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PROPOSAL

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| from: | The Commission |
| dated: | 16 November 2012 |
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| Subject: | Proposal for a Directive of the European Parliament and of the Council on improving the gender balance among non-executive directors of companies listed on stock exchanges and related measures |

Delegations will find attached a proposal from the Commission, submitted under a covering letter from Mr Jordi AYET PUIGARNAU, Director, to Mr Uwe CORSEPIUS, Secretary-General of the Council of the European Union.

Encl.: COM(2012) 614 final



Brussels, 14.11.2012
COM(2012) 614 final

2012/0299 (COD)

Proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

**on improving the gender balance among non-executive directors of companies listed on
stock exchanges and related measures**

(Text with EEA relevance)

{SWD(2012) 348 final}

{SWD(2012) 349 final}

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

Background

Company boards in the EU are characterised by persistent gender imbalances, as evidenced by the fact that only 13.7% of corporate seats in the largest listed companies are currently held by women (15% among non-executive directors).¹ Compared to other areas of society, especially to the public sector², the under-representation of women on the boards of publicly listed companies is particularly significant.

Member States and the EU institutions have undertaken numerous efforts in the course of several decades to promote gender equality in economic decision-making, notably to enhance female presence in company boards, by adopting recommendations and encouraging self-regulation. Two Council Recommendations (in 1984 and 1996) encouraged the private sector to increase the presence of women at all levels of decision-making, notably by positive action programmes, and called upon the Commission to take steps to achieve balanced gender participation in this regard.³ National self-regulation and corporate governance initiatives were aimed at encouraging companies to appoint more women into top-level positions.

However, progress in increasing the presence of women on company boards has been very slow, with an average annual increase in the past years of just 0.6 percentage points.⁴ The rate of improvement in individual Member States has been unequal and has produced highly divergent results. The most significant progress was noted in those Member States and other countries where binding measures had been introduced.⁵ Self-regulatory initiatives in a number of Member States have not yielded any similarly noticeable changes. At the current pace it would take several decades to approach gender balance throughout the EU.

Growing discrepancies between Member States are likely to increase given the very different approaches pursued by individual Member States. Some Member States have developed national legislation but addressed different groups of companies and with differing legal approaches. National legislations, if they address the problem at all, are evolving in different

¹ This gender imbalance is striking in all EU Member States, with national averages ranging from around 5% in MT, CY, HU, LU, LU, PT, IT, EE and EL to around 25% in SE, LV and FI. The share of women varies across Member States between around 3% and around 28% for non-executive directors and between 0% and around 21% for executive directors. See Progress report: Women in economic decision-making in the EU, March 2012 (http://ec.europa.eu/justice/gender-equality/files/women-on-boards_en.pdf).

² Some examples: 30% of women at the highest level of national public administrations, 33% of women among members of supreme courts. In research institutions, 22% of board members are women (2007). Only national central banks have remained against all trends almost exclusively male dominated strongholds: 83% of their board members are men and there is at the moment not a single female central bank governor in the EU.

³ OJ L 331, 19.12.1984, p. 34 and OJ L 319, 10.12.1996, p. 11.

⁴ See Progress report, footnote 1.

⁵ From October 2010 to January 2012, the by far largest increase of the share of women on company boards has been registered in France (increase of 10 percentage points to 22%), where companies reached the first target introduced by a new law in January 2011 (20% by 2014, 40% by 2017) ahead of schedule. Norway increased the female share of board members from 18% in 2006, when the binding target was introduced, to 40% within only three years.

directions. Some Member States have privileged a "comply or explain" model, where companies not complying with a gender balance objective have to disclose the reasons for not doing so. Others establish an outright binding legal gender balance objective with sanctions. Some Member States target listed companies, while others focus on large companies (regardless of listing) or state-owned companies only. Some Member States are focusing their measures on non-executive board members of listed companies while others cover both executive and non-executive board members of listed companies.

The divergence or the absence of regulation at national level does not only lead to the discrepancies in the number of women among executive and 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. This varied evolution of national legislations has led to a fragmentation of the legislative frameworks across the EU, which translates into inconsistent legal obligations of difficult comparability, confusion and higher costs for companies, investors and other stakeholders, and, ultimately, hinders the proper functioning of the internal market. In particular, these 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. The current lack of transparency of the selection procedures and qualification criteria for board positions in most Member States represents an important barrier to more diversity of board members and negatively affects both board candidates' careers and their freedom of movement, as well as investor decisions. The opacity of board appointments makes it more difficult for women with the necessary qualifications for board positions to apply for such positions in general and even more so in another Member State. Lack of transparency on qualification criteria for company directors may also have a negative impact on investors' confidence in a company, in particular in cross-border situations. Disclosing relevant information on gender composition of boards would also translate into better accountability of companies, better informed and sounder decision-making, better allocation of capital, and, ultimately, higher and more sustainable growth and employment in the EU.

The under-utilisation of the skills of highly qualified women's constitutes a loss of economic growth potential. Fully mobilising all available human resources will be a key element to addressing the EU's demographic challenges, competing successfully in a globalised economy and ensuring a comparative advantage vis-à-vis third countries. Moreover, gender imbalance in the boards of publicly listed companies in the EU can be a missed opportunity at company level in terms of both corporate governance and financial company performance⁶. The core of the problem lies in the persistence of multiple barriers faced by the constantly growing number of highly qualified women who are available for board seats⁷ on their way to the top positions in corporations. The reluctance to appoint female candidates to board positions is

⁶ Most recently: Credit Suisse Research Institute (August 2012), "Gender diversity and corporate performance". Other important studies include: Catalyst (2004), "The Bottom Line: Connecting Corporate Performance and Gender Diversity"; McKinsey (reports of 2007, 2008 and 2010), "Women Matter"; Deutsche Bank Research (2010), "Towards gender-balanced leadership"; Ernst & Young (2012), "Mixed leadership".

⁷ Women account for around 60% of university graduates in the EU. More importantly, the European Business Schools Women on Board Initiative was able to quickly identify more than 7000 'boardable' women who are highly qualified, professionally experienced and ready to take over a board position (<http://www.edhec.com/html/Communication/womenonboard.html>).

often rooted in gender stereotypes in recruitment and promotion, a male-dominated business culture and the lack of transparency in board appointment processes. These elements, which are often referred to in their entirety as a 'glass ceiling', undermine the optimal functioning of the labour market for top management positions throughout the EU.

