

CONTRIBUTION TO THE EUROPEAN COMMISSION'S PUBLIC CONSULTATION ON 'GENDER IMBALANCE IN CORPORATE BOARDS IN THE EU'

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'Male domination is so rooted in our collective unconscious that we no longer even see it'
Pierre Bourdieu¹

Centre for Regional Policy Research and Cooperation 'Studiorum', Skopje-based think-tank, and a group of individuals submit this contribution to the public debate as opened by the European Commission in March 2012. This contribution looks at the issue of gender imbalance in corporate boards in the EU through the prism of international human rights law standards, applicable to EU Member States, and as complemented by EU law and other relevant European regional standards.

1. HOW EFFECTIVE IS SELF-REGULATION BY BUSINESSES TO ADDRESS THE ISSUE OF GENDER IMBALANCE IN CORPORATE BOARDS IN THE EU?

In her article "*The UN Global Compact and Substantive Equality for Women: revealing a 'well hidden' mandate*"² Maureen Kilgour states that '*to date no state has been able to achieve women's equality...despite being a well-established principle in international law and public policy*'³ and that '*even those states which have created specific agencies mandated to put women's issues front and centre have made little progress.*'⁴ Thus, if states are yet to promote gender equality, expectations for corporations doing so are remote. In fact, the little progress

¹ Bourdieu, Pierre, 'De la domination masculine'. *Le Monde Diplomatique* (October 1998). <<http://www.monde-diplomatique.fr/1998/08/BOURDIEU/10801>>. Last accessed: 26.05.2012

² Kilgour, M " *The UN Global Compact and Substantive Equality for Women: revealing a 'well hidden' mandate*"² Third World Quarterly, Vol. 28, No. 4, 2007. 751-773

³ *Ibid.* page 751

⁴ *Ibid.* See also: United Nations, "The Role of National Mechanisms in Promoting Gender Equality and the Empowerment of Women", 2004. <<http://www.un.org/womenwatch/daw/egm/nationalm2004/docs/EGM%20final%20report.26-jan-05.pdf>>. Last accessed: 27.05.2012

which has already been made in the number of women on EU company boards may stall or even be reversed if the issue is consigned to self-regulating company CSR policies as they rarely deal with the issue of gender equality.

It has been suggested that the reason for this is because women's inequality is so pervasive, and women so invisible, that the need to address women's inequality is not even recognised.⁵ However, The Global Compact has made a belated attempt to address gender inequality by introducing the Women's Empowerment Principles (WEP), in conjunction with UNIFEM in 2010, in an effort to bolster high-level corporate leadership for gender equality. Global Compact companies are invited to sign a CEO Statement of support for the WEP and so far over 400 companies have done so. Sub-titled *Equality Means Business*, the Principles offer guidance to companies on how to empower women in the workplace, marketplace and community and emphasize the business case for corporate action to promote gender equality.⁶ Specifically they call, *inter alia*, for companies to: establish high-level corporate leadership for gender equality; treat all women and men fairly at work - respecting and supporting human rights and non-discrimination; implement enterprise development, supply chain and marketing practices that empower women; and measure and publicly report on progress to achieve gender equality.⁷ However, The Global Compact is not '*a regulatory instrument, and therefore is unable to police or make accountable signatory firms which violate*'⁸ the WEP or its primary Ten Principles.

Further, whilst '*women-centred initiatives have on the whole remained relatively marginal in global governance*'⁹ there is one private sector initiative in the USA, the Calvert Women's Principles which provide the First Global Code of Corporate Conduct focused exclusively on empowering, advancing, and investing in women worldwide.¹⁰ Whilst this type of initiative is useful for demonstrating how CSR approaches can promote gender awareness¹¹ there is no enforcement mechanism attached. Further, most other CSR policies are silent on the issue of imbalances in board membership which Coleman suggests is due to the fact that the CSR 'industry' is male-dominated, which serves to overlook women's interests.¹²

