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Gender Diversity on Corporate Boards: The Competing Perspectives in the U.S. and the EU

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Part I

Introduction

In order to make effective and calculated decisions, it is certainly important to have the smartest, most proven, business savvy individuals at the helm of the organization. However, another key component that is often overlooked is the value of diversity of background. We see it in sports—the teams that are most successful have players in each position that offer unique strengths to their position, as well as differing backgrounds off the field to bring different views and strategies to the locker room. The top 11 quarterbacks of all time—undeniably the best decision makers ever to play in the National Football League (NFL)—would not be able to play together and create an NFL playoff team, let alone the best team in the league.

On the board of a large corporation, this same diversity of background and skillset is essential for making the best decisions possible. Women often bring a unique skillset, background, and perspective to their role, which is why establishing gender diversity on corporate boards in the United States and other countries around the world makes sense, and could be hugely beneficial for shareholders.

The issue is not recognizing that many corporations in the United States have a gender diversity problem. The issue is finding a solution that can work and be effective, without diminishing the power and effectiveness of the current board, nor decreasing shareholder value or returns. In 2015, only 19.2% of corporate directors in the Fortune 500 were women. Yet women comprise approximately half of the U.S. workforce, hold half of all management positions, are responsible for almost 80% of all consumer spending, and account for 10 million majority-owned, privately-held firms in the U.S., employing over 13 million people and generating over $1.9 trillion in sales.[1] We have a problem, but this paper is not intended to say that we have a problem in the U.S. of which companies are not already cognizant. Promoting and establishing gender diversity on corporate boards of publicly held companies is easier said than done. The U.S. is the land where capitalism reigns supreme and corporate board decision making is dominated by shareholder primacy and profits, and government regulation over the structures of those boards would be seen by many as overreaching.

[1] *Why Gender Diversity Matters*, 2020 WOMEN ON BOARDS, https://www.2020wob.com/learn/why-gender-diversity-matters.

In the United States, unlike some states in the European Union, government regulation and mandates are not the solution to gender diversity issues. Instead, the solutions need to come from within, so that the corporation can maintain its power and control.

Current State of Gender Diversity Globally

Many European countries have implemented mandatory quotas to increase gender diversity on corporate boards. In 2011, women represented just 15.2% of United States public corporate board members.[2] The U.S. is by no means the worst performer globally, but aside from a few countries in Europe, generally there is no equality among genders at the highest levels of publicly traded companies. Norway is the country that is most often discussed in the world of corporate gender equality, as their controversial quota law was adopted in 2005, requiring companies to achieve 40% female board member representation by 2008 and beyond.[3] In 2011, the European average was 11.7%, lower than that of the U.S., but that number is not perfectly representative, as there is wide variance among EU member states.[4] Some countries are drastically outperforming their neighbors—Norway over 40%, Sweden and Finland at 28.2% and 26%, respectively, and then there are others that greatly lag behind—Germany, Luxembourg, Italy, and Portugal, with 7%, 6%, 3.6%, and 0.6%, respectively.[5]

In the Pacific Rim, the outlook is more of the same. Australia leads at just 10.6%, followed by New Zealand at 9.3% and the Peoples Republic of China at 7.3%.[6] It is evident that, globally, women are not well represented on the boards of some of the largest companies. Furthermore, some of the numbers above are further skewed high based on the different board structures in Europe. For example, Germany uses a two-tiered board structure, and the 7% figure accounts for female board members that serve on the supervisory board as well, which is much larger in size, but much less powerful in decision-making.[7]

Since Norway passed its mandatory quota in 2005, other European countries have begun to follow suit. Germany recently passed legislation requiring 30% of supervisory board seats to

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[2] Branson, Douglas M., *Women on Boards of Directors: A Global Snapshot*, University of Pittsburgh Legal Studies Research Paper No. 2011-05, 1 (Feb. 16, 2011), available at http://ssrn.com/abstract=1762615.
[3] *Id*.
[4] *Id*.
[5] *Id*.
[6] *Id*. at 2.
[7] *Id*.

be held by women.[8] The trend across Europe is certainly that gender diversity has become a hot issue, and regulatory efforts are aimed at decreasing the gender gap.[9] In the United States, the outlook has been just the opposite. From 2004-2011, the U.S. deviated by no more than 0.5% of female representation on public company boards from year to year.[10] However, since 2011, that trend has mildly begun to change in the U.S., as companies begin to progress in gender diversity, and are closely approaching the 20%[11] mark, thanks to responsiveness to the public and leading organizations, such as the NFL, which will be discussed in detail below.

Current State of Gender Diversity in the United States

As mentioned above, in 2015 women held 19.2% of board seats in the Fortune 500 companies, which is up from 16.6% in 2012, a time when even 10% of the Fortune 500 had no women whatsoever on their boards.[12] The landscape of gender diversity is improving, but not at the rate at which it should. Notably, this does paint a somewhat inaccurate picture, as it does not account for a theme that we see quite often here in the U.S., which is service on multiple boards merely for the appearance of diversity. Corporations often appoint female board members for the sake of appearing forward thinking and diverse, when in actuality these women have no real power to effect change or share their opinion, since some of them serve on up to seven or eight different boards. It is not possible for one person to attend all of the necessary meetings for each company, let alone to serve effectively on that many different boards of publicly held companies. Growth in gender diversity may still be occurring, but we need to first analyze the root causes for the gender gap before we can implement any effectual changes.

According to a recent survey by McKinsey & Company, the primary obstacle for women seeking top management positions is often a deep-seeded culture and attitude issue among the male executives currently in charge.[13] Women have said that they are ready to make the sacrifices in their personal lives to achieve these high ranking management roles, but fear,

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[8] Alison Smale & Clare Caine Miller, *Germany Sets Gender Quota in Boardrooms*, THE NEW YORK TIMES (Mar. 6, 2015), http://www.nytimes.com/2015/03/07/world/europe/german-law-requires-more-women-on-corporate-boards.html?_r=0.
[9] Branson, *supra* note 2, at 4.
[10] *Id*. at 5.
[11] Soares, *infra* note 12.
[12] Rachel Soares, *2012 Catalyst Census: Fortune 500 Women Board Directors,* CATALYST (Dec. 11, 2012).
[13] Sandrine Devillard, Sandra Sancier-Sultan, & Charlotte Werner, *Why gender diversity at the top remains a challenge*, MCKINSEY QUARTERLY (Apr. 2014), http://www.mckinsey.com/insights/organization/why_gender_diversity_at_the_top_remains_a_challenge.

possibly rightfully so, that corporate culture would not support their ambitions.[14] Some of the cultural issues that cause these challenges that women face are the lingering doubt on behalf of many male CEO's and executives about the value of diversity initiatives, coupled with the additional stress that is demanded of top executives who are often required to make themselves available 24/7, which can pose significantly greater challenges for women.[15]

The second issue of "anytime, anywhere" availability is less persuasive, but the argument is simply that this mentality tilts more significantly against women because only 62% of women believe that children can coincide with a C-suite career, compared to 80% of men.[16] However, the argument fails because most men and women agree that running a major public company requires this heightened availability in order to succeed in the role, so it would appear that chasing these top management positions requires self-selection from both genders.

The biggest issue for women and career advancement is the lack of support from their male counterparts, and it is often the case that men outwardly support diversity, but fail to recognize the many unique challenges faced by women. While about 75% of men agree that teams with women are more successful, men are less likely to see the value in diversity programs and often feel that too many gender diversity initiatives become unfair to men.[17]

Is Change Necessary?

It is evident that women are facing difficulties and obstacles on the path to the top levels of management, but does that mean that something needs to be done? Ignoring issues of fairness and equality, there are certainly strong arguments based on the market and company efficiency that suggest that a greater percentage of females on boards would increase company performance.[18] However, a strong market-efficiency advocate would argue that requiring companies to hire female directors could actually decrease business performance, and that the only companies capable of benefitting from an increase in gender diversity are the companies that voluntarily choose to increase gender diversity.[19] A study by Kenneth Ahern and Amy Dittmar in fact found that a mandatory increase in female directors could actually lower

[14] *Id*.
[15] *Id*.
[16] *Id*.
[17] *Id*.
[18] *See generally* Anne L. Alstott, *Gender Quotas for Corporate Boards: Options for Legal Design in the United States,* PACE INT'L L. REV. SYMPOSIUM ED. (Vol. 26:1).
[19] *Id*. at 43.

companies' share price or earnings.[20] Conversely, another salient argument is that women make the majority of household spending decisions, and therefore to increase female representation on boards would increase the ability to mirror the market.[21] Unfortunately, this argument ignores the obvious point that many public companies do not manufacture consumer products, and therefore have no need to mirror the household market. To both of these arguments, the market-efficiency advocate would maintain that the structure of corporate boards has been designed to maximize value and efficiency, and so if a board needed more females to increase value, the market would ensure that more females became directors.[22] This appears to be in line with the U.S. legal view of the market, where there is to some extent a belief that "existing companies have optimized their mix of directors," while those that have females benefit from their presence, but those that do not have concluded that it would reduce performance.[23]

It is certainly important to note that European companies evidence some of the arguments for greater company performance after increasing diversity, as the EU has the most empirical data on the issue, since the U.S. has never issued a mandatory gender quota. That being said, "greater performance" is sometimes defined as a more socially praiseworthy performance, and not necessarily improved shareholder vale, share price, earnings or profits, which are the biggest factors here in the U.S. For example, a female director's greater reluctance to lay off workers may hurt the bottom line and share prices may fall, but is this seen as value added by retaining the jobs and salaries of thousands of workers? This may create problems in the U.S. where directors are responsive to shareholders—shareholders that are interested in making money and increasing the return on their investment. Generally, it is the opinion of U.S. shareholders that socially praiseworthy causes are beneficial if they keep that company in the news, and the American public generally looks favorably upon the actions of the company, and therefore will purchase great quantities of the company's product or services. Admittedly, this is the cynic's view of the American market, but there is certainly a valid argument to say that socially

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[20] *Id*.; *See also* Renee B. Adams & Daniel Ferreira, *Women in the Boardroom and Their Impact on Governance and Performance*, (2008), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1107721 (noting better performance metrics of companies with more female directors); David A. Matsa & Amalia R. Miller, *A Female Style in Corporate Leadership? Evidence from Quotas*, AM. ECON. J. (2012) (finding lower short-term profits in firms under Norway's mandatory quota).

[21] *See e.g., Women in Mature Economies Control Household Spending*, MARKETING CHARTS (May 18, 2010), http://www.marketingcharts.com/topics/asia-pacific/women-in-mature-economies-control-household-spending-12931.

[22] Alstott, *supra* note 18, at 43.

