

# Listed Companies' Engagement with Diversity: A Multi-Jurisdictional Study of Annual Report Disclosures

Law Working Paper N° 221/2013

August 2013

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## Abstract

The paper reports the findings of a multi-jurisdictional study on companies' reporting of diversity practices at board level and below. It involved a review of the 2009, 2010 and 2011 annual reports of listed companies in Australia, Belgium, Norway, Spain and the UK. Some of the questions addressed in this research are: Are companies reporting the existence of corporate diversity policies in their annual reports to shareholders? How do companies define diversity? What reported evidence is there of real promotion of diversity as opposed to tokenism? How do different countries compare in their progress and reporting styles in their annual reports? Is there a difference in reported engagement between jurisdictions with mandatory gender quotas and disclosure requirements and those like Ireland and the UK with "comply or explain" rules?" Our research on board composition indicates that a mandatory quota system is more efficient in increasing female representation at board level but that non-binding quotas and diversity reporting requirements lead to progress albeit at a slower pace. Even where women are appointed to boards, there is a noted delay in appointing them to the committee chair level. Statistics concerning gender in middle and senior management are limited. In terms of defining diversity, our research indicates that gender is the most common criteria referred to in all jurisdictions. Other aspects commonly referred to are age, disability and experience. While the existence of diversity policies is commonly reported, this tends to be rather general and imprecise. The majority of companies in the UK, Norway and Belgium do not explain their rationale for reporting diversity although this situation is improving in the UK with the "business case" being cited. In terms of addressing the pipeline issue, our research indicates that in all countries reviewed disclosure of diversity policies in respect of recruitment and promotion is increasing though the figures are not high. In Australia, the UK and Spain, reporting of mentoring and work-life balance policies is also increasing. Networks such as the UK's Women on Boards are also important to actual and aspiring board members.

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Keywords: Diversity, board of directors, corporate governance, gender balance, quotas, comply or explain, hard law, soft law, non-executive directors, annual reports, stakeholders, corporate social responsibility, Action Plan on European Company Law and Corporate Governance, non-executive directors, pipeline

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# CHAPTER 1 POLICY BACKGROUND AND RESEARCH FOCUS

## A. INTRODUCTION

The collection of statistics concerning female representation on boards of listed companies is common.<sup>1</sup> Diversity on corporate boards within the EU is strikingly low and does not reflect demographics or labour market availability. This research project funded by the Irish Department of Jobs, Enterprise and Innovation with data collection undertaken between 1 October 2012 and 10 December 2012 involved a comparative study on board diversity with both qualitative and quantitative elements. Data was collected on underlying qualitative indicators of companies' responsiveness to the diversity agenda as self-reported. This necessarily involved going beyond the trend for looking at diversity, particularly gender diversity which is the most easily measured form, in terms of percentages and targets at board level. The research based on analysis of data collected is on-going and this report presents some of the most salient findings to date.

The main focus of this report is not on the debate on the need for diversity, which has been well-canvassed in the literature and at policy level, but rather on a comparative study of practices in five countries in order to identify listed companies' progress on diversity and the incidence of indicators of a drilled-down working diversity policy from companies' corporate governance disclosures and other statements in their annual reports. Companies' annual reports serve as a transparency tool in relation to corporate governance, corporate performance and company ethos and policies. An annual report conveys certain impressions to the investor community and other stakeholders, therefore it is not surprising that companies are concerned with optics and

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<sup>1</sup> See eg European Commission, *Women in Economic Decision-making in the EU: Progress Report* (2012); Egon Zehnder International, *European Board Diversity Analysis 2012* (2012); Cranfield School of Management, *The Female FTSE Board Report 2013: False Dawn of Progress for Women on Boards* (2013).



‘impression management’ as well as with reporting corporate performance.<sup>2</sup> Consequently, as well as collecting board composition data relating to gender diversity, this study was concerned with examining the impressions that listed companies provide in relation to their engagement with diversity at board level and throughout the company.

Board diversity may confer direct and indirect benefits to companies as a result of board composition reflecting the demographic characteristics of key stakeholder groups such as customers, employees and investors.<sup>3</sup> A study has found a positive correlation between women on the board and firms’ corporate social responsibility ratings or ‘social capital’ and corporate reputation.<sup>4</sup> It is therefore not surprising that firms embracing diversity clearly see value in making it known.<sup>5</sup> An analysis of the annual reports of Fortune 500 companies revealed that companies with higher percentages of female directors are more likely to display pictures of them in their annual reports.<sup>6</sup>

Our study of annual reports of companies in five countries reveals a high degree of referencing of diversity in terms of corporate ethos and practices. However, to operate effectively, corporate diversity policies need to extend beyond ticking a box in relation to board composition to embody genuine engagement in the form of active company-wide policy initiatives. The importance of real engagement with the diversity issue is underpinned in the EU’s 2011 Green Paper on Corporate Governance when it states:

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<sup>2</sup> Impression management by means of annual report is a well-known feature of corporate social responsibility disclosures. See *eg* D. Neu, H. Warsame and K. Pedwell, “Managing Public Impressions: Environmental Disclosures in Annual Reports” (1998) 23 *Accounting, Organisations and Society* 265.

<sup>3</sup> S. Brammer, A. Millington and S. Pavelin, “Gender and Ethnic Diversity among UK Corporate Boards” (2007) 15 *Corporate Governance: An International Review* 393, 395; S.L. Gillan and L.T. Starks, “Corporate Governance Proposals and Shareholder Activism: The Role of Institutional Investors” (2000) 57 *Journal of Financial Economics* 275.

<sup>4</sup> S. Bear, N. Rahman, and C. Post, “The Impact of Board Diversity and Gender Composition on Corporate Social Responsibility and Firm Reputation” (2010) 97 *Journal of Business Ethics* 207.

<sup>5</sup> V.K. Pandey, K.J. Shanahan and S.W. Hansen, “The Relationship between Shareholder Wealth Effects, Diversity and Publicity as a Marketing Strategy” (2005) 33(4) *Journal of the Academy of Marketing Science* 423 (favourable stock price reaction to firms publicising their inclusion on the Fortune diversity elite list).

<sup>6</sup> R.A. Bernardi, D.F. Bean and K.M. Weippert, “Signaling Gender Diversity through Annual Report Pictures: A research note on image management” (2002) 15 *Accounting, Auditing and Accountability Journal* 609.

“The introduction of measures such as quotas or targets to ensure gender balance in boards ... is not sufficient if companies do not adopt diversity policies that contribute to work life balance for women and men and encourage notably (*sic*) the mentoring, networking and adequate training for management positions that are essential for women wanting to follow a career path that leads to eligibility for board positions. While it should be for companies to decide whether they introduce such a diversity policy, boards should at least be required to consider the matter and disclose the decisions that they have taken.”<sup>7</sup>

Consequently, a key objective of this study was to look behind the headline statistics concerning gender representation on boards with a view to exploring what evidence there is of companies self-reporting the embedding of pro-diversity measures to support the sourcing and growing of talent, for example, mentoring schemes, appointment practices and the setting of measurable voluntary targets in relation to nomination and appointment practices.

## **B. THE ‘HARD LAW’ VERSUS ‘SOFT LAW’ DEBATE**

While the case for gender diversity is now broadly accepted, what academic commentators, industry and policy-makers differ on is the appropriate method of signalling to companies that this is a goal worth striving for. Countries have variously opted for hard law quotas (for example, Norway’s law of 2003 and Belgium’s 2011 quota law), ‘comply or explain’ corporate governance code requirements (for example, in the UK, Spain and Australia), or have left this as a voluntary matter for companies.

There is clear empirical evidence that a quota system works, with Norway being the prime exemplar as a country with a well-established gender representation law. This is borne out by cross-country comparison of the board composition data in Chapter 2 where every country studied trailed far behind Norway. Nonetheless, the position is more nuanced than it may seem. It would appear that a sizeable number of public companies that were listed on the Oslo Stock Exchange have re-registered as private companies and this may be attributable to a desire to

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<sup>7</sup> European Commission, *The EU Corporate Governance Framework* COM(2011) 164 final 5.4.2011 at 7.

avoid the quota law and its harsh sanctions for non-compliance.<sup>8</sup> Furthermore, while there is broad consensus in relation to the need for board diversity, particularly gender diversity, the imposition of a mandatory quota as a tool to achieve this end is controversial because it is a blunt instrument which may impinge on the ability of companies to make decisions in relation to appointments based purely on the needs of the business.

The introduction in the UK of the flexible ‘comply or explain’ approach to corporate governance as a non-statutory model was founded on the belief that “statutory measures would impose a minimum standard and there would be a greater risk of boards complying with the letter, rather than with the spirit, of their requirements”.<sup>9</sup> The legitimacy of the Code rested on the well-founded expectation that shareholder pressure would be sufficient to ensure its widespread adoption.<sup>10</sup> Subsequent reports did not tinker with ‘comply or explain’ and instead it became replicated around the globe as other countries emulated the UK’s approach. In its 2009 review of the Combined Code, the Financial Reporting Council confirmed that the flexibility offered by a code remained preferable to a more prescriptive framework<sup>11</sup> and this was confirmed in the latest incarnations of the code, the UK Corporate Governance Code of 2010 and 2012.

It cannot be ignored that the ‘comply or explain’ approach is widely supported by regulators, companies, and investors. Surveys among companies and investors show most of them consider a “comply or explain” approach as an appropriate tool in corporate governance, with its main advantage being its flexibility, allowing companies to adapt their corporate governance practice to their specific situation.<sup>12</sup> In relation to soft law corporate governance provisions concerning diversity, depending in part on the level of specificity with which the issue is dealt with in the code, the flexibility of a ‘comply or explain’ approach may mean that a company will overtly express a commitment to diversity which is expressed in generic terms and which does not

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<sup>8</sup> L. Linnainmaa and A. Horttainen, *The Glass Ceiling is Cracking: Self-Regulation Beats Quotas* (Finland Chamber of Commerce, 2012), p.16.

<sup>9</sup> *Report of the Committee on the Financial Aspects of Corporate Governance* (Cadbury Report) (London, Gee & Co., 1992), para. 1.10.

<sup>10</sup> *Ibid.*

<sup>11</sup> Financial Reporting Council, *2009 Review of the Combined Code: Final Report* (2009), p.2.

<sup>12</sup> European Commission, *The EU Corporate Governance Framework* COM(2011) 164 final 5.4.2011, p.18.

display the hallmarks of a genuine continuing engagement with the complexities of the issue or the embracement of express targets.

That the ‘comply or explain’ approach is not without problems was acknowledged by the European Commission in its announcement of an initiative to improve corporate disclosures.<sup>13</sup> Brief, generic and non-specific explanations militate against any meaningful evaluation of the significance of departure from the code.<sup>14</sup> In the UK, Arcot and Bruno’s empirical study of 245 non-financial companies for the period 1998-2004 uncovered a common practice of providing standard and uninformative explanations for non-compliance which they suggest may point up issues relating to monitoring and enforcement.<sup>15</sup> Indeed the European Commission Green Paper *the EU Corporate Governance Framework* quotes a recent study showed the informative quality of explanations published by companies departing from the corporate governance code’s recommendation is – in the majority of cases – not satisfactory and that in many Member States there is insufficient monitoring of the application of the codes.<sup>16</sup>

## **C. RECENT EU DEVELOPMENTS**

### ***(1) Policy Background***

Board diversity is now a key policy issue for the European Union. In the Commission’s 2011 Green Paper on corporate governance it was stated that “[d]iversity in [board] members’ profiles and backgrounds gives the board a range of values, views and sets of competencies.”<sup>17</sup> The discussion on board composition clearly endorses diversity in the selection of non-executive board members and also raises distinct issues in relation to how diversity should be defined.

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<sup>13</sup> European Commission, *Action Plan: European Company Law and Corporate Governance - a modern legal framework for more engaged shareholders and sustainable companies* COM(2012) 740/2.

<sup>14</sup> See *eg* M.T. Moore, “Whispering Sweet Nothings: The Limitations of Informal Conformance in UK Corporate Governance” (2009) 9(1) *Journal of Corporate Law Studies* 95.

<sup>15</sup> S. Arcot and V. Bruno, “In Letter but Not in Spirit, An Analysis of Corporate Governance in the UK” SSRN Working Paper Series last revised 23 June 2006. See also I. MacNeil and X. Li, “‘Comply or Explain’: market discipline and non-compliance with the Combined Code” (2006) 14 *Corporate Governance: An International Review* 486, 489.

<sup>16</sup> RiskMetrics Group, *Study on Monitoring and Enforcement Practices in Corporate Governance in Member States* (2009).

<sup>17</sup> European Commission, *The EU Corporate Governance Framework* COM(2011) 164 final 5.4.2011, p.5.

The Green Paper raised the question of whether companies should be required to ensure a better gender balance on boards and how this might be done but it also put forward for consideration whether companies should have to disclose whether they have a diversity policy, summarise the content and objectives of such a policy and report on progress achieved against objectives set.

In the context of the European Commission's *Strategy for Equality between Women and Men*,<sup>18</sup> Justice Commissioner Viviane Reding requested that companies voluntarily pledge to have a minimum of 30% female board members by 2015 and 40% by 2020. However, one year later only 24 companies had signed the pledge.<sup>19</sup> Following the Progress Report, *Women in Economic Decision-making in the EU 2011*,<sup>20</sup> DG Justice launched a consultation which sought views on the introduction of recommended or binding quotas to improve gender balance in boards.<sup>21</sup> However, there was strong opposition from a number of Member States to Commissioner Reding's proposals for European legislation to introduce binding quotas.

In the EU, there has long been a sense of growing impatience with the level of diversity in decision-making. In January 2012, women occupied on average just 13.7% of board seats on the largest publicly listed companies in EU Member States.<sup>22</sup> In its 2012 report, *Women in Economic Decision Making in the EU*,<sup>23</sup> the European Commission linked progress made between 2010 and 2012 to intense public debate initiated by the Commission and the European Parliament's calls for action, which were followed in some Member States by concrete steps to accelerate the pace of change. However, significantly the Commission concluded that

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<sup>18</sup> European Commission, *Strategy for Equality between Women and Men 2010-2015* (2010).

<sup>19</sup> Europa Press Release IP/12/1205, "Women on Boards: Commission Proposes 40% Objective", 14 November 2012.

<sup>20</sup> European Commission, *Women in Economic Decision Making in the EU 2011* (2012).

<sup>21</sup> European Commission, *Consultation on Gender Imbalance in Corporate Boards in the EU* (2012).

<sup>22</sup> European Commission, *Women in Economic Decision Making in the EU 2012* (2012) (Fig 1). Available at [http://ec.europa.eu/justice/gender-equality/files/women-on-boards\\_en.pdf](http://ec.europa.eu/justice/gender-equality/files/women-on-boards_en.pdf).

<sup>23</sup> *Ibid.*

“progress continues to be very limited and the overall trend does not show significant improvement... at the same pace as recent years, it would take more than 40 years to achieve gender balanced boards (at least 40% of both sexes).”<sup>24</sup>

In its *Action Plan on European Company Law and Corporate Governance* published on 12 December 2012,<sup>25</sup> the Commission acknowledged that regardless of the board structure, board composition plays a key role in a company’s success and that “diversity of competences and views among the board’s members is very important”.<sup>26</sup> The Action Plan provided the platform from which two important legislative proposals would emerge in 2013 – a proposal for a gender balance directive and a proposal for an amendment to the accounting directive to introduce diversity reporting.

## **(2) *The Proposed Directive on Gender Balance in the Boards of Listed Companies***

On 14 November 2012, the European Commission announced a proposal for a directive in relation to gender representation on boards.<sup>27</sup> It applies to listed companies other than companies which are classified as “small and medium sized enterprises”.<sup>28</sup> The rationale for action was to provide a harmonised regime within the internal market to address the very slow rate of change in relation to gender balance on boards within the European Union. Concern was expressed that the divergence or absence of regulation at national level was leading not just to the discrepancies in the number of women among executive and non-executive directors and different rates of improvement across Member States, but also to the creation of potential barriers to the internal market through the imposition of different requirements on European listed companies operating across borders. The Commission confirmed that its objectives could

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<sup>24</sup> European Commission. *Women in Economic Decision Making in the EU 2012* (2012), p.15.

<sup>25</sup> European Commission, *Action Plan: European Company Law and Corporate Governance - a modern legal framework for more engaged shareholders and sustainable companies* COM(2012) 740/2.

<sup>26</sup> At p.5.

<sup>27</sup> European Commission, *Proposal for a Directive of the European Parliament and of the Council on improving the gender balance among non-executive directors of companies listed on stock exchanges and related measures* Brussels 14.11.2012 COM (2012) 614 final. See Europa Press Release IP/12/1205, “Women on Boards: Commission Proposes 40% Objective”, 14 November 2012.

<sup>28</sup> As defined by Commission Recommendation 2003/361/EC. These are companies with less than 250 employees or an annual worldwide turnover of less than EUR50 million.

not be sufficiently achieved by Member States acting unilaterally and would “be better achieved through coordinated action at EU level rather than through national initiatives of varying scope, ambition and effectiveness”.<sup>29</sup> The proposal is consistent with existing EU policies promoting equal treatment and equal opportunities of men and women in matters of employment and occupation<sup>30</sup> and Article 23 of the Charter of Fundamental Rights of the European Union.

The purpose of the proposed gender balance directive is to increase the number of women on boards by setting a minimum objective of 40% presence of the “under represented sex”<sup>31</sup> among the non-executive directors of listed companies.<sup>32</sup> The rationale given for limiting this objective to non-executive directors was “to strike the right balance between the necessity to increase the gender diversity of boards on the one hand and the need to minimise interference with day-to-day management of a company on the other hand”.<sup>33</sup> The 40% figure was chosen as being situated between the minimum of the 30% deemed necessary for a ‘critical mass’ sufficient to have a sustainable impact on board performance and full parity at 50%.

As the proposed directive is designed to create a minimum harmonisation regime, Member States will be permitted to take additional measures more favourable than those laid down in the Directive.<sup>34</sup> By limiting itself to such a proposal, the Commission opined that Member States would be given sufficient freedom to determine how the objectives should be achieved at national level “taking into account national, regional or local circumstances including national company law and company board recruitment practices”.<sup>35</sup> The proposal therefore requires only

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<sup>29</sup> <sup>29</sup> European Commission, *Proposal for a Directive of the European Parliament and of the Council on improving the gender balance among non-executive directors of companies listed on stock exchanges and related measures* Brussels 14.11.2012 COM (2012) 614 final, p.10.

<sup>30</sup> Directives 2006/54/EC and 2010/41/EU.

<sup>31</sup> Article 4(1).

<sup>32</sup> The proposal applies to the different systems of board structures currently in place in the EU.

<sup>33</sup> European Commission, *Proposal for a Directive of the European Parliament and of the Council on improving the gender balance among non-executive directors of companies listed on stock exchanges and related measures* COM (2012) 614 final, p.5.

<sup>34</sup> Article 7.

<sup>35</sup> European Commission, *Proposal for a Directive of the European Parliament and of the Council on improving the gender balance among non-executive directors of companies listed on stock exchanges and related measures* COM (2012) 614 final, p.10.

such changes to national company law as are strictly necessary for the minimum harmonisation of requirements for appointment decisions.

### **(i) Non-Executive Directorships**

The proposed gender balance directive sets an objective of 40% female representation among non-executive directors.<sup>36</sup> Article 4(1) requires relevant listed companies that do not meet the 40% women<sup>37</sup> non-executive director threshold to make non-executive appointments to those positions on the basis of a comparative analysis of the qualifications of each candidate. A central principle of the proposed directive is that of positive action. Thus where candidates of equal qualifications emerge, the minority gender can be preferred in order to further the gender balance of the board.<sup>38</sup> In order to obtain this 40% objective, Article 4(3) provides that where candidates are equally qualified, priority must be given to women unless “an objective assessment taking account of all criteria specific to the individual candidates tilts the balance in favour of the other sex”.<sup>39</sup> An exception is provided in Article 4(6) where women represent less than 10% of the workforce.

The proposed directive contemplates that companies will introduce “pre-established, clear, neutrally formulated and unambiguous criteria in selection procedures” in order to facilitate the attainment of the 40% target by 1 January 2020.<sup>40</sup> This requirement is also likely to assist with the transparency and professionalisation of the appointments process by companies which is important to furthering the diversity agenda.<sup>41</sup>

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<sup>36</sup> Article 4(7) provides that Member States may provide that the objective is met where companies can show that women hold at least one third of all director positions irrespective of whether they are executive or non-executive.

<sup>37</sup> The proposal refers to the “under-represented sex” but for the purposes of this report, we refer to women in this context.

<sup>38</sup> Article 4(3).

<sup>39</sup> Member States must ensure that companies will be obliged to disclose, on the request of the unsuccessful candidate, the qualification criteria upon which the selection was based, the objective comparative assessment of those criteria and, where relevant, the considerations tilting the balance in favour of a candidate of the opposite sex.

<sup>40</sup> The deadline for listed companies which are public undertakings is 1 January 2018 on the basis that Member States exercise a dominant influence over such companies and they are thus in a position to attain 40% representation more quickly: Article 4(1).

<sup>41</sup> See further Chapter 2 below.



## **(ii) Executive Directorships**

The proposed gender balance directive operates a ‘flexi-quota’ approach when it comes to executive directors. Article 5(1) of the proposed gender balance directive requires Member States to ensure that companies undertake individual commitments regarding gender balance among executive directors. It is, however, as yet unclear how it is proposed such voluntary targets would be policed. The Commission indicated that it refrained from setting a fixed mandatory objective for executive board members “due to the greater need for sector-specific knowledge and experience in the day-to-day management of a company”.<sup>42</sup>

## **(iii) Disclosure and Enforcement**

The proposed gender balance directive envisages the imposition of disclosure obligations on companies, requiring them to annually notify their national competent authorities once a year about the gender representation of their boards, distinguishing between non-executive and executive directors and about the measures they have taken to achieve the objectives laid down in Article 4(1) and Article 5(1).<sup>43</sup> This information would also be published on the websites of the companies.<sup>44</sup> Failure to meet the objectives must be disclosed by companies to their competent authorities and on their websites together with the reasons for not reaching the objective and a description of the measures planned to remedy this matter.<sup>45</sup>

National equality bodies established under Directive 2006/54/EC will be entrusted with the task of promoting, analysing, monitoring and supporting gender balance on the boards of listed

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<sup>42</sup> European Commission, *Proposal for a Directive of the European Parliament and of the Council on improving the gender balance among non-executive directors of companies listed on stock exchanges and related measures* Brussels 14.11.2012 COM (2012) 614 final, p.8.

<sup>43</sup> Article 5(2). Article 9 also imposes a reporting obligation on Member States.

<sup>44</sup> See also the proposed mandatory annual report disclosure requirements in relation to diversity in European Commission, *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* COM(2013) 207 final.

<sup>45</sup> Article 5(3).

companies.<sup>46</sup> The Directive provides that the sanctions must be “effective, proportionate and dissuasive”.<sup>47</sup> A “non-exhaustive list”<sup>48</sup> of sanctions open to Member States includes administrative fines as well as judicial annulment or nullification of appointments in breach of national provisions adopted pursuant to Article 4(1).<sup>49</sup> The annulment and nullification sanctions may operate as a particularly effective deterrent against non-compliance. That being said, there is a strong argument to be made in favour of a harmonised approach being taken to the question of sanctions in order to avoid incongruity should different sanctions for breach apply to companies with multiple listings in the EU.

#### **(iv) Implementation**

In order to be adopted, the proposed gender balance directive will need to proceed to the European Parliament and the Council. It is as yet unclear as to whether its journey will be ultimately successful. If it is, Member States will have two years from the date of adoption of the directive to adopt and publish the laws, regulations and administrative provisions necessary to comply with the Directive.<sup>50</sup> The potential for differing requirements in different Member States is obvious given the minimum harmonisation approach that is being pursued. Notably, it is planned that the directive will expire on 31 December 2028.<sup>51</sup> This reflects the expectation that if the directive has succeeded in embedding its objectiveness into corporate culture, it will be unnecessary to continue a prescriptive approach in order to ensure appropriate diversity levels.

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<sup>46</sup> Article 5(4).

<sup>47</sup> Article 6(2).

<sup>48</sup> Commentary in the proposal on Article 6.

<sup>49</sup> Article 6(2).

<sup>50</sup> Article 8(1).

<sup>51</sup> Article 10.

### **(3) *The Proposed Directive on the Disclosure of Non-Financial and Diversity Information***

In its *Action Plan on European Company Law and Corporate Governance* published on 12 December 2012,<sup>52</sup> the Commission, encouraged by the results of the 2011 Green Paper consultation on corporate governance, stated that “increased transparency as regards board diversity policy could make companies reflect more on the issue and take better account of the need for greater diversity on their boards.”<sup>53</sup> As a result, the Commission indicated that in order to encourage companies to enhance board diversity and give greater consideration to non-financial risks, in 2013 it would make a proposal to strengthen disclosure requirements with regard to their board diversity policy and risk management through amendment of the Accounting Directive 78/660/EEC.<sup>54</sup> This resulted in the publication of a proposal for a directive to provide for the disclosure of non-financial and diversity information.<sup>55</sup>

It is proposed to add a new paragraph 1(g) to Article 46a of Directive 78/660/EEC to require large listed companies to provide information on their diversity policy, including aspects concerning age, gender, geographical diversity, and educational and professional background. The information will be included in the corporate governance statement and will have to contain the objectives of such a policy, its implementation in the reporting period and the results obtained. Companies not having a diversity policy will be obliged to provide a “clear and reasoned explanation.” It is hoped that greater transparency achieved through the implementation of such a reporting standard will serve to inform the market of corporate governance practices putting indirect pressure on companies to improve board diversity.

