



Conseil de  
l'Union européenne

Bruxelles, le 10 juin 2022  
(OR. fr, en)

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**Dossier interinstitutionnel:  
2012/0299(COD)**

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**9880/22  
ADD 1**

**LIMITE**

**SOC 361  
GENDER 104  
ECOFIN 578  
DRS 28  
CODEC 843**

**NOTE**

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Origine:	Secrétariat général du Conseil
Destinataire:	Comité des représentants permanents
N° doc. préc.:	9070/22 + ADD 1
Objet:	Proposition de DIRECTIVE DU PARLEMENT EUROPÉEN ET DU CONSEIL relative à un meilleur équilibre hommes-femmes parmi les administrateurs des sociétés cotées en bourse et à des mesures connexes - Analyse du texte de compromis final en vue d'un accord

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Les délégations trouveront ci-joint le texte consolidé de l'accord provisoire.

Proposal for a

**DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL**

**on improving the gender balance among [...] directors of companies listed on stock exchanges, and related measures**

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular [...]

*Article* 157(3) thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national Parliaments,

Having regard to the opinion of the European Economic and Social Committee,<sup>1</sup>

*Having regard to the opinion of the Committee of the Regions,*<sup>2</sup>

Acting in accordance with the ordinary legislative procedure,

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<sup>1</sup> *OJ C 133, 9.5.2013, p68.*

<sup>2</sup> *OJ C 218, 30.7.2013, p. 33.*

Whereas:

- (1) [...] Under Article 2 [...] of the Treaty on European Union [...] (*TEU*), *equality is a founding value* of the [...] *Union and it is common to the Member States in a society in which equality, including equality between [...] women and men, prevails. Under Article [...] 3(3) TEU, the Union [...] is to promote equality between women [...] and men.*
- (1a) *Article 157(3) of the Treaty on the Functioning of the European Union confers upon the Union legislative powers to adopt measures to ensure the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation.*
- (2) [...] *With a view to ensuring full equality in practice* between women and men in [...] *working life, Article 157(4) TFEU enables Member States to maintain or adopt measures providing for specific advantages in order to make it easier for the under-represented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers (positive action).* Article 23 of the Charter of Fundamental Rights of the European Union [...] (*the 'Charter'*) provides that equality between women and men [...] *needs to* be ensured in all areas and that the principle of equality [...] *cannot* prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex.
- (2a) *The European Pillar of Social Rights, jointly proclaimed by the European Parliament, the Council, and the Commission in 2017, incorporates among its principles equality of treatment and opportunities between women and men, including regarding participation in the labour market, terms and conditions of employment and career progression.*

- (2b) *Achieving gender equality in the workplace requires a comprehensive approach, which also includes fostering gender-balanced decision-making within companies at all levels, as well as closing the gender pay gap. Ensuring equality in the workplace is also a key prerequisite for reducing poverty among women.*
- (3) Council Recommendation 84/635/EEC [...] <sup>3</sup> recommended that Member States [...] take steps to ensure that positive action includes, as far as possible, actions having a bearing on active participation by women in decision-making bodies. Council Recommendation 96/694/EC <sup>4</sup> [...] recommended that Member States [...] encourage the private sector to increase the presence of women at all levels of decision-making, [...] *in particular* by the adoption, [...] or within the framework, of equality plans and positive action programmes.
- (3a) *This Directive aims at ensuring the application of the principle of equal opportunities between women and men and attaining a gender-balanced representation among top management positions by establishing a set of procedural requirements concerning the selection for appointment or election of company board members based on transparency and merit.*

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<sup>3</sup> *Council Recommendation 84/635/EEC of 13 December 1984 on the promotion of positive action for women (OJ L 331, 19.12.1984, p. 34).*

<sup>4</sup> *Council Recommendation 96/694/EC of 2 December 1996 on the balanced participation of women and men in the decision-making process (OJ L 319, 10.12.1996, p.11).*

- (4) In recent years the European Commission has presented several reports taking stock of the situation concerning gender diversity in economic decision-making.<sup>5</sup>[...] **It** has encouraged publicly listed companies in the European Union to increase the number of [...] **members of the under-represented sex** on their boards by self-regulatory measures and to make concrete voluntary commitments in that regard. In **2010, in its Communication entitled "A Strengthened Commitment to Equality between Women [...] and Men - Women's Charter"**, the European Commission underlined that women still do not have full access to the sharing of power and decision-making in political and economic life and reaffirmed its commitment to use its powers to promote a fairer representation of women and men in positions of responsibility. Improving the gender balance in decision-making was [...] **one of the priority tasks set** by the Commission **in its Communication entitled "Strategy for equality between women and men 2010-2015"**. **Achieving gender balance in the decision-making and politics is one of the priorities set out in the Commission's Communication entitled "A Union of Equality: Gender Equality Strategy 2020-2025.** -[...]
- (5) **In 2011, the Council adopted** the European Pact for Gender Equality (2011-2020), **acknowledging** [...] that gender equality policies are vital to economic growth, prosperity and competitiveness. **It** reaffirmed its commitment to close the gender gaps with a view to meeting the objectives of the Europe 2020 Strategy, especially in three areas of great relevance to gender equality, namely employment, education and social inclusion, [...] **urging** action to promote the equal participation of women and men in decision-making at all levels and in all fields, in order to make full use of all available talent, **knowledge and ideas, thus enriching the diversity of human resources and improving business prospects.**

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<sup>5</sup> [...] **COM(2020) 152 final**

