

GENDER DIVERSITY IN THE BOARDROOM AND ITS IMPACTS: IS THE EXAMPLE OF NORWAY A WAY FORWARD?

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Norway is one of the most egalitarian countries in the world, with a high level of gender equality and a high percentage of women at work. Nevertheless, mandatory rules appeared necessary to bring about changes in the composition of corporate boards. This article describes the coup that made Norway the first country in the world to mandate gender diversity on corporate boards and outlines Norway's innovative legislative approach to this issue. The significance of gender diversity to corporate governance is discussed, drawing on empirical studies of the effect of diversity on the performance of companies. The article also discusses the potentially broader impact of gender diversity in the boardroom, including the pressing question of whether gender diversity in the boardroom can help companies create sustainable value within the planetary boundaries.

I INTRODUCTION: WHY IS THIS STILL AN ISSUE?

It seems logical and obvious that limiting oneself to only men or only women in any corporate setting may diminish the potential for constructive and open-minded discussions that may improve the company's performance and its relationship to society. Detrimental group-think is a risk in any very homogeneous context. Conversely, the positive effects of gender, cultural, age

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and other diversity are well-known.¹ Experienced business people tell us that having a heterogeneous board is fruitful. So, as one of the male presenters, Peter Lamell, observed at the Forum on Mandatory Gender Quota Legislation held on 20 October 2014 in Melbourne: ‘Why don’t they get it’? Why the resistance, or, formulated positively, the very slow progress, which underpins the discussion of whether to legislate to achieve change?

The example of Norway is striking here. Norway is one of the most egalitarian countries in the world, with a high level of gender equality and a high percentage of women at work. Nevertheless, as this article outlines, mandatory rules appeared necessary to bring about the desired change in the composition of company boards — businesses did not do this on their own, in spite of a long grace period. The explanation of why they ‘don’t get it’ seems to be a combination of path-dependency, power and money.²

This article goes on in Part II to describe the *coup* that made Norway the first country in the world to introduce this rule, and the innovative legislative approach which Norway took. In Part III, the Norwegian rule is elaborated on, with discussion of its background as a corporate governance — rather than gender equality — initiative, and of the compliance with the rule by Norwegian companies.

In Part IV, the article discusses the effect of the rule, after first elaborating on the challenges and uncertainties connected with such a discussion. With these caveats, the corporate governance significance of gender diversity is discussed, drawing on empirical studies of the effect of the rule on the companies’ performance. This may be especially relevant given the discussion that the Norwegian rule has inspired in many jurisdictions around the world. The article also discusses the potentially broader impact of gender diversity in the boardroom, including the pressing question of whether gender diversity in the boardroom can help companies create sustainable value within the planetary boundaries.

¹ See also Lawrence J Trautman, ‘Corporate Boardroom Diversity: Why Are We Still Talking about This?’ (2014) 17 *The Scholar: St Mary’s Law Review on Race and Social Justice*. Available at SSRN <<http://ssrn.com/abstract=2047750>>.

² That I am the only female company law professor in Norway and one of two in the whole Nordic region also illustrates the male dominance still visible in business law and more generally in the economy. See ‘Surprisingly Few Female Company Law Scholars’ at the University of Oslo website <<http://www.jus.uio.no/english/research/areas/companies/news/company-law-and-women.html>> which provides the background for *Daughters of Themis: International Network of Female Business Scholars*. See under Networks at the website for the research group Companies, Markets, Society and the Environment <<http://jus.uio.no/companies>>.

Part V concludes with some reflections on whether Norway is indeed an example to follow in this respect.

II THE STORY OF A COUP BY TABLOID

Ironically, in the end, it was a man who performed what may be denoted a *coup* by tabloid and gave Norway the first mandatory corporate gender quota rule in the world. In 2002, the then Minister of Trade and Industry, Ansgar Gabrielsen, proposed to make it obligatory for public limited liability companies in Norway to have at least 40 per cent women directors on their boards.³ The minister voiced the proposal in a tabloid newspaper, apparently without checking this idea with the prime minister — or anybody else in the government or in the ministry. In an interview Mr Gabrielsen later revealed that this was a carefully planned strategy: the perceived problem with unequal gender representation on the boards (referred to disparagingly as ‘boys’ clubs’) had long been a topic of debate, albeit not one that had created big headlines. The minister feared that putting the proposal through the normal channels first would cause its quiet death, smothered by corporate lobby forces and a bureaucracy sceptical of such drastic measures.⁴ Leaving this to business to sort out also did not seem to be an option, as the percentage of female directors on the boards of Norwegian companies in the twenty years from 1992 had only increased from four to six per cent, despite ‘a multitude of voluntary efforts’.⁵

Going to the tabloids certainly got the minister attention: ‘I got a real telling-off in the next meeting of ministers. Some of them practically had smoke coming out of their ears’.⁶ But in the end, the then Norwegian Prime Minister Kjell Magne Bondevik supported the proposal. It would probably have been quite difficult for a Christian Democrat Prime Minister to say that he was against it. He had, indeed, together with the rest of the government, been presented with a *fait accompli*.

³ More precisely, at least 40 per cent of each gender, but as the perceived problem has been male dominance, the *de facto* effect is one of a radical quota system to get women onto boards.

⁴ ‘Han skaffet 800 styrekvinner’ [He Got 800 Women onto the Boards], *Aftenposten*, 4 February 2008) 2–3.

⁵ Morten Huse and Marina Brogi, ‘Introduction’ in Silke Machold et al (eds), *Getting Women on to Corporate Boards: A Snowball Starting in Norway* (Edward Elgar, 2013) 1.

⁶ ‘Han skaffet 800 styrekvinner’, above n 4.

The strategy worked, and the new section 6-11a of the *Norwegian Public Limited Liability Companies Act* entered into force on 1 January 2006.⁷

However, its entry into force was indirectly the choice of business. This legislative initiative took an innovative approach: the legislation enacted in 2003 stipulated that the rule would enter into force only if companies did not, by 1 July 2005, in aggregate have 40 per cent representation by women on their boards.

In spite of protestations beforehand that business would sort this out itself if left alone, a full two year period after the passing of the legislation (following a number of years during which the discussion had flared up from time to time) was not sufficient to produce the required numbers. By July 2005 there were only 15.5 per cent women on boards of public companies and as many as 80 public companies had not reached 40 per cent of each gender.⁸ The rule therefore entered into force, giving business another two years to comply.

Although this was a gender-neutral rule, the existing male dominance on boards of public companies meant that a large number of women directors had to be recruited within a two year period. In spite of strong protests, in the end all Norwegian public companies complied. However, a large number of public companies reincorporated as private companies, a fact which has been blamed on the gender diversity rule. As will be seen below, however, the existence of other factors explaining the re-incorporations seems to have been overlooked.

⁷ *Allmennaksjeloven, lov av 13. Juni 1997 nr. 45 (Norwegian Public Limited Liability Companies Act of 13 June 1997 No 45)*, available in an unofficial English translation at the website of the Oslo Stock Exchange (*Oslo Børs*) <http://www.oslobors.no/ob_eng/Oslo-Boers/Regulations/Acts-and-regulations>.

⁸ Espen Bolshaug, 'Flere kvinner i norske styrer — Bra Eller Dårlig?' [More Women on Norwegian Boards — Bad or Good?] (2011) *Magma* <<http://www.magma.no/flere-kvinner-i-norske-styrer-bra-eller-darlig?tid=213203>>. Of course, an increase to 15.5 per cent was a large jump relatively speaking but the legislature had made up its mind and the limits of its patience had been exceeded.

