁵⁰ UK Government Report, Women on Boards, European Union Committee (2012) <<https://publications.parliament.uk/pa/ld201213/ldselect/ldcom/58/5806.htm#n80>> accessed 5 July 2019.

⁶⁵¹ 'naming and shaming', n., Online Cambridge Dictionary <<https://dictionary.cambridge.org/dictionary/english/naming-and-shaming>> 5 July 2019.

⁶⁵² Jo Iwasaki, 'What Should Companies be Responsible for?' (The Institute of Chartered Accountants in England and Wales; 2014) <<https://www.icaew.com/-/media/corporate/files/technical/corporate-governance/dialogue-in-corporate-governance/what-should-companies-be-responsible-for.ashx?la=en>> accessed 5 July 2019.

According to the Baroness Bottomley of Nettlestone, former Member of Parliament, debating in the House of Lords, the UK economy thrived because corporate governance is 'principles-based, not rules-based.'⁶⁵³ The idea of

[a] quota is alien to the British way of thinking. We believe in voluntary principles, in persuasion, in best practice and a bit of naming and shaming. Our approach is a voluntary one wherever possible and quotas offend. A target, a goal, an objective, but not a quota.⁶⁵⁴

Soft law measures were effective in increasing the representation of women on boards in the United Kingdom and quota measures were deemed excessive.

b. The Opportunity 2000 Programme

The Programme Opportunity 2000 (called Opportunity Now) is a soft law programme supported by the BBC. It was launched to increase the representation of women in business and public life. The Programme is supported by another Programme, called 'Business in the Community', which was responsible for training women and to improve the professional women in the workplace, including to increase the representation of women in the workforce in all sectors, and on the board of directors.⁶⁵⁵ The programme is still active today and encourages employers to recruit women in all areas of the company, stating that gender equality 'enhances employee engagement, boosts

⁶⁵³ UK Parliament Report, Gender Balance among Non-Executive Directors, House of Lords Debate (Volume 742) (Debated on 10 January 2013) <[https://hansard.parliament.uk/Lords/2013-01-10/debates/13011048001188/GenderBalanceAmongNon-ExecutiveDirectors\(EUCReport\)](https://hansard.parliament.uk/Lords/2013-01-10/debates/13011048001188/GenderBalanceAmongNon-ExecutiveDirectors(EUCReport))> accessed 5 July 2019.

⁶⁵⁴ *ibid.*

⁶⁵⁵ n 610, UK Government Response to the House of Lords European Union Committee Report on Women on Boards, House of Lords Report; BBC News Report, 'Opportunity Now Programme, The Economy Boosting Women's Work Prospects' (1999) <<http://news.bbc.co.uk/2/hi/business/388349.stm>> accessed 3 September 2018; The Prince's Responsible Business Network, Business in the Community (The Prince's Responsible Business Network, 2020) <<https://www.bitc.org.uk/?s=business+in+the+community>> accessed 3 January 2021.

productivity, meets the diverse needs of customers and suppliers, and improves brand reputation'.⁶⁵⁶

c. Sponsorship schemes

Sponsorship schemes were important career starters for women who wish to advance as future business leaders. The programmes were aimed at high potential women managers, who would be mentored by a senior manager for coaching and career advice. The business-led sponsorship programmes were considered the best way for high potential women manager to become board directors.⁶⁵⁷

d. Networking events

Companies created networking events to encourage women to join either within the same company or a different company within the same sector, as a way for women to learn about career growth.⁶⁵⁸ The networking events were considered the best way for women to become known in their job sector and an important means to network and to promote women to 'gain... equal access to traditionally perceived male-focused networks'.⁶⁵⁹

e. Database of boardable women

The Government recommended that companies work with the Cranfield School of Management to compile and keep the boardable women database updated.⁶⁶⁰

⁶⁵⁶ *ibid.*

⁶⁵⁷ ILO Report, 'Women on Boards, Building the Female Talent Pipeline' (2015).

⁶⁵⁸ *ibid.*

⁶⁵⁹ n 647, PricewaterhouseCoopers Report, 29.

⁶⁶⁰ n 631, UK Government Report, Women on Boards Report, House of Lords, European Union Committee, 5th Report of Session 2012-13, no.144.

f. The 30 Percent Club

The 30 Percent Club, a private initiative, supported thirty percent of women on boards of FTSE 100 companies by 2015. The 30 Percent Club favours self-regulatory means to increase women on boards, but is opposed to the idea of quota legislation.⁶⁶¹ The Club was founded in 2010 to increase the representation of women on boards, which was at twelve percent then. The Club acknowledged that research found 'thirty percent represents a critical mass from which point minority groups can impact boardroom dynamics.'⁶⁶²

Having shown that through numerous soft law programmes, the research has found that the UK government managed to increase the representation of women on boards without quota legislation.

II. CORPORATE GOVERNANCE AND BOARD COMPOSITION

The origins of corporate governance may be found in Financial Aspects of Corporate Governance, referred to as the Cadbury Report, which set recommendations for company boards and financial systems to comply with.⁶⁶³ The Cadbury Committee published the first UK Corporate Governance Code in 1992. It defined corporate governance, as '...the system by which companies are directed and controlled. Boards of directors are responsible for the governance of their companies.'⁶⁶⁴ This report was 'the departure point ... as a way of dealing with corporate governance and its problems, extending to over ninety countries'⁶⁶⁵ and remains the corporate governance reference today. The Cadbury Report set the standard of corporate governance rules, used by

⁶⁶¹ The 30 Percent Club, 'Who We Are' (The 30 Percent Club, 2019) <<https://30percentclub.org/about-us/>> accessed 5 July 2019.

⁶⁶² *ibid.*

⁶⁶³ Cadbury (n 13).

⁶⁶⁴ *ibid*; The UK Corporate Governance Code 2018 (Financial Reporting Council, 2018) 1.

⁶⁶⁵ n 377, G20/OECD Principles of Corporate Governance (2015).

members adhering to OECD Principles of Corporate Governance. The Report notably recommended the separation of functions, stating the chairman and CEO should not be the same person. The Report recommended that shareholders elect board directors, so that boards of directors are 'properly constituted and not dominated by any one individual.'⁶⁶⁶ It was also recommended that the majority of the board be composed of non-executive directors.⁶⁶⁷

Corporate governance codes are rooted in the Cadbury Report. Member States with women on boards provisions in their corporate governance codes include 'Austria, Belgium, Germany, Finland, France, Ireland, the Netherlands, Poland, Slovenia, Spain, Sweden and the UK'.⁶⁶⁸ The research shows that corporate governance codes are effective in increasing the representation of women on boards (A), with several codes mentioning diversity policies (B).

A. EU MEMBER STATES CORPORATE GOVERNANCE CODES

EU Member States make use of corporate governance codes, which are a form of non-binding soft law rules, and use the comply or explain principle to increase the representation of women on boards. 'Soft law does not have legal validity. As these codes are heavily deployed by EU institutions and Member States, they may be perceived as having legal effect.'⁶⁶⁹

There are several EU Member States, who refer to women on boards provisions in their corporate codes ('Austria, Belgium, Germany, Finland, France, Ireland, the Netherlands,

⁶⁶⁶ Cadbury (n 13).

⁶⁶⁷ *ibid.*

⁶⁶⁸ Senden and Kruisinga (n 30) 75.

⁶⁶⁹ Van Klink and Lembcke (n 51) 145-164.

Poland, Slovenia, Spain, Sweden and the UK'),⁶⁷⁰ though, they do not share a standard women on boards approach of notions of gender equality.⁶⁷¹

The research shows that the provisions of the corporate governance codes of Austria, Belgium, Denmark, Finland, France, Germany, Luxembourg, the Netherlands, Poland, Spain, Sweden, and the United Kingdom may include various wording, such as, 'gender', 'diversity of gender', 'diversity' or 'women' (1), and though the recommendations of the Code, companies may be required to establish a diversity policy (2).

1. Corporate code provisions and women and boards

There are specific references to women on boards, which may be found in the following subject code provisions:

- the composition of the board
- diversity policies
- measures taken
- legislation
- and reporting on diversity policies.⁶⁷²

The composition of board practices in EU Member States are comparable by gender, diversity provisions and policies to an extent.⁶⁷³ They remain instruments of soft law and therefore are recommendations. With the comply or explain principle, there is

⁶⁷⁰ Senden and Kruisinga (30) 75.

⁶⁷¹ S. R. Arcot and V. G. Bruno, 'One Size does Not Fit All, after All: Evidence from Corporate Governance' (London School of Economics Research Paper, 2007) < https://editorialexpress.com/cgi-bin/conference/download.cgi?db_name=res2007&paper_id=247 > accessed 5 July 2019.

⁶⁷² Colin J. Bennett, 'What Is Policy Convergence and What Causes It?' (1991) 21(2) British Journal of Political Science, 215-233.

⁶⁷³ *ibid.*

more incitation for companies to comply with the provisions. Board practices are examined and compared in the following codes:

- The Austrian Code of Corporate Governance (a)
- The Belgian Code of Corporate Governance (b)
- The Netherlands Code of Corporate Governance (c)
- The Finnish Code of Corporate Governance (d)
- The Polish Code of Corporate Governance (e)
- The Slovenian Code of Corporate Governance (f)
- The Swedish Corporate Governance Code (g)
- The UK Corporate Governance Code (h)
- The French Corporate Governance Code (i)

a. The Austrian Code of Corporate Governance

The provisions of the Code mention women on boards, directly or indirectly. According to the Austrian Code of Corporate Governance, shareholders have the responsibility to nominate future board directors, based on expertise and qualifications, as well as to comply with the corporate code diversity policy to ensure balanced boards.⁶⁷⁴

According to Section 4 of the Austrian Corporate Governance Code, companies shall comply with the women on boards measures, per §243c paragraph. 2, number 3 of the Business Code, which states:

- The number of women on the board in supervisory and management positions per §80 of the Stock Corporation Act.
- The company should describe the women on boards measures for the year.
- The company should include a diversity 'concept', which concerns joint-stock companies, who prepare a corporate governance report.
- This concerns public interest companies per § 189a, number1, of the Business Code, but not large joint stock companies, who are not concerned.
- The Corporate Governance Report should include the diversity concepts in place for board members, which include gender.

⁶⁷⁴ The Austrian Governance Code (Austrian Working Group for Corporate Governance 2015) 52.

- Reporting the diversity concept is required, unless the company does not have a concept, and then shall use the comply or explain principle.⁶⁷⁵

The Austrian Corporate Governance Code includes national quota legislation, the Act on Equal Treatment of Women and Men, which obliges companies to increase the representation of women on supervisory boards to thirty percent, with an exception, if there are less than six shareholder representatives or less than twenty percent of employee representatives. If the company is non-compliant, the board appointment is cancelled.⁶⁷⁶

The inclusion of the binding legislation in the Austrian corporate governance codes demonstrates that women on boards must be complied with on two levels: national law and corporate governance. Even if corporate governance is soft law, it has hard legal effect with mention of the legislation.

b. The Belgian Code of Corporate Governance

According to the Belgian Code of Corporate Governance, the provisions mention gender in the composition of the board of directors. According to Principle 3.3.3, which states that, '[t]he composition of the board should be determined so as to gather sufficient expertise in the company's areas of activity as well as sufficient diversity of skills, background, age and gender.'⁶⁷⁷ The use of the specific reference to 'gender' indicates that women are specifically included and to be complied with, though again, this is soft law.

⁶⁷⁵ *ibid*, Section 4, The Austrian Governance Code 2020.

⁶⁷⁶ n 674, The Austrian Governance Code 2015, Section 4; *ibid*, The Austrian Governance Code 2020.

⁶⁷⁷ The Belgian 2020 Code on Corporate Governance, Principle 3, 3.3 (Belgian Corporate Governance Committee, 2020) <<https://ecgi.global/code/belgian-code-corporate-governance-2020>> accessed 5 July 2019.

c. The Netherlands Code of Corporate Governance

There are several references to diversity of supervisory boards in the Netherlands Code of Corporate Governance. The call for best practice, in Section 1.1.1, complies with the EU Directive on Disclosure of Non-Financial and Diversity Information.⁶⁷⁸

According to Principle 1, 2.1.5 Diversity Policy, the company should conceive a diversity policy for the supervisory and management boards. The company shall set diversity targets, which include gender.⁶⁷⁹

According to Principle 1, 2.1.6 Accountability about Diversity, the company shall draft a diversity policy statement, which includes the objectives, the implementation of the diversity policy, the results of the past year, explaining if the objectives have been met according to the legislation and the comply or explain principle, if the objectives have not been met.⁶⁸⁰

According to 2.1.5 Diversity Policy and 2.1.6 Accountability about Diversity, the Explanatory Notes mention that the EU Directive on Disclosure of Non-Financial and Diversity Information will be transposed into Netherlands national legislation. But, the Code goes beyond the Directive, as companies are obliged to use the comply or explain principle regarding their diversity policies. The Directive is addressed to large companies, while the Code applies to all companies. The thirty percent target of woman and thirty percent of men on supervisory boards expired on 1 January 2016. Legislation

⁶⁷⁸ EU Legislation, Directive 2014/95/EU of the European Parliament, and of the Council of 22 October 2014 amending Directive 2013/34/EU as Regards Disclosure of Non-Financial and Diversity Information by Certain Large Undertakings and Groups (2014) OJ L330, 1-9 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L_.2014.330.01.0001.01.ENG&toc=OJ%3AL%3A2014%3A330%3ATOC> accessed 5 July 2019.

⁶⁷⁹ The Netherlands Corporate Governance Code 2016, Code Principle 1, 2.1.5 Diversity Policy <https://ecgi.global/sites/default/files/codes/documents/thenetherlands_cgcode_2016.pdf> accessed 5 July 2019

⁶⁸⁰ *ibid.*

establishing targets is found in Section 2.166 of the Netherlands Civil Code, which expired in 2020. Binding quota legislation has recently entered into force in January 2022.⁶⁸¹

According to Principle 2, 2.2, Appointment, succession and evaluation, a clear process and succession plan should include the diversity policy of the company.⁶⁸²

According to Principle 2, 2.2.1 Appointment and reappointment periods, the company shall consider its diversity policy, when making these appointments.⁶⁸³

According to Principle 2.2.4 Succession, the company shall consider its diversity policy, in the event of succession of board directors.⁶⁸⁴

d. The Finnish Code of Corporate Governance

The Finnish Code of Corporate Governance 2020 mentioned the importance of diversity policies, as a means for companies to manage and develop their internal operations.⁶⁸⁵ The policies should promote 'open discussion and independent decision-making. Diversity ... promotes good corporate governance [and] efficient supervision of the company's directors ...'⁶⁸⁶

⁶⁸¹ n 679, Explanatory Notes to the Netherlands Corporate Governance Code, (2016) 43; Dutch Legislation, Diversity Quota and Targets Act (*Wet ingroeiquotum en streefcijfers*) Amendment to Book 2 of the Netherlands Civil Code in Connection with Balancing the Ratio of Men to Women on the Ratio of Men to Women on the Management and Supervisory Boards of Large Public and Private Supervisory Boards of Large Public and Private Limited Companies (2021) <<https://open.overheid.nl/repository/ronl-52b5140c-5416-423c-a6cb-7493613ffb7/1/pdf/wvs%20m-v%20verhouding.pdf>> 14 December 2021.

⁶⁸² n 679, The Netherlands Corporate Governance Code, (2016), Principle 2, 2.2, Appointment, Succession and Evaluation.

⁶⁸³ n 679, The Netherlands Corporate Governance Code, (2016), Principle 2, 2.2.1, Appointment and Reappointment Periods-Management Board Members.

⁶⁸⁴ n 679, The Netherlands Corporate Governance Code, (2016), Principle 2, 2.2.4, Succession.

⁶⁸⁵ n 236, The Finnish Corporate Governance Code 2020, The Rationale of Recommendation 9, Diversity of the Board of Directors, 26.

⁶⁸⁶ *ibid.*

The Finnish Code calls for diversity in all companies, no matter the size and makes a specific reference to the word 'gender'.⁶⁸⁷ The reference here specifically to 'gender' has legal effect, though remains soft law.

According to Recommendation 9, Diversity of the Board of Directors of the Finnish Corporate Governance Code 2020, the composition of the board of directors should include diversity and include both genders.⁶⁸⁸

According to Recommendation 18 Nomination Committee, the diversity policies of the company shall be referred to during the nomination process of board directors.⁶⁸⁹

e. The Polish Code of Corporate Governance

According to the Polish Code of Corporate Governance, companies shall include diversity policies, which include gender. These policies shall be published on the company website. Those companies who do not have diversity policies are obliged to explain the reasons on their websites.⁶⁹⁰

In 2017, the ten largest Polish listed companies represent nearly twenty percent of women on boards. There were sixteen women on boards of a total of 85 board directors.⁶⁹¹

⁶⁸⁷ n 236.

⁶⁸⁸ n 236.

⁶⁸⁹ n 236, Rationale of Recommendation 18 Nomination Committee, no. 37.

⁶⁹⁰ The Corporate Governance Review: Poland, The Polish Code of Corporate Governance (The Corporate Governance Review: Poland, 2020) <<https://thelawreviews.co.uk/edition/the-corporate-governance-review-edition-10/1222294/poland>> accessed 20 March 2020.

⁶⁹¹ Cigna, Kobel and Sigheartau (n 505) Bank for Reconstruction and Development Report, 'Corporate Governance in Transition Economies, Poland' 9.

f. The Slovenian Corporate Governance Code

According to the Slovenian Corporate Governance Code, board directors should have expertise and relevant experience, and include women.⁶⁹² Board directors are appointed according to the usual merits of experience and skills. The provision states that other criteria be included under the 'objectives of the Diversity Policy ... from the perspective of gender...'⁶⁹³

g. The Swedish Corporate Governance Code

According to 4.1 of the Swedish Corporate Governance Code, shareholders shall appoint board directors based on diversity and gender equality policies in view of balanced boards.⁶⁹⁴

h. The United Kingdom Corporate Governance Code

The provisions in the Code make reference to women on boards, by using different wording, which may include 'diversity' or 'diversity of gender.' According to the Introduction of the UK Corporate Governance Code 2018, company culture should include diversity.⁶⁹⁵

According to §3 Composition, Succession and Evaluation in Principles J, company appointments to the board should carry objective selection, which includes 'diversity of gender.'⁶⁹⁶

⁶⁹² The Slovenian Corporate Governance Code for Listed Companies 2018, Composition and Nomination of the Supervisory Board, no. 9. <<https://ecgi.global/code/slovenian-corporate-governance-code-listed-companies-2016-updated-2018>> accessed 20 March 2020.

⁶⁹³ *ibid.*

⁶⁹⁴ The Swedish Corporate Governance Code 2020, The Size and Composition of the Board, 4.1.

⁶⁹⁵ n 664, The UK Corporate Governance Code 2018, p4.

⁶⁹⁶ n 664, The UK Corporate Governance Code 2018, §3 Composition, Succession and Evaluation in Principles J.

According to §3 Composition, Succession and Evaluation in Principles L, the board shall make a yearly evaluation, which includes composition and diversity of board directors.⁶⁹⁷

According to §3 Composition, Succession and Evaluation in Provisions 23, the Nomination Committee shall provide diversity policy information and gender balance for disclosure in the Annual Report.⁶⁹⁸

i. The French Code of Corporate Governance

The French published Corporate Governance Code resulted from privatizations of state-owned companies in the 1990s. French corporate governance is vastly influenced by UK corporate governance, and above all, the Cadbury Report and the comply or explain principle.⁶⁹⁹ The Viénot and Bouton Reports introduced corporate governance rules to give investors' confidence, by making changes to the rules of the board of directors, as well as committees. For matters of transparency, new rules were made, such as, the CEO is no longer the Chairman of the Board, as well as regular updating of the code of corporate governance. The AFEP/MEDEF Code of Corporate Governance for public limited companies is a voluntary means, which refers to provisions to increase the representation of women on boards.⁷⁰⁰

Public limited companies are required to publish the code provisions relating to gender in the annual report, which includes gender balance on boards and the use of the

⁶⁹⁷ n 664, The UK Corporate Governance Code 2018

⁶⁹⁸ n 664, The UK Corporate Governance Code 2018, §3 Composition, Succession and Evaluation in Provisions 23.

⁶⁹⁹ n 664, The UK Corporate Governance Code 2018

⁷⁰⁰ n 71, French Legislation, Law No. 2011-103 of 27 January 2011 on the Balanced Representation of Women and Men on Boards of Directors and Supervisory Boards and on Professional Equality (1).

comply or explain principle.⁷⁰¹ The Association of Business Leaders (AFEP-MEDEF)⁷⁰² drafted the corporate governance codes. These French Business Associations have been developing corporate governance standards since 1995 for listed companies. The Association is composed of business leaders from the largest French companies. The codes remain soft law, which allow companies to manage business operations to meet the requirements of investors and stakeholders.⁷⁰³

France is the only Member State in the European Union, where corporate governance codes are drafted by business associations and not government commissions. Though, the code is non-binding. Regulatory authority reports are disclosed on the implementation of the code, which are revised frequently.⁷⁰⁴ However, at the beginning, the business association AFEP was not in favour of the binding quota legislation,⁷⁰⁵ the Copé Zimmermann Act in 2011. In 2020, AFEP changed its position. It now recognises the notion of parity and the boards of directors. Therefore, there was a conflict of interests between the soft law position and the hard law. AFEP was obliged to act, as it could not leave women on boards to be regulated under French national law and not mentioned in the corporate governance codes. According to Article 7.1 of the AFEP-MEDEF Corporate Governance Code, the process of including a women on boards policy is clearly defined in the Code:

- ... the Board shall determine the objectives of gender diversity within the governing bodies.
- ...[The] annual monitoring of the results obtained and a description, in the report on corporate governance, of the gender

⁷⁰¹ French Legislation, Article L. 621-18-3, Monetary and Financial Code (2021) <https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000042340656/> accessed 3 March 2021.

⁷⁰² The French Business Associations, AFEP and MEDEF, Odile De Brosses (AFEP, 2020) <<https://afep.com/themes/gouvernance/>> accessed 20 March 2020.

⁷⁰³ AMF Report on Corporate Governance and Internal Control (2008) 9.

⁷⁰⁴ n 554, AMF Report, 15.

⁷⁰⁵ Deloitte Report, The Feminisation of the Governing Bodies (2021) <<https://www2.deloitte.com/fr/fr/services/consulting/human-capital/la-feminisation-des-instances-dirigeantes.html>> accessed 23 August 2021.

diversity policy applied to the governing bodies, including the objectives of this policy, the results obtained during the previous financial year and, if necessary, the reasons for not achieving these objectives.⁷⁰⁶

Having shown that Member States use the provisions of corporate governance codes with direct or indirect wording of women on boards, the research examines the French

2. The French Corporate Governance Code

The French Corporate Governance Code 2020 includes women on boards provisions. The recommendations of the Code request companies to establish a diversity policy in view of parity.⁷⁰⁷ According to Section 6.2 of the French Corporate Governance Code, the board and committees should be balanced and take into consideration the composition of women on boards. The diversity policies include objectives and results attained in the financial year and are published in annual corporate reports.⁷⁰⁸ According to Section 7 of the French Corporate Governance Code, the nomination committee⁷⁰⁹ is in charge of board composition and selection. The Nomination Committee responsibilities include

- ... making proposals to the Board after examining in detail all the elements, ...
- ... [proposing] a balanced composition of the Board representation between men and women, ... [and]
- ... organis[ing] a procedure to select future independent directors and carries out its own studies on potential candidates before approaching them.⁷¹⁰

⁷⁰⁶ *ibid.*

⁷⁰⁷ The French Corporate Governance Code (AFEP MEDEF, 2020) 1.6.

⁷⁰⁸ *ibid.*, 6.2.

⁷⁰⁹ n 707, 17.1 Attributions and 17.2.1.

⁷¹⁰ n 707, §7.

If a company is unable to comply with the women on boards provisions, the matter will be examined by the board of directors. If the reasons given for non-compliance are unsatisfactory, the French High Committee for Corporate Governance will send a letter to the company within a two-month time period. The High Committee supports the AFEP-MEDEF codes. If there is no reply, the matter may go public, which will bring attention to the company.⁷¹¹

Companies are obliged to explain actions, which have been taken to comply with the code. The reasons for non-compliance must be clear and provide enough details in the explanation. If other means were implemented, they will need to be explained, with reference to the particular provision. A company also is obliged to mention, when it is not applying a recommendation for a time, provide an explanation and explain when it shall include the recommendation.⁷¹²

The French Code of Corporate Governance includes notions of women on boards policies and the composition of the board. According to the French Code of Corporate Governance 2018, the board of directors should include a diversity policy.⁷¹³

According to 1.7 in §1, the provision in 'The Tasks of the Board of Directors' in the French Corporate Governance Code 2018, requires the board to be composed of women and men, a balanced and diverse board.⁷¹⁴

According to 6.2 of §6, the provision in 'Membership of the Board of Directors' in the French Corporate Governance Code 2018, calls for a diverse board to include women,

⁷¹¹ n 707, 27.2; HCGE Report, High Committee for Corporate Governance Annual Report (Haut Comité de Gouvernement d'Entreprise, 2021) 4 <<https://hcge.fr/rapports/>> accessed 25 May 2022.

⁷¹² n 707, 27.1.

⁷¹³ The French Corporate Governance Code (AFEP MEDEF) 2018, 17.2.1.

⁷¹⁴ *ibid*, 1.7 in §1 The Tasks of the Board of Directors.

but not only. The diversity policy of the company should be coherent with board selection and reporting requirements.⁷¹⁵

When comparing the two French Corporate Governance Codes' provisions for diversity on boards, the 2020 Code is more detailed. It explicitly calls for a balanced board and representation of women on boards.⁷¹⁶

In the 2009 Code, the wording 'diversity policies' does not specifically refer to women. When no specific mention to women on boards exists, the efforts to increase the representation of women on boards is weakened. The word 'women' was lacking in former governance codes up until the 2020 codes. Only the word 'diversity' in the text of the provisions, or 'background', might have indirectly inferred that, this meant the representation of women on boards, but remained a vague interpretation. This has now been clarified in the revised 2020 French Corporate Governance Code.

3. The Spanish Corporate Governance Code and women on boards

The Spanish Corporate Governance Code specifically refers to gender. The research also found that, the Spanish Corporate Governance Code Recommendation and Principles called for balanced boards, including a minimum of forty percent of women on boards (a), which shows that the Spanish code converges with other EU Member States' codes, and includes gender and diversity on boards (b).

a. The Spanish Corporate Governance Code

According to Recommendation 15 in the Spanish Corporate Governance Code, 'the number of female directors should account for at least 40 percent of the members of

⁷¹⁵ n 713, 17.2.1 ; *ibid*, 6.2 of §6 Membership of the Board of Directors.

⁷¹⁶ n 713, 17.2.1.

the board of directors before the end of 2022 and thereafter, and not less than 30 percent previous to that'. In Principle 10 and 11 of the Spanish Corporate Governance Code, the board of directors should be balanced, with specific reference to gender.⁷¹⁷ Recommendation 14 of the Spanish Corporate Governance Code, the selection of board directors should include gender.⁷¹⁸

b. Convergence of code provisions

Corporate code provisions converge to an extent across the Member States, where the composition of board directors specify 'gender', 'diversity of gender' or 'diversity.' The call for diversity represents a larger group than the representation of women on boards, but it also includes women on boards. The provisions found in different Member States codes give depth of understanding on the use of soft law recommendations and their effectiveness.

Having shown that the Member States included gender diversity provisions in their corporate governance codes, the research points to three Member States with detailed diversity policies in their corporate governance codes.

B. DIVERSITY POLICIES IN CORPORATE CODE PROVISIONS

The research has examined that corporate codes concerning composition of board directors converge to an extent. Though, three Member States include details of their diversity policies in their corporate governance codes. The three Member States with explicit diversity policies are Slovenia (1), France (2) and the UK (3).

⁷¹⁷ Good Governance Code of Listed Companies, Spain (2017) Recommendation 15, III.3.2.1, III.3.2.2, Principle 10 and 11, Board of Directors, 22.

⁷¹⁸ *ibid*, III.3.2.1, Recommendation 14.

1. The Slovenian Corporate Governance Code

According to the Slovenian Corporate Governance Code Chapter One, the diversity policy was added and now includes:

[a] description of the diversity policy ... carried out with respect to representation in the management and supervisory bodies in terms of gender...and the indication of goals, and the ... results of the diversity policy in the reporting period. If no diversity is being carried out, the company shall explain the reasons...in the corporate governance statement.⁷¹⁹

The diversity policy consists of recommendations for the boards of companies to follow. It describes gender balance on boards, as recommendations. Companies are asked to impose the same policies in all companies.⁷²⁰ The Slovenian Diversity Policy is very precise. The recommendations are:

- The supervisory board will draft and adopt the policy for the management and supervisory boards.
- Diversity on the board shall mean age, education qualifications, personal characteristics of board members.
- Diversity shall mean gender of board members.⁷²¹ The diversity policy considers both genders, in proportion to the number of members.
- The diversity policy shall include objectives for the board, implementation, procedures as well as other processes.⁷²²

The reference of the diversity policy in the Companies Act creates a legal obligation and legal effect in this particular governance code.

⁷¹⁹ The Slovenian Corporate Governance Code for Listed Companies 2021, 12 <<https://ljse.si/UserDocs/Images/datoteke/Pravila,%20Navodila,%20Priročnik/Slovenian%20Corporate%20Governance%20Code%20for%20Listed%20Companies%209.12.2021.pdf?vel=298801>> accessed 25 May 2022; Slovenian Legislation, The Slovenian Companies Act, Article 70(5)(7), (Slovenian Companies Act, Amended, ZGD-1,2021) <<http://www.pisrs.si/Pis.web/npbDocPdf?idPredpisa=ZAKO7316&idPredpisaChng=ZAKO4291&type=doc&lang=EN>> accessed 25 May 2022.

⁷²⁰ *ibid*, ch1, 3-4.

⁷²¹ *ibid*, 4.2, 9.

⁷²² *ibid*, ch1, 3-4.

2. The French Corporate Governance Code

According to 1.7 of French Corporate Governance Code, companies should provide a description of the diversity and non-discrimination policy, as applied to the composition of board directors, and objectives, which are published. This soft law policy explicitly calls for reporting the number of women and men on boards in the annual report.⁷²³

3. The UK Corporate Governance Code

The UK Corporate Governance Code includes several references to women on boards and the composition of the board. According to the UK Corporate Governance Code, companies shall define a diversity policy, when nominating board appointments and reporting women on boards objectives. According to B2.4 of the Code, information shall be given to 'the nomination committee [and the] process ... used in relation to board appointments... [and] include ... the board's policy on diversity, including gender, any measurable objectives that it has set for implementing the policy, and progress on achieving the objectives.' The Annual Report should provide a complete description of the procedures used to nominate board directors, giving details about the number of each gender and reaching objectives.⁷²⁴ Companies should publish information about nomination committees and the diversity policy of the board of directors.⁷²⁵ The reporting obligations include disclosure of the diversity policy, by gender, the measurable targets and company strategy to appoint board directors, which shall be published in the annual report.⁷²⁶ The nomination committee should report the process used to appoint directors. The evaluation of board directors should include experience,

⁷²³ n 713, The French Corporate Governance Code (AFEP MEDEF) 2018, 1.7.

⁷²⁴ n 626, The UK Corporate Governance Code 2016, B2.4, 32.

⁷²⁵ n 626, B2.1, C.3.3, D.2.1, 34.

⁷²⁶ n 626, B2.4, 16.

knowledge and diversity of board directors.⁷²⁷ The provisions are important, as they have binding effect. The details of the provisions have proven sufficient to effectively increase women on boards, without binding legislation.

Having shown that the Member States included detailed diversity policies in their corporate governance codes, the research examines other non-binding legislation and background to French gender equality legislation.

III. OTHER NON-BINDING GENDER EQUALITY LEGISLATION

EU institutions have a range of instruments to use to increase the representation of women on boards. These include, treaties, directives, recommendations, case law precedents, which have established gender equality standards in the EU labour market. The tools consist principally of soft or non-binding law.

The transition from social policies towards harmonising economic policies among the Member States in the name of keeping the EU competitive is the underlying explanation given for EU intervention with a women on boards proposal, as a means to harmonise this policy among the Member States. The development of gender equality in France began as soft law.

The research examines the historical background, a reminder of the numerous difficulties faced (A), the French Commercial and Labour Codes, as important sources of numerous gender equality texts (B), and other French gender equality legislation (C), before being able to pass binding women on boards legislation.

⁷²⁷ n 626, B2.1, C.3.3, D.2.1, B6, 18, 34.

A. BACKGROUND OF FRENCH GENDER EQUALITY LEGISLATION

The historical background of gender equality in France reveals daunting obstacles that French women have had to endure and overcome over the centuries in order to reach positions of economic decision-making, as women on boards of directors. One of the first French feminists, Olympe de Gouges, wrote the Declaration of the Rights of Women and Citizens in 1791, which stated that women are born free and equal to men in law. She was sent to the guillotine for speaking out against Robespierre in 1793.⁷²⁸

Even though French women participated actively during the French Revolution, there was a great lack of civil rights and their situation would worsen. 'The end of the Revolution and... Empire are the darkest periods in the fight for women's rights. Napoleon scorned 'women who get involved in politics' and his civil code of 1804 made them minors for life'.⁷²⁹

The research shows that the Napoleonic Civil Code of 1804 deprived women of all legal rights (1), while the French Civil Code subjected women to be controlled by their husbands until 1965 (2).

1. Napoleonic family law

According to the Napoleonic Civil Code of 1804 French law, the patriarchal family established the inferiority of women and gave power to the husband. The Code was influenced from the Germanic concept of '*mundium*' or marital authority, as well as from Roman law of '*imbecillitas sexus*', which means weak female mental power or

⁷²⁸ Charlotte Denöel, 'Les Femmes et la Révolution, Olympe de Gouges' (Histoire de l'image, 2008) <<https://histoire-image.org/fr/etudes/olympde-gouges>> accessed 5 July 2019.

⁷²⁹ French Senate, 'Women Citizens without Civil Rights' (The Revolution and the Empire) (2021) <<https://www.senat.fr/evenement/archives/D25/revol1.html>> accessed 14 January 2021; French Government Report, 'The Evolution of Women's Rights' (2019) <<https://www.vie-publique.fr/eclairage/19590-chronologie-des-droits-des-femmes>> accessed 5 July 2019.

legal incapacity, depriving women of all legal rights and giving authority to the father and husband.⁷³⁰ This situation carried into the 20th century. According to Article 1124 of the Napoleonic Civil Code of 1804, women were included in the same category as children, criminals and mentally handicapped. 'The persons deprived of legal rights are minors, married women, criminals and mentally retarded.'⁷³¹

Women were defined as daughters, mothers and illegitimate children, who have no rights and were prohibited to

- access high school and university
- manage property and other assets
- participate in politics
- work without permission from husband
- receive a salary
- correspond or have friendships without the authorization from the husband and
- travel abroad.⁷³²

Having shown that Napoleonic family law codified the condition of women, preventing them from independently taking decisions, the research examines the French Civil Code, which was an extension of the Napoleonic law, until the reference of incapacity was removed in 1965.

⁷³⁰ Benoît de Boysson, 'Promulgation of the Law Reforming Matrimonial Property Regimes' (France Archives, 2015) <<https://francearchives.fr/fr/commemo/recueil-2015/39211>> accessed 5 July 2019; French Legislation, Article 213 of the French Civil Code (Légifrance, 1803) <<https://www.legifrance.gouv.fr/affichCodeArticle.do?idArticle=LEGIARTI000006422741&cidTexte=LEGITEXT000006070721>> accessed 5 July 2019; French Government Communication; Women's Equality and Rights in the Private Sphere (2019) <<https://www.vie-publique.fr/eclairage/19592-egalite-et-droits-des-femmes-dans-la-sphere-privee>> accessed 5 July 2019.

⁷³¹ French Legislation, French Civil Code of 1804, Article 1124 <<http://8mars.info/le-code-napoleon?lang=fr>> accessed 5 July 2019; Open Online Training Course (FLOT) Introduction to Substantive Equality between Women and Men, The Status of Women, The Civil Code of 1804 <https://uoh.fr/document/1fe92c32/f318/4671/1fe92c32-f318-4671-b9e4-9b6db2521799/co/01_02_statut_femme.html#:~:text=Le%20Code%20civil%20de%201804%20affirme%20l'incapacit%C3%A9%20juridique%20totale,aux%20lyc%C3%A9es%20et%20aux%20universit%C3%A9s> accessed 5 July 2019.

⁷³² *ibid.*

2. The French Civil Code and the condition of women

The basis of Napoleonic law Article 213 was revised and became the French Civil Code,⁷³³ which stated that in a patriarchal family 'the husband owes protection to his wife, the woman obedience to her husband.'⁷³⁴ This remained in force until 1938. The husband continued to keep absolute power over all property and income of his wife, as well as deciding on the profession of his wife until 1965.⁷³⁵ Women had no power to enter into commercial activity or any act of business, without permission from the husband.⁷³⁶ The right to vote in 1944 was much later than other industrialized nations. It was only in 1965, when the reference to women's incapacity was removed, when French women could finally own property and work without permission from their husbands.⁷³⁷

Having shown that the French Civil Code treated women's incapacity until 1965, the research moves to the present, where women are represented on boards, and where the French Commercial Code makes use of used economic indicators to increase women on boards.

⁷³³ French Legislation, French Civil Code 1803, Article 212 to 226, Duties and Rights of Spouses (1803) <<https://www.legifrance.gouv.fr/codes/id/LEGISCTA000006136137/>> accessed 5 July 2019.

⁷³⁴ De Boysson (n 7310) Promulgation of the Law Reforming Matrimonial Property Régimes; n 730, French Legislation, Article 213 of the French Civil Code; n 730, French Government Communication; Gabriel Baudry-Lacantinerie, 'Precisions of Civil Law: Containing in the First Part a Statement of Principles, and in the Second Part Detailed Questions and Controversies' (1921) <<https://gallica.bnf.fr/ark:/12148/bpt6k5859299x/f231.item>> accessed 5 July 2019; Ute Gerhard, 'Women's Rights in Civil Law in Europe in the 19th Century' (Open Edition Journals, 2016) 250-273 <<https://doi.org/10.4000/clio.13020>> accessed 5 July 2019.

⁷³⁵ French Government Report, Chronology of Provisions in Favour of Gender Equality (French Government, 2019) <<https://www.egalite-femmes-hommes.gouv.fr/le-ministere/organisation-du-ministere/chronologie-des-dispositions-en-faveur-de-legalite-des-femmes-et-des-hommes/>> accessed 5 July 2020.

⁷³⁶ Gerhard (n 733) 257.

⁷³⁷ French Legislation, Law n. 65-570 of July 13, 1965 Reforming Matrimonial Property Regimes (1965) <<https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=LEGITEXT000006068258>> accessed 17 March 2019.

B. THE FRENCH COMMERCIAL CODE

The French Commercial and Labour Codes include a range of gender equality texts. The research points out that French Labour Code, Article L2312, section 18 recommends that the Government consult economic databases regarding indicators of the number of women on boards (1) though, this tool and other soft law have not been effective in increasing the representation of women on boards (2).

1. French Labour Code Article L2312, section 18

According to the French Labour Code Article L2312 section 18, states that the board of directors shall consult the government economic database to make informed decisions. The economic indicators specify professional gender equality between men and women.⁷³⁸ Economic indicators provide information of the numbers of men and women in decision-making positions, including on corporate boards.

2. Soft law recommendations

The French government has actively passed a great volume of gender equality legislation. French law prohibits all forms of discrimination and adheres to the principle of equality. Despite the vast amount of legislation, such as recommendations establishing equality principles, soft law has proven ineffective, as women had remained absent from boards of directors, until only after binding quota legislation was passed. Ineffective women on boards policies in the Member States led to the EU intervention in proposing a women on boards directive. The corporate governance

⁷³⁸ French Legislation, French Labour Code, Article L2312-18 (Légifrance, 2018) <<https://www.legifrance.gouv.fr/affichCodeArticle.do?cidTexte=LEGITEXT000006072050&idArticle=LEGIARTI000035609788&dateTexte=&categorieLien=cid>> accessed 3 January 2020; French Labour Code, Article L1142-8 (Légifrance, 2019) <https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000037380125/> accessed 17 March 2019.

framework with the use of the codes did not lead to significant an increase in the representation of women on boards in those Member States. Having shown that economic indicators and soft law have been ineffective in increasing the representation of women on boards, the research examines French gender equality legislation.

C. FRENCH GENDER EQUALITY LEGISLATION

In France, gender equality legislation dates back to 1972.⁷³⁹ There have been several important political reforms, which occurred in 1999, 2000 and 2014. A range of legal instruments mentioned '*parité*' (parity) in national legislation, corporate governance codes, the French Labour Code and the French Commercial Code.

1. Background to binding legislation

However, before hard law, there was much legislation, which attempted to increase the representation of women on boards. The Roudy law amended the French Labour Code and the Criminal Code, as the first French legislation calling for professional equality between women and men.⁷⁴⁰ Companies with more than fifty employees signed a Charter with the government stating they would comply with the legislation, which would promote '*parité*' (parity) in the workplace.⁷⁴¹

According to Law No. 83-635 1983 of the French Labour Code, '*parité*' (parity) would apply to all areas of the workplace. Companies would be obliged to disclose their

⁷³⁹ French Legislation, Law no. 72-1143 of December 22, 1972 Relating to Equal Remuneration between Men and Women (Légifrance, 1972) <<https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000875404&categorieLien=id>> accessed 17 March 2019.

⁷⁴⁰ French Legislation, Law No. 83-635 of 13 July 1983 Amending the French Labour Code and the Criminal Code with Regard to Professional Equality between Women and Men (Légifrance, 1983) <<https://www.legifrance.gouv.fr/loda/id/JORFTEXT000000504474/2021-06-22/>> accessed 17 March 2019.

⁷⁴¹ French Government Communication, Women's Rights: the State of Play on Professional Equality (2019) <<https://www.vie-publique.fr/eclairage/19602-droits-des-femmes-ou-en-est-legalite-professionnelle>> accessed 17 March 2019.

employment statistics in annual reports, which would include numbers of women and men on boards of directors.⁷⁴²

According to Law No. 89-488 1989 of the French Labour Code, companies with convention and branch agreements would be obliged to include '*parité*' (parity) provisions and given a two-year period to comply with the legislation.⁷⁴³

According to Law No. 2001-397 2001 of the French Labour Code relating to professional equality between women and men, companies would include '*parité*' (parity) at all levels of the company and company branches. The legislation would oblige companies to negotiate their professional equality policies. The law, known as the Genisson Law, reinforced the Roudy Law.⁷⁴⁴ Other legislation, such as, Law No. 2006-340 2006 of the French Labour Code, called for equal pay for men and women by 2010. The law recommended private companies to increase the representation of women in decision-making positions.⁷⁴⁵

According to Article 3 of Decree no. 2013-8 of January 3, 2013 establishing the High Council for Equality Between Women and Men, a report on the situation of women shall be written every two years and sent to the Prime Minister and Women's Rights

⁷⁴² n 740, French Legislation, Law No. 83-635 of 13 July 1983 Amending the French Labour Code and the Criminal Code with Regard to Professional Equality between Women and Men.

⁷⁴³ French National Assembly Report, Made on Behalf of the Committee on Constitutional Laws, Legislation and General Administration of the Republic on the Proposed Law (no. 2140) by Mr. Jean-François Copé and Mrs. Marie-Jo Zimmermann Relating to the Balanced Representation of Women and Men in the Advice of Administration and Supervision and the Professional Equality by Mrs. Marie-Jo Zimmermann (2009) <http://www.assemblee-nationale.fr/13/rapports/r2205.asp#P116_12445> accessed 17 March 2019.

⁷⁴⁴ *ibid*; French Legislation, Law no. 2001-397 of May 9, 2001 Relating to Professional Equality Between Women and Men (1) (2001) <<https://www.legifrance.gouv.fr/loda/id/JORFTEXT000000756495/>> accessed 17 March 2019; n 729, French Government Communication.

⁷⁴⁵ French Legislation, Law No. 2006-340 of March 23, 2006 on Equal Pay for Women and Men (1) (Légifrance, 2006) <<https://www.legifrance.gouv.fr/loda/id/JORFTEXT000000816849/>> accessed 5 July 2019.

Minister.⁷⁴⁶ Moreover, Law No. 2014-873 2014 of the French Labour Code, called for real equality between women and men, the objective of the legislation was to guarantee women access to all professions.⁷⁴⁷ While this legislation guaranteed equality in the workplace, it was not a specific reference to women on boards.

Having examined the wide selection of gender equality legislation, the research examines the French notion of parity and equality.

2. The French notion of parity and equality

French gender equality legislation refers to '*parité*' (parity), the notion of '*démocratie paritaire*' (parity democracy) and equality legislation in the workplace or in politics. However, the legislation did not specifically call for regulating the representation of women on boards until 2008.

The term parity is used to ... to ... demand for equal sharing of power and ... an equal distribution of candidates or seats in all decision-making assemblies, whether political, economic or decision-making assemblies, ... France, which did not grant women the right to vote until the ordinance of 21 April 1944 and which still has 73% male MPs in 2013, was the first country to adopt a law based on the principle of equality of women in 2000. In 2000, France was the first country to adopt a law based on the application of the parity principle for elections. In 2008, parity was extended beyond the political sphere to the professional and social spheres, where power issues are also important.⁷⁴⁸

⁷⁴⁶ Decree no. 2013-8 of January 3, 2013 Establishing the High Council for Equality Between Women and Men (French Government Circular, 2013) Article 3 <https://www.circulaires.gouv.fr/jorf/article_jo/JORFA RTI000026894632> accessed 5 July 2019.

⁷⁴⁷ French Legislation, Article 1, Act No. 2014-873 of 4 August 2014 for Real Equality between Women and Men (1) (Légifrance, 2014) <<https://www.legifrance.gouv.fr/loda/id/JORFTEXT000029330832/>> accessed 5 July 2019.

⁷⁴⁸ French Legislation, Law no. 2001-1066 of November 16, 2001 Relating to the Fight Against Discrimination (1) (2001) <<https://www.legifrance.gouv.fr/loda/id/JORFTEXT000000588617/>> accessed 5 July 2019.

Having examined the French notion of parity and the difficulty to pass women on boards legislation, Law No. 2011-103 of 27 January 2011, known as the Copé Zimmermann Act, was passed, calling for a minimum quota forty percent for each sex on boards of directors and carries binding sanctions.⁷⁴⁹

CONCLUSION

The wording in diversity policies in the Member States corporate governance codes vary. Not all Member States mention diversity in their codes and there are Member States that do not have a diversity policy in place. Other Member States refer to a diversity policy within national law in the corporate codes (hard law in soft law). The obligation of a diversity policy suffices for other Member States (soft law only). Further research over a longer period of time will be able to confirm, if diversity policies will become an obligation in corporate governance codes. Soft law carries no sanctions. The comply or explain principle goes a short step further than soft law policies alone. The comply or explain principles may have legal effect, they do not carry hard sanctions.

Gender equality legislation is an ongoing process in the European Union. Although gender equality policies have greatly advanced in the Western European EU Member States, it will still take a very long time for women to have the same rights as men in the Eastern European Union Member States. Therefore, the subject of women on boards remains unresolved in the EU. The European Commission proposed the women on boards directive as a means to increase the representation of women based on

⁷⁴⁹ French Government Report, Parity: Power Sharing, From Political to Economic, (Hauts Conseil à l'égalité, 2015) <https://www.haut-conseil-egalite.gouv.fr/IMG/pdf/parite-depliant_2015.pdf > accessed 4 July 2022.

economic reasons.⁷⁵⁰ Member States decide on how to best interpret the EU legislation, by transposing it into national law.⁷⁵¹

In 2020, nine Member States disagreed with the proposed directive and eighteen Member States supported the proposed directive. If Germany had given its vote at that time, the Council would have had a majority pass the proposal already. There has been fierce opposition from Denmark, Greece, Croatia, Hungary, the Netherlands, Poland, Sweden and Slovakia, as they consider national legislation sufficient. Despite a further consultation in 2020 with the Ministers of Employment and Social Affairs about gender equality in the EU labour market, the proposed directive was blocked in Council. The possibility of a minimum harmonisation single policy for all Member States may happen, as the Council has voted in favour of the proposed directive in March 2022. Talks are underway in the European Parliament. As the proposed directive has just passed in Council, negotiations with the Member States shall begin. Therefore, there is now a real possibility of the women on boards directive entering into force in the near future. The proposed directive is 'the first step in exploring formal approaches to gender diversity internationally,' as corporate governance codes remain in a national context.

⁷⁵⁰ Carlos Gorritiz, 'Women on Boards: A European Proposal' 14(1) (Global Jurist, 2014) 2 <https://www.researchgate.net/publication/269623988_Women_on_Boards_A_European_Proposal/link/581c7f1c08ae40da2caaf74c/download> accessed 3 September 2019.

⁷⁵¹ n 29, Proposal for a Directive.

CONCLUSION OF CHAPTER ONE

There are numerous barriers to increase the representation of women on boards in Eastern European Union Member States. The historical and political context may explain the difficulties, as 'opponents of affirmative measures for women use the cultural cliché reminiscent of Romanian communism when it was thought that women were artificially promoted in political councils or leadership positions to fulfil quotas, not for their merits.'⁷⁵² The reasons for the absence of women on boards are mainly due to a patriarchal society, where nearly all board directors are men, where gender inequality is the norm and where real work and life needs for women are inexistant.⁷⁵³ The situation in Romanian public limited companies shows the proportion of women on boards is not rapidly increasing, despite gender equality legislation.⁷⁵⁴ However, the gender equality legislation in place consists of soft law recommendations, which is non-binding.

In 2016, there were 10.1 percent of women on Romanian public limited company boards and four years later, in 2020, there were 12.8 percent of women on boards.⁷⁵⁵ The current context of women on boards in Eastern Europe is a serious matter for the EU economy, as little progress is being made. There is an economic decline in many Eastern European Union Member States, and with that, no place for women on boards legislation.

⁷⁵² Senden and Kruisinga (n 560) 91-94.

⁷⁵³ *ibid.*

⁷⁵⁴ *ibid.*

⁷⁵⁵ n 240, EIGE Statistics, Largest Listed Companies: Presidents, Board Members and Employee Representatives.

Chapter Two

THE CLASSIFICATION OF HARD LAW

A legal framework implementing hard law brings rapid results, compared to soft law, which carries no sanctions. Hard law is used to adjust an imbalance, such as, in the underrepresentation of women on boards. The research distinguishes different degrees of hard law (Section 1), as soft law initiatives to increase the representation of women on boards have failed, which has led EU institutions and Member States to turn to hard law (Section 2).

SECTION 1 DIFFERENT DEGREES OF HARD LAW

Hard law may carry a ranges of sanctions, which are due to diverse legal forms. As hard law is rooted in company law, it may carry sanctions, which range from very strict to non-binding. The different sanctions may include, delisting a company, as the strictest form of sanction, as in the Norwegian legislation, to the requirement of the comply or explain principle for non-compliance, fines or other measures.⁷⁵⁶ Article 157(3) of the TFEU is considered the legal basis for women on boards and principal legislation, which calls for 'equal opportunities and ... treatment ... in matters of employment and occupation,⁷⁵⁷ which ensures equality between women and men in work and employment. The research examines gender equality legislation with hard sanctions (§1), and, as comprised in the women on boards Italian legislation (§2)

⁷⁵⁶ Armstrong and Walby (n 567) 14.

⁷⁵⁷ n 76, EU Charter of Fundamental Rights, Article 23.

§1: GENDER EQUALITY LEGISLATION WITH SANCTIONS

With a greater number of women entering the labour market in the EU Member States, there are more gender equality tools available, such as, programmes, policies and legislation to increase the representation of women on boards. Quotas are also used as a political tool. It remains to be seen, if quotas will be accepted by all Member States.⁷⁵⁸ France, Italy, Belgium and Germany have substantial gender equality legislation using quotas. Political initiatives in those Member States allowed for a greater number of women to enter the workforce, including increasing the representation of women on boards. European countries with binding women on boards quota legislation called for a critical mass of women on boards within a timeframe: Norway forty percent by 2006, Iceland forty percent by 2013, France forty percent by 2017, Italy thirty-three percent by 2015, Belgium thirty-three percent by 2019 and Germany thirty percent by 2016.⁷⁵⁹

There are many different women on boards hard law approaches in the Member States. The French government cancels board appointments, freezes the boards remuneration and cancels board decisions if the board is non-compliant, the Belgian government uses financial and non-financial benefits. The Italian government penalizes companies with board annulments. The Spanish government uses preferential treatment incentives for government contracts.⁷⁶⁰ There is no consultation between the Member States nor interference from the EU, as to which hard law sanctions or penalties should be applied. The research has found that while EU institutions leave enforcement and the choice of sanctions to the Member States (I), there is a call for stronger sanctions to enforce women on boards legislation (II).

⁷⁵⁸ n 484, European Commission Report, 33.

⁷⁵⁹ *ibid*, 30.

⁷⁶⁰ n 585, European Commission Report, 13.

I. THE ENFORCEMENT OF HARD LAW

The enforcement of hard law is subject to many factors, such as

- the legal system in the Member State
- the level of gender equality and development
- corporate governance
- corporate governance codes
- and company law.

Each Member State is left to decide on the hard law and sanctions. These differences create complexity, resulting in important divergences. This situation constituted the basis for EU legal and political intervention, calling for a minimum harmonisation approach among the Member States.

Principally, legal sanctions are not directed at a company itself, but at the board and its directors. Though, the Norwegian legislation (non-EU) was an exception, as sanctions call for the dissolution of the company itself. The Italian government also decided to fine companies and not board directors. The French government called for the suspension of the remuneration of board directors, until the board becomes compliant with the legislation. Sanctions range from being strict to lenient, referred to as the 'softening of hard legislation'.⁷⁶¹ The research examines the German sanction, the empty chair, which may seem like a soft sanction, but which may impact management decisions and disrupt the nominations of board directors (A), while the French sanction nullifies the board nomination and discussions, imposes penalties, such as freezing payment to board directors (B) and the Dutch sanction calls to nullify board appointments (C).

⁷⁶¹ Machold and Hansen (n 86) 175-76.

A. THE GERMAN SANCTION, THE EMPTY CHAIR PROVISION

Sanctions for irregular board appointments result in leaving the board chair empty and voiding resolutions. If targets are not published, financial sanctions may be called for. If the thirty percent target is not met, the company is obliged to explain the reasons for non-compliance.⁷⁶² The research explains the background to the German legislative quota and accompanying sanctions (1) and legal company obligations regarding compliance of the legislation (2).

1. German quota legislation and sanctions

The German women on boards legislation is historic business legislation in Germany and considered equal rights legislation for women.⁷⁶³ The legislation set out to make important changes, and to 'change ... culture' in German companies.⁷⁶⁴ Yet, this change is premature, as the legislation is still quite recent. The German hard law (*Gesetz für die gleichberechtigte Teilhabe von Frauen und Männern an Führungspositionen in der Privatwirtschaft und im öffentlichen Dienst*), called the '*Frauenquote*' law or women's quota law, passed in 2015. The legislation has forced change on corporate boards.⁷⁶⁵ The '*Frauenquote*' law was extended to the supervisory boards of listed companies, which fixed a thirty percent binding quota (considered parity) and include companies subject to co-determination status, where employee representatives constitute half of the supervisory board. Though, the far-reaching legislation also includes German

⁷⁶² The Berlin Joint Declaration (Berliner Erklärung, 2017) <<http://www.berlinererklaerung.de/berliner-erklaerung-2011/>> accessed 5 July 2019.

⁷⁶³ Deutsche Welle Communication, Statement by Manuela Schwesig, Current German Federal Minister of Family Affairs, Senior Citizens, Women and Youth, 'German Managerial Women's Quota 'Working,' Says Minister Schwesig' (DW, 2017) <<https://www.dw.com/en/german-managerial-womens-quota-working-says-minister-schwesig/a-37858552>> accessed 3 July 2019.

⁷⁶⁴ *ibid.*

⁷⁶⁵ German Government Report, More Women in Leadership Positions in the Private Sector (German Ministry of Family Affairs, Senior Citizens, Women and Youth, 2021) <https://www.bmfsfj.de/bmfsfj/themen/_gleichstellung/frauen-und-arbeitswelt/quote-privatwirtschaft/quote-fuer-mehr-frauen-in-fuehrungspositionen-privatwirtschaft-78562> accessed 4 January 2021.

federal administration companies, courts and other federal administrations, private listed and co-determined companies to set their own women on boards targets (these structures are not addressed in this research). The 2020 Government commissioned study has shown that progress has been slow, despite the relative success of the '*Frauenquote*' law. Hard law is needed as an important means to balance boards, as it could not happen without it.⁷⁶⁶ The legislation has been effective in increasing the representation of women on boards to more than thirty percent in listed companies. The majority of companies limit the gender quota to thirty percent, as the minimum ceiling and do not go beyond that. This strict minimum should be understood that companies do not wish to go beyond that quota figure. The question has been asked, if raising the critical mass from thirty percent to forty percent, as in France, would be acceptable to increase the representation of women, instead of a wait and see approach.

Furthermore, as part of the Government report, a survey was taken about gender equality, which revealed that all respondents considered gender equality as important. Fifty percent of the companies consulted agreed that binding hard law with sanctions is necessary to increase the representation of women on boards. The other fifty percent considered that hard law is a violation of entrepreneurial freedoms without foundation in their companies.⁷⁶⁷ Therefore, the subject of women on boards remains topical among German companies.

