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GENDER CONSIDERATIONS ON THE BOARDS OF EUROPEAN UNION COMPANIES: LESSON FOR US CORPORATIONS OR CAUTIONARY TALE?

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*506 INTRODUCTION

On October 3, 2012, Viviane Reding, then Justice Minister and a Vice President of the Commission of the European Union ("EU" or Union), announced a proposed directive mandating that all listed companies in the Union implement a forty percent gender quota on their corporate boards. [1] Reding proposed the directive in response to the slow progress in achieving gender diversity at the highest level of business decision-making on boards throughout the Union after other, less stringent, attempts at increasing diversity on corporate boards had failed. [2] Although Reding faced significant opposition from several Member States, on November 14, 2012, the Commission proposed a directive asking that companies reach the forty percent objective by 2020. [3]

Men and women are stereotyped in our culture to the detriment of both genders in their family and work roles. The kernels of truth in the stereotypes are exaggerated to become straight-jackets for both sexes. While men seem to hold

all the advantages as far as pathways to high positions in business, they may be forced by the business culture to lose out on family. Men currently hold many more than forty percent of the seats and often know each other from business school and business associations in which they not only talk about business but also share their various interests in sports, golfing, and, depending on where they live, hunting and fishing trips and other common interests. The culture of the un-accountable "boy forever" of the hard-charging alpha male who bullies and takes advantage of other employees is frequently and unconsciously seen as under threat from the sober, hard-working woman, although that dangerous culture is not assessed in these terms. The office's discomfort with what is seen as at best an interference with male culture and at worst a destruction of that behavior leads business to an unacknowledged, confused assessment of women as either nurturing or neutering for the men in the office.

The role of women in the workplace and the progress of professional women seeking seats on boards of these global and other large companies (whether the woman starts her career in sales, marketing, law, finance, trading or some other specialty) depends in part on society's support for women and families so that women can be seen as free to do their jobs. Furthermore, women are viewed primarily through the lens of their family roles: nurturer in chief, supporting her husband, encouraging her children and responsible for keeping the nuclear family in touch with the wider family of in-laws and adult siblings.

***507** This Article begins by discussing the foundational support for the Commission's proposed quota legislation on the basis of the principles of Union law as well as the specific regulations or directives that authorize the Commission to take action in order to create gender equality. In Part I, we set forth the Union's long-standing policy of encouraging equality between men and women, and note that since full equality has not yet been achieved, further Union-wide action must be taken, including--but not limited to--an emphasis on increasing gender diversity on corporate boards. Quotas are the next logical step in the Commission's long journey toward a full realization of free movement of workers and freedom from sexual discrimination. The Commission has taken the stance, based on the experience of Norway, that legal quotas may at least provide enough women--a critical mass--with experience on boards to make their presence felt. Even a century after the women's suffrage movement, the Commission's position is bold, although it is a compromise representing less than the Commission had hoped to accomplish.

Impetus for introducing legal quotas on boards of directors of European publicly listed companies derives in part from the data of the Commission's studies which show that thirteen percent of women serve as chairs of boards of directors. [4] Thus the "quota" for men is ninety-seven percent, down only three percent from the long-time quota of 100%, better termed a monopoly. [5] Yet not all Member States officially recognize the gender discrimination at the heart of such data; therefore not all Member States recognize the need for anyone, themselves or the Union, to deal directly with the situation of women's presence on boards of directors. The different views on women assuming seats on boards become clear through the presentation in this Article of market (business), moral and social arguments for the presence of women on boards and the arguments presented against the Commission and the European Parliament's proposed change in the law.

Part II features the main arguments of the "business case" for increasing the presence of women on corporate boards--that is, the notion that diversity of gender on corporate boards can make a positive difference for the company's bottom line. In this Article, the business case is treated somewhat differently from the usual economic and corporate literature. [6] Those who disagree with the business rationale for gender diversification tend to rely on short-term putative benefits, acting more like day-traders seeking a quick profit or result. Finding none, they trade into the next position. Instead, we contend that the proper time-frame is an extended period to determine the value of women's contribution to their companies and the economy and society as a whole. Testing the efficacy ***508** and originality of contributions to the board is an investment in human capital and takes time to assess over the long-term.

Part III summarizes the quota legislation implemented in Norway in December 2003, and assesses the successes both of that legislation in obtaining gender equality at high levels of business decision-making and of the business rationale itself as an impetus for increasing the number of women on boards of directors. Part IV addresses Ms. Reding's proposal and the Commission's ensuing revised proposal for a directive and provides an overview of national, international and private initiatives to increase gender equality on corporate boards. In Part V, we conclude that the proposed directive, if done with co-operation and measured for long-term success, will permit business value and human value to be enhanced together. As the early reaction to the Norwegian quota legislation in 2003 demonstrates, human factors in employment may put a heavy thumb on the scale of justice--as, in human terms, quotas mean nothing less than the relinquishment of a near male monopoly on boards of directors. If passive resistance sabotages the proposed Union law, progress will come only slowly and at great cost.

I. THE FUNDAMENTAL EUROPEAN UNION PRINCIPLE OF ENCOURAGING GENDER EQUALITY AND THE NECESSITY FOR MANDATORY, EFFECTIVE UNION-WIDE ACTION

Gender equality is a longstanding fundamental principle of the European Union, found in treaties that date back to the founding of the community. The Treaty of Rome of 1957 includes a provision banning pay discrimination based upon gender. [7] Article 8 of the Treaty of the Functioning of the European Union (TFEU) establishes equality between men and women as one of the EU's main objectives, stating: "[i]n all its activities, the Union shall aim to eliminate inequalities, and to promote equality between men and women." [8] Article 157 of the TFEU authorizes Member States to take positive action in order to achieve equality *in practice* between men and women in business. The original text of Article 119 (1) EEC Treaty (later Article 157 (1) TFEU), which was adopted in 1957, states: "Each Member State shall ... ensure and subsequently maintain the application of the principle that men and women should receive equal pay for equal work." [9] Even further, the Charter of Fundamental Human Rights of the European Union tolerates no discrimination on the grounds of sex. [10] Article 23 states that "[t]he principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favor of the ***509** under-represented sex." [11]

In addition to the explicit Treaty provisions, which establish principles of gender equality and equal pay for the same work, the Commission took action during the 1970s based upon this competence. The Commission mandated that men and women have the same opportunities for promotion and training. [12] It has also issued directives on gender equality regarding people receiving payments from the government, the self-employed and people on maternity and parental leave. [13]

The European Court of Justice has a rich history of case law, emphasizing the social aim of equalizing men and women in the work place. [14] While the Treaty (Article 119 of the EEC Treaty, now Article 157 of the TFEU) codified the principle of equal pay for equal work, the original inclusion of Article 119 was primarily economically motivated--the Treaty authors sought to eliminate distortions in competition between Member States with different levels of social protections. [15] Nevertheless, in 1976, the Court of Justice held that Article 119 EEC was not merely economic in nature, but also contained a social goal. [16] This goal, as the Court discussed, was to contribute to social progress and improve both living and working conditions by eliminating gender discrimination. [17] The Court of Justice has gone further by holding that the principle of equal pay for equal work is a fundamental human right. [18] Both equality of treatment and positive action (promotion of the under-represented sex) are recognized in Article 23 of the Charter of the Fundamental Rights of the European Union, Article 157 of the TFEU, and Article 3 of Directive 2006/54/EC on equal treatment of both ***510** sexes in matters of occupation. [19] Despite these legal protections, gender inequality remains a serious

problem from the point of view of equal justice and greater economic prospects for the companies women work for as well as greater economic prosperity for society at large when women reach their potential. Therefore, it is in the interests of all to hasten the arrival of gender equality at all levels of business, for too long now a partially realized goal.

The traditional division of labor, with women responsible for taking care of the family and men responsible for providing economically for the family, acts as an ever-present barrier to the advancement of women up the corporate ladder. [20] Both men and women are invested psychologically in society as they know it and value the contributions they make. Behavioral economists show us that the force of habit even without animosity or passive resistance can present barriers to doing things in a better way both in personal and in public life. [21] At least some men also resent women moving into what they perceive as their area. [22]

The *Gender Diversity* study McKinsey completed in 2013 found that companies must address underlying assumptions and cultural divides in order to achieve gender diversity at executive levels. [23] The study highlights the lack of awareness among men of the difficulties which women alone face in climbing the corporate ladder, and the perception among women that female leadership styles do not "fit in." [24] The study also examines the current performance model of "anytime, anywhere"--or being on call 24/7--as being more advantageous to ***511** men, who do not as frequently stay home at night with the children, but remain at work or at their computers as necessary to demonstrate total commitment to the company. [25] For example, eighty percent of respondents to the study said that having children was compatible with a high level career for men, while only sixty-two percent said the same for women. [26] Flexible time arrangements, even those which would help keep women in a company, are seen as a barrier to career advancement. [27] When sacrifices in a career are to be made because flexible time and child care are unavailable, the parents discuss the situation and more often than not the woman sacrifices her career. Because she does not have the support or resources to keep working when she has responsibility for children, she disguises the situation by saying she has made a "choice." [28] While the study revealed relative equality in terms of men and women's ambition and willingness to make sacrifices in personal lives, it found a striking difference in the level of confidence in the chances of success that men and women expressed. [29] Women were about fifteen percentage points less sure than men when asked whether they would actually achieve their career goals. [30]

Structurally, the lack of access to and high prices for dependent care services, inadequate leave systems and inflexible working arrangements, along with tax policies unfavorable to two income families, discourage many women seeking careers. [31] More often, women facing those challenges sacrifice their career aspirations to care for family. Women are under-represented at the management ***512** level, which provides the experience leading to recruitment and seats on Boards and positions as CEOs. [32] Consequently, women are often less trained and less prepared for the highest positions. [33] A lack of role models and mentors in the business world may also discourage women from actively seeking higher management positions in large companies.

The European Commission in 2003 created a database of information in thirty-three countries about women and men in business decision-making positions. [34] The Commission began collecting data from companies that cover the largest registered constituents of the index maintained by the stock exchange of each country. The database totaled 598 companies with at least ten but no more than fifty companies from each country. [35] It recently disclosed that an average board has just one female member and that men chair ninety-seven percent of the boards. [36] As of 2010, women accounted for fewer than twelve percent of board members in publicly listed companies and a little more than three

percent of board chairs. [37] In 2010, most respondents to the Commission's public consultation on corporate governance agreed that "greater diversity on boards avoided the 'group think' phenomenon and stepped up the challenge within boards." [38] Although the respondents were concerned that diversity may come at the price of sacrificing knowledge and expertise in the boardroom, some respondents still favored mandatory quotas of female board members. [39]

In both the Women's Charter and the Strategy for Equality between Women and Men (2010-2015), equality in decision-making is listed as one of the Commission's top five priority areas. [40] These documents reaffirm the Commission's ***513** dedication to equalizing gender representation in practice and to placing women into positions of responsibility. [41] Nevertheless, progress toward gender balance at top economic levels has significantly slowed in recent times, evidencing a lack of effective voluntary action on the part of both Member States and the companies themselves. [42] The disparity between men and women in positions of responsibility at the top level in business has not narrowed in any noteworthy manner in recent years. In fact, from 2000 to 2009, the percentage of female business leaders rose only 2.1%. [43]

In marked contrast, in Norway, not a member state of the EU, women constitute nearly forty percent of board members in the largest companies since the country instituted a legal requirement for balanced representation. [44] In 2012, McKinsey conducted a study of more than 230 European companies with a majority implementing measures to improve gender diversity without, however, being able to achieve satisfactory results from their efforts. [45] One in three listed companies in the European Union had no women on its board, while another third had only one female member serving on the board of directors. [46] If this rate of progression were to remain constant, it would take more than fifty years to reach a balanced gender representation, with at least forty percent of each sex, on company boards. [47]

In the largest companies in 2010, fewer than three percent of CEOs were women. [48] This figure is notable because CEOs often play a central role in boardroom recruitment. An increase in women in recruiting positions will allow greater female representation overall. Women have been close to half the labor force for nearly two decades. [49] This figure highlights the flaw in the argument that the mere sustained presence of women in the business sector, without particular efforts and plans to promote women, will allow women to reach the highest positions in economic decision-making. [50] In fact, during the same two decades, women have taken relatively miniscule steps in terms of gaining a presence on corporate boards. [51] An OECD study concluded that better use of ***514** female human capital would increase economic growth, decrease poverty, enhance business performance and innovation, cut costs for health care and social programs, better tailor government policies to the needs of more citizens, and decrease environmental damage. [52]

Real change in social norms often requires a legal precedent to ignite change. Gender equality may require such action. [53] A generation ago, Rosabeth Moss Kanter argued that only structural change in an organization will achieve real growth both in decision-making responsibility and among individual decision-making personnel themselves: "[I]t is not only necessary to appoint women to corporate board, it is also essential to create favorable conditions for the board members to realize their potential." [54] The force of that argument has not diminished today and, sadly, neither has the need for that argument. A significant factor in support of the call for action across the European Union to increase gender equality, as opposed to leaving board representation to Member States, is the disparity of progress within the individual Member States throughout Europe. The disparity in accepting women on boards of large companies not only creates social issues in bringing about total gender equality, but may also affect the competition in the internal market. Improvements in some Member States stand against the decline in the percentage of women on corporate boards in other Member States between October 2010 and January 2012, including Romania, Hungary and Slovakia. [55]

Further, in many Member States all-male corporate boards continue to be common practice. In about a third of the Member States, including Bulgaria, Cyprus, Estonia, Hungary, Lithuania, Luxembourg, Malta, and Slovakia, more than half of the largest corporations have no females on their boards. [56] In France, Sweden and Finland every company board has at least one female member with the majority of boards having more than one. [57] In fact, only five Member States ***515** have at least two women in more than half of their corporate boards. [58] This includes France with eighty-nine percent, Sweden with eighty-five percent, Germany with seventy percent, Finland with sixty-seven percent, and the United Kingdom with sixty-six percent. [59] In Europe, resistance to the full integration of women into corporate boards characterizes this age, as resistance to an internal market in goods characterized an earlier age of European Union history.

