

CONSTITUTIONAL VALUES UNDERLYING GENDER EQUALITY ON THE BOARDS OF COMPANIES: HOW SHOULD THE EU PUT THESE VALUES INTO PRACTICE?

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Abstract There is a large gap between the proportion of employed and well-educated women and those sitting on the boards of EU companies. However, the Commission's proposal for a Directive on improving the gender balance among non-executive directors of companies listed on stock exchanges does not constitute an appropriate legal solution for this problem. The Commission's reasoning underlying the draft Directive is so strongly pervaded by economic considerations that it gives the impression that women are merely instruments useful to attain economic objectives. By contrast, the need for enhancing women's representation in the boards of companies is justified by much more fundamental and incomparably higher-ranked values, and including equality between women and men and the need for democratic legitimization of the EU and of its economic governance. These fundamental values, however, must be achieved in accordance with the principles of proportionality and subsidiarity. The present article proposes some alternatives to compulsory gender quotas that might be used by EU institutions to promote more gender-balanced boards of EU companies.

Keywords: corporate governance, democratic legitimization, economic governance, EU companies, gender equality.

I. INTRODUCTION

In recent years, the European Commission, European Council and European Parliament have shown growing concern about the equality of opportunities for women and men to participate in making decisions concerning economic life. The EU political institutions have put this problem on their political and legislative agendas, making it clear that there is a need to enhance women's participation in economic decision-making at all levels and in all fields in the EU.¹ The boards of companies are one of the areas in which the EU institutions

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¹ See eg Commission's Women's Charter (COM (2010) 78 final); Commission's Strategy for Equality between Women and Men 2010–2015 (COM (2010) 491 final); Commission's report 'More Women in Senior Positions', January 2010; Commission Staff Working Paper 'The Gender Balance in Business Leadership', March 2011 (SEC(2011) 246 final); Commission's Progress Report 'Women in Economic Decision-Making in the EU', March 2012; Commission Staff

expect increased female participation in economic decision-making to be achieved.

The European Commission's proposal for a Directive on improving the gender balance among non-executive directors of companies listed on stock exchanges (the 'draft Directive'),² presented on 14 November 2012, shows that the EU Commission is now ready to go far beyond catchphrases, calls or encouragements. The draft Directive provides for concrete and legally binding tools that must be used by Member States to promote gender equality on the boards of EU companies. According to the draft Directive, listed companies in whose boards members of the under-represented sex hold less than 40 per cent of non-executive director positions must attain that percentage by 1 January 2020 at the latest, or by 1 January 2018 in the case of listed companies with the status of public undertakings. This should be achieved by giving conditional priority to candidates of the under-represented sex in the selection process for non-executive directors.³

This legislative proposal reinvigorated the EU debate on gender equality in economic decision-making and focused public debate on some related legal issues, including subsidiarity and the proportionality of gender quotas. In this public discourse, it has been asked if the time has come to adopt such an obligatory legal solution, or, alternatively, if the EU should patiently await future developments at the level of individual Member States.⁴ An even more fundamental question that the EU now faces is whether the EU is competent to promote gender equality on the boards of companies, especially in light of the EU's aims and tasks as established in the founding Treaties.

This article argues that economic arguments in favour of gender-balanced boards of companies are not as strong and convincing as the Commission claims. In particular, it is not obvious that such gender-balanced boards work more efficiently or contribute to better economic performance by individual companies. Corporate governance and performance may be improved by board appointments of the best possible candidates (irrespective of sex) and meeting all relevant criteria, not simply by the appointment of women (Section III of the article). Conversely, as Sections IV and V of this article argue, gender equality among directors of EU companies can be justified by primordial

Working Document 'Progress on Equality between Women and Men in 2011', April 2012 (SWD (2012) 85 final); the European Pact for Gender Equality 2011–2020, adopted by the Council on 7 March 2011; Resolution of the European Parliament of 6 July 2011 on women and business leadership (2010/2115(INI)); Resolution of the European Parliament of 13 March 2012 on equality between women and men in the European Union—2011 (2011/2244(INI)).

² COM (2012) 614 final.

³ See art 4 of the draft Directive.

⁴ See eg C De Groot, 'Three Innovations in Corporate Law in the Netherlands: On Directors' Employment Contracts, Limits to Non-Executive Directorships and Gender-Balanced Boards' (2013) 10 *European Company Law* 147 ff; A Zanardo, 'Achieving Gender Balance in Corporate Boards: The Italian Experience' (2013) 10 *European Company Law* 109 ff; see also the reasoned opinions of individual national parliaments submitted under Protocol No 2 to the Lisbon Treaty, available at <<http://www.ipex.eu/IPEXL-WEB/dossier/dossier.do?code=COD&year=2012&number=0299&appLng=EN>>.

EU constitutional principles such as the equality between women and men (Article 23 of the Charter of Fundamental Rights of the EU; hereinafter ‘the Charter’), the social market economy (Article 3(3) TEU) and democracy (Article 2 TEU). However, the constitutional values referred to above should not be achieved through an obligatory gender quota established at the EU level because this would infringe other important EU constitutional principles, namely subsidiarity and proportionality. In the light of these latter principles, it is more desirable to respect Member States’ decisions on how to implement gender equality on the boards of companies. It should be for individual Member States to opt for mandatory gender quotas or soft law measures within their corporate governance frameworks (Section VI below). The role of the EU in this regard should consist of supporting and supplementing the steps taken by Member States, including the identification of the most promising practices of individual countries and corporations and the actual and expected impact of these practices on the realization of the constitutional values underlying gender equality on the boards of companies.

To ground the present constitutional analysis in its social and economic context, this article begins by outlining the data reflecting the under-representation of women on the boards of companies in Member States and summarizes the main causes, and national remedies (Section II).

II. WOMEN ON THE BOARDS OF COMPANIES IN EU MEMBER STATES: A GENERAL OUTLINE

Corporate reality in the EU is pervaded by the lack of gender equilibrium on the boards of companies. The percentage of women on such boards is significantly lower than the corresponding proportion of men. Taking into account only the largest publicly listed companies, in April 2013, the average share of women on the top-level boards of these companies in the EU was only 16.6 per cent. Women are also barely visible among the top business leaders of these companies: only 4 per cent of company board presidents are women. This gender imbalance is striking in all EU Member States, with national averages ranging from approximately 3–9 per cent in Malta, Portugal, Greece, Cyprus, Estonia and Romania to approximately 26–29 per cent in Sweden, France, Latvia and Finland. In general, women are better represented in non-executive positions than in executive positions. While women currently account for 17.6 per cent of non-executive directors in the EU, in the case of the most senior executives, this share amounts to 11 per cent. In April 2013, more than three-quarters of companies (77 per cent) had at least one woman on the board, and nearly half (48 per cent) had more than one. However, this still means that nearly one in four (23 per cent) of the largest companies in the EU have no female representatives at the board level. France is the only EU country with more than one woman on the board of every company covered by the data considered. Finland and Sweden are the only other EU countries with

at least one woman on the boards of all major companies. The UK, the Netherlands, Denmark and Germany are not far behind, with 93–96 per cent. In contrast, more than half of the companies in Malta, Estonia, Bulgaria and Poland have no women on their boards.⁵ Because women account for 46 per cent of employees across the EU⁶ and approximately 56 per cent of people in tertiary education,⁷ it may be reasonably inferred from the data presented above that there is a significant gap between the proportion of employed and well-educated women and the proportion of women functioning at the board level in EU Member States.

This overwhelming outnumbering of women by men on boards of companies does not occur only in the EU. In many of the EU's major trading partners, the situation in this regard is even worse. In these countries, the proportion of women in boardrooms typically does not exceed 10 per cent, with the exception of Australia (10.9 per cent) and Canada (10.3 per cent). In the largest US companies of the Fortune 500, women account for 15.7 per cent of board membership (compared to 16.6 per cent in the EU). The greatest dominance of men in corporate boardrooms occurs in Japan, where women account for less than 1 in 100 board members (0.9 per cent) and have, in reality, no voice in the decision-making process.⁸

The reasons for this worldwide under-representation of women on the boards of companies (and in other senior positions) have been the subject of numerous scientific studies. In general, scholars usually conclude that there are individual, organizational, and societal reasons for this occurrence.⁹ As far as the individual reasons are concerned, it is sometimes argued that the under-representation of women in senior management and on corporate boards results from a shortage of women with the requisite qualifications and experience and that women generally lack certain psychological traits (such as ambition, confidence and leadership ability) that are necessary to attain senior positions. These individual-level explanations, however, are nothing more than gender stereotypes. Over the past decades, women have greatly increased their human capital and women are currently more likely to have formal managerial qualifications, to hold academic qualifications, and to be graduates

⁵ European Commission: Women and men in leadership positions in the European Union 2013. A review of the situation and recent progress is available at <http://ec.europa.eu/justice/gender-equality/files/gender_balance_decision_making/131011_women_men_leadership_en.pdf> 6–12.

⁶ Eurostat, Labour Force Survey, data from 2012.

⁷ Eurostat, Tertiary students (ISCED 5-6) by field of education and sex [educ_enr15], 2009.

⁸ See Progress Report of the European Commission, 'Women in Economic Decision-Making in the EU' (March 2012) 12, as well as other sources indicated therein.

