



Council of the
European Union

Brussels, 17 October 2022
(OR. en)

Interinstitutional File:
2012/0299 (COD)

10521/1/22
REV 1

SOC 394
GENDER 117
ECOFIN 651
DRS 32
CODEC 970
PARLNAT 161

LEGISLATIVE ACTS AND OTHER INSTRUMENTS

Subject: Position of the Council at first reading with a view to the adoption of a
DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL
on improving the gender balance among directors of listed companies and
related measures
- Adopted by the Council on 17 October 2022

DIRECTIVE (EU) 2022/...
OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of ...

on improving the gender balance among directors of listed companies 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,¹

Having regard to the opinion of the Committee of the Regions,²

Acting in accordance with the ordinary legislative procedure³,

¹ OJ C 133, 9.5.2013, p. 68.

² OJ C 218, 30.7.2013, p. 33.

³ Position of the European Parliament of 20 November 2013 (OJ C 436, 24.11.2016, p. 225) and position of the Council at first reading of 17 October 2022 [(OJ ...)/(not yet published in the Official Journal)]. Position of the European Parliament of ... [(OJ ...)/(not yet published in the Official Journal)].

Whereas:

- (1) Under Article 2 of the Treaty on European Union (TEU), equality is a founding value of the Union and is common to the Member States in a society in which equality between women and men prevails. Under Article 3(3) TEU, the Union is to promote equality between women and men.
- (2) Article 157(3) of the Treaty on the Functioning of the European Union (TFEU) confers upon the European Parliament and the Council the power 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.
- (3) With a view to ensuring full equality in practice between men and women in working life, Article 157(4) TFEU permits positive action by allowing Member States to maintain or adopt measures providing for specific advantages in order to make it easier for the underrepresented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers. Article 23 of the Charter of Fundamental Rights of the European Union (the 'Charter') provides that equality between women and men is 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 underrepresented sex.

- (4) The European Pillar of Social Rights, which was 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.
- (5) 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.
- (6) Council Recommendation 84/635/EEC¹ 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/EC² 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.
- (7) This Directive is aimed at ensuring the application of the principle of equal opportunities between women and men and achieving a gender-balanced representation among top management positions by establishing a set of procedural requirements concerning the selection of candidates for appointment or election to director positions based on transparency and merit.

¹ 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).

² 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).

- (8) In recent years the Commission has presented several reports taking stock of the situation concerning gender equality in economic decision-making. It has encouraged listed companies to increase the number of members of the underrepresented sex on their boards by means of self-regulatory measures and to make concrete voluntary commitments in that regard. In its communication of 5 March 2010 entitled ‘A Strengthened Commitment to Equality between Women and Men – A Women's Charter’, the Commission underlined that women still do not have full access to the sharing of power and decision-making in political and economic life and in the public and private sectors, and reaffirmed its commitment to using its powers to pursue a fairer representation of women and men in positions of power in public life and the economy. Improving the gender balance in decision-making was one of the priorities set by the Commission in its communication of 21 September 2010 entitled ‘Strategy for equality between women and men 2010-2015’. Achieving gender balance in decision-making and politics is one the priorities set out in the Commission's communication of 5 March 2020 entitled ‘A Union of Equality: Gender Equality Strategy 2020-2025’.
- (9) In its conclusions of 7 March 2011 on European Pact for Gender Equality (2011-2020), the Council acknowledged that gender equality policies are vital to economic growth, prosperity and competitiveness. It reaffirmed its commitment to closing 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 promoting social inclusion. It also 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 talents. In that regard, making use of all available talent, knowledge and ideas would enrich the diversity of human resources and improve business prospects.