[23] *Id*.

praiseworthy causes that are simply for the sake of helping others, but not deriving share value, are of little to no interest for a disinterested shareholder. Profits drive business decisions at the end of the day in the cynical, capitalist, and arguably American view.

However, it could certainly be the case that we are seeing the carriage come before the horse in this situation. The true market-efficiency advocate rationale may just be the argument put forth by large corporations that intend to keep doing things the way they always have. There is evidence, as shown by the McKinsey study above[24], that women are not being given equal opportunities to reach top level management because of past opinions held about their gender, and corporations have an interest in limiting the regulations that the government enforces upon them. Therefore, we must question whether we are simply seeing corporations defending their current actions, due to inflexibility and unwillingness to change, or is the market-efficiency test a valid argument here in the United States? Whether or not there is agreement with either side of the statement above, it is certainly true that the view in the U.S. is that the market is better than the government at regulation, and it is one of the most core principles underpinning the foundation of the U.S. economy. Therefore, as will be discussed later, changes to increase gender diversity cannot come in the form of mandatory regulation in its strictest sense, but will need to be uniquely tailored to allow corporate control, yet still become effective in increasing women at the top.

Linda Senden argues that tough top-down regimes for change, such as the mandatory quotas that have become prevalent in Europe, are the most effective option.[25] However, she makes an argument that effectiveness is in the eye of the beholder, noting that effectiveness can either be judged by equal outcomes or the creation of equal opportunities.[26] America is the land of opportunity, and to base our regulations on equal outcomes would be seen by many as an intrinsic violation of this country's founding economic principles. Mitt Romney said it during his campaign in 2012: "America is more than just a place. America is an idea. It's the only country founded on an idea. Our rights come from nature and God, not from government. … We promise equal opportunity, not equal outcomes. And this idea was founded on the principles of freedom,

[24] *See generally supra* note 13.
[25] Linda Senden, *The Multiplicity of Regulatory Responses to Remedy the Gender Imbalance on Company Boards*, 10 UTRECHT L. REV. 51, 62 (2014).
[26] *Id*.

free enterprise, self-determination and government by consent of the governed."[27] Linda argues for the effectiveness of these tough top-down regimes as a "fast" means of achieving change, but is fast what is best for shareholders and the business?[28] The voluntary bottom-up self-regulation regimes would be far more successful in the United States, especially since a large-scale overhaul of the board is never a safe bet. Slow, incremental changes toward our goal would have a far greater likelihood of acceptance among publicly held corporations.

Changes certainly need to be made, but it may not be the best course of action to follow the example of many successful European countries that have shown tremendous growth in gender diversity through the use of mandatory quotas. To do so could undermine the very attribute that makes the American marketplace what it is. The laissez-faire economic system works for the United States and to overhaul that could prove to be a grave mistake in a time when we are already concerned with keeping American companies on American soil and keeping the corporate earnings of U.S. companies here at home, rather than abroad.

Quotas and Other Mechanisms for Change

In Europe, the status of gender representation falls into a wide range, but on average is better than the state of the U.S. Gender diversity in Europe currently ranges from 7.9% representation on corporate boards by women in Portugal, to 35.5% in Norway, though eight European countries have greater representation by women on boards than the U.S. Much of Europe, including Germany, France, Spain, Italy, and Norway have instituted or are considering legislation to institute mandatory quotas requiring a certain percentage of board seats to be filled by women. These legislative measures have been met with some skepticism, as companies that value their independence feel that their boards are comprised the way they are because a rational decision has been made to only select the candidates which are going to be most effective for the company's goals. Another criticism or fear is that these quotas may be promoting diversity, but hurting the financial results of companies. Essentially, critics have argued that the female directors may either be promoted merely as figureheads, or even worse, that untrained or inexperienced women would be promoted to boards in order for companies to come into

[27] Bronwyn, *"America is an idea . . . we promise equal opportunity, not equal outcomes" and h2k's open thread*, NO QUARTER USA (Aug. 14, 2012), http://www.noquarterusa.net/blog/70082/america-is-an-idea-we-promise-equal-opportunity-not-equal-outcomes-and-h2ks-open-thread/.
[28] Senden, *supra* note 25, at 63.

compliance with the quotas quickly.[29] In the first scenario, the problem is that these women are not actually promoting the goals intended by gender diversity, which is to provide a new perspective and unique experiences to the existing board. Furthermore, in both scenarios the female board members could be taking the seats of potential board members that would have been prepared to effectively govern. There are many hard and soft measures that could be implemented to solve the gender diversity problem in the United States, but the softer measures are far more likely to gain traction in U.S. economic culture.

Mandatory Quotas

Across Europe, countries have been implementing mandatory gender diversity quotas on corporate boards. France, Italy, Belgium, the Netherlands, and Norway have quotas ranging from 30-40%.[30] Norway was the first to adopt a mandatory quota in 2005, requiring public companies to achieve a quota of 40% of female directors by 2008, which has been successful.[31] Spain followed suit, also mandating a 40% target by the year 2016, so it remains to be seen whether companies will come into full compliance, but as the trend across the EU shows, it is highly likely to be the case.[32] Spain has the potential to shed new light on the attainability of a high quota, as Spanish public companies have a steep hill to climb, since the average percentage of female directors on corporate boards was 5% at the time of the law's adoption.[33] As we have seen in the United States in the past, there can be adverse consequences to mandatory quota laws, as companies will do what is necessary in order to avoid penalties, which does not always accomplish the goal of the legislation. It cannot be disputed that the goal of mandatory gender quotas is to increase the percentage of females on corporate boards for the sake of affording women equal opportunities in employment and advancement. In 2006 in the United States, "Susan Bayh, wife of former Senator Evan Bayh, sat on eight boards."[34] Shortly after the quota law was passed in Norway, one woman was elected to the boards of 18 different companies.[35] It is simply not possible for any human to effectively serve on that many different boards, and

[29] Alstott, *supra* note 18.
[30] *Women in economic decision-making in the EU: Progress Report,* EUR. COMM'N: JUSTICE (2012), http://ec.europa.eu/justice/gender-equality/files/women-on-boards_en.pdf.
[31] Branson, *supra* note 2, at 6.
[32] *Id*.
[33] *Id*.
[34] *Id*. at 3.
[35] *Id*. at 8.

provide value to each one. It is unlikely that Susan or anyone else in a similar position has any significant influence on any one of the boards, let alone all 8 or 18 of them, which does nothing to increase opportunities for females to break through the glass ceiling.

These countries represent the use of the "stick" for gender diversity initiatives, rather than the "carrot," though we will look at some of those as well. The mandatory quota does not fit within the United States culture of company and investor choice, capitalism and the free market economy, and our overall laissez-faire economic system.[36] Furthermore, there is another deep seeded reason for the United States' avoidance of the word "quota," which is that it would certainly be challenged as unconstitutional. Even if the mandatory quotas won acceptance in the United States, they would face constitutional questioning, as a potential violation of the Equal Protections Clause of the Constitution.[37]

The laissez-faire culture of the U.S. economy has been cultivated over many years, and a quota does not seem to fit within the U.S. system, even ignoring constitutional issues. In more recent history, we have even seen the disappearance of many labor unions and there are simply not as many regulations requiring large equity holders to listen to the opinions of other stakeholders. Proponents of quotas or other mandatory legislation have argued that the government strongly regulates securities law, so therefore this regulation would not be completely new. This argument fails to recognize that the securities regulations primarily deal with the issues of disclosure of vital information, but do not regulate the actions of companies to the extent that a quota would. The United States favors shareholder primacy and market self-regulation. A mandatory quota simply does not fit within that framework.

Mandatory Disclosure

Recently, the United States has enacted legislation known as "Say on Pay," which requires publicly held companies to disclose the ratio of the compensation of the highest paid executive, often the CEO, to the median employee. This data is not new data. We can generally guess, moderately accurately with minimal research, the range of salary that a median employee at a company receives, and the highest paid executive's salary is required to be disclosed. Therefore, Americans and anyone else that is interested could have calculated the ratio between

[36] Alstott, *supra* note 18.
[37] *Regents of the Univ. of California v. Bakke,* 438 U.S. 265 (1978) (ruling unconstitutional the use of racial quotas in making admissions decisions at a public university).

these two salaries or compensation packages on their own, with some margin of guessing error. It is safe to say that most people have never made this calculation. Americans could also fairly easily find out the ratio of male to female directors that sit on the boards of the largest publicly traded companies in the country. Again, most people do not look at this ratio on their own.

If the SEC enacted legislation requiring companies to either disclose a ratio or percentage of female directors, it may put the issue of gender diversity just enough into the spotlight to provide an avenue for change. It remains to be seen whether the Say on Pay legislation will have any effect on executive compensation. If it is effective in either lowering executive compensation or increasing compensation from the bottom, then it could be evidence that simply disclosing gender diversity information could increase the number of females as directors.

The SEC has already required that companies disclose board members' qualifications and whether the nomination committees consider diversity.[38] It would not be a far stretch to include the gender diversity of sitting board members. The SEC did in fact amend Regulation S-K Item 4079(c)(2)(vi) "to require corporations with a diversity policy to disclose how the policy is implemented and how the nominating committee 'assesses the effectiveness of its policy.'"[39] The major issue is that the current regulations on considering diversity in the board member nomination process are weak, and for this method to be effective, the questions need to be improved. In fact, Regulation S-K does not actually define the term diversity, nor does it require a board to consider diversity in the nomination process.[40] Anne L. Alstott recommends "a stronger disclosure strategy [that] might pose sharper questions: *Are directors familiar with studies of gender bias in decision-making? Did the board take steps to cast a wide net for potential directors? How many women were interviewed for recent positions? How does the board intend to address diversity in the future?*"[41] This potentially viable option for increasing gender diversity on corporate boards would only require amended legislation to ask more pointed

[38] Alstott, *supra* note 18, at 50.
[39] Enkelena Gjuka, *Corporate America, It's Time to Increase Gender Diversity in Boardrooms*, JURIST - DATELINE (Nov. 11, 2013), http://jurist.org/dateline/2013/11/enkelena-gjuka-womens-rights.php.
[40] *Id*.
[41] *Id*.; For a cautionary note and a summary of empirical findings on responses to diversity disclosure, *see* Aaron Dhir, *Boardroom Diversity and Disclosure: A Nudge in the Right Direction? Commentary*, THESTAR.COM (May 31, 2013), http://www.thestar.com/opinion/commentary/2013/05/31/boardroom_diversity_and_disclosure_a_nudge_in_the_right_direction.html.

and specific questions as part of mandatory SEC disclosure, in order to create actual responsibility of compliance on publicly traded corporations.