The German legislation covers the Co-Determination Act, the Mining Co-Determination Act and the Co-Determination Supplement Act. According to Section 96 (2) of the

⁷⁶⁶ Kienbaum et al, Commissioned Report for the German Federal Ministry for Family, Senior Citizens, Women and Youth (BMFSFJ) 'Evaluation of the Act for the Equal Participation of Women and Men in Management Positions in the Private Sector and in the Public Service' (German Government, 2020) <<https://www.bmfsfj.de/resource/blob/162402/86e9ad8f2a0f8a4613719d3a0b4b5d8c/evaluation-fuepog-data.pdf>> accessed 4 January 2021.

⁷⁶⁷ *ibid*, 17-18.

German Stock Corporation Act,⁷⁶⁸ the composition of the supervisory board shall include thirty percent of women and thirty percent of men, including companies under the Co-Determination Act, the Mining Co-Determination Act and the Co-Determination Supplement Act.⁷⁶⁹ In case of non-compliance, the sanctions call for board elections to be voided and the chair destined for a woman or women will remain legally vacant, known as the 'empty chair' provision.⁷⁷⁰ The sanction calling for leaving the board chair empty, until the right board director is appointed seems to be a light sanction. However, the logic of the effectiveness of such a sanction, may be explained in the difficulty for the management to fill the empty chair, which then would leave the board unbalanced. This could become problematic, if the board presence is less than the called for quorum of fifty percent. Moreover, the empty chair will remove an automatic guarantee of an employer majority vote.⁷⁷¹

The quota legislation concerned more than one hundred listed companies and included four hundred and eighty women. Non-executive directors on supervisory boards on public limited companies are concerned by the legislation, not management

⁷⁶⁸ German Legislation, Stock Corporation Act, Article 3, no 4 of the Act on Equal Participation of Women and Men in Leadership Positions in the Private Sector, BGBl, 642, Section 96, Composition of the Supervisory Board (2015) §96(2) <<https://www.buzer.de/gesetz/4702/a65124.htm>> accessed 3 July 2019.

⁷⁶⁹ *ibid.*

⁷⁷⁰ German Government Report; Stock Corporation Act, Article 4, no 2, Requirements for Supervisory Bodies Act for the Equal Participation of Women and Men in Leadership Positions in the Private and Public Sector, Federal Law Gazette, no. 17 (2015) §4(2) <<https://www.buzer.de/gesetz/11557/a192191.htm>> accessed 4 January 2021; McDermott Will & Emery Communication, 'Germany Enacts Law on Mandatory Quota for Women in Business' (McDermott Will & Emery, 2015) <<https://www.lexology.com/library/detail.aspx?g=5d9103dc-381c-44f8-9067-e4f2b917c4aa>> accessed 3 July 2019; Bredin Prat Hengeler Mueller Slaughter and May Report, Board Level Gender Quotas in the UK, France and Germany (2016) 5 <https://www.hengeler.com/fileadmin/news/BF_Letter/14_Board-LevelGenderQuotas_2016-08.PDF> accessed 3 July 2020.

⁷⁷¹ BDO Deutschland Report, Sanctions for Non-Compliance (2021) (*in German*) <<https://www.bdo.de/de-de/insights/news-bdo/sondernewsletter-frauenquote/sanktionen-bei-nichterfullung>> assessed 4 April 2021.

boards, as Germany has a two-tier corporate governance board system. There were thirty-six percent of women on boards in 2021.⁷⁷²

2. Legal company obligations and compliance

If company management disagrees with the application of the sanction, the company may request a court order to fill the empty chair, as legal obligations require a fully functioning supervisory board. The court would have to comply with the *Frauenquote* and leave the chair empty anyway. If the quota is not reached, no other sanctions will be applied.⁷⁷³

Having explained German quota legislation and sanctions, the research examines French sanctions.

B. FRENCH SANCTIONS TO NULLIFY THE BOARD AND PENALTIES

The principal French corporate governance legislation is the Commercial Code, which is the legal framework for the composition of the board and all aspects of the company. Non-compliance with parity legislation would result in rendering null and void the board for up to five years. Financial sanctions include withholding remuneration of the board directors until the board meets legal parity requirements.⁷⁷⁴

⁷⁷² German Federal Ministry, Fixed Quota (2015) <<https://www.bmfsfj.de/quote/daten.html>> accessed 3 July 2019; S&P Market Intelligence Report, Camilla Naschert, 'Stop Favouring Men: German Law means Big Companies must Appoint Women to Boards' (2021) <<https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/stop-favoring-men-german-law-means-big-companies-must-appoint-women-to-boards-62001664>> accessed 23 March 2021; EIGE Gender Statistics (2019 and 2020) < EIGE Gender Statistics Database, Largest Listed Companies, Board Members (EIGE, 2021) <https://eige.europa.eu/gender-statistics/dgs/indicator/wmidm_bus_bus_wmid_comp_compbm/datatable> accessed 23 December 2021.

⁷⁷³ n 770, McDermott Will & Emery Communication.

⁷⁷⁴ French Government Report, Parity in Boards of Directors and Supervisory Boards of Public Institutions and Companies in the Public Sphere, Report Submitted on 7 July 2017 to the Minister of Action and Public Accounts and the Secretary of State for Gender Equality to the Prime Minister (*in French*) (2017)

The research demonstrates that the sanctions were not considered hard enough (1), therefore, the sanctions in the Copé Zimmermann Act (2) have been improved in the PACTE Law (3).

1. Sanctions and obligation of parity

Sanctions for non-compliance are part of Law no. 2011-103 of January 27, 2011 on the Balanced Representation of Women and Men on Boards of Directors and Supervisory boards and on Professional Equality (1) (the Copé Zimmermann Act) and are applied, as a means to enforce the legislation.⁷⁷⁵ Certain sanctions were considered not hard enough. The legislation initially referred to public limited companies with more than five hundred employees, but this was lowered to two-hundred and fifty employees with a turnover of more than fifty million euros. Companies must comply with a forty percent quota of women on boards or face strict sanctions .

According to Article 2 of Law no. 2011-103 of January 27, 2011 on the Balanced Representation of Women and Men on Boards of Directors and Supervisory boards and on Professional Equality (1) (the Copé Zimmermann Act), the legislation states that, in the event of non-compliance, two sanctions will be applied. The first sanction withholds director fees remuneration and the second sanction cancels new appointments to the board.

The Copé Zimmermann Act set the groundwork for medium to strict sanctions, which penalised the board of directors' remuneration and cancelled the irregular board

4.8 <https://www.economie.gouv.fr/files/parite-ca-cs-rapport-cgefi_remise-aux-ministres-7-juillet-2017.pdf> accessed 5 July 2019.

⁷⁷⁵ n 71, French Legislation, Law No. 2011-103 of January 27, 2011 on the Balanced Representation of Women and Men on Boards of Directors and Supervisory Boards and Professional Equality (1), Article 2.

director. The PACTE law created an obligation for parity and added another sanction, which cancelled the board discussions, if the board was irregular.

Having explained French sanctions and obligation of parity, the research examines the Copé Zimmermann Act.

2. The Copé Zimmermann Act

The quota legislation, known as the Copé-Zimmermann Act,⁷⁷⁶ introduced binding quota legislation in public limited companies to increase the representation of women on supervisory boards, in joint stock corporations and limited partnerships in France. The quota legislation aimed at all French companies with at least five hundred employees and revenue or the amount of total assets of fifty million euros or greater, which refers to the last three financial years of the company. The legislation called for a transition in two phases.⁷⁷⁷ The sequence of events of the legislation entering into force was the following:

- In 2011, if a woman was not already present on a board, at least one woman would be appointed at the following general assembly meeting.
- In 2014, there should be 20 percent of both men and women on the board and not less.
- In 2017, there should be not less than 40 percent of men and women on the board and not less. If a board has more than 8 members, the difference of members of either men or women may not exceed 2. The legislation had to be complied with at the first general meeting in 2017.
- In 2020, the obligation of 500 people is reduced to 250 for unlisted companies.⁷⁷⁸

⁷⁷⁶ n 71, French Legislation, Law No. 2011-103 of January 27, 2011 on the Balanced Representation of Women and Men on Boards of Directors and Supervisory Boards and Professional Equality (1).

⁷⁷⁷ *ibid.*

⁷⁷⁸ *ibid.*

According to Article L225-18-1, the women on boards provisions guaranteed '*parité*' (parity) in the workplace. The French Commercial Code stated that, the composition of the board of directors and the supervisory board cannot be composed of less than forty percent of men and women in public limited companies. The appointments would need to be approved by the shareholders at the general meeting.⁷⁷⁹ Moreover, the shareholders decide on the board of directors at the annual shareholder meeting, and also correct the irregular board composition, if an appointment has been annulled. The legislation has been amended to apply to companies with at least two hundred and fifty employees to four hundred and ninety-nine employees and a turnover of a minimum of fifty million euros, from the third consecutive financial year. Companies with more than two hundred and forty-nine employees may be liable starting from the first year of the three starting from January 2017.⁷⁸⁰

The legislation precises the procedures for non-compliance with the legislation and the implementation of sanctions. According to Article L225-18-1, when there are less than eight board directors, the 'representation of each sex may not exceed two'. The precisions entered into law in January 2020.⁷⁸¹ The legislation includes strict sanctions, if companies are not in compliance, the board appointment is voided.⁷⁸² If women are absent from the board by the time the legislation is published, one women must be appointed at the next general meeting. If there are irregularities in board appointments, the board will be voided.⁷⁸³ The Copé-Zimmermann law became the most effective legislation among the EU Member States, establishing the notable increase of the representation of women on boards from 12.3 percent in 2010 to 45.1 percent in 2020. The results have clearly exceeded the legal requirement of forty

⁷⁷⁹ Article L225-18-1, modified by Law no. 2014-873 of August 4 2014 for Real Equality Between Women and Men (1) (2014) Article 67 <https://www.legifrance.gouv.fr/loda/article_lc/LEGIARTI000029333476/#LEGIARTI000029333476> accessed 9 July 2019.

⁷⁸⁰ *ibid.*

⁷⁸¹ n 779.

⁷⁸² n 779.

⁷⁸³ n 779.

percent.⁷⁸⁴ These results demonstrated that this women on boards quota legislation was the right means to rapidly increase the representation of women on boards in France.

The Copé Zimmermann Report provided clear evidence of the advantages of quotas, citing the positive example of the Norwegian government and binding quota legislation.⁷⁸⁵ Initially, French legislators and companies preferred voluntary non-binding measures to increase the representation of women on boards. Though, non-binding measures had not significantly increase the representation of women on boards. According to the Report to the French Parliament, 'parity in politics has not yet become reality'.⁷⁸⁶ Women in politics seeking electoral mandates and women on the boards of directors could only be able to do so through legislative quotas.⁷⁸⁷ Having shown the application of the Copé Zimmermann Act, the research examines the PACTE law, which includes further sanctions.

3. The PACTE law

Law No. 2019-486 of 22 May 2019 on the Growth and Transformation of Enterprises (1) (known as the PACTE law) reinforced the Copé Zimmermann Act.⁷⁸⁸ The legislation

⁷⁸⁴ n 24, OECD Statistics, Employment : Female Share of Seats on Boards of the Largest Publicly Listed Companies; Challenges Article, Bénédicte Hautefort, 'Feminization, Equity: the New Afep-Medef Code is too Vague and not Sufficiently Engaged'(Challenges 2020) (*in French*) <https://www.challenges.fr/entreprise/feminisation-equite-le-code-afep-medef-est-trop-flou-et-pas-assez-engage_698952> accessed 27 janvier 2021; French Government Report, 10 Years After the Law of 27 January 2011 on the Representation of Women and Men on Boards of Directors and Supervisory Boards, the CAC 40 Announces 45% of Women on its Boards. 10 Years of the Copé-Zimmermann Law 2011-2021 (French Ministry of the Economy, 2021) (*in French*) <[brochure-10ans-loi-coppe-zimmermann.pdf \(economie.gouv.fr\)](#)> accessed 27 mai 2021.

⁷⁸⁵ *ibid*, French Government Report, , 10 Years After the Law of 27 January 2011 on the Representation of Women and Men on Boards of Directors and Supervisory Boards.

⁷⁸⁶ n 784.

⁷⁸⁷ n 784.

⁷⁸⁸ French Legislation, The PACTE Law, no. 2019-486 of 22 May 2019 on the Growth and Transformation of Enterprises (1) (2019) <<https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000038496102/>> accessed 3 July, 2019.

went a step further than the Copé Zimmermann Act. It included harder sanctions, stating that board discussions with an irregularly elected board director(s) would be annulled. This sanction clearly reinforces the quota legislation. A selection process for nominations would be implemented to guarantee the presence of at least one person of each sex among the candidates, until the end of the process and ensure a balanced representation of men and women.⁷⁸⁹ In addition, according to the PACTE law, if a nomination was not compliant, the irregular appointment to the board would be voided.⁷⁹⁰ Article 188 of the PACTE law, Article L 225-53 of the Commercial Code was amended to add on to existing text, that 'a selection process ... ensures the presence of at least one person of each sex until its completion among the candidates. These nomination proposals seek a balanced representation of women and men'.⁷⁹¹ Article 188 of the PACTE law, Article L 225-58 of the Commercial Code was amended and added a sentence. 'The composition of the Executive Board shall endeavour to seek a balanced representation of women and men'.⁷⁹² Article 188 of the PACTE law, Article L 225-58 of the Commercial Code added a sentence to precise, that '[i]t shall determine at this time a selection process that ensures the presence of at least one person of each sex until the end of the process among the candidates'.⁷⁹³ According to the PACTE Act, the Copé Zimmermann Act sanctions had not gone far enough. Therefore, Article 189 of the PACTE Act cancelled the text in the second sentence of the second paragraph of three articles: Articles L. 225-18-1, L. 225-69-1 and L. 226-4-1 of the French Commercial Code. The quota legislation initially called for the nullity of nominations in case of irregularity. With the cancellation of the text in the three articles, the nullity of decisions could be considered, as part of French company law on the subject of nullity. A company in non-compliance with the legislation also risks nullity of discussions. The

⁷⁸⁹ *ibid.*

⁷⁹⁰ n 788.

⁷⁹¹ French Legislation, Article 188 of the PACTE law, no. 2019-486 of 22 May 2019 on the Growth and Transformation of Enterprises (1). Section 2 of Chapter V of Title II of Book II <https://www.legifrance.gouv.fr/jorf/article_jo/JORFARTI000038496261> accessed 3 July, 2020.

⁷⁹² *ibid.*

⁷⁹³ n 791.

legislation does not limit the number of times the company may face this sanction. Nevertheless, this may be dangerous for a company, as it may bring litigation.⁷⁹⁴

According to Article 235-4 of the Commercial Code, the Court may pronounce the nullity after two months from the date of litigation, choose a different length of time or ask the company to call an extraordinary general meeting.⁷⁹⁵ The updated legislation, therefore, went beyond the original sanction, which voided board appointments, by also nullifying board decisions made during meetings, which puts additional pressure on companies to comply with the binding legislation.⁷⁹⁶

Having explained PACTE law, the research examines quota legislation in the Netherlands.

C. QUOTAS IN THE NETHERLANDS AND RECENT APPOINTMENTS ANNULLED

Women on boards binding quota legislation recently passed in the Netherlands and became effective on 1 January 2022. The Minister for Legal Protection said that, the legislation should not have been needed, making a reference to failed soft law and targets. The Minister of Emancipation declared that the new legislation is historic, as the Netherlands government has finally regulated women on boards in public limited companies. The Netherlands has always had a strong preference for self-regulation, including corporate governance codes, which served as a voluntary means to increase the representation of women on boards. However, the recent legislation, Amendment

⁷⁹⁴ *ibid*; Article 235-14 of the French Commercial Code (2004) <https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000006229645> accessed 23 December 2021.

⁷⁹⁵ *ibid*; French Legislation, Law no. 2019-486 of May 22, 2019 Relating to the Growth and Transformation of Businesses (1) Article 189 <https://www.legifrance.gouv.fr/jorf/article_jo/JORFARTI000038496262> accessed 5 July 2019; Gide Loyrette Nouel Report, PACTE law <<https://www.gide.com/loipacte/files/basic-html/page17.html>> accessed 23 December 2021; French Ministry of Economy and Finance Report, Gender Diversity and Professional Equality in Companies (2020) <<https://www.entreprises.gouv.fr/fr/mixite-et-egalite-professionnelle-dans-entreprises>> 23 December 2021.

⁷⁹⁶ *ibid*; n 1019, French Legislation; Article L. 225-18-1 of the French Commercial Code (2019).

to Book 2 of the Netherlands Civil Code, calls for a thirty percent women and thirty percent men on management and supervisory boards of public and private listed companies for all new board appointments. According to the legislation, the appointment will be annulled, if board appointments are not compliant with the thirty percent rule. An exception is permitted, when a board director is reappointed within a period of eight years. According to Article 135a, paragraph 5, the number of board directors of the supervisory board should be able to be divided by three or the next number which can be divided by three. Though, when a board appointment is annulled because of non-compliance with the ratio, it will not annul the decisions made during the board meeting itself, which was the same in the French legislation initially. The French PACTE Act hardened the sanction, by annulling the discussions and decisions of board meetings, if the board composition was irregular.

According to Section 7 of Title 4, Article 166, a company with more than 250 employees and 20 million euros asset value or 40 million euros net turnover should set yearly targets on management and supervisory boards. At the end of each fiscal year, a company report is sent to the Social and Economic Council, which shall include the exact numbers of women and men on the boards. If the required ratio is not met, a report explaining the reasons for non-compliance is required.⁷⁹⁷

⁷⁹⁷ n 681, Dutch Legislation, Diversity Quota and Targets Act (Wet ingroeiquotum en streefcijfers) Amendment to Book 2 of the Netherlands Civil Code in Connection with Balancing the Ratio of Men to Women on the Ratio of Men to Women on the Management and Supervisory Boards of Large Public and Private Supervisory Boards of Large Public and Private Limited Companies (*in Dutch*) (2021); Netherlands Government News Release, New Legislation will Improve Gender Diversity on Corporate Boards (9 September 2021) <<https://www.government.nl/latest/news/2021/09/29/new-legislation-will-improve-gender-diversity-on-corporate-boards>> 14 December 2021; Planet Labor News, Netherlands: Large Companies will have to Respect a Quota of Women in their Management Bodies from January 1, 2022 (10 December 2021) <<https://www.planetlabor.com/en/legal-developments/national-legislation/netherlands-large-companies-will-have-to-meet-a-quota-of-women-on-their-boards-from-1-january-2022/>> 14 December 2021; Netherlands SER Report, Research into Awareness of the Integration Quota Law and Target Figures (4 October 2021) <<https://www.ser.nl/nl/Publicaties/ingroeiquotum-streefcijfers>> 14 December 2021; The Netherlands Ministry of Justice and Security, Ministry of Education, Culture and Science Report, Modernization of Public Limited Liability Law and a more Balanced Male/Female Ratio (2020) <<https://www.internetconsultatie.nl/nvenmv>> 3 January 2021.

According to Article II, the legislation will expire after five years on 1 January 2027. The legislation will be reviewed at that date.⁷⁹⁸ The research shows that more Member States are transitioning to hard law, with The Netherlands, as one of the most recent Member States to pass binding legislation (1) and calling for thirty percent representation of women on boards (2).

1. The Netherlands and hard law

EU Member States continue to transition from soft law towards hard law. The most recent Netherlands legislation entered into force on 1 January 2022. Large public limited and non-listed companies on the stock exchange are subject to this new legislation to increase the representation of women on boards. Having shown that the Netherlands recently passed women on boards hard law, the research examines the details of the legislation.

2. Legal obligations and compliance

The Netherlands government consulted with SER and Diversity at the top organisations about the decision for binding legislation. According to the legislation, if there are not enough women directors to be nominated on the supervisory board to meet the thirty percent quota, the irregular appointment will be annulled and the board chair will be empty, until the board is compliant with the legislation. The empty chair sanction looks similar to the German sanction, when there is an irregular board appointment. The legislation applies to one-tier boards. The legislation requires thirty percent representation of women on boards. The legislation obliges large companies to report

⁷⁹⁸ *ibid.*

targets of women and men on boards to increase the representation of women on boards rapidly.⁷⁹⁹

Having analysed the recent Dutch legislation, the research shows that other EU Member States or European countries are passing hard law.

D. RECENT WOMEN ON BOARDS LEGISLATION

More and more EU Member States are passing women on boards legislation. For Member States who do not have women on boards hard law, these States are hardening their soft law with new policies and legislation to increase the representation of women on boards. The research shows that, the Greek government passed women on boards legislation in 2020 (1), while the Swiss government (non- EU) passed women on boards legislation in 2020 for economic reasons (2), while French legislation has been the most effective legislation to date (3).

1. Recent women on boards legislation in Greece

The Greek women on boards legislation entered into force in July 2020. According to Article 3 of Law 4706/2020, all public limited companies shall increase the representation of women on boards in public limited companies to twenty-five percent.⁸⁰⁰

⁷⁹⁹ *ibid*; Dutch Legislation, Amendment of Book 2 of the Dutch Civil Code in Connection with Making the Ratio between the Number of Men and Women in the Management and Supervisory Boards of Large Public and Private Companies More Balanced; Dutch Legislation <<https://zoek.officielebekendmakingen.nl/kst-35628-2.html>> accessed 23 December 2021; Amendment of Book 2 of the Dutch Civil Code in Connection with Making the Ratio between the Number of Men and Women in the Management and Supervisory Boards of Large Public and Private Companies More Balanced, No. 3, Explanatory Statement (2021) <<https://zoek.officielebekendmakingen.nl/kst-35628-3.html>> accessed 23 December 2021.

⁸⁰⁰ EuroGender, EIGE, Greek Legislation on Quotas for Women's Participation in Economic Decision-Making (EuroGender, 6 August 2020) <<https://eurogender.eige.europa.eu/posts/greek-legislation->

Having explained the recent Greek legislation, the research examines the Swiss women on boards legislation.

2. New women on boards legislation in Switzerland

The Swiss government passed women on boards legislation in June 2020. Switzerland is not a Member State. Swiss women were granted the right to vote only in 1971, much later than other European countries. Moreover, Swiss women were granted equal rights in 1988, after matrimonial law was reformed. Prior to this, the husband had legal control over the actions of the wife, whether she could work or open a bank account.⁸⁰¹ The Swiss government decided to pass women on boards legislation for economic reasons, to assure that qualified women are able to access the board of directors in public limited companies. Switzerland faces the same macro-economic factors, as in the rest of Europe, with an ageing population, declining workforce and a shortage of qualified workers. There is a need for women to enter or stay in the labour market to increase employment rate. The Government stated that, regulation restricts market freedoms, but assured that, the women on boards legislation would not harm the business environment in Switzerland. The objective of the legislation is to have a balanced board of directors. Article 734f of the Stock Corporation Law of June 19, 2020 states that,

[u]nless each gender is represented by at least 30 percent on the board of directors ..., the compensation report in pursuant to Article 727, paragraph 1, item 2, shall state:

[quota-favour-women%E2%80%99s-participation-economic-decision-making>](#) accessed 23 December 2021; European Commission Report, 2021 Report of Gender Equality in the EU, (European Commission Report, 2021) 38 <<https://op.europa.eu/en/publication-detail/-/publication/11d9cab1-fa52-11eb-b520-01aa75ed71a1>> accessed 23 December 2021.

⁸⁰¹ UN Report, The Weaker Sex? An Exhibition on Women and Power at Morges Castle (UN Today, 2021) <<https://untoday.org/the-weaker-sex-an-exhibition-on-women-and-power-at-morges-castle/>> accessed 25 May 2022.

1. the reasons why the genders are not represented as envisaged; and represented; and
2. the measures taken to promote the less strongly represented gender.⁸⁰²

The recent women on boards legislation will enter into force in 2026. The legislation was motivated by the constitutional amendment of equality of the sexes.⁸⁰³ Though, the legislation is binding, there are no sanctions, but the use of the comply or explain principle. However, since gender equality is a very recent notion in Switzerland, there is a concern about traditional gender bias and women in decision-making positions, as there is a structural lack of childcare and family facilities, as well as paternity leave.⁸⁰⁴ In 2021, there were 26.1 percent of women on the board of directors in public limited companies in Switzerland.⁸⁰⁵

Having shown that more Member States and non-EU European countries are turning to hard law, the research turns to the French quota legislation to examine the effectiveness ten years after the legislation entered into force.

3. Effectiveness of French binding legislation

With the introduction of the quota legislation in 2011, French companies reached the first target of twenty percent by 2014 and forty percent by 2017.⁸⁰⁶ According to the

⁸⁰² Swiss Legislation, Article 734f of the Stock Corporation Law (*in German*) (2020) <<https://perma.cc/VZK4-AE2D>> accessed 23 December 2021.

⁸⁰³ Swiss Government, More Women in the Management of Listed Companies (*in German*) (2021) <<https://perma.cc/H9TT-3FJ2>> accessed 23 December 2021.

⁸⁰⁴ Swiss News Release, Urs Geiser, Swiss Cabinet Insists on Gender Quota for Company Boards (swissinfo.ch, 23 November 2016) <<https://www.swissinfo.ch/eng/stock-corporation-law-women-quotas-for-company-boards-watered-down/42662932>> accessed 23 December 2021.

⁸⁰⁵ n 24, OECD Statistics, Employment : Female Share of Seats on Boards of the Largest Publicly Listed Companies.

⁸⁰⁶ n 71, French Legislation, Law No. 2011-103 of January 27, 2011 on the Balanced Representation of Women and Men on Boards of Directors and Supervisory Boards and Professional Equality (1).

President of the French Institute of Directors (IFA),⁸⁰⁷ the Copé Zimmermann Act⁸⁰⁸ was the right legal instrument to increase the representation of women on boards in France. Hard law with strict sanctions was an effective means. The French Institute of Directors, founded in 2003 by company directors were concerned with sustainable governance practices, which included women on boards quota legislation.⁸⁰⁹ Sanctions for non-compliance are integrated into the law, as a means to enforce the legislation. These sanctions include withholding the directors' remuneration and cancelling new appointments to the board.⁸¹⁰

The women on boards quota legislation has been effective in making structural changes on boards of French companies and in the economy. More women are entering the labour market and becoming board directors. It should be noted that this would have been impossible without the quota legislation.⁸¹¹ However, taking a closer look at the application of the legislation, there is still a long way to go to reach real parity. Therefore, a new reform is in preparation, which will include all governance boards in public limited companies and SCA French companies (*société en commandité par actions*, a partnership limited by shares) to apply quota legislation, as well as on all committees. The new legislation will apply to companies with more than fifty million euro turnover (no criteria for number of employees). The quotas will be applied in two phases: twenty percent by 2023 and forty percent by 2025.

The High Council of Equality (HCE) will monitor to control that companies are implementing the legislation. This includes all sanctions concerning composition of the

⁸⁰⁷ The French IFA Directors Report, Performance Factor within Boards (IFA, 2021) <<https://www.ifa-asso.com/>> accessed 4 June 2021.

⁸⁰⁸ n 71, French Legislation, Law No. 2011-103 of January 27, 2011 on the Balanced Representation of Women and Men on Boards of Directors and Supervisory Boards and Professional Equality (1).

⁸⁰⁹ n 807, The French IFA Directors Report.

⁸¹⁰ n 71, French Legislation, Law No. 2011-103 of January 27, 2011 on the Balanced Representation of Women and Men on Boards of Directors and Supervisory Boards and Professional Equality (1).

⁸¹¹ n 729, French Government Report, The Evolution of Women's Rights.

board of directors and the PACTE law sanction to cancel board discussions and decisions.⁸¹² In 2020, women composed 43.8 percent of representation on boards of the CAC40 and 43.7 percent of the SBF120. France has made the most progress of all Member States to increase the representation of women on boards, with the Copé Zimmermann and PACTE legislation.

Having pointed to the effectiveness of the French quota legislation, the research examines the correlation between legislation with hard sanctions and the effectiveness of the legislation to increase the representation of women on boards.

II. STRONGER SANCTIONS FOR NON-COMPLIANCE

Member States apply various sanctions mentioned in their national legislation. The French legislation has been compared to Norwegian legislation, with hard sanctions, though, French sanctions stop short on calling for company dissolution. Sanctions call on the personal liability of board directors, if non-compliant with the selection and nomination procedures of the board of directors. However, Italian legislation employs a different hard sanction, by applying stiff fines of up to one million euros on the company and not on the directors.. The Belgian legislation cancels board appointments, if non-compliant with the legislation. If the board remains non-compliant, board directors' remuneration will be suspended, until the board becomes compliant. The Belgian government called on hard sanctions, as Italian and French legislation, and influenced by the Norwegian legislation.

⁸¹² HCE Press Release, The HCE Welcomes the Progress of the Bill at Accelerating Economic and Professional Equality but Wishes to Go Further (HCE, 11 May 2021) <<https://www.haut-conseil-egalite.gouv.fr/parite/travaux-du-hce/article/cp-le-hce-salue-les-avancees-de-la-proposition-de-loi-visant-a-accelerier-l->> accessed 26 May 2022; Tanguy Allain, Gender Diversity in the Governing Bodies of Companies: Soon a New Law? Lettre Creda Sociétés 2021-03 of February 17, 2021 <<https://www.cci-paris-idf.fr/fr/prospective/creda/mixite-femmes-hommes-instances-dirigeantes>> accessed 26 May 2022.

Besides the application of vastly different sanctions, Member States define a different critical mass of the representation of women on boards quotas: the Belgian quota 33 percent, the French quota 40 percent and the Italian quota 33 percent.⁸¹³ Hard sanctions bring a rapid increase of the representation of women on boards. Inversely, in the case of Spanish legislation, the lack of sanctions has not led to a rapid increase of women on boards. The research examines Norwegian legislation sanctions calling for company dissolution (A), French sanctions (B) and German sanctions (C).

A. HARD SANCTIONS IN NORWEGIAN AND FRENCH LEGISLATION

The Norwegian women on boards legislation was the first to demonstrate that binding quotas were effective in increasing the representation of women on boards. The research confirms that, when there are strong sanctions in the legislation (1),⁸¹⁴ there is a rapid increase of women on boards (2).

1. Norwegian sanctions

The Norwegian quota legislation was adopted in Parliament in 2003.⁸¹⁵ The legislation has greatly influenced EU institutions, who proposed a women on boards directive, strongly influenced by the Norwegian regulations.⁸¹⁶ The Norwegian legislation called for the dissolution of companies, in case of non-compliance.⁸¹⁷ The protocol for dissolution followed a strict application of a series of warnings. First, companies would be issued with warnings, asking for compliance within a four-week period. After a

⁸¹³ Reding (n 586) 205.

⁸¹⁴ Fagan (n 264) European Parliament Report, Women on Corporate Boards in Europe, 13.

⁸¹⁵ Norwegian Legislation, Recommendation from the Ministry of Children and Family Affairs of 13 June 2003, approved by the Minister on the same day.(Bondevik II government), Proposition No. 97 (2002-2003) On the Act amending Act no. 44 of 13 June 1997 on Public Limited Companies and in Certain other Acts (Equality on boards of directors of public limited companies, state enterprises) (2003) <<https://www.regjeringen.no/no/dokumenter/otprp-nr-97-2002-2003-/id127203/>> accessed 5 July 2019.

⁸¹⁶ Storvik and Teigen (n 56) 6.

⁸¹⁷ Storvik (n 278).

second warning, companies who remained non-compliant were given additional time to comply with the legislation. During this time, companies had the possibility to change their legal company status from public limited companies to private limited companies, which would exempt them from complying with the legislation.⁸¹⁸

Having explained the procedures of putting into place Norwegian sanctions, the research examines the effects of the sanctions.

2. The effects of strict sanctions

Norwegian women on boards legislation entered into force in 2005⁸¹⁹ and concerns public limited companies (*Allmennaksjeselskap* or ASA), the largest Norwegian companies with shareholders listed on the Oslo Stock Market. Limited liability companies were excluded, as they are composed of smaller companies. The quota applies to listed and non-listed public limited companies. Established public limited companies had a two-year period to comply with the quota legislation. Companies created after 2006, were obliged to comply with the legislation the same year as the creation of the company.⁸²⁰

In the 1990s, Norwegian women represented less than six percent on boards. When the legislation entered into force, this figure greatly increased. In 2002, from six percent of women on boards,⁸²¹ the figure rose to nine percent in 2004, twelve percent in 2005,

⁸¹⁸ *ibid.*

⁸¹⁹ Norwegian Legislation, Norwegian Public Limited Liability Companies Act (2003) §§ 6–11a <<https://www.euronext.com/media/3746/download>> accessed 27 November 2017.

⁸²⁰ ILO Report, Improving Gender Diversity in Company Boards (ILO, 2020) 6 <https://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---act_emp/documents/briefingnote/wcms_754631.pdf> accessed 3 January 2021; Discussion Paper, Knut Nygaard, 'Forced Board Changes: Evidence from Norway' (2011) 22 Norwegian School of Economics Discussion Paper 5 <<https://openaccess.nhh.no/nhh-xmlui/bitstream/handle/11250/163332/dp2011-5.pdf?sequence=1&isAllowed=y>> accessed 5 July 2019.

⁸²¹ Teigen (n 119) 74.

eighteen percent in 2006 and twenty-five percent in 2007. The legislation entered into force in 2008 and resulted in thirty-six percent of women on boards. In 2009, the forty percent quota of the representation of women on boards was met. Binding quota legislation has made important changes to Norwegian boards⁸²² in approximately 450 public limited companies on the Oslo Stock Exchange.⁸²³ The quota legislation has also had negative impact on companies, who have disagreed with it. Those companies changed the legal company form, so as to no longer be obliged to comply with quota legislation.⁸²⁴

Strict sanctions are the principle reason why quota legislation remains an effective means for companies to comply with the legislation.⁸²⁵ Sanctions ranged from warnings and fines to company dissolution. The Companies Act called for forced dissolution of companies, as a final penalty. Companies received warnings, followed by a fine and as a last resort, the company would face forced dissolution. Moreover, according to company law,⁸²⁶ '...company board registration...[would be] prohibited if the requirements of representation ...[were] not met'.⁸²⁷ These coercive measures were means to achieve its objectives, as a company faced dissolution.⁸²⁸ The Register for Business Enterprises reported that all Norwegian companies had complied with the legislation and no sanctions were needed.⁸²⁹ It was not the intention of the Norwegian government to see companies dissolved. Paradoxically, the 2006 amendment would give the Norwegian government legal authority to take action to prevent company

⁸²² Storvik (n 278).

⁸²³ *ibid.*, Storvik and Teigen (n 56) 6.

⁸²⁴ *ibid.*

⁸²⁵ Teigen (n 63) 115-14

⁸²⁶ S. Machold, M. Huse, K. Hansen and M.; Brogi, 'Introduction' in *Getting Women on to Corporate Boards – A Snowball Starting in Norway* (1st edn, Edward Elgar Publishing, 2013) 3.

⁸²⁷ Morten Huse, 'Women on Corporate Boards of Directors' in Susan Vinnicombe et al (ed) (2nd edn, Edward Elgar Publishing 2009) 82.

⁸²⁸ *ibid.*

⁸²⁹ Teigen (n 63) 115-146.

dissolution, if substantial considerations were met.⁸³⁰ Though, the strict legislation had a determining effect on the outcome of representation of women on boards. In 2019, there were 41.8 percent of women on boards in Norway.⁸³¹ Having considered the effects of the strict sanctions on companies, the research examines French sanctions and suspension of board compensation.

B. FRENCH SANCTIONS AND SUSPENSION OF BOARD COMPENSATION

Non-compliance with parity legislation would render the board null and void for up to five years in France. The legislation called for financial sanctions, withholding remuneration of the board directors, until the board of directors meets legal parity requirements. The PACTE law called for further sanctions. The first sanctions did not include cancelling discussions held during non-compliant board meetings.⁸³² The research found that sanctions called for withholding board remuneration (1), though, the PACTE law would pass even stronger sanctions, by cancelling board discussions during irregular board meetings (2).

1. Withholding compensation

The legislation specifies the procedures for passing sanctions. According to Article L. 225-78 of the Code of Commerce Sub-Section 2, if the composition of the supervisory

⁸³⁰ Norwegian Government Press Release, Rules regarding Gender Balance within Boards of Public limited Companies (2005) <<https://www.regjeringen.no/en/historical-archive/Stoltenbergs-2nd-Government/bfd/Nyheter-og-pressemeldinger/pressemeldinger/2005/rules-regarding-gender-balance-within-bo/id429993/>> accessed 3 September 2018.

⁸³¹ Norwegian Government Statistics, Board and Management in Limited Companies (Statistics Norway, 2020) <<https://www.ssb.no/en/styre>> accessed 3 September 2018.

⁸³² C. Montalcino et al, 'Parity in the Boards of Directors and Supervisory Boards of Public Institutions and Companies in the Public Sphere' (French Ministry of Economy and Finance, 2017); n 795, French Legislation, Article 188 of the PACTE law, Law No. 2019-486 of 22 May 2019 on the Growth and Transformation of Enterprises (1); n 71, French Legislation, Law No. 2011-103 of January 27, 2011 on the Balanced Representation of Women and Men on Boards of Directors and Supervisory Boards and Professional Equality (1).

board (and management board, though this is not the focus of the research) is not compliant with Article L. 225-69-1, the supervisory board must make temporary board appointments, no longer than six months from the time the board seat becomes available.

According to Article VII, an article to Article L. 225-83, the legislation specified that board remuneration shall be suspended, until the composition of the board becomes compliant with the legislation. Remuneration and past payments will be made, only after the board composition becomes compliant with the legislation.⁸³³

Having explained that French sanctions withhold board directors' remuneration, which target the board of directors, the research examines the further effects of sanctions.

2. Further effects of sanctions and the PACTE law

The PACTE law called for stronger sanctions than in Law no. 2011-103 of January 27, 2011 relating to the Balanced Representation of Women and Men on Boards of Directors and Supervisory Board and to Professional Equality (1) (the Copé Zimmermann Act). Under the PACTE Law, board discussions would be annulled, if the board composition was irregular and non-compliant with the legislation.⁸³⁴ Sanctions in France were moderately strict, but not considered as harsh as the Norwegian sanctions. The payment to supervisory board directors would be suspended, until the board situation returned to legal requirements and include all back payments, after

⁸³³ French Legislation, The Code of Commerce, Article L. 225-78, Sub-Section 2: The Management Board and the Supervisory Board (Version in force since January 01, 2017) (2017) <https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000023519855/> accessed 4 April 2021; French Legislation, Article L. 225-83 of the Code of Commerce Sub-Section 2: The Management Board and the Supervisory Board (2021)<https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000042339488> accessed 23 December 2021.

⁸³⁴ n 795, French Legislation, Article 188 of the PACTE law, Law No. 2019-486 of 22 May 2019 on the Growth and Transformation of Enterprises (1).

having complied with the legislation.⁸³⁵ The scope of the legislation was extended in 2012 to include public companies, industrial and mixed companies, subject to private law rules.⁸³⁶ Public limited companies are obliged to disclose the number of women on boards, board director remuneration and suspension of board director fees, according to irregularities of board composition in their company report.⁸³⁷

Having explored further sanctions with the PACTE Act, the research examines German sanctions.

C. GERMANY ADMINISTRATIVE FINES AND SANCTIONS

In Germany, companies who failed to publish gender quotas, the number of women on boards and lack of an explanation for non-compliance to meet the quota will result in various sanctions, which may include, cancelling the board nomination, fines and the empty board chair.

According to Section 96(2) of the Stock Corporation Act, the legislation calls for the composition of the supervisory board to include one-third representation of women on boards, representing shareholders and employee representatives, for the board as a whole. The sanctions for irregular boards include the nullifying board nomination and leaving the irregular board position unoccupied, or the empty chair.⁸³⁸

⁸³⁵ n 833, French Commercial Code, Article 225-78 of the French Commercial Code, Sub-Section 2 (2017); n 784, French Government Report, 10 Years After the Law of 27 January 2011 on the Representation of Women and Men on Boards of Directors and Supervisory Boards.

⁸³⁶ n 71, French Legislation, Law No. 2011-103 of January 27, 2011 on the Balanced Representation of Women and Men on Boards of Directors and Supervisory Boards and Professional Equality (1).

⁸³⁷ *ibid.*

⁸³⁸ n 768, German Legislation, Stock Corporation Act, Section 96 (1) (2) (2015) <<https://www.buzer.de/gesetz/4702/a65124.htm>> assessed 4 April 2021; n 771, BDO Deutschland Report, Sanctions for Non-Compliance (2021) (*in German*).

Having explained that French and German sanctions target the board of directors, the research examines Italian sanctions, which are directed at the company.

§2: SANCTIONS AND QUOTA LEGISLATION IN ITALY

When quotas carry strict sanctions, they are more effective, than quotas without any sanctions at all or minimal sanctions. Sanctions calling for financial penalties or where companies risk closure, observed a significant increase of the representation of women on boards, than weak sanctions where no or little action led to insignificant or little change. As other EU Member States, the Italian government was influenced by the Norwegian legislation in passing women on boards national legislation. The Italian economy is a large economy, despite a decline in recent years. Italy remains an industrialized nation, ranked in the top ten globally in GDP. If Italy had increased the number of women in the workforce, as called for in the Treaty of Lisbon to sixty percent, GDP would have increased by seven percent.⁸³⁹ The research examines the Italian women on boards legislation, which entered into force in 2012 (I), as well as legislative reforms (II).

I. ITALIAN GENDER QUOTA LEGISLATION

Gender quota legislation, known as the Golfo Mosca Law, was passed in Italy in 2011 and went into effect in 2012. The legislation was named after MP Lella Golfo of the PDL government party, a centre-right political party (*Il Popolo della Libertà*) and Alessia

⁸³⁹ The Constitution of the Republic of Italy, Article 3 (Senato della Repubblica, 1947) <<https://www.ces.es/TRESMED/docum/ita-cttn-ing.pdf>> assessed 4 April 2021; Arndt and Wrohlich (n 477) 337-344; Marina Brogi, 'Italy's Lessons Learnt from Norway' in Silke Machold, Morten Huse, Katrin Hansen, and Marina Brogi (eds) *Getting Women to Corporate Boards: A Snowball Starting in Norway* (1st edn, Edward Elgar Publishing, 2013) 188.

Mosca of the PD main opposition centre-left party (*Partito Democratico*). The research points out that gender equality legislation dates back to the Italian Constitution, while EC Recommendations recommended public limited companies to include women on boards (A), though, there are few public limited companies in Italy, as many companies are privately owned or state-owned (B).

A. ITALIAN GENDER QUOTA LEGISLATION BACKGROUND

Article 3 of the Constitution of the Republic of Italy is the legal basis of gender equality with the mention that, 'all citizens are equal before the law.'⁸⁴⁰ The Equal Treatment Legislation Act 903 of December 1977 was considered to be ineffective, as it remained unenforced. The Employment Act 125 of April 1991 included positive action in the workplace. Italian gender equality legislation, based on EC Recommendation of 13 December 1984 on the Promotion of Positive Action for Women, called on developing posts of responsibility where they are underdeveloped.⁸⁴¹ Though the legislation did not specifically call for women on boards, it was a breakthrough, as it represented a modernisation of gender equality legislation.⁸⁴²

The research shows that binding women on boards legislation was implemented in two phases (1), though, it is a temporary measure, which will remain in effect for nine years (2).

⁸⁴⁰ *ibid*; The Constitution of the Republic of Italy, Article 3.

⁸⁴¹ Livia Amidani Aliberti, 'Action not Words: Reflections on the Golfo Mosca Law on Gender Parity in Bodies of Corporate Governance' (2011) <<http://www.alibertiga.com/FM-eng.pdf>> accessed 4 April 2021; P. Pastore, 'Italian Lesson about Getting Women on the Board Five Years after the Implementation of the Gender Quota Law' (2018) 16 (1-1) *Corporate Ownership & Control* 185-202 <<http://doi.org/10.22495/cocv16i1c1art7>> assessed 4 April 2021; Maria Vittoria Ballestrero, 'European Developments Section: New Legislation in Italian Equality Law Act 125 of 10 April 1991 (the Positive Action Act)' (2005) (21)2 *Industrial Law Journal* 152 <<https://academic.oup.com/ilj/article/21/2/152/769170>> accessed 5 December 2021.

⁸⁴² n 190, European Commission (EC), Council Recommendation of 13 December 1984 on the Promotion of Positive Action for Women.

1. Quota legislation in two phases

The legislation calls for thirty-three percent of women on boards, executive and non-executive directors, by 2015, with twenty percent within the first fiscal year. This legislation concerns public limited companies and state-owned companies.

Having explained that Italian legislation calls for quotas within a timeframe, the research notes that Italian quotas are limited in time.

2. Quota legislation is temporary

The women on boards legislation, Law no. 120 of 12 July 2011, called for increasing the representation of women on boards gradually. The quota legislation is of temporary nature, calling for three terms starting and remain in effect for nine years.⁸⁴³

Having shown that Italian quotas are limited in time, the research examines the specific nature of Italian public limited companies and the board of directors.

B. ITALIAN PUBLIC LIMITED COMPANIES

There are fewer public limited companies in Italy, than in other Western European Union Member States, due to a mixed model of high private ownership and state-owned companies, with a lack of separation of ownership and control. The research examines the specific nature of the board of directors in public limited companies, which usually have a single shareholder, an Italian family (1), and, therefore, economic decisions concerning the company are taken by the majority shareholder (2).

⁸⁴³ Italian Legislation, Legislative Decree No 120 of 12 July 2011 Amendments to the Consolidated Law on Financial Intermediation, pursuant to Legislative Decree No 58 of 24 February 1998, concerning Equal Access to the Administrative and Control Bodies of Companies Listed on Regulated Markets (11G0161) (*in Italian*) (2011) Article 1 <http://www.pariopportunita.gov.it/wp-content/uploads/2018/01/legge_120-2011-2-2.pdf> accessed 23 December 2021.

1. The board of directors in Italian public limited companies

There were approximately 260 listed companies in 2015, representing twenty-six percent market capitalization on GNP. Public limited companies may have a single majority shareholder, a family, who selects board directors, connected to the principal shareholder/owner. This demonstrates that the board of directors is in place, but not an independent decision-making body.⁸⁴⁴

Having explained the particularities of Italian public limited companies, the research examines the role of non-executive board directors and economic decision-making in these companies.

2. Economic decision-making in Italian public limited companies

Economic decision-making on the board of directors in Italian public limited companies is taken by the leading shareholder and owner. This explains why non-executive directors may not have influence in decision-making. This may also explain that outside non-executive directors are not independent. The Government has passed a series of reforms to regulate outside investors. The gender quota legislation is an additional means to give power to outside investors, rather than the status quo of the majority shareholder.

Having explained the mechanism of economic decision-making in Italian public limited companies, the research examines the legislative reforms.

⁸⁴⁴ A. Rigolini and M. Huse, 'Women on Board in Italy: The Pressure of Public Policies' in *Gender Diversity in the Boardroom*, C. Seierstad, P. Gabaldon and H. Mensi-Klarbach (eds) (1st edn, Palgrave McMillan, 2017) 126.

II. LEGISLATIVE REFORMS

The Draghi reform in 1998, the Codice Preda in 1999 (the Italian Corporate Governance Code), the reform of Company Law in 2003 by Legislative Decree No. 6/2003 concern governance reforms, as well as the, Golfo Mosca Law no. 120/2011, women on boards legislation. These reforms have been deployed to take away control from powerful shareholders, usually powerful families, to modernise Italian corporate governance practices.⁸⁴⁵ The research finds that the Golfo Mosca Law no. 120/2011 is the women on boards legislation in Italy (A), and, enforced by the Italian Stock Exchange Commission (B).

A. ITALIAN GENDER QUOTA LEGISLATION

The Gender Quota law, Golfo Mosca Law no. 120/2011, is the women on boards legislation and positive action gender equality law in Italy. This law calls on public companies and majority-owned governmental companies to renew or appoint women on management and supervisory boards. From the first renewal, there should be twenty percent of women on boards and from the second and third renewal, there should be a minimum of one-third of women on boards. A renewal represents 'three mandates: from August 2012 until 2022 (nine years for each company : boards of companies listed on the Italian stock exchange are elected every three years). The corporate bodies renewed for the first time after the Law in 2014 will remain in office up to a maximum of 2023'.⁸⁴⁶ This legislation is temporary and will expire in 2022. It shall be implemented in phases. More time is needed to research and assess the overall and effectiveness of this legislation. The research turns to unique Italian corporate governance, known as

⁸⁴⁵ n 843, Italian Legislation, Legislative Decree No 120 of 12 July 2011 Amendments to the Consolidated Law on Financial Intermediation, pursuant to Legislative Decree No 58 of 24 February 1998, concerning Equal Access to the Administrative and Control Bodies of Companies Listed on Regulated Markets, Article 1-ter.

⁸⁴⁶ P Pastore (n 841) 3.

Dual Horizontal Governance (1), which may reveal issues, as outside non-executive directors are not independent, which may lead to issues between majority and minority shareholders (2).

1. Traditional Italian governance: the Dualistic Horizontal Governance structure

Traditional Italian governance, known as, the Dualistic Horizontal Governance, consisting of two structures, the board of directors (managing the company) and the board of statutory auditors (controls responsibility). Boards are appointed by shareholders. This is the governance chosen by more than ninety percent of Italian public limited companies.⁸⁴⁷ Having explained the Dualistic Horizontal Governance structure, the research examines governance issues and majority shareholders.

2. Governance issues and majority shareholders

The controlling shareholder may be composed of family members . Problems may arise between the family member majority and minority shareholders. This is more common than issues arising from management and controlling shareholders. Having explained governance issues and majority shareholders, the research examines the role of the CONSOB (the Control Commission for Listed Companies) and sanctions.

B. THE CONSOB AND SANCTIONS

The CONSOB, the Control Commission for Listed Companies, is responsible for enforcing the gender quota legislation. The research indicates that, if companies are not compliant with the Golfo Mosca law, the CONSOB may apply a fine up to one million euros (1), where sanctions target companies, not board directors (2).

⁸⁴⁷ Rigolini and Huse (n 844) 132.

1. The Golfo Mosca Law and role of the CONSOB

If a company fails to comply with the legislation, the CONSOB will issue strict warnings and sanctions. According to Article 1 of the Legislation, the underrepresented gender should include a third of the board and for three renewable terms. If board composition is not compliant, the CONSOB sends a warning to the company and reminds the company to comply with the legislation within a four month timeframe.

The CONSOB will sanction the company with a 100,000 to 1 million euro fine. If the company ignores the warning and the sanction, a new warning will require the irregular board director to be cancelled. The CONSOB will apply warnings and sanctions six months from the date the legislation enters into force.⁸⁴⁸ Having explained the Golfo Mosca Law and the role of the CONSOB, the research examines how companies are sanctioned, not the board directors.

2. Sanctioning the company, not the board director

The sanctions apply to Italian public limited companies, rather than to the board of directors. These sanctions are very different from sanctions in other EU Member States, where penalties target the board of directors. Though, Norwegian legislation is an exception (though not an EU member), calling for company dissolution for non-compliance of the quota legislation.

The research has explained the particularities of the Italian gender legislation, the Golfo Mosca Law, the role of the CONSOB and the importance of sanctions. It should be noted that the Italian legislation chose to sanction the company and not the board of directors.

⁸⁴⁸ n 845, Legislative Decree No 120 of 12 July 2011 Amendments to the Consolidated Law on Financial Intermediation, pursuant to Legislative Decree No 58 of 24 February 1998, concerning Equal Access to the Administrative and Control Bodies of Companies Listed on Regulated Markets, Article 1.

CONCLUSION

In 2011, there were six percent of women on boards in public limited companies in Italy. In 2015, this figure rose to 27.6 percent. Binding quota legislation is responsible for the increase. In 2020, there were 38.4 percent of women on boards of public limited companies in Italy.⁸⁴⁹ The Italian gender quota legislation will expire in 2023 and, then, each company will decide on increasing the representation of women on boards.⁸⁵⁰

SECTION 2 FAILURES OF LEGAL METHODOLOGIES

Different attempts to introduce soft law, as a means to increase the representation of women on boards, were unsuccessful. Soft law programmes, which are non-legal measures, give companies the possibility to self-regulate. Since self-regulated programmes do not carry sanctions, they are unable to increase the representation of women on boards rapidly. It is important to analyse soft law failures to determine the cause of the failure and how EU institutions are able to implement corrective measures.

The research review of the fragmented EU and Member State soft law programmes have demonstrated that, though there were many attempts to increase the representation of women on boards, most of those programmes failed (§1), though, hard law has also failed (§2).

⁸⁴⁹ n 24, OECD Statistics, Employment : Female Share of Seats on Boards of the Largest Publicly Listed Companies.

⁸⁵⁰ Rigolini and Huse (n 844) 126.

§1: FAILURES OF THE SOFT LAW

The research has shown that the majority of EU Member States have not been able to increase the representation of women on boards with soft law (I), though, hard law may also, have limitations, if it is not enforced with strict sanctions (II).

I. SUBJECTIVE INTERPRETATION OF THE PROGRAMMES

Non-binding measures to increase the representation of women on boards have failed to provide a long-term solution to increase the representation of women on boards in the Member States, as recommended by the EU Strategy 2020 and other soft law programmes. Soft law accommodated the EU vision of self-regulation, which allowed Member States to self-regulate women on board initiatives. Before quota legislation entered into force, there were no women on boards numerical targets in Norway to increase the representation of women on boards. Instead, pure soft law programmes existed, which included political debates, participation in women's networks, the funding of research to increase the representation of women on boards, training and development for board-ready women, mentorship and sponsorship programmes, database management of qualified boardable women, and lastly, consultations and recommendation to increase the representation of women on boards.

Despite the multitude of soft law programmes, the programmes have been unable to increase the representation of women on boards, as there is no means of enforcement or sanctions. The research examines the Norwegian government and private soft law programmes were ineffective (A), though, non-binding measures in France and Germany also failed (B).

A. FAILURE OF NORWEGIAN SOFT LAW PROGRAMMES

In principal, the Norwegian government agreed that, highly educated women should contribute their competencies in all areas of the labour market.⁸⁵¹ The research has found that, although gender equality existed in political and electoral offices, and despite many women on boards programmes (1), there were, in reality, few women on boards in the private sector in Norwegian public limited companies, until binding quota legislation passed (2).

1. Background leading up to binding quota legislation

Before binding quota legislation, Norway, a non-EU Member State, regularly held political debates and women's network meetings and launched research programmes, training and seminars, mentorship programmes, databases and soft law initiatives, as a means to increase the representation of women on boards.⁸⁵² Despite these soft law efforts, there were too few women in top positions of Norwegian companies. Further efforts were made by the Norwegian government to remedy economic stagnation, by passing binding legislation, which led to a rapid increase of women on boards in public limited companies. Binding quota legislation was passed, due to ineffective business initiatives to increase the representation of women on boards.⁸⁵³ According to the Norwegian government, increasing the representation of women on boards was an efficiency need, to not allow talent to go to waste, and to support the economy. The former Norwegian Minister of Trade and Industry Ansgar Gabrielsen stated that, the Norwegian quota legislation was 'not about...equality between the sexes: it was about the fact that diversity is a value in itself, that it creates wealth'. The opaque buddy system had been the rule for board directors to be appointed, and the former Minister

⁸⁵¹ Teigen (n 119) 75.

⁸⁵² Huse (n 286) 15.

⁸⁵³ Teigen (n 119) 75.

stated that, '[t]he business world ought to incorporate women onto their boards, the sooner the better... [to]...better use ... our resources and diversity.' ⁸⁵⁴

Though, initially, Norwegian business favoured a self-regulation approach to increase the representation of women on boards in public limited companies. ⁸⁵⁵ Self-regulation was also a means to stall change, which was due to the Norwegian business culture, which excluded women from decision-making positions. The legislation would allow women and men to access boards, thereby improving the management in companies and their competitiveness in the economy. ⁸⁵⁶

Having provided background information about the Norwegian legislation, the research examines how the legislation was politically-led.

2. Politically-led binding quota legislation

The Norwegian women on boards quota legislation was politically led by the Christian Democrats and Conservative Parties for economic reasons, not by the left government nor feminist movements, though, they also supported the quota legislation. The legislation was debated from 1999 to 2008, until the date it entered into force. ⁸⁵⁷ The legislation was initially proposed to expand Article 21 of the Gender Equality Act, but was subsequently legally determined to be part of the Companies Act, as it would regulate women on boards. It first proposed a twenty-five percent quota, which was changed to forty percent to align with other Norwegian quota legislation. ⁸⁵⁸ The Progress Party voted against the quota legislation, in favour of self-regulation and free market economies for business. It was the only political party to vote against the

⁸⁵⁴ Storvik and Teigen (n 56) 7.

⁸⁵⁵ n 29, Proposal for a Directive.; n 29, Senden, 51; Teigen (n 119) 77.

⁸⁵⁶ n 819, Norwegian Public Limited Liability Companies Act (2003) §§ 6–11a.

⁸⁵⁷ Teigen (n 119) 78–79.

⁸⁵⁸ *ibid.*

legislation.⁸⁵⁹ The Party believed in individual freedom, limited government interference and low taxes.⁸⁶⁰ The Progress Party stated that, quota legislation was a form of discrimination, citing state intervention in private law.⁸⁶¹

The Norwegian government and business association, the Confederation of Norwegian Enterprises, set out to increase the representation of women on boards on a voluntary basis.⁸⁶²

Despite initiatives, between 1990 and 2002, the number of women did not increase significantly. Before binding quota legislation was introduced in 2003, the Norwegian government extended the mandate of the Confederation Norwegian Business by two years in the attempt to increase women on boards, by continuing with soft law programmes.⁸⁶³ The Confederation favoured self-regulation and remained fiercely opposed to quotas, finding them to be symbolic and without substance. In the end, since the Confederation of Norwegian Enterprises soft law efforts failed, the Norwegian government passed quota legislation.⁸⁶⁴ This may also be explained, as the Norwegian government has large ownership stakes in its national companies,⁸⁶⁵ which strongly support corporate social responsibility principles in their governance.⁸⁶⁶ Norwegian Corporate Governance is defined as 'interactions between various internal and external actors and the board directors in directing a company for value creation,' with

⁸⁵⁹ *ibid.*

⁸⁶⁰ The Norwegian Progress Party (The Progress Party, 2018) <<https://www.frp.no/om-frp>> accessed 3 September 2018.