(10) In its communication of 3 March 2010 entitled 'Europe 2020: A strategy for smart, sustainable and inclusive growth' (the 'Europe 2020 Strategy'), the Commission recognised that increasing women's labour market participation is a precondition for boosting growth and for tackling demographic challenges in Europe. The Europe 2020 Strategy set a headline target of reaching an employment rate of at least 75 % for the Union population aged between 20 and 64 years by 2020. It is important that a clear commitment be made to eliminate the persisting gender pay gap and that a reinforced effort be made to tackle all barriers to women's participation in the labour market, including the existing 'glass ceiling' phenomenon. The Porto Declaration, which was signed by the Heads of State or Government on 8 May 2021¹, welcomed the new Union headline targets on jobs, skills and poverty reduction and the revised social scoreboard proposed by the Commission in its communication of 4 March 2021 entitled 'The European Pillar of Social Rights Action Plan'. That Action Plan provides that, in order to achieve the overall goal of an employment rate of at least 78 % among the Union population aged between 20 and 64 years 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 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 women and men. Research has shown that inclusion and diversity enable recovery and resilience. They are of vital importance in ensuring the Union's economic competitiveness, encouraging innovation and enhancing professional standards on boards.

¹ <https://www.consilium.europa.eu/en/press/press-releases/2021/05/08/the-porto-declaration/>

- (11) 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. It would be important that such legislation be implemented on a temporary basis and serve as a catalyst 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 resolutions of 13 March 2012 and 21 January 2021.

- (12) It is important that Union institutions, bodies, offices and agencies lead by example when it comes to gender equality by, inter alia, 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, in its communication of 5 March 2020 entitled ‘A Union of Equality: the Gender Equality Strategy 2020-2025’ the Commission emphasised that Union institutions, bodies, offices and agencies should ensure gender balance in leadership positions. In its communication of 5 April 2022 entitled ‘A new Human Resources Strategy for the Commission’, the Commission committed to ensuring full gender equality at all levels of its management by 2024. The Commission will monitor progress and report regularly in that regard on its website. The Commission further shares best practices with other Union institutions, bodies, offices and agencies and will report on the situation of gender balance in leadership positions in those institutions, bodies, offices and agencies on its website. The European Parliament, in its Bureau decision of 13 January 2020, has agreed on setting targets for gender balance in senior and middle management positions for 2024. The European Parliament will continue to monitor the progress at all levels of its management and aims to lead by example. The Council committed, in its Diversity and Inclusion Strategy 2021-2024, to achieving gender equality in management positions of its General Secretariat (GSC) with a 45 to 55 % margin at the latest by the end of 2026. The GSC’s Action Plan for Gender Equality in Management sets out measures to achieve that objective.

- (13) It is important that companies and businesses foster, support and develop female talent at all levels and throughout their careers in order to ensure that qualified women are provided with opportunities to hold board and management positions.
- (14) In order to promote gender equality and support the participation of women in decision-making, Directive (EU) 2019/1158 of the European Parliament and of the Council¹, 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 women and men by means of parental, paternity and carers' leave, alongside the existing maternity leave. That Directive also provides for the right to request flexible working arrangements.
- (15) The appointment of women as directors is hampered by a number of specific factors which can be overcome not only by means of binding rules but also by means of 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 directors and to introduce positive measures to promote and reward efforts by Member States and companies to adopt a more decisive approach to such changes in top economic decision-making bodies at all levels.

¹ Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019 on work-life balance for parents and carers and repealing Council Directive 2010/18/EU (OJ L 188, 12.7.2019, p. 79).

- (16) The Union has a large pool of highly qualified women, which is constantly growing as evidenced by the fact that 60% of university graduates are female. Achieving gender balance on boards is essential for an efficient use of that existing pool, which is key to addressing the Union's demographic and economic challenges. Thus, the under-representation of women on boards is a missed opportunity for Member States' economies in general and for their development and growth. Making full use of the existing pool of female talent would also improve the return on education for both individuals and the public sector. It is widely acknowledged that the presence of women on boards improves corporate governance, as 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 consumer 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. Achieving gender balance on boards is therefore vitally important for ensuring the Union's competitiveness in a globalised economy and would offer a comparative advantage vis-à-vis third countries.
- (17) Increasing the representation of women on boards 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 boards is likely to have a positive impact on closing both the gender employment gap and the gender pay gap.