By shifting global governance away from the state, as primary protector and promoter of human rights, to non-state actors such as corporations we risk creating an accountability gap into which gender equality will inevitably fall. This is because there is very little law regulating non-state actors on the supra-national level. Although, now there are UN Guiding Principles on Business and Human Rights which state that businesses should respect international human rights by avoiding infringing on the human rights of others and addressing adverse human rights impacts with which they are involved.¹³ At a minimum, the rights that they should respect are those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labour Organization's Declaration on Fundamental Principles and Rights at Work¹⁴ all of which refer to gender equality and non-discrimination.¹⁵ Not only do these Guiding Principles outline the duty on companies to respect human rights but they also outline the state

⁵ Kilgour. n.2 *supra*. 767

⁶ UN Global Compact, "Equality Means Business", 2009.

<http://www.unglobalcompact.org/Issues/human_rights/equality_means_business.html>. Last accessed: 27.05.2012

⁷ UN Global Compact, "Women Empowerment Principles", 2009. <http://www.unwomen.org/wp-content/uploads/2011/10/Women-s-Empowerment-Principles_en.pdf>. Last accessed: 27.05.2012

⁸ Kilgour. n.2 *supra*. 768

⁹ Scholte, J '*Globalization: A Critical Introduction*,' New York: Palgrave Macmillan, 2005. 339 per Kilgour. n2 *supra*. 764

¹⁰ Calvert Investments, "Calvert Women's Principles", 2004. <<http://www.calvert.com/womensPrinciples.html>>. Last accessed: 27.05.2012

¹¹ Kilgour. n.2 *supra*. 767

¹² Coleman, G '*Gender, power and post-structuralism in corporate citizenship: a personal perspective on theory and change*', Journal of Corporate Citizenship, 5, 2002. 21 per Kilgour. n.2 *supra*. 767

¹³ 'UN Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework': A/HRC/17/312011. Principle 11

¹⁴ *Ibid*. Principle 12

¹⁵ See ICCPR Arts, 2(1), 3, 26 and ICESCR Arts 2(2), 3, 7(a)(i), UDHR Art.2 and ILO C111 Discrimination (Employment and Occupation) Convention, 1958 Art 2.

responsibility to protect against human rights abuses within their territory and/or jurisdiction by third parties, including business enterprises.¹⁶ This requires them to '*enforce laws that are aimed at, or have the effect of, requiring business enterprises to respect human rights, and periodically to assess the adequacy of such laws and address any gaps.*'¹⁷ As such, there is a duty on EU Member States, now that they have identified accountability gaps in the regulation of corporate board membership, to address the issue of gender imbalance on EU company boards.

Of interest are the statistics provided in the European Commission's 2012 "*Women in economic decision-making in the EU: Progress report*" which identifies a slight increase in the number of women occupying board seats in the largest publicly listed companies in EU Member States: up from 8.5% in 2003 to 13.7% today.¹⁸ This increase may be a result of the enactment of legislative measures in France, the Netherlands, Italy and Belgium aimed at improving gender balance in company boards.¹⁹ If so, then this strongly suggests that regulation is needed if we are to see any improvement, no matter how small, in eliminating formal and substantive discrimination that prevents women from achieving full equality in the workplace.²⁰

We submit that since the marketplace has failed to adjust the gender imbalance on EU company boards, regulators must step in so that the human rights principles, which all EU Member States have signed up to (including the principles of equality and non-discrimination), can be protected, respected and fulfilled.

2. WHAT ADDITIONAL ACTION (SELF-REGULATORY/REGULATORY) SHOULD BE TAKEN TO ADDRESS THE ISSUE OF GENDER IMBALANCE IN CORPORATE BOARDS IN THE EU?

