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on the Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on improving the gender balance among non-executive directors of companies listed on stock exchanges and related measures (COM (2012) 614)

Summary of the djB-opinion on the proposal for a Directive on female supervisory board members (women-on-board proposal)¹

The German Women Lawyers Association (djB) welcomes the women-on-board proposal, though it would have been better to introduce mandatory legal quotas with sanctions in all EU Member States. However, given the opposition in some Member States, the proposal of Justice Commissioner Vice President Viviane *Reding* aiming at a target percentage of 40 percent by means of transparent and objective appointment processes is wise and deserves support.

DjB asks Member States and companies to promote the professional development of women at all levels of management and not to seek legal hideaways in order to circumvent the objectives of the Directive. Furthermore, the Directive should stipulate active measures among all actors and ultimately increase the share of the under-represented sex among Managing Directors/Supervisory Board members. This will also have a spillover effect on (listed and non-listed) small and medium-sized enterprises (SMEs).

DjB is an association of female lawyers and economists. Its objective is to foster the further development of law (Civil Society Organization/NGO). It is independent and not linked to a political or religious organization.

DjB fosters the further development of law in particular with regard to equal rights and equality for women in all areas of society on national, European and international level. DjB has been calling for legal measures to promote gender equality on the labor market for a

¹ Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on improving the gender balance among non-executive directors of companies listed on stock exchanges and related measures (COM (2012) 614), hereinafter: **Directive on female board members**. Online: <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2012:0614:FIN:en:PDF>> (accessed: 7/15/2014).

long time. In order to implement women-specific demands at European level, our association cooperates with similar organizations at European and international level.

It is of particular importance to the djb to comment on European legislation in the area of gender equality. In order to ensure or bring into place effective gender equality measures, existing regulations must be checked repeatedly and amended if necessary, to suit the current social needs. This also applies to the women-on-boards proposal.

Djb considers this proposal an important tool for increasing the percentage of women in management positions and takes the following position:

Purpose of the Directive

The purpose of the Directive is to ensure a 40 percent level of the under-represented sex in positions of non-executive directors/supervisory board members in listed companies within the European Union (EU). Furthermore, these companies shall set their own targets regarding a balanced representation of both sexes among the executive directors / board members.

The proposal does not apply to all companies; it only applies to large listed companies. Thus, in Europe only about 5,000 companies are affected. For instance, approximately 700 companies in Germany² will be affected; compared to 21.7 million companies in total Europe.³

SMEs⁴ are excluded, even if they are listed (see below (B.I.3.)).

The proposal allows for Member States to find and apply, according to their own needs, efficient methods to achieve gender equality on boards of listed companies, thus respecting the principle of subsidiarity. The Directive also promotes overall corporate governance of companies in Member States as companies will be obliged to apply more transparency in board appointment procedures.

Temporal application of the Directive

The Directive aims at reaching a 40 percent-share of women among non-executive directors/supervisory board members by 2020 for private listed companies. State-owned listed companies would have to reach that quota already by 2018.

² Reding, Viviane: The route to more women on supervisory boards: For an intelligent quota instead of inflexible requirements, speech of 27.11.2012, European Commission, SPEECH/12/865. Online: <http://europa.eu/rapid/press-release_SPEECH-12-865_en.htm> (accessed: 7/2/2014).

³ EUROSTAT Structural Business Statistics, Booth / last update: 04.11.2014. Online: <http://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=sbs_na_sca_r2&lang=de> (accessed: 5/1/2014).

⁴ Art. 2 (8) defines SME: „[...] a company which employs less than 250 persons and has an annual turnover not exceeding EUR 50 million or an annual balance sheet total not exceeding EUR 43 million, or, for an SME which is incorporated in a Member State whose currency is not the euro, the equivalent amounts in the currency of that Member State.“

If this goal will not be met at the deadlines above, the Member States are obliged to put in place the mechanism for a transparent appointment process. There are no sanctions for not meeting the quota.

The women-on-boards proposal will be repealed at the end of 2028.

A. General considerations for the proposal as a whole

I. The women-on-boards proposal as gender diversity instrument across the EU

Vice President Viviane *Reding* firstly mentioned the idea for a Directive on female board members in November 2012. At that moment, she said that there was too little voluntary and effective effort from companies and Member States.⁵ To the often quoted words – „I'm not a fan of quotas. But I like the results they bring [...]“⁶ – we want to add the following: „[...] should we leave aside an important issue such as equal rights for men and women just because we are experiencing a crisis? We must not use the crisis as an excuse for dodging our responsibilities when it comes to important social policy issues, especially when they are of economic importance, too.“⁷

In 2011, Belgium⁸, France⁹ and Italy¹⁰ have introduced quota obligations with sanctions; in the same year the Netherlands¹¹ decided to have quotas without sanctions. Spain has a simi-

⁵ „Since the last quarter of the year 2003, the proportion of women in the highest decision-making bodies of 8.5% has risen to 13.7%; an increase of 5.2 percentage points in just over eight years. This means a slow increase in the average rate by 0.6 percentage points per year“, in: European Commission: Women in economic decision-making in the EU. Progress Report, Directorate-General Justice, Luxembourg: Publications Office of the European Union, 2012, p. 11 Online: <http://ec.europa.eu/justice/gender-equality/files/women-on-boards_en.pdf> (accessed: 7/25/2014).