⁹ C Fagan, MC González Menéndez and S Gómez Ansón (eds), 'Introduction' in *Women on Corporate Boards and in Top Management: European Trends and Policy* (Palgrave Macmillan 2012) 2 ff; S Terjesen, R Sealy and V Singh, 'Women Directors on Corporate Boards: A Review and Research Agenda' 17 *Corporate Governance: An International Review* (2009) 321 ff; S Terjesen and V Singh, 'Female Presence on Corporate Boards: A Multi-Country Study of Environmental Context' 83 *Journal of Business Ethics* (2008) 56 ff.

from prestigious universities.¹⁰ There is also no reliable evidence of fundamental differences in psychological traits between women and men that might ostensibly favour men in their corporate careers.¹¹

With respect to organizational reasons, it might be argued that relevant structures and processes in organizations clearly favour men. Although, ideally, work design, job promotion, the practices of recruiting and selecting workers, and other adaptive and regulative mechanisms in organizations should be objective and gender neutral, they are, in fact, male biased. They are structured to meet the traditional beliefs about what men and women should do and what specific roles both genders should play.¹² Being subject to such male-biased processes and acting in organizations that are not gender neutral, women are clearly not capable of dominating in the boardroom or in leadership positions in general.¹³ The men who have monopolized the senior positions in companies do what they can to make it more difficult for women to become board members. These male monopolists disdain the potential and ambition of women.¹⁴

Societal reasons refer to national institutional contexts and the wider environment in which women with the potential to enter the boards of companies must operate. The societal factors that put women in disadvantaged positions include: insufficient or disproportionately low representation of women in national parliaments and among senior officials and managers; the gender pay gap; the relatively small size of the service sector in a country (the smaller the service sector is, the smaller the chances are of finding women in high positions); and a lack of state programmes or policies that would give women more generous social benefits.¹⁵

Although the organizational and societal reasons referred to above, as well as certain individual reasons, have led to the major under-representation of women in the boardroom, this situation is by no means predetermined and unchangeable. The disproportionately low presence of women on the boards of companies can and should be remedied. To that end, political decision-makers,

¹⁰ González Menéndez, Fagan and Gómez Ansón *ibid* 3.

¹¹ S Pesonen, J Tienari and S Vanhala, 'The Boardroom Gender Paradox' 24 *Gender in Management: An International Journal* (2009) 327 ff; V Singh and S Vinnicombe, 'Why So Few Women Directors in Top UK Boardrooms? Evidence and Theoretical Explanations' 12 *Corporate Governance: An International Review* (2004) 479 ff.

¹² See S Halford and P Leonard, *Gender, Power, and Organisations* (Palgrave MacMillan 2001); J Wajcman, *Managing Like a Man: Women and Men in Corporate Management* (Pennsylvania State University Press 1998).

¹³ González Menéndez, Fagan and Gómez Ansón (n 9) 4.

¹⁴ R Sealy, E Doldor and S Vinnicombe, *Increasing Diversity on Public and Private Sector Boards: Part 1—How Diverse Are Boards and Why?*, International Centre for Women Leaders, Cranfield School of Management, (October 2009) 30 available at <<http://www.som.cranfield.ac.uk/som/media/images/research/wbl/geo1.pdf>>.

¹⁵ Terjesen and Singh (n 9) 56–8; F Engelstad and M Teigen (eds), 'Introduction: Gender and Varieties of Economic Power: The Significance of Family and State' in *Firms, Boards and Gender Quotas: Comparative Perspectives* (Emerald Group Publishing Limited 2012) xv; Terjesen, Sealy and Singh (n 9) 327–8.

social partners, industries, corporations, and other stakeholders have two basic types of measures at their disposal. First, they may agree to set mandatory quotas either legislatively or administratively. Second, they may undertake or promote voluntary initiatives or good practices.

Legislation containing quotas or obligatory targets for gender representation on company boards is currently in force in several EU Member States. France, Italy, and Belgium have enacted statutes that set obligatory target proportions for women's participation on the boards of individual companies and impose concrete sanctions on companies for non-compliance with these quotas or targets.¹⁶ The Netherlands and Spain have also passed relevant statutory laws instituting quotas, but these national rules are softer insofar as they are neither binding nor tied to concrete sanctions.¹⁷ The legislation in these five countries is very differentiated, not only with regard to the sanctions but also with regard to the size of the mandatory quotas and the scope of the companies covered.

Legislative measures setting quotas have also been in force (for many years) in Denmark,¹⁸ Finland¹⁹ and Greece,²⁰ but in these countries, the legislation covers only companies owned by the state or local authorities and excludes private companies. Quota requirements for public undertakings have also been established in Austria and Slovenia, but these quotas were not legislated directly in these States and were instead instituted by means of administrative regulations.²¹

Irrespective of whether a particular country adopts gender quotas, there are also voluntary initiatives that can be taken by stakeholders that may be very effective in increasing the representation of women on the boards of companies. In particular, state authorities or companies themselves can adopt voluntary corporate governance codes that encourage gender diversity on company boards. Individual companies can also sign charters that establish quantitative goals for the representation of women in boardrooms. The stakeholders concerned can develop specific recruiting, training, mentoring, and networking programmes aimed at promoting more women into the boardroom. Those interested in remedying the under-representation of women

¹⁶ In France, the relevant rules were introduced by Law 2011-103 of 27 January 2011 (published in Official Journal of 28 January 2011). In Italy, the rules in question were established by Act No 120 of 12 July 2011 (published in Official Journal No 174 of 28 July 2011). In Belgium, the relevant rules were set by the Act of 28 July 2011 (published in *Moniteur Belge/Belgisch Staatsblad* of 14 September 2011, 59600).

¹⁷ In the Netherlands, the discussed rules were adopted by means of a law amending the Civil Code (Law of 6 June 2011, published in the *Staatsblad* 2011, 275). In Spain, the relevant provisions are included in Organic Law 3/2007 of 22 March 2007 on effective equality between men and women.

¹⁸ Danish Gender Equality Act of 1990, Consolidation Act No 1095 of 19 September 2007.

¹⁹ Act 609/1986 on Equality between Women and Men.

²⁰ Gender Equality Act, Law 2839/2000 of 12 September 2000.

²¹ In Austria, the Council of Ministers issued an administrative decision in March 2011 (No GZ BKA- 140.200/0048-II/1/2011, 93/23). In Slovenia, the government adopted Regulation No 103/04 on Criteria for Respecting the Principle of Gender Balanced Representation.

can also create databases promoting female candidates or organize campaigns to increase the sensitivity of social partners and businesses towards gender balance in boardrooms.²²

These legislative, administrative and voluntary measures taken by individual Member States in recent years have proven to be effective.²³ Thus, they should continue in force, and, as argued below, they should not be replaced or accompanied by EU measures that set binding quotas.

III. THE ECONOMIC AND BUSINESS CASE FOR GENDER EQUALITY ON THE BOARDS OF COMPANIES: MYTH OR REALITY?

In a considerable body of literature, the positive economic effects of gender balance on the boards of companies are consistently proposed as offering the strongest arguments for promoting the participation of women in boardrooms. Arguments related to three main economic advantages are typically advanced by scholars and practitioners in support of the increased presence of women on company boards.

The first claim that is typically made is that gender balance on the boards of companies means that human resources in the economy are more efficiently used, and economic productivity is thus enhanced. If individual corporations wish to gain access to a greater and more diverse pool of talents and intellect, they have a simple method at their disposal to achieve this aim: they should increase the number of women on boards and occupying other senior or managerial positions. This will allow these companies to build stronger business strategies and improved frameworks for managing their policies.²⁴ Increased representation of women on corporate boards leads to greater economic efficiency and productivity, not only at the micro level but also in the entire economy. The higher the level of female representation in the boardroom, the better the exploitation of this skilled human capital at the level of the entire economy. This situation is believed to trigger a higher GDP growth rate in a given country.²⁵ Therefore, an inseparable connection has been observed between gender equality and economic growth.²⁶

²² For an extensive overview of all of the voluntary initiatives in individual Member States, see Progress Report of the European Commission, 'Women in Economic Decision-Making in the EU' (March 2012) 13–14, 21–2.

²³ For statistics showing their recent effects, see *ibid* 11, as well as 'Women and Men in Leadership Positions in the European Union 2013: A review of the Situation and Recent Progress' (by EU Commission) 6–12.

²⁴ L. Joy, 'Women Board Directors in the United States: An Eleven Year Retrospective' in S Vinnicombe, V Singh, RJ Burke and D Bilimoria (eds), *Women on Corporate Boards of Directors: International Research and Practice* (Edward Elgar Publishing 2008) 22.

²⁵ D Rosenblum, 'Feminizing Capital: A Corporate Imperative' (2009) 6 *Berkeley Business Law Journal* 92.

²⁶ For example, as Norway's Minister of Children and Equality has stated, legislation mandating gender equality on the boards of companies leads to 'the creation of economic prosperity and wealth in society': *Experiences from Norway Concerning Representation of Women in Company*

The second argument is that gender equality on boards improves the quality of corporate governance and has a positive impact on decision-making processes within individual companies. It is argued that gender-balanced board members have a positive impact on corporate governance because they represent broad and differentiated experiences, ideas and opinions that may be useful in corporate discussions.²⁷ More diverse teams consider a greater range of perspectives and therefore reach better decisions, which ultimately lead to higher business value and better business performance.²⁸ In addition, if it is true that women on boards can help to ensure a better exchange of information between the board and the company's stakeholders and can strengthen the board's independence, then the corollary of these occurrences would be the increased accountability of the board.²⁹ It has also been claimed that boards with more women are more likely to demonstrate stronger oversight of company and management conduct than boards with no women and that such boards pay more attention to audits and to controlling risks.³⁰

The third economic advantage that is expected as a consequence of gender-balanced company boards is better financial performance and increased profits of a company. Some studies have demonstrated that various indicators reflecting the financial performance of a company—such as stock price, average operating profits, returns in sales, returns on invested capital and returns on equity—are higher in the case of companies with the most gender-diverse boards.³¹

This type of economic reasoning constitutes the most important and extensive line of argumentation for the EU Commission in justifying the draft

Boards, 7 October 2006, available at <http://www.regjeringen.no/nb/dep/bld/aktuelt/taler_artikler/ministeren/barne_og_likestillingsminister_bekkemell/2006/experiences-from-norway-concerning-repre.html?id=437481>.

