

THE IMPACT OF POSITIVE ACTION ON PRIVATE LAW FREEDOMS - PROPOSED EU DIRECTIVE ON GENDER BALANCE IN THE BOARDROOM

Accepted Version February 2015

The Final Published Version Can be Found at Niall O'Connor, 'The Impact of Positive Action on Private Law Freedoms-Proposed EU Directive on Gender Balance in the Boardroom' (2015) 8 *TCLR* 128.

Introduction

This paper will seek to analyse the impact of EU positive discrimination measures on the private rights of employers, notably their freedom to contract. A brief outline of the background to EU positive action measures will be provided alongside a discussion of the outer limits placed on such measures by the courts. Particular attention will be paid to the proposed EU Directive on gender balance in the boardroom.¹ The impact of this proposal will be assessed in light of the principles of contractual and commercial autonomy. Alternatives to the Proposed Directive will also be discussed in order to determine whether it is indeed the approach which most appropriately balances the freedom of contract with the desire to achieve a valuable social goal. There can be little doubt that at present, there is a critical lack of women in decision making-positions in European companies.² However, the purpose of the paper is not to assess the merits of the goals the Directive seeks to achieve, but rather to focus on whether the proposal is the correct and legitimate approach for achieving such aims in light of the competing fundamental private freedoms. Recent attention in Ireland has centred on the implications of gender quotas in the political sphere.³ Much less discussion has been directed towards the consequences of positive action for private actors.

I. The Concept of Positive Action

The potential forms of positive action are numerous and an in-depth discussion of their possible impact and ideological underpinnings is beyond the scope of this article. The complexity of the concept of positive action is underscored by the debate surrounding the use of the term itself. Terminology has been described as “the perennial problem that besets any discussion of positive action,” with a multitude of alternative labels, including reverse discrimination and positive discrimination being used.⁴ However, very little turns on such distinctions and a wide variety of initiatives may come within the term positive action. Such initiatives include preferential treatment for minorities, eradicating prohibited discrimination, outreach programmes or even a redefinition of merit.⁵ The difficulty with positive action is that for every person benefiting from such action, another party necessarily loses out. Therefore, positive action is normally treated differently to other forms of gender-related preferences, as it “is a zero - sum game in which the allotment of the good

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, Brussels, 14 November 2012 COM (2012) 614 final [hereinafter Proposed Directive].

² Proposed Directive, note 1, at 2.

³ Largely due to the adoption of the Electoral (Amendment) (Political Funding) Act 2012.

⁴ Lisa Waddington and Mark Bell, “Exploring the Boundaries of Positive Action under EU Law: A Search for Conceptual Clarity” (2011) 48(5) *CMLRev* 1503, at 1507.

⁵ Christopher McCrudden, “Rethinking Positive Action” (1986) 15 *ILJ* 219, 223-25

to one person means taking it away from another.”⁶ Naturally, there are implications for other actors, including the State, industry and individual companies. The effect of positive action measures on private enterprise is particularly problematic given the fact it has implications for the allocation of their resources.

II. The Legislative Approach to Positive Action

Under EU law, Member States are permitted to implement positive action measures which compensate for gender⁷ imbalance in the professional sphere, thus a number of legislative measures have been adopted to facilitate positive action. As a starting point, it is important to note that positive action is a departure from formal equality principles. Equality is a fundamental principle of EU law and is also protected by Article 40.1 of the Irish Constitution, providing that all citizens are equal before the law. Deviation from this principle is permitted under Article 2(4) of the Equal Treatment Directive (“ETD”) which provides: “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 referred to in Article 1(1).”⁸ S.24(1) of the Employment Equality Act, 1998,⁹ which reflects the wording of the EU Treaty, as well as s.14(b)(i) of the Equal Status Act 2000, provide for a departure from formal equality under Irish law. Irish legislation covers both the public and private sectors. However, there are no binding measures for positive action or gender quotas, with the 1998 Act allowing for positive action, without specifying what, if any, action is to be taken.¹⁰

The ETD was amended by Directive 2002/73/EC in order to put into operation what is now Article 157(4) of the Treaty on the Functioning of the European Union (“TFEU”),¹¹ which permits positive action as a means to achieve full equality in practice between men and women. Although the ETD has been repealed and replaced by the recast Directive 2006/54,¹² the Court of Justice of the European Union (“CJEU”) jurisprudence considered below continues to be of application. According to Article 3 of the recast Directive, “Member States may maintain or adopt measures within the meaning of Article 141(4) of the Treaty with a view to ensuring full equality in practice between men and women in working life.” Article 6 of Directive 2004/113/EC provides that, “with a view to ensuring full equality in practice between men and women, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to sex.”¹³ Finally, Council Recommendation

⁶ Anne Peters, *Women, Quotas and Constitutions, a Comparative Study of Affirmative Action for Women under American, German, European Community and International Law*, (Kluwer Law International, 1999), at 22.

⁷ The terms “gender” and “sex” are used interchangeably throughout this article.

⁸ 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, OJ L039/40, 14 February 1976.

⁹ As amended by the Equality Act, 2004, s.15.

¹⁰ European Commission, “Positive Action Measures to Ensure Full Equality in Practice between Men and Women, including on Company Boards”, September 2011, at 116 <ec.europa.eu/justice/gender-equality/files/gender_balance_decision_making/report_gender-balance_2012_en.pdf> (visited 31 January 2015).

¹¹ Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 amending Council Directive 76/207/EEC 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, OJ L269/15, 5 October 2002.

¹² 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), OJ L204/23, 26 July 2006.

¹³ 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, OJ L373/37, 21 December 2004.

84/635/EEC on the promotion of positive action for women, suggested that Member States should adopt positive action policies with a view to eliminating inequality in working life.¹⁴ Reference should also be made to Article 2 of the Treaty on the European Union (“TEU”) and Article 21 of the EU Charter of Fundamental Rights (“the Charter”) which form the basis of the Union’s commitment to the principle of non-discrimination.¹⁵

III. The Judicial Approach to Positive Action

To date, there have been no cases from the Irish courts addressing the question of positive action with regard to gender.¹⁶ The issue of positive discrimination has received more attention at an EU level. At the outset it is important to emphasise that the European courts have not always been consistent in their approach to the scope of positive action, often appearing “to oscillate between approaches rooted in formal equality, and others are based to some degree on substantial equality, social inclusion, or group rights theories.”¹⁷ The first opportunity for the CJEU to define the limits of positive action in the EU arose in *Kalanke v Bremen*,¹⁸ a preliminary reference from a German court relating to a quota system for public servants. Under the system in question, women were to be given priority when they were underrepresented in a particular sector, provided they were equally as qualified as competing male candidates for the same position. According to the Court, “national rules which guarantee women absolute and unconditional priority for appointment or promotion go beyond promoting equal opportunities and overstep the limits of the exception in Article 2(4) of the Directive.”¹⁹ The Court narrowly construed the exception in Article 2(4) and held the German provision to be invalid as “a national rule that, where men and women who are candidates for the same promotion are equally qualified, women are automatically to be given priority in sectors where they are under-represented, involves discrimination on grounds of sex.”²⁰ In this judgment, the CJEU failed to define the limits of positive action with sufficient clarity, which led to much uncertainty for policy makers as to the best approach to take in tackling gender imbalance in the workplace.²¹ In subsequent judgments, the Court has attempted to clarify its position.