In fact, market considerations, such as the instrumentalist argument that women's presence will increase the profitability of a company, as well as ethical and moral arguments are often cited to increase the number of women on boards. [60] By analogy, the business argument for introducing a cafeteria into business premises was that decent, low-priced meals would result in employees returning promptly to work, energized by healthful choices of foods without worrying about where to go for lunch, rain or shine. [61] The profit-seeking shareholder is deemed not to be concerned about moral or humane reasons for instituting such measures, including increasing the number of women serving on the board of directors.

II. THE BUSINESS RATIONALE FOR INCREASINGWOMEN'S PRESENCE ON CORPORATE BOARDS

The most frequent and compelling argument in favor of gender quotas on corporate boards is the business rationale. At its most basic, the "business case" for gender equality argues that "women's advancement in the world of work brings benefits for businesses, while the under-utilisation of women's skills is a loss for the economy, particularly in the light of anticipated skill shortages." [62] Perhaps for its familiarity, the Commission invoked the business rationale in its proposed directive. While women's advancement in the business sector arguably brings a variety of benefits to the businesses, [63] a critical mass of women in the boardroom may be needed before women have a measurable impact on business. ***516** While the business rationale for increasing women's representation on boards of directors may appear persuasive, it has been undermined by the fact that companies, by and large, have not voluntarily increased the numbers of women on boards. [64] Either more than profits are at stake in the composition of the boards or women on boards simply do not increase profits for companies. Both arguments are considered in this Article.

It is useful to review the functions of a corporate board before examining the studies on women's effects on the company in general or the board itself. The primary roles of a company board are to monitor and provide advice and guidance to the management team. [65] Female members of company boards and audit committees, and female chief financial officers and auditors have been found to have a positive impact on financial reporting, auditing and internal controls. [66] It is well established that diversity increases innovation by tapping into individual knowledge, skills and experience. Ernst and Young, studying diversity in the workplace, found that groups with greater diversity outperformed less diverse groups, even if the less diverse groups were more capable. [67] The study specifically found that diversity affected performance to the same extent as, if not more than, individual ability. [68]

Multiple studies demonstrate a positive correlation between the percentage of women in senior positions and company performance. One recent study found that a company with a female CEO is about ten percent more profitable than a corresponding company led by a male CEO. [69] The same study also found that the ***517** percentage of female officers

has a similar effect on profitability. [70] The study suggests several possible explanations for a positive correlation between female management and profitability. [71] Although the first hypothesis, namely that women may be better leaders, was not proven, the study did show that women's leadership style may be well- or better-suited for modern business. [72] The study did show that women are subjected to more scrutiny due to the existence of the "glass ceiling." [73] Other recent studies show that a greater number of women in higher positions increases support networks in the office, thereby increasing employee satisfaction, reducing turnover rates, and reducing the costs associated with turnovers. [74]

Importantly, diversification at high levels of a corporation may have decreased both the economic and social costs associated with discrimination and harassment in the workplace. [75] Corporations risk of millions of dollars in liability defending and settling sexual harassment and gender discrimination lawsuits. [76] Female directors may be equipped with a better understanding of discrimination and harassment, and thus be better suited both to help resolve and to mitigate the risk of such incidents. [77]

A number of studies throughout international academic literature focus on the connection (or lack thereof) between female presence at higher levels of economic management and the financial profitability of a business. [78] The findings, however, are often contradictory due to small and often skewed data sets which do not inspire readers to trust these studies. [79] The percentage of women in top executive positions is so low that obtaining the necessary pool of participants has often been, or been perceived as, a problem, at least until a concerted effort to identify large numbers of women ready to assume board responsibility was ***518** widely publicized. [80] Further, corporate boards do not often make decisions that directly weigh on firm performance; rather, the board oversees management and sets policies for the company as a whole. [81] It is therefore difficult to determine in what ways positive or negative financial performance is influenced by the board at all, let alone the performance of individual members of the board. [82] Despite these difficulties, however, many studies have indicated that there may be a positive correlation between a business's financial successes and female leadership. [83]

Nevertheless, some economic studies dissent. Most prominently, some authors deny that business advantages were obtained for companies from diversification after the increase of women on boards of directors in Norway in the years immediately preceding and following the Great Recession of 2008. [84] Critics believe that increases in stock prices following quota legislation were not a result of having more women on boards, but rather a correction for declines in stock prices that often occurred in anticipation of the legislation, showing that any change in shareholder value at the time the legislation was introduced was not a true reflection of women's influence. The readers may agree or may go further and assume that therefore months later any increase in share price is due to other factors than female directors adding value to the corporation. Resistance to accepting the business rationale for increasing the presence of women on boards has led one researcher to suggest that mixed empirical evidence for women's contribution to the bottom line of their companies is not "the sole or even motivating reason for the stagnation" in the number of women serving on boards. [85]

Other means, whether less instrumentalist or more coercive, are necessary to increase the presence of women on boards of corporate directors. Other means, however, which fall short of quotas and even quotas themselves, may also not prove sufficient to increase women's prominence on boards or in other important business positions within corporate management itself when resistance to change ***519** is more powerful in the face of possibly losing one's culture or one's own position on the board. Quotas may nevertheless change attitudes in the corporate world. The proposal for an EU directive on quotas for corporate boards as well as for Member State legislation on board quotas was inspired by the experience in Norway. A 2010 survey found that female directors in Norway "perceive themselves to have more influence,

receive more information, and are more engaged in social interaction with the increased ratio of female board members after the quota law was implemented." [86]

III. QUOTA LEGISLATION FOR CORPORATE BOARDS IN NORWAY

In 2002, Ansgar Gabrielsen, the Minister of Trade and Industry in Norway, suddenly and without previous signaling within the government, proposed a voluntary quota law proposing that public limited liability companies have at least forty percent members of both genders on their boards. [87] The minister described the proposal to the media without passing through the normal channels because he feared that corporate lobby forces and bureaucracy would squash the proposal:

> The law was not about getting equality between the sexes; it was about the fact that diversity is a value in itself, that it creates wealth. I could not see why after 25-30 years of having an equal ratio of women and men in universities and with having so many educated women with experience, there were so few of them on boards. From my time in the business world, I saw how board members were picked: They come from the same small circle of people. They go hunting and fishing together, they are buddies. [88]

***520** In December 2003, in large part due to the support of then Prime Minister Kjell Magne Bondevik, Norway enacted its voluntary quota law, requiring at least forty percent of each sex on the boards of all 500 companies listed on the Oslo Stock Exchange and gave companies two years to comply. [89] The original legislation of 2003 contained a provision stating that the quota would not come into force if the companies on their own had achieved an average of forty percent women represented on boards. When that voluntary action yielded only mixed success, the new Section 6-11a of the Norwegian Public Limited Liability Companies Act entered into force on January 1, 2006, again giving companies two years to recruit the required number of female directors but this time with consequences for non-compliance by the end of the grace period on December 31, 2007. [90] A failure to meet the quota was to result in penalties, including the dissolution of the company as a last resort. [91]

A. NORWAY'S EARLY LESSONS IN BOARD COMPOSITION

Section 6-11a of the Norwegian Public Limited Liability Companies Act requires forty percent of the directors of public companies registered in the Norwegian Register of Business Enterprises to be women. [92] The stated reason for not applying the quota to private companies was that the shares of private companies are typically less dispersed and the companies are typically family-controlled with the shareholders being the members of the board. [93] During the last quarter of 2007, some companies were still struggling to comply with the now mandatory quota law; roughly sixteen percent of the companies had not ***521** complied by the end of the quarter. [94] Thus, there were about seventy-seven (out of nearly 500 public limited companies) reported instances of companies being warned about possible sanctions if they did not comply within a newly issued deadline. [95] Companies not yet in compliance tended to be in finance, IT, and gas and oil. [96] The governmental agency responsible for compliance (Bronnoysund Registration Centre) contacted non-compliant companies after the grace period expired and gave them a month to comply with the sanction under the Companies Act of dissolution. [97] Nearly another half year passed before total compliance was reached. By the middle of 2008, all Norwegian public companies had the required number of women on their boards. [98] According to the Register of Business Enterprises, no company was actually sanctioned for non-compliance. [99]

Notably, the main legislative purpose of Section 6-11a was to recruit more women onto boards for the sake of the performance and competitiveness of the company, not for the protection of the under-represented gender. [100] Rather than sacrificing the quality of directors, the quota law aimed to increase the talent pool available for selection by including women, which should allow companies to select the most qualified person for the position. [101]

The effect of the law has been to recruit the best women for the positions and force out the least competent men, giving companies better boards. [102] A newspaper reported that the Norwegian boards have expelled the least competent male directors as a direct consequence of Section 6-11a. [103] Reports noted that the increased number of women in top management positions has resulted from the increased visibility of competent businesswomen due to Section 6-11a. [104] According to one study, "team members of both sexes identify that working groups with 50 percent men and 50 percent women deliver optimal performance in most areas that drive innovation." [105] The study reported that "[g]ender imbalances create a significant deterioration in knowledge-based work with regard to experimentation, knowledge transfer, the capacity to work across functional or business boundaries, and general efficiency." [106]

***522** The immediate consequence of this law has been a sharp increase in the number of women on the boards of large companies in Norway. [107] According to the Institute for Social Research in Oslo, Norwegian women now have more access to economic decision making positions, more female role models in the business sector, and more eligible candidates for top management positions. [108] The law, however, did not have a spill-over effect with regard to positions and companies not subject to the quotas. [109]

The Norwegian experience blazed a trail for all other countries, though it may have been too much, too soon for those with vested interests in ascending to board directorships through the "old boys" network. Retreat from its pioneering achievement began early with disclaimers that diversification of the board could profit the corporation economically. [110]

B. EARLY REACTIONS TO QUOTA LEGISLATION FOR NORWEGIAN PUBLIC COMPANIES

Some scholars found the quota law had a negative impact on companies. For example, financial economists Kenneth Ahern and Amy Dittmar examined the impact of the announcement of the Norwegian law requiring at least forty percent representation of women on boards of directors. [111] The study looked at 248 publicly listed Norwegian firms from 2001 to 2009 during the go-go years before the Great Recession of 2008 and immediately after it, and found a large negative impact on firm value. [112] The study also found that the new female directors were younger and more likely to be employed as nonexecutive managers than the retained male directors. [113] The women were also more highly educated but had ***523** less CEO experience than the men on the board. Notably, the study did not find that board sizes had changed as a result of the law, suggesting that, rather than increasing size by adding more female directors, companies are choosing to replace the least competent male directors. [114] The study found that after the implementation of the quota law, companies generally increased in size, took on more acquisitions, increased leverage and reduced cash holdings. [115]

Ahern and Dittmar argue that these negative results are consistent with deterioration in the capabilities of the board, although other researchers have found that "a company's poor performance is a trigger for appointment [of a woman] to the board." [116] Ahern and Dittmar acknowledge, however, that the increase in female presence on the board does not rule out all other explanations, including the fact that Norwegian companies had a short time frame in which to

comply.[117] Their honest disclaimer about exclusive causation is not always remembered in assessments of what the business case, or rationale, for guidance on increasing women's accessibility to board membership. It deserves underlining here. Almost any economic study measuring occurrences in companies or society also has a political economy effect on its readers. Thus, readers interpret studies, sometimes by supplying causations for the effect and at other times by asking how valuable the data in the study are to the end user in question.

At this point, "other" explanations for the deterioration than the arrival, or increase in the number, of women on the board may properly be noticed. Ahern and Dittmar's study noted that many firms have avoided the law altogether by becoming private (that is, adopting the equivalent of American LLC status while continuing to be publicly listed) or incorporating outside of Norway, thereby expressing opposition to the law.[118] It is easy to infer that initial dislike of ***524** increased female influence on boards caused passive resistance to the quota legislation. Male directors simply do not wish to give up seats on the boards to women.

Therefore, the design of the quota system can decrease non-compliance by including sanctions for non-compliance and by temporarily increasing the number of directors serving on boards until incumbents are phased out over a period of years (perhaps seven to ten years, depending on the board). On the other hand, failure to impose sanctions for avoidance or non-compliance, temporary increase in board numbers or the number of women to be added to the board (only one token woman rather than two or three women) may allow reluctant incumbents to circumvent weak quota laws and to ignore the woman's input once she assumes her seat.[119]

Were these Norwegian companies which avoided accepting women on their boards not subject to the same financial decline leading up to the Great Recession in 2008 Tobin's Q and the control groups of companies for comparison)?[120] To financial economists, the actual context of the conditions under which the Norwegian quota law was introduced is irrelevant for Ahern and Dittmar's study, since they are tracing statistically what anecdotal evidence had made clear. Ahern and Dittmar examined the effects of the announcement of the Norwegian quota proposal on the stock value of listed companies, in keeping with the canons of financial economic studies.[121] They thereby, if unintentionally, confirmed Minister Gabrielsen's approach in making an end-run around corporate lobbyists and getting the legislation approved in the face of all but inevitable backlash which temporarily depressed stock prices.

It is appropriate to ask how those observations about the stock price contribute to whether the business case for increasing women on boards is relevant. General Western financial decline, outside of the "Canadian miracle," was characterized by the assumption of improvident debt, corporate expansion using that debt, and ***525** the lack of cash in companies' treasuries, including companies that did not also greatly increase the number of women on their boards. The Great Recession affected companies across the United States as well as in Norway. Notably, the men on the boards of American companies did not out-perform their female Norwegian counterparts, insofar as male board members in the West did not save their companies from the excesses of debt or the consequences of the Great Recession.[122] Thus, it may be that depression of the stock price of companies upon the announcement of unpopular news may be irrelevant to whether the decision is in fact good for companies. The men who ran companies leading up to the Great Recession were not subject to unpopular news that they were running companies badly. The whole system simply collapsed when their management was found wanting, despite their continued popularity and continued pay rises during the height of the Recession.

As noted above, Ahern and Dittmar acknowledge that other factors could have caused the perceived decline in companies with newly installed women on their boards. In that sense, the very narrow focus of the study on perceived short-term decline in Tobin's Q due to the sudden presence of women on the board reduces the usefulness of the study.

