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Show Me the Money: Using the Business Case Rationale to Justify Gender Targets in the EU

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NOTES

SHOW ME THE MONEY: USING THE BUSINESS CASE RATIONALE TO JUSTIFY GENDER TARGETS IN THE EU

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INTRODUCTION

On February 22, 2002, Ansgar Gabrielsen, Norway's Minister of Trade and Industry shocked the country when he announced that the government was imposing a forty percent quota for female boards of directors.¹ This announcement was even more controversial because it was a surprise to the other members of the Norwegian government.² Norway became the first country to implement a mandatory quota for females on corporate boards.³

Similarly, on September 3, 2012, Viviane Reding, the Justice Minister of the Commission for the European Union, announced that she would propose a directive forcing all listed

1. See *The Business of Gender Equality*, NORWAY.ORG (Feb. 22, 2002), <http://www.norway.org/ARCHIVE/News/archivc/2001/200105gender> (announcing the Norwegian board quota); Nicola Clark, *The Female Factor: Getting Women Into Boardrooms by Law*, N.Y. TIMES, Jan. 27, 2010, <http://www.nytimes.com/2010/01/28/world/europe/28iht-quota.html> (reporting on the implementation of Norwegian gender quota).

2. See Hedvig Bugge Reiersen & Beate Sjaafjell, *Report from Norway: Gender Equality in the Board Room 1* (Eur. Company L., Working Paper No. 4, 2008), available at <http://ssrn.com/abstract=1139604> (reflecting on impact of quota in Norway); see also Clark, *supra* note 1 (giving a description of the introduction of the Norwegian gender quota).

3. See James Kanter, *European Proposal Presses for Women to Join Boards*, N.Y. TIMES, Sept. 4, 2012, at B2 (giving background Norway's gender quota); James Fontanella-Khan, *EU Pushes 40% Quota for Women on Boards*, FIN. TIMES (Sept. 3, 2012) <http://www.ft.com/intl/cms/s/0/65f494c6-f5c7-11e1-a6c2-00144fcabdc0.html> (relaying information about Norway's gender quota).

companies in the European Union (“EU”) to implement a forty percent gender quota on their boards.⁴ Currently, women only make up 13.7% of board seats in the largest publicly listed companies in the European Union.⁵ Reding, frustrated with the slow progress of gender diversity on corporate boards, introduced the proposal after other attempts to increase diversity failed.⁶

Reding faces opposition from several Member States, her fellow Commissioners, and even some women’s equality groups.⁷ On September 14, 2012, a week after Reding’s announcement, nine Member States—Bulgaria, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, the Netherlands, and the United Kingdom—wrote a letter to Reding and the President of the European Commission, Jose Manuel Barroso, stating their opposition to the proposed quota.⁸ The letter expressed that

4. See *supra* note 3 (reporting on the announcement of the proposed quota).

5. See James Kanter, *Renewed Push in Europe To Seat Women on Boards*, N.Y. TIMES, Nov. 14, 2012, at B3 (“Only 13.7 percent of corporate seats in the largest public companies in the European Union are held by women, according to the commission.”); *Progress Report of the Justice Committee on Women in Economic Decision Making in the EU*, at 9 (2012), available at http://ec.europa.eu/justice/gender-equality/files/women-on-boards_en.pdf [hereinafter Commission Progress Report] (summarizing the status of gender diversity on boards in the EU); European Commission, *Database on Women and Men in Decision Making* http://ec.europa.eu/justice/gender-equality/gender-decision-making/database/business-finance/financial-institutions/index_en.htm [hereinafter European Commission Database] (compiling data about gender diversity in the EU).

6. See Fontanella-Khan, *supra* note 3; Kanter, *supra* note 3 (giving the reasoning of the proposed quota).

7. See Ivan Camilleri, *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.442358> (reporting on the delay in proposing gender quotas); Ophelie Spanneut, *College of Commissioners Blocks Quotas for Women*, EUROPOLITICS, Oct. 24, 2012, <http://www.europolitics.info/social/college-of-commissioners-blocks-quotas-for-women-art344384-25.html> (reporting the postponement of proposal for EU gender quotas); see also Juliet Mann, *More Women Needed In “Identikit Boardrooms,” Says CEO*, CNN (Feb. 9 2012), <http://edition.cnn.com/2012/02/09/business/women-in-the-boardroom/index.html> (quoting head of 30%, a group that promotes gender equality on corporate boards); *The Women of Europe Should Be Outraged*, NEW EUR. ONLINE (Oct. 28, 2012, 9:53 PM), <http://www.neurope.eu/article/women-europe-should-be-outraged> (expressing criticism of quota proposal).

8. See Letter from Totyu Mladenov, Minister of Labour and Soc. Policy, Bulgaria, et al., to Jose Manuel Barroso, President, European Commission & Viviane Reding, Vice-President, European Commission (Sept. 14, 2012) [hereinafter Letter of Opposition], (published by the Financial Times) available at <http://www.ft.com/intl/>

while there are too few women on the boards of companies, the goal of gender diversity is “first and foremost up to the Member States to find their own national approaches.”⁹

On November 14, 2012, the Commission proposed a new directive.¹⁰ The new proposal softened the quota, mandating instead that companies implement policies to reach a forty percent objective by 2020.¹¹ It requires listed companies that are “public undertakings” to meet this objective by 2018.¹² The proposed directive excludes small and medium size enterprises (“SMEs”), but would affect approximately 5,000 corporations in the European Union.¹³ If the European Union adopts this proposal, the law could impact the way corporations structure their boards, their corporate status (i.e., whether the company remains private or public), and the positions of women throughout the company.¹⁴

This Note analyzes the Commission’s rationale for initiating this proposed directive and whether it satisfies the principles of

cms/28b56d12-00d7-11c2-8197-00144fcabdc0.pdf (arguing against proposal for binding quotas for women on corporate boards).

9. *Id.* (opposing the gender quota).

10. See Commission Press Release, IP/12/1205 (Nov. 14, 2012) [hereinafter Nov. 14 Press Release] (publicizing the Commission’s proposal for the 40% objective of women on the board); Aoife White, *EU Companies Face 40% Quota Rule Favoring Women on Boards*, BLOOMBERG, Nov. 14, 2012, <http://www.bloomberg.com/news/2012-11-14/eu-companies-face-40-quota-rule-favoring-women-on-boards-2.html> (reporting on the Commission’s proposal).

11. James Fontanella-Khan, *Brussels Waters Down Board Quota Plans*, FIN. TIMES, Nov. 13, 2012, <http://www.ft.com/intl/cms/s/0/f5562b3a-2d6f-11e2-9b88-00144fcabdc0.html> (reporting on the forthcoming announcement of the proposed directive and noting the rescinding of the quota); White, *supra* note 10 (announcing the amendment of the proposed directive in November 2012).

12. 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 (2012) 614 final, art. 4(1) (Nov. 2012) [hereinafter Proposed Directive] (proposing a binding gender objective on select EU corporate boards).

13. See Nov. 14 Press Release, *supra* note 10 (approximating the number of companies that would be affected by the proposal); James Kanter, *Britain Opposes Quotas for Women on Boards*, N.Y. TIMES, Nov. 15, 2012, at B9 (reporting on Commission’s announcement of proposed directive). Small and medium size enterprises (“SMEs”) are defined as companies that have fewer than 250 persons and that have an annual turnover of EU€50 million or a balance sheet EU €43 million or less, or the monetary equivalent of that, if the Member State does not use the euro. See Proposed Directive, *supra* note 12, at art. 2 (defining “SME’s”).

14. See generally *infra* Part II.B (describing the arguments in opposition to the proposed directive, as well as general concerns regarding gender equality legislation).

subsidiarity and proportionality, two elements that must be met for EU legislation to pass. Part I of this Note discusses the legal principles and rationales applicable to gender equality in the European Union. Part I also discusses the countries that have already adopted binding gender equality laws. Next, Part II of this Note describes the arguments for and against the implementation of Reding's proposal of a gender equality objective, focusing on the principles of subsidiary and proportionality. Part II then examines the arguments that Member States have made in opposition to the proposed objective and gender equality legislation in general. Finally, Part III analyzes the arguments presented in Part II and questions the arguments for the gender objective. Part III recommends that the European Union implement policies and create programs that prevent women from leaving the workplace before they reach management levels, such as providing better daycare and work hours.

I. GENDER DIVERSITY IN THE EUROPEAN UNION

Gender diversity is an important issue in the European Union, as seen in EU treaties, EU case law, and individual countries' legislation. To aid in the determination of whether the Council and Parliament may properly pass the proposed directive, this Part discusses the background of diversity and its presence in the European Union. Part I.A describes the legally binding effect of an EU directive and the legal principles invoked in passing a law regulating gender equality. Part I.B discusses the business case rationale, which is used to justify diversity on corporate boards. Part I.C describes the implementation of a gender quota in Norway, one of the inspirations for the proposed directive, and countries in the European Union that have implemented quotas.

A. *Legal Principles of Passing Gender Equality Legislation*

Several EU treaties contain provisions for gender equality in the workplace.¹⁵ Additionally, the Court of Justice of the

15. See Consolidated Version of the Treaty of the Functioning of the European Union arts. 8, 153(1)(i), 157(4), 2012 O.J. C 326/47, at 53, 115, 118 [hereinafter TFEU] (stating in the Consolidated Version of the Treaty of the Functioning of the

European Union (“the Court of Justice”) decided several cases that set the precedent for the permissibility of legislation for gender equality.¹⁶ The proposed directive must also satisfy several other principles of law. Under the principle of subsidiarity, the Treaty on European Union (“TEU”) limits EU action to areas that cannot be achieved at a national level.¹⁷ Under the principle of proportionality, proposed legislation can only regulate activities to the degree necessary to achieve its objective.¹⁸

1. Equal Treatment of Gender in EU Law

The Treaty of the Functioning of the European Union (“TFEU”) contains several provisions mandating gender equality.¹⁹ Article 8 of the TFEU states that “[i]n all its activities, the Union shall aim to eliminate inequalities, and to promote equality between men and women.”²⁰ Article 2 of the Treaty of the European Union (“TEU post-Lisbon”) lists equality as one of the values the European Union is founded on, specifically referring to equality between men and women.²¹ Furthermore, Article 3 of the “TEU post-Lisbon” states that the European

European Union (“TFEU”) powers of EU institutions and rights of EU citizens); Consolidated Version of the Treaty on European Union arts. 2, 3(3), 2012 O.J. C 326/13, at 17 [hereinafter TEU post-Lisbon] (establishing powers in the Consolidated Version of the Treaty on European Union (“TEU”) of EU institutions and rights of its citizens).

16. *See generally* Georg Badeck and Others, Case C-158/97, [2000] E.C.R. I-1902; Katarina Abrahamsson & Leif Anderson v. Elisabet Fogelqvist, Case C-407/98, [2000] E.C.R. I-5539 (deciding whether national laws may give priority to women as an underrepresented class in a public sector); Hellmut Marschall v. Land Nordrhein-Westfalen, Case C-409/95, [1997] E.C.R. I-6363 (deciding whether a national rule may give priority in employment opportunities to equally qualified women if they are underrepresented).

17. TEU post-Lisbon, *supra* note 15, art. 5(3), 2012 O.J. C 326, at 18 (stating the requirement of subsidiarity and proportionality).

18. *Id.* art. 5(4), at 18 (explaining briefly the requirements under proportionality).

19. *See* TFEU, *supra* note 15, arts. 8, 153(1)(i), 157(4), 2012 O.J. C 326, at 53, 115, 118 (mandating equality of gender).

20. *See* TFEU, *supra* note 15, art. 8, 2012 O.J. C 326, at 53 (requiring the EU to protect equality).

21. *See* TEU post-Lisbon, *supra* note 15, art. 2, 2012 O.J. C 326, at 17 (listing the basic values the EU treaties).

Union “shall promote . . . equality between women and men.”²²

In addition to the treaties, the Charter of Fundamental Human Rights of the European Union (“Charter of Rights”) also protects gender equality in the workplace.²³ Article 21 of the Charter of Rights provides that there may be no discrimination based on the grounds of sex.²⁴ Article 23 ensures equality between men and women in “employment, work and pay.”²⁵ More importantly, Article 23 also expressly states that “[t]he principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex.”²⁶

These treaties establish that the European Union may take positive action to ensure the fundamental right of gender equality.²⁷ The TFEU authorizes the European Parliament (“Parliament”) and Council to “adopt measures to ensure the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation including the principle of equal pay for equal work or work of equal value.”²⁸ The treaties and the Charter of Rights show that gender equality a fundamental right in the European Union and that EU institutions may pass legislation to enforce that right and aid the underrepresented sex.²⁹

22. *Id.* art. 3(3), at 17 (expressing the requirement of equality between men and women).

23. *See* Charter of Fundamental Rights of the European Union art. 21(1), 23, 2012 O.J. C 326/391, at 396 [hereinafter Charter of Rights] (protecting in the Charter of Fundamental Rights of the European Union (“Charter of Rights”) equality as a right in the workplace).

24. *Id.* art. 21(1), at 396 (protecting against sex discrimination).

25. *Id.* art. 23, at 400 (protecting against discrimination against gender in the workplace).

26. *Id.* (showing that the Charter of Rights explicitly provides there may be action in favor of the underrepresented sex which would not violate Article 21’s principle of equality).

27. TFEU, *supra* note 15, art. 157(3), 2012 O.J. C 326, at 118 (giving the EU the power to take positive action).

28. *Id.* (giving the Parliament and Council the power to pass protective legislation).

29. *See supra* notes 19–28 and accompanying text (discussing the treaties’ provisions and Charter of Rights that mandate gender equality).

