European company law as an instrument for gender equality? Comments on the qualifications of the company board members and EU legislation policy

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On 5 April 2011 the European Commission published a Green Paper – The EU corporate governance framework[1]. Apart from a number of recommendations for Member States regarding *corporate governance* the Commission also asks a question: should stock exchange companies be required to ensure greater gender equality in the composition of boards? If so, how? It seems that in the opinion of the Commission, covering this issue in the range of harmonization is justified because it states: "*Gender diversity can contribute to tackling group-thinking. There is also some evidence that women have different leadership styles,[2] attend more board meetings[3] and have a positive impact on the collective intelligence of a group[4]. Studies suggest that there is a positive correlation between the percentage of women in boards and corporate performance[5] though for certain the overall impact of women on firm performance is more nuanced. Though these studies do not prove any causality, the correlation highlights the business case for gender equality in management and corporate decision-making* ".

The European Parliament took a further reaching stance in this matter and on 6 July 2011, it even passed a resolution[6] which called the Commission to:

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1 http://ec.europa.eu/internal_market/company/docs/modern/com2011-164_pl.pdf

2 Analysis of McKinsey & Company 2008 "Women master", quot. after: Green Paper.

3 Adams and Ferreira "Women in the boardroom and their impact governance and performance",
Journal of Financial Economics no. 94 (2009) quot.: Green Paper.

4 Woolley, Chabris, Pentland, Hashmi and Malone "Evidence for a Collective Intelligence Factor in the
Performance of Human Groups", Sciencexpress, 30 September 2010. quot.: Green Paper.

5 Analysis of McKinsey & Company of 2007 "Women matter"; „Female Leadership and Firm Profitability,
Finnish Business and Policy Forum", EVA 2007; "The Bottom Line: Connecting Corporate
And performance Gender Diversity" in Catalyst of 2004 quot.: Green Paper.

6 Resolution of the European Parliament of 6 July 2011 on women and management of companies, 2010/2115 (INI),

- present, as soon as possible, comprehensive current data on female representation within all types of companies in the EU and on the compulsory and non-compulsory measures taken by the business sector as well as those recently adopted by the Member States with a view to increasing such representation ;
- following this exercise, and if the steps taken by companies and the Member States are found to be inadequate, to propose legislation, including quotas, by 2012 to increase female representation in corporate management bodies to 30% by 2015 and to 40% by 2020, while taking account of the Member States' responsibilities and of their economic, structural (i.e. company-size related), legal and regional specificities;
- present a road map setting out specific, measurable and attainable targets for the achievement of balanced representation in enterprises of all sizes;
- set up a website dedicated to good practice in this area to inform the public and the social partners effectively on this issue.

Although the above documents are classified as the so-called *soft law*, a regulation including the above recommendations was adopted in 2003 by Norway, and France and Spain wait for its effective date – respectively in 2017 and 2015.

The European Commission at the meeting on 14 November 2012 had decided to propose Directive in this matter. This decision was supposed to be made already at the meeting on 23 October 2012 however, it was postponed to 14 November 2012 after the appearance of doubts about compliance of this concept with the EU law.

Main elements of the proposal:

- the Directive sets a minimum objective of 40% by 2020 for members of the under-represented sex for non-executive members of the boards of publicly listed companies in Europe, or 2018 for listed public undertakings;
- the proposal also includes, as a complementary measure, a "flexi quota": an obligation for listed companies to set themselves individual, self-regulatory targets regarding the representation of both sexes among executive directors to be met by 2020 (or 2018 in case of public undertakings). Companies will have to report annually on the progress made;
- qualification and merit will remain the key criteria for a job on the board. The directive establishes a minimum harmonisation of corporate governance requirements, as appointment decisions will have to be based on objective

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http://www.europarl.europa.eu/oeil/popups/summary.do?id=1159389&t=d&l=en

qualifications criteria. Inbuilt safeguards will make sure that there is no unconditional, automatic promotion of the under-represented sex. In line with the European Court of Justice's case law on positive action, preference shall be given to the equally qualified under-represented sex, unless an objective assessment taking into account all criteria specific to the individual candidates tilts the balance in favour of the candidate of the other sex. Member States that already have an effective system in place will be able to keep it provided it is equally efficient as the proposed system in attaining the objective of a presence of 40% of the under-represented sex among non-executive directors by 2020. And Member States remain free to introduce measures that go beyond the proposed system;

- member States will have to lay down appropriate and dissuasive sanctions for companies in breach of the Directive;
- subsidiarity and proportionality of the proposal: The 40% objective applies to publicly listed companies, due to their economic importance and high visibility. The proposal does not apply to small and medium enterprises. The 40% objective is focused on non-executive director posts. In line with better regulation principles, the Directive is a temporary measure and is set to expire in 2028.

