

Gender Quota for Boards of Corporations in Spain

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Abstract This article describes the limited success of the corporate governance self-regulation system aimed at achieving a balanced presence of women and men on the boards of listed companies. To provide empirical evidence, an analysis of the representation of female directors in Spain is presented. This study also aims to examine the effects of the recommendations on gender diversity contained in the Spanish Good Corporate Governance Code and in the Effective Equality Act 2007. The results show the scant presence of women on Spanish boards until 2013, but reports of 2013 reveal changes in that respect, and statistically significant differences can be observed compared with previous years, probably due to the amendment of the Companies Act 2010. However, the draft EU Directive on improving the gender balance seems to be the only way to reach effective gender equality.

Keywords Gender diversity · Female directors · Gender equality · Spain

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1 Introduction

Developing the constitutional principle of equality ('Spaniards are equal before the law and may not in any way be discriminated against on account of birth, race, sex, religion, opinion or any other personal or social condition or circumstance', s. 14 of the Spanish Constitution of 1978), Organic Act 3/2007 of 22 March for Effective Equality between Women and Men (Effective Equality Act 2007) has implied an unquestionable advance in the effective equality between women and men, at least in public administration and public undertakings. The Act is very ambitious¹ and goes beyond the transposition of the two main European Directives on equal treatment, i.e., Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment between men and women (recast)² and Directive 2004/113/EC implementing the principle of equality of treatment between women and men in the access to and supply of goods and services.³

The Act acknowledges that full recognition of formal equality before the law (s. 14 Spanish Constitution 1978), indisputably constituting a decisive step, has proved to be insufficient. The still scant presence of women in positions of economic responsibility stands as evidence of the fact that the attainment of full, effective equality between women and men is, even today, an unfinished task, and further legal instruments are necessary to complete this task in order to transform the principle of equality into effective practice.⁴

In general terms, the Act of 2007 imposes upon the Spanish Central Government a *balanced presence of women and men in the Central Government and its associated or subordinate public bodies*. Section 52 of the Act states: 'Where appointment is incumbent upon the Government, it will honour the principle of the balanced presence of women and men in the overall membership of the management bodies of the Central Government and its associated or subordinate public bodies.' More especially, in relation to the *appointment of Central Government representatives* (Section 54), the Central Government and its associated or subordinate public bodies will appoint their representatives in professional bodies and national or international expert or advisory boards in accordance with the principle of the balanced presence of women and men, barring duly reasoned,

¹ Article 1 of the Effective Equality Act reads as follows: 'Purpose of the Act. 1. Women and men are equal in human dignity, equal in rights and duties. The purpose of this Act is to ensure equal treatment and opportunities for women and men, in particular via the elimination of discrimination against women of whatsoever circumstances or background and in all areas of life, specifically in the political, civil, occupational, economic, social and cultural domains, so as to build a more democratic, fair and solidary society, pursuant to Articles 9.2 and 14 of the Constitution. 2. To this end, the Act establishes the principles governing the action of public authorities, regulates natural and corporate persons' public and private rights and duties and lays down measures designed to eliminate and correct all forms of discrimination on the grounds of sex in the public and private sectors.' (© Spanish Ministry of Justice).

² Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), OJ L 204, 26 July 2006.

³ Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment of men and women in the access to and supply of goods and services, OJ L 373, 21 December 2004.

⁴ Preamble to Act 3/2007, Part II.

justified and objective arguments to the contrary. As far as state-owned enterprises are concerned, the Central Government and its associated or subordinate public bodies will observe the principle of balanced presence in their appointments to boards of directors of companies in which the state has a holding. The Act defines ‘balanced presence’ as ‘the presence of women and men in the context in question in a manner such that neither sex accounts for more than sixty percent nor less than forty percent of the total.’⁵

Four years later, the Sustainable Economy Act of 4 March 2011 set forth the obligation for public undertakings and enterprises in which the state exercises control to adapt their daily management to the general principles of sustainability. In the elaboration of their annual corporate governance reports (ACGRs) these corporations and enterprises shall pay special attention to effective equality between women and men. They must promote the adoption of social responsibility principles and practices among their suppliers, with special attention to the promotion of women’s integration and effective equality between women and men.⁶ The entry into force of the Sustainable Economic Act in 2011 implied new transparency requirements in corporate governance for listed companies and public undertakings.⁷

In spite of this legislation imposing the principle of equality in the composition of boards of directors in public undertakings, in practice, only a few boards of directors of public undertakings have an equal representation of men and women. However, in state-owned enterprises, the rule of equal representation of men and women on the board of directors has been applied more effectively than in private companies; for example, the ENSA board is composed of 7 men and 4 women (6 men and 5 women in 2011).⁸ However, this is not a commonplace occurrence. Nevertheless, we highlight that equality is more respected in the public sector than in the private sector. The Government of Spain comprises 3 female and 11 male ministers (September 2016), a proportion that is not seen in any of the companies listed on the IBEX 35,⁹ where the average of women on boards was 16.6 % in 2014 (12.1 % in

⁵ See additional provision one of the Effective Equality Act of 2007.

⁶ Section 35 Act 2/2001 of 4 March on sustainable economy.

⁷ This Act is in line with the legislative initiatives at international level and non-binding regulations in Spain. (Dodd-Frank Act 2010, EU Green Book on Corporate Governance). See PWC, Report on boards of directors of listed companies (2012), <http://www.pwc.es> (last visited 20 September 2012).

⁸ Ensa, Annual Report 2011, <http://www.ensa.es> (last visited 5 March 2015). On the other hand, on the board of directors of the public RTVE Corporation there are 3 women and 6 men (<http://www.rtve.es> (last visited 5 March 2015) despite the fact that in 2012 its Regulatory Act was amended (Official Journal of 23 April 2012). Now its Section 10.1 lays down the following: ‘The board of directors of the RTVE Corporation will be composed of nine members, all of whom will be individuals with enough training and professional experience, with the aim to obtain equality between men and women in its composition.’ The State Company for Mail and Telegraphs has 6 women and 10 men on its board (4 women and 12 men in 2012) Sociedad Estatal de Correos y Telégrafos S.A., Informe Anual de Gobierno Corporativo (2012), at pp. 8–9, <http://www.correos.es> (last visited 5 March 2015). The board of the parent company of the state holding SEPI consists of 5 women and 12 men, <http://www.sepi.es> (last visited 5 March 2015).

⁹ IBEX 35 (acronym of ‘Índice Bursátil Español’, the Spanish stock exchange index), is a capitalisation-weighted index comprising the 35 most liquid Spanish shares traded in the continuous market (SIBE).

2012). This is certainly an improvement, since in the first five Governments of the current democracy, female participation was below 15 %.¹⁰

This article shows the failure of corporate governance self-regulation aimed at achieving a balanced presence of women and men on the boards of listed companies. After presenting, in the Introduction, the *status quaestionis* in public law, the article continues as follows: Sect. 2 describes the *status quaestionis* in private law. Subsequently, in order to provide some conclusions on these aspects, an analysis on the average proportion of women on the boards of the larger Spanish listed companies, using data from 2007 to 2012, is provided in Sect. 3. This Section also examines the effects of the recommendations on gender diversity contained in the Spanish Corporate Governance Code and in the Effective Equality Act 2007, and presents the empirical results. Section 4 concludes.

2 The *Status Quaestionis* of Private Law

2.1 The Effective Equality Act 2007 and Gender Equality on Companies' Boards of Directors: Non-Existence of Binding Rules Governing Gender Equality on Boards of Companies

There are no binding rules on gender equality on the boards of private companies, as opposed to the situation in public undertakings. The Effective Equality Act 2007 does not contain an obligation for private companies to observe the principle of gender equality (or at least a balanced presence of men and women) in the composition of the board of directors. Section 75 of the aforementioned Organic Act just stipulates that big companies¹¹ shall endeavour to include a sufficient number of women on their boards of directors to reach a balanced presence of men and women within 8 years of the entry into effect of the Act (i.e., 2015). This provision shall be taken into account when making appointments upon the expiration of the terms of directors appointed before this Act entered into force (2007). But no sanctions are provided for in case of breach of this regulation.

The measures in favour of equality provided by the Act fall within the framework of *moral suasion* through the award of a mark to companies that encourage equality within their labour force. The Act of 2007, in an effort to promote gender equality, created the Corporate Equality Mark (Section 50) to distinguish employers for outstanding achievements in the implementation of equal treatment and opportunity policies for their workers, which may be used in the company's commercial

¹⁰ Gender equality in the Spanish Government was achieved in 2004, under the Socialist Party, see Novo Vázquez (2011).

