



HOUSE OF LORDS

European Union Committee

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24 September 2014

Commissioner Martine Reicherts,
Commissioner for Justice, Fundamental Rights and Citizenship,
Rue de la Loi 200,
1049 Brussels,
Belgium

Dear Commissioner Reicherts,

I attach a copy of a letter from the EU Committee of the House of Lords to the UK Government. The letter is a reaction from the UK House of Lords to *COM (2012) 614 final- 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.*

As you may be aware, the Committee published a report on the subject of this draft Directive entitled *Women on Boards* and we continue to take an interest in negotiations on the draft Directive.

We hope that sight of this letter is helpful in terms of outlining the Committee's views on the dossier and that it provides a useful contribution to ongoing discussions, and that your successor will keep the Committee's views in mind.



No response to this letter is necessary.

Your Sincerely,

Baroness O'Cathain
Chairman of the European Union Sub-Committee on the Internal Market, Infrastructure and Employment.



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The Rt Hon Dr Vince Cable MP
Secretary of State for Business, Innovation and Skills
Department for Business, Innovation & Skills
1 Victoria Street
London SW1H 0ET

11 September 2014

Dear Secretary of State

COM (2012) 614 final - Directive to improve the gender balance among non-executive directors of companies listed on stock exchanges and related measures

House of Lords European Union Select Committee Report Women on Boards (5th report, session 2012-13, HL Paper 58)

The European Union Sub-Committee B on the Internal Market, Infrastructure and Employment held an inquiry in 2012 which looked at the work of the EU in the area of gender equality on corporate boards. We published our report on Friday 9 November 2012, and the report was debated in the House of Lords on 13 November 2012. The report was published in anticipation of the expected legislation from the EU which deals with gender balance on corporate boards. The draft EU Directive to *improve the gender balance among non-executive directors of companies listed on stock exchanges and related measures* (COM(2012) 614 final) was published on 14 November 2012, the day after our debate on the report.

Between June and July, this year the Committee held three sessions following-up its report. The Committee first received an informal briefing from the department officials on 9 June, then on 30 June heard from Marina Yannakoudakis MEP, who was a Member of the European Parliament Women's Rights and Gender Equality Committee when it considered the proposal. On 7 July the Committee held an evidence session with you, which we found very useful. This letter follows up our 2012 report and outlines our views on the draft gender balance Directive, in light of the evidence we have heard.

Women on Boards report

The *Women on Boards* report considered a wide range of issues around the topic of gender balance on boards, including the benefits that come from a gender balanced board, the possibility of an EU-wide system of monitoring the numbers of women in senior positions, and reforms to corporate governance to improve the balance between men and women on boards.

We also considered in detail the merits of introducing quotas at EU level and opposed in principle the setting of quotas as a means of increasing the representation of a particular gender on company boards. In our view, quotas failed to address the underlying cause of gender inequality: the lack of progression of a consistent stream of women into senior positions. At the time of the report publication, self-regulation had not shown itself to have failed: FTSE 100 companies were on target to have a quarter of board positions occupied by women by 2015, and across the EU as a whole, the proportion of women on boards had risen by 16 per cent since 2010 to just under 14 per cent of overall board positions.

We considered the appropriateness of the Commission's preferred target of 40 per cent. We said that from the Committee's perspective, full equality of opportunity (a point at which data demonstrate that women entering the labour market are not being institutionally disadvantaged in their careers) should be the ultimate target, rather than a specific number. Nevertheless, we agreed that targets could have a pragmatic political value. We observed the literature in this area which had identified 30 per cent of women as creating a "critical mass" for cultural change in the boardroom, and said that 30 per cent would be more appropriate than the Commission's target of 40 per cent.

Commission proposal

The key element of the Commission's proposal was to propose a quantitative objective of at least 40 per cent representation for each gender among non-executive by 2020, or 2018 for State owned undertakings. It is described by the Commission as a "procedural quota" rather than a "quantitative quota"¹ in that it sets out requirements for the board selection process (one of which would be to give priority to equally qualified female candidates) that must be followed until a company achieves a quota of 40 per cent of women on boards. Member States must set out sanctions for companies that fail to reach the quota, if they have not properly applied the procedural obligations.

We first considered the proposal on 10 December 2012. In our scrutiny of the draft Directive we considered that the distinction in the draft Directive between executive and non-executive directors was problematic. In its explanatory memorandum (EM), the Government suggested that they would be likely to apply the processes to all director appointments, meaning that the target would be met if there was a third of women on boards. However, the application of the procedural requirements of the draft Directive to all directorships could allow implementation to interfere with the day-to-day functions provided by company boards – a risk that the Commission sought to avoid in imposing the distinction.