⁸⁶¹ Teigen (n 119) 79-80.

⁸⁶² Huse (n 286) 14-15.

⁸⁶³ *ibid.*

⁸⁶⁴ *ibid.*

⁸⁶⁵ Janicke L. Rasmussen and Morten Huse; 'Corporate Governance in Norway: Women and Employee-Elected Board Members' in Handbook on International Corporate Governance, Christine A. Mallin (ed.) (1st edn, Edward Elgar Publishing, 2011) 130 <https://www.researchgate.net/publication/298533616_Corporate_governance_in_Norway_Women_and_employee-elected_board_members> accessed 5 July 2019.

⁸⁶⁶ *ibid.*

preference of a stakeholder strategy rather than a shareholder strategy'.⁸⁶⁷ Having provided information, which led to Norwegian legislation, the research examines the background to binding legislation in France and Germany.

B. BACKGROUND TO BINDING MEASURES IN FRANCE AND GERMANY

Germany and France had soft law non-binding measures in place for many years, before legislating quotas. Soft law policies in the two Member States were ineffective, as they did not increase the representation of women on boards. The research examines the long history of work reforms in Germany (1), while, France has an equally long past, concerning gender equality legislation (2).

1. German economic work reform and women on boards policies

Germany became a leading economic power in the late 19th century and early 20th century, as it witnessed important changes in its economy, such as, industrialization, population growth and the move of populations from the countryside to cities. This led to the transformation of an old class system to a market economy with a large working class, a growing middle class and a decreasing population of bourgeoisie. These economic changes forced the German government to develop health and accident insurance for workers. The changes did not include workers' unemployment. Germany needed workers to increase its industrialization strategy. However, workers risked unemployment, when economic conditions took a downturn. Unemployment insurance was discussed, as early as 1879. Trade unions offered insurance to workers, as well as city halls. The SPD Party (Social Democratic Party of Germany or *Sozialdemokratische Partei Deutschlands in German*) supported a national insurance

⁸⁶⁷ Rasmussen and Huse (n 865) 130; Morten Huse, 'Boards' in *Governance and Value Creation, the Human Side of Corporate Governance* (1st edn, Cambridge University Press, 2007) 23 <https://www.researchgate.net/publication/230660474_Boards_Governance_and_Value_Creation_The_Human_Side_of_Corporate_Governance> accessed 5 July 2019.

unemployment policy, but the German government encouraged workers to work on farms, instead of offering unemployment insurance.⁸⁶⁸

During the First World War, there were labour shortages in Germany. Women were hired to replace men. Unions helped the unemployed and city halls. The German government helped soldiers. After the war, a new employment policy, included in the Constitution, stated that every German citizen was entitled to employment. Article 15 of the German Constitution states, '[t]he right to work is guaranteed. By means of economic control the state ensures to each citizen work and a living'.⁸⁶⁹ City hall governments were responsible for assisting the unemployed, as there were many unemployed after the war, along with growing inflation. In 1927, unemployment insurance was finally legislated. Though, this was seen as an important social policy, it was ineffective in covering all costs. In 1932, over thirty percent of the German workforce remained unemployed. The Chancellors of the Republic decreased unemployment benefits, which, in turn, created chaos and left millions of Germans without resources.⁸⁷⁰ More work reforms were passed to avoid further disorder after the First World War. The Kaiser abdicated his throne, as there was a possibility of internal revolt. The unions and employers established work councils to permit two employee representatives on supervisory boards. During the Nazi Rule from 1933 to 1945, women were removed from the workforce. However, as the Rule increased, women under the age of twenty-five were obliged to work in the military or on a farm. After the war, the Basic Law in 1949 officialized employment rights for women and men, as a national responsibility in Western Germany. In Eastern Germany, the planned state economy increased the number of women entering the workforce to compensate for those who had moved to the West.⁸⁷¹ This historical overview is important to

⁸⁶⁸ Hans-Walter Schmuhl, 'Labour Policy in Germany' (Social History, 2006) <<https://socialhistoryportal.org/news/articles/110057>> accessed 17 March 2019.

⁸⁶⁹ *ibid.*

⁸⁷⁰ *ibid.*

⁸⁷¹ *ibid.*

understand, as a reminder, that women in Germany were used as a solution of replacement or forbidden employment during the twentieth century until the Basic Law.

This summary is in line with the position of feminist movements in Germany, who insisted on their rights and lobbied for women on boards binding legislation. In 2011, the Berlin Joint Declaration was signed by an alliance of leading women in politics, associations and businesses in Germany. The Berlin Joint Declaration called for binding quota legislation, as soft law was ineffective and unable to increase the representation of women on boards. Women from different Parliamentary groups of the German Bundestag joined together to address the legal requirements for the equal participation in the 'management levels of the economy' calling for a thirty percent women on boards quota.⁸⁷²

The Nurnberg Resolution was deeply influenced by the Norwegian legislation.⁸⁷³ Norwegian binding quota legislation also had influenced France and Germany to pass hard law, as result of ineffective self-regulated national soft law. With the implementation of hard law, the percentage of women on boards of companies rose sharply in both Member States. The background, which led to the passing of the Nurnberg Resolution, revealed that companies in Germany negotiated agreements with the government to increase the representation of women on boards, but through self-regulating gender diversity measures, voluntary targets and recruitment strategies to increase the representation of women on boards. The German government first implemented voluntary measures to respond to the market, by adding a diversity provision in the corporate governance codes with reference to 'appropriate

⁸⁷² n 29, Proposal for a Directive.; European Women's Lobby Report; 'Status of the Proposed Directive on Women on Boards' (2017) <http://www.bpw.fr/files/7115/4327/0540/Brief_Women_on_Boards_Directive-June2017.pdf> accessed 3 September 2019.

⁸⁷³ The Nuremberg Resolution (Erfolgsfaktor website, 2019) <<https://erfolgsfaktor-frau.de/nuernberger-resolution-2018/>> accessed 5 July 2019.

consideration of women' as a means to increase the representation of women on boards. The flexi-quota was initiated by government regulation and finally by legally binding quota legislation.⁸⁷⁴

The 'Agreement between the Federal Government and the Central Associations of German Business to Promote Equal Opportunities for Women and Men in the Private Sector' did not specifically cite women on boards, as it was a general soft law recommendation. Though, it was ineffective in increasing the representation of women on boards. Voluntary efforts to increase women on boards had failed. The 'Frauenquote' law entered into force in January 2016, requiring a thirty percent representation of women on boards.⁸⁷⁵ The legislation applies to over one hundred major German public limited and co-determined companies, with the sanction of the empty chair principle, where companies will leave the board seats empty, should irregularities exist in the nomination and selection process of board directors.⁸⁷⁶ The legislation has been effective in increasing the representation of women on boards. The thirty percent remains under the critical mass of forty percent, as fixed by the proposed directive. The legislation did not apply to mid-sized companies, who set their own women on boards targets.⁸⁷⁷

⁸⁷⁴ Anja Kirsch, 'Women's Access to Boards in Germany, Regulation and Symbolic Change' in *Gender Diversity in the Boardroom Volume 1 The Use of Different Quota Regulations*, Heike Mensi-Klarbach, Cathrine Seierstad, Patricia Gabaldon (eds) (1st edn, Palgrave Macmillan Publishers, 2017) 215; Michael Grünberger, 'Gender Equality in the Competition of Regulatory Models.- Ways to Actually Implement Gender Equality in Leadership Positions in the Economy' (2012) 3(1) NOMOS Publication 1-45 <https://www.rechtswissenschaft.nomos.de/fileadmin/rechtswissenschaft/doc/Aufsatz_ReWiss_12_01.pdf> accessed 5 July 2019.

⁸⁷⁵ German Legislation, Act for the Equal Participation of Women and Men in Leadership Positions in the Private Sector and the Public Sector (2015) Artikel 1, §4, Specifications for Supervisory Boards (Bundesgesetzblatt Jahrgang 2015 Teil I Nr. 17, ausgegeben zu Bonn am 30. April 2015) <https://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bund_esanzeiger_BGBI&jumpTo=bgbl115s0642.pdf#_bgbl_%2F%2F%5B%40attr_id%3D%27bgbl115s0642.pdf%27%5D_1655915125939> accessed 5 July 2019.

⁸⁷⁶ n 771, BDO Deutschland Report, Sanctions for Non-Compliance

⁸⁷⁷ *ibid.*

According to the German Institute for Economic Research, the lack of harder sanctions make it impossible to force companies to comply. Many companies remain against quota legislation. The rate of appointments of women to boards reached thirty percent quota in 2018, which was clearly due to quota legislation. Further efforts to increase the representation of women on boards have not been successful.⁸⁷⁸ German women on boards quota legislation was adopted in Parliament in 2015 and entered into force in 2016, requiring German public limited companies to have thirty percent of women on supervisory boards.⁸⁷⁹ Sanctions consist of leaving the board chair empty until the position is filled. The legislation applies to public limited companies and companies subject to co-determination. More than 3500 large businesses will disclose targets in reports on how women will reach top corporate positions.⁸⁸⁰

There has been a great progression in the representation of women in the labour market and on boards in German public limited companies. In 1990, women made up 43.3 percent of the workforce in Germany. In 2019, women represented 56.6 percent of the workforce.⁸⁸¹ In 2010, there were 12.6 percent of women on supervisory boards of public limited companies. In 2019, there were 35.6 percent of women on boards in public limited companies.⁸⁸² As women increasingly entered the workforce, the number of women on boards have also increased. Before the '*Frauenquote*' legislation entered into force, there were 'quota wars' to increase the representation of women on boards. This included non-binding soft law in the largest German companies. In the political decision-making sphere, two Conservative Länder turned against their own political party, supporting the Social Democrats women on boards proposed binding

⁸⁷⁸ *ibid.*

⁸⁷⁹ German Government Report, Women on Boards Legislation, a Historical Milestone (German Federal Ministry for Family Affairs, Senior Citizens, Women and Youth, 2016) <<https://www.bmfsfj.de/quote/zeitstrahl.html>> accessed 5 July 2019; Lang (n 642).

⁸⁸⁰ *ibid.*

⁸⁸¹ n 24, OECD Statistics, Employment : Female Share of Seats on Boards of the Largest Publicly Listed Companies.

⁸⁸² *ibid.*

legislation. The former Labour and Women's Minister, Ursula von der Leyen (current EU Commission President) supported women on boards quotas, while the former Women's Minister, Kristina Schroeder voted against the proposal. At the same time, the proposed EU women on boards directive was in the background. Germany did not support the EU women on boards proposal. In Germany, women joined together to give an official response to years of non-binding efforts in the form of the Berlin Declaration. The Berlin Declaration upheld women's rights and stated that for more than 60 years, the Basic Law has supported equal rights for women and men. During the years of struggle for gender equality, the Basic Law had not been complied with. Therefore, instead of upholding the proposed EU directive, the German government decided to reinforce the legal basis to increase the representation of women on boards, as found in the Basic Law, as the 'the continuing disadvantage of women in all areas of society is therefore contrary to our Basic Law and international law.'⁸⁸³ According to the Berlin Declaration, equality is still far off, as women remain disadvantaged.⁸⁸⁴ Members of the Berlin Declaration denounced injustices and constant violation of the Basic Law, as per Article 3 paragraph 2, demanding gender equality.⁸⁸⁵ Therefore, the legal basis of the representation of women on boards is the Basic Law, which was supposed to have forced a change in the mindset of German leaders. Due to the combativeness of feminist lobbies and constant in-house political quarrelling between the Ministers von der Leyen and Schroeder, the Merkel government had little choice but to pass binding quota legislation. The situation could be defined as divisive and conflictual, as women on boards negotiations in favour of binding legislation lasted for more than 20 years. The clashes between former Social Democrat Chancellor Schroeder and former Conservative Party Chancellor Angela Merkel slowed down the process to move towards binding legislation. The German government was in favour of flexi-

⁸⁸³ n 762, The Berlin Joint Declaration.

⁸⁸⁴ *ibid.*

⁸⁸⁵ *ibid.*

quotas,⁸⁸⁶ or soft law means, which allowed companies to set individual targets.⁸⁸⁷ The Government and the private sector tried to keep the *status quo*. At the time of the consultation for binding legislation under national law, in 2012, the European Commission proposed the women on boards directive. The German government voted against the proposed EU women on boards directive in the Council, preferring national legislation. The German women on boards legislation was voted in 2013, which included a forty percent binding quota for women on boards to be effective by 2020. Yet, the forty percent critical mass failed. In March 2015, the '*Frauenquote*' (quota law) was voted in Parliament to enter into force 2016. Public limited and co-determined ruled companies would be required to have a representation of thirty percent of women on supervisory boards and not the initial forty percent. The '*Frauenquote*' legislation was a compromise situation, as soft law had endured in Germany for too many years.⁸⁸⁸ This law was supposed to lead to an increase of women on supervisory boards, as it is binding and carries sanctions.

As this legislation is still quite recent,⁸⁸⁹ the effects of quotas and sanctions are just beginning to be known. In January 2021, the German government passed further women on boards legislation, which would oblige the largest German companies to have at least one woman on the board. There are currently thirty public limited companies with no women on boards, despite the 2015 '*Frauenquote*' legislation. The empty chair soft sanction may cause a disturbance to the management of the board,

⁸⁸⁶ n 41, European Commission Report, Women in Economic Decision-Making in the EU, Progress Report. A Europe 2020 Initiative (2012) 20.

⁸⁸⁷ European Parliament Paper, Katja Langenbucher, 'The Sanctions, Legal Aspects of Gender Balance on Corporate Boards in Germany', White Paper Series No. 2. (2013) §1.3, 5; n 36, European Parliament, Gender Balance on Boards.

⁸⁸⁸ Lang (n 642).

⁸⁸⁹ DIW Report, Alexandra Fedorets, Anna Gibert and Norma Burow, 'Gender Quotas in the Boardroom: New Evidence from Germany' (2019) 21; Anja Kirsch und Katharina Wrohlich, 'More Women on Supervisory Boards: There are Growing Indications that the Gender Quota will have an Impact on the Board of Directors.' (2020).

but it has not been effective. Consequently, the new legislation is supposed to remedy this situation.⁸⁹⁰

Having provided background information, which led to German quota legislation, the research examines the context of passing French women on boards legislation.

2. The background leading up to French women on boards legislation

The French legislative situation was complex, as the first attempt to pass binding legislation failed, overturned by the Constitutional Council.⁸⁹¹ This was, despite the positive ruling in the 1999 legislation, which allowed gender parity in elected offices. The Constitutional Council considered gender parity in elected offices different from parity in business contexts. In 2008, an amendment finally allowed for equal access to elected offices, as well as 'positions of professional and social responsibility'.⁸⁹²

The transition from soft law to binding quota legislation may be understood best from taking a look back in time. French women have experienced many obstacles in their advancement for gender equality, obtaining the vote in 1944, much later than most Western European countries. In 1965, women were allowed to finally own property and work without the consent of their husbands. This late start towards equality led to the adoption of the Constitutional Act No. 99-569 of 8 July 1999, which amended Articles 3 and 4 of the French Constitution, which granted '... equal access for women and

⁸⁹⁰ Reuters Communication, 'German Cabinet agrees Quota for Women on Company Boards (2021) <<https://www.reuters.com/article/us-germany-women-companies/german-cabinet-agrees-quota-for-women-on-company-boards-idINKBN29B16U>> accessed 3 March 2021.

⁸⁹¹ French Legislation, Constitutional Council, Decision no. 2006-533 DC of March 16, 2006, Law on Equal Pay for Women and Men (2006) <<https://www.conseil-constitutionnel.fr/decision/2006/2006533DC.htm#:~:text=Le%20Conseil%20constitutionnel%20a%20%C3%A9t%C3%A9,ADAM%2C%20Sylvie%20ANDR IEUX%2C%20MM>> accessed 3 July 2019.

⁸⁹² French Constitutional Law, No. 2008-724 of July 23, 2008 on the Modernization of the Institutions of the Fifth Republic (1) (JO 11890, 2008) Article 1 <<https://www.legifrance.gouv.fr/loda/id/JORFTEXT000019237256/>> accessed 3 July 2019.

men to electoral mandates and elective functions ...' and decreed on 6 June 2000. According to the Constitutional Act No. 99-569 of 8 July 1999, the word 'women' had to be added, which would then justify the exception from a formal equality approach. Though, this legislation concerned electoral offices only. It was necessary to wait until the 2008 Constitutional Amendment, which called to 'promote equal access for women and men to elective offices and posts as well as to positions of professional and social responsibility',⁸⁹³ which would then allow for binding quota legislation to be passed, known as, the Copé Zimmermann Act.⁸⁹⁴ The amendment would allow women equal access to all professional positions. It was moved from Article 3, which addressed suffrage to Article 1, which gave equality to women and men.⁸⁹⁵ The mention of women and men in the amendment advanced gender parity in the Constitution. This was not without complications, as several politicians objected to a gender equality provision in Article 1, stating it did not belong in the Constitution.⁸⁹⁶

At the time, there were difficulties for women to access political mandates. '[R]esults of previous elections show that...parity in politics was not a reality.'⁸⁹⁷ Women seeking political mandates or on boards of directors would only be able to do so through binding quotas. The French precedent of passing binding quota legislation in politics was, indeed, the legal basis of women on boards in French legislation. Parity in politics was the first step to legislate before women on boards of directors. The French situation had been compared to 'legislative sedimentation' due to the lack of progress in

⁸⁹³ French Legislation, Constitutional Council, Constitutional Law no. 99-569 of July 8, 1999 on the Constitution Relating to Equality between Women and Men (1999) <<https://www.legifrance.gouv.fr/loa/id/JORFTEXT000000396412/>> accessed 3 July 2019.

⁸⁹⁴ n 71, French Legislation, Law No. 2011-103 of January 27, 2011 on the Balanced Representation of Women and Men on Boards of Directors and Supervisory Boards and Professional Equality (1).

⁸⁹⁵ French National Assembly website, French Constitution, Articles 1 and 3 (French National Assembly, 1958) <<https://www.conseil-constitutionnel.fr/en/constitution-of-4-october-1958>> accessed 3 July 2019.

⁸⁹⁶ French Senate Political Debate, Senate Meeting of 18 June 2008 (verbatim report of proceedings) (2008) <<http://www.senat.fr/seances/s200806/s20080618/s20080618007.html>> accessed 3 July 2019.

⁸⁹⁷ n 729, French Government Report, The Evolution of Women's Rights.

advancing the situation of women in the French workplace. Women have always been underrepresented in the French economy and unable to access decision-making positions in major French companies. Binding quota legislation succeeded in forcing structural economic change in France.⁸⁹⁸ The French economy is based on a Corporatist model. Therefore, the French government is heavily involved in regulating employment and rights for women to access employment, through gender equality policies and legislation. French policies are especially influenced by the Nordic model and Norwegian legislation.⁸⁹⁹

Having provided background information leading to German and French women on boards legislation, the research has shown that there were several issues in passing the legislation in both Member States, either with agreeing on critical mass or amending the Constitution to allow for women on boards legislation. The next section will examine the problem of constitutionality and women on boards in several European countries.

II. UNCONSTITUTIONAL REGULATIONS: QUOTAS IN NORWAY, FRANCE AND GERMANY

The question of quotas raises questions of constitutionality. Constitutionality is defined as, 'a particular political system, the constitutionality of a law or action is the fact that it is allowed by the Constitution'.⁹⁰⁰ Several European Union Member States contended the EU women on boards proposed directive is a constitutional violation.⁹⁰¹ The research has also examined the difficulties of situating the women on boards legislation in its right context from gender legislation to company law, as with the Norwegian

⁸⁹⁸ *ibid.*

⁸⁹⁹ C. Fagan, M. González Menéndez and S. Gómez Ansón (n 28) 10.

⁹⁰⁰ 'constitutionality', n, Collins online dictionary <<https://www.collinsdictionary.com/dictionary/english/constitutionality>> accessed 5 July 2019.

⁹⁰¹ n 36, European Parliament, Gender Balance on Boards.

legislation (A), while the French legislation required a constitutional amendment before being able to pass national legislation, the Copé Zimmermann Act (B).

A. THE REFORM FROM GENDER LEGISLATION TO COMPANY LAW

There were problems with the Norwegian women on boards legislation, as it was initially considered gender equality legislation and not company law. Besides the difficulty to situate the women on boards legislation, the proposition initially proposed a twenty-five percent quota, less than the current forty percent, which is considered the critical mass of women on boards.⁹⁰² The research found that it is important to examine the background leading up to the legislation, as it was political, government-led and backed (1). The legislation concerned the largest Norwegian companies (2), public and private limited companies, calling for a forty percent representation of women on boards (3).

1. Women on boards legislation issues

The first consultation for Norwegian quota legislation was in 1999. It took ten years before the initial proposal by the Bondevik I government, a coalition of Centre, Liberal and Christian Democratic Parties, revised Article 21 of the Gender Quality Act.⁹⁰³ According to Article 21 of the Act⁹⁰⁴, the revision firstly called for twenty-five percent of women on boards for men and women in public limited companies.⁹⁰⁵ The proposal seemed to be coherent at that time, since the subject of gender equality existed in public sector legislation, which dated back to 1988.⁹⁰⁶ The Bondevik I coalition revised

⁹⁰² Torchia and others (n 114) 42-51.

⁹⁰³ Teigen (n 119) 78.

⁹⁰⁴ Norwegian Legislation, Norwegian Gender Equality Act, §21 (1988) <<https://www.regjeringen.no/en/dokumenter/the-act-relating-to-gender-equality-the-/id454568/>> accessed 3 January 2018; Storvik and Teigen (n 56) 5.

⁹⁰⁵ *ibid*, 9.

⁹⁰⁶ Teigen (n 119) 78.

the Gender Equality Act. Women on boards legislation would no longer be part of the Gender Equality Act, as the legal aspects required further consultation.⁹⁰⁷ In fact, the legal aspects of the proposal had been included in the wrong legislation. The women on boards proposal should have been part of the Companies Act, not the Gender Equality Act.⁹⁰⁸

The another issue was the critical mass of twenty-five percent changed to forty percent of women on boards, which would comply with quota requirements in other Norwegian public committees and government policies.⁹⁰⁹ The Bondevik II coalition government adopted the women on boards quota amendment into the Companies Act in 2003.⁹¹⁰ Though, the Consultative Phase took ten years. This situation also showed, there was confusion about where to place the gender quota provisions, whether to place the legislation in the Gender Equalities Act or the Company Act. This further demonstrated that, the subject of women on boards was controversial legislation at the time, even in a progressive socially democratic country, as Norway.⁹¹¹ Having explained that there were several issues to pass the Norwegian women on boards legislation, the research examines the legislation and companies concerned by the legislation.

2. The binding quota legislation and companies concerned

The Norwegian women on boards legislation was entered into force in 2005⁹¹² and applied to public limited companies (*Allmennaksjeselskap* or ASA), the largest Norwegian companies with shareholders listed on the Oslo Stock Market. Limited

⁹⁰⁷ Storvik and Teigen (n 56) 5; n 273, Norwegian Legislation Equality and Anti-Discrimination.

⁹⁰⁸ Teigen (n 119) 78.

⁹⁰⁹ n 904, Equality and Anti-Discrimination Act (2020), §21.

⁹¹⁰ Norwegian Legislation, Proposition to Parliament No. 97 (2002/2003) 5 <<https://www.regjeringen.no/no/dokumenter/otprp-nr-97-2002-2003-/id127203/>> accessed 5 July 2019.

⁹¹¹ Storvik and Teigen (n 56) 7.

⁹¹² n 819, Norwegian Legislation, The Norwegian Public Limited Liability Companies Act (2003) §§ 6–11a.

liability companies were excluded, as they are composed essentially of smaller companies. The quota applies to listed and non-listed public limited companies. Established public limited companies had a two-year period to comply with the quota legislation. Companies created after 2006, were obliged to comply with the legislation the same year as the creation of the company.⁹¹³

Having explained that the legislation was directed at public limited companies, the research has found that the legislation has been effective and greatly increased the representation of women on boards.

3. Results of binding quota legislation

Norway has had a steady forty percent of women represented in government, since the 1960s. There were less than five percent of women on boards in the 1990s,⁹¹⁴ which pressured the Norwegian government to pass binding quota legislation. There were less than six percent of women on boards in Norwegian companies in the 1990s. Once the binding legislation entered into force, this figure greatly increased. In 2002, there were less than six percent of women on boards,⁹¹⁵ nine percent in 2004, twelve percent in 2005, eighteen percent in 2006 and twenty-five percent in 2007. The legislation entered into force in 2008 with thirty-six percent of women on boards. In 2009, the forty percent representation of women on boards was met. Binding quota legislation would make important changes to Norwegian boards⁹¹⁶ in public limited companies, which included approximately 450 companies listed on the Oslo Stock Exchange and public limited companies in the private sector.⁹¹⁷

⁹¹³ *ibid.*, §§ 6–11a; n 820, Discussion Paper, Knut Nygaard, 5.

⁹¹⁴ Teigen (n 119) 72–74.

⁹¹⁵ *ibid.*

⁹¹⁶ Storvik (n 278).

⁹¹⁷ *ibid.*, Storvik and Teigen (n 56) 7.

Though, Norway has a long history of gender equality measures, it was the first time that, women on boards quotas would be regulated in company law. According to the Norwegian government, 'a quota regulation would breach the existing norms of Norwegian gender equality policy, which ... did not infringe on the private economic sphere'.⁹¹⁸ Furthermore, the twenty-five percent quota was changed to forty percent to align with other traditional Norwegian quota rules.⁹¹⁹ Section 21 of the Gender Equality Act was amended to align with Companies Act legislation.⁹²⁰ In parallel and nearly at the same time, the Companies Act quota legislation was adopted in Parliament by the new coalition, the Bondevik II, composed of Conservative, Liberal and Christian Democratic Parties.⁹²¹ Norway passed strict binding legislation. Following Norway, several EU Member States introduced quota legislation,⁹²² which has raised questions of the use of varying legal instruments. These legal instruments include sanctions, penalties, the comply or explain principle, the application of the type of law, a timescale for reaching targets, an expiration period, the use of incentives, the size of the company, the ownership structure and the range of management and board positions.⁹²³ The Norwegian legislation has remained the example of women on boards legislation with the strictest sanctions. No other EU Member State has replicated the dissolution sanction, due to the severity and difficulty of delisting companies under company law.⁹²⁴

⁹¹⁸ *ibid.*

⁹¹⁹ Teigen (n 119) 78.

⁹²⁰ n 273, Norwegian Legislation Equality and Anti-Discrimination, Section 21; Norwegian Legislation, n 265, The Act Relating to Gender Equality, 38; Teigen (n 119) 79.

⁹²¹ n 910, Proposition to Parliament No. 97 (2002/2003) 5 Teigen (n 119) 90.

⁹²² n 650, UK Parliament Report, Women on Boards – European Union Committee Contents, Chapter 3: Quotas. (Norway 40 percent by 2008, Iceland 40 percent by 2013, France 40 percent by 2017, Italy 33 percent by not specified, Belgium 33 percent by 2017 (Germany 30 percent by 2016, The Netherlands 30 percent (recent proposed legislation, 2020).

⁹²³ Storvik and Teigen (n 56) 5.

⁹²⁴ Armstrong and Walby (n 567) 8-9.

Recently, the Norwegian Bank of Investment Management has set sustainable business requirements to include women on boards, for its portfolio starting at the beginning of 2021.⁹²⁵ The Norwegian wealth fund invests in companies worldwide and is the wealthiest fund in the world. It has requested companies to have at least thirty percent of women on boards or it will set a target for these companies. With investments in over 9,200 companies, it owns 1.5 percent of listed companies worldwide. The corporate governance manager of the wealth fund stated, '[d]iversity is good for the board because it brings better perspective, it is better for decision-making and increasingly important for the legitimacy of companies'. If a company does not comply with the rule, it could show the wealth fund that there is irregular selection and nomination of board directors in that company. The wealth fund has the right to vote down appointments, if there are not at least two women on the board in the U.S. and Europe. They will allow the comply or explain principle to provide reasons for non-compliance with the targets.

Having explained that, at the beginning, there were several issues with the Norwegian women on boards legislation. As soon as this was fixed, the legislation quickly became effective. The research also investigates the implementation phase of French women on boards legislation, which was also extremely difficult to pass.

B. THE FRENCH CONSTITUTION AND WOMEN ON BOARDS QUOTA LEGISLATION

The French legislative situation of transitioning from soft law to hard law is noteworthy, because of the complexity in passing binding quota legislation. Women on boards binding legislation first passed, as political parity legislation and then, was further extended to the private sector. The French Constitution had to be reformed, in 1999,

⁹²⁵ Reuters News, Gwladys Fouche, 'Norway Wealth Fund Tells Firms: Put More Women on Your Boards' (Reuters, 15 February 2021) <<https://www.reuters.com/article/us-norway-swf-exclusive-idUSKBN2AF0TX>> accessed 23 December 2021.

before the Copé Zimmermann Act could be passed in Parliament, as it had been previously censured by the Constitutional Council. The Council based its reasoning that it could not accept quota legislation which allowed women to access elective offices or professional positions on the grounds that, it was unconstitutional per Article 3 and 6 of the Declaration of the Rights of Man and of Citizens of 26 August 1789, which promoted the principle of equality.⁹²⁶ According to Article 1 of the *Déclaration des Droits de l'Homme et du Citoyen de 1789*, 'men are born and remain free and equal in rights. Social distinctions can only be based on common utility.'⁹²⁷ Article 6 of the *Declaration of the Rights of Man and of the Citizen of 1789* referred to women and men, stating "...All citizens have the right to participate personally, or through their representatives, in its formation...All citizens being equal in its eyes are equally eligible for all public dignities, places and jobs, according to their capacity, and without distinction other than that of their virtues and talents"⁹²⁸

At the time, the constitutional rejection and decision stopped women on boards legislation, until the Constitution was reformed. Then, the Copé Zimmermann legislation could be passed, with a forty percent representation of women on boards, as the minimum quota and critical mass. The French government and policymakers observed that Norwegian women on boards quota legislation brought rapid results, from seven percent in 2003 to forty-one percent in 2008. This was achieved in less than seven years, for public and private limited companies. Norwegian quota legislation influenced European legislators in passing their own national legislation. French and

⁹²⁶ n 893, French Legislation, Constitutional law no. 99-569 of July 8, 1999, Relating to Equality between Women and Men (1999). The Constitutional Act of 8 July 1999 revised Articles 3 and 4 of the 1958 Constitution. Article 1 provided that 'the law shall encourage equal access for women and men to electoral mandates or elective offices' and Article 2 provided that 'political parties and groups shall help apply that principle in accordance with the conditions set by the law.'

⁹²⁷ Declaration of the Rights of Man and of the Citizen of 1789 (1789) <<https://www.elysee.fr/en/french-presidency/the-declaration-of-the-rights-of-man-and-of-the-citizen>> accessed 5 July 2019; n 784, French Government Report, 10 Years After the Law of 27 January 2011 on the Representation of Women and Men on Boards of Directors and Supervisory Boards.

⁹²⁸ *ibid.*

German legislators saw Norway as an example to be followed.⁹²⁹ The French quota legislation was largely influenced by the effectiveness of the Norwegian legislation.⁹³⁰ French Parliament changed the quota to forty percent of women on boards from the originally proposed twenty percent. Marie-Jo Zimmermann introduced the twenty percent proposal in 2006, which was backed in Parliament and then, rejected by the Constitutional Council. In 2008, the amendment to the Constitution entered into force, which established equality in the professional sector. Then, Marie-Jo Zimmermann re-introduced a bill with a forty percent women on boards quota, based on the Norwegian model.

The proposal was met in Parliament with circumspect, though the Grésy Report confirmed the situation of gender inequality on boards in 2009. The French law passed on 27 January 2011. This was considered radical and avant-garde for French law, as it was the first time that French law would pass binding legislation in company law, calling for a quota with sanctions. However, it was not contested, as there were many stakeholders in favour of the legislation, notably, the MEDEF, professional associations, women's organisations and most French listed companies. Even the change from twenty to forty percent was accepted. To begin with, lawyers were in disagreement with the principle of a quota law to regulate women on boards in public limited companies.⁹³¹

⁹²⁹ n 784, French Government Report, , 10 Years After the Law of 27 January 2011 on the Representation of Women and Men on Boards of Directors and Supervisory Boards.

⁹³⁰ n 71, French Legislation, Law No 2011-103 of 27 January 2011 on the Balanced Representation of Women and Men on Boards of Directors and Supervisory Boards and on Professional Equality (1); Anne-Françoise Bender, Isabelle Berrebi-Hoffmann and Philippe Reigné. 'The French Controversy Over the Law on Balanced Representation of Women and Men on Company Boards (2006-2013)' (2017) 4-5 <<https://hal.archives-ouvertes.fr/hal-01735909/document>> accessed 5 July 2019.

⁹³¹ Emmanuel Zenou, Isabelle Allemand, and Bénédicte Brullebaut, 'Gender Diversity on French Boards, Example of a Success from a Hard Law, in Gender Diversity in the Boardroom', in *Volume 1: The Use of Different Quota Regulations*, Cathrine Seierstad, Patricia Gaboldon and Heike Mensi-Klarsbach (eds) (1st edn, Palgrave Macmillan Publishers, 2017) 114.

The research examines the Law no. 2011-103 of January 27, 2011 (the Copé Zimmermann Act), stating that, the board of directors shall include forty percent of women on boards (1), applicable in the largest French companies and in two phases (2).

1. Law no. 2011-103 of January 27, 2011

Law no. 2011-103, known as, the Copé Zimmermann Act,⁹³² passed in 2011 and entered into force in 2017. The quota legislation requires a balanced representation on the boards of directors in public limited companies, which is defined by a minimum of forty percent representation of women. The law applies to corporations and limited partnerships with over five hundred employees and with revenues or assets of more than fifty million euros, which includes the last three financial years.⁹³³

Having explained that the Copé Zimmermann Act requirements for public limited companies, the research examines the application of the quota legislation.

2. Application of the quota legislation

The quota legislation applies to non-executive directors in the largest French public limited companies and non-listed companies. The quota legislation was passed in two steps. The first increment, in 2011, required a twenty percent representation of women on boards within a two-year timeframe. The second phase, from January 2017, called for forty percent representation of women on boards.⁹³⁴

⁹³² n 71, French Legislation, Law No. 2011-103 of January 27, 2011 on the Balanced Representation of Women and Men on Boards of Directors and Supervisory Boards and Professional Equality (1).

⁹³³ *ibid.*

⁹³⁴ *ibid.*

Despite the considerable amount of existing French gender equality legislation, the women on boards legislation required greater involvement from its political leaders. Ex-Deputy Marie-Jo Zimmermann proposed a draft of the Copé-Zimmermann Act in 2009, calling for real '*parité*' (parity) or fifty percent of women on boards, though forty percent was finally accepted.⁹³⁵ The research points out that, the French Constitution was amended to allow for the women on boards legislation (a), as Article 4 of the Constitution was revised in July 2008, adding professional responsibilities to electoral mandates (b) and the wording of the revision includes every working title (c).

a. Amendment to the French Constitution and binding quota legislation

The French Constitution did not include provisions, which included women on boards quotas in public and private sectors. The Constitutional Counsel clarified that, '[t]he search for balanced access by women and men to responsibilities other than elective political office is not contrary to the constitutional requirements ...[though] it cannot... give precedence to ... consideration of sex over that of capacity.'⁹³⁶ Under the principle of equality in the French Constitution and in Articles 1 and 6 of the Declaration of the Rights of Man and of Citizens of 26 August 1789, quotas were considered a form of positive discrimination, which was censored by the Constitutional Council, as suffrage was deemed to be universal. When comparing the situation with other Member States, and

...[u]nlike other major democracies, France has long been legally prevented from pursuing affirmative action policies aimed at women...[which has] represented an obstacle insurmountable ... This was illustrated by the censorship of the Constitutional Council of the first legislative initiatives in favor of political parity (decisions n ° 82-146 DC of November 18, 1982 and n ° 99-

⁹³⁵ Bender, Berrebi-Hoffmann and Reigné (n 929) 13.

⁹³⁶ n 891, French Constitutional Council Ruling, Decision no. 2006-533 DC of March 16, 2006, Law on Equal Pay between Women and Men, '...consequently, the Constitution does not allow the composition of the governing or consultative bodies of legal persons under public or private law to be governed by restrictive rules based on sex.' 15 <<https://www.conseil-constitutionnel.fr/decision/2006/2006533DC.htm>> accessed 5 July 2019.

407 DC of January 14, 1999) and professional (decision n ° 2006 -533 DC of March 16, 2006).⁹³⁷

The Constitutional Council narrowly interpreted this and used a formal equality approach to reject the proposed legislation. The Council could no longer use a formal equality approach, after the 1999 legislation added the word 'women' to the clause. This, now reads, 'the law promotes the equal access of women and men to electoral mandates and elective functions'⁹³⁸ The Council adopted a text to the 2008 Amendment to Article 1 of the French Constitution, which stated that, '[s]tatutes shall promote equal access by women and men to elective offices and posts as well as to position of professional and social responsibility.'

The amendment to Article I of the Constitution provided the basis for '*parité*' (parity) and women on boards quota legislation.⁹³⁹ After lengthy consultation about the constitutionality of women on boards, the quota legislation was passed in 2011.⁹⁴⁰

⁹³⁷ n 927, Declaration of the Rights of Man and of the Citizen of 1789; n 784, French Government Report, 10 Years After the Law of 27 January 2011 on the Representation of Women and Men on Boards of Directors and Supervisory Boards.

⁹³⁸ n 893, French Constitution, Article 1, Constitutional law no. 99-569 of July 8, 1999 Relating to Equality between Women and Men.

⁹³⁹ The French Constitution, including the Constitutional revision of July 23, 2008, Article 1 'France is an indivisible, secular, democratic and social Republic. It ensures the equality before the law of all citizens without distinction of origin, race or religion. It respects all beliefs.' <<https://www.conseil-constitutionnel.fr/le-bloc-de-constitutionnalite/texte-integral-de-la-constitution-du-4-octobre-1958-en-vigueur#:~:text=leur%C3%A9volution%20d%C3%A9mocratique.-,ARTICLE%20PREMIER.,Elle%20respecte%20toutes%20les%20croyances.>> accessed 5 July 2019.

⁹⁴⁰ Storvik and Teigen (n 56) 5; Selanec and Senden (n 175); European Commission Report, S. Burri and S. Prechal, 'EU Gender Equality Law' (2014) <http://ec.europa.eu/justice/gender-equality/files/your_right_s/eu_gender_equality_law_update2013_en.pdf> accessed 5 July 2019; European Commission Report, Sandra Fredman, 'Making Equality Effective: the Role of Proactive Measures' (2009).

According to the Decision no. 2006-533 DC of 16 March 2006,⁹⁴¹ the Constitutional Counsel amended the Constitution to guarantee rights to women.⁹⁴² The principle of equality was in the Constitution for the very first time,⁹⁴³ stating that, women had equal rights with men in all areas.⁹⁴⁴

According to Law no. 2006-340 of March 23, 2006, the Council amendment permitted legislation to be passed, which guaranteed rights for women to access decision-making positions⁹⁴⁵

Article L225-18-1, which has been modified several times, serves as the principle women on boards reference.

- The proportion of directors of each sex may not be less than 40% at the end of the next general meeting called to decide on appointments, in companies which, for the third consecutive financial year, employ an average number of at least 250 permanent employees and have a net turnover or balance sheet total of at least 50 million euros.
- ... [W]here the board of directors is composed of no more than eight members, the difference between the number of directors of each sex may not exceed two.

⁹⁴¹ n 891, French Legislation, Constitutional Council Decision no. 2006-533 DC of March 16, 2006, Law on Equal Pay for Women and Men, No 12. Considering that Article 1 of the Declaration of 1789 proclaims: 'Men are born and remain free and equal in rights. Social distinctions can only be based on common utility'; that paragraph 3 of the Preamble to the Constitution of 27 October 1946 states: The law guarantees women equal rights with men in all fields'.

⁹⁴² *ibid.*

⁹⁴³ French Constitutional Council, Commentary on Decision No. 2006-533 DC of 16 March 2006 (2006) <https://www.conseil-constitutionnel.fr/sites/default/files/as/root/bank_mm/commentaires/cahier20/cc_533dc.pdf> accessed 5 July 2019.

⁹⁴⁴ n 784, French Government Report, 10 Years After the Law of 27 January 2011 on the Representation of Women and Men on Boards of Directors and Supervisory Boards

⁹⁴⁵ *ibid*; n 745, French Legislation, Law no. 2006-340 of 23 March 2006 Relating to Equal Pay between Women and Men. Objectives of Eliminating the Pay Gap between Women and Men within Five Years. i.e. by 31 December 2010 at the latest...[and] promoting women's access to decision-making positions. (Légifrance, 2006) <<https://www.legifrance.gouv.fr/loda/id/JORFTEXT000000816849/>> accessed 5 July 2019.

- Any appointment made in breach of the first paragraph and which does not have the effect of remedying the irregularity in the composition of the board shall be null and void.⁹⁴⁶

The French Commercial Code stated that the composition of the board of directors and the supervisory board cannot be composed of less than forty percent of men and women in public limited companies. The appointments should be approved by shareholders at the general meeting. This law entered into force in January 2020.⁹⁴⁷

b. Article 4 of the French Constitution

Under Article 4, the legislation would be carried out by the political parties and the government.⁹⁴⁸ This reform granted women additional political rights. This is historic and important French legislation, as no text had previously existed, granting women the same rights as men. Initially, the Council contested women on boards quota legislation, until the reform. Under Constitutional law no. 99-569 of 8 July 1999, the legislation became known as the 'law of parity'.⁹⁴⁹

⁹⁴⁶ French Commercial Code, Article L225-18-1 (2020) <https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000042339622/> accessed 5 July 2019.

⁹⁴⁷ *ibid.*

⁹⁴⁸ The French Constitution of 4 October 1958, Revision 23 July 2008, Article 4, Political parties and groups contribute to the expression of suffrage. They train and exercise their activity freely. They must respect the principles of national sovereignty and democracy. They contribute to the implementation of the principle stated in the second paragraph of Article 1 (The law promotes equal access of women and men to electoral mandates and elective functions, as well as to professional and social responsibilities) under conditions determined by law. The law guarantees pluralistic expressions of opinions and the equitable participation of political parties and groups in the democratic life of the Nation. n 893, French Constitutional Law, Constitutional law no. 99-569 of July 8, 1999 relating to Equality between Women and Men (1999) Article 1 (Conseil Constitutionnel, 2019) <<https://www.conseil-constitutionnel.fr/en/constitution-of-4-october-1958>> accessed 5 July 2019.

⁹⁴⁹ n 892, French Constitutional Act No. 2008-724 of 23 July 2008 on the Modernisation of the Institutions of the Fifth Republic.

⁹⁴⁹ n 784, French Government Report, , 10 Years After the Law of 27 January 2011 on the Representation of Women and Men on Boards of Directors and Supervisory Boards.

c. Other legislation and reports

According to Constitutional law no. 2008-724 of July 23, 2008 the modernization of the institutions of the Fifth Republic, or parity legislation, included the wording 'professional life', which includes every working title.⁹⁵⁰

The text cited 'social and professional responsibilities.' Indeed, the reasoning stated that,

...the participation of women in public life and its institutions is very insufficient, it is important to promote, through appropriate measures, the objective of parity between women and men... in all aspects of the life of the Nation justifies taking into account also women's access to professional and social responsibilities.'⁹⁵¹

Constitutional law no. 2008-724 of July 23, 2008 provided the legal basis that, this was no longer an unconstitutional issue.⁹⁵² The Constitution amendment, therefore, recognised the notion of positive action with the addition of the new wording, making this no longer unconstitutional.⁹⁵³ The changes provided the legal basis, which then allowed Parliament to pass quota legislation in 2011.⁹⁵⁴

⁹⁵⁰ n 893, French Constitutional Law, Act No. 99-569 of 8 July 1999 on the Constitution Relating to Equality between Women and Men (1999) <<https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000000396412>> accessed 5 July 2019.

⁹⁵¹ French Constitutional Law, Bill of Constitutional Law relating to Equality between Women and Men, (Referred to the Committee on Constitutional Laws, Legislation and General Administration of the Republic in the absence of the constitution of a special committee within the prescribed deadlines by Articles 30 and 31 of the Rules), National Assembly Constitution of October 4, 1959, Eleventh Legislature, Registered at the Presidency of the National Assembly on June 18, 1998 (1998). <<https://www.assemblee-nationale.fr/11/projets/pl0985.asp>> accessed 5 July 2019.

⁹⁵² n 892, French Constitutional Act No. 2008-724 of 23 July 2008 on the Modernisation of the Institutions of the Fifth Republic.

⁹⁵³ Principle of Equality in the French Constitution and in Articles 1, 6 and 13 of the Declaration of the Rights of Man and of Citizens of 26 August 1789: quotas are considered positive discrimination and censored by the Constitutional Counsel.

⁹⁵⁴ n 892, French Constitutional Act No. 2008-724 of 23 July 2008 on the Modernisation of the Institutions of the Fifth Republic.

The German and French governments have had a long history of implementing gender equality soft law. However, the Commission intervened with hard law legislation, as soft law had been ineffective to increase the representation of women on boards. Even when there is hard law, not all companies comply with the legislation, as several German public limited companies still have no women on the boards of directors. According to FIDAR and on 27 May 2021, '[o]f the 66 listed firms ... including 30 on the DAX blue-chip index, 25 have no women on the board and 12 have no plan yet to change this...on Supervisory Boards.'⁹⁵⁵

Having explained the complexity of unconstitutionality and passing gender quota legislation, the research examines the failures of the hard law.

§2: FAILURES OF THE HARD LAW

The proposed women on boards binding legislation was a call from European institutions to regulate the different legal and non-legal systems in national law and the lack of representation of women on boards in public limited companies. Several of the largest public limited companies by capital and size in the EU, employing the greatest number of women,⁹⁵⁶ still do not have gender parity on the boards of directors.⁹⁵⁷ The proposed directive called for a minimum forty percent of women on boards. In 2020, there were 27.8 percent of women on boards in public limited companies in the EU.⁹⁵⁸

⁹⁵⁵ Reuters News Release, Many German Boards Have no Women on Boards Despite Quota, Study Shows (Reuters, 27 May 2021) <<https://www.reuters.com/business/many-german-firms-have-no-women-boards-despite-quota-study-shows-2021-05-27/>> 23 December 2021.

⁹⁵⁶ n 24, OECD Statistics, Employment : Female Share of Seats on Boards of the Largest Publicly Listed Companies.

⁹⁵⁷ Jourová (n 25) Gender Balance on Corporate Boards, Europe is Cracking the Glass Ceiling, 1.

⁹⁵⁸ n 27, EIGE Report, Positions Held by Women in Senior Management Positions.

The research examines the reasons EU institutions had called for intervention with the proposed directive, as a necessity for economic reasons (I), having given examples of the fragmented Member States approach, with different legal systems, which reveal important gaps (II).

I. A REVIEW OF THE HARD LAW

The EU institutions considered intervention with a proposed directive, as Member States ignored or worse, failed to implement regulations, directives and decisions.⁹⁵⁹ Therefore, this led to the proposed women on boards directive, as the response to the inaction of the Member States. According to the European Commission Report Gender Balance on Company Boards, the gap is widening within the Member States. In several Member States, the numbers of women on boards has actually been decreasing. In 2011, the ‘...gender imbalance is striking in all EU Member States, with national averages ranging from around 5 percent in Malta, Cyprus, Hungary, Luxembourg, Portugal, Estonia and Greece to around 25 percent in Sweden, Latvia and Finland. The share of women varies across Member States between around 3 percent and around 28 percent for non-executive directors.’⁹⁶⁰ The proposed women on boards directive was intended to improve economic decision-making on company boards in the European Union, rather than treat gender equality issues. Yet, the proposed directive raises several issues. The level of acceptance, implementation and enforcement of binding legislation in the Member States is dependent on many factors, including the legal system in place, the level of development of gender equality, the existence of corporate governance codes and company law. Several EU Member States will not comply with the directive, if and when it goes into effect. This divergence from a

⁹⁵⁹ ‘soft law’, Eurofound <<https://www.eurofound.europa.eu/observatories/eurwork/industrial-relations-dictionary/soft-law>> 5 July 2019.

⁹⁶⁰ n 29, Proposal for a Directive.

common EU policy remains problematic from a macroeconomic viewpoint. Though EU institutions support an increase in the number of women in the labour market in Europe, the legislation is not aligned in many EU Member States, which consider it too difficult to implement, mostly in the Eastern European Union Member States. The European Union has not satisfied a policy objective, in mainly the Eastern European Union Member States, by increasing child support and family facilities, which would allow more women to enter the labour market.⁹⁶¹ Lower employment rates in Member States have led to missed earnings and to a loss of millions of euros, which would have increased GDP.⁹⁶² This has resulted in lost opportunities for EU competitiveness. The research indicates that, Member States with hard law may have legislation with sanctions or without sanctions (A), while hard law without sanctions may be ineffective (B).

A. MEMBER STATES WITH HARD LAW

Member States are moving towards binding women on boards legislation. Nevertheless, Member States are at different stages of gender diversity development, which has an impact on the hard law effectiveness overall in the European Union. Hard law is not a guarantee of effectiveness, as binding legislation may exist with or without sanctions. The research points out that Norway and France have the most effective women on boards legislation (1), while the Belgian Constitution had to be amended to pass women on boards legislation (2).

1. Most effective women on boards legislation

At present, Norway (a non-EU Member) and France have reached parity on boards. It is important to provide evidence that, hard law has been effective. Though, it is also

⁹⁶¹ Corsi (n 42) 137.

⁹⁶² *ibid*; Elborgh-Woytek and others (n 47) IMF Report.

important to prove, where gender quota legislation has been ineffective among the Member States. Norwegian legislation, was the first women on boards hard law, which increased the representation of women on boards with a forty percent legislative quota in public limited and state owned companies for economic reasons. 'Expert legal opinion suggested that such a quota law should be part of the Companies Act, not the Gender Equality Act.' ⁹⁶³ As a member of the EEA, Norway implements EU regulations and policies, as it has close relations with neighbouring Sweden and Denmark, EU Member States. ⁹⁶⁴ The Norwegian legislation included hard sanctions for non-compliance. ⁹⁶⁵ Following the Norwegian legislation, The French government introduced binding legislation in 2011. In 2020, there were 45.1 percent of women on boards in public limited companies. ⁹⁶⁶

The French Copé Zimmermann Act has been very effective in increasing the representation of women on boards, due to strict sanctions. Also, following the Norwegian legislation, the government of the Republic of Iceland introduced binding legislation in 2010. There were 44.4 percent of women on boards in 2020. ⁹⁶⁷ The binding legislation has been effective, but does not carry sanctions.

A further investigation of hard law and women on boards, shows that Member States with hard law include the mention of the hard law in the provisions of the corporate governance codes. Norway, France and Germany have corporate governance codes, which include recommendations provisions to increase the representation of women on boards, and which mention national binding legislation inside the provisions. The codes interact with government policies and legislation, as a way for companies 'to

⁹⁶³ Storvik and Teigen (n 56) 6.

⁹⁶⁴ Seierstad and Huse (n 94) 13.

⁹⁶⁵ Arndt and Wrohlich (n 477) 337-344.

⁹⁶⁶ n 24, OECD Statistics, Employment : Female Share of Seats on Boards of the Largest Publicly Listed Companies.

⁹⁶⁷ *ibid.*

achieve the highest sustainable ... growth... [and] to contribute to the development of the ...economy'.⁹⁶⁸ Member States with hard law and hard law embedded in the soft law governance codes reinforce the legislation, which leads to parity and effective results. Having shown the most effective hard law came from Norway and France, the research examines the application of the quota legislation in Belgium.

2. Gender quota legislation in Belgium

Belgium introduced binding legislation in 2011. Though, Article 10 of the Belgian Constitution had to be amended, which granted equality between women and men, and, which is the basis of gender equality and women on boards legislation.⁹⁶⁹ Article 11bis of the Constitution, guarantees parity between men and women in its political institutions, by making it mandatory to have a minimum of one person of each sex on all levels of government.⁹⁷⁰ The research examines the Belgian women on boards legislation, included in the Belgian Company Code (a), which has been effective with nearly forty percent representation of women on boards in 2020 (b).

a. The Belgian Company Code

According to the Act of 28 July 2011, the Belgian gender quota legislation in the Company Code includes a thirty-three percent women on boards critical mass in public limited companies, which entered into force in 2012. The legislation was implemented in two steps, first in 2017 and then in 2019, depending on the size and turnover. This legislation included executive and non-executive directors. The legislation states that, if there is an irregular appointment and the board does not comply with the legislation,

⁹⁶⁸ n 14, OECD Principles of Corporate Governance.

⁹⁶⁹ Belgian Constitution, Article 10 (Belgian Senate, 2019) <https://www.senate.be/doc/const_fr.html> accessed 5 July 2019.

⁹⁷⁰ *ibid*; Belgian Constitution, Article 11bis. (Belgian Senate, 2019) 'The law, decree or rule referred to in Article 134 shall guarantee women and men the equal exercise of their rights and freedoms, and shall in particular promote their equal access to elective and public office...'

the next person to be appointed shall be from the under-represented sex to fill the vacant position or the appointment is annulled. The board would be obliged to meet the quota at the next general meeting. If the gender quota is not complied with a year from the date of when it entered into force, a new board will be appointed. Sanctions include suspending financial remuneration to board directors, as long as the board remains in non-compliance. According to Article 18 §2bis, directors are personally liable to be fined.

If the number of directors of different sex does not reach the minimum number set in § 1, the next general meeting shall constitute a board of directors in accordance with the provisions of that paragraph. In the event of non-compliance with this provision, all benefits, financial or otherwise, of all directors in connection with the performance of their duties shall be suspended. Such benefits shall be reinstated when the composition of the board of directors becomes in conformity with § 1.⁹⁷¹

b. Effectiveness of the legislation

Gender quotas in Belgium are effective only in a hard law context, as soft law has not been effective. Sanctions are linked to the effectiveness of the legislation. Besides hard law, the Code of Corporate Governance includes provisions for gender parity on boards. The legislation has been effective, as there was a rapid and sharp rise of the representation of women on boards, which is proof that, legislation with hard sanctions increase the representation of women on boards. In 2020, there were 38.4 percent of women on boards of public limited companies. However, even with hard law, there was

⁹⁷¹ Belgium Legislation, Second Review of the Law of 28 July 2011 on Gender Quotas in Board of Directors (2011) (thirty percent women on boards quota in public listed companies, as well as public and the lottery, should be complied within six years for the largest companies and eight years for smaller companies) <https://igvm-iefh.belgium.be/fr/publications/second_bilan_de_la_loi_du_28_juillet_2011_relative_aux_quotas_de_genre_dans_les > accessed 3 January 2020.

a decrease in the representation of women on boards in 2021, as the report shows 37.9 percent.⁹⁷²

Having shown that Norway, France and Belgium passed effective hard law, the research examines ineffective women on boards legislation.

B. INEFFECTIVE WOMEN ON BOARDS LEGISLATION

A Member State may introduce binding legislation, only to qualify it as ineffective. Spain introduced binding legislation, which has been ineffective and not led to the forty percent representation of women on boards called for in the legislation. The research notes that the Spanish government passed women on boards binding hard law with incentives, but without sanctions, which has been ineffective (1), as it called for forty percent of women on boards, but has never reached this critical mass (2).

1. The Spanish gender quota legislation

Spain introduced binding women on boards legislation in 2007. The Spanish gender quota legislation applies to public and private listed companies. Regardless, this quota legislation could be considered soft law, as there are no sanctions for non-compliance. The only motivation for Spanish companies to comply with the binding legislation was to be awarded public contracts. This very soft sanction gives context about why the Spanish gender quota legislation has failed to reach the forty percent critical mass.

The Spanish legislation demonstrates a lack of a hard law approach, although the legislation is binding. According to Article 75, Spanish companies have eight years from

⁹⁷² n 24, OECD Statistics, Employment, Female Share of Seats on Boards of the Largest Publicly Listed Companies.

the date that the law enters into force to reach gender parity on boards.⁹⁷³ Eight years is a long time to implement legislation. Article 78(2), provides a definition of parity on boards as a minimum of forty percent and a maximum of sixty percent of women on the board.⁹⁷⁴ While these figures are optimistic, the real figures are very different and much lower.

Having shown that Spanish hard law set quotas that were too optimistic, the research examines the reasons for the failure of the legislation.

2. Failure of the Spanish gender quota legislation

In 2005, there were 6.8 percent of women on boards in 767 Spanish companies, with at least one women on the board in 26 percent of the firms. In 2014, there were 11.6 percent of women on boards, with 42 percent of firms having at least one woman on the board. Binding legislation entered into force in 2007, fixing the objective of forty percent, as a minimum critical mass of the representation of women on boards. However, that quota target has not been met. In 2020, there were 29.3 percent of women on boards of public limited companies in Spain. In 2021, there was a rise to 32.6 percent.⁹⁷⁵ The Spanish gender quota legislation has not been effective in reaching a minimum of forty percent and maximum of sixty percent representation of women on boards. Though this is binding legislation.⁹⁷⁶

⁹⁷³ n 215, Spanish Constitutional Act 3/2007 of 22 March for Effective Equality between Women and Men.

⁹⁷⁴ *ibid.*

⁹⁷⁵ n 24, OECD Statistics, Employment : Female Share of Seats on Boards of the Largest Publicly Listed Companies.

⁹⁷⁶ Catalyst Report, 'Why Some Board Gender Quotas Don't Work' (Catalyst, 2019) <<https://www.catalyst.org/2019/02/12/why-some-board-gender-quotas-dont-work>> accessed 3 January 2020.

