

Hong Kong Exchanges and Clearing Limited (HKEx)'s  
Consultation Paper on Review of Corporate Governance Code and  
Related Listing Rules  
(April 2021)

**Submission from the Equal Opportunities Commission**

**Introduction**

Hong Kong is well behind other leading markets in terms of ratio of women on boards. As of 31 December 2020, around 32.1% of 2,538 issuers have no female directors, while around 37.4% with only one female director.<sup>1</sup> According to MSCI's "Women on boards: 2020 Progress Report", as at 30 October 2020, only 12.7% of director seats of listed issuers are held by women in Hong Kong, while Singapore has 19.5% and United Kingdom has 34.3%. It is very timely for Hong Kong Exchanges (HKEx) to further promote board (gender) diversity of listed issuers, which is long overdue.

**I. HKEx's proposal to highlight that diversity is not considered to be achieved by a single gender board (Question 6a of HKEx's Consultation Paper)**

2. The Equal Opportunities Commission (EOC) fully supports the proposal of HKEx to highlight that diversity is not considered to be achieved by a single gender board in the note of the Rule. Having said that, HKEx may consider setting a faster pace for issuers to achieve that goal and HKEx should consider doing

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<sup>1</sup> Hong Kong Exchanges and Clearing Limited (HKEx)'s Consultation Paper on Review of Corporate Governance Code and Related Listing Rules (April 2021). Retrieved on 1 June 2021. See paragraph 83 of p. 17 <https://www.hkex.com.hk/-/media/HKEX-Market/News/Market-Consultations/2016-Present/April-2021-Review-of-CG-Code-and-LR/Consultation-Paper/cp202104.pdf>

more to avoid issuers taking a “one and done” approach to gender diversity in boardroom.

3. First, the HKEx’s proposed timeline to eliminate single gender boards is too conservative. Paragraph 74 of the HKEx Consultation Paper proposes introducing a new Code of Practice requiring issuers to appoint a new Independent Non-Executive Director (INED) at the forthcoming AGM. By comparison, it is difficult to explain why the Consultation Paper proposes a three-year transition period for existing issuers with single gender boards to appoint at least a director of the absent gender on their boards. HKEx may consider giving a shorter transition period, if one is necessary.

4. Second, the EOC recommends HKEx to further consider introducing sustainable measures to prevent tokenism. Instead of a lone woman on board, a critical minority is required to avoid “groupthink”, improve decision-making process and in turn, mitigate risk of company and increase financial performance.

5. A study on this critical mass theory in the Norwegian context was conducted in 2011 by analysing the effect of boards with one, two, or at least three women directors on organisational innovation. The study found that once the number of women directors increased ‘from a few tokens (one woman, two women) to a consistent minority (‘at least three women’), they are able to effectively influence the level of organisational innovation’<sup>2</sup>.

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<sup>2</sup> Mariateresa Torchia, Andrew Calabro and Morten Huse ‘Women Directors on Corporate Boards: From Tokenism to Critical Mass’ (2011) 102 Journal of Business Ethics 299, 308

6. Lastly, gender diversity should not be limited to the Board, but should be extended to Board Committees as well. If gender diversity stops short of practising at Board Committees level, it is difficult to truly implement gender balance at all levels. In particular, considering the role of the Nomination Committee to promote gender diversity on board when making recommendations on the appointment or reappointment of directors and succession planning for directors (including the chairperson and the chief executive), it is important that a fair representation of both genders are present in the Nomination Committee. In Singapore, paragraph 2.4 of their Code of Corporate Governance (August 2018), which is applicable to listed companies there requires “The Board and board committees are of an appropriate size and comprise directors who as a group provide the appropriate balance and mix of skills, knowledge, experience, and other aspects of diversity such as gender and age.”

**II. HKEx’s proposal to introduce a Mandatory Disclosure Requirement ("MDR") requiring all listed issuers to set and disclose numerical targets and timelines for achieving gender diversity at both: (a) board level; and (b) across the workforce (including senior management) (Question 6b)**

7. The Equal Opportunities Commission (EOC) fully supports the above proposal. By adding “Diversity” (paragraph J) under Mandatory Disclosure Requirement (“MDR”), HKEx sends an important message that diversity would be a crucial requirement for issuers to establish clear board accountability and commitment to intensify their actions for gender diversity at both board level and across the senior management.

8. The EOC believes that disclosing the number of employees (including first layer of senior management below board level and their direct reports) in annual reports under MDR would give a better bird's eye view of the overall gender diversity achieved by an issuer, other than just purely focusing on the number of board of directors. This would also pave way for better succession planning for listed issuers in future.

9. Given that at least a critical minority has to be formed before issuers can be benefitted from a more gender diversified board, the EOC recommends HKEx to consider setting recommended benchmark to achieve this critical minority on board. And the issuers may set staggered targets and timelines for achieving gender diversity at board level and across workforce.