We also observed that the proposal is likely to affect only a small number of companies in the UK (approximately 1000), given that non-listed companies and SMEs fall outside of the proposal. In our view, this raised questions about the efficacy of the proposal in achieving the aim of greater overall gender diversity – especially given the high administrative costs involved. We considered that this was a fatal flaw in the argument that the aim of improving Gender Equality on boards would be best achieved through the draft Directive.

We noted that the impact assessment specified that existing and projected action by Member States in the absence of EU legislation is expected to achieve an increase in the proportion of female non-executive directors from 15 per cent to 24 per cent by 2020. We considered that this was a significant step towards achieving the critical mass of 30 per cent given that 15 Member States had taken no action at all at that stage, and that the increasing profile of this

¹ European Commission press release (June 2014) *Improving the gender balance in company boardrooms*.

area suggested that the projection would be exceeded. **Therefore, we came to the view that EU-wide legislation was unnecessary, and could be counter-productive to the Commission's stated aim of increasing gender diversity on boards.**

We published a Reasoned Opinion on the proposal on 20 December 2012, on the grounds that the proposal did not comply with the principle of subsidiarity: that action should only be taken at EU level where it is necessary and adds value. Reasoned Opinions were also issued by the UK House of Commons, the Netherlands, Sweden, Czech Republic, Poland, and Denmark, amongst others. The Commission's response to our Reasoned Opinion stated that the efforts of Member States were diverse and not all Member States had been responsive to the need for change. It also cited that the current figures for women on boards were too low and had not changed significantly in years.

Developments at national and EU level

In the three years from October 2010 to October 2013, the share of women on boards of large listed EU companies increased in 22 of the 28 EU Member States. Across the EU 28 the share of women on boards increased by 6 per cent, standing at 18 per cent. This demonstrates an exponential increase in the average number of women on boards; in the two years between 2010 and 2012 the average increase was only 2 per cent, which was doubled the following year (between 2012 and 2013). It is the case that some of the most significant increases took place in countries that have taken legislative action: France saw a percentage point increase of 17, while Italy saw a percentage point increase of around 10. Nevertheless, it is notable that countries such as Germany and the Netherlands, where quotas have not been introduced, have experienced 9 and 10 percentage point increases in their respective share of women on boards.

In its June 2014 press release on the draft Directive, the Commission notes that most of the significant increases took place in countries that had either considered legislative action or had an intense debate on the issue. **We consider that raising the profile of the issue is more effective than quotas in achieving meaningful institutional change – ensuring a cultural change in the business sector which supports women in moving up the career ladder on to boards, rather than imposing a superficial change.**

In this respect, we welcome the efforts that the EU has made to bring in guidance for Member States in this area, and raise awareness of the issue across the EU. We recently considered the EU's proposal for a Directive *as regards disclosure of non-financial and diversity information by certain large companies and groups*, COM (2013) 207 final (hereafter the disclosure Directive). The Directive would require companies either to provide in their corporate governance statement information on their diversity policy or explain why it does not have a diversity policy.

We are supportive of the EU's attempts to spread best practice across Europe, by introducing soft measures such as the disclosure Directive. The most recent statistics show that there are still eight Member States with no measures in place at all at national level. In a number of those, the share of women on boards has decreased. We therefore reiterate the view expressed in our *Women on Boards* report that **the Commission could usefully complement measures like this by monitoring Member State action in encouraging gender diversity on company boards, and by issuing a non-binding Recommendation to Member States urging strong action at national level and outlining a range of possible policy developments.**

The data across the EU on the share of women on boards reinforce our view that 40 per cent is not a realistic figure for a target, which should be stretching and achievable. When we published our report in November 2012, we observed that a target of 40 per cent by 2020 was too ambitious at a time when even the best performing nation (Finland) was still well below that point. This view is reinforced by the most recent figures, which show that countries such as France and Italy that have seen four years of targets are still well below the 40 per cent mark, with a 30 per cent and 15 per cent share of women on boards, respectively.²