Having shown that though the Spanish binding legislation exists, it has been ineffective, which proves that the divergence among Member States in passing effective women on boards legislation.

II. DIVERGENCE AMONG MEMBER STATES POLICIES

Even if it is well-known that women still remain absent from company boards in public limited companies in the European Union,⁹⁷⁷ it is important to show the reasons for such divergences among the Member States. Despite remarkable advances in a few Member States, the different policies and legislation reveal important gaps. The gender equality policies and legislation continue to diverge greatly from each other in the Member States.⁹⁷⁸

The research shows that, the objective of the proposed EU women on boards directive was to bring Member States under an integrated and united European Union (A) though, the German government initially rejected EU intervention with the proposed directive (B) and other Member States have no hard law in place and no plans on passing legislation (C).

A. FAILURE OF EU WOMEN ON BOARDS LEGISLATION

The proposed women on boards directive had remained blocked in Council for ten years, with nine of twenty-seven Member States (representing 35 percent of the EU population) opposed to the legislation. Member States included Denmark, the Netherlands, Poland, Sweden, the United Kingdom, and one of the chambers of the Czech Republic.⁹⁷⁹ Since the proposed directive in 2013, no other EU women on boards

⁹⁷⁷ Reding (n 34) Women in Senior Positions: Key to Economic Stability and Growth, 5.

⁹⁷⁸ Gennari (n 6) 107.

⁹⁷⁹ n 36, European Parliament, Gender Balance on Boards.

legislation has been proposed.⁹⁸⁰ In 2017, there was another attempt to push the directive through. 'A qualified majority in the Council means that 55 percent of member states vote in favour (16 out of 28) and that, the proposal is supported by member states representing at least 65 percent of the total EU population'. It did not pass.⁹⁸¹

The proposed directive should have entered into force in the private sector by 2020 and in the public sector by 2018. Germany remained opposed to the proposed directive and did not change its position under the leadership of the former Chancellor Angela Merkel. Though, Germany has finally given its vote in Council under the new German leadership of Chancellor Olaf Scholtz in March 2022.⁹⁸² The political aspects of the proposed directive cannot be ignored. The research shows that while Member States are passing their own women on boards legislation to counter the EU legislation (1), there are also constitutional issues in several Member States, as seen with France and Belgium (2).

1. Political aspects of binding legislation

There are several important political aspects of passing binding women on boards legislation. Member States with hard law have set different critical masses, ranging from twenty-five percent to forty percent representation of women on boards. Though, most Member States have not passed hard law.

The research finds there is a division within the Member States, those against women on boards binding legislation and quotas (a), while other Member States favour the proposed directive and use of quotas (b).

⁹⁸⁰ *ibid*; n 202, EU Law, Opinion of the European Economic and Social Committee on the Proposal for a Directive of the European Parliament and of the Council on Improving the Gender Balance among Non-Executive Directors of Companies Listed on Stock Exchanges and Related Measures, 68–76.

⁹⁸¹ *ibid*.

⁹⁸² Preiss (n 35).

a. Member States against women on boards quotas

The United Kingdom government resented interference from the EU with the proposed directive, preferring self-regulation and non-binding targets, in line with economic policies. The UK considers quotas create a negative business environment. Several Member States use soft law, as a means to increase the representation of women on boards, such as corporate governance codes and programmes, which have been effective. Hard law is not the preferred method for those Member States, considered that, the proposed directive restricts business freedom and that, binding quota legislation does not comply with the principle of subsidiarity.

According to the UK government, European Union institutions should not intervene with binding legislation. The Government believed a Recommendation would be enough. A Recommendation would give the Member States time to adopt their own women on board policies. If the Recommendation turned out to be ineffective, the European Union institutions could take stronger measures at that time, such as, binding legislation.⁹⁸³

Having shown that several Member States are against the use of quotas and EU interference proposing a directive to regulate women on boards, the research examines the Member States in favour of the use of binding legislation and quotas.

b. Member States in favour of the use of quotas

Several Member States are in favour of the use of quotas, as a result of the failure of soft law, which was not able to increase the representation of women on boards.

⁹⁸³ n 650, UK Government Report, Women on Boards, European Union Committee (2012).

Quotas rapidly increase the representation of women on boards, as the Norwegian legislation had proven. When the legislation entered into force, there were six percent of women on boards, which rose to forty-four percent six years later. The greatest increases of women on boards comes from those Member States who have passed binding legislation. The internal structure of boards has changed, as companies comply with the legislation, concerning board appointments, instead of the informal old network.

Having shown the different opinions of the Member States, either for or against the use of quotas, the research examines the constitutional aspects of binding legislation.

2. Constitutional aspects of binding legislation

In France, women on boards legislation could not be passed until the Constitution was amended. Despite the difficulty of amending the Constitution, the implementation of the legislation was effective and increased the representation of women on boards.

Having shown the constitutional aspects of binding legislation, the research examines unconstitutionality and sovereignty issues.

B. UNCONSTITUTIONALITY AND SOVEREIGNTY ISSUES

The German government was opposed to the EU becoming involved in its national affairs. The Government viewed quotas as unconstitutional and an interference, as 'unacceptable erosion of ownership authority among shareholders in filling the seats of the shareholder bank.'⁹⁸⁴ The German government objected to the interference of having to comply with EU rules, not being able to freely nominate board directors was

⁹⁸⁴ Sagener (n 19).

viewed as a violation, as well as interfering in freedom to conduct business. German business owners fiercely opposed the proposed directive, stating that it did not respect the ownership authority and that the proposed directive interferes with freedom of trading. Further concerns were raised about the scope of the law. It was difficult to establish, which companies would be subject to the proposed directive. The German government examined the possibility that the binding quota legislation would be problematic with the unions, as companies with co-determination status would appoint employee representatives or companies might seek to avoid co-determination status to avoid the quota creating problems with unions. The research examines the reasons the proposed directive was considered unconstitutional, citing the German Constitution, the legal basis of the German legislation (1) and indicates that a third of the Member States considered that, the proposed directive interferes with national sovereignty (2).

1. Unconstitutional aspects

Article 3(2) of the German Constitution guarantees the principle of gender equality, which stated, 'men and women shall have equal rights. The state shall promote the actual implementation of equal rights for women and men and shall work towards the elimination of existing disadvantages'.⁹⁸⁵ The Rule of Equality was the legal basis for the '*Frauenquote*' legislation. This legislation regulates women on boards and calls for a thirty percent women on supervisory boards of public limited companies and companies subject to co-determination. Conflicts of interest between EU institutional governance and Member States have resulted in Member States not accepting the proposed legislation. The German government considered the call for women on boards tie-break quotas, as unacceptable and incompatible under German constitutional law. Germany applied a strict interpretation of Article 8 of the TFEU. The

⁹⁸⁵ n 60, German Constitution, Basic Law for the Federal Republic of Germany, Article 3, Rule of Equality (1949); n 60, German Legislation, Act for the Equal Participation of Women and Men in Leadership Positions in the Private and Public Sector.

proposed directive was considered positive action, which is prohibited under German law. However, in another reading in March 2022, the German government voted in favour of the proposed directive in Council, thereby allowing the proposed directive to go to Parliament to next step negotiation talks with Member States.⁹⁸⁶

Article 8 of the TFEU advanced that, '[i]n all its activities, the Union shall aim to eliminate inequalities, and to promote equality, between men and women.'⁹⁸⁷ In addition, Article 23 of the Charter of Fundamental Rights of the European Union states, 'equality between men and women must be ensured in all areas, including employment, work and pay.'⁹⁸⁸ Though, the German government had rejected the proposed women on boards directive in 2013, it passed its own national quota legislation, following poor results of women on boards soft law measures.⁹⁸⁹ This was an example of an EU Member State that changed its policies from soft to hard law. External pressure from the EU with the proposed directive and the Norwegian legislation influenced the German government to pass its own hard law,⁹⁹⁰ and, despite the fact that, the German government remained firmly against the proposed EU women on boards directive.

Having examined the German position citing unconstitutional aspects of the proposed directive, the research questions EU interference and national sovereignty.

2. EU interference and national sovereignty

European institutions had first taken a hard law stance to the subject of women on boards, then moved to a soft law approach and then back to hard law position. The change of EU policy from hard law to soft law and back to hard law demonstrates that

⁹⁸⁶ Preiss (n 35).

⁹⁸⁷ n 75, Consolidated Version of the Treaty on the Functioning of the European Union, Article 8.

⁹⁸⁸ n 76, Charter of Fundamental Rights of the European Union, Article 23.

⁹⁸⁹ *ibid.*

⁹⁹⁰ Schulz-Strelow (n 78) 'Women's Access to Boards in Germany – Regulation and Symbolic Change,' 225.

EU institutions strived to implement a common approach among the Member States to increase the representation of women on boards, in view of a single European market.⁹⁹¹ Though, the proposed women on boards directive has been contested in nine of the twenty-seven Member States,⁹⁹² who consider that the directive interferes with national sovereignty.⁹⁹³ Having considered there are nine Member States against the proposed directive, the research examines Member States without hard law.

C. MEMBER STATES WITHOUT HARD LAW

Several Member States have limited gender equality legislation in place and are unable to consider the subject of binding women on boards legislation in their current economic and political state of affairs. Those Member States are mainly Eastern and South East EU Member States. The German position and Member States without gender equality policies or legislation clearly demonstrate the fragmented women on boards policies and legislation in the European Union and the need for a minimum harmonisation.

CONCLUSION

Member States may be in favour of the use of quotas, this also brings on complicated legal issues, such as questions of sovereignty and amending constitutions. The fragmented policies and legislation consisting of soft law did not lead to an increase of the representation of women on boards. Binding legislation remains the fastest way to increase the representation of women on boards, not all Member States are in favour of this.

⁹⁹¹ n 89, McKinsey Report, 12.

⁹⁹² *ibid*, n 36, European Parliament, Legislative Train Schedule, Gender Balance on Boards.

⁹⁹³ *ibid*.

CONCLUSION OF CHAPTER TWO

France and Germany constitute the largest economies in the European Union, with many public limited companies and a high percentage of women in the labour market. When soft law initiatives and programmes were first implemented, there were many expectations from the government, business associations and companies, believing that soft law would be sufficient to increase the representation of women on boards. Yet, the soft law policies have proven ineffective. This has led to legislative forms, or binding legislation, which has proven to bring rapid results and has influenced other Member States to take action.

CONCLUSION OF TITLE TWO

To increase the representation of women on boards of directors in public limited companies in the European Union, it is necessary to have gender equality measures in place. Gender equality policies consist of soft law, such as, programmes, targets, recommendations and codes. These are important tools, which bring awareness to stakeholders about the lack or underrepresentation of women on boards along with the means to increase representation. The provisions in the corporate governance codes are constantly updated to include the composition of board directors and gender or diversity policies. The degree of effectiveness of such measures is different in every Member State. Whereas, binding quota legislation rapidly increases the representation of women on boards, when penalties or sanctions are applied. The majority of EU Member States dislike quotas, though they bring rapid results. Quotas call for a minimum percentage of each sex and require specific selection and recruitment procedures. Arguments against quotas consist of challenging meritocracy and status quo.

CONCLUSION OF PART ONE

Corporate governance involves processes, which sustain internal company practices, including the nomination and composition of the board of directors, who take part in the economic decision-making of the company. The governments and business associations (France) monitor corporate governance codes, especially the composition of the board of directors, which increasingly includes gender, women or diversity, as well as rules concerning selection and nomination of board directors. EU institutions have made gender equality the foundation of EU law. Norway, a non-EU Member State, was the first to pass binding women on boards quota legislation for economic reasons. There was legal confusion about whether passing binding legislation was for social democratic or economic reasons. It was confirmed to be for economic reasons. The legislation was moved to the Companies Act. This was symbolic, as it led the way for the largest EU Member States, France and Germany, to pass similar legislation. Though, different legal systems remain and include Member States, who have no women on boards legislation in place. This is not due to social democratic reasons or economic ones, but for ideological and political reasons.

Part Two

A LEGAL FRAMEWORK OF A MINIMUM HARMONISATION OF WOMEN ON BOARDS PROGRAMME IN THE EUROPEAN UNION

The European Union has a long history of gender equality policies and legislation. Despite this, different legal systems in the Member States include soft law, semi-binding soft law to hard law. Part One of the thesis focussed on different legislation and policies, which have been largely ineffective, with several exceptions. The lack of a standard legal approach has led the EU to regulate women on boards through the proposed directive. Currently, the Member States have an unequal approach to women on boards with different legal systems. Therefore, Part Two of the thesis shall focus on a legal framework of a minimum harmonisation of women on boards, the women on boards directive, would effectively increase the representation of women on boards in public limited companies, with the use of sanctions. A Minimum Harmonisation Programme would accompany the directive to Member States soft law programmes, as a first step.

Title One

HARD LAW IS REPLACING SOFT LAW

Member States move from soft to hard law for various reasons. The Norwegian government stated, it was for societal reasons, such as, for reasons of justice, democracy and human rights of the individual. These reasons may have been a starting point to increase the representation of women on boards, as well as upholding gender equality, as provided in UN and EU Charters and Treaties. Another motive was the business argument, which stated that more women on boards supports diversity. Nevertheless, the underlying reason was the economic contribution that women on boards bring, which would be profitable for companies and the economy, as a whole. The economic contribution was the basis for the Norwegian binding legislation.⁹⁹⁴ This legislation has had a profound effect on Norway, the European Union institutions and on several Member States. The Norwegian legislation continues to influence more Member States, as they pass women on boards legislation. Since soft law is limited in effectively increasing the representation of women on boards, hard law has become the new norm. Though, it is a slow and uneven process, because not all the Member States adhere to it.

The research has found, that for the time being, the current EU legal framework does not impose Member States to pass binding legislation (Chapter One), which has resulted in failures of EU and Member States institutions (Chapter Two).

⁹⁹⁴ n 41, European Commission Report, Women in Economic Decision-Making in the EU, Progress Report. A Europe 2020 Initiative (2012) 13; Huse (n 286) 13.

Chapter One

CURRENT EU LEGAL FRAMEWORK AND DIRECTIVES

The current EU legal framework does not impose the Member States to pass binding quota legislation to increase the representation of women on boards. Member States may decide on their own policies and legislation. Though, when the proposed women on boards directive enters into force, Member States will have to comply with the binding EU legislation. The research has found that more and more Member States are passing hard law (Section 1), and the proposal of a Minimum Harmonisation Programme would be able to support the women on boards directive, through consultations with the Member States (Section 2).

SECTION 1 HARD LAW

European Union Member States public limited companies constantly evaluate and update their corporate governance, diversity and corporate social responsibility policies, which include the representation of women on corporate boards. This may include mention in the code provisions of the composition of the board, specifically the mention to include gender and/or diversity.

The research has examined that, the first steps to increase women on boards consisted of soft law initiatives (§1) though, more Member States are moving towards hard law (2).

§1: FROM SOFT LAW TO HARD LAW

Due to certain limitations in EU Member States, women may be unable to join the board of directors. A Member State may not have active gender equality policies, or hard law, which include women on the boards of directors legislation, or means to enforce soft law policies. The research indicates that, since soft law does not carry sanctions and is limited to the interpretation and will of the company or government (I), the recommendations are not strong enough to increase the representation of women on boards (II).

I. EXPOSING LIMITATIONS TO SOFT LAW

The soft law women on boards approach includes the use of governance codes, targets, as well as other measures, such as recommendations. Though, the use of soft law is non-regulatory, it establishes a set of rules for companies. Corporate governance codes provisions in public limited companies in the EU Member States may seem to take a similar approach. Though, differences may be reflected in economic, historical and political backgrounds of each EU Member State and the application of the codes in companies. There are structural differences to account for, such as, the board nomination process, the board structure (one or two-tier systems), the composition of board directors and shareholder interests.⁹⁹⁵ The most developed economies of certain Member States have sophisticated gender equality policies and codes in place that are effective, because the political and economic environments support the national public limited companies, as important for the economy. This is also reflected in shareholders and regulators behaviour towards policies, such as, the mention of gender equality and hard law in the governance codes.

⁹⁹⁵ n 61, French Legislation, French National Assembly Commission for Constitutional Laws, Legislation and General Administration of the Republic, Report Number 29.

Governance codes cannot be directly linked to the outcome of how many women are or will be on the boards of directors, as they are soft law guidelines. When codes are used with the comply or explain principle, the question of non-compliance will have to be explained. Shareholders are interested in this information and may react, if the codes are not complied with. The comply or explain principle has strong legal effect, which encourages companies to comply with the codes. In underdeveloped markets without political and economic support of company corporate culture and codes, there may be few women on company boards. The research points out that, soft law is an important first step for a Member State to implement (A), though, even Member States who favoured only soft law are now turning to hard law (B).

A. SOFT LAW IS A STEPPING STONE TO HARD LAW

The OECD defines soft law, as not legally binding compared to hard law, which is strict regulation and binding. Soft law is useful, as a first step or two towards hard law. The comply or explain principle is used, as a governance tool, with reporting obligations. Then, the very definition of soft law has changed. With these obligations, there is a semi-binding notion of soft law, which is moving closer to hard law.

Self - and co-regulation can... be seen as important mechanisms for creating ... industry, political and public awareness of the problem itself and for rethinking appropriate and effective responses thereto. In the end, such responses often entail a mixed toolbox of instruments, the exact contents of which may however depend on context, time and place.⁹⁹⁶

A semi-binding legal approach considers the mix of soft law and the 'comply or explain' principle, as having legal binding effect, though not hard law. The research indicates the limits of soft law to provide a basis to increase the representation of women on

⁹⁹⁶ Senden (n 29) 51.

boards, as it cannot guarantee results (1), and, moreover, there is a risk that the representation of women on boards may actually decrease with the use of only soft law (2).

1. Soft law and women on boards

The majority of EU Member States prefer a soft law approach to increase women on boards, rather than pure binding legislation. Though, the research has established that, while soft law does increase the representation of women on boards, it does not do so fast enough.⁹⁹⁷

The use of corporate governance codes is an important soft law instrument, whose provisions include, deciding on board composition, gender or diversity. Eventually, Member States will move towards hard law, when they decide to make use of women, as an economic resource. Even so, the change to hard law will take time in the EU Member States. Binding quota legislation is not the first measure taken to increase the representation of women on boards.

Having shown that soft law is an important tool, the research notes that soft law may actually contribute to decreasing the representation of women on boards.

2. Soft law may decrease the representation of women on boards

The French Assembly passed binding quota legislation, reporting that soft law, self-regulation and corporate codes had failed to bring about effective results. Soft law alone may slow down the representation of women on boards, by staying within the

⁹⁹⁷ 'soft law' (OECD, 2019) <<https://www.oecd.org/gov/regulatory-policy/irc10.htm>> accessed 5 July 2019; 'soft law' Teresa Fajardo, in *Soft Law Essay* (2014) <<https://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0040.xml>> 5 July 2019; Teigen (n 68) 115-146.

status quo or possibly even have the opposite effect, by decreasing the representation of women on corporate boards.⁹⁹⁸

Having shown that, though, soft law is an important tool, it has proven ineffective, as the research shows that, Member States are turning towards binding quota legislation.

B. TOWARDS BINDING QUOTA LEGISLATION

More Member States are regulating the composition of boards in public limited companies. The Netherlands and Greece are the latest Member States to have passed women on boards of directors legislation. The motivation for the Greek government to pass women on boards legislation was to make a structural change for listed companies to meet market requirements, as required in Directive 2017/828/EU to attract investment, be aligned and to 'respect the diversity of corporate governance systems within the Union.'⁹⁹⁹

According to the Greek Legislation, Article 3 of Law 4706/2020 (Government Gazette A 136/17.07.2020) on Corporate Management, public limited companies are obliged to increase women on boards to a twenty-five percent quota. The legislation includes strict requirements for selection of board directors, an obligation for non-executive board directors and requirement to have a governance code.¹⁰⁰⁰

⁹⁹⁸ n 61, French Legislation, French National Assembly Commission for Constitutional Laws, Legislation and General Administration of the Republic, Report Number 29.

⁹⁹⁹ Directive (EU) 2017/828 of the European Parliament and of the Council of 17 May 2017 Amending Directive 2007/36/EC as regards the Encouragement of Long-term Shareholder Engagement (European Parliament, 2017) 28 <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32017L0828>> accessed 29 May 2022.

¹⁰⁰⁰ AK Law Firm Report, Corporate Governance: the Newly Published Law 4706/2020 (2020) <<https://www.aklawfirm.gr/knowledge-center/corporate-governance-newly-published-law-47062020>> accessed 23 December 2021; *ibid*, Directive (EU) 2017/828 of the European Parliament and of the Council of 17 May 2017 Amending Directive 2007/36/EC as regards the Encouragement of Long-Term Shareholder Engagement, 28.

The research has shown that, the recent passing of hard law legislation in Greece and in the Netherlands indicate that, binding legislation brings results (1), though, this is in contrast with the situation in the Eastern European Union Member States (2).

1. Binding quota legislation and effectiveness

Binding quota legislation is recognised, as the most effective way to rapidly increase the representation of women on boards in public limited companies. The increase of the representation of women in decision-making positions results in structural changes within the company, which leads to change in economic policy. Binding quota legislation in the political sphere has led to significant increases in the representation of women in Parliaments on national and EU levels. The same strategy is being addressed in the private sector of companies to increase the representation of women on boards, in line with the EU Strategy 2020.¹⁰⁰¹

Having shown that binding quota legislation is the most effective means to increase the representation of women on boards, the research confirms an absence of women on boards legislation in the Eastern European Union Member States.

2. Absence of legislation in Eastern European Union Member States

There is a stark absence of women on boards of public limited companies in the Eastern European Union Member States. The transition from a state planned economy to a market economy has not led to an effective application of soft law gender equality policies, or hard law to increase the representation of women in national parliaments or on the boards of directors in public limited companies. There are few women in

¹⁰⁰¹ Ekin (n 38) 1-24; Cathrine Seierstad, Morten Huse and Silvija Seres, 'Lessons from Norway in Getting Women onto Corporate Boards' (The Conversation, 2015) <<https://theconversation.com/lessons-from-norway-in-getting-women-onto-corporate-boards-38338>> accessed 5 July 2019.

politics in the Eastern European Union Member States. The use of quotas in the Eastern European Union Member States is not well-accepted and consider women, as token representation in decision-making positions.¹⁰⁰² The application of gender quotas in politics or in business has backfired, with an absence of women and created the exact opposite result and accelerated greater gender inequality in the Eastern European Union Member States.¹⁰⁰³

Women in the Eastern European Union Member States are mainly excluded from the board of directors of public limited companies.¹⁰⁰⁴ While a few Eastern European Union Member States exceptions may allow for a form of quotas in politics, this is not the general situation in the private sector, where no women on boards legislation exists.¹⁰⁰⁵

Having investigated the effectiveness of binding legislation and the failure to move Eastern European Union Member States in the same direction with the other Member States, the research examines the problem of soft law and lack of sanctions.

II. SOFT LAW AND LACK OF SANCTIONS

Soft law has not proven effective in increasing the representation of women on boards. This is the main reason Member States pass hard law legislation. As the research has shown, the legal and political environments in the individual Member States have to support a structural change or modernisation of the governance of companies. The nature of intervention comes on two levels: from the EU to the Member States and from Member States national law to companies. The French example demonstrated an exceptional situation, where the Constitution had to be reformed to allow the passing

¹⁰⁰² The research by Kanter on tokenism has shown that minority members of a group are labelled as tokens. R. M. Kanter, *Men and Women of the Corporation* (16th edn, New York: Basic Books, 1977).

¹⁰⁰³ L Hjelm-Wallén (n 65) 62.

¹⁰⁰⁴ *ibid.*

¹⁰⁰⁵ *ibid.*, 14.

of the women on boards legislation. This has resulted in the decision for EU institutions to push an interventionist directive onto the Member States. Moreover, several Member States pass women on boards legislation to increase the representation of women on boards more rapidly. Another difficulty with soft law is that it remains a recommendation, without any sanction, in case of non-compliance. The research has shown that there are exceptions, such as, the UK, Finland and Sweden, who have increased the representation of women on boards through soft law means, as these Member States have strong business and cultural contexts and fully comply with soft law, as if it were legally binding. Yet, most Member States do not share this approach.

The incorporation of corporate social responsibility and sustainability policies in corporate governance, with a strong commitment to gender equality and women on boards. If the women on boards policies are not complied with, the soft law may use naming and shaming the company, which then may incur problems with the company shareholders and stakeholders.¹⁰⁰⁶ Not all Member States implement corporate social responsibility policies, though, the European Union institutions have called for this. Nor would naming and shaming be effective in all Member States, as a soft law means to increase the representation of women on boards. The research examines how the European Commission turned from soft law to intervention with hard law (A), while, considering corporate social responsibility policies, which include stakeholders and social concerns in business (B).

A. SOFT LAW AND INTERVENTION WITH HARD LAW

The European Commission intervention demonstrated that Member States' efforts to increase the representation of women on boards have been insufficient. As a result, the proposed women on boards directive would force companies to comply with the

¹⁰⁰⁶ Senden (n 29) 51.

legislation or to face sanctions, if they do not increase the representation to forty percent. Without the directive, it would take forty more years for boards for gender parity on the boards of directors in public limited companies. The research considers that, the former EU Commissioner Reding was an important influence and supported the need for the proposed directive (1) and EU intervention with the proposed directive (2).

1. Strong leadership from former EU Commissioner Reding

The former European Commission Ex-European Commissioner Reding strongly supported increasing the representation of women on boards. She stated in 2012, that hard law with quotas would lead to a rapid increase of the representation of women on boards, and that only hard law would bring real results.¹⁰⁰⁷ Having shown that with the right leadership with former Commissioner Reding was in place to propose legislation with sanctions, the research examines Commission intervention with the proposed directive.

2. Intervention with the proposed directive and EU institutions

As there was a fragmented approach with Member States consisting of too many different legal systems to increase the representation of women on boards, the EU institutions decided a return to intervention, as a means to increase the representation of women on boards, by way of a directive. The European Commission was influenced by Norwegian legislation, which had effectively passed forty percent binding quota legislation and had increased the representation of women on boards within a short time. The Norwegian government adopted women on boards legislation in 2003. New

¹⁰⁰⁷ n 67, Euractiv Communication, EU to Go for 40% Gender Quota on Company Boards; n 55, European Commission, Viviane Reding Speech.

companies had to comply by 2006 and full implementation of the legislation entered into force in 2008.¹⁰⁰⁸

Having analysed the means to intervene with the proposed directive, the research examines the role of corporate social responsibility policies and women on boards.

B. THE ROLE OF CORPORATE SOCIAL RESPONSIBILITY AND WOMEN ON BOARDS

Corporate social responsibility is defined, as 'a concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis.'¹⁰⁰⁹ The reporting on corporate social responsibility is primarily to assure shareholders that, the company is meeting sustainable development goals.¹⁰¹⁰ The research points to the involvement of the European Commission, requesting Member States to include corporate social responsibility policies in their women on boards' policies and legislation (1), which had been identified, as important to economic decision-making and business strategy (2).

1. Member States corporate social responsibility policies

Member States faced additional European Commission pressure to improve their national corporate social responsibility policies and legislation, to align with EU corporate social responsibility principles, which included gender equality. Though, voluntary, the Commission called on companies in the Member States to meet their corporate responsibilities, founded in UN Guiding Principles. The EU Member States

¹⁰⁰⁸ Teigen (n 68) 11.

¹⁰⁰⁹ n 72, European Commission Communication, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A renewed EU Strategy 2011-14 for Corporate Social Responsibility; Teigen (n 68) 11.

¹⁰¹⁰ *ibid*, European Commission Communication, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A renewed EU Strategy 2011-14 for Corporate Social Responsibility, 14; n 8, UN Report, Sustainable Development Goals: Number Five: Gender Equality.

were called to submit reports at the end of 2012, which were based on the United Nations Principles.¹⁰¹¹ Germany launched the Sustainability Code in 2014, which included women in management in the twenty criteria, replying to the Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 on Disclosure of Non-Financial and Diversity Information by Certain Large Undertakings and Groups.¹⁰¹²

Having explained the importance of corporate social responsibility policies and women on boards in the Member States, the research examines corporate social responsibility policies and economic decision-making, which include the representation of women on the boards of directors.

2. Corporate social responsibility and economic decision-making

Corporate social responsibility principles, such as, gender diversity, talent, skills and opinions, are essential for economic decision-making on boards of directors in public limited companies. Corporate social responsibility is an increasingly important concern to government and business development.¹⁰¹³

Having shown that corporate social responsibility is included in how companies do business and economic-decision making activities, including the selection and nomination of women on the boards of directors, the next section examines the move from soft law towards hard law.

¹⁰¹¹ *ibid*, n 8, UN Report, Sustainable Development Goals: Number Five: Gender Equality.

¹⁰¹² n 678, EU Legislation, Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 Amending Directive 2013/34/EU as Regards Disclosure of Non-Financial and Diversity Information by Certain large Undertakings and Groups (2014) OJ L 330, 1–9.

¹⁰¹³ Gennari (n 6) 107.

§2: MEMBER STATES MOVE TOWARDS HARD LAW

This thesis has demonstrated that EU Member States are moving away from a pure soft law approach towards a combination of soft and hard law, by passing binding quota legislation, as an effective means to increase the representation of women on corporate boards in public limited companies in Europe (I), though, as an exception, it should be pointed out that, several Member States use soft law effectively, such as, the United Kingdom (ex-Member State), Sweden, Finland and Denmark (II).

I. BINDING QUOTA LEGISLATION

Binding quota legislation is the right means to rapidly increase the representation of women on boards. Though, legislation differs in each Member State, due to its particular economic, political and social background. The research has found that few Member States have been able to increase the representation of women on boards significantly without binding legislation (A), though, soft law programmes, policies and corporate governance codes, as well as social norms work well for the UK (before Brexit), Sweden and Finland (B).

A. EXAMPLES OF SOFT LAW INEFFECTIVENESS

Soft law has been ineffective in raising the representation of women on boards, in most EU Member States. Nevertheless, the majority of EU Member State governments continue to favour a soft law approach, through corporate governance codes or other instruments, such as, programmes or flexi-quotas. Binding quota legislation is considered top-down and restrictive of economic freedom. Even if national governments and business have a preference for soft law, governments are obliged to

pass hard law. The research points out that the German government initiative of flexi-quotas was ineffective (1), while the soft law programmes led by the Norwegian government and the Confederation of Norwegian Enterprises were unable to increase the representation of women on boards (2).

1. German flexi-quotas and business policy

The German government policy favoured soft law voluntary women on boards with flexi-quotas, which were ineffective. The soft law programmes in Germany date back to 1980, when the government launched the '*Situation der Frauen*' Programme.¹⁰¹⁴ The Programme made recommendations for companies to increase the representation of women in top management of companies. The soft law flexi-quota programmes were launched in 2013. If companies had not increased the representation of women on boards by voluntary means, a soft sanction would be attributed. The sanctions were ultra-soft, consisting only of contesting the appointment of a board director. Furthermore, the flexi-quota would not be enforced, if companies reached thirty percent of women on boards in supervisory and management boards, through voluntary means.¹⁰¹⁵ As a result, soft law programmes had not led to a significant increase in the representation of women on boards, the binding quota legislation entered into force in 2016.

Having shown that the German government tried flexi-quotas with targets to increase the representation of women on boards, which were ineffective, the research examines the Norwegian Government and Confederation of Norwegian Enterprises soft law

¹⁰¹⁴ n 558, Council Recommendation 84/635/EEC of 13 December 1984 on the Promotion of Positive Action for Women, n4; n 558, Second Council Resolution of 24 July 1986 on the Promotion of Equal Opportunities for Women, 75.

¹⁰¹⁵ n 41, European Commission Report, Women in Economic Decision-Making in the EU, Progress Report. A Europe 2020 Initiative (2012) 20-21.

programmes, which were equally ineffective in increasing the representation of women on boards.

2. The Norwegian Government and Confederation of Norwegian Enterprises

The Norwegian government and Confederation of Norwegian Enterprises, business association, preferred a soft law approach to increase the representation of women on boards.¹⁰¹⁶ Despite various initiatives, between 1990 and 2002, the number of women on boards had not increased significantly. The Norwegian government renewed another two-year mandate, in an attempt to increase the representation of women on boards with soft law recommendations.¹⁰¹⁷ The business association was opposed to quotas, finding quotas symbolic and without substance. In the end, soft law efforts failed and quota legislation was introduced in 2003.¹⁰¹⁸

Having shown that German and Norwegian governments failed to increase the representation of women on boards with soft law, the research examines the effectiveness of hard law.

B. THE EFFECTIVENESS OF HARD LAW

The research has shown that despite government or business preference for soft law, it remained ineffective. Therefore, the Member States turned to binding women on boards legislation for economic, social and democratic reasons. The research found that political impetus was necessary to push through the French hard law, as the notion of parity is an economic concept and fully understood in France (1) though, despite hard law, several companies had still not complied with the legislation (2).

¹⁰¹⁶ Standal (582) 38.

¹⁰¹⁷ Huse (n 286) 14-15.

¹⁰¹⁸ n 266, Kilden Gender Research Report.

1. The French example of parity and binding legislation

France passed binding quota legislation in 2011. The Copé Zimmermann Act called for companies to implement legislation in two phases, twenty percent in 2014 and forty percent of women on boards in 2017, with rules about the maximum difference for each sex. The legislation called for forty percent of women and men on corporate boards in public limited companies with a minimum of five hundred employees and more than fifty million euros in revenue.¹⁰¹⁹ New regulations entered into force in January 2020. Companies with more than two hundred and fifty employees are also subject to the Act.¹⁰²⁰

The notion of 'parité' (parity) in France is now fully integrated and referred to in the context of professional equality. 'Parity' is recognised in women on boards legislation. This is an important transition, from the word equality, as parity has led to a change in politics, governance and the economy for democratic reasons and not led by feminist movements, as in Germany, which is an important difference.

'*Parité*' (parity) is the right term to use in all decision-making positions and on the boards of directors. It refers to

...the legislation on parity ... [and] the adoption of a law on balanced representation of men and women on the boards of directors and supervisory boards of public ... company boards of public and private companies and in the private sector and supervisory boards of public and private companies ... is

¹⁰¹⁹ n 795, French Legislation, Article L. 225-18-1 of the French Commercial Code (2019).

¹⁰²⁰ AMF French Financial Markets Authority Report 2020 on Corporate Governance and Executive Compensation in Listed Companies (2020) <<https://www.amf-france.org/fr/actualites-publications/publications/rapports-etudes-et-analyses/rapport-2020-sur-le-gouvernement-dentreprise-et-la-remuneration-des-dirigeants-des-societes-cotees>> accessed 8 juillet 2021.

essential to bring about a change that too many legal entities are reluctant to undertake on their own.¹⁰²¹

Consultations with the unions on the subject of women on boards also upheld the notion of '*parité*' (parity), as found in the Grésy report¹⁰²² The French Senate Reports¹⁰²³ conclude that, the Copé Zimmermann Act was effective, but it has gone as far as it could. According to the Proposition to Law 2140,¹⁰²⁴ the quota legislation will not erase history or the past. The legislation led to the transformation of company structures, with gender parity on boards. Though, the issue of real parity remains, or fifty percent representation of women on boards. The legislation was effective, as it supported transparent business practice, in the interest of economic development and democracy.¹⁰²⁵

Having considered the French example of parity and binding legislation, the research examines the comply or explain principle and legal effect.

¹⁰²¹ French National Assembly Report, Done on Behalf of the Committee on Constitutional Law, Legislation and General Administration of the Republic, The General Administration of the Republic on the Draft Law (no. 2140) by Mr. Jean-François Copé and Mrs. Marie-Jo Zimmermann Relating on the Balanced Representation of Women and Men on Administrative and Supervisory Boards and on Professional Equality [2009] 23-24 <<https://www.assemblee-nationale.fr/13/pdf/rapports/r2205.pdf>> accessed 8 juillet 2021.

¹⁰²² n 132, French Government HCE Report; French National Assembly, Constitution of 4 October 1958, 13th Législature, Proposal for a Law on the Balanced Representation of Women and Men on Boards of Administration and Supervisory Boards and on Professional Equality no. 2140 (2009) <<https://www.assemblee-nationale.fr/13/propositions/pion2140.asp>> accessed 8 juillet 2021.

¹⁰²³ French Senate Report, Martine Filleul, Joëlle Garriaud-Maylam and Dominique Vérien, The Delegation for Women's Rights, Parity in Companies: for Further Progress, Ten Years After the Copé-Zimmermann Law No. 757, 2020-2021 (2021) <<http://www.senat.fr/rap/r20-757/r20-7573.html>> accessed 25 July 2021; French Senate Report No. 38 (2010-2011), Marie-Hélène des Esgaulx, Law Commission, Proposal for a Law on the Balanced Representation of Women and Men on Boards of Directors and Supervisory Boards and Professional Equality: The Presence of Women on Boards: An Economic Interest for French Companies (2010) <<https://www.senat.fr/rap/l10-038/l10-0383.html>> accessed 5 July 2019.

¹⁰²⁴ *ibid.*

¹⁰²⁵ n 1022, French National Assembly, Constitution of 4 October 1958, 13th Législature, Proposal for a Law on the Balanced Representation of Women and Men on Boards of Administration and Supervisory Boards and on Professional Equality no. 2140.

2. Comply or explain principle and legal effect

According to the 2019 Report of the High Committee on Corporate Governance (HCGE),¹⁰²⁶ 'the question of... gender balance in boards of directors ... led to appropriate responses, placing French boards at the head of the global ranking on this issue... The HCGE [remains] vigilant [and will] notify companies which have an unsatisfactory policy in this area.'¹⁰²⁷ The High Committee on Corporate Governance, the French legal authority of compliance with the Afep-Medef code, analyses how companies apply the corporate governance code provisions. The High Committee disclosed that two CAC40 corporations and eight SBF120 companies still do not have any women on the board of directors.

The largest French companies of the French Stock Market, the CAC40 companies have fixed objectives for women on boards, which represent eighty-eight percent of the companies. Forty-nine percent of SBF120 companies are concerned with women on boards quotas. The High Committee reporting to the Government receive notification from companies, submitting action plans and reporting on issues of compliance, not before 2025 or even later. The High Committee considers this 'unacceptable' and calls for an earlier date of implementation. If companies are unable to meet the quota, they are obliged to use the comply or explain principle and explain why and when they will remedy the situation.¹⁰²⁸

This issue of non-compliance with the legislation demonstrates that, even when binding legislation is in place, it may be ineffective, if companies are not compliant and

¹⁰²⁶ The French High Committee for Corporate Governance (2021) <<https://hcge.fr/rapports/>> accessed 25 July 2021.

¹⁰²⁷ *ibid.*

¹⁰²⁸ The French High Committee on Corporate Governance Report (HCGE, 2019) 2.1 <https://hcge.fr/wp-content/uploads/2019/12/Rapport_HCGE_-2019.pdf> accessed 25 July 2021; The French High Committee on Corporate Governance Report (2020) <https://hcge.fr/wp-content/uploads/2020/11/Rapport_HCGE_-2020.pdf> accessed 25 July 2021.

have not reported the non-compliance with the comply or explain principle. Having investigated the use of the comply or explain principle and legal effect, the research examines the EU Member States exceptions, as they are able to increase the representation of women on boards by soft law means.

II. EU MEMBER STATES AND SOFT LAW EXCEPTIONS

Soft law works well in several Member States for different reasons. In the United Kingdom, Sweden, Finland, Denmark, soft law and the comply or explain principle are sufficient measures to increase the representation of women on boards. Though, this remains the exception, as there are twenty-seven Member States to consider. The research has found that the United Kingdom (ex-Member State) did not believe quotas were needed to increase the representation of women on boards (A), and neither did Sweden (B).

A. THE UK EXCEPTION (PRIOR TO BREXIT)

The UK has a principled answer to quotas by 'choos[ing] not to recommend quotas, because we believe that board appointments should be made on the basis of business needs, skills and ability.'¹⁰²⁹ The research examines the UK government position, as it believed a standard EU directive was not the answer to increase the representation of women on boards (1), preferring to keep a national voluntary approach (2).

1. The UK and the proposed EU women on boards legislation

The UK government disagreed with EU intervention with the proposed directive, stating that the EU should wait until the EU institutions have collected all the problems

¹⁰²⁹ n 22, UK Government, Department for Business, Innovation & Skills, Women on Boards (2011) 26.

surrounding the proposed directive in the individual Member States. However, this could take a long time. During this time, the Member States may not increase the representation of women on boards. Quotas are a starting point, as they permit a rapid change of the composition of board directors and are limited in time. Moreover, the UK government disagreed to an EU-shared approach, which included twenty-eight company law systems (prior to Brexit).¹⁰³⁰

Furthermore, the Government position was to systematically block discussions, maintaining there was not enough proof that the proposed directive could fix the problem of women on boards.¹⁰³¹ The official UK government position has always been opposed to 'prescriptive measures, such as quotas or binding targets, [that] might be perceived as condescending and tokenistic, undermining the contribution made by women.'¹⁰³² Having explained that the UK government strongly disagreed with the EU position of intervention and quotas, the research examines the effectiveness of the UK voluntary approach.

2. The effective UK voluntary approach

The former Minister for Employment Relations and Consumer Affairs Swinson supported an increased representation of women on boards. However, according to the former Minister, the European Union needed to take 'account of specific national circumstances including business...[T]he specific proposals...put forward by the Commission run counter to the UK's voluntary approach.'¹⁰³³ Though, the UK government agreed that executive and non-executive board directors are within the

¹⁰³⁰ UK Parliament Report, House of Commons European Scrutiny Committee, Twenty-Eighth Report of Session 2013-14, Section 3.12 Gender Balance on Corporate Boards (2014) <<https://publications.parliament.uk/pa/cm201314/cmselect/cmeuleg/83-xxv/83xxv.pdf>> accessed 30 October 2020.

¹⁰³¹ *ibid*, 3.4.

¹⁰³² *ibid*, 3.6.

¹⁰³³ *ibid*.

scope of EU Treaty, Article 157(3) to adopt measures based on the equal treatment of men and women in employment.¹⁰³⁴

Interestingly, the Government had quickly identified a derogation clause in the proposed directive, which would permit a Member State to prove that the forty percent quota had been met, and then allow other listed companies to be exempt from the proposed directive.¹⁰³⁵ The UK government also objected to the proposed directive on the grounds of 'proportionality and subsidiarity, having examined the legal basis of the Directive.¹⁰³⁶ The UK government remains strongly opposed to an EU interventionist approach and favours a voluntary approach, which stakeholders support.¹⁰³⁷

Having shown that, the UK government remains opposed to quotas, the research compares it with the Swedish self-regulation approach.

B. THE SWEDISH EXCEPTION

The Swedish government calls itself a feminist Government, guaranteeing gender equality to women and men, for democratic reasons. Gender equality is associated with economic performance and social and legal developments in Sweden.¹⁰³⁸ The notion of gender equality has held a distinct and historic place in Sweden, prior to the 1970s, including women in the labour market and economic growth, due to a combination of political decisions and feminist movements. The link between gender equality and corporate social responsibility is strong, as the Swedish government seeks gender equitable sustainable solutions.

¹⁰³⁴ n 166, Consolidated Version of the Treaty on the Functioning of the European Union; Article 157(3).

¹⁰³⁵ UK Parliament Report, Gender Balance on Corporate Boards, Ninth Report, European Scrutiny Committee 2014 (UK Parliament, 2014) 6.10 <<https://publications.parliament.uk/pa/cm201415/cmselect/cmeuleg/219-ix/21910.htm>> accessed 14 December 2020.

¹⁰³⁶ *ibid*; n 1050, UK Parliament Report, 3.13.

¹⁰³⁷ UK CIPD Policy Report, Quotas and Targets: How do They Affect Diversity Progress? (CIPD, 2015) 6.

¹⁰³⁸ Swedish Government Report, Gender Equality Policy in Sweden (2021).

The research maintains that the Swedish government supports gender equality policy making, based on inclusion of all stakeholders and the use of targets (1), as it counts on their effectiveness and use of reporting (2).

1. Women on boards targets, not quotas

The Swedish government set a forty percent women on boards target for state-owned companies. While for public limited companies, the Swedish Corporate Governance Board made recommendations that, companies should have forty percent of women on boards by 2020. This recommendation has been in place since 2014.¹⁰³⁹ Women on boards in Sweden are almost at parity with men. In 2019, there were thirty-four percent of women on boards.

There was an increase of 9.5 percent of public limited companies from 2010 to 2017. In 2020, there were thirty-eight percent of women on boards of public limited companies.¹⁰⁴⁰ Having shown that the Swedish government was effective with self-regulated policies, which included targets, not quotas, though, the research found that the Swedish government closely monitored policies among the Member States.

2. Gender balance on boards of Swedish public limited companies

The Swedish Corporate Governance Board publishes statistics to assess the representation of women on boards. The Board compares Swedish public limited

¹⁰³⁹ *ibid*, Swedish Government Report, Gender Equality Policy in Sweden; Swedish Corporate Governance Board Press Release, Gender Balance on Boards of Listed Companies: The Swedish Corporate Governance Board Assesses the Situation Ahead of this Year's AGMs (2015) <http://corporategovernanceboard.se/UserFiles/Archive/316/pressrelease_gender_2014-02-03.pdf> accessed 24 July 2021.

¹⁰⁴⁰ n 24, OECD Statistics, Employment : Female Share of Seats on Boards of the Largest Publicly Listed Companies.

companies with statistics from other Member States.¹⁰⁴¹ Having shown that the Swedish government was effective in increasing the representation of women on boards with targets, the research turns to the need for a minimum harmonisation legal framework for the Member States.

SECTION 2 TOWARDS A MINIMUM HARMONISATION LEGAL FRAMEWORK

The objective of a minimum harmonisation legal framework, such as the proposed directive, is to increase the representation of women on boards¹⁰⁴² by harmonisation of a standard approach across all EU Member States. The research considers that an EU-led Minimum Harmonisation Programme would be the first step towards supporting the women on boards directive for those Member States without sufficient soft or hard law (§1), while there are several complications with the proposed women on boards directive (§2).

§1: A MINIMUM HARMONISATION PROGRAMME

A Minimum Harmonisation Programme would support women on boards policies in public limited companies in all EU Member States in several ways:

- to ensure investors that there were no regulatory differences within EU Member States

¹⁰⁴¹ *ibid.*

¹⁰⁴² Gennari (n 6) 107.

- to allow Member States to set deadlines
- to develop gender equality policies and legislation
- and, to align national legislation with that of the proposed women on boards directive.

The research examines the Minimum Harmonisation Programme, consisting of two phases (I), based on the French women on boards legislation (II), as the Copé Zimmermann and PACTE legislation have had an important effect on the French economy and corporate governance (III).

I. A TWO-PHASE APPROACH

The Minimum Harmonisation Programme would be implemented in two phases, so as to accommodate all EU Member States and allow them to develop women on boards policies and legislation. The research comprises an evaluation of the policies and legislation in place to facilitate the implementation of the programme (A) by developing standards, as an effective means for all Member States to increase the representation of women on boards (B).

A. BACKGROUND TO A SHARED PROGRAMME

EU Member States choose from different legal systems to increase the representation of women on boards, which may include binding quota legislation, with or without sanctions, corporate governance codes with the comply or explain principle and company voluntary efforts, such as, targets or recommendations. The argument remains, whether Member States should pass women on boards national legislation, knowing that, there are difficulties for many EU Member States to implement gender equality policies and legislation for different reasons, such as, due to a lack of policies for political, cultural or societal reasons, or whether it will become more effective to pass the proposed directive.

B. THE DEVELOPMENT OF GENDER EQUALITY POLICIES AND LEGISLATION

There are many layers to analyse in order to fully prescribe one legal system over another, though, should the proposed directive enter into force, a Minimum Harmonisation Programme could provide assistance to certain Member States to put into place policies that have proven effective.

II. THE FRENCH COPE ZIMMERMANN ACT AND MINIMUM HARMONISATION PROGRAMME

The Copé Zimmermann Act is the appropriate legal model to refer to a Minimum Harmonisation Programme for Member States, who have not yet met the proposed forty percent representation of women on boards in public limited companies. The legislation could be used as a reference, allowing Member States and public limited companies to refer to the French legislation, with added flexibility to set the number of employees and revenue. Currently, the Copé Zimmermann Act calls for a quota of forty percent of women and forty percent of men on boards in two steps, by 2017 for public limited companies and by 2020 for unlisted companies. Companies should have more than two hundred and fifty employees and a turnover greater than fifty million euros. For companies with eight board directors, the difference of women or men cannot exceed two. Making use of the Copé Zimmermann Act as a model, Member States could base a forty percent of women and forty percent of men on boards in two steps, establishing the number of years to implement the legislation and divide in two for public limited companies and unlisted companies. The number of board directors can follow the same rule or not more than two of a sex, when the board has eight members.

A Minimum Harmonisation Programme would allow Member States to implement the pre-phases, which would include adopting policies, with the objective of working

towards the proposed women on boards directive. The French government is known for its ambitious gender equality policies and French women on boards legislation. The research examines the French women on boards legislation, as the legal reference for the Minimum Harmonisation Programme (A), while before quota legislation, soft law was the reference (B) though, soft law has reached its limits (C).

A. BACKGROUND TO THE LEGISLATION

France has performant women on boards legislation today, placing it at the top of EU Member States best practices. It should not be forgotten that the French history of '*parité*' (parity) has been a struggle until the Constitutional reform in 1999, which allowed women and men equality in political offices and electoral mandates. But, it has been much more complicated in the governance of companies in business, which remained difficult for women to access.

At the end of the 1990s, there were fewer than ten percent of women on boards of the largest companies by size and capitalization (CAC40). In 1999, there were fewer than ten percent of women on boards, while today, the figure has reached forty-five percent of women on boards. The forty percent quota is considered '*parité*' (parity). When there are quotas and monitoring, the law is effective. Nevertheless, when there are quotas, but no monitoring nor enforcement, the law is ineffective (as seen in the SBF120 and unlisted companies, even if this is not the target of this research). The January 2020 requirements for companies in the PACTE Act, with 250 or more employees and 50 million in turnover cannot be analysed, since the date of this legislation is so recent. A new proposal for a law (no. 592) is aimed at executive management on public limited companies, and has been adopted by the National Assembly, after an accelerated procedure for economic and professional equality for women on 12 May 2021 and sent to Social Affairs Committee. The Copé Zimmermann Act serves as the legal basis for

this legislation.¹⁰⁴³ The research maintains that, binding quotas are an essential part of the women on boards legislation (1), and that several Member States have had amend their Constitutions to permit women on boards legislation (2).

1. Quotas as part of the Minimum Harmonisation

Quotas are part of a minimum harmonisation. Without sanctions, which include quotas, the representation of women would not increase on its own. The subject of quotas is topical. Governments or business may be in favour or not of the use of quotas.

However, the business argument supports that, quotas should be used by all means, including the use of corporate governance codes and targets, to fully make use of womens' leadership in the economy.

To compete and flourish in the global economy, business must leverage the talents of its very best women. The means may vary, the key is that it gets done. Until women achieve parity in business leadership roles, they will be marginalised in every other arena. Quotas are one proven strategy to boost diversity on top.¹⁰⁴⁴

Having shown that quotas are necessary to increase the representation of women on boards rapidly, the research found that, a minimum harmonisation may have the requirement that a Member State amend its Constitution to include an equality clause, should it lack this provision, in order to pass women on boards legislation.

¹⁰⁴³ French Legislation, Law no. 2021-1774 of 24 December 2021, Accelerating Economic and Professional Equality, The French government initiated the accelerated procedure on this text on 5 April 2021 (French National Assembly, 2021) <<https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000044559192>> accessed 24 July 2021.

¹⁰⁴⁴ Heather Foust-Cummings, 'Research and Considerations Regarding Women on Boards' in Silke Machold, Morten Huse, Katrin Hansen, and Marina Brogi (eds) *Getting Women to Corporate Boards: A Snowball Starting in Norway* (1st edn, Edward Elgar Publishing, 2013) 60-61.

2. Minimum harmonisation and amending Constitutions

Certain Member States may need to amend their Constitutions, if women are not mentioned explicitly. Commercial codes should include a parity provision in the board of director composition, as based on the Copé Zimmermann Act.

Having explained that, a Member State may need to have its Constitution amended, the research turns to the French situation before quota legislation was passed.

A. BEFORE QUOTA LEGISLATION

Former President François Mitterrand said in an interview in 1994 that, he supported gender parity and quotas in electoral offices, though little parity legislation existed at that time. According to the Decree No. 95-1114 of October 18, 1995 Establishing an Observatory of Parity between Women and Men, a report on the rights of women, was given to the Government every two years. The support was political and societal, but nothing said about women on boards.

The research found that, there were a few women present on boards of small companies (1), though, women were hardly present on listed companies, prior to the women on boards legislation (2).

1. Women on boards in small companies

Prior to the passing of the Copé-Zimmermann Act,¹⁰⁴⁵ women were present on the boards of directors in small companies.

¹⁰⁴⁵ n 71, French Legislation, Law No. 2011-103 of January 27, 2011 on the Balanced Representation of Women and Men on Boards of Directors and Supervisory Boards and Professional Equality (1).

Having shown that before French legislation passed, there were few women on boards in small companies, while the research examines that there were even fewer women on company boards in CAC40 companies.

2. CAC40 companies before women on boards legislation

Prior to 2011, CAC 40 companies showed a 0.2 percent to 0.4 percent representation of women on boards rise per year. French companies with existing internal women on boards policies showed greater representation of women on boards.¹⁰⁴⁶

Having shown that before French legislation passed, there were few women on boards in CAC 40 companies, the research examines the reasons for the transition from soft to hard law.

C. THE TRANSITION FROM SOFT TO HARD LAW

The research has shown that Member States are transitioning towards hard law, as soft law is not legally binding and does not carry sanctions (1), while hard law is legally binding and includes sanctions (2).

1. Soft law ineffectiveness

As previously mentioned, European institutions have made recommendations for soft law since 1984, as a means to increase the representation of women on company boards and by 'encouraging women candidates and the recruitment and promotion of women in sectors and professions ... at levels where they are underrepresented, particularly as regards positions of responsibility...' ¹⁰⁴⁷ Most Member States implement

¹⁰⁴⁶ *ibid.*

¹⁰⁴⁷ n 558, Council Recommendation 84/635/EEC of 13 December 1984 on the Promotion of Positive Action for Women (1984) OJ L331, 0034, n4; n 558, EU Law, Second Council Resolution of 24 July 1986 on the Promotion of Equal Opportunities for Women (1986) OJ C203, 0002.

soft law approach through corporate governance codes or other non-binding quota legislation. Though companies use soft law, it remains a recommendation to increase the representation of women on boards. There are no sanctions, which makes it mostly ineffective in significantly increasing the representation of women on boards. However, soft law have may legal effect with corporate codes. This will depend on the Member State and the legal effect of the corporate codes. Though, companies used soft law, as a means to increase the representation of women on boards, the research examines that structural change occurs in economies with binding legislation and sanctions.

2. Binding legislation and sanctions

Binding legislation would oblige companies to become compliant with the EU proposed directive, if the legislation includes sanctions. This would increase the number of women on boards and also include sanctions. Moreover, it would force structural economic change and rapidly increase the representation of women on boards.¹⁰⁴⁸ Having shown that, soft law has been ineffective in increasing the representation of women on boards. Binding legislation with sanctions is the most effective means to increase the representation of women on boards. The research examines the details of the French quota legislation, the Copé Zimmermann Act and PACTE law.

III. THE COPE ZIMMERMANN ACT AND PACTE LAW

The Copé Zimmermann Act¹⁰⁴⁹ is important legislation, which has had a determining effect on the French economy and corporate governance. The Copé Zimmermann Act was reinforced with the PACTE law. This add-on sanction strengthens the legislation, which states, if the board is non-compliant, the meeting discussions will be cancelled, when a non-compliant board participant is present. Before this law, the board

¹⁰⁴⁸ *ibid.*

¹⁰⁴⁹ n 71, French Legislation, Law No. 2011-103 of January 27, 2011 on the Balanced Representation of Women and Men on Boards of Directors and Supervisory Boards and Professional Equality (1).

appointment was cancelled but not the meeting discussions.¹⁰⁵⁰ This makes the sanction more pertinent, as the discussions are the focus and not the participants. This is a strong deterrent to dissuade non-compliance with the legislation. The research points out that, before binding legislation, women were hardly represented on boards of directors in France (A), and the results of passing legislation have shown structural changes in board composition and corporate governance (B).

A. PRIOR TO THE COPE ZIMMERMANN ACT

The EU Commission revealed that '[I]n economic decision-making, the proportion of women is lower than that of men at all levels of management and decision-making. Women represent only one in ten board directors of the largest publicly limited companies in the EU...'¹⁰⁵¹ The French women on boards legislation has led to legal, political and structural changes. Having discussed that, prior to the Copé Zimmermann Act, women were barely represented on boards of directors, the research examines the structural change on boards of directors in French companies following the entry into force of the Copé Zimmermann Act and PACTE law.

B. STRUCTURAL CHANGE ON BOARDS IN FRENCH COMPANIES

The Copé Zimmermann Act entered into force eleven years ago and is well-established and effective legislation, in facilitating structural change in board composition and in corporate economic governance in France. The French Senate Report confirmed that, the Copé Zimmermann Act is an example of effective of economic governance and

¹⁰⁵⁰ n 791, French Legislation, PACTE Law; The second sentence from paragraph 2 of Articles L. 225-18-1, L. 225-69-1 and L. 226-4-1 of the Commercial Code was removed, Article 189 (2019). This was to allow voiding irregular board decisions and discussions.

