

# LOOKING BACK AND MOVING FORWARD: A CLOSER LOOK AT THE DUTCH GENDER QUOTA

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## Abstract

The Dutch Civil Code stipulates that, for balanced gender representation, 30% of seats on the boards of large corporations should be occupied by women. If a company does not meet this requirement, the company is compelled to be transparent in its annual report by means of the 'comply or explain' principle. This article analyses the application of this rule through content analysis of the annual reports of 52 listed companies in 2012 and 49 in 2013. The article discusses whether this rule has the desired effect of creating transparency on the gender quota. The conclusion is that 'the comply or explain' mechanism is inadequate without further measures, including sanctions. For 2012, 21% of the companies researched made no mention in their annual report of the application of the gender quota. In 2013, 18% of the companies made no mention of it. The companies that did indicate that they did not meet the quota failed to provide the required transparency. The reasons cited for not meeting the quota are nothing more than clichéd phrases, lacking any specificity. If the Netherlands wants to achieve the European and Dutch targets with the aid of the 'comply or explain' mechanism, the government will have to introduce additional mechanisms, including sanctions - or, alternatively, steer an entirely different course.

**Keywords:** Gender Quota, 'Comply Or Explain' Principle, Board Of Directors, Transparency, Corporate Governance

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## 1. INTRODUCTION

Since 1 January 2013<sup>1</sup>, to achieve gender balance in Dutch companies, 30% of seats on the boards of around 4,500 'large' corporations should be occupied by women and 30% by men. If such an in the law specified company does not meet these quota, the company is compelled to be transparent in its annual report concerning why there is no gender balance, the attempts that have been made to rectify this and how it intends to achieve this in the future. This ties in with the wider European debate. The European Commission believes that the representation of men and women on boards of directors in the EU is not balanced. In early 2012, the European Commission indicated that just 13.7% of seats on the boards of the biggest listed companies were held by women and 15% of non-executive directors were female (EU Commission, 2012). The European Banking Authority collected in its recent report on the benchmarking of diversity practices data from 873 institutions from 29 countries. The conclusion is that the representation of women within the management body in 2016 is still (with 13.63% in the management function and with 18.90% in the supervisory function) very low (EBA, 2016).

At the end of 2012, the European Commission published a draft directive aimed at increasing the number of women on the boards of listed companies (COM (2012) 614 Final 4 November 2012). The Netherlands has made it known that it does not want any EU regulation in this sphere, particularly if

it means imposing a fixed quota with attendant sanctions (Parliamentary Papers II 2011/12, 30 420, no. 172). However, a number of other EU Member States have chosen to embrace such quotas in their national legislation. In Norway, for instance, companies are dissolved if they fail to meet the requirements in this sphere. In France, the appointment of directors is void if the requirement is not met and payment of attendance fees is suspended (Middelkoop and Van der Holst, 2003; Cremers-Hartman and Eleveld, 2014). Spanish companies are no longer eligible for public contracts or government subsidies if they have not met the quota. Furthermore, since 2016 Germany will introduce sanctions for companies that fail to observe the quota that applies there (Winter et al., 2015).

As explained in paragraph 2 below, the Netherlands does, on the face of it, satisfy the European requirements, having included a gender quota in Article 2:391 paragraph 7 DCC. However, no sanctions are imposed on companies that fail to meet the quota. In the Netherlands, transparency and the 'comply or explain' principle are used as mechanisms for achieving the desired percentages; if companies do not meet the quota, they must report on this in their annual report. This article analyses the content of annual reports to ascertain how listed companies have complied with this article of Dutch law. The study methods and results are presented in paragraph 3 and paragraph 4 respectively. Paragraph 5 summarises the study and ends with the conclusion.

For a good understanding of this research, I notice that this article does not analyse the gender

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<sup>1</sup> Under Art. 2:391 paragraph 7 of the Dutch Civil Code (DCC), in conjunction with Art. 2:166 and 276 DCC.

quota per se. The article analyses the correct application of Article 2:391 paragraph 7 DCC, discussing whether transparency on the gender quota has been achieved, is close at hand or is still a long shot. The European Commission has expressed in its proposal directive the expectation that, in 2035, 40% of seats on the boards of directors of listed companies in the Netherlands will be occupied by women. Based on the annual reports, this study has undertaken an initial analysis of the expectations of the companies themselves regarding gender balance on their boards of directors and supervisory boards over the next few years. The conclusions of this study therefore help answer the question of whether the 'comply or explain' mechanism is sufficient without imposing further sanctions and, most importantly, whether the required transparency has been achieved. Moreover, a certain legal vacuum now exist, since the Dutch rule lapsed on 1 January 2016. At present, the incumbent cabinet is submitting a legislative proposal to extend the legislation until 1 January 2020 (Parliamentary Papers II 2015/16, 30420, no. 230) (Parliamentary Papers II 2015/16, 34435, no. 2 and 4). It is therefore important to take stock of experiences so far before making further decisions on the future of the Dutch gender quota.