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<sup>52</sup> European Commission, *Action Plan: European Company Law and Corporate Governance - a modern legal framework for more engaged shareholders and sustainable companies* COM(2012) 740/2.

<sup>53</sup> At p.5.

<sup>54</sup> At p.5-6.

<sup>55</sup> European Commission, *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* COM(2013) 207 final.

#### **(4) *The Proposed Capital Requirements Directive (IV)***

In April 2013, the European Parliament agreed to adopt a legislative package to strengthen the regulation of the banking sector. This will replace the current Capital Requirements Directives (2006/48 and 2006/49) with a Capital Requirements Directive (CRD IV)<sup>56</sup> and a Capital Requirements Regulation (CRR).<sup>57</sup> One of the measures included in CRD IV is aimed at enhancing diversity on boards of banks and investment firms. The objective is to increase effective risk oversight by boards of banks by providing for a broader range of views and opinion and reducing group think. The recitals note that “to facilitate independent opinions and critical challenge, management bodies of institutions should therefore be sufficiently diverse as regards age, gender, geographical provenance, educational and professional background to present a variety of views and experiences.”<sup>58</sup>

Of particular note are the clear signals in CRD IV that diversity should be tackled by entities to whom it applies. Relevant entities will be required to establish a diversity policy in respect of their management body.<sup>59</sup> Article 86 sets out governance arrangements and Article 86(2) requires nomination committees to identify and recommend candidates to fill management body vacancies. It states that “[i]n doing so, the nomination committee shall evaluate the balance of knowledge, skills, diversity and experience of the management body.” Such language is of itself fairly unremarkable within the context of corporate governance arrangements. However, significantly CRD IV contemplates a more active role for the nomination committee in terms of the diversity agenda - the role of the nomination committee in respect to diversity is also more specifically focused in terms of setting and achieving gender balance targets. The nomination committee is expected to “decide on a target for the representation of the underrepresented gender in the management body and prepare a policy on how to increase the number of the

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<sup>56</sup> European Commission, *Proposal for a Directive of the European Parliament and of the Council on the access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms and amending Directive 2002/87/EC of the European Parliament and of the Council on the supplementary supervision of credit institutions, insurance undertakings and investment firms in a financial conglomerate* COM (2011) 453 final.

<sup>57</sup> European Commission, *Proposal for a Regulation of the European Parliament and of the Council on prudential requirements for credit institutions and investment firms* COM(2011) 452 final.

<sup>58</sup> Recital 45a.

<sup>59</sup> Article 87(3).

underrepresented gender in the management body in order to meet that target.” The target, policy and its implementation must then be made public in accordance with Article 422(2)(c) of CRR and it is contemplated that this information will be collected by national authorities and by the European Banking Authority to benchmark diversity practices.

## **D. KEY THEMES FOR INVESTIGATION**

Of particular interest in our study was the question of how listed companies responded to the diversity issue within the environment of their annual report. Thus the study examined how listed companies operating within different ‘comply or explain’ corporate governance regimes behaved in comparison to companies in Norway which for a number of years have been subject to a mandatory ‘command and control’ gender quota law. Quota laws with real sanctions of the type applicable to companies quoted on the Oslo Stock Exchange plainly do work. However, they may also be associated with tokenism.

### ***(1) Trends in Board Composition***

Our study sought to identify trends in board composition over the 2009-2011 period chosen for study in order to examine the rate of progress in relation to minority gender representation. Although diversity is a live issue, particularly in relation to gender, there is a known phenomenon of ‘diversity fatigue’.<sup>60</sup> Of particular interest was whether trends in each jurisdiction were uniform or whether progress was uneven or in some cases static or regressive. Our findings in relation to board composition, which are discussed in Chapter 2, show positive progress in all five countries studied in relation to greater female board representation. For those countries without hard law quotas backed by real sanctions, progress has, however, been slow. Furthermore, there remains a huge imbalance in relation to executive directors which is unlikely to change until considerable progress is made both in relation to the senior management gateway and in relation to female accession to non-executive director roles. Chapter 2 also considers trends in relation to the chairing of board committees and assesses board selection and appointment practices as the linchpin of any diversity promotion agenda.

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<sup>60</sup> See further D. Branson, “Initiatives to Place Women on Corporate Boards of Directors – A Global Snapshot” (2012) 37 *Journal of Corporate Law* 793.

## **(2) *Defining Diversity***

A key conceptual issue relates to how diversity is defined. The Oxford English Dictionary defines diversity as “the condition or quality of being diverse, different, or varied; difference, unlikeness”. In the context of corporate boards, the term is closely associated with gender diversity and, in the US, with racial diversity. The inclusiveness with which the concept of diversity is imbued will correlate to the scope of reach of a company’s diversity policy. While recognising that attempting an exhaustive definition of qualifying characteristics in relation to board or employee diversity is neither possible nor desirable, our study examined the extent to which companies’ annual reports referenced well-recognised diversity criteria and the reasons put forward for promoting diversity. Discussion of this issue is contained in Chapter 3.

## **(3) *The Existence and Nature of Company Diversity Policies***

Our study was concerned to establish the extent to which companies’ annual reports suggested the existence of a diversity policy. We also engaged in a qualitative assessment of whether, from the information provided, such a policy appeared to be specific and detailed or vague and generic. This analysis helped to provide information in relation to reported disclosures of meaningful engagement with diversity as a matter of company policy. We sought to identify reported instances in companies’ annual reports of practices which went beyond tokenism in the upper echelons of a company to suggest the embodying of an organisational culture through the mainstreaming of a pro-diversity culture. Our analysis on the nature of companies’ diversity policies is contained in Chapter 3, with further discussion in Chapter 4.

## **(4) *Addressing the Pipeline***

Chapter 4 considers the literature and policy debate concerning the importance of companies addressing the supply-chain en route to the boardroom by embedding pro-diversity measures applicable to employees, middle management and senior management. Against this backdrop, the chapter explores the evidence from our study of companies adopting measures which support diversity and advancement below board level.

## **(5) Regulation and Diversity**

A central debate in relation to diversity concerns the prospect of significant progress being made in the absence of prescriptive regulation. A carrot and stick approach has been a feature of policy-making in this area. This chapter has already considered aspects of hard and soft law regulatory approaches. Chapter 5 examines the role of enforcement mechanisms in ensuring the adoption of good diversity practice. Chapter 5 also examines policy developments in relation to diversity disclosure requirements which help to facilitate the making of a candid assessment of companies' buy-in to diversity.

## **E. METHODOLOGY**

### **(1) Countries Selected for Study**

We were interested in the impact of mandatory versus voluntary or soft law requirements concerning diversity. Mandatory regulation of this area has gained some traction within Europe. Since 1 January 2006 Norway has required 40% representation of the minority gender on boards of listed companies with nine or more members. Quota legislation has come about in a number of Member States in 2011, often closely modelled on the Norwegian model. In 2011 France introduced a requirement of boards of listed companies comprising at least 20% of the minority gender by 2014 and 40% on management and supervisory boards by 2017.<sup>61</sup> In 2011 Italy introduced a requirement of one third representation of each sex by 2015.<sup>62</sup> The Netherlands requires public limited companies to seek balanced representation (defined as 30%) on the management and supervisory board.<sup>63</sup> There are no sanctions for non-compliance and the measure expires on 1 January 2016. Also in 2011, Belgium introduced a requirement for listed companies to meet a one third minority gender requirement by 2017.<sup>64</sup>

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<sup>61</sup> Law 2011-102 of 27 January 2011 relating to the equal representation of women and men on boards and professional equality published in the Official Journal 28 January 2011.

<sup>62</sup> Act No.120 of 12 July 2011 Official Journal No.174 of 28 July 2011.

<sup>63</sup> Civil Code, Article 2.391, para. 7.

<sup>64</sup> Article 518bis of the Belgian Code of Companies.

Other countries make no demands in relation to diversity or, in countries such as the UK, Spain and Australia, include varying recommendations and principles within the context of a ‘comply or explain’ corporate governance code. Given the short time frame within which this research was to be conducted, the aim in choosing countries for study was to select countries which would enable comparison of a variety of approaches.

Five jurisdictions were selected for study to examine the effects of a soft law approach versus a hard law or voluntary approach on corporate governance practices and disclosures. Three are within the EU – the UK, Belgium and Spain, and two are outside the EU – Norway and Australia. The rationale for selecting these countries is set out below.

*(i) Norway*

Norway was selected for study as a non-EU European country which has led the way in imposing a quota law<sup>65</sup> and thus allows for study of the effect of a mandatory regime on companies’ reporting of adoption of diversity-enabling measures. Article 6-11a of the Norwegian Public Limited Liability Companies Act which was adopted in December 2003 entered into force on 1 January 2006 and requires 40% representation of the minority gender on boards with nine or more members.<sup>66</sup> Notably, a carrot and stick approach was employed whereby companies initially had the opportunity to meet the 40% target on a voluntary basis but as progress was considered unsatisfactory, the legislative provision was commenced.<sup>67</sup> Sanctions for non-compliance include the ultimate sanction of company dissolution by court order which creates a very high deterrent against non-compliance. Disclosure of board composition concerning gender is required under the Norwegian Accounting Act.

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<sup>65</sup> For an overview of the Norwegian experience see M. Hoel, “The Quota Story: Five Years of Change in Norway” in S. Vinnicombe (ed. et al), *Women on Corporate Boards of Directors: International Research and Practice* (Cheltenham, Edward Elgar, 2008), p.79.

<sup>66</sup> Below this a sliding scale applied: if the board has two or three members, each sex must be represented; if the board has four or five members, two directors of each sex are required; if the board has six to eight members, three directors of each sex are required.

<sup>67</sup> Resolution of enactment no.1429 of 9 December 2005.



Companies listed on the Norwegian Stock Exchange are subject to the Norwegian Code of Practice for Corporate Governance.<sup>68</sup> This reiterates that the statutory gender composition requirements must be adhered to.<sup>69</sup> Although the results have been described by one commentator as “stunning”,<sup>70</sup> it would appear that companies have encountered supply difficulties in relation to meeting the quotas set. Under what is termed the ‘golden skirts’ phenomenon, some women directors were reported as having 25-35 directorships.<sup>71</sup>

Inclusion of Norwegian companies within the comparative study facilitated comparison between diversity-related information disclosures by companies subject to a hard law compliance regime and companies subject to a voluntary or soft law regime. Our study was of OBX Index companies. Listing on Oslo Børs involves a full stock exchange listing that complies with all EU requirements. Shares included in the OBX Index, normally 25 shares, constitute the 25 most liquid companies on the main index of the Oslo Stock Exchange.

## **(ii) *The United Kingdom***

The UK was selected for study as a world corporate governance policy leader and EU Member State in transition from a voluntary approach to a soft law approach to diversity. There has been strong opposition to the introduction of a quota system within the UK where Lord Davies’ 2011 major policy review, *Women on Boards*,<sup>72</sup> ultimately decided against the introduction of a quota system but strongly encouraged the adoption of voluntary targets.

The background to the Davies Report was the invitation to Lord Davies by the UK Government “to undertake a review of the current situation, to identify the barriers preventing more women reaching the boardroom and to make recommendations regarding what government and business

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<sup>68</sup> Norwegian Corporate Governance Board, *The Norwegian Code of Practice for Corporate Governance for Companies* (2010).

<sup>69</sup> Norwegian Corporate Governance Board, *The Norwegian Code of Practice for Corporate Governance for Companies* (2010), p.7.

<sup>70</sup> M. Hoel, “The Quota Story: Five Years of Change in Norway” in S. Vinnicombe (ed. et al), *Women on Corporate Boards of Directors: International Research and Practice* (Cheltenham, Edward Elgar, 2008), p. 86.

<sup>71</sup> “Norwegian Firms’ Boards”, *The Economist* 3 January 2008.

<sup>72</sup> Lord Davies, *Women on Boards* (Department for Business, Innovation and Skills, 2011).

could do to increase the proportion of women on corporate boards”. In February 2011, Lord Davies published his review, *Women on Boards*, making the following ten recommendations:

- “1. All Chairmen of FTSE 350 companies should set out the percentage of women they aim to have on their boards in 2013 and 2015. FTSE 100 boards should aim for a minimum of 25% female representation by 2015 and we expect that many will achieve a higher figure. Chairmen should announce their aspirational goals within the next six months (by September 2011). Also we expect all Chief Executives to review the percentage of women they aim to have on their Executive Committees in 2013 and 2015.
2. Quoted companies should be required to disclose each year the proportion of women on the board, women in senior executive positions and female employees in the whole organisation.
3. The Financial Reporting Council should amend the UK Corporate Governance Code to require listed companies to establish a policy concerning boardroom diversity, including measurable objectives for implementing the policy, and disclose annually a summary of the policy and the progress made in achieving the objectives.
4. Companies should report on the matters in recommendations 1, 2 and 3 in their 2012 Corporate Governance Statement whether or not the underlying regulatory changes are in place. In addition, Chairmen will be encouraged to sign a charter supporting the recommendations.
5. In line with the UK Corporate Governance Code provision B2.4 ‘A separate section of the annual report should describe the work of the nomination committee, including the process it has used in relation to board appointments’. Chairmen should disclose meaningful information about the company’s appointment process and how it addresses diversity in the company’s annual report including a description of the search and nominations process.
6. Investors play a critical role in engaging with company boards. Therefore investors should pay close attention to recommendations 1-5 when considering company reporting and appointments to the board.
7. We encourage companies periodically to advertise non-executive board positions to encourage greater diversity in applications.

8. Executive search firms should draw up a Voluntary Code of Conduct addressing gender diversity and best practice which covers the relevant search criteria and processes relating to FTSE 350 board level appointments.

9. In order to achieve these recommendations, recognition and development of two different populations of women who are well-qualified to be appointed to UK boards needs to be considered:

- Executives from within the corporate sector, for whom there are many different training and mentoring opportunities; and
- Women from outside the corporate mainstream, including entrepreneurs, academics, civil servants and senior women with professional service backgrounds, for whom there are many fewer opportunities to take up corporate board positions.

A combination of entrepreneurs, existing providers and individuals needs to come together to consolidate and improve the provision of training and development for potential board members.

10. This steering board will meet every six months to consider progress against these measures and will report annually with an assessment of whether sufficient progress is being made.”

In May 2011 the Financial Reporting Council issued a consultation document seeking views on whether the UK Corporate Governance Code should be amended as recommended by Lord Davies.<sup>73</sup> As a result it indicated it intended to implement two amendments to the Combined Code. The first required boards in their description of the work of the nomination committee in its annual report “to include a description of the board’s policy on diversity, including gender, any measurable objectives that it has set for implementing the policy, and progress on achieving the objectives.”<sup>74</sup>

The second change included the following as a Supporting Principle:

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<sup>73</sup> Financial Reporting Council, *Consultation Document: Gender Diversity on Boards* (2011).

<sup>74</sup> Financial Reporting Council, *Corporate Governance Code* (2012), B2.4.

“Evaluation of the board should consider the balance of skills, experience, independence and knowledge of the company on the board, its diversity, including gender, how the board works together as a unit, and other factors relevant to its effectiveness.”

These changes were announced on 11 October 2011 and the Financial Reporting Council (“FRC”) has encouraged early adoption. In its feedback statement in October 2011, the FRC stated that the changes would apply to financial years beginning on or after 1 October 2012. However, in view of the importance of diversity to the effective functioning of boards, the FRC strongly encouraged early adoption by all companies by voluntarily applying and reporting on the intended additions to the Code with immediate effect. Companies thus would not have to adhere to these requirements but would be aware when producing their 2011 annual reports that they were forthcoming. Many boards such as Aviva thus expressly noted in their 2011 reports that they wholly supported Lord Davies’ report, “Women on Boards”, and its recommendations.

Our study was of FTSE 100 companies which comprise the 100 most highly capitalised blue chip companies, representing approximately 81% of the UK market. The overall increase in female representation reported by many companies in 2011 can be seen as in part attributable to the impetus created by the Davies review and the subsequent adoption of the voluntary code of conduct for executive search firms in response to the Davies review.

### *(iii) Spain*

Spain was selected as an EU Member State with ‘comply or explain’ diversity requirements for listed companies and with a supporting legislative provision, albeit lacking in meaningful sanctions.

For state-owned enterprises Article 75 of the Organic Law<sup>75</sup> introduced an equality provision in 2007 which recommended that women have an “equal representation” to men on boards by 2015. Equal representation was defined as 40 % by 2015. However, this target only applies to state bodies and companies entering into contracts with state companies and has proved

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<sup>75</sup> Ley Orgánica 3/2007 of 22 March 2007 on effective equality between women and men.

controversial.<sup>76</sup> In relation to listed companies, the first support for adequate diversity in terms of “knowledge, gender and experience” appeared in the commentary accompanying Recommendation 9 of the Spanish Securities and Exchange Commission (CNMV)’s Unified Good Governance Code of Listed Companies 2006.<sup>77</sup> This states that “[t]he Board of Directors should have an adequate diversity of knowledge, gender and experience to perform its tasks efficiently, objectively and in an independent manner.”<sup>78</sup>

The Unified Good Governance Code also contains a specific Gender Diversity heading under which it is stated:

“A good gender mix on boards of Directors is not just an ethical-political or ‘corporate social responsibility’ question; it is also an efficiency objective which listed companies might wish to work towards in the mid term at least. Neglecting the potential business talent of 51% of the population-women-cannot be an economically rational conduct for the country’s leading corporate names. This is amply borne out by the experience of the last few decades which have seen women occupying a growing place in the business world. But more effort is required for this presence to extend into the senior executive and directorship spheres. With this in mind, the Code calls on listed companies with few women on their boards to actively seek out female candidates where a board vacancy needs to be filled, especially for independent directorships.”

There is a provision in Recommendation 15 of Spain’s Unified Corporate Governance Code which applies on a ‘comply or explain’ basis in relation to ensuring that women are candidates for board appointments. Recommendation 15 states:

“When women directors are few or non-existent, the board should state the reasons for this situation and the measures to be taken to correct it; in particular, the Nominations Committee should take steps to ensure that:

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<sup>76</sup> See further C. de Anca, “Women on Corporate Boards of Directors in Spanish Listed Companies” in S. Vinnicombe (ed. et al), *Women on Corporate Boards of Directors: International Research and Practice* (Cheltenham, Edward Elgar, 2008) p. 101-102.

<sup>77</sup> The Code has not been revised since 2006.

<sup>78</sup> Comision Nacion del Mercado de Valores, Unified Good Governance Code of Listed Companies (2006), p.20.

- a. The process of filling board vacancies has not implicit bias against women candidates;
- b. The company makes a conscious effort to include women with the target profile among the candidates for board places.”

While this is commendable, it does not create a requirement to set specific diversity targets. Moreover, under the ‘comply or explain’ approach taken to the code, the CNMV does not take any action in relation to the extent of compliance or the quality of explanations provided and regards it as being up to “shareholders, investors and the markets in general”<sup>79</sup> to evaluate compliance and the quality of explanations given for departures from the Code’s Recommendations.

Our study focused on IBEX-35 which companies represent the most liquid shares on Bolsa de Madrid, the principal Spanish Stock Exchange.

*(iv) Belgium*

Belgium was selected for study as an EU Member State that has recently chosen to move from a fairly generic ‘comply or explain’ provision contained in the Belgium Corporate Governance Code 2009 in favour of a legal quota solution.

The 2009 Code on Corporate Governance (Code Daems) published by the Corporate Governance Committee (established by the Commission of Banking Finance and Insurance, the Federation of Enterprises and Euronext) applies on a ‘comply or explain’ basis.<sup>80</sup> The 2009 Code contains nine principles and a number of provisions or recommendations.<sup>81</sup> Companies whose shares are listed on the public market Euronext Brussels must comply or explain.

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<sup>79</sup> Comision Nacion del Mercado de Valores, Unified Good Governance Code of Listed Companies (2006), p.20.

<sup>80</sup> The ‘comply or explain’ model had been introduced in the listing requirements of the Brussels Stock Exchange in 1998.

<sup>81</sup> The Code also contains guidelines although the requirement to comply or explain does not apply to them.

The guidelines accompanying Principle 1.2 in relation to the board's role in determining company policy and strategy state that "[t]he board should decide on the company's values and strategy, its risk appetite and key policies" and that "[i]n translating values and strategies into key policies, the board should pay attention to corporate social responsibility, gender diversity and diversity in general." This guideline has been in place since the 2005 Belgian Corporate Governance Code.

Principle 2 provides that the company must have an effective and efficient board which takes decisions in the interests of the company. Diversity is supported in Principle 2.1 which states that "[t]he board's composition should ensure that decisions are made in the corporate interest. It should be determined on the basis of gender diversity and diversity in general, as well as complementary skills, experience and knowledge. A list of the members of the board should be disclosed in the Corporate Governance Statement."<sup>82</sup>

The 2009 Belgian Corporate Governance Code also contemplates the existence of a nomination committee which is tasked with recommending suitable candidates to the board. Principle 4.3 states:

"For any new appointment to the board, the skills, knowledge and experience already present and those needed on the board should be evaluated and, in the light of that evaluation, a description of the role and skills, experience and knowledge needed should be prepared (also referred to as a 'profile')."

In January 2011 the Corporate Governance Committee stated that at least 30% of boards of listed companies should be women within seven years. To help achieve this objective, the Commission published a practical recommendation intended to ensure greater representation of women, while maintaining the effectiveness of the management bodies. It recommended, inter alia, that until the 30% representation was reached, half of the new directors appointed by progressive period of 3 years should be women.

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<sup>82</sup> There is a requirement for companies from 2010 to include a Corporate Governance Statement concerning compliance with the Belgian Corporate Governance Code or other corporate governance practices and compliance with relevant statutory obligations in their annual report: Law of 6 April 2010 on the enhancement of corporate governance for listed companies and autonomous public undertakings.

However, on 28 July 2011 a quota law was enacted. A new Article 518bis of the Belgian Code of Companies adopted in 2011 will require companies trading on a regulated market to have a minority gender representation of at least one third.<sup>83</sup> A transitional period was provided for given that directors may be appointed for a maximum period of six years. Therefore the quota imposed will only be applied as of the first day of the sixth financial year following the publication of this law *ie* 2017.<sup>84</sup> In addition, companies will be required to disclose in their annual reports the efforts taken by the company to ensure that at least one third of the members of the board are of a different gender than the other members.<sup>85</sup>

Where the quota is not met, companies must appoint a person of the minority gender to any board vacancy which arises. Any appointment in breach of this requirement is void. Sanctions will apply where the quota is not met. The amended Company Code provides that there may be a suspension of any financial or other benefit attached to the position of director for all members of the board for so long as the composition of the board does not comply with the quota requirement. As the law will take effect from 1 January 2017,<sup>86</sup> this is a transitional period for companies. The amendment will only be fully effective in 2019 as the period for implementation depends upon the size of the company measured according to factors such as the number of employees, annual turnover and total balance sheet.

Our study was of BEL20 companies. The BEL20 index of Euronext Brussels consists of a maximum of 20 companies traded at the Brussels Stock Exchange based on market share price.

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<sup>83</sup> The relevant rules were introduced by an Act of 28 July 2011: Law modifying the law of 21 March 1991 on the reform of certain public economic enterprises, the Company Code and the law of 19 April 2002 concerning the rationalisation of functioning of the National Lottery aiming to guarantee the presence of women in the boards of autonomous public enterprises, listed companies and the National Lottery, published in *Moniteur Belge/Belgisch Staatsblad* of 14 September 2011, p.59600.

<sup>84</sup> An additional two year transitional period is was provided for certain companies where the value of free marketable shares is less than 50% and also for smaller listed companies.

<sup>85</sup> This provision will apply from 2018.

<sup>86</sup> This reflects the facts that board appointments are commonly made for a six year period.



(v) *Australia*

Australia was selected for study on the basis of it being a significant non-European country that has recently made the transition to a structured reporting ‘comply or explain’ diversity regime and, as such, is one step ahead of the UK in terms of the data yield on the effect of such a transition. In 2008, progress on women’s representation on ASX200 corporate boards in Australia was described as “glacial at best”.<sup>87</sup> The introduction of a structured diversity corporate governance reporting protocol followed policy discussion in the area.<sup>88</sup> It has been observed that “[t]he intention ... is that entities embrace the spirit of the Recommendations in driving a culture-change in their organisations, rather than adopting a ‘tick the box’ compliance approach.”<sup>89</sup>

On 30 June 2010, the ASX Corporate Governance Council announced amendments to the 2nd edition of the Corporate Governance Principles and Recommendations which included reporting requirements in relation to diversity. The change in the reporting requirements applies to financial years commencing on or after 1 January 2011 and therefore covered companies with a 31 December 2011 year end. Nonetheless the ASX Corporate Governance Council encouraged entities to make an early transition to the amended Principles and Recommendations especially for companies with a 30 June 2011 year end.<sup>90</sup> In Australia, compliance with the corporate governance code is perceived as more in the nature of “if not then why not”, which is more imperative than “comply and explain”.<sup>91</sup>

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<sup>87</sup> A. Ross-Smith and J. Bridge, “ ‘Glacial at Best’: Women’s Progress on Corporate Boards in Australia” in S. Vinnicombe (ed. et al), *Women on Corporate Boards of Directors: International Research and Practice* (Cheltenham, Edward Elgar, 2008), p.67.

