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Balanced Representation between Men and Women in Business Law: The French 'Quota' System to the Test of EU Legislation

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Balanced Representation between Men and Women in Business Law: The French 'Quota' System to the Test of EU Legislation

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Abstract

The number of women directors on the boards of large listed companies in the EU is very low and progress towards equal participation and representation of women and men in company boards has been extremely low. In the aftermath of the Global Financial Crisis, the lack of gender diversity on corporate boards has become less justifiable. In response to the clear need for change a number of European countries and the European Union have adopted or proposed the introduction of various forms of measures designed to tackle the gender imbalance on corporate boards. This article aims to compare and contrast the French and the EU methods used to achieve a better gender balance on company boards. This article suggests that the French approach is wide reaching in its coverage of executive as well as non-executive directors and, as such, goes further than the proposed EU directive and has the potential to be a role model within the EU.

Introduction: A global move towards gender equality

Global trends in gender equality currently focus on enhancing gender balance in decision making, in the political as well as the economic sphere. Both France and the European Union (EU) have initiated significant legislative reforms to that end. Initial reforms focussed on increasing the number of women in politics, based on principles of citizenship and representation. As Rainbow Murray notes '[parliamentary] gender quotas invite citizens to revisit their expectations of what it means to be represented and what makes a "good" politician.'¹ A recent EU publication observes that 18 of the (at the time) 27 EU Member States have at least one political party with a voluntary quota mandating a certain level of gender balance representation of candidates.² Other Member States, including France, have introduced legal obligations ensuring that political party candidate lists include a minimum number of

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¹ M. Rainbow, 'Quotas, Citizens, and Norms of Representation', 9 *Politics and Gender* 3 (2013), p. 304-328.

² European Commission Directorate General for Justice, 'Women and Men in Leadership Positions in the European Union: A Review of the Situation and Recent Progress' (2013), available at http://ec.europa.eu/justice/gender-equality/files/gender_balance_decision_making/131011_women_men_leadership_en.pdf (Accessed 1 March 2014).

women candidates.³ These measures have cumulatively led to steady increase of women in Member State national parliaments to up to 27 per cent as of 2013. In contrast to this progress in the political sphere, the number of women directors on the boards of large listed companies in the EU is considerably behind at 16.6 per cent.⁴ In the aftermath of the Global Financial Crisis, it has become clear that a lack of gender diversity on corporate boards is not just a European issue, but also a global problem. This is perhaps best illustrated by the International Monetary Fund's (IMF) Managing Director, Christine Lagarde's famous quip in 2010 that 'if Lehman Brothers had been "Lehman Sisters," today's economic crisis clearly would look quite different.'⁵ Lagarde added that she wished 'that there were more women in finance... it [the economy] would be much healthier.' In addition, a Credit Suisse study of large companies from 2005-2011 found that companies which have women on their board of directors tend to perform better, with a higher return on equity, lower gearing and better average growth compared to those without.⁶ An array of researchers in various fields, ranging from economics to finance to behavioural management, has sought to assess if indeed diversity in corporate boards does lead to financial success. While the studies are not all in agreement, some have found a link between corporate board diversity and key performance measures behind shareholder wealth.⁷ As such, it is arguable that the appointment of women directors might be needed to achieve the corporate goal of maximising shareholder wealth. Sylvia Walby argues, with Lagarde, that the monoculture of decision-making in financial companies is possibly one reason behind the failure of financial institutions to govern in the best possible manner.⁸ As the relative lack of women directorships cannot arguably be condensed to a lack of citizenship and representation as can be done in the political sphere,

³ *Ibid.* at 26.

⁴ *Ibid.* at 6.

⁵ Responding to Niall Ferguson's question about whether there would have been a financial crisis had more women been in senior positions. <http://www.thedailybeast.com/videos/2012/03/09/christine-lagarde-if-lehman-brothers-had-been-lehman-sisters.html> (Accessed 15 March 2014).

⁶ Credit Suisse Research Institute, Gender Diversity and Corporate Performance (2012), available at https://www.credit-suisse.com/newsletter/doc/gender_diversity.pdf. Accessed 2 March 2014.

⁷ See also: McKinsey and Company, 'Women Matter 2: Gender Diversity. A Corporate Performance Driver' (2007), Available at file:///C:/Users/Timothy/Downloads/Women_matter_oct2008_english.pdf; McKinsey and Company, 'Is there a Payoff from top team diversity?' (2012), http://www.mckinsey.com/insights/organization/is_there_a_payoff_from_top-team_diversity (Accessed 13 May 2014); Catalyst, *The Bottom Line: Corporate Performance And Women's Representation On Boards* (2007), cited in D.L. Rhode and A.K. Packel, *Diversity on Corporate Boards: How Much Difference Does Difference Make?* Rock Center for Corporate Governance at Stanford University Working Paper No. 89, p. 4-5, available at <http://www.catalyst.org/knowledge/bottom-line-corporate-performance-and-womens-representation-boards> (Accessed 13 May 2014); S. Vinnicombe et al., *The Female FTSE Report 2004*, Center for Developing Women Business Leaders, Cranfield School of Management 1 (2004), available at <http://www.europeanpwn.net/files/ft2004finalreport.pdf> (Accessed 13 May 2014). These studies are disputed however. See for instance R. Adams and D. Ferreira, 'Women in the boardroom and their impact on governance and performance' 94 *Journal of Financial Economics* 2 (2009), p. 291-309; F. Dobbin and J. Jung, 'Corporate Board Gender Diversity and Stock Performance: The Competence Gap or Institutional Investor Bias?' 89 *North Carolina Law Review* 3 (2011), p. 809-838.

⁸ S. Walby, 'Gender Quotas for Boards of Directors: Gendering Economic Governance in a Time of Financial Crisis', presented at Council for European Studies Conference, Amsterdam, 26 June 2013, p. 2.

justification for legislative intervention is complex and controversial. It is acknowledged in this article that it is impossible to know if more women would have led to a milder Global Financial Crisis.

Nevertheless, there appears to be consensus at global level that gender balance in corporate board is becoming a legitimate policy goal.⁹ In response to the clear need for change, the French legislator adopted a law in January 2011 that requires applicable listed companies to have 40 per cent female directors by 2017.¹⁰ More recently, the European Commission proposed a directive on improving the gender balance among non-executive directors of companies listed on stock exchanges (hereafter the proposed directive), which aims at having 40 per cent of the under-represented sex in non-executive board positions by 2020.¹¹

This article compares and contrasts the French and the EU methods used to achieve a better gender balance on company boards. It argues that the French legislation is not only in line with EU principles on gender equality but it also goes further than the EU's proposed directive. The article starts by providing backgrounds to the global interest in developing gender equality beyond the employment sphere. It then considers the concept of positive action and its 'accepted' principles under EU law. Positive action measures are set in contrast to other concepts, such as quotas, affirmative actions or positive discrimination, which arguably create an unhelpful and confusing legal environment. The next section provides a background to the French legal measure and it is followed by a description of relevant aspects of the proposed EU directive. Finally, the last section considers whether and under what circumstances, the French model is compatible with the EU legal Framework and the proposed EU directive. It is suggested that the significant differences between the methods used by the French and the EU legislators, mean that the French approach is wider reaching in its coverage of executive as well as non-executive directors, and as such, goes further than the proposed EU directive and is therefore more effective.

Overview: An impetus for change

Manifestation of women's promotion in the world

The desire to have greater numbers of women in positions of responsibility within companies has increased to the point where it has become an investment criterion for certain in-

⁹ 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', 1 *European Gender Equality Law Review* (2013), p. 17-33.

¹⁰ L. n° 2011-103 du 27 janvier 2011 relative à la représentation équilibrée des femmes et des hommes au sein des conseils d'administration et de surveillance et à l'égalité professionnelle, Article 5, I.