The announcement of quotas in Norway did not give companies much lead time. Thus, the perceived negative short-term impact of the quota on the values of companies may have "reflected perceptions of performance not actual performance." [123] The decline of these companies just after instituting a quota cannot be fully studied in isolation, comparing these companies only with their past histories and without considering other companies which did not increase the number of women on their boards during this same time period and yet suffered declines. "Several challenges arise in relying on the evidence of these studies for [accurate assessment of] the impact of quotas on corporate board performance" since boards are not looking primarily at the stock price of the company so much as overseeing management and setting company policies. [124]

Similarly to Ahern and Dittmar, Bohren and Strom analyzed a variety of board design mechanisms, including directors' equity ownership in the firm, directors' independence, directors' network, age and gender heterogeneity, board size, and employee directors in relation to firm performance. [125] The study found that as the number of women on the board increases, the performance of the firm decreases. [126] Nevertheless, Nielsen and Huse, who surveyed 201 Norwegian companies, found female directors "do not perform operational control tasks ***526** better or worse than men." [127] In fact, traditional agency theories familiar to any corporate finance student "do not provide much insight about how women contribute to board effectiveness." [128] "Female members of company boards and audit committees and female chief financial officers and auditors may also have a positive impact on financial reporting, auditing and the organization of internal controls." [129] Women certainly enhance board strategic control. Women have specific advantages for performing board strategic tasks, including "their consideration of the interests and perspectives of multiple parties." [130]

Bohren and Strom's study also suggests that more gender diversity may reduce the speed of decision-making among directors when other researchers point out the dangers of a board with only one point of view so that no decision actually has to be discussed and defined but is automatic. [131] For both of these studies, almost contemporaneous with the Norwegian quota legislation, the results are almost certainly too soon to say that women have no business impact on improving the companies on whose boards they sit. Ahern and Dittmar's study of the announcement of the law and the resultant stock-market volatility measures exactly the apprehension of these worried about the presence of women on boards.

By definition, the trader's approach does not consider long-term investment value. Thus longer-term studies will present a more accurate picture about the impact of women on boards of directors of companies. [132] Will "taste discrimination" ('my nagging wife reminds me of the chores I'd rather not do but can't afford to hire out') decline over time? Will two or three women on one board eventually have some impact on companies' bottom lines, perhaps by implementing more effective retention policies for lower-level employees which have more ***527** immediate but lower long-term costs? Does the structural design of the quota law invite avoidance? Leadership theories are already being applied to determine how gender-based differences "might influence board processes, dynamics and task performance." [133]

The studies by Ahern and Dittmar and Bohren and Strom appeared fast out of the gate once the Norwegian quota law went into effect. They take the first temperature. The data are too short-term and limited to give meaningful, reliable results for women's work on the board. Yet, they also become actors in the story of maintaining the *status quo* because they encourage those reaching for the yield not to buy into the project of seating women on the board. The immediate-yield hogs, to whom these articles most appeal, forego a much richer corporation, both literally and figuratively.

Contributions of women to the board take time to emerge and even more time to assess, just as a value investor in a business venture takes the long-term measure of a company rather than the trader's short-term, more speculative stance. Ready dismissal of female directors' contributions on the grounds of making a business case for their presence on the board is a disservice to women and to business. It equates the business case with short-term change in the stock-market, analyzing the immediate years following the announcement of the quota legislation, when, in fact, it took into 2008 even to obtain full compliance with the quota law.

The business argument is too near-sighted to invalidate the contributions of women to boards. Despite the easily quantified costs provided in the quarterly snapshot of the firm on earnings' day or following the announcement of an event deemed to affect companies, taking a short-term view with regard to the long-term influence of women is almost certainly suspect. While some analysts recognize female corporate finance experts as equal to their male counterparts in quantitative skills, immediate returns are not the only consideration in evaluating the health and success of a corporation. Time as well as other resources are invested and must be measured in assessing the effectiveness of the overall project. As more women assume their seats on corporate boards and serve on different board committees, data will become available to indicate the full range of women's contributions to the short and long-term business, social and financial health of the corporations on whose boards they serve. The market, or business, argument based on the traditional economic theory of the business firm focuses on the financial fundamentals of the corporation as its agents, skilled in quantitative measurements, provide the stockholders with immediate quarterly profits. Even quarterly reports conceive of a business rationale with a longer view than initial apprehension at the announcement of a new law.

Furthermore, when existing corporate failures create downturns and near bankruptcy--even going so far as to require government bailouts--but do not ***528** lead to firing the responsible CEOs and CFOs, it can be inferred that the business rationale is being deployed selectively. Against this backdrop, it appears to serve the sole function of legitimizing the exclusion of women from boards. After all, how can studies which indicate shareholders' apprehension about seating of women on boards be used to argue that women contribute no immediate value to the stock price upon their election and that therefore they should not be seated? [134] In fact, these studies instead validate after the fact the approach Minister Gabrielsen took to achieve his legislative purpose.

Perhaps the “lack of early profit” argument should be held in abeyance to await the experience of women on the boards. The business rationale of “pay-for-performance” did not reduce pay for those financial executives in global investment and banking firms who in hindsight were erroneously hired and who caused losses not only for the stock in their companies but for the people of many countries in terms of their jobs, their houses and their families' well-being. These poorly performing but nevertheless powerful executives continue to receive unwarranted, premium remuneration instead of being fired for the losses they caused. In fact, their companies were for the most part bailed out and their executives' salaries remained large by any standards. [135]

Finally, the many business school and employment agency studies identifying board-ready women addressed the early Norwegian problem of placing the same women on multiple boards to avoid search costs and employ people already known to the decision-makers. Now names and qualifications of women ready to assume non-executive seats on Norwegian and other European boards are ***529** available online for all to identify easily and quickly. [136] The business rationale of pay-for-performance of those already employed but providing sub-par service should have been (but in fact was not) immediately applied to executive retention and pay in the wake of the Great Recession of 2008.

Henceforth, any focus on the business rationale to assess women's performance on boards should use a long-term lens to examine their contribution. Only this perspective will permit women to be judged fairly on the same playing field as

men. If, for example, future female board directors were to contribute materially to causing a disaster like the Great Recession, they should not be retained, any more than male corporate officials should have been.

IV. THE COMMISSIONER'S PROPOSALS FOR GENDER EQUALITY ON CORPORATE BOARDS, MEMBER STATES' REACTIONS AND THE COMMISSION'S PROPOSED DIRECTIVE

In March 2011, Commissioner Viviane Reding, at the behest of the European Parliament, began a "self-regulatory initiative" (the call to action) to invite companies to sign the "Women on the Board Pledge for Europe" and voluntarily increase women's presence on corporate boards. [137] European Business Schools/Women on Board Task Force partnered in the European Commission's call to action to increase women's presence on boards and compiled a list of 3,500 female graduates in management ready for service on the boards of large listed companies and posted the list online on March 7, 2012. [138] Both the compilation and the public posting are important because those who resist seating women on boards, let alone through legal quotas, profess not only their own ignorance of any qualified women not already serving but also the very existence of such qualified women. Executive search consultants in touch with the business school provide even greater numbers of female executives they have identified as "board ready."

The results were limited and met with a mixture of acceptance and ambivalence. That year, the number of women on boards increased by 1.9% compared to .5% the year before. [139] Yet, most of the improvement occurred in ***530** two Member States, the Netherlands and France, which instituted quota legislation. At the EU Commission, although the then commissioner from the Netherlands (Neelie Kroes) was not interested in supporting the original quota proposal, the proposed directive was supported by France, Italy, Austria, and Belgium. [140]

The serious social division over Reding's proposal has been largely framed in legal terms concerning the meaning of quota, whether a quota of 40% women on the board gives undeserving women a seat on the board, in effect a promotion these women do not deserve, and whether an informal quota of over 80% for men itself represents the discriminatory failure of men to recognize that the custom which keeps them in power is not the superior merit of all those men but their network of connections and perhaps (gently?) bullying ways. In that sense, the quota fight is a reflection of all the myriad, debilitating employment-family inequalities, from domestic violence to lack of child care and resultant part-time-work, which necessarily lowers women's pensions upon retirement and with consequently greater poverty in old age.

Those Member States that accept 80% male members on the boards of companies and that hence reject forty percent female members have, if unwittingly, halted the progress of women. Countries that failed to address "gender imbalance through quota laws backed up by effective enforcement mechanisms have not made a great deal of progress in increasing the number of women directors." [141] Many Member States that have not implemented quota legislation face stagnating and even decreasing female representation on boards, rendering the idea of at least forty percent representation of both sexes more remote. [142] It has been unusually difficult to find consensus for this legislation. Many Member States have decided that the fight for gender equality is too divisive in their own societies.

Eleven Member States have in fact implemented quota legislation for publicly listed companies: Belgium, France, Italy, the Netherlands, Spain, Portugal, Denmark, Finland, Greece, Austria and Slovenia have legislated quotas in order to improve gender equality on boards. [143] Depending on the strength of the terms ***531** of the particular legislation in each Member State, over all, these laws have the immediate consequence of increasing the number of women on boards.

United Kingdom

In contrast to other Member States, the UK has rejected quota legislation but prides itself on using consensus to operate as a substitute for legislation. A combination of a government commission and private business women and men started in 2010 to increase progress for women to access places on boards. [144] Up to that time, "the percentage of women directors in the top companies (Fortune 500 and the FTSE 1000) increased by less than 0.5% average per year over the last 10 to 15 years." [145] Similarly in 2010, just after the government commission was announced, a well-connected and successful British business woman, Helena Morrissey, a CEO of an investment firm, founded the 30% club. [146] Organizational psychologists agree that "a minority voice can be heard" if they represent thirty percent of a group, in this case a corporate board. The 30% Club also promotes a voluntary code of conduct on gender diversity used by the headhunters in UK. [147] Since the founding of the 30% Club and Lord Davies' commission, "the percentage of women on Britain's top boards has nearly ***532** doubled, up to 23%, while in the United States the figure has crept up a few percentage points to 17%." That voluntary concerted approach may work well in UK.

Belgium

The Act of 28 July 2011 introduced quota legislation in Belgium. The Act amended the Company Code, which concerned corporations that were quoted on the stock exchange and the laws that regulated the state-owned companies. [148] The Act required at least one-third of board members of both publicly listed companies and state-owned companies be members of the under-represented sex. [149] The Act requires companies who have not fulfilled the minimum quota to appoint a member of the under-represented sex to any vacant position, voiding any appointment not made in compliance with the Act. [150] The amended Company Code further prescribes a sanction of suspension of any advantage that is attached to the position of Director in the company for all members of the board as long as the company is not complying with the quota. [151]

France

Corporate legislation often expresses a desideratum. Sometimes it does not come with hard sanctions but often it does want to put corporations subject to compliance on notice and to provide sufficient time to comply with the new requirements. Thus France passed its legislation in January 2011 with an effective date of January 2014. Since France is a larger country than some other Member States, it is worth stating that the corporations affected here are either large listed companies and companies with more than 500 employees or more than 50 million euros in revenue, in all around 2,000 companies. By January 2017, the legislation seeks forty percent representation on the affected boards by each sex. The work leading up to the legislation previewed here is set forth below, showing shared French and European Union goals.

MEP Constance Le Grip detailed the Union's proactive stance on gender equality, including both the Parliamentary Committee on Women's Rights and Gender Equity and the establishment of the European Institute for Gender Equality. MEP Le Grip showcased France's work in parallel with the Union's. By 2001, France had adopted binding legislation on quotas in politics. Because ***533** legislation was the only way that brought progress in women's political representation, MEP Le Grip deemed quotas necessary ("a necessary evil"): "quotas have an impact." [152] This prior experience with political quotas provides a significant cultural precursor for France to be able to tackle the representation of women on "the decision-making bodies of large enterprises." [153] It is clear that "support for quotas among both men and women is higher in countries with quotas than in countries without quotas: 95 percent of women and 43 percent of men in

countries with quotas believe they are an effective way to increase gender diversity (as opposed to 48 percent and 23 percent, respectively, in countries without quotas)." [154]

France passed legislation in January 2011, giving large companies six years to have women in forty percent of boardroom positions, requiring that twenty percent be reached within the first three years. [155] The law requires companies to ensure that each sex occupies twenty percent of boardroom seats by 2014, and forty percent within six years from the entry into force of law. [156] The law applies to both companies listed on the stock exchange and non-listed companies that have at least 500 employees and have made over € 50 million in the past three years. [157] Around 2,000 companies are subject to the law. [158] State owned companies are also covered by the legislation. [159] In terms of sanctions, companies that do not comply with the quota are subject to nullification of their board elections and the suspension of benefits of the directors. [160] Notably, the law also creates quotas for public bodies besides corporate boards including universities and administrative bodies. [161] From October 2010 through January 2013, France, which adopted its quota law in January 2011, made the most notable improvements among the Member States. [162] Women on the boards of French companies had increased by ten percent. [163] From the perspective of the percentage of change at a Union-wide level between these two years, France's ***534** change made up more than forty percent of the total increase. [164] The Member States with the next greatest improvements were Slovenia and Bulgaria (both up four percent or more), the Netherlands, the Czech Republic and Germany (all up three percent or more). [165]

Italy

In Rome, under the auspices of the corporate association Valore D, several hundred women convened in early 2012 to discuss the empowerment of female executives. [166] With economic stagnation in Italy, it was felt that women should contribute more and could do so as they moved into the highest business ranks. Men held ninety-two percent of the seats on the boards of Italian companies. [167] Thus, at the end of the Berlusconi regime, the parliament voted to require more seats on boards of listed companies to be held by women before 2016. [168]

Thus, Law 120 of 12 July 2011 requires at least one third representation of each sex on the boards of companies listed on the stock exchange and state-owned companies. [169] The law applies to all companies with boards of at least three members and requires that the quota be achieved by 2015. [170] The law envisions three possible sanctions for noncompliance including: (1) a warning to comply within four months; (2) a fine ranging from €100,000 to € 1,000,000 along with a second warning to comply within three months, and finally (3) forfeiture of offices of members of the board who do not comply. [171]

Nevertheless, it was not entirely clear that people were taking this law seriously. [172] Before the law came into effect, people feared that the law would be a stumbling block for companies (not yet listed on an exchange) to get listed; but the quota law is designed to change the situation and eventually the culture. [173] Therefore, Valore D has associated with recruitment companies to show that ***535** enough women are "fully prepared to join a board." [174]

