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Michael J. Zimmer

Loyola University Chicago School of Law

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Binders Full of Women & Closing the Gap

Michael J. Zimmer*

Presidential candidate Mitt Romney used the unfortunate phrase of seeking out “binders full of women” to claim that he wanted women to fill high administrative positions once he became Governor of Massachusetts.¹ This came in the same period when Marissa Mayer, who was in her second trimester, was picked to be the CEO of Yahoo² and Anne-Marie Slaughter was writing in *The Atlantic* that she had to leave her position in the State Department because her children needed her.³ Cracking through the glass ceiling to top-level positions is not only a hot topic in the United States but is in the European Union as well. On November 14, 2012, the European Commission adopted a proposed Directive that would require EU member states to require that boards of large European corporations be made up of “40% of the underrepresented gender” for non-executive, outside director seats.⁴ If the European Council and Parliament both adopt

* Professor of Law, Loyola University Chicago School of Law. My thanks to my research assistant, Lisa Dannewitz JD 2014, Francesca Marinelli, Ricercatore di Diritto del Lavoro, Università Degli Studi di Milano, and Loyola research librarian Joe Mitzenmacher. I also want to thank my co-authors, Roger Blanpain, Susan Bisom-Rapp, Bill Corbett and Hilary Josephs. As always my thanks to Margaret Moses.

¹ In response to a question in a debate about equal pay for women, Romney said, “I went to a number of women’s groups and said, ‘Can you help us find folks?’ and they brought us whole binders full of women.” *Romney ‘Binders Full Of Women’ Female Hiring Boast Falls Apart*, HUFFPOLITICS BLOG (Oct. 17, 2012, 1:27 PM), http://www.huffingtonpost.com/2012/10/17/romney-binders-full-of-women_n_1974092.html. Beyond being rather creepy because it could be interpreted as binders on women in the sense of restrictions, his statement was not true. Josh Hicks, *Fact checking Romney’s ‘binders full of women’ anecdote*, THE FACT CHECKER: THE TRUTH BEHIND THE RHETORIC BY GLENN KESSLER (Oct. 18, 2012, 10:00 AM), http://www.washingtonpost.com/blogs/fact-checker/post/fact-checking-romneys-binders-full-of-women-anecdote/2012/10/18/42f4cd38-18cb-11e2-9855-71f2b202721b_blog.html.

² Julia Haskins, *Marissa Mayer, Yahoo CEO, Welcomes a Baby Boy*, PEOPLE (Oct. 1, 2012, 4:55 PM), <http://www.people.com/people/article/0,,20635072,00.html>.

³ Anne-Marie Slaughter, *Why Women Still Can’t Have It All*, THE ATLANTIC, July/Aug. 2012, available at <http://www.theatlantic.com/magazine/archive/2012/07/why-women-still-cant-have-it-all/309020/>.

⁴ *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*, at 5, COM (2012) 614 final (Nov. 14, 2012), available at

this,⁵ the Directive will have significant impact on the gender composition of these boards of directors. However, it may also impact gender equality for employment in these companies and, perhaps, the success of the businesses in the market.⁶

This paper will discuss the background leading up to the Directive being proposed, its scope and also how it might work. Further, this paper will attempt to assess its potential impact for gender equality in the workplace.⁷ Part I will lay out the backstory and Part II will describe what the Directive requires, as well as evaluating how it might work. Part III will attempt to evaluate the potential for this Directive to improve gender equality across the workforce of these businesses. Part IV will juxtapose the “positive action” the Directive will require with the legal treatment of “affirmative action” in the United States.

I. THE BACKSTORY

Equality is one of the core values of the EU.⁸ Since at least 1975, the EU has considered issues of gender equality by adopting its first Directive requiring equal pay for equal work.⁹ In 2010, the EU Com-

<http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2012:0614:FIN:en:PDF> [hereinafter *Proposed Directive*]. The Proposed Directive is based on Article 157(3) of the Treaty on the Functioning of the European Union.

Since the EU is a transnational organization of independent and sovereign nation states, directives promulgated by the EU require the member states to conform their national laws to the requirements laid out in the Directive: “EU directives lay down certain end results that must be achieved in every Member State. National authorities have to adapt their laws to meet these goals, but are free to decide how to do so.” *Application of EU Law*, EUROPEAN COMMISSION, http://ec.europa.eu/eu_law/directives/directives_en.htm (last updated June 11, 2012).

⁵ Final adoption is by no means a sure thing. While one EU Commissioner comes from each of the 27 member states, Commissioners are charged with acting for the best interests of the EU and not as representatives of the member state from which they come. The EU Council, on the other hand, is made up of the representatives of the member states and the European Parliament represents the people.

⁶ The Commission justifies the Directive in part based on its instrumentalist function of improving gender equality in employment and business success.

⁷ The impact on business success is beyond the scope of this paper, though some reference will be made to it.

⁸ Treaty on European Union, Feb. 7, 1992, 1992 O.J. (C 191) 1, arts. 2 and 3(3) [hereinafter TEU]. According to Consolidated Version of the Treaty on the Functioning of the European Union art. 8, 2010 O.J. (C 83) 47 [hereinafter TFEU], the EU should aim to eliminate inequalities and to promote equality between men and women in all of its activities. The first 6 of the 40 “whereas clauses” that precede and justify the substantive provisions of the Proposed Directive trace the history of the EU’s actions vis-à-vis greater gender equality. See *Proposed Directive*, *supra* note 4.