<sup>88</sup> Corporations and Markets Advisory Committee (Australia), *Report on Diversity on Boards of Directors* (2009).

<sup>89</sup> KPMG, *ASX Corporate Governance Council Principles and Recommendations on Diversity: Analysis of 31 December 2011 Year End Disclosures* (2011), p.4.

<sup>90</sup> For 2012 see generally KPMG, *ASX Corporate Governance Council Principles and Recommendations on Diversity: Analysis of disclosures for financial years ended between 31 December 2011 and 30 December 2012* (2013).

<sup>91</sup> D. Branson, “Initiatives to Place Women on Corporate Boards of Directors – A Global Snapshot” (2012) *Journal of Corporate Law* 793, 808.

A number of changes to the Principles and Recommendations were effected by the 2010 Amendments in relation to diversity policy and reporting. Recommendation 3.2 states that listed entities should establish a policy concerning diversity and disclose the diversity policy or summary of the policy. Under Recommendation 3.3, listed entities should disclose in their annual report measurable objectives set by the board in accordance with the diversity policy and progress made towards achieving the objectives that have been set. It has, however, been noted that some guidance from the ASX Corporate Governance Council in relation to the meaning of “measurable objectives” would be of assistance.<sup>92</sup>

Under Recommendation 3.4, listed entities should disclose in each annual report the proportion of women employees in the whole organisation; women in senior executive positions; and women on the board. Explanations are required to be provided for departure from these recommendations. Recommendation 3.5 states that any code of conduct and the diversity policy or a summary of them should be made publicly available, ideally on the company’s website under a defined “Corporate Governance” section.

In the 2010 *Gender Equality Blueprint*, Sex Discrimination Commissioner, Elizabeth Broderick recommended inter alia a target of 40% representation of each gender on all publicly listed Boards in Australia, to be achieved over five years should be promoted. If progress is not made, it was suggested that the Australian Government should consider legislating to require publicly listed companies and other large employers to achieve a mandatory gender diversity quota of a minimum of 40% of both genders within a specified timeframe, failing which penalties will be imposed.<sup>93</sup> While ASX listed companies are now expected to set measurable diversity objectives, to date there is no available data to indicate that there has been any significant take-up in relation to the suggested 40% target.

Our study was of ASX 100 companies which are admitted to the index based on market capitalisation.

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<sup>92</sup> KPMG, *ASX Corporate Governance Council Principles and Recommendations on Diversity: Analysis of 31 December 2011 year end disclosures* (2012), p. 3

<sup>93</sup> Australian Human Rights Commission, *Gender Equality Blueprint* (2010), p.23-24.

## **(2) Survey Design and Data Collection**

Data collection was carried out for the five countries based on a survey questionnaire contained in the Appendix to this report. The data collection element of this project involved collation of diversity-related disclosures and other relevant information from the 2009, 2010 and 2011 annual reports of a sample comprising Oslo Børs OBX companies (Norway), FTSE 100 companies (UK), IBEX-35 companies (Spain), BEL20 companies (Belgium) and ASX 100 companies (Australia). The companies studied were those listed on the indices as at 31 December 2011.

## **F. PRESENTATION OF FINDINGS**

The subject matter of this research project was intended to have a strong resonance with current themes in EU policy debate in relation to board diversity, corporate governance disclosures and the monitoring role of investors and stakeholders. The key findings of this research were presented in Dublin at the 12th European Company Law and Corporate Governance Conference on 17 May 2013.<sup>94</sup> The presentation placed salient findings of the study in the context of the policy agenda of the EU Action Plan on Company Law and Corporate Governance,<sup>95</sup> the proposed directive aimed at achieving a target of the under-represented gender comprising 40% of non-executive directors in publicly listed companies other than SMEs<sup>96</sup> and the proposed directive on the disclosure of non-financial and diversity information.<sup>97</sup> The issue of meaningful

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<sup>94</sup> The presentation, “Companies’ Reporting of Diversity: A Multi-Jurisdictional Study”, by Professor Deirdre Ahern and Professor Blanaid Clarke has been made available to the European Corporate Governance Institute’s conference repository.

<sup>95</sup> European Commission, *Action Plan: European company law and corporate governance - a modern legal framework for more engaged shareholders and sustainable companies* COM(2012) 740/2.

<sup>96</sup> European Commission, *Proposal for a Directive of the European Parliament and of the Council on improving the gender balance among non-executive directors of companies listed on stock exchanges and related measures* Brussels 14.11.2012 COM (2012) 614 final. See Europa Press Release IP/12/1205, “Women on Boards: Commission Proposes 40% Objective”, 14 November 2012.

<sup>97</sup> European Commission, *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* COM(2013) 207 final.

versus opaque or generic statements in companies' annual reports has obvious resonance in relation to how companies choose to report on diversity policies and practices in their annual reports and this was an underlying theme in our study and in the presentation of our findings at the conference.

# CHAPTER 2 BOARD COMPOSITION AND APPOINTMENTS PRACTICES

## A. INTRODUCTION

Compiling comparative statistics on gender diversity on boards of listed companies has inherent limitations given differences in the way in which capital markets are organised and regulated and the fact that by its nature board refreshment occurs incrementally over a period of years. Nonetheless some comparative analysis is instructive in relation to the data we compiled for Norway, the UK, Spain, Belgium and Australia.

This chapter presents some of the key trends identified in relation to board composition in the course of our study in respect of the companies sampled. The chapter also considers appointments practices within the context of the crucial role of such practices in creating the conditions to facilitate board diversity. As discussed below, it is clear from an analysis of statements made by companies in their annual reports that there is a common disconnect between the abstract intention of tackling diversity and concrete board appointment practices which are likely to make real change.

Collection of board composition data in respect of the sample studied for 2009-2011 arose against a background where, as reported by the European Commission, in January 2012 the average percentage of female board members in the largest listed companies in the EU was 13.7% as compared with 11.8% in 2010.<sup>1</sup> The situation in Europe is mirrored in the US. An Alliance for Board Diversity report shows that women and minorities are severely underrepresented on Fortune 100 and Fortune 500 corporate boards.<sup>2</sup> In the Fortune 100, between 2004 and 2010, white men's share of seats marginally decreased from 71.2 % to 69.9%. Minorities and women shared the remainder.

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<sup>1</sup> European Commission, *Women in Economic Decision-making in the EU: Progress Report* (2012), p.15.

<sup>2</sup> Alliance for Board Diversity, *Missing Pieces: Women and Minorities on Fortune 500 Corporate Boards* available at <http://theabd.org/Reports.html>.

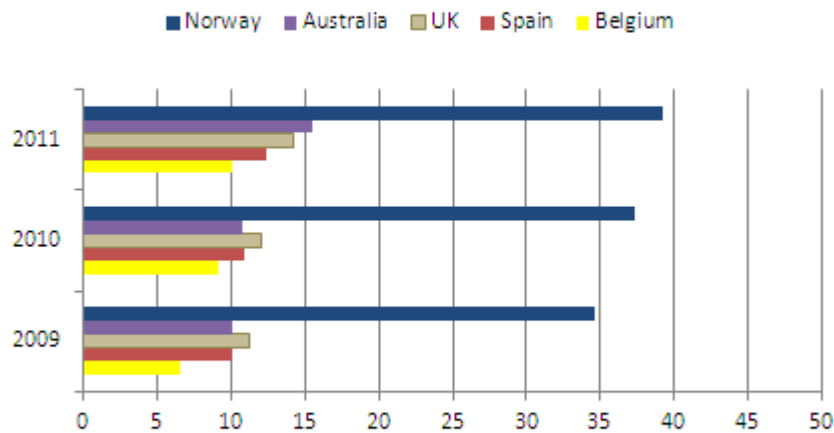
## B. BOARD COMPOSITION

### (1) Board Size

The size of a board affects board dynamics and board refreshment.<sup>3</sup> The average board size in our sample for the 2009-2011 period studied varied by country. For the UK, the average board size in FTSE 100 companies for the period was 11. For Spain, the average board size in IBEX-35 companies was 15 while in Belgium for BEL20 companies it was 13. Outside the EU, for Australia, the average board size of ASX 100 companies was eight to nine members. In Norway, the average board size of OBX companies was nine.<sup>4</sup>

### (2) Average Female Representation

#### Average Percentage of Female Board Representation by Country and Year



Our board composition data for Norway over the 2009-2011 period confirms the efficacy of a quota approach backed by real sanctions in leading to the desired result in terms of broad equality of representation at board level with no significant time-lag. In 2011, female board

<sup>3</sup> On the question of the optimal size and composition of a corporate board see *eg* C.J. Rahaja, “Determinants of Board Size and Composition: A Theory of Corporate Boards” (2005) 40(2) *Journal of Financial and Quantitative Analysis* 283.

<sup>4</sup> This relates to the supervisory board of OBX companies.

representation had reached 39.17% and 29.1% of the 24 OBX companies exceeded the quota law gender requirements for women by having 50% or 60% female representation on the supervisory board.

Unsurprisingly, the level of progress towards gender balance on boards within the other countries sampled was less significant. Taking the EU average benchmark average figure of 13.7% female representation on the boards of the largest companies in the EU as at January 2012,<sup>5</sup> it is notable that the leading share index in Spain, at 12.45%, did not match this figure for 2011. In Spain the overall increase from 2009 to 2011 in the average percentage of female board members was low at 2.38 percentage points.<sup>6</sup> There is clearly still some ground to be made up to achieve traction in Spain and the combination of corporate governance recommendations and legislation which operates as more in the character of a recommendation does not seem to have been particularly effective.<sup>7</sup>

Progress was also below par in Belgium, at 10.14% female representation in 2011. Figures for female representation in BEL20 companies showed modest gains in the 2009-2011 period.<sup>8</sup> It is fair to assume that for the 2011 period, Belgian companies had not had sufficient time to react to the quota law of 28 July 2011, with a little above a percentage point increase observable from 2010 to 2011.<sup>9</sup> Figures for 2012 will therefore provide interesting comparative data in this regard.

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<sup>5</sup> European Commission, *Women in Economic Decision-making in the EU: Progress Report* (2012), p.15.

<sup>6</sup> Female board representation moved from 10.07% in 2009 to 12.45% in 2011.

<sup>7</sup> In 2011, 8.57% or three of the IBEX-35 companies achieved female directorships of 25% or above, the highest percentage achieved being 30.77% by Acciona S.A, an engineering and construction company. In 2011, 20% of the companies met the critical mass figure of three or more women directors. At the other end of the spectrum, in 2011 three utility companies in the natural gas and electricity sector (constituting 8.57% of all companies) did not have a female director.

<sup>8</sup> Female board representation increased from 6.61% in 2009 to 9.11% in 2010 and increased marginally to 10.14% in 2011.

<sup>9</sup> For female non-executive directors, the figures increased, however, from 8.19% in 2009 to 9.76% in 2010 and to 10.80% in 2011. Six boards had no women in 2011, compared to 7 in 2010 and 2009. In one case this was attributed to “le fruit de l’histoire”.

Leaving aside Norway as best in class, the EU average was also exceeded in 2011 by the UK at 14.25%, with the UK being pipped by Australia by one and a quarter percentage points at 15.57%. While the statistics for the UK demonstrate some progress being made,<sup>10</sup> the 2011 figure of 14.25% shows that very brisk progress would need to be made by many companies to reach the UK minimum voluntary target of 25% by 2015 as advocated by Lord Davies.<sup>11</sup> Indeed, there are some post-2011 indications that some element of diversity fatigue may have subsequently set in as there has been a decline in the rate of progress in relation to female board appointments.<sup>12</sup> Our findings for Australia show the impact of the introduction of an apply or explain diversity reporting requirement with a significant increase in female board representation from 10.78% in 2010, reaching 15.57% female representation in 2011.<sup>13</sup> This significant increase can be directly correlated to the announcement by the ASX Corporate Governance Council of diversity policy corporate governance reporting requirements. This is encouraging for both the UK's introduction in late 2012 of similar reporting provisions and the structured reporting within the context of the annual report which is the subject of proposed EU legislation.<sup>14</sup>

### **(3) *Executive Directorships***

There is data to suggest that women hold less than 1 in 20 executive roles in Europe and that the proportion of non-executive roles is almost four times greater.<sup>15</sup> It is the case that there is usually less room on a board for the appointment of external executive directors. This limited

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<sup>10</sup> The average percentage of women on FTSE 100 boards increased incrementally in the period under review from 11.20% in 2009 to 12.09% in 2010 to 14.25% in 2011. For female non-executive directors, a discernible increase was evident, moving from 9.99% in 2009 to 10.67% in 2010 and upwards to 12.74% in 2011.

<sup>11</sup> See further Chapter 1 above.

<sup>12</sup> See Cranfield School of Management, *The Female FTSE Board Report 2013: False Dawn of Progress for Women on Boards* (2013), p.6; "Number of Women on FTSE100 Boards Stalls" *The Financial Times* 15 May 2013.

<sup>13</sup> The overall increase from 2009 to 2011 in the average percentage of female board members in ASX 100 companies was 5 percentage points.

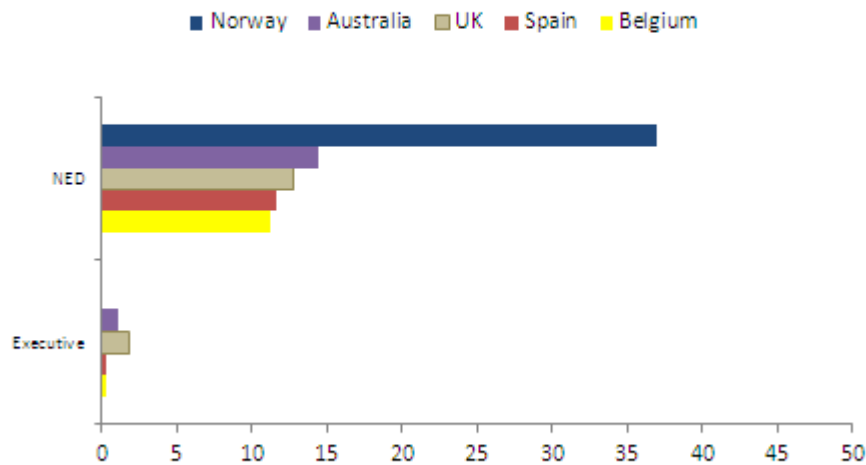
<sup>14</sup> European Commission, *Proposal for a Directive of the European Parliament and of the Council amending Council Directives 78/660/EEC and 83/349/EEC as regards disclosure of non-financial and diversity information by certain large companies and groups* COM(2013) 207 final. See further Chapter 1 above.

<sup>15</sup> Egon Zehnder, *European Board Diversity Analysis 2012* (2012), p.16.



availability is likely to exacerbate an imbalance that also relates to a supply issue which is connected to the some degree with the inescapable fact that executive appointments are based on having the requisite management and commercial experience.

### Average Percentage of Female Non-Executive and Executive Directorships by Country in 2011



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Across the board, most appointments of women are to non-executive directorships. It is clear from our survey that there is still a lot of ground to be made up in terms of female executive directorships within our sample, with the UK FTSE 100 companies achieving the highest representation of our sample at an average of just 1.9% female executive directors in the FTSE 100 in 2011.<sup>16</sup>

#### (4) *The Relevance of Industry Sector*

There is research which suggests that consumer-oriented businesses are more inclined to appoint female directors to their board, while those with the lowest female representation are heavy industry companies.<sup>17</sup> There is some evidence of this in our findings which show that

<sup>16</sup> The statistics above in relation to Norway do not contain values in relation to executive directors for Norway since the sample surveyed related to supervisory boards which by law are not required to have executive directors.

<sup>17</sup> *Diversity and Gender Balance in Britain plc*: a study by TCAM in conjunction with The Observer and as part of the Good Companies Guide (London, TCAM 2009).

those companies with the highest female board representation tend not to be involved in heavy industry. Taking the UK experience, in 2011, 22.2% of FTSE companies met the critical mass figure of three or more women directors. 15 FTSE 100 companies achieved female board representation of 25% or above – Admiral Group plc (financials), AstraZeneca plc (healthcare), BAE Systems plc (industrials – aerospace and defence), British American Tobacco plc (consumer durables), Burberry Group plc (consumer discretionary), Centrica plc (energy), Diageo plc (consumer discretionary), InterContinental Hotels Group plc (consumer discretionary), Marks and Spencer Group plc (consumer discretionary), Morrison plc (consumer discretionary), Pearson plc (media), Sage Group (software), J. Sainsbury plc (consumer discretionary), Standard Life plc (financials) and Unilever plc (consumer discretionary). At the other end of the spectrum, nine FTSE 100 companies did not have a single female director in 2011. Of these, five companies were in the mining or oil industries.

### **C. CHAIRING OF BOARD COMMITTEES**

Diversity in both membership and chairing of board committees are important indicators of the level of genuine engagement with diversity within a company. Representation of women as committee chairs is regarded as a benchmark in relation to real influence on boards.<sup>18</sup> An argument is sometimes presented which explains the disparity in the male-female ratio in terms of an experience-based bias.<sup>19</sup> While this has some resonance, it does not excuse failure to supply and use an available diverse pipeline. This is a particular reason for ensuring diversity on the nomination committee.<sup>20</sup>

In the UK, the Davies Report called on all Chief Executives to review the percentage of women they aim to have on their executive committees in 2013 and 2015.<sup>21</sup> Where women are

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<sup>18</sup> The Conference Board Inc., *Board Diversity in US Corporations* Research Report 1230-99-RR, (New York, 1999), p.30; L. Joy, “Women Board Directors in the United States: An Eleven Year Retrospective” in S. Vinnicombe (ed. et al), *Women on Corporate Boards of Directors: International Research and Practice* (Cheltenham, Edward Elgar, 2008) 15, p.19.

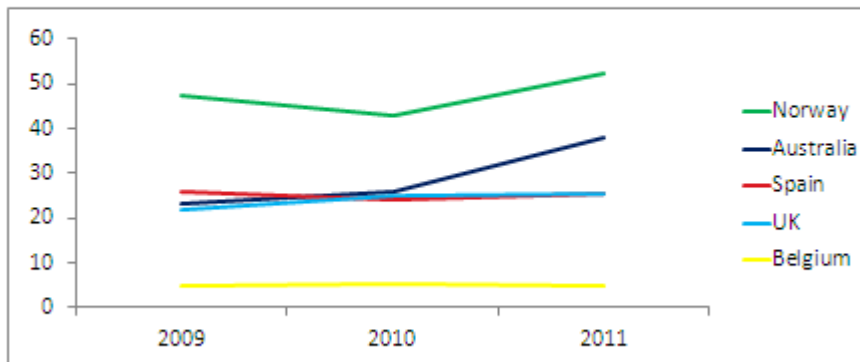
<sup>19</sup> D. Bilimoria and S.K. Piderit, “Board Committee Membership: Effects of Sex-based Bias” (1994) 37(6) *Academy of Management Journal* 1453, 1455-1456.

<sup>20</sup> D. Bilimoria and S.K. Piderit, “Board Committee Membership: Effects of Sex-based Bias” (1994) 37(6) *Academy of Management Journal* 1453, 1469.

<sup>21</sup> Lord Davies, *Women on Boards* (Department for Business, Innovation and Skills, 2011), p.18.

appointed as committee chairs, this may be regarded as demonstrating a commitment to diversity which extends beyond appointment to the board. In this regard, the UK Corporate Governance Code states that “[t]he value of ensuring that committee membership is refreshed and that undue reliance is not placed on particular individuals should be taken into account in deciding chairmanship and membership of committees.”<sup>22</sup>

Percentage of Companies where Women Chair one or more Board Committees



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Our findings indicate that even where women are beginning to find their way into the board room, progress is slow in relation to women chairing board committees. This is the case in relation to all of the countries surveyed. As of 2011, the leader in this regard was Norway where 52.4% of companies had one or more committees chaired by a woman, showing a correlation between board representation and leadership at committee level. In Australia considerable strides were made in relation to women chairing ASX 100 board committees over the period studied with 37.8% of companies having one or more committees chaired by a woman by 2011. By contrast, limited progress was made in Spain where the percentage of such companies remained fairly static, ending at 25.7% in 2011. Similarly, in the UK the 2011 figure of 25.3% indicates room for improvement. Belgium, as the country surveyed with the lowest average female board representation, trailed a long way behind the other countries with just 5.0% of companies having a committee chaired by a woman in 2011.<sup>23</sup>

<sup>22</sup> Financial Reporting Council, UK Corporate Governance Code (2012), Supporting Principles to Principle B.1.

<sup>23</sup> In Belgium in 2009, 95% of BEL20 companies had no board committees chaired by women and 5% had one committee. None had more than one committee chaired by a woman. The figures remained static in both 2010 and 2011.

## **D. BOARD SELECTION AND APPOINTMENT PRACTICES**

### **(1) Background**

Encouraging diversity on boards of listed companies requires an appointments process that is transparent and open. A formalised selection process lends itself more readily to a broader pool of candidates than one based on informal business networks. The establishment of a nomination committee is associated with increased transparency concerning board selection and appointment processes. We were therefore concerned to investigate the existence and expectations of nominations committees in the five countries studied.

The board appointment process is often criticised for its subjective and exclusionary nature.<sup>24</sup> In 2003 the UK Higgs & Tyson reports found more than half of directors had acquired positions through people they knew.<sup>25</sup> The situation was mirrored in the US. Nowicki has highlighted the historically insular director nomination process as being “clubby”, traditionally spearheaded by a corporation’s (male) chief executive officer or male dominated board nominating committee, who have looked to friends and business associates as potential board nominees.<sup>26</sup> It is well-known that social connections created through education, employment and social and leisure activities both create and reinforce exclusive networks that can lead to career advancement and, ultimately, to an invitation to join a board of directors.<sup>27</sup> Thus, a human

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<sup>24</sup> See eg E. Doldor, S. Vinnicombe, M. Gaughan and R. Sealy, *Gender Diversity on Boards: The Appointment Process and the Role of Executive Search Firms* Research report 85 (Equality and Human Rights Commission, 2012).

<sup>25</sup> D. Higgs, *Review of the Role and Effectiveness of Non-executive Directors* (Higgs Report) (London, Department of Trade & Industry, 2003); L Tyson, *The Tyson Report on Recruitment and Development of Non-Executive Directors* (London Business School, 2003).

<sup>26</sup> E.A. Nowicki., “Economic Concerns, Beleaguered Corporations, and Women in Corporate Boardrooms” (2008-2009) 30 *Journal of Public Law & Policy* 549.

<sup>27</sup> The issue of interlocking boards has been mapped in an Irish context and it has been shown that a small pool of individuals dominate boards in Irish listed companies and state-owned bodies. See further P. Clancy, N. O’Connor and K. Dillon, *Mapping the Golden Circle* (Dublin, Tasc, 2010), para. 6.12.

tendency to in-group favouritism within a historically informal and subjective appointment process can substantially influence the profile of non-executive directors.<sup>28</sup>

Following a recommendation in Chapter 10 of the 2003 Higgs Review, Professor Laura Tyson, Dean of the London Business School, was asked to lead a group to examine how companies might draw on wider pools of talent with a view to enhancing board effectiveness. The Tyson Report<sup>29</sup> recommended a number of measures including that private search agencies be used as well as recommending recruitment from the public sector and human resource management and the establishment of registers of persons who would be interested in acting as non-executive directors.

In line with the adoption of corporate governance codes and their frequent revision, there has been a discernible global trend in favour of creating best practices protocols concerning the establishment of uniform and transparent nomination and appointments practices in listed companies. In terms of the work of the nomination committee in formulating a candidate brief and finding candidates, the Davies Report raised the need for human capital to be counted in appointments, and the need to move from narrow search criteria, in particular of significant prior financial responsibility, and for greater emphasis to be placed on a broader mix of skills and experience.<sup>30</sup> Following the Davies Report, the Voluntary Code of Conduct for Executive Search Firms was adopted by many leading UK executive search firms. The code includes seven key principles of best practice from client brief to final induction.

However, in spite of these developments, a major UK Equality and Human Rights Commission report in 2011, which reviewed the background and impact of adoption of the Code,<sup>31</sup> found

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<sup>28</sup> K.A. Lane, J. Kang and M.R. Banaji, "Implicit Social Cognition and Law" (2007) 3 Annual Review of L. & Social Science 427, 433.

<sup>29</sup> L. Tyson, *The Tyson Report on Recruitment and Development of Non-Executive Directors* (London Business School, 2003) <http://www.london.edu/facultyandresearch/research/docs/TysonReport.pdf>

<sup>30</sup> Lord Davies, *Women on Boards* (Department for Business, Innovation and Skills, 2011).