## 2. TRANSPARENCY ON THE GENDER QUOTA THROUGH THE 'COMPLY OR EXPLAIN' PRINCIPLE

With effect from 1 January 2013, the Netherlands introduced a gender quota for 'large' public and private limited companies (Art. 2:166 and 2:276 Dutch Civil Code (DCC)) (Government Gazette, 2012). To ensure balanced representation on boards of directors (hereafter BoD) and supervisory boards (hereafter SB), at least 30% of the seats must be held by men and at least 30% by women. This rule applies to one-tier and two-tier companies. The reasons for choosing a quota of 30% are unclear, (Parliamentary Papers I 2010/11, 31763 C), but in order to be deemed a 'large' company, at least two of the following conditions must be met (Art. 2:397 paragraph 1 DCC):

- a. the value of the assets on the balance sheet exceeds EUR 17,500,000 (based on cost of acquisition and manufacture);
- b. net turnover for the financial year exceeds EUR 35,000,000;
- c. the average number of employees over the financial year is greater than 250.<sup>2</sup>

If a public limited company (hereafter N.V.) or private limited company (hereafter B.V.) has a seat on the board of another N.V. or B.V. which meets at least two of the above criteria, the 30% requirement also applies to that BoD and to the BoD of the parent, even if the latter do not meet the requirements themselves. Thus the applicability of the requirements is transmitted from subsidiary to parent. It is estimated that 4,500 companies satisfy these conditions (Middelkoop and Van der Holst, 2013). If these 'large' companies do not abide by the quota, then Article 2:391 paragraph 7 DCC applies,

which contains a 'comply or explain' rule specifically for this 30% diversity percentage. If gender balance is not achieved, an explanation must be provided in the annual report as to:

- a. why there is no gender balance on the board;
- b. what attempts have been made to achieve balance;
- c. how the company intends to achieve this in the future.

The Netherlands has chosen a 30% gender quota, with the additional mechanism of the 'comply or explain' principle. Why the legislature chose the percentage of 30, is not clarified in the parliamentary papers. Perhaps this mechanism was chosen to take account of sectors in which women are relatively poorly represented (Parliamentary Papers I 2010/11, 31763 C). The Netherlands does not impose any sanctions for failing to reach the quota or providing little or no explanation, other than that an interested party to this issue could set an annual procedure (Van Ginneken, 2012). Both in literature as well as in parliamentary papers criticism is visible (Houwerzijl, 2010; Middelkoop and Van der Holst, 2013). The rule is considered as a nice gesture, but doubt arise whether it will take effect. Moreover, the 'comply or explain' mechanism - and the limited duration of the rule - are somewhat odd (Van Ginneken, 2012). Because it is a so-called sunset clause, the rule lapsed on 1 January 2016 and the concerning companies are no longer obliged by law to provide explanation for failing to reach the quota of 30 percent (Parliamentary Papers II 2009/10, 31763, no. 14). Taking the minimal growth in balanced gender representation in the boards into account, the incumbent cabinet believes in extending the rule. Therefore, the cabinet submitted a legislative proposal to extend the legislation until 1 January 2020 (Parliamentary Papers II 2015/16, 30420, no. 230) (Parliamentary Papers I 2010/11, 31763, C, p. 25). The legislative proposal is currently pending for the Second Chamber of the Dutch parliament. In the spring of 2017 and subsequently 2019 the situation will be reassessed and further decisions will be made (Parliamentary Papers II 2015/16, 34435, no. 2 and 4) (Parliamentary Papers II 2014/2015, TK 86-8-1).

In November 2012, the European Commission published a proposal for a Directive on improving the gender balance among non-executive directors of companies listed on stock exchanges (COM (2012) 614 Final 4 November 2012). The self-regulation initiatives taken in many Member States have not, it has been noted, yielded clear change. On 1 March 2011, the European Commission made another attempt to encourage self-regulation, by asking the Member States to sign a declaration of intent, but the results of this initiative were disappointing (Parliamentary Papers II 2012/13, 33483, no. 7). The European Commission has indicated in the proposal directive that, if things continue to progress at this pace, just eight Member States (including the Netherlands) will have achieved a percentage of 40% women among non-executive directors by 2035. Meanwhile, the national legislation that is now in place in this sphere has developed in various directions; some countries have a legally binding target with sanctions and the Netherlands has the 'comply or explain' principle. In the explanatory