¹¹ 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, 14 November 2012, COM(2012) 614 final

vestors when deciding where to invest their capital.¹² For instance, the Global Women Equity Fund, conceived in 2006, aims to invest in companies around the world that are leaders in advancing gender equality and women's empowerment.¹³ The fund's objective is the same as many investors', as it invests with the aim of long term capital growth. In the United States, the Gender Equality Fund, which has been created in 2009, provides women's economic and political empowerment. Other countries hold similar funds. For example, the Global Women Equity Fund was the first mutual fund in Canada to promote women's opportunities.¹⁴ In Japan, the United Nations Development Programme (UNDP)/Japan Women in Development Fund (JWIDF), which was established in 1995, supports 'national capacities in promoting gender equality and the empowerment of women through innovative projects that broaden and sustain women's opportunities.'¹⁵ In addition to these funds, market indexes have been created to monitor the participation of women in business. The Women's Entrepreneurial VentureScope in Latin America and the Caribbean,¹⁶ for example, was created in 2013 by the Economist Intelligence Unit in collaboration with the Multilateral Investment Fund which is a member of the Inter-American Development Bank Group. This index is 'the first comprehensive assessment of the environment for all female entrepreneurs in Latin America and the Caribbean, creating a standardised framework to help the public and private sectors empower women business owners.'¹⁷

The promotion of women in leadership is also undertaken by forums, including the 'Women's Forum'¹⁸ whose reputation continues to grow. These forum's meetings:

*[a]im to bring together leaders from all over the world – women and men – representing the business world, the government, academic circles, culture etc. in order to give new perspectives to key issues in our present and our future; to create a powerful, global network in order to strengthen the influence of women throughout the world; to draw up innovative and concrete action plans to encourage women's contribution to society and promote diversity in the business world.*¹⁹

¹² V. Martineau-Bourgninaud, 'L'obligation de mixité dans les conseils d'administration et de surveillance', 10 *Recueil Dalloz* (2010), p. 599-603.

¹³ <http://www.paxworld.com/advisors/investment-strategies/pax-world-mutual-funds/womens-equality-fund> (Accessed 15 March 2014).

¹⁴ B. Critchley, 'Meet the country's first SRI mutual fund aimed at investing in companies that promote women', *Financial Post*, 2 May 2013.

¹⁵ http://www.undp.org/content/undp/en/home/ourwork/womenempowerment/projects_and_initiatives/index/ (Accessed 15 March 2014).

¹⁶ <http://www.weventurescope.com> (Accessed 15 March 2014).

¹⁷ The Economist and Intelligence Unit, Women's Entrepreneurial Venture Scope, *WEVentureScope 2013*, p. 5.

¹⁸ De Deauville à Rangoon, le Women's Forum se démultiplie, *Les échos* 16 octobre 2013, p. 9.

¹⁹ <http://www.womens-forum.com/meetings> (Accessed 15 March 2014).

Importantly, this initiative is on a global scale, with recent activities noted in Brazil and Burma.

Balanced representation between men and women in democratic decision making has, for some years, been a concern at international levels. As aforementioned, the debate on gender balanced participation has moved from political representation towards representation in the economic sphere. Regulatory provisions mandating or recommending gender balance on corporate boards are increasingly being adopted across the globe.²⁰ The EU is arguably leading this trend.²¹ Over the past decade, significant progress has been made in the area of gender balanced political representation at the EU and national levels. These developments are broadly based on the principles of citizenship and equal representation.²² The recent financial crisis has triggered increasing interests into regulating gender balance participation in the field of private enterprises.

Diversity of balanced representation in the world

A number of influential positions in the financial and banking sectors have over recent years been filled by women. Christine Lagarde joined the IMF as Managing Director in July 2011 and an increasing number of women are heading national Central Banks as president. For example, Janet Yellen was appointed by United States' President Barack Obama as Chairman of the Board of Governors of the United States of America Federal Reserve System (Fed) on 9 October 2013. She is the first woman Chairman of the Fed. Beyond the United States of America, Elvira Nabiullina was appointed as Chairperson of the Central Bank of Russia in June 2013, while in Israel, Karnit Flug has been the Chair of the Israel Central Bank since July 2013. In April 2014, Chrystalla Georghadji was appointed as Chairperson of the Cyprus Central Bank. In December 2013, Danièle Nouy was appointed as chair of the supervisory board of the European Central Bank, in charge of the 130 largest banks in the Eurozone. Despite these high profile appointments, out of 177 central bankers at a global level, less than 10 of

²⁰ In 2003, Norway enacted a law that mandated every public company to have, at the least, 40 per cent women on their board by 2008. The consequence of non-compliance was delisting and dissolution of the company. In Asia for instance, the Indian Parliament introduced the Companies Bill, 2012, which seeks to include at least one woman director on the board of directors of a number of companies; see A. Kamalnaath and Peddada, Y., 'Women in Boardrooms: Formulating a Legal Regime for Corporate India', 1 *Journal on Governance* 6 (2012), p. 675-694. The Malaysian Code of Corporate Governance, 2012 requires public companies to have at the least 30 per cent women on their boards by 2016. For an Asian perspective on corporate quotas, see A. Kamalnaath and A. Masselot, 'Women on board: The unlikely convergence of Europe and Asia on corporate quotas law', European Union Studies Associations Asia Pacific (EUSA AP), 1-2 May 2014, Melbourne, Australia. In Australia, see D. Branson, 'An Australian Perspective on a Global Phenomenon: Initiatives to Place Women on Corporate Boards of Directors', *University of Pittsburgh Legal Studies Research Paper* No. 2012-13 at p. 5, available at <http://ssrn.com/abstract=2064087>. For a perspective on New Zealand, see: T. Brand and A. Masselot, 'Diversity, Quota and Compromise in the New Zealand Boardroom: possible way forwards', working paper 2014.

²¹ A. Kamalnaath and A. Masselot, 'Women on board: The unlikely convergence of Europe and Asia on corporate quotas law', European Union Studies Associations Asia Pacific (EUSA AP), 1-2 May 2014, Melbourne, Australia.

²² E. Lépinard, 'For Women Only? Gender Quotas and Intersectionality in France', 9 *Public & Gender* (2013), p. 276-298.

them are women.²³ In addition, the proportion of women in senior management of the four main European Central Banks reveals disparities. Women represented 44 per cent of the senior management in the Bank of England in 2012, 28 per cent in the Banque de France in 2013, 21 per cent in the Bundesbank in 2011 and 14 per cent in the European Central Bank in 2012.²⁴

At company level, the percentage of women in senior management globally varies, yet remains systematically low: 5 per cent in Japan, 14 per cent in India, 18 per cent in North America, 22 per cent in Latin America, 24 per cent in Europe and in Australia, 25 per cent in China, 28 per cent in South Africa and New Zealand, 31 per cent in Turkey, 32 per cent in the ASEAN region and 46 per cent in Russia.²⁵ Although the United States of America are still trailing behind Europe in this area, efforts are being made.²⁶ The percentage of women in senior management globally also surprisingly varies over the year. Indeed, this percentage increased from 19 per cent in 2004 to 24 per cent in 2007 and 2009, but decreased to 20 per cent in 2011 and reached 21 per cent in 2012.²⁷

Exploration and contrast: the 'positive actions' concept

The idea of 'quotas' rattles feminist thinking as women are divided on the merit of such measures. This is evidenced by the Commission's internal disagreements. Female commissioners (including Catherine Ashton, Connie Hedegaard, Cecilia Malmström and Neelie Kroes) have voiced their opposition to the proposal of the EU directive because they believe that quotas are not the best way for achieving equality. Viviane Reding herself claims that she does not like quotas but she likes their effects.²⁸ This nuance is fundamental to understand the merits of the EU proposed legislation. The term 'quota' is often used both by lay people and the legal profession. However, it is a malleable concept which can cover a number of different legal forms. This term is problematic because in reality, it can take a range of legal forms, from internal organisational motivational 'targets', to State-imposed 'positive action' to 'positive discrimination', to 'reverse discrimination', to the extreme 'affirmative action' form found in the United State of America's (USA) legal system. The unfortunate use and mix-match of such terms and terminology has led to much confusion, which has fuelled 'the belief that these measures are typically concerned with automatic and unconditional

²³ Le superviseur bancaire européen sera une femme, *Les échos* 22 octobre 2013, p. 27.

²⁴ A Francfort, les femmes prennent le contrôle de la supervision bancaire, *Les échos* 7 et 8 mars 2014, p. 30.

²⁵ Women in senior management: still not enough, Grant Thornton International Business Report 2012, p. 5.

²⁶ Comment Philadelphie veut imposer la parité dans les conseils d'administration, *Les échos* 4 et 5 octobre 2013, p. 29.

²⁷ Grant Thornton, Women in senior management: still not enough, Grant Thornton International Business Report 2012, p. 4.

²⁸ F. Agnès et I. Lefort, *100 ans de combats pour la liberté des femmes*, (Flammarion, Paris, 2014), p. 347.

forms of preferential treatment in the allocation of jobs and other social goods.’²⁹ A common misconception regarding gender ‘quota’ in corporate boards, infers that women applicants will automatically be appointed to a position over more qualified male applicants.