¹⁰⁵¹ n 292, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Strategy for Equality Between Women and Men 2010-2015, COM(2010) 491 final, 7.

parity on boards,¹⁰⁵² following the Norwegian legislation. The research found that, the French and Norwegian dilemma was to question where to situate the legislation (1), which has now been resolved, as the legislation includes women in decision-making positions on corporate boards in company law (2).

1. Economic corporate governance of the company

According to the French Senate Information Report, Made on Behalf of the Delegation for Women's Rights no. 45 (2010-2011) of October 19, 2010, women on boards legislation is accepted on two levels:

1. as a gender equality policy,
2. and, as an integral part of economic corporate governance of a company.

Women on the board of directors legislation is examined closely by international financial institutions, which has changed the view of corporate governance.¹⁰⁵³

2. Decision-making on corporate boards

Structural changes to the boards of directors are attributed to the women on boards legislation, after the implementation of the Copé Zimmermann Act. The Copé Zimmermann Act has 'contribut[ed] to the cause of women and a major contribution to our country (France)'.¹⁰⁵⁴

¹⁰⁵² n 1023, French Senate Report, Parity in Companies.

¹⁰⁵³ French Senate Information Report, Garriaud-Maylam Towards Parity for Corporate Governance, French Senate Information Report by Joëlle Garriaud-Maylam, Made on Behalf of the Delegation for Women's Rights no. 45 (2010-2011) (2010) <<http://www.senat.fr/notice-rapport/2010/r10-045-notice.html>> accessed 23 December 2021; n 784, French Government Report, 10 Years After the Law of 27 January 2011 on the Representation of Women and Men on Boards of Directors and Supervisory Boards.; n 1026, French Senate Report, Parity in Companies.

¹⁰⁵⁴ *ibid.*

CONCLUSION OF CHAPTER ONE

Soft law initiatives are important, but do not increase the representation of women on boards rapidly enough. According to the European Commission, the EU economy requires a greater number of women to enter the workforce, including women on boards. Recommendations, programmes and guidelines are soft law and weak, as they do not carry sanctions. Even when Member States have soft law, the soft law is different in each Member State. Not all Member States may be able to transpose EU soft law into national soft law, if their legal systems do not permit it.

The proposed women on boards directive is on the way to become binding legislation, but the directive has still not entered into force. The hard law proposed is not very hard, as it consists of tie-break quotas. Tie-break quotas are not hard quotas, but define criteria between two candidates. A preference would be given to the underrepresented sex, only if the two share equal qualifications. Despite the flexibility of the proposed directive, nine Member States consider it as direct interference in national sovereignty. Soft law has been mostly ineffective in increasing the representation of women on boards. The proposed directive was voted in Council in March 2022. European Parliament is set to begin negotiations with the Member States. Hard law may present a challenge in all Member States. A Minimum Harmonisation Programme would accompany the Member States to reach forty percent of the representation of women on boards in phases.

Chapter Two

FAILURES OF EU AND NATIONAL INSTITUTIONS

Despite national legislation and soft law, representation of women on boards remained a notion, as the majority of Member States had not made it a priority and, despite all existing EU gender equality policies and directives calling on the Member States to pass legislation. Therefore, in 2011, the European Commission invoked Article 288 of the TFEU, calling for EU intervention with the proposed directive, as Member States were not able to increase the representation of women on boards on their own initiative. According to Article 288 of the TFEU,

[t]o exercise the Union's competences, ... institutions shall adopt regulations, directives, decisions, recommendations and opinions. ...A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.¹⁰⁵⁵

Article 288 of the TFEU is the legal basis for the transfer and the right for the EU to propose binding women on boards legislation, which will allow each Member State to choose the form and methods of implementing the directive into national law.¹⁰⁵⁶

The research has shown that, EU intervention has not worked (Section 1), as women on boards proposed directive has been legally challenged by the Member States (Section 2).

¹⁰⁵⁵ Consolidated Version of the Treaty on the Functioning of the European Union, Part Six – Institutional and Financial Provisions Title 1 – Institutional Provisions, Chapter 2 - Legal acts of the Union, adoption procedures and other provisions Section 1 - The legal acts of the Union, Article 288 (former Article 249 TEC) (2012) OJ C 326, 171–172 <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E288>> accessed 5 July 2019.

¹⁰⁵⁶ *ibid.*

SECTION 1 EU INTERVENTION HAS NOT WORKED

The European Commission planned top-down intervention, with the proposed directive, as a means to push through the legislation to oblige the Member States to increase the representation of women on boards to forty percent. It will take the Member States many more years to reach parity on boards, if the directive does not enter into force in the near future.

Just 1 in 7 board members (13.7%) at Europe's top companies is a woman. This is only a slight improvement from 11.8% in 2010. At this slow rate of progress it would still take around 40 years to even get close to gender balance in boardrooms (at least 40% of both sexes).¹⁰⁵⁷

The research points to the Commission intervention with the proposed directive for economic reasons (§1), though, there remain complications with the proposed directive (§2).

§1: ECONOMIC JUSTIFICATION

The role of the European Commission is to coordinate with other EU institutions to bring Member States together under its leadership and ensure that Member States adhere to Article 23 of the Charter of Fundamental Rights and Principles, which calls for equality in employment and the use of positive action.¹⁰⁵⁸ The Commission

¹⁰⁵⁷ European Commission Press Release, Women on Boards: Commission Proposes 40% Objective, IP/12/1205 (Brussels, 14 November 2012) <http://europa.eu/rapid/press-release_IP-12-1205_en.htm> accessed 27 November 2017.

¹⁰⁵⁸ n 76, Charter of Fundamental Rights of the European Union, Article 23.

proposed a single interventionist framework for all Member States, despite the different stages of advancement of gender equality in the Member States.

According to EU institutions, the proposed women on boards directive was a matter of economic rationale for intervention, which could not be postponed any longer. The European Economic and Social Committee advanced that, women make up fifty-one percent of the EU population. Therefore, binding legislation is ' a social and economic necessity...[for] Member States and businesses, as it hugely impacts ... sustainable growth and GDP.' ¹⁰⁵⁹ The Committee called on the Council to continue talks on the proposed women on boards directive and gender equality strategic programme to improve the situation by 2030. The EU proposed directive will take precedence, when it is passed.

As the research finds, Member States will be obliged to comply with the legislation (I), which is part of the economic strategic plan to increase GDP, and, focuses on increasing the number of on boards of directors (II).

I. EU VERSUS NATIONAL LAW

The primacy of EU law is a legal principle, which takes precedence over national law.¹⁰⁶⁰ The precedence principle applies to all European acts with binding force. Therefore, Member States may not apply a national rule, which would contradict European law. The research finds that the Commission proposed the women on boards directive for economic reasons (A), though, several Member States remain opposed to EU intervention (B).

¹⁰⁵⁹ The European Economic and Social Committee Report, Gender Equality Issues (2019) <<https://www.eesc.europa.eu/en/our-work/opinions-information-reports/opinions/gender-equality-issues-own-initiative-opinion>> accessed 5 July 2019.

¹⁰⁶⁰ n 511, EU law, Law of Precedence or Primacy of EU law.

A. THE PROPOSED WOMEN ON BOARDS DIRECTIVE

The proposed women on boards directive is binding legislation to improve 'gender balance among non-executive directors of companies listed on stock exchanges.' The directive called for forty percent of women on boards 'in economic decision-making at the highest level'.¹⁰⁶¹ The research has found that the proposed directive has failed (1), as there remains strong opposition to the proposed directive (2).

1. Proposal failure

The proposed directive has faced much opposition from Member States, who disagree with binding legislation and prefer to implement national hard law or remain with soft law. This is a failure, as there are too many different legal systems, which has led to a fragmented approach.

Despite the resistance, the proposed directive has been finally voted by the Member States in March 2022 and is on its way to become a directive passes. EU institutions will need to negotiate separately with each Member State in Parliament, and especially, with the nine Member States, who disagree on the basis of sovereignty and constitutionality.

2. Member States' opposition to the proposed directive

The opposing Member States to the proposed directive come from all geographic regions of the European Union. The Parliaments of the Czech Republic, Denmark, the

¹⁰⁶¹ European Parliament Report, Women on Boards Directive Proposal, Parliamentary Questions (2018) <https://www.europarl.europa.eu/doceo/document/O-8-2018-000123_EN.html> accessed 5 July 2019.

Netherlands, Poland, Sweden and former EU-Member State, the UK. These Member States provided Reasoned Opinions why they object to the proposed directive.¹⁰⁶²

Having noted that the proposed directive has failed in nine Member States, the research examines the reasons for the opposition.

B. DIVERGENCE OF MEMBER STATES' REASONED OPINIONS

The research finds that EU intervention with the proposed directive was not welcome by all the Member States (1), though, several Member States decided to pass national women on boards legislation for sovereignty reasons (2).

1. Divergence of Member States' Reasoned Opinions

The proposed directive is a hard law solution to the failure of soft law in the EU Member States, despite differences of opinion. Different Member States object to EU interference with its national policies and legislation. Though, the Reasoned Opinions given for the disagreement about the proposed directive are linked to the EU institutions' intervention in national policies, the research examines that several Member States passed national women on boards legislation to avoid the directive.

2. An opportunity to pass national legislation

Member States, such as, Denmark, the Netherlands and Sweden passed national legislation, which went beyond what the directive called for.¹⁰⁶³

¹⁰⁶² n 6, European Parliament, Gender Balance on Boards.

¹⁰⁶² *ibid*; Note that the Netherlands has changed its position and has passed women on boards national legislation.

¹⁰⁶³ *ibid*; n 29, Proposal for a Directive.

Having shown that several Member States decided to pass national legislation, the research examines the reasons for EU intervention were based on macroeconomics and increasing GDP in the Single Market.

II. THE EU ECONOMIC STRATEGIC PLAN TO INCREASE GDP

The plan to increase Gross Domestic Product (GDP) in the European Union was a consequence of the global financial crisis of 2008-09. The research has shown that European Union institutions analysed the economic structural framework of the EU and compared the employment rate of its principal trading partners (A), though, despite a strategic plan to increase the employment of women, efforts failed (B).

A. THE EU EMPLOYMENT RATE

The EU employment rate was found to be lower than that of the US or Japan, its principal trading partners.¹⁰⁶⁴

- In the EU in 2009, the workforce total was 63.6%.
- In the EU in 2020, the workforce total was 67.6 %.¹⁰⁶⁵
- In Japan in 2009, the workforce total was 70.2%.
- In Japan in 2020, the workforce total was 77.4%.¹⁰⁶⁶
- In the U.S. in 2009, the workforce total was 67.3%.
- In the U.S. in 2020, the workforce total was 67%.¹⁰⁶⁷

¹⁰⁶⁴ Eurostat Statistics, Employment Annual Statistics (2021) <[https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Employment - annual statistics](https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Employment_-_annual_statistics)> accessed 23 December 2021; Eurostat Statistics, Gender Statistics (2021) <[https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Gender statistics#Labour market](https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Gender_statistics#Labour_market)> accessed 23 December 2021.

¹⁰⁶⁵ OECD Statistics, Employment Rate (2009 and 2020) <<https://data.oecd.org/emp/employment-rate.htm>> accessed 23 December 2021.

¹⁰⁶⁶ *ibid.*

¹⁰⁶⁷ *n* 1065.

The research points out that, the European Union faced a shortage of labour, due to baby boomers retiring and massively leaving the workforce (1), which created important employment gaps among the Member States (2).

1. A declining workforce

The EU workforce, composed of men and women, has been on the decline, with two million people leaving the labour market each year. The employment rate decreased between 2019 and 2020.

Having examined that the EU employment rate has been unsatisfactory, the research points out that, there is uneven employment of women in the Member States.

2. Employment gaps

Finland and Sweden have the lowest employment gap. The Czech Republic, Poland, Hungary, Romania, Italy, Greece and Malta have the highest, due to fewer women employed in these Member States.¹⁰⁶⁸ Having shown that the EU employment rate of women is low, the research shows that the EU economic plan is based on increasing the employment of women, including women on boards.

B. EMPLOYMENT OF WOMEN IN THE EUROPEAN UNION

The Europe 2020 Strategy called for an increase of the percentage of women and men entering the workforce to 75 percent by 2020.¹⁰⁶⁹ In order to reach this objective, more women were needed to enter the workforce. Companies were asked to provide

¹⁰⁶⁸ n 1065.

¹⁰⁶⁹ n 1064, Eurostat Statistics, Employment Annual Statistics; n 41, European Commission Report, Women in Economic Decision-Making in the EU, Progress Report. A Europe 2020 Initiative (2012) 20.

opportunities to women to top management, including on boards.¹⁰⁷⁰ However, this figure was not met, as there were 67.6 percent of women on boards in the European Union in 2020, it shows an increase from 2009, where the figure stood at 63.6 percent, but still far from the initial target of 75 percent.¹⁰⁷¹ The research sustains that the EU economy called on increasing the percentage of women and men in the labour market to remain globally competitive (1), despite challenging demographics, different company law and gender equality policies, which are barriers to increase the representation of women on boards (2).

1. An Economic Strategic Plan

According to the EU 2010-2015 Strategic Plan, the macro-economic argument sustained, that an increased employment rate with more women in the workforce would lead to a sustainable EU economy and increase GDP.¹⁰⁷² This would lead to structural change in companies, including an increase in the representation of women on the boards of directors. Having considered that the EU strategic plan calls for increasing the employment rate of women and on boards, the research examines demographics and the EU economy.

2. Demographics and the EU economy

Increasing the number of women in the workforce is part of the growth strategy for the European Union to stay globally competitive.¹⁰⁷³ The research has found that the uneven and unequal employment practices among the Member States weakens the

¹⁰⁷⁰ *ibid*, 7.

¹⁰⁷¹ n 1065.

¹⁰⁷² n 41, European Commission Report, Women in Economic Decision-Making in the EU, Progress Report. A Europe 2020 Initiative (2012) 5.

¹⁰⁷³ Catalyst Report, Lois Joy, 'Advancing Women Leaders: the Connection between Women Board Directors and Women Corporate Officers' (The Catalyst, 2008) <<https://www.catalyst.org/research/advancing-women-leaders-the-connection-between-women-board-directors-and-women-corporate-office>

overall economic competitiveness of the European Union as '...different company law rules and sanctions for not complying with gender balance laws ... lead to complications for businesses ...'¹⁰⁷⁴ Having considered the EU strategic plan, a low employment rate of women and on boards, the research assesses the proposed women on boards directive.

§2: A CRITICAL ASSESSMENT OF THE PROPOSED WOMEN ON BOARDS DIRECTIVE

The proposed women on boards directive is targeted at public limited companies (and private, though not the focus of this research) on European stock exchanges. The proposed directive calls for companies in the Member States to set women on boards targets to forty percent (non-executive board directors). Member States may extend the selection process to executive and management boards.¹⁰⁷⁵

This research has focussed on supervisory boards and non-executive board directors. Companies are required to report women on boards statistics and selection strategy in annual reports and websites. Companies are subject to sanctions, if non-compliant with the directive. The derogation clause allows Member States to annul the application of the directive, if the same national law exists, replacing EU law.¹⁰⁷⁶ According to the proposed directive, the selection process is required to use a tie-break quota, when

rs/> accessed 5 July 2019; n 292, European Commission Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'Strategy for Equality Between Women and Men 2010-2015' COM (2010) 491 final, 7; n 335, Strategic Engagement for Gender Equality 2016-2019.

¹⁰⁷⁴ EU law, EU Fundamental Rights, 7 <https://ec.europa.eu/info/policies/justice-and-fundamental-rights_en> accessed 5 July 2019; n 1060, European Commission Press Release, Women on Boards: Commission Proposes 40% Objective.

¹⁰⁷⁵ n 29, Proposal for a Directive of the European Parliament and of the Council on Improving the Gender Balance among Non-Executive Directors of Companies Listed on Stock Exchanges and Related Measures.

¹⁰⁷⁶ *ibid.*

two candidates are equally qualified. The preference will be given to the woman, the underrepresented sex. The preference principle calls on examining all information concerning both candidates fairly, but the underrepresented candidate would be selected, which is generally a woman. This tie-break quota is the key regulatory requirement in the proposed directive, ensuring compliance with EU case-law.¹⁰⁷⁷

When comparing the proposed directive with French women on boards legislation, the Copé Zimmermann Act has provided more specific information, than the requirements in the proposed directive, as it included company turnover, number of full-time employees, the number of women on boards and setting a binding forty percent quota with strict sanctions.

The proposed directive has not yet entered into force. The objective of the proposed directive is to harmonise board selection and composition in the Member States. Though, it has polarised many Member States and created strong opposition to EU institutions, for reasons of subsidiarity, incompatibility and interference in national law.

The research has shown that the German government opposed the proposed directive, citing conflicts of interest, such as restricting business freedom and interfering with national law (I), therefore, a Minimum Harmonisation Programme, based on the Copé Zimmermann Act, may provide a solution to accompany Member States to work towards the requirements in the proposed directive (II), though, not all Member States will be in agreement, as they remain opposed to the use of quotas to increase the representation of women on boards (III).

¹⁰⁷⁷ *ibid*, The positive action case law of the CJEU and judicial review included the following cases: C-450/93: Kalanke (1995 ECR I-3051) C-450/93 *Eckhard Kalanke v Freie Hansestadt Bremen* [1995] ECR I-03051, C-409/95: Marschall (1997 ECR I-6363) Case C-409/95 *Marschall v Land Nordrhein- Westfalen* [1997] ECR I-6363, C-158/97: Badeck, (2000 ECR I-1875) Case C-158/97 *Georg Badeck and Others, interveners: Hessische Ministerpräsident*, C-407/98: Abrahamsson (2000 ECR I-5539) Case C-407/98 *Abrahamsson v Fogelquist* [2000] ECR I-5539; Selanec and Senden (n 175) 5.

I. THE GERMAN GOVERNMENT REASONED OPINION TO THE PROPOSED DIRECTIVE

According to the German government, the proposed EU women on boards directive restricted business freedom. The Government did not accept that EU institutions intervene in national law. The Commission reply stated that intervention was necessary to keep the EU economy competitive, as soft law was ineffective. The research points out that the proposed directive has brought about conflicts of interest about the role of the EU and EU law in Member State national law (A), as the German government remained opposed to intervention (B).

A. CONFLICTS OF INTEREST

Women on boards is not only a corporate governance subject, but also the subject of European institutions' relations with the Member States, which turn to the principle of subsidiarity or may 'regulate the exercise of the Union's non-exclusive powers. It rules out Union intervention when an issue can be dealt with effectively by Member States themselves...' ¹⁰⁷⁸ The Member States have reasoned opinions of what constitutes the basis of intervention in its national affairs. This requires clarification about the role of the European Union and EU law in Member State national law.

European law is constantly developing new Treaties. The Treaties and the ECJ are founded on a legal order. The powers of the EU consist of rights of sovereignty, which may include the transfer of Member States powers to the EU. Member States have agreed to limit their sovereignty in certain areas. National law is limited to the Member

¹⁰⁷⁸ European Parliament Report, The Principle of Subsidiarity (2020) <<https://www.europarl.europa.eu/factsheets/en/sheet/7/the-principle-of-subsidiarity#:~:text=the%20EU's%20competences.In%20areas%20in%20which%20the%20European%20Union%20does%20not%20have,the%20Member%20States%2C%20but%20can>> accessed 13 July 2020.

States. The EU would have to justify intervention, by way of the subsidiarity principle. Several Member States declare they are able to increase the representation of women on boards without binding legislation.¹⁰⁷⁹ The research notes that the EU institutions claim that, intervention with the proposed directive is justified for economic reasons (1), while the German government position stated there were enough directives and that, the proposed women on boards directive was unnecessary (2).

1. Justification of EU intervention with the proposed directive

According to Article 5§3 of the TEU, EU intervention is justified

... if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.¹⁰⁸⁰

According to the German government, the Commission violated Article 23 of the Charter of Fundamental Rights, as the Government considered it was the sole authority to decide on its national measures, and should not be forced by the EU to comply with the proposed directive.¹⁰⁸¹ The German government believed that, Article 23 of the Charter of Fundamental Rights, was sufficient without binding legislation, The Article called on '[e]quality between women and men ... in all areas, including employment, work and pay. The principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the underrepresented sex'.¹⁰⁸²

¹⁰⁷⁹ n 232, European Parliament Report, 51.

¹⁰⁸⁰ Consolidated Version of the Treaty of the European Union, C 326/15 (2012) Article 5 §3 https://eur-lex.europa.eu/resource.html?uri=cellar:2bf140bf-a3f8-4ab2-b506-fd71826e6da6.0023.02/DOC_1&format=PDF; Raphael Koch, 'Board Gender Quotas in Germany and the EU: An Appropriate Way of Equalising Participation of Women and Men' (2015) 20(1) Deakin Law Review 53-74.

¹⁰⁸¹ *ibid.*

¹⁰⁸² n 76, EU law, Charter of Fundamental Rights, Article 23.

Before passing national binding legislation, the German government position was to maintain the *status quo*, which would allow companies to carry on with self-regulation and report targets with the use of flexi-quotas.¹⁰⁸³ At the time, the Government maintained a strong opposition to quotas, EU interference and sovereignty over its legislation. Though, the proposed directive is directly linked to company law and the economy of the European Union. No other directive or legislation had been so specific about parity, company boards and the impact on the EU economy. The German position was fixed in gender equality legislation, though the proposed directive is first company law and then a gender equality subject.

Having shown the German government opposition to the proposed directive and EU institutions justification of intervention citing Article 5§3 of the TEU, the research examines EU legislation and the Directive on Equal Treatment in Employment and Occupation.

2. The Directive on Equal Treatment in Employment and Occupation

The German government did not object to increasing the representation of women on boards. However, according to the Government, there were enough directives about gender equality and equal treatment in EU law,¹⁰⁸⁴ notably, the Directive on Equal Treatment in Matters of Employment and Occupation 2006/54/EC.

¹⁰⁸³ n 41, European Commission Report, Women in Economic Decision-Making in the EU, Progress Report. A Europe 2020 Initiative (2012) 20.

¹⁰⁸⁴ Council Directive 2000/78/EC of 27 November 2000 Establishing a General Framework for Equal Treatment in Employment and Occupation (2000) OJ L303, 16–22 <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32000L0078>> accessed 5 July 2019; Council Directive 2004/113/EC of 13 December 2004 Implementing the Principle of Equal Treatment between Women and Men in the Access to Goods and Services and the Supply of Goods and Services (2006) OJ L 153M, 294–300 <<https://eur-lex.europa.eu/legal-content/FR/TXT/?uri=celex%3A32004L0113>> accessed 5 July 2019; Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the Implementation of the Principle of Equal Opportunities and Equal Treatment of Men and Women in Matters of Employment

The German government considered one more directive, as unnecessary and cited four provisions in the Equal Treatment in Employment and Occupation directive already in place.¹⁰⁸⁵

According to Article 2 of the Directive on Equal Treatment in Employment and Occupation, the legislation makes reference to equal treatment and earlier EU legislation, the Council Directive 76/207/EEC of 9 February 1976 on the Implementation of the Principle of Equal Treatment for Men and Women as regards access to Employment.¹⁰⁸⁶

According to Article 9 (9) of the Council Directive 2000/78/EC of 27 November 2000 Establishing a General Framework for Equal Treatment in Employment and Occupation, the legislation guarantees 'equal opportunities for all... and ...full participation of citizens in economic ... life.'¹⁰⁸⁷

According to Article 10 Council Directive 2000/78/EC of 27 November 2000 Establishing a General Framework for Equal Treatment in Employment and Occupation, the Council adopted a Directive enforcing the principle of equal treatment between women and men and protecting against discrimination in employment.¹⁰⁸⁸

and Occupation (Recast) (2006) OJ L204, 23-36 <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32006L0054>> accessed 5 July 2019.

¹⁰⁸⁵ *ibid*, Council Directive 2004/113/EC of 13 December 2004 Implementing the Principle of Equal Treatment between Women and Men in the Access to Goods and Services and the Supply of Goods and Services, 294–300; *ibid*, Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the Implementation of the Principle of Equal Opportunities and Equal Treatment of Men and Women in Matters of Employment and Occupation (Recast), 23–36.

¹⁰⁸⁶ n 1084, Council Directive 2000/78/EC of 27 November 2000 Establishing a General Framework for Equal Treatment in Employment and Occupation, Article 2.

¹⁰⁸⁷ *ibid*, Article 9.

¹⁰⁸⁸ n 1086, Article 10.

According to Article 28 Council Directive 2000/78/EC of 27 November 2000 Establishing a General Framework for Equal Treatment in Employment and Occupation, positive action allowed Member States to improve the legislation, if more favourable terms were required. The research considers that the directive was a starting point, as the legislation refers to equal treatment, but this did not pertain specifically parity and women on boards. Moreover, the directive does not include targets, quotas or sanctions.

B. THE IMPLICATION OF THE PROPOSED DIRECTIVE ON GERMAN LEGISLATION

The German government and business sectors were concerned about women on boards legislation, as it was not clear which companies would be concerned by the legislation. The consequences of the EU proposed women directive pressured the German government to pass national women on boards legislation in 2015, with thirty percent of representation of women on boards and which also applies to shareholder representatives and co-determination law. This law states that companies with two thousand employees or more would be employee representatives and represent half of the board on supervisory boards.¹⁰⁸⁹

The research found that, the German government considered the proposed directive, as a threat to national sovereignty and objected to EU intervention in national law (1), though, EU intervention was a result of a fragmented legal approach among the Member States and called for a minimum harmonisation (2).

1. German national sovereignty

The proposed directive allows Member States to choose the most adapted sanctions

¹⁰⁸⁹ n 1086, Article 28; n 232, European Parliament Report, 36-38.

and minimum regulation, as Member States may improve the minimum regulation.¹⁰⁹⁰

According to the German government, EU intervention proposing the directive and a minimum harmonisation in Member States is a threat to German national sovereignty, despite the flexibility allowing Member States to regulate different aspects of the proposed directive.¹⁰⁹¹ This had always been the official line from the Government, until the change of government in 2022. The newly formed German government has finally changed its position about women on boards and tie-break quotas.¹⁰⁹²

Having shown that the proposed directive was considered a threat to national sovereignty until the change in the text of the proposed directive at the beginning of 2022, the research examines the EU institutions' justification for intervention.

2. Justification for EU intervention and fragmentation

The reasons for EU intervention is founded on the fragmented legal approach to increase the representation of women on boards. The Member States do not share a common approach, which has caused concern for a Single EU Market. Member States use soft and hard law, from the comply or explain principle with disclosure for non-compliance to binding legislation with sanctions. Other Member States use a voluntary self-regulation system and may make the use of targets.¹⁰⁹³

Furthermore, other Member States have limited policies in place. Having explained that Member States may consider the proposed directive a threat to national sovereignty, the research examines constitutionality issues and women on boards legislation.

¹⁰⁹⁰ n 29, Proposal for a Directive, 10-11.

¹⁰⁹¹ *ibid.*

¹⁰⁹² Preiss (n 315) 'Parliament Pushes for Gender Balance on Corporate Boards after Decade-long Deadlock on Legislation.'

¹⁰⁹³ *ibid.*

SECTION 2 WOMEN AND BOARDS AND CONSTITUTIONALITY

The legality of women on boards has been and is challenged on all fronts, from national parliaments, Constitutional Councils to industry. The structural nature of corporate governance practices are founded in business and government relationships, founded in corporatist cultures, such as in Europe, where business works with government. This is a possible explanation why women on boards has become a constitutional matter, where gender equality is rooted in democratic principles and, where women have rights to work on the boards of directors.¹⁰⁹⁴ This is, in addition, to the economic argument for women on boards. The proposed women on boards legislation has gone through intense legal scrutiny in the Member States, which has raised concerns of constitutionality, and called for constitutional reform, such as, with the French women on boards legislation. It is a considerable challenge to pass binding women on boards legislation under these circumstances. This is the perfect example, which has demonstrated that, the board of directors in public limited companies and the business world are greatly dependent on the political environment. In France, the Constitutional Council rejected the inclusion of women on boards in the 2006 proposed law, as Number 14 of the Council Decision no. 2006-533 DC of March 16, 2006, Law on Equal Pay between Women and Men only recognised gender equality for women in electoral office, but not for women in private companies on boards of directors. Numbers 15 and 16 of the Decision considered that, though women had the same rights as men, there was no mention of professional equality, such as with the electoral mandates and

¹⁰⁹⁴ Julie C. Suk, 'Gender Parity and State Legitimacy: From Public Office to Corporate Boards (2012) 10(2) International Journal of Constitutional Law 454 <<https://doi.org/10.1093/icon/mos012>> accessed 5 July 2019.

therefore, did not consider positive action, but has taken a formal equality approach. Here is the exact text regarding the Decision:

14. ...'The law promotes equal access of women and men to electoral mandates and elective functions', it follows from parliamentary proceedings that this paragraph only applies in elections to political mandates and functions;

15. Considering that, while the search for balanced access of women and men to responsibilities other than elective political office is not contrary to the constitutional requirements mentioned above, it cannot, without disregarding them, make prevail the consideration of sex over that of capacities and common utility; that, therefore, the Constitution does not allow the composition of the governing or advisory bodies of legal persons governed by public or private law to be governed by binding rules based on the sex of the persons;

16. Considering that it follows that by imposing respect for determined proportions between women and men on the boards of directors and supervisors of private companies and public sector undertakings, on management committees company, among the staff delegates, in the lists of candidates for industrial tribunals and joint public service bodies, the provisions of Title III of the law referred are contrary to the principle of equality before the law; that it is therefore necessary to declare them contrary to the Constitution; that the same applies to the other provisions of Title III, because of their inseparable nature from the previous ones.¹⁰⁹⁵

The Constitution was amended in 2008. According to the 2008 Amendment, Article 1 a specific gender equality reference was added, which mentioned first access to electoral offices and then, the wording 'professional responsibilities'. It was only after the 2008 Amendment was revised that, Law 2011-103 of 27 January 2011 on the Balanced Representation of Women and Men on Boards of Directors and Supervisory Boards and on Professional Equality (1) could be legislated. This Amendment indicated that, the Constitutional Council viewed women on boards, as a business concern and a different matter from women in electoral offices. Though, amending the French Constitution was a formidable task, it was revised for democratic reasons. National

¹⁰⁹⁵ n 891, French Constitutional Council, Decision no. 2006-533 DC of March 16, 2006, Law on Equal Pay between Women and Men, 2006.

constitutions 'are where equality and rights are articulated and emboldened. As such, constitutions provide the strongest legal means to protect the fundamental rights and freedoms of women.'¹⁰⁹⁶

When advancing women on boards legislation, one thinks first of gender equality. However, the first reference is the Constitution, as it is the highest law of a nation. Gender equality inclusion in a Constitution is the basis for all other rights in the Constitution. When no specific mention to gender equality is stated in a Constitution, women are unequally treated and may be excluded in fully participating in professional life, as the Council Decision declared. This has become a gender equality concern, as more nations are amending their Constitutions to include gender equality provisions.

The research has taken the example of the 2008 French amendment to the Constitution, to show the difficult and historic change in French law, with the Law 2011-103 of 27 January 2011 on the Balanced Representation of Women and Men on Boards of Directors and Supervisory Boards and on Professional Equality (1) (§1), which has since raised questions about amending national Constitutions and the role of the EU in proposing the women on boards directive (§2).

§1 CONSTITUTIONALITY AND EU LAW

EU Member States may have to consider amending their constitutions in order to pass women on boards legislation. France amended its Constitution in 2008, which now includes, the wording 'women in professional life', to put into place national women

¹⁰⁹⁶ n 196, Forster, Foreword, 2; n 71, French Legislation, Law No. 2011-103 of January 27, 2011 on the Balanced Representation of Women and Men on Boards of Directors and Supervisory Boards and Professional Equality (1); Suk (n 1094) 454.

on boards legislation. Belgium amended its Constitution to include gender equality in Article 10 in 2002. The Gender Act of 2007 (updated in 2014) is the principal legislation for gender equality in Belgium. Austria amended its Constitution in 1998 to include gender equality in Article 7.¹⁰⁹⁷ In contrast, other Member States did not need to include a specific reference to women and men in their Constitutions, as the mention already existed. The research explains that the German Principle of Constitutional Equality granted equality to men and women (I), therefore, the legal basis of the German quota legislation is founded in the Principle of Constitutional Equality (II).

I. THE PRINCIPLE OF CONSTITUTIONAL EQUALITY IN GERMAN LAW

The German Constitution founding principle is based on the Basic Law or the Principle of Constitutional Equality. The research notes that, the Basic Law grants equal rights to women and men (A), though, Article 23 of the Charter of Fundamental Rights of the European Union, specifies equality between men and women in employment (B). The German Constitution did not need to be amended, as the French Constitution, to extend additional rights to women, as it already existed.

A. THE GERMAN BASIC LAW

The Basic Law entered into force in 1949 by two-thirds majority of the Länder in the Parliamentary Council, as follows

¹⁰⁹⁷ n 196, Forster, Foreword, 2; Institute for the Equality of Women and Men Report, Amendment to the Belgian Constitution 2002 (2015) <https://igvm-iefh.belgium.be/fr/activites/politique/modification_de_la_constitution> accessed 5 July 2019; Belgian Legislation, The Gender Act of 10 May 2007 to Combat Certain Forms of Discrimination (BS 30 V07) (amended by the Act of 30 December 2009 on various provisions (2007) <<https://www.ilo.org/dyn/travail/docs/2525/Loi%20du%2010%20mai%202007%20tendant%20%C3%A0%20lutter%20contre%20certaines%20formes%20de%20discrimination.pdf>> accessed 5 July 2019; The Austrian Constitution, Article 7 <<https://constitutionnet.org/sites/default/files/Austria%20FULL%20Constitution.pdf>> accessed 5 July 2019; Nora Gresch and Birgit Sauer, Debates on Women's Representation in Austria. Or: The Development of the Pitfalls of a Conservative Gender Regime, EUI Working Paper (2015) 11 <https://blogs.eui.eu/genderquotas/wp-content/uploads/sites/24/2015/07/Austria_LAW_2015_32.pdf> accessed 5 July 2019.

[c]onscious of their responsibility before God and man, Inspired by the determination to promote world peace as an equal partner in a united Europe, the German people, in the exercise of their constituent power, have adopted this Basic Law...This Basic Law thus applies to the entire German people.¹⁰⁹⁸

The research confirms that, the inclusion of 'the entire German people' in the Constitution allowed for German women on boards law to pass (1), as the Basic Law, acknowledges equal treatment between men and women (2).

1. The Principle of Constitutional Equality in German Law

According to Article 3 of the German Constitution, 'all persons shall be equal before the law.' Article 3 stated that women and men have equal rights and women shall not be discriminated because of their sex. Germany adopted Article 3, which gave women equal rights to men much earlier than in other Member States. It was the only European country, besides Switzerland, to include this equality article in its Constitution. The Principle of Constitutional Equality is upheld by administrative law, civil law and constitutional law in German courts.¹⁰⁹⁹ Having examined the principle of constitutional equality in German law, the research turns to the legal basis of Article 3(2) in the German Constitution and the notion of representation of women on boards.

2. Article 3(2) of the German Constitution

The German Constitution provided the legal basis for the women on boards legislation.

¹⁰⁹⁸ n 60, The German Constitution; European Commission Report, U Lembke, 1.1, Country Report on Gender Equality, Germany, Reporting period 1 January 2017 – 31 December 2017 (2018).

¹⁰⁹⁹ The German Constitution, Article 1(1) and 1(2), The German Basic Law (Grundgesetz), Die Grundrechte <https://www.bundestag.de/parlament/aufgaben/rechtsgrundlagen/grundgesetz/gg_01-245122> accessed 5 July 2019; The German Constitution, The Basic Law, Article 1(3) <https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html> accessed 3 September 2019.

According to the Basic Law and its interpretation, women should be equally represented on the boards of directors in public limited companies in Germany. Article 3(2) of the German Constitution¹¹⁰⁰ is the principle of equal rights legislation for women and men and the legal basis of national quota legislation. German women comprise fifty percent of the population and are well educated. Therefore, women should not be excluded from the board of directors, per Article 3(2) of the Constitution, especially, since German companies lacked qualified professionals, which has had a consequence on business and the economy. Therefore, this was not only a legal problem, but a political and economic one to increase the representation of women in decision-making positions in companies.¹¹⁰¹

According to the Basic Law, the German State is responsible for guaranteeing equal rights to men and women.¹¹⁰² Having justified that, the German legislation, the principle of constitutional equality in German law, Article 3(2) is the legal basis for national women on boards legislation, the research examines the Charter of Fundamental Rights of the EU, which the German government has repeatedly referred to. The German government maintained its opposition for ten years against EU intervention with the proposed directive. However, the German government has finally approved of the proposed directive in March 2022, voting in favour of increasing the representation of women on boards in the European Council.

B. THE CHARTER OF FUNDAMENTAL RIGHTS OF THE EU

In addition to the Basic Law, the German government referred to Articles 20 to 26 of the Charter of Fundamental Rights of the European Union, which are gender equality provisions. The research considers that, the Charter of Fundamental Rights of the

¹¹⁰⁰ n 641, The German Constitution, The Basic Law Article 3 (2).

¹¹⁰¹ n 770, McDermott Will & Emery Communication.

¹¹⁰² *ibid.*

European Union provisions form the basis of European Union values (1), and that, these EU values were the legal basis to pass national German binding women on boards legislation (2).

1. Article 23 of the Charter of Fundamental Rights of the European Union

The German government recognised Article 23 of the Charter of Fundamental Rights of the European Union,¹¹⁰³ as the legal basis for binding quota legislation, since soft law had proven ineffective. Article 23 of the Charter of Fundamental Rights of the European Union, calls for '[e]quality between women and men must be ensured in all areas, including employment...'.¹¹⁰⁴

Having examined Article 23 of the Charter of Fundamental Rights of the European Union, which guaranteed equality in all areas, the research concludes that the interaction of EU and German law supported national women on boards legislation.

2. Interaction of the Basic Law and Charter of Fundamental Rights of the EU

The combination of the Basic Law and the Charter of Fundamental Rights of the European Union formed the legal basis for the German government to pass binding national women on boards legislation.

Having explained that, the German government passed national legislation, based on the Basic Law and Article 23 of the Charter of Fundamental Rights of the European Union, the research turns to the German quota legislation.

¹¹⁰³ n 76, Charter of Fundamental Rights of the European Union.

¹¹⁰⁴ *ibid.*

II. GERMAN QUOTA LEGISLATION

The research explains that, the background to with a low percentage of women on boards in public limited companies prior to the national women on boards legislation entering into force, which has greatly significantly increased (A) and has been effective, though it has not reached the forty percent quota called for by the proposed directive (B).

A. BACKGROUND TO QUOTA LEGISLATION

The German women on boards quota legislation entered into force in 2015. However, at that time, women represented seven percent of supervisory board directors on the DAX Stock Exchange. In 2018, , there were 30.9 percent of women on boards of 1564 board directors. This was an increase of 9.1 percent.¹¹⁰⁵ There were thirty-four percent of women on boards in 2019¹¹⁰⁶ and thirty-six percent of women on boards in 2021.¹¹⁰⁷ Having shown that the German quota legislation led to an important increase of the representation of women on boards, the research examines the effectiveness of the legislation.

B. EFFECTIVENESS OF THE GERMAN QUOTA LEGISLATION

The quota legislation has mostly been effective in Germany, However, there has been a slowdown and without quota legislation, soft law means to increase the representation of women on boards would have been ineffective.¹¹⁰⁸ The research has

¹¹⁰⁵ Investigate Press Release, Monika Schulz-Strelow 'FidAR WoB-Index: 75 DAX Companies Continue to Plan with Zero Board Diversity / FidAR Calls to End 90 Percent Male Quota in Top Ranks of German Corporations' (Frauen in die Aufsichtsräte, 2020) <<https://www.investegate.co.uk/fidar---frauen-in-die-aufsic/eqs/fidar-wob-index--75-dax-companies-continue-to-plan-with-zero-board-diversity---fidar-calls-to-end-90-percent-male-quota-in-top-ranks-of-german-corporations/20200630090005ELJRW/>> accessed 3 January 2021.

¹¹⁰⁶ n 784, French Government Report, , 10 Years After the Law of 27 January 2011 on the Representation of Women and Men on Boards of Directors and Supervisory Boards.

¹¹⁰⁷ n 24, OECD Statistics, Employment : Female Share of Seats on Boards of the Largest Publicly Listed Companies.

¹¹⁰⁸ *ibid.*

shown that the German quota legislation led to an important increase of the representation of women on boards and that it was very effective. Though, there are several listed companies that remain without women on boards.

§2 AMENDING NATIONAL CONSTITUTIONS AND LEGITIMACY OF THE EU

The reference to equality in constitutional law ensures parity in political and private sector initiatives for women. The constitution of a nation is the most important legal means, guaranteeing fundamental rights and includes gender equality. Without the specific mention of gender, men and women, national governments would be obliged to amend their constitutions to allow gender parity legislation. A constitution may be weak, if it does not include the mention of women or gender equality in the articles of the constitution.

Since this situation has become an issue in many countries in the world, politicians are amending their constitutions to guarantee gender equality, which would allow gender parity legislation, such as, women on boards legislation to be passed.¹¹⁰⁹ Gender parity is a political tool, as it compares men and women by using statistics in the economic sector, in employment and on boards. This has been effective, as it has increased the representation of women on boards in public limited companies.

The research explains that, a government may have its constitution amended to allow for women on boards binding quota legislation (I), which would allow for Member States to pass national legislation, as called for in the proposed directive (II).

¹¹⁰⁹ United Nations Report, UNDP Report, 'Women's Rights in Constitutions' (2016) 10.

I. THE LEGAL ISSUE OF AMENDING NATIONAL CONSTITUTIONS

The French government was able to resolve the legal issue, by amending the national constitution, which then allowed the passing of the women on boards legislation. Every Member State has a specific constitutional context, which may include the mention of women or not. As seen in the German Constitution, the legal basis of equality for men and women already existed in the Basic Law. There are considerable difficulties in amending a constitution, as it calls for a majority in the parliament or a referendum. This is a prerequisite, which would allow women on boards legislation. The research examines that, in addition to amending a Constitution, the EU launched public consultations about the proposed directive, (A), which revealed differences of opinion amongst the Member States, with a strong preference for non-EU intervention in national affairs, especially in Eastern European Union Member States (B).

A. PUBLIC CONSULTATION OF THE PROPOSED DIRECTIVE

The European Commission launched a public consultation regarding the proposed women on boards directive.¹¹¹⁰ Twenty-three Member States replied, with the Eastern European Union Member States, including, Bulgaria, Lithuania, Slovenia and Slovakia abstaining. The most responses were received from: 'Germany (163) and the United Kingdom (79), followed by the Netherlands (43), France (26), the Czech Republic (25), Italy (17), Spain (15), Denmark (15) and Austria (15).'¹¹¹¹ The conclusion of this research has found that, several Member States remain in favour of self-regulation and

¹¹¹⁰ European Commission Working Document; Annexes to the Impact Assessment on Costs and Benefits of Improving the Gender Balance in the Boards of Companies Listed on Stock Exchanges, Accompanying the Initiative to Improve Gender Balance in Company Boards (2012) SWD 348 final, 12. <<https://secure.ipex.eu/IPEXL-WEB/dossier/files/download/082dbcc53af8a9ca013b0991626f0798.do>> accessed 19 June 2021.

¹¹¹¹ *ibid*, 13.

corporate initiatives (1) while other Member States are in favour of the proposed directive for business and economic reasons (2).

1. Member States preference for self-regulation and corporate initiatives

Public consultation indicated that, the majority of Member States agreed, that women were underrepresented on boards. Though, not all Member States share the same approach. Many Member States called for self-regulation or corporate initiatives and not binding legislation.¹¹¹² Having confirmed that most Member States have a preference to self-regulate women on boards policies, the research examines the business case to increase the representation of women on boards.

2. Member States and the business case

Several Member States' governments agreed that women on boards is relevant for the economy, since women constitute at least fifty percent of the workforce and would represent a huge financial loss, if not all human resources were exploited. However, this was not the opinion of all Member States.¹¹¹³ The research has explained that, Member States' governments agree that women on boards is a governance and economic problem, as women represent fifty percent of the workforce. Though, not all Member States share the same opinion, especially several Eastern European Union Member States.

B. EU MEMBER STATES REASONED OPINIONS AND NON-INTERFERENCE

Eastern European Union Member States do not welcome EU interference in their national affairs. The political, economic and legal environment in Eastern European Union Member States is considerably different, than in Western European Union Member States. Though, there are several Western European Union Member States,

¹¹¹² n 1110,15.

¹¹¹³ *ibid.*

who do not welcome EU interference in their national affairs, including Denmark, Sweden and the UK (former EU Member State). The research confirms that, the dire economic situation in the Eastern European Union Member States has created important socio-economic problems, which question EU values, EU gender equality policies and legislation (1) and, which has resulted in macroeconomic figures, showing that, in several Eastern European Union Member States, employment numbers are decreasing, as women are leaving the labour market, and gender equality policies are not enforced (2).

1. The macroeconomic situation in Eastern European Union Member States

High unemployment and market difficulties forced women out of the labour market in several Member States in Eastern Europe, which may be explained by a failed transition to the market economy. The lack of strong economies in the Eastern European Union Member States also reflect little to no gender equality legislation or policies in place.¹¹¹⁴ However, Eastern European Union Member States had to meet certain conditions to join the European Union, as established as Copenhagen Criteria. These conditions consisted of

- (i) a working market economy, able to compete within the EU
- (ii) stable political institutions, with a respect for democracy and human rights (including the rights of women)
- (iii) and, political and economic loyalty to the European Union.¹¹¹⁵

Women are not present on company boards to any noticeable degree, compared to France, Germany or Nordic Member States. Several Eastern European Union Member States may have gender equality policies and legislation in place. Though, the governments are unable to enforce gender equality policies and legislation, which will

¹¹¹⁴ n 476, United Nations Report, 6.

¹¹¹⁵ EU Law, Accession Criteria, Copenhagen Criteria (1993) <<https://eur-lex.europa.eu/EN/legal-content/glossary/accession-criteria-copenhagen-criteria.html>> accessed 23 December 2021.

not lead to women on boards binding legislation in company law in the near future. Eastern European Union Member States have limited gender equality policies, no binding legislation and many of these Member States governments have no interest in these subjects, even if companies may be interested. The South East European Union Member States, such as Malta and Cyprus, are included in this assessment.¹¹¹⁶

Having explained the difficult economic situation of Eastern European Union Member States, the research examines recent history and gender equality.

2. Eastern European Union Member States recent history and gender equality

The explanation why these Member States are unable to comply with EU gender equality policies and legislation may be found in the recent history of this geographic region. Most Eastern European Union Member States were part of the socialist work economy. This obliged every man and woman to work, with women in top management positions at that time. Nevertheless, after the fall of the Wall in 1989 and collapse of the USSR, women were forced to leave the workplace to take care of their children, as the job market disappeared. Therefore, it is too expeditive to speak about implementing the EU proposed women on boards directive in the Eastern European Union Member States. Several Eastern European Union Member States governments call for gender equality. They are not ready to be compared with Western European Union Member States. Others are not calling for gender equality at all. The gap continues to widen, as more women are leaving the workforce in the Eastern European Union Member States.¹¹¹⁷ Having explained the recent history and gender equality in the Eastern European Union Member States, the research examines the legal basis of EU intervention.

¹¹¹⁶ Arndt and Wrohlich (n 477) 337-344.

¹¹¹⁷ n 476, United Nations Report, 6.

II. THE LEGAL BASIS TO EU INTERVENTION

The legal basis of EU intervention in national law is dependent on a number of factors. Member States may pass national legislation, only if the EU has not passed binding legislation on the subject or leaves it to the Member States to do so.

The research has found that, the proposed women on boards directive allows the Member States to transpose provisions into national law (A), though many Member States have not passed women on boards legislation (B). This raises the question of how EU institutions plan to oblige Member States to implement the proposed directive or become part of a Minimum Harmonisation Programme, when the directive enters into force.

A. EXCLUSIVE OR SHARED COMPETENCE AND THE LEGAL BASIS

Directives are binding legislation, which Member States have to comply with, but allow the Member States to decide on how to transpose the legislation into national law. Therefore, the directive has to be agreed by the majority, before it becomes national law. Shared competence with the Member States, allow the EU and Member States to act. Whereas, exclusive EU competence, is top-down and only allows the EU to act. The research explains that, EU legitimacy is dependent on three principles: the Principle of Conferral, the Principle of Proportionality and the Principle of Subsidiarity (1), though, the EU may go beyond what is mentioned in the treaties, when it concerns the economy and employment, if a Member State agrees (2).

1. EU legitimacy and principles

EU legitimacy is based on the Principle of Conferral, the Principle of Proportionality and the Principle of Subsidiarity, which are defined, as follows:

1. Principle of Conferral – the EU has only that authority conferred upon it by the EU treaties (Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU)), which have been ratified by all member countries.¹¹¹⁸
2. The Principle of Proportionality – the EU action cannot exceed what is necessary to achieve the objectives of the treaties
3. Principle of Subsidiarity – in areas where either the EU or national governments can act, the EU may intervene only if it can act more effectively.¹¹¹⁹

According to Article 5(3) TEU, the principle of subsidiarity, EU institutions have the right to intervene ‘...in areas which do not fall within its exclusive competence...only if ... the objectives of the proposed action cannot be sufficiently achieved by the Member States, ... but ... be better achieved at Union level’.¹¹²⁰

According to Protocol (No 2) of the TFEU, allows EU institutions to take decisions, when the Member States cannot act and when it is better realised at EU institutional level.¹¹²¹

According to the principle of proportionality, there are limited actions which may be taken by EU institutions and how it may use its powers. EU institutions may not go beyond what is needed to realise its objectives.¹¹²²

Having shown the EU institutions legitimacy, based on the Principle of Conferral, the Principle of Proportionality and the Principle of Subsidiarity, as well as, Protocol (No 2) of the TEU, which allow the EU to intervene, the research examines Articles 5 and 13 of

¹¹¹⁸ n 169, Treaty of the European Union, Consolidated Version of the Treaty on European Union, Article 5; n 169, Treaty of the European Union, Consolidated Version of the Treaty on European Union, Article 13.

¹¹¹⁹ European Commission, EU law, Areas of EU Action (2021) <https://ec.europa.eu/info/about-european-commission/what-european-commission-does/law/areas-eu-action_en> accessed 20 June 2021.

¹¹²⁰ n 169, Treaty of the European Union, Consolidated Version of the Treaty on European Union, Article 5(3).

¹¹²¹ Consolidated Version of the Treaty on the Functioning of the European Union - Protocols - Protocol (No 2) on the Application of the Principles of Subsidiarity and Proportionality (OJ C115/2008) 206–209, Protocol (No 2) <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12008E%2FPRO%2F02>> accessed 20 June 2021.

¹¹²² *ibid.*

the TEU, which allows the Member State to agree to intervention under special circumstances.

2. Articles 5 and 13 of the Treaty on the European Union

EU institutions may have special access to Member States, which go beyond what is included in the treaties, concerning economic and employment policies, which are part of the 'flexibility clause,' allowing for intervention under special conditions.¹¹²³ Though, there is a prerequisite to this policy. According to Articles 5 and 13 of the Treaty on the European Union (TEU), EU institutions may only intervene, if a Member State allows it to.¹¹²⁴

The research has shown that, EU institutions legitimacy is based on the Principle of Conferral, the Principle of Proportionality and the Principle of Subsidiarity, as well as, Protocol (No 2) of the TEU, which allow the EU institutions to act. However, Articles 5 and 13 of the TEU specify intervention is possible under certain circumstances and, if a Member State permits it. Therefore, the proposed directive may be contested by a Member State. As the proposed directive has not yet entered into force, further research will be needed to monitor developments.

B. EU INSTITUTIONS AND OBLIGATION FOR MEMBER STATES TO ADHERE TO MINIMUM HARMONISATION

Under EU law, policies may be implemented, if not addressed in exclusive or shared competence. This includes coordinating economic and employment policies with the Member States. The research raises the question, if EU institutions have the right to

¹¹²³ n 1119, European Commission Communication, Areas of EU Action.

¹¹²⁴ n 169, Treaty of the European Union, Consolidated Version of the Treaty on European Union, Article 5(3); n 169, Treaty of the European Union, Consolidated Version of the Treaty on European Union, Article 13.

coordinate and harmonise an independent economic policy for all Member States (1), and if so, could a Minimum Harmonisation Programme, based on the Copé Zimmermann Act be proposed as a model to accompany the Member States with limited gender equality policies or women on boards legislation (2).

1. European Union integration and true federation

Jacques Delors, the former President of the European Union, stated that, Europe would become a federation before the Year 2000. His vision was that, of an integrated European Union, with all economies of the Member States in a single common market. Integration has always been part of the EU institutions strategy. The background to EU integration was the Community Method, which lasted from the 1950s to the 1980s and was reliant on legal integration and EU institutions. EU hard law policies depend on the ECJ, which called for a new EU legal order. EU norms consisted of treaties, secondary law, which included hard law directives, decisions and regulations, as well as, EC law and external agreements. The subject of employment, is dependent on these norms, as well as soft law. Although, nowhere was it written in the European treaties that, EU institutions had the right to propose an independent EU economic policy. This is a very narrow interpretation, which may be understood, by allowing Member States to harmonise their economic policies under EU institutions coordination.¹¹²⁵ The long run impact of EU integration shows a significant increase in GDP. Though, the EU may still have a long way to go before full economic integration, the profits will be much greater than today.¹¹²⁶

The European Commission upholds economic policies and sustainable transformation of the economies of the Member States, as part of the Europe 2020 Strategy, which

¹¹²⁵ n 424, Becker, A European Economic Policy in the Making.; Terpan (n 556) 29.

¹¹²⁶ David Comerford and Sevi Rodriguez Mora 'The Gains from Economic Integration: The EU has Still a Long Way to Go' Research Paper (2019) <<https://voxeu.org/article/gains-economic-integration-eu>> accessed 20 June 2021.

includes women in decision-making positions, and, on the board of directors of public limited companies.¹¹²⁷ The European Strategy for Equality between Women and Men 2010-2015 included the notion of quotas and corporate governance codes, while the European Pact for Gender Equality 2011-2020, made specific reference to the representation of women on the board of directors. The European Commission initiates strategic programmes, as part of its economic policy with the aim of EU convergence.¹¹²⁸ Having shown the background to EU integration, the research examines the Minimum Harmonisation Programme, which would accompany the directive, when it enters into force.

2. A Minimum Harmonisation Programme: based on the Copé Zimmermann Act

Member States cannot be forced to participate in the Minimum Harmonisation Programme. French legislation, Law 2011-103 of 27 January 2011 on the Balanced Representation of Women and Men on Boards of Directors and Supervisory Boards and on Professional Equality (1) (the Copé Zimmermann Act), could become the legal basis and reference for Member States seeking to draft national legislation.

Having examined the background to EU integration and with a Minimum Harmonisation Programme to accompany the directive, when it enters into force, the research notes that Member States remain far off from integration, concerning women on boards. Moreover, when the proposed directive enters into force, it will need a strong programme to accompany Member States, such as, the Minimum Harmonisation Programme, which could be based on the Copé Zimmermann Act, as it represents very effective legislation, which effectively increased the representation of women on boards in France.

¹¹²⁷ Becker (n 424) A European Economic Policy in the Making.

¹¹²⁸ *ibid.*

CONCLUSION OF CHAPTER TWO

The European Commission chose intervention, as a means to converge women on boards policies in the European Union. A third of the Member States did not welcome this, as many have implemented either soft or hard law, or both, on national level. European institutions have justified that, it was an economic necessity to intervene with the proposed women on boards directive. The proposed directive has had legal effect on the Member States. Several Member States are implementing soft law policies, corporate governance codes and passing hard law or about to transition to hard law. Despite the opposition from several Member States, the proposed directive finally passed in the Council in March 2022, after being blocked for ten years. It will now be deliberated in Parliament with the Member States to become a directive.

CONCLUSION OF TITLE ONE

The transition from soft to hard law is full of obstacles. A Minimum Harmonisation Programme would accompany the Member States with have limited gender equality policies, soft law or hard law. To be able to rapidly consider the legal situation of all Member States, a Minimum Harmonisation Programme would facilitate convergence between the Member States in two phases. Phase One would audit and Phase Two would work towards implementing hard law in gradual phases, based on French gender quota legislation, the Copé Zimmermann Act. Over time, the programme would increase the representation of women on boards to the minimum forty percent, as called for in the proposed directive.

Title Two

MINIMUM HARMONISATION

There are many women on boards approaches in the Member States. EU institutions intervention was necessary for economic reasons, to keep the economy competitive. However, the proposed directive may prove challenging to implement for several Member States. A Minimum Harmonisation Programme, a soft law method, would allow Member States to gradually transition to the proposed forty percent of women on boards hard law. This programme would be implemented in steps with deadlines, which would allow each Member State to set a minimum target, before complying with the forty percent of women on boards proposed directive. Member States may apply stricter rules.¹¹²⁹

¹¹²⁹ n 71, French Legislation, Law No. 2011-103 of January 27, 2011 on the Balanced Representation of Women and Men on Boards of Directors and Supervisory Boards and Professional Equality (1); n 71, French Ministry of Equality, of Diversity and Equal Opportunities, Law of 2011: Is your company affected?

Chapter One

INCLUSIVE COMPREHENSIVE REGULATION

Inclusive and comprehensive regulation refers to existing legislation. Though, it includes new propositions to increase the representation of women on boards. The women on boards environment is rapidly changing, as more Member States transition to hard law. Yet, there are many Member States not moving to hard law. The proposed women on boards directive, proposed in 2012, is at the centre of attention once again, as part of the EU Gender Equality Strategy 2020-2025.