III THE NORWEGIAN GENDER DIVERSITY RULE

A *Scope, Aim and Type of Regulation*

The rule in section 6-11a applies to all public companies — in other words, not just listed companies.⁹ These include all Norwegian public limited liability companies registered in the Norwegian Register of Business Enterprises.¹⁰

The gender equality rule in section 6-11a does not apply to private limited liability companies. Private companies were excluded because they normally have shares that are less dispersed than those of public companies (as only public companies can offer shares to the public), and also because Norwegian private companies are typically family-controlled, with the shareholders also being the members of the board.¹¹

Better corporate governance was at the heart of this bold legislative move.¹² The main legislative purpose of section 6-11a was to recruit more women into the boardrooms for the sake of the performance and competitiveness of the companies.¹³ Contrary to popular opinion, its purpose was not first and foremost to increase gender equality for the sake of the underrepresented gender (although that was also a legislative objective). The idea was that when companies were faced with this rule they would have to widen their scope and pick the best qualified persons for directorships, instead of restricting the search to the ‘old boys’ club’.

⁹ These companies, *allmennaksjeselskap* in Norwegian, are in Australia also referred to as public companies limited by shares and may or may not be listed, as is the case in Norway. See <<http://www.companydirectors.com.au/Director-Resource-Centre/Organisation-Type/Organisation-definitions>> for Australian company types.

¹⁰ See the Norwegian *Register of Business Enterprises Act 1985* ss 1–2. (Norwegian Acts are available on <www.lovdata.no>, but only in Norwegian. Some Acts are available in unofficial translations from the following link: <www.ub.uio.no/ujur/ulov/>).

¹¹ See more about the effect of this distinction between public and private companies in Part IV below.

¹² It has, however, been indicated that denoting improved corporate governance as the main objective was a strategic move, as better corporate governance was easier to sell than gender equality. See along these lines Huse and Brogi, above n 5.

¹³ Ot prp nr 97 (2002–2003) <<https://www.regjeringen.no/no/dokumenter/otprp-nr-97-2002-2003-/id127203/?ch=1>>. Propositions to the Odelsting (Ot prp) are used when the government proposes new laws or the cancellation of or amendments to existing laws, and they are often only available in Norwegian.

The legislative mechanism chosen was a mandatory quota rule, as opposed to ‘comply or explain’ rules or target rules, under which companies are merely required to report on their progress.¹⁴

B The Specifics of the Rule

Section 6-11a requires a certain minimum of both genders to be represented on the board of directors in public companies. The text of section 6-11a is gender-neutral, but its history shows that it is informed by the previous male domination in the boardrooms of public companies.

For the companies with the smallest boards, the rule requires only that each gender be represented, while the larger boards need to comply with the rule requiring 40 per cent of each gender. It is this latter requirement for which the Norwegian rule is best known.

The rule is specified in section 6-11a in the following manner:

1. If the board of directors has two or three members, both genders shall be represented.
2. If the board of directors has four or five members, each gender shall be represented with at least two members.
3. If the board of directors has six to eight members, each gender shall be represented with at least three members.
4. If the board of directors has nine members, each gender shall be represented with at least four members, and if the board of directors has more than nine members, each gender shall be represented with at least 40 per cent of the board of directors.¹⁵

Section 6-11a applies to both directors of the board and alternate directors, regardless of whether the directors are elected by the shareholders in the general meeting or by the employees according to the Norwegian co-determination

¹⁴ While the Norwegian rule has inspired many other countries to follow in Norway’s footsteps, Norway is still one of the few countries with a true quota rule, mandating that the board consist of a certain percentage of each gender. Germany has recently followed this course, albeit only for some of the largest listed companies; see below n 32 on new legislation to enter into force in 2016.

¹⁵ English text from the unofficial translation available on the website of the Oslo Stock Exchange, above n 7.

rules.¹⁶ The gender representation is calculated separately for the directors elected by the general meeting, and those chosen by the employees. Giving the gender equality rule this common application prevents circumvention of the rule, but, as shown below, it can also raise other issues not regulated by the text in section 6-11a.

With section 6-11a being such a new and, in the eyes of many, radical rule, both scepticism and criticism were foreseeable. Many Norwegian legal scholars and other critics have aired their views on some of the uncertainties concerning the application of section 6-11a. Questions have, for example, been raised regarding the situation where one director resigns. Do the demands for gender equality in section 6-11a then apply to the originally elected board of directors or to the remaining board with one director less? This is, however, not a new issue arising with the gender equality rule. The same question arises in connection with other statutory provisions concerning the composition of the board: for example, the requirement concerning the total number of directors and the requirement concerning residence of the directors. According to the *Norwegian Public Limited Liability Companies Act* when a director resigns the remaining directors are as a rule compelled to choose a new director in such a way that the board at all times is lawfully constituted.¹⁷ The consequence is that if, for example, a female director resigns, the board must choose a new female director, if this is necessary to comply with the 40 per cent rule.

Questions concerning alternate directors have also been raised. What is the situation if the gender representation amongst the alternate directors does not comply with section 6-11a? Will the sanction in that case also be dissolution of the company? Taking into account the severity of the sanction, the legal department of the Norwegian Ministry of Justice has stated that the company will not be dissolved in this situation. What the sanction instead would be is not yet clear, however, as companies tend not to push the point. And what if an alternate director actually steps in for a director of the opposite gender with the consequence that the board on the face of it no longer fulfils the gender requirement of section 6-11a? The answer here is probably that section 6-11a applies to the elected board, so for an alternate director with the ‘wrong’ gender to step in will not constitute a violation of the gender equality rule.

¹⁶ See the *Norwegian Public Limited Liability Companies Act 1997* ss 6-3, 6-4, 6-5, 6-37.

¹⁷ *Ibid* s 6-8, supported by a statement from the legal department of the Ministry of Justice.

C Consequence of Non-Compliance

The Norwegian Register of Business Enterprises is the legal authority responsible for ensuring that the boards of companies act in accordance with section 6-11a. A company acting in breach of section 6-11a is sanctioned in accordance with the ordinary rules applicable to inadequate compliance with legal provisions concerning the composition of the board in public companies.¹⁸

One important type of sanction is denial of registration in the Register of Business Enterprises, which has major consequences for the operation of the company. The most dramatic sanction is dissolution of an existing company.¹⁹ However, an actual dissolution is effected only after several warnings and opportunities for the company to put together a legally compliant board.

The Norwegian public companies were obliged to have the required number of women in their boardrooms by 1 January 2008. By the end of 2007, 483 public companies were registered in the Norwegian Register of Business Enterprises. By 7 January 2008, 90 per cent of the public companies had boards in accordance with section 6-11a. A few months into 2008 all Norwegian public companies had the necessary number of women on their boards. Although there were a few reported instances of companies being notified about possible sanctions if they did not comply within an individually set deadline,²⁰ the Register of Business Enterprises reports that no companies actually had to be sanctioned for acting in breach of the rule.

In an article about the Norwegian study by Siv Staubo, the forced dissolution of companies that do not have a lawful board is characterised as imposing a ‘death sentence’ on companies.²¹ This seems to be overly emotional. First, companies are not human beings. They do not have a life independent of law and can therefore not be put to death. Companies are, as the Court of Justice of the European Union has repeatedly pointed out, ‘creatures of national law’.²² These legal entities therefore exist in as far, and for as long, as they comply with certain fundamental rules of company law which their founders have

¹⁸ See, eg, s 6-11 concerning the place of residence of the directors, and s 6-4 concerning codetermination.

¹⁹ *Ibid* s 16-15.

²⁰ Robert Anderson, ‘Norway Rushes in Female Directors’ *Financial Times* (online), 31 December 2007 <<http://on.ft.com/1IfEutu>>.

²¹ Audun Farbrot, ‘Gender-Quota Boardrooms Come at a High Price’ *Science Nordic* (online), 15 February 2014 <<http://sciencenordic.com/gender-quota-boardrooms-come-high-price>>.

