



Gender-Balanced Company Boards in Europe

A comparative analysis of the regulatory, policy and enforcement approaches in the EU and EEA Member States

1 December 2017

Dr. Sonja Kruisinga, Utrecht University, RENFORCE
Prof.dr. Linda Senden, Utrecht University, RENFORCE

Universiteit Utrecht



Comparative analysis:

II. Public regulatory and enforcement approaches of EU and EEA Member States

III. Self- and co-regulatory measures; CGCs

IV. Assessment of national approaches

=> in the light of the EU Directive proposal on Gender-Balanced Company Boards (I)





I. The EU Directive proposal on Gender-Balanced Company Boards

From soft law to hard law =>

Proposal for EU-Directive of the European Parliament and the Council '**on improving the gender balance among *directors of companies listed on stock exchanges and related measures***' (2012, as updated lastly in 2017)

- ***What obligations*** does it actually entail and what implications for the Member States?





Substantive target

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 2022, 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 2022, the objective that members of the under-represented sex hold at least **33 % of all director positions, including both executive and non-executive directors**

Procedural obligation 1: recruitment procedure

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.



Procedural obligation 2: priority rule

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.





Procedural obligation 3: information duty

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.



Procedural obligation 4: burden of proof

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 compares 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).***





Discretion for Member States: flexibility clause

Art. 4b

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.





Article 4b, 1a:

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 2022 and effective, proportionate and dissuasive enforcement measures apply in the case of non-compliance with these requirements. [...]
- 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).



Reporting obligation

Article 5:

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 Article 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) [...], **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 [shall be included].



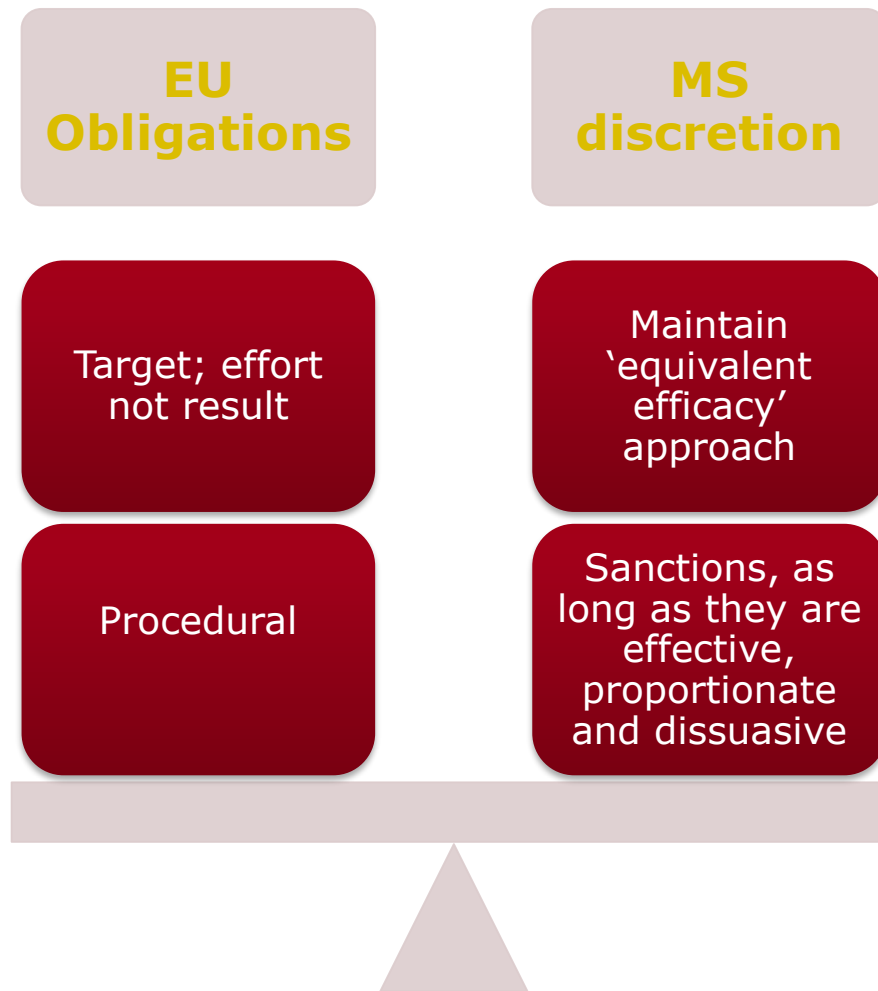
Enforcement measures

Art. 6:

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.