The Court of Justice laid down necessary elements that must be met before positive action may be used.³⁰ First, the measures must concern a sector in which women are under-represented.³¹ Next, the measures must not “automatically and unconditionally give priority to women when women and men are equally qualified. . . .”³² Finally, the candidates must be subject to an “objective assessment, which takes [into] account the specific personal situations of all candidates.”³³ The Court also held in *Abrahamsson v. Fogelqvist* that in applying these criteria the procedures must be transparent and amenable to review to obviate any arbitrary assessment of the qualifications of candidates.³⁴ Once it is established that the European Union may take positive action, it must be ensured that that action fulfills the principles of subsidiarity and proportionality.³⁵

2. Subsidiarity and Proportionality

Directives are one of four types of legislation that the European Union may pass.³⁶ Directives “shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.”³⁷ In addition, Member States have some

30. *See* Georg Badeck and Others, Case C-158/97, [2000] E.C.R. I-1919, ¶3 (holding that women are given priority in public sectors where they are under-represented under certain conditions).

31. *See id.* (holding that a national law that gives priority to women in a public under-represented sector is compatible with EU law).

32. *See id.* (holding that a law giving priority to women cannot give a female candidate automatic preference).

33. *See id.* (requiring a national law that gives preference to the under-represented sex be objectively assessed); *see generally* Marschall v. Nordrhein-Westfalen, Case C-409/95, [1997] E.C.R. I-6364, Summary of Judgment ¶ 1. The Court held in *Kalanke v. Freie Hansestadt Bremen* that national law cannot automatically give preference to women over equally or even more qualified men. *Kalanke v. Freie Hansestadt Bremen* Case C-450/93, [1995] E.C.R. I-3078, ¶ 24.

34. *Katarina Abrahamsson & Leif Anderson v. Elisabet Fogelqvist*, Case C-407/98, [2000] E.C.R. I-5582, ¶ 49 (deciding whether national laws may give priority to women as an under-represented class in a public sector).

35. TEU post-Lisbon, *supra* note 15, art. 5(3), 2012 O.J. C 326, at 18 (stating that when exercising EU powers the action is limited by the principles of subsidiarity and proportionality).

36. TFEU, *supra* note 21, art. 288, 2010 O.J. C 83, at 171–72 (establishing the forms of EU legislation). The EU’s governing bodies may also issue regulations, decisions, and recommendations and opinions. *Id.*

37. *Id.* (describing what an EU-issued directive is).

freedom in the means by which the directive is implemented and regulated.³⁸

The TEU post-Lisbon mandates that the European Union's power to legislate is limited by the principle of subsidiarity.³⁹ Article 5(3) of the TEU post-Lisbon dictates that for the areas that do not fall within the explicit control of the Union power, the European Union may act only if the goal of the proposed action cannot be effectively enacted by the Member States.⁴⁰ Additionally, the objective must be better achieved by taking EU-wide action, because of either the scale of the legislation or further reaching effects.⁴¹

Protocol (No 2) of the TEU post-Lisbon and the TFEU state that the Commission shall consult widely and take into account the regional and local dimension of the action.⁴² Protocol (No 2) also states that proposed legislation should be substantiated by qualitative and, if possible, quantitative indicators and take into account the financial or administrative burden on national governments, regional or local authorities, and economic operators and citizens.⁴³ Thus, the proposed directive must show that the objective of gender diversity cannot be achieved individually by the Member States.⁴⁴

Article 5 of the TEU post-Lisbon also mandates that Union power conforms to the principle of proportionality.⁴⁵ Additionally, the content and the form of Union action cannot exceed what is necessary to achieve the objectives of the Treaties.⁴⁶ Protocol No. 2 of the TEU post-Lisbon requires the Commission to contain some assessment of the proposal's

38. *Id.* (establishing the elements of an EU directive).

39. TEU post-Lisbon, *supra* note 15, art. 5(3), 2010 O.J. C 83, at 18 (establishing the principle of subsidiarity).

40. *Id.* (describing the elements that must be fulfilled under subsidiarity).

41. *Id.* (establishing the requirements for subsidiarity).

42. Protocol (No 2) of the TEU post-Lisbon and the TFEU art. 2, 2010 O.J. C 83/206, at 206 (issuing protocols for following principle of subsidiarity pursuant to EU treaties).

43. *Id.* art 5, at 207 (stating an action that the EU must undertake to fulfill subsidiarity).

44. *See supra* notes 39–43 (discussing the requirements under subsidiarity that all directives, including the gender directive, must pass under).

45. TEU post-Lisbon, *supra* note 15, art 5(4), 2010 O.J. C 83, at 18 (requiring proportionality for proper legislation).

46. *Id.* (specifying what is necessary to meet the proportionality requirement).

financial impact and its implications for the rules to be put in place by the Member States when proposing a directive.⁴⁷

Any EU directive must meet three elements to satisfy proportionality: 1) the proposal must be reasonably and rationally related to a legitimate goal, 2) its costs must not be excessive in light of its benefits, and 3) it must represent the least restrictive action available and avoid unnecessary incidental constraints.⁴⁸ The Court of Justice, however, gives the legislature wide discretion to make social policy choices that requires it to carry out complex assessments.⁴⁹ Accordingly, the proposed directive must be geared towards a legitimate goal, its cost must not outweigh its benefits, and it must be the least restrictive option.⁵⁰

B. *Rationale For Diversity On Corporate Boards*

Historically, diversity has been promoted for social reasons, but in recent years, diversity advocates have shifted to the “business case rationale,” arguing that diversity in corporations improves corporate performance.⁵¹ Advocating that diversity is beneficial for business allows supporters to avoid arguing for diversity based on remedying past discrimination.⁵² The next

47. Protocol (No 2) of the TEU post-Lisbon and the TFEU, *supra* note 42, art. 5, 2010 O.J. C 83, at 207 (specifying means of fulfilling proportionality).

48. See *generally* Internationale Handelsgesellschaft mbH v. Einfuhr-Und Vorratsstelle Fur Getreide Und Futtermittel, Case 11/70 1970 E.C.R. 01125 (holding that legislation cannot run counter to fundamental rights of the European Union). *Id.* at ¶ 16 (holding that there must be a balancing test); United Kingdom of Great Britain & Northern Ireland v. Council of the European Union, Case C-84/94, [1996] E.C.R. I-05755, ¶ 81 (holding that EU legislation may not be overly restrictive).

49. See *The Queen v. Minister of Agriculture, Fisheries & Food & Secretary of State for Health, ex parte: Fedesa and others*, Case C-331/88, [1990] E.C.R. I-04023 (qualifying how proportionality is to be judged in court).

50. See *supra* notes 45–49 (detailing the requirements of proportionality that all directives must pass under).

51. See Lisa M. Fairfax, *Board Diversity Revisited: New Rationale, Same Old Story?*, 89 N.C. L. REV. 855, 856–57 (2011) [hereinafter Fairfax, *Board Diversity Revisited*] (evaluating effectiveness of using business case rationale to improve corporate diversity); Lisa M. Fairfax, *The Bottom Line on Board Diversity: A Cost-Benefit Analysis of the Business Rationales For Diversity On Corporate Boards*, 2005 WIS. L. REV. 795, 838–40 (2005) [hereinafter Fairfax, *The Bottom Line*] (discussing the evolution of the rationales for promoting diversity on corporate boards).

52. See Tristin K. Green, *Race and Sex in Organizing Work: “Diversity,” Discrimination, and Integration*, 59 EMORY L.J. 585, 595 (2010) (stating that business case model developed in response to opposition to affirmative action); David B. Wilkins, *From*

section describes the business case rationale and the critiques against its use to justify diversity in the board.

1. The Business Case Rationale

The business case rationale states that corporate board diversity leads to economic benefits for corporations.⁵³ Empirical evidence suggests that board diversity leads to economic benefits such as an increase in firm value, improved corporate governance, an increase in the return on equity, and a higher return on invested capital.⁵⁴ A 2007 study by McKinsey and Company showed that the eighty-nine most diverse European listed companies outperformed other companies relative to the average for their sector.⁵⁵ The study showed that these companies had an 11.4% return on equity compared to the average of 10.3%, earnings of 11.1% compared to the average 5.8%, and stock growth from the period of 2005–2007 of 64% compared to the average 47%.⁵⁶

“Separate is Inherently Unequal” to “Diversity is Good for Business”: The Rise of Market-Based Diversity Argument and the Fate of the Black Corporate Bar, 117 HARV. L. REV. 1548, 1554 (2004) (describing the aversion to justifying diversity based on past discrimination by the Supreme Court and most of the country until *Grutter v. Bollinger*, 539 U.S. 306 (2003)).

53. See Fairfax, , *Board Diversity Revisited*, *supra* note 51, at 857; Steven A. Ramirez, *Diversity and the Boardroom*, 6 STAN. J.L. BUS. & FIN. 85, 85–86 (2000) (describing the trend of corporate America moving towards diversity in the workforce to enhance productivity and competitiveness).

54. See Commission Progress Report, *supra* note 5, at 7 (add parenthetical); Catalyst, THE BOTTOM LINE: CORPORATE PERFORMANCE AND WOMEN’S REPRESENTATION ON BOARDS, (2007), available at <http://www.catalyst.org/knowledge/bottom-line-corporate-performance-and-womens-representation-boards> (reporting beneficial effects of having women on boards).

55. Diversity was evaluated by looking at the number and proportion of women on the executive committee, their function (i.e. Chief Executive Officer (“CEO”) or Chief Financial Officer (“CFO”)), number of women on the board, and statistics on gender diversity in the annual report. MCKINSEY & COMPANY, WOMEN MATTER: GENDER DIVERSITY, A CORPORATE PERFORMANCE DRIVER 13–14 (2007) (reporting on benefits of diversity on corporate boards using corporate performance). McKinsey & Company is a global management-consulting firm. See *id.* Companies were chosen from listed companies with a stock market capitalization over EU€150 million. *Id.* at 13 (reporting on benefits of diversity on corporate boards using corporate performance).

56. *Id.* at 14. Additionally, a 2007 study in Finland found that companies that had a female CEO were 1.8% more profitable than companies that had a male CEO based on return on assets, return on investments, and the operating margin. ANNA KOTIRANTA ET AL., FEMALE LEADERSHIP AND FIRM PROFITABILITY 3 (2007) (sampling all of the limited liability companies employing at least 10 people in Finland).

Proponents argue that gender diversity on boards leads to higher corporate performance for several reasons.⁵⁷ The first, most common rationale is that diversity leads to innovation, a greater variety of ideas, and the avoidance of “group think.”⁵⁸ In addition, companies can enlarge their talent pool and attract the best candidates by appealing to more women.⁵⁹ Accordingly, diversity gives the board a greater perspective and creates a more qualified board.⁶⁰

Studies also show that there must be a certain proportion of women on a board to have an impact on corporate performance.⁶¹ This “critical mass” theory asserts that when there is a more balanced group of women on the board, the company will start to experience the performance benefits of having a diverse board.⁶² Studies show that three is the “magic number” of women needed on the board to effect positive firm performance.⁶³ The studies conclude that having more women

57. See CREDIT SUISSE RESEARCH INSTITUTE, *GENDER DIVERSITY AND CORPORATE PERFORMANCE* 17–20 (2012) (reporting on effects of board diversity and corporate performance); DAVID A. CARTER ET AL., *THE DIVERSITY OF CORPORATE BOARD COMMITTEES AND FIRM FINANCIAL PERFORMANCE* 10–11 (2007) [hereinafter CARTER, *DIVERSITY OF CORPORATE BOARD COMMITTEES*] (studying effects of diversity and corporate performance).

58. See CREDIT SUISSE, *supra* note 57, at 18 (finding that more diverse groups perform better than homogenous groups). See also CARTER, *DIVERSITY OF CORPORATE BOARD COMMITTEES*; *supra* note 57, at 10 (stating that diversity is beneficial because it leads to shifts in perspective, creativity, and innovation).

59. See CREDIT SUISSE, *supra* note 57, at 18 (concluding that because females make up a greater proportion of graduates and greater percentage of girls get top grades, companies with the greatest amount of diversity are more likely to “tap into the widest possible pool of talent”). See also FORBES INSIGHT, *GLOBAL DIVERSITY AND INCLUSION: FOSTERING INNOVATION THROUGH A DIVERSE WORKFORCE* 7–9, 19 (2011) (advocating diversity on corporate boards using corporate performance as an incentive).

60. See *infra* notes 70–72 (discussing the reasons that diversity increases corporate performance).

61. See Jasmine Jockes et al., *Gender Diversity in the Boardroom and Firm Performance: What Exactly Constitutes a “Critical Mass”?*, *J. BUS. ETHICS* 17–18 (2012) (examining the requirements for critical mass); Mariateresa Torchia et al., *Women Directors on Corporate Boards: From Tokenism to Critical Mass*, 102 *J. BUS. ETHICS* 299, 312–13 (2011) (studying how to achieve effects of gender diversity on boards).

62. See Rosabeth Moss Kanter, *Some Effects of Proportions of Group Life: Skewed Sex Ratios and Responses to Token Women*, 82 *AM. J. SOC.* 965, 966 (examining the number of women required to effect change on a corporate board); Jockes, *supra* note 61, at 6 (finding the critical mass for women on boards).

63. See Jockes, *supra* note 61, at 17 (concluding that critical mass is reached with three women on the board); Torchia, *supra* note 61, at 302 (finding that critical mass is reached when there are at least three women on the board).

on the board increases their visibility, decreases polarity between the women and the others board members, and decreases the likelihood of assimilation, where other board members distort the views of a single woman to fit the pre-existing generalizations of women.⁶⁴ Merely having a woman on the board is not enough to increase firm performance; there must be a certain number of women on the board before these benefits can be obtained.⁶⁵

Corporations and regulatory agencies have embraced the business case rationale.⁶⁶ The US Securities and Exchange Commission, for example, requires that corporations disclose whether it considers diversity when choosing directors.⁶⁷ Additionally, in 2011, the EU Commission used the business case rationale when issuing a recommendation aimed at increasing the percentage of women on corporate boards.⁶⁸

2. Critiques of the Business Case Rationale

Although the business case rationale is popular, critics attack the theory's effectiveness in achieving diversity.⁶⁹ They argue that the studies that show that />greater diversity

64. See generally Kanter, *supra* note 62; see Torchia, *supra* note 61, at 301–04 (finding that when there is only one woman on a board she will be stereotyped and ignored by the majority group).

