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## **Call for Evidence EU Women on Boards Proposals**

## **Response from Employment Lawyers Association**

**10 July 2012**

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#### **Introduction**

The Employment Lawyers Association ("ELA") is a non-political group of specialists in the field of employment law and includes those who represent Claimants and Respondents in the Courts and Employment Tribunals. It is therefore not ELA's role to comment on the political merits or otherwise of proposed legislation, rather to make observations from a legal standpoint. ELA's Legislative and Policy Committee is made up of both Barristers and Solicitors who meet regularly for a number of purposes including to consider and respond to proposed new legislation.

A sub-committee was set up by the Legislative and Policy Committee of the ELA under the chairmanship of Brona Reeves of Barclays Bank plc to consider and comment on the Call for Evidence EU Women on Boards Proposals. Its report is set out below. A full list of the members of the sub-committee is annexed to the report.

#### **Summary of Response**

We have set out detailed responses to the House of Lord's questions below, which we hope are useful to the subcommittee. However, in summary our response is:

1. Both the EU and national governments have a role to play in addressing gender imbalance and considering the existing structure of legislation (and other schemes) to address diversity issues. We believe that the detail of any approach to address imbalance (whether regulatory or self regulatory) will need to be addressed at national level in order to take into account variations across EU states and corporate structures and to ensure that the method of implementation is most effective for each country.
2. ELA agrees that, on the basis of other initiatives in some member states (most notably Norway and the UK), self regulation can produce significant changes. However, regulated approaches can equally give rise to clear and dramatic changes over shorter periods of time, notably in relation to attitudes and culture. Regulated approaches are not without challenge and ELA's view is that any decision on a self regulated/regulated approach will depend on the period of time over which change is to be made. Governments equally should not rule out the use of both methods, as is currently a possibility in relation to equal pay reporting in the UK.
3. Monitoring should be conducted at a national level, but co-ordinated across member states to ensure consistency and transparency.
4. It is difficult to see how "incentivisation" could be adequately and fairly imposed, given the importance of board level provisions and the fact that historic methods of incentivisation (for example in relation to public procurement) will not apply equally across the market. However, ELA agrees that, if gender imbalance is addressed by self regulation or regulation, that some form of "sanction" is key to addressing change. This may range from the "comply or explain" approach under self regulation to financial or other penalties (or even the threat of dissolution as relied on in Norway) under a regulatory scheme.
5. Measuring what progress is acceptable depends first on how the House of Lords define "success" in relation to gender imbalance. In particular, it depends on how any scheme is embedded in or a part of any wider initiatives to address gender imbalance. However, ELA agrees that "success" should be defined at the start of any programme. Also, if regulatory methods are a later possibility, the circumstances for implementing regulatory requirements

(if, say, targets are not reached) and the timescales for this should be set out at the start of any programme, to ensure maximum impact.

6. It is too early to state whether any steps taken by individual member states have had an impact on a single market. However, the fact that this is now being seen as an issue of importance by both the EU Commission and national governments suggests that there has been some impact.
7. ELA members have argued that consistency across the EU is an important way to ensure a coherent approach to diversity related issues. The strong arguments against consistency of application (which are in many ways compelling) relate more to the practical aspects of implementation.
8. ELA members have submitted that a higher level of women on boards across the EU would be advantageous to the UK, in the same way as a higher level of representation across UK boards would be advantageous. It would ensure that countries and businesses are making the best use of their talented employees.
9. There are many arguments for and against quotas, which are summarised below. However, the best evidence on this appears to come from the UK and Norway experience where both self regulation and (in the latter case) regulated quotas have been used.
10. There are equally many other steps which can be taken to support gender diversity at board level. These are likely to be most successful if implemented at national level and may be used both on their own or to support quotas.
11. ELA considers that gender imbalance at board level should be seen as part of the wider issue of gender imbalance in the workplace and diversity legislation. Whilst success can be measured by increasing the gender balance of boards, broader success can be measured by how the overall issue of gender balance and diversity is managed at both an EU and national level, regardless of the political or social policy agenda in each member state from time to time.

