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gender equality and non-discrimination



# Gender-balanced company boards in Europe

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

Including summaries in English,  
French and German

*Justice  
and Consumers*

**EUROPEAN COMMISSION**

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# **Gender-balanced company boards in Europe**

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enforcement approaches in the EU and EEA Member States

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# Executive summary

## Introduction and research outline

This report provides an overview of the regulatory approaches and policies of the **28 EU Member States** as well as of 3 EEA countries (**Iceland, Liechtenstein and Norway**) to enhance gender-balanced company boards, and of the monitoring and enforcement mechanisms they have put into place so as to achieve the goals set. It also considers co- and self-regulatory approaches that may have been developed in these States in consultation with or by private actors. It addresses these public and private regulatory and enforcement approaches in the light of the objectives and obligations put forward in the European Commission's proposal on the promotion of gender-balanced company boards (hereafter: GBB-Directive proposal). The main questions of this report are: What is the state of affairs in the Member States and EEA countries; are the adopted approaches capable of meeting the objectives and standards proposed in the Directive; and what enabling and hampering factors emerge in this regard?

With a view to answering these questions, the main provisions and obligations contained in the GBB-Directive proposal as it stood after the Luxembourg Presidency have been taken as the yardstick for the assessment of the national public and private regulatory, policy and enforcement approaches throughout this report.<sup>1</sup> The relevant data were predominantly gathered from country reports based on a questionnaire that was structured along the lines of the GBB-Directive proposal, and that was sent out to the legal gender equality experts of the European Equality Law Network from the 28 Member States and the 3 EEA States.<sup>2</sup> An important preliminary observation is that there are still quite a few countries that up until today lack both a public and private regulatory and enforcement approach to enhance gender balance in company boards, so they may at best have put some soft-policy measures into place. These include **Croatia, Cyprus, the Czech Republic, Hungary, Latvia, Liechtenstein, Lithuania, Malta and Slovakia**.

This report starts out by charting the contents and scope of the legal obligations that the GBB-Directive proposal seeks to impose and how they fit in with already applicable EU gender equality law, specifically the CJEU case law on positive action (Chapter 2). It then proceeds by giving an overview of the different public regulatory approaches that the analysed States have developed to enhance the gender balance in company boards, ranging from hard legally binding quota to soft targets and mere policy measures (Chapter 3). It also identifies the different monitoring and enforcement mechanisms that States have adopted, demonstrating the variety of rules, sanctions and procedures that have been put into place (Chapter 4). Next, it presents the co-regulatory and self-regulatory approaches that have been developed in a number of States, and considers the role that companies themselves have been playing so far in enhancing gender-balanced boards, in varying degrees of collaboration with public bodies (Chapter 5). Based on this, the report presents a general, comparative assessment focussing in particular on the reasons that the national experts have identified regarding their national approach and their perceived effectiveness as well as regarding their alignment with the GBB-Directive proposal or lack thereof, and remaining troublesome issues and ideas regarding the best way forward, both at national and at EU level (Chapter 6). While this assessment is therefore based on the national experts' views on these issues, this report wraps up by presenting the main conclusions drawn by the authors of this report from the overall analysis and assessment (Chapter 7).

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1 The GBB-Directive proposal has already been revised twice, the latest version dating from 31 May 2017 as amended by the Maltese Presidency. See Annex 2 of this report.

2 See Annex 1 of this report. The gender equality experts have answered the questionnaire on the basis of the state of affairs of 5 June 2017. Thus, the research was concluded 5 June 2017. In Austria, Portugal and Spain, there were important recent developments concerning gender balanced company boards. These can be found in the newsflashes on Austria, Portugal and Spain in Annexes 4, 5 and 6 of this report.

## The GBB-Directive proposal (Chapter 2)

The GBB-Directive proposal contains five important elements, the first relating to the current quantitative targets (not quota), the second concerning the means to achieve these, the third relating to the Member States' discretion to apply or continue to apply an 'equally effective' approach, i.e. the so-called flexibility clause, the fourth concerning monitoring and reporting, and the fifth covering enforcement requirements.

Regarding the first element, Article 4(1) of the proposal contains a numerical objective. As the proposal now stands it 'would require the Member States to ensure that listed companies aim to attain, by 31 December 2022 (rather than 2020), the objective that members of the under-represented sex hold at least 40 % of non-executive director positions or the objective that members of the under-represented sex hold at least 33 % of all director positions, including both executive and non-executive directors.' Member States shall also ensure that listed companies which are not subject to this last-mentioned objective 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 2022 (Article 4c(1)). Article 3 stipulates that the Directive does not apply to small and medium-sized enterprises, i.e. companies which employ less than 250 persons and have an annual turnover not exceeding EUR 50 million or an annual balance sheet total not exceeding EUR 43 million.

With respect to the second element – the means to attain these objectives – its Article 4a contains four important procedural obligations relating to the election/selection of candidates. In particular, listed companies in whose boards members of the underrepresented sex hold less than 40 % of the non-executive positions have to ensure to make the appointments to these positions on the basis of a comparative analysis of the qualifications of each candidate, by applying pre-established, clear, neutrally formulated and unambiguous criteria. A comply-or-explain duty applies, as companies not complying with the 40 % target would be required to apply the procedural rules and explain what measures they have taken in order to reach the target. In addition, in the election/selection of these candidates, Member States shall also ensure that, when choosing between candidates who are equally qualified in terms of suitability, competence and professional performance, the companies concerned shall give priority to the candidate of the underrepresented sex, unless an objective assessment taking account of all criteria specific to the individual candidates tilts the balance in favour of the candidate of the other sex. This means that a priority rule needs to be applied in such cases. There is also an information duty for companies if a candidate who has been considered makes such a request, regarding the qualification criteria on which the selection was based, the objective comparative assessment of the candidates according to these criteria, and, where relevant, the considerations tilting the balance in favour of a candidate of the other sex. Finally, Member States shall take the necessary measures 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 the priority rule. It must be noted that the requirements for recruitment procedures, the applicability of a priority rule that does not give absolute priority but is linked to a hardship clause, and the shift of the burden of proof to the employer are in line with consistent case law of the CJEU and can actually be seen as a codification thereof.

Yet, as the third element, Member States would be able to suspend the Directive's procedural requirements, if they can demonstrate to 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 therefore defines three scenarios which would be deemed by law to guarantee 'equal effectiveness', but these are not meant to be exhaustive.

Fourthly, the Directive proposal imposes a reporting duty in its Article 5, stipulating that the Member States shall require listed companies to provide information to the competent authorities on an annual basis. They must do so on the gender representation in their boards, distinguishing between non-executive and

executive directors, and on the measures taken with a view to attaining the target objectives in Articles 4(1) and 4c. Where they fail to meet these targets, they must provide the reasons for this and describe the measures taken and/or that it intends to take in order to meet the targets. This means that it actually seeks to impose a comply-or-explain duty. Member States shall also require the companies to publish that information in an appropriate and accessible manner on their websites. It should be noted that there are already two EU Directives that provide for a certain reporting obligation for companies beyond simply financial matters, including on gender and diversity policies. This concerns Directive 2013/36 of the EP and the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms and Directive 2014/95 on the disclosure of non-financial and diversity information.<sup>3</sup>

Finally, the GBB-Directive proposal also provides that Member States will have to make sure to lay down rules in their national law so as to ensure effective, dissuasive and proportionate enforcement measures for infringements of the procedural and reporting obligations. So, very importantly, the GBB-Directive proposal does not impose any sanctions on listed companies that fail to realise the targets as set by it. The requirement itself of ensuring effective, dissuasive and proportionate sanctions is longstanding CJEU case law as well.

## Public regulation and policy on gender-balanced boards (Chapter 3)

There is huge variety among the Member States as to whether any public regulatory approach towards the promotion of gender-balanced boards has been taken at all. Where adopted, some regulations contain 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. These can be qualified as soft public-regulatory approaches. Other States have introduced mandatory quotas in their legislation, with non-compliance with the said quotas possibly being sanctioned, but this not always being the case. These can be qualified as hard public-regulatory approaches. Furthermore, in some States these may have been supplemented with policy measures, such as action plans, while in others only such policy measures have been taken. Thus, **Croatia, Cyprus, the Czech Republic, Hungary, Latvia, Liechtenstein, Lithuania, Malta and Slovakia** have no public regulatory approach to a more balanced representation of women and men in company boards, but **Croatia, the Czech Republic, Malta and Slovakia** have developed some policy measures. While in some countries recent amendments were made to company law, references to the gender balance in company boards have been lacking completely and have not been subject of debate at all (**Hungary, Malta**). In other States, provisions on gender balance in company boards were introduced in the Corporate Governance Code, as addressed in Chapter 5.

### *Scope and targets*

Some States have adopted a hard public-regulatory approach only regarding state-owned companies (**Greece, Luxembourg and Slovenia**). Other States have adopted a hard regulatory approach for state-owned companies and a soft one for private companies (**Finland**). Soft regulatory approaches as to private companies can be found in **Austria, Bulgaria, Denmark, the Netherlands, Portugal and Spain**. Six States have enacted mandatory quotas in their legislation in order to reach a more balanced representation of women and men in company boards and have provided that non-compliance of such obligations may be sanctioned. The first State to do so was **Norway**, followed by **Iceland, Belgium, France, Italy and Germany**. **Romania** did not introduce mandatory quotas, but did provide for legal obligations for all entities that operate based on their own articles of association or regulations ‘to

<sup>3</sup> Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC, OJ 27.6.2013, L 176/338. and Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups, OJ 2014, L 330/1.

promote and support balanced participation of women and men in leadership and decision' and 'to adopt the necessary measures' for ensuring this goal. For some States, the relevant obligations can be found in equality law, in others in company law, or in both, for example in **Denmark**, and sometimes in labour law.

As seen above, the scope of the GBB-Directive proposal is limited to listed companies. While most Member States that have introduced mandatory quota have generally indeed done so for listed companies only (**Belgium, France, Germany and Italy**), in **Norway** and **Iceland** the scope of application is not limited to these. Yet, in Norway it is limited to public companies. Some Member States which have 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**). In the revised version of the Directive proposal, the aim is to achieve a more balanced representation of men and women among the directors, meaning both executive and non-executive directors. In some Member States the relevant provisions apply only to non-executive directors (**France and Germany**), in other States 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. In States that have adopted a soft regulatory approach, the relevant legal obligations concern both the executive and non-executive directors in **Austria, Bulgaria, the Netherlands and Portugal**, whereas in **Finland and Spain** they apply only to non-executive directors and in **Denmark** they apply only to the composition of the executive board.

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 on the board. If the board consists of more than nine members, each gender shall be represented by at least 40 %. In **Italy** and **France** the quotas will increase over time from 20 % to 33 % in **Italy** and to 40 % in **France**. The quotas were set at 30 % in **Germany**; in **Belgium** the quotas were set at one third and in **Iceland** at 40 %. Soft targets range from 30 % in **the Netherlands and Portugal**, to 40 % in **Bulgaria, Finland and Spain**. In addition, only **Denmark, Finland and Germany** have taken legal measures to require companies to set individual quantitative objectives regarding gender-balanced company boards. Overall therefore, many States still fall short in setting the same level of ambition as contained in the GBB-Directive proposal and provide for a mandatory way to achieve the set target even less.

There are also only very few States (**Belgium, Iceland, Italy, Germany and Norway**) that can avail themselves of the flexibility or 'equally effectiveness' clause as provided for by the Directive proposal, as their national law complies with any of the options mentioned therein.

#### *Procedural requirements regarding recruitment and priority rules*

Regardless of which regulatory approach – soft or hard – a State has adopted, it appears that recruitment requirements have rarely been provided for and if so, they are still of a fairly general nature (**Germany, Italy, France, Portugal, the Netherlands**). Even more strikingly, only the **Icelandic** expert has reported the use of a priority rule. In this respect, most countries therefore fall short in meeting the procedural obligations the GBB Directive seeks to impose.

#### *Measures below board level*

Only few States have enacted public regulations that also regard the management levels below board level (**Austria, 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 board level as well. Some other States have legal provisions or policies that may be of relevance to the position of the

underrepresented sex at lower management levels, which include **Iceland, the Netherlands, Portugal and the UK**.

## Public monitoring and enforcement (Chapter 4)

### *Reporting obligations*

It has appeared that some form of reporting obligation regarding the composition of company boards in terms of gender now exists in only about half of the States under consideration: **Austria, Belgium, Bulgaria, Denmark, Finland, France, Germany, Iceland, Ireland, Italy, the Netherlands, Norway, Poland and the UK**. The legal foundations and scope of these reporting obligations varies considerably, depending also on whether it concerns States that have introduced specific legislation for promoting gender-balanced boards or not. Some of these countries have limited themselves to merely demanding information without an explanation duty being imposed. 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**.

In terms of transparency and accessibility of such information and reports, this still leaves quite something to be desired: while in many of these countries there is a duty to provide this information in their annual company reports, it is very much left to the discretion of companies whether to make this information available on their website or not. Only in **Bulgaria, Germany, Norway and the UK** does such a duty exist.

### *Sanctions*

When considering the national public enforcement approaches in the light of the requirement to provide for effective, dissuasive and proportionate sanctions, it appears that the States providing for a mandatory quota law in one form or another provide for sanctions, which may be imposed in the case of appointments that contravene the law and for not realizing the targets set (**Belgium, France, Germany, Greece, Iceland, Italy, Norway, Romania**). Yet, there is quite some variety in these sanctions: naming and shaming of companies (**France**), voidness/nullity of board appointments (**Belgium, France, Germany**), annulment of the board decision (**Greece**), withdrawal of benefits from board members (**Belgium, France**), refusal of registry of a company or company board (**Iceland, Norway**), dissolution of the company (**Italy, Norway**), financial sanctions (**Italy, Germany, Romania**) as well as compensation for moral damages (**Greece**). In addition to this stick approach, interesting elements of a carrot approach for well-performing companies have also been identified: awards, tax advantages, public procurement conditionality, and the number of women on company boards of companies that apply for such support constituting a preferential criterion to benefit from public financial support programmes (**Portugal**). Furthermore, private initiatives of blacklisting and whitelisting have been identified as good practices (**Sweden**).

## Co- and self-regulatory approaches (Chapter 5)

Some States have shown a shift from self-regulation to a soft and then harder public-regulatory approach, while other countries (still) give preference to a self- or co-regulatory approach or leave the issue completely to the corporate sector itself. To obtain a more comprehensive picture, self- and co-regulatory approaches to address the problem of underrepresentation of women in company boards have also been considered. Co-regulatory approaches are those that are 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-regulatory approaches are those that have no involvement of public authorities in the regulatory and enforcement framework. Corporate governance codes (hereafter: CGCs)

are the most important tool to be discussed under this heading. These are established by either private stakeholders or (more often so) by public bodies and private stakeholders in conjunction.

### *Corporate governance codes*

In about one third of the States, the CGCs appear to contain provisions on gender balance in company boards (**Austria, Belgium, Germany, Finland, France, Ireland, Poland, Slovenia, Spain, Sweden and the UK**). Some codes require or encourage companies to set their own individual quantitative objectives regarding gender-balanced boards. This goes in particular for **Denmark, Finland, Ireland, Germany and the UK**. The personal scope of CGCs has been seen to vary quite considerably. In some countries, they apply only to non-executive boards (**Slovenia, Spain**), whereas in others they apply to both (**Austria, Belgium, Ireland, Finland, France, Poland, Sweden**). In the **UK**, they are geared to executive boards in particular. In all countries, they only apply to listed companies (even if they may voluntarily be applied by other companies as well), but may be quite specific about which listed companies are covered in particular.

Most codes lack any stipulation of numerical targets and sometimes do not even contain the aim of achieving a gender-balanced composition of the company board, **France, Spain and the UK** being exceptions in this regard by providing clear targets and **Sweden** as well, since recently; **France** 40 % by 2016, **Sweden** 40 % by 2020, the **UK** 33 % by 2020, and **Spain** 30 % by 2020 also. Interestingly, however, there seems to be somewhat more attention in CGCs for stipulating specific requirements in relation to recruitment and selection procedures, whereas it was seen that at the public regulatory level such specific requirements are largely lacking. Particularly interesting here is the **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'. In **Spain**, the selection procedure of non-executive board members must be concrete and verifiable and ensure that the proposals for 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.

Regarding monitoring and enforcement, most CGCs entail a comply-or-explain obligation, but the scope of the actual duty imposed may vary. The most interesting element coming to the fore in the comparative analysis, however, is the broader spectrum of carrots and sticks that may be applied so as to encourage companies to comply with the corporate governance codes and other public-private initiatives and to promote gender-balanced boards. Naming and shaming policies are applied in some countries (**France, Sweden**), whereas in other countries specific rewards are offered to companies developing best practices, such as lowering exchange fees (**Slovenia**) and the publication of good examples (**Sweden, UK**).

## Conclusions and overall assessment (Chapters 6 and 7)

### *Explaining diversity of national approaches*

The analysis in this report shows that the regulatory and enforcement landscape of gender-balanced company boards throughout the EU and EEA Member States is very diverse, no approach being alike. This also goes for the results actually realised, some approaches having revealed themselves as more effective than others. Given this diversity, what are the political arguments that may explain the adopted approach – or the lack thereof – and what other possible factors may have played a role in this respect, of a societal, cultural, social-economic or constitutional nature as to the understanding and balancing of different rights? In this respect, it has appeared that the issue of gender-balanced company boards is very low on the list of political priorities of quite a large number of countries and that there is also quite some political and societal resistance to moving towards introducing mandatory quota in many countries. Several factors have been identified that can explain such resistance, including in particular the protection



of the autonomy of companies and their property rights (**Austria, Luxembourg, Sweden**), a rather narrow, formal understanding of the concept of equality (**Bulgaria, Croatia, Slovakia**), market features (**Cyprus, Estonia, Luxembourg, Finland, Malta, Slovakia**) and historical (socialist/communist) reasons (**Hungary, Romania, Slovakia**). Quite a number of experts have also referred to cultural factors that have a negative impact on taking – public and private – action to promote gender-balanced boards (**Croatia, Cyprus, Czech Republic, Estonia, Hungary, Latvia,<sup>4</sup> Malta, Poland, Romania, Slovakia, Slovenia**). These factors include the patriarchal structure of society, traditional perceptions, gender roles and stereotypes that want and place women in the private sphere as caretakers or guide them in the choice of education and profession, which reduces the support in society and family for women to be in high management positions. Other important perceptions are that women are less important, not ‘tough’ and competent enough, have weaker reactions in situations of crisis and are less educated, but also that they are not flexible enough. As a result, there are still quite a few countries that up until today lack a public and/or private regulatory and enforcement approach to enhance gender balance in company boards, and may at best have put some policy measures into place. These include **Croatia, Cyprus, the Czech Republic, Hungary, Latvia, Liechtenstein, Lithuania, Malta** and **Slovakia**. The figures of the number of women on company boards in these countries are also in the lowest range.

### *The role of women’s organisations, female leaders and the media*

The national reports have also revealed an interesting, diverse picture when it comes to the role women’s organisations and women in leadership positions have played in the debate on what measures to take to promote the gender balance in boards, and specifically as regards the introduction of mandatory quota rules. In only relatively few countries they appear to have been mostly supportive of this (**Luxembourg, Malta, Iceland**). In quite some countries female leaders and politicians (especially female politicians) have resisted gender quota, such as in **Germany** and **Estonia**. Many women do so because the few female leaders in the public or private sector are accused of being ‘quota women’, meaning that they do not hold their position due to their competence but to unjustified promotion. Also when it comes to the role of the media, the picture is quite diverse. First of all, quite a number of experts have noted this influence to be marginal (**Belgium, Latvia, Slovenia, Spain, Sweden**) or rather invisible (**Austria, Bulgaria, Czech Republic, Greece, Lithuania, Poland**). Some experts have pointed to a negative approach of the media (**Cyprus, Estonia, Slovakia**). Only in a few countries do the media actually seem to have made a positive contribution to the debate on gender-balanced boards (**Croatia, Finland, Germany, Norway**), whereas others show a more mixed picture (**Italy, Malta, Portugal**).

### *Comparing national approaches to the GBB-Directive proposal*

Concluding next on the extent to which national approaches concur with the one in the GBB-Directive proposal, it can be emphasised that as to the first element of the Directive proposal – setting a numerical target – many national approaches appear to fall short of setting an ambition level that is in line with that of the Directive proposal.

As to the second element of the proposal – the procedural requirements regarding the recruitment procedure and priority rule – these have been seen to lack in virtually all adopted laws, regulations and policies, except for **Iceland**, and in some CGCs (**Spain, UK**).

Regarding the third element – the equally effectiveness rule that States might avail themselves of instead of the imposition of such procedural requirements – only few States are likely to meet the ‘equal effectiveness’ benchmark (**Belgium, Iceland, Italy, Germany, Norway**).

4 Society Integration Fund, ‘The research on the situation of women and men in the big enterprises in Latvia’, Riga, 2014, page 94, available in Latvian at [http://www.sif.gov.lv/images/files/SIF/progress-lidzt/petijums/precizets\\_zinojums\\_final.pdf](http://www.sif.gov.lv/images/files/SIF/progress-lidzt/petijums/precizets_zinojums_final.pdf) (accessed on 31 May 2017).

On a slightly more positive note, it has appeared that about half of the States already apply some kind of comply-or-explain duty, as the Directive proposal also provides for; companies have to report on the measures they have taken to comply with the target and in case of non-compliance, they are required to explain why this is the case and what action they will be taking to remedy the situation. Yet, in some countries, this is more an information duty than an explanation duty. So, on this point there also certainly is something to be gained from the adoption of the Directive, since the reporting obligation will then find application in all EU/EEA States and the actual scope of the comply-or-explain duty will have to be broadened in some of them. Furthermore, the accessibility and transparency of corporate policies and (non-)achievements in this domain still leave much to be desired overall. Even in countries that do have a reporting obligation and where companies have to make statements in their annual reports on the gender balance of boards, or gender equality and diversity more generally, companies are not always under a duty to make this information available to a broader public via their websites, as the Directive proposal requires.

Concerning the fifth element of the Directive proposal, many States have not provided for any sanctions at all. Yet, those that have can be said to have gone beyond the Directive proposal, by setting sanctions for failing to comply with the set target. In some cases, it is still too early to assess their effectiveness and dissuasiveness and some experts have doubts, *inter alia* because of the vagueness of the (target) obligation imposed and of the imposition of fines being considered rather hypothetical. It indeed appears that so far few sanctions have been imposed at all, **Italy** showing most enforcement activity.

Overall, we can conclude that many States still fall short of meeting the requirements as set by the GBB-Directive proposal. This does not mean at the same time that all national approaches fall short in terms of impact and/or credibility.

#### *Impact and credibility of national approaches*

Factors impacting the effectiveness of both national public and private approaches may be of an internal nature, relating to limitations in the law or corporate governance codes themselves as regards for instance the 'softness' of the obligations actually imposed, their personal and substantive scope, monitoring mechanisms or the lack of sanctions. But they may also be of an external nature, relating for example to the fact that the State fails to lead by example, the role of the media and cultural factors. In assessing the credibility of national approaches and their capability of realising the goal of gender-balanced boards as they have set themselves, many experts have also observed that it is difficult to establish to what extent the progress made can be traced back to the adopted approach.

