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REPORT

From: Presidency
To: Council (EPSCO)

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No. Cion prop.: 16433/12 SOC 943 COMPET 708 DRS 130 CODEC 2724

Subject: Proposal for a Directive of the European Parliament and of the Council on improving the gender balance among directors of companies listed on stock exchanges and related measures
- General approach

I. INTRODUCTION

On 14 November 2012, the Commission adopted a 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. Aiming to address the serious problem of women's under-representation in economic decision-making at the highest level, the proposed Directive would set a quantitative objective for the proportion of the under-represented sex on the boards of listed companies of 40% by 2020 (by 2018 in the case of public undertakings). The companies would be obliged to work towards that objective, *inter alia*, by introducing procedural rules on the selection and appointment of non-executive board members.

Companies which have not reached the 40% target would be required to continue to apply the procedural rules, as well as to explain what measures they had taken and intended to take in order to reach it. For Member States that choose to apply the objective to *both* executive and non-executive directors, a lower target (33%) would apply.

The national parliaments of DK, NL, PL, SE, UK, and one of the two chambers of CZ Parliament (Chamber of Deputies) submitted reasoned opinions within eight weeks from the submission of the Commission's proposal, alleging that it did not comply with the principle of subsidiarity.¹

The European Economic and Social Committee adopted its opinion on 13 February 2013.²

The Committee of the Regions adopted its opinion on 30 May 2013.³

The European Parliament adopted its position at first reading on 20 November 2013.⁴

CZ, DK, SK, SI and LV have linguistic scrutiny reservations.

¹ No review of the proposal was required on the part of the Commission, the one-third threshold set out in Protocol 2 TEU, Article 7, having not been met.

² OJ C 133, 9.5.2013, p 68.

³ ECOS-V-039.

⁴ A7-0340/2013. Mariya Gabriel (BG/EPP) has been appointed as the new Rapporteur.

The proposal is based on Article 157(3) TFEU, which is, within the framework of the Union's social policy, the legal basis for adopting "measures to ensure the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, including the principle of equal pay for equal work or work of equal value". The Presidency believes that an agreement by qualified majority can be reached based on Article 157(3) TFEU.

II. THE COMPROMISE TEXT

While there is a growing consensus in Europe regarding the need to improve the gender balance in economic decision-making, including on company boards, progress has been slow and uneven, as shown by recent figures.⁵ Discussions in the Working Party have confirmed that the objective of the proposed Directive continues to enjoy broad support; the delegations that remain opposed to the Directive have stressed, in particular, that it fails to respect the principle of subsidiarity. Meanwhile, certain other delegations otherwise positively disposed towards the proposed Directive have pointed out that Member States have very different starting-positions, some requiring more time than others to attain the quantitative objectives foreseen.

The Luxembourg Presidency had intended to place the file on the agenda of the EPSCO Council on 5 October 2015, but the item was eventually withdrawn in order to allow time for further discussion. Seeking to address the remaining concerns, the Presidency tabled a fresh set of drafting suggestions, which were examined by the Working Party on Social Questions on 5 and 17 November, and by the Committee of Permanent Representatives on 25 November 2015. The main elements are the following:

⁵ http://ec.europa.eu/justice/gender-equality/files/womenonboards/factsheet_women_on_boards_web_2015-10_en.pdf

a) Flexibility clause (Article 4b)

Conceived in a spirit of subsidiarity, the flexibility clause set out in Article 4b would allow Member States to pursue the aims of the Directive by means of their own choosing and to suspend the Directive's procedural requirements, provided that they have already taken equally effective measures or attained progress coming close to the quantitative objectives set in the Directive. With a view to combining flexibility with maximum legal certainty, Article 4b thus defines three scenarios which would be deemed by law to guarantee "equal effectiveness" until 31 December 2022."⁶

It also leaves open the possibility that Member States might be entitled to avail themselves of the flexibility clause in other legitimate cases where equal effectiveness or sufficient progress had been demonstrated. In its drafting suggestions, the Luxembourg Presidency fine-tuned the example scenario set out in Article 4b(1a)(a) so as to make it clear that Member States whose national legislation contained binding quantitative targets that did not cover all the listed companies falling within the scope of the Directive would nevertheless be allowed to benefit from the flexibility clause, provided that the narrower application of these binding quantitative targets is compensated by other national measures that are not otherwise required under the Directive.

