Studia Iuridica 101
ISSN 0137-4346; e-ISSN 2544-3135

https://doi.org/10.31338/2544-3135.si.2024-101.8

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BREAKING THE GLASS CEILING: IN SEARCH OF THE ROLE OF EUROPEAN COMPANY LAW FOR WOMEN'S EMPOWERMENT

Abstract

Women empowerment agenda plays a crucial law in a global legal debate. Despite years of struggle and undeniable success in several fields, women remain vastly underrepresented in the workforce and business leadership. The areas traditionally associated with gender equality are located within the public law regulations, with the core of labor and social security law. At the same time, it seems that some useful tools can be also provided by private law. Therefore, in the thought of a multi-faced, comprehensive approach, it is worth evaluating the actual and potential law of the European company law regulations. The aim of the article is to present the current legal and research state-of-play, mark the research gaps and formulate hypotheses as to the possible developments in this regard.

KEYWORDS

women empowerment, gender equality, gender diversity, company law, board members, quotas

SŁOWA KLUCZOWE

równouprawnienie kobiet, równość płci, różnorodność płci, prawo spółek, członkowie organów, parytety

INTRODUCTION

Gender inequalities are a critical issue of global concern.[1] The progress toward women's empowerment varies across countries, among which European Union is often credited as a pioneer.[2] With equality as one of its fundamental values, the EU has undertaken several initiatives aimed at closing the gender gap in various areas of life. However, despite the undisputable gains in educational attainment,[3] the European labor market still exhibits a significant imbalance between men and women in terms of professional activity, earnings and occupied positions.[4] Many years into the discussion on gender equality, the so-called glass ceiling still seems firmly in place – women remain vastly underrepresented in the workforce and business leadership, accounting for an average of 30.6% of the board members and only 8.5 % of chairpersons in the largest listed companies in 2021.[5]

Solutions to the problems identified with gender imbalance are commonly associated with public law regulations – in particular, labor and social security law.[6] However, a significant role in this respect can also be played by company law, traditionally located in the private domain. Embodying the concept of corporate social responsibility, the EU has most recently aptly recognized the need to approach the gender gap by influencing corporate practices. Although the landmark directive 2022/2381 provides a valuable starting point for the desired

[1] OECD, *Enhancing Women's Economic Empowerment through Entrepreneurship and Business Leadership in OECD Countries*, Paris 2014.

[2] T. M. Dworkin, C. A. Schipani, *The Role of Gender Diversity in Corporate Governance*, "University of Pennsylvania Journal of Business Law", Vol. 21:1, p. 110.

[3] EC, *Gender Balance in Business Leadership: a Contribution to smart, sustainable and inclusive growth', Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions*, Brussels 2012.

[4] OECD, *Enhancing Women's Economic Empowerment...,* p. 9.

[5] Directive (EU) 2022/2381 of the European Parliament and of the Council of 23 November 2022 on improving the gender balance among directors of listed companies and related measures, point 18.

[6] See: e.g., Directive (EU) 2006/54/EC of the European Parliament and 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; Directive (EU) 2019/1157 of the European Parliament and the Council of 20 June 2019 on work-life balance for parents and careers and repealing Council Directive 2010/18/EU.

transition, the solutions introduced therein may not be sufficient for effective achievement of substantive gender balance in European companies. Therefore, it may be argued that to unleash the potential of European societies fully, the current regulatory state still calls for further improvements.

WHY SHOULD WE PROMOTE GENDER DIVERSITY ON COMPANY BOARDS?

The composition of company boards, as the key operation bodies of each corporation, is a practically vital issue, which in terms of the gender criterium, fits into the general discussion on modern corporate governance and corporate social responsibility.[7] As follows from a wide array of literature, the involvement of women on company boards benefits two often contradicted, yet, in this case, complementary, interests of business and society.