⁶ *Boltzen*, Stefanie: Quoten haben gute Ergebnisse, Interview with Viviane Reding, in: Die Welt of 5.3.2012. Online: <http://www.welt.de/print/welt_kompakt/print_politik/article13903234/Quoten-haben-gute-Ergebnisse.html> (accessed: 7/25/2014).

⁷ *Reding*, Viviane: The route to more women on supervisory boards: For an intelligent quota instead of inflexible requirements, speech v. 27.11.2012, European Commission, SPEECH/12/865, in: *ibid* Fn. 2.

⁸ Law sets 30% quota for women on management boards, in: EIROnline of 16.8.2011. Online: <<http://www.eurofound.europa.eu/eiro/2011/06/articles/be1106021i.htm>> (accessed: 7/23/2014).

⁹ France sets quota for women on big company boards, in: Reuters of 13.1.2013. Online: <<http://www.reuters.com/article/2011/01/13/us-france-equality-idUSTRE70C5ZA20110113>> (accessed: 5/1/2014).

¹⁰ European Commission: National Fact Sheet. Gender balance in boards. Italy, January 2013 Online: <http://ec.europa.eu/justice/gender-equality/files/womenonboards/womenonboards-factsheet-it_en.pdf> (accessed: 5/1/2014).

¹¹ On May 21st, 2011, the Grand Chamber of the Dutch Parliament adopted a ‘flexi’ Quota Act, which provides for a proportion of women (and expressly also a male proportion) of at least 30 percent in the management bodies of large Dutch companies. This law came into force in mid-2012. More information is included in: *Lambooy*, Tineke: 30 percent Women on Boards: New Law in the Netherlands (2012), in: European Company Law 9, No. 2 (2012), pp. 53-63.

lar sanction-free law already since 2007, which, inter alia, provides for a gender balance in the Spanish administrative bodies.¹²

Djb agrees with the European Commission that it is necessary, for reasons of gender equality, but also for reasons of internal market legal considerations, to oblige all EU Member States to undertake a minimum harmonization in order to improve the gender balance on the boards of listed companies.¹³

II. Excursion: International Comparison: Spain, France and Germany

The (lack of) implementation of the so-called **Spanish „flexi-quota”** law shows that the current Conservative government did not take effective means to achieve a more balanced gender ratio in the Spanish boards of directors: In 2003 the percentage of women on the boards of the 35 companies listed on the stock exchange IBEX was 3.3 percent. In 2007, when the Equality Act was introduced, there were, after all, already 30 female directors, representing a share of six percent. But in the years thereafter, from 2008 to 2012, the percentage of women on boards stagnated between 10 and 12 percent.¹⁴ Only in 2013, a veritable boom of nominations took place, leading towards a female percentage of 15.27 percent on November 14th, 2013. Expressed in numbers this is equivalent to 75 female directors' posts.¹⁵ However, this is less due to the Equality Act but more due to the fact that since November 2012 Spanish media and Spanish women's associations started promoting female participation on non-executive company boards. However, there are still three Spanish companies¹⁶ active in the construction and energy sectors, which have no female board members. But there are also two companies that meet the quota of 40 percent.¹⁷

France has introduced quota mechanism by law¹⁸ in early 2011 under the Conservative government at that time. The law provides that supervisory and executive boards of all private companies listed at stock exchange as well as public companies¹⁹ must nominate, on January

¹² It is to the so-called Equality Act Ley Orgánica 3/2007, de 22 de marzo, para la igualdad efectiva de mujeres y hombres, that the Social Democratic government has enacted under then-President Zapatero. Online: <http://noticias.juridicas.com/base_datos/Admin/lo3-2007.html> (accessed: 5/16/2014).

¹³ See also: Opinion of the djb of 25.5.2012 to the public consultation of the European Commission on „imbalanced sex ratio in the highest decision-making bodies of companies in the EU”. Online: <<http://www.djb.de/Kom/K5/st12-5/>> (accessed: 5/1/2014).

¹⁴ See for the data the Spanish report from Informa, Las mujeres en los consejos de administración y organismos de decisión de las empresas españolas, Marzo 2012, p.7.

¹⁵ Online: <<http://www.paridad.eu/ibex35/>> (accessed: 12/8/2013).

¹⁶ It involves Sacy, Técnicas Reunidas and Gas Natural Fenosa.

¹⁷ Jazztel and REE.

¹⁸ Law „Copé-Zimmermann”, Loi n° 2011-103 of 27.1.2011. Online: <http://www.legifrance.gouv.fr/affichTexte.do;jsessionid=1BD4557C6AEB2E7B8B4DD0E76D060F03.tpdjo07v_1?cidTexte=JORFTEXT000023487662&categorieLien=id> (accessed: 5/14/2014).

¹⁹ At least 500 permanent employees and an annual net turnover of at least 50 billion euros (CAC 40 and beyond) for at least three years.