In *Marschall v Land Nordrhein Westfalen*,²² a male teacher was refused a promotion, as an equally qualified female colleague was given priority under national law. Unlike *Kalanke*, the provision in question did not require absolute priority, but rather contained a savings clause that allowed for the individual circumstances of a male candidate to be taken into account. The Court held that Article 2(4) permitted a rule giving priority to equally qualified female candidates where females were underrepresented, as long as this priority could be overridden where an objectively assessed individual criterion favoured the male candidate.²³ It has been noted that it is not altogether clear whether such a savings clause would make a significant difference in practice, as unsuccessful

¹⁴ Council Recommendation 84/635/EEC of 13 December 1984 on the promotion of positive action for women OJ L331/34, 19 December 1984.

¹⁵ The Charter of Fundamental Rights of the European Union, OJ C326/391, 26 October 2012.

¹⁶ However, see *Re The Employment Equality Bill 1996* [1997] 2 IR 321 where the Supreme Court found that positive discrimination on religious grounds was not incompatible with the Constitution.

¹⁷ Colm Ó Cinneide, “Positive Action and EU Law”, a modified and updated version of an article initially published as “Positive Action and the Limits of the Law” (2006) *Maastricht Journal of European and Comparative Law* 351, at 356.

¹⁸ Case C-450/93 *Kalanke v Bremen* [1996] ECR I-3051 [hereinafter *Kalanke*].

¹⁹ [1996] ECR I-3051, at para. 15.

²⁰ [1996] ECR I-3051, at para. 11.

²¹ Eric Hinton, “The Limits of Affirmative Action in the European Union: Eckhard Kalanke v Freie Hansestadt Bremen” (1997) 6 *Texas Journal of Women and the Law* 215, at 216.

²² Case C-409/95 *Marschall v Land Nordrhein Westfalen* [1997] ECR I-6363 [hereinafter *Marschall*].

²³ [1997] ECR I-6363, at para. 35.

applicants would still find few grounds upon which they could rely without introducing exclusionary or indirectly discriminatory criteria, such as age, seniority or bread-winner status.²⁴ Furthermore, this judgment provides no real guidance regarding the method by which one should deal with gender quotas. Consequently, as Sandra Fredman accurately predicted, this is an area which the Court later had to confront.²⁵

In *Georg Badeck and others*,²⁶ the Court was faced with a more sophisticated positive action programme under which women were to be given priority in promotions, access to training and recruitment in the public service. This priority was not to be automatic but rather was subject to several conditions: female candidates would have to be underrepresented in the sector, female candidates would have to be equally as qualified as competing male candidates and there could not be any circumstances which might tilt the balance in favour of the male candidate.²⁷ A further limiting factor was that the targets were set at a level proportionate to the number of female graduates; thus it was not an absolute quota.²⁸ Regardless of this provision, the appropriate number of women would have to be available to take up the positions. Furthermore, one of the rules concerned training, not actual employment, and its effect was limited to areas in which the State did not have a monopoly. As a result, men who were excluded from state sponsored training could always be trained in the private sector.²⁹ Another provision involved a guarantee that, where male and female candidates were equally qualified, women would be called for interview in sectors where they were underrepresented. The Court noted that this was not an attempt to determine a final result.³⁰ Furthermore, only those candidates who were actually qualified could be called to interview.³¹ Given these limitations, the Court found the scheme was compatible with Article 157 TFEU.

The final case to be dealt with in relation to the CJEU's approach to positive action is *Abrahamsson and Anderson v Fogelqvist*.³² This case involved a rule which provided for automatic recruitment of female research assistants if they were sufficiently qualified and the requirement of objectivity, as set out in *Marschall*, was met. This occurred even if such candidates were less qualified than a candidate of the opposite sex, unless the difference between the qualifications was so great that the application of the rule would offend common sense.³³ The Court noted that the scope and effect of the condition of objectivity in making appointments could not be precisely determined, as a member of the underrepresented sex was selected more often than not.³⁴ On the question of justification, the CJEU noted that although EU legislation provides for positive discrimination, "it cannot be inferred from this that it allows a selection method of the kind at issue in the main proceedings which appears, on any view, to be disproportionate to the aim pursued."³⁵ It is apparent that the CJEU considered that the measures in question were so clearly disproportionate as to be incapable of justification.

²⁴ Sandra Fredman, "Affirmative Action and the European Court of Justice: A Critical Analysis" in Jo Shaw ed., *Social Law and Policy in an Evolving EU* (Hart Publishing, 2000), 171 at 179.

²⁵ *Ibid.*

²⁶ Case C-158/97 *Georg Badeck and Others* [2000] ECR I-1875 [hereinafter *Badeck*].

²⁷ [2000] ECR I-1875 at para. 38.

²⁸ [2000] ECR I-1875 at para. 42.

²⁹ [2000] ECR I-1875 at paras. 51–53.

³⁰ [2000] ECR I-1875 at para. 60.

³¹ [2000] ECR I-1875 at para. 61.

³² Case C-407/98 *Abrahamsson and Anderson v Fogelqvist* [2000] ECR I-5539 [hereinafter *Abrahamsson*].

³³ Fredman, note 24, at 182.

³⁴ [2000] ECR I-5539 at para. 53.

³⁵ [2000] ECR I-5539 at para. 55.

Having outlined the EU jurisprudence on positive action, it is important to remember that the cases the Court has been faced with to date are very limited in nature and do not come close to assessing the validity of the large variety of possible positive action measures.³⁶ It is submitted that a degree of uncertainty as to the scope of positive action still exists. Commercial and legal certainty are important values for any business, particularly in the field of contract law.³⁷ The appropriateness of the application of positive action measures to the private sector must therefore be assessed.

IV. Contractual Autonomy and its Limitations

The freedom of contract involves the freedom of individuals and corporations to form contracts without interference. As Gaabriel Tavits underlines, the freedom of contract is closely related to the concepts of self-determination and self-responsibility and individuals must be allowed “the maximum level of freedom possible in the organisation of their private lives.”³⁸ The ability to enter into contracts is undoubtedly an important expression of this private autonomy, and private individuals or indeed businesses must be allowed to decide whether or not to conclude a contract and with whom.³⁹ The Principles of European Contract Law (“PECL”),⁴⁰ a set of model rules drawn up by leading private law academics, demonstrate a clear commitment to the concept of contractual freedom. The Guiding Principles of European Contract Law,⁴¹ which complement the PECL, outline the two essential elements of the freedom. These are the freedom to choose with whom to enter into a contract and the freedom to choose the content of a contract as well as its form. Although non-binding, the Guiding Principles highlight the fact that all Member States recognise the freedom of parties to contract according to the conditions of their choice.⁴² Even in those jurisdictions that do not have a specific national provision dealing with the freedom of contract, there is often an indirect commitment to this principle.⁴³ The CJEU has also recognised the freedom of contract as a general principle of civil law.⁴⁴ Furthermore, Article 16 of the Charter,⁴⁵ which is discussed below, protects the freedom to conduct a business. Both Irish employers and employees also enjoy an extensive freedom of contract, which is naturally conditioned by employment legislation, such as the Unfair Dismissals Act 1997.