## **Our Response**

1. **To what extent does the EU have a role to play in improving the representation of women on boards? Should this be tackled through measures at a European level or is it a matter for national Governments? Do the differences in board structures across the EU affect the pursuit of a common European approach?**
  - a. ELA considered that the EU and national Governments both have a role to play in tackling issues related to the representation of women on boards. Consistent with the current structure of legislation, all core equality legislation has emanated from EU level, with specific methods of implementation left to national governments. Further consideration of this issue is also contained in our response to the “EU Commission’s Consultation on gender imbalance on corporate boards in the EU (the “**Commission Consultation**”)” a copy of which we enclose. Addressing the issue of gender imbalance at board level by the EU and national governments in a similar way would be consistent with this structure and would, ELA believes, have the following benefits:
    - i. Addressing the issue at EU level would send out a clear and consistent message on the importance of the issue on an EU wide basis;
    - ii. The existing framework of both EU and national level schemes and legislation works. It supports the EU and member states’ commitments to certain core rights and standards across the EU;
    - iii. Allowing the detail of any schemes and/or legislation to implement methods of tackling gender imbalance at a national level would allow member states to ensure that their approach was tailored to each member states particular corporate structures, and challenges in addressing diversity at board level.

Further details on the potential differences between member states are set out in response to the below questions.

**2. Can a “voluntary approach”, or self-regulation, achieve a fair representation of women on boards? How can change through voluntary measures be sustained?**

**Current Achievements**

- a. Self-regulation has thus far achieved much towards fairer representation of women on boards, particular from a non-executive perspective. Following the Davies Women on Boards Report (2011),<sup>1</sup> which recommended business-led self-regulatory solutions to gender imbalance, the update to the Report in March 2012<sup>2</sup> indicated the percentage of women board members in FTSE 100 companies was up 3.1% from 12.5% in February 2011 to 15.6% in February 2012. This is the biggest-ever reported increase in female representation on boards, and may suggest that a voluntary business-led approach can work to achieve “fairer representation”.

**A fair representation?**

- b. The current recommended goal for UK companies is 25%, falling short of full gender parity at board level. The Cranfield School of Management *Female FTSE* study predicts that on the current self-regulation trajectory an increase up to 30% of women on boards could be achieved in the next 4 years.<sup>3</sup> Even the 40% quotas in Norway and other EU member states fall short of full gender parity.
- c. Whether self-regulation is able to facilitate the necessary shift may depend upon the size of the desired percentage increase as well as the interval over which such an increase is sought. ELA suggest that qualitative as well as quantitative indicators of fair representation should be examined. For example, the European Women’s Lobby highlights the discrepancy between executive and non-executive roles held by women.<sup>4</sup> Statistics for executive roles show almost no improvement, meaning that current self-regulation mechanisms risk creating a “two-speed system”.
- d. Against the charge that there is barely any improvement in the numbers of female executive appointments, is the view that self-regulation achieves qualitatively fairer outcomes than quotas, such as fairness to meritorious applicants, fairness on the basis of other equality indicators such as race, and the potential for undermining the position of women on boards as the result of a quota system. Does it matter if the means of achieving parity is engineered as long as the standard remains constant?

**Sustaining change**

- e. ELA considers that a range of initiatives may need to be utilised to ensure that change is sustained. In the UK and in other countries, cooperative approaches relying

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<sup>1</sup> *Women on Boards: Davies Report* (2011), <http://www.bis.gov.uk/assets/biscore/business-law/docs/w/11-745-women-on-boards.pdf>.

<sup>2</sup> *Women on Boards: One year on* (2012), <http://www.bis.gov.uk/assets/biscore/business-law/docs/w/12-p135-women-on-boards-2012.pdf>.

<sup>3</sup> The Female FTSE Report 2012, Cranfield School of Management, <http://www.som.cranfield.ac.uk/som/dinamic-content/research/documents/2012femalftse.pdf>

<sup>4</sup> European Women’s Lobby, *Women On Boards In Europe: From A Snail’s Pace To A Giant Leap? Report on Progress, Gaps and Good Practice* (2012), <http://womenlobby.org/spip.php?article3208>, 16.

on regulatory coordination between stakeholders have proved so far quite successful. For example, a new voluntary code of conduct addressing gender diversity setting out best practice for FTSE 350 board appointments has been agreed by industry head-hunters. New changes to the Financial Reporting Council will come into force in 2013, requiring narrative reports on the proportion of women on boards and consideration of gender factors in assessing board effectiveness.<sup>5</sup>

- f. The European Women's Lobby emphasises that targets, deadlines and monitoring are critical to achieving lasting change. This must be accompanied by other measures, especially education, to promote a culture shift. Initiatives may include mentoring, training and the publication of lists of female board-ready candidates.