*(5a) The Europe 2020 Strategy for Smart, Sustainable and Inclusive Growth recognised that increasing women's labour market participation is a precondition for boosting growth and for tackling demographic challenges in Europe. The Strategy set a headline target of reaching an employment rate of 75 % for women and men aged 20 to 64 years by 2020, as well as a clear commitment to the elimination of the persisting gender pay gap and a reinforced effort to tackle all barriers to women's participation in the labour market, including the existing 'glass ceiling' phenomenon. The Porto Declaration signed by the Heads of State and Government on 8 May 2021<sup>6</sup> welcomed the new EU headline targets on jobs, skills and poverty reduction as well as the revised Social Scoreboard proposed by the Commission in the European Pillar of Social Rights Action Plan<sup>7</sup>. In order to achieve the overall goal of an employment rate of 78 % among the Union's population aged 20 to 64 by 2030 %, it is necessary to strive to at least halve the gender employment gap compared to 2019. Enhancing women's participation in economic decision-making, on company boards in particular, is expected to have a positive spill-over effect on women's employment in the companies concerned and throughout the whole economy. In the aftermath of the COVID-19 crisis, gender equality and inclusive leadership matter more than ever, in line with the need to make full use of the available pool of talent, of both men and women. Research has shown that inclusion and diversity are enablers of recovery and resilience. They are of vital importance in ensuring Europe's economic competitiveness, encouraging innovation and enhancing professional standards on company boards.*

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<sup>6</sup> <https://www.consilium.europa.eu/en/press/press-releases/2021/05/08/the-porto-declaration/>

<sup>7</sup> COM(2021) 102 final

- (6) The European Parliament, in its resolution **of 6 July 2011** on women and business leadership, urged companies to attain the critical threshold of 30 % female membership of management bodies by 2015 and 40 % by 2020. It called on the Commission, if the steps taken by companies and the Member States were found to be inadequate, to propose legislation by 2012, including quotas, ***to be implemented on a temporary basis and to serve as catalysts for change and for rapid reforms designed to eliminate persisting gender inequalities and stereotypes in economic decision-making.*** The European Parliament reiterated that call for legislation in its resolution of 13 March 2012 [...] ***and in its resolution of 21 January 2021.***
- (6a) Union institutions and bodies should lead by example as regards gender equality, inter alia by setting objectives for a gender-balanced representation at all levels of management. Particular attention needs to be given to policies for the recruitment of senior management. Therefore, the Gender Equality Strategy 2020-2025 [COM(2020)152 of 5 March 2020] emphasised that EU institutions and bodies should also ensure gender balance in leadership positions. The Commission committed to ensuring full gender equality at all levels of Commission management by 2024 in its recent HR Strategy [C(2022) 2229 final]. The Commission will monitor progress and report regularly on its website. The Commission further shares best practices with other EU institutions and bodies and will report on the situation of gender balance in leadership positions in these institutions and bodies on its website. The European Parliament has in its Bureau decision 13 January 2020 agreed on setting targets for gender balance in senior and middle management positions for 2024. The Parliament will continue to monitor the progress on all levels and aims to lead by example. The Council is committed, in its Diversity and Inclusion Strategy, to attaining gender equality in management positions of its General Secretariat with a 45 to 55 percent margin at least by the end of 2026. The GSC's Action Plan for Gender Equality in Management sets out measures to achieve this objective.***

(7) [...]

**(7a) *It is important that the companies and businesses consider the creation of a pipeline of board- and management-ready women that fosters, supports and develops female talent at all levels and throughout their careers.***

**(7b) *In order to promote gender equality and support the participation of women in decision-making, Directive (EU) 2019/1158, which promotes work-life balance for parents and carers', provides that Member States take the necessary measures to ensure an equal sharing of caring responsibilities between men and women through well-designed parental, paternity and carers' leaves, besides the existing maternity leave, and the right to request flexible working arrangements.***

(7c) [...]

(8) [...]

**(8a) *The appointment of women as board members is being hampered by a number of specific factors which can be overcome not only through binding rules but also through educational initiatives and incentives to promote good practices. First, it is essential to heighten awareness in business schools and universities of the benefits of gender equality in making companies more competitive. It is also necessary to encourage a regular turnover of board members and to introduce positive measures to promote and reward efforts by states and companies to adopt a more decisive approach to such changes in top economic decision-making bodies at all levels.***

(9) [...]

(10) *Europe has a large pool of highly qualified women, which is constantly growing as evidenced by the fact that 60% of university graduates are female. Attaining/achieving<sup>8</sup> gender balance on company boards is essential for an efficient use of this existing human capital, which is key to addressing the Union's demographic and economic challenges. Thus, the under-representation of women [...] in the [...] boardrooms of publicly listed companies [...] in the EU is a missed opportunity for Member States' economies at large, as well as their development and growth. Making full use of the existing talent pool would also improve the return on education for both individuals and the public sector. It is widely acknowledged that the [...] presence of women [...] in the boardroom improves corporate governance, because team performance and the quality of decision-making [...] are enhanced by a more diverse and collective mind-set incorporating a wider range of perspectives. Numerous studies have shown that diversity leads to a more proactive business model, more balanced decisions and enhanced professional standards on boards that better reflect societal realities and consumers' needs. It also encourages innovation. Numerous studies have also shown that there is a positive relationship between gender diversity at top management level and a company's financial performance and profitability, resulting in substantial long-term sustainable growth. Attaining/achieving<sup>9</sup> gender balance on company boards is therefore vitally important for ensuring Europe's economic competitiveness in a globalised economy and offers a comparative advantage vis-à-vis third countries.*

(10a) *Increasing the representation of women in the boardrooms of listed companies in the Union not only affects the women appointed to boards, but also contributes to attracting female talent to the company and ensuring a greater presence of women at all levels of management and in the workforce. Therefore, a higher share of women on company boards should have a positive impact on closing both the gender employment gap and the gender pay gap.*

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<sup>8</sup> *for lawyer linguists*

