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Public Consultation on Gender imbalance in corporate boards in the EU

Response from Employment Lawyers Association (UK)

28 May 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 Public Consultation on Gender imbalance in corporate boards in the EU. Its report is set out below. A full list of the members of the sub-committee is annexed to the report.

Summary of our response

We have responded to the Commission's specific questions below, but given the breadth of the issues and the detail of our response, we thought that it would be useful to provide a summary of our views.

As explained above, the ELA is an apolitical organisation. Consequently, where some of the questions could lead to a particular political perspective, we have sought to provide a balanced view of the issues which the Commission could consider in answering each question, taking into account, in particular, the UK experience.

One of the key issues which we have identified in responding to the Commission's questions is that the issue of gender diversity at board level is part of a wider issue relating to the representation of women at senior levels in all organisations, and in particular barriers to women taking roles that do not optimise their skills and experience and therefore their economic potential. This is of course a wider social issue, but, as our response highlights, we believe that any action on gender imbalance at board level should reflect the Commission's wider policy on women in the workforce (regardless of what this may be), as the issue of gender inequality at board level appears symptomatic of this wider issue.

In taking action to address gender imbalances in board rooms, there are a wide range of experiences across EU Member States, which the Commission can draw on to

determine both the options available for regulatory and self regulatory initiatives, and the likely success of such initiatives. We have highlighted a number of these initiatives below.

Many of the issues which the Commission's questions raise, relating to the possible implementation of a regulatory option, depend, to a large degree on the Commission's overall aims – in terms of representation on boards and the timescale within which this can be achieved. Both the experience in Norway and the UK's more recent experience demonstrate that change can be made both through regulated and self-regulated initiatives, but that clear objectives and timescales are needed to achieve this.

On a practical level, ELA felt that both self regulatory and regulatory approaches may form part of the overall solution. This was particularly the case given the timescales involved in implementing new regulatory measures. In addition, a particular challenge that the Commission faces is the breadth of experiences of different EU Member States in this area. We therefore query whether a "one size fits all" approach is appropriate, either in relation to targets or the way in which such targets are achieved.

Finally, we have set out a number of issues for the Commission to consider in taking different approaches to companies of different size or status as well as in relation to executive and non-executive roles. One further point which we have raised is whether the Commission should also consider senior roles in non-corporate organisations, such as public bodies, charities and other similar organisations, where women may also be significantly underrepresented.

Question 1: How effective is self-regulation by businesses to address the issue of gender imbalance in corporate boards in the EU?

1. As the Commission will be aware, the UK has considered the issue of self – regulation in the UK to focus on the low proportion of women on corporate boards.
2. This is set out in the February 2011 Davies Women on Boards Report¹ ("the Davies Report") which concluded that the pace of change in gender imbalance on boards was not quick enough. In order to meet the challenges of both supply of qualified female board members and demand for such roles the Report made 10 recommendations, the last of which was to meet biannually to consider progress against the measures set out and to assess whether sufficient progress was being made.
3. In opting for self-regulation rather than quotas, the Davies Report recommended a more focused business-led approach which it was hoped would increase the number of women on company boards at a much faster rate than seen recently (page 18 of February 2011 Report).
4. The March 2012 update² noted that the FTSE 100 board ratio of men to women had risen from 87.5% men: 12.5% women to 84.4% men: 15.6% women. Further, as at May 2012, women account for 16% of all FTSE 100 directorships and there are only 9 all-male FTSE 100 boards, according to the latest research by Cranfield School of Management.
5. This update noted that the increase had taken place without the use of quotas: see Lord Davies' introduction and in particular the following paragraph:

In the three years prior to my report the number of women on boards had effectively plateaued, stalling at less than a single percentage-point rise year-on-year. Over the past year, however, we have seen the biggest-ever reported increase in the percentage of women on boards. Cranfield School of Management's Female FTSE report, published in parallel to this report, notes that should we maintain this momentum we would see a record 26.7% female board representation by 2015. This is great news, and demonstrates how a voluntary business-led approach can work.

6. We also draw to the Commission's attention Lord Davies' warning in this introduction that:

... I also need to state clearly that these efforts need to be ramped up and this speed of change accelerated sharply if we are to avoid Government interference.

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

² Women on Boards, March 2012 <http://www.bis.gov.uk/assets/biscore/business-law/docs/w/12-p135-women-on-boards-2012>

7. This update also drew attention to the fact that while the number of female board members is increasing, the rate at which the numbers of non-executive directors are rising is much faster than that for executive directors (see paragraphs 83 and 84 below).
8. When considering self-regulation, and in particular progress reports on this, such as “The percentage of new appointments to FTSE 100 boards that are going to women has nearly doubled”, it is relevant to consider whether these new appointments are executive or non-executive posts. The research within the Cranfield Report will be a useful analytic tool³. Of the useful research set out in the Cranfield Report, the Commission will wish to have due regard to the findings at para 3.2.1 concerning women holding multiple directorships

“On FTSE 100 boards, 141 women hold 163 directorships. Since the Norwegian quota on women on boards, much has been made of “The Golden Skirts” – those women who apparently hold a large number of NED positions. However, research by Tiegen & Heidenreich (2010), from the Institute for Social Research in Oslo, dispels this myth by clearly demonstrating that the percentage of women with multiple directorships is lower than that of men. We can report that in the UK there is no significant difference between the number of directorships held by women and men, nor has this situation changed with the recent increases of female representation.”

9. Also pertinent are the concluding reports of the Cranfield Report at paragraph 5:

“The multi-stakeholder approach of the Davies Report has undoubtedly had an important impact over the past 12 months. For the nay-sayers, the change is not fast enough and pessimism prevails. We trust that our updated model charting the increasing number of women on boards dispels such negativity. As long as the stakeholders remain engaged we could achieve 30% women on boards within four years. This would be a fantastic achievement. We urge Chairmen, Chief Executives, Executive Search Firms, the government, investors and women to stay focused and use the momentum to change the status quo permanently.”

10. The Commission may also find relevant to its considerations the launch of a Women’s Business Council by the UK Home Secretary⁴, to be headed by a chief executive called Ruby McGregor-Smith. The Council aims to identify barriers and challenges that prevent women from achieving their economic potential and will come up with ideas for overcoming those obstacles.
11. As the Commission has recognised, self-regulation is not without its difficulties. The outcome of the Davies Report in 2011, where quotas were not recommended

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

⁴ Cranfield Report Launch Speech by Theresa May, 13 March 2012 <http://www.homeoffice.gov.uk/media-centre/speeches/cranfield-speech-home-sec>

as an initial step to address the gender disparity on boards, was met with criticism from some areas including the UK Equalities Group. The Fawcett Society's Acting Chief Executive, Anna Bird, responded by asserting:

“The lack of women on British boards is a stark example of workplace inequality between women and men. Many years of tapping away at the glass ceiling have left it stubbornly intact, with almost 90 per cent of boardroom positions going to men.

