

THE PURPOSE OF THE FIRM AND BOARD HETEROGENEITY

The Global Financial Crisis (GFC) has served as a wake-up call for the pronounced impact that hegemonic financial firms can have on the society and the economy.¹ Lagarde's statement that the Lehman Brothers crisis would not have happened had it been 'Lehman Sisters',² although reductionist,³ raises an important point, that is; whether endogenous governance of homogeneous corporate boards can have such immense implications on the world economy.⁴ If correct, this would assume that firms would need to be treated like '*public utilities*' to ensure that such a crisis will not reappear and that heightened regulation is the only way to safeguard against the negative impacts of private corporate management.⁵ However, corporations do not have societal values as their main aim;⁶ prioritising viability;⁷ therefore, creating a division of opinion as to whether firms should be internally *or* externally regulated in the market sphere.⁸ This author believes that it is an important issue to consider as it has a complex connection to the ever present corporate purpose debate and thus; may be able to shed some light on how this contention impacts on who has a seat at the boardroom table.

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¹ D. Asalidou et al., *Weak corporate governance can lead to a country's financial catastrophe*, JBL 2015/4, p. 365.

² C. Lagarde, *Women, Power and the Challenge of the Financial Crisis*, New York Times 10.05.2010, <http://www.nytimes.com/2010/05/11/opinion/11iht-edlagarde.html>, 17.12.2016.

³ A. Fogg, *Don't Give Me This 'If Lehman Sisters had been in Charge' Nonsense*, The Guardian 17.09.2013, <https://www.theguardian.com/commentisfree/2013/sep/17/dont-give-me-lehman-brothers-sisters-nonsense>, 18.12.2016.

⁴ C. Lagarde, *Women...*

⁵ D. Asalidou et al., *Weak...*, pp. 361–365, 380.

⁶ L. Strine, *Our Continuing Struggle with the Idea That For-Profit Corporations Seek Profit*, WFLR 2012/1, p. 155.

⁷ Ibid.

⁸ A. Wolfe, *The Modern Corporation: Private Agent or Public Actor?*, WLLR 1993/4, p. 1678.

Agreeing that ‘no crisis should be wasted’⁹ and relating to Lagarde’s statement above; my critical analysis will contemplate the contemporary issue of boardroom diversity; specifically gender, as a catalyst for consideration of the appropriate way to treat firms in light of the GFC and ask whether this calls for governmental intervention, via quotas, or whether the voluntary approach is adequate. The corporate board is the pivotal instrument guiding the company direction;¹⁰ consequently, it is salient for it to be reflective of the demographics of society.¹¹ Therefore, it appears diversity is too important for it to be left solely as a private issue,¹² that is; if significant change in board composition is the objective.¹³

I will argue that it is essential for firms to institute these changes internally,¹⁴ before any discussion of mandatory legislation should be considered, as quota success may have been overstated.¹⁵ However, I will conclude that, ultimately, this public/private distinction is a distraction to the changes that companies need to make in order to enhance board diversity.¹⁶ Therefore, considering the public implications of private firm governance; especially the different turn the crisis could have taken;¹⁷ large firms should be given an enhanced opportunity to ingrain boardroom diversity into their corporate nucleus.¹⁸

⁹ A. Hutchinson, *Hurly - Berle - Corporate Governance, Commercial Profits, and Democratic Deficits*, SULR 2011/4, p. 1219.

¹⁰ B. Tricker, *Corporate Governance*, OUP 2015, p. 167.

¹¹ Dept. for Business, Energy & Industrial Strategy, *Corporate Governance Reform* (Green Paper, Nov 2016), para 2.2.

¹² A. Wolfe, *The Modern...*, p. 1696.

¹³ H. Gregory, S. Austin, *Corporate Governance Issues for 2015*, <https://corp.gov.law.harvard.edu/2014/12/12/corporate-governance-issues-for-2015>, 15.12.2016.

¹⁴ D.S.R. Leighton, *Making Boards Work* [in:] *Women on Corporate Boards of Directors*, eds. R. Burke, M. Mattiss, Kluwer 2010, p. 260.