⁶ See explanatory notes contained in docs. 14562/14 and 13942/15.

b) Implementation calendar and sunset clause (Articles 4b, 9 and 10)

The implementation and reporting calendar as well as the target date for reaching the quantitative objectives have already been extended during the course of previous discussions in the preparatory bodies of the Council. In its drafting suggestions, the Presidency further adapted the implementation calendar to the effect that the suspensions based on Article 4b would expire on *31 December 2022* (rather than 31 December 2020) unless certain conditions were met (see Article 4b(2)). If the conditions were not met, Member States would be required to ensure the application of the procedural requirements contained in Article 4a with effect from *30 September 2023* (rather than 30 September 2021).

By the same logic, the Commission would be required to begin reporting on the application of the Directive by *31 December 2024* (rather than 31 December 2022), and the Directive would expire on *31 December 2031* (rather than 31 December 2029).

c) Reporting (Article 5)

The Presidency's drafting suggestions offer an exemption from the reporting provisions contained in Article 5(3) to listed companies having their registered offices in Member States where measures to improve the gender balance on company boards are guaranteed by law and where national law includes the same or similar reporting obligations (see Article 4b(1a)(a)).

d) Rounding rule and right to establish objectives separately for shareholder representatives and employee representatives (Article 4(2), Article 4b(1b), Recital 21, Recital 29a and Annex)

The Presidency's drafting suggestions provide for the possibility--but no obligation--to apply the binding quantitative targets provided for in national law (referred to in the "flexibility clause" provision in Article 4b(1a)(a)) separately for shareholder representatives and employee representatives.

The latest version of the text, including the above elements, is set out in the Annex to the present report.

III. DELEGATIONS' POSITIONS

Many delegations (BE, BG, IE, EL, FR, IT, CY, LV, LT, LU, MT, AT, RO, SI, FI) support the Directive as currently drafted.

CZ, DE, ES, PT and PL have maintained scrutiny reservations on the current text.

DK, CZ, FR, PL and UK have maintained parliamentary scrutiny reservations.

DK, EE, HR, HU, SK, NL, SE and UK have maintained reservations on the Commission's proposal.

While strongly supporting the attempts to advance the work, the Commission has yet to adopt a formal position on the compromise suggested by the Presidency.

Further details about delegations' positions can be found in docs. 13772/15 and 14126/1/15 REV 1.

IV. CONCLUSION

The Council is invited to address the remaining reservations, with a view to reaching a general approach.

Proposal for a

**DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL
on improving the gender balance among directors of companies listed on stock exchanges, and
related measures**

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Articles 157(3) thereof,⁷

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,⁸

Acting in accordance with the ordinary legislative procedure,

Whereas:

⁷ The square brackets have been removed.

⁸ OJ C , , p. .

- (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 (TEU). Under the terms of Article 8 of the Treaty on the Functioning of the European Union (TFEU), the Union has to 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 role the principle of positive action can play in achieving effective equality between women and men in practice is recognised in Article 157(4) TFEU and in Article 23 of the Charter of Fundamental Rights of the European Union (Charter), which provides that equality between women and men needs to be ensured in all areas and that the principle of equality cannot prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex.
- (3) Council Recommendation 84/635/EEC⁹ 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/EC¹⁰ 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.

⁹ 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).

¹⁰ Council Recommendation 96/694/EC of 2 December 1996 on the balanced participation of women and men in the decision-making process (OJ L 319, 10.12.1996, p.11).