The persistent under-representation of women on boards is a key element of a broader lack of board diversity in general with its negative consequences. In boards with a predominance of members of one sex there is a considerably higher likelihood of a narrow "group think". This can contribute to the failure of an effective challenge of the management decisions, as the lack of diverse views, values, and competences may lead to less debate, ideas and challenge in the boardroom. Insufficient board diversity is linked above all to insufficient market incentives for companies to change the situation. In this respect, inadequate recruitment practices for board members contribute to perpetuating the selection of members with similar profiles. The selection often draws on a too narrow pool of people, non-executive directors are still often recruited through an "old boys' network" from among business and personal contacts of the current board members. The inadequate transparency on board diversity is reinforcing the problem, as the level of information and the extent to which this information is available to the public at large is often insufficient.

As far as the objectives for board composition, the transparency of recruitment and reporting on gender diversity of boards are concerned, the identified problems affect the overall performance of companies, their accountability, the ability of investors to assess and factor appropriately and timely all relevant information, and the efficiency of the EU financial markets. As a consequence, the internal market potential for sustainable growth and employment may not be fully exploited. Clear requirements as regards the targets to be achieved by companies as regards the gender of the non-executive directors, the transparency of the recruitment process (qualifications criteria) and reporting obligations as regards gender diversity of boards are therefore necessary.

Policy context

Recently, the issue of enhancing female participation in economic decision-making has become increasingly prominent in the national, European and international arenas, focusing particularly on the economic dimension of gender diversity.

The European Commission reaffirmed its support for an increased participation of women in positions of responsibility, both in its Women's Charter⁸ and its Strategy for Equality between Women and Men 2010-2015,⁹ whilst also publishing several reports taking stock of the situation.¹⁰

In the European Pact for Gender Equality 2011-2020, adopted on 7 March 2011, the Council acknowledged that gender equality policies are vital to economic growth, prosperity and competitiveness and urged 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 the talents.

⁸ COM(2010) 78 final.

⁹ COM(2010) 491 final.

¹⁰ See Commission report 'More women in senior positions', January 2010; Commission Staff Working Paper 'The Gender Balance in Business Leadership', March 2011 (SEC(2011) 246 final); Progress Report 'Women in economic decision-making in the EU', March 2012; Commission Staff Working Document 'Progress on equality between women and men in 2011', April 2012 (SWD(2012) 85 final).

The European Parliament repeatedly called upon companies and Member States to increase female representation of women in decision-making bodies and invited the Commission to propose legislative quotas to attain the critical threshold of 30 per cent female membership of management bodies by 2015 and 40 per cent by 2020.¹¹

The European social partners have reaffirmed their commitment to further action in this area in their work programme for 2012-2014.

Purpose of the proposal

The purpose of the proposal is to substantially increase the number of women on corporate boards throughout the EU by setting a minimum objective of a 40% presence of the under-represented sex among the non-executive directors of companies listed on stock exchanges and by requiring companies with a lower share of the under-represented sex among the non-executive directors to introduce pre-established, clear, neutrally formulated and unambiguous criteria in selection procedures for those positions in order to attain that objective.

The proposal seeks to promote gender equality in economic decision-making and to fully exploit the existing talent pool of candidates for more equal gender representation on company boards, thereby contributing to the Europe 2020 objectives. The proposed Directive will lead to breaking down the barriers that women face when aiming for board positions and to improved corporate governance, as well as enhanced company performance.

Minimum harmonisation as regards both a requirement for listed companies to take appointment decisions on the basis of an objective comparative assessment of the qualifications of candidates and the setting of a quantitative objective for the gender balance among non-executives directors seems essential to ensure a competitive playing field and to avoid practical complications for listed companies in the internal market.

The quantified objective of 40% set by this Directive only applies to non-executive directors in order to strike the right balance between the necessity to increase the gender diversity of boards on the one hand and the need to minimise interference with day-to-day management of a company on the other hand. Non-executive directors and supervisory boards have an essential role in appointing the highest level of management and shaping the company's human resources policy. A stronger presence of the under-represented sex among non-executive directors will therefore have positive ripple effects for gender diversity throughout the career ladder.

The proposal focuses on publicly listed companies, due to their economic importance and high visibility. They set standards for the private sector at large. Moreover, they tend to have larger boards and have a similar legal status across the EU, providing the necessary comparability of situations.

The proposed objective of 40% for the minimum share of both sexes is in line with the targets currently under discussion and set out in a number of EU Member States/EEA countries. This figure is situated between the minimum of the 'critical mass' of 30%, which has been found necessary in order to have a sustainable impact on board performance and full gender parity (50%).

¹¹ See e.g. Resolution of 6 July 2011 on women and business leadership (2010/2115(INI)), Resolution of 13 March 2012 on equality between women and men in the European Union – 2011 (2011/2244(INI)).

Consistency with other policies and objectives of the Union and with the Charter of Fundamental Rights of the European Union

Equality between women and men is one of the Union's founding values and core aims under Articles 2 and 3(3) TEU. In accordance with Article 8 TFEU the Union shall aim to eliminate inequalities, and to promote equality, between men and women in all its activities.

There are several important legal measures in place to promote equal treatment and equal opportunities of men and women in matters of employment and occupation, including self-employment¹².

The proposal is consistent with the Charter of Fundamental Rights of the European Union ('Charter'). It will help to promote fundamental rights, particularly those related to equality between women and men (Article 23) and to the freedom to choose an occupation (Article 15). The proposal also touches upon the freedom to conduct a business (Article 16) and on the right to property (Article 17). It does so in a justified manner: in line with the principle of proportionality the proposal's focus is on non-executive board members who – while being important actors in particular in relation to corporate governance – are not involved in the day-to-day running of operations.

Article 21(1) of the Charter prohibits, in principle, any discrimination based on sex. Article 23 recognises, however, that the principle of equality does not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex.

This principle of **positive action** is also recognised in Article 157(4) TFEU.

The Court of Justice of the European Union (CJEU) has established the criteria that need to be met in order to reconcile the two concepts of formal equality of treatment and positive action aimed at bringing about de facto equality, both of which are recognised in the Charter as well as in Article 157 TFEU and in Article 3 of Directive 2006/54/EC.

The criteria are:

- (1) the measures must concern a sector in which women are under-represented;
- (2) they can only give priority to equally qualified female candidates over male candidates;
- (3) they must not give automatic and unconditional priority to equally qualified candidates, but must include a "saving clause" which includes the possibility of granting exceptions in justified cases which take the individual situation into account, in particular the personal situation of each candidate.

The proposal is in compliance with these criteria (see Article 4(3)).

