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Delegations will find attached Commission document SWD(2012) 348 final - VOLUME I.

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EUROPEAN
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Brussels, 14.11.2012
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# COMMISSION STAFF WORKING DOCUMENT

# IMPACT ASSESSMENT ON COSTS AND BENEFITS OF IMPROVING THE GENDER BALANCE IN THE BOARDS OF COMPANIES LISTED ON STOCK EXCHANGES

*Accompanying the document*

**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) 614 final}
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# TABLE OF CONTENTS

## 1. PROCEDURAL ISSUES AND CONSULTATION OF INTERESTED PARTIES

### 1.1. Identification, Organisation and timing

The Commission Work Programme 2012 (CWP) foresees a legislative measure in order to improve the gender balance in the boards of companies listed on stock exchanges. DG JUST is the lead DG who prepared this Impact Assessment (IA).

An Impact Assessment Steering Group (IASG) was set up in February 2012 and met twice. Of the Commission Directorates-Generals (DGs) that were invited, the following DGs participated in the IASG: the Legal Service, the Secretariat-General, DGs Internal Market, Employment, Enterprise, and Eurostat. The last IASG meeting took place on 7 June 2012.

The Impact Assessment Board (IAB) meeting took place on 18 July 2012. Following the IAB's recommendations, the following main changes were made to the IA: the problem definition has been reinforced, in the baseline scenario more details about Member State's individual situation and the situation in different sectors have been added, subsidiarity and proportionality issues have been assessed more extensively, the explanation of the choice of the policy options and the scope of potential measures has been expanded, the description of the methodology for the calculation of possible benefits has been substantiated, the feasibility of the different options has been analysed in greater detail, the impact analysis and the part on monitoring have been adapted. Following the IAB's second opinion issued on 28 August 2012, the assessment has further been refined, particularly in relation to the need for action at EU level, the choice and the content of the policy options with regard to some common parameters and the detailed reflection of the views of stakeholders as expressed in the public consultations.

A wide range of internal[1] and external studies were used to prepare this IA. A full list is in Annex 1. In August 2011, Matrix Insight Ltd was commissioned to carry out a study on possible EU measures on gender quotas in boardrooms, which was finalised in June 2012 (hereinafter: Matrix study). The methodology used in this IA to calculate the impacts and all the quantified data are based on this study.

### 1.2. Consultations and expertise

A 2011 Eurobarometer survey[2] revealed that the overwhelming majority of Europeans think that women should be equally represented in company leadership positions (88%) and that the European business community is dominated by men who do not have sufficient confidence in women's abilities (78%). The survey found that when given the possibility to choose between three options to achieve gender balance on company boards, opinion is divided between self-regulation by companies (31%), binding legal measures (26%), and non-binding measures such as Corporate Governance Codes and Charters (20%). Nevertheless, 75% of Europeans are in favour of legislation on the condition that it takes into account qualification and does not automatically favour members of one sex.

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[1] Notably DG MARKT's impact assessment on an initiative on disclosure of non-financial information by listed companies which assesses the costs and benefits of disclosure of information on diversity on boards.

[2] Special Eurobarometer 376 (2011), Women in decision making, see: http://ec.europa.eu/public_opinion/archives/eb_special_379_360_en.htm#376.

In March 2012, the Commission organised a public consultation to gather stakeholders' views on whether and what kind of action should be taken to tackle the current gender imbalance on corporate boards. The consultation ran until 28 May 2012. The feedback received showed the considerable amount of interest and the significance of the issue for a large variety of stakeholders.

Of the total number of 485 replies, 161 were sent by individual citizens and 324 were sent by organisations. These included 13 Member States, 3 regional governments, 6 cities or municipalities, 79 companies (both large listed companies and SMEs), 56 business associations at EU and national level, 53 NGOs (most of them women's organisations), trade unions, professional associations, political parties, associations of investors and shareholders, actors involved in corporate governance and others.

There was a large consensus on the urgency to increase the share of women on company boards. The vast majority of respondents agreed that a gender-diverse workforce and board structure is a driver of innovation, creativity, good governance and market expansion for companies and that it would be short-sighted to leave untapped the economic potential of qualified women who constitute half of the talent pool. Views varied among stakeholders on the appropriate means to bring about change. While some, predominantly the business stakeholders, favoured continued self-regulation, corporate governance codes, recommendations or corporate initiatives, other stakeholders, including trade unions, other NGOs and a number of regional and municipal authorities, considered that non-binding measures and self-regulation had shown their limits and advocated a more ambitious approach in the form of binding objectives for the gender composition of corporate boards. Some stakeholders also expressed concerns about the often obscure and impenetrable recruitment processes within company boards. Further details on the replies to the public consultation are provided in Annex 2.

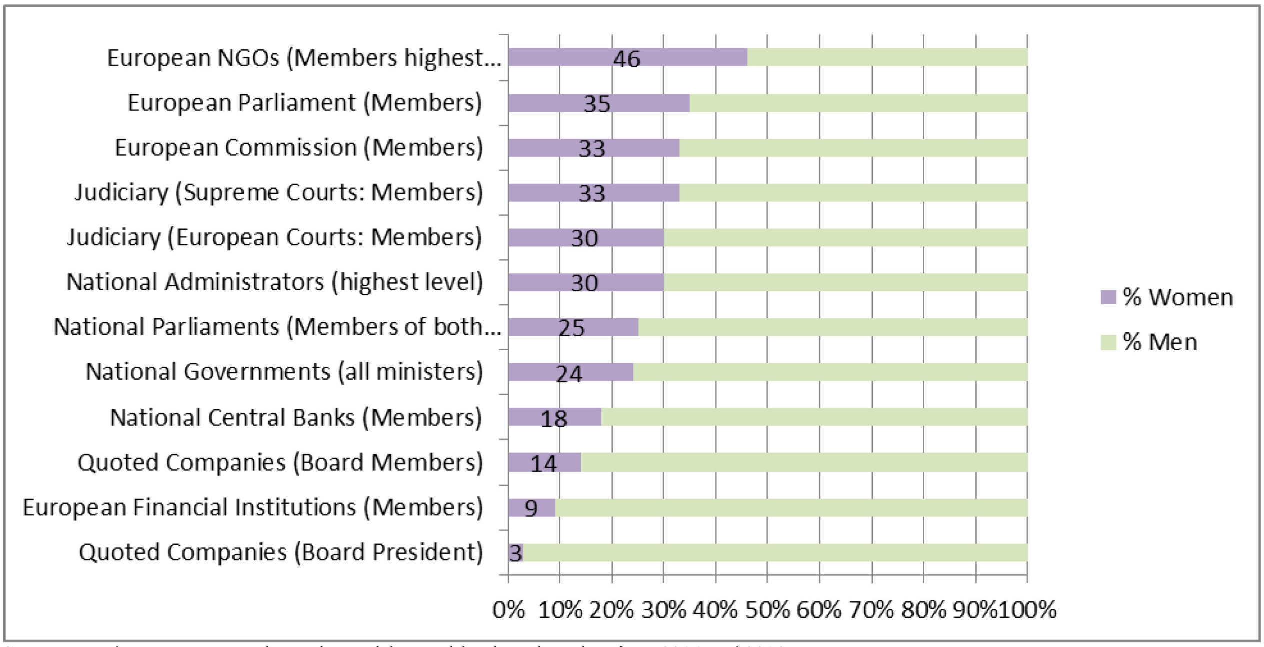
## 2. PROBLEM DEFINITION

### 2.1. Female under-representation on boards and its effects

#### *2.1.1. Introduction*

Company boards in the EU are marked by persistent and manifest gender imbalances, as evidenced by the fact that only 13.7% of corporate seats in the largest listed companies are currently held by women. This means that men outnumber women by approximately 7 to 1. Compared to other areas of society, notably the public sector, the female under-representation in boards of publicly listed companies is particularly significant as follows from the table below. Therefore, this Impact Assessment focusses on the female under-representation in boards of listed companies.

**Figure 1: Gender-Balance Across Key Institutions in Different Areas**[3]




Source: Database: Women and Men in Decision Making based on data from 2011 and 2012

Given that women do not only possess the educational[4] and professional[5] credentials to participate in the highest economic decision-making bodies, but are also willing[6] and available in sufficient number[7] to do so, their under-representation suggests that the market fails to make full use of its highly skilled workforce.

As an efficient use of human capital constitutes the most important determinant of an economy's competitiveness, it is clear that underutilising the skills of highly qualified women is a loss of economic potential for individual companies as well as the economy as a whole. This view was also endorsed by the public consultation, which demonstrated consensus across stakeholder groups that the under-representation of women on company boards is a problem and that empowering women to take leadership positions is important for company performance. Fully exploiting human capital is also key for addressing the EU's demographic challenges,[8] for competing successfully in a globalised economy and for ensuring a comparative advantage vis-à-

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3 Institutions included: European Financial Institutions/Central Banks: European Central Bank, European Investment Bank, European Investment Fund; European Social Partners: Employer Organisations, Employee Organisations; Politics (National Level): National Parliaments, National Governments; Judiciary (National Level/European Level): European Court of First Instance, European Court of Human Rights, European Court of Justice, European Union Civil Service Tribunal, Supreme Courts: Politics European Level: EP, Commission, Committee of the Regions, Economic, Social Committee

4 Almost 60% of EU university graduates are women. See Eurostat, Tertiary students (ISCED 5-6) by field of education and sex [educ_enrl5], 2009.

5 Women account for around 45% of the people employed across the EU. See Eurostat, Employment by sex, age groups and nationality [lfsq_egan], 3rd quarter of 2011.

6 Studies show that 83% of mid-level career women have expressed a strong desire to move up the company ladder. See http://www.mckinsey.com/Client_Service/Organization/Latest_thinking/Unlocking_the_full_potential.

7 Contrary to the commonly articulated belief that there is a lack of qualified women to take up a corporate seat in an EU company board, a database established by European business schools in 2012 has demonstrated the suitability and availability of over 7000 'boardable' women for seats in boards of listed companies – the number of women listed is quickly growing without claiming to be exhaustive.
See http://gallery.mailchimp.com/3ad8134be288a95831cc013aa/files/2012_5_Commissioner_Reding_Initiative.pdf .

8 As a result of demographic change, such as the ageing of the workforce, Europe's workforce is shrinking and a smaller number of workers are supporting a growing number of inactive people. While demand for workers remains stable, low birth rates mean that European population is falling. For a regional overview of these demographic challenges, see the background document to the Commission Staff Working Document SEC (2008)2868 Final.

vis third countries.[9] In short, it is a necessary means to reignite economic growth as laid out in the Europe 2020 Strategy.

Furthermore, the systematic under-representation of women in economic decision-making positions is both a cause and an effect of persistent gender inequalities and is not in line with the EU's fundamental values enshrined in Article 3 TEU and Article 8 TFEU.

### *2.1.2. Policy context*

Promoting equality between women and men is one of the EU's main objectives, as reflected in its Treaties (Article 3(3) TEU, Article 8 TFEU, Article 157 TFEU) as well as in the Charter of Fundamental Rights (Article 23).

The EU institutions have undertaken various efforts over several decades to promote gender equality in economic decision-making, notably to enhance female presence in company boards, by Recommendations and by encouraging self-regulation.

The Council of the European Union has adopted two Recommendations (in 1984 and 1996) encouraging the private sector to increase the presence of women at all levels of decision-making, notably by positive action programs, and called upon the Commission to take steps to achieve a balanced gender participation in this regard.[10]

The Commission reaffirmed its support for an increased participation of women in positions of responsibility, both in its Women's Charter[11] and made in one of its priorities in the Strategy for Equality between Women and Men 2010-2015.[12] The Commission published several reports in order to take stock of the situation.[13] In March 2011, Commission Vice-President Reding launched the "Women on the Board Pledge for Europe". The pledge called on companies to voluntarily increase women's presence on corporate boards to 30% by 2015 and to 40% in 2020. However, only 24 companies have signed the pledge.

The European Parliament called upon the Member States to increase female representation of women in decision-making bodies and called upon the Commission to propose legislative quotas to increase female representation in corporate boards to 30% by 2015 and 40% by 2020.[14]

In the recent past, the issue of enhancing female participation in economic decision-making has become increasingly prominent in the national, European and international[15] arena. A particular focus has been placed on the economic dimension of gender diversity and the contribution that more balanced boards could make to a more productive and innovative working environment, to improved company performance and thus ultimately to growth and to the attainment of the objectives of the Europe 2020 Strategy.

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[9] A recent study by Catalyst (2012) shows that the EU Member States are on average lagging behind the United States of America (16.1%), South Africa (15.8%) and Israel (15%). The results are higher than for other countries such as China (8.5%), Russia (5.9%), India (5.3%) and Brazil (5.1%). These latter differences, which have to be seen in the context of different present demographic structures and rates of educational achievement, constitute a competitive advantage of the EU at least in the medium or longer term. See http://www.catalyst.org/publication/433/women-on-boards.

[10] O. J. of 19/12/1984, L 331/34 and O. J. of 10/12/1996, L 319/11.

[11] COM(2010)78 final.

[12] COM(2010)491 final.

[13] See Commission report 'More women in senior positions' (2010), Staff Working Document "The Gender Balance in Business Leadership", Commission report 'Public service, justice, business and politics –Top jobs for men but where are the women?' (2011) and Commission 'Report on Progress on equality between Women and Men in 2010'.

[14] See e.g. Resolution of 9 June 2011 on women and business leadership, Resolution of 11 May 2011 on corporate governance in financial institutions and Resolution of 8 March 2011 on equality between women and men in the European Union.

[15] See, for instance, the recent UN Women's Empowerment Principles: Equality Means Business. Available from: http://unglobalcompact.org/Issues/human_rights/equality_means_business.html.

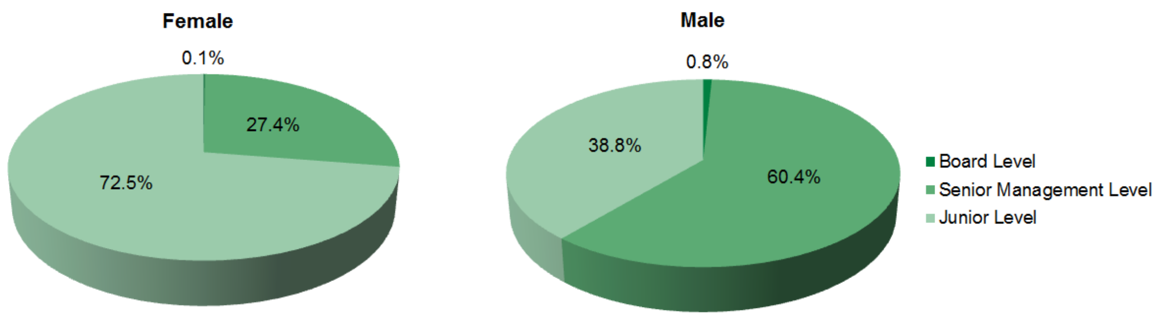
However, it should be noted from the outset that gender imbalances in corporate leadership positions are only the 'tip of the iceberg' of a more widespread situation on gender inequalities in our society stemming from traditional gender roles and division of labour, women's and men's educational choices, women's concentration in few occupational sectors, unbalanced care responsibilities etc. Furthermore, despite progress being made, gender inequalities also persist at political decision-making level. The EU has recognised this and has taken various measures to redress those inequalities. The current Impact Assessment should be seen in this wider policy context.

### *2.1.3. Gender imbalances in company boards: scale of the problem*

In the EU, listed companies have different board structures depending on the country in which they are located. They either belong to the single board system (also called monistic or unitary board system), to the two-tier (or dual board) system or to some form of mixed system. In this impact assessment, reference to the functional distinction between the two categories of executive directors and non-executive directors should be understood as including respectively members of the management board and members of the supervisory board. Annex 5 gives an overview of different board structures and appointment practices in the EU. An average board of a publicly listed company in the EU has 7.8 members, or 8.3, excluding SMEs.

The figure below presents the distribution of females and males across levels. The probability for a man to be a manager is twice as high as the probability for a woman to be at that level (60% versus 27%). Significantly, the probability for a man to be sitting on a corporate board eight times the probability for a woman to be in that position (0.8% versus 0.1%).

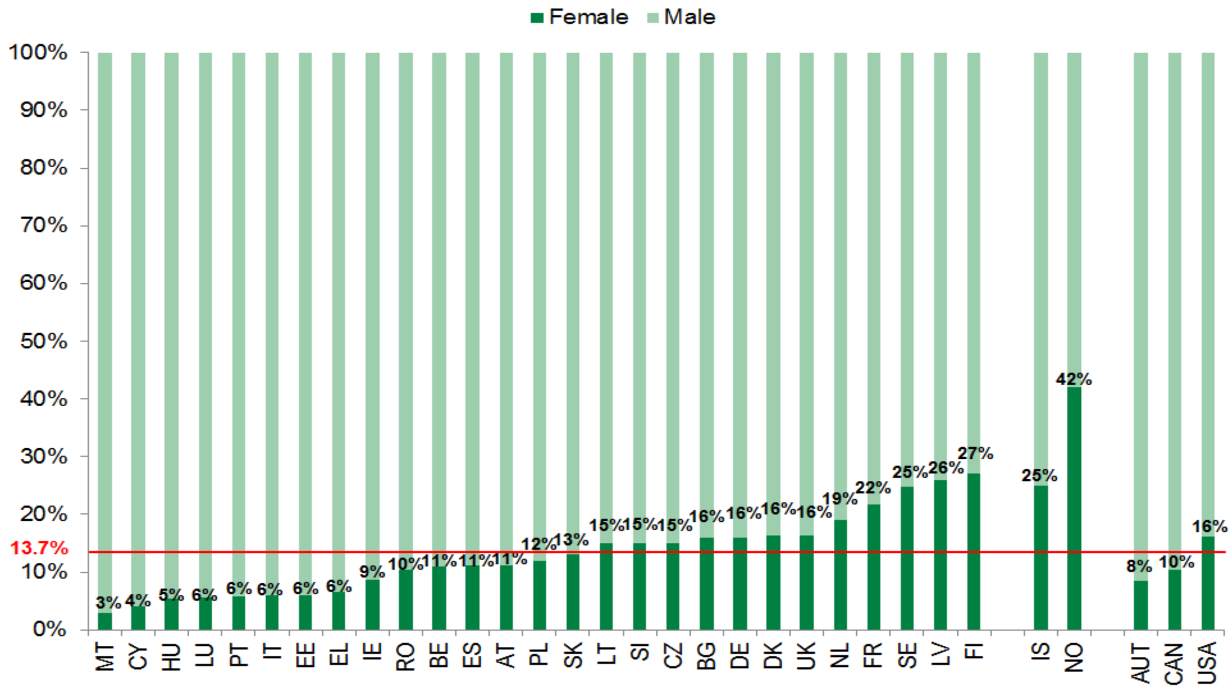
**Figure 2: Career Progression for Women and Men in Listed Companies (2011)**




*Source: Matrix own calculations based on data from EC Database for Women and Men in Decision-Making, S&P's and Eurostat.*

As the charts below show, both the share of women on company boards and the changes in this share in the recent past differ greatly between Member States. In some Member States, such as Finland, Latvia and Sweden, women occupy a quarter of the seats on boards of large companies, whereas in others, such as Ireland, Greece, Estonia, Italy, Portugal, Luxembourg, Hungary, Cyprus and Malta, less than one in ten board members are women. In some cases, this figure even falls to less than one in twenty. In nearly a third of Member States (Malta, Estonia, Luxembourg, Cyprus, Hungary, Lithuania, Bulgaria and Slovakia) more than half of the largest companies have no women on their boards at all.

**Figure 3: Share of Women among Members on Boards for Listed Companies in EU Member States and some other countries (Iceland, Norway, Australia, Canada and the US), January 2012** [16]

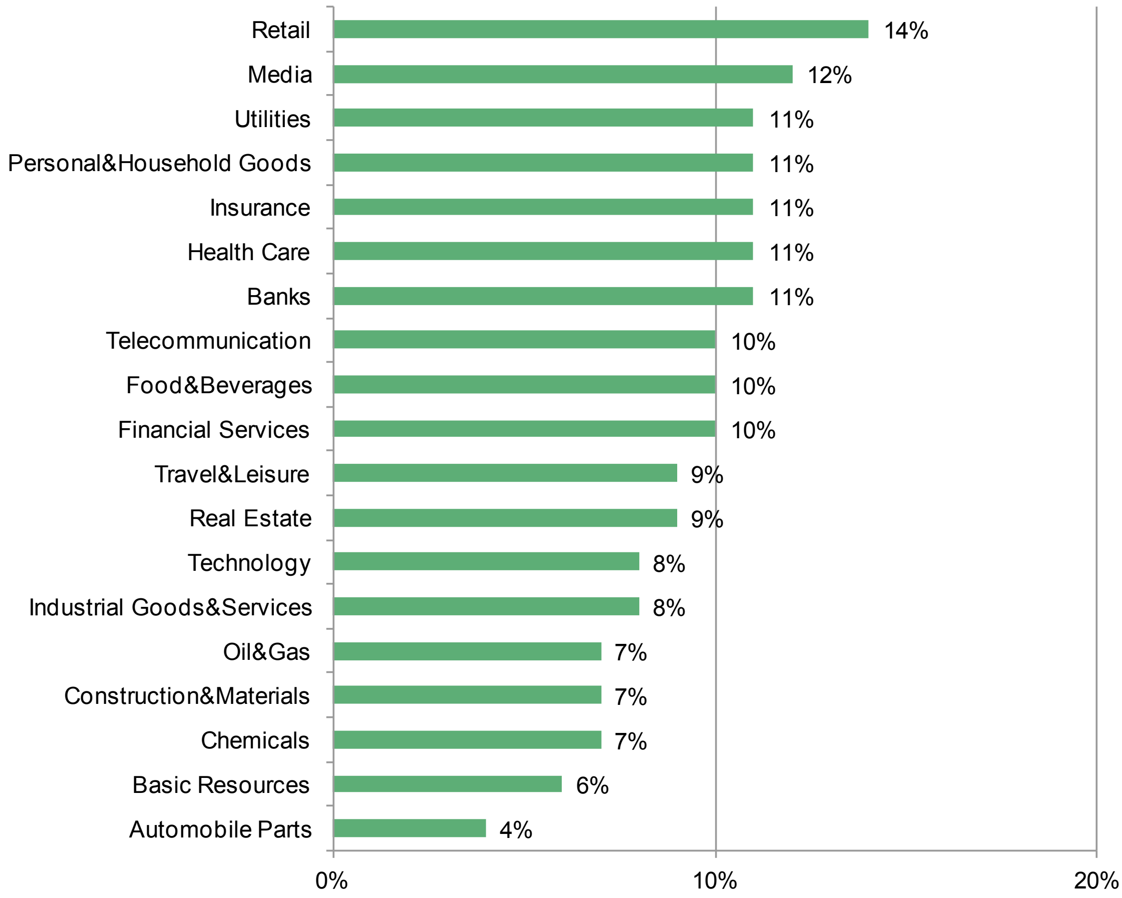



*Source: European Commission. Database: women & men in decision making, [Online] Available from: http://ec.europa.eu/justice/gender-equality/gender-decision-making/database/business-finance/quoted-companies/index_en.htm and Catalyst, Women on Boards, Quick takes, [Online] Available from: http://www.catalyst.org/publication/433/women-on-boards*

Unsurprisingly, female board participation tends to be particularly low in traditionally male-dominated sectors. As demonstrated by the figure below the sectors with the highest percentage of women directors are retail and media whereas the lowest representation can be found in the automobile sector.