(18) Despite evidence of the beneficial impact of gender balance on companies themselves and on the economy in general, and despite the existing Union law prohibiting sex discrimination and the existing Union-level actions encouraging self-regulation, women continue to be vastly underrepresented 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 could be compromised, leading to increased distrust of business power structures and possibly to a reduction in the efficient use 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 in the largest listed companies and for only 8,5 % of chairpersons. That indicates unfair and discriminatory under-representation of women, thereby clearly undermining the Union principles of equal opportunities and equal treatment of women and men in the fields of employment and occupation. Measures to encourage career progression for women at all levels of management should therefore be introduced and reinforced, and particular attention should be paid to ensuring that that is the case in listed companies, due to the significant economic and social responsibility of such companies. In addition, it is important that Union bodies, offices and agencies lead by example when it comes to redressing existing gender imbalances within the composition of their own management boards.

- (19) The proportion of women on boards has increased very slowly over recent years. The rate of improvement has varied among 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 national level, and to exchange best practices, with a view to supporting progress across the Union towards achieving a more balanced representation of women and men on boards.
- (20) The scattered and divergent regulation or the absence of regulation at national level as regards the gender balance on boards of listed companies not only leads to discrepancies in the number of women among non-executive directors and to different rates of improvement across Member States, but it also poses barriers to the internal market by imposing divergent corporate governance requirements on listed companies in the Union. Those differences in legal and self-regulatory requirements for the composition of boards can lead to practical complications for listed companies operating across borders, in particular when establishing subsidiaries or in mergers and acquisitions, and for candidates for director positions.

- (21) Gender imbalances within companies are greater at more senior levels. Furthermore, many of those women who are represented at senior management level 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 director 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.
- (22) 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 of directors, with candidates' qualifications, knowledge and skills being considered on an equal basis, regardless of their gender.
- (23) The current lack of transparency in the selection process and qualification criteria for director positions in most Member States represents a significant barrier to greater gender balance among directors and negatively affects both the board candidates' careers and freedom of movement and investor decisions. Such a lack of transparency prevents potential candidates for director 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 might have investment strategies that require that information linked also to the expertise and competence of directors be provided. More transparency in the qualification criteria and the selection process for directors 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 candidates be assessed objectively on their individual merits, regardless of their gender.

- (24) While this Directive does not aim to harmonise national laws on the selection process and qualification criteria for director positions in detail, the introduction of certain minimum requirements for listed companies without balanced gender representation relating to the selection of candidates for appointment or election to director positions on the basis of a transparent and clearly defined selection process and an objective comparative assessment of their qualifications in terms of suitability, competence and professional performance is necessary for achieving 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.
- (25) The Union should therefore aim to increase the presence of women on boards in all Member States, in order to boost economic growth, encourage labour market mobility, strengthen the competitiveness of listed companies and achieve effective gender equality on the labour market. That aim should be pursued by laying down minimum requirements with regard to positive action in the form of binding measures. Those binding measures should seek to achieve a quantitative objective for the gender composition of boards, in view of the fact that Member States and third countries which have chosen that or a similar method have achieved the best results in reducing the under-representation of women in economic decision-making positions.
- (26) It is important that each listed company develop a gender equality policy in order to achieve a more balanced gender representation at all levels. Such policies might include the nomination of both a female candidate and a male candidate for key positions, mentoring schemes and career development guidance for women, and human-resources strategies designed to encourage diverse recruitment.

- (27) Listed companies have a particular economic importance, visibility and impact on the market as a whole. Such 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 listed companies justifies their being regulated to a greater extent in the public interest.
- (28) The measures provided for in this Directive should apply to listed companies.
- (29) This Directive should not apply to micro, small and medium-sized enterprises (SMEs).
- (30) For the purposes of this Directive, the Member State competent to regulate matters covered by this Directive should be the Member State in which the listed company in question has its registered office. This Directive does not affect national rules determining the law applicable to companies for matters not governed by this Directive.
- (31) 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 and a unitary system combining the management and supervisory functions in a single board. 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 existing in the Member States.