Of course, it should be highlighted that the freedom of contract, like any fundamental freedom, is not absolute. Maria Marella remarks that in European law “the question of limits of freedom of contract finds very different and contrasting solutions.”⁴⁶ The limitations on the freedom of contract addresses several needs, namely: ensuring efficiency, morality and equity as the interests of private

³⁶ Lisa Waddington and Mark Bell, “More Equal than Others: Distinguishing European Union Equality Directives” (2001) 38 *CMLRev* 587, at 602.

³⁷ See for example, in the context of the repudiation of contracts, Qiao Liu, “The White and Carter Principle: A Restatement” 74 *Modern Law Review* 2, at 171, 181.

³⁸ Gaabriel Tavits, “Freedom of Contract in Labour Relations” (1999) 4 *Juridica International* 179, at 180.

³⁹ *Ibid.*

⁴⁰ Principles of European Contract Law, Article 1:102 <www.trans-lex.org/400200> (visited 8 August 2014).

⁴¹ Guiding Principles of European Contract Law <www.legiscompare.fr/site-web/IMG/pdf/19._Guiding_Principles.pdf> (visited 7 October 2014).

⁴² Principles of European Contract Law, note 40, at 99.

⁴³ Reinhard Zimmermann, *The New German Law of Obligations: Historical and Comparative Perspectives* (Oxford University Press, 2005), at 160, 205, and 207.

⁴⁴ Case C-240/97 *Spain v European Commission* [1999] ECR I-6571, at para. 99.

⁴⁵ European Commission, “Explanations relating to the Charter of Fundamental Rights”, Doc No. OJ C303/17, 14 December 2007, at 23.

⁴⁶ Maria Rosaria Marella, “The Old and the New Limits of Freedom of Contract in Europe” (2006) 2 *European Review of Contract Law* 258, at 258.

parties may conflict with those of society.⁴⁷ It has also been noted that limiting the freedom of contract is not merely a technical question, but rather involves sensitive political choices, and harmonisation involves “an intrusion into the intangible sphere of national sovereignty.”⁴⁸ It is evident therefore, that any attempt to limit private contractual autonomy represents a very serious policy decision and should not be taken lightly. This must be particularly true in the context of positive discrimination which not only prohibits private actors from taking certain decisions, but also specifies how they should use their own resources. Michael Trebilcock emphasises that although there may be limitations placed on the freedom of contract, these can never go so far as an obligation to take positive action measures which impose a duty “to take affirmative actions to assist or enable others to pursue life plans of their own in priority to my own preferences.”⁴⁹ On the more specific issue of the choice of contractual partners, Dagmar Coester-Waltjen notes that this is a fundamental element of contractual freedom and private choices in this field should never have to be justified.⁵⁰ The German courts have, however, recognised a duty to contract in certain situations, but only in extreme circumstances as it represents an “especially sharp inroad” into contractual freedom.⁵¹ Thus, it is certainly going too far to say that anti-discrimination measures and the freedom of contract are entirely incompatible, as there may be varying degrees of interplay between the concepts. On the other hand, it might be said that positive action goes beyond anti-discrimination measures and is particularly interventionist in private contractual autonomy.

Therefore, Courts have therefore been faced with a conflict between classic liberal theories regarding property rights and contractual freedom on the one hand, and the new wave of civil rights and public protection on the other.⁵² It has been emphasised that limiting the freedom of contract, although an exception to a fundamental principle, is in fact useful for enacting state policies.⁵³ Regarding the social perspective of limiting contractual freedom, Hugh Collins observes that “the central idea is that the general limit to the freedom of contract has the specific function of correcting and/or compensating a sort of original law of solidarity and proportionality that inheres to freedom of contract.”⁵⁴ Moreover, it is interesting to note that the German Constitutional Court has adopted a distributive interpretation of the freedom of contract in order to protect the weaker party.⁵⁵ In this sense, contract law becomes “the vehicle through which the state enacts solidarity within the community.”⁵⁶ Such cases are particularly remarkable given the traditional antipathy seen in German academic discourse towards the interference with contractual autonomy. Indeed, regarding the harmonisation of European private law, many German lawyers warned against the dilution of contractual freedom that would result from private law protection against discrimination.⁵⁷ Furthermore, German academics have criticised the Draft Common Framework of Reference for European Private Law which replaced the PECL for making the freedom of contract subject to conditions such as good faith and fair dealing which they saw as an attempt to subordinate private autonomy to social or moral standards.⁵⁸ It has even been suggested that the principle of freedom of

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*, at 259.

⁴⁹ Michael Trebilcock, *The Limits of Freedom of Contract* (Harvard University Press, 1993), at 194.

⁵⁰ Dagmar Coester-Waltjen, “Discrimination in Private Law: New European Principles and the Freedom of Contract” in Katja Ziegler ed., *Human Rights and Private Law: Privacy as Autonomy* (Oxford Hart, 2007), at 124.

⁵¹ *Ibid.*

⁵² Hugh Collins, *The Law of Contracts* (4th ed., Butterworths, 2003) at 106..

⁵³ Maria Rosaria Marella, note 46, at 265.

⁵⁴ *Ibid.*, at 266.

⁵⁵ For example, see BVerfG 89, 19 October 1993, am 214.

⁵⁶ Maria Rosaria Marella, note 46, at 267.

⁵⁷ Franz Ebert and Tobias Pinkel, “Restricting Freedom of Contract through Non-Discrimination Provisions: A Comparison of the Draft Common Frame of Reference (DCFR) and the German ‘General Equality Law’” (2009) 10 *German Law Journal* 11, at 1417.