¹⁵ Hampton-Alexander Review, *FTSE Women Leaders*, https://30percentclub.org/assets/uploads/UK/Third_Party_Reports/Hampton_Alexander_Review_Paper_Nov_2016.pdf, 17.12.2016.

¹⁶ A. Wolfe, *The Modern...*, p. 1696.

¹⁷ C. Lagarde, *Women...*

¹⁸ E. Ferran, *Corporate Law, Codes and Social Norms - Finding the Right Regulatory Combination and Institutional Structure*, JCLS 2001/1, p. 385.

I will approach this essay in four parts. *Part I* will critique the corporate purpose debates. *Part II* focuses on the importance of boardroom diversity. *Part III* will contemplate quota and voluntary regulation. *Part IV* concerns future prospects. *Lastly*, I shall conclude that treating enterprises as public utilities will not bring about greater boardroom heterogeneity. Moreover, firms cannot be regarded as *either* private or public entities but rather, there has to be a reconceptualization of how these seemingly binary approaches actually complement each other.¹⁹

1. Purpose

Diversity revolves around the debate of whether the corporate purpose is to serve entirely to shareholders or whether it engages with other roles beyond investor interest.²⁰ The question of in whose interest corporations should be run has become salient following the Global Financial Crisis;²¹ as it became apparent that private arrangements within the corporate ‘black box’²² could have global implications,²³ with many corporate failings being due to executive failures and a lack of sufficient controls on firm activities.

The search for the corporate purpose was ‘launched’ by the Berle-Dodd dialogue concerning the wider company role;²⁴ with this discussion maintaining its relevance today.²⁵ Berle’s (initial)²⁶ point of view that ‘all powers granted’ for the corporation should be exercised for shareholders²⁷ had formed the basis for the prevalent shareholder-primacy model.²⁸

¹⁹ A. Wolfe, *The Modern...*, p. 1696.

²⁰ S. Russel et al., *Understanding Corporate Sustainability* [in:] *Corporate Governance and Sustainability*, eds. S. Benn, D. Murphy, Routledge 2007, p. 38.

²¹ H. Gregory, S. Austin, *Corporate...*

²² B. Tricker, *The Evolution of Corporate Governance* [in:] *Corporate Governance*, eds. T. Clarke, D. Branson, Sage 2012, p. 56.

²³ A. Hutchinson, *Hurly...*, p. 1253.

²⁴ R. Valsan, *Board Gender Diversity and the Enlightened Shareholder Value Principle*, CL 2016, p. 175.

²⁵ J. Weiner, *Berle-Dodd Dialogue in the Concept of the Corporation*, CLR 1964, p. 1458

²⁶ W. Bratton, M. Wachter, *Shareholder Primacy’s Corporatist Origins*, JCL 2008, p. 135.

²⁷ A. Berle, *Corporate Powers as Powers in Trust*, HLR 1931/7, p. 1049.

²⁸ A. Dhir, *Challenging Boardroom Homogeneity*, CUP 2015, p. 61.

Berle was also sceptical about the concept of a company having public duties as these could potentially lead to its 'ultimate downfall'.²⁹ Following this reasoning, adopting boardroom diversity should be a matter of corporate decision and not that of public need, especially since female appointments may result in reduced profits;³⁰ resulting in loss of value for shareholders,³¹ which are, according to the above view, of the ultimate importance for the corporate existence.

Contrastingly, Dodd considered that the board's role entails 'social decision making';³² whereby, private actions have public results;³³ which I agree with considering the adverse impact that lack of diversity may have on the functioning of giant firms.³⁴ I think that the crux of Dodd's article, for the purpose of this essay, is the statement that companies have a 'social service'³⁵ *as well as* a 'profit-making function'.³⁶ This means that firms should be neither treated as *purely* private entities nor public utilities, but that there has to be a balance between these two factors³⁷ and so, boardroom diversity cannot be driven exclusively by social or profit explanations.

The increasing relevance of stakeholder interests in UK³⁸ cumulated into s172,³⁹ which indicated the necessity for reconsideration of governance values.⁴⁰ However, this is not seen as a 'radical' change;⁴¹ mainly

²⁹ A. Berle, *For Whom Corporate Managers Are Trustees: A Note*, HLR 1921/8, p. 1372.