²² See, eg, *VALE Építési Kft (C-378/10)* [2012] ECJ 440, a case in the Court of Justice of the European Union with a preliminary ruling from the Magyar Köztársaság Legfelsőbb Bírósága (Hungary).

chosen for the company. Having a lawful board is such a fundamental requirement.

At the time the legislation was passed, dissolution of a company was criticised as a disproportionate sanction for the company not acting in accordance with section 6-11a.²³ However, the preparatory works emphasise that dissolution is the most effective sanction, and thus also the most appropriate.²⁴ The sanction is, from a Norwegian company law perspective, completely in line with that which applies when other fundamental requirements are breached, including the requirements of sending in accounts according to the *Accounting Act* and of having an auditor. As opposed to much CSR (Corporate Social Responsibility) regulation,²⁵ which either does not have teeth to start with or is not enforced, the Norwegian mandatory gender quota rule is dealt with as core company law should be — seriously. This in itself is also indicative of the aim: better corporate governance, as opposed to reporting requirements on gender diversity as CSR regulation.²⁶

IV GENDER DIVERSITY AND ITS IMPACTS

A *What to Measure and How?*

As is well-known, measuring the impact of legislation is extremely demanding, especially when it is done with a view to assessing what the potential effect of similar reforms would be on other countries. A number of factors can influence the apparent results of legislation. When building on and comparing the results of empirical studies, it is crucial to have an understanding of the scope of the studies, including the business sectors, number of businesses frame that they relate to, and what has been measured and how. The recurring challenge is, of course, to understand when statistically significant correlations represent

²³ Ot prp nr 97 (2002-2003) Om lov om endringer i lov 13 juni 1997 nr 44 om aksjeselskaper, lov 13 juni 1997 nr 45 om allmennaksjeselskaper og vise andre lover ((Preparatory works: the Government's proposal to the Norwegian Parliament for amendments to the Norwegian Private Limited Liability Companies Act of 13 June 1997 No 44, the Public Limited Liability Companies Act of 13 June 1997 No 45, and certain other Acts), section 6.3.4, 51.

²⁴ Ibid.

²⁵ An example here is the Norwegian CSR reporting rules, discussed in Sjøfjell, 'Sustainable Companies: Barriers and Possibilities in Norwegian Company Law' (2015) 11 *International and Comparative Corporate Law Journal* 1.

²⁶ Norway has for decades had reporting requirements for companies, under which the companies are meant to report on labour issues, gender equality and anti-discrimination measures as well as environmental performance, without that having had much effect. See Sjøfjell, *ibid*.

causality.²⁷ Even where causality is assumed, the question of the direction of causality may be raised. The argument can, for example, be made that companies that have a good financial, social and environmental performance are also the companies that embrace diversity in the boardroom and amongst employees.²⁸ Whether diversity causes good performance, or whether the converse is true, may be difficult to find out, even in the case of Norway where the strong exogenous ‘shock’ of the regulation provides an especially good basis for investigation.

It is beyond the scope of this article to consider this complex issue in depth. Instead I will outline some of the measurable issues and challenges in assessing the effects of a gender diversity rule and then move on under the other headings of this Part to share some tentative reflections based on some of the studies in this area.

Attempts can be made to measure the effect of a gender diversity rule in various contexts, some relatively straightforward but most of them more complex. An obvious, relatively uncomplicated, check is to see the change in the composition of the boards, although even here it may be difficult to say with certainty what would have happened over time independent of the rule. An effect which has received much public discussion is that on the registration of public companies, as critics of the rule have latched onto the fact that the number of public companies has fallen drastically since the introduction of the rule, from 554 to only 250 public companies in June 2014.²⁹ Whether that can be attributed solely to the gender quota rule is, however, questionable.

The financial performance of companies is the effect that the corporate world naturally is especially interested in. Although one might imagine that measuring impact based on financial performance is straightforward, this is not so. Financial performance is not one simple indicator that can be used to assess impact. Notably, it is necessary to distinguish between value creation in the company, profits as measured by the accounts, and returns to shareholders. Further, as is generally the case in company law and corporate governance discussions, market attitude needs to be distinguished from the real economic

²⁷ Katrin Hansen, ‘Women on Boards: What We Know, What We Do Not Yet Know and How We Should Further Advance Knowledge’ in Machold et al (eds), above n 5, 101, 102–3.

²⁸ See, eg, Jean du Plessis, James O’Sullivan and Ruth Rentschler, ‘Multiple Layers of Gender Diversity on Corporate Boards: To Force or Not to Force?’ (2014) 19(1) *Deakin Law Review* 1.

²⁹ Information available in Norwegian from the Norwegian Register of Business Enterprises at <<http://www.brreg.no/>>, while more limited information is available in English at <<http://www.brreg.no/english/>>.

performance of companies. Contrary to the belief that underpins the efficient market hypothesis, a share price is not necessarily a reliable indicator of how a company is run. Indeed, the fluctuation in the financial markets need not have much connection with the underlying real economy. An interlinked issue is the distinction between short-term and long-term effects and between perception and reality. These caveats may make comparing empirical studies or summarising the results near impossible.

A perhaps even more complex impact to measure is the impact of gender diversity on the interrelated environmental and social performance of the company. This impact may be directly relevant to financial performance in the long run, while in itself being highly relevant to society. Whether introducing gender diversity onto boards will help companies contribute to the overarching societal goal of sustainable development is hardly possible to measure but it is nevertheless a crucial issue to discuss.

Also discussed in Norway has been the impact that the diversity rule has had — or not had — on the broader social norms concerning gender diversity in business, as will be shown below.

Perhaps somewhat easier to ascertain is that this Norwegian initiative has indeed inspired many other countries as well as the EU to put the issue of corporate gender diversity on their agendas. A number of countries have enacted, or proposed, or are considering proposing, or at least recommending, similar legislation. National examples include Sweden as far back as 2003,³⁰ Spain in 2008³¹ and, most recently, Germany.³² The issue has also been debated

³⁰ ‘However, no real progress was made until Ms Winberg became deputy prime minister last year. In a newspaper interview in late November, she demanded that at least 25 per cent of Swedish board members be female by 2004 or quotas would be enforced’: ‘Sweden’s Glass Ceiling Begins to Crack’ *Financial Times*, 12 May 2003.

³¹ ‘Spain’s male-dominated business elite also watered down some statutes in Mr Zapatero’s gender equality law, which now recommends, but does not require, publicly listed companies to have an equal number of men and women directors and senior managers’, Leslie Crawford, ‘“Feminist” Zapatero puts focus on women’ *Financial Times* (online), 16 April 2008 <<http://on.ft.com/1IfEB8p>>.

