
QUICK LINKS

INTRODUCTION

GENDER QUOTA APPROACH OF THE DRAFT DIRECTIVE

NATIONAL APPROACHES IN THE UK, FRANCE AND GERMANY

CONCLUSION

BOARD-LEVEL GENDER QUOTAS IN THE UK, FRANCE AND GERMANY

I. Introduction

Gender quotas are a hot topic in the EU and its Member States. Although the number of women on company boards has increased in recent years, their share is still substantially below that of men. According to the EU Commission, in October 2015, while the share of women among new university graduates was approx. 60%, the ratio of women on boards of the largest publicly listed companies in the EU averaged 22.7%. Women account for over a quarter of board members in only ten EU member states, among them France (35.6%), the UK (27.8%) and Germany (26.1%). The average share of women as board chairs (6.5%) and as CEOs (4.3%) was yet significantly lower.

At EU level, the process of introducing gender quotas has been stalled since November 2012 following passage of a proposal for a Directive on Improving the Gender Balance Among Directors of Companies Listed on Stock Exchanges and Related Measures (COM(2012) 614 final) (the “**Draft Directive**”) in the EU Parliament. The required consent by the heads of states and governments of the EU Member States is pending. The latest attempt at passage failed in December 2015, with the Draft Directive’s opponents arguing, inter alia, that due to the principle of subsidiarity, the EU has no competence in this regard.

In the meantime, a number of EU Member States have taken measures at national level to increase the presence of women on company boards. This briefing summarises the respective approaches taken by the UK, France and Germany.

II. Gender quota approach of the Draft Directive

The Draft Directive would apply to large companies listed on stock exchanges in the EU Member States (“**Listed Companies**”). In summary, Listed Companies would have been required to staff at least 40% of their non-executive board members (“**Board Members**”) with the gender least represented on the board. Companies failing to meet this quota would be obliged to implement a new selection process for Board Members, giving priority to qualified candidates of the

QUICK LINKS**INTRODUCTION****GENDER QUOTA
APPROACH OF THE
DRAFT DIRECTIVE****NATIONAL APPROACHES
IN THE UK, FRANCE AND
GERMANY****CONCLUSION**

underrepresented sex. Member States would be required to introduce appropriate and dissuasive sanctions for non-compliance.

In addition to the fixed quota for non-executive boards, the Draft Directive would require Listed Companies to set their own individual targets for equal gender representation among their executive directors. Both quotas would have to be achieved by 2020 (in the case of public undertakings, by 2018). Finally, the Draft Directive provided for annual reporting obligations on compliance with applicable quotas.

III. National approaches in the UK, France and Germany

The UK, France and Germany are among those ten EU Member States whose share of women on company boards exceeds 25%. However, their individual paths towards that end have been substantially different. France and Germany have introduced binding gender quotas (France as early as 2011; Germany only recently in 2015) and sanctions for non-compliance, e.g. vacant board seats. In the UK, similar results have been attained through a commitment by the UK government to encourage a change in culture. Although the UK government introduced legislation requiring quoted companies to include in their strategy reports the sex of their board directors, executive search firms have led the way in changing the proportion of women on boards. Their drive has been complemented by a range of other measures, namely the introduction of codes and guidance to ensure companies report on their boardroom diversity policies and pledges such as those made in the 'Women in Finance Charter'.

1. Board-level gender quotas under German law

In Germany, board-level gender quotas were introduced in 2015 by the "Act on Equal Participation of Men and Women in Leadership Positions in the Private and the Public Sector" (the "**Gender Quota Act**") which amended existing corporate and co-determination laws (i.e. the laws on employee participation on supervisory boards). In essence, the Gender Quota Act introduced:

- i. a mandatory 30%-quota for the underrepresented sex on non-executive boards ("**Fixed Gender Quota**"), i.e. supervisory boards (*Aufsichtsräte*) or, in one-tiered board structures, administrative boards (*Verwaltungsräte*) of listed corporations that are subject to co-determination (i.e. to

QUICK LINKS

INTRODUCTION

GENDER QUOTA APPROACH OF THE DRAFT DIRECTIVE

NATIONAL APPROACHES IN THE UK, FRANCE AND GERMANY

CONCLUSION

employee-participation on these boards). As administrative boards are rarer in Germany, for purposes of this briefing, quota rules will only be described in relation to supervisory boards; and

- ii. women quotas individually determined by each affected company (“**Individual Women Quotas**”) for the members on its supervisory board, executive board (*Vorstand* or *Geschäftsführung*, depending on the type of company; for the purposes of this briefing, these are uniformly referred to as “**Executive Board**”) and the two uppermost levels of the management of corporations that are listed or subject to co-determination (or both).

