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Gender Quotas in Corporate Governance: A Comparative Perspective

Economic decision-making in the European Union suffers at the highest corporate echelons from a lack of diversity, especially in terms of gender representativeness. This article seeks to contribute to the corporate gender quota debate, reinvigorated by the European Commission's recent proposal aiming to introduce quotas in boardrooms, by taking some national experiences as a starting point. It will reveal the existence of a plethora of perspectives and introduce a reference to industrial relations, borrowing from corporate governance theory. The article focuses on three selected countries, representing different models of addressing corporate gender imbalance: the United Kingdom, Spain and France.

1. Introduction

Gender, understood as a social construct, has traditionally been relied upon to maintain an unequal division of tasks and roles in our societies. The impact of this gendered distribution of opportunities can be found in many social structures, among which is the economic decision-making at the highest corporate echelons.

One of the reasons for the renewed popularity of this topic has been the adoption of a Proposal for a Directive by the European Commission in November 2012, seeking to introduce certain female representation targets ('quotas') in the boardrooms of the largest publicly listed companies throughout the European Union.[1] This proposal had a polarising effect on the various actors concerned, and created a strong divide between those Member States that were considering or had implemented quota designs and those favouring a non-regulatory or self-regulatory approach. This division led, after the Proposal's approval by the European Parliament in November 2013, to an *impasse* at the level of the Council of the European Union, where failure to reach an agreement between national governments has stretched the legislative procedure until today.

This article intends to contribute to the European corporate gender quota debate by taking some national experiences as a starting point. It builds on the hypothesis

[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/2012/0614 final, 2012/0299 (COD).

that the resistance some Member States have expressed in relation to this proposal stems from a different manner of conceiving corporate governance. This comparative overview seeks, through the choice of three specific Member States, to identify different corporate quota models currently existing at the national level within the European Union. The goal is to briefly describe the historic, social and path dependence constraints, the rationale and the main features of each system.

The article is structured as follows. Section I provides some explanations about the conceptual framework mobilised in our query. It reviews the concepts of corporate governance, positive action and gender quotas, and makes a conceptual bridge between all three concepts. Section II presents the Proposal for a Directive and sets out its main elements and features. Section III contains a comparative overview: it summarises the identified gender quota models and the clusters of countries integrating them. Three specific countries will be subject to a more in-depth examination: namely, the United Kingdom, Spain and France.

2. Gender quotas in corporate governance

The term 'corporate governance' refers to the system whereby companies are directed and controlled. Depending on the structure of a given company, corporate governance can refer either to the checks and balances adopted to protect the interests of its shareholders or, more broadly, encompass its responsibilities towards all stakeholders.[1] The concept of stakeholder includes, among others, the company's employees, the consumers of its products or services, members of local communities and social actors defending public or collective interests. Whether a specific undertaking effectively integrates stakeholders' interests into its decision-making processes will depend on external factors, such as domestic company law, the composition of the shareholder constituencies or the overall socioeconomic fabric of the country in which the company operates.[2]

The most prominent actor in contemporary corporate governance is the board of directors. As a fiduciary organ elected or appointed by the general meeting of shareholders and governed by the company's bylaws, the board of directors is ordinarily in charge of overseeing the good progress of business, of appointing managers and of undertaking advisory and monitoring functions on behalf of the shareholders.

From a functional standpoint, boards can operate as one- or two-tier organs. A one-tier or single board merges executive and supervisory functions into one single

1 See, on the different corporate governance models, R. Mullerat (ed), *Corporate Social Responsibility: The Corporate Governance of the 21st Century* (2nd edn, Kluwer Law International 2011).

2 See further K. Hopt, 'Comparative Corporate Governance: The State of the Art and International Regulation' in A. Fleckner and K. Hopt (eds), *Comparative Corporate Governance: A Functional and International Analysis* (Cambridge University Press 2013).

entity, composed of managers or executive directors along with independent or non-executive directors. In turn, a two-tier or dual board scheme separates these functions into two distinct bodies: the executive board, in charge of managing the company's daily operations, and the supervisory or non-executive board, charged with overseeing functions.[3] Comparative company law has not shown any prevailing configuration.[4]

A closer look at how corporate governance mechanisms work in practice requires identifying the prevalent model of *industrial governance* in the country under examination. This concept connects to the role of labour and undertakings within the field of socioeconomic relations; more specifically, to whether access to social partnership is recognised as a means to articulate public policy (existence of an 'organisational-corporate' channel of decision-making).[5] In other words, do industry and labour formally influence legislative and executive decisions in social and economic matters? The answer to this question opens a dichotomy of models between corporatism and pluralism.

Corporatist models are characterised by the existence of formal, institutional channels that internalise the group interests of social and economic actors. This input often occurs in the form of negotiations between the state and representatives of social groups, with a view to formulating economic policies.[6] Corporatism has been defined as 'a system of interest representation in which the constituent units are (...) recognized or licensed (if not created) by the state and granted a deliberate representational monopoly within their respective categories in exchange for observing certain controls.'[7]

On the other hand, pluralism describes a model in which influence is not exercised by means of institutionalised channels, but rather through various manifestations of political speech such as lobbying and corporate communications with elected officials.[8] The state plays here a neutral role, maintaining its impartiality towards undertakings and labour: it is thus prevented from selectively recognising access to social partnership. In pluralist systems, 'the power of corporations is to be curbed by non-interference with the speech of all (including less powerful) corporations, rather than by imposing responsibilities on the most powerful corporate speakers.'[9]

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[3] See further F. Belot and others, 'Freedom of Choice between Unitary and Two-tier Boards: An Empirical Analysis' (2014) 112 Journal of Financial Economics 364.

[4] A comparative study of board structures can be found in K. Hopt (ed), *Comparative Corporate Governance: A Functional and International Analysis* (Cambridge University Press 2013).