¹² In particular Directives 2006/54/EC and 2010/41/EU.

2. RESULTS OF CONSULTATIONS WITH THE INTERESTED PARTIES AND IMPACT ASSESSMENTS

Consultation and expertise

From 5 March to 28 May 2012, the Commission organised a public consultation to gather stakeholders' views on whether any action should be taken to tackle gender imbalance on corporate boards, and, if so, what kind of action. Of the total number of 485 replies, 161 were sent by individual citizens and 324 were sent by organisations. These included 13 Member States, 3 regional governments, 6 cities or municipalities, 79 companies (both large listed companies and SMEs), 56 business associations at EU and national level, 53 NGOs (most of them women's organisations), trade unions, professional associations, political parties, associations of investors and shareholders, actors involved in corporate governance and others.

There was a broad consensus on the urgent need to increase the share of women on company boards. By far the majority of respondents agreed that a gender-diverse workforce and board structure is a driver of innovation, creativity, good governance and market expansion for companies and that it would be short-sighted to leave untapped the economic potential of qualified women. Views varied among stakeholders as to the appropriate means to bring about change. While some, predominantly the business stakeholders, favoured continued self-regulation, other stakeholders, including trade unions, women organisations, other NGOs and a number of regional and municipal authorities, advocated a more ambitious approach in the form of binding objectives. Some stakeholders suggested focusing in the first place on non-executive board members and supervisory boards, as this would constitute a less significant interference with the daily management of companies, while executive board members should follow later.

A 2011 Eurobarometer survey¹³ revealed that 88% of Europeans think that women should be equally represented in company leadership positions. When given the possibility to choose between three options to achieve gender balance on company boards, opinion is divided between self-regulation by companies (31%), binding legal measures (26%), and non-binding measures such as Corporate Governance Codes and Charters (20%). Nevertheless, 75% of Europeans are in favour of legislation provided that it takes qualifications into account and does not automatically favour members of one sex.

Impact assessment

The Impact Assessment (IA) analysed five policy options, fully described in the IA Report:

- **Option 1:** the baseline scenario (i.e. no further action at EU level);

¹³ Special Eurobarometer 376 (2012), Women in decision-making positions (http://ec.europa.eu/public_opinion/archives/eb_special_379_360_en.htm#376).

- **Option 2:** a Commission Recommendation encouraging Member States to achieve the objective of at least 40% of board members of each gender by 2020;
- **Option 3:** a Directive introducing a binding objective of at least 40% of each gender by 2020 for non-executive directors;
- **Option 4:** a Directive introducing a binding objective of at least 40% of board members of each gender by 2020 for non-executive directors and a flexible objective for executive directors, which would be set by the companies themselves;
- **Option 5:** a Directive introducing a binding objective of at least 40% of board members of each gender by 2020 for both executive and non-executive directors.

The outcome of the comparison of the consequences of the different policy options was that (i) binding measures are more effective in meeting the policy objectives than non-binding measures, (ii) measures that target both executive and non-executive board members are more effective than measures only targeting one group and (iii) binding measures will generate more societal and economic benefits than non-binding measures.

At the same time the effectiveness of the different policy options is directly linked to the extent of interference with the rights of the companies and the shareholders as their owners, including their fundamental rights. Compared to a non-binding measure with a tangible yet limited effect, a substantial increase of the impact in terms of the policy objectives would require an instrument with binding force, which would prescribe minimum requirements for the composition of boards.

Binding measures would entail comparatively larger costs and administrative burdens which, however, remain rather modest in comparison to the projected economic benefits. The administrative burden is expected to be minimal for all policy options, given that these options would cover only publicly listed companies which are expected to be able to use existing reporting mechanisms.

The current proposal opts for the increased effectiveness of fixed objectives and the resulting economic and wider societal benefits in relation to non-executive board members which justify a higher degree of interference with fundamental rights. The proposal refrains from establishing a fixed binding objective for executive board members, due to the greater need for sector-specific knowledge and experience in the day-to-day management of a company. However, companies should be obliged to make commitments in relation to executive directors that reflect their specific circumstances, and to report on the compliance with these commitments. The proposal is therefore based on Option 4.

3. LEGAL ASPECTS OF THE PROPOSAL

Legal base

Article 157(3) TFEU is the legal basis for any binding measures aimed at ensuring the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, including positive action.

The proposal is based on Article 157(3) TFEU.

Subsidiarity

Measures introduced by some Member States to strengthen the gender balance on company boards vary widely, and a substantial number of Member States, in particular those where the share of women among directors is particularly low, have not taken any action in this area. They do not show any willingness or face resistance to act on their own initiative. At the same time, there are discrepancies in terms of the numbers of women on boards in Member States, with the key indicator ranging from 3% to 27% - a situation which jeopardises the attainment of the fundamental objective of gender equality in economic decision-making across the Union.

The projections in the IA report based on comprehensive information on existing or planned legislative and self-regulatory initiatives in this area in all Member States show that without EU action the female representation in boards of publicly listed companies is expected to evolve from 13.7% in 2012 to 20.4% (20.84% excluding SMEs) in 2020 for the EU. Only one Member State (France) will have achieved a 40% female representation in boards by 2020 as the result of national binding quota legislation. Only 7 more Member States - Finland, Latvia, the Netherlands, Slovakia, Spain, Denmark and Sweden - are estimated to reach 40% before 2035. In addition to being unsatisfactory from a gender equality perspective, this would not be sufficient to bring about the “critical mass” of women on boards across the Union which, as research shows, is needed to generate positive effects on company performance. Based on this scenario, the EU as a whole is not expected to even achieve 40% of women on boards by 2040. Irrespective of the general possibility for Member States to act efficiently, the concrete indications of Member States regarding their intentions, including their replies to the public consultation and the projections based on all available information, clearly demonstrate that action by Member States individually will not achieve the objective of a more balanced gender representation on company boards in line with the policy objectives set out in this proposal by 2020 or at any point in the foreseeable future.

This situation entails a certain number of risks for the attainment of the fundamental objective of gender equality across the Union. The Founding Treaties intended to create a competitive level-playing field between Member States by enshrining the principle of equal pay and of gender equality on the labour market, to avoid any downward competition between Member States in labour and equal treatment matters. Member States may indeed hesitate to regulate in this area on their own, as they could perceive a risk of putting their own companies at a disadvantage with companies from other Member States. This perception, reinforced by pressure from the business community, represents an additional major obstacle preventing Member States from taking adequate action.