The European Commission's '*Women in economic decision-making in the EU: Progress report*' together with European Court of Justice case law clearly conclude that equality of opportunity sometimes necessitates giving preference to women candidates, as a means of counteracting prejudicial effects.²¹ The UN human rights treaty bodies agree, stating in their General Comments pertaining to non-discrimination that positive action is permissible and often required to accelerate *de facto* equality between men and women.²²

However, they do not specify what these positive measures should be, thus there is room to consider all possible alternatives. For example, measures can include the enactment of legal instruments or the implementation of strategic documents, or both:

- Legal acts: amending existing, or adopting new legal acts, prescribing quotas for addressing the gender imbalance, including transitory provisions for reaching the quotas; compulsory adoption of statutory documents ensuring the implementation of the provisions on the quotas, including the establishment of internal monitoring mechanisms, as well as compulsory adoption of data collection strategies; and

¹⁶ UN Guiding Principles on Business and Human Rights. n.13 *supra*. Principle 1

¹⁷ *Ibid.* Principle 3(a)

¹⁸ European Commission, "*Women in economic decision-making in the EU: Progress report*", 2012.

http://ec.europa.eu/justice/newsroom/gender-equality/opinion/files/120528/women_on_board_progress_report_en.pdf. Last accessed: 27.05.2012. p.10

¹⁹ *Ibid.* page 5

²⁰ See CESCR's General Comment No.20 on *Non-discrimination in economic, social and cultural rights* (E/C.12/GC/20, 2009) which states in para. 8 that eliminating formal discrimination requires states to ensure that its constitution, laws and policy documents do not discriminate on prohibited grounds whilst the elimination of substantive discrimination requires state parties to immediately adopt the necessary measures to prevent, diminish and eliminate the conditions and attitudes which cause or perpetuate substantive or *de facto* discrimination in practice.

²¹ See for example, *Marschall v Land Nordrhein-Westfalen*, paras.29,35

²² Convention on Elimination of Discrimination Against Women, Art.4(1). CESCR, General Comment No.20. HRC, General Comment No.18.

- Strategic documents: recommending companies adopt charters, governance codes, or other voluntary initiatives to complement the regulatory legal actions (to allow companies a sense of ownership in the process). However, state-owned enterprises must be compelled to adopt strategic documents.

In either case, enforcement safeguards must be put in place to ensure compliance with any proposed measures, for example sanctions for non-compliant companies following the EU pattern of being effective, proportionate and dissuasive²³ with a real deterrent effect on the employers²⁴ (for more details on sanctions, please see our answer to Question 7 below).

3. IN YOUR VIEW, WOULD AN INCREASED PRESENCE OF WOMEN ON COMPANY BOARDS BRING ECONOMIC BENEFITS, AND WHICH ONES?

Widespread evidence showing that women are underrepresented on boards is coupled with arguments that an increased presence of women on company boards may bring many economic benefits. Some of the arguments include: improved company performance in terms of strong organization skills, better financial performance than rival companies, better management and controlling of risks, greater creativity and motivation, improved quality of corporate governance and ethical behaviour, better use of the talent pool of Europe's female graduates,²⁵ better reflection of the needs of the markets,²⁶ unique attention to detail not seen on all male boards, which are often "criticized for having similar board members, with similar backgrounds, education and networks, [and resulting in a] 'group-think' [thus limiting] the diversity of opinions and perspectives",²⁷ etc.

Arguments have also been raised pertaining to the general tendencies of men and women, claiming that when it came to interest rates, men may be "more risk-loving and overconfident",²⁸ attributable to biological factors, such as increased testosterone levels, which ultimately leads to the conclusion that the inclusion of women on a team would balance out risk behaviours and provide for greater stability and predictability.²⁹

In addition, studies have shown that where governance is weak, female directors exercise strong oversight, and can have a "positive, value-relevant impact" on the company, paying more attention to managing and controlling risk.³⁰ According to a study by the Leeds University Business School, "having at least one female director on the board appears to cut a company's chances of going bust by 20% and that having two or three female directors lowers the chances of bankruptcy even further."³¹

Research has also shown that strong stock market growth among European companies is most likely to occur where there is a higher proportion of women in senior management teams.³² According to a study carried out by McKinsey and Company, companies with the most gender-diverse management teams had a 17 percentage-point higher stock price growth between 2005

²³ See for example the Race Equality Directive, Recital 26 and Article 15

²⁴ See 1984 ECJ *Harz* case, para.23

²⁵ European Commission Report.n.18. *supra*.