65. See *supra* notes 61–64 (discussing the critical mass theory).

66. Fairfax, *Board Diversity Revisited*, *supra* note 51, at 865 (describing the increasing reliance on economic justifications for diversity); Wilkins, *supra* note 52, at 1555 (claiming that diversity advocates stake their claim on marketplace reasoning).

67. Securities and Exchange Commission, 17 C.F.R. § 229.407(c)(2)(vi) (2010); Proxy Disclosure Enhancements, 74 Fed. Reg. 68,334 (Dec. 23, 2009) (requiring disclosure of diversity policies in corporations). See Fairfax, *Board Diversity Revisited*, *supra* note 51, at 865–66 (using the SEC's regulation as an example of the increased acceptance of the business case rationale).

68. Commission Memorandum, EU Justice Commissioner Reding challenges business leaders to increase women's presence on corporate boards with "Women on the Board Pledge for Europe," Memo/11/124 (Mar. 1, 2011), available at http://curopa.eu/rapid/press-release_MEMO-11-124_en.htm [hereinafter Commission Memorandum] (challenging EU corporations to sign a pledge to increase diversity on their corporate boards).

69. See generally Fairfax, *Board Diversity Revisited*, *supra* note 51 (giving a critique of the use of the business case rationale to justify diversity on boards); Colm McLaughlin & Simon Deakin, *Equality Law and the Limits of the "Business Case" for Addressing Gender Inequalities*, in *GENDERED LIVES: GENDER INEQUALITIES IN PRODUCTION AND REPRODUCTION* 153, 158 (Jacqueline Scott et al. eds., 2011) (addressing the limitations of using business case rationale for gender equality).

improves corporate performance only prove correlation, not causation.⁷⁰ This weakens the argument for the business case rationale because the improved corporate performance could be attributed to factors other than diversity.⁷¹

Furthermore, a study by David A. Carter, Frank D. Souza, Betty J. Simkins, and W. Gary Simpson (“CSSS study”) that attempted to prove causation concluded that there was no causation between diversity and corporate performance.⁷² The CSSS study used Tobin’s *q*, a measure of corporate performance, to measure financial performance of a company and tested it against the business case model.⁷³ The CSSS study concluded that under none of the theories was there enough statistically significant evidence to show causation between diversity and Tobin’s *q*.⁷⁴

Additionally, several studies conclude that in reality, firms that improved diversity had no change at all, or actually suffered from a decrease in corporate performance.⁷⁵ A study of the 500

70. See Fairfax, *Board Diversity Revisited*, *supra* note 51, at 862–63 (attacking studies that find diversity increases firm performance because causation cannot be established). See also Lissa Lamkin Broome & Kimberly D. Krawiec, *Signaling Through Board Diversity*, 77 U. CIN. L. REV. 431, 433–34 (2008) (discussing gaps that empirical evidence of business case theory leaves); CARTER, DIVERSITY OF CORPORATE BOARD COMMITTEES, *supra* note 57, at 5 (identifying the problem of empirical investigation for business case rationale).

71. See Fairfax, *Board Diversity Revisited*, *supra* note 51, at 862–63 (attacking studies that find diversity increases firm performance because causation cannot be established). See also Broome, *supra* note 70, at 433–34 (listing alternative possibilities for improvement of corporate performance).

72. See David A. Carter et al., *The Gender and Ethnic Diversity of US Boards and Board Committees and Financial Performance*, 18 CORP. GOVERNANCE 396, 411 (2010) [hereinafter Carter Gender and Ethnic Diversity] (concluding that when using Tobin’s *q* as a measure of financial performance there is no causal relationship, positive or negative, between gender diversity). See also Fairfax, *Board Diversity Revisited*, *supra* note 51, at 862–63 (pointing out weak points of the business case rationale even acknowledged and studied by business case advocates).

73. Carter, *Gender and Ethnic Diversity*, *supra* note 72, at 402, 411 (defining which calculation of Tobin’s *q* was being used and the four theories of business case rationale being tested).

74. *Id.* at 411 (finding no significant results of causation). The researchers found that the resource dependence theory and human capital theory offer the most support for positive causation between gender and ethnic diversity and firm performance, but was unable to conclude that there was causation because the other theories were not mutually exclusive. *Id.*

75. See Fairfax, *Board Diversity Revisited*, *supra* note 51, at 862–63 (attacking the studies that show diversity has a positive effect on corporate performance); see also Renée B. Adams & Daniel Ferreira, *Women in the Boardroom and Their Impact on*

largest companies in Denmark, Norway, and Sweden found no significant impact on stock performance or returns on assets.⁷⁶ One US study concluded that, while female directors have a positive effect on corporate governance, they have a negative impact on firm performance.⁷⁷

A study conducted by Frank Dobbins and Jiwook Jung, of the Harvard Sociology Department, studied the effects of gender diversity and the institutional investor community influences.⁷⁸ The study found that increasing board diversity did not affect profits, but negatively affected stock prices.⁷⁹ Dobbins and Jung attribute this to their “bias theory,” which hypothesizes that increases in board diversity activates the gender bias of institutional investors.⁸⁰

This bias theory hypothesizes that institutional investors subsequently decrease their holdings in that company as a result of gender bias.⁸¹ However, the study shows that visible investors significantly increase their positions after increased gender diversity.⁸² Dobbins and Jung attribute this finding to their accountability hypothesis, which posits that because visible

Governance and Performance, J. FIN. ECON. 291, 292–93 (studying the impact of females on corporate boards and corporate performance); Frank Dobbins & Jiwook Jung, *Corporate Board Gender Diversity and Stock Performance*, 89 N.C. L. REV. 809, 828–29 (2011) (finding that in study of 400 companies when increasing diversity, stock prices decrease significantly and there is no effect on profits).

76. See Trond Randoy et al., *A Nordic Perspective on Corporate Board Diversity*, 21–24 (Nordic Innovation Centre 2006) (analyzing gender diversity and corporate performance in Denmark, Norway and Sweden).

77. Adams, *supra* note 75, at 292–93, 304 (finding that CEO turnover rates indicate some aspects of decision making are improved by having a diverse board and that women are more likely to sit on boards affecting directors’ compensation); (concluding firms perform worse measured in Tobin’s q and return on assets with greater diversity, unless firm has weak governance, because women are tougher monitors).

78. Dobbins, *supra* note 75, at 811–13 (studying the impact of gender diversity and corporate performance given the reaction of corporate investors).

79. *Id.* at 811 (finding that an increase in gender diversity lead to a decrease in the stock price). The study was conducted on more than 400 of the largest US firms from 1997–2006. *Id.* at 813.

80. *Id.* at 835.

81. *Id.* at 821–22 (hypothesizing a negative impact on firm performance as a result of increased gender diversity).

82. *Id.* at 829 (finding that when gender diversity is increased visible shareholders increase their holdings in a company).

investors and public pension funds are subject to public accountability they will be more willing to support diversity.⁸³

Another critique of the business case rationale is that it has been ineffective in actually achieving diversity.⁸⁴ In the Fortune 500 companies in the United States, the number of women on boards increased from 15.7% to 16.1% from 2010 to 2011.⁸⁵ According to the EU Commission's Justice database of gender balance in decision-making positions, the average number of women on the boards of the largest companies⁸⁶ of each of the EU Member States increased from 11.8% to 13.7% from 2010 to 2012.⁸⁷ Thus, although advocates use the business case rationale to help incentivize the promotion of diversity, critics hold that diversity has not improved significantly.⁸⁸

83. *Id.* at 812–13 (hypothesizing that investors that are scrutinized greater by society are pressured into accepting diversity).

84. See Fairfax, *Board Diversity Revisited*, *supra* note 51, at 866 (arguing the flaws of using business case rationale); Mike Noon, *The Fatal Flaws of Diversity and the Business Case for Ethic Minorities*, 21 *WORK, EMP'T & SOC'Y* 773, 773 (2007) (criticizing use of business case rationale to advocate for gender equality).

85. See Rachel Soares, et al., *2011 Catalyst Census: Fortune 500 Women Board Directors*, (Catalyst December 2011) available at http://www.catalyst.org/file/533/2011_fortune_500_census_wbd.pdf (2011) (reporting on number of female directors on corporate boards in United States). The percentage of women on boards for all companies in the United States increased from 12.5% to 12.9% from 2010 to 2011. *2011 Women on Boards Reports* 10 (GovernanceMetrics International, Inc. 2011), available at http://www.calstrs.com/corporategovernance/women_on_boards_2011.pdf (reporting on number of female directors on corporate boards in United States).

86. "Largest" company is defined by the number of member of the primary blue-chip index and registered in the country concerned. European Commission http://ec.europa.eu/justice/gender-equality/gender-decision-making/database/business-finance/supervisory-board-board-directors/index_en.htm.

87. European Commission Database, *supra* note 5 (recording percentage of women on boards in EU countries); Commission Progress Report, *supra* note 5, at 11. The increase in diversity is largely attributed to the significant increase of women on boards in France that have implemented mandatory quotas. Commission Progress Report, *supra* note 5 at 11.

88. See Viviane Reding, Vice-President of the Eur. Comm'n, EU Justice Comm'r, Mapping EU Action on Gender Equality: From Treaty of Rome to Quotas, Address at the Harvard Club Belgium/Brussels (Oct. 8, 2012), available at http://europa.eu/rapid/press-release_SPEECH-12-702_en.htm [hereinafter Reding's Speech] (addressing arguments for implementation of a quota and concerns against implementation); Kanter, *supra* note 3 (reporting on the initial introduction of the gender quota proposal in September 2012).

C. European Countries That Have Implemented A Gender Quota

Norway, Belgium, France, Italy, the Netherlands, and Spain have already passed gender quota legislation.⁸⁹ Additionally, Austria, Denmark, Finland, Ireland, Luxembourg, Sweden, and the United Kingdom have passed “comply or explain” regulations in their corporate governance codes.⁹⁰ These regulations mandate that companies comply with corporate code or explain why they have not complied.⁹¹

I. Norway

Norway was the first country in Europe to pass a gender quota on corporate boards.⁹² Norway’s law, which took effect in 2006, calls for the highest percentage of women on boards in Europe.⁹³ As a result, several studies examined the gender quota in Norway and the impact that it has had on the affected companies.

89. Catalyst, INCREASING GENDER DIVERSITY ON BOARDS: CURRENT INDEX OF FORMAL APPROACHES 2–3 (2012) [hereinafter Catalyst Index], available at http://www.catalyst.org/europe/Approaches_to_Increasing_Gender_Diversity_on_Boards-APRIL-EUROPE.pdf (reporting on legislation and policies implemented by various European and other countries regarding women on corporate boards); Commission Progress Report, *supra* note 5, at 13–14 (summarizing the countries that have taken action to improve diversity on boards).

90. See Catalyst Index, *supra* note, at 89 (summarizing the countries that have passed regulations regarding gender diversity on boards); Commission Progress Report, *supra* note 5, at 14 (summarizing the countries in the EU that have passed regulations concerning gender diversity on boards).

91. See David Scidl, *Standard Setting and Following in Corporate Governance: An Observation: Theoretical Study of the Effectiveness of Governance Codes*, 14 ORG. 705, 708–09 (2007) (giving an example of having flexibility of code regimes); Ruth V. Aguilera & Alvaro Cuervo-Cazurra, *Codes of Good Governance*, 17 CORP. GOVERNANCE: AN INT’L REV. 376, 383 (2009) (describing methods of voluntary firm compliance).

92. Catalyst Index, *supra* note 89 (summarizing the countries that have passed gender quota legislation); Douglas M. Branson, *Women on Boards of Directors: A Global Snapshot*, 3 (U. Pitt. Working Paper No. 2011-05, 2011) 6 (giving an overview of gender quota legislation globally).

93. See European Commission Database, *supra* note 5 (tracking the progression of women on boards from 2003 to 2012); COMMISSION OF THE EUROPEAN COMMUNITIES, Impact Assessment on Costs and Benefits of Improving the Gender Balance in the Boards of Companies Listed on Stock Exchanges, COM (2012) 614, Final 39–40 (Nov. 2012) [hereinafter Commission Cost-Benefit Analysis] (graphing percentages of women on boards in the EU and Norway).

Norway passed its gender quota law, the Norwegian Public Limited Liability Companies Act, in 2003, and it came into force on January 1, 2006.⁹⁴ Section 6-11a of the law requires that both sexes be represented on the boards of public limited liabilities companies.⁹⁵ The law mandated that public limited companies have at least forty percent of women on their corporate boards by 2008.⁹⁶ If companies fail to comply with §6-11a, they are subject to sanctions, including the possibility of dissolution of the company.⁹⁷ Since 2008, there has been 100% compliance with the quota in Norway, as currently women make up forty percent of the boards of publicly listed companies.⁹⁸

Critics of the Norwegian quota argue that while there are an increased number of women on boards, the number of female CEOs has not increased and remains at five percent.⁹⁹ Moreover, critics argue that the law does not lead to more

94. See Reiersen, *supra* note 2, at 1 (giving a background of the rise of Norwegian legislation); *Fact Sheet: The Legislation on Representation of Both Sexes in Boards*, MINISTRY OF TRADE AND INDUSTRY OF NORWAY, <http://www.regjeringen.no/en/dep/nhd/presesenter/fakta-ark/faktaark-kjonnkvotering-i-styrer.html?id=641431> (summarizing Norwegian quota legislation).

95. Norwegian Public Limited Liability Companies Act, §6-11(a)(2009). Public limited companies have a capitalization of at least one million Norwegian kroner with share available to the general public. David A. Matsa & Amalia R. Miller, *A Female Style in Corporate Leadership? Evidence From Quotas*, AM. ECON. J.: APPLIED ECON. 5 (2012) (using Norway as a case study by studying the impact gender quota on corporate boards).

