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REPORT

From:	The Presidency
to:	Permanent Representatives Committee (Part I) / Council (EPSCO)
Prev. doc.:	10422/13 SOC 417 ECOFIN 453 DRS 110 CODEC 1314
No. Cion prop.	16433/12 SOC 943 ECOFIN 708 DRS 130 CODEC 2724 – COM(2012) 614 final
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 - Progress Report

I. INTRODUCTION

On 14 November 2012, the Commission adopted a 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. Aiming to address the serious problem of women's under-representation in economic decision-making at the highest level, the proposed Directive would set a quantitative objective for the proportion of the under-represented sex on the boards of listed companies of 40% by 2020 (by 2018 in the case of public undertakings). The companies would be obliged to work towards that objective, *inter alia*, by introducing procedural rules on the selection and appointment of non-executive board members.

Should companies fail to reach the 40% target by the deadline set, they would be required to continue to apply the procedural rules, as well as to explain what measures they had taken and intended to take in order to reach it. For Member States that choose to apply the objective to *both* executive and non-executive directors, a lower target (33%) would apply.

The national parliaments of DK, NL, PL, SE, UK, and one of the two chambers of CZ Parliament (Chamber of Deputies) submitted reasoned opinions within eight weeks from the submission of the Commission's proposal, alleging that it did not comply with the principle of subsidiarity.¹

The European Economic and Social Committee adopted its opinion on 13 February 2013.²

The Committee of the Regions adopted its opinion on 30 May 2013.³

The European Parliament adopted its position at first reading on 20 November 2013.⁴

All delegations have general scrutiny reservations on the proposal at this stage; UK and FR have parliamentary scrutiny reservations; and CZ, DK, SK, SI and LV have linguistic scrutiny reservations.

II. THE COUNCIL'S WORK UNDER THE LITHUANIAN PRESIDENCY

During the Lithuanian Presidency, the Working Party on Social Questions examined two sets of drafting suggestions⁵ prepared by the Presidency and a suggested compromise package jointly tabled by two delegations.

¹ No review of the proposal was required on the part of the Commission, the one-third threshold set out in Protocol 2 TEU, Article 7, having not been met.

² OJ C 133, 9.5.2013, p 68.

³ ECOS-V-039.

⁴ A7-0340/2013. (Final text not yet available.) Rodi Kratsa-Tsagaropoulou (EPP/EL) served as Rapporteur for the FEMM Committee, and Evelyn Regner (S&D/AT) for the JURI Committee.

⁵ 11390/13 and 13988/13.

The discussions in the Working Party revealed a continuing broad consensus in favour of the objective of the proposal; however, opinions still differed sharply regarding the best way of achieving it. Many delegations continued to support the Commission's approach, while others preferred a voluntary solution such as a Council recommendation, allowing Member States more discretion to decide on their own policies. In this context, some delegations felt that the proposal failed to respect the principles of subsidiarity and proportionality and that it interfered unduly with company law. Reaffirming their positions as set out in a statement to the minutes of the EPSCO Council on 20 June 2013,⁶ a number of delegations stated that they did not support the adoption of legally binding provisions in this area at the European level.

Title

The Presidency adjusted the title of the draft Directive to reflect the fact that the provisions concern both executive and non-executive Directors.

The legal basis

Certain delegations questioned the use of Article 157(3) TFEU as the legal basis for the proposal and the Council Legal Service Opinion on this issue is set out in doc. 8020/13 + ADD 1. The Commission has reaffirmed the legal basis chosen.⁷

The 40% (33%) quantitative objective (Article 4)

The proposed Directive provides that, in seeking to increase the number of boardroom positions held by the under-represented sex, the Member States could either pursue a 40% objective applying to non-executive board members *or* a 33% objective applying to *both* executive and non-executive directors.

⁶ See 11370/13.

⁷ Commission Staff Working Document SWD(2013) 278.