The Netherlands

The Netherlands amended its Civil Code to require public and private limited companies to strive for at least thirty percent representation of each gender on both the management and supervisory boards. [175] However, because it requires nothing more than a periodic report of the company's effects, the law remains quite weak. It further requires that companies take into account balanced gender representation as far as possible when selecting new members on the boards. [176] If an affected company does not comply with thirty percent representation of each gender on its board, it must issue a report to stockholders explaining why balanced gender representation has not been achieved, the measures which it has undertaken to achieve it, and what future measures it plans on implementing in order to achieve balanced representation. [177] The law, however, contains no sanction for non-compliance and expires on January 1, 2016. [178]

Finland

Finland's best-known international company is Nokia, founded in 1865, and most recently recognized for its phones. In 1994, Nokia responded to the ban on discrimination in the EU. [179] Finland lags behind Norway as far as the number of women on corporate boards. [180] Section 4a(2) of the Act on Equality between Women and Men, titled "Composition of Public Administration Bodies and Bodies Exercising Public Authority," stipulates that if an agency, body, institution with public authority, or company in which the Government or a municipality is a majority shareholder, has a board, that board must contain an equitable proportion of both women and men unless special circumstances require ***536** otherwise. [181]

Greece

The Gender Equality Act in Greece requires a one-third quota for state-appointed boards of all bodies consisted of members appointed by state authorities, including corporations which are fully or partially state-owned. [182] The law does contain a sanction in which appointments that do not comply with the quota requirement are subject to annulment carried out by administrative courts. [183] Even further, appointments made in the formation of boards that do not comply with the quota requirements are subject to annulment carried out by civil courts. [184]

Austria

The Austrian Council of Ministers, in March of 2011, issued a decision gradually to implement quotas on the boards of companies in which the State owns fifty percent or more of the shares. [185] The decision required companies to attain twenty-five percent representation of female board members by December 31, 2013 and thirty-five percent representation by December 31, 2018. [186] The quota does not apply only to the board members who represent the public owners, but also to the board as a whole. [187] Progress toward achievement of the quota is monitored by an annual report. [188]

A. THE COMMISSIONER'S PROPOSAL FOR GENDER EQUALITY ON CORPORATE BOARDS

After a decade of suggestions with little progress for the Commission to report on all its efforts, including those recent activities of Member States just set forth, Viviane Reding, Vice President of the European Commission and Commissioner for Justice, proposed that the European Union implement legislative action to achieve balanced representation of women and men on corporate boards. [189] Her proposal, formally introduced on October 3, 2012, was made as a call to action to members of the European Parliament and members of national parliaments with ***537**

the purpose of addressing the serious lack of gender equality in companies listed on stock exchanges in the Union. [190] Companies with more than 250 employees or 50 million euros in revenue would be subject to annual reports on the composition of their boards. Failure to reach the quota of the proposed law would result in administrative fines or exclusions from state-aid and contracts.

In making her case for using quotas as a tool to increase women's presence on boards of publicly listed companies, Ms. Reding began by tracing the long history of European Union competence legislating on the issue of gender equality. [191] The Treaty of Rome (1957) includes a provision that explicitly bans discrimination on the basis of sex. [192] In 1976, the European Court of Justice interpreted the then former Article 119 EEC to include a social objective that contributed to social progress and improved living and working conditions. [193] Ms. Reding noted that the TFEU empowers the European Union to adopt measures that ensure both equal opportunities for and equal treatment of men and women in employment and occupation matters. [194] In fact, in the 1970s, the Commission took action based upon its competence and legislated on gender equality by establishing the principle that men and women have the same promotion and training opportunities. [195]

Therefore, after voluntary compliance produced few visible results, Ms. Reding argued that the proposal for gender quotas on the boards of public companies constitutes the next logical step for seeking gender equality on the road to gender equality in practice and at all levels. [196] Ms. Reding set forth the micro- and macro-economic benefits of EU legal action to accelerating progress toward balanced representation of both genders at the highest level in business decision-making. [197] In fact, the proposal was made in agreement with all of the economic portfolio Commissioners. [198] Ms. Reding cites a number of studies that show better financial performance in companies with more women in senior jobs, in addition to boosting growth and jobs in Europe in general. [199]

At the time of the proposal, 86.5 percent of board members across the EU were men while women only represented 13.5 percent. Ms. Reding recognized that the ***538** problem is not a lack of qualified women but in fact the failure of companies to employ, train, or promote women to the top positions. [200] The Commission's premise is that integrating more women into the higher echelons of the labor market will improve competitiveness and raise employment rates, not to mention the benefits of making use of the wasted human capital of a large talent pool of highly skilled women. [201]

The United Kingdom fell into the category of those Member States with companies not interested in training or promoting women *per se*. The United Kingdom organized at least 11 countries in a strong opposition to the concerted legislative initiative to increase the presence of women on the boards of large companies. [202] In order to comply with the important principles of subsidiarity (Member States decide the methods and sanctions for accomplishment of a policy) and proportionality (taking the least restrictive means necessary to accomplish the legislative goal in question) the proposal for the directive therefore adopted six limiting provisions not originally considered. [203]

Member States' concerns caused the reshaping of the stronger original proposal in order to accommodate the hesitating and doubtful Member States. Mandatory quotas were no longer required. Only non-executive female directors on boards are addressed as part of the proposal to increase the number to forty percent. [204] Further, the scope of the law will only extend to companies listed on the stock exchange; small and medium-sized enterprises are exempt. [205] Qualifications are deemed the decisive criterion for selection of board members and the best candidates must be selected, even though they

may be female. [206] A possible "flexibility clause" permits the legislation to be temporary. Member States themselves will fashion the sanctions for failing to comply. [207]

B. PROPOSED DIRECTIVE IN RESPONSE TO THE CALL FOR GENDER EQUALITY

V.P. Reding's proposal faced significant criticism from Member States, commissioners, and even women's equality groups. [208] A week after the proposal was made, nine Member States (Bulgaria, Czech Republic, Estonia, Hungary, ***539** Latvia, Lithuania, Malta, the Netherlands, and the United Kingdom) wrote a letter to V.P. Reding and the President of the European Commission stating their opposition to the proposal and arguing that gender diversity should be left in the exclusive control of Member States. [209] Sweden, Finland, Germany and the United Kingdom voiced opposition to the adoption of a quota law. [210] The EU Parliamentary debate of Monday, March 12, 2012, dealt with equality between women and men in the EU, including the proposed quota. UK Member of the European Parliament (MEP) Paul Nuttall stated that "if a woman is dedicated and good she should get to the top. Did Margaret Thatcher need quotas ...?" [211] He dismissed quotas, unaware of the existence of qualified women who could serve on boards. According to MEP Erminia Mazzoni "we must refer to merit, but do we really think that the current make-up of decision-making positions, so unequal in terms of gender, is qualitatively as good as it could be? I do not think quotas are the best possible solution, but for now they are the only one available and anyone who contests this solution also has to come up with alternative proposals." [212]

The spectrum of Members' views on the concept of quotas and justice presented during this debate in the European Parliament gives some idea of the MEPs' broad commitment to gender justice, with the remarks of MEP Nuttall in the minority. [213] Thus, MEP Nicole Kiil-Nielsen favors binding measures "because parity seems vital to me. This is, quite simply, a question of justice .... Quotas are thirty to forty percent; they are not justice. Justice is 50:50." [214] ***540** According to MEP Cornelia Ernst, the glass ceiling is "also known as structural discrimination, and as long as that is the case, we will need this quota. It is [a] very crude tool: all the quota does is to create formal equality, which is the prerequisite for bringing about real equality of rights and fairness between the sexes. It seems to me that we should not beat around the bush, we should give this our clear support and I am therefore nailing my colours to the mast in support of this quota." [215]

"Certain people are appalled at the idea of quotas," explained MEP Mikael Gustafsson. "Well, I agree with them--I am appalled at the current male quotas. This is something that happens informally ... it is more likely the case that the current male quota is harmful to men, as people assume that many men have been elected simply because they are men. In the name of democracy, we must therefore achieve a system whereby women's and men's experience can be utilized in a much clearer way ..." [216] MEP Nuttall stated, "You promote mediocrity and I contend that businesses should have the right to hire the best person for the job ... It is called a meritocracy and it is something which Britain and the English-speaking peoples of the world have been pioneering for centuries." [217] For the career-span of a business woman, a pioneering gestation of centuries is simply too long for her to wait, although to MEP Nuttall it seems the ideal waiting period for a woman.

A female MEP asked MEP Nuttall how those men "in top jobs" in companies are there purely on the basis of merit. "Would you say that the people in top jobs, 97% of whom are white men, have done a great job with our economy lately?" He answered, "I would not say that women would probably do a better job ... I tell you that if you go down this line, all you are doing is tying the hands of businesses in times of austerity. It is wrong! ... give businesses the freedom to

hire the people they want." [218] MEP Nuttal's laissez-faire attitude is very close to the position of the UK's Association of General Counsel. [219]

In response to the Parliamentary Debate and Member States' comments, on November 14, 2012, the European Commission set forth a revised proposed ***541** directive dealing with gender equality on boards of directors of companies in Member States. [220] As the Opinion of the Parliamentary Committee on Employment and Social Affairs put it, "[c]onsidering the persistently low number of women on company boards and the obvious failure of self-regulation ... the time has come to take legislation action." [221] The Economic and Monetary Affairs Committee agreed "that bold legislation is needed from the EU" and further suggested that "the proposal does not go far enough, both in terms of scope and measures." [222] The Internal Market and Consumer Protection Committee welcomed "the choice of a Directive as a tool to establish a harmonized legal system and to reduce administrative burdens resulting from the divergent application and implementation of the principles of gender equality at the boardroom by the Member States ... and [in amendments] calls for M[ember] S[tates] to incentivize companies to achieve and report ... progress [including] shaping H[uman] R[esources] policy in such a way as to support the female talent pipeline." [223]

The proposal contains a "flexi-quota" requiring listed companies to set self-regulatory targets of representation of both sexes among executive directors to be met by 2020 (2018 for public undertakings). [224] If, however, the target of forty percent is not met by 2020, under Article 4 of the directive, a "preference rule" will be triggered to provide a female candidate an advantage over men, with the right to seek disclosure from the company of the criteria upon which her non-selection was based. The directive will apply to all non-executive directors or board members of companies incorporated in a Member State with its securities traded on a regulated market. [225] The proposed directive states that companies must give priority to a woman if she is equally qualified by suitability, competency and professional performance. [226] The proposal encourages companies to take a broader base of candidates from the beginning of the selection process, thereby enhancing fairness and transparency in the selection process. [227] The directive requires reporting to competent national authorities, explanations for non-compliance, and dissuasive, proportionate and effective sanctions. [228]

A year after the introduction of the proposed directive, on November 20, 2013, the European Parliament's Report was adopted with a strong majority of 459 to 148, and 81 abstaining. [229] Parliamentary Committees set forth their own rationales and amendments extending beyond the Commission's strong embrace ***542** of the business rationale to social and moral imperatives, reflecting its representation of the European people. [230] By the time of the International Women's Day in March 2014, the Council was discussing the directive although it had not had its first reading but the Italian Presidency taking office in July 2014 will treat this initiative as a priority in order to achieve a compromise solution. [231]

Regarding gender equality at the highest level of business decision-making, society's use of optional measures has thus far all but failed to make any measurable difference. If any real change to improve gender equality is going to be made, then legal, effective, binding, Union-wide action must be taken. "The gender revolution is not in a stall. It has hit a wall." [232] According to a Catalyst study, women in American corporations hold 16.9% of board seats; the current 4.9% of CEO positions was 1.7% ten years ago, "a tortoiselike rate" of increase, demonstrating that progress has stalled, perhaps due to balancing career and family. [233] A synthesis of the various methods implemented to improve gender equality reveals that in order for real progress to be made, Union-wide legal regulations must be adopted and enforced.

This action, called for by Vice President Viviane Reding and the Commission, is not only legally permissible and within the parameters of European Union law, but also is required based upon the fundamental principle of gender equality.

Deep-seated societal misconceptions act as a glass ceiling excluding the most qualified women from the highest positions at corporations. The economic benefits of increasing innovation through gender diversity on boards, improving work environments, mirroring the market and improving corporate reputations will resonate to the benefit of a stronger board for the corporations themselves.

CONCLUSION: QUOTAS, UNPALATABLE TO VESTED INTERESTS, MAY BE NEEDED TO INCREASE FEMALE PRESENCE ON CORPORATE BOARDS BUT WILL NOT LIKELY HAPPEN IN THE UK OR THE USA

Many across Europe have experienced a "far baser reaction to the prospect of empowered female leadership of any kind: Fear, plain and simple." [234] Critics argue that including women on boards by force of law would create mediocrity ***543** because the most qualified people for the position have already been selected. [235] A recent experiment at Yale belies this criticism: when researchers sent out a series of resumes of fictional male and female candidates, the qualified female candidates were consistently passed over, even when their credentials were identical to the male candidates' credentials in every respect but gender. [236]

Negative stereotyping is certainly not new. It depends on subjective considerations, casting women "as emotional, not rational, as unsuited for analysis or leadership, and as good at caring but not at decision making." [237] Negative stereotyping plagues women and minorities, not only in the political arena but also with regard to promotions in their employment. The first promotion and the entire career ladder are fraught with hurdles. [238] Nearly half the women in one survey by Catalyst claim to have acceded to high positions by developing a management style that makes men comfortable. [239] We take these conditions as a given. This milieu, however, greatly affects not only the prospects of women for promotion to significant executive positions and to the board but also about how soon we may expect to see the effects of a more equitable presence of women on boards.

Although some baseline attitudes may have changed over the past decades about working women, it does not follow that attitudes have likewise changed about women as leaders. A United States national Gallup poll completed in 2006 revealed that Americans were nearly twice as likely to prefer a male boss to a ***544** female boss. [240] Sufficient answers to questions about women's performance on boards to make or disprove the business case remain unavailable. Indeed, unfortunately so too is the presence of women on the boards of directors in any numbers approaching a critical mass so that their average contributions might be assessed. The social milieu in which women must fashion their careers continues to include deep-seated but unexplained negative stereotyping of women. [241] Perhaps that indicates both that (1) quotas are very much needed insofar as they express the underlying denial to women of a reasonable participation the business life of America; and that (2) quotas are politically untouchable in any form, at least in the United States, although they may be acceptable in a watered-down form in various countries in Europe, possibly at the EU level, and in Asian countries and Australia.