⁵⁸ *Ibid.*, at 1422.

contract actually involves a certain liberty to discriminate.⁵⁹ This is a particularly extreme position, and other commentators have rightly been more nuanced in their views, suggesting that the freedom of contract should not face excessive intervention with on the premise of justice. Instead, justice and contractual autonomy can be seen as two valuable principles and need to be balanced.⁶⁰ Within the specific context of employment contracts, it has been noted that they are often treated differently to normal contracts, in that the State prescribes certain minimum conditions in order for them to be constituted as such.⁶¹ A particular characteristic of employment contracts is the inequality of bargaining power between the parties. As a result, the State has often intervened to protect the weaker party, usually the employee. Although it is certainly true that employment contracts are subject to more limitations than general contract law, the freedom of contract is still considered a fundamental aspect of such contracts.⁶² The European courts approach to contractual autonomy in the more general employment context, and its potential relevance to the Proposed Directive, will be discussed below

V. Proposed Directive on Gender Balance in the Boardroom

The Explanatory Memorandum of the Proposed Directive outlines, in some detail, its background and purpose. Undoubtedly, the depth of analysis and justification therein is testament to the controversial nature of the proposal. The Memorandum highlights the gender imbalances that are characteristic of company boards across the EU, with only 13.7% of corporate seats in the largest companies being held by women, rising only slightly to 15% among non-executive directors.⁶³ This situation, according to the Commission, is worse in the private sector, with the underrepresentation of women on public company boards being of particular concern.⁶⁴ Such a discrepancy is perhaps to be expected given the inherent responsibility of the State not to discriminate, which is constitutionally mandated. The responsibility of private actors in this area is much more contested, with some arguing that it is not for private individuals, who may have had no role at all to play in the development of institutionalised discrimination, to bear the cost of remedying gender imbalances.⁶⁵ The Memorandum goes on to note that progress in the area of female participation in company decision-making has been extremely slow, with the average annual growth rate of female representation on company boards being just 0.6%.⁶⁶ Furthermore, the rate of improvement across the Member States has not been uniform, with the most significant improvements, perhaps unsurprisingly, being noted in Member States which have introduced binding measures.⁶⁷ The Commission argues that self-regulation has not come close to achieving similar results and “at the current pace it would take several decades to approach gender balance throughout the EU.”⁶⁸

The Commission highlights the fact that the lack of female decision-makers is largely a result of male-dominated business culture as well as a lack of transparency, and “these elements, which are often referred to in their entirety as a glass ceiling, undermine the optimal functioning of the labour market for top management positions throughout the EU.”⁶⁹ The fact that existing differences of

⁵⁹ *Ibid.*, at 1425.

⁶⁰ *Ibid.*, at 1426.

⁶¹ Tavits, note 38, at 188.

⁶² *Ibid.*

⁶³ Proposed Directive, note 1, at 2.

⁶⁴ *Ibid.*

⁶⁵ See further discussion in Fredman, note 24, at 173-74.

⁶⁶ Proposed Directive, note 1, at 2.

⁶⁷ *Ibid.*

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*, at 4.

approach between Member States are only going to grow is given as further justification for the proposed Directive.⁷⁰ It is suggested that the absence of harmonisation in this area has a negative impact on the internal market. Increased fragmentation leads to inconsistencies in legal obligations and difficulties of comparability which involves greater costs for companies and other stakeholders.⁷¹ This argument, coupled with the suggestion that balanced boardrooms lead to more dynamic and efficient markets, clearly shows an attempt on the part of the Commission to persuade companies that positive action is in fact good for business.

Cooperation between the EU legislature and private actors is to be welcomed, particularly considering the perceived burden which the Commission plans to impose on companies in seeking to increase the presence of the underrepresented sex on corporate boards throughout the EU.⁷² This is to be achieved by setting a minimum objective of 40% representation for members of the underrepresented sex for non-executive positions on boards to be attained by 2020, or by 2018 in the case of listed companies which are public undertakings.⁷³ In order to attain this objective, companies that have a lower share of the underrepresented sex among the non-executive directors will be required to make appointments to those positions on the basis of a comparative analysis of the qualifications of each candidate. This requires the application of clear, gender-neutral and unambiguous criteria. Priority is to be given to the candidate of the underrepresented sex if that candidate is equally as qualified as the candidate of the other sex.⁷⁴

The legal basis of the proposal is Article 157(3) TFEU which gives the EU competence to act on issues of gender equality in employment and occupation. This provision is the specific legal basis for any binding measures aimed at ensuring the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, including positive action. The very fact that the legal bases available in the social sphere are so specific and narrow is testament to the controversy surrounding the implementation of EU measures in a field which is so deeply characterised by Member State sovereignty. Article 157(3) can be contrasted with 157(4) which, as mentioned above, allows the Member States to introduce positive action measures aimed at achieving full equality in practice. It has been pointed out that the divergence between these paragraphs is evidence of the unwillingness of Member States to give the Union competence to prescribe outcomes in relation to female representation.⁷⁵ Given the Commission's concern about potential consequences for the internal market, if the divergences between Member States are allowed to continue, Article 115 TFEU, which provides for measures to ensure the proper functioning of the internal market, might have provided an alternative legal basis. The Court's existing interpretation of the four fundamental freedoms of EU law prevents discrimination on grounds of nationality, so the market is already protected in this respect. It is possible this approach was not adopted because the Commission would have great difficulty in proving an appreciable distortion of competition or an obstacle to the exercise of the internal market freedoms.⁷⁶ Another obstacle to the use of Article 115 is that it requires unanimity in Council, a threshold the Commission could not be confident of reaching, given the contentious nature of the proposal.

⁷⁰ *Ibid.*

⁷¹ *Ibid.*, at 3.

⁷² *Ibid.*, at 5.

⁷³ *Ibid.*

⁷⁴ "Women on Boards - Factsheet 3: Legal Aspects", European Commission <ec.europa.eu/justice/gender-equality/files/womenonboards/factsheet-general-3_en.pdf> (visited 10 August 2014) [hereinafter Women on Boards Factsheet].

⁷⁵ Anna Katharina Jelko, "Affirmative Action at its Extreme: A European Gender Quota for the Boards of Publicly Listed Companies in the EU?" (Thesis, College of Europe Bruges, 2012, supervised by Siofra O'Leary) at 28.

⁷⁶ *Ibid.*

Before turning to the question of the proposal's compatibility with commercial autonomy principles, it is necessary to assess its conformity with the limits placed on positive action by the CJEU.

(1) The measures must concern a sector in which women are under-represented (*Kalanke, Marschall, Badeck*):

This condition does not warrant in depth discussion as it is quite clear from the evidence discussed above that women are indeed underrepresented on the non-executive boards of publicly listed companies.

(2) Positive action measures can only give priority to equally qualified female candidates over male candidates (*Kalanke, Marschall and Badeck*):

Article 4(3) of the proposal deals specifically with this issue. According to this provision, the preference rule should only apply in the presence of equally qualified candidates.

(3) The measures must not give automatic and unconditional priority to equally qualified candidates, but must include a "savings clause" (*Marschall*):

As we have seen in the case law, such savings clauses include the possibility of granting exceptions in justified cases which take the individual situation of each candidate into account. In ensuring compliance with the Proposed Directive, Member States are required to guarantee a comparative analysis of a candidate's qualifications by introducing clear, pre-established criteria. Only then should priority be given to the candidate of the underrepresented sex; if he or she is equally as qualified as other candidates from the opposite sex "in terms of suitability, competence and professional performance;"⁷⁷ and after an objective assessment, there are no specific criteria tilting the balance back in favour of the candidate of the opposite sex.⁷⁸

It is evident, therefore, that the Proposed Directive is indeed in conformity with the CJEU's existing jurisprudence on positive discrimination. It is hardly surprising that the Commission made every effort to ensure that this flagship anti-discrimination measure would not be open to challenge, at least on equality-related grounds. The above-mentioned clarification and refinement of the CJEU's approach to positive discrimination was certainly of assistance to the drafters of the Proposed Directive. As this article will demonstrate below, the compatibility of the proposal with the CJEU's approach to contractual freedom is not so clear-cut.