<sup>9</sup> *for lawyer linguists*

*(10b) Despite evidence of the beneficial impact of gender balance on companies themselves and the economy in general, and despite the existing Union legislation prohibiting sex discrimination and Union-level actions encouraging self-regulation, women continue to be vastly under-represented in the highest decision-making bodies of companies throughout the Union. Statistics show that the proportion of women involved in top-level business decision-making remains very low. If one half of the talent pool is not even considered for leadership positions, the very process and quality of appointments may be compromised, leading to increased distrust of business power structures and possibly to a reduction in the efficient utilisation of available human capital. It is important that the make-up of society is faithfully reflected in corporate decision-making and that the potential of the entire population of the Union is utilised. According to the European Institute for Gender Equality, in 2021, women accounted for an average of 30.6 % of the members of boards of directors in the largest publicly listed companies and only 8.5 % of chairpersons. This indicates unfair and discriminatory under-representation of women, thereby clearly undermining Union principles of equal opportunities and equal treatment of men and women in the fields of employment and occupation. While measures to encourage career progression for women at all levels of management should therefore be introduced and reinforced, special attention should be paid to ensuring that this is the case in listed companies in the Union, due to the significant economic and social responsibility of such companies. In addition, it is important that Union bodies and agencies lead by example when it comes to redressing existing gender imbalances within the composition of their management boards.*

**(10c)** [...]

(11) The proportion of women on company boards [...] **has increased** very slowly, [...] during the past years. The rate of improvement has differed in [...] Member States and has led to highly divergent results. Much more significant progress was noted in [...] **those** Member States where binding measures have been introduced. [...] **That divergence is** likely to increase given the very different approaches [...] **to improving gender balance on boards. Therefore Member States are encouraged to share information about the effective measures taken and policies adopted at the national level, and to exchange best practice, with a view to supporting progress across the Union towards achieving a more balanced representation of women and men on company boards.** [...]

(11a) [...]

(12) The scattered and divergent regulation or the absence of regulation at national level as regards the gender balance on boards of listed companies does not only lead to discrepancies in the number of women among non-executive directors and different rates of improvement across Member States, but also poses barriers to the internal market by imposing divergent corporate governance requirements on European listed companies. Those differences in legal and self-regulatory requirements for the composition of corporate boards can lead to practical complications for listed companies operating across borders, notably when establishing subsidiaries or in mergers and acquisitions, as well as for candidates for board positions.

(12a) **Gender imbalances within companies are greater at more senior levels. Furthermore, many of those women who are represented in senior management are to be found in fields such as human resources and communication, while men at a senior level are more likely to be employed in general management or 'line management' within the company. As the main pool for recruitment to board positions is comprised largely of candidates with senior management experience, it is vital that the number of women advancing to such management positions within companies be increased.**

*(12b) One of the main factors enabling this Directive to be correctly implemented is the effective application of criteria, to be set in advance and with full transparency, for the selection directors, with candidates' competencies being considered on an equal basis, regardless of their gender.*

*(12c) [...]*

(13) The current lack of transparency [...] *in* the selection [...] **process** and qualification criteria for board positions in most Member States represents a significant barrier to more gender diversity among board members and negatively affects both the board candidates' careers and freedom of movement, as well as investor decisions. Such lack of transparency prevents potential candidates for board positions from applying to boards where their qualifications would be most required and from challenging gender-biased appointment decisions, thus restricting their freedom of movement within the internal market. On the other hand, investors have different investment strategies that require information linked also to the expertise and competence of the board members. More transparency in the qualification criteria and the selection [...] **process** for board members enables investors to better assess the company's business strategy and to take informed decisions. ***It is therefore important that board appointment procedures be clear and transparent and that candidate be assessed objectively on their individual merits, irrespective of gender.***

(14) While this Directive does not aim to harmonise national laws on the selection [...] **process** and qualification criteria for board positions in detail, the introduction of certain minimum standards as regards the requirement for listed companies without balanced gender representation to **select candidates for election or [...] appointment [...] to the posts of director/or appointment to director positions**<sup>10</sup> on the basis of **a transparent and clearly defined selection procedure and** an objective comparative assessment of [...] **their** qualifications [...] in terms of suitability, competence and professional performance is necessary [...] **with the purpose of attaining** gender balance. **Only a binding measure at Union level** [...] can effectively help to ensure a competitive level-playing field throughout the Union and avoid practical complications in business life.

(15) [...]

(15a) [...]

(16) The Union should therefore aim to increase the presence of women on company boards **in all Member States**, in order [...] to boost economic growth, **encourage labour market mobility, strengthen** [...] the competitiveness of European companies and to achieve effective gender equality on the labour market. This aim should be pursued through minimum requirements on positive action in the form of binding measures aiming at attaining a quantitative objective for the gender composition of boards of listed companies, in [...] view of the fact that Member States and other countries which have chosen this or a similar method have achieved the best results in reducing the under-representation of women in economic decision-making positions.

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<sup>10</sup> **to the post of vs directors position - Council request to delete the to the post of and instead change to director position - to be decided by lawyer-linguists**

*(16a) It is important that listed companies develop a gender policy, in order to attain a more balanced gender representation at all levels. Such policies might include the nomination of both a female and male candidate for key positions, mentoring schemes and career development guidance for women, and human resource strategies designed to encourage diverse recruitment.*

17) Companies listed on stock exchanges [...] **have** a particular economic importance, visibility and impact on the market as a whole. [...] These companies set standards for the [...] **wider economy** and their practices can be expected to be followed by other types of companies. The public nature of **the** listed companies justifies [...] **their being** regulated to a greater extent in the public interest.

*(17a) The measures provided for in this Directive should apply to listed companies, which are defined as companies having their registered office in a Member State and whose shares are admitted to trading on a regulated market within the meaning of Directive 2014/65/EU of the European Parliament and of the Council,<sup>11</sup> in one or more Member States.*

*(17b) For the purposes of the implementation of this Directive, the Member State competent to regulate the matters under this Directive should be the Member State in which the listed company in question has its registered office. This Directive does not affect national legislation determining the law applicable to companies for matters not governed by this Directive.*

18) This Directive should not apply to micro, small and medium-sized enterprises (SMEs), as defined by Commission Recommendation 2003/361/EC. [...]