<sup>31</sup> E. Doldor, S. Vinnicombe, M. Gaughan and R. Sealy, *Gender Diversity on Boards: The Appointment Process and the Role of Executive Search Firms* Research Report 85 (Equality and Human Rights Commission, 2012). The Equality and Human Rights Commission commissioned Cranfield's International Centre for Women Leaders to examine the corporate board appointment process and the role of executive search firms in this process. A particular emphasis was placed on what was being done to make boards more gender balanced.

that the board appointment process remains opaque and subjective, typically driven by a corporate elite of predominantly male Chairmen who tend to favour those with similar characteristics to themselves. Non-executive director appointments are still informed by how much candidates 'fit' with the values, norms and behaviours of existing board members. More positively, the report found that search consultants interviewed indicated a heightened awareness of the importance of gender diversity on boards within their firms and among their clients. Overall, the EHRC report concluded that while the Voluntary Search Code was a good first step towards addressing the issue of gender diversity in the executive search sector, the Code is open to improvement and diversity practices across the search sector need to be mainstreamed and made more visible.

As discussed below in connection with the countries sampled, the concept of diversity as central to the work of a nomination committee is frequently recognised in corporate governance codes. Notably, the proposed new Capital Requirements Directive (CRD IV) for the banking and investment sector expects nomination committees to “evaluate the balance of knowledge, skills, diversity and experience of the management body.”<sup>32</sup>

## **(2) Key Findings**

In each of the countries studied, companies are expected to have a nomination committee tasked with the role of overseeing the process of appointments to the board.<sup>33</sup> In each country, the nomination committee is guided by references of varying specificity to diversity in the corporate governance code or elsewhere.

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<sup>32</sup> European Commission, *Proposal for a Directive of the European Parliament and of the Council on the access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms and amending Directive 2002/87/EC of the European Parliament and of the Council on the supplementary supervision of credit institutions, insurance undertakings and investment firms in a financial conglomerate*, Article 86(2)(a).

<sup>33</sup> Financial Reporting Council, *The UK Corporate Governance Code (2012)*, Provision B.2.1; Norwegian Corporate Governance Board, *The Norwegian Code of Practice for Corporate Governance for Companies (2010)*, Recommendation 7; Comision Nacion del Mercado de Valores, *Unified Good Governance Code of Listed Companies (2006)*, p.44; ASX Corporate Governance Council, *Corporate Governance Principles and Recommendations (2<sup>nd</sup> ed, 2010)*, Recommendation 2.4; Corporate Governance Council, *The Belgian Code on Corporate Governance (2009)*, Principle 5.3.

In Norway, apart from the statutory imperative to meet gender balance requirements,<sup>34</sup> the Norwegian Corporate Governance Code states:

“The composition of the board of directors as a whole should represent sufficient diversity of background and expertise to help ensure that the board carries out its work in a satisfactory manner. In this respect due attention should be paid to the balance between male and female members of the board.”<sup>35</sup>

However, in Norway, in the period under review, only one company referred in its annual report in each of the three years to using external consultants to ensure diversity of candidates.<sup>36</sup>

In the UK, there has been a recent policy focus on the appointments process within the context of the diversity agenda. The Davies Report has been influential in this respect. It recommended that Chairmen should disclose meaningful information about the company’s appointment process and how it addresses diversity in its annual report including a description of the search and nominations procedure.<sup>37</sup> In October 2011 the UK’s Financial Reporting Council announced that the UK Corporate Governance Code would be amended to require companies to describe the work of the nomination committee in a separate section of the annual report<sup>38</sup> and to consider diversity as a factor when evaluating the effectiveness of the board.<sup>39</sup> These changes took effect for financial years beginning on or after 1 October 2012.

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<sup>34</sup> Article 6-11a of the Norwegian Public Limited Liability Companies Act.

<sup>35</sup> The Code also makes it clear that the statutory gender composition requirements must be adhered to: Norwegian Corporate Governance Board, *The Norwegian Code of Practice for Corporate Governance for Companies* (2010), p.7.

<sup>36</sup> Storebrand’s 2011 annual report states that “[t]he company requires that its partner recruitment agencies present final candidates of both genders for managerial positions.”

<sup>37</sup> Lord Davies, *Women on Boards* (Department for Business, Innovation and Skills, 2011), p.20.

<sup>38</sup> Financial Reporting Council, *The UK Corporate Governance Code* (2012), Provision B.2.4.

<sup>39</sup> Financial Reporting Council, *The UK Corporate Governance Code* (2012), Supporting Principle to B.6.

It is still early days in relation to the formal embracement of the diversity agenda by FTSE 100 companies in the UK<sup>40</sup> although for 2011 we observed a very high rate of referencing of diversity in companies' annual reports in connection with the work of nomination committees. In 2009, 96.9% referred to a nominations committee (38.2% of these referred to diversity in this context), the figure was 91.8% in 2010 (with 51.1% referring to diversity) and 98% in 2011 (with 84.5% referring to diversity).

Our findings suggest that there is scope for greater take-up by FTSE 100 companies of the services of external search consultants. In 2009, 36.1% of FTSE 100 companies referred to a reference in the annual report indicating that the company uses external consultants to ensure diversity of candidates. It remained relatively static in 2010 at 36.7% but increased to just under half of FTSE 100 companies or 48.5% in 2011. Notably, the UK Corporate Governance Code requires that companies provide an explanation if they do not make use of either an external search firm or open advertising in relation to the appointment of a non-executive director or chairman.<sup>41</sup> The 2012 Davies progress report reiterated that transparent appointment processes and demographic disclosures across organisations will assist businesses to identify where the talent blockages and attrition black spots lie within their systems, thereby facilitating the building of a sustainable talent pool upon which to draw in future years.<sup>42</sup> In October 2012 a new network, Women on Boards, was launched in the UK based on an Australian counterpart to assist women who aspire to become directors.

In the area of measurable diversity targets, there has been some real progress by FTSE 100 companies. In 2009, none of the FTSE 100 companies referred in their annual report to setting a measurable target objective for women on the board. In 2010, 4.3% did. Significantly, however, in 2011, 41.4% of companies made reference to having set measurable targets.

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<sup>40</sup> See generally E. Doldor, S. Vinnicombe, M. Gaughan and R. Sealy, *Gender Diversity on Boards: The Appointment Process and the Role of Executive Search Firms* Research report 85 (Equality and Human Rights Commission, 2012), p.4.

<sup>41</sup> Financial Reporting Council, *The UK Corporate Governance Code* (2012), Provision B.2.4.

<sup>42</sup> Lord Davies, *Progress Report* (Department for Business, Innovation and Skills, 2012), p.9.



Furthermore, in 2011, 13.1% of companies referred in their annual report to a company requirement for a woman candidate for board vacancies.<sup>43</sup>

In Spain, there is specific reference to gender in the Unified Good Governance Code in connection with the work of the nominations committee.<sup>44</sup> The Spanish Code promotes the desirability of companies “mak[ing] a conscious effort” to include” female candidates for board vacancies so as to rectify gender imbalance at board level as well as ensuring that the process does not have an “implicit bias against women candidates”.<sup>45</sup> Our study found that there is increasing reference by IBEX-35 companies to diversity in connection with the work of the nominations committee. Of companies with a nominations committee, 60.87% referred to diversity in connection with the nominations committee in 2009, this rose marginally to 62.09% in 2010 and increased to 70.0% in 2011. There is no reference to the use of external recruitment consultants in Spain’s Unified Good Governance Code. Nonetheless, a fifth of IBEX-35 companies were disclosing use of external recruitment consultants by 2011.<sup>46</sup>

However, it would appear that in vast majority of cases, companies have not reported a requirement to have a female candidate. In 2009 8.7% of companies reported such a requirement. This rose slightly to 9.7% in 2010 and jumped to 17.2% in 2011. Although there is an upward trend, it is clear the minority gender candidate principle has yet to be mainstreamed in Spanish corporate governance practice. Furthermore, none of the IBEX-35 companies reported the setting of a specific measurable target for women in 2009-2011. Indeed, although the Unified Good Governance Code endorses companies actively seeking out female candidates for board vacancies, it does not refer to the setting of measurable targets *eg* 25% by 2015.

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<sup>43</sup> In 2009 only 2.1% of companies referred to a company requirement for a woman candidate for board vacancies. This increased to 7.1% in 2010 and to 13.1% in 2011.

<sup>44</sup> Comision Nacion del Mercado de Valores, Unified Good Governance Code of Listed Companies (2006), Recommendation 15.

<sup>45</sup> Comision Nacion del Mercado de Valores, Unified Good Governance Code of Listed Companies (2006), Recommendation 15.

<sup>46</sup> In 2009 12.5% of companies used external recruitment consultants. This dipped to 6.3% in 2010 and rose significantly to 20.0% in 2011.

In the case of Belgium, diversity is supported in Principle 2.1 of the Belgian Corporate Governance Code which states that “[t]he board’s composition should ensure that decisions are made in the corporate interest. It should be determined on the basis of gender diversity and diversity in general, as well as complementary skills, experience and knowledge.” However, it would seem that BEL20 companies have been relatively slow to specifically reference diversity in connection with the work of the nomination committee. In 2009 and 2010, 95.0% of companies referred to the existence of a nominations committee but only 5.0% of these referred to diversity in this context. By 2011 90.0% referred to a nominations committee, with 16.6% of these referring to diversity in this regard. Furthermore, none of the BEL20 companies referred in their 2009-2011 annual reports to the use of external consultants to ensure diversity of candidates. There has, however, been discernible progress made in Belgium in relation setting measurable target objectives for women on board. In 2009 none of the BEL20 companies referred in their annual report to setting a measurable target objective for women on the board. However, by 2010, 15.0% did and in 2011 the figure had tripled to 45.0%.

In Australia, companies are expected to have “[a] formal and transparent procedure for the selection, appointment and re-appointment of directors”.<sup>47</sup> Companies are expected to include in their Corporate Governance Statement a statement concerning “the mix of skills and diversity” that the board wishes to achieve in its membership<sup>48</sup> and the nomination committee is expected to engage in succession planning in order to meet these objectives. Of ASX 100 companies with a nominations committee, 45.0% referred to diversity in connection with the nominations committee in 2009, this rose significantly to 64.0% in 2010 and increased to 74.0% in 2011. This is in line with the specific corporate governance requirements to set diversity targets which were announced in 2010. Just under a third of ASX 100 companies were disclosing use of external recruitment consultants by 2011.<sup>49</sup>

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<sup>47</sup> ASX Corporate Governance Council. Corporate Governance Principles and Recommendations (2<sup>nd</sup> ed, 2010), Commentary to Recommendation 2.4.

<sup>48</sup> ASX Corporate Governance Council. Corporate Governance Principles and Recommendations (2<sup>nd</sup> ed, 2010), Commentary to Principle 2.

<sup>49</sup> In 2009 17.4% of companies used external recruitment consultants, this increased markedly to 28.6 % in 2010 and to 31.3% in 2011.

In Australia there has been a marked trend in favour of setting diversity objectives which is attributable to the introduction of underlying corporate governance requirements in this regard. In 2009, 14.3% of ASX 100 companies referred in their annual report to setting diversity objectives. In 2010, the figure had increased significantly to 48.4% and it increased significantly again in 2011 to 78.6% of companies. In relation to requiring a women candidate for board appointments, this is not yet the norm for ASX 100 companies. Such a requirement was reported in just 2.2% of companies in 2009, rising to 5.4% of companies in 2010 and to 12.2% of companies in 2011.

## **E. CONCLUSION**

Our study of companies in Norway, the UK, Spain, Belgium and Australia shows that, leaving aside Norway as the only country where listed companies are subject to an existing mandatory quota benchmark, advancement of female representation on boards of companies is occurring, but slowly and starting from a low base. Considerable strides will need to be made by companies in relation to new board appointments in order to make significant progress within the next five to ten years. In Belgium it can be expected that there will be a significant shake-up in relation to female board representation over the coming years given the expectation that boards will meet a minority gender representation of one third by 2017. This will require a trebling of the 2011 average of 10.14%, but, based on the experience of listed companies in Norway, this can be achieved given appropriate succession planning and the threat of associated sanctions for non-compliance.

While many companies may have a woman on the board, an important theme in the literature is the necessity of establishing a critical mass of diverse directors in order to reap the benefits in boardroom dynamics.<sup>50</sup> Without a critical mass, a lone diverse perspective may be drowned out

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<sup>50</sup> See eg S. Erkut, V.W. Kramer and A.M. Konrad, "Critical Mass: Does the Number of Women on a Corporate Board Make a Difference?" in S. Vinnicombe (ed. et al), *Women on Corporate Boards of Directors: International Research and Practice* (Cheltenham, Edward Elgar, 2008) 222; M. Torchia, A. Calabro and M. Huse, "Women Directors on Corporate Boards: From Tokenism to Critical Mass" (2011) 102 *Journal of Business Ethics* 299 (Norwegian study confirming the critical mass theory of requiring three women on corporate boards).

or ignored by a chorus of homogenous voices.<sup>51</sup> The contributions women bring to the board are more likely to be considered by the board when the group diversity dynamics move away from tokenism to normality.<sup>52</sup> Critical mass theory suggests that a board with three or more women (or a third by proportion) is more likely to experience the positive effects and contributions to good governance than a board with fewer women.<sup>53</sup> Further studies have shown that the environment for women in senior roles improves once about a third of leaders at that level are female.<sup>54</sup> Thus the EU proposals for 40% minority gender representation fit well within critical mass theory.

While nomination committees are now standard, greater clarity concerning their agreed role assists in leveraging a diversity agenda. For the rate of progress is to increase the nomination committee must embrace the diversity issue and be open to a requirement that diversity candidates be included on long lists and to the use of executive search firms and other means of broadening the available pool for board vacancies.

If adopted, there will be an impetus on EU listed companies to meet the EU's gender balance directive's proposed minority gender target of 40% by 2020 of non-executive directors in publicly listed companies other than SMEs.<sup>55</sup> This would require significant rethinking of board nomination and appointment practices for approximately 5,000 listed companies. In

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<sup>51</sup> T.W. Joo, "A Trip Through the Maze of 'Corporate Democracy': Shareholder Voice and Management Composition" (2003) 77 St. John's L. Rev. 736 at 742.

<sup>52</sup> S.V. Erkut, V.W. Kramer and A.M. Konrad, "Critical Mass: Does the Number of Woman on a Corporate Board Make a Difference?" in S. Vinnicombe, R.J. Burke, D. Bilmoria and M. Huse (eds), *Women on Corporate Boards of Directors: International Research and Practice* (Cheltenham, Edward Edgar, 2008); S. Bear, N. Rahman and C. Post., "The Impact of Board Diversity and Gender Composition and Corporate Social Responsibility and Firm Reputation" (2010) 97 Journal of Business Ethics 207 at 217.

<sup>53</sup> V.W. Kramer, A. Konrad, and S. Erkhut, *Critical Mass on Corporate Boards: Why Three or More Women Enhance Governance* Report No. WCW 11, (Wellesley Centre for Women, Wellesley, MA, 2006), p.53.

<sup>54</sup> It has been suggested that research into the relationship between female directors and performance may require a distinction between boards with one women and boards that have reached a certain threshold: M. Lückers-Rovers, "Women on Boards and Firm Performance" (2011) Journal of Management & Governance 1.

<sup>55</sup> SMEs are companies with less than 250 employees or an annual worldwide turnover of less than EUR50 million. See further Chapter 1 above.

addition, the EU proposal to introduce diversity disclosures helps to focus companies' attention on diversity targets and policies.

## CHAPTER 3 CORPORATE DIVERSITY POLICIES

### A. INTRODUCTION

Although the diversity issue is most closely associated with gender balance, an important issue is to what extent companies are reporting a more inclusive approach when framing diversity. Variety in the composition of the board of directors may be characterised in terms of observable features *eg* age, gender, nationality and ethnic background, and less visible ones *eg* educational, functional and occupational background.<sup>1</sup> It is therefore appropriate to consider the approach of companies to definitional issues based on our data collection. Against this backdrop our findings are presented in relation to suggested existence of a diversity policy in companies' annual reports and the comprehensiveness or otherwise of such a policy. The rationale for promoting diversity is also examined through the lens of reasons expressly put forward by companies in their annual reports.

### B. DEFINING DIVERSITY

An important threshold issue concerns how diversity is defined. An approach to diversity which looks beyond gender is in line with well-established practice in the US and in line with the approach taken in the EU Green Paper which reflects upon professional and international diversity in addition to gender representation.<sup>2</sup> In the Commission's 2011 Green Paper on corporate governance it was stated that "[d]iversity in [board] members' profiles and backgrounds gives the board a range of values, views and sets of competencies."<sup>3</sup> This view was reiterated in the Commission's Action Plan on European company law and corporate

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<sup>1</sup> J. Mahadeo, T. Soobaroyen and V.O. Hanuman, "Board Composition and Financial Performance: Uncovering the Effects of Diversity in an Emerging Economy" (2012) 105 *Journal of Business Ethics* 375, 388.

<sup>2</sup> European Commission, Green Paper, *The EU Corporate Governance Framework* COM(2011) 164 final 5.4.2011, p.6.

<sup>3</sup> European Commission, Green Paper, *The EU Corporate Governance Framework* COM(2011) 164 final 5.4.2011, p.5.

governance published on December 12 2012.<sup>4</sup> The discussion on board composition clearly endorses diversity in the selection of non-executive board members and also raises distinct issues in relation to how diversity should be defined. In relation to professional diversity, which was understood in the sense of skill and expertise, it was commented that:

“Diversified expertise is considered the key to efficient board work. A variety of professional backgrounds is needed to ensure that the board as a whole understands, for example, the complexities of global markets, the company’s financial objectives and the impact of the business on different stakeholders including employees.”<sup>5</sup>

While the proposed directive concerning gender balance on boards of listed companies focuses on gender,<sup>6</sup> a broader approach is seen in the proposed Directive on the Disclosure of Non-Financial and Diversity Information which requires disclosure by large listed companies of information relating to a diversity policy “with regard to aspects such as age, gender, geographical diversity,<sup>7</sup> educational and professional background”.<sup>8</sup>

A fluid approach to defining diversity is also seen at a policy level in a number of jurisdictions. For example, in Australia, the Corporations and Markets Advisory Committee noted the need to focus on diversity on a wider spectrum:

“Public comment on the make-up of corporate boards, and the diversity, or lack thereof, of board membership, has largely focused on gender. Similar issues can arise with other

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<sup>4</sup> European Commission, *Action Plan: European company law and corporate governance - a modern legal framework for more engaged shareholders and sustainable companies* COM(2012) 740/2.

<sup>5</sup> European Commission, Green Paper, *The EU Corporate Governance Framework* COM(2011) 164 final 5.4.2011, p.6.

<sup>6</sup> European Commission, *Proposal for a Directive of the European Parliament and of the Council on improving the gender balance among non-executive directors of companies listed on stock exchanges and related measures* Brussels 14.11.2012 COM (2012) 614 final.

<sup>7</sup> The desirability of nationality and having board representation from emerging markets has been noted: “European Companies Lack Board Diversity” *The Financial Times* 9 June 2013.

<sup>8</sup> European Commission, *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* COM(2013) 207 final, Article 1(2)(a).

measures of diversity, including tangible factors such as age, ethnicity, socio-economic or cultural background, and level of formal qualifications, technical skills and expertise, or intangible factors such as life experience, personal attitudes or perspectives.”<sup>9</sup>

In the UK, Lord Davies contended that diversity in the boardroom extended beyond the issue of gender in stating that the issue:

“is not just a gender numbers game. It is about the richness of the board as a whole, the combined contribution of a group of people with different skills and perspectives to offer, different experiences, backgrounds and life styles and who together are more able to consider issues in a rounded, holistic way ....”<sup>10</sup>

In the US, the since 28 February 2010 the Securities Exchange Commission requires disclosure of whether and in what way a nominating committee considers diversity in identifying board candidates and how it assesses the effectiveness of the policy.<sup>11</sup> However, no definition of diversity is provided. Therefore diversity may be defined by corporations more broadly than gender to include other criteria such as ethnic background.

Looking at hard and soft law provisions in relation to diversity and board composition reveals a variety of approaches in the countries sampled. In Norway, the Norwegian Code of Practice for Corporate Governance for Companies (2010) refers to the importance of diversity in connection with board composition.<sup>12</sup> The accompanying commentary states that “[t]he composition of the board of directors as a whole should represent sufficient diversity of *background and expertise* to help ensure that the board carries out its work in a satisfactory manner. In this respect due

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<sup>9</sup> Corporations and Markets Advisory Committee (Australia), *Report on Diversity on Boards of Directors* (2009), p.2.

<sup>10</sup> Lord Davies, *Women on Boards* (Department for Business, Innovation and Skills, 2011), p.7.

<sup>11</sup> Proxy Disclosure Enhancements, Securities Act Release No. 33-9089, Exchange Act Release No. 34-61175; Investment Company Act Release No. IC-29092. See further T.L. Hazen and L. Lamkin Broome, “Board Diversity and Proxy Disclosure” (2011) 37 *University of Dayton Law Review* 39.

<sup>12</sup> Norwegian Corporate Governance Board, *The Norwegian Code of Practice for Companies* (2010), Recommendation 8.



attention should be paid to the balance between male and female members of the board.”<sup>13</sup> The UK Corporate Governance Code 2012 refers to “the benefits of diversity on the board, including gender”.<sup>14</sup> A similar approach is taken in Belgium where the 2009 Corporate Governance Code refers to “gender diversity and diversity in general”.<sup>15</sup> An inclusive approach is also taken in Australia where diversity is defined in the commentary to Recommendation 3.2 as including, but not limited to, “gender, age, ethnicity and cultural background”.<sup>16</sup> Spain’s Unified Good Governance Code focuses largely on gender diversity,<sup>17</sup> but also refers to “diversity of knowledge and experience.”<sup>18</sup>

### C. COMPANY DEFINITIONS OF DIVERSITY

Our survey asked:

“(i) Which of the following are referred to by the company in the context of diversity?”

<i>Gender</i>	<i>Race/ethnic origin</i>	<i>Nationality</i>
<i>Age</i>	<i>Skills/experience</i>	<i>Religious beliefs</i>
<i>Disability</i>	<i>Sexual orientation</i>	<i>Background</i>

(ii) List any other aspects of diversity referred to in the annual report.”

Our study indicates not unexpectedly that gender was the most common criterion referred to by the companies sampled in all five jurisdictions. Other aspects commonly referred to were age,

<sup>13</sup> Norwegian Corporate Governance Board, The Norwegian Code of Practice for Companies (2010), p.29 (emphasis added).

<sup>14</sup> Financial Reporting Council, The UK Corporate Governance Code (2012), Supporting Principle to Principle B.2. See also Principle B.2.4.

<sup>15</sup> Belgian Corporate Governance Committee, The 2009 Belgian Code on Corporate Governance (2009), Principle 2.1.

<sup>16</sup> ASX Corporate Governance Council, Corporate Governance Principles and Recommendations (2<sup>nd</sup> ed updated 2010).

<sup>17</sup> Comision Nacion del Mercado de Valores, Unified Good Governance Code of Listed Companies (2006), p.24.

<sup>18</sup> Comision Nacion del Mercado de Valores, Unified Good Governance Code of Listed Companies (2006), p.20.

skills and experience, race/ethnic origin, and disability. In Belgium, Norway and Spain sexual orientation was the least common variable referred to by companies whereas in the UK only background was referred to less in this context.

### Most Reported Diversity Aspects 2011

Country	1	2	3	4	5
Norway	Gender	Age	Skills / experience	Nationality	Race / ethnic origin
Australia	Gender	Race / ethnic origin	Age	Skills / Experience	Disability
UK	Gender	Disability	Race / ethnic origin	Skills / experience	Nationality
Spain	Gender	Background	Skills / experience	Disability	Age
Belgium	Gender	Age	Skills / experience	Nationality	Race / ethnic origin

Norwegian companies tended to limit themselves to the aspects of diversity mentioned in the survey questionnaire in their annual reports. However, UK companies frequently included additional criteria for diversity in their reports. These included in a significant number of cases: independence, culture, skills and marital or civil partnership status. Less frequently there was a reference to knowledge (Arm Holdings), social class (BAT), aptitude (Bunzl), and politics (Rio Tinto and Vodafone). Glaxo included “chronic health conditions, genetic make-up or other protected characteristics” as relevant. In Spain, religious beliefs and sexual orientation also featured. Although Belgian companies did not typically include other aspects of diversity in their annual reports, social group and marital status were referred to on a number of occasions and also political opinion (Umicore) and education (Belgacom). Not surprisingly given Australia’s history, indigenous people were frequently chosen for specific mention as was culture. Other additional factors which were frequently listed by ASX 100 companies included culture, lifestyle choice, independent thought, political beliefs and language. Newcrest Mining Ltd referred to “life experience, communication styles, interpersonal skills, education, functional expertise and problem solving styles”.

## **D. DISCLOSED EXISTENCE AND COMPREHENSIVENESS OF DIVERSITY POLICY**

### ***(1) Overview***

In our study we asked whether the annual report of the companies sampled reported or suggested the existence of a diversity policy. In cases where the annual report suggested the existence of a diversity policy, we were interested in ascertaining whether the policy appeared to be vague or generic or specific and detailed.

