Improving Gender Balance on Boards in the United Kingdom: The Case for Enhanced Targets

DETRA EBERECHI ONWUCHEKWA

LLB, LLM

AMERICAN JOURNAL of TRANSFORMATIONAL LEADERSHIP

Improving Gender Balance on Boards in the United Kingdom: The Case for Enhanced Targets

DETRA EBERECHI ONWUCHEKWA LLB, BL, LLM

Improving Gender Balance on Boards in the United Kingdom: The Case for Enhanced Targets

By

DETRA EBERECHI ONWUCHEKWA
LLM in Corporate Governance and Law/ Grad ICSA
School of Law,
University of Portsmouth.
Study Supervision: Joanne Atkinson

Associate of the
American Journal of Transformational Leadership

Table of Contents

Table of Abbreviations

CEO- Chief Executive Officer

CIPD- Chartered Institute of Personnel and Development

FRC- Financial Reporting Council

UKCGC- United Kingdom Corporate Governance Code

IMF- International Monetary Fund

FTSE- Financial Times Stock Exchange

ILO- International Labour Organisation.

NED- Non-Executive Director

TEU- Treaty of the European Union

EU- European Union.

Acknowledgement

My deepest gratitude goes to my Supervisor Joanne Atkinson for her constant support and her invaluable advice throughout my dissertation. I am also grateful to my Mother Nellie Onwuchekwa, my sisters Stephanie, Crystal and Nitsher. Special thanks to my mentor Mazi Owunna MFR and my friend Aisha Ali-Ndume. To Abumchukwu Ngwu, Chijioke Chijioke-Oforji, I cannot thank you enough for your moral support. To all who stood by me, I say a huge thank you.

Abstract

Current figures of women on corporate boards has provoked controversy. This paper explores the causes of this phenomenon. Under particular scrutiny is the scale of the challenge in the United Kingdom. The paper also examines the extant regulatory initiatives that have been advanced to deal with this problem. It further makes a case for enhanced targets to drive holistic and far-reaching change.

Introduction

The underrepresentation of women on corporate boards has provoked controversy. This has been inspired by the disappointing levels of female directors on boards across the United Kingdom.

This dissertation advances a case for enhanced targets in the United Kingdom. This has been inspired by the inadequacies of the current targets system in the United Kingdom and the complexities of the quota system in parts of Europe. The dissertation pursues this case in four chapters.

The first Chapter investigates the rationale for Gender diversity in the boardroom. It begins with an appraisal of the role of the corporate board. This is followed by an analysis of the need for board-level heterogeneity and the rationales for gender participation on boards. The following section investigates the theoretical explanations for gender diversity.

The penultimate chapter explores the causes of gender underrepresentation on corporate boards. It begins with an analysis of contemporary board level statistics across the world and in the United Kingdom. This is followed by an examination of the causal factors for female underrepresentation on boards. Here, the Chapter examines the so-called pipeline issue and other cultural factors which hamper female participation on boards.

The third chapter explores the extant initiatives that have been advanced to tackle the issue of diversity on boards. These initiatives typically consist of targets and quotas. The former are typically soft recommendations without sanctions and is used in the United Kingdom whilst the latter are legislative requirements backed by sanctions. Quotas are employed in Norway, Germany and in the proposed European Directive on Gender Balance. The chapter also finds that targets and quotas are in practice delivering suboptimal results especially on the executive boards. The chapter argues that this calls not for a radical redesign of the UK's regulatory regime of targets but for enhanced targets. The final chapter conceptualises these targets.

The methodology employed is a doctrinal analysis of the subject matter. The paper thus relies on research, studies, industry papers, reports, reputable newspapers and magazines, and data from reputable organizations and agencies. The Third Chapter however looks at jurisdictions such as Germany and Norway not for pure comparative reasons but to understand the practical aspects of their system. The final findings are based on deductions from a critical analysis of the afore-mentioned sources. This paper employs a simple introduction, analysis, and conclusion format.

Chapter 1 – The Rationale for Gender Diversity in the Board room.

Introduction

The gap between male and female representation on boards has provoked controversy. Underlying this debate is the idea that corporations as agents of society must be representative of the composition of modern societies.[1] Therefore, achieving balanced representation on corporate boards has risen to the top of the public policymaking agenda.

This chapter sets out to examine the notion of Gender diversity on corporate boards. It pursues its aim in four sections: the Corporate Board, Rationales for Gender diversity and the theoretical explanations for gender diversity. Section 1 investigates the importance of the corporate board. Here, the chapter pursues an exposition of the nature and role of the board, including whether diversity can strengthen board level efficacy.

The second section scopes the rationales that have been advanced to explain the notion of gender diversity. These include the business and social justice imperatives. This is followed by the third section which investigates the theoretical underpinnings of the idea of a gender diverse board. The final section concludes the chapter.

[1] P Drucker, The Concept of Corporation (1st edn, Transaction Publishers 1993) pg. 5

1.1 The Corporate Board

The Corporate Board plays an important role in the governance of a company. Bob Trickier argues that the primary function of the board is one of Strategy Formulation.[2] Christin Mallin goes even further. She argues that the corporate board is responsible for among other things, determining a company's aims and strategies, devising the plans and policies to achieve those aims; monitoring progress in the achievement of those aims and CEO oversight.[3] Another exposition of the responsibilities of the Board can be found in the seminal 1992 report by Sir Adrian Cadbury. The report argues that ..."the responsibilities of the Board include setting the company's strategic aims, providing the leadership to put them into effect, supervising the management of the business and reporting to shareholders on their stewardship."[4]

Given the settled academic and policymaking position on the role of the board as a key organ of a company, it thus follows that the elucidated roles must be dispensed effectively if a corporation is to succeed. This is particularly important given that decisions made at board level may have far reaching consequences, not only for the corporation itself but also for a wide range of stakeholders.[5]

Amongst others, one of the metrics for an effective board is its composition and diversity.[6] This is reflected in contemporary literature. For one, the Financial Reporting Council's guidance on Board effectiveness argues that "diversity in board composition is an important driver of a board's effectiveness, creating a breadth of perspective among directors, and

---

[2] Bob Trickier, Corporate Governance: Principles, Policies and Practices (2nd edn, Oxford University Press 2015) pg.167
[3] C Mallin, Corporate Governance (5th edn, Oxford University Press 2015) pg. 181
[4] A Cadbury, Report on the Financial Aspects of Corporate Governance (December 1992) pg.14
[5] M Dodds, For Whom are Corporate Managers Trustees? (1932) 45 Harvard Law Review 1145
[6] Supra N2 at 409

breaking down a tendency towards 'groupthink'."[7] The report goes on to argue that "diversity of psychological type, background and gender is important to ensure that a board is not composed solely of like-minded individuals."[8] This is indeed interesting. For one, the FRC appears to be suggesting that diversity relates not only to gender but to other observable characteristics such as psychological type and background. Secondly, the FRC appears to be suggesting that the presence of the aforementioned characteristics can actually improve board level decision making and monitoring, thus strengthening the governance of a corporation.

The sentiments expressed in the FRC's guidance are repeated in the revised UK Corporate Governance Code. The code argues that "diversity is as much about difference of approach and experience, and is very important in securing effective engagement with key stakeholders and in order to deliver the business strategy." The code also links diversity, including gender diversity to tackling the problems of 'groupthink' – a situation in which there is insufficient dialogue which is both constructive and challenging at board level. This problem was exposed as the catalyst for board inadequacy and inefficacy during the financial crisis. [9] As Andrew Howard recently argued, Groupthink was responsible for the failure of directors at Citigroup to spot failings within the bank's business model, leading to the bank's failure. [10] By way of example, the senior risk officer, and the most senior officials in the bank's proprietary trading department were not only men, they were also friends from school. This according to Howard meant an absence of independence and a tendency for groupthink.[11]

[7] Financial Reporting Council, Guidance on Board Effectiveness (March 2011) pg. 2.
[8] Ibid at pg. 10.
[9] Financial Reporting Council, The UK Corporate Governance Code (April 2016) pg.2
[10] A Howard, Groupthink and Corporate Governance Reform: Changing the Formal and Informal Decision-making Processes of Corporate Boards (2011) 20 Southern California Interdisciplinary Law Journal 425, 448
[11] Ibid

From the above, it appears that a key argument for diversification at board level is the need to stimulate robust discussion and to tackle groupthink. The rationale for this is undoubted. Corporate boards perform a variety of functions. The gravity of these responsibilities therefore requires a heterogeneity of board level actors, including women, and a panoply of perspectives and difference. The importance of such diversity of representation and approach cannot be overemphasised. A corporation is at a basic level, an economic and social institution. It thus follows that decisions taken at the board level may well generate externalities well beyond the firm. Having examined the corporate board, it is now important to investigate the narratives for gender diversity.

1.2 Rationales for Board Gender Diversity

(a) The Business Case

The Business case is one that is often deployed in debates about gender diversity. At its core is the notion that increased female representation on corporate boards can generate economic efficiency and improve the financial performance of the company.[12]

Studies seeking to establish this nexus are in no way limited. Perhaps the most cited is the 2007 report by the investment consultancy McKinsey titled 'Women Matter'. This report documented a positive correlation between the representation of women on the boards of 101 sampled companies and strong corporate performance.[13] The report however warned that notwithstanding the striking correlation between organisational excellence and female participation, a causal link is difficult to substantiate. [14]

[12] R Valsan, Board Gender Diversity and the enlightened Shareholder value principle (2016) 37(6) Company Lawyer 171, 173.

[13] McKinsey, *Women Matter: Gender Diversity, A Corporate Performance Driver* (June 2007) pg. 12

[14] ibid

A similar study by the Catalyst, an Industry group, also found that Fortune 500 companies with three or more women on their board for a period of four years, significantly outpaced comparable firms with no female board representation, in terms of returns on sales, return on invested capital and return on equity. [15] Like the McKinsey report, this report however warns that the statistically significant correlations do not establish or imply causal connections.[16]

In similar vein, Credit Suisse in its 2012 report noted that the average Return on Equity of firms with at least one woman on the board from 2005-2011 was 16 percent, 4 percent higher than the ROE of similar firms without any female board representation.[17]

Another study which found a positive correlation between female board representation and firm performance is a recent International Monetary Fund (IMF) working paper titled 'Gender Diversity in Senior Positions and Firm Performance: Evidence from Europe'.[18] As the title suggests, the researchers examined evidence in Europe of women in managerial and board positions and their role in shaping firms' financial performance. Contrary to existing studies which typically focus on a small sample of listed firms, the paper analysed more than 2 million listed and non-listed firms with at least two people in their senior management team. The analysis revealed that firms with larger proportion of women in senior managerial positions have significantly higher Return on Assets (ROA). Like earlier findings, the report also cautions that "a causal interpretation of this correlation is difficult".[19]

---

[15] Catalyst, The Bottom Line: Corporate Performance and Women's Representation on Boards (2004-2008) (March 2011) Pg. 2

[16] ibid

[17] M Curtis, C Schmid, and M Struber, Gender Diversity and Corporate Performance, Credit Suisse Research Institute, (Credit Suisse, July 2012) P.14

[18] L Christiansen, H Lin, J Pereira, P Topalova and R Turk, Gender Diversity in Senior Positions and Firm Performance: Evidence from Europe, IMF Working Paper WP/16/50 (March, 2016) P.6