16 These figures may be slightly different from those estimated by Matrix due to difference in calculation method. The EC database does not report figures for Australia, Canada and the US. Catalyst instead reports figures only for some EU countries and Anglo-Saxon countries. Since the EU figures reported by Catalyst are in line with those reported by the EC database figures, we believe that the two databases are comparable.

**Figure 4: Female Board Participation by Sector**




*Source: Governance Metrics International (2011), 2011 Women on Boards Report, March 8, 2011*

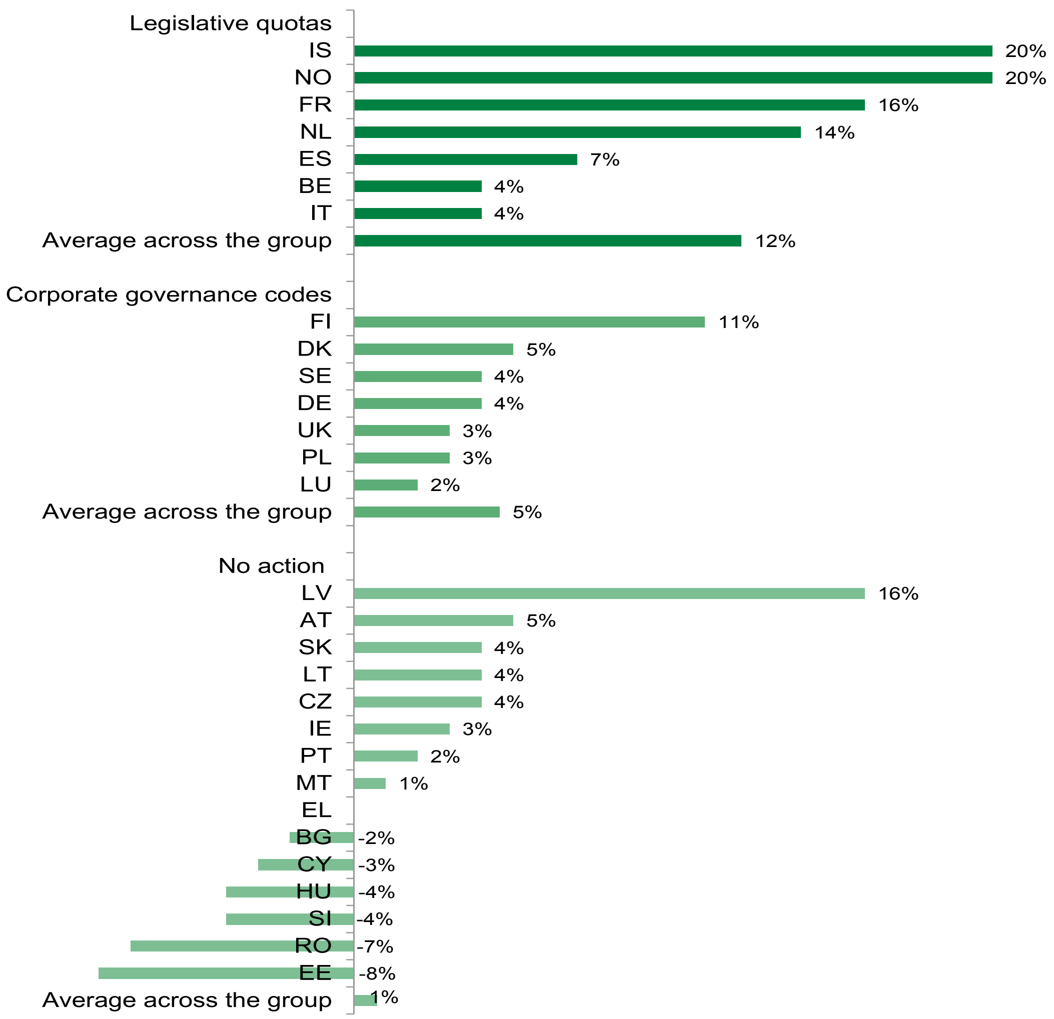
In recent years, an increasing number of Member States (11 up to the end of 2011) have adopted laws establishing quotas or targets for gender representation on company boards.[17] France, Italy and Belgium have adopted legislation setting quotas for company boards, including sanctions for non-compliance. Spain and the Netherlands have adopted quota laws without sanctions,[18] while Denmark, Finland, Greece, Austria and Slovenia have enacted rules covering only the boards of state-controlled companies; Germany's existing legislation affects the gender balance on boards via rules governing workers' representation on boards. The deadlines for compliance, the scope and the concrete obligations however differ widely. In France, for instance, all listed companies and companies with more than 500 employees are covered. In the Netherlands and Spain the law applies to listed and non-listed companies with more than 250 employees. In Italy and Belgium, the scope comprises listed and state-owned companies. In Spain and France, 40% female presence is required (like in Iceland and Norway), whereas in the Netherlands 30% and in Belgium and Italy 33% are required. In Italy, the measure is temporary (three board renewals). In view of these differences the effectiveness of legislative measures varies significantly across Member States. Unsurprisingly, progress has been much faster in Member States where stronger sanctions, more transparent monitoring systems and shorter compliance periods are in place.

17 In general, the impact assessment takes into account the developments until the end of 2011.
18 Apart from the need to explain non-compliance ("comply or explain" method) in the Netherlands.

Austria, Belgium, Denmark,[19] Finland, France, the Netherlands, and Spain have developed – either on top of legislative measures or as stand-alone measures – voluntary initiatives such as corporate governance codes or charters that companies can sign. The United Kingdom, Germany, Poland, Sweden and Luxembourg have developed voluntary initiatives. The remaining 15 Member States have taken no action.[20]

The figure below shows the percentage point change in female presence on company boards between 2004 and January 2012, thereby grouping countries[21] into categories which correspond to the different types of measures taken[22].

**Figure 5: Percentage Point Change in Female Presence in Corporate Boards between 2004 and January 2012**

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[19] In May 2012 Denmark announced the intention to adopt legislation that would oblige the largest 1100 (listed and non-listed) companies to set targets at company level without attaching sanctions to the failure to meet these self-imposed targets. Companies will have to report on their progress in the annual report.

[20] In March 2012, Portugal has issued a governmental Decision encouraging companies which are state-owned to increase female presence on board. However, neither targets nor sanctions are set.

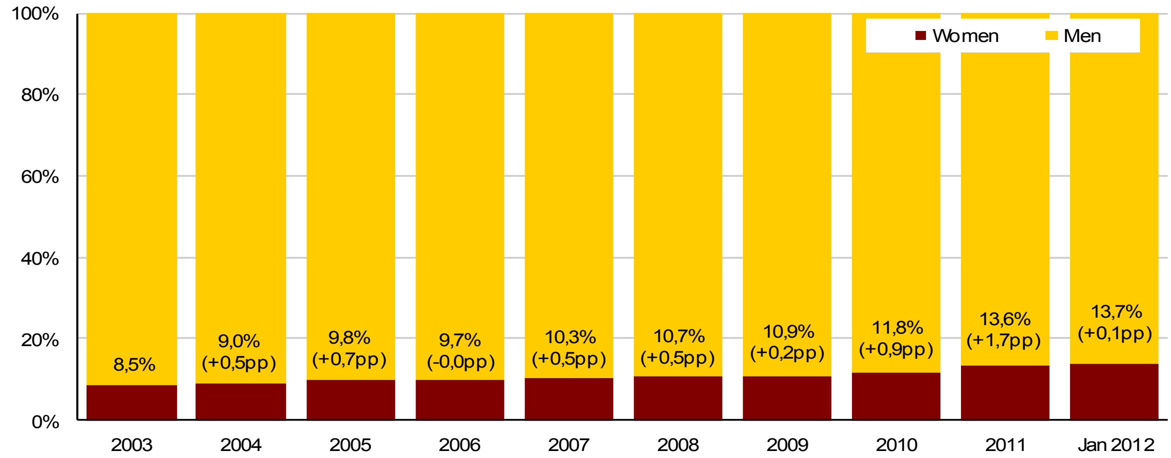
[21] Norway and Iceland have been included in this table for comparative purposes in order to examine the degree of attainment of gender balance in corporate boards. These two countries are comparable to EU Member States in terms of their overall socio-economic setting and are, as members of the EEA, also legally bound by the EU *acquis* in the field of gender equality. In view of these circumstances and given their experience with legally binding targets which is considerably longer than in EU Member States, the results achieved in these countries are particularly valuable to enrich the evidence base concerning the impacts of such measures.

[22] For the purpose of this figure the category "legislative quotas" does not include countries with legally binding quotas only for state-controlled companies.

*Source: European Commission. Database: women & men in decision making. Available from: http://ec.europa.eu/justice/gender-equality/gender-decision-making/database/business-finance/quoted-companies/index_en.htm*

Despite some improvements where governments have recently introduced measures, the pace of change remains very slow. In all Member States that have introduced legally binding gender quotas for listed company boardrooms, female presence in company boards has significantly increased. For the most recent period from 2010 to the beginning of 2012, the largest increase has been registered in France (+10 percentage points). In Belgium, Italy and Spain the effects of legislative quotas have been smaller. In Spain, where the quota has been introduced in 2007, female presence in boardrooms has increased by less than 2 percentage points in the same period. This might be related to the fact that the Spanish measure comes closer to the character of a recommendation since no sanctions are foreseen. In Belgium and Italy instead, the measures have been introduced only very recently (June and July 2011 respectively) which explains the limited progress to date. The share of women in corporate boardrooms also increased in Member States that have introduced non-binding measures to improve gender equality in business leadership positions. However, compared to Member States that have introduced binding quotas, the positive change has generally been more limited. In Member States, where no action has been taken to support female presence on company boards, the trends differ. In some countries female participation on company boards has increased; in others it has declined. Overall, between 2003 and 2012, the share of women in boardrooms in the EU27 has risen from 8.5% to 13.7%, an increase of 5.2 p.p. over eight years at an average rate of 0.6 p.p. per year (see chart below). The percentage of women among non-executive directors in January 2012 was 15%.

**Figure 6: Women and men on corporate boards in the EU, 2003-2012**[23]




*Source: European Commission, Database on women and men in decision-making. Note: Data cover all 27 EU Member States except in 2003 when data for CZ, LT, MT & PL are not available. Small discrepancies between the percentage shown in consecutive years and the change in percentage points derive from rounding. Data are normally collected in the final quarter of the year but the data for 2012 was collected in January, just 3 months after the 2011 data, and should therefore not be treated as part of the annual time series.*

Progress in the number of women on boards of the largest companies picked up slightly in 2011, but this can be attributed to the new quota laws in France (which contributed to almost half the increase), Belgium and Italy, as well as the threat of legislation and the enhanced level of debate and interest in other Member States (mainly the UK and Germany). This recent development is, however, limited to a few Member States, and cannot be considered as sustainable in the long run.

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[23] See a detailed table on Member States' individual progress in the Annex 6.

#### 2.1.4. *Untapped long-term economic growth potential*

As an efficient use of human capital constitutes the most important determinant of an economy's competitiveness, it is clear that underutilising the skills of highly qualified women is a **loss of economic potential**. This is underpinned by several national and international studies. According to the OECD (2008), the increase in women's participation in the labour market has accounted for a quarter of economic growth since 1995. Research commissioned by the Swedish presidency of the EU (2009)[24] concluded that labour market equality – meaning equal levels of employment, equal pay, and equal shares of part-time work and self-employment – could in an optimistic scenario boost the GDP of Member States by an average of 27%, particularly if women reach the same rate of labour market participation as men. In the same vein, the Global Gender Gap Index 2011[25] shows the relation between more gender equality in general and a higher GDP in specific countries, thereby showing that countries with more gender equality in general have higher GDP per capita. By failing to offer women more attractive career prospects, EU economies are limiting their growth potential. According to the Lord Davies report[26] for instance, to compete globally the UK would need an additional 2 million highly qualified workers within the next 10 years, a target that could only be achieved by increased incentives for female labour force participation.

Increased female participation in company boards will have **positive spill-over effects** on all levels of female employment within a company and to the wider economy, which in the current situation are missed out on.

Increasing the share of women on company boards is expected to have "pull" and "push" effects on the numbers of women employed in listed companies at all levels of responsibility. The "pull" effect should emerge as more balanced boards are expected to lead to greater numbers of women being appointed to senior management positions below board level: the presence of greater numbers of women on boards will help to change male perceptions about women's ability to exercise senior positions, while the additional female board members should be inherently less likely to have such preconceptions. An increased share of women in senior positions should in turn lead to a greater share of middle and junior management positions being filled by women, and so on, through all levels of the organisation. By providing role models, the presence of greater numbers of women on boards and in senior positions in general should have a "push" effect on women in junior positions by helping to break down their perceptions of the qualities required by those who occupy more senior positions. This will help to increase the potential pool of future senior female managers.

In this way, the "vicious circle" explained below, will be transformed into a virtuous circle, in which greater numbers of women on boards will lead to an increase in the number of women appointed to senior positions, which will in turn encourage more women to seek management positions and help to increase the supply of potential future senior managers and board members.

Matsa and Miller data (2011) analysed the effect of increases in the number of female board members on the subsequent recruitment of senior female managers in a company. They estimated on the basis of the existing available data that a 10% increase in female non-executive

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24 Asa Lofstrom: Gender equality, economic growth and employment, a report which measures relations between gender equality and growth rates, see: http://www.eurosfaire.prd.fr/7pc/doc/1261581381_eu_studie_gender_growth_sidvis.pdf.

25 World Economic Forum, R. Hausmann et al, The Global Gender Gap Report 2011, page 28, available at: .http://www3.weforum.org/docs/WEF_GenderGap_Report_2011.pdf

26 Department for Business Innovation & Skills. 2011. Women on Boards. Available at: http://www.bis.gov.uk/Consultations/women-on-boards.

board members increases the average female top management share by 4% and a 10% increase in female executive and non-executive board members increases the average number of female top managers by 7%.

Increasing the share of women on company boards will also have a positive impact on female salaries. When promoted to the board, women will earn more. Increase female board members and their increased pay levels will also impact female salaries throughout the whole company. Matsa and Miller (2011) concluded that a 10% increase in female non-executive board members increases the average female top management pay by 6% and a 10% increase in female executive and non-executive board members increases the average number of female top managers by 14%. Matrix also found wider societal impacts linked to the increase in female salaries due to the fact that women who would have been inactive would decide to participate in the labour force, part-time female employees would be incentivised to work longer hours, women would reduce the amount of time they take out of employment to have children, and women would be motivated to stay longer in education, thus increasing their chances on employment. In addition, higher rates of female labour force participation and pay entail a higher return on education for both individuals and the public sector.[27]

### *2.1.5. Untapped potential for company performance*

Gender imbalance in the boards of publicly listed companies in the EU is also a missed opportunity at company level both in terms of corporate governance and financial company performance.

*Corporate governance*

Numerous indicators of the quality of corporate governance point to the benefits of more gender-diverse company boards. Academic studies and business research have confirmed that the presence of women contributes to improving corporate governance, team performance and the quality of decision-making. A more diverse team is likely to consider a wider range of perspectives and therefore to reach more balanced and better decisions. The value added of a gender-diverse board can also be traced back to traits of leadership behaviour which are observed more frequently in female decision-makers and among well-performing companies and directly affect key indicators of good corporate governance and organisational performance.

These observations are shared by the vast majority of stakeholders which responded to the public consultation, including the business community and its European and national umbrella organisations. Diversity in boards, including gender, is seen as a 'synonym for innovation, creativity, good governance and can reflect a company's customer base more accurately' (BUSINESSEUROPE). Most stakeholders agree that 'it would indeed be short-sighted to limit recruitment to 50% of the available talent pool and not tap into the full potential of women' (UEAPME).

*Financial company performance*

Furthermore, there is a growing body of literature showing that companies with more gender-diverse boards not only have better corporate governance but also are more profitable, and that the differences are statistically significant, provided that the level of representation of women

27 Following the OECD (2011), return on education can be defined as the internal rate of return for an individual which is given by the rate that makes the financial benefits equal the costs.

reaches a sufficiently high level in order to influence the behavioural patterns in decision-making.[28] Many stakeholders who responded to the public consultation see 'better business results' as an outcome of greater gender diversity on corporate boards (e.g. European Round Table of Industrialists). Few organisations (e.g. Confederation of Danish Industry) reject the idea that there is a 'business case' for more women on boards.

McKinsey (2007), Catalyst (2004) and Credit Suisse (2012) came to the result that there is a positive correlation between the share of women on boards and financial company performance. The McKinsey series of "Women Matter" reports focus on women's contribution to companies' performance. Their "Women Matter 3" study reported that companies that scored in the top quartile of organisational performance – which were the companies with more women in top management – tended to have an operating margin at least twice as high as those in the bottom quartile. In their 2010 study, "Women at the top of corporations: Making it happen", they report a 41% higher return on equity (ROE) for companies with the highest share of women on their boards compared to companies with no women on their boards.

Catalyst designed the "Bottom Line" report series to establish whether an empirical link exists between gender diversity in corporate leadership and financial performance. They found that the ROE of companies with higher gender diversity on their board or among top management is higher than the ROE of companies with lower gender diversity. More specifically, Catalyst ranked 353 companies from the Fortune 500 index according to women in top management (bottom quartile: 0% to 5.1% women in top management; top quartile: 14.3% to 38.3% women in top management) and then compared their ROE. Companies in the top quartile had a ROE that is 34.1% (or 4.6 percentage points) higher than companies in the bottom quartile.

In a very recent study (August 2012), Credit Suisse[29] compiled a database on the number of women – since 2005 – sitting on the boards of the 2,360 companies constituting the MSCI AC World index. The outcome shows that, over the past six years, companies with at least one female board member outperformed those with no women on the board in terms of share price performance. This rate of outperformance was 26% for companies with a market capitalisation greater than USD 10 billion, and 17% for small-to-mid cap stocks. Interestingly this performance pattern is particularly noticeable since the onset of the global financial crises in the second half of 2008. The study has also shown a positive correlation on a number of other indicators: The average return on equity (ROE) with at least one woman on the board over the past six years is 16% - 4 percentage points higher than the average ROE of companies with no female board representation (12%). The aggregate price/book value (P/BV) for companies with women on the board is on average a third higher than the ratio for those with no women on the board. And net income growth for companies with women on the board has averaged 14% over the last six years compared to 10% for those without female board representation.

Already in 2001 Adler[30] started scoring companies according to the number of women in executive positions and then evaluated the profitability of 31 companies that scored the highest. These firms outperformed the corresponding industry medians by 69% in terms of ROE (26.5% versus 15.7%). A consistent statistically significant correlation between ROE and companies with female directors was also found by Lückerath-Rovers (2010), who relied on a regression analysis of 116 companies listed on the Dutch stock exchange. Adams and Ferreira (2009) found that diversity has a positive impact on companies' performance. Carter et. al. (2003), examined

[28] See for instance: McKinsey, Women Matter: Gender diversity, a corporate performance driver (2007).
[29] Credit Suisse Research Institute, August 2012, Gender diversity and corporate performance
[30] Details for this report and the following research can be found in Annex 3 – Business case literature review

the relationship between board diversity and firm value for Fortune 1000 firms, found that Tobin's Q (the ratio of the market value of a firm divided by the replacement cost of its assets) is positively related to the percentage of female directors. Research carried out by Smith et al (2005) on 200 of the largest Danish firms confirmed that there is a positive relation between women on boards and company performance. Ernst&Young (2012) showed that companies with higher female presence have better financial performance indicators. Knorbel and Evans (2012) confirmed the positive impact of female directors on performance and corporate governance among Fortune 500 companies.[31] The existence of a "business case" is also supported by Lord Davies Report[32] assessing the situation in UK and Deutsche Bank Research.[33]

Despite increasing acceptance of the 'business case' for gender diversity among scholars, major stakeholders and a broader public, empirical evidence on the issue also points to other results: other studies have found the opposite or no significant relationship between gender diversity and better performance.[34] For instance, in 2009, Adams and Ferreira studied a sample of firms from 1996-2003 and found a negative relationship between gender diversity and two indicators for financial performance. A 2011 study of 400 leading U.S. corporations between 1997 and 2005 by Dobbin and Jung[35] found that increases in board gender diversity had no effect on subsequent profitability but were followed by marginally significant decreases in stock value.[36]

The different results can be explained by difference of methodology, the different time periods, countries, economic environments, types of companies, and measures of diversity and financial performance selected. The relationship between board characteristics and firm performance varies by country because of the different regulatory and governance structures, economic climate and culture, and size of capital markets.

