

**PROPOSAL FOR A DIRECTIVE ON GENDER  
EQUALITY - AN INITIAL ANALYSIS**

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## Proposal for a Directive on gender equality - An initial analysis

Eddy Wymeersch<sup>1</sup>

### 1. Objectives of the proposed directive

Since many years the European Commission has been working on projects dealing with gender equality especially in large companies. Early projects date back to 2012 and were updated several times. Further work was undertaken in the European economic and Social Committee by the Committee of the Region and by the European Parliament<sup>2</sup>. In 2020 the Commission published a Q&A on Gender Equality Strategy 2020-2025<sup>3</sup>. The Commission President stated that the Commission will push for the adoption of the 2012 proposal for a Directive<sup>4</sup>

The Maltese presidency took up the challenge again, notwithstanding the opposition from several Member States. A new project is now being discussed under the title of a “Proposal for a directive on improving the gender balance among directors of companies listed on stock exchanges and related measures”<sup>5</sup>. This renewed interest reflects the trend of the times, as in our societies, women occupy a more prominent position, both in politics and in economic and financial companies, while this factor is not always recognized in the decision-making processes. It also reflects the concerns that the female members of our societies - who have accumulated outstanding professional skills and expertise in many fields – have not been able to contribute to the economic processes with the same degree of prominence and authority in the economic world, although in the non-economic world they occupy often

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<sup>2</sup> OJ eu C 133, 9.5.2013, p 68. [Proposal for a Directive on improving the gender balance among non-executive directors of companies listed on stock exchanges and related measures](#), COM/2012/0614 final - 2012/0299(COD) . The latest version of the proposal of this directive dates from 31 May 2017, 9496/17 , Interinstitutional file 2012/0299 (COD); see also European Parliament , Gender balance on Boards, September 2015

<sup>3</sup> 5 March 2020, Questions\_and\_Answers\_\_Gender\_Equality\_Strategy\_2020-2025

<sup>4</sup> See U.Von der Leyen; A Union of Equality: Gender Equality Strategy 2020-2025, COM(2020) 152 final 5 3; the 2020.;The directive is one of the priorities in the European Commission’s new EU Gender Equality Strategy 2020-2025. See for the latest developments: European Parliament, Legislative Train 01.2022/7: Area of Justice and Fundamental rights, “Gender balance on Boards”; European Parliament resolution of 21 January 2021 on the EU Strategy for Gender Equality ([2019/2169\(INI\)](#))

Other relevant projects include: European Women on Boards: <https://europeanwomenonboards.eu/>; [the project on Gender Equality Index, by the European Institute for Gender Equality.](#)

<sup>5</sup> See: Proposal for a directive of the European Parliament and the Council on improving the gender balance among directors of companies listed on stock exchanges and related matters. 31 May 2017, Council, 9495/17, Interinstitutional file 2012/0299 (COD) .



important and frequently leading positions. The judiciary could be mentioned as one example among others.

The objective of the directive would be to bridge this gap and introduce a mechanism which will secure that women take part in economic life as their male counterparts, especially in directing and managing the largest companies which will benefit from their expertise, skills and knowledge<sup>6</sup>, and this to the benefit of these companies, but more widely of society as a whole. The general objective therefore is certainly to contribute to the public interest in society, while allowing the economic world to benefit from the knowledge, insights and specific expertise which the female part of our society has accumulated. These general objectives explain the support which this and other similar proposals should receive.

The directive proposal in fact addresses the participation of “women” in our economic life. Women are not mentioned as such: the directive refers to the “under-represented sex”, a euphemism for the subordinated position many women still occupy in our society. This expression might be ambiguous, as it might be used – but is clearly not applicable - in both directions. This idea is referred to as the improvement of the gender balance<sup>7</sup>, whereby certain measures are intended to improve the position of the under-represented gender, as a rule the female gender, although their overall number in society is certainly higher than that of their male counterparts<sup>8</sup>.