¹¹ The Act refers to this recommendation (Section 75) only for companies that can prepare abridged income statements (i.e., medium-sized or small companies). Section 258 of the Companies Act 2010 allows corporations to draw up abridged income statements if they meet at least two of the circumstances listed below regarding the closing date of two consecutive financial years: (i) total assets not over eleven million four hundred thousand euros, (ii) net annual turnover not over twenty-two million eight hundred thousand euros, and (iii) average headcount during the financial year not over two hundred and fifty employees.

dealings and for advertising purposes.¹² The criteria to be taken into account for the award of this mark include, among others, the balanced presence of women and men in the company's management bodies and occupational groups and categories, the adoption of equality plans or other innovative measures to further equality, and non-sexist advertising of company goods and services.¹³

Several authors consider that women's empowerment and gender equality can accelerate development; there is a high and positive correlation between the level of economic development and gender equality in a country. 'Therefore, it is not only a matter of rights but also an economic issue.'¹⁴

2.2 Companies' Disclosure Requirements

In relation to the notes to companies' financial statements, Section 260.8 of the Companies Act 2010¹⁵ imposes on companies the obligation to disclose, in their annual notes, the year-end distribution by gender of the company's personnel, broken down into a sufficient number of categories and levels, including senior management and directors, i.e., women members of the board. This rule applies to all companies, listed and non-listed, irrespective of their size.

It should be remembered that, in Spain, corporations follow the one-tier administration system (board of directors). The two-tier governance system (directors and a supervisory board) may be chosen by European Companies (SE)¹⁶ with registered offices in Spain.¹⁷

2.3 A Step Forward: The Amendment of the Companies Act in December 2014

The Companies Act 2010 was amended by Law 31/2014 of 3 December in order to strengthen the corporate governance of listed companies. In particular, due to the poor results of the corporate governance recommendations on gender diversity in

¹² Royal Decree 1615/2009 of 26 October regulates the obtaining and use of the 'Equality at the Company' mark. The mark is awarded on an annual basis and is in force for three years, though the awarded companies must submit an annual report to be assessed by the Directorate-General for Equal Opportunities of the Secretariat of State of the Ministry of Health, Social Services and Equality in order to prove that they maintain the level of excellence in equality issues for which they were awarded the mark. In 2011, several companies listed on the IBEX 35 obtained the mark (BBVA, Acciona, FCC, Indra) (see Ministerial Order SSI/499/2012 of 24 February, Official Journal 03/13/2011). In 2010, the mark was awarded to Banco Popular, Banco de Santander, Enagás, Endesa, Ferrovial, REE and Repsol (see Ministerial Order SPI/3138/2010 of 26 November, Official Journal 12/03/2010).

¹³ The Ministry of Labour and Social Affairs monitors the companies awarded the mark to ensure they implement equal treatment and opportunities policies regarding their workers on an ongoing basis, withdrawing the mark from non-compliant organisations (Article 50.5, Organic Act 2007).

¹⁴ Conde-Ruiz and Hoya (2015), at p. 2. Weighing up the arguments for and against, Szydlo (2015), at pp. 101–104.

¹⁵ Royal Legislative Decree 1/2010 of 2 July approving the consolidated text of the Companies Act, Official Journal 3 July 2010.

¹⁶ Council Regulation (EC) 2157/2001 of 8 October 2001 on the Statute for a European company (SE).

¹⁷ See Articles 455 to 494, Companies Act 2010.

the management body, this Law introduces the obligation for the board nominations committee to decide on a target for the representation of the underrepresented gender in the management body and to prepare a policy on how to increase the number of women on the company's board in order to meet that target (Article 529 *quindecies* Companies Act).

This obligation specifies the board's general mandate so as to ensure that the directors' selection processes are not subject to implicit bias that will make it difficult to select female directors, and to make a conscious effort to search for female candidates who have the required profile (s. 529 *bis* Companies Act).

3 Corporate Governance of Listed Companies and Other Bodies with Securities Admitted to Trading on a Regulated Market

3.1 Corporate Governance Rules and Regulations

The Companies Act 2010 and the Securities Market Act 1998 contain specific provisions for companies that issue debt securities and equity traded on a regulated market in any European Union Member State.¹⁸ These companies shall disclose their corporate governance report once a year. Section 540 of the Corporates Enterprise Act (amended by Law 31/2014 of 3 December) details the content of the corporate governance report for listed companies. The reform has increased the level of information on gender diversity on the board. In the 2015 corporate governance report, the board shall provide information on the arrangements adopted, if any, for promoting the balanced participation of men and women in the management body and explain the 'degree of application of the corporate governance recommendations' as well as provide 'an explanation, in any case, where the recommendations are not followed'.¹⁹ So, the principle of 'comply or explain' is laid down in Spanish corporate governance legislation.

The Spanish regulation of corporate governance has its origins in the voluntary codes of conduct adopted in Spain in the 90s, following the model of the UK Corporate Governance Code 1992 (Cadbury Report²⁰). The first relevant Spanish corporate code, dating back to 1996, neither included references to the promotion of the presence of women on the board of directors, nor made general mention of women's participation in the management of a public company.²¹

¹⁸ Law 24/1988 of 27 July on the securities market.

¹⁹ Section 540, paragraph 4, letter g), Companies Act.

²⁰ Committee on the Financial Aspects of Corporate Governance and Gee and Co. Ltd, Report of the Committee on the Financial Aspects of Corporate Governance (1992), http://www.ecgi.org/codes/code.php?code_id=13 (last visited 15 June 2012).

²¹ Círculo de Empresarios, Una propuesta de normas para un mejor funcionamiento de los Consejos de Administración [A proposal for regulations for a better functioning of boards of directors] (1996), <http://www.ecgi.org/codes/documents/empres.pdf> (last visited 15 June 2010).

The situation was similar in the Code of Good Governance of February 1998 (Olivencia Code), drawn up by the Special Commission set up to consider a code of ethics for companies' boards of directors.²²

Almost 5 years later, the next Corporate Governance Code, the Aldama Report of 2003,²³ prepared on the Government's initiative, did not include references to gender equality in the board composition of listed companies either.

In Spanish law, the first reference to gender diversity in the board of directors of listed companies was made in 2006, following the creation of a Special Working Group (on 25 July 2005) by the Spanish Government in order to advise the Comisión Nacional del Mercado de Valores (National Securities Market Commission—CNMV) on the elaboration of a new corporate governance code.²⁴ This Special Working Group approved, in January 2006, the draft of the Unified Code on Good Corporate Governance. This draft harmonises and updates the Olivencia and Aldama Report recommendations regarding the good governance of listed companies. The final report of the Working Group was approved on 19 May 2006 and is commonly quoted as the 'Conthe Code' or Unified Good Governance Code 2006.²⁵

The Code marks a significant advance in the recognition in Spain by a public body (CNMV) of the importance of female presence on boards of directors of listed companies. Three new recommendations were introduced in this regard, as we can read in the draft of the Conthe Code. The new recommendations

²² On 28 February 1997, the Spanish Cabinet, at the proposal of the Second Vice-President of the Government and Minister of Economy and Finance, resolved to create a Special Commission to consider a code of ethics for companies' boards of directors. By means of a Ministerial Order, dated 24 March 1997, in compliance with the Cabinet's decision, the Second Vice-President of the Government and Minister of Economy and Finance appointed the members of the Special Commission, chaired by Manuel Olivencia. The final report ('The governance of listed companies') is dated 26 February 1998, http://www.ecgi.org/codes/code.php?code_id=110 (last visited Jan 15, 2011).

²³ Report of the Special Commission to foster transparency and security in the markets and in listed companies, dated 8 January 2003, chaired by Enrique de Aldama y Miñón. On 19 June 2002, the Spanish Cabinet adopted a resolution establishing a Special Commission 'to study the criteria and guidelines that should apply to companies which issue securities and instruments admitted to listing on organised markets in their relations with consultants, financial analysts and other companies, persons or entities which assist them or provide professional services to them, and those which should apply among the latter, in order to increase transparency and security of the financial markets in the light of the structural changes, the current globalised economy and the trends in international markets. The Commission must also analyse the current status and degree of application of the Code of Good Governance for Listed Companies.'