[5] S. Rokkan, 'Norway: Numerical Democracy and Corporate Pluralism' in R. Dahl (ed), *Political Oppositions in Western Democracies* (Yale University Press 1966) 110.

[6] See J. Suk, 'Gender Parity and State Legitimacy: From Public Office to Corporate Boards' (2012) 10(2) International Journal of Constitutional Law 449, 459.

[7] P. Schmitter, 'Still the Century of Corporatism?' (1974) 36(1) The Review of Politics 85, 96.

[8] See *Citizens United v Federal Election Commission*, 130 S Ct 876, 907 (2010).

[9] J. Suk (n 7) 463.

Positive action seeks to introduce mechanisms to combat entrenched discriminatory biases present *de facto* in society but left untackled by a rigid application of the formal equality principle.[10] It is rooted in an understanding of other anti-discrimination devices (prohibition of direct and indirect discrimination, of harassment and of victimisation, shifting or sharing of the burden of proof, creation of equality bodies, etc.)[11] as non-dynamic and non-redistributive.[12] Positive action thus aims to effect substantive changes in society, so that hidden obstacles or customarily stereotyped roles are not only set aside in a specific instance of discrimination but also structurally dismantled.[13]

As a category in permanent expansion,[14] positive action can be reflected, *inter alia*, by mainstreaming, monitoring and outreaching programmes, diversity policies and by means of preferential treatment of equally qualified individuals pertaining to an under-represented group.[15] Positive action has thus been defined as 'a process to introduce a dynamic, result oriented approach that internalizes group dimensions into an equally static and individual formal equality model.'[16]

Positive action is underpinned by two core characteristics: temporality and proportionality. The former mandates that any deviation from the individual formal equality paradigm be restricted in time, until the aims pursued are effectively accomplished. Proportionality, on the other hand, limits the scope and extent of those measures by requiring that they have a legitimate aim, be appropriate or suitable to achieve that aim, be necessary for the objective envisaged and not go further than indispensable in their operation.

European Union law recognises and authorises positive action. Besides positive action in connection with other discrimination grounds,[17] such as racial or ethnic

[10] See further, on the concepts of formal equality, substantive equality, equality of opportunity and equality of results, O. De Schutter, 'Positive Action' in D. Schiek, L. Waddington and M. Bell (eds), *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law* (Hart Publishing 2007); D. Schiek and V. Chege, *European Union Non-Discrimination Law: Comparative Perspectives on Multidimensional Equality Law* (Routledge-Cavendish 2009).

[11] See Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L180/22 and Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L303/16.

[12] E. Ellis and P. Watson, *EU Anti-Discrimination Law* (2nd edn, Oxford University Press 2012) 176.

[13] E. Ellis and P. Watson, *EU Anti-Discrimination Law* (n 13).

[14] See L. Waddington and M. Bell, 'Exploring the Boundaries of Positive Action under EU Law: A Search for Conceptual Clarity' (2011) 48 Common Market Law Review 1503, 1519.

[15] See C. McCrudden, 'Equality and Non-Discrimination' in D. Feldman (ed), *English Public Law* (2nd edn, Oxford University Press 2009).

[16] M. De Vos, 'Gender Quotas and EU Discrimination Law' in M. De Vos and P. Culliford (eds), *Gender Quotas for Company Boards* (Intersentia 2014) 38.

[17] See a comprehensive study in M. De Vos, *Beyond Formal Equality: Positive Action under Directives 2000/43/EC and 2000/78/EC* (European Commission 2007).

origin, religion or belief, disability, age or sexual orientation, the legal foundations of positive action in the field of gender can be traced back to Article 2(4) of Council Directive 76/207/ EEC (the first Equal Treatment Directive).[18] Today, gender-based positive action is also enshrined in primary law. Article 157(4) of the Treaty on the Functioning of the European Union[19] thus reads:

With a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the underrepresented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers.

Additionally, Article 23 of the Charter of Fundamental Rights of the European Union[20] contains a reference to gender-based positive action in the following terms:

Equality between men and women must be ensured in all areas, including employment, work and pay.

The principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex.

The Court of Justice of the European Union has, through its case law,[21] shaped this concept and clarified the requisite standard of review for positive action measures to be admissible under EU law. Suffice it to say here that the Court of Justice has adopted a rigorous standard: positive action measures are defined as exceptional and requiring an exclusive and specific justification. Their lawfulness is subject to a strict proportionality test: they must 'remain within the limits of what is appropriate and necessary in order to achieve the aim in view and the principle of equal treatment [must] be reconciled as far as possible with the requirements of the aim thus pursued.'[22]

[18] Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions [1976] OJ L39/40. Article 2(4) thereof reads: 'This Directive shall be without prejudice to measures to promote equal opportunity for men and women, in particular by removing existing inequalities which affect women's opportunities in the areas [of access to employment, including promotion, and to vocational training and as regards working conditions].' See also, for the currently applicable framework, Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services [2004] OJ L373/37 and Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) [2006] OJ L204/23.

[19] Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C326/47.

[20] Charter of Fundamental Rights of the European Union [2012] OJ C326/ 391.

[21] See, notably, Judgment in *Bilka*, C-170/84, EU:C:1986:204; Judgment in *Commission v France*, C-312/86, EU:C:1988:485; Judgment in *Lommers*, C-476/99, EU:C:2002:183; Judgment in *Briheche*, C-319/03, EU:C:2004:574.

[22] See Judgment in *Lommers* (n 22) para 39.