- (32) All board systems distinguish, *de jure* or *de facto*, between executive directors, who are 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 of the listed company. 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 balance of boards and the need to minimise interference with the day-to-day management of a company, this Directive distinguishes between those two categories of director.
- (33) In several Member States, a certain proportion of the non-executive directors can or must, pursuant to national law or practice, be appointed or elected by the companies' workforce, by employee organisations or by both. The quantitative objectives laid down in this Directive should also apply to such directors. However, because some non-executive directors are employee representatives, the Member States should establish the means for ensuring that those objectives are achieved, with due regard to the specific rules for the election or designation of employee representatives as laid down in national law and with respect for the freedom of vote in the election of employee representatives. Given the differences between Member States' national company law, it should be possible for Member States to apply the quantitative objectives separately to shareholder representatives and employee representatives.

- (34) Member States should subject listed companies either to the objective of having boards on which members of the underrepresented sex hold at least 40 % of non-executive director positions by 30 June 2026 or, alternatively, since it is important that listed companies increase the proportion of the underrepresented sex in all decision-making positions, to the objective of having boards on which members of the underrepresented sex hold at least 33 % of all director positions by 30 June 2026, regardless of whether they are executive or non-executive, with a view to promoting a more balanced gender representation among all directors.
- (35) The objectives of having boards on which members of the underrepresented sex hold at least 40 % of non-executive director positions or at least 33 % of all director positions concern the overall gender balance 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 listed companies or shareholders. The decision on the appropriate directors thus remains with the listed companies and the shareholders.

- (36) Due to their nature, it is appropriate that public undertakings which fall under the scope of this Directive serve as a model for the private sector. Member States exercise a dominant influence over public undertakings within the meaning of Article 2, point (b), of Commission Directive 2006/111/EC¹ which are listed on a regulated market. Due to that dominant influence, Member States have the instruments at their disposal to bring about the necessary change more rapidly.
- (37) Determining the number of director positions necessary to achieve the objectives laid down in this Directive requires further specification since, given the size of most boards, it is not possible mathematically to reach the exact proportion of 40 % or, where applicable, 33 %. Therefore, the number of director positions necessary to meet the objectives laid down in this Directive should be the number closest to the proportion of 40 %, or, where applicable, 33 %, and in both cases should not exceed 49 %.

¹ 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 (OJ L 318, 17.11.2006, p. 17).

(38) In its case-law¹ on positive action and the compatibility thereof with the principle of non-discrimination based on sex, which also is laid down in Article 21 of the Charter, the Court of Justice of the European Union (the ‘Court of Justice’) accepted that priority can in certain cases be given to the underrepresented sex in selection for employment or promotion, provided that the candidate of the underrepresented 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 can 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.

¹ Judgment of the Court of Justice of 17 October 1995, *Kalanke v Freie Hansestadt Bremen*, C-450/93, ECLI:EU:C:1995:322; judgment of the Court of Justice of 11 November 1997, *Marschall v Land Nordrhein-Westfalen*, C-409/95, ECLI:EU:C:1997:533; judgment of the Court of Justice of 28 March 2000, *Badeck and Others*, C-158/97, ECLI:EU:C:2000:163; judgment of the Court of Justice of 6 July 2000, *Abrahamsson and Anderson*, C-407/98, ECLI:EU:C:2000:367.

- (39) Member States should ensure that those listed companies on whose boards members of the underrepresented sex hold less than 40 % of non-executive director positions or less than 33 % of all director positions, including both executive and non-executive directors, as applicable, select the best qualified candidates for appointment or election to those positions on the basis of a comparative assessment of the qualifications of candidates by applying clear, neutrally formulated and unambiguous criteria established in advance 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, leadership, communication skills, networking abilities and knowledge in specific relevant areas such as finance, financial oversight or human resources management.

- (40) When selecting candidates for appointment or election to director positions, priority should be given to the equally qualified candidate of the underrepresented sex. Such priority should not, however, constitute an automatic and unconditional preference. There might 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 underrepresented sex. Such an overriding of preference could take place, for instance, where broader diversity policies apply at national or company level for the selection of directors. The overriding of the application of positive action should nevertheless remain exceptional, be based on a case-by-case assessment and be duly justified by objective criteria which should not, in any event, discriminate against the underrepresented sex.
- (41) In Member States where the requirements laid down in this Directive relating to the selection of candidates for appointment or election to director positions are applicable, listed companies on whose boards members of the underrepresented sex hold at least 40 % of non-executive director positions or at least 33 % of all director positions, as applicable, should not be obliged to comply with those requirements.