³⁰ S. Ghosh, *Why It's a Man's World After All? Women on Bank Boards in India*, [http://ac.els-cdn.com.queens.ezp1.qub.ac.uk/S0939362516301017/1-s2.0-S0939362516301017-main.pdf?_tid=3b5dd2e0-cb5f-11e6-9d14-00000aacb35d&acdnat=1482752236_d955e3b7a5002f78c4b489e30b155b6a](http://ac.els-cdn.com/queens.ezp1.qub.ac.uk/S0939362516301017/1-s2.0-S0939362516301017-main.pdf?_tid=3b5dd2e0-cb5f-11e6-9d14-00000aacb35d&acdnat=1482752236_d955e3b7a5002f78c4b489e30b155b6a), 26.12.2016.

³¹ *Ibid.*

³² J. Parkinson, *Corporate Power and Responsibility*, OUP 1993, p. 10.

³³ *Ibid.*

³⁴ C. Lagarde, *Women...*

³⁵ M. Dodd, *For Whom are Corporate Managers Trustees?*, HLR 1932/7, p. 1148.

³⁶ *Ibid.*

³⁷ A. Wolfe, *The Modern...*, p. 1696.

³⁸ R. Valsan, *Board...*, p. 176.

³⁹ Companies Act 2006.

⁴⁰ R. Valsan, *Board...*, p. 176.

⁴¹ B. Sjaafjell et al., *Shareholder Primacy* [in:] *Company Law and Sustainability*, eds. B. Sjaafjell, B. Richardson, CUP 2015, p. 99.

because a ‘pluralist’ approach was discarded.⁴² But, perhaps that would have been too intrusive for company interests to have a realistic chance of acceptance.⁴³ Nevertheless, Valsan argues that following s172, which introduced Enlightened Shareholder Value (ESV),⁴⁴ long-term stakeholder relationships have become crucial for directors.⁴⁵ For this reason, female directorial qualities are principal as they will bring more of these varied interests into the fore⁴⁶ and thus, it has been argued that women directors will adapt effectively into stakeholder-driven boards.⁴⁷ Therefore, an expansion of the stakeholder theory via legislation would result in greater female representation, due to the fact that it would enshrine the ‘public utility’ treatment.⁴⁸ But, this would be at a risk of management opportunism.⁴⁹

Fundamentally, legislation does not appear to either encourage companies to be seen exclusively as of a public nature nor private and; thus, it is placed in-between these two visions.⁵⁰ Therefore, perhaps this debate should be abandoned and the focus shifted to what companies should be doing to enhance diversity.⁵¹

2. Diversity

The debates above have prompted the rethinking of the board’s importance as an enforcer of public change.⁵² In order for this to occur, it is important to recognize the obstacles that persist within the corporate

⁴² Ibid.

⁴³ Ibid.

⁴⁴ R. Valsan, *Board...*, p. 175.

⁴⁵ Ibid., p. 175.

⁴⁶ Ibid., p. 176.

⁴⁷ S. Weasley-Key, *Companies Act 2006: Are Cracks Showing in the Glass Ceiling?*, ICCLR 2007/12, p. 424.

⁴⁸ Ibid.

⁴⁹ A. Keay, *Tackling the Issue of the Corporate Objective: An Analysis of the United Kingdom’s Enlightened Shareholder Value approach*, SLR 2007, p. 602.

⁵⁰ C. Ajibo, *A Critique of Enlightened Shareholder Value: Revisiting the Shareholder Primacy Theory*, BBKLR 2014/1, p. 56.

⁵¹ A. Wolfe, *The Modern...*, p. 1696.