It is clear that disclosed existence of a diversity policy within the annual report is becoming the norm in most countries studied. For EU countries, this trend would be cemented by the adoption of the proposed Directive on the Disclosure of Non-Financial and Diversity Information.<sup>19</sup>

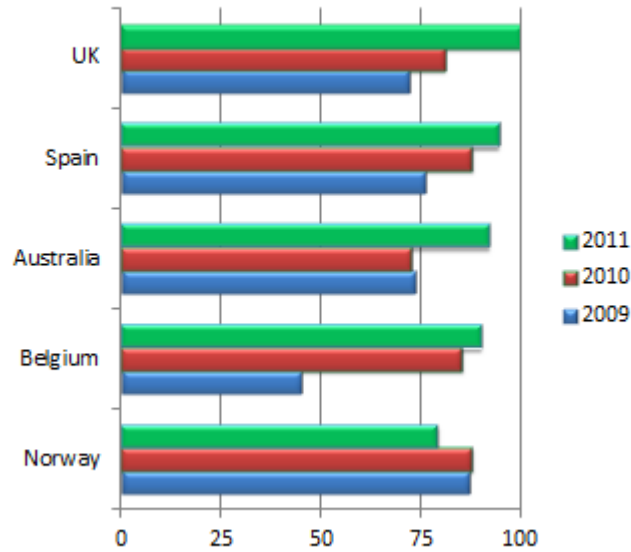
Our survey indicates that policies were commonly reported but often in a rather general or imprecise fashion. This was a common theme across all countries sampled. While companies were clearly aware of diversity as an issue that needs to be seen to be engaged with, the level of engagement within the annual report was variable. While references to the existence of a diversity policy were increasingly common year on year, the provision of specific and meaningful information in relation to the diversity policy within the context of the annual report was not always apparent. Thus while the impression may be given in the annual report that a company was supportive of diversity, when the substance of the information actually provided in relation to engagement with diversity was examined across our sample, this was frequently, in contrast, more superficial than substantial in nature. This suggests that, in some companies, buy-in to diversity as a concept has been more nominal than all-embracing. This observation is equally applicable across all the regulatory regimes and countries studied. In fact, as discussed below, it is notable that the Norwegian sample, as companies complying with hard law requirements, did not as a rule choose to engage either at all or in any great depth with the

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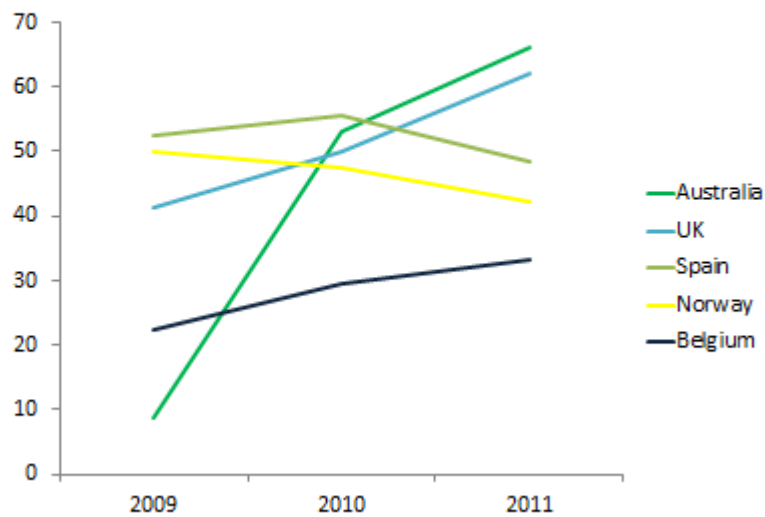
<sup>19</sup> European Commission, *Proposal for a Directive of the European Parliament and of the Council amending Council Directives 78/660/EEC and 83/349/EEC as regards disclosure of non-financial and diversity information by certain large companies and groups* COM(2013) 207 final, Article 1(2)(a). See further Chapter 1 above.

diversity issue within the context of the annual report as a transparency tool for the investor and stakeholder community.

## Reporting of the Existence of a Diversity Policy



## Companies with a Specific and Detailed Diversity Policy



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## **(2) Discussion**

As at 2011, our findings show the UK FTSE 100 companies leading the way with the full complement or 100% of FTSE 100 companies' reports suggesting the existence of a diversity policy.<sup>20</sup> However, in many countries we found a gap in terms of perception of the level of their engagement with diversity as discerned in relation to the information companies provided within the annual report. The most meaningful engagement was indicated in the 2011 annual reports of Australian ASX 100 companies where 66.0% of companies whose annual reports suggested the existence of a diversity policy met the specific and detailed standard.

The marked progress in FTSE 100 companies over the 2009-2011 period in relation to the existence of a diversity policy is consistent with the impact of policy debate and changes to the UK Corporate Governance code. However, this increase in prevalence in 2011 was not necessarily matched by an increase in detail as in only 62% of such companies the annual report suggested a specific and detailed diversity policy.

For Norwegian OBX companies, high reporting of the existence of a diversity policy would be expected for the sample for all three years studies given that the mandatory quota law has been in force since 1 January 2006. However, the figures are not as high as might be expected. In Norway there has been a decline in the percentage of companies' annual reports suggesting the existence of a diversity policy from 87.0% in 2009 to 79.2% in 2011. Furthermore, our survey indicated that whilst policies were reported, they were not always specific and detailed. For 2011, of the companies self-reporting a diversity policy in only 42.1% of cases the information provided suggested that policy was specific and detailed. One may speculate as to why OBX companies did not appear to have engaged more strongly with diversity<sup>21</sup> and whether the effect of compliance with a hard law provision was to remove engagement with diversity at a more general level. On the other hand, equality including gender equality and work-life balance measures are at a high level in Norway and diversity may be engaged with by Norwegian

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<sup>20</sup> This was an increase from 72.1% of FTSE 100 companies in 2009 and 80.6% in 2010.

<sup>21</sup> In the period under review, none of the four OBX companies that did not report having a diversity policy provided an explanation for this.

companies as the norm without companies feeling the need to make diversity-related disclosures in their annual report.

Analysis of the 2011 annual reports of IBEX-35 companies suggests that an overwhelming majority have a diversity policy. Our findings indicate a steady upward progression in this respect. The annual reports for 2009 suggest a figure of 75.8%, rising to 87.5% in 2010 and 94.3% in 2011. This finding is consistent with the existence of soft law recommendations in the Unified Good Governance Code of Listed Companies in relation to diversity since 2006. However, in terms of the indicative specificity of the policy, our findings were less positive and the trend has not been consistently progressive. In 2009, the annual reports of 52.4% of companies reporting a policy suggested the existence of a specific and detailed diversity policy as opposed to a vague or generic policy or no policy. In 2010, the figure rose marginally to 55.6% and in 2011 dropped back to 48.4%.

In Belgium, there is no requirement to have a diversity policy although the board is advised to pay attention to diversity and in 2011 a mandatory quota law was introduced. In 2009 figures 45.0% of companies reported or suggested the existence of a diversity policy. Considerable improvement is seen in 2010, the year following the inclusion of references to diversity in the corporate governance code with 85.0% of companies' annual reports suggesting the existence of a diversity policy with some incremental improvement in 2011 to a figure of 90%.<sup>22</sup> However, upon analysis, the quality of the reporting was poor for BEL20 companies. In 2009, only 22.2% of policies could be described as "specific and detailed", rising to 29% in 2010 and to 33% in 2011.

In Australia, there was a very strong upward trajectory in relation to the reporting of a diversity policy; the leap of 19 percentage points from 73.4% in 2009 to 91.9% in 2011 can be directly linked to the transition to a comply or explain diversity reporting protocol.<sup>23</sup> The specificity of the disclosures improved considerably over the period. In 2009, in only 8.7% of cases the diversity statements suggested the existence of a specific and detailed diversity policy. This

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<sup>22</sup> This figure can be expected to increase for subsequent years with the full roll-out of the mandatory quota law.

<sup>23</sup> The figure for 2012 can be expected to be higher again given the full roll-out of the diversity provisions in the corporate governance code.

leaped to 53.1% in 2010 and rose again in 2011 to 66.0%, showing that the introduction of a structured reporting regime can assist companies to move away from making vague and generic statements in relation to their commitment to diversity.

## E. REASONS FOR PROMOTING DIVERSITY

### (1) *Disclosure of Reasons for Promoting Diversity*

In our survey we asked whether companies had given reasons for promoting diversity in their annual report. In addressing the question of diversity on company boards, a significant majority of Spanish and Australian companies now explain their rationale for fostering diversity. Although, like their Spanish and Australian counterparts, increasing numbers of UK companies are explaining their decision, this still represents only about half of companies in the FTSE 100. The number of companies is much lower though in Norway and Belgium with only about a third of companies explaining their decisions. Not surprisingly gender, as the most tangible diversity characteristic, is mentioned most often in all countries. After that, the results are more varied. Other aspects which were often mentioned included sexual orientation and religion.

Most Reported Reasons for Promoting Diversity 2011

Country	1	2	3
Norway	Business case (26%)	Equality / Human Rights (10%)	Broader board perspective / avoiding group-think (5%)
Australia	Equality / Human Rights (82%)	Business case (74%)	Broader board perspective / avoiding group-think (72%)
UK	Equality / Human Rights (52%)	Business case (49%)	Broader board perspective / avoiding group-think (46%)
Spain	Equality / Human Rights (66%)	Business case (19%)	Broader board perspective / avoiding group-think (14%)
Belgium	Equality / Human Rights (15%)	Broader board perspective / avoiding group-think (5%)	
	Business case (15%)		

## (2) *Equality / Human Rights*

Our survey of annual reports for 2011 found that equality and human rights justifications formed the most prevalent rationale advanced by companies for promoting diversity. A greater number of companies across all three jurisdictions referred to the value of diversity in terms of an equality or human rights perspective than either improved performance (the business case) or a broader board perspective / the avoidance of group think.

The case for board diversity based on equity and fairness is normative. The human rights case aims to convince firms to increase the diversity of boards on the grounds that it achieves for society an outcome that is more equitable and, in some sense, fairer. It promotes balanced representation, avoids stereotyping and emphasises inclusiveness regardless of similarities or differences between men and women or between other groupings. The emphasis is upon equality of opportunity for all.<sup>24</sup>

The human rights case framed in terms of equality is supported by international instruments such as the UN Universal Declaration of Human Rights,<sup>25</sup> the UN Convention on the Elimination of All Forms of Discrimination Against Women,<sup>26</sup> the UN Millennium Development Goals (No. 3), the UN Global Compact “Women’s Empowerment Principles”,<sup>27</sup> the European Convention on Human Rights<sup>28</sup>, the EU Charter of Fundamental rights<sup>29</sup> and EU

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<sup>24</sup> S. Brammer, A. Millington and S. Pavelin “Gender and Ethnic Diversity among UK Corporate Boards” (2007) 15 *Corporate Governance: An International Review* 393, 395; C. Villiers, “Achieving Gender Balance on the Boardroom: Is it Time for Legislative Action in the UK?” (2010) 30 *Legal Studies* 533; M. McCann and S. Wheeler, “Gender Diversity in the FTSE 100: The Business Case Claim Explored” (2011) 38(4) *Journal of Law and Society* 542.

<sup>25</sup> Article 2.

<sup>26</sup> Article 3, Article 11.

<sup>27</sup> United National Development Fund for Women and UN Global Compact, Women’s Empowerment Principles: Equality Means Business, available at

<http://www.unifem.org/attachments/stories/WomensEmpowermentPrinciples.pdf>.

<sup>28</sup> Article 15.

<sup>29</sup> Article 23.



anti-discrimination law.<sup>30</sup> Indeed, equality is one of the five values on which the European Union is founded and the EU is bound to strive for equality between men and women in all its activities.<sup>31</sup> In this regard it is worth noting that, in line with CJEU jurisprudence, the proposed EU gender balance directive is founded on the principle of merit-based board appointments whereby a minority gender should only be favoured where two candidates are equally qualified.<sup>32</sup>

### **(3) *The Business Case for Diversity***

In our study we asked whether companies identified diversity with a driver for success or improved performance *ie* a business case for diversity. The business case may involve improving performance, accessing the widest talent pool and being more responsive to the target market. Australian companies stood out amongst their peers in terms of emphasising the value of diversity in this respect with almost three quarters of companies responding positively. In 2011 approximately three quarters of the Australian sample and half of the UK sample identified the business case as a rationale for promoting diversity. This rationale also featured in the other three countries but the numbers were significantly lower in the remaining three countries although this aspect was more strongly prevalent than the avoidance of group-think rationale.

In the UK, women are estimated to be responsible for about 70% of household purchasing decisions and to hold almost half of the UK's wealth.<sup>33</sup> The UK Cranfield Report 2012 states that “[t]here is growing evidence that companies with more diverse boards perform better; achieving higher sales, higher returns on invested capital and higher returns on equity.”<sup>34</sup> The

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<sup>30</sup> On equality and discrimination in the context of diversity see European Commission, *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* COM(2013) 207 final, p.2-3.

<sup>31</sup> Articles 2 and 3 TEU, Article 8 TEFU.

<sup>32</sup> European Commission, *Proposal for a Directive of the European Parliament and of the Council on improving the gender balance among non-executive directors of companies listed on stock exchanges and related measures* Brussels 14.11.2012 COM (2012) 614 final. See further Chapter 1 above.

<sup>33</sup> *Diversity and Gender Balance in Britain plc: a study* by TCAM in conjunction with The Observer and as part of the Good Companies Guide (London, TCAM 2009).

<sup>34</sup> Cranfield School of Management, *The Female FTSE Board Report 2012* (2012).

basis of the economic case for board diversity is that it is correlated to increased value for shareholders. However, at present the empirical evidence for this is mixed and the jury remains out on this point. There are some studies which find a positive link between corporate performance and the presence of female directors on the board.<sup>35</sup> However, a number of studies find no positive relationship between board diversity and board performance.<sup>36</sup> As Villiers aptly observes, “[t]he effect of diversity has not been fully tested because diversity has not yet been solidly achieved so much of the business case is therefore speculative.”<sup>37</sup> Furthermore, in any event it is difficult to artificially isolate diversity as a causative factor. In a 2007 study, Carter *et al* found the percentage of women and ethnic minority directors on the board appears to create value for shareholders.<sup>38</sup> However, they also found that the process through which gender and ethnic diversity impacts financial performance is subtle and complex such that some functions of the board may benefit from diverse directors while other functions may actually suffer. They note that the mixed results of empirical tests are not unexpected because the link between board diversity and firm performance is both theoretically and empirically nuanced.

Indeed, although several studies have established a correlation between board diversity and value, the authors generally concede the correlation does not necessarily imply causation. It has been fairly contended that causality and cross-linkage between diversity and other performance-

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<sup>35</sup> R.B. Adams and D. Ferreira, “Diversity and Incentives in Teams: Evidence from Corporate Boards” (2002) Working Paper, Federal Reserve Bank of New York; N.L. Erhardt, J. Werbel, C.B. Sharder, “Board of Director Diversity and Firm Financial Performance” (2003) 11 *Corporate Governance: An International Perspective* 102; D.A. Carter, B.J. Simkins and W.G. Simpson “Corporate Governance, Board Diversity and Firm Value” (2003) 38 *Financial Review* 33.

<sup>36</sup> See *eg* C. Rose, “Does Female Board Representation Increase Board Performance? The Danish Evidence” (2007) 15(2) *Corporate Governance* 404; D. Carter, F. Souza, B. Simkins and G. Simpson, “The Diversity of Corporate Board Committees and Firm Financial Performance”, March 2007 available at <http://ssrn.com/abstract=972763>; F. Dobbin and J. Jung, “Corporate Board Gender Diversity and Stock Performance: Competence Gap or Institutional Bias?” (2011) 89 *North Carolina Law Review* 809, 815.

<sup>37</sup> C. Villiers, “Achieving Gender Balance on the Boardroom: Is it Time for Legislative Action in the UK?” (2010) 30 *Legal Studies* 533, 545.

<sup>38</sup> D. Carter, F. Souza, B. Simkins and G. Simpson, “The Diversity of Corporate Board Committees and Firm Financial Performance”, March 2007 available at <http://ssrn.com/abstract=972763>.

influencing factors make single factor research problematic.<sup>39</sup> Lückerath-Rovers concludes that the business performance issue is a nuanced one:

“...it cannot be concluded definitely that one woman on the board impacts the performance of the company on her own. Along with previous empirical studies, our results may add support to the idea that having women on the board is a logical consequence of a more innovative, modern, and transparent enterprise where all levels of the company achieve high performance.”<sup>40</sup>

In summary, the value case is more difficult to assess than the normative equity case - diversity can be observed and the implications tested empirically, but the literature reflects that the facts are difficult to untangle so as to determine causation. This helps to explain why empirical studies on the relationship between diversity and business performance are not consistent.

#### ***(4) A Broader Board Perspective / Avoiding Group-Think***

In our study we asked whether companies identified provision of a broader board perspective and the avoidance of group-think with the rationale for diversity. Almost three quarters of Australian companies identified the value of achieving a broad perspective within the organisation, a little less than half of UK companies did and companies listed in the other three countries appeared to attach less importance to reporting this.

It is a well-established and fundamental precept in corporate governance theory and practice that a board comprising directors from varied backgrounds may encourage more dissent and result in more robust decision-making.<sup>41</sup> Diversity is also regarded as enhancing creativity and

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<sup>39</sup> M. Lückerath-Rovers, “Women on Boards and Firm Performance” (2011) *Journal of Management & Governance* 1. These complicating factors include, firstly, how to measure diversity over time, secondly, causality between diversity and performance, and thirdly, critical mass theory.

<sup>40</sup> M. Lückerath-Rovers, “Women on Boards and Firm Performance” (2011) *Journal of Management & Governance* 1, 17.

<sup>41</sup> See *eg* I. Janis, *Groupthink: Psychological Studies of Policy Decisions and Fiascos* 2<sup>nd</sup> ed (Boston: Houghton Mifflin, 1983); N. Fondas and S. Salsalos, “A Different Voice in the Boardroom: How the Presence of Women Directors Affects Board Influence over Management” (2000) 12 *Global Focus* 13; N. Shahinpoor and B.F. Matt, “The Power of One: Dissent and Organizational Life” (2007) 74(1) *Journal of Business Ethics* 37; N. McInerney-

innovation. Diverse boards may also be better at dealing with strategic change.<sup>42</sup> Establishing a level of “cognitive diversity”<sup>43</sup> and the accompanying element of constructive dissent which questions the dominant logic in the boardroom is a strategic asset which assists the firm in increasing independence and avoiding “group-think.”<sup>44</sup> Indeed, the European Commission has recognised that “[d]ifferent leadership experiences, national or regional backgrounds or gender can provide effective means to tackle ‘group-think’ and generate new ideas. More ideas lead to more discussion, more monitoring and more challenges in the boardroom.”<sup>45</sup>

Whether gender diversity improves the governance of a company is linked to the question of what good governance should achieve, including, as Lückerath-Rovers observes, a good relationship with stakeholders as proposed both by stakeholder theory<sup>46</sup> and resource dependency theory,<sup>47</sup> diversity as a measure of independence as advocated in agency theory,<sup>48</sup> and diversity as a necessity for fair and transparent decision-making.<sup>49</sup>

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Lacombe, D. Bilimoria and P.F. Salipante, “Championing the Discussion of Tough Issues: How Women Corporate Directors Contribute to Board Deliberations” in S. Vinnicombe (ed. et al), *Women on Corporate Boards of Directors: International Research and Practice* (Cheltenham, Edward Elgar, 2008), p.123.

<sup>42</sup> K. Takacs Haynes and A. Hillman, “The Effect of Board Capital and CEO Power on Strategic Change” (2010) 31(11) *Strategic Management Journal* 1145.

<sup>43</sup> Q.M. Roberson and H. J. Park “Examining the Link Between Diversity and Firm Performance: The Effects of Diversity Reputation and Leader Racial Diversity” (2007) *Group and Org. Mgmt* 548 at 553.

<sup>44</sup> N. Fondas and S. Salsalos, “A Different Voice in the Boardroom: How the Presence of Women Directors Affects Board Influence over Management” (2000) 12 *Global Focus* 13 at 20.

<sup>45</sup> European Commission, *The EU Corporate Governance Framework* COM(2011) 164 final 5.4.2011, p.5. See also European Commission, *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* COM(2013) 207 final, p.2.

<sup>46</sup> M. Lückerath-Rovers, “Women on Boards and Firm Performance” (2011) *Journal of Management & Governance* 1 referring to L. Donaldson and J.H. Davis, “Stewardship Theory or Agency Theory: CEO Governance and Shareholder Returns” (1991) 16(1) *Australian Journal of Management* 49.

<sup>47</sup> J. Pfeffer and G.R. Salancik, *The External Control of Organisations: A Resource Dependency Perspective* (Stanford Business Books, 1978).

<sup>48</sup> M.C. Jensen and W.H. Meckling, “Theory of the Firm: managerial behaviour, agency, costs and ownership structure” (1976) 3 *Journal of Financial Economics* 305.

<sup>49</sup> P. Luoma and J. Goldstein, “Shareholders and Corporate Boards: Institutional influences on board composition and structure” (1999) 42(5) *Academy of Management Journal* 553.

Studies have shown that where governance is weak, female directors exercise strong oversight and that a gender balanced board is more likely to pay attention to managing and controlling risk.<sup>50</sup> A Canadian study of public, not-for-profit and private boards found that boards with three or more women showed very different governance behaviours to those with all male boards.<sup>51</sup> The study found that the more gender-balanced boards were more likely to identify criteria for measuring strategy, to follow conflict of interest guidelines and to adhere to a code of conduct. They were more likely to ensure better implementation and focus on additional non-financial performance measures such as employee and customer satisfaction, diversity and corporate social responsibility. They were also found to be more likely to have new director induction programmes and closer monitoring of board accountability and authority. In the UK, FTSE 100 companies with more women on their boards were considered to be more focused on succession planning and the use of external search consultants, new director induction and training, audit and balance of the whole board's skills and knowledge.<sup>52</sup> Other studies have found a negative association between female directors and insolvency risk – gender balance may increase challenge and thereby reduce undue risk-taking.<sup>53</sup>

Board diversity also serves as a useful contributor to meeting board independence requirements which corporate governance codes reference as in accordance with best corporate governance practice. The degree of director independence is often focused on as the single most prominent indicator of firm-specific governance quality.<sup>54</sup> A standard of independence which revolves around the absence of familial or economic connections between a firm and its directors may be inadequate in ensuring independent oversight. It is notable that diversity along racial, gender and other dimensions has been proposed as a potentially more effective standard for board

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<sup>50</sup> Lord Davies, *Women on Boards* (Department for Business, Innovation and Skills, 2011), p.9.

<sup>51</sup> D. Brown, D. Brown and V. Anastasopoulos, *Women on Boards: Not Just the Right Thing...But the Bright Thing* Report 341-02 (Ottawa, The Conference Board of Canada, 2002).

<sup>52</sup> Lord Davies, *Women on Boards* (Department for Business, Innovation and Skills, 2011), p.10.

<sup>53</sup> N. Wilson and A. Altanlar, "Director Characteristics, Gender Balance and Insolvency Risk: An Empirical Study" May 30, 2009 available at SSRN:<http://ssrn.com/abstract=1414224>.

<sup>54</sup> On the link with board diversity see H. Colaco, P. Myers and M. Nitkin, "Pathways to Leadership: Board Independence, Diversity and the Emerging Pipeline in the US for Women Directors" (2011) 8(2) *International Journal of Disclosure and Governance* 122.

independence on the basis that a heterogeneous board which includes a mix of men and women, a mix of ages, a mix of tenure, and a mix of experience is likely to provide real independence.<sup>55</sup>

### **(5) Other Rationales for Promoting Diversity**

In our survey we asked whether companies had referred to any other considerations in relation to why they were promoting diversity. One of the biggest considerations in promoting diversity as a concept has to be widening the pool of available talent. This feeds into the business case but merits independent consideration in its own right. Firms need access to critical resources in order to survive. If we assume that certain valuable qualities are not evenly distributed among demographic groups (men and women), the company is structurally denying these qualities by excluding women.<sup>56</sup> In its report, *Women in Economic Decision Making in the EU 2012*, the European Commission stated:

“Drawing on women’s talent and professional skills for leadership positions is likely to become all the more necessary as ageing populations and the resulting shortage of skilled labour put an increasing brake on economic growth.”<sup>57</sup>

In its 2011 Green Paper on Corporate Governance, the Commission had also made the argument strongly, stating:

“promoting women to boards has one indisputably positive effect: it contributes to increasing the pool of talent available for a company’s highest management and oversight functions.”<sup>58</sup>

Female corporate directors bring a different perspective, knowledge and skill-set<sup>59</sup> to the boardroom.

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<sup>55</sup> *Ibid.*

<sup>56</sup> S. Brammer, A. Millington and S. Pavelin, “Gender and Ethnic Diversity among UK Corporate Boards” (2007) 15 *Corporate Governance: An International Review* 393.

<sup>57</sup> European Commission, *Women in Economic Decision Making in the EU: Progress Report* (2012), p.7.