<sup>2</sup> After the implementation of Directive 2013/34 / EU, the limits in Art. 2: 397 paragraph 1 DCC will be increased, Parliamentary Papers II 2014/15, 34 176, no. 2

memorandum to its proposal for a directive, the European Commission argues that these divergent rules and developments pose barriers to the internal market for European listed companies, which is why it is advocating the rules in the proposed directive. Therefore, the European Commission proposes that Member States must ensure that 40% of the non-executive directors at public listed companies are female with effect from January 2018; for other listed companies, the deadline is January 2020. There are some striking differences compared to the Dutch rules: the higher percentage (40% instead of 30%) and the fact that only listed companies and only non-executive directors are affected (Cremers-Hartman and Eleveld, 2014). The proposal has attracted a great deal of criticism and several Member States have made it known to the European Commission at various times that European regulation in this sphere is not welcomed. The Netherlands took the stance that diversity is chiefly the responsibility of the companies themselves and self-regulation accommodates the preferences and circumstances of the individual company (Parliamentary Papers II 2011/12, 30420, no. 172). Meanwhile, there is now a blocking minority that is against the proposal and negotiations regarding the directive are on hold for the time being, the file having been postponed (Parliamentary Papers II 2012/13, 33483, no. 6). In the meantime, on 5 December 2014 the EU Directive 2014/95 EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups came into force. This directive has to be implemented by the Netherlands before 16 December 2016 and states that large undertakings which are public-interest entities exceeding the average number of 500 employees shall include in the management report a non-financial statement containing a description of the diversity policy applied. If no such policy is applied, the statement shall contain an explanation as to why this is the case.

### 3. RESEARCH METHODOLOGY AND RESULTS

#### 3.1 Research methodology

The study population consists of all the companies seated in the Netherlands, listed in the Netherlands on the AEX, AMX or AScX, and with an annual report available for the years 2012 and 2013. Therefore, the study population consists of 52 companies for 2012 and 49 companies for 2013. The study population is comprised as follows:

**Table 1.** Composition of study population

	AEX	AMX	AScX	Total
2012	17	19	16	52
2013	15	18	16	49
Total	32	37	32	101

None of these companies met the gender quota in 2012 and 2013 and therefore all are required to explain their non-attainment of the 30% diversity quota pursuant to Art. 2:391 paragraph 7 DCC. The study was conducted by means of content analysis

that is to be defined as a systematic, objective, quantitative analysis of message characteristics for making replicable inferences (Krippendorff, 2004). For each company, a questionnaire was completed based on the information provided by the companies in their annual report regarding non-attainment of the 30% requirement for diversity on the BoD and SB. The reasons indicated and the quality of the reasons for not achieving the 30% requirement were further categorised in the questionnaire.

## 4. RESULTS

### 4.1 Mention of the legal clause

Art. 2:391 paragraph 7 DCC unequivocally states that, if the BoD and/or SB of a (listed) company does not comprise at least 30% women (and men), the company must explain:

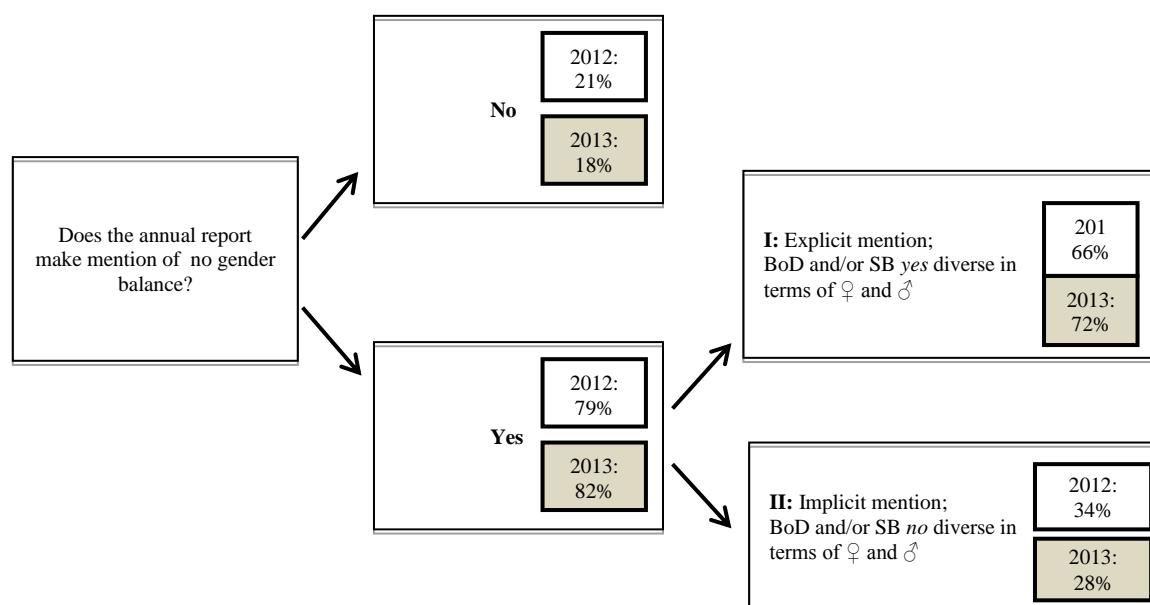
- why there is no gender balance on the board;
- what attempts have been made to achieve balance;
- how the company intends to achieve this in the future.

