

Berlin, May 25, 2012

S T A T E M E N T

on the European Commission's public consultation regarding "unbalanced gender ratio in EU-companies' top decision-making-bodies"

The German Women Lawyers Association (djb) is an association of female lawyers, political and business economists aiming at the further development of the law (Civil Society Organization/NGO), independent and not aligned with any political party or religious faith.

The djb takes part mostly in the further development of the law in all fields and the implementation of equal rights and equal treatment of women in all areas of society on a national, European and international level. The djb has been asking for the issuing of statutory provisions regarding gender equality in the working life, equal pay for women as well as the increase of women in leading positions in the economy for a long time. For the realization of female-specific demands also on a European level, our association cooperates with similar organizations in the EU and worldwide.

Despite all pleas along with statutory provisions on an international, EU-, constitutional and national level as to gender equality in the working life, the percentage of women in economy's leading positions is still on an unacceptable, low level. Only ten of all 189 positions in "DAX-30"-companies' Managing Boards (= 5,29%), and only 88 of all 492 Supervisory Boards' positions (= 17,88%) – the latter mostly owed to the German Co-determination act, meaning women are mostly elected by employees, not by shareholders – are filled by women (as per May 25, 2012, research: djb). In order to change this situation, the djb initiated the project "Women shareholders demand gender equality: Increasing the percentage of women in German economy's leading positions" in 2009, which has been generously sponsored ever since by the German Federal Ministry of Family Affairs, Senior Citizens, Women and Youth (BMFSFJ). In the course of our project, our members are visiting annual shareholder meetings of German DAX-, MDAX- or TechDAX-companies, representing shareholders, asking CEOs and members of Supervisory Boards what measures are being taken to fill respective leading positions with female candidates. This systematic use of shareholders' rights to ask questions during annual meetings puts the mere self-regulatory vows and their supposed effects and results to the test. Furthermore shareholders of respective companies are being shown potential female candidates for positions in Managing or Supervisory Boards actually do exist. The so far results have been evaluated qualitatively as well as quantitatively in two comprehensive reports, **2010** and

2011, taking into account Germany's current legislation. For a detailed documentation of the project, also in an english version, please see our **website**.

Answers to the above questions in detail:

1. How efficient do you consider companies' self-regulating regarding the reduction of gender imbalance in EU-companies' top decision-making-bodies?

A respective self-regulation has proven to be ineffective. In July 2001 the German government as well as German economy's head organizations (Federation of Employers, BDA; Federation of German Industry, BDI; Federation of German Chambers of Industry and Commerce, DIHK; German Confederation of Skilled Crafts, ZDH) signed a "contract for more gender equality in private companies". Also, the German Corporate Governance Codex (DCGK), in effect since 2002, was added the clause "to mind diversity" in 2009, complemented in 2010 in the sense "especially an adequate share of women" shall be sought. The DCGK, developed by a commission of the German government, mostly contains recommendations as to „good corporate governance“ regarding leading positions, Managing and Supervisory Boards.

According to *paragraph 161 AktG* (German Stock Corporation Act) all DAX-listed companies must deliver an annual Compliance Statement as to their adherence to or deviation from DCGK's recommendations. However, a respective deviation could not cause invalidation of Managing Boards' members' appointments – the latter not being subject to the annual meeting's control – but only of the Managing and Supervisory Boards' granted (monetary) „relief“.

Comparing the "djb's" Q&A Sessions during annual meetings 2010/2011 shows there is now some pressure of justification as to the negative status quo on the one hand, while there has been no significant increase of the percentage of women in respective job positions on the other.

In sum, experiences with the two main self-regulatory-measures (the above 2001-"contract" and the DCGK as of 2002) show their inefficiency, despite all public pressure. Due to that, the djb has been promoting the idea of a "women's quota" for a long time now.

2. What extra (self-) regulatory measures shall be taken as to a reduction of gender imbalance in EU-companies' top decision-making-bodies?

Since Germany's private sector has been ignoring their self-imposed duties from respective commitments for more than ten years now, we consider a statutory "women's"- or "gender quota" necessary. We are in need of legal obligations regarding inward and outward transparency of selecting- and decision-making-processes, and the increase of the percentage of women in leading positions shall leave its mark on Executives' and Supervisors' profit-related, variable bonuses. Only that could allow for a change in the so far male dominated business culture. For that reason we need **a law now, as demanded by the djb for a long time**.

Supplemental to such statutory provisions companies shall be bound to a thorough collecting and release of further female-specific data regarding the executive level (Managing / Supervisory Boards) as well as leading positions beneath in their respective reports of the company's business situation.

Since Managing Boards are usually being generated from leading positions beneath, the latter shall be part of the examination, too. According to German law Managing as well as Supervisory Boards are to be registered in the Commercial Register – where Managing Boards can be publicly viewed –, members' names are fully listed in the annual reports and also Supervisory Boards in their reports refer to changes within the Managing and Supervisory Boards during the past year. But the handling of female-specific data proves its still rather unusual to collect and publish such data – so it is hard to make it comparable in the broader sense. Female-specific data could be such as: parameters, quotas, trainings, male colleagues' parental leaves etc. A comprehensive, reliable publishing in respective reports "on companies' business situation", always in the same section and for a certain amount of time, is required.

A quick and successful performance of the above would also require electoral committees as well as their respective proposals of candidates are being formed according to gender equality.

As the djb's project shows technical-oriented companies' common thesis regarding a general lack of potential female engineers suitable for top-leading positions is non-provable: Managing and Supervisory Boards' members' job-qualifications are diversified, according to our research and evaluation of their respective trainings / fields of study (as per July 1, 2010); and the percentage of female graduates among professions prevalent in such boards – business economics and law – is at least equal these days.