VI. Impact of the Proposed Directive on Private Law Rights

Introduction

⁷⁷ Women on Boards Factsheet, note 74, point 4.

⁷⁸ *Ibid.*

This section will outline in depth the scope of the Proposed Directive. The Proposed Directive's compatibility with the principles of subsidiarity and compatibility, in addition to the CJEU's jurisprudence on the Freedom of Contract, will then be addressed. Finally, alternative approaches to achieving greater female representation on company boards will be discussed.

Scope of the Proposal

The Proposed Directive applies solely to publicly listed companies, which are considered of high economic importance and in any event, tend to have larger boards.⁷⁹ Furthermore, there is little divergence in the legal form and status of such companies across the EU, making for ease of comparability.⁸⁰ Excluded from the scope, even if they are publicly listed, are small and medium-sized companies ("SMEs"), which are defined as those with fewer than 250 employees and with an annual turnover of less than €50 million.⁸¹ SMEs represent around 99% of all European companies and have often been described as the backbone of the European economy.⁸² In the EU, some 20.7 million SMEs employ 67% of the private sector workforce and studies demonstrate that 85% of net new jobs in the EU between 2002 and 2010 were created by SMEs.⁸³ The importance of SMEs is recognised by the Treaty itself which contains an obligation to consider how EU legislation would affect their interests.⁸⁴ This clearly indicates the vital role they play for economic growth and job creation in Europe. It is clear, therefore, that the Commission was obliged to take into account the impact the proposal would have on SMEs. On the other hand, it is somewhat contradictory for the Commission to highlight the size, visibility and economic performance of publicly listed companies as the very reason for which they are being targeted by the proposal, while simultaneously excluding SMEs. It could be surmised that the Proposed Directive amounts to little more than an attempt by the Commission to draw attention to this area in order to avoid accusations of inaction. A related justification, which has been put forward for the targeting of companies listed on stock exchanges, was that their high visibility means that there is a pre-existing existing public interest rationale for intervention.⁸⁵ However, it could be argued that such companies have already had to comply with much greater regulation than non-publicly listed companies including minimum capital and disclosure requirements.⁸⁶ It should also be noted that public SMEs which comprise 33% of all EU public companies were excluded alongside their private SME counterparts. The Commission further rejects the argument that female participation in decision-making should be

⁷⁹ European Commission, "Impact Assessment on Costs and Benefits of Improving the Gender Balance in the Boards of Companies Listed on Stock Exchanges", Doc No. SWD (2012) 348 final, 14 November 2012, at 35 [hereinafter Impact Assessment].

⁸⁰ *Ibid.*, at 36.

⁸¹ Commission Recommendation, "Definition of Micro, Small and Medium-Sized Enterprises", Doc No. OJ L124/36, 6 May 2003.

⁸² Commission Communication, "Responding to the Needs of Small and Medium-Sized Enterprises", Doc No. COM(2013) 122, 7 March 2013.

⁸³ EIM Business Policy and Research (Sponsored by European Commission), "Do SMEs Create More and Better Jobs" November 2011, at 28 <http://ec.europa.eu/enterprise/policies/sme/facts-figures-analysis/performance-review/files/supporting-documents/2012/do-smes-create-more-and-better-jobs_en.pdf> (visited 22 September 2014).

⁸⁴ Article 153 TFEU.

⁸⁵ Impact Assessment, note 79, at 35

⁸⁶ Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC, OJ L390/38, 31 December 2004.

increased beyond the private sector.⁸⁷ Although the public sector was not perceived as a problem area it is interesting to note the specific reasons for not intervening here. It was argued that particular features of the public service, which tend to be hierarchical, make it difficult to introduce a quota without violating case law on positive action.⁸⁸ Furthermore it was thought that the Member States would resist any attempt by the EU to interfere with its management of the public sector.⁸⁹ However, it should be noted at this juncture that the Proposed Directive does apply to state-owned companies which are publicly listed, by virtue of the fact they are publicly listed. It is surely to be welcomed that the Commission is carefully considering the impact of the Proposed legislation on businesses. On the other hand, it is possible that the creation of so many exceptions may undermine the goals of the Proposed Directive.

Regarding the temporal scope of the proposal, the Commission itself accepts that the rationale for EU action in this area will only exist as long as the problem of female underrepresentation persists.⁹⁰ A “sunset clause” is contained in Article 11, which provides that the Proposed Directive will expire in 2028. A further limitation on the interference with contractual autonomy is that the Proposed Directive applies only to non-executive directors. The Commission recognised that the inclusion of executive directors would be an unacceptable interference with the daily management of companies.⁹¹ It is intended that only supervisory positions should be covered by the Proposed Directive, at least for the time being.⁹² It is perhaps inconsistent that on the one hand, it is stated that it is important to have women in positions of power within companies, while on the other hand, it is suggested that contractual autonomy remains intact precisely because non-executive directors wield little power.

Conformity with the Principles of Subsidiarity and Proportionality and Choice of Legal Instrument

The principle of subsidiarity requires that the Union shall act only, if and insofar as, the objectives of the Proposed action cannot be sufficiently achieved by the Member States.⁹³ This first element involves a test of necessity. The second element involves a test of EU added value; that is to say that the measure, by reason of its scale or effects, can be better achieved at Union level. It is argued that differences between national company laws could have a deterrent effect on cross-border trade and investment, as businesses could become more reticent about establishing in other Member States.⁹⁴ Another related argument is the increased competitiveness which companies stand to gain by making their workforces more diverse. This, it is noted, can only be effectively achieved on a large scale, which therefore necessitates Union action as “only an EU-level measure can effectively help to ensure a competitive level-playing field.”⁹⁵ However, it might be argued that such heavy-handed regulation of corporate activity is likely to make European companies less competitive, thereby deterring inward investment from outside of the Union. The Commission is at pains to emphasise

⁸⁷ Impact Assessment, note 79, at 34.

⁸⁸ *Ibid.*, at 35.

⁸⁹ *Ibid.*, at 34

⁹⁰ *Ibid.*, at 28.

⁹¹ *Ibid.*, at 55.

⁹² For example, see the submission of Frauen in die Aufsichtsräte e.V., European Commission, “Stellungnahme zur öffentlichen Konsultation der Europäischen Kommission” (available at <http://ec.europa.eu/justice/newsroom/gender-equality/opinion/files/120528/all/140_de.pdf> (visited 13 August 2014).

⁹³ Treaty on the European Union, Article 5(3) [hereinafter ‘TEU’].

⁹⁴ Proposed Directive, at 9.

⁹⁵ *Ibid.*, at 10.

the commercial aspects of the proposal and the perceived benefits to business. The sanctions to be imposed are also left open to the Member States, although they must be effective, proportionate and dissuasive.⁹⁶ Member States have every incentive to keep sanctions to a minimum in order to protect their companies from competitors in other Member States. It is therefore clear that the internal market argument works both ways. The measure is deemed necessary to protect the efficiency of the market yet the very same internal market conditions will lead to the sanctions and therefore the proposal itself, being largely ineffective.

Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.⁹⁷ Emphasis is placed on the fact that the Proposed Directive is a minimum harmonisation proposal which is limited to simply setting common objectives.⁹⁸ It is left to the Member States to implement the proposal in a manner that best suits their local circumstances and conditions, particularly national company law and local board recruitment practices.⁹⁹ Again, it seems that the Commission is wary of impeding national sovereignty and the company law choices made by Member States.

Regarding the choice of legal instrument, a Directive was chosen in order to give the maximum flexibility possible to the Member States in implementing the measures.¹⁰⁰ Of course, any room for manoeuvre is to be welcomed as Member State governments are in the best position to assess the needs of companies operating in their territory. On the other hand, this approach is, once again, not entirely consistent with the Commission's statement that the reason public companies were targeted was their high degree of homogeneity and therefore comparability.

Compatibility with CJEU Jurisprudence on the Freedom of Contract

As discussed above, freedom of contract implies that there is no government interference in the choice of content or contractual party. It is evident that the Proposed Directive directly conflicts with the general principle of contractual freedom, and would therefore be invalid if such a freedom were absolute. However, this freedom, like any fundamental freedom, is subject to legitimate restrictions which are proportionate and necessary to achieve a legitimate aim. In certain instances, the CJEU has taken a very interventionist approach in restricting private autonomy. This can be seen in particularly controversial cases such as *Association Belge des Consommateurs Test-Achats ASBL v Council*,¹⁰¹ in which the Court severely limited the freedom of insurance companies to discriminate based on sex, by relying on a derogation to the Gender Directive.¹⁰² The CJEU held that such a derogation was invalid as it constituted sex discrimination in contravention of the equality principle in the Charter.¹⁰³ This was held despite the fact that the derogation represented a clear desire on the part of the legislature to avoid significant interference with the activity of businesses. It is clear from this case that the Court will not tolerate commercial practices which run

⁹⁶ Proposed Directive, Art. 6.

⁹⁷ TEU, Article 5(4).

⁹⁸ Impact Assessment, note 79, at 29.

⁹⁹ Proposed Directive, note 1, at 10.

¹⁰⁰ *Ibid.*

¹⁰¹ Case C-236/09 *Association Belge des Consommateurs Test-Achats ASBL v Council* [2011] ECR I-00773 [hereinafter *Test-Achats*].

¹⁰² OJ L373/37.

¹⁰³ [2011] ECR I-00773, at para. 17.

contrary to the general principle of equality as expressed in the Charter. The Proposed Directive presents a very different situation. In contrast to the targeted, limited nature of the Gender Directive, the Proposed Directive on gender balance in the boardroom applies to a wide range of companies and is particularly intrusive in relation to commercial and contractual autonomy. Furthermore, the proposal relates not to aggressive business practices such as those seen in the *Test-Achats* case, but rather to the more everyday activity of hiring employees. Although there is some debate surrounding the classification of non-executive directors as employees of the company, it is suggested that they are best described as part-time employees working, at director level, but without an executive position.¹⁰⁴

Within the employment context, the CJEU has recently demonstrated a stronger commitment to the freedom of contract, often at the expense of vulnerable employees. This can be seen particularly in the CJEU's jurisprudence on the transfer of undertakings. It is suggested that the CJEU would be even more willing to protect the freedom of contract in the context of the Proposed Directive, which involves the very existence of the contractual relationship itself. This relationship is largely binary; you either are a contractual partner or you are not. Of course, it is always possible to terminate a contractual relationship, which is in itself subject to restrictions, but this does not mitigate the fact that the employer faced with a gender quota is left with little margin of manoeuvre in relation to its decision of whom to employ. It must be recalled that these are not cases dealing directly with discrimination and the balance to be achieved between commercial autonomy and equality may turn out to be somewhat different. The CJEU has never been faced with the specific question of the compatibility of gender quotas with the freedom of contract. However, as this article shall highlight below, the CJEU has interpreted freedom to conduct a business as buttressing managerial power, without any consideration for the competing Charter rights of employees.

In *Hans Werhof v Freeway Traffic Systems GmbH & Co KG*,¹⁰⁵ the claimant urged the Court to permit a “dynamic” interpretation of an employment contract. This allowed for the continuation of a collective agreement, despite the fact that the new employer had no involvement in the negotiation of that agreement. The defendant on the other hand, argued that to impose such an obligation on the new employer would hinder his freedom of association and his freedom to contract, a situation which could be equated with expropriation of his property.¹⁰⁶ According to the Court, an essential characteristic of any contract is the freedom of the parties to arrange their own affairs. As a result, an employer who was not a member of an association and therefore had no involvement in negotiating the collective agreement could not be bound by it.¹⁰⁷ To hold otherwise would infringe the principle that contracts cannot impose obligations on third parties and might also have the effect of imposing more obligations “on an employer who had not been a party to an agreement than on the person who had been, leaving the former in uncertainty and exposed to the risk that conditions might be introduced behind his back.”¹⁰⁸ The Court did note, however, that contractual autonomy was not absolute. To hold otherwise would be to erode the rights of employees which would defeat the very purpose of the legislation, which was to protect such employees from the absolute application of the principle of freedom of contract.¹⁰⁹

¹⁰⁴ Guy Clapperton, *Growing your small business with non-executive directors* <www.guardian.co.uk/small-business-network/2013/jan/07/growing-small-business-non-executive-directors> (visited 24 September 2014).

¹⁰⁵ Case C-499/04 *Hans Werhof v Freeway Traffic Systems GmbH & Co KG* [2006] ECR I-2397 [hereinafter *Werhof*].

¹⁰⁶ [2006] ECR I-2397 at para. 19.

¹⁰⁷ [2006] ECR I-2397 at para. 23.

¹⁰⁸ [2006] ECR I-2397 at para. 58.

¹⁰⁹ [2006] ECR I-2397 at para. 24.

The Court held that the terms of the collective agreement in force at the time of the transfer are only valid until its expiration or until a new agreement enters into force. The agreement is therefore not perpetual but is subject to future negotiations.¹¹⁰ The Court further highlighted the fact that the freedom of association is protected by Article 11 of the European Convention on Human Rights (“ECHR”) and is a fundamental right protected by the Community legal order.¹¹¹ The Court concluded that to apply the dynamic interpretation as submitted by the claimant “would mean that future collective agreements apply to a transferee who is not party to a collective agreement and that his fundamental right not to join an association could be affected.”¹¹² This corollary of the freedom of association, that is to say the freedom to dissociate, has also been recognised by the European Court of Human Rights (“ECtHR”).¹¹³ It is clear from this case that the CJEU is seeking to preserve the liberty of the employer regarding the terms of the employment relationship. It would hardly be surprising therefore, if the CJEU were faced with the Proposed Directive, that it would be equally as reticent regarding the formation of the contract itself. The decision regarding the choice of party to a contract is surely a fundamental element of the freedom. It is this action which exposes the employer to the obligations associated with that position. It appears from *Werhof* that the limitation of the freedom of contract in the employment context is usually justified by the need to protect the weaker party to contractual negotiations, *ie* employees. It is not altogether clear whether such a justification could exist in the context of non-executive directors. It is suggested that it might be difficult to classify them as having weak bargaining power to the same extent as vulnerable employees.