⁹ Council Directive 75/117/EEC, of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women, 1975 O.J. (L 45) 19 (EEC) [hereinafter Equal Pay Directive]. For the later amendments to the Equal Pay Directive as well as other EU legislation dealing with gender equality, see *Equal Pay*,

mission included a goal of improved gender equality as part of its Europe Strategy 2020 to turn the EU into a “smart, sustainable and inclusive economy delivering high levels of employment, productivity, and social cohesion.”¹⁰ That same year, the Commission also adopted a Women’s Charter.¹¹ Following that, the Commission issued a call to major corporations to voluntarily improve the representation of women on their boards of directors, “Women on the Board Pledge for Europe.”¹² Because only 24 corporations took the pledge, the next step was to consider adoption of what ultimately became the Directive dealing with mandated gender equality on corporate boards.¹³

In March 2012, the Commission issued the “Women in Economic Decision Making in the EU: Progress Report,” indicating that women made up “just 13.7% of board seats of the largest publicly held listed companies in EU Member States.”¹⁴ There were only 19 women CEOs of the 600 corporations listed on stock exchanges in member states in the EU.¹⁵ Before the present push for increased gender equality on corporate boards, Norway, in 2003, had amended its corporate law by adopting a 40% quota, a goal that was achieved by

SUMMARIES OF EU LEGISLATION, http://europa.eu/legislation_summaries/employment_and_social_policy/employment_rights_and_work_organisation/c10905_en.htm (last updated Apr. 4, 2008).

¹⁰ *Europe 2020: A European Strategy for Smart, Sustainable and Inclusive Growth*, at 3, COM (2010) 2020 (Mar. 3, 2010), available at <http://ec.europa.eu/research/era/docs/en/investing-in-research-european-commission-europe-2020-2010.pdf>. The Proposed Directive is in part justified as part of the EU’s growth strategy “to raise the employment rate for women and men aged 20-64 to 75% by 2020.” Press Release, European Commission IP/12/1205, *Women on Boards: Commission proposes 40% objective*, at 4 (Nov. 14, 2012), available at http://europa.eu/rapid/press-release_IP-12-1205_en.htm [hereinafter *EC Press Release*].

¹¹ *Communication from the Commission*, COM (2010) 78 final (Mar. 5, 2010). In September 2010, the Commission adopted a new “Strategy for Equality between Women and Men,” that included a commitment “to improve the gender balance in decision making.” See *Strategy for Equality between Women and Men: 2010-2015*, at 20 (2011), available at ec.europa.eu/social/BlobServlet?docId=6568&langId=en.

¹² *Women on the Board Pledge for Europe*, EUROPEAN COMMISSION, http://ec.europa.eu/commission_2010-2014/redoing/womenpledge/index_en.htm (last visited Mar. 13, 2013). For the pledge form companies may complete, see *Women on the Board Pledge for Europe*, available at http://ec.europa.eu/commission_2010-2014/redoing/pdf/p_en.pdf.

¹³ *EC Press Release*, *supra* note 10, at 4.

¹⁴ *Women in economic decision-making in the EU: Progress report* (2012), available at http://ec.europa.eu/justice/gender-equality/files/women-on-boards_en.pdf [hereinafter *Progress Report*]. From the end of 2003 until January 2012, the representation of women on boards rose from 8.5% to 13.7%. *Id.* at 10-11. There is striking gender imbalance within the member states, with the national average ranging from about 3% to up to 27%. *Id.* at 9. By comparison, women hold 16.6% of all board seats in United States corporations. *Catalyst Pyramid: U.S. Women in Business*, CATALYST (Mar. 1, 2013), <http://www.catalyst.org/knowledge/us-women-business-0>.

¹⁵ *Progress Report*, *supra* note 14, at 12.

2006.¹⁶ France, Italy, and Belgium have recently enacted legislation requiring gender equality on corporate boards; the Netherlands and Spain have passed similar legislation but those laws do not include any significant sanctions. Other member states, such as Denmark, Finland, Greece, Austria and Slovenia, have adopted some measures on gender equality for corporate board membership.¹⁷ Some, like the United Kingdom, adopted purely voluntary programs.¹⁸

The impact of those national laws no doubt explained the progress that had been made,¹⁹ but overall, Viviane Reding, the Vice President of the Commission and commissioner for justice, considered it inadequate.²⁰ Reding's opinion was the justification for going forward with a mandatory community-wide effort if real progress was to be made within the foreseeable future. While some member states have made real progress, others have fallen far short. This growing difference in the gender composition of the boards among member states was seen as interfering with the goal of a single, strong EU-wide economy.²¹ Reding's original proposal to the Commission would have required member states to punish corporations for failing to meet a 40% goal for non-executive board positions.²² Facing stiff resistance,²³ the Commission initially postponed a vote on that draft, leaving time for compromise to overcome at least some of the opposition.²⁴ Finally, the full Commission adopted the revised Directive lacking the direct

¹⁶ *Proposed Directive*, *supra* note 4, at 2 n.5. Norway is not a member state of the EU but it is closely associated with it through its membership in the European Economic Area. See EUROPEAN ECONOMIC AREA, <http://www.efta.int/eea.aspx> (last visited Mar. 12, 2013).

¹⁷ *Progress Report*, *supra* note 14, at 13.

¹⁸ Ian Traynor & Simon Goodley, *Brussels leaves 40% Quota for Women at Mercy of Member States*, THE GUARDIAN (Nov. 13, 2012), <http://www.guardian.co.uk/business/2012/nov/14/eu-gender-quotas-upto-member-states>.

¹⁹ France initiated its law in January 2011, and the compliance of French corporations "accounts for more than 40% of the total EU-wide change recorded between October 2010 and January 2012." *EC Press Release*, *supra* note 10, at 4.

²⁰ Without the Directive, it was predicted that the "EU as a whole [was] not expected to even achieve 40% of women on boards by 2040." *Proposed Directive*, *supra* note 4, at 9.

²¹ The Commission viewed this increasing divergence as leading "to practical complications for listed companies operating across borders, notably when establishing subsidiaries or in mergers and acquisitions, as well as for candidates for board positions Only an EU-level measure can effectively help to ensure a competitive level-playing field throughout the Union and avoid practical complications in business life." *Id.* at 17.