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<sup>11</sup> *Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (OJ L 173, 12.6.2014, p. 349–496).*

- 19) There are various systems of board structures for listed companies in the Member States, the main distinction being between a dual [...] system with both a management board and a supervisory board (*'two-tier system'*) and a unitary [...] system combining the management and supervisory *functions* in a single board (*'one-tier system'*). There are also mixed systems, which feature aspects of both systems or give companies an option between different models. [...] This Directive should apply to all board systems in the Member States.
- (20) All board systems distinguish, *de jure or de facto, between executive directors*, [...] involved in the daily management of the company, and non-executive directors who *perform a supervisory function and* are not involved in the daily management. [...] *This Directive aims to improve the gender balance among both categories of directors*. In order to strike the right balance between the need to increase the gender diversity of boards and the need to minimise interference with the day-to-day management of a company, [...] *this Directive distinguishes between the two categories of director*.
- (21) In several Member States, a certain proportion of the non-executive directors can or must be appointed or elected by the *companies'* workforce and/or [...] *by employee organisations* pursuant to national law or practice. The quantitative objectives [...] *should also apply to these directors. However, in view of the fact that some* non-executive directors [...] *are* employee representatives, [...] *the means* for ensuring that those objectives are attained *should be defined by the Member States concerned, with due regard to the specific rules for the election or designation of employee representatives as laid down in Member States' legislation and respect the freedom of vote in the election of employee representatives*. [...] *Given the differences in national company law, this* should [...] *include the possibility for Member States to apply the quantitative objectives separately to shareholder representatives and employee representatives*.

(22) Listed companies in the Union should be [...] ***subject to the objective of having at least 40 % of non-executive directors*** of the under-represented sex [...] ***no later than 30 June 2026. Alternatively, since listed companies should [...] aim to increase the proportion of the under-represented sex in all decision-making positions, Member States may provide that listed companies should be subject to*** the objective of ***having*** at least [...] ***33% of all directors positions*** of the under-represented sex, [...] ***irrespective of whether they are executive or non-executive [...] with a view to promoting a more balanced gender representation among*** directors. [...]

(22a) [...]

(22b) ***These objectives concern the overall gender diversity among directors and do not interfere with the concrete choice of individual directors from a wide pool of male and female candidates in each individual case. In particular, this Directive 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.***

(22c) [...]

(23) [...] ***Due to their nature, public undertakings [...] falling under the scope of this Directive, should serve as a model for the private sector. Member States exercise a dominant influence over such listed public undertakings [...] within the meaning of point (b) of Article 2 of Commission Directive 2006/III/EC.*** Due to that dominant influence, they have the instruments at their disposal to bring about the necessary change more rapidly. [...]

(23a) [...]

(23b) [...]

(24) Determining the number of [...] director positions necessary to [...] *reach the objectives* requires further specification since, *given the size of most boards*, [...] it is [...] *not* possible [...] *mathematically to reach* the exact share of 40 % *or, where applicable, 33 %*. Therefore, the number of board positions necessary to meet the objective should be the number closest to 40 %, [...] *or, where applicable, 33 %, and in both cases should not exceed 49%*.

(24a) [...]

(25) In its case-law <sup>12</sup> on positive action and the compatibility thereof with the principle of non-discrimination *based* on sex [...] ([...] also laid down in Article 21 of the Charter [...]), the Court of Justice of the European Union accepted that priority may in certain cases be given to the under-represented sex in selection for employment or promotion, provided that the candidate of the under-represented sex is equally qualified as *compared with* the competitor of the other sex in terms of suitability, competence and professional performance, that the priority is not automatic and unconditional but may be overridden if reasons specific to an individual candidate of the other sex tilt the balance in that candidate's favour, and that the application of each candidate is *the* subject of an objective assessment which [...] *specifically applies all the selection* criteria [...] to the individual candidates.

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<sup>12</sup> C-450/93; Kalanke (ECR I-3051, C-409/95 Marschall [...] ECR I-6363, C-158/97 Badeck [...] *ECR I-1875*, C-407/98 Abrahamsson [...] ECR I-5539.

(26) *Member States should ensure that those listed companies on whose boards members of the under-represented sex hold less than 40 % of non-executive director positions, or less than 33 % of all director positions, respectively, carry out [...] the selection of the best qualified candidates for [...] election or appointment to those positions on the basis of a comparative analysis of the qualifications of [...] candidates by applying clear, neutrally formulated and unambiguous criteria established at the beginning of the selection process, with a view to improving gender balance on boards.* Examples of types of selection criteria that *listed* companies could apply include professional experience in managerial [...] *or* supervisory tasks, *international experience, multidisciplinary, and* knowledge, in specific relevant areas such as finance, controlling or human resources management, leadership and communication skills and networking abilities. [...]

(26a) *When carrying out the selection process, priority should be given to the equally qualified candidate of the under-represented sex. Such priority should not, however, constitute an automatic and unconditional preference. There may be exceptional cases where an objective assessment concerning the specific situation of an equally qualified candidate of the other sex might override the preference which should, otherwise, be accorded to the candidate of the under-represented sex. Such overriding could take place, for instance, where broader diversity policies apply at national or company level for the selection of board members. The overriding of the application of positive action should nevertheless remain exceptional and based on a case-by-case assessment, and should be duly justified by objective criteria which should not, in any event, discriminate against the under-represented sex.*

(26b) *In Member States where the requirements relating to the process of selection of candidates are applicable, companies on whose boards members of the under-represented sex hold at least 40 % of non-executive director positions, or at least 33 % of all director positions, respectively, should not be obliged to implement those requirements.*

(27) The methods of [...] *selecting candidates for appointment or election to the posts of* directors differ from one Member State to another and from one company to another. They may involve the pre-selection of candidates to be presented to the shareholders' assembly, for example by a nomination committee [...] *or by executive search firms*. The requirements concerning the selection of candidates should be met at the appropriate stage of the selection process in accordance with national law and the articles of association of the listed companies concerned, *including prior to the election of a candidate by shareholders, for example while preparing a shortlist*. In this respect, this Directive only establishes [...] *minimum standards for the process* of selection [...] *of candidates for appointment or election to the posts*, making it possible to apply the conditions provided for by the case-law of the Court of Justice with a view to *allowing for gender diversity and* attaining the objective of a more balanced [...] *representation of women and men on* boards of listed companies. *The provisions of this Directive do not unduly interfere with day-to-day management, since companies maintain the freedom to select candidates on the basis of qualifications or other objective relevant considerations.*

(27a) [...]

