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signed by Mr Jordi AYET PUIGARNAU, Director

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Detailed explanation of the choice of the legal basis for the Commission's
proposal for a Directive on improving the gender balance among non-executive
directors of companies listed on stock exchanges and related measures

Delegations will find attached Commission document SWD(2013) 278 final.

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COMMISSION STAFF WORKING DOCUMENT

**Detailed explanation of the choice of the legal basis for the Commission's proposal for a
Directive on improving the gender balance among non-executive directors of companies
listed on stock exchanges and related measures**

COMMISSION STAFF WORKING DOCUMENT

Detailed explanation of the choice of the legal basis for the Commission's proposal for a Directive on improving the gender balance among non-executive directors of companies listed on stock exchanges and related measures

The Commission proposal for a Directive on improving the gender balance among non-executive directors of companies listed on stock exchanges and related measures {COM(2012)614 final} refers to Article 157(3) TFEU as its legal basis.

This provision reads:

"The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, and after consulting the Economic and Social Committee, shall adopt measures to ensure the application of the principle of equal opportunities 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."

The availability of this legal basis for "rules concerning the appointment of non-executive members of company boards" has been put into question by the Council Legal Service's opinion of 27 March 2013 (doc. 8050/13) complemented by an addendum issued on 11 June 2013 (doc. 8050/13/ADD1). In its view, board members do not fall within the personal scope of that Treaty provision.

1. PREVIOUS USE OF THE LEGAL BASIS BY THE LEGISLATOR

The decisive question is whether rules on the gender balance of members of company boards not exercising management functions (non-executive board members), to which the 40% objective and the procedural rules concerning selection and appointment apply, can be regarded as "matters of employment and occupation" within the meaning of Article 157(3) TFEU.

In all or most Member States, board members are usually not employees, as they do not have work contracts falling under national labour law. They are either self-employed or assimilated to that status or have a 'sui generis' status under national company law.

It remains, however, that board members perform tasks for a company in exchange for remuneration. They should therefore be considered as performing professional activities.

The legislator has clearly considered Article 157(3) TFEU as a legal basis enabling the Union to take gender equality measures that go beyond employed work under labour law:

- Article 14 of Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation¹ contains rules for "conditions for access to employment, to self-employment or to occupation (...) whatever the branch of activity and at all levels of the professional hierarchy". The fact that "occupation" is mentioned here next to "employment" and "self-employment" indicates that the legislator wanted to cover all professional activities, irrespective of their status under national law. It should also be stressed that the "access" to these activities "at all levels of the professional hierarchy" is explicitly mentioned here.

¹ OJ L 204 of 26.7.2006, p. 23.

- Article 2 of Directive 2010/41/EU on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity², which is based on Article 157(3) TFEU, stipulates that the Directive applies not only to self-employed workers, defined as "*all persons pursuing a gainful activity for their own account*", but also to their spouses habitually participating in the activities of the self-employed worker, i.e. persons not having any formal professional status in many Member States.
- Article 4 of Directive 2010/41/EU prohibits discrimination on grounds of sex in relation to the "*establishment, equipment or extension of a business or the launching or extension of any other form of self-employed activity*" thus covering all forms of entrepreneurial activity including the setting-up of a company which are clearly outside the area of employment. It seems therefore difficult to argue that the establishment of a company would be covered by an EU competence to ensure equal treatment between men and women, but not the activities of board members in the management or supervision of a company.

An interpretation of the term "matters of employment and occupation" as being limited to matters such as access to employment, working conditions, occupational health and safety, information and representation of workers therefore seems to be too narrow. The term rather refers to all kinds of professional activities and all spheres of professional life, an interpretation which seems fully in line with the case-law of the Court of Justice of the European Union (CJEU).

2. THE CJEU'S CASE LAW AND THE DANOSA JUDGMENT

The Court of Justice of the European Union has so far given a wide interpretation of the EU law concept of "worker", including in matters of equal treatment between men and women, and has explicitly addressed the situation of company board members.

First of all, it is important to note that for the purposes of the EU law concept of worker, it is irrelevant how the labour relationship is created (appointment/labour contract/civil law contract) and what the legal status of the relationship is under national law. The *sui generis* nature of the employment relationship under national law is of no consequence as regards whether or not a person is a worker for the purposes of EU law (case C-116/06 *Kiiski*, paragraph 26). Therefore, for the purposes of the draft Directive, it does not matter how one becomes a board member and whether, under national law, the legal status of board members is of *sui generis* nature, as long as EU definition of worker is fulfilled.

Secondly, the Court has analysed specifically the situation of members of company boards. In its ruling in the case C-232/09 *Danosa v. LKB Līzings SIA*, the Court held that a member of a capital company's board of directors must, under certain conditions, but irrespective of the absence of a work contract, be considered a worker for the purposes of the Pregnant Workers Directive (92/85/EEC): "*Board Members who, in return for remuneration, provide services to the company which has appointed them and of which they are an integral part, who carry out their activities under the direction or control of another body of that company and who can, at any time, be removed from their duties without such removal being subject to any restriction, satisfy prima facie the criteria for being treated as workers within the meaning of the case-law of the Court*" (paragraph 51).