Gender quotas constitute a particular kind of positive action measures that seek to redress gender imbalances by establishing numerical female representation targets within a comprehensive array of social structures. Originally introduced in matters of employment and occupation, gender quotas feature in candidate lists for elections to legislative bodies (‚electoral quotas'), for nominees to public decision-making bodies or high civil service positions (‚public board quotas') and for the recruitment, selection and appointment of candidates for corporate boards in the private sector (‚corporate quotas'). Quotas have also been implemented in other gender-imbalanced sectors such as academia, the judiciary, scientific committees or accreditation bodies.[23]

In our understanding, gender quotas are not a rigid, monolithic instrument to establish unconditional and automatic preferences regardless of the material circumstances, rather the various areas in which quotas can be introduced require different quota designs, appropriate quantitative and qualitative objectives and effective implementation methods and enforceability mechanisms.

As to the typology of quotas, one can distinguish between soft quotas, contained in non-binding directives such as codes and principles of good governance, and hard quotas, enshrined in instruments with legally binding force. Ordinarily, non-compliance with the first type of quotas does not entail any meaningful sanctions, although they often oblige companies in breach to publicly explain the reasons for their failure to achieve the established goals (‚comply or explain' principle). Regarding hard quotas, sanctions oscillate between non-consideration for public subsidies or state contracts to delisting from stock exchanges and forcible relocations of the headquarters.[24]

The Court of Justice of the European Union has developed, in a body of case law addressing specific quota measures, a cautious stance towards them. Two caveats must be pointed out: first, the number of rulings directly addressing gender quota schemes is scarce; secondly, this case law refers exclusively to gender quotas in the public sector. Briefly, the Court of Justice accepts gender quota measures in the abstract; they must, however, be interpreted strictly in that they derogate from the individual right to equality.[25] They must not provide for an absolute and unconditional priority, but instead they shall include an 'opening clause' to the effect that women are not to be given priority if reasons specific to an individual male candidate tilt the balance in his favour.[26] This 'objective assessment' must take into account all criteria specific

[23] See, for instance, A. Śledzińska-Simon and A. Bodnar, *Between Symbolism and Incrementalism: Moving Forward with the Gender Equality Project in Poland* (EUI Working Papers, Department of Law, LAW 2015/30, 2015).

[24] See S. Terjesen, R.V. Aguilera and R. Lorenz, 'Legislating a Woman's Seat on the Board: Institutional Factors Driving Gender Quotas for Boards of Directors' (2014) 128(2) Journal of Business Ethics 233.

[25] See Judgment in *Kalanke*, C-450/93, EU:C:1995:322.

[26] See Judgment in *Marschall*, C-409/95, EU:C:1997:533.

to the individual candidates, and these criteria must not be such as to discriminate against female candidates.[27]

As a last point, a conceptual bridge can be built between gender quotas as positive action instruments and the concepts of corporatism and pluralism within corporate governance theory. More specifically, this conceptual bridge identifies *models of interaction* of quota measures with the socioeconomic fabric of a given country.[28] The determining factor here is the existence or absence of an organisational-corporate channel of decision-making therein.

In corporatist systems, where some aspects of public decision-making directly rely on the social partners' governance mechanisms, the democratic legitimacy of the state appears to be directly engaged by the balanced composition of boards.[29] Potential biases within these structures can emerge as a matter of public concern, in that a systemic lack of diversity might pose doubts as to the fairness of the social dialogue. Gender quotas, which seek precisely to eliminate such biases and to reintroduce diversity, interact better with corporatist models, where representatives of social groups are formally integrated into decision-making processes.

In pluralist countries, by contrast, absent these mechanisms, it would appear easier to argue that the democratic legitimacy of the state is not directly compromised by an imbalanced composition of boards. Gender quotas lead to a weaker interaction with the socioeconomic fabric of pluralist countries, where such imbalances are generally seen as a competitive disadvantage that the dynamics of the market are, in one way or another, to expel.[30] Two strong objections can however be raised in this last regard: first, the argument that the lack of access to formalised social dialogue entails a corporate detachment from public policy-making is highly questionable;[31] secondly, corporations can, even in pluralist systems, be expected to actively contribute to the inclusion of under-represented groups through the notion of corporate social responsibility.[32]

[27] Judgment in *Marschall* (n 27). See also Judgment in *Badeck*, C-158/97, EU:C:2000:163; Judgment in *Abrahamsson and Anderson v Fogelqvist*, C-407/98, EU:C:2000:367.

[28] See, for a different interpretation based on liberal as opposed to social-democrat welfare systems, L. Senden, 'The Multiplicity of Regulatory Responses to Remedy the Gender Imbalance on Company Boards' (2014) 10(5) Utrecht Law Review 51.

[29] See further J. Suk (n 7).

[30] cf C.R. Sunstein, 'Why Markets Don't Stop Discrimination' (1991) 8(2) Social Philosophy and Policy 22.

[31] This objection poses the question whether lobbying is not a *de facto* recognised channel of influencing decision-making (think, for example, of the compulsory registration and disclosure of lobbyists in the United States). A positive finding of the lobbying efforts' capacity to influence public policy would contradict, in our view, the conception of pluralist systems as rooted on the free speech rights of a corporate world distant from the public sphere. See *Citizens United v Federal Election Commission*,(n 9).

[32] The second objection brings up the counterargument that corporations are built upon, and take advantage of, a sociolegal substrate provided for by the community, that creates the appropriate environment for business to thrive (eg an internal market, a normative framework ensuring legal certainty, a qualified workforce). See further J. Ringelheim, 'Adapter l'Entreprise à la Diversité des Travailleurs: la Portée Transformatrice de la Non-Discrimination / Adapting the Enterprise to Workers'

3. The Proposal for a Directive

The Proposal for a Directive (as considered by the Council)[33] seeks to achieve a more balanced representation of men and women among the directors of listed companies by establishing measures aimed at accelerated progress.[34] For this purpose, it targets publicly listed companies having their registered office in a Member State, to the exclusion of small and medium-sized enterprises (SMEs). It is expected that a 'trickle-down effect' will ensue, thereby nudging companies not directly affected by these measures towards more balanced corporate boards.