<sup>58</sup> European Commission, *The EU Corporate Governance Framework* COM(2011) 164 final 5.4.2011, p.7.

<sup>59</sup> The talent base of 51% of the population is specifically referenced in the Unified Good Governance Code: Comision Nacion del Mercado de Valores, *Unified Good Governance Code of Listed Companies* (2006), p.12.

Our findings in terms of the expression of additional considerations for promoting diversity varied from country to country and from company to company. In 2011 19% of Norwegian OBX companies also referred to one or more additional considerations for supporting diversity. These included a reference to the company wanting to be an attractive employer for people with different backgrounds regardless of their ethnicity, religion or age (Algeta ASA), improving the corporate culture (Orkla SA) or working environment (Schibsted) and good people management (Songa Offshore). The figure for UK FTSE 100 companies was 25%. Additional considerations mentioned by these companies included increasing visibility and opportunities for women, attracting and retaining the best people, unlocking innovation and driving employee engagement, strengthening company culture, to represent their clients better, to reflect the global nature of the company and the communities they work in, best equipped to face challenges, empowering employees, reflect their customers and investors etc. It was common among Spanish IBEX-35 companies to refer to additional considerations - 47.6% did so in 2011. These reasons included the attracting of talent.

In Belgium in 2011, 15% of companies also referred to one or more additional considerations for supporting diversity. These included a reference to gaining a better understanding of customers and improving creativity and consequently innovation, ensuring a diversity of skills, and compliance with legal requirements. The percentage of companies in Australia reporting additional considerations in 2011 was considerable at 57.1% of ASX 100 companies. These considerations included attracting the best talent, representing stakeholders and customers and making employees feel valued.

## **F. CONCLUSION**

This chapter has examined the debate in the literature and policy arena on defining diversity and the rationale for enshrining a diversity policy within listed companies. We have presented key trends which have emerged from our study in relation to how companies in the countries reviewed have engaged with the diversity debate and how they have chosen to place their own parameters around it. We have also collated useful data in relation to the reasons companies are reporting in their annual report as a motivation for promoting diversity. Furthermore, a significant finding is that even where the promotion of diversity is represented as a corporate

value in a company's annual report, in many instances the commitment is made in vague, general or aspirational terms rather than there been clear evidence presented of a genuine and detailed corporate diversity policy. It is fair to conclude while companies may have captured the zeitgeist, in some cases it is in form rather than spirit.

In Chapter 4 we examine the nuts and bolts of companies' pro-diversity measures within the broader context of the importance of providing an embedded organisational diversity culture.



# CHAPTER 4 ADDRESSING THE PIPELINE: THE IMPORTANCE OF PRO-DIVERSITY MEASURES

## A. INTRODUCTION

In addressing the diversity challenge, it is important that debate and action do not stop at the boardroom. A board of directors provides legitimacy to several groups of stakeholders. Female directors and directors who meet other diversity criteria can provide a valuable form of legitimacy in the eyes of current and potential employees, and also symbolise career possibilities to prospective recruits.<sup>1</sup> Appointments which meet diversity criteria may signal that the firm values employees within the firm who meet diversity criteria,<sup>2</sup> and provide role models for them.<sup>3</sup> However, the provision of inspirational role models from above is not enough to create a diverse work environment at all levels within a company and at senior management level so as provide the proverbial pipeline to the boardroom. As KPMG noted in a report concerning diversity disclosures by ASX companies,

“Commentators, investors and directors are ... clear that entities should be concentrating on the pipeline of women coming through the organisation rather than simply looking at the gender representation at the top levels. Entities should be looking at recruitment practices to ensure they consider the widest possible pool of candidates and provide

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<sup>1</sup> V. Singh and S. Vinnicombe, “Why so Few Women Directors in Top UK Boardroom? Evidence and Theoretical Explanations” (2004) 12(4) *Corporate Governance: An International Review* 479; A.J. Hillman, C. Shropshire and A. Canella “Organisational Predictors of Women on Corporate Boards” (2007) 50(4) *Academy of Management Journal* 941.

<sup>2</sup> D. Bilmoria, “The Relationship between Women Corporate Directors and Women Corporate Officers” (2006) 18(1) *Journal of Managerial Issues* 47.

<sup>3</sup> L. Fairfax, “The Bottom Line on Board Diversity: A Cost Benefit Analysis of the Business Rationales for Diversity on Corporate Boards” (2005) *Wisconsin Law Review* 795, 820-30.

flexible working practices and the appropriate mentoring and support to ensure they can recruit and retain women at the right levels.”<sup>4</sup>

The ‘leaky talent pipeline’ phenomenon represents a major challenge. A 2011 McKinsey report shows women are left behind at each transition up the management ranks; women represent 53% of new hires, 37% of managers, just 26% of vice presidents and senior executives, and on average only 14% of the executive committee are women.<sup>5</sup> The McKinsey report concluded that the odds are stacked against women at every step of the career ladder – not just at the top. Why do women falter? The McKinsey study found women leave because they feel they will not manage to successfully reconcile personal and professional goals.<sup>6</sup> Higher up the ladder women lack a network of sponsors to help build their standing. While they found motherhood per se rarely prompts a women to stay put, downshift or look for work elsewhere, diversity officers did express concern about the impact of the always-on 24/7 executive lifestyle and travel requirements.<sup>7</sup> Working less than full time is still often seen as a risky career move and this can deter women from making it. Flexible working is likely only to be a successful initiative for promoting gender diversity only when it ceases to be regarded as the preserve of women with dependants.

The Davies Report regarded the reasons behind the level of attrition of women up through an organisation as complex, relating to factors such as lack of access to flexible working arrangements, difficulties in achieving work-life balance or disillusionment at a lack of career progression.<sup>8</sup> Responses to the Davies review revealed a considerable barrier in terms of a lack of flexibility around work-life balance particularly around young families and the perception of a traditional male cultural environment, the old boys’ network and a lack of networking

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<sup>4</sup> KPMG, *ASX Corporate Governance Council Principles and Recommendations on Diversity: Analysis of 31 December 2011 Year End Disclosures* (2011), p.18.

<sup>5</sup> See generally J. Barsh, and L. Lee, *Unlocking the Full Potential of Women in the U.S. Economy*, special report for The Wall Street Journal Executive Task Force for Women in the Economy (McKinsey & Company, 2011).

<sup>6</sup> J. Barsh, and L. Lee, *Unlocking the Full Potential of Women in the U.S. Economy*, special report for The Wall Street Journal Executive Task Force for Women in the Economy (McKinsey & Company, 2011), p.2.

<sup>7</sup> J. Barsh, and L. Lee, *Unlocking the Full Potential of Women in the U.S. Economy*, special report for The Wall Street Journal Executive Task Force for Women in the Economy (McKinsey & Company, 2011), p.6.

<sup>8</sup> Lord Davies, *Women on Boards* (Department for Business, Innovation and Skills, 2011), p.16.

opportunities for women.<sup>9</sup> Across Europe, the European Commission report *Progress on Equality between Men and Women* found that reconciling work, family and private life remains a great challenge for many European women.<sup>10</sup>

Perhaps too much should not be made of the pipeline explanation for lack of diversity in the higher echelons of companies. There is a perception that low representation on boards and in senior management positions is a product of a shortage of supply of qualified women and the lack of qualified, visible minority candidates.<sup>11</sup> However, it has been fairly contended that the pipeline explanation does not necessarily stand up to scrutiny since, despite a dramatic expansion in the number of female managers to approximately 50%, the trajectory for achieving equal numbers in the top ranks is another 60 years, both in the UK and in the USA.<sup>12</sup> A recent survey of over 700 corporate directors concerning gender disparity found that while men emphasised the pipeline deficit, women said that a major obstacle was the prevalence of closed traditional networks in the appointment process.<sup>13</sup>

Nonetheless the key question of how promote diversity in the next generation of board leaders by propelling them through the executive ranks remains. In unravelling the pipeline debate, metrics,<sup>14</sup> advocacy and disseminating better information on available qualified women have a crucial role to play in increasing awareness of qualified women available to serve, and expanding the number of women reaching the executive layer of management.<sup>15</sup> While the 2011

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<sup>9</sup> Lord Davies, *Women on Boards* (Department for Business, Innovation and Skills, 2011), p.34.

<sup>10</sup> European Commission, *Progress on Equality between Men and Women in 2011* COM (2012) 169 final.

<sup>11</sup> On this phenomenon see A. Dhir, "Towards a Race and Gender-Conscious Conception of the Firm: Canadian Corporate Governance, Law and Diversity (2009-10) 35 *Queen's Law Journal* 569, 578.

<sup>12</sup> C. Villiers, "Achieving Gender Balance on the Boardroom: Is it Time for Legislative Action in the UK?" (2010) 30 *Legal Studies* 533, 539 referring to Equal Opportunities Commission, *Sex and Power: Who Runs Britain?* (2007).

<sup>13</sup> E. Doldor, S. Vinnicombe, M. Gaughan and R. Sealy, *Gender Diversity on Boards: The Appointment Process and the Role of Executive Search Firms* Research report 85 (Equality and Human Rights Commission, 2012), at p.31.

<sup>14</sup> On gender metric reporting see Chapter 5 below.

<sup>15</sup> A pipeline of women sitting on corporate boards and at executive committee levels below the FTSE 100 Boards, has been highlighted in the Cranfield *Female FTSE Reports*. In addition, Cranfield School of Management produces an annual 100 Women to accompany their *Female FTSE Reports*.

McKinsey study<sup>16</sup> revealed that many companies have made real strides in removing structural barriers for women by adopting more flexible work routines, implementing career on and off-ramps, and policies that enable women to survive the dual responsibilities of family and work, they believe the real challenge is to achieve a genuine transformation in mind-set.

## **B. EMBEDDING PRO-DIVERSITY MEASURES**

A simple hard or soft law requirement to establish a diversity policy does not directly address the elements of good organisational practice which will buttress the embedding of pro-diversity measures within an organisational culture. Analysis of the data collected in our study permits consideration of the engagement by companies with the pipeline issue by means of adopting and outlining pro-diversity measures in their annual reports.

The European Commission has noted:

“An increasing number of businesses recognise the positive impact of women’s participation in management and are implementing concrete measures to support the leadership potential of women. These measures range from raising awareness on the business case for gender diversity, setting company voluntary targets, developing strategies and tools to recruit, train, mentor and promote the networking for senior female managers and promoting reconciliation between family and professional life.”<sup>17</sup>

Against this background, our study was concerned to ascertain the extent to which companies self-report the adoption of pro-diversity measures which facilitate and support diversity throughout the company and which therefore address the pipeline issue to make the workplace a more accessible place for advancement by women and other persons meeting diversity criteria.

We note the importance of companies establishing clearly expressed, specific, measurable objectives rather than expressing vague aspirations and affiliations to diversity as an ideal. As

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<sup>16</sup> J. Barsh, and L. Lee, *Unlocking the Full Potential of Women in the U.S. Economy*, special report for The Wall Street Journal Executive Task Force for Women in the Economy (McKinsey & Company, 2011).

<sup>17</sup> European Commission, *Women in Economic Decision-making in the EU: Progress Report* (2012), p.14.

KPMG has rightly observed in the Australian context, “[e]stablishment of measurable objectives is recommended to assist entities in transforming their diversity strategies and goals into achievable outcomes.”<sup>18</sup>

Our research in relation to pro-diversity measures adopted by companies, builds upon some interesting findings in the McKinsey *Women Matter* report 2012.<sup>19</sup> This showed that, in the main, companies are taking the issue of diversity extremely seriously, and devoting precious resources to redressing the gender balance. Many have made important progress with training programmes established to open up the organisation’s eyes to the value of diversity. Recruitment and promotion processes have been rethought to counter unwitting biases, clear goals set for the number of women in senior positions, and in some companies, more women in top jobs. Nevertheless many companies also express frustration that their efforts do not always gain traction, particularly with managers lower down the organisation. Putting initiatives in place does not guarantee they will be well executed and many companies are struggling to implement effectively strategic commitments on diversity and mentoring programmes they have formally put in place.

The McKinsey report identified key elements underpinning effective diversity initiatives: management commitment, a culture sympathetic to the aims of gender diversity programmes, and diligent implementation and tracking. It requires a high level of CEO and top management commitment to make a case for diversity, and leading by example to tackle mind-sets. A rigorous system for monitoring diversity within the company, a critical mass of initiatives, and a set of enablers to ease progress through the company *eg.* support with childcare are also considered important. The programme has to be seen to be not just as a set of initiatives but more a way of life, with senior management showing their commitment until diversity becomes the status quo.

A clear set of targets for each part of the business and level of the organisation is also recognised as crucial. Best practice is emerging to tackle issues with implementation, for

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<sup>18</sup> KPMG, *ASX Corporate Governance Council Principles and Recommendations on Diversity: Analysis of 31 December 2011 Year End Disclosures* (2011), p.13.

<sup>19</sup> J. Barsh, and L. Lee, *Unlocking the Full Potential of Women in the U.S. Economy*, special report for The Wall Street Journal Executive Task Force for Women in the Economy (McKinsey & Company, 2011).

example, making managers across the business accountable for implementing gender programmes initiated by diversity champions. Certain initiatives are supported by the EU and Social Partners, for example, initiatives from BUSINESSEUROPE and ETUC recommendations for improving gender balance in trade unions, national confederations and European industry federations.

Set out below is a summary of our findings in relation to corporate disclosures across our sample in relation to a number of pro-diversity measures – management recruitment and promotion practices, mentoring, work-life balance measure, and monitoring or auditing company-wide diversity.

### ***(1) Management Recruitment and Promotion Practices***

The European Commission has noted that “inadequate recruitment practices for board members drawing often on a too narrow pool of people contribute to perpetuating the selection of members with similar profiles.”<sup>20</sup> Given the importance of the pipeline and the need for a drilled-down approach to diversity, our survey of annual reports sought information in relation to the reporting of diversity policies in relation to management recruitment and promotion. Some countries have begun to take note of the need to formally support progress in this area<sup>21</sup> and many corporate governance codes emphasise the need to set specific targets for more women in management positions.<sup>22</sup> Our research indicates that in all countries reviewed disclosure of diversity policies in respect of recruitment and promotion was increasing.

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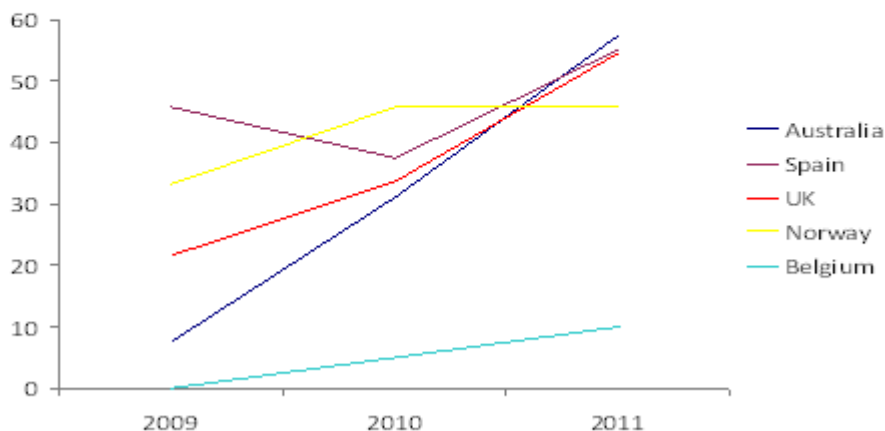
<sup>20</sup> European Commission, *Proposal for a Directive of the European Parliament and of the Council amending Council Directives 78/660/EEC and 83/349/EEC as regards disclosure of non-financial and diversity information by certain large companies and groups* COM(2013) 207 final, p.4.

<sup>21</sup> In Germany, for example, DAX30 companies in 2011 voluntarily set individual targets for women in management positions.

<sup>22</sup> Committee on Corporate Governance, *Recommendations on Corporate Governance* (Denmark, 2011), Recommendation 4.11.4 and Comment thereto.

## Disclosure of Diversity Policies on Management Recruitment / Promotion

(Expressed as a % of those that reported on such matters)



Australian companies were the strongest performing of our sample on this pro-diversity indicator as at 2011. In 2009, 7.6% of ASX 100 companies reported in their annual report the existence of diversity policies in relation to management recruitment or promotion. This increased markedly to 31.2% in 2010 and to 57.4% in 2011. Newcrest Mining Ltd referred in its 2011 report to its policy to have 33.3% succession plans for all level 2 to level 5 roles including at least one female by 31 December 2013. Oz Minerals referred to the introduction of targets to improve gender equity in under-represented roles and address pay equity. It states: “[o]ur targets will cover key areas of focus and measurement including: increasing representation of women in management roles; increasing representation of women in under-represented roles such as trades and engineering; remuneration equity; and increasing retention of women.” AMP is another example of a diversity leader in setting particular targets in its 2011 annual report in relation to increasing the number of women in senior executive positions to 35% by 2015 and increasing the number of women in middle management to 43% by 2015.

In Spain the Unified Good Governance Code recognises the need for companies to concentrate efforts on ensuring that women reach senior executive and director roles but no specific recommendation is made in relation to how this should be done.<sup>23</sup> We found strong evidence in

<sup>23</sup> Comision Nacion del Mercado de Valores, Unified Good Governance Code of Listed Companies (2006), p.44.

IBEX-35 companies' annual reports of adoption of diversity policies in relation to management. In 2009, 45.8% of companies reported such a policy, this dipped to 37.5% on 2010 and increased to 55.2% in 2011. A good example of one such company is Banco Santander which in its 2011 annual report Banco Santander states "The Bank has processes and tools to detect and develop internal talent, and to identify the best people for each post. Of note are those for high potential professionals, such as STEP, or the development of female talent, such as the Alcanza plan."

In the UK, there was a considerable increase in the percentage of companies reporting diversity policies in connection with management recruitment or promotion. In 2009, 21.6% of FTSE 100 companies reported in their annual report the existence of diversity policies in relation to management recruitment or promotion. This increased to 33.7% in 2010 and to 54.5% in 2011. In certain cases details were provided of such policies. In 2011 these included asking recruitment agencies to ensure that at least half of the candidates were women, the directors were asked their view on diversity and a report produced (Aggreko); "embedded gender KPIs throughout the talent management process" (Aviva); drawing up development plans for our senior women and monitoring progress against them (BAT); the use of an assessment tool that looks at key business processes such as recruitment, promotion and training where businesses are required to produce a plan to show how they are progressing against the strategy (G4S); and executive development programmes, series of "development interventions" targeted at women, participation in the "Women in Business" initiative (Morrisons). Companies also referred to participation in the FTSE 100 Cross Company Mentoring Programme, the objective of which is to increase the pool of eligible senior female candidates.

On the FTSE 100 Evraz can be seen as a champion of diversity in referring to "the development of a transformation division "which has implemented a range of activities such as improving the representation of historically disadvantaged people in senior management structures, the development of education programmes, preferential procurement agreements and support for the development of local black owned businesses as preferred suppliers".

Another FTSE 100 company (Experian) referred in its 2011 annual report to the Experian Business Network (EBN) which it created as a development forum for high potential and diverse emerging talent. Analysis shows that over a quarter of participants have gained a role



promotion while part of the forum. This promotion and retention rate is over double that of the all-employee population “indicating that the forum is achieving its objectives in terms of both the promotion and retention of diverse talent.” It also referred to the “ongoing commitment from the Experian executive team to promote diversity when hiring senior leaders. Candidate shortlists would be expected to offer a range of diversity, provided that each individual met the role criteria and deserved their place on the list by merit, not by reason of their diversity”.

FTSE 100 companies are conscious of the need to provide supply for the pipeline. In setting out its targets, Aviva in its 2011 annual report specifically noted that it was important to do so “as it is recognised that a higher number of women in senior management will create a stronger talent pipeline and is better for business.” BP noted in its 2011 report that “[w]e are also incorporating detailed diversity and inclusion analysis into talent reviews, with processes to identify actions where any issues are found. We continue to increase the number of local leaders and employees in our operations so that they reflect the communities in which we operate.”

In Norway, for OBX companies there was a relatively strong showing on this pro-diversity indicator. In 2009, 33.3% of companies reported in their annual report the existence of diversity policies in relation to management recruitment or promotion. This increased to 45.8% in 2010 and remained static in 2011. One OBX company specifically referred in its 2011 annual report to “focusing on recruitment in order to increase the number of women in male-dominated positions and disciplines” (Det norske oljeselskap ASA) Orkla ASA. This company also stated that

“measures to increase the proportion of women [in leading positions] include a special focus on female managers in the annual management evaluations, giving women priority in connection with leadership development courses, the requirement always to identify a female candidate for senior positions and the measurement of gender balance trends”.

Our findings show Belgium as the outlier in relation to this pro-diversity indicator. In 2009, none of the BEL20 companies reported the existence of diversity policies in relation to management recruitment or promotion. However, such policies were reported by 5.0% of companies in 2010 and 10.0% in 2011. Belgacom referred in its 2011 Annual Report to promoting the increased participation of women in the ICT sector and in management and

leadership functions and Solvay referred to workshops for women. There are, however, some external initiatives which are useful in this regard. For example, in May 2009, the Ministry of Equal Chances for the Flemish Region, together with certain Chambers of Commerce and the Belgian Institute of Directors established a programme to promote the representation of women on boards of companies and in management positions. The initiative included coaching and the establishment of a public database of both male and female board candidates.<sup>24</sup>

## (2) *Mentoring*

Mentoring assists with the development of skills, experience and commercial judgement. Relationships and social capital<sup>25</sup> are critical factors for the career progression of managers and executives in general,<sup>26</sup> and for access to corporate boards.<sup>27</sup> Lack of social capital can be a significant obstacle for women. Studies have found that building social capital appears more difficult for women, due to the natural tendency of the male-dominated corporate elite to exclude demographically dissimilar others.<sup>28</sup> Further, the exclusion of women from the networks that give them a passage to the top ranks also reinforces the masculinity that surrounds those positions, as well as the masculinity that appears to characterise the corporate organisation.<sup>29</sup>

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<sup>24</sup> See Deloitte, *Women in the Boardroom: A Global Perspective* (2011), p.16.

<sup>25</sup> D. Brass, "Social Capital and Organizational Leadership" in D.S.J. Zaccaro and R. Klimoski (eds), *The Nature of Organizational Leadership* (Jossey-Bass, 2001). Social capital refers to the relationships between people and the mutual obligations and support that these relationships create emphasising the value of social networks and relationships, reciprocity, trust, and shared social norms.

<sup>26</sup> A.M. Morrison, R.P. White and E. Van Velsor, *Breaking the Glass Ceiling: Can Women Reach the Top of America's Largest Corporations?* (Reading, MA Addison-Wesley, 1992); P. Tharenou, "Gender Differences in Advancing to the Top" (2003) 1(2) *International Journal of Management Reviews* 111.

<sup>27</sup> A. Sheridan and G. Milgate, "Accessing Board Positions: A Comparison of Women's and Men's Views" (2005) 13(6) *Corporate Governance: An International Review* 847.

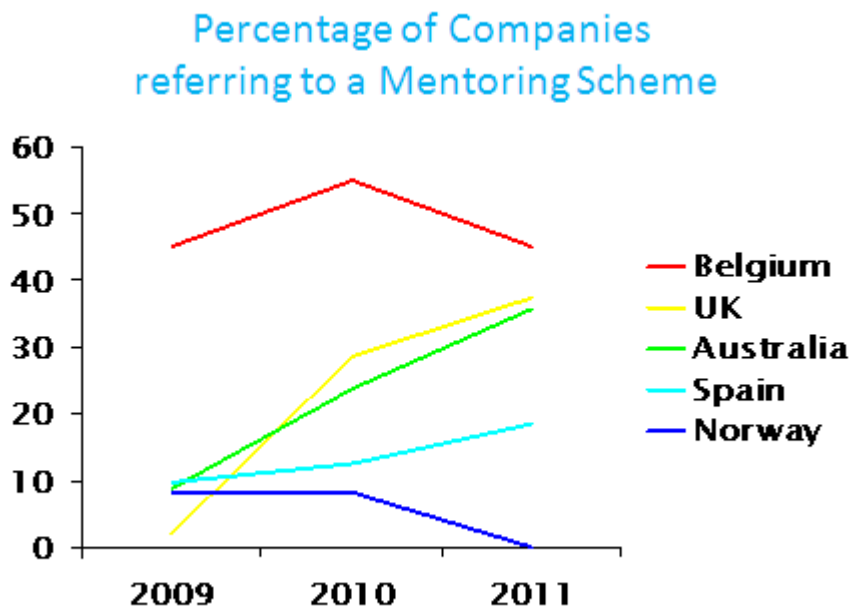
<sup>28</sup> B.R. Ragins and E. Sundstrom, "Gender and Power in Organisations: A Longitudinal Perspective" (1989) 105(1) *Psychological Bulletin* 51; A.S. Tsui, T.D. Egana and C.A. O'Reilly, "Being Different: Relational Demography and Organisational Attachment" (1992) 37(4) *Administrative Science Quarterly* 547; J. Barsh, and L. Lee, *Unlocking the Full Potential of Women in the U.S. Economy*, special report for The Wall Street Journal Executive Task Force for Women in the Economy (McKinsey & Company, 2011).

