



BREAKING THE GLASS CEILING: WOMEN IN THE BOARDROOM

PAUL

HASTINGS



FOREWORD

We are pleased to present the inaugural edition of “Breaking the Glass Ceiling: Women in the Boardroom,” a global survey that looks at regional differences in how legislatures and regulators are addressing gender parity on the boards of listed companies.

In the report, we examine the legal and regulatory developments and trends around this issue. In certain jurisdictions, change is mandated; in others, change is encouraged; and, in still others, change is dependent on whether industry will respond. We offer insights into differences in viewpoint and the varying degrees of government involvement in mandating stronger representation of women in the boardroom. Following is a brief snapshot of our findings.

Since its beginning, the European Union has viewed gender equality with keen interest. However, despite a number of directives and recommendations starting in 2006 addressing gender equality, women in general remain under-represented on boards throughout Europe. In response, earlier this year the EU Commission issued its “Green Paper on Corporate Governance,” which solicited suggestions from Member States, Parliament, and other interested parties on how to better ensure gender balance. This, along with more persuasive measures such as quotas – and even the threat of quotas – has helped keep the issue in the spotlight. Although the EU is still analyzing responses to the Green Paper, one thing is clear: gender parity is a high priority in Europe, with some countries adopting quotas while others are implementing less stringent affirmative action initiatives.

Across the pond, gender parity continues to gain attention in both Canada and the U.S., but with far less vigor. While there is no existing statutory requirement that mandates equality on boards in Canada, it has become a focus of major policy issues with a number of initiatives underway to level the playing field. In the U.S., although there is strong support for diversity initiatives as a whole, efforts around diversity on boards remain largely voluntary and progress has been slow. While the SEC requires disclosure of a company’s diversity policy, it does not mandate that listed companies commit to diversity. The aspirational view is that, while these measures may not be as immediately impactful as quotas, they will be more widely embraced and therefore will be more effective in the long run.

Lastly, we examine efforts in Australia and New Zealand. Australia reports a high number of women in the workforce, but a small number of women represented in leadership roles or on boards. However, new legislative measures and more stringent disclosure requirements for listed companies have recently delivered encouraging results with a positive trend line. In New Zealand, gender equality in high-ranking public positions is not equally reflected on corporate boards. Though there is a desire for change, legally mandated action or quotas are not popular options. Only time will tell whether other less stringent measures will be strong enough catalysts for change.

Diversity has been a core value of our firm since inception and remains so today. We are proud to have a number of women in leadership roles and strive to ensure that diversity influences all aspects of our business. We were honored to receive Gold Standard Certification from the Women In Law Empowerment Forum (WILEF) in June 2011, recognizing that women comprise a significant portion of our leadership structure and are top earners.

We are pleased to present this study and hope you find it interesting and informative. We are already working on the next edition which will add jurisdictions, notably in Asia which is missing from this report, as well as address developments in the countries covered by this inaugural edition. We look forward to providing you with future updates and welcome the interesting and important discourse that is part of the debate as to how best to achieve gender parity on corporate boards.

Tara K. Giunta, Partner
Paul Hastings (Washington, D.C.)
Editor

BREAKING THE GLASS CEILING:
WOMEN IN THE BOARDROOM

EUROPE

European Union

**Carmen Di Marino, Associate
Paul Hastings (Milan)**

Equality between women and men is one of the European Union's founding principles.¹ This principle has been detailed in a number of European directives and recommendations issued by the European Commission (the "EU Commission") concerning, in particular, employment matters.² However, despite these principles and commitments, the European Union and individual Member States have experienced a long period of inequality between men and women due mainly to historical and cultural factors.

Therefore, on March 1, 2006, the EU Commission issued its first "Strategy for Equality between Women and Men 2006-2010" (the "EU First Strategy")³ on the grounds that gender equality is a fundamental right, a common value of the EU, and a necessary condition for the achievement of the EU objectives of growth, employment and social cohesion. The EU First Strategy was a roadmap that outlined six priority areas for EU action on gender equality for the period 2006-2010 and, in particular, equal economic independence for women and men; reconciliation of private and professional life; equal representation in decision-making; eradication of all forms of gender-based violence; elimination of gender stereotypes; and promotion of gender equality in external and development policies. For each area, it identified priority objectives and actions.

On September 21, 2010, the EU Commission issued the "Strategy for Equality Between Women and Men 2010-2015," which includes the issue of women on corporate boards of directors (the "EU Second Strategy").⁴ The EU Second Strategy spells out a series of actions based around five priorities: the economy and labor market; equal pay; equality in senior positions; tackling gender violence; and promoting equality beyond the EU. Those actions include, in particular, getting more women into the labor market and helping to reach the Europe 2020 target employment rate of 75 percent overall for women and men; putting forward targeted initiatives to get more women into top jobs in economic decision-making positions; promoting female entrepreneurship and self employment; instituting an annual European "equal pay day" to raise awareness of the fact that women continue to earn an average of nearly 18 percent less than men across the EU; and working together with all Member States in combating violence against women.

The EU Second Strategy made it imperative for European and national institutions to make the issue of gender parity on corporate boards a matter of high priority among Member States. Current figures show that, in the European Union, the number of female university students exceeds that of their male classmates in law, business and economics programmes, and that while 45.5 percent of workers are women, the proportion of women on boards of European public companies is on average a meager 12 percent.⁵

Therefore, as a result of the lack of any positive developments on gender balance within Europe, on April 5, 2011, the EU Commission, within the framework of the EU Second Strategy, launched a public consultation by issuing a Green

Paper on Corporate Governance (the "Green Paper"). The Green Paper asks Member States, the European Parliament, the European Economic and Social Committee and other interested parties to submit their views on a number of items concerning corporate governance, including gender diversity on corporate boards of European public companies.

In Section 1.1.3 of the Green Paper, the EU Commission addressed the issue of the gender diversity on corporate boards. In particular, the EU Commission solicited suggestions on the introduction of specific measures (such as targets) to ensure gender balance on boards of public companies.⁶ Moreover, along with more persuasive measures (such as quotas), the EU Commission asked interested parties to express their opinion of whether companies should establish boardroom diversity policies that address work-life balance for women and men, as well as policies and programs designed to encourage mentoring, networking and training. The deadline for submitting contributions and comments was July 22, 2011.⁷

It is worth mentioning that most of the interested parties that sent their responses to the Green Paper (among others, the U.K. government, the Council of Bars and Law Societies of Europe (the "CCBE"), and the Business Law Committee ("BLC") of the Consultative Committee of Accountancy Bodies-Ireland), were in favor of European measures to ensure a better gender balance on boards.⁸ Assonime, an Italian association of limited liability companies, had a slightly different approach stating that "in line with the approach already expressed in the European Commission and by the European Parliament, we believe that gender diversity in board composition should be better dealt with by self-regulation. However, considering the legislative evolution in some countries, an EU recommendation (but not an EU directive or regulation) could be appropriate." The EU Commission is now analyzing the responses received and will present its own conclusions with legislative and non-legislative proposals. So far, no proposal – in the form of either an EU directive or an EU recommendation – has been issued.

The gender parity between men and women is also a goal for other European bodies. In particular, on February 24, 2011, the Committee on Women's Rights and Gender Equality of the European Parliament (FEMM), a committee of the European Parliament specifically dedicated to advocating for gender equality within the European Union and abroad, issued a draft report and motion for a European Parliament resolution on "women and business leadership" (2010/2115 (INI)) (the "Women and Business Leadership Report"). The European Parliament has the power to recommend amendments to the proposals for EU directives and regulations drawn up by the EU Commission, which are also referred to the Council of the European Union. The Women and Business Leadership Report was adopted by FEMM on June 9, 2011, approved by the European Parliament on July 6, 2011. After approval, the Women and Business Leadership Report was forwarded to the Council of the European Union, the EU Commission and the governments of the Member States.

The Women and Business Leadership Report is a non-legislative resolution of the European Parliament – therefore it is not binding on the Member States – which invites the EU Commission and the Member States to implement new policies balancing representation of women and men on corporate boards and in management positions at all levels. It also welcomes single Member States' initiatives in setting thresholds, which companies have to achieve, for women's representation on management bodies.

1 In particular, Article 2 of the European Union Treaty affirming the prevalence of, *inter alia*, the recognition of equality between women and men in the European society; Article 23 of the Charter of Fundamental Rights of the European Union; and Article 57 of the Treaty on the Functioning of the European Union.

2 In particular, Council Directive 75/117/EEC on the application of the principle of equal pay for men and women; Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training, promotion and working conditions; Council Directive 79/7/EEC on the progressive implementation of the principle of equal treatment for men and women in matters of social security; Council Directive 2000/78/EEC establishing a general framework for equal treatment in employment and occupation; Directive of the European Parliament and Council 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation; and the Recommendations of the EU Commission No. 84/635 soliciting affirmative measures to eliminate actual disparity between women and men.

3 EU Commission, Strategy for equality between women and men 2006-2010, SEC (2006). The EU First Strategy builds on the Framework Strategy for equality between women and men for the period 2001-2005. It combined the launch of new actions and the reinforcement of successful existing activities. It reaffirmed the dual approach of gender equality based on gender mainstreaming (the promotion of gender equality in all policy areas and activities) and specific measures.

4 Communication from the Commission to European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, "Strategy for equality between women and men 2010-2015," COM(2010).

5 Italian Chamber of Deputies, Bill of Law No. A.C. 2426-2956-B and EU Commission, Database on women and men in decision-making, <http://ec.europa.eu/social/main.jsp?catId=764&langId=en>.

6 The EU Commission asked the relevant parties the following questions: "a) Should recruitment policies be more specific about the profile of directors, including the chairman, to ensure that they have the right skills and that the board is suitably diverse? If so, how could that be best achieved and at that level of governance, i.e. at national, EU or international level? b) Should listed companies be required to disclose whether they have a diversity policy and, if so, describe its objectives and main content and regularly report on progress? c) Should listed companies be required to ensure a better gender balance on boards? If so, how?"

7 Comments to the Green Paper were sent, *inter alia*, by: the U.K. Government, Department for Business Innovation & Skills; the Council of Bars and Law Societies of Europe ("CCBE"); Assonime (Associazione fra le società italiane per azioni); the Business Law Committee ("BLC") of the Consultative Committee of Accountancy Bodies-Ireland ("CCAB-I"); The Federation of European Risk Management Association ("FERMA"); Eurosif and UKSIF.

8 In particular, CCBE stated that "insofar as the number of women serving on boards among European companies is still low, it is desirable to promote greater representation of women on boards. Therefore CCBE favors the introduction of quotas in listed companies. These should be determined first at a relatively low and practicable threshold (20 percent for example), and then progress over time. The implementation of such quotas should be optional – on a comply or explain basis – during a transitional period of three years before becoming binding." The U.K. government affirmed that "gender diverse boards are better boards, benefiting from the holistic thinking brought to the table by individuals with a wider range of backgrounds and experiences, a departure from 'group think' and a greater affinity to shareholders, investors and customers." The UK fully supports this approach. In line with this approach we would support discussions at an EU level on how board diversity could be reflected in governance requirements to ensure that companies are focused on having effective strategies to increase their boardroom diversity."

Moreover, the Women and Business Leadership Report calls the EU Commission:

- (i) to present, as soon as possible, comprehensive current data on female representation within all types of companies in the European Union and on the compulsory and non-compulsory measures taken by the business sector as well as those recently adopted by the Member States with a view to increasing such representation;
- (ii) following this exercise, and if the steps taken by companies and the Member States are found to be inadequate, to propose binding legislation, including quotas, by 2012 to increase female representation in corporate management bodies to 30 percent by 2015 and to 40 percent by 2020, while taking account of the Member States' responsibilities and of their economic, structural, legal and regional specificities;
- (iii) to present a road map setting out specific, measurable and attainable targets for the achievement of balanced representation in enterprises of all sizes and to draw up a specific guide for small/medium sized enterprises; and
- (iv) to set up a website dedicated to good practice in this area with a view to disseminating and exchanging best practice.

Gender parity has become a high priority not only at the European Union level. Some Member States have already introduced into their national legislation mandatory quotas for corporate boards. Norway, Sweden, Spain, France, Iceland, and, most recently, Italy are European countries that have adopted affirmative action to promote gender parity while some others, such as Germany, have started discussions on this issue.

The European Union, therefore, has taken increasing action to address gender parity issues within Member States, including the representation of women on corporate boards. Based upon comments to the EU Green Paper, it appears that influential industry groups consider gender diversity in board composition to be an important issue. The EU Commission's response to these comments, whether in the form of a directive, legislation or recommendation, is forthcoming.

Belgium

Anne-Françoise Art, Partner
Delwaide Avocats Advocaten (Brussels)

In April 2011, the daily financial newspaper *L'Echo* released the results of a study on gender parity in Belgium's main listed companies. These results showed that, on average, women:

- are absent from 48 percent of the boards of directors and from 57 percent of the executive committees;
- represent only 9 percent of the board of directors;
- represent only 9 percent of the executive committees; and
- represent 36 percent of the employees/workers of the company.

The study further showed that the limited representation of women on corporate boards is noticeable even in sectors typically considered "women-oriented," indicating that the problem is not related to particular industries or types of activities performed by the company.

Following the example of other European countries like Norway, Finland, France, Spain, Holland and Germany, the matter was referred in March 2011 to the Belgian Parliament, where five proposed bills had already been submitted on the issue.