[19] ibid

Like many contested areas of scholarly research, there are indeed studies that do not support the nexus between board gender diversity and improved financial performance. For instance, a study by Carter etal did not find “any empirical evidence of causation going from board diversity to financial performance, either positive or negative”.[20] This is similar to Broome and Kraewiec’s research which acknowledged deep challenges in establishing causation between diversity and improved economic performance.[21] Some studies are more uncompromising. For one, Dale-Olsen, Schone and Verner find a negative correlation between increased female board participation and increased economic performance at the firm level.[22] Other studies point towards negative investor reactions affecting the share price, rather than addressing the issue of whether a causal link can be established between female board representation and increased performance.[23]

Overall, it appears that the business case for Gender diversity, although persuasive, remains inconclusive, owing to methodological limitations and a failure to establish a direct causal relationship between female representation and economic performance. Yet, these failures do not necessarily repudiate the preponderance of research which suggests a positive correlation between gender representation and firm performance. Indeed, the majority of opposing research does not satisfactorily disavow the studies that find a positive correlation. For instance, Carter etal merely point to a lack of empirical evidence to establish that greater female representation directly causes increased firm performance.[24] This does not exactly annihilate

---

[20] A Carter, F D’Souza, J Simkins and G Simpson, “The Gender and Ethnic Diversity of US Boards and Board Committees and Firm Financial Performance” (2010) 18(5) Corporate Governance an International Review 396, 411

[21] L Broome and K Kraewiec, Signalling through Board Diversity: is any one listening’ (2008) 77 University of Cincinnati Law Review 431, 436

[22] H Dale-Olsen, P Schone and M Verner, Diversity among Norwegian Boards of Directors: Does a Quota for women improve firm performance? (2013) 14(4) Feminist Economics 110.

[23] F Dobbin and J Jung, Corporate Board Gender Diversity and Stock Performance: The Competence Gap or Institutional Investor Bias? (2011) 89 North Carolina Law Review 809.

[24] ibid

the suggestion of a positive correlation. It only calls for further studies to create a clearer picture. Notwithstanding the limitations, the business case for Gender diversity remains persuasive. However, its methodological weaknesses justify an accompanying explanation which the social justice argument might provide.

(b) The Social Justice Case

The social justice or equality rationale views gender equality as a value that should be promoted in itself, rather than a means to an end.[25] It begins with a claim for an equal society or in other words – a society in which there is just distribution of power and resources, participation and influence between men and women.[26] At their best, social justice arguments are premised on the intrinsic value of women to society. For instance, Peta Spender avers that female representation on boards is "a measure of democratic leadership because corporations are critical actors in the public sphere and their directors influence public debate and access to resources".[27] Similarly, Barbara Black asks "is it really necessary to make a business case to justify increased efforts towards board diversity? The number of women, including professional women… should put the onus on the business community to explain their failure to nominate more female candidates for board position."[28] This puts a spotlight on gender diversity as a social more which must be advanced and promoted regardless of any countervailing arguments.

Social Justice Arguments also possess a Rawlsian slant. Rawls' principle of Justice promotes the importance of efforts to advance equal opportunity. He argued that roles should be available

---

[25] Supra N 18 at 174

[26] B Choudary, New Rationales for Women on Boards (2014) 34(3) Oxford Journal of Legal Studies 511, 523

[27] P Spender, Gender Diversity on boards in Australia – Waiting for the great leap forward? (2012) 27 Australian Journal of Corporate Law 23, 27

[28] B Black, Salted: Gender diversity on Corporate Boards (2012) 37 University of Drayton Law Review 7, 20

to all under the conditions of fairness and equality of opportunity.[29] Rawls also explained that "those who are at the same level of talent and ability, and have the same willingness to use them, should have the same prospects of success."[30] Perhaps the most direct admonition from Rawls vis a vis the corporate environment was his conclusion that "Free market arrangements must be set within a framework of political and legal institutions which…preserves the social conditions necessary for fair equality of opportunity."[31] Therefore, the social justice argument sees gender diversity as a social more which must be advanced and defended. It possesses a visceral loathing for the structural imbalance between male and female board representation and advocates the enactment of policy responses to address this divide as a socially and morally adequate response to a societal ill.

Notwithstanding such utilitarian articulation, it deserves to be asked whether relying primarily on social justice arguments to rationalise the case for gender equality is compatible with a corporate culture that is fixated on the maximisation of profit and the deification of shareholder value. Another difficulty with the social justice argument is that it does not serve as a discrete case for gender diversity. It applies with equal force to other observable diversity criteria such as ethnicity, race, religion, age or sexual orientation. Yet, an equality and social justice argument is necessary as it elucidates more than the business case, the underlying issues which have given rise to the lack of women on boards and it also enables female representation to be valued in its own right.

[29] J Rawls, Justice as Fairness: A Restatement (1st edn, Harvard University Press 2001) 66.
[30] Ibid at 63
[31] ibid

1.3 Theoretical explanations for Gender Diversity

There are four main theoretical approaches that have been mobilized to explain the need for Gender diversity. They include Human Capital Theory, resource dependency theory, institutional theory and agency theory.

(a) Human Capital Theory

At the heart of Human Capital Theory is the suggestion that the education, training, skills, experience and productive ability of any individual is advantageous to the firm.[32] It posits that each director brings a unique set of human capital resources which are valuable to the board. In the context of gender diversity, proponents of this approach believe that female board representatives contribute skills and resources needed by an organisation that their male counterparts do not necessarily possess. By way of example, Singh etal have examined the human capital profiles of women newly appointed to sampled boards. They found that the appointed women were more likely to bring international diversity. They also found that the appointees possessed significant expertise as directors on boards of smaller companies and were thus more likely to integrate into their new surroundings at a faster rate than their male counterparts.[33] The challenge however with the human capital theory is that it provides a theoretical underpinning for just about every other observable criteria for diversity. Its central assumption is that the performance of the board will be affected by diverse and unique human capital. It therefore does not provide a unique explanation for Gender diversity.[34]

(b) Resource Dependency Theory

In addition to Human Capital Theory, Resource dependency theory provides a compelling explanation for gender diversity on boards. Resource dependency theorists traditionally view

---

[32] R Dang and L Voo, Women on Corporate Boards of Directors: Theories, Facts and Analysis in S Boubaker and D Nguyen (eds), Board Directors and Corporate Social Responsibility (1st edn, Palgrave Macmillan 2012) pg. 3

[33] V Singh, S Terjesen, and S Vinnicombe, 'Newly Appointed Directors in the Boardroom: How Do Women and Men Differ? (2008) 26(1) European Management Journal, 48

[34] Supra N 20 at 398

the firm as a functionally open system that is susceptible to the unpredictability of the external environment. Theorists in this area traditionally see corporate boards as a means to manage this external dependency, reduce the unpredictability of the environment and its associated transaction costs. Resource dependency theory therefore posits that directors when appointed to boards, contribute an array of resources such as prestige, legitimacy, skills and knowledge which enables a firm to manage the risks which stem from the unpredictability and volatility of the external environment.[35] The more diverse the board, the more valuable the resources become. In the context of gender diversity, resource dependency theorists aver that females contribute advice, counsel, and legitimacy which are undoubtedly valuable resources to any given board. Yet, the notable downside with Resource Dependency arguments is its failure to provide a sui generis case for gender diversity on boards. Like the human capital arguments, it provides a convincing theoretical frame for almost every observable criteria of diversity. In fact, De Souza etal apply this theory in their seminal piece on ethnic diversity.[36]

(c) Institutional theory

Institutional theory on the other hand has a sociological origin and bears a certain semblance to the social justice rationale. Institutionalism views an organisation as legitimate if it conforms to social norms, values and expectations. To survive and to acquire legitimacy, a firm need not be efficient, it only needs to adhere to the rules of its immediate environment. In seeking to acquire legitimacy, institutionalists believe that firms are subjected to three kinds of pressures: coercive, mimetic and normative. Mimetic pressures may lead a firm to imitate other successful organisations for example by hiring female directors. Coercive pressures arise by virtue of the rules and regulations of the firm's geographical location. It thus follows that where the law of

---

[35] Supra N 32 at pg. 3
[36] Supra N 20

the particular area imposes a quota on female board representation, a firm will be perceived as legitimate if it conforms to such regulation. Normative pressures on the other hand arise from the values, norms and expectations of the firm's environment and its constituents. In the context of Gender diversity, normative pressure may induce firms to strengthen their female board representation because it is consistent with the social expectations, norms and values of its direct constituency. In so doing, institutionalists believe that the firm is burnishing and entrenching its legitimacy.[37] Although a compelling theoretical frame for gender diversity, it is suggested that institutionalism could also explain other forms of diversity. Further, its fixation on social expectations, pressure and organisational reputation may reduce the case for gender diversity from a virtue in its own right to a tick-box exercise which organisations engage in to enhance their image and to head off societal pressure. It is also worth asking whether the institutionalist case is pragmatic enough given that in the face of societal agitation, the level of female representation on boards has continued to lag behind men.

(d) Agency theory

Agency theory on the other hand describes the relationship between the principal (shareholders) and the agent (the board). Fama and Jenson in their seminal piece argued that the board is an important lever through which managers can be controlled and monitored.[38] Agency theorists believe that the role of the board is to resolve agency problems which may arise between the principal and the agent. These problems typically arise when an agent appears to apotheosise its interests above that of the principal. [39] Given the role of the board highlighted above, agency arguments typically celebrate the independence and difference of board

[37] Supra N 32.
[38] E Fama and M Jensen, Agency Problems and Residual Claims (1983) 26(2) Journal of Law and Economics 327, 331.
[39] ibid

members. Relying on this theory, one can argue that women on corporate boards contribute both independence and difference. It is plausible that a female non-executive director may question and scrutinise board decisions before they are implemented. It is also plausible that by including females on boards, they may contribute different perspectives thereby challenging board room homogeneity and groupthink. [40] Agency theory provides the most pragmatic and sophisticated explanation for gender diversity. Its focus on reducing boardroom homogeneity and groupthink through the infusion of diversity is welcome. However, like other theories explored above, it is worth questioning whether it makes a distinctly holistic case for gender diversity. Indeed, its arguments are equally true for other forms of diversity such as ethnic diversity. Another point worth making is whether agency theorists actually consider board level practice in their arguments. In challenging groupthink, one requires a high level of independence. It is therefore worth questioning whether groupthink and board level independence can be achieved in an era of director interlocks and an age where a director is more likely to be appointed because he or she has cronyist links to the executive board.[41]

In sum, the first three theories addressed above are aligned. To varying degrees, they speak to the virtues of a gender diverse board which maximises abundant human capital and conforms to societal norms, mores, values and expectations. Agency theory on the other hand is not entirely an outlier. It also celebrates board level difference and independence. Yet, it is questionable whether any of these theories make a distinctly holistic case for gender diversity. In the quartet of theories advanced, Agency theory appears to be the most pragmatic given its focus on tackling groupthink and entrenching independence but its pragmatism fades when one considers that we inhabit an age of cronyism and director interlocks.