The myriad studies in every field of professional endeavor [242] expose and confirm a hostile work environment for women and extreme job pressures. "The reasons for the current over-representation of men in power and decision-making are not only structural and multifaceted, but are also grounded in traditional gender roles." [243]

These reports, surveys and experiments provide abundant and sufficient evidence to show a pattern of discrimination in hiring, promoting and retaining women. "There has been a recent surge of interest in literature indicating that even people who perceive themselves as tolerant have 'unconscious' or 'ingrained' biases that influence their behavior when

they interact with people of different races or genders. Importantly, the literature suggests that unconscious biases cause people to misunderstand how they would behave in the context of issues dealing with race or gender." [244]

***545** Since an employee puts so much of oneself into the job, companies work better and are better places to work if personal authenticity is valued in a corporate culture. Gender balance on boards of directors will fall into place once these very deep-seated problems are solved. As it stands now, quotas merely serve as a proxy for avoiding the many questions and problems to be addressed in order to establish a working environment that welcomes the contributions of women and men to the work environment. [245]

Footnotes

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1 Viviane Reding, Vice-President of the European Comm'n, EU Justice Comm'r, Turning Gender Equality into Reality: from the Treaty of Rome to the Quota Debate (03/10/2012) (transcript available in European Comm'n Press Release Database).

2 *Id.* at 3.

3 *European Commission Proposal for a Directive of the European Parliament and of the Council on Improving the Gender Balance Among Non-executive Directors of Companies Listed on Stock Exchanges and Related Measures*, COM at 5 (2012) 614 final (Dec. 14, 2012), http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52012PC0614&from=EN [Hereafter Proposed Directive].

4 *See* European Commission database on women and men in decision-making (January 2012), http://ec.europa.eu/justice/gender-equality/gender-decision-making/database/environment/index_en.htm.

5 *See id.*

6 *See* Ahern & Dittmar, *infra* note 110.

7 *See* Treaty Establishing the European Economic Community art. 119, Mar. 25, 1957, 298 U.N.T.S. 11 [hereinafter Treaty of Rome].

8 Consolidated Version of the Treaty on the functioning of the European Union art. 8, Oct. 26, 2012, 2012 O.J. (C. 326) 53, http://eur-lex.europa.eu/resource.html?uri=cellar:ccccda77-8ac2-4a25-8e66-a5827ecd3459.0010.02/DOC_1&format=PDF C. 326/53 [hereinafter TFEU].

9 Treaty of Rome, *supra* note 7, at 30.

10 *See* Charter of Fundamental Rights of the European Union art. 21(1), Oct. 26, 2012, 2012 O.J. (C 326) 400, http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012P/TXT&from=EN.

11 *Id.* at. 23. The principle of equality which Article 23 of the Charter highlights has many definitions. Thus equality of opportunity might direct attention to barriers in careers at all the steps up the ladder from initial training, first employment, and promotion to mentoring, sponsorship and access to strong mid-level positions which are stepping stones to the highest positions. Without sponsors to help promising female employees make the right connections, get placed on the right projects

and become visible for promotion to higher positions, women are precluded in varying numbers at each of these steps on the way to becoming a CEO, CFO or board member. *See generally*SYLVIA ANN HEWLETT, FORGET A MENTOR, FIND A SPONSOR (2013) (subtitle omitted) (explaining how the sponsor advocates the sponsored employee's advancement within the organization).

12 *See*SUSANNE BURRI & SACHA PRECHAL, EU GENDER EQUALITY LAW UPDATE 2013 (January 2014), http://ec.europa.eu/justice/gender-equality/files/dgjustice_eugenderequalitylaw_update_2013_final20november2013_en.pdf (referring to the Recast Directive 2006/54).

13 *See id.* at 10, 12-13. For example, Directive 92/85 (protecting employees who are pregnant, have recently given birth, or are breast-feeding) was adopted in 1992. The Parental Leave Directive 96/34 sets standards to facilitate the reconciliation of family life and work. *See id*; Council Directive 92/85, 1992 O.J. (L 348) 1; Council Directive 96/34, 1996 O.J. (L 145) 6.

14 *See* Case C-158/97, 2000 E.C.R. I-1902 (citing earlier cases).

15 *See* Reding, *supra* note 1, at 2.

16 Case 43/75, Defrenne v. SociétéAnonymeBelge de Navigation Aérienne Sabena, 1976 E.C.R. 0455, 472.

17 *Id.*

18 Case C-50/96, Deutsche Telekom AG v. Schröder, 2000 E.C.R. I-774, 794.

19 European Commission, Women on Boards--Factsheet 3, Legal Aspects, at 2, http://ec.europa.eu/justice/gender-equality/files/womenonboards/factsheet-general-3_en.pdf.

20 *See*COMMISSION STAFF WORKING PAPER, THE GENDER BALANCE IN BUSINESS LEADERSHIP, EC.EUROPA.EU at 6 (Mar. 1, 2011), http://ec.europa.eu/justice/gender-equality/files/gender_balance_decision_making/110301_gender_balance_business_leadership_en.pdf [hereinafter GENDER BALANCE]. *See also*MARTHA ALBERTSON FINEMAN, THE AUTONOMY MYTH: A THEORY OF DEPENDENCY 200 (2004) (theorizing a "responsive" government that, by accommodating caretakers, would "ensure family-friendly public institutions that do not require compromise between the demands of the workplace and the demands of dependents.").

21 *See generally*, RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE (rev'd & expanded version 2009).

22 *See* Mary F. Radford, *Sex Stereotyping and the Promotion of Women in Positions of Power*, 41 HASTINGS L.J. 471, 494 (1990).

23 MCKINSEY & COMPANY, GENDER DIVERSITY IN TOP MANAGEMENT: MOVING CORPORATE CULTURE, MOVING BOUNDARIES 14 (2013) McKinsey has a series of studies entitled "Women Matter," devoted to various issues of concern to women in business. As the notes up to note 20 indicate, the usual law review articles, books and legal documents from treaties to cases are cited. In addition, however, references to studies by paid think tanks (McKinsey, Virtcom, Ernst & Young) or non-profits (Catalyst) are cited along with various newspapers such as the Financial Times or the Wall Street Journal. The authors all have points of view that must be considered in measuring their reliability, even when they simply report data or the progress of a bill toward enacted legislation. This is, nevertheless, also true for academic articles whether by law professors or financial economists, psychologists or sociologists, all reflected in the notes hereafter. Their agreement or disagreement with our own views may or may not impact their reliability in terms of their usefulness in the field.

24 *Id.* at 5. *See also supra* note 6 (discussing the notion from studies by McKinsey, Catalyst and others that access to initial jobs and promotions is not equal for men and women who graduate from business school).

25 *See*GENDER DIVERSITY, *supra* note 23, at 5. In fact, this survey showed that the ambitions of women are equal to those of men. *Id.* at 10. Seventy-nine percent of women answered affirmatively when asked if they desired to reach a top management position. *Id.* In addition to sheer ambition, the survey also revealed that as many women as men expressed willingness to

compromise on their personal lives in order to succeed professionally. *Id.* Over sixty percent of women surveyed revealed that they were ready to sacrifice part of their personal lives in order to reach the top, in line with the responses of male counterparts. *Id.*

26 *Id.* at 14.

27 *Id.*

28 KATHLEEN GERSON, THE UNFINISHED REVOLUTION: HOW A NEW GENERATION IS RESHAPING FAMILY, WORK, AND GENDER IN AMERICA 191-94 (2010). Women's greater responsibility for the care of children (and aging parents) deriving from choice or necessity "will imply higher costs of entering and continuing in the labor force" leading to the selection of fewer women for promotion within companies. ROHINI PANDE & DEANNA FORD, GENDER QUOTAS AND FEMALE LEADERSHIP: A REVIEW, BACKGROUND PAPER FOR THE WORLD DEVELOPMENT REPORT ON GENDER, THE WORLD BANK, at 7 (2012), *available at* https://openknowledge.worldbank.org/bitstream/handle/10986/9120/WDR2012-0008.pdf?sequence=1&isAllowed=y.

29 GENDER DIVERSITY, *supra* note 23, at 11. The other end of the spectrum from self-assurance is the burden of other people's expectations of women in the workplace. For example, women frequently encounter the bias of constantly having to show their abilities without that ever becoming a presumption, as it is with men (the "Prove-It-Again!" syndrome).

30 GENDER DIVERSITY, *supra* note 23, at 11. *See also*CARYL RIVERS & ROSALIND C. BARNETT, THE NEW SOFT WAR ON WOMEN: HOW THE MYTH OF FEMALE ASCENDANCE IS HURTING WOMEN, MINORITIES AND OUR ECONOMY 1 (2013) (explaining that "[w]hile more women than ever before are studying medicines, law and business in college and professional schools, there is a real question whether they will ever attain leadership positions in the areas in which they have been trained ...").

31 *See*GENDER DIVERSITY, *supra* note 23.

32 *Id.* at 7.

33 *See id.*

34 *See*GENDER BALANCE, *supra* note 20, at 4 n.7, 9 (listing thirty-three Member States and possible candidates for accession: Croatia (which acceded Jan. 7, 2013); former Yugoslavian Republic of Macedonia; Turkey; Serbia; Iceland (no longer interested in accession but a member of EFTA); and Norway (member of EFTA)). The Commission also collected data in partnership with European business schools and executive search consultants. See *infra* nn.161-162 and accompanying text.

35 GENDER BALANCE, *supra* note 20, at 4 n.7. Throughout the Union, there are many small and medium sized firms, some family owned, but the focus for reducing discrimination on boards is on large companies listed on the stock exchange.

36 *Id.* at 4; EUROPEAN COMMISSION, DATABASE ON WOMEN AND MEN IN DECISION-MAKING: WOMEN AND MEN ON THE BOARDS OF THE LARGEST LISTED COMPANIES, EC.EUROPA.EU (2010), http://ec.europa.eu/justice/gender-equality/gender-decision-making/index_en.htm [hereafter Database].

37 PROGRESS REPORT OF THE JUSTICE COMMITTEE ON WOMEN IN ECONOMIC DECISION MAKING IN THE EU, EC.EUROPA.EU at 9 (2012), http://ec.europa.eu/justice/gender-equality/files/women-on-boards_en.pdf. *See also* Fawn Lee, *Show Me the Money: Using the Business Case Rationale to Justify Gender Targets in the EU*, 36 FORDHAM INT'L L.J. 1471, 1473 (2013).

38 GENDER BALANCE, *supra* note 20, at 9.

39 *Id.*

40 EUROPEAN COMMISSION, A STRENGTHENED COMMITMENT TO EQUALITY BETWEEN WOMEN AND MEN, COMMUNICATION FROM THE COMMISSION, COM at 78 (2010); EUROPEAN COMMISSION,

STRATEGY FOR EQUALITY BETWEEN WOMEN AND MEN 2010-2015, COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS, COM at 491 (2010).

41 *See*GENDER BALANCE, *supra*, note 20, at 3.

42 *See id.*

43 *Id.* at 4; Database*, supra* note 33.

44 GENDER BALANCE, *supra* note 20, at 5. *See* Part III. A, *infra*, at note 88 and accompanying text.

45 GENDER DIVERSITY, *supra* note 23.

46 GENDER BALANCE, *supra* note 20, at 5; Database, *supra* note 4.

47 GENDER BALANCE, *supra* note 20, at 5.

48 *Id.* at 6.

49 BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, WOMEN IN THE LABOR FORCE: A DATABOOK, 1-3 (2005).

50 *See generally*, Lisa Fairfax, *Women and the "New" Corporate Governance: Clogs in the Pipeline: The Mixed Data on Women Directors and Continued Barriers to their Advancement*, 65 MD. L. REV. 579 (2006) (pioneering the idea that gender is diverse). Furthermore, "improvements in education[al] attainment, professional development, and political participation have not translated into significant increases in female leadership in politics and business." PANDE & FORD, *supra* note 28, at 2. In fact, "[w]omen's broadening career paths have not led to a proportional increase in female leaders." *Id.* at 5.

51 *See generally* Fairfax, *supra* note 50.

52 *Gender and Sustainable Development: Maximizing the Economic, Social and Environmental Role of Women,*ORG. FOR ECON. COOPERATION AND DEV., 8 (2008), www.oecd.org/social/40881538.pdf.

53 *See*JON ELSTER, EXPLAINING SOCIAL BEHAVIOR: MORE NUTS AND BOLTS FOR THE SOCIAL SCIENCES 358-59 (2007) (arguing that the change in attitudes toward smoking began with legal restrictions on where smoking was permitted).

54 Sabina Nielsen & Morten Huse, *The Contribution of Women on Boards of Directors: Going Beyond the Surface*, 18 CORP. GOVERNANCE: AN INT'L REV. 136, 146 (2010) Kanter pioneered the structural interpretation of organization behavior. Thus, once women are brought onto boards, "men and women who occupy the same leadership role will behave very similarly." *Id.* at 138. Nevertheless, women have not in fact assumed a significant number of seats on the boards of corporations. "If, despite the presence of talented women, discrimination or other structural features of labor markets exclude them from leadership positions, then there is an efficiency case for using quotas to improve the allocation of talent in the labor market." PANDE & FORD, *supra* note 28, at 12; *see also* Beate Elstad & Gro Ladegard, *Women on Corporate Boards: Key Influencers or Tokens?*, 16 J. MGMT. & GOVERNANCE 595 (2012) (applying Kanter's consequences of tokenism).

55 European Commission Directorate-General for Justice, *Women in Economic Decision Making in the EU: Progress Report*, 2012, at 11 [hereinafter Directorate-General].

56 *Id.*

57 *Id.* (based on the sample studied in Database, *supra* note 33).

58 *Id.*

59 *Id.*

60 *See* Elstad & Ladegard, *supra* note 54.

61 Working conditions were hotly debated as part of the social program of the Maastricht Treaty (Maastricht Treaty Social Protocol for UK). *See* Case C-84/94, United Kingdom v. Council (Working Time Directive), 1996 E.C.R. I-5755. When differences in Member States' policies lead to obstacles for the internal market, TFEU Art. 114 permits the Union to take action, for example, through a directive. *See* TFEU art. 114.