**3. How should progress be monitored and audited? Should monitoring be coordinated at the European level?**

- a. Ideally progress outcomes should be easily accessible to all stakeholders including shareholders, investors and employees through the annual report. ELA consider that progress should be monitored nationally on an annual basis. We would suggest that the most appropriate way to do this would involve companies submitting information to the relevant equality body in each member state.
- b. The efficacy of this proposal would largely be dependent on the relevant equality body having sufficient resources to enable them to take an active role in auditing and reporting, but we see auditing and monitoring as a key role of that authority, and that the ability to collate and report on such metrics could provide a strong basis for any such authority to take action.
- c. In the UK the relevant equality body is the Equality and Human Rights Commission (EHRC). The EHRC are currently in the midst of a major consultation process in relation to their remit, and following a significant reduction in funding are in the process of making a significant reduction in their headcount. Whilst we obviously do not have first-hand information on whether they have capacity to increase their workload, we would imagine that as a result of recent events they would not have sufficient resources to expand their remit. At a time of global austerity and pressure on public sector budgets we would imagine that similar issues exist in other member states.
- d. ELA considers that it would be desirable for EU grant funding to be distributed at European level to each national equality body, specifically for auditing to ensure that there is not only an adequate level of resource for compliance work, but that there is also uniformity in terms of the approach to compliance.
- e. We would also recommend that companies are under a duty to make the information public, for example in their annual reports, and that this was subject to consistent standards to allow for meaningful comparisons. In the UK this could be achieved by amendments to the UK Corporate Governance Code. This would then give a wider transparency in relation to each company's progress and would mean that any burden on each country's equality authority would be reduced, as data would already be widely and publicly available. Companies could also be encouraged to provide a narrative describing the wider activities which are taking place to support a pipeline of female talent.

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<sup>5</sup> Finance Reporting Council, Feedback Statement: Gender Diversity on Boards, <http://frc.org.uk/FRC-Documents/FRC/Feedback-Statement-Gender-Diversity-on-Boards.aspx>

- f. Finally, it is worth noting that, to some extent, the publication and/or monitoring of gender balance at board level is already happening through organisations like Boardwatch which tracks the appointment of women to boards.

**National rather than European co-ordination**

- g. There are a number of reasons for devolving responsibility for monitoring and enforcement at a national level.
- h. National equality bodies are likely to have existing enforcement powers if a company does not comply with their instructions. Companies will already be aware of who the national equality body is and what it does. They will therefore know to contact the equality body for support and assistance as well as from a regulatory perspective.
- i. We would recommend that when companies have filed their monitoring information with their national equality body, there should be a further period in which the national body would collate the information and send this information to the EU. This would then provide the EU with the ability to benchmark corporate progress across member states. Such an approach would also incentivise the national equality body to work with the companies to assist them in increasing the number of women on boards.
- j. ELA does not consider that it would be effective to have individual companies submitting information directly to the EU. Not only would this be a substantial administrative burden across the EU but if companies were non-compliant then the European body would also require enforcement powers.