²² James Kanter, *New European Push for Women in Boardroom*, N.Y. TIMES (Nov. 13, 2012), http://www.nytimes.com/2012/11/14/business/global/eu-officials-expected-to-support-new-quota-proposal.html?_r=0.

²³ Under the leadership of the United Kingdom, nine member states signed a letter to the Commission opposing the Directive. See Stephen Castle, *Proposed Quota for Women in Boardrooms Is at Risk*, N.Y. TIMES, Sept. 18, 2012, at B4.

²⁴ James Kanter, *Europe Postpones Vote on Gender Quota Plan*, N.Y. TIMES (Oct. 23, 2012), <http://www.nytimes.com/2012/10/24/business/global/eu-postpones-vote-on-gender-quota-plan.html>.

enforcement power, sending it to the European Council and Parliament for their adoption.

II. THE PROPOSED DIRECTIVE

Article 4 (1) sets forth the basic thrust of the Directive by establishing a requirement, to be met by January 1, 2020, that private corporations incorporated in a member state whose securities are listed on any stock market in any EU member state have at least 40% of its outside board seats – seats not occupied by executive employees of the corporation – filled by the “under-represented sex.”²⁵ There are some exceptions from coverage. Thus, Article 3 provides that the Directive “shall not apply to small and medium-sized enterprises.”²⁶ Further, companies with a workforce with less than 10% women are also excluded.²⁷ Finally, Article 10 (2) sets a “sunset clause” for the Directive of December 31, 2028.²⁸

²⁵ *Proposed Directive*, *supra* note 4, at 24. Paragraph 1 of Article 4 also requires that the goal for “public undertakings” is January 1, 2018. The 40% figure is justified because it splits the difference between the “critical mass” of 30%, which has been found necessary in order to have a sustainable impact on board performance and full gender parity (50%).” *Id.* at 5. Paragraph 2 provides that the actual number of directors of the underrepresented sex is “the number closest to the proportion of 40 per cent, but not exceeding 49 per cent.” Thus, the actual number can be below or above the 40% threshold, but “listed companies should not be obliged to appoint members of the under-represented sex to half or more of the non-executive positions in order to avoid excessive restraints.” *Id.* at 12.

“[T]o avoid discrimination of the initially over-represented sex, listed companies should not be obliged to appoint members of the under-represented sex to half or more of the non-executive board positions. Thus, for example, members of the under-represented sex should hold at least one position on boards with three or four non-executive directors, at least two positions on boards with five or six non-executive directors, and at least three positions on boards with seven or eight non-executive directors.” *Id.* at 19. The Directive applies to listed companies whether or not they are “two-tier,” i.e., with separate management and supervisory boards, a unitary system or a hybrid. *Id.* at 18. If all the members of the management board in a two-tier system of corporate governance are executive employees of the corporation, then the Directive would only apply to the supervisory board and only to its members who were not corporate executives.

²⁶ *Id.* at 24. This exemption may not have much application since small and medium corporations are unlikely to be listed on a stock exchange in the first place.

²⁷ *Id.* at 24-25, para. 6. The justification for this exemption is not clear since traditionally sex segregated jobs would seem to be most in need of greater gender equality on their boards if women do bring added value to the overall employment policies of these corporations. It may be the Commission’s thinking that it would be difficult to find qualified members of the under-represented sex if to be qualified means that the person has worked in the business. Rather than an exemption, a lower target or a longer time to reach it might better serve the overall purpose of the Directive.

²⁸ *Id.* at 13, 27. Presumably, the Directive will no longer be required if the laws of all the Member States are harmonized with it within two years of its final adoption pursuant to Article 8 and have been complied with by corporations as of January 1, 2020. Presumably, the Commission is predicting that Member States will not repeal their laws after 2028 and that the practices

Rather than requiring that non-complying corporations be punished, Article 4 (5) establishes that, for companies that have not met the goal, a system of merit selection must be implemented.²⁹ For corporations not meeting the goal, appointments must be made “on the basis of a comparative analysis of the qualifications of each candidate, by applying pre-established, clear, neutrally formulated, and unambiguous criteria.”³⁰ Setting the enforcement scheme this way creates a significant incentive for corporations to act to meet the goal in order to avoid the necessity of adopting a transparent procedure for board appointments. Assuming most corporations would want to maintain their existing means of filling board positions without public oversight, there is tremendous value to them to fill openings with a sufficient number of the underrepresented sex and to fill 40% of the non-executive board seats without having to make any changes in how those appointments were made.

While Article 5 (1) applies to board members who are executives of the company, it only requires that these listed companies “undertake individual commitments regarding gender-balanced representation of both sexes among executive directors.”³¹ According to the Commission, requiring all the member states to mandate representation of women who are not executives, but only requiring some commitment of gender equality for executive members of the board, is justified “in order to strike the right balance between the necessity to increase the gender diversity of boards on one hand and the need to minimize interference with day-to-day management of a company on the other hand.”³² The link that the Commission claims between non-executive and executive board members and gender equality within employers is that women non-executive directors will have “positive ripple effects for gender diversity throughout the career ladder.”³³ By limiting the scope of this requirement to board members who are not executive employees of the corporation, the Directive appears at most to have an indirect effect on the employment of its executives as well as on the corporation’s employment in general. The only direct effect will result with the board members who are selected by the employees

of corporations in appointing non-executive board members will continue in accord with the requirement of the Directive.

²⁹ See *id.* at 24. Corporations, of course, will claim that board positions are already filled by merit. They resist, however, losing their unrestricted discretion to regulate the level of managerial slack that would come with a legally required system of merit where that can expose the corporation to criticism and litigation.

³⁰ *Id.*

³¹ *Id.* at 25.

³² *Id.* at 5.