---

[40] Supra N 32 pg. 3

[41] Jill Solomon, Corporate Governance and Accountability (3rd edn, John Wiley 2010) pg. 94

1.4 Conclusion

This Chapter set out to examine the rationale for Gender diversity on corporate boards. It began with an elucidation of the nature and function of a corporate board. The chapter also found that the corporation as an economic and social institution can generate significant impacts if board responsibilities are handled ineffectively. This raised the question of what constitutes an effective board. Here, the chapter found that amongst other things, the composition of a board and its diversity is a driver for effectiveness.

Having established the importance of diversity on corporate boards, the chapter embarked on an analysis of the contemporary narratives for board level gender diversity. The business case attempts to link increased gender representation to increased economic performance at firm level. The chapter found divergences between authors who find a positive correlation and academics who argue otherwise. The chapter argued that the business case is inconclusive given the failure of academics to find a causal connection. This methodological weaknesses calls for a stronger explanation which the social justice case presents. The social justice rationale on the other hand possesses a utilitarian tenor. It views gender equality as an intrinsic value that should be promoted in itself.

The analysis then moved on to the theoretical explanations for Gender Diversity. Four theoretical explanations are advanced including Human Capital theory, Resource Dependency theory, Institutional theory and Agency Theory. The chapter finds that the first three theories are somewhat aligned. At a basic level, they advocate the maximisation of human capital and conformity to social norms and expectations through boards that properly reflect the composition of society. Agency theory on the other hand underscores gender diversity by celebrating the virtues of difference and independence on the board. However, the quartet of theories do not make a sui generis case for gender diversity. Indeed, their arguments can equally be applied to other forms of diversity. The next chapter investigates the causes of female underrepresentation on corporate boards in the UK.

Chapter 2- Gender Diversity in the United Kingdom- Causes and Possible Solutions?

Introduction

The Preceding Chapter investigated the rationale for board level gender diversity, including the competing narratives for gender diverse boards. This Chapter sets out to investigate the causes and possible solutions of gender diversity on UK Corporate Boards. It pursues this aim in four sections – Gender diversity the global context, Gender Diversity statistics in the United Kingdom, Causes of Gender diversity and differing approaches to tackling diversity.

The first section introduces the global statistics on female participation on boards in order to establish the divergences between male and female representation on Corporate Boards. The analysis then proceeds to an appraisal of the figures and statistics in the United Kingdom, including the figures across companies listed on various markets of the London Stock Exchange, including the FTSE 100, 250 and 350 Markets.

Having diagnosed the challenge, the third section examines the underlying causes of female underrepresentation on boards. Here, two main factors are identified, including cultural factors and the so-called pipeline argument. The fourth section scopes the differing approaches that have been advanced to further the idea of gender balanced boards. These include the use of voluntary targets and mandatory quotas. Targets are traditionally associated with jurisdictions like the United Kingdom and quotas are associated with western European Countries like Norway and Germany[42] and it has also been proposed by the European Commission in its draft directive on improving gender balance on European Boards.[43] The intrinsic characteristics of these approaches will be investigated in greater detail in the next chapter.

The final section concludes the chapter.

---

[42] CIPD, Quotas and targets: How do they affect diversity progress? Policy Report (2015)

[43] Ibid

2.1 Gender Diversity the Global Context

The debate around gender diversity has risen to the top of the public policy making agenda.[44] Fundamental to this rise is the uproar about the divergence between male and female participation in the governance of corporations.[45] To put things in perspective, the World Bank's population index estimates that women constitute almost 50 percent of the world's populace.[46] Yet, global statistics on corporate board representation continue to show a significant gap between women and men. A 2017 report by the professional consultancy, Deloitte, suggests that on average, 15 percent of all board seats globally are taken up by women, representing only a modest improvement over the 12 percent reported in the 2015 report.[47] The figure for male participation stands at roughly 85 percent- a figure which starkly elucidates the levels of female underrepresentation across boards.[48] When taken in conjunction with the rates of general participation in the work place, a similar picture is noticeable. Figures released by the World Bank suggest that the rate of female participation in the global workforce is just over 49 percent as opposed to 76 percent for Men.[49] These figures reveal what appears to be a deeper trend of inequality between female and male participation in the board room and in the global labour force in general.

Digging deeper into the 2017 Deloitte report reveals a mixed bag of sorts. On one hand, the European continent (mostly countries of the European Union) appear to have made the most progress with over 22.6 percent of Board seats held by Women. This is often associated with recent regulatory initiatives aimed at delivering gender balance on boards. [50] This is closely

---

[44] A Dhir, *Challenging Boardroom Homogeneity: Corporate Law, Governance, and Diversity* (1st edn, Cambridge University Press, 2015) pg. 1
[45] Ibid
[46] The World Bank, Female Population Index (2016)
[47] Deloitte, Women in the Boardroom: A global perspective, (5th edn, June 2017), P3
[48] Ibid
[49] The World Bank, Labor force participation rate, female (% of female population ages 15+) (modelled ILO estimate) (2016)
[50] Supra N 47 at 43

followed by the Australasian continent in which 20.8 percent of Board seats are held by women.[51] The African continent despite its size merely manages 18.8 percent of female board seats.[52] This is followed by the North American continent (which features countries like the United States of America and Canada) where the figure for female board seats stands at 14.5 percent.[53] The Middle East scores a modest 11.3 percent.[54] Whilst the Asian and South American continents come in at 7.8 and 7.2 percent respectively. [55]

The content of the 2017 Deloitte analysis is broadly matched by the 2016 Global Board Diversity Analysis carried out by the Corporate Executive Search Firm, Egon Zehnder.[56] According to the Egon Zehnder report, the percentage of females on global boards averaged 19 percent in 2016, up from 14 percent in 2012.[57] The analysis also found that the biggest improvements in Board diversity came from Western Europe.[58] The report was equally laudatory of the quota systems in France and Italy, which according to it had “literally transformed” corporate boards in Italy and France –the properties of the quota system is explored in more detail below.[59] This conclusion in the Egon Zehnder report is welcome but there is a risk of glossing over the inherent difficulty typically experienced in quota countries which is that majority of appointments are in fact to the non-executive board and not to the executive board – a situation which can hardly be characterised as holistic change.[60]

---

[51] Ibid at 34
[52] Ibid at 38
[53] ibid at 9
[54] ibid at 73
[55] ibid at 9
[56] Egon Zehnder, 2016 Global Diversity Analysis (2016)
[57] Ibid pg. 3
[58] Ibid Pg. 6
[59] Ibid Pg. 5
[60] 30 Percent Club, *Norway’s Quota – A decade on* (August 28, 2014)

Having established the nature of the problem in the global context, and given the focus of this dissertation, it is important to investigate the state of gender diversity on UK Boards.

2.2 Gender Diversity: Current figures in the UK

Closer home in the United Kingdom, a similar spectacle is noticeable – a spectacle of a gap between female and male participation on corporate boards. Although progress has been made over the years to reduce this gap, the figures are still disappointing. On average, Women occupy just above 20 percent of overall Board seats in the United Kingdom – a figure which lags behind western European Countries such as Norway, Sweden and France.[61] Worse still, when this average is broken down, it reveals a mixed picture of sorts.

For instance, On FTSE 100 Boards recent figures suggest that the percentage of female participation on these boards is at 26.6 percent, up from about 26 percent in 2015 – a change which the Alexander-Hampton review regards as slow.[62] Notwithstanding this welcome sign, there is still one FTSE 100 board with an all-male board.[63] Further, it appears that the majority of women appointed to FTSE 100 boards are in fact appointed to non-executive positions as opposed to executive positions – meaning that they may have a limited say in the day to day management of a corporation.[64] Worse still, a recent BEIS Select Committee Report suggests

---

[61]Supra N47 at p.71

[62] Professional Boards Forum, Boardwatch (2017). See also Hampton-Alexander Review, FTSE Women Leaders: Improving gender balance in FTSE Leadership (November 2016), pg. 9

[63] House of Commons: Business Energy and Industrial Strategy Select Committee, Corporate Governance (Third Report of Session 2016-17), pg. 242

[64] ibid

that only 10.4 percent of FTSE 100 Executive Board Positions are held by women, compared with 19 percent of non-executive Board Positions.[65] The number of FTSE 100 Female Chief Executive Officers declined in the past three years. To put things in perspective, there were nine female Chief Female Executive Officers of FTSE 100 companies in 2014, this figure declined to six in March 2017– a figure which elucidates slowing progress in the appointment of women to the Executive boards of top-tier corporations in the UK.[66]

The figures for female representation in Executive committees of FTSE 100 companies are also grim. Executive committees are the most senior management rank below board level.[67] Recent reports by the Cranfield Management Institute suggests that this stands at 19.4 percent for women and 80.6 percent for men.[68] In addition to the underrepresentation of women on executive committees, there are also worrying results for women who hold the most important senior management positions in FTSE 100 Companies such as Chief Executive Officer, Chief Financial Officer and Chief Operating Officer. According to the 2016 Cranfield University School of Management report, this figure stood at 10 percent in 2016.[69] When read in conjunction with the statistics above, these figures highlight a potential pipeline issue in several of the top-tier organisations in the United Kingdom – a situation of poor levels of participation at the highest level where females may be able to make more of an impact in terms of corporate strategy and governance.[70]

FTSE 250 boards on the other hand reflect a similar tale. Recent figures by the industry group, professional board watch suggest that these Corporations have just over 21 percent of female

---

[65] ibid
[66] ibid
[67] Cranfield University School of Management, *The Female FTSE Board Report 2016, Women on Boards: Taking Stock of where we are* (November 2016) pg. 22
[68] ibid
[69] ibid
[70] ibid pg 31

directors, with over 18 percent of female non-executive directors and 4 percent of female positions on the Executive Boards.[71] The number of FTSE 250 female executive directors appears to have gone backwards given that the Cranfield Institute of Management report issued in November 2016 suggested that the rate of female participation on FTSE 250 executive boards was at 5.6 percent as opposed to the meagre 4 percent recorded in the Boardwatch analysis.[72] The Boardwatch research also reports about 8 all-male boards in the FTSE 250 index.[73] Taken together, these figures suggest very slow progress, in particular, on appointments to the executive board of FTSE 250 Corporations.

On FTSE 350 boards, there is a worryingly analogous story. On average, there are just over 23 percent of female directors on these boards, marginally up from the 21 percent recorded in 2015. Further, there appears to quite a lot of tinkering around the edges and creative compliance by FTSE 350 boards on the issue of gender representation. This is best exemplified by the fact that over 18 percent of women appointed to the boards of FTSE 350 Corporations were appointed to Non-executive positions, whilst 6 percent were appointed to the executive board. Further, research by the Professional Board Forum, an industry network, suggests a total of 9 all-male boards on the FTSE 350 index.[74] The tinkering around the edges is also reflected in a recent inquiry by the Equality and Human Rights Commission into FTSE 350 boards which revealed worrying evidence that in 46 percent of FTSE 350 boards, the proportion of women on their board either remained the same or even decreased.[75] The report also found that where improvements had been made, this was as much due to a trend to reducing board size as it was

[71] Professional Boards Forum, Boardwatch (2017)
[72] Supra N70 at p.39
[73] Supra N 74
[74] Ibid
[75] Equality and Human Rights Commission, *An Inquiry into Fairness, Transparency and Diversity in FTSE 350 Board Appointments* (2015), pg. 9

to the appointment of women.[76] In other words, FTSE 350 corporations are scarcely making new female board appointments but are instead reducing the size and structure of their boards to gloss over the failure to progressively address female participation on their boards. This may be reflective of a corporate culture that is restrictive to towards greater female participation on their boards and disposed towards forms of creative tinkering to comply with external targets.