**4. Should progress be incentivised, or a lack of progress punished? If so, how could this be achieved?**

- a. We are not aware of any other equality measure where incentives have been offered not to discriminate, other than in relation to the consideration of diversity related issues in public procurement. We are aware that in Spain companies are given priority in public procurement if they have met certain diversity related targets. Given the challenges made to programmes to increase gender diversity on the basis that it undermines the meritocracy of the system, we do not believe that incentives would be an appropriate way to encourage progress. Further, given the importance of a board level appointment to any company, it is difficult to construct an incentivisation system which would be effective incentives in this context.
- b. We consider that sanctions should be imposed if a company fails to comply with any reporting requirements or targets. Please see further our response to question 7 of the EU Commission Consultation. In summary, ELA's view, is that the question of whether (and, if so, what) sanctions and exceptions should be applied depends on whether legislation is introduced imposing quotas or some other binding requirement on companies.
- c. If legislation is to be brought in, it is ELA's view that sanctions should be applied to companies which do not meet the objectives. The success of such an approach is evident from the situation in Norway where full compliance was ultimately achieved through the use of fines and even potential dissolution. It is also worth noting that a considerable lead in time was given to enable companies to comply voluntarily in Norway. We would recommend that a similar approach was adopted here. The 40% target which was adopted by Norway in 2003 was initially a voluntary target, but because of a failure to comply legislation was introduced in 2006. A grace period was given until January 2008 by which time 77 out of the estimated 450 public limited companies had not met the quota. The Norwegian Ministry of Trade &

Industry then notified the companies that they had 4 weeks to comply under threat of dissolution. By mid-2008 all companies were compliant.<sup>6</sup>

- d. If there is no appetite to impose sanctions and a voluntary model is preferred, then there are additional levers which could be used, even as a transitional measure, before looking at full blown sanctions. One option could be the "comply or explain" model whereby companies who fail to comply with the recommendations would be required to explain in their Annual Report what steps they have taken to comply. This can include:
- i. The steps they have taken to advertise positions on the Board;
  - ii. The number of women who applied for those positions;
  - iii. The number of women interviewed for those positions;
  - iv. Details of the interviewers;
  - v. An explanation of the reasons why no women or an insufficient number of women were selected for the roles; and
  - vi. Details of the successful candidates and why they were successful.
- e. There is some evidence in the UK that this approach does prompt action. For instance when the Disability Equality Duty first came into force, public authorities were required to publish their equality schemes by December 2006. Those who did not do so were "named and shamed" in the press.
- f. It is also worth noting that at one stage the UK Equality Act 2010 contained a provision which would require organisations to publish their gender pay gap, with the EHRC taking this type of approach for those who failed to comply.
- g. Another option for compliance which falls short of the Norwegian model is the procurement option. ELA believes the approach taken in Spain would be beneficial whereby companies who comply with the recommendations (or who have good reasons for not doing so) are given priority status in the allocation of government contracts. There is already some basis in the UK for using procurement as a tool to leverage equality. Both Scotland and Wales have adopted specific equality duties relating to procurement. If a lighter touch approach to regulation is adopted then this could be one potential option to consider.
- h. ELA does not believe having a set of objectives without any form of sanction would achieve the desired result. If legislation is the route which is chosen for the implementation of a quota then it would obviously require a sanction of some sort. It is self-evident that law creates rights of some nature, whether they are private or public, and that they are then capable of enforcement. Legislation without any means of enforcement would lack credibility and do wider damage to perceptions regarding equality.

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<sup>6</sup> Gender Quotas and Female Leadership: A Review, Pande and Ford 2011- Background Paper for the World Development Report on Gender