Targeted companies should attain by the predetermined deadline (31 December 2020) either (a) 40 percent of members of the under-represented sex among non-executive directors; or (b) 33 percent of members of the under-represented sex among all directors, both executive and non-executive. The choice is in principle open to the implementing Member State, which may also exempt companies where women represent less than ten percent of the employees. An additional obligation is foreseen to set individual quantitative gender balance objectives when the overall thresholds do not apply.[35]

A reporting duty to the national equality body is introduced, following the 'comply or explain' principle. In particular, a document must be compiled that details the gender representation on companies' boards, distinguishing between non-executive and executive directors, as well as including the measures taken with a view to attaining the applicable objectives. The same information shall be published in an appropriate and accessible manner on the companies' websites.

The core of the proposal lies in the series of procedural requirements imposed on companies which fall short of the planned numerical objectives. These companies must, when selecting candidates for director positions, undertake a comparative analysis of the qualifications of each candidate by applying clear, neutrally formulated and unambiguous criteria established in advance.[36] They shall, following this analysis, give priority to the candidate of the under-represented sex, unless an objective assessment of all criteria specific to the individuals tilts the balance in favour of the other candidate(s).[37]

Diversity: the Transformative Potential of Non-Discrimination' (2013) 1 Journal européen des droits de l'Homme / European Journal of Human Rights 57; O. De Schutter, *Discriminations et Marché du Travail: Liberté et Egalité dans les Rapports d'Emploi* (Presses interuniversitaires européennes 2001).

[33] 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, ST 14343 2015 INIT, 2012/0299 (COD).

[34] See Article 1.

[35] See further Articles 4.6 and 4c.

[36] See Article 4a.1.

[37] See Article 4a.2. The wording of these requirements is directly drawn from the case law of the Court of Justice of the European Union regarding gender quotas (see nn 26–28).

Upon request from any candidate, all parameters considered when deciding over selection (the qualification criteria, the objective comparative assessment and, where relevant, the considerations tilting the balance) need be disclosed to her or him in a transparent manner. Moreover, if the candidate of the under-represented sex establishes a *prima facie* instance of discrimination, the burden will shift onto the respondent company to disprove those allegations.[38]

Sanctions are to be imposed by the Member States alone for the infringement of the procedural requirements, the reporting obligation or the mandate to set individual quantitative objectives. In other words, non-compliance with the numerical quota objectives by the end of the established deadline is not *per se* penalised beyond requiring companies to state 'the reasons for not attaining the objectives and a description of the measures which the company has already taken and/or intends to take in order to meet them.'[39]

One of the major points of contention between delegations has been the introduction of the so-called *equivalent efficacy* or *flexibility* clause. Following this clause, Member States which have enacted measures to ensure a more balanced representation of men and women on corporate boards can suspend the application of the procedural requirements, given that those measures are equally effective or have attained progress coming close to the aims set out in the directive. With a view to combining flexibility with legal certainty, the proposal envisages several scenarios deemed to guarantee equal effectiveness, and leaves the door open to analogous situations existing in the Member States. Beyond 2020, more stringent conditions will have to be complied with if the Member State wishes to maintain the suspension.

The European Union's intervention in the field has an essentially temporary character, the rationale being to foster gender diversity within corporate boards to the extent that conditions in society do not guarantee that balance on their own. This interim approach is reflected by the sunset clause contained in the proposal: the directive shall expire in December 2029. As a last point, it is notable that the proposed directive would only effect minimum harmonisation, thus allowing Member States to go in principle beyond these measures.

4. A comparative overview

4.1. Categorisation

This section turns to concrete corporate gender quota experiences in selected countries, which will serve to shed some light on the different quota models. Three countries, representative of three broader paradigms of addressing corporate gender

[38] See Articles 4a.3 and 4a.4.
[39] See Article 5.3.

imbalance, constitute the focus of this study. The spectrum of countries capable of being examined is naturally much broader: a choice has been made in this contribution to limit the scope to Member States of the European Union, thus leaving out other outstanding but well-studied examples of quota systems such as Norway.

Because of the clarity in the categories it leads to, the classifying criterion of the *regulatory intensity* of gender balance measures has been chosen for the comparative overview. According to this criterion, four possible models can be identified:

(1) countries with no corporate gender intervention whatsoever;
(2) countries with no legislated quotas but where soft law gender balance targets have been introduced;
(3) countries with legislated quotas but lacking enforceability mechanisms in case of non-compliance;
(4) countries with legislated quotas backed by enforceability mechanisms in case of non-compliance.

Under this categorisation, classifying any given country in one of the four models follows this logical scheme: Have gender balance targets for corporate boards in the private sector been adopted in the country at stake? If so, are such targets embodied in a legally binding instrument? If so, are the targets backed up by sanctions for non-compliance? A negative answer to the first question leads to the first model, a negative answer to the second question leads to the second model, a negative answer to the third question leads to the third model and, finally, a positive answer to the third question leads to the country being classified under the last model.

Several precisions must be made in this respect. Whereas countries in the second model have adopted some sort of gender targets, these are usually contained in non-binding directives, such as codes of good corporate governance. These targets are more flexible in nature than legislated quotas, as the focus lies on self-regulation: it is the market actors who voluntarily adhere to the gender balance objectives, driving change from within their own organisations. By contrast, legislated quotas establish a *legal* obligation to progressively increase gender balance in corporate boards up to a certain threshold. They are external obligations imposed by the state that are by nature mandatory.

A brief reference to the clusters of countries composing each of the four models can be made as follows. Model number one broadly includes those countries which joined the European Union after 2004, and which generally display at the same time the lowest levels of gender balance in corporate boards (eg Malta, Estonia or Cyprus). Model number two includes countries such as the United Kingdom, Finland, Sweden or Poland, whose levels of representation are generally above the EU average and where legislated quotas have not been felt as necessary. Model number three is comprised notably of Spain and the Netherlands, where a somewhat hybrid model of legislated

quotas with incentives for compliance rather than sanctions is applicable. Lastly, model number four encompasses countries like France, Belgium and, more recently, Germany, where strong quota systems backed by stringent sanctions have been put in place, with the consequence of a rapid growth in female presence in the boardroom.