²⁴ Section one f) of Order ECO/3722/2003 of 26 December calls on the CNMV to publish 'a single text with existing corporate governance recommendations' for listed companies to use as a benchmark when reporting their compliance or otherwise with corporate governance recommendations in their annual corporate governance report, as mandated by the Securities Market Act (Law 31/2014 repealed the regime of the Securities Market Act on Annual Corporate Governance Reports of Listed Companies). In the Government Agreement of 25 July 2005, creating the Special Working Group, the Government orders the Working Group to take into account other recommendations made by the European Commission and international organisations (such as the OECD).

²⁵ In June 2013, the CNMV published an updated version of the Conthe Code, which showed no progress on gender diversity on corporate boards. The Unified Good Governance Code, the Appendix and other related documents are available at the CNMV web site: <http://www.cnmv.es/portal/Legislacion/COBG/COBG.aspx> (last visited 1 November 2013).

‘start from the conviction that a good gender mix is not just an ethical-political or corporate social responsibility question but also an efficiency builder, in the medium term at least: neglecting the potential business talent of 51 % of the population—women—cannot be globally efficient for listed companies. Recommendations also assume that men domination of senior posts is, in some way, self-perpetuating, possibly fuelled by hysteresis and network externalities (the “old boys’ network”). This makes it likelier that male appointments will continue to predominate, and suggests the diversity deficit will not go away without a directed effort.’²⁶

The Special Working Group also recognises that the gender diversity recommendations of the Unified Code are aimed strictly at improving the performance of boards of directors, and do not address other changes that may be desirable from a ‘social responsibility’ standpoint (for example, disclosure of salary differences or the company’s adoption of policies to help reconcile family and working life).²⁷

These ideas appear again in the final version of the Unified Code,²⁸ where Recommendation 15 states:

‘When women directors are few or non-existent, the board should state the reasons for this situation and the measures taken to correct it; in particular, the Nomination Committee should take steps to ensure that a) the process of filling board vacancies has no implicit bias against women candidates; b) the company makes a conscious effort to include women with the target profile among the candidates for board positions.’

The reference in the draft of the Unified Code to a section on gender diversity in the annual corporate governance report, with detailed information on (i) the year-end gender distribution of company staff, with a detailed breakdown by occupational categories and levels, including senior officers and directors, and (ii) the changes occurring in the said distribution over the course of the year, had disappeared in the final version of May 2006, probably because this recommendation was turned into a legal obligation through amendment of the Companies Act 1989 by the Effective Equality Act 2007.²⁹

²⁶ Unified Good Governance Code (draft) (2006), at p. 12, http://www.ecgi.org/codes/documents/unified_code_jan06_en.pdf (last visited 21 May 2014).

²⁷ Ibid, at p. 13.

²⁸ Under the Title ‘Gender Diversity’, the introduction to Recommendation 15 reads as follows: ‘A good gender mix on boards of directors is not just an ethical-political or “corporate social responsibility” question; it is also an efficiency objective which listed companies might wish to work towards in the mid term at least. Neglecting the potential business talent of 51 % of the population—women—cannot be an economically rational conduct for our country’s leading corporate names. This is amply borne out by the experience of the last few decades which have seen women occupying a growing place in the business world. But more effort is required for this presence to extend into the senior executive and directorship spheres. With this in mind, the Code calls on listed companies with few women on their boards to actively seek out female candidates whenever a board vacancy needs to be filled, especially for independent directorships.’

²⁹ This obligation currently appears in Article 260.8 of the Companies Act, but without the reference included in the draft Unified Code to the changes occurring in the gender distribution of company staff over the course of the year.

A crucial point is the voluntary nature of the Unified Code, subject to the comply-or-explain principle. Its recommendations are not binding on listed companies, but if they are not followed, the company must provide a reasoned explanation for any deviation.³⁰ Below, we will see some examples of explanations regarding the lack of gender diversity on the board of directors.

The new Good Governance Code of Listed Companies (February 2015), approved following the amendment of the Companies Act by Law 31/2014 of 3 December, recommends the adoption of a directors' selection policy that promotes the objective of at least 30 % of women on the board. The companies' annual report should comply or explain non-compliance with this target.

This Code recognises, once more, the insufficient number of women on boards and recommends the explicit mention in the directors' selection policy of a gender diversity target, including concrete measures for its achievement, following the provision contained in s. 529 *quindecies* of the Companies Act.

Circular 4/2007 of the CNMV of 27 December adopted a new model of the annual corporate governance report for listed companies.³¹ Point B.1.27 of Annex I (ACGR model) reads as follows:

'In the event of few or no women directors, explain the reasons and the initiatives taken to correct this situation. In particular, indicate whether or not the Appointments and Compensation Commission has established procedures to prevent selection processes from being implicitly biased and raising obstacles for the selection of women directors and that it deliberately seeks candidates that meet the required profile indicating the main procedures.'

The listed company should fulfil this point B.1.27 even if it complies fully, partially or not at all with the recommendation on gender diversity on the board, in accordance with paragraph F, item 15 ACGR. If the company does not comply with the recommendation, because there is no woman member on the board, the company should explain the reasons and list the initiatives taken to correct this situation.³² Order ECC/461/2013 of 3 March 23 determines the new content and structure of the annual corporate governance report for listed companies. Circular 5/2013 of the CNMV of 12 June encloses the new ACGR model. The information of point B.1.27 is now included in sections C.1.5 and C.1.6. These provisions have not been amended following the entry into force of s. 541 of the Companies Act (introduced by Law 31/2014).

The 50.4 % of firms reporting zero or near-zero presence of female directors admit that they have taken no steps to remedy this situation. They do not comply with the Corporate Governance Code's recommendations on this point. Most explain that their selection procedures are based on candidates' abilities and experience, and they do not make a conscious effort to find women with the target profile. Despite having improved from 35.6 % in 2007 to 49.6 % in 2011, full

³⁰ Unified Good Governance Code, at p. 7.

³¹ Official Journal of 14 January, 2008. This Circular was repealed by Circular 5/2013 of 12 June. Listed companies shall prepare their annual reports in 2014 according to the Annexes of this Circular.

³² See Preamble to Circular 4/2007.

compliance with this recommendation still lags 32 points behind the average compliance with the Code as a whole.³³

With the aim of analysing compliance with the recommendations, information has been compiled from the IBEX 35 companies in relation to subparagraph B.1.27 of Circular 4/2007 for Annual Reports on Corporate Governance, including the years 2007–2012. For 2013, in line with Circular 5/2013, the information has been collected in regard to subparagraphs C.1.5 and C.1.6. The financial reference period is 2007–2013 (see Table 1). While 56.8 % of the companies comply with the recommendations, there is still a significant percentage that either do not (18.2 %) or only partially (18.6 %) comply. A percentage of 6.4 % consider this subparagraph not to be applicable.

The companies listed on the IBEX 35 that, in 2011, had no female representation on their board of directors were Endesa S.A, Gas Natural S.A. and Técnicas Reunidas S.A. Their annual reports on corporate governance of 2011 included very general comments that avoided a clear and direct answer.³⁴ In 2012, these companies still had no women on their board of directors, and they were joined by another company, Sacyr Vallermoso S.A. The situation in 2013 was that Endesa ceased to be listed on the IBEX 35 and the other three companies still had no women on their boards.

The approach of the Spanish law to this issue does not encourage the presence of women on the board of directors because it allows companies, if they consider it appropriate, not to provide details regarding the absence of women on their board. But, at least, information about the presence or absence of women on the board of directors of listed companies is public and accessible to everybody on their web

³³ CNMV, Informe de Gobierno Corporativo de las entidades emisoras de valores admitidos a negociación en mercados secundarios oficiales, IAGC, 2011, at p. 87.