However, the analysis shows that the most stringent public regulatory and enforcement approaches have secured the quickest progress in terms of achieving the set target or coming close to this (**Belgium, Italy, France, Norway**), yet this does not yet go for all States that have introduced such an approach (**Germany, Iceland**). The States that have managed to put into place relatively successful self- and co-regulatory approaches – in particular **Sweden** and to some extent the **UK** and **Finland** – have done so very much 'in the shadow of the law', there being the constant threat that if these approaches do not bring the desired change, legislation will be introduced. Importantly also, many of the national experts have expressed doubts as regards the credibility and capability of their national approach to forge the desired change in the end, including of the countries that have put into place hard public approaches, the **Swedish** expert being the major exception. This expert has referred to three important enabling forces that have contributed to the success of the Swedish approach. First of all, the threat of statutory quotas has been an important driving force for the corporate sector. A second factor has been the importance of the State leading by example. In 1999, when the share of women in state-owned company boards was 28 %, the Government set the goal of gender-balanced boards, with an intermediate target of 40 % women in 2003 which was met then and Formulärets överkant today the share of women is 49 %. Important elements in this process have been the requirement for both female and male nominees in



the appointment procedures, state-financed projects aiming to increase the share of women, and a duty to report on a continuous basis the proportion of women and men in state boards. A third factor is the policy context embodied in the Swedish welfare system, which rests on and aims to implement gender equality, among other egalitarian values. This includes extensive rules on the right to parental leave and parental benefits, policies and legislative measures aimed at creating a more equal sharing of parental leave between men and women, and cheap and accessible high-quality childcare. The long-lasting and intense focus in the public debate on this subject and work-family reconciliation has fostered a climate where parental duties are not necessarily incompatible with a top career.

### *Particularly troublesome issues*

What has been considered particularly problematic by quite some experts, is the lack of transparency and objectiveness of selection procedures, and the absence of selection criteria as well as of priority rules. The same goes for the lack of monitoring, implementation and sanctions, which clearly emerges as a rather general, problematic issue throughout the EU/EEA Member States, obstructing the realization of progress overall and achievement of targets and quota. As such, one can say that there is still an important disjunction between the regulatory and enforcement dimension of national approaches, many experts having stressed the problems that remain in securing the monitoring of and compliance with targets, when set at all, for failure to provide for specific monitoring bodies and enforcement mechanisms and sanctions.

Other obstructing factors that have been mentioned, affecting also the credibility and future effectiveness of national approaches, include the dominance of men in networks in the corporate world and on the stock market; the unawareness of applicable legislation and rules; national authorities not working sufficiently on building and enforcing flanking policies which will enable better work-life balance and allow women to strive for more active participation in the business environment; and the (weak) position of women in the labour market in general.

## The way forward

The summary of the report findings presented above already shows that the GBB-Directive proposal has strong added value in tackling current gaps in most public and private approaches, including those in States that have adopted mandatory quota rules. These gaps need addressing to spark further progress, in all Member States. Yet, stipulating targets or quota rules and securing their compliance and enforcement is not to be considered an aim in itself, its relevance going beyond this. What the national reports have revealed in particular, is that underrepresentation of women on boards can be seen as the tip of the iceberg where persistent traditional societal and cultural norms are still very much underneath its surface. It is therefore hugely important to address the root causes of this underrepresentation. On the one hand, we see this reflected in the high level of gender stereotyping and positioning of women as caretakers in many CEE States and also the Baltic States which has been said to underlie the very low political attention for this problem and the very low numbers of women on company boards. On the other hand, a country like Sweden where the value of equality ranks high in society and politics, corporate policy is much more likely to address the issue, even if this is also in the shadow of the law. Societal and cultural norms also have a negative impact in a number of States not only on women's educational and career choices, but also on the extent to which an enabling environment is created in terms of making it easier for women to combine work and care. Where equality is a highly valued societal norm, this environment is more conducive to women pursuing leadership careers, not only at the top level but also at levels of management below the board.

It is a fundamental question what this implies for the role of the EU in this domain: given this huge political, societal and cultural variety – reflecting in itself a broad range of hard and soft public and private regulatory and enforcement approaches – what European approach would be suitable? To what extent

can the law – in this case an EU directive – be used as a steering mechanism to bring about change in the EU/EEA Member States? Gender equality, equal opportunities and gender mainstreaming being core values of the EU/EEA, anchored in the European Treaties and Charter of Fundamental Rights, these are not to remain values just on paper, but need implementation by and in the Member States in daily life. The GBB-Directive proposal can be seen as an effort to bring this about specifically in the area of economic decision-making: women should have equal opportunities to be part of the exercise of this power but also to pursue their own personal career ambitions. This is also what it essentially proposes by not imposing a target obligation but mainly procedural obligations that enhance equal opportunities for women and men in the recruitment and appointment process of board members. This means that it shows restraint, which is reinforced by the fact that it also still allows Member States to follow their own approach instead of the one proposed in the Directive, as long as it proves to be of equal effectiveness. Last but not least, the GBB Directive may also provide the necessary counterweight to the worrying tendencies that have been signalled in this report of growing gender stereotyping in some Member States, renewed emphasis on women's role as primary caretakers and their supposed incompetence regarding leadership positions. The GBB Directive may therefore be exactly what is needed to bring about a mentality change and to enhance a more cognitively supported view in society, that securing equal representation of women and men in management positions and company boards is not only the right thing to do from the perspective of building resilient institutions and risk management,<sup>5</sup> but also from the perspective of achieving equality and social justice. States are to lead by example, but opening and securing pathways for women to enter corporate careers requires a broader effort from all parties concerned to create an enabling environment, including work-life balance, education, and other policies that are now still hampering women's participation in the labour market and their promotion to leadership positions.

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5 As acknowledged already in Directive 2013/36 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms; *ibid.* note 3.

# Résumé

## Introduction et grandes lignes de l'analyse

Le présent rapport propose un aperçu des approches et politiques réglementaires adoptées par les **28 États membres de l'UE** et les trois pays de l'EEE (**Islande, Liechtenstein et Norvège**) pour favoriser l'équilibre hommes-femmes dans les conseils des sociétés, ainsi que des mécanismes de suivi et de contrôle de l'application mis en place pour atteindre les objectifs fixés. Il examine également les approches de corégulation et d'autorégulation éventuellement développées dans ces pays en concertation avec ou par des acteurs privés. Ces approches réglementaires et d'exécution publiques et privées sont abordées ici à la lumière des objectifs et obligations énoncés dans la proposition de la Commission européenne relative à un meilleur équilibre hommes-femmes dans les conseils des sociétés. Les principales questions posées par le rapport sont les suivantes: quelle est la situation dans les États membres de l'UE et les pays de l'EEE? Les approches adoptées sont-elles en mesure de réaliser les objectifs et les normes que propose la directive? Et quels sont les facteurs porteurs et les freins observés à cet égard?

Pour y répondre, le rapport évalue les approches réglementaires, stratégiques et exécutoires nationales tant publiques que privées en prenant systématiquement pour critère de référence les dispositions et obligations principales contenues dans la proposition de directive telle qu'elle se présentait à l'issue de la présidence luxembourgeoise.<sup>1</sup> Les données pertinentes proviennent essentiellement de rapports nationaux rédigés sur la base d'un questionnaire structuré sur le modèle de la proposition de directive et adressé aux membres du Réseau européen d'experts juridiques en matière d'égalité des genres et de non-discrimination appartenant aux 28 États membres de l'UE et aux 3 pays de l'EEE.<sup>2</sup> Une première remarque préliminaire s'impose, à savoir qu'il existe à ce jour bon nombre de pays qui n'ont encore adopté aucune approche réglementaire ni d'exécution, publique ou privée, pour améliorer l'équilibre hommes-femmes dans les conseils des sociétés, et qui se sont contentés au mieux de mettre en place certaines mesures «douces» ou non contraignantes. Il s'agit de la **Croatie**, de **Chypre**, de la **Hongrie**, de la **Lettonie**, du **Liechtenstein**, de la **Lituanie**, de **Malte**, de la **République tchèque** et de la **Slovaquie**.

Le présent rapport commence par décrire la teneur et le champ d'application des obligations juridiques que la proposition de directive visant à un meilleur équilibre hommes-femmes dans les conseils des sociétés cherche à imposer, et la manière dont elles s'inscrivent dans le droit européen déjà en vigueur en matière d'égalité des genres, et plus particulièrement dans la jurisprudence de la CJUE relative à l'action positive (chapitre 2). Il donne ensuite un aperçu des différentes approches réglementaires publiques développées par les pays couverts par l'analyse pour améliorer la parité au sein des conseils des sociétés, lesquelles approches vont de quotas rigoureux juridiquement contraignants à des objectifs non contraignants, voire de simples mesures de politique (chapitre 3). Il recense également les mécanismes de suivi et de contrôle de l'application mis en place par les États en soulignant leur diversité en termes de règles, de sanctions et de procédures (chapitre 4). Il présente ensuite les approches de corégulation et d'autorégulation développées dans un certain nombre de pays, et se penche sur le rôle joué à ce jour par les sociétés elles-mêmes pour améliorer l'équilibre hommes-femmes au sein de leurs conseils moyennant des degrés divers de collaboration avec des organismes publics (chapitre 5). S'appuyant sur ces éléments, le rapport

1 La proposition de directive relative à un meilleur équilibre hommes-femmes dans les conseils des sociétés a déjà été révisée à deux reprises; la version la plus récente, telle que modifiée par la présidence maltaise, date du 31 mai 2017 (voir l'annexe 2 du rapport).

2 Voir l'annexe 1 du présent rapport. Les experts en matière d'égalité hommes-femmes ont répondu au questionnaire en prenant en compte la situation au 5 juin 2017. L'analyse a donc été clôturée à cette date. Des développements importants sont intervenus récemment en Autriche, au Portugal et en Espagne concernant la représentation équilibrée hommes-femmes au sein des conseils des sociétés: ils sont décrits dans les *Newsflashes* relatifs à ces pays aux annexes 4, 5 et 6 du présent rapport.

propose une évaluation générale et comparative portant plus spécifiquement sur les raisons qui sous-tendent selon les experts nationaux l'approche adoptée par leur pays et son efficacité perçue; il examine ensuite l'alignement de ces approches nationales, ou leur non-alignement, sur la proposition de directive européenne avant d'aborder les problématiques qui restent préoccupantes et certaines idées quant à la meilleure manière d'aller de l'avant tant au niveau national qu'au niveau de l'UE (chapitre 6). Si le rapport s'appuie sur les points de vue des experts nationaux pour l'étude de ces questions, il s'achève cependant par la présentation des grandes conclusions tirées par ses auteurs de ce processus général d'analyse et d'évaluation (chapitre 7).

## La proposition de directive relative à un meilleur équilibre hommes-femmes dans les conseils des sociétés (chapitre 2)

La proposition de directive comporte cinq éléments majeurs: le premier concerne les objectifs quantitatifs actuels (il ne s'agit pas de quotas); le deuxième concerne les moyens de les réaliser; le troisième concerne la discrétion laissée aux États membres d'appliquer ou de continuer d'appliquer une approche «d'égale efficacité», autrement dit la clause dite de flexibilité; le quatrième concerne le suivi et l'établissement de rapports; et le cinquième concerne les exigences d'application.

S'agissant du premier élément, l'article 4, paragraphe 1, de la proposition contient un objectif chiffré. Dans sa version actuelle, la proposition demande que «les États membres veillent à ce que les sociétés cotées cherchent à atteindre d'ici le 31 décembre 2022 (au lieu de 2020) l'objectif consistant à ce que des membres du sexe sous-représenté occupent au moins 40 % des postes d'administrateurs non exécutifs, ou l'objectif consistant à ce que des membres du sexe sous-représenté occupent au moins 33 % de tous les postes d'administrateurs, tant ceux d'administrateurs exécutifs que d'administrateurs non exécutifs». Les États membres sont également invités à veiller à ce que les sociétés cotées non concernées par ce dernier objectif se fixent des objectifs quantitatifs individuels pour la représentation équilibrée des deux sexes parmi leurs administrateurs exécutifs, qu'elles devront atteindre au plus tard le 31 décembre 2022 (article 4 *quater*, paragraphe 1). L'article 3 précise que la directive ne s'applique pas aux petites et moyennes entreprises, à savoir aux sociétés qui occupent moins de 250 personnes et dont le chiffre d'affaires annuel n'excède pas 50 millions d'euros ou dont le total du bilan annuel n'excède pas 43 millions d'euros.

S'agissant du deuxième élément – les moyens pour atteindre ces objectifs – son article 4 *bis* prévoit quatre obligations procédurales relatives à la sélection des candidats à nommer ou élire. De manière plus spécifique, les sociétés cotées dont les membres des conseils appartenant au sexe sous-représenté occupent moins de 40 % des postes d'administrateurs non exécutifs doivent veiller à pourvoir ces postes sur la base d'une analyse comparative des qualifications de chaque candidat à l'aune de critères préalablement établis, clairs, formulés en termes neutres et dépourvus d'ambiguïté. Une obligation de se conformer ou de s'expliquer s'applique dans la mesure où les sociétés ne respectant pas l'objectif de 40 % seront tenues d'appliquer les règles procédurales et d'expliquer les mesures prises pour parvenir à l'objectif. De surcroît, lors de la sélection des candidats à nommer ou à élire, les États membres doivent également veiller à ce que, pour départager des candidats possédant des qualifications égales quant à l'aptitude, à la compétence et aux prestations professionnelles, les sociétés concernées accordent la priorité au candidat du sexe sous-représenté, à moins qu'une appréciation objective tenant compte de tous les critères relatifs à la personne des candidats ne fasse pencher la balance en faveur d'un candidat de l'autre sexe. En d'autres termes, une règle de priorité doit s'appliquer dans de tels cas. Un devoir d'information est également prévu pour les sociétés, lorsqu'un candidat non retenu en fait la demande, de communiquer les critères relatifs aux qualifications sur lesquels elles ont fondé leur sélection, l'appréciation comparative objective des candidats en fonction de ces critères et, le cas échéant, les considérations ayant fait pencher la balance en faveur d'un candidat de l'autre sexe. Enfin, les États membres doivent prendre les mesures nécessaires pour veiller à ce que, lorsqu'un candidat non retenu du sexe sous-représenté établit des faits qui permettent de présumer qu'il possédait une qualification

égale à celle du candidat retenu de l'autre sexe, il incombe à la société cotée de prouver l'absence de violation de la règle de priorité. Il convient de souligner que les exigences en matière de procédures de recrutement, l'applicabilité d'une règle de priorité ne conférant pas une priorité absolue mais liée à une clause de force majeure, et le renversement de la charge de la preuve sur l'employeur sont conformes à la jurisprudence de la CJUE et peuvent effectivement être considérés comme une codification de celle-ci.

Ceci étant dit et s'agissant du troisième élément, les États membres pourraient suspendre les exigences procédurales de la directive s'ils peuvent prouver avoir déjà pris des mesures aussi efficaces ou accompli des progrès les rapprochant des objectifs quantitatifs fixés dans la directive. Dans le souci de concilier cette flexibilité avec un maximum de sécurité juridique, l'article 4 *ter* définit donc trois scénarios qui seraient censés, en droit, garantir une «égale efficacité» mais qui ne se veulent pas exhaustifs.

Quatrièmement, la proposition de directive impose une obligation de rapport en son article 5, lequel dispose que les États membres exigeront des sociétés cotées qu'elles fournissent annuellement des informations aux autorités nationales compétentes. Ces informations doivent porter sur la représentation des sexes dans leurs conseils en établissant une distinction entre administrateurs non exécutifs et administrateurs exécutifs, et sur les mesures prises en vue d'atteindre les objectifs fixés à l'article 4, paragraphe 1, et à l'article 4 *quater*. Lorsqu'une société ne répond pas à ces objectifs, elle doit fournir les raisons du manquement et une description des mesures qu'elle a adoptées et/ou qu'elle envisage d'adopter pour les atteindre. Autrement dit, la proposition de directive vise effectivement à imposer une obligation de se conformer ou de s'expliquer. Les États membres exigeront également des sociétés que ces informations soient publiées sur leur site web d'une manière adaptée et accessible. Il convient de rappeler qu'il existe déjà deux directives européennes prévoyant pour les sociétés une certaine obligation de rapport qui, allant au-delà des seules questions financières, porte notamment sur les politiques en matière d'égalité hommes-femmes et de diversité: il s'agit de la directive 2013/36 du PE et du Conseil du 26 juin 2013 concernant l'accès à l'activité des établissements de crédit et la surveillance prudentielle des établissements de crédit et des entreprises d'investissement, et de la directive 2014/95 relative à la publication d'informations non financières et d'informations relatives à la diversité.<sup>3</sup>

Enfin, la proposition de directive en vue d'un meilleur équilibre hommes-femmes dans les conseils des sociétés dispose que les États membres devront veiller à définir dans leur droit national des règles sur des mesures d'exécution effectives, proportionnées et dissuasives applicables au non-respect des obligations de procédure et de rapport. Il est donc très important de noter que la proposition de directive n'impose aucune sanction aux sociétés cotées qui ne réalisent pas les objectifs qu'elle définit. L'exigence même de veiller à des sanctions effectives, dissuasives et proportionnées est également une jurisprudence de longue date de la CJUE.

## Réglementation et politique publiques relatives à la représentation équilibrée hommes-femmes dans les conseils des sociétés (chapitre 3)

On observe une très grande diversité entre États membres quant à l'adoption (éventuelle) d'une approche réglementaire publique en faveur de l'amélioration de l'équilibre hommes-femmes dans les conseils des sociétés. Lorsque tel est le cas, il peut s'agir de simples objectifs chiffrés ou d'obligations de faire «de son mieux» pour améliorer cet équilibre sans aucune mention d'obligation légale quelconque ni de sanction en cas de non-respect. On parle alors d'approche réglementaire publique «douce» ou non contraignante. D'autres pays ont introduit dans leur législation des quotas obligatoires, assortis de sanctions éventuelles

3 Directive 2013/36/UE du Parlement européen et du Conseil du 26 juin 2013 concernant l'accès à l'activité des établissements de crédit et la surveillance prudentielle des établissements de crédit et des entreprises d'investissement, modifiant la directive 2002/87/CE et abrogeant les directives 2006/48/CE et 2006/49/CE, JO L 176/338 du 27.6.2013 et directive 2014/95/UE du Parlement européen et du Conseil du 22 octobre 2014 modifiant la directive 2013/34/UE en ce qui concerne la publication d'informations non financières et d'informations relatives à la diversité par certaines grandes entreprises et certains groupes, JO L 330/1 du 15.11.2014.

– mais non systématiques – s'ils ne sont pas respectés. On parle alors d'approche réglementaire publique contraignante. Dans certains pays, ces dispositions sont complétées de mesures telles que des plans d'action tandis que, dans d'autres, seules des mesures de ce type ont été adoptées. C'est ainsi que **la Croatie, Chypre, la République tchèque, la Hongrie, la Lettonie, le Liechtenstein, la Lituanie, Malte et la Slovaquie** ne se sont dotés d'aucune approche réglementaire publique en vue d'une représentation plus équilibrée des femmes et des hommes dans les conseils des sociétés, mais que **la Croatie, la République tchèque, Malte et la Slovaquie** ont instauré certaines mesures à cette fin. Dans plusieurs pays, en revanche, de récents amendements apportés au droit des sociétés ne font pas la moindre référence à l'équilibre hommes-femmes au sein des conseils, et la question n'a même fait l'objet d'aucun débat (**Hongrie, Malte**). Dans d'autres pays, des dispositions en la matière ont été introduites dans le code de gouvernement d'entreprise (voir le chapitre 5).

### *Champ d'application et objectifs*

Certains pays ont adopté une approche réglementaire publique contraignante visant exclusivement les entreprises publiques (**Grèce, Luxembourg et Slovénie**). D'autres ont opté pour une approche réglementaire contraignante pour les entreprises publiques et non contraignante pour les entreprises privées (**Finlande**). Des approches réglementaires non contraignantes visant les sociétés privées sont en place en **Autriche**, en **Bulgarie**, au **Danemark**, aux **Pays-Bas**, au **Portugal** et en **Espagne**. Six pays ont inscrits des quotas réglementaires dans leur législation afin de parvenir à une représentation plus équilibrée des femmes et des hommes dans les conseils des sociétés, et prévu de sanctionner le non-respect de ces obligations. Le premier pays à agir dans ce sens a été la **Norvège**, suivie de l'**Islande**, de la **Belgique**, de la **France**, de l'**Italie** et de l'**Allemagne**. La **Roumanie** n'a pas introduit de quotas obligatoires mais l'obligation légale pour toutes les entités exerçant leur activité sur la base de leurs propres statuts ou règlements de «promouvoir et soutenir une participation équilibrée des femmes et des hommes au niveau de la direction et des décisions» et d'«adopter les mesures nécessaires» pour atteindre ce but. Dans certains pays, les obligations en la matière figurent dans le droit sur l'égalité; dans d'autres, elles figurent dans le droit des sociétés, ou dans les deux (au **Danemark** notamment), et parfois dans le droit du travail.

Comme indiqué plus haut, le champ d'application de la proposition de directive relative à un meilleur équilibre hommes-femmes dans les conseils couvre uniquement les sociétés cotées en bourse. Si la plupart des États membres ayant introduit un quota obligatoire l'ont effectivement limité aux seules sociétés cotées (**Belgique, France, Allemagne et Italie**), la **Norvège** et l'**Islande** n'appliquent pas cette restriction. Ceci dit, en Norvège, l'obligation se limite aux entreprises publiques. Plusieurs États membres ayant opté pour une approche réglementaire publique non contraignante l'appliquent exclusivement aux sociétés cotées (**Autriche, Finlande et Portugal**) tandis que d'autres appliquent cette approche aux «grandes» entreprises (**Bulgarie, Danemark, Pays-Bas et Espagne**). Dans la version révisée de la proposition de directive, le but est de parvenir à une représentation plus équilibrée des hommes et des femmes parmi les administrateurs, à savoir à la fois les administrateurs exécutifs et les non exécutifs. Dans certains États membres, les dispositions pertinentes d'appliquent uniquement aux administrateurs non exécutifs (**France et Allemagne**); dans d'autres, elles s'appliquent tant aux administrateurs non exécutifs qu'aux administrateurs exécutifs (**Belgique et Italie**). La **Norvège** et l'**Islande** ont un système moniste et ne font pas de distinction entre administrateurs exécutifs et non exécutifs. Dans les pays qui ont opté pour une approche réglementaire non contraignante, les obligations légales pertinentes concernent à la fois les administrateurs exécutifs et non exécutifs dans le cas de l'**Autriche**, de la **Bulgarie**, des **Pays-Bas** et du **Portugal**, alors qu'elles s'appliquent uniquement aux administrateurs non exécutifs en **Finlande** et en **Espagne**, et uniquement à la composition du comité de direction au **Danemark**.