(42) The methods of selecting candidates for appointment or election to director positions differ from one Member State to another and from one listed company to another. They might 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 for the selection of candidates for appointment or election to director positions 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 that respect, this Directive establishes minimum standards only for selecting candidates for appointment or election to director positions, 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 equality and achieving the objective of a more balanced representation of women and men on boards of listed companies. This Directive does not unduly interfere with the day-to-day management of listed companies, since they maintain the freedom to select candidates on the basis of qualifications or other objective relevant considerations.

- (43) In view of the objectives of this Directive as regards gender balance, listed companies should be required at the request of a candidate for appointment or election to a director position, 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 underrepresented sex. A requirement to provide such information 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 Council¹.
- (44) Where a candidate of the underrepresented sex for appointment or election to a director position establishes facts, before a court or other competent authority, from which it can be presumed that that candidate was as equally qualified as the selected candidate of the other sex, the listed company should be required to demonstrate the correctness of the choice.

¹ 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).

- (45) While this Directive seeks to establish minimum requirements in the form of binding measures to improve the gender composition of boards, it is important, in accordance with the principle of subsidiarity, to recognise the legitimacy of different approaches and to acknowledge the effectiveness of certain existing national measures, already adopted in this policy area, which have shown satisfactory results. In some Member States, efforts to ensure a more balanced representation of women and men on boards have thus already been made through the adoption of binding measures that are considered equally effective to those laid down in this Directive. Those Member States should be able to suspend the application of the requirements laid down in this Directive relating to the selection of candidates for appointment or election to director positions and, where relevant, those relating to the establishment of individual quantitative objectives, provided that the conditions for a suspension set out in this Directive are fulfilled. In such cases, where Member States have introduced such binding measures by way of national law, the rounding rules set out in this Directive with regard to the specific number of directors should be applied *mutatis mutandis* for the purpose of assessing those national measures under this Directive. In a Member State where such suspension applies, the objectives laid down in this Directive should be deemed to be attained and thus the objectives laid down in this Directive in relation to non-executive directors or all directors do not replace and are not added to the relevant national measures.

- (46) With a view 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 achieving such objectives by the date set out in this Directive. Those objectives should help companies to achieve tangible progress as compared with their current situation. That obligation should not apply to listed companies which pursue the objective of 33 % relating to all directors, whether executive or non-executive.

(47) Member States should require listed companies to provide, on a yearly basis, information on the gender composition of their boards and on the measures taken with a view to achieving the objectives laid down in this Directive to the competent authorities in order to enable them to assess the progress made by each listed company towards achieving gender balance among directors. Listed companies should publish such information in an appropriate and easily accessible manner on their websites and include it in their annual reports. Where a listed company has not achieved the applicable quantitative objectives, it should include in such information a description of the concrete measures that it has taken so far or intends to take in the future in order to achieve the objectives laid down in this Directive. In order to avoid unnecessary administrative burden and duplication of efforts, the information on gender balance on boards to be reported pursuant to this Directive should form part, where applicable, of the corporate governance statement of listed companies, in accordance with applicable Union law and, in particular, Directive 2013/34/EU of the European Parliament and of the Council¹. Where Member States have suspended the application of Article 6 pursuant to Article 12, the reporting obligations set out in this Directive should not apply, provided that the national law of those Member States provides for reporting obligations that ensure that information regarding the progress made by listed companies towards achieving a more balanced representation of women and men on their boards is regularly published.

¹ Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC (OJ L 182, 29.6.2013, p. 19).

- (48) The requirements relating to the selection of candidates for appointment or election to director positions, 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 that purpose. Such penalties might include fines or the possibility for a judicial body to annul a decision concerning the selection of directors or to declare it null and void. 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 women and men 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 listed company related to the obligations laid down in 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 applicable Union law.
- (49) Member States or listed companies should be able to introduce or maintain more favourable measures to ensure a more balanced representation of women and men.