In Norway, which usually serves as an example, trainings are now being offered as to a targeted preparation for jobs in top-leading positions, equally to women and men. Similar trainings for private companies have been designed in Germany as well, which however need to be refined and offered more frequently.

3. Do you think a higher percentage of women in companies' top decision-making-bodies would bring about economic benefits, and if so, those would be as such?

Several analyses – e. g. Ernst & Young's study published January 2012 – have found economic benefits rising, for companies themselves as well as the national economy, as a result of the respective increase of women; companies with gender equal executive committees verifiably do flourish. Also, the demographic trend along with predicted skill shortages require placing more women in leading positions.

Action on EU-level is required now, since EU-Member-States still have not been fulfilling their respective duties as to the above, which is proven by impressive reports by Member States in our 2011-study.

By the way, 70 percent of the population do not only approve of intensified efforts as to the promotion of a better work-family-balance but also the introduction of statutory provisions as to the increase of the percentage of women in leading positions.

Next to economic benefits being brought about most certainly, the EU-Member-States are obliged to take action. They are bound to take steps towards the promotion of women in the private sector. According to the UN-convention for women's rights (CEDAW), *article 2*, the Member-States commit themselves to „immediately and by all adequate means pursue a policy as to the abolishment of the discrimination of women“ and therefore according to *Art. 2 lit. e) CEDAW* also take all proper steps against a potential discrimination by people, organizations or companies. By that, the above public obligations are being extended into the private sector explicitly. Temporary special measures, such as quotas, are no „discrimination“ according to *Art. 4 I, II CEDAW* – which is why, according to *Art. 157 IV*

AEUV, promotive or balancing rules may be set up. Furthermore the European Court of Justice (EuGH), being the territorial institution of case-law, is bound to in its ruling regarding „quotas“ in the private sector and therefore interpretation of Art. 157 IV AEUV watch the UN-convention for women's rights (CEDAW) as well as universal standards for human rights.

4. What shall be binding objectives in percent (e. g. 20%, 30%, 40%, 50%, 60%) and an according time frame regarding the increase of the respective underrepresented sex in companies' top-decision-making-bodies? Shall those directives be binding or recommendatory, and why?

Our constitution demands companies' top-leading-positions be filled gender equally. Nevertheless, since fundamental changes in society as well as private businesses do not happen over night, it would be wise to operate step by step, setting up differing rules as to each the Managing and the Supervisory Boards, if necessary.

With the “**Berliner Statement**“ the djb together with eleven further initiators claim women's equal participation in companies' top-leading- and supervisory-committees' decision-making-processes. A binding quota of at least 30 percent – enforced by penalty of law – regarding DAX-listed, public companies subject to co-determination shall be the first step towards that direction.

The djb regards a binding quota of at least 40 percent as realistic indeed. Since terms of office are differing according to national law the above aim shall be achieved within a period of ten years. Furthermore it is important to implement differing quotas regarding shareholders and employers within Supervisory Boards of companies subject to co-determination. A quota as to the proposal of candidates during electoral processes shall be binding and women's participation in electoral committees be verified.

Moreover, it is necessary to set up binding quotas for the Managing Boards and other leading positions, of 40 percent for a short transition period, or at least of 30 percent.

5. Which companies (e.g. DAX-listed or of a certain size) shall be subject to this initiative?

The legal quota shall be binding for companies under private law as well as public enterprises.

Regarding the private sector the legal quota shall cover DAX-listed companies and those subject to co-determination (i.e. corporations with more than 2000 or at least 500 employees) as well as European Companies (Societas Europaeas, SE).

The legal quota must also cover state-owned companies. Since the state is to provide for a de facto implementation of gender equality in society in general, therefore leads the way in companies' different hierarchy-levels as well, the legal quota shall also cover public corporations, foundations under public law as well as public-law-institutions, regardless of the respective number of employees.

6. What decision-making-bodies / respective members (i.e. managing or not) shall be subject to this initiative?

A binding legal quota shall cover managing as well as other bodies of companies. Within dualistic systems it would therefore cover the supervising as well as the managing body.

Also, the composition of the proposal of candidates during electoral processes shall be subject to a binding legal quota, i.e. if a body of the company or a person is held to submit respective proposals to another.

It shall also cover electoral committees. In case only part of a respective body is in charge of electing candidates, this particular part shall be gender equal, in order to have women participate in electing- and decision-making-processes.

7. Shall there be sanctions for companies not adhering to those rules? Shall there be exceptions in case respective objectives cannot be met?

The djb-project shows the binding declaration during annual meetings regarding “diversity“ in the sense of gender equality in electoral processes has not improved women’s share in companies’ leading committees. Due to other company-specific data needing to be presented in such diversity-declaration its meaning as to gender equality is easily being overlooked. Therefore, only sanctions aiming directly at companies actionability could be meaningful in this context. As the Norwegian experiences show, a legal quota can in fact lead to a quick and efficient increase of the percentage of women if companies were facing respective sanctions in case they not adhere to the objectives accordingly.

The following sanctions, set up as a step model if necessary, would be imaginable and appropriate:

- In case female-specific data regarding leading-committees is not being published in reports on companies’ business situations, penalty payments, administrative fines or even criminal liability shall arise as a result.
- In case DAX-listed companies’ Supervisory Boards are being elected without observance of the quota, their listings shall be revoked.
- The Supervisory Boards’ elections shall be binding only in case the set up adheres to the legal quota, the election being null and void otherwise. By that, all decisions made by a respective Supervisory Board turn null and void (not voidable only).
- In case no person of the respective underrepresented sex is being elected / appointed, according positions shall remain vacant.
- Additional measures on a national level could be sanctions regarding taxes: In case companies do not adhere to quotas accordingly, directors’ remunerations shall no longer be subject to tax deduction.

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