“Leaving business alone to tackle the problem on a voluntary basis isn't working; continuing with this approach means excluding another generation of women from the top table of business. The time has come to take radical action.

“While Lord Davies has reserved the right to introduce more prescriptive measures in coming years - if further voluntary action on the part of business fails - the Fawcett Society believes this report is a missed opportunity.

“All the evidence shows positive action through the use of quotas is the only sure fire way to ensure more women reach the boardroom. Government should set a deadline by which they will force boards to take action. Wishful thinking and encouraging words are not going to bring about the step change we urgently need.⁵”

12. The Commission is referred to the Fawcett Society report for the Gender Equality Forum on boardroom quotas entitled “Breaking the Mould”⁶ where they asked “And if we can be confident that quotas really aren't appropriate for the UK, what options are available to us that are radical enough to prevent the stagnation or gradual receding of women as UK leaders?” This question – are the self-regulatory options sufficient to make the necessary shift? – is at the heart of the decision on whether to impose quotas or not.

13. From the ELA's perspective, the key question for the Commission to ask itself is: whether it is appropriate to legislate now or to await the impact of measures upon the ratio of men to women on company boards. For example, recent developments include:

13.1. Shared maternity leave, in force in the UK since April 2011 and a government consultation on proposals to introduce a new regime of shared parental leave in the Children and Families Bill on or after April 2015;

⁵ “Lord Davies report on women on boards a missed opportunity” Fawcett Society 24 February 2012, <http://fawcettsociety.org.uk/index.asp?PageID=1213>

⁶ “Breaking the mold for woman leaders: Could board room quotas hold the key? Fawcett Society, October 2008 <http://www.fawcettsociety.org.uk/documents/Breaking%20the%20Mould%20for%20Women%20Leaders%20-%20could%20boardroom%20quotas%20hold%20the%20key.pdf>

- 13.2. Developments from UK companies that have utilised the Equality Act 2011 positive action measures in sections 158 and 159, including whether there have been challenges to such use (there have been none to date);
 - 13.3. The impact of other measures and voluntary codes in other countries (see further below at paragraphs 29-37 below); and
 - 13.4. Greater investor and shareholder involvement and activism.
14. Finally, it is the ELA's position that the following questions are relevant before any decision is taken to move away from self-regulation:
- 14.1. Were quotas to be introduced, what would be the impact upon publicly-listed companies' existing diversity policies, which refer to various protected groups as well as to women? Would other protected groups such as different racial groups also call for race quotas if quotas for managing gender imbalance were introduced? Has this been the experience in countries such as Norway and France?
 - 14.2. Has the fear expressed by the Davies Report, that quotas will dilute quality, become a reality in those countries where quotas have been introduced? The ELA is not aware of studies to date which demonstrate that the impact of quotas is to undermine meritocracy, yet we have heard of businesswomen being concerned that they will be perceived as second-rate members of a board should they be appointed via a quota system. Is this a price worth paying to achieve more women on the boards or is self-regulation an equally effective alternative?
 - 14.3. One reason for the Norwegian quota legislation being passed was the suggestion that companies with more women on their boards would be more profitable. McKinsey & Co⁷ has produced a number of research papers under the heading Women Matter linking indicating a link between gender diversity and company profitability
 - 14.4. In the UK particularly given the significant progress that has been made and the gathering momentum surrounding this issue, it may be sensible to see whether self-regulation⁸ and voluntary codes are sufficiently effective over time to deem the use of quotas unnecessary.

⁷ McKinsey & Co, "Women Matter" http://www.mckinsey.com/Features/Women_Matter

⁸ See http://www.bath.ac.uk/management/crri/pubpdf/Research_Reports/17_Bartle_Vass.pdf

Question 2: What additional action (self-regulatory/regulatory) should be taken to address the issue of gender imbalance in corporate boards in the EU?

15. ELA members consider that there are a number of actions, regulatory and self-regulatory, which the Commission could consider. As a consequence of the focus on gender imbalance in corporate boards in the UK under the Davies Report, a number of initiatives have also been launched in the UK, which may provide additional assistance to the Commission in evaluating the practicality and effectiveness of such actions.
16. These initiatives include: a new voluntary code of conduct addressing gender diversity setting out best practice for FTSE 350 board appointments; institutional investors publicly asking businesses to declare aspirational goals for female representation on boards and the Financial Reporting Council announcing changes to the UK Corporate Governance Code applying to financial years beginning on or after 1 October 2012. Further, there is currently a government consultation on new narrative reporting requirements; one of the proposals within this is that a new annual "Strategic Report" will be required to state the proportion of women on the board from April 2013. We also refer you to paragraphs 27-30 and 65 below, where we detail some of these initiatives further.

UK progress to date

17. As referred to above, the Davies Report set out recommendations for FTSE 350 companies to adopt to achieve a business-led, rather than legislatively imposed, solution to female underrepresentation on boards. The Report recommended that UK listed companies in the FTSE 100 should aim for at least 25% female representation on their boards by 2015 and that FTSE 350 companies should set their own challenging targets.
18. The government reserved the right to introduce more prescriptive alternatives if the business-led approach failed to achieve significant change.
19. To date 17 companies in the FTSE 100 have already reached the target and a further 17 are currently between 20 – 25%; in respect of FTSE 250 companies, 21 have reached 25% target and a further 28 are between 20 – 25%.
20. At February 2012, women accounted for 15.6% of all directorships within the FTSE 100, up from 12.5% a year earlier. Further, as mentioned above at paragraph 4 as at May 2012, women account for 16% of all FTSE 100 directorships according to the latest research by Cranfield School of Management.
21. In addition, there has been a definite decline in the number of all-male boardrooms in recent years with only 9% all-male boards among FTSE 100

companies and (for the first time ever) a minority of 44.8% all-male boards among FTSE 250 companies⁹.

22. More than 90% of 235 European companies surveyed in a recent McKinsey & Co report now have programmes in place that tackle gender diversity. Gender diversity was among the top 10 strategic priorities for more than half the companies surveyed (double the number in 2010)¹⁰.