⁵² M. Huse, *Boards, Governance and Value Creation*, CUP 2007, p. 94.

institutions which prevent a greater concentration on public needs.⁵³ And so, the legislative shift in direction towards stakeholders is not enough as its effect will be ‘muted’,⁵⁴ unless the composition of those who wield the power will be varied.⁵⁵ As the directors decide what is in the interest of the stakeholders; diversification needs to take place from within to have an impact.⁵⁶ Consequently, greater board diversity can prevent ‘risky corporate outcomes’⁵⁷ which impact upon the whole society,⁵⁸ and so through this; companies are seen as ‘utilities’ to safeguard both; diversity and economic viability.⁵⁹

Not only is there a public interest in ensuring equitable access to opportunities⁶⁰ but; moreover, there is a strong business case for boardroom diversification.⁶¹ This economic case states that women contribute to the boards on which they sit,⁶² as well as to ‘sustainable (company) growth’.⁶³ This reasoning is laid out in the ‘Lord Davies Report’⁶⁴ which had encouraged the UK movement for heterogeneity.⁶⁵ Due to these advantages, it is clear that there is both a public drive for achieving diverse boards, but also there should be private motivations for companies in terms of governance improvements,⁶⁶ as these firms tend to have higher returns on investments in comparison to their competitors.⁶⁷ Consequently, I would argue that it is important to *see* these companies as

⁵³ S. Russel et al., *Understanding...*, p. 15.

⁵⁴ A. Hutchinson, *Hurly...*, p. 1253.

⁵⁵ *Ibid.*

⁵⁶ *Ibid.*, p. 1253.

⁵⁷ R. Adams, *Women on Boards: The Superheroes of Tomorrow?* LQ 2016, p. 378.

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*

⁶⁰ A. Dhir, *Challenging...*, p. 58.

⁶¹ R. Adams, *Women...*, p. 372.

⁶² *Ibid.*

⁶³ *Ibid.*, p. 172.

⁶⁴ *Women on Boards*, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/31480/11-745-women-on-boards.pdf, 26.12.2016.

⁶⁵ *Ibid.*

⁶⁶ *Ibid.*

⁶⁷ S. Sun et al., *Board Openness During an Economic Crisis*, JBE 2015, p. 364.

public utilities due to the changes they can enact,⁶⁸ but that it is not necessary to *treat* them as such; as they have reason enough to act themselves; noticing that those firms which fail to embrace heterogeneity are limiting their growth.⁶⁹

Unfortunately, a lot of board diversity justifications hinge on the verge of essentialism,⁷⁰ which reduces their effectiveness,⁷¹ as it cannot be said that all women will generate beneficial outcomes.⁷² A solution offered by Dhir is a heightened focus on the social case.⁷³ This directly relates to the ‘public utility’ argument in terms of concentrating upon the underrepresentation of women in the boardroom and associated negative implications;⁷⁴ thus, this sees companies as ‘state-like’⁷⁵ enterprises⁷⁶, rather than private entities.⁷⁷ Nevertheless, one should be wary of imposing ‘democratic ideas’;⁷⁸ of greater public involvement in firm activities, onto the corporate agenda as these are two different institutions;⁷⁹ and so, it may be questioned whether certain social expectations are excessively demanding.⁸⁰ Nevertheless, I would agree with Hutchinson’s view, in that companies cannot be ‘immune from public oversight for the public interest’,⁸¹ but this does not necessarily entail stricter enforcement.⁸²

⁶⁸ B. McCall, *The Corporation as Imperfect Society*, DJCL 2011, p. 509.

⁶⁹ J. Keefe, S. Krawcheck, *Why Gender Diversity Should Matter to Investors*, <http://www.greenmoneyjournal.com/april-2015/gender-diversity>, 21.12.2016.

⁷⁰ M. Torchia et al., *Women Directors on Corporate Boards: From Tokenism to Critical Mass*, JBE 2011/2, p. 312.

⁷¹ Ibid.

⁷² Ibid.

⁷³ A. Dhir, *Challenging...*, p. 281–283.

⁷⁴ Ibid.

⁷⁵ D. Greenwood, *Markets and Democracy: The Illegitimacy of Corporate Law*, UMKCLR 2005/1, p. 44.

⁷⁶ A. Dhir, *Challenging...*, p. 282.

⁷⁷ Ibid.

⁷⁸ C. Rose, *Does female board representation influence firm performance? The Danish Evidence*, CG 2007/2, p. 405.

⁷⁹ Ibid.

⁸⁰ A. Dhir, *Challenging...*, p. 34.

⁸¹ A. Hutchinson, *Hurly...*, p. 1248.

⁸² Ibid.