<sup>29</sup> C. Villiers, "Achieving Gender Balance on the Boardroom: Is it Time for Legislative Action in the UK?" (2010) 30 *Legal Studies* 533, 540.

Women are affected by lack of access to informal networks where they can make important connections, lack of female role models higher up in the organisation and lack of sponsors to provide opportunities.<sup>30</sup> Organisations contributing to the Davies review believed the most significant problem posed by lack of gender diversity was that there were too few senior women to act as role models and mentors for other women.<sup>31</sup>

There are many examples of voluntary adoption of mentoring programmes designed to support board membership of senior female managers such as the FTSE 100 Cross-Company Mentoring Scheme in the UK referred to below. Of course, the mere existence of a mentoring programme is no guarantee that it will be effective. A repeated criticism of mentoring is that, whether mentoring is informal or structured, it is unlikely to be effective unless it is associated with a clearly defined objective.

Our survey asked whether companies disclosed in their annual report the existence of a formal company mentoring scheme or alternatively to a plan to establish one.



<sup>30</sup> J. Barsh, and L. Lee, *Unlocking the Full Potential of Women in the U.S. Economy*, special report for The Wall Street Journal Executive Task Force for Women in the Economy (McKinsey & Company, 2011).

<sup>31</sup> Lord Davies, *Women on Boards* (Department for Business, Innovation and Skills, 2011), p.28.

Perhaps surprising given that female board representation in Belgium is comparatively low, our Belgian sample were the strongest performing on this indicator with reporting of mentoring schemes which culminated at 55.0% of companies in 2010. In both Australia<sup>32</sup> and the UK<sup>33</sup> there was a very strong upward trend over the 2009-2011 period which coincided with the increased policy focus on diversity in each of these jurisdictions. In Spain, the trajectory was less marked than in Australia and the UK but also progressive.<sup>34</sup>

In Norway, there was not a strong showing in this area. Our study indicates that internal mentoring schemes are not commonly reported by OBX companies. Thus while 8.3% of companies chose to advert to mentoring schemes in both 2009 and 2010, by 2011, none of the OBX companies mentioned the existence of such schemes in their annual report. There is, however, a strong tradition of formal mentoring programmes in Norway. In 1996, the NHO (Norwegian Federation of Business and Industry) started the mentoring programme “opdagelsesreise” (discovery) with the objective of placing more women in management and board positions<sup>35</sup> which was later reformulated as Innovation Norway. This led to the initiation of a second programme – the Ledermentor programme – in 2001 by Innovation Norway with the task of mentoring female managers across Europe. These two programmes have been very influential and mentoring has been described as “an accepted method to increase the number of women in management positions and also to cultivate leadership potential”.<sup>36</sup> This may explain why companies do not feel the need to expressly refer to mentoring in their annual report.

For FTSE 100 companies, the description of the mentoring scheme varied where it explained it was described as applying to “high potential” female managers, “senior female executives”,

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<sup>32</sup> The percentage of ASX 100 companies disclosing the existence of mentoring schemes moved from 8.7% in 2009 to 35.7% in 2011.

<sup>33</sup> The percentage of FTSE 100 companies disclosing the existence of mentoring schemes moved from 2.1 % in 2009 to 37.4% in 2011.

<sup>34</sup> The percentage of IBEX-35 companies disclosing the existence of mentoring schemes moved from 9.7% in 2009 to 18.5% in 2011.

<sup>35</sup> D. Clutterbuck, K. Poulsen and F.K. Kochan, *Developing Diversity Mentoring Programmes: An International Casebook* (Open University Press, 2012), p.129.

<sup>36</sup> *Ibid.*

graduates, ethnic minorities and in a few rare cases (*eg* BP) all managers. Frequently annual reports did not state who did the mentoring, but included were senior staff, leaders, the Chairman, senior female executives (Reed Elsevier), CEO or Chairman mentors from other non-competing FTSE 100 companies (Experian). The FTSE 100 Cross-Company Mentoring Programme established by the Mentoring Foundation in 2003 has been a positive development in facilitating mentoring relationships for senior women executives in FTSE 100 or equivalent organisations and has been expanded to apply to FTSE 250 companies and equivalent. The mentors, who are Chairmen or Chief Executives of FTSE 100 companies or their equivalent in the public sector, seek to help mentees with career progression and the attainment of board positions.<sup>37</sup>

In Australia, a third of ASX 100 companies referred to mentoring in 2011. AMP is an example of a company offering an internal mentoring programme and it reported that more than half of the participants were women in 2011. Mirvac referred to the existence of a specific talent management program for female leaders in the context of mentoring. In Australia, companies can benefit from a formal initiative of the Australian Institute of Company Directors (AICD). In March 2010 the AICD launched a mentoring/sponsorship program. Under this programme, mentee applicants attend either the AICD's Directors' Course in Mastering the Boardroom or its International Company Director's Course.<sup>38</sup> Once they have become "ASX 200 board ready," through attendance at the course, and their experience as lawyers, accountants, corporate managers, or in non-profit entities, women candidates are assigned a mentor. These mentors are company chairmen, or experienced directors of ASX listed companies. At the program's inception, 56 of the chairmen of the ASX 200 had signed on. They pledged not only to mentor the candidate for a year but at the end of the year place that woman on a public company board of directors.

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<sup>37</sup> In October 2012, the Mentoring Foundation reported that by that date 94 Mentees had participated in the Programme and 81 of those Mentees have gone on to achieve significant career success.

<sup>38</sup> D.M. Branson, "An Australian Perspective on a Global Phenomenon: Initiatives to Place Women on Corporate Boards of Directors" (May 21, 2012). Australian Corporate & Securities Law Review, forthcoming; University of Pittsburgh Legal Studies Research Paper No. 2012-13. Available at SSRN: <http://ssrn.com/abstract=2064087>.

### (3) *Work-Life Balance Measures*

The inclusion of flexible work practices and policies can support employees, particularly women, in remaining in the workforce and developing their career. For companies such policies provide benefits including increased productivity and creativity of their staff, a competitive advantage in recruitment and increased retention rates.

Changes in the composition of families and the workforce,<sup>39</sup> including more dual-career couples, single parents and working mothers with young children, have increased the likelihood that both male and female employees have substantial domestic commitments in addition to their work responsibilities. In addition, as the population ages, responsibilities towards elderly dependents will rise. In order to respond to these changes, many companies have implemented policies and programs designed to accommodate the needs of today's diverse workforce.<sup>40</sup> These policies are commonly referred to as "work-life balance initiatives" or "family-friendly benefits" and they often include flexible work schedules, child-care facilities or support, working from home, and leave of absence.<sup>41</sup> Although both men and women can benefit from such programs, in practice most programs appear to focus on the needs of women.<sup>42</sup>

Our survey asked whether companies reported the existence of pro-work-life balance measures for its employees.

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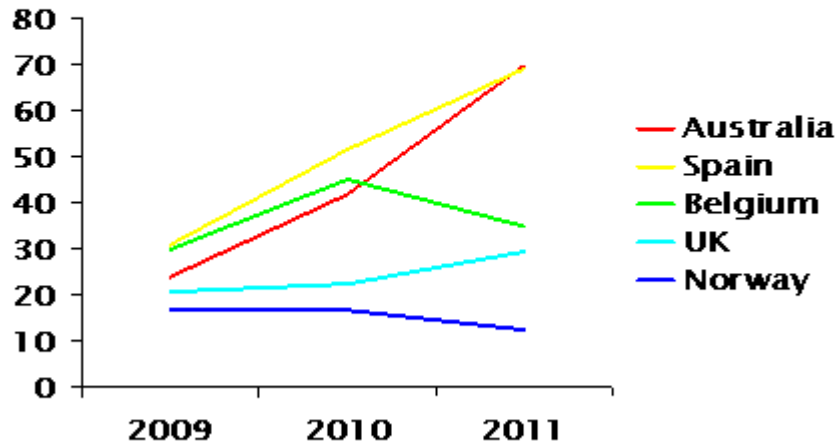
<sup>39</sup> G.N. Powell, *Women and Men in Management* (Thousand Oaks, Sage Publications, 2011).

<sup>40</sup> S.A. Lobel and E.E. Kossek, "Human Resource Strategies to Support Diversity in Work and Personal Lifestyles: Beyond the 'family friendly' organization" in E. E. Kossek and S. A. Lobel (eds), *Managing Diversity: Human Resource Strategies for Transforming the Workplace*, (Cambridge, MA: Blackwell, 1996), pp.221-243.

<sup>41</sup> T.D. Allen, "Family-supportive Work Environments: The Role of Organizational Perceptions" (2001) 58(3) *Journal of Vocational Behavior* 414.

<sup>42</sup> G. Strachan, E. French and J. Burgess, *Managing Diversity in Australia: Theory and Practice* (Sydney, McGraw-Hill, 2009).

## Percentage of Companies Disclosing Pro Work-Life Balance Measures



With the exception of Norway and Belgium, there was an upward trend in relation to the disclosure of the existence of work-life balance policies. The percentage of companies reporting work-life balance policies has increased significantly and disclosure had become particularly prevalent by 2011 in Australia at 69.7% of companies and in Spain at 69.0% of companies.

In relation to Norway, it would be wrong to assume based on a low percentage of self-reporting (12.5% of companies in 2011) that support for work-life balance is not available. Indeed, in a recent OECD review of work life balance, Norway ranked fourth of OECD countries in terms of work-life balance.<sup>43</sup> On occasion this is clearly articulated in a company’s annual report. For example, Storebrand stated that “[t]he company provides a series of employee benefits that contribute to flexible solutions, including the right to 15 days off in lieu, flexible working hours within the Group’s core hours, and the majority of employees have laptops. Employees receive their full pay if they, their children or their parents are sick and during pregnancy.”

In Norway, sufficient affordable, high-quality childcare has been a priority since the introduction of the welfare state in the early 1950s.<sup>44</sup> The Norwegian government introduced a

<sup>43</sup> *OECD Better Life Index* <http://www.oecdbetterlifeindex.org/topics/work-life-balance/>

<sup>44</sup> J. Grosvold, S. Brammer, and B. Rayton, “Board Diversity in the United Kingdom and Norway: An Exploratory Analysis (2007) 16 *Business Ethics: A European Review* 344.

law in 2006 giving all employees in Norway the right to flexible working hours and either parent may take up to a year's leave with 80% pay. As work-life balance may be regarded as mainstreamed, it is perhaps not surprising that the level of company support reported appears relatively low.

For the UK, self-reporting of work-life balance measures moved from approximately a fifth to a third of FTSE 100 companies over the period.<sup>45</sup> As an example, ARM provides a number of assistance and wellness programmes to employees and their families, flexible working, on-site physiotherapy and athletic training. ARM also offers family friendly programmes such as maternity, paternity and parental leave, a child care voucher scheme in the UK and a flexible spending account in the US. Unilever UK provides policies on home working, flexible working, maternity and paternity leave, child care provision and career breaks, which, the company stated, helped the company to meet the objective of greater employee diversity.

In 1997 the UK Government initiated a programme of changes that recognised the importance of balancing work with bringing up a family. There is some disagreement about how widely new initiatives have been implemented. There are now a number of pieces of legislation dealing with flexible working. However, in the OECD review of work life balance, the UK ranked twentieth of OECD countries in terms of work life-balance.<sup>46</sup>

While IBEX-35 companies performed highly on this indicator, the society as a whole presents some challenges in bringing about change. The existing social structure in Spain has a persistent gendered division of work. In addition, part-time working arrangements are not very common in Spain amongst either sex. The European Working Conditions Observatory has reported that

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<sup>45</sup> 20.6% of FTSE 100 companies reported the existence of pro-work/life balances measures for employees in 2009, 22.4% in 2010 and 29.3% in 2011.

<sup>46</sup> *OECD Better Life Index* <http://www.oecdbetterlifeindex.org/topics/work-life-balance/>



“from an enterprise perspective, the issue of work-family conciliation is usually regarded as a sort of ‘threat’ for labour performance. Thus, 41.3% of enterprises suggest that the adoption of any work-family measures may negatively affect competitiveness.”<sup>47</sup>

This concern would not appear to be reflected in our research in relation to IBEX-35 companies. Reporting of work-life friendly practices is high in IBEX-35 companies and has increased significantly over the three year period.<sup>48</sup> The European Working Conditions Observatory also indicated that some Spanish companies are adopting a number of measures for reconciling work and family life (beyond those laid down in legislation), where the most important ones refer to flexibility in the times of starting and finishing work, free choice of shifts and exchanging shifts and flexible distribution of hours over time. In the OECD review of work-life balance, Spain ranked third of OECD countries in terms of work-life balance.<sup>49</sup>

In Belgium, by 2011 a third of companies were disclosing the existence of work-life balance measures.<sup>50</sup> The public debate on quality of work gained public prominence in Belgium from the mid-90s.<sup>51</sup> In 2002, the Federal administration published its *Belgian Report on the Quality of Work*. In 2003, a Federal State Secretary for Organisation of Work and Well-being at Work was appointed. To facilitate work-life balance, Belgium introduced a new system of ‘time credit’ in 2002 for the private sector which permits employees to take work breaks and work reduced hours without losing their job security and social security entitlements. Other measures that have been taken in recent years include the extension of the system of parenthood leave; the development and strengthening of a system of ‘service vouchers’ that allow households to hire people legally and at a subsidised wage for assistance in domestic tasks; strong expansion of childcare facilities and after-school nursery and optimisation of the regulations on telework (in

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<sup>47</sup> European Working Conditions Observatory, *Quality in Work and Employment – Spain* <http://www.eurofound.europa.eu/ewco/studies/tn0612036s/es0612039q.htm>

<sup>48</sup> 31% of companies reported the existence of pro-work/life balances measures for employees in 2009, 51.6% in 2010 and 69.0% in 2011.

<sup>49</sup> *OECD Better Life Index* <http://www.oecdbetterlifeindex.org/topics/work-life-balance/>

<sup>50</sup> 30% of BEL20 companies reported the existence of pro-work/life balances measures for employees in 2009, 45% in 2010, dropping back to 35% in 2011.

<sup>51</sup> European Working Conditions Observatory, *Quality in Work and Employment – Belgium*. <http://www.eurofound.europa.eu/ewco/studies/tn0612036s/be0612039q.htm>

accordance with the EU-level agreement). In the OECD review of work life balance, Belgium ranked second of OECD countries in terms of work-life balance.<sup>52</sup>

Reporting of work-life friendly practices is high in ASX 100 companies and there was a marked increase reporting on work-life balance measures over the 2009-2011 period.<sup>53</sup> In Australia the Fair Work Act 2009 introduced a number of changes to the regulation of work practices which included a new net of National Employment Standards that incorporated a formal right for some workers to request flexibility or extended unpaid parental leave from 1 January 2010. A national system of paid parental leave came into effect in January 2011.<sup>54</sup> In the OECD review of work life balance, Australia ranked thirty-first of OECD countries in terms of work-life balance.<sup>55</sup>

#### ***(4) Monitoring or Auditing Company-Wide Diversity***

Effective tracking of diversity within companies is key. Tracking helps identify where companies are missing or losing women or minorities coming up through the organisation, thereby enabling companies to better target initiatives aimed at maintaining their upward trajectory through the organisation.

Companies are clearly seeing the importance of auditing measures as an aid to efficient management and our research indicated that reporting of such measures increased in every country studied. The proportion of companies making such disclosures in Australia and Spain was particularly high.

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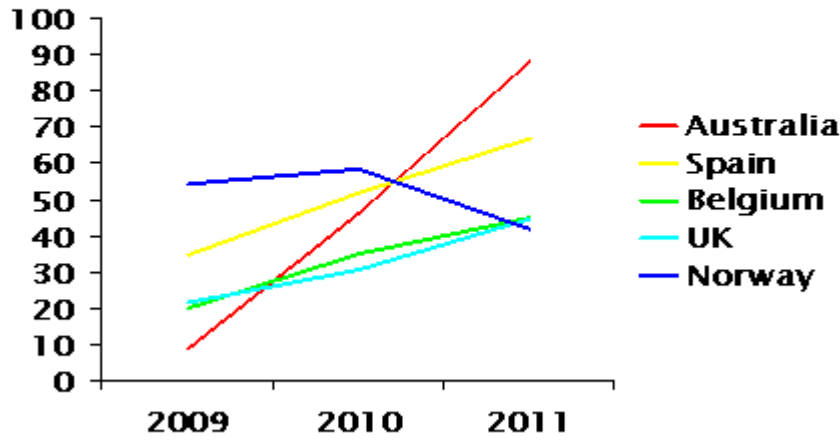
<sup>52</sup> *OECD Better Life Index* <http://www.oecdbetterlifeindex.org/topics/work-life-balance/>

<sup>53</sup> In 2009, 23.9 % of companies reported the existence of pro-work-life balance measures for their customers. This increased to 41.9 % in 2010 and increased significantly to 68.7% in 2011.

<sup>54</sup> Australian Work and Life Index 2012 <http://w3.unisa.edu.au/hawkeinstitute/cwl/projects/awali.asp>

<sup>55</sup> *OECD Better Life Index* <http://www.oecdbetterlifeindex.org/topics/work-life-balance/>

## Percentage of Companies Disclosing Diversity Auditing/Monitoring Practices



In line with increased focus on diversity, there is a trend for increased disclosure by companies of diversity monitoring or auditing of their workforce in order to gain a picture of how diverse the workforce is. Within the EU Member States studied, increasing reporting of diversity monitoring occurred in the FTSE 100,<sup>56</sup> IBEX-35<sup>57</sup> and BEL20<sup>58</sup> companies. In Australia, there was a very sharp upward trend of increasing reported diversity monitoring in ASX 100 companies, beginning from a very low base.<sup>59</sup> Norway bucked the trend in that there was an overall decline in diversity monitoring or auditing by OBX companies over the period.<sup>60</sup>

<sup>56</sup> Only 21.6% of companies reported that they audited, measured or monitored diversity within the company in 2009. This grew to 30.6% in 2010 and 44.4% in 2011.

<sup>57</sup> In 2009 34.5% of companies reported auditing or monitoring diversity. This increased to 51.6% in 2010 and to 66.7% in 2011.

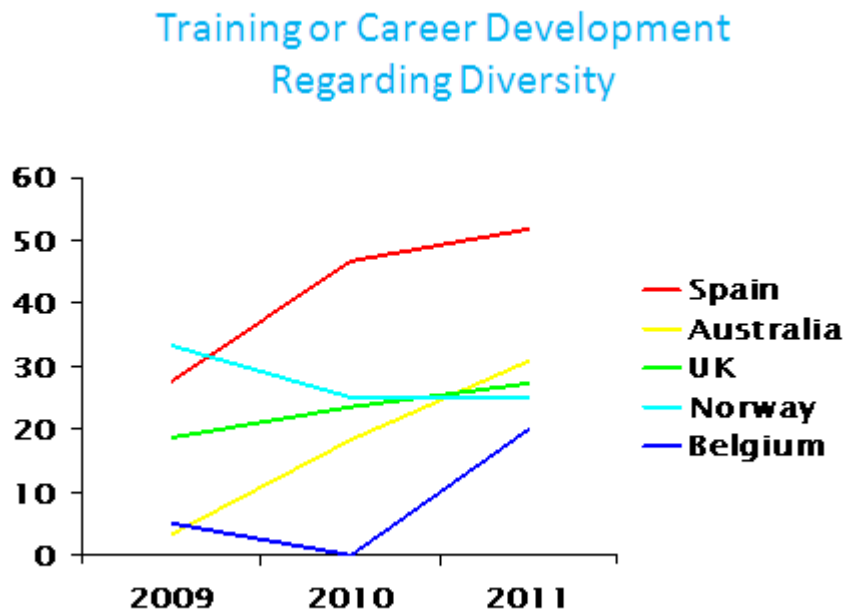
<sup>58</sup> While only 20.0% of companies reported that they audited, measured or monitored diversity within the company in 2009, this increased to 35.0% in 2010 and rose to 45.0% in 2011.

<sup>59</sup> In 2009 8.7% of companies reported auditing or monitoring diversity. This increased very markedly to 46.2% in 2010 and again in 2011 to 87.9%.

<sup>60</sup> 54.2% of OBX companies reported that they audited, measured or monitored diversity within the company in 2009. This figure increased to 58.3% in 2010 and fell to 41.7% in 2011.

## (5) *Other Pro-Diversity Measures*

Training and career development schemes are a common method of increasing diversity across a company and our research suggests that they are used and reported widely in the companies reviewed. In addition, companies are increasingly reporting other pro-diversity measures in their annual reports. Again, Spanish and Australian companies were particularly forthcoming in this respect.



In Spain, in 2009 27.6% of IBEX-35 companies reported the existence of formal training / career development schemes for management in the context of diversity. This rose significantly to 46.7% of companies in 2010 and to 51.7% in 2011. Other pro-diversity supporting measures were commonly referred to. Such measures included awareness raising, the employment of people with disabilities and the adoption of the Diversity Charter which is based on a European initiative which accompanies the EU anti-discrimination directives.<sup>61</sup> Indra referred to the development of an innovative internal social network for the BBVA Group known as GENERA! to encourage dialogue between the group's professionals around the world in order to generate

<sup>61</sup> The Spanish Diversity Charter was launched on 17 March 2009 and it has been signed up to by many companies. Such companies are committed to promoting awareness of equal opportunity principles and respect for diversity and working to build a diverse workforce by hiring employees irrespective of their gender, race, nationality, ethnic origin, religion, beliefs, age, sexual orientation, disability etc.

new ideas and solutions to make progress within a model of gender equality and diversity within the company.

In the UK, there was an increase from 18.6% of companies reported the existence of formal training or career development schemes for management in the context of diversity in 2009, 23.5% in 2010 and 27.3% in 2011. By 2011 a sizeable proportion of FTSE 100 companies were reporting the adoption of other pro-diversity supporting measures. Disclosures ranged from the token gesture such as an acknowledgement of Women's Day to the considered and substantial. For example, Aviva reported raising awareness of gender diversity through articles on its intranet and external sponsorships. It also noted that it worked on best practice with organisations included the ORC Global Diversity Forum and the Institute of Business Ethics. BAE Systems reported that a Diversity Council had been established with responsibility for developing and driving objectives in diversity and inclusion. Activities in 2011 included the roll-out and launch of leadership training and manager training kits to help increase the awareness of employees across the business.

Barclays referred to an annual global scheme celebrating the significant contribution from female colleagues. Capita reported that all their employees completed their online diversity awareness training every three years and that they used "a network of diversity champions" to help communicate our strategy across the business. GSS stated that case studies showcasing internal excellence in recruiting and retaining diverse employees were shared across the businesses. ITV referred to its participation in major national and industry-specific diversity forums "working as a collective to share best practice and campaign for change". Old Mutual noted the completion of a Culture Survey and its commitment to focus on actions to address the survey results. Reed Elsevier referred to identifying one senior champion from each of its business units to serve on a D&I (Diversity and Inclusion) Advisory Group and noted that "[t]hey are supported by our wider D&I Working Group, which met throughout the year to share internal best practice and hear from experts on topics like unconscious bias and creating a D&I culture."

In Belgium, the pattern was mixed. 5.0% of BEL20 companies reported the existence of formal training or career development schemes for management in the context of diversity in 2009, none in 2010 and 20.0% in 2011. For example, Nysstar referred to induction and leadership

programmes. It was relatively uncommon for companies to have referred to the adoption of other pro-diversity supporting measures. In some cases there were references to the Brussels 2008 Anti-Discrimination Order and the Brussels Capital Government Decree of 7 May 2009. These two texts provide Brussels firms with a framework enabling them to put their commitment to diversity into practice by adopting a Consolidation Plan and by applying for a “Diversity Label”.

In Norway, there was a downward trajectory from 33.3% of companies reporting the existence of formal training or career development schemes for management in the context of diversity in 2009, stabilising at 25.0% in 2010 and 2011. Few companies referred to additional pro-diversity measures and many displayed an external focus rather than an internal focus. For example, Gjensidige Forsikring referred to cooperating with the Norwegian Welfare and Labour Administration to provide job training for unemployed people. Petroleum Geo Service reported that it operated a cultural sensitivity course. Songa Offshore referred to the company’s encouragement of equal opportunity and diversity policies amongst its third party vendors.

In Australia, a strong upward trajectory was evident. In 2009, 3.3% of ASX 100 companies reported the existence of formal training or career development schemes for management in the context of diversity. This rose significantly to 18.3% of companies in 2010 and to 30.8% in 2011. For example, AMP offers leadership development programmes to counteract unconscious biases. A large proportion of companies reported the adoption of other pro-diversity supporting measures. However, the type measures disclosed varied from the tokenistic to the meaningful. A number of companies had appointed Diversity Directors and established regional diversity committees, hosted diversity websites, identified diversity indicators, sponsorship of external diversity programmes, information sessions.

Boral Ltd reported the establishment of an active Indigenous employment strategy and the entering into of an Indigenous Employment Plan with the Department of Education, Employment and Workplace Relations with an objective to employ 50 Indigenous people over the next two years.