In terms of the corporate dimension, it is suggested that having female members on board might provide companies with tangibly improved results.[8] The studies on corporate governance show that a high proportion of women on boards is likely associated with a significantly higher return on sales and return on invested capital, greater productivity and financial performance compared to homogenous teams.[9] Gender-diverse boards also tend to have a broader range of backgrounds, experiences and problem-solving skills,[10] as well as better compliance with ethical and social standards compared to the gender-homogenous bodies.[11] Moreover, female directors are reported to be more diligent in monitoring and thus more efficient in terms of shareholders' interests protection.[12] Various research also points out to positive reputational effects of a gender-balanced corporate environment.[13]

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[7] S. May, G. Cheney, J. Roper (ed.), *The Debate Over Corporate Social Responsibility*, Oxford University Press 2007.

[8] I. Velkova, *Quotas for Women on Corporate Boards: The Call for Change in Europe*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2568604 (accessed 23 February 2015), p. 1; Dworkin T.M., Schipani C.A, *The Role of Gender Diversity in Corporate Governance*, "University of Pennsylvania Journal of Business Law", Vol. 21:1, p. 115.

[9] N. M. Carter, H. M. Wagner, *The Bottom Line: Corporate Performance and Women's Representation on Boards 2004-2008*, Catalyst 1 March 2011.

[10] OECD, *Enhancing Women's Economic Empowerment...,* p. 26.

[11] H. Isidro, S. Sobral, *The Effects of Women on Corporate Boards on Firm Value, Financial Performance, and Ethical and Social Compliance*, "Journal of Business Ethics", Vol. 1/2014.

[12] R. Adams, D. Ferreira, *Women in the boardroom and their impact on governance and performance*, "Journal of Business Economics" 292/2008.

[13] S. Brammer, A. Millington, S. Pavelin, *Corporate Reputation and Women on the Boards*, "British Journal of Management", Vol. 17:29/2008; L. Campbell, A. Minguez-Vera, *Gender*

In such a state of research, economic efficiency is often indicated as the main source of legitimacy and a driving force behind various gender-balance policies. However, some authors underline that the women's empowerment agenda should not lose sight of the social issues in play.[14] As noted in the literature, increasing female participation in the boardroom creates cultures of inclusion, increases awareness and diversity and improves the situation of downstream female employees.[15]

CURRENT STATE-OF-PLAY

1.1. EU MANDATORY MEASURES AS A WAY FORWARD

Given the above, the overall advantage of gender diversity on company boards – although still explored and evidenced – is essentially uncontested. The real challenge lies, however, in determining how such a gender-balanced corporate environment can be achieved through tools specific to company law.

Although equality has always been one of the top priorities of the EU (Art. 2 TFEU), the treaty mandate to promote gender equality (Art. 3.3, Art. 157 TFEU and Art. 23 CFR) has not been used in the area of company law for many years. Until 2022, the issues related to gender diversity in the European boardrooms have been addressed only by several Member States under different approaches, including mandatory quotas, voluntary measures or lack of any action.[16] Although, in the end, these attempts have not led to a resounding transition, they did reveal two regularities relevant to designing new legal solutions to the discussed problem.

Firstly, the regulatory model has proven to be the most effective one, continuously impacting gender diversity. On the other hand, the voluntary (corporate governance code) measures have not brought the expected results.[17]

Secondly, the impact assessment of the national regulations underlined the EU dimension of the discussed issue. The scattered and divergent regulatory state at the national level has not only led to discrepancies in the number of female

Diversity in the Boardroom and Firm Financial Performance, "Journal of Business Ethics" 439-440/2008.

[14] T. M. Dworkin, C. A. Schipani, *The Role of Gender Diversity...*, p. 139.

[15] T. M. Dworkin, C. A. Schipani, *The Role of Gender Diversity...*, p. 108.

[16] I. Velkova, *Quotas for Women on Corporate Boards…*, p. 22.