Furthermore, scattered and divergent regulation at national level is bound to create practical problems in the functioning of the internal market. Different company law rules and sanctions for not complying with a national binding quota, such as exclusion from public procurement, could lead to complications in business life and have a deterrent effect on companies' cross-border investments and the establishment of subsidiaries in other Member States. Diverging rules or the absence of rules on the selection procedure for the key positions of non-executive

board members without any minimum standards and the impact of these differences for corporate governance and the assessment of corporate governance by investors could further lead to problems in the functioning of the internal market.

The potential for competitiveness and growth inherent in making full use of the talent pool of the best qualified women for board positions can be realised more effectively, by reasons of scale, if all Member States engage in that direction, in particular those where figures are currently low and no action has been taken or even envisaged. Only an EU-level measure can effectively help to ensure a competitive level-playing field throughout the Union and avoid practical complications in business life by means of minimum harmonisation of corporate governance requirements relating to appointment decisions based on objective qualifications criteria in order to attain gender balance among non-executives directors.

It can therefore be concluded that the objectives of the envisaged action cannot be sufficiently achieved by the Member States on their own and may be better achieved through coordinated action at EU level rather than through national initiatives of varying scope, ambition and effectiveness. The proposal therefore complies with the principle of subsidiarity.

Proportionality

Non-binding measures such as past EU-level recommendations and calls for self-regulation have not achieved and cannot be expected to achieve the objective of improving gender equality in economic decision-making throughout the EU. Further-reaching action to be taken at EU-level is therefore necessary to achieve those aims. This should, however, not go beyond what is strictly required to achieve sustainable progress in the share of women on company boards, without impinging on the functioning of private companies and the market economy.

This minimum harmonisation proposal is limited to setting common objectives, giving Member States sufficient freedom to determine how they should be best achieved at national level, taking into account national, regional or local circumstances including national company law and company board recruitment practices. In particular, the proposal requires only such changes to national company law that are strictly necessary for the minimum harmonisation of requirements for the appointment decisions and it respects the different board structures across Member States. It does not cover small and medium-sized enterprises (SMEs), for which such measures could represent a disproportionate burden. In addition, as explained above, the proposal establishes quantitative objectives only for non-executive board members, thereby considerably limiting interference in the daily management of the company. As non-executive directors perform mainly supervisory tasks, it is also easier to recruit qualified candidates from outside the company or the specific sector – a consideration which is of importance for areas of the economy where members of a particular sex are especially under-represented in the workforce.

The temporary nature of the proposed Directive (see Article 10) underpins its compliance with the principles of subsidiarity and proportionality.

Choice of instrument

A directive is the instrument that best ensures a coherent minimum level of gender diversity among non-executive directors in boards of publicly listed companies across the EU, whilst allowing Member States to adjust the detailed regulation to their specific situations in terms of national company law and to choose the most appropriate means of enforcement and

sanctions. It also allows individual Member States to go beyond the minimum standard, on a voluntary basis.

European Economic Area

This is a text of relevance to the European Economic Area and the Directive will be applicable to the non-EU member States of the European Economic Area following a decision of the EEA Joint Committee.

4. BUDGETARY IMPLICATION

The proposal has no implications for the Union budget.

5. DETAILED EXPLANATION OF THE SPECIFIC PROVISIONS

Article 1: Purpose

This provision states the aim of this Directive.

Article 2: Definitions

This Article sets out the key definitions, which are based on those in Commission Recommendation 2005/162/EC on the role of non-executive or supervisory directors of listed companies and of the Committees of the (supervisory) board¹⁴, on Commission Recommendation 2003/361/EC of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises¹⁵ in relation to the definition of SMEs, and on Commission Directive 2006/111/EC of 16 November 2006 on the transparency of financial relations between Member States and public undertakings, as well as on financial transparency within certain undertakings¹⁶ in relation to the definition of public undertakings.

The definitions ensure in particular that the Directive is equally applicable to various systems of board structures for listed companies that exist in the Member States, i.e. to a dual ('two-tier') system in which there are separate management and supervisory boards, to a unitary ('one-tier') system combining the management and supervisory functions in one single board, as well as to mixed systems featuring elements of 'one-tier' and 'two-tier' systems or giving companies an option between different models.

The definition of 'director' clarifies that the objectives set by the directive cover all non-executive directors, including employee representatives in those Member States where a certain proportion of the non-executive directors can or must be appointed or elected by the company's workforce and/or organisations of workers pursuant to national law or practice while the practical procedures for ensuring that the objectives provided for in this Directive are attained should be defined by the Member States concerned (see Recital 21).

Article 3: Exclusion of small and medium-sized enterprises

¹⁴ OJ L 52, 25.2.2005, p. 51.

¹⁵ OJ L 124, 20.5.2003, p. 36.

¹⁶ OJ L 318, 17.11.2006, p. 17.

This Article excludes from the scope of the Directive listed companies which are small and medium-sized enterprises (SMEs), as defined by Commission Recommendation 2003/361/EC of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises.¹⁷

Article 4: Objectives with regard to non-executive directors

Paragraph 1 imposes on listed companies which do not have a presence of the under-represented sex of at least 40 per cent of non-executive directors an obligation to make the appointments to those positions on the basis of a comparative analysis of the qualifications of each candidate, by applying pre-established, clear, neutrally formulated and unambiguous criteria, in order to attain the said percentage at the latest by 1 January 2020. A shorter deadline for achieving the objective (1 January 2018) is set for listed companies which are public undertakings within the meaning of Article 2(b) of Commission Directive 2006/111/EC of 16 November 2006 on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings.¹⁸ Member States exercise a dominant influence over such companies and therefore have more instruments to bring about the change more rapidly.

Paragraph 2 specifies the method of calculation of the exact number of non-executive director positions necessary to meet the objective mentioned in paragraph 1. The exact number of board positions necessary to comply with the objective should be the number closest to 40 per cent, whether below or above that threshold, but at the same time listed companies should not be obliged to appoint members of the under-represented sex to half or more of the non-executive board positions in order to avoid excessive constraints.

Paragraph 3 imposes a preference rule with the aim of meeting the objective laid down in paragraph 1. This preference rule provides that, in the presence of equally qualified candidates of both sexes priority shall be given to the candidate of the under-represented sex unless an objective assessment taking account of all criteria specific to the individual candidates tilts the balance in favour of the candidate of the other sex. This procedural requirement is necessary to ensure that the objectives comply with the case-law¹⁹ of the Court of Justice of the European Union concerning positive action. The requirements laid down in this paragraph should be met at the appropriate stage of the selection process depending on national law and the articles of association of listed companies.