However, the proposed measures would not be applicable at all levels: they would only be applicable to the leading positions, but only in listed companies, as these stand for most of the largest businesses in our society. This partial scope of application is likely to trigger criticism as women are more and more actively included in other activities – e.g. in the medical sector, in higher education, in politics – while the skills they have accumulated can be used in all parts of today’s society, such as their IT skills, management skills, and so on. In many other, equally important segments of our society, no comparable balancing applies, mainly because the intrinsic qualities of the women active in these fields have since long been recognized and apply beyond any idea of gender subordination.

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<sup>6</sup> See Preamble, 10 b, citing “knowledge, competence and innovation”

<sup>7</sup> [“Gender” has been defined in the](#) Council of Europe Convention on preventing and combating violence against women and domestic violence, 11 May 2011, [Article 3 \(c\)](#), as “ ‘Gender’ shall mean the socially constructed roles, behaviours, activities and attributes that a given society considers appropriate for women and men”

<sup>8</sup> The directive’s preamble, (10 and 10 a) refers to the 2015 report on Equality between women and men, according to which 22,7% of board members in the largest listed companies were women but only 6,5% chairpersons, or 4,3% CEOs. Updated figures are available at the Gender Equality Index GEI (Bloomberg) , collecting data from 418 companies from 45 countries and regions. Bloomberg reported “ A Record Number of Firms in Bloomberg Gender-Equality Index” markets , 27 1. 2022 , in which series women represent 31% of board members, 83% have a woman recruitment strategy and while 72% designated a Chief Diversity Officer. See in general : Selin Dilli, S G Carmichael and A. Rijpma, Introducing the Historical Gender Equality Index, <https://www.tandfonline.com/doi/full/10.1080/13545701.2018.1442582>.



It would have been logical to extend the requirement to leadership positions in all large economically active entities: by way of example among many, national railways, or the management of airport or harbors, where men and women have been cooperating since a long time. The proposed directive choose another approach: it only addresses leadership positions in listed companies, as defined in the proposal.<sup>9</sup> Also, the directive requirement does not extend to the entire structure of these entities: it only addresses the positions of members of the board of directors, especially the non-executive directors - and including the labor representatives- both groups actively involved in framing the decisions of the company; it also applies to the executive directors, in charge of the daily management of the company's affairs<sup>10</sup>. These are the persons exercising the ultimate responsibilities in these companies; the directive's gender equality principle would apply to both groups. Their appointment will be governed according to the mechanisms applied in these companies, being whether elected or appointed by or on behalf of the shareholders, by decision of the general meeting or pursuant to a board decision. This aspect of their relationship to the company as a legal entity – including their possible dismissal - is left unmentioned in the proposal. Also, it is unclear how this mechanism will apply to labor representatives.

From a business point of view, the policy objective of the directive would be to aim at securing companies to be able to call on the best, most able directors or executives<sup>11</sup>. This principle should apply to all top employments. Considering the economic and social importance of these companies and the effect of their activities on society in general, this is an objective of “public interest”. It should take precedence over any other selection criterion such as race, gender, family origin, nationality, or others. It should be the outcome of a neutral, objective selection process aimed at hiring the most capable individuals for the leading functions in these companies, the decisions of which might have considerable consequences on society in general.

The proposal follows another path: its objective is to secure equal representation of persons from both genders at the highest level of these companies. The Commission document affirms the benefits of a gender diversified board in terms of economic benefits, such as better business returns, business diversity and expansion and overall firm stability. It does not refer to the well documented information on the benefits of participation of female members in the economic and financial outcomes of companies in which they are involved. In many parts of the world there is ample evidence that companies managed by a sex based diversified group of directors obtains better results. This feature has been amply documented in numerous scientific contributions<sup>12</sup>. The Commission did not refer in detail to the

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<sup>9</sup> It only applies to listed companies mostly of the Limited by shares type. Some jurisdictions accept other company types to be listed e.g. the S.p.a, or the GmbH type. The listing on a stock exchange requirement would probably exclude companies traded on other trading facilities, such as multilateral trading platforms.

<sup>10</sup> As will be illustrated in the annex to the directive, the relative importance in terms of numbers is higher for the non-executives, than for executive directors.