Tax Incentives

Another option for promoting gender diversity would be to provide tax incentives on a sliding scale for companies that reach a certain threshold or percentage of gender diversity on a yearly basis.[42] Enkelena Gjuka advocates for a seven-year tax program enacted by Congress to increase gender diversity to 20% by the year 2020.[43] Gjuka proposes a tax credit for every female that is nominated to the board, and gives two reasons for imposing the seven year provision: (1) by setting a time constraint, it encourages companies to promote females quickly, since the tax credits would only be a limited time offer; and (2) by 2020 Gjuka argues that tax credits will no longer be needed, as corporations will have realized the benefit of greater female board representation.[44] However, this argument is not fully salient, because although there is empirical evidence that supports stronger performance by companies that have greater female representation, there is also the market-efficiency argument on the other side, as discussed above, which says that the number of female directors has already been optimized for maximal firm performance.[45]

Gjuka's argument[46] does not account for the fact that there is a strong possibility that women are not promoted to corporate boards because of deep-seeded attitudes about their capabilities from the male executives. It is possible that male executives' attitude toward women is what is keeping them from board representation, not necessarily a fear that increasing female representation would hurt stock performance. Therefore, if the tax incentives are removed by year 2020, is that really enough time to remove the attitudes of the other 80% of the board members that are male? Furthermore, once the tax incentives are removed, corporations could certainly find crafty ways to unseat the females that provided the tax incentive, and immediately drop back below the 20% threshold of board representation.

[42] *Id*. at 49.
[43] Gjuka, *supra* note 39.
[44] *Id*.
[45] *See supra Are Changes Necessary?*
[46] *See generally* Gjuka, *supra* note 39.

Voluntary Pledges

Some countries in Europe have gone a route drastically different from the mandatory quota regime, and have taken strides that have been effective, and would possibly be accepted by U.S. companies. In 2008, the Dutch implemented a "Talent to the Top" program, which required companies to add women to their boards, but only if they subscribed to the pledge to do so.[47] In 2006 the Dutch corporate boards averaged only 7% female representation, but that number had increased to 20.9% by 2010.[48] The "Talent to the Top" program does not impose any strict requirements on who must sign, or how many women must be elevated to board member status, but considers the "specific circumstances within the organization."[49] There is no punishment for any company that does not comply with the pledge, except that the company will not be listed on the Talent to the Top website as a pledge company.[50] The public and the consumers are the only ones that can hold the companies accountable.[51] Even with this voluntary structure, the pledge has been signed and implemented by the 110 largest Dutch companies, such as Shell, Heineken, and Wolters Kluer.[52]

The voluntary nature of this program could work in the U.S. where corporations value their freedom to make decisions unilaterally, and without input from the government. It cannot be overstated that, in general, corporations in the U.S. believe the market is the best regulator of best business practices. That being said, the objective of increasing gender diversity on corporate boards is becoming more and more of a hot issue. Using peer pressure to influence change could be a viable option for increasing gender diversity in the U.S., because if some of the large household names within the Fortune 500 begin signing on to a gender diversity pledge, it is only a matter of time before the rest follow suit. Google would not want to be seen by the public and its consumers as uncommitted to diversity if Microsoft signs on to a pledge program and makes immediate strides of improvement. Voluntary pledges are the most viable option discussed thus far for the U.S., but determining the structure of a successful program is vital.

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[47] Branson, *supra* note 2, at 10.
[48] *Id*.
[49] *Charter*, Talent Naar De Top, http://www.talentnaardetop.nl/uploaded_files/mediaitem/Charter_TalentNaarDeTop_EN_03.pdf.
[50] Senden, *supra* note 25, at 53.
[51] *Id*.
[52] Branson, *supra* note 2, at 10.

Voluntary Targets and the NFL's Rooney Rule

In early August 2015, The White House held its first Demo Day, highlighting the work of female and minority entrepreneurs.[53] "President Barack Obama issued a call to action to the tech industry, asking companies to step up their game on workforce diversity."[54] 14 tech companies responded to the call to action, including giants Facebook and Pinterest—who had actually announced plans to roll out their own "Rooney Rule" earlier in the summer—which would require these companies to consider at least one woman and one minority in the slate of candidates for either every open position, or every open senior position, depending on the company.[55] This new buzzword in the tech industry has come to be known as the "Rooney Rule."

After the 2001 National Football League (NFL) season, 67% of the players in the league were African-American, but only 6% of the league's head coaches, two, were African-American.[56] Dan Rooney, President of the Pittsburgh Steelers, was appointed by the NFL to lead the Committee on Work Place Diversity for the NFL.[57] By 2003, the NFL had adopted the Rooney Rule, which mandated that all teams consider a minority candidate as a finalist for any opening in the head coach or general manager position, and to conduct an on-site interview with that candidate.[58] By 2010, the number of African-American coaches in the NFL had increased from 6% to 22%.[59]

On November 4, 2010, SEC Commissioner Luis Aguilar joked that he is often confused with the Commissioner of the Southeastern Conference—the other SEC.[60] In that luncheon speech, Commissioner Aguilar supported the Rooney Rule, noting that the NFL's rule could be

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[53] *See* Valentina Zarya, *Why is the "Rooney Rule" suddenly tech's answer to hiring more women?*, FORTUNE (Aug. 10, 2015), http://fortune.com/2015/08/10/rooney-rule-diversity-in-tech/ (noting the call to action by President Obama during Demo Day).
[54] *Id*.
[55] *Id*.
[56] Richard Lapchick with Boma Ekiyor & Horacio Ruiz, *The 2006 Racial and Gender Report Card: National Football League*, Univ. of Cent. Fla. Devos. Sport Bus. Mgmt. Program (2007).
[57] Douglas C. Proxmire, *Coaching Diversity: The Rooney Rule, Its Application and Ideas for* Expansion, AMERICAN CONSTITUTION SOCIETY FOR LAW AND POLICY (Dec. 2008), https://www.acslaw.org/sites/default/files/Proxmire_Issue_Brief.pdf.
[58] Branson, *supra* note 2, at 11.
[59] *Id*.
[60] Luis A. Aguilar, Comm'r, SEC, Speech at the Nat'l Ass'n of Minority & Women Owned Law Firms 2010 Annual Meeting & Gala: Changing the Dialogue on Diversity to Achieve Results (Oct. 4, 2010), *available at* https://www.sec.gov/news/speech/2010/spch100410laa.htm.

applied to corporate board composition, and specifically, applying the rule as a model for a pledge program, like those outlined above.[61]

The NFL has seen great success because of the Rooney Rule, and NFL Commissioner Roger Goodell recently expanded the coverage of the Rooney Rule, speaking at the first "Women's Summit" at Super Bowl 50.[62] The Thursday prior to Super Bowl 50, Goodell announced that the NFL would extend the Rooney Rule to require interviewing female candidates for executive positions.[63]

The Rooney Rule has propelled the NFL exponentially forward with respect to women around the game. This year, the NFL saw its first female coaches and female officials on the field, in Jen Welter and Sarah Thomas, respectively.[64] The Buffalo Bills followed suit, adding a female coach as well, Kathryn Smith.[65] It is quite possibly the perfect time for U.S. companies to follow the example set by the NFL—an organization that undoubtedly cares about profits over many other social issues, if you ask Dr. Omalu for his opinion.[66] This system would not force corporate boards to hire or fire anyone specifically, but simply consider diversity at the final stages of the interview and candidacy process. "The NFL moved from lip service to action and the results are self-explanatory. It is time for the legal profession and the financial services industry to do the same."[67]

United States Wrap-Up

The United States prides itself on leadership and the ability to promote and influence global initiatives. Currently, the U.S. is lagging behind some of its European counterparts as it relates the female executives on the boards of publicly traded companies. Due to the culture and structure of the U.S. financial and economic systems, change cannot necessarily come from the same avenues as it has in many countries across the Atlantic. The U.S. values shareholder

[61] *Id*.; *supra Voluntary Pledges.*
[62] Kevin Patra, *Roger Goodell: NFL creating a Rooney Rule for women*, NFL.COM (Feb. 4, 2016) http://www.nfl.com/news/story/0ap3000000632320/article/goodell-nfl-creating-a-rooney-rule-for-women.
[63] *Id*.
[64] *Id*.
[65] *Id*.
[66] Interview with Dr. Bennet Omalu, *League of Denial: The NFL's Concussion Crisis*, PBS.ORG, *available at* http://www.pbs.org/wgbh/pages/frontline/sports/league-of-denial/the-frontline-interview-dr-bennet-omalu/ (interviewing Dr. Omalu as he shares his process of discovering CTE and the NFL's reaction to his findings about its concussion problem among NFL players and the brain disease they would suffer later in life).
[67] Aguilar, *supra* note 60.

primacy and believes in the market's ability to self-regulate. In order to promote and increase gender diversity, change must come from within, or at least appear to. Corporations need to feel empowered to make the decision that is in their best interests—a policy which can be achieved under the Rooney Rule. The Rooney Rule has the advantages of both quotas and voluntary pledge programs. The Rooney Rule is not a mandatory quota, because there would be no requirement on how many women are hired to fill board seats. Theoretically, a company is not under any obligation to fill a single seat on its board with a female under the Rooney Rule. The Rooney Rule is simply an interview quota, requiring there to be a certain percentage of female candidates in the final round of interviews, which includes an on-site interview and a tour of the facilities (potential facilities would likely be the headquarters or nucleus of business for a large corporation). The Rooney Rule is effective in creating change that benefits minorities, but comes with the added advantage that the corporations are actively selecting the candidates that they want to hire from a larger pool of candidates that includes males candidates, therefore greatly decreasing the likelihood that female board members would ever be seen as mere "quota fillers" or met with resentment. Mandatory quotas and governmental regulation will not be met without severe pushback, and could be seen by many as the opening of a potential floodgate into governmental regulation of the markets. The U.S. can move the gender diversity initiative forward on a global scale, but it must be done in a way that does not threaten the culture and values of the current system.

The Rooney Rule, and other voluntary pledge programs like it, has the ability to increase gender diversity on corporate boards in a meaningful way that gives real power and influence to the females that it benefits. It is beneficial to shareholders because boards are not forced to change practices or composition, or hire anyone specifically, but the Rooney Rules is still able to promote equality among genders at the executive levels of corporate America.

Part II

Introduction

Would the world be in this financial mess if it had been Lehman Sisters? was a question raised at the World Economic Forum in Davos 2009[68], following the financial crisis. This question triggered international debates looking at the situation of gender diversity on corporate boards, which intensively influence our market system and workday life. This paper provides an overview of the history and present state of actions and laws establishing gender diversity on corporate boards by the European Union, Germany and other Member and Non-Member States. We will examine self-enforced voluntary legal actions, as well as, mandatory enforced equality laws, like a binding quota. Subsequently, we will be able to understand how the EU and its Member States justify these legal measures, while illuminating the differences between economic reasoning and a value based approach.