1.1 Fixed Gender Quota

The Fixed Gender Quota requires that at least 30% of the supervisory board members of the affected companies are either male or female. At the time of the enactment, approximately 100 German companies were affected. The quota applies to non-executive boards of certain kinds of companies (namely corporations (“**AG**”), partnerships limited by shares (“**KGaA**”) and, in principle, European Corporations and companies resulting from cross-border mergers), in each case provided that the relevant company is:

- i. listed on a stock exchange, and
- ii. subject to equal supervisory board co-determination under the Co-Determination Act (*Mitbestimmungsgesetz*), the Act on Co-Determination in the Coal, Iron and Steel Industry or its supplementary act (*Montanmitbestimmungsgesetz* and *Montanmitbestimmungsergänzungsgesetz*). This encompasses companies that regularly have more than 2,000 employees and, limited to the coal, iron and steel producing or processing industry, companies that regularly have 1,000 or more employees, as well as certain companies controlling such companies.

It remains unclear whether foreign companies that have their administrative seat in Germany and are otherwise comparable to the German companies that fall in the scope of the law (e.g. British plcs) should also be subject to the law.

QUICK LINKS

INTRODUCTION

GENDER QUOTA APPROACH OF THE DRAFT DIRECTIVE

NATIONAL APPROACHES IN THE UK, FRANCE AND GERMANY

CONCLUSION

of supervisory board members by elected substitutes (*Ersatzmitglieder*) taking place from 1 January 2016 have to comply with the Fixed Gender Quota. Ongoing terms of office remain unaffected. If fewer board seats are vacant than are needed to satisfy the quota requirements, all new members have to be of the underrepresented sex.

Principally, the quota applies to boards as a whole (“**Joint Fulfilment**”). However, for certain companies (namely AG and KGaA), if either the employee or employer representatives on the supervisory board object to the system of Joint Fulfilment prior to an election, a separate 30%-quota applies to either side. This may lead to different required numbers of the underrepresented sex on a board of the same size. For example, on a 16-member supervisory board, five individuals of the underrepresented sex would be needed to comply with a joint quota ($16 \times 30\% = 4.8$), whereas four in the aggregate would suffice if separate quotas applied ($8 \times 30\% = 2.4$).

1.2 Individual Women Quotas

Individual Women Quotas are applicable to a wider circle of companies. Approximately 3,500 companies were affected when the law was enacted. They apply to (a) all listed companies and (b) all companies that are subject to mandatory co-determination. Besides the types of companies subject to the Fixed Gender Quota regime, also GmbHs, registered cooperatives, European Cooperative Societies and mutual insurance companies have to adhere. KGaAs are partially exempt; they do not have to apply a women quota to their Executive Board since they are by law managed by their shareholders.

Companies had to lay down an initial set of quotas and a deadline for reaching these by 30 September 2015. Initial deadlines may expire no later than 30 June 2017. Upon expiry, follow-up quotas and deadlines (up to five years) for reaching these have to be established.

Principally, companies are free to determine their individual quotas. However, if the actual share of women on a board or management level is below 30% when a quota is established, the target quota may not fall below the actual share. In this context, it is disputed whether it is permissible for a company with an all-male board to establish a 0% women quota or whether there is an implied obligation to aim for at least one woman on the board. Nevertheless, several large German companies have given themselves a 0%-quota.

QUICK LINKS

INTRODUCTION

GENDER QUOTA APPROACH OF THE DRAFT DIRECTIVE

NATIONAL APPROACHES IN THE UK, FRANCE AND GERMANY

CONCLUSION

Companies have to publish their Individual Women Quotas in their mandatory annual reports (*Lagebericht*). If they are under no obligation to publish such a report, publication must be on the company's website, for example. Publication has to include information on whether quotas have been met at the end of a chosen deadline, and, if not, the reasons for failure to do so. Interim progress reports are not required.

1.3 Sanctions for non-compliance

Non-compliance with gender quota requirements is sanctioned by empty board seats or administrative fines. It is disputed whether damage claims by companies against board members or by women against companies can be brought. Likely, such claims would be denied. However, if the relevant body of a company, e.g. the Executive Board, did not make reasonable (*angemessen*) efforts to reach or did not exercise due care in the process of establishing a quota, this may be sanctionable as malperformance under secs. 93, 116 AktG, 43 GmbHG.