1st, 2014, at least 20 percent of both sexes in its supervisory and executive boards respectively. On January 1st, 2017, the gender ratio should have risen to 40 percent. This will ultimately result in an appointment of at least 900 women.²⁰ The law provides for two types of sanctions: Firstly, the „jetons de présence“, i.e. the attendance fee granted to all Supervisory Board members, will not be paid unless quotas are met. Secondly, the election of new members not respecting the quota obligation is simply void.

The law has been effective even before its adoption, because it was discussed months earlier by the media, thus creating an early awareness among stakeholders: In 2009, well before the act entered into force, the percentage of women was stagnating at around ten percent. Already at the end of 2011, the average was 20.6 percent and it rose steadily to an average of 24.6 percent in mid-2013. Despite this very positive interim result, there are still six French companies within CAC 40 below the prescribed 20 percent. Moreover, in France the phenomenon of multiple mandates is widespread among women. Already in 2013, however, 16 companies exceeded a female share of 30 percent. Thus, due to this law, France belongs to the few countries in the EU, where, in 2013, at least one woman was represented in at least one decision-making body of large, publicly traded companies.²¹ The quota legislation not only triggered this „hard numbers“ but had even more interesting effects on civil society. Several professional women's associations have been established since 2011²², which are vividly present in the media. They support or question the gender-specific developments in economy and politics, thus contributing to the „empowerment process“ of qualified women through specific training, information and public events.²³ Their action to establish the „List of competent women for Supervisory Boards“ is, for example, proof that there are enough qualified women manager out there to meet the 40 percent in all sectors of the economy. Moreover, this list makes it easier for companies to search for the right person. Well-respected elite colleges such as „Sciences Po Paris“ or „ESSEC“ offer special training for future board members and thus contribute to qualification and professionalization beyond the gender issue. The public considers the law as important but inadequate as it (so far) covers only the tip of the iceberg, ie the highest executive level and not middle and upper management.

²⁰ *Le Galés*, Jann: Les femmes ont forcé la porte des conseils d'administration, in: Le Figaro of 3.7.2013. Online: <<http://www.lefigaro.fr/societes/2013/07/03/20005-20130703ARTFIG00311-les-femmes-ont-force-la-porte-des-conseils-d-administration.php>> (accessed: 5/1/2014).

²¹ *Husson*, Séverin: De plus en plus de femmes dans les conseils d'administration, in: La Croix of 27.1.2013. Online: <http://www.la-croix.com/Actualite/Economie-Entreprises/Economie/De-plus-en-plus-de-femmes-dans-les-conseils-d-administration-_NG_-2013-01-27-904240> (accessed: 5/1/2014).

²² For example, the „Fédération des femmes administrateurs“ or „Association femmes d'expertise Chartered Accountants administrateurs“.

²³ ETHICS & BOARDS SAS 2013 published the first index of a feminisation of French companies. Online: <<http://www.ethicsandboards.com/etudes/71-palmares-de-la-feminisation-des-instances-dirigeantes-2013>> (accessed: 5/1/2014).

Germany does not (yet) has a mandatory quota law. It used to rely on self-regulation. In 2010, the demand for more diversity in leadership positions, management and supervisory boards was included in the German Corporate Governance Code.²⁴ In the same year, the proportion of women on executive boards of companies listed in the German stock index (DAX 30) still stood at 2.16 percent and, with regard to the shareholder side, at 7.42 percent on supervisory boards.²⁵ In 2013, the percentage of women on supervisory boards is at 22.1 percent. As regards the Supervisory Board, on the shareholder side, the proportion of women stands at 9.4 percent, whereas the proportion of employee representatives is at 12.7 percent. However, only 7.4 percent of executive directors are female and in 19 of the 30 DAX companies there are no women at all on the boards. Overall, the share of women in supervisory boards and management boards is at 14.8 percent.²⁶ There are still two companies without women on their board.²⁷

Denmark, Finland, Greece, Austria and Slovenia set up rules for state-owned enterprises.²⁸

III. Legal basis

Djb has no concerns about the legal basis.

The legal basis chosen by the European Commission for this proposal, namely Art. 157 (3) of the Treaty on the Functioning of the European Union (TFEU), has been criticized. On this legal basis, EU gender equality directives prohibiting direct and indirect discrimination can be traced back so far.²⁹ However, until now no legal measures have been adopted in order to favor the under-represented sex. Such specific measures or „positive actions“ so far have only been taken by individual Member States. The Court of Justice of the European Union (CJEU) in various judgments has formulated to what extent these measures are allowed un-

²⁴ Online: <http://www.ecgi.org/codes/documents/cg_code_germany_may2010_en.pdf> (accessed: 5/1/2014).

²⁵ Koch-Rust, Victoria: Das Projekt des djb: Von Erkenntnissen, Bekenntnissen und Begründungen zu Handlungsempfehlungen, in: Aktionärinnen fordern Gleichberechtigung, BMFSFJ Berlin, 2010, p. 8.

²⁶ Shareholders demand equality – 2009 till 2013. More women in leadership positions. Conclusion and requests, Berlin, 2013, pp. 14.

²⁷ Fresenius and Fresenius Medical Care.