- i. In relation to our experience of objectives without sanction, targets or objectives will be a new concept in UK employment law. Prior to the Equality Act 2010 coming into force, the law on positive action was so limited that very few organisations embraced it. One well known example of positive action and its interplay with the public sector equality duties, was the self-imposed targets set by various police forces including West Midlands to increase their ethnic minority police officers. These were not, as far as we are aware, enforced by the EHRC or its predecessor, the CRE.
  - j. The only other well-known positive action measure of which we are aware relates to political party short listing, as mentioned above. The Sex Discrimination (Election Candidates) Act 2002 was introduced after a legal challenge in 1996 to the Labour party's decision to introduce All Women Shortlists (AWS). This seems to have fairly low levels of support in the UK, and all that the 2002 Act did was allow parties to set quotas and ensure that men who were unable to become candidates could not challenge this. It did not prescribe that political parties should reach any particular level of representation, unlike other countries.
  - k. Moving beyond equality, the obvious analogy of behavioural change following legislation relates to the use of seat belts. Attempts were made to encourage people to use them, but ultimately legislation was required to compel widespread use. Similarly, in the field of age discrimination it is possible to identify a marked shift in attitudes towards age in the workplace since regulations were first introduced in 2006. This may be contrasted against the relative lack of change brought about by the introduction of the Code of Practice in 1999.
  - l. In terms of exceptions, ELA believes the following should be considered:
    - i. If a company can demonstrate it has taken reasonable steps to comply with any recommendations, no sanction should be applied save that, where the only sanction is a "comply or explain" sanction, the company in question would still be required to set out the steps it took to achieve compliance.
    - ii. In order to maximise the legitimacy of the system we would recommend that sanctions should be on a sliding scale in relation to culpability with fines, before proceeding to the ultimate sanction of dissolution.
- 5. What level of progress is acceptable? Is there a point at which it should be determined that self-regulation is not working and that a legislative intervention (whether at national or European level) is needed?**
- a. As above, this question requires the Government to define what success "looks like". It is crucial for the Government to determine appropriate targets, benchmarks and timetables for monitoring and measuring progress.
  - b. In doing so, it is suggested that the question whether or not self-regulation is "working" does not necessarily assist. It may be better to consider whether self-regulation is sufficient to meet the benchmarks of success, or whether self-regulation has a natural limit and should be supplemented by legislative measures once that limit is reached. In the UK, the self-regulatory mechanisms recommended in the Davies Report are still relatively new, having only been in place for a year and a half. In that short time they have achieved significant progress, and according to predictions they are likely to achieve more. Arguably, not enough time has elapsed to evaluate the impact and effectiveness of self-regulation.
  - c. In the UK, the full effect of new legislative initiatives such as shared maternity leave also cannot yet be measured. Similarly, there is not yet sufficient data from those countries that have adopted quotas to demonstrate that board performance has improved. It might be useful to gather data from companies carrying out a business-



led approach to the issue of gender imbalance under the Equality Act 2010. It is not yet clear whether challenges have been made to companies undertaking positive action particularly during recruitment and promotion. A substantive review based on objective and transparent criteria to assess how much has been achieved in a particular time frame as well as the likely future achievements will help to decide whether legislative intervention should be contemplated.

- d. As to whether legislative intervention should occur at the national or European level, it is submitted that the differences in gender balance at board level and the differences regulation of boards and board reporting across European member states would make Europe-wide quotas difficult to implement - this is not a "one size fits all" problem. That does not preclude Europe-wide regulation of gender diversity on boards, but any legislation would need to be expressed in broad terms.

**6. Has the introduction of quotas in some Member States had any impact on the single market?**

- a. Quotas have only been introduced in certain member states in 2011. As detailed above and in the EU Commission Response, this has had the most impact in countries such as Norway. At this stage there is little information available detailing how their imposition has affected the single market. It appears to ELA members that on a social and political level, the progress made by some countries has put the issue of gender imbalance on boards (and gender issues more generally) squarely on the social and political agenda. This is particularly the case in relation to newer members of the EU, who have not previously been involved in diversity related initiatives or legislation.

**7. What are the arguments for and against consistency across the EU on women on boards?**

- a. ELA suggests that if all Member State citizens enjoy the same rights throughout Europe this will aid the free movement of workers. This is consistent with the current EU level legislation on diversity related matters and reflects the view that if workers know they will be treated equally throughout Europe this will act as encouragement for them to pursue opportunities in other States. It also supports the political and social view that such rights should be fundamentally available across the EU. Consistency also provides certainty for companies and workers as to what their rights and obligations are.
- b. A clear argument against consistency across the EU at a more detailed level (for example by the imposition of quotas) is any conflict between existing legislation within Member States, such as the positive discrimination provisions in England under the Equality Act 2010, and any European wide legislation. However, any such conflicts will be resolved under the principle of primacy of European law. This is therefore not a strong argument against consistency throughout Europe on this basis.
- c. Despite the above, ELA considers that there are a number of practical problems with a European-wide rule regarding women on boards. For example:
  - i. Member States have differing categories and sizes of company, therefore consideration would need to be given to what type of companies the rules applied.
  - ii. A number of Member States have already initiated their own mandatory (Belgium, France, Italy, the Netherlands, Spain) or voluntary (UK, Austria, Luxembourg, Sweden) measures, in differing degrees, regarding female board representation.