²⁶ O'Donnell, S. and Kennedy S., *Women Controlling Consumer Spending Sparse Among Central Bankers*, Bloomberg, Jul 25, 2011, <<http://www.bloomberg.com/news/2011-07-24/women-controlling-70-of-consumer-spending-sparse-in-central-bankers-club.html>>. Last accessed: 27.05.2012. para.2

²⁷ Lord Davies, *Women on boards*, 24 February 2011, <<http://www.bis.gov.uk/assets/biscore/business-law/docs/w/11-745-women-on-boards.pdf>>. 12

²⁸ O'Donnell and Kennedy.n.26. *supra*. para.13

²⁹ *Ibid*. para.14

³⁰ Lord Davies.n.27. *supra*. 9

³¹ *Ibid*.

³² *Ibid*.7

and 2007 compared to the industry average.³³ This study also noted that companies that had the best financial performance also had higher proportions of women on management committees thus highlighting the economic benefit of having women on company boards.³⁴ A study carried out by the US research body, Catalyst, demonstrated similar results, showing an 83 per cent average return on equity, 73 per cent higher return on sales and 112 per cent higher return on invested capital.³⁵ Companies with more women on their boards were also found to outperform their rivals with 42% higher return in sales, 66% higher return on invested capital and 53% higher return on equity.³⁶ However, both McKinsey and Company and Catalyst note that these correlations do not imply that women in senior positions cause superior financial performance, rather that their studies identify changes in behaviour and environment when gender balance is improved, which contributes to the positive results.³⁷

A Canadian study entitled 'Not just the right thing, but the bright thing', looking at public, not-for-profit and private boards, found that boards with three or more women on them showed better corporate governance behaviours compared to those with all-male boards.³⁸ The more gender-balanced boards were the more likely they were to "identify criteria for measuring strategy, monitor its implementation, follow conflict of interest guidelines and adhere to a code of conduct,"³⁹ as well as offer closer monitoring of board accountability and authority.⁴⁰ These issues of greater corporate governance and greater accountability can reduce the number of illegal practices and scandals from occurring, which negatively impact economic growth.⁴¹

Furthermore, gender diversity can also be perceived as "an asset for the corporate image, as well as helping to bring the company, its employees, its shareholders and its customers closer together."⁴² Gender diversity programs also have positive impacts on employee motivation⁴³ and 69% of the companies surveyed noted an improvement in their brand image.⁴⁴ In addition, capital markets and investors are paying more attention to corporate performance in terms of gender diversity, using it as an indicator among their investment criteria. Furthermore, rating agencies are also developing tools to measure gender diversity.⁴⁵

On the global scale, a recent report carried out by the ILO declared that "the Asia and Pacific region is losing 42 billion USD to 47 billion USD annually because of women's limited access to employment opportunities."⁴⁶ As such, by way of analogy we submit that EU companies must also be losing revenue due to the low representation of women on boards. For this reason increasing women's participation in company boards in the EU can potentially increase revenue, but also keep the EU ahead of its competitors in the Asia and Pacific region, who are losing billions per year and are much farther behind the EU on this issue. Furthermore, by 2040 there is an anticipated shortfall in the active workforce of 24 million people, which will slow down economic

³³ McKinsey and Company, *Women matter: gender, diversity, a corporate performance driver*, 2007, <http://www.mckinsey.de/downloads/publikation/women_matter/Women_Matter_1_brochure.pdf>. Last accessed: 27.05.2012. 14

³⁴ *Ibid.*

³⁵ Maitland, A., *Top women tip the scales*, Financial Times, October 11, 2007, <http://www.mckinsey.com/locations/paris/home/womenmatter/pdfs/Press_Clippling_Women.pdf>. Last accessed: 27.05.2012. para. 4

³⁶ Lord Davies.n.27. *supra*. 7

³⁷ *Ibid.* 6

³⁸ *Ibid.* 10

³⁹ *Ibid.*

⁴⁰ *Ibid.*

⁴¹ *Ibid.* 10-12.