<sup>11</sup> See Preamble 38 “This directive should not interfere with the possibility ... to appoint the most qualified board members, and it grants a sufficiently long period of adaptation”

<sup>12</sup> SSRN contains an long list of articles, (more than 1500) on gender diversity, most of them in support of a mandatory gender equality requirement ; IMF, Gender diversity in the executive board— Progress report of the executive board to the board of governors, , **1 November 2020**. But further details on the fact would be useful:



economic aspect of the diversity debate, which should be further discussed in the public consultation on the basis of expert opinions.<sup>13</sup>

A somewhat extraordinary provision requires Member States to designate bodies for the promotion, analysis and support of gender balance in listed companies.<sup>14</sup> Reference is made to the directive 2006/54 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.<sup>15</sup> This should not be understood as a call for organizing lobbying groups.

## 2. The directive's legal basis: Company law or social policy?

A point of controversy will be the introduction of these principles by way of an EU directive, a regulation or by non-binding EU measures leading to national measures. A directive would introduce provisions binding on the Member States, but they Member States would have to adopt their own formulation of the directive obligations. A regulation to the contrary would introduce a directly applicable and identical regime in all Member States, but is likely to become too strict. Therefore, the idea has been mentioned to introduce the principles underlying the directive by an EU measure, leaving member states the freedom to shape the obligation in conformity with national provisions, and allowing companies to diverge under a “comply-and-explain” regime. This would be comparable to the regime applied for the corporate governance codes<sup>16</sup>

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see e.g. C. van der Elst,<sup>6</sup> Empirisch onderzoek naar de benoeming van bestuurders van genoteerde vennootschappen, Tijdschrift Rechtspersoon en Vennootschap (TRV) 2017,621. There have also been some negative statements by business leaders. Bundesbank Studie: Frauenquote ungeeignet, <https://femokratie.com/bundesbank-studie-frauenquote-ungeeignet/04-2012/> 6 April 2012; A. Durbin, Optimizing Board effectiveness with Gender Diversity; Are quotas the Answer? IFC, A global Corporate Governance publication, 21

<sup>13</sup> According to the European Institute for Gender Equality (EIGE), improving gender equality would by 2050 lead to an increase in the EU's GDP per capita by 6.1% to 9.6%, which amounts to €1.95 to €3.15 trillion: <https://eige.europa.eu/gender-mainstreaming/policy-areas/economic-and-financial-affairs/economic-benefits-gender-equality>; see; <https://eige.europa.eu/gender-equality-index/2019>.

<sup>14</sup> Article 7 a

<sup>15</sup> Focusing on access to employment, working conditions including pay and occupational social security schemes

<sup>16</sup> Some Member States considered that binding measures at EU level are not the best way to pursue the objective. Some states submitted an opinion that the proposal did not comply with the principle of subsidiarity (Denmark, Sweden, Netherlands, Poland, the United Kingdom and Czech Republic). Other States asked for stronger penalties, removal of exception for companies with less than 10% female workers, and extension to the EU own institutions and agencies, and to cover non-listed companies. See EU Parliament, Parliament's resolution of 21 January 2021 on the new EU Gender Equality Strategy, calling on the Commission to continue working with the Member States and EU presidencies to urgently break the deadlock in the Council. The listing conditions may also offer an alternative legal basis.



An important point of discussion is the legal basis on which this directive should be based.

Some will refer to the other company law directives, based on article 114 TFEU, on “approximation of laws” which aims at the establishment and functioning of the internal market. The draftsmen have indicated article 157 (4) as the right legal basis.

The Commission adopted the format of a directive, based on article 157 (4).<sup>17</sup> which is part of the powers of the EU dealing with “social policy” and refers expressly to the “underrepresented sex to pursue vocational activities” what would include company leaders as qualified “workers” according to the EU legal framework .