²⁸ European Commission: Women in economic decision-making in the EU. Progress Report. General Directorate Justice, Luxembourg: Publications Office of the European Union, 2012, p.13, in: *ibid*.

²⁹ Art. 14 of Directive 2006/54/EC implementing the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation includes provisions for „*access to employment or to employment or self-employment, regardless of activity and professional position*“, in: OJ. L 204 of 26.7.2006, p. 23, Directive 2010/41/EU implementing the principle of equal treatment between men and women engaged in an activity, applies, under Art. 2, not only to self-employed workers, i.e. to persons in paid employment on their own account, but also to their spouses who usually participate in the activities of self-employed workers, in OJ. L 180 of 15.7.2010, p. 1. Art. 4 of Directive 2010/41/EU prohibits any discrimination on grounds of sex related to the „*establishment, equipment or extension of a business or the launching or extension of any other type of self-employment*“.

der European law.³⁰ The European Commission's proposal adheres to this framework. It is of particular importance to mention that the Directive on female board members does not specify an automatic priority of female candidates possessing the same qualifications as men in case fewer women than men are present in the relevant positions.³¹ The Directive on female board members rather sets a procedural quota with an „escape clause“³², without allowing for automatic and unconditional priority of female candidates. Moreover, the introduction of transparent procedures shall guarantee that candidates are subject to an objective assessment which takes into account the personal situation.³³

Critics argued Art. 157 (3) TFEU does not authorize the European Commission to set „positive actions“ or measures to „reverse discrimination“ because Art. 157 (4) TFEU expressly and exclusively authorizes the Member States. However, Djb agrees with the European Commission that Art. 157 (3) TFEU does provide a legal basis for binding EU measures to implement the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, including positive measures in favor of women.³⁴

According to the observations of the European Commission, the EU's right to act in the area of gender equality in employment is based on Art. 157(3) TFEU, as only an EU-level measure can effectively ensure equal opportunities and equal treatment of men and women in matters of employment and occupation.³⁵ These arguments are convincing and supported by djb.

In this context, djb refers to the following considerations:

Even if Art. 157(3) TFEU as amended by the Treaty of Lisbon has the same wording as Art. 141(3) Treaty establishing the European Community (EC Treaty), it has to be interpreted in the light of the new framework of the Lisbon Treaty. While the 28th Declaration to the Final Act of the Amsterdam Treaty, with regard to Art. 119 (4) of the Treaty (predecessor to Art. 157 (4) TFEU), states that „actions of the Member States [...] should primarily improve the situation of women in the labor market“, the (overall) promotion of equality between women and men enshrined in Art. 2 and Art. 3 (3), sub (2) Treaty on the European Union

³⁰ CJEU 17.10.1995, Case C-450/93, ECR 1995, I-3051 – *Kalanke*; CJEU 11.11.1997, Case C-409/95, ECR 1997, I-6383 – *Marshall*; Judgment of 28.3.2000, Case C-158/97, ECR 2000, I-1902 – *Badeck*; Judgment of 6.7.2000, Case C-407/98, ECR 2000, I-5562 – *Abrahamsson*.

³¹ see *Kalanke*, in: *ibid*, para 16.

³² see *Marshall*; in: *ibid*, para. 24.

³³ see *Badeck* and *Abrahamsson*, in: *ibid*.

³⁴ Directive on female board members, COM (2012) 614, p 10.

³⁵ Commission Staff Working Document impact assessment on Costs and Benefits of Improving the gender balance in the Boards of Companies listed on Stock Exchanges. Accompanying the document Proposal for a Directive of the European Parliament and of the Council on Improving the gender balance among non-executive directors of companies listed on stock exchanges and related measures, SWD (2012) 0348, pp. 24. Online: <<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52012SC0348>> (accessed: 5/15/2014).

(TEU) has now become an integral part of primary law.³⁶ The EU therefore now fosters equality between women and men in all its policies, not only by eliminating direct and indirect discrimination. With the Lisbon Treaty entering into force, the European integration moved to a new level and EU's values were carved out. The EU is described as a community of values and, among other things, characterized by equality of women and men. Already the preamble to the TEU makes this very clear. This principle is reinforced and concretized by Art. 2 TEU referring to EU values. This orientation towards values is further specified in Art. 3 (2) with regard to gender equality, as the EU shall promote equality between women and men. In fact, Art. 8 TFEU obliges the EU to promote equality between women and men in all its activities. Furthermore, Art. 10 TFEU concretizes the task of the EU to combat discrimination when defining and implementing its policies and activities.