⁴² McKinsey and Company.n.33. *supra*. 10

⁴³ *Ibid.* 10-11

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*

⁴⁶ International Labour Organization and Asian Development Bank, *Window of opportunity for Asia to improve gender equality at work*, 2011, <http://www.ilo.org/asia/info/public/pr/WCMS_154852/lang--en/index.htm>. Last accessed: 27.05.2012

growth.⁴⁷ However, according to a study carried out by McKinsey, if women are equally employed and integrated into the market now it will reduce this predicted shortage to only 3 million.⁴⁸

Women have become the new majority in the highly qualified talent pool, and account for approximately six out of every ten university graduates in Europe and the USA.⁴⁹ Failing to maximize on the talents of all people in any business or economy will result in below par performance, and puts its corporate competitiveness at stake.⁵⁰ Therefore, employing women on boards will bring about economic benefits by fulfilling a need in the market for people in the active work force, making use of Europe's female talent pool, and permit steady economic growth, which would otherwise not be possible, due to the lack of skilled workers.

Lastly, failure to provide women with equal employment opportunities violates obligations under international human rights law.⁵¹ Unequal numbers of men to women on company boards can imply indirect discrimination based on sex, which is impermissible under international law.⁵² Furthermore States are required to move as expeditiously as possible to comply with equal opportunities in employment, including board positions, in order to achieve *de facto* equality.⁵³

4. WHICH OBJECTIVES (E.G. 20%, 30%, 40%, 60%) SHOULD BE DEFINED FOR THE SHARE OF THE UNDERREPRESENTED SEX ON COMPANY BOARDS AND FOR WHICH TIMEFRAME? SHOULD THESE OBJECTIVES BE BINDING OR A RECOMMENDATION? WHY?

Provisions prescribing binding objectives of representation of the underrepresented sex on company boards in the form of quotas should be defined, and should be gradually increased within a defined timeframe. This will make the pace and the measuring of the progress more realistic and tangible, and should be coupled with obligations for data collection on promoting equality between the sexes. The impact which quotas can make has been illustrated already through the improvements in political participation of women following the adoption of quotas.

Following the adoption of the Europe 2020 strategy, several EU countries introduced fully fledged quota legislation for company boards that include sanctions. Changes in France show that these measures can yield positive results.⁵⁴ Other countries show similar experiences (see our response to Question 1 above). Further examples showing the improvement in gender balance on boards following the introduction of quotas also exist outside the EU. For example, in 2010 the Australian Stock Exchange issued a set of guidelines on female board representation. Companies that failed to comply were required to explain the shortcomings to shareholders in their annual reports. In this period, 25 per cent of new board appointments were women - up from the 10 per cent that it had been for the past decade.⁵⁵

⁴⁷ McKinsey and Company.n.33. *supra*. 10

⁴⁸ *Ibid*.

⁴⁹ Lord Davies.n.27. *supra*. 9

⁵⁰ *Ibid*.

⁵¹ Convention on the Elimination of All Forms of Discrimination against Women, article 11(b), provides that women have equal rights to the same employment opportunities.

⁵² According to the International Covenant on Economic, Social and Cultural Rights (ICESCR), article 2(1), states are required to use maximum available resources, with a view to progressively achieve the full realization of the rights recognized in the Covenant, including non-discrimination on the basis of sex and equal opportunity in the workplace, which can be achieved through the adoption of legislative measures. Furthermore, article 2(2) of this Covenant declares that no rights enunciated in the covenant may be exercised with discrimination of any kind, including sex.

⁵³ CESCR, General Comment 3, para. 9.

⁵⁴ For more details, please see: European Commission Report.n.18. *supra*.13

⁵⁵ Knight, Elizabeth, "Business boys' club won't change without a push". <<http://www.smh.com.au/opinion/society-and-culture/business-boys-club-wont-change-without-a-push-20110308-1blwd.html#ixzz1vtnw9Bas>>. Last accessed: 28.05.2012

With regards to the present issue, a percentage of 30% for an initial period of four years, with an increase of 10% in the subsequent two year period seems to be a realistic target. For companies which already have a 30% representation of both sexes on boards, the subsequent 40% target should apply. Additional guarantees for non-retrogression should be put in place.