Empty seats: To the extent that election results are not in compliance with Fixed Gender Quota requirements, supervisory board elections will be deemed void. The respective seat(s) on the board will remain vacant until new elections or by-elections (*Nachwahlen*) produce results that comply with the quota or a member is appointed by court in application of sec. 104 AktG. Substitutes for board members will be barred from membership on the board if the quota requirements would be violated thereby. Vacant seats are not, in principle, a major issue unless the remaining board members fail to meet the required quorum (presence of 50% of its members). However, the effect of a vacancy on the employer side can be significant since it will remove the majority vote which is otherwise guaranteed to the employer side through the casting vote of the chairman.

Administrative fines: Failure to publish Individual Women Quotas, achieved results and/or reasons for failure to meet a quota constitutes an administrative offence which can trigger a fine of up to EUR 50,000. However, it is unclear whether this also applies to companies that are not under an obligation to publish an annual report.

QUICK LINKS**INTRODUCTION****GENDER QUOTA
APPROACH OF THE
DRAFT DIRECTIVE****NATIONAL APPROACHES
IN THE UK, FRANCE AND
GERMANY****CONCLUSION**

2. Introduction of board level gender quotas in France

In a first attempt to legislate on the representation of women on company boards, in 2006, France adopted an act on equal remuneration for women and men. Articles 21 and 22 thereof required that no more than 80% of the members of company boards were to belong to the same sex. However, the Constitutional Council (*Conseil Constitutionnel*) barred the law from entering into force, finding that these provisions violated the constitutional principle of equality before the law. The French Constitution was subsequently modified in 2008 to allow positive discrimination for the benefit of women in respect of access to professional and social positions. Following this, board-level gender quotas were introduced by the “Act of 27 January 2011 on the balanced representation of women and men on governing and supervisory boards and on professional equality” (*LOI n° 2011-103 du 27 janvier 2011 relative à la représentation équilibrée des femmes et des hommes au sein des conseils d’administration et de surveillance et à l’égalité professionnelle* (“**Act of 2011**”)).

2.1 Introduction of gender quotas in private companies in France

Gender quotas in France were established by the Act of 2011 and the AFEP/MEDEF-Code, a voluntary, self-regulation code for industry. Additionally, in 2012, a law on the representation of the genders on the boards of public companies, public industrial and commercial undertakings and public administrative institutions was adopted. This briefing focuses on private sector companies.

2.1.1 Principles established by the Act of 2011

The Act of 2011 requires that the governing and supervisory boards of companies shall be staffed “seeking a balanced representation of women and men”. It establishes a mandatory 40% minimum quota of members of each sex on the governing and supervisory boards of companies (“mandatory gender quotas”). This obligation applies to the boards of private sector companies which meet the following criteria:

1. having their shares listed on a regulated market; or
2. having, during three consecutive fiscal years, employed at least 500 permanent employees AND having a net turnover OR total assets of at least EUR 50 million.

QUICK LINKS

INTRODUCTION

GENDER QUOTA APPROACH OF THE DRAFT DIRECTIVE

NATIONAL APPROACHES IN THE UK, FRANCE AND GERMANY

CONCLUSION

For listed companies, such quota applies as from their first general meeting following 1 January 2017. For non-listed companies, it applies as from the first general meeting during which board members shall be appointed and which is held after the end of the third consecutive fiscal year in which the criteria set out under no. 2 above have been met.

Additionally to this 40%-quota, the Act of 2011 provides that the affected companies may not have a difference of more than two persons between the members of each sex when their board has a maximum of eight members.

These rules are complemented by gender-related provisions in the French Commercial Code regarding the election of the board members representing the employees. There are two possible scenarios:

1. *There is only one seat to fill:* Each candidacy must include the name of the candidate and its substitute. Candidate and substitute have to be of different gender.
2. *In all other cases:* The candidates are elected based on proportional representation list ballot. Each list shall comprise, alternately, a candidate of each sex; also, on each list, the difference between the number of candidates of each sex may not exceed one.