However, as shown above, the overwhelming majority of studies find a positive correlation between increased female presence on boards and better performance, even if a causal link between more female presence in boards and better performance has not been established. The studies particularly by Catalyst and McKinsey which have been conducted over the years have again and again found similar positive results if more women are on the boards which leads to the conclusion that positive performance results are to be expected if the share of women on boards will increase.

In sum, although there is research coming to different conclusions, there is a high plausibility of a direct correlation evidenced by a wealth of research. This result is further strengthened by the unequivocal positive outcome of the research on more female presence and better corporate governance, since better corporate governance performance in relation to a number of crucial aspects for a company's success is likely to be ultimately reflected in the financial results. Finally, this correlation is further underscored by the replies to the public consultation from which a broad consensus emerged about the positive impact of improved gender balance on

[31] Pam Watson Knorbel and Donna Evans, Women on boards=Peak performance in organisations, 2012, Women's Leadership Foundation.

[32] Lord Davies report, Women on boards 2011.

[33] Deutsche Bank, Research, 2010, Towards gender-balanced leadership.

[34] See detailed review in Annex 3; a good overview can be found in : Deborah L. Rhode and Amanda K. Packel, Diversity on Corporate Boards, How much difference does difference make?, 2010

[35] Corporate board gender diversity and stock performance: the competence gap or institutional investor bias?

[36] It has to be taken into account that that these studies are based exclusively on data prior to the onset of the financial crisis. Especially in relation to the evaluation of company performance by investors and the resulting stock value before the crisis it appears to be appropriate to exercise a certain caution.

company performance, including replies by Member States and in particular also by business stakeholders.[37]

As to the share of women which is necessary to make a substantive change, it has to be noted, that one or two women are easily marginalised when their presence in a larger group is modest and they are viewed as a token. Only if the size of the female group increases to the point that it is no longer a token minority this can this cause a fundamental and sustainable change in the boardroom and enhance corporate governance. Only then are women no longer seen as outsiders and are able to influence the content and process of board discussion more substantially. Studies have shown that only after a **'critical mass'** of about 30% women has been reached – or where the board size permits where at least three board members are female -, gender diversity can produce significant effects in terms of catalysing board activities and better corporate governance and performance. [38] The research on the 'critical mass' suggests that there are two elements to the critical mass, first the percentage share of directors of the under-represented sex and second the absolute number of persons from the under-represented sex holding a director's post. There is a high degree of consensus among scholars that for the benefits of gender diversity to fully materialise it is preferable to reach the critical mass in both respects where the board size so permits.

## 2.2. Problem driver: the significance of demand-side barriers

According to the findings of a 2012 Eurobarometer report, 'the majority (69%) of Europeans believe that women are just as interested as men in positions of responsibility' (Eurobarometer 2012, p. 11). Despite this and although women account for 60% of new university graduates, existing research highlights multiple barriers women face on their way to the top positions of corporations. Those barriers can be divided into so-called "supply-side" and "demand-side" explanations.

**'Supply-side' barriers** are linked to potential female candidates. They explain for example that women may shy away from competition for promotions (Niederle and Vesterlund 2009) or choose to avoid the stress and work-life imbalance associated with company board positions. Career interruption due to childbearing may also limit women's ultimate advancement (Miller (2010), Bertrand, Goldin and Katz (2010). Reconciliation of work and private life, insufficient childcare and segregation of the labour market are general problems which women have to master when they want to stay in the labour market, have children and make progress in their career.

Statistics reveal that the supply side has undergone considerable changes since women have been increasingly outnumbering men among those qualifying from tertiary education. From 1998 to 2002 the proportion of women graduates compared to their male counterparts in the majority of Member States increased over 10 percentage points. The latest available figures show that

[37] Annex 3 gives a complete overview of the business case literature, including the more critical reviews and Annex 4 provides background information on the problem definition, including a problem tree.

[38] The boards have better attendance rates, more communication, more initiatives to take supervisory action, See M. Schwartz- Ziv, Do the Gender of Directors and Critical Masses of Genders Matter? 2012, available here: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1868033&http://www.google.com/url?sa=t&rct=j&q=M.+Schwartz+Ziv%2C+Do+the+Gender+of+Directors+and+Critical+Masses+of+Genders+Matter%3F+2012&source=web&cd=1&ved=0CEgQFjAA&url=http%3A%2F%2Fpapers.ssrn.com%2Fsol3%2FDelivery.cfm%3Fabstractid%3D1868033&ei=31UOUIeKD8fU0QXjrYGwBg&usg=AFQjCNGrXgUAWjGMl7dHVjlxjr6sV20Cog, Joecks, J. et al (2012). 'Women on Boards and Firm Performance: What Exactly Constitutes a 'Critical Mass'?' Available at SSRN: http://ssrn.com/abstract=2009234; Kramer, V. et al (2007). 'Critical Mass on Corporate Boards: Why Three or More Women Enhance Governance'. Available from http://vkramerassociates.com/writings/NACD%20article.pdf. Konrad, M. and Kramer, V. (2006). 'How many women do boards need?'. Harvard Business Review, Forethought Gender edition December 2006.;Kramer, V. et al (2007). 'Critical Mass on Corporate Boards: Why Three or More Women Enhance Governance.

between 2002 and 2006 the proportion of women graduates was stable, representing approximately three women graduates for every two men. In spite of the fact that considerably more qualified women than men have been entering the labour market and that in the last ten years 50% more highly qualified women than men are available this has not translated into more equal representation of women at higher levels of responsibility. This is underscored by the fact that the rate of women with tertiary education who work in roles below management level for which they are over-qualified is considerably higher than that of men. This culminates in the current situation in company boards where women hold only 13.7% of the seats (an increase of 5.2 percentage points in a little over 8 years) and progress over recent years has not remotely corresponded to the long-standing availability of higher numbers of qualified women.

In spite of the continued existence of supply-side barriers blocking the career advancement of highly qualified women as set out above, particularly in relation to the reconciliation of professional and private life[39] which still represents a challenge predominantly for women (the so-called "double-burden syndrome")[40], it is also evident that there are enough women out there having the professional skills for a board position and wanting to move up. The European Business School initiative to promote women on boards has quickly identified more than 7000 'boardable' women who are highly qualified, professionally experienced and ready to take over a board position[41] thus indicating that there is no general shortage of supply that could explain the current levels of female under-representation of women on company boards. For these women who are just one step below board positions, supply-side barriers play no significant role any more. Women who have made their way up to the management level of companies have overcome these problems; otherwise they would not have been able to achieve these positions. These women do not make it to board positions because companies do not consider them as potential candidates and not because of lacking childcare, for instance. This is illustrated by the Norwegian example: Norway has very good reconciliation and childcare facilities which allow women to stay in the labour market while having children and there is generally a high level of gender equality. However, the policies successfully tackling supply-side barriers did not translate into higher levels of female board representation. On the contrary, a persistent striking problem of female under-representation in board rooms finally led to the adoption of a quota law in Norway. This shows that measures tackling supply-side barriers, while remaining essential, are not sufficient in and of themselves to solve the problem of female under-representation at the highest levels of economic decision-making.

The combination of factors explaining the fact that the existing female talent pool is not exploited can be referred to as the **'demand-side' barriers** concerning the readiness of companies to appoint available qualified female candidates to board positions, which are evidenced by ample research.[42] This research shows that women have significantly more difficulties than men to make it to top leading positions even where their career developed just as well before they reached the threshold of selection for a board position. At this watershed, regardless of their

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39 The Commission and Union legislator have been actively striving to improve the framework for reconciliation, e.g. through the recently amended Parental leave Directive 2010/18/EU, bearing in mind that most reconciliation measures (such those related to the Barcelona targets for childcare) fall within Member State competence.

40 Some stakeholders, mainly from the business community, consider this double-burden as one of the main reasons for the persistent under-representation of women in top management and on company boards.

41 See section 2.1.1 above.

42 See Ridgeway, C. L. (2001), Gender, Status, and Leadership. Journal of Social Issues, 57: 637–655, Kumra, S. and Vinnicombe, S. (2008). A Study of the Promotion to Partner Process in a Professional Services Firm: How Women Are Disadvantaged. SSRN eLibrary. Available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id, Sinus Institute (2010). Women in leading positions – barriers and bridges and Center for Work Life Balance. The Sponsor Effect: Breaking Through the Last Glass Ceiling. Harvard Business Review. Key Findings 2011 [cited 2011 Sep 23]. Available at: http://www.worklifepolicy.org/documents/CWLP%20Sponsor%20Effect%20Press%20Release.pdf. See Annex 4 (background to the problem definition) for a non-exhaustive list of studies used for this IA related to the glass ceiling.

willingness to advance and their academic and professional qualifications, women are prevented from realising their full professional potential. The "demand-side" barriers are illustrated by a 'glass ceiling' blocking women to advance to company board positions and manifest themselves for instance through gender stereotypes barriers, a male-dominated business culture[43] and recruitment processes barriers.[44] Such obstacles to women's career progression to the top and their causes have been highlighted by a considerable number of contributions to the stakeholder consultation. Tackling this dimension of demand-side barriers appears to be indispensable to bring about more gender balance on company boards as well as complementary and mutually reinforcing in relation to other gender equality policies aiming to overcome supply-side obstacles.

An important element of these demand-side barriers lies in the current recruitment and promotion practices which prevents the labour market for top management from working properly. EU and national provisions in the field of company law and corporate governance tend to leave companies a very broad margin of discretion concerning the board **recruitment process** and at the most only require the disclosure of some general information relating to boards.[45] There is currently a **lack of transparency** in the process leading to the appointment of new board members. The procedure tends to rely heavily on personal and professional contacts of current board members, which some stakeholders in the public consultation have argued to be one of the reasons for the persistent under-representation of women in boards. A UK survey on non-executive board members confirmed that a high level of informality surround the appointment process. Almost half of the non-executive directors surveyed were recruited to their role through personal contacts and friendships. Only 4% had had a formal interview, and 1% had obtained their job through answering an advertisement.[46] Companies and head-hunters are not required currently to prepare shortlists that go beyond the 'usual suspects'.[47] Moreover, the relatively dispersed ownership of the shares of many listed companies makes it difficult for shareholders to effectively monitor the nomination processes that precede the appointment of board members.

Monitoring progress in complying with the recommendations of the Lord Davies report,[48] the UK Equality and Human Rights Commission reached the conclusion that the board appointment process remains "opaque and subjective, and typically driven by a corporate elite of predominantly male chairmen who tend to favour those with similar characteristics to themselves".[49] The lack of transparency of appointments for board positions was also highlighted by stakeholders responding to the consultation, with some suggesting that companies could contribute to a better gender balance on boards by developing clear job descriptions, profile criteria and transparent selection procedures.

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43 The US Glass Ceiling Commission found that the reasons for the glass ceiling are stereotypes, erroneous beliefs and 'plain old fear'. It was found that without the glass ceiling business would develop stronger.

44 The term "glass ceiling" probably has been used first in this context to refer to invisible barriers that impede the career advancement of women in the American workforce in an article by Carol Hymowitz and Timothy Schellhardt in the March 24, 1986 edition of the Wall Street Journal.

45 Directive 2009/101/EC (currently under review) requires Member States to take measures to ensure compulsory disclosure by companies of information about the appointment, termination of office and particulars of the persons who either as a body constituted pursuant to law or as members of any such body which take part in the administration, supervision or control of the company. Directive 78/660/EEC requires listed companies to include in their corporate governance statement information on the composition and operation of the administrative, management and supervisory bodies and their committees.

46 Derek Higgs, 2003, Review of the role and effectiveness of non-executive directors, available at: http://www.berr.gov.uk/files/file23012.pdf, page 39

47 Vince Cable, 16 July 2012, The Evening Standard, available at: http://www.standard.co.uk/comment/vince-cable-city-passivity-and-prejudice-is-still-sidelining-women-7946158.html?origin=internalSearch

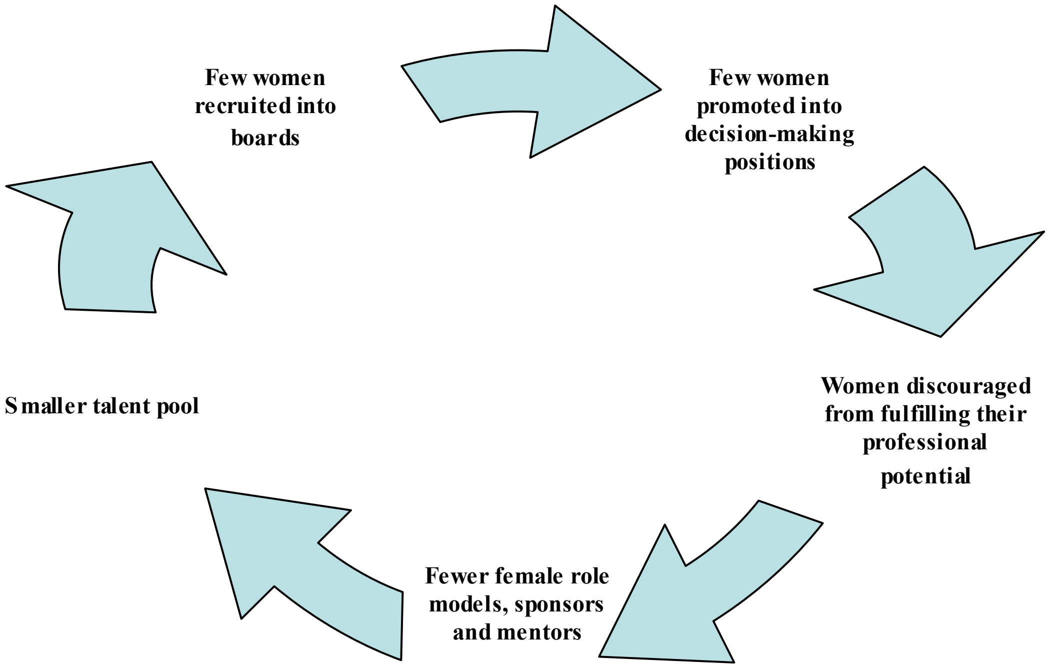
48 Davies, M (2011), Women on Boards, available at http://www.bis.gov.uk/assets/noscpre/business-law/docs/w/11-745-women -on-boards.

49 Doldor, S, Vinnicombe, S and Gaughan, M (2012). Gender Diversity on Boards: The Appointment Process and the Role of Executive Search Firms, p. iv. Available at http://www.equalityhumanrights.com/uploaded_files/research/rr85_final.pdf

The current lack of women in boardrooms implies a high likelihood of perpetuating the "vicious circle". The current board composition affects the attitude of a company towards gender equality and negatively influences the readiness to appoint more female board members. Women's under-representation at board level contributes to a repeated unequal screening at every promotion level,[50] based on perceptions that women are either not interested or incapable of performing these functions.[51] For example, Eurochambres interviewed women entrepreneurs (41%) and managers (59%) in six EU Member States and concluded that the perception remains that women should primarily be homemakers, and that this would undermine their capacity to adequately pursue a career, especially at senior management level.[52]

The lack of female board members also implies a lack of adequate mentors, sponsors and role models. Research shows that mentoring and sponsorship confers a statistical benefit for men of up to 30% in terms of promotion and increased remuneration.[53] Thus the lack of female role models, mentors and sponsors undermines women's' career progression and reduces the number of potential female board members.[54]

**Figure 7: The Vicious Circle: How the current under-representation of women on company boards contributes to their future under-representation**




The demand-side or institutional barriers also explain the **failure of the market** to make full use of its human capital and the failure to profit from better performance: systematic female under-

[50] Ferree, M.M. and Purkayastha, B. 2000. Review: Equality and Cumulative Disadvantage: Response to Baxter and Wright. Gender and Society, 14(6): 809-813. Singh, V, Kumra, S and Vinnicombe (2002). Gender and Impression Management: Playing the Promotion Game'. Journal of Business Ethics, 37, 1: p. 77-89.

[51] The rich evidence confirming these findings includes Kumra, S. and Vinnicombe, S. (2008) and Sansonetti (2004).

[52] http://www.eurochambres.be/Content/Default.asp?PageID=216

[53] Center for Work Life Balance. The Sponsor Effect: Breaking Through the Last Glass Ceiling. Harvard Business Review. Key Findings 2011 [cited 2011 Sep 23]. Available at: http://www.worklifepolicy.org/documents/CWLP%20Sponsor%20Effect%20Press%20Release.pdf

[54] Singh, V, Kumra, S and Vinnicombe (2002). Gender and Impression Management: Playing the Promotion Game'. Journal of Business Ethics, 37, 1: p. 77-89. Association of British Insurers, Report on Board Effectiveness, Highlighting best practice: encouraging progress, page 17; see also Review of the role and effectiveness of non-executive directors ("Higgs review"), 2003, p. 39.

representation in company boards is a cause of labour market failure and a source of inequality in the distribution of income and wealth also in other respects. Market failure occurs for instance, if the market is "monopolised" or a small group of businesses hold significant market power without adequate competition. For the company boards this means that only a narrow circle of candidates is taken into consideration whereas boards would worker better with more gender diversity.

There are models to explain such a market failure, namely by the 'Taste-Model' (employers and workers have a distaste for working with people from different backgrounds or gender i.e. people prefer to associate with others from their own group) or the 'Ignorance-Model' (people are unable to directly observe the productive ability of individuals and therefore rely on other easily observable characteristics such as gender).[55] Although decision-makers in companies should be driven exclusively by the objective of maximising company performance these models explain why in spite of the benefits of gender diversity in that respect which is generally acknowledged in principle, the still almost exclusively male company boards tend to reproduce themselves in terms of gender composition. In recent years, some Member States have taken action and the share of women on boards in these Member States is increasing (see below under point 2.4.). This trend shows that the market corrects its stance generally not of its own initiative but as a reaction to policy measures.

The comparison with other sectors of society with a significantly less manifest gender balance in decision-making positions, notably in the public sector (administration, judiciary, parliaments) illustrates the particular strength and persistence of demand-side barriers in the private sector and specifically in listed companies. Apart from other structural differences the public sector is more receptive to the increasing demand from civil society and the media to ensure improved gender balance in decision-making positions. Member States that have actively participated in the adoption of recommendations or have encouraged self-regulation at EU as well as at national level are by definition under greater pressure to set an example. The public sector is also in a fundamentally different position concerning the transparency of recruitment processes since, unlike in the private sector (in particular for board positions), all vacant posts including at the highest level generally have to be published including a job description and the qualification requirements.

It also needs to be taken into consideration that in spite of these factors weakening the demand-side barriers at least in relative terms, many Member States, even many of those currently opposed to binding targets in the private sector, have introduced a wide range of measures, often including positive action similar to what is contemplated under the binding options of this impact assessment, to ensure accelerated progress in approaching gender balance. It is instructive in that respect that all the cases referred to the CJUE to clarify the requirements for positive action measures concerned binding measures in the public sector applicable in particular to higher management positions.[56] The better representation of women in the public sector is explained by the entirety of these factors notably including a different attitude on the part of Member States to positive action measures in this area and the effects of such measures.

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[55] G. Riley, 2006, Labour Market Discrimination, available at: http://tutor2u.net/economics/revision-notes/a2-micro-labour-market-discrimination.html

[56] For details on the case-law and the cases see point 2.4.4 below and Annex 7; the main CJEU rulings are quoted in footnote 61 of Annex 7. As far as the political sphere is concerned, quotas exist in many Member States, in particular quotas used by political parties in the process of nominating candidates.

## 2.3. Evolution of the problem in absence of further action (baseline scenario)

The extent and the direction of changes in female presence in board differ across Member States and have been influenced by national level policies. In particular, it is possible to distinguish trends in Member States where there is no regulation, trends in Member States with non-binding regulation or self-regulation and trends in Member States with legislative quotas which are set out in more detail above under point 2.1.3.

On the basis of these past trends and taking into consideration the recent introduction of national measures, it can be estimated how female presence on company boards will evolve in the future. As far as the effects of self-regulation are concerned this estimate includes the experience with previous and existing self-regulation and corporate governance codes in place in Member States. The table below presents the estimates of the level of female presence on company boards, distinguishing between executive and non-executive positions. The methodology for the calculation of the baseline is outlined in more details in Annex 6.