- (50) Member States should designate bodies for the promotion, analysis, monitoring and support of gender balance on boards. Furthermore, information campaigns and the sharing of best practices would significantly contribute to the raising of awareness of the issue among all listed 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 boards.
- (51) This Directive respects fundamental rights and observes the principles recognised by the Charter. In particular, it contributes to the fulfilment of the principle of equality between women and men (Article 23 of the Charter) and 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 to a fair trial (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 that right and are necessary and proportionate. It is possible to make limitations only if they genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

(52) 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 and intentions show that Member States acting individually will not achieve a balanced representation of women and men among directors across the Union in line with the objectives laid down in this Directive 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 boards, the gender balance on boards across the Union can only be improved by means of a common approach, and the potential for gender equality, competitiveness and growth can be better achieved through coordinated action at Union level rather than by means of national initiatives of varying scope, ambition and effectiveness. Since the objective of this Directive, namely to achieve a more balanced representation of women and men 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 for that purpose, cannot be sufficiently achieved by the Member States but can rather, by reason of the scale and effects 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 TEU.

In accordance with the principle of proportionality, as set out in that Article, this Directive is limited to setting common objectives and principles and does not go beyond what is necessary in order to achieve that objective. 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 to boards. This Directive does not interfere with the possibility for listed companies to appoint the most qualified directors, and it grants a flexible framework and provides for a sufficiently long period of adaptation.

- (53) 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.
- (54) In accordance with the principle of proportionality, the objectives to be achieved by listed companies should be limited in time and should remain in force only until sustainable progress has been made 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 this Directive beyond that date.

(55) In accordance with the Joint Political Declaration of Member States and the Commission of 28 September 2011 on explanatory documents,¹ Member States have undertaken to accompany, in justified cases, 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:

¹ OJ C 369, 17.12.2011, p. 14.

Article 1

Purpose

This Directive aims to achieve a more balanced representation of women and men 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 for that purpose.

Article 2

Scope

This Directive applies to listed companies. This Directive does not apply to micro, small and medium-sized enterprises (SMEs).

Article 3

Definitions

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

- (1) 'listed company' means a company which has its registered office in a Member State and whose shares are admitted to trading on a regulated market within the meaning of Article 4(1), point (21), of Directive 2014/65/EU in one or more Member States;

- (2) 'board' means an administrative, management or supervisory body of a listed company;
- (3) 'director' means a member of a board, including a member who is an employees' representative;
- (4) 'executive director' means a member of a unitary board who is engaged in the daily management of a listed company or, in the case of a dual board system, a member of the board which carries out the management functions of a listed company;
- (5) 'non-executive director' means a member of a unitary board other than an executive director or, in the case of a dual board system, a member of the board which carries out the supervisory functions of a listed company;
- (6) 'unitary board' means a single board that carries out both the management and 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) 'micro, 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.

Article 4
Applicable law

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

Article 5
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 underrepresented sex hold at least 40 % of non-executive director positions;
 - (b) members of the underrepresented sex hold at least 33 % of all director positions, including both executive and non-executive directors.

2. Member States shall ensure that listed companies which are not subject to the objective laid down in paragraph 1, point (b), set individual quantitative objectives with a view to improving the gender balance among executive directors. Member States shall ensure that such listed companies aim to achieve such individual quantitative objectives by 30 June 2026.

3. The number of non-executive director positions deemed necessary to achieve the objective laid down in paragraph 1, point (a), shall be the number closest to the proportion of 40 %, but not exceeding 49%. The number of all director positions deemed necessary to achieve the objective laid down in paragraph 1, point (b), shall be the number closest to the proportion of 33 %, but not exceeding 49 %. Those numbers are set out in the Annex.

