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Factsheet

Women on boards Directive

What has happened so far?

In 2012, the European Commission proposed a directive to address legislative inequalities and the under-representation of women on boards among Member States and to create a level playing field. The European Parliament had also already adopted its version of this proposed directive in 2013.

Due to a lack of majority, several attempts to reach an agreement in the Council failed, for example by Malta in 2017 or Luxembourg. After the change of government in Germany with the traffic light coalition, we tried again and worked closely with the French Council Presidency since December 2021 to get a Council majority. This was achieved in March 2022. After intensive negotiations, the co-legislators, the European Parliament and the Council, reached a preliminary agreement on the directive in June 2022. This agreement was finally passed in the Council on 17 October 2022 and in the European Parliament on 17 November 2022. The Directive was signed into law on the 22nd of November. It comes into force 21 days later.

Why do we need quotas in the EU?

- ▶ The representation of women in corporate leadership positions is improving, but progress remains slow and there are significant differences between Member States.
- ▶ In 2021, around 30% of non-executive board members of the largest listed companies in the EU were women. The pace has slowed considerably since 2016.

- ▶ France remains the only Member State with at least 40% of both genders on the boards of listed companies (EIGE 2021). Italy (38.8%) and the Netherlands (38.1%) are close to this mark. Women also make up about one-third of board members in Sweden, Belgium, Germany, Finland, Denmark and Austria.
 - In seven countries, however, women still make up less than one-fifth of all non-executive board members.
 - In about one-fifth of companies, non-executive boards are still exclusively male, including more than half of the companies in Estonia, Cyprus and Hungary.
- ▶ EIGE's 2021 data shows that seven Member States currently have national gender quotas (between 25% and 40%) on the boards of listed companies: France, Italy, Belgium, Portugal, Germany, Austria and Greece. In addition, the lower and upper houses of the Dutch parliament passed a law in 2021 to introduce a 33% quota, which came into force in January 2022.
- ▶ Ten member states have adopted a softer approach: Denmark, Estonia, Ireland, Spain, Luxembourg, Poland, Romania, Slovenia, Finland and Sweden. They use a wide range of measures and initiatives with varying degrees of stringency and specificity.
 - In Spain, for example, there is equality legislation recommending that each gender should be represented by at least 40% on company boards, but as this is only a recommendation and not a legal obligation, it is not enforceable.
 - In Slovenia, there is a legal quota for state-owned companies, but not for publicly listed companies.
 - Other countries have preferred to encourage companies to self-regulate in order to redress the gender imbalance on boards (e.g. Denmark and Ireland).
- ▶ The remaining nine Member States (Bulgaria, Czechia, Croatia, Cyprus, Latvia, Lithuania, Hungary, Malta and Slovakia) have not taken any significant measures.
- ▶ This data shows us one thing above all: legislative measures to redress the gender imbalance in economic decision-making are driving progress.

- In October 2021, the proportion of women on the boards of the largest listed companies in countries with national gender quotas was 36.4%, compared to 30.3% in countries with less stringent measures and only 16.6% in countries with no measures at all. Quotas have more than tripled the rate of change from 0.8 to 2.9 percentage points per year. Progress in countries without legal measures (i.e. with soft measures or no measures) is only 0.7 percentage points per year.
- ▶ In the EU, less than one in ten CEOs and board chairs is female (8.5% and 7.8% respectively in October 2021). Furthermore, women make up one third (33.3%) of non-executive, but only about one fifth (20.2%) of senior executives. As a result, progress towards gender parity is also slow among executives, with very few women reaching top positions in large companies (1.0 percentage points per year compared to 1.5 percentage points per year among non-executives since 2016).
- ▶ It is widely recognised that the presence of women in senior management improves corporate governance by enhancing team performance and the quality of decision-making through a more diverse and collective mind-set that incorporates a broader range of perspectives.