Les États membres ayant opté pour des quotas obligatoires, et n'ayant pas limité leur approche réglementaire publique aux entreprises publiques, appliquent des quotas différents. En **Norvège**, aucun pourcentage spécifique n'est fixé car les taux dépendent du nombre d'administrateurs formant le conseil.

Si celui-ci comprend plus de neuf membres, chaque sexe doit être représenté à hauteur de 40 % au moins. En **Italie** et en **France**, les quotas augmenteront au fil du temps pour passer de 20 à 33 % en **Italie** et à 40 % en **France**. Les quotas ont été fixés à 30 % en **Allemagne**; en **Belgique**, ils ont été fixés à un tiers et en **Islande** à 40 %. Les objectifs non contraignants vont de 30 % aux **Pays-Bas** et au **Portugal** à 40% en **Bulgarie**, en **Finlande** et en **Espagne**. Par ailleurs, seuls le **Danemark**, la **Finlande** et l'**Allemagne** ont pris des mesures juridiques pour obliger les sociétés à définir des objectifs quantitatifs individuels concernant l'équilibre hommes-femmes au sein de leurs conseils. Globalement donc, il reste de nombreux pays qui ne se sont pas donné le même niveau d'ambition que celui escompté par la proposition de directive, et qui se sont moins encore dotés de modalités contraignantes pour parvenir à l'objectif fixé.

Très rares sont en outre les pays (**Belgique, Islande, Italie, Allemagne et Norvège**) qui peuvent se prévaloir de la clause de flexibilité ou d'«égale efficacité» prévue par la proposition de directive du fait que leur droit interne respecte l'une des options qui y sont énoncées.

### *Exigences procédurales applicables au recrutement et à la règle de priorité*

Quelle que soit l'approche réglementaire – contraignante ou non – adoptée par un pays, il apparaît que des exigences sont rarement prévues en matière de recrutement et que, lorsqu'elles existent, elles conservent un caractère assez général (**Allemagne, Italie, France, Portugal, Pays-Bas**). Plus frappant encore, seule l'experte **islandaise** signale le recours à une règle de priorité. À cet égard donc, la plupart des pays ne satisfont pas encore aux obligations procédurales que la directive proposée cherche à imposer.

### *Mesures relatives aux niveaux de direction se situant en-dessous du conseil d'administration*

Seuls quelques pays ont adopté des réglementations publiques couvrant également les échelons inférieurs au conseil d'administration (**Autriche, Danemark et Allemagne**). La législation **allemande**, par exemple, stipule que toutes les sociétés privées cotées ou en cogestion doivent également fixer des objectifs quantitatifs individuels (quotas-cibles hommes-femmes) pour le premier et le second niveau de direction sous le conseil d'administration. D'autres pays ont adopté des dispositions juridiques ou des mesures susceptibles d'influencer la situation du sexe sous-représenté aux échelons inférieurs du management: on peut citer à cet égard l'**Islande**, les **Pays-Bas**, le **Portugal** et le **Royaume-Uni**.

## Dispositions légales en matière de suivi et de contrôle de l'application (chapitre 4)

### *Obligations de rapport*

Il ressort de l'analyse qu'une obligation de rapport concernant la composition des conseils de sociétés en termes de genre n'existe aujourd'hui que dans la moitié environ des pays étudiés: **Allemagne, Autriche, Belgique, Bulgarie, Danemark, Finlande, France, Irlande, Islande, Italie, Norvège, Pays-Bas, Pologne et Royaume-Uni**. La base juridique et le champ d'application de ces obligations de rapport varient fortement, notamment selon que le pays considéré a introduit ou non une législation spécifiquement destinée à promouvoir l'équilibre hommes-femmes dans les conseils des sociétés. Certains de ces pays se sont contentés de requérir des informations sans imposer de devoir d'explication. Les pays ayant instauré des obligations de rapport découlant spécifiquement de lois relatives à des quotas obligatoires ou à des objectifs non contraignants sont l'**Allemagne, la Belgique, la France, la Grèce, l'Islande, l'Italie et les Pays-Bas**.

Quant à la transparence et à l'accessibilité de ces informations et rapports, elles laissent encore quelque peu à désirer: si l'obligation de fournir ces informations dans le rapport annuel des sociétés a été instaurée dans beaucoup de pays, la décision de les publier sur le site web des sociétés est largement laissée à la



discrétion de celles-ci. Une telle obligation existe uniquement en **Allemagne**, en **Bulgarie**, en **Norvège** et au **Royaume-Uni**.

### *Sanctions*

On observe, en examinant les approches nationales en matière d'application à la lumière de l'exigence de prévoir des sanctions effectives, dissuasives et proportionnées, que les pays dotés d'une législation fixant des quotas obligatoires prévoient des sanctions sous une forme ou une autre, lesquelles peuvent être infligées lorsque des nominations enfreignent la loi ou lorsque les objectifs fixés ne sont pas atteints (**Allemagne, Belgique, France, Grèce, Islande, Italie, Norvège, Roumanie**). Ces sanctions sont toutefois très diverses: désignation et «humiliation publique» des sociétés (**France**), nullité des nominations au conseil (**Allemagne, Belgique, France**), annulation de la décision du conseil (**Grèce**), retrait des indemnités allouées aux administrateurs (**Belgique, France**), refus d'enregistrer la société ou son conseil d'administration (**Islande, Norvège**), dissolution de la société (**Italie, Norvège**), sanctions financières (**Allemagne, Italie, Roumanie**) et indemnisation pour préjudice moral (**Grèce**). Outre cette politique du bâton, il existe à l'intention des sociétés «bonnes élèves» une série d'éléments intéressants qui s'inscrivent dans une politique de la carotte: récompenses, avantages fiscaux, conditionnalité en matière de marchés publics, et le fait que le nombre d'administratrices au sein du conseil réclamant ce type de soutien constitue un critère préférentiel lors de l'attribution de fonds dans le cadre de programmes d'aide financière (**Portugal**). Des initiatives privées de mise sur liste noire et sur liste blanche ont par ailleurs été recensées en tant que bonnes pratiques (**Suède**).

## **Approches de corégulation et d'autorégulation (chapitre 5)**

Plusieurs pays ont effectué une transition de l'autorégulation vers une approche réglementaire publique non contraignante, puis progressivement davantage contraignante, tandis que d'autres persistent à préférer une approche d'auto- ou de corégulation ou à laisser la question à la discrétion totale du secteur des entreprises elles-mêmes. Soucieux d'établir un bilan plus global, le présent rapport s'est également intéressé aux approches d'auto- et de corégulation dans une perspective de lutte contre la sous-représentation des femmes dans les conseils des sociétés. Les approches de corégulation sont celles qui revêtent un caractère hybride public-privé, et impliquent ainsi une certaine collaboration entre acteurs publics et privés dans le processus de normalisation, de suivi et/ou de mise en application. Les approches d'autorégulation sont celles qui ne prévoient aucune implication des pouvoirs publics dans le cadre de réglementation et d'exécution. L'outil principal à examiner sous la présente rubrique sont les codes de gouvernement d'entreprise (ci-après CGE), qui sont établis par des parties prenantes privées ou (plus fréquemment) conjointement par des organismes publics et des parties prenantes privées.

### *Les codes de gouvernement d'entreprise*

Il apparaît que dans un tiers environ des pays, les CGE contiennent des dispositions relatives à l'équilibre hommes-femmes dans les conseils des sociétés (**Allemagne, Autriche, Belgique, Espagne, Finlande, France, Irlande, Pologne, Royaume-Uni, Slovaquie et Suède**). Certains codes obligent ou encouragent les sociétés à définir leurs propres objectifs quantitatifs individuels en la matière. Tel est plus particulièrement le cas du **Danemark**, de la **Finlande**, de l'**Irlande**, de l'**Allemagne** et du **Royaume-Uni**. Il apparaît également que le champ d'application personnel des CGE varie lui aussi de manière assez considérable. Dans plusieurs pays, ces codes s'appliquent uniquement aux conseils non exécutifs (**Espagne, Slovaquie**), tandis qu'ils s'appliquent aux deux dans d'autres (**Autriche, Belgique, Irlande, Finlande, France, Pologne, Suède**). Au **Royaume-Uni**, ils visent spécifiquement les conseils exécutifs. Ces codes s'appliquent exclusivement, dans tous les pays, aux sociétés cotées en bourse (même si d'autres sociétés peuvent les appliquer à titre volontaire) mais ils peuvent préciser les sociétés cotées plus particulièrement visées.



La plupart des codes ne stipulent absolument aucun objectif chiffré et ne n'énoncent même pas, dans certains cas, le but d'une composition équilibrée du conseil de société – les exceptions à cet égard étant l'**Espagne**, la **France** et le **Royaume-Uni**, qui fixent des objectifs clairs, et plus récemment la **Suède**; ces objectifs s'établissent à 40 % en **France** à l'horizon 2016, à 40 % en **Suède** à l'horizon 2020, à 33 % au **Royaume-Uni** à l'horizon 2020 et à 30 % en **Espagne** à l'horizon 2020 également. Il est toutefois intéressant de noter que les CGE tendent à réserver une attention assez grande à la stipulation d'exigences spécifiques concernant les procédures de recrutement et de sélection alors qu'il apparaît que ces exigences spécifiques font largement défaut au niveau réglementaire public. Il convient de mentionner plus spécialement ici l'exigence des CGE en vigueur au **Royaume-Uni** en vertu desquels le processus de nomination doit être formel, rigoureux et transparent, et les nominations effectuées sur la base du mérite par rapport à des critères objectifs et compte tenu des avantages d'une diversité du conseil, y compris en termes de genre. En **Espagne**, la procédure de sélection des membres des conseils non exécutifs doit être tangible et vérifiable, et garantir que les propositions de nomination ou de réélection se fondent sur une analyse des besoins du conseil supervisée par la Commission nationale du marché des valeurs.

En ce qui concerne le suivi et le contrôle de l'application, la plupart des CGE comportent une obligation de se conformer ou de s'expliquer, mais la portée de l'obligation réellement imposée peut varier. L'aspect le plus intéressant mis en lumière par l'analyse comparative réside cependant dans la gamme élargie des carottes et des bâtons utilisés pour encourager les sociétés à se conformer aux codes de gouvernement d'entreprise et à d'autres initiatives publiques-privées, et à promouvoir un équilibre hommes-femmes dans les conseils des sociétés. La désignation et «l'humiliation publique» sont des pratiques en vigueur dans certains pays (**France, Suède**) tandis que, dans d'autres, des récompenses sont attribuées aux sociétés qui mettent en place de bonnes pratiques – abaissement des frais de change (**Slovenie**) et publication de bons exemples (**Suède, Royaume-Uni**), entre autres.

## Conclusions et évaluation globale (chapitres 6 et 7)

### *Les raisons de la diversité des approches nationales*

L'analyse présentée dans le rapport fait état d'un paysage très diversifié en ce qui concerne la réglementation et la mise en application d'un meilleur équilibre hommes-femmes dans les conseils des sociétés implantées dans les pays de l'UE et de l'EEE – où l'on ne trouve effectivement pas deux approches nationales identiques. Il en va de même des résultats concrètement engrangés, certaines approches s'étant avérées plus efficaces que d'autres. Il est utile de se demander, face à cette diversité, quels sont les arguments politiques pouvant expliquer l'approche adoptée – ou l'absence de toute approche – et quels autres facteurs de nature sociétale, culturelle, socioéconomique ou constitutionnelle pourraient avoir joué un rôle à cet égard en termes de perception et de pondération des droits en jeu. On constate dans ce contexte que la question de l'équilibre hommes-femmes dans les conseils de société se situe très bas sur la liste des priorités politiques d'un nombre assez important de pays, et qu'une réticence politique et sociétale assez marquée se manifeste dans certains pays lorsqu'il est question d'introduire un quota obligatoire. Plusieurs facteurs susceptibles d'expliquer cette réticence ont été identifiés, parmi lesquels on note plus particulièrement la préservation de l'autonomie des sociétés et de leurs droits de propriété (**Autriche, Luxembourg, Suède**), une interprétation formelle assez étroite du concept d'égalité (**Bulgarie, Croatie, Slovaquie**), des spécificités du marché (**Chypre, Estonie, Luxembourg, Finlande, Malte, Slovaquie**) et des raisons historiques (socialistes/communistes) (**Hongrie, Roumanie, Slovaquie**). Un nombre non négligeable d'experts ont également pointé des facteurs culturels ayant une influence négative sur l'adoption de mesures – publiques ou privées – favorisant l'équilibre hommes-femmes dans les conseils des sociétés (**Croatie, Chypre, Estonie, Hongrie, Lettonie**,<sup>4</sup> **Malte, Pologne**,

4 Fonds pour l'intégration sociale, «Étude de la situation des femmes et des hommes dans les grandes entreprises en Lettonie», Riga, 2014, page 94, disponible en letton sur [http://www.sif.gov.lv/images/files/SIF/progress-lidzt/petijums/precizets\\_zinojums\\_final.pdf](http://www.sif.gov.lv/images/files/SIF/progress-lidzt/petijums/precizets_zinojums_final.pdf) (consulté le 31 mai 2017).

**République tchèque, Roumanie, Slovaquie, Slovénie**). Ces facteurs sont notamment la structure patriarcale de la société, les perceptions traditionnelles ainsi que les rôles et stéréotypes liés au genre qui veulent que la place des femmes soit dans la sphère privée en tant que gardiennes et soignantes, ou qui les orientent dans leurs choix éducatifs et professionnels – autant d'éléments qui affaiblissent le soutien dont les femmes bénéficient au sein de la société et en famille pour accéder à des postes de direction. On note encore d'autres perceptions importantes selon lesquelles les femmes sont moins importantes, ne sont pas suffisamment «solides» et compétentes, réagissent moins en situation de crise et sont moins instruites, mais également manquent de flexibilité. Il en résulte qu'un nombre non négligeable de pays ne se sont encore dotés aujourd'hui d'aucune approche réglementaire ou d'exécution, publique et/ou privée, visant à améliorer l'équilibre hommes-femmes dans les conseils des sociétés, et ont adopté au mieux quelques mesures dans ce sens. On peut citer parmi eux la **Croatie, Chypre, la Hongrie, la Lettonie, le Liechtenstein, la Lituanie, Malte, la République tchèque et la Slovaquie**. Le nombre d'administratrices dans les conseils de sociétés de ces pays est également parmi les plus faibles.

#### *Le rôle des organisations féminines, des femmes occupant des postes de direction et des médias*

Les rapports nationaux ont également brossé un tableau intéressant et diversifié concernant le rôle joué par les organisations féminines et les femmes occupant des postes de direction dans le débat sur les mesures à prendre pour améliorer l'équilibre hommes-femmes dans les conseils, et sur la question plus particulière de l'introduction de règles obligatoires en matière de quota. Peu nombreux sont les pays où elles semblent être globalement favorables à la démarche (**Luxembourg, Malte, Islande**). Dans un nombre non négligeable de pays, en revanche, les femmes occupant des postes de directions et les politiciens (et les politiciennes en particulier) se sont opposés au quota de genre, en **Allemagne** et en **Estonie** notamment. Beaucoup de femmes réagissent de la sorte parce que les quelques dirigeantes présentes dans le secteur public ou privé sont accusées d'être des «femmes de quota», autrement des femmes qui n'occupent pas leur poste en raison de leur compétence mais en raison d'une promotion injustifiée. S'agissant du rôle des médias, le tableau est lui aussi assez diversifié. Tout d'abord, les experts ont été assez nombreux à décrire cette influence comme marginale (**Belgique, Espagne, Lettonie, Slovénie, Suède**) ou très peu visible (**Autriche, Bulgarie, Grèce, Lituanie, Pologne, République tchèque**). Plusieurs experts ont fait état d'une approche négative de la part des médias (**Chypre, Estonie, Slovaquie**). Peu nombreux sont les pays où les médias semblent avoir contribué de manière réellement positive au débat sur l'équilibre hommes-femmes dans les conseils des sociétés (**Allemagne, Croatie, Finlande, Norvège**), tandis que d'autres donnent une image davantage contrastée (**Italie, Malte, Portugal**).

#### *La comparaison des approches nationales avec la proposition de directive relative à un meilleur équilibre hommes-femmes parmi les administrateurs non exécutifs des sociétés cotées en bourse*

La conclusion suivante, qui porte sur la mesure dans laquelle les approches nationales rejoignent la proposition de directive, tend à souligner qu'en ce qui concerne le premier élément de celle-ci, à savoir la fixation d'un objectif chiffré, beaucoup d'approches nationales n'ont pas un niveau d'ambition à la hauteur de celui de la directive proposée.

Quant au deuxième élément de la proposition – les exigences procédurales relatives au recrutement et à la règle de priorité – il semble qu'il fasse défaut dans la quasi-totalité des lois, réglementations et politiques adoptées, hormis dans le cas de l'**Islande** et de certains CGE (**Espagne, Royaume-Uni**).

En ce qui concerne le troisième élément – la règle de l'«égale efficacité» dont les pays peuvent se prévaloir au lieu d'imposer les exigences procédurales en question – seuls quelques pays atteindront sans doute la norme requise (**Allemagne, Belgique, Islande, Italie, Norvège**).

Sur une note légèrement plus positive, il apparaît que la moitié environ des pays appliquent déjà, sous une forme ou une autre, une obligation de se conformer ou de s'expliquer comme le prévoit également la proposition de directive; les sociétés sont tenues de faire rapport sur les mesures qu'elles ont prises pour respecter l'objectif et, en cas de non-respect, d'expliquer les raisons de cette situation et ce qu'elles envisagent de faire pour y remédier. Il s'agit cependant davantage, dans certains pays, d'un devoir d'information que d'explication. À cet égard aussi, il y aurait assurément quelque chose à gagner de l'adoption de la directive, étant donné que l'application de l'obligation de rapport serait étendue à tous les pays de l'UE/EEE et que le champ d'application effectif de l'obligation de se conformer ou de s'expliquer devrait être élargi dans certains d'entre eux. Par ailleurs, l'accessibilité et la transparence des politiques d'entreprise et les (non-)réalisations dans ce domaine laissent encore, de façon générale, beaucoup à désirer. Même dans les pays qui appliquent une obligation de rapport et où les sociétés sont tenues de fournir dans leurs rapports annuels une information concernant l'équilibre hommes-femmes au sein de leurs conseils d'administration, ou concernant l'égalité hommes-femmes et la diversité de façon plus générale, lesdites sociétés ne sont pas toujours obligées de mettre ces informations à la disposition du grand public via leurs sites web, comme l'exige la directive proposée.

En ce qui concerne le cinquième élément de la proposition de directive, beaucoup de pays n'ont prévu aucune sanction du tout. On peut affirmer toutefois que ceux qui en ont prévu ont été plus loin que la proposition de directive puisqu'ils établissent des sanctions en cas de non-réalisation de l'objectif fixé. Il serait prématuré, dans certains cas, de vouloir évaluer leur efficacité et leur caractère dissuasif, et plusieurs experts éprouvent des doutes à ce sujet en raison notamment de l'imprécision de l'obligation (cible) imposée et de la nature considérée comme assez hypothétique de l'infliction d'amendes. Il semble en effet que très peu de sanctions aient été infligées à ce jour, et que c'est l'**Italie** qui se montre la plus active en termes de mise en application.

On peut globalement conclure que beaucoup de pays ne satisfont pas encore aux exigences énoncées dans la proposition de directive – ce qui ne signifie pas pour autant que toutes les approches nationales n'y soient pas conformes en termes d'impact et/ou de crédibilité.

### *Impact et crédibilité des approches nationales*

Les facteurs qui affectent l'efficacité des approches nationales, tant publiques que privées, peuvent être d'ordre interne, relevant notamment des limites de la loi ou des codes de gouvernement d'entreprises eux-mêmes en ce qui concerne, par exemple, la «souplesse» des obligations effectivement imposées, leur champ d'application personnel et matériel, les mécanismes de contrôle ou l'absence de sanctions. Mais ils peuvent également être d'ordre externe, relevant notamment du fait que l'État ne montre pas l'exemple, du rôle des médias et de facteurs culturels. En procédant à l'évaluation de la crédibilité des approches nationales et de leur capacité de réaliser l'objectif d'un équilibre hommes-femmes dans les conseils des sociétés qu'elles ont elles-mêmes défini, bon nombre d'experts ont également constaté qu'il est difficile d'établir dans quelle mesure les progrès réalisés peuvent être attribués à l'approche adoptée.

L'analyse montre néanmoins que les approches de réglementation et d'exécution les plus rigoureuses ont permis d'accomplir les avancées les plus rapides pour ce qui est d'atteindre l'objectif fixé ou de s'en approcher (**Belgique, Italie, France, Norvège**) – même si ce constat ne se vérifie pas encore dans tous les pays ayant opté pour ce type d'approche (**Allemagne, Islande**). Les pays qui sont parvenus à mettre en place avec un certain succès des approches d'auto- et de corégulation – la **Suède** plus particulièrement et, dans une certaine mesure, le **Royaume-Uni** et la **Finlande** – ont largement agi «dans l'ombre de la loi», étant donné la menace constante de l'instauration d'une loi au cas où les approches en question n'apporteraient pas le changement escompté. Il est important de souligner également que beaucoup d'experts nationaux ont exprimé des doutes quant à la crédibilité de leur approche nationale et à sa capacité d'engendrer en définitive le changement espéré, y compris dans le cas de pays ayant opté pour des approches publiques contraignantes – la grande exception étant l'experte de **Suède**, qui fait

référence aux trois forces porteuses majeures à l'origine du succès de l'approche suédoise: premièrement, la menace de quotas obligatoires a constitué un véritable moteur pour le secteur des entreprises. Deuxièmement, le fait que l'État montre l'exemple. En 1999, lorsque la proportion de femmes dans les conseils des entreprises publiques était de 28 %, le gouvernement a fixé un objectif de parité avec un objectif intermédiaire de 40 % de femmes en 2003, qui a été réalisé à l'époque. La proportion de femmes atteint aujourd'hui 49 %. Les principaux éléments de ce processus ont été l'obligation de candidats féminins et masculins dans les procédures de nomination; des projets financés par des fonds publics pour accroître la proportion de femmes; et l'obligation de faire rapport régulièrement de la représentation hommes-femmes au sein des conseils des sociétés. Un troisième facteur a été le contexte stratégique incarné par le système suédois de protection sociale, qui repose sur l'égalité des sexes et vise à la mettre en œuvre, entre autres valeurs égalitaires – ce qui se traduit par des règles exhaustives quant au droit au congé parental et aux prestations parentales, par des politiques et mesures législatives destinées à instaurer un partage plus équilibré du congé parental entre hommes et femmes, et par l'existence de structures d'accueil de la petite enfance peu onéreuses et aisément accessibles. L'intérêt intense et de longue date à l'égard de ce thème dans le cadre du débat public, de même qu'à l'égard de la conciliation entre vie familiale et vie professionnelle, a créé un climat dans lequel les devoirs de parents ne sont plus nécessairement incompatibles avec une carrière à haut niveau.