In an opinion on the definition of “workers”, the Commission, referring to the Council Legal Service stated:

“Therefore, the CLS is of the view that the ruling of the Court in the Danosa case<sup>18</sup> confirms that Article 157(3) TFEU does not confer on the EU institutions the power to legislate on the composition of non-executive Boards. The social aspects of the proposal form its centre of gravity. In particular, the CLS confirms that non-executive Board members do not, in a general way, constitute “workers” in the meaning of EU law.”<sup>19</sup> The Board members exercising executive functions should be analysed as “workers”, in the context of an employment relationship. This positive action aims at increasing the gender balance, reducing gender gaps in employment and pay, and the development of human resources. “In no way, the proposal intends to harmonise company law.”<sup>20</sup>

Whether the issue of appointing directors or executives in listed companies who mainly direct or address the efficiency of company conduct and management should not -or at least not only - be addressed from the individual social position of the candidates involved, but from the overall organisation of the legal entity, as this issue deals with the process of designating optimal candidates for company boards offering best guarantees for the company’s success. The purpose of this directive is not to define the individual social position of a candidate<sup>21</sup>, but to shape the composition of the company’s boards and policies, the gender issue being a component of the efficiency of company conduct<sup>22</sup>.The directive has a very substantial impact on the functioning of listed companies, as these play a leading role in our economic systems and pursue overall success, without affecting the position of other legal entities.

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<sup>17</sup> “With a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting 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 157(4) TFEU.

<sup>18</sup> See the Danosa case: *Danosa v. LKB Lizings SIA*, C-232/09, 11 November 2011, where the Court held that as a board member, a pregnant woman cannot be dismissed on account of pregnancy and constitutes direct discrimination on grounds of sex contrary to provisions of directive 76/207/EEC

<sup>19</sup> Council legal service, 11 June 2013, 8020/13, referred to in the Commission Staff Working Document relating to the Directive, 16 July 2013, SWD (2013), 278 final

<sup>20</sup> See the arguments stated in the Preamble, 14. The directive only aims “at improving the gender balance”

<sup>21</sup> See the arguments stated in the Preamble, 14.

<sup>22</sup> This refers to the points frequently made in legal writing, as referred to supra note 11.



There is no credible reason not to accept that this directive is in fact touches on company law matters, and does not address “men and women in working life” in general.

### 3. Scope and objective of the proposed regime

The proposed directive only addresses leadership positions in listed companies, as defined in the proposal<sup>23</sup>. Non-EU companies<sup>24</sup>, SME and medium sized enterprises are excluded<sup>25</sup>, and this irrespective of their importance, the volume of their business, or their economic added value. No mention is made of conglomerates, as a consequence of which the directive would only apply to the listed (top) company. This limited view on gender equality has not prevented the Commission itself to follow a diversity approach in its own organisation <sup>26</sup>.

The directive approaches the matter of representation of female members from an equal treatment (in fact from a proportional) approach. The Commission document affirms the benefits of a gender diversified board in terms of economic benefits, such as better business returns, business diversity and expansion and overall firm stability. It does not refer to the well documented information on the benefits of participation of female members in the economic and financial outcomes of companies in which they are involved. In many parts of the world there is ample evidence that companies managed by a sex based diversified group of directors obtain better results. This feature has been amply documented in numerous scientific contributions<sup>27</sup>. The Commission did not refer to the economic aspect of the diversity debate. <sup>28</sup> A comparative study would be very welcome.

In many jurisdictions gender diversity has been practiced for many years, and several EU states expressly have mandated it in their national regulation. The directive proposes formal minimum quantitative proportions of representation. This threshold for the presence of one or several members of the under-represented sex would be put at different levels

- for non-executive directors, members of the boards, the threshold is put at at least 40% of the number of mandates of that board;

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<sup>23</sup> It only applies to listed companies mostly of the Limited by shares type the registered office of which is located in the EU. Some jurisdictions accept other company types to be listed e.g. the SRL, the S.p.a, or the GmbH type. Listing on a stock exchange requirement would probably exclude companies traded on other trading facilities. See the Multinational Trading Facilities and “the Organised Trading Facilities”, See : ESMA Recommendations, 8 April 2021

<sup>24</sup> Article 2 a

<sup>25</sup> Article 3. Obviously, the directive excludes business entities other than companies.

<sup>26</sup> In 2019, 41% of managers in the Commission were women (up from 30% in 2014). This included 37% of senior managers (up from 27%) and 42% of middle managers (up from 31%).

<sup>27</sup> Article 6(1). Liability of national companies is limited to acts of omission attributed to them, and this is accordance with national law.