³² The German legislation, which will come into force in 2016, mandates a 30 per cent gender quota for the supervisory boards (*Aufsichtsrat*) of the largest of the German listed companies: ‘Germany backs quotas for women on boards’ *Financial Times* (online), 26 November 2014 <<http://on.ft.com/1rux12U>>. The German legislation was finally approved in March 2015: ‘Germany passes gender quota legislation for the boardroom’ *The Guardian* (online), 6 March 2015 <<http://www.theguardian.com/business/2015/mar/06/germany-gender-quota-legislation-boardroom-law-women>>. According to Adams, Gray and Nowland, Spain passed guidelines in 2007 to encourage companies to increase the share of female directors to 40 per cent by 2015, and in 2010 the French National Assembly proposed a law that will impose 20 per cent gender quotas on boards of listed French companies within three years of the law’s adoption and 40

by the European Union (EU) in the years since Norway's initiative, culminating in a proposal for a new directive which aims to achieve 40 per cent of each gender among non-executive directors (supervisory board members in a dual board system) by 2020.³³ As opposed to the Norwegian rule, this is not a quota obligation. Rather it is, in the words of the EU Commission, a 'procedural quota: the proposed Directive sets out a fair and transparent board selection process until the 40% objective is achieved'.³⁴ However, the EU Council was not able to reach agreement on the Directive in December 2014 and it appears an open question whether such an agreement will ever be achieved.³⁵ On the positive side, on aggregate EU businesses and shareholders appear now to be reacting to the political and regulatory signals, with the number of female directors on boards of large European companies rising from 11.9 per cent in October 2010 to 18.6 per cent in April 2014.³⁶

B Effect on the Composition of Boards

One of the results of the Norwegian rule has undoubtedly been that there are many more female directors in public companies in Norway than there ever were before. Interestingly, female directors have replaced male directors. As there is no maximum number of directors according to company law, a way around this mandatory requirement in practice could have been to just appoint the necessary number of token female directors. The male directors could then have had their informal meetings beforehand, with the actual board meetings as *pro forma* board meetings, where the female directors were met with a *fait accompli* from their male colleagues. There is no indication that this has taken place in aggregate.

per cent quotas after six years. Similar laws are currently awaiting final enactment in Belgium, Italy and the Netherlands. Other countries, such as Australia and the UK, are asking companies to set voluntary boardroom gender quotas or disclose diversity policies: Renée B Adams, Stephen Gray and John Nowland, 'Does Gender Matter in the Boardroom? Evidence from the Market Reaction to Mandatory New Director Announcements' (2011), available at SSRN <<http://ssrn.com/abstract=1953152>>.

³³ *Improving the Gender Balance in Company Boardrooms* (27 June 2014) European Commission <http://ec.europa.eu/justice/newsroom/gender-equality/index_en.htm>.

³⁴ *Ibid.*

³⁵ Council of the European Union, 'Outcome of the Council Meeting: Employment, Social Policy, Health and Consumer Affairs' (Press Release, 16803/1/14 REV 1, 11 December 2014) <<http://www.consilium.europa.eu/en/workarea/downloadasset.aspx?id=40802194630>>.

³⁶ *Gender Balance on Corporate Boards — Europe is Cracking the Glass Ceiling* (24 September 2014) European Commission <http://ec.europa.eu/justice/gender-equality/files/women_boards/wob-factsheet_2014_en.pdf>.

Furthermore, the word of mouth amongst company lawyers who were opposed to the rule to start with (and even amongst those still opposed to that type of legislation) is that the effect of the rule has been to bring the best women in and to force some of the less competent men out. If this is true, companies in the aggregate have better boards than they had before the enterprising minister took matters into his own hands and called the tabloids. A Danish newspaper has put this into print, stating that Norwegian boards have got rid of the least competent male directors and replaced them with 'top qualified, top motivated women' as a direct consequence of section 6-11a.³⁷

Yet another, probably unintended, consequence of section 6-11a has been mentioned in the Norwegian media: the rule has led to a number of Danish women being recruited into Norwegian boards and therefore increased the Nordic representation in the administrative organs of Norwegian public companies.³⁸

There has undoubtedly been an increase in cultural diversity through the breaking up of the 'old boys' club', and the resulting need to look outside of the traditional circles for competent directors. Studies have shown, for example, that there has been a certain increase in age diversity.³⁹ We will probably also see an increase in social and ethnic diversity over time, as female directors tend to be better-educated than their male colleagues.⁴⁰ When a selection is made based on education and formal qualifications rather than on social status and connections, this opens up new possibilities for well-qualified people with other social and ethnic backgrounds than, to simplify the picture somewhat, the typical middle-aged white male director from Oslo west.

³⁷ 'Udugelige styremenn forsvunnet?' ('Have incompetent male board members disappeared?') *Ukeavisen ledelse* (Norwegian weekly newspaper) 7 March 2008, citing the views in an article in the Danish newspaper *Berlingske* that the quality of Norwegian corporate boards has increased.

³⁸ See 'Danske kvinner eksporteres til Norge' ('Danish women are exported to Norway'), *E24* (large Norwegian online business newspaper) (online) 20 April 2008.

³⁹ Female directors tended to be younger: Kenneth R Ahern and Amy K Dittmar, 'The Changing of the Boards: The Impact on Firm Valuation of Mandated Female Board Representation' (2012) 127(1) *Quarterly Journal of Economics* 137, available at SSRN <<http://ssrn.com/abstract=1364470>>.

⁴⁰ *Ibid.*

C Effect on Registration of Public Companies

At the time of enactment of the Norwegian rule, it was pointed out that limiting the application of section 6-11a to public companies might influence the organisation of businesses.

An article in a Norwegian internet-based newspaper asserted that section 6-11a played a key role when the company structure of the Norwegian corporate group *Aker* was developed.⁴¹ The listed public company *Aker Kværner* is a subsidiary controlled by the main shareholders (the Norwegian businessman Kjell Inge Røkke, the Swedish Wallenberg family, and the Norwegian state) of the private company *Aker Holding*. The newspaper article claimed that this organisational choice was a result of section 6-11a, as the intention of structuring the parent company as a private company was to avoid the gender equality rule. The article did not, on the other hand, go into the fact that the choice of type of company for *Aker Holding* is an obvious one considering that the parent company has only the three abovementioned shareholders.⁴²

Even more directly, a landslide of reorganisation of businesses from public to private companies and a tumble in new registrations of public companies was predicted. On the face of it, this prediction seems to have held true. The number of public companies registered in Norway has fallen by over 50 per cent. However, to conclude that this is due to the gender quota rule appears somewhat hasty. A survey of 108 of the 126 companies that re-registered in 2007 and 2008 indicated that most companies re-registered for other reasons (that it was more convenient or practical to be a private company, that changes in the law rendered it unnecessary for financial companies to be public companies, and that the company had restructured).⁴³ Only a very small number of the re-registrations could be directly attributed to the gender quota rule.⁴⁴ Whether this holds true for companies registering after 2008 is an open question, as is the question of whether the gender quota rule is a disincentive for choosing the public corporate form. A tentative impression, based on informal discussions, is that the gender diversity rule is accepted as much as, or even more than, the

⁴¹ Johann D Sundberg and Frank Ertesvåg, 'Unngår kvinnekravet' ['Avoiding the Gender Equality Rule'] E24, 26 June 2007 <e24.no/boers-og-finans/article1856055.ece>.

⁴² The shareholders in this parent company have a shareholder agreement according to which they 'acknowledge the need for both genders to be represented on the board of directors', although of course anything else would have been a difficult PR issue for the Norwegian government: *ibid*.

⁴³ Vibecke Heidenreich, 'Consequences of the Norwegian Gender Quota Regulation for Public Limited Company Boards' in Machold et al (eds), above n 5, 123.

⁴⁴ *Ibid*.

rule on employee-elected directors and that it should not in itself be a barrier to registering a public company today.⁴⁵

Even if one could identify the percentage of this fall in the number of public companies that can be attributed to the Norwegian rule on gender diversity, this would not tell us whether the rule in itself is good — only that some corporate decision-makers react negatively to the rule.⁴⁶ In our era of globalisation when businesses may often choose not only the corporate form that they will adopt but often also the country in which they will register, a certain degree of regulatory competition is unavoidable.

D Effect on Financial Performance of Companies

Discerning whether, and to what extent, and in what way gender diversity has an effect on the financial performance of companies is one of the most difficult and contested issues in this area. Before considering the studies specific to the Norwegian example, it is useful to take a broader view and look at the general picture of what research tells us about the impact of gender diversity.