In other words, if gender balance is not achieved (52 companies in 2012 and 49 in 2013), the 'comply or explain' mechanism with respect to subparagraphs a-c must be used. In their annual report for 2012, 21% of the listed companies that had not achieved gender balance made *no* mention of the requirements placed on them by Art. 2:391 paragraph 7 DCC; for 2013, that figure was 18% of companies (see figure 1). Despite the marginal improvement, we can conclude that 18% of listed companies are not complying with the mandatory article of law in 2013. The companies that did comply in principle (79% for 2012 and 82% for 2013) varied in the clarity of their explanations of the application of the requirements under Art. 2:391 paragraph 7 DCC. The explanations they gave have been further categorised (see figure 1).

Where there was explicit mention, the companies indicated that there was no gender balance on their BoD and/or SB and a clear response was provided to the questions in a-c. This is deemed good practice. 66% of the companies at which the BoD and/or the SB lacked gender balance applied this good practice in 2012, which increased to 72% in 2013 (category I). The second category of companies (category II) implicitly referred to the requirements set by Art. 2:391 paragraph 7 DCC; with implicit mention, the reader is obliged to draw his or her own conclusions. In 2012 34% and in 2013 28% of the companies implicitly applied the requirements placed on them by Art. 2:391 paragraph 7 DCC. Comparing 2013 and 2012, there was a shift among the companies, from category II to categories I. They applied good practice - making explicit mention - more frequently.

The mentions made by the companies - as indicated in figure 1 - are broken down further by organ (BoD or SB) and listing in table 2. Incidentally, various companies explicitly mentioned that one organ did not meet the quota while making an implicit mention for the other organ.

**Figure 1.** Mention of no gender balance in BO and/or SB



**Table 2.** Mention of no gender balance in BoD and/or SB

Year	Type of mention	Organ	ASCX	%	AMX	%	AEX	%	Total
2012	Explicit mention (good practice)	BoD	7	27%	12	43%	7	27%	26
		SB	8	31%	13	46%	7	27%	28
		<b>Total explicit</b>	<b>15</b>	<b>58%</b>	<b>25</b>	<b>89%</b>	<b>14</b>	<b>54%</b>	<b>54</b>
	Implicit mention	BoD	6	23%	2	7%	6	23%	14
		SB	5	19%	1	4%	6	23%	12
		<b>Total implicit</b>	<b>11</b>	<b>42%</b>	<b>3</b>	<b>11%</b>	<b>12</b>	<b>46%</b>	<b>26</b>
<b>Total 2012</b>			<b>26</b>	<b>100%</b>	<b>28</b>	<b>100%</b>	<b>26</b>	<b>100%</b>	<b>80</b>
2013	Explicit mention (good practice)	BoD	8	33%	12	40%	10	53%	30
		SB	7	29%	14	47%	3	16%	24
		<b>Total explicit</b>	<b>15</b>	<b>63%</b>	<b>26</b>	<b>87%</b>	<b>13</b>	<b>68%</b>	<b>54</b>
	Implicit mention	BoD	4	17%	2	7%	2	11%	8
		SB	5	21%	2	7%	4	21%	11
		<b>Total implicit</b>	<b>9</b>	<b>38%</b>	<b>4</b>	<b>13%</b>	<b>6</b>	<b>32%</b>	<b>19</b>
<b>Total 2013</b>			<b>24</b>	<b>100%</b>	<b>30</b>	<b>100%</b>	<b>19</b>	<b>100%</b>	<b>73</b>
Explicit mention (good practice): Trend in 2013 compared with 2012				+ 5%		-/- 2%		+ 14%	

It is striking that far more AMX-listed companies employ good practice (89% in 2012 and 87% in 2013) by explicitly disclosing how they meet the requirements of Art. 2:391 paragraph 7 DCC. The AEX-listed companies less widely employ good practice, although there was an improvement in 2013 (68% make explicit mention) compared with 2012 (54% make explicit mention). Lastly, the ASCX-listed companies score the lowest here: 58% employed good practice in 2012 and 63% in 2013.

In this subparagraph, it was shown that 79% of the companies either comment on the application of Article 2:391 paragraph 7 DCC in their 2012 annual

report and 82% in 2013, or use the 'comply or explain' principle in any manner and display transparency. On first sight these percentages may seem relatively high, but we analyse below whether this constitutes genuine transparency of content.

#### 4.2 Categories of explanations for non-attainment of the 30% diversity quota

In their annual reports, the companies that are required to explain their non-attainment of the 30% diversity quota, gave diverging responses to the questions in a-c of Art. 2:391, paragraph 7 DCC.

These responses have been subdivided into 15 categories. Table 3 shows the top 5 responses given by the listed companies to the three questions in Art. 2:391 paragraph 7 DCC for 2012 (a. why there is

no gender balance on the board, b. what attempts have been made to achieve balance and c. how the company intends to achieve this in the future).

