

## Directive equal gender listed companies

On 23 November 2022, a breakthrough at the level of European legislation was reached when a proposal for a Directive of the European Parliament and of the Council on improving gender balance among directors of listed companies was finally approved by the European Parliament (following approval by the EU Commission in October) <sup>1</sup>. On 7 December 2022, the text of Directive (EU) 2022/2381 of the European Parliament and of the Council on improving gender balance among directors of listed companies and related measures (referred to as “the Directive”) <sup>2</sup> was published in the Official Journal of the European Union. The draft Directive was submitted by the EU Commission on 14 November 2012 and the Directive has waited more than 10 years for political agreement in the EU institutions and its adoption.

### Aims of the Directive

The Directive imposes new obligations on Member States to ensure equal representation of women and men on the management and supervisory bodies of listed companies. Member States

will be required to implement the Directive in national legislation by 28 December 2024 at the latest.

- **Binding quotas**

The Directive imposes an obligation for Member States to ensure (in an appropriate manner) that in listed companies<sup>3</sup>, persons of the “under-represented gender” hold at least 40% of the non-executive seats on its governing bodies or that persons of the “under-represented gender” hold at least 33% of all seats on its governing bodies, whether executive or non-executive<sup>4</sup>. Listed companies are to achieve this mainly through transparent tender procedures with predetermined and neutrally formulated and unambiguous criteria, and by taking appropriate measures to ensure equal representation of women and men on their boards.

- **Rules of the selection procedure**

Under the Directive, positive discrimination will be introduced for tenders for listed companies that do not meet the quotas set by the Directive.

Member States will be obliged to ensure that listed companies which do not meet the relevant gender representation targets on their boards

<sup>1</sup> for the purposes of the Directive, a listed company is a company with its registered office in a Member State whose shares are admitted to trading on a regulated market in one or more Member States within the meaning of Article 4(1)(21) of Directive 2014/65/EU. The Directive does not apply to listed companies that are “micro, small and medium-sized enterprises” or just “SMEs” - that is, companies that employ fewer than 250 persons and whose annual turnover does not exceed EUR 50 million or whose annual balance sheet total does not exceed EUR 43 million, or, in the case of SMEs established in a Member State whose currency is not the euro, the equivalent amount in the currency of that Member State.

<sup>2</sup> Official Journal L 315, 7.12.2022, s. 44–59, <https://eur-lex.europa.eu/legal-content/CS/TXT/?uri=OJ:L:2022:315:TOC> full text of the Directive: [https://eur-lex.europa.eu/legal-content/CS/TXT/?uri=uriserv%3AOJ.L\\_2022.315.01.0044.01.CES&toc=OJ%3AL%3A2022%3A315%3ATOC](https://eur-lex.europa.eu/legal-content/CS/TXT/?uri=uriserv%3AOJ.L_2022.315.01.0044.01.CES&toc=OJ%3AL%3A2022%3A315%3ATOC)

<sup>3</sup> listed company” under the Directive means a company which has its registered office in a Member State and whose securities are admitted to trading on a regulated market in one or more Member States within the meaning of Article 4(1)(14) of Directive 2004/39/EC;

<sup>4</sup> “corporate body” is defined in the Directive as the administrative, management or supervisory body of a listed company; “member of a corporate body” is defined in the Directive as a member of any body, including one who is an employee representative; “executive member of a corporate body” under the Directive means, in a monistic system, a member of the administrative body who is involved in the day-to-day management of the listed company and, in a dualistic system, a member of the governing body of the listed company; “non-executive member of a corporate body” under the Directive means, in a monistic system, a member of the administrative body who is not an executive member of the administrative body and, in a dualistic system, a member of the supervisory body of the listed company.

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regulate the procedure for selecting candidates for appointment or election to the company's governing bodies. Under this arrangement, when selecting new directors, preference will always be given to a candidate of the "under-represented gender" if he or she is as qualified as the opposite gender in terms of suitability, competence, and professional performance. Furthermore, Member States will be required to ensure that listed companies are obliged to disclose, at the request of the unsuccessful candidate, the qualification criteria on which the selection of candidates was based, an objective comparative assessment of those criteria and, where appropriate, the reasons which decided in favour of the candidate of the opposite gender.

- **Reversal of the burden of proof**

Member States must also provide special rules in case of disputes. Where an unsuccessful candidate of the "under-represented gender" presents to a court or other competent authority facts suggesting that he or she had the same qualifications as a candidate of the opposite gender selected for appointment or election to a seat on a listed company's body, it will be for that company to prove that there has been no breach of the rules of the Directive. Unlike an ordinary dispute, this shifts the burden of proof to the listed company that does not meet the quotas set by the Directive, rather than the unsuccessful candidate.

- **Control of listed companies at Member State level**

The Directive also requires Member States to require listed companies to submit once a year a summary report on gender representation on their boards and the measures taken to achieve the relevant objectives of the Directive. Member States will also be required to check that listed

companies also publish this information on their websites in an appropriate and accessible manner.

- **Effectiveness of the Directive and timing of quota compliance**

The Directive will enter into force on the 20th day after its publication in the Official Journal of the EU, i.e., on 28 December 2022.

Member States will then have two years to properly implement the Directive in their national laws. By 28 December 2024 at the latest, Member States will have to adopt and publish the laws, regulations and administrative provisions adopted to comply with the Directive and submit them to the European Commission.

The targets set by the Directive, i.e., the required percentage of women and men on the boards of listed companies, are to be achieved by the Member States or the listed companies to which the provisions of the Directive apply by 30 June 2026 at the latest.