What other actions are available? What has past experience been where such action is taken?

Collaborative approaches which rely on co-operation between government and business stakeholders

23. In the UK, the coalition government commissioned the Davies Report soon after coming into office in May 2010 which culminated in the publication of the Davies Report in February 2011. The government fully supported its recommendations and there has been some notable progress as mentioned above.
24. The Davies Report recommended that recruitment firms and head-hunters take voluntary steps to improve board diversity. Following the recommendation in the Davies Report that these firms draw up a voluntary code of conduct addressing gender diversity and setting out best practice for FTSE 350 board appointments, the head-hunting industry agreed such a code in July 2011¹¹. The code encourages nomination committees to place significant weight on an individual's relevant skills and personal qualities, as well as their actual experience, and recommends a target of 30% of women for the initial list of candidates put forward to each client. It also recommends that firms should have to justify any failure to meet this target.
25. Some of the UK's largest institutional investors have publicly asked businesses to declare their aspirational goals for female representation on boards. The Association of British Insurers (ABI) published its report on Board Effectiveness dated 29 September 2011, which identifies diversity, succession planning

⁹ (Women on Boards, Davies first annual progress report March 2012 <http://www.bis.gov.uk/assets/biscore/business-law/docs/w/12-p135-women-on-boards-2012.pdf> and Cranfield Management report March 2012 <http://www.som.cranfield.ac.uk/som/dinamic-content/research/documents/2012femaltse.pdf>) and recent research by Cranfield School of Management May 2012.

¹⁰ McKinsey Women Matter 2012 http://www.mckinsey.com/Features/Women_Matter

¹¹ Voluntary Code of Conduct for Executive Search Firms, <http://www.30percentclub.org.uk/how-to-balance-your-board/executive-search-firms/>

strategies and board evaluation as its key areas of focus for improving board effectiveness¹².

26. The Financial Reporting Council has announced changes to the UK Corporate Governance Code applying to financial years beginning on or after 1 October 2012¹³ which require listed companies to: (i) report annually on their boardroom diversity policy, including gender and on any measurable objectives that the board has set for implementing the policy; and (ii) consider the diversity of the board, including gender, when evaluating board effectiveness. A similar measure has also been implemented in Australia, where the AFX, Australia's stock exchange has required that all listed companies disclose in their annual report the policy, the board's annual assessment of the objectives and progress made towards achieving them (and explain why they had not achieved them if they had not) since 2010. Since those measures were introduced the proportion of women on ASX 200 Boards has increased to 14% and in 2010 and 2011 women made up 25% of appointments to ASX 200 Boards¹⁴.
27. Further, there is currently a UK government consultation on new narrative reporting regulations to introduce a new mandatory requirement for companies to make disclosures about the percentage of women at different levels of their organisations. Under the proposals, a new annual "Strategic Report" will be required to state the proportion of women on the board. The Department for Business, Innovation and Skills ("BIS") only published its response to the consultation on the future of narrative reporting in March 2012¹⁵. The government intends to develop proposals with a view to new regulations coming into force with effect from April 2013.
28. All of these above options could form part of a comprehensive self-regulatory (or even regulatory framework).

Liberal approaches which rely on voluntary corporate commitment

¹² Report on Board Effectiveness: Highlighting best practices, encouraging progress, Association of British Insurers http://www.ivis.co.uk/PDF/ABI_1684_v6_CS4.pdf

¹³ Financial Reporting Council, Feedback Statement: Gender Diversity on Boards, October 2011, <http://www.frc.org.uk/images/uploaded/documents/Feedback%20Statement%20on%20Boardroom%20Diversity%20October%202011.pdf>

¹⁴ Corporate Government Recommendations, Australia Stock Exchange, http://www.asxgroup.com.au/media/PDFs/cg_principles_recommendations_with_2010_amendments.pdf

¹⁵ The Future of Narrative Reporting: Government Response, March 2012 Department for Business, Industry and Skills; <http://www.bis.gov.uk/assets/biscore/business-law/docs/f/12-588-future-of-narrative-reporting-government-response.pdf>

29. Some countries have embraced voluntary initiatives, such as corporate governance codes, training, networking and mentoring programmes to complement legislative measures.
30. National corporate governance codes encourage gender diversity on company boards in Austria, Belgium, Denmark, Finland, France, Germany, Luxembourg, Poland, Spain, Sweden and in the UK.
31. Sweden is notable in achieving 23% women on the boards of its main companies without the use of quotas, moving from 3% in 1999 and as a result of a number of initiatives to promote gender diversity at a senior level. However, Sweden's majority party has announced recently that it will also considered quotas to increase female representation on boards¹⁶.

Coercive measures via government intervention

UK quotas

32. Historically, quotas have been used with relative success in the UK. Following World War Two the UK Government imposed 3% quotas on the numbers of disabled people that a company needed to employ to assist with re-employment of injured soldiers, although the practice was retained far beyond what was necessary to address the problem¹⁷. Outside the employment sphere, all-women shortlists (AWS) for electing Members of Parliament were used with notable successes in the 1997 general election. The role of AWS in encouraging women to offer their candidacy has been recognised and the policy was certainly successful in improving female representation in parliament. In both 1997 and 2005, fifty per cent of women MPs elected were selected from all-women shortlists.

Experience abroad of quotas

33. Norway, Spain and Finland have had quotas in place for some time. In respect of the introduction of quotas, Norway is a success story. It was seen to be at the forefront of this issue when it introduced a voluntary target of 40% board appointments for both male and females in 2003, which subsequently became compulsory in 2008. Norway is now reported to have approximately 42% women on company boards.

¹⁶ Sweden considers board gender quotas, ISS, 12 October 2011, <http://blog.issgovernance.com/gov/2011/10/sweden-considers-board-gender-quotas.html>

¹⁷ Hansard, Lord Campbell of Croy, <http://hansard.millbanksystems.com/lords/1994/apr/13/disabled-employment-quota-system>

34. In the course of 2011, France, the Netherlands, Italy and Belgium enacted legislation aimed at improving the gender imbalance on company boards with varying sanctions for non-compliance.
35. The legislation in France, Italy and Belgium, following the example of Norway, imposes binding quotas with sanctions for non-compliance.
36. The laws in the Netherlands and Spain are not binding, nor tied to any significant sanctions. Spain has also operated a quota system - a gender equality law passed in 2007 obliged public companies and IBEX 35-quoted firms with more than 250 employees to attain a minimum 40% share of each sex on their boards by 2015. However, there are no formal sanctions and, in early 2011, Spain had only achieved 11.2% female representation on its boards.
37. In addition, some Member States have prescribed gender requirements specifically for boards of state-controlled companies, e.g. Denmark, Finland, Greece, Austria and Slovenia.