Content of the Directive

Main points:

- ▶ At the heart of the Directive lies the process for the selection of non-executive as well as executive board members. This is the most important means of achieving the goal of gender balance, as it creates the framework for the gender balance in existing boards to come into focus in the first place and pre-determines the possibilities of action. If the selection process is flawed, the best qualified candidates will not be shortlisted - to the detriment of both the company and the candidates. This is why the directive focuses on transparency and qualification in the selection process.
- ▶ Once equal qualifications are established, the candidate of the under-represented gender must be selected to meet the target of 40% of non-executive

board members or 33% of non-executive and executive board members combined. This "positive action" falls under Article 157 (4) of the Treaty on the Functioning of the European Union (TFEU).

- ▶ These targets of 40% or 33% respectively have to be reached by 30 June 2026.
- ▶ The understanding of the directive is clear: more women in decision-making positions is only one of many measures that need to be taken to achieve gender equality in the workplace. Nevertheless, it is an important piece of the puzzle.

Achievements of the European Parliament:

- ▶ For the European Parliament, Evelyn Regner (S&D, AT) and Lara Wolters (S&D, NL) are the main negotiators. As such, in close cooperation with the other political groups and the French Presidency of the Council, a lot was achieved.
- ▶ In the original proposal of the European Commission, an exemption from the scope of the Directive was foreseen for companies with less than 10% employees of one gender. This would have meant that those with a massive imbalance of employees, would not have had to do anything. This aspect of horizontal segregation was an important aspect that the EU Parliament was able to delete. This exception is therefore no longer included in the final version and is an important point for gender equality in all sectors.
- ▶ For a long time, the Council insisted on an open and unlimited suspension clause. But here, too, the EU Parliament was able to prevail insofar as there are now only two very specifically formulated exceptions and in particular the one that is based on factual figures is not only to be monitored regularly by the Commission but would also have to be examined in a revision of the Directive. At the same time, the system of actual quotas at national level is protected and strengthened.
- ▶ The selection process is not only the core of the Directive, but the entire procedure has been formulated much more clearly and, above all, more transparently at the request of the EU Parliament - from the vacancy notes to the shortlists, selection pools until the decision.

- ▶ Thanks to the solid negotiations, the target date for achieving the goals was also set earlier than originally planned by the Council. There is enough time for companies to adapt their structures, but at the same time, we do not have to wait another 10 years until the targets have to be reached.
- ▶ Originally vehemently rejected by the Member States but after intensive negotiations, there are now penalties foreseen in the Directive. Exactly what these look like is left to the Member States in the implementation. What is important, however, is that the Directive provides a concrete framework and obliges Member States to impose penalties on companies if they fail to meet the objectives.
- ▶ Part of the measures that the European Parliament was able to add concerns the strengthened and more frequent reporting obligation of companies and also Member States. Here, the proposal of a so-called "faming" list, which is now included on the initiative of Parliament, is to be emphasised. This list highlights at the level of the Member States which companies have already achieved the specified goals. This, of course, makes it easy to see which companies, on the other hand, have not yet achieved them.

Details of the content of the Directive:

- ▶ The scope refers to all listed companies, whether public or private, and the applicable law is that of the registered office. SMEs are clearly excluded.
 - In a revision of the Directive, an important request to the Commission is to extend the scope to all large companies, whether listed or not.
 - Currently, the Directive would affect about 5,000 companies in the European Union.
- ▶ The Directive sets two clear targets for the European Union as a whole: to achieve a gender balance of at least 40% of non-executive boards or 33% of non-executive and executive boards combined by 30 June 2026. Member States must ensure that companies falling within the scope meet these targets.
 - In addition, companies falling under the 40% target for non-executive boards must also set individual quantitative targets, i.e. internal targets, for executive boards. They must also reach these by 30 June 2026.