Article 6

Means to achieve the objectives

1. Member States shall ensure that listed companies which do not achieve the objectives referred to in Article 5(1), point (a) or (b), as applicable, adjust the process for selecting candidates for appointment or election to director positions. Those candidates shall be selected on the basis of a comparative assessment of the qualifications of each candidate. For that purpose, clear, neutrally formulated and unambiguous criteria shall be applied in a non-discriminatory manner throughout the entire selection process, including during the preparation of vacancy notices, the pre-selection phase, the shortlisting phase and the establishment of selection pools of candidates. Such criteria shall be established in advance of the selection process.

2. As regards the selection of candidates for appointment or election to director positions, 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 underrepresented sex unless, in exceptional cases, reasons of greater legal weight, such as the pursuit of other diversity policies, invoked within the context of an objective assessment which takes into account the specific situation of a candidate of the other sex and which is based on non-discriminatory criteria, tilt the balance in favour of the candidate of the other sex.
3. Member States shall ensure that, at the request of a candidate who was considered during selection of candidates for appointment or election to a director position, 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 who is not of the underrepresented 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 underrepresented sex establishes facts, before a court or other competent authority, from which it may be presumed that that candidate was as equally qualified as the candidate of the other sex who was selected for appointment or election to a director position, it is for the listed company to prove that there has been no breach of Article 6(2).

This paragraph shall not prevent Member States from introducing rules of evidence which are more favourable to plaintiffs.

5. Where the process for selecting candidates for appointment or election to director position is made through a vote of shareholders or employees, Member States shall require listed companies to ensure that voters are properly informed regarding the measures provided for in this Directive, including penalties for non-compliance by the listed company.

Article 7
Reporting

1. 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 executive and non-executive directors and regarding the measures taken with a view to achieving the applicable objectives laid down in Article 5(1) and, where applicable, the objectives set in accordance with Article 5(2). Member States shall require listed companies to publish that information in an appropriate and easily accessible manner on their websites. On the basis of 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 achieved either of the objectives laid down in Article 5(1).
2. Where a listed company has not achieved one of the objectives laid down in Article 5(1) or, where applicable, the objectives set in accordance with Article 5(2), the information referred to in paragraph 1 of this Article shall include the reasons for not achieving the objectives and a comprehensive description of the measures which the listed company has already taken or intends to take in order to achieve them.
3. Where applicable, the information referred to in paragraphs 1 and 2 of this Article shall also be included in the company's corporate governance statement, in accordance with the relevant provisions of Directive 2013/34/EU.

4. The obligations set out in paragraphs 1 and 2 of this Article shall not apply in a Member State which has suspended the application of Article 6 pursuant to Article 12 where national law provides for reporting obligations that ensure the regular publication of information regarding the progress made by listed companies towards a more balanced representation of women and men on their boards.

Article 8

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 Article 5(2) and Articles 6 and 7, as applicable, and shall take all necessary measures to ensure that they are implemented. In particular, Member States shall ensure that adequate administrative or judicial procedures are available to enable the obligations deriving from this Directive to be enforced. The penalties shall be effective, proportionate and dissuasive. Such penalties may comprise fines or the possibility for a judicial body to annul a decision concerning the selection of directors made contrary to the national provisions adopted pursuant to Article 6 or to declare it null and void. Member States shall, by ... [OJ: two years after entry into force of this Directive], notify the Commission of those rules and of those measures and shall notify it, without delay, of any subsequent amendment affecting them.

2. Listed companies may be held liable only for acts or omissions which can be attributed to them in accordance with national law.
3. 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 applicable Union law.

Article 9

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 women and men in respect of listed companies incorporated in their national territory.

Article 10

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 boards. For that purpose, Member States may designate, for example, the equality bodies they have designated pursuant to Article 20 of Directive 2006/54/EC of the European Parliament and of the Council¹.

¹ 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).

Article 11
Transposition

1. Member States shall adopt and publish, by ... [OJ: two years after entry into force of this Directive] the laws, regulations and administrative provisions necessary to comply with this Directive. They shall immediately inform the Commission thereof.

When Member States adopt those measures, they shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States.