³³ *Id.*

to positions on supervisory boards, by the codetermination laws of countries like Germany, and who are employees subject to the 40% goal.³⁴

Concerns about affirmative action and reverse discrimination, which is characterized as “positive action” by the EU, are addressed in Article 4 (3), which uses gender as the tiebreaker between two otherwise equally qualified candidates.³⁵ Priority should be given to candidate of the under-represented sex “if that candidate is equally qualified as a candidate of the other sex in terms of suitability, competence and professional performance, unless an objective assessment taking account of all criteria specific to the individual candidates tilts the balance in favour of the candidate of the other sex.”³⁶ In *Kalanke v. Freir Hansestadt Bremen*,³⁷ the European Court of Justice had found that a provision guaranteeing “women absolute and unconditional priority for appointment,” even if done to redress gender inequality, was not within the permissible parameters of legal positive action. Subsequently, in *Hellmut Marschall v. Land Nordrhein Westfalen*, the ECJ qualified *Kalanke* by approving a rule that, where women were under-represented in a job category, a tie goes to the woman candidate over an equally qualified male candidate “unless reasons specific to an individual male candidate tilt the balance in his favour.”³⁸ In essence, it appears that where there is gender inequality and two candidates are equally qualified, affirmative action in favor of the woman can be used as the tiebreaker unless something specific about the male candidate, presumably not involving qualifications for the job because their qualification must be equal, justifies hiring him.³⁹

³⁴ The Commission states that those board members not within the coverage of the Directive are “executives,” not corporate employees. *Id.* at 11. Thus, “employee representatives in those Member States where a certain proportion of the non-executive directors can or must be appointed or elected by the company’s workforce and/or organization of workers” are within the scope of the Directive. *Id.* Where those representatives are employees of the corporation, the Directive will apply. How that will work is left to be determined by the member states. *Id.* at 19.

³⁵ Paragraph 3 is “necessary to ensure that the objectives comply with the case-law of the Court of Justice of the European Union concerning positive action.” *Id.* at 12. The Commission recognized that the ECJ has “accepted that priority may in certain cases be given to the under-represented sex in selection for employment or promotion,” and the Directive extends that to the appointment of non-executive board members. *Id.* at 20.

³⁶ *Id.* at 24.

³⁷ Case C-450/93, *Kalanke v. Freir Hansestadt Bremen*, 1995 E.C.R. I-03051.

³⁸ Case C-409/95, *Hellmut Marschall v. Land Nordrhein Westfalen*, 1997 E.C.R. 6363.

³⁹ ROGER BLANPAIN, SUSAN BISOM-RAPP, WILLIAM R. CORBETT, HILARY K. JOSEPH & MICHAEL J. ZIMMER, *THE GLOBAL WORKPLACE: INTERNATIONAL & COMPARATIVE EMPLOYMENT LAW* 457 (2d ed. 2012). An example of something about a candidate that does not implicate job qualifications is unclear. Perhaps, a man with heavy obligations to provide for elderly parents or a disabled child or spouse, where the woman candidate does not face those

In paragraphs 4 and 5 of Article 4, the Directive creates a way for unsuccessful candidates to challenge the appointment decision. Paragraph 4 requires that, “on the request of an unsuccessful candidate, the qualification criteria upon which the selection was based, the objective comparative assessment of those criteria and, where relevant, the considerations tilting the balance in favor of the candidate of the other sex,” must be provided to the unsuccessful candidate, whether the candidate is a member of the under- or the over-represented gender.⁴⁰ Paragraph 5 then provides that a private cause of action to challenge the decision in the national judicial system must be available to candidates of the under-represented sex, but not the over-represented sex, who were not chosen.⁴¹ Further, it provides the claimant the benefit of a burden shifting procedure to establish liability: “[W]here an unsuccessful candidate of the underrepresented sex establishes facts from which it may be presumed that that candidate was equally qualified as the appointed candidate of the other sex, it shall be for the listed company to prove that there has been no breach of the rule.”⁴² Article 4 (5) provides that the national judicial systems must be available for the enforcement of these challenges by unsuccessful candidates of the underrepresented sex, typically women.⁴³ It does not require that unsuccessful candidates of the overrepresented sex be provided such an action.⁴⁴ Presumably, members of the overrepresented sex who are unsuccessful candidates need only be entitled to the information required by paragraph 4. The terms of the Directive, however, do not require that the member states provide a cause of action to them in their national court system.⁴⁵ Problems of discrimination are raised in member states that do not provide a means to challenge board ap-

burdens, might be an example of a situation where the “savings clause” of *Hellmut Marschall* would apply.

⁴⁰ *Proposed Directive*, *supra* note 4, at 24. The Commission acknowledges that these disclosure provisions apply to information concerning “personal data” but that the disclosure requirements are “necessary and, in conformity with the principle of proportionality, genuinely meet recognised objectives of general interest.” *Id.* at 20-21. In addition, they are consistent with the privacy provisions of Article 52(1) of the Charter of Fundamental Rights of the European Union. *Id.* at 21.

⁴¹ *Id.* at 24-25.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.* at 25.

⁴⁵ However, armed with the information that the corporation is required to provide, an unsuccessful candidate of the overrepresented sex might have other venues available outside of the national judicial system, from internal corporate grievance procedures to using the information to create a public relations challenge for the corporation.

pointments.⁴⁶ While the distinction is phrased in gender-neutral terms – referring to over and underrepresented sexes – the distinction would cause an adverse impact on men.