Generally, studies seem to indicate that gender diversity has a positive effect on company performance. An example is the research by Lynda Gratton and Lamia Walker, which they present in the *Financial Times* in October 2007, emphasising that ‘[t]eam members of both sexes identify that working groups with 50 per cent men and 50 per cent women deliver optimal performance in most areas that drive innovation’.⁴⁷ They go on to state that ‘[g]ender imbalances create a significant deterioration in knowledge-based work with regard to experimentation, knowledge transfer, the capacity to work across functional or business boundaries, and general efficiency’.⁴⁸

This is not one isolated research report either. Gratton and Walker state that this research

supports a number of recent studies that show the positive effect of gender parity in business. This year alone, three studies found consistent evidence

⁴⁵ Ibid 125.

⁴⁶ A different perspective may be found in Øyvind Bøhren and Siv Staubo, ‘Does Mandatory Gender Balance Work? Changing Organizational Form to Avoid Board Upheaval’ (2013) *Journal of Corporate Finance*, forthcoming, available at SSRN <<http://ssrn.com/abstract=2257769>>.

⁴⁷ Lynda Gratton and Lamia Walker, ‘Gender Equality: A Solid Business Case at Last’ *Financial Times* (online), 28 October 2007 <<http://on.ft.com/Ohw0fg>>.

⁴⁸ Ibid.

for the business case. McKinsey reports that better-than-average financial performance is experienced by European companies with the highest proportion of women in leadership roles. Research at the University of Helsinki finds that companies with female chief executives or board directors achieve a 10 percent higher return on capital, regardless of the company or sector, while Catalyst reports that Fortune 500 companies with the highest proportion of female directors are more profitable and efficient, on average, than those with the lowest.⁴⁹

A deeper examination of the empirical research generally supports the impression given by Gratton and Walker that female directors have something positive to offer in breaking up the group-think of homogeneous male boards. According to Renée Adams and Patricia Funk, female directors are more benevolent and universally concerned, as well as less power-oriented, than men. As opposed to a popular myth, their study also finds that women are less traditional and security-oriented than their male colleagues and slightly more risk-loving.⁵⁰ Breaking up group-think through promoting diversity on boards is crucial, because, as Mijntje Lückerath-Rovers points out, group-think brings with it ‘three risks: excessive self-esteem, the creation of tunnel vision and a strong pressure within the group to come to an agreement’, which ‘threaten the independent and critical view needed’ for good governance and management.⁵¹ As Adams and Funk point out, group-think and lack of critical opposition may have contributed to the financial crises that have been seen over the last years.⁵²

It is interesting and very challenging to assess the impact in Norway of the introduction of the gender diversity rule. In one way the Norwegian case provides a unique opportunity to study the effect of gender diversity which was suddenly brought into the companies through the exogenous ‘shock’ of

⁴⁹ Ibid. See for a perhaps opposing opinion, Øyvind Bøhren and R Øystein Strøm, ‘The Value-Creating Board: Theory and Evidence’ (Research Report No 8, BI Norwegian School of Management, Department of Financial Economics, 2005) <http://www1.uis.no/ansatt/odegaard/governance/Report_Boards.pdf>.

⁵⁰ Renée B Adams and Patricia Funk, ‘Beyond the Glass Ceiling: Does Gender Matter?’ (Finance Working Paper No 273, UPF Working Paper Series, 2009), available at SSRN <<http://ssrn.com/abstract=1475152>>.

⁵¹ Mijntje Lückerath-Rovers, ‘A Comparison of Gender Diversity in the Codes of France, Germany, Spain, the Netherlands and the United Kingdom’ (2010), available at SSRN: <<http://ssrn.com/abstract=1585280>>.

⁵² Adams and Funk, above n 50, 2, also indicating that the male domination of financial firms may have contributed to the poor performance of banks. See also Darren Rosenblum, ‘Feminizing Capital: A Corporate Imperative’ (2009) 6(1) *Berkeley Business Law Journal* 55, 81, available at SSRN <<http://ssrn.com/abstract=1430508>>.

mandatory legislation requiring ‘overnight’⁵³ board changes, rather than the gradual development (or stagnation) of company board structures that one otherwise saw. However, the mandatory nature of the rule and the negative reaction that that in itself entails, especially in a front-runner country, may conversely make measuring the impact of the changes during the first years difficult.

Within the limited scope of this article, a tentative impression of the impact of gender diversity is attempted, drawing both on studies specific to Norway and studies from other jurisdictions. As pointed out above, we must attempt to distinguish between studies that tell us something about the effect firstly on the value creation in the company, secondly on the profits as measured by the accounts, and thirdly on dividends to shareholders. A study by David Matsa and Amalia Miller shows lower short-term profits in Norwegian companies affected by the rule than in other Nordic companies unaffected by the rule.⁵⁴ This study gives valuable insight by establishing, through investigation, that the reduction in Norwegian profits appears to be caused by a relative increase in labour costs because of fewer lay-offs.⁵⁵ A Danish study by Nina Smith, Valdemar Smith and Mette Verner indicates that the proportion of women among top executives and on boards of directors tends to have a significantly positive effect on company performance, understood as profits.⁵⁶ A study by Mijntje Lückérath-Rovers of Dutch listed companies with and without women board members finds that companies with women board members produce better returns on equity than those without women board members.⁵⁷ In the Norwegian context, Knut Nygaard finds positive effects on returns for businesses where there was low information asymmetry between ‘insiders’ and ‘outsiders’, with female directors often belonging to the ‘outsider’ category in relation to the CEO as ‘insider’. He further finds an insignificantly negative

⁵³ The changes were not really required overnight, but it may have been perceived that way. See Part II above describing the two two-year grace periods.

⁵⁴ David A Matsa and Amalia R Miller, ‘A Female Style in Corporate Leadership? Evidence from Quotas’ (2012) *American Economic Journal: Applied Economics*, forthcoming, available at SSRN: <<http://ssrn.com/abstract=1636047>>.

⁵⁵ *Ibid.*

⁵⁶ Nina Smith, Valdemar Smith and Mette Verner, ‘Do Women in Top Management Affect Firm Performance? A Panel Study of 2500 Danish Firms’ (Discussion Paper No 1708, IZA, 2005) <<http://ssrn.com/abstract=780910>>. The authors use four alternative measures of profit to ensure the robustness of their results: 1. Gross value added/net turnover; 2. Profit on ordinary operations/net turnover; 3. Ordinary result/net assets; and 4. Net result after tax/net assets.

⁵⁷ Mijntje Lückérath-Rovers, ‘Women on Boards and Firm Performance’ (2010) 17(2) *Journal of Management & Governance* 491, available at SSRN <<http://ssrn.com/abstract=1586832>>.

effect where the information asymmetry is high.⁵⁸ Generally, gender diversity is found to be either positive or neutral for the performance of the business.⁵⁹

A fundamental distinction lies also between the actual impact of a rule on the company, its decision-making and its performance, and the market perception of that rule. A number of studies focus on market perception. These tend to indicate that shareholders and potential investors reacted negatively to the mandatory Norwegian rule. For example, a study by Kenneth Ahern and Amy Dittmar reports a ‘significant drop in the stock price at the announcement of the law’.⁶⁰ Such studies do not necessarily tell us anything about the real effect on the business of gender diversity on the board, only that (male?) shareholders and financial analysts are unhappy with the perceived constraints of new mandatory rules. In certain contexts there may also be a ‘shareholder bias’ against gender diversity (or rather against women on boards) as highlighted by Jean du Plessis et al.⁶¹ Conversely, Renée Adams, Stephen Gray and John Nowland show us that announcements of new female directors were received positively in Australia, where there was at the time no mandatory quota.⁶² Also, as mentioned above, Nygaard indicates positive investor expectations where there is low information asymmetry between ‘insiders’ and ‘outsiders’ and where female directors, typically ‘outsiders’, could expect fewer information asymmetry disadvantages.⁶³ When Ahern and Dittmar attempt to discern whether lower age, higher education (!) and different business experience may have had a negative effect on the board’s influence on the operations of the companies, they seem to indicate that an explanatory factor may be male resistance to the female directors.⁶⁴

This indicates that any negative effects may be of a transitional nature. However, there are also studies, such as the Norwegian study by Øyvind

⁵⁸ Knut Nygaard, ‘Forced Board Changes: Evidence from Norway’ (Discussion Paper, NHH (Norwegian School of Economics) Department of Economics, 2011), available at SSRN: <<http://ssrn.com/abstract=1793227>>.