³⁴ In its Corporate Governance Annual Report 2011, Endesa acknowledged that it had no female directors: ‘However, Endesa does have an Equality Plan in place, reasserting its commitment to ensuring compliance with the gender equality principle.’ Article 15 of the Endesa Board of Directors’ Regulations stipulates: ‘The Appointments and Remuneration Committee will be entrusted with, among other functions, the functions of reporting and proposing the appointment of the members of the Board of Directors, whether in the event of co-optation or for proposal to the General Shareholders’ Meeting guaranteeing that the selection procedures do not suffer from implicit flaws which impair the selection of female Directors’ (Endesa Corporate Governance Annual Report 2011, at p. 20). It is doubtful that this company (like the other two companies mentioned earlier) actively pursues a policy encouraging the presence of woman on the board of directors. It is highly unlikely that, currently, there are no women who meet the professional profile enabling them to carry out the duties as members of the board in these companies, at least, as independent members of the board. More briefly, Gas Natural only ticks the ‘yes’ box to question B.1.27 (‘In particular, indicate whether or not the Appointments and Remuneration Committee has laid down procedures to ensure that the selection processes are not subject to implicit bias that prevents the selection of female Directors and deliberately look for female candidates with the required profile.’). In relation to the main procedures it only says that ‘Article 31.2 of the Regulations of the Board of Directors lays down the Appointments and Remuneration Committee obligation’s to ensure that “[...] when covering new vacancies, selection processes shall apply that are not subject to implicit bias that prevents the selection of female Directors, where the potential candidates shall include, under the same conditions, women that meet the professional profile being sought” ’ (Gas Natural Fenosa, Annual Corporate Governance Report 2011, at p. 26). And even more briefly, Técnicas Reunidas’ answer to question B.1.27 in its ACGR 2011 is: ‘In the selection process of new members of the boards, the company follows procedures that are not subject to implicit bias that hampers the selection of female Directors’ (Técnicas Reunidas, Annual Corporate Governance Report 2011, at p. 27).

Table 1 Degree of compliance with corporate governance recommendations *Source* Own elaboration

| | Frequency | Percent | Cumulative percent |
|--------------------|-----------|---------|--------------------|
| Valid | | | |
| Full compliance | 134 | 56.8 | 56.8 |
| Partial compliance | 44 | 18.6 | 75.4 |
| Non-compliance | 43 | 18.2 | 93.6 |
| Not applicable | 15 | 6.4 | 100 |
| Total | 236 | 100 | |

IBEX 35. Period: 2007–2013

page (where the annual corporate governance reports are published, s. 61 *bis* Securities Market Act). This constitutes a first step towards knowing more about the representation of women on boards of directors and to adopting measures encouraging an increase in their numbers.

As noted earlier, Circular 4/2013 of 13 June presents a new model of the annual corporate governance report.³⁵ This new model introduces the express obligation to detail the evolution of the management body's composition over the last 4 years. Besides, information on the implementation of measures on gender equality should be provided, if appropriate, that aim at including in the board of directors a number of women that allows achieving a balanced representation of men and women. On the other hand, we can highlight the current requirement that the board explain the measures which have been agreed by the Nominations Committee to ensure that the selection procedures do not include any implicit bias preventing the selection of female directors, and that the company deliberately searches for and includes women with the appropriate profile among the potential candidates. Furthermore, when filling new vacancies, the company shall deliberately search for and include women who meet the required professional profile. This means progress in the provision of information about the reasons why there is no balanced representation of women and men on boards of directors.

Table 2 shows the average compliance by year, with a value of 1 for full company compliance, 2 for partial compliance, 3 for no compliance at all, and 4 for 'not applicable'. Very slowly, companies are beginning to comply with the recommendations, except in 2010 compared to the previous year, and in 2013.

As expected, companies with more women are those that comply with several recommendations of the Code (Fig. 1). The box-and-whisker plot shows two outliers among the companies not complying with the recommendations. Case 183 is Caixabank S.A., with 17.65 % women (3 of the 17 board members) in 2008. In the CNMV report this company is shown with a value of 3, which means it does not comply, while in fact it has a higher than average percentage of women on its board. Case 216 (not applicable) is the same company that, a year earlier, in 2007, had a

³⁵ This Circular details Ministerial Order ECC/461/2013, dated 20 March, which lays down the content and structure of the Corporate Governance Annual Report, the Annual Report on Remunerations, and other information instruments of listed companies, savings banks and other bodies that issue securities in official securities markets. The Circular requires that a comparative chart be filled in showing the number of women members of the board over the last four years, as well as their position: executive, independent or external director. The Corporate Governance Annual Report 2014 must be completed on the basis of this Circular.

Table 2 Degree of compliance with corporate governance recommendations *Source* Own elaboration

| | Mean | N | Std. deviation |
|------|------|----|----------------|
| 2007 | 1.97 | 33 | 1.045 |
| 2008 | 1.91 | 33 | 1.011 |
| 2009 | 1.73 | 33 | .977 |
| 2010 | 1.78 | 32 | .975 |
| 2011 | 1.66 | 35 | .906 |
| 2012 | 1.60 | 35 | .881 |
| 2013 | 1.78 | 35 | .962 |

IBEX 35. Mean compliance

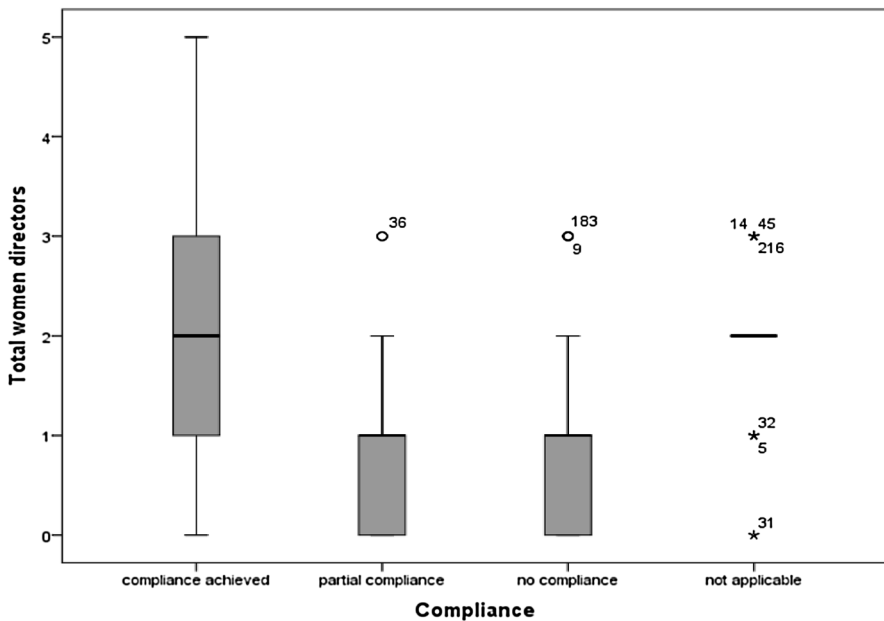


Fig. 1 Box plots displaying distributions of total women directors by degree of compliance with corporate governance recommendations. *Source* Own elaboration

board of 15 members, among whom three women, and thus the percentage of female directors was 20 %. The company in question considered point B.1.27 not applicable. Case 9 is identified as an extreme outlier in the box-and-whisker plot (Fig. 2), Banco Santander S.A., which, in 2013, had a board size of 13 members (including 3 women, representing 23.08 %). This organisation is shown to comply with the recommendations. The Bank gives the following explanation:

‘This does not apply since there are several female directors sitting on the board of directors. Refer to sections C.1.5 and C.2.2 of this report for more information on the female presence on the board and its committees.’³⁶

³⁶ Banco de Santander S.A., Annual Corporate Governance Report 2013, at p. 20.

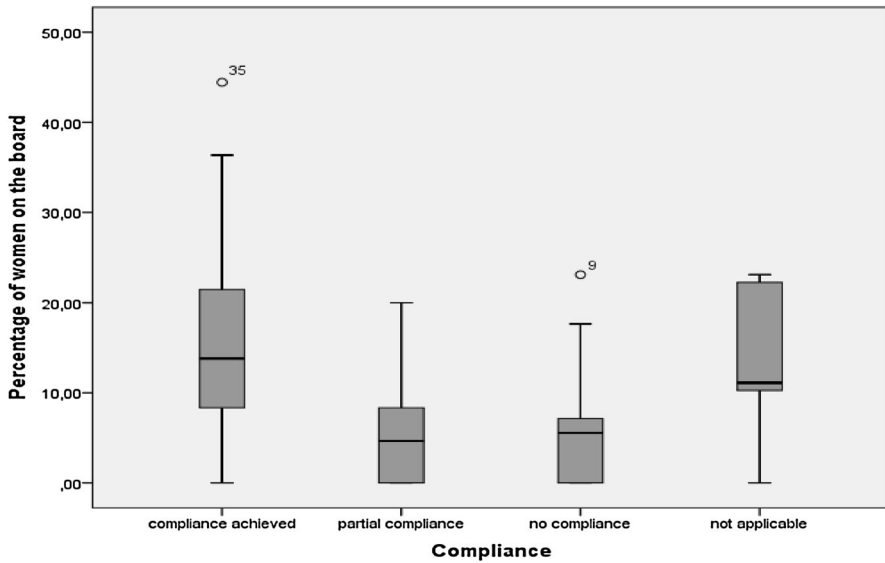


Fig. 2 Box plots displaying distributions of percentage of women board members by degree of compliance with corporate governance recommendation. *Source* Own elaboration

And Section C.1.5 states:

‘A European Commission study with figures to April 2013 found that the average percentage of female directors in major listed European Companies in the 27 European Union countries was 16.6, and 14.5 % for Spain. Both the appointments and remuneration committee and the board of directors are aware of the importance of promoting equal opportunities for men and women and the benefits of appointing women with the necessary abilities, dedication and skills for the job to the board of directors. This attitude is reflected in the current composition of the board (25 % female directors; 18.8 % at year-end 2013), which exceeds the aforementioned European average. The percentage of women on our board committees also exceeds the aforementioned average of 16.6 % for the boards of European companies.’³⁷

3.2 The Path to Gender Equality

3.2.1 Some Data on Listed Companies

Currently, one of the aspects where there has been most progress with regard to board composition is gender diversity, although this is an area of improvement

³⁷ Ibid.

