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from: UK House of Lords
date of receipt: 11 January 2013
to: President of the Council of the European Union

Subject: 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
[doc. 16433/12 SOC 943 COMPET 708 DRS 130 CODEC 2724 - COM(2012) 614 final]
- *Opinion on the application of the Principles of Subsidiarity and Proportionality*¹

Delegations will find attached the above mentioned opinion.

¹ For available translations of this opinion see the interparliamentary EU information exchange site (IPEX) at the following address: <http://www.ipex.eu/IPEXL-WEB/search.do>



HOUSE OF LORDS
Clerk of the Parliaments

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The President
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11 January 2013

Dear Mr President

16433/12: Commission 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

On 10 January 2013 the House of Lords of the United Kingdom Parliament resolved as follows:

“that this House considers that Commission 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 (16433/12) does not comply with the principle of subsidiarity, for the reasons set out in the Sixth Report of the European Union Committee (HL Paper 97); and, in accordance with article 6 of the Protocol on the application of the principles of subsidiarity and proportionality, instructs the Clerk of the Parliaments to forward this reasoned opinion to the Presidents of the European institutions.”

I have the honour so to do. I enclose the report referred to.

Yours sincerely

David Beamish

David Beamish
Clerk of the Parliaments

HOUSE OF LORDS

European Union Committee

9th Report of Session 2012–13

Subsidiarity Assessment: Gender Balance on Boards

Report

Ordered to be printed 18 December 2012 and published 20 December 2012

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HL Paper 97

The European Union Committee

The Committee considers EU documents in advance of decisions being taken on them in Brussels, in order to influence the Government's position and to hold them to account.

The Government are required to deposit EU documents in Parliament, and to produce within two weeks an Explanatory Memorandum setting out the implications for the UK. The Committee examines these documents, and 'holds under scrutiny' any about which it has concerns, entering into correspondence with the relevant Minister until satisfied. Letters must be answered within two weeks. Under the 'scrutiny reserve resolution', the Government may not agree in the EU Council of Ministers to any proposal still held under scrutiny; reasons must be given for any breach.

The Committee also conducts inquiries and makes reports. The Government are required to respond in writing to a report's recommendations within two months of publication. If the report is for debate, then there is a debate in the House of Lords, which a Minister attends and responds to.

The Committee has six Sub-Committees, which are:

Economic and Financial Affairs (Sub-Committee A)

Internal Market, Infrastructure and Employment (Sub-Committee B)

External Affairs (Sub-Committee C)

Agriculture, Fisheries, Environment and Energy (Sub-Committee D)

Justice, Institutions and Consumer Protection (Sub-Committee E)

Home Affairs, Health and Education (Sub-Committee F)

Our Membership

The Members of the European Union Committee are:

Lord Boswell of Aynho (Chairman)	Lord Hannay of Chiswick	The Earl of Sandwich
Lord Bowness	Lord Harrison	Baroness Scott of Needham Market
Lord Cameron of Dillington	Lord Maclennan of Rogart	Lord Teverson
Lord Carter of Coles	Lord Marlesford	Lord Tomlinson
Lord Dear	Baroness O'Cathain	Lord Trimble
Baroness Eccles of Moulton	Lord Richard	Baroness Young of Hornsey
Lord Foulkes of Cumnock		

The Members of the Sub-Committee on the Internal Market, Infrastructure and Employment, which conducted this inquiry, are:

Lord Brooke of Alverthorpe	Lord Fearn	Baroness O'Cathain (Chairman)
Baroness Buscombe	Lord Haskel	Baroness Scott of Needham Market
Lord Clinton-Davis	Lord Kakkar	Baroness Valentine
Lord Elton	Earl of Liverpool	Lord Wilson of Tillyorn

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General Information

General information about the House of Lords and its Sub-Committees, including guidance to witnesses, details of current inquiries and forthcoming meetings is on the internet at

<http://www.parliament.uk/business/lords/>

Sub-Committee Staff

The current staff of the Sub-Committee are Nicole Mason (Clerk), Paul Dowling (Policy Analyst) and Mandeep Lally (Committee Assistant).

Contacts for the European Union Committee

Contact details for individual Sub-Committees are given on the website. General correspondence should be addressed to the Clerk of the European Union Committee, Committee Office, House of Lords, London, SW1A 0PW. General enquiries 020 7219 5791. The Committee's email address is euclords@parliament.uk

Subsidiarity assessment: Gender Balance on Boards

COM(2012) 614 – 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.