**Table 1: Estimated Percentage of Women in Board by 2020**[57]

| MS | 2004 (Estimated) | | | 2011 (Estimated) | | | 2020 (Predicted) | | |
|---|---|---|---|---|---|---|---|---|---|
| | ED | NED | Average | ED | NED | Average | ED | NED | Average |
| AT | 1% | 6% | 6% | 2% | 12% | 11% | 3% | 15% | 15% |
| BE | 3% | 8% | 7% | 4% | 13% | 11% | 9% | 29% | 25% |
| BG | 55% | 0% | 18% | 47% | 0% | 15% | 37% | 0% | 12% |
| CY | 12% | 5% | 7% | 8% | 3% | 5% | 4% | 1% | 2% |
| CZ | 4% | 14% | 11% | 6% | 20% | 16% | 8% | 25% | 20% |
| DE | 4% | 15% | 12% | 5% | 19% | 15% | 6% | 23% | 18% |
| DK | 8% | 12% | 11% | 12% | 17% | 16% | 20% | 30% | 28% |
| EE | 28% | 14% | 15% | 13% | 6% | 7% | 11% | 5% | 6% |
| EL | 6% | 8% | 7% | 5% | 7% | 6% | 3% | 4% | 4% |
| ES | 1% | 5% | 4% | 3% | 13% | 11% | 7% | 35% | 29% |
| FI | 9% | 17% | 16% | 15% | 28% | 26% | 22% | 40% | 38% |
| FR | 1% | 7% | 6% | 4% | 27% | 22% | 7% | 40% | 40% |
| HU | 3% | 11% | 9% | 2% | 6% | 5% | 3% | 14% | 12% |

[57] All the averages in the table are weighted, i.e. they depend on the number of executive and non-executive directors in the company. As in general there are more non-executive directors in a company, the average-figure is closer to the figures for non-executive directors. Figures were estimated by Matrix based on data from EC Database for Women and Men in Decision-Making and Standard & Poor's. Differences with other figures presented in the report are due to recalculation of raw data in order to provide sufficient breakdown of the figures for the purpose of the analysis.

| MS | 2004 (Estimated) | | | 2011 (Estimated) | | | 2020 (Predicted) | | |
|---|---|---|---|---|---|---|---|---|---|
| | ED | NED | Average | ED | NED | Average | ED | NED | Average |
| **IE** | 5% | 7% | 6% | 7% | 10% | 9% | 10% | 14% | 13% |
| **IT** | 0% | 2% | 2% | 1% | 7% | 6% | 3% | 26% | 23% |
| **LT** | 9% | 12% | 11% | 11% | 15% | 14% | 15% | 20% | 18% |
| **LU** | 0% | 5% | 4% | 0% | 7% | 6% | 0% | 8% | 7% |
| **LV** | 8% | 10% | 10% | 22% | 27% | 27% | 31% | 37% | 37% |
| **MT** | 5% | 1% | 2% | 6% | 1% | 2% | 7% | 2% | 3% |
| **NL** | 3% | 5% | 5% | 9% | 19% | 18% | 16% | 34% | 31% |
| **PL** | 6% | 9% | 9% | 9% | 12% | 12% | 10% | 15% | 14% |
| **PT** | 5% | 4% | 4% | 7% | 5% | 6% | 6% | 4% | 5% |
| **RO** | 33% | 11% | 17% | 20% | 7% | 10% | 24% | 8% | 12% |
| **SE** | 3% | 23% | 21% | 4% | 27% | 25% | 5% | 35% | 32% |
| **SI** | 23% | 19% | 19% | 17% | 14% | 14% | 12% | 10% | 10% |
| **SK** | 9% | 9% | 9% | 15% | 15% | 15% | 33% | 33% | 33% |
| **UK** | 6% | 17% | 13% | 7% | 21% | 16% | 8% | 22% | 17% |
| **EU** | 9% | 9% | 9% | 7% | 17% | 15% | 8% | 24% | 20% |

*Average = overall presence of women in corporate boards; the average is weighted, i.e. it depends on the number of executive and non-executive directors; ED = Executive Directors; NED = Non-executive Directors*
*Source: 2004 and 2011 figures were estimated by Matrix based on data from EC Database for Women and Men in Decision-Making and Standard & Poor's; 2020 data have been extrapolated by Matrix on the basis*

Under this baseline scenario – despite projecting an increase in female representation on company boards until the year 2020 that is somewhat higher than the increase measured over the past 8 years[58] – the female representation in boards of publicly listed companies is expected to evolve from 13.7% in 2012 to 20.4% (20.84% excluding SMEs) in 2020 for the EU. The female representation among non-executive directors will evolve from around 15% in 2012 to around 24% in 2020, which is still below the critical mass of 30%.

Thus, in the absence of EU action, progress in achieving more equitable gender representation in company boards will remain very slow, both as regards executive and non-executive director positions. It will depend on self-regulation and regulatory initiatives taken at national level. In some Member States there will be more progress than in others, in others there will be no progress at all or the even a decline in the representation of women on boards. This has been the case for Hungary, Slovakia and Romania in the time period from 2010 to 2012. But even in

58 Drawing on the pace of change observed over the past 8 years, it is estimated that it would take more than 40 years to arrive at a level of representation of at least 40% on boards for both sexes

Member States, where the issue is currently under intensive discussion, like in Germany, and where DAX30 companies have decided in March 2011 to increase the female share in leading positions, progress remains slow. For instance, of all 34 executive board members of the DAX30 companies appointed between January 2011 and February 2012, 27 are men and 7 are women.[59]

Only one Member State (France) will have achieved a 40% female representation in boards by 2020. Only 7 more Member States - Finland, Latvia, the Netherlands, Slovakia, Spain, Denmark and Sweden - are estimated to reach 40% before 2035. This would not be sufficient to bring about the "critical mass" of women on boards that the research referred to in section 2.1.5 shows is needed to generate positive effects on company performance.[60] Based on this scenario, the EU as a whole is not expected to even achieve 40% of women on boards by 2040.

## 2.4. The EU's right to act and EU's added-value

### *2.4.1. Political foundations of the right to act: Europe 2020*

The Europe 2020 Strategy for Smart, Sustainable and Inclusive Growth[61] established that an "increased female labour force participation is a precondition for boosting growth and for tackling demographic challenges in Europe". As a result of demographic change, such as the ageing of the workforce and the EU's low average birth rates, Europe's workforce is shrinking and a smaller number of workers are supporting a growing number of inactive people. The economic crisis has exacerbated this precarious situation, as it has brought forth high youth unemployment rates of over 21%,[62] which effectively reduces the number of those entering the workforce and reinforces the demographic challenges ahead.

Improving gender equality is essential for the EU's response to the current economic crisis, which has magnified Europe's ever-growing need to rely on knowledge, competence and innovation. With an employment rate reaching 75.1% for men and 62.1% for women, it has become mainstream thinking that the EU can only reach the Europe 2020 headline target (75% of the population aged 20-64 should be employed by 2020) if there is a clear commitment to gender equality.

The Commission had already strengthened its political commitment to the need to enhance the balance between women and men in economic decision-making positions with the adoption of the Strategy for Equality between Women and Men (2010-2015) in 2010, in which the Commission announced that it was considering using "targeted initiatives to get more women into top jobs in decision-making". The Strategy builds on the priorities of the Women's Charter,[63] signed by President Barroso, which reaffirms the Commission's commitment to ensure the full realisation of women's potential and the full use of their skills, to facilitate a better gender distribution on the labour market and more quality jobs for women.

In June 2012, in the context of the Europe 2020 Strategy, the Commission proposed country-specific recommendations to the Council, highlighting the need to enhance female labour market participation rates to make full use of the pool of available talent. Enhancing female participation in economic decision-making, notably in company boards, is expected to have a positive spill-

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59 T. Sattelberger, Executive board member of German Telecom, Öffnet das System!, djbZ 2/2012

60 Research concludes that a 'critical mass' of 30% women on boards is needed to bring about positive effects; see below under section 4.1.3.

61 COM (2010)0193).

62 In the third quarter of 2011 the youth unemployment rate in the EU-27 stood at 21.6% Eurostat, available at: http://epp.eurostat.ec.europa.eu/statistics_explained/index.php/Unemployment_statistics#Youth_unemployment_trends.

63 COM(2010)78 final.

over effect on female employment in the companies concerned and throughout the whole economy. The need to act for a better balance between women and men in economic decision-making is thus fully endorsed by the current political agenda.

### 2.4.2. *Legal basis: Article 157(3) TFEU*

The EU's right to act in issues of gender equality in employment and occupation follows from Article 157 (3) TFEU.[64] This provision is the specific legal basis for any binding measures aiming at ensuring the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation. If a measure took the form of a Recommendation, the legal basis could also be Article 292 TFEU.

Article 50(1) TFEU is the legal basis for adopting EU measures aimed at achieving an Internal Market in company law. Minimum harmonisation measures on selection procedures for non-executive members of boards of listed companies with a persistent under-representation of one sex concern the internal organisation of companies and therefore company law. This provision could be an additional legal basis, completing Article 157 (3) TFEU.

### 2.4.3. *Subsidiarity and proportionality*

The **principle of subsidiarity** requires that the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States (necessity test), but can rather, either by reason of the scale or effects of the proposed action, be better achieved at Union level (test of EU value added).

The baseline scenario, taking into account current trends in Member States, shows that the objectives of achieving a higher percentage of women in boards of listed companies and the inherent gender equality and economic and business benefits will not be attained if this issue is dealt with at Member State level only. Based on these observations, the baseline scenario projects an increase in female representation on company boards until the year 2020 that is higher than the increase measured over the past 8 years. Yet these projected further improvements will not lead to a sustainable gender balance on boards in the foreseeable future.

The projections in this report based on comprehensive information on existing or planned legislative and self-regulatory initiatives in this area in all Member States show that without EU action the female representation in boards of publicly listed companies is expected to evolve from 13.7% in 2012 to 20.4% (20.84% excluding SMEs) in 2020 for the EU and from around 15% in 2012 to around 24% in 2020 for non-executive directors. Only one Member State (France) will have achieved a 40% female representation in boards by 2020 as the result of national binding quota legislation. Only 7 more Member States - Finland, Latvia, the Netherlands, Slovakia, Spain, Denmark and Sweden - are estimated to reach 40% before 2035. This would not be sufficient to bring about the “critical mass” of women on boards across the Union that research shows is needed to generate positive effects on company performance. Based on this scenario, the EU as a whole is not expected to even achieve 40% of women on boards by 2040. Irrespective of the general possibility for Member States to act efficiently, the concrete indications of Member States as to their intentions, including in their replies to the public consultation, and the projections based on all available information, clearly demonstrate that

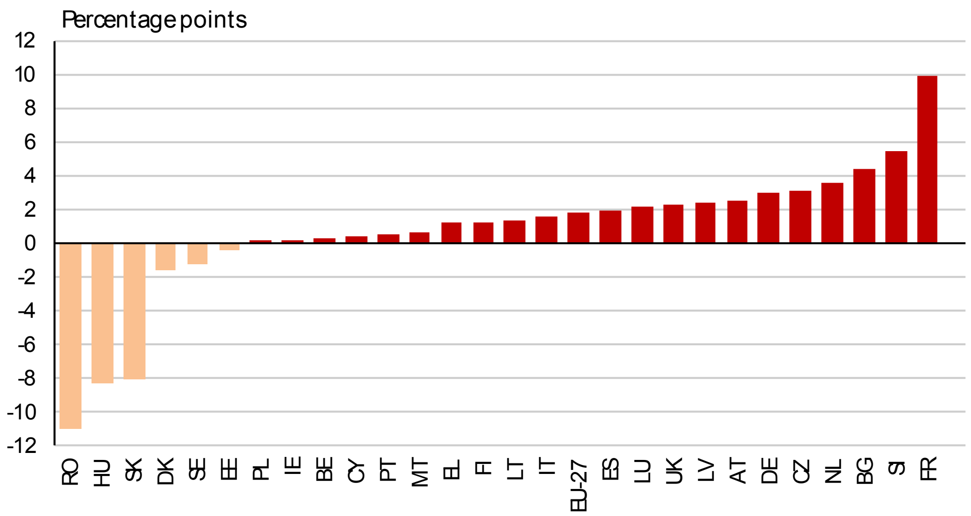
[64] Art. 157(4) TFEU clarifies that positive action measures can also be undertaken by Member States themselves but does not exclude the right of the EU to act. Positive action measures adopted on the basis of Article 157(3) TFEU would need to respect the relevant case-law of the Court of Justice of the European Union regarding the principle of non-discrimination on ground of sex which is set out in detail under point 2.4.4 below and in Annex 7.

action by Member States individually will not achieve sufficiently significant progress towards a more balanced gender representation on company boards by 2020 or at any point in the foreseeable future.

As described above, the measures introduced by some Member States vary broadly, and 15 Member States have not taken any action in this area. The level of debate on the issue is rather unbalanced across Europe, as demonstrated by the results of the stakeholder consultation: half of the 485 contributions came from only two Member States (DE and UK), whereas no or less than five replies were received from 14 Member States (BE, BG, CY, EE, EL, HU, LU, LT, LV, MT, PL, RO, SI, SK). Among these are 6 of the 8 Member States where the share of women on company boards is at an extremely low level, at 7% or less.

The lack of debate on this issue in many Member States suggests that no action to increase gender balance on company boards is likely to be taken there and that the discrepancies between Member States already apparent today will widen further. The conflicting situation in Member States are illustrated by the changes in the share of women on corporate boards from October 2010 to January 2012: while the share in France grew by 10 percentage points (p.p.), it dropped by 11 p.p. in Romania and roughly 8 p.p. in Hungary and Slovakia (see table below).

**Figure 8: Change in the share of women on corporate boards in the EU, October 2010-January 2012**




*Source: European Commission, Database on women and men in decision-making.*

Some stakeholders, mainly from the business community and including some Member States, argue that different non-legislative approaches have also been successful in achieving a better gender balance on company boards, including voluntary initiatives e.g. in Finland and Sweden, and no action at all in Latvia. They conclude that the decision on the approach to achieve more gender-balanced company boards should entirely be left to the national level.

However, first of all, the three Member States mentioned as examples have so far only achieved a female share of about a quarter of all board seats (while three quarters are still occupied by men), and their recent progress is not remarkable or even negative (see figure 8 above). The relatively good performance of the two Nordic countries with an exceptionally good record and tradition of gender equality measures can be explained by a real debate on the issue and a credible 'threat' to legislate in case of failure of voluntary action. This 'threat' is, however, difficult to maintain over a longer period of time, and the level of current efforts cannot be realistically expected to be maintained at company level if such a credible 'threat' no longer exists. Moreover, in both countries the legal or *de facto* obligation to ensure gender parity on boards of state-owned companies also contributed to the good figures. Finally, the case of Latvia must be regarded as an 'outlier', to be explained by the Member State's specific socio-economic situation, in particular the high level of female entrepreneurs (36.5%) and the exceptional long-term predominance of women among higher education graduates (around 70%)[65] – figures against which the share of 26% of female board members does not appear to be outstanding.

These examples confirm that Member States can sometimes improve the gender balance on corporate boards through their own non-legislative means – albeit under rather exceptional circumstances. There they cannot serve as models which other Member States can easily reproduce. Moreover, many Member States have not shown any interest so far to take action, neglecting the business and economic benefits a greater presence of women can bring to their companies and economy.

While Member States have the legal possibility to act in order to counter the under-representation of women in economic decision-making, many of them do not show any willingness or face resistance from the business community to act at their own initiative[66], in particular those where the share of women among non-executive and executive directors and managers in general is particularly low..

This situation entails a certain number of risks for the attainment of the fundamental objective of gender equality across the Union. Although the Treaty objective of equality between women and men in the EU is not directly related to the establishment of an internal market (as demonstrated by the wording of Article 3(3) TEU) and does not require any transnational or cross-border problem to establish the EU's right to act[67], the current situation denotes at the same time important internal market aspects that call for the EU intervention and justify the use of minimum harmonisation measures for the promotion of the internal market.

The Founding Treaties intended to create a competitive level-playing field between Member States by enshrining the principle of equal pay and of gender equality on the labour market, to avoid any downward competition between Member States in labour and equal treatment matters. Member States may indeed hesitate to regulate in this area on their own, as they could perceive a risk of putting their own companies at a disadvantage with companies from other Member States[68]. This perception, reinforced by pressure from the business community, represents a major obstacle preventing Member States from taking adequate action. An EU-level initiative in this area is needed to ensure a comparable level of promotion of gender equality throughout the Union, as required by the EU Treaties.

Furthermore, the economic repercussions in terms of the quality of corporate governance and its impact on company performance as well as the other economic indicators analysed in this report

65 Figures provided by the Latvian government in its reply to the stakeholder consultation.

66 This situation corresponds to the concept of 'real subsidiarity', whereby the Union's duty to abstain from action is limited to cases where Member States not only can act but also show the willingness to act (as opposed to the concept of 'formal subsidiarity', whereby the Union has to abstain from action, as soon as Member States have the legal possibility to act), see PV(2001) 1520 final, p. 20.

67 Nor does Article 157(3) TFEU require a direct cross-border dimension to serve as a legal basis for the EU legislator. Indeed several EU legal acts have been adopted on this basis without any direct aim of promoting the internal market, e.g. most recently Directive 2006/54/EC (gender equality in employment and occupational social security) and Directive 2010/41/EU (gender equality in self-employment).

68 See, for instance, consultation reply from Austria, which has not introduced gender quotas for private company boards itself, but calls for the EU to set binding objectives and highlights the advantages of introducing them at the EU level in terms of companies' competitiveness.

will vary considerably and even to an increasing extent. The potential for competitiveness and growth inherent in fully exploiting the talent pool of the best qualified women for board positions can better be realised, by reasons of scale, if all Member States engage in that direction, in particular those where figures are currently low and no action has been taken or even envisaged. Similarly to the objective of raising employment rates where Member States start from different positions, a common effort by all Member States will be the best guarantee to reach the objective of more balanced decision-making on company boards across the entire Union within a reasonable period of time.

At the same time, discrepancies in terms of numbers of women on boards are growing in Member States, with the key indicator ranging from 3% to 27% (from 2.7% to 27.9% as regards non-executive directors). Scattered and divergent regulation at national level is bound to create practical problems in the functioning of the internal market, as different company law rules and sanctions for not complying with a binding quota, such as exclusion from public procurement, could lead to complications in business life and have a deterrent effect on companies' cross-border investments and the establishment of subsidiaries in other Member States.

Similarly, the specific objectives of reducing the "demand side" barriers women face when aiming for board positions and improving corporate governance cannot be sufficiently achieved by Member States and could be better achieved through EU action.

An important element of these demand side barriers lies in the current selection procedures for board members which often lack transparency. A binding EU level initiative would need to comply with the CJEU's positive action case-law, which requires that preference can only be given to a candidate of the under-represented sex in case of equally qualified candidates and that all candidacies are subject to individual assessment taking account of all criteria specific to individual candidates. In order to establish whether two candidates are equally qualified the selection processes needs to be made transparent, e.g. by the definition of qualification criteria. Binding EU measures would thus as a minimum need to be accompanied by an obligation for companies without gender-balanced representation among non-executive directors to make selection procedures more transparent, notably by making appointments to these posts on the basis of a comparative analysis of the qualifications of candidates and applying pre-established clear, neutrally formulated and unambiguous criteria.

In the absence of EU action, the current divergent situation will continue and further deteriorate. Some Member States may impose transparency and other requirements on companies for their selection procedure, whilst others would not. Even though the costs of rendering selection procedures transparent (and consistent with the CJEU's case law on positive action) are estimated to be minimal, different requirements on the transparency, criteria and conduct of selection procedures (i.e. comparative assessment of qualifications) could lead to potential distortions of competition.

The current lack of transparency of the selection procedures and qualification criteria for board positions in most Member States represents an important barrier to more gender diversity of board members and negatively affects both board candidates' careers and freedom of movement, as well as investor decisions. Such lack of transparency prevents potential candidates for board positions from applying to boards where their qualifications would be most required and from challenging gender-biased appointment decisions, thus restricting their freedom of movement within the internal market.

The lack of transparent selection procedures may make it even more difficult for "boardable" women to find a place in the board of a company in another Member State. Egon Zehnder

International Board Diversity Analysis[69] looked at the nationality background of directors. In the sample of companies they surveyed, the average board in Europe includes 27.8% non-national directors. There were, however, great disparities among European countries. Non-national women directors account for a higher proportion of the female total than is the case for their male counterparts: 32.1% or almost every third woman on a European board is a non-national, compared to 27.8% for all directors. But again great disparities among Member States were found.

On the other hand, investors have different investment strategies that require information linked also to the expertise and competence of the board members. More transparency on qualification criteria and the selection procedure for board members enables investors to better assess the company's business strategy and to take informed decisions. Obliging companies to make their selection procedures transparent could therefore have a positive impact on the internal market.

To conclude, the objective of reducing demand side barriers can be better achieved at EU level, since the EU has the competence to harmonise the requirements for the selection procedures for companies across the EU, including (and in the current case limited to) companies characterised by the gender imbalance among their non-executive directors. In addition, such a minimum harmonisation at EU level of certain requirements relating to selection procedures would avoid potential distortions of competition and make it easier for companies to reap the benefits of the internal market in their search for the most qualified candidate.

It can therefore be concluded that the <u>objectives can be better achieved through coordinated action at EU level</u> rather than through national initiatives of varying scope, ambition and effectiveness.

However, the rationale for EU action in this area only exists as long as the maintenance of EU measures is necessary and indispensable to redress continuing female under-representation. EU action would no longer be justified if the participation of female board members in publicly listed companies across the EU has reached a sufficiently high level and has changed business culture and recruitment patterns to such degree that the withdrawal of the measure would not lead to a reconstruction of the glass ceiling and that the economic potential resulting from gender balance in company boards would be exploited in a sustainable way without further regulatory intervention. Features ensuring, from the outset, the **temporary nature** of the instrument and its expiry or repeal therefore could underpin its compliance with the principle of subsidiarity.

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. In particular, this principle requires that the considerable differences among Member States and sectors with respect to the current level of female participation be taken into account in the design of any EU-level measure aiming at a higher degree of gender balance among company directors.

As demonstrated by the problem definition and the baseline scenario above, the current and envisaged measures, which include EU-level recommendations and calls for self-regulation as well as a patchwork of national regulatory, non-regulatory and company initiatives, have not achieved and cannot be expected to achieve the objective of improving gender equality in economic decision-making throughout the EU.

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[69] Egon Zehnder International Board Diversity Analysis, "European board diversity analysis 2010 - Is it getting easier to find women on European boards"

Further-reaching action to be taken at EU-level is therefore necessary to attain those aims. It should, however, not go beyond what is strictly required to achieve sustainable progress in the share of women on company boards and its scope should be restricted as far as possible in order not to impinge on the functioning of private companies and the market economy.

In particular, Member States' different starting points require that any EU measure be limited to setting common objectives and general rules – in line with the approach of minimum harmonisation – thereby giving Member States sufficient freedom to determine how these common objectives should be best achieved at national level, taking into account national, regional or local circumstances including national company law and company board recruitment practices. Such EU-level measures should therefore not require undue changes to national company law and should in particular respect the different board structures across Member States. They should further not require companies to appoint less qualified board members and should not cover small and medium-sized enterprises (SMEs), for which such measures could represent a disproportionate burden in relation to their size and resources.