Art. 157(3) TFEU does not provide a basis for interpreting Art. 157(4) TFEU³⁷ more restrictive. The value-based understanding of Art. 157(3) TFEU provides the basis for an understanding of the provision in the sense that measures to „reverse discrimination“ are allowed. This understanding is also fostered by the Charter of Fundamental Rights of the European Union („CHARTER“). According to Art. 6(1) TEU, the CHARTER has to be seen on the same legal level as the Treaties themselves. Art. 21, Section 1, of the CHARTER prohibits discrimination on grounds of sex. Under Art. 23, sentence 1, equality between women and men has to be ensured in „all areas [...]“. Thus, Art. 23, sentence 1, proclaims its comprehensive validity for gender equality in all spheres of life. It even can be understood as requiring positive action measures, not only compensating measures. This principle corresponds to the principles established in Art. 3 TEU and Art. 8 TFEU obliging the EU to promote gender equality in all its activities as well as to combat discrimination. In this regard, Art. 51 CHARTER cannot be held against this interpretation, as competences conferred to the EU are not extended by the Charter. Moreover, as regards social policy (Art. 4 para 2 lit. B TFEU) including Art. 157 TFEU, the competences remain split between Member States and EU. Even if the EU acts on the basis of Art. 157 TFEU, there are competences remaining with Member States. EU action under Art. 157(3) TFEU and Member States acting under Art. 157(4) thus do not exclude each other. In other words, EU action does not limit the powers of Member States. Rather, the Treaty provision expressly allows for parallel actions of Member States and the European Commission. The referral of the European Commission to internal market standards and conformity with those thus „reconciles“ equality with the internal market.³⁸ Equality is not opposed to the single market, but is part of it. The equation expressed as: 'internal market equals Europe' and 'gender equality equals national Member State' thus does not work. The

³⁶ Coen, Martin, in: Lenz, Carl Otto/Borchardt, Klaus-Dieter: EU-Verträge, Commentary to the Treaty of Lisbon, 5th edition 2010, Art. 157 TFEU, RN 63.

³⁷ According to Art. 157(4) TFEU „positive actions“ of the Member States are allowed under European law.

³⁸ Preamble (12) and (13), in: Directive on female board members COM (2012) 614, p. 20.

business-related fundamental rights do not annul the fundamental right to equality. Equality is an expression of EU values.

In addition, there is also a duty to active state action under the law of the United Nations (UN)³⁹. Art. 3 of the UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) requires States to take all appropriate measures – including legislation – to achieve full equality for women and men. In particular, Art. 4 (1) CEDAW makes it clear that temporary special measures to accelerate the actual equality of women and men are not to be considered discrimination. Since all EU Member States have ratified CEDAW, those provisions are a source of fundamental rights within the EU, which via Art. 6 TEU and due to the jurisdiction of the CJEU, are enshrined as general principles into EU Law.

With respect to the values clearly carved out by TEU and TFEU and with regard to the application of the CHARTER and CEDAW, it is necessary to develop a new and enhanced understanding of the actions to be taken under Art. 157(3) TFEU. Any measures taken have to be based on the values of the EU and to serve the enforcement of equality between women and men.

Action is needed to enforce those values. The Member States systematically neglect fundamental rights to equal opportunity and equal treatment and instead favored the fundamental rights of the freedom to conduct a business and of the right to property. There is now an explicit state duty to counteract this imbalance.

The European Commission has dealt extensively with the issue of compliance with fundamental rights in its impact assessment.⁴⁰ It recognizes the violation regarding the freedom to conduct a business and the right to property but considers it justified since no fundamental right applies boundless/absolutely. In addition, the European Commission pointed out that, in order to achieve real equality, „positive actions“ are expressly authorized and approved by the ECJ. Art. 157 TFEU, Art. 23 CHARTER define „specific advantages in favor of the under-represented sex“ and their maintenance or introduction does not contradict the principle of equality.

The proposal for a „procedural quota with escape clause“ has three characteristics:

- a) It is mandatory as it sets a fixed target via the legal form of a European directive: 40 percent until 2018 and 2020 respectively. Sanctions can be enforced only if the requirements for a transparent appointment procedure laid down in advance with clear and public criteria have not been observed. The European Commission has cho-

³⁹ *Laskowski, Silke*: Gesetzliche Quotierung der Aufsichtsräte, in: *Aktionärinnen fordern Gleichberechtigung*, BMFSFJ Berlin, 2010, pp. 70ff. Laskowski points out that CEDAW goes beyond the quota jurisdiction of the CJEU and thus the question arises whether the CJEU's case law would have developed differently if it had taken into account the Women's Convention. See also: *Rudolf, Beate*: CEDAW und the Europäische Union, in: *Rust, Ulla / Lange, Joachim* (ed.): *CEDAW vor dem Zwischenbericht 2011 Locomer Protokolle 36/11*, pp. 75-92 (79-81).

⁴⁰ SWD (2012) 0348, in: *ibid.*

sen the path of minimum harmonization by demanding more transparency in appointment decisions and by pre-defined, clear and transparent criteria. Only in this way the principle requiring that „qualification succeeds“ can be ensured.

- b) Quality counts. The CJEU has adopted the principle of selecting the best. According to its specifications, qualification is more important than sex.⁴¹ The proposal is „gender neutral“ because it applies to the „under-represented sex“.
- c) It is up to each Member State to choose the most appropriate means to achieve the target, depending on its legal and factual circumstances.