Paragraph 4 imposes a disclosure obligation and a burden of proof rule applicable in cases of challenges to the selection procedure by an unsuccessful candidate.

Paragraph 5 provides for a possibility of justifying non-compliance with the objective where the members of the under-represented sex represent less than 10 per cent of the workforce.

Paragraph 6 provides that the objective laid down in Paragraph 1 can also be met where the members of the under-represented sex hold at least one third of all director positions, irrespective of whether they are executive or non-executive.

Article 5: Additional measures by companies and reporting

¹⁷ OJ L 124, 20.05.2003, p. 36

¹⁸ OJ L 318, 17.11.2006, p. 17.

¹⁹ C-450/93: Kalanke (1995 ECR I-3051), C-409/95: Marschall (1997 ECR I-6363), C-158/97: Badeck (2000 ECR I-1875), C-407/98: Abrahamsson (2000 ECR I-5539).

Paragraph 1 imposes an obligation for listed companies to undertake individual commitments regarding the representation of both sexes among executive directors to be achieved by 1 January 2020, or by 1 January 2018 in the case of listed companies which are public undertakings.

Paragraph 2 imposes an obligation for listed companies to provide and publish information on the gender composition of their boards and on compliance with Article 4(1) and Article 5(1) on a yearly basis.

Paragraph 3 imposes on listed companies which fail to meet the objectives concerning the non-executive directors or commitments concerning executive directors an additional obligation to explain the reasons and to include the description of measures taken and planned in order to meet the objectives or commitments in the future.

Paragraph 4 concerns the competences of the national equality bodies established under Directive 2006/54/EC.

Article 6: Sanctions

This Article obliges Member States to lay down rules on sanctions applicable in case of breach of this Directive. These sanctions must be effective, proportionate and dissuasive. A non-exhaustive list of possible concrete measures is set out in paragraph 2.

Article 7: Minimum requirements

This provision states the minimum harmonisation nature of the Directive.

Article 8: Implementation

Member States are under an obligation to adopt the relevant transposition measures within two years from the date of adoption of the Directive. The Article further specifies the obligations concerning those measures and their communication to the Commission. Paragraph 3 enables Member States which before the entry into force of this Directive have already taken measures to ensure a more balanced representation of women and men among the non-executive directors of listed companies to suspend the application of the procedural requirements related to appointments contained in Article 4(1), (3), (4) and (5), provided that they can demonstrate that the measures taken are of equivalent efficacy in order to attain the objective set in Article 4(1).

Articles 9, 10 and 11: Review; Entry into force and expiry; Addressees

The Directive imposes a reporting obligation on Member States. The Commission is obliged to review and report on the application of the Directive every two years, in particular on whether the aims of the Directive have been achieved.

The objectives remain in force only until sustainable progress in gender composition of boards has been achieved and the Directive includes a 'sunset clause' to that effect.

Proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

on improving the gender balance among non-executive 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 Articles 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,²⁰

Acting in accordance with the ordinary legislative procedure,

Whereas:

- (1) Equality between women and men is one of the Union's founding values and core aims under Article 2 and Article 3(3) of the Treaty on European Union. Under the terms of Article 8 of the Treaty on the Functioning of the European Union (hereinafter referred to as the Treaty), the Union shall aim to eliminate inequalities, and to promote equality, between men and women in all its activities. Article 157(3) of the Treaty provides a legal basis for the adoption of Union 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) The principle of positive action and its importance for achieving effective equality between women and men in practice are recognised in Article 157(4) of the Treaty and in Article 23 of the Charter of Fundamental Rights of the European Union, which provides that equality between women and men must be ensured in all areas and that

²⁰ OJ C , , p. .

the principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex.

- (3) Council Recommendation 84/635/EEC of 13 December 1984 on the promotion of positive action for women²¹ recommended that Member States should 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 of 2 December 1996 on the balanced participation of women and men in the decision-making process²² recommended that Member States should encourage the private sector to increase the presence of women at all levels of decision-making, notably by the adoption of, or within the framework of, equality plans and positive action programmes.
- (4) In recent years the European Commission has presented several reports taking stock of the situation concerning gender diversity in economic decision-making.²³ The Commission has encouraged publicly listed companies in the European Union to increase the number of women on their boards by self-regulatory measures and to make concrete voluntary commitments in that regard.²⁴ In its Women's Charter²⁵ of 5 March 2010, 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 defined by the Commission's strategy for equality between women and men 2010-2015²⁶ as one of its priority tasks.
- (5) In the European Pact for Gender Equality 2011-2020, which was adopted on 7 March 2011, the Council acknowledged that gender equality policies are vital to economic growth, prosperity and competitiveness, 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, and urged 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.
- (6) The European Parliament, in its resolution on women and business leadership of 6 July 2011²⁷, urged companies to attain the critical threshold of 30 per cent female membership of management bodies by 2015 and 40 per cent 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. The European Parliament

²¹ OJ L 331, 19.12.1984, p. 34.

²² OJ L 319, 10.12.1996, p. 11.

²³ Commission report 'More women in senior positions' (2010); Commission Staff Working Paper 'The Gender Balance in Business Leadership' of 1.3.2011 (SEC(2011) 246 final); Progress Report 'Women in economic decision-making in the EU' of 5.3.2012; Commission Staff Working Document 'Progress on equality between women and men in 2011' of 16.4.2012 (SWD(2012) 85 final).

²⁴ 'Women on the Board Pledge for Europe', IP/11/242.

²⁵ COM(2010) 78 final.

²⁶ COM(2010) 491 final.