- (4) In recent years the Commission has presented several reports taking stock of the situation concerning gender diversity in economic decision-making. It has encouraged publicly listed companies in the Union to increase the number of women on their boards by self-regulatory measures and to make concrete voluntary commitments in that regard. In 2010, in its Communication entitled "A Strengthened Commitment to Equality between Women and Men - 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 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 Communication entitled "Strategy for equality between women and men 2010-2015" as one of its priority tasks.
- (5) In 2011, the Council adopted the European Pact for Gender Equality (2011-2020), acknowledging that gender equality policies are vital to economic growth, prosperity and competitiveness, reaffirming 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 urging action to promote the equal participation of women and men in decision-making at all levels and in all fields, in order to make full use of all available talent.
- (6) The European Parliament, in its resolution of 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. The European Parliament reiterated that call for legislation in its resolution of 13 March 2012 on equality between women and men in the Union.

(7)

(8)

(9)

- (10) Europe has a large pool of highly qualified women. Improving the gender balance on company boards is essential for making more efficient use of existing human capital, which is key to addressing the Union's demographic challenges. Moreover, it is widely acknowledged that the presence of women in the boardroom improves corporate governance and numerous studies have shown a positive correlation between gender diversity at the top management level and a company's financial performance and profitability. Despite evidence of the beneficial impact of gender balance on companies themselves and the economy in general, and despite the existing Union legislation prohibiting sex discrimination and Union-level actions encouraging self-regulation, women continue to be vastly 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.
- (10a) 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. According to the Commission's Report on Equality between Women and Men in 2014, women account for an average of 20.2 % of the members of boards of directors in the largest publicly listed companies, only 6.5 % of chairpersons, and 3.3 % of chief executive officers.
- (10b) The Europe 2020 Strategy for Smart, Sustainable and Inclusive Growth recognised that increasing women's labour market participation is a precondition for boosting growth and for tackling demographic challenges in Europe. The Strategy set a headline target of reaching an employment rate of 75 % for women and men aged 20 to 64 years by 2020, which can only be reached if there is a clear commitment to gender equality and a reinforced effort to address all barriers to women's participation in the labour market. The recent economic crisis highlighted the Union's ever-growing need to rely on knowledge, competence and innovation and to make full use of the pool of available talent. Enhancing women's participation in economic decision-making, on company boards in particular, is expected to have a positive spill-over effect on women's employment in the companies concerned and throughout the whole economy.

- (11) The proportion of women on company boards is progressing very slowly, with an average annual increase of just 1.0 percentage points during the past years. The rate of improvement has differed in Member States and has led to highly divergent results. Much more significant progress was noted in the Member States where binding measures have been introduced. That divergence is likely to increase given the very different approaches to ensuring a more balanced representation of women and men on boards. Therefore Member States are encouraged to share information about the effective measures taken and policies adopted at the national level, and to exchange best practice, with a view to supporting progress across the Union towards achieving a more balanced representation of women and men on company boards.
- (12)
- (13) The current lack of transparency in the selection process and qualification criteria for board positions in most Member States represents a significant barrier to more gender diversity among board members and negatively affects both the board candidates' careers and freedom of movement, as well as investor decisions. Such lack of transparency prevents potential candidates for board positions from applying to boards where their qualifications would be most required and from challenging gender-biased appointment decisions, thus restricting their freedom of movement within the internal market. On the other hand, investors have different investment strategies that require information linked also to the expertise and competence of the board members. More transparency in the qualification criteria and the selection process for board members enables investors to better assess the company's business strategy and to take informed decisions.

- (14) While this Directive does not aim to harmonise national laws on the selection process and qualification criteria for board positions in detail, the introduction of certain minimum standards as regards the requirement for listed companies without balanced gender representation to select candidates for election or appointment to the posts of non-executive directors on the basis of an objective comparative assessment of their qualifications in terms of suitability, competence and professional performance is necessary for improving the gender balance. Only a measure at Union level can effectively help to ensure a competitive level-playing field throughout the Union and avoid practical complications in business life.
- (15)
- (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 view of the fact that Member States and other countries which have chosen this or a similar method have achieved the best results in ensuring a more balanced representation of women and men in economic decision-making positions.
- (17) Companies listed on stock exchanges have a particular economic importance, visibility and impact on the market as a whole. These companies set standards for the wider economy and their practices can be expected to be followed by other types of companies. The public nature of the listed companies justifies their being regulated to a greater extent in the public interest.