The discussion above presents the blurring of the private and public company purposes⁸³ and through this; the justifications for boardroom diversity.⁸⁴ Consequently, relying on a strict public-private divide will exacerbate the ‘pernicious’⁸⁵ impacts that firms can have on the society.⁸⁶

3. The Public-Private division

There are ‘normative’ and ‘coercive’ pressures for boardroom diversity⁸⁷ which entail; respectively, private corporate initiatives and ‘public utility’ treatment through mandatory quotas.⁸⁸

If firms are to be treated more like public utilities, this means that there needs to be an external intervention. The reasoning behind these mandates is that radical state-based regulation is the only way to shift the entrenched⁸⁹ governance norms;⁹⁰ and so, quotas are crucial to change ‘path dependency’.⁹¹ The most ‘extreme promotion’⁹² of diversity has been achieved in Norway;⁹³ whereby, since 2008, a mandatory 40% female representation is required;⁹⁴ consequently, quotas are seen as transferring ‘public tasks’ onto these private entities.⁹⁵ Moreover, mandates are targeting firm abilities to choose directors; which is usually a private activity and

⁸³ A. Dhir, *Challenging...*, p. 284.

⁸⁴ Ibid.

⁸⁵ A. Hutchinson, *Hurly...*, p. 1248.

⁸⁶ Ibid.

⁸⁷ I. Alemand et al., *Institutional Theory and Gender Diversity on European Boards*, VeSdE 2014, p. 76.

⁸⁸ Ibid.

⁸⁹ C. Liao, *Limits to Corporate Reform and Alternative Legal Structures* [in:] *Company Law and Sustainability*, eds. B. Sjaafjell, B. Richardson, CUP 2015, p. 277.

⁹⁰ J. Lorsch, *Boardroom Challenges; Lessons from the Financial Crisis and Beyond* [in:] *The Future of Boards: Meeting the Governance Challenges of the Twenty-First Century*, ed. J. Lorsch, HBR Press 2012, p. 5.

⁹¹ B. Sjaafjell, *Gender Diversity in the Boardroom and its Impacts: Is The Example of Norway a Way Forward?*, DLR 2015, p. 50.

⁹² A. Dhir, *Challenging...*, p. 75.

⁹³ Ibid.

⁹⁴ Ibid.

⁹⁵ M. Szydło, *Constitutional Values Underlying Gender Equality on the Boards of Companies: How Should EU Put These Values into Practice*, ICLQ 2014/1, p. 181.

so,⁹⁶ it is a forceful ‘state intrusion’ into the internal governance process;⁹⁷ whereby, the ‘utility case’⁹⁸ treats corporations as tools to enforce a public agenda.⁹⁹

However, legal mandates can lead to a problem of becoming ‘necessary’ to represent every minority in the boardroom;¹⁰⁰ the impetus for which is seen in the Parker Review.¹⁰¹ As a result, and despite the commendable intentions, this would severely overcomplicate the nomination process.¹⁰² Additionally, there are aspects of underrepresentation which quotas cannot reach; such as the social mechanisms;¹⁰³ whereby, women receive significantly less mentoring than their male counterparts.¹⁰⁴ These governance aspects should be targeted privately, as public control will not be able to account for such important issues,¹⁰⁵ unless every aspect of the boardroom process was legislated for,¹⁰⁶ but this is unrealistic and would only provoke artificial governing strategies.¹⁰⁷

Another issue with quotas is that they may appear to be more beneficial than they truly are; for example in Norway there exists the ‘Golden Skirts’ phenomenon;¹⁰⁸ whereby, the high number of females on boards

⁹⁶ A. Dhir, *Challenging...*, p. 75.

⁹⁷ Ibid.

⁹⁸ S. Terjensen, R. Sealy, *Board Gender Quotas: Exploring Ethical Tensions From A Multi-Theoretical Perspective*, BEQ 2016/1, p. 29.

⁹⁹ Ibid.

¹⁰⁰ F. Dickens, *Why Quotas Aren't the Answer to Gender Inequality in the Boardroom*, <http://elitebusinessmagazine.co.uk/people/item/why-quotas-aren-t-the-answer-to-gender-inequality-in-the-boardroom>, 18.12.2016.