EU proposal balancing on a tightrope



II. Divergent regulatory and enforcement approaches of EU and EEA Member States





States lacking a regulatory approach

- Croatia
- Cyprus
- Czech Republic
- Hungary
- Latvia
- Liechtenstein
- Lithuania
- Malta
- Slovakia

Croatia, the Czech Republic, Malta and Slovakia have developed some policy measures





Soft or hard public regulatory approach

Soft regulatory approaches:

- States that have adopted regulations containing mere target figures or obligations to 'make best efforts' to improve the gender balance in company boards, without stipulating any specific legal obligations or sanctions for non-compliance

Hard regulatory approaches:

- States that have introduced mandatory quotas in their legislation, with non-compliance with the said quotas possibly being sanctioned, but this not always being the case





Looking inside these regimes

Besides public or private nature of the approach, and voluntary or binding nature...

variety as to...

- Temporary or unlimited duration;
- Non-executive and/or executive board members;
- Private, listed and/or state companies;
- Size of the companies covered;
- Level of ambition and target set;
- Time-limits for their realization;
- Implementing and monitoring mechanisms;
- Provision of sanctions and their harshness



(i) Type of companies covered

- States having introduced mandatory quota generally did so for **listed companies** only: **Belgium, France, Germany and Italy**
- In **Norway** and **Iceland** the scope of application of the mandatory quota is not limited to these
- A hard public regulatory approach only regarding **state-owned companies**: **Greece, Luxembourg and Slovenia**
- States having taken a soft public regulatory approach apply this only to **listed companies** (**Austria, Finland and Portugal**), whereas others apply such an approach to **'larger' companies** (**Bulgaria, Denmark, the Netherlands and Spain**)



(ii) The set targets

- Article 4 of the Directive provides the objective that members of the underrepresented sex hold at least 40 % of the non-executive director positions or at least 33 % of all director positions, including both executive and non-executive directors
- The Member States that have introduced mandatory quotas, and have not limited their public regulatory approach to state-owned companies, apply different quotas: in **Norway**, no specific percentage applies, but the rates will depend on the number of directors in the board; if the board consists of more than nine members, each gender shall be represented by at least 40 %



The set targets

Mandatory quotas:

- In **Italy** the quotas will increase over time from 20 to 33%
- In **France** the quotas will increase over time from 20 % to 40 %
- **Germany** 30 %
- **Belgium** 33%
- **Iceland** 40 %

Soft targets:

- 30 % in the **Netherlands** and **Portugal**
- 40 % in **Bulgaria, Finland** and **Spain**





The set targets

- **Denmark** did not set a target figure but instead requires companies to set a clear objective and timeline for the share of the underrepresented gender, but only as regards the executive board
- **Austria** did not set a specific target figure either, but since the beginning of 2017 it requires listed companies to include a description of the diversity policy they pursue in relation to the staffing of company boards and supervisory boards concerning for instance age, gender, and educational or professional qualifications in the statutory corporate governance reporting





(iii) Executive and/or non-executive directors?

- Focus Directive proposal: both executive and non-executive directors

Mandatory quotas:

- In some Member states the relevant provisions only apply to **non-executive directors**: **France** and **Germany**
- In others the relevant provisions apply to **both non-executive and executive directors**: **Belgium** and **Italy**
- **Norway** and **Iceland** have a unitary board system and do not distinguish between executive and non-executive directors

Executive and/or non-executive directors?

States that have adopted a **soft regulatory approach**:

- The relevant legal obligations concern ***both the executive and non-executive directors***: **Austria, Bulgaria, the Netherlands** and **Portugal**
- In **Finland** and **Spain** they apply only to ***non-executive directors***
- In **Denmark** they apply only to the composition of the ***executive board***





The management levels below the board level

- Only few States have enacted public regulation that also regards the management levels below the board level (**Austria, Bulgaria, Denmark** and **Germany**)
- **German law** for instance provides that all private companies that are listed or subject to co-determination companies have to set individual quantitative objectives (target gender quotas) with regard to the first and second management levels below the board level as well
- Some other States have legal provisions or policies which may be of relevance to the position of the underrepresented sex at lower management levels, which include **Iceland, the Netherlands, Portugal** and **the UK**





(iv) Recruitment requirements?