- iii. In contrast, there are a number of countries where board diversity is very low (Hungary, Lithuania and Slovakia);
  - iv. Another challenge to consistency across the EU is the differences between States with regards to the regulation of boards, board level reporting and requirements placed on directors (for example in terms of qualifications and experience) as well as the period board members are in office and the frequency at which new posts arise. This will affect how quickly each Member State will be able to comply with any rule. In addition, some States (such as employee representatives in Germany<sup>7</sup>) have board members that are not appointed by the company board. Any law would need to consider whether such posts are relevant to any quota or other rule created.
- d. In conclusion, consistency offers greater certainty and Europe-wide protection but may be extremely difficult to achieve effectively due to the inherent differences in companies between each Member State. For this reason, ELA considers that whilst some EU level consistency may be appropriate (such as a general requirement that quotas are used, but not the level of those quotas), that progress is likely to be slower and unduly complex if absolute consistency in implementation is also required.
- 8. What impact would a higher level of representation of women on boards across Europe have on the UK? Would it bring any advantages and/or disadvantages?**
- a. There are various studies that suggest that a greater representation of women on company boards will improve the performance and governance of companies, as the EU Commission Consultation makes clear. If UK companies are performing well this will in turn benefit the UK economy.
  - b. Bloomberg estimate that women control 70% of global consumer spending<sup>8</sup>. Women are consequently more likely to represent the consumer and understand what they want. On that basis, women on boards could be expected to improve a company's performance. Research by Catalyst<sup>9</sup> established that companies with a higher number of female directors had a 42 % higher return in sales, 66 % higher return on invested capital and 53 % higher return on equity<sup>10</sup>.
  - c. Other studies have suggested that decision making in general improves on a gender-balanced board due to the variety of views that are brought to the table and that a diverse board is more likely to focus on managing and controlling risk<sup>11</sup>. In addition, it is said that corporate governance and the ethical behaviour of companies improve when there are more women on the board<sup>12</sup>. These are all factors that will improve the health and longevity of UK companies and consequently their employees, customers and the UK economy in general will benefit.
  - d. It is difficult to see what disadvantages companies could suffer by reason of a higher representation of women on boards. Any argument against the increase in female representation would in reality be an argument against quotas or other measures that encouraged female recruitment, where the issues are more complex.

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<sup>7</sup> Germany operates a two-tier board system with a supervisory board and a management board. Up to one-half of the supervisory board's members are elected by employees.

<sup>8</sup> <http://www.bloomberg.com/news/2011-07-24/women-controlling-70-of-consumer-spending-sparse-in-central-bankers-club.html>

<sup>9</sup> A non-profit membership organisation that provides information and research regarding women in business.

<sup>10</sup> "The Bottom line: corporate performance and women's representation on boards", 2007.

<sup>11</sup> "Diversity and gender balance in Britain plc": a study by TCAM in conjunction with The Observer and as part of the Good Companies Guide, London, UK: TCAM, 2009.

<sup>12</sup> "Gender Differences in Ethical Perceptions of Business Practices", Franke G. R. et al., Journal of Applied Psychology, 1997; "Women on boards: Not just the Right Thing... but the 'Bright' Thing", the Conference Board of Canada 2002.

- e. One study<sup>13</sup> has found that the implementation of quotas in Norway resulted in two problems. On the one hand large numbers of inexperienced women were appointed to company boards due to a lack of female talent in the pipeline. In contrast, a small number of highly qualified women were recruited into too many board positions.
- f. In conclusion, it seems to ELA that gender balance can improve company performance but only if female appointees have the experience and qualifications necessary for the board positions in question. As such, the method of implementing (in particular the debate over mandatory quotas) is critical in making sure that gender balance is a success for companies and that companies are not disadvantaged by such requirements.