The Opinion of Advocate General (“AG”) Cruz Villalón in *Alemo-Herron v Parkwood Leisure*,¹¹⁴ also in the context of the transfer of undertakings, provides a strong, but nuanced example of the importance of contractual autonomy. The question which arose in this case was whether an acquiring company was bound by a national collective agreement negotiated between the employees and their previous employer. On the question of the freedom of association guaranteed by the Charter and the ECHR, the AG noted that the issue was not that the new employer would be compelled to join an organisation in order to influence the contractual terms, but rather that it had no means of being so represented, as the Union in question was a public body.¹¹⁵ Despite this, the AG supported a dynamic interpretation of this agreement, which would have bound the acquiring company even though it was not involved in the negotiations. However, the permissibility of such dynamic clauses must not run contrary to the fundamental right to conduct a business contained in Article 16 of the Charter:

The fact that the employer may be indefinitely bound, in the event of the transfer of an undertaking, by terms and conditions of employment to which it did not agree, starts to resemble a restriction on the freedom of contract, which is one of the component parts of the freedom to conduct a business, according to the explanations of Article 16 of the Charter.¹¹⁶

In its judgment, the CJEU preferred to adopt a static approach on the facts of case, holding that where a transferee does not have the opportunity to participate in negotiations that are concluded

¹¹⁰ [2006] ECR I-2397 at para. 29.

¹¹¹ Case C-415/93 *Union Royale Belge des Sociétés de Football Association ASBL v Jean-Marc Bosman, Royal Club Liégeois SA v Jean-Marc Bosman and Others and Union des Associations Européennes de Football (UEFA) v Jean-Marc Bosman* [1995] ECR I-4921.

¹¹² [2006] ECR I-2397 at para. 34.

¹¹³ *Young, James and Webster v United Kingdom* (Application No. 7601/76; 7806/77, s.52) 13 August 1981.

¹¹⁴ Case C-426/11, *Alemo-Herron v Parkwood Leisure* of 18 July 2013, Opinion of AG Cruz Villalón, at para. 31.

¹¹⁵ Case C-426/11, Opinion of AG Cruz Villalón, at para. 44.

¹¹⁶ Case C-426/11, Opinion of AG Cruz Villalón, at para. 54.

after the date of transfer, the outcome of the negotiations should not be binding. To hold otherwise would be to reduce employer freedom “to the point that such a limitation is liable to adversely affect the very essence of its freedom to conduct a business”.¹¹⁷ The Court was of the opinion that the Transfer of Undertakings Directive does not aim solely to safeguard the interests of employees in the event of transfer of an undertaking, but seeks to ensure a fair balance between the interests of those employees, on the one hand, and those of the transferee, on the other. The Court went on to rule “by reason of the freedom to conduct a business, the transferee must be able to assert its interests effectively in a contractual process to which it is party.”¹¹⁸ It is clear from this judgment that the CJEU is willing to give precedence to the employer’s freedom to conduct a business over the rights of the employees as expressed in the Transfer of Undertakings Directive.¹¹⁹ It is suggested that the approach of the AG is perhaps preferable, in that it appropriately considers the balance between social rights and the freedom of contract, which is “very much open to being used as a counterweight” to other fundamental rights.¹²⁰ Indeed, a strong criticism which can be made of the Court’s approach is that it failed to consider adequately the competing fundamental rights of the employees. Article 30 on the protection of workers in the event of unjustified dismissal could, in particular, have acted as a counterweight to Article 16.¹²¹ Although this case did not involve the termination of the contracts, Article 30 might have provided some assistance, taking into account the general protective objectives of the Directive.¹²² This argument was not, however, raised by any of the parties, nor was it addressed by the CJEU. In the context of the Proposed Directive it might be argued that the Equality Chapter of the Charter could act as a support against excessive managerial power. It remains to be seen whether the CJEU in future cases will retreat from its strong commitment to the principle of freedom of contract.

The balancing of social and economic objectives is inherent in EU social policy legislation. Siofra O’Leary notes that given the terms of the Treaty “this balancing act could be regarded as part of the DNA of social policy legislation.”¹²³ Article 151 and 153 TFEU highlight, on the one hand, the need to promote employment and improved working conditions, while on the other hand identifying the need for competitiveness. The EU is therefore obliged to avoid legislation which may impose too great an administrative or financial burden on businesses. The element of proportionality has a key role to play here. Essentially, the Court must weigh the interests involved against all the circumstances of the case in order to determine whether a fair balance was struck between those interests.¹²⁴ The intensity of a proportionality review depends on the nature of the interests at stake.¹²⁵ An approach often taken by the CJEU is a test of excessiveness, which essentially asks whether the measure taken was too drastic in relation to the aim pursued.¹²⁶ The ECtHR has also embraced the balancing approach but with a wide margin of appreciation for Member States. It has held that the balancing of often contradictory interests is difficult and States should be given wide discretion.¹²⁷ It is apparent that the CJEU is also having great difficulty in finding the right

¹¹⁷ Case C-426/11 *Alemo-Herron v Parkwood Leisure* of 18 July 2013, at para. 35.

¹¹⁸ Case C-426/11, at para. 33.

¹¹⁹ Jeff Kenner, “Article 30 – Protection in the Event of Unjustified Dismissal”, in Peers *et al* ed., *The EU Charter of Fundamental Rights: A Commentary* (Hart, 2014), at 821.

¹²⁰ Case C-426/11, Opinion of AG Cruz Villalón, at para. 52.

¹²¹ Kenner, note 19, at 812.

¹²² *Ibid.*, at 822.

¹²³ Siofra O’Leary, “The Charter and the Future Contours of EU Social and Employment Law” in Rosas *et al* ed., *Constitutionalising the EU Judicial System: Essays in Honour of Pernilla Lindh* (Bloomsbury, 2012), at 323.

¹²⁴ Case C-112/00 *Eugen Schmidberger; Internationale Transporte und Planzüge v Republik Österreich* [2003] ECR I-05659, at para. 81.

¹²⁵ Paul Craig, “Judicial Review, Intensity and Deference in EU Law” in Dyzenhaus ed., *The Unity of Public Law* (Oxford Hart, 2004) at 339.

¹²⁶ Paul Craig, *EU Administrative Law* (Oxford University Press, 2006), at 681.