Moreover, Member States with currently low levels of female board participation need to be given a realistic timeframe to be able to achieve the common objectives, taking into account the usual cycles of board elections and renewal. In Norway, it was possible to increase the share of women non-executive directors from 18% to 40% within two years; however, that short deadline was criticised for being too short. A longer time horizon of at least five years would seem more proportionate and realistic even for the least advanced Member States[70].

The availability of highly qualified female managers differs among sectors of industry, and some sectors might face more difficulties in filling board positions with women – even within a long timeframe. The likelihood of such problems depends on the precise content of a measure and generally appears to be significantly lower for non-executive than for executive members.[71] Any binding EU measure should therefore not establish rigid quotas, but should allow companies to justify the non-compliance with the objectives where it has not been possible to find a suitable person of the under-represented sex for a board position, in order to guarantee that the best qualified persons are selected. Such binding measures would thus fully respect the requirements of the relevant positive action case-law of the Court of Justice of the European Union (CJEU), the specific purpose of which is to ensure compliance with the principle of proportionality, as set out in the next section.

All policy options will therefore be assessed on their compliance with the proportionality principle and options that would not be in line with this principle will be discarded (see below).

### *2.4.4. Compliance with the EU Charter of Fundamental Rights and CJEU case-law*

The EU's right to act also needs to be examined in the light of the Charter of Fundamental Rights of the European Union ('Charter'). It would help to promote some fundamental rights, particularly those related to equality between women and men (Article 23) and to the freedom to choose an occupation (Article 15). On the other hand it would imply a restriction on the freedom to conduct a business (Article 16) and on the right to property (Article 17).

First, any positive action measure is characterised by the tension between the purpose to promote de facto gender equality and the need to prevent preferential treatment given to members of the

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[70] See point 4.2.3 below for more detail on the appropriate deadline for compliance.

[71] The risk of such problems is separately assessed for all binding policy options, in particular for options 3 and 5 analysing the differences between non-executive and executive board members. See points 5.4 and 5.6 below.

under-represented sex from turning into a prohibited discrimination against members of the other sex. This tension is reflected in the Charter, which in principle prohibits any discrimination based on sex in its Article 21(1), but also recognises in Article 23 that the principle of equality does not prevent the adoption of measures providing for specific advantages in favour of the under-represented sex. The CJEU has established the criteria that need to be met in order to reconcile the two concepts of formal equality of treatment and de facto equality, both of which are recognised in the Charter as well as in Article 157 TFEU and in Article 3 of Directive 2006/54.[72] Any EU initiative in this field would have to be in compliance with these requirements.

These requirements are:

(1) The measures must concern a sector in which women are under-represented.

(2) Priority to a female candidate can only be given in case this female candidate is at least equally qualified as the male candidate.

(3) They must not give automatic and unconditional priority to equally qualified candidates, but must guarantee that the individual situation, notably the personal situation of each candidate, is taken into account.

In order to enable companies to make an objective assessment as required according to CJEU jurisprudence, companies would have to establish objective selection criteria for the specific post before starting the procedure. As these criteria are shaped according to the area of business and the specific skills needed for the respective board position, these criteria cannot be specified by an EU measure. However, in order to comply with the case-law it would be sufficient that an EU measure requires such criteria to be defined before the selection procedure starts.

In addition, an EU initiative restricting the rights of shareholders to freely choose board members would have an impact on some other fundamental rights of shareholders and candidates for board positions, most notably the freedom to conduct a business pursuant to Article 16 of the Charter. Such a restriction can be justified, particularly with a view to promoting other fundamental rights, but the justification requires compliance with the principle of proportionality. The assessment of proportionality is influenced by a range of elements, most notably the degree of interference (binding or non-binding measure, coverage of non-executive or also of executive board members, guarantee of the maintenance of qualification as the key criterion for the selection), the scope of the measure in terms of the companies that have to observe the quota (including or excluding SMEs) and further individual features of the measure such as the time allowed for reaching the objective, the possibility of derogations in sufficiently justified cases and the temporary or indeterminate nature of the restriction.

A detailed analysis of the impact of the different policy options on the affected fundamental rights is carried out in the assessment of the impact of the policy options and in more detail in Annex 7.

## 3. POLICY OBJECTIVES

The policy response to the persistent gender imbalance in corporate board rooms needs to meet certain general objectives:

[72] 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).

1. To promote gender equality in economic decision-making, specifically in the boardrooms of listed companies, in line with Article 3 (3) TEU;

2. To fully exploit the existing talent pool for more equal gender representation on company boards thereby contributing to the proper functioning of the internal market and to the Europe 2020 objectives.

In order to meet these general objectives, the following specific objectives have been identified:

(1) To reduce the "demand side" barriers women face when aiming for board positions ;

(2) To improve corporate governance and enhance company performance;

The operational objective would be to introduce a common (non-binding or binding) objective for the share of each sex in boards of publicly listed companies in the EU.

## 4. POLICY OPTIONS

This section gives an overview of the policy options which have been discarded and those which have been considered and retained for addressing the problem and meeting the objectives outlined above.

The **results of the stakeholder consultation** demonstrate highly divergent views of stakeholders with regard to the most suitable policy options. The majority of the business community and some Member States (CZ, HU, NL, SE) advocate a voluntary approach, notably through corporate governance codes and industry or individual corporate initiatives – which would be consistent with the scenario of no further EU action. They argue that change will be led by the market, as the business case argument will convince more and more companies that diversity pays off. Some also argue that developing a talent pool of sufficiently qualified women for board positions is a matter of time, and the composition of company boards will change naturally.

Other stakeholders, including in the business community, acknowledge that public authorities, including at EU level, have a role to play in triggering a change of mentality and can support that change through soft measures, such as recommendations, 'comply-or-explain' rules and awareness-raising. Some actors, including Member States (FI, LV), specifically mention the possibility of an EU-level Recommendation.

Finally, a substantive share of contributors, including shareholders associations (e.g. Euroshareholders/EuroFinuse), women organisations (including of women managers and lawyers), trade unions as well as some Member States (AT, FR) consider that the current gender imbalance on boards can at least partly be explained by the male-dominated business culture, where many appointment decisions are taken informally and through personal networks. In their view, binding legal targets at EU level are necessary to break the glass ceiling that many women in middle-management of companies currently face.

As regards the type of board members to be covered, there was no clear trend in the replies to the public consultation. Many stakeholders argued that both management and supervisory boards (in the dual board system) or both executive and non-executive directors (in the unitary board system) should be covered by an EU-level initiative, while others favoured covering only one or the other group. Many contributions underlined the need to take into account the diversity of board systems across Member States, when designing an initiative. Several German organisations (including women NGOs) argued that the initiative should focus on supervisory boards only, and also some Finnish organisations argued that only the non-executive boards should be covered. Some stakeholders suggested starting an initiative with non-executive board members, as it would constitute a less significant interference with the daily management of companies and could be done faster, while executive board members should follow later.

### 4.1. Discarded policy options

Several policy options have been discarded at an early stage of the impact assessment process, as being either unrealistic, unable to meet the objectives or disproportionate.

#### *4.1.1. More self-regulation*

As regards the form of the measure, various types of self-regulation[73] could be contemplated to increase the female representation on company boards, either at European or at national level.

In the stakeholder consultation, the majority of the business community, i.e. companies and industry associations, and some Member States (CZ, HU, NL, PL) saw self-regulation (by which they often understand voluntary initiatives by individual companies) as the most appropriate approach, as it allows taking into account the starting point of different companies and sectors and provides for tailor-made solutions. In their view, the self-regulatory method ensures ownership and a substantial change in corporate culture, through a bottom-up approach and realistic targets, without undue interferences into the freedom of business. Several stakeholders in the UK highlighted the change brought about by the self-regulatory approach suggested by the Lord Davies Report.

Other stakeholders, including some Member States (AT, FR) consider that self-regulation may be a first step, but has not (yet) delivered. The disappointment about the failure of the approach to produce satisfactory results is strongest among women NGOs and trade unions. They consider that only the recent threat of legislation (such as in the UK and in Germany) to impose a higher share of women business leaders has triggered some change, but this change is not sustainable and not fast enough, as it would still take decades at the current pace to achieve a sufficient level of gender balance on company boards. These stakeholders often point to disappointing experiences with self-regulation in their own Member States (e.g. DE, PT, IE, NL).

Self-regulation, i.e. agreements, common guidelines or codes of practice adopted by the business community, is theoretically possible at EU level. However, none of the stakeholders who would be able to spearhead such an initiative (e.g. BUSINESSEUROPE, ERT, EUROCHAMBRES) called for a self-regulatory approach at European level, but rather advocated voluntary measures mainly by companies. In addition, experience at the national level appears to show that where self-regulatory initiatives only produce noteworthy results, as for example in Finland or currently to some extent in the UK, if they are tied to constant monitoring combined with a credible threat of legally binding measures if no significant progress is made. At EU level, various attempts have been made to encourage self-regulation, most recently in Vice-President Reding's call for businesses to pledge to increase the share of women on their boards combined with the announcement that in case of insufficient improvements legislative action would be considered. Judging by the meagre response to this initiative and by business stakeholders' responses to the

[73] Self-regulation is defined as the possibility for economic operators, the social partners, non-governmental organisations or associations to adopt amongst themselves and for themselves common guidelines (particularly codes of practice or sector agreements) As the Single Market Review points out, measures set this way may be quicker to adopt and may lead to more acceptable results for stakeholders.

public consultation, the prospects for success of such an initiative removing the threat of legally binding measures remain very low in the light of past experiences. Therefore, further self-regulation initiatives at EU level were not regarded as likely to come into being and to achieve the policy objectives.

As regards the national level, the effectiveness of self-regulation by business associations or companies, possibly supported by awareness-raising campaigns, has proven to be very limited. Several such initiatives have been taken in Member States[74] for an extended period of time, particularly since the 1996 Council Recommendation. In Germany, for example, the commitment of the business community in 2001 to enhance the share of women in decision-making positions has not been followed by significant improvements: from 2004 to 2012 female presence has increased from 12% to 16%. In Norway, the government had tried to improve the gender balance on company boards through a self-regulatory approach for several years without any success, before finally turning to regulatory measures in 2002.

Similarly, corporate governance initiatives for more gender diversity on boards in a number of Member States have not led to noticeable changes in the figures where they were not combined with a threat of legislation. In Denmark, for instance, a corporate governance code of 2008 recommending gender equality in boardrooms and a 'Charter for More Women in Management' (2010) recommending gender diversity in boards exist for some years already. However, in Denmark the female presence in boards of big companies has decreased by 2% between October 2010 and January 2012.

Therefore recommending, by an EU measure, more self-regulation in Member States is not considered appropriate to achieve the policy objectives either.

#### *4.1.2. Increased transparency of the board selection processes as a stand-alone measure*

Some contributions to the stakeholder consultation suggested that the share of women on company boards could be raised by regulating and improving the transparency of selection procedures for board positions. It has been argued that the gender imbalance on corporate boards is mainly due to intransparent selection and appointment of candidates, not necessarily on the basis of objective qualification criteria, but rather through personal networks of key shareholders and current board members. Measures to increase the transparency and competition of such appointments have been proposed either as stand-alone initiatives or flanking measures.

In most Member States, the procedure for nominating and electing the board members is largely left for the company to regulate in its company statutes or articles of association. Even where such rules exist in national company law, they are either default rules that come into play only where a company has not addressed these matters in its articles of association or they are dispositive and can be departed from by the statutes of the company. This lack of regulation can be explained by the fundamental, although not absolute, freedom to conduct a business. Any attempt to regulate the procedures for recruiting board members at EU level in more detail than necessary to achieve the aim of improving the gender balance in decision making could therefore be a considerable interference in the freedom granted by national company law and would have to be well justified.

It is questionable whether a stand-alone measure on the appointment process could lead to a sufficient increase of women on boards of publicly listed companies in order to bring about a

[74] See a detailed overview about Member Stats existing self-regulation under 6.2 in Annex 6.

change in business culture and would lead to more gender equality and whether it would be suitable to achieve the objectives. For example, measures simply obliging companies to define in advance the qualification criteria for individual board positions would not *per se* imply any enhanced necessity for companies to pro-actively look for candidates, notably including female candidates, meeting those requirements outside the usual circles and thus not be suitable to achieve the objectives. Measures with a clear focus on producing an impact on gender balance indirectly through more transparent recruitment processes without setting gender targets for the composition would thus have to regulate these processes by binding rules in much greater detail[75] and in ways that are likely to be disproportionate in view of a number of the very different settings of companies that require a certain flexibility and justify the discretion left to undertakings by company law in that respect[76] and may even be equally or even more intrusive than a gender balance objective as such. If such measures are not related to specific targets for the representation of both sexes transparency measures alone also imply a considerable risk that in spite of intense interference the results of the process will not significantly change.[77] Therefore, as a measure regulating selection procedures for board members risks to disproportionately interfere with a company's individual recruitment processes and with national company law it has been excluded as a stand-alone option.

However, it should be underlined that whilst as stand-alone measure, this option has been discarded, greater transparency in recruitment processes is included in the binding policy options (numbers 3 -5). In fact, any binding measure should comply with the CJEU's positive action case law requirements from which it follows that preference can only be given to a woman in case of equally qualified candidates. In order to establish whether two candidates are equally qualified the recruitment processes need to be made transparent, e.g. by the definition of qualification criteria[78]. If in the future a requirement will oblige companies to achieve a certain target of female presence in the board, the process will thus have to become more open and transparent automatically. At the same time, a very detailed binding regulation of the different steps of that process would not appear to be necessary and the exact shape and form of the transparency of that process can be determined by companies themselves in the light of their specific circumstances in line with the general approach taken in company law.

### *4.1.3. Increasing female participation in decision-making beyond the private sector*

Since the under-representation of women is not only a phenomenon of the private economy, but also in other areas of public life, an option would be measures to improve the gender balance in decision-making in a wide variety of sectors, ranging from companies, to the public administration, the judiciary, NGOs, associations, social partners etc.

However, several arguments plead against such a wide-ranging measure. First, as shown by the figures presented in the problem definition, the female under-representation in decision-making positions is a less acute problem in other sectors such as public administration, the judiciary and NGOs. These sectors seem to have a better ability of promoting highly qualified women to top management positions. Second, the management structure of many of these sectors is different from companies, as many of them are not governed by collective bodies such as management

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75 For example in relation to the appropriate means for publishing such posts, the process of pre-selecting candidates (e.g. a certain required percentage of members of both sexes) or even the determination of the relevant qualification criteria.

76 For example, where a major shareholder, e.g. a family, has the right to individually appoint one or more board members and traditionally appoints a family member, a publication requirement would be clearly inappropriate.

77 Without targets it would appear to be possible for companies much more easily, for example, to define the qualification requirements with a view to maintain the current patterns of board composition.

78 Such a requirement, which would be insufficient as a stand-alone measure as set out above, would be sufficient as an element in an instrument also including a gender target.

and supervisory boards, but often by a more hierarchical structure, making it more difficult to define gender objectives without violating the restrictions of CJEU case-law regarding positive action. Finally, due to the organisational autonomy of Member States, the competence for the EU to intervene in matters of management appointments in the public sector will be heavily contested, even if it can be argued that these positions are covered by the legal basis for equal treatment in the labour market (Article 157(3) TFEU). This is supported by the results of the public consultation, as none of the stakeholders identified the public sector as a problem area that requires action. For these reasons this option has been discarded.

## 4.2. Framing the remaining policy options

Having discarded a number of policy options, measures aiming at a minimum harmonisation of measures to improve gender diversity in company boards across the EU appear to be the most appropriate way to tackle the identified problems. It will, however, be necessary to further focus and narrow down the remaining policy options, taking into account the principles of subsidiarity and proportionality, as well as consistency with the EU Charter of Fundamental Rights and other Commission policies. This initial screening examines which companies should be covered by the retained options, the degree of ambition of the retained options, and the timeframe for achieving the objective in the retained options.

### *4.2.1. Scope of the options: which companies should be covered?*

In response to the public consultation, stakeholders favouring more far-reaching – in particular binding – measures argued that the target group should be restricted, both for reasons of feasibility and the possibility to control compliance. Many contributors thought that such an initiative should focus on companies listed on stock exchanges, where the public interest rationale for external intervention is greatest, due to these companies' visibility in the public domain. Others preferred targeting the companies with the highest market capitalisation, as they did not consider the criterion of listing as relevant. The size in terms of employees was often cited as a relevant criterion, with different thresholds suggested, such as 250 or 500 employees – which would exclude small and medium-sized enterprises (SME) from the scope. Finally some stakeholders thought that state-owned or publicly owned companies should be covered, irrespective of their legal form or size. Quite a number of stakeholders pleaded in favour of a gradual or differentiated approach, namely by starting an initiative with listed and/or state-owned companies and then extending it to a wider target group, or by having different requirements for different sizes of companies.

In order to adequately respond to the policy objectives as defined above, in line with the principles of subsidiarity and consistent with other EU policies, policy options under consideration should focus on **publicly listed companies**[79] with the **exception of SMEs**.

The turnover of publicly listed companies is equivalent to 68% of EU GDP.[80] In addition to their economic importance, listed companies are also highly visible. Important developments in relation to board composition are communicated and discussed in the media and are likely to have an impact by setting standards for the private sector at large. Listed companies can be described as the heart of national business. Their importance and the fact that the female representation on boards is one of the lowest compared to other areas have been the decisive criteria to choose listed companies for an EU measure.

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[79] Including both privately owned and state-owned listed companies.

[80] The high percentage is due to the fact that these companies mostly operate internationally and often worldwide

Out of the 7424 publicly listed companies in the EU in 2011, 33% or 2415 companies are small and medium-sized enterprises (**SMEs**).[81] These companies generally have less staff, a smaller turnover and smaller boards. SMEs, even when publicly listed, are often family-owned and rely on family members to serve as board directors, thereby reducing flexibility in the recruitment of board members.[82] After consulting relevant stakeholders, therefore, the inclusion of SMEs was considered to represent a disproportionate interference with the right of freedom to conduct a business as enshrined in Article 16 of the EU Charter of Fundamental Rights. In line with the Council Conclusions of June 2011[83] recommending that SMEs should be exempted from certain regulations, the Commission's Review, in 2011, of the "Small Business Act" for Europe,[84] and the Commission's 2011 report on minimizing regulatory burden for SMEs,[85] it is important to allow SMEs to pursue their business goals without imposing any disproportionate compliance costs.[86] As SMEs frequently have no own human resources department and would have to rely on the assistance of executive search firms, it would be inconsistent with Commission policies to oblige SMEs to incur additional costs to find new directors an expansion of their recruitment pool, particularly at a time of economic distress. However, it has to be noted that an EU measure would not 'exclude' SMEs. Of course SMEs are encouraged to apply the targets required by any EU measure - but they will not be obliged to do so.

In a similar vein, any policy option targeting large **companies which are not listed** on the stock exchange would also be difficult to justify in terms of subsidiarity and proportionality and would have an increased impact on the freedom to conduct a business. Like SMEs, unlisted companies tend to be owned by single individuals or families who play a crucial direct role in the management of the company. The diversity of company types and the multiplicity of various different legal regimes for unlisted companies within and across Member States, furthermore, would make it a complex exercise to determine the appropriate decision-making body or level of management where the objective for more gender diversity would have to be observed. In addition, unlisted companies are not necessarily bound by the reporting obligations that already exist for listed companies throughout the EU, as a result of which their inclusion would subject these companies to a newly established reporting regime which could significantly increase red tape. Also, in general non-listed companies are less important economically, receive less media attention and measures for non-listed companies are less likely to have the broader economic effect for the society as a whole. However, Member States could consider extending a measure to big unlisted companies in the light of the specific national circumstances.

It is nevertheless anticipated that enhanced female participation in the boards of the remaining approximately 5000 publicly listed companies could generate a spill-over effect on other companies, including SMEs and companies which are not listed on the stock exchange, owing to listed companies' visibility in the economy and their influence in terms of setting standards for industry.

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81 For the definition of SMEs see: Commission Recommendation 2003/361/EC of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (Text with EEA relevance), Official Journal L 124, p. 36-41, of 20 May 2003.

82 For instance, in Germany in listed family enterprises roughly 10-20% have family members among executive and non-executive directors. The non-executive board also tends to be smaller (5.1 members) than the average board, see: Stiftung Familienunternehmen, Börsennotierte Familienunternehmen in Deutschland.

83 Council Conclusions of 23/24 June 2011,see at: http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/123075.pdf

84 COM(2011)78 (23) final.

85 COM(2011) 803 final, Commission Report, Minimizing regulatory burden for SMEs

86 On average, where a big company spends one euro per employee to comply with a regulatory duty a medium-sized enterprise might have to spend around four Euros and a small business up to ten Euros (Report from the Expert Group on "Models to Reduce the Disproportionate Regulatory burden on SMEs", May 2007).

*4.2.2. Level of ambition*

Initiatives to increase female representation on boards of publicly listed companies in the EU should be able to bring about a sustainable change in business culture and truly break the glass ceiling with lasting effect. This raises the questions which objectives for female participation on company boards should be set, taking into account the need for sufficient flexibility to select board members. In the stakeholder consultation, proponents of a more ambitious approach supported binding objectives for company boards at levels generally ranging from 30% to 50%.

For the purpose of this impact assessment, the level of the objective in the retained policy options is assumed to be **40%**. This working assumption is in line with the targets currently under discussion and with the demands made by the European Parliament. It lies between the minimum that has been found (see below) necessary to have a sustainable impact on board performance (30% women, which roughly corresponds on average to 3 women given the average size of listed company boards) and full gender parity (50%).