²⁷ N Fondas and S Sallalos, 'A Different Voice in the Boardroom: How the Presence of Women Directors Affects Board Influence over Management' (2000) 12 *Global Focus* 13 ff; H Kang, M Cheng and SJ Gray, 'Corporate Governance and Board Composition: Diversity and Independence of Australian Boards' (2007) 15 *Corporate Governance* 194 ff.

²⁸ M Lücknerath-Rovers, 'Women on Board and Firm Performance' (April 2010) 6, available at <<http://ssrn.com/abstract=1586832>>; Z Burgess and P Tharenou, 'Women Board Directors: Characteristics of the Few' (2002) 37 *Journal of Business Ethics* 39 ff; V Singh and S Vinnicombe, 'Why So Few Women Directors in Top UK Boardrooms? Evidence and Theoretical Explanations' (2004) 12 *Corporate Governance* 479 ff; DA Carter, BJ Simkins and WG Simpson, 'Corporate Governance, Board Diversity and Firm Value' (2003) 38 *The Financial Review* 44 ff.

²⁹ Terjesen, Sealy and Singh (n 9) 329.

³⁰ Joy (n 24) 22; 'Diversity and Gender Balance in Britain plc': a study by TCAM in conjunction with *The Observer* and as part of the Good Companies Guide, London, UK: TCAM, 2009.

³¹ See eg N Smith, V Smith and M Verner, 'Do Women in Top Management Affect Firm Performance? A Panel Study of 2,500 Danish Firms' (2006) 55 *International Journal of Productivity and Performance Management* 569 ff; 'Women Matter', McKinsey (2007, 2008, 2010); 'The Bottom Line: Connecting Corporate Performance and Gender Diversity', Catalyst (2007); 'Female Leadership and Firm Profitability', Finnish Business and Policy Forum (EVA), 2007; 'Groundbreakers, Using the Strength of Women to Rebuild the World Economy', Ernst & Young and Deutsche Bank Research (2010) <www.dbresearch.com>; 'Women on Boards' Lord Davies of Abersoch Report UK (2011).

Directive and its target of more gender-balanced boards of companies. In an explanatory memorandum to the draft Directive and in its preamble, the Commission notes the three economic advantages that were discussed above: more efficient use and mobilization of available human resources in the economy (which, in turn, increases the potential for economic growth, is a key element in addressing the EU's demographic challenges, and will allow the EU to compete more successfully in a globalized economy); improved corporate governance, enhanced team performance, and a higher quality of decision making; and better financial performance and profitability for the company.³²

These economic arguments, however, are neither particularly convincing nor reliable. With respect to arguments based on fully utilizing the available human resources in the economy by not wasting the pool of highly trained and qualified women, it is noteworthy that an actual loss for the economy at both the micro and macro levels would occur only if the women who were systematically not appointed to the boards of companies were indeed better qualified—with greater skills and abilities—than the male executives who were appointed. To show that human capital is currently not used efficiently on company boards, it must be demonstrated that the men appointed to the boards are not as well-educated, experienced or talented as the women candidates that were passed over. Such evidence is lacking, however, and it is doubtful whether it could ever be obtained. In particular, it is not credible to assert that companies and their shareholders (including women) consciously reject better women candidates and act intentionally against their own economic interests.

It is true that, in general, women in today's world are not inferior to men with respect to their levels of education, formal qualifications, skills or psychological traits and they often surpass men in these areas. However, the differences between persons who are better-educated, more talented, and have greater skills and better experience, on the one hand, and those who are not as well educated, less talented, and have inferior skills and less experience, on the other hand, do not run along gender divisions; instead, they run across these divisions. It is, therefore, a great oversimplification to claim that the selection of more women candidates to the boards of companies will, in itself, guarantee the appointment of more talented, better-educated, and more skilled persons to these positions, just as it would be unfounded to claim that the appointment of only male candidates would ensure better-trained and more qualified human capital in boardrooms. For human capital to be used efficiently on the boards of companies (and, consequently, to be used efficiently in the interests of the entire economy), it is thus necessary to appoint to these boards the best possible candidates, meeting all of the relevant (formal and substantive) criteria to the greatest extent, without regard to the sex of these candidates. Accordingly, promoting women candidates will not guarantee the optimal utilization of all human resources; promoting the most appropriate candidates,

³² Explanatory memorandum, 3; points 7–8 in the preamble to the draft Directive.

regardless of their gender, is the correct strategy to achieve that purpose. When attempting to achieve the most efficient use of human capital on the boards of companies, the selection criteria applied should be based purely on merit and thus should be gender neutral as opposed to gender biased.³³

The argument that increased participation of women in boardrooms results in significant improvements in corporate governance and in the decision-making processes of boards is likewise not convincing. Although it is true that more diverse boards are better able to consider a greater range of perspectives and opinions than more homogenous boards, this diversity may result in more conflicts, unnecessarily prolonged discussions and delayed decisions.³⁴ It is very difficult to effectively coordinate top management teams that are very heterogeneous; this triggers some additional costs.³⁵

Furthermore, in many instances, it is unfounded or even naive to claim that increased representation of women on the boards of companies will, by itself, result in a greater diversity of experiences and ideas and more debates on boards.³⁶ Contrary to such expectations, a narrow 'group think' may persist. It is by no means certain that the thinking of new women board members will be entirely different from that of the current male members. This would be the case only if the individual companies and the current male board members, faced with the legal obligation to appoint new women members, selected these new members not from among their own business and personal contacts but from a large pool of anonymous candidates or applicants. By continuing to recruit board members through an 'old boys' network' from among the business and personal contacts of the current board members, companies and

³³ Notably, the draft Directive does not give women candidates for boards unconditional priority over male candidates, even before the 40 per cent quota is achieved. According to the draft Directive, such a priority should be given only if the woman candidate (ie the candidate of the under-represented sex) is equally qualified as a male candidate (ie the candidate of the other sex) in terms of suitability, competence and professional performance (see art 4(3) of the draft Directive). This means that even the EU Commission is far from the conclusion that selecting women candidates will guarantee the selection of the most appropriate candidates. The provision of the draft Directive excluding the unconditional priority of women candidates (even before the 40 per cent quota is achieved) is obviously welcomed, but it challenges the Commission's own claims that admitting more women to corporate boards will ensure the efficient use of all human resources (see explanatory memorandum, 3; point 7 in the preamble to the draft Directive). The greater participation of women in the boards of companies is required for various reasons, but not because it will, in itself, guarantee the optimal (or at least better than current) use of human resources in the economy. If the women remaining outside of the boards are equally, but not better, qualified than the current male members of the boards (and it would be unfounded to claim that women remaining outside are indeed generally better qualified), then one may deem such a situation unfair, but the use of human resources is not suboptimal.

³⁴ Lückcrath-Rovers (n 28) 6; C Rose, 'Does Female Board Representation Influence Firm Performance? The Danish Evidence' (2007) 15 *Corporate Governance* 404 ff.

³⁵ S Dwyer, OC Richard and K Chadwick, 'Gender Diversity in Management and Firm Performance: The Influence of Growth Orientation and Organizational Culture' (2003) 56 *Journal of Business Research* 1009 ff; Lückcrath-Rovers (n 28) 6.

³⁶ As the Commission argues, see explanatory memorandum, 4; point 8 in the preamble to the draft Directive.

other interested stakeholders will not ensure the desired diversity of the board, even if they appointed women.³⁷ To diversify the thinking of the board members, one must apply merit-based selection, not selection based purely on gender criteria. Moreover, a higher percentage of female representation on the boards of companies does not necessarily increase the overall number of women who are board members because the same women might sit on several boards.³⁸ A limited number of women sitting simultaneously on many corporate boards nationwide does not contribute decisively to the greater diversity of boards in terms of new opinions and ideas, as the Commission and other adherents of this argument envision.

Finally, the argument must be challenged that greater representation of women on boards necessarily leads to better financial performance and profitability for more gender-balanced companies. Even if there is empirical research showing the better financial performance of companies with the most gender-balanced boards, these studies often suffer from serious methodological flaws. First, instead of assessing the financial performance of the aforementioned companies in a comprehensive way, these studies usually consider a single or a few selected financial parameters of companies. There is no guarantee that this single or selected few parameters are higher because of the presence of more women on boards. The parameters in question might be higher due to some specific industry-related reasons.³⁹ Second, in most instances, the above mentioned empirical studies do not reveal and do not explain the criteria for the selection of the companies whose financial performance was evaluated. If these criteria are purely subjective and discretionary, this significantly weakens the reliability of these studies.⁴⁰

³⁷ The Commission suggests that the fact that the board members are often recruited through an ‘old boys’ network’ from among business and personal contacts of the current board members leads to the persistent under-representation of women on boards (explanatory memorandum, 4). It must be noted, however, that the aforementioned networks and contacts may encompass women as well. As a result, male board members and other stakeholders faced with the legal obligation to comply with a gender quota might select women candidates who they know very well (through an ‘old boys’ network’) and who represent similar thinking and business attitudes as the current board members. This will not lead to the desired growth of board diversity, apart from simple sex diversity.

³⁸ Statistics from Norway—the country in which the obligatory 40 per cent gender quota in boards of companies was introduced in 2003—show that many of the most qualified women, known as the ‘Golden Skirts’, now sit on several boards. There is an example of one Norwegian executive who now sits on 179 boards and chairs three Norwegian companies and one Danish company. Even if this example is extreme, it must be admitted that the Norwegian legislation has led to a much smaller than predicted increase in the overall number of women on corporate boards nationwide: A Sweigart, ‘Women on Board for Change: The Norway Model of Boardroom Quotas As a Tool for Progress in the United States and Canada’ (2012) 32 *Northwestern Journal of International Law & Business* 83A.