10. In the United Kingdom (UK), the FTSE companies adopt voluntary targets to achieve a gender balanced leadership. Having said that, the Lord Davies report (2011) recommended that the FTSE 100 increase female board representation to 25% by 2015 and that the Financial Reporting Council require disclosure of boardroom diversity policies.

11. From 2015 onwards, the current cumulative (voluntary) recommendations for board composition on gender is minimum of 33% women's representation across leadership teams (the Executive Committee and direct reports) by 2020 in FTSE 100 and FTSE 250 companies. For FTSE 350 companies, they are recommended to increase women's representation to 33% by 2020. The Nominations Committee would review action plans and assess progress made to improve women's representation in leadership roles at least annually. All CEOs

would take action to improve the under-representation in leadership roles and publish details of the number of the women in leaderships annually.<sup>3</sup>

12. The final report from the Hampton-Alexander Review of the UK, released recently said the number of female board directors in the FTSE 350 has doubled over the last five years. The report also noted that both the FTSE 100 and the FTSE 250 achieved the target of having at least 33 percent female representation on boards by the end of 2020.

13. In April 2014, the European Parliament approved a proposal aimed at increasing women's presence on corporate boards of listed companies to 40% by 2020. This target applied only to companies listed on stock exchanges in EU Member States, with the exception of small and medium-sized companies.<sup>4</sup>

14. HKEx should take stock of the gender diversity targets set and aimed by issuers across UK and EU markets.

15. More importantly, while some people are of the view that the issue for gender diversity on board is a scarcity of qualified women, the real challenge is actually the recruitment and retention of talented women.

16. On top of numerical targets and timelines for achieving gender diversity, the EOC recommends that HKEx should consider requiring issuers to formulate an Equal Opportunities (EO) Policy, with a view to improving gender diversity in the pipeline. The EO Policy should include measures to facilitate achieving gender

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<sup>3</sup> *Taking stock: UK diversity report – metrics and proposed changes*. Retrieved on 1 June 2021. <https://www.simmons-simmons.com/en/publications/ck0a8y0hln4o80b33h8nu1063/060718-uk-diversity-reporting-metrics-proposed-changes>

<sup>4</sup> *Breaking the Glass Ceiling: Women in the Boardroom, A Study of Major Global Exchanges*. Retrieved on 31 May 2021. See pp. 18-19 [https://webstorage.paulhastings.com/Documents/PDFs/gender\\_parity\\_report\\_exchanges.pdf](https://webstorage.paulhastings.com/Documents/PDFs/gender_parity_report_exchanges.pdf)

diversity in the recruitment, training, staff retention and promotion processes. For instance, gender-blind shortlisting, family-friendly working environment and increasing retention rate of staff after maternity leave which are particularly important for retention of future woman leaders at management and board levels.

### **III. HKEx’s proposal to introduce a Code Provision under the Corporate Governance Code requiring the board to review the implementation and effectiveness of its board diversity policy annually (Question 6c)**

17. The Equal Opportunities Commission (EOC) fully supports the proposal to introduce a CP requiring the board to review the implementation and effectiveness of its board diversity policy annually.

18. The EOC also advises the HKEx to set out more concrete steps as CP or recommended good practices under “B.1 Board composition, succession and evaluation” and “B.3 Nomination Committee” in Part 2 of Principles of Good Corporate Governance, Code Provisions and Recommended Best Practices (CG Code). For instance, some major directions for recruitment processes could be provided as follows:

- (i) Reach the widest possible talent pool during executive search and nomination stages, so that they potential candidates are not only the board’s circle of contacts;
- (ii) Issuers can provide their diversity targets to their executive search firms;
- (iii) Adopt consistent selection and assessment criteria at all recruitment stages in terms of measurable skills, experience, knowledge and personal qualities,

- (iv) Actions that the issuers have been taken to oversee the development of a diverse pipeline for future succession to board and senior management appointments, and
- (v) The Nomination Committee should meet to consider the Board's progress in improving women's representation in leadership roles at least annually, and not only when there are specific board appointments to consider.

19. The above guidance could better equip the issuers with the means and specific measures to achieve gender diversity. The UK Corporate Governance Code 2018 (July 2018)<sup>5</sup>, that applies to financial years beginning on or after 1 January 2019, requires a greater emphasis on succession planning and the need for a company to develop a diverse executive pipeline and the nomination committee's remit has been expanded to oversee the development of this pipeline. The EOC strongly encourages the HKEx to take reference and adopt similar governance practices from the London Stock Exchange.

#### **IV. HKEx's proposal to amend the relevant forms to include directors' gender information (Question 6d)**

20. The EOC fully agrees to adopt any relevant, or consequential amendments in order to reflect transparent disclosure of gender information for board diversity purposes. The HKEx could also consider to include racial profile of directors for the improvement of racial diversity, if appropriate, in the near future.

21. The EOC also recommends HKEx to establish a database of directors' gender information of all issuers and publish a league table for the public to compare

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<sup>5</sup> The UK Corporate Governance Code 2018 refers to the one published by the Financial Reporting Council.

the progress of achieving gender diversity on board, in management and senior management, and in the workforce among issuers of the same sector/industry.