**Table 3.** Explanations for non-attainment of the 30% diversity quota for 2012 (total)

Organ	Art. 2:391	3 (No female candidate available)	5 (Considers gender as one aspect of diversity)	11 (Not investigated it)	12 (Trying to take account of the clause)	13 (No mention)	Total
BoD	Subparagraph a (present)	3	5	1	4	6	19
	Subparagraph b (past)	4	4	1	3	7	19
	Subparagraph c (future)	0	4	3	13	1	21
	<b>Total</b>	7	13	5	20	14	59
SB	Subparagraph a (present)	5	8	1	1	6	21
	Subparagraph b (past)	6	7	1	1	7	22
	Subparagraph c (future)	0	5	3	10	2	20
	<b>Total</b>	11	20	5	12	15	63
Both	<b>Total BoD + SB</b>	<b>18</b>	<b>33</b>	<b>10</b>	<b>32</b>	<b>29</b>	<b>122*</b>
<b>Top 5</b>		<b>4</b>	<b>1</b>	<b>5</b>	<b>2</b>	<b>3</b>	

\* 122 responses of a total of 162 responses to the questions in Art. 2:391, paragraph 7 (a-c) DCC

The most common responses to the questions in Art. 2:391, paragraph 7 DCC that were given in annual reports for 2012 (see table 3) and which are therefore the top 5 are:

- The company regards gender balance on the BoD and SB as one aspect of diversity and states that, in the past, present, and future it has devoted and will devote equal attention to a candidate's gender, age and nationality (category 5; 33 times) (no. 1 of the top 5);
- The company indicates that it has taken and will continue to take as much account as possible of the diversity clause (category 12; 32 times) (no. 2 of the top 5);

- The company makes no mention (category 13; 29 times). Naturally, this means they have not met the requirements set by Art. 2:391 paragraph 7 DCC (no. 3 of the top 5);
- The company indicates that no woman was available (with the required qualities) (category 3; 18 times) (no. 4 of the top 5);
- The company indicates that it has not yet investigated the effect of the provision at the company, or will do so (category 11; 10 times) (no. 5 of the top 5).

Table 4 shows the top 5 responses given by the listed companies to each question in Art. 2:391 paragraph 7 DCC for 2013.

**Table 4.** Explanations for non-attainment of the 30% diversity quota for 2013 (total)

Organ	Art. 2:391	3 (No female candidate available)	5 (Considers gender as one aspect of diversity)	6 (Preference to female)	12 (Trying to take account of the clause)	13 (No mention)	Total
BoD	Subparagraph a (present)	6	1	2	5	4	18
	Subparagraph b (past)	6	2	1	7	4	20
	Subparagraph c (future)	0	1	2	14	4	21
	<b>Total</b>	12	4	5	26	12	59
SB	Subparagraph a (present)	4	3	3	0	5	15
	Subparagraph b (past)	5	4	2	0	5	16
	Subparagraph c (future)	0	2	3	10	1	16
	<b>Total</b>	9	9	8	10	11	47
Both	<b>Total BoD + SB</b>	<b>21</b>	<b>13</b>	<b>13</b>	<b>36</b>	<b>23</b>	<b>106*</b>
<b>Top 5</b>		<b>3</b>	<b>4</b>	<b>5</b>	<b>1</b>	<b>2</b>	

\* 106 responses of a total of 162 responses to the questions in Art. 2:391, paragraph 7 (a-c) DCC

A new addition to the top 5 in 2013, replacing category 11 (Not investigated it) is category 6:

- The company indicates that, if candidates are equally suitable, preference is given, or will be given to female candidates (category 6; 13 times). This response was given four times as often by companies in 2013 compared with the previous year (2012: 3 times).

Looking at both the years studied together, the explanation for category 12 (*The company indicates that it has taken and will continue to take as much account as possible of the diversity clause*) is the most common. Sadly, category 13 (*The company makes no mention*) was twice in the top 5 of responses given to the questions in Art. 2:391 paragraph 7 (a-c). Also striking is that the response for category 11 (*the company indicates that it has not yet investigated the effect of the provision at the company (subparagraph a/b), or will do so*

(*subparagraph c*) was given 10 times in 2012 and not at all in 2013. This leads to the conclusion that, in 2013, companies more frequently investigated the effect of Art. 2:391 paragraph 7 DCC at their company than in 2012, which is a positive development.

**4.3 Quality of the transparency**

In this subparagraph the quality of the explanations given by the listed companies is further reviewed. Or in other words, is the 'comply or explain' mechanism used in such a way that it is clear why the company does not reach the 30% diversity quota? As shown immediately below in table 5, the quality of the response given to the questions a-c of Art. 2:391 paragraph 7 DCC has been divided into five categories:

**Table 5.** Quality of explanation in response to 2:391 paragraph 7 a-c

Category	Type of explanation
A	<b>No explanation:</b> The company gives no explanation for the discrepancy.
B	<b>General:</b> A general or non-specific (relating to the company) explanation has been given. Often, clichéd phrases have been used without any specific details. For example, the company has sought to comply with the provision (but not how).
C	<b>Implementation:</b> The company is working to implement the provision.
D	<b>Limited:</b> An explanation is given which provides more explanation than <i>General</i> , but still fails to be specific to the nature or circumstances of the company.
E	<b>Specific:</b> An explanation is given that is deemed specific within the meaning of the law. Such an explanation is geared specifically towards the company, substantiated, detailed and verifiable.