96. See Reiersen, *supra* note 2 (detailing the requirements of Norwegian's gender legislation). See also MINISTRY OF TRADE AND INDUSTRY, *supra* note 94 (giving a brief overview of the Norwegian law). The 2003 law was voluntary if all public limited firms had at least forty percent female representation, however, by 2005, women filled only twelve percent of the public limited corporations. AAGOTH STORVICK & MARI TEIGEN, *WOMEN ON BOARD: THE NORWEGIAN EXPERIENCE*, FRIEDRICH EBERT STIFTUNG (June 2010) 8, available at <http://library.fes.de/pdf-files/id/ipa/07309.pdf> (examining effect of quota on Norwegian companies).

97. See Norwegian Public Limited Liability Companies Act, §16-15 (mandating sanctions for noncompliance).

98. See European Commission Database, *supra* note 5 (showing that Norway reached forty percent female diversity by 2011); Reiersen, *supra* note 2, at 5 (noting that all Norwegian firms have complied with the law).

99. Kenneth R. Ahern & Amy K. Dittmar, *The Changing of the Boards: The Impact on Firm Valuation of Mandated Female Board Representation*, 127 Q. J. OF ECON. 137, 139 (2012) (studying the effects of Norwegian quota legislation on firm performance and change in board demographics); Nicola Clark, *The Female Factor-Getting Women Into Boardrooms by Law*, N.Y. TIMES, Jan. 27, 2010, www.nytimes.com/2010/01/28/world/europe/28iht-quota.html (reporting that under five percent of CEOs in Norway are women).

women on boards.¹⁰⁰ Instead the quota promotes the “golden skirts,” or “trophy directors,” where one woman sits on many boards at one time.¹⁰¹

Recent studies have evaluated the effects of quotas on the Norwegian companies, studying changes in the boards’ composition and the impact on firm performance.¹⁰² These studies, discussed below, are indicative of how the proposed quota may impact companies in the European Union.¹⁰³

a. Board Composition

Researchers study board demographics to determine if adding women to the board changes the demographic on the board and how those changes affect corporate performance.¹⁰⁴ Studies found a number of changes in board composition

100. See Anne Sweigart, *Women on Board for a Change: The Norway Model of Boardroom Quotas As a Tool For Progress in the United States and Canada*, 32 NW J. OF INT’L L. & BUS. 80A, 83A (2012) (studying Norwegian quota legislation as a means of improving diversity in United States and Canada); see also Branson, *supra* note 92, at 4–5 (examining diversity on corporate boards in various countries with a focus on Norway).

101. See *supra* note 99 (arguing that only the same women are being added to boards).

102. See generally Knut Nygaard, *Forced Board Changes: Evidence From Norway* (Norwegian School of Economics and Business Administration Mar. 2011) (studying effects of information asymmetry on corporate performance after announcement of quota in Norway); Ahern, *supra* note 99 (studying the impact of the Norwegian quota on board demographics and corporate performance); Matsa, *supra* note 95 (comparing the effects on companies affected and not affected by Norway’s quota). The effects of the recent economic crisis may affect the firm’s performance. Matsa, *supra* note 95, at 21–22 (explaining the effects of the recession on corporate performance). However, Ahern’s study does compare the effects of stock prices to that of Denmark, Finland, Sweden, and the U.S. as placebos. Ahern, *supra* note 99, at 163 (using placebos in similar economic conditions).

103. Theo Vermaelen, *Gender Quotas for Boards: How to Destroy European Competitiveness*, INSEAD Blog (Nov. 16, 2012) <http://blog.insead.edu/2012/11/gender-quotas-for-boards-how-to-destroy-european-competitiveness> (using the Ahern study to critique the proposed directive); NATIONAL ASS’N OF PENSION FUNDS, EUROPEAN COMMISSION CONSULTATION, GENDER IMBALANCE IN CORPORATE BOARDS IN THE EU 5 (2012) (using the Ahern study to evaluate the prudence of gender legislation in the EU).

104. See Ahern, *supra* note 99, at 141 (studying how the change in the board affects firm performance); Matsa, *supra* note 95, at 18–19 (testing for whether firms that had to change its board the most had a more negative impact on firm performance).

following the implementation of the quota in Norway.¹⁰⁵ First, from 2001 through 2009, the board size of Norwegian companies remained roughly the same, indicating that boards did not add women to fulfill the quota, but simply replaced male directors.¹⁰⁶ Second, the proportion of members on the board with CEO experience declined in 2008.¹⁰⁷ Third, the average age of female board members was less than the male directors, whose average age increased.¹⁰⁸ One study found that the number of women with the same last name as another board member increased from .97% to 3.82%, suggesting that to comply with the quota some directors appointed family members to the board.¹⁰⁹ Simply put, board members became younger, with less CEO experience, and had an increase in the number of board members who were related.¹¹⁰

b. Norwegian Corporate Performance and Policies After the Passage of the Quota

In Norway, researchers found that there was greater change in performance of companies with no women on the corporate board pre-quota compared to the change in companies that had at least one woman on the board pre-quota.¹¹¹ In the days following the initial announcement of the quota in 2006, one

105. See Ahern, *supra* note 99, at 140–41 (summarizing findings on changes in board demographics); Matsa, *supra* note 95, at 2–3 (explaining findings of changes in board demographics).

106. Matsa, *supra* note 95, at 9. (finding that the board size did not significantly increase post-quota). The number of board members increased slightly from 2006 to 2009 from 6.1 to 6.3. *Id.* See Ahern, *supra* note 99, at 153 (studying the shift in board demographics post-quota); *id.* at 140–41 (indicating that the size of the board did not significantly increase post-quota).

107. See Ahern, *supra* note 99, at 150 (studying the change in board experience post-quota); see also Matsa, *supra* note 95, at 24 (examining the change in director experience post-quota).

108. Ahern, *supra* note 99, at 153–54 (studying the change in the average age of women versus men on boards post-quota); Matsa, *supra* note 95, at A-8 (finding the average age of women to be lower than that of men on the board).

109. Ahern, *supra* note 99, at 154 (studying the change in board demographics post-quota and hypothesizing based on the results).

110. See *supra* notes 106–09 (describing the results of studies of board composition after the passage of the quota).

111. See Ahern, *supra* note 99, at 139 (finding companies that had no women on the board performed worse than those that had at least one woman); Matsa, *supra* note 95, at 46 (finding firms that had no women on the board prior to the quota had a greater decline in profits).

study found that the average stock return for firms with no female directors went down -3.54%, and -0.02% for firms with at least one female director.¹¹² These value losses persist from 2002 until the end of the study.¹¹³ Companies with no women on the board in 2006 suffered from greater decline in operating profits compared to companies that had some women on the board.¹¹⁴ Thus, the researchers concluded that the announcement of the quota and its implementation had a negative effect on stock prices in Norway.¹¹⁵

Also, after the passage of the quota, a number of firms privatized or delisted.¹¹⁶ One study found that in 2009, there were seventy percent fewer public limited companies in Norway than there were in 2001.¹¹⁷ In fact, after 2001, the number of private limited companies increased.¹¹⁸ These results suggest that companies delisted to avoid compliance with the quota.¹¹⁹

112. See Ahern, *supra* note 99, at 139 (studying the impact of the announcement of the gender quota law on firm's stock returns); Matsa, *supra* note 95, at n.2 and accompanying text (discussing the findings of Ahern's study).

113. Ahern, *supra* note 99, at 139.

114. See Ahern, *supra* note 99, at 188 (concluding that announcing the quota law had a negative impact on stock prices); see also Matsa, *supra* note 95, at 16 (studying effect on firms farthest from compliance).

115. See Ahern, *supra* note 99, at 188 (concluding that announcing the quota law had a negative impact on stock prices); see also Matsa, *supra* note 95, at 15 (describing Ahern's study of stock prices after announcement of quota). The studies acknowledged that these studies could not prove causation, but one study assumed causation because there was no other significant event that would have affected stock prices and compared stock prices to US firms surrounding the announcement of the quota. See Ahern, *supra* note 99, at 156. Another study compensated by comparing the performances to companies in Scandinavia, outside of Norway. See Matsa, *supra* note 95, at 2.

116. See Ahern, *supra* note 99, at 185 (testing to see if the cost of compliance is too high for some companies so that they would rather delist recognizing there were other reasons for companies to delist); see also Matsa, *supra* note 95, at 7 (focusing its study on companies that were listed and noting the conversion of unlisted public companies to a private status); Nygaard, *supra* note 102, at 25 fig. 2 (graphing the number of listed firms versus private firms from 1999 to 2008).

117. See Ahern, *supra* note 99, at 141 (contrasting to the increased number of private firms that were not affected by the quota).

118. See Ahern, *supra* note 99, at 184; see also Nygaard, *supra* note 102, at 25 fig. 2 (graphing the number of listed firms versus private firms from 1999 to 2008).

119. See Nygaard, *supra* note 102, at 14 (explaining how companies could avoid compliance); see also Ahern, *supra* note 99, at 188 (finding that companies are more likely to delist if there is a younger board with less CEO experience); Claire Braund, *Looking at the Big Picture on Gender Diversity*, WOMEN ON BOARDS (Oct. 13, 2010)

2. Spain

Spain passed a gender quota in 2007 that requires publicly traded companies with over 250 employees to have at least forty percent of each gender on their boards within eight years after the implementation of the law.¹²⁰ Spain, however, has not imposed any sanctions in the law for non-compliance.¹²¹ Compared with Norway and France, the percentage of women on boards has not increased as dramatically in Spain.¹²² From 2007 to 2012, the percentage of women on boards increased from four to eleven percent, compared with Norway's increase from six percent in 2002 to thirty-five percent in 2006.¹²³ Although Spain became the first EU Member State to pass a gender equality law in 2007, they did so without establishing sanctions for non-compliance. As a result, Spain has not experienced a significant increase in the percentage of women on boards.¹²⁴

http://www.womenonboards.org.au/pubs/articles/norway_bigpicture.htm. (reflecting on impact of quotas in Norway in 2010).

120. Law for Effective Equality of Women and Men Title VII art. 75 (B.O.E. 2007, 71) (Spain) *available at* http://noticias.juridicas.com/base_datos/Admin/lo3-2007.t7.html (effecting quota legislation on corporate boards in Spain); *see also* Catalyst Index, *supra* note 89, at 3.

121. Law for Effective Equality of Women and Men Title VII art. 75 (B.O.E. 2007, 71) (Spain) *available at* http://noticias.juridicas.com/base_datos/Admin/lo3-2007.t7.html (mandating gender quotas for certain corporations); *see also* Catalyst Index, *supra* note 89, at 3 (summarizing Spain's quota law).

122. *See* European Commission Database, *supra* note 5 (showing the percentage of women on the board in EU countries and certain other surrounding countries); Branson, *supra* note 92, at 6 (stating that Spain's quota is largely aspirational because of the lack of sanctions).

123. *See* MARI TEIGEN, WOMEN IN ECONOMIC DECISION MAKING: DISCUSSION PAPER NORWAY, 5 (European Commission 2012), *available at* http://ec.europa.eu/justice/gender-equality/files/exchange_of_good_practice_no/no_discussion_paper_no_2012_en.pdf (giving a background on Norway's gender quota); *see also* European Commission Database, *supra* note 5 (tracking the percentage of women on the board in Spain from 2003 until 2012); Commission Progress Report, *supra* note 5, at 9 (charting percentage of women on the board in the EU).

124. *See* European Commission Database, *supra* note 5 (showing Spain has not increased its diversity as quickly as Norway and France after passing their quotas); Branson, *supra* note 92, at 6 (stating that Spain's quota is largely aspirational because of the lack of sanctions).

3. France

On January 13, 2011 the French Assemblée Nationale passed a law requiring publicly traded companies, companies with more than 500 employees, or companies with net sales or total assets of at least €50 million to maintain forty percent of each gender on their boards.¹²⁵ The law requires compliance by January 2017, and mandates that publicly traded companies have at least twenty women on the board by January 2014 and that boards with no women must appoint one woman by the next general meeting.¹²⁶ The law sanctions companies for non-compliance by suspending payments to directors.¹²⁷ France saw a dramatic increase in the number of women on boards, rising from twelve to twenty-two percent between 2010 and 2012.¹²⁸ One study found that the number of French companies with at least one woman on the board increased from sixty-seven to eighty-nine percent from 2009 to 2011.¹²⁹

Proponents and critics of the proposed directive in the European Union rely on the results of passing quotas in these countries, in particular Norway, to evaluate how the proposed directive will impact the European Union.¹³⁰ Norway and France implemented quotas that resulted in significant increases of diversity on boards, while Spain's quota has not lead to significant increases in diversity in Spain's board of directors

125. Loi, n° 592 du 13 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 [relating to the balanced representation of women and men on boards of directors and supervisory and professional equality] art. 1, available at <http://www.assemblee-nationale.fr/13/pdf/ta/ta0592.pdf> (effecting gender quota legislation on corporate boards in France).

126. *Id.* art. 5 (detailing the timeframe for compliance).

127. *Id.* art. 1 (detailing the sanctions for non-compliance).

128. See European Commission Database, *supra* note 5 (looking at the largest publicly traded companies on the national stock exchange). The percentage of women on boards in France has increased to 16.6%, a 7.5% increase from 2009. See Kimberly Gladman & Michelle Lamb, GMI Ratings' 2012 Women on Boards Survey, 7 (GMIRatings Mar. 2012), available at http://library.constantcontact.com/download/get/file/1102561686275-86/GMIRatings_WOB_032012.pdf (reporting on number of women on boards in various countries).