The afore-cited figures elucidate the extent of the Gender Diversity challenge in the United Kingdom. Although, the last few years has seen encouraging signs in the level of female participation on corporate boards, there is still significant underrepresentation across board levels in the United Kingdom. This warrants an examination of the underlying causes of poor board diversity and the emerging approaches in tackling this issue.

2.3 Underlying causes of Poor Gender Diversity on Corporate Boards

There are two categories of explanations concerning the causes of poor gender diversity on board positions.[77] The first category involves barriers erected by the so-called pipeline problem which avers that at the top level, there is a dearth of qualified women to take up corporate positions. Explanations in the other broad category are often rooted on behavioural and cultural issues such as indirect discrimination, stereotyping, power, preferred leadership style and what Oakley describes as the psychodynamics of male and female relations.[78]

(a) The Pipeline problem.

This speaks to perceived human capital differences between men and women which is said to result in a dearth of qualified female directors. Proponents of the pipeline problem typically

[76] ibid
[77] J Oakley, *Gender-based Barriers to Senior Management Positions: Understanding the Scarcity of Female CEOS* (2000) 27 Journal of Business Ethics 321,
[78] ibid

aver that there is a limited supply of female candidates for director positions.[79] This supply dilemma is sometimes explained through the lens of lifestyle choices made by women and other issues of discrimination which means that career progression is truncated as women limit their own aspirations to strike a balance between their role in a family setting and their roles in the business world.[80] The pipeline argument was employed by the Lord Davies Review in its explanation for the low number of females on corporate boards. In its first report, Lord Davies averred "The low number of women on boards is in part a symptom of insufficient numbers emerging at the top of the management structure and the under-representation of women in senior management generally. [81] According to the Davies Review, this leaking pipeline is party explained by the level of female attrition from the United Kingdom workforce. The reasons for this level of attrition are said to be complex and relate to factors such as lack of access of flexible working arrangements, difficulties in work-life balance and disillusionment at a lack of career progression. However, compelling such an explanation is, it is worth considering whether the pipeline argument stands up to scrutiny. For one, research by the Cranfield School of Management has identified not a leaking pipeline but a pipeline full of probable talent for board level positions. The 2010 Female FTSE 100 report found a "substantial and growing pipeline of talented women that are available to search firms and companies, in particular for non-executive board roles".[82] The report further concluded that this ready supply of talent challenges the notion that a supply problem has hampered corporate organisations from appointing female talent. In terms of the executive board, the so-called pipeline problem has also been challenged. A recent report in the New York Times suggests that there is enough

---

[79] J Suk, *Work-family Conflict and the Pipeline to Power: Lessons from European Gender Quotas* (2012) Mich St L Rev 1797, 1798
[80] ibid. see also D Kershaw, Company Law in Context: Text and Materials (1st edn, OUP) pg. 248
[81] Lord Davies' Report on Women on Boards (2011),
[82] Cranfield University School of Management, *The Female FTSE Board Report: Opening up the process* (2010), pg. 40

female talent in the pipeline and that the failure of corporations to appoint gender-balanced executive boards run deeper than a perceived shortage in the supply of talent.[83] Further, the growing number of non-executive directors appointed in recent years should also populate the pipeline in particular for executive Board appointments. This then begs the question of why women are still underrepresented in corporate boardrooms. To answer this question, Doldor etal have suggested that the obstacle to gender balanced boards moves beyond the perception of a leaky pipeline. They suggest that culture is the real factor holding women back.[84]

(b) Cultural barriers.

Explanations for the underrepresentation of women in corporate board positions also go beyond the so-called pipeline problem and embrace the impact of cultural and gender-based behavioural dynamics.[85] For one, David Kershaw has suggested that systematic indirect discrimination could be a factor which explains the underrepresentation of females on corporate boards. He defines this as a situation where capable women are excluded from top management positions because they do not fit the cultural profile of a director of a major UK Company.[86] This cultural dynamic can also be explained through the idea of old boys' networks. As Oakley argues, several top tier corporations are characterised by old boy networks in which members of the network transfer the competition and power advantages realised in this network onto friendship patterns and alliances within the architecture of the network.[87] The dominant subculture within these networks mean that women are sometimes shut out of corporate positions. Another facet of the cultural dynamic are gender-based stereotypes.

[83] Susan Chira, *Why Women Aren't C.E,Os, According to Women who almost were*, New York Times(New York, 21 July 2017)

[84] E Doldor, S Vinnicombe, M Gaughan and R Sealy, *Gender Diversity on Boards: The Appointment Process and the Role of Executive Search Firms*, Equality and Human Rights Commission Research Report 85 (2012) pg. 31

[85] Supra N 80 at 324

[86] D Kershaw, Company Law in Context: Text and Materials (1st edn, OUP, 2012) pg. 248

[87] ibid

Oakley argues that certain gender-based stereotypes are reinforced in the workplace and has thus inhibited the progression of several women to the top of several corporations. By way of example, she cites a survey of male directors which found that they considered their female counterparts to be less-confident, less analytical, less emotionally stable, less consistent and possessing poorer leadership qualities than men.[88] Other cultural and behavioural factors include the fact that women are biologically disposed to having children and raising families. This according to Oakley means that they are sometimes set back after such biological processes. Oakley avers that the remedy to such cultural assignment is to create corporate cultures that are accommodative of the family commitments of women and which allow for better work-life balance.[89] Oakley's argument is further advanced in Chapter 4 which proposes a blueprint for enhanced targets in the United Kingdom. Having examined the factors which have contributed to the underrepresentation of women on corporate boards, it is important to examine the emerging approaches employed in tackling poor diversity on corporate boards.

2.4 Emerging Approaches in tackling Gender Diversity on Corporate Boards.

Since the rise of the debate on gender inequality, several countries have taken two broad paths to tackling this problem. The first broadly involves the use of voluntary targeting and the second involves the use of mandatory and institutionalised quotas.[90] In the context of the former, Jurisdictions such as the United Kingdom typically set targets aimed at guiding action by regulated entities. As the word voluntary implies, these targets are non-binding. However, they are typically enshrined in soft corporate governance codes – meaning that failure to adhere to such a provision may attract ethical and reputational opprobrium. In a deeper sense, voluntary targeting constitutes as a form of decentred and collaborative governance where the

---

[88] ibid

[89] ibid

[90] T Clarke, International Corporate Governance: A Comparative Approach (2nd edn, Routledge, 2017) pg. 80

state no longer serves as the sole or primary regulator. Rather, it forms but one part of a pluralistic regulatory environment where the regulated entity and other stakeholders also contribute to the formulation and adoption of an overall normative ordering.[91]

Quotas on the other hand serve as a form of command-and-control regulation, according to which the relationship between the regulator and the regulated is hierarchical and is predicated on a deterrence-based logic.[92] The quotas are usually binding and typically carry the force of statutory law with traditional sanctions for infractions. This approach is traditionally adopted by western European countries such as Norway, Sweden and France – which explains the significant rise in female representation on boards in these countries. It has also been proposed by the European Commission in its Proposed Directive on improving gender balance on European Boards.[93] This will be explored in more detail in the following chapter.

Conclusion

This chapter set out to examine the cause of gender diversity is a problem in the United Kingdom. The first section began with an appraisal of global statistics, which reveal a gap between female and male representation on corporate boards across every continent of the world.

The second section examined the nature of the problem in the United Kingdom. Here, there is a similar spectacle of a gap between female and male representation on boards. Whilst, progress has been made over the years to address this challenge, there are lingering concerns. For one,

[91] Supra N44 pg. 10
[92] Ibid
[93] 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 (2012)

women remain underrepresented across corporate boards. The picture however is not entirely gloomy, there has been good progress made, in particular, with female appointments to non-executive board positions but this is darkened by slower appointments to the executive board. There are also instances of creative tinkering by corporations in their efforts to meet targets – including by reducing board size and structure.

Having diagnosed the problem, the third section examined the causes of poor gender diversity on boards. This is narrowed down to two main issues: the pipeline problem and cultural factors. Proponents of the pipeline argument aver that there isn't enough supply of female directors. This is however challenged by compelling figures which suggest a steady supply pf female directors. Cultural arguments on the other hand appear to be deep-seated and range from old-boy networks to gender-based stereotypes. The section argued that the deep nature of some of these perceptions call for policy initiatives aimed at tackling issues of gender diversity.

The fourth section examined the approaches employed by different jurisdictions in tackling this challenge. A comprehensive audit of existing literature suggests that there are two broad approaches – Voluntary targeting and the use of mandatory quotas. As the word voluntary implies, targets involve a certain level of voluntarism and the goodwill of regulated entities (corporations). However, it suffers from a certain lack of enforceability, save for the ethical and reputational opprobrium which failure might raise. The features of this approach in the United Kingdom will be explored in greater detail in the following chapter. The quota approach on the other hand involves a deterrence-based mechanism, usually enshrined in statutory law and backed by conventional sanctions. This is typically used by western European Countries and has been advocated by the European Commission. (This will be explored in the following chapter).

Chapter 3- Voluntary Targets vs. Quotas in practice- The governance initiatives for gender balanced boards in the United Kingdom and in Continental Europe

3.0 Introduction:

The preceding chapter investigated the causes of gender diversity and introduced the possible solutions. This chapter builds on the previous one. It forensically examines the governance initiatives for gender diversity. These typically fall under voluntary targets and the use of mandatory quotas.

The first section examines the structural properties of targets and quotas, including the pros and cons of these regulatory instruments. The section moves from theorising these instruments to examining their practical application. This is done through an analysis of the use of targets in the United Kingdom and the use of quotas in Norway, Germany and the proposed European directive on gender balance. The analysis reveals amongst other things the weaknesses of the duo. On one hand, the targets in Britain has delivered the avowed Davies target of 25 percent gender representation on the FTSE 100. In jurisdictions like Norway, quotas have also delivered dramatic change. There is however common concern about the failure of these instruments to thus far to drive serious change to the levels of female underrepresentation on executive boards.

The chapter concludes by averring that this raises the prospect of an enhanced which addresses the light touch gradualism of voluntary targets and the absolutism of quotas. This is examined in the final chapter.