The quality ranges from poor (A: 'No explanation') to good (E: 'Specific'). As can be seen from figure 2 (for 2012) and figure 3 (for 2013), the majority of listed companies gave a general explanation in response to the questions in Art. 2:391 paragraph 7 DCC (quality B). For 2012, this was true for 56% of the responses on average and an average of 53% of the responses for 2013. Furthermore, the companies regularly gave no explanation for one or more questions in the Article (quality A); in 2012, this was true for 19% of cases on

average, reducing to an average of 14% of cases in 2013. The companies were more inclined to give a response to the question in Art. 2:391 paragraph 7(b) DCC in 2013 than in 2012; or how the company sought to achieve gender balance on the BoD and SB. In both years, only a few companies indicated that they were working to implement the clause (quality C; average 4% in 2012 and 1% in 2013). Quality C is to be expected more frequently, given the 'novelty' of the gender quota.

**Figure 2.** Quality of the explanations (2012)

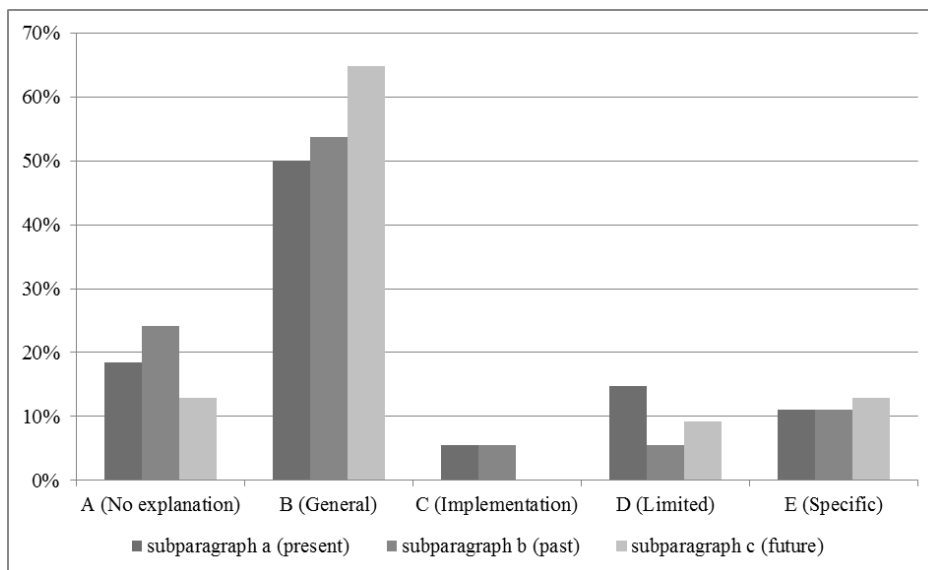
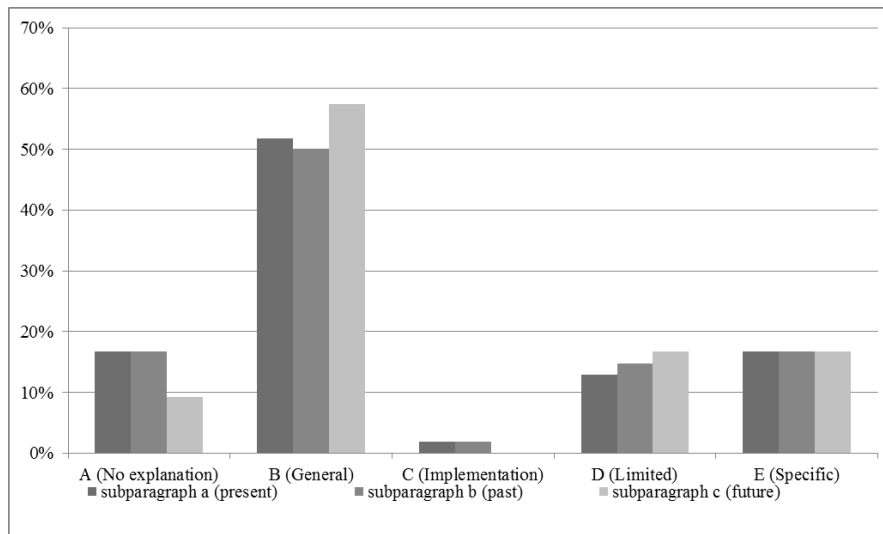


Figure 3. Quality of the explanations (2013)