129. Gladman, *supra* note 128, at 20 (reporting on number of companies with at least one woman on the board).

130. See *infra* notes 161, 210 and accompanying text (referencing the quota in Norway and how it shows support for and against the proposed directive).

due to the lack of sanctions for non-compliance.¹³¹ Several studies tested the effects of the quota in Norway and concluded that, while the quota was 100% successful in achieving diversity on boards, the law led to a decline in stock prices and was followed by the delisting of public companies.¹³²

II. IMPLEMENTING AN EU-WIDE GENDER LEGISLATION

Part II of this Note examines the directive proposed by the Commission in November 2012, which set as its objective to have forty percent women on boards for large, publically listed companies incorporated in a member state. Part II.A describes the requirements under the proposed directive and the Commission's rationale behind the proposal. Part II.B states the general arguments in opposition to the proposed directive, as well as general concerns about gender equality legislation.

A. Arguments For A Uniform Law For Gender Diversity On Corporate Boards In The European Union

1. The Requirements Under The Binding Directive

The EU directive proposes that companies set the objective to have forty percent female non-executive directors on corporate boards by January 1, 2020, with a 2018 deadline for listed companies that are public undertakings.¹³³ This directive would affect companies incorporated in a Member State whose securities are traded on a regulated market in one or more Member States ("listed companies").¹³⁴ Small and medium-sized enterprises ("SMEs") are excluded from the application of the

131. See *supra* notes 98, 121–22, 128 and accompanying text (discussing the increase of diversity on boards in Norway, Spain, and France).

132. See *supra* notes 112–19 and accompanying text (discussing studies done on effects of the quota in Norway).

133. See Proposed Directive, *supra* note 12, at art. 4(1) (establishing the timeframe for compliance). Public undertaking is a company in which the public authorities may exercise, directly or indirectly, a dominant influence where public authorities hold a major part of the company's capital, control the majority of the votes attaching to shares issued by the undertakings, or can appoint more than half of the members of the undertaking's administrative, managerial or supervisory body. *Id.* art. 2(9).

134. *Id.* art. 2(1) (establishing which companies would be affected by the law).

directive.¹³⁵ In companies that employ a two-tier board system, the directive applies to the supervisory board.¹³⁶

Additionally, the directive applies to non-executive directors or board members who are not involved with daily management of the company.¹³⁷ The directive states that companies must give priority to the candidate of the underrepresented sex for a board position, if the candidate is equally qualified, in terms of suitability, competence, and professional performance.¹³⁸ Two years after the adoption of the directive, companies must report to “competent national authorities” once a year about their compliance, or if they have not complied, the reason for non-compliance and the measures they intend to adopt to comply.¹³⁹

The directive requires that sanctions for non-compliance be effective, proportionate, and dissuasive.¹⁴⁰ Member States are responsible for ensuring that companies comply with the directive and for laying down sanctions for non-compliance.¹⁴¹ Member States may impose administrative fines and nullify or

135. *Id.* art. 3 (providing for companies which are exempt from compliance). SMEs are defined as companies with less than 250 employees and an annual turnover less than or equal to €50 million, or an annual balance sheet less than or equal to €43 million, or the equivalent currency, if the SME does not use the euro. *See id.* art. 2(8).

136. *Id.* art. 2(5) (establishing which board members would be affected).

137. *Id.* art. 4(1); art. 2(4)–(5) (establishing which board members are affected). If women comprise at least one-third of a board, including executive and non-executive positions, a Member State may hold that that company has met the objective. *Id.* art. 4(7) (providing for an exception for compliance). Furthermore, Member States may allow listed companies that have less than 10% females in their workforce to be excused from complying with the objective. *Id.* art. 4(6). Although the proposed directive does not impose a target for executive officers, affected companies must undertake individual commitments for gender equality among executive officers to be achieved by the same deadlines. *Id.* art. 5(1) (requiring Member States oversee that listed companies take action for improving gender diversity among executive officers even though the objective does not apply to them).

138. *Id.* art. 4(3). The proposed directive would give the Member State the responsibility of ensuring, upon request from the losing candidate, that listed companies are obliged to disclose the qualification criteria upon which the decision was made, the objective comparative assessment of the criteria, and the considerations in giving the position to the candidate of the opposite sex. *Id.* art. 4(4).

139. *Id.* arts. 5(2)–(3). Companies must also publicly publish these reports. *Id.* art. 5(3).

140. *Id.* art. 6(2) (providing guidelines for how Member States should sanction non-complying companies).

141. *Id.* arts. 5(4), 6(1) (providing monitoring responsibilities to Member States to oversee companies' compliance).

annul the appointment or election of a non-executive director that has been made in opposition to the directive provisions.¹⁴² The Commission will review the progress of Member States and reevaluate the directive by December 2021 to determine if the renewal of the directive is necessary.¹⁴³

2. Reasoning Behind A Binding Objective

Proponents offer several arguments for implementing a binding directive providing for board diversity.¹⁴⁴ The main argument relies on the business case rationale, contending that companies with greater board diversity outperform companies in the same industry that are dominated by men.¹⁴⁵ The European Commission emphasizes that companies with women on their boards have a higher rate of return in sales, higher return on invested capital, higher return on equity, and better share price performance.¹⁴⁶ The improvement in firm performance with women on the board is attributed to a more productive working environment due to a more diverse and collective mind-set and a wider range of perspectives for more balanced decision-making.¹⁴⁷ Additionally, proponents argue

142. *Id.* art. 6(2) (providing examples of sanctions Member States may issue for non-compliance).

143. *Id.* arts. 9(2)–(4) (projecting the conclusion of the timeframe for the legislation).

144. *See* Reding's Speech, *supra* note 88 (addressing arguments for implementation of a quota and concerns against implementation); *see also* Proposed Directive, *supra* note 12, at 3–4 (presenting arguments for why the directive should be adopted).

145. *See* Reding's Speech, *supra* note 88 (citing to studies conducted that companies with diversity on boards have better governance and financial performance); *see also* Proposed Directive, *supra* note 12, at 5 (stating the purpose of the directive is to improve financial performance); *see also* Nov. 14 Press Release, *supra* note 10 (publicizing the reasoning behind the proposed directive); Henriette Jacobsen, *Reding Pushes 40% Female Quota on Corporate Boards*, EURACTIV, Nov. 15, 2012, <http://www.euractiv.com/social/europe/commission-gives-green-light-gen-news-516048> (compiling various quoted reactions to the announcement of the proposed directive).

146. *See* Reding's Speech, *supra* note 88 (extolling the economic benefits of having diversity on the board); European Commission, *Women on Boards - Factsheet 1 – The Economic Arguments* (Nov. 14, 2012) *available at* http://ec.europa.eu/justice/gender-equality/files/womenonboards/factsheet-general-1_en.pdf (summarizing the economic arguments of the proposed directive).

147. *See* Nov. 14 Press Release, *supra* note 10 (stating that diversity leads to a more innovative environment due to a more diverse mindset with a wider range of

that because women control seventy percent of global consumer spending decisions, having more women on the board can provide a better insight into consumer choices, which will ultimately lead to a sales boost.¹⁴⁸ Furthermore, by including more women on the board, companies can take advantage of the talent pool, where more than half of EU university graduates are female.¹⁴⁹ Expanding the available talent pool increases the likelihood that the most suitable candidates, male and female, are selected for the board.¹⁵⁰

Proponents also assert that the proposed directive will benefit the European Union as a whole, beyond individual corporations.¹⁵¹ Citing the Europe 2020 Strategy, EU's growth strategy, the Commission states that it is necessary to encourage women to enter into the workforce and retain the women already working, given the aging population that will result in a shortage of skilled workers.¹⁵² The Commission worries that the low number of women on boards discourages women from pursuing employment, which would only ensure that the "vicious cycle" of gender employment and gender pay differences continues.¹⁵³

perspectives); *see also* Proposed Directive, *supra* note 12, at 16, ¶ 8 (stating that team performance is enhanced when there is a greater range of perspectives on boards).

148. *See* Commission Progress Report, *supra* note 5 at 7 (explaining that it is beneficial for the board to mirror the market for a greater insight into consumer choices); *see also* Reding's Speech, *supra* note 88 (arguing that there is a business advantage in having women on boards given women's high involvement as a consumer decision maker).

149. *See* Commission Progress Report, *supra* note 5, at 7 (arguing that expanding the talent pool is a benefit of board diversity); *see also* Proposed Directive, *supra* note 12, at 16 ¶ 7 (arguing the benefits of have greater diversity on the board).

150. *See* Commission Progress Report, *supra* note 5, at 7 (explaining how increasing the talent pool is beneficial to the board); *see also* Proposed Directive, *supra* note 12, at 5 (arguing for the increase the percentage of women on the board).

151. *See* Reding's speech, *supra* note 88 (arguing that there is a macroeconomic argument for having greater diversity on boards); Commission Progress Report, *supra* note 5, at 7 (stating a macroeconomic benefit of having women in leadership positions).

152. *See* Europe 2020, [ec.europa.eu/2020](http://ec.europa.eu/europe2020/europe-2020-in-a-nutshell/targetsindex_en.htm) (Oct. 15, 2012), http://ec.europa.eu/europe2020/europe-2020-in-a-nutshell/targetsindex_en.htm (summarizing the EU targets to be achieved by 2020); Nov. 14 Press Release, *supra* note 10 (arguing the slow growth of diversity in the EU as a reason for initiating proposed directive); Proposed Directive, *supra* note 12, at 9 (noting the slow development of progress in the EU and its inability to meet the goal set in Europe 2020).

153. *See* Commission Progress Report, *supra* note 5, at 7 (stating that the glass ceiling that keeps women out of decision making roles likely discourages them from

The proposal's biggest advocate, Commission Vice-President Viviane Reding, is pushing for the legislation out of frustration that, despite the fact that sixty percent of university graduates are female, there is slow growth of diversity on corporate boards.¹⁵⁴ In January 2011, Reding challenged companies to sign a pledge to increase the number of women on boards to thirty percent by 2015 and forty percent by 2020.¹⁵⁵ By March 2012, however, only twenty-four companies had signed the pledge.¹⁵⁶ As a result of the pushback against her original proposal for a quota in October 2012, Reding had to water down her proposal to be a "binding objective."¹⁵⁷ Even so, her reasoning for legislation remains the same.¹⁵⁸

fulfilling their full professional potential); *See* Reding Speech, *supra* note 88 (arguing that poor career prospects discourages women from remaining in the workforce).

154. *See* Press Conference, Mar. 3, 2012, available at <http://ec.europa.eu/avservices/player/streaming.cfm?type=ebsvod&sid=198355> (addressing progress of diversity on corporate boards in EU); Commission Press Release, *European Commission Weighs Options To Break The 'Glass Ceiling' For Women On Company Boards*, IP/12/213 (Mar. 5, 2012) available at http://europa.eu/rapid/press-release_IP-12-213_en.htm?locale=en [hereinafter March 3 Press Release] (publicizing the concerns of lack of diversity of gender on corporate boards and lack of progress in the European Union).

155. Commission Memorandum, *supra* note 68.

156. *See* March 3 Press Release, *supra* note 154, *see also* Commission Progress Report, *supra* note 5, at 15.

157. *See European Commission Adopts "Watered Down" Text on Company Gender Quotas*, PARTY OF EUROPEAN SOCIALISTS (Nov. 14, 2012), <http://www.pes.eu/en/news/european-commission-adopts-watered-down-text-company-gender-quotas> [hereinafter Part of European Socialists] (reporting on the party's disappointment in the less demanding directive); BBC, *EU Defends Women-on-Boards Plans*, BBC Nov. 14, 2012, <http://www.bbc.co.uk/news/business-20322317> (reporting on the change in the proposal after the postponement of the gender quota proposal because of strong opposition).

158. *See* Frances Robinson, *Commission Approves Gender Proposal*, WALL ST. J., Nov. 14, 2012, <http://online.wsj.com/article/SB10001424127887324556304578118383366062000.html> (reporting on the announcement of the proposed directive); *see also* Claire Davenport, *EU Wants Direct Action to Get Women Into Boardrooms*, REUTERS, Nov. 15, 2012, <http://www.reuters.com/article/2012/11/13/us-cu-gender-idUSBRE8AC0PE20121113> (reporting on the expected announcement of the proposed directive). Contrasted to a quota, this means that the Member States must implement policies that strive in good faith towards the forty percent target. PARTY OF EUROPEAN SOCIALISTS, *supra* note 157 (reporting on the proposed directive from the perspective of the Party of European Socialists party); James Fontanella-Khan, *Brussels Waters Down Board Quota Plans*, FIN. TIMES, Nov. 13, 2012, <http://www.ft.com/intl/cms/s/0/f5562b3a-2d6f-11e2-9b88-00144fcabdc0.html#axzz2Gn5H8o00> (reporting on the forthcoming announcement of the proposed directive).

Arguing for quotas, Vice-President Reding also cites the lack of significant improvement of diversity in the European Union.¹⁵⁹ From 2003 to 2012, the percentage of women on boards increased from 8.5% to 13.7%, with an average .6 percentage points increase each year and some Member States have less than five percent of women on boards.¹⁶⁰ Countries that adopted mandatory quotas, however, such as Norway and France, significantly increased diversity on their boards.¹⁶¹ Thus, advocates argue that stronger laws are required to get companies to diversify their boards.¹⁶²

The Commission argues that this directive is necessary for minimum harmonization.¹⁶³ Minimum harmonization is the ability of the European Union to pass legislation that is the minimum standard, which helps to remove barriers from the internal market.¹⁶⁴ It is required to ensure a competitive playing field and to avoid complications in the interactions between companies listed in EU Member States.¹⁶⁵ The difference in

159. See Reding's Speech, *supra* note 88 (explaining her frustration with the slow progress of diversity in the EU); Kanter, *supra* note 3 (reporting on the initial introduction of the gender quota proposal in September 2012).

160. See Commission Progress Report, *supra* note 5, at 11 (reporting on the progress of diversity in the EU); see also European Commission Database, *supra* note 5 (tracking the progression of diversity in the EU from 2003 to 2012).

161. See Reding's Speech, *supra* note 88 (using Norway and France as an example to argue that legislation is necessary); see also Proposed Directive, *supra* note 12, at 2 (using France and Norway as an example for the necessity of having legislation).

162. See Reding's Speech, *supra* note 88 (arguing that legislation is necessary). See also Proposed Directive, *supra* note 12, at 2 (publicizing the necessity of proposing legislation).