The common understanding of the term ‘quota’ is often a reflection of the pre-eminence of the United States of America’s media which regularly equate quota with affirmative actions. The term ‘affirmative action’ generally refers to a wide array of measures, which were set up at the end of the 1960s by executive agencies and the federal judiciary. These measures aim to grant a number of, more or less flexibly, preferential treatment, in the allocation of resources such as jobs, tertiary education admissions and government contracts, to members of groups formerly targeted for legal discrimination (African Americans, Hispanics, Native Americans, women, sometimes Asians).³⁰ Gender has later been added to this list. In its earlier forms affirmative actions has taken the form of quota system, whereby a certain percentage of jobs or school vacancies was set aside for members of these groups irrespective of merit. However, increasing opposition against such quotas based on a numerical approach or based on the unjustified preference of the unqualified over the qualified of any race or gender, has led to increasing case law³¹ as well as the banning of such quota in numerous States.³² Today affirmative actions in the United States of America rarely grant automatic rights.³³

The EU legal order as adopted the term ‘positive action’ to tackle underlying structural and historical barriers that perpetuate disadvantages for certain groups. We submit that what has been labelled as gender ‘quotas’ on boards of EU companies should instead be understood as a form of positive actions. Such concept is now a well-established instrument of EU anti-discrimination legislation enshrined in Article 157(4) TFEU. It provides that:

[w]ith a view to 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 under-represented sex to pursue a vocational activity or to prevent or compensate for disadvantage’s in professional careers.

²⁹ L. Waddington and M. Bell, ‘Exploring the Boundaries of Positive Action under EU Law: A Search for Conceptual Clarity’, 48 *Common Market Law Review* 5 (2011), p. 1503-1026, at 1508.

³⁰ Executive Order 11246 of Sept. 24, 1965 - Equal Employment Opportunity, Section 202.

³¹ See in particular *Grutter v. Bollinger*, 539 U.S. 306 (2003) and *Gratz v. Bollinger*, 539 U.S. 244 (2003). N. Devins, ‘Explaining *Grutter v. Bollinger*’ 152 *University of Pennsylvania Law Review* 1 (2003), p. 347-383.

³² California (Proposition 209 of 5 November 1996), Washington (Washington State Initiative 2000, November 1998), Michigan (Michigan Civil Rights Initiative, 7 November 2006), and Nebraska (Nebraska Civil Right Initiative 2008). See also C. Myers, ‘A Cure for Discrimination? Affirmative Action and the Case of California’s Proposition 209’, 60 *Industrial and Labor Relations Review* 3 (2007), p. 379-396; L. Ware, ‘Strict scrutiny, affirmative action, and academic freedom: the University of Michigan cases’ 78 *Tulane Law Review* (2004), p. 2097-2116.

³³ See D. Sabbagh, ‘Affirmative Action’ in M. Rosenfeld and A. Sajó (ed.), *The Oxford Handbook of Comparative Constitutional Law*, (Oxford University Press, Oxford, 2012).

Positive actions are further mentioned in Article 23 of the EU Charter of Fundamental Rights, which states that ‘the principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex.’ Moreover, a number of secondary legislation also authorise Member States to adopt positive action measures in the field of gender equality and non-discrimination on grounds of racial or ethnic origin, religion of belief, disability age and sexual orientation.³⁴ The legislative framework, specifically that relating to gender equality in the access to employment, has furthermore been interpreted by the Court of Justice of the EU.³⁵

‘Positive discrimination’ is often used in place of ‘positive actions’ in the EU context. However, the terms should not be confused or used alternatively as they reflect different concepts and procedures. The use of positive actions under EU law is consistent with the realisation of substantial equality and goes further than the narrow concept of formal equality. Positive action measures are not considered to be forms of discrimination but rather they are specific advantages designed to balance past and/or present discrimination. However, as noted by Waddington and Bell, the term ‘specific advantages’ provides few clues as to where the boundary lies between (unlawful) discrimination and (lawful) positive action.³⁶

In this article, it is argued that the measures designed to improve the gender balance in corporate boards in France and at EU level are not to be understood as ‘quotas’ but rather as forms of positive action measures. As such, these positive actions must follow the characteristics and procedures set up by the EU legislation and the case law of the Court of Justice.

The legal basis of the proposed EU directive on improving the gender balance among non-executive directors of companies listed on the stock exchange is Article 157(3) TFEU, which states that:

The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, and after consulting the Economic and Social Committee, 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.

³⁴ Article 5 of Directive 2000/43/EC implementing the principle of equal Treatment between persons irrespective of racial or ethnic origin, O.J. 2000, L180/22; Article 7 of Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation, O.J. 2000, L303/16; Article 6 of Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and the supply of goods and services, O.J. 2004, L373/37; Article 3 of Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (Recast Directive), O.J. 2006, L204/23.

³⁵ See for instance Case C-450/93 *Kalanke v Freie Hansestadt Bremen* [1995] ECR I-3051; Case C-409/95 *Hellmut Marschall v Land Nordrhein-Westfalen* [1997] ECR I-6363; Case C-158/97 *Badeck* [2000] ECR I-1875.

³⁶ L. Waddington and M. Bell (2011), above n. 29, at 1506.

While arguments may arise that the phrasing ‘matters of employment and occupation’ in Article 157(3) TFEU and ‘working life’ in Article 157(4) TFEU does not extend to the position of a corporate director, the Recast Directive 2006/54 provides for a wide scope. Most significantly, in *Danosa* the Court held that board members can also be considered to be ‘workers’.³⁷ The *Danosa* decision concerns an executive board member while the proposed EU directive applies to non-executive/supervisory board members. However, Senden and Visser note that *obiter dictum*, the *Danosa* decision suggests that the treatment would not differ for non-executive/supervisory directors.³⁸

In addition, the Court of Justice has set up a restrictive test for positive action measures to be lawful. The test has largely been set with regard to national positive action measures. However, it is reasonable to assume that such a test would also apply to EU measures.³⁹ In *Kalanke*⁴⁰ and *Marschall*⁴¹, the Court considered priority measures taken by German public employers in the context of employment recruitment. The Court laid out strict requirements for lawful positive action measures under EU law. The measure must not apply to either sex, but rather to the under-represented sex; candidates need to be ‘equally qualified’; the measure must not apply in an unconditional and automatic way⁴² and should include a savings clause. As a result, a binding quota rule seeking a certain per cent of women in a certain position by a certain date regardless of qualification would not have a legal basis under Article 157(4) TFEU.

Furthermore, positive action measures must be proportionate. In other words, it is necessary that ‘derogations must remain within the limits of what is appropriate and necessary in order to achieve the aim in view and that the principle of equal treatment be reconciled as far as possible with the requirements of the aim thus pursued.’⁴³ The question regarding the respect of the principle of proportionality is a difficult one, notwithstanding the less than clear position of the Court of Justice. Szydło, for instance, argues that the proposed EU directive is ‘clearly’ incompatible with the principle of proportionality.⁴⁴ His argument centres mostly on the fact that compulsory gender quotas are illegal under EU law regulating positive actions measures. While we can only agree with his assessment of this rule, we, however, dispute the idea that the proposed EU directive imposes compulsory numerical

³⁷ Case C-232/09 *Dita Danosa v LKB Līzings SIA* [2010] ECR I-11405, at 47.

³⁸ L. Senden and M. Visser (2013), above n. 9.

³⁹ *Ibid.* at 28.

⁴⁰ Case C-450/93 *Kalanke v Freie Hansestadt Bremen* [1995] ECR I-3051.

⁴¹ Case C-409/95 *Hellmut Marschall v Land Nordrhein-Westfalen* [1997] ECR I-6363.

⁴² *Ibid.* at para 32; Case C-407/98 *Katarina Abrahamsson and Leif Anderson v Elisabet Fogelqvist* [2000] ECR I-5539, para 52.

⁴³ Case C-476/99 *Lommers v. Minister van Landbouw, Natuurbeheer en Visserij* [2002] ECR I-2891, para 39.

⁴⁴ M. Szydło, ‘Gender equality on boards of EU Companies: Between economic efficiency, Fundamental Rights and Democratic Legitimation of Economic Governance’ *European Law Journal* (2013) DOI: 10.1111/eulj.12074, in Section VI.

gender quotas. The proposed directive does not impose an obligation of result on the Member States to reach a minimum of 40 per cent women on company boards, but rather imposes on the Member States an obligation of means or effort.⁴⁵ The legal obligation is concerned with adjustment of recruitment and appointment procedures of listed companies to make sure that criteria of clarity, transparency and gender neutrality are included in these procedures. The sanctions provided are linked to the breach of these criteria not to the non-achievement of the 40 per cent target. Proportionality is therefore respected.