Constraints of extension have led us not to select any country from the first model: the intention is rather to examine, where targets *have* been adopted, the different models surrounding this adoption, the different implementation mechanisms and the different outcomes obtained. Firstly, a country like the United Kingdom with no legislated quotas but rather self-regulatory initiatives will be examined. Secondly, our study features the Spanish quota framework, with legislated quotas but lacking real sanctions. Thirdly, an example of a legislated quota model containing severe sanctions will be analysed: France.

The three case studies conform to the following structure. In the first place, the general state of the question in the country examined will be pointed out, with reference to the overall statistic levels of female representation in its corporate boards. This task has been facilitated by the European Commission's database on women and men in decision-making,[40] updated biannually. Thereafter, the case study takes a quick glance at the country's general attitude towards quotas and to whether electoral quotas, public board quotas or quotas within other sectors are already in place, as indicators of historic, social and path dependence constraints. The corporate gender balance initiatives undertaken are then set out, with an emphasis on the main features and practicalities of each system. To conclude, some comments are advanced regarding the country's future perspectives as regards corporate quotas.

4.2. The self-regulatory approach: the United Kingdom

The United Kingdom is one of the top-ranking European Union Member States in terms of the percentage of women in corporate boards, according to the European Commission's database. The UK ranks fifth out of twenty-eight countries, with a 26 percent overall share of female board members. Data compiled by experts equally shows that FTSE[41] boards were composed of a 26.1 percent share of female directors

[40] See European Commission, 'Board Members' (*Database: Women and men in decision-making*, October 2015) <http://ec.europa.eu/justice/gender-equality/gender-decision-making/database/business-finance/supervisory-board-board-directors/index_en.htm> accessed 10 November 2015. Some indications about the statistical methodology can be found at the cited electronic resource. In short, 'the database covers the largest publicly listed companies in each country. Publicly listed means that the shares of the company are traded on the stock exchange. The „largest" companies are taken to be the members (max. 50) of the primary blue-chip index, which is an index maintained by the stock exchange covering the largest companies by market capitalisation and/or market trades.'

[41] The initials 'FTSE' stand for *Financial Times Stock Exchange Index*, a share index of the companies listed on the London Stock Exchange with the highest market capitalisation.

in October 2015, up from 12.5 percent in 2010.[42] Relying on a soft law approach, whereby businesses have internalised the necessity of a more balanced female presence in the boardroom, the United Kingdom represents a successful example of self-regulation.

The United Kingdom has consistently shown reluctance to the introduction of gender quotas in various social structures. For instance, the 'Women in Parliament' All Party Parliamentary Group does not advocate quotas in general, nor in respect of corporate boards.[43] Quite apart from voluntary intra-party quotas,[44] allowed by specific legislation,[45] there are no legally binding quotas in Britain or Northern Ireland for electoral lists, nor for public boards or in other domains of decision-making.

The House of Lords submitted in January 2013 a reasoned opinion against the European Commission's Proposal on gender quotas in corporate boards, arguing a breach of the principle of subsidiarity.[46] In its 'Subsidiarity Assessment: Gender Balance on Boards' Report, the House of Lords argues that the proposal clashes with the different cultural contexts and practices within different Member States. It deems the European Union 'unlikely to be able to work directly with companies (...), to bring about changes at the heart of business in order to ensure a long-term, sustainable solution.' This statement confirms the British understanding of gender imbalance in corporate boards as an endogenous problem, companies being primarily responsible for effecting changes in their own structures. As the 2015 Davies Review, to which we will refer below, puts it:

> From the very beginning we addressed the lack of gender diversity on British Boards as a key business issue, at a time when it was still being narrowly boxed by many as an equalities, diversity or women's issue. We worked up the business case for change and spoke language business understands. (...) We spoke of global credibility, impact to reputation, the longer-term stability of our economy and the UK's competitive position on the global stage.

The British approach towards quotas is reflected in the key 'Women in Boards' Report, published in February 2011 by Lord Davies of Abersoch as commissioned

[42] See Professor S. Vinnicombe and others, *The Female FTSE Board Report 2015* (Cranfield School of Management, 2015); Lord Davies of Abersoch, *'Women on Boards' Five-Year Summary Review* (2015).
[43] See further S. Childs, *The unfinished business all women shortlists and the UK Parliament: Contagion, transformation and extension* (EUI Working Papers, Department of Law, LAW 2015/29, 2015).
[44] S. Childs, *The unfinished business* (n 44).
[45] Sex Discrimination (Election Candidates) Act 2002.
[46] See Consolidated version of the Treaty on European Union [2012] OJ C326/13, art 5(3); Protocol on the application of the principles of subsidiarity and proportionality [2012] OJ C326/206, art 6.

by the Business Minister and the Minister for Women. The objective of the Davies Report was to undertake a review of the situation in late 2010, to identify the barriers preventing more women reaching the boardroom and to make recommendations regarding what government and business could do to increase the proportion of women on corporate boards.[47] The Davies Report set a minimum target of 25 percent of female representation in FTSE 100 boards by 2015, and recommended quoted companies to disclose each year the proportion of women on their boards. Notably, the Report fosters the recognition and development of two 'different populations of women,' namely, 'executives from within the corporate sector, for whom there are many different training and mentoring opportunities; and women from outside the corporate mainstream.'[48]

In October 2015, Lord Davies' 'Women on Boards' Five-Year Summary Review was released. In view of the achieved 25 percent objective, the Review considers that 'the steady and sustained increase in the number of women (...), the winning of hearts and minds and overridingly supportive stakeholder feedback, all provide clear evidence that the UK's approach is working.' The Review recognises, however, that a longer-term aim to achieve better gender balance on FTSE Boards is still required, together with a renewed focus. For this purpose, the Review suggests the increase of the voluntary target to a minimum of 33 percent to be achieved in the next five years by FTSE 350 companies. Additionally, and based on figures showing that the majority of women directors are part-time non-executives,[49] the Review recommends that women should progress in higher numbers to chair and senior independent directorships and to executive director positions.