- (17a) The measures provided for in this Directive should apply to listed companies, which are defined as companies having their registered office in a Member State and whose shares are admitted to trading on a regulated market within the meaning of Directive 2004/39/EC of the European Parliament and of the Council,¹¹ in one or more Member States. This Directive does not affect the existing legislation on determining the seat of a listed company.
- (17b) For the purposes of the implementation of this Directive the Member State competent to regulate the matters under this Directive should be the Member State in which the listed company in question has its registered office, rather than the Member State on whose regulated market the listed company trades its shares. The applicable law should be the law of the Member State in which the listed company has its registered office.
- (18) This Directive should not apply to 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 enterprises¹².
- (19) There are various systems of board structures for listed companies in the Member States, the main distinction being between a dual system with both a management board and a supervisory board ('two-tier system') and a unitary system combining the management and supervisory functions in a single board ('one-tier system'). There are also mixed systems, which feature aspects of both systems or give companies an option between different models. This Directive should apply to all board systems in the Member States.

¹¹ Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments (OJ L 145, 30.4.2004, p. 1).

¹² OJ L 124, 20.5.2003, p. 36.

- (20) 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 are not involved in the daily management but do perform a supervisory function. This Directive aims to improve the gender balance among both categories. In order to strike the right balance between the need to increase the gender diversity of boards and the need to minimise interference with the day-to-day management of a company, this Directive distinguishes between the two categories of Director.
- (21) The quantitative objectives provided for in this Directive should apply to all non-executive directors. 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 by employee organisations pursuant to national law or practice. The quantitative objectives should also apply to these directors. However, in view of the fact that some non-executive directors are employee representatives, the means for ensuring that those objectives are attained should be defined by the Member States concerned, with due regard to the specific rules for the election or designation of employee representatives as laid down in Member States' legislation and respect the freedom of vote in the election of employee representatives. Given the differences in national company law, this should include the possibility for Member States to apply the quantitative objectives separately to shareholder representatives and employee representatives.

- (22) Listed companies in the Union should aim to attain the objective of having at least 40 % of non-executive directors of the under-represented sex no later than 31 December 2020. Alternatively, since listed companies should aim to increase the proportion of the under-represented sex in all decision-making positions, Member States may provide that listed companies may aim to attain the objective that members of the under-represented sex hold at least 33 % of all director positions, irrespective of whether they are executive or non-executive. These objectives concern the overall gender diversity among directors and do not interfere with the concrete choice of individual directors from a wide pool of male and female candidates in each individual case. In particular, this Directive does not exclude any particular candidates for director positions, nor does it impose any individual directors on companies or shareholders. It respects the shareholders' rights and the freedom of vote at the assembly of shareholders. The decision on the appropriate board members thus remains with the companies and shareholders.
- (22a) For listed companies having their registered office in a Member State that has taken measures providing for equally effective means to ensure a more balanced representation of women and men on the boards of listed companies or where there is evidence of progress coming close to the above objectives and where that Member State has decided to suspend the application of Article 4a, the objectives set out in Article 4(1) should be deemed to be met.
- (23)
- (24) Determining the number of director positions necessary to attain the objectives requires further specification since, given the size of most boards, it is not possible mathematically to attain the exact share of 40 % or, where applicable, 33 %. Therefore, the number of board positions necessary to meet the objective should be the number closest to 40 %, or, where applicable, 33 %, and in both cases should be less than 50 %.

- (24a) Since the gender composition of the workforce may have a direct impact on the availability of candidates of the under-represented sex, Member States may provide that the quantitative objectives concerning the representation of men and women among directors laid down in this Directive do not apply to listed companies where the members of the under-represented sex make up less than 10 % of the employees. Such companies should nevertheless set their own quantitative objectives regarding gender-balanced representation of both sexes among all director positions and aim to attain those objectives by 31 December 2020.
- (25) In its case-law on positive action and the compatibility thereof with the principle of non-discrimination based on sex (now also laid down in Article 21 of the Charter), the Court of Justice of the European Union accepted that priority may in certain cases be given to the under-represented sex in selection for employment or promotion, provided that the candidate of the under-represented sex is equally qualified as compared with the competitor of the other sex in terms of suitability, competence and professional performance, that the priority is not automatic and unconditional but may be overridden if reasons specific to an individual candidate of the other sex tilt the balance in that candidate's favour, and that the application of each candidate is the subject of an objective assessment which specifically applies all the selection criteria to the individual candidates.¹³

¹³ 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.