2. Member States which have suspended the application of Article 6 pursuant to Article 12 shall immediately communicate to the Commission the information demonstrating that the conditions laid down in Article 12 are fulfilled.
3. 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 12

Suspension of the application of Article 6

1. A Member State may suspend the application of Article 6 and, where relevant, Article 5(2), where, by ... [OJ: the date of entry into force of this Directive], the following conditions have been fulfilled in that Member State:
 - (a) members of the underrepresented sex hold at least 30 % of the non-executive director positions or at least 25 % of all director positions in listed companies; or
 - (b) that Member State's national law:
 - (i) requires that members of the underrepresented sex hold at least 30 % of non-executive director positions or at least 25 % of all director positions in listed companies;
 - (ii) includes effective, proportionate and dissuasive enforcement measures in the event of non-compliance with the requirements referred to in point (i); and
 - (iii) requires that all listed companies not covered by that national law set individual quantitative objectives for all director positions.

Where a Member State has suspended the application of Article 6 and, where relevant, Article 5(2) on the basis of either of the conditions set out in paragraph 1 of this Article, the objectives laid down in Article 5(1) shall be deemed to have been achieved in that Member State.

2. For the purpose of assessing the fulfilment of the conditions for a suspension on the basis of paragraph 1, first subparagraph, point (a) or (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 not exceed 39 %. That shall also be the case where, pursuant to national law, the quantitative objectives laid down in Article 5 are applied separately to shareholder representatives and employee representatives.
3. Where, in a Member State which has suspended the application of Article 6 and, where relevant, Article 5(2) pursuant to paragraph 1 of this Article, the conditions set out in paragraph 1 of this Article are no longer fulfilled, Article 6 and, where relevant, Article 5(2) shall apply at the latest six months after such conditions ceased to be fulfilled.

Article 13

Review

1. By ... [OJ: one year after the date provided for in Article 11(1)], and every two years thereafter, Member States shall communicate to the Commission a report on the implementation of this Directive. Such a report shall include comprehensive information about the measures taken with a view to achieving the objectives laid down in Article 5(1), information provided in accordance with Article 7 and, where applicable, representative information about individual quantitative objectives set by listed companies pursuant to Article 5(2).

2. Member States which have suspended the application of Article 6 and, where relevant, Article 5(2) pursuant to Article 12 shall include in the reports mentioned in paragraph 1 of this Article information showing whether and how the conditions laid down in Article 12 are fulfilled and whether they continue 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 ... [OJ: two years after the date provided for in Article 11(1)], and every two years thereafter, the Commission shall issue a specific report ascertaining, *inter alia*, whether and how the conditions laid down in Article 12(1) are fulfilled and, as applicable, whether the Member States have resumed the application of Article 6 and Article 5(2), in accordance with Article 12(3).

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

4. In its report referred to in paragraph 3 of this Article, the Commission shall assess whether, in the light of developments in the representation of women and men on boards at different levels of decision-making throughout the economy and taking into account whether the progress made is sufficiently sustainable, this Directive is an efficient and effective instrument for increasing the gender balance on boards. On the basis of that assessment, the Commission shall consider whether there is a need to extend the duration of this Directive beyond 31 December 2038 or whether there is a need to amend it, for instance by extending its scope to non-listed companies which do not fall within the definition of SMEs or by revising the conditions set out in Article 12(1), first subparagraph, point (a), so as to ensure continued progress towards a more balanced representation between women and men among executive and non-executive director positions or all director positions in listed companies.

Article 14

Entry into force and expiry

This Directive shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

It shall expire on 31 December 2038.

Article 15
Addressees

This Directive is addressed to the Member States.

Done at ...,

For the European Parliament
The President

For the Council
The President

ANNEX

TARGET NUMBERS OF DIRECTORS OF THE UNDERREPRESENTED SEX

Number of positions on the board	Minimum number of non-executive directors of the underrepresented sex necessary to meet the objective of 40 % (Article 5(1), point (a))	Minimum number of directors of the underrepresented sex necessary to meet the objective of 33 % (Article 5(1), point (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%)

Number of positions on the board	Minimum number of non-executive directors of the underrepresented sex necessary to meet the objective of 40 % (Article 5(1), point (a))	Minimum number of directors of the underrepresented sex necessary to meet the objective of 33 % (Article 5(1), point (b))
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%)