62 GENDER BALANCE, *supra* note 20, at 3.

63 Aaron A. Dhir of Osgoode Hall Law School, York University, states that "[w]hile studies have not established a causal link between diversification and shareholder value, they have documented the benefits of diverse leadership in terms of enhanced decision-making and governance effectiveness." Aaron Dhir, *Time to Regulate Diversity in the Boardroom?*, THE GLOBE & MAIL (Mar. 7, 2012), http://www.theglobeandmail.com/globe-debate/time-to-regulate-diversity-in-the-boardroom/article551846/. Professor Dhir has studied the operation of Norway's quota law empirically through a series of interviews. He suggests modifications to the business rationale. *See generally*AARON A. DHIR, CHALLENGING BOARDROOM HOMOGENEITY: CORPORATE LAW, GOVERNANCE AND DIVERSITY (2015).

64 *See*GENDER BALANCE*supra* note 20, at 3.

65 PANDE & FORD, *supra* note 28, at 20.

66 GENDER BALANCE, *supra* note 20, at 8. Corporations have not, however, voluntarily moved to instate women on boards in large numbers, possibly because they either find the prevalent male culture comfortable, or they do not wish to cede valuable seats to women, or they fail to accept that women can fulfill these roles successfully. The moral and economic value of diversity may be unrecognized. See the remarks of former Norwegian trade minister, Ansgar Gabrielsen, *infra* note 88.

67 Ernst & Young, *Groundbreakers Study, Diversity: An Equation For Success* (2009), http://www.vitalvoices.org/sites/default/files/uploads/Groundbreakers.pdf.

68 *Id.*

69 *See generally, e.g.*, Annu Kotiranta, Anne Kovalainen & Petri Rouvinen, *Female Leadership and Firm Profitability, Finnish Business and Policy Forum*, No. 3, EVA ANALYSIS, (2007), www.eva.fi; McKinsey & Company, WOMEN MATTER REPORT (2007), http://www.raeng.org.uk/publications/other/women-matter-oct-2007; Nielsen & Huse, *supra* note 54; AVIVAH WITTENBERG-COX & ALISON MAITLAND, WHY WOMEN MEAN BUSINESS (2008); Claire Schaffnit-Chatterjee, TOWARDS GENDER-BALANCED LEADERSHIP, WHAT HAS NOT WORKED-AND WHAT MAY, DEUTSCHE BANK RESEARCH (2011), www.dbresearch.com; *Signs Of Improvement But Boards Still Need to Be Bolder When it Comes to Appointing Women*, CRANFIELD, UNIVERSITY SCHOOL OF MANAGEMENT (Oct. 12, 2011), http://www.som.cranfield.ac.uk/som/som_applications/somapps/oepcontent.aspx?pageid=14249&apptype=newsrelease&id=4410. *But see* David A. Matsa & Amalia R. Miller, *A Female Style in Corporate leadership? Evidence from Quotas*, 5 AM. ECON. J.: APPLIED ECON. 136, 166 (2013) (reaching the opposite conclusion, that in fact companies in Norway with female directors lost money in the short-term by retaining workers during the Great Recession rather than firing them). Notably, however, these results may not conflict with Kotiranta since Kotiranta's study from 2007 presented data before the Great Recession and before the Norwegian quota law had come into force (with extension in mid-2008).

70 Kotiranta, *supra* note 70.

71 *Id.* at 6 ("(1) women may be better leaders than men; 2) women may face harsher selection in climbing the corporate ladder making them more qualified as a group as compared to men in the same positions; 3) women may seek higher level position[s]

in more profitable companies and; 4) female leadership and business profitability may be connected to an unrelated third factor.”).

72 *Id.*

73 *Id.* at 7.

74 *See* James K. Harter et al., *Business-Unit-Level Relationship Between Employee Satisfaction, Employee Engagement, and Business Outcomes: A Meta-Analysis*, 87 J. APPLIED PSYCH. 268 (2002).

75 *See* Steven A. Ramirez, *Diversity and the Boardroom*, 6 STAN J.L. BUS. & FIN. 85, 88-89 (2000) (explaining that even if not explicitly addressed as an issue, businesses incur costs when some employees discriminate against other employees in the workplace).

76 *See* Cheryl L. Wade, *Corporate Governance as Corporate Social Responsibility: Empathy and Race Discrimination*, 76 TUL. L. REV. 1461, 1468-69 (2002); Cheryl L. Wade, *The Impact of U.S. Corporate Policy on Women and People of Color*, 7 J. GENDER RACE & JUST. 213, 225 (2003).

77 *See* Fairfax, *supra* note 50; Edward S. Adams, *Using Evaluations to Break Down the Male Corporate Hierarchy: A Full Circle Approach*, 73 U. COLO. L. REV. 117, 165-66 (2002).

78 *See*, *e.g.*, Kotiranta, *supra* note 70, at 2. Some studies conclude that women in higher levels of decision-making may bring economic benefits, such as higher profitability, to corporations. *Id.*

79 *See id.*

80 *Id. See infra* Part IV.A, note 132 and accompanying text, for the efforts to publish the names and credentials of women ready to assume their positions on the board.

81 *See*PANDE & FORD, *supra* note 28, at 22.

82 *Id.*

83 Kotiranta, *supra* note 70, at 2 (citing Orlando Richard, David Ford & Kiran Ismail, *Exploring the Performance Effects of Visible Attribute Diversity: The Moderating Role of Span of Control and Organizational Life Cycle*, INT. J. OF HUMAN RES. MGMT., 17(12), 2091-2109 (2006)); Caspar Rose, *Does Female Board Representation Influence Firm Performance? The Danish Evidence*, 15 CORP. GOVERNANCE: AN INT'L REV. 404 (2007); Nina Smith, Valdemar Smith & Mette Verner, *Do Women in Top Management Affect Firm Performance? A Panel Study of 2,500 Danish Firms*, 55 INT'L J. PRODUCTIVITY & PERFORMANCE MGMT. 569 (2006). *But see* Wolfers, *Diagnosing Discrimination: Stock Returns and CEO Gender*, 4 J. EUR. ECON. ASS'N 531 (2006).

84 *See* Part III.B, *infra*, note 111 and accompanying text; Lisa M. Fairfax, *Board Diversity Revisited: New Rationale, Same Old Story?*, 89 N. CAROLINA L. REV. 855, 855 (2011) [hereinafter Fairfax, Board Diversity Revisited].

85 Fairfax, *supra* note 84, at 879.

86 *See id.* at 883.

87 *See*HEDVIG BUGE REIERSEN & BEATE SJAFJELL, REPORT FROM NORWAY: GENDER EQUALITY IN THE BOARD ROOM, at 1 (2008), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1139604 (citing Lynda Gratton & Lamia Walker, *Gender Equality: a Solid Business Case at Last*, FIN. TIMES, Oct. 28, 2007, at n. 23).

88 *Id.* (citing “Han skaffet 800 styrekvinner [He got 800 women onto the boards]” Aftenposten, 4 February 2009, p 2-3 of the financial section (translated in Eng. by Beate Jafjell). Minister Gabrielsen's observations that culture and custom may exert their own pressure on the market led him to act through legislation. Erroneous assessments of gender capabilities or the

value of old cultures may hobble the market's assessment of the readiness of women to assume positions on boards. Eventual acceptance of non-executive women on Norwegian boards have shown fears to be groundless in the long run, despite the initial poor reaction to their presence. In Norway, that distrust receded in recent years and the numbers of women on Norwegian boards approached the 40% goal by 2014. *See* Joann S. Lublin & Theo Francis, *Women Gain Board Seats-- Abroad*, WALL ST. J., Feb. 5, 2014, at B6. Thaler and Sunstein discuss "Humans and Econs," particularly biases and blunders, with respect to Thaler's MBA students enrolled in Managerial Decision Making. Despite their quantitative skills and knowledge of statistics, they have unrealistic expectations with respect to their class performance. THALER & SUNSTEIN, *supra* note 18, at 31-32. It is possible that even after graduation, they may fail to assess others' abilities as well, leaving companies to muddle through and eke out profits despite the poor management. Thaler and Sunstein further observe that the invisible hand of the market "works best when products are simple and purchased frequently." *Id.* at 242. The Great Recession of 2008 itself was due to many biases and blunders, with decision-makers willing to risk other people's money by pressing a thumb on the scale of the market or even out-right rigging different markets from bonds to mortgages. To the extent that "the quants" in corporate finance were in charge of decision-making, it cannot be said that women would have been any more incapable or greedy than the men in those positions.

89 Section 6-11a, Norwegian Public Limited Liability Companies Act (hereafter Norwegian Act), available in translation at: http://www.oslobors.no/ob_eng/Oslo-Boers/Regulations/Acts. Section 6-11a(1) provides for the representation of both sexes, as follows: "1. If the board of directors has two or three members, both sexes shall be represented. 2. If the board of directors has four or five members, each sex shall be represented by at least two. 3. If the board of directors has six to eight members, each sex shall be represented by at least three. 4. If the board of directors has nine members, each sex shall be represented by at least 40 percent ..." *Id. See generally* Laura Kilday, et al., *Women on Boards of Directors: The Case of Study of Norway*, EURO. WOMEN'S LOBBY, July 2011 Executive Summary; Anne Sweigart, *Women on Board for Change: The Norway Model of Boardroom Quotas as a Tool for Progress in the United States and Canada*, 32 NW. J. INT'L L. & BUS. 81A, 82A (2012).

90 *See* Reiersen, *supra* note 87, at 1. "[I]t took over four years from the passing of the law for all companies in Norway to comply." PANDE & FORD, *supra* note 28, at 15.

91 PANDE & FORD, *supra* note 28, at 2. In Norway, "the quota approach was already well engrained and the hard sanction for its non-realization-- warnings, fines, the delisting of a company from the Stock Exchange in case of persistent non-compliance-- as such was met with (relatively) limited resistance ..." Linda Senden, *The Multiplicity of Regulatory Responses to Remedy the Gender Imbalance on Company Boards*, 10 UTRECHT L. REV. 51, 63 (2014).

92 PANDE & FORD, *supra* note 28, at 3.

93 *See id.*

94 Kilday, *supra*, note 89.

95 PANDE & FORD, *supra* note 28, at 15. REIERSEN & SJAFJELL, *supra* note 87, at 5.

96 Gladys Fouché, *Quarter of Norway's Firms Face Shutdown as Female Directors Deadline Approaches*, THE GUARDIAN (Dec. 27, 2007), http://www.theguardian.com/business/2007/dec/27/norway.female.director.

97 Beate Sjafjell, *Gender Diversity in the Board Room and Its Impacts: Is the Example of Norway a Way Forward?*, DEAKEN L. REV. 25, 32 (2015) (Austl.).

98 *Id.* at 32.

99 *Id.*

100 REIERSEN, *supra* note 87, at 5 (citing Ot.prp. nr. 97 (2002-2003)).

101 *Id.* at 6.

102 *Id.*

103 *Id.* at 6 (citing Norwegian newspaper "Ukeavisenledelse," 6 March 2008).

104 *Id.* at 6 (citing Norwegian newspaper "Ukeavisenledelse," 9 April 2008).

105 REIERSEN, *supra* note 87, at 7 (citing Gratton, *supra* note 50).

106 *Id.*

107 *Id.*

108 GENDER BALANCE, *supra* note 20, at 10.

109 *See id.* at 11.

110 *See generally* Kenneth R. Ahern & Amy K. Dittmar, *The Changing of the Boards: The Impact on Firm Valuation of Mandated Female Board Representation*, 127 Q.J. ECON.137 (2010). Their work was designed to take the temperature of shareholder wealth upon the announcement of the Norwegian law suggesting at first voluntary quotas. Here the authors would like to express appreciation for his comments about this part of the Article by Professor Martin Gelter in assessing financial economic articles written according to the canons of economics and the strictures of statistics.

111 *Id.* at 138.

112 *Id.* at 139. Ahern & Dittmar emphasized a measure of value in which, roughly speaking, the market value of the company is divided by the book value of the assets (denominated "Tobin's Q" in economic literature). They found that the quota law caused Tobin's Q to decrease by 8-15% in the companies subject to the quota, compared to the control group.

113 *Id.* at 140. *See also* Fairfax, *supra* note 50, at 599-600, n.114 (citing Marianne Bertrand & Kevin F. Hallock, *The Gender Gap in Top Corporate Jobs*, 55 INDUS. & LAB. REL. REV. 3, 7-9 (2001)) (discussing the continuing impediments to women's success in being selected as directors, including the fact that corporations by custom tend to select directors from the pool of retired executives of other companies for their boards, while women are segregated in "lower-level managerial positions."). While the Norwegian Act accomplished its goal for women chosen for seats on the boards of publicly listed companies, even six years later it has had no spill-over effect for those "highly qualified women whose qualifications mirror those of board members but who were not appointed to boards" or for those in the next echelons below them. Marianne Bertrand et al., *Breaking the Glass Ceiling? The Effect of Board Quotas on Female Labor Market Outcomes in Norway*, INST. FOR THE STUDY OF LABOR (July 2011), http://ftp.iza.org/dp8266.pdf.

114 Ahern & Dittmar, *supra* note 110, at 140.

115 *Id.* at 141. It is notable that in the United States, women on boards have most frequently been members of the audit committee. Fairfax, *supra* note 46, at 597. Due to statutory provisions encouraging more independent directors, audit committee members, often independent directors, resolve disputes between the corporation's auditors and its management. *Id.* (citing Sarbanes-Oxley Act of 2002 (codified as amended at 15 U.S.C. § 78j-l (Supp. II 2002)). Finally, it should be noted that this committee spends almost double the average number of hours for committee meetings. *Id.* The nominating committee's consideration of diversity for nomination to the board must also be disclosed on Proxy Disclosure Enhancements, 17 C.F.R. § 229.407(c)(2)(vi) (2012). *See generally* Fairfax, *supra* note 84, at 872-876 (discussing this disclosure rule for which the SEC, like the European Commission, relies on the business rationale).

116 RIVERS & BARNETT, *supra* note 30, at 53-54 (explaining that "[w]omen then become lightning rods--blamed for negative outcomes that were set in motion well before they assumed their new roles.").