<sup>28</sup> Most studies and papers are strongly in support of diversity and its benefits: See also the Google Scholar page: [https://scholar.google.be/scholar?q=Harvard+Study+on+the+benefits+of+diversity&hl=nl&as\\_sdt=0&as\\_vis=1&oi=scholar](https://scholar.google.be/scholar?q=Harvard+Study+on+the+benefits+of+diversity&hl=nl&as_sdt=0&as_vis=1&oi=scholar); No mention is made of the dissenting views.



- it is in general at least 33% of all director position, i.e, of the cumulative executive and non-executive numbers<sup>29</sup>.
- In each of these case, the 50% limit of position should not be crossed.
- These thresholds are objectives which companies should aim to attain, meaning that if they do not reach the threshold, there is no violation of the legal obligation.

If the calculation results in a fraction of a director position, the obligation will be adapted to the number closest to the proportion of 40% or 33%, but less than 50%.

By way of example, if the board of directors is composed of 12 members – executive and non-executive – and 5 members in the executive board, in total 17 members, the total F members (executives and non-executives) should be at least 5,61, in practice rounded off to 6<sup>30</sup>. A careful calculation will have to be undertaken if the number of non-executives is increased. <sup>31</sup> .

Also, it is unclear how this mechanism will apply to labor representatives: the quantitative requirements will be applied separately to the shareholder representatives and to the employee representatives. If they would be qualified as non-executives, this will reduce the possibility to appoint non-labor non-executives. In some cases, this would affect the balance of power within the board.

As these functions will be exercised in private companies, a fully neutral process may not seem easily compatible with the ultimate law based decision-making powers of the shareholders who are as owners/ beneficiaries of the activities of the persons responsible for the business activity of the company. This may lead to reclassification of position of some directors or of the number of executive directors.

#### 4. Process for designating candidates

With a view of obtaining optimal outcomes in the identification of the best candidates, the process for the designation of candidates to these leading positions should guarantee the neutrality and objectivity of the selection process. Today members of the decision-making bodies in listed companies are designated as a result of different processes: suggestions from the shareholders, especially from the significant shareholders, or from the most active ones, proposals from the management, often identified as a result of the search efforts of an external consultant. For labor representatives, proposals will be endorsed by the

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<sup>29</sup> See article 4(2) for the number of positions necessary to attain the objective closest to 40% but less than 50%; this percentage has been further detailed in the annex to the directive.

<sup>30</sup>  $12+5=17 * 33\% = 5,61$  or 6 F members, in which case these F members could not all be part in case of full board, as this would not be less than 6, or 50% of that board number of directors. Hence, there should be one of two F members in the executive committee. In the case of a composition  $15 + 5 = 20 * 33\% = 6,6$  or rounded off at F 7 members, the same problem would not occur as the 50% limit in the full board would not be crossed. These could be non-executive members of the full board, as the 40% limit is a minimum.

<sup>31</sup> See in addendum, the extensive table allowing for calculating the number of directors



representative labor organisations. In practice, many appointments take place at the demand of the top management which is directly exposed to the operational needs of the company.

The directive does not choose between any of these alternatives: it merely states that for the appointments of non-executive positions which should attain by end 2022 at least 40% of the non-executive positions, companies will carry out a recruitment process, based on “clear, neutrally formulated and unambiguous criteria established in advance of the selection process”<sup>32</sup>. Between the candidates – male or female – who are equally qualified in terms of “suitability, competence and professional performance”, preference will be given to the candidate of the under-represented sex. An exception would apply to the case of a male candidate if “an objective assessment taking into account of all criteria specific to the individual candidates tilts the balance in favor of that -male- candidate”<sup>33</sup>. This rule will not be applicable for an individual appointments to companies which already meet the the 40% or 33% limit.

The directive does not exclude that the hiring process is organized as a public search program, managed by the board or by an external advisor on the basis of criteria defined by the board. The intervention of an external professional advisor will not only identify candidates unknown to the company’s management but will result in a neutral assessment of them, thereby considerably reducing the complexity of the process<sup>34</sup>, and giving comfort to the members of the body appointing them. This additional step would contribute to the credibility of the overall process, allowing to meet and balance the diversity criteria.