A. The Law of June 30, 2011

On June 30, 2011, the Belgian Parliament voted in favor of a law designed to improve the representation of women on corporate boards of listed companies, certain public entities and the National Lottery (*"loi modifiant la loi du 21 mars 1991 portant réforme de certaines entreprises publiques économiques, le Code des sociétés et la loi du 19 avril 2002 relative à la rationalisation du fonctionnement et de la gestion de la Loterie Nationale afin de garantir la présence des femmes dans le conseil d'administration des entreprises publiques autonomes, des sociétés cotées et de la Loterie Nationale,"* hereafter the "Law")⁹.

The Law is meant to be a temporary measure, subject to review by the Parliament after 12 years.

1. Scope of the Law

- (i) *Autonomous public entities – National Lottery*

The Law applies to autonomous public entities as defined under the law of March 21, 1991 reforming certain economical public entities (*"loi du 21 mars 1991 portant réforme de certaines entreprises publiques économiques"*)¹⁰ and provides that at least one-third of the directors designated by the Belgian State or by a company controlled by the Belgian State shall be of a different gender than the others. If this proportion is not met, the next director appointed must be of the minority gender, otherwise the appointment shall be null. The same applies where an appointment results in the board failing to meet the minimum quota, *i.e.*, in that case, the next director appointed must be of the minority gender otherwise its appointment shall be null.¹¹

The provisions of the Law regarding the National Lottery are similar to those described above.

⁹ The Law has not yet been published in the Belgian State Gazette.

¹⁰ "Autonomous public entities" refers to public interest bodies having entered a management agreement with the Belgian State granting such bodies a larger autonomy of management (for example: "B-Post" (Belgian Post), "SNCB" (Belgian Railway company), "Belgacom" (telecommunications) and "Belgocontrol" (air traffic management)).

¹¹ If a board meets the quota, it can appoint a majority gender director even if it brings the board under the quota. This appointment shall not be null but the next appointment must be of a minority gender director, under penalty of nullity.

(ii) *Listed companies*

The Law also inserts two new provisions in the Belgian Company Code (hereafter “BCC”).

First, the corporate governance declaration (which is part of the board’s annual management report) must contain an overview of the efforts made towards meeting the minimum requirement of one-third of board members from a different gender.¹² This requirement applies only to companies the *shares* of which are admitted to trading on a regulated market.

Second, at least one-third of the directors of listed companies must be of a different gender than the others on their boards of directors.¹³ If this proportion is not met, the next director appointed must be of the minority gender, otherwise the appointment shall be null. The same applies in case an appointment of a director results in the board failing to meet the minimum quota, i.e., in that case, the next director appointed must be of the minority gender otherwise its appointment shall be null. By contrast to Article 96 BCC, Article 518*bis* BCC refers to “*securities* admitted to trading” instead of “*shares* admitted to trading.” Its scope of application thus appears to be larger, as *securities* (“*titres*”) includes, but is not limited to, *shares* (“*actions*”). The Law may thus lead to a situation where a company may find itself subject to Article 518*bis* BCC because it has issued bonds (or other securities other than shares) admitted to trading, but not to Article 96 BCC.

For the purpose of enforcing the quota, Section 2 of Article 518*bis* BCC stipulates that, if the board of directors falls under the quota, then at the next general meeting of the company the board must remedy the situation and appoint members to the board to ensure that it complies with this requirement. Otherwise, any advantage, whether financial or otherwise, owed to the directors for the performance of their duties shall be suspended until the quota is met (and the Parliament’s preparatory work specifies that the advantages accrued during the period when the quota was not met will not be paid to the directors retroactively).

Belgium has thus opted for a pecuniary sanction in addition to the nullity of any appointment in violation of the Law.

2. Coming into force

The provisions applicable to autonomous public entities and to the National Lottery will be effective as from the first day of the accounting year beginning after the Law is published in the Belgian State Gazette.

Listed companies must comply with the Law as from the sixth accounting year following the publication of the Law in the Belgian State Gazette. The pecuniary sanction described above shall be applicable as from the seventh accounting year after the Law’s publication.

For “small” listed companies (within the meaning of the BCC)¹⁴ and companies with less than 50 percent of their securities admitted to trading on a regulated market, the aforementioned implementation periods are increased by an additional period of two years.

Companies admitted for the first time to trading on a regulated market after the publication of the Law shall be subject to the Law as from the sixth accounting year following their admission to trading.

The Belgian Parliament’s recent legislation to improve the representation of women on corporate boards recognizes women’s historically limited representation in such positions. The Belgian legislation impacts both public entities and listed companies, and the provisions affecting the latter may include a broader set of companies beyond those that have listed shares for trading on a regulated market. Because this legislation is relatively new, its full impact remains to be seen, but the possible nullification of board appointments may provide a strong mechanism for enforcement.

¹² See Article 96, §2, al. 1, 6° BCC.

¹³ See Article 518*bis* BCC.

¹⁴ Within the meaning of the BCC, “small” companies are listed companies meeting at least two of the following three criteria on a consolidated basis: (i) average number of workers under 250 for the pending accounting year, (ii) balance sheet of maximum 43,000,000 EUR and (iii) annual net turnover of maximum 50,000,000 EUR.

France

Aline Poncelet, Partner
Paul Hastings (Paris)

Empowerment and sufficient participation in decision-making and governance at all levels for women in Europe has been and remains a long-standing topic. Depending on the country, different approaches have been adopted in order to promote boardroom diversity and to increase the number of women serving on corporate boards, from voluntary initiatives and non-mandatory corporate governance codes to legal requirements imposing specific gender quotas.

In 2010, the proportion of women serving on corporate boards in France’s CAC 40 listed companies was 15 percent, while there was only 9.5 percent female participation on the boards on a sample of 103 listed companies. Further, there were few indications that this trend would change.

In light of the stagnation in progress under the voluntary approach, the French Parliament decided to implement a mandatory regulatory approach in order to give France’s largest companies a serious and immediate incentive to change their behavior.

Hence, France is one of the European countries that have recently passed a law imposing specific gender parity quotas on listed companies. As a result, the proportion of female non-executive directors at France’s top listed companies is now expected to hit 20 percent in 2012 – 7 percent higher than the 2010 numbers.

The French Constitution

In July 2008, the French Constitution was modified to enable the introduction of board gender quotas into French law. This was in response to a 2006 proposal regarding equal pay between men and women that was rejected by the French Constitutional Council on the rationale that such quota measures violated the French Constitution as a kind of discrimination. The only exception was given by Article 3 of the Constitution under which equality between men and women was provided only for political and electoral functions.

The revision and widening of Article 3 was thus necessary in order to enable a larger introduction of gender quotas into French law. In 2008, Article 3 of the Constitution was modified and the new Article 1 now states that “French law favors equal access for men and women to elective functions and political mandates as well as to social and business functions.”¹⁵

Therefore, equality between men and women is now constitutionally required in both public and private sectors and can be guaranteed through the implementation of quotas. It is interesting to note that, in Germany, the introduction of quotas is still considered a violation of the German Constitution.

Voluntary approach

After the revision of the French Constitution, a new law was introduced in December 2009 by the French deputies Jean-François Copé and Marie-Jo Zimmerman aimed at establishing women quotas on corporate boards.

One of the main French employer’s organizations, AFEP-MEDEF, anticipated this legislative move and believed that a voluntary approach to the issue would be more appropriate. In April 2010, the AFEP-MEDEF amended its voluntary corporate governance code applicable to companies whose securities are admitted to trading on a regulated market. Pursuant to the revised Article 6-3 of the code, each board of directors should consider the appropriate balance of its composition, and take particular care to set up an adequate representation of women on its board based on skills diversity. To reach this goal, the AFEP-MEDEF code foresees the implementation of quotas of 20 percent of women in three years, and of at least 40 percent in six years from the date of publication of the AFEP-MEDEF recommendation or from the date of the introduction on a regulated market.

¹⁵ The formal text reads: “la loi favorise l’égal accès des femmes et des hommes aux mandats électoraux et fonctions électives ainsi qu’aux responsabilités sociales et professionnelles.”

Contrary to German recommendations, boards of directors that are elected are not included in the quotas. The AFEP-MEDEF code also states that corporate boards that do not include any women as of the date of its publication should appoint one female board member no later than the next general meeting of shareholders, either by appointing a new female board member or by replacing a male board member whose mandate is expiring. Six years from the date of publication of the code, for the boards that have fewer than nine administrators, the difference between the number of male and female board members should not be greater than two.

Compliance with corporate codes is not mandatory but rather is voluntary for French companies. Based on 2011 figures, it did not appear that such voluntary approach to achieving gender parity was producing effective results. According to the fundamental corporate governance principle “comply or explain,” the reasons for non-compliance only have to be explained in the companies’ annual reports. Hence, as long as the companies explain it, they are not subject to any sanctions. Considering that self-regulation has not been effective, in January 2011, France adopted a new law implementing gender quotas on corporate boards.

The Law

On January 27, 2011, after more than a year of discussions, the French national assembly (“Assemblée nationale”) and the French Congress (“Sénat”) came up with a common text aiming at improving the representation of women on corporate boards.

Such law concerns both listed companies whose shares are admitted to trading on a regulated market and non-listed companies with revenues or total assets over 50 million euros or employing at least 500 persons for the last three years.

This French law will be implemented gradually. An immediate change could be problematic, not only for legal reasons, but also because an abrupt shift on corporate boards could hinder the trust of business partners and result in economic losses.

During the transition period, which runs for three years starting on the date the law is published, the law will not be applicable. However, during this transition period, corporate boards that do not include any women as of the law’s publication date should appoint a female board member when replacing a male board member whose mandate is expiring on the date of the next general assembly of shareholders.

After the transition period, there are two deadlines – at three and six years after the publication date. The content of the law after this period is similar to the AFEP-MEDEF Code recommendations, except that it is accompanied with effective sanctions.

Under the Law, the proportion of women and men directors should not be below 40 percent in both listed and non-listed companies. Companies have six years from the enactment of the law to reach this 40 percent level, with a first step of reaching 20 percent before the end of the third year in companies whose shares are admitted to trading on a regulated market. In addition, when the corporate board includes eight directors or less, the difference between the number of directors of each gender should not be higher than two. It is important to note that the law imposes absolute gender quotas. This means that they are set in order to reach a certain required percentage, without prior consideration to the skills of the female candidates, although it is stated that the appointments should be done in accordance with the social interest of the company.

As regards to the sanctions attached to the law, the French legislature chose not to adopt any pecuniary sanctions as pecuniary sanctions were considered to be easy to bypass for top-listed companies. Thus, the main sanction when breaching the law is the nullity of the non-compliant appointment.

In recent years, the French government has adopted increasingly stringent measures to achieve gender parity on corporate boards. While certain organizations have advocated for self-regulation, the French government enacted more stringent legislation involving quotas after it appeared that a voluntary approach did not significantly increase gender diversity on corporate boards in France. The legislation’s requirements will be implemented over a multiyear period and may be enforced by nullification of board appointments for companies that are not in compliance.

Germany

Fritz Kleweta, Associate Paul Hastings (Frankfurt am Main)

Against the backdrop of recent developments in Europe, the discussion in Germany with regard to gender parity on corporate boards has become increasingly important. In Germany, the number of women on corporate boards barely increased over the last few years. The women’s share within the corporate boards of Germany’s 500 most important enterprises is still stagnating at about 2.4 percent. Their share in supervisory boards is a little higher, but still only 10 percent, most of them as employee representatives instead of shareholder representatives.

Over twelve years ago, the recommended tactic for ensuring that more women would be appointed to the boards of directors of German companies was for the companies themselves to voluntarily bring about that change. Specifically, the companies would self-commit to increasing the percentage of women on their boards. The number or percentage of women appointed to a company’s board was still voluntary and at the companies’ discretion, however, companies would have to report to the government in order to justify their recruitment policy. In 2001, a voluntary agreement was entered into between the German federal government and the umbrella organization of the German economy. However, there was no material progress in increasing women on corporate boards in Germany. To date, only Deutsche Telekom AG implemented a quota for gender parity – the first among the German 30 top-listed companies (DAX). According to a recent resolution of the management board (Vorstand) of Deutsche Telekom AG, by 2015 at least thirty percent (30 percent) of the Deutsche Telekom AG board and executive employees are to be women. The current CEO of Deutsche Telekom AG announced in July 2011 that at least three of eight positions of the management board will be replaced by women as soon as practicable. This step goes even further than the current discussion in Germany which primarily considers gender parity within the supervisory boards (Aufsichtsrat). Quotas within the management boards, which are the formal governing body of a stock company (supervised by the supervisory board), seem to be of lower priority within the current discussions.

Given the lack of initiative by German companies to appoint women to corporate boards, some leading German officials have asked for a rigid legal quota. Even within the ruling party, the Christian Democratic Union (CDU), there has been some debate between the current German Federal Secretary of Family Affairs, Kristina Schröder, and her predecessor and now Secretary for Employment, Ursula von der Leyen, as to whether gender parity should be ruled by law or simply subject to self-commitment. This debate has been settled by the German Chancellor Angela Merkel, stating that a rigid quota is not yet appropriate and any legal inroads determining a quota should be postponed until 2013. If, at that time, companies have not increased the share of women in leading positions, a law should be introduced obligating listed companies to increase the share of women in supervisory boards to 30 percent until 2018 or 2020 at the latest. According to the current discussion within the ruling party, such legislation would require stock companies to increase the representation of women at least to 30 percent, and report to the government on their recruitment policy. However, sanctions for non-compliance have been rejected by the German Chancellor so far.