Moreover, the fact that the EU has taken a 'soft' approach to the issue of gender equality on company boards over the past 30 years with little improvement suggests that a harder line, involving legislative obligation is capable of being a proportionate response. Waddington and Bell note that the requirement for proportionality implies that where a group experiences particularly severe disadvantages, exclusion and discrimination, more radical and long lasting measures will be justified.⁴⁶ Finally, the temporality of the measure could reinforce the respect for the principle of proportionality. Under international law, for example, temporality is a key attribute of the 'special measures' under the Convention on the Elimination of Discrimination Against Women.⁴⁷

In contrast to (legal) positive action measures and (illegal) discrimination measures as tools to improve the gender balance on boards, some Member States, such as the United Kingdom (UK), have adopted a self-regulation approach. Here, we can refer to an internal organisational 'target'. Unacceptable levels of female board members on large UK companies led to Lord Davies publishing a report in 2011 which recommended that chairmen should set targets to have at least 25 per cent of women on their boards by 2015, disclosure by companies of the proportion of the female directors and the introduction of a code of conduct for executive search firms.⁴⁸ While initial progress was made, it is unlikely that the 25 per cent target will be reached by 2015 since only 17.3 percent of the 100 companies listed on the London Stock Exchange with the highest market capitalization (Financial Times Stock Exchange or FTSE 100) and 13.3 per cent of FTSE 250 directors were women in 2013.⁴⁹ The UK Government has repeatedly indicated that the adoption of hard quotas remains a

⁴⁵ L. Senden and M. Visser (2013), above n. 9, at 27.

⁴⁶ L. Waddington and M. Bell (2011), above n. 29, at 1513.

⁴⁷ For further discussion on the temporary measures imposed under the Convention on the Elimination of Discrimination Against Women, see: L. Waddington and L. Visser, 'Temporary Special Measures under the women's convention and possible action under EU law: Mutually compatible or irreconcilable?' in I. Westendorp (Ed.) *The Women's Convention Turned 30: Achievements, Setbacks and Prospects*, (Maastricht Series in Human Rights, Maastricht, 2012), p. 95-110.

⁴⁸ Lord Davies, Women on Boards, (2011) https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/31480/11-745-women-on-boards.pdf. Accessed 8 March 2014.

⁴⁹ Cranfield School of Management (2013) The Female FTSE Board Report. Available at <http://www.som.cranfield.ac.uk/som/ftse>. Accessed 8 March 2014.

real possibility if the target is not met under the self-regulatory approach.⁵⁰ Therefore, it appears that positive action measures may be the only ‘tool’ capable of improving gender balance on boards across European companies. This view is in accordance with many other European countries which have introduced some form of positive action measures to improve gender balance in corporate boards.

Positive action measures à la Française?

Not enough female board members

In France, the representation of women in big businesses is still insufficient. Although women represent 28 per cent of the boards of directors of the CAC 40⁵¹ companies, none is Chief Executive Officer (CEOs). Moreover, only 10 per cent of executive committee members are women and 32 per cent of companies have no women in their executive committees. In addition, within the SBF 120,⁵² there are 26 per cent of women in boards of directors and just one is CEO. Women represent only 12 per cent of executive committees and 36 per cent of companies have no women in their executive committees.⁵³ During the *Semaine de l'égalité professionnelle* (Week of Professional Equality)⁵⁴ in October 2013, the French government published a ranking of SBF 120 companies in terms of the place of women in boards of directors or executive committees of these companies. The company Orange reached the first place with a feminization rate of about 28 per cent.⁵⁵

A growing concern since 2000

The balanced representation of men and women has been a growing concern in France. As a result, gender equality legislation has been adopted across a broad range of areas including political life, public service, private companies and banks.

The Constitutional Law of 23 July 2008 amended the French Constitution to allow for the promotion of gender equality.⁵⁶ Now Article 1, §2 of the Constitution provides that ‘(s)tatutes shall promote equal access by women and men to elective offices and posts as well as to professional and social positions.’⁵⁷ It builds on previous legislation aimed at im-

⁵⁰ L. Senden and M. Visser (2013), above n. 9, at 25.

⁵¹ The CAC 40 index, which was created in 1988, is the main stock index in Paris. It includes 40 stocks selected among the hundred capitalization of the core market. CAC 40 stands for *Cotation Assistée en Continu*.

⁵² The SBF 120 index stands for *Société des Bourses Françaises 120 Index*. It was created in 1993 and it is a stock index in France. It is based on the 120 most actively traded stocks listed in Paris.

⁵³ Ministère des droits des femmes, *Semaine de l'égalité professionnelle*, 1^{re} éd., 14 au 20 octobre 2013, p. 12.

⁵⁴ *Ibid.*

⁵⁵ *Egalité hommes-femmes: les sociétés les plus vertueuses*, *Les échos* 18 et 19 octobre 2013, p. 31.

⁵⁶ Loi constitutionnelle n° 2008-724 du 23 juillet 2008 de modernisation des institutions de la Ve République, Article 1.

⁵⁷ Our translation. The French text states: ‘La loi favorise l'égal accès des femmes et des hommes aux mandats électoraux et fonctions électives, ainsi qu'aux responsabilités professionnelles et sociales’.

proving gender equality in the spheres of parliamentary representation and positions of public office. For example, the law of 6 June 2000 aimed to improve the political representation of women, especially because they are still under-represented.⁵⁸ Particularly, it requires that the difference between male and female candidates on each party list cannot be greater than one. Additionally, political parties must submit an equal number of men and women on the polls list for municipal elections in towns of 3,500 or more inhabitants, regional elections, senatorial elections in more than three departments electing senators and European elections. The introduction of the so-called *parité* in the political game has been a mitigated success for French women.⁵⁹ A law of 9 May 2001 goes further by requiring the use of a balanced representation of women and men in juries, selection committees and advisory bodies representing the administration.⁶⁰

As a further example of the growing French 'culture' of legislating to improve women's representation in politics and public office, France adopted legislation on 12 March 2012,⁶¹ which requires that the proportion of qualified persons of each sex named on the basis of their skills, experience or knowledge in boards of directors, supervisory boards or equivalent bodies of public institutions cannot be less than 40 per cent. However, this legislation is only concerned with public undertakings. It covers specifically the *Établissements publics industriels et commerciaux* (Public enterprises of an industrial and commercial nature), whose staff are subject to a system of public law and the *Établissements publics administratifs* (Public administrative bodies). This Act, along with the law of 9 May 2001, has successively improved the requirement for balanced representation of men and women, and indeed professional equality, in the public service.

Finally, a law of 26 July 2013 has established that there must be gender balanced participation at the Haut Conseil de stabilité financière (the High Council for Financial Stability) as well as requiring equality of insurance premiums and benefits.⁶² The *Haut Conseil de stabilité financière* oversees the financial system as a whole in order to preserve its stability and the ability to ensure a sustainable contribution to economic growth.⁶³ Thus, it defines macro-prudential policy and takes into account the objectives of financial stability set by the European Union and the European Economic Area. Article L. 631-2 of the Monetary and Finan-

⁵⁸ Loi n° 2000-493 du 6 juin 2000 tendant à favoriser l'égal accès des femmes et des hommes aux mandats électoraux et fonctions électives.

⁵⁹ In practice, the law is not very well respected. E. Lépinard, 'For Women Only? Gender Quotas and Intersectionality in France', 9 *Public & Gender* (2013), p. 276-298, at 278.

⁶⁰ Loi n° 2001-397 du 9 mai 2001 relative à l'égalité professionnelle entre les femmes et les hommes.

⁶¹ Loi n° 2012-347 du 12 mars 2012 relative à l'accès à l'emploi titulaire et à l'amélioration des conditions d'emploi des agents contractuels dans la fonction publique, à la lutte contre les discriminations et portant diverses dispositions relatives à la fonction publique.

⁶² Loi n° 2013-672 du 26 juillet 2013 de séparation et de régulation des activités bancaires, Article 30 and Article 79.

⁶³ Article L. 631-2-1 of the Monetary and Financial Code.

cial Code provides that nominations of qualified key figures (*personnalités qualifiées*) must adhere to the goal of equality between women and men within this Council. As for the equality of insurance premiums and benefits, Article 79 of the law of 26 July 2013 reaffirms the principle of equal treatment between men and women. Indeed, no difference in treatment regarding contributions and benefits can be based on sex. So, pregnancy and maternity shall not result in less favourable treatment of women in terms of premiums and benefits. This acceleration of parity legislation is the result of a political will which started in 2006.