The United Kingdom scenario is certainly unique within the European Union. Whereas there is no collective voice in the UK pushing for corporate quotas,[50] the introduction of voluntary targets together with a direct engagement from businesses and stakeholders alike have successfully led the British boardrooms to significantly high gender balance figures. More progress is still to be achieved, and the new recommendations contained in the Davies Review will foreseeably help this cause.

However, trying to export this soft law model to some other EU Member States could prove difficult: the United Kingdom solution is rooted in a socioeconomic fabric that favours a pluralist system of industrial relations, where the underlying rationale is that markets judge the compliance or detachment of corporations from these gender diversity recommendations.[51] Companies, by accepting the business case

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[47] Lord Davies of Abersoch, *'Women in Boards' Report* (2011) 6.
[48] Lord Davies of Abersoch, *'Women in Boards' Report* (n 48).
[49] See Professor S. Vinnicombe and others (n 43).
[50] S. Childs (n 44) 16.
[51] See R. Palá Laguna, 'The Balanced Representation of Men and Women on the Board of Directors of Companies Listed on Stock Exchanges and Public Undertakings: The Status Quaestionis in Spain' in

for diversity put forward by the Davies Report, compete with each other horizontally for more balanced boards, rather than vertically through legislation and sanctions. In this model, it is the dynamics of the market that monitors compliance with gender balance targets, pushing leaders and penalising laggards: corporations, threatened by their competitor's compliance, have an incentive to comply themselves by driving change from within. Bearing these considerations in mind, the United Kingdom's model constitutes a noteworthy comparative example of self-regulation.

4.3. Regulation without coercion: Spain

Spain is below the EU average in gender balance in the boardroom: according to the European Commission's database, only 17 percent of the directorships in Spanish large-sized listed corporations are occupied by women. The Spanish Commission for the Securities Market *(Comisión Nacional del Mercado de Valores)* similarly shows, in its latest Annual Corporate Governance Report,[52] a 16.7 percent share of women directors for IBEX 35[53] companies, the figure dropping to 13.5 percent for all listed companies. Newly appointed women seem to concentrate, moreover, in the less influential positions of the Spanish one-tier board: non-executive directorships.[54]

Despite the introduction of legislated corporate gender quotas more than seven years ago, the gender balance levels remain deceptively low. It would appear that the indifference of the business sector, combined with the absence of sanctions for non-compliance, has simply led corporations to ignore the legal mandate and maintain their obscure practices in the selection and appointment of candidates to fill board positions.[55] The argument traditionally expressed by the opposition to quotas in Spain, claiming that gender imbalance in economic decision-making is a consequence of the low number of female candidates for the openings (‚supply' arguments), controls the current mainstream political discourse. Consequently, the arguments claiming the existence of male-dominated structures that place obstacles in recruitment procedures (‚demand' arguments) are no longer in the spotlight.[56]

M. De Vos and P. Culliford (eds), *Gender Quotas for Company Boards* (Intersentia 2014). See also Lord Davies of Abersoch, *'Women in Boards' Report*; Lord Davies of Abersoch, *'Women on Boards' Five-Year Summary Review*.

[52] See, for fiscal year 2014, Comisión Nacional del Mercado de Valores, *Informe de Gobierno Corporativo de las entidades emisoras de valores admitidos a negociación en mercados secundarios oficiales. Ejercicio 2014* (2015).

[53] *IBEX 35* is a market capitalisation weighted index that comprises the thirty-five most liquid Spanish traded stocks.

[54] Comisión Nacional del Mercado de Valores.

[55] T. Verge and E. Lombardo, *The Differential Approach to Gender Quotas in Spain: Regulated Politics and Self-Regulated Corporate Boards* (EUI Working Papers, Department of Law, LAW 2015/24, 2015) 3.

[56] T. Verge and E. Lombardo, *The Differential Approach* (n 56).

The Spanish quota experience is one of dissimilarities between targeted social sectors, implementation methods and enforceability mechanisms. The origins of the quota debate can be found in the early 2000s, when the first attempts to introduce quotas in electoral lists were systemically blocked by a majority in Parliament, on the grounds of formal equality and 'supply' arguments. A change of parliamentary composition in 2007 did away with the quota deadlock and brought the enactment of Organic Law 3/2007, of 22 March, on Effective Equality of Women and Men,[57] the cornerstone of the Spanish gender equality legal framework.[58] Article 1 thereof states that the purpose of the Law is to 'ensure equal treatmentand opportunities for women and men (...) whatever their circumstances or background may be and in all areas of life.'

Organic Law 3/2007 introduces various kinds of gender quotas, albeit to a very different degree and with varying intensity. It does so by enshrining the so-called 'principle of balanced composition or presence', which mandates that the members of each sex shall not represent more than 60 percent, nor less than 40 percent, of the total members of the corresponding group. Through this somewhat confusing legislative technique, the law establishes such principle in various areas, rather than spelling out the sixty-forty ratio in each of the sectors concerned. Balanced composition or presence must therefore be complied with by party lists in all elections, whereas public authorities shall only 'endeavour to take into account' this principle in all nominations and appointments for which they are competent. Non-compliance of electoral lists with the principle of balanced presence entails their rejection and successive exclusion from the electoral process. By contrast, non-compliance by public authorities is not monitored by any supervisory body, nor are any sanctions foreseen.[59]

Turning more specifically to corporate quotas, Organic Law 3/2007 targets all corporations, whether listed or not, which shall 'endeavour to include in their boards a sufficient number of women as to achieve a balanced presence [before 2015].'[60] Crucially, no sanctions are applicable to companies that disregard this provision. The Spanish legislator has chosen here the 'carrot' over the 'stick': companies which comply with the principle of balanced presence are incentivised in the form of a potential priority status for government contracts and the award of a ‚Corporate Equality Label' to be used for commerce and advertising purposes.