Table 3 Summary statistics for women directors *Source* Own elaboration

| | Total directors | Total women directors | Percentage of women on boards |
|----------------|-----------------|-----------------------|-------------------------------|
| N | | | |
| Valid | 236 | 235 | 236 |
| Missing | 0 | 1 | 0 |
| Mean | 14.26 | 1.61 | 11.52 |
| Median | 14.00 | 1.00 | 10.00 |
| Mode | 15 | 1 | .00 |
| Std. deviation | 3.42 | 1.22 | 8.72 |
| Minimum | 8 | 0 | .00 |
| Maximum | 24 | 5 | 44.44 |
| Sum | 3365 | 379 | 2720.02 |

Period: 2007–2013

which still has a long way to go (the aim is 40 % of women on the board of directors).³⁸ In 2006, only 5 % of the board members were women.³⁹

During the period 2007–2013 (see Table 3), the average percentage of women was 11.52 % with a standard deviation of 8.72. The minimum rate was 0 % women and the maximum 44.44 %. The average number of women on the same board was 1.61. The most frequent score in the data set is one or zero female board members. The highest number of women on the board was 5. Of a total of 3365 board members during this period, only 379 were women.

In the period 2007–2013, 83.8 % of the IBEX 35 companies had at least one woman on the board or, in other terms, 16.2 % of the boards had no female presence (Table 4). Fomento de Construcciones y Contratas S.A. had more women on its board in absolute numbers during the period analysed (5, except in 2010, when this was 4). 38.1 % of the companies had only one female board member. In 54.5 % of the companies, there were no women board members, or only one.

Table 5 shows the evolution of the percentage of women in each year analysed. The lowest percentage of women on boards was 6.93 % in 2007, while the highest was observed in 2013, i.e., 16.22 %. The percentage of women multiplied by 2.3 in 6 years. The highest growth took place between 2012 and 2013.

Given the above results, we have examined, through analysis of variance, if statistically significant differences in the percentage of women on boards existed between 2013 and the remainder of the years (2007–2012). In Table 6, the results of

³⁸ In 2011, 91.4 % of the IBEX 35 companies had at least one woman on the board, an increase of 8.5 percentage points compared to the previous year. This is in line with the upward trend observed since 2007. In addition, the number of women board members rose by 15.1 % in 2010, accounting for 12.1 % of the board members of listed companies, compared with 10.6 % in the previous year. This percentage brings Spain very close to the United Kingdom (13 %), and close to the then EU-16 (14 %) and the United States (16 %). See PWC, Report on boards of directors of listed companies, June 2012, at p. 38, <http://www.pwc.es> (last visited 20 September 2012).

³⁹ Grupo Inforpress, Centro Internacional Trabajo y Familia (ICWF) (2014), at p. 5.

Table 4 Total women directors *Source* Own elaboration

| | Frequency | Percent | Valid percent | Cumulative percent |
|---------|-----------|---------|---------------|--------------------|
| Valid | | | | |
| 0 | 38 | 16.1 | 16.2 | 16.2 |
| 1 | 90 | 38.1 | 38.3 | 54.5 |
| 2 | 58 | 24.6 | 24.7 | 79.1 |
| 3 | 30 | 12.7 | 12.8 | 91.9 |
| 4 | 12 | 5.1 | 5.1 | 97.0 |
| 5 | 7 | 3.0 | 3.0 | 100.0 |
| Total | 235 | 99.6 | 100.0 | |
| Missing | | | | |
| System | 1 | .4 | | |
| Total | 236 | 100.0 | | |

Period: 2007–2013

Table 5 Descriptive statistics of women board members by year *Source* Own elaboration

| | N | Mean | Median | Mode | Std. deviation | Minimum | Maximum |
|------|----|-------|--------|--------------------|----------------|---------|---------|
| 2007 | 33 | 6.93 | 6.67 | 0.00 | 6.73 | 0.00 | 23.81 |
| 2008 | 33 | 9.05 | 7.14 | 0.00 | 7.80 | 0.00 | 27.27 |
| 2009 | 33 | 10.51 | 8.33 | 0.00 | 8.31 | 0.00 | 30.00 |
| 2010 | 32 | 11.25 | 9.55 | 0.00 | 7.69 | 0.00 | 27.27 |
| 2011 | 35 | 12.40 | 10.53 | 13.33 ^a | 8.11 | 0.00 | 30.77 |
| 2012 | 35 | 13.84 | 14.29 | 0.00 | 9.16 | 0.00 | 36.36 |
| 2013 | 35 | 16.22 | 15.00 | 14.29 | 10.02 | 0.00 | 44.44 |

Period: 2007–2013

^a Multiple modes exist. The smallest value is shown

Table 6 Descriptives of percentage of women board members

| | N | Mean | Std. deviation | Std. error | 95% confidence interval for mean | | Minimum | Maximum |
|-----------|-----|-------|----------------|------------|----------------------------------|-------------|---------|---------|
| | | | | | Lower bound | Upper bound | | |
| 2007–2012 | 201 | 10.71 | 8.23057 | .58 | 9.56 | 11.85 | .00 | 36.36 |
| 2013 | 35 | 16.22 | 10.02025 | 1.69 | 12.78 | 19.66 | .00 | 44.44 |
| Total | 236 | 11.52 | 8.71964 | .57 | 10.40 | 12.64 | .00 | 44.44 |

Period: 2007–2012 and 2013

the descriptive analyses are reported, while the outcome of the analysis of variance is shown in Table 7.

The tests conclude that significant differences in the variability of the mean percentage of women on boards existed between both groups of firms; one group is

Table 7 ANOVA

| | Sum of squares | df | Mean square | F | Sig. |
|----------------|----------------|-----|-------------|--------|------|
| Between groups | 905.321 | 1 | 905.321 | 12.489 | .000 |
| Within groups | 16962.232 | 234 | 72.488 | | |
| Total | 17867.553 | 235 | | | |

Percentage of women board members. Period: 2007–2012 and 2013

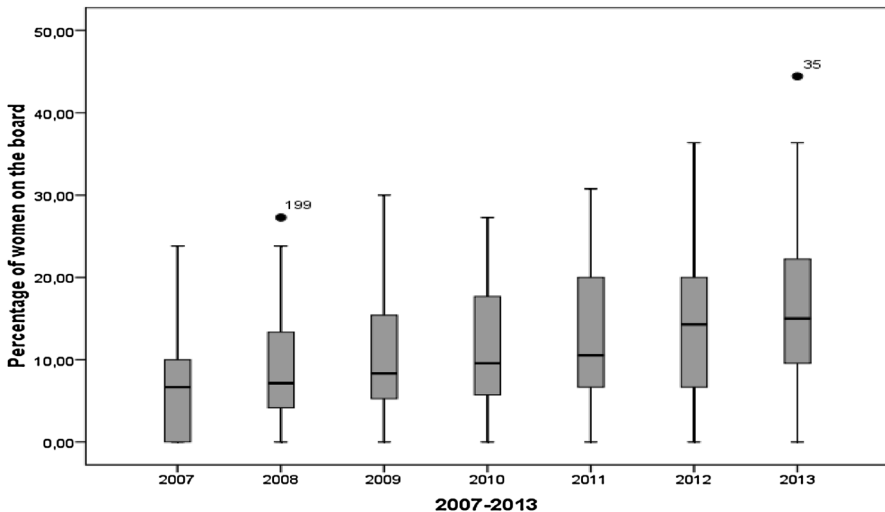


Fig. 3 Box plots displaying percentage of women board members. *Source* Own elaboration

composed of companies listed on the IBEX 35 during 2007–2012 and the other of those listed in 2013.