- ▶ The means to achieve these targets are especially transparent, fair and clear selection processes. Once equal qualifications are established, the decision must take into account the existing gender imbalance. This means that if there is a qualified candidate of the under-represented gender, this candidate must be chosen.
 - Only in exceptional cases can the balance be tipped in favour of another candidate, e.g. if other broader legal measures to promote diversity outweigh the gender aspect in the individual case. However, this exception, based on case law, must be duly justified by objective criteria which must in no case discriminate against the under-represented sex.
 - Clear, neutral, unambiguous pre-determined criteria must be applied throughout the entire selection process, including the creation of vacancy notices, pre-selection or the formation of selection pools or shortlists.
 - In the event of a voting process by shareholders, employees or otherwise, voters must be properly informed of the content and obligations of this Directive prior to voting.
- ▶ If an unselected candidate feels disadvantaged by the process, companies must inform them of the qualification criteria, the objective comparative assessment based on them and, where appropriate, the determining considerations.
 - Member States must ensure that these candidates can challenge the procedure before a court or other competent authority, depending on their national legal system. If facts are presented that suggest an equal qualification, the company must prove that the rules for a fair selection procedure were not violated. This reversal of the prima facie burden of proof is also intended to ensure that applicants have a fair chance in the procedure.
- ▶ Once a year, each company must provide the competent national authority with information on the representation of women and men in its management bodies, distinguishing between non-executive and executive, and on the measures taken to achieve the targets.
 - This information must also be published on the company's website.

- If the company does not meet the targets, it must explain the reasons and give a comprehensive description of the measures it has taken or intends to take to achieve the targets.
- ▶ As part of the reporting, member states must publish a list of companies that have achieved the target of 40% non-executive board members or 33% executive and non-executive members. This "faming list" should serve as a good example and support those companies that have actually taken the necessary steps.
- ▶ Member States must impose effective, proportionate and dissuasive penalties on companies that breach the commitment to individual quantitative targets, selection process and/or reporting.
 - Such penalties may include fines or judicial annulment of the selection of directors made in contravention of national rules.
 - Member States must also ensure that companies comply with applicable social and labour law obligations in the performance of public contracts and concessions, in line with relevant EU legislation.
- ▶ An exception to the application of the Directive is provided for in Article 8a. In two clearly defined cases, Member States do not have to apply the rules on the selection procedure, do not have to submit reports and companies do not have to set individual targets if, at the time of entry into force of the Directive, one of the following is met:
 - (1) de facto achievement: already achieved 30% of non-executive board members or 25% of non-executive and executive members combined.
or
 - (2) de iure achievement: national quota regulations.
 - Point 1 refers to those countries that have already achieved a minimum level in companies subject to the Directive. However, they still have to report whether further progress is made. This will be taken into account by the Commission when revising the Directive.
 - Point 2 refers to the system of quotas. Contrary to the objectives of this Directive, the quotas are a minimum and must also be at least 30% of the non-executive boards or at least 25% of the total number of all non-

- executive and executive members. In addition, national law must set strict enforcement measures similar to the penalties set out in the Directive and individual quantitative targets. If these national laws impose stricter reporting than the Directive, reporting may also be suspended.
- If the situation changes *de facto* or *de iure*, the Member State must resume the application of the entire Directive, otherwise it faces proceedings by the Commission for non- or incorrect transposition of the Directive.
 - ▶ In the Member States, at least one body, possibly the Equality Bodies, has to be designated to promote, analyse, monitor and support the balanced representation of women and men on the boards of listed companies. At European level, the Commission is responsible for monitoring the proper implementation.
 - ▶ On the basis of its regular reports and reviews, the Commission must also assess whether and how the Directive needs to be revised, e.g. by extending its duration (currently until 31 December 2038), by extending its scope to all large companies - including non-listed ones - or by revising the *de facto* exemption of the suspension clause.

What still needs to be done:

This Directive opens a door. A door to better companies, where the selection of decision-makers is based on competence and transparency and where the toxic features of internal corporate culture can also be addressed top-down.

It is clear, however, that this has only opened the first and already very heavy door to these important issues. This means that more needs to be done to truly achieve a discrimination-free workplace and gender-balanced corporate boards. But we can already be proud of this first symbolic "foot in the door" with the Women on Boards Directive.

