

COURTESY TRANSLATION

The Hague, 18 December 2012

Subject:

Reasoned opinion (breach of subsidiarity) on the proposal for a directive on improving the gender balance among non-executive directors of companies listed on stock exchanges and related measures (COM (2012) 614).

In accordance with the applicable procedure, the Senate and the House of Representatives of the States General in The Netherlands have assessed the proposal for a directive on improving the gender balance among non-executive directors of companies listed on stock exchanges and related measures on the basis of the principle of subsidiarity. As such, use was made of Article 5 of the EU Treaty and Protocol 2 of the Treaty on the Functioning of the European Union concerning the application of the principles of subsidiarity and proportionality.

This letter serves to inform you of the opinions of the Senate and of the House of Representatives of the States General. Identical letters have been sent to the European Parliament, the Council, and the Dutch government.

Both the majority of the Senate and the majority of the House of Representatives are of the opinion that the proposal is in conflict with the principle of subsidiarity¹. According to the principle of subsidiarity the European Union should only undertake action if this is more effective than action taken at national level, so if the Member States are not sufficiently able to achieve the objectives of the proposed action. In the opinion of the Senate and the House of Representatives of the States General this is not the case.

On the basis of article 157, subarticle 3, of the Treaty on the Functioning of the European Union the EU can adopt measures to ensure the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation. The European Commission has proposed a directive setting a minimum objective of a 40% presence of the underrepresented sex among the non-executive directors of companies listed on stock exchanges. However, the proposal insufficiently clarifies the necessity of the proposed measures and does not clearly justify why legislation at European level should be adopted to achieve this objective. The choice of a binding percentage of 40% is not clearly substantiated either. Besides, it remains unclear how the internal market will be distorted, as the European Commission claims. Moreover, there is a lack of clarity on the details of the proposed legislation.

The European Commission argues that national initiatives have proven insufficient to achieve the objective of the directive: more women in senior positions in companies. However, it is impossible to conclude that national initiatives have not been successful, since most initiatives are still in their infancy and have not yet been able to prove their effectiveness. It is even possible that the European proposal will pose barriers to well functioning national initiatives in the field of gender equality.

Both the Senate and the House of Representatives of the States General recognise the importance of equal opportunities of men and women in the labour market. That is why a statutory target figure of 30% for large companies will be introduced as of 1 January 2013 in the Netherlands, for both the board of directors and the supervisory board. Implementation of European legislation – with a different objective, a different target group, a different time schedule and the introduction of sanctions – might interfere with this national initiative and would not grant our national approach enough time to get to a result.

¹ In the Senate this majority consists of the parliamentary groups of VVD, SP, PVV, CDA and ChristenUnie and in the House of Representatives of the parliamentary groups of VVD, SP, PVV, CDA, ChristenUnie and SGP.

Moreover, the European Commission refers to the necessity of harmonising national initiatives with a view to the good functioning of the internal market. However, distortion of the internal market due to the existence of various national initiatives aiming at gender equality cannot be demonstrated. This might be the case if in some countries the under-represented sex would not have the opportunity to hold a senior position in a company in some countries. This is not the case.

The effectiveness of a binding target figure is not demonstrated. There are few examples of countries where it has already been implemented, and even in those countries the initiatives are of such recent date that it is impossible to establish whether they are successful. Moreover, an overall obligation for companies listed on stock exchanges would disregard the specific situation of the various companies. It has been insufficiently demonstrated, scientifically, that the stated percentage, 40%, is most effective given the objective to be achieved and the current situation of many member states. It is therefore preferable to wait for clear results of national initiatives and to enable Member States to learn from the evaluation of these national initiatives, instead of setting binding percentages at this stage.

It is not demonstrated either that the proposed approach to achieve equal opportunities of men and women, namely by imposing "proportionate and dissuasive sanctions" will be effective. Some national initiatives without binding sanctions show a rising trend in women's representation in senior positions in companies. This raises the question why the European Commission should interfere in this development with the obligation to impose dissuasive sanctions. It does not become clear which efforts Member States are supposed to make, when sanctions should be imposed and when there is non-compliance. In brief, it is not clear when Member States comply with the proposed directive.

The Senate and the House of Representatives of the States General see no added value or any necessity of intervention by the European Commission through legislation in existing national initiatives in the field of equal opportunities for men and women in senior positions of companies.

Yours sincerely,

(signed)

G.J. de Graaf
Speaker of the Senate
of the States General

(signed)

Anouchka van Miltenburg
Speaker of the House of Representatives
of the States General.