European and German Basic Approaches for Achieving Gender Diversity

European Union

"While women make up at least half of the population, their share in the exercise of political and economic power has remained at a very low level even in the 21st century."[69] The lack of women's participation in the EU and the economy in general, affects especially their representation in companies and corporate boards.[70] The EU-average for women in high management roles of large listed company boards is still rather low at 17.8 % with significant cross-country differences—the lowest in Malta at 2.1% and the highest in Finland at 29.8%.[71] The EU's average for women represented in executive positions is staggeringly low compared to the non-EU member Norway, with an average of 42%.[72] Female representation in CEO positions is even lower throughout the EU with less than three females in CEO positions out of the hundreds of the largest listed companies in Europe.[73]

Looking at the EU's history on sex equality, 1965 ex Art. 119 EEC (later Art. 141 EC), was the main law in stating the principle of "equal pay for equal work", fighting unfair

[68] Bennhold, The New York Times, January 1, 2009.
[69] Senden, Utrecht Law Review 2014, 51.
[70] Senden, Utrecht Law Review 2014, 51.
[71] European Commission, Improving the gender balance in company boards, 2014, 5.
[72] Senden, Utrecht Law Review 2014, 51.
[73] European Commission, Gender balance on corporate boards, 2014, 2.

competition between Member States.[74] This is equivalent to today's Art. 157 TFEU[75]: equal pay for work of equal value, which ensures Member States' positive discrimination actions.[76] A further progress in favor of gender equality was the Treaty of Amsterdam, which added to Art. 3 the "aim to eliminate inequalities, and to promote equality, between men and women."[77] Further labor equality issues initiatives of EU institutions outside of the normal social and political agendas included the first European Ministerial Conference in 1986, which created the Equality between Women and Men in Political Life—Policy and Strategies to Achieve Equality in Decision Making.[78] In 1988, the Committee of Ministers introduced the Declaration on Equality Between Women and Men, declaring gender equality as an essential human right and essential for democracy.[79] This was followed by the Third European Commission's Pluriannual Action Program (1991-1995), which added women to decision-making issues.[80] Connected to the program's implementation in 1996, a Recommendation by the Council, addressed the Member States to pursue a holistic way of achieving a balanced female representation in "decision-making bodies at all levels of […] economic life."[81] The Council of Europe focused on its idea of equality, declared in The Declaration on Equality Between Women and Men as a fundamental criterion of democracy in Istanbul 1997, supporting equal power distribution by overcoming fixed gender stereotypes, such as the need for more men in domestic duties by demanding "structural change" and "new social order."[82] In 2009, a Declaration by the Committee of Ministers of the Council of Europe embodied the equality concept as an essential democratic value, demanding "equal visibility, empowerment, responsibility and participation of both women and men in all spheres of public and private life."[83]

In March 2011, the European Commission instituted a voluntary pledge for companies to achieve 30% female representation on company boards by 2014 and 40% by 2020, but the plan was never realized because by 2012 only 24 companies agreed to the pledge.[84] This led to the

[74] Rubio-Marín, American journal of comparative law, 2012, 104.
[75] Treaty on the Functioning of the European Union, Part Three, Title X, Art. 157.
[76] Rubio-Marín, American journal of comparative law, 2012, 104.
[77] Rubio-Marín, American journal of comparative law, 2012, 104.
[78] Rubio-Marín, American journal of comparative law, 2012, 106.
[79] EU Committee of Ministers, Declaration of Equality of women and men, 1988, 1.
[80] EU Commission, Third Medium-Term Community Action Program for Equal Opportunities, 1991-1995.
[81] Council Recommendation on the balanced participation of women and men in decision making, Art. (6), 1996.
[82] Conference on equality between women and men, Report by the Secretary General, Appendix III, 1997.
[83] Declaration by the Committee of Ministers, 119th Session, 2009.
[84] European Commission Press Release, 2012.

Commission's Directive, based on the aforementioned 2011 pledge, which enforced that all companies embodied the mandatory 40% on their boards by 2020.[85] The latest Commission initiative is the Strategic Engagement for Gender Equality 2016-2019[86]: promoting "gender balance in economic leadership positions at least 40 % representation of the under-represented sex among non-executive directors of companies listed on stock exchanges" and "equality in decision-making […] among executive directors of major listed companies and in the talent pipeline."[87] This initiative seizes suggestions from the 1997 Ministerial Conference in Istanbul and is based on the 2012 Commission's directive (vide supra).

Germany

The EU overrules national decisions, as a supreme organ of legal procedures. Member States developed individual legal actions for female leadership in company boards even before the restrictive EU approach of the above illustrated Strategic Engagement for Gender Equality 2016-2019 came into account. For a long time in Germany it was not clear whether to approach the problem of female under-representation on company boards with corporate governance tools or with other means. The German government agreed in 2001 to cooperate with principal business associations on a proposal to promote the equality of women in company boards and decision-making positions in the private economy.[88] This soft law measure was implemented under the notion that the government would not apply any further gender equality legislations unless it is obliged to do so by EU law.[89] The agreement manifested in a gender diversity provision in the German Corporate Governance Code Art. 4.1.5: "When filling managerial positions in the enterprise the Management Board shall take diversity into consideration and, in particular, aim for an appropriate consideration of women."[90] It should be emphasized that the German wording (soll) makes the provision non-binding, along with the lack of clarifying when and how the sought "appropriateness" will be rated.[91] Nevertheless, most of the German stock listed companies set different targets regarding female representation in their boards, ranging

[85] European commission Press Release, 2012.
[86] EU Comission, Staff working document, 2015, 21.
[87] EU Comission, Staff working document, 2015, 21.
[88] Senden, Utrecht Law Review, 2014, 54.
[89] Waas, Gender Quota in Company Boards, 2014, 131.
[90] German Corporate Governance Code, amended on May 5th 2015, BAnZ June 12th 2015.
[91] Senden, Utrecht Law Review, 2014, 54.

from 20% to 30% up until 2011.[92] Because the percentage of representation has increased from about 11% to 22%, in the following three years, the so called legal comply-or-explain duty, implicated in the German Stock Corporation Act (Section 161)[93] came into action.[94] In 2015, the law on Equal Participation of Women and Men in Leadership Positions in the Private and Public Sector[95] was introduced. On January 1, 2016, a fixed gender quota of 30% came into force in Art. 1 sect. 4, para. 1 applying to new supervisory board seats of major companies listed on the stock exchange. Around 3500[96] more companies were obliged to set their own target to increase the female proportion of supervisory boards, board of directors and top management level through Art. 3 sect. 76 para. 4 Stock Corporation Act.[97] The law aims at improving the proportion of women in leading positions and to achieve a gender balance (Art. 1 sect. 1). Manuela Schwesig, current German Federal Minister of Family Affairs, Senior Citizens, Women and Youth states that: "the law is an historic step for the equal rights of women in Germany. Hence the law not only acts in leadership positions, but reaches millions of women concretely."[98] This quota regulation is effective through Art. 11 No. 2 b for stock corporations and limited partnerships on stocks with more than 2000 female and male employees and European Companies (SE), where the supervisory and administrative body consists of the same number of shareholders and labor representatives[99]. In case of non-compliance, the election is void and intended chairs for the underrepresented sex stay legally vacant ("empty chair"), Art. 14 No. 1 a.[100]

Critics fear a violation of the principles of equal treatment, Art. 3 para. 2 GG[101] and of non-discrimination, Art. 3 para. III GG by the quota.[102]

[92] Senden, Utrecht Law Review, 2014, 54.
[93] Stock Corporation Act, as of September 6th 1965, BGBl. I 1965, 1089.
[94] Langenbucher, legal aspects of gender balance, 2013, 31.
[95] Law on Equal Participation of Women and Men in Leadership Positions in the Private and Public Sector, as of April 24th 2015, BGBl. I 2015, 642.
[96] Federal Ministry for Family Affairs, Senior Citizens, Women and Youth, May 30th 2015.
[97] Art. 3, No. 1, supra note 28.
[98] Federal Ministry for Family Affairs, Senior Citizens, Women and Youth, May 30th 2015.
[99] Federal Ministry for Family Affairs, Senior Citizens, Women and Youth, May 30th 2015.
[100] Federal Ministry for Family Affairs, Senior Citizens, Women and Youth, May 30th 2015.
[101] Basic Law for the Federal Republic of Germany, as of May 23 1949 BGBl. I 1.
[102] Papier & Heidebach, Zeitschrift für Unternehmens- und Gesellschaftsrecht, 2011, 305, 320 f.

Different Justifications for Legal Actions Promoting Gender Diversity:
Economic Advantages vs. Constitutional Values

To understand the reasons for pursuing gender diversity on company boards it is vital to scrutinize suitable measures e.g., out of economic benefits, or moral values for the society, politics and law.

Economic Reasoning

A financial argument for gender diversity, is the economic, *business case argument* pursuing a business's need for more gender balanced boards to improved company's efficiency[103], (though there is skepticism about its actual outcome[104]) improving quality of decision-making, corporate governance and ethics, as well as resorts of the talent pool, leading to innovation and market presentation.[105] Specific actions, based on economic reasoning, are often soft law measures: "Self-regulatory approaches may be induced [...] by the business case rationale and developed […] as part of corporate social responsibility policy, as reflected in corporate governance codes."[106] An example is the Polish Warsaw Stock Exchange Management Board which connects gender balanced participation creativity and innovation of business's economic actions or the Swedish Corporate Governance Board companies need to maintain need to a responsible and sustainable behavior, comprising gender equality, thus becoming trustworthy in public.[107]

Value Justification

A value-oriented reason for gender diversity is the *individual, equal opportunities justification*: achieving a gender power balance corporate boards is linked to individual fairness. Equally qualified women should have equal access like men to boards, which would be beneficial for the society as a whole "affect[ing] the economic, financial and social life of all citizens."[108]

[103] Senden, Utrecht Law Review, 2014, 58.
[104] Senden &Visser, 2013 European Gender Equality Law Review, 21.
[105] Senden, Utrecht Law Review, 2014, 58.
[106] Senden, Utrecht Law Review, 2014, 59.
[107] Senden, Utrecht Law Review, 2014, 59.
[108] Senden, Utrecht Law Review, 2014, 59.