These objectives need to be binding. As pointed out in the European Commission's '*Women in economic decision-making in the EU: Progress report*', practice has shown that only binding objectives manage to produce real changes and results.

5. WHICH COMPANIES (E.G. PUBLICLY LISTED / FROM A CERTAIN SIZE) SHOULD BE COVERED BY SUCH AN INITIATIVE?

The 2011 European Commission report on '*Minimising regulatory burden for Small and medium-sized enterprises (SMEs): Adapting EU regulation to the needs of micro-enterprises*' states that SMEs account for 99 % of EU enterprises, of which 92 % are micro-enterprises⁵⁶ (an enterprise with less than 10 employees and an annual turnover of €2 million or less).⁵⁷ As such, any measure aiming at correcting the gender imbalance on EU company boards that only applied to large publicly listed companies, would have little effect on the promotion of substantive gender equality in the EU. Thus, it is recommended that the suggested initiative cover all companies, publicly listed or otherwise, including SMEs and micro-enterprises.

Further, the EU practice of exempting SMEs and micro-enterprises from compliance with certain administrative burdens does not apply to their obligations to adhere to overall public policy objectives including regulations seeking to empower women.⁵⁸ In fact, any suggestion that these entities should be excused from appointing women to their boards presupposes that the equal (or near to equal) presence of women in positions of power is a burden on smaller operators with the propensity to produce broader negative repercussions which could outweigh any benefits. Such thinking undermines all the Commission's research into the economic and social benefits of having women on company boards. Further there is a contradiction in the EU's "*Small Business Act*" for Europe which applies the "Think Small First" policy whereby the Commission, when considering the impact of new regulations on SMEs and micro-enterprises, must first exclude micro-entities from the scope of the proposed legislation unless the proportionality of their being covered can be demonstrated.⁵⁹ The contradiction is that the same Act also requires EU and Member States to create an environment within which entrepreneurial interest and talent among women is fostered. The European network to promote women's entrepreneurship (WES) also promotes this goal by supporting initiatives to increase the size (scale) of existing women run businesses.⁶⁰

Further, the UN Guiding Principles on Business and Human Rights state that '*the responsibility of business enterprises to respect human rights applies to all enterprises regardless of their size, sector, operational context, ownership and structure*;⁶¹ human rights including the principles of gender equality and non-discrimination. However, the Principles do realise that SMEs may have less capacity as well as more informal processes and management structures than larger

⁵⁶ Report from the Commission to the Council and the European Parliament: *Minimizing regulatory burden for SMEs: Adapting EU regulation to the needs of micro-enterprises*, COM(2011) 803 final:
<http://ec.europa.eu/governance/better_regulation/documents/minimizing_burden_sme_EN.pdf >. Last accessed: 27.05.2012

⁵⁷ http://ec.europa.eu/enterprise/policies/sme/facts-figures-analysis/sme-definition/index_en.htm

⁵⁸ European Commission Report. n.18. *supra*. 10

⁵⁹ *Ibid.*

⁶⁰ Europa Website, "Small and Medium-Sized Enterprises (SMEs)".

http://ec.europa.eu/enterprise/policies/sme/index_en.htm. Last accessed 25.05.2012

⁶¹ UN Guiding Principles on Business and Human Rights. n.13. *supra*. Principle 14.

companies, so their respective policies and processes will take on different forms.⁶² As such, the EC could consider some concessions such as extended transition periods for SMEs and micro-enterprises, but full exemption from regulations seeking to empower women would not be in keeping with EU laws and policy.