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[57] Ley Orgánica 3/2007, de 22 de marzo, para la igualdad efectiva de mujeres y hombres, Boletín Oficial del Estado, núm. 71, 12611.

[58] The Preamble *(Exposición de Motivos)* to the Organic Law highlights that 'it is, indeed, necessary to develop normative action aimed at combating all subsistent manifestations of discrimination, whether direct or indirect, on the grounds of sex, and at promoting real equality between women and men, thereby removing obstacles and social stereotypes that prevent its achievement.'

[59] See further R. Palá Laguna (n 52) 191.

[60] Ley Orgánica 3/2007 (n 58) art 75.

On the self-regulatory side, several soft law initiatives, mostly through voluntary corporate governance codes, have been put forward. For instance, the recently elaborated 2015 Good Governance Code for Listed Companies contains a gender target in the following terms: 'the director selection policy should pursue the goal of having at least 30 percent of total board places occupied by women directors before the year 2020.'[61] A ‚comply or explain' principle is foreseen to monitor this recommendation. It remains to be seen, however, whether companies will in practice adhere to it and strive to achieve an objective that appears, by reference to the current data, relatively ambitious.

It is self-evident that the 'regulation without coercion' approach has not managed to remedy the overwhelmingly male composition of Spanish corporate boards.[62] We are nearing the end of 2015 and Spain is lagging behind its 40 percent objective by almost twenty-five percentage points. The differences with our previous case study are striking: whereas in the United Kingdom the engagement of businesses led to a race to the top to achieve the gender balance targets, the impassivity of the Spanish corporations has rather led to a race to the bottom, where no company has the incentive to comply insofar as its competitors equally do not comply. The failure of the current model raises the question whether stringent sanctions will not be necessary to achieve gender balance on corporate boards in Spain. However, as indicated above, the current state of the gender quota debate in Spain is rather one of soft law, self-regulation and 'supply' arguments.[63]

4.4. Through parity to the avant-garde: France

France leads the European Commission's database ranking: a third (33 percent) of the director positions in French listed companies are currently held by women. The French Authority for Financial Markets *(Autorité des Marchés Financiers)*, in its 2014 Annual Report, points to a 29 percent share of women in CAC 40[64] corporate boards and a 28 percent share of women in all listed companies.[65]

Once reluctant to gender quotas, considered as 'un-French' and as introducing US-style identity politics,[66] these have now become a preferred policy instrument to

[61] See Comisión Nacional del Mercado de Valores, *Good Governance Code of Listed Companies* (2015) Recommendation 14.
[62] See R. Palá Laguna (n 52).
[63] See T. Verge and E. Lombardo (n 56) 11.
[64] CAC 40 is the index representing a capitalisation-weighted measure of the forty most significant values among the French traded stocks.
[65] Autorité des Marchés Financiers, *Rapport 2014 de l'AMF sur le gouvernement d'entreprise et la rémunération des dirigeants* (2014).
[66] E. Lépinard, *The Adoption and Diffusion of Gender Quotas in France (1982-2014)* (EUI Working Papers, Department of Law, LAW 2015/19, 2015) 1.

combat structural gender inequalities in various social ambits. The route to the current situation has, nevertheless, encountered many obstacles: the French experience shows a gradual evolution marked by successive resolutions of the Constitutional Council *(Conseil Constitutionnel)* declaring prospective quota measures unconstitutional and upholding a strict formal equality paradigm. Although the French legal order has traditionally embodied a strong *acquis* in the field of gender equality at work,[67] extrapolating these resources to the world of corporate governance has not been an easy task.

The first of the Constitutional Council's decisions came after a 1982 bill foreseeing a gender quota for candidate lists in municipal elections.[68] The ruling declared the unconstitutionality of the bill on two main grounds: the indivisibility of the sovereignty of the French people and the constitutional principle of formal equality. Indeed, 'the use of a quota was perceived as dividing the people in different groups (men and women) and therefore incompatible with the idea that the French people is undividable and exercises its sovereignty through its representatives in a non-divided way.'[69]

Quota initiatives came to a halt for almost two decades: it was not until 1999 that a consensus reform introduced in the Constitution the tenet that 'the law promotes women's and men's equal access to electoral mandates and elective functions.' This reform unambiguously opened the door to electoral quotas, successfully introduced in France in the year 2000. Public board quotas would arrive much later, with the enactment of a 2012 Law targeting administrative and supervisory boards of public institutions, high councils and selection committees for access to civil service.[70]

With regard to corporate quotas, the first legislative proposal on the matter was tabled in 2005, sponsored by the Minister for Parity and Gender Equality at Work. Envisaging a 20 percent target to be achieved in five years, the proposal was, however, struck down in 2006 by the Constitutional Council.[71] The Council echoed in its ruling many of the arguments sustained in 1982, and estimated that, although the aim of achieving gender balance in non-electoral structures was legitimate, the legislator could not 'let the consideration of gender have priority over the capacities and the common utility.'[72] Formal equality was to be protected under the applicable constitu-