Moreover the *societal, public interest and fundamental rights argument* focusses broadly on a balanced representation through social justice and democratic legitimacy. These are EU core values, which build a political and economic system in which in legal terms translates into the principle of equality and of equal opportunities.[109] Experience showed that in Member States without specific regulation no major critical awareness has risen to actively support gender balance. None of the mentioned justifications have been sufficient or convincing by the public regulator or by industry to act. These nations trust in the application of the general thought of equality, but no proactive approach to overcome persisting inequalities in this domain have arisen yet.[110]

Different National Value Types

Compared to this the Norwegian quota model is rather invasive, not justified through the business case rationale, but the claim that achieving equal participation is a democratic value, seeing equality as a contribution for fairness, power balance and affluence in society.[111] This is a prime example that international differences affect regulatory and enforcement choices, reasons for international differences. Firstly they are influenced by the Member State's type of political and welfare system and cultural differences: Diverse political, socio-economic and cultural contexts in which companies and employees work affect the problem of under-representation, as well as, regulatory solutions and instruments built to resolve it.[112] "The proportion of women on corporate boards is likely to be lower in countries exhibiting high masculinity."[113] In the UK for instance which is typified as a liberal welfare system[114], the self-regulatory approach still prevails.[115]

In a few countries, pro-active measures were only taken due to strict legal regulation where no active measures came up, no legal or political tradition and have been applied. France requires legislative and constitutional checks before any quota rules may be adopted.[116] Before the quota rule came to force in Germany, doubts covered the constitutionality, the conformity

[109] Buijze, air transport and gender equality law, 58.
[110] Warth, UNECE Discussion Paper Series, No. 2009.4, 16.
[111] Selanec, Executive Summary, 2013, 26.
[112] Senden, Utrecht Law Review, 2014, 60.
[113] Carrasco, Journal of Business Ethics, 2014, DOI 10.1007/s10551-014-2166-z, 433.
[114] Esping-Anderson, The Three Worlds of Welfare Capitalism, 1990, 2.
[115] Senden, Utrecht Law Review, 2014, 60.
[116] Senden, Utrecht Law Review, 2014, 60.

with the freedom of property, the freedom of association, and the principle of equality are understood under the German Constitution.[117] In Finland, the currently applicable constitutional provision would only allow for a soft quota system.[118] In Norway, the introduction of the hard quota was received easier because these rules already existed in the legal system and have been enforced in other fields, which left their constitutionality doubtless.[119]

Economic Reasoning Overshadows Values

"There is a large gap between the proportion of employed and well-educated women and those sitting on the boards of EU companies."[120] Looking at the above presented Commission's proposal for a Directive on improving the gender balance among non-executive directors of companies listed on stock exchanges does not seem to be a convenient legal solution: "The Commission's reasoning [of] the draft Directive is so strongly pervaded by economic considerations that it gives the impression that women are merely instruments useful to attain economic objectives."[121] The urge to promote female representation could be justified rather by social oriented values, including gender equality, as well as the necessity of democratic legitimization of the EU and of its economic governance to promote the tandard of proportionality and subsidiarity.[122] Gender equality among European company managers could find justification in EU constitutional values like the equality between women and men Art. 23 of the Charter of Fundamental Rights of the EU, the social market economy, Art. 3 para. 3 TEU and democracy, Art. 2 TEU. As well as in the general rule of EU law, Article 6 para. 3 TEU.[123] Furthermore critics utter there might be no correlation between advanced economic performance due to a higher female proportion which offers an excuse for companies to prlongue the need and value of having more female representation on the boards.[124] "Corporate governance and performance may be improved by board appointments of the best possible candidates

[117] Waas, Gender Quotas for Company Boards, 2014, 131 f.
[118] Nousiainen, 'Finland', Executive Summary, 2013, 78.
[119] Senden, Utrecht Law Review, 2014, 62.
[120] Szydło, International and Comparative Law Quarterly 2014, 167.
[121] Szydło, International and Comparative Law Quarterly 2014, 167.
[122] Szydło, International and Comparative Law Quarterly 2014, 167.
[123] Szydło, International and Comparative Law Quarterly 2014, 168 f.
[124] Szydło, International and Comparative Law Quarterly 2014, 168.

(irrespective of sex) and meeting all relevant criteria, not simply by the appointment of women."[125]

Comply or explain approach

One solution to quota skepticism is the *comply-or-explain approach* for diversity.[126] The best known proposal where "companies with a lower proportion, less than 30% women on their boards, would have to explain [in their annual reports] if they proposed to fill a vacancy with a man."[127]. Research found out that by asking why individuals took certain actions advance the decision-making quality, reduce stereotype thinking, and create space for underrepresented groups.[128] Diversity rulings are often introduced as essential to good governance, an example for comply or explain approach requirements is: *"*listing rules of several stock exchanges require as part of their agreement with listed companies that the companies 'comply' with governance requirements or 'explain' why they do not.".[129] The European Council is planning a directive requiring large publicly traded firms to present their board diversity-policy and its results, corporations without that policy, must provide a "clear and reasoned explanation as to why this is the case."[130] Denmark created two laws since 2012: the Gender Equality Act and the Companies Act. The laws make it obligatory for private and public companies to set concrete and realistic aims and establishing a recruitment policy, including a comply-or-explain approach. (companies must disclose annually about the implementation this policy and, explain why the objective was not realized. If it fails to report on this, a fine may be imposed.[131]

Legal Instruments in Action in the EU

Legislations of many EU Member States have quotas or mandatory targets which regulate gender proportions on company boards, varying in sanctions and number of corporations. States operating with obligatory targets for female presence on individual company boards impose

[125] Szydło, International and Comparative Law Quarterly 2014, 180.
[126] See Sanderson & Burgess, Financial Times, May 28, 2010, http://perma.cc/49MJ-TA85.
[127] How to Build Diversity on Boards, Financial Times, May 19, 2009, 12.
[128] Foschi**,** Social Psychology Quarterly, 251.
[129] Branson, Research Paper No. 2011-05, 2011, 9.
[130] Proposal for a Directive of the European Parliament and of the Council Amending Council Directives 78/660/EEC and 83/349/EEC as Regards Disclosure of Non-financial and Diversity Information by Certain Large Companies and Groups, 3, Apr. 16 2013, http://perma.cc/FT5A-HEEQ.
[131] Senden, Utrecht Law Review 2014, 55.

sanctions for non-compliance. Others have softer statutory quota laws, which are neither binding nor connected to any injunctions. The legislation of a few countries only concerns state owned corporations or local authorities (excluding private companies). Countries with the least developed quotas for public undertakings came into force through administrative regulation, without direct legislation.[132]

Quota

Hard public law is one way to achieve gender diversity, by introducing binding quota regimes. The non-EU Member State Norway is an international role model for hard public law in 2006, introducing a legal sanctioned quota that mandates representation of 40% of both genders on company boards, for both public limited and state-owned companies.[133]. The quota became mandatory as companies failed to raise female representation under the soft law.[134] The sanction for non-compliance is forced liquidation.[135] Also the registration of company boards is prohibited if the balanced representation is not reached.[136] Supportively, the Norwegian government set up a database for companies where qualified female applicants can have their CVs evaluated.[137] The majority of companies succeeded in complying with the quota within the two-year transition period. [138]

Other European countries followed, most recently Germany, like stated above. France passed a quota law requiring listed and non-listed major private, and state owned companies, to uphold a gender proportion of at least 40%.[139] Corporations with only male board members should fill any vacant seat with a woman, the sanction in case of legal non-compliance means the invalidity of any director's assignment.[140] Legislative mandatory gender quotas are largely politically debated but are considered more and more. Like in Belgium, since 2011, concerning public undertakings, the law demands "at least a third of the members of the board of directors appointed by the Belgian State or by a company controlled by the Belgian State shall be of a

[132] Szydło, International and Comparative Law Quarterly, 2014, 172.
[133] See Norwegian Public Limited Liability Companies Act, in Section 6-11a.
[134] Kristen, 26 Pace Int'l L. Rev. 68, 2014, 70.
[135] Norwegian Public Limited Liability Companies Act, in Section 16-14.
[136] Norwegian Public Limited Liability Companies Act, in Section 16-17 (3).
[137] Ahern, Dittmar, Quarterly Journal of Economics, 2012, 137, 145.
[138] Hastings, Breaking the Glass Ceiling: Women in the Boardroom, 57.
[139] Law 2011-103 of 27 January 2011, Journal Officiel, 28 January 2011.
[140] Gresy, De Vos & Culliford, 2014, 123 f.

different gender from the other members".[141] If the company does not comply, the following director's appointment will be null.[142] An Italian Act regulates "that [more] company statutes must ensure that directors and auditors of one sex cannot be elected in a proportion greater than two-thirds compared to directors and auditors of the opposite sex"[143] of listed companies and state subsidiaries.[144] The National Securities and Exchange Commission is in charge of controlling this process and can warn that the quota application should comply within four months and, if non-compliant a fine up to 1 million € (up to 200.000 € for auditors) can follow; if no action took place by a second warning if the quota is not achieved within three months. If the company fails to implement this, dissolution of the board might occur.[145]

Alternate Legal Instruments

"Quotas are not the end of the possibilities for securing female representation in corporations, and more generally, in the workplace."[146] There are different tactical categories, like focusing on increasing the candidate's skills, motivating corporations to take voluntary actions and the law. To increase the representation of women on boards, state authorities or corporations can adopt corporate governance codes individually; companies can sign charters, certificates or pledges realizing quantitative aims for female boardroom-representation; stakeholders can initiate special recruiting, training, mentoring and networking activities.[147] Moreover databases promoting female candidates could be created, or campaigns raising the sensitivity of social partners and businesses towards gender balance in boardrooms[148]. Regulatory approaches of boards' gender balance range from no regulatory action to softer in public and private institutions. In some Member States self- or co-regulatory and public law approaches may come to force parallel, because of the distinction between private and state-owned companies, and left to their discretion.[149] The softest of all approaches can be achieved through so called *conditioned self-regulation or co-regulation.* Those and other measures are

[141] Arts. 2, 5 of the Law of 28 July 2011, in De Vos & Culliford, 2014, 101.
[142] Senden, Utrecht Law Review 2014, 57.
[143] Senden, Utrecht Law Review 2014, 58.
[144] Renga, Italy, in Selanec & Senden 2013, 127.
[145] Renga, Italy, in Selanec & Senden 2013, 125.
[146] Kristen, 26 Pace International Law Review 68, 2014, 78.
[147] Szydło, International and Comparative Law Quarterly, 2014, 172 f.
[148] Progress Report of the European Commission, March 2012, 13–14, 21 f.
[149] Senden, Utrecht Law Review 2014, 52.