- (26) In line with that case-law, Member States should ensure that those listed companies on whose boards members of the under-represented sex hold less than 40 % of non-executive director positions, or less than 33 % of all director positions, respectively, carry out the selection of the best qualified candidates for election or appointment to those positions on the basis of a comparative analysis of the qualifications of candidates by applying clear, neutrally formulated and unambiguous criteria established at the beginning of the selection process, with a view to attaining the said percentage no later than 31 December 2020. Examples of types of selection criteria that listed 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.
- (26a) In Member States where the requirements relating to the process of selection of candidates are applicable, companies on whose boards members of the under-represented sex hold at least 40 % of non-executive director positions, or at least 33 % of all director positions, respectively, should not be obliged to implement those requirements.
- (27) The methods of selecting candidates for appointment or election to the posts of directors differ from one Member State to another and from one company to another. They may involve the pre-selection of candidates to be presented to the shareholders' assembly, for example by a nomination committee or by executive search firms. The requirements concerning the selection of candidates should be met at the appropriate stage of the selection process in accordance with national law and the articles of association of the listed companies concerned, prior to the election of a candidate by shareholders, for example while preparing a shortlist. In this respect, this Directive only establishes minimum standards for the process of selection of candidates for appointment or election to the posts, making it possible to apply the conditions provided for by the case-law of the Court of Justice with a view to attaining the objective of a more balanced representation of women and men on boards of listed companies. This Directive respects the shareholders' rights and the freedom of vote at the assembly of shareholders.

- (28) In view of the objectives of this Directive, listed companies should be required upon the request of a candidate, to inform that candidate of the qualification criteria upon which the selection was based, the objective comparative assessment of the candidates under those criteria and, where relevant, the considerations tilting the balance in favour of a candidate who is not of the under-represented sex. Such an information requirement might imply a limitation to the right to respect for private life and the protection of personal data that is recognised 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 and should be applied in compliance with the provisions of Directive 95/46/EC of the European Parliament and of the Council¹⁴.
- (29) Where a candidate of the under-represented sex establishes the presumption that they were equally qualified as compared with the selected candidate of the other sex, the listed company should be required to demonstrate the correctness of the choice.

¹⁴ Directive of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ L 281, 23.11.1995, p.31).

- (29a) In accordance with the principle of subsidiarity, it is important to recognise the legitimacy of different approaches and to acknowledge the effectiveness of certain national measures available in this complex policy area. In some Member States, measures providing for equally effective means to ensure a more balanced representation of women and men on the boards of listed companies have already been taken or may yet be taken, or there may be evidence of progress coming close to the objectives set by this Directive, before the deadline for its implementation. All requirements relating to the process of selection of candidates may be suspended by those Member States. In Member States that have introduced equally effective measures by way of national legislation requiring that the members of the underrepresented sex hold at least 30 % of non-executive director positions or at least 25 % of all director positions in large listed companies, the rounding rules defined in this Directive with regard to the specific number of board members should be applied *mutatis mutandis* for the purpose of assessing those national provisions under this Directive.
- (29b) With a view also to improving the gender balance among directors involved in daily management tasks, listed companies should be required to set individual quantitative objectives regarding a more balanced representation of both sexes among executive directors, with the aim of attaining such objectives by the date set out in this Directive. These objectives should help companies to achieve tangible progress as compared with their current situation. This obligation should not apply to listed companies which pursue the objective of 33 % relating to all directors, whether executive or non-executive.