### *Les aspects particulièrement préoccupants*

L'aspect considéré comme particulièrement problématique par un nombre non négligeable d'experts est le manque de transparence et d'objectivité des procédures de sélection ainsi que l'absence de critères de sélection et de règles de priorité. Il en va de même de l'absence de suivi, de mise en application et de sanctions, laquelle ressort clairement en tant que question problématique générale se posant dans tous les États membres de l'UE/EEE et freinant l'accomplissement d'avancées et la réalisation des objectifs et quotas. On peut affirmer dès lors qu'un important déphasage persiste entre la dimension réglementaire et la dimension exécutoire des approches nationales, de nombreux experts mettant en lumière les problèmes encore causés en termes de suivi et de respect des objectifs, lorsqu'il y en a, du fait que les États n'ont spécifiquement prévu ni organismes de contrôle, ni mécanismes de mise en application, ni sanctions.

D'autres facteurs nuisant également à la crédibilité et à l'efficacité future des approches nationales ont encore été cités: la prédominance des hommes dans les réseaux du monde de l'entreprise et sur le marché boursier; la méconnaissance de la législation et des règles applicables; l'effort insuffisant des autorités nationales pour élaborer et faire appliquer des politiques d'accompagnement favorisant un meilleur équilibre entre travail et vie privée et permettant aux femmes de participer plus activement au monde des entreprises; et la (faible) position des femmes sur le marché du travail en général.

## **La voie à suivre**

Ce résumé des conclusions du rapport montre déjà que la proposition de directive relative à un meilleur équilibre hommes-femmes dans les conseils des sociétés cotées offre une valeur ajoutée considérable pour remédier aux lacunes actuelles de la plupart des approches publiques et privées, y compris celles en vigueur dans des pays qui ont opté pour des règles de quota obligatoire. Il est impératif de combler ces lacunes pour stimuler de nouvelles avancées dans tous les États membres. Mais il convient aussi de considérer que la stipulation d'objectifs et de règles de quota, et le contrôle de leur conformité et de leur application, ne sont pas une fin en soi, et que la démarche doit aller plus loin. Les rapports nationaux ont notamment révélé en effet que la sous-représentation des femmes dans les conseils des sociétés n'est que la partie visible de l'iceberg et que des normes sociétales et culturelles traditionnelles persistent largement sous la surface. Il est donc absolument essentiel de remédier aux causes profondes de cette sous-représentation. D'un côté, dans de nombreux États membres d'Europe centrale et orientale et dans les États baltes, elles se traduisent par des stéréotypes sexistes très prononcés et par un positionnement des femmes en tant que gardiennes et soignantes, ce qui expliquerait la faible attention politique accordée

à cette problématique et le nombre très peu élevé de femmes dans les conseils d'administration. Par contre, dans un pays comme la Suède où l'égalité figure parmi les valeurs prioritaires tant en politique qu'au sein de la société, les politiques d'entreprise sont bien davantage susceptibles de s'intéresser à la question, fût-ce parfois dans l'ombre de la loi. Les normes sociétales et culturelles peuvent également avoir, dans un certain nombre de pays, une incidence négative non seulement sur les choix de formation et de carrière des femmes mais aussi sur la mesure dans laquelle un environnement porteur est créé pour les aider à concilier plus aisément travail et charges familiales. Lorsque l'égalité constitue une norme sociétale hautement appréciée, l'environnement est davantage propice à la poursuite par les femmes d'une carrière managériale, non seulement au niveau le plus élevé mais également à des niveaux de direction se situant en-dessous du conseil d'administration.

Il s'avère fondamental de déterminer les implications de ce qui précède pour le rôle de l'UE en la matière: face à cette immense diversité politique, sociétale et culturelle – reflétant elle-même un large éventail d'approches réglementaires et exécutoires, contraignantes et non contraignantes, publiques et privées, quelle serait l'approche européenne appropriée? Dans quelle mesure la loi – en l'occurrence une directive de l'UE – peut-elle servir de mécanisme de pilotage d'un changement dans les États membres de l'UE/EEE? Étant des valeurs fondamentales de l'UE/EEE, ancrées dans les traités européens et dans la charte des droits fondamentaux, l'égalité hommes-femmes, l'égalité des chances et l'intégration de la dimension de genre ne peuvent rester lettres mortes mais doivent être mises en œuvre par les États membres dans la vie quotidienne des citoyens. La directive proposée peut être considérée comme un effort dans ce sens, en particulier pour ce qui concerne les prises de décisions économiques: les femmes devraient bénéficier d'une égalité de chances dans l'exercice de ce pouvoir mais également dans la poursuite de leurs propres ambitions professionnelles. C'est également ce que la directive propose en n'imposant pas d'obligation chiffrée mais en optant principalement pour des obligations procédurales favorisant l'égalité des chances entre les femmes et les hommes dans le processus de recrutement et de nomination des administrateurs. Autrement dit, elle fait preuve de retenue, ce que confirme le fait qu'elle continue aussi d'autoriser les États membres à suivre leur propre approche plutôt que celle proposée par la directive pour autant qu'ils en démontrent l'égale efficacité. Enfin et surtout, la directive proposée pourrait faire utilement contrepoids aux tendances préoccupantes signalées dans le présent rapport, à savoir le renforcement des stéréotypes liés au sexe dans certains États membres, l'accent à nouveau plus marqué sur le rôle des femmes en tant que responsables en première ligne de la garde et des soins, et leur prétendue incompétence pour l'occupation de fonctions de direction. La directive proposée pourrait être l'élément déclencheur attendu pour faire changer les mentalités et renforcer une opinion davantage éclairée au sein de la société quant au fait que l'égalité de représentation des femmes et des hommes aux postes de direction et dans les conseils d'administration ne s'impose pas seulement dans une perspective d'édification d'institutions résilientes et de gestion des risques<sup>5</sup> mais également dans une perspective d'instauration d'une égalité et d'une justice sociale. Les États doivent montrer l'exemple, mais ouvrir et assurer des voies permettant aux femmes de faire carrière en entreprise exige de toutes les parties concernées qu'elles multiplient leurs efforts en vue de créer un environnement porteur, y compris en termes d'équilibre entre vie professionnelle et vie privée, d'éducation et d'autres politiques qui continuent d'entraver la participation des femmes au marché du travail et leur promotion aux postes de direction.

5 Comme le reconnaît déjà la directive 2013/36 concernant l'accès à l'activité des établissements de crédit et la surveillance potentielle des établissements de crédit et des entreprises d'investissement; *ibidem* note 3.

# Zusammenfassung

## Einleitung und Forschungsdesign

Dieser Bericht bietet einen Überblick über die regulatorischen Ansätze und politischen Maßnahmen in **28 EU-Mitgliedstaaten** und drei EWR-Ländern (**Island, Liechtenstein und Norwegen**) zur Förderung einer ausgewogenen Vertretung von Frauen und Männern in Vorständen und Aufsichtsräten sowie über die Mechanismen, mit denen diese Länder die Einhaltung der gesetzlichen Vorgaben kontrollieren und durchsetzen. Sofern in den Ländern in Absprache mit bzw. von der Privatwirtschaft Ansätze zur Ko- oder Selbstregulierung entwickelt wurden, werden auch diese berücksichtigt. Diese öffentlichen und privaten Ansätze der Regulierung und Durchsetzung werden vor dem Hintergrund der Ziele und Verpflichtungen analysiert, die im Entwurf der Europäischen Kommission zur Förderung einer ausgewogenen Vertretung von Frauen und Männern in Leitungsorganen von Unternehmen (im Folgenden AVL-Richtlinienentwurf) festgelegt wurden. Dabei stellt dieser Bericht vor allem die folgenden Fragen: Wie ist der Sachstand in den Mitgliedstaaten und EWR-Ländern; sind die gewählten Ansätze geeignet, um die in der Richtlinie vorgeschlagenen Ziele und Normen zu erreichen, und welche Faktoren begünstigen bzw. behindern dies?

Zur Beantwortung dieser Fragen und zur Bewertung der öffentlichen und privaten Regulierungs- und Durchsetzungsmaßnahmen in den Mitgliedstaaten wurden die wichtigsten Bestimmungen und Verpflichtungen der AVL-Richtlinie in der Fassung nach der luxemburgischen Ratsvorsitz als Maßstab genommen.<sup>1</sup> Die relevanten Daten stammen in wesentlichen Teilen aus Länderberichten auf der Grundlage eines Fragebogens, der sich an den Hauptpunkten der AVL-Richtlinie orientiert und Mitgliedern des Europäischen Netzwerks von Rechtsexpertinnen und Rechtsexperten auf dem Gebiet der Gleichstellung von Frauen und Männern aus den 28 Mitgliedstaaten und drei EWR-Ländern vorgelegt wurde.<sup>2</sup> Dabei ist eine vorläufige wichtige Beobachtung, dass zahlreiche Länder bis heute keine öffentlichen oder privaten Ansätze zur Regulierung und Kontrolle einer ausgewogenen Vertretung von Frauen und Männern in Leitungsorganen börsennotierter Gesellschaften entwickelt haben und bestenfalls auf „weiche“ Maßnahmen setzen. Dazu gehören **Kroatien, Zypern, die Tschechische Republik, Ungarn, Lettland, Liechtenstein, Litauen, Malta** und **die Slowakei**.

Zu Beginn dieses Berichts werden Inhalt und Umfang der gesetzlichen Verpflichtungen skizziert, die mit der AVL-Richtlinie eingeführt werden sollen, sowie deren Verhältnis zum bereits geltenden Gleichstellungsrecht der EU und insbesondere zur Rechtsprechung des EuGH über positive Maßnahmen (Kapitel 2). Anschließend folgt ein Überblick über die unterschiedlichen staatlichen Regulierungsmaßnahmen, mit denen die untersuchten Staaten ein ausgewogeneres Verhältnis von Frauen und Männern in den Leitungsorganen von Unternehmen gewährleisten wollen. Diese reichen von rechtsverbindlichen Quoten bis zu „weichen“ Zielvorgaben und bloßen politischen Maßnahmen (Kapitel 3). Ferner werden die unterschiedlichen Kontroll- und Durchsetzungsmechanismen in den einzelnen Staaten erläutert, bei denen ebenfalls eine große Bandbreite von Regeln, Sanktionen und Verfahren festzustellen ist (Kapitel 4). Im nächsten Abschnitt werden die Ansätze zur Koregulierung und Selbstregulierung untersucht, die in einigen Staaten entwickelt wurden. Dabei wird auch analysiert, mit welchen Maßnahmen die Wirtschaft selbst versucht, das Verhältnis von Frauen und Männern in Leitungsorganen ausgewogener zu machen, wobei sie mehr oder weniger

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1 Der Entwurf für eine AVL-Richtlinie wurde bereits zweimal überarbeitet; die aktuelle Fassung ist die der maltesischen Ratspräsidentschaft vom 31. Mai 2017. Siehe Anhang 2 dieses Berichts.

2 Siehe Anhang 1 dieses Berichts. Bei der Beantwortung des Fragebogens haben die GleichstellungsexpertInnen den Stand vom 5. Juni 2017 zugrunde gelegt. Das heißt, die Datenerhebung war am 5. Juni 2017 abgeschlossen. In Österreich, Portugal und Spanien gab es seitdem wichtige aktuelle Entwicklungen zur Gewährleistung einer ausgewogenen Vertretung von Frauen und Männern in Leitungsorganen von Unternehmen. Diese werden in den Kurzmeldungen zu Österreich, Portugal und Spanien in den Anhängen 4, 5 und 6 dieses Berichts erläutert.



stark mit staatlichen Einrichtungen kooperiert (Kapitel 5). Auf dieser Grundlage bietet der Bericht eine allgemeine vergleichende Bewertung des Sachstands. Dabei werden insbesondere die Ursachen erläutert, die von den nationalen ExpertInnen in Bezug auf die länderspezifischen Ansätze, deren Wirksamkeit und die – bestehende oder fehlende – Übereinstimmung mit dem AVL-Richtlinienentwurf genannt wurden. Außerdem werden die wichtigsten Hindernisse analysiert und Ideen für die beste Vorgehensweise auf nationaler und europäischer Ebene gesammelt (Kapitel 6). Während diese Bewertung vorwiegend auf der Einschätzung der nationalen ExpertInnen beruht, schließt der Bericht mit den wichtigsten Schlussfolgerungen, die seine Autoren aus dieser umfassenden Analyse und Bewertung gezogen haben (Kapitel 7).

## Der AVL-Richtlinienentwurf (Kapitel 2)

Der AVL-Richtlinienentwurf enthält fünf wichtige Elemente. Erstens aktuelle quantitative Zielvorgaben (nicht Quoten), zweitens Mittel, um diese Vorgaben zu erreichen, drittens eine Möglichkeit der Mitgliedstaaten erstmalig oder weiterhin „ebenso wirksame“ Maßnahmen zu ergreifen, d. h. die sogenannte Flexibilitätsklausel, viertens Kontroll- und Meldepflichten und fünftens Durchsetzungsmaßnahmen.

Zum ersten Element enthält Artikel 4 Absatz 1 eine numerische Zielvorgabe. Nach dem derzeitigen Wortlaut des Entwurfs müssen „die Mitgliedstaaten dafür Sorge tragen, dass die börsennotierten Gesellschaften versuchen, bis zum 31. Dezember 2022 (statt 2020) die folgenden Zielvorgaben zu erreichen: das unterrepräsentierte Geschlecht stellt mindestens 40 % der nicht geschäftsführenden Direktoren/Aufsichtsratsmitglieder oder mindestens 33 % aller Unternehmensleitungsstellen, wozu die Stellen der geschäftsführenden und der nicht geschäftsführenden Direktoren/Aufsichtsratsmitglieder zählen, sind mit Vertretern des unterrepräsentierten Geschlechts besetzt.“ Außerdem müssen die Mitgliedstaaten dafür Sorge tragen, dass börsennotierte Gesellschaften, die von den eben genannten Zielvorgaben ausgenommen sind, individuelle quantitative Zielvorgaben für eine ausgewogene Vertretung beider Geschlechter unter den geschäftsführenden Direktoren/Aufsichtsratsmitgliedern festlegen und versuchen, diese Zielvorgaben spätestens am 31. Dezember 2022 zu erfüllen (Artikel 4c Absatz 1). Gemäß Artikel 3 gilt die Richtlinie nicht für kleine und mittlere Unternehmen, d. h. Unternehmen mit weniger als 250 Beschäftigten und einem Jahresumsatz von bis zu 50 Millionen Euro bzw. einer Jahresbilanz von bis zu 43 Millionen Euro.

In Bezug auf das zweite Element – die Mittel zur Erreichung der Zielvorgaben – enthält Artikel 4a vier wichtige Verfahrensregeln für die Bestellung oder Wahl von Kandidaten. Insbesondere müssen börsennotierte Gesellschaften, in denen das unterrepräsentierte Geschlecht weniger als 40 % der nicht geschäftsführenden Direktoren/Aufsichtsratsmitglieder stellt, die Kandidaten für die zu besetzenden Stellen auf Grundlage eines Vergleichs ihrer Qualifikationen nach vorab festgelegten, klaren, neutral formulierten und eindeutigen Kriterien auswählen. Dabei gilt der Grundsatz „Mittragen oder Begründen“, nach dem Unternehmen, die die Zielvorgabe von 40 % nicht erreichen, diese Verfahrensregeln einhalten und die Maßnahmen begründen müssen, mit denen sie das Erreichen der Zielvorgabe gewährleisten wollen. Außerdem müssen die Mitgliedstaaten dafür Sorge tragen, dass die betroffenen Gesellschaften bei der Auswahl der Kandidaten für die durch Bestellung oder Wahl zu besetzenden Stellen dem Kandidaten des unterrepräsentierten Geschlechts Vorrang einräumen, wenn es zwei Kandidaten gibt, die hinsichtlich Eignung, Befähigung und fachlicher Leistung über die gleiche Qualifikation verfügen, es sei denn, eine objektive Beurteilung, bei der alle die einzelnen Kandidaten betreffenden Kriterien berücksichtigt werden, fällt zugunsten des Kandidaten des anderen Geschlechts aus. Das heißt, in derartigen Fällen gilt eine Vorrangregel. Außerdem müssen Unternehmen einen Kandidaten, der in Betracht gezogen wurde, auf dessen Antrag über die Qualifikationskriterien für die Auswahl der Kandidaten, den objektiven Vergleich der Kandidaten anhand dieser Kriterien und gegebenenfalls über die Erwägungen, die den Ausschlag zugunsten des Kandidaten des anderen Geschlechts gegeben haben, informieren. Schließlich müssen die Mitgliedstaaten mit Hilfe geeigneter Maßnahmen sicherstellen, dass die börsennotierte Gesellschaft verpflichtet ist nachzuweisen, dass nicht gegen die Vorrangregel verstoßen wurde, wenn ein Kandidat des unterrepräsentierten Geschlechts Belege dafür hat, dass er die gleiche Qualifikation hat wie der

Kandidat des anderen Geschlechts, der für den durch Bestellung oder Wahl zu besetzenden Posten ausgewählt wurde. Dabei ist zu beachten, dass die Vorschriften zum Besetzungsverfahren, die Geltung einer Vorrangregel, die keinen absoluten Vorrang gewährt, sondern mit einer Härteklausel verknüpft ist, sowie die Verlagerung der Beweislast hin zum Arbeitgeber der ständigen Rechtsprechung des EuGH entspricht und im Grunde als deren Kodifizierung gesehen werden kann.

Allerdings wird es den Mitgliedstaaten als drittes Element gestattet, die Verfahrensvorschriften der Richtlinie auszusetzen, sofern sie bereits Maßnahmen mit ähnlicher Wirkung ergriffen oder Fortschritte erzielt haben, die den in der Richtlinie festgelegten quantitativen Zielvorgaben nahe kommen. Um Flexibilität mit einem Höchstmaß an Rechtssicherheit zu verbinden, werden in Artikel 4b daher drei Szenarien definiert, die rechtlich die „gleiche Wirksamkeit“ gewährleisten, jedoch nicht als abschließende Aufzählung gedacht sind.

Viertens wird mit Artikel 5 des Richtlinienentwurfs eine Berichterstattungspflicht eingeführt, nach der die Mitgliedstaaten von den börsennotierten Gesellschaften verlangen, den zuständigen Behörden jährlich bestimmte Informationen vorzulegen. Zu diesen Informationen gehören Angaben über die Vertretung von Frauen und Männern in ihren Leitungsorganen, und zwar getrennt nach nicht geschäftsführenden Direktoren/Aufsichtsratsmitgliedern und geschäftsführenden Direktoren/Aufsichtsratsmitgliedern, sowie über die Maßnahmen die sie ergriffen haben, um die Zielvorgaben des Artikels 4 Absatz 1 und des Artikels 4c zu erreichen. Werden diese Zielvorgaben nicht erreicht, müssen sie die Gründe hierfür nennen und darlegen, welche Maßnahmen die Gesellschaft bereits ergriffen hat und/oder zu ergreifen gedenkt, um die Zielvorgaben zu erfüllen. Das heißt, mit der Richtlinie soll der Grundsatz „Mittragen oder Begründen“ durchgesetzt werden. Die Mitgliedstaaten müssen die Unternehmen außerdem verpflichten, diese Informationen in geeigneter und leicht zugänglicher Form auf ihren Webseiten zu veröffentlichen. Dabei ist zu berücksichtigen, dass es bereits zwei EU-Richtlinien gibt, mit denen Unternehmen bestimmte Berichterstattungspflichten auferlegt werden, die über rein finanzielle Fragen hinausgehen und insbesondere ihre Gleichstellungs- und Diversitätspolitik betreffen. Dabei handelt es sich um die Richtlinie 2013/36/EU des Europäischen Parlaments und des Rates vom 26. Juni 2013 über den Zugang zur Tätigkeit von Kreditinstituten und die Beaufsichtigung von Kreditinstituten und Wertpapierfirmen und die Richtlinie 2014/95/EU im Hinblick auf die Angabe nichtfinanzieller und die Diversität betreffender Informationen.<sup>3</sup>

Schließlich müssen die Mitgliedstaaten gemäß dem AVL-Richtlinienentwurf die Verfahrensvorschriften und die Berichterstattungspflichten mit Hilfe von wirksamen, abschreckenden und verhältnismäßigen nationalen Bestimmungen durchsetzen. Das heißt, mit dem AVL-Richtlinienentwurf werden keine Sanktionen für börsennotierte Unternehmen eingeführt, die die in der Richtlinie genannten Zielvorgaben nicht erfüllen. Die Pflicht zu wirksamen, abschreckenden und verhältnismäßigen Strafmaßnahmen entspricht ebenfalls der langjährigen Rechtsprechung des EuGH.

## Staatliche Regulierung und Politik für ein ausgewogenes Verhältnis von Frauen und Männern in Leitungsorganen (Kapitel 3)

Bei den öffentlichen Regulierungsansätzen zur Förderung eines ausgewogenen Verhältnisses von Frauen und Männern in Vorständen und Aufsichtsräten gibt es gewaltige Unterschiede zwischen den einzelnen Mitgliedstaaten. Sofern überhaupt entsprechende Vorschriften eingeführt wurden, enthalten sie in einigen Fällen bloße Zielvorgaben oder die Pflicht, nach „besten Kräften“ für ein ausgewogenes

3 Richtlinie 2013/36/EU des Europäischen Parlaments und des Rates vom 26. Juni 2013 über den Zugang zur Tätigkeit von Kreditinstituten und die Beaufsichtigung von Kreditinstituten und Wertpapierfirmen, zur Änderung der Richtlinie 2002/87/EG und zur Aufhebung der Richtlinien 2006/48/EG und 2006/49/EG, ABl. 27.6.2013, L 176/338, und Richtlinie 2014/95/EU des Europäischen Parlaments und des Rates vom 22. Oktober 2014 zur Änderung der Richtlinie 2013/34/EU im Hinblick auf die Angabe nichtfinanzieller und die Diversität betreffender Informationen durch bestimmte große Unternehmen und Gruppen, ABl. 2014, L 330/1.



Verhältnis zu sorgen, jedoch ohne konkrete rechtliche Verpflichtungen oder Sanktionen festzulegen. Diese Maßnahmen bezeichnen wir als weiche öffentlich-regulatorische Ansätze. Andere Staaten haben verbindliche gesetzliche Quoten eingeführt, wobei die Nichterfüllung dieser Quoten nicht in jedem Fall mit Sanktionen verbunden ist. Diese Maßnahmen bezeichnen wir als harte öffentlich-regulatorische Ansätze. In einigen Staaten werden diese Ansätze durch politische Maßnahmen, wie z.B. Aktionspläne ergänzt, in anderen Staaten wurden nur politische Maßnahmen ergriffen. So verfügen **Kroatien, Zypern, die Tschechische Republik, Ungarn, Lettland, Liechtenstein, Litauen, Malta** und **die Slowakei** über keinen öffentlich-regulatorischen Ansatz für ein ausgewogeneres Verhältnis von Frauen und Männern in den Leitungsorganen von Unternehmen, wobei **Kroatien, die Tschechische Republik, Malta und die Slowakei** jedoch politische Maßnahmen ergriffen haben. In zwei Ländern wurde sogar vor Kurzem das Unternehmensrecht geändert, ohne die Vertretung von Frauen und Männern in Leitungsorganen in die Gesetze aufzunehmen oder überhaupt nur zu diskutieren (**Ungarn, Malta**). In anderen Staaten wurden Bestimmungen zum Verhältnis von Frauen und Männern in Leitungsorganen in den Corporate Governance Kodex aufgenommen, siehe Kapitel 5.