²⁷ 2010/2115(INI).

reiterated that call for legislation in its resolution of 13 March 2012 on equality between women and men in the European Union – 2011.²⁸

- (7) The efficient use of human capital is the most important determinant of an economy's competitiveness and is key to addressing the EU's demographic challenges, to competing successfully in a globalised economy and to ensuring a comparative advantage vis-à-vis third countries. The pool of highly trained and qualified women is constantly growing as evidenced by the fact that 60 per cent of university graduates are female. A continued failure to draw on this pool in appointments to economic decision-making positions would amount to a failure to fully exploit skilled human capital.
- (8) At company level, it is widely acknowledged that the presence of women on boards improves corporate governance, because team performance and the quality of decision-making are enhanced due to a more diverse and collective mind-set incorporating a wider range of perspectives and therefore reaching more balanced decisions. 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. Enhancing female representation on the boards of publicly listed companies in the Union can therefore have a positive impact on the performance of companies concerned.
- (9) Existing evidence also shows that labour market equality can improve economic growth substantially. Enhancing female presence 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 has a positive impact on closing both the gender employment gap and the gender pay gap. Making full use of the existing female talent pool would constitute a marked improvement in terms of return on education for both individuals and the public sector. Female under-representation in the board rooms of publicly listed companies in the EU is a missed opportunity in terms of achieving long-term sustainable growth for Member States' economies at large.
- (10) Despite the existing Union legislation aimed at preventing and combating sex discrimination, the Council recommendations aimed specifically at increasing the presence of women in economic decision-making and Union-level actions encouraging self-regulation, women continue to be strongly outnumbered by men in the highest decision-making bodies of companies throughout the Union. In the private sector and especially in listed companies this gender imbalance is particularly significant and acute. The Commission's key indicator of gender representation on corporate boards shows that the proportion of women involved in top-level business decision-making remains very low. In January 2012, women occupied on average just 13.7 per cent of board seats in the largest publicly listed companies in Member States. Among non-executive directors only 15 per cent were women.
- (11) The proportion of women on company boards is progressing very slowly, with an average annual increase of just 0.6 percentage points during the past years. The rate of

²⁸ 2011/2244(INI).

improvement has differed in individual Member States and has led to highly divergent results. Much more significant progress was noted in the Member States where binding measures have been introduced. Growing discrepancies between Member States are likely to increase given the very different approaches pursued by individual Member States to increase the representation of females on boards that are being pursued by individual Member States.

- (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.
- (13) The current lack of transparency of the selection procedures 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 procedure for board members enables investors to better assess the company's business strategy and to take informed decisions.
- (14) While this Directive does not aim to harmonise national laws on the selection procedures 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 take appointment decisions for non-executive directors on the basis of an objective comparative assessment of the qualifications of candidates in terms of suitability, competence and professional performance is necessary in order to attain gender balance among non-executives directors. Only an EU-level measure can effectively help to ensure a competitive level-playing field throughout the Union and avoid practical complications in business life.
- (15) The Europe 2020 Strategy for Smart, Sustainable and Inclusive Growth²⁹ ascertained that increased female labour force 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 per cent for women and men aged 20-64 by 2020, which can only be reached if there is a clear commitment to gender equality and a reinforced effort to tackle all barriers to women's participation in the labour market. The current economic crisis has magnified Europe's ever-growing need to rely on knowledge, competence and innovation and to make full use of the pool of available

²⁹ COM(2010) 2020 final.

talent. Enhancing female participation in economic decision-making, on company boards in particular, is expected to have a positive spill-over effect on female employment in the companies concerned and throughout the whole economy.

- (16) The Union should therefore aim to increase the presence of women on company boards, in order both to boost economic growth and 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 the 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.
- (17) Companies listed on stock exchanges enjoy a particular economic importance, visibility and impact on the market as a whole. The measures provided for in this Directive should therefore apply to listed companies, which are defined as companies incorporated in a Member State whose securities are admitted to trading on a regulated market within the meaning of Article 4(1) (14) of Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments,³⁰ in one or more Member States. These companies set standards for the economy in its entirety and their practices can be expected to be followed by other types of companies. The public nature of listed companies justifies that they be regulated to a greater extent in the public interest.
- (18) This Directive should not apply to micro, small and medium-sized enterprises (SMEs), as defined by Commission Recommendation 2003/361/EC of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises,³¹ even if they are listed companies.
- (19) There are various systems of board structures for listed companies in the Member States, the main distinction being between a dual ('two-tier') system with both a management board and a supervisory board and a unitary ('one-tier') system combining the management and supervisory function in a single board. There are also mixed systems, which feature aspects of both systems or give companies an option between different models. The measures provided for in this Directive should apply to all board systems in the Member States.
- (20) All board systems distinguish between executive directors, who are involved in the daily management of the company, and non-executive directors who are not involved in the daily management, but do perform a supervisory function. The quantitative objectives provided for in this Directive should apply only to the non-executive 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. As the non-executive directors perform supervisory tasks, it is also easier to recruit qualified candidates from outside the company and to a large extent also from outside the specific sector in which a company operates – a

³⁰ OJ L 145, 30.4.2004, p. 1.

³¹ OJ L 124, 20.5.2003, p. 36.

consideration which is of importance for areas of the economy where members of a particular sex are especially under-represented in the workforce.

- (21) In several Member States, a certain proportion of the non-executive directors can or must be appointed or elected by the company's workforce and/or organisations of workers pursuant to national law or practice. The quantitative objectives provided for in this Directive should apply to all non-executive directors including employee representatives. However, the practical procedures for ensuring that those objectives are attained, taking into account the fact that some non-executive Directors are employee representatives, should be defined by the Member States concerned.
- (22) Listed companies in the Union should be imposed obligations of means providing for appropriate procedures with a view of meeting specific objectives regarding the gender composition of their boards. Those listed companies in whose boards members of the under-represented sex hold less than 40 per cent of non-executive director positions should make the appointments to those positions on the basis of a comparative analysis of the qualifications of each candidate, by applying pre-established, clear, neutrally formulated and unambiguous criteria, in order to attain the said percentage at the latest by 1 January 2020. Therefore, the Directive establishes the objective of at least 40 per cent of non-executive directors of the under-represented sex by that date. This objective in principle only concerns the overall gender diversity among the non-executive directors and does not interfere with the concrete choice of individual directors from a wide pool of male and female candidates in each individual case. In particular, it 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.
- (23) Member States exercise a dominant influence over listed companies which are public undertakings within the meaning of Article 2(b) of Commission Directive 2006/111/EC of 16 November 2006 on the transparency of financial relations between Member States and public undertakings, as well as on financial transparency within certain undertakings.³² Due to that dominant influence, they have the instruments at their disposal to bring about the necessary change more rapidly. Therefore, in such companies the objective of least 40 per cent of non-executive directors of the under-represented sex should be set at an earlier date.
- (24) Determining the number of non-executive director positions necessary to meet the objective requires further specification since for most board sizes it is mathematically possible only to go beyond or remain below the exact share of 40 per cent. Therefore, the number of board positions necessary to meet the objective should be the number closest to 40 per cent. At the same time, in order to avoid discrimination of the initially over-represented sex, listed companies should not be obliged to appoint members of the under-represented sex to half or more of the non-executive board positions. Thus, for example, members of the under-represented sex should hold at least one position on boards with three or four non-executive directors, at least two positions on boards with five or six non-executive directors, and at least three positions on boards with seven or eight non-executive directors.