- (29d) Member States should require listed companies to provide information on the gender composition of their boards as well as information on the measures taken with a view to attaining the objectives laid down in this Directive, on a yearly basis to the competent authorities in order to enable them to assess the progress of each listed company towards a more balanced representation of men and women among directors. Such information should be published by listed companies in an appropriate and accessible manner on their websites. Where a listed company has not met the applicable quantitative objectives, such information should also include a description of the measures that the company intends to take in the future in order to meet the objectives. Where Member States have suspended the application of Article 4a on the basis of Article 4b(1a)(a) these obligations should not apply provided that national legislation contains the same or similar reporting obligations.
- (30) The obligations relating to the process of selection of candidates for appointment or election, the obligation to set a voluntary target in relation to executive directors, and reporting obligations should be enforced by measures which are effective, proportionate and dissuasive. Without prejudice to national law on the imposition of enforcement measures, as long as listed companies comply with those obligations, they should not be penalised for failing to attain the quantitative objectives concerning the representation of men and women among directors. Enforcement measures 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.
- (31)
- (32)
- (33)
- (34)
- (35)

- (35b) Member States or listed companies may introduce or maintain more favourable measures to ensure a more balanced representation of men and women.
- (36) This Directive respects fundamental rights and observes the principles recognised by the Charter. In particular, it contributes to the fulfilment of the right to equality between women and men (Article 23 of the Charter), the right to 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 representation of women and men among board members across the Union in line with the objectives set out in this Directive will not be attained 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 attain those objectives. Member States are given sufficient freedom to determine how the objectives laid down in this Directive should best be attained taking national circumstances into account, in particular rules and practices concerning recruitment to board positions. This Directive does not interfere with the possibility for listed companies to appoint the most qualified board members, and it grants a sufficiently long period of adaptation.
- (39) In accordance with the principle of proportionality, the objective to be met by listed companies should be limited in time and remain in force only until sustainable progress has been achieved in the gender composition of boards. For that reason, the Commission should regularly review the application of this Directive and report to the European Parliament and the Council. Furthermore, this Directive provides for an expiry date. 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,¹⁵ 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:

¹⁵ OJ C 369, 17.12.2011, p. 14.

Article 1
Subject matter

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

Article 2
Definitions

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

- (1) 'listed company' means a company having its registered office in a Member State, and whose shares are admitted to trading on a regulated market within the meaning of point (14) of Article 4(1) of Directive 2004/39/EC, in one or more Member States;
- (2) 'board' means any administrative, managerial or supervisory body of a listed company;
- (3) 'director' means any member of a board, including an employees' representative;
- (4) 'executive director' means any member of a unitary board who is engaged in the daily management of the listed company and any member of a managerial board in a dual board system;
- (5) 'non-executive director' means any member of a unitary board other than an executive director and any member of a supervisory board in a dual board system;
- (6) 'unitary board' means a single board that carries out both the managerial and the supervisory functions of a listed company;

- (7) 'dual board system' means a system in which the managerial and supervisory functions of a listed company are carried out by separate boards;
- (8) 'small and medium-sized enterprise' or 'SME' means a company which employs less than 250 persons and has an annual turnover not exceeding EUR 50 million or an annual balance sheet total not exceeding EUR 43 million, or, for an SME having its registered office in a Member State whose currency is not the euro, the equivalent amounts in the currency of that Member State;
- (9)

Article 2a

Applicable law

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

Article 3

Exclusion of small and medium-sized enterprises

This Directive shall not apply to small and medium-sized enterprises.

Article 4

Objectives with regard to gender balance on boards

1. Member States shall ensure that listed companies:
 - (a) aim to attain, by 31 December 2020, the objective that members of the under-represented sex hold at least 40 % of non-executive director positions

or

- (b) aim to attain, by 31 December 2020, the objective that members of the under-represented sex hold at least 33 % of all director positions, including both executive and non-executive directors
2. The number of non-executive director positions that shall be deemed necessary to attain the objective laid down in paragraph 1(a) shall be the number closest to the proportion of 40 %, but less than 50 %, while the number of all director positions that shall be deemed necessary to attain the objective laid down in paragraph 1(b), shall be the number closest to the proportion of 33 %, but less than 50 %. Those numbers are set out in the Annex.
- 3.
- 4.
- 5.
6. Member States may provide that listed companies in which the members of the under-represented sex represent less than 10 % of the employees are not subject to the provisions laid down in this Article.
- 7.