Taking into consideration the arguments above, the comments criticizing the proposal are convincing. There are many indications that an EU minimum harmonization measure will make better use of the competences of highly qualified women. This will enhance their chances for top positions and thus opportunities can be effectively used to improve competitiveness and growth. Vice-President *Reding* rightly speaks of an „ntelligent procedural quota“

B. On the proposal in detail

I. Certain provisions of the Directive on female board members

1. Article 1: Purpose of the Directive

The Directive aims at achieving a more balanced representation of women and men on the boards of listed companies; measures provided for in the Directive are intended to speed up this process, but at the same time allow companies sufficient time for adjusting. The Directive allows Member States to take into account national characteristics before implementing.

The Directive shall not only improve the percentage ratio between the sexes. Through transparent appointment procedures of non-executive directors/supervisory board members, the diversity and appointment on the basis of performance criteria shall be ensured. A Spanish foundation underlines that this in the end may lead to more transparency and to the improvement of corporate governance in the respective major companies within the EU. Their study takes the view that, inter alia, mismanagement in Spanish listed companies is basically caused by nepotism in the non-executive boards.⁴² This finding is in contradiction with the idea that big companies should be particularly responsible regarding their staff.

⁴¹ see *Abrahamsson*, in: *ibid*.

⁴² Fundación Compromisos y Transparencia is a Spanish foundation that deals with the Corporate Governance of Spanish companies and has found significant deficiencies in compliance with the so-called Spanish Corporate Governance Code. Online: <<http://www.compromisoytransparencia.com>> (accessed: 1/5/2013).

Furthermore, it should be kept in mind that the Directive is of a temporary nature with an expiry date fixed at 2028. It seems clear that promotion of the under-represented sex within Managing Directors/Supervisory Board members should start now. In this regard, the European Parliament (EP) encourages mentoring programs within companies. The example of Norway with its quota for women in place since 2003 shows that the same women are often appointed to many different boards – and this is true also for men. Even though the Norwegian quota of 40 per cent is met, Norwegian companies do not have promoted sufficient executive female directors or women in middle management.⁴³ Therefore, the djb supports amendment 46 of the European Parliament, which proposed inserting the word „*effective*“ to the sentence „measures aimed at accelerated progress towards gender balance while allowing companies sufficient time to make the necessary arrangements.“⁴⁴

2. Article 2: Definitions

The more rigorous treatment of a „public undertaking“ is reasonable and justified due to its role model status. Public undertakings within the meaning of Art. 2. lit. b of Directive 2006/111/EC of 16 November 2006 are subject to stricter rules. These are undertakings/companies over which public authorities may exercise, directly or indirectly, a dominant influence by virtue of their ownership thereof, their financial participation therein, or rules which govern it. Those companies have a special responsibility for the economy and society. Therefore, higher transparency and gender equality on boards of these companies is essential. Because of the role model status of the public sector in society and the greater influence of Member States in such companies the Directive should be implemented more quickly, namely by the year 2018.

3. Article 3: Exclusion of small and medium-sized enterprises (SMEs)

SMEs are specifically excluded, even if they are listed. The proposal is therefore limited to large listed companies operating across borders and cross-border organized. For those a similar regulatory environment is created EU-wide in all Member States. Many SMEs also operate across borders, but are not organized to a comparable extent.

Nevertheless, Member States should provide incentives to ensure a much more balanced representation of women and men in the management bodies of SMEs. Listed SMEs domi-

⁴³ Reimann, Anna: Quote in Norwegen:Frau am Steuer, in: Spiegel of 28.5.2012. Online: <<http://www.spiegel.de/politik/ausland/in-norwegen-funktioniert-die-frauenquote-in-aufsichtsraten-a-831693.html>> (accessed: 5/1/2014).

⁴⁴ Amendment 46 Proposal for a Directive, Art. 1, in: proposal for a directive of the European Parliament and of the Council on improving the gender balance among non-executive directors of companies listed on stock exchanges and related measures (COM(2012)0614 – C7-0382/2012 – 2012/0299(COD)), p. 34. Online: <<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A7-2013-0340+0+DOC+PDF+V0//EN>> (accessed: 7/7/2014).

nated by one of the two sexes should meet the objectives of the Directive. Those are also of major importance for the economy and society in general.

The same applies to all non-listed SMEs, which should have an interest in a healthy and enriching diversity for their company.⁴⁵ The EP in its Amendment 64 requests the Commission to establish an evaluation report with figures and data for the year 2017 with an impact assessment as to the question whether the scope of the Directive should be extended to companies that are above the threshold of SMEs.

Djb supports this proposal.

4. Article 4: Objectives with regard to non-executive directors/ Supervisory Board members

The target quota of 40 percent only applies to „non-executive“ boards. Only those are subject to the obligation for transparent appointment choices to those positions on the basis of a transparent selection procedure, with the objective to attain the target quota. The appointments of executive directors are exempted from that rule and only subject to voluntary self-regulation in the sense of a „flexi-quota“ (see Art. 5).

The Directive on female board members only specifies the appointment process for „non-executive“ directors.

Based on an analysis of reasons for setting the quota at a different level, the European Commission applies the 40 percent target. Although this is below the absolute gender parity⁴⁶ of 50 percent, it is still above the critical mass of 30 percent. Since only minimum rules are set, this is an appropriate solution. It is also a realistic target considering the narrow time frame for implementation.