Six box plots are shown in Fig. 3, one for each year analysed, regarding the percentage of women on boards. We can clearly see the evolution in the percentage of female directors. One outlier, with a value of 27.27 % (3 women on a board of 11 members), has been identified for the year 2008. It corresponds to Red Eléctrica Corporación S.A. The other outlier corresponds to Jazztel plc, in 2013, which had the highest percentage of women, namely 44.44 % (4 women on a board of 9 members).

The box plot in Fig. 4 shows the number of female directors. The plot also shows the case numbers of the 11 outliers and one extreme outlier. The majority of outliers correspond with two companies: Fomento de Construcciones y Contratas S.A. and Caixabank S.A. Fomento de Construcciones y Contratas S.A. had an extreme value (220) in 2007. That year, the company stood out from the rest by having 5 women on a board of 21 (23.81 %). 2008 presents an outlier (case 187) with the same figures as the previous year. In 2009, the number of women was still 5 while the size of the board decreased by one member (case 155), increasing the percentage of women to 25 %. In 2010, a woman left the board, bringing down the percentage of

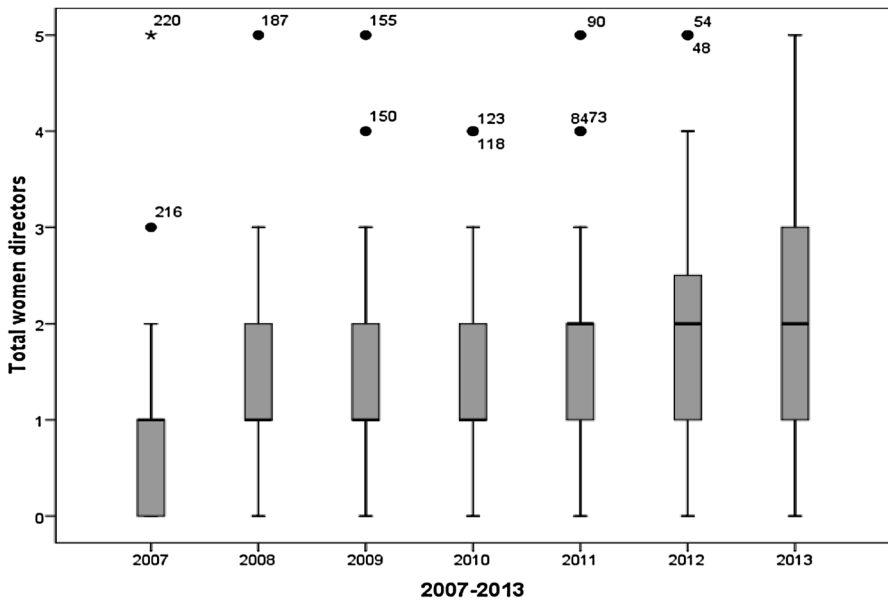


Fig. 4 Box plots displaying number of women directors. *Source* Own elaboration

women to 20 % (case 123). In 2011 (case 90) and 2012 (case 54) the figure of 5 women was reached again, while the board size decreased to 18 members, bringing the percentage of women to 27.78 %. Another company with the largest number of outliers is Caixabank S.A. In 2007, its board had three women on a total of 15 members (case 216), thus bringing the percentage of women to 20 %. In 2009, the number of women increased to 4, on a board of 20, representing 25 % women (case 150). In 2010 and 2011, the board size was 17 members, 4 of whom were women, representing 23.53 % women (cases 118 and 84 respectively). In 2012, two new members acceded to the board, one of whom female, thus bringing the percentage of women to 26.32 % (case 48). Another outlier refers to Acciona S.A. (case 73). This company stands out because, in 2011, the presence of women reached a percentage of 30.77 % (4 of its 13 board members being women).

Nevertheless, as a counterpoint, we should note that the presence of women with an executive role remained unchanged since 2010.⁴⁰ In fact, there was only one female chairperson of the board in the IBEX 35-listed companies in 2012 (Día) and two in 2013 (Día and Fomento de Construcciones y Contratas). But the upward trend regarding the presence of women on boards of directors observed in recent years was consolidated in 2011.

Regarding the director type in the period 2008–2011, there was an apparent increase in the proportion of independent directors, from 11.7 % in 2008 to 14.9 % in 2011; in 2011, the positions held by female directors on governance bodies were

⁴⁰ CNMV, Quarterly Report III (2012), at pp. 134, 143, <http://www.cnmv.es/portal/Publicaciones/BoletinCNMV.aspx> (last visited 5 November 2013).

Table 8 Descriptive statistics *Source* Own elaboration

| N = 35 | Minimum | Maximum | Sum | Mean | Std. deviation |
|--|---------|---------|-----|-------|----------------|
| Women executive directors | 0 | 1 | 2 | 0.06 | 0.24 |
| Women non-executive directors | 0 | 5 | 59 | 1.69 | 1.18 |
| Men executive directors | 0 | 9 | 84 | 2.40 | 1.77 |
| Men non-executive directors | 2 | 19 | 360 | 10.29 | 3.46 |
| Committees chaired by women | 0 | 2 | 10 | 0.29 | 0.52 |
| Companies that had at least one woman on their board | 0 | 1 | 32 | 0.91 | 0.28 |

Boards of directors 2011. Companies IBEX 35

similar to the levels of 2010, being 10.8 % women on the appointments committee and 11.7 % on the audit committee.⁴¹

In 2011, the number of women executive directors was 2, which implies a mean of 0.06 versus that of men executive directors amounting to 2.4, representing a total of 80 men in this category (Table 8). It should also be noted that the number of committees chaired by women was only 10, i.e., a mean of 0.29.

Regarding the nationality of female board members in the IBEX 35-listed companies, in 2013, there were 80 female directors. A total of 12 were foreign: 5 women from EU countries, 1 Asiatic, another with dual citizenship (Canada and UK), 3 North American and 3 Latin American.⁴² With regard to the education of these women in 2013, 42 had a degree in economics and business, 17 in law, 11 in science, 1 in psychology, 2 in engineering and 5 in other fields.⁴³

Table 9 lists the companies with the highest percentage of women directors in the last year available, i.e., 2013. None of them had a number of women equal to or greater than men on their boards. In 3 of the major Spanish companies the percentage of female board members was zero (Gas Natural, Sacyr Vallermosto and Técnicas Reunidas). Only one company complied with the recommendation of the European Union, i.e., Jazztel with 44.44 % women.

Although women are under-represented, the arguments in favour of gender diversity on boards vary. According to Bilimoria,⁴⁴ women facilitate communication in the decision-making process. Research suggests that with diversity on boards, companies are more innovative.⁴⁵

The report led by Lord Davies in United Kingdom states:

‘There is a strong business case for balanced boards. Inclusive and diverse boards are more likely to be effective boards, better able to understand their customers and stakeholders and to benefit from fresh perspectives, new ideas,

⁴¹ CNMV, Quarterly Report I (2013), at p. 123, <http://www.cnmv.es/portal/Publicaciones/BoletinCNMV.aspx> (last visited 16 November 2013).

⁴² Grupo Inforpress, Centro Internacional Trabajo y Familia (ICWF) (2014), at p. 21.

⁴³ *Ibid.*, at p. 22.

⁴⁴ See Bilimoria (2000), at pp. 25–40.

⁴⁵ Miller and Triana (2009), at pp. 755–786. See also Nielsen and Huse (2010), at, pp. 136–148.