### *Umfang und Ziele*

Einige Staaten haben harte öffentlich-regulatorische Ansätze nur für staatliche Unternehmen eingeführt (**Griechenland, Luxemburg und Slowenien**). In anderen Staaten gilt für staatliche Unternehmen ein harter öffentlich-regulatorischer Ansatz und für private Unternehmen ein weicher Ansatz (**Finnland**). Weiche regulatorische Ansätze für private Unternehmen gelten auch in **Österreich, Bulgarien, Dänemark, den Niederlanden, Portugal und Spanien**. Sechs Staaten haben gesetzliche Quoten eingeführt, mit denen ein ausgewogeneres Verhältnis von Frauen und Männern in Vorständen und Aufsichtsräten erreicht werden soll, sowie Sanktionen bei Verstößen gegen die gesetzlichen Verpflichtungen. Der erste Staat, der diesen Ansatz verfolgt hat, war **Norwegen**, gefolgt von **Island, Belgien, Frankreich, Italien und Deutschland**. **Rumänien** hat zwar keine verbindliche Quote festgelegt, verpflichtet jedoch juristische Personen, deren Tätigkeit ihrer eigenen Satzung oder Verordnung unterliegt, „eine ausgewogene Mitwirkung von Frauen und Männern an Leitungs- und Entscheidungsprozessen zu fördern und zu unterstützen“ und dazu „die notwendigen Maßnahmen zu ergreifen“. Die einschlägigen Bestimmungen sind in manchen Staaten im Gleichstellungsrecht zu finden, in anderen im Unternehmensrecht, oder in beiden, zum Beispiel in **Dänemark**, und manchmal im Arbeitsrecht.

Wie bereits erwähnt gilt der AVL-Richtlinienentwurf nur für börsennotierte Unternehmen. Zwar haben die meisten Mitgliedstaaten, die verbindliche Quoten eingeführt haben, den Geltungsbereich tatsächlich auf börsennotierte Unternehmen beschränkt (**Belgien, Frankreich, Deutschland und Italien**), jedoch ist dies in **Norwegen und Island** nicht der Fall. Allerdings gilt die Quote in Norwegen nur für Aktiengesellschaften. In manchen Mitgliedstaaten mit einem weichen öffentlich-regulatorischen Ansatz gilt dieser nur für börsennotierte Unternehmen (**Österreich, Finnland und Portugal**), in anderen für „größere“ Unternehmen (**Bulgarien, Dänemark, Niederlande und Spanien**). Ziel der überarbeiteten Fassung des Richtlinienentwurfs ist eine ausgewogenere Vertretung von Frauen und Männern unter Direktoren bzw. Aufsichtsratsmitgliedern, wobei sowohl geschäftsführende als auch nicht geschäftsführende Direktoren und Aufsichtsratsmitglieder gemeint sind. In manchen Mitgliedstaaten gelten die einschlägigen Bestimmungen nur für nicht geschäftsführende Direktoren/Aufsichtsratsmitglieder (**Frankreich und Deutschland**), in anderen für beide Kategorien (**Belgien und Italien**). **Norwegen und Island** haben ein monistisches System der Unternehmensführung, in dem nicht zwischen geschäftsführenden und nicht geschäftsführenden Direktoren unterschieden wird. Von den Staaten, die einen weichen regulatorischen Ansatz verfolgen, gelten die einschlägigen Rechtsvorschriften in **Österreich, Bulgarien, den Niederlanden und Portugal** sowohl für geschäftsführende als auch für nicht geschäftsführende Direktoren/Aufsichtsratsmitglieder, in **Finnland und Spanien** nur für nicht geschäftsführende Direktoren/Aufsichtsratsmitglieder und in **Dänemark** regeln die Bestimmungen nur die Zusammensetzung des Vorstands.

Wenn Mitgliedstaaten im Rahmen eines öffentlich regulativen Ansatzes gesetzliche Quoten eingeführt haben, die nicht auf staatliche Unternehmen beschränkt sind, gelten unterschiedliche Quoten. In **Norwegen** gilt kein konkreter Prozentsatz, sondern die Quote hängt von der Anzahl der Mitglieder im jeweiligen Leitungsorgan ab. Wenn das Leitungsorgan aus mehr als neun Mitgliedern besteht, muss jedes Geschlecht mindestens 40 % der Mitglieder stellen. In **Italien** und **Frankreich** werden die Quoten nach und nach angehoben, von 20 % auf 33 % in **Italien** und auf 40 % in **Frankreich**. In **Deutschland** liegt die Quote bei 30 %, in **Belgien** bei einem Drittel und in **Island** bei 40 %. Weiche Zielvorgaben reichen von 30 % in **den Niederlanden** und **Portugal** bis zu 40 % in **Bulgarien, Finnland und Spanien**. Nur in **Dänemark, Finnland und Deutschland** wurden Gesetzesvorschriften eingeführt, die Unternehmen zur Festlegung individueller quantitativer Zielvorgaben in Bezug auf die ausgewogene Vertretung von Frauen und Männern in ihren Leitungsorganen verpflichten. Insgesamt gesehen übernehmen nur wenige Staaten die im AVL-Richtlinienentwurf angestrebten ehrgeizigen Zielvorgaben und noch weniger gewährleisten die Erreichung dieser Zielvorgaben mit Hilfe verbindlicher Rechtsvorschriften.

Auch können nur sehr wenige Staaten (**Belgien, Island, Italien, Deutschland und Norwegen**) die Flexibilitätsklausel bzw. die Klausel der „gleichen Wirksamkeit“ in Anspruch nehmen so wie sie im Richtlinienentwurf enthalten ist, weil ihr nationales Recht den genannten Optionen entspricht.

#### *Verfahrensvorschriften und Vorrangregeln bei der Besetzung von Positionen*

Unabhängig vom jeweiligen regulatorischen Ansatz – weich oder hart – haben nur die wenigsten Staaten Verfahrensvorschriften festgelegt, die außerdem eher allgemein gehalten sind (**Deutschland, Italien, Frankreich, Portugal, die Niederlande**). Besonders bemerkenswert ist die Tatsache, dass nur der **isländische** Experte über die Verwendung einer Vorrangregel berichtet. In dieser Hinsicht haben die meisten Länder bisher nicht die Verfahrensvorschriften eingeführt, die in der AVL-Richtlinie vorgesehen sind.

#### *Maßnahmen unterhalb der obersten Leitungsorgane*

Nur wenige Staaten haben gesetzliche Vorschriften erlassen, die auch für das Management unterhalb der obersten Leitungsorgane gelten (**Österreich, Dänemark und Deutschland**). Nach **deutschem** Recht beispielsweise müssen alle börsennotierten und voll mitbestimmungspflichtigen Unternehmen auch für die erste und zweite Führungsebene unterhalb von Vorstand und Aufsichtsrat individuelle quantitative Zielvorgaben (Ziel-Frauenquoten) festlegen. In andere Staaten gibt es andere Rechtsvorschriften oder politische Maßnahmen, die ebenfalls die Stellung des unterrepräsentierten Geschlechts auf unteren Führungsebenen betreffen, z. B. **Island, die Niederlande, Portugal und Großbritannien**.

## Öffentliche Kontrolle und Durchsetzung (Kapitel 4)

#### *Berichterstattungspflichten*

Nach unseren Daten gibt es nur in rund der Hälfte der untersuchten Staaten irgendeine Form der Berichterstattungspflicht über die Zusammensetzung der obersten Leitungsorgane: **Österreich, Belgien, Bulgarien, Dänemark, Finnland, Frankreich, Deutschland, Island, Irland, Italien, die Niederlande, Norwegen, Polen und Großbritannien**. Rechtsgrundlage und Umfang dieser Verpflichtung unterscheiden sich stark und hängen auch davon ab, ob der betreffende Staat die Förderung einer ausgewogenen Vertretung von Frauen und Männern in Leitungsorganen gesetzlich verankert hat oder nicht. In einigen Ländern müssen die Unternehmen zwar bestimmte Informationen bereitstellen, diese jedoch nicht erklären. Konkrete Berichterstattungspflichten in Bezug auf eine verbindliche Quote oder eine weiche Zielvorgabe wurden unter anderem in **Belgien, Frankreich, Deutschland, Griechenland, Island, Italien und den Niederlanden** eingeführt.

Die Transparenz und Verfügbarkeit dieser Informationen und Berichte lässt jedoch noch viel zu wünschen übrig: zwar müssen diese Informationen in vielen Ländern im Jahresbericht bereitgestellt werden, es bleibt jedoch den Unternehmen überlassen, ob sie die Informationen auch auf ihren Webseiten veröffentlichen oder nicht. Nur in **Bulgarien, Deutschland, Norwegen und Großbritannien** ist dies gesetzlich vorgeschrieben.

### *Sanktionen*

Die Mitgliedstaaten müssen die Erfüllung der Zielvorgaben mit Hilfe von wirksamen, abschreckenden und verhältnismäßigen Sanktionen durchsetzen. Tatsächlich zeigen die Daten, dass die Staaten, die eine rechtsverbindliche Quote in irgendeiner Form eingeführt haben, Sanktionen für den Fall vorsehen, dass Positionen rechtswidrig besetzt oder die Zielvorgaben nicht erfüllt werden (**Belgien, Frankreich, Deutschland, Griechenland, Island, Italien, Norwegen und Rumänien**). Allerdings gibt es bei den Sanktionen eine große Bandbreite: Erstellung von schwarzen und weißen Listen (**Schweden**), das öffentliche Bloßstellen von Unternehmen (**Frankreich**), Ungültigkeit/Annullierung von Ernennungen (**Belgien, Frankreich, Deutschland**), Annullierung von Entscheidungen des Leitungsorgans (**Griechenland**), Entzug von Leistungen für Mitglieder des Leitungsorgans (**Belgien, Frankreich**), Weigerung, ein Unternehmen bzw. ein Leitungsorgan zu registrieren (**Island, Norwegen**), Auflösung des Unternehmens (**Italien, Norwegen**), finanzielle Sanktionen (**Italien, Deutschland, Rumänien**) und Ansprüche auf Schmerzensgeld (**Griechenland**). Es kommt jedoch nicht nur die Peitsche zum Einsatz, es wurden auch einige interessante Ansätze identifiziert, die Unternehmen mit dem Zuckerbrot zu Wohlverhalten anregen: Auszeichnungen, Steuervorteile, Berücksichtigung bei öffentlichen Beschaffungsverfahren und eine hohe Anzahl von Frauen in Leitungsgremien als Vorzugskriterium für staatliche Förderprogramme (**Portugal**). Zu den bewährten Verfahren gehören außerdem private Initiativen zur Erstellung von schwarzen und weißen Listen (**Schweden**).

## Ansätze zur Ko- und Selbstregulierung (Kapitel 5)

In manchen Staaten kann ein schrittweiser Wechsel von der Selbstregulierung zu weichen und dann zu härteren Formen der öffentlichen Regulierung festgestellt werden. Andere Länder bevorzugen weiterhin einen Ansatz der Selbst- oder Koregulierung oder überlassen das Thema ganz der freien Wirtschaft. Um ein vollständiges Bild zu erhalten, werden in diesem Bericht auch Maßnahmen im Bereich der Selbst- oder Koregulierung berücksichtigt, mit denen das Problem der Unterrepräsentation von Frauen in Vorständen und Aufsichtsräten angegangen werden soll. Als Koregulierung werden hybride öffentlich-private Maßnahmen bezeichnet, bei denen Normen in Kooperation zwischen öffentlichen und privaten Akteuren festgelegt, überwacht und/oder durchgesetzt werden. Als Selbstregulierung bezeichnen wir Ansätze, bei denen die Regulierung und Durchsetzung ohne Beteiligung staatlicher Stellen stattfindet. Corporate Governance Kodizes (im Folgenden CGK) sind hierbei die wichtigsten Instrumente. Sie werden entweder von privaten Akteuren oder (häufiger) von öffentlichen Stellen und privaten Akteuren gemeinsam erstellt.

### *Corporate Governance Kodizes*

In rund einem Drittel der Staaten enthalten die CGK Bestimmungen zum Verhältnis von Frauen und Männern in den Leitungsorganen von Unternehmen (**Österreich, Belgien, Deutschland, Finnland, Frankreich, Irland, Polen, Slowenien, Spanien, Schweden und Großbritannien**). Einige Kodizes verpflichten oder ermutigen Unternehmen, selbst individuelle quantitative Zielvorgaben für eine ausgewogene Vertretung von Frauen und Männern in Vorstand und Aufsichtsrat festzulegen. Dies gilt insbesondere für **Dänemark, Finnland, Irland, Deutschland und Großbritannien**. Beim persönlichen Geltungsbereich von CGKs gibt es große Unterschiede. In manchen Ländern gelten sie nur für den Aufsichtsrat (**Slowenien, Spanien**), in anderen für beide Leitungsorgane (**Österreich, Belgien, Irland, Finnland, Frankreich, Polen, Schweden**). In **Großbritannien** sind sie speziell auf Vorstände ausgerichtet. In allen Ländern gelten sie ausschließlich für börsennotierte Unternehmen (auch wenn andere Unternehmen sie freiwillig umsetzen können), unterscheiden sich aber in der genauen Definition der betroffenen börsennotierten Unternehmen.

Die meisten Kodizes geben keine numerischen Ziele vor und manche nicht einmal das Ziel einer ausgewogenen Vertretung von Frauen und Männern in den Leitungsorganen von Unternehmen. Ausnahmen, bei denen klare Ziele genannt werden, gibt es in **Frankreich, Spanien, Großbritannien** und seit Kurzem auch in **Schweden**; in **Frankreich** 40 % bis 2016, in **Schweden** 40 % bis 2020, in **Großbritannien** 33 % bis 2020 und in **Spanien** 30 % ebenfalls bis 2020. Interessanterweise legen die CGK größeren Wert auf konkrete Vorschriften für Einstellungs- und Auswahlverfahren, die bei der öffentlichen Regulierung meist fehlen. Besonders interessant sind hier die Vorschriften im **britischen** CGK, nach denen das Besetzungsverfahren formal, präzise und transparent und die Auswahl „nach Leistung gemäß objektiven Kriterien und unter angemessener Berücksichtigung der Vorteile eines vielfältigen Leitungsorgans, auch in Bezug auf das Geschlecht“ erfolgen sollte. In **Spanien** muss das Auswahlverfahren für nicht geschäftsführende Mitglieder von Leitungsorganen konkret und nachprüfbar sein und gewährleisten, dass die Kandidaten anhand einer Analyse der Bedürfnisse des Leitungsorgans vorgeschlagen werden, die vom Nationalen Börsenausschuss überwacht wird.

In Bezug auf die Überwachung und Durchsetzung enthalten die meisten CGK eine Bestimmung, dass die Vorgaben erfüllt und eine Nichterfüllung ggf. erklärt werden muss, wobei der Umfang der konkreten Verpflichtungen nicht immer gleich ist. Das interessanteste Ergebnis der vergleichenden Analyse ist jedoch die große Bandbreite der Anreize und Strafmechanismen, mit denen Unternehmen zur Einhaltung der Corporate Governance Kodizes und anderen öffentlich-privaten Initiativen und zur Förderung einer ausgewogenen Vertretung von Frauen und Männern angeregt werden. In manchen Ländern werden Unternehmen öffentlich bloßgestellt (**Frankreich, Schweden**), in anderen gibt es spezielle Vergünstigungen für Unternehmen, die bewährte Verfahren nutzen, z. B. verminderte Abwicklungsgebühren (**Slowenien**) und die Veröffentlichung vorbildlicher Unternehmen (**Schweden, Großbritannien**).

## Schlussfolgerungen und Bewertung (Kapitel 6 und 7)

### *Erklärungen für die Unterschiede zwischen den nationalen Ansätzen*

Die Analyse in diesem Bericht zeigt, dass sich die Maßnahmen zur Regulierung und Durchsetzung einer ausgewogenen Vertretung von Frauen und Männern in den Leitungsorganen von Unternehmen zwischen den einzelnen EU-Mitgliedstaaten und EWR-Ländern stark unterscheiden und keine zwei Ansätze gleich sind. Dasselbe gilt für die erzielten Ergebnisse, wobei sich manche Ansätze als wirksamer erwiesen haben als andere. Dies wirft die Frage auf, welche politischen Argumente bestimmen, ob regulatorische Maßnahmen ergriffen werden und, wenn ja, in welcher Form, und welche anderen sozialen, kulturellen, sozio-ökonomischen oder verfassungsrechtlichen Aspekte beim Verständnis und Ausgleich unterschiedlicher Rechte eine Rolle spielen. Dabei ergibt sich das Bild, dass eine ausgewogene Vertretung von Frauen und Männern in den Leitungsorganen von Unternehmen in zahlreichen Ländern eine geringe politische Priorität hat und auch die Einführung einer verbindlichen Quote in vielen Ländern auf politischen und gesellschaftlichen Widerstand stößt. Zu den vielen Faktoren, die diesen Widerstand erklären, gehört der Schutz der unternehmerischen Autonomie und der Eigentumsrechte (**Österreich, Luxemburg, Schweden**), ein recht enges und formales Verständnis von Gleichstellung (**Bulgarien, Kroatien, Slowakei**), Besonderheiten des betreffenden Marktes (**Zypern, Estland, Luxemburg, Finnland, Malta, Slowakei**) und historische Gründe (Sozialismus/Kommunismus) (**Ungarn, Rumänien, Slowakei**). Mehrere ExpertInnen verweisen auch auf kulturelle Faktoren, die Maßnahmen zur Förderung einer ausgewogenen Vertretung von Männern und Frauen in Leitungsorganen verhindern (**Kroatien, Zypern, Tschechische Republik, Estland, Ungarn, Lettland,<sup>4</sup> Malta, Polen, Rumänien, Slowakei, Slowenien**). Zu den Faktoren, die verhindern, dass Gesellschaft und Familie Frauen in hohen Führungspositionen akzeptieren, gehören patriarchalische gesellschaftliche Strukturen und traditionelle Sichtweisen, Geschlechterrollen

4 Society Integration Fund, „Studie zur Situation von Frauen und Männern in den großen Unternehmen Lettlands“, Riga, 2014, Seite 94, in lettischer Sprache verfügbar unter [http://www.sif.gov.lv/images/files/SIF/progress-lidzt/petijums/precizets\\_zinojums\\_final.pdf](http://www.sif.gov.lv/images/files/SIF/progress-lidzt/petijums/precizets_zinojums_final.pdf) (zuletzt aufgerufen am 31. Mai 2017).

und Stereotypen, die Frauen eine fürsorgende Rolle im Privatbereich zuweisen oder sie in ihren Bildungs- und Berufsentscheidungen einschränken. Zu den häufigen Vorurteilen gehört außerdem, dass Frauen weniger wichtig, nicht „zäh“ oder kompetent genug, schlechter ausgebildet, aber auch weniger flexibel sind und nicht mit Krisen umgehen können. In der Folge haben zahlreiche Länder bis heute keine öffentlichen und/oder privaten Ansätze zur Regulierung und Kontrolle einer ausgewogenen Vertretung von Frauen und Männern in Leitungsorganen börsennotierter Gesellschaften entwickelt und setzen bestenfalls auf „weiche“ Maßnahmen. Dazu gehören **Kroatien, Zypern, die Tschechische Republik, Ungarn, Lettland, Liechtenstein, Litauen, Malta und die Slowakei**. Entsprechend ist der Frauenanteil in den Leitungsorganen von Unternehmen in diesen Ländern auch besonders gering.

### *Die Rolle von Frauenorganisationen, weiblichen Führungspersönlichkeiten und den Medien*

Auch bei der Frage, wie Frauenorganisationen und Frauen in Führungspositionen die Debatte über die ausgewogene Zusammensetzung von Leitungsorganen und insbesondere die Einführung einer rechtsverbindlichen Quote beeinflussen, zeichnen die Länderberichte ein interessantes und facettenreiches Bild. Nur in relativ wenigen Ländern unterstützen diese Akteure eine Quote (**Luxemburg, Malta, Island**). In einigen Ländern haben sich weibliche Führungspersönlichkeiten (insbesondere in der Politik) gegen eine Frauenquote ausgesprochen, z. B. in **Deutschland und Estland**. Viele Frauen tun dies, weil die wenigen weiblichen Führungspersönlichkeiten im öffentlichen oder privaten Sektor als „Quotenfrauen“ wahrgenommen, d. h. verdächtigt werden, ihre Stellung nicht aufgrund ihrer Kompetenz, sondern durch eine ungerechtfertigte Förderung erhalten zu haben. Auch die Rolle der Medien ist recht uneinheitlich. Zunächst haben zahlreiche ExpertInnen festgestellt, dass ihr Einfluss eher gering (**Belgien, Lettland, Slowenien, Spanien, Schweden**) oder sogar unmerklich ist (**Österreich, Bulgarien, Tschechische Republik, Griechenland, Litauen, Polen**). Andere ExpertInnen zählen die Medien zu den negativen Faktoren (**Zypern, Estland, Slowakei**). Nur in wenigen Ländern scheinen die Medien einen positiven Beitrag zur Diskussion über eine ausgewogene Vertretung von Frauen und Männern in Leitungsorganen geleistet zu haben (**Kroatien, Finnland, Deutschland, Norwegen**), in anderen ist das Bild widersprüchlich (**Italien, Malta, Portugal**).

### *Vergleich der nationalen Ansätze mit dem AVL-Richtlinienentwurf*

Zu der Frage, wie weit die nationalen Ansätze den im AVL-Richtlinienentwurf genannten Maßnahmen entsprechen, zeigt sich, dass viele Maßnahmen in den Mitgliedstaaten in Bezug auf dessen erstes Element – der Festlegung eines numerischen Ziels – den ehrgeizigen Vorgaben des Richtlinienentwurfs nicht gerecht werden.

Das zweite Element des Entwurfs, Vorschriften für Besetzungsverfahren und Vorrangregel, fehlt in fast allen einschlägigen Gesetzen, Verordnungen und politischen Maßnahmen, mit Ausnahme von **Island**, und in einigen CGKs (**Spanien, Großbritannien**).

In Bezug auf das dritte Element, d. h. die Regel, nach der Staaten statt dieser Verfahrensvorschriften eine Regulierung mit gleicher Wirksamkeit erlassen können, dürften nur wenige Staaten das Kriterium der „gleichen Wirksamkeit“ erfüllen (**Belgien, Island, Italien, Deutschland, Norwegen**).