Said criteria should reflect the well identified needs of the company and its management in terms of business expertise and insight, technical knowledge, social position, and other elements proper to the individual case, such as proximity to the local environment. There will not be one single predominant characteristic, but a hierarchy of characteristics in function of the needs of the company and the position to be filled on the board. The proposed directive also alludes to this balancing of objectives in the identification of candidates, which will be the subject of an analysis by the appointing body, and may be subject to an additional review by the company in case a candidate complains<sup>35</sup>.

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<sup>32</sup> Article 4 a (1); these criteria will be further detailed by the boards to which candidates will be elected. The Preamble mentions professional experience in managerial/supervisory tasks, knowledge in specific relevant areas as finance, controlling or human resources management, communication skills and networking abilities”; see Preamble 26

<sup>33</sup> See article 4a (2)

<sup>34</sup> See article 4 (a) of the proposed directive stating that the selection of candidates takes place 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.” The criteria are referred to as “suitability, competence and professional performance”. It does not clarify who will adopt these criteria in detail.

<sup>35</sup> See article 4 a (4), the company will have to prove that there was no breach of the selection criteria such as “suitability, competence, professional performance” mentioned in article 4a (2)



## 5. Application of the gender equality requirement.

The proposed directive leaves it open which body will decide on the selection process of candidates; it will probably be the body where the appointment will have to be made i.e. the general meeting or the board of directors, on the advice of the nomination committee as the specialised committee of the board. The process should take place on the basis of a comparative analysis of the qualifications of each candidate, applying “clear, neutrally formulated and unambiguous criteria” adopted in advance to the selection process<sup>36</sup>. Unclear is whether account should be taken of the specific needs of the position to be filled in - e.g. in terms of expertise - what seems logical, although may put pressure on the neutrality requirement.

The precedence to be given to candidates plays between all candidates with equal qualifications, in terms of suitability, competence and professional performance. Between these candidates, precedence will be given to the best placed candidate of the under-represented sex. If there are several candidates classified as comparable, the appointing body will have to make a decision and motivate its preference<sup>37</sup>.

The directive recognises that in some cases, this process may result in giving preference to a weaker candidate. The directive therefore provides for some type of recourse procedure for a candidate – not female - which has not been retained for appointment, in which case this plaintiff candidate alleges that “an objective assessment based of all criteria specific to the individual candidates tilts the balance in favour of him“ , and that he would be equally qualified as the selected candidate<sup>38</sup>. In this case the company will have to prove that its decision was well taken, that it was based on an “objective assessment which did “tilt the balance in favour of the selected candidate .... taking account of all criteria specific to the individual candidate”, and this on the basis of the criteria considered most relevant. It for the company to prove that the prerequisites – “suitability, competence, professional performance” of the proposed candidate– have been met, and that the opposing candidate would not be “equally qualified” as the selected candidate. The company can in certain cases be held liable for not abiding to the applicable national provisions<sup>39</sup>

Striking, this opposition procedure does not apply to candidates’ actions against candidates from the same sex<sup>40</sup>. In order to make this procedure operational, the company will have to inform the candidates which have been considered about the essential evaluation criteria followed, including the objective comparative assessment and the considerations which have tilted the balanced to the selected candidate<sup>41</sup>.

## 6. Non-application of the directive.

In a certain number of cases, the directive will not apply, or will only partially apply. These cases often are based on the expectation that after time, the requirements of the directive will become applicable.

A general exception relates to companies where the under-represented sex represents less than 10% of all employees<sup>42</sup>. One can imagine that to attain the 40% under-represented

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<sup>36</sup> Article 4 a

<sup>37</sup> This has already been decided in the ECJ case law: See Preamble, 25, the cases referred to in nt 6.

<sup>38</sup> Article 4 a (2)

<sup>39</sup> See article 6 (3)

<sup>40</sup> See article 4 a (4). The process can only serve to oppose a candidate of the other sex.