The European Commission President von der Leyen, has been committed to see the proposed women on boards directive unblocked. Despite, the contestation by several Member States, the proposed directive finally passed in March 2022.¹¹³⁰ Former President Angela Merkel considered support for the proposed directive with concern that too many years have passed since the directive was proposed. The German government had not voted in favour of the proposed women on boards directive, stating, it is against the use of quotas at EU institutional level. However, the new German government has since reconsidered its position and voted in favour of the proposed directive in March 2022.¹¹³¹

The research explains that, EU institutions intervened with the proposed directive to fix a fragmented approach and harmonise the women on boards legislation in the Member States (Section 1), which included sanctions (Section 2).

¹¹³⁰ n 36, European Parliament, Gender Balance on Boards; Preiss (n 35).

¹¹³¹ Angela Merkel Speech at Party of European Socialists (2016) <<https://www.pes.eu/en/news-events/news/detail/PES-Women-Angela-Merkel-must-unblock-Women-on-Boards-Directive/>> accessed on July 13, 2020; Preiss (n 35).

SECTION 1 A CALL FOR A MINIMUM LEVEL OF RULES

The lack of a standard women on boards approach in the European Union has left a negative effect on women on boards effectiveness in the European Union. Too many different national women on boards policies and legislation are obstacles for the European Union to compete in the global economy. Therefore, it was necessary for the European Commission to intervene to increase the representation of women on boards with stronger measures, such as the proposed women on boards directive, to strengthen the EU economy.¹¹³² The research notes that, EU institutions intervention with the proposed directive was necessary (§1), along with an EU-led Minimum Harmonisation Programme, which would be a means to move Member States towards complying with the directive, when it enters into force (§2).

§1 EU INTERVENTION

EU institutions intervention has raised many questions about EU law, subsidiarity and sovereignty, such as, to what extent does the EU have the right to intervene in Member States national law? Is intervention necessary to save democracy in the EU? Should it be considered that Member States with limited soft or hard law need to be sanctioned? Is intervention the only reasonable solution? Finding answers to these questions raises other issues about the Member States involvement in increasing the representation of women on boards, such as Member States applying their own sanctions for non-compliance of the directive. However, when the directive enters into force, what tools will the EU institutions have to intervene and to enforce, other than offering financial

¹¹³² n 29, Proposal for a Directive.

incentives or taking those away. The research points to the need for a women on boards directive, as increasing the representation of women on boards cannot be achieved by soft law means alone (I), though, the proposed directive may not be sufficient and require a Minimum Harmonisation Programme, to accompany the directive (II).

I. THE CALL FOR A DIRECTIVE TO REGULATE WOMEN ON BOARDS

According to EU law, a 'directive is a legislative act that, sets out a goal that, all EU countries must achieve. However, it is up to the individual countries to devise their own laws on how to reach these goals.'¹¹³³ Member States may set higher standards than those stated in the directive. 'A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods'.¹¹³⁴ The research explains that, few Member States have in place strong gender equality policies and legislation (A), though, the first legislation was passed in the 1980s, calling for balanced participation in decision-making, including women on boards (B).

A. WOMEN ON BOARDS BINDING LEGISLATION

There is a stark contrast between Member States with hard law and Member States with limited gender equality policies. Member States' national parliaments, in favour of the proposed women on boards directive, have passed national women on boards legislation. Though, those Member States favoured the proposed directive, many

¹¹³³ n 553, EU Law, Regulations, Directives and other Acts.

¹¹³⁴ European Union Law, Directives and Minimum Harmonisation (2019) <<https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=uriserv%3Al14527>> accessed 3 September 2019; n 1055, Consolidated Version of the Treaty on the Functioning of the European Union, Part Six – Institutional and Financial Provisions Title 1 – Institutional Provisions, Chapter 2 - Legal acts of the Union, adoption procedures and other provisions Section 1 - The Legal Acts of the Union, Article 288 (former Article 249 TEC) (2012) OJ C 326, 171–172.

remain far from meeting the forty percent quota. According to the OECD Statistics for women on boards of public limited companies, several EU Member States have limited gender equality policies in place. This may be understood by the low percentages of women in boards in certain Member States. In 2019, Estonia had 9.4 percent of women on boards and 9.1 percent in 2021, while Hungary had 12.9 percent of women on boards in 2019 and 9.4 in 2021.¹¹³⁵ This indicates that the number of women on boards is declining in those Member States. The research examines the proposed directive, which would oblige all Member States to increase the representation of women on boards to forty percent, using a tie-break quota (1), though, even EU institutions disagree about the most effective means to pass quota legislation (2).

1. The proposed women on boards directive

After soft law corporate governance codes, the proposed directive¹¹³⁶ originally planned to increase the representation of women on boards to forty percent minimum by 2020. The proposal does not call for hard quotas, but a preferential tie-break provision.¹¹³⁷ The tie-break quota concerns the nomination procedures of board directors. Companies would be subject to sanctions under national law, who failed to reach forty percent of women on boards.¹¹³⁸ The proposed women on boards directive was introduced, as a result of an economic and political failure by Member States, for failing to increase the representation of women in economic decision making positions through soft law, as part of the Europe 2020 Strategy. Tie-break quotas carry sanctions for non-compliance, which each Member State would decide on.¹¹³⁹ The proposed directive was adopted by European Parliament at the first reading in 2013. At that reading, stronger sanctions had been proposed:

¹¹³⁵ *ibid.*

¹¹³⁶ n 29, Proposal for a Directive.

¹¹³⁷ *ibid.*

¹¹³⁸ *ibid.*; n 36, European Parliament, Gender Balance on Boards.

¹¹³⁹ n 29, Proposal for a Directive.

- ...excluding companies from public tenders, ... non-compliant with appointment procedures,
- taking away exemptions if companies employ less than ten percent of women,...
- and an enquiry about requiring non-listed public companies to the forty percent proposed women on boards target.¹¹⁴⁰

Though, the proposed directive passed during the first reading, it remained blocked in the Council of the European Parliament for more than ten years. It has just been voted on in Council in March 2022. European Parliament will now enter into negotiations with the Member States.

Having explained the details and procedures about appointments of board directors in the proposed directive, the research examines the internal disagreements in EU institutions about how to increase the representation of women on boards in the Member States.

2. Internal disagreements about effectiveness of the proposed directive

EU institutions, the European Commission and Parliament, have had internal disagreements about the most effective means to increase the representation of women on boards. According to EU institutions, *The EU Strategy for Equality between Women and Men Post-2015* and ¹¹⁴¹ the *Europe 2020 Strategy*, women on boards have not been treated effectively.¹¹⁴² EU Parliament has consistently called for stronger measures to increase the representation of women on boards,¹¹⁴³ with support of the Council in negotiations to reach agreement of the proposed directive within a limited

¹¹⁴⁰ C. Fagan, M. González Menéndez and S. Gómez Ansón (n 28) 7.

¹¹⁴¹ European Parliament Resolution, *The EU Strategy for Equality Between Women and Men* (2015) 2152 (INI) 2014 <https://www.europarl.europa.eu/doceo/document/TA-8-2015-0218_EN.html> accessed on 3 January 2018.

¹¹⁴² *ibid.*, 8.

¹¹⁴³ *ibid.*, 10.

timeframe.¹¹⁴⁴ Though, the proposed directive had been blocked for over ten years.¹¹⁴⁵ Nine Member States oppose the proposed directive, which had never been shelved, and which, has finally passed in Council in March 2022 to become a directive.¹¹⁴⁶

The proposed women on boards directive calls for a minimum harmonisation to include requirements for comparative assessments of candidates, as well as fixing a forty percent tie-break quota of non-executive board directors, in view of gender parity on boards by 2027.¹¹⁴⁷ The proposed directive goes beyond soft law. It is a stronger measure, which shall be more effective in ensuring economic competitiveness of the EU. The proposed directive sets minimum rules for all Member States.¹¹⁴⁸ Member States may implement the directive, as they wish, as long as they reach minimum results.¹¹⁴⁹ Member States may decide on the procedures for board nominations and appointments in public limited companies.¹¹⁵⁰

There has been apprehension from certain Eastern European Union Member States that, the legislation would be misinterpreted by allowing quota women, defined as, 'women who join the board because they happen to be female and not based on merit alone'.¹¹⁵¹ Though, the proposed directive ensures that qualification and merit remain the means of selection of non-executive board directors.¹¹⁵²

¹¹⁴⁴ *ibid*, 40.

¹¹⁴⁵ European Parliament Procedure File, Legislative Observatory, Gender Balance among Non-Executive Directors of Companies listed on Stock Exchanges COD (2012) 0299 <<https://oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=2012/0299%28COD%29&l=en>> accessed on March 17, 2019.

¹¹⁴⁶ n 36, European Parliament, Gender Balance on Boards; Preiss (n 35).

¹¹⁴⁷ n 29, Proposal for a Directive, 5.

¹¹⁴⁸ *ibid*.

¹¹⁴⁹ n 29, 13, Article 7.

¹¹⁵⁰ n 29.

¹¹⁵¹ Beate Boeker, 'Quota Woman, New Boardrooms Gender Rules' (Impakter, 2015) <<https://impakter.com/quota-woman-new-boardrooms-gender-rules/>> accessed 5 July 2019.

¹¹⁵² n 36, European Parliament, Gender Balance on Boards.

Having explained the framework to appoint board directors in the proposed directive and explained the EU internal institutional difficulties, the research examines the legal basis to increase the representation of women on boards.

B. THE LEGAL BASIS TO INCREASE REPRESENTATION OF WOMEN ON BOARDS

EEC soft law recommendations were passed in 1984, long before the proposed women on boards directive. The Council Recommendation 84/635/EEC of 13 December 1984 on the Promotion of Positive Action for Women called for increasing the representation of women on boards in the private sector.¹¹⁵³

1. Council Resolutions calling for balanced boards

The Council Resolution of 27 March 1995 on the Balanced Participation of Men and Women in Decision-Making called on the Commission to promote efforts, including reporting and special measures.¹¹⁵⁴ The Council Recommendation of 2 December 1996 on the Balanced Participation of Women and Men in the Decision-Making Process called for a comprehensive inclusion of women in decision-making in 'public, economic and social life'.¹¹⁵⁵

Having explained that women on boards legislation dates back to 1984 and successive recommendations were made to increase the representation of women on boards, the research examines that, binding legislation raises questions of subsidiarity and proportionality.

¹¹⁵³ n 558, Council Recommendation 84/635/EEC of 13 December 1984 on the Promotion of Positive Action for Women, n4; n 558, Second Council Resolution of 24 July 1986 on the Promotion of Equal Opportunities for Women, 75.

¹¹⁵⁴ Council Resolution of 27 March 1995 on the Balanced Participation of Men and Women in Decision-Making (1995) OJ C/168, 3–4 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.C_.1995.168.01.0003.01.ENG&toc=OJ%3AC%3A1995%3A168%3ATOC> accessed 20 March 2020.

¹¹⁵⁵ n 195, EU Law, Council Recommendation of 2 December 1996 on the Balanced Participation of Women and Men in the Decision-Making Process, 1(f).

2. From recommendations to binding legislation

The Commission intervened with a directive, as soft law means failed. This led to many Member States transposing soft law recommendations into specific provisions to their corporate governance codes. The recommendations allowed Member States to self-regulate policies, which in the end, turned out to be ineffective, since self-regulation is non-binding. The EU legal basis for intervention with the proposed directive provides a common framework for all Member States. It is considered the most effective way to increase the representation of women on boards. However, as Article 5 of the Principle of Subsidiarity and Proportionality of the TFEU states, EU institutions must provide reasons why intervention should be 'better achieved at Union level'.¹¹⁵⁶ The decision for EU institutions intervention in national affairs has created conflicts of interests, which involve the principles of subsidiarity and proportionality.

Having shown that women on boards soft law initiatives failed, EU institution intervention with the proposed directive has created conflicts, concerning subsidiarity and proportionality, the research turns to the proposal of a Minimum Harmonisation Programme.

II. A PROPOSAL OF A MINIMUM HARMONISATION PROGRAMME

Along with the women on boards directive, once as it enters into force, a Minimum Harmonisation Programme would accompany Member States to comply with the terms of the proposed directive by passing soft law, before hard law to reach the forty percent quota of women on boards. The proposed directive calls

¹¹⁵⁶ Consolidated Version of the Treaty on the Functioning of the European Union - Protocol (No 2) on the Application of the Principles of Subsidiarity and Proportionality, Article 5 < <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12008E%2FPRO%2F02> > accessed 20 March 2020.

...to substantially increase the number of women on corporate boards throughout the EU by setting a minimum objective of a 40% presence of the underrepresented sex among the non-executive directors of companies listed on stock exchanges and by requiring companies with a lower share of the underrepresented sex among the nonexecutive directors to introduce pre-established, clear, neutrally formulated and unambiguous criteria in selection procedures for those positions in order to attain that objective.¹¹⁵⁷

The forty percent quota applies to non-executive directors on public limited company boards, which will balance the board and have 'a ripple effect'.¹¹⁵⁸ Though, a forty percent quota may be too difficult for those Member States with limited soft law policies and no hard law, to increase the representation of women on boards. Therefore, a Minimum Harmonisation Programme would set common objectives and benchmarks to work towards the creation of a common framework to meet the requirements of the proposed directive.¹¹⁵⁹

The research examines the first phase of the Minimum Harmonisation Programme is consultation with each Member State (Part One) (A), and provide a timetable (Part Two) (B).

A. PHASE ONE OF THE PROPOSED PROGRAMME: PART ONE

The Minimum Harmonisation Programme will evaluate the background, scope and objectives of each Member State, through individual consultation. The research points out that, there are several objectives to create a standard approach through a

¹¹⁵⁷ n 29, Proposal for a Directive of the European Parliament and of the Council on Improving the Gender Balance among Non-Executive Directors of Companies Listed on Stock Exchanges and Related Measures, 5.

¹¹⁵⁸ *ibid.*

¹¹⁵⁹ A Minimum Harmonisation Programme led by EU institutions would advance the representation of women on corporate boards in public limited companies by benchmarking best practices and accompany the Member States who have limited gender equality policies in place or women on boards legislation to first implement soft law and then hard law to comply with the proposed directive.

minimum set of common objectives (1), while benchmarking will situate the level of existing gender equality policies in each Member State (2), by including a reporting requirement about the existing legal framework or lack of soft or hard law (3).

1. Common legal framework

The Minimum Harmonisation Programme, which could be led by the European Commission implement a common legal framework through consultation, assessment and evaluation of national means, leaving the Member States to decide best how to reach minimum harmonisation, by using national law, corporate governance codes and other non-legal means.

Having explained that, a Minimum Harmonisation Programme would create a common legal framework, which would accompany Member States to meet the requirements of the proposed directive, the research examines the benchmarking methodology of the Programme.

2. Benchmarking methodology of the Minimum Harmonisation Programme

A benchmarking methodology in phases would audit and benchmark the level of the Member State, according to the level of existing soft and hard law.

- Level I relates to no or little soft law in place.
- Level II relates to limited soft law policies in place.
- Level III soft law policies in place, possible transitioning to hard law.
- Level IV both soft law polices and hard law.

Having explained that a benchmarking methodology of the Programme would audit each Member State and situate the progression of soft to hard law in place, while

working towards the proposed directive, the research reviews the reporting requirements based on the proposed directive.

3. Reporting requirements based on the proposed directive

Each Member State would submit an annual report (as part of a three-year review report) with its findings, which would include, an action plan with a yearly Situation Review to demonstrate transitions between levels. According to Article 5, paragraph 3 of the proposed women on boards directive,¹¹⁶⁰ explanations are provided for non-compliance by means of the comply or explain principle and plan of how the company will become compliant with the directive.¹¹⁶¹ The Minimum Harmonisation Programme will benchmark the progress of the Member State. According to Article 5, paragraph 2 of the proposed women on boards directive, Member States are obliged to disclose company information on an annual basis, concerning board composition and women on boards.¹¹⁶² In the Minimum Harmonisation Programme, Member States would be also be required to report information concerning board composition and women on boards annually. Having explained that a Minimum Harmonisation Programme would create a standard legal framework for all Member States, a benchmarking methodology and reporting requirements, the research explains Phase One of the Minimum Harmonisation Programme: Part Two.

B. PHASE ONE OF THE MINIMUM HARMONISATION PROGRAMME: PART TWO

The European Commission would consult with the Member States individually, in view of developing women on boards policies with an agreed calendar. The Minimum Harmonisation Programme consists of soft law and therefore, cannot be subjected to

¹¹⁶⁰ n 1156, Consolidated Version of the Treaty on the Functioning of the European Union - Protocol (No 2) on the Application of the Principles of Subsidiarity and Proportionality, Article 5 < <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12008E%2FPRO%2F02> > accessed 20 March 2020.

¹¹⁶¹ *ibid.*, Article 5(3).

¹¹⁶² n 1156.

sanctions. The research confirms that the Commission will be responsible to set incentives (1), which will encourage the Member States over sanctions (2) and keep an Annual Situational Review (3).

1. Incentives or sanctions

The Commission will enter into negotiations with the Member States about compliance with the Minimum Harmonisation Programme. As a reminder, Norwegian quota legislation called for company dissolution, if the company is non-compliant. This is a reminder that hard sanctions are effective.¹¹⁶³ However, It is most unlikely that this would be an answer for the Minimum Harmonisation Programme, as it is a soft law programme. Targets and incentives should be considered instead of hard sanctions. Monetary awards, as an incentive, should also be considered for progress made.

Having explained that incentives and targets work best with the Minimum Harmonisation Programme, the research examines outcomes, when different levels of sanctions are applied.

2. Outcomes according to sanctions

The findings are that different types of sanctions bring various outcomes:

- The countries with a gender quota and tough sanctions significantly increased the proportion of women on boards;
- Moderate sanctions, such as, the 'empty chair' in Germany are markedly less effective;
- And, voluntary commitments or quotas with no sanctions do very little.¹¹⁶⁴

¹¹⁶³ *ibid.*

¹¹⁶⁴ *ibid.*

Having explained that, hard sanctions significantly increase women on boards, the research explains that, the Minimum Harmonisation Programme is subject to an Annual Situational Review.

3. Annual Situational Review

An Annual Situational Review will disclose findings from the actions, do external benchmarking and identify the level of the Member State. Experts from Phase IV would advise Member States and summarise future actions to report for the following year. The research examines how incentives and targets work best with the Minimum Harmonisation Programme. Hard sanctions would bring the best results, but this would not work, as the Minimum Harmonisation Programme cannot be enforced, as it is a soft law programme.

§2 PROPOSAL OF A MINIMUM HARMONISATION PROGRAMME

There are difficulties for EU Member States to implement gender equality policies and legislation for different reasons, such as, a lack of political will or policies (for legal, economic, historical, cultural or societal reasons). The research explains that, an EU-led Minimum Harmonisation Programme would be an effective means to move Member States towards women on boards legislation (I), while the French government called to increase the representation of women on boards to forty percent with binding legislation, as soft law was ineffective (II).

I. MOVING FORWARD WITH A MINIMUM HARMONISATION PROGRAMME

A Minimum Harmonisation Programme supports women on boards policies and legislation in the Member States, despite regulatory differences across the Member

States. This would allow Member States to set deadlines and develop women on boards soft and hard law. The research shows that a Minimum Harmonisation Programme has its legal basis in the proposed directive and the French legislation, the Copé Zimmermann Act (A), although, it has been a major struggle to pass legislation to increase the representation of women on boards (B).

A. LEGAL FRAMEWORK FOR A MINIMUM HARMONISATION PROGRAMME

The proposed women on boards directive is the legal basis for a Minimum Harmonisation Programme, as it will assure stakeholders that the application of the representation of women on boards is the same in all Member States. Minimum harmonisation implies that there is binding law in place. The different Member States with diverse national legal systems are recognised within the Minimum Harmonisation Programme. The research notes that the French women on boards legislation has been effective in increasing the representation of women on boards significantly (1), and that the Minimum Harmonisation Programme should model its women on boards legal requirements on a more flexible version of the Copé Zimmermann Act (2).

1. French women on boards binding legislation, the Copé Zimmermann Act

The Copé Zimmermann Act has been instrumental in increasing the representation of women on boards in France. It is the most effective example of gender quota law in the EU. The requirements of the legislation could be proposed, as the legal basis in Phase Two of the Minimum Harmonisation Programme. An overview of the Copé Zimmermann Act shows that:

- In 2011, public limited companies with at least 500 employees and at least 50 million euros turnover, must include 40 percent of women on boards on supervisory boards.
- In 2020, companies with 250 employees and same conditions.

- Sanctions include freezing board directors remuneration, voiding irregular position and discussions.¹¹⁶⁵

There are several EU Member States without women on boards legislation. These Member States could draft legislation, based on the Copé Zimmermann Act.

Having shown that the Copé Zimmermann Act is the legal basis of the Minimum Harmonisation Programme, the research explains that a more flexible version of the Copé Zimmermann Act will encourage Member States to pass binding legislation.

2. Towards a more flexible version of the Copé Zimmermann Act

Member States could adjust the Copé Zimmermann Act by changing the number of employees or revenue, for example, which would comply with the legislation.

Having shown that, a more flexible version of the Copé Zimmermann Act would encourage Member States to pass binding legislation, the research examines the origin of parity on boards and legal challenges in passing women on boards legislation in France.

B. FRENCH GENDER PARITY ON BOARDS AND GOVERNANCE ISSUES

France has performant women on boards legislation. The research notes that French history of gender equality and parity legislation has been a struggle, with a history of obstacles, such as, Constitutional reforms (1), though, it has also been complicated for women to access positions of governance in the business world (2). At the end of the

¹¹⁶⁵ n 71, French Legislation, Law No. 2011-103 of January 27, 2011 on the Balanced Representation of Women and Men on Boards of Directors and Supervisory Boards and Professional Equality (1).

1990s, there were fewer than ten percent of women on boards of the largest companies by size and capitalization (CAC40).

1. 2008 constitutional reform

The 2009 Parliamentary Report by Jean-François Copé and Marie-Jo Zimmermann promoted women on boards using quotas to move gender parity on boards and governance issues forward. The 2008 constitutional reform granted women and men economic parity. The law of 27 January 2011 on the Representation of Women and Men on Boards of Directors (the Copé Zimmermann Act) has passed the ten year mark of time.¹¹⁶⁶

Having shown that the 2008 constitutional reform granted women economic parity and allowed the law of 27 January 2011 on the Representation of Women and Men on Boards of Directors to be passed, the research explains that the legislation has been very effective.

2. The Copé Zimmermann Act and effective results

In 1999, there were fewer than ten percent of women on boards, while today the figure has reached forty-five percent of women on boards. Forty percent is considered parity. France is the only Member State with such a high percentage of women on boards. With the use of quotas and monitoring, the law is effective. The January 2020 requirements for companies with 250 or more employees and 50 million in turnover cannot be analysed yet, since the data is very recent.¹¹⁶⁷ Having shown that the French 2008 constitutional reform granted women economic parity and effective law of 27 January

¹¹⁶⁶ n 132, The French Government, High Council for Equality between Women and Men Report, 10 Years of the Law Copé-Zimmermann.

¹¹⁶⁷ *ibid.*

2011 on the Representation of Women and Men on Boards of Directors, the research points to the Copé Zimmermann Act, as the legal basis of the Minimum Harmonisation Programme.

II. THE COPE ZIMMERMANN ACT AS MODEL FOR MEMBER STATES

Without quotas, companies will not automatically increase the representation of women on boards. (Eurogrowth companies state there are seventeen percent of women on boards, which remains far from the forty percent called for in the proposed directive.) The research finds that, the French government has been effective in passing the women on boards legislation with the Copé Zimmermann Act. Member States could construct their legal requirements according to the Copé Zimmermann Act, which would benefit all Member States and the EU economy (A), as there is a growing gap between Member States different soft and hard law, which can be supported by a Minimum Harmonisation Programme (B).

A. EFFECTS OF A MINIMUM HARMONISATION PROGRAMME

The effects of a Minimum Harmonisation Programme would benefit all Member States and the EU economy. Harmonisation is a legal approach that all Member States implement similar policies to reduce costs for companies working cross-border and to harmonise rules to reassure the market and shareholders.¹¹⁶⁸ The research points out that, a Minimum Harmonisation Programme should be implemented in two steps (1) and it may be necessary for a Member State to have the Constitution amended to be able to pass women on boards legislation (2).

¹¹⁶⁸ European Parliament Public Hearing Committee, Sandra Almeida Rodrigues, Public Hearing Committee on the Internal Market and Consumer Protection Harmonisation as a Principle for Single Market legislation A Key to EU Competitiveness (2019) <<https://www.europarl.europa.eu/cmsdata/159160/Programme%20Hearing%20harmonisation%20SM.pdf>> accessed 23 December 2021.

1. A Minimum Harmonisation Programme in two phases

A Minimum Harmonisation Programme should be implemented in two phases. Phase One would increase the representation of women on boards to twenty percent and three years later, Phase Two would increase the representation to forty percent of women on boards, following the Copé Zimmermann Act.¹¹⁶⁹

Having explained that a Minimum Harmonisation Programme would be implemented in phases, as the Copé Zimmermann Act, the research examines the possibility of amending a constitution.

2. Amending constitutions

Member States may have to amend their Constitutions, if the wording of women and men are not mentioned. A parity provision may be needed in the commercial code and board composition, based on the Copé Zimmermann Act.

Having explained that a Minimum Harmonisation Programme takes place in two phases and the possibility of amending a constitution, the research examines future of women on boards in public limited companies in the European Union.

B. FUTURE OF WOMEN ON BOARDS IN PUBLIC LIMITED COMPANIES IN THE EU

There is a growing gap between the Member States soft and hard law, which can be supported by a Minimum Harmonisation Programme. The gap is widening. A Minimum Harmonisation Programme would respond to those Member States, who need to draft policies and legislation, incrementally. The research points out that, the Minimum

¹¹⁶⁹ n 71 French Legislation, Law No. 2011-103 of January 27, 2011 on the Balanced Representation of Women and Men on Boards of Directors and Supervisory Boards and Professional Equality (1), Section 5.

Harmonisation Programme is for all Member States (1), and though, the Programme is EU-led, it would be a collaborative effort between the Member States (2).

1. The proposed directive and Minimum Harmonisation Programme

The objective of the proposed directive is to work towards a minimum standard of women on boards, which would gradually increase over time. The Minimum Harmonisation Programme supports the proposed directive.¹¹⁷⁰ Having explained that although the Minimum Harmonisation Programme backs the proposed directive, the Programme is a collective responsibility of the Member States.

2. An EU-led programme, but a collaborative Member State effort

The Member States would have to accept the EU-led Minimum Harmonisation Programme, as an alternative way to increase the representation of women on boards rapidly. Member States consult with each other during the Situation Review. EU institutions could not be accused of top-down intervention, but as a collaborative effort by all Member States. A Minimum Harmonisation Programme is the response to accompany the proposed women on boards directive. Ten years have passed, waiting for the German government to finally vote in favour of the proposed directive and unblock the situation. The vote in favour of the proposed directive came through in Council in March 2022.

Having explained that the Minimum Harmonisation Programme, shall be led by EU institutions, with Member States involvement, the research explains the reasons why the proposed directive became necessary.

¹¹⁷⁰ n 36, European Parliament, Gender Balance on Boards.

SECTION 2 WOMEN ON BOARDS BINDING QUOTA LEGISLATION

EU institutions intervened with the proposed directive, because the Member States have too many different policies and use various legal systems, which have been ineffective. These are issues which have negative consequences on the EU economy. The proposed directive allows Member States the right to apply sanctions, if binding legislation is not complied with. The absence of women on boards legislation in the Member States constitutes an economic threat to Europe, as it compromises a unified EU competitive market. The research has shown that, binding legislation is the only way to unify the EU market (§1), when legislation includes sanctions, especially strict ones, it is an effective means for companies to rapidly increase the representation of women on boards (§2).

§1: THE PROPOSED WOMEN ON BOARDS DIRECTIVE

The different legal approaches to women on boards in the Member States have contributed to legislative disintegration among the Member States, which justifies a call for minimum harmonisation and hard law. Though, the research notes many Member States remain opposed to the proposed women on boards directive (I), especially the Swedish government (II).

I. OPPOSITION TO THE PROPOSED DIRECTIVE

Member States adopt national legislation, which reflect different company law, legal frameworks and economic situations. The EU institutions' intervention with the

proposed women on boards directive is a means to harmonise the representation of women on boards in public limited companies in the Member States and calls for a minimum harmonisation. Since 2012, the discussions have continued, despite hostility from several Member States to the proposed directive.

... 8 EU Member States (Denmark, Greece, Croatia, Hungary, the Netherlands, Poland, Sweden and Slovakia) continue to oppose the proposal, some because they already have legislation in place. In October 2020, EU ministers of employment and social affairs held a debate on gender equality in the labour market, at which some participants called on the presidency and Member States to finally move forward with the directive.¹¹⁷¹

The research explains that, the Commission decided to intervene with the women on boards directive, which would permit Member States to decide on sanctions (A), rather than continuing with ineffective soft law (B).

A. THE CALL FOR SANCTIONS

The European Commission decided, for reasons of subsidiarity and proportionality, that Member States should decide on the sanctions for irregular boards of public limited companies, as Member States may implement sanctions based on specific company law (1) and on the means of enforcement (2).

The minimum harmonisation legislation permitted Member States to decide on the sanctions, the research notes the wide range of noteworthy sanctions for irregular boards, such as, the Norwegian legislation calling for company dissolution, the Spanish legislation giving business incentives or the German legislation leaving the board chair empty.

¹¹⁷¹ n 36, European Parliament, Gender Balance on Boards.

1. Article 6(1) of the proposed women on boards directive

According to Article 6(1) of the proposed women on boards directive, Member States may decide on the sanctions, if companies are non-compliant. Member States are also responsible for enforcing the legislation.¹¹⁷²

Having explained that, Article 6(1) of the proposed directive calls for Member States to decide on sanctions and enforcement of the sanctions, the research examines Article 6(2), which defines the type of sanctions that may be applied.

2. Article 6(2) of the proposed women on boards directive and sanctions

According to Article 6(2), sanctions should be 'effective, proportionate and dissuasive'. The proposed directive recommends certain sanctions, such as, fines and nullifying the board appointment.¹¹⁷³

According to Article 4(1), the Member States have an obligation to appoint a minimum of forty percent of the underrepresented sex.¹¹⁷⁴ The criteria to use when selecting board candidates has to be based on the application of 'pre-established, clear, neutrally formulated and unambiguous criteria...'¹¹⁷⁵

Having explained that Article 6(1) and 6(2) of the proposed directive calls for Member States to decide on sanctions, the type of sanctions, enforcement and criteria to select board candidates, the research examines the binding nature of the proposed directive.

¹¹⁷² n 29, Proposal for a Directive, 3.

¹¹⁷³ *ibid*, Article 6(2).

¹¹⁷⁴ *ibid*, Article 4(1).

¹¹⁷⁵ *ibid*.

B. THE BINDING NATURE OF THE PROPOSED DIRECTIVE

European Union institutions initially preferred a flexible self-regulating framework, based on soft law to increase the representation of women on boards. However, this approach created too many different regulatory frameworks concerning gender equality and women on boards, leaving Member States (currently 27, minus the UK, since Brexit) without a common approach. EU strategic policy objectives included increasing the employment rate of women and on boards of directors, as a way to contribute to a more competitive European economy. Public limited companies in the EU evaluate their corporate governance policies, diversity and corporate social responsibility policies, which are soft law.¹¹⁷⁶

The research explains that Member States are turning to binding legislation, due to the nature of soft law (1), which has been mainly ineffective in increasing the representation of women on boards rapidly or substantially (2).

1. The nature of soft law

Soft law may be effective when combined with hard law. It may be effective in corporate governance codes, when companies decide to comply with the codes, including gender equality provisions. Investors are interested in governance codes that include provisions, which include women, gender and diversity of gender. Stakeholders are asking for fairness and a democratization of governance, which may be found in updated corporate governance codes, which include the mention of gender diversity in corporate governance codes.

¹¹⁷⁶ n 41, European Commission Report, Women in Economic Decision-Making in the EU, Progress Report. A Europe 2020 Initiative (2012) 13.

The German Corporate Governance Commission believed that only soft law was the right measure to increase the representation of women on boards, although it was agreed that binding legislation should be considered, if companies did not consider women on boards, as a subject of corporate governance. And, that is exactly what happened, as soft law was proven ineffective and reached its limits. The ex-Commission Reding recommended binding legislation at European Union level. The research has shown that, non-binding measures without sanctions produce limited results.¹¹⁷⁷

Having explained that certain Member States preferred self-regulation and did not consider women on boards a subject of corporate governance (For example, the French women on boards legislation was not initially supported by AFEF MEDEF corporate governance codes), the research examines the limitations of soft law.

2. The limitations of soft law

Soft law is less effective than hard law, as a Member State cannot reach the forty percent representation of women on boards with the sole use of soft law, although there are few Member States, who are exceptions. A study of the effectiveness of corporate governance codes in EU Member States has shown that the codes had effect in only three of the Member States and no effect in the other Member States. The weakness of soft law governance codes is the lack of monitoring and enforcement by companies and shareholders. Therefore, the only effective means to increase the representation of women on boards is with binding legislation. Though, soft law programmes are important means for Member States to start off with. However, they take a very long time, before they are effective.¹¹⁷⁸ There are a few exceptions to this rule. Soft law has been effective in increasing the representation of women on boards in Sweden, Finland and the United Kingdom. Having explained that, certain Member

¹¹⁷⁷ Machold and Hansen (n 86) 176-177; Walby and Armstrong (n 567) 8-14.

¹¹⁷⁸ *ibid*; Machold and Hansen (n 86) 176-177

States preferred self-regulation, despite limitations of soft law, the research examines the Swedish opposition to the proposed directive.

II. EXCEPTIONS: SWEDISH OPPOSITION TO EU INTERVENTION

Sweden has reached a high level of representation of women on boards by self-regulation, but has not reached forty percent (A) though, this Member State has been effective with shareholder participation, strong social norms and self-regulating measures to increase the representation of women on boards (B). The Scandinavian exception was Norway, who chose forty-percent women on boards quota legislation. Norway has the highest level of gender parity, along with France and Iceland.¹¹⁷⁹

A. SELF-REGULATION AND WOMEN ON BOARDS

The Swedish government preferred self-regulation to increase the representation of women on boards through the Swedish Code on Corporate Governance.¹¹⁸⁰ The research examines the failed attempt to regulate women on boards in Sweden (1), though, it should be noted that unique Swedish governance permits shareholders to participate as board directors (2).

1. Failed proposal

Women on boards legislation was of interest to different political parties in Sweden during the election campaign of 2010. The Left Parties, Green Party and Social Democrats favoured women on boards quotas and promised to pass legislation by 2012. The proposal called for forty percent of women on boards on public limited companies. Sanctions would have been applied, in the form of annual administrative

¹¹⁷⁹ n 224, EIGE Report.

¹¹⁸⁰ n 694, The Swedish Corporate Governance Code.

finances ranging from 250,000 kronor and 5 million kronor. The Conservative Party Alliance was voted in for another term, but divided over the subject of quotas. The split was between the Conservative Party, in favour of women on boards legislation, while the Liberal and Centre Parties were against the legislation. In October 2011, the proposal did not pass and the subject of women on boards legislation was no longer of interest to policy makers.¹¹⁸¹

Having explained that the Swedish government failed to pass binding legislation, the research examines the unique Swedish corporate governance model.

2. Unique Swedish corporate governance and shareholders as board directors

Swedish company owners are composed of one or few major shareholders, similar to other Member States. Approximately one third of the shareholders have extra shareholder rights, such as, becoming a board director. They are equally involved in the appointments of board directors, as they participate on company nomination committees. This is regulated by the Swedish Code of Corporate Governance. The nomination committee is constituted of shareholders, who are appointed by larger shareholders. The participation of shareholders on the board of directors is an accepted practice in Sweden. The shareholders take an active role in governance of the company. The Companies Act regulates the protection of minor shareholders, calling for majority votes for decision-making at general board meetings. Under this particular system, public debate has called to increase the representation of women on boards to balance

¹¹⁸¹ Guardian Article, 'Sweden Rejects Quotas for Women on Boards of Listed Companies' (The Guardian, 12 January 2017) <<https://www.theguardian.com/world/2017/jan/12/sweden-rejects-quotas-women-boardroom-listed-companies>> accessed 3 January 2019; European Parliament Report, The Policy on Gender Equality in Sweden (2015) 16 <[https://www.europarl.europa.eu/RegData/etudes/STUD/2015/510011/IPOL_STU\(2015\)510011_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2015/510011/IPOL_STU(2015)510011_EN.pdf)> accessed 3 January 2019.

the board through legislation. Though, the Swedish government and businesses prefer the use of the Code of Corporate Governance to regulate the board.¹¹⁸²

Having explained that, the Swedish government preference for self-regulation and unique Swedish corporate governance, the research examines shareholder participation on boards of directors.

B. SHAREHOLDER PARTICIPATION ON BOARDS OF DIRECTORS

The Swedish government is in favour of women on boards through self-regulation. Governance includes shareholders participation on boards, while social norms may explain why quotas are not needed.

The research finds that the Swedish Code of Corporate Governance has legal effect (1), backed up with the Swedish Annual Accounts Act, which obliges companies to write a sustainability report, which includes diversity (2).

1. The Swedish Code of Corporate Governance

The Swedish Corporate Governance Code makes reference to gender parity on boards. Rule 4.1 of the Code calls to 'strive for gender balance on the board'.¹¹⁸³ The Code remains soft law. Swedish boards in public limited companies have nearly reached forty percent of the representation of women on boards. This may be explained by strong social norms and acceptance of the codes, which have legal effect, which make it

¹¹⁸² The Law Reviews Report, Christoffer Saidac, Mattias Friberg and Khaled Talayhan, Hannes Snellman Attorneys Ltd, The Corporate Governance Review: Sweden (2021) <<https://thelawreviews.co.uk/title/the-corporate-governance-review/sweden>> accessed 23 December 2021.

¹¹⁸³ n 248, Swedish Code of Corporate Governance.

possible to avoid binding legislation.¹¹⁸⁴ Having explained that, the Swedish government makes use of soft law governance codes, which explicitly refer to gender parity and shareholders' participation on boards, the research examines the importance of sustainability and women on boards.

2. Sustainability and women on boards

The Swedish Annual Accounts Act, as transposed from the EU Directive of Non-Financial Reporting, amended its legislation and obliges companies to submit a sustainability report. This obligation calls for more diversified boards to avoid groupthink, as Sweden has had its share of financial scandals, which included the executive management and the board of directors.

(19) The obligation to disclose diversity policies in relation to the administrative, management and supervisory bodies with regard to aspects such as, for instance, age, gender or educational and professional backgrounds should apply only to certain large undertakings. Disclosure of the diversity policy should be part of the corporate governance statement, as laid down by Article 20 of Directive 2013/34/EU. If no diversity policy is applied there should not be any obligation to put one in place, but the corporate governance statement should include a clear explanation as to why this is the case.¹¹⁸⁵

As a result, the Swedish government continues to include women on boards as a priority in the corporate code and reporting requirements in the Companies Act. Women on boards binding legislation is considered unnecessary, as Sweden reached thirty-eight percent of representation of women on boards in 2020.¹¹⁸⁶

¹¹⁸⁴ Lenita Freidenvall, 'Legal Struggles and Political Mobilization around Gender Quotas in Europe' (Workshop Paper, 2014) <<https://blogs.eui.eu/genderquotas/wp-content/uploads/sites/24/2015/03/Executive-summary-Sweden-Freidenvall1.pdf>> accessed 3 January 2019.

¹¹⁸⁵ n 678, EU Legislation, Directive 2014/95/EU of the European Parliament, and of the Council of 22 October 2014 amending Directive 2013/34/EU as Regards Disclosure of Non-Financial and Diversity Information by Certain Large Undertakings and Groups (2014) OJ L330, 1-9

¹¹⁸⁶ n 24, OECD Statistics, Employment : Female Share of Seats on Boards of the Largest Publicly Listed Companies.

The research has examined that, the Swedish government has been effective in increasing the representation of women on boards by self-regulation. Therefore, binding legislation is found to be unnecessary. The use of soft law governance codes, with reference to gender parity, shareholders' participation on boards and sustainability reporting to increase the representation of women on boards have been extremely effective.

§2: TOWARDS STRICTER SANCTIONS

A couple of Member States surpassed the forty percent representation of women on boards called for by the European Commission. The research has found that the Member States may choose from a wide range of sanctions. Though, if the company does not comply with the legislation, the result will be sanctions, (I), although, several Member States have binding legislation without sanctions (II).

I. HARD LAW AND SANCTIONS

The proposed women on boards directive called for greater transparency in board appointments. Lack of transparency on boards has been an important corporate governance issue. The proposed women on boards directive called for sanctions, if a Member State does not comply with the legislation. Member States may decide on the sanctions, which include fines, exclusion from tenders, funding and annulment of appointments of non-executive directors. The research explains that, Member States may apply hard sanctions, which include withholding board remuneration, penalizing the company and dissolution of companies (A), though, several Member States have passed binding legislation, but with soft sanctions (B).

A. BINDING QUOTA LEGISLATION WITH STRICT SANCTIONS

The French government used quota legislation in politics, and then codified quotas into legislation, by setting a forty percent minimum of women on boards with sanctions. The women on boards legislation would never have entered into force, without existing quotas in politics. The research has found, that despite different legal frameworks, quota legislation, types of companies and sanctions in the event of noncompliance, the French sanctions were hard (1), as Italian sanctions (2), following the example of the Norwegian legislation of sanctions.

1. French hard sanctions

In 2011, the French government passed quota legislation, which required public listed companies and companies with at least 500 employees and revenue of over fifty million euros to include twenty percent of women on boards within three years and forty percent within six years. The sanctions include cancelling the board appointment, withholding the remuneration of board directors and cancelling board decisions taken during irregular meetings. The hard sanctions are targeted against the board of directors. Having explained that, the French government calls on sanctions against the board of directors, the research examines that, the Italian government calls on sanctions against the company.

2. Italian hard sanctions

In 2011, the Italian government passed gender quota legislation on boards of directors of public listed companies and state owned companies. The board is expected to include thirty percent of women on boards. The legislation applies to all board nominations, starting from when the legislation entered into force. Sanctions include

warnings, cancellation of board nominations and steep company fines. The strong fines are sanctions targeted against the company, more than against the board of directors. The research found that, the French and Italian governments' sanctions against the board of directors and the company consist of binding and enforceable legislation.

3. Conclusion

The binding quota legislation in France and Italy demonstrate that, strict quotas are the most effective means to increase the representation of women on boards. The approach of using hard sanctions in both Member States reveals a difference of approach, which may be linked to culture and economics, as France targeted individuals, while Italy targeted the company.

B. BINDING LEGISLATION BUT SOFT SANCTIONS

The European Commission intervened in national law not to improve gender equality in the Member States, but for business reasons, considering the proposed directive, as a necessity for a more competitive European economy.¹¹⁸⁷ Though, the proposed directive has not had the effect of unifying the EU Member States with a common approach. On the contrary, it has intensified the different approaches of soft law and hard law in the Member States.

The research shows that, the German government passed a thirty percent representation of women on boards quota, but with a soft sanction (1), while the Spanish government called for forty percent of women on boards, but with ultra-soft sanctions (2).

¹¹⁸⁷ Walby and Armstrong (n 567) 8-9; n 1061, European Parliament Report, Questions, Women on Boards Directive Proposal.

1. German light sanctions

The German government passed binding legislation (Gesetz für die gleichberechtigte Teilhabe von Frauen und Männern an Führungspositionen in der Privatwirtschaft und im öffentlichen Dienst) in 2015, which called for a thirty percent representation of women on boards. Though, if companies do not comply with the legislation, the sanction is to leave the board chair empty.

Having explained that the German government sanction for irregular boards is particular, and called the empty chair. The research turns to Spanish sanctions for irregular boards, which cannot really be qualified, as a real sanction, as it does not consist of fines or nullifying appointments, but awarding incentive government contracts.

2. The Spanish ultra-soft sanctions

The Spanish government was the first Member State to pass binding quota legislation, which called for forty percent representation of women on boards in 2003. However, the sanction, is not really a true sanction, as it is ultra-soft. It offers companies incentives to government contracts in exchange for compliance with the legislation.

The research has found that the German and Spanish governments call on a particular sanction, which are not dissuasive or even penalizing in any strict sense.

3. Conclusion

The German legislation without hard sanctions has not been completely effective, though there are important increases of the representation of women on boards. The German government passed new legislation, a second law, called *Zweites*

Führungspositionen-Gesetz – Füpog II, which entered into force in August 2022. The legislation requires public and codetermined companies with more than 2000 employees to include a minimum of one woman and one man to an executive board with more than three members.

II. MEMBER STATES WITH BINDING LEGISLATION BUT WITHOUT SANCTIONS

The Spanish government and the government of the Republic of Iceland passed binding women on boards legislation, but without sanctions. The research points out that, the Spanish legislation (2007) did not include hard sanctions, as it offered companies incentives to access government contracts, in exchange for increasing the representation of women on boards (A), while the government of the Republic of Iceland passed women on boards legislation (2010), calling for forty percent of women on boards in public limited companies, state owned companies and private limited companies with over fifty employees, and without any sanctions (B). In 2020, in Spain, there were 29.3 percent of women on boards.¹¹⁸⁸ In Iceland, there were 37.2 percent of women on the boards of directors.¹¹⁸⁹

A. SPANISH GENDER QUOTA LEGISLATION

Article 14 of the Spanish Constitution 1978 stated that ‘Spaniards are equal before the law and may not in any way be discriminated against on account of birth, race, sex, religion, opinion or any other personal or social condition or circumstance.’ A

¹¹⁸⁸ German Legislation, Second Management Positions Act Füpog II (Act to Supplement and Amend the Regulations for the Equal Participation of Women in Leadership Positions in the Private Sector and the Public Sector - *Gesetz zur Ergänzung und Änderung der Regelungen für die gleichberechtigte Teilhabe von Frauen an Führungspositionen in der Privatwirtschaft und im öffentlichen Dienst*) (2021) <<https://www.buzer.de/gesetz/14890/index.htm>> accessed 24 June 2022; n 24, OECD Statistics, Employment : Female Share of Seats on Boards of the Largest Publicly Listed Companies.

¹¹⁸⁹ Statistics Iceland, Women 34.7% of Board Members of Medium and Large Companies (2020) <<https://statice.is/publications/news-archive/enterprises/managers-and-board-of-directors-2019/>> accessed 23 December 2021.

constitutional amendment was unnecessary to pass women on boards legislation. Spain was the first EU Member State to introduce women on boards legislation in public limited and private companies in 2007,¹¹⁹⁰ to increase the representation of women on boards over a period of eight years, which included executive and non-executive directors by 2015.

According to Article 75 of the Organic Law 3/2007 of March 22 for the Effective Equality of Women and Men, women and men should be represented at a minimum of forty percent or no more than sixty percent. Yet, the legislation does not apply any sanctions for non-compliant companies. The legislation failed to increase board appointments within the eight-year designated timeframe. This hard law approach without sanctions suggests that women on boards sanctions are not a priority for the Spanish government. The government pointed out the difficulty of finding qualified board directors.¹¹⁹¹ The research finds that the Spanish legislation took too long to implement to bring about rapid change (1), while, in addition, the Spanish government incentives contracts scheme without sanctions were responsible for the failed legislation (2).

1. Slow application of the Spanish legislation

As a general rule, and as the research has shown, the greater the state regulates the board of directors, the greater the representation of women on boards.¹¹⁹² Although, Spanish binding legislation has been in force since 2007, but the increase in the

¹¹⁹⁰ Spanish Legislation, Organic Law 3/2007 of March 22 for the Effective Equality of Women and Men BOE-A-2007-6115 <<https://www.boe.es/buscar/act.php?id=BOE-A-2007-6115>> accessed 3 January 2020; P. Gabaldon, H. Mensi-Klarbach and C. Seierstad, 'The Multiple Versions of Quota Laws in Europe' in P. Gabaldon, H. Mensi-Klarbach and C. Seierstad (eds) *Gender Diversity in the Boardroom*, (1st edn, Palgrave Macmillan, 2017) 244-345.

¹¹⁹¹ Tania Verge and Emanuela Lombardo, 'The Differential Approach to Gender Quotas in Spain: Regulated Politics and Self-Regulated Corporate Boards' EUI Working Paper Law 2015/24 <<https://www.researchgate.net/publication/279535831> The differential approach to gender quotas in Spain regulated politics and self-regulated corporate boards EUI Working Paper LAW 201524> accessed 3 January 2020.

¹¹⁹² *ibid.*

representation of women on boards in Spain is too slow and spread out over a too long period of time. In 2006, there were six percent of women on boards. In 2011, there were ten percent. In 2015, there were nearly nineteen percent. And, in 2020 there were just slightly over twenty-nine percent of women on boards of public limited companies in Spain. Though, this figure is on the rise, it is still far off from the required forty percent called for in the proposed directive.

Having explained that the Spanish government legislation is moving slowly, the research examines the notion of quotas in exchange for government contracts.

2. Quotas in exchange for government contracts

The Spanish government offered incentives to companies in return for meeting the quota, as a means to incite companies to comply with the legislation. This was not a hard sanction and has not been effective. It is not a penalty in the strict sense. The Spanish government did not link its economic policies to governance and women on boards. The lack of sanctions does not oblige companies to comply with the legislation. The governance code has called for forty percent of women on boards by 2022.¹¹⁹³ Having explained that the Spanish legislation is moving slowly, as quotas for contracts are not inciting companies to meet the forty percent quota, the research examines gender quota legislation in Iceland.

B. GENDER QUOTA LEGISLATION AND ICELAND

The most recent gender equality legislation in Iceland is the Equal Status and Equal Rights for the Sexes Act no. 150 December 29, 2020, which forms the legal basis of

¹¹⁹³ Spanish National Securities Market Commission Report (Comision Nacional del Mercado de Valores) The Presence of Women on Boards of Directors Rose by Almost Four Percentage Points in 2019, to 23.9 Percent (2020) <<https://www.cnmv.es/portal/verDoc.axd?t=%7Bfad8ccf2-3d3b-4454-b8ca-3db5391c16e9%7D>> accessed 23 December 2021.

gender equality legislation in Iceland, guaranteeing women equality of opportunity. The legislation has been reformed several times: Act on Equal Status and Equal Rights of Women and Men no. 96/2000, as per the Act on Equal Status and Equal Rights of Women and Men No. 10/2008, as amended by Act No. 162/2010 and No. 126/2011.¹¹⁹⁴

Moreover, the legislation allowed existing companies to decide on whether or not to apply national women on boards legislation, whereas, new companies were obliged to comply with the legislation.

The research explains that, the legislation calls for binding quota legislation for all companies (1), though, it was not as effective, as the Norwegian women on boards legislation (2).

1. Women on boards legislation

According to the legislation Amending the Act on the Establishment of a Partnership for Reykjavík Energy, the Act on Landsvirkjun, the Act on Cooperatives and the Act on Partnerships (Chairman of the Board, Gender Ratio on the Board), companies in Iceland with more than fifty employees of public owned and public limited companies are required to have at least forty percent of women and forty percent of men on boards. There were no sanctions for non-compliance.

¹¹⁹⁴ Icelandic Legislation, Law on Equal Status and Gender Equality, Act no. 150 (2020) <<https://www.althingi.is/altext/stjt/2020.150.html>> accessed 22 December 2021; Government of Iceland Report, Rósa Guðrún Erlingsdóttir, WTO Committee on Trade and Gender Is Mandatory Regulation a Key to Gender Equality in Businesses? The Impact of Icelandic Laws on Gender Quotas on Company Boards, the Equal Pay Certification, and Other Special Measures (2020) <https://www.wto.org/english/tratop_e/womenandtrade_e/230621_iceland.pdf> accessed 22 December 2021.

The legislation entered into force in September 2013. Existing companies may decide, whether or not to apply this legislation.¹¹⁹⁵ New companies are obliged to comply with forty percent of women on boards.¹¹⁹⁶

Recent legislation has passed to amend the Companies Act which calls for sanctions to the forty percent women on boards requirement. This legislation entered into force on 1 January 2021.¹¹⁹⁷ According to the proposed bill, an amendment paragraph will be added to each of the company structures that have to comply with the women on boards legislation. Chapter 1 Article 1 states that, companies will pay daily fines until the irregular board becomes compliant with a minimum of forty percent of women on boards. The fines are 10,000 ISK to 1000,000 per day. Since the Government requires all company structures to comply with the women on boards legislation, this required all company structures to add the amendment to the legislation to include the new sanctions. This includes the following Amendments:

- Amendment to the Act on Cooperatives, no. 22/1991,
- Amendment to the Act on Private Limited Companies, no. 138/1994,
- Amendment to the Act on Public Limited Companies, no. 2/1995 and
- Amendment to the Act on Partnerships, no. 50/2007.

¹¹⁹⁵ Icelandic Legislation, Amending the Act on the Establishment of a Partnership for Reykjavík Energy, the Act on Landsvirkjun, the Act on Cooperatives and the Act on Partnerships (Chairman of the Board, Gender Ratio on the Board), Act no. 49, (2011) Chapter 2, Article 2(a) <<https://www.althingi.is/altext/stjt/2011.049.html>> accessed 22 December 2021; Government of Iceland News Release, Directorate of Equality, Iceland Introduces Gender Quotas on Corporate Boards (24 March 2010) (2010) <<https://www.jafnretti.is/en/moya/news/iceland-introduces-gender-quotas-on-corporate-boards>> accessed 22 December 2021.

¹¹⁹⁶ *ibid.*

¹¹⁹⁷ n 1195; n 1189, Statistics Iceland, Women 34.1% of Board Members of Medium and Large Companies.

The Government will take into consideration the financial situation of the company. The Treasury Department will enforce the payments for irregularity.¹¹⁹⁸

Having explained that the government of Iceland has recently passed quota legislation with financial sanctions, the research examines the effectiveness of the legislation.

2. The effectiveness of women on boards legislation in Iceland

The Government referred to the Norwegian legislation of 2003 and the effectiveness of the rapid increase of women on boards. Citing a Norwegian economist, Sissel Jensen, more women in top management have been able to receive higher remuneration, thanks to the women on boards legislation. In Iceland, the results are different than in Norway. According to the Government, the legislation had not been complied with. There were 33.2 percent of women on boards in public limited companies in Iceland in 2020.

The research has compared the quota legislation in Spain and Iceland, and found that, though the two countries had passed binding legislation, the Spanish approach could not be considered effective, due to the lack of real sanctions, while the government of Iceland recently passed quota legislation with financial sanctions and quickly increased the representation of women on boards.

¹¹⁹⁸ Icelandic Legislation, The Bill to the Law on Amendments to the Act on Cooperatives, the Act on Private Limited Companies, the Act on Public Limited Companies and the Act on Partnerships (Penalties for the Proportion of the Sexes on the Board) (2019) <<https://www.althingi.is/altext/150/s/0019.html>> accessed 22 December 2021.

CONCLUSION OF CHAPTER ONE

There are many different women on boards soft and hard law policies in the EU Member States. Too much and varied legislation is harmful for the functioning and the economy of the European Union. Several Member States have limited soft law and no hard law in place. This situation cannot be sustained by individual Member States *ad infinitum*. The proposed women on boards directive is a move towards a minimum harmonization in the European Union. A Minimum Harmonisation Programme could accompany the directive, when it enters into force to work towards the forty percent representation of women on boards, called for in the proposed directive. Minimum harmonisation would align the Member States with the binding quota and sanctions. There is an economic case for this, as many Member States EU continue to have a systemic imbalance on the boards of directors. Women are untapped economic resources, which will allow the EU to remain competitive in the global economy.¹¹⁹⁹

¹¹⁹⁹ n 202, Credit Suisse Research Report; n 89, McKinsey Report, 12.; n 202, Deutsche Bank Research Report.

Chapter Two

EXCLUSIVE UNIQUE REGULATION

Exclusive unique regulation refers to those Member States who either do not follow EU policies, such as Denmark (Section 1) or Member States now outside the EU, the UK (Section 2). The decision for the EU institutions to intervene with the proposed directive was a result of the absence of a harmonised policy. The European Commission acknowledged the lack of a standard policy would weaken the economic functioning of the European Union, since '...different company law rules and sanctions ... lead to complications for businesses ...'¹²⁰⁰ Though, this was not the opinion of several Member States.

SECTION 1 MEMBER STATES OPPOSITION (DENMARK)

The various legal approaches to increase the representation of women on boards revealed the need for the EU institutions to intervene with the proposed directive, as Member States have been passing their own legislation. Though, other Member States disapprove of EU institutions intervention and increasing the representation of women on boards by the use of quotas. The research points out that the intention of a EU-led minimum harmonisation proposed directive will sustain EU economic policies (§1), even though, despite strong opposition from several Western European Union Member States and Eastern and South East European Union Member States.

¹²⁰⁰ n 1060, European Commission Press Release, Women on Boards: Commission Proposes 40% Objective.

§1: EU INSTITUTIONS INTERVENTION AND MEMBER STATES

The EU institutions objective for minimum harmonisation is founded in the notion of integration of Member States into a single economy, through improved economic and social policies. The divergence of practices, different standards and widening of the gap of the representation of women on boards demonstrates that, each Member State has been going in a different direction with its legal system for a long time.¹²⁰¹ The research explains that, due to fragmented women on boards policies in public limited companies in the European Union, the EU institutions had to intervene with a minimum harmonisation of women on the boards of directors (I), though, several Member States remain opposed to intervention (II).

I . PINPOINTING THE LEGAL BASIS OF INTERVENTION

European institutions were determined to intervene, as a means to remediate the different legal systems and fragmented approach to women on boards in the Member States. In order to achieve this, it was necessary to pinpoint the legal basis, which was found in Article 5(3) of the Treaty on European Union and in Protocol Number 2 on the Application of Subsidiarity and Proportionality, which called for the EU institutions to take action. Though, Article 5(3), calls on

...the Union and the Member States shall... assist each other in carrying out tasks which flow from the Treaties. The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. The Member States shall facilitate the

¹²⁰¹ European Commission, Report, 'Measuring Convergence in the European Union' (2020) <<https://www.eurofound.europa.eu/topic/measuring-convergence>> accessed 14 January 2021.

achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.¹²⁰²

Article 5(3) encourages Member States to take action and comply with the Treaties. The article is also a warning for the Member States not to go against the Union. The research shows that, Protocol Number Two on the Application of Subsidiarity and Proportionality allowed the EU institutions the right to intervene with the proposed directive (A), as EU law takes precedence over national law, per Article 4 of the TEU (B).