³⁹ D Rosenblum (n 25) 92.
⁴⁰ On the methodological weaknesses and flaws of all the empirical studies discussed here, see eg R Adams, S Gray and J Nowland, ‘Does Gender Matter in the Boardroom? Evidence from the Market Reaction to Mandatory New Director Announcements’ (November 2011) 8 ff, available at <<http://ssrn.com/abstract=1953152>>; Lückerrath-Rovers (n 28) 11 ff; H Dale-Olsen, P Schöne and

Apart from their methodological weaknesses, these studies openly state that even research that demonstrates the better financial performance of companies with the most gender-balanced boards does not demonstrate a causal relationship but only a correlation.⁴¹ In other words, the better financial performance of companies with gender-balanced boards may be due to many different factors (eg the application of transparent and objective recruitment practices, promoting the best possible candidates) and the increased participation of women on such boards may not necessarily be one of these factors.⁴²

Several studies show a strong positive correlation between the participation of women on the boards of companies and the stock price of the companies, but it is possible that companies with more women in the boardrooms were perceived by markets and shareholders as being innovative and original because these studies were conducted in countries with no obligatory (legal) gender quota. If companies are under a legal duty to appoint women directors, it is not clear that shareholders will continue to view female appointments positively.⁴³ In Norway, the effects of the gender quota law on the profits of companies are still very ambiguous.⁴⁴

From the foregoing, it follows that most, if not all, economic arguments advanced in support of the increased presence of women on the boards of companies have not been sufficiently proven and are relatively easy to challenge. At this stage, they do not seem to contain properly documented facts and do not sufficiently justify the EU actions aimed at promoting the representation of women in boardrooms. For these actions to be properly legitimized, another justification in EU constitutional law must be found.

IV. THE EU FUNDAMENTAL RIGHT OF EQUALITY BETWEEN WOMEN AND MEN

The proper justification for EU actions promoting gender equality on the boards of companies should involve the EU's fundamental right of equality between women and men that is guaranteed by Article 23 of the Charter. According to this provision, 'Equality between women and men must be ensured in all areas, including employment, work and pay. The principle of

M Verner, 'Women on Boards of Directors and Firm Performance: Evidence from Denmark and Norway' in Engelstad and Teigen (n 15) 211 ff.

⁴¹ See eg 'The Bottom Line: Corporate Performance and Women's Representation on Boards' (Catalyst 2007) fn 2, available at <<http://www.catalyst.org/knowledge/bottom-line-corporate-performance-and-womens-representation-boards>>.

⁴² Lückerrath-Rovers (n 28) 18; HA Krishnan and D Park, 'A Few Good Women—on Top Management Teams' (2005) 58 *Journal of Business Research* 1712 ff.

⁴³ Adams, Gray and Nowland (n 40) 7.

⁴⁴ Many commentators argue that these effects are in fact negative, such as KR Ahern and AK Dittmar, 'The Changing of the Boards: The Impact on Firm Valuation of Mandated Female Board Representation' (2012) 127 *Quarterly Journal of Economics* 137 ff; DA Matsa and AR Miller, 'A Female Style in Corporate Leadership? Evidence from Quotas' *American Economic Journal: Applied Economics*, forthcoming, available at <<http://ssrn.com/abstract=1636047>>.

equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex'. It follows that within the legal structure of the fundamental right in question, one may identify two main dimensions: a negative dimension that prohibits any discrimination between women and men and a positive dimension which legitimizes affirmative action specifically supporting persons who represent the under-represented sex.⁴⁵ Such positive or affirmative action by the EU and Member States (when implementing EU law) are accepted by the Court of Justice, which holds that provided some prerequisites are met, priority may, in certain cases, be given to the under-represented sex when selecting for employment or promotion.⁴⁶ Accordingly, priority can also be given to the under-represented gender, provided that the aforementioned prerequisites are met, when selecting the members of company boards.

Although the Commission briefly mentions the fundamental right of equality between women and men and its legitimizing role in justifying new legislative proposals in its explanatory memorandum and in the preamble to the draft Directive,⁴⁷ the Commission's references to this fundamental right are modest compared to its extensive economic justification introducing the gender quota. The Commission justifies the quota on economic grounds and argues that it should be adopted because of (ostensibly) positive business consequences. By contrast, it is the fundamental right of equality between women and men, particularly in its positive (affirmative) dimension that is fully capable of justifying EU action to promote gender balance on the boards of EU companies. As a result, the aims of this legislation should not be grounded in economics but in the fundamental right of equality between women and men. This right should play the primary role in legitimizing EU actions in support of increasing women's presence on the boards of companies. While the economic aims of this legislation are questionable and should not, in any event, be compulsorily foisted on individual companies, equality between women and

⁴⁵ In this regard, 'affirmative action' can be defined as 'a generic term for programs which take some kind of initiative, either voluntarily or under the compulsion of law, to increase, maintain or rearrange the number or status of certain group members usually defined by race or gender, within a larger group': RA Johnson, 'Affirmative Action Policy in the United States: Its Impact on Women' 18 *Policy & Politics* (1990) 77; SE De Lange, 'Toward Gender Equality: Affirmative Action, Comparable Worth, and the Women's Movement' (2007) 31 *New York University Review of Law & Social Change* 315.

⁴⁶ These prerequisites are as follows: 1) the candidate of the under-represented sex is equally qualified as the competitor of the other sex in terms of suitability, competence and professional performance; 2) the priority is not automatic and unconditional but may be overridden if reasons specific to an individual candidate of the other sex tilt the balance in that candidate's favour; and 3) the application of each candidate is subject to an objective assessment that takes into account all criteria specific to the individual candidates; see cases C-450/93, *Eckhard Kalanke v Freie Hansestadt Bremen*, [1995] ECR I-3051, paras 16–24; C-409/95, *Hellmut Marschall v Land Nordrhein-Westfalen*, [1997] ECR I-6363, paras 23–35; C-158/97, *Georg Badeck and Others*, [2000] ECR I-1875, paras 17–23; C-407/98, *Katarina Abrahamsson and Leif Anderson v Elisabet Fogelqvist*, [2000] ECR I-5539, paras 43–62.

⁴⁷ Explanatory memorandum, 6; points 1–2 and 36 in the preamble to the draft Directive.

men has incomparably higher rank. This higher status can be identified on both formal and substantive planes. From a purely formal point of view, equality between women and men, as a fundamental right, is one of the most important values of the EU (Article 2 TEU) and is a general principle of EU law (Article 6(3) TEU). From a substantive standpoint, equality between women and men constitutes a principal and moral value. This is a value in itself and is inherently linked to human dignity. To be treated equally and to have equal opportunities to participate in all fields of social and economic life is a basic need of all women and men. As human beings, women and men simply deserve to be placed on equal footing, not least because it underlines the immanent value of all women and men.

Given the significance of the equality between women and men in the EU legal order on both formal and substantive planes, this value should justify the EU's actions aimed at eliminating the under-representation of women on the boards of companies. The fundamental character of this value makes it less important or even unnecessary to justify doing so on economic or financial grounds. Irrespective of whether the increased presence of women on the boards of companies produces economic advantages, this should be supported by public authorities in light of the central and elementary role of equality between women and men for the EU and Member States.⁴⁸ By underscoring the economic benefits linked to the increased representation of women on the boards of companies, it seems that women are instrumentalized in the economy. Women thus become simple factors of production that are used to achieve economic goals.

It may be that the expected economic benefits of women's increased participation on the boards of companies in the future will not materialize (and, in fact, it is doubtful that they will materialize at all). Would this indicate that gender equality on the boards of companies is unnecessary and unfounded and should be abolished? The answer to this question must be negative because there are many more fundamental reasons justifying this postulated gender equality than purely economic grounds, as argued above.

It should be noted that although EU and Member States' actions supporting or ensuring gender equality on the boards of companies effectuate the fundamental right of equality between women and men, these actions inevitably encroach upon the private autonomy of companies. One fundamental right (ie equality) is thus put into effect at the expense of other fundamental rights (eg freedom to conduct a business, right to property).

⁴⁸ It is correctly argued that Member States, which are bound by the equality rights embodied in their national constitutions, could transfer some powers to the EU only on the condition that the latter would exercise the conferred powers in accordance with these equality rights. In this way, the equality rights guaranteed in the EU legal order play an important role in legitimizing all actions of the EU in the eyes of EU citizens (supranational legitimacy); see T Kingreen, *Gleichheitsgrundrechte und soziale Rechte* in D Ehlers (ed), *Europäische Grundrechte und Grundfreiheiten* (De Gruyter Recht 2005) 479.

Accordingly, by effectuating the fundamental right of equality, which is traditionally perceived as a public task, the EU and Member States transfer this public task, including the accompanying costs, to companies and to the private sphere, particularly if the EU decides to impose on companies a mandatory gender quota. Against such a background, one must agree with the conclusion that obligatory gender quotas blur the public/private distinction and modify the relationship between the public and private sectors.⁴⁹

For the contemporary constitutional legal orders, it is not uncommon for private parties (eg private companies) to be bound by the public task that consists of materializing the fundamental equality rights of other private parties (eg women and men).⁵⁰ However, this public task must be imposed on private parties in a proportionate manner. The requirement for proportionality is present within the EU legal order as well (see Article 5(1) and (4) TUE) and must be strictly observed when the EU restricts the private autonomy of individual companies by imposing an obligatory gender quota on them. By contrast, there are many convincing reasons to believe that the extension of law onto individual companies, as provided in the draft Directive, is not proportional with regard to the aim of equality between women and men embodied in the Charter (see Section VI below).

V. THE CONCEPT OF SOCIAL MARKET ECONOMY AND DEMOCRACY IN THE EU

Other fundamental values capable of justifying gender equality on the boards of EU companies are the concept of social market economy (Article 3(3) TEU) and the principle of democracy (Article 2 TEU). The former concept is strongly influenced by ideas of social democracy, implying democratic governance in the economic field. State communities and societies organized in accordance

⁴⁹ On revisiting the public/private dichotomy that is the unavoidable corollary of imposing obligatory gender quotas on companies, see D Rosenblum (n 25) 68 ff.