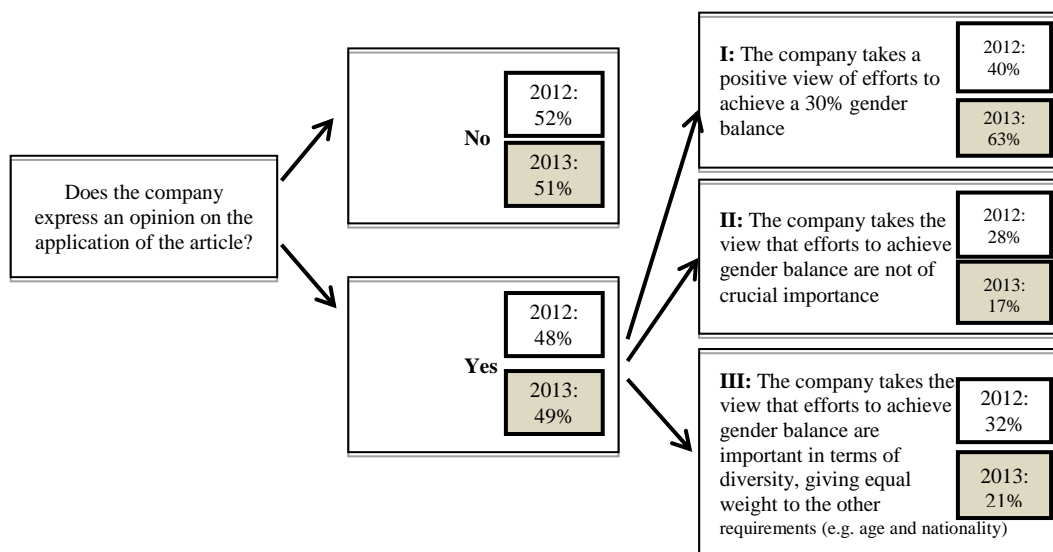
Furthermore, the number of times that a high-quality response was given to the questions in Art. 2:391 paragraph 7 DCC (quality D and E) has increased. For 2012, 10% of the responses given were deemed to be Quality D and 12% quality E. This rose to 15% and 17% for 2013. Although this is a positive development, it can be concluded that, for 2013, by far the majority of listed companies neglect to give a high-quality response to the questions they are required by law to answer in their annual report.

**4.4 Gaining acceptance of the statutory diversity clause**

To ascertain the level of support for the diversity requirement, the opinions given by the companies in their annual reports were subjected to further analysis. Roughly half of the listed companies (48% in 2012 and 49% in 2013) expressed an opinion on the clause. Those opinions have been assigned to three categories (see figure 4). For 2012, 40% of the companies took a positive view of efforts to achieve

the 30% gender balance; this rose to 63% for 2013 (category I). This group is therefore favourably disposed towards the statutory diversity clause. For 2012, 28% of the companies indicated that they did not believe gender balance on the BoD and/or SB to be of decisive importance (category II). They indicated that they select their candidates on the basis of requirements other than gender. This percentage fell to 17% for 2013; as just described, more companies took a positive view in that year of efforts to achieve gender balance on the BoD and/or SB. Finally, in 2012 32% of the companies indicated that they regarded gender as one aspect of diversity, and that other requirements (such as age and nationality) are of equal importance (category III). In 2013 this figure was 21%. The listed companies that can be placed in the last category (category III, see figure 4) rate gender as equally important as other forms of diversity. One should wonder if, in reality, these companies take a negative view of the requirement of Art. 2:391 paragraph 7 DCC, which focuses only on gender.

