

RESOLUTION  
of the Sejm of the Republic of Poland

of 4 January 2013

**on declaring the 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  
to be incompatible with the principle of subsidiarity**

Pursuant to Art. 148cc of the Standing Orders of the Sejm, the Sejm of the Republic of Poland declares that the 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 (COM(2012) 614 final) is incompatible with the principle of subsidiarity, as referred to in Article 5(3) of the Treaty on European Union. The proposal infringes the principle of subsidiarity inasmuch as the proposed directive does not guarantee that the objectives of the proposed action would be better achieved at the European Union level than as a result of measures taken at the national level. The reasoned opinion stating the reasons why the Sejm considers that the proposal does not comply with the principle of subsidiarity is annexed to this Resolution.

Annex to the Resolution  
of the Sejm of the Republic of Poland  
of 4 January 2013

**Reasoned opinion of the Sejm of the Republic of Poland of 4 January 2013 stating the reasons why the Sejm considers that the 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 does not comply with the principle of subsidiarity**

The Sejm of the Republic of Poland declares that the 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 is incompatible with the principle of subsidiarity, as referred to in Article 5(3) of the Treaty on European Union (TEU). The proposal infringes the principle of subsidiarity inasmuch as the proposed directive does not guarantee that the objectives of the proposed action would be better achieved at the European Union level than as a result of measures taken at the national level.

The aim of this directive is 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 (Article 1 of the proposal). In the opinion of the Sejm, the proposal does not fulfil this objective “better” – within the meaning of Article 5(3) TEU and Article 5 of Protocol (No 2) on the Application of the Principles of Subsidiarity and Proportionality enclosed to TEU and the Treaty on the Functioning of the EU (TFEU) – than the Member States currently applying their national regulations.

In order to justify the need to introduce the measures stipulated in the proposal, the European Commission cites female under-representation in the boards of publicly listed companies of individual Member States and the lack of any significant improvement of this state of affairs despite measures hitherto adopted by individual Member States. The Sejm would like to point out that the Commission looks at

gender inequality in company boards only in terms of the percentage of women who currently sit on company boards of the largest listed companies. The Commission has failed to present any analysis of this phenomenon that would help identify its causes in individual Member States. For example, comparing the number of women who have applied for the highest company positions in individual Member States vs. the number of those who were finally appointed would be a more reliable method in that respect. It would enable a better identification of the causes of the problem in individual Member States, which are not necessarily homogeneous. The lack of an appropriate analysis in that respect makes it impossible to verify the main assumption on which the proposal is based, namely that the lack of transparency of the selection procedures and qualification criteria for such positions represents a barrier to more gender diversity among board members. The lack of such analysis also means that introducing a single EU-wide measure in the form of gender parity may transpire to be an ostensible action rather than a means to cause a genuine and effective change of the existing situation. In the opinion of the Sejm, the proposed measures are not capable of fulfilling the assumed objective as declared by the legislator: improving the quality of decision-making and greater economic growth throughout the EU (recitals 8 and 9). Without knowing the cause of the problem one cannot ascertain whether the proposed solution may be effective at all.

It should be noted that the issues relating to the catalogue, the powers and the rules of appointing and dismissing boards of joint stock companies have not hitherto been standardised within the EU. The legal orders of EU Member States are greatly varied even with respect to such basic issues as the company management structure (monistic or dualistic). If such a fundamental matter as appointing non-executive company directors or supervisory board does not pose a barrier to internal market growth, then neither do regulations pertaining to the participation of women in such boards. The document under consideration does not specify any data that would justify the claim that the lack of regulations pertaining to gender equality has a negative impact on investor decisions concerning acquisition of shares; by the same token, it is not clear why the solutions proposed in the directive should "enhance company performance". Neither are there any premises pointing to the negative impact of the lack of regulations pertaining to gender parity in company boards on the functioning of the internal market.

Furthermore, establishing the requirement of the minimum representation of women at the level of 40% only among non-executive directors is also incompatible with the principle of subsidiarity. The explanatory memorandum indicates that “the proposal refrains from establishing a fixed binding objective for executive board members, due to the greater need for sector-specific knowledge and experience in the day-to-day management of a company” (item 2 of the explanatory memorandum – *Results of consultations with the interested parties and impact assessments: Impact assessment*, last paragraph, sentence two). The proposed regulations promote women only at positions that require a lesser degree of specialist knowledge and lesser experience in management, which further contributes to strengthening the existent stereotypes rather than eradicating them. As a consequence, this may lead to opposite results than those intended, i.e. reinforced reluctance to employ females as executive directors.

In the opinion of the Sejm, the proposal is also in breach of the principle of proportionality. The European Commission states that the under-representation of women on company boards is predominantly due to the lack of transparency of the selection procedures and qualification criteria for such positions. In that case, in order to achieve the directive’s objective it would suffice to adopt EU-wide measures aimed at standardising the criteria of appointing members of company boards, without the need to establish binding parities.

The Sejm would also like to stress the breach of the principle of conferral. Pursuant to Article 5(2) of the TEU, the European Union shall only act within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States. The legal basis of the proposal is Article 157(3) of TFEU. The provisions of Article 157(1) and (2) of TFEU refer to the term “worker”. The Court of Justice stresses that this is an autonomous term of European Union law, which defines a person who performs services for and under the direction of another person for a certain period of time in return for which he receives remuneration (Judgment of the Court of Justice of 3 July 1986 in the case C-66/85 *Deborah Lawrie-Blum v Land Baden-Württemberg*, item 16 and 17 and judgement of the Court of Justice of 13 January 2004 in the case C-256/01 *Allonby v Accrington and Rossendale College*, items 67-71). Article 157(3) of TFEU, which forms the direct legal basis for adopting the proposed directive, does not employ the term “worker”,

but the terms "work" and "employment". Systemic interpretation would lead to the conclusion that these terms pertain to a relationship in which one of the parties is the worker, as referred to in Article 157(1) and (2) of TFEU. Pursuant to Article 2 item 5 of the proposed directive, it would pertain to any supervisory board member. However, holding the supervisory board member position in a joint stock company is not always tantamount to employment (within the meaning of TFEU) in such company. In some cases the direction or even remuneration component is missing. The cited regulation solely authorises the adoption of measures to ensure equal opportunities in matters of employment and work. The proposed regulation fails to take into account various forms of employment of company supervisory board members which exist in individual Member States. This leads to extending the scope of application of the proposed directive beyond the limits of the legal basis for its adoption.

In conclusion, in the opinion of the Sejm the 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 (COM(2012) 614 final) is in breach of the principle of subsidiarity, the principle of proportionality and the principle of conferral.