The provision on the appointment process is supplemented by a variety of different modifications: a calculation scheme, an objective assessment requirement, a duty of disclosure, an exception rule, a 33 percent bonus rate and an opening clause for Member States with more efficient provisions.

The calculation scheme in Art. 4(2) provides a practicable and workable solution for calculating the target quota in small boards. The target quota is considered to be fulfilled at a number that comes next to 40 per cent.

⁴⁵ A good example: *Theissen*, Bettine: Warum Arbeitgeber sich von der Behinderten-Quote freikaufen, in: Frankfurter Allgemeine Zeitung of 12.3.2013. Online: <<http://www.faz.net/aktuell/beruf-chance/recht-und-gehalt/arbeitsmarkt-warum-arbeitgeber-sich-von-der-behinderten-quote-freikaufen-12686091.html>> (accessed: 5/1/2014).

⁴⁶ According to the definition in TheFreeDictionary.com underrepresented means represented in smaller numbers than it (in relation to the total number) ought to be. Online: <<http://de.thefreedictionary.com/unterrepr%C3%A4sentiert>> (accessed: 5/1/2014).

The requirement for objective assessment (Art. 4 (3)) corresponds to CJEU case-law.⁴⁷ However, Thomas *Sattelberger*, former Head of Human Resources of Deutsche Telekom, indicated at a hearing before the Judicial Committee of the German Bundestag on January 16, 2013 that the opponents of the quota carry „the myth of the appointment of the best like a monstrosity before them”.⁴⁸ By arguing in this way, the importance of male cliques, of exchange dealings and of appointments only serving the purpose to fill the position for a certain time ('Statthalterbesetzungen') is ignored, according to *Sattelberger*.

The duty of disclosure (Art. 4 (4)) underpinned by a shift of the burden of proof, Art. 4(5), is a recognized means of preventing indirect discrimination in labor law. An unsuccessful candidate shall be able to request disclosure of the qualification criteria for the appointment, the objective comparison of these criteria and, if necessary, the considerations for the appointment. If he/she finds evidence for a violation of objective assessment criteria, the burden of proof is reversed. On the basis of the exemption rule (Art. 4 (6)) companies may be exempted from the 40-percent rule if less than 10 percent of one gender is represented in the workforce. Djb rejects explicitly this exemption and welcomes the proposal by the EP to delete the exemption (Amendment 53).

It does not seem acceptable that companies having made no or little effort in the past to attract female workers into their workforce should be exempted. Moreover, this exemption promotes the wrong incentive, namely to keep the proportion of women in the workforce small in order to be able to continue appointing leading positions mainly by men.

In this case, even the duty to give reasons for the failure to reach the target does not provide help. This was recently experienced by Germany.⁴⁹

A breach of the transparency rules may lead to sanctions. The proposal also allows for Member States to introduce a „bonus rate“ (Art. 4(7)): if 33 percent of both sexes are represented in the Executive Board and Supervisory Board taken together, this is sufficient. Then, the 40 per cent quota of women on the Supervisory Board would no longer have to be achieved. Djb rejects this provision; the 40 % target quota for the Supervisory Board should not be called into question by offsetting with numbers from the Executive board.

Finally, djb supports the EP proposal for an amendment of Article 4 (1) (Amendment 48) as follows:

⁴⁷ *Kalanke* regarding the „under-representation”, *Abrahamsson* with respect to the same qualifications and *Marshall* with respect to the non-automatic and absolute primacy.

⁴⁸ So quoted in: hib – heute im Bundestag, No. 024, Ziff. 1 of 16.1.2013. Online: <http://www.bundestag.de/presse/hib/2013_01/2013_024/01.html> (accessed: 5/1/2014).

⁴⁹ Women Shareholders Demand Gender Equality: As part of the project funded by the BMFSFJ members of the djb and from friendly women's organizations attended since 2009 annually 75 general meetings of listed companies and made use of their right to information. The responses of the supervisory and management boards have been analyzed and published in four studies. All four studies have been published. Online: <http://www.djb.de/Themen/Projekt_HV/> (accessed: 8/6/2014).

„In particular, Member States shall ensure that companies select the most qualified candidates for a board position from a gender-balanced selection pool and on the basis of a comparative analysis of the qualifications by applying pre-established, clear, neutrally formulated, non-discriminatory and unambiguous criteria. In the case of an election procedure, Member States shall ensure that companies guarantee gender diversity in the composition of the shortlist of candidates while ensuring that the sex of the non-executive director elected in this procedure is not in any way predetermined.”

Taken as a whole, the proposal is a balanced body of provisions, provided the indicated EP-amendment proposals are taken into account.

5. Article 5: Additional measures by companies and reporting

In principle, djb welcomes the annual reporting requirements imposed on companies and the duty to give reasons for the failure to reach the (set) targets. The information requested should be checked by an external review process in the form of an audit.

Djb supports the EP’s call for information on company websites as well as its call for a duty to give reasons in the annual reports.⁵⁰ In addition, djb advocates the involvement of civil society with regard to ensuring the „promotion, analysis, monitoring and support of a balanced representation of both sexes in the management bodies of listed companies“, which corresponds to a further amendment of the EP.⁵¹

The Directive on female board members provides for a „flexi-quota“ provision for directors/executive board members (Article 5 (1)). No provision is made for women at middle management level.