The European Commission already warned Schröder as well as other EU Member States that a delay until 2013 is not acceptable. The European Commission expects substantial changes no later than March 2012 or it will pursue legal measures (i.e., by way of an EC regulation, as currently no basis for legal measures exists) to impose a rigid quota of women on supervisory boards of listed companies of 30 percent by 2015 and 40 percent by 2020. However, so far the European Parliament has issued a non-binding resolution only, calling on the European Commission to present, as soon as possible, comprehensive current data on female representation within all types of companies in the EU and on the compulsory and non-compulsory measures taken by the business sector as well as those recently adopted by the Member States with a view to increasing such representation following this exercise. If the steps taken by companies and the Member States are found to be inadequate, the European Commission is to propose legislation in 2012, including quotas, to increase female representation in corporate management bodies to 30 percent by 2015 and to 40 percent by 2020, while taking account of the Member States’ responsibilities and their economic, structural (i.e., related to company-size), legal and regional considerations.¹⁶

¹⁶ See Plenary Sitting of the European Parliament, Report, June 9, 2011, on women and business leadership (2010/2115(INI)).

In response, the convention of the German ministers of justice of the 16 federated states of Germany (Justizministerkonferenz) submitted a draft bill to the German Federal Council (Bundesrat) that would impose a rigid quota of 30 percent for supervisory boards of listed companies by 2017 and, by 2022, increase that quota to 40 percent (the “Draft Bill”). In order to implement the quota, the Draft Bill provides a mechanism which makes it impossible to choose a male member of the supervisory board if the 30 percent threshold has not been fulfilled. The same would apply to women nominees if less than 30 percent of members of the supervisory board are male. This makes the imposition of any sanctions essentially unnecessary as the respective member would simply not be eligible for election. An election violating those rules would simply be void as a matter of law. However, there is an exception if the respective company can prove that there was – despite intense efforts – no woman willing or sufficiently qualified to occupy the position as a member of the supervisory board.

In addition, the Draft Bill imposes a yet unspecified quota for management board members. Until the quota is introduced for management boards, the Draft Bill imposes an obligation on listed companies to report to the government as to the development of gender parity on their executive board. By making this information public, women can consider the recruitment policy of the company as well as assess its commitment to the retention and advancement of women within the company. This publicity is supposed to result in higher competition between the companies in terms of attracting and promoting women.

Whether legislation imposing a rigid quota would be in compliance with the German Constitution, the Grundgesetz (“GG”), is unclear particularly with regard to the principle of equality contained in the German Constitution.¹⁷ Under this principle, it is unconstitutional to choose a woman over a man if a male competitor is better qualified (and *vice versa*). Moreover, the higher the respective quota, the more difficult it will be to find sufficient, qualified female applicants. Therefore, according to opponents, a quota system could result (they would argue, would certainly result) in violating the principle of equality under the GG. Nevertheless, the GG also permits the German legislator to take measures in order to enforce gender equality.¹⁸ According to the German Federal Constitutional Court (Bundesverfassungsgericht), it is in fact permissible to implement provisions preferring women over men in order to compensate for actual disadvantages which typically apply to women. Even a legal quota can be acceptable in certain fields if women are obviously under-represented and if other ways to compensate the under-representation have been fruitless. Since, as discussed above, self-commitment by companies has barely had any discernible effect to date, the Draft Bill thus might in fact be deemed consistent with the GG.

However, the GG also provides for the right of unimpeded freedom of association, which can be interpreted to include the right of shareholders to freely vote the members of the supervisory board.¹⁹ In Germany, certain civil rights can only be restricted if such right conflicts with another civil right and a restriction is necessary in order to help establish the respective fundamental right. Such restriction is supposed to balance both civil rights in order to make them as mutually effective as possible. Therefore, if a quota system were legislated, an argument could be made that there was a rational justification for impinging on the freedom of association in order to help establish gender equality. Therefore, although the issue of mandatory quotas is controversial, such legal quota might be in line with the German constitution.

The issue of gender diversity on corporate boards has received increased attention by German legislators. Certain companies voluntarily adopted quotas and other commitments to increase the representation of women in senior positions, but self-regulation did not produce meaningful results. The introduction of the Draft Bill implementing rigid quotas represents a significant development, but it is likely this bill will generate strong debate regarding its legality under the German Constitution.

Italy

Carmen Di Marino, Associate Paul Hastings (Milan)

In 2009, only 4 percent of Italian public companies had at least one woman on their boards of directors.²⁰ The representation of women on the boards of directors is significantly higher in larger Italian public companies (e.g., those whose profits are greater than €10,000,000). However, this figure still does not exceed 14 percent and, among European Member States, only Malta, Cyprus, Luxembourg and Portugal have worse ratios than Italy.

In response to recent developments in Europe, particularly the EU Second Strategy and the Green Paper, on June 28, 2011 the Italian Parliament passed (with a supermajority vote) a mandatory gender quota requirement (Law No. 120) which was signed by the President on July 12, 2011 (the “Gender Parity Law”).²¹ The Gender Parity Law was published in the Italian Official Gazette on July 28, 2011 and went into effect on August 12, 2011.

The Gender Parity Law applies to public companies with shares traded on the Italian Stock Exchange or other EU stock markets, as well as Italian private companies controlled by public entities, and requires these companies to have gender parity on their boards of directors and boards of statutory auditors. The provisions of the Gender Parity Law shall be applicable to public companies starting from the first renewal of the board of directors and the board of statutory auditors occurring one year after the enactment of the Gender Parity Law.²²

The Gender Parity Law will be effective only for a limited period of time as it will apply for three renewals of the boards of directors and the boards of statutory auditors. Considering that such bodies can be appointed for a maximum period of three years (until the approval of the financial statements of the third year), the law will be effective, with respect to each listed company, for 9 years from the first renewal of the relevant boards. In particular, under the Gender Parity Law, the underrepresented gender (whether men or women) shall receive at least 20 percent of the director positions and statutory auditor positions in the first renewal of the board of directors that will occur one year after the Gender Parity Law becomes effective and, for the second and third renewals, 33 percent of those positions must be filled by the underrepresented gender.

The Gender Parity Law is directly applicable to public companies²³ but, because it does not regulate all aspects of the boards’ composition, the procedure for the implementation of the quota rule will be regulated by the Commissione Nazionale per la Società e la Borsa (“Consob”)²⁴ within six months of the enactment of the Gender Parity Law with a second level regulation.²⁵

In the event that public companies fail to comply with the mandatory quota rule, a multi-tier sanctioning scheme would apply. First, Consob would issue a notice warning such companies to comply with the Gender Parity Law within four months from notification and, if the legal quota is not met within such four-month period, the noncompliant companies will be charged a fine ranging from €100,000 to €1,000,000, or €20,000 to €200,000 depending on whether the violation concerns, respectively, the board of directors or the board of statutory auditors. In addition, Consob will issue another formal warning asking the companies to comply with the mandatory quota within a subsequent three-month period and, in the event the companies again fail to comply, the election of the board of directors and/or the board of statutory auditors, as the case may be, will be null and void and all elected members will be expelled from their positions.

20 Cerved, “Le donne al comando delle imprese: il fattore D,” Mar. 2009.

21 Specifically, the Italian Chamber of Deputies enacted it, in its final vote, with a deliberation comprising 438 votes in its favor, 27 against it and 64 abstainers.

22 The Gender Parity Law is not applicable to private companies nor have any other laws on gender parity been proposed with regard to private companies.

23 As for private companies controlled by public entities, the application of the Gender Parity Law will be set forth by a Government regulation to be adopted within two months of its enactment.

24 Commissione Nazionale per la Società e la Borsa (Consob) is the Italian equivalent of the SEC.

25 Under Italian law, Consob has the power to enact second level regulations when legislative measures do not regulate all aspects of a matter regarding public companies.

17 Article 3, Para. 2, Sentence 1 of the German Constitution, the Grundgesetz (GG).

18 See GG, Article 3, Para. 2, Sentence, 2.

19 See GG, Article 9, Para. 1.

Although they are welcome from a social and political point of view, mandatory quota provisions are criticized on the grounds that they introduce a “gender requisite” above other eligibility requirements for the selection and appointment of candidates, such as competence, experience and expertise. A rigid quota requirement may result in women being chosen over men even if male candidates have higher qualifications and experiences, according to opponents.

Moreover, there is a precedent from the Italian Constitutional Court (the “Court”) that makes it likely that mandatory quota provisions, such as the Gender Parity Law, would be attacked as unconstitutional under Article 3, paragraph 1, of the Italian Constitutional Law (“ICL”).²⁶ The Court first considered the issue of mandatory gender quotas in 1995 when a national law regulating the election of mayors, members of city halls and the provincial councils was introduced.²⁷ In Ruling 422/1995, the Court stated that the constitutional principle of equality set forth in Article 3, paragraph 1 of the ICL would vanish if provisions creating advantages for the under-represented gender were introduced in the name of establishing equality because it has the effect of discriminating against the other gender. In other words, discriminating actions cannot be used as a way to pursue equality.

Further, Article 3, paragraph 2 of the ICL²⁸ authorizes the introduction of specific legislative and non-legislative measures to remove economic and social obstacles to equality between men and women. However, according to the Court’s interpretation in Ruling 422/1995, such measures may not directly grant preferential protections and direct benefits to the under-represented gender. Therefore, Ruling 422/1995 prevented so-called “affirmative action” measures from the scope of Article 3 of the ICL.

In response to this judicial interpretation of the ICL, the Italian Parliament passed Law No. 1 of 30 May 2003 (“Law No. 1”) which partially amended the ICL, allowing the introduction of affirmative action measures in the area of public offices and elections (provisions regulated under Article 51 of the ICL). Subsequent Court rulings²⁹ upheld as constitutional affirmative action for public offices and elections.

However, Law No. 1 did not directly amend Article 3 of the ICL, but only amended Article 51, paragraph 1 of the ICL,³⁰ which refers to the equal right of both women and men to be elected to public office and committees. Therefore, the Court’s interpretation in Ruling 422/1995 may still be used as precedent against the Gender Parity Law, since the affirmative action initiatives introduced by such law do not refer to public offices and elections but to the governance of special categories of companies, an economic area governed by another provision of the ICL (Article 41, “Freedom of Enterprise”).³¹

According to the interpretation of Article 41 of the ICL, because private economic enterprise is free, legislative and non-legislative measures limiting such freedom may be introduced only to defend liberty, security and human dignity and/or to pursue social interests. Whether the interests of the stakeholders of public companies and companies controlled by public entities may fall within the definition of “social interests” and, therefore, compel affirmative action initiatives in order to achieve gender parity in an economic area governed by the “principle of freedom” will be a matter for future interpretation by the Court.

Concerns about the legitimacy of the Gender Parity Law were also expressed by the Italian Senate’s Justice Commission on February 22, 2011 during the approval phase of the law by the Italian Parliament.³² In particular, the Senate’s Justice Commission argued that it is doubtful that mandatory gender quotas for corporations would be compliant with Article 3 of the ICL on the basis of the principles set forth by the Court in Ruling 422/1995. The Senate’s Justice Commission also stated that an interest that may justify a compression of the “principle of freedom” governing private economic enterprise should be a relevant public interest. Such relevant public interest seems, in principle, not identifiable in relation to both public companies and to private companies controlled by public entities, according to the opinions expressed by the Senate’s Justice Commission.

The issue raised by mandatory quota provisions was also examined by the European Court of Justice (the “European Court”) in a number of cases addressing public employment matters. In those rulings, the European Court has embraced, with time, a more permissive approach. Although the rulings of the European Court do not represent binding precedent under Italian law or for the Italian Court, the positive approach of the European Court to gender quotas and the strong actions that are being implemented at the European legislation level may force the Italian Parliament to pursue the matter even further.

In its first ruling on national legislation permitting priority in hiring decisions in order to address gender under-representation,³³ the European Court argued that the national statute exceeded the European Union principle of equal opportunity and was therefore not in compliance with European legislation.

However, in subsequent rulings on the issue, the European Court came to different conclusions validating the legitimacy of national quotas subject to the following prerequisites: the existence of a substantial under-representation of the gender targeted by the new policy; the impermanence of public action and legislation; and, lastly, their non-automatic enforcement.³⁴ In addition, the European Court has consistently indicated that any such quota systems must comply with the principle of proportionality so that any formal discriminatory measure shall be pursued only to the extent that the case at hand strictly demands such action. Indeed, in a recent ruling, the European Court affirmed that statutes introducing national quotas are in compliance with European law so long as, in each individual case, “*the candidatures are subjected to an objective assessment which takes account of the specific personal situations of all the candidates.*”³⁵

While these cases are instructive as to how the European Court would view the Gender Parity Law, it is debatable whether these rulings could be used in any case contesting the constitutionality of the Gender Parity Law, since such rulings do not refer to matters of corporate governance of enterprises but rather to public employment law. Further, despite the arguments discussed above, the legal legitimacy of mandatory gender quotas under the Constitution is still far from conclusive and it is anticipated that the impact of the Gender Parity Law will be examined in one to two years’ time which is, in turn, expected to generate a lot of controversy.

26 In particular, Article 3, paragraph 1, ICL states that: “All citizens have equal social status and are equal before the law, without regard to their sex, race, language, religion, political opinions, and personal or social conditions.”

27 See Ruling No. 422 of 12 September 1995 (422/1995).

28 Pursuant to Article 3, paragraph 2, ICL: “It is the duty of the republic to remove all economic and social obstacles that, by limiting the freedom and equality of citizens, prevent full individual development and the participation of all workers in the political, economic, and social organization of the country.”