- (28) [...] *In view of the objectives of this Directive as regards gender balance*, listed companies should [...] be required [...] upon the request of [...] *a candidate*, [...] *to inform that candidate of* the qualification criteria upon which the selection was based, [...] the objective comparative assessment of *the candidates under* those criteria and, where relevant, the *specific* considerations *exceptionally* tilting the balance in favour of a candidate who is not of the under-represented sex. *Such an information requirement might imply a limitation* [...] to the right to respect for private life [...] *and to the right* to the [...] *protection* of personal data *that are recognised, respectively, by* [...] Articles 7 and 8 of the Charter. [...] *However, such limitations* are necessary and, in conformity with the principle of proportionality, genuinely meet recognised objectives of general interest. They are therefore in line with the requirements for such limitations laid down in Article 52(1) of the Charter and with the relevant case-law of the Court of Justice. *Such limitations should be applied in compliance with Regulation (EU) 2016/679 of the European Parliament and of the Council*<sup>13</sup>.
- (29) Where [...] *a candidate* of the under-represented sex establishes the presumption *that* they were equally qualified as *compared with the selected* [...] candidate of the other sex, the listed company should be required to demonstrate the correctness of the choice.

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<sup>13</sup> *Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (OJ L 119, 4.5.2016, p. 1–88).*

*(29a) While this Directive seeks to establish minimum requirements in the form of binding measures to improve the gender composition of boards of listed companies, and in accordance with the principle of subsidiarity, it is important to recognise the legitimacy of different approaches and to acknowledge the effectiveness of certain national measures, already adopted in this policy area, that have already shown satisfactory results. In some Member States, efforts to ensure a more balanced representation of women and men on the boards of listed companies have thus already been made through the adoption of binding measures that are considered equally effective to those laid down in this Directive. The requirements relating to the process of selection of candidates and, where relevant, those relating to the establishment of individual quantitative objectives, may therefore be suspended by those Member States. In such cases, where Member States have introduced such measures by way of national legislation, the rounding rules defined in this Directive with regard to the specific number of board members should be applied mutatis mutandis for the purpose of assessing those national provisions under this Directive. Where a Member State has decided to apply such suspension, the objectives set out in this Directive should be deemed to be attained.*

*(29b) With a view also to improving the gender balance among directors involved in daily management tasks, listed companies should be required to set individual quantitative objectives regarding a more balanced representation of both sexes among executive directors, with the aim of reaching such objectives by the date set out in this Directive. These objectives should help companies to achieve tangible progress as compared with their current situation. This obligation should not apply to listed companies which pursue the objective of 33 % relating to all directors, whether executive or non-executive.*

*(29c) Member States should require listed companies to provide information on the gender composition of their boards as well as information on the measures taken with a view to attaining the objectives laid down in this Directive, on a yearly basis to the competent authorities in order to enable them to assess the progress of each listed company towards gender balance among directors. Such information should be published by listed companies in an appropriate and easily accessible manner on their websites and included in the company's annual report. Where a listed company has not met the applicable quantitative objectives, such comprehensive information should also include a description of the concrete measures that the company has taken so far and/or intends to take in the future in order to meet the objectives. Where Member States have suspended the application of Article 4a on the basis of Article 8a these obligations should not apply provided that national legislation contains reporting obligations that ensure the regular publication of information regarding the progress attained by listed companies towards a more balanced representation of women and men on their boards. In order to avoid unnecessary administrative burden and duplication of efforts, the information on gender balance in company boards to be reported pursuant to this Directive should form part, where applicable, of the corporate governance statement of these listed companies, in accordance with the applicable Union legislation and, in particular, Directive 2013/34/EU.*

(30) *The obligations relating to the process of selection of candidates for appointment or election, the obligation to set a quantitative objective in relation to executive directors and reporting obligations should be enforced by penalties [...] which [...] are effective, proportionate and dissuasive, and Member States should ensure that adequate administrative or judicial procedures are available for this purpose. Such penalties may include fines [...] or the nullity or annulment declared by a judicial body of the [...] selection of directors. Without prejudice to national law on the imposition of penalties, as long as listed companies comply with those obligations, they should not be penalised for failing to attain the quantitative objectives concerning the representation of men and women among directors. Penalties should not be applied to listed companies themselves if under national law a given action or omission is not attributable to the company, but to other natural or legal persons such as individual shareholders. It should be possible for Member States to apply penalties other than those listed in the non-exhaustive list of penalties set out in this Directive, especially in cases of serious and repeated infringements by a company related [...] to the [...] obligations set out by this Directive. Member States should ensure that, in the performance of public contracts and concessions, listed companies comply with applicable obligations relating to social and labour law, in accordance with the applicable EU legislation on the matter.*

(31) [...]

(32) [...]

(33) [...]

(34) [...]

(35) [...]

(35a) *Member States or listed companies may introduce or maintain more favourable measures to ensure a more balanced representation of men and women.*

(36) This Directive respects fundamental rights and observes the principles recognised by the Charter of Fundamental Rights of the European Union. In particular, it contributes to the fulfilment of the [...] *principle of* equality between women and men (Article 23 of the Charter), the freedom to choose an occupation and the right to engage in work (Article 15 of the Charter). This Directive seeks to ensure full respect for the right to an effective remedy and a fair hearing (Article 47 of the Charter). The limitations on the exercise of the freedom to conduct *a* business (Article 16 of the Charter) and of the right to property (Article 17(1) of the Charter) respect the essence of [...] *that freedom and right* and are necessary and proportionate. *Limitations may be made only if* they genuinely meet objectives of general interest recognised by the Union and [...] the need to protect the rights and freedoms of others.