Table 9 Extreme values percentage of women board members *Source* Own elaboration and Observatorio de la Responsabilidad Social Corporativa* (2014)

| Name company | Value 2013 | Ranking CRS 2012* | Score CRS (0–4) 2012* |
|---|------------|-------------------|-----------------------|
| Highest | | | |
| 1 Jazztel plc | 44.44 | – | – |
| 2 Red Eléctrica Corporación S.A. | 36.36 | 1 | 1.94 |
| 3 Acciona S.A. | 30.77 | 23 | 1.17 |
| 4 Iberdrola S.A. | 28.57 | 5 | 1.62 |
| 5 Fomento de Construcciones y Contratas S.A. | 27.78 | 30 | 0.98 |
| Lowest | | | |
| 1 Gas Natural SDG S.A. | .00 | 4 | 1.63 |
| 2 Sacyr Vallehermoso S.A. | .00 | 28 | 1.02 |
| 3 Técnicas Reunidas S.A. | .00 | 33 | 0.62 |
| 4 Telefónica S.A. | 5.56 | 3 | 1.65 |
| 5 Acs. Actividades de Construcción y Servicios S.A. | 5.88 | 24 | 1.16 |

vigorous challenge and broad experience. This in turn leads to better decision making.⁴⁶

In order to find an explanation for why some Spanish companies are doing better than others with respect to gender diversity, we have analysed whether there is a relationship between corporate governance practices and the presence of women on boards. That is, if firms with better corporate governance practices are those that have more women on their boards. To verify this relation, we have taken data from the Observatorio de Responsabilidad Social Corporativa (Corporate Social Responsibility Observatory).⁴⁷

The report evaluates the quality of the information available on several aspects of corporate social responsibility (CSR) of the companies that make up the IBEX 35, more specifically the practices regarding environment, human and labour rights, community, corruption, consumption, and management systems. The ‘CSR Ranking’ column (Table 9) indicates the score obtained in this study. The ‘Score CSR (0–4)’ column indicates the points obtained, where 0 means that the quality of the information found is so low as to be non-existent (practically no information was found about the aspects evaluated in the analysed documentation) and 4 that relevant, descriptive and detailed information related to all evaluated aspects was found, covering all levels of the organisation. These columns do not contain information about Jazztel, the company with the highest percentage of women, because during the year under review that company was not listed on the IBEX 35.

⁴⁶ Department for Business, Innovation & Skills (2011) Women on boards, at p. 7, <https://www.gov.uk/government/publications/women-on-boards-review> (last visited 8 April 2015).

⁴⁷ Observatorio de Responsabilidad Social Corporativa, La Responsabilidad Social Corporativa en las memorias anuales de las empresas del IBEX 35. Análisis del ejercicio 2012 (released in 2014), at p. 42.

According to these results, the company Red Eléctrica, coming first in the CSR ranking when excluding Jazztel, would be the firm with the highest percentage of women on its board (36.36 %). However, being socially responsible does not seem to be directly related to parity since the worst positioned companies regarding gender diversity, such as Telefónica or Gas Natural, ranked third and fourth respectively in corporate social responsibility practices.⁴⁸

In 2011, 66.4 % of the boards of listed companies in official secondary markets had female members. This means an increase of 2.3 percentage points in comparison with 2010.

However, the 50.4 % of firms reporting zero or near-zero presence of female directors admit that they have taken no steps to remedy this situation. They do not comply with the Good Governance Code's recommendation on this point. Most explain that their selection procedures are based on candidates' abilities and experience, and they do not make a conscious effort to find women with the target profile. Despite having improved from 35.6 % in 2007 to 49.6 % in 2011, full compliance with this recommendation still lags 32 points behind the average for the Code as a whole.⁴⁹ In 2014, three companies had no women on their board (Gas Natural Fenosa, Sacyr and Técnicas Reunidas).

Regarding issuers of traded securities other than shares, women directors held 8.1 % of the board positions in 2011 (8.2 % in 2010). One cooperative reported 66.7 % and another, from the industrial sector, 33.3 %. If we exclude these two, the percentage of women directors drops back to 5.4 % (4.1 % in 2010). Twenty-two companies, moreover, had not one woman on their board (almost representing 60 % of the total). As in previous years, companies reported no female directors in the executive category.⁵⁰

Women kept up their presence on company boards: 10.4 % vs. 9.9 % in 2010.⁵¹ This percentage urges companies with few or no women on their boards to deliberately cast round for female candidates whenever a director position falls vacant.⁵² Women's share of board seats averaged 10.4 % in 2011 (11.9 % among IBEX companies and 9.9 % among those with market capitalisation above 1,000 million euros). The average percentage rose in the IBEX 35-listed companies and fell in the other corporations.⁵³

Of the 164 women on listed company boards in 2011 (158 in 2010), 15.4 % also sat on the executive committee (16.5 % in 2010), 37.7 % on the audit committee (39.9 % in 2010) and 32.7 % on the nomination and remuneration committee (30.4 % in 2010). It bears mentioning, finally, that the number of women board

⁴⁸ It is important to note that no company obtains a score equal or higher than the average (2 points), which means that the information provided by the IBEX 35 is of low quality as regards CSR.

⁴⁹ CNMV, Informe de Gobierno Corporativo de las entidades emisoras de valores admitidos a negociación en mercados secundarios oficiales, IAGC, 2011, at p. 87.

⁵⁰ Ibid, at pp. 106-7.

⁵¹ Ibid, at p. 30.

⁵² As stated by the CNMV in Informe de Gobierno Corporativo de las entidades emisoras de valores admitidos a negociación en mercados secundarios oficiales, IAGC, 2010, at p. 38.

⁵³ CNMV, Informe de Gobierno Corporativo de las entidades emisoras de valores admitidos a negociación en mercados secundarios oficiales, IAGC, 2011, at p. 29.

members (36.4 % of the total in 2011, 34.8 % in 2010) who were not on any board committee increased.⁵⁴

3.2.2 Codes of Corporate Governance and the Objective of 40 % Women on Boards in Spain

In line with the self-regulation development in Spain, with the first reports on corporate governance appearing in the nineties of the last century, significant changes are taking place in Spanish listed company law.⁵⁵ Self-regulation, as a characteristic phenomenon of countries with a common law tradition, has irrefutably influenced EU law and, by extension, Spanish listed company law not directly covered by EU directives.

Self-regulation in Spain is aimed at remedying inadequacies in positive law regulations so as to ensure a proper protection of the interests at stake. Such codes of voluntary compliance establishing guidelines to be observed on a voluntary basis emerge in order to compensate for deficiencies in the balanced representation of women and men on boards of directors.⁵⁶

The idea that these codes are the result of the work of special commissions set up *ad hoc*, consisting of experts on the subject as well as professionals in the sector, as guarantee and legitimacy of their content tries to convey an appearance of neutrality and consensus in their elaboration; if to all this we add the presence of public administration representatives (the Code owes its name to the then president of the CNMV, and the new Good Governance Code 2015, the Rodríguez Code, to the current chairwoman of the CNMV), the result is a polished text produced by experts and on which, on occasions, a public survey has been held and other interested parties have given their opinions. This text is then proposed to listed companies for them to adopt on a voluntary basis.

In a first stage, as we have seen, the monitoring is not subject to any company regulation, following the idea that it concerns the *reputational capital*⁵⁷ of the company, the first interested in complying with these corporate governance codes. The concept of *moral suasion* comes into play here due to the fact that the

⁵⁴ Ibid, at p. 30.

⁵⁵ Alonso Ureba interprets this as there being an intention to reform the structural or organic regime of listed companies, without considering our system of sources. From a legitimate perspective, the work of the commissions referred to in these codes should constitute the basis for regulations proposed by the General Commission of Codification, which, after a public information process, should be submitted to Parliament as a bill (Alonso Ureba (1999), at p. 101).

⁵⁶ The reasoning can be summarised as follows: in a situation of crisis, possible failures are detected in how the board of directors works with empirical analysis that uses, mostly, economic techniques. For example, it is considered that different studies show the appropriateness of taking into account independent members on the board representing the reference or control shareholders (that are represented directly or indirectly on the board) and executive board members. Thus, as it seems excessive to make the presence of these board members mandatory by law (this might be contrary to the right of association in Art. 22 of the Spanish Constitution 1978), the Spanish corporate governance codes recommend their presence on the board.

⁵⁷ This concept comes from economic science and is gaining momentum due to the debate on corporate social responsibility.

underlying idea is that non-compliance with the code without a justified reason will have a direct impact on the reputation level of the relevant companies within the market. The Companies Act only requires an explanation of the reason why the corporate governance recommendations are not followed (s. 540. 4 g). There is no doubt that there is an intention to influence the listed company as of the moment the latter has to give explanations as to why it does not follow a certain pattern of behaviour laid down in a code drafted by the Government. The starting point is that the simple monitoring of the code's recommendations reinforces the control and transparency of the decisions and subsequently increases company value.⁵⁸ Thus, the markets will judge the monitoring of and deviations from the regulations contained in corporate governance codes.⁵⁹

When companies voluntarily adopt the recommendations and include them in their internal regulations, these internal regulations will be regulations of conventional law originating from the will of the company.⁶⁰ Their efficiency derives from the exercise of companies' self-regulation powers.