29 See, e.g., Ruling No. 49 of 13 February 2003 and Ruling No. 4 of 14 January 2010.

30 Article 51, paragraph 1, ICL states the following: “Citizens of one or the other sex are eligible for public office and for elective positions under equal conditions, according to the rules established by law. To this end, the republic adopts specific measures in order to promote equal chances for men and women.” The last sentence was introduced with Constitutional Law No. 1/2003.

31 Such Article states the following: “Private economic enterprise is free. It may not be carried out against the common good or in a way that may harm public security, liberty, or human dignity. The law determines appropriate planning and controls so that public and private economic activities may be directed and coordinated towards social ends.”

32 In Italy, in each of the branches of the Parliament (House and Senate) there is a Justice Commission. The Justice Commission is a permanent internal commission that has the authority to express its opinion on draft bills in various areas of public interest such as the system of justice, public security, and civil and criminal law matters.

33 In its first decision, the Kalanke’s case of 17 October 1995, the European Court ruled against the legitimacy of a regional provision of the Land of Bremen stating that, in case of equivalent qualification, female candidates should be chosen over men if the former are underrepresented in a specific public employment category, also considering compensation. The decision of the European Court was based on the grounds that the automatic and absolute preference set by the national statute exceeded the European Union equal opportunity principle set forth by Article 177 of the European Treaty and Article 2, paragraphs 1 and 4, of the European Directive on parity opportunity between women and men.

34 European Court of Justice C-409/95, European Court of Justice C-158/97 and European Court of Justice C-407/98.

35 European Court of Justice C-407/98, para. 61.

Netherlands

Frans G.K. Overkleef, Attorney NautaDutilh N.V. (Amsterdam)

As in surrounding countries in Europe, there has been a considerable public discussion in the Netherlands in recent years about the lagging degree of participation of women on corporate boards, in particular on boards of listed Dutch companies. While there is general consensus that a well-balanced participation of men and women on a corporate board can have a positive effect on the quality of the boards' decision-making process, there is some disagreement within the business community, academia and the public on the means through which such well-balanced participation could be best achieved. As a result, a number of initiatives have been written in recent years, which were all met with a fair degree of criticism. Nonetheless, there have been some important developments in Dutch corporate law, specifically with regard to achieving gender parity on boards of Dutch listed corporations.

As a matter of law and practice, Dutch listed corporations typically have a two-tier governance structure: a management board, which is responsible for the management of the business and the affairs of the company, and a separate supervisory board which is tasked with monitoring and advising the management board. At the moment, a legislative amendment is pending which would allow Dutch companies to opt for a unitary one-tier board structure in which the board would consist of both executive as well as non-executive board members, with the latter more or less assuming a position comparable to a current supervisory board member. For present purposes, however, this memorandum takes a listed Dutch company with a two-tier board structure as a starting point with a focus on the gender parity of the supervisory board and the management board of such companies.

The Dutch Corporate Governance Code

In addition to the mandatory provisions of statutory corporate law, listed Dutch companies are also subject to the Dutch Corporate Governance Code (the "Code"). The Code, which was first released in 2003, contains principles and best practices on a wide range of corporate governance topics within listed companies. The provisions of the Code are non-binding in nature:³⁶ companies have an obligation to either comply with the provisions of the Code or, in case of non-compliance, include an explanation in their annual reports as to why they do not comply with those provisions of the Code. An independent monitoring committee (the "Monitoring Committee") was charged with publishing annual reports on overall compliance in the marketplace and with assessing whether or not the Code would need to be updated.

In 2007, the Monitoring Committee commissioned a study from Groningen University on the diversity of the supervisory boards of Dutch listed companies. The study found that, although between 2001 and 2006 there had been an empirical increase in some diversity features (including gender), diversity in other features was still found to be lacking (an updated 2009 study by the same authors did not find any material improvements in this respect). In response, the Monitoring Committee proposed to include a principle and best practice relating to diversity in the 2008 updated version of the Code. Principle III.3 of the 2008 Code stipulates that a supervisory board must aim at achieving a gender and age diversity, and disclose its approach and efforts in this regard. Specifically, Principle III.3.1 provides:

The supervisory board shall prepare a profile of its size and composition, taking account of the nature of the business, its activities and the desired expertise and background of the supervisory board members. The profile shall deal with the aspects of diversity in the composition of the supervisory board that are relevant to the company and shall state what specific objective is pursued by the board in relation to diversity. In so far as the existing situation differs from the intended situation, the supervisory board shall account for this in the report of the supervisory board and shall indicate how and within what period it expects to achieve this aim. The profile shall be made generally available and shall be posted on the company's website.

As reflected in Principle III.3.1, the 2008 Code provides for a best efforts obligation (albeit a non-binding one) for supervisory boards of listed companies to aim at a diverse composition. Perhaps more importantly, the 2008 Code

requires public companies, through the supervisory board disclosures in their annual reports, to account to the investment community and the public at large as to whether or not this aim is actually met. Still, no specific quotas were included. Such quotas have been considered by the Monitoring Committee, but were eventually dismissed with a view towards retaining flexibility in the practical application of this best practice. Also, the diversity standard contained in the Code only applies to the supervisory board; the Code does not contain any diversity requirements for the management boards of Dutch listed companies.

Statutory Amendment on Gender Diversity

In addition to the Code, the issue of gender diversity was recently put on the legislative agenda through a motion with respect to imposing a gender diversity quota for both supervisory and management boards of large Dutch companies. This motion was filed by a member of the Dutch Labour Party in December 2009 during the parliamentary deliberation on a bill proposing a one-tier board structure for Dutch companies (see the introduction above). Although the motion did not have any direct connection to the purpose of the bill, it was proposed nonetheless and, with the support of a number of opposition parties, was adopted by the lower house of Dutch Parliament and subsequently approved by the Upper House of Dutch Parliament in May 2011. The bill, including the motion, is yet to be signed into law, but this may happen as soon as January 2012.

Under the forthcoming statutory provision, Dutch corporations (N.V.s) and private companies with limited liability (B.V.s) that qualify as Large Companies (as defined in the bill) should endeavor to have at least 30 percent of the seats of the company's board (one-tier) or boards (two-tier) held by men and at least 30 percent of the seats held by women. This balance is thus prescribed not only for the supervisory board, but also as regards the management board. Moreover, this diversity criterion should be taken into account both in case of specific appointments or nominations for appointments, as well as in drawing up an overall profile of the supervisory board (or for the non-executive board members in a one-tier structure).

Most importantly, the new bill would impose specific quotas for the participation of women on Dutch corporate boards. In that sense, the new bill goes considerably further than the scope of the 2008 Code which does not contain such a quota. Moreover, the gender diversity provision of the bill extends to management boards (or executive board members in a one-tier structure), which also goes beyond the scope of the 2008 Code.

The obligation to provide for well-balanced participation of men and women on Dutch corporate boards is still a non-binding one. In the case of non-compliance, the company is required to provide an explanation in its annual reports on (i) the reasons why the composition of its boards is not in compliance with the gender diversity requirement; (ii) the measures that the company has taken to achieve compliance; and (iii) the measures which the company is planning to take to ensure future compliance. Also, since the provision is something of an experiment, the statutory obligation has been purposely limited in time and is currently expected to cease to be in force on January 1, 2016.

In recent years, the subject of enhancing diversity on the corporate boards of listed Dutch companies has received increased attention. The Dutch business community, academia and public leaders have both studied and adopted measures to address the issue. While forthcoming legislation may impose a quota requirement on the corporate boards of listed companies, such an obligation appears to remain non-binding.

³⁶ While a few provisions of the Code in fact mirror statutory obligations and thus contain norms which, as a matter of statutory law, are binding on public companies, those provisions are not relevant for this discussion.

Norway

**Anne Kjørseth Ekerholt, Partner
Advokatfirmaet Selmer DA (Oslo)**

**Carmen di Marino, Associate
Paul Hastings (Milan)**

Norway has been a leader (along with other Nordic European countries such as Sweden, Iceland and Finland) in advocating women’s rights for many years. Norway was the second country in the world (the first being Finland) to give women the right to vote in 1913³⁷ and is one of the top 10 countries with the highest levels of women represented in the national Parliament. More than one-third of the representatives elected to Parliament in each of the past seven elections have been female and the proportion of women and men in ministerial positions has reached a perfect gender balance (50-50).³⁸

Non-legislative gender quota rules first appeared in 1975, when the Socialist Left and the Liberal Party both adopted gender quota policies for the selection of the slates of candidates to Parliament. Those policies were then emulated by the Labor Party. As a result, women’s representation in Parliament rose from 15.5 percent in 1973, the last election before the gender quota policy, to 34.4 percent in 1985.³⁹ Since then, such representation has never been below 35 percent, with a peak of 40 percent in 2010.

Much of Norway’s gender equality progress has been mandated by the Norwegian Parliament. In fact, the level of participation of women in politics and in the economic sphere has dramatically improved through the introduction of affirmative action measures such as gender quotas. According to a 2010 report by the Norwegian Ministry of Foreign Affairs and of the Norwegian Ministry of Children, Equality and Social Inclusion, “experience shows that the proportion of women in political bodies does not increase without special efforts, and quotas have proved the most effective means of achieving a more balanced representation.”⁴⁰

The first affirmative action law was the Gender Equality Act of June 9, 1978 No. 45 (*likestillingsloven*), which has been amended several times, most recently in 2005 (the “Gender Equality Act”). Under Section 1 of the Gender Equality Act, public authorities, public and private enterprises and employers have the duty to promote equality between women and men. Further, Section 3 allows affirmative action in favour of one of the sexes (generally for men in connection with education and children’s care). By express provision of the Gender Equality Act, affirmative action does not represent a contravention of the principle of gender non-discrimination but rather is an instrument to pursue equality.⁴¹

Another innovative legislation to ensure gender parity was the quota rule introduced in 2003 for the appointment of board members of all public limited companies, both listed and not listed, on the Norwegian Stock Exchange.⁴² Specifically, the Public Limited Companies Act No. 45 of 1997, as amended by the Act of December 19, 2003 No. 120 (“PLCs

Act”), gives women and men equal opportunity to be represented on company boards of public limited companies in accordance with the principle of equal treatment set forth by the Gender Equality Act.

The political process resulting in passage of the PLCs Act actually started in October 1999, when the Bondevik I Cabinet (the Conservative-Centre government coalition) sent a proposal for rules on gender representation on company boards to public hearing. The proposal was part of a major revision of the Gender Equality Act and, in particular, of Section 21, which deals with gender representation in publicly appointed members of committees, councils, and governing boards, among others.⁴³ However, due partly to the need to further evaluate the legal aspects of such quota rule and partly due to some political pressure, the motion was excluded from the wider revision of the Gender Equality Act.

The issue was again raised in March 2002, when then Minister of Trade and Industry, Mr. Ansgar Gabrielsen, proposed to the Bondevik II Cabinet the implementation of a gender quota rule for boards of directors of all public limited companies. After being approved by the Cabinet in June 2003, the new quota legislation was submitted to Parliament.

The proposal noted that only 7.3 percent of the members of the boards of public limited companies were women and proposed a requirement that at least 40 percent of both genders be represented on those boards. The PLCs Act was then approved by Parliament with a broad majority of the vote.⁴⁴

Section 6-11a of the PLCs Act states that women and men shall be represented on the board of a public limited company and details the minimum representation of each gender on the board based on the size of the board, as follows:

Total Number of Directors on the Board	Minimum Representation of Each Gender
2-3 members	at least one
4-5 members	at least two
6-8 members	at least three
9+ members	at least 40 percent

This quota applies to elections of deputy members, but not for directors being elected among the employees.⁴⁵

³⁷ See *Gender Equality in Norway*, European Commission for Democracy through Law, Strasbourg 12 June 2006.

³⁸ According to the *Global Gender Gap Report 2010*, an annual research project introduced by the World Economic Forum (WEF) in 2006, Norway holds the second position in terms of lower gender gap between men and women. Among those figures, it is interesting to note that in 2010, women have surpassed men as Cabinet Members.

³⁹ Those figures are described in *The Norwegian Experience of Gender Quotas*, written by Richard E. Matland, professor at the University of Houston, presented at the International Institute for Democracy and Electoral Assistance (IDEA)/CEE Network for Gender Issues Conference, *The Implementation of Quotas: European Experiences*, Budapest, Hungary, 22-23 Oct. 2004.

⁴⁰ See *Gender Equality – a Key to Democracy*, a publication of the Norwegian Ministry of Foreign Affairs and of the Norwegian Ministry of Children, Equality and Social Inclusion, 06/2010.

⁴¹ In particular, Section 3 (General clause) states that “direct or indirect differential treatment of women and men is not permitted.” However, Section 3a (Affirmative action in favour of one of the sexes) provides that “different treatment that promotes gender equality in conformity with the purposes of this Act is not a contravention of Section 3.”

⁴² A public liability company (plc) is a company in which none of the shareholders are personally liable for the company’s debts. This type of company usually has many shareholders and is governed by strict rules in terms of board composition and share capital. In order to be listed on the Norwegian Stock Exchange, a company must be incorporated as public limited company. However, not all public limited companies are listed.

⁴³ For more details on the historical background refer to *Follow-up to the Package Meeting of 9 to 10 November 2005 regarding representation of both sexes on company boards* of the Royal Ministry of Children and Family Affairs, 19 December 2005; A. Storvik and M. Teigen, *Women on Board – The Norwegian Experience*, INTERNATIONAL POLICY ANALYSIS June 2010.

