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REPORT

from: The Presidency
to: Permanent Representatives Committee/Council (EPSCO)

No. prev. doc.: 9498/14 SOC 333 EGC 18 ECOFIN 451 DRS 63 CODEC 1212
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 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.

Companies which have not reached the 40% target 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. 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) 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 adopted its position at first reading on 20 November 2013.⁴

All delegations have general scrutiny reservations on the proposal at this stage; 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 A7-0340/2013. (Final text not yet available.) Rodi Kratsa-Tsagaropoulou (EPP/EL) served as Rapporteur for the FEMM Committee, and Evelyn Regner (S&D/AT) for the JURI Committee.

II. THE COUNCIL'S WORK UNDER THE HELLENIC PRESIDENCY

During the Hellenic Presidency, the Working Party on Social Questions continued its discussions on the basis of drafting suggestions⁵ prepared by the Presidency.

While discussions in the Working Party have revealed a broad consensus in favour of the objective of the proposal, opinions continue to differ sharply regarding the best way of achieving it, a number of delegations reaffirming their opposition to the proposal. However, one delegation that is opposed to the Directive has indicated that it is reviewing its position.

In its drafting suggestions, the Presidency mainly sought to improve the technical coherence of the draft Directive, including by reordering the recitals and aligning them better with the articles. Delegations broadly welcomed the Presidency's suggestions as improvements to the text.

Other initiatives at the EU level

A delegation reminded the Working Party of the recent adoption of a Directive on disclosure of non-financial and diversity information by certain large companies and groups that contains provisions requiring large listed companies to provide information on their diversity policy and of a Commission Recommendation on the quality of corporate governance reporting ("comply or explain" principle) that calls on companies to disclose the composition of their boards, including in terms of gender diversity, but without imposing any legal obligation. The Commission made the point that these instruments were complementary to and consistent with the proposed Directive, which contained more far-reaching provisions.

⁵ 6574/14.

Progress at the EU level (Recital 10)

The Presidency had updated the statistics on the gender balance on company boards on the basis of the Commission's recent Report on progress on equality between women and men in 2013⁶. Divergent views were expressed regarding the reasons behind the improvement seen, the Commission underscoring the impact of binding measures adopted by some Member States.

Exchange of good practice (Recital 11)

Delegations welcomed the mention of "exchange of good practice" introduced in Recital 11, further discussion on practical aspects of such a measure being nevertheless needed.

Companies where members of the under-represented sex make up less than 10 per cent of employees (Recital 24a and Article 4(6))

Certain delegations expressed the fear that exempting companies where members of the under-represented sex make up less than 10 per cent of employees might undermine the purpose of the Directive by creating a disincentive to the hiring of women. Responding, the Presidency explained that the provision merely aimed to accommodate existing situations.

Right of shareholders to choose candidates for board positions (Recitals 22, 26 and 27 and Article 4a)

Responding to remarks made, the Commission explained that the proposed Directive fully respected the right of shareholders to vote freely as the applicable procedural rules only applied to the selection of *candidates* for appointment or election.

⁶ 9042/14 ADD 3.

Exemption for Member States with effective national measures (Article 4b(1) and Recital 29)

In its drafting suggestions, the Presidency had postponed the deadline for taking alternative national measures from the date of entry into force to the date of implementation of the Directive. Moreover, the Presidency had reworded the text to the effect that those alternative national measures should allow the Member State to reasonably consider that, through those measures, the objectives of the Directive would be attained by 1 January 2020 at least as effectively as through the measures specified in the Directive.

Certain delegations felt that the expectation described would be impossible to measure. However, the Commission made the observation that a prognostic element was unavoidable and that the Presidency's wording had a softening effect, giving greater flexibility to the Member States.

Specific target numbers for members of company boards (Annex I and Recital 24)

In its drafting suggestions, the Presidency had re-introduced a table setting out the specific target numbers for company boards of various sizes. The Commission endorsed the mathematical reasoning behind the suggested table and its practical value. Given that the precise figure of 40% could be met only in few cases (e.g. where a board consists of five members, 40% of five being exactly two), in other cases, it was proposed that the number of board members closest to 40% be deemed to be the target irrespective of whether that number amounted to more or less than 40%. However, target number should in any case result in a proportion that was less than 50 per cent.

III. MAIN OUTSTANDING ISSUES

From the discussions to date, it is clear that a number of issues require substantial further discussion. These include the following:

The legal basis

Certain delegations have questioned the use of Article 157(3) TFEU as the legal basis for the proposal. Council Legal Service Opinion on this issue is set out in doc. 8020/13 + ADD 1. The Commission has reaffirmed the legal basis chosen.⁷

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. Certain delegations have expressed concerns regarding the viability of the objectives, given that the Member States had different starting points.

Procedural requirements (Articles 2 and 4)

Certain delegations still have concerns regarding the practical implementation of the procedural provisions regarding the process for selecting candidates for appointment or election.

⁷ Commission Staff Working Document SWD(2013) 278.

Other issues

Other issues that may also require clarification and discussion include the implementation and review calendar (Articles 8 and 9) and a number of other technical details.⁸

Further details of delegations' positions can be found in 14852/13 and 9498/14.

IV. CONCLUSION

While all delegations are in principle in favour of improving gender balance on company boards, a number of delegations continue to prefer national measures (or non-binding measures at the EU level) whereas others support EU-wide legislation. During the Hellenic Presidency, the Working Party has mainly concentrated its work on technical aspects. Further work and political reflection will be required before a compromise can be reached.

⁸ Further details of delegations' positions can be found in 14046/13 + COR 1, 14852/13, 16279/13 and 9498/14 + COR 1.