In Spain, self-regulation via codes of conduct of listed companies is relatively new. Initially, corporate governance codes voluntarily adopted by companies aiming for a better reputation were not that successful where it concerned the presence of women on boards of directors. Voluntary adoption has always been encouraged by the Public Administration. The Conthe Code 2006 had regulatory consequences leading to the reform of the Securities Market Act enacted by Act 47/2007 of 19 December. And it was not until the Effective Equality Act of 2007 that the lawmaker referred to the expediency of having women on boards of directors. The recent amendment of the Companies Act in December 2014 is a decisive step in this regard.

Due to the relative failure of the voluntary adoption of these corporate governance codes, the Securities Markets Act was amended in order to introduce the 'comply or explain' principle at a legal level so as to try to make companies explain why they do not follow or adopt, as regards the composition of their boards of directors, the recommendations or guidelines laid down in these codes which are encouraged by the state, as highlighted above.⁶¹

Thus, the Securities Market Act amended by Act 26/2003 of 17 July, Section 116 under letter f), renders compulsory, for listed companies, the introduction in the annual corporate governance report of a reference to the 'degree of monitoring of the recommendations of corporate governance or, if that is the case, an explanation

⁵⁸ These ideas were put forward brilliantly by Fernández de la Gándara (1999), at p. 73: '[T]he zealots of corporate governance are convinced, (...), about the fact that implementing a new company behaviour code will increase the financial value of the company and its position in the market.'

⁵⁹ 'Every company must have its ideas, its philosophy, its beliefs and values, and transform them into commitments and the draftsman should not intervene', Masifern (1997), at p. 291.

⁶⁰ Fernández de la Gándara (1999), at p. 71.

⁶¹ The agreement of the Cabinet Meeting on 28 February 1997 whereby a special commission was set up to study an ethical code for the board of directors of listed companies stipulates that 'in spite of the voluntary character for the governing bodies of listed companies to adhere to the ethical code, the CNMV will be entitled to ask listed companies for information about whether the said ethical code has been adopted or not'.

for the absence of monitoring of the mentioned recommendations'. This rule is now contained in s. 540 Companies Act, amended by Law 31/2014 of 3 December. Under Section 100 b *bis*) of the Securities Markets Act, not drafting or publishing the annual corporate governance report, or the existence of omissions in the said report or false or deceitful data, is considered a serious infringement. The drawing up of the Report provides legal status to listed companies and, step by step, some recommendations contained in these codes or in the EU recommendations are introduced in our positive law.

4 Conclusions

Until 2012, the low representation of women on boards of directors of Spanish listed companies issuing equity and other securities relentlessly showed the failure of this self-regulation system and the failure to comply with good practices in the absence of legal support.⁶² However, in 2013 a significant growth compared to other years can be seen. Our study results show that the firms listed on the IBEX 35 in 2013 had a higher female participation on their board than the firms listed in 2007–2012, and the differences are statistically significant. In 2014, only one company (Jazztel) reached the 40 % target.

In our opinion, ethics and what is legally demandable—what can be sanctioned—must be separated. Regarding ethics, we are in favour of self-regulation and voluntary compliance.

But in the absence of the coercion of the law, self-regulation and voluntary compliance become simple behavioural guidelines that do not alter, in a significant way, the behaviour of private agents within the market. In other words, there are few reputational consequences for Spanish listed companies that do not comply with corporate governance codes. We consider it appropriate, at this point, to recall the words of Thomas Hobbes: '[C]ovenants, without the sword, are but words and of no strength to secure a man at all'. The recent amendment of the Companies Act

⁶² In this sense, the background of the Proposal for a Directive of the European Parliament and of the Council on improving the gender balance among non-executive directors of companies listed on stock exchanges and related measures (COM/2012/0614 final) is as follows: 'Member States and the EU institutions have undertaken numerous efforts in the course of several decades to promote gender equality in economic decision-making, notably to enhance female presence in company boards, by adopting recommendations and encouraging self-regulation. Two Council Recommendations (in 1984 and 1996) encouraged the private sector to increase the presence of women at all levels of decision-making, notably by positive action programmes, and called upon the Commission to take steps to achieve balanced gender participation in this regard. National self-regulation and corporate governance initiatives were aimed at encouraging companies to appoint more women into top-level positions. However, progress in increasing the presence of women on company boards has been very slow (...). The most significant progress was noted in those Member States and other countries where binding measures had been introduced. Self-regulatory initiatives in a number of Member States have not yielded any similarly noticeable changes. At the current pace it would take several decades to approach gender balance throughout the EU.'

confirms this point, although the presence of non-executive women directors on boards was not the least followed recommendation in 2013 (55.7 %).⁶³

Due to this fact, we would consider the adoption of a Directive on improving the gender balance among non-executive directors of companies listed on stock exchanges and related measures highly convenient, particularly regarding the obligation for Member States to lay down rules on sanctions applicable to infringements of the national provisions relating to the improvement of the gender balance among non-executive directors of companies listed on stock exchanges (Article 6.1 of the proposed Directive).⁶⁴

As the European Parliament stated, the objective of 40 % only concerns the overall gender diversity among non-executive directors and does not interfere with the concrete choice of individual directors from a wide pool of male and female candidates in each individual case. In particular, it does not exclude any particular candidates for director positions, nor does it impose any individual directors on companies or shareholders. The decision on the appropriate board members thus remains with the companies and shareholders.⁶⁵

The debate at EU level is still open. Detractors of the Proposal argue that

‘compulsory gender quotas are disproportionate responses mainly because requiring positive policies in companies in the process of selecting candidates for their boards is not necessary to realise the right of gender equality. In this regard, it is sufficient to compel these companies to respect the simple prohibition of discrimination on the basis of sex.’

In their opinion, the Proposal goes beyond the principles of proportionality and subsidiarity:

‘Public authorities cannot usurp the decision-making power to determine what actions or decisions are in the best economic interest of private companies.’

Besides:

‘[I]t must be observed that national measures aimed at promoting more gender-balanced boards have only been introduced by Member States in the last few years, and thus the applications of these measures remain in the early stages; these measures have had no chance to exhibit their practical

⁶³ The least followed recommendations in 2013 were those concerning independent directors’ membership of governing bodies. Recommendations 12 (independent board members should be at least a third of the total) and 49 (independents should be a majority on the nomination and remuneration committee) were not adhered to by 45.1 and 38.6 % of companies respectively (CNMV, Corporate governance report of entities with securities admitted to trading on regulated markets 2013, released in 2015, Madrid, at p. 9).

⁶⁴ The Proposal makes reference to administrative fines and to the nullity or annulment, declared by a judicial body, of the appointment or election of non-executive directors that is contrary to the national provisions which impose gender balance among non-executive directors. Recently on this Proposal, see González Bustos and Fernández de Gatta Sánchez (2013), at pp. 6–12.

⁶⁵ Report of the European Parliament of 25 October 2013 on the Proposal for a Directive of the European Parliament and of the Council on improving the gender balance among non-executive directors of companies listed on stock exchanges and related measures (A7-0340/2013), amendments to the proposed Directive, Recital 22 b.

ramifications. Therefore, it is clearly too soon to assume that they are ineffective and to claim that their ostensible ineffectiveness makes the EU action necessary.⁶⁶

We agree with the European Parliament's point of view in respect of the principle of proportionality. Regarding the principle of subsidiarity, only 21.42 % of the EU Member States have enacted laws on gender quotas in companies, be it public or private ones (France, Italy, Belgium, the Netherlands, Spain and Germany).

In Spain, more than a 60 % of university students are women, and 45 % of the Spanish labour market is composed of women.⁶⁷ In the High Administration, the majority of those promoted most recently included women (judges, notaries, registrars, state economists, state tax inspectors, etc.⁶⁸). This reality does not seem to be reflected in the composition of boards of directors of listed companies. Neither the Effective Equality Act 2007 nor self-regulation has achieved a balanced presence of women on boards. Although it is too early to assess the reform of the Companies Act in terms of achieving a balanced number of women and men on the management body, it is true that the trend among listed companies is to increase the presence of women on boards.

However, we believe it is necessary to adopt compulsory and not merely voluntary laws that impose penalties in case of a breach of the provisions therein.

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⁶⁶ Szydło (2015), at pp. 111–112.

⁶⁷ PWC & ISOTÉS, *La mujer directiva en España. Women as leaders* (2012), http://www.isotes.net/wp-content/uploads/2012/06/La_mujer_directiva_en_Espa%C3%B1a.pdf (last visited 21 May 2014).

⁶⁸ Indeed, in 2010 and 2011, 74 % of the new judges and public prosecutors were women, http://www.manuelbagues.com/public_exams.html (last visited 8 May 2013).

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