Article 6 (1) requires that sanctions must be made “applicable to infringements of the national provisions adopted pursuant to this Directive.”⁴⁷ Paragraph 2 requires that the sanctions must be “effective, proportionate and dissuasive and *may* include . . . administrative fines [and] nullity or annulment declared by a judicial body of the appointment . . . of non-executive directors.”⁴⁸ Since fines and annulment of the appointment are authorized but not required, it is not entirely clear what other remedies would be considered to be “effective, proportionate and dissuasive.” Presumably, tort-type compensatory damages would potentially suffice. Article 5 (4) recognizes that national “equality bodies” required for employment in Directive 2006/54/EC that have jurisdiction over “the promotion, analysis, monitoring and support of equal treatment of all persons without discrimination on grounds of sex”⁴⁹ in employment are required to have similar jurisdiction over questions of “gender balance on the boards of listed companies.”⁵⁰

In sum, the Directive, if ultimately adopted by the Council and the European Parliament, may transform the gender composition of corporate boards of listed companies in the EU member states. If the Directive came into effect by the end of 2013, the member states would have until the end of 2015 to conform their laws to it. That would leave four years – from the beginning of 2016 to the end of 2019 – for corporations to which it applies to meet the 40% quota. With the listed corporations in some member states already making significant progress toward that goal, the largest changes in the gender composition of corporate boards would be in member states where little progress has so far been made. About 5,000 companies are listed on the stock exchanges of EU member states and would therefore be required to comply.⁵¹ It is not clear how many outside director seats there are on all those corporations, so it is not clear how many women directors would need to be in place with full compliance. Al-

⁴⁶ Providing a cause of action for women, but not men, who claim they were discriminated against by not being appointed to the corporate board would likely be a basis for claiming sex discrimination in the way this cause of action is structured.

⁴⁷ *Id.*

⁴⁸ *Id.* at 26 (emphasis added).

⁴⁹ Directive 2006/54/EC, of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), 2006 O.J. (L 204) 23, 31.

⁵⁰ *Proposed Directive, supra* note 4, at 25.

⁵¹ See Kanter, *supra* note 22.

ready, the European Business Schools Women on Board Initiative has identified more than 7,000 highly qualified women in the EU who would be ready to assume board positions.⁵² As for improving gender equality in corporate employment more broadly, the question is whether corporations with gender integrated boards of directors will make corporate decisions that will assist gender equality in employment generally and to help break the glass ceiling to top management positions. The next section turns to that question.

III. GENDER INTEGRATED BOARDS AND EMPLOYMENT OPPORTUNITY

Given the long standing commitment of the EU for gender equality— simply stated, greater gender equality advances justice even if it does not produce gains in employment equality -- there is no need to seek justification for the proposed Directive beyond that straightforward justice claim.⁵³ The Commission, however, tied the justification for the Directive to the Europe Strategy 2020, which was aimed at making the EU a “smart, sustainable and inclusive economy delivering high levels of employment, productivity and social cohesion.”⁵⁴ Thus, the proposed Directive is justified as part of the EU’s growth strategy “to raise the employment rate for women and men aged 20-64 to 75% by 2020.”⁵⁵ The question is whether increasing gender equality

⁵² *Proposed Directive, supra* note 4, at 3. Many more women would be needed to fill all of the slots on all the boards of directors. There is an issue of where companies will find these female board members because of the problems they face during their life cycle. Gender bias throughout a woman’s career is cumulative. Thus, for example, women’s pensions are adversely affected not only by wage discrimination, but also by life patterns that take them out of the workforce for periods of caregiving (or lead them to work part-time). Put simply, there may be fewer women qualified compared to men in countries where women’s access to top management positions is severely limited for a host of reasons. So, in terms of tie breakers, the question is, at least initially, how many ties can one expect there will be?

One study concerning representation by people of color on corporate boards showed that just a few traditionally-qualified people of color were each offered multiple board slots by multiple corporations. See Clayon S. Rose & William T. Bielby, *Race to the Top: How Companies Shape the Inclusion of African Americans on Their Boards in Response to Institutional Pressure*, 40 SOC. SCI. RES. 841 (2011).

⁵³ See Lisa M. Fairfax, *Board Diversity Revisited: New Rationale, Same Old Story?*, 89 N.C. L. REV. 856 (2011) (a sufficient argument for diversity is on social and moral grounds rather than that board diversity is good for business).

⁵⁴ *Europe 2020: A European Strategy for Smart, Sustainable and Inclusive Growth*, at 3, COM (2010) 2020 (Mar. 3, 2010), available at <http://ec.europa.eu/research/era/docs/en/investing-in-research-european-commission-europe-2020-2010.pdf>.

⁵⁵ *EC Press Release, supra* note 10, at 4. Further, the Directive was also justified as “a key element to . . . competing successfully in a globalised economy and ensuring a comparative advantage vis-à-vis third countries. . . . [G]ender imbalance in the boards of publicly listed companies in the EU can be a missed opportunity at company level in terms of both corporate governance and financial company performance.” *Proposed Directive, supra* note 4, at 3. This paper

on corporate boards will improve gender equality in employment by those corporations.

The first step in answering that fundamental question is to determine whether gender-integrated groups are likely to operate differently from gender-segregated ones. There is a strong case that in general they do. Outside of employment or board membership – looking at the decisions by three-judge panels of judges on United States Circuit Courts of Appeal – it is clear that having one woman on the panel does change the way a panel acts than if the panel was all male.⁵⁶ A study reviewing sex discrimination suits decided in the federal circuits between 1995 and 2002 showed that men are significantly more likely to rule in favor of the plaintiff when a woman serves on the panel.⁵⁷ Thus, there is evidence supporting the conclusion that a gender integrated decision making body, like the three judge panels of courts of appeal, will act differently than one that is all male.⁵⁸ The difference will likely favor women.

It is also reasonably clear that gender balanced boards of directors do act differently than ones that are not balanced. Miriam Schwartz-Ziv recently published a very interesting study based on the analysis of Israeli corporations that are private, but in which the government holds a substantial equity interest. Because of government investment, these corporations are required to produce detailed minutes, she calls them “quasi-transcripts,” of board and board-committee meetings.⁵⁹ What makes this study so potentially powerful is that, unlike most studies attempting to assess the effect of gender representation on the actions of boards of directors, it is based on more than only publicly available data.⁶⁰ The more in depth analysis of these

will focus on the question whether greater gender equality at the board of directors level is likely to lead to improved equality of opportunity in employment for women. The link of board composition to financial performance is beyond this paper. There is a considerable amount of scholarship on that issue. See Symposium, *Board Diversity and Corporate Performance: Filling in the Gaps*, 89 N.C. L. REV. 711 (2011), available at <http://www.nclawreview.org/category/archives/89/>.