6. WHICH BOARDS/BOARD MEMBERS (EXECUTIVE / NON-EXECUTIVE) SHOULD BE COVERED BY SUCH AN INITIATIVE?

It is recommended that all boards, whether they be corporate boards or boards of other organisations including boards of governors, boards of trustees, and boards of visitors, be subject to the proposed legislation. We also submit that the gender balance apply to both executive and non-executive board members in line with Principle 2 of the Global Compact's Women's Empowerment Principles which states that equal opportunity and inclusion should extend across all areas of governance and decision-making in an organization. This means that gender-sensitive recruitment and retention practices should be implemented across the spectrum of board appointees so that women are proactively recruited and appointed to managerial and executive positions and to the corporate board of directors.⁶³ Gender balance within executive and non-executive board positions is an objective which is reiterated in Calvert Investment's Global Code of Corporate Conduct: the Calvert Women's Principles.⁶⁴ They state that to attain gender equality in all areas of management and governance, corporations must take proactive efforts to recruit and appoint women to both managerial positions and to the corporate board of directors.⁶⁵

One of the specific concerns with the appointment of non-executive, outside directors, to boards is that individual directors often serve on more than one board, resulting in a sort of 'closed-shop' whereby only a relatively small number of individuals have significant influence over a large number of important EU entities. Initiatives that encourage gender equality within these appointments can only serve to broaden the range of expertise for companies in the EU, bringing with them fresh ideas to what could otherwise become rather stagnated forums.

7. SHOULD THERE BE ANY SANCTIONS APPLIED TO COMPANIES WHICH DO NOT MEET THE OBJECTIVES? SHOULD THERE BE ANY EXCEPTION FOR NOT REACHING THE OBJECTIVES?

Many international and regional human rights instruments recognize the importance of equality and non-discrimination between men and women as a core human rights value, including the EU Charter of Fundamental Rights (see Article 23). Moreover, the UN Guiding Principles on Business and Human Rights stress the importance of remedies for effective redress for business-related human rights violations. These include punitive sanctions, as well as injunctions and guarantees of non-repetition.⁶⁶ Following from this, it is recommended that sanctions are prescribed for companies which fail to promote gender balance on their boards, drawing from, *inter alia*, international human rights law.

It is recommended that any prescribed sanctions on this issue follow the EU pattern of sanctions for discrimination cases. This means that the sanctions prescribed need to be effective, proportionate and dissuasive (see, for example, the Race Equality Directive, Recital 26 and Article 15), and must have real deterrent effect on the employers (see, for example, the 1984 ECJ *Harz* case, para.23).

⁶² *Ibid.*

⁶³ UN Global Compact, "Women Empowerment Principles" .n.7. *supra.* 4

⁶⁴ Calvert Investments, "Calvert Women's Principles" .n.10. *supra.* 4

⁶⁵ *Ibid.*

⁶⁶ UN Guiding Principles on Business and Human Rights. n. 13. *supra.* 22

However, one needs to also undergo an exercise of identification of any competing interests between various stakeholders and the legitimate comparison of the weight of those interests.⁶⁷ When discussing the present issue, one must consider that SMEs represent 99% of businesses in the EU and are a key driver for economic growth⁶⁸ and that the EU often exempts SMEs and micro-enterprises from compliance with certain administrative burdens. As a result, we submit that rather than imposing sanctions on these smaller entities (as should apply to larger corporations), tax benefits could be offered to those compliant smaller companies instead.

Some exceptions could also be factored into the regime of sanctions for larger corporations if, in exceptional circumstances, a company's future existence is at stake. However, in this situation alternative remedies including injunctions and guarantees of non-repetition can be considered.

Each situation should be subject to very strict judicial or administrative scrutiny and corporations should not rely on these exceptions as an excuse to violate the fundamental principle of equality between men and women. In sum, we submit that the existence of effective remedies, including a regime of sanctions for infringement and tax benefits for adherence, are integral to the success of the whole initiative.

⁶⁷ Russell, Irma S., *The Logic of Legal Remedies and the Relative Weight of Norms: Assessing the Public Interest in the Tort Reform Debate* (October 24, 2007). University of Tulsa Legal Studies Research Paper No. 2007-08.

⁶⁸ Europa Website.n.60. *supra*.