A . PROTOCOL NUMBER 2 ON THE APPLICATION OF SUBSIDIARITY AND PROPORTIONALITY

Besides Article 5(3) of the Treaty on European Union, the legal basis of EU intervention may also be found in in Protocol Number Two on the Application of Subsidiarity and Proportionality. Article 5 of the Protocol places the burden on EU institutions to explain in a statement that the proposed legislation complies with principles of subsidiarity and proportionality. EU institutions also need to give reasons why intervention is necessary by providing qualitative and quantitative facts.¹²⁰³ While, Article 6 of the Protocol states that, the Parliaments of the Member States have the right to respond to the EU institutions by way of a Reasoned Opinion or letter, within a period of six weeks from reception of the proposed legislation and statement, providing reasons for disagreement and questioning compliance with the principle of subsidiarity.¹²⁰⁴ The research has included several Reasoned Opinions from the Member States, giving reasons for disagreements and bringing up the principle of subsidiarity.

¹²⁰² n 75, Consolidated Version of the Treaty on the Functioning of the European Union, Article 5(3).

¹²⁰³ Protocol Number Two on the Application of Subsidiarity and Proportionality, C 310/207 (2004) <https://ec.europa.eu/info/sites/default/files/protocol_no_2_on_the_application_of_the_principles_of_subsidarity_and_proportionality_dec2004_en.pdf > accessed 15 June 2022.

¹²⁰⁴ *ibid.*

According to the principle of subsidiarity, '[i]n areas in which the European Union does not have exclusive competence, the principle of subsidiarity, laid down in the Treaty on European Union, defines the... action to be taken by the Union, rather than the Member States'.¹²⁰⁵ Therefore, this may be interpreted that, the EU institutions had the right to intervene. Member States were accountable for the lack of representation of women on boards, despite all efforts, which may have occurred. However, the principle of proportionality 'requires that, any action by the EU should not go beyond what is necessary to achieve the objectives of the Treaties'.¹²⁰⁶ The research found that, the lack of involvement from Member States to increase the representation of women on boards (1), justified the EU institutions right to intervention, based on the principle of subsidiarity (2).

1. Member States lack of effective legislation

EU Member States were 'unable to achieve the objective of gender balance, and the inability for the Member States to increase the representation of women justifies the need for the EU to act'.¹²⁰⁷ The European Commission had the right to intervene, as non-binding measures failed.

The proposed directive was called for in 2012 to increase the representation of women on boards to thirty percent by 2015 and to forty percent by 2020. However, the proposed directive was blocked in the Council for ten years. The legislation was recently voted in Council in March 2022. The deadline has been extended to 2027.¹²⁰⁸

¹²⁰⁵ n 1078, European Parliament, Report, The Principle of Subsidiarity.

¹²⁰⁶ European Union Law, Summaries (2020) <<https://eur-lex.europa.eu/browse/summaries.html>> accessed 13 July 2020.

¹²⁰⁷ M Szydło, 'Gender Equality on the Boards of EU Companies: Between Economic Efficiency, Fundamental Rights and Democratic Legitimation of Economic Governance'(European Law Journal, 2013) 221.

¹²⁰⁸ n 32, Proposal for a Directive; European Council Press Release, Member States Adopt a General Approach Aiming to Strengthen Gender Equality on Corporate Boards (European Council, 14 March

Having explained that, the Member States were unable to increase the representation of women on boards with soft law and the EU institutions legal position affirming the right to intervention, the research turns to the principle of subsidiarity.

2. The principle of subsidiarity and intervention

According to the Commission, EU institutions intervention respected the principle of subsidiarity with the proposed women on boards directive.¹²⁰⁹ Article 130r (4) EEC of the the Single European Act, the first subsidiarity provision provided that

[t]he Community shall take action relating to the environment to the extent to which the objectives referred to in paragraph 1 can be attained better at Community level than at the level of the individual Member States. Without prejudice to certain measures of a Community nature , the Member States shall finance and implement the other measures.¹²¹⁰

Having explained that the EU institutions right to intervene with the proposed directive, the research examines intervention and primacy of EU law.

B . INTERVENTION AND PRIMACY OF EU LAW

EU institutions are the only authorities, who can effectively ensure that Member States increase the representation of women on boards. The European Commission

2022) <<https://www.consilium.europa.eu/en/press/press-releases/2022/03/14/les-etats-membres-arretent-leur-position-sur-une-directive-europeenne-visant-a-renforcer-l-egalite-entre-les-femmes-et-les-hommes-dans-les-conseils-d-administration/>> accessed 15 June 2022.

¹²⁰⁹ n 202, EU Law, Opinion of the European Economic and Social Committee on the Proposal for a Directive of the European Parliament and of the Council on Improving the Gender Balance among Non-Executive Directors of Companies Listed on Stock Exchanges and Related Measures, 68–76.

¹²¹⁰ EU (EEC) The Single European Act (1987) No L 169/1, Art 130r (4) <https://eur-lex.europa.eu/resource.html?uri=cellar:a519205f-924a-4978-96a2-b9af8a598b85.0004.02/DOC_1&format=PDF> accessed 5 July 2019.

recognised that, too many different legal systems in the Member States would eventually lead to intervention and stronger measures.¹²¹¹

The research points out that EU law takes precedence over national law, per Article 4 of the TEU (1), and the principle of primacy of EU law requires national law to transpose EU law and not alter it (2).

1. Article 4 of the TEU

EU Member States are sovereign over their own legislation. Therefore, the relationship between EU law and national law have limits, when examining the women on boards situation. EU law supersedes national law, even if Member States have flexibility in transposing EU recommendations or directives to different degrees, i.e., with force, lightly or not at all into national law. The final application of the law remains EU law. Therefore, the problem arises in the interpretation of the ambiguous relationship between EU and national law, which interact with one another and are dependent on each other. Article 4 of the TEU defines the relationship that, the¹²¹²

...[European] Union and the Member States shall, in full mutual respect, assist each other [and] take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union...The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.¹²¹³

Article 4 states that, interaction of EU law and national law is built on mutual cooperation. Though, when reviewing women on boards hard and soft law in the EU Member States, not everything is transposed into national law. It may be impossible to

¹²¹¹ Machold and Hansen (n 86) 177.

¹²¹² Consolidated Version of the Treaty on European Union, Article 4(3) (2012) OJ C326 <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12012M004>> accessed on November 25, 2017.

¹²¹³ *ibid.*

apply EU law exactly as required, across the board in all Member States, since different legal systems may not allow it. This creates conflicting legal approaches between EU law and national law. There are different ways to recognise that, national law does not address women on boards in the same way in all Member States. Therefore, EU intervention with the proposed women on boards directive has created conflicting interests between EU law and national law. EU law calls for mutual respect of working with the Member States and yet, at the same time, calls for strict application of a directive. This may conflict with national law and questions EU law precedence over national law. Though, if national law conflicts with EU law, national law does not apply.

Having explained that the Article 4 of the TFEU is based on mutual cooperation between EU institutions and Member States, the research examines the principle of primacy.

2. The principle of primacy of EU law

The legal consequence of the principle of primacy is that, no new national laws may be passed, unless they comply with EU law.¹²¹⁴ The explanation of the principle of primacy is the following and,

... (referred to as 'precedence') of EU law... based on the idea that where a conflict arises between an aspect of EU law and an aspect of law in an EU country (national law), EU law will prevail. If this were not to be the case, EU countries could simply allow their national laws to take precedence over primary or secondary EU legislation, and the pursuit of EU policies would become unworkable.¹²¹⁵

¹²¹⁴ n 511, EU law, Law of Precedence or Primacy of EU law.

¹²¹⁵ *ibid.*

According to Articles 258¹²¹⁶ and 259 of the TFEU,¹²¹⁷ EU Member States will be obliged to transpose the proposed directive into national law, when it enters into force. The proposed directive would have to be interpreted equally among the Member States. National law is required to transpose EU law, as EU law precedes national law. The Commission will give a warning, if a Member State has not complied with the Treaties. The Member State will be able to reply. However, if the Member State does not comply within a timeframe, the Commission may bring the matter to the Court of Justice of the European Union.¹²¹⁸

Having explained that Article 4 of the TFEU is based on mutual cooperation between EU institutions and Member States and according to the principle of primacy of EU law, the research examines opposition to EU intervention with the proposed directive in the Western European Union Member States.

II. OPPOSITION TO EU INTERVENTION (WESTERN EUROPE)

The Danish government did not pass national binding quota legislation, as Norway, because of a strong disapproval of quotas. The government reformed its legislation, with a preference to encourage self-regulation, rather than EU binding quotas.

¹²¹⁶ Consolidated Version of the Treaty on the Functioning of the European Union, Part Six, Institutional and Financial Provisions, Title I Institutional Provisions, Chapter 1 The Institutions, Section 5, The Court of Justice of the European Union, Article 258 (former Article 226 TEC) (2008) OJ C115, 160-160 <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12016E258>> accessed on 5 July 2019; European Commission Report, Lise Rolandsen-Augustin, 'The Policy of Gender Equality in Denmark – Update' (European Commission, 2015) 10 <[https://www.europarl.europa.eu/RegData/etudes/IDAN/2015/510026/IPOL_IDA\(2015\)510026_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/IDAN/2015/510026/IPOL_IDA(2015)510026_EN.pdf)> accessed on 5 July 2019.

¹²¹⁷ Consolidated Version of the Treaty on the Functioning of the European Union, Part Six, Institutional and Financial Provisions, Title I Institutional Provisions, Chapter 1 The Institutions, Section 5, The Court of Justice of the European Union, Article 259 (former Article 227 TEC) (2016) OJ C202, 161 <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12016E259>> accessed on 5 July 2019.

¹²¹⁸ *ibid.*

The research finds Western European Union Member States, such as Denmark, disagreed with the proposed directive (A) nor did the German government initially agree with EU institutions intervention and the proposed directive (Though, the German government finally voted in favour of the proposed directive in Council in March 2022, which is ten years later from its initial position about the proposed directive) (B).

According to Act no. 1383 of 23 December 2012, Danish companies (limited and unlisted) were required to develop women on boards policies, set targets for executive and non-executive directors and report on the results.¹²¹⁹ This Act amended the previous Act no. 477 of 30 May 2012, which introduced rules for companies to comply with women on boards. Companies are required to set twenty-five percent women on boards targets to increase the representation of women on boards, within a defined timeframe. Companies used soft law mentoring and networking programmes to reach the target.¹²²⁰

A. DANISH GOVERNMENT OPPOSITION TO EU INTERVENTION WITH DIRECTIVE

Denmark has a high rate of women in employment, compared to other EU Member States, with 72.3 percent of women in the workforce, compared to 77 percent of men.¹²²¹ The research notes that, Denmark is a leader in gender equality legislation (1), though, there is a wide gap between social programmes and women on boards legislation, compared to other Northern European countries (2). Gender equality

¹²¹⁹ n 245, Nordic Women on Boards and in Leadership, 19; Danish Legislation, Act Amending the Companies Act, the Annual Accounts Act and Various Other Acts, Law No. 1383 of 23/12/2012 (2012) <<https://www.retsinformation.dk/eli/lt/2012/1383>> accessed 20 March 2020.

¹²²⁰ *ibid.*

¹²²¹ Statista Statistics, Employment Rate in Denmark from 2009 to 2019, by Gender (Statista, 2019) <<https://www.statista.com/statistics/1166044/employment-rate-in-denmark-by-gender/#:~:text=The%20employment%20rate%20was%20consistently,both%20men%20and%20women%20decreased>> accessed 20 March 2020; Agustin (n 242) 14.

policies in Denmark are ‘...characterized by high female employment rates, high representation of women in part-time employment...[and} low representation of women in economic decision making...’¹²²²

1. Danish gender equality legislation

According to Section 1 of the Gender Equality Act LBK No. 1678 of 19 December 2013, the legislation ‘promotes equality between women and men, including equal integration, equal influence and equal opportunities in all functions of society bases on the equal value of women and men.’¹²²³ Further legislation, the Danish Gender Targets and Policies Act entered into force in 2013. The Act was passed to increase the representation of women on boards and in leadership. The Act obliges the largest private Danish companies to set women on boards targets.. There was an increase from 7.3 percent in 2012 to 15.3 percent in 2016 in the number of women board directors of public limited companies. Employee representatives were not included in the calculation.¹²²⁴ In 2019, there were 30 percent of women on boards in public limited companies in Denmark.¹²²⁵

Having explained that, the Danish gender equality legislation called for companies to increase the representation of women on boards through the use of soft law targets, the research examines the Danish opposition to EU institutions intervention with the proposed directive.

¹²²² *ibid*, 10.

¹²²³ Danish Legislation, Gender Equality Act (2013) LBK No. 1678,§1 <<https://www.retsinformation.dk/eli/Lta/2013/1678> accessed 3 September 2019; European Commission Report, Country Report Denmark, Gender Equality (2016) 8.

¹²²⁴ *ibid*, 13.

¹²²⁵ n 24, OECD Statistics, Employment : Female Share of Seats on Boards of the Largest Publicly Listed Companies.

2. Danish opposition to EU intervention

The Danish political parties did not believe women on boards could be increased rapidly in the Member States; even with the proposed directive, as legal approaches diverge greatly. While minority parties, supported women on boards initiatives, the Danish parties were against tie-break quotas with sanctions, preferring a more flexible approach for companies to decide. The minority parties stated that the measures mentioned in the proposed EU directive of reaching forty percent of women on boards was unclear. The principal concerns were the lack of transparency of the recruitment process and not being able to reach the forty percent representation of women on boards. The research notes that, the Danish government asked for clarification about the application of the proposed directive (a),¹²²⁶ while the Commission asked the Danish government to change its opinion about the proposed directive (b).

a. The Danish government and the Reasoned Opinion

The Danish government and majority of political parties were opposed to EU institutions intervention on the basis of the principle of subsidiarity. In the Reasoned Opinion to the Commission, the Danish government disagreed with the need for EU institutions intervention, stating that, the subject of women on boards falls under national law. The Red-Green Political Alliance called on the Government to pass its own quota legislation. The Alliance invited the EU Member States to adopt their own women

¹²²⁶ n 166, Consolidated Version of the Treaty on the Functioning of the European Union; Article 157(3); European Commission, Commission Staff Working Document Impact Assessment on Costs and Benefits of Improving the Gender Balance in the Boards of Companies Listed on Stock Exchanges. Accompanying the document Proposal for a Directive of the European Parliament and of the Council on Improving the Gender Balance among Non-Executive Directors of Companies Listed on Stock Exchanges and Related Measures (2012) SWD 0348 <<https://secure.ipex.eu/IPEXL-WEB/dossier/document/SWD20120348.do#dossier-COD20120299>> accessed 27 November 2017; Reasoned Opinion, EU Law, Proposal for a Directive of the European Parliament and of the Council on Improving the Gender Balance among Non-Executive Directors of Companies Listed on Stock Exchanges and Related Measures, Scrutiny Details, Subsidiarity Details (2013) <<https://secure.ipex.eu/IPEXL-WEB/dossier/document/SWD20120348.do#dossier-COD20120299>> accessed 3 September 2019; IPEX, Danish Government Reasoned Opinion (2013) <<https://secure.ipex.eu/IPEXL-WEB/document/COM-2012-0614>> accessed 24 August 2021.

on boards legislation. The minority parties, the Social Democratic Party, the Social Liberal Party and the Socialist Peoples' Party, did not find any inconsistencies with the principle of subsidiarity in the proposed directive, since the Article 157(3) of the TFEU is the legal basis for adopting the proposed directive in the first place, which included equal treatment of men and women in employment and occupation.¹²²⁷

b. The reply from the European Commission

The European Commission consulted with the Danish government, asking for approval of the proposed women on boards legislation, explaining that the majority of Member States had not passed women on boards legislation, nor did they have significant gender equality recommendations or codes in place. Self-regulation has failed. EU recommendations and programmes have not been successful in increasing the representation of women on boards. In 2013, at the time of the reply from the Commission, women represented five percent of non-executive board directors in public limited companies in Denmark. According to the Commission, the principle of subsidiarity had not been violated; as Member States were left to implement EU policies. Though, as the policies were ineffective, the Commission stated the right to intervene. The proposed women on boards directive would allow Member States to implement their own national law, before the directive entered into force. This was contingent on reaching forty percent of women on boards by 2020 and the guarantee that, the European Commission was compliant with the principle of subsidiarity.

Clarifying the scope of the proposed directive, the Commission stated that, the method of recruitment and nomination would require tie-break quotas, a forty percent quota, which was binding. Though, the process was more of a target, than a strict quota. 'As regards any remaining question regarding the scope and the obligation of the

¹²²⁷ *ibid.*

proposal, ...the method of achieving the 40 percent would be binding (obligation of means), but not the 40 percent target itself (which is a target to attain)'.¹²²⁸ The method of nomination and recruitment to reach forty percent of women on boards was a binding obligation. Though, the total percentage of women on boards actually in companies, which may not reach forty percent. Therefore, this was confusing and not a binding obligation in the strictest of definitions, which may explain why the Danish government asked for clarification.

Denmark was able to raise women on boards without EU binding quota legislation. Though, companies have not reached the forty percent representation of women on boards called for by the European Commission. The Danish position continues to be opposed to the use of quotas and against EU institutions intervention, on the basis of the principle of subsidiarity.

Having explained that, Danish gender equality legislation consisted of soft law targets, which the government preferred, the research examines the German government opposition to EU intervention with the proposed directive.

B. GERMAN GOVERNMENT OPPOSITION TO EU INTERVENTION

The European Commission stated that, the proposed women on boards directive was compatible with the principle of subsidiarity for two reasons. The first reason given was that, Member States were not introducing their own legislation. The second reason stated that, Member States have different soft and hard law, which harmed the European Union market economy.¹²²⁹

¹²²⁸ European Commission, Commission Reply to the Danish Reasoned Opinion (IPEX, 2013) <<https://secure.ipex.eu/IPEXL-WEB/document/COM-2012-0614>> accessed 3 July 2019.

¹²²⁹ R. Koch (1080) 53-74.

According to the German government position, regulations were already in place, which included quota legislation. Thus, the Government found the pretenses for EU institutions intervention exaggerated. The German government ruled that, the proposed women on boards directive was in conflict with German constitutional law, which would affect existing board composition.¹²³⁰

The German government opinion was that, the Member States should pass their own legislation, which would not have the same legal basis in other Member States. Therefore, national sovereignty would be called into question, if Member States did not pass their own women on boards legislation. According to the German government, even if the proposed directive was voted positively, not all EU Member States would accept it. According to the German interpretation of the principle of subsidiarity, the matter of women on boards was not under the authority of European Union law. The German government rejected the proposed directive.¹²³¹ The research notes that, the German government disagreed with the legal basis of intervention, according to the principle of subsidiarity (1), and also, rejected the legal basis of intervention under Article 157(3) of the TEU, which allowed EU institutions to intervene with the proposed directive (2).

1. The legal basis of intervention and the principle of subsidiarity

The legal basis of the principle of subsidiarity under EU law is defined in the TEU,¹²³² when the EU shall take action and not the Member States. According to Article 5(3) of the TEU,

¹²³⁰ *ibid.*

¹²³¹ *ibid.*

¹²³² n 169, Treaty of the European Union, Consolidated Version of the Treaty on European Union, Article 5(3).

Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.

The various legislation considers the interdependence between EU institutions and the Member States. According to Number Ten of the Resolution of 13 September 2012, EU Parliament requested national Member States' Parliaments to examine all proposed EU legislation in relation to the principles of subsidiarity and proportionality.¹²³³

According to Number Eleven of the Resolution of 18 April 2018, EU Parliament received numerous Reasoned Opinions from national Member States Parliaments, which demonstrated increased interest of Member States interactions with EU institutions.¹²³⁴

According to 'Article 5(3) of the Treaty on the European Union (TEU) and Protocol Number 2 on the application of the principles of subsidiarity and proportionality',¹²³⁵ the European Parliament justified intervention concerning the proposed women on boards directive, as the Member States with different soft and hard law approaches have proven ineffective.

The European Parliament is responsible for scrutinising the national Parliaments and compliance with the principle of subsidiarity.¹²³⁶ EU institutions adhere to three conditions before intervention. Firstly, the matter must not be within exclusive competence of EU law. Second, EU Member States are unable to achieve the objectives on their own. Lastly, EU institutions are able to take action more effectively, than the

¹²³³ *ibid.*

¹²³⁴ n 169.

¹²³⁵ n 169.

¹²³⁶ European Parliament, 'The Principle of Subsidiarity' (2019) <https://www.europarl.europa.eu/ftu/pdf/en/FTU_1.2.2.pdf> accessed 5 July 2019.

EU Member States.¹²³⁷ The provisions relating to women on boards may be found in the Directive on Equal Treatment in Matters of Employment and Occupation.¹²³⁸ The Directive upholds the Treaty of Nice,¹²³⁹ as the legal basis of the principle of equal treatment in employment and occupation,¹²⁴⁰ as in Article 141(3),¹²⁴¹ and under Articles 21 and 23 of the Charter of Fundamental Rights of the European Union,¹²⁴² the Directive guarantees the right of equal treatment between men and women in employment.

According to Number 36 of the Directive on Equal Treatment in matters of Employment and Occupation, objectives may be better reached by EU law, with reference to Article 5 of the Treaty of Nice and the principle of subsidiarity. The Directive also mentions that, EU law shall comply with the principle of proportionality, as it 'does not go beyond what is necessary in order to achieve those objectives.'¹²⁴³

According to Article 14 of Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the Implementation of the Principle of Equal Opportunities and Equal Treatment of Men and Women in Matters of Employment and Occupation (Recast), equal treatment is equal access to employment, including promotion, selection and recruitment 'whatever the branch of activity and at all levels of the professional hierarchy' includes women and men.¹²⁴⁴

¹²³⁷ n 169, Article 5.

¹²³⁸ n 1085, Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the Implementation of the Principle of Equal Opportunities and Equal Treatment of Men and Women in Matters of Employment and Occupation (Recast) (OJ L204, 2006) 23–36, numbers 4–5, 19, 36.

¹²³⁹ EU Treaty, Treaty Establishing the European Community (Nice Consolidated Version) <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12002E141>> accessed 3 September 2019.

¹²⁴⁰ n 1084, Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the Implementation of the Principle of Equal Opportunities and Equal Treatment of Men and Women in Matters of Employment and Occupation (Recast) (2006) OJ L204, 23–36, n 4.

¹²⁴¹ *ibid.*

¹²⁴² n 1084, n4, n5.

¹²⁴³ n 1084, n36.

¹²⁴⁴ n 1084, Article 14, 23–26.

Having explained that the German government disagreed with the EU institutions reasoning for intervention, the research examines Article 157(3), as the legal basis for quota legislation, which allows for intervention.

2. German government rejection of Article 157(3) of the TFEU as legal basis

The German government rejected Article 157(3) of the TFEU,¹²⁴⁵ as the legal basis for women on boards quotas. The Article gives European institutions the right to intervention, which was highly contested by the German government. 'The European Parliament and the Council...shall adopt measures to ensure the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation...' ¹²⁴⁶

The German government disagreed with the wording of the Article, stating it was another form of positive action, which is forbidden in German law. This situation, along with the objections concerning the principle of subsidiarity, affirmed the position of the Government. According to the government, the representation of women on boards should remain a subject, left to the Member States and, a proposal of a new directive. The strict interpretation of Article 157(3) and Article 157(4) stated

...ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the underrepresented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers.¹²⁴⁷

¹²⁴⁵ n 172, Consolidated Version of the Treaty on the Functioning of the European Union – Part Three: Union Policies and Internal Actions – Title X: Social Policy, Article 157(3) and Article 157(4).

¹²⁴⁶ *ibid.*

¹²⁴⁷ *ibid.*

According to the German government, EU institutions were not the competent authority to address women on boards legislation, as they did not uphold the fundamental rights of the Member States. The test of the principle of subsidiarity had not been complied with, as the Government would pass tougher women on boards legislation.

The Lisbon Treaty called on the Member States to deal with employment and social affairs. Though, the EU agenda consists of full employment strategies, by soft and hard law, to coordinate the Member States national policies. According to the Centrum für Europäische Politik Policy Brief, 'the EU does not have the competency to adopt a legally binding gender quota.' The Think Tank exposed several controversial points about the proposed directive:

- Public limited companies are forced to implement the forty percent women on boards quota.
- The EU is imposing an ideology on the Member States
- Economic value is unsubstantiated
- Intervening in the rights of the Member States
- Violation of the principle of subsidiarity

Therefore, intervention by EU institutions in Germany was deemed unwelcome. According to the Think Tank, EU institution intervention is causing a struggle between Member States to pass quota legislation, in the interest of protecting national companies and the EU proposed directive. Therefore, the Think Tank called on EU institutions to harmonise the regulations, as there are great differences among the Member States gender equality policies and legislation, which is harmful to the internal market. There was also a perception that, these differences would impact investment in the Member States. In the absence of women on boards quotas, Member States may

be excluded from participating in bids and tenders, where the quota is in application.¹²⁴⁸

Several Member States, such as, 'Denmark, the Netherlands (at the time), Poland, Sweden, the United Kingdom and part of the Czech Republic Parliament' ¹²⁴⁹ objected to the proposed women on boards directive. These Member States preferred national measures in the first place, and as a last resort, EU soft law measures. Those Member States objected on the basis of the principle of subsidiarity.¹²⁵⁰

However, the proposed directive was finally voted by the new German government in March 2022, who did not refer this time to a strict interpretation of positive action, nor to a strict interpretation of the principle of subsidiarity.

The research has explained that, the German government disagreed with Article 157(3), as the legal basis for quota legislation. Other Member States also disagreed with EU institutions intervention on the principle of subsidiarity.

§2: OPPOSITION TO EU INTERVENTION (EASTERN AND SOUTH EAST EUROPEAN UNION MEMBER STATES)

There are important differences among the Eastern and South East European Union Member States. Though, with weak legal frameworks, it is difficult for these Member States to adhere to and enforce corporate governance and EU gender equality policies.

¹²⁴⁸ Stiftung Ordnungspolitik Report, Ordnungspolitik Foundation (Stiftung Ordnungspolitik)).The Ordnungspolitik Foundation supports the principles of a free, democratic, market-based system in Germany, Europe and the rest of the world. (Centrum für Europäische Politik, 2012) <<https://www.cep.eu/en/cep/stiftung-ordnungspolitik.html>> 13 July 2020.

¹²⁴⁹ n 36, European Parliament, Gender Balance on Boards.

¹²⁵⁰ *ibid.*

The transition to the market economy and western style corporate governance progressed too rapidly. The research reveals ineffective legal environments (I), which show serious governance issues concerning gender equality and women on boards legislation in these Member States (II).

I. INEFFECTIVE LEGAL ENVIRONMENTS IN EASTERN AND SOUTH EAST EUROPEAN UNION MEMBER STATES

Most of the Eastern European Union Member States had adopted corporate governance models from the United States, the United Kingdom or Germany, following the collapse of the Soviet Union in 1989. This contributed to the transitioning to market economies, which was supposed to lead to more democracy and free market economies. Though, the transition is very recent, the adoption of the legal approaches have been ineffective. Eastern Member States had no choice, but to adopt practices from the West to build their new economies. The Western corporate governance practices were supposed to manage the financial markets, banking and investments. EU corporate governance recommendations and legislation are constantly evolving. These changes in governance have been too rapid for Eastern European Union Member States, which has had negative consequences. In many Eastern European Union Member States, changes are not easily accepted. This may be due to past history of the region under Communism and the Eastern European tradition of not adhering to Western methods, but rather pretending to comply with Western institutions, such as the Commission. Furthermore, it may be problematic to openly disagree in government, in society and in the courts, which are not independent enough to uphold the law. The pressure of authoritarian regimes in power does not allow independent thinkers, transparency in government or acceptance of liberal western principles.¹²⁵¹

¹²⁵¹ Miklós Dobák and Thomas Steger, 'Corporate Governance in Central and Eastern Europe: An Introductory Review' (2003) 8(3) Journal for East European Management Studies, 230-31.

After the 2008 Financial Crisis, there were many social inequalities, corruption and favours to the few who became private owners of companies, reinforcing the weakness of the liberal West. The 2008 Financial Crisis has had enormous consequences, where Eastern European Union Member States populations have never been able to accept the Crisis, caused by the West and therefore, this is one of the reasons that, they have turned against it.¹²⁵² The financial sector in most of the Eastern European Union Member States is and has been ineffective. Public limited companies do not control the markets in these Member States. After 1989, private ownership went to government members from the former state-run economy, who '...imposed from above... the dominance of politics over economics even in the field of business.' Traditional values and customs ruled over Western business practices.'¹²⁵³

Though, from a macroeconomic assessment, Eastern European Union Member States face a similar situation as Western European Union Member States, with a declining demography, people ageing and leaving the workforce, a low birth rate and high emigration. High emigration is the main difference of demographics between Eastern and Western European Union Member States.¹²⁵⁴

Moreover, the research confirms that there are limited active gender equality policies in place and no women on boards legislation in the Eastern European Union Member States (A), which has also led the Commission to intervene with the proposed directive to force a change (B).

¹²⁵² Ivan Krastev and Stephen Holmes, The Guardian, How Liberalism Became the God that Failed in Eastern Europe (The Guardian, 24 October 2019) <<https://www.theguardian.com/world/2019/oct/24/western-liberalism-failed-post-communist-eastern-europe>> accessed 23 December 2021.

¹²⁵³ Dobák and Steger (n 1251) 230-31.

¹²⁵⁴ Krastev and Holmes (n 1252) The Guardian, How Liberalism Became the God that Failed in Eastern Europe.

A. LIMITED GENDER EQUALITY POLICIES

Women on boards is a non-subject in many Eastern and South East European Union Member States. The research finds there is limited gender equality policies and women on boards legislation (1), which are a result of the lack of political support (2). A huge gap remains between Eastern and Western European Union Member States. It is important to understand the origins and reasons why these Member States are unable have effective gender equality policies and legislation, including enforcement mechanisms.

Many Eastern and South East European Union Member States have very limited gender equality policies in place and no means to increase the representation of women on boards. These Member States include Croatia, Cyprus, the Czech Republic, Hungary, Latvia, Liechtenstein, Lithuania, Malta and Slovakia.¹²⁵⁵

1. Lack of gender equality policies and women on boards legislation

According to the Eastern European Union Member States, traditional society and social norms are more important than gender equality law. The position of 'women' is very different than in Western European Union Member States. Women are stereotyped to have and take care of children, as well as, cleaning house. Many women have no access to top management jobs nor decision-making positions on the boards of directors.¹²⁵⁶ Having explained that gender equality and women on boards legislation is lacking in several Eastern and Southeastern European Union Member States for cultural, historical and political reasons, the research examines the lack of political support for gender equality policies and legislation.

¹²⁵⁵ Senden and Kruisinga (n 30) 9.

¹²⁵⁶ *ibid*, 17.

2. Lack of political support for gender equality policies and legislation

Though the Eastern and South East European Union Member States have their own cultural identification, based on past history, it is not possible to imagine that, Member States are going to radically change their positions and suddenly, increase the representation of women on boards with hard law, when soft law is limited. The lack of political support from the governments of these Member States confirm that, they do not support gender equality policies or legislation, which continues to keep women out of the labour market.¹²⁵⁷

Having explained that, gender equality and women on boards legislation is lacking in several Eastern and Southeastern European Union Member States for cultural, historical and political reasons, due to the lack of political support, the research examines that, EU institutions intervention with the proposed directive will eventually force change in this region, though it may take a very long time.

B. EU INTERVENTION TO FORCE CHANGE

The proposed women on boards directive will force change in the Eastern European and South East European Union Member States, as there is a backward evolution or devolution, where women are becoming exactly, as the stereotype has categorized them, i.e., housewives, child bearers, housekeepers and caretakers. In several of these Member States, men believe women are too incompetent to be allowed to participate on top management level or company boards.¹²⁵⁸ The research found that, the Commission believed that the proposed directive would make national institutions stronger (1), though, there were several problems trying to regulate women on boards legislation in Eastern and South East European Union Member States (2).

¹²⁵⁷ *ibid.*

¹²⁵⁸ *ibid.*, 18.

1. The proposed women on boards directive and national institutions

The optimistic position of the European Commission was that, intervention would bring a positive change and oblige Member States to comply with the legislation. The initial view of the European Commission¹²⁵⁹ was that, the inclusion of women on boards legislation and gender equality policies would make national institutions stronger with such legislation in Eastern and South East European Union Member States, as they transition to market economies.

Having explained that EU institutions believed that, women on boards legislation would strengthen institutions, the research examines the ongoing issues with regulation and legislation in Eastern European Union Member States.

2. Ongoing issues with regulation and legislation

European institution experts claim that, there are contradictions, when trying to regulate in the Eastern European Union Member States for the following reasons:

- the lack of transparency and objectiveness of selection procedures
- the absence of selection criteria as well as of priority rules.
- the lack of monitoring, implementation and sanctions, which clearly emerges as a rather general, problematic issue throughout the EU/EEA Member States
- [and] obstructing the realization of progress overall and achievement of targets and quota.¹²⁶⁰

Other issues remain concerning monitoring and complying with targets, sanctions and quotas, as these are difficult to put into places.¹²⁶¹ Having explained that, EU institutions believed that legislation would strengthen institutions, despite issues with

¹²⁵⁹ n 29, Proposal for a Directive.

¹²⁶⁰ Senden and Kruisinga (n 30) 18.

¹²⁶¹ *ibid.*

regulation and legislation, the research examines governance in Eastern European Union Member States.

II. GOVERNANCE IN EASTERN EUROPEAN UNION MEMBER STATES

The majority of private company owners hold onto their power, as private ownership is not a transparent subject. Neither is how top management appointments are made. At the start of the transition to the market economy, there were many employee ownership structures. However, this is no longer the situation. Today, there are mainly minority shareholders, whose rights are not protected. They are, therefore, unable to contribute to the controlling majority shareholders, who are people appointed by the state. This is the same situation on supervisory boards. Private owners keep the same board of directors in place, without any obligation of transparency. In addition, nationalist and paternalistic management style is the tradition in Eastern Europe.¹²⁶²

The research finds that, this makes regulating the board of directors a failure in these Member States (A), because when the Eastern European Union Member States joined the European Union, they agreed to comply with the EU *acquis* from the date of entry onwards (B) and the recent attacks against the EU institutions by Eastern European Union Member States reveal a flagrant lack of respect for EU values and non-compliance with EU law (C).

A. EU GOVERNANCE FAILURE IN EASTERN EUROPE

Gender equality legislation may never develop in Eastern Europe, as '[a]fter communism fell, the promises of western liberalism to transform central and eastern

¹²⁶² Dobák and Steger (n 1251) 232-33.

Europe were never fully realised –and now we are seeing the backlash.’¹²⁶³ This information was written in 2019, which is rather recent. The explanation is not simply because of the change from centrally managed economies to free-market economies, or even the slow economic growth, nor the lack of women in employment, because they were forced out. There is a real crisis on the rise in Eastern Europe, which is anti-European, claiming to be the authentic Europe. This is not going to move in the direction for women to become board directors. The European Commission needs to address the subject of illiberalism now, as the importance of gender equality, women’s rights and EU values are at stake in several Eastern European Union Member States. Illiberalism may be defined, as an

...ideological universe that opposes different forms of liberalism by promoting majoritarian, nation-centric, and culturally integrative approaches... a backlash ... of liberalism, ‘undemocratic liberalism’, i.e., the political, economic, and cultural liberalism embodied by supranational institutions, globalization, multiculturalism, and minority-rights protections. ... [I]t combines elements from classical conservatism (respect for traditional hierarchies, whether national, religious, patriarchal, or heterosexual) and from the New Right (including calls for rebellion against the current social and political order).¹²⁶⁴

Croatia, Hungary, Poland and Slovakia are the Member States, who most actively disagree with European Union institutions, in the name of nationalism, safeguarding the family and religious values. These Member States are against social policies, coming from the liberal West, such as, gender, feminism, rights of gay people, LGBT and foreigners. The four Member States have formed a pact called the Visegrad Group, to counter the invasion of liberal EU values.¹²⁶⁵

¹²⁶³ Krastev and Holmes (n 1252) The Guardian, How Liberalism Became the God that Failed in Eastern Europe.

¹²⁶⁴ ‘illiberalism’, n, definition, ‘Disillusioned with Democracy: A Conceptual Introduction to Illiberalism’ Marlène Laruelle, Institut Montaigne Think Tank (2021) < <https://www.institutmontaigne.org/en/analysis/disillusioned-democracy-conceptual-introduction-illiberalism> accessed 23 December 2021.

¹²⁶⁵ Jacques Rupnik, ‘Explaining Eastern Europe: The Crisis of Liberalism’ (2018) 29(3)The Journal of Democracy 24-38 <<https://www.journalofdemocracy.org/articles/explaining-eastern-europe-the-crisis-of-liberalism/>> accessed 23 December 2021.

Few European Union Member States openly scorn the European Union and liberalism. The same pre-candidate EU Member States accepted the conditions to become a Member of the European Union by accepting EU values and *acquis*. Several Eastern European Union Member States have had many disagreements with the European Union, affirming that their country is the 'authentic' Europe and that, they would be destroyed by adopting Western rules. Many leaders from the Eastern European Union Member States looked for alternatives to the Western model. Several of those Member States chose to imitate the values of Germany's far-right Alternative für Deutschland Party. Those Member States are anti-Western, anti-EU and anti-world. National leaders from these Member States seek to negate support of the European Union, in favour of copying the far-right German party. The Western model in Eastern European Union Member States has failed, as the leaders of those governments disdain everything Western. Additionally, it is an insult to the great national pride of those leaders to be forced to use Western means to adapt to local practices.¹²⁶⁶

The research has taken a closer look at corporate governance and women on boards representation in the Eastern European Union Member States and has found a correlation between the anti-EU position in Croatia, Hungary, Poland and Slovakia. It has investigated to see, if there is a connection between the decrease of women on boards figures, due to the new illiberalism taking hold in Eastern European Union Member States. Therefore Croatia, Hungary, Poland and Slovakia corporate governance codes and women on boards statistics have been compared. The research confirms that, despite gender equality board provisions, the actual percentage of women on boards on public limited companies in Croatia has decreased (1), while the

¹²⁶⁶ Krastev and Holmes (n 1252) The Guardian, How Liberalism Became the God that Failed in Eastern Europe; RFE/RL's Hungarian Service, EU's Top Court Rejects Appeal By Hungary, Poland, Over Bloc's Rule-Of-Law Tool (RFE/RL, February 16, 2022) <<https://www.rferl.org/a/hungary-poland-european-union-challenge-court/31706163.html>> 9 June 2022.

Hungarian governance code does not mention gender or women, but refers to the underrepresented sex, though the percentage of women has decreased (2) and the Polish code has included an important diversity policy calling for thirty percent of women on boards, which has shown a slight increase of women on boards in public limited companies in Poland in 2021 (3), though, the Slovakian code only makes a very indirect reference to women. The percentage of women on boards in Slovakia has significantly decreased (4).

1. The Croatian Corporate Governance Code and gender equality board provisions

The Croatian Corporate Governance Code 2019 includes three references to gender and diversity. According to Section 21 of the Code, '[t]he supervisory board should include members with different genders, ages, backgrounds and experience to ensure it brings different perspectives to its decision-making.'¹²⁶⁷ The governance code includes inclusion of diversity and different perspectives on the board of directors.

According to Principle J of Section 5 of the Code, '[t]he management board shall have the necessary skills, knowledge, education, experience and diversity to carry out its collective responsibilities effectively...'¹²⁶⁸

According to 'Section 4 The Supervisory Board and Committees of the Code, [d]iversity is also an important consideration to ensure that different perspectives are taken account of in the board's decision-making'.¹²⁶⁹

¹²⁶⁷ The Croatian Corporate Governance Code 2019 <https://www.hanfa.hr/media/3616/2_cgcode_draft_2019-04-25_fin.pdf> accessed 23 December 2021.

¹²⁶⁸ *ibid.*

¹²⁶⁹ *in* 1257.

According to Gender Statistics, in 2019, there were 24.3 percent of women on boards in Croatia. In 2020, there were 23.4 percent. The figures show a decrease in the representation of women on boards in Croatia.¹²⁷⁰

Having explained that the Croatian governance made a couple of references to diversity in the Corporate Governance Codes, though, statistics point to a decrease of women on boards, the research examines governance in Hungary.

2. Particular wording in Hungarian Corporate Governance Recommendations

The Hungarian Corporate Governance Recommendations 2018 do not have any mention of women, gender or diversity in the provisions of the Code. Altogether, there are two mentions using the wording 'whose sex is under-represented' and 'have both sexes represented'.¹²⁷¹

According to 2.5.1 of the Code, the nomination process shall include the 'sex...under-represented in the given board,...given preference during the nomination process, if they possess the same qualifications...as the candidates of the other sex'.¹²⁷²

According to 2.5.2 of the Code, '[t]he Company should seek to have both sexes represented in the Board of Directors / Governing Board and the Supervisory Board'.¹²⁷³

¹²⁷⁰ n 772, EIGE Gender Statistics (2019 and 2020).

¹²⁷¹ The Hungarian Corporate Governance Recommendations 2018 <<https://www.ebrd.com/document/s/ogc/hungary-code.pdf>> accessed 23 December 2021.

¹²⁷² *ibid.*

¹²⁷³ *ibid.*

According to Gender Statistics, in 2019, there were 14.3 percent of women on boards in Hungary. In 2020, there were 12.9 percent. The figures show a decrease in the representation of women on boards in Hungary.¹²⁷⁴

Having explained that, the Hungarian governance made a couple of references to the underrepresented or other sex, statistics point to a decrease of women on boards, the research examines governance in Poland.

3. The Polish code and gender equality provisions

According to 1.3.2. Best Practice for GPW Listed Companies 2021 (Poland), '... actions taken and planned ... ensure equal treatment of women and men'.¹²⁷⁵

According to 2.1, the Polish Code calls for a diversity policy, calling for thirty percent of women on boards. The word diversity is mentioned eight times in the Code.

Companies should have in place a diversity policy applicable to the management board and the supervisory board, approved by the supervisory board and the general meeting, respectively. The diversity policy defines diversity goals and criteria, among others including gender, ...and specifies the target dates and the monitoring systems for such goals. With regard to gender diversity of corporate bodies, the participation of the minority group in each body should be at least 30%.¹²⁷⁶

According to Gender Statistics, in 2019, there were 20 percent of women on boards in Poland. In 2020, there were 23.5 percent. The figures show an increase in the representation of women on boards in Poland.¹²⁷⁷

¹²⁷⁴ n 772, EIGE Gender Statistics (2019 and 2020).

¹²⁷⁵ The Best Practice for GPW Listed Companies 2021 (Poland) <<https://www.gpw.pl/best-practice-2021>> accessed 23 December 2021.

¹²⁷⁶ *ibid.*

¹²⁷⁷ n 772, EIGE Gender Statistics (2019 and 2020).

Having explained that the Polish governance includes equal treatment and diversity policy, statistics point to an increase of women on boards, the research examines governance in Slovakia.

4. The Slovakian Corporate Governance Code without gender equality mention

The Slovakian Corporate Governance Code 2016 does not have any mention of women, gender or diversity. However, the wording 'diversity of thought' is the closest reference in the provisions of the Code.¹²⁷⁸

According to E. i. of Section V, Responsibilities of the Board states that, '[b]oards should consider, if they collectively possess the appropriate mix of backgrounds and competences, in order to avoid groupthink and bring a diversity of thought to discussions'.¹²⁷⁹

According to Gender Statistics, in 2019, there were 29.8 percent of women on boards in Slovakia. In 2020, there were 26.4 percent. The figures show a decrease in the representation of women on boards in Slovakia.

The research reference to gender, women, diversity in the corporate codes of the four Eastern European Union Member States have been compared. Three Member States reveal that the acceptance of gender equality and women on boards is problematic and on the decline. Those Member States are Croatia, Hungary and Slovakia. The increase of representation of women on boards in Poland is the exception. This may be explained, and despite Poland going towards the Hungarian position. The Polish

¹²⁷⁸ Corporate Governance Code for Slovakia 2016 <http://www.bsse.sk/Portals/2/Issuers%20Guide/2018/kodex_ENG_akt.pdf> accessed 23 December 2021.

¹²⁷⁹ *ibid.*

Corporate Governance Code 2021 set a target of thirty percent representation of women on boards, as requirements for board composition. Therefore, this research calls for close monitoring and further research to see, if the illiberalism spreading in Eastern Europe, will impact the decline of gender equality in the region and the representation of women on boards of public limited.

B. EASTERN EUROPEAN UNION MEMBER STATES AND GENDER EQUALITY ACQUIS

The EU gender equality acquis is rooted in principles, political objectives, agreements, legislation and policies, which must be transposed into national law on the date they become a Member. The research cites that, according to the Copenhagen Criteria, there are conditions to EU membership (1), though, the Eastern European Union Member States defy EU law and values (2).

1. EU gender equality legislation and Eastern European Union Member States

Eastern European Union Member States agreed to comply with EU gender equality law, as a condition of joining the EU, and, as indicated in the Copenhagen Criteria. The criteria is composed of three principal EU conditions, which the pre-Members have to meet, which are

- (i) the stability of institutions guaranteeing democracy, the rule of law, human rights, and the respect for and protection of minorities;
- (ii) the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the EU; and
- (iii) the ability to take on the obligations of membership, including adherence to the aims of political unification as well as Economic and Monetary Union (EMU).¹²⁸⁰

The future EU Member States agreed to commit to gender equality, as part of EU law.

¹²⁸⁰ n 1115, EU Law, Accession Criteria, Copenhagen Criteria.

This would naturally include adopting positive action measures to increase numbers of women in the workforce as part of economic EU policies. It would also include the equal treatment in employment directive and the proposed women on boards directive.

Having explained that the Eastern European Union Member States are obliged to respect the primacy of EU law, which includes women on boards, the research examines the recent EU versus Poland and Hungary clash.

2. The recent EU versus Poland and Hungary clash

During the recent EU Summit meeting, the Ministers of the Polish Nationalist Party, currently in power, and ally to the actual Hungarian Prime Minister, Viktor Orban, considered Eurosceptic, called to have the wording 'gender equality' removed from the Summit Declaration to rebuild Europe post-covid. For political reasons, by stating, that they uphold 'traditional social values at home, [though, they admitted to] have repeatedly clashed with their more liberal Western peers over the rights of women...' ¹²⁸¹ The first version of the Summit Declaration included the wording 'gender equality.' However, the edited Declaration stated: '[w]e will step up efforts to fight discrimination and work actively to close gender gaps...and to promote equality'. ¹²⁸² Therefore, the removal of the wording 'gender equality' from the Declaration does not fully uphold EU unity and law, which is questioned, as gender equality is a core EU value. There are no sanctions for such actions. Though, this may not be considered a major change in the text, it reveals the lack of political unification by certain Member States in the European Union. EU institutions may consider possible sanctions, such as budget cuts for members who do not uphold EU law.

¹²⁸¹ Reuters Article, Gabriela Baczynska, 'Poland, Hungary Block "Gender Equality" from EU Social Summit' (Reuters, May 2021) <<https://www.reuters.com/world/europe/poland-hungary-push-against-gender-equality-eu-social-summit-2021-05-07/>> accessed 6 June 2021.

¹²⁸² *ibid.*

Having explained that, certain Eastern European Union Member States lack respect of primacy of EU law, which includes gender equality, as a core EU value, and despite the EU institution clash with Hungary and Poland, the research turns to recent issues concerning gender equality and EU institutions.

C. RECENT ISSUES OF GENDER EQUALITY AND EUROPEAN UNION INSTITUTIONS

There are recent issues and disputes between the Eastern European Union Member States and the European Union institutions, which show an increasingly lack of respect for EU values and gender equality. In a recent European Conference, the gender equality text was removed from a legal document. The removal of gender equality language from the European Union Summit Declaration, a legal document, sends the message that gender equality is not an important core EU value. The lack of inclusion of this language is harmful, as it does not fully support women from advancing in the post-covid pandemic. The language 'closing gender gaps' is not the same as the term 'gender equality', which is larger in real meaning. The question that should be asked, is why was the change to the text permitted at the EU Summit Declaration.

In addition, the research cites the recent Polish court ruling that Polish national law precedes EU law is just another example of the conflictual relations between the EU institutions and certain Eastern European Union Member States (1), which also extends to the women on boards proposed directive, as a conflict of interests with the majority Eastern European Union Member States (2).

1. Women and inequalities post-covid

Women are the victims of the global covid pandemic, as during an economic downturn, women were the first to lose their jobs. The discussion at the EU Summit about gender equality was avoided and taken off the agenda. Eastern European Union Member State,

Poland, recently ruled in the Polish Court on 7 October 2021 that, Polish constitutional law has primacy before EU law. This is an attack on the primacy of EU law. The Polish Constitutional Court upheld that, the European Treaty is not compatible with Polish law, specifically calling into question EU law on national rights. The Court ruled that, CJEU interpretations are in conflict with national law. The Polish government warned the Commission not to interfere with its national law, as it considers EU law does not have primacy in Poland. The Polish government considered this is a question of sovereignty. This may lead to a form of sanction from the Commission, such as withholding stimulus funds to Poland, grants or loans. EU Member States are obliged to comply with European Union *acquis* and participate in the EU. The unwillingness of the Polish government and Courts to adhere to primacy and EU law raises questions about its commitment and membership to EU political institutions. The Hungarian and Polish governments have communicated, that they do not uphold the law of primacy and EU values, which bind all 27 EU Member States. Each Member State is free to choose compliance or leave the EU, as the recent Brexit has shown. As long as a Member State is within the Union, that Member State should comply with EU law.¹²⁸³ The non-application of sanctions to these Member States weakens the European Union, granting those Member States permission to continue passing discriminatory laws. Should the EU decide to apply strict sanctions, those Member States might have to reverse their decision and find a way to comply with EU law.

¹²⁸³ Le Monde Article, 'Poland: Calling into Question the Primacy of European Law is "an attack on the European Union", denounces France' (*Le Monde*, 8 October 2021) <https://www.lemonde.fr/international/article/2021/10/08/la-pologne-decrete-la-non-primaute-du-droit-europeen-sur-le-droit-national_6097593_3210.html> accessed 8 October 2021; Le Monde Article, 'Under Pressure from the European Union, Four Polish Regions Revoke their Homophobic Charters' (*Le Monde*, 30 September 2021). <https://www.lemonde.fr/international/article/2021/09/30/sous-pression-de-l-union-europeenne-quat-re-regions-polonaises-reviennent-sur-leurs-chartes-homophobes_6096578_3210.html> accessed 8 October 2021.

Having explained that there are ongoing problems with certain Eastern European Union Member States, who do not comply with EU law or values, the research notes the difficulty for the proposed directive to be accepted by certain Member States.

2. The Member States and the proposed directive

During the Summit, EU institutions stated that, women have been deeply harmed by the covid pandemic. The Summit provided discussions about employment and economic progress. Though, during the Summit, EU officials were accountable for not upholding EU values of gender equality.

At the same time as the Summit, the proposed women on boards directive continued to be blocked in Council. This changed in March 2022, as the proposed directive passed in Council and is on its way to become a directive. This legislation will be the first international women on boards legislation to date, which includes twenty-seven countries (EU Member States). Though, Croatia, Denmark, Greece, Hungary, the Netherlands (at the time), Poland, Sweden and Slovakia state they have their own legislation in place¹²⁸⁴ and are against the proposed directive, based on principles of unconstitutionality and sovereignty. Furthermore, recent opposition to the EU Treaty and lack of EU values from Eastern European Union Member States, confirm there is a need to accelerate and pass the proposed directive with a Minimum Harmonisation Programme to accompany Member States, according to the level of gender equality in place. This will prove to be challenging, since Poland and Hungary have openly stated that, they are against EU gender equality.

Having explained that certain Member States oppose the proposed directive, the research examines the situation of women on boards in the United Kingdom and post-Brexit.

¹²⁸⁴ n 36, European Parliament, Gender Balance on Boards.

SECTION 2 FORMER MEMBER STATES EXCLUSION (UK)

The United Kingdom left the European Union on 31 January 2020 and had been an active EU Member State, since 1 January 1973. While the United Kingdom was a EU Member State, it was often in disaccord with EU legislation, preferring the self-regulated approach. As is the situation with all the Member States, there is not just one legal way to approach women on boards. Instead of approving a forty percent quota determined by EU institutions, the United Kingdom prefers to set targets. According to the 2020 United Kingdom government reports, the FTSE 350, 250 and 100 have met their women on boards targets.

- FTSE 100 is at 36.2% up from 32.4% in 2019.
- FTSE 250 is at 33.2% up from 29.6% in 2019.
- FTSE 350 is at 34.3% up from 30.6% in 2019.¹²⁸⁵

Despite the targets being met, the results remain below the forty percent women on boards EU critical mass recommendation. Although, this may no longer be relevant, since the United Kingdom left the European Union.

The research examines the great amount of apprehension concerning Brexit, the future of gender equality and women on boards in the United Kingdom (§1), and the legitimate fear that the UK Supreme Court will replace EU institutions and challenge EU law (§2).

¹²⁸⁵ n 219, UK Government Communication, The Changing Face of Business: Number of women on FTSE Boards up by 50% in just 5 Years; n 24, OECD Statistics, Employment : Female Share of Seats on Boards of the Largest Publicly Listed Companies.

§1: IMPACT OF BREXIT AND GENDER EQUALITY

The UK government stated it would leave in place EU gender equality legislation after Brexit. Yet, there is no obligation to consider EU law, when new UK legislation is proposed. The UK Supreme Court will replace EU institutions, as the legal authority.

The research points out that, academicians are concerned about EU gender equality legislation being repealed or minimized (I),¹²⁸⁶ as the United Kingdom government favours voluntary targets, not quotas (II), though, it does not exclude binding legislation, if the targets remain unmet (III).

I. GENDER EQUALITY IN THE BOARDROOM

The Equality and Human Rights Commission stated, it will take the United Kingdom seventy more years to reach gender equality in the boardroom in the 100 largest UK companies without mandatory quotas.¹²⁸⁷ Moreover, UK case-law has revealed a consistent rejection of positive action measures. There is 'confusion and anxiety' at the thought of moving away from formal equality and speaking about positive action in Parliament.¹²⁸⁸ The proposed EU directive was a move away from a formal equality approach, as it set out to implement positive action measures to increase the representation of women on boards through the use of tie-break quotas. The UK government has always been against the use of quotas, preferring voluntary business-led measures.¹²⁸⁹ The UK government stated, it was premature to use 'heavy-handed

¹²⁸⁶ Sandra Fredman, Alison Young and Meghan Campbell, 'The Continuing Impact of Brexit on Equality Rights, UK in 'a Changing Europe' (Oxford Human Rights Hub, 2018) 3 <<https://ukandeu.ac.uk/wp-content/uploads/2018/04/The-continuing-impact-of-Brexit-on-equality-rights.pdf>> accessed 14 January 2021.

¹²⁸⁷ n 22, UK Government, Department for Business, Innovation & Skills, Women on Boards, 26.

¹²⁸⁸ Aileen McColgan, *Discrimination, Equality and the Law* (1st edn, Hart Publishing, 2014) 21.

¹²⁸⁹ n 22, UK Government, Department for Business, Innovation & Skills, Women on Boards, 26.

measures, such as mandatory targets...' stating that 'regulation and legislation would fail to fix the problem.'¹²⁹⁰ The research has found that, the UK government remained opposed to EU intervention and the proposed directive (A), though, if the United Kingdom had remained in the EU, the government would have deployed the derogation clause to minimise application of the directive (B).

A. THE EU PROPOSED WOMEN ON BOARDS DIRECTIVE AND UK POLICY

The UK government openly disavowed a EU shared approach with 28 company law systems.¹²⁹¹ The Government argued that there was not enough proof that, the proposed directive could fix the problem of gender equality and women on boards.¹²⁹² The women on boards proposed directive is contrary to self-regulation.¹²⁹³

Having explained that there has been considerable disagreement between the UK government and the European Union concerning the application of the proposed women on boards directive, the research examines the UK objection to the proposed directive on grounds of interfering in national matters and subsidiarity.

B. THE DEROGATION CLAUSE AND PRINCIPLE OF SUBSIDIARITY

The UK government agreed that non-executive board directors are within the scope of Article 157(3). Interestingly, the government identified a plan to be exempted by way of the derogation clause, which permits Member States to be exempted from the Directive, once it proves that the 40 percent target has been met. This would allow other listed companies to be exempt from the proposed Directive.¹²⁹⁴ Furthermore, the government objected to the proposed directive on grounds of 'proportionality and

¹²⁹⁰ n 1035, UK Parliament Report, 3.3.

¹²⁹¹ *ibid.*, 3.12.

¹²⁹² n 1035, 3.4.

¹²⁹³ *ibid.*, 3.6.

¹²⁹⁴ n 1035, UK Parliament Report, Gender Balance on Corporate Boards, 6.10.

subsidiarity.¹²⁹⁵ Having explained that the UK government objected to the proposed directive on grounds of subsidiarity, and would have used the derogation clause, the research points to the UK system of voluntary targets.