At the beginning of the discussion it is worth indicating two issues of general nature. First, even if some research, in a manner not creating any doubts (which seems unlikely), proved the existence of correlation concerning a significant strength of dependencies between gender of members of stock market companies and corporate financial performance (positive or negative) it would not have decisive importance for solution to the discussed problem (it will be mentioned in the further part). Secondly, it is of no importance for evaluation of purposefulness and justified character of regulations ordering to ensure appropriate representation of women in decision-making bodies of companies that any possible quotas would apply only to stock market companies. Although companies whose shares were approved to public trading are subject to some limitations of public-law nature, they do not cease to be private law corporations conducting activities at their risks, though in the economic perspective, this is, of course, the risk of shareholders of the companies.

The issue of qualifications of capital companies members should not be without importance for the legislator. Due to trade safety it is purposeful that commercial-law regulations predicted even minimum requirements for candidates for administrations and supervisory boards members. For example, in the Polish Commercial Companies Code this issue is regulated in Article 18, which states that:

- a member of the board of directors, supervisory board, audit committee or a liquidator may only be a natural person having full capacity to be a party in legal acts (§ 1);

- a person cannot be a member of the board of directors, supervisory board, audit committee or a liquidator if he/she has been sentenced with a legally binding sentence for offenses against information protection, credibility of documents, property, economic transactions, money and securities transactions, as well as an offence of announcing untrue data and presenting them to companies bodies, state authorities and auditors, an offence of obstructing exercising minority rights and use of false documents during voting at the general meeting or realization of minorities' rights (§ 2).

The above rules undoubtedly limit the freedom of shareholders on selection of specified persons for company bodies. The purpose of the above mentioned regulation restricting the freedom of shareholders is not, however, ensuring competent managers by the legislator to companies, and in this way influencing the financial results of companies, but turnover safety protection. It is in the public interest, particularly the interest of the company's creditors, its shareholders and stakeholders that the companies were managed by people with minimum personal qualifications (only full capacity to be a party in legal acts) and ethical (not punished for offenses related to economic turnover).

The rights of shareholders of companies members are an element of a broader category which is subjective right. Although passive voting right is not structurally connected with the membership right, active voting right shall be granted, as a principle, only to shareholders, directly or indirectly. The essence of this right is competence to freely choose the authority member that is most often a person having trust of the shareholder.

The nature of companies, as a principle, envisages that shareholders do not run any matters of the company, nor do they represent it. Therefore, they must have influence on selection of people who, on their behalf, will perform these competencies. Active voting right to the authorities of capital companies is thus an instrument of implementation of member rights in a company. Introduction of gender criterion with respect to selection of body members could result in a situation when a shareholder actually would be forced to resign from appointment or voting for a specific member of the board of directors only because they do not meet the gender criterion.

Certainly, a completely different thing are practical difficulties that could result from such a regulation, such as identification of colliding rules determining who is allowed to select body members freely and who is not, what would be the results of violation of such an order regarding legal activities performed by such bodies, etc.

A regulation introducing gender criterion with respect to selection of members of stock market companies bodies would excessively interfere in autonomy of the will of shareholders, which is, after all, a foundation of private law. Meanwhile, restrictions of autonomy of will are acceptable only when they can be justified by the need to protect public interest. The legislator should not impose the management method on entities of private law in the event when it is not a state but shareholders who bear the economic risk of the company's functioning. Thus, even if it was empirically proved that a manager's gender has an impact on the performance of company managed by them, still it would not justify interference of the legislator in the freedom of shareholders to appoint such managers whom they consider competent, if only they meet minimum criteria requested. A regulation ordering introduction of quotas at the level of domestic law seems to be defective.

It would be even more groundless to standardise this issue at the community level. It seems that it would be in conflict with the principle of proportionality and subsidiarity of the European Union law.

In accordance with the principle of proportionality, the scope and form of the EU actions do not go beyond those necessary to achieve the Treaties goals (Article 5, passage 4 TEU). Legislative measures taken by the EU must not only be necessary, but also least nagging. The community legislator to accept quotas would have to demonstrate that this regulation is necessary and at the same time it is not excessively nagging. Additionally, in the situation when the essence of regulation comes down to interference in private-legal autonomy, an legislator would have to demonstrate that interference is justified[7] and the only possible justification of interference in private autonomy could be public interest.

In accordance with the subsidiarity principle (help), in areas which do not belong to its exclusive competence, the Union undertakes actions only when and only to the extent to which the goals of the intended action cannot be achieved sufficiently by Member States, both at the central and regional as well as local level, and if owing to the size or results of the proposed action it is possible to achieve them better at the level of the EU (Article 5 passage 3 TEU). In order not to violate the principle of subsidiarity of the EU law, the Community legislator would have to demonstrate that Member States are not able to independently solve the problem of gender equality without any harm for the idea of internal market safety.

So far there is no evidence that provision of gender equality in stock market companies bodies is justified by important public interest or that Member States are not able to independently and effectively solve this problem. Therefore, we should hope that finally the Community legislator will withdraw from the idea to ensure gender equality in stock market companies bodies in an artificial manner.

[7] See: D. Chalmers, G. Davies, G. Monti, European Union Law, Cambridge 2010, p. 362.