<sup>41</sup> Article 4 a (3)

<sup>42</sup> Article 4(6) ; Preamble 24 a



threshold, a large overhaul of the presently employed population would be necessary. The directive requirements would not be applicable.

In some states, a more favourable regime of gender equality than provided for in the directive may already apply<sup>43</sup>. These national provisions may be maintained, provided that they do not introduce unjustified discriminations or affect the proper functioning of the internal market. The directive does not state that it will not be applicable, e.g. the rules on sanctions<sup>44</sup>, or disclosure would still be applicable.

Exemption from the selection requirements of art 4(a)- the “clear, neutrally formulated and unambiguous” criteria - will be allowed in companies where the 40% and 33% have already been met<sup>45</sup>.

A similar idea is expressed in the provision allowing a Member State to suspend the application of directive provisions on gender under-representation in the case the State has already adopted equally effective measures allowing to attain a more balanced representation leading over time to attain the 40% and 33% thresholds, or coming close to 30% or 25% of non-executive c.q. executive directors. This may be the case in which national legislation requires the female non-executive directors hold at least 30% of all non-executive positions or at least 25% of all director position before the end of 2022.<sup>46</sup> The suspension of the main regime in this case will be limited to end 2024.<sup>47</sup>

## 7. External Reporting- article 5

Listed companies which applied the gender equality regime as laid down in the directive will provide information, to the national competent authority once a year, especially the data on gender representation, distinguishing non-executive and executive directors, along with the measures to attain the objectives of the directive. This information will be published on the company's website. Where applicable it will state the reasons for not meeting the objectives and the measures envisaged

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<sup>43</sup> See article 7; Preamble 22a

<sup>44</sup> See article 6, (1) not referring to national law; liability for acts or omissions may only be established on the basis of national law.

<sup>45</sup> Article 4 b 2 (b); Preamble 26 (a)

<sup>46</sup> See article 4 b(1a) further dealing with the case of partial application, complemented with application to all listed companies not covered by national rules, including SME, and applicable to all board members and at least one lower level management member. Member States may provide that female member hold 33% of all director positions, executive or non-executives; Preamble 22.

<sup>47</sup> See article 4 (1a) b and c for further details



## **8. Infringements and Enforcement article 6**

The directive provides that Member states will adopt rules on enforcement and adopt measures to ensure application. Liability for acts or omissions attributed to the companies concerned will apply in accordance with national law.

## **9. Entry into force**

The new regime will enter into force on the 2022 according to the Maltese proposal. The objectives are planned to take effect from 30 September 2025.<sup>48</sup>

## **Conclusion**

This proposed directive has been on the drawing board for about ten years. Member States have not been able to agree on the underlying policy. Whether that will change during the ongoing attempt to adopt the directive is not sure<sup>49</sup>.

The directive offers a response to a frequently heard complaint about gender discrimination, glass ceiling and similar expressions. In several Member States, the situation is however conforming to the directive's objectives, whether on the basis of legal provisions, or – more or less largely – on factual practices. But efforts still have to be made, and in that respect, it is welcome that the directive introduces a formal obligation. How this has to be achieved, will however trigger active discussions.

The purpose of this directive is not to deal with the full subject of gender equality in the economic sector: it is limited to a specific class of large business firms, and leaves the other economic and other entities untouched, whatever their social functions: there is no general standard of gender diversity in our societies, applicable to the business, administrative, or other sectors. The directive further only deals with their highest decision-making levels, there where the unbalance applies to all segments of these entities.

Even within this limited field, the directive only deals with the instruments to ensure gender balance; it does not indicate which body will be responsible for developing these rules, nor how candidates for these functions will be identified, and on which criteria these will be

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<sup>48</sup> Article 4 b(2), in fine.

<sup>49</sup> Germany has announced it will not further oppose, but there is no information on the position of the other Member States which did not support.



chosen. Who makes the appointments will be a matter of company law, but the proposals under this directive are binding on the company's bodies<sup>50</sup>.

The directive does not require to propose the best candidates, as among the 'equally qualified', the underrepresented sex will be given priority. This is not equal treatment, as a 40F/33F proportion remains the objective. The directive's content is essentially focusing on the conditions for achieving this objective: the process of decision making cannot be considered neutral and objective when the proportion has been determined beforehand. Moreover, the directive does not clarify why the best candidates do not deserve election, gender becoming the primary consideration.