163. See Proposed Directive, *supra* note 12, at 5 (stating minimum harmonization as a purpose of the proposed directive. See also Nov. 14 Press Release, *supra* note 10, at 3 (summarizing the elements covered under the proposed directive).

164. See TFEU, *supra* note 22, art. 114(1), 2010 O.J. C 83, at 94 (stating that the EU should have as its object the establishment and functioning of the internal market). See also Catherine Barnard, *The Substantive Law of the EU: The Four Freedoms*, 600 (Oxford UP, 2007) (explaining minimum harmonization is beneficial because it gives a level playing field between Member States).

165. See Reding's Speech, *supra* note 88 (arguing that avoidance of disruption of the internal market between Member States requires uniform gender legislation); see also Nov. 14 Press Release, *supra* note 10 (arguing a uniform policy on gender diversity on boards is required for minimum harmonization). Minimum harmonization is the ability of the EU to pass legislation that is the minimum standard, which helps to remove barriers from the internal market. See TFEU, *supra* note 15, art. 114(1), 2010 O.J. C 83, at 94 (stating that the EU should have as its object the establishment and functioning of the internal market); Catherine Barnard, *The Substantive Law of the*

gender diversity policies among the various Member States presents a barrier to the internal market.¹⁶⁶ The Commission argues that the disparity between Member States leads to inconsistent legal obligations of difficult comparability, confusion, and higher costs for companies, stakeholders, all of which hinders the proper functioning of the internal market.¹⁶⁷

3. Legality of Passing The Directive

To pass this directive, the Commission must ensure that the directive may be legally enacted.¹⁶⁸ The Commission has laid out the legal basis for its proposed directive, asserting that it has the power to ensure workplace equality under TFEU Article 157.¹⁶⁹ More importantly, the directive must also fulfill the principles of subsidiarity and proportionality.¹⁷⁰

a. Subsidiarity

The proposed directive must meet the requirements under subsidiarity.¹⁷¹ One of the reasons why the Commission decided to initiate this gender equality legislation is to harmonize differences in the gender requirements throughout the

EU: The Four Freedoms, 600 (Oxford UP, 2007) (explaining minimum harmonization is beneficial because it gives a level playing field between Member States).

166. See Proposed Directive, *supra* note 12, at 3 (arguing for the necessity of having a EU directive governing gender diversity on boards); European Commission Justice, Women on boards-Factsheet 3 Legal Aspects, (Nov. 14, 2012), http://ec.europa.eu/justice/gender-equality/files/womenonboards/factsheet-general-3_en.pdf [hereinafter Factsheet 3] (basing the proposal on the minimum harmonization approach under proportionality).

167. See Proposed Directive, *supra* note 12, at 3 (giving background as to why the proposed directive is necessary); Reding's Speech, *supra* note 88, (arguing that a uniform EU law is necessary to prevent the disruption of the internal market).

168. See *supra* notes 45–50 and accompanying text (explaining the requirements under proportionality).

169. The elements are that the action by the EU is necessary because it cannot be achieved by the Member State alone and the objective can better be achieved at a Union level. See Proposed Directive, *supra* note 12, at 6 (stating its legal grounds under which the proposal may be passed); Factsheet 3, *supra* note 166 (summarizing the legal grounds of passing the directive).

170. See Factsheet 3, *supra* note 166 (summarizing how the principles of subsidiarity and proportionality are fulfilled); see also Proposed Directive, *supra* note 12, at 9–11 (detailing how subsidiarity and proportionality are fulfilled).

171. See *supra* notes 39–44 and accompanying text (detailing the requirements of subsidiarity under EU treaties).

different Member States.¹⁷² Currently, the Commission predicts that by 2020, only France will have forty percent females on boards, and only Finland, Latvia, the Netherlands, Slovakia, Spain, Denmark, and Sweden will reach forty percent by 2035.¹⁷³ This hinders the positive benefits of corporate performance.¹⁷⁴ The Commission believes that the failure of companies to sign the pledge to improve gender diversity on the boards, plus the slow rate of growth in certain Member States, further proves that Member States will not implement their own gender equality laws.¹⁷⁵

Without a uniform target for gender equality, Member States will be hesitant to implement policies that are not in effect in other Members States.¹⁷⁶ The Commission argues that this is because Member States want to protect their companies from any perceived risk that arises out of placing women on the board that their competitors will not have.¹⁷⁷ Furthermore, the Commission argues that the objective must be uniform to achieve the proper functioning of the internal market.¹⁷⁸

b. Proportionality

The Commission also must ensure that the directive fulfills the principle of proportionality, which states that the requirements under the directive “shall not exceed what is

172. See *infra* notes 208–15 and accompanying text (discussing Commission’s minimum harmonization arguments).

173. See Proposed Directive, *supra* note 12, at 9 (discussing the necessity for the directive as required under subsidiarity); Commission Cost-Benefit Analysis, *supra* note 93, at 23 (giving a background of the problem of lack of diversity in the EU).

174. See Proposed Directive, *supra* note 12, at 9; Commission Cost-Benefit Analysis, *supra* note 93, at 23 (giving a background of the problem of lack of diversity in the EU).

175. See Proposed Directive, *supra* note 12, at 9 (reasoning why EU action is necessary); see also *supra* notes 171–75 and accompanying text (discussing the failure of companies to act under self-regulation and non-binding EU action).

176. See Proposed Directive, *supra* note 12, at 9 (providing reasoning for necessity of passing a collective action directive); Commission Cost-Benefit Analysis, *supra* note 93, at 26–27 (arguing that companies would not enact gender policies if their competitors do not either).

177. See *supra* note 177 (stating reasons why Member States are hesitant to enact their own gender quota policies).

178. See Proposed Directive, *supra* note 12, at 9; see *supra* notes 163–67 and accompanying text (discussing Commission’s minimum harmonization arguments).

necessary to achieve the objectives of the Treaties.”¹⁷⁹ The Commission argues that the binding objective is necessary given the failure of non-binding objectives and recommendations issued in the past and the failure of self-regulation.¹⁸⁰ The Council adopted two recommendations, one in 1984 and one in 1996, promoting positive action and equality in decision-making that was ineffective in increasing the number of women on the board to the number needed for “critical mass.”¹⁸¹ Moreover, more recent attempts at non-binding actions were also ineffective in improving gender diversity, including Reding’s challenge for companies to pledge to increase diversity.¹⁸²

Although the European Union may pass legislation necessary to meet an objective set out in the Treaties, the European Union is restricted to enacting only the narrowest provisions that would achieve that objective.¹⁸³ The Commission argues that this directive stays within those parameters.¹⁸⁴ First, the directive is constructed under a minimum harmonization approach.¹⁸⁵ By using a directive, the Commission allows Member States to determine how to best achieve the requirements under the law and take into consideration

179. See *supra* notes 48–50 and accompanying text (detailing the requirements to meeting proportionality under EU treaties); See Factsheet 3, *supra* note 166, (briefly summarizing the requirements of proportionality).

180. See Proposed Directive, *supra* note 12, at 10 (arguing that proportionality has been met); see also Factsheet 3, *supra* note 166 (summarizing arguments for how proportionality has been met).

181. See also Factsheet 3, *supra* note 166 (detailing prior action taken by the EU in an attempt to improve board diversity). See generally Council Recommendation on the Promotion of Positive Action for Women, 1984 O.J. L 331/34 (issuing a recommendation for Member States to enact legislation for gender equality). See generally Council Recommendation on the Balanced Participation of Women and Men in the Decision-Making Process, 1996 O.J. L 319/11 (issuing a recommendation for Member States to enact legislation for gender equality on corporate boards).

182. See *supra* note 154–58 and accompanying text (discussing a failed attempt to get companies to voluntarily improve their board diversity).

183. See *supra* notes 48–50 and accompanying text (detailing the requirements under proportionality under EU treaties).

184. See Proposed Directive, *supra* note 12, at 10 (arguing that the directive is within the parameters of the EU treaties); Factsheet 3, *supra* note 166 (stating that the directive has only what is necessary to achieve its objective).

185. See Proposed Directive, *supra* note 12, at 10 (arguing that the EU is taking minimum action to ensure the objective is achieved); Factsheet 3, *supra* note 166 (giving an overview of the arguments that only the minimum action is being undertaken in the proposed directive).

independent circumstances that are specific to that Member State.¹⁸⁶ Member States may enact the appropriate enforcement measures, and Member States that have already passed a quota or other law may keep their own laws.¹⁸⁷ Moreover, the directive does not require an undue change to company law and respects the different board structures that exist within the European Union.¹⁸⁸

Second, the Commission argues that the directive is not overly burdensome.¹⁸⁹ The forty percent objective only applies to non-executive and supervisory board members, who are easier to recruit.¹⁹⁰ In addition, several exceptions in the legislation prevent it from being overly burdensome.¹⁹¹

Third, safeguards are built into the directive that ensures that women will not be automatic and unconditional appointed because gender can only tilt the balance in favor of the woman if two candidates are equally as qualified.¹⁹² Fourth, the directive

186. See Proposed Directive, *supra* note 12, at 10–11 (giving Member States freedom to pass their own policies to show that the EU is not taking action beyond what is necessary); Factsheet 3, *supra* note 166 (summarizing arguments for showing that the EU is taking minimal steps).

187. See Proposed Directive, *supra* note 12, at art. 4(7) (allowing companies that have at least one-third of the board is women to be exempted from compliance); *id.* at art. 7 (allowing companies to enact policies beyond the minimum requirements). See also Factsheet 3, *supra* note 166 (summarizing the freedom the companies have under the law to implement their own policies).

188. See Proposed Directive, *supra* note 12, at 10–11 (describing the rights of the Member States under the proposed directive); Factsheet 3, *supra* note 166 (summary of the rights of the Member States under the proposed directive).

189. See Proposed Directive, *supra* note 12, at 10–11 (arguing that the proposed directive is not unduly burdensome); Factsheet 3, *supra* note 175 (summarizing that SMEs are exempt from payment because the cost may be overly burdensome).

190. See Proposed Directive, *supra* note 12, at 10 (arguing it is not burdensome to hire female non-executive directors); Factsheet 3, *supra* note 166 at 2 (pages not numbered) (stating that passing laws regarding non-executive directors is not overly burdensome).

191. See Proposed Directive, *supra* note 12, at 10–11, 21 (exempting certain companies under certain conditions from compliance). See also Hogan Lovells, et al, *European Commission Publishes Proposed Directive To Improve Gender Balance*, LEXOLOGY (Dec. 14, 2012) <http://www.lexology.com/library/detail.aspx?g=c1bf7fba-afc5-4b7f-99f8-baada5888756> (listing a summary of the provisions in the proposed directive). In addition, the directive exempts companies that have less than ten percent of women in their workforce from complying. See *id.* at 191 (reporting on the exceptions to the proposed directive); see also Proposed Directive, *supra* note 12, at 21.

192. See Proposed Directive, *supra* note 12, at 12 (proposing that companies can only hire a women if she is equally as qualified as a man); Factsheet 3, *supra* note 166 (limiting the deference given to women during hiring).

automatically expires in 2028, when it will be reevaluated to determine if the directive should continue.¹⁹³

The Commission also conducted a cost-benefit analysis of gender equality legislation.¹⁹⁴ In a Staff Working Document, the Commission found that binding measures are more effective in achieving gender equality and “generate more societal and economic benefits.”¹⁹⁵ On the other hand, however, binding measures also increase costs and the administrative burden, and forces greater interference with the right of the company and its shareholders.¹⁹⁶

The cost-benefit analysis estimates a EU€17.5 billion increase in net income under the proposed directive.¹⁹⁷ The Commission estimates from 2017–2020, the total annual investment costs will be € 18.3 million, and from 2021–2030, EU€3.5 million.¹⁹⁸ Furthermore, the estimated administrative burden of monitoring is EU€100,000 and the total annual cost of reporting is EU€124,000.¹⁹⁹ Thus, because benefits greatly

193. See Proposed Directive, *supra* note 12, at 22 (stating that within the principle of proportionality the directive will be reevaluated in 2028 to determine if it is still necessary); see also Facisheet 3, *supra* note 166, at 4 (pages not numbered) (summarizing why the directive fulfills proportionality).

194. Commission Cost-Benefit Analysis, *supra* note 93, at 8 (analyzing the cost versus benefits of implementing various gender legislation, including the proposed directive). The Commission analyzed five different gender equality legislative options: 1) No new action (non-binding), 2) issue a Recommendation (non-binding), 3) pass a directive with a 40% target for non-executive board members (binding), 4) issue a directive with a 40% target for non-executive board members and a flexible target for executive directors (binding), and 5) issue a directive with a 40% target for both non-executive and executive officers (binding). See *id.* (stating the possible legislative options regarding gender diversity on boards).

195. *Id.* at 58 (studying two non-binding and three binding legislation options to balance the cost and benefit of employing each option). The study looked at the societal benefits by analyzing the enhancement to company reputation, development of role models, changes in recruitment policies and employees’ identification with a company. *Id.* at 45.

196. *Id.* at 58 (studying the costs of employing binding legislation versus non-binding legislation).

197. See Commission Cost-Benefit Analysis, *supra* note 93, at 54 (comparing the increased benefits of having binding objective).

198. See *id.* (estimating investment costs of various possible gender diversity legislation).

199. See *id.* (estimating administrative costs of various possible gender diversity legislation).

outweigh costs, the Commission argues proportionality is satisfied.²⁰⁰

B. Arguments Against The Binding Objective

Several Member States and EU Commissioners raised vehement objections when Vice President Reding first announced her plans of a gender quota.²⁰¹ In particular nine Member States, led by the United Kingdom, wrote a letter to the Vice-President and to the Commission president, Jose Manuel Barroso, expressing their opposition to the proposed quota.²⁰² The letter stated that in accordance with the subsidiarity principle, the responsibility of increasing diversity should be left to the individual Member States and that Member States needed more time to see if already implemented legal devices lead to improved gender equality.²⁰³

Despite having a more positive response to the change in the proposal from a quota to an objective, critics still believe that a EU directive should not regulate gender equality on boards.²⁰⁴ Critics opposed the proposed legislation for several reasons. First, opponents of gender equality legislation argue that Member States should have the power to determine their own

200. See Proposed Directive, *supra* note 12, at 7–8 (opting for option 4 based on the cost-benefit analysis); Commission Cost-Benefit Analysis, *supra* note 93, at 59–60 (summarizing its study of the five different options).