⁴⁴ The new quota legislation received the support of the Labour Party and the Socialist left Party while only the representatives of the Progress Party voted against it. In particular, in line with its liberal economic doctrine, the Progress Party argued that free market competition is the best protection against discrimination while a rigid quota rule may result in an unjustified discrimination of the overrepresented gender.

⁴⁵ According to Section 6-11a of the PLCs Act, “where two or more board members are elected from and among employees, both sexes shall be represented. The same applies to deputy directors. The second and third sentences do not apply if one of the sexes represent less than 20 percent of the total number of employees in the company at the time of election.”

For existing companies, non-compliance with the quota rule can lead to liquidation through a court ruling. Specifically, Section 16-15 of the PLCs Act subsection 2, states, “if the Company has not notified the Register on Business Enterprises of a board of directors that meets the requirements set out in statutory provisions or pursuant thereto,” the court shall decide by order that the company is to be dissolved. In these cases, the Registry will issue up to two letters of warning, giving the company a period of one month each with a warning to change the composition of the board. If such noncompliance is not cured within the given time, the company will be dissolved.⁴⁶

Further, for companies that are being formed, Section 5-2 of the PLCs Act (Refusal of Registration) states that, if a company under incorporation does not fulfill the legal requirements for board composition, and does not correct it within a given time, it can be denied registration.

Notably, according to an agreement between the Cabinet and the private business sector, the quota rules approved with the PLCs Act would not have become mandatory if companies had voluntarily achieved the required gender representation on their boards by July 1, 2005. However, a survey carried out by the Central Bureau of Statistics showed that, by such deadline, only 68 out of 519 public limited companies (approximately 13 percent) managed to voluntarily comply with the gender representation quota. Therefore, on December 2005, the government decided that the quota rule for boards of public limited companies would become mandatory as of January 1, 2006.⁴⁷ As a result, public limited companies registered before December 31, 2005 were given two years to comply with the requirements of the quota rule while new registered public limited companies had to comply with the 40 percent gender rule as a condition of registration.

During the two-year transitional period, most of the limited liability companies managed to achieve the 40 percent requirement. In fact, by January 2008, only 77 public limited companies had failed to comply with the gender representation rule and those companies received a letter from the Registry giving them four weeks’ notice to comply with the rules. The deadline was fixed for the middle of February 2008 and, of those 77 noncompliant companies, only 12 received a second four weeks’ notice with a public announcement. By April 2008, all public limited companies were in compliance with the 40 percent mandatory quota representation and such quota has been met ever since.

The same provisions of the PLCs Act on gender representation are also applied to all publicly owned enterprises (state-owned private limited liability companies and state-owned public limited companies, as well as private limited liability companies and public limited companies and their wholly controlled subsidiaries). Moreover, beginning January 1, 2004, some special state-owned companies, enterprises incorporated by special legislation and inter-municipal companies were required to comply with the gender representation rule.

Additionally, the 40 percent quota rule was extended to cooperative societies with more than 1000 members, beginning January 1, 2008, and to private limited companies where municipalities own two-thirds or more of the shares, beginning January 1, 2010, with a two-year transitional period.

However, no rules have yet been approved for privately owned limited liability companies because most of those companies are small and medium-sized family enterprises and the shareholders are often members of the boards. However, according to the Central Bureau of Statistics, in 2010, only 17 percent of the board members of private limited liability companies were women. Therefore, it is possible that the quota rule will be extended to these companies in the future.

The Norwegian Code of Practice for Corporate Governance also has regulations regarding board composition. The code is a series of recommendations for listed public limited companies. As it is only a recommendation, the companies are not obliged to follow it, but listed companies are required to give an explanation if they are not in compliance with the code (“*comply or explain*”). In particular, it is recommended that “*due attention should be paid to the balance between male and female members of the board.*”

It is important to note that, before and during the two-year transitional period, the gender representation rule was actively debated in political and public arenas. Opponents argued that there were not enough competent and experienced women to replace the experienced men already sitting on boards. In order to facilitate the identification of qualified female candidates, national, regional and sector-specific databases were established containing the resumes of professional women from different fields. Companies could search those databases to identify suitable candidates. Moreover, specific programs to qualify women were organized by professional associations and employer organizations.⁴⁸

The other two arguments raised most by opponents related to the alleged strong interference that mandatory quotas have on the owners’ right to select and appoint their candidates and to the unfairness of a selection criterion based only on gender.⁴⁹ There is a debate among researchers as to whether there is a connection between increasing the representation of women on boards and corporate performance and, if so, whether it is positive or negative. However, almost all researchers agree that the long-lasting effects on corporate value and performance of the mandatory quota rule should be analyzed only in future periods when statistical results for a number of years are available. Regardless, gender quotas have been demonstrated to be effective at increasing board diversity and are now emulated by several European countries such as Iceland, Sweden, Spain, France and Italy.

Although Norway has made significant progress with regard to gender parity on corporate boards, studies show that there are still areas that need focus. In particular, the majority of boards are still chaired by men; women tend to remain in non-executive positions and only 2 percent of the CEOs of public limited companies listed on the Norwegian Stock Exchange are women.⁵⁰ Those aspects represent challenging future goals for the Norwegian legislation as highlighted in the Global Gender Gap Report 2010.⁵¹

46 According to Section 16-16 of the PLCs Act: “When the conditions of § 16-15 (1) 1 through 4 above have been satisfied, the Register of Business Enterprises shall give the company notice thereof. In cases as mentioned in § 16-15 (1) 5, the notice is given by the Register of Company Accounts. The company shall be allowed a period of one month to remedy the matter and will be informed of the consequences of exceeding that period.”

47 “Rules regarding gender balance within boards of Public Limited Companies,” press release No. 05116 dated 8 December 2005 of the Ministry of Children, Equality and Social Inclusion, “If the company has not remedied the matter by the end of the period, the Register of Business Enterprises or the Register of Company Accounts shall repeat the notice by announcement in the Brønnøysund Register Center’s electronic bulletin for public announcements and in abbreviated form in a newspaper which is generally read at the company’s place of business. The announcement shall state that the conditions for dissolving the company are satisfied, and that the company is allowed a period of four weeks from the electronic announcement to remedy the matter. The consequences of exceeding that period shall also be stated. Wherever appropriate the notice under this provision may instead be given by the city court.”

48 A. Storvik and M. Teigen, *Women on Board – The Norwegian Experience*, INTERNATIONAL POLICY ANALYSIS June 2010.

49 *Id.*

50 *Id.*

51 *Global Gender Gap Report 2010*, *supra* note 38.

Spain

María Segimón, Partner
Tatiana Vernaza, Attorney
Watson, Farley & Williams (Madrid)

The right to equality was proclaimed in Spain in 1978, with the enactment of the Spanish Constitution. Specifically, Article 14 of the Spanish Constitution states that “*Spaniards are equal before the Law, thus no discrimination for reasons of birth, race, sex, religion, opinion or any other condition or circumstance may prevail.*” The right to equality under the Constitution expressly recognizes the inherent equality between women and men.

As a consequence of such constitutional mandate, a number of regulations were enacted intended to implement the Constitutional mandate articulated in Article 14 with regard to gender parity. Such regulations, although binding, proved to be ineffective, as parity in different areas, especially in labor and business related areas, had not been achieved.

Therefore, on March 22, 2007, the Spanish Congress enacted Law 3/2007 on effective equality between women and men (the “Law on Equality”), with the spirit of unifying these disparate regulations and to have a single norm for equality and gender parity.

The European Union has tried to protect equality and gender parity through the introduction of several regulations.⁵² The Law on Equality incorporates into the Spanish regulation several European directives, including: Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 (amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women in access to employment, vocational training and promotion, and working conditions), and Council Directive 2004/113/EC of 13 December 2004 (implementing the principle of equal treatment between men and women in the access to and supply of goods and services).

The Law on Equality introduces a provision for companies⁵³ to establish boards of directors with a “balanced presence” of women and men. A balanced presence is defined, by the Law on Equality, as a maximum presence on a board of each gender of 60 percent and a minimum presence of 40 percent.

Additionally, regional legislation, such as those in the Autonomous Region of Galicia and Extremadura, have included in their regulations similar provisions as those set forth in the Law on Equality. It is worth highlighting the way in which such regions have included similar provisions in their regional regulations: Galicia⁵⁴ includes the obligation that companies with a corporate address in such region must annually inform the regional administration of the composition of their boards of directors. Upon review of such information, the administration will issue public or private recommendations. The regulation of the Autonomous Region of Extremadura⁵⁵ mandates that regional administrations that hold stakes in private companies must appoint members of their boards in accordance with the “balanced presence” principle.

Companies have a period of eight years from the date upon which the Law on Equality was enacted (March 24, 2007) to comply with this legal requirement.

52 Among others, Council Directive 75/117/EEC on the application of the principle of equal pay for men and women; Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training, promotion and working conditions; Council Directive 79/7/EEC on the progressive implementation of the principle of equal treatment for men and women in matters of social security; Council Directive 2000/78/EEC establishing a general framework for equal treatment in employment and occupation; Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services; Directive of the European Parliament and Council 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation; and the Recommendations of the EU Commission No. 84/635 soliciting affirmative measures to eliminate the actual disparity between women and men.

53 The provision only refers to companies whose assets are higher than Euro 11,400,000; whose net annual income exceeds Euro 22,800,000; and whose average employee number is over 250.

54 Law 2/2007, of 28 March, on Law on Equality of employment for women.

55 Law 8/2011, of 23 March, on Law of Equality between women and men and against gender violence.

According to the comparative study 2009/2010 of women on boards of directors⁵⁶ published by the Cesce Group (the “Cesce Report”), there have been tangible improvements as a result of the enactment of the above legislation. Specifically, the Cesce Reports finds that between 2008 and 2010 respectively, the presence of women on boards of directors increased from 29 percent in 2008 to 31 percent in 2010, and the presence of women in companies (and not only on the boards of directors) increased from 36 percent to 56 percent. Further, additional information in the Cesce Report confirms that companies lacking a female presence on their boards of directors are in sectors typically considered more male-dominated, such as construction, the production of energy, and extraction industries. Additionally, according to the Cesce Report, in companies with State ownership, the presence of women on their boards of directors has increased from 25.22 percent in 2009 to 28.14 percent in 2010.

Therefore, although the former data indicates that the legal requirement has not yet been achieved, companies still have a few more years (up to 2015) in order to adopt the necessary measures to include a more balanced ratio of women on their boards of directors, and it seems that they are taking positive actions to do so.

The slow progress toward achieving these legal thresholds may be a result of the fact that, contrary to other jurisdictions, there is no statutory penalty for noncompliance in Spain. The Spanish legislature did not include sanctions in the event companies do not adopt the necessary measures by 2015. For the moment, companies will only need to disclose, through their annual accounts⁵⁷ or by other means imposed by sectoral and regional regulations, the gender composition of their boards of directors.

Instead of encouraging compliance through sanctions, the Law on Equality has attempted to promote the inclusion of gender equality policies and plans in companies by creating other incentives, such as an “award” for companies that apply equality policies internally. Such policies should include, among others, a balanced presence of women and men on the boards of directors, in addition to the different groups and categories of employees of a company. At the beginning of 2011, this award was extended to three companies: Henkel Ibérica, S.A., Reale Seguros Generales, S.A. and Banco de Santander, S.A. It is important to highlight the fact that certain Autonomous Regions have also established awards for companies that comply with local equality regulations.

There may be reasons other than the lack of sanctions for this slow implementation of gender parity on corporate boards. In particular, the issue of gender parity on boards of directors, although endorsed by the Spanish legislatures (both, national and regional as described above), is not free from debate among scholars. In general, there are two main views:⁵⁸ those who defend its convenience state that it provides the boards of directors with more talent, increased creativity and innovation, and that it introduces a vision of society that more accurately reflects its actual composition. The main counter-arguments used by those who are reluctant to implement gender parity policies are that the market responds negatively to the appointment of women in high positions, that it may complicate the decision-making process and that women tend to be more risk-adverse than men.

Particularly with regard to listed companies, a complementary effort to the actions described above has been made since May 2006 (before the enactment of Law on Equality). Specifically, the Spanish National Stock Exchange Commission (“*Comisión Nacional de Mercado de Valores*”) promoted a good governance code (the “Good Governance Code” or the “Code”). This Code issues recommendations in a variety of areas that listed companies may follow voluntarily. One of those areas is the functions and composition of boards of directors. If they do not do so, companies must include an explanation of the reasons why they are not following the recommendations.

Based on the principle that the boards of directors should reflect a diversity of knowledge, experience and gender in order to pursue the social interests of a company, Recommendation 15 of the Good Governance Code focuses on the gender composition of boards of directors. The Good Governance Code sees the increased female presence on boards

56 Comparative study 2009/2010 on women on boards of directors made by the Cesce Group and D&B.

57 Royal Legislative Decree 1/2010, of 2 July, on Law on Capital Companies, states that the report that accompanies the annual accounts shall include information on the gender distribution of the staff of such company, breaking-down the categories and levels, which shall include top executives and board members.

58 Report Adding talent. Present and future of women in board of directors. Add Talenta. 2008.

as an ethical, political and corporate responsibility challenge, as well as a target for increasing efficiency in companies by not disregarding 51 percent of the Spanish population.

Therefore, the Good Governance Code invites listed companies to make an effort in the search for female candidates to cover vacancies on boards. As a consequence of this, there has been a gradual increase of women on the boards of directors of listed companies. According to the Spanish National Stock Exchange Commission,⁵⁹ in 2010 the number of female directors within Spanish IBEX 35 companies amounted to 53, up from 50 women directors in 2009 (constituting 10.6 percent of IBEX 35 companies in 2010).