Constraints of existing legislation

38. Any regulatory steps, such as quotas, would have to be reconciled with any existing legal constraints. For example, the constraints presented by the positive action provisions in the Equality Act 2010 in the UK. Favouring a candidate on grounds of gender is unlawful positive discrimination under the Equality Act 2010. There are two positive action exceptions which allow companies to take some steps to achieve a gender balanced board.
39. A general positive action provision allows companies to take measures to address underrepresentation in certain circumstances, for example where an employer reasonably thinks that persons with a particular protected characteristic (in this case gender) are disadvantaged or have different needs, or that their participation in an activity is disproportionately low, e.g. reserving places on management and leadership training courses, creating targeted networking opportunities or providing mentoring.
40. A specific positive action provision, which relates to recruitment and promotion, which is much more limited in scope, allows the employer to treat a person with the relevant characteristic more favourably than others in recruitment or promotion where the person is "as qualified as" the other candidates.
41. The employer cannot have a blanket policy of treating women more favourably. However, companies are cautious about using the positive action provisions, partly because of the uncertainty as to which actions will be covered by the legislation¹⁸. Given the level of uncertainty for employers as to what types of

¹⁸ In particular it is, as yet, unclear how the "as qualified" test will work in practice. The Equality and Human Rights Commission has published a Code for tribunals to have regard to when considering claims under the

action will be lawful, some commentators argue that the law should be changed to allow firms to specifically look for and appoint women to be company directors, without having to worry about being sued for sex discrimination.¹⁹

42. While differences between individual EU Member States' legislation could be overcome by amending legislation, on a practical factor the time and complexity involved in such amendments would need to be factored into the Commission's recommendations on implementing quotas. This, and other time and legislative constraints in implementing a regulated approach to gender imbalance, may also support a self-regulatory approach to gender diversity on boards, prior to a regulatory approach being implemented.

What can we learn from other actions or the combination of actions?

43. Based on the objective evidence, ELA does consider that quotas do seem to work in the sense of achieving higher levels of female representation at board level, but only when supported by effective sanctions. One advantage of quotas is that they can provide the momentum to achieve a kind of quantum change of culture necessary for women to come forward and pursue board-level appointments. Reports suggest that 30% representation provides the critical mass to challenge "group think" and for the benefits of female representation to be felt.
44. However, there is a risk that the existence of quotas undermines a system of rigorous merits-based appointment. There has been opposition to quotas from women themselves who are concerned that quotas would undermine the influence and respect given to female board members. There could be a perception of tokenism, as referred to under Question 1. Further, while there has been research by INSEAD business school that shows that female leaders score more highly than their male peers on most "critical components" of leadership, including team building, energising, rewarding and feedback, tenacity and emotional intelligence²⁰, references to the need for representation of the "female voice or female leadership style can lead to unhelpful generalisations about "women" as a homogenous group, assumptions which fail to recognise the complex and varied

Equality Act but this was published before the specific positive action provision came into force and, as such, it is not specifically addressed in the Code. Government guidance suggests that it should be given an expansive meaning, not limited to academic qualifications. The government's Quick Start Guide uses the phrase "equal merit" rather than "as qualified" which suggests an assessment of a candidate's overall ability, competence and experience as well as academic qualifications would be appropriate. There is no obligation on an employer to take positive action measures. However, if they do, their actions must be proportionate. The extent to which it will be proportionate to take positive action measures will depend, among other things, on the seriousness of the relevant disadvantage, the extremity of need or underrepresentation and the availability of other means of countering them. Therefore, it may be difficult for an employer to know which steps may or may not be lawful under the legislation.

¹⁹ Michael Rubenstein's Diary, Equal Opportunities Review April 2012

²⁰ Alison Maitland, Women and the Workplace, Financial Times, 19 April 2012

contribution that an individual can make depending on their particular skills and experience, rather than gender.

Barriers to advancement

45. In addition to some of the issues raised by quotas, highlighted above, one of the key issues in relation to a self-regulatory or regulatory approach, is the Commission's aim of tackling the broader issue of barriers to advancement for women, not just in board positions, but in senior management roles and, more generally in retaining women within the workforce, at a level which reflects their skills and experience. Put simply, there appears to be a direct correlation between women leaving the workforce, or not advancing beyond a particular level, and the underrepresentation of women at board level. It could be said that quotas target the visible problem of female underrepresentation at board level, but not the causes of the issue, which is a loss of female talent.
46. Whilst some of the regulatory and self-regulatory initiatives highlighted above might address board level issues, the ELA's position is that it is also important for the Commission to have an agreed position in relation to the broader issues underpinning this lack of diversity. Aligned to this is a need for the Commission to have clear agreement on whether tackling these underpinning issues forms part of their mandate, and if it does, how any steps in relation to gender inequality on boards will address this.
47. It is equally the ELA's position that any regulatory or self-regulatory approach recommended by the Commission would, on a practical basis, need to be looked at alongside these potential barriers to female advancement. The ELA also recognises that a significant problem is identifying what can be done to retain women at all levels. However, as highlighted above, unless women can be encouraged to stay to perform senior roles, there will be a smaller pool of women to choose for board appointments and less of a pipeline of female talent to promote up to board level, which is necessary to make change sustainable.

Lack of access to flexible work

48. ELA's view is that 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, our members are concerned that women take less skilled and less well-paid work following a period of maternity leave. This can have a career-limiting impact as highlighted in a recent report by Resolution and

Netmums in the UK²¹. The poll of over 1,600 part-time working mothers revealed almost half (48%) of mothers on low to middle incomes take a lower-skilled part time job on their return to work after having children. Even those mothers that held a degree could not find work which paid a salary commensurate with their skills: 42% of degree holders said they had taken a less skilled job because of working part time²².

49. 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. The Co-operative Group, for example, has reported a marked increase in retention rates since implementing family-friendly policies and flexible working, with 97% of female managers returning. In general, if companies think more creatively about (and are encouraged to think, by self-regulatory or regulatory means) and are more open to flexible working/job-shares/SMART working (eg from home, results-driven), it may be more likely that women will be able to perform senior roles. Would, for example, a legislative initiative giving all employees a statutory right to work part-time do more to address female underrepresentation at board level? We have set out below a number of issues which the Commission may wish to consider in relation to the loss of women at senior levels.