2.1.2 Sanctions for non-compliance

In the context of sanctions, a distinction has to be made between (1) non-compliance with the principle that gender equality shall be sought in staffing company boards and (2) non-compliance with mandatory gender quotas.

a) Non-compliance with the staffing principle

There is no sanction enforcing the principle that there shall be a balanced representation of both sexes on governing and supervisory boards. However, the presidents of the boards of directors of all listed companies have to report on the composition of their boards and the application of the principle of balanced representation of women and men in such bodies in a management report. Such reports have to be attached to the companies' annual reports.

QUICK LINKS**INTRODUCTION****GENDER QUOTA
APPROACH OF THE
DRAFT DIRECTIVE****NATIONAL APPROACHES
IN THE UK, FRANCE AND
GERMANY****CONCLUSION**

b) Non-compliance with gender quotas

If a company fails to comply with the mandatory gender quotas, two different sanctions may apply.

(1) Nullity of appointments made in violation of the gender quotas

As from 1 January 2017, if its composition no longer meets the mandatory gender quota the board shall make temporary appointments to the board within six months from when the vacancy arose. Such appointments are subject to ratification by the next ordinary general meeting of the company, although a failure to ratify does not nullify the deliberations and acts of the board that have already occurred. If a board fails to make required appointments or obtain ratifications, any interested party may request a court to designate an authorised agent to convene a general meeting that shall, as appropriate, appoint board members or ratify their previous appointment.

If the appointment of a board member violates applicable gender quotas, such appointment is null and void. Again, the nullity of the appointment does not nullify acts or deliberations in which such member participated.

(2) Suspension of payment of attendance fees

If the governing or supervisory board is not lawfully composed, the payment of attendance fees to board members will be suspended. Payment resumes once the composition of the board is in compliance with the requirements.

In practice this sanction has a limited effect on smaller companies since most of these use methods of board member remuneration other than attendance fees.

(3) Lack of control instance

A difficulty in the context of the introduction of gender quotas is the lack of a monitoring or control instrument or body to ensure compliance. Therefore, the *Haut conseil à l'égalité entre les femmes et les hommes* (High Council for equality between women and men) and the *Conseil supérieur de l'égalité professionnelle entre les femmes et les hommes* (High Council on professional equality between women and men) recommend creation or charging of a body with responsibility to ensure that mandatory gender quotas are implemented.

QUICK LINKS**INTRODUCTION****GENDER QUOTA
APPROACH OF THE
DRAFT DIRECTIVE****NATIONAL APPROACHES
IN THE UK, FRANCE AND
GERMANY****CONCLUSION**

2.2 *Soft law mechanisms*

In addition to the Act of 2011, certain self-regulation mechanisms have been introduced for private sector companies. One example is the AFEP/MEDEF Code (recently revised in 2015) which is applicable to 214 listed companies that have subscribed to it. Under the Code, companies shall reach a proportion of 20% of women on their boards within three years from the later of their 2010 general meeting or the admission of the company's shares to a regulated market, and of 40% within six years of either event. For most members, in practice, this means by the end of 2016; for new members within six years from the beginning of their membership. Companies that do not meet these thresholds have to explain and give reasons for not doing so. AFEP and MEDEF have created a committee in charge of monitoring the application of the Code and of proposing amendments that it deems appropriate.

2.3 *Implementation of these gender quotas*

For listed companies gender quotas are introduced in a gradual process:

1. From 28 January 2011, the date of publication of the Act of 2011, for companies whose boards were unisex, a board member of the other sex had to be appointed once a seat on the board became vacant, and in any event no later than at the next ordinary general meeting when board members were ordinarily appointed.

To assess whether a board was unisex, all members, including the permanent representative of the legal entity and the board members representing employee shareholders elected under article L225-23 or article L225-27 of the French Commercial Code are taken into account.

2. From the first ordinary general meeting after 1 January 2014, at least 20% of the board members have to belong to either sex. Again, this includes the permanent representative of a legal entity and the board members representing employee shareholders.
3. As from 1 January 2017, a quota of 40% for each sex applies which has to be achieved
 - by listed companies at the first ordinary general meeting following that date

QUICK LINKS**INTRODUCTION****GENDER QUOTA
APPROACH OF THE
DRAFT DIRECTIVE****NATIONAL APPROACHES
IN THE UK, FRANCE AND
GERMANY****CONCLUSION**

- by non-listed companies falling within the original scope of the Act of 2011 at the first ordinary meeting following such date and during which board members shall be appointed. For non-listed private companies, the first fiscal year to be considered to assess whether the minimum thresholds of 500 permanent employees AND net turnover OR total assets of at least EUR 50 million have been fulfilled is the one beginning on or after 1 January 2014.