117 *Id.*

118 *See* Reiersen, *supra* note 87, at 2-3, n.6. Similarly, a small number of the 500 companies subject to the Norwegian Act decided to "go dark" rather than comply with the law. Christine Toomey, *Quotas for Women on the Board: Do They Work?*, THE TIMES (UK) (June 8, 2008), http://www.christinetoomey.com/2008/quotas-for-women-on-the-board-do-they-work/; *see also* Kilday, *supra* note 89 (noting that the timing of the decision by several Norwegian companies to de-list at the end of the statutory grace period for complying with the quota law evince their desire not to admit women their boards).

119 PANDE & FORD, *supra* note 28, at 16, 27. A typical pattern is that the board often asks a woman to assume the helm of a troubled company in order to mask the troubles at the company and deflect attention onto the woman herself. RIVERS & BARNETT, *supra* note 30, at 54. "See what happens when you put a woman in charge." *Id.* at 54, 249, n.1 (citing Michelle K. Ryan & S. Alexander Haslam, *The Glass Cliff: Evidence that Women Are Over-Represented in Precarious Leadership Positions*, in IMPLICIT LEADERSHIP THEORIES: ESSAYS AND EXPLORATION 173 (B. Schyns & J.R. Meindel eds. 2005)).

120 PANDE & FORD note that other board characteristics besides gender, "such as average age, CEO experience and whether members are full-time board members[,]" decrease the effect on Tobin's Q so that isolating gender per se distorts the story of the addition of women to the board and decreases Tobin's Q. PANDE & FORD, *supra* note 28, at 22; *see* Matsa & Miller, *supra* note 69 (considering the effects of the Great Recession on corporate performance).

121 Ahern & Dittmar, *supra* note 110, at 160 (comparing corporations which already had female directors with corporations which did not). In terms of an econometric event study focused on the first public announcement of the Norwegian quota proposal, the results are statistically significant according the standards and goals of econometrics. *Id.* at 157. Again, we express our thanks to Martin Gelter for his careful observations. Minister Gabrielsen "feared that putting the proposal through normal channels would be equal to its quiet death, smothered by corporate lobby[ing] forces ..." Reiersen, *supra* note 87, at 1.

122 *See generally* Fairfax, *supra* note 84, at 868-870 ("[D]iversity has remained relatively unchanged over the past several years .... From 2005-2007 [the relevant years for the Norwegian quota law], the percentage of Fortune 1000 corporate boards with at least one woman grew by 1% ....").

123 PANDE & FORD, *supra* note 28, at 22.

124 *Id.*

125 Oyvind Bohren & R.O. Strom, *The Value-creating Board: Theory and Evidence, Research Report*, ii BI NORWEGIAN SCH. OF MGMT., DEP'T OF FIN. ECON. (2005).

126 *Id.* at 24.

127 Nielsen & Huse, *supra* note 54, at 143. "Board operational control tasks refer to the board's responsibility to supervise managerial decisions regarding investments, cash flow, dividends, financial statements ... that is decisions concerning the firm financial and accounting situation requiring strong quantitative background knowledge and skills." *Id.* at 138.

128 *Id.* at 137 (citing the classic articles, Eugene Fama, *Agency Problems and the Theory of the Firm*, 88 J. POL. ECON. 288 (1980); Eugene Fama & Michael C. Jensen, *Separation of Ownership and Control*, 26 J. LAW & ECON. 301 (1983)); Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs, and Ownership Structure*, 3 J. FIN. ECON. 305 (1976).

129 *See*GENDER BALANCE, *supra* note 20, at 8 & n.14 (citing Sami Vahamaa, the lead professor (Vaasa U., Helsinki) in a study project financed by NASDAQ OMX Nordic Foundation showing that women's representation on audit committees have "a positive impact on financial reporting, auditing and organization of internal control.").

130 *Id.* at 143 (suggesting that these differences may explain why it is hard to attribute firm performance to gender composition). Thus, the quantitative skills and risk-taking spirit of the investment bankers, primarily males, are associated with triggering the Great Recession.

131 *See* Bohren & Strom, *supra* note 125, at 29; *but see* Fairfax, *supra* note 50, at 590; Marleen A. O'Connor, *The Enron Board: The Perils of Groupthink*, 71 U. CIN. L. REV. 1233, 1261 (2003) (explaining that homogeneous groups decide quickly out of a narrower perspective, which excludes a fuller spectrum of possibilities). Although it takes longer to reach a decision, a board with both genders, that is, has different view points, avoids problems arising from "groupthink." *Id.* at 1309.

132 *See generally*PANDE & FORD, *supra* note 28. Ahern & Dittmar noted the preference of some companies to delist rather than have a woman on the board. Ahern & Dittmar, *supra* note 110, at 185.

133 Nielsen & Huse, *supra* note 54, at 137.

134 *See* Lee, *supra* note 37, at 1489 n.103 (noting positions taken against gender quotas) (citing Ahern & Dittmar, *supra* note 110).

135 *See generally* Shayndi Raice & Julie Steinberg, *Goldman CEO Pay Back on Top*, WALL ST. J., (Mar. 19, 2014), at C1 (listing the pay for 2013 of the following CEOs: Goldman Sachs, JPMorgan, Wells Fargo, Citigroup and Bank of America and noting that the compensation of the CEO of JP Morgan was reduced in 2012 because of the losses from the "London Whale"). In an editorial dated April 25, 2014, the Financial Times described the context for disapproving the proposed bonuses at Royal Bank of Scotland (RBS); *see generally* Editorial, *The Low Politics of Bankers' Pay*, FT VIEW (Apr. 25, 2014), http://www.ft.com/cms/s/0/8ba72c18-cc68-11e3-9b5f-00144feabdc0.html#axzz42zfw7G7Q. Like other banks bailed out during the financial crisis, RBS had severe losses in its investment banking area which in 2013, made £620 m. Overall, RBS is thinly capitalized and lost £8.2bn in 2013 but its board said RBS "must pay the going rate or lose key investment banking employees with valuable skills." *Id.* Other banks made the same argument. *Id.* The bank's board approved £ 576m in bonuses with half of that pool going to the investment bankers because RBS is "one of the less generous payers in the investment banking game." *Id.* The UK government in its capacity as majority shareholder through the bailout vetoed the bank's request to avoid the coming EU rules to cap bank bonuses (the government strenuously opposed the Commission's proposal by lobbying hard in Brussels). *Id.* RBS has 2,400 employees in its US business. Max Colchester, *RBS to Cut Hundreds of Jobs in U.S. Trading Businesses*, WALL ST. J. (May 28, 2014), at C3 (explaining that RBS plans to cut as many as 400 jobs across the US over the next year and a half, mainly in its trading operations at Stamford to dip below the threshold of $50 billion in assets because of the coming more stringent capital rules in Dodd-Frank). The Great Recession will continue to be studied from different perspectives beyond risky trading and hedging against one's own clients. Excessive mortgage-lending which contributed to the bubble in housing is receiving more attention. *See generally*ATIF MIAN & AMIR SUFI, HOUSE OF DEBT: HOW THEY (AND YOU) CAUSED THE GREAT RECESSION, AND HOW WE CAN PREVENT IT FROM HAPPENING AGAIN (2014).

136 Here again, thoughtful discussions with Martin Gelter sharpened the arguments and facilitated the summarization of several points made in different parts of this Article in one comprehensive assessment of the business rationale insofar as women's advancement on boards is concerned.

137 *See* European Parliamentary Debates, *Equality between women and men in the European Union* (Mar. 12 2012), http://www.europa.eu/sides/getDoc.do?type=CRE&reference=20120312+secondRef=IT&M-017&language=EN, at 4 (39 pages, numbered, e.g., 4/39); Reiersen, *supra* note 87, at 7.

138 In England alone, London Business Schools identified 330 alumnae and Cambridge Judge Business School proposed 160 women who were qualified to be board members of listed companies. *See* Charlotte Clarke, *Schools Promote Women on Boards*, FIN. TIMES, March 7, 2012, available at: http://www.ft.com/cms/s/2/bbf0bbf8-6871-11e1-a6cc-00144feabdc0.html??ftcamp=engage/link/ft=articles. Oxford, Bocconi and INSEAD, among other schools, also participated. Press Release, Association of Executive Search Consultants (AESC) (June 27, 2013).

139 Reding, *supra* note 1, at 3.

140 James Fontanella-Kahn, *EU's Female Board Quota Plan Set to Fail*, FIN. TIMES (Oct 22, 2012), http://www.cnbc.com/id/49498903 (noting that Catherine Ashton (UK), Connie Hedegaard (Denmark), Maire Geoghegan-Quinn (Ireland) &

Cecilia Malstrom (Sweden) did not agree to the quotas but such male commissioners as Olli Rehn (Finland), Michel Barnier (France), Antonio Tajani (Italy) & Laszlo Andor (Hungary) did, with seven undeclared).

141 Doreen E. Lilienfeld, *Measures to Increase Gender Diversity on Corporate Boards Gain Traction*, 251 N.Y. L.J. 2 (2014).

142 *See* Reding, *supra* note 1, at 4. Between October 2010 and January 2012, the percentage of women on corporate boards in Romania, Hungary and Slovakia declined. Directorate-General, *supra* note 55, at 11.

143 Directorate-General, *supra* note 55, at 22. In 2007, Spain was the first EU Member State to pass gender-quota legislation, which it recommended without direct or immediate sanctions for noncompliance; Spain responded to the Norwegian inspiration rather than to V. P. Reding's later call to action, *supra* note 34. By January 2013, women represented 12.3% of board members of Spain's largest companies listed on IBEX35 index, below the EU average of 15.8%. EUR. COMM'N, Spain National Factsheet: Gender Balance in Boards (Jan. 2013), ec.europa.EUjustice/gender-equalityfiles/womenonboards/womenonboards-factsheet-es_en.pdf.

144 Directorate-General, *supra* note 55, at 17. In the United Kingdom, Secretary of State for Business Vince Cable and Minister for Women and Equality Theresa May appointed Lord Davies of Abersoch on August 6, 2010, to chair a commission to consider options for promoting gender equality on the boards of listed companies. In his report, Lord Davies recommended that the United Kingdom's listed companies should aim for at least 25% female board members by 2015. MERVYN DAVIES, WOMEN ON BOARDS, 18 (Feb. 2011), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/31480/11-745-women-on-boards.pdf. Lord Davis, a former Trade Minister and chair of the board of Standard Chartered PLC, encouraged companies to set targets in both 2013 and 2015 in order to allow more talented women to reach the highest level of economic decision making in the United Kingdom. *Id.* Lord Davis's campaign shows progress. At the time of his report in Feb. 2011, about 12.5% of the FTSE company directors were female. By Feb. 2014, women numbered about 20%. Lublin & Francis, *supra* note 88, at B6.

145 *See*PANDE & FORD, *supra* note 28, at 5, n.25 (citing Corporate Women Directors International, *supra* note 122).

146 Jenny Anderson, *Helena Morrissey, Aiming at Britain's Glass Ceilings*, N.Y. TIMES, Jan. 26, 2015, http://dealbook.nytimes.com/2015/01/26/helena-morrissey-aiming-at-britains-glass-ceilings-getsresults/. Ms. Morrissey uses the business rationale, noting that shareholders will receive a better return with a diverse board. *Id.* She and several other women had approached chairs of boards of the companies in the list of the FTSE 350 companies and when they had convinced two influential chairmen that they wanted to make changes to their own boards, the women launched The 30% Club. *Id.* Now 120 chairmen are convinced that more diverse boards will produce better company returns. *Id.* In 2014, Peter Grauer, chair of Bloomberg L.P., started the American chapter of The 30% Club. *Id.*

147 In July 2011, the headhunters in the United Kingdom launched a voluntary code of conduct on gender diversity. Theresa May, *Headhunters Code of Conduct Launched*, HOME OFFICE, July 22, 2011, https://www.gov.uk/government/news/headhunters-code-of-conduct-launched; *see also* Directorate-General, *supra* note 55, at 21.

148 Law modifying the law of 21 March 1991 on the reform of certain public economic enterprises, the Company Code and the law of 19 April 2002 concerning the rationalism of functioning and management of the National Lottery aiming to guarantee the presence of women in the boards of autonomous public enterprises, listed companies and National Lottery. Act of 28 July 2011, MONITEUR BELGE [Official Gazette of Belgium], 14 September 2011, p. 59600. *See also* DHIR, *infra* note 63, at 75, n. 25.

149 *Id.*

150 *Id.*

151 *Id.*

152 Remarks of Constance Le Grip, Eur. Parl. Deb., *supra* note 134, at 28. Darren Rosenblum is engaged in a wonderful study of French board members, perhaps the most important in the EU, because of the French quota legislation which is producing impressive results.

153 Lilienfeld, *supra* note 141.

154 *Id.* (citing Boris Groysberg & Deborah Bell, *Dysfunction in the Boardroom*, 91 HARV. BUS. REV. 88 (2013)).

155 GENDER BALANCE, *supra* note 20, at 11.

156 Loi 2011-103 du 27 janvier 2011 relative à la representation équilibrée des femmes et des hommes au sein des conseils d'administration et de surveillance et à l'égalité professionnelle [Act 2011-103 of 27 January 2011 on the balanced representation of women and men on boards of directors and supervisory and professional equality], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANCAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Jan. 28, 2011, p. 2. *Id.*

157 *Id.*

158 *Id.* at 17.

159 *Id.* at 18.

160 *Id.*

161 *Id.*

162 *Id.* at 11.

163 *Id.*

164 *Id.*

165 *Id.*

166 Rachel Sanderson, *Italian Women Unite to Pry Open the Boardroom Doors*, FIN. TIMES (Mar. 1, 2012), http://www.theglobeandmail.com/report-on-business/careers/management/italian-women-unitetopry-open-the-boardroom-doors/article551267/ (citing research by McKinsey & Company).

167 *Id.*

168 *Id.*

169 Act No. 120 of 12 July 2011, published in Official Journal No. 174 of 28 July 2011 (Legge 12 luglio 2011, n. 120 Modifiche al testounicodelledisposizioni in materiali di intermediazionefinanziaria, di cui al decrete legislative 24 febbraio 1998, n. 58, concementi la parità di accessoagliorgani di amministrazione e di controllodellesocietàquotate in mercatiregoloamentati, GU n. 174 del 28-7-2011.