(37) While some Member States have taken regulatory action or encouraged self-regulation with mixed results, the majority of Member States have not taken action or indicated their willingness to act in a way that would bring about sufficient improvement. Projections based on a comprehensive analysis of all available information on past and current trends as well as intentions show that a balanced [...] **representation of women and men** among [...] board members across the Union in line with the objectives set out in this Directive will not be **achieved/attained**<sup>14</sup> by Member States acting individually at any point in the foreseeable future. **Inaction in this area slows down the pursuit of gender equality in the workplace more generally, including in terms of closing the gender pay gap, which results in part from vertical segregation.** In the light of those circumstances and given the growing discrepancies between Member States in terms of the representation of women and men on company boards, the gender balance on corporate boards across the Union can only be improved through a common approach, and the potential for gender equality, competitiveness and growth can be better achieved through coordinated action at Union level rather than through national initiatives of varying scope, ambition and effectiveness. Since the objectives of this Directive cannot be sufficiently achieved by the Member States and can, therefore, by reason of the scale and effect of action, be better achieved at Union level, the Union may adopt measures in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union.

**(37a) Member States should cooperate with the social partners and civil society in order to efficiently inform them about the significance, transposition and implementation of this Directive.**

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<sup>14</sup> *for lawyer linguists*

*(37b) Member States should designate bodies for the promotion, analysis, monitoring and support of gender balance on the boards of listed companies. Furthermore, information campaigns and the sharing of best practices would significantly contribute to the raising of awareness of the issue among all companies and encourage them to achieve gender balance proactively. In particular, Member States are encouraged to put in place policies to support and incentivise SMEs to improve significantly the gender balance at all levels of management and on company boards.*

(38) In accordance with the principle of proportionality, as set out in that same Article, this Directive is limited to setting common objectives and principles and does not go beyond what is necessary in order to achieve/ *attain*<sup>15</sup> those objectives. Member States are given sufficient freedom to determine how the objectives laid down in this Directive should best be *achieved/ attained*<sup>16</sup> taking national circumstances into account, in particular rules and practices concerning recruitment [...] *to* board positions. This Directive does not interfere with the possibility for *listed* companies to appoint the most qualified board members, and it grants a *flexible framework and grants a* sufficiently long period of adaptation. [...]

(39) In accordance with the principle of proportionality, the objective to be met by listed companies should be limited in time and *should* remain in force only until sustainable progress has been achieved in the gender composition of boards. For that reason, the Commission should regularly review the application of this Directive and report to the European Parliament and the Council. [...] *Furthermore, this* Directive [...] *provides for a date on which it will expire.* The Commission should assess, in its review, [...] *whether* there is a need to extend the duration of the Directive beyond that [...] *date.*

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<sup>15</sup> *attain vs achieve to be left to lawyer linguists*

<sup>16</sup> *attain vs achieve to be left to lawyer linguists*

(40) In accordance with the Joint Political Declaration of Member States and the Commission of 28 September 2011 on explanatory documents,<sup>17</sup> Member States have undertaken, in justified cases, to accompany the notification of their transposition measures with one or more documents explaining the relationship between the components of a directive and the corresponding parts of national transposition instruments. With regard to this Directive, the legislator considers the transmission of such documents to be justified.

(40a) [...]

HAVE ADOPTED THIS DIRECTIVE:

#### Article 1

#### Subject matter

This Directive [...] *seeks to achieve* a more balanced representation of men and women among the [...] directors of listed companies by establishing *effective* measures [...] *that aim to accelerate* progress towards gender balance, while allowing *listed* companies sufficient time to make the necessary arrangements.

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<sup>17</sup> OJ C 369, 17.12.2011, p. 14.

## Article 2

### Definitions

For the purposes of this Directive, the following definitions [...] apply:

- (1) 'listed company' means a company [...] **having its registered office** in a Member State, **and** whose [...] **shares** are admitted to trading on a regulated market within the meaning of [...] **point (21) of Article 4(1) of Directive [...] 2014/65/EU**, in one or more Member States;
- (2) 'board' means [...] **an** administrative, managerial or supervisory body of a **listed** company;
- (3) 'director' means any member of a board, including an employees' representative;
- (4) 'executive director' means any member of a unitary board who is engaged in the daily management of [...] **a listed** company and any member of a managerial board in a dual board system;
- (5) 'non-executive director' means any member of a unitary board other than an executive director and any member of a supervisory board in a dual board system;
- (6) 'unitary board' means a single board that [...] **carries out both the managerial** and the supervisory functions of a **listed** company;
- (7) 'dual board system' means a system in which the management and supervisory functions of a **listed** company are carried out by separate boards;

- (8) 'small and medium-sized enterprise' or [...] '**SME**' means a company which employs less than 250 persons and has an annual turnover not exceeding EUR 50 million or an annual balance sheet total not exceeding EUR 43 million, or, for an SME [...] **having its registered office** in a Member State whose currency is not the euro, the equivalent amounts in the currency of that Member State;
- (9) [...]

### *Article 2a*

#### *Applicable law*

*The Member State competent to regulate matters covered in this Directive with respect to a given listed company shall be the Member State in which that company has its registered office and the applicable law shall be the law of that Member State.*

### Article 3

#### Exclusion of small and medium-sized enterprises

This Directive shall not apply to small and medium-sized enterprises ('SMEs').

## Article 4

### *Objectives with regard to gender balance on boards [...]*

1. Member States shall ensure that listed companies [...] *are subject to either* of the [...] *following objectives to be reached by 30 June 2026:*
  - (a) *members of the under-represented sex hold at least 40% of non-executive director positions;*  
  
[...]
  - (b) *members of the under-represented sex hold at least 33% of all director positions, including both executive and non-executive directors.*
- 1a. *Member States shall ensure that listed companies which are not subject to the objective laid down in Article 4(1)(b) set individual quantitative objectives in view of improving gender-balanced representation of both sexes among executive directors, which they shall aim to reach no later than 30 June 2026.*
2. The number of non-executive director positions *that shall be deemed* necessary to [...] *attain* the objective laid down in paragraph [...] *I(a)* shall be the number closest to the proportion of 40 [...] %, but not exceeding 49 [...] %, *while the number of all director positions that shall be deemed necessary to attain the objective laid down in paragraph I(b), shall be the number closest to the proportion of 33 %, but not exceeding 49%.* *Those numbers are set out in the Annex.*
3. [...]
4. [...]