⁵⁰ With regard to the legal concepts elaborated in the jurisprudence and doctrine of some Member States that explain how fundamental rights bind the actions of private parties, see R Buxton, 'The Human Rights Act and Private Law' 116 LQR (2000) 48 ff; HWR Wade, 'Horizons of Horizontality' (2000) 116 LQR 217 ff; J Morgan, 'Privacy, Confidence and Horizontal Effect: "Hello" Trouble' (2003) 62 CLJ 444 ff; A Lester and D Pannick, 'The Impact of the Human Rights Act on Private Law: The Knight's Move' (2000) 116 LQR 380 ff; I Leigh, 'Horizontal Rights, the Human Rights Act and Privacy: Lessons from the Commonwealth?' (1999) 48 ICLQ 57 ff (Great Britain); R Alexy, *Theorie der Grundrechte* (Nomos 1994) 475 ff; C-W Canaris, *Grundrechte und Privatrecht* (Walter de Gruyter 1999); S Oeter, 'Drittwirkung der Grundrechte und die Autonomie des Privatrechts' (1994) 119 Archiv des öffentlichen Rechts 529 ff; CD Classen, 'Drittwirkung der Grundrechte in der Rechtsprechung des Bundesverfassungsgerichts' (1997) 122 Archiv des öffentlichen Rechts 65 ff (Germany); J Boesjes, 'De horizontale werking van grondrechten' (1973) 48 Nederlandse Juristenblad 905 ff; AK Koekkoek, 'De betekenis van grondrechten voor het privaatrecht' (1985) 116 Weekblad voor privaatrecht, notariaat en registratie 385 ff; LFM Verhey, *Horizontale werking van grondrechten, in het bijzonder van het recht op privacy* (Zwolle 1992) *passim* (Netherlands); for an extensive overview of many different jurisdictions and various fields of private law see the contributions in D Friedmann and D Barak-Erez (eds), *Human Rights in Private Law* (Hart Publishing 2002).

with this concept are authorized to determine the legal rules that bind them through participation in legislative and regulatory processes. Self-interested undertakings, trade unions, non-governmental organizations, and other representatives of society have the legal competence to affect state policies.⁵¹ Such participatory democratic governance is also present in the EU. Various social and economic policies of the EU are formulated and pursued using the Open Method of Coordination (OMC).⁵² This method requires that social and economic governance should involve many types of social and economic stakeholders, including national administrations, social partner organizations representing business and labour, and other non-state and subnational actors with relevant interests and expertise. The corollary of this broad participation of social and economic stakeholders in the determination of public policies is the democratic legitimacy of OMC processes and increased accountability of public officials.⁵³ Due to the involvement of many private actors, this method of economic governance can be referred to as a model of industrial democracy. It makes the resulting regulation much more democratically legitimized than distant state or EU rule would be.⁵⁴

The EU model of industrial democracy did not emerge in a vacuum. It drew upon concepts of social market economy taken from the national constitutions of many Member States.⁵⁵ The latter concepts require the inclusion of social partners, such as corporations, in the process of formulating public policies, including employment and social protection policies.⁵⁶ In addition, certain

⁵¹ An important aspect of the concept of social market economy is that of social democracy, which advocates participatory democracy, civil society, and other non-hierarchical forms of cooperation in the field of economy there: T Meyer and L Hinchman, *The Theory of Social Democracy* (Polity Press 2007) 45.

⁵² On OMC in the EU in general, see C De la Porte and P Pochet (eds), *Building Social Europe through the Open Method of Coordination* (Peter Lang 2002); D Hodson and I Maher, 'The Open Method As a New Mode of Governance: The Case of Soft Economic Policy Coordination' (2001) 39 *Journal of Common Market Studies* 719 ff; J Zeitlin and P Pochet (eds), *The Open Method of Coordination in Action: The European Employment and Social Inclusion Strategies* (Peter Lang 2005); R Dehousse (ed), *L'Europe sans Bruxelles? Une analyse de la Methode Ouverte de Coordination* (L'Harmattan 2004); E Szyzszak, 'Experimental Governance: The Open Method of Coordination' (2006) 12 *European Law Journal* 486 ff; G de Búrca, 'The Constitutional Challenge of New Governance in the EU' (2003) 28 *European Law Review* 814 ff; J Zeitlin, 'Towards a Stronger OMC in a More Social Europe 2020: A New Governance Architecture for EU Policy Coordination' in E Marlier and D Natali (eds), *Europe 2020: Towards a More Social EU?* (Peter Lang 2010) 253 ff; V Hatzopoulos, 'Why the Open Method of Coordination Is Bad For You: A Letter to the EU' (2007) 13 *ELJ* 309 ff.

⁵³ J Zeitlin, 'Social Europe and Experimentalist Governance: Towards a New Constitutional Compromise?' in G de Búrca (ed), *EU Law and the Welfare State: In Search of Solidarity* (OUP 2005) 224.

⁵⁴ D Schiek, *Economic and Social Integration: The Challenge for EU Constitutional Law* (Edward Elgar Publishing 2012) 234–5.

⁵⁵ See eg arts 1 and 2 of Italian Constitution; art 1 of French Constitution; art 20(1) of German Constitution; art 1(1) of Spanish Constitution; arts 1 and 2 of Portuguese Constitution; art 2 of Swedish Constitution; arts 2 and 20 of Polish Constitution.

⁵⁶ See eg B Casey and M Gold, *Social Partnership and Economic Performance: The Case of Europe* (Edward Elgar Publishing 2000) 9 ff

public tasks or state powers are delegated to undertakings, associations of undertakings, and organizations of economic self-government.⁵⁷ Accordingly, instead of being a product of sole government control, social and economic governance has been transformed into the interaction of organizations, networks and associations, with the broad participation of both public and private actors.⁵⁸

It is argued that the EU and national industrial democracy and democratic governance discussed here (in economic and social matters) can be legitimate on the condition only that it is based on gender parity. In other words, gender parity is necessary to properly legitimize the industrial democracy as well as economic and social governance. There is a convincing argument that true democracy should be gender-parity based because gender parity is a 'structural prerequisite of the democratic state'.⁵⁹ Because humanity is itself gendered, its representative bodies must likewise reflect those of different genders; if the political and economic system is to have democratic legitimacy.⁶⁰ In gender parity democracy—that is, in true democracy—in addition to the right to vote and the chance to run for political office, women must participate in the public institutions of the state, and this participation must be substantial and visible.⁶¹

In this regard, the arguments raised during the public debates in some states that preceded the introduction of gender quotas to elected offices play an instructive role.⁶² It has been argued in these debates that such a gender quota will give the state more legitimacy and will make the state democracy more representative. The ultimate beneficiary of this gender parity is not women but the (democratic) state itself. Only a legislative body reflecting the gendered composition of society can claim to be democratically legitimate.⁶³ From a constitutional point of view, gender parity in elected offices is relevant not

⁵⁷ See eg R Stober, *Allgemeines Wirtschaftsverwaltungsrecht: Grundlagen des Wirtschaftsverfassungs- und Wirtschaftsverwaltungsrechts, des Weltwirtschafts- und Binnenmarktrechts* (W Kohlhammer Verlag 2004) 355 ff; W Frotscher, *Wirtschaftsverfassungs- und Wirtschaftsverwaltungsrecht* (CH Beck 2004) 283 ff.

⁵⁸ H Schepel, *The Constitution of Private Governance: Product Standards in the Regulation of Integrating Markets* (Hart Publishing 2005) 19–20.

⁵⁹ B Rodríguez Ruiz and R Rubio-Marín, 'The Gender of Representation: On Democracy, Equality, and Parity' (2008) 6 *International Journal of Constitutional Law* 289.

⁶⁰ Rodríguez Ruiz and Rubio-Marín (n 59) 302.

⁶¹ JC Suk, 'Gender Parity and State Legitimacy: From Public Office to Corporate Boards' (2012) 10 *International Journal of Constitutional Law* 456.

⁶² For an overview of such electoral gender quotas in Europe, see the study titled 'Electoral Gender Quota Systems and their implementation in Europe', elaborated by D Dahlerup and L Freidenvall (with the assistance of E Johansson, E Stolt, K Bivald and L Persson-Weiss) for the request of the European Parliament's Committee on Gender Equality, 2011, available at <<http://www.europarl.europa.eu/committees/fr/studiesdownload.html?languageDocument=EN&file=60648>>.

⁶³ See *Assemblée Nationale Rapport fait au nom de la commission des lois constitutionnelles, de la législation et de l'administration générale de la république sur le projet de loi constitutionnelle relative à l'égalité entre les femmes et les hommes*, No 1377 (10 February 1999) 11–12; Suk (n 61) 455.

because it gives women the chance for success in politics but because it guarantees women's participation in law-making in state institutions that otherwise could not be regarded as democratically legitimate.⁶⁴

As a result, gender parity is needed to legitimize governance, especially if this governance is to be regarded as democratic. EU governance in the field of economy and social policies should also be democratically legitimized in this sense. Because the EU mode of governance is characterized by the broad participation of self-interested private companies and corporations (because this is mandated by the concept of the social market economy and the principle of democracy), the institutions that form part of this governance system must themselves be configured appropriately. Otherwise, the EU's economic governance will not be properly and democratically legitimized.