**V. HKEx’s proposal to upgrade a Code Provision to Rule requiring issuers to establish a Nomination Committee chaired by an Independent Non-Executive Director (INED) and comprising a majority of INEDs (Question 7)**

22. The EOC particularly welcomes the HKEx “will set out in the guidance the expected disclosures regarding the INED nomination and appointment, including the channels used in searching for appropriate INED candidates (whether through search firms, advertisements or personal network), and the potential contribution the candidates would bring to the board (in terms of their qualifications, skills and experience).”

23. This will raise the overall practice and standards in executive search for board diversity as current market practice still relies heavily on personal network or word-of-mouth recruitment. Improving the channels for recruitment is the first and fundamental step to putting the objective of board diversity into actions.

24. Furthermore, as mentioned in our response to Question 6(a), the EOC recommends that gender diversity should be practiced at Board Committees level. Hence, the Nomination Committee itself should have a gender diversified composition as well.



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## **Supplementary Note from the Equal Opportunities Commission**

### **Introduction**

The Equal Opportunities Commission (EOC) has responded to the Hong Kong Exchanges’ (HKEX) Consultation Paper on Review of Corporate Governance Code and Related Listing Rules (Consultation Paper) on 9 June 2021. This supplementary note is to further explain our position on Question 6d of the HKEX Consultation Paper and to identify a few relevant issues for HKEX’s further consideration.

### **HKEX proposal to amend the relevant forms to include directors’ gender information (Question 6d)**

2. In the Consultation Paper, HKEX proposes to amend the relevant forms requiring board directors of listed issuers (hereinafter referred to as “board directors”) to provide diversity related information upon appointment. To enhance transparency of the board and diversity information, HKEX plans to display such board diversity related information (including the board director’s age, gender and directorships) on the HKEX website.

3. While the EOC expresses its support for HKEX to adopt any relevant, or consequential amendments in order to reflect transparent disclosure of gender information for board diversity purposes in our June 2021

submission, the EOC would like to raise a few relevant issues for HKEX to further consider in this connection.

#### **Disclosure of aggregated statistics rather than individual information**

4. HKEX may consider whether or not it is sufficient, for the purpose of transparency, for listed issuers to submit to HKEX the aggregated statistics of board diversity, instead of requiring listed issuers to disclose the gender of each individual board director on the relevant forms of HKEX. Nasdaq, in its latest proposal filed with the U.S. Securities and Exchange Commission in December 2020 on board diversity, only required issuers to provide diversity statistics.

#### **Disclosure of gender information beyond the traditional “male / female” dichotomy**

5. In the HKEX’s proposed forms, it is required to disclose the sex of a board director by selecting either “male” or “female” on the forms. However, it is noted that in some foreign jurisdictions, the concept of gender has gone beyond the traditional dichotomous view (i.e. the notion that one is either male or female).

6. Given that HKEX is a world-leading capital raising institute having to deal with listed issuers worldwide, it may sooner or later come across listed issuers from places where forms of gender identity go beyond the male – female dichotomy, including self-recognised gender, are acceptable / lawful.

7. To cater for this possible scenario, HKEX may wish to consider whether the submission of board gender diversity information could be based on self-identified gender or not. For example, Nasdaq recently proposed to require all companies listed on the exchange to publicly disclose consistent, transparent diversity statistics about their board of directors, and self-identified gender was proposed by Nasdaq as the basis of providing gender information. In Nasdaq’s proposal, “female” means an individual board director who self-identifies her gender as a woman, without regard to the individual board director’s designated sex at birth, and the proposal provides four options of gender identity (female, male, non-binary and “did not disclose gender” for companies to disclose the number of directors in each category).

### **Reporting gender information by transgender people**

8. For transgender people (individuals whose gender identity and/or expression of their gender differs from social norms related to their sex assigned at birth), their self-identified gender may be different from the gender on their identity cards. Hong Kong has not yet enacted any gender recognition law for transgender people, although the Court of Final Appeal decided in **W v Registrar of Marriages**<sup>1</sup> in 2013 that a transsexual person who has legally changed gender must be allowed to marry in their affirmed gender under Article 37 of the Basic Law and Article 19 of the Bill of Rights. Under the current legal regime of Hong Kong, only persons who have undergone gender re-assignment surgery can apply to change the gender on their identity cards. However, in some foreign jurisdictions, transgender people can legally use self-recognised gender without the need of having undergone any gender re-assignment surgery at all.

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<sup>1</sup> W v Registrar for Marriages (FACV No4 of 2012) <http://www.hklii.hk/eng/hk/cases/hkcfa/2013/39.html>

9. For reasons stated in paragraph 6 above, HKEX may also consider how to accommodate transgender people on gender information disclosure. In this regard, HKEX may find it useful to consult relevant stakeholders' groups so as to formulate a pragmatic and effective policy on the issue of disclosure.

*Equal Opportunities Commission  
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