Corporate culture

50. 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. It might be argued that the most effective way to change corporate culture is by imposition of quotas. Once more women are appointed at board level, a change in corporate culture may follow to remove any barriers and bias inherent in the system.

Lack of strong female networks

- 50.1. Informal networks can be influential in recruitment and promotion decisions, particularly where any selection process lacks transparency. A number of

²¹ The Price of Motherhood: women and part-time work, The Resolution Foundation, http://www.resolutionfoundation.org/media/media/downloads/The_price_of_motherhood_-_women_and_part-time_work.pdf

²² <http://www.resolutionfoundation.org/publications/price-motherhood-women-and-part-time-work/>

initiatives have been launched to address the need for mentoring among female executives, e.g. the FTSE 100 Cross-Company Mentoring Programme.

Mirror imaging.

50.2. 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.

Role models

50.3. There is a concern that more junior female employees do not see enough examples of successful women whose careers they can aspire to.

Need for more female talent in the pipeline

50.4. Training can play a part in developing the necessary leadership skills. In response to suggestions that the reason for slow progress in this area is a lack of board-ready female talent, the European Business School's Women on Board initiatives published a list of more than 3,500 board-ready female candidates on 8 March 2012.

Industry sector

50.5. A recent survey of UK companies²³ identified above-average numbers of women in the retail, utilities, and media and banking sectors. Women were less well represented in mining, real estate, steel and electrical companies. A low percentage of women in a particular company can be self-perpetuating as other women may be less attracted to that working environment.

Lack of state support and subsidies for childcare

50.6. Childcare costs continue to have a significant impact on women in work. Childcare in the UK, for example, is the most expensive in Europe²⁴. Contrast this with Scandinavia where parents receive full state support and heavy subsidies for child care.

²³ [full citation needed]
<http://www.freshfields.com/publications/pdfs/2011/oct11/31304.pdf>

²⁴ See Financial Times report 19 April 2012 by Natasha Stidder "Bridging the gaps created by maternity leave"

Female choice

50.7. It is important to be realistic about people's own choices. Setting targets at unrealistically high levels may create an artificial situation in which women are over-promoted to satisfy quotas. This may simply be an issue of transition to the extent that there are not already sufficient board-ready women. However, 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 Commission to decide 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.

50.8. The Commission may wish to consider a phased approach whereby voluntary self-regulatory measures are recommended initially, with the imposition of regulatory measures should insufficient progress be made within a specified time frame. If the Commission chooses to take self-regulatory action, the ELA considers that this could be taken within a monitoring regime for a fixed period, to assess what progress is made on a voluntary basis following these new developments before imposing a regulatory solution, further details are set out below at paragraphs below where progress has been made under a voluntary regime.

50.9. Alternatively, if the Commission is minded to introduce quotas, we consider that it would be appropriate to introduce them on a voluntary basis (ie targets), for an initial fixed period, with scope to make the quota binding at some future point if insufficient progress is made.

50.10. Either of these approaches would have the advantage of allowing business time to implement initiatives to address the underrepresentation of women at board level without closing the door on the imposition of quotas if this proves necessary to achieve significant change.

Question 3: In your view, would an increased presence of women on company boards bring economic benefits, and which ones?

51. The ELA is aware that there has been a great deal of research on this point. See, for example, research papers by McKinsey & Co that companies with strong

female representation at board level and top management level perform better than those without²⁵.

52. Research also indicates that there is a negative correlation between female directors and insolvency risk, indicating that gender balance at board level can reduce the risk of insolvency²⁶. Much of this data is referred to in the Davies Report cited above and the European Commission report, also cited above.

What is the rationale for the focus on economic benefits (positive and negative)?

53. ELA agrees that it is important to focus on economic benefits so that companies see the advantage in their balance sheet of appointing women, particularly in the current economic climate. Commercial companies are driven by profit and respond to economic indicators.
54. In the ELA's view, the research on and evidence for economic benefits falls into two categories. First, evidence that focuses on empirical data and the correlation between gender diversity on boards, as noted above. This has been subject to some criticism by commentators and is also difficult to rely on particularly in the current economic climate. The second economic perspective is underpinned by a more social/economic perspective – in short, that having all employees working at their optimum skill and experience level is best for an economy, since it maximises the value of everyone's output (regardless of gender). Consequently, a society where one gender is not represented at a particular level is not economically efficient, unless there is clear evidence that that gender is not able to work at the relevant level of skill/experience.

What other benefits are relevant?

55. The ELA also considers that there are a number of other benefits that are relevant when considering gender imbalance in corporate boards, and that it is equally important that they be considered by the Commission.
56. Equality of access to board level appointments is important to ensure that EU companies benefit from the best talent and that fairness is promoted in society as highlighted in paragraph 54 above.
57. This issue can also be looked at in the context of the wider debate on the benefits of diversity generally. The promotion of gender diversity may well improve ethnic and socio-economic diversity at board level, too. Better decision-making, risk

²⁵ McKinsey & Co, Women Matter, 2007. Also see more recent research by McKinsey: http://www.mckinsey.com/Features/Women_Matter

²⁶ Director Characteristics, Gender Balance and Insolvency Risk, Empirical Study 30/05/09 Nick Wilson and Ali Altanlar

assessment and governance at board level is likely to result from a more diverse board. This is not simply a question of gender. Where a board has a broad spectrum of individuals from different groups based on race, ethnicity, religion, gender, age and sexuality, this should help to stimulate positive debate and avoid group think and “cronyism”.

58. We consider that it is also important for many industries that the board composition reflects the spectrum of people who use the company's services. Recognition of the importance of this is prevalent in relation to pharmaceuticals, food, beverage and general retailers, which have historically had relatively strong female board membership. This is reflected in the Davies Report, because an effective understanding of consumer or client needs improves business performance.
59. It has been argued that the increase in women in politics following the adoption of All Women Shortlists brought increased parliamentary priority to new issues and initiatives such as women's health, domestic violence and childcare. Increased female representation at board level could, by analogy, change the focus of business strategy, risk and corporate governance with unanticipated benefits for business and society.