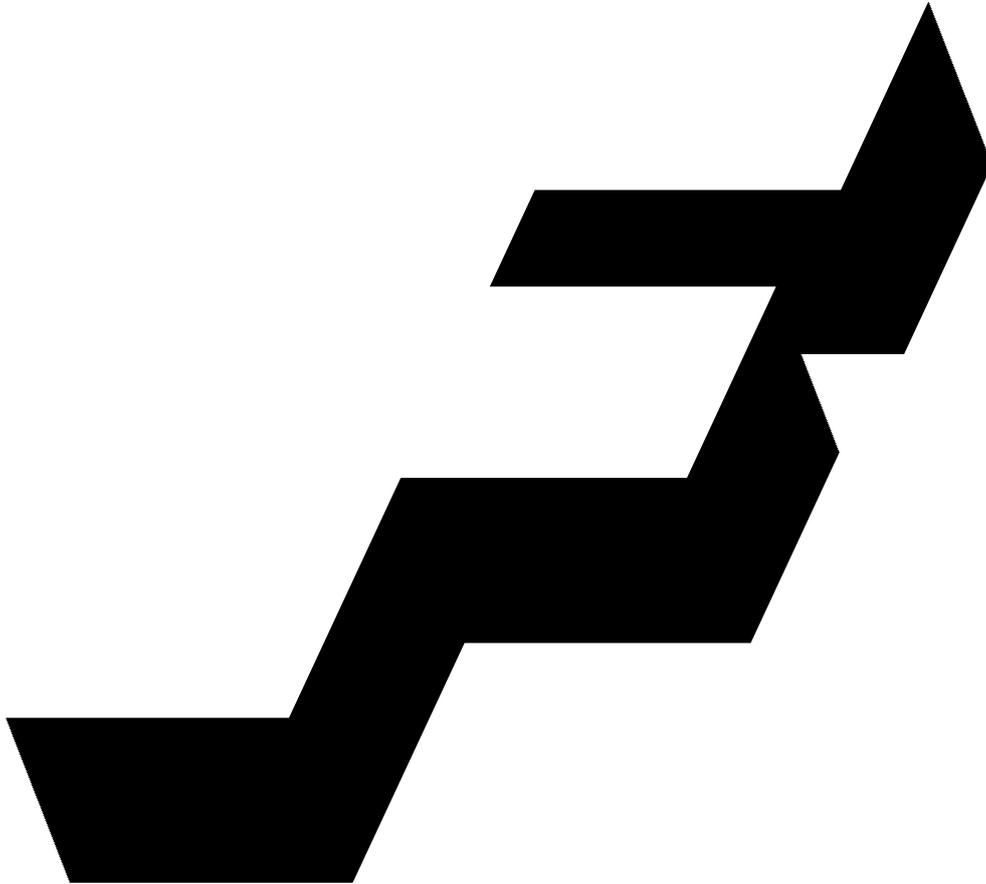
The main added value of this directive consists of putting forward a formal gender proportion, outlining the conditions along which this gender balance can be achieved: in this respect it rightly requires that candidates have to be selected as part of a -open - procedure, with a comparative analysis of the qualifications, with clear, neutral and unambiguous criteria. The selection procedure consists of choosing between the candidates meeting the criteria of suitability, competence and performance, priority being granted the under-represented sex. A safeguard for the respect of this principle is the ex -post recourse available to the non-selected candidates, to be based on the balance of qualities with the selected candidate.

**Article 4 of directive application of the 40% and 33% requirements**

	non-exec	Board		Board +exec	at least		female
	40%	min. non exec	33%	all directors	33%	minimum	members
12	4,8	female	5	9,8	3,234	female	<b>4</b>
15	6	female	6	12	3,96	female	<b>4</b>
18	7,2	female	6	13,2	4,356	female	<b>5</b>
12	4,8	female	7	11,8	3,894	female	<b>4</b>

<sup>50</sup> Under national law they will "aim to attend", Article 4.





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