¹⁰¹ The Parker Review Committee, *A Report into Ethnic Diversity of UK Boards*, [https://webforms.ey.com/Publication/vwLUAssets/A_Report_into_the_Ethnic_Diversity_of_UK_Boards/\\$FILE/Beyond%20One%20by%2021%20PDF%20Report.pdf](https://webforms.ey.com/Publication/vwLUAssets/A_Report_into_the_Ethnic_Diversity_of_UK_Boards/$FILE/Beyond%20One%20by%2021%20PDF%20Report.pdf), 19.12.2016.

¹⁰² F. Dickens, *Why...*

¹⁰³ M. McDonald, J. Westphal, *Access Denied: Low Mentoring of Women and Minority First-Time Directors and Its Negative Effects on Appointments to Additional Boards*, AMR 2013/4, p. 1188.

¹⁰⁴ Ibid., p. 1187.

¹⁰⁵ Ibid.

¹⁰⁶ Ibid.

¹⁰⁷ Ibid.

¹⁰⁸ A. Sweigart, *Women on Board for Change: The Norway Model for Norway Quotas as a Tool For Progress*, NJILB 2012, p. 92A.

may be ‘unrepresentative’¹⁰⁹ of the reality of women serving more than one board,¹¹⁰ and so public utility treatment does not encourage *real* diversity. Therefore, mandates treat the ‘symptoms and not the cause’ of homogeneity.¹¹¹ Also, the fact that the stock price of these quota companies fell¹¹² is evidence that board members are chosen for their ability to increase shareholder-wealth,¹¹³ and so this echoes the shareholder primacy model,¹¹⁴ which appears to be so ingrained that quotas cannot change the basis on which the appointments are made.¹¹⁵

Furthermore, quotas resulted in creative avoidance tactics by Norwegian companies in order to sidestep the regulatory burden.¹¹⁶ Since the mandate applied only to *public* firms, these would delist in order to have the freedom to nominate the directors they considered most appropriate.¹¹⁷ Although, reasons for delisting are disputed,¹¹⁸ it appears that treating companies as ‘public utilities’ through quotas may, paradoxically, create even more private firms.¹¹⁹ However, the focus on the boardroom should not lead to neglect of the issues down the ‘pipeline’.¹²⁰ Boardroom percentage and executive percentage of women are disconnected.¹²¹ For example; Norway, even though containing the highest female board percentage, is behind Colombia in terms of its diversity of executive teams.¹²² Thus, indicating that quotas are inflexible and achieve what

¹⁰⁹ Ibid.

¹¹⁰ Ibid.

¹¹¹ B. Chouhury, *Gender Diversity on Boards: Beyond Quotas*, EBLR 2015/1, p. 230.

¹¹² K. Ahern, A. Dittmar, *The Changing of the Boards: The Impact on Firm Valuation of Mandated Female Board Representation*, QJE 2012, p. 137.

¹¹³ Ibid.

¹¹⁴ Ibid.

¹¹⁵ Ibid.

¹¹⁶ A. Dhir, *Challenging...*, p. 146.

¹¹⁷ K. Ahern, A. Dittmar, *The Changing...*, p. 141.

¹¹⁸ A. Hillman, *Board Diversity: Beginning to Unpeel the Onion*, CG:IR 2015/2, p. 105.

¹¹⁹ Ibid.

¹²⁰ S. Nadkarni et al., *Looking Beyond Corporate Boards*, https://30percentclub.org/assets/uploads/UK/Research/CJBS_white_paper_v8_web_version.pdf, 15.12.2016.

¹²¹ Ibid.

¹²² Ibid.

they are supposed to but go no further¹²³ and; therefore, ‘soft regulation’ is promising.¹²⁴

The number of UK all-male boards is decreasing and there is a ‘sustained’ increase in the number of women board members,¹²⁵ which supports the claim that the voluntary approach is working.¹²⁶ The main forms of board diversity regulation in the UK are the disclosure requirements of the Companies Act 2006¹²⁷ and the Corporate Governance Code.¹²⁸ The CGC tries to encourage heterogeneity through declaration of board diversity policy¹²⁹ and also, directorial appointments must have regard to gender.¹³⁰ Additionally, these disclosure requirements appear to be an ‘incentive’ for companies,¹³¹ suggesting that there is a reputational element of desiring to be seen as firms responsive to public pressures.¹³² However, these CGC requirements are a more ‘cautious route’ towards achieving diversity.¹³³

Studies have found that the *comply or explain* approach is successful in comparison to the quota system,¹³⁴ as it enables companies to ‘contextualise’ their appointment choices, and thus avoids rigidity.¹³⁵ Voluntary initiatives such as the 30% club are emphasizing this boardroom issue and, as corporations are ‘publicly backing’¹³⁶ these campaigns, it takes

¹²³ Ibid.