³² OJ L 318, 17.11.2006, p. 17.

- (25) In its case-law³³ on positive action and the compatibility thereof with the principle of non-discrimination on ground of sex (now also laid down in Article 21 of the Charter of Fundamental Rights of the European Union), 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 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 subject of an objective assessment which takes account of all criteria specific to the individual candidates.
- (26) In line with that case-law, Member States should ensure that the selection of the best qualified candidates for non-executive directors is based on a comparative analysis of the qualifications of each candidate on the basis of pre-established, clear, neutrally formulated and unambiguous criteria. Examples of types of selection criteria that companies could apply include professional experience in managerial and/or supervisory tasks, knowledge in specific relevant areas such as finance, controlling or human resources management, leadership and communication skills and networking abilities. Priority should be given to the candidate of the under-represented sex if that candidate is equally qualified as the candidate of the other sex in terms of suitability, competence and professional performance, and if an objective assessment taking account of all criteria specific to the individual candidates does not tilt the balance in favour of a candidate of the other sex.
- (27) The methods of recruiting and appointing 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, the direct appointment of directors by individual shareholders or a vote in the shareholders' assembly on individual candidates or lists of candidates. 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. In this respect, this Directive only establishes a minimum harmonisation of selection procedures, making it possible to apply the conditions provided for by the case-law of the Court of Justice with a view to attaining the objective of a more balanced gender representation in the boards of listed companies.
- (28) This Directive aims to improve the gender balance among directors of companies listed on stock exchanges and thus to contribute to the realisation of the principle of equal treatment between men and women, recognised as a fundamental right of the Union. Listed companies should therefore be required to disclose, upon the request of an unsuccessful candidate, not only the qualification criteria upon which the selection was based, but also the objective comparative assessment of those criteria and, where relevant, the considerations tilting the balance in favour of a candidate who is not of the under-represented sex. These limitations to the right to respect for private life with regard to the processing of personal data, recognised by the Articles 7 and 8 of the

³³ C-450/93: Kalanke (1995 ECR I-3051), C-409/95: Marschall (1997 ECR I-6363), C-158/97: Badeck (2000 ECR I-1875), C-407/98: Abrahamsson (2000 ECR I-5539).

Charter, and the obligation for listed companies to supply that information, upon request, to the unsuccessful candidate, 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.

- (29) Where an unsuccessful candidate of the under-represented sex establishes the presumption they were equally qualified as the appointed candidate of the other sex, the listed company should be required to demonstrate the correctness of the choice.
- (30) Member States should provide for effective, proportionate and dissuasive sanctions for breaches of this Directive, which could include, inter alia, administrative fines and nullity or annulment declared by a judicial body of the appointment or of the election of non-executive directors made contrary to the national provisions adopted pursuant to Article 4(1).
- (31) Since the gender composition of the workforce has a direct impact on the availability of candidates of the under-represented sex, Member States may provide that where the members of the under-represented sex make up less than 10 per cent of the workforce the company concerned should not be required to meet the objective laid down in this Directive.
- (32) Since listed companies should aim to increase the proportion of the under-represented sex in all decision-making positions, Member States may provide that the objective laid down in this Directive should be considered to be met where listed companies can show that members of the under-represented sex hold at least one third of all director positions, irrespective of whether they are executive or non-executive.
- (33) In addition to the measures relating to non-executive directors, and with a view also to improving the gender balance among directors involved in daily management tasks, listed companies should be required to make individual commitments regarding the representation of both sexes among executive directors, to be achieved at the latest by 1 January 2020. These commitments should aim to achieve tangible progress from the individual company's current position towards better gender balance.
- (34) Member States should require listed companies to provide information on the gender composition of their boards as well as information on how they managed to meet the objectives laid down in this Directive, on a yearly basis to the competent national authorities in order to enable them to assess the progress of each listed company towards gender balance among directors. Such information should be published and, where the company in question has not met the objective, it should include a description of the measures that it has taken so far and intends to take in the future in order to meet the objective.
- (35) Member States may have already taken measures providing for means to ensure a more balanced representation of women and men in company boards before the entry into force of this Directive. Such Member States should have an opportunity to apply those measures in place of the procedural requirements relating to appointments where they can demonstrate that the measures taken are of equivalent efficacy in order to attain the objective of a presence of the under-represented sex of at least 40 per cent among non-executive directors of listed companies at the latest by 1 January 2020 or

at the latest by 1 January 2018 in case of listed companies which are public undertakings.

- (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 right to 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 business (Article 16 of the Charter) and of the right to property (Article 17(1) of the Charter) respect the essence of those rights and freedoms and are necessary and proportionate. 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 gender representation among non-executive board members across the Union in line with the objectives set out in this Directive will not be achieved by Member States acting individually at any point in the foreseeable future. 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.
- (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 those objectives. Member States are given sufficient freedom to determine how the objectives laid down in this Directive should best be achieved taking national circumstances into account, in particular rules and practices concerning recruitment for board positions. This Directive does not interfere with the possibility for companies to appoint the most qualified board members, and it grants a sufficiently long period of adaptation for all listed companies.
- (39) In accordance with the principle of proportionality, the objective to be met by listed companies should be limited in time and 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. The Directive is due to expire on 31 December 2028. The Commission should assess, in its review, if there is a need to extend the duration of the Directive beyond that period.

- (40) In accordance with the Joint Political Declaration of Member States and the Commission of 28 September 2011 on explanatory documents,³⁴ 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.

HAVE ADOPTED THIS DIRECTIVE:

Article 1
Subject matter

This Directive lays down measures to ensure a more balanced representation of men and women among the non-executive directors of listed companies by establishing measures aimed at accelerated progress towards gender balance while allowing companies sufficient time to make the necessary arrangements.

Article 2
Definitions

For the purposes of this Directive, the following definitions shall apply:

- (1) ‘listed company’ means a company incorporated in a Member State whose securities are admitted to trading on a regulated market within the meaning of Article 4(1) (14) of Directive 2004/39/EC, in one or more Member States;
- (2) ‘board’ means any administrative, managerial or supervisory body of a 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 the 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 combines the management and the supervisory functions of a company;
- (7) ‘dual board system’ means a system in which the management and supervisory functions of a 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 which is incorporated in a Member State whose currency is not the euro, the equivalent amounts in the currency of that Member State;

³⁴ OJ C 369, 17.12.2011, p. 14.