In its drafting suggestions, the Presidency sought to clarify the distinction between the two sets of quantitative objectives and the provisions applicable in each case. The Presidency suggestion not to distinguish between the target dates for publicly listed companies and public undertakings respectively was broadly supported in terms of ensuring bigger clarity in application of the Directive. Certain delegations continued to voice concerns regarding the viability of the objectives, given that the Member States had different starting points.

Procedural requirements (Articles 2 and 4)

In the light of delegations' concerns, in its drafting suggestions, the Presidency changed the term "selection procedure" to "selection process" and sought to clarify the rules concerning the selection process, including by specifying that the Directive respects the rights of both shareholders and employees and their freedom of vote when selecting board members or representatives (Recitals 21 and 27). However, certain delegations still had abiding concerns regarding the practical implementation of the procedural provisions.

Enforcement measures (Article 6)

The Presidency replaced the term "Sanctions" with "Enforcement measures" and clarified the relevant provisions, which apply only to the obligation relating to the process of selection of candidates, to the obligation to set a voluntary target in relation to executive directors, and to the reporting obligations. Thus listed companies are *not* to be sanctioned for failing to attain the quantitative objectives. The Presidency also clarified the text to the effect that listed companies will not be held reliable for acts or omissions not attributable to them. (Recital 30 and Article 6).

Company law

In its drafting suggestions, the Presidency clarified certain company law aspects, including by defining "a listed company" (Recital 17a) and by specifying that the Member State competent to regulate the matters under this Directive should be the Member State in which the listed company in question has its registered office (Recital 17b). A reference to relevant data protection legislation was also placed in the text (Recital 28).

Definition of SMEs (Articles 2 (8) and 3)

In the light of the discussion, the Presidency suggested maintaining the current definition, which is based on a Commission Recommendation from 2003.⁸

Recognition of effective pre-existing national measures (Article 4b and Recital 35)

The Presidency clarified the elements providing for the suspension of the procedural obligations in those Member States where effective national measures are already likely to lead to the quantitative objectives being met.

Other issues requiring further discussion

Certain other issues may also require clarification and may require further discussion, including the implementation calendar and a number of other technical details.⁹

III. COMPROMISE PACKAGE TABLED BY TWO DELEGATIONS

In an attempt to break the deadlock in the discussions, two delegations tabled a suggested compromise package,¹⁰ which was welcomed by the Presidency and placed on the agenda of the Working Party. The Presidency noted that the suggestions usefully addressed the specific issues raised by several Member States that had serious concerns, in particular regarding the consistency of the proposal with the principles of subsidiarity and proportionality. The compromise suggestions consisted of several suggestions concerning certain core elements of the proposal questioned by some Member States:

- a) Restricting the application of the enforcement measures to reporting only (i.e. no enforcement measures would apply to the procedural provisions). Thus the revised Directive would, in effect, put in place a "comply or explain" model.

⁸ OJ L 124, 20.5.2003, p. 36.

⁹ Further details of delegations' positions can be found in 16279/13, 14046/13 + COR 1.

¹⁰ 15947/13. See also 14852/13.

- b) A longer timeframe (six years) for achieving the quantitative targets, and the addition of an interim quantitative targets and an interim target date, Member States being free to choose which quantitative target to pursue (33% for all directors or 40% for non-executive directors).

- c) Allowing the Member States that so wished to either exclude employee representatives from the quantitative objectives or to exempt employee representatives from the procedural requirements.

The Working Party expressed its gratitude for this initiative. While some delegations regretted the substantial watering down involved, others supported the approach suggested. The delegations with serious concerns (see above) could at this stage neither support the suggested compromise suggestions nor enter into a substantive discussion thereon. The Commission, for its part, affirmed its original proposal at this stage

IV. CONCLUSION

While all delegations are in principle in favour of improving gender balance on company boards, a number of delegations strongly prefer national measures (or non-binding measures at the EU level) whereas others support EU-wide legislation. In the light of all the above, substantial technical work has been done at Working Party level. However further work and political reflection will be required before a compromise can be reached.

Significant progress has nevertheless been made under the Lithuanian Presidency in clarifying the provisions of the draft Directive with the aim of achieving a broader agreement on this Proposal.