The Good Governance Code specially recommends that such female candidates should be nominated to cover vacancies of independent directors as opposed to other types of directors. As a result of this recommendation, in the Annual report on corporate governance of Spanish IBEX 35 companies issued by the Spanish National Stock Exchange, among the ranks of women directors of IBEX 35 companies, 67.9 percent are independent, while 26.4 percent represent dominical directors and only a mere 3.8 percent are executive directors.

Likewise, the Good Governance Code recommends that in the cases of listed companies with a low number of women directors, such companies should explain the reasons and describe the initiatives undertaken to correct the situation. The Code particularly values the selection processes. With that in mind, the Law on Securities Exchange⁶⁰ has recently (March 2011) turned this recommendation into a legal obligation for listed companies by requiring them to provide information in their annual reports on corporate governance on the composition of their boards of directors, as well as the degree of compliance with the recommendations of the Good Governance Code.

However, the information presented by the Spanish National Stock Exchange Commission shows that the participation of women on boards of directors is still below the 40 percent minimum imposed by the Law on Equality (with the caveat that the implementation of this percentage is not due until 2015). This notwithstanding, there are reports⁶¹ that indicate that, at the current rate, it is unlikely that the minimum threshold of 40 percent female presence on boards of directors will be achieved and that it is more likely that only an 18 percent presence will be reached by 2015.

In their 2010 report,⁶² Add Talenta predicted that the 40 percent minimum of female gender participation on boards of directors will not be met by 2015. If that is the case, the Spanish legislators will analyze the situation and take further actions that might include introducing sanctions for noncompliance by companies, similar to those already implemented in other European countries.

In conclusion, although the legal requirement has not yet been achieved in Spain, there has been improvement in gender parity on boards of directors and in companies generally since the enactment of the Law on Equality. More importantly, companies still have until 2015 to adapt and adopt the necessary measures to include a more balanced ratio of women on their boards of directors. This time pressure will certainly impact on the selection processes they need to carry out in the future.

⁵⁹ Annual report on corporate governance of Spanish IBEX 35 companies' issued by the Spanish National Stock Exchange for the year 2010.

⁶⁰ Law 24/1988, of 28 July, on Law on Securities Exchange, as amended by Law 2/2011, of 4 March.

⁶¹ Report Parity, further away. Present and future of women in board of directors. Add Talenta. October 2010.

⁶² *Id.*

United Kingdom

**Michelle Duncan, Partner
Paul Hastings (London)**

Women are notably underrepresented in UK boardrooms. As of 2010, only 12.5 percent of directors and 5.5 percent of executive directors of FTSE 100 companies were women. Twenty-one percent of FTSE 100 companies had exclusively male boards and, among FTSE 250 companies, only 7.8 percent of board directors were women.⁶³ The statistics set out in the table below illustrate the scale of the problem and the slow rate of change.

Female FTSE 100	2010	2009	2008
Female-held directorships	135 (12.5 percent)	131 (12.2 percent)	131 (11.7 percent)
Female executive directorships	18 (5.5 percent)	17 (5.2 percent)	17 (4.8 percent)
Female non-executive directorships	117 (15.6 percent)	114 (15.2 percent)	114 (14.9 percent)
Women holding FTSE directorships	116	113	113
Companies with female executive directors	16	15	16
Companies with at least one female director	79	75	78
Companies with multiple female directors	39	37	39
Companies with no female directors	21	25	22

(Female FTSE Report 2010)

The reasons behind this situation are complex. Women are successful at university and in their early careers. Male and female graduate entry into the workplace is fairly equal. This equality is maintained in junior management positions but

⁶³ Female FSTE Report 2009, Cranfield School of Management (hereinafter Cranfield Report).

not at the senior management level. There is currently a drive in the UK to address this imbalance and encourage more women into executive and non-executive board positions. The motivations for this are manifold but include:

- *improving performance* – there is a great body of research showing that companies do better when there is a proportionate representation of women on their boards;⁶⁴
- *making full use of the widest talent pool*;
- *being more responsive to the market*; and
- *achieving better corporate governance* – studies indicate that the better the gender balance on a company's board, the more likely that company is to practice good corporate governance.⁶⁵

As a statement of its intention to address this issue, in May 2010 the current Government in its Coalition Government Agreement pledged to, “*look to promote gender equality on the boards of listed companies.*” In September 2010, the Business Minister, Edward Davey, and the Minister for Women, Lynn Featherstone, invited Lord Davies of Abersoch to undertake a review of the current situation with regard to women on corporate boards, to identify barriers to women entering these positions and to make recommendations as to what government and business can do to increase the percentage of women on corporate boards. The subsequent report found that there is currently a huge imbalance in the representation of men and women on corporate boards. It cited the statistic that, at the current rate of change, it will take 70 years to achieve equality.

The same report is clear in its intention to provide “*practical recommendations to address this imbalance.*” Lord Davies' key recommendations are as follows.

1. By September 2011, chairmen of FTSE 350 companies should set out the percentage of women they aim to have on their boards in 2013 and 2015. FTSE 100 boards should aim for a minimum of 25 percent female representation by 2015.
2. Quoted companies should be required to disclose each year the proportion of women on their boards and in senior executive positions, as well as female employees in the whole organization.
3. The Financial Reporting Council should amend the UK Corporate Governance Code to require listed companies to establish a policy concerning boardroom diversity.
4. Companies should report on the matters detailed in paragraph 2 above in their 2012 Corporate Governance Statement.
5. Chairmen should disclose meaningful information about the company's appointment process and how it addresses diversity in their company's annual report.
6. Investors are encouraged to recognize their critical role in engaging with company boards.
7. Companies are encouraged to periodically advertise non-executive board positions to encourage greater diversity in applications.
8. Executive search firms should draw up a voluntary code of conduct addressing gender diversity.

64 See, e.g., Fondas, N. and S. Salsalos (2000), “A Different Voice in the Boardroom: How the Presence of Women Directors Affects Board Influence Over Management,” *GLOBAL FOCUS*, 12: 13-22; Izraeli, D. (2000), “Women Directors in Israel,” in BURKE, R. AND MATTIS, M. (eds.), *WOMEN ON CORPORATE BOARDS OF DIRECTORS: INTERNATIONAL CHALLENGES AND OPPORTUNITIES*, 75-96 (Kluwer Academic Publishers, Dordrecht, The Netherlands); Huse, M., and Solberg, A.G. (2006), “Gender-Related Boardroom Dynamics: How Scandinavian Women Make and Can Make Contributions on Corporate Boards,” *WOMEN IN MANAGEMENT REVIEW*, 21(2): 113-30; Maznevski, M.L. (1994), “Understanding Our Differences: Performing in Decision-Making Groups with Diverse Members,” *HUMAN RELATIONS*, 47(5): 531-52; Zelechowski, D. and Bilimoria, D. (2004), “Characteristics of Women and Men Corporate Inside Directors in the US,” *CORPORATE GOVERNANCE: AN INTERNATIONAL REVIEW*, 12(3): 337-42; McKinsey & COMPANY, *WOMEN MATTER: GENDER DIVERSITY, A CORPORATE PERFORMANCE DRIVER* (2007); Bhogaita, M. (2011), “Companies With A Better Track Record of Promoting Women Deliver Superior Investment Performance,” *NEW MODEL ADVISOR*; The Co-operative Asset Management (TCAM) (2009), “Diversity and Gender Balance in Britain plc,” *THE OBSERVER*; Ahuja, A., “Women in the Boardroom Help Companies Succeed,” *THE TIMES* (Mar. 19, 2009); Wilson N. and Altanlar, A. (2009), “Director Characteristics, Gender Balance and Insolvency Risk: An Empirical Study,” available at <http://ssrn.com/abstract=1414224>.

65 UNITED KINGDOM DEPARTMENT FOR BUSINESS, INNOVATION AND SKILLS, *WOMEN ON BOARDS* (2011), available at <http://www.bis.gov.uk/assets/biscore/business-law/docs/w/11-745-women-on-boards.pdf> (hereinafter “Davies Report”).

9. The following two groups of women need to come together to consolidate and improve training and development of potential board members:

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

10. The steering board which authored the report to meet every six months to consider progress and report annually.

Lord Davies did not recommend mandatory quotas. However, his report notes that, if the business-led approach does not work, then “*more prescriptive alternatives*” may be required. For a business-led approach to succeed, it will require the cooperation of investors, chairmen and chief executives, as well as executive search firms, with governments to have more of a “*supporting role.*” This approach was echoed in a speech made by the Home Secretary on July 4, 2011, stating that “*change has more of an impact and is more long lasting if it comes from positive action, not positive discrimination.*”

There have already been positive developments since Lord Davies' report was published: 21 percent of new board members appointed since the report have been women, up from just 13 percent in 2010, and the number of male-only boards has dropped from 21 in October 2010 to 14 in July 2011. The headhunting industry has also agreed to a voluntary code on diversity.

A revised UK Corporate Governance Code was published in June 2010, which included a new supporting principal stating that, “*the search for board candidates should be conducted, and appointments made, on merit, against objective criteria and with due regard for the benefits of diversity on the board, including gender.*”⁶⁶ Following the publication of Lord Davies' report, the Financial Reporting Council published a consultation paper seeking views on whether the UK Corporate Governance Code should be further revised to require listed companies to establish a policy on boardroom diversity. The consultation closed on June 29, 2011 and the results will be announced later in the year.

In addition to developments in connection with Lord Davies' report, the Equality Act of 2010 makes it unlawful to discriminate against people who are or wish to become office holders. This would cover the situation where a woman was not appointed because of her gender (or because she was pregnant).

In May 2010, in response to the Cranfield Report and the reality that very few women were making it into top positions at UK corporations, Helena Morrissey (CEO, Newton Investment Management) and Labour peer Mary Goudie formed the 30 Percent Club to galvanize the business community into action. The 30 Percent Club and its member corporations work with company chairmen to appoint more women to their boards; assist companies in trying to improve their diversity and with women seeking board appointments; liaise with related groups, including executive search firms, to improve boardroom diversity; influence the political agenda and garner increased media coverage; and track progress toward the 30 percent goal.⁶⁷

In the absence of prescribed legislation, the UK Government, business groups, and other pressure groups are working to insure that the issue of women on corporate boards remains at the center of national debate. Since the issuance of Lord Davies' report, there have been positive developments in the number of women appointed to board positions as well as voluntary action within the headhunting industry. It remains to be seen, however, what the long term results of the debate will be and whether there will be a significant increase in the representation of women on corporate boards.

66 Supporting Principle B2 Revised UK Corporate Governance Code June 2010.

67 See www.30percentclub.org.uk.

BREAKING THE GLASS CEILING:
WOMEN IN THE BOARDROOM

NORTH AMERICA

Canada

**Michelle Yetter, Associate
Paul Hastings (Washington, D.C.)**

In Canada, the issue of gender diversity on corporate boards has received increasing attention over the past decade from legislators, policy advocates, and members of the business community. Currently, women hold approximately 14 percent of board positions in major publicly traded companies in Canada. One survey found that 51 percent of major Canadian companies have no more than one woman on their boards of directors. From 1998 until 2003, the percentage of women appointed to director positions increased from approximately 6 percent to approximately 11 percent.⁶⁸ From 2006 until 2008, 21 percent of new director appointments in major companies were women.⁶⁹ Since then, however, the percentage of women holding directorship positions has decreased to pre-2006 levels.

The Canadian Constitution guarantees the equality of the sexes. In 1982, the Canadian government enacted the Canadian Charter of Rights and Freedoms, which is a bill of rights entrenched within the Canadian Constitution. The Charter provides that every individual is equal under the law and has the right to equal protection without discrimination based upon many factors, including sex. Significantly, the Charter expressly permits laws, programs, and activities that attempt to ameliorate conditions of disadvantaged individuals or groups, including those who are disadvantaged because of their gender.⁷⁰

In March 2010, Senator Céline Hervieux-Payette, P.C. (QC), introduced Senate Public Bill S-206, the Board of Directors Gender Parity Act (the "Bill"). The Bill would have amended various laws to require certain corporations and financial institutions to achieve parity in the number of women and men serving as directors. The parity requirement would have affected most corporations and financial institutions starting at their respective second annual meeting following the day on which the Bill came into force. The Bill was referred to the Standing Senate Committee on Banking, Trade and Commerce for consideration.