201. See Letter of Opposition, *supra* note 8 (expressing opposition to the proposed plan for gender quotas in the EU); see also Valentina Pop, *EU Commissioner Up For 'Fight' on Gender Quotas*, EU OBSERVER (Oct. 2, 2012, 5:25 PM) <http://euobserver.com/economic/117715> (reporting on the September announcement of Reding's proposal for quotas in the EU); see also James Fontanella-Khan, *Brussels Drafts Board Gender Quota*, FIN. TIMES, (Sept. 7, 2012), <http://www.ft.com/intl/cms/s/0/05e2cb34-f8dc-11e1-b4ba-00144feabdc0.html#axzz2FKWiWeF7> (reporting on initial proposal for gender quota in September 2012).

202. Letter of Opposition, *supra* note 8 (expressing its opposition to the implementation of quotas for women on the board).

203. See *id.* (objecting to uniform legislation without individual policies for each country).

204. See Vince Cable, *Business Secretary's Statement on European Commission's Proposed Directive on Improving Gender Balance on Europe's Corporate Board*, DEPARTMENT FOR BUSINESS, INNOVATION AND SKILLS (Nov. 14, 2012, 11:09 AM), <http://rnn.cabinetoffice.gov.uk/Press-Releases/Business-Secretary-s-statement-on-European-Commission-s-proposed-directive-on-improving-gender-balance-on-Europe-s-corporate-boards-6834b.aspx> (reacting to announcement of proposed directive); see also Jacobsen, *supra* note 145 (compiling various quoted reactions to the announcement of the proposed directive).

laws and policies.²⁰⁵ The UK Business Secretary Vince Cable stated in response to the announcement of the proposed directive that while the UK appreciates the decision of the Commission to not impose mandatory quotas, the UK believes it is best to consider increasing women's representation at a national level.²⁰⁶ Given the economic crisis, critics believe countries should focus on staying afloat and not gender equality.²⁰⁷

Furthermore, during a European Parliament debate, a minister argued that the best people for boards have already been chosen.²⁰⁸ Thus, adding women onto the board only promotes mediocrity, especially if the country does not have the female talent pool to fill board seats.²⁰⁹ Critics argue that this occurred in Norway.²¹⁰ The quota only established mediocrity on the board by adding "golden skirts," female board directors who

205. See Letter of Opposition, *supra* note 8; see also Jacobsen, *supra* note 145.

206. Cable, *supra* note 204; see also DUTCH GOVERNMENT, MINISTRY OF EDUCATION, CULTURE AND SCIENCE, PUBLIC CONSULTATION, *available at* http://ec.europa.eu/justice/newsroom/gender-equality/opinion/files/120528/pa/295_en.pdf (last visited Apr. 2, 2013) (responding to solicitation of public consultation regarding gender quotas in the EU from Dutch government).

207. See Theo Vermaelen, *Gender Quotas for Boards: How to Destroy European Competitiveness*, INSEAD BLOG, (Nov. 16, 2012), <http://blog.insead.edu/2012/11/gender-quotas-for-boards-how-to-destroy-european-competitiveness> (expressing negative opinion of implementing gender equality legislation because of encouragement of mediocrity); see also Fontanella-Khan, *supra* note 3; see also Hans Bader, *European Union Pushes Harmful Gender Quotas for Corporate Boards*, *Examiner*, (Mar. 6, 2012), <http://www.examiner.com/article/european-union-pushes-harmful-gender-quotas-for-corporate-boards> (criticizing EU plans for gender quotas).

208. Remarks of Paul Nuttall, Eur. Parl. Deb. (17) (Mar. 12, 2012), *available at* <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+CRE+20120312+ITEM-017+DOC+XML+V0//EN> (debating *inter alia* gender quotas in the EU among members of the European Parliament).

209. See *id.*; see also Kingsley Napley & Amy Griffiths, *Not Enough Women on Boards? Or Not Enough Women Who Are Qualified?*, *Ass. Corp. Counsel* (Oct. 14, 2011), <http://www.lexology.com/library/detail.aspx?g=28bf620d-c249-4fbc-87d9-78142ea53c12> (questioning whether there are a sufficient number of qualified women to be placed on boards); see also Jabben Bhatti, *The Quota Wars*, *GERMAN TIMES*, (June 2011), http://www.german-times.com/index.php?option=com_content&task=view&id=41578&Itemid=12 (reporting on a variety of opinions of Norway's gender quota and its impact).

210. See Branson *supra* note 92, at 8–9 (arguing that when companies must quickly find women to be placed on boards this will lead to under qualified women to be placed on the board or the placement of one qualified woman on too many boards); see also *supra*, notes 137–38 (studying the impact of the quota on companies in Norway).

are a small pool of women who are placed on too many boards to effectively manage their duties or by adding women who were unqualified for the position.²¹¹ Further, the women being added to the board were younger and had less CEO experience.²¹² Accordingly, critics claim that the economic benefits cited in advocacy of the gender directive are not certain.²¹³

Second, both proponents and critics of gender equality argue that to encourage diversity on the board, company policies should be implemented to allow women more flexible hours to allow them to spend time with their families.²¹⁴ Critics argue that quotas only focus on the result without considering the barriers that women face in the corporate pipeline.²¹⁵ A UK

211. See Branson *supra* note 92, at 8–9 (describing the adverse consequences of implementing quotas as a means of improving diversity); see also Brian Groom, *Diversity Reigns As Women Jump On Board*, FIN. TIMES, (Mar. 13, 2012), <http://www.ft.com/intl/cms/s/0/c9841b46-6c6d-11e1-bd0c-00144feab49a.html#axzz2FKWfWcF7> (reporting on the criticism regarding Norway's necessary use of "golden skirts" to fulfill its quota).

212. See Groom, *supra* note 211 (reporting on progress of women on boards one year after Lord Davies report was issued in the UK); see also *supra*, notes 99–101 (showing that boards in Norway became younger and had less CEO experience after the quota was implemented).

213. See *id.*

214. See LATVIAN MINISTRY OF WELFARE, PUBLIC CONSULTATION, EUR. COMM'N JUSTICE (2012), available at http://ec.europa.eu/justice/newsroom/gender-equality/opinion/files/120528/pa/294_lv.pdf [hereinafter LATVIAN PUBLIC CONSULTATION] (responding to solicitation of Commission's public consultation regarding gender quotas in the EU from the Latvian government); see also CZECH GOVERNMENT, PUBLIC CONSULTATION, EUR. COMM'N JUSTICE (2012), available at http://ec.europa.eu/justice/newsroom/gender-equality/opinion/files/120528/pa/278_cs.pdf [hereinafter CZECH GOVERNMENT PUBLIC CONSULTATION] (responding that a reconciliation between family and work life is a measure that should be addressed to improve gender equality on boards); see also FEDERAL CHANCELLERY OF AUSTRIA, FEDERAL MINISTER FOR WOMEN AND CIVIL SERVICE, PUBLIC CONSULTATION, EUR. COMM'N JUSTICE (2012), available at http://ec.europa.eu/justice/newsroom/gender-equality/opinion/files/120528/pa/276_en.pdf (supporting quotas, but still believes other measures need to be taken into account); see also BARCELONA CITY COUNCIL, PUBLIC CONSULTATION, EUR. COMM'N JUSTICE (2012), available at http://ec.europa.eu/justice/newsroom/gender-equality/opinion/files/120528/pa/287_cs.pdf (supporting quotas, but still believes other measures need to be taken into account); see also Louisa Peacock, *Women on Boards? Some Chairmen Are Missing The Point*, TELEGRAPH (Nov. 15, 2012), <http://www.telegraph.co.uk/finance/jobs/9678670/women-on-boards-some-chairmen-are-missing-the-point.html>.

215. See Peacock, *supra* note 214; see also Geraldine Gallacher, *All Aboard? The EU Looks Again at Quotas for Women on Boards*, HUFFINGTON POST (Nov. 14, 2012), http://www.huffingtonpost.co.uk/geraldine-gallacher/women-business-gender_b_2121374.html (expressing opinion on the proposed directive and the lack of women coming up the corporate pipeline as a potential problem).

study showed a “leaking pipeline,” where a comparable number of women as men are employed at a junior level, but fewer and fewer women remain going up the corporate ladder.²¹⁶ Critics argue that providing flexible hours and affordable, adequate daycare will prevent women from choosing between their careers and their family obligations.²¹⁷ Third, critics argue that by mandating that companies add more women to the board, women who are chosen will be respected less.²¹⁸ Placing a woman on the board in response to outside pressure will signal to the employees and other directors that the woman is not qualified and was only brought on to fulfill the target.²¹⁹

In summary, proponents of the directive believe that the directive may be legally passed, and would be effective in improving diversity on boards and would be economically

216. See Lord Davies of Abersoch, *Women on Boards*, U.K. DEP'T FOR BUS. INNOVATION & SKILLS 15–16 (Feb. 23, 2011), available at <http://www.bis.gov.uk/assets/biscore/business-law/docs/w/11-745-women-on-boards.pdf> (reporting on board gender diversity in the UK and suggesting solutions); see also IRENE JANSSEN, PUBLIC CONSULTATION, EUR. COMM'N JUSTICE (2012), available at http://ec.europa.eu/justice/newsroom/gender-equality/opinion/files/120528/individual/nl_nl.pdf [hereinafter Lord Davies Report] (responding to solicitation of Commission's public consultation regarding gender quotas in the EU).

217. See *supra* note 214 and accompanying text.

218. See Nicholas Cecil, *Board Quotas Risk Demeaning Women, Says Equalities Chief*, LONDON EVENING STANDARD, (Oct. 10, 2012), <http://www.standard.co.uk/news/uk/board-quotas-risk-demeaning-women-says-equalities-chief-8205165.html> (opining that gender quotas actually devalue women); see also Pop, *supra* note 201 (reporting on opinion of former Latvian president Vaira Vike-Freiberga on gender quotas); see also Gabriella Griffith, *Are Boardroom Quotas for Women Patronizing or Positive?*, LONDONLOVESBUSINESS (Mar. 6, 2012), <http://www.londonlovesbusiness.com/business-in-london/business-regulation/are-boardroom-quotas-for-women-patronising-or-positive/1842.article> (opining that gender quotas are patronizing for women who are appointed to boards); see also Leo Cendrowicz, *Can Mandatory Quotas Bring Gender Equality to Europe's Boardrooms?*, TIME, (Mar. 8, 2012), available at <http://www.time.com/time/world/article/0,8599,2108607,00.html> (reporting movement towards gender legislation and finding that some women believe this undermines women in the workplace).

219. See Griffith, *supra* note 218; see also Gemma Variale, *Women On Boards Quota To Threaten Multinationals?*, INT'L FIN. L. REV. (Sept. 6, 2012), <http://www.iflr.com/Article/3085297/Women-on-boards-quota-to-threaten-Europe-multinationals.html> (reporting on criticisms of the implementation of an EU gender quota); see also Louisa Peacock & Philip Aldrick, *Female Executives Warn Government Against Using "Patronising" Board Quotas*, TELEGRAPH (Feb. 24, 2011), <http://www.telegraph.co.uk/finance/yourbusiness/8343997/Female-executives-warn-Government-against-using-patronising-board-quotas.html> (reporting opinions of female executives that are oppose use of a quota).

beneficial, both in a micro and macroeconomic way. Critics argue, on the other hand, that the directive will lead to mediocrity on boards and will not be effective in addressing the bigger problem that leads to the lack of women on boards, which is the lack of support for women climbing the corporate ladder.

III. THE EUROPEAN UNION PROPOSED DIRECTIVE IS LEGAL, BUT NOT SUFFICIENT

A. *Is The Directive Legal?*

Under the EU treaties and the Charter of Fundamental Human Rights of the European Union, the European Union may take positive action to ensure equal employment opportunities of women and men.²²⁰ Also, the Charter of Fundamental Rights expressly states that while there must be equality between men and women in the area of employment, this principle does not prevent the adoption of measures that will tip the scales in favor of the under-represented sex.²²¹ On its face, the directive does not violate these treaties or the Charter.²²² The directive is a positive action to promote equal opportunity between men and women, which TFEU Article 157 allows.²²³ Additionally, while critics may argue that the directive is discriminatory against the men who are turned down in favor of a woman, the Charter of Fundamental Rights permits this because the European Union may enact measures that give a specific advantage in favor of underrepresented sex.²²⁴

220. See *supra* text accompanying notes 19–35 (discussing the EU’s ability to take positive action regarding gender equality and employment).

221. Charter of Rights, *supra* note 23, art. 23, 2012 O.J. C 83, at 396 (providing the right to take positive action to protect the underrepresented sex); see also *supra* text accompanying notes 27–30 (discussing the Charter of Rights’ protection of equality in employment and the allowance for the EU to protect the underrepresented sex).

222. See *supra* notes 20–35 (detailing powers given in the treaties and the Charter of Rights to protect equality in the workplace).

223. See TFEU, *supra* note 15, art. 157(3), 2010 O.J. C 83, at 118 (giving the Council and Parliament the ability to pass legislation to protect gender equality); see also *supra* notes 31–34 (discussing the power of the EU to take positive action to protect equality).