⁵⁹ Trautman, above n 1; see also above n 30.

⁶⁰ Ahern and Dittmar, above n 39.

⁶¹ Du Plessis, O’Sullivan and Rentschler, above n 28, 7–8, with reference to Frank Dobbin and Jiwook Jung, ‘Corporate Board Gender Diversity and Stock Performance: The Competence Gap or Institutional Investor Bias?’ (2011) 89 *North Carolina Law Review* 809, 819.

⁶² Adams, Gray and Nowland, above n 32. A positive effect is found also by Collins G Ntim, ‘Board Diversity and Organizational Valuation: Unravelling the Effects of Ethnicity and Gender’ (2013) *Journal of Management and Governance*, forthcoming, available at SSRN <<http://ssrn.com/abstract=2338073>>. Ntim argues that ethnic diversity is valued even more highly than gender diversity: at 24.

⁶³ Nygaard, above n 58.

⁶⁴ Adams, Gray and Nowland, above n 32.

Bøhren and Øystein Strøm, claiming that there should be no mandatory gender quotas, no rights for employees to elect board members and no independent directors, since companies that are closely controlled by shareholders provide superior financial results.⁶⁵

As profits and returns can be influenced by a number of factors independent of the introduction of the gender diversity rule, any insights into the internal effect on the board — on the decision-making and the assumed impact that that has on the value-creation in the company — may be seen as particularly helpful for our understanding.⁶⁶

A study of US companies suggests that the inclusion of more women on boards has a positive influence on the board in that attendance of members at board meetings improves and so does monitoring of the company. This has a positive effect on companies where better monitoring is required (but possibly a negative effect on companies that were already well-monitored).⁶⁷ Comparing the Norwegian quota rule to the ‘less interventionist regulatory approach’ of the US, Aaron Dhir finds that the Norwegian model produces benefits that improve the boards’ decision-making.⁶⁸ Similarly, a study of the French quota rule by Darren Rosenblum and Daria Roithmayr indicates that gender diversity on the board leads to more open-ended board discussions.⁶⁹

Sabina Nielsen and Morten Huse have gone beneath the surface, drawing upon theories of gender differences and group effectiveness, in their in-depth study of 201 Norwegian companies, opening the ‘black box’ of board behaviour.⁷⁰ Nielsen and Huse indicate that women’s ability to contribute positively to the board may be attributed to their different leadership styles. The presence of

⁶⁵ See for example Øyvind Bøhren and R Øystein Strøm, ‘Governance and Politics: Regulating Independence and Diversity in the Board Room’ (2010) 37 *Journal of Business Finance and Accounting* 1281, available at SSRN <<http://ssrn.com/abstract=2257734>>.

⁶⁶ See, eg, Tor Brunzell and Eva Liljebloom, ‘Gender Representation in Nordic Boards: Evaluation of Board Work’ (2012) on the difficulty of evaluating the gender diversity effect on financial performance because of the variety of other factors that can influence this performance: available at SSRN <<http://ssrn.com/abstract=1988826>>.

⁶⁷ Renée B Adams and Daniel Ferreira, ‘Women in the Boardroom and Their Impact on Governance and Performance’ (2008), available at SSRN <<http://ssrn.com/abstract=1107721>>.

⁶⁸ Aaron A Dhir, ‘Homogeneous Corporate Governance Cultures’ (2014), available at SSRN: <<http://ssrn.com/abstract=2487149>>.

⁶⁹ Darren Rosenblum and Daria Roithmayr, ‘More than a Woman: Insights into Corporate Governance after the French Sex Quota’ (2014), available at SSRN: <<http://ssrn.com/abstract=2482720>>.

⁷⁰ Sabina Nielsen and Morten Huse, ‘The Contribution of Women on Boards of Directors: Going Beyond the Surface’ (2010) 18(2) *Corporate Governance: An International Review* 136.

women on corporate boards seems to increase board effectiveness through reducing the level of conflict and ensuring a high quality of board development activities.⁷¹

An inside view is also provided by Tor Brunzell and Eva Liljebloom in their Nordic study. While the study indicates that gender diversity (in other words, more women on the boards) is positive for high risk firms (contrary to earlier beliefs), the study also finds that the predominantly male CEOs tend to react negatively to female directors.⁷²

In other words, to the extent that negative effects on the value creation in the companies were caused in these first years after the introduction of compulsory gender diversity, the hostility of male CEOs and male directors to the mandatory quota rule may be a part of the explanation. Also, and linked with this, one may speculate that the women who agreed to sit on boards in the initial phase may not necessarily have been the most experienced and highly qualified. Some well qualified women may have been reticent about saying yes because of the opposition and because of a feeling of being appointed due to the quota rule rather than their qualifications.⁷³ These and other factors may have contributed to transitional negative effects. As Morten Huse points out, female directors are not a homogeneous group. To the extent that one can generalise, Morten Huse indicates that female directors are more positive about the Norwegian quota rule after having been on boards for a while and that, with board experience, female directors have gained more business acumen and tended to become the type of directors that Huse denotes 'value creators'.⁷⁴ As pointed out by Gro Ladegård, there are overall no indications that the quota rule has reduced the competence or the legitimacy of the boards in general.⁷⁵

The Norwegian legislator intended to break up the 'old boys' club' and combat the negative effects of group-think in a very homogeneous group. Logic suggests that widening the scope of the pool of potential directors from (a limited number of) men only to both men and women is positive. It is difficult

⁷¹ Ibid. See also Sabina Nielsen and Morten Huse, 'Women's Contribution to Board Decision-Making and Strategic Involvement: The Role of Equality Perceptions' (2010) 7 *European Management Review* 16.

⁷² Brunzell and Liljebloom, above n 66.

⁷³ Indeed, before the gender quota rule, only two per cent of Norwegian CEOs and only six per cent of the board members were women, so naturally not many women had what had been perceived as the only relevant background: CEO or boardroom experience: Morten Huse, 'Concluding Remarks to Part III' in Machold et al (eds), above n 5, 94.

⁷⁴ Ibid 94–7.

⁷⁵ Gro Ladegård, 'Legitimacy, Inclusion and Influence: Investigating Women Directors' Board Experience' in Machold et al (eds), above n 5, 152.

to envisage that gender diversity on the board after a transitional phase is anything but neutral or positive for the decision-making and value creation of the company. The impression derived from the tentative examination of studies supports this. In addition, there is a political choice to be made: rectifying gender imbalance may arguably be ethically and politically warranted, even if hostility towards such quotas and possible transitional problems bring with them negative economic effects.

E Interrelated Effect on Financial, Social and Environmental Performance of Companies

The different and positive qualities that women bring into a previously male-dominated domain are probably especially relevant in the discussion of the impact of gender diversity on the broader societal performance of companies.