Although the Bill received widespread attention and support from many groups, the Standing Senate Committee on Banking, Trade and Commerce recommended that the Bill not proceed further in the Senate. On February 3, 2011, the Committee issued a report enumerating its reasons for recommending against further consideration of the Bill. The report stated that the Bill raised several legal and constitutional issues because it attempted to impose federal requirements on the composition of provincially incorporated and foreign-incorporated public corporations operating in Canada. Additionally, the Committee observed that the corporate governance provisions of certain statutes aim to provide a framework allowing companies to decide how they should best operate. The Committee stated that enacting the Bill would move away from this principle and that shareholders, rather than the government, were better placed to decide the composition of their company's board.⁷¹

While implementation of a federal requirement regarding gender parity on corporate boards has stalled, in 2006 the Government of the Province of Quebec passed legislation similar to the Bill. In that year, Quebec implemented a law that required Quebec Crown corporations to have equal representation of men and women on all boards of directors by December 2011. Reports have indicated that Quebec's Crown corporations are on track to have 50 percent female representation before the year's end.⁷²

Further, non-governmental policy groups have taken up the cause of increasing diversity on Canada's corporate boards. The Mouvement d'Éducation et de Défense des Actionnaires ("MÉDAC") is a not-for-profit organization that educates and advocates on behalf of those who invest and save money. MÉDAC achieves its mission by submitting shareholders' proposals to Canadian companies. In recent years, MÉDAC has made gender parity on boards of directors one of its major policy issues. Significantly, MÉDAC was able to secure the National Bank's commitment to increase the number of female directors and work toward gender parity via one of its shareholders' proposals.⁷³

The Canadian Board Diversity Council (the "CBDC") was created in 2009 to promote board diversity in Canada by increasing Financial Post 500 and public sector board representation of women, visible minorities, Aboriginal peoples, persons with disabilities, and lesbian, gay, bisexual and transgender (LGBT) community members. Specifically, the CBDC aims to increase the percentage of women on Financial Post 500 boards from 14 percent (2009 statistic) to 20 percent by 2013. To achieve this goal, the CBDC surveyed Financial Post 500 directors regarding board diversity and, in 2010, issued its findings in the first Annual Report Card. Of responding directors, 16 percent stated that their boards have written diversity policies on board membership, and 62 percent believed their boards were diverse. Significantly, 39 percent of respondents identified the issue of board diversity as very important and 45 percent stated that diversity was somewhat important. The 2010 Annual Report Card represents an important baseline on the representation of women and other minorities on Canada's corporate boards.⁷⁴

Additionally, Women on Board, a not-for-profit organization, is dedicated to promoting the appointment of women to Canadian corporate boards. In 2007, Women on Board launched its Mentoring Program in Canada, which connects senior executive women with CEOs or Board Chairs from participating, non-competing companies. Since 2007, Women on Board has matched forty-four (44) women with mentors. Three Women on Board mentees and alumnae members were named to the 2010 Canada's Most Powerful Women Top 100 list. It is through the Mentoring Program that Women on Board seeks to develop the talent pool of Canada's potential female directors, facilitate the appointment of mentees to Canadian directorships, and reinforce the commitment of Canadian companies to increasing gender parity.⁷⁵

While federal legislation to increase the representation of women on Canadian corporate boards appears to have stalled, both industry groups and provincial governments continue to address the issue. Organizations such as MÉDAC and CBDC initiate grassroots corporate initiatives, raise awareness, and track data regarding gender parity among boards of directors. Other entities, like Women on Board, also contribute to such grassroots initiatives by supporting women business leaders with mentoring opportunities. The results of these efforts will be closely monitored, as the issue of women's representation on corporate boards remains significant in Canada's national debate.

68 Proceedings of the Standing Senate Committee on Banking, Trade and Commerce, Issue 16, Evidence (Feb. 2, 2011) (Testimony of Louise Champoux-Paille, Administrator, Mouvement d'Éducation et de Défense des Actionnaires ("MÉDAC")), available at http://www.parl.gc.ca/Content/SEN/Committee/403/bank/16eva-e.htm?Language=E&Parl=40&Ses=3&comm_id=3.

69 Eighth Report of Banking, Trade and Commerce Committee, Board of Directors Gender Parity Bill (Feb. 3, 2011), available at http://www.parl.gc.ca/Content/Sen/Chamber/403/Debates/082db_2011-02-03-e.htm?Language=E.

70 Constitution Act, 1982, Part 1, Canadian Charter of Rights and Freedoms (Canadian Charter), Section 15(1) and (2).

71 Eighth Report of Banking, Trade and Commerce Committee, Board of Directors Gender Parity Bill (Feb. 3, 2011), available at http://www.parl.gc.ca/Content/Sen/Chamber/403/Debates/082db_2011-02-03-e.htm?Language=E.

72 Mary Teresa Bitti, *Look Who is Legislating Seats for Women at the Boardroom Table*, CBC (Oct. 20, 2010), available at <http://www.cbc.ca/news/world/story/2010/10/20/f-bitti-gender-parity.html>; UNITED KINGDOM DEPARTMENT FOR BUSINESS, INNOVATION AND SKILLS, WOMEN ON BOARDS 23 (Feb. 2011), available at <http://www.bis.gov.uk/assets/biscore/business-law/docs/w/11-745-women-on-boards.pdf>.

73 Proceedings of the Standing Senate Committee on Banking, Trade and Commerce, Issue 16, Evidence (Feb. 2, 2011) (Testimony of Louise Champoux-Paille, Administrator, Mouvement d'Éducation et de Défense des Actionnaires ("MÉDAC")), available at http://www.parl.gc.ca/Content/SEN/Committee/403/bank/16eva-e.htm?Language=E&Parl=40&Ses=3&comm_id=3.

74 CANADIAN BOARD DIVERSITY COUNCIL, 2010 ANNUAL REPORT CARD (2011), available at http://www.boarddiversity.ca/images/stories/cbdc_report02-13-final-low.pdf.

75 Women On Board, <http://www.womenonboard.ca/home/default.asp>.

United States

**Elizabeth Norton, Associate
Paul Hastings (Washington, D.C.)**

In the United States, the issue of gender parity has gained increasing attention in the last decade. Surveys conducted by Catalyst and the Alliance for Board Diversity reveal slightly better representation of women on Fortune 100 boards than Fortune 500 companies.⁷⁶ However, overall, there has been minimal growth in the last few years. A Catalyst census comparing 2009 and 2010 figures for the Fortune 500 indicated almost no change between the two years. In 2009, of all board seats in the Fortune 500, women held 15.2 percent,⁷⁷ and that number increased slightly to 15.7 percent in 2010.⁷⁸ This means that, of the 5,463 board seats available in the Fortune 500, men held roughly 84 to 85 percent of these seats in both 2009 and 2010.⁷⁹ The Catalyst report noted that, in both 2009 and 2010, “more than 50 percent of companies had at least two women board directors, yet more than 10 percent had no women serving on their boards.”⁸⁰

Another survey by the Alliance for Board Diversity, a non-profit collaboration of four organizations – Catalyst, The Executive Leadership Council, the Hispanic Association on Corporate Responsibility, and Leadership Education for Asian Pacifics, Inc. – found that results from the past six years suggest longer term stagnation. Of the Fortune 100 companies, men held 83.1 percent and 82 percent of board seats in 2004 and 2010, respectively.⁸¹ So in the last six years, women only gained a 1.1 percent presence on boards of directors, an increase that was “not appreciable.”⁸² Of the S&P 500, there are only three companies – Avon, Estée Lauder, and Macy’s – where women make up more than 40 percent of the board seats.⁸³

To address the issue of diversity (including gender diversity) on corporate boards, in 2009 the Securities and Exchange Commission (the “SEC”) approved rules to enhance shareholder information, which went into effect February 28, 2010.⁸⁴ Among other requirements, these rules require the management of publicly held companies to disclose in their annual proxy and information statements their companies’ consideration of diversity, which the SEC does not define, in the nominating process for board members. In particular, the rule requires a company to disclose: 1) whether diversity is a factor in considering candidates for nomination to the board of directors; 2) how diversity is considered in that process; and 3) how the company assesses the effectiveness of its policy for considering diversity.⁸⁵

The SEC implemented a formal comment program to gauge the interest of investors in accessing information on diversity in the boardroom. Numerous individuals and corporations, representing over three trillion dollars in assets, submitted comments to the SEC, 90 percent of which supported the disclosure of information related to race and gender diversity on corporate boards. In light of this show of support, the SEC determined that investors wanted access to this information and finalized the rule.⁸⁶

The SEC rule does not require a commitment to diversity from public companies. Rather, the SEC rule requires that companies disclose whether or not they have a diversity policy with regard to the selection of individuals for their boards. Companies have, for the most part, stated that they do take diversity into consideration when filling board seats. There are, of course, notable exceptions. Berkshire Hathaway indicated in both its 2010 and 2011 proxy statements that it does not have a policy regarding diversity in identifying nominees for director, and it affirmatively stated that its nominating committee does not seek diversity. Instead, “the Governance, Compensation, and Nominating Committee looks for individuals who have very high integrity, business savvy, an owner-oriented attitude and a deep genuine interest in the Company.”⁸⁷

In contrast, in its 2011 proxy statement, Citigroup stated: “Diversity is among the critical factors that the nomination and governance committee considers when evaluating the composition of the board.”⁸⁸ Citigroup went on to explain that, of the candidates nominated for election at the 2011 annual meeting, “two nominees are women (14 percent) and five nominees (35 percent) – including the chairman and the chief executive officer – are Asian, African-American or Hispanic.”⁸⁹ This type of disclosure, with concrete numbers, appears to be what the SEC had in mind.

In a November 2010 speech, SEC Commissioner Luis Aguilar reported on the initial review of companies’ 2010 diversity disclosures.⁹⁰ He praised companies that provided investors with concrete facts and useful information within the “spirit” of the rule.⁹¹ However, he noted that other companies limited their disclosure to “a brief statement indicating that diversity was something considered as part of an informal policy.”⁹² Aguilar reminded companies that the investors, and not just the SEC, had requested information on diversity and therefore the companies should provide information that would be useful to these investors. For example, Aguilar suggested a “useful disclosure” would be one that indicates how many candidates interviewed were women or minorities.⁹³ He also stated that the SEC would follow-up with some of these companies and that he expected the disclosures to improve in the future.⁹⁴

Also in his November 2010 speech, Aguilar noted similarities between statements commonly made about a lack of diversity on boards and a lack of diversity in the NFL.⁹⁵ He explained that, instead of mandating diversity quotas, the NFL implemented the “Rooney Rule,” which requires all NFL teams to interview at least one minority candidate when filling a head coaching position.⁹⁶ The idea behind this rule, an idea supported by many advocacy groups, is that the problem is not a shortage of qualified women or even a calculated effort to exclude women; rather, it derives from a tradition of hiring board members (or coaches) from an existing pool.⁹⁷ This habit makes it very difficult for new individuals to break into the field, whether in the NFL or in the boardroom. Though this idea has not yet gained much traction, it would offer a way for women to at least get a foot in the door while precluding the argument, frequently offered against quotas or mandatory requirements, that companies would be forced to hire women for positions for which they are not qualified.⁹⁸

Applying the “Rooney Rule” to the boardroom is not an idea unique to Commissioner Aguilar. Calvert Investments Senior Sustainability Analyst Aditi Mohapatra has also suggested adopting a similar approach to bring more diversity

76 UPDATED DATASHEET: ALLIANCE FOR BOARD DIVERSITY REPORT: MISSING PIECES: WOMEN AND MINORITIES ON FORTUNE 500 BOARDS (Jul. 21, 2011), http://theabd.org/ABD_datasheet.pdf [hereinafter, the “ALLIANCE FOR BOARD DIVERSITY REPORT”].

77 Some boards had more than one woman and some had no women at all.

78 Rachel Soares, 2010 Catalyst Census: Fortune 500 Women Directors, CATALYST, 1, Dec. 2010, [available at http://www.catalyst.org/file/413/2010_us_census_women_board_directors_final.pdf](http://www.catalyst.org/file/413/2010_us_census_women_board_directors_final.pdf) [hereinafter, the “2010 Catalyst Census”].

79 ALLIANCE FOR BOARD DIVERSITY REPORT, *supra* note 76.

80 2010 Catalyst Census, *supra* note 76.

81 ALLIANCE FOR BOARD DIVERSITY REPORT, *supra* note 76.

82 *Id.*

83 Joel Stonington, Boys Only Boards, BLOOMBERG BUSINESSWEEK, June 23, 2011, [available at http://www.businessweek.com/print/managing/content/jun2011/ca20110620_788661.htm](http://www.businessweek.com/print/managing/content/jun2011/ca20110620_788661.htm). As noted in this article, this apparent slow-down in the movement toward greater diversity in the last few years has led some to suggest that the initial progress could have been “tokenism” rather than a sincere effort to solve the problem.

84 Press Release, U.S. Securities and Exchange Commission, SEC Approves Enhanced Disclosure About Risk, Compensation and Corporate Governance (Dec. 16, 2009), [available at http://www.sec.gov/news/press/2009/2009-268.htm](http://www.sec.gov/news/press/2009/2009-268.htm).

85 Securities and Exchange Commission, Regulation S-K, 17 C.F.R. pt. 229.407(c)(2)(vi) (2010).

86 Luis A. Aguilar, Commissioner, Securities and Exchange Comm’n, Board Diversity: Why It Matters and How to Improve It (Nov. 4, 2010), [available at http://www.sec.gov/news/speech/2010/spch110410laa.htm](http://www.sec.gov/news/speech/2010/spch110410laa.htm).

87 Berkshire Hathaway Schedule 14A Information, Definitive Notice and Proxy Statement, May 1, 2010, [available at http://www.sec.gov/Archives/edgar/data/1067983/000119312510053975/ddef14a.htm](http://www.sec.gov/Archives/edgar/data/1067983/000119312510053975/ddef14a.htm), at 5 and Berkshire Hathaway Schedule 14A Information, Definitive Notice and Proxy Statement, Apr. 30, 2011, [available at http://www.sec.gov/Archives/edgar/data/1067983/000119312511062515/ddef14a.htm](http://www.sec.gov/Archives/edgar/data/1067983/000119312511062515/ddef14a.htm), at 6.

88 Citigroup Inc., 2011 Proxy Statement, Mar. 10, 2011, [available at http://www.citibank.com/citi/fin/data/ar11cp.pdf](http://www.citibank.com/citi/fin/data/ar11cp.pdf), at 8.

89 *Id.*

90 Luis A. Aguilar, Commissioner, Securities and Exchange Comm’n, Board Diversity: Why It Matters and How to Improve It (Nov. 4, 2010), [available at http://www.sec.gov/news/speech/2010/spch110410laa.htm](http://www.sec.gov/news/speech/2010/spch110410laa.htm).