In this instance, the board member was an executive director who had to report on her management to the supervisory board, so it might be debatable whether the reasoning also

² OJ L 180 of 15.7.2010, p. 1.

holds for non-executive board members or supervisory board members. However, since the Court refers to the fact that, under the national law in question, a board member may be removed from his or her duties by a decision of the shareholders, concluding that there must be a relationship of subordination to the company, it seems that wherever board members may be revoked by the shareholders and where all other conditions are fulfilled, they should be considered as workers under EU law.

Moreover and possibly even more importantly, the Court goes further to suggest that, even where a board member would not fulfil the above-mentioned conditions to be considered a worker under EU law (Directives 92/85/EEC and 76/207/EEC) and on that account be protected against sex discrimination, it would be logical to categorise this board member as "a self-employed person" within the scope of Directive 86/613 (now replaced by Directive 2010/41/EU), equally protected against discrimination on grounds of sex. In the relevant paragraph of the ruling (paragraph 70) the Court does not even consider the possibility that a board member is neither a worker nor self-employed.

Considering this statement by the Court that company board members – irrespective of what their precise status as worker or non-worker is – are protected against discrimination by the existing *acquis* (adopted on the basis of Article 157(3)), it seems difficult to argue that the same legal basis should not be available for legislative measures specifically aiming at improving gender equality for the same category of professionals.

3. THE COUNCIL LEGAL SERVICE OPINION

The opinion delivered by the Council Legal Service (CLS), while mentioning Directive 2006/54/EC and 2010/41/EU, does not draw any conclusions from the fact that in these instances Article 157(3) has been used as a legal basis concerning equal treatment in access to self-employment and occupation. The CLS only reaches the conclusion that 'matters of employment of occupation' should not necessarily be "read in a manner specific to the context of Article 157(3) TFEU".

The opinion further argues that "it may well be that the activities to which the proposal applies do not have any professional character in the law of the relevant Member State" and that "it is to be supposed that the board members do not accept such appointments for the main purpose of meeting their income needs", without giving any arguments or examples in support of these statements. In this context it must be stressed that under the established case-law of the Court the status of a group of professionals under national law is of no relevance to the necessary autonomous interpretation of the terms "matters of employment and occupation" under EU law. Holders of non-executive posts in large listed companies do tend to be generously remunerated in exchange for their services, in some cases this remuneration constituting the main source of their income.

The CLS goes on to argue that the appointment and the activity of board members are governed by the rules of company law rather than labour law. However these aspects are regulated by other fields of law for a considerable number of other professions (such as civil servants, judges, doctors, pilots), without putting in question that EU labour law, and in particular EU equal treatment legislation, is applicable to these professions.

Most importantly, the draft directive does not purport to change the status nor functions of non-executive directors, but regulates in a minimal and proportionate way equal access to this profession for both women and men. As in the case of workers, it is immaterial that their functions are exercised on the basis of appointments.

The implications of the Danosa case for the definition of nature of board-membership are addressed in CLS addendum of 11.06.2013. According to the CLS, the ruling in Danosa "confirms that non-executive board members do not, in a general way, constitute 'workers' in the meaning of EU law", and therefore it "confirms that Article 157(3) does not confer on the EU institutions the power to legislate on the composition of non-executive boards".

It should be stressed that the Court, in its ruling of 11 November 2011, states that board members fulfilling the conditions set out by the Court "satisfy prima facie the criteria for being treated as workers within the meaning of the case law of the Court". There is nothing to suggest that the test developed by the Court in the judgment applies only in the limited circumstances of the case at hand and is not relevant in other similar cases. Whether or not a non-executive board member is capable of meeting the criteria set out by the Court has to be judged on a case-by-case basis, but it is by no means excluded that he or she may be covered, since the judgment refers to the control of the activity of a board member by "another body of a company", which in the case of an individual non-executive board member could mean either the non-executive board as the entity of which he is a member or the assembly of shareholders.

However, the addendum to the CLS opinion only deals with the question whether non-executive board members are to be considered workers or, in other words, whether they are in an *employment* relationship with the company.

It does not address the broader question whether board membership has to be considered *a matter of employment and occupation* within the meaning of Article 157(3) TFEU, which without any doubt is a concept wider than the notion of employment analysed in the CLS opinion. In that context, it cannot be ignored that in Danosa the Court also considered that

- under certain conditions board members are to be considered workers; and
- even where in a specific case these conditions are not met board members are covered by the equal treatment *acquis* in relation to self-employed persons (based on Article 157(3) TFEU) for the reasons explained in section 2 above.

In the view of the Commission, this position of the Court confirms a broad interpretation of the terms "matters of employment and occupation" and supports the argument that both non-executive and executive board members fall within the ambit of either employment (as workers) or occupation (as self-employed persons).

Finally, the CLS opinion of 27.03.2013 takes argument from the location of Article 157(3) within Title X of Part Three of the TFEU to reach the conclusion that this legal basis is not to be used in the context of company law, to harmonise rules concerning appointments to company boards. However, the social aspects of the proposal form its centre of gravity. It is a positive action measure intended to ensure the respect of the fundamental principle of equality between men and women in EU law and thus to increase gender balance on boards for a number of reasons stated in its preamble, including promotion of employment, reduction of gender gaps in employment and pay, and the development of human resources. In no way, the proposal intends to harmonise company law.

4. CONCLUSION

Article 157(3) TFEU remains the appropriate legal basis for the Commission's proposal for a Directive on improving the gender balance among non-executive directors of companies listed on stock exchanges and related measures.