#### **9. What are the positive and negative effects of legislative quotas?**

- a. The positive effects of legislative quotas might be considered to be the following:
  - i. a government level commitment to improving the representation of women on boards by objective and clearly stated means;
  - ii. a more rapid pace of change towards increasing the number of women on boards - experience in other European jurisdictions suggests that significant progress is only made when quotas are imposed;
  - iii. to overcome the employment law difficulties companies many feel that they face in light of national level anti-discrimination legislation - a legally binding quota could and should override any such concerns;
  - iv. a greater level of pressure on companies to ensure that they put the processes in place to ensure that they have a pipeline of suitably qualified female candidates for Board positions.
- b. The negative effects of legislative quotas might be considered to be the following:
  - i. a concern that the appointment of women to Boards might become a “box ticking” exercise;
  - ii. allegations of “tokenism” and a concern that women might be perceived as having achieved their appointment in order to fulfil a quota rather than on merit (although we are not aware of any studies or empirical evidence to show that this is or is not the case in those jurisdictions in which quotas are already in place); and
  - iii. a concern that there has been insufficient time for less coercive, voluntary measures to work and/or be seen to work.

#### **10. Other than quotas, what measures could be considered at European level to directly improve the representation of women on boards? Are there alternative measures that should be pursued, but which are better suited for action at a national level?**

- a. A number of other jurisdictions have looked at tackling the under representation of women on Boards. Some of the approaches which have been or could be adopted are:
  - i. a “comply or explain” led approach along the lines of the framework which already exists for UK corporate governance. Such an approach could be

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<sup>13</sup> “The Changing of the Boards: The Impact on Firm Valuation of Mandated Female Board Representation” by Kenneth R. Ahern of the University of Southern California - Marshall School of Business and Amy K. Dittmar of the University of Michigan at Ann Arbor - Stephen M. Ross School of Business

applied relatively easily on a Europe-wide level by the various country specific corporate regulators;

- ii. other non-prescriptive initiatives could include training, networking and mentoring, increased level of disclosure and economic pressure, such as Board level diversity being a requirement for tendering for government contracts. It is ELA's view these types of initiatives are probably best suited to national level implementation as they are more suited to the principle of subsidiarity and can be adapted to reflect country level factors.
- iii. other initiatives aimed at retaining women, particularly at more senior levels, in the workplace. The focus on gender balance at board level can be seen as too narrow; in order to achieve wider social change, a more fundamental approach to facilitating women to enter and remain in the work place should be considered. It may be the case that that family friendly employment laws and affordable child care are more likely, in the long term, to result in greater participation of women at the higher levels of working society. This should then support and sustain female board level appointments i.e. a "bottom up" rather than a "top down" approach. However, the different economic pressures in the various EU member states and the current significant variations in family friendly laws and child care costs across the EU member states would make such initiatives more difficult to enforce on a Europe-wide basis.

**11. Is support needed for women when making their choice of careers, and throughout their careers, to ensure that there are sufficient candidates for board appointments? Is this a matter for European-level action, or should it be a matter for national governments?**

- a. Yes, ELA submits that increased support is required. Whilst ELA notes that the focus of this consultation is on board level appointments, ELA is concerned that this is part of a wider issue on gender imbalance in the workplace and the retention of women, particularly at senior levels, in the workplace.
- b. Turning specifically to the issue of ensuring there are sufficient candidates for board level appointments, ELA agrees that additional support is needed in this area. It notes that it is a point of concern amongst some commentators that board level female appointments also still tend to focus on the roles that have traditionally already had high levels of female representation at less senior levels e.g. HR, Marketing and so on.
- c. However, ELA is of the view that addressing such issues is a complex one and, by way of example, includes changes in approach by schools and further/higher education bodies as well as society in general.
- d. As such, ELA perceives this challenge as a society wide one and not just something that requires attitude change within the higher echelons of quoted companies.
- e. Given the complexities of the issue, and the variety of organisations which may be involved in providing such support, it seems that on a practical level responsibility must rest at national government level. However, the existence of European level schemes to encourage diversity at all levels of an organisation and in career choices in the forms of subsidies and support for women in designated key professions could also be considered.

**12. What does success look like? What should be the ultimate goal with respect to women on boards across the EU?**

- a. Identifying success in this context is not a straightforward task. There is an argument that success in this context may be assessed by reference to the pure number of

women on corporate boards. A body of research demonstrates the link between female board representation and better governance and there are a number of research papers indicating a link between gender diversity and company profitability. Further, one might argue more broadly that a simple increase in the numbers of women on boards would equate with "success" in terms of diversity and equality within society as board composition more accurately reflects the gender balance within society as a whole.