essential for raising public awareness, employees and company management need to change organizational practices and consensus-building.[150] To achieve cultural change in the organization of corporation's acceptance, flexibility and a positive framing is more effective than punishment.[151] For instance Finland selected a self-regulatory approach implemented through the Corporate Governance Code for public and private corporations in 2010, not explicitly demanding an equal gender distribution of board seats, the required action are left to the employers own execution.[152] The Hungarian Equality Act only demands an adoption of an equal opportunity plan only for public employers, (without content-scrutiny and only soft provisions) not adopting such a plan imposes fine.[153] Mostly initiatives by public authorities setting certain quantitative targets, which are of little legally binding nature and sanctions of non-achievement and non-compliance:[154] Spain recommended in a law of 2007 that major corporations should reach at least 40% of each gender on company boards before 2015[155], but no sanctions are attached to this rule, only a duty for companies to state their board's gender composition of in their annual reports.[156] Ireland set a target in 2011 of 40% of each gender for all state boards, till today this does not have any legal implication.[157] No specific measures (like from the legislator) promoting gender diversity yet have been adopted, in mainly the latest EU-acceded Member States, like in Bulgaria, Croatia, the Czech republic, Cyprus, Latvia, Lithuania, Malta and Slovakia, as well as in founding EU Member States: Luxembourg and Portugal.[158] Where there is no binding public regulation, initiatives make corporations pay attention to gender imbalances: mostly within corporate governance codes (which often only apply to stock listed companies), and are phrased rather widely, not setting any hard standards.[159] The Dutch *Talent to the Top* program created an online platform where companies can publicly pledge to commit themselves to promoting gender diversity, which is very much voluntary and without any sanctions.[160] The UK introduced the *FTSE 100 Cross-Company Mentoring Executive Programme,* offering

[150] Warth, UNECE Discussion Paper Series, No. 2009.4, 16 f.
[151] Armstrong, Walby, Gender Quotas in Management Boards, Brussels 2012, 13.
[152] Senden, Utrecht Law Review 2014, 55.
[153] Senden, Utrecht Law Review 2014, 55.
[154] Senden, Utrecht Law Review 2014, 56.
[155] Art. 75 of Law 3/2007.
[156] Senden, Utrecht Law Review 2014, 56.
[157] Senden, Utrecht Law Review 2014, 56.
[158] Senden, Utrecht Law Review 2014, 52.
[159] Senden, Utrecht Law Review 2014, 53.
[160] Senden, Utrecht Law Review 2014, 53.

mentoring and related services to high-potential women within the 100 highest value stock companies on the London Stock Exchange, the aim is the connection of women, Chief Executives and Chairmen.[161] Forcing corporations to give information about retention, recruitment, and the promotion of women, creates transparency[162], would open the companies' consciousness concerning inclusion of women, preventing discrimination.[163] Another necessity is their search expansion, beyond traditional CEO types, considering different corporate executives, nonprofit directors and officers, and academic presidents and experts.[164] "What's holding women back [is] the fact that no one ever leaves the boards."[165] Board members do not want to give up their power, linked to prestige and a high salary.[166] This leads to an increasing average age of directors: 40% of public corporation managers are age 68 or older.[167]

Legal strategies can remove obstacles to women, wishing to enter in leadership positions. An idea is demanding companies "over a certain size to disclose data concerning recruitment, retention, and promotion."[168] Another legal strategy would be to strengthen enforcement resources for anti-discrimination initiatives. Still state and federal equal opportunity agencies could be more proactive in investigating organizations with a poor performance on gender equity.[169]

Does Diversity Pay Off?

How to Access Diversity

As we have seen above in Chapter (IV), the *business case argument* for diversity on corporate boards is generally the most striking legitimization for mandatory quota laws, even if lesser used than the *value approach*. Today several studies exist, indicating positive correlations between enhanced female representation on company boards and a better business performance.[170] At the same time, negative or simply no significant outcome is also often

[161] Senden, Utrecht Law Review 2014, 53.
[162] Rhode, Packel, Delaware Journal of Corporate Law, 2014, 412.
[163] Kristen, Norway's Companies Act, 26 Pace International Law Review 68, 2014, 77.
[164] Fairfax, Maryland Law Review, 2006, 605-607.
[165] Diane Brady, Bloomberg Businessweek, Sept. 20, 2012.
[166] Rhode, Packel, Delaware Journal of Corporate Law, 2014, 421.
[167] Holly, RACTICAL LAW, June 2013, 27.
[168] Kellerman, Rhode, 2007, 31.
[169] Kellerman, Rhode, 2007, 31.
[170] Committee for Economic Development: Washington, D.C., 2012, 13.

determined.[171] Evaluation of effectiveness depends on whether we see the main goal in a creation of potential equal opportunities between men and women, or if we just judge the de facto equal representation on company boards.[172] While the *equal opportunity attempt* is often institutionalized by self-regulatory and soft gender equality laws, the *outcome orientated approach* is often embodied by different hard quota regimes, as mentioned in Chapter (V).[173] Also the EU Commission concluded that: "legal instruments to enforce quotas are effective and fast means of achieving change"[174], and commits itself thereby to hard quota law enforcements. In its Draft Direction uses arguments, based on three economic advantages, which are also the main argumentative pillars in the other, considerable body of literature:[175] At first it is often mentioned that a more balanced allocation among the sexes in corporate boards would enhance productivity through a more efficiently used workforce.[176] Secondly, it is argued that gender equality in corporate boards leads to a better decision-making and monitoring of the companies actions.[177] This assumption rests on theories, highlighting the idea that women were "more financially risk averse"[178], while others believe in a wider variety of viewpoints[179] or a better resistance to internal board conflicts.[180] However, the third economic advantage is the assumption, that increased female representation on corporate boards leads to an overall better financial performance (at the stock market, overall profits and foreign invested capital) of the company.[181]

Looking at the most mentioned disadvantages of gender diversity on corporate boards, we can divide those into two kinds of arguments. Those doubting the research validly, predicting a positive correlation and those who claim disadvantages are caused by enhanced gender diversity on boards directly. Despite the comprehensive researches, there seems no clear evidence that diversity leads vice versa to an improved financial performance.[182] Many studies

[171] Rhode, Packel, Delaware Journal of Corporate Law, 2014, 383.
[172] Senden, Utrecht Law Review, 2014, 63.
[173] Senden, Utrecht Law Review, 2014, 63.
[174] Armstrong, Walby, European Parliament's Committee on Gender Equality, 2012, 4.
[175] Szydło, International and Comparative Law Quarterly 2014, 173.
[176] Szydło, International and Comparative Law Quarterly 2014, 173.
[177] Szydło, International and Comparative Law Quarterly 2014, 174.
[178] Jianakoplos, Bernasek, Economic Inquiry, 1998, 620.
[179] Rhode, Packel, Delaware Journal of Corporate Law, 2014, 395.
[180] Mannix, Neale, Psychological Science in the Public Interest, 2005, 35.
[181] Rhode, Packel, Delaware Journal of Corporate Law, 2014, 385.
[182] Brammer, Corporate Governance: An International Review, 2007, 394f.

are overshadowed by the reproach of "serious methodological flaws"[183], while the critique is: a selective approach choosing the companies' financial parameters, that they only portray the wanted positive relationship.[184] Moreover the studies often do exhibit their selection pattern, how the companies were chosen.[185] Another point of criticism is the short-term periods of the mentioned studies,[186] therefore a long-term observation of the company's stock market shareholder value is not connectable to diversity specific findings.[187]

The different studies are connected to country-, cultural- and company-specific backgrounds, which often preclude the view of a wider, global market context.[188] Because of this, the correlation between diversity and financial benefits is often of an anticipated and indirect nature.[189] For example, some scholars claim that the female representation on boards has no direct financial impact, but due to its appearance as a diverse board, shareholders may invest convinced of the company's innovativeness.[190] This argument is underlined by the fact that studies which predict a positive financial correlation, often derive from countries without an enforced legal gender quota.[191] Furthermore, some mentioned disadvantages are of a general nature, like predicted changes in companies' financial performance, as an effect of a "dysfunctional transition period[s]" [192]. Some may argue that the mentioned reasons for efficiently used human capital in corporations had no value, because not the best but the most appropriate candidates (gender-based), enter the boards.[193] The tendency to appoint women is less a case in self-regulatory regimes but just to accomplish an enforced legal quota system.[194] Therefore we should spotlight on quota-specific disadvantages. Against mandatory quotas, experience in Norway where still only 3% of CEOs are female, in spite of the quota for board members there, thus arguing that the 'trickle down' effect of mandatory measures is virtually non-existent.14[195]

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[183] Szydło, International and Comparative Law Quarterly 2014, 177.
[184] Adams, Gray, & Nowland, 2011, 8.
[185] Szydło, International and Comparative Law Quarterly 2014, 177.
[186] Rhode, Packel, Delaware Journal of Corporate Law, 2014, 391.
[187] Hollowell, Journal of Diversity Management, 2007, 51f.
[188] Kang, Cheng, & Gray, Corporate Governance: Int. Rev, 2007,194.
[189] Forbes, & Milliken, Academy of Management Review, 1999, 490.
[190] Szydło, International and Comparative Law Quarterly 2014, 178.
[191] Szydło, International and Comparative Law Quarterly 2014, 178.
[192] Kristen, 26 Pace International Law Review 68, 2014, 74.
[193] Szydło, International and Comparative Law Quarterly 2014, 176.
[194] Rhode, Packel, Delaware Journal of Corporate Law, 2014, 391.
[195] Senden, Utrecht Law Review 2014, 54.

Does the Quota Pay Off?

Women, who are lacking experience as quota placements on corporate boards, are known as the *trophy director* phenomenon[196] or the *golden skirt effect*[197]. Forced by a quota companies tend to reduce the board size to maximize the effect of the few female "trophies". [198] At the same time these *trophy directors* help the company to present a pluralistic image, refraining from further efforts.[199] This concerns critics that legal gender quotas have, on top of the already given questionable profitability, also a general negative impact on gender equality.[200]
On the other hand, though an academic proof of a positive correlation should miss, the same applies for the critic's studies, because most of them are lacking longtime empirical negative evidence.[201] Surely, gender quotas are able to "alter business structures for integration of women into leadership positions"[202], while we have seen that voluntary soft measures often miss any progress or do even stop them. [203] The just work in coexistence with mandatory quota instruments, as we have seen in Norway and Finnalnd.[204] The trap could be, that the industry longs for positive correlations to be open for voluntary approaches[205]and as those are lacking any evidence, they are vulnerable for circumventions.