It is argued that the EU should strive not only for the democratic legitimization of its own governance but also for that of Member States. This is because the need for democratic legitimization of all forms of governance in Member States, including the legitimization of governance through gender parity, can be reasonably regarded as forming an integral part of the national identities of Member States that is inherent in their fundamental constitutional structures. This can be explained by the fact that many Member States and their citizens agree that there is an inherent and necessary connection between gender parity, democracy and States' legitimacy.⁶⁵ Because this connection belongs to the national identities of Member States, the EU, which has a duty to respect these identities (see Article 4(2) TEU),⁶⁶ must support Member States in promoting gender equality in companies that participate in economic governance at the national level. It will also strengthen the EU's legitimacy.

Gender parity, which is necessary to legitimize economic and social governance, must be implemented not only in state institutions but also in companies and other private sector organizations that participate, together with public authorities, in modern economic governance at the EU and national levels. The latter companies and other organizations, like public authorities, must be organized and act in an accountable and legitimate manner.⁶⁷ If we consider the role that the companies play in the EU and national governance (in economic and social matters), it is understandable that achieving gender

⁶⁴ Suk (n 61) 455.

⁶⁵ This has been proven by empirical research; see B Gilley, 'The Determinants of State Legitimacy: Results for 72 Countries' (2006) 27 *International Political Science Review* 48, 53–7. The author provides the empirical data showing how great of an influence the materialization of gender equality in a state has on that state's legitimacy in the eyes of its citizens.

⁶⁶ On these national identities within the meaning of art 4(2) TEU, see eg A von Bogdandy and S Schill, 'Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty' (2011) 48 *CMLR* 1417 ff; D Chalmers, G Davies and G Monti, *European Union Law: Cases and Materials* (CUP 2010) 219 ff; LFM Besselink, 'National and Constitutional Identity before and after Lisbon' (2010) 6 *Utrecht Law Review* 36 ff.

⁶⁷ Suk (n 61) 460.

equality on the boards of these companies ‘is a question of democracy’.⁶⁸ Adequate representation of women on the boards of companies, by increasing the democratic legitimacy of the governance in which these companies take part, enhances the democratic legitimacy of the EU and of the Member States.

VI. EU LEGAL ACTIONS PROMOTING GENDER EQUALITY ON THE BOARDS OF COMPANIES

A. Obligatory Gender Quota for the Boards of Companies

The very fact that gender equality on the boards of EU companies finds its axiological justification in the fundamental right of equality between women and men, in the concept of social market economy, and in the principle of democracy does not mean that the EU institutions are permitted to use any means for the practical implementation of gender parity. On the contrary, the EU institutions must act in accordance with the principles of proportionality and subsidiarity and on legitimate legal grounds (see Article 5 TEU). It is argued below that the latter constitutional requirements contradict the introduction of gender quotas for the boards of EU companies in the form provided in the draft Directive (section VIA). There are many other types of actions at the EU institutions’ disposal that are constitutionally admissible and can effectively contribute to the enhancement of gender equality on the boards of EU companies (section VIB).

In this regard, it should be noted that gender quotas in the form envisioned in the draft Directive are clearly disproportionate with respect to the aims presented above: the fundamental right of equality between women and men, the need for the democratic legitimization of the EU’s and Member States’ governance in the field of economy, and the economic aims (which are so strongly advanced by the Commission).

As a means designed to effectuate the fundamental right of equality between women and men, the compulsory gender quota fails to respect the principle of proportionality because it is not necessary to oblige companies to undertake affirmative action policies when selecting candidates for their boards to ensure the practical implementation of the right to equality. It suffices to require the companies concerned to select board candidates in accordance with the simple prohibition of discrimination on the basis of sex. This would mean that companies in the EU would be bound by the EU’s fundamental right of equality between women and men—through the mediation of an act of secondary law—in its negative dimension only.⁶⁹ In the current practice of

⁶⁸ See KE Øie (Norwegian State Secretary in Ministry for Children and Equality), ‘Gender Equality: A Key Component of a Modern Growth Strategy’ (27 April 2007) available at <http://www.regjeringen.no/nb/dep/bld/aktuelt/taler_artikler/politisk_ledelse/tidligere_statssekretaer_oeie/2007/gender-equality-a-key-component-of-a-mod.html?id=465563>.

⁶⁹ This argument is similar to the concept that is sometimes advocated in the case of the fundamental freedoms of an EU internal market. Namely, it is argued that the EU’s fundamental internal market freedoms should bind private parties only insofar as they include prohibitions on

selecting candidates to boards, EU companies often do not respect the fundamental right of equality between women and men in its negative dimension because they apply selection criteria that, at least indirectly, favour men.⁷⁰ If such companies were under the express duty not to discriminate against any candidate for the board on the basis of sex and if they were required to apply objective and fully gender-neutral criteria in that selection process, equal treatment for women and men candidates would be guaranteed to a sufficient degree without unduly restricting the individual freedom of the companies concerned.

However, even the gender quota, which is the manifestation of a positive action, can be potentially shaped in a way that is compatible with the principle of proportionality. This would be the case if a gender quota was of a recommendatory or other form of non-binding character. This would mean that individual companies would be under a duty to attain the stipulated gender quota only so far as they were reasonably able. In case of non-compliance, they would have to report why they failed to achieve the suggested quota and what specific steps they will take to meet it in the future. A gender quota that is not accompanied by any specific sanction is not a purely theoretical idea because such statutory arrangements function very well in the Netherlands and Spain.⁷¹

The obligatory gender quota in the form provided for in the draft Directive fails to respect the principle of proportionality when considered an instrument to achieve the democratic legitimization of economic governance. It is fully possible to ensure the democratic legitimization of economic governance by not excluding women from adequate representation and real participation without introducing a gender quota at the level of the boards of companies. An example of such softer instruments to ensure the democratic legitimization of the EU or national governance is a gender quota for bodies or organizational structures where the public authorities and the representatives of business and civil society cooperate in formulating and implementing public policies.

discrimination on the grounds of nationality or origin (see case C-281/98 *Roman Angonese v Cassa di Risparmio di Bolzano SpA* [2000] ECR I-4139, paras 30–36). By contrast, the fundamental freedoms should not obligate private parties to action insofar as these freedoms imply prohibitions of non-discriminatory restrictions (see eg J Gebauer, *Die Grundfreiheiten des EG-Vertrags als Gemeinschaftsgrundrechte* (Duncker & Humblot 2004) 141–2, and the literature indicated therein). An analogous concept might be applied in the case of the EU fundamental right that is provided for in art 23 of the Charter, with a reservation that this is not about the issue of whether art 23 of the Charter directly binds private parties (it does not, either in its negative or in its positive dimension, with the exception of equal pay for male and female workers—see case 43/75 *Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena* [1976] ECR 455, paras 38–40). Instead, it involves the issue of whether it is legally admissible for EU institutions to obligate private parties by means of acts of secondary law to such behaviours that realize the fundamental right of other private parties stemming from art 23 of the Charter. It is argued that such acts of secondary law are, as a rule, admissible; however, if they obligate private parties to some affirmative actions in that regard (as opposed to the simple prohibition of discrimination on the grounds of sex), it is much more difficult for them to pass the test of proportionality.

⁷⁰ González Menéndez, Fagan and Gómez Ansón (n 9) 3–4, with further references.

⁷¹ See above (n 17).

Another example is the gender quota for a pool of candidates or applicants from whom companies or other stakeholders select board members. Instead of reserving a pre-established number of seats on the board of a company for persons belonging to the under-represented sex, it is sufficient to establish a gender quota at the earlier stage of the selection process. This is how the desired gender equality is ensured in elections to national parliaments in some European countries. Instead of reserving an established proportion of seats for women in parliament (as in some African and Asian countries),⁷² a preferred solution in Europe is to establish gender quotas that merely shape the gender composition of the pool of potential candidates (aspirants) from whom the voters are to elect the members of a parliament.⁷³ While this approach gives the voters a chance to select from a gender-balanced pool of candidates, it does not distort the voters' final choice.

The obligatory gender quota is also disproportionate with respect to the economic aims advanced by the Commission in justifying the draft Directive. As previously argued in Section III, it is highly unlikely that an obligatory gender quota for the boards of EU companies will achieve the economic aims discussed in the draft Directive because an obligatory gender quota is not a suitable method for this task. Another reason that the gender quota in the form provided in the draft Directive is not a suitable means of attaining the discussed economic objectives is the fact that the provisions of the draft Directive on gender quotas do not contribute to the achievement of these economic objectives in a consistent and coherent manner. According to the Court of Justice, when legal means do not effect a given objective in a consistent and coherent manner, they are not suitable for that objective.⁷⁴

Among the economic aims that the draft Directive attempts to achieve is the efficient use of human capital and the need to recruit highly trained and qualified women.⁷⁵ However, because of three inconsistencies, the draft Directive includes provisions that do not encourage the realization of that goal in a consistent and coherent manner. First, in accordance with the case law of the Court of Justice concerning the admissibility of affirmative action programmes,⁷⁶ the draft Directive permits companies to not give priority to the candidate of the under-represented sex if that candidate is not as equally

⁷² See RE Matland, 'Electoral Quotas: Frequency and Effectiveness' in D Dahlerup (ed), *Women, Quotas and Politics* (Routledge 2006) 286.

⁷³ See the study 'Electoral Gender Quota Systems and Their Implementation in Europe' (n 62) 21–2.

⁷⁴ See eg cases C-243/01 *Piorgiorgio Gambelli and Others* [2003] ECR I-13031, para 67; C-46/08 *Carmen Media Group Ltd v Land Schleswig-Holstein, Innenminister des Landes Schleswig-Holstein* [2010] ECR I-8149, para 55; see also G Mathisen, 'Consistency and Coherence as Conditions for Justification of Member State Measures Restricting Free Movement' (2010) 47 CMLR 1021 ff.

⁷⁵ Explanatory memorandum, 3; point 7 in the preamble to the draft Directive.