5. [...]
6. [...]
- 6a. [...]
7. [...]

#### *Article 4a*

##### *Means to attain the objectives*

1. *Member States shall ensure that listed companies which do not meet the objectives referred to in Article 4(1) as applicable, adjust the process for the selection of candidates for appointment or election to the director positions. The selection shall be carried out on the basis of a comparative analysis of the qualifications of each candidate, by applying in a non-discriminatory manner and throughout the entire selection process, including the preparation of vacancy notices, the pre-selection, the shortlisting or the establishment of selection pools of candidates, clear, neutrally formulated and unambiguous criteria established in advance of that process.*
2. *In the selection of candidates for appointment or election to the positions referred to in Article 4(1), Member States shall ensure that, when choosing between candidates who are equally qualified in terms of suitability, competence and professional performance, priority is given to the candidate of the under-represented sex, unless in exceptional cases, reasons of greater legal weight, such as the pursuit of other diversity policies, applied within the context of an objective assessment and based on non-discriminatory criteria, which takes into account the specific situation of a candidate of the other sex, tilt the balance in favour of that candidate.*

3. *Member States shall ensure that, in response to a request from a candidate who has been considered in the selection for appointment or election, listed companies are obliged to inform that candidate of the following:*
- (a) the qualification criteria upon which the selection was based,*
  - (b) the objective comparative assessment of the candidates under those criteria, and,*
  - (c) where relevant, the specific considerations exceptionally tilting the balance in favour of a candidate of the other sex.*
4. *Member States shall take the necessary measures, in accordance with their national judicial systems, to ensure that where an unsuccessful candidate of the under-represented sex [...] establishes facts from which it may be presumed he or she was equally qualified compared with the candidate of the other sex selected for appointment or election, it shall be for the listed company to prove before a court or other competent authority that there has been no breach of Article 4a(2).  
This paragraph shall not prevent Member States from introducing rules of evidence which are more favourable to plaintiffs.*
5. *Where the selection referred to in paragraph 1 is made through a vote of shareholders or employees, companies shall ensure that voters are properly informed regarding the measures provided for in this Directive, including penalties for non-compliance by the company.*

## *Article 4b*

[...]

## *Article 4c*

[...]

## **Article 5**

### **[...] Reporting**

1. [...]
2. Member States shall require listed companies to provide information to the competent-[...] authorities, once a year,[...] about the gender representation on their boards, distinguishing between non-executive and executive directors and [...] **regarding** the measures taken [...] **with a view to attaining the applicable** objectives laid down in Article 4(1) and [...] **4(1a)**. **Member States shall require listed companies** to publish that information in an appropriate and **easily** accessible manner on their [...] **websites**. **Based on the information provided, Member States shall publish and regularly update, in an easily accessible and centralised manner, a list of the listed companies that have reached one of the objectives laid down in Article 4(1)**.
3. Where a listed company does not [...] **attain one of** the objectives laid down in Article 4(1) or [...] **the objectives set in accordance with 4(1a)**, the information referred to in paragraph 2 [...] shall include the reasons for not [...] **attaining** the objectives [...] and a **comprehensive** description of the measures which the company has [...] **already taken** or intends to [...] **take** in order to [...] **attain them**.
- 3a. **The obligations set out in paragraphs 2 and 3 shall not apply in a Member State that has suspended the application of Article 4a on the basis of Article 8a where national law includes reporting obligations that ensure the regular publication of information regarding the progress attained by listed companies towards a more balanced representation of women and men on their boards.**

4. [...] *Where applicable, the information referred to in this Article [...] shall also be included in the company's corporate governance statement, in accordance with the relevant provisions of Directive 2013/34/EU.*

## Article 6

### *Penalties and additional measures [...]*

1. Member States shall lay down rules on [...] *penalties* applicable to infringements *by listed companies* of the national provisions adopted pursuant to *Articles 4(1a), 4a, and 5* of this Directive *as applicable* and shall take all necessary measures to ensure that they are applied. *In particular, they shall ensure that adequate administrative or judicial procedures are available to enable the obligations deriving from this Directive to be enforced. The penalties must be effective, proportionate and dissuasive. Such penalties may comprise fines or the nullity or annulment declared by a judicial body of the selection of directors made contrary to the national provisions adopted pursuant to Article 4a.*
2. [...]
- 2a. *Listed companies may be held liable only for acts or omissions which can be attributed to them in accordance with national law.*
- 2b. *Member States shall ensure that, in the performance of public contracts and concessions, listed companies comply with applicable obligations relating to social and labour law, in accordance with the applicable EU legislation on the matter.*

## Article 7

### Minimum requirements

Member States may introduce or maintain provisions which are more favourable than those laid down in this Directive to ensure a more balanced representation of men and women in respect of *listed* companies incorporated in their national territory. [...]

## Article 7a

### *Bodies for the promotion of gender balance in listed companies*

*Member States shall designate one or more bodies for the promotion, analysis, monitoring and support of gender balance on the boards of listed companies; these bodies can be, for example, the ones designated in accordance with Article 20 of Directive 2006/54/EC of the European Parliament and of the Council.*<sup>18</sup>

## Article 8

### Implementation

1. Member States shall adopt and publish, by [two years after adoption] the laws, regulations and administrative provisions necessary to comply with this Directive. They shall [...] *immediately* communicate to the Commission the text [...] *thereof*.