Auf der Plusseite ist zu erwähnen, dass rund die Hälfte der Staaten bereits den Grundsatz „Mittragen oder Begründen“ umsetzen, der ebenfalls in der Richtlinie enthalten ist. Unternehmen müssen über die Maßnahmen Bericht erstatten, mit denen sie das Erreichen der Zielvorgabe gewährleisten und ggf. erklären, warum dies noch nicht gelungen ist und wie sie das Problem lösen wollen. In einigen Ländern besteht allerdings eher eine Informations- als eine Erklärungspflicht. In dieser Hinsicht würde die Verabschiedung der Richtlinie also sicher einen Fortschritt bedeuten, da dann in allen EU-/EWR-Staaten eine Berichterstattungspflicht eingeführt und in einigen der Geltungsbereich der Pflicht zum „Mittragen oder Begründen“ erweitert werden würde. Die Verfügbarkeit und Transparenz der Richtlinien und Erfolge

von Unternehmen in diesem Bereich lässt insgesamt noch viel zu wünschen übrig. Selbst in Ländern mit einer Berichterstattungspflicht, in denen die Unternehmen in ihrem Jahresbericht Angaben zum Verhältnis von Frauen und Männern in ihren Leitungsorganen oder zur Gleichstellung und Diversität insgesamt machen müssen, sind die Unternehmen nicht immer verpflichtet, diese Informationen, wie in der Richtlinie vorgesehen, auf ihren Webseiten einer breiten Öffentlichkeit zugänglich zu machen.

Was das fünfte Element des Richtlinienentwurfs angeht, haben viele Staaten überhaupt keine Sanktionen vorgesehen. Die Staaten jedoch, in denen es Sanktionsbestimmungen gibt, gehen über den Richtlinienentwurf noch hinaus, weil auch bei der Nichterfüllung der gesetzlichen Zielvorgaben Sanktionen verhängt werden. In einigen Fällen lässt sich noch nicht beurteilen, ob diese Sanktionen wirksam und abschreckend sind, was von einigen ExpertInnen unter anderem deshalb bezweifelt wird, weil die Pflichten eher vage formuliert sind und daher die Verhängung von Geldbußen eher eine hypothetische Möglichkeit darstellt. Tatsächlich hat es den Anschein, dass bisher noch kaum Strafen verhängt wurden, wobei die Regeln in **Italien** besonders aktiv durchgesetzt werden.

Insgesamt kommen wir zu dem Schluss, dass viele Staaten die Vorgaben des AVL-Richtlinienentwurfs noch nicht erfüllen. Das heißt aber nicht, dass sämtliche nationale Ansätze unwirksam und/oder unglaubwürdig sind.

#### *Wirksamkeit und Glaubwürdigkeit der nationalen Ansätze*

Die Wirksamkeit von öffentlichen wie privatwirtschaftlichen Regulierungsmaßnahmen kann durch unterschiedliche Faktoren beeinträchtigt werden. Zu den internen Faktoren gehören Schwächen des Gesetzes oder des Corporate Governance Kodex selbst, z. B. „weiche“ Zielvorgaben, ein eingeschränkter persönlicher oder inhaltlicher Geltungsbereich oder fehlende Kontrollmechanismen oder Sanktionen. Zu den externen Faktoren gehören zum Beispiel ein öffentlicher Sektor, der nicht mit gutem Beispiel vorangeht, die Rolle der Medien und kulturelle Faktoren. Bei der Frage nach der Glaubwürdigkeit der nationalen Maßnahmen und ihrer Eignung, beim Verhältnis von Frauen und Männern in den Leitungsorganen von Unternehmen die selbst gesteckten Ziele zu erreichen, haben viele ExpertInnen darauf hingewiesen, dass sich manchmal nur schwer sagen lässt, ob die erzielten Ergebnisse tatsächlich auf die jeweilige Maßnahme zurückgehen.

Dennoch zeigt die Analyse, dass die besonders strikten öffentlichen Regulierungs- und Durchsetzungsmaßnahmen auch zu den schnellsten Fortschritten bei der Erreichung der Zielvorgaben geführt haben (**Belgien, Italien, Frankreich, Norwegen**), was aber nicht für alle Staaten gilt, die diesen Ansatz gewählt haben (**Deutschland, Island**).

Um in allen Mitgliedstaaten weitere Fortschritte zu erzielen, müssen diese Lücken geschlossen werden. Den Staaten, die relativ erfolgreiche Ansätze der Selbst- und Koregulierung verfolgt haben – insbesondere **Schweden** und in gewissem Umfang **Großbritannien** und **Finnland** – ist dies „im Schatten des Rechts“ gelungen, das heißt unter der ständigen Drohung, dass Gesetze erlassen werden, wenn diese Ansätze nicht zu den gewünschten Veränderungen führen. Viele nationale ExpertInnen haben Zweifel daran ausgedrückt, ob ihre nationalen Ansätze glaubwürdig sind und die gewünschten Ergebnisse erzielen können, sogar in den Ländern mit „harten“ öffentlichen Regulierungsmaßnahmen. Die einzige Ausnahme hierbei ist die **schwedische** ExpertIn. Sie nannte drei wichtige Faktoren, die zum Erfolg des schwedischen Ansatzes beigetragen haben. Erstens war die Androhung gesetzlicher Quoten eine wichtige Triebkraft für die Unternehmen. Ein zweiter Faktor war die Vorbildfunktion des Staates. Im Jahr 1999 lag der Anteil der Frauen in den Leitungsorganen staatlicher Unternehmen bei 28 %. Damals legte die Regierung das Ziel einer ausgewogenen Vertretung von Frauen und Männern fest. Ein Zwischenziel von 40 % Frauen bis 2003 wurde erreicht und heute formuläres überkant beträgt der Frauenanteil 49 %. Wichtige Elemente in diesem Prozess waren die Pflicht, in Besetzungsverfahren sowohl weibliche als auch männliche Kandidaten zu benennen, staatlich finanzierte Projekte zur Erhöhung des Frauenanteils und die Pflicht, jährlich über



das Verhältnis zwischen Frauen und Männern in den Leitungsorganen staatlicher Unternehmen Bericht zu erstatten. Ein dritter Faktor ist der politische Kontext des schwedischen Wohlfahrtssystems, das auf Gleichheit basiert und unter anderem auch die Gleichstellung von Frauen und Männern anstrebt. Dazu gehören das Recht auf Elternzeit und Elterngeld, politische und gesetzgeberische Maßnahmen, mit denen erreicht werden soll, dass Väter und Mütter den Elternurlaub gleich häufig in Anspruch nehmen, und eine günstige, breit verfügbare und hochwertige Kinderbetreuung. Eine lange und intensive öffentliche Debatte zu diesem Thema und zur Vereinbarkeit von Beruf und Privatleben haben ein Klima geschaffen, in dem sich elterliche Pflichten und Karriere nicht unbedingt ausschließen.

### *Schwer zu überwindende Hindernisse*

Besonders problematisch finden viele ExpertInnen die mangelnde Transparenz und Objektivität der Auswahlverfahren, sowie das Fehlen von klaren Kriterien und Vorrangregeln. Dasselbe gilt für das Fehlen von Kontroll- und Durchsetzungsmechanismen und Sanktionen, das in allen EU- bzw. EWR-Mitgliedstaaten ein allgemeines Problem darstellt und Fortschritte und das Erreichen von Zielvorgaben und Quoten erschwert. Viele ExpertInnen haben auf das Problem hingewiesen, dass Zielvorgaben nicht kontrolliert und erreicht werden können, wenn spezielle Überwachungsorgane, Durchsetzungsmechanismen und Sanktionen fehlen. Somit muss man feststellen, dass in den nationalen Ansätzen noch immer ein Missverhältnis zwischen Regulierung und Durchsetzung besteht.

Als weitere Hindernisse, die Glaubwürdigkeit und künftige Wirksamkeit der nationalen Ansätze beeinträchtigen, wurde die Dominanz von Männern in Netzwerken der Unternehmenswelt und an der Börse genannt, mangelndes Wissen über einschlägige Rechtsvorschriften und Normen, das Versäumnis nationaler Stellen, flankierende Maßnahmen zu entwickeln und umzusetzen, die die Vereinbarkeit von Beruf und Familie verbessern und es Frauen erlauben, sich aktiver in der Wirtschaft zu engagieren, und die (schwache) Stellung von Frauen auf dem Arbeitsmarkt insgesamt.

## Weitere Schritte

Die Zusammenfassung der Forschungsergebnisse in den vorherigen Abschnitten zeigt, dass der AVL-Richtlinienentwurf stark zur Schließung von Lücken in den meisten öffentlichen und privaten Regulierungsmaßnahmen beitragen würde, und dies sogar in Staaten, in denen bereits rechtsverbindliche Quoten eingeführt wurden. Um in allen Mitgliedstaaten der EU weitere Fortschritte zu erzielen, müssen diese Lücken geschlossen werden. Allerdings ist die Festlegung von Zielvorgaben und Quotenregelungen und von Mechanismen zu deren Erreichung und Durchsetzung kein Ziel an sich; ihre Relevanz geht weit darüber hinaus. Wie die Länderberichte zeigen, ist die Unterrepräsentation von Frauen in Leitungsorganen nur die Spitze des Eisbergs, unter der sich hartnäckige traditionelle soziale und kulturelle Normen verbergen. Daher ist es enorm wichtig, die Ursachen dieser Unterrepräsentation anzugehen. Einerseits spiegeln sie sich in der hohen Verbreitung von Geschlechterstereotypen in vielen mittel- und osteuropäischen Staaten und auch in den baltischen Ländern wider, die Frauen vor allem auf eine fürsorgenden Rolle festlegt und den Grund für den sehr niedrigen Frauenanteil in Leitungsorganen von Unternehmen und für die geringe politische Aufmerksamkeit für dieses Problem darstellt. Andererseits gehen Unternehmen dieses Problem viel aktiver in Ländern wie Schweden an, in denen das Thema Gleichbehandlung in Politik und Gesellschaft einen hohen Stellenwert hat, auch wenn dies im Schatten des Rechts stattfindet. In zahlreichen Staaten beeinträchtigen gesellschaftliche und kulturelle Normen nicht nur die Bildungs- und Karrierechancen von Frauen, sondern sie verhindern auch, dass günstige Bedingungen geschaffen werden, die es Frauen erleichtern, Beruf und familiäre Verpflichtungen zu vereinbaren. In Gesellschaften, die großen Wert auf Gleichheit legen, besteht ein Umfeld, das Frauen den Weg in Führungspositionen ermöglicht, und dies nicht nur in den obersten Leitungsorganen, sondern auch im mittleren Management.

Die Frage ist, was dies für die Rolle der EU bedeutet: angesichts dieser enormen politischen, sozialen und kulturellen Vielfalt, die sich in den sehr unterschiedlichen harten und weichen öffentlichen und privaten



Regulierungsansätzen und Durchsetzungsmechanismen widerspiegelt – welcher europäische Ansatz wäre besonders erfolgversprechend? In welchem Umfang können Gesetze – in diesem Fall eine EU-Richtlinie – Veränderungen in den EU- bzw. EWR-Mitgliedstaaten anstoßen? Die Gleichstellung von Frauen und Männern, Chancengleichheit und deren durchgehende Berücksichtigung in allen Politikbereichen gehören zu den Kernwerten der EU bzw. des EWR und sind in den Europäischen Verträgen und der EU-Grundrechtecharta verankert. Damit sie nicht nur auf dem Papier bestehen, müssen sie in den Mitgliedstaaten Tag für Tag umgesetzt werden. Der AVL-Richtlinienentwurf ist der Versuch, dies insbesondere im Bereich der unternehmerischen Entscheidungsprozesse zu verwirklichen. Frauen müssen die gleichen Chancen auf Machtpositionen, aber auch die Möglichkeit erhalten, ihre persönlichen Karriereziele zu verfolgen. Indem sie keine festen Zielvorgaben vorsieht, sondern sich vor allem auf Verfahrensvorschriften konzentriert, mit denen die Chancengleichheit von Frauen und Männern bei der Auswahl von Kandidaten und der Besetzung von Positionen in Vorständen und Aufsichtsräten gewährleistet wird, strebt sie genau dies an. Sie zeigt also Zurückhaltung, was noch von der Tatsache verstärkt wird, dass sie den Mitgliedstaaten weiterhin erlaubt, anstelle der in der Richtlinie vorgesehenen Vorgaben eigene Ansätze zu verfolgen, solange diese ebenso wirksam sind. Zu guter Letzt könnte die AVL-Richtlinie ein notwendiges Gegengewicht zu den beunruhigenden Tendenzen bieten, die in diesem Bericht ebenfalls erwähnt wurden, nämlich die Zunahme geschlechtsspezifischer Stereotypen in einigen Mitgliedstaaten, die Frauen vor allem auf eine fürsorgende Rolle festlegen und ihnen die Eignung für Führungspositionen absprechen. Deshalb ist die AVL-Richtlinie womöglich genau das richtige Instrument, um ein Umdenken anzustoßen und in der Gesellschaft die aufgeklärte Haltung durchzusetzen, dass der Kampf für eine ausgewogene Repräsentation von Frauen und Männern in Führungspositionen und den Leitungsorganen von Unternehmen der richtige Weg ist. Und dies nicht nur für den Aufbau starker Institutionen und ein besseres Risikomanagement,<sup>5</sup> sondern auch für mehr Gleichberechtigung und soziale Gerechtigkeit. Der staatliche Sektor sollte dabei mit gutem Beispiel vorangehen. Um Frauen den beruflichen Aufstieg zu erleichtern, ist jedoch die gemeinsame Anstrengung aller beteiligten Akteure notwendig, mit der sie die Bedingungen für Frauen verbessern, insbesondere Maßnahmen zur Vereinbarkeit von Beruf und Privatleben, in der Bildung und in anderen Problembereichen, die derzeit die Teilhabe von Frauen am Arbeitsmarkt und ihre Beförderung in Führungspositionen verhindern.

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5 Dies wurde auch in der Richtlinie 2013/36/EU über den Zugang zur Tätigkeit von Kreditinstituten und die Beaufsichtigung von Kreditinstituten und Wertpapierfirmen anerkannt; ebd. Fußnote 3.

# 1 Introduction

On 14 November 2012, the European Commission put forward 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 (hereafter: the Gender-Balanced Boards/ GBB-Directive proposal).<sup>1</sup> This proposal set a quantitative objective of 40 % for the number of the under-represented sex on the non-executive boards of listed companies by 2020 and by 1 January 2018 for listed companies which are public undertakings, with a view to achieving a more balanced representation of men and women among the non-executive directors of large listed companies. For Member States applying the objective to both executive and non-executive directors, a lower target (33 %) would apply. The Member States would have to make sure that companies take the necessary steps to realize this, in particular by adopting procedural rules regarding the transparent and non-discriminatory selection and appointment of non-executive board members, and by applying a priority rule. Companies not complying with the 40 % target would be required to apply the procedural rules and explain what measures they have taken in order to reach the target.

A number of Member States have considered this proposal to be too far-reaching in the light of the subsidiarity principle. During the Luxembourg Presidency (2015), the proposal was debated again with a view to addressing some delegations' subsidiarity concerns. This resulted in a revised Article 4b, which contains a flexibility clause. As set out in the Luxembourg Presidency Report,<sup>2</sup> this clause '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". These scenarios will be addressed in Sections 2.1 and 3.5 of this report. The timetable was also slightly adapted, providing that by 31 December 2020, Member States should aim to attain the objective that members of the under-represented sex hold at least 40 % of non-executive director positions, and 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. Importantly, also, the title of the Directive proposal was extended to 'directors of companies', so no longer merely restricted to non-executive directors. In the first half of 2017, the Malta Presidency placed the adoption of the GBB Directive high on the political agenda again, while adjusting the implementation calendar, the target dates, the reporting deadlines and the sunset clause by adding two years.<sup>3</sup>

Against this background, the European Commission has sought to obtain an up-to-date overview of the regulatory approaches of the Member States to enhance gender-balanced boards, and of the monitoring and enforcement mechanisms; what rules, enforcement measures and policies have been put into place and with what effects, also in the light of the objectives entailed in the GBB-Directive proposal? Are the national approaches capable of meeting those objectives and what can be seen as enabling and hampering factors in this regard? This report will provide answers to these questions, but will start with briefly outlining the broader EU-law context in which the issue of promoting gender-balanced company boards needs to be considered, firstly, as regards its fit in EU gender equality law and, secondly, as regards two EU Directives which impose duties on companies in the Member States to disclose non-financial information (Chapter 2). The report will then proceed by giving an overview of the different public regulatory approaches that the 28 EU Member States and 3 EEA states have developed to enhance the

- 1 The 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 of 14 November 2012, COM(2012) 614 final.
- 2 Report from the Presidency to the Council, 15 December 2015, 14343/15, <http://data.consilium.europa.eu/doc/document/ST-14343-2015-INIT/en/pdf>.
- 3 The report from the Presidency to the Council, 31 May 2017, Interinstitutional File: 2012/0299 (COD), [http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CONSIL:ST\\_9496\\_2017\\_INIT&from=EN](http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CONSIL:ST_9496_2017_INIT&from=EN).

gender balance in company boards, ranging from hard legally binding quota to soft targets and mere policy measures (Chapter 3). It also identifies the different monitoring and enforcement mechanisms that states have adopted, demonstrating the variety of rules, sanctions and procedures that have been put into place (Chapter 4). Next, it will also present the co-regulatory and self-regulatory approaches that have been developed in a number of states, and consider the role that companies themselves have been playing so far in enhancing gender-balanced boards, in varying degrees of collaboration with public bodies (Chapter 5). Based on this, the report will present a general, comparative assessment focussing in particular on the reasons that the national experts have identified behind their national approach and the (perceived) effectiveness thereof as well as on their (lack of) alignment with the GBB-Directive proposal, and remaining troublesome issues and ideas regarding the best way forward, both on the national and EU levels (Chapter 6). While this assessment is thus built on the national experts' views on these issues, the report will wrap up by presenting the main conclusions which the authors of this report draw from the overall analysis and assessment (Chapter 7).

The relevant data have been gathered predominantly from country reports based on a questionnaire that was sent out to the legal gender equality experts of the European Equality Law Network from the 28 Member States and the 3 EEA states.<sup>4</sup> The questionnaire was structured according to the main provisions and obligations of the GBB-Directive proposal as it stood after the Luxembourg Presidency and can be found in Annex 1 to this report.<sup>5</sup> An important preliminary observation is that there are still quite some States that up until today lack both a public and private regulatory and enforcement approach to enhance gender balance in company boards, so may at best have put some policy measures into place. These include **Croatia, Cyprus, the Czech Republic, Hungary, Latvia, Liechtenstein, Lithuania, Malta and Slovakia**.

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- 4 But it also builds on insights of previous work of the authors in the field, including the following publications: L.A.J. Senden, *Getting Women on Company Boards in the EU – A Tale of Power-Balancing in Three Acts*. In Nada Bodiroga-Vukobrat, Sinisa Rodin & Gerald G. Sander (Eds.), *New Europe – Old Values? Reform and Perseverance*, pp. 77-95, Switzerland: Springer International Publishing; L.A.J. Senden, *The Multiplicity of Regulatory Responses to Remedy the Gender Imbalance on Company Boards*, *Utrecht Law Review*, 2014, 10 (5), pp. 51-66. S.A. Kruisinga, M.L. Lennarts and L.A.J. Senden, *Van symboolwetgeving naar een aanpak die wél werkt – Een rechtsvergelijkende beschouwing over de vraag hoe m/v-diversiteit kan worden gerealiseerd in de top van het Nederlands bedrijfsleven*, *Nederlands Juristenblad*, 2016 (21), pp. 1470-1479. L.A.J. Senden and M. Visser, *Promoting Women in Leadership. Comparative Study on Legal and Regulatory Approaches in Europe to Increase the Share of Women in Middle and Higher Management Positions*. (33 p.). Confédération Européenne des Cadres (CEC European Managers). See: [https://www.ledarna.se/globalassets/om-ledarna/internationalit/cec-pwl\\_120115\\_engl.pdf](https://www.ledarna.se/globalassets/om-ledarna/internationalit/cec-pwl_120115_engl.pdf); L.A.J. Senden and M. Visser, *Balancing on a Tightrope – The EU Directive on Improving the Gender-Balance among Non-Executive Directors of Boards of Listed Companies*, *European Gender Equality Law Review*, 2013-2.
- 5 The gender equality experts have answered the questionnaire on the basis of the state of affairs of 5 June 2017. The research for this report was therefore concluded on 5 June 2017. In Austria, Portugal and Spain, there have been important recent developments concerning gender-balanced company boards. These can be found in the newsflashes on Austria, Portugal and Spain in Annexes 4, 5 and 6 of this report.

## 2 The broader EU-law context

### 2.1 The GBB-Directive proposal in relation to EU gender equality law and positive action

The introduction to this report already indicated that the GBB-Directive proposal has already been revised twice, the latest version dating from 31 May 2017 as amended by the Maltese Presidency. Since the proposal provides an important yardstick for the assessment of the national public and private approaches throughout the report, we will first consider the legal basis on which it was presented, the contents and scope of the legal obligations it seeks to impose and how they fit in with already applicable EU gender equality law, specifically also the case law of the CJEU on positive action.

The GBB Directive is proposed on the basis of Article 157(3) of the Treaty on the Functioning of the EU, which allows the European legislator to adopt measures to ensure the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation. With this aim in mind, the GBB-Directive proposal contains four important elements, the first relating to the actual quantitative targets (not quota), the second concerning the means to achieve these, the third relating to the Member States' discretion to (continue to) apply an 'equally effective' approach, i.e. the so-called flexibility clause, and the fourth covering monitoring and enforcement requirements.

Regarding the first element, Article 4(1) of the proposal contains a numerical objective. As the proposal now stands it 'would require the Member States to ensure that listed companies aim to attain, by 31 December 2022 (rather than 2020), the objective that members of the under-represented sex hold at least 40 % of non-executive director positions as well as the objective that members of the under-represented sex hold at least 33 % of all director positions, including both executive and non-executive directors.'<sup>6</sup> Member States shall also ensure that listed companies which are not subject to this last-mentioned objective 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 2022 (Article 4c(1)). Article 3 stipulates that the Directive does not apply to small and medium-sized enterprises, meaning companies which employ less than 250 persons and have an annual turnover not exceeding EUR 50 million or an annual balance sheet total not exceeding EUR 43 million.

With respect to the second element – the means to attain these objectives – its Article 4a contains four important procedural obligations relating to the election/selection of candidates. In particular, listed companies in whose boards members of the underrepresented sex hold less than 40 % of the non-executive positions have to ensure making the appointments to those positions on the basis of a comparative analysis of the qualifications of each candidate and by applying pre-established, clear, neutrally formulated and unambiguous criteria. A comply-or-explain duty applies, as companies not complying with the 40 % target would be required to apply the procedural rules and explain what measures they have taken in order to reach the target. In addition, in the election/selection of these candidates, Member States shall also ensure that, when choosing between candidates who are equally qualified in terms of suitability, competence and professional performance, the companies concerned shall give priority 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.<sup>7</sup> So, a priority rule needs to be applied in such cases. There is also an information duty for companies

6 Stated as such in the Progress Report, mentioned in footnote 3. See Article 4 and Recitals 22, 24a and 26 of the GBB-Directive proposal.