224. See Charter of Rights, *supra* note 23, art. 23, 2010 O.J. C 83, at 396 (allowing the EU to take positive action in favor of an underrepresented sex); see also *supra* notes

However, the directive must meet the requirements under the principle of subsidiarity; the directive can be enacted only if the objective of the proposed action cannot be sufficiently achieved individually by the Member States or if the action would be better achieved at a Union level.²²⁵ Because the objective of the European Union is to raise the percentage of women on boards throughout the European Union to forty percent by 2020, the directive fulfills the principle of subsidiarity.²²⁶ Subsidiarity is fulfilled because Member States could not achieve the forty percent objective on its own and forty percent can be better achieved at a EU level.²²⁷

Member States will not be able to achieve the forty percent objective by 2020.²²⁸ As in Norway and France, diversity will only drastically improve with strong legislation.²²⁹ While the United Kingdom has implemented a non-quota policy to improve gender diversity with positive results,²³⁰ in other Member States diversity improved at a much slower rate.²³¹ Over the last three years, diversity improved only 0.6 percentage points throughout the EU.²³² Some Member States have less than five percent women on their corporate boards.²³³ Without a strong EU

28–30 (stating that the principle of equality should not prevent the adoption of measures in favor of the under-represented sex).

225. See *supra* text accompanying notes 49–52 (discussing the requirements under subsidiarity); see also TEU post-Lisbon, *supra* note 15, art. 5(3), 2010 O.J. C 83, at 18 (limiting the EU's power to pass legislation).

226. See *supra* note 152 (discussing Europe's 2020 target to have the EU average at 40% females on corporate boards).

227. See *supra* notes 161–63 and accompanying text (discussing the inability of EU Member States to reach a forty percent level by 2020.)

228. See *id.*

229. See *supra* notes 94–98 (describing the implementation of the quota in Norway and the resulting full compliance); *supra* notes 125–29 (explaining the quota law passed in France and noting the rapid increase of the number of women on boards following the legislation).

230. See European Commission Database, *supra* note 5 (showing an increase in percentage of women in the UK). See also Press Release, Dep't for Bus. Innovation & Skills, *Women on Boards: Code of Conduct One Year On*, (July 24, 2012), available at <http://news.bis.gov.uk/Press-Releases/Women-on-boards-code-of-conduct-one-year-on-67d91.aspx> (analyzing diversity on boards in 2012 since 2011).

231. See European Commission Database, *supra* note 5 (showing the slow growth in the percentage of women on boards in certain EU countries).

232. See *supra* notes 160, 189 and accompanying text (discussing the impetus behind proposed directive).

233. See *supra* note 160 (discussing the lack of improvement in diversity in the EU).

policy, Member States like Spain will not pass laws that will force change on corporate boards.²³⁴ Accordingly, subsidiarity is fulfilled because the directive is necessary to achieve forty percent of females on boards by 2020.²³⁵

Under the principle of proportionality, the goal of the proposed directive of having forty percent female representation on boards must be legitimate.²³⁶ The legitimacy of the proposed directive is most vulnerable to attack where it uses the business case rationale.²³⁷ While some studies show that corporations benefit from having women on the board, these studies are unable to show causation between the presence of women on the board and the improved corporate performance.²³⁸ Without causation, it is possible that better-performing firms are diversifying because they have the resources and time to focus on improving diversity.²³⁹

Several studies show that diversity, whether racial or gender, has no effect on corporate performance, and may even have a negative effect.²⁴⁰ According to the studies done in Norway, where there has been full compliance with a quota law since 2008, improving diversity does not guarantee improved corporate performance.²⁴¹ Not only did stock prices and operating profits decline, but these decreases were greater for companies that had no women on their board initially.²⁴² If this trend occurs in other countries, businesses might experience a

234. *See supra* notes 120–24 (describing Spain’s quota law and the lack of significant improvement in gender diversity on boards).

235. *See supra* notes 228–34 (analyzing arguments that the Commission has fulfilled the principle of subsidiarity).

236. *See supra* note 45–50 (discussing the proportionality requirements).

237. *See supra* notes 53–60 (discussing the use of the business case rationale to advocate for the proposed directive).

238. *See supra* notes 71–74 (describing the study by Carter that could not prove causation between diversity on boards and firm performance).

239. *See id.*

240. *See supra* notes 75–77 (describing studies that diversity had no effect or negative effect on corporate performance).

241. *See supra* notes 114–15 (describing studies performed in Norway that examine the effects of the gender quota).

242. *See id.* (discussing the Ahern and Nygaard studies that found that companies that had no women on the board prior to the announcement of the quota suffered more afterwards).

negative impact.²⁴³ Because there is no clear answer as to whether diversity is good for business and because it has been shown that in Norway quotas harmed firm performance, it is difficult to use the business case rationale to establish that improving corporate performance is a legitimate objective of mandatory quotas.²⁴⁴

However, the Commission may have a legitimate objective. Achieving minimum harmonization where the internal market would suffer because of the differences in the quota laws and gender equality regulations between various Member States is still a legitimate objective that the Commission can legislate.²⁴⁵ The directive would have to show that the benefits of harmonizing the laws between Member States outweigh the cost of either adding women to the board, or implementing policies that encourage the appointment of women.²⁴⁶ While the Commission estimates that the burden of compliance will be low, insofar as it affects the cost of complying, compared with the increase in net profit, the Commission does not address the cost of possible consequences that were seen in Norway.²⁴⁷

More specifically, additional consequences include the cost of companies avoiding compliance by privatizing or delisting.²⁴⁸ According to the study by Jung and the accountability theory, this phenomenon in Norway could be explained by the fact that Norway's corporations have concentrated ownership and are willing to privatize and delist because they are less subject to shareholder control and the public opinion.²⁴⁹ Considering that most of the Member States also have corporations with

243. *See id.* (showing the negative impact on companies with no women on the board post-quota in Norway). *See also* Commission Progress Report, *supra* note 5. (reporting the countries in the EU with less than five of women on boards).

244. *See supra* notes 54–56 (discussing studies that show diversity improves corporate performance); *cf. supra* notes 72–80 (explaining studies that show that diversity has no effect or is harmful to corporate performance).

245. *See supra* notes 165–67 (discussing the concern of the minimum harmonization in the EU without a uniform gender legislation).

246. *See supra* note 45–50 (detailing the requirements under proportionality).

247. *See generally* Proposed Directive, *supra* note 12 (lacking consideration of any other costs, such as the cost of companies delisting or moving to countries outside of the EU).

248. *See supra* notes 116–19 (detailing the cost and benefit analysis conducted on this proposal).

249. *See id.* (explaining the accountability theory that more publicly accountable companies find it harder to disapprove of diversity).

concentrated ownership it is likely that at least some of them will delist.²⁵⁰ When deciding on the legality of this directive, the Council and the Parliament should consider the possible costs of delisting, to determine if the benefits of minimum harmonization outweigh the costs of avoidance.²⁵¹

The European Union, however, does have a legitimate interest in promoting equality in the EU.²⁵² The EU treaty protects the equality of women in employment and the Charter of Fundamental Rights makes gender employment equality a fundamental right.²⁵³ Additionally, the treaty gives the European Union the power to take positive action to promote the underrepresented gender.²⁵⁴ Social rationales may have more legitimacy because they do not require a showing of causation and proof as the business case rationale and so can give more legitimacy as a reason to implement diversity policies.²⁵⁵

Presuming that the objective of diversity is legitimate under the business case rationale, the specific requirements to achieve the objective must be reasonable under the principle of proportionality.²⁵⁶ Here, using a forty percent target for females on the board is reasonable. The critical mass requirement, thirty percent, must be met under the business case rationale for firms to experience increased firm performance.²⁵⁷ Critics could argue that because the forty percent target goes above the thirty percent, this directive goes beyond what is necessary and fails the proportionality requirement.²⁵⁸ However, under a social and

250. See Reinier Kraakman et al., *THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH* 29–30 (2d ed. 2009) (giving an overview of comparative corporate law between the United States, Japan and European countries); see generally Marco Becht & Colin Mayer, *Corporate Control in Europe* (2000), available at <http://economics.ouls.ox.ac.uk/11439/1/ccineurope.pdf> (deliberating the relationship between ownership control and corporate management).

251. See *supra* notes 60–61 (detailing the requirement under proportionality that only necessary actions be undertaken).

252. See *supra* notes 26–33 and accompanying text (describing the EU's responsibility to protect equality in the workplace).

253. See *id.*

254. See *id.*

255. See *supra* note 88 and accompanying text (critiquing the business case rationale).

256. See *supra* note 56 (discussing the proportionality requirements).

257. See *supra* note 86–90 (discussing the critical mass theory).

258. See *supra* note 22 (describing the requirement under proportionality that limits EU action to what is necessary).

moral objective to pursue equal gender employment in the board, forty percent works better towards achieving that goal, while not overly burdening the corporations. Therefore, forty percent is not more than what is necessary to achieve the objective.

B. *The Directive Is Not Enough To Promote Diversity*

While this directive is a step in the right direction for gender equality, it is not enough to improve diversity throughout a company.²⁵⁹ The European Union should require that several other policies should be implemented in addition to the objective. In addition, the European Union should consider bottom-up policies to better improve diversity because there is a “leaking pipeline” where the number of women in companies decrease when going up the corporate ladder.²⁶⁰

First, corporations must remove barriers that prevent women from both having a family and being promoted to management positions.²⁶¹ While the general overlooking of women by the committee that chooses board members will be addressed in the proposed directive for board positions, the directive does not remedy the number of women voluntarily leaving because of family pressures.²⁶² To prevent women from leaving the workforce, the European Union should mandate that corporations adopt measures, such as more flexible hours, affordable day care, and more flexible and understanding maternity leave.²⁶³

Second, corporations have to create a safe and fair working environment for employees, so that women do not feel excluded while working.²⁶⁴ Women do not want to work in an

259. *See supra* notes 215–16 and accompanying text (discussing the loss of women in the workplace going up the corporate ladder).

260. *See supra* note 216 (describing the “leaking pipeline” where women leave companies going up the corporate ladder).

261. *See supra* notes 214–17 (discussing the critique of the proposed directive).

262. *See id.*

263. *See id.*

264. *See* Jennifer K. Brooke & Tom R. Tyler, *Diversity and Corporate Performance: A Review of the Psychological Literature*, 89 N.C. L. R. 715, 732 (2011) (studying the use of psychological methods to improve diversity in corporations); *see also* Lord Davies Report, *supra* note 216, at 30–33 (studying the reasons that women leave their jobs).

environment where they feel unwelcome.²⁶⁵ Isabella Lenarduzzi, a former board member at Reed Elsevier, stepped down because she felt that as the only female board member surrounded by men, none of the men listened to her when she spoke.²⁶⁶ As the Polish government suggested in its public consultation, anti-discrimination initiatives should be implemented to get women more incorporated into the workforce.²⁶⁷

Third, one of the main arguments against the gender diversity legislation and the promotion of women in general is the lack of qualified women.²⁶⁸ While various business schools have compiled a long list of thousands of women who are board ready, the reality is that board members will choose directors that they know.²⁶⁹ Thus, there could be an increase in females in management position if there was a mentorship and training program implemented that would pair current board members with females working in corporations.²⁷⁰ This would help women make the important networking connections to get on a board and encourage women to go for a board position.²⁷¹ In Australia, the Australian Institute of Company Directors launched, in April 2010, a mentoring program that not only mentored women to become board ready, but also pledged to place each women on a board by the end of the year. Throughout the next year, fifty-nine women were appointed to corporate boards, compared to

265. See Brooke, *supra* note 315, at 723 (discussing psychological adversity to diversity). See also Lord Davies Report, *supra* note 216 at 29 (showing women leave the workplace because of a hostile environment).

266. See Cendrowicz, *supra* note 218 (discussing the impact that a gender quota could have in the EU).

267. Polish Government Plenipotentiary for Equal Protection, Public Consultation, (last visited June 1, 2013) http://ec.europa.eu/justice/newsroom/gender-equality/opinion/files/120528/pa/296_cn.pdf (responding to Commission's solicitation of public consultation regarding gender quotas from the Polish government).

268. See *supra* notes 209–12 (examining the critique against the proposed directive that states there aren't enough qualified women to fill seats on boards).

269. For example, in Norway after the quota was passed, the number of directors on the same board with the same last name increased, making it likely that board directors chose their family members or their spouses. See Ahern, *supra* note 99, at 154 (finding that board members were likely to appoint their female board members).

270. Australia Institute of Company Directors, *Directors Take the Lead in Helping Put Women on Boards*, (Apr. 22, 2010) <http://www.companydirectors.com.au/General/Header/Media/Media-Releases/2010/Directors-take-the-lead-in-helping-put-women-on-boards> (publicizing mentorship program for women reaching for board positions).

271. See *id.*

the ten appointed the previous year.²⁷² The implementation of a similar program in the EU, with the specific pledge of placing women on the boards within the year, could be a good supplement to the directive.

CONCLUSION

The European Union is admirably trying to increase diversity in corporations by a trickle down directive of gender equality on the corporate boards. The Vice President of the Commission, Viviane Reding, has wisely chosen not to implement quotas in the face of the vehement reaction against the strictness of such a regulation.²⁷³ While the Commission believes that it is compelling to argue for gender equality under a business case rationale, this weakens the legitimacy of the directive because of the questionable results that past studies have shown.²⁷⁴ The Commission would make their reasoning more legitimate under social justifications that do not require the level of proof that the business case rationale does.

Furthermore, while the directive will likely increase the number of women on corporate boards, this won't necessarily solve all of the gender divisions in the entire workforce. The Commission should study the barriers for women climbing the corporate ladder and address those issues as well.

272. See Branson, *supra* note 92, at 13 (noting the success of the mentoring program in Australia); see also Teresa Ooi, *Women Groomed In Art of Smashing Glass Ceilings*, AUSTRALIAN (Jan. 25, 2011), available at <http://www.theaustralian.com.au/business/women-groomed-in-art-of-smashing-glass-ceilings/story-c6f8z-1225993879008> (reporting on the launch of the mentorship program in Australia).

273. See notes 257–61 (discussing the strong critique against implementing a quota).

274. See *supra* notes 96–105 (describing studies that have show diversity does not necessarily improve firm performance).