- Recruitment requirements have been rarely provided for
- If so, they are still of a fairly general nature; **Germany, Italy, France, Portugal, the Netherlands**
- Only the **Icelandic** expert has reported the use of a priority rule



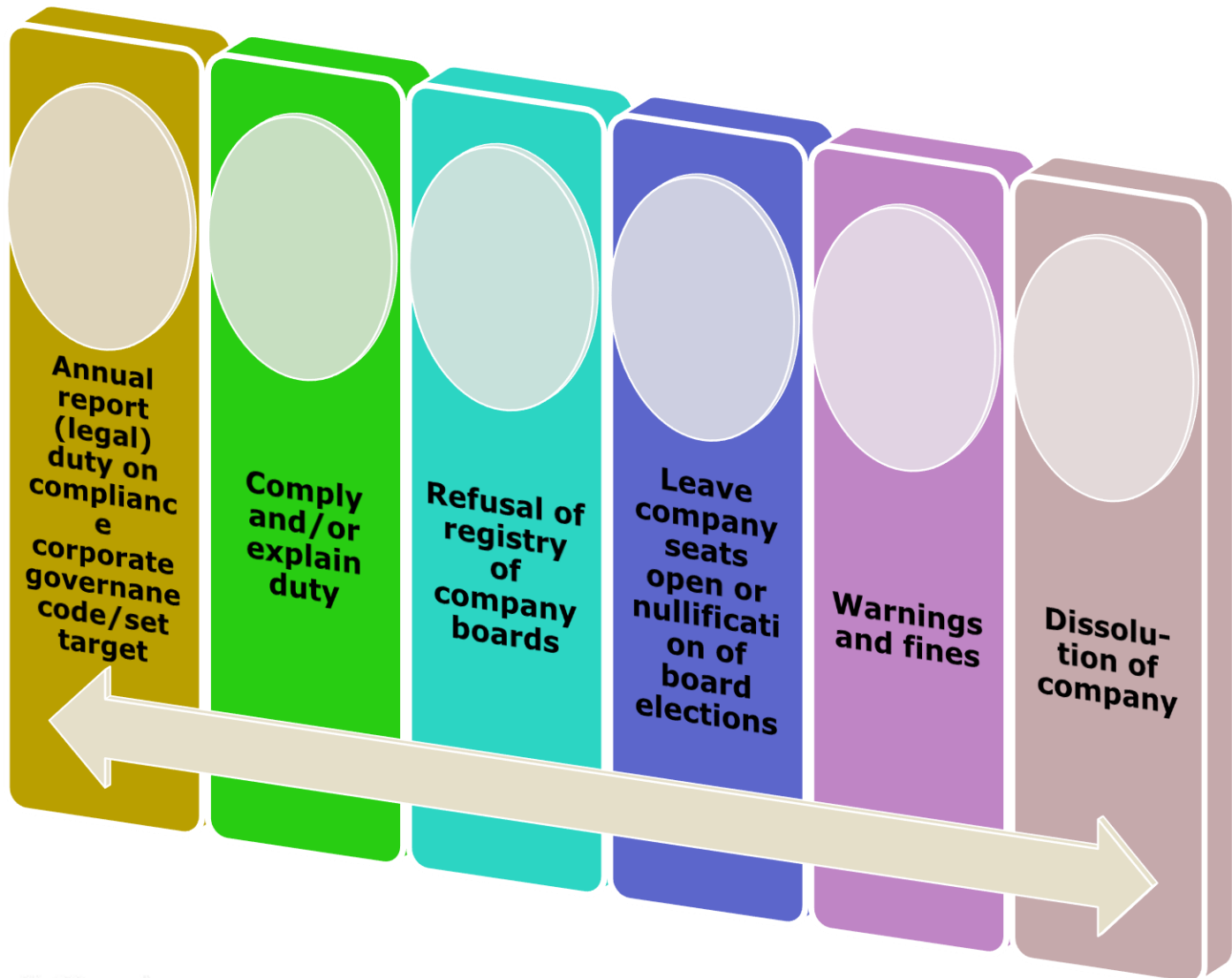


(v) Reporting obligation?

- Some form of a reporting obligation regarding the composition of the boards in terms of gender exists in: **Austria, Belgium, Bulgaria, Denmark, Finland, France, Germany, Iceland, Ireland, Italy, the Netherlands, Norway, Poland and the UK**
- Only the CGCs of **Austria, France, Ireland, Poland, the Netherlands, Slovenia, Sweden, the UK** provide for a comply-or-explain duty; legal comply-or-explain type of obligations exist in **Austria, Germany, Iceland, the Netherlands and the UK**
- Countries that have introduced specific reporting obligations as a result of specific mandatory quota or soft target laws are **Belgium, France, Germany, Greece, Iceland, Italy and the Netherlands**



(vi) Monitoring and enforcement mechanisms?