The final date of validity and effectiveness of the Directive is set as 31 December 2038.

- **Background to the Directive**

The Directive is one of the first binding EU instruments to contribute to gender balance on the boards of major and often multinational corporations and to target the participation of women in the management of these companies, since in the vast majority of cases women will be the "under-represented gender".

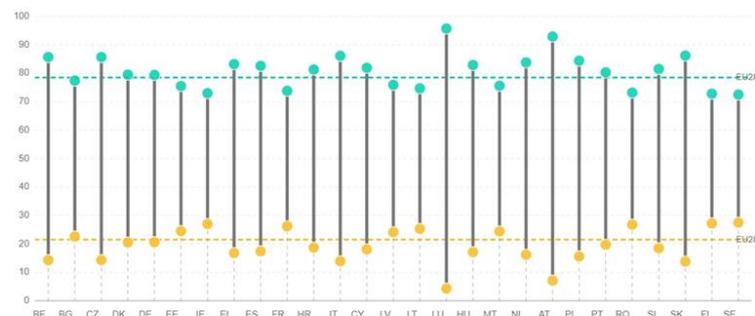
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- **A single goal**

As the EU Commission's 2022 Report on Gender Equality in the EU5 shows, the proportion of women and men on the boards of the largest listed companies in the EU varies significantly across the EU. France remains the only Member State with at least 40% of both genders represented on the boards of listed companies. Italy (38.8%) and the Netherlands (38.1%) are close to this threshold.

According to the study, women also make up at least a third of board members in Sweden, Belgium, Germany, Finland, Denmark and Austria. However, in seven EU countries, women still represent less than a fifth of the directors of listed companies.

More than a quarter (28%) of the largest EU-listed companies have at least 40% of both genders on their boards. However, around one in five EU-listed companies still has an all-male statutory body, and more than half of these companies are in Estonia, Cyprus and Hungary.



EIGE's Gender Statistics Database - Indicator Largest listed companies: CEOs, executives and non-executives  
Source: European Institute for Gender Equality  
LAST UPLOAD ON: 01/06/2022

The chart above, regularly updated by the European Institute for Gender Equality (EIGE), shows the average representation of women in the management and non-executive bodies of the largest listed companies in EU countries on 1 June 2022.

The Directive also aims to harmonize progress in the inclusion of women in supervisory and management positions in listed companies across the EU. The Directive refers to the results of monitoring the measures taken to achieve gender balance in the management and supervisory bodies of companies across the Member States, according to which binding legislative measures clearly have the most significant effect on the inclusion of women. The setting of binding quotas by Member States has more than tripled the rate of change in the occupation of the boards of listed companies from 0.8% to 2.9% per year. Progress in countries without binding legislative measures

<sup>5</sup> European Commission, Directorate-General for Justice and Consumers, 2022 report on gender equality in the EU, Publications Office of the European Union: <https://data.europa.eu/doi/10.2838/94579>

<sup>6</sup> [https://eige.europa.eu/gender-statistics/dgs/indicator/wmidm\\_bus\\_bus\\_wmid\\_comp\\_compex/bar](https://eige.europa.eu/gender-statistics/dgs/indicator/wmidm_bus_bus_wmid_comp_compex/bar)

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(i.e., with or without the introduction of non-enforceable measures) remains at just 0.7% per year.

- **Unified internal market**

The differences arising in legislation on a gender-balanced composition of the management and supervisory bodies of listed companies at national level, or the complete absence of legislation in this respect in some Member States, also significantly restricts the functioning of the internal market. Differences in the laws of Member States impose different requirements on European listed companies in terms of corporate governance. Different developments in national legislation are often difficult to compare and, as a result, increase the costs to companies, investors and other stakeholders of managing multinational companies.

Differences in the legal and self-regulatory requirements for the composition of corporate management and supervisory bodies can cause practical complications for listed companies operating across borders (in particular when setting up subsidiaries or in mergers and acquisitions) and can also be problematic for candidates for management and supervisory positions.

- **Trying to break out of gender stereotypes**

In an explanatory memorandum, the Directive also mentions the sad reality that women are significantly under-represented in management and supervisory positions in European companies, despite the fact that they themselves represent approximately 60% of all university graduates in the EU. The Directive thus also hopes that the

compulsory appointment of women to the management and supervisory bodies of large companies will provide new potential for economic growth and mobilization of available human resources. The compulsory inclusion of women in control and executive positions in Europe's largest companies will kick start the process of breaking out of gender stereotypes and the non-transparent male-dominated business culture, which itself can also lead to a persistent undesirable effect of narrow 'groupthink' and a lack of diversity in corporate leadership.

### **Conclusion**

The directive, which introduces mandatory quotas for control and management positions in EU-listed companies, is already stirring up a lot of emotions. The length of the legislative process itself is testament to its controversial nature.

Among the critics, there are especially voices that call any kind of forced quotas and positive discrimination as measures that are completely inappropriate for achieving the desired goal, which in a particular case may lead to the election of members of company bodies purely on the basis of gender, and not on the basis of quality, education or qualifications. Some critics are of the opinion that the issue of gender balance in corporate governance is a matter for national legislation in the Member States and not for regulation at the EU level.

However, it cannot be ignored that self-regulation at the Member State level has to date failed to bring about any significant progress towards more equal participation of men and women in corporate governance. The quotas introduced by the Directive thus have the potential to replace the will for change in Member States where it has been lacking.



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