The Act of 4 August 2014 on substantive equality between women and men has extended the application of this 40% quota to companies employing 250 to 499 employees which meet the abovementioned criteria. These companies have to comply with the quota from their first ordinary general meeting following 1 January 2020 during which board members shall be appointed. For these companies, the first fiscal year to be looked at to determine whether the prerequisites for the application of the quota are fulfilled is the one beginning on or after 1 January 2017.

Further to that, for companies falling within the scope of the Act of 2011, as from 1 January 2017, there may not be a difference of more than two persons between the number of board members of each sex if a board has no more than eight members. The permanent representative of the legal entity appointed as a member of the governing or supervisory board and those employee shareholder representatives elected under the legal regime of article L225-23 of the French Commercial Code count towards fulfillment of these obligations, whereas those employee shareholder representatives elected under the optional regime of article L225-27 of the French Commercial Code may no longer be taken into account for such purpose.

3. UK

Unlike France and Germany, the UK has chosen not to introduce mandatory board-level gender quotas. Rather, a government-commissioned report published in February 2011 by Lord Davies recommended that the UK refrain from introducing binding quotas and identified a number of voluntary measures designed to encourage an increase in the appointment of the number of women on company boards. A number of these voluntary measures have been put into practice relatively recently.

QUICK LINKS

INTRODUCTION

GENDER QUOTA APPROACH OF THE DRAFT DIRECTIVE

NATIONAL APPROACHES IN THE UK, FRANCE AND GERMANY

CONCLUSION

As set out in this section, change in the UK has been effected in a very different way from France and Germany. Although the UK government introduced legislation requiring quoted companies to include in their strategy reports the sex of their board directors, it has been the government's initiative to encourage a change in culture, the commitment of executive search firms and the voluntary initiatives of the business community which have led to an increase in the proportion of women on boards. This drive has been complemented by the introduction of codes and guidance to ensure companies report on their boardroom diversity policies and through pledges such as that by the Treasury to build a more balanced society with initiatives such as the introduction of the 'Women in Finance Charter' and by businesses themselves such as the founding of the 30% Club to support and motivate senior women. The UK is to introduce legislation later this year obliging some companies to report on gender pay gap statistics and it remains to be seen whether this will further encourage board diversity.

The measures taken have resulted in an increase of female directors of companies belonging to the FTSE 100 index (that is: broadly the 100 largest companies listed at the London Stock Exchange and having the highest market capitalisation, "**FTSE 100 companies**") and to the FTSE 250 Index (broadly the 250 largest companies listed at the London Stock Exchange and having the highest market capitalisation, "**FTSE 250 companies**") from 12.5% in 2010 (FTSE 250 companies: 7.8%) to 26.1% in October 2015 (FTSE 250 companies: 19.6%). There were no FTSE 100 all-male boards in October 2015 and the number of all male boards in FTSE 250 companies had decreased to 15 from 131 in February 2011.

Progress in respect of appointing women into executive roles such as chief executive, chief finance officer and chairmanship roles compared to non-executive roles has been slower. Female executive directors on FTSE 100 boards had a share of 5.5% in February 2011. By October 2015 this had increased to 9.6%. In this context, research by the European Women on Boards (a group comprising the UK's Institute of Directors and similar groups in eight other European countries) indicates that in respect of female representation on the boards of Europe's largest companies (i.e. of the 600 listed companies on the STOXX Europe 600 index) the UK has fallen from sixth to eighth place among twelve leading economies since 2011.

In October 2015, Lord Davies published a final report. He maintained his recommendation that

QUICK LINKS**INTRODUCTION****GENDER QUOTA
APPROACH OF THE
DRAFT DIRECTIVE****NATIONAL APPROACHES
IN THE UK, FRANCE AND
GERMANY****CONCLUSION**

legally enforced quotas are unwarranted because progress in the UK so far proves that the voluntary approach is working. Instead, he recommended a continuation of the voluntary, business-led approach. In light of this, in February 2016, the UK Government appointed Sir Philip Hampton, Chair of GlaxoSmithKline and former Chair of the Royal Bank of Scotland and Sainsbury's, to lead an independent review on increasing representation of women at executive level in broadly the 350 largest companies listed at the London Stock Exchange and having the highest market capitalisation ("FTSE 350 companies").