⁷⁶ See above n 46.

qualified as a candidate of the other sex in terms of suitability, competence and professional performance or if an objective assessment that considers all criteria specific to the individual candidates tilts the balance in favour of the candidate of the other sex (Article 4(3) of the draft Directive). Thus, it may be that a company will not comply with the obligatory gender quota provided in Article 4(1) of the draft Directive because it will not find women candidates that are equally qualified as male candidates. It may also be that women candidates that are at least as qualified as male candidates will not be interested in being members of a board of a particular company. However, these facts will not relieve a company of the legal duty to reach the gender quota objective that is provided in Article 4(1) of the draft Directive. A non-compliant company must then defend its reasons for not reaching the objective and relate the measures the company intends to adopt to meet the objective (Article 5(3) of the draft Directive). In such a situation, a company may be prompted to appoint to the board women candidates who are not as qualified as the current male members of the board to avoid sanctions.⁷⁷ The fear of sanctions may lead a company to recruit women to the board who are not as highly trained and qualified as the company might have expected.

Second, the draft Directive allows Member States to exempt from the gender quota companies in which members of the under-represented sex represent less than 10 per cent of the workforce (Article 4(6) of the draft Directive). As a result, companies in which members of the under-represented sex represent slightly more than 10 per cent of the workforce may feel prompted by this provision to pursue an employment and personnel policy that will reduce this proportion to below 10 per cent. While this will relieve a company from the legal duty provided in Article 4(1) of the draft Directive (provided that a Member State makes use of this exception), it may occur at the expense of the employment of workers belonging to the under-represented sex who are even more qualified than workers from the dominant sex. This contradicts the main economic aim of the draft Directive, which is the more efficient use of human capital.

Third, it is striking that the legal duty of companies to apply pre-established, clear, neutrally formulated, and unambiguous criteria in the process of selecting candidates to the board is activated only in the case of companies whose board members of the under-represented sex hold less than 40 per cent of the non-executive director positions (see the literal wording of Article 4(1) of the draft Directive). This indicates that companies that implemented the minimum gender quota are permitted to make appointments to the positions of non-executive directors while not applying pre-established, clear, neutrally

⁷⁷ In such a situation, a company will not be authorized to invoke the justifying reasons referred to in art 4(3) of the draft Directive because these reasons can be invoked only when a company compares women and men 'candidates' to the board (then, a company is indeed entitled to reject a woman candidate if she is less qualified than a male candidate), not when the comparison between 'candidates' to the board and the current board members is at stake.

formulated, and unambiguous selection criteria because there is no under-represented sex on the board, even if such a discretionary selection process would lead to the rejection of candidates who are better qualified than candidates belonging to the other sex. Thus, the very fact of reaching the objective presented in Article 4(1) of the draft Directive relieves a company from the duty to conduct a selection process in a manner that guarantees the recruitment of the best-qualified candidates. Again, this provision is not consistent with the main economic aim of the draft Directive, which is the efficient use of human capital.

In light of the foregoing, the draft Directive does not pursue the aim of the efficient use of human capital and the recruitment of highly trained and qualified women in a consistent and coherent manner and, therefore, is not a suitable means to that end.

However, even if a gender quota, as envisioned in the draft Directive, were a suitable method for achieving that and other economic goals, this instrument would have to be seen as not ensuring that there were a proper balance between the rank and character of the economic goals on the one hand, and the individual autonomy of the affected companies, on the other hand (disproportionality in a strict sense). To impose obligatory gender quotas on companies with the aim of achieving economic benefits on the part of affected companies (ie more efficient use of available human resources; improved corporate governance, team performance, and decision making; better company financial performance and greater profitability) is to force companies to realize economic visions and business strategies that are expected or supported by public authorities, even if the companies concerned do not share such visions and strategies and, unlike public authorities, are not convinced that this will bring them economic benefits. This paternalistic attitude of public authorities towards the business activities and strategies of individual companies conflicts with the individual autonomy of the companies affected to an unacceptable extent. In a free market economy that is pervaded by individual autonomy and freedom of behaviour (including the freedom to conduct business), it is uncommon for public authorities to force individual companies to take some form of action on the basis that they, the public authorities, consider such actions to be economically sensible for the companies concerned. It is for individual companies themselves to decide what is most economically appropriate for them. Companies cannot be replaced by public authorities in this regard, and they even have the right to commit some errors. Accordingly, if public authorities oblige individual companies to comply with a gender quota by claiming that it is in the best economist interest of the companies concerned, this is blatantly incompatible with the individual autonomy of these companies. It thus follows that the obligatory gender quota provided in the draft Directive is not compatible with the principle of proportionality.

Apart from the principle of proportionality, the principle of subsidiarity also contradicts the adoption of a gender quota provided for in the draft Directive.

Because national measures promoting more gender-balanced boards of companies began to be more actively undertaken by Member States only in the last few years, it would be premature to conclude that these national remedies are ineffective and call for the EU measures. Further analysis and evaluation is required to assess with greater certainty the consequences of these national measures and the extent of the advances that they are able to achieve. Only after more time—that is, over at least the next several years—will EU institutions be in a position to reasonably conclude whether Member States are willing to take meaningful action in this field and/or whether and to what extent national measures promoting gender equality on the boards of companies have been effective.

As discussed in Section II, national measures undertaken by individual Member States to promote gender balance in boardrooms are greatly varied. Even the gender quotas introduced by certain Member States vary as regards matters of detail. In view of these differences, it is all the more reasonable to await the practical consequences of these measures to assess which are most effective in reaching their goals and which of them are least costly in social and economic terms. The variety of solutions that currently exist at the national level makes it possible to elaborate and identify which solutions would best meet the needs and preferences of all stakeholders and which would be economically optimal and socially just. This type of regulatory competition and regulatory arbitrage in the field will help to identify the most optimal corporate arrangements.⁷⁸ The draft Directive, if adopted, will prevent or at least limit this regulatory competition, which would not accord with the principle of subsidiarity.

It is true that gender equality on the boards of companies, as a means of enhancing the democratic legitimization of economic governance at the level of Member States, is mandated by the EU principles of social market economy and democracy (as argued in section V). In light of Article 4(2) TEU, the EU institutions must respect the Member States' actions in making their economic governance more democratically legitimized and must actively support these national actions. However, this does not mean that the EU institutions are authorized to foist on Member States any legal arrangements that EU

⁷⁸ On regulatory competition and regulatory arbitrage in the field of company law, see eg S Lombardo, *Regulatory Competition in Company Law in the European Community: Prerequisites and Limits* (Peter Lang 2002); SF Deakin, *Regulatory Competition Versus Harmonisation in European Company Law* (University of Cambridge 2000); T Woertge, *The Political Economy of Competition on Corporate Charters in Europe* (GRIN Verlag 2012); LA Bebchuk, 'Federalism and the Corporation: The Desirable Limits on State Competition in Corporate Law' (1992) 105 HarvLRev 1435 ff; R Romano, 'Law as a Product: Some Pieces of the Incorporation Puzzle' (1985) 1 Journal of Law, Economics and Organization 225 ff; K Heine and W Kerber, 'European Corporate Laws, Regulatory Competition, and Path Dependence' (2002) 13 European Journal of Law and Economics 43 ff; K Heine, *Regulierungswettbewerb im Gesellschaftsrecht: Zur Funktionsfähigkeit eines Wettbewerbs der Rechtsordnungen im europäischen Gesellschaftsrecht* (Duncker & Humblot 2003).

institutions deem effective in strengthening democratic legitimization at the level of Member States. The principle of subsidiarity implies that the EU cannot impose on Member States its own visions, methods, and instruments for making economic governance at that level more democratic. The EU must be much more circumspect in this regard.

Among the main shortcomings of the draft Directive is the incorrect choice for the legal basis of its adoption. In particular, the draft Directive is to be adopted on the basis of Article 157(3) TFEU. This provision authorizes the European Parliament and the Council to adopt measures ensuring the application of the principle of equal opportunity 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. Because Article 157(3) TFEU refers to the terms 'work' and 'employment' and because Article 157(1) and (2) TFEU uses the term 'worker', a systemic interpretation leads to the conclusion that the Directives referred to in Article 157(3) TFEU concern only relationships in which one of the parties is a 'worker' within the meaning of Article 157(1) and (2) TFEU. According to the Court of Justice, the term 'worker' within the meaning of the latter provision relates to a person who, for a certain period of time, performs services for and under the direction of another person in return for which he/she receives remuneration.⁷⁹ Against such a background, it is doubtful whether Directives adopted on the basis of Article 157(3) TFEU may cover persons who are not workers within the aforementioned meaning. It is important to note that this assertion is not disproven simply because EU institutions have previously adopted a Directive based on Article 157(3) TFEU that did not pertain to persons who were workers⁸⁰ because this latter Directive was not necessarily adopted on the correct legal basis. In this regard, it should be noted that the draft Directive applies to any member of the company's board, that is, to any non-executive director of a company (see Article 2(5) of the draft Directive). Non-executive directors of companies do not necessarily have the status of workers of the companies in question within the meaning of Article 157 TFEU. In fact, it is more common for non-executive directors of companies to not be employed by the latter and to not be under the direction of these companies. As a result, the draft Directive, which applies to persons without the status of workers within the meaning of Article 157 TFEU, cannot be based on Article 157(3) TFEU.

Finally, it should be underscored that, in certain respects, the draft Directive is not fully consistent with the Commission's own documents concerning its plans for the modernization of EU company law. This is particularly clear when comparing the content of the draft Directive with the Commission Green

⁷⁹ Case C-256/01 *Debra Allonby v Accrington & Rossendale College, Education Lecturing Services, and Secretary of State for Education and Employment* [2004] ECR I-873, paras 66–71.

⁸⁰ See Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC, OJ L 180, 15.7.2010, 1.