More recently, a new proposal for legislation on equality between women and men was presented to Parliament on 3 July 2013.⁶⁴ In addition to various measures requiring equality in the working place, the fight against precariousness and the protection of women against violence and offence against their dignity, the proposed legislation also includes important measures on the balanced participation of men and women in the public sector in accordance with the French constitutional framework. Although the proposal is still in the early stages of debate, the proposed measures seek to enforce parity for elections to the legislature, to include gender balance in the organization of sport, to ensure a balanced representation at all EPIC's, Chambers of Commerce and industry and Chambers of agriculture. This proposed legislation aims to also extend gender balanced representation to Independent Administrative Authorities (IAA).⁶⁵ A dissuasive penalty is embedded in the legislation. Indeed, it requires that companies will only be able to access the public-sector market if they respect the goal of equal opportunities for employment.⁶⁶ In other words, the non-compliance on gender equality will be punished by denied access to the public-sector market and procurement. The proposed legislation is far reaching and certainly progressive in terms of gender equality. However, the proposed legislation is limited to the public sector and does not address the private sector.⁶⁷ The reason perhaps lies in the success of the law of 27 January 2011, as discussed below which applies to the private sector.⁶⁸

The introduction of legislation regarding the balanced participation of gender on French company boards

As a prerequisite to discussing the French legislation aimed at increasing the number of female directors in the private sector, it is useful to give a brief overview of the composition of French company boards. There are in France two kinds of company boards: boards of directors and supervisory boards depending on the type of public limited companies (plc)⁶⁹

⁶⁴ Projet de loi pour l'égalité entre les femmes et les hommes, Étude d'impact, 1^{er} juillet 2013.

⁶⁵ An IAA is an administrative body, sometimes with legal personality, which is provided regulatory and judicial powers. See: Association Henri Capitant, dir. G. Cornu, *Vocabulaire juridique*, (9^e éd., Press Universitaire de France, Paris, 2011), p. 108.

⁶⁶ Projet de loi pour l'égalité entre les femmes et les hommes, Étude d'impact, 1^{er} juillet 2013, p. 19.

⁶⁷ *Ibid.* at p. 78.

⁶⁸ See hereafter.

⁶⁹ This kind of company exists therefore both in France and in the United Kingdom. In France, the name of a public compa-

adopted, namely 'monistic' (unitary board system) or 'dualistic' (dual board system). The unitary board system includes a board of directors, a chairman of this board and a managing director. Since the law of 15 May 2001, the functions of chairperson and managing director can be separated or not.⁷⁰ Article L. 225-51-1 of the Commercial Code states that '[t]he general direction of the company is assumed, under his responsibility, either by the chairman of the board, or another person appointed by the board with the title of managing director.'⁷¹ But 75 per cent of such companies have unified these two functions.⁷² The board of directors is composed of at least three members and a maximum of eighteen.⁷³ According to Article L. 225-35 of the Commercial Code, it determines the activity of the company and oversees their implementation.

In contrast, the dual board system includes both an executive board and a supervisory board.⁷⁴ According to Article L. 225-64 of the Commercial Code, '[t]he executive board is vested with the broadest powers to act in all circumstances on behalf of the company'. It has to use these powers in accordance with the objectives of the company and the powers expressly granted by law to the supervisory board and shareholders' meetings. The supervisory board is generally composed of at least three members and has a maximum of eighteen, like the board of directors.⁷⁵ The role of the supervisory board differs from the board of directors. According to Article L. 225-68 of the Commercial Code, the supervisory board exercises a permanent control over the management of the company. In France, public limited companies with a unitary board of directors are the most frequently used.⁷⁶ They represent 80 per cent of companies against 20 per cent for public limited companies with supervisory boards.⁷⁷

The presence of women on boards of companies – boards of directors and supervisory boards – started to be promoted in 2006 by the French legislator. The law of 23 March 2006 introduces a strict ceiling. The number of members from one sex could not be greater

ny is 'société anonyme', See D. French, S. Mayson and Ch. Ryan, *Company Law*, (30th edition, Oxford University Press, Oxford, 2013-2014), p. 58. The public limited company is the largest trading structure which may offer shares for sales to the public. See Ch. Taylor, *Company Law*, (2nd edition, Pearson, 2013), p. 9.

⁷⁰ Loi n° 2001-420 du 15 mai 2001 relative aux nouvelles régulations économiques, Article 106.

⁷¹ The French provisions are not gender neutral: 'La direction générale de la société est assumée, sous sa responsabilité, soit par le président du conseil d'administration, soit par une autre personne physique nommée par le conseil d'administration et portant le titre de directeur général.'

⁷² Autorité des Marchés Financiers, Rapport sur le gouvernement d'entreprise et la rémunération des dirigeants, 2013, p. 7.

⁷³ Article L. 225-17 of the Commercial Code.

⁷⁴ M. Cozian, A. Viandier and F. Deboissy, *Droit des sociétés*, (26^e éd., LexisNexis, 2013), n° 525; Ph. Merle, *Droit commercial, Sociétés Commerciales*, (17^e éd., Dalloz, Paris, 2014), n° 419.

⁷⁵ Article L. 225-69 of the Commercial Code.

⁷⁶ C. Perchet, 'Pertinence et pérennité de la SA avec conseil d'administration', *Bulletin Joly Sociétés* avril 2009, p. 440.

⁷⁷ Autorité des Marchés Financiers, *supra* note 64.

than 80 per cent on unitary boards of directors and supervisory boards of public institutions, public companies, companies of public sector and companies of private sector.⁷⁸ However, in 2006, the Constitutional Council declared these rules contrary to the Constitution on the grounds that ‘the search for a balanced access of women and men in responsibilities other than elective political office [...] cannot [...] uphold the consideration of gender on the capacity and the common utility.’⁷⁹ The Constitutional Law of 23 July 2008 mentioned above has remedied this problem by introducing in the French Constitution a principle of equal access for men and women in professional responsibilities.⁸⁰

The Grésy Report in 2009, written by Mrs Grésy, a member of the General Inspectorate of Social Affairs, made recommendations in order to promote the representation of women on boards of directors and supervisory boards.⁸¹ The aim was firstly to carry out an assessment of the differences in treatment between men and women in access to employment and professional development as well as assessing the role of women in decision-making. The report was also tasked with making recommendations on the issue of women's representation on boards of directors and supervisory boards of private and public companies. Moreover, it dealt with the question of the precariousness of women's work. Most significantly, recommendation 32 of the Grésy Report proposes ‘to establish an obligation to have 40 per cent of directors of the under-represented sex on boards of directors and supervisory boards, within six years, for public companies and companies whose shares are admitted to trading on a regulated market, by adding a criterion of size (1000 employees).’⁸² The Report further recommends that an intermediate target of 20 per cent of directorships be held by members of the under-represented sex within two years. The Grésy Report has subsequently become the foundations of the law of 27 January 2011 in which the French legislature introduced a 40 per cent gender quota.

The law of 27 January 2011 was fundamental towards the establishment of balanced representation between men and women on boards of directors and supervisory boards of public limited companies and partnership limited by shares.⁸³ The 2011 legislation is to be applied in three progressive distinct stages. First, if at the date of publication of the law,

⁷⁸ Loi n° 2006-340 du 23 mars 2006 relative à l'égalité salariale entre les femmes et les hommes, Title III, Articles 21 and 22 ; J.-E. Schoettl, 'La loi relative à l'égalité salariale entre les femmes et les hommes devant le Conseil constitutionnel (suite et fin)', 75 *Les Petites Affiches* 14 avril 2006, p. 8-21 *sq.*, spéc. p. 15-16.

⁷⁹ Conseil Constitutionnel, 16 mars 2006, déc. n° 2006-533 DC – Loi relative à l'égalité salariale entre les femmes et les hommes, *JO* 24 mars 2006, p. 4446, considérant n° 15 (our translation).

⁸⁰ *V. supra.*

⁸¹ B. Grésy, Rapport préparatoire à la concertation avec les partenaires sociaux sur l'égalité professionnelle entre les femmes et les hommes, juillet 2009, p. 111 *sq.*

⁸² *Ibid.* at p. 114.