Figure 4. Opinion on the statutory diversity clause

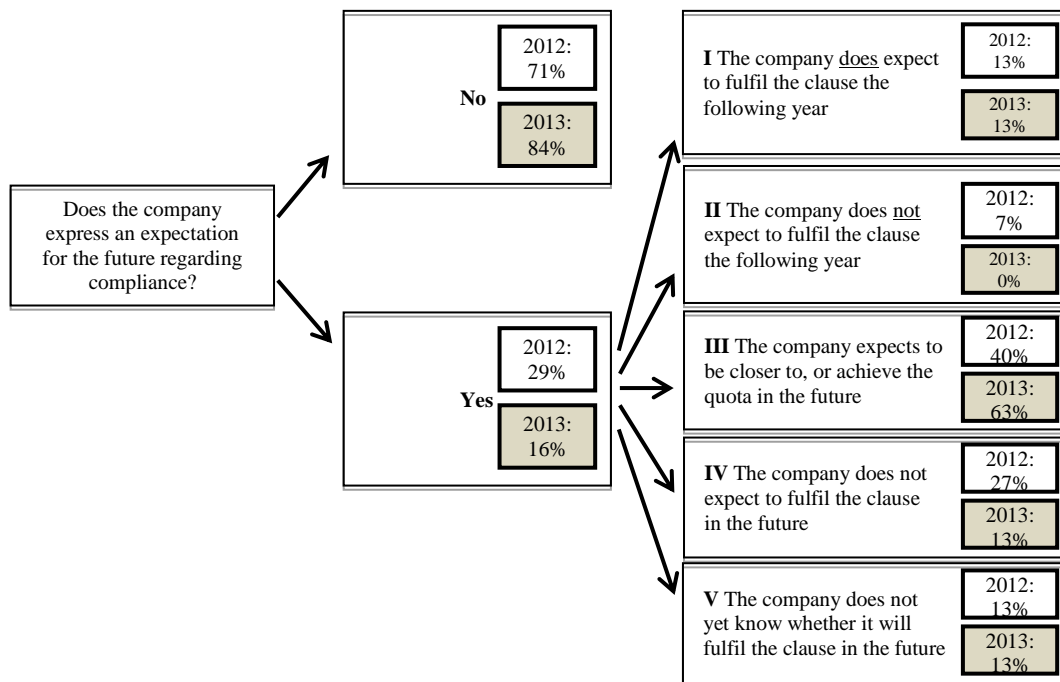


#### 4.5 Future expectations of the diversity quota

Finally, I examined the future expectations about achieving the diversity targets. A small percentage of the listed companies (29% in 2012 and 16% in 2013) indicated whether they expected to meet the quota stated in Art. 2:391 paragraph 7 DCC in the future. These expectations have been divided into five categories (see figure 5). Category I comprises the companies that expected to meet the diversity quota set in Art. 2:391 paragraph 7 DCC the following year; in 2012 and 2013, this was true for 13% of the companies. Category II comprises the companies that did not expect to meet that quota the following

year; in 2012, 7% of the companies belonged to this group and not a single company in 2013. Category III comprises the companies that expected to be closer to, or achieve the 30% gender quota in the future. In 2012, this figure was 40% of the companies, rising to 63% in 2013 - a positive trend. The fall in the number of companies placed in category IV was consistent with this; they did not expect to meet the diversity quota in the future (27% in 2012 and 13% in 2013). Finally, category V comprises the companies that did not yet know whether they would comply with the clause in the future; this was 13% of the companies in both 2012 and 2013.

Figure 5. Future expectations regarding compliance with the diversity clause



It can be concluded that, compared with 2012, the listed companies outlined more positive expectations for the future in 2013 regarding gender balance in their BoD and SB. Nonetheless, some of the companies still explicitly stated the expectation that more than 70% of the seats on their BoD and/or SB would continue to be occupied by men in the future, as was currently the case.

#### 5. CONCLUSIONS

Art. 2:391 paragraph 7 was included in the Dutch Civil Code with the aim of increasing the number of women on boards of directors and supervisory boards of large companies in the near future. The above paragraphs consider whether the 'comply or explain' mechanism is adequate for this purpose and whether the required transparency has been achieved. As already mentioned, the 'sunset' of the Dutch clause has been approached and it is therefore important to take stock of experiences so far. In the meantime, the Dutch Government submitted a legislative proposal to extend the legal basis of the diversity target rate of 30% (Parliamentary Papers II 2015/2016, 30420, No. 227).

This study reveals that, of the 52 companies who do not meet the gender quota in 2012, 21% make no mention of this in their annual report. For 2013, 18% of companies of the 49 listed companies studied made no mention of it. Moreover, the companies that did indicate that they did not meet the quota did not provide the required transparency with regard to the questions (i) why there is no gender balance on the boards, (ii) how has the company sought to achieve this and (iii) how does it intend to achieve it in the future. Common responses to the questions were that the company pays equal attention to candidates' gender, age and nationality, as it regards gender as one aspect of diversity, that no woman with the required qualities was available and that the company has not yet investigated the effect of the clause at the company.

The quality of the responses given was not high; more than half the companies gave only a general response to the questions. They used clichéd phrases without any specific details. Only a small - albeit growing - percentage provided a specific explanation in response to a question; a response that is geared specifically towards the company and is substantiated, detailed and verifiable. Despite these poor results, a substantial number of the



companies did declare themselves in favour of the substantive requirements of Art. 2:391 paragraph 7 DCC. Those listed companies that took a negative view of the clause made it clear that they selected their candidates according to requirements other than gender. It is highly doubtful whether these companies will achieve the statutory percentage. A small minority of companies expressed future expectations regarding compliance. Those that did increasingly indicated that they expected to be closer to, or achieve the quota in the future.

The article analyses the correct application of Article 2:391 paragraph 7 DCC, discussing whether transparency on the gender quota has been achieved, is close at hand or is still a long shot. The European Commission has expressed the expectation that, in 2035, 40% of the seats on the boards of directors of listed companies in the Netherlands will be occupied by women. The findings of this study present a different picture; few listed Dutch companies are properly complying with Art. 2:391 paragraph 7 DCC. The quota is not being met but, most importantly, the required transparency is lacking: the explanations are either absent or inadequate. If the Netherlands wants to achieve the European and Dutch targets with the aid of the 'comply or explain' mechanism, the government will have to introduce additional mechanisms, including sanctions - or, alternatively, steer an entirely different course. Simply extending the legislation until 1 January 2020 will not result in the necessary changes. Transparency is a huge asset and a powerful weapon but, in this instance, it has been found lacking.

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