- b. If numbers alone were the best measure of success, there would be a compelling argument that quotas are a very helpful tool in achieving success quickly. It follows that the imposition of quotas and the corresponding increase in gender balance on boards, would be a "success" and a clear goal for legislators to focus on. As noted above, one might argue that they assist in achieving what should plainly be the situation in any event; namely that the best person available is appointed to the role, regardless of gender. However, there is also a risk that a gender quota could distort a merits-based appointment process. As we have noted above, the imposition of quotas, particularly across the EU and the sanctions to enforce these are complex questions
- c. If companies were coerced into making appointments under threat of legal or financial sanction, then whilst the appearance of the board might be attractive in equality terms, the reality may be different. The women appointed in that fashion may not be perceived as having been appointed purely on merit. This could impact on their perceived credibility and their ability to function effectively and make a proper contribution to board governance. Many senior businesswomen do not support the introduction of legal quotas as they consider that this could give rise to a perception of token female appointments, thereby undermining the credibility of the women appointed.
- d. Further, unless the workplace genuinely embraces systems to retain a balance of male/female employees at all levels, a focus on board level appointments alone may not be enough. In order to ensure the availability of female candidates for (and their interest in) board level roles, it will also be necessary to address the growing conundrum faced by many women who have children about how to advance their career and/or achieve their potential and balancing this against other aspects of their life. This may be achieved through, for example, focus on flexible working arrangements and "smart working"). In the current environment, quotas may only really assist women who are prepared to work full-time (or nearly full-time).
- e. That is why it could be argued that true success should be determined not purely by the results but also the methodology adopted and its impact on the wider issue of gender balance throughout companies and the retention of talented women at all levels of seniority.
- f. In our full ELA response we discuss in some detail some of the perceived barriers to advancement. These include:

  - i. Lack of access to flexible work - increased virtual and remote working has certainly made it easier for all employees, and in particular, women to achieve a satisfactory work/life balance. However, there is a concern that women take less skilled and less well-paid work following a period of maternity leave. This can have a career-limiting impact.
  - ii. Need for an increased role of fathers in parenting - improving the ability of all employees to work flexibly should allow men wishing to be hands-on parents to redress part of the imbalance in relation to child-care on the domestic front, as well as improving female retention rates
  - iii. Corporate culture - this encompasses a range of issues including the workplace atmosphere, working hours expectations, business culture and

corporate governance in an organisation. These can all impact on the ability of a company to attract and retain female talent.

- iv. Lack of strong female networks - informal networks can be influential in recruitment and promotion decisions, particularly where any selection process lacks transparency.
  - v. Mirror-imaging/subconscious bias - there remains a concern that individuals are more likely to recruit candidates who are similar to them. Such an approach to recruitment may perpetuate the prevalence of male board members. This could be addressed by greater transparency in appointment process and additional emphasis on the need for a diverse board.
  - vi. Role models - there is a concern that more junior female employees do not see enough examples of successful women whose careers they can aspire to.
  - vii. Need for more female talent in the pipeline - training can play a part in developing the necessary leadership skills.
  - viii. Lack of state support and subsidies for childcare - childcare costs continue to have a significant impact on women in work.
- g. Female choice - it is important to be realistic about the choices individual women make. Setting targets at unrealistically high levels may create an artificial situation in which women are over-promoted to satisfy quotas. ELA members were concerned that consideration should also be given to whether there is a fundamental difference in the numbers of women, as opposed to men, who wish to pursue these corporate roles. There are certainly industries where a particular gender dominates despite equality of access. One of the issues for the House of Lords to consider is the extent it is the role of the government to address such issues through social engineering with quotas and whether the focus should, instead, be on tackling the significant barriers to entry to ensure equality of access. Given the much wider context within which issues surrounding board level diversity sit, one of the key issues for the House of Lords to consider is how any initiatives sit within the overall issue of gender diversity, and how “success” can be measured in that context.

ELA would like to offer our thanks for the opportunity to respond to this call for evidence and set out ELA’s views on this important issue. We should be happy to offer further assistance and invite the Select Committee to contact ELA using our details above if further evidence is requested.

### **Employment Lawyers Association**

**10 July 2012**

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Jemima Coleman, Herbert Smith LLP

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