



**COUNCIL OF
THE EUROPEAN UNION**

Brussels, 7 June 2013

10422/13

**Interinstitutional File:
2012/0299 (COD)**

**SOC 417
ECOFIN 453
DRS 110
CODEC 1314**

REPORT

From: The Presidency
to: Permanent Representatives Committee (Part I) / Council (EPSCO)
Prev. doc.: 10362/13 SOC 404 ECOFIN 440 DRS 108 CODEC 1299
No. Cion prop. 16433/12 SOC 943 ECOFIN 708 DRS 130 CODEC 2724 – COM(2012) 614 final
Subject : 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
- Progress Report

I INTRODUCTION

On 14 November 2012, the Commission adopted a 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. Aiming to address the serious problem of women's under-representation in economic decision-making at the highest level, the proposed Directive would set a quantitative objective for the proportion of the under-represented sex on the boards of listed companies of 40% by 2020 (by 2018 in the case of public undertakings). The companies would be obliged to work towards that objective, *inter alia*, by introducing procedural rules on the selection and appointment of non-executive board members.

Should companies fail to reach the 40% target by the deadline set, they would be required to continue to apply the procedural rules, as well as to explain what measures they had taken and intended to take in order to reach it. Companies would face sanctions only for failing to implement those procedural obligations. For Member States that choose to apply the objective to *both* executive and non-executive directors, a lower target (33%) would apply.

The national parliaments of DK, NL, PL, SE, UK, and one of the two chambers of CZ Parliament (Chamber of Deputies) have submitted reasoned opinions within eight weeks from the submission of the Commission's proposal, alleging that it did not comply with the principle of subsidiarity.¹

The European Economic and Social Committee adopted its Opinion on 13 February 2013.²

The Committee of the Regions adopted its opinion on 30 May 2013.³

The European Parliament has yet to adopt its Opinion in First Reading.⁴

During the Irish Presidency, the Social Questions Working Party examined the entirety of the Commission's proposal, the accompanying Impact Assessment and an opinion of the Council Legal Service (CLS) on the legal basis for the draft Directive.⁵

All delegations have general scrutiny reservations on the proposal at this stage; DK, UK and FR have parliamentary scrutiny reservations; and CZ, DK, SK, SI and LV have linguistic scrutiny reservations.

¹ No review of the proposal was required on the part of the Commission, the one-third threshold set out in Protocol 2 TEU, Article 7, having not been met.

² OJ C 133, 9.5.2013, p 68.

³ ECOS-V-039.

⁴ Rodi Kratsa-Tsagaropoulou (EPP/EL) has been appointed Rapporteur for FEMM Committee, and Evelyn Regner (S&D/AT) for JURI Committee.

⁵ Meetings on 1 February, 18 February, 25 March and 24 May.

II THE COUNCIL'S WORK UNDER THE IRISH PRESIDENCY

The discussions in the Working Party revealed a broad consensus in favour of the objective of the proposal; however, opinions differed regarding the best way of achieving it. Many delegations supported the Commission's approach, while others preferred a voluntary solution such as a Recommendation, allowing Member States more discretion to decide on their own policies. In this context, some delegations were also of the view that the proposal failed to respect the principles of subsidiarity and proportionality.

The legal basis

Certain delegations questioned the use of Article 157(3) TFEU as the legal basis for the proposal and the Council Legal Service was requested to prepare, and presented, an Opinion on this issue.⁶ The Commission has reaffirmed the legal basis it had chosen, citing, in particular, the broad interpretation that the Court of Justice of the European Union has given to the concept of "employment and occupation"⁷ and existing EU legislation adopted on the same legal basis which covers, not just employees, but also entrepreneurs and even unpaid spouses.⁸

The 40% (33%) quantitative objective (Article 4)

The proposed Directive provides that, in seeking to increase the number of boardroom positions held by the under-represented sex, the Member States could either pursue a 40% objective applying to non-executive board members *or* a 33% objective applying to *both* executive and non-executive directors.

⁶ 8020/13.

⁷ E.g. Case C-232/09 "Danosa".

⁸ Directive 2010/41/EC.