As indicated above under point 2.1.5, several studies have identified the need to create a "critical mass" of women on individual company boards in order to break the glass ceiling and significantly affect company performance. Women are easily marginalised when their presence in a larger group is modest and due to their under-representation they are viewed as a token. Only if the size of the female group increases to the point that it is no longer a token minority, a fundamental and sustainable change in the boardroom can be brought about. As a result, a "critical mass" of women would enhance corporate governance, as women would no longer be seen as outsiders and would able to influence the content and process of board discussion more substantially. These studies have concluded that the critical mass of women directors is reached when boards of directors have at least 30% women and also have pointed out that where possible the threshold in terms of absolute numbers of at least three persons should be reached.[87] Several Member States and EEA countries in their national legislation have also applied the target of 40% (FI, FR, IS, and NO).[88]

The average size of company boards varies significantly between Member States (from 5.9 to 14.4). As the average number of non-executive board members is 6.39,[89] a target of 30% would mean a share of roughly 2 women which would lead to female presence below the 'critical mass'-level as identified in relation to the preferable absolute number of at least three persons of the under-represented sex where the size of the board so permits. Setting a working assumption of 40% will, on the basis of the average size of boards and thus in the majority of cases, correspond to having at least three women on boards and thus meet the critical mass both in relation to the percentage (more than 30%) and the absolute number (at least three) of women on company boards. However, any working assumption above 40% approaches full parity and would be too rigid and disproportionate with respect to the objectives.

A lower ambition level, for instance 35% or 30% would reduce proportionately the effects shown below for the different options. While for the reasons mentioned above an objective of 40% has been chosen as a working assumption, the appropriate target level achieving the

[87] Joecks, J. et al (2012). 'Women on Boards and Firm Performance: What Exactly Constitutes a 'Critical Mass'?' Available at SSRN: http://ssrn.com/abstract=2009234; Kramer, V. et al (2007). 'Critical Mass on Corporate Boards: Why Three or More Women Enhance Governance'. Available from http://vkramerassociates.com/writings/NACD%20article.pdf. Konrad, M. and Kramer, V. (2006). 'How many women do boards need?', Harvard Business Review, Forethought Gender edition December 2006; Kramer, V. et al (2007). 'Critical Mass on Corporate Boards: Why Three or More Women Enhance Governance.

[88] Some Member States have chosen different targets: NL(30%); IT (33%), (BE 33%) AT (35%).

[89] In a scenario without SMEs.

objectives identified and reaching at least the critical mass level of 30% is left to political judgment in view of these proportionately varying impacts.[90]

*4.2.3. Deadline for compliance*

For the purpose of this impact assessment, compliance by 2020 is taken as a working assumption.[91] 2020 is a date also taken into account for the Europe 2020 Strategy. The positive effects of the initiative will strengthen growth and thus support the Europe 2020 Strategy. Furthermore, in addition to the fact that this timeline corresponds to the one currently discussed at EU level and called for by the European Parliament, this deadline appears to be ambitious yet realistic and in line with the request by a majority of the public consultation respondents that companies should be given sufficient time to identify, train and select the most qualified women to be promoted to their boards. In the public consultation, the proposed timeframe varied in most cases from 3 to 8 years, most stakeholders acknowledging that a sufficient time span is required to achieve substantial progress, without putting companies in difficulty, in particular since board elections in some Member States take place only every 3 years.

Considering the divergent situations across Member States, with levels of female representation ranging from 3% to 27%, a compliance period until 2020 would enable a harmonised effort to increase the number of women on company boards throughout the EU duly taking account of the different points of departure of each Member State.[92] However, by setting the date for compliance at 2020, it was assumed that a (binding) instrument will be adopted at EU level by 2013 and transposed by the Member States by 2015, so that companies would have 5 years from the transposition deadline until the end of 2020 to comply. It also has to be taken into consideration, however, that the determination of a (binding) objective at EU level from which Member States could not derogate would already provide companies with full legal certainty that they will have to reach this objective by 2020 irrespective of the details of national transposition and would incentivise them to take the necessary preparatory measures. Therefore the effective period for companies to make the required adjustments would be 7 rather than 5 years. This is close to the upper end of the range of timeframes suggested by stakeholders in the public consultation (8 years) and should therefore allow compliance across Member States and sectors, even where female participation in boards, top management or the workforce at large is currently below average.

This is illustrated by the fact that an individual company, in order to reach the targets of policy options 3 and 4, would only have to replace one or two men by women in the non-executive board. Given that on average there are 8.31 directors on boards (1.91 executive and 6.39 non-executive directors) and that the recommended mandate of a board directorship lasts 3.1 years, the requested dimension of change seems achievable without serious problems over a period of 5 (or effectively 7) years. Even for option 5, only four Member States would be required to replace between three and four men by women in boards. In those four Member States the total number of directors exceeds the average, meaning that there is more fluctuation in general.

Against this background compliance within the given timeframe is considered feasible even in Member States or sectors with a particularly low current level of female representation. The

90 In order to keep the number of options considered manageable and in view of the fact that effects of a lower objective of 30% or 35% will be proportionately lower, this impact assessment refrains from assessing in detail the exact impacts of other conceivable target levels.

91 Recalling the general objective of any initiative to contribute to the Europe 2020 strategy, setting targets to be achieved by the year 2020 would also represent a symbolic timeframe.

92 Such a deadline would also contribute to reducing or eliminating any risk of negative short-term effects of binding measures as explained in more detail below under section 5.4.2.

plausibility of this assumption is further corroborated by the fact that all the Member States which have taken the most ambitious (binding) measures in this field have set deadlines that are tighter even where these Member States start from a very low level of female presence on boards[93]. The instrument would not impose an objective in those cases where an individual company can show that it is unable to reach the target for reasons beyond that company's control. Based on the expectation that such cases will be rather exceptional this solution appears to be more suitable than a more generous deadline for all companies hampering the effectiveness of the measure in achieving its policy objectives and going beyond the upper end of the range considered reasonable by most stakeholders[94].

Delays in the adoption process could have an impact on the deadlines with a view to guaranteeing a comparable period for companies to adapt to the measure. For the reasons set out above, it has been excluded to set a longer compliance period.

#### *4.2.4. Requirements of the CJEU case law*

In line with the requirements of the CJEU's case law, priority can only be given to a female candidate if she is at least equally qualified as the male candidate. In order to meet the objective and establish whether two candidates are equally qualified, companies not having gender-balance among their non-executive directors will need to define the qualification criteria and look for candidates of both sexes who meet the qualification profile thus making the recruitment processes more open and transparent.

Furthermore, the retained policy options cannot impose rigid quotas but should respect the CJEU case-law on positive action and the principle of proportionality, allowing for companies to justify under special conditions why they could not comply with the target, in particular in cases of a lack of equally qualified female candidates for board positions or the under-representation of women among the workforce.

Finally, also in line with the case-law and the principle of proportionality, it was also assumed that the retained policy options will only be taken on a **temporary basis** until sustainable change has been achieved. This would imply that the legal instrument would be automatically repealed after the expiration of a defined period of time, unless the legislator votes to prolong the measure after a thorough review by the Commission.

### 4.3. Retained policy options

The following 5 policy options have been retained for further impact analysis:

**Option 1:** No further action at EU level (baseline scenario).

**Option 2:** A Commission Recommendation encouraging Member States to achieve an objective of at least 40% of board members of each gender by 2020 for both executive and non-executive directors of publicly listed companies in the EU.

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93 For example, in Italy, one of the Member States with the lowest female share of board members (6%), a level of 33% has to be reached by 2015.

94 The final political judgment as to the appropriate compliance period could also include, within this general framework, a differentiation based on reasonable expectations concerning the possibility to comply differing between different areas. For example, in line with existing regulation in some Member States, e.g. in relation to a binding objective in Belgium, it may be argued that companies in public ownership should be obliged to comply earlier.

**Option 3:** A Directive introducing an objective of at least 40% of each gender by 2020 for non-executive directors of publicly listed companies in the EU.

**Option 4:** A Directive introducing an objective of at least 40% of board members of each gender by 2020 for non-executive directors of publicly listed companies in the EU and, in addition to option 3, also a flexible objective for executive directors which would be set by the publicly listed companies themselves in the light of their specific circumstances.

**Option 5:** A Directive introducing an objective of at least 40% of board members of each gender by 2020 for both executive and non-executive directors of publicly listed companies in the EU.

## 5. IMPACT ANALYSIS

Each retained policy option has been assessed in terms of its social, economic and environmental[95] impacts compared to the baseline and the extent to which it meets both the policy objectives and the broader EU objectives. Further details on the methodology for all the impacts as outlined below are provided in Annex 8.

### 5.1. Methodology to assess the impacts

#### *5.1.1. Effectiveness*

Impact on female representation on company boards

Most straightforwardly, the effects in terms of the percentage of board seats held by women are projected on the basis of full compliance in the case of fixed binding objectives and additional assumptions for non-binding or flexible targets which are explained in the assessment of the different options. If in individual cases companies are not able to achieve full compliance upon the deadline, the benefits for them and for the national economy would fully show only some time later when compliance is achieved.

As indicated above[96] studies have shown that only after a **'critical mass'** of about 30% women has been reached – and where the board size permits where at least three board members are female - gender diversity can produce significant effects, notably in terms of corporate governance and performance. It has not been possible to estimate exactly how benefits will develop in options which do not lead to a 'critical mass' level of women on boards. As a general statement it can be said that the full potential of benefits identified can only be exploited if the critical mass is reached and that benefits will be smaller than calculated if results stay below this critical mass. This effect is mentioned in the evaluation of the different options. The question only arises for option 2, the Recommendation, as in all other options the 'critical mass' level will be reached.

#### *5.1.2. Economic impacts*

Impacts on company performance

The impacts on company performance are further sub-divided into (i) impacts on corporate governance, and (ii) impacts on financial performance.

[95] None of the policy options were found to have environmental impacts.

[96] See point 2.1.5.

*Corporate governance*

As stated above, companies with more women on their boards have better corporate governance. A methodology was developed to score qualitatively the impact of the different policy options on corporate governance. Two factors have been taken into consideration to establish this scoring: (i) the effect each policy option has on the increase of female presence in board rooms and (ii) the impact female board members have on selected corporate governance indicators.

To score the effect of each policy option on the presence of women on boards, it is assumed that the impact of the policy options on corporate governance indicators increases in direct proportionality with the increase of female presence. The following "effect size" score is used: policy options that do not increase female presence on boards have "no impact" (score 0), policy options that increase female presence of women on boards receive a score which corresponds to the extent of the percentage point change, as follows: score 1: 0-5 percentage point increase; score 2: 5-10 percentage point increase; score 3: 10-15 percentage point increase, score 4: 15-20 percentage point increase, score 5: 20-25 percentage point increase, score 6: 25-30 percentage point increase and score 7: 30-35 percentage point increase.

The following nine corporate governance indicators, which have been developed by governance rating firms, have been selected. Evidence on the link between the selected indicator and the presence of female board members is detailed for each indicator in Annex 8. Based on a model developed by McKinsey (2008), each indicator has received a score to indicate the strength of the relationship between increased female presence in company boards and corporate governance ("indicator score"). As executive and non-executive board members play different roles and ultimately have various degrees of influence, some indicators are only relevant for either executive or non-executive directors.

**Table 2: Overview of corporate governance indicators**

| |
|---|
| **Accountability, Risk & Audit:** to evaluate individual and company performance and to ensure accountability and responsibility for business results. This indicator only applies to non-executive directors. The indicator score is 1. |
| **Monitoring & Control:** to measure and evaluate business performance and risk. This indicator only applies to non-executive directors. The indicator score is 2. |
| **Innovation and Creativity:** to generate flow of ideas that the company adopts and to identify new market perspectives). This indicator only applies to executive directors The indicator score is 1. |
| **Work Environment & Values:** to shape interactions between employees, generate discussions through team work and foster a shared understanding of organizational values. This indicator only applies to executive directors and the indicator score is 3. |
| **Direction & Leaders**hip: to ensure leaders shape and inspire the actions of others to drive better performance. This indicator applies to both non-executive and executive directors. The indicator score is 2. |
| **Pay Policies:** to ensure board members' earnings reflect company's performance and personal achievements. This indicator only applies to non-executive directors. The indicator score is 2. |
| **Corporate Reputation and Corporate Social Responsibility (CSR).** This indicator applies to both non-executive and executive directors and the indicator score is 2. |
| **Understanding of the Market:** to engage in constant two way interactions with customers, suppliers and other partners and to understand needs, requirements and demand trends. This indicator only applies to executive directors. The indicator score is 3. |
| **Board Dynamics:** to manage and run a company, to determine its direction, leadership, goals and market position. To ensure that board roles and responsibilities are clearly defined. This indicator applies to both non-executive and executive directors and the indicator score is 3. |

The total scoring of the impact of the policy options on each of the corporate governance indicators has been obtained by multiplying the "effect size" score by the "indicator" score. This combined score gives an indication of the relative qualitative ranking of each of the options in terms of improved corporate governance; it should not be interpreted as measuring their impact on the quality of corporate governance on some absolute scale. It has been decided to refrain from such a quantitative estimate of the impact on corporate governance because of the lack of evidence that would link each of the indicators described above to company performance directly and separately and to avoid double-counting of the positive impact of female presence on company financial performance.

*Financial performance*

Notwithstanding the large amount of research (see section 2.1 and Annex 3) showing that companies with more gender-diverse boards outperform companies with less gender-diverse boards, these studies do not give precise estimates of the scale of the impact on company performance that is directly due to increasing the gender-diversity of the company board.

To nevertheless provide an indication of the potential scale of such impact, the results of the 2004 Catalyst study[97] already referred to have been used as a starting point. Catalyst designed the 'Bottom Line' report series to establish whether an empirical link exists between gender diversity in corporate leadership and financial performance. Based on 353 Fortune 500 companies, this study provides the broadest sample[98] and the most complete information to quantify the impact that an increased presence of female board members in publicly listed companies could have on financial performance as measured in terms of return on equity (ROE) – i.e. the profit on every Euro invested by the company's shareholders. In 2011,[99] based on the same model, Catalyst found that the ROE[100] in companies with three or more women was 46% higher compared to companies with no women on boards. This is similar to the result in the 2010 McKinsey "Women Matter" report,[101] which found a 41% higher ROE for companies with the highest share of women on board compared to companies with no women on board. These results are confirmed by numerous other studies.[102]

The Catalyst results suggest that a 1 percentage point increase in the female share of a company's board members is associated with a 0.25 percentage point increase in its ROE on average. This provides a way of illustrating the potential improvement in company performance that could result from the various policy options.[103] However, many factors determine company financial performance, and it is likely that the difference in performance that was demonstrated in numerous studies is only partly due to a greater share of women on the board. In this impact assessment, for the purposes of enabling a comparison of the relative impact of the different policy options, it has been assumed that one-tenth of the difference in ROE found in the Catalyst

97 Catalyst (2004). The Bottom Line- Connecting Corporate Performance and Gender Diversity.

98 Catalyst ranked 353 Fortune 500 companies according to women on top management (bottom quartile: 0% to 5.1% women in top management; top quartile: 14.3% to 38.3% women in top management) and then compared their ROE. Companies in the top quartile had a ROE that is 34.1% (or 4.6 percentage points) higher than companies in the bottom quartile.

99 Catalyst (2011), The Bottom Line; based on data from 2005-2009.

100 Using ROE as a measure for financial performance of a company is advantageous because it indicates how the value of a company is growing. It is also an accounting indicator, meaning that the inputs to calculate ROE (shareholders equity and net income) are published in the company accounts, allowing for accurate measurement of the indicator.

101 'Women at the top of corporations: Making it happen'.

102 Ernst&Young (2012, Mixed Leadership) based on the 250 biggest companies in the EU, reports comparable results if there was at least one woman on boards, companies had, over a period of 5 years, a 89% better performance. Lückerath-Rovers, Women on board and firm performance, 2010, based on 99 Dutch listed companies in the period 2005-2007 found a difference in the ROE of 110% in companies with women on board compared to companies without women.

103 Due to lack of information by board type, it was assumed that both effects would impact on ROE separately and that the effects can be added.

survey between firms in the top and bottom quartiles in terms of the gender-diversity of their boards is directly due to these differences in gender diversity. That is, every 1 percentage point increase in the share of a company's board members who are female is assumed to lead to a 0.025 percentage point increase in its ROE. In the light of the difficulty to quantify the exact influence of a multiplicity of factors on company results this approach represents an estimate demonstrating the potential effects of enhanced gender balance on boards for company performance. However, given the magnitude of the correlation found in numerous studies and the resulting plausibility of a link this estimate appears to represent a rather conservative assumption even in the absence of an empirically proven causality.

As the Catalyst results are based on a comparison between firms with the most gender-diverse boards and those firms that have fewest women on their boards, the differences in performance they report can be interpreted as reflecting the "critical mass" effect. In the calculations below, no adjustment of this effect is made for policy options that do not achieve a "critical mass" in terms of gender diversity. Accordingly, the impact on company performance of options that fail to achieve a critical mass of women on company boards is likely to be overstated relative to those options that do achieve this critical mass, and this should be kept in mind when interpreting the results.

Impacts on long-term economic growth

An increase in female board members of publicly listed companies will have a spill-over effect on (i) the numbers of women in senior and middle management positions, with consequences for, (ii) female earnings and (iii) the return on education (see section 2).

Therefore, each policy option would have a positive impact on reducing the gender employment gap and the gender pay gap.

A methodology has been developed to score the impact of the policy options on the spill-over effect on the gender employment gap and the gender pay gap. The quantitative evidence on the impact of the number of female board members on the number of female employees at other management levels of the company and on the female earnings is based on the US study (Matsa Miller, 2011) providing the best available quality of evidence. However, no evidence has been found to quantify the spill-over effect on female employment at junior level. Furthermore it has not been possible to quantify the positive feedback impact that a larger pool of female top management would have on the gender composition of the board. Due to those limitations, it has been decided to only qualitatively score the policy options' spill-over effect in this impact assessment report. A quantitative score is provided in Annex 8.

Each policy option would also have an impact on the return to education. Given that approximately 60% of the university graduates in Europe are women and substantial investments are made publicly and privately to educate these female students, the current GEG and GPG also generate limited returns on education. The concept of the rate of return on investment in education is very similar to that of any other investment: it is a summary of the costs and benefits of the investment incurred at different points in time, and it is expressed in an annual (percentage) yield, similar to that quoted for savings accounts or government bonds. For the purpose of this IA, it has been assumed that women who will be brought to board and managerial level have already invested in formal education and that they have achieved tertiary education.

If more women were to occupy positions of economic decision-making, the reasoning goes, it is expected that investment in education would yield a higher return at both an individual and societal level.[104] In line with OECD indicators, the degree to which the costs of attaining higher levels of education translate into higher levels of earnings is estimated on the basis of the average increase in female salaries across levels. The impact on return on education is interpreted as the contribution of the policy options to increasing the individual and public sector benefits of education. A quantitative estimate is provided in Annex 8.

Investment costs

In order to comply with a target, companies are expected to invest in mechanisms to ensure that the most qualified women are identified, selected and trained, for instance through (in)formal mentoring or training programmes for internal candidates or through the use of executive search firms to find external candidates, to fully reap the associated micro-economic benefits. Investment costs will also cover costs for more transparency in selection procedures. The costs related to such mechanisms ('investment costs') are analysed for each option, based on their financial (monetary) costs and non-financial costs (value of time spent by an individual attending such a programme). It was assumed that companies will face annual investment costs between 2017 – 2020 (from 2017, as the year when it is assumed that companies will begin to invest in meeting the target until 2020, the year it is assumed the target will have to be met) as well as annual investment costs from 2021 to 2030 in order to maintain the target. It is also assumed that the time required to provide each programme was constant across Member States.

The total amount of investment costs incurred in each Member State will depend on the current level of female participation in corporate boards in each Member State, the existing provisions already introduced in each Member State and the policy option in place.

Administrative burden

Following the introduction of any of the policy options other than the baseline, companies that are obliged to implement a binding measure or choose to implement a non-binding measure will have to provide information on compliance, for example in their annual reports.[105] It is assumed that those information obligations would occur annually as of 2020 and would roughly be equivalent for each company concerned on average so that differences between the policy options are explained by the number of companies concerned. Data from case studies indicate that the administrative burden would be minimal as the only additional information requirement that companies would face would be to report the percentage of women on their boards. They could do this in the annual reports that listed companies in all Member States have to make available to their shareholders and to the public. Indeed, Article 46 (a) of the Accounting Directive 78/660/EEC[106] already requires companies to include in their annual report a corporate governance statement which contains in particular information on the composition of their boards.

Member States' review of such reports was also not regarded as very time-consuming. In addition, it is assumed that the time required to produce (by a company) and assess (by a Member State) a report was constant across Member States and would remain the same for all

[104] For individuals: (a) net benefits are calculated based on gross earnings, income tax, social contributions, transfers, unemployment benefits, and grants; and (b) costs are calculated based on direct costs and forgone earnings whilst in education. For the public sector: (a) net benefits are calculated based on forgone taxes on earnings, income tax, social contributions, transfers, unemployment benefits and grants; and (b) costs are calculated based on direct costs.

[105] As even non-binding measures on gender diversity are often combined with an obligation to make the situation transparent it is assumed that this administrative burden would also arise for a non-binding measure.

[106] Fourth Council Directive 78/660/EEC of 25 July 1978 based on Article 54(3)(g) of the Treaty on the annual accounts of certain types of companies.

binding options. However, the costs in time varied by Member States based on variation in salary levels.

### *5.1.3. Social impacts*

Measures to increase female representation on boards of publicly listed companies in the EU will have a positive effect on society as a whole in terms of enhanced gender equality, and it will bring specific benefits on associated elements such as company reputation, the development of role models, changes in recruitment policies and employees' identification with a company. Beyond the immediate impact of the policy measures on board representation as result of a Recommendation or even a legal obligation it is the entirety of these factors that ensure the demand side barriers are not only moderately reduced while measures last but bring about a sustainable change in business culture and significantly reduce the demand side barriers with a lasting effect.