3.1 Tackling Gender underrepresentation on boards through Voluntary Targets and Quotas

As argued in Chapter 2, the approaches to tackling gender diversity typically take the form of voluntary targets or quotas. Targets are voluntary aspirations identified and pursued by organizations, without regulatory sanctions imposed by the state.[94] They can be external or decentred.[95] External targets are aspirations set by business-led initiatives to drive gender diversity. Examples include the Davies review in Britain – investigated below which set an external target of 25 percent females for FTSE 100 corporations. Decentred targets on the other hand are aspirations set by businesses themselves. The latter invokes the new governance idea of self-regulation and co-regulation which radically transforms regulation from a vertical and top-down process to a horizontal process which empowers regulatees to shape and constrain their own behaviour.[96]

Principally, targets rely on the assumption that the idea of gender balanced boards moves beyond the need to change numbers. Proponents argues that it instead concentrates on changing cultures and organisational behaviours.[97] For this reason, targets are by their nature flexible. They provide corporations with the flexibility to set their own timescale and achievable goals which can be applied as part of a system-wide gender diversity strategy. The double dividend

---

[94] Supra N 70 at pg.45
[95] ibid
[96] Supra N44 pg.10
[97] Supra n 1

of flexibility and voluntarism also increases the likelihood of buy-in from multiple stakeholders, thereby enhancing the legitimacy of targets.[98]

Targets are however not without their challenges. For one, the decentralisation and voluntarism of targets may mean that they are set too low or not realised, suggesting that targets may in fact be unduly light-touch.[99] Perhaps in recognition if this, targets are typically supported by reporting requirements which establish clear lines of responsibility. For instance, the 2001 Davies review recommended that Boards of FTSE 350 companies should announce publicly any targets set.[100] Further, as Clarke argues, Diversity targets may be also lost among other commercial strategies regarded as more vital or immediate.[101] In the case of decentred targets, the pursuit of a target may lose steam if there is a change of leadership at the affected firm.[102]

Quotas on the other hand have as a common denominator the goal of achieving a particular gender balance.[103] They typically set out by way of statutory intervention, minimum representation requirements for each gender or for the underrepresented gender. These requirements are typically backed by sanctions which are characterised by varying degrees of forcefulness, including fines, empty chairs and in extreme circumstances, dissolution. An example is the Norwegian quota system which prescribes in some cases dissolution in the event of infringement.[104] In this sense, Quotas represent a recognisable level of state-based intrusion into the marketplace and a classical model of command and control regulation. Baldwin has

---

[98] ibid
[99] ibid
[100] Lord Davies of Abersoch, Women on Boards – February 2011 (Department of Business Innovation and Skills, (2011). pg. 18
[101] T Clarke, International Corporate Governance: A Comparative Approach (2nd edn, Routledge, 2017) pg. 80
[102] ibid
[103] Supra N 3 at pg. 72
[104] B Sjafjell, Gender Diversity in the Boardroom and its Impacts: is the Example of Norway a way Forward? (2015) 20(1) Deakin Law Review 25, 27

described this model as the use of the force of law to prohibit certain forms of conduct and to demand positive actions.[105]

Proponents argue that the underlying assumption of quotas is to change the numbers and ensure a critical mass, in order to gradually change the culture of organisations.[106] Yet, it is questionable whether regulatory instruments that are perceived as an imposition to business will actually drive cultural change beyond efforts aimed at tick-box compliance.

Advantages of Quotas include predictability and symbolic certainty. Where they are backed by effective sanctions, they can also deliver swift and uniform outcomes. Yet, there are also concerns about the nature of quotas. First, quotas can be inflexible and absolutist thus failing to allow business the requisite amount of reflexivity and timescale to set targets and achieve the end goal. They also impose additional regulation, costs and inefficiencies on business. Further, it is questionable whether the use of quotas does drive cultural reorientation. As Choudary argues, they can lead to tokenistic appointments, which is inconsistent with the idea of cultural change.[107] Choudary has also argued that Quotas are best suited for countries where there is a core foundation of gender equality. It thus follows that quotas might struggle in jurisdictions with difficult records of gender equality. [108] Having studied the structural properties of quotas and targets, it is imperative to investigate their use in practice. The following section will investigate the use of targets in Britain and the use of Quotas in Norway, Germany and the European Union. These jurisdictions have been chosen to showcase the practical aspects of targets and quotas.

---

[105] R Baldwin, M Cave and M Lodge, Understanding Regulation: Theory, Strategy and Practice (2nd edn, Oxford University Press, 2012) at 106.
[106] Supra N 97
[107] B Choudary, Gender Diversity: Beyond Quotas (2015) 26(1) E.B.LR 229,238
[108] ibid

3.2 Targets and Quotas in practice.

(a) Targets in the United Kingdom

The United Kingdom's approach to tackling gender inequality on corporate board is predicated on the use of voluntary targets. This is a consequence of the soft law echelon of much of the UK's corporate governance and regulation.[109] However, there are statutory provisions such as S 13 of the Equality Act 2010 which provides a protection against discrimination on the basis of gender and section 417 of the Companies Act 2006 which requires Corporations in the UK to publish a strategic review on inter alia their approach to gender diversity.

The UK's voluntary targeting system resulted from several corporate governance reviews which began with the Sir Derek Higgs Review of 2003.[110] The raison etre of the Higgs Review was to examine the role and effectiveness of non-executive Directors and their implication for corporate governance in the United Kingdom.

Amongst other things, the Higgs review observed that the number of female non-executive directors on Corporate Boards in the United Kingdom was "striking".[111] This was according to Higgs, a consequence of recruitment through personal contacts or friendships[112] - an observation which echoes the argument made in chapter two about old boy's networks that are functionally closed to females and thus difficult to penetrate. Higgs' conclusion was not entirely perplexing given that at the time, a paltry six percent of non-executive directorships were held by women.[113] Higgs' consternation with this lack of diversity prompted a

---

[109] J Du Plessis, The case for and against mandatory gender quota legislation for company boards (2015) 20(1) Deakin Law Review 1, 9.
[110] Derek Higgs, Review of the Role and Effectiveness of Non-Executive Directors (DTI 2003)
[111] ibid para. 10.22.
[112] ibid at para 10.24
[113] Ibid para 10.22

recommendation in his final report that corporate boards in making future NED appointments should draw from pools of qualified women.[114]

Like several pioneering corporate governance reviews, the Higgs review was not without its flaws. Although it highlighted the problem of female underrepresentation on boards, it did not set any targets nor did it set any measurable standards beyond the aspirational statement that corporations must draw actively from an observable talent pool of female director candidates in future appointments. The hortatory nature of this recommendation meant that it was without enough thrust. This according to Choudary resulted in a poor response to the issues of gender diversity highlighted in the report.[115] Indeed, the Davies Review which was commissioned years later found in its 2011 preliminary report that in the immediate aftermath of the Higgs Review (2003-2010), the percentage of women on FTSE 100 boards had risen by only four percentage points from 8.6 percent to 12 percent – a rise which can hardly be described as seismic given the focus placed on the issue of gender diversity by the Higgs review.[116]

Following the publication of the Higgs Report was the 2003 Laura Tyson review which was commissioned to further examine the recruitment of female non-executive directors on UK Boards.[117] Like the Higgs review, the Tyson review similarly advocated, in hortatory terms, the appointment of female non-executive directors to the boards of UK Corporations. It also did not set targets to be met by corporations.

In the wake of the Global Economic Crisis, debates about gender diversity on boards rose to the fore. This was in part, a consequence of the normative deficiencies highlighted by the crisis.

---

[114] Ibid
[115] Supra N 26 at 515
[116] Lord Davies of Abersoch, Women on Boards – February 2011 (Department of Business Innovation and Skills,
2011). 12
[117] London Business School, The Tyson Report on the Recruitment and Development of Non-Executive Directors (June 2003)

As argued in Chapter 1, the Global Crisis highlighted amongst other things, the dangers of a culture of ‘groupthink’ by male-dominated boards at several corporations.[118] This prompted Christine Lagarde, the IMF’s Executive Director to question whether the crisis would have been as egregious if the firm Lehman Brothers was rather Lehman Sisters.[119] However reductionist such claims were, it threw into sharp relief the question of gender diversity on corporate boards.

In the United Kingdom, the renascent diversity agenda sparked swift policy reaction. The most immediate was the insertion in the then combined code of corporate governance of a requirement drawn entirely from the Higgs Review which required the search for board candidates to be conducted and appointments made with “due regard for the benefits of diversity on the board, including gender.”[120] However, the comply or explain nature of the code meant that corporations were not obliged to comply with this principle if they provide an explanation to shareholders. This was soon followed by a government-backed review led by Lord Davies of Abersoch, on the issue of gender-diverse boards.

At the time of Lord Davies’ commissioning, women only represented 12.5 percent of FTSE 100 directors and 7.8 percent of FTSE 250 directors. In addition, over 21 percent of FTSE 100 boards had all male directors. The figure was 52 percent for FTSE 250 boards. At the same time, women in the basic labour force accounted for 46 percent.[121] These figures threw the subject of female underrepresentation on corporate boards into sharp relief.

[118] Supra N 10
[119] C Lagarde, “Women, Power and the Challenge of the Financial Crisis”, The New York Times (10 May 2010)
[120] Financial Reporting Council, the U.K. Corporate Governance Code (2010), Principle B.2.
[121] Lord Davies of Abersoch, Women on Boards – February 2011 (Department of Business Innovation and Skills, 2011). 9

Buoyed by these revelations, Lord Davies opted for ten recommendations as opposed to formal quotas in his February 2011 preliminary report. This is presumably in keeping with the soft law echelon of contemporary UK Corporate Governance. The Davies recommendations included targets for Corporations listed on the London Stock Exchange. For FTSE 100 Corporations, the report recommended a minimum of 25 percent female representation by 2015. For the FTSE 350, the Davies review recommended a decentred approach which required companies listed on the index to set their own targets. The report sadly did not make direct recommendations for FTSE 250 firms. It only referred to the fact that FTSE 250 companies had smaller boards with comparatively lower levels of female directors and thus that the boards of these companies should aspire to achieve 25 percent by 2015. Other recommendations of the preliminary Davies report included a requirement for the Financial Reporting Council to amend the UK Corporate Governance Code to require listed companies to establish a policy concerning board diversity and annual disclosure of the progress made. The report also recommended critical engagement by investors with regards to appointments and reporting of appointments to a company's board.[122]

At ground level, Lord Davies' preliminary recommendations can be criticised for their lack of ambition. For one, the use of voluntarist solutions still divides opinion about its efficacy. As argued above, several academics still criticise the UK's voluntarist system as unduly light touch.[123] Further, it appears that Lord Davies missed a golden opportunity to put down a marker on female executive board appointments. In lieu of a separate target for executive board appointments, Lord Davies only admonished firms to disclose the proportion of women in senior executive roles. This has arguably proven to be counterproductive given the continuing

[122] ibid at pg. 2
[123] Supra N 97

levels of underrepresentation on executive boards and has now formed the basis of the Hampton-Alexander review which is addressed below.

Further, it appears that Lord Davies' decision not to set targets for FTSE 350 and 250 firms in the 2011 preliminary report may have been ill-judged given his subsequent decision in 2015 to set observable targets for firms listed in the FTSE 350 index. It also deserves to be asked whether outsourcing the monitoring of board appointments to institutional investors as Lord Davies proposed is credible, given their underwhelming performance with regards to general stewardship responsibilities. Indeed, Lee Roach has recently suggested that the business models of several institutional investors and their passive investment instinct means that they are sometimes unable to engage effectively with investee boards.[124] This if anything calls into question Lord Davies' recommendation that these investors should engage with investee companies in relation to their record on female director appointments.