⁸³ Loi n° 2011-103 du 27 janvier 2011; Regarding the board of directors, Article L. 225-17, al. 2 of the Commercial Code; Regarding the supervisory board, Article L. 225-69, al. 2 of the Commercial Code concerning the public limited companies and Article L. 226-4, al. 2 concerning the partnership limited by shares.

namely 28 January 2011, one of the sexes was not represented on the board of directors or supervisory board, at least one representative of that sex should be appointed at the next ordinary general meeting designed to approve the appointment of directors or members of supervisory board.⁸⁴ Second, and for companies whose shares are admitted to trading on a regulated market, the proportion of directors or members of the supervisory board of each sex cannot be less than 20 per cent at the end of the first annual general meeting following 1st January 2014.⁸⁵ This stage is only temporary and applies only to listed companies.⁸⁶ The obligation of gender balance for non-listed companies is postponed to 2017. The reason is probably that it is easier to enforce gender quotas for listed companies because they are visible to the public. Moreover, larger companies are considered to be models to be followed by smaller companies over time. Finally, by 1st January 2017, the proportion of members of the board of directors or supervisory board of each sex may not be less than 40 per cent on applicable companies.⁸⁷ Applicable companies include both: companies whose shares are admitted to trading on a regulated market, and so-called 'large' companies. The latter are those that have employed an average of at least 500 permanent employees for three consecutive years from 1st January 2017⁸⁸ and have a net sales or total assets of at least 50 million Euro. According to Article L. 225-18-1, §2 of the Commercial Code, if these targets are not met, penalties are provided by law. Indeed, any appointment made in violation of legal rules is void. However, the decisions adopted are not affected by such nullity and therefore remain valid.⁸⁹

EU legislates for substantial gender equality on corporate boards

Gender equality as one of the EU's fundamental values

The EU has a history of promoting substantive gender equality, which includes the use of positive actions. The principle of gender equality has been entrenched 'as one of the central missions and activities of the Union'⁹⁰ and as one of its fundamental values.⁹¹ Indeed, Article

⁸⁴ Loi n° 2011-103 du 27 janvier 2011, Article 5, II, al. 2.

⁸⁵ *Ibid.* Article 5, II, al. 1.

⁸⁶ It is necessary not to confuse 'public limited companies' (plc) and 'listed companies'. Indeed, 'listed companies' are a kind of plc. These companies, listed on the stock exchange, may trade their shares. See Ch. Taylor, *Company Law*, (2nd edition, Pearson, 2013), p. 11.

⁸⁷ Loi n° 2011-103 du 27 janvier 2011, Article 5, I.

⁸⁸ The French bill intends to amend the standard of 'the third consecutive year' by the 'first of three consecutive years', V. Doc. AN n° 1380, Article 20 *bis*, *JCP E* 2013, 733.

⁸⁹ Article L. 225-18-1, §2 of the Commercial Code: 'Toute nomination intervenue en violation du premier alinéa et n'ayant pas pour effet de remédier à l'irrégularité de la composition du conseil est nulle. Cette nullité n'entraîne pas celles des délibérations auxquelles a pris part l'administrateur irrégulièrement nommé'; See H. Le Nabasque, 'La sanction des délibérations adoptées par un conseil d'administration irrégulièrement composé', in *Le conseil d'administration*, n° spécial, *Revue Trimestrielle de Droit Financier* novembre 2013, p. 108 sq., spéc. p. 110.

⁹⁰ M. Bell, 'The Principle of Equal treatment: Widening and Deepening' in P. Craig and G. De Búrca (eds) *The Evolution of EU*

2 of the Treaty on European Union (TEU) proclaims that equality is one of the values on which the Union is founded. Article 3(3) TEU provides that gender equality and the combat of discrimination constitute aims of the EU. The Treaty of Amsterdam introduced the concept of 'gender mainstreaming',⁹² now enshrined in Article 8 TFEU⁹³ which places the EU legislator under an obligation to take into account the principle of gender equality when drafting and enacting legislation. In addition, Article 157(4) TFEU and Article 23 of the Charter of Fundamental Rights of the European Union (the Charter) provide the possibility for a Member State to maintain or adopt measures providing for specific advantages in favour of the under-represented sex. As such, these provisions aim to prevent or compensate for (past) disadvantages.⁹⁴ Similarly, Article 157(3) tasks the EU with '...adopt[ing] measures to ensure the application of the principle of equal treatment and opportunities of men and women in matters of employment and occupation...'⁹⁵ The Court of Justice has accepted these measures under certain conditions, as discussed above.⁹⁶

Gender equality and democratic participation

The EU has, for some time, been interested in intervening in order to redress the continuing gender gap between men and women in the area of democratic participation. Critics relating to the EU democratic deficit as well as the increasing recognition that women's participation into decision making is a requirement for democracy have won over the EU.⁹⁷ In addition, it has been argued that 'different ideas and values will be fed into the decision-making process, leading to results which take into account the interests and needs of the whole population',⁹⁸ this in turn arguably leads to positive outcomes for society. On this basis a number of soft measures have been adopted with a view to develop a strategy in relation to democratic representation. The Recommendation of 13 December 1984 provides that Member States are entitled 'to adopt a positive action policy designed to eliminate ex-

Law (second edition, Oxford University Press, Oxford, 2011), p. 611-639, at 629.

⁹¹ S. Koukoulis-Spiiotopoulos, 'The Lisbon Treaty and the Charter of Fundamental Rights: Maintaining and Developing the *aquis* in Gender Equality' 1 *European Gender Equality Law Review* (2008), p. 15-24.

⁹² M. Pollack and E. Hafner-Burton, 'Mainstreaming gender in the European Union' 7 *Journal of European Public Policy* 3 (2000), p. 432-56.

⁹³ Article 8 TFEU provides that '[i]n all its activities, the Union shall aim to eliminate inequalities, and to promote equality, between men and women.'

⁹⁴ R.C. Tobler, 'Positive Action under the Revised Second Equal Treatment Directive', in Association des Femmes Françaises Juristes & European Women Lawyers Association (Eds.), *L'Egalité entre Femmes et Hommes et la Vie Professionnelle, le Point sur les Développements Actuels en Europe*, (Editions Dalloz, Paris, 2003) p. 59-92.

⁹⁵ Article 157(3) TFEU.

⁹⁶ See in particular Case C-450/93 Eckhard Kalanke v. Freie Hansestadt Bremen [1995] ECR I-3051 and Case C-409/95 Hellmut Marschall v. Land Nordrhein-Westfalen [1997] ECR I-6363.

⁹⁷ S. Walby, 'Gender Quotas for Boards of Directors: Gendering Economic Governance in a Time of Financial Crisis', presented at Council for European Studies Conference, Amsterdam, 26 June 2013, p. 2.

⁹⁸ **Report from the Commission to the Council on the implementation of Council recommendation 96/694/EC of 2nd December 1996 on the balanced participation of women and men in the decision-making process, COM(2000) 120 final.**

isting inequalities affecting women in working life and to promote a better balance between the sexes in employment'⁹⁹ in the public and the private sectors. A Recommendation of 2 December 1996 urged Member States to promote balanced participation of women and men in decision-making processes.¹⁰⁰ It aimed to 'encourage the private sector to increase the presence of women at all levels of decision-making, notably by the adoption of, or within the framework of, equality plans and positive action programmes.'¹⁰¹

The EU proposal for balanced representation on corporate boards

In the field of business, the action of the EU is much more recent and still highly controversial.¹⁰² By way of background, in 2011 the EU Commissioner for Justice and Fundamental Rights, Viviane Reding, launched Women on the Board Pledge for Europe, calling on large companies to increase women's presence at the board level to 30 per cent by 2015 and to 40 per cent by 2020.¹⁰³ Reding promised to consider legislative action if the self-regulatory initiative did not yield results by March 2012. However, a year later only 24 companies had signed the pledge, which made it clear that a 'soft' European Union led approach, would not work.¹⁰⁴ By the end of the deadline, the EU figures showed 91.9 per cent of executive board members, 85 per cent of non-executive board members and 96.8 per cent of the boardroom chairs were men. Yet 60 per cent of university graduates in Europe were women. It appeared that the 'glass ceiling' remained unbroken, with self-regulation having made little headway. Therefore, on 12 November 2012, the Commission adopted a proposal for a directive designed to set up a series of measures on improving the gender balance among non-executive directors of companies listed on stock exchanges. On 20 November 2013, the European Parliament voted in favour of the Commission's proposal with an overwhelming majority,¹⁰⁵ which led Viviane Reding to declare that 'today's European Parliament vote is a historic mo-

⁹⁹ Council Recommendation of 13 December 1984 on the promotion of positive action for women, *O.J.* L331 of 19 December 1984, p. 34-35, 1.

¹⁰⁰ Council Recommendation of 2 December 1996 on the balanced participation of women and men in the decision-making process, *O.J.* L 319 of 10 December 1996, p. 11-15.

¹⁰¹ *Ibid.* at p. 11-15, I, §4, d.

¹⁰² The EU proposal faces opposition as EU Member States are divided with regards to the methods to be used for addressing the lack of women in company boards. On the one hand, eleven Member States as well as Norway have already introduced legally binding instruments designed to promote gender equality on company boards. In eight of these countries, the instruments cover public undertakings. On the other hand, in the remaining two-thirds of the Member States, no legal measures have been introduced and no significant progress has been made in recent years. Unsurprisingly, Member States which have opted for self-regulation oppose the proposal.