European Parliament amendments

The European Parliament adopted its report on the proposal on 20 November 2013. Many of the Parliament's amendments were measured and sensible, such as the requirement for Member States to collaborate "efficiently" with social partners. However, we are concerned about the changes to Article 6, which deals with sanctions. Marina Yannakoudakis, who sat on the Women's Rights and Gender Equality Committee while the draft Directive was being considered, described the amendments made by the European Parliament as "extreme". She referred specifically to the European Parliament's amendment to Recital 30 which lists as possible sanctions: prevention from bidding for public calls for tenders, partial exclusion from the award of EU Structural funds and the forced dissolution of the company concerned. **We would urge the UK Government to resist these amendments in negotiations, given that they could undermine the goodwill accrued through national self-regulatory efforts of engagement with businesses in countries such as the UK.**

We note that the European Parliament has removed the derogation allowing exemption from the proposal for companies where the underrepresented sex represents less than 10 per cent of the work force. We would be grateful for the Government's view on whether they agree with the amendment, and what impact they expect that it would have.

Situation in the UK

The share of women on boards in the UK is currently above the EU average, at 22 per cent, as compared to a share of just over 12 per cent in 2010.³ On the basis of this trajectory, you told us in our evidence session on 7 July that by 2015 the UK would reach its own target of 25 per cent of women on boards and is expected to have a share of around 40 per cent of women on boards in the FTSE 100⁴. We welcome these considerable developments. We also note that if the UK continues on this trajectory, the share of women on company boards will be very close to the proposed 33 per cent aim that the Commission has put forward for Member States like the UK where company boards are made up of both executive and non-executive directors.

Government negotiations

We received a briefing from Government officials on 9 June which provided us with a helpful update on negotiations and confirmed that despite possible changes in the negotiating position of other Member States, the UK was still part of a solid blocking minority in the Council.

² European Commission press release (June 2014) *Improving the gender balance in company boardrooms*.

³ Q12

⁴ Q12

Nonetheless, there are still a number of issues on which we seek clarity. The first relates to the possible exemption from the proposal for Member States that can show that their national measures will achieve the aim set out by the draft Directive. We understand that the Government does not intend to invoke the exemption.⁵ We were not persuaded with your explanation of the rationale behind this position: that the draft Directive has not progressed to a point where there is a need to consider this issue. We seek further information as to how difficult it would be for the UK Government to invoke the exemption in practice, and for confirmation as to whether or not it would consider doing so.

You put forward a similar explanation with respect to the potential conflict between the Equality Act, under which positive discrimination is illegal, and the Directive. We ask again for clarity on your view on whether or not the EU proposal would conflict with the Equality Act 2010.

We note your view that legal challenges in the Court of Justice of the European Union are a valid mechanism, but should be used sparingly and that, “you use them when the real problem presents itself rather than a hypothetical problem”.⁶ While we acknowledge that the Government still has a blocking minority in the Council, we are disappointed that you are not considering this issue ahead of a possible adoption of the proposal – given that Member States are only given a two month window after adoption in which to challenge a proposal at the Court of Justice.

Conclusion

We are concerned about the text of the draft Directive for many of the reasons we expressed in our *Women on Boards* report. One of the key findings from the evidence we received was that there is need to ensure a supply of women lower down the organisation, coming through the senior management pipeline. In this respect, we agree with your view that the proposal “seems to miss the point”⁷ by focusing solely on having more women in non-executive boards.

We reiterate our view that a more holistic approach is needed, fostering a sustainable change at the heart of business. This would support better the women that it seeks to help, avoiding the incorrect perception that women on company boards are not there by merit. We agree with the Secretary of State’s observation that,

“It is so much better if companies own this issue rather than having it imposed on them, partly because we want this to become embedded in the way companies think, but particularly because, if you are trying to develop an executive pipeline, companies really have to own this issue.”⁸

The recent statistics show that in the UK and other Member States, a self-regulatory approach is working. However, while we wish to see sustainable change, we believe that goodwill to the business sector should have a limit, and that EU action would be justified if the rate of progress did not improve. However, on the basis of the rapidly increasing share of women on boards across the EU, we do not feel that self-regulatory efforts have been shown to be failing.

Turning to the specific situation in the UK, we welcome the efforts made at national level, and would encourage the Government to consider what might be an appropriate target to set

⁵ Q15

⁶ Q17

⁷ Q12

⁸ Q14

after 2015. **We suggest that 30 per cent would be an appropriate target at UK level, to be reached by 2017.**

I am copying this letter to Sir William Cash MP, Chair of the Commons European Scrutiny Committee; Sarah Davies, Clerk to the Commons Committee; Les Saunders, Cabinet Office; and Marzena Bujalska, Departmental Scrutiny Co-ordinator.

Yours Sincerely

Delia Ghai

Lord Boswell
Lord Boswell
Chairman of the European Union Committee