Depending on the policy options it can be expected, to different degrees, that companies' representatives will make less use of stereotypes and preconceptions when it comes to identifying candidates for posts on boards. Companies will have to engage more in a serious all-encompassing search for the best qualified candidates including the female talent pool and organise the selection process accordingly. Companies will build up and train their own female staff better in order to establish their own recruitment pool. Companies will also enhance the number of role-models,[107] mentors and sponsors for other women. All this will lead to more well-performing women on boards which again will lead to stereotypes diminishing and ultimately to a different business culture thus sustainably tackling the problem drivers underlying the current under-representation of women.

To qualify these social benefits, it is assumed that the social impacts proportionally increase with the effect that the policy option has on female presence among both executive and non-executive board members. The effects of the options are scored as follows: score 1: 0-5 percentage point increase; score 2: 5-10 percentage point increase; score 3: 10-15 percentage point increase, score 4: 15-20 percentage point increase, score 5: 20-25 percentage point increase, score 6: 25-30 percentage point increase and score 7: 30-35 percentage point increase.

## 5.2. Option 1: No new action at EU level (baseline scenario)[108]

Since this policy option is identical with the baseline scenario it can obviously not produce any impacts compared to the baseline.

The developments of female presence on company boards, estimated under the baseline scenario to increase to 20.84% in 2020, were fed into the economic models in order to calculate the following benchmarks against which the other policy options are assessed:

- On average, 20.84% female board members and 34.84% female managers.
- The <u>ROE</u> is on average 10.78% for listed companies in the EU-27. Based on data from Bloomberg and Capital IQ (Standard and Poors) and 2011 values, this is equivalent very roughly to net income of about €600 billion, or an average of €125 million per listed company.

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[107] Including, for example, for female entrepeneurship.

[108] The figures presented for all options in this impact assessment are based on the Matrix study and are based on a scenario without SMEs.

- The gender employment gap at board level in 2020 is 343% at board level and 118% at managerial level.[109] This means that men are more than four times as likely as women to occupy a board position, and more than twice as likely to be managers.
- The unadjusted gender pay gap[110] in listed companies is 23.72% on average.
- The average return on education for individuals is 18.20% and 22.11% for the public sector.

This is the policy option favoured by a majority of business stakeholders as well as a number of Member States (CZ, HU, NL and SE). They consider that the choice whether to take measures to increase the female presence on boards and what kind of measures should be entirely left to individual companies, and that no EU measures are needed. These stakeholders are optimistic that, due to the business and image benefits to be expected, companies will indeed take action and appoint more women to their boards. Other stakeholders (e.g. women associations, shareholder associations, trade unions) hold, on the contrary, that this approach of self-regulation and voluntary measures – which has been pursued over more than 10 years now – has failed and that strong action at EU level is now needed.

This policy option would obviously have the smallest impact on the fundamental rights enshrined in the Charter, or even no impact at least as far as the EU level is concerned. There would neither be a beneficial impact on equality between women and men (Article 23) and the freedom to choose an occupation and right to engage in work (Article 15), nor would there be any negative impact on the freedom to conduct a business (Article 16) and the right to property (Article 17). Binding measures or soft regulation in Member States do have an impact on those fundamental rights, but as they would not be implementing Union law, the Charter would not be applicable pursuant to its Article 51(1).

## 5.3. Option 2: Recommendation

The impact of option 2 depends on whether and how Member States will take action. This option could lead to additional – more focussed – soft-law measures and self-regulation at national level, additional binding measures at national level, or have no effect at national level. In case of non-binding measures, the effect will also depend on companies' compliance.

Two Member States (FI and LV) expressed their preference for an EU-level Recommendation. Some companies and business-related stakeholders stated that they would also accept a recommendation or some form of 'soft' targets to be set by an EU-level initiative. The effectiveness of such 'soft' measures is, however, put into question by a number of stakeholders advocating stronger measures.

### *5.3.1. Effectiveness*

A Recommendation, due to its non-binding nature and in the light of past experience (Recommendations have been used in this field since 1984),[111] is assumed to be limited in its effects and to have a potential impact mainly by tipping the balance in favour of non-binding/

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[109] It is calculated as the difference between the participation of men and women divided by the participation of women.

[110] The unadjusted gender pay gap is the difference between hourly wages of male and female employees which has not been corrected according to individual characteristics that might explain part of the earnings difference. It comprises both potential discrimination and pay discrepancies that are not related to discrimination as such.

[111] See footnote 1.

binding action only in those Member States where such measures are currently under considerable discussion but have not yet received the necessary support[112].

Accordingly, under this option, by 2020 the presence of females on boards of publicly listed companies increases to 23.57% (8.47% executive and 28.09% non-executive board members), which is a 2.73% point increase at board level compared to the baseline scenario. As the 'critical mass' is not reached for board members, the effects as described below might be slightly lower.

#### *5.3.2. Economic impacts*

Impact on company performance

As option 2 covers both executive and non-executive directors, it has an impact on all 9 corporate governance indicators.

Option 2 leads to an increase in female presence among both executive and non-executive directors of 0.66 percentage points and 3.35 percentage points respectively, leading to an effect size of 1 for both executive and non-executive directors. Multiplying the "effect size" score with the "indicator score" for each indicator leads to the following score:

**Table 3: Corporate governance score for policy option 2**

| Indicator | Target group & Indicator score | Effect size score | Score |
|---|---|---|---|
| Accountability Risk & audit | Non-executive Directors: 1 | Executive Directors: 1<br>Non-executive Directors: 1 | 1 |
| Monitoring & control | Non-executive Directors: 2 | Executive Directors: 1<br>Non-executive Directors: 1 | 2 |
| Innovation & creativity | Executive Directors: 1 | Executive Directors: 1<br>Non-executive Directors: 1 | 1 |
| Work environment & values | Executive Directors: 3 | Executive Directors: 1<br>Non-executive Directors: 1 | 3 |
| Direction & Leadership | Executive Directors: 2<br>Non-executive Directors: 2 | Executive Directors: 1<br>Non-executive Directors: 1 | 4 |
| Pay Policies | Non-executive Directors: 2 | Executive Directors: 1<br>Non-executive Directors: 1 | 2 |
| Corporate Reputation & CSR | Executive Directors: 2<br>Non-executive Directors: 2 | Executive Directors: 1<br>Non-executive Directors: 1 | 4 |
| Understanding of the Market | Executive Directors: 3 | Executive Directors: 1<br>Non-executive Directors: 1 | 3 |
| Board Dynamics | Executive Directors: 3<br>Non-Executive Directors: 3 | Executive Directors: 1<br>Non-executive Directors: 1 | 6 |
| **Total score** | | | **26** |

Option 2 thus has a moderate impact on improving all aspects of corporate governance. Due to the expected slight increase in the number of female executive and non-executive directors, in particular the board dynamics and corporate reputation and CSR will be slightly positively affected.

Under option 2, the illustrative calculation described in section 5.1.2 shows an increase in average return on equity by 0.07 percentage points or 0.67% compared to the baseline. Following the approximate calculations shown for the baseline, these percentage changes would be equivalent to an increase in the net income of listed companies of about €4 billion.

This increase would be concentrated in those Member States and firms that take action following the recommendation.

112 For more details on these assumptions consult Annex 8.

Investment costs

Investment costs arise only in Member States following a Recommendation and, in the case of non-binding national measures, only for companies that respond. On that basis, the total annual investment costs in the EU will be €3.7 million for the period 2017 – 2020 and €651,800 for the period 2021 – 2030.

Impact on long-term economic growth

Compared to the baseline, the increased female presence at board level will also imply a higher representation at the managerial level. Therefore, the gender employment gap and the gender pay gap in listed companies in option 2 will be moderately reduced compared to the baseline scenario.

Option 2 will also have a moderate impact on the return on education for employment in listed companies both for individuals and for the public sector.

Administrative burden

Under the assumption that all Member States taking measures - also those that only take non-binding options - will monitor progress, the total annual average annual administrative burden for the costs of monitoring in the EU-27 is estimated at €93,005. The total costs of reporting for all companies affected will be €115,563.

*5.3.3. Social impacts*

Since option 2 leads to a roughly 3 percentage point increase of women on company boards compared to the baseline, this option will have a fairly small impact on gender equality and the associated elements (score: 1). Consequently, this option is expected to only have a limited impact on reducing the influence of the demand side barriers.

To the extent that the Recommendation will achieve its objective of increasing the proportion of women on company boards and in managerial positions in the economy and thereby reducing gender gaps, it will positively contribute to the promotion of the right to equality between women and men in the labour market (Article 23) and of women's freedom to choose an occupation and right to engage in work (Article 15).

Inasmuch as action by Member States following up to the Recommendation has to be considered as implementing EU law within the meaning of Article 51(1) of the Charter, Member States would have to ensure that the negative impact on the freedom to conduct a business (Article 16) and the right to property (Article 17) is minimised as far as possible in order to respect the essence of these fundamental rights. The proportionality of these limitations can be ensured.

## 5.4. Option 3: Directive with a 40% target for non-executive board members

This policy option is binding on listed companies across the EU, which will have to take necessary measures to ensure that, by 2020, at least 40% of their non-executive board members will be female while executive members would not be covered.

This kind of binding option is favoured by a large group of stakeholders, ranging from women organisations, shareholder associations, NGOs, a few business stakeholders to some Member States (AT and FR), even though some of these organisations suggest a lower (30%) or higher

(50%) threshold, a shorter timeframe or the inclusion of all (i.e. also executive) board members (and sometimes also higher and middle management). The majority of business associations and companies are opposed to any binding measures.

As to the feasibility of this option, even if there are considerable differences among Member States and sectors with respect to the current level of female participation on boards and in the workforce at large, a timeframe of 5 (or effectively 7[113]) years seems sufficient to comply.

As can be seen from table 8 in Annex 8, the highest replacement obligation exists in two Member States where on average 2.7 additional women are required. In 11 Member States on average less than 1 woman is required to replace a male board member, in 9 Member States on average between 1 and 2 women have to replace male board members and in 6 Member States between 2 and 3 women are required. As far as sectoral differences are concerned, it has to be taken into account that for most positions non-executive directors do not have to have specific knowledge of the sector the company is working in. A non-executive director has a supervisory task requiring general knowledge and experience and an overview of market developments or for example financial and accounting skills that are not related to one specific sector. Therefore, it should be possible in general to find qualified female persons with these qualifications within the timeframe.

As far as differences between Member States are concerned the long timeframe should put even the companies in those with a currently very low female board representation in a position to comply. In that context it needs to be taken into account that most of the listed companies in question operate internationally and that even in the event of a limited pool of candidates in the same Member State they could consider recruiting non-executive directors from abroad.

A binding objective would oblige companies to pro-actively look for qualified female candidates, to expand beyond the usual and often opaque recruitment procedures and thus automatically bring about an improvement to the transparency of these processes[114]. Transparency obligations imposed under such an instrument would not have to regulate the selection and appointment process in detail. They could essentially be limited to a requirement to pre-define the qualification standards for the board positions in order to ensure that choices between candidates can be measured against these standards. Companies would then have to make a sincere effort to find a sufficient number of female candidates with the required profiles. At the same time, this rather non-intrusive requirement would enable the application of the case-law of the CJEU on positive action ensuring full compliance with the principle of proportionality[115].

Finally, any binding option would allow derogations for companies that could not find qualified female candidates, in order to ensure that sectors in Member States where it has not been possible to identify at least equally qualified women for board positions are not penalised (although it is expected that this possibility will be less relied on for non-executive director positions, where sector-specific experience is often not indispensable). Therefore compliance with this option seems feasible[116].

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[113] See above point 4.2.3.

[114] See above point 4.1.2.

[115] These considerations concerning the shape and form of transparency obligations are identical for all the following options including legally binding objectives. They are not repeated in the assessment of those options.

[116] Under the assumption that a derogation for cases of lack of equally qualified female candidates will allow companies to justify non-compliance, the feasibility of implementation was not analysed more in detail for sectors like the automobile or chemistry industry, where the highest numbers of additional women will be required.

### 5.4.1. *Effectiveness*

Based on the assumption that all companies comply with the target due to the existence of sufficiently deterrent sanctions,[117] option 3 generates by 2020 an increase to 32.58% of women on boards, an increase by 11.74% points compared to the baseline scenario (20.84%). This is due to the fact that that female non-executive directors' presence will increase to 40%. The critical mass level is reached by this option; therefore the predicted benefits are expected to fully materialise.

### 5.4.2. *Economic impacts*

Impact on company performance

As option 3 only covers non-executive directors, it has an impact on 6 corporate governance indicators.

Option 3 leads to an increase in female presence among non-executive directors of 15.25 percentage points, leading to an effect size of 4 for non-executive directors. Multiplying the "effect size" score with the "indicator" score, leads to the following score:

**Table 4: Corporate governance score for policy option 3**

| Indicator | Target group & Indicator score | Effect size score | Score |
|---|---|---|---|
| Accountability Risk & audit | Non-executive Directors: 1 | Non-executive Directors: 4 | 4 |
| Monitoring & control | Non-executive Directors: 2 | Non-executive Directors: 4 | 8 |
| Innovation & creativity | Executive Directors: 1 | Non-executive Directors: 4 | - |
| Work environment & values | Executive Directors: 3 | Non-executive Directors: 4 | - |
| Direction & Leadership | Executive Directors: 2<br>Non-executive Directors: 2 | Non-executive Directors: 4 | 8 |
| Pay Policies | Non-executive Directors: 2 | Non-executive Directors: 4 | 8 |
| Corporate Reputation & CSR | Executive Directors: 2<br>Non-executive Directors: 2 | Non-executive Directors: 4 | 8 |
| Understanding of the Market | Executive Directors: 3 | Non-executive Directors: 4 | - |
| Board Dynamics | Executive Directors: 3<br>Non-Executive Directors: 3 | Non-executive Directors: 4 | 12 |
| **Total score** | | | **48** |

Option 3 thus has a visible impact on improving corporate governance. Due to the expected increase in female non-executive directors, in particular the board dynamics will be positively affected.

Under option 3, the illustrative calculation described in section 5.1.2 shows an increase in average return on equity by 0.28 percentage points or 2.61% compared to the baseline. Following the approximate calculations shown for the baseline, these percentage changes would be equivalent to an increase in the net income of listed companies of about €15.7 billion. For an average company this would mean an increase in net income of about €3.1 million compared to the baseline.

While the potential for improved financial company performance in general has been estimated on the basis of experience gained with company performance in cases of higher female

[117] The assumption of full compliance is made for all binding measures.

representation achieved without binding obligations imposed by law there is a discussion as to whether the same results could be expected following the introduction of a binding quota or whether one would even have to reckon with a lower positive or even a short-term negative impact on company results due to the imposition by law. Several studies analysing the effect of the Norwegian legislation as the only precedent until 2011 have looked into its impact on financial company performance and come to diverging results concluding that there was either a positive, a neutral or a negative short-term impact on company performance. The evidence on this point is by no means conclusive. One of them (Ahern and Dittmar)[118] identified a short-term risk of negative impact on financial performance while others (e.g. Nygaard) came to more positive results as regards investor's anticipation.[119] Ahern and Dittmar looked into reactions of shareholders of 166 Norwegian companies after the announcement that binding quotas were introduced in Norway and found that companies saw their market value decline around the time of the announcement of the law and they found a drop in Tobin's Q in the following years. They stressed that the loss of value was not caused by the sex of the new board members but rather by their lack of high level work experience and lack of the necessary competencies and skills. However, there is ample evidence acknowledging a positive effect on company performance of more gender balance on boards.

It should be noted that in Norway the situation was very different from a binding measure which could be adopted in the EU.[120] In Norway, the 40% objective had to be met in a short deadline of two years and companies had not enough time to prepare. The Norwegian law does not provide for any justification for companies that do not comply with the objective and are therefore threatened with dissolution, even in the event of a lack of qualified female candidates. Therefore any risk, should it exist, could be mitigated or excluded in an EU measure by ensuring that priority to a female candidate can only be given in case of better of equal qualification, and giving enough time for compliance. In addition, the investment costs assessed in this report estimate the expenses that would be necessary to train or identify candidates for board positions with sufficient qualifications to mitigate or eliminate any such risk.

Furthermore, it should be underlined that in option 3, the potential risk would in any case already be limited from the outset since this option only applies to non-executive directors. Due to their tasks of a supervisory nature, they need general skills more than specialised professional experience in the particular domain where the company is active. Executive members in comparison tend to need more experience and expertise in the specific sector concerned since they have to run the day-to-day management.

It has not been possible to quantify any potential short term risk for option 3 but on the basis of the above considerations it can be assumed to be very limited at the most.

Investment costs

In option 3 all the covered listed companies in all Member States have to ensure the constant availability of (female) candidates to comply with a binding target. For this option, the total annual investment costs in the EU for the period 2017-2020 will amount to roughly €16.6 million

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118 Ahern, Dittmar, 2011, The changing of the boards: the value effect of a massive exogenous shock.

119 Nygaard (2011) finds that investors anticipated the new (female) directors to be more effective in firms with less information asymmetry between insiders of the firm and outsiders. Firms with low information asymmetry experience positive Cumulative Abnormal Returns (CAR). Dale-Olsen et al (2011-2012) came to the result that the Norwegian reform contributed to increase return n assets for a previously badly performing firm.

120 Annex 9 provides further background information on the Norwegian case.

and roughly €3 million for the period 2021-2030.[121] These investment costs are not negligible but they are very modest in relation to the benefits at company level presented above, even leaving aside the macroeconomic considerations.

Impacts on long-term economic growth

Compared to the baseline, the impact on gender employment gap and gender pay gap in option 3 will be good. The impact on the return on education of the option 3 for both individuals and for the public sector will be moderate compared to the baseline

Administrative burden

Based on the model described above, policy option 3 leads to a total annual burden of monitoring for all Member States of €100,000 and a total annual cost of reporting for all companies in the EU of €124,000.

### *5.4.3. Social impacts*

Since policy option 3 leads to a 11.74% points increase of women on company boards of women on board, this option will have a quite good impact on gender equality and the associated elements (score: 3). Consequently, this option is only expected to have a moderate impact on reducing the influence of the demand-side barriers.

As far as impacts on fundamental rights are concerned, Option 3 would have a clear beneficial impact on equality between women and men (Article 23) and on women's freedom to choose an occupation and right to engage in work (Article 15). It clearly also represents a limitation to the freedom to conduct a business (Article 16) and the right to property (Article 17) of owners and shareholders of companies in that it restricts their right to determine by whom the company is managed and supervised. However, such limitation still respects the principle of proportionality and safeguards the essence of those rights since it leaves a sufficiently wide margin of choice for selecting board members. Companies do not face restrictions in defining qualification requirements and in the appointment of the best qualified candidates and the instrument only affects the overall gender composition of the body. Moreover, the limitation is much lighter if the binding objective only covers non-executive directors who are not involved in day-to-day management tasks.

## 5.5. Option 4: Directive with a 40% target for non-executive board members and a flexible target for executive board members

With respect to non-executive boards, option 4 does not differ from option 3. With respect to executive boards or board members, option 4 introduces a "flexi-quota", which means that listed companies will be required to set their own individual targets for female presence in the executive board. Once the target has been communicated to the relevant national authority, should the company not comply with it, sanctions will apply. As companies set their own targets for the 'flexi-quota' and otherwise there is no change compared to option 3, as regards feasibility of compliance. The explanations given for option 3 in relation to non-executive directors apply accordingly.

[121] The average annual investment costs per company are estimated at € 3.327 for the period 2017 – 2020 and € 600 for the period 2021 – 2030.

Stakeholder views are obviously very similar to those for option 3. The flexible target[122] for executive directors would be favoured by a number of stakeholders that advocate an initiative starting with non-executive board members, to be followed later by executive directors.

### 5.5.1. *Effectiveness*

It is assumed that in order for companies to do the minimum to signal compliance and ambition, amongst others for reputational reasons under a flexi quota, each company would replace one man with one woman (leaving the average board size unchanged). This represents an increase of 85% (nearly doubling the number of executive female board members from 1.1 to 2.1). As there has been a declining trend in the average board size over the last decade, it is assumed that the companies will leave the board size unchanged as opposed to increasing it.

Based on these assumptions, option 4 generates 34.11% of women on boards by 2020, an increase of 13.27% points compared to baseline scenario. This is due to the fact that on top of a 40% target for non-executive directors, female presence among executive directors will change to 14.44% (an increase of 6.63 % points compared to the baseline scenario). This option achieves the 'critical mass' level and it can thus be expected that the predicted benefits will fully materialise.

### 5.5.2. *Economic impacts*

Impact on company performance

As option 4 covers both executive and non-executive directors, it has an impact on all 9 corporate governance indicators.

Option 4 leads to an increase in female presence among non-executive directors of 15.25% points and to an increase in female executive directors or 6.63% points, leading to an effect size of 4 for non-executive directors and of 2 for executive directors. Multiplying the "effect size" score with the "indicator" score, leads to the following score:

**Table 5: Corporate governance score for policy option 4**

| Indicator | Target group & Indicator score | Effect size score | Score |
|---|---|---|---|
| Accountability Risk & audit | Non-executive Directors: 1 | Executive Directors: 2<br>Non-executive Directors: 4 | 8 |
| Monitoring & control | Non-executive Directors: 2 | Executive Directors: 2<br>Non-executive Directors: 4 | 8 |
| Innovation & creativity | Executive Directors: 1 | Executive Directors: 2<br>Non-executive Directors: 4 | 2 |
| Work environment & values | Executive Directors: 3 | Executive Directors: 2<br>Non-executive Directors: 4 | 6 |
| Direction & Leadership | Executive Directors: 2<br>Non-executive Directors: 2 | Executive Directors: 2<br>Non-executive Directors: 4 | 12 |
| Pay Policies | Non-executive Directors: 2 | Executive Directors: 2<br>Non-executive Directors: 4 | 8 |
| Corporate Reputation & CSR | Executive Directors: 2<br>Non-executive Directors: 2 | Executive Directors: 2<br>Non-executive Directors: 4 | 12 |
| Understanding of the Market | Executive Directors: 3 | Executive Directors: 2<br>Non-executive Directors: 4 | 6 |
| Board Dynamics | Executive Directors: 3<br>Non-Executive Directors: 3 | Executive Directors: 2<br>Non-executive Directors: 4 | 18 |
| **Total score** | | | **80** |

[122] The idea of a flexible target as such has been mentioned by some German stakeholders, as it has been proposed in the first place by the German Minister in charge of the file.