The study by Renée Adams and Patricia Funk on the characteristic values of female directors, finding them more benevolent, universally concerned and less power-oriented than men,⁷⁶ is based on a survey of Swedish directors and CEOs.⁷⁷ This makes it especially relevant in a discussion of the probable impact of the Norwegian rule, as Norway and Sweden are culturally quite similar. A Dutch study by Mijntje Lückérath-Rovers (based on a resource-dependency perspective, where boards are seen as a mechanism to link companies and their 'stakeholders') indicates that gender diversity on the board is a positive signal in the broader social context.⁷⁸

The abovementioned study by Matsa and Miller, indicated lower short-term profits in Norwegian companies because of a relative increase in labour costs.⁷⁹ This gives rise to the question of whether having more women in the boardroom will encourage the use of a longer-term and broader vision in matters of value-creation within the company. Other studies, such as that by Richard Bernardi and Veronica Threadgill, also suggest a possible correlation between female directors and more community-oriented boards.⁸⁰

⁷⁶ Adams and Funk, above n 50.

⁷⁷ Ibid.

⁷⁸ Mijntje Lückérath-Rovers, 'Female Directors on Corporate Boards Provide Legitimacy to a Company: A Resource Dependency Perspective' (2009) *Management Online Review* 1, available at SSRN <<http://ssrn.com/abstract=1411693>>.

⁷⁹ Matsa and Miller, above n 54.

⁸⁰ Richard A Bernardi and Veronica H Threadgill, 'Women Directors and Corporate Social Responsibility' (2010) 15(2) *Electronic Journal of Business Ethics and Organizational Studies* 15, available at SSRN <<http://ssrn.com/abstract=1752267>>.

Studies of the introduction of gender diversity into previously male-dominated areas suggest that gender (as well as age and cultural) diversity on company boards will lead to broader and more open discussions of the impact of the businesses on society. If diversity has any effect at all, it should have a positive effect on social performance of the company. It is difficult to envisage that breaking up the group-think of an ‘old boys’ club’ could be negative in that respect.

Another possible significant effect of the quota rule is an improvement in gender equality in business. Early reports indicated an increase in the number of women attaining top-positions in businesses as a result of women becoming more visible in the aftermath of the law reform.⁸¹ Furthermore, the current criticism of the gender quota is that the rule has not *sufficiently increased* gender diversity in business in general. This is an indication that the most strident opposition to the Norwegian gender quota has calmed down.⁸² This seems to signal a new phase in which it is not the rule itself that is the object of criticism, but rather the perceived lack of significant broader, societal effects.

F Does Gender Diversity Contribute to Sustainability?

Arguably, the most important question with respect to gender diversity on boards is whether it contributes to the overarching societal goal of sustainability in all three dimensions: economic, social and environmental. This section concentrates on the environmental dimension.

⁸¹ ‘Styrekvinner til toppjobber’ (‘Female board members into high-level positions’) *Ukeavisen ledelse* (Norwegian weekly newspaper), 18 April 2008.

⁸² See, eg, Marianne Bertrand et al, ‘Breaking the Glass Ceiling? The Effect of Board Quotas on Female Labor Market Outcomes in Norway’ (Working Paper No 20256, NBER 2014) available at <www.nber.org/papers/w20256>. See also Cathrine Seierstad and Tore Opsahl, ‘For the Few Not the Many? The Effect of Affirmative Action on Presence, Prominence, and Social Capital of Women Directors in Norway’ (2010) 27(1) *Scandinavian Journal of Management*. Available at SSRN <<http://ssrn.com/abstract=1420639>>.

The mainstream corporate governance debate tends to regard the maximisation of shareholder profit as the sole purpose of companies. However, as a matter of law, this is to a great extent incorrect, especially when the relevant ‘purpose’ is understood as society’s purpose for companies in the aggregate.⁸³ No company law system insists on boards focusing only on returns to shareholders.⁸⁴ All jurisdictions expect boards to ensure compliance with environmental regulation. Generally company law across jurisdictions also allow boards to integrate environmental externalities (beyond legal compliance) into their operations, at least as far as the business case argument allows — that is, as far as the case can be made that this is profitable for the company in the long run. Within the current system, company law across the jurisdictions provides perhaps surprising latitude to the board, and by extension the management, to shape business in a sustainable manner.⁸⁵

However, boards do not, by and large, choose the environmentally friendly, low carbon option even within the parameters of the business case, let alone challenge the outer boundaries of the scope to pursue profit in a sustainable manner. This is because of the overriding social norm of shareholder primacy, which, supported by management remuneration incentives and other drivers, leads to an extremely narrow, short-term, profit maximisation focus.⁸⁶ The resulting practice of companies in the aggregate is detrimental to those affected by climate change and environmental degradation today, and to the possibility for future generations to fulfil their own needs. It is also damaging to any shareholder with more than a very short-term perspective on their investment,

⁸³ See Beate Sjøfjell et al, ‘Shareholder Primacy: the Main Barrier to Sustainable Companies’ in Beate Sjøfjell and Benjamin Richardson (eds), *Company Law and Sustainability* (Cambridge University Press, 2015).

⁸⁴ In some jurisdictions environmental sustainability has begun tentatively to make inroads into the explicit duties of the board. See, eg, Andrew Johnston, ‘Reforming English Company Law to Promote Sustainable Companies’ (2014) 11(2) *European Company Law* 63; Tineke Lambooy, *Corporate Social Responsibility: Legal and Semi-Legal Frameworks Supporting CSR: Developments 2000 – 2010 and Case Studies* (Kluwer, 2010) 107.

⁸⁵ The cross-jurisdictional analysis of the Sustainable Companies Project has shown that there is a great unexplored potential in the current company law regimes for companies to shift away from the path of business as usual and onto a path towards sustainability; see Matsa and Miller, above n 54.

⁸⁶ Pinpointed also by the EU Commission as a problem but not adequately acted on. See Beate Sjøfjell and Linn Anker-Sørensen, ‘Directors’ Duties and Corporate Social Responsibility (CSR)’ in Hanne S Birkmose, Mette Neville and Karsten Engsig Sørensen (eds), *Boards of Directors in European Companies* (Kluwer, 2013).

including institutional investors such as pension funds or sovereign wealth funds, as well as to the companies themselves.⁸⁷

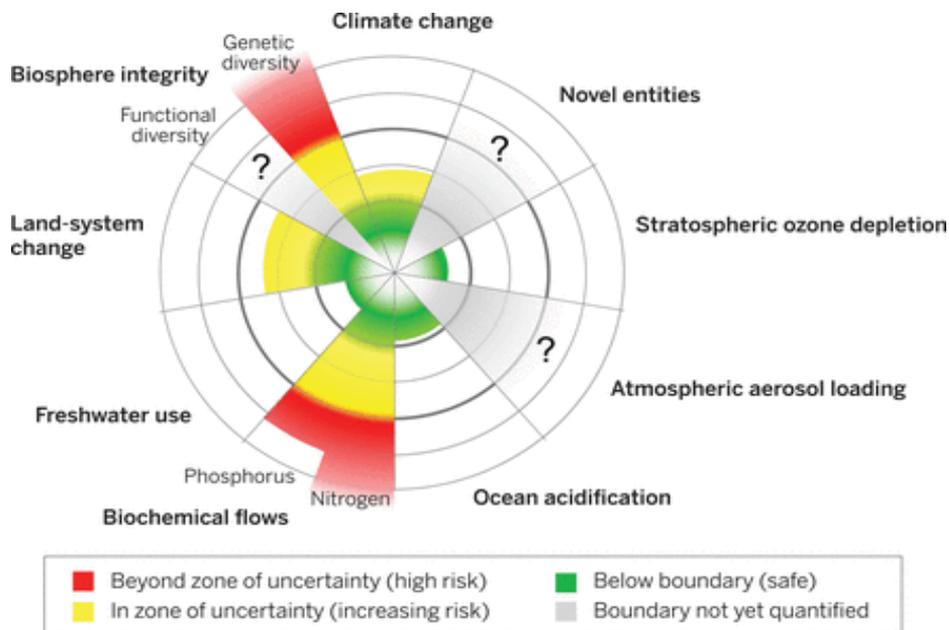
While the case has been made elsewhere that company law reform is necessary to effect the required change,⁸⁸ the pervasive question in the present context is whether gender diversity will facilitate a reorientation of the decision-making in the boardroom towards environmental objectives.