Conclusion

All in all it is certain that the issue of *gender diversity on corporate boards* and its legal, self-regulatory or mandatory implementation will remain highly controversial. In Chapter (II), we examined the EU's history on gender equality from the first attempt of Equal Payment in 1965 to today's Draft Directive of the Commission. The gender diversity discussion in Germany mirrors this long-term development best, portraying the power of obligatory laws and recommendations of the EU and its Commission: from soft self-regulative measures to a mandatory quota. Still, the German example is an average approach of diverse strategies among Member States. Legal actions regarding gender diversity demand justifications, which we

[196] Branson, Research Paper No. 2011-05, 2011, 3.
[197] Milne, Finnish Times, Oct. 23. 2012.
[198] Rhode, Packel, Delaware Journal of Corporate Law, 2014, 383.
[199] Rhode, Packel, Delaware Journal of Corporate Law 2014, 383.
[200] Teigen, Department of Law Research Paper No. 2015/22., 70, 83.
[201] Alstott, Public Law Research Paper No. 489, 2013, 40.
[202] Alstott, Public Law Research Paper No. 489, 2013, 41.
[203] Senden, Utrecht Law Review 2014, 64.
[204] Armstrong, Walby, European Parliament's Committee on Gender Equality, 2012, 12.
[205] Senden, Utrecht Law Review 2014, 64.

surveyed in Chapter (III). We found out that the economic reasoning is often used as incentive for self-regulatory approaches while mandatory quota laws mostly find their justifications based on fundamental rights arguments. Despite this pattern, the EU Commission falls out of this frame by highlighting primarily economic considerations in its Directive. While examining the functioning and variety of regulatory gender laws in the EU in Chapter (IV) it became evident, that the multiplicity of national strategies were often limited by the countries' perception of the advantages of diversity. Chapter (V) hence presented the most contested issue of diversity: its effectiveness. Pro-diversity studies and their critics helped understanding the debate, but their arguments balanced each other in the end. More rewarding instead was the question of how to measure effectiveness: countries' particular evaluation ways are either based on equal opportunities or the practical outcome of female board representation. The pitfall of legal gender equality enforcement crystalized. As governments have to legitimate their legal actions, they tried to offer companies a self-regulatory approach while pledging for positive economic effects of diversity. Softer approaches failed due to the board's unwillingness and their appointment of *trophy directors*, challenging the equal opportunity attempt. The mandatory measures which came therefore to force got justified by value arguments. Companies require evidence for economic benefits out of gender diversity and even mandatory quotas cannot achieve this in a short run, the legal strategies for diversity on corporate boards risks to become an only "nice thought" but at the same time just a political straw fire. In the end, despite a lack efficiency evidence, mandatory gender quotas can alter business structures in accordance with the EU's Equality Values and might seem the only chance to make any, even if little, change.

Part III: Co-Authored by Tyler Winters and Madhuri Jacobs-Sharma

The United States' Perspective: Why A Quota Wouldn't Fly

A Constitutional Objection

In 1995, the Italian Constitutional Court[206] held that a constitutional challenge against two laws regulating gender diversity in elections was valid, because Article 3.2 of the Italian Constitution sanctions substantive equality, but the Court determined that was not enough for the adoption of affirmative actions measures in the political sphere. Although the EU has seen mandatory quotas in a substantial subset of its member-states, the Constitution can be used as a defense mechanism against this type of legislation.

In the United States, a constitutional challenge would certainly arise if a mandatory gender quota for corporate boards were passed. The Equal Protections Clause of the Constitution has been read to stand against the use of a mandatory quota to benefit a minority.[207] The first challenge that a quota in the realm of gender diversity would face is whether women are a minority, and then if so, whether they deserve constitutional protection. In the *Bakke* case, the court specifically noted that classifications that treat people as groups rather than individuals are problematic on their face, and that a desire to increase minorities in the medical profession is not a legitimate state interest.[208] It is hard to see why there would be any way to justify a legitimate state interest in increasing the number of women on corporate boards. Even if the quota would pass the legitimate state interest test, it would again be difficult to see how one could say that a mandatory quota would pass the next constitutional test, and be seen as "narrowly tailored" to achieve that legitimate state interest. [209] As American constitutional law stands today, there is no doubt that minority status can be considered in admissions and hiring decisions. Quotas, on the other hand, are unconstitutional because you have the reverse discrimination argument on the other side. For example, imagine that at a large company there was only one opening for a board seat, and there were only two applicants for that seat. One applicant was a male and one was a

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[206] Coste cort., Decision no. 422 (1995). For a discussion of the debate surrounding this decision, *see* Blanca Rodriguez-Ruiz & Ruth Rubio-Marin, *The Gender of Representation on Democracy, Equality and Parity,* 6 ICON 287 (2008).
[207] *Regents of the Univ. of California v. Bakke, supra* note 37.
[208] *Id*.
[209] *Id*.

female. The board is 1% below a hitting a mandatory quota set the by U.S. government for female board members. The male applicant was the youngest person ever to serve on a Fortune 500 board and he is an expert in the industry of this company. The female has never served on a board, and is actually more than four steps down the corporate ladder in terms of experience seen as essential for becoming an effective board member. Does the United States really want to implement a policy that could potentially deny a seat to the best candidate? Quotas go too far, but gender should undeniably be considered as a factor in the conversation. A case from Michigan Law School stands for the proposition that diversity can be considered in the process, within the bounds of the Constitution.[210] Strict scrutiny over whether the policy is narrowly tailored to achieve the end of the legitimate state interest is required, but the court found that affirmative action in admissions decisions was a constitutional exercise of the state's interest in improving diversity in higher education. A similar process would be equally likely to pass constitutional muster in the realm of gender diversity in hiring practices. The question before us today is not where exactly we draw that line, but certainly gender should be considered in hiring practices, and, with all other qualities of candidacy being equal, giving the edge to the female candidate may be the best policy for achieving diversity in that example. Unfortunately, that is not the stage of the current issue that we face. Indisputably, mandatory quotas would not be effective, nor constitutional, in the United States. However, in order to see the benefits from any type of gender affirmative action program on corporate boards, we need to find a solution for putting women in the position to be interviewed for those seats in the first place.

Ruth Rubio-Marin notes that this anti-classification reading of the Equal Protections Clause (EPC) has gained strength over other readings of anti-subordination, as a mandatory gender quota would violate the gender-neutral reading of the EPC.[211] Rubio-Marin is one of the few scholars who noted that the mandatory quotas are not necessarily unchallenged constitutionally in Europe.[212] Both Italy and France required constitutional amendments prior to implementing mandatory quotas.[213] Constitutional challenges are not a new concept in Europe where mandatory quotas have been the answer for many countries' gender diversity issues. In the

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[210] *See Grutter v. Bollinger*, 539 U.S. 306 (2003) (noting that strict scrutiny is required for affirmative action cases, but that considering diversity as a factor is not unconstitutional).
[211] Ruth Rubio-Marin, *A New European Parity-Democracy Sex Equality Model and why it won't Fly in the United States, A*, 60 AM. J. COMP. L. 99, 121 (2012).
[212] *See id*. at 122 (noting the constitutional challenges faced by mandatory quotas in France and Italy).
[213] *Id*.

United States, the Constitution would prevent a mandatory quota from taking effect, and based on previous court decisions, has defeated mandatory quotas before they could even start.

Cultural Objections

Undoubtedly, any mandatory quota would face a strong constitutional objection, but a mandatory quota should be seen as a last resort for the United States. Soft measures should come first. Either using a voluntary pledge program similar to the Dutch's Talent to the Top program, or something drafted similarly to the Rooney Rule, would allow corporate board members and decision makers to feel empowered. If the United States government passed legislation tomorrow that required a mandatory gender quota for X% of board seats by some date in the distant future, corporations would immediately feel threatened and either implement defensive or aggressive strategies. The choice to respond either defensively and protect the current way of doing things, or aggressively challenging the legislation, is not important. Either way, the new "quota" board members become the targets and are the people that are forcing these boards to change their equations for success. This creates multiple problems within the organizations and has a greater opportunity to hurt large corporations in the short-term.

Conversely, if the United States could implement a voluntary pledge program—admittedly tackling the question of "who" should start this initiative is another question in itself—corporations that sign on to the pledge could feel like they are part of the conversation. It would give major public companies the ability to sign on to a pledge that makes them look good in the eyes of the public and their consumers. Filling board seats with women would be seen as a positive and active decision made from within, and just maybe, these new board members could influence the company with real power, and still allow the board to drive increased shareholder value through the public good will that stems from increased gender diversity at the executive level.

In a mandatory quota regime, companies are forced to hire people that they do not necessarily plan to ever hire, which obviously could create animosity among the board. In that situation, in order to come into compliance with the regulation, what happens to current board members that have been effective during their time on the board? Are companies supposed to ask seasoned members to step down to be replaced because of legislation—which would cause

further constitutional complications,[214] or should companies simply add board seats and dilute the power of the individual members, and potentially decrease shareholder value because of it? To provide another example, imagine a corporation—albeit a small one—that only has 10 board seats. If a 40% mandatory gender quota were implemented, the company has two potentially very bad outcomes. First, it could hire seven female board members (7/17 is 41.1%), adding seven new seats to the board, and significantly decreasing the power of all of the current board members. Alternatively, the board could remove four of the current directors, who may presumably be doing a good job, and replace those board members with four new females. A voluntary pledge program would allow companies to avoid both of these issues.

Companies should be hiring more women. Companies should be promoting more women. More women should be effective and powerful members of the boards of the Fortune 500 in the United States. That being said, companies should be given the opportunity to make this decision on their own, with just a small nudge in the right direction. Let the companies derive shareholder and consumer goodwill from changing their hiring practices to conform to industry standards. If Ford signed onto a mandatory pledge and receives public praise, is there anyone that believes that General Motors would not sign onto that very same pledge? If a company like Google signed on, the ripple effect it would have in the tech space would be unfathomable.

Mandatory quotas in the United States will not lead to *truly* increased diversity on corporate boards. It is already an issue in the United States that a few women sit on many different boards as "trophy directors."[215] They are simply there to fill the role of increasing diversity for that company, but do not have any effective power for decision-making. To implement a mandatory quota runs a severe risk that any new female board members will be seen as "quota fillers" or met with outright resentment from the other board members.

A European View of US Law on Gender Equality

While the discussions on gender diversity in the EU are often mirrored by debates on established or newly introduced corporate governance codes, the overall picture across the Atlantic is actually different. On its roots, the gender gap in U.S. business boards remains with

[214] *See Wygant v. Jackson Bd. of Education*, 476 U.S. 267 (1986) (Declaring unconstitutional a school system's plan to lay off white teachers with more seniority instead of minority teachers with less seniority).
[215] Branson, *supra* note 2, at 3.