7 See Case C-450/93 Kalanke, ECLI:EU:C:1995:322; Case C- 409/95 Marschall, ECLI:EU:C:1997:533; Case C-158/97 Badeck, ECLI:EU:C:2000:163; Case C- 407/98 Abrahamsson ECLI:EU:C:2000:367; Case C-476/99 Lommers ECLI:EU:C:2002:183; and Case E-1/02, EFTA Surveillance Authority v. Norway, 4.4.2013. For a discussion of this case law, see also G. SELANEC AND L.A.J. SENDEN, Positive Action to ensure full equality in practice between men and women, including in company boards, report for the European Commission, 2012, [http://ec.europa.eu/justice/gender-equality/files/gender\\_balance\\_decision\\_making/report\\_gender-balance\\_2012\\_en.pdf](http://ec.europa.eu/justice/gender-equality/files/gender_balance_decision_making/report_gender-balance_2012_en.pdf).

if a candidate who has been considered makes such a request, regarding the qualification criteria on which the selection was based, the objective comparative assessment of the candidates according to those criteria, and, where relevant, the considerations tilting the balance in favour of a candidate of the other sex. Finally, Member States shall take the necessary measures 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 the priority rule.

Yet, as the third element, Member States would be able to suspend the Directive's procedural requirements, if they can demonstrate to 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'. We quote these in full here below given their importance for the assessment to be made later on in this report. However, one must also note that these scenarios are not exhaustive, as the provision reads that 'the conditions for the suspension shall be deemed fulfilled where, *for example* [emphasis added]' one of the following situations is at hand:<sup>8</sup>

- '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. 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 referred to in 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).'

In short, this means that Member States can either meet this 'equal effectiveness' requirement by demonstrating that they have taken the necessary measures in law as stipulated under a) or by being able to show actual results as listed under b) and c).

Fourthly, the Directive proposal imposes a reporting duty in its Article 5, stipulating that the Member States shall require listed companies to provide information to the competent authorities on an annual basis. They must do so on the gender representation in their boards, distinguishing between non-executive and executive directors, and on the measures taken with a view to attaining the target objectives in Articles 4(1) and 4c. Where they fail to meet these targets, they must provide the reasons for this and describe the measures taken and/or that it intends to take to meet the targets. This means that it actually seeks to impose a comply-or-explain duty. Member States shall also require the companies to publish that information in an appropriate and accessible manner on their websites. Member States

8 Note that the implementation calendar was adapted by the Maltese Presidency to the effect that the suspensions based on Article 4b would expire on 31 December 2024 (rather than 2022) unless certain conditions were met. 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 2025 (rather than 2023). (See Article 4b.) The same change of date was also made in Article 4c concerning individual quantitative objectives to be set by listed companies that are not subject to the objectives laid down in Article 4. (See Article 4c.) By the same logic, the Presidency suggested that the Commission would be required to begin reporting on the application of the Directive by 31 December 2026 (rather than 2024). (See Article 9.) Finally, the sunset clause was revised to the effect that the Directive would expire on 31 December 2033 (rather than 2031). (See Article 10.)

will also have to make sure to lay down rules in their national law so as to ensure effective, dissuasive and proportionate enforcement measures for infringements of the procedural and reporting obligations and the flexibility scenario a) identified above. So, very importantly, the GBB-Directive proposal does not impose any sanctions on listed companies that fail to realise the targets as set by it.

Quite a number of the elements thus proposed have been contested in several Member States for various reasons, with some arguments relating to its lawfulness under current EU – equality – law. While this consideration is not the main focus of this report, it is important to make a few observations on this at this point. First of all, contrary to some beliefs, the proposal does not impose a compulsory target but procedural and reporting duties that should contribute to attaining the targets, enforcement measures also being limited to sanctioning non-compliance with those duties. Secondly, the procedural requirements are in line with consistent case law of the CJEU and can actually be seen as a codification thereof. This regards the requirements for recruitment procedures, the applicability of a priority rule that does not give absolute priority but is linked to a hardship clause as well as the shift of the burden of proof to the employer.<sup>9</sup> Thirdly, the initial version of the GBB-Directive proposal listed specific sanctions, stipulating that '[t]he sanctions must be effective, proportionate and dissuasive and *may include* the following measures: (a) administrative fines; (b) nullity or annulment declared by a judicial body of the appointment or of the election of non-executive directors made contrary to the national provisions adopted pursuant to Article 4(1).' [our emphasis] While the proposal as such did not prescribe the imposition of a certain sanction but rather gave some examples of which sanctions could be considered as being effective, dissuasive and proportionate, these were removed from the proposal during Council negotiations. Yet, the requirement itself of effective, dissuasive and proportionate sanctions is longstanding case law of the CJEU as well.<sup>10</sup>

Chapters 3 and 5 of this report will specifically consider the public and private regulatory approaches that exist in the EU Member States and EEA States, if any, as regards the setting of hard quota or soft targets, timelines, recruitment procedures and the application of priority rules. Chapter 4 focuses on a consideration of the public enforcement mechanisms and sanctions that may be imposed. An assessment will be provided as to how these correspond – or not – with the GBB-Directive proposal.

## 2.2 The GBB-Directive proposal in relation to EU Directives 2013/36 and 2014/95

As seen in Section 2.1, Article 5 of the proposed GBB Directive provides for an obligation of the companies that fall within its scope to report on the gender representation in their boards. Currently, however, there are already two EU Directives which provide for a certain reporting obligation for companies beyond simply financial matters. This concerns Directive 2013/36 of the EP and the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms and Directive 2014/95 on the disclosure of non-financial and diversity information.<sup>11</sup> These had to be transposed into the national laws of the Member States by 20 July 2015 respectively 6 December 2016.

Directive 2013/36/EU was a response to weaknesses in corporate governance in a number of institutions, which contributed to excessive and imprudent risk-taking in the banking sector. One of its aims was to strengthen the corporate governance approach in a number of institutions, in order to improve risk

9 See for a more elaborate account of the Court's approach to positive action, G. Selanec and L.A.J. Senden, Gender quotas and other positive action measures to ensure full equality in practice between men and women. The transposition of EU provisions on positive action and gender quotas in employment, in access to and supply of goods and services, and in decision-making and political bodies in 33 European countries, publication of the European Network of Legal Experts in the Field of Gender Equality, European Commission, April/May 2012.

10 See on this e.g. Jans, Prechal, Widdershoven, Europeanisation of Public Law, 2nd edition, 2015, Europa Law Publishing.

11 Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC, OJ 27.6.2013, L 176/338. and Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups, OJ 2014, L 330/1.



management and ensure effective oversight or supervision by the management body of credit institutions and investment firms. The Directive provides, in Consideration No. 59, that appointment procedures for the members of the management bodies of such institutions have to be transparent and open. As different governance structures are used across Member States, using in most cases a unitary or a dual board structure, the term management body intends to embrace both the board of directors (or management board) in a one-tier or two-tier system and the supervisory board in the two-tier system. The Directive provides that management bodies of the relevant institutions have to be sufficiently diverse as regards – amongst other things – gender in order to facilitate independent opinions and critical challenge. It follows from Consideration No. 60 that ‘(g)ender balance is of particular importance to ensure adequate representation of population. In particular, institutions not meeting a threshold for representation of the underrepresented gender should take appropriate action as a matter of priority. More diverse management bodies should more effectively monitor management and therefore contribute to improved risk oversight and resilience of institutions. Diversity should therefore be one of the criteria for the composition of management bodies and be addressed in institutions’ recruitment policy more generally. Such a policy should, for instance, encourage institutions to select candidates from shortlists including both genders.’

Article 88(2) of the Directive obliges Member States to ensure that institutions which are significant in terms of size, internal organisation and the nature, scope and complexity of their activities establish a nomination committee composed of members of the management body who do not perform any executive function in the institution concerned. The role of the nomination committee is to identify and recommend candidates to fill management body vacancies and evaluate, amongst other things, the diversity in the management body. In addition, the nomination committee shall decide on a target for the representation of the underrepresented gender in the management body and prepare a policy on how to increase the number of the underrepresented gender in the management body in order to meet that target. The target, policy and its implementation shall be made public and the nomination committee shall periodically assess the composition of the management body and make recommendations to the management body if necessary. The scope of this Directive may, however, be limited: if, under national law, the management body does not have any competence in the process of selection and appointment of any of its members, Article 88(2) of the Directive will not apply. In addition, Article 91 provides that Member States or competent authorities shall require institutions and their respective nomination committees to put in place a policy promoting diversity on the management body. The competent authorities will collect the information and use it to benchmark diversity practices. The competent authorities will provide the European Banking Authority (EBA) with that information and EBA will use that information to benchmark diversity practices at Union level.

Directive 2014/95<sup>12</sup> stipulates that the corporate governance statement should also contain ‘a description of the diversity policy applied in relation to the undertaking’s administrative, management and supervisory bodies with regard to aspects such as, for instance age, gender, [...] the objectives of that diversity policy, how it has been implemented and the results in the reporting period. If no such policy is applied, the statement shall contain an explanation as to why this is the case.’<sup>13</sup> This means that the obligation is limited to reporting on general diversity policies that may – but need not – concern gender. Moreover, its scope is limited: Article 20 only applies to those undertakings ‘whose transferable securities are admitted to trading on a regulated market of any Member State’<sup>14</sup> and to large companies with more than 500 employees.

It appears that in quite a number of Member States these two Directives or either one of them have been transposed belatedly or have not been transposed yet, whereas the deadline for doing so has already passed for quite some time (**Belgium, France, Spain**). In **Belgium** and **Spain**, the acts aimed

12 Article 1(2)(a) of Directive 2014/95.

13 Article 20(1)(g) of Directive 2013/34/EU (as amended by Article 1(2)(a) of Directive 2014/95).

14 Article 20(1) of Directive 2013/34/EU in conjunction with Article 2(1)a Directive 2013/34/EU. Indeed, the preamble of Directive 2013/34 shows the intention to only oblige large undertakings to disclose diversity policies. See preamble No. 19 of Directive 2013/34/EU.



at implementing Directive 2013/36/EU therefore do not contain any elements relevant to the present report and in both countries Directive 2014/95/EU is not being implemented yet. In some countries where transposition has occurred, they have no bearing on gender equality. This can be said to act against the duty of gender mainstreaming that exists not only at the level of EU legislation, but also in the Member States. In quite a number of states this goes beyond being a mere political commitment but also entails a legal obligation.<sup>15</sup>

As will be seen in more detail in Section 4.1.1, in some countries a reporting obligation that has some relevance regarding the issue of gender-balanced boards has only been introduced by legislation implementing these Directives, such as recently in **Ireland**. In some other countries, such a reporting obligation adds to specific obligations that ensue from specific laws on the promotion of gender-balanced boards as will be discussed below. It will also be detailed there what these obligations entail.

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<sup>15</sup> For an overview, see <http://eige.europa.eu/gender-mainstreaming/institutions-and-structures/eu-member-states>.

## 3 Public regulation and policy on gender-balanced boards

### 3.1 Introduction

The first question submitted in the questionnaire to the gender equality experts of the EELN, was to report whether any public regulatory approach has been developed in their country to reach a more balanced representation of women and men in company boards. In this chapter, we will consider these approaches. An important first preliminary observation is that there are quite a few States that have not developed any such approach, meaning that they have not adopted any specific laws or legal provisions for enhancing the number of women on company boards. These include **Croatia, Cyprus, the Czech Republic, Hungary, Latvia, Liechtenstein, Lithuania, Malta and Slovakia**. Even in countries where recent amendments were made to company law, references to the gender balance in company boards have been lacking completely and not been topic of debate at all (**Hungary, Malta**). Yet, some of these States have proceeded to taking policy measures that may make a contribution to this (see Section 3.6), while others also lack such measures (**Latvia**). A second observation is that, where present, the differences between States are striking, the nature of these public regulatory approaches varying from hard legally binding quota rules to soft targets. Thirdly, in addition to such a quota or target approach, States may have developed action plans or taken other policy measures. In about one third of the analysed States, the corporate governance codes contain provisions on gender balance in company boards (**Austria, Belgium, Germany, Finland, France, Ireland, Poland,<sup>16</sup> Slovenia, Spain, Sweden and the UK**). As these are established by either private stakeholders or (more often so) by public bodies and private stakeholders in conjunction, these can be qualified as self-regulatory or co-regulatory approaches, which will be discussed in Chapter 5. In some of these national and self-regulatory/co-regulatory approaches, companies are also required or encouraged to set their own individual quantitative objectives regarding gender-balanced boards.<sup>17</sup> This goes in particular for **Denmark, Finland, Ireland, Germany** and the **UK**.

This chapter will proceed as follows. It will first consider the national regulatory regimes that are limited to the boards of state-owned companies (Section 3.2). Next, we consider the national regulatory regimes that apply either only to private companies, or to both private and state-owned companies which show quite some differences from state to state (Section 3.3). National exceptions for companies where the members of the underrepresented sex represent less than 10 % of the workforce will be addressed in Section 3.4. Whether States can avail themselves of the flexibility clause, as explained in detail in Section 2.1 of this report, will be addressed in Section 3.5. In Section 3.6, we will consider the various kinds of policy measures the EU and EEA States have taken to enhance gender-balanced boards. The chapter will wrap up with an assessment of the national public approaches in the light of the standards and obligations set by the GBB-Directive proposal (Section 3.7).

### 3.2 Public regulatory approaches to state-owned companies only

#### 3.2.1 Introduction

There are a few States that do not have a public regulatory approach to a more balanced representation of women and men in company boards in general, but that do have such an approach for state-owned companies. These States are **Estonia, Finland, Greece, Luxembourg and Slovenia**. **Austria** and **Portugal** have taken specific measures regarding state-owned companies as well, which differ from their public regulatory approach to private companies. In **Austria** these measures also apply to partly

16 The Polish case is somewhat specific as 99 % of the shares at the Warsaw Stock Exchange belong to the State treasury. The Corporate Governance Rules issued by the Warsaw Stock Exchange Council could for this reason possibly also be considered as a public regulatory approach. Yet, since the lawmaker is not directly involved in the process of issuing of these Rules while there still being a legal basis for them, we will consider these Rules rather as a co-regulatory device and discuss them in Chapter 5.

17 Cf. Article 4c(1) GBB-Directive, as discussed in Section 2.1.

state-owned companies (public shares have to be more than 51 %). The first set of measures of these two countries will be discussed here, the latter in Section 3.5. Elements that will be considered in the analysis of the national approaches are: the – hard/soft – nature and scope of the obligations imposed, in terms of targets, timelines and personal reach, as well as requirements regarding recruitment procedures and application of priority rules. There appear to be many differences between States in all these respects. For example, in some States the relevant public regulatory framework only applies to the gender balance in the board of directors, in other States it only applies to the composition of the supervisory board and yet in other States it applies to both. It has to be noted that some EU Member States have a dual board system, which means that there is a board of directors and a supervisory board, other Member States have a unitary board system, having a board that consists of both executive and non-executive directors, and some have a dual system, but also permit companies to opt for a unitary board system. In this report, we will indicate for each State to (the composition of) which types of boards the relevant public regulatory approach applies.

### 3.2.2 Nature, scope and timeline of the obligations

**Austria, Estonia Finland, Greece, Norway, Portugal and Slovenia** have enacted binding legislation, whereas the **Luxembourg** Government merely announced its intentions in this respect. The relevant obligations for state-owned companies in **Finland, Greece, Portugal and Slovenia** are already in force, while the targets in **Austria and Luxembourg** will need to be reached in 2018 and 2019, respectively. **Slovenia** has not set any timeline. **Austria and Finland** have only set targets for the composition of the supervisory boards. In **Greece, Luxembourg, Portugal and Slovenia**, the targets apply to both executive and non-executive boards. The relevant targets also differ from 40 % in **Finland, Luxembourg and Slovenia** to 35 % in **Austria** and 33 % in **Greece**. In **Portugal** there is a legal obligation to put equality plans into place. It must also be noted already at this point that only Greece has provided enforcement mechanisms and/or sanctions in case of non-compliance with the rules identified below. These will be discussed in more detail in Chapter 4.

**Greece** was the first State in the EU/EEA to introduce measures concerning gender balance in state owned companies. The applicable law<sup>18</sup> requires that, where members of boards of legal persons are appointed by the State, in the boards of legal persons governed by public law or local authorities, at least one third (33 %) of these members must belong to one sex, provided that the members to be thus appointed to each board are more than one. The legal form of the legal persons concerned is irrelevant. They may be governed by either public or private law; they may or may not be companies; and if they are companies, they do not have to be listed. There is mostly a single board, which may consist of executive and non-executive board members. The 33 % figure applies to all appointments made to the boards covered as from the coming into effect of the relevant Act, i.e. 12 September 2000. If it concerns a legal person governed by public law, the appointing decision is an administrative act, which is subject to judicial review and possible annulment for violation of the law, in accordance with basic principles and provisions of administrative law. If a legal person governed by private law is concerned, a decision concerning an illegally established board may be declared null and void by civil courts. The consequences thereof will be explained in section 4.3.4.

In **Slovenia** the legally binding Regulation on Criteria for Respecting the Principle of Gender-Balanced Representation<sup>19</sup> was adopted in 2004, applying to state-owned companies and other public entities appointed by the Government, and stipulates that the representation of one sex has to be at least 40 %. This principle must be applied in nominating or appointing government representatives to executive and non-executive boards of state-owned companies and has to be respected from the day the Regulation on

18 Paragraph 1(b) of Article 6 of Act 2839/2000 'Provisions concerning the Ministry of the Interior and other provisions' (OJ A 196/12.09.2000).

19 Regulation on Criteria for Respecting the Principle of Gender-Balanced Representation, Official Gazette of the Republic of Slovenia, No. 103/04. <http://www.pisrs.si/Pis.web/pregledPredpisa?id=SKLE4452>.

Criteria for Respecting the Principle of Gender-Balanced Representation entered into force, which was on 24 September 2004. There are, however, no sanctions in case of non-compliance.

**Austrian** corporations in public ownership or with public participation are required to comply with rules based on a 2011 resolution of the Federal Council of Ministers that requires companies with more than 50 % of the shares held in federal ownership to raise the participation of women in supervisory boards to at least 35 % by the end of 2018. The **Finnish** Equality Act requires the relevant companies to have a minimum of 40 % of men and women, but only in non-executive boards and 'unless there are special circumstances against it'.<sup>20</sup> Such 'specific circumstances' may refer to arrangements where certain public bodies are entitled to nominate a board member. Officials and other bodies that are entitled to nominate a candidate for the board of directors are to propose both a man and a woman 'if possible'.<sup>21</sup> The figure should have been reached now.

In **Portugal**, both a government resolution of 2012 and a law dating from 2013 provide that the executive and the non-executive boards of public companies must aim to have both men and women as members, and establishes the obligation of public companies to put in place equality plans.<sup>22</sup> In addition, the National Plan for Equality (2014-2017)<sup>23</sup> indicates the intention to assess the implementation of the plans for gender balance in the boards of state-owned companies. Likewise, in the Gender Equality Plan 2015-2018, the **Luxembourg** Government announced its intention to achieve a 40 % representation of the underrepresented sex in the boards of companies, in which the Government is a shareholder.<sup>24</sup> The 40 % quota is to be reached before 2019.

In **Estonia**, the Gender Equality Act, which has been in force since 2004, requires in Articles 9-11 the promotion of gender equality by state and local government authorities, educational institutions and employers. Its Article 9(4) stipulates that the membership committees, councils and other collegial bodies formed by state and local government authorities shall, if possible, include members of both sexes. Unfortunately, no attention has been paid to these provisions. An attempt to introduce a zipper-system electoral list was rejected by Parliament after the first reading on 13 June 2017. This was found to be artificial and not the correct way for getting more women into political decision-making positions.

### 3.2.3 Recruitment procedures and priority rules

In **Luxembourg**, the gender equality plan also mentions formal and transparent procedures for the appointment of members of the boards of public companies. The applicable laws in **Finland**, **Portugal**<sup>25</sup> and **Greece** do not prescribe any such specific rules for the selection of candidates nor a priority rule.

## 3.3 Public regulatory approaches towards state-owned and/or private companies

### 3.3.1 Introduction

**Belgium, Bulgaria, Denmark, France, Italy, the Netherlands** and **Spain** have developed more general public regulatory approaches towards the promotion of gender-balanced company boards, without making a distinction between state-owned and private companies. In **Germany**, it is also one

20 (609/1986), Section 4 a (2).

21 Section 4 a (3).

22 Decree-Law No. 133/2013 of 3 October 2013 ('General Features of Public Companies' – 'Estatuto das Empresas Públicas') (Article 31 No. 6). Government Resolution No. 19/2012, of 8 March 2012.

23 'Plano Nacional para a Igualdade', approved by Government Resolution No. 103/2013 of 31 December 2013.

24 [http://www.mega.public.lu/fr/publications/publications-ministere/2015/pan-egalite-2015/06244\\_Broch\\_Plan\\_Egalite\\_Femmes\\_Hommes\\_2015-2018\\_04-2015-Web.pdf](http://www.mega.public.lu/fr/publications/publications-ministere/2015/pan-egalite-2015/06244_Broch_Plan_Egalite_Femmes_Hommes_2015-2018_04-2015-Web.pdf), accessed 22 May 2017.

25 In Portugal, the law is more demanding in the case of Independent Agencies for the Monitoring of Economic Activity in the Private and in the Public Sector' (Law No. 67/2013, of 28 August 2013): in this case, the presidency of the board must be occupied by persons from both sexes alternatively.

law applying to both types of companies, yet one part regulating private companies and another part concerning the civil service, courts and state-owned companies. In **Austria, Finland and Portugal**, specific legal provisions were introduced for private companies, different from the ones identified in Section 3.2 for state-owned companies. All these approaches show numerous differences. Some States 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. These can be qualified as soft regulatory approaches and will be discussed in Sections 3.3.2 and 3.3.3. Other States have introduced mandatory quotas in their legislation, with non-compliance with the said quotas possibly being sanctioned, but this not always being the case. These hard regulatory approaches will be presented in Sections 3.3.4 and 3.3.5. Some States have adopted both soft and hard regulatory approaches, for example **Germany**. Some States have laid down the target figures or quotas (if any) in equality law, others in company law, or in both, as for example is the case in **Denmark**. Here also, elements that will be considered in the analysis of the national approaches are not only the hard or soft nature of the obligations imposed, but also their scope in terms of targets, timelines and different board positions, as well as requirements regarding recruitment procedures and application of priority rules. There appear to be many differences between States in all these respects. **Romania** can be seen as a somewhat exceptional case, since it did not introduce mandatory quotas but does provide for a general legal obligation for the balanced participation of men and women in leadership positions, imposing sanctions in case of non-compliance. Due to the general nature of the legal obligation, these measures will be discussed in Section 3.3.2. The monitoring and enforcement mechanisms and sanctions will be discussed in more detail in Chapter 4.

### *3.3.2 Soft regulatory approaches: nature, scope and timeline of the obligations*

Soft regulatory approaches towards a more balanced representation of women and men in company boards can be identified in **Austria, Bulgaria, Denmark, Finland, the Netherlands, Portugal, Romania and Spain**. It should be noted here that in **Austria, Bulgaria, the Netherlands and Portugal**, the relevant legal obligations apply to both the executive and the non-executive directors, whereas in **Finland and Spain** they apply only to non-executive directors and in **Denmark** they apply only to the composition of the executive board.