⁵⁶ Christina Boyd, Lee Epstein & Andrew D. Martin, *Untangling the Causal Effects of Sex on Judging*, 54 AM. J. POL. SCI. 389 (2010).

⁵⁷ *Id.* at 402.

⁵⁸ See generally *id.*

⁵⁹ Miriam Schwartz-Ziv, *Does the Gender of Directors Matter?*, at 2 (May 7, 2013) available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1868033 [hereinafter *Does the Gender of Directors Matter?*] (“For each [of 11 companies], minutes for one year in the period 2007-2009 are examined – altogether 155 board meetings and 247 meetings of board-committees. These document the details of the meetings, including the statements made by every participant in each meeting. Altogether, 2,459 issues were discussed in these meetings.”).

⁶⁰ *Id.* It might be argued that this is a small study, limited by the fact that it involves private corporations with government investment, and that its conclusions should not be assumed to be applicable to private corporations generally. Its power, however, is based on the granular nature of the data that makes it possible to link board actions with corporate performance.

meeting minutes gives a clearer basis for determining that the gender representation on the different boards is linked to action of some sort by the corporation.⁶¹ Schwartz-Ziv starts by defining what constitutes a gender-integrated board. Based on prior studies that showed that “a critical mass of three women directors . . . will catalyze board active-ness/performance,”⁶² she analyzed the minutes of these meetings and concluded:

The empirical results indicate that boards are most active when they are relatively gender-balanced – when at least three men and three women directors are in attendance, a situation [called] a “dual-critical mass.” Boards with such a dual-critical mass were found, in comparison to boards without one, to be approximately twice as likely to request further information or an update [from management], and also to take an initiative [by proposing some corporate action]. These results are driven more strongly by the presence of a critical mass of women directors.⁶³

Because the study was able to look at the “below the surface” data of these corporate minutes, Schwartz-Ziv was able to establish the effect gender-diverse boards had on corporate performance in the market. Return of equity and net profit margins were found to be significantly larger in companies that have at least three women directors.⁶⁴

Taken together with the findings pertaining to the work of boards below the surface, which document a *causal* relation in the same direction, the findings pertain to performance (rather than it being only associated with it).⁶⁵ This study connects corporations having greater gender equality on their boards with corporate action, which leads to a greater business success than for boards that lacked that equality.

⁶¹ Prior studies that could only rely on public information about financial performance to compare with the gender composition of the board are necessarily inconclusive since there is nothing to show what the board did, what decisions that it made. See Deborah L. Rhode & Amanda K. Packel, *Diversity on Corporate Boards: How Much Difference Does Difference Make?* (Rock Ctr. for Corporate Governance at Stanford Univ., Working Paper No. 89., 2010), available at <http://ssrn.com/abstract=1685615> (meta study of more than two dozen empirical studies did not convincingly establish any relationship between the gender composition of the board and the corporations’ financial performance).

⁶² *Does the Gender of Directors Matter?*, *supra* note 59, at 3; see also Vicki W. Kramer, Alison M. Konrad & Sumru Erkut, *Critical Mass on Corporate Boards: Why Three or More Women Enhance Governance* (Wellesley Ctr. for Women, Report No. WCW 11, 2006).

⁶³ *Does the Gender of Directors Matter?*, *supra* note 59, at 3.

⁶⁴ *Id.* at 36.

⁶⁵ *Id.* There are studies that go the other way. Frank Dobbin and Jiwook Jung found that stock price was adversely affected by the presence of women on boards. They posit that this is the result of investor bias. And they find no positive effect on corporate profits. See Frank Dobbin & Jiwook Jung, *Corporate Board Gender Diversity and Stock Performance: The Competence Gap or Institutional Investor Bias?*, 89 N. CAR. L. REV. 809 (2011).

Thus, the Commission has some reason to expect that greater gender equality on corporate boards will be good for business.

The study also gives some support to the conclusion that gender-integrated boards' corporate action as to employment is part of what makes those corporations more successful in business than corporations with gender segregated boards of directors. In the 279 personnel and benefits issues that these corporate boards dealt with, boards with dual-critical masses asked for more information 6.4% of the time, while boards without only asked 2.4% of the time.⁶⁶ The board took an initiative on a personnel or benefit issue 12.2% of the time if it had a dual-critical mass, and 9.8% of the time if there was no dual-critical mass.⁶⁷

Schwartz-Ziv's study does not, unfortunately, include data concerning the gender composition of these corporations' workforces, nor does it show whether the particular personnel issues involved questions concerning the gender composition of the workforce. There is good evidence, however, that gender-integrated boards of directors do correlate with the greater representation of women at all levels of an employer's workforce.⁶⁸ A study based on 2011 data from nine European countries concluded that there is a statistically significant relationship between the representation of women on corporate executive committees (not boards of directors) and the overall rate of employment of women.⁶⁹ The percentage of women on these executive committees runs from 21% in Sweden to only 3% in Germany, and averages 10% overall.⁷⁰ The average of women on corporate boards is

⁶⁶ *Does the Gender of Directors Matter?*, *supra* note 59, at 46 tbl. 4.

⁶⁷ *Id.*

⁶⁸ A recent study of U.S. Fortune 500 companies found that corporations with gender equality in upper management had more demographic diversity overall than their peers. See Frank Dobbin, Soohan Kim & Alexandra Kalev, *You Can't Always Get What You Need: Organizational Determinants of Diversity Programs*, 76 AM. SOC. REV. 386, 388 (2011).