Article 4a

Means to attain the objectives

1. Member States shall ensure that, with the aim of attaining the objective laid down in Article 4(1), in listed companies which do not meet those objectives the selection of candidates for appointment or election to the positions referred to in Article 4(1) is carried out on the basis of a comparative analysis of the qualifications of each candidate, by applying clear, neutrally formulated and unambiguous criteria established in advance of the selection process.

2. In the selection of candidates for appointment or election to the positions referred to in Article 4(1), Member States shall ensure that, when choosing between candidates who are equally qualified in terms of suitability, competence and professional performance, priority 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.
3. While respecting the provisions of Directive 95/46/EC, Member States shall ensure that, in response to a request from a candidate who has been considered in the selection for appointment or election, listed companies are obliged to inform that candidate of the following:
 - (a) the qualification criteria upon which the selection was based,
 - (b) the objective comparative assessment of the candidates under those criteria, and,
 - (c) where relevant, the considerations tilting the balance in favour of a candidate of the other sex.
4. Member States shall take the necessary measures, in accordance with their national judicial systems, to ensure that where a candidate of the under-represented sex establishes facts from which it may be presumed that he or she was equally qualified as compared with the candidate of the other sex selected for appointment or election, it shall be for the listed company to prove that there has been no breach of Article 4a(2).

Article 4b

Suspension of the application of Article 4a

1. A Member State in which, before [*OJ to insert the deadline for implementation pursuant to Article 8(1)*], equally effective measures have already been taken with the aim of attaining a more balanced representation of women and men among the directors of listed companies in line with the objectives set out in Article 4(1), or progress coming close to these objectives has been attained, may decide to suspend the application of Article 4a. In this case, the objectives set out in Article 4(1) shall be deemed to be met.
 - 1a. The application of Article 4a may be suspended, in accordance with the conditions set out in paragraph 1 before the deadline for implementation pursuant to Article 8(1). The conditions for the suspension shall be deemed fulfilled where, for example:
 - a) national legislation requires that members of the under-represented sex hold at least 30 % of non-executive director positions or at least 25 % of all director positions no later than 31 December 2020 and effective, proportionate and dissuasive enforcement measures apply in the case of non-compliance with these requirements. Where the binding targets set in the national legislation do not apply to all the companies falling within the scope of this Directive, the conditions for suspension shall nevertheless be deemed fulfilled if obligations to set individual quantitative objectives pursuant to Article 4c(1) apply to all listed companies not covered by the binding targets, including SMEs, with regard to the non-executive and executive board members as well as with regard to at least one management level below the board level.

- b) members of the under-represented sex hold at least 30 % of the total number of all non-executive director positions or at least 25 % of the total number of all director positions.
 - c) members of the under-represented sex hold at least 25 % of the total number of all non-executive director positions or 20 % of the total number of all director positions and the level of representation has increased by at least 7.5 percentage points over a recent five-year period ending before the deadline for implementation pursuant to Article 8(1).
- 1b. For the purpose of assessing a suspension on the basis of paragraph 1a(a), 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 less than 40 %. This shall also be the case where, pursuant to national legislation, the binding quantitative objectives are applied separately to shareholder and employee representatives.
2. Member States which have suspended the application of Article 4a pursuant to paragraph 1 may continue this suspension beyond 31 December 2022 only if
- a) the national legislation complying with the requirements set out in paragraph 1a(a) remains applicable; or
 - b) members of the under-represented sex hold at least 30 % of the total number of all non-executive director positions or 25 % of the total number of all director positions by 31 December 2022.

Where the requirements set out in this paragraph are not met, Member States shall ensure the application of Article 4a with effect from 30 September 2023.

3. Where a Member State suspends the application of Article 4a as provided in paragraphs 1 and 2 on the basis of national measures or progress extending to executive directors, that Member State may also suspend the requirements set out in Article 4c(1).