Coca-Cola Amatil Ltd can be singled out for having an excellent Diversity Report in its annual report. It is divided into the following headings: Indigenous Employment, Gender Diversity,

Actions Taken By CCA in Australia, Actions From Other Countries and Gender Diversity Objectives 2012. The annual report referred inter alia to the signing of the Australian Employment Covenant committing CCA Australia to a target of 150 sustainable jobs for Indigenous Australians, the development of an Indigenous Employment Strategy with the assistance of the Federal Government and an accredited Indigenous Employment Provider and the testing of approximately 70 senior leaders in the Australian business of their individual Mettle Leadership Gauge which assesses the perceptions of the work culture the leaders create in CCA Australia, including the value that they place on diversity and the progress on diversity initiatives.

## **C. CONCLUSION**

Our research confirms other studies which show that the vast majority of companies are taking the issue of diversity extremely seriously, and devoting precious resources to redressing the gender balance.<sup>62</sup> Many have made important progress with training programmes established to make the company conscious of the value of diversity, recruitment and promotion processes have been rethought to counter unwitting biases, clear objectives have been established for the number of women in senior positions. Companies have been innovative in their search for new measures to bring into their companies to improve diversity awareness and have learned from successful practices in other companies and jurisdictions. Nevertheless, it must be remembered that not all the measures reviewed in this chapter gain traction, particularly with managers lower down the organisation. Putting initiatives in place does not guarantee they will be well executed and many companies are struggling to implement effectively strategic commitments on diversity and mentoring programmes they have formally put in place.

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<sup>62</sup> *Women Matter*, (McKinsey & Company, 2012).

## **CHAPTER 5 REFLECTIONS ON BEST PRACTICES FOR SUPPORTING DIVERSITY**

### **A. INTRODUCTION**

It was noted in Chapter 1 that the countries sampled were chosen to represent a variety of differing regulatory approaches to the issue of diversity so as to facilitate comparisons to be made. This chapter reflects on the efficacy of differing approaches to supporting diversity based on consideration of the findings of this study. Issues relating to diversity reporting and metrics are considered as are the limitations of a number of potential avenues of enforcement. The chapter concludes with some final observations based on our analysis of the data-set and surrounding policy framework.

### **B. REGULATING DISCLOSURE OF DIVERSITY POLICIES AND PRACTICES**

While there is a marked trend of increased focus on diversity in regulatory codes, to distinguish lip service from action, it is useful to separate these into disclosure of diversity policies and disclosure of actual diversity metrics. Structured rules in relation to disclosure, whether within a ‘comply or explain’ regime or a mandatory regime, assist in separating the wheat from the chaff in terms of ascertaining the level of diversity policy integration within companies.

#### ***(1) Disclosure of Diversity Policies***

Our study found a multitude of different ways in which companies handled the diversity issue in their annual reports. Creating a structured reporting environment for diversity disclosures can help to ensure that greater clarity and consistency is brought to diversity signalling in annual



reports.<sup>1</sup> In addition, diversity disclosure requirements may create a subtle pressure for companies to move beyond lip service to diversity to integration of a meaningful multi-pronged company-wide approach.

The Australian approach to diversity reporting demonstrates the potential of a good soft law corporate governance approach to diversity. Recommendation 3.2 of the ASX Corporate Governance Principles and Recommendations<sup>2</sup> states that listed entities should establish a policy concerning diversity and disclose the diversity policy or summary of the policy. Under Recommendation 3.3, listed entities are expected to disclose in their annual report measurable diversity objectives and progress made towards achieving set objectives. Recommendation 3.5 requires that the diversity policy or a summary of it should be made publicly available, ideally on the company's website under a defined "Corporate Governance" section. The approach taken in the UK Corporate Governance Code is similar but somewhat less prescriptive. It is expected that a company's description of the work of the nomination committee in its annual report will "include a description of the board's policy on diversity, including gender, any measurable objectives that it has set for implementing the policy, and progress on achieving the objectives."<sup>3</sup> That being said, the language used does not suggest that setting of measurable objectives is necessarily required.

The EU proposal for a directive to provide for the disclosure of non-financial and diversity information,<sup>4</sup> discussed in Chapter 1, is to be welcomed as a positive step which will encourage listed companies to adopt a considered approach to diversity within the context of a requirement to provide information on their diversity policy in their annual report. This would help to move away from the phenomenon we noted in this study of companies including relatively generic

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<sup>1</sup> See conclusions to a similar effect concerning the wider sphere of corporate social responsibility reporting in A. E. Nielsen and C. Thomsen, "Reporting CSR – What and How to Say It?" (2007) 12 *Corporate Communications: An International Journal* 25.

<sup>2</sup> ASX Corporate Governance Council, *Corporate Governance Principles and Recommendations* (2<sup>nd</sup> ed, 2010).

<sup>3</sup> Financial Reporting Council, *The UK Corporate Governance Code* (2012), B.2.4.

<sup>4</sup> European Commission, *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* COM(2013) 207 final.

statements of support for diversity which do not appear to correlate to the existence of a well-defined policy with a clear agenda for positive advancement.

## **(2) *Boardroom Diversity Metrics***

Disclosed diversity policies are a step forward. However, it is the disclosure of metrics which can help to point up whether a company is simply engaging with diversity in a meaningful and integrated manner or simply engaging in a smoke and mirrors form of window dressing. Given that only certain countries require gender reporting in relation to management and employees, there are considerable disparities in relation to the information made available by companies in different countries as to existing diversity levels in their pipeline. Requiring companies to provide meaningful statistics on the context in which their diversity policy is operating in practice can help to redress the informational asymmetries which necessarily result from voluntary self-reporting. An increased voluntary reporting of gender representation progress within companies is something that can be linked to the rise in corporate social responsibility reporting.<sup>5</sup> The largest public corporations can be seen as trend-setters in this regard.<sup>6</sup> The availability of such data helps to provide a fuller picture concerning the state of diversity within the company and the pipeline of talent.

In Australia the ASX Corporate Governance Council announced amendments in 2010 to the 2nd edition of the Corporate Governance Principles and Recommendations. Under Recommendation 3.4, listed entities should disclose in each annual report the proportion of women employees in the whole organisation; women in senior executive positions; and women on the board. Explanations are required to be provided for departure from these recommendations.

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<sup>5</sup> K. Grosser and J. Moon, “Developments in Company Reporting on Workplace Gender Equality: A Corporate Social Responsibility Perspective” (2008) 32 Accounting Forum 179.

<sup>6</sup> G.K. Meek , C.B. Roberts and S.I. Gray, “Factors Influencing Voluntary Annual Report Disclosures by U.S., U.K.. and Continental European Multinational Corporations” (1995) 26 Journal of International Business Studies 555.

In the UK, the Davies Report<sup>7</sup> recommended that FTSE 350 companies put in place better systems for monitoring the proportion of women in their workforce; in senior management and on the board and that quoted companies should be required to disclose the number of women on the board, in senior executive positions and in the whole organisation. The stated rationale for this was that “transparent reporting will help the Chairmen and CEOs to better understand the composition of their workforces and monitor attrition rates.”<sup>8</sup>

In 2011, the UK Department for Business, Innovations and Skills (“BIS”) consulted on improving the quality of narrative reporting by quoted companies in their annual reports, including a proposal for companies to disclose the proportion of women on their boards and in the company as a whole. This led in late 2012 to the BIS launching the draft Companies Act 2006 (Strategic Report and Directors’ Report) Regulations 2013 (“Proposed Regulations”) for consultation. When adopted, the Proposed Regulations will require disclosures of the number of persons of each gender who are, respectively, directors, managers (excluding those who are also directors) and employees of the company.<sup>9</sup> Thus gender metrics are set to become more common.

## **C. ENFORCEMENT**

### ***(1) Monitoring and Enforcement by National Authorities***

Our research feeds into a larger debate concerning the efficacy of a ‘comply or explain’ approach from an enforcement perspective. A RiskMetrics Group study highlighted concerns in relation to the quality of compliance where meaningful monitoring and enforcement is not present.<sup>10</sup> Obviously where there is little danger of national authorities pursuing companies who choose not to comply with corporate governance provisions relating to diversity and give a poor

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<sup>7</sup> Lord Davies, *Women on Boards* (Department for Business, Innovation and Skills, 2011), p.6.

<sup>8</sup> Lord Davies, *Women on Boards* (Department for Business, Innovation and Skills, 2011), p.19.

<sup>9</sup> The Proposed Regulations are expected to come into force in October 2013, and will apply to companies preparing annual reports for financial years ending after that date.

<sup>10</sup> RiskMetrics Group, *Study on Monitoring and Enforcement Practices in Corporate Governance in the Member States* (2009).

explanation or none at all, there may be little incentive for companies to comply unless they perceive that their reputation will suffer.

While not advocating abandoning the fundamentals of the ‘comply and explain’ approach, the Commission has advocated improving the informative quality of reports, suggesting that ‘comply or explain’ could work much better if monitoring bodies moved from simply a formal role of verifying if the corporate governance statement is published to checking whether the available information is sufficiently informative and comprehensive, without interfering with the content of the information or making business judgments on the solution chosen by the company.<sup>11</sup> The Commission rightly notes there is great potential for improving and extending the current exchange of best practice between monitoring bodies. These solutions, the report notes, are without prejudice to the possible need to reinforce certain requirements at EU level by including them in requirements rather than making recommendations. This issue was not addressed in the recent Action Plan.<sup>12</sup> It is notable that the proposed Gender Balance Directive<sup>13</sup> leaves the ball in Members States’ court in connection with selecting sanctions and providing enforcement mechanisms. The issue of effective monitoring by both national authorities and auditors is also an important one in relation to the EU proposal to introduce diversity reporting.<sup>14</sup>

## **(2) *The Role of Institutional Investors***

It has been observed that it is important that “shareholders, business groups and others ... take an interest in the vitality of the approach by which the governing boards of companies are

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<sup>11</sup> European Commission, *The EU Corporate Governance Framework* COM(2011) 164 final 5.4.2011.

<sup>12</sup> European Commission, *Action Plan: European Company Law and Corporate Governance - a modern legal framework for more engaged shareholders and sustainable companies* COM(2012) 740/2.

<sup>13</sup> European Commission, *Proposal for a Directive of the European Parliament and of the Council on improving the gender balance among non-executive directors of companies listed on stock exchanges and related measures* Brussels 14.11.2012 COM (2012) 614 final.

<sup>14</sup> European Commission, *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* COM(2013) 207 final.

constituted.”<sup>15</sup> Institutional investors have been the focus of a significant amount of attention at both national and transnational level of late. The UK introduced its first Stewardship Code in 2010 with a view to enhancing the quality of engagement between institutional investors and companies “to help improve long-term returns to shareholders and the efficient exercise of governance responsibilities”.<sup>16</sup> The European Commission is currently examining ways to increase appropriate shareholder engagement.<sup>17</sup> In the 2012 Action Plan on European Company Law and Corporate Governance, the Commission noted that “[s]hareholders have a crucial role to play in promoting better governance of companies. By doing this they act in both the interest of the company and their own interest.”<sup>18</sup>

The potential for investors to influence diversity policy is clear.<sup>19</sup> Indeed, respondents to the EU consultation on corporate governance were supportive of a requirement on companies to make diversity-related disclosures so as to enable more informed decision-making by investors.<sup>20</sup> The question is whether institutional investors are willing to ask questions about the diversity issue or whether they are content to act as what Lord Myners famously termed “absentee landlords”.<sup>21</sup> Evidence suggests that diversity is becoming a key component of stewardship dialogue between investors and companies.<sup>22</sup> Whilst the issue of diversity is not covered in the UK Stewardship Code, some of the UK’s largest institutional investors have now published their own policies setting out how they intend to engage with the companies in which they invest on the issue of diversity. In February 2011 the Association of British Insurers, representing the most significant

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<sup>15</sup> Corporations and Markets Advisory Committee (Australia), *Report on Diversity on Boards of Directors* (2009), p.31.

<sup>16</sup> Financial Reporting Council, *The UK Stewardship Code* (2010). The Code was revised in 2012: Financial Reporting Council, *The UK Stewardship Code* (2012).

<sup>17</sup> European Commission, *Action Plan: European Company Law and Corporate Governance - a modern legal framework for more engaged shareholders and sustainable companies* COM(2012) 740/2.

<sup>18</sup> *Ibid* at p.1.

<sup>19</sup> See further T.W. Joo, “A Trip through the Maze of ‘Corporate Democracy’: Shareholder Voice and Management Composition” (2003) 77 *St John’s L. Rev.* 735, 752-753, 761.

<sup>20</sup> European Commission, *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* COM(2013) 207 final, p.3.

<sup>21</sup> Speech by Lord Myners delivered at the Association of Investment Companies conference 23 March 2009.

<sup>22</sup> Lord Davies, *Progress Report* (2012), p.10.

group of institutional investors in the UK, announced that it would review what listed companies were already doing in respect of board effectiveness and the role that diversity plays in this, board evaluation and proper succession planning. Lord Davies' 2013 report, *Women on Boards: Two Years' On*<sup>23</sup> reports positive developments in relation to institutional investors "becoming increasingly vocal and proactive" on this issue including adopting policies in relation to voting practices where companies are considered to have failed to appropriately engage with diversity.<sup>24</sup> In this regard, it would seem that institutional investors are now looking to corporate governance practice in the US where institutional investors routinely adopt diversity policies which influence investment and corporate governance decision-making.<sup>25</sup>

### (3) *Diversity Activism*

In terms of enforcement, there is also the fairly recent phenomenon of diversity activists who often form part of a wider social movement.<sup>26</sup> These activists may or may not be organised. When Facebook Inc. disclosed in 2012 in the run up to its IPO that all members of its initial board would be men, it faced a strong back-lash. Ultraviolet, a community of women's rights activists, collected 53,000 signatures to a petition asking for a woman to be added to the board. This led to the addition to the board of Sheryl Sandberg, Facebook's Chief Operating Officer.<sup>27</sup> In the EU, the European Women's Lobby, the largest alliance of women's non-governmental associations in the European Union, advocates the introduction of democratic and meritocratic principles and nomination methods to private sector decision-making.<sup>28</sup> Some have championed the cause of employee activism to effect organisational change in relation to diversity and inequality in the workplace.<sup>29</sup> It is likely that diversity activism will continue to grow given the

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<sup>23</sup> Lord Davies, *Women on Boards: Two Years' On* (Department for Business Innovation and Skills, 2013).

<sup>24</sup> At p.15-16.

<sup>25</sup> See *eg* "Calvert-Sponsored Resolution on Board Diversity Nearly Doubles Support at Urban Outfitters, 39% of Shareholders Approve Versus 22% Last Year" Business Wire, 1 June 2012.

<sup>26</sup> E.S. Clemens and D.C. Minkoff, "Beyond the Iron Law: Rethinking the Place of Organizations in Social Movement Research" in D.A. Snow, S.A. Soule and K. Hanspeter (eds), *The Blackwell Companion to Social Movements* (Malden, MA, Blackwell Publishing, 2004), 155.

<sup>27</sup> In 2013 Facebook appointed a second woman to its board.

<sup>28</sup> <http://www.womenlobby.org/spip.php?article4271&lang=en>.

<sup>29</sup> M. Scully and A. Segal, "Passion with an Umbrella: Grassroots Activists in the Workplace" (2012) 19 *Social Structure and Organizations Revisited* 125.

considerable progress that still needs to be made on the issue around the world and the general rise in stakeholder visibility and power which coincides with the digital age.

## **D. CONCLUDING OBSERVATIONS**

Our study of listed companies' annual reports for 2009-2011 in Norway, the UK, Spain, Belgium and Australia leads us to conclude that diversity in the boardroom is increasing with positive progress in all five countries in relation to female board representation. However, with the caveat that there are some bright spots and reasons to be hopeful, the pace of change remains generally sluggish and uneven. Our five country study illustrates that mandatory quotas can accelerate gender balance on boards at a greater rate than voluntary targets or soft law corporate governance provisions. That being said, although a quota system may lead to an increase in female non-executive directors, this is not necessarily the case in relation to executive directors and there is a lot of ground to be made up in relation to diversity concerning executive directorships.

The diversity agenda arises in response to under-representation of women and minorities within the corporate arena. The rationale for this begins first and foremost with a normative equality and rights basis. However, although the jury remains out on the business case for diversity, we found that many companies are expressly making the link in their annual reports between diversity and corporate performance. This was most apparent in Australia (where 74.2% of companies made a link to diversity as a driver for success in 2011) and the UK (where 48.5% of companies made this link in 2011). Diversity is most commonly defined by companies primarily in terms of gender and framed as an equality issue. We found that companies' embracement of diversity is also more broadly based with age, skills and experience, race / ethnic origin, and disability being the most common elements listed in our sample after gender.

Diversity has been name-checked in a very high proportion of companies' annual reports in 2011. Notably, the 2011 annual report of over 90% of companies in the UK, Spain, Belgium and Australia suggested the existence of a diversity policy, as against 79.2% in Norway. However, while companies were increasingly reporting the existence of diversity policies, the

descriptions provided were often vague and uninformative and on closer inspection, these statements did not indicate the existence of a specific or detailed diversity policy.

It is clear that setting mandatory or voluntary targets for diversity at board level will not of itself address the pipeline issue. Companies in our sample were reporting increased efforts to address the talent pool below board level. Overall, companies in the UK and Australia in transition to a 'comply or explain' diversity regime have been the most responsive to the diversity challenge in relation to the provision of measures to support the sourcing and growing of talent. These companies also tend in their annual reports to express the benefits of diversity and to disclose pro-diversity measures such as mentoring. Whilst there is some indication of possible diversity fatigue in Spain in the context of board composition, Spanish companies tend to explain why they promote diversity and emphasise its many benefits. They are also introducing more mentoring programmes and other pro-work-life balance measures. In Belgium, it appears that real engagement with diversity had yet to take place ahead of the announcement of a quota law in mid-2011.

In Norway, companies have proven compliant at board level in meeting strict gender targets, but our analysis of OBX reports did not find much discussion of diversity and supporting measures in their annual reports. Scandinavian countries and their citizens take for granted many State-sponsored work-life balance measures and diversity measures that other countries simply do not have ingrained at policy level. However, the hypothesis that Norway has mainstreamed diversity and that companies do not need to refer to it may belie deeper concerns that boxes that had to be ticked at board level have been ticked and that corporate engagement with the diversity issue may be in some cases be at surface level as witnessed by the golden skirts phenomenon.

Increased disclosure by companies of diversity policy, diversity objectives and progress made against objectives facilitate greater engagement with diversity throughout the company. It also enables value judgments to be made concerning a company's level of commitment to diversity. The requirement to provide the diversity policy or a summary of it encourages a more coherent approach to reporting diversity policy. The regulation and formalisation of diversity disclosures permits a more standardised approach to be taken by companies to reporting. This is positive in permitting clearer picture to be obtained of diversity as a defined policy rather than from



analysis of a series of voluntary disparate statements within a company's annual report. Provision of relevant information on corporate diversity policies in a structured way is crucial in order to permit meaningful evaluation by stakeholders and other interested parties of companies' performance in this area and cross-company comparisons. As matters stand, unless companies are particularly forthcoming in relation to their policies, brief statements referencing the benefits of diversity do not facilitate a positive judgment on whether within a company there is genuine commitment to the adoption of the nuts and bolts of an embedded diversity policy. It is therefore a step forward to see the EU's plans to support diversity disclosures. In essence, requirements to disclose details of the diversity policy and targets set help to guard against the lure of impression management that can take place within the context of an annual report in lieu of deep engagement when companies are free to tailor voluntary statements to show the company to its best advantage. The introduction of gender metric reporting within annual reports can assist to focus company and public attention on how a company measures up in terms of the pipeline at different levels of seniority.

We have highlighted the importance of national authorities in carrying out a monitoring and enforcement role, as well as the role of investors and other stakeholders. Their participations is crucial in maintaining the momentum to drive the diversity agenda forward.

We conclude by simply noting that board diversity is here to stay as a key policy issue for consideration, and, rather than being complacent in relation to their level of engagement, it is time for companies who have not already done so to seize the bull by the horns and to take on the concept in all its dimensions. This will require, not just a willingness to comply with the letter of the law or a corporate governance provision or to provide a stated commitment to diversity in the company's annual report, but more importantly there is a need for companies to have considerable vision and commitment to change as well as flexibility, innovation and good talent management practices.



# APPENDIX: SURVEY QUESTIONNAIRE

## PART I: ANNUAL REPORT

(complete for each of the three years 2011/2010/2009)

### A. COMPANY DETAILS

- (i) Company name:
- (ii) Annual report for financial year ending: [day, month, year].
- (iii) Primary Stock Exchange Listing: [Insert stock exchange]
- (iv) Other Exchange Listings: [insert stock exchange(s)]
- (v) Industry Sector Identified in Index:

**energy**

**consumer discretionary**

**healthcare**

**information technology**

**utilities**

**industrials**

**consumer staples**

**financials**

**telecommunications services**

**materials**

### B. GENDER REPRESENTATION

- (i) Board composition at year end

Women Executive Directors [**insert number**]

Women Non-Executive Directors [**insert number**]

Men Executive Directors **[insert number]**  
Men Non-Executive Directors **[insert number]**  
Percentage of women on the board **[insert figure %]**  
Committees Chaired by Women **[insert number]**  
Photographs of the Board **[yes/no]**

(ii) Percentage of women in workforce

**[insert % / not provided]**

(iii) Percentage of women described as in “senior” management

**[insert % / not provided]**

(iv) Percentage of women described as in “middle” management

**[insert % / not provided]**

## **C. DIVERSITY POLICY**

(i) Does the company report or suggest the existence of a diversity policy? **Yes / No**

**If Yes**

Is it specific and detailed? **Yes / No**

**or**

Is it vague / generic in nature? **Yes / No**

Does the company’s diversity policy apply to management and employees below board level? **Yes / No / Not Reported**

In what section(s) of the annual report is the reference to diversity policy (e.g. the company responsibility statement, the corporate governance statement)?

**If No,**

Is an explanation provided? **Yes / No**

If an explanation is provided for not having a diversity policy, what is the explanation?

- (ii) Does the company's annual report refer to the setting of diversity objectives and the reviewing of progress against these objectives? **Yes / No**
- (iii) Is there a reference to external benchmarks or best practices (eg. the Davies Report (UK))? **Yes / No. If Yes, which one(s)?**

**D. DEFINING DIVERSITY**

- (i) Which of the following are referred to by the company in the context of diversity?

<b>Gender</b>	<b>Race/ethnic origin</b>	<b>Nationality</b>
<b>Age</b>	<b>Skills/experience</b>	<b>Religious beliefs</b>
<b>Disability</b>	<b>Sexual orientation</b>	<b>Background</b>

- (ii) List any other aspects of diversity referred to in the annual report.
- (iii) Does the Report state why it is promoting diversity or otherwise refer to the benefits of diversity? [**Yes/No**]

**If yes, does this relate to:**

- a driver for success/improved performance? [**Yes / No**]
- a broader board perspective / avoidance of group think ? [**Yes / No**]
- equality/human rights ? [**Yes / No**]
- other? [**Yes / No. If Yes, please specify**]

## **E. INVENTORY OF PRO-DIVERSITY MEASURES**

### **(i) Board Selection/Nomination Practices**

Does the company's annual report refer to setting a measurable target objective for women on the board eg 20% by 2014? **Yes / No. If yes, state the percentage and the year**

Does the company's annual report refer to a company requirement of a minority gender candidate for board vacancies? **Yes / No**

Is there a reference in the company's annual report to a nominations committee? **Yes / No**

**If yes, does the company's annual report refer to diversity in relation to the nominations committee? **Yes/No****

Does the company's annual report indicate that the company uses external recruitment consultants to assist diversity of candidates? **Yes / No**

### **(ii) Management Recruitment Practices**

Does the company's annual report provide diversity policies in relation to management recruitment / promotion? **Yes / No**

**If yes, provide details:**

Does the company's annual report provide diversity targets in relation to management recruitment / promotion? **Yes / No**

**If yes, provide details:**

(iii) Mentoring

Does the company's annual report refer to a formal company mentoring scheme or to plans to establish one? **Yes / No**

**If yes, who is the mentoring scheme for?**

**If yes, does the report specify who provides the mentoring?**

Does the company participate in an external mentoring scheme? **Yes / No**

Is there specific reference to career development? **Yes / No**

Is there a specific reference to employee networks? **Yes / No**

(iv) Training / Career Development

Does the company report the existence of formal training or career development schemes for management in the context of diversity?

**Yes / No**

(v) Work-Life Balance Measures

Does the company report the existence of pro-work-life balance measures for its employees? **Yes / No**

(vi) Diversity Auditing/Monitoring

Does the company report that it audits, measures or monitors diversity within the company? **Yes / No**

(vii) Other Measures

Does the company adopt other pro-diversity supporting measures (e.g. employee networks, raising awareness)? **Yes / No**

**If yes, what are they?**

**PART II: CURRENT COMPANY WEBSITE (2012)**

(i) Is there a specific reference to “diversity”? **Yes / No**

**If yes, in which section(s) is/are the references?**

Investor Relations/Corporate Governance?

Corporate Responsibility (if a separate section)?

(ii) Are there references to other diversity initiatives which are not stated in the 2011 Annual Report? **Yes / No**

**If yes, what are they?**



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The European Corporate Governance Institute has been established to improve *corporate governance through fostering independent scientific research and related activities*.

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