15.7 % of female board membership (compared to 16.6 % in the EU) one of the widest in the Anglo-Saxon countries.[216]

Moreover in the US the percentage of female representation in leadership positions changed from an already flattening figure to a mere stagnation since 2004, which is often explained by the financial crisis and its aftermaths.[217] In general the discussion's approach is also extremely different, as: "support for diversity [in the U.S.] has grown in principle, but progress has lagged in practice, and controversy has centered on whether and why diversity matters".[218] Therefore, it should be highlighted where the differences between the U.S. and the EU are rooting out, how the concrete state measures for gender equality are justified and applied in the country and in front of cultural-specific backgrounds.

Quota: Why It *Might* Not Fly in the US *That Easily*?

The primary differences between the EU and the U.S. concerning gender equality measures can be found in different fields, namely: specific U.S. law, an exceptional business culture and social structure of the country. All these differences come into account while discussing hard and invasive equality-laws, which are eminently embodied by a mandatory quota.

Some argue that quotas for female directors would be necessary in the U.S. to overcome structural impediments and to help women directors reach or exceed a critical mass.[219]

The Specific U.S. Law

In the U.S. the functioning and mere concept of a gender quota, seems as a: "cultural and legal oddity in the United States; a European transplant unlikely to take root [t]here"[220]. The main reason therefore is the fact that any quota system on the basis of sex violates the U.S. Constitution's Equal Protection Clause.[221] At the national level, the handling of business

[216] European Commission, Progress Report of the European Commission, 2012, 12.
[217] Branson, Research Paper No. 2011-05, 2011, 5.
[218] Fairfax, 89 N.C. L. Rev. 855, 2011, 867.

[219] See Kogut, Colomer & Belinky, Strategic Management Journal, 2014, 891.

[220] Alstott, Public Law Research Paper No. 489, 2013, 40.
[221] Rubio-Martin, American journal of comparative law, 2012, 121.

regulations in the U.S. is very exceptional and mirrors the neo-liberal attitude and basis of U.S. business law[222] as well as the overall political attitude to keep entrepreneur‘s backs “as free as is consistent with public order.”[223] This basis is also incorporated in state law, which sets limited boundaries for corporations, “in the service of economic efficiency.”[224] The general attitude denies any competence of the central state in this field.[225] Because of this liberal attitude, state corporate law in the U.S. is generally seen as an inappropriate way to introduce mandatory quotas, as it also affects the inner competition between the U.S. States.[226]

Business Culture Reasons

Even if a mandatory gender-quota could withstand the constitutional differences of U.S. law, the regulation itself would generally stand against the nation's laissez faire business ideology.[227] While the EU has a strong welfare state tradition since the end of World War II, enabling state interventions in the economy and employment regulations, the U.S. traditions do not offer these possibilities.[228] On the contrary the U.S. economy is strictly against any industrial policy or planning by a central state, while the isolated worker-units just offer a limited base for grass root-claims for gender-equality.[229] On a higher level, the discussions on gender equality in the U.S. mainly focus on the *why* and not on the *how* of women’s participation in corporate boards should be enhanced.[230] At the same time the discussions in the EU predominantly circle around the question of appropriateness of mechanisms to achieve this goal.[231]

But while the economic evidence in the U.S. discussion is predominant, some anticipate that even a clear positive correlation of higher company earnings through expanded women’s participation in boards would be proven, quotas would not be the tool of choice.[232] At first because the self-regulatory of companies’ conception is that “firms that would benefit from

[222] Alstott, Public Law Research Paper No. 489, 2013, 43.
[223] Branson, Research Paper No. 2011-05, 2011, 8.
[224] Easterbrook, 95 VA. L. REV., 2009, 685, 688.
[225] Easterbrook, 95 VA. L. REV., 2009, 688.
[226] Alstott, Public Law Research Paper No. 489, 2013, 49.
[227] Alstott, Public Law Research Paper No. 489, 2013, 40.
[228] Alstott, Public Law Research Paper No. 489, 2013, 40.
[229] Alstott, Public Law Research Paper No. 489, 2013, 40.
[230] Wallace, CNN, Dec. 11, 2013.
[231] Rhode, Packel, Delaware Journal of Corporate Law (DJCL), 2014, 416.
[232] Alstott, Public Law Research Paper No. 489, 2013, 44.

greater female representation on boards would already have done so."[233] Secondly, the U.S. concerns regarding invasive quota laws are also shared by individual employees[234], which fear to lose their credibility and stigmatization due to quota rules in the extremely competitive U.S. economy.[235] This might be a reason, why also *"a majority of American female directors are oppose quotas, even though they believe the strategy would be effective in increasing board diversity".*[236]

Obligating U.S. corporations to give information about recruitment and promotion would facilitate comparing their performance to similar institutes, and for stakeholders to hold poor performers accountable. The government could demand transparency of board recruitment forcing corporations to disclose if female candidates were considered or interviewed. An even stronger approach would be to encourage corporations to adopt a version of the "Rooney Rule," applicable to professional football. The National Football League (NFL) requires teams to pledge to include a minority candidate among the finalists for each coaching and general manager position and to conduct an on-site interview with that finalist.230 In the seven years after "the rule was adopted in 2003, the number of black head coaches in the NFL increased from 6% to 22%. Securities and Exchange Commissioner Luis Aguilar has suggested that "many corporate boards may need their own Rooney [R]ule ....

Social Differences

The specific historical background of the U.S. has its direct impact on local economic politics that leads directly to "impossibility".[237] Until today around 75% of corporate board seats are given to white men[238] while in 66% of the Fortune 500 companies no women of color holds a board seat at all.[239] Although the overall number of women and minorities on U.S. corporate boards grew in three decades from merely representation in 7% of corporate boards to 76% in 2014[240], the overall representation on boards remains rather low.[241] But not alone women of

[233] Alstott, Public Law Research Paper No. 489, 2013, 44.
[234] Rhode, Packel, Delaware Journal of Corporate Law (DJCL), 2014, 416.
[235] Rhode, Packel, Delaware Journal of Corporate Law (DJCL), 2014, 416.
[236] Rhode, Packel, Delaware Journal of Corporate Law (DJCL), 2014, 416.
[237] Rubio-Martin, American journal of comparative law, 2012, 119.
[238] The Alliance for the Alliance for Board Diversity, 2003, 2.
[239] Rhode, Packel, Delaware Journal of Corporate Law (DJCL), 2014, 380.
[240] Fairfax, St. John's Law Review, 2013, 1017.
[241] Calvert Investments, Examining the Cracks in the Ceiling, 2013, 19.

color have to struggle with social norms and strains, which keep them out of the top companies employments. Christian-fundamentalist communities, which are highly influential in some American states, are demanding a picture of women which is mainly or exclusively focused on the family care-work and not on carrier or individual fulfillment. [242]

This peer pressure on women in general could be the reason why in the U.S. quota laws are also highly contentious among those who are otherwise highly interested in women's equality, especially by feminists.[243] While this phenomenon is also known in Europe, the U.S. focus on labor-essentialism reinforces this quota obstacle.[244] The double-tracked quota discussions in Europe, based on positive economic assumptions and fundamental values, seem to be unique in this case.[245]

Conclusion: A Wrap-Up from the U.S. Perspective

The United States is already facing great pressure to change, as the percentage of females on corporate boards has stalled over the last few years in the United States.[246] If the government is set on implementing legislation to follow the trend in the EU, it needs to start with legislation that is modeled on the Rooney Rule. Force companies to put women at least in the position to get the job. The NFL did it, and teams have been surprised by the quality of the minority candidates they interviewed—so surprised that 14% more of the minorities were hired into head coaching positions than before the NFL implemented the rule.[247] If corporate boards are given the same set of ground rules for their hiring practices, they too will be surprised by the quality of the candidates they receive. The SEC's rules on disclosure were not strict enough and did not require companies to take any action. The rules are not specific to gender or racial diversity, and were admittedly "not intended to steer behavior."[248] Over 60 companies continue to fail to comply

[242] Rubio-Martin, American journal of comparative law, 2012, 120.
[243] Fraser, *Cahiers du Genre* 2/2005 (No 39), 10.
[244] Rubio-Martin, American journal of comparative law, 2012, 123.
[245] Rubio-Martin, American journal of comparative law, 2012, 123.
[246] Rebecca Shambaugh, *Should US Follow Europe's Lead for Gender Quotas on Boards?*, HUFFPOST BUSINESS (May 18, 2015), http://www.huffingtonpost.com/rebecca-shambaugh/should-us-follow-europes-_b_6885208.html.
[247] Branson, *supra* note 2, at 11.
[248] Bryce Covert, *American Companies Made No Progress In Gender Diversity On Boards For 8 Straight Years*, THINKPROGRESS.ORG (Dec. 10, 2013), http://thinkprogress.org/economy/2013/12/10/3042231/women-boards-progress/ (noting that the SEC rules on disclosure are vague and ineffective in steering corporate hiring behavior).

with the SEC disclosure rules.[249] Corporations need something that is stricter, more explicit, and actually works. Programs like the Rooney Rule will create change.

The only programs that can be effective in the United States are strong top-down policies that are implemented by the corporations themselves. The corporations must be open and willing to hire women, and create the right work environment at the board level to create effective change. Peter Grauer, leader of the U.S. chapter of the 30% club, which aims for higher female representation globally on FTSE-100 boards, notes that "a mandatory quota isn't the way to make [change] happen."[250] Barb Stinnett, one of the first female executives in the tech space in her role as director of worldwide sales for Hewlett-Packard, agrees with Grauer.[251] Both Stinnett and Grauer agree that there is a fear of "token hires" with respect to the implementation of a mandatory quota in the U.S.[252] No female board member wants to be seen as a token director, and no female board member wants her qualifications diminished because of the use of a mandatory quota.

The U.S. has women out there that are ready to take on these roles in companies and ready for the added responsibility. They want these jobs, they have worked hard for these jobs, and they are prepared to succeed as board members. Fortune 500 companies just need a voluntary program or small piece of legislation to give them the nudge to start opening their doors to these women, in order to break down long held stereotypes.[253] Bottom-up legislation requiring a set quota will not be effective—it will serve to setback any future female board members, who will be seen as "token hires" or "quota fillers." The United States' only option for affecting change is to take the admittedly slower, but more thorough route of top-down programs that force organizations to change from the top and from within, in order to create a work environment that will allow female executives to thrive and add value. The women are out there. The women are qualified and prepared. They can add value, but corporate America needs a push—or shove—in the right direction, so that it can take the first steps toward change on its own.

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[249] *Id*.
[250] Danielle Paquette, *Why American women hate board quotas*, THE WASHINGTON POST (Feb. 9, 2015), https://www.washingtonpost.com/news/on-leadership/wp/2015/02/09/why-american-women-hate-board-quotas/ (stating that "It's up to organizations and private companies—not the government—to incite change.").
[251] *Id*.
[252] *Id*.
[253] Devillard, Sancier-Sultan, & Werner, *supra* note 13.