91 *Id.*

92 *Id.*

93 *Id.*

94 *Id.*

95 Aguilar, *supra* note 90.

96 *Id.*

97 *Id.*

98 *Id.*

to corporate boards.⁹⁹ Calvert is an investment management company that manages over \$13.5 billion in assets.¹⁰⁰ It selects the companies in which it invests through their financial performance as well as their environmental, social, and governance practices.¹⁰¹ Calvert uses proxy voting as a primary method of effecting change in companies that do not fit its Sustainable and Responsible Investing (“SRI”) strategy.¹⁰² Calvert routinely uses these proxy votes to encourage companies to change certain policies, including increasing the representation of women on boards of directors.¹⁰³

Once the shareholder resolutions are submitted, often the filer of the resolution and the company will negotiate and agree to specific terms before the resolution is put to a vote; if they agree on these terms, Calvert considers the resolution “successfully withdrawn.”¹⁰⁴ If the filer and the company do not agree, the resolution will be put to a vote. Though most resolutions are not binding on the company, Calvert states that obtaining significant shareholder support for a particular resolution is often enough to influence companies to change their policies.¹⁰⁵ Since 2002, Calvert has engaged with hundreds of companies on the issue of board diversity. Through these efforts, Calvert has “successfully withdrawn” 46 resolutions on this issue and 28 female and/or minority candidates have been added to corporate boards.¹⁰⁶

Though there appears to be significant support for diversity initiatives in the United States, these efforts remain voluntary. Despite movements toward quotas or similar mandatory requirements in other countries, to date such initiatives have not taken root in the United States. Instead, in addition to firms such as Calvert, several non-profit groups have taken on the role of advocating for more diverse corporate boards, notably the Alliance for Board Diversity, Women Corporate Directors, Catalyst, and 2020 Women on Boards, among others.¹⁰⁷

This support includes raising awareness, developing networks of women directors to provide information and assistance, collecting data and publishing reports, using proxy voting to change company policies, and recommending diversity requirements in consideration of candidates. While these approaches may not have as immediate an impact, they are less controversial than quotas and, as such, may garner broader-based support for encouraging better gender parity on corporate boards in the United States.

BREAKING THE GLASS CEILING: WOMEN IN THE BOARDROOM

AUSTRALASIA

99 Aditi Mohapatra, Are there Really Boards with No Women?, FORBES, Aug. 2, 2011, available at <http://www.forbes.com/sites/womensmedia/2011/08/02/are-there-really-boards-with-no-women/>.

100 Calvert Investments, About Us, available at <http://www.calvert.com/about.html>.

101 *Id.*

102 Any shareholder with at least \$2,000 in stock who holds that stock for at least one year is able to file a resolution calling for a company to take a specific action. See, Calvert Investments, Shareholder Advocacy 2010, available at <http://www.calvert.com/nrc/literature/documents/br10059.pdf?litID=BR10059>.

103 *Id.*

104 *Id.*

105 *Id.*

106 Calvert Investments, Board Diversity Remains a Key Focus for Calvert Advocacy (Mar. 7, 2011), available at <http://www.calvert.com/newsArticle.html?article=17603>.

107 Catalyst conducts seminal research in this field and routinely publishes reports of progress (or lack thereof). Catalyst, About Us, available at <http://www.catalyst.org/page/59/about-us>. The Alliance for Board Diversity supports diversity on boards by offering referrals of qualified candidates and by supporting other similar organizations. The Alliance for Board Diversity, About the Alliance for Board Diversity, available at <http://theabd.org/>. 2020 Women on Boards primarily seeks to increase awareness about the issue through the use of social and traditional media. 2020 Women on Boards, About: The Idea, available at <http://www.2020wob.com/about/idea>. Women Corporate Directors is a network of women corporate directors that seeks to “leverage local, regional, and global knowledge and perspective from other Directors and boards worldwide.” Women Corporate Directors, Overview, available at <http://www.womencorporatedirectors.com/displaycommon.cfm?an=1&subarticlenbr=28>. The organization provides a source of advice and expertise for other women directors and helps secure board positions for women. *Id.*

Australia

Michelle Duncan, Partner Paul Hastings (London)

Australia is one of the top-ranking countries for women's educational attainment and its workforce is 45 percent female. However, in 2010, the proportion of female CEOs in the Australian Stock Exchange (ASX) 200 was 3 percent, and 54 percent of ASX 200 companies had no female directors.¹⁰⁸

In June 2010, the Australian Human Rights Commission published a report setting out recommendations in five priority areas, including promoting women to leadership positions and strengthening gender equality laws, agencies and monitoring. Their recommendations included the following:

Targets

- Set a minimum target of 40 percent representation of each gender on all Australian government boards within three years and publicly announce, and annually monitor, progress.
- Consider statutory quotas if expected progress is not made.

Legislation

- Rename and amend existing legislation to include gender equality as a key object.
- Adequately fund the Equal Opportunity in the Workplace Agency.

Monitor progress

- Amend current legislation to require the Sex Discrimination Commissioner to monitor progress towards eliminating sex discrimination and achieving gender equality and biannually report progress to parliament.
- Resource and require the Australian Bureau of Statistics to generate relevant data and analysis.

Following this 2010 report, Australia's legislation was reviewed and a number of legislative initiatives were passed. Importantly, the Workplace Gender Equality Act (the "WGE Act") was passed, replacing the Equal Opportunity for Women in the Workplace Act of 1999. The WGE Act, which covers men and women equally, will be developed and implemented in 2011. The first reports under this new Act will be due in 2013. The WGE Act will include transitional arrangements to allow reporting organizations to adapt to the new system. In addition, pursuant to the WGE Act, the Equal Opportunity for Women in the Workplace Agency will be replaced by the Workplace Gender Equality Agency (the "WGE Agency"). The WGE Act and the WGE Agency, along with a series of further reforms to be implemented progressively over the following years, reflect the recognition by the legislature of shared responsibilities among men and women, as well as the importance of issues such as pay equity.

Beginning in 2013, organizations with 100 or more employees (with no exemptions) will be required to provide annual reports, accessible to employees and shareholders, to the WGE Agency, including details of the gender composition of their boards and performance against a set of gender equality indicators. The WGE Agency will have powers to inspect and verify whether reports are accurate and non-compliant organizations will be named in the Australian parliament and may be disqualified from receiving government work or funding.

Since January 1, 2011, the ASX Corporate Governance Principles and Recommendations have required ASX 200 companies to set targets for increased numbers of women on boards, as well as in the executive ranks, by creating and disclosing a diversity policy with quantitative objectives. Listed companies are also required to report separately the number of female employees in the company as a whole, in senior management and on the board of directors. Boards of directors are further required to disclose the skills and diversity criteria for new board appointments. These Recommendations also require ASX 200 companies to report their progress in achieving these gender objectives.

The Recommendations are treated as "comply or explain" requirements for ASX 200 companies; any non-compliant company must provide full public reasoning for any decision not to complete any of the steps towards gender equality.

This new approach appears to be working. Since the implementation of the Recommendations, the number of women on the boards of ASX 200 companies has increased by almost 600 percent.¹⁰⁹ As of March 8, 2011, 11.7 percent of directors of companies listed on the ASX were female,¹¹⁰ an increase of over 3 percent from 8.3 percent in 2010. In addition, a range of initiatives have been undertaken by bodies such as the Australian Institute of Company Directors to encourage and support women in their roles as directors of corporate boards.

The recent legislative and business focus on gender diversity on corporate boards already has generated positive results. While the first reports under the WGE Act are not due until 2013, it appears that the ASX Recommendations have preceded a sharp increase in the number of women on ASX company boards. This increase may foreshadow further progress in response to Australia's legislative initiatives.

¹⁰⁹ Getting on Board: Quotas and Gender Equality, Speech by Elizabeth Broderick (Sex Discrimination Commissioner for the Human Rights Commission) at the 'Gender Matters' – Third Women on Boards Conference (Apr. 29, 2011).

¹¹⁰ GOVERNANCE METRICS INTERNATIONAL, 2011 WOMEN ON BOARDS REPORT (Mar. 8th, 2011).

¹⁰⁸ 2010 'Women in Leadership' Census by the Equal Opportunity for Women in the Workplace Agency – EOWA (Australian Government).

New Zealand

Michelle Duncan, Partner Paul Hastings (London)

While New Zealand has historically had a strong record of gender equality in high profile public positions (exemplified by a female Prime Minister, Chief Justice, Governor General and Attorney General), this has not been reflected at the highest levels of corporations.

As of May 14, 2010, forty-five (45) women held fifty-eight (58) directorships, or 9.32 percent of the 622 director positions in companies listed on the New Zealand Stock Exchange. This number had not changed since 2008. As of the same date, the number of female CEOs in the private sector was 4 percent, compared with 17.6 percent in the public sector.¹¹¹ The Equal Employment Opportunities Commissioner for the New Zealand Human Rights Commission has previously observed that, despite the skills and experience of women in senior positions in the public sector, the private sector does not appear willing to take advantage of these skills to fill director positions.¹¹²

Also in 2010, the United Nations Human Rights Committee stated that it was “concerned about the low representation of women in high-level and managerial positions and on the boards of private enterprises” in New Zealand and recommended that the New Zealand government should “seek ways to further encourage the participation of women in high-level and managerial positions and on boards of private enterprises through enhanced cooperation and dialogue with partners in the private sector.”¹¹³

There appears to be a desire for change. The Chairman of Shell New Zealand, Rob Zager, described the drive for gender parity as a “great, positive challenge, as well as providing role models for women aspiring to leadership roles.”¹¹⁴ Further, the Chief Executive of Business New Zealand, Phill O’Reilly, suggested that any company not attempting to work for equality will be failing to “realize maximum value because they miss out on women’s abilities and insights at governance level.”¹¹⁵

The New Zealand Census of Women’s Participation 2010 includes an “Agenda for Change 2010,” which is intended as a catalyst for action. The objectives of this Agenda include:

- requiring publicly listed companies without any women on their boards to prioritize female appointments when board vacancies arise;
- asking women’s groups and public agencies involved in mentoring and leadership initiatives to meet and share best practices, compare evaluation techniques, and develop collective strategies to promote female boardroom participation; and
- monitoring the new gender diversity regime being implemented by the Australian Stock Exchange, with a view to adopting a similar regime by 2012.¹¹⁶

The government-funded group Equal Employment Opportunities Trust (the “EEO Trust”) has established several initiatives to train and develop female talent for senior roles within the private sector. These initiatives include:

- seminars and corporate mentoring, provided by the Auckland Chamber of Commerce;

- providing support through “toolkits,” which include checklists and suggestions on how to improve diversity in recruiting and promoting; and
- creating the Trust Work and Life Awards.

Mandatory quotas are not popular. However, it remains to be seen whether the Agenda for Change alone will be effective. If not, there may be a push for legislatively mandated action, including potentially, quotas.

There are several governmental and nongovernmental organizations keeping close track on progress (or lack thereof) of this issue in New Zealand. In addition to the EEO Trust, the National Equal Opportunities Network (“NEON”) is a partnership between the New Zealand Human Rights Commission and the EEO Trust which was formed to promote best employment practices in New Zealand. NEON was formed in response to the 2004 report, *Framework for the Future*, which, among other things, observed that while there were diverse groups working to advance equal employment opportunities, they would often work in isolation. NEON encourages communication and cooperation across these groups and among employers and employees in general. Gender parity on corporate boards is one of the crucial issues on NEON’s agenda.

Additionally, in 2009, A Place at the Table was formed which “aims to improve the diversity of boards of directors in New Zealand.” It is a partnership between the New Zealand Human Rights Commission and the EEO Trust with the goal of increasing the number of women in governance positions. The “A Place at the Table: The Way Forward” forum was held at the University of Auckland Business School in October 2009 during which prominent board chairs, senior women in governance and community representatives identified positive strategies for the future. Visiting international governance expert, Professor Susan Vinnicombe of Cranfield University, spoke at the forum about international efforts to improve the numbers and status of women on boards.

On September 24, 2010, A Place at the Table and the Australian advocacy organization, Women on Boards, held “Women on Boards: Getting Ahead” in Auckland. The event offered inspiration, tools and advice for women wanting to be effective members of corporate boards.

The disparity between women’s representation in high profile roles in the public and private sectors has been noticed by important actors both inside and outside of New Zealand. While no formal action has been taken by the legislature, business leaders and interest groups have laid a framework for increasing the representation of women in senior business roles. Further, both governmental and nongovernmental organizations have made increasing gender diversity a priority and will serve the important role of monitoring progress and communicating successful strategies and results.

¹¹¹ NEW ZEALAND HUMAN RIGHTS COMMISSION, CENSUS OF WOMEN’S PARTICIPATION 2010 [hereinafter, the “CENSUS OF WOMEN’S PARTICIPATION”].

¹¹² Judy McGregor, Gender Equality Lacking in New Zealand Boardrooms, Mar. 30, 2008, available at <http://www.stuff.co.nz/business/338351/Gender-equality-lacking-in-New-Zealand-boardrooms>.

¹¹³ CENSUS OF WOMEN’S PARTICIPATION 2010, *supra* note 111.

¹¹⁴ Business NZ, Institute of Directors in New Zealand Inc. and Ministry of Women’s Affairs, *Women on Board – Why Women on Boards are Good for Business*, at 9.

¹¹⁵ *Id.* at 1.

¹¹⁶ CENSUS OF WOMEN’S PARTICIPATION 2010, *supra* note 111.



