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REPORT

From: Presidency

To: Permanent Representatives Committee/ Council

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Subject: Proposal for a Directive of the European Parliament and of the Council on improving the gender balance among 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.

Companies which have not reached the 40% target 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 has a parliamentary scrutiny reservation; and CZ, DK, SK, SI and LV have linguistic scrutiny reservations.

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.) Ms Mariya Gabriel (EPP / BG) is the new Rapporteur. (The initial Rapporteur, Rodi Kratsa-Tsagaropoulou (EPP + FEMM Committee / EL), is no longer an MEP.)

II. THE COUNCIL'S WORK UNDER THE LATVIAN PRESIDENCY

The Working Party on Social Questions continued its discussions⁵ on the basis of materials prepared by the Presidency, namely, a questionnaire and a comparative table⁶ and a set of drafting suggestions.⁷

While discussions in the Working Party have confirmed a broad consensus in favour of the objective of the proposal, they also revealed that opinions continue to differ regarding the best way of achieving it. Thus a number of delegations have reaffirmed their opposition to the proposal. However, certain among these delegations indicated the possibility that their positions could be open to review depending on the circumstances.

Target date

In its drafting suggestions, the Presidency changed the target date for achieving the quantified objectives from 1 January 2020 to 31 December 2020, which is now more realistic.

In consequence, certain other dates were also changed, including the date of the Commission's report on the application of the Directive (now 31 December 2022) and the sunset clause (now 31 December 2029).

Delegations broadly supported the suggested changes to the dates, although some considered that the new dates were still somewhat optimistic. Others underlined the importance of maintaining the symbolic link with the Europe 2020 Strategy, meaning that the target date should not be extended any further. The Commission representative indicated that the 12-month postponement of the target date could be acceptable if the sunset clause was also changed to 31 December 2029 as suggested by the Presidency.

⁵ Meetings took place on 23 March and 27 April.

⁶ 6633/15 + ADD 1.

⁷ 8017/15.

Flexibility clause

Successive Presidencies have worked on the flexibility clause set out in Article 4b, which would allow Member States to pursue the aims of the Directive by means of their own choosing and to suspend the procedural requirements, provided that they have already taken equally effective measures or attained progress coming close to the objectives set in the Directive. With a view to combining flexibility with maximum legal certainty, Article 4b thus defines three scenarios which would be deemed by law to guarantee "equal effectiveness." It also leaves open the possibility that Member States might be entitled to avail themselves of the flexibility clause in other legitimate cases where equal effectiveness or sufficient progress had been demonstrated.

In its drafting suggestions, the Presidency had fine-tuned the third example contained in the flexibility clause set out in Article 4b (1a)(c) to the effect that the conditions for the suspension would be deemed fulfilled if "members of the under-represented sex hold at least 25 % of the total number of all non-executive director positions or 20 % of the total number of all director positions and the level of representation has increased by at least 7.5 percentage points *over a recent five-year period* ending before the deadline for implementation pursuant to Article 8(1)."

The Commission representative welcomed the attempt to add clarity and to ensure flexibility for Member States wishing to avail themselves of the suspension clause. The meaning of the term "recent" was, according to Cion, unlikely to be stretched to an unreasonable limit, as few countries would be able to show that they had achieved a rapid improvement in the gender balance on company boards in a period other than the recent past. If necessary, however, the wording could be made more concrete by defining a time range within which the "recent" five-year period should fall.

The Presidency also added a recital stressing the subsidiarity-oriented nature of the suspension clause. Not all delegations, however, saw a need for this addition, which was also questioned by the Commission. Some further fine-tuning of the flexibility clause is likely to be required before an agreement can be reached on the Directive.

Further details of delegations' positions can be found in 7468/15 and 8348/15 + COR 1.

III. CONCLUSION

There is a broad consensus among the Member States in favour of taking measures to improve the gender balance on company boards. While a large number of Member States support EU-wide legislation, others continue to prefer national measures (or non-binding measures at the EU level). Thus further work and political reflection will be required before a compromise can be reached.