Broader focus – beyond number of board level appointments

60. As we have highlighted above it can be difficult to assess and stimulate female progress in the corporate world. One area of initial concern is that a focus on the number of board seats is not the best indicator of female representation within senior management. Over the last 10 – 20 years, we have seen the number of executive board level positions contract in listed companies. Women may be influential and prominent in senior management, e.g. as Heads of Business Units, General Counsel and Human Resources directors, without being statutory directors. This is particularly the case in the largest, most influential companies, where, from a practical perspective, many positions of influence will not result in a statutory board role.
61. A review of the statistics of gender breakdown of senior employees and a company's record on promotions and retention may be a good starting point. In addition to the narrative reporting proposal to introduce a Strategic Report, the government is currently considering whether to require wider disclosure on the number of female employees within the whole organisation and the number in senior executive positions. We expect draft legislation on this in summer 2012. It is still a work in progress, e.g. consideration is being given to how senior executive is defined. Before introducing quotas at board level, we consider that further research could be done to understand more about the current position of women in senior management in the corporate world and whether disclosure obligations combined with other voluntary initiatives and recommendations will achieve change.

Question 4: Which objectives (e.g. 20%, 30%, 40%, 60%) should be defined for the share of the underrepresented sex on company boards and for which timeframe? Should these objectives be binding or a recommendation? Why?

Which objectives should be set?

62. If the Commission recommends a quota system, the ELA's position is that the ultimate objective in terms of the target quota will, to a large extent, be driven by the timeframe for compliance and its application. If the proposals are to apply to all European Union jurisdictions on a uniform basis, then we would suggest that both the target and timeframe would have to take into account the varying starting points in the various jurisdictions. This would, we submit, inevitably result in a lower target and an extended timeframe. These questions also link in with the issue of which companies should be covered by the proposals, as detailed in Question 5 below and, aligned to this, whether different objectives are relevant for different organisations.

63. Turning to the issues raised by the target levels suggested in the Commission's question, the ELA's position is that in deciding on what objectives would be relevant, and in particular talking a percentage based approach, the following issues are relevant:

63.1.1. the average gender composition of the relevant companies and/or EU Member States at the time any initiative commences;

63.1.2. any empirical data on the period of time taken to change board membership, for example, in the UK and Norway, significant changes were made over relatively short periods as set out at paragraphs 4 and 33 above, combined with the period over which board level appointments are normally made; in the UK appointments are typically for period of between 1 and 3 years with the opportunity for such appointments to be renewed; and

63.1.3. the time period over which any objectives may be achieved.

64. Based on the available data in relation to the above points, the ELA's position on a practical level is that:

64.1.1. 20% may be considered as too low a target in relation to many EU Member States who have already taken some steps towards gender diversity at board level. This is particularly the case if women on boards are not (or are not perceived to be) a "token" since for most boards a 20% quota would mean one, or two women on a board which would still be predominately male. In addition, a low target is also unlikely to be seen as aspirational, and may, therefore, undermine the importance of the overall issue;

64.1.2. for the same reasons, a quota of 60% would seem, in practice to be too high and goes beyond redressing the current gender imbalance;

- 64.1.3. on this basis a target of 40% -50% should be the ultimate target, but the Commission should consider the use of "staging posts" along the way of, for example, 20% and then 30% over a realistic timeframe which need necessarily take into account the speed at which new vacancies ordinarily arise, as detailed above. Phased targets should also help address the issue of a low starting point, which is particularly acute in some jurisdictions, and in addition will help recognise the fact that it will take time to address the historic lack of experienced and senior women in pipeline roles as candidates for board level positions.
65. A further option which the Commission could consider in setting objectives is the extent to which board members who are appointed other than via a board-driven process (such as employee representatives in Germany) should be included or excluded when considering whether any quota has been achieved. From a practical perspective, it is the ELA's position that such a board member should be excluded if it is an appointment over which the board has little or no control.
66. As referred to in Question 3, a further point which the Commission could consider, particularly for larger global companies, is whether in addition to setting objectives for board level, objectives should also be implemented at senior management levels, since these are the roles from which individuals are more likely to move up to board level roles. In the context of such companies, it may be more helpful to measure success by analysing the numbers/percentage of women at senior levels, including in the management grade below board level, rather than just looking at the board make up itself. This may have an overall greater impact in terms of more widely addressing the broader barriers to advancement of senior women as highlighted at paragraphs 45- 50 above.

How should the timing of any objectives be structured?

67. From a practical perspective, the ELA believes that phased timing would be appropriate as it would provide a clear end goal to aspire to but balanced against all of the factors/changes that may be required for a company to be in a position to have vacancies to fulfil and too source female candidates (either organically from within the organisation or externally through lateral appointments).
68. The benefit of a short timescale, e.g. 3 years, is that companies will need to take immediate action. However, shorter term goals may equally run the risk of becoming unachievable very quickly and the potential failure to reach a target or even to take a target seriously may be off - putting to companies. The Commission might be mindful when setting timeframes of the speed at which change can be affected through the creation of board level vacancies. By contrast, "artificially" meeting objectives could lead to candidates being appointed to hit targets, perhaps before they are ready to take up a board appointment. This may have a number of indirect consequences:
- 68.1. the female board member herself may essentially be "doomed to fail" in that position;

- 68.2. this may lead to increased reluctance amongst board members going forward to comply with objectives and appoint future female members on the basis of such an experience; and
- 68.3. the more general possibility that it may engender a general resentment of having a quota system/objectives altogether.
69. On a practical basis, therefore, the ELA's position is that longer-term timescales are more realistic. Companies will, to a greater or lesser extent, have to deal with their own succession planning and pipeline issues. Sensible talent management is likely to result in a programme of up to 5 or 6 years from the time at which a high performing potential candidate is identified to the point of that candidate being in a position to confidently take up a board role. However, the disadvantage of a long timeframe is that some companies may not take any immediate action to address the issue. This could result in talented potential candidates becoming disillusioned at the rate of progress.
70. A balance between short and long term timescales could be achieved by phasing in targets in a structured way, as highlighted at paragraph 64 above, which could include different targets and timescales depending on the type of size of company.

Binding or recommendation?