⁶⁹ SANDRINE DEVILLARD, WIETEKE GRAVEN, EMILY LAWSON, RENEE PARADISE & SANDRA SANCIER-SULTAN, MCKINSEY & COMPANY, WOMEN MATTER 2012: MAKING THE BREAKTHROUGH 5 (2012), available at http://www.mckinsey.com/client_service/organization/latest_thinking/women_matter [hereinafter MAKING THE BREAKTHROUGH]. The level of statistical significance is $r = 0.63$. *Id.* The seven countries are Belgium, Czech Republic, France, Italy, Netherlands, Norway and Sweden.

There is, however, evidence that gender-integrated boards will lead to gender-integrated organizations. The key is whether corporate leadership insists on organization-wide integration and holds lower level managers accountable to enforce integration. Symbolic measures that are de-coupled from the day-to-day functioning of the organization do not by themselves produce change. See Soohan Kim, Alexandra Kalev & Frank Dobbin, *Progressive Corporations at Work: The Case of Diversity Programs*, 36 REV. OF L. & SOC. CHANGE 171 (2012). It is questionable whether legally imposed integration will produce a positive impact for women workers throughout the corporation for which they work.

⁷⁰ MAKING THE BREAKTHROUGH, *supra* note 68, at 6.

17% overall, with a high of 35% in Norway and a low of 5% in Italy.⁷¹ The participation rate of women in the workforce in Italy is about 50%, the lowest among the nine countries.⁷² It also has the lowest percentage of women on executive committees and corporate boards; 6% and 5% respectively.⁷³ Sweden has an 80% participation rate of women in the labor market,⁷⁴ a 21% participation rate on executive committees, and a 25% participation rate on corporate boards.⁷⁵

In sum, there is some reasonable basis for the Commission to claim that, in general, the Directive will be good for business and for gender equality in employment for those corporations that have gender integrated boards of directors.

IV. THE DIRECTIVE AND “AFFIRMATIVE ACTION,” U.S. STYLE

What is most surprising about the Directive from the perspective of the United States is that it was proposed and has, so far, made it through the decision making by the EU Commission. While not without pushback, a majority of the 27 EU Commissioners voted to adopt the Directive. It seems unlikely such a bold proposal would even be made here. The issue appears to be much less contentious in the EU than it would be in the United States. That may in part be because in the United States race-based affirmative action has been such an extremely hot button, politicized issue for an extended period.⁷⁶ It is possible that affirmative action for women would be somewhat less contentious, although affirmative action for women has also been the

⁷¹ *Id.*

⁷² REPORT ON PROGRESS ON EQUALITY BETWEEN MEN AND WOMEN IN 2010: THE GENDER BALANCE IN BUSINESS LEADERSHIP 18 (2011), available at ec.europa.eu/social/BlobServlet?docId=6562&langId=en [hereinafter GENDER BALANCE IN BUSINESS LEADERSHIP]

⁷³ MAKING THE BREAKTHROUGH, *supra* note 68, at 6.

⁷⁴ GENDER BALANCE IN BUSINESS LEADERSHIP, *supra* note 71, at 18.

⁷⁵ MAKING THE BREAKTHROUGH, *supra* note 68, at 6. The substantial range of difference among these countries is, no doubt, the consequence of significant cultural, economic and political differences that persist. One major cause for the differences is how these different countries deal with work/family balance issues. “A major reason for women’s low employment rates is the challenge of reconciling work, family and private life. The labour market participation of mothers is 11.5 p.p. lower than that of women without children, while the rate for fathers is 8.5 p.p. higher than that for men without children.” GENDER BALANCE IN BUSINESS LEADERSHIP, *supra* note 71, at 6. There is a strong correlation between women’s position in the workplace and the support the government provides for families of $r = 0.52$. MAKING THE BREAKTHROUGH, *supra* note 68, at 6. The level of government support is determined by the average of the number of children in child care, the government expenditure on family/children as a percentage of GDP, and the proportion of men working part-time. *Id.*

⁷⁶ The Supreme Court most recently addressed race-based affirmative action in *Fisher v. University of Texas*, 570 U.S. _____ (2013), available at http://www.supremecourt.gov/opinions/12pdf/11-345_15gm.pdf. The Court remanded the case for further fact-finding on what constitutes a ‘critical mass’ of students of color.

subject of litigation. In *Johnson v. Transportation Agency of Santa Clara County*,⁷⁷ an unsuccessful male candidate for promotion of the position of a road dispatcher brought a Title VII action, claiming that by promoting a woman pursuant to an affirmative action plan, the defendant had committed sex discrimination.⁷⁸ In determining the legality of the defendant's affirmative action plan, the Court applied its earlier analysis of affirmative action in *United Steelworkers of America v. Weber*.⁷⁹ Like *Johnson*, *Weber* was a Title VII case but the issue involved an affirmative action plan based on race. Such a plan would not violate Title VII if it was designed "to eliminate manifest racial imbalances in traditionally segregated job categories,"⁸⁰ was a temporary measure, and did not "unnecessarily trammel the interests of the white employees."⁸¹ Both *Johnson* and *Weber* generated heated dissents. A subsequent case, *Piscataway School Board v. Taxman*,⁸² that involved the use of race as a tiebreaker along the lines of how the Directive would work, was settled off the Court's docket because of fears that the Court would overturn *Johnson* and *Weber*.⁸³ The permissible range of positive action allowed by the Directive is much narrower than would be possible in the United States, at least under the relatively lenient test established in *Weber* and *Johnson*. Affirmative action is not limited to tiebreaker situations.

Several aspects arising out of the Directive resonate with the constitutional equal protection issues involved in affirmative action in the United States. The Directive accepts the notion that a "critical mass" of women on a board would be established if at least 40% of its outside directors were women. In *Grutter v. Bollinger*,⁸⁴ the University of Michigan Law School was successful in defending its affirmative action admissions plan's use of race by claiming that a "critical mass" of people of color was necessary to meet its objective of increased educational diversity. In the oral argument of *Fisher*, the major focus of the questioning addressed the issue of how to define "critical mass."⁸⁵ The EU Commission did not appear to have the difficulty that the United

⁷⁷ 480 U.S. 616 (1987).