Sanctions and their harshness

States providing for a mandatory quota law that in one form or another provide for sanctions, which can be imposed in the case of appointments that contravene the law and for not realizing the set targets:

- naming and shaming of companies (**France**)
- voidness/nullity of board appointments (**Belgium, France, Germany**)
- withdrawal of benefits from appointing board members (**Belgium, France**)
- refusal of registry of a company (board) (**Iceland, Norway**)
- dissolution of the company (**Italy, Norway**)
- financial sanctions (**Italy, Germany**)



Carrot approach

- awards, tax advantages, public procurement conditionality, a preferential criterion to benefit from public financial support programmes being the number of women in company boards of companies that apply for such support (**Portugal**).





III. Self- and co-regulatory measures

- **Co-regulation:** approaches of a hybrid public-private nature, meaning that there is a certain collaboration of public and private actors in the process of norm-setting, monitoring and/or enforcement.
- **Self-regulation:** approaches that can be typified as purely private ones, there being no public-law aspect to it and there being no involvement of public authorities in the regulatory and enforcement framework.

Corporate governance codes (CGCs) are the most important tool in this regard and established by either private stakeholders or (more often so) by public bodies and private stakeholders in conjunction.





(i) Companies and directors covered

- CGCs containing provisions on gender balance in company boards: **Austria, Belgium, Germany, Finland, France, Ireland, Poland, Slovenia, Spain, Sweden, UK**
- In all countries, they only apply (formally) to listed companies
- Applicability to supervisory boards only (**Slovenia, Spain**), to both (**Austria, Belgium, Ireland, Finland, France, Poland, Sweden**). In the **UK**, it is geared to executive boards in particular.



(ii) Targets

- Stipulation of numerical target only in **France** (40 % by 2016), **Spain** (30%), **UK** (33 % by 2020), **Sweden** (40 % by 2020).
- Codes requiring or encouraging companies to set own individual quantitative objective: **Denmark, Finland, Ireland, Germany]**





(iii) Recruitment procedures

Somewhat more attention in CGCs for stipulating specific requirements in relation to recruitment and selection procedures:

- **UK:** CGC requirement that the appointment process ought to be formal, rigorous and transparent, with appointments made 'on merit against objective criteria and with due regard for the benefits of diversity of the board, including gender'
- **Spain:** the selection procedure of non-executive board members must be concrete and verifiable and ensure that the proposals for the appointment or re-election are based on an analysis of the needs of the board, which is supervised by the National Commission of the Stock Market