- (9) 'public undertaking' means an undertaking over which the public authorities may exercise directly or indirectly a dominant influence by virtue of their ownership thereof, their financial participation therein, or the rules which govern it. A dominant influence on the part of the public authorities shall be presumed when these authorities, directly or indirectly in relation to an undertaking:
- hold the major part of the undertaking's subscribed capital; or
 - control the majority of the votes attaching to shares issued by the undertakings; or
 - can appoint more than half of the members of the undertaking's administrative, managerial or supervisory body.

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 non-executive directors

1. Member States shall ensure that listed companies in whose boards members of the under-represented sex hold less than 40 per cent of the non-executive director positions make the appointments to those positions on the basis of a comparative analysis of the qualifications of each candidate, by applying pre-established, clear, neutrally formulated and unambiguous criteria, in order to attain the said percentage at the latest by 1 January 2020 or at the latest by 1 January 2018 in case of listed companies which are public undertakings.
2. The number of non-executive director positions necessary to meet the objective laid down in paragraph 1 shall be the number closest to the proportion of 40 per cent, but not exceeding 49 per cent.
3. In order to attain the objective laid down in paragraph 1, Member States shall ensure that, in the selection of non-executive directors, priority shall be given to the candidate of the under-represented sex if that candidate is equally qualified as a candidate of the other sex in terms of suitability, competence and professional performance, unless an objective assessment taking account of all criteria specific to the individual candidates tilts the balance in favour of the candidate of the other sex.
4. Member States shall ensure that listed companies are obliged to disclose, on the request of an unsuccessful candidate, the qualification criteria upon which the selection was based, the objective comparative assessment of those criteria and, where relevant, the considerations tilting the balance in favour of a candidate of the other sex.
5. 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 that that candidate was equally qualified as the appointed candidate of the other sex, it shall be for the

listed company to prove that there has been no breach of the rule laid down in paragraph 3.

6. Member States may provide that listed companies where the members of the under-represented sex represent less than 10 per cent of the workforce are not subject to the objective laid down in paragraph 1.
7. Member States may provide that the objective laid down in paragraph 1 is met where listed companies can show that members of the under-represented sex hold at least one third of all director positions, irrespective of whether they are executive or non-executive.

Article 5

Additional measures by companies and reporting

1. Member States shall ensure that listed companies undertake individual commitments regarding gender-balanced representation of both sexes among executive directors to be achieved at the latest by 1 January 2020, or, in case of listed companies which are public undertakings, by 1 January 2018.
2. Member States shall require listed companies to provide information to the competent national authorities, once a year as from *[two years after adoption]*, about the gender representation on their boards, distinguishing between non-executive and executive directors and about the measures taken in view of the objectives laid down in Article 4(1) and in paragraph 1 of this Article, and to publish that information in an appropriate and accessible manner on their website.
3. Where a listed company does not meet the objectives laid down in Article 4(1) or its own individual commitments taken pursuant to paragraph 1 of this Article, the information referred to in paragraph 2 of this Article shall include the reasons for not reaching the objectives or commitments and a description of the measures which the company has adopted or intends to adopt in order to meet the objectives or commitments.
4. Member States shall take the necessary measures to ensure that the body or bodies designated in accordance with Article 20 of 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 (recast)³⁵ are also competent for the promotion, analysis, monitoring and support of gender balance on the boards of listed companies.

Article 6

Sanctions

1. Member States shall lay down rules on sanctions applicable to infringements of the national provisions adopted pursuant to this Directive and shall take all necessary measures to ensure that they are applied.

³⁵ OJ L 204, 26.7.2006, p. 23.

2. The sanctions must be effective, proportionate and dissuasive and may include the following measures:
 - (a) administrative fines;
 - (b) nullity or annulment declared by a judicial body of the appointment or of the election of non-executive directors made contrary to the national provisions adopted pursuant to Article 4(1).

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 companies incorporated in their national territory, provided those provisions do not create unjustified discrimination, nor hinder the proper functioning of the internal market.

Article 8
Implementation

1. Member States shall adopt and publish, by [*two years after adoption*] at the latest, the laws, regulations and administrative provisions necessary to comply with this Directive. They shall forthwith communicate to the Commission the text of those provisions.
2. When Member States adopt those provisions, they 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.
3. Without prejudice to Article 4(6) and (7), Member States which before the entry into force of this Directive have already taken measures to ensure a more balanced representation of women and men among the non-executive directors of listed companies may suspend the application of the procedural requirements relating to appointments contained in Article 4(1), (3), (4) and (5), provided that it can be shown that those measures enable members of the under-represented sex to hold at least 40 per cent of the non-executive director positions of listed companies by at the latest 1 January 2020, or at the latest 1 January 2018 for listed companies which are public undertakings.

The Member State in question shall notify this information to the Commission.

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 9
Review

1. Member States shall communicate to the Commission by 1 January 2017 at the latest and every two years thereafter a report on the implementation of this Directive. These reports shall include, amongst others, 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(2) and information about individual commitments taken by listed companies pursuant to Article 5(1).

2. Member States having suspended pursuant to Article 8(3) the application of the procedural requirements relating to appointments contained in Article 4(1), (3), (4) and (5) shall include information in the reports mentioned in paragraph 1 demonstrating the concrete results obtained by the national measures referred to in Article 8(3). The Commission shall then issue a specific report ascertaining whether those measures effectively enable members of the under-represented sex to hold at least 40 per cent of the non-executive director positions by 1 January 2018 for listed companies which are public undertakings, and by 1 January 2020 for listed companies which are not public undertakings. The first such report shall be issued by the Commission by 1 July 2017, and subsequent reports shall be issued within six months after notification of the respective national reports under paragraph 1.

Member States in question shall ensure that listed companies, which by applying the national measures referred to in Article 8(3) have not appointed or elected members of the under-represented sex for at least 40 per cent of the non-executive director positions of their boards by 1 January 2018, where they are public undertakings, or by 1 January 2020, where they are not public undertakings, apply the procedural requirements relating to appointments contained in Article 4(1), (3), (4) and (5) with effect respectively from those dates.

3. The Commission shall review the application of this Directive and report to the European Parliament and the Council by 31 December 2021 at the latest and every two years thereafter. The Commission shall evaluate in particular whether the objectives of this Directive have been achieved.
4. In its report, the Commission shall assess whether, in the light of developments in the representation of men and women in the boards of listed companies and at different levels of decision-making throughout the economy and taking into account whether the progress made is sufficiently sustainable, there is a need to extend the duration of this Directive beyond the date specified in Article 10(2) or to amend it.

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 2028.

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