¹²⁷ *Chassagnou and Others v France* (Application no. 25088/94, 28331/95 and 28443/95 [s.113] 29 April 1999.

approach to proportionality. Overall, the approach taken by the CJEU bears a close resemblance to the ECtHR's margin of appreciation test. This approach involves the granting of a wide level of discretion to the Member States, or their courts, in their interpretation of national laws.¹²⁸ This margin of appreciation does of course vary, with the suggestion being that the margin widens when the ECtHR is faced with cases involving a potential application of fundamental rights in a dispute between private parties.¹²⁹ In other situations, the CJEU has demonstrated a more activist approach, which has been explained by the personal movement rights which were at stake and the risk of social protectionism that was involved.¹³⁰ The potential impact of the Charter, which has full effect since the entry into force of the Lisbon Treaty, is also unknown. While the Charter presents the possibility of a stronger protection of social rights, now that both economic and social rights are regarded as fundamental, the Charter provides little guidance to the Court in how to balance those rights.¹³¹

Alternative Approaches

As part of its wider scale public consultation, the Commission received a large number of responses from various business and employers' groups. The results of the stakeholder consultation demonstrated the divergent views among the various interested parties.¹³² The vast majority of the businesses who responded were in favour of the continuation of a voluntary approach; in other words, they perceive no need for further action by the EU. The majority of businesses argued that only the market could lead to the required change. As companies become increasingly aware of the benefits of having a more diverse workforce, they will seek to increase the number of females involved in their business.¹³³ Obviously self-regulation allows for greater flexibility, allowing companies to adapt hiring policies to suit their own needs. In addition, companies are best placed to recognise the needs of particular industries. Whilst this is certainly true, it is not clear how self-regulation will lead to the achievement of greater female representation on company boards. The idea that self-regulation will lead to any improvements is largely speculative. The arguments put forward by business groups tend to focus on why gender quotas are the wrong approach, rather than proposing any concrete alternative which would achieve the same result. Indeed, it must be asked what has prevented business from adopting voluntary measures up until now. It is difficult to escape the conclusion that self-regulation is merely being pursued as an attempt to stave off the threat of EU intervention.

It is further noted that other business stakeholders have agreed in principle that public bodies have a role to play in encouraging changing attitudes towards women in the workplace, yet this should only be achieved through soft law measures, namely recommendations, comply or explain rules or simple awareness raising.¹³⁴ Many of the business leader submissions emphasised that the company's directors were in the best position to assess the needs of the business and therefore the composition of the board should be left entirely to their expert judgment.¹³⁵ IBEC notes that it is a

¹²⁸ Andrew Clapham, *Human Rights in the Private Sphere* (OUP, 1993) at 241.

¹²⁹ *Ibid.*, at 212.

¹³⁰ Koen Lenaerts and José Gutiérrez-Fons, 'The Constitutional Allocation of Powers and General Principles of EU Law' (2010) 47 *CMLRev* 1666.

¹³¹ O'Leary, note 123, at 325.

¹³² Impact Assessment, note 79, at 31.

¹³³ Impact Assessment, note 79, at 4.

¹³⁴ European Commission, "Submission of IBEC" <http://ec.europa.eu/justice/newsroom/gender-equality/opinion/files/120528/all/189_en.pdf> (visited 8 October 2014) [hereinafter 'Submission of IBEC'].

¹³⁵ European Commission, "Submission of GlaxoSmithKline" <ec.europa.eu/justice/newsroom/gender-equality/opinion/files/120528/all/159_en.pdf> (visited 8 October 2014).

mistake to focus solely on the position of women in boardrooms without also looking at other areas such as the factors inhibiting women from reaching decision-making level.¹³⁶ Arguably, legislation is therefore not necessarily an appropriate response to these issues.¹³⁷ There is little point, they argue, in parachuting a required number of women into senior positions without addressing the underlying societal and structural problems that women face. NASDAQ point out that the composition of company boards changes over time depending on the particular requirements of the business, notably due to its size, structure or a need for specific skills and experiences and “it is a fundamental property right for owners of an asset to take decisions related to it.”¹³⁸ IBEC further notes that in order for diversity to be sustainable it must go beyond gender diversity on boards to include other aspects of the business. In any event “sustainable diversity should be developed by companies themselves and not be imposed via quotas by EU institutions.”¹³⁹ Such a holistic approach is surely to be welcomed and serves to reiterate the assertion that bottom-up measures introduced by the company itself are also required.

Another proposal that was suggested concerned a move towards increased transparency of the board selection process as a stand-alone measure. The Commission remarked that the selection of board members is largely a matter for the company in most Member States and that any attempt to interfere in this process would require significant justification given its interference with the freedom to conduct a business.¹⁴⁰ It is accepted that as a stand-alone measure, increased transparency is unlikely to lead to any immediate increase in female participation. Interestingly, the Commission argues that the introduction of transparency rules without a corresponding gender quota target would in fact necessitate further regulation and binding rules of much greater detail. They argue that this is likely to have a disproportionate effect on certain companies particularly those which require a certain level of flexibility and might “disproportionately interfere with a company’s individual recruitment processes and with national company law.”¹⁴¹ Further confusion is caused by the fact that increased transparency, although rejected as a standalone measure, has been retained as an element in the binding policy options. Ironically, this was done in order to comply with the CJEU’s case law on positive action, which requires an objective assessment of candidate’s qualifications, thus a transparent selection procedure was essential.¹⁴² The Commission argues that a binding quota, although forcing the company to be more transparent, avoids the need for binding regulation of each step of the selection process which can be left to the company.¹⁴³

Conclusion

Having briefly discussed the alternative approaches, it is evident that no other proposal has the same potential to achieve significantly greater levels of female representation on company boards, as the Proposed Directive does. The EU legislature’s desire to remedy long-standing barriers to the entry of women into decision-making positions is surely to be lauded. However, the Commission’s impatience to quickly achieve a clear result may not necessarily translate into good laws. This author submits that the Proposed Directive, in its current form, disrespects private law freedoms and

¹³⁶ Submission of IBEC, note 134.

¹³⁷ *Ibid.*

¹³⁸ European Commission, “Public Consultation on Gender Imbalance in Corporate Boards in the EU: Submission of NASDAQ OMX”, May 2012 <ec.europa.eu/justice/newsroom/gender-equality/opinion/files/120528/all/201/210_en.pdf> (visited 7 October 2014).

¹³⁹ *Ibid.*

¹⁴⁰ *Ibid.*

¹⁴¹ *Ibid.*, at 34.

¹⁴² *Ibid.*

¹⁴³ *Ibid.*

therefore, its compatibility with the freedom of contract, as currently defined by the CJEU, is far from certain. However, it should be noted, there is a possibility the CJEU may be more cognisant of the competing Charter rights of individuals when weighing the freedom to conduct a business with social and equality rights.

It appears at present that the European Parliament is enthusiastic about the Proposed Directive. In a Resolution of the 20th November 2013, MEPs voted overwhelmingly in favour of the proposal with minor “compromise amendments” being suggested which do not substantially alter the Commission’s proposal. The proposal now goes to the Member States in the Council for their consideration, who, despite being in favour of improving gender balance on company boards, differ on the best approach to achieve this objective. It is certainly to be hoped that an approach which respects contractual autonomy and advances a valuable social goal will be found. It would be unfortunate if the adoption of an overly interventionist approach at the outset, would risk jeopardising all hope of improvement into the future.