Recommendation

1. We recommend that the House of Lords should issue the reasoned opinion set out below to the effect that the proposed Directive does not comply with the principle of subsidiarity; and should send it to the Presidents of the European Parliament, the Council and the Commission, in accordance with the provisions of the European Union (EU) Treaties,¹ before the expiry of the prescribed period on 15 January 2012.

Scrutiny history

2. In May 2012 the Commission launched a consultation on gender imbalance in the EU, to identify measures to address the “persistent lack of gender diversity in boardrooms of listed companies across Europe”, including possible legislative measures.² The Committee conducted an inquiry into this subject, and on 9 November 2012 produced a report which anticipated the publication of this legislative proposal.³ The Committee concluded that legislative quotas on gender balance in companies should only be resorted to if and when all other options have been exhausted, and the business sector has shown itself unwilling to change its ways. The evidence taken during the inquiry suggested that it could not be argued that quotas are the only remaining option, given the high priority of gender diversity on boards in Member States across the EU. The Committee also suggested that the Commission’s target of 40 per cent was too ambitious at a stage when even the best performing Member State (Finland) is well below that point. The Commission’s proposed draft Directive was published on 14 November 2012.

Scrutiny reserve

3. This report was prepared by the Internal Market, Infrastructure and Employment Sub-Committee (Sub-Committee B) whose members are listed in the Appendix. This report does not complete our scrutiny of this proposal.

¹ Article 5(3) of the Treaty on European Union and Article 6 of the Protocol on the application of the principles of subsidiarity and proportionality

² European Commission, *Consultation on Gender imbalance in the EU*, May 2012: http://ec.europa.eu/justice/newsroom/gender-equality/opinion/120528_en.htm

³ European Union Committee, 5th Report (2012–13): *Women on Boards* (HL Paper 58)

Reasoned opinion

4. We have examined 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 in particular as to whether it complies with the principle of subsidiarity. The principle of subsidiarity provides that, in policy areas which do not fall within the exclusive competence of the European Union, but where competence is shared with the Member States, the Union can act “only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States”.⁴ Therefore, to comply with the principle of subsidiarity, EU action must ‘add value’ as compared to action at Member State level, and be ‘necessary’. We fully support the aim of increasing gender diversity on boards, but we have come to the conclusion that this proposal is inconsistent with the principle of subsidiarity.
5. The aim of this proposed Directive is to increase the number of women on corporate boards throughout Europe, setting a minimum objective of 40 per cent of female non-executive directors on the boards of listed companies by 2020, and by 2018 in the case of listed public undertakings. The Commission suggests that the measure is necessary due to the gender imbalances which characterise company boards in the EU, with only 13.7 per cent of total corporate board seats in the largest listed companies held by women, and only 15 per cent of non-executive board seats held by women.
6. The proposed Directive is intended to achieve this target by requiring EU listed companies to give preference to an equally qualified candidate of the under-represented sex. Member States would be obliged to ensure that companies have transparent gender neutral appointment processes in place for their boards, and to disclose the qualification criteria and assessment upon which disputed selections are based. The proposed Directive also contains the requirement that Member States should introduce some form of sanctions for companies which fail to introduce suitably open, gender neutral appointment processes.
7. The Commission justifies action in this area on the basis that, while some Member States have introduced measures to strengthen gender balance, these vary widely and a substantial number of States have not taken any action at all in this area, leaving the share of female directors very low. The Commission argues that action at EU level will serve to overcome Member States’ resistance to regulate at the national level due to a perceived risk of putting their own companies at a disadvantage as compared with companies from other Member States. It suggests that divergent regulations at national level are likely to create practical problems in the functioning of the internal market, with different company law rules and sanctions (such as exclusion from public procurement) for not complying with a national binding quota. The Commission argues that only EU level action can ensure a competitive playing field throughout the union.
8. The Commission’s argument about the need for a Directive is unconvincing. The relevant organisational literature suggests that a board should have at least 30 per cent of women members, in order to establish a “critical mass” of female representation and to have a recognisable impact on corporate

⁴ Article 5(3) of the Treaty on European Union

culture.⁵ Indeed the Commission cite this idea in the Communication but do not appear to justify the higher figure of 40 per cent.⁶ We are not persuaded by the Commission's suggestion that a higher figure should be imposed in order to ensure a "critical mass" of women on boards in Member States where boards are traditionally smaller. This proposal fails to take into account the rate of change and the board structures within each Member State.