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<sup>18</sup> *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 (OJ L 204, 26.7.2006, p. 23).*

2. [...] *The laws, regulations and administrative provisions [...] referred to in paragraph 1* shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.
- 2a. *Member States that suspend, pursuant to Article 8a the application of the requirements referred to in Article 4a shall immediately communicate to the Commission the information demonstrating that the conditions laid down in Article 8a are fulfilled.*
3. [...]  
[...]
4. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

#### *Article 8a*

##### *Suspension of the application of Article 4a*

1. *A Member State may decide to suspend the application of Article 4a and, where relevant, Article 4(1a), where, by [OJ to insert date for entry into force of this Directive]:*
  - (a) *members of the under-represented sex hold at least 30 % of the total number of all non-executive director positions or at least 25 % of the total number of all director positions in listed companies; or*
  - (b) *national legislation requires that:*
    - i. *members of the under-represented sex hold at least 30 % of non-executive director positions or at least 25 % of all director positions in listed companies;*

- ii. *effective, proportionate and dissuasive enforcement measures apply in the case of non-compliance with these requirements; and*
- iii. *all listed companies not covered by such national legislation set individual quantitative objectives for all director positions.*

*In those cases, the objectives set out in Article 4(1) shall be deemed to be met.*

- 2. *For the purpose of assessing the fulfilment of the conditions for a suspension on the basis of paragraphs 1(a) and 1(b), the number of director positions required shall be the number closest to the proportion of 30 % of non-executive directors or 25% of all director positions, but no more than 39%. This shall also be the case where, pursuant to national legislation, the quantitative targets are applied separately to shareholder and employee representatives.*
- 3. *Where the requirements set out in this Article are not met, Member States shall resume the application of Article 4a and, where relevant, Article 4(1a) at the latest six months after ceasing to meet such requirements.*

## Article 9

### Review

- 1. Member States shall communicate to the Commission by [...] *[one year after the date provided for in Article 8(1)]* and every two years thereafter, a report on the implementation of this Directive. These reports shall include, [...] *inter alia*, comprehensive information about the measures taken with a view to attaining the objectives laid down in Article 4(1), information provided in accordance with Article [...] *5 and, where applicable, representative* information about individual [...] *quantitative objectives set* by listed companies pursuant to Article [...] *4 (1a)*.

**1a.** [...]

**1b.** [...]

2. Member States [...] *that suspend*, pursuant to Article [...] **8a**, the application of [...] Article [...] **4a and, where relevant, Article 4(1a)** shall include [...] -in the reports mentioned in paragraph 1 [...] *information showing whether and how the conditions laid down in Article [...] 8a are fulfilled and whether the Member State is continuing to make progress towards a more balanced representation between women and men among non-executive director positions or all director positions in listed companies. By [two years after the date provided for in Article 8(1)], and every two years thereafter, the Commission shall issue a specific report ascertaining, inter alia whether and how the conditions in Article 8a(1) are fulfilled and, as applicable, whether the Member States have resumed the application of Article 4a and Article 4(1a), in accordance with Article 8a(4).*

[...]

3. The Commission shall review the application of this Directive and report to the European Parliament and the Council by 31 December **2030** [...] and every two years thereafter. The Commission shall evaluate in particular whether the objectives of this Directive have been achieved.

4. In its report *referred to in paragraph 3*, the Commission shall assess whether, in the light of developments in the representation of men and women in the boards of listed companies [...] at different levels of decision-making throughout the economy and taking into account whether the progress made is sufficiently sustainable, ***the Directive is an efficient and effective instrument for increasing the gender balance on company boards. On this basis, the Commission shall assess whether*** there is a need to extend the duration of this Directive beyond the date specified in Article 10(2) or ***whether there is a need*** to amend it, ***for instance by extending its scope to non-listed undertakings which do not fall within the definition of SMEs or by revising the conditions set out in Article 8a(1)(a) so as to ensure continued progress towards a more balanced representation between women and men among non-executive and executive director positions or all director positions in listed companies.***

## Article 10

### Entry into force and expiry

1. This Directive shall enter into force on the [twentieth] day following that of its publication in the Official Journal of the European Union.
2. It shall expire on 31 December [...] 2038.

Article 11

Addressees

This Directive is addressed to the Member States.

Done at Brussels,

*For the European Parliament*  
*The President*

*For the Council*  
*The President*

**TARGET NUMBERS OF DIRECTORS OF THE  
UNDER-REPRESENTED SEX**

<b>Number of positions on the Board</b>	<b>Minimum number of non-executive directors of the under-represented sex necessary to meet the objective of 40% (Article 4(1))</b>	<b>Minimum number of directors of the under-represented sex necessary to meet the objective of 33% (Article 4(1)(b))</b>
1	-	-
2	-	-
3	1 (33,3%)	1 (33,3%)
4	1 (25%)	1 (25%)
5	2 (40%)	2 (40%)
6	2 (33,3%)	2 (33,3%)
7	3 (42,9%)	2 (28,6%)
8	3 (37,5%)	3 (37,5%)
9	4 (44,4%)	3 (33,3%)
10	4 (40%)	3 (30%)
11	4 (36,4%)	4 (36,4%)
12	5 (41,7%)	4 (33,3%)
13	5 (38,4%)	4 (30,8%)

14	6 (42,9%)	5 (35,7%)
15	6 (40%)	5 (33,3%)
16	6 (37,5%)	5 (31,3%)
17	7 (41,2%)	6 (35,3%)
18	7 (38,9%)	6 (33,3%)
19	8 (42,1%)	6 (31,6%)
20	8 (40%)	7 (35%)
21	8 (38,1%)	7 (33,3%)
22	9 (40,1%)	7 (31,8%)
23	9 (39,1%)	8 (34,8%)
24	10 (41,7%)	8 (33,3%)
25	10 (40%)	8 (32%)
26	10 (38,5%)	9 (34,6%)
27	11 (40,7%)	9 (33,3%)
28	11 (39,3%)	9 (32,1%)
29	12 (41,4%)	10 (34,5%)
30	12 (40%)	10 (33,3%)

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