[67] B. Gresy, 'France: The Measures of Positive Discrimination within the Boards of Directors of Undertakings' in M. De Vos and P. Culliford (eds), *Gender Quotas for Company Boards* (Intersentia 2014) 123.
[68] See Décision n° 82-146 DC of 18 November 1982.
[69] E. Lépinard (n 67) 2.
[70] Loi n° 2012-347 du 12 mars 2012 relative à l'accès à l'emploi titulaire et à l'amélioration des conditions d'emploi des agents contractuels dans la fonction publique, à la lutte contre les discriminations et portant diverses dispositions relatives à la fonction publique (Journal officiel de la République française n°0062, 4498).
[71] Décision n° 2006-533 DC of 16 March 2006.
[72] Décision n° 2006-533 DC of 16 March 2006, para 15.

tional framework as part of the core republican values. Once again, a constitutional reform was necessary to resolve the legal tensions surrounding gender quotas. The last constitutional revision undertaken in France thus far took account of the situation: since 2008, Article 1 of the French Constitution, which contains the principles guiding the Republic, is drafted in the following terms: 'statutes shall promote equal access by women and men to elective offices and posts as well as to professional and social positions.'

Building upon this constitutional mandate, legislated quotas were introduced in the French corporate scene by means of the 2011 'Coppé-Zimmerman' Law.[73] This Law implemented a two-step gender quota: it set a mandatory 20 percent share of female directors to be achieved by 2014, along with a 40 percent share to be reached by 2017. The act concerns board members of publicly listed companies, as well as unlisted companies which employ more than 500 workers or whose revenues or assets are above a certain threshold. Notably, sanctions for non-compliance include nullifying all nominations that contravene the quota, although the Law explicitly maintains the validity of deliberations. Corporate boards subject to these requirements are additionally obliged to discuss the company's policy in the field of professional equality and equal pay at least once a year.

France is today the European Union's forerunner for gender balance in corporate decision-making. Since its general attitude toward quotas radically shifted, and after two constitutional reforms and the introduction of legislation specifically targeting corporate boards, France has seen a swift growth in its female boardroom representation. Part of this success can be attributed to the stringent character of the sanctions foreseen. However, the French business sector has also embraced the narrative of diversity, which explains further the rapid changes experienced.[74]

In particular, France can be taken as an example of a country where the interaction of enforced quotas with a corporatist system of industrial relations has proven successful. Since gender quotas have been framed as a matter of parity, that is, as a device to reintroduce diversity in decision-making for the benefit of the democratic legitimacy of the state,[75] social actors have internalised this claim and brought credibility to the organisational-corporate channel. The fact that the targets are presented as mandatory and accompanied by sanctions has certainly favoured this outcome. The 40 percent objective by 2017 thus looks, at this point, achievable.

[73] Loi n° 2011-103 du 27 janvier 2011 relative à la représentation équilibrée des femmes et des hommes au sein des conseils d'administration et de surveillance et à l'égalité professionnelle (JORF n°0023, 1680).
[74] E. Lépinard (n 67) 17.
[75] E. Lépinard (n 67) 17.

5. Conclusion

This article has described how the corporate gender balance debate in Europe, highly topical due to the European Commission's Proposal to implement quotas in corporate boards across the European Union, is underpinned by a diversity of national perspectives: different Member States with varying sociolegal backgrounds approach gender balance from fairly divergent angles.

The distinction, borrowed from corporate governance theory, between corporatist and pluralist systems of industrial relations can be related to gender quotas, understood as a specific kind of positive action measures. In particular, this relationship can be established through the various *models of interaction* of gender quotas with the socioeconomic fabric of a given country. Corporatist models, where the group interests of social and economic actors are internalised through formal channels, develop a better interaction with the quota instrument through the concept of democratic legitimacy of the state. By contrast, pluralist systems lead to a weaker interaction with gender quotas, in that gender imbalances are generally seen as an endogenous issue that companies themselves, through the dynamics of the market, will address.

On the other hand, this diversity of perspectives is reflected in the distinctiveness of Member States' quota designs, which show different implementation methods and enforceability mechanisms. Applying the criterion of the *regulatory intensity* of gender balance measures, four models can be distinguished:

(1) countries with no corporate gender intervention;
(2) countries with no legislated quotas but soft law targets;
(3) countries with legislated quotas but lacking enforceability mechanisms; and
(4) countries with legislated quotas backed by sanctions.

The article has thus presented a comparative overview of three selected countries – the United Kingdom, Spain and France – with the objective of revealing the differences and similarities amongst them.

The United Kingdom relies on a soft law approach, whereby companies have accepted the necessity of a balanced female presence in the boardroom and have driven change from within. Reluctant to the introduction of gender quotas in social structures, the British approach is based on the understanding that companies themselves are primarily responsible for effecting changes. The active involvement of business and stakeholders has led British boards to achieve the foreseen self-regulatory target. However, trying to export this model could prove difficult: the United Kingdom solution is rooted in a pluralist model where the underlying rationale is that markets judge the compliance or detachment from gender diversity recommendations.

Spain implemented legislated gender quotas in corporate boards more than seven years ago. Nevertheless, it is lagging behind its own objectives by almost twenty-five

percentage points. The indifference of the business sector, combined with the absence of sanctions for non-compliance, has led companies to disregard the legal mandate. Despite its ambitious Effective Equality Law, a confusing legislative technique together with a policy choice of incentives over penalties have caused a race to the bottom where no corporation has the incentive to comply insofar as its competitors equally do not comply. The complementary soft law approach, through good governance codes, has advanced gender balance targets that appear disconnected from the current factual situation.

France is the European Union's forerunner for gender balance in corporate decision-making. Although the French legal order embodies a strong *acquis* in the field of gender equality at work, extrapolating it to the world of corporate governance was not an easy task. A shift in the French attitude towards gender quotas through two constitutional reforms has made them a preferred policy tool today. The introduction of legislated quotas in boardrooms and stringent sanctions, along with the adoption by the business sector of the parity narrative, all make France a notable example of the good interaction quotas can develop with a corporatist system of industrial relations.

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