The criticisms of the recommendations aside, the preliminary Davies Review did not get off to a good start. A Cranfield School of Management report released two years after its publication found that although progress had been made with new female appointments to boards, substantial changes in the appointment of women remained slow.[125] This if anything suggests an institutional reticence to improve the gender balance of boards. [126]

This slow start was soon followed by sharp improvements. By 2015, FTSE 100 companies had achieved 23.5 percent of female representation on their boards and looked likely to hit the 25 percent target prescribed by Lord Davies.[127] FTSE 250 and 350 boards on the other hand had

---

[124] L Roach, The UK Stewardship Code (2011) 11(2) Journal of Corporate Studies 463
[125] Cranfield School of Management, the Female FTSE Board Report 2013: False Dawn of Progress for Women on Boards? (Cranfield University, 2013)
[126] ibid at 11
[127] Lord Davies of Abersoch, Improving the Gender Balance on British Boards: Women on Boards Davies Review Five Year Summary– October 2015 (Department of Business Innovation and Skills, 2015) pg. 34

recorded female participation of about 18 percent and 20 percent respectively.[128] The positive tenor of these figures were however darkened by the revelation that the proportion of female executive directors in the FTSE 100 companies was still disappointingly low at 9.6 percent.[129]

On the strength of these numbers, Lord Davies made further recommendations. First, he called for an extension of the voluntary targeting system for a further five-year period. He also increased the target of female representation across FTSE 350 boards to 33 percent by 2020. This was followed by a recommendation for all boards to focus on the appointment of female executive directors. Lord Davies also called for the establishment of a business group to monitor firm's adherence to his recommendation and to review their substance.

Although Lord Davies' recommendations regarding a higher target is welcome, his 2015 report can be criticised on the ground of its substantive weakness. For one, the report assumes too facilely that the extension of targets will deliver what its 2011 predecessor failed to do (increasing the numbers of executive board appointments). There is also a question of whether the target of 33 percent goes far enough. A recent report by the CIPD, suggested that a sustainable target "should not be anything less than 50 percent."[130] It is also worth mentioning that the target of 33 percent falls below the 40 percent quota proposed by the European Union in its draft directive and the quotas implemented in several European states like Norway. Further, the target in the 2015 report appears to be for FTSE 350 corporations.

Beyond the weakness of his voluntarist targets, the 2015 Davies report can also be criticised for its failure to set a specific target for executive board appointments – a decision that has been

[128] ibid
[129] ibid at pg. 18
[130] E Cadman and J Pickard, 'CBI Welcomes Davies Report raising women on boards target to 33%', Financial Times (London, 29 October 2015)

criticised by industry groups including the CIPD.[131] This suggests a failure to learn the most glaring lesson from the preliminary review of 2011.

In line with Lord Davies' recommendation for the establishment of a business led group to carry forward his proposals, the Hampton-Alexander review has been set up for this purpose.[132] The review has made several recommendations in its November 2016 report which merit analysis.

The Hampton-Alexander review recommended that 33 percent of executive pipeline positions (the combined executive committee and direct reports to the executive committee) for FTSE 100 companies be filled with female directors by 2020. The review also called on FTSE 350 companies to aim for a minimum of 33 percent female representation on their boards by 2020. It further admonished stakeholders to work together to ensure increasing number of women are appointed to the roles of chair, senior independent director and executive director positions on the Board of FTSE 350 companies. Further recommendations of the Hampton-Alexander review include a requirement for FTSE 350 companies to voluntarily publish details of the number of women on their executive committees and in the direct reports to the executive committees on an annual basis. The Hampton-Alexander review also requires the financial reporting council to amend the UK Corporate Governance Code so that all FTSE 350 listed firm disclose in their Annual Report and Accounts the gender balance of the executive committee.[133] Like the Davies Review, the Hampton-Alexander review enlists the help of investors in advancing gender diverse boards as part of their stewardship responsibilities. [134]

---

[131]Supra N 42
[132] Supra N 138 at 10
[133] ibid
[134] ibid

In principle, the Hampton-Alexander review and its focus on greater female representation is welcome. Its restatement of Lord Davies' 33 percent target on FTSE 350 boards also deserves applause. So also is the exhortation to FTSE 350 boards to appoint more women to senior positions on their boards. The review's positives also include the requirement for FTSE 100 firms to aim for a minimum of 33 percent representation on their executive committees by 2020. If successful, this may create a pipeline of women who can be readily appointed to executive positions. The disclosure requirement for FTSE 350 firms is also welcome and will help establish a cascade of information about the level of appointment to these boards– an objective which the review described as lacking in FTSE 250 boards.[135]

Notwithstanding these positives, certain criticisms are in order. First, the Review like its predecessor failed to set a bespoke target for executive board appointments at FTSE 350 level. This appears to have been subsumed within the overarching 33 percent objective. Further, there is no mention of what can be done at the FTSE 250 level with regards to executive committee or board appointments. The target for FTSE 100 firms only relates to the executive committee and not actual executive directorships. In this context, a separate target for appointments to executive boards across all FTSE indexes might have been more appropriate. The enlistment of investors is also problematic. As argued above, these investors are typically passive in their activities and tend not to bother about stewardship responsibilities.[136] This calls into question the wisdom of enlisting them in monitoring board appointments.

Like the Davies review, the aftermath of the Hampton-Alexander review has not been entirely rosy. Recent analysis released by the action group, Women pipeline found that since 2016, there has been no progress in the overall representation of women on executive committees at FTSE 350 corporations. The figures according to the count continues to be 16 percent. The

[135] ibid at pg. 8
[136] Supra N 129

report also did not spot any rise in the appointment of female executive board members. It concluded that the number of executive board members continues to be below 10 percent on FTSE 350 boards.[137] Whilst such criticism may be presumptuous given the recent publication of the Hampton-Alexander Review, it raises huge questions about the culture at several FTSE 350 firms.

The voluntary targeting system is often theorised as capable of delivering change without the inflexibility and absolutism of quotas. Its relative success in Britain suggests that a redesign of the UK's framework may be heavy-handed. Its weaknesses which include a failure to deliver optimal levels of female participation on executive boards does however call for an investigation of other initiatives including quotas in jurisdictions such as Norway, and Germany as well as the proposed EU directive to ascertain whether quotas are delivering far-reaching and radical change in corporations.

(b) Practical examples of Quotas

(i) Norway

A debate about gender diversity quotas cannot begin without the namechecking of Norway. Norway was indeed, the first country to introduce such a system in tackling the gross levels of female underrepresentation on its boards.[138] The journey to Quotas in Norway began ironically on the back of proposals made by the then male Trade and Industry Minister Ansgar Gabrielson to have at least 40 percent of women on their boards. At this time, Norway only had about 6 percent of female directors on its board after several voluntary efforts aimed at improving this figure.[139] The Gabrielson proposal soon became Sections 6-11a of the Norwegian Public

---

[137] The Pipeline, Women Count 2017 : Role, Value and Number of Female Executives in the FTSE 350 (July 2017)

[138] Supra N 109 at 27

[139] ibid

Limited Liability Companies Act 2006. Contrary to popular opinion, the Provisions in S6-11a are gender neutral.

The rule is specified in the following manner. First, if the board of directors has two or three members, both genders shall be represented. Secondly, if the board of directors of a given public company has four or five members, each gender shall be represented with at least two members. If the board has six to eight, each gender shall be represented with at least three members. The number goes up progressively if the board has 9 members.[140] S6-11a applies to directors of the main board and the alternate board.[141]

Given the quota-based nature of this rule, the Norwegian government has enshrined certain accountability mechanisms and sanctions. For one, the Norwegian Register of business enterprises is the competent authority for ensuring that companies compliant with Sections 6-11a. Further, a company acting in breach of this provision can be sanctioned in accordance with the ordinary rules governing Norwegian company law provisions.

An important sanction is the denial of registration in the Register of Business Enterprises. The most stringent is the actual dissolution of an incorporated company. However, this is only effected after serial notices and opportunities for the offending company to put in a place a compliant board.[142]

Since the enactment of the rule, the figures for female participation has jumped from 6 percent in 2006 to above 40 percent.[143] Barnali Choudary has attributed this rise to the normative stranglehold that gender equality enjoys in other aspects of Norwegian society.[144] Beneath this

---

[140] ibid at 30
[141] ibid
[142] Supra N 147
[143] Supra N 112 at 236
[144] ibid

headline figure are deep concerns. For several critics, the enshrining of quotas has legitimised a certain tokenism where women are appointed to boards just to tick boxes.[145] In other words, the use of quotas in Norway may have changed statistics but it has not succeeded in changing cultures.[146]

Further, critics argue that Norway's quotas may not have achieved radical change in appointments. For instance, Studies have found that the quota laws in Norway has not increased the percentage of women directors on the Executive Board.[147] In other words, many Norwegian Corporations are simply appointing women to non-executive director positions – a situation that is similar to the UK. A recent report for the industry group 30 percent club suggests that this stands at just 6.4 percent.[148] For a country with seemingly egalitarian foundations, this is disappointing to say the least. Further Choudary argues that the use of quotas has also resulted in an increasing number of women holding multiple directorships – the so-called golden skirt conundrum where women are appointed to several board seats.[149] This might have untoward consequences by concentrating appointments around a few women, thus stymying fresh appointments.

In sum, Norway's example shows that quotas can produce dramatic results at the NED board level. Yet, like voluntary targets, they can also lead to difficulties such as poor representation on executive boards. Given this, it is important to investigate other quota-based systems in continental Europe.

---

[145] ibid
[146] Supra n 147
[147] ibid
[148] 30 Percent Club, Norway's Quota – A decade on (August 28, 2014)
[149] Supra N 112 at 236

(ii) Germany

Germany is another jurisdiction with quotas for female representation on boards. Before examining the minutiae of Germany's legislation, it is important to state that Germany operates a tiered board system, with a supervisory board and a management board.[150] The former is typically larger in size but less powerful in decision-making.[151] Germany's journey to mandatory quota shares a striking similarity with Norway. Like the Norwegians, Germany began with voluntary mechanisms. The most notable being the German Corporate Governance Code which provided with regards to supervisory board appointments that specific targets should be set, and that these targets should specify an 'adequate proportion of women'. [152] The quasi-legal nature of the code meant that its provisions where not binding. They were instead subject to the so-called comply or explain principle – thus companies could deviate from the recommendations if they disclose and justify such deviation. The impact was poor levels of female representation on German Boards. For instance, a study by the German Institute for Economic Research found that, in 2013, the percentage of women on the management boards of the top 200 German companies was only 4.4 percent and the proportion on supervisory boards was 15.1 percent.[153] The general participation rate of women in the German Labour Market was however above 67 percent.[154]

These figures sparked calls for policy action and eventually led to the enactment of the Law for the Equal Participation of Men and Women in Management Positions in Private Industry and Public Services in 2015. At the heart of this legislation is a requirement for all listed companies, employing over 2000 employees and subject to codetermination (employee

---

[150] M Roe, German Codetermination and German Securities Markets (1998-9) 5 Columbian Journal of European Law 199

[151] ibid

[152] German Code of Corporate Governance para 5.4.1

[153] R Koch, Board Gender Quotas in Germany and the EU: An Appropriate Way of Equalising the Participation of Women and Men? (2015) 20(1) Deakin Law Review 53, 54

[154] ibid

participation on the supervisory board) to have at least 30 percent of females on their supervisory board and at least, 30 percent of men.[155] The gender quota applies to directors appointed by Shareholders and those appointed by employees as part of the Co-determination process. As far as sanctions go, errant companies can have the election of a supervisory board member voided to the extent that the quota is not met. This is a comparatively weaker sanction than the array of sanctions in the Norwegian system.