¹⁰³ Viviane Reding, *Women on the Board Pledge for Europe*, 2011 (IP/11/242 and MEMO11/124).

¹⁰⁴ See (IP/12/213).

¹⁰⁵ See J. Jehl, 'Union européenne : vers l'équilibre hommes-femmes dans les conseils d'administration', 49 *La Semaine Juridique Edition Générale* (2013), p. 2221.

ment for gender equality in Europe...the Parliament has made the first cracks in the glass ceiling that continues to bar female talent from top jobs.’¹⁰⁶

The proposed EU directive of 14 November 2012 aims¹⁰⁷:

*to ensure a more balanced representation of men and women among the non-executive directors of listed companies by establishing measures aimed at accelerated progress towards gender balance while allowing companies sufficient time to make the necessary arrangements.*¹⁰⁸

Article 4 requires compliance with a minimum proportion of 40 per cent of board members belonging to the under-represented sex, which has to be attained at the latest by 1st January 2020.¹⁰⁹ The date is pushed back to 1st January 2018 for listed companies which are public undertakings.¹¹⁰ The law requires companies with fewer than 40 per cent of its board members as women to introduce a selection procedure for new board members which give priority to female candidates providing that the female applicant is at least equally qualified to the male applicant. In contrast to the French measure, the EU proposal does not apply to executive directors. The proposed law is a temporary measure, expiring in 2028.¹¹¹ In addition to the quota applying to supervisory boards, the EU legislation also requires that companies listed on stock exchanges set a self-regulatory ‘flexi-quota’. In other words, they must set themselves targets that aim to have 40 per cent female executive measures by 2020 (or 2018 for public undertakings). Companies must report progress in their annual reports.

In accordance with the EU principle of positive actions, priority can be given to the candidate of the under-represented sex, if s/he is equally qualified to a candidate of the oth-

¹⁰⁶ European Commission, Cracking Europe’s Glass Ceiling: European Parliament backs Commission’s Women on Boards proposal, Press release, 20 November 2013 (IP/13/118)

¹⁰⁷ 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, 14 November 2012, COM(2012) 614 final, article 1.

¹⁰⁸ COM(2012) 614, article 1.

¹⁰⁹ COM(2012) 614, Article 4(1) oblige Member States of an obligation of effort: ‘Member States shall ensure that listed companies in whose boards members of the under-represented sex hold less than 40 per cent of the non-executive director positions make the appointments to those positions on the basis of a comparative analysis of the qualifications of each candidate, by applying pre-established, clear, neutrally formulated and unambiguous criteria, in order to attain the said percentage at the latest by 1 January 2020 or at the latest by 1 January 2018 in case of listed companies which are public undertakings.’ In aiming to achieve better appointment procedure, Member States are required to apply a priority rule for the under-represented sex as stated by Article 4(3): ‘In order to attain the objective laid down in paragraph 1, Member States shall ensure that, in the selection of non-executive directors, priority shall be given to the candidate of the under-represented sex if that candidate is equally qualified as a candidate of the other sex in terms of suitability, competence and professional performance, 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.’

¹¹⁰ See (IP/12/1205) and (MEMO/12/860)

¹¹¹ Ibid.

er sex in terms of suitability, competence and professional performance as set by the Court in *Kalanke* and *Marschall*. Even in this case, it is always possible that ‘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.’¹¹² The so-called ‘saving clause’ developed by the Court in its interpretation of positive actions guarantees that there is no automatic selection of candidates based exclusively on sex. The problem with the saving clause is that the objective assessment could ultimately lead to a subjective selection. However, in a spirit of transparency, the listed company must inform the unsuccessful candidate, upon request, of the criteria that led to the ‘objective assessment’.¹¹³ The fact that the EU measure applies to only the ‘under represented sex’ and aims for equality of opportunity rather than equality of result indicates that it is within the conditions of lawful positive action measure under Article 157(4) TFEU and the Court’s case law.¹¹⁴ The fact that it is temporary and only applies to supervisory directors, together with the fact that the EU’s previous ‘soft’ self-regulatory approach has failed, indicate that the proposal is likely to be considered a proportionate measure.

The proposed EU directive exempts certain companies from the obligation. These include listed companies where members of the under-represented sex represent less than 10 per cent of the workforce.¹¹⁵ Also exempt are listed companies which can show that members of the under-represented sex hold at least one third of all director positions, irrespective of whether they are executive or non-executive.¹¹⁶ The European Commission argues that despite numerous exceptions, the proposed directive still provides enough constrained to ensure a balanced representation of men and women on the boards of companies in the EU.

Does the French model comply with the EU legal framework?

This section discusses the basis of the French legislation under EU law as well as considers whether any particular aspects of the French rule on balanced participation may be deemed illegal under EU law. Such an analysis is important for determining whether a similar model could be adopted by other EU countries. As discussed in the preceding paragraphs, the French Constitutional law reform of 23 July 2008 gives a domestic legal basis for the adoption of positive action measures. Similarly, Article 157(4) TFEU and Article 23 of the Charter, as discussed above, serve as the legal basis for the adoption of positive action measures under EU law.

¹¹² COM(2012) 614, article 4(3). Again this is in accordance with the EU case law on positive action.

¹¹³ COM(2012) 614, article 4(4).

¹¹⁴ See discussion surrounding the *Kalanke* and *Marschall* decisions.

¹¹⁵ COM(2012) 614, article 4(6).

¹¹⁶ COM(2012) 614, article 4(7).

Differences between French legislation and the planned EU Directive

There are three main differences between the French legislation, on the one hand, and the EU legal framework and proposed EU directive on gender balanced representation in company boards, on the other hand. First, the scope of the French and the EU measures are widely different which means that their real impact as well as their potential impact as a role model differs drastically.

In contrast to the French legislation, the proposed EU directive applies only to 'non-executive directors' who are 'any member of a unitary board other than an executive director and any member of a supervisory board in a dual board system.'¹¹⁷ Thus, the 'executive directors' who are 'any member of a unitary board who is engaged in the daily management of the company and any member of a managerial board in a dual board system'¹¹⁸ are exempt from the obligation of gender balance representation. Non-executive directors are generally less visible and have less influence on the company policies compared to executive directors. The potential impact of non-executive directors as a form of role model is therefore limited.¹¹⁹ Although Article 5 of the proposed EU directive provides the additional element of the self-regulatory 'flexi-quota', this does not have the same legal status as the wider reaching French measure. The French measure applies to executive as well as non-executive directors; therefore, it would appear that it has a wider reaching scope than the proposed EU directive. As such, it can be argued that the more extensive French model should be viewed as an example for the European institutions looking to legislate beyond the narrower scope of the EU proposal.¹²⁰ Indeed, Viviane Reding said that France alone accounts for over 40 per cent of the total variation observed in the European Union between October 2010 and January 2012.¹²¹ Therefore, the participation of France in the field of balanced representation in the European Union is significant.

In addition, the type of companies affected by positive action measures differs in the French and the EU proposal. Indeed, all companies are not concerned. In contrast to the French legislation, unlisted companies are totally excluded under the EU proposal. The rationale behind this restriction is that:

Companies listed on stock exchanges enjoy a particular economic importance, visibility and impact on the market as a whole [...]. These companies set standards for the economy in its entirety and their practices can be expected to be fol-

¹¹⁷ COM(2012) 614, article 2 (5).

¹¹⁸ COM(2012) 614, article 2(4).

¹¹⁹ L. Senden and M. Visser (2013), above n. 9, at 32-33.

¹²⁰ J. Chacornac, 'L'équilibre hommes-femmes parmi les administrateurs non exécutifs dans les sociétés cotées : la France en avance sur le droit de l'Union', *Lettre Creda-Sociétés* n° 2013-13, 12 avril 2013, p. 1.

¹²¹ F. Agnès et I. Lefort, *100 ans de combats pour la liberté des femmes*, (Flammarion, Paris, 2014), p. 347.

*lowed by other types of companies. The public nature of listed companies justifies that they be regulated to a greater extent in the public interest.*¹²²

Even among listed companies, a selection is still performed under the EU approach. Small and medium-sized enterprises (SMEs), 'which employ less than 250 persons and have an annual turnover not exceeding EUR 50 million or an annual balance sheet total not exceeding EUR 43 million' are not concerned by the proposed directive.¹²³ These restrictions may have been made to the text to be easily and quickly applied. The French legislation only excludes small companies indirectly based on certain threshold. However, the French law applies to boards of directors and supervisory boards of public limited companies and partnerships limited by shares. This means in reality that the concerned companies are those that have employed an average of at least 500 permanent employees for three consecutive years and have a net sales or total assets of at least 50 million Euro. The broad scope of the French legislation gives the signal that gender balanced participation is the principle and that exception only applies in restricted areas.

