



EUROPEAN COMMISSION

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Dear President,

The Commission would like to thank the Poslanecká Sněmovna 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 apologizes for the delay in replying.

The Commission has been driving the debate on addressing the situation of gender imbalance in the composition of boards of European companies listed on stock exchanges. The analysis and impact assessment of the Commission in preparing this proposal show an overwhelming case for pursuing a greater representation of women on boards as well as the clear benefits to businesses resulting from a more gender diverse boardroom.

In principle, Member States have the possibility to improve gender balance on boards on their own. In practice, however, a vast majority of Member States of the European Union are not 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 failed. 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 intense public debate and some voluntary initiatives at national and European level, the situation has not changed significantly in recent years.

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

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action at EU level as this is necessary in order to achieve the objective of significantly improving gender balance on the boards of listed companies.

The Commission notes the reference in the Reasoned Opinion of the Poslanecká Sněmovna to the fact that the proposal would have a limited impact on the Czech companies as it would only apply to an estimated 10-20 listed companies. Contrary to the fears expressed in the Reasoned Opinion, the Commission would like to state that it is not envisaging "an intense legislative activity of the EU concerning the equal representation of women and men in all of labour law, with a broad impact on Member States". The flexible, proportionate nature of the proposed directive, its limited scope and the minimum harmonisation approach it adopts, are all a testimony to this.

The Commission would like to stress that the proposed directive does not introduce rigid quotas. Instead, it aims to realise the objective of 40% of non-executive directors to be of under-represented sex, which is tied to procedural obligations of increasing the transparency and fairness of the appointment procedure of the candidates for board position and the preference rule for the candidates of the under-represented sex only in case of equal qualifications of candidates of over- and under-represented sex. The latter feature of the proposed directive guarantees that merit will remain the decisive criterion in recruitment to board positions.

The Commission is 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' since it covers all other forms of occupation, but it must also be stressed that in the EU law the concept of 'worker' has been given a wide interpretation by the Court of Justice of the EU. In this connection the Commission would like to draw the Poslanecká Sněmovna's attention to the CJEU ruling in the Case C-232/09 Danosa v. LKB Lizings SLA, 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.

Moreover, the Commission is firmly of the opinion the Article 157(4) in no way prevents the EU from introducing positive action measures for the under-represented sex at the Union level. Nowhere does the Treaty state that the Union is not competent to enact positive action measures. Article 157(4) provides a possibility for Member States to adopt positive action, but it does not exclude the adoption of such measures by the Union on the basis of paragraph (3) of that Article. This provision has to be seen in a wider context of the specific circumstances at the time when this provision was incorporated in the Treaty of Amsterdam, as it was meant to clarify that national positive action measures are allowed by EU law. The provision, however, does not limit the competence of the EU to adopt positive action measures on the basis of Art 157(3) TFEU.

The Commission does not share the concern that the proposal involves a significant administrative burden for the companies concerned. In relation to this issue the European Commission would like to refer to the impact assessment accompanying the proposal, which estimates the administrative costs for companies to be relatively minimal. The exclusion of SMEs from the scope of the proposed directive for proportionality reasons by no means implies that the proposal would create a considerable burden for the companies within its scope, as the same obligation may be easy to meet by a large listed company but relatively burdensome for an SME.

Unlike the Poslanecká Sněmovna, the Commission is convinced that the proposed directive fully respects the principle of proportionality. 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 temporary nature. Furthermore, the Commission has fully recognised that in some Member States efficient measures already exist and that those measures, adapted to conditions existing in each Member State, should continue to apply. Therefore, the proposal would allow Member States to continue following a nationally devised course of action embarked upon before the entry into force of the proposed directive if it can be shown that this approach is of equivalent effectiveness in terms of reaching the target of a 40% representation of both sexes on company boards by 2020.

The Commission trusts that these clarifications address the concerns raised in the Reasoned Opinion of the Poslanecká Sněmovna and looks forward to continuing the political dialogue in the future.

Yours faithfully,

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Vice-President*