3.1 Legislative measures

The legislative measures taken in the UK following Lord Davies' first report were limited to publishing obligations. In October 2013 the Companies Act 2006 (Strategic Report and Directors' Report) Regulations 2013 (SI 2013/1970) came into force which required quoted companies to set out in the strategic report (which provides shareholders with information regarding an entity's business model, strategy, development, performance, position and future prospects) separate entries stating the number of persons of each sex within a company who are, respectively, directors, senior managers (other than directors) and employees.

This will shortly be followed by the Equality Act 2010 (Gender Pay Gap Information) Regulations 2016 which are expected to be brought into effect on 1 October 2016 for companies in the private and voluntary (not-for-profit and charitable) sectors with 250 or more employees. These Regulations require affected employers to publish overall gender pay gap statistics. Although there are no penalties for non-compliance, this may place pressure on larger companies to look at gender equality from a pay perspective and encourage scrutiny of pay gaps between men and women. This may in turn lead to an increase in the appointment of women to more senior roles where pay gaps are identified.

3.2 Measures by the Financial Reporting Council

In September 2012 the Financial Reporting Council (which oversees the Corporate Governance Code in the UK) introduced Provision B.2.4 to the UK Corporate Governance Code to require listed companies to report annually on their boardroom diversity policy, including gender, and on any measurable objectives that the board has set for implementing the policy and the progress it has

QUICK LINKS**INTRODUCTION****GENDER QUOTA
APPROACH OF THE
DRAFT DIRECTIVE****NATIONAL APPROACHES
IN THE UK, FRANCE AND
GERMANY****CONCLUSION**

made in achieving the objectives. It also required boards to consider diversity when evaluating board effectiveness.

The Council also produced a non-binding ‘*Guidance on Board Effectiveness*’ explaining how the Code should be applied and endorses gender diversity as an important element in ensuring that a board is not composed solely of like-minded people (Paragraph 4.3 FRC Guidance).

3.2 Measures by executive search firms and the business community

3.3.1 Executive Search Firms

In July 2011, a code called the ‘Standard Voluntary Code of Practice for Executive Search Firms’ (the “**Voluntary Code**”) was drawn up by members of executive search firms representing 20 leading companies in the sector (the “**Committee**”), all of which committed to signing up to the Voluntary Code for future boardroom appointments. This initiative followed Lord Davies’ recommendation that the executive search community draw up a voluntary code of conduct to address gender diversity on corporate boards and best practice for the search processes.

The Voluntary Code sets out seven key principles of best practice for executive search firms to follow, ranging from action when accepting a boardroom brief through to induction. The Voluntary Code covers succession planning over the medium term, the setting of diversity goals, defining the client brief to balance experience with relevant skills, the value of diverse long lists, writing gender-neutral job descriptions and supporting candidates during the selection process.

In 2014 the Committee introduced an enhanced code of conduct under which executive search firms would be awarded a FTSE 350 accreditation if they could demonstrate certain achievements in increasing the number of women appointed to FTSE 350 boards. As at July 2015, 86 executive search firms had signed up to the standard voluntary code and these firms account for the vast majority of the boardroom appointments in the UK. The five-year review of the Lord Davies’s report concluded that the Voluntary Code and enhanced code of conduct produced by the Committee had been a key driver of progress on gender diversity in UK boardrooms.

QUICK LINKS**INTRODUCTION****GENDER QUOTA
APPROACH OF THE
DRAFT DIRECTIVE****NATIONAL APPROACHES
IN THE UK, FRANCE AND
GERMANY****CONCLUSION**

3.3.2 30% Club

There have also been a number of business-led initiatives. In November 2010, a number of FTSE 100 chairmen founded the 30% Club in an attempt to increase the number of women on their boards to 30% by encouraging change in the business culture through supporting, motivating and promoting the appointment of more women to board-level positions by lobbying ministers and the City for change and by acting as role models for the emerging female leaders of the future.

The 30% Club was founded by Helena Morrissey, the chief executive of Newton Investment Management and she initially focused on corporate boards and engaging the chairs of the boards who had the power to change the shape of their own boards. There has been significant support for the 30% Club and today 33 members of the 30% Club are Chairs or CEOs of FTSE 100 companies and 13 members are Chairs or CEOs of FTSE 250 companies. Members also include senior and high profile individuals from the professional, financial, corporate, higher education, media, recruitment and public sectors.