[17] W. Kang, J. K. Ashton, A. Orujov, Y. Wang, *Realizing Gender Diversity on Corporate Boards*, "International Journal of the Economics of Business" 2022, p. 12-13; I. Velkova, *Quotas for Women on Corporate Boards…*, p. 4; M. Swoy, *Corporate Gender Quotas and Meaningful Female Board Participation,* "California Western International Law Journal", Vol. 52:1/2021, pp. 215-217.

board members among the Member States but also established barriers to the internal market by imposing inconsistent corporate governance requirements on the companies in different jurisdictions.[18] Accordingly, in the recent literature, EU-level measures are believed to be more efficient than any national initiatives.[19]

1.2. DIRECTIVE 2022/2381

The above findings were first acknowledged at the European level debate in 2012 when the European Commission stressed the need to adopt mandatory, EU-wide legislation aimed at improving gender balance on boards across Europe.[20] This demand was not, however, fulfilled until ten years later, with the enactment of the directive 2022/2381 on improving the gender balance among directors of listed companies and related measures.

The scope of the directive is limited to listed companies due to their particular economic importance and trend-setting ability. For those entities, the directive sets a universal objective for women to hold at least 40% of non-executive director positions or 33% of all director positions (both executive and non-executive) by 30 June 20026 (Art. 5.1).

The companies which fail to achieve these thresholds should be obliged to adjust their selection procedure by introducing clear, neutrally formulated and unambiguous criteria established in advance of the recruitment process (Art. 6.1). In the case of equally qualified candidates, the gender preference in favor of the underrepresented sex shall apply (Art. 6.2).

Member States are also required to impose new reporting obligations, regarding i.a.: the gender representation on their boards, the undertaken or planned measures, or the reasons for not achieving the objectives (Art. 7.1).

2. IS THIS ENOUGH?

2.1. GENERAL REMARKS

The general design of the latest regulation, its mandatory character and territory scope deserves approval. As mentioned above, quotas are reported to be an effective method of advancing women into boardrooms in large numbers.[21]

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[18] Directive 2022/2381, point 20.

[19] I. Velkova, *Quotas for Women on Corporate Boards…*, p. 40.

[20] EC, *Gender Balance in Business Leadership*, point 77.

[21] I. Velkova, *Quotas for Women on Corporate Boards…*, p. 5, 17.

Assuming that corporations should promote not only the economic interests of their investors but also specific higher social values, introducing quality objectives and reporting duties should not raise significant objections. At the same time, the adopted approach lacks proper deliberation and complexity.

2.2. UNANSWERED QUESTIONS: REASONS AND GOALS

The search for solutions to gender inequalities should begin with identifying the reasons for the current imbalance and correlated objectives that should be pursued. Meanwhile, these primary issues have not been considered by the EU legislator or profoundly researched in the literature. However, the up-to-date studies acknowledge that it is not only the corporate environment and entrenched cultural patterns that stand behind the current situation.

Research suggest that the male dominance on company boards might be, in fact, due to women's reluctance to serve as directors.[22] Most frequently identified barriers to a more significant presence of women in leadership positions include, in particular, work-life balance issues and parenting-related career breaks.[23] However, these difficulties are by no means eliminated by quotas.

Moreover, regardless of the achieved parities, female directors have statistically shorter tenures and are thus less likely to hold leadership roles on the company boards.[24] Therefore, the purely quantitative, threshold-based approach toward gender equality also fails to ensure a substantive balance between the actual influence exercised by male and female directors.

Limiting the women's empowerment agenda to quotas does not, therefore, seem sufficient to achieve the actual, and not only formal, gender balance on company boards.

3. GOING BEYOND SELECTION MECHANISMS: THREE STAGES CALLING FOR ACTION

3.1. GENERAL REMARKS

To adequately address the complex research problem, I propose distinguishing three stages of the transition towards gender equality on company boards,

[22] T. M. Dworkin, C. A. Schipani, *The Role of Gender Diversity...*, p. 119.

[23] OECD, *Enhancing Women's Economic Empowerment...*, p. 25.

[24] Y. Nilli, *Beyond the Numbers: Substantive Gender Diversity in Boardrooms*, "University of Wisconsin Law School Legal Studies Research Papers", Series Paper No. 1436, p. 152.

including pre-selection, selection and post-selection. Each covers different causes of the observed imbalance and matches solutions to achieve different goals.

