



EUROPEAN COMMISSION

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Dear President,

The Commission would like to thank the Sejm for its Reasoned Opinion on 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} and apologises for the delay in replying.

The analysis and impact assessment of the Commission in preparing this proposal make a strong case for pursuing greater representation of women on boards and demonstrate the clear benefits to businesses resulting from a more gender diverse boardroom.

In principle, Member States have the possibility to act to improve gender balance on boards on their own. In practice, however, the vast majority of Member States are not currently making use of this possibility or their actions are so diverse that they often lead to very divergent results. Moreover, the current figures reveal that decades of self-regulation have not led to satisfactory results. The last attempt by the Commission to encourage self-regulation was on 1 March 2011. At that time, the Commission invited listed companies to sign the "Women on the boards pledge for Europe" and to make a credible commitment to raising the number of women on their boards. The results of this initiative were very disappointing as only a handful of companies signed the pledge. The current figures speak for themselves: EU-wide, 85% of non-executive board members and 91.1% of executive board members are men. Despite an intensive public debate and some voluntary initiatives at national and European level, the situation has not changed significantly in recent years.

Subsidiarity is not only about the hypothetical possibility of reaching a certain policy objective at the level of Member States, but also about Member States' use of the possibilities at their disposal to really and efficiently achieve that objective. After having thoroughly evaluated the present situation in the impact assessment, the Commission has come to the conclusion that action by Member States individually will not achieve the objective of a more balanced gender representation on company boards by 2020 or at any point in the foreseeable future. Consequently, the Commission took action at EU level as this is necessary in order to achieve the objective of gender balance on the boards of listed companies.

The Commission holds the view that the causes of gender imbalances on boards have been identified to a sufficient extent. The Commission's impact assessment contains a

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comprehensive analysis of the problem drivers, including the lack of transparency in the process leading to the appointment of new board members.

The Commission underlines its opinion that, while the proposal is a gender equality legislative measure based on Article 157(3) TFEU, it will strongly contribute to better corporate governance, better company performance and to an improvement of the EU economy as a whole, in particular as far as female employment rates and gender pay gap are concerned. The Commission is of the opinion that the draft directive can also help avoid possible problems related to maintaining a competitive level-playing field in, and proper functioning of, the internal market.

As for the evidence of increased company performance as a result of greater board diversity, the Commission would like to draw the Sejm's attention to a growing body of literature showing that companies with more diverse boards not only have better corporate governance, but also are more profitable. A comprehensive analysis of that literature can be found in the Commission's impact assessment.

In relation to the Sejm's view that the 40% target only for non-executive directors would reinforce gender stereotypes, the Commission would like to stress that executive directors are covered by the proposed directive too, as listed companies are obliged to set objectives in relation to them. Moreover, Member States are given a possibility to provide that the objective is met where listed companies can show that members of the under-represented sex hold at least one third of all board positions, thus including executive directors. Having a quantified target for non-executives only is not by any means stereotypical, as it is intended as first step to raise the gender diversity of company boards to a critical mass while keeping the interference with the day-to-day management of companies limited, thus enhancing the proportionality of the proposal.

The Commission is convinced that the proposed directive fully respects the principle of proportionality. In the Commission's impact assessment, the option of standardising appointment procedures as a stand-alone measure was discarded from the beginning, not least for proportionality reasons, as it would require regulating the appointment processes in much greater detail than the minimum harmonisation introduced by the proposed directive. Moreover, it is highly questionable that such an option could lead to a sufficient increase of women on boards in an acceptable timeframe without combining it with a target for the representation of both sexes. Furthermore, there are numerous elements of the proposal that guarantee its proportionate nature. For example, it is limited to publicly listed companies only and excludes small and medium-sized enterprises (SMEs); it requires only such changes to national company law that are strictly necessary for the minimum harmonisation of requirements for the appointment decisions while respecting the different board structures across Member States; and it is of a temporary nature.

The Commission is firmly convinced that the proposed directive has a solid legal basis in the Treaty. Article 157(3) TFEU covers employment and occupation and has been used as legal basis for adopting provisions concerning self-employment, notably Directive 2010/41/EC on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity. The use of this Article is not restricted to 'workers' but it must also be stressed that the EU law concept of 'worker' has been given a wide interpretation by the Court of Justice of the EU. In this connection the European Commission would like to draw the Sejm's attention to the CJEU ruling in the Case C-232/09 Danosa v. LKB Līzings SIA, according to which a member of a

capital company's Board of Directors who provides services to that company and is an integral part of it must be, under certain conditions, considered a worker.

The Commission hopes that these clarifications address the concerns raised in the Reasoned Opinion of the Sejm and looks forward to continuing our political dialogue in the future.

Yours faithfully,

*Maroš Šefčovič
Vice-President*