¹²⁴ Ibid.

¹²⁵ Women on Board Davies Review, *Improving the Gender Balance on British Boards*, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/482059/BIS-15-585-women-on-boards-davies-review-5-year-summary-october-2015.pdf, 27.11.2016.

¹²⁶ Ibid.

¹²⁷ S 414C, (8) (c) (i) – (ii).

¹²⁸ FRC, *The UK Corporate Governance Code*, <https://www.frc.org.uk/Our-Work/Publications/Corporate-Governance/UK-Corporate-Governance-Code-April-2016.pdf>, 17.12.2016.

¹²⁹ Ibid., para B.2.4

¹³⁰ Ibid., para B.1.2.

¹³¹ R. Valsan, *Board...*, p. 173.

¹³² Ibid.

¹³³ V. Sila et al., *Women on board: Does boardroom gender diversity affect firm risk?*, JCF 2016, p. 46.

¹³⁴ H. Al-Shaer, M. Zaman, *Board Gender Diversity and Sustainability Reporting Quality*, JCAE 2016, p. 221.

¹³⁵ A. Dhir, *Challenging...*, p. 242.

¹³⁶ Hampton-Alexander Review, *FTSE...*, p. 35.

this ‘private’ issue into the public sphere without firms being treated as public utilities through restrictive regulation.¹³⁷ Additionally, as the UK does not appear to favour the ‘state-led’ approach;¹³⁸ it will be safe from the impending threat of quotas¹³⁹ upon the exit of the EU.¹⁴⁰ And so, voluntary initiatives will be the only remaining option unless, the business community changes its views on mandated diversity.¹⁴¹

However, despite the progress, this growth appears to have slowed¹⁴² and so, corporations have to find new ways to re-engage with this important issue.¹⁴³ Perhaps, a reason for this is that what could be attained through such voluntary initiatives *has* been achieved,¹⁴⁴ and the remaining problems are the complex unconscious barriers;¹⁴⁵ therefore, these private biases need to be acknowledged directly, before greater board diversity can be accomplished.¹⁴⁶

4. Future

It has been argued that a modern economy needs a balance of greater flexibility for companies as well as heightened regulation;¹⁴⁷ consequently considering the above, positive discrimination of treating firms as public utilities will be a ‘step backwards’.¹⁴⁸ This is due to internally-driven change being preferable;¹⁴⁹ by way of, companies signing ‘charters’ of

¹³⁷ Ibid.

¹³⁸ *Women at the Top: The Quota Effect*, Financial Times 1.11.2016.

¹³⁹ EU Commission, *Improving Gender Balance in Company Boardroom*, http://ec.europa.eu/justice/gender-equality/files/gender_balance_decision_making/boardroom_factsheet_en.pdf, 21.12.2016.

¹⁴⁰ *Women at the Top...*

¹⁴¹ Ibid.

¹⁴² Hampton-Alexander Review, *FTSE...*, p. 35.

¹⁴³ Ibid.

¹⁴⁴ D.S.R. Leighton, *Making...*, p. 260.

¹⁴⁵ Ibid.

¹⁴⁶ A. Dhir, *Challenging...*, p. 54.

¹⁴⁷ E. Ferran, *Corporate...*, p. 385.

¹⁴⁸ D.S.R. Leighton, *Making...*, p. 260.