3.2. PRE-SELECTION STAGE

As mentioned above, women are generally less willing to take management positions than men, mainly due to the difficulties of maintaining a work-life balance while keeping a top corporate position. The first goal of the gender diversity policy should, therefore, be to encourage women to take on new challenges related to participation in high corporate structures.

Currently, the EU company law does not provide any specific rules enabling convenient reconciliation of the director's role with personal arrangements, requiring a temporary break from professional activity. Directors' duties apply permanently, also during any absences. Consequently, the board members remain constantly liable for the damages incurred by the company due to breach of the entrusted tasks. Thus, the instability entailed in the risk of flexible revocation or the necessity to resign from the office in case of a need for a more extended leave may be a significant deterrent to women in management corporate roles.

This situation can be remedied by introducing a temporary office suspension for a fixed period due to specified circumstances, i.e., parental leave or prolonged illness. On the one hand, such a mechanism enables the directors to reconcile their professional and personal life. On the other, it may be designed in such a way so as not to overburden corporations. Guarantees safeguarding the legitimate interests of the companies may, in particular, include: (i) the appropriate suspension period, (ii) relevant exceptions from the right to demand suspension (e.g., in case of single-person boards), (iii) allowing revocation of the board member even during the suspension period, in case of a conduct-related, legitimate reason, (iv) adequate notice period, (v) ensuring office continuity by temporary replacement (e.g., an obligation to convene a shareholders' meeting and present recommendations as to the substituting director). Similarly, proper legislation can effectively protect the interests of the third parties, including the company's creditors – e.g., by obliging the board to reveal information on the suspension and temporary director in the public registry.

The practical potential of the above proposal is confirmed by German law, which has already introduced similar regulations in 2021.[25] Given the need to harmonize gender equality standards and encourage women to have greater involvement in European company boards, implementation of such a mechanism also at the EU level seems most desirable.

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[25] § 84 (3) Aktiengesetz.

3.3. SELECTION STAGE

Having increased the number of female candidates by introducing appropriate mechanisms at the pre-selection stage, the women empowerment agenda should further focus on the selection process. Since, historically, companies are more likely to appoint male directors, ensuring that women take a fair number of boardroom seats is crucial. An adequate tool to achieve this goal is quotas, which provide for the so-called positive discrimination, privileging the underprivileged gender.[26]

In this regard, Directive 2022/2381 is adequate. At the same time, it may be worth considering broadening its scope, currently limited only to listed companies. Both private and public companies can have a significant economic and social impact, dependent on their size. Therefore, some Member States decided to apply the quotas also based on the turnover criterion.[27]

3.4. POST-SELECTION STAGE

As mentioned above, research shows that regardless of the set thresholds, women remain underprivileged in terms of the tenures' duration, entrusted tasks, and opportunities for corporate advancement.[28] Consequently, the next goal of the equality agenda should be to ensure that, once appointed, female directors enjoy a similar influence on the company's operations.

In this regard, a possible solution is extending the reporting obligations, currently focused solely on the quantitative parities. Companies could be obliged not only to point out the number of female directors but also, e.g., their specific roles and tenures.[29] In this way, the shareholders could verify whether the gender balance in a given company is only illusory or real.

4. CONCLUSIONS

The European company law exhibits significant potential to close the gender gap in the corporate environment. At the same time, although the latest legislative trends are welcomed, there is still room for further improvements. The subse-

[26] I. Velkova, *Quotas for Women on Corporate Boards…*, p. 24.

[27] Kang W., Ashton J.K., Orujov A., Wang Y., *Realizing Gender Diversity...,* p. 5-7.

[28] Nilli Y., *Beyond the Numbers...*, p. 152.

[29] Nilli Y., *Beyond the Numbers…*, p. 196.

quent regulatory agenda should consider involvement at the pre-and post-selection stages of shaping company boards' personal composition.

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