Option 4 thus has a large impact on improving all aspects of corporate governance. Due to the expected increase in both female executive and non-executive directors, in particular, the board dynamics, corporate reputation & CSR and direction & leadership will be positively affected.

Under option 4, the illustrative calculation described in section 5.1.2 shows an increase in average return on equity by 0.32 percentage points or 2.92% compared to the baseline. Following the approximate calculations shown for the baseline, these percentage changes would be equivalent to an increase in the net income of listed companies of about €17.5 billion. For an average company this would mean an increase in net income of about €3.5 million compared to the baseline.

As regards a potential short-term risk for company performance due to the binding nature of the measure, in principle the considerations set out for option 3 apply here as well. While the same general safeguards as under option 3 apply here it has to be taken into account that option 4 also covers executive directors. The flexible nature of the binding objective for those directors enables companies to avoid any negative impact through the setting of a self-imposed target. Therefore any possible additional short-term risks for this option have to be considered very limited. This limited risk could not be quantified.

<u>Investment costs</u>

For option 4, the total annual investment costs in the EU for the period 2017-2020 will amount to roughly €18.3 million and roughly €3.5 million for the period 2021-2030.[123] These investment costs are not negligible but they are very modest in relation to the benefits at company level presented above, even leaving aside the macroeconomic considerations.

Impacts on long-term economic growth

Compared to the baseline, the impacts on the <u>gender employment gap</u> and the gender pay gap of option 4 will be significant.

The impact on average <u>return on education</u> in the option 4 both for individuals and for the public sector compared to the baseline scenario is quite good as well.

Administrative burden

Based on the model described above, policy option 4 leads to a total annual burden of monitoring for all Member States of €100,000 and a total annual cost of reporting for all companies in the EU of €124,000. The burden is not assumed to change significantly as compared to option 3 since in both options all listed companies are obliged to provide short information.

[123] The average annual investment costs per company are estimated to be € 4.821 for the period 2017 – 2020 and €915 for the period 2021 – 2030.

#### *5.5.3. Social impacts*

Since policy option 4 leads to a 13.27% points increase of women on company boards, this option will have a quite good impact on gender equality and the associated elements (score: 3). Consequently, this option is expected to have a positive impact on reducing the influence of the demand-side barriers.

As far as impacts on fundamental rights are concerned, Option 4 would have a clear beneficial impact on equality between women and men (Article 23 Charter) and on women's freedom to choose an occupation and right to engage in work (Article 15). It clearly also represents a limitation to the freedom to conduct a business (Article 16) and the right to property (Article 17) of owners and shareholders of companies in that it restricts their right to determine by whom the company is managed and supervised. However, such limitation still respects the principle of proportionality since it leaves a sufficiently wide margin of choice for selecting board members and does not go beyond what is necessary to achieve the intended objective. Companies do not face restrictions in defining qualification requirements and in the appointment of the best qualified candidates and the instrument only affects the overall gender composition of the body. Moreover, the limitation is much lighter if the binding objective only covers non-executive directors who are not involved in day-to-day management tasks.

### 5.6. Option 5: Directive with a 40% target for both non-executive and executive directors

Option 5 would oblige Member States to introduce a binding target of 40% for executive and non-executive board members.

As the farthest reaching option covering also executive directors, it would be considered by the vast majority business stakeholders as an unacceptable interference in the daily management of companies. The coverage and the level of the target correspond, however, to the requirements of the French Law of 27 January 2011 (with a deadline already in 2017). On the other side of the spectrum, a number of stakeholders hold that, only by including the executive level of management, can real follow-on effects through the lower ranks of management and the entire workforce be expected. However, even some women's organisations[124] consider that only the supervisory positions should be covered by a binding objective – at least in a first stage.

As to the feasibility of the measure, this option is the most difficult for the companies to comply with. In four Member States companies will on average have to change from 3.2 to 3.8 persons in their boards. In these Member States, the average size of boards of listed companies (SMEs excluded) is between 8.73 and 13.45 directors, meaning that in these Member States companies will have to make a big effort to replace significant parts of their male board members by qualified women. In 9 Member States companies will have to change more than 2 directors on boards; in 8 Member States companies will have to change more than one director on boards and in 4 Member States the mathematical 40% level would be achieved with a change of less than one person.[125] These figures cover the total number of executive and non-executive directors, which on average in EU27 stands at 8.31 directors (SMEs excluded).

[124] E.g. Frauen in die Aufsichtsräte e.V. (FidAR).

[125] See table 8 in Annex8

In the light of a bigger need for sector-specific knowledge and experience for executive directors in charge of the day-to-day management of a company difficulties to comply with the objective for these directors may arise in areas where the female talent pool is particularly restricted. In sectors such as the mining, metal or automobile industries, qualified female staff and managers may sometimes be in short supply. However, given that a binding instrument would allow for derogations for companies that could not find a qualified female candidate in particular for executive positions, compliance with this option still seems feasible.

### *5.6.1. Effectiveness*

Based on the assumption of full compliance, option 6 generates by 2020 a 40% female presence among both executive and non-executive directors, an increase of 19.16% points at board level compared to the baseline scenario.

### *5.6.2. Economic impacts*

Impact on company performance

As option 5 covers both executive and non-executive directors, it has an impact on all 9 corporate governance indicators.

Option 5 leads to an increase in female presence among non-executive directors of 15.25% points and to an increase in female executive directors of 32.19% points, leading to an effect size of 4 for non-executive directors and of 7 for executive directors. Multiplying the "effect size" score with the "indicator" score, leads to the following score:

**Table 6: Corporate governance score for policy option 5**

| Indicator | Target group & Indicator score | Effect size score | Score |
|---|---|---|---|
| Accountability Risk & audit | Non-executive Directors: 1 | Executive Directors: 7<br>Non-executive Directors: 4 | 4 |
| Monitoring & control | Non-executive Directors: 2 | Executive Directors: 7<br>Non-executive Directors: 4 | 8 |
| Innovation & creativity | Executive Directors: 1 | Executive Directors: 7<br>Non-executive Directors: 4 | 7 |
| Work environment & values | Executive Directors: 3 | Executive Directors: 7<br>Non-executive Directors: 4 | 21 |
| Direction & Leadership | Executive Directors: 2<br>Non-executive Directors: 2 | Executive Directors: 7<br>Non-executive Directors: 4 | 22 |
| Pay Policies | Non-executive Directors: 2 | Executive Directors: 7<br>Non-executive Directors: 4 | 8 |
| Corporate Reputation & CSR | Executive Directors: 2<br>Non-executive Directors: 2 | Executive Directors: 7<br>Non-executive Directors: 4 | 22 |
| Understanding of the Market | Executive Directors: 3 | Executive Directors: 7<br>Non-executive Directors: 4 | 21 |
| Board Dynamics | Executive Directors: 3<br>Non-Executive Directors: 3 | Executive Directors: 7<br>Non-executive Directors: 4 | 33 |
| **Total score** | | | **146** |

Option 5 thus has a significant impact on corporate governance. Due to the expected increase in both female executive and non-executive directors, in particular direction and leadership, corporate reputation & CSR and board dynamics will be positively affected.

Under option 5, the illustrative calculation described in section 5.1.2 shows an increase in average return on equity by 0.43 percentage points or 3.95% compared to the baseline. Following the approximate calculations shown for the baseline, these percentage changes would be equivalent to an increase in the net income of listed companies of about €23.7 billion. For an average company this would mean an increase in net income of about €4.7 million compared to the baseline.

Investment costs

Under option 5 it is expected that total annual investment costs in the EU for the period 2017-2020 will amount to roughly €26.5 million and roughly €5 million for the period 2021-2030.[126] These investment costs are not negligible but they are very modest in relation to the benefits at company level presented above, even leaving aside the macroeconomic considerations.

As regards a potential short-term risk for company performance due to the binding nature of the measure, in principle the considerations set out for option 3 apply here as well. While the same general safeguards as under option 3 apply here, it has to be taken into account that option 5 also covers executive directors who are in charge of day-to-day management and therefore might be required to have experience in the specific sector in which the company operates. Candidates of the under-represented sex might be more difficult to find in some circumstances, particularly where there is severe under-representation in the workforce throughout that whole sector. A potential risk should be manageable in view of the safeguards set out under option 3 but is appreciably higher than in any other policy option. However, it is very difficult to quantify as it will depend to a large extend on previous preparations of companies, on the general share of women in high management positions and human resource policy but also on the number of companies making use of the flexibility afforded under the safeguard measures aimed at containing or eliminating such risks.

Impacts on long-term economic growth

Compared to the baseline, the gender employment gap and gender pay gap in option 5 will be very significantly reduced. The impact on the average return on education in option 5 for individuals and the public sector compared to the baseline scenario is also significant.

Administrative burden

Based on the model described above, policy option 5 leads to a total annual burden of monitoring for all Member States of €100,000 and a total annual cost of reporting for all companies in the EU of €124,000.

*5.6.3. Social impacts*

Since policy option 5 leads to a 19.16% points increase of women on company boards and thus to 40% share of women on boards, this option will have a quite good impact on gender equality and the associated elements (score: 4). Consequently, this option is expected to have a very significant impact reducing the influence of the demand-side barriers.

The positive impact on gender equality (Article 23) and on women's freedom to choose an occupation and right to engage in work (Article 15) would undoubtedly be strongest for this option. It would achieve the furthest-reaching and most sustainable change in management and business culture, with the strongest positive effects for the position of women on the labour market. The limitation to the fundamental freedom to conduct a business (Article 16) and the fundamental right to property (Article 17) of owners and shareholders of companies would be

[126] The average annual investment costs per company are estimated to amount to €5,311 for an average company for the period 2017 – 2020 and of €1,011 for the period 2021 – 2030.

more significant if gender equality considerations would limit the choice of those persons who run the enterprise on a daily basis and decide on important business transactions.

Nevertheless, other restrictions of these fundamental rights in areas such as company law, labour law and environmental law would not make this limitation appear disproportionate, especially given the importance of the intended aim of gender equality which is recognised both in the Charter and the Treaties. It can, however, be argued that such limitation needs in any case to be mitigated by a 'saving clause' which allows departing from the binding gender objective where equally qualified candidates of the under-represented sex cannot be found, e.g. in sectors where female participation in the workforce and management is particularly low and for executive positions which require specific expertise and experience in that sector. Policy makers would have to consciously take into consideration the extent of the restricting shareholders' fundamental rights when choosing this option.

## 6. COMPARISON OF POLICY OPTIONS

All policy options are expected to address the main drivers of the problem and would help to reduce the importance or even to break the "vicious circle" explaining and maintaining female under-representation in corporate board rooms. The demand-side barriers that "boardable" women are facing will be reduced due to an increase of female representation on board of listed companies.

The comparison of the consequences of the different policy options yields the result that (i) binding measures are more effective in meeting the policy objectives than non-binding measures, (ii) measures that target both executive and non-executive board members are more effective than measures only targeting one group and (iii) binding measures will generate more societal and economic benefits than non-binding measures.

At the same time, binding measures will entail comparatively larger costs and administrative burdens. Furthermore, the degree of effectiveness of the different policy options is directly linked to the extent of interference with the rights of the companies and the shareholders as their owners. Compared to a non-binding measure with a tangible yet limited effect a substantial increase of the impact in terms of the policy objectives would require an instrument with binding force prescribing minimum requirements for the composition of company boards. While the consequences of all the different policy options on fundamental rights are justifiable and in line with the principle of proportionality in view of the legitimacy of the policy objectives and the in-built safeguards, those that establish binding targets for executive board members, the persons directly responsible for the operative day-to-day management of a company produce the most beneficial effects but also represent the most significant interference.

The choice of the preferred option will therefore require a political judgement to be made as to whether the increased cost of binding measures and their greater degree of interference with fundamental rights of binding measures can be justified by their wider socio-economic benefits, or whether, on the contrary, non-binding measures are to be preferred because, although they generate less significant socio-economic benefits, and are less effective in terms of meeting the policy objectives, they also entail fewer constraints on the exercise of fundamental rights. Should preference be given to a legally binding option, the envisaged features of such an option (such as the length of the implementation period or a "saving clause" allowing derogations on certain conditions) should be sufficient to effectively eliminate or mitigate any possible short-term risks for company performance, considering that this potential risk is more likely to occur in case of legally binding measures also targeting executive board members.

The administrative burden linked to all policy options assessed is expected to be minimal, and identical per company and Member State for all retained policy options. These options would cover only publicly listed companies which are expected to be able to use existing reporting mechanisms to provide the necessary information on their compliance to the Member States. During the preliminary screening exercise of policy options, the policy options which were likely to entail higher administrative burden were discarded at an early stage.

As can be concluded from the overview table below, the policy options differ in terms of their impact on the objectives.

**The baseline scenario** means continuing at a very slow pace towards a better gender balance in board rooms. In light of the fundamental values of gender equality in the EU and the missed opportunity in terms of micro- and macro-economic benefits, "business as usual" is a scenario the EU cannot afford. The impact analysis of options 2-5 confirms the added value of EU action.

**Option 2** is estimated to only slightly increase the participation of women in company boards by 2.73 percentage points compared to option 1 (baseline). Although the investment costs and administrative burden are estimated to be higher compared to the baseline scenario, the illustrative calculation in section 5.3 indicates that ROE could increase by up to 0.07 percentage points to 10.85%. For all EU listed companies, therefore administrative burden costs of €12,000 and the investment costs of €3,7 million and €651,800 for the periods 2017-2020 and 2021-2030 respectively can be considered negligible compared to a possible benefit of about €4 billion in increased net income. The benefits of this option translate into a slight reduction of the gender employment gap and the gender pay gap compared to baseline.

**Option 3** is estimated to further increase the participation of women in company boards by 11.74 percentage points. This increase will have a visible positive influence on corporate governance of companies, too. Although the investment costs and the administrative burden for the total EU are estimated to be higher compared to option 2, the illustrative calculation in section 5.4 indicates that ROE could increase to 11.06%. For all EU listed companies, therefore administrative burden costs of €124,000 and the investment costs of €16.6 million and €3 million for the periods 2017-2020 and 2021-2030 respectively can be considered negligible compared to an increase in net income of about €15.7 billion. The benefits of this option translate into a further reduction of the gender employment gap and the gender pay gap compared to baseline and option 2.

**Option 4** is estimated to further increase the participation of women in company boards by 13.27 percentage points compared to baseline. The investment costs of roughly €5,000 are estimated to be higher compared to option 3. However, administrative burden for average companies and Member States stays the same compared to option 3. The illustrative calculation in section 5.5 indicates that ROE could increase to 11.10%. For all EU listed companies, therefore administrative burden costs of €124,000 and the investment costs of €18.3 million and €3.5 million for the periods 2017-2020 and 2021-2030 respectively can be considered negligible compared to an increase in net income of about €17.5 billion. The benefits of this option translate into a further reduction of the gender employment gap and the gender pay gap compared to the baseline and to option 3.

**Option 5** is estimated to further increase the participation of women on company boards by 19.16 percentage points. The investment costs of roughly €5,300 are estimated to be higher compared to option 4 (administrative burden for companies and Member States stay the same as under option 5). However, the illustrative calculation in section 5.6 indicates that ROE could increase to 11.21%. For all EU listed companies, therefore administrative burden costs of €124,000 and the investment costs of €26.5 million and €5 million for the periods 2017-2020 and 2021-2030 respectively can be considered negligible compared to an increase in net income of about €23.7 billion. In addition, the possible short term risks on a company's financial performance might be higher compared to options 3 and 4. The benefits of this option translate into a further reduction of the gender employment gap and the gender pay gap compared to baseline and option 4. However, option 5 would arguably be more difficult for companies to implement, as executive directors have to be chosen from people with specialised professional experience in the field. It can therefore be more difficult to find a suitable person if a gender target is imposed. Such a measure could change the internal company structure and could therefore create additional burden for companies.

**Table 7: Overview of the impact of policy options**

| | Effectiveness | Micro-economic impact | | | Macro-economic impact | | Social impacts | Admin burden |
|---|---|---|---|---|---|---|---|---|
| | Change from baseline in p.p. of female board members on average for EU-27 | Corporate performance (qualitative score) | Financial performance expressed in % change in return on equity compared to the baseline | Total EU annual investment costs over the period 2017 – 2020 and the period 2021-2030 | Impact on reducing gender employment gap and gender pay gap compared to baseline<br><br>(qualitative score) | Return on education: change compared to baseline<br><br>(qualitative score) | Impact on gender equality (quantitative score) | Annual average reporting and monitoring costs in total EU |
| PO1 (Baseline) | (20.84%) | - | (10.78%) | | | | | |
| PO2 | +2.73% | + | 0.67% | €3.7 million/€651,800 | + | + | 1 | €115,000/ €93,000 |
| PO3 | +11.74% | ++ | 2.61% | €16.6 million/ €3 million | ++ | + | 3 | €124,000/ €100,000 |
| PO4 | +13.27% | +++ | 2.92% | €18.3 million/ €3.5 million | +++ | ++ | 3 | €124,000/ €100,000 |
| PO5 | +19.16% | ++++ | 3.95% | €26.5 million/€5million | ++++ | +++ | 4 | €124,000/ €100,000 |

The impacts under the different policy options as compared above lead to the assessment of the suitability of these options to achieve the policy objectives indicated under point 3 as shown by the table below:

**Table 8: Correlation between objective and options**

| Options / Objectives | Option 1 Baseline | Option 2<br>Recommendation | Option 3<br>Directive (40% for non-executive directors) | Option 4<br>Directive (40% for non-executive directors and flexi-quota for executive directors) | Option 5<br>Directive (40% for both executive and non-executive directors) |
|---|---|---|---|---|---|
| Gender equality in boards | No direct encouragement | Moderate link as not binding | Good effect on more female non-executive directors | Significant effect on more female non-executive directors and moderate effect on executive directors | Very significant effect on both non-executive and executive directors |
| Exploit female talent pool | No direct influence | Moderate link as not binding | Good effect on exploiting pool for female non-executive directors by internal training and talent pool | Significant effect on exploiting pool for female directors by internal training and talent pool | Very significant effect on exploiting pool for female directors by internal training and talent pool |
| Reduce barriers for women aiming at board positions | No direct effect | Moderate link as not binding | More women in board positions would reduce barriers | More women on boards would reduce barriers | High reduction of barriers |
| Improve corporate governance | No direct influence | Moderate link as not binding | Direct effect on many indicators | Direct effect on all indicators | Very significant effect on all indicators |
| Operational objective | Not achieved | Not achieved throughout the EU | Achieved for non-executive directors | Achieved for non-executive directors | Achieved for both executive and non-executive directors |

## 7. MONITORING AND EVALUATION ARRANGEMENTS

In case of any policy option based on a legally binding measure at EU level (options 3-5), Member States will have to monitor whether listed companies comply with the targets and report to the Commission on the state of implementation at national level. In compliance with the principle of subsidiarity, the relevant information should be gathered primarily by Member States through relevant agencies.

The Commission will, in turn, monitor whether the legally binding instrument has been correctly transposed and implemented at national level. The Commission will report to the European Parliament and the Council on the progress made in practice at regular intervals. Monitoring activity should involve sample reviews of statements or reports, to ensure compliance with a binding instrument. During the transposition and implementation period, implementation workshops can be organised by the Commission to deal with questions/issues that might arise in the course of the implementation period. Where questions are common, guidance on how to deal with the issue may be issued by the Commission. The evaluation of effects of the preferred policy option shall be carried out to see to what extent the anticipated impacts materialise. In terms of possible downsides it will be necessary to assess whether companies have chosen to de-list from EU regulated stock exchanges as a consequence of the policy. Such an evaluation will be carried out by the Commission services. Data collection should be possible at limited cost at EU level, as it would be made broad use of existing structures and this would not require the setting up of new instruments. The existing network of legal experts will, upon the expiration of the implementation deadline, provide a study on the implementation and effects of the obligation. The results of this study would be made public.

DG MARKT's initiatives on the disclosure of non-financial information and on gender diversity policies will contribute to increasing board diversity in general and will also offer better information on board diversity policy to investors and civil society. [127] Therefore, it is complementary to any of the retained policy options: better disclosure can help in monitoring the application of a requirement on female participation in boards of listed companies.

It is expected that a legally binding EU measure will be limited in time, meaning that it will be repealed after a number of years, when sufficient progress has been made and it is expected that the trends will sustain even when the EU measure will be discontinued.

In case of a non-legally binding measure at EU level, Member States are free to decide whether and if so, what type of action they will take at national level. The Commission will monitor the situation to assess process made and regularly report to the European Parliament and the Council. If, on the basis of those progress reports, not enough progress is made, the Commission may propose legally binding measures at EU level at a later stage.

The main indicator to monitor and evaluate progress towards to the policy objectives would be the number of female board members in publicly listed companies in the EU.

[127] See for instance the proposal for the Capital requirement Directive 4 (CRD4).

## 8. List of Annexes

1. List of consulted studies
2. Results of the stakeholder consultation
3. Business case literature review
4. Background to the problem definition
5. Background on the board structure and the appointment of board members in practice
6. Background on the baseline scenario
7. Fundamental rights
8. Background on methodology of calculation of all impacts
9. Background on the Norwegian case

2. List of consulted studies

## 9. LIST OF FIGURES AND TABLES