While a number of delegations supported these targets, certain delegations questioned the rationale for choosing the 40% figure and expressed the concern that the Member States had different starting-points. Others called for the practical meaning of the 33% objective to be defined more precisely. Some delegations called for the link between the quantitative objectives, the procedural requirements and the sanctions (see below) to be clarified, with a view to spelling out the fact that the 40% objective was not a fixed quota but an objective, for the achievement of which the Directive lays down procedural requirements.

Procedural requirements (Articles 2 and 4)

A number of delegations questioned the practicability of the provisions such as the obligation for companies to draw up "clear, neutrally formulated selection criteria" for the selection of board members. In particular, they queried how such provisions could be applied in the context of elections to choose board members and the choices made by shareholders. Others warned against undue interference in the freedom of employees to select their own representatives in those Member States where employees are represented on the boards. The Commission has acknowledged the need to clarify the text, including by making a clearer distinction between an election and a pre-selection procedure.

Certain delegations considered that the disclosure requirement (Article 4(4)) went beyond existing discrimination legislation and might compel companies to reveal confidential matters of company strategy.

In relation to Article 4 (6), certain delegations suggested that the exemption of listed companies where the under-represented sex made up less than ten per cent of the workforce might create an incentive for companies to keep below this threshold in order to avoid coming within the scope of the Directive. Others questioned the rationale for choosing ten per cent as the cut-off point.

Additional measures by companies and reporting (Article 5)

Some delegations are seeking clarification of the nature and content of the commitments that companies were required to undertake regarding the gender-balanced representation among *executive* directors. Others had concerns about excessive administrative burden on companies, in this regard.

Sanctions (Article 6)

Under the proposed Directive, sanctions for non-compliance with the national provisions required are to be laid down by the Member States themselves, and have to be effective, proportionate and dissuasive. The Commission explained that sanctions would not automatically apply to companies that did not reach the 40% (33%) objective. They would be imposed on companies for not implementing the procedural obligations, for infringing the obligation of setting individual targets relating to executive directors, and for not fulfilling the reporting obligations.

Certain Member States were not in favour of sanctions, some preferring a comply-or-explain approach instead. Others warned against practical difficulties that could arise, for example, if boardroom appointments were nullified.

Company law

Several delegations raised the concern that the proposal might not be consistent with company law. Others called for clarification on matters of jurisdiction in the context of determining where a given company has its seat. The Commission acknowledged the need to ensure clarity and consistency with company law. Certain delegations also saw a need to clarify the scope (i.e. which companies the Directive applied to) and called for further discussion and possible clarification of the definition of "a listed company."⁹

⁹ The definition is taken from Commission Recommendation 2005/163/EC.

SMEs (Articles 2 (8) and 3)

While small and medium-sized companies are exempted from the provisions of the draft Directive, certain delegations pointed out that the definition of "an SME" may not be consistent with a forthcoming revision of Directive 2004/39/EC.

Recognition of effective pre-existing national measures (Articles 8 and 9)

Certain delegations called for clarifications regarding the provision that would suspend the procedural obligations in those Member States where effective national measures were already likely to lead to the binding objective being met by the deadline set in the Directive (2018 for public companies, 2020 for private companies).

Impact Assessment

Certain delegations raised the concern that evolving national policies aimed at improving the gender balance on company boards had not been adequately considered, some Member States having recently introduced successful measures. Others asked whether the economic benefits of gender balance for company performance had been demonstrated convincingly enough. Responding to these remarks, the Commission referred to the research showing a positive correlation between gender diversity on boards and improved company performance.

Other issues requiring further discussion

Various other issues will require clarification and may require further discussion, including the implementation calendar and the deadlines contained in the proposal, the interplay between the provisions concerning unitary boards and two-tier boards respectively, and a number of other technical details.¹⁰

¹⁰ Further details of delegations positions can be found in 5792/1/13 REV 1, 6569/1/13 REV 1, 8002/13 + COR 1 and 10362/13.

III CONCLUSION

While all delegations are in principle in favour of improving gender balance on company boards, some prefer national measures while others support EU-wide legislation. Accordingly, more work will be needed to clarify and amend aspects of the Commission proposals before a compromise can be reached. Significant progress has been made during the four meetings convened on this dossier under the Irish Presidency and Ireland looks forward to collaborating further on this draft Directive.