II. THE UK SYSTEM OF VOLUNTARY TARGETS

The United Kingdom, considered a liberal economy, challenges meritocracy, or the 'social system ... based on an individual's capabilities and merits ...'¹²⁹⁶ Merit may be important, but the economy is, too. The global financial crisis of 2009 called on companies to increase the representation of women on boards to thirty percent, by voluntary targets, not hard quotas, for economic reasons.¹²⁹⁷ The research finds that the UK government has always had a conflictual relationship with the EU, including with the proposed women on boards directive (A), and though, the UK Equality Act calls for equal treatment, there is no statutory law concerning women on boards in the United Kingdom (B).

A. FROM SOFT LAW TO BREXIT

The United Kingdom has had a long history of opposing EU legislation. The 2016 speech by Lord Lawson perfectly explains the difficult relationship between the United Kingdom and the EU, and before the Brexit. According to Lord Lawson,

[t]he European Union is nugatory. That is why the creation of a Eurozone and our decision – correctly – not to be part of it was a watershed. The lack of influence is quite marked. Over the past twenty years, which is roughly the time that the Euro has been in existence, there have been 72 occasions in the Council of Ministers where the United Kingdom has opposed a particular measure. Of

¹²⁹⁵ *ibid.*, 3.3.

¹²⁹⁶ C .H. Kim and Y.B. Choi, 'How Meritocracy is Defined Today?' (2017) 10(1) *Contemporary Aspects of Meritocracy, Economics and Sociology* 112-121.

¹²⁹⁷ Nina Teasdale, Colette Fagan and Claire Shepherd, 'Women's Representation on the Boards of UK-Listed Companies' in Colette Fagan, Maria González Menéndez and Silvia Gómez Ansón (eds) *Women on Corporate Boards and in Top Management: European Trends and Policy* (1st edn, Palgrave MacMillan, 2012) 139.

those 72 occasions, we have been successful precisely 0 times and we have lost 72 times. That is a fact. And, you know, a scoreline of 0-72 is not particularly brilliant. This is how it would continue. Of course what matters is not our influence in the European Union, but our influence in the world as a whole. And we have a certain degree of influence in the world as a whole, certainly more than most countries.¹²⁹⁸

The United Kingdom has had a special status in the European Union, often opting-out to enlarge its protections, allowing it to block EU legislation on grounds of subsidiarity.¹²⁹⁹ Therefore, it came as no surprise that, the UK government opposed the proposed women on boards directive, which called for forty percent of women on boards with tie-break quotas. According to Lord Davies, '[t]he voluntary approach is working and companies have got the message that better balanced boards bring real business benefits. We are finally seeing a culture change taking place at the heart of British business.'¹³⁰⁰

According to the research, the voluntary approach is the preferred approach with the UK government (1),¹³⁰¹ though, as it will revert back to common law, it is unknown how the Brexit will impact the future of gender equality in the United Kingdom (2).

¹²⁹⁸ 'nugatory', adj., 'of no value or importance', 'useless or futile' Oxford Dictionary Lexico <<https://www.lexico.com/definition/nugatory>> accessed 3 September 2019; 'watershed', n., used in politics, 'If something such as an event is a *watershed* in the history or development of something, it is very important because it represents the beginning of a new stage in it, Collins Dictionary <<https://www.collinsdictionary.com/us/dictionary/english/watershed>> accessed 30 May 2022; European Parliamentary Report, UK Opposition to EU legislation, The Impact of the UK's Withdrawal on EU Integration (2018) <[https://www.europarl.europa.eu/RegData/etudes/STUD/2018/604973/IPOL_STU\(2018\)604973_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2018/604973/IPOL_STU(2018)604973_EN.pdf)> accessed 3 September 2019; Transcript of Lord Lawson of Blaby's Keynote Speech at the UK in a Changing Europe's Conference: The UK and Europe (2016) <<https://ukandeu.ac.uk/wp-content/uploads/2016/01/Lord-Lawsons-speech.pdf#page=3>> accessed 3 September 2019.

¹²⁹⁹ UK Government Report, Review of the Balance of Competences between the United Kingdom and the European Union Subsidiarity and Proportionality (2014) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/388852/BoCSubAndPro_acc.pdf> accessed 3 September 2019.

¹³⁰⁰ UK Government Communication, Lord Davies Speech, Department for Business, Innovation and Skills (2014) <<https://www.wired-gov.net/wg/news.nsf/articles/Women+on+Boards+2014+3+years+on?open>> accessed 3 September 2019.

¹³⁰¹ Teasdale, Fagan and Shepherd (n 1297) 139.

1. Targets not quotas

The UK government position has always been against quotas, in politics and in business.¹³⁰² According to the Government, quotas lead to negative consequences.¹³⁰³ Soft law is working in the United Kingdom. In 2019, there were 32.6 percent of women on boards. This has been mainly due to the extensive business programmes set with target objectives.

Having explained that, the UK government means to increase the representation of women on boards remains self-regulation with the use of targets. The research examines the Brexit and gender equality in the United Kingdom.

2. The Brexit and the future of gender equality in the UK

The UK government recognised Article 119 of the Treaty of Rome 1957, as the equal pay principle for women and men and the basis of gender equality in the European Union. The EU has shaped gender equality legislation, which the UK government has transposed into national law. EU legislation has greatly advanced the position of working women in the UK. However, the government did not approve of the proposed women on boards directive. According to the government, women are part of a marginal group. The future of gender equality legislation in the United Kingdom will no longer be based on EU legislation, or 'provide a safety net for traditionally marginal groups, e.g. women, that struggle to influence policy at the national level'.¹³⁰⁴ This is

¹³⁰² UK Government Report, Thérèse Coffey and Mary Macleod, 'Executive Women in the Workplace' (Inquiry Report) (House of Commons Publication, 2013) <<https://executivewomenintheworkplace.files.wordpress.com/2013/06/executive-women-in-the-workplace-inquiry-report.pdf>> accessed 3 September 2019.

¹³⁰³ Sarah Childs, 'The Unfinished Business All Women Shortlists and the UK Parliament: Contagion, Transformation, and Extension', European University Institute Department of Law Research Paper (EUI, 2015) 16 <<https://blogs.eui.eu/genderquotas/wp-content/uploads/sites/24/2015/07/United-Kingdom-LAW-2015-29.pdf>> accessed 3 September 2019.

¹³⁰⁴ R. Guerrina and H Murphy 'Strategic Silences in the Brexit Debate: Gender, Marginality and Governance' (2016) 12(4) Journal of Contemporary European Research 872 -880.

not a reassuring statement for women in the United Kingdom and questions the future concerning progressive women on boards targets and gender equality legislation, in general.

Having explained that, the UK government position is based on self-regulation with the use of targets, it remains unknown how the Brexit will impact gender equality in the United Kingdom. The research will examine UK gender equality legislation.

B. UK GENDER EQUALITY LEGISLATION

As the United Kingdom does not have a written constitution, the Equality Act 2010 is the closest reference of protected characteristics, which includes sex (gender). 'The right to equality in the United Kingdom is not protected by a constitutional bill of rights, but...governed entirely by parliamentary legislation'.¹³⁰⁵ The research has found that, though, the United Kingdom does not have a constitutional bill of rights, the Equality Act is the reference to protected characteristics of gender (1), though, the UK government supports increasing the representation of women on the boards of directors for economic reasons, but not in favour of the actual proposed directive, which calls for quotas (2).

1. The Equality Act 2010

The UK government approach to women on boards is different from that, of Norway or Continental Europe and, especially, from that of France and Germany. The two Member States have written Constitutions, which mention equality explicitly for women

¹³⁰⁵ n 24, OECD Statistics, Employment : Female Share of Seats on Boards of the Largest Publicly Listed Companies; UK Legislation, The Equality Act 2010, UK Public General Acts 2010, c. 1, Part 2, Chapter 1, Section 4 (2010) <<http://www.legislation.gov.uk/ukpga/2010/15/section/4>> 3 September 2019; UK Legislation The Equality Act 2010, c15, part 2, ch1, s4 (2010) <<https://www.legislation.gov.uk/ukpga/2010/15/part/2/chapter/1>> 3 September 2019; Fredman, Young and Campbell (n 1286) 'The Continuing Impact of Brexit on Equality Rights, 3.

and men. Whereas, in the UK, protected characteristics, such as, age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation. are included in the Equality Act.

According to the Sex Discrimination (Election Candidates) Act 2002, the legislation refers to the Sex Discrimination Act 1975 as the legal basis, which allowed positive action during the selection process to electoral bodies.¹³⁰⁶ Positive action provisions provided in the Equality Act¹³⁰⁷ have improved gender equality in the United Kingdom.¹³⁰⁸ The Equality Act is the closest legislation to a statutory provision, as it made a change from policy-led measures. Though, gender equality statutory provisions may never happen, in the context of post-Brexit. According to Sections 158 and 159 of the Equality Act 2010, the legislation called for '...positive action to redress disadvantage as well as tackle discrimination.'¹³⁰⁹ The Sex Discrimination Act 1975 protected women on grounds of sex.¹³¹⁰ Quota legislation is not completely foreign to the United Kingdom, though not used for women on boards. The reasons in favour of quotas was linked to the fear that, without quotas women would not become elected.

In Section 158 of the Equality Act 2010, the framework allows for positive action proportionate to specific aims¹³¹¹ and encourages the underrepresented.¹³¹² In Section 159, an employer is permitted to select, recruit and promote a candidate, with a

¹³⁰⁶ Nicole Busby, 'Sex Equality in Political Candidature: Supply and Demand Factors and the Role of the Law' (2003) 66(2) The Modern Law Review 245–260.

¹³⁰⁷ UK Legislation, The Equality Act 2010, Chapter Two: Positive Action, 158-9 (2010) <<http://www.legislation.gov.uk/ukpga/2010/15/contents>> accessed 3 September 2019.

¹³⁰⁸ Simon Deakin and Gillian Morris, *Labour Law* (5th ed., Hart Publishing, 2012) 692.

¹³⁰⁹ Mark Bell, 'British Developments in Non-Discrimination Law : the Equality Act' in R Schulze (ed), *Non-Discrimination in European Private Law* (1st edn, Mohr Siebeck, 2011) 227.

¹³¹⁰ UK Legislation, Sex Discrimination Act, repealed by the Equality Act 2010. The legal basis of gender equality was founded in the Sex Discrimination Act 1975 <https://www.legislation.gov.uk/ukpga/1975/65/pdfs/ukpga_19750065_en.pdf> accessed 3 September 2019.

¹³¹¹ Hepple (n 172) 129.

¹³¹² n 473, UK Legislation, The Equality Act 2010, s 158.

protected characteristic, where two candidates are equally qualified. This is considered a 'harder-edged' positive action measure,¹³¹³ although, it does not allow recruitment and promotion on the basis of gender.

Preferential treatment is permitted provided that, one person is 'as qualified' as the other,¹³¹⁴ which allows the employer to decide on selection criteria of candidates¹³¹⁵ However, the caveat is that legal boundaries remain unclear, as to which candidate is the most qualified. The tie-break situation needs to be further examined, as employers may be at risk of a claim.¹³¹⁶ The Equality Act 2010 is limited to tie-break, which is not a hard quota. Therefore, the Equality Act 2010 remains soft law.

Having explained that the United Kingdom has limited legislation, which targets gender equality, the research examines the proposed EU directive and the UK Reasoned Opinion.

2. The proposed EU Directive and UK government Reasoned Opinion

The UK government¹³¹⁷ supports women on boards policies for economic reasons. Yet, women remain underrepresented on the boards of directors of public limited companies in the United Kingdom.¹³¹⁸

¹³¹³ *ibid*, s 159.

¹³¹⁴ n 473, s 159 (4) (a) c 15 EN.

¹³¹⁵ n 473, c 15 EN 518.

¹³¹⁶ Hugh Collins, K. D. Ewing and Aileen McColgan, *Labour Law* (1st edn, Cambridge University Press, 2012) 340-341.

¹³¹⁷ Women on boards European Statistics, Information will be treated differently, the Brexit on 31 January 2020. UK statistics are listed with European statistics until December 2020, and will be published on the Eurostat website, Eurostat (2020) <<https://ec.europa.eu/eurostat/web/main/help/faq/brexit>> accessed 3 March 2021.

¹³¹⁸ n 22, UK Government, Department for Business, Innovation & Skills, Women on Boards, 3.

The research shows that the UK commissioned a series of reports, which defined women on boards and targets (a) and included the Hampton-Alexander Review (b).

a. The proposed directive and commissioned reports

The UK government was against the proposed EU directive and launched its own business backed programmes to increase the representation of women on boards. According to the Davies Review, the UK government¹³¹⁹ would ‘...promote gender equality on the boards of listed companies,¹³²⁰ as an alternative to the proposed directive. In 2011, there were 12.5 percent of women on boards on FTSE 100 companies. This rose to fifteen percent in 2012.¹³²¹ By 2013, the objective of twenty-five percent of women on boards remained unachieved.¹³²² The Davies Review is the most recognised and significant UK recommendation. The Review formalized a process about how to screen for nominations of board directors, using merit-based objective criteria and ‘due regard’ for diversity and gender. Companies were obliged to disclose women on board figures and company policy.¹³²³

The UK government threatened to pass women on boards quotas, should a voluntary approach fail. ‘Government must reserve the right to introduce more prescriptive alternatives if the recommended business-led approach does not achieve significant change’. This was a veiled threat and indirect means of saying, that the use of gender quotas would be proposed, if the 25 percent target on FTSE 100 companies was not met by 2015.¹³²⁴ By 2014, there were 20.7 percent of women on boards with 2 all male

¹³¹⁹ *ibid*, 8.

¹³²⁰ UK Government Cabinet Office, David Cameron and Nick Clegg, *The Coalition: Our Programme for Government*, (UK Government, 2010) 18.

¹³²¹ n 611, UK Government Report, *The UK Response to the European Commission Consultation on Gender Imbalance in Corporate Boards in the EU* (2012).

¹³²² n 629, Sealy and Vinnicombe.

¹³²³ n 22, UK Government, Department for Business, Innovation & Skills, *Women on Boards* (2011) 8.

¹³²⁴ n 618, UK Government Report, Department for Business, Innovation & Skills, *Women on Boards: Two Years on* (2013).

boards on FTSE 100 companies. In 2020, there were 40.8 percent of women on boards in FTSE 100 companies.¹³²⁵ The UK policy has always been against the use of quotas, preferring targets and massive programmes to increase the representation of women on boards.

b. Other Commissioned Reports

The Hampton-Alexander Review¹³²⁶ improved the process with clearer rules and greater transparency.¹³²⁷ The target increased to thirty-three percent target of women on boards on the FTSE 350 in 2016, with a deadline to be reached by 2020.¹³²⁸ The target was successfully reached in May 2020.¹³²⁹

Having explained that, though the UK has limited gender equality legislation, there are several commissioned reports, which focus on women on boards. The research examines the possibility for the UK government to turn to quota legislation.

III. POSSIBLE QUOTA LEGISLATION AND WOMEN ON BOARDS

The UK government affirmed its self-regulation approach, by setting its critical mass of women on boards target at twenty-five percent, despite that, twenty-five percent

¹³²⁵ Ernst and Young Report, Sonam Patel, 'Women on Boards on FTSE 100 Companies' (2020) <https://www.ey.com/en_uk/news/2020/09/targets-bring-more-women-on-boards-but-they-still-dont-reach-the-top#:~:text=FTSE%20100%3A%20the%20percentage%20of,has%20risen%20slightly%20to%2013.2%25> accessed 14 January 2021.

¹³²⁶ UK Government Press Release, The Rt Hon Baroness Nicky Morgan, Baroness Neville-Rolfe DBE CMG and Caroline Dinenage, MP, 'Rallying Call for Female Boost in Business and the Boardroom' Department for Business, Innovation & Skills (Government Equalities Office, 7 July 2016) <<https://www.gov.uk/government/news/rallying-call-for-female-boost-in-business-and-the-boardroom>> accessed 27 November 2017.

¹³²⁷ n 626, UK Corporate Governance Code 2016, Principle B2, 11 (Financial Reporting Council, 2016).

¹³²⁸ n 636, UK Government Press Release, The FTSE 350 Urged to Step up to Meet 2020 Women on Boards Targets.

¹³²⁹ Alex Architektonidis, 'UK FTSE 350 Reaches 33% Females on Boards' and Chart: 'Women on Boards on FTSE Indices'(BoardEx,2020) <<https://www.boardex.com/ftse-350-reaches-33-females-on-board/>> accessed 14 January 2021.

remains below the proposed EU directive target of forty percent. The UK government would only consider binding quota legislation, if the twenty-five percent targets were unmet.¹³³⁰ However, self-regulation has been effective and many countries ask how the UK government accomplished this effort. According to the Women on Boards Davies Review: 5 Year Summary, the explanation lies in

... the driving forces ... behind the UK's increase in the number of women on FTSE boards. The UK is admired by many other countries, who whether having adopted voluntary measures or quotas, have achieved far less progress in a similar timeframe. We stand in sixth place in the international ranking, with all of the countries ahead of us, having largely introduced legislative quota regimes.¹³³¹

As the research points out, self-regulation and targets have proven effective in increasing the representation of women on the boards of directors in public limited companies in the United Kingdom (A), and as, EU intervention and quotas were unwelcome (B).

A. EU INTERVENTION AND THE USE OF QUOTAS

The proposed women on boards directive was put forward long before the Brexit. However, even at that time, the UK government position stated that, Member States ' should ... take action according to their ... position, legal system and ... business environment. While we respect the right... to put quotas in place, we remain committed to a voluntary, business led approach'.¹³³²

The research shows that, the UK government was against the EU interfering with the proposed directive (1), as this has led to a conflict of interests (2).

¹³³⁰ *ibid*, 6.

¹³³¹ n 633, UK Government Report, Women on Boards Davies Review: 5 Year Summary, Improving the Gender Balance on British Boards (UK Government, 2015) 6.

¹³³² UK Government, Women on Boards, Davies Review (2015) 22.

1. EU intervention

The UK government rejected an EU interventionist approach to women on boards for all Member States, considering the use of quotas as 'intellectually flawed at a fairly fundamental level.'¹³³³ Having explained that, the UK government rejects the use of quotas, as proposed in the women on boards directive, the research examines the conflict between the UK government and EU institutions.

2. Conflict between the UK government and EU institutions

There were many disagreements between the UK Government and EU institutions over the proposed women on boards directive. The House of Lords referred to this conflict as, 'the vexed question of legislative quotas for women on boards.'¹³³⁴ Having explained that the UK government remains against the use of quotas and is opposed to the proposed directive, the research examines the EU ideology.

B. QUOTAS AND EU IDEOLOGY

According to the UK government, the proposed EU women on boards legislation is an EU ideology, which would not bring change.¹³³⁵ The research explains that, the UK government position about quotas, is that they should be used as a last resort (1), therefore, the UK government challenged the legal basis of intervention, advancing the principle of subsidiarity (2).

¹³³³ *ibid*, 9.

¹³³⁴ n 650, UK Government Report, Women on Boards, European Union Committee 4.

¹³³⁴ *ibid*.

¹³³⁵ *ibid*.

1. Quotas as a last resort

Quotas were perceived negatively among UK business leaders, to be used only if voluntary means failed. The UK government was convinced that, voluntary measures were the best means to increase the representation of women on boards in the United Kingdom.¹³³⁶

Having explained that, the UK government might use quotas, if nothing else worked, the research examines the UK government position and legal basis of opposing the proposed directive.

2. The Reasoned Opinion and questioning the EU legal basis

The UK government questioned the legal basis of the proposed women on boards directive on grounds of subsidiarity. The Reasoned Opinion of the House of Commons focussed on the details of the principle of subsidiarity, before addressing the subject of the representation of women on boards of directors.¹³³⁷ The European Commission strongly suggested that, all Member States comply with the recommended forty percent representation of women on boards.¹³³⁸

The research has shown that, the UK government has a preference for self-regulation and questioned the legal basis of EU intervention with the proposed women on boards directive.

¹³³⁶ *ibid*, 34.

¹³³⁷ n 1229, Commission Staff Working Document.

¹³³⁸ n 29, Proposal for a Directive.

§2: THE UK GOVERNMENT TAKES BACK ITS LEGAL AUTHORITY

The United Kingdom left the European Union on 31 January 2020, as set out in Article 50 of the TEU. The transition period was from 31 January 2020 to 31 December 2020. The UK formally ended the transition period on 1 January 2021. Therefore, it no longer participates in EU affairs, nor is it bound to comply with new EU legislation. The research confirms that, EU legislation may be replaced by UK law at any time (I), which has resulted in a great amount of uncertainty about the future of gender equality legislation in the United Kingdom, including the subject of women on boards (II).

I. EU LEGISLATION IN POST-BREXIT UNITED KINGDOM

EU Legislation in place in the United Kingdom may be revoked at any time. Lawmakers in the House of Commons have attempted to have guarantees to maintain the same level of gender equality policies and legislation. There have been several attempts to pass a statute embedding gender equality into UK law. So far, the UK government has not taken any action.¹³³⁹ The EHRC and House of Commons Women's Selection Committee are unable to obtain guarantees from the government that women's rights and equality will be protected, as set out in the EU Charter of Fundamental Rights, ECJ and CJEU case law. There is concern that the UK government may cancel the following EU legislation: the Working Time Directive, Agency Workers, Part-Time Workers, pregnant workers, female atypical workers, parental and career leavers. In the

¹³³⁹ European Commission Communication, The EU-UK Withdrawal Agreement (2019) <https://ec.europa.eu/info/relations-united-kingdom/eu-uk-withdrawal-agreement_en> accessed 14 January 2021; House of Commons Women and Equalities Committee Report, Ensuring Strong Equalities Legislation after the EU Exit: Seventh Report of Session 2016-2017 (2017) <<https://publications.parliament.uk/pa/cm201617/cmselect/cmwomeq/799/799.pdf>> accessed 14 January 2021.

Withdrawal Agreement 2018, gender equality and women on boards were not included in Brexit discussions.

The UK Government remained hostile to the proposed women on boards directive. The loss of Article 23 of the EU Charter of Fundamental Rights will be an additional blow to gender equality in the United Kingdom. This Article has upheld the TFEU, as the legal basis for women on boards. Article 23 is positive action legislation, which states '[e]quality between men and women must be ensured in all areas, including employment, work and pay. The principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex.'¹³⁴⁰ UK women face 'a glass cliff', as they are largely absent from Brexit discussions and dependent on hostile legislators, who are antagonistic to EU legislation. It is said that the Brexit is the opportunity that UK Brexiters had been waiting for, to throw out much of the European influenced legislation.¹³⁴¹ The research examines how EU gender equality policies and legislation have been transposed into UK law (A), though Retained EU law, as part of the European Union (Withdrawal) Act 2018, did not include gender equality or women on boards (B).

A. EU GENDER EQUALITY AND THE UNITED KINGDOM

Women in the United Kingdom have greatly benefited from EU gender equality policies and legislation. The research is concerned that, the United Kingdom withdrawal from the European Union leaves questions to be answered about the effect it will have on gender equality, as the European Union has led almost all gender equality initiatives,

¹³⁴⁰ n 76, Charter of Fundamental Rights of the European Union, Article 23; Socialists and Democrats in the European Parliament, Mary Honeyball MEP and Hannah Manzur, Women and Brexit Report: Executive Summary and Key Points (2019) <https://www.socialistsanddemocratseu/sites/default/files/2019-11/Executive_Summary_women_and_brexit_report_final.pdf> accessed 14 January 2021.

¹³⁴¹ *ibid.*

which have been transposed into UK law (1), as the future of gender equality and women on boards is unclear at the time of this writing (2).

1. EU Gender Equality Policies and influence on UK law

The UK government has taken back its legal authority, as the Brexit has passed. EU legislation will no longer be the reference. The European Union has tied gender equality to economic policy, while the UK government treats gender in a completely different way. This leads to questioning about the future influence of EU gender equality law on UK law.

Having explained that, though EU legislation has had an important influence on UK law, the research examines post-Brexit and the UK government, as the legal authority over policies and legislation.

2. The UK government as legal authority

With Brexit, the future is uncertain about where gender equality policies are heading in the United Kingdom. The automatic turning to the EU for gender equality laws and policies is no longer the reference. The EU has greatly influenced UK courts by way of EU *acquis* of Treaties, such as the Treaty of Lisbon, policies and directives by way of the European Commission, the CJEU and other EU institutions. EU gender equality policies and legislation, as well as EU economic policies have greatly contributed to gender equality and increasing the representation of women on boards of directors in public limited companies. There is concern that, the UK government will not carry out comparable policies. With time, EU influence will fade away. An ongoing question is how deeply rooted are EU gender equality laws in the United Kingdom and whether they will take root in national law or continue to be reliant on EU law. It is too early to

know, if the UK legislation will be the sole established policy, or if UK and EU legislation will continue to be the rule of law and to what degree the European Union has obliged the UK government to adopt EU policies and regulation post-Brexit. This will need to be further researched.

Another question arises of what shall happen to UK law when the EU Treaty and Directives have expired. There are two opposing political views. One which supports free market initiatives to include gender equality into market regulations. The other, the UK Government, which for now, states it will continue with existing policies and regulation. A general concern is that less policy and regulation would increase inequality and this may impact women on the boards.

The politics of governance in the European Union and United Kingdom are very different. The European Union has its roots in social democratic principles, built on diplomacy, whereas, the United Kingdom has a harder approach, which may question the approach towards women on boards.

The EU has a stronger approach to gender equality than the UK...Policy instruments to implement the goal of gender equality are varied and are lodged in institutions that have different amounts of power and influence. These instruments include: legal principles (for example, equal treatment), descriptive representation (for example, gender balance in decision-making institutions), ...The UK government, in its White Paper on Brexit, addresses gender (and other) equalities issues as if they were a separate policy field from those of the economy ...¹³⁴²

The major concern is that leaving the EU will increase gender inequality in the European Union. The existence of gender matters as they have been influenced by the EU will

¹³⁴² Philip Syrpis, 'European Union (Withdrawal) Bill: Paving the Way Towards a Very Uncertain Future,' (University of Bristol Law School Blog, 2017) <<https://legalresearch.blogs.bris.ac.uk/2017/07/european-union-withdrawal-bill-paving-the-way-towards-a-very-uncertain-future/>> accessed 14 January 2021; Sylvia Walby, 'Gender, Violence and Brexit' (2020) 70(1) Northern Ireland Legal Quarterly 25, 31-32.

transform from social democratic influences to that of a 'more neoliberal form of public gender regime, and which will negatively impact the advancements of gender equality and women on boards in the UK'.¹³⁴³

Having explained that, though EU legislation has influenced UK law, the UK government is the legal authority over its policies and legislation, the research examines the European Union (Withdrawal) Act 2018 and the future of gender equality and women on boards in the European Union.

B. POST-BREXIT AND EU LEGISLATION

After Brexit and according to Sections 2 and 3 of the European Union (Withdrawal) Act 2018, EU Legislation was called 'retained EU legislation', which became a part of UK legislation. Section 4 guarantees that 'EU rights and obligations, including directly effective rights within EU treaties, continue to be recognised and available in domestic law after exit'.¹³⁴⁴ It is a vague provision and compromises a large amount of European law. The European Union (Future Relationship) Act 2020 precises the cooperation terms between the EU and the UK on trade, nuclear cooperation, security and information.¹³⁴⁵

The research notes that nothing is mentioned about gender equality or women on boards (1), though, under common law, the Parliament has free reign to cancel or change existing legislation (2).

¹³⁴³ *ibid*, Syrpis, 'European Union (Withdrawal) Bill: Paving the Way Towards a Very Uncertain Future'; *ibid*, Walby (n 416) 31-32.

¹³⁴⁴ UK Legislation, European Union (Withdrawal) Act 2018, Sections 3 and 4 (c. 16) <<https://www.legislation.gov.uk/ukpga/2018/16/section/2>> accessed 23 December 2021; UK Legislation, European Union (Withdrawal) Act 2018, Section 4 <<https://www.legislation.gov.uk/ukpga/2018/16/section/4>> accessed 23 December 2021.

¹³⁴⁵ UK Legislation, European Union (Future Relationship) Act 2020 (c. 29) <<https://www.legislation.gov.uk/ukpga/2020/29/contents>> accessed 23 December 2021.

1. Post-Brexit and women on boards

It remains unknown to what extent Post-Brexit will negatively impact the women on boards situation in the United Kingdom, or if women will be held back from accessing board positions, as the it reverts back to its legal and political system. This may lead to a serious setback in the commitment to move forward towards gender parity on boards, which may have economic consequences.¹³⁴⁶

Having explained that Post-Brexit may negatively impact the economy and women on boards, the research examines EU law and the principle of equal treatment, which may no longer be the legal basis in the United Kingdom.

2. The state of gender equality legislation post-Brexit

There are many negative opinions of what may happen to gender equality legislation in the UK post-Brexit, which state that gender equality may be put on hold, or worse regress.¹³⁴⁷ While the United Kingdom was an EU Member State, it was obliged to comply with the principle of equal treatment, the basis of EU law. However, under UK law, the principle of equal treatment would no longer be the legal basis. Gender equality subjects will be debated in UK Parliament. Parliament will freely enact legislation and interpret gender equality according to common law, which is not favourable to women.¹³⁴⁸

¹³⁴⁶ Walby (n 416) 4-29.

¹³⁴⁷ Eugenia Caracciolo di Torella and Annick Masselot, 'Pregnancy, Maternity and the Organisation of Family Life: an Attempt to Classify the Case Law of the Court of Justice' (2001) 26(3) *European Law Review* 239–60.

¹³⁴⁸ *ibid.*

Having explained that principle of equal treatment may no longer be a reference in UK law, the research points out to the uncertainty of gender equality policies in the United Kingdom.

II. UNCERTAINTY OF GENDER EQUALITY POLICIES IN THE UNITED KINGDOM

Without the binding force of EU law, there is no certainty about how the UK Parliament will react concerning women on boards. Current UK gender equality legislation, as found in the Equality Act 2010, may be repealed or challenged. The Brexit has incurred costs, which have UK academicians concerned that gender equality 'will be sacrificed for political and economic interests.' Only time will tell, if the UK government will keep EU law and *acquis*, as Norway.¹³⁴⁹

The research finds that, current UK gender equality legislation is founded in EU law (A), though, the consequences of Brexit remain uncertain about how long EU legislation will remain in place (B).

A. UK GENDER EQUALITY LEGISLATION

Most UK legislation refers to diversity in the workplace. Existing gender equality legislation has its origins in EU law. The research explains that, the subject of women on boards should not be confused with existing UK legislation, which guarantees equal treatment under common law, such as the Equalities Act 2010 (1), and as a result of the Brexit, the UK economy may find itself in an economic crisis with an impact on employment or change of government and cancel gender equality policies, including increasing the representation of women on boards (2).

¹³⁴⁹ Fredman, Young and Campbell (n 1286) 'The Continuing Impact of Brexit on Equality Rights, 3; *ibid*, Walby (n 416) 31-32.

1. Common law and equality

UK gender equality law comes from 3 sources:

- national law, which is parliamentary legislation and case law
- EU law, legislation of the Council and EU Parliament and case law from the CJEU
- case law from the ECHR and agreements made between Council Members¹³⁵⁰

The United Kingdom retains its membership in the Council of Europe. Equality rights in the European Court of Human Rights (ECHR) and in the Human Rights Act 1998 will continue to have effect.

However, equality as part of UK common law is a

...result of legislative intervention or ... jurisprudence of the European courts. The 'home-grown' common law standards remain relatively underdeveloped. As such, it may be premature to speak of equality as constituting a well-established 'constitutional principle': rather, it is better to describe it as an important democratic value that is protected by a complex web of overlapping European and domestic legal standards, but whose scope and content remain very much open to debate.¹³⁵¹

In the context of post-Brexit, the notion of equality may lose democratic value. Further research is needed to examine the impact of post-Brexit and gender equality in the United Kingdom.

¹³⁵⁰ Colm O'Cinneide, 'Equality :A Constitutional Principle?' (UK Constitutional Law Group Blog, 2011) <<https://ukconstitutionallaw.org/2011/09/14/colm-ocinneide-equality-a-constitutional-principle/>> accessed 5 July 2019; H. Mott, M A Stephenson and J. De Henau, 'Exploring the Economic Impact of Brexit on Women'(Women's Budget Group Report, 2018) 6-9 <<https://wbg.org.uk/wp-content/uploads/2018/03/Economic-Impact-of-Brexit-on-women-briefing-FINAL-1.pdf>> accessed 5 July 2019.

¹³⁵¹ *ibid*; O'Cinneide, 'Equality :A Constitutional Principle?'; *ibid*; H Mott, M A Stephenson and J De Henau, 'Exploring the Economic Impact of Brexit on Women', 6-9.

Having explained that, the source of UK law originates in common law, EU law and case law. Though, as the United Kingdom is no longer a Member State, this will no longer be the reference. The research examines the possibility that, the Brexit will have a negative consequence in the UK economy and on GDP, which may impact women in employment and on boards.

1. The impact of Brexit on the UK economy

There are many questions about the future of the UK economy post-Brexit. According to the WBG Think Tank, the Brexit will have a negative consequence on GDP with an estimated decrease of 1.5 percent to 9.5 percent, compared to, if the United Kingdom had stayed in the EU. Further research will need to be done in the coming years to know how Brexit has impacted the economy. With a decreased GDP, the economy will contract and result in unemployment, with women being the most affected. The direct impact of women on boards is less known, since most of the legislation came from EU law. As EU policies and legislation may be adopted into UK law, there is a risk that, a change in government could also decide on voiding gender equality policies, such as employment rights with origins in EU Treaties and CJEU case law, which have been in place when the United Kingdom joined the EU in 1973. Gender equality is not at the top of the list of concerns of the UK government, as during the pre-referendum talks, '[g]ender impact assessments and gender-responsive budgeting and planning are not mainstreamed and the gendered impacts of Brexit were largely absent ...'¹³⁵²

Having explained that the UK government did not include a gender impact assessment in its planning of the Brexit, the research shows that the consequences of Brexit will have influence on future legislation, which may modify or cancel any EU legislation at any time.

¹³⁵² *ibid.*

B. CONSEQUENCES OF BREXIT

Under UK common law, new legislation is open to parliamentary discussions. Existing legislation may be amended or excluded from current gender equality legislation. Therefore, there is a real possibility that EU legislation is no longer part of UK legislation. And, existing EU legislation already incorporated into UK law may be modified or even withdrawn by the UK government at any time, making this a *de facto* reason to worry about gender equality, in general, and women on boards policies in the post-Brexit United Kingdom. The research notes that, though, the United Kingdom is no longer a Member State (1), post-Brexit research has found there are more women on boards than in previous years (2).

1. Background to Brexit

Brexit was officialised on 31 January 2020. The Withdrawal Agreement entered into force on 1 February to define the implementation period of the Brexit. During the this time, the United Kingdom continued to have the same rights, as a member of the EU. Today, the United Kingdom can no longer participate in EU matters.¹³⁵³

Having explained that the Withdrawal Agreement put an end to the United Kingdom, as a Member State of the European Union, the research shows that despite the fear of a change or reversal of policy, there is an increase in the representation of women on boards in public listed companies.

2. Post-Brexit women on boards levels in the UK

While the UK government has seen an increase in the representation of women on boards in public limited companies using targets and self-regulation, no board has

¹³⁵³ Mott et al. (n 1350) 6-9; n 1339, The EU-UK Withdrawal Agreement.

reached the forty percent critical mass, as called for in the proposed women on boards directive. Moreover, the UK government has contested the proposed directive for years. Recently, the Financial Conduct Authority (FCA), the financial services regulator in the UK, presented a Consultation Paper to the Government to raise the women on boards targets to forty percent in public limited companies.¹³⁵⁴ Though, this figure remains a target, not a quota, as the proposed directive. The research has explained that, targets with the comply or explain principle have legal effect, which have generally been very effective in the United Kingdom. The Consultation Paper precises six steps to increase the representation of women on boards, which include the following:

1.1. of the Consultation Paper, the FCA has proposed to amend information requirements in annual financial reports. Companies would have a separate entry to report women on boards targets and the use of the comply or explain principle. Companies will also be required to include information about board composition and senior management by gender.¹³⁵⁵

1.2 of the Consultation Paper, the FCA has proposed that corporate governance codes include more specific provisions, other than gender, such as 'ethnicity, sexual orientation, disability and socio-economic background.'¹³⁵⁶

1.3 of the Consultation Paper, the FCA has proposed that for transparency reasons, more information about diversity on boards should be shared with investors and shareholders, which would improve market trust. It is expected that greater transparency will increase board diversity, corporate governance practices and company operations.¹³⁵⁷

1.14 of the Consultation Paper, the FCA proposes a forty percent women on boards target, with a minimum of one woman senior board director and a minimum of one ethnic minority director.¹³⁵⁸

¹³⁵⁴ UK Financial Conduct Authority Paper, Diversity and Inclusion on Company Boards and Executive Committees (Consultation Paper) CP21/24 (2021) <<https://www.fca.org.uk/publication/consultation/cp21-24.pdf>> accessed 23 December 2021.

¹³⁵⁵ *ibid*, 1.1.

¹³⁵⁶ *n* 1354, 1.2.

¹³⁵⁷ *n* 1354, 1.3.

¹³⁵⁸ *n* 1354, 1.14.

1.15 of the Consultation Paper, the FCA proposes a requirement for companies to publish the board composition data using a specific table format during the fiscal year.¹³⁵⁹

1.23 of the Consultation Paper, the FCA proposes the reporting will include numerical data. This will allow all stakeholders, i.e., issuers, FCA, investors to compare the company data on women on boards.¹³⁶⁰

The 2021 Consultation Paper is a recommendation to the UK government to improve the representation of women on boards, though this Paper has now opened the scope to include other underrepresented populations, than gender, which include 'ethnicity, sexual orientation, disability and socio-economic background.' These are new elements, which have never been included in any existing women on boards policies or legislation, in the UK or in the European Union. This recommendation will need to be monitored in future research, as this is an example of intersectionality, which adds complexity to women on boards policies.

The UK government complied with EU law and continued to adhere to CJEU court decisions, as specified in the Withdrawal Agreement. The end of the Withdrawal period was on 30 December 2020, resulting in the end of the United Kingdom, as an EU Member State.

The research has explained that, the UK government maintained a position against the women on boards directive up to Brexit. Though, as the Consultation Paper has recommended, there has been recent discussion at UK government level about the possibility of raising women on boards targets to forty percent.¹³⁶¹ Since the Brexit, there is little new research available on the subject of women on boards targets and policies in the United Kingdom.

¹³⁵⁹ n 1354, 1.15.

¹³⁶⁰ n 1354, 1.23.

¹³⁶¹ n 1354, 1.14.

CONCLUSION OF CHAPTER TWO

The women on board proposed directive has had a significant impact on the Member States. The problem of having a women on boards corporate governance policy integrated in an EU directive led many Member States to oppose the proposed directive on the basis of subsidiarity and sovereignty. The Commission stated that, intervention was necessary for economic reasons. According to the Commission, there was no conflict of interest with intervention. The principle of subsidiarity would allow intervention, as Member States were unable to increase the representation of women on boards on their own with soft law. Though, the Danish government found that the basis of Article 4 of the TEU was unclear, as EU and Member States are interdependent with the relationship built on mutual cooperation, based on Article 5 of the TEU, the principle of conferral. According to Article 4(1) and, ' [i]n accordance with Article 5, competences not conferred upon the Union in the Treaties remain with the Member States'. The Danish government already had its own legislation, Act no. 1383 of 23 December 2012, which obliged companies to develop women on boards policies with targets of 25 percent of representation of women on boards and a reporting requirement. The Danish government was against the use of quotas. Even though, the representation of women on Danish boards is 33.6 percent in 2020, the figures remain under the 40 percent critical mass.¹³⁶² The German government rejected Article 157(3) of the TEU, as the legal basis for women on boards, considering it positive action legislation, which is forbidden in German law. The government position was that, women on boards should be left for national law authorities to decide. The conflict of interests between the German government and EU institutions resulted in the German

¹³⁶² n 1212, Consolidated Version of the Treaty on the European Union - Title I Common Provisions- Article 4(1) (2012) OJ C/326, 18; n 169, Article 5, 18; n 24, OECD Statistics, Employment : Female Share of Seats on Boards of the Largest Publicly Listed Companies.

government passing national women on boards legislation, which exceeded the proposed women on boards directive. The German women on boards legislation came into effect in 2016, calling for a thirty percent representation of women on supervisory boards of publicly limited companies.¹³⁶³

Other Member States, such as, the Czech Republic, Denmark, the Netherlands, Poland, Sweden and the United Kingdom (former EU Member State) disagreed with intervention with the proposed women on boards directive. As of this writing, the UK is no longer part of the EU and the Netherlands has passed its own national women on boards legislation.

Eastern and South East European Union Member States are opposed to intervention and the proposed women on boards directive. These Member States have weak economies and legal environments. Though, they base their governance standards on Western practices, there are many difficulties to implement governance in these regions. These Member States have limited gender equality soft law and an absence of women on boards hard law. Recent political conflicts have called into question EU values and political commitment from certain Eastern European Union Member States, due to illiberalism, which is taking hold in Eastern Europe.

Gender equality and women in economic decision-making positions are unpopular, especially in Croatia, Hungary and Slovenia. Though, Poland recently incorporated a thirty percent women on boards target in its corporate governance code, further research is needed to see if the 30 percent target will be reached or, if the representation of women on boards will also decline, as in Croatia, Hungary and Slovenia. EU institutions have stated that, intervention is a means to force change in these regions. However, the lack of transparency and governance in these Member

¹³⁶³ n 36, European Parliament, Gender Balance on Boards.

States makes gender equality very complicated to monitor. Further research is needed over a longer period of time.

The former EU Member State, the United Kingdom, has always disagreed with EU women on boards policies, with a preference for self-regulation and targets. Though, targets have raised the representation of women on boards in the United Kingdom, the results remain under the forty percent critical mass called for. The UK government agreed that the legal basis for the proposed women on boards directive is Article 157(3) of the TEU. However, the government referred to the possible use of a derogation clause, which states that, if Member States reaches forty percent of the representation of women on boards under national law, the particular Member State will be exempt from the directive. According to UK law, there is no statutory legislation for women on boards in place. The UK legislation treats gender in the Equality Act 2010, which is discrimination law. The UK government has questioned the legal basis of EU intervention and the proposed directive on the principle of subsidiarity, as the German government. Though, now that, Brexit has passed, it remains unknown, how EU gender equality legislation will become part of UK law, or if it will be rejected, since the UK practices a neoliberal approach, which does not link gender equality to the economy. If the EU gender equality legislation is transposed into UK law, it is uncertain, how favourable it will be, as UK women had gained much with EU legislation, but have much to lose under UK common law, as EU legislation may be repealed by Parliament at any time. The positions of the EU and the following Member States: Denmark, Germany, East and South East European Union Member States and the UK (former EU Member State) are in conflict over EU institutions intervention and the proposed women on boards directive for reasons of subsidiarity and sovereignty, but also since several Member States have weak legal systems and are unable to consider the future legislation.

CONCLUSION OF TITLE TWO

The European Union proposed a women on boards directive in 2012¹³⁶⁴ to increase the representation of women on boards on public limited companies to forty percent for non-executive board directors or thirty-three percent of all board directors. The legislation has taken ten years to be voted in Council, which occurred in March 2022. Member States may have a range of national soft and hard law, but there is not an EU minimum harmonisation. Therefore, inclusive comprehensive regulation would take the existing legislation and add on new programmes or legislation to incite Member States to increase the representation of women on boards, by way of passing the women on boards directive, along with a Minimum Harmonisation Programme. However, this raises questions about the role of the European Union and intervention in the Member States national law. The questions are raised concerning subsidiarity, sovereignty, sanctions and non-compliance. When the directive enters into force, Member States will be responsible for transposing it into national law and defining sanctions. The women on boards directive is EU legislation, which concerns all Member States in view of European Union economic unity. It is the first 'international women on boards' minimum harmonisation legislation. It has a stricter application than soft law. However, several Member States questioned legislating women on boards, fearing it will allow quota women to access the top management level of the company. The proposed legislation nominations and selection procedures are based on merit and experience. There is equal concern about the use of tie-break quotas and not strict quotas. However, the Member States may exceed the minimum requirements, as stated in the Directive.

¹³⁶⁴ n 29, Proposal for a Directive.

A Minimum Harmonisation Programme may accompany Member States, by benchmarking progress of soft law policies and legislation. The legal basis for a Minimum Harmonisation Programme is the Copé Zimmermann Act, or a more flexible version of the Act, which could be adapted according to the different legal and company environment in the Member State. The Copé Zimmermann Act entered into force in 2011. The legislation would apply to public limited companies with a minimum of 250 employees and 50 million euros turnover to include a minimum forty percent of women and forty percent of men to the supervisory board. The sanctions for non-compliance include freezing board directors remuneration, voiding irregular board appointments and board discussions. A more flexible version could adapt requirements in steps. The number of company employees and amount of turnover could be adapted to the rules of the Member State. The sanctions could be dissuasive by setting targets and incentives and by not applying strict sanctions, until the Member State reaches forty percent of the representation of women on boards. The Programme would initially focus on Member States, who have limited gender equality policies in place, by setting targets and incentives. The research has explained that, several Member States have effective women on boards policies and legislation and do not need quotas to increase the representation of women on boards. These Member States include Sweden, the UK (former EU Member State) and Finland. The Swedish government prefers self-regulation and the involvement of shareholders on the boards of directors, who take an active role. The Swedish Code of Corporate Governance includes women on boards provisions, with reporting duties included in the Companies Act. This demonstrates that, quotas are unnecessary in Sweden. Member States who have passed hard law have the choice to include sanctions or not. France and Germany applied sanctions, based on the Norwegian legislation, though not as strict. Member States who passed hard law, but without sanctions include Spain and Iceland. The government of Iceland has passed legislation in 2022 to harden sanctions, which now include fines.

CONCLUSION OF PART TWO

Soft law initiatives to increase the representation of women on boards have not been effective. The European Commission calls for a competitive European Union, by increasing the number of women in the workforce and on the board of directives. The research investigated the proposed directive and supervisory boards in public limited companies. The proposed directive is on its way to become a directive, as was finally approved in the European Council in October 2022.

Most Member States have either soft law or soft and hard law in place. Though, the majority of the Eastern and South East European Union Member States have little soft law and no women on boards legislation in place. Several of these Member States are hostile to the proposed directive for reasons of subsidiarity and sovereignty. Certain Western European Union Member States and a former Member State are opposed to the proposed women on boards directive for diverse reasons. The UK government has a preference for self-regulation and stated that, EU institutions have violated its national policies. The Danish and German governments also stated that, EU intervention with the proposed directive have transgressed the principle of subsidiarity. Though, the new German government voted in Council in favour of the Directive in March 2022. Soft law has been ineffective in increasing the representation of women on boards and hard law is not acceptable to all Member States. A new directive of a minimum harmonisation will oblige all Member States to increase the representation of women on boards. A Minimum Harmonisation Programme will accompany Member States to comply with the legislation, when it enters into force

GENERAL CONCLUSION

The beginning of this research pointed out that, the European Union has been pursuing an economic policy to increase the representation of women in economic decision-making positions, i.e., the representation of women on the boards of directors in public listed companies in economic decision-making positions (in companies *versus* political decision-making in government) for macroeconomic reasons to improve the GDP in the Member States and counter a declining workforce. The fragmented women on boards' policies and legislation in the European Union reveal that, there is an imbalance, with women remaining underrepresented on corporate boards of public limited companies in the European Union. Politicians have stated that, the lack of reform has led to legislative sedimentation¹³⁶⁵ and that it would take fifty more years¹³⁶⁶ to see balanced boards without EU intervention with the proposed women on boards directive. The objective of this research is to explain that fragmented policies and legislation led to a minimum harmonisation of women on boards of directors of public listed companies of the European Union for economic reasons.

The research has thoroughly evaluated the theoretical approaches of gender issues and legal systems, which included approaches of notions and legal approaches of gender equality. The various notions of gender equality and the different legal systems are important notions which concern parity and quotas. The research turned to the classification of gender issues and legal systems, which included legal systems based on soft law and the classification of hard law, which included EU law, Member States' soft

¹³⁶⁵ n 1021, French National Assembly Report, Done on Behalf of the Committee on Constitutional Law, Legislation and General Administration of the Republic, The General Administration of the Republic on the Draft Law (no. 2140) by Mr. Jean-François Copé and Mrs. Marie-Jo Zimmermann Relating on the Balanced Representation of Women and Men on Administrative and Supervisory Boards and on Professional Equality [2009] 8.

¹³⁶⁶ n 55, Viviane Reding Speech, ex-EU Commissioner; The European Commission's New Gender Equality Strategy: Towards Quotas for Women in the Boardroom

law, corporate governance codes and hard law. The proposed women on boards Directive incited Member States, such as, France, Germany and Italy to pass binding legislation with sanctions. Other Member States have hard law in place, but without sanctions. Though, several Member States have limited soft law and no hard law in place. The research indicates that soft law has been ineffective. Hard law remains the most significant way for women to reach parity on the board of directors in public limited companies within a short period, accompanied by the use of quotas and sanctions.

***The fragmented women on boards policies and legislation
in the European Union***

The research has shown that, there is a multidimensional aspect to consider, which includes several structural layers to increase the representation of women on boards, such as, EU institutions, EU Member States national Parliaments, business associations, stakeholders and public listed companies. In 2020, the European Parliament Sustainable Corporate Governance Resolution called for, 'putting an end to the pervasive imbalance' of the boards of directors, as soon as possible and has called on the proposed women on boards directive to do this.¹³⁶⁷ Increasing the representation of women on boards is a corporate governance issue, though, it is also political. Women on boards policies and legislation stem from EU institutions or Member States' decisions. The European Commission has worked with the Member States on various issues related to women on boards, which include modernising corporate governance, corporate social responsibility, sustainability, shareholder concerns and the proposed directive to increase the representation of women on boards in public limited companies in the Member States through soft and hard law.

¹³⁶⁷ n 373, European Parliament Resolution of 17 December 2020 on Sustainable Corporate Governance (2020/2137(INI)) (2020).

The multi-level dimension and scope of this research also includes the EU institutions and Member States, as well as EEA Members, such as Norway and Iceland. EU institutions and Member States policies are static and evolving at the same time. The subject of a women on boards directive is an urgent regulatory concern. More Member States are passing hard law to increase the representation of women on boards. The transition from soft law to hard law is underway. The legal basis of a minimum harmonisation women on boards directive remains Article 157(3) of the TEU, which guarantees women equal treatment with men to participate on boards of directors. Nevertheless, the gap is widening between the Member States, with certain Member States not implementing soft or hard law to increase the representation of women on boards. This deprives the European Union and Member States greater GDP and competition in cross-border and international business. Member States have twenty-seven different legal systems (twenty-eight with the UK, though, former EU Member State and part of this research), which reflect particular contexts of the Member States. The research has found an important gap between Western and Eastern (and South East) European Union Member States, due to a lack of political support and the rise of national anti-gender equality political illiberalism, which questions the future of gender equality and women on boards in the European Union.

A legal framework of minimum harmonisation

Corporate governance codes may be improved, with code provisions explicitly mentioning women, gender or diversity on boards with the use of the comply or explain principle. Despite this, Member States are turning to hard law to increase the representation of women on boards, as hard law brings results faster results. Hard law with sanctions will harmonise the women on boards practices in all Member States. However, there remain obstacles, which several Member States have raised and include questions of subsidiarity, sovereignty and self-regulation. These issues will have to be overcome in order to increase the representation of women on boards in public listed

companies in all EU Member States. EU institutions will need to establish a dialogue with the Member States, who oppose the proposed women on boards directive. A Minimum Harmonisation Programme will accompany Member States, develop soft law measures, such as, women on boards provisions in corporate codes, recommendations, programmes, and work towards the proposed women on boards directive. The Programme could follow requirements based on the Copé Zimmermann Act, which effectively increased the representation of women on boards above the forty percent quota.

The research has shown that fragmented women on boards' policies and legislation have led to a legal framework of a minimum harmonisation. There were many reasons for EU intervention, as EU and national institutions failed to increase the representation of women on boards through soft law. Women on boards legislation was requalified from gender equality to company law. Constitutions had to be amended to allow for women on boards legislation. The research has pointed out that Member States with binding legislation may use a range of sanctions, which may or may not be effective. The legal framework has demonstrated that, despite the quantity of EU legislation, EU intervention with the proposed directive happened, as a result of inaction by the Member States. Despite the failure of the Member States to pass binding legislation, the proposed EU directive, has also been rejected by nine Member States. Inclusive comprehensive regulation includes, the women on boards directive, which had been blocked in Council since March 2022. The Council approved of the proposed directive to become a directive in October 2022. Several Member States have passed hard law, with or without sanctions. Denmark and the United Kingdom have their own exclusive unique regulation and rejected the proposed directive on grounds of subsidiarity. Though, the United Kingdom left the European Union in 2020, it is too early to know where women on boards policies are headed post-Brexit.

The research confirms and compliments the positions of politicians, such as, Viviane Reding, former EU-Commissioner and former French MP, Marie-Jo Zimmermann, as well as, academicians, such as, Linda Senden and Mari Teigen. Briefly, Viviane Reding is credited with legislating the proposed women on boards directive. Marie-Jo Zimmermann succeeded in having the French Constitution amended, which then allowed the Copé Zimmermann Act. Linda Senden, is the gender equality expert at the European Commission and academician, with an anchored position in hard law and women on boards. Mari Teigen is a research professor and Director of the Centre for Research on Gender Equality in Norway.

The research was subject to several limitations. The limitations of the research are points, which could not be treated sufficiently, as it was difficult to find up-to-date reports, statistics and information about gender equality policies and legal documentation in Eastern and South East European Union Member States. The research has provided reliable information from vetted government or expert sources to fill the void.

The research has not covered every EU Member State. This has not impacted the research. Future research could focus on the missing Member States. The research has not addressed in detail women on boards discussions between different stakeholders, such as, feminist groups, politicians and company associations. It has not impacted the research and was not the focus of the research. Further research is needed to follow developments and ongoing changes in corporate governance in the European Union. The different corporate governance environments demonstrate the variability and transition of women on boards soft to hard law, as soft law reaches its limits. However, it is necessary to monitor the political situation in Eastern Europe, as this is directly affecting gender equality, in general, and women on boards legislation specifically, as well as the relationship those Member States have with European Union institutions.

In conclusion, the research has shown that, the fragmented women on boards policies and legislation in the European Union may continue be a legal problem. Though, when the proposed women on boards directive becomes a directive and enters into force, it will have a great impact on Member States and national legislation. Further research is necessary to follow the continued interaction between the EU institutions and Member States, especially to follow the impact of the new directive on the Member States . The research on this subject started ten years ago exactly. The recent approval of the proposed directive to become a directive in Council in October 2022 is a major event for women, corporate governance and the European Union. Future research will focus on the implementation of the new directive in the Member States and follow closely the impact of the directive in the East European Union Member States. Moreover, the proposed directive is effective legislation for improving the representation of women on boards and European Union economy.

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Title : Corporate Governance and Women on the Board of Directors : the Legal Framework towards a Minimum Harmonisation in the EU

Keywords : corporate governance, women on boards, economic decision-making, minimum harmonisation, quotas, gender equality, parity

ABSTRACT: Women are underrepresented on corporate boards of public limited companies in the European Union. This comparative study examines the reasons, which are due to fragmented women on boards policies and legislation in the European Union, which includes EU law, national law, soft law, corporate governance codes and hard law. France, Germany and Italy passed women on boards legislation with sanctions, influenced by the Norwegian legislation and the proposed women on boards directive. The majority of Member States have preference for soft law. Article 157(3) of the TFEU is the legal basis for the women on boards directive. However, this has raised legal issues, such as, whether the EU is the competent authority to propose an EU women on boards legislation, calling into question the principle of subsidiarity. The legal basis of the proposed directive also has raised several

questions, such as, national and political sovereignty, as well as constitutionality issues in several Member States. The proposed directive had been blocked in Council for over ten years, until March 2022. Negotiations will begin in EU Parliament and consult with the Member States and review the legal systems in place, in view of a minimum harmonisation. A Minimum Harmonisation Programme will accompany the proposed directive in steps towards the minimum harmonisation. The research has demonstrated that soft law and hard law have not been effective. When the EU directive enters into force, it will ensure that at least forty percent of non-executive directors are women on boards.

Titre : Gouvernance d'entreprise et la représentation des femmes au conseil d'administration : le cadre juridique vers une harmonisation minimale dans l'Union européenne

Mots clés : gouvernance d'entreprise, femmes dans les conseils d'administration, prise de décision économique, harmonisation minimale, quotas, égalité homme-femme, parité

Résumé: Les femmes sont sous-représentées dans les conseils d'administration des sociétés anonymes de l'Union européenne. Cette étude comparative examine les politiques et la législation fragmentées en matière de la représentation des femmes dans les conseils d'administration dans l'Union européenne, ce qui inclut le droit communautaire, le droit national, le soft law, les codes de gouvernance d'entreprise et le hard law. La France, l'Allemagne et l'Italie ont adopté une législation contraignante assortie de sanctions, influencée par la législation norvégienne et la proposition d'une directive sur les femmes dans les conseils d'administration. La majorité des États membres ont une préférence pour le soft law. L'article 157 constitue la base juridique pour la directive. Cela soulève des questions juridiques, notamment celle de savoir si l'UE est l'autorité compétente, ce qui remet

en question le principe de subsidiarité, la souveraineté nationale et de la constitutionnalité dans plusieurs États membres. La proposition de directive était bloquée au Conseil pendant dix ans, et jusqu'en mars 2022. Les négociations commenceront au Parlement européen avec les États membres. Un programme d'harmonisation minimale accompagnerait la directive, afin d'adapter les politiques de parité, les codes de gouvernance et en travaillant vers la directive proposée par étapes, des objectifs et des rapports. La recherche a démontré que la soft law et la hard law n'ont pas été efficaces. Lorsque la directive européenne entrera en vigueur, elle veillera à ce qu'au moins quarante pour cent des directeurs non exécutifs soient des femmes dans les conseils d'administration.