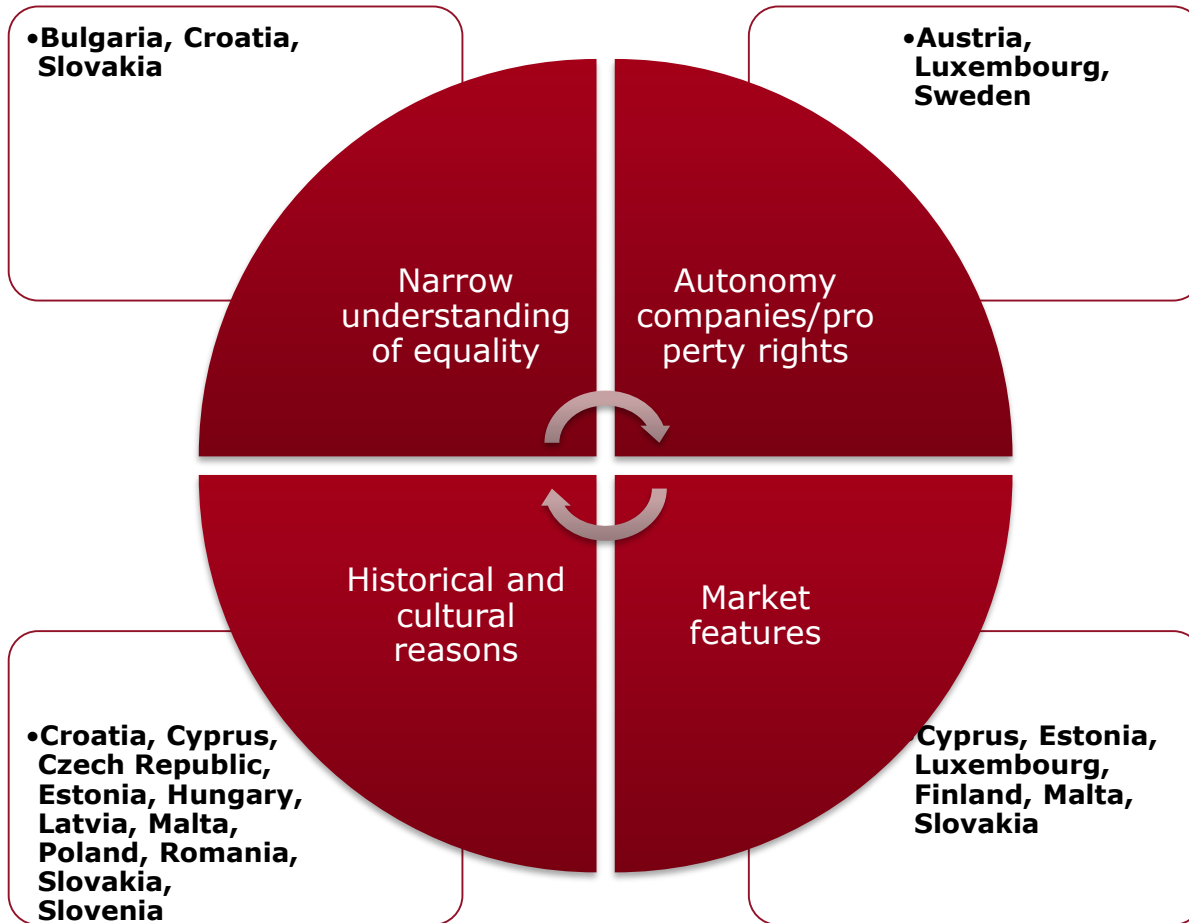


(iv) Reporting and enforcement

- most CGCs entail a **comply-or-explain obligation**, but the scope of the actual duty imposed may vary
- **Broader spectrum of carrots and sticks** that may be applied so as to incentivise companies to comply with the CGCs and other public-private initiatives and to promote gender-balanced boards
 - naming and shaming policies are applied in some countries (**France, Sweden**);
 - specific rewards for companies developing best practices, such as quality marks (**Malta**), lowering exchange fees (**Slovenia**) and the publication of good examples (**Sweden, UK**)



IV. Assessment of national approaches *why lack/resistance in quite some States to public regulation?*





National approaches meeting the Directive's aim? (i)

- many national approaches fall short of setting a similar **ambition – target – level**
- **procedural requirements regarding recruitment procedures and priority rules** lack in all adopted laws, regulations and policies, except for **Iceland**, and in some CGCs (**Spain, UK**); problem of their transparency and objectiveness
- only few States are likely to meet the '**equal effectiveness**' benchmark that could apply instead of procedural requirements (**Belgium, Iceland, Italy, Germany, Norway**)





National approaches meeting the Directive's aim? (ii)

- about half of the analysed States apply some kind of **comply-or-explain duty**
- but **insufficient accessibility and transparency** overall of corporate policies and (non-)achievements in this domain and failure to make this information available to a broader public via corporate websites
- only few States have provided for **implementing, monitoring mechanisms and sanctions**; while those that have done so go beyond the Directive proposal by setting sanctions for failing to comply with the set target, so far few sanctions have been imposed at all, **Italy** showing most enforcement activity





Effectiveness and credibility of national approaches

- **Internal factors**; legal/CGCs limits re the 'softness' of the obligations imposed, their personal and substantive scope, monitoring and sanctions mechanisms..
- **External factors**; role of the state leading by example, role of the media, cultural factors..

BUT:

- ⇒ the most stringent public regulatory and enforcement approaches have secured the quickest progress (**Belgium, Italy, France, Norway**), yet this does not go (as yet) for all States concerned (**Germany, Iceland**)
- ⇒ Successfull self-/co-regulatory approaches operate very much 'in the shadow of the law' (**Finland, Sweden, UK**)



What way forward?

Address root causes of underrepresentation of women; persistent traditional societal and cultural norms versus the value of equality ranking highly in society and politics

- The Directive as a possible counterweight and aid for putting EU values and principles into practice
 - force a number of States to engage in action
 - but fill gaps also in EU and EEA States that have adopted some regulatory approach
- Necessity of creating an 'enabling environment'
 - Flanking policies, including in education, work-life balance, etc.
 - States leading by example
 - Role of companies, media, NGOs, equality bodies, social partners, (fe)male leaders, etc.



THANK YOU FOR YOUR ATTENTION!



Universiteit Utrecht