The second difference concerns the sanctions imposed on companies which fail to reach the 40 per cent target. According to the proposed EU directive, the choice of sanctions is left to the Member States, provided that these sanctions are effective, proportionate and dissuasive.¹²⁴ However, Article 6(2) of the proposed EU directive provides two potential measures such as administrative fines and nullity or annulment of the appointment or of the election of non-executive directors declared by a judicial body. The fact that there are no mandatory and firm sanctions defined by the proposed EU directive is perhaps the proposals greatest weakness. In turn, Member States have a broad discretion with regards to the adoption of adequate sanctions. The lack of harmonization may lead to the development of very different treatment of offending companies across the Member States. The weak sanctions, under the EU proposal has been criticised by the European Parliament, which called for obligatory and not just indicative sanctions. The European Parliament even offered to add 'the exclusion from public procurement'¹²⁵ to the list of sanctions. This seemingly 'lacking teeth' rule is in sharp contrast to the existing French legislation. A breach of the obligation under the French rule can lead to the appointment of a director to be cancelled, although it does not result in cancellation of the deliberations which have taken part as regards the irregularly appointed member. In some cases, if the board of directors or supervisory board is not regularly made up, payment of compensation may be suspended until its regularization. The sanctions considered under the French legislations are structural and arguably

¹²² COM(2012) 614, recital n° 17.

¹²³ COM(2012) 614, article 2 (8) et 3.

¹²⁴ COM(2012) 614, article 6.

¹²⁵ European Commission, Cracking Europe's Glass Ceiling: European Parliament backs Commission's Women on Boards proposal, Press release, 20 November 2013.

have the potential to be more efficient, and therefore more persuasive than the weaker EU proposal.

The third difference between the French law and the proposed EU directive lies in interpretation of the automatic rule and its compatibility with the principle of proportionality as set by the Court of Justice. According to the Court's interpretation given in the field of employment, positive action measures must not apply to either sex, but rather to the under-represented sex; candidates need to be 'equally qualified'; the measure must not apply in an unconditional and automatic way¹²⁶ and should include a savings clause. The proposed EU directive appears to fulfil all of these criteria.¹²⁷

French legislation and EU law

On the one hand, the French measure, in accordance with EU law, applies to the 'under represented sex', so does not apply to either sex. On the other hand, the rule could appear to be drafted to apply in an unconditional and automatic way. In addition, the French law does not mention the consideration of equal qualification for appointment. Is it therefore possible that the French measure breaches EU requirement of a saving clause? Is the French measure a 'quota' (potentially incompatible with the EU legal framework) or is it a form of positive action?

Again here, it should be highlighted that the rule does not apply to all French companies but to those listed on the stock exchange and which have a large turnover and a large number of employees. In other words, these companies are the most visible, likely also to operate across borders. The French legislation in that sense is not too rigid because the automaticity of the rule is not universal and does not concern all companies. Only the most visible companies are concerned.

In addition, the requirement for companies to achieve a 40 per cent proportion of women on boards does not necessarily mean that they must prefer women unconditionally. Indeed, they can employ women who are better qualified than their male applicants. This can be achieved by looking more widely for female applicants. They can also consider redefining their qualification criteria to fit the tasks of the board members better. Only a rule which governs the individual employment decision can ever be unconditional and automatic and the French legislation does not contain such a rule about the individual appointment decision.

Finally, the ambiguity of the Court's guidelines regarding the distinction between lawful positive actions and other unlawful measures leaves space for wider interpretation of the concept of positive action. It also provides a space for these measures to truly serve the

¹²⁶ Ibid. at para 32; Case C-407/98 Katarina Abrahamsson and Leif Anderson v Elisabet Fogelqvist [2000] ECR I-5539, para 52.

¹²⁷ L. Senden and M. Visser (2013), above n. 9.

general public interest, participatory democracy and fairness. The Court has recognised that equal opportunity and preferential treatment can combat gender stereotypes.¹²⁸ The Court has also accepted that the public interest might demand broader positive action measures.¹²⁹ Going further than that, academics have also argued that positive actions measures have a wide potential and might covers a broad spectrum of practices.¹³⁰

Is France leading the way?

The French legislative developments discussed above have led to France surpassing any other of the EU Member States, and the European Union especially, in the area of gender equality on company boards. Indeed, the proposed EU directive states that:

*[o]nly one Member State (France) will have achieved a 40 per cent female representation in boards by 2020 as the result of national binding quota legislation. Only seven other Member States – Finland, Latvia, the Netherlands, Slovakia, Spain, Denmark and Sweden - are estimated to reach 40 per cent before 2035*¹³¹

without EU intervention.

It is worth noting that Norway is ahead of France and all the other EU countries, also through the use of positive actions measures, yet it is not a member of the EU. More specifically, in 2003, the Norwegian employers had launched a program called Female future: mobilizing talent. The objective was to create a database of 500 women eligible for the boards of directors. The result was rather positive. Indeed, 50 per cent of candidates of regional programs and 26 per cent of candidates of the national program could provide a mandate.¹³² Then, from 1 January 2008, a Norwegian law imposed a representation of at least 40 per cent of each sex in boards of directors. The objective is to realize the progress made five years ago by allowing more women to access these boards. The initiative and the impetus given by Norway were a success because, in 2008, all companies already met this quota.¹³³ The representation of women on boards of directors of listed companies is currently around 42 per cent.

¹²⁸ *Marshall* cited by L. Senden and M. Visser (2013), above n. 9, at 21.

¹²⁹ Joined Cases C-250 and 268/09 *Vasil Ivanov Georgiev v Tehniceski universitet - Sofia, filial Plovdiv* [2010] ECR I- 11869, cited by L. Waddington and M. Bell (2011), above n. 29.

¹³⁰ Ch. McCrudden, 'Rethinking positive action', 15 *Industrial Law Journal* (1986), p. 219-243; S. Fredman, 'Affirmative action and the European Court of Justice: a critical analysis', in Shaw (ed.), *Social law and policy in an evolving European Union*, (Hart Publishing, 2000), p. 179.

¹³¹ COM(2012) 614 final, p. 9.

¹³² IFA – European PWN – ORSE, *L'accès et la représentation des femmes dans les organes de gouvernance d'entreprise*, septembre 2009, p. 32.

¹³³ *Ibid.* at p. 46-47.

Notwithstanding the example of Norway, and within the EU, it appears that the French legislation is suitable to ensure a better balance in the proportion of men and women on the boards of companies. It also appears that the French legislation is not only compatible with the EU legal framework but also goes further than the proposed EU directive in terms of scope, aim and, importantly, as a role model. Terjesen and Singh found that countries with more women on their corporate boards also tended to have more women in senior management positions.¹³⁴ An implication of this finding is that an increase of female directorships may lead to improvements in company policy towards improving the gender balance in senior management positions. The French legislation would, therefore, serve as a role model beyond company boards. Thus, if the EU proposal really aims to achieve a better gender balance in companies, then its timidity raises the question of its ability to effectively contribute to the goal of gender equality in the wider economic sphere.

Conclusion

As noted by the Executive Vice-President of the 'Women's Forum', positive action measures would not be necessary if women were included from the outset in economic and political life.¹³⁵ Given the extent of the systematic and persistent lack of equality between men and women across EU Member States, it is apparent that a positive action measure in relation to the appointment of company board member would be a proportionate response. From the above analysis, it can be concluded that the French legislation is clearly wider reaching than the EU proposal. However, the drafting of the French legislation indicates that it may be closer to 'substantive' equality and less cautious with the legal criteria set out by the Court in the Kalanke and Marschall decisions. By contrast the proposed EU directive's timidity raises the issue of its ultimate impact. It cannot be viewed as overtly onerous for EU Member States when compared to the French model. Instead, it should be considered as a 'bare minimum' that sits comfortably under Article 157 TFEU and Article 23 of the Charter as well as with the jurisprudence of the Court of Justice. Member States are given wide discretions as to how to tackle the issue of gender balance in company boards under the proposed directive. Arguably, Member States might be more influenced by the French legislations than they might by the EU proposal, especially in the context of regional commercial exchanges. Over time, we may see more states follow France by adopting more extensive and arguably effective positive action measures.

¹³⁴ S. Terjesen and V. Singh, 'Female Presence on Corporate Boards: A Multi-Country Study of Environmental Context' 83 *Journal of Business Ethics* 1 (2008), p. 55-63.

¹³⁵ De Deauville à Rangoon, le Women's Forum se démultiplie, *Les échos* 16 octobre 2013, p. 9.