¹⁴⁹ Ibid.

established goals and also improving their director training.¹⁵⁰ Further, it may be claimed that corporations already have this ‘public element’ ingrained in their legal foundations¹⁵¹ as, ultimately, through incorporation firms are entering into a ‘bargain with the state and the community’¹⁵² and thus, their public responsibilities¹⁵³ must not go unnoticed.¹⁵⁴ Accordingly, Hutchinson argues that the debate about the corporate purpose is ultimately about the ‘nature’ of the public purpose of the firm,¹⁵⁵ and it is no longer appropriate to present the ‘public utility’ and ‘private entity’ as binaries;¹⁵⁶ rather, there should be a focus on how to achieve a common purpose.¹⁵⁷

Conclusion

The global financial crisis had a dramatic impact on how the public views firm responsibility.¹⁵⁸ The importance of boardroom diversity is no longer a marginal issue, but one that is out in the open of both; corporate and public debates, and so it may be questioned whether a greater governmental engagement in firm governance is needed;¹⁵⁹ especially with reference to statements that bank collapses would not have occurred if there were more female directors present in these boardrooms.¹⁶⁰

However, genuine board heterogeneity¹⁶¹ cannot be achieved through the enactment of quotas, whose benefits have been overstated;¹⁶² as they

¹⁵⁰ M. Szydlo, *Constitutional...*, p. 172.

¹⁵¹ A. Wolfe, *The Modern...*, p. 1696.

¹⁵² A. Hutchinson, *Hurly...*, p. 1249.

¹⁵³ *Ibid.*

¹⁵⁴ *Ibid.*

¹⁵⁵ *Ibid.*

¹⁵⁶ A. Wolfe, *The Modern...*, p. 1696.

¹⁵⁷ A. Hutchinson, *Hurly...*, p. 1249.

¹⁵⁸ H. Gregory, S. Austin, *Corporate...*

¹⁵⁹ D. Asalidou et al., *Weak...*, pp. 361–365, 380.

¹⁶⁰ C. Lagarde, *Women...*

¹⁶¹ A. Sweigart, *Women...*, p. 106.

¹⁶² Hampton-Alexander Review, *FTSE...*, p. 35.

are ‘intrusive’ disturbances into the functioning of the corporate entity¹⁶³ and will not target social impediments encountered by female directors.¹⁶⁴ Furthermore, the voluntary approach of the United Kingdom appears to be achieving its objectives,¹⁶⁵ which suggests that this should be developed further in the future.¹⁶⁶

Moreover, the public/private divide is a significant ‘distraction’ in attaining diversity;¹⁶⁷ supported by the fact that the corporate purpose debate and legislation is situated in-between shareholder-primacy and stakeholder models.¹⁶⁸ Thus, it is not about making opposing choices between treating firms as either public utilities or private entities,¹⁶⁹ but about a balanced solution,¹⁷⁰ to ensure that corporations exercise their immense power to disrupt the status quo.¹⁷¹

¹⁶³ A. Dhir, *Challenging...*, p. 75.

¹⁶⁴ M. McDonald, J. Westphal, *Access...*, p. 1188.

¹⁶⁵ *Women on Boards*, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/31480/11-745-women-on-boards.pdf, 26.12.2016, p. 6.

¹⁶⁶ *Ibid.*

¹⁶⁷ A. Wolfe, *The Modern...*, p. 1696.

¹⁶⁸ C. Ajibo, *A Critique...*, p. 56.

¹⁶⁹ A. Wolfe, *The Modern...*, p. 1696.

¹⁷⁰ E. Ferran, *Corporate...*, p. 385.

¹⁷¹ M. Pollak, *Catalyst Corporate Board Placement: New Seats at the Table* [in:] *Women on Corporate Boards of Directors*, eds. R. Burke, M. Mattiss, Kluwer 2010, p. 263.

Summary

The article considers the potential relation of the financial crisis to the development of corporate governance policies for the achievement of board heterogeneity. Board diversity has become critical in order to further the purpose of the corporation and this article claims that such an achievement would improve the functioning of the board of directors. The article contemplates the possibility of legislative and governmental interference in this traditionally unregulated area and, ultimately, concludes that genuine board heterogeneity cannot be achieved through the enactment of quotas. Moreover, the debates concerning the objective of the corporation can be a distraction to the achievement of genuine female representation on corporate boards, and so a balanced approach is needed to attain board diversity.

Keywords: board, corporate law, governance, diversity, directors