The law also established a so-called flexi-quota for listed Companies employing more than 500 but less than 2000 employees and which are subject to Co-determination. For these companies, the legislation obliges them to set targets for increasing the proportion of women both in their executive and supervisory boards. Consequently, there is no obligation to achieve a special quota. However, if the proportion of women was below 30 percent at the time the targets were set, companies are not permitted to fall below this status quo. [156] To give the flexi-quota added thrust, the comply or explain mechanism in the Corporate Governance Code still applies.

Substantively, the German mandatory quota raises huge questions. For one, it only applies to the supervisory board as opposed to the management board where much of decision making power is concentrated. This is at best a lack of ambition and at worst an unnecessary gradualism given the significant number of females in the general labour force.[157] The flexi-quota on the other hand bears many of the hallmarks of a voluntary target. Indeed, it can be derided as targets through the back door. Yet, it remains to be seen whether it will inspire a revolution in female appointments to the executive and non-executive board.

---

[155] ibid
[156] ibid
[157] Supra N 163 at 54

Over a year since the legislation's entry into force, the result has been mixed. The months following the commencement date saw a rise totalling 28 percent of non-executive directors.[158] Unsurprisingly however, the count for executive directors remains a paltry 8 percent.[159] This if anything shows that there is a steep mountain to climb and that corporations may be turning a blind eye to executive board appointments. That said, the progress to 28 percent is undoubtedly supported by the 30 percent supervisory board quota.[160] Yet, it is worth pointing out that it is 2 percent below the stipulated threshold. This again raises the question of whether quotas in themselves can drive radical and holistic change.

(iii)The Proposed EU Directive

The desire to achieve change is at the heart of the European Union's agenda on corporate board diversity. This has been inspired by gender disequilibrium on the boards of companies across Europe.[161] The corollary of this is a proposal for a directive to guarantee Gender balance on corporate boards.[162] Action in this area often justified by reference to Article 23 of the EU's Charter of Fundamental rights which provides for equality between women and men in all areas, including employment, work and pay. Szydlo has also linked this to the idea of a European Social Market economy enshrined in Article 3(3) of the Treaty of the European

---

[158] Supra N 57 at pg. 16

[159] ibid

[160] ibid

[161] M Szydlo, Constitutional Values underlying gender equality on the Boards of Companies: How should the EU put these values into practice? (2014) 63(1) ICLQ 171

[162] 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), 14 November 2012, 614.

Union (TEU) – a concept strongly influenced by ideas of social democracy and democratic governance in the economic field. [163]

At the heart of the proposed directive is a quota to increase the proportion of women in non-executive positions to 40 percent by 2020.[164] On the other hand, a fixed quota is not specified for executive board appointments. Instead, Article 5 obliges member states to ensure that Listed Corporations take individual commitments regarding gender-balanced representation of both sexes among executive directors to be achieved at the latest by January 2020. This is followed by a proposal for affected companies to provide information to competent authorities annually, including on whether they cannot meet the obligation to set targets or why self-imposed targets have been missed. This bears a striking semblance to the German Flexi-quota and is often characterised as a compromise provision which avoids undue disruption given the heterogeneity of cultures and corporate legislation across Europe.[165]

The quota requirement in article 4 applies only to listed companies; small and medium-sized companies would be exempt. As far as sanctions go, Article 6(2) proposes what it christens effective, proportionate and dissuasive sanctions which may include administrative fines, nullity or annulment declared by a judicial body of the appointment of NEDs made in contravention of the quota. This is comparatively more lenient than the Norway option which can see corporations deregistered.

The implementation of the quota is by virtue of Article 8 left to Member States. Article 8(3) however allows member states who already have existing gender diversity measures to suspend the application of the procedural requirements in Article 4 if it can be shown that existing measures will deliver up to 40 percent of female appointments by January 2020.

[163] Supra N 56
[164] Art 4
[165] Supra N 163 at 62

Although the directive is not yet in force, the quota requirement is problematic. First, in Article 4(3), it permits companies not to give priority to the candidate of the underrepresented sex if that candidate is not as equally qualified as a candidate of the other sex in terms of suitability, competence or professional performance or if an objective assessment that considers all criteria specific to individual candidates tilts the balance in favour of the candidate of the other sex. The latter element (objective assessment) presumably gives companies a get out of jail clause in future appointments where in their subjective assessment, a male candidate is better than his female counterpart. A further defect is that the directive in Article 4(6) inexplicably grants member states the power to exempt from the quota, companies in which members of the underrepresented sex represent less than 10 percent of the workforce. Szydlo has argued that this gives impetus to unscrupulous corporations in which the underrepresented sex constitutes slightly more than 10 percent of the workforce to pursue an employment policy which reduces this proportion to below 10 percent so as to take advantage of the exemption.[166] In a practical sense, this could result in declining levels of females in the corporate workforce.

Beyond the substantive defects in the directive, it also suffers from practical deficiencies. For one, it is questionable whether the decentred targets for executive boards in Article 5 can deliver optimal results. This scepticism is perhaps understandable given the slow levels of executive appointments in jurisdictions with quotas and voluntary targets.

In sum, the directive in its current form appears far from rigorous. Also, Quotas established at national levels do raise significant concerns with regards to their ability to deliver far-reaching change especially regarding executive board appointments. A similar picture appears with regards to the voluntary targeting system in Britain. Given the relative success of the latter, in particular on NED appointments, a case for transplantation is not clear. This raises the question

[166] Supra N 172

of whether an enhanced target which delivers effective change, including on executive boards might be appropriate. The next chapter conceptualises what an enhanced targets system might look like.

3.3 Conclusion

This chapter set out to examine the governance instruments in the regulation of gender diverse boards in the United Kingdom and in continental Europe. The first section examined the features of targets and quotas. It found that amongst other things, targets possess the virtues of voluntarism and flexibility and are said to pursue cultural change. Quotas on the other hand can be predictable and can drive rapid results. Yet, there are lingering concerns as to whether they can produce cultural change in business.

The penultimate section scoped the practical use of these instruments. It found that targets in Britain have driven up the numbers of non-executive directors. So also has quotas in jurisdictions like Norway and Germany. The picture remains challenging with regards to executive directors.

The chapter concludes that this raises the prospect of a third formula which seeks to tackle appointments in particular to the executive boards without the weaknesses of targets and the difficulties of quotas.

Chapter 4- Enhanced Targets Approach

4.0 Conceptualising the Enhanced Targets model

The preceding chapters revealed the inadequacies of Voluntary targets as they operate in the United Kingdom and the Quota system in parts of Europe. It found that Targets and Quotas have in relative degrees driven up the numbers of Female Non-Executive Directors, whilst the numbers of female Executive Directors in the jurisdictions analysed remain disappointing. In Britain for instance, the numbers for Female Executive Directors on the FTSE 100 continues to lag at 10.4 percent.[167] This is broadly comparable with Germany A quota jurisdictions where the figures are at 8 percent.[168] That said, the ability of UK Corporations to meet the Davis Target without the need for statutory intervention, suggests that a radical overhaul of the existing model may be heavy-handed. However, given the difficulties with the targets approach discussed above, certain architectural and institutional reforms may be in order.

By way of Architectural reforms, it might be appropriate to revisit the targets set by the Davis and Hampton-Alexander Reviews. The common criticisms of these targets are that they are light touch and that they operate without enhanced policing and monitoring. For this reason, an appropriate architectural reform might be to incorporate the recommendations of these reviews into Voluntary Charters developed by a government and business backed agency (discussed below) and signed by participant firms. That said, the use of Voluntary Charters is not overly radical nor is it without Precedent. For Instance, the UK Treasury has recently orchestrated a Voluntary Charter for Women in Finance,[169] on the back of recommendations made by the Jayne-Anne Gadhia review which examined ways in which the talents of women

[167] Supra N 67
[168] Supra N 167
[169] HM Treasury, Women in Finance Charter: A Pledge for Gender Balance across financial services (2016)

can be harnessed in Financial Services.[170] The Treasury's Charter has been developed in conjunction with several top-tier organisations and amongst other things admonishes signatory firms to up the ante in the appointment of female executive directors across several financial corporations. Given the co-optation of several financial corporations in the drafting of this charter, it immediately received support from over 72 financial services firms (both listed and unlisted).[171] This number has since grown to 141 in July 2017.[172]

Content wise, it might be appropriate for the proposed Charter to incorporate the numerical targets of the Davies and Hampton-Alexander Reviews or a new target altogether. However, to learn the lesson of the above-mentioned reviews and to drive swift and holistic change, this charter should also set a separate numerical target for Executive Board appointments. This will plug what is often characterised as a leaky pipeline and is in line with ideas set out by organisations like the CIPD who have called for a bespoke target for female executive directors.[173]

Beyond these headline targets, the charter should also encourage firms to set their own targets, above the threshold set externally and to publish annual progress reports on their webpages and on a central repository made available by the Administrators of the Charter (discussed below). Further, this proposed Charter should also provide for senior executive responsibility for meeting the targets specified in it. Further, the executive's pay should be linked to delivery against the gender diversity targets. There is again precedent for this. The Treasury's Women in Finance Charter provides that signatory firms must appoint or designate a senior executive

[170] HM Treasury and Virgin Money, Empowering Productivity: Harnessing the Talents of Women in Financial Services (March 2016)
[171] Company Lawyer, Women in Finance Charter receives support from 72 Financial services firms (2016) 37(10) 308-309
[172] HM Treasury, Women in Finance Charter: List of 141 signatories (2017)
[173] CIPD Policy Report, Targets and Quotas: How do they affect Gender Diversity Progress? (July 2015), pg. 4

as responsible for meeting the organisation's commitments under the charter and that the executive's pay should be linked to progress made on gender diversity and inclusion.[174] The benefit of this kind of executive level accountability is that it attributes responsibility for driving cultural change not to the organisation but the natural persons behind veil who are in fact the directing minds.[175] This is the principle behind ideas such as the Financial Conduct Authority's Senior Managers regime.[176]

The substantive contents of the Charter should also address the factors spelt out in Chapter 2 which hamper female participation on Corporate Boards. This should include a commitment that firms will promote flexible work practices, establish policies and practices in relation to gender balance in the workplace and conduct data analysis to develop a comprehensive workplace profile. Firms should also be required to develop pay equity policies, policies for recruitment and retention. The Charter must also provide for commensurate reporting responsibilities on all the above not only on the website of the firm but also on a central repository designed by the charter administrators.