9. Furthermore, the Commission has not adequately made the case that measures taken at national level are not working. Indeed, its own Impact Assessment of August 2012 accepted that Member States have taken significant measures in this area, and that the evidence base to demonstrate the need for EU action is very weak. The Impact Assessment specified that existing and projected action by Member States in the absence of EU legislation is expected to achieve an increase in the proportion of female non-executive directors from 15 per cent to 24 per cent by 2020.⁷ This is a significant step towards achieving the critical mass of 30 per cent given that 15 Member States have taken no action to date. The increasing profile of this area suggests that this projection of 24 per cent will be exceeded.
10. The Commission asserts that "numerous studies have also shown that there is a positive relationship between gender diversity at top management level and a company's financial performance and profitability."⁸ In our recent report, we found that there was insufficient evidence to support this claim.
11. In the UK, in just over a year and a half, the proportion of FTSE 100 board members who are female has gone up by 4.8 per cent, and by 4.2 per cent in the case of FTSE 250 board members. Research by the Cranfield School of Management finds that the UK is on a trajectory to achieve 36.9 per cent women on boards by 2020.
12. The implementation of the proposal at EU level appears not to 'add value'. The Commission suggests that uniform rules are necessary for the practical and competitive functioning of the internal market. This justification appears to be weak when balanced against the administrative burdens of the proposal and the different cultural contexts and practices within different Member States. For example, there is not currently a distinction in UK law between executive and non-executive directors, and making this distinction for the first time (as the proposed Directive would necessitate) could have significant legislative implications. Furthermore, the EU is unlikely to be able to work directly with companies within Member States' specific cultural contexts, to bring about changes at the heart of business in order to ensure a long-term, sustainable solution. Our recent report on this subject highlights, for example, the importance of firms developing a sustainable supply of talented women who are ready and able to take on board positions.
13. It is our view that EU-wide legislative action at the present time is unnecessary, and could be counter-productive to the Commission's stated aim of increasing gender diversity on boards. Action at Member State level to

⁵ European Union Committee, 5th Report (2012–13): *Women on Boards* (HL Paper 58), p.18

⁶ COM (2012) 614, p.5; SWD 349 final

⁷ DG Justice opinion on European Commission Impact Assessment Board Impact Assessment on costs and benefits of improving the gender balance in the boards of companies listed on stock exchanges: http://ec.europa.eu/governance/impact/ia_carried_out/docs/ia_2012/sec_2012_0592_en.pdf

⁸ Recital (8) of the proposal.

address these issues would be more effective. However, as expressed in our report, we acknowledge that the Commission could usefully complement this by monitoring Member State action, and by issuing a non-binding Recommendation to Member States, which urges strong action and outlines a range of possible policy developments. Where individual Member States fail to comply with their obligations to combat discrimination, the Commission should consider further action.

APPENDIX: SUB-COMMITTEE ON THE INTERNAL MARKET, INFRASTRUCTURE AND EMPLOYMENT

The Members of the Sub-Committee which conducted this inquiry were:

Lord Brooke of Alverthorpe
 Baroness Buscombe
 Lord Clinton-Davis
 Lord Elton
 Lord Fearn
 Lord Haskel
 Lord Kakkar
 The Earl of Liverpool
 Baroness O’Cathain (Chairman)
 Baroness Scott of Needham Market
 Baroness Valentine
 Lord Wilson of Tillyorn

Declaration of Interests

Lord Brooke of Alverthorpe
No relevant interests

Baroness Buscombe
Non-Executive Director, Affinity Water Limited
Chairman, Advisory Board for the Samaritans

Lord Clinton-Davis
No relevant interests

Lord Elton
No relevant interests

Lord Fearn
No relevant interests

Lord Haskel
No relevant interests

Lord Kakkar
No relevant interests

The Earl of Liverpool
No relevant interests

Baroness O’Cathain
No relevant interests

Baroness Scott of Needham Market
No relevant interests

Baroness Valentine
No relevant interests

Lord Wilson of Tillyorn
No relevant interests

The following Members of the European Union Select Committee attended the meeting at which the report was approved:

Lord Boswell of Aynho (Chairman)
Lord Bowness
Lord Dear
Baroness Eccles of Moulton
Lord Foulkes of Cumnock
Lord Hannay of Chiswick
Lord Harrison
Lord MacLennan of Rogart
Lord Marlesford
Baroness O’Cathain
Lord Richard
The Earl of Sandwich
Baroness Scott of Needham Market
Lord Teverson
Lord Trimble
Baroness Young of Hornsey

A full list of Members’ interests can be found in the Register of Lords Interests:

<http://www.parliament.uk/mps-lords-and-offices/standards-and-interests/register-of-lords-interests/>