The 30% Club is widely regarded as having had a significant impact on effecting change at board level. Although it is difficult to know how much of the increase in female boardroom appointments can be attributed to the efforts of the 30% Club, there can be no doubt that the efforts of the 30% Club has had a positive impact on the numbers of women on boards and their actions have actively encouraged businesses to view a better balance of men and women at all levels of their organisations as a business imperative rather than a 'women's issue'.

3.4 Women in Finance Charter

On 22 March 2016 the UK Government launched a new 'Women in Finance Charter' to link financial services firms' bonuses to the appointment of senior women. The Charter constitutes a commitment and pledge by HM Treasury and signatory firms to work together to build a more balanced and fair industry. The Charter recommends that financial service firms link part of the remuneration packages of their executive teams to gender balance targets. An additional recommendation is to implement four actions:

QUICK LINKS**INTRODUCTION****GENDER QUOTA
APPROACH OF THE
DRAFT DIRECTIVE****NATIONAL APPROACHES
IN THE UK, FRANCE AND
GERMANY****CONCLUSION**

- (i) have one member of the senior executive team who is responsible and accountable for gender diversity and inclusion;
- (ii) set internal targets on gender diversity in senior management;
- (iii) publish progress annually against these targets in reports on their websites; and
- (iv) aim to ensure pay of the senior executive team is linked to delivery against these internal targets.

Although these actions are voluntary, seven large banks have said that they are committed to the Charter; the UK Treasury will publish a list of the firms who have signed up to the Charter later this year.

3.5 Difficulties in the process: prohibition of positive discrimination

Although boards are encouraged to promote diversity, “positive discrimination” is generally unlawful in the UK and a woman cannot be treated more favourably than a man. Companies which do treat women more favourably than men may be at risk of discrimination claims.

However, “positive action” is principally permissible under the Equality Act 2010 (“**EqA**”) in a context where persons who share a protected characteristic (for example, a woman because of her sex) suffer a disadvantage, have particular needs or are disproportionately under-represented (for example, in respect of women on boards) and the specific action in question is proportionate in light of the disadvantage or under-representation in the individual case. Positive action in the context of under-representation of women on company boards may include training, mentoring or encouraging women to apply for board positions, setting targets for increasing the participation of women on boards and providing funding for women to gain particular qualifications.

In these circumstances a company may give preference to a woman over a man in respect of recruitment pursuant to section 159 EqA but only if (i) there is a tie-break situation (i.e. where the woman is equally as qualified as a male candidate for the same job), (ii) the employer does not have a policy of treating women more favourable in connection with recruitment or promotion than men,

QUICK LINKS**INTRODUCTION****GENDER QUOTA
APPROACH OF THE
DRAFT DIRECTIVE****NATIONAL APPROACHES
IN THE UK, FRANCE AND
GERMANY****CONCLUSION**

and (iii) recruiting a woman to the board is a proportionate means of achieving a legitimate aim (i.e. it is reasonably necessary in order to achieve that aim, and there are no less discriminatory means available).

IV. Conclusion

Despite a standstill at the EU-level, the aim of an increased presence of women on company boards is making progress in EU Member States. Practice shows that there are multiple roads to success. In France and Germany a substantial increase of women on company boards has been attained through binding quotas, complemented by sanctions for non-compliance, much in the spirit of the Draft Directive. However, the example of the UK demonstrates that similar results can be reached without binding quotas, through voluntary measures in conjunction with mandatory reporting requirements.

NEWS

NO 14/ AUGUST 2016

This material is for general information only and is not intended to provide legal advice.

Further information

If you would like to find out more about any of the issues raised in this briefing, or require advice in relation to a specific matter, please contact:

BREDIN PRAT

www.bredinprat.com
Paris, Brussels

Pascale Lagesse (Partner, Paris)
Email: pascalelagesse@bredinprat.com
Tel: + 33 1 44 35 35 35

HENGELER MUELLER

www.hengeler.com
Berlin, Düsseldorf, Frankfurt, Munich, Brussels, London, Shanghai

Dr Hans-Joachim Liebers (Partner, Frankfurt)
Email: joachim.liebers@hengeler.com
Tel: +49 69 17095 154

Dr Christian Hoefs (Partner, Frankfurt)
Email: christian.hoefs@hengeler.com
Tel: +49 69 17095 643

SLAUGHTER AND MAY

www.slaughterandmay.com
London, Brussels, Hong Kong, Beijing

Charles Cameron (Partner, London)
Email: charles.cameron@slaughterandmay.com
Tel: + 44 207 090 5086