71. The ELA believes that the Commission needs to consider the recent experience of recommendations and their impact. Both Norway and France have brought in binding requirements for board membership. These decisions were taken on the basis that their governments took the view that there was too little movement in response to having recommendations alone. One issue which the Commission could consider further is the period of time it would expect such recommendations (as opposed to binding requirements) to have an impact and, if there is sufficient time within the programme to drive forward change, to allow such initiatives a reasonable amount of time to take effect.
72. Relevant initiatives, which can be self-regulatory, would include the "comply or explain" approach, which has been broadly successful in the UK corporate governance arena in helping to bring down notice periods for directors. A binding quota may be seen as detracting from a meritocratic approach as it may be perceived as calling into question the merit of the women appointed following the quota being adopted. On the other hand, companies, when faced with binding targets, appear to be more likely to reverse engineer their processes so that they do their very best to ensure that they have a sufficient pipeline of talented employees and potential non-executive recruits. This should, in turn, help to ensure that there would be, in fact, no impact on the overall quality of the Board.
73. Quotas by themselves cannot redress the basic problem of too few women rising to the top in companies, as has been detailed above. To achieve wider change the ELA would suggest that further initiatives (which may include legislative changes) need to be considered by governments, by way of example and without limitation, in the context of family friendly employment legislation, including maternity and in particular more extensive paternity leave/pay entitlements and affordable child-care initiatives.

Question 5: Which companies (e.g. publicly listed / from a certain size) should be covered by such an initiative?

74. ELA is aware that, broadly speaking, countries in Europe currently differentiate between publicly listed and private companies. The reason for this historically has been the perceived need to provide adequate protection for shareholders in public through closer monitoring and regulation of public companies. In the UK , the Corporate Governance Code ("the Code") applies to most public companies. The Davies Report made recommendations for amendments to the Code, such as setting targets for percentages of women on boards, but only for FTSE 100 and FTSE 350 companies.
75. In ELA's view, one issue the Commission will need to consider in determining which companies should be covered by any initiatives is whether the historical reason for differentiation of regulation between public and private companies in the UK and Europe (namely, protection of shareholders) is applicable to the current aim of encouraging diversity on boards. The Commission's aims for encouraging greater diversity, which go far beyond simple corporate governance, may require a different (and more expansive) approach to which type of companies should be covered by diversity initiatives than the historical demarcation between public and private companies. Conversely, one benefit of limiting the application of initiatives to public companies is that it is easier to monitor compliance through established corporate governance mechanisms.
76. In ELA's view, there appear to be three main options for the Commission to consider:
- 76.1. limit any measures to some/all listed companies (as with the Davies Report);
 - 76.2. apply measures purely on the basis of company size (which, in practice, would capture most, if not all, listed companies); or
 - 76.3. apply measures to a combination of listed and other large companies.
77. In addition, consideration would also be given to whether any other organisations (for example, public sector organisations) should be included within these options, whereto the extent that they do not otherwise fall into the traditional definition of a company. This has been a particular focus of Canadian legislation at province level. For example in Quebec, over the past 5 years regulated targets set for all state -owned corporations has have seen such entities reach an equal gender split on their boards over 5 years.
78. The countries currently operating some form of targets or quotas (both in the EU and outside) have taken a varied approach as to which organisations should be covered by diversity measures. In many countries (such as France, Belgium, Italy, the Netherlands, Norway, Spain and Germany), the diversity requirements apply only to state -owned companies and to listed companies (although what is meant by a listed company in this context varies). So, for example, the Netherland's gender diversity measures apply to public and private listed companies, but only to the extent that they meet 2 out of 3 criteria designed to exclude smaller corporations. Spain's requirements apply to "larger companies" which means

companies who are required to present full accounts (determined by assets, turnover and number of employees).

79. One issue for the Commission to consider in determining which companies to cover is how onerous any diversity initiatives will be. For example, it may be appropriate to apply more onerous and/or mandatory requirements to a more limited category of companies, at least initially. Wider application could be feasible if there was a phased introduction (as was the case in Belgium, for example) so that smaller organisations have longer to comply. Similarly, if the Commission decides to make the objectives in the form of recommendations rather than binding requirements, a wider range of organisations could be covered. If the recommendations are binding, the Commission could consider reviewing their application after a period (either to increase coverage, or potentially to alter the arrangements entirely, depending on the social impact/success of the arrangements). Further aspects of this issue are considered in response to Question 7 below.
80. From a practical perspective, the ELA submits that any quota obligation is, at least at first, best suited to large companies. These are the companies that usually have the most developed diversity and talent management programmes. In addition, in terms of driving wider social change on the basis of the "trickle down" effect, larger companies also tend to have a wider social influence. At the other end of the scale the Commission will need to consider whether it is realistic to expect, for example, small family-run companies, where the directors' posts are filled by members of a family, to be required to open up board membership to fulfil a quota.
81. As highlighted above, the Commission also needs to consider the feasibility of imposing European-wide obligations; given that in some countries (for example Hungary, Lithuania, Slovakia) the current level of diversity at board level is very low. It may be that, in these countries, the available pool of talent and/or the current diversity on boards is currently too low to set realistic targets that capture anything other than the largest listed companies. Similarly, what amounts to a large company in terms of number of employees in some jurisdictions may be a relatively small employer elsewhere. A "one size fits all" approach will require careful thought.
82. A further issue to consider is the benefit of clarity. If binding requirements are to be applied, ELA believes that it is unhelpful if the rules used for deciding which organisations are covered are vague and/or transitory. On that basis, there is an argument for limiting the application to listed companies rather than applying size-related criteria.

Question 6: Which boards/board members (executive / non-executive) should be covered by such an initiative?

83. The UK experience may be considered particularly relevant to this issue, as there are significant differences in the UK between its executive and non-executive roles and populations. The UK has a single board system in which each board consists of executive and non-executive board members. Since the Higgs Report²⁷ in 2003 there has been a marked reduction in the number of executive board members; in 1991, there were 6.5 executive directors per board, this had reduced to 3.2 in 2011.
84. At present, women are poorly represented in executive directorships in the FTSE 100; only 6.6% of executive directors are women. By contrast, women hold 22.4% of non-executive director roles. Given this disparity, one issue which the Commission will need to consider is whether any quota or other initiative can be fulfilled by a company by solely recruiting female non-executive board members. On a practical basis, if companies could archive quotas in this way, the ELA members are concerned that this would not have the desired effect of achieving proper gender balance on company boards. Therefore, on a practical level, to fully address the issue of gender diversity on boards, any proposed initiative should cover both executive and non-executive roles separately.
85. In order to fully meet the Commission's objectives, women would also need to be encouraged to seek access to all board positions, including traditionally non-female roles.
86. On a practical level, we recognise that approaching executive and non-executive roles separately will present challenges. In particular, due to the smaller number of executive roles, any initiative will need to have consideration of the fact that there are fewer executive directorships available and any quota may need to be weighted accordingly.
87. A related, but significant problem in any initiative encouraging female representation for all executive board members is that companies have a more limited choice of women at senior level to promote to the board. Quotas may cause particular problems in this context on a practical basis, as companies will have to fulfil them from a more limited pool of candidates.
88. One means of tackling the limited pool of qualified women would be to encourage companies to consider women in other sectors (for example the public, charity, academic and professional services sectors) for future board positions and to extend initiatives supporting the training and/or coaching of senior women in these areas to consider executive and non-executive roles. However, we recognise that this will present more challenges with executive roles, where company or industry specific experience is likely to be required.