Company law has tended to ignore the issue of environmental protection, based on the assumption that company law can leave it to environmental law to ensure ecological sustainability. This is contrary to the very essence of sustainable development. While environmental law is traditionally very much about anti-pollution, about prohibiting or limiting the spread of toxic substances, sustainable development is a way of thinking. Sustainable development requires the balancing of the inextricable complexity of economic, social and environmental interests, within the non-negotiable ecological limits of our planet. The pursuit of growth in the business context tends to ignore the finite nature of the natural resources of our planet. The concept of planetary boundaries, while foreign in a company law context, forms the natural framework within which all business, our economies and societies must find a peaceful and sustainable way to coexist.⁸⁹

⁸⁷ While the preamble of the proposal for an amendment of the Shareholder Rights' Directive claims in Recital 2 that the financial crisis has 'revealed that shareholders in many cases supported managers' excessive short-term risk taking', an at least equally valid concern is that shareholders have put pressure on directors and managers to focus on short-term returns only.

⁸⁸ Beate Sjøfjell, 'Corporate Governance for Sustainability: The Necessary Reform of EU Company Law' in Beate Sjøfjell and Anja Wiesbrock (eds), *The Greening of European Business under EU Law* (Routledge, 2015) 97.

⁸⁹ See Johan Rockström et al, 'Planetary Boundaries: Exploring the Safe Operating Space for Humanity' (2009) 14(2) *Ecology and Society* <www.ecologyandsociety.org/vol14/iss2/art32/>; Will Steffen et al, 'Planetary Boundaries: Guiding Human Development on a Changing Planet', *Science*, 347 (6223) (2015) (January 2015), available at <www.sciencemag.org/content/347/6223/1259855.abstract>.



Source: Will Steffen et al, '*Planetary Boundaries: Guiding Human Development on a Changing Planet*' (2015)⁹⁰

Based on the general indications that female directors take broader and longer-term perspectives discussed in this section, as well as the general positive impact of breaking up group-think indicated in this article, we may envisage that gender diversity on corporate boards is a small but positive contribution to the necessary transition away from business as usual and onto a sustainable path.⁹¹

⁹⁰ Steffen, above n 89. The planetary boundaries include, as shown above and in addition to climate change and biodiversity loss: global freshwater and land use, chemical pollution, ocean acidification, atmospheric aerosol loading, stratospheric ozone depletion, and cycling of phosphorus and nitrogen. It is estimated that humanity has already transgressed four boundaries: climate change, biosphere integrity (genetic diversity, with uncertainty concerning the boundary for functional diversity), and land system change, and biogeochemical cycles (phosphorus and nitrogen): *ibid.* The planetary boundaries may be revised through new evidence, and scientific uncertainty is naturally unavoidable. The environmental precautionary principle is of the essence. Indeed, the conceptual framework for planetary boundaries itself proposes a strongly precautionary approach, by 'setting the discrete boundary value at the lower and more conservative bound of the uncertainty range': Johan Rockström et al, 'Supplementary Information' (2009) <www.stockholmresilience.org/> (under Research; planetary boundaries).

⁹¹ For the argument of the necessity of such a transition, see, eg, Sjøfjell, above n 88.

V THE EXAMPLE OF NORWAY: A WAY FORWARD?

This article poses the question of whether the example of Norway is a way forward for other jurisdictions. From a corporate governance perspective the answer seems to be yes. Boardroom gender diversity has such a positive effect that it should be sought to be achieved, through mandatory legislation if necessary. Whether mandatory legislation is necessary depends on time and place.⁹² Certainly mandatory norms often seem to be necessary to change a path-dependent outcome. The Norwegian legislative initiative seems to be an example in practice of what Jon Elster discusses regarding social norms: a change in social norms (which social perceptions will be based on) often needs a legal norm to start if off.⁹³

The much criticised and ‘radical’ piece of Norwegian legislation has indeed sparked a Europe-wide debate. That mandatory legal norms are often necessary in contexts such as those under discussion in this article is also illustrated by the example of Germany. Although gender diversity is on the rise on aggregate in Europe, according to the EU Commission,⁹⁴ the proportion of women on German supervisory boards has actually declined, despite all the debates about equality and promises by German companies to rectify this situation on a voluntary basis.⁹⁵ The only positive change seems to be in the listed companies, which is probably a sign of acceptance (or resignation) in the face of the quota legislation now adopted in Germany, which will enter into force in 2016.⁹⁶

To achieve the positive effects of gender diversity, a certain critical mass must be reached. This does not necessarily have to be 40 per cent, as is the Norwegian rule. One Norwegian study by Beate Elstad and Gro Ladegård emphasises the importance of a certain ratio of women in overcoming the social barriers against

⁹² An interesting, comparative discussion of this may be found in Jean du Plessis, Ingo Saenger and Richard Foster, ‘Board Diversity or Gender Diversity? Perspectives from Europe, Australia and South Africa’ (2012) 17(2) *Deakin Law Review* 207.

⁹³ See Jon Elster, *Explaining Social Behavior: More Nuts and Bolts for the Social Sciences* (Cambridge University Press, 2007) 358–9. The example Elster uses is smoking, and the change in the societal attitude to smoking sparked by legal restrictions on where smoking is permitted. If bans on smoking in restaurants etc were lifted today, the social norm against smoking in places where it affects other people, such as when visiting somebody’s home, would probably *not* revert back to the former social attitude that smoking is only the smoker’s business.

⁹⁴ European Commission, above n 36.

⁹⁵ ‘Inequality Still Presides for Women in German Boardrooms’ *Deutsche Welle* (online), 9 October 2014 <dw.de/inequality-still-presides-for-women-in-german-boardrooms/a-17985476>.

⁹⁶ ‘Germany to Legislate 30 Percent Quota for Women on Company Boards’ *Deutsche Welle* (online), 26 November 2014 <dw.de/germany-to-legislate-30-percent-quota-for-women-on-company-boards/a-18088840>.

female directors in a male-dominated setting, and indicating that the benefits of gender diversity may materialise at a ratio below 40 per cent.⁹⁷ A German study by Jasmin Joecks, Kerstin Pull and Karin Vetter indicates that a 30 per cent ratio is a minimum,⁹⁸ while the Norwegian study by Mariateresa Torchia indicates that the critical mass is three women.⁹⁹ The important thing is to avoid ‘trophy directors’ and to ensure that real change is achieved.

The pervasive question of how to regulate companies so that they contribute to the necessary, fundamental transition away from business as usual and onto a sustainable path is more challenging. Boardroom diversity is most likely a positive but insufficient contribution to this end. Lest we end up fiddling while the world burns, we need to keep our eyes on the overarching goal of long-term sustainability, financial and social, within the planetary boundaries. At the end of the day, that and nothing else is the benchmark against which we should be measured.

⁹⁷ Beate Elstad and Gro Ladegård, ‘Women on Corporate Boards: Key Influencers or Tokens?’ (2010) 16(4) *Journal of Management and Governance*, available at SSRN <<http://ssrn.com/abstract=1582368>>.

⁹⁸ Jasmin Joecks, Kerstin Pull and Karin Vetter, ‘Gender Diversity in the Boardroom and Firm Performance: What Exactly Constitutes a “Critical Mass”?’ (2012), available at SSRN <<http://ssrn.com/abstract=2009234>>. It is not surprising then that the new German rule aims for the minimum indicated by this German study, namely 30 per cent; see n 32.

⁹⁹ Mariateresa Torchia, ‘Women Directors and Corporate Innovations: A Critical Mass Perspective’ in Machold et al (eds), above n 5, 126.