Article 4c
Individual quantitative objectives

1. Member States shall ensure that listed companies which are not subject to the objective laid down in Article 4(1)(b) set individual quantitative objectives regarding gender-balanced representation of both sexes among executive directors, which they shall aim to attain no later than 31 December 2020.
2. Where Member States provide, in accordance with Article 4(6), that certain listed companies are not subject to the objectives laid down in Article 4, those Member States shall ensure that such companies set individual quantitative objectives regarding gender-balanced representation of both sexes among all director positions and aim to attain those objectives by 31 December 2020.

Article 5
Reporting

- 1.
2. Member States shall require listed companies to provide information to the competent authorities, once a year, about the gender representation on their boards, distinguishing between non-executive and executive directors and about the measures taken with a view to attaining the applicable objectives laid down in Articles 4(1) and 4c. Member States shall require listed companies to publish that information in an appropriate and accessible manner on their websites.
3. Where a listed company does not attain the objective laid down in Article 4 (1) or the individual quantitative objectives pursuant to Article 4c, the information referred to in paragraph 2 shall include the reasons for not attaining the objectives and a description of the measures which the company has already taken and/or intends to take in order to meet them.

3a. The obligations set out in paragraphs 2 and 3 shall not apply to listed companies having their registered offices in a Member State that has suspended the application of Article 4a on the basis of Article 4b (1a) (a) and where national law includes the same or similar reporting obligations.

4.

Article 6

Enforcement measures

1. Member States shall lay down rules on enforcement measures applicable to infringements of the national provisions adopted pursuant to Articles 4a, 4b(1a)(a), 4c, and 5 of this Directive as applicable and shall take all necessary measures to ensure that they are applied.
2. The enforcement measures must be effective, proportionate and dissuasive.
3. Listed companies may be held liable only for acts or omissions which can be attributed to them in accordance with national law.

Article 7

Minimum requirements

Member States may introduce or maintain provisions which are more favourable than those laid down in this Directive to ensure a more balanced representation of men and women in respect of listed companies, provided those provisions do not create unjustified discrimination or hinder the proper functioning of the internal market.

Article 7a (new)

Bodies for the promotion of gender balance in listed companies

Member States shall designate one or more bodies for the promotion, analysis, monitoring and support of gender balance on the boards of listed companies; these bodies can be, for example, the ones designated in accordance with Article 20 of Directive 2006/54/EC of the European Parliament and of the Council¹⁶.

Article 8

Implementation

1. Member States shall adopt and publish, by [*three years after adoption*], the laws, regulations and administrative provisions necessary to comply with this Directive. They shall immediately communicate to the Commission the text thereof.
2. When Member States adopt those measures, 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.
- 2a. Member States that suspend, pursuant to Article 4b, the application of the requirements relating to the process of selection of candidates for appointment or election referred to in Article 4a shall forthwith communicate to the Commission the information demonstrating that the conditions laid down in Article 4b are fulfilled.
- 3.

¹⁶ 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).

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 [*one year after the date provided for in Article 8(1)*] and every two years thereafter, a report on the implementation of this Directive. These reports shall include, *inter alia*, comprehensive information about the measures taken with a view to attaining the objectives laid down in Article 4(1) or about the fulfilment of the conditions referred to in Article 4b as applicable, information provided in accordance with Article 5 and, where applicable, representative information about individual commitments taken by listed companies pursuant to Article 4c.
2. Member States that suspend, pursuant to Article 4b, the application of Article 4a shall include in the reports mentioned in paragraph 1 information showing whether the conditions laid down in Article 4b are fulfilled. The Commission shall issue a specific report by [*two years after the date provided for in Article 8(1)*] ascertaining, *inter alia*, whether the conditions in Article 4b are fulfilled.

2a.
3. The Commission shall review the application of this Directive and report to the European Parliament and the Council by 31 December 2024 and every two years thereafter. The Commission shall evaluate in particular whether the objectives of this Directive have been achieved.

4. In its reports, the Commission shall assess whether, in the light of developments in the representation of men and women on boards 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 otherwise 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 2031.

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