²⁷ Review of the role and effectiveness of non-executive directors",. Department for Business, Enterprise and Regulatory Reform. <http://www.berr.gov.uk/files/file23012.pdf>.

89. As has been highlighted above, the broader issue for gender diversity within companies is increasing the number of women rising up company ranks to senior level, as highlighted at paragraphs 45-50 above. A robust 'pipeline' of women will enable companies to recruit all types of board members from a wider female talent pool. Some companies have implemented innovative programmes to address this issue; for example, women being able to step on and off the fast track and schemes to make sure senior leaders have gender balanced teams. The FTSE 100 Cross-Company Mentoring Programme is also acting to develop the female pipelines. As set out above, ELA's position is that any Commission initiative would be more effective in the long-term if it tackles the pipeline of female talent rather than compelling companies to appoint women onto their boards, and this is particularly the case in relation to executive level board roles.

Question 7: Should there be any sanctions applied to companies which do not meet the objectives? Should there be any exception for not reaching the objectives?

90. In the ELA's view, 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.

91. If legislation is to be brought in, it is the ELA's view that the Commission will need to consider carefully what, if any, sanctions should be applied to companies which do not meet the objectives. The success of a sanctions based approach is evident from the situation in Norway where achievement of gender balance on boards was ultimately achieved through the use of fines and even potential dissolution.

92. If there is no appetite to impose sanctions then there are additional levers which could be used, even as a transitional measure, before looking at a full sanctions based approach, as in the Norwegian model. This would give flexibility of approach within the EU Member States, and may be of way of encouraging early compliance with any quotas.

93. One option which both addresses the need for a sanction, but provides some leeway for companies is the "comply or explain" model whereby companies who fail to comply with the recommendations or quotas would be required to explain in their Annual Report what steps they have taken to comply. This can include:

- 93.1. steps they have taken to advertise positions on the Board;
- 93.2. the number of women who applied for those positions;
- 93.3. the number of women interviewed for those positions;
- 93.4. how the board has responded to any concerns raised by shareholders on diversity;
- 93.5. the reasons why no women or an insufficient number of women were selected for the roles; and
- 93.6. details of the successful candidates and why they were successful.

94. 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.
95. 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.
96. Another option for compliance which falls short of the Norwegian model of full financial sanctions is the procurement option. The approach taken in Spain 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, is a useful example of this model. 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.
97. The further option is for a regulatory requirement, but without any formal sanction. However, based on experience of other such regulations, without clear sanctions, the ELA does not believe that such an approach would achieve the desired result, as the experience in Spain suggests (see paragraph 36 above).
98. In relation to the UK experience targets or objectives will, in themselves, be a relatively 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 in the UK 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.
99. 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, which allowed for such short lists was introduced after a legal challenge in 1996 to the UK Labour Party's decision to introduce all-women shortlists.
100. Moving beyond equality, the obvious analogy of behavioural change following legislation in the UK is the requirement that those in the front seats of cars wear seat belts, where attempts were made to encourage people to use them, but ultimately legislation with clearly set out sanctions was required to compel widespread use.

How should sanctions be imposed?

101. If the Commission does opt for a sanction based/regulatory approach, then a further issue for the Commission to consider is how such sanctions should be introduced and in particular, whether they come into force immediately, or whether there is any form of ‘grace’ period or staggered implementation.
102. It is also worth noting that a considerable lead time was given to enable companies to comply voluntarily in Norway. 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.²⁸

Should there be any exceptions to any sanctions?

103. In terms of exceptions to any sanctions, a number of options can be considered, by the Commission. However, given the potentially wide ranging impact of any regulations, particularly if it were to have European wide application, and in light of the challenges detailed at Question 2 above in addressing gender balance on boards by regulatory means (for example, availability of candidates), there are a number of options which the Commission could consider by way of exceptions. This may include:

103.1. Allowing companies to apply for an “exception” to the quota, ahead of any date for compliance. The grant of such an exception could be based on a number of backward looking criteria, such as the company having taken reasonable efforts to find relevant candidates, and forward looking criteria, such as an agreed strategy to ensure the quota is met within a reasonable period.

103.2. Allowing limited exceptions for “near misses” of the quota, for example where resignations/changes in board membership within (say) 6 months of the relevant date for compliance meant that any quota would otherwise have been met; and/or

103.3. Providing an exception Where a company can demonstrate it has taken reasonable steps to comply with any recommendations. Such an exception could also be based on backward and forward looking criteria as referred to above.

104. Given the breath of company which may fall within the scope of any regulation, the ELA believed that it is also relevant for the Commission to consider whether a “one size fits all” approach is appropriate for any sanctions. One option in this respect would be that sanctions were on a sliding scale in relation to either culpability or the size/income of the company.

105. Finally, a number of options are also available to the Commission in relation to the nature of any sanction. This includes:

105.1. fines, either fixed, or as a percentage of profit or turnover, with or without a minimum payment or cap;

105.2. requirements that a company explain any failure in its annual accounts, or by other format (such as public statement);

²⁸ Gender Quotas and Female Leadership: A Review, Pande and Ford 2011- Background Paper for the World Development Report on Gender

- 105.3. requirements that a company undergo (and fund) an external review by the relevant government body (for example in the UK the Equal Opportunities Commission (the “EOC”)) in relation to gender equality; and
- 105.4. a number of other sanctions, such as limits on the companies status, to external or government bodies placing board level candidates in role are also available (such as dissolution, as used in Norway), although such interventions could lead to significant conflict with the company and the EU Member States laws on self determination for companies.
106. On balance, it is the ELA’s position, that objectively, if regulations are introduced, some form of sanction is appropriate. However, as we have set out above, there are a number of potential ways in which this can be achieved, and, aligned to this, a number of relevant exceptions which should be considered.
107. Finally, we would add that the issue of sanctions is not necessarily limited to a regulated outcome. Self regulated initiatives can of themselves include sanctions, in particularly, the “comply or explain” approach is particularly suited to the self regulation approach, as the UK’s experience following the Davies Report shows.

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