As far as Institutional reforms are concerned, The Charter should be administered by a responsible agency, preferably created by Statute. There is no reason why a specialised Gender diversity unit within the Equality and Human Rights Commission cannot satisfy the above requirement given that the organisation is itself established by statute.[177] The proposed agency must have an avowed commitment to driving holistic change through the use of integrity measures as opposed to formal sanctions. Integrity measures might include detailed explanations on a Company's adherence to the Charter. The proposed organisation should

---

[174] HM Treasury: Women in finance charter: Guidance on the Charter (2016) pg. 2
[175] J McCalman, A Young and R Chan, Regulating the Culture of Banks in the United Kingdom: Strengthening legal accountability or just better Leadership 32(6) JIBLR 261, 263
[176] Ibid
[177] S1 Equality Act 2006

operate a tiering system by which companies are tiered by the quality and granularity of their reporting. The Gender diversity unit should also establish and administer a public/accessible register where members of the public and advocacy groups can find such information of Corporations who are delivering real progress. The agency should produce reports and indicators which organisations can use for benchmarking against peers. To drive cultural change, the proposed organisation should also launch educational activities including ELearning Modules and technical workshops where designated executives can exchange ideas about progress on gender balance in their organisations. In this way, the enhanced targets will transcend the light-touch voluntarism of ordinary targets and the absolutism of quotas.

Conclusion

This dissertation set out to elaborate on the gender diversity paradigm. This is tied to increasing apprehension about female underrepresentation on corporate boards. In earlier analyses, it was established that board level diversity is crucial for the optimal delivery of corporate board responsibilities. This was followed by the penultimate chapter which scoped the current levels of female board representation in the Global context and in the United Kingdom. Here, the figures are revealed as disappointing, in particular on the executive board and in need of improvements. The analysis then moved to the causes of female underrepresentation. Here, two arguments are advanced: the pipeline factor and cultural dynamics. The former is examined and is revealed to be unconvincing. The latter perhaps explains more why women are underrepresented on boards.

The third chapter investigated the current regulatory frameworks used in tackling gender unbalanced boards. These typically fall under Targets and quotas. The former consists of voluntary commitments made by corporations to upping the levels of women on their boards and is used in the UK, whilst the latter consists of legislative requirements which stipulate levels of appointments backed by sanctions. A deeper analysis of the duo reveals that both have delivered good progress especially on the non-executive board but there is still a lot to be desired on executive board appointments. The chapter went on to argue that the progress of targets in the UK means that a radical overhaul might be heavy-handed. It instead advanced the case for enhanced targets which sit in the hinterland between light-touch targets and the absolutism of quotas.

The fourth chapter conceptualised these targets. First, it called for the incorporation of existing targets into a voluntary chapter that is attested to be a designated executive. This level of personal responsibility might arguably lead to greater progress on female appointments. The chapter further called for the establishment of a specialised agency to carry out certain integrity measures such as enhanced reporting, benchmarking and education.

Bibliography

Baldwin R, Cave M and Lodge M, Understanding Regulation: Theory, Strategy and Practice (2nd edn, Oxford University Press, 2012)

Black B, Salted: Gender diversity on Corporate Boards (2012) 37 University of Drayton Law Review 7

Boubaker S and Nguyen D (eds), Board Directors and Corporate Social Responsibility (1st edn, Palgrave Macmillan 2012)

Broome L and Kraewiec K, Signalling through Board Diversity: is any one listening' (2008) 77 University of Cincinnati Law Review 431

Cadman E and Pickard J, 'CBI Welcomes Davies Report raising women on boards target to 33%', Financial Times (London, 29 October 2015)

Carter A, D'Souza F, Simkins J and Simpson G, "The Gender and Ethnic Diversity of US Boards and Board Committees and Firm Financial Performance" (2010) 18(5) Corporate Governance an International Review 396

Catalyst, The Bottom Line: Corporate Performance and Women's Representation on Boards (2004-2008) (March 2011)

Chira S, Why Women Aren't C.E,Os, According to Women who almost were, New York Times(New York, 21 July 2017)

Choudary B, New Rationales for Women on Boards (2014) 34(3) Oxford Journal of Legal Studies 511

Choudary B, Gender Diversity: Beyond Quotas (2015) 26(1) E.B.LR 229

Christiansen L, Lin H, Pereira J, Topalova P and Turk R, Gender Diversity in Senior Positions and Firm Performance: Evidence from Europe, IMF Working Paper WP/16/50 (March, 2016)

CIPD Policy Report, Targets and Quotas: How do they affect Gender Diversity Progress? (July 2015)

Clarke T, International Corporate Governance: A Comparative Approach (2nd edn, Routledge, 2017)

Company Lawyer, Women in Finance Charter receives support from 72 Financial services firms (2016) 37(10) 308-309

Cranfield University School of Management, The Female FTSE Board Report: Opening up the process (Cranfield University, 2010)

Cranfield School of Management, Female FTSE Board Report 2012: Milestone or Millstone? (Cranfield University 2012).

Cranfield School of Management, the Female FTSE Board Report 2013: False Dawn of Progress for Women on Boards? (Cranfield University, 2013)

Cranfield University School of Management, The Female FTSE Board Report 2016, Women on Boards: Taking Stock of where we are (Cranfield University, November 2016)

Dale-Olsen H, Schone P and Verner M, Diversity among Norwegian Boards of Directors: Does a Quota for women improve firm performance? (2013) 14(4) Feminist Economics 110

Deloitte, Women in the Boardroom: A global perspective, (5th edn, June 2017)

Derek Higgs, Review of the Role and Effectiveness of Non-Executive Directors (Department of Trade and Industry, 2003)

Dhir A, Challenging Boardroom Homogeneity: Corporate Law, Governance, and Diversity (1st edn, Cambridge University Press, 2015)

Dobbin F and Jung J, Corporate Board Gender Diversity and Stock Performance: The Competence Gap or Institutional Investor Bias? (2011) 89 North Carolina Law Review

Doldor E, Vinnicombe S, Gaughan M and Sealy R, Gender Diversity on Boards: The Appointment Process and the Role of Executive Search Firms, Equality and Human Rights Commission Research Report 85 (2012)

Drucker P, The Concept of Corporation (1st edn, Transaction Publishers 1993)

Du Plessis J, The case for and against mandatory gender quota legislation for company boards (2015) 20(1) Deakin Law Review 1

Equality and Human Rights Commission, An Inquiry into Fairness, Transparency and Diversity in FTSE 350 Board Appointments (2015)

Egon Zehnder, 2016 Global Diversity Analysis (2016)

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), 14 November 2012

Fama M and Jensen M, Agency Problems and Residual Claims (1983) 26(2) Journal of Law and Economics 327

Financial Reporting Council, the U.K. Corporate Governance Code (2010)

Hampton-Alexander Review, FTSE Women Leaders: Improving Gender Balance in FTSE Leadership (November 2016)

House of Commons: Business Energy and Industrial Strategy Select Committee, Corporate Governance (Third Report of Session 2016-17),

Howard A, Groupthink and Corporate Governance Reform: Changing the Formal and Informal Decision-making Processes of Corporate Boards (2011) 20 Southern California Interdisciplinary Law Journal 425

HM Treasury and Virgin Money, Empowering Productivity: Harnessing the Talents of Women in Financial Services (March 2016)

HM Treasury, Women in Finance Charter: A Pledge for Gender Balance across financial services (2016)

HM Treasury: Women in finance charter: Guidance on the Charter (2016)

International Labour Organisation, Women at Work: Trends 2016 (International Labour Office, 2016)

Kershaw D, Company Law in Context: Text and Materials (1st edn, OUP, 2012

Koch R, Board Gender Quotas in Germany and the EU: An Appropriate Way of Equalising the Participation of Women and Men? (2015) 20(1) Deakin Law Review 53

Lagarde C, "Women, Power and the Challenge of the Financial Crisis", The New York Times (10 May 2010)

London Business School, The Tyson Report on the Recruitment and Development of Non-Executive Directors (Department of Trade and Industry, June 2003)

Lord Davies of Abersoch, Women on Boards – February 2011 (Department of Business Innovation and Skills, 2011).

Lord Davies of Abersoch, Improving the Gender Balance on British Boards: Women on Boards Davies Review Five Year Summary– October 2015 (Department of Business Innovation and Skills, 2015)

Mallin C, Corporate Governance (5th edn, Oxford University Press 2015)

McCalman J, Young A and Chan R, Regulating the Culture of Banks in the United Kingdom: Strengthening legal accountability or just better Leadership 32(6) JIBLR 261

McKinsey, Women Matter: Gender Diversity, A Corporate Performance Driver (June 2007)

MSCI Index, The Tipping Point: Women on Boards and Financial Performance (December 2016)

Oakley J, Gender-based Barriers to Senior Management Positions: Understanding the Scarcity of Female CEOS (2000) 27 Journal of Business Ethics

Professional Boards Forum, Boardwatch (2017)

Rawls J, Justice as Fairness: A Restatement (1st edn, Harvard University Press 2001)

Roach L, *the UK Stewardship Code* (2011) 11(2) Journal of Corporate Studies 463

Roe M, *German Codetermination and German Securities Markets* (1998-9) 5 Columbian Journal of European Law 199

Singh V, Terjesen S, and Vinnicombe S, 'Newly Appointed Directors in the Boardroom: How Do Women and Men Differ? (2008) 26(1) European Management Journal

Sjafjell B, Gender Diversity in the Boardroom and its Impacts: is the Example of Norway a way Forward? (2015) 20(1) Deakin Law Review 25

Solomon J, Corporate Governance and Accountability (3rd edn, John Wiley 2010)

Spender P, Gender Diversity on boards in Australia – Waiting for the great leap forward? (2012) 27 Australian Journal of Corporate Law 23

Suk J, Work-family Conflict and the Pipeline to Power: Lessons from European Gender Quotas (2012) Mich St L Rev 1797

Szydlo M, Constitutional Values underlying gender equality on the Boards of Companies: How should the EU put these values into practice? (2014) 63(1) ICLQ 171

The Pipeline, Women Count 2017: Role, Value and Number of Female Executives in the FTSE 350 (July 2017)

Trickier B, Corporate Governance: Principles, Policies and Practices (2nd edn, Oxford University Press 2015)

Valsan R, Board Gender Diversity and the enlightened Shareholder value principle (2016) 37(6) Company Lawyer 171

The World Bank, Labor force participation rate, female (% of female population ages 15+) (modelled ILO estimate) (World Bank, 2016)

30 Percent Club, Norway's Quota – A decade on (August 28, 2014)

DETRA ONWUCHEKWA LLB, BL, LLM

Associate of the American Journal of Transformational Leadership

As an Associate of the American Journal of Transformational Leadership, Detra Onwuchekwa's latest research explored gender disparities on boards in the United Kingdom. The study focused on effective practices for improvement. The paper also examined the extant regulatory initiatives that have been advanced to deal with this problem, while results and discussions made substantial case for enhanced targets to drive holistic and far-reaching change.

Detra Onwuchekwa (LLB, University of Nigeria, Nsukka; B.L, Nigerian Law School; and LLM, University of Portsmouth, England) is United Kingdom-based attorney, proficient in Business Law and Corporate Governance. Within the past lustrum, she received specialty training in Corporate Law; Corporate Governance; Corporate Secretarial Practice; and Financial Analysis and Decision making.

Currently a Graduate Member of the Institute of Chartered Secretaries and Administrators (ICSA) of the United Kingdom, Detra has intense passion for the development of an effective corporate compliance system in Africa and Europe. Besides coaching corporate entities in government regulations and compliance, Detra is committed to humanitarian services. She is a Volunteer for Save the Children, England and Wales, as well as the United Nations Children's Fund (UNICEF).

Detra spends her spare time in writing and reading.