Djb regrets that the middle management level does not fall within the scope of the Directive. For djb the „flexi-quota“ is not a convincing measure, because experience made in Germany since 2001 as to commitment of the business sector shows that no progress could be achieved through self-regulation. Though the cautious Commission approach is comprehensible given the current political context, the djb regrets that the European Commission has not advanced in a more courageous way, given its right of legislative initiative.

6. Article 6: Sanctions

Listed companies, which fail to introduce, apply or comply with the procedure provided for the selection or appointment of non-executive directors/supervisory board members, shall be punished by effective, proportionate and dissuasive sanctions. Djb supports the recommendation of the European Parliament (amendments 61 and 62) to add to the list of possi-

⁵⁰ Amendment 55 Proposal for a Directive Article 5 – para. 2, in: *ibid* (Fn. 44), pp. 43-45.

⁵¹ Amendment 57 Proposal for a Directive Article 5 – para. 4, in: *ibid* (Fn. 44), pp. 43-45.

ble sanctions the exclusion from public calls for tender and partial exclusion from the award of funding via the Union's Structural Funds. It seems important here to show the range of possibilities, even if listed companies do not participate in public tenders in all Member States. In any case Member States are not bound to adopt one or more of the penalties proposed in the catalog of sanctions.

Djb supports amendment 58 of the European Parliament with respect to a breach of the requirements for an open and transparent procedure under Article 4(1), because this article specifically addresses the type of procedure to be followed and does not globally refer to a violation of Member States' implementing legislation.⁵²

7. Article 7: Minimum requirements

The Directive on female board members aims at minimum harmonization leaving Member States sufficient discretion. That is appropriate.

8. Article 8: Implementation

Member States are free to choose how they implement the Directive into national law and how they adjust the detailed regulation to their specific situation and their national traditions. Since Belgium, France and Italy already have a quota law with sanctions, these three Member States will have to take transposition measures only to a limited extent. In this context, Art. 8(3) of the proposal contains a suspension clause for Member States „which before the entry into force of this Directive have already taken measures to ensure a more balanced representation of women and men among the non-executive directors of listed companies“. These Member States may suspend the application of the procedural requirements of Article 4 (1), (3), (4) and (5) for the appointment of directors, „provided that it can be shown that their measures enable members of the under-represented sex to hold at least 40 per cent of the non-executive directors positions of listed companies by 1 January 2020 at the latest, or at the latest by 1 January 2018 for listed companies which are public undertakings“. This suspension clause is reasonable, because it takes into account the legislative activities individual Member States already made. Nevertheless, the djb supports Amendment 63 of the EP to the de facto moratorium in 2017 if progress is insufficient.

9. Article 9, 10 and 11: Verification, Entry into force and expiry, addresses

The Directive expires on 31 December 2028. It is doubtful whether 14 years will be sufficient, even though generational and demographic change may promote necessary changes in corporate culture. Overall, the question remains how to ensure progress in non-regulated areas. This underlines the need for binding targets.

Djb appreciates the review clause included by the European Parliament rapporteurs, requesting the European Commission to examine, in the report pursuant to Art. 9, whether the scope of the Directive should be extended to cover non-listed public undertakings not falling within the definition of SME, non-listed large undertakings and executive directors of listed companies (Amendment 66).

A general review regarding the scope for mid-level management and the managing directors/supervisory board members and the involvement of SMEs is recommended.

II. Conclusions

Djb considers necessary the introduction of mandatory quotas with sanctions in all EU Member States and deplores the fact that there is no such compulsory duty in the proposal. However, the women-on-board proposal is an important first step to achieve a more balanced representation of women and men in the boards of European companies.

In addition, in many Member States the past year has shown that cooperation between various groups, good public relations and the media interest raised public awareness regarding the issue. This is true not only for the general public but also in the companies concerned. The work of the djb in Germany and in Spain with the projects „Shareholders demand equality“ and „Paridad en Acción“ encouraged companies to rethink the current practice of selecting management personnel applying a critical approach. Therefore, it is highly advisable to continue this information policy. This could avoid the proposal becoming a one-way street ultimately only leading to an increase in the share of the under-represented sex among the non-executive directors/supervisory board members. Otherwise the risk might occur that there is no professional development for women with regard to management positions and legal hideaways are used to avoid having to apply the targets of the Directive. Furthermore the spillover effect on listed and non-listed SMEs could fail. Then, finally, the quota setting would not lead to a change in society. Last but not least, djb would like to mention that the ultimate objective should be an increase of the under-represented sex (in all management posts the under-represented sex is it the female sex) particularly among Managing Directors/Supervisory board members.

C. Conclusion

Djb has a high interest in the Directive on female board members entering into force and therefore asks the relevant actors – the governments of the Member States, the European Parliament, the European Commission and the Presidency – to rapidly adopt the Directive, kindly considering the proposals presented above for amendment.

⁵² Ibid., p. 45.

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