170 *Id.*

171 *Id.*

172 *See* Giada Zampano, *Italy to Push 'Pink Quotas,'* WALL ST. J. June 6, 2012, at B1 (explaining that because of its culture, Italian law makes part-time work difficult for women).

173 *Id.* (explaining that critics fear meritorious males will be closed out in favor of gender equality but that, on the other hand, Fiat appointed the first women to its board in 2012 after 113 years of males only).

174 Sanderson, *supra* note 166. While Spain did not include formal sanctions in its equality law of 2007, the law does take progress reports into account in awarding public subsidies or state administrative contracts; Spain therefore saw progress from four percent female representation on boards in 2006 to ten percent in 2010. *See* Gender Balance, *supra* note 20, at 11.

175 Law of 6 June 2011, published in Staatsblad 2011, 275. (Wet van 6 juni 2011 tot wijziging van boek 2 van het BurgerlijkWetboek in verband met de aanpassing van regels over bestuur en toezicht in naamloze en bestolenvennotschappen); Directorate-General, *supra* note 55, at 18.

176 *Id.*

177 *Id.*

178 *Id.*

179 *See*ALEKSANDRA GREGORIC ET AL., NORDIC INNOVATION CTR., CORPORATE GOVERNANCE AS A SOURCE OF COMPETITIVENESS FOR NORDIC FIRMS 71, 74 (A. Gregoric et al. eds., 2009).

180 *See id.* at 57. Furthermore, Sweden recommended gender-equal boards in 2004 in its Corporate Governance Code, going from 18% women in 2003 to 28.6% in 2009. Gender Balance, *supra* note 20, at 10, n. 21; *see also* Julie C. Suk, *Gender Quotas after the End of Men*, 93 B.U. L. REV. 1123 (2013) (explaining that quota laws might prove valuable to prevent new discrimination as more men leave the work force and more women enter it with greater educational credentials).

181 Act on Equality between Women and Men, No. 609/1986; amendments up to 488/2011 included; Directorate-General, *supra* note 55, at 18.

182 Law 2839/2000; Directorate-General, *supra* note 55, at 18.

183 *Id.*

184 *Id.*

185 Federal Chancellery/Federal Minister of Women's Affairs and Public Service, 14.03.2011, No. GZ BKA-140.200/0048-II/1/2011, 93/23; Directorate-General, *supra* note 55, at 19.

186 *Id.*

187 *Id.*

188 *Id.*

189 *Id. See* James Fonatanella-Khan, *EU Pushes 40% Quota for Women on Boards* (Sep. 3, 2012), http://www.ft.com/intl/cms/s/0/65f494e6-f5e7-11e1-a6c2-00144feabdc0.html#axzz30076zXJ3.

190 *See* Reding, *supra* note 1, at 2.

191 *Id.*

192 *Id.*

193 *See id.*

194 *Id.*

195 *Id.*

196 *Id.*

197 *See id.* at 3.

198 *Id.* The macro-economic case for gender equality is that women's participation in the labor market provides measurable economic growth in the economy. OECD, *supra* note 56. The business, or micro-economic, case suggests that "[d]iversity among employees and board members boosts creativity and innovation by harnessing complementary knowledge, skills and experience." GENDER DIVERSITY, *supra* note 17, at 8.

199 Reding, *supra* note 1, at 3. (Specifically, she notes studies by Deutsche Bank, McKinsey, Ernst & Young and Credit Suisse).

200 *Id.*

201 *Id.* For comparable American figures, *see infra* note 226 and accompanying text.

202 James Fontanella-Khan, Sanctions to Enforce Female Board Quotas, Nov. 14, 2012, available at http://www.ft.com/intl/cms/s/0/4621efb6-2e80-11e2-9b98-00144feabdc0.html#axzz30076zXJ3.

203 *See* Reding, *supra* note 1, at 4.

204 *Id.* "Companies will have to prove they are trying their best to increase the number of women in top management positions to at least 40 per cent ... by setting their own transparent mechanisms for selecting new board members ...." Fontanella-Khan, *supra* note 202.

205 *See* Reding, *supra* note 1, at 4. Small-sized enterprises are defined as having under fifty employees; medium as under two-hundred and fifty employees. See EU Recommendation 2003/316.

206 *See* Reding, *supra* note 1, at 4.

207 *Id.*

208 *See generally* Lee, *supra* note 37, at 1473 (citing Ivan Camileri, *Women EU Commissioners Block Gender Quota Plan*, TIMESOFMALTA.COM (Oct. 24, 2012), http://www.timesofmalta.com/articles/view/20121024/local/Women-EU-commissioners-block-gender-quotas-plan.

209 *See* Letter from Totyu Mladenov, Minister of Labour and Soc. Policy, Bulgaria, et al., to Jose Manuel Barroso, President, European Comm'n & Viviane Reding, Vice-President, FINANCIAL TIMES (Sept. 14, 2012), http://www.ft.com/intl/cms/28b56d12-00d7-11e2-8197-00144feabdc0.pdf.

210 *See generally* Douglas M. Branson, Women on Boards of Directors: A Global Snapshot, U. Pitt. Legal Stud. Res. Paper Series Working Paper No. 2011-05 9 (2011); DOUGLAS M. BRANSON, NO SEAT AT THE TABLE: HOW CORPORATE GOVERNANCE AND LAW KEEP WOMEN OUT OF THE BOARDROOM, (2007); DOUGLAS M. BRANSON, THE LAST MALE BASTION: GENDER AND THE CEO SUITE IN AMERICA'S PUBLIC COMPANIES (2009).

211 Remarks of Paul Nuttall, Eur. Parl. Deb. during European Parliamentary Debates *supra* note 138, at 16. MEP Nuttal states that quotas lessen quality. For a quota of more than 80%, MEP Nuttal's observation would indeed fit the situation; for a quota of 40 percent, as the saying goes, "not so much." MEP Nuttall seems not to recognize that the de facto quotas for males carry mediocrity with them, especially when men occupy more than 80% of the board seats.

212 *Id.* at 25. In a similar vein, speaking of the need for quotas, MEP Ulrike Lunacek noted that people "are clearly overlooking the fact that a great many men already occupy top positions not because they are particularly well qualified or because the quality of their work is so outstanding, but solely because they are male ... Today an informal system of quotas is de facto in [effect], where men are privileged over women and where men choose men for decision-making positions, which is not a formalized system but nevertheless a systematic and very real deep-rooted culture of positive treatment of men." *Id.* at 11.

213 Several other serious concerns about gender equality were treated during the debate, including (domestic) violence against women, work-family balance, family leave, unavailability of child care and resulting underemployment of women, job-training

and lack of women in the many of the higher echelon staff positions at the Commission and in other governmental entities in Europe. *Id.* For a discussion of these important issues, *see*ROGER BLANPAIN, EUROPEAN LABOUR LAW (14th rev'd ed. 2014).

214 *Id.* at 18. To MEP Marc Tarabella, other areas than business may naturally trend toward justice. "Here we come up against, real conservatism, particularly on the part of the economic sphere, but also its representatives among employers, who say that they are making efforts. However, we are left with no change. If we do not take these measures, we will achieve nothing." *Id.* at 19.

215 *Id.* at 32. The phrase "formal equality" invokes several possible types and definitions of equality. In this debate, the advocates of the quota legislation were willing to settle for participation in the positions on the board, thus falling far short of equality of outcome or treatment, which would by definition require board positions to be in proportion to the population, roughly 50-50. *Cf. supra* notes 6 and 21 (discussing equality of opportunity).

216 *Id.* at 8.

217 *Id.* at 16. *See also*, *id.* at 8 (noting similar comments by MEP Tadeuz Cymanski).

218 *Id.* at 17. MEP Franz Obermayr feels as MEP Nuttal does. "I personally am predominantly masculine ... there must be the same opportunities for the same qualifications ... I believe that quota arrangements should be rejected ... It is highly questionable ... whether board members who have gained their place through a quota would really feel accepted." *Id.* at 32.

219 MARY MULLALLY, GENDER IMBALANCE ON CORPORATE BOARDS: EUROPEAN COMMISSION CONSULTATION, EUROPEAN COMMISSION (2013).

220 Proposed Directive, *supra*, note 3.

221 Committee Opinion on Proposed Directive, *supra* note 3, at 66.

222 *Id.* at 36.

223 *Id.* at 94.

224 Proposed Directive, *supra* note 3, at 24.

225 *Id.* at art. 2(1) (explaining which companies would be affected by the law).

226 *Id.* at art. 4(3).

227 European Commission, Gender Balance on Corporate Boards; Europe is Cracking the Glass Ceiling, at 3, March 2014, http://ec.europa.eu/justice/gender-equality/files/documents/140303_factsheet_wob_en.pdf. [Hereinafter Cracking the Glass].

228 Proposed Directive, *supra* note 3, at 25-6.

229 Cracking the Glass, *supra* note 227, at 3.

230 The Opinion of the Legal Affairs Committee highlights TFEU Art. 157 (3) as the legal basis for the proposed directive. Proposed Directive, *supra* note 3, at 9.

231 EUROPEAN COMMISSION, WOMEN ON BOARDS: COMMISSION PROPOSES 40% OBJECTIVE (Nov. 14, 2012), http://ec.europa.eu/justice/newsroom/gender-equality/news/121114_en.htm.

232 Stephanie Coontz, Why Gender Equality Stalled, N.Y. TIMES, Feb.17, 2013, http://www.nytimes.com/2013/02/17/opinion/sunday/why-gender-equality-stalled.html.

233 Claire Cain Miller, *The Elusive Jackpot: Riches Come to Women as C.E.O.s, but Few Get There*, N.Y. TIMES (June 7, 2014), http://www.nytimes.com/2014/06/08/business/riches-come-to-women-as-ceosbutfew-get-there.html.

234 *The Women of Europe Should Be Outraged*, NEW EUR. ONLINE (Oct. 28, 2012), http://www.neurope.eu/article/women-europe-should-be-outraged.

235 Remarks of Paul Nuttall, Eur. Parl. Deb. during European Parliamentary Debates *supra* note 138, at 17. *See also* Amy Griffiths, *Not Enough Women on Boards? Or Not Enough Women Who Are Qualified?*, KINGSLEY NAPLEY (Oct. 14, 2011), http://www.lexology.com/library/detail.aspx?g=28bf620d-e249-4fbc-87d9-78142ea53c12*I*.

236 RIVERS & BARNETT, *supra* note 30, at 33-34. Yale researchers submitted resumes of identically qualified fictional candidates, John and Jennifer, to six research universities (departments of biology, chemistry and physics) for a position as a laboratory manager and for evaluations. The fictional John did so significantly better that "the strength of the results was really quite striking," according to a female biology professor at Yale. *Id.* at 247, n.27 (citing Kenneth Chang, Bias Persists for Women of Science, a Study Finds, N.Y. TIMES Sept. 24, 2012, http://www.nytimes.com/2012/09/25/science/bias-persists-againstwomenof-science-a-study-says.html).

237 RIVERS & BARNETT, *supra* note 30, at 214. On the other hand, female politicians are often more popular with votes than female board directors are with boards. Political voters are not losing out by having a monopoly or oligopoly reduced as may occur in the all male board unless the board is enlarged. *See also* Lori Beaman et al., *Powerful Women: Does Exposure Reduce Bias?*, 124 Q. J. ECON. 1497 (2009) (arguing that gender mandates in India changed voters' perception of female leaders so that women are more likely to not only run but also to win in an unregulated election if previous female leaders were elected by mandate).

238 RIVERS & BARNETT, *supra* note 30, at 224.

239 Katherine Giscombe, *Women in Corporate Leadership: Status and Prospects*, *in*WOMEN AND LEADERSHIP: THE STATE OF PLAY AND STRATEGIES FOR CHANGE 383, 386-391 (Barbara Kellerman & Deborah L. Rhode eds., 2007) (citing Catalyst, Women and Men in United States Corporations); RIVERS & BARNETT, *supra* note 30, at 246 n.5 (citing Nancy M. Carter & Christine Silva, *The Myth of the Ideal Worker: Does Doing All the Right Things Really Get Women Ahead?*, CATALYST (Oct. 1 2011), http://www.catalyst.org/knowledge/myth-ideal-worker-does-doing-all-right-things-really-get-womenahead.

240 Joseph Carroll, Americans Prefer Male Boss to a Female Boss, GALLUP (Sept. 1, 2006), http://www.gallup.com/poll/24346/americans-prefer-male-boss-female-boss.aspx. *See generally*PANDE & FORD, *supra* note 28. Christine Lagarde, managing director of the IMF, when asked why the glass ceiling persists, noted that the glass ceiling applies "in Afghanistan, the Emirates, and Saudi Arabia and African countries, and Germany and Japan and the U.S.," and explained the glass ceiling is "a factor of culture, a factor of minority vs. majority ...." Geoff Colvin, Christine Lagarde, *The Global Economy is Finally Turning the Corner*, FORTUNE (June 2, 2014), http://fortune.com/2014/06/02/christine-lagarde-imf/.

241 RIVERS & BARNETT, *supra* note 30, at 30-32 (explaining that the same negative gender stereotyping "in corporate America and in Washington is also true in academia. A major MIT report describes what happens all too often to talented women .... Nine universities ... concluded that 'barriers still exist' to prevent progress for female academics.") *Id.* at 247 nn.24 & 26.

242 The vast number of studies on women's lack of progress in the work place over more than twenty years of availability of professionally educated women are retrievable in such media outlets as Time, Fortune, CNN and Money simply by entering "women in the work place" (including the MIT study, studies on women in military careers (which are characterized by hazing and sexual abuse) and "Women in Higher Education." For example, the "Athena Factor" was a research project in 2008 designed to fashion an effective retention policy for women in science, engineering, mathematics and technology. For a summary of this (and many other) studies in various fields from academia to Wall Street, *see*RIVERS & BARNETT, *supra* note 30 at 71.

243 GENDER BALANCE, *supra* note 20, at 6.

244 Fairfax, *Board Diversity Revisited*, *supra* note 84, at 883.

245 Kilday, *supra* note 89 (stating "Ultimately, quotas address the effects but not the causes of the discrepancies between the number of men and women on boards. In order to address the causes, cultural change is necessary, and it is presumptuous to believe that legislation or quotas could tackle deeply engrained cultural beliefs.").

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