⁷⁸ Although the defendant was a state actor subject to the constitution's equal protection clause, the case was decided on statutory grounds. *Id.*

⁷⁹ 443 U.S. 193 (1979).

⁸⁰ *Id.* at 197.

⁸¹ *Id.* at 208.

⁸² 91 F.3d 1547 (3d Cir. 1996).

⁸³ See Michael J. Zimmer, *Taxman: Affirmative Action Dodges Five Bullets*, 1 U. PA. J. LAB. & EMP. L. 229, 229, 233 (1998).

⁸⁴ 539 U.S. 306, 340-43 (2003).

⁸⁵ Transcript of Oral Argument at 9, *Fisher v. University of Texas*, No. 11-345 (argued Oct. 10, 2012), available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/11-345.pdf. The phrase appears some 48 times in the transcript.

States Supreme Court had with the term. Further, like the justification that the Directive would be good for business, the law school's use of race in admissions was justified in *Grutter* as being necessary to improve the functioning of business in a globalized economy.⁸⁶

Finally, the Directive is not phrased in gender explicit terms; instead, it characterizes the issue as one of the “over-” and “under-represented” genders. Despite the potential separation from the use of the terms “women” or “men,” or “male” or “female,” the Directive appears to treat the two sets of terms the same. In the United States, at least so far, the constitutional equal protection analysis would be quite different. If the classification under attack involved gender explicit terms, then so-called middle level scrutiny would be applied; a gender explicit law will be upheld if it is “substantially related to an important government purpose,” and not merely a legitimate one.⁸⁷ Where the law is not phrased in terms of sex or race, then “rational basis” analysis is used, so it will be upheld if it is rationally related to any legitimate government purpose.⁸⁸ A background issue in *Fisher* was that the state law mandated that the top ten percent of each Texas high school be automatically admitted to the University.⁸⁹ The top ten percent law was enacted for the purpose of admitting some students of color to the University without explicitly using race because the public high schools are extremely segregated by race.⁹⁰ Under prevailing law, the top ten percent law would be analyzed for equal protection purposes using the lowest level, rational relationship scrutiny.⁹¹

⁸⁶ *Grutter*, 539 U.S. at 308. Another justification was the necessity of an integrated officer corps in the military.

⁸⁷ *United States v. Virginia*, 518 U.S. 515 (1996). Where a law explicitly uses race, strict scrutiny applies so the law will be upheld only if it is necessary to achieve a compelling governmental interest. *Adarand Constructors v. Peña*, 515 U.S. 200 (1995).

⁸⁸ *Pennell v. City of San Jose*, 485 U.S. 1 (1988).

⁸⁹ *Fisher v. Univ. of Tex.*, 631 F.3d 213, 227 (5th Cir. 2011). The affirmative action admissions policy attacked in *Fisher* uses race explicitly to further enhance educational diversity.

⁹⁰ Hope Yen, *Supreme Court Weighs in on Race with Affirmative Action, Voting Rights Cases*, HUFFPOLITICS BLOG (Apr. 1, 2013), http://www.huffingtonpost.com/2013/04/01/supreme-court-race_n_2991460.html (“The university automatically grants admission to the top 10% of students in each of the state’s high schools. That helps bring in students of different backgrounds because Texas high schools are highly racially segregated, reflecting decades of segregated neighborhoods.”).

⁹¹ Gender and race neutral laws are not entirely exempt from meaningful equal protection review since such a law might still be proven to be discriminatory if the challenger can prove it had a “discriminatory purpose.” That would require proof that the legislature “selected or reaffirmed a particular course of action at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group.” *Personnel Administrator v. Feeney*, 442 U.S. 256 (1979) (quoting *Washington v. Davis*, 426 U.S. 229 (1976)).

V. CONCLUSION

The Commission's adoption of the Directive is a bold step forward. It will be quite interesting to see if the Council and the European Parliament adopt it. If they do and the Directive becomes EU law, the member states will have two years to modify their corporate laws to put in place the 40% goal of board seats to be filled by the underrepresented sex, generally women. Presumably, even before the member states act to harmonize their corporate laws with the Directive, corporations listed on stock exchanges in the EU will have a strong incentive to meet the 40% goal by the end of 2020. If they succeed by that time, the corporations will be able to avoid making any changes to their board appointment procedures. If, however, they do not achieve that goal, then the corporate laws under which they are organized would mandate the adoption of transparent appointment procedures that require the corporations to use pre-established, clear, neutrally formulated and unambiguous criteria. It will be interesting to see whether the incentive of avoiding the adoption of merit procedures is strong enough so that few corporations will be their subject due to successful voluntary compliance.

Expanding gender equality on corporate boards is justifiable for its own sake. The Commission further justifies the Directive on the ground that it will be good for gender equality in employment generally as well as good for business. There are some studies that support that happening. The move of large EU corporations to expand the representation of women on their boards of directors will provide new opportunities to evaluate those claims.

A proposal such as this seems to be far off the radar in the United States.⁹² This Directive is another example of how the EU has passed the US by in terms of moving toward greater gender equality.

⁹² The Securities and Exchange Commission, however, has adopted rules requiring public companies to consider "diversity in the process by which candidates for director are considered for nomination" to their boards of directors, *SEC Approves Enhanced Disclosure About Risk, Compensation and Corporate Governance*, U.S. SEC. & EXCH. COMM'N (Dec. 16, 2009), <http://www.sec.gov/news/press/2009/2009-268.htm>, and a rule requiring them "to disclose how they view diversity with respect to their boards". Luis A. Aguilar, *Speech by SEC Commissioner: Board Diversity: Why it Matters and How to Improve It*, U.S. SEC. & EXCH. COMM'N (Nov. 4, 2010), <http://www.sec.gov/news/speech/2010/spch110410laa.htm>.