Paper 'The EU corporate governance framework'.⁸¹ In particular, the Commission openly admits in the latter document that the overall impact of women on firm performance is nuanced and that the studies that have been conducted do not demonstrate causality between the percentage of women on boards and corporate performance.⁸² By contrast, in the draft Directive, a mere one-and-a-half years later, the Commission has certainty about this complex issue and stipulates that there is a positive relationship between gender diversity at the top management level and a company's financial performance and profitability. Therefore, the Commission now believes that enhancing female representation on the boards of publicly listed companies in the EU will have a positive impact on the performance of the affected companies.⁸³ However, this discrepancy between two related Commission documents cannot make the Commission's claims in the draft Directive more convincing and reliable.

Additionally, in the Green Paper, the Commission correctly notes that the introduction of gender quotas is not sufficient to ensure gender balance on boards. This is especially true if companies do not adopt diversity policies that contribute to work-life balance for women and men and encourage the mentoring, networking, and training for management positions that are essential for women who wish to follow a career path that leads to board positions. According to the Commission, the boards of companies should at least be required to consider these matters and disclose their decisions regarding them.⁸⁴ By contrast, in the draft Directive, there is no such requirement for the actions of the companies' boards that the Commission regarded as necessary in 2011.

Finally, in its Green Paper and in its Action Plan on European company law and corporate governance (2012),⁸⁵ the Commission suggests that the gender diversity of boards constitutes only one aspect of a much broader issue, which is the diversity of boards in general in terms of age, experience, and even nationality. In addition to ensuring this broadly understood diversity, the Commission deems it necessary to compose a board in such a way as to guarantee that the board suits the company's business. Therefore, according to the Commission, non-executive board members should be selected on the basis of a broad set of criteria: merit, professional qualifications, experience, the personal qualities of the candidate, independence and diversity.⁸⁶ In light of the foregoing, it seems that the process of selecting candidates for the boards of companies should be uniformly regulated in a single EU legal act without

⁸¹ COM (2011) 164 final.

⁸² Green Paper of the European Commission, 7.

⁸³ Point 8 in the preamble to the draft Directive.

⁸⁴ Green Paper of the European Commission, 7.

⁸⁵ Commission Action Plan: European Company Law and Corporate Governance: A Modern Legal Framework for More Engaged Shareholders and Sustainable Companies, COM (2012) 740/2.

⁸⁶ Green Paper of the European Commission, 5–6; Commission Action Plan, 5–6.

splitting this issue into various Directives because such a separation may trigger unanticipated inconsistencies. The draft Directive provides that the criteria for selection to the boards of companies should be pre-established, clear, neutrally formulated, unambiguous and should relate to the candidates' qualifications (Article 4(1) of draft Directive). However, it would be unambiguously undesirable for a company that seeks to ensure a required gender equality in the board to be required to apply both a set of selection criteria referred to in Article 4(1) of the draft Directive and a different set of criteria to guarantee the board's diversity in other aspects and to meet the requirements regarding board members referred to by the Commission in its Green Paper and Action Plan. The process of candidates' selection to the board should be conducted in a comprehensive manner. During this process, one uniform set of criteria should be applied. Therefore, it would be best if the criteria in question were uniformly and comprehensively regulated in a single legal instrument to avoid any possible inconsistencies.

The drawbacks and shortcomings of the draft Directive presented above make the Commission's legislative proposal inappropriate and prompts the search for other forms of EU action to ensure gender equality on the boards of EU companies.

B. Potential Forms of EU Action

There are many types of actions which the EU Commission and Agency for Fundamental Rights⁸⁷ might take in order to ensure more gender-balanced boards of EU companies rather than seeking to introduce a compulsory gender quota.

The EU institutions can raise awareness among the companies concerned that, contrary to existing biases against women candidates, there are many experienced and well-prepared women to fill board positions. This can be done by making available lists of suitably qualified women. In December 2012, the EU Commission supported the establishment of the Global Board Ready Women Database, which was an initiative of leading European business schools. It seems that for the EU Commission (Directorate-General for Justice), a time has come to establish its own database that is freely available to all interested stakeholders and adapted to the specific needs of particular sectors and industries. In addition to providing simple information about women candidates, the EU institutions can organize a type of institutional platform promoting direct contact between existing and aspiring women board members and the companies interested in recruiting them.

⁸⁷ See Council Regulation (EC) No 168/2007 of 15 February 2007 establishing a European Union Agency for Fundamental Rights, OJ L 53, 22.2.2007, 1.

The EU institutions can organize, finance, and manage mentoring programmes aimed at developing the potential of women and preparing them for roles as board members.

The EU institutions can also actively disseminate and promote good practices of corporate governance to eliminate the opaque hiring practices of companies. Such improper practices include: a lack of appropriately accessible information regarding vacancy and selection criteria; male-dominated nomination committees; and an overly strong emphasis on the prior boardroom experience of candidates, which is more commonly held by men. The EU Commission could even issue some soft-law measures identifying and recommending appointment practices that will help to utilize talented women and will ensure more gender-balanced boards.

The EU institutions can also encourage companies in various sectors to establish voluntary targets to ensure gender equality on boards and can organize prizes and/or awards to companies that have distinguished themselves by promoting gender equality and women in management.

Also the actions of the EU Commission in the field of state aid have great potential for promoting gender equality on the boards of EU companies. In this regard, the Commission could amend its General Block Exemption Regulation⁸⁸ and introduce a new category of admissible state aid: aid to prepare women for the roles of top managers in companies. The Commission could also relax the conditions for the admissibility of state aid for female entrepreneurship⁸⁹ to make this aid more effective in preparing women for involvement in management. In the case of many other categories of state aid provided for in the General Block Exemption Regulation, the Commission can expressly determine that state aid intensity can be increased for undertakings with gender-balanced boards. In addition to such legislative amendments, the Commission can promote gender-balanced boards by supervising state aid given to individual companies. In particular, the Commission can issue positive decisions on notified state aid on condition that a given beneficiary of such will increase the presence of women on its board.⁹⁰

EU institutions can also promote gender equality on the boards of companies by effectively adapting EU public procurement rules. Although currently existing EU rules on public procurement⁹¹ have the potential to effectuate

⁸⁸ Commission Regulation (EC) No 800/2008 of 6 August 2008 declaring certain categories of aid compatible with the common market in the application of arts 87 and 88 of the Treaty (General Block Exemption Regulation), OJ L 214, 9.8.2008, 3.

⁸⁹ See art 16 of Regulation (EC) No 800/2008.

⁹⁰ This is admissible on the grounds of art 7(4) of Council Regulation (EC) No 659/1999 of 22 March 1999, which establishes detailed rules for the application of art 93 of the EC Treaty, OJ L 83, 27.3.1999, 1.

⁹¹ Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors, OJ L 134, 30.4.2004, 1; Directive 2004/18/EC of the European Parliament

certain societal values, including gender equality,⁹² their openness to the implementation of such values can and should be much greater. This has been indicated by the Commission in its Green Paper on the modernization of EU public procurement policy.⁹³ Unfortunately, the Commission's new legislative proposals on public procurement⁹⁴ do not go far in this direction. It is argued that EU rules on public procurement should expressly allow the use of gender equality as one of the selection criteria and/or contract award criteria, even if this gender criterion is not linked to the subject matter of the public contract in question. The admissibility of the application of a gender criterion in the case of public contracts would emphasize the role of these contracts as additional policy measures.⁹⁵

Finally, it should be underlined that among the admissible legal means supporting gender equality on the boards of companies, one cannot exclude the adoption of a specific Directive promoting this objective without instituting a mandatory gender quota. Once the EU institutions are certain that there are no prospects of increasing women's presence on the boards of companies by using other means, they can adopt a Directive that will oblige companies to apply objective, merit-based, and gender-neutral criteria in the process of selecting candidates to boards. Such a Directive could even establish a voluntary gender quota on the condition that it would lack a specific sanction for non-compliance.

VII. CONCLUSIONS

There is no doubt that, because they are bound by the fundamental right of equality between women and men, as well as by the principles of social market economy and democracy, the EU institutions must actively support gender equality on the boards of companies. This will help to satisfy women's needs to be treated as human beings who are equal to men and will make economic governance at the EU and national levels more democratically legitimized. However, the Commission's proposal for a Directive on improving the gender balance among non-executive directors of companies listed on stock exchanges does not constitute an appropriate legal solution for this problem. The draft

and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts, and public service contracts, OJ L 134, 30.4.2004, 114.

⁹² See Communication of the Commission on the Community law applicable to public procurement and the possibilities for integrating social considerations into public procurement, COM (2001) 566 final, 5, 11, 17, 19, 22; European Commission: *Buying Social: A Guide to Taking Account of Social Considerations in Public Procurement* (October 2010) 7, 8, 10, 11, 15, 21, 35, 38, 48.

⁹³ COM (2011) 15 final; see point 4 of the Green Paper.
⁹⁴ See Proposal for a Directive of the European Parliament and of the Council on procurement by entities operating in the water, energy, transport and postal services sectors, COM (2011) 895 final; Proposal for a Directive of the European Parliament and of the Council on public procurement, COM (2011) 896 final.

⁹⁵ P Trepte, *Regulating Procurement: Understanding the Ends and Means of Public Procurement Regulation* (OUP 2006) 173.

Directive is based on incorrect economic assumptions and on insufficient financial and economic arguments. It also promotes excessive and unfounded economic expectations. When these expectations are not met, they may undermine public trust in the actions of EU institutions in the future. In addition, the Commission's reasoning underlying the draft Directive is so strongly pervaded by its economic considerations that it suggests that the Commission is seeking to instrumentalize women in order to attain economic objectives. Furthermore, the compulsory gender quota in the form provided in the draft Directive is incompatible with the EU principles of proportionality and subsidiarity.

It is argued that there are many types of actions at the EU institutions' disposal other than a compulsory gender quota that are fully capable of ensuring more gender-balanced boards of EU companies. The EU institutions should apply these measures with greater courage and creativeness.