**Spanish** law does contain a target figure of 40 %, but companies only have an obligation to ‘make best efforts’ to reach the target.<sup>26</sup> Furthermore, it applies only to the composition of the non-executive boards of companies with more than 250 workers that have a turnover exceeding € 22 million a year. The timeline according to which this figure was to be reached was 24 March 2015. **Bulgaria** has also set a target figure of 40 % in its National Strategy on Gender Equality of women and men 2016-2020.<sup>27</sup> It has identified the elaboration and introduction of a recommendation for businesses for achieving the target of 40 % of women at the level of senior and middle management positions in companies as a key action therein. It applies to large enterprises, with an average number of staff of 500, and to enterprises with at least two of the following indicators: balance value of assets of EUR 19.43 million (BGN 38 million);<sup>28</sup> net income from sales of EUR 38.86 million (BGN 76 million);<sup>29</sup> average number of staff 250. The Strategy has not been complemented with any national plan yet.

**The Netherlands and Portugal** have restricted themselves to setting a target of 30 %, but applying to both executive and non-executive boards. In **Portugal**, a government resolution of 2012 encourages private listed companies to implement internal equality plans so as to enhance access of the underrepresented sex to company boards.<sup>30</sup> In 2014, the legislation applicable to banks and other companies from the

26 Article 75 of the Law 3/2007 of 22 March 2007 for the effective equality of women and men, [http://noticias.juridicas.com/base\\_datos/Admin/lo3-2007.html](http://noticias.juridicas.com/base_datos/Admin/lo3-2007.html), accessed 16 May 2017.

27 Adopted by Decision of the Council of Ministers No. 967 from 14 November 2016.

28 On 15 September 2017.

29 On 15 September 2017.

30 Government Resolution No. 19/2012, of 8 March 2012.

financial sector was amended, making it compulsory for these companies to implement internal plans intended to increase the participation of persons of the underrepresented sex in the executive and non-executive boards.<sup>31</sup> Furthermore, a government resolution of 2015 instated a programme that intends to lead private listed companies into a voluntary commitment to the Government's aim to promote a more balanced participation of women in company boards until 2018, when a minimum of 30 % of female representation in these boards should be reached.<sup>32</sup> Under this programme, 16 agreements have already been signed between the government and major listed companies.<sup>33</sup> In addition, the National Plan for Equality provides the possibility of taking into consideration, as a preferential criterion to benefit from public financial support programmes, the number of women in company boards of companies that apply for such support. In the **Dutch** Civil Code, provisions were inserted stipulating that at least 30 % of the seats on the executive and non-executive boards of large public limited liability companies and limited liability companies must be filled by women and 30 % by men,<sup>34</sup> to be temporarily applied from 1 January 2013 until 1 January 2016. Given the very limited progress realised, however, they have been prolonged as of 13 April 2017 until 1 January 2020. This is a soft target, because only a comply-or-explain duty applies (see Section 4.1). The criterion 'large' refers to meeting two out of three criteria:<sup>35</sup> (1) the value of the assets, according to the balance sheet, exceeds EUR 20,000,000; (2) the net turnover in a financial year exceeds EUR 40,000,000; (3) the average number of employees in a financial year is higher than 250.<sup>36</sup> Companies meeting two of these three criteria, must 'as far as possible' take into account the aim of realising the 30 % target when: (a) appointing and nominating board directors, (b) drawing up a profile for the size and composition of the Supervisory Board as well as when identifying, appointing, recommending and nominating members of the Supervisory Board, and (c) drawing up a profile for the non-executive directors as well as in nominating, appointing and recommending non-executive directors. In addition, the Dutch Corporate Governance Code also contains a provision which is of relevance in this context (see Section 5.3.3).

A decision by the **Finnish** Government of 17 February 2015 concerns the balanced participation in the boards of listed companies,<sup>37</sup> setting guidelines for the progress to be shown by the company through self-regulative efforts.<sup>38</sup> In large-cap and mid-cap listed companies, there should be 40 % of men and women on the board of directors by 1 January 2020. Such companies are to publish their aims concerning balanced participation by 30 June 2016, and by the beginning of 2017, the companies are to publish their progress in getting to the aim, and the measures they have taken.

**Danish** company law dating from 2013 and the Danish Equality Act do not set a target figure but instead require both state-owned companies and listed companies to set a clear objective and timeline for the share of the underrepresented gender, but only as regards the executive board.<sup>39</sup> This obligation also

31 Decree-Law No. 157/2014 of 24 October 2014 (Article 30 No. 6 and Article 115-B No. 2 (b)).

32 Government Resolution No. 11-A/2015, of 6 March 2015.

33 In 2017, the Government presented a proposal for new legislation on this issue ('Proposta de Lei nº 52/XIII', of 5 January 2017). This proposal, which is presently under discussion in Parliament, imposes women quota in company boards of state-owned companies and private listed companies: for state-owned companies the minimum representation of people from both sexes in company boards must be at least 33 %, in the first election or nomination after January 2018; for private listed companies, the bill establishes a progressive growing mechanism, by fixing a first goal of a 20 % minimum representation in the first election or nomination after January 2018, up to 33 % in 2020. If the bill is approved, this figure will be a hard target, since the legislative proposal includes several sanctions in case of breach; the timeline within which this figure is to be reached is 2018 for state-owned companies, and 2020 for private listed companies, but in this case with an intermediate figure of 20 % in 2018.

34 Articles 2:166, 2:276 and 2:391(7) CC.

35 Mentioned in Article 2:397(1) DCC.

36 Article 2:397(1) CC.

37 This decision seems to be directed only to companies under Finnish law, although that is not specified.

38 Valtioneuvoston periaatepäätös sukupuolten tasapuolisen edustuksen toteuttamisesta pörssiyrityksissä (Government's decision on balanced gender participation in listed companies), Ministry of Justice 17 February 2015, <http://oikeusministerio.fi/documents/1410853/5002649/Valtioneuvoston+periaatep%C3%A4%C3%A4t%C3%B6s++p%C3%B6rssiyrity%C3%B6iden+hallitukset.pdf/6250f033-f0d6-4a33-8f98-6da45d458101>, accessed 4 June 2017.

39 These requirements were implemented by amendments to the Company Law Act (Consolidation Act No. 1089/2015) and to the Equality Act (Consolidation Act No. 1678/2013). Act on Companies Section 139a Section 2 and Act on Equality Section 11.



applies to large companies. The goal can be set in accordance with the situation in the company and in the industry. These requirements apply to state-owned companies, companies whose shares, debt instruments or other securities are admitted to trading on a regulated market in an EU/EEA country and to large limited liability companies, which employ more than 250 persons and have an annual turnover exceeding EUR 4214.88 million (DKR 313.50 million) or an annual balance sheet total exceeding EUR 20.97 million (DKR 156 million).<sup>40</sup> The requirements are also imposed on the boards, executive committee or similar collective managements of public limited companies and independent institutions. In addition, the Danish legislation imposes a requirement on the executive boards to draft a policy to increase the share of the underrepresented gender at the other management levels of the company. This requirement does not apply to limited liability companies having employed less than 50 employees in the latest financial year.

**Austria** does not set a specific target figure either, but since the beginning of 2017 it requires stock 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.<sup>41</sup> When selecting members of the supervisory board, stock companies are required to observe diversity aspects, especially concerning a more balanced gender participation and age structure of the board.<sup>42</sup> In addition, banking companies in Austria are obliged by law to appoint a nomination panel for upper management positions (Paragraph 29 Banking Act [*Bankwesengesetz, BWG*]). The panel has to formulate a target quota for hiring members of the underrepresented sex. For banks that are listed on the stock exchange, the decisions of the panel would also fall under the comply-or-explain regime of the Corporate Governance Code for gender representation (see Section 5.3.1).

Finally, in **Romania**, no legislative measures have been put into place specifically as regards gender-balanced boards, but there is a provision in the Gender Equality Law,<sup>43</sup> adopted in 2002, which provides that all entities that operate based on their own statutes or regulations have ‘to promote and support balanced participation of women and men in leadership and decision’ and ‘to adopt the necessary measures’ for ensuring this goal. This legal obligation applies to all types of enterprises: ‘(n)ational and local public authorities and institutions, in the civil and military area, economic or social entities, as well as political parties, employers’ organisations and trade unions or other not-for-profit organisations that operate based on their own statutes or regulations’. It also applies to all types of boards: ‘the nomination of members and/or participants in any council, group of experts and other lucrative structures of management and/or consultancy’.

### 3.3.3 Soft regulatory approaches: recruitment procedures and priority rules

It appears that in **none of the above countries**, specific selection of candidates, recruitment or election procedures are prescribed nor priority rules established. Only **Dutch** law seems to provide for some special attention to reach the set target by drawing up a profile for a company board position. Furthermore, under the **Portuguese** Labour Code<sup>44</sup> collective agreements should establish ‘measures that contribute to the effective implementation of the equality and non-discrimination principle’. These measures can include equality plans, positive action and preferential treatment (including quotas) directly aimed at managing positions, if, in the concrete situation, they meet the legal requirements for such action measures (e.g. if a factual discriminatory situation is detected and provided the measures are adopted on a temporary basis). However, this last legal rule is a non-binding recommendation, since no sanctions are imposed on the absence of such measures or plans.

<sup>40</sup> Using the exchange rate of 13 September 2017.

<sup>41</sup> Paragraph 234c Section 2 No. 2a Code of Corporations.

<sup>42</sup> Paragraph 87 Section 2a Stock Corporations Act [*Aktiengesetz, AktG*].

<sup>43</sup> Article 21(2) j. 39(3) of Law 202 of 19 April 2002 on equal opportunities and treatment between women and men (*Lege nr. 202 din 19 aprilie 2002 privind egalitatea de șanse și de tratament între femei și bărbați*) (hereafter Gender Equality Law).

<sup>44</sup> Article 492 No. 2 (d) of the (LC) (approved by Law No. 7/2009, of 12 February 2009).



### 3.3.4 Hard regulatory approaches: nature, scope and timeline of the obligations

A few States have enacted in their legislation mandatory quotas or other legally binding measures in order to reach a more balanced representation of women and men in company boards and have provided that non-compliance with such obligations may be sanctioned. The first State that introduced specific legislation containing mandatory quotas was **Norway**, subsequently **Iceland** also introduced mandatory quotas. Thereafter, also **Belgium, France, Italy** and **Germany** introduced such quotas.

Again, the variety between the legal regimes of the different states is immense, the mandatory quotas differing from 40 % in **Iceland** to 33.3 % (one third) in **Belgium** and 30 % in **Germany** to varying quotas in **France** and **Italy**; in **France** the quotas were 20 % by 2014 and 40 % by 2017; in **Italy** the quotas will increase over time from 20 % to 33 %. In **France** and **Germany** the quotas only apply to non-executive directors, whereas the **Belgian** and **Italian** quotas generally apply to both executive and non-executive directors. In **Germany**, some companies are obliged to set individual quantitative objectives with regard to both the non-executive and executive board members as well as to the first and second management level below the board level. **Iceland** has a unitary board system and does not distinguish between executive and non-executive directors.

**Norway** was the first State in the EU/EEA to introduce legally binding measures concerning gender balance in company boards in December 2003, which are binding not only for all publicly owned enterprises, but also for all public limited companies in the private sector. No rules were adopted for privately owned limited liability companies, because most of these companies are small family enterprises and the owners themselves are members of the board. The rules entered into force on 1 January 2006. No specific percentage applies, but the rates will depend on the number of directors on the board, as does their applicability to executive directors and/or non-executive directors. The Public Limited Liability Companies Act<sup>45</sup> provides that on the board of public limited liability companies both genders shall be represented in the following manner: 1) on boards consisting of two or three members, both men and women shall be represented; 2) on boards consisting of four or five members, both genders shall be represented by at least two; 3) on boards consisting of six to eight members, both genders shall be represented by at least three; 4) on boards consisting of nine members, both genders shall be represented by at least four, and if the board consists of more than nine members each gender shall be represented by at least 40 %; and 5) the rules as stated in 1) – 4) equally apply to the election of deputy members. These rules do not apply to board members elected by and amongst the employee representatives: in such cases when two or three members of the board are to be elected, both men and women have to be represented. The provisions in this Act were the model for all equivalent quotas in other relevant Acts.<sup>46</sup>

The next State in the EEA/EU to adopt a quota law was **Iceland**. In March 2010, the Gender Equality Act and the Acts on public limited companies and private limited companies introduced an obligation concerning a balanced representation of women and men in company boards.<sup>47</sup> The quota law applies to state-owned public corporations, public limited companies and private limited companies with over 50

45 The Public Limited Liability Companies Act of 13 June 1997, as amended in December 2003, No. 45 Section 6-11a See (in Norwegian) the following website: [https://lovdata.no/cgi-wift/wiftldles?doc=/app/%20gratis/www/docroot/all/nl-19970613-045.html&emne=allmennaksjelov\\*&&](https://lovdata.no/cgi-wift/wiftldles?doc=/app/%20gratis/www/docroot/all/nl-19970613-045.html&emne=allmennaksjelov*&&), accessed 4 May 2017.

46 For example the Limited Liability Companies Act of 13 June 1997 No. 44 *Lovomaksjeselskaper [aksjeloven]*, Section 20-6 and the Local Government Act (*Kommuneloven*) Section 80a, which refers to the Limited Liability Companies Act Section 20-6.

47 The Gender Equality Act No. 10/2008 and the Acts on public limited companies and private limited companies, respectively No. 2/1995 with later amendments and No. 138/1994. The bill was adopted in March 2010 as Act No. 13/2010. This Act amended the Act on Public Limited Companies No. 2/1995 as well as the Act on Private Limited Companies No. 138/1994. <http://www.althingi.is/altext/138/s/0752.html> (accessed on 13 June 2017). An English translation of the Act Respecting Public Limited Companies, the Act Respecting Private Limited Companies, and the Act Respecting Foundations Engaging in Business Operations, can be found on the home page of the Ministry of Industries and Innovation, under "Legislation" and then "Company Law," even temporarily under the elder website of the Ministry of Economic Affairs. <https://eng.atvinnuvegaraduneyti.is/laws-and-regulations/nr/nr/7336> (accessed on 12 June 2017).

employees as well as pension funds.<sup>48</sup> There are stricter requirements for public limited companies than for private limited companies; private limited companies with over 50 employees (only about 1 % of private limited companies in Iceland) shall observe special rules on gender equality in the company board;<sup>49</sup> if the board of directors of such a company constitutes of two or three board members each gender shall have a representative and if it comprises of more members the 40% gender ratio rule applies. All public limited companies and private limited companies with more than 50 employees had to comply with the aforementioned legal obligation before 1 September 2013, while it became obligatory for publicly owned limited companies to do so immediately. Article 15 of the GEA stipulates that the equal representation of men and women may not be lower than 40 % in publicly-owned limited companies and enterprises in which the State or municipality is the majority owner. Company law<sup>50</sup> provides that the board of directors of a Public Limited Company shall consist of a minimum of three persons. On Boards of Directors of Official Public Limited Companies and Public Limited Companies with more than 50 employees each sex shall be represented in the Board when the Board consists of three persons and when there are more than three members in the Board of Directors, it shall be ensured that the sex ratio is not lower than 40 %. The same applies to sex ratios among Reserve Directors in such Companies, but ratios on the Board and the Reserve Board shall in total be as equal as possible. Additionally, all companies falling under the scope of the Act shall take gender ratio perspectives into consideration in the recruitment of CEOs, and all public limited companies with more than 25 employees must report the relevant statistics to the Register of limited companies. In addition, both the Act on public limited companies<sup>51</sup> and the Gender Equality Act provide that employers shall take steps to avoid jobs being classified as especially women's or men's jobs and that particular emphasis shall be placed on achieving equal representation of women and men in managerial and influential positions, the beneficiary being the underrepresented sex. Companies with more than 25 employees are obliged to draw up gender equality programmes and have to make sure that when managers are appointed the gender ratio shall be observed.<sup>52</sup> This does not apply to private limited companies as they are not obliged to have a manager.

In **Belgium**, the federal Act of 28 July 2011<sup>53</sup> aims at ensuring the presence of women on boards of directors, applying in the private sector to companies quoted on the stock exchange and in the public sector to the Economic Public Bodies mentioned in the Act of 21 March 1991, which are for example B-Post, Proximus, Belgocontrol, Infrabel, SNCB-NMBS, including also the National Lottery. The 2011 Act deals exclusively with the boards of directors, not making any distinction between executive and non-executive directors. The target is a quota of at least one third of directors belonging to the other sex, which is a hard target. Concerning the federal Economic Public Bodies, the target is only applicable to members of the boards of directors appointed by public authorities. Nothing is said about the members appointed by private shareholders; thus, depending on the proportion of shares private persons or bodies acquire, a significant part of the board might not be bound by the obligation to achieve the target. B-Post, Proximus and the National Lottery have adopted the legal form of 'limited liability companies under public law', subject to the Company Code; as such they would be bound by the quota obligations applicable both in the public and private sectors. For the public sector, the obligation to achieve the quota was applicable as from 1 January 2012. For the private sector, the 'larger' companies concerned had to achieve the quota by 1 January or 1 July 2017 at the latest according to the beginning of each company's financial year; an extra 2 years (i.e. until 1 January or 1 July 2019) was given to the 'smaller' companies. To belong to this

48 <http://www.sa.is/frettatengt/eldri-frettir/47-fyrirtaekja-uppylla-loeg-um-kynjakvota/> (accessed on 13 June 2017). In 2011 a special provision was adopted with regard to gender quotas for the boards of pension funds by amendments to the 1997 pension fund's legislation (129/1997). In September 2011 a provision regarding gender quotas on the boards of pension funds was adopted with Act No. 122/2011 amending Pension Act No. 129/1997. This Act took effect 1 September 2013, making it obligatory for pension funds as well as to have gender-balanced company boards.

49 <https://www.atvinnuvegaraduneyti.is/media/Acrobat/felog.stofnun.thyding.22.1.2013.pdf> (accessed 12 June 2017).

50 Article 63 of the Act on Public Limited Companies No. 2/1995, as amended.

51 Gender Equality Act No. 10/2008 and the Act on public limited companies (No. 2/1995 with later amendments) <https://eng.atvinnuvegaraduneyti.is/laws-and-regulations/nr/nr/7336> (accessed on 12 June 2017).

52 Article 65 Paragraph 1 on the Act on Public Limited Companies No. 2/1995 as amended by Act No. 13/2010, <http://www.althingi.is/lagas/146a/1995002.html>.

53 All legal texts mentioned are available in French and Dutch on [www.juridat.be](http://www.juridat.be), accessed on 17 May 2017.

'smaller' category, a company quoted on the stock exchange must either have a free float of below 50 %, or meet at least two of the following criteria: a workforce of less than 250 employees; a balance sheet total not higher than EUR 43 million; or a turnover not higher than EUR 50 million.

Also in **France**, a quota law was adopted in 2011,<sup>54</sup> applying to companies listed on the stock exchange (the CAC 40, which is short for the 'Cotation Assistée en Continu'), and unlisted companies with at least 500 employees and a EUR 50 million turnover over the previous three consecutive years. The 2014 Act on 'Real Equality' has extended the provisions of the 2011 Act to companies with 250 or more employees.<sup>55</sup> Public companies regulated by commercial law, such as industrial and state-owned companies, are also covered. The quotas apply only to non-executive directors (i.e. members of *conseil d'administration* in the one-tier system and *conseil de surveillance* in the two-tier system).<sup>56</sup> The law implements two-step quotas of 20 % by 2014 and 40 % by 2017.<sup>57</sup> According to the Commercial Code, if the board has 8 members or less, the difference between the genders cannot exceed two.<sup>58</sup> Regarding the election of board members representing the employees, since 2013 the Commercial Code provides two possible scenarios. If there is only one seat to fill: each candidacy must include the name of the candidate and its substitute. Candidate and substitute have to be of different genders. In all other cases: the candidates are elected based on a proportional representation list ballot. Each list shall comprise, alternately, a candidate of each sex; also, on each list, the difference between the numbers of candidates of each sex may not exceed one.

Also in **Italy**, in 2011 an act was adopted modifying an article of the Code of Merchant Banking.<sup>59</sup> The Act applies both to listed companies and state-owned companies and concerns the board of directors and the board of auditors in the traditional company model. These rules also apply to the board of directors of one-tier system companies and to the supervisory and executive board of two-tier system companies, when made up of at least three members.<sup>60</sup> Directors and auditors of one sex cannot be elected in a proportion lower than one-third (33 %) compared with directors and auditors of the opposite sex. This rule is to be enforced for three periods of tenure of directors and auditors in, respectively, the boards of directors and the boards of auditors; for the first period of tenure, the proportion can be, however, one-fifth to four-fifths. The Companies Statute shall rule the formalities to constitute a list of candidates, the appointment of candidates and the substitution of members of the Company Board during their terms so as to ensure the balanced participation of the two sexes provided by the law. The gender-balanced principle applies also to substitute auditors. This rule is to be enforced only for three periods of tenure of directors and auditors (i.e. 9 years), but for the first period of tenure the proportion will be one-fifth to four-fifths and it will come into force only at the first change of board members one year after the law came into force (12 August 2011).

In **Germany**, the Law on the equal participation of women and men in leading positions of private companies and in the civil service (hereafter 'the Law') introduced strictly binding quotas for some companies and measures of a rather voluntary nature for others and asks some federal public undertakings to 'endeavour' to ensure the application of the statutory requirements. This law partly covers company law (amendments to inter alia the Stock Corporation Act, the Limited Liability Companies Act and the Commercial Code) and is partly a new publication of the amended Statute on Bodies within Federal Control and the amended Federal Equality Act. The Law contains a 30 % gender quota for non-executive board

54 Act No. 2011-103 27 January 2011, relating to a Balanced Participation between Men and Women on Company Boards, JO No. 23, 28 January 2011, p. 1680, also referred to as the Zimmerman-Copé Act. The parity mechanism for the public sector was partially covered by this Act and it was extended by an Act passed on 12 March 2012 (Act No. 2012-347).

55 No. 2014-873, 4 August 2014.

56 See the Commercial Code Articles L225-18-1 for governing boards and L 225-69-1 and L226-4-1 for supervisory boards.

57 For listed companies, the quota apply as from their first general meeting following 1 January 2017. For non-listed companies, the quota will apply as from the first general meeting during which board members shall be appointed and which is held after the end of the third consecutive fiscal year in which the aforementioned quantitative criteria have been met.

58 Article L225-8-1 and Article L225-17 of the Commercial Code.

59 Act No. 120/2011. The Act is enforced through two regulations: Consob (National Securities and Exchange Commission) Decision No. 18098 of 8 February 2012, for listed companies, which modified the Consob Framework Regulation of listed companies of 14 May 1999 n. 11971 and d.p.r. No. 251/2012, for state subsidiary companies.

60 Article 1 Paragraph 1, Article 1 Paragraph 2 and Article 1, Paragraph 3 of Act No. 120/2011.

members of private companies that are listed and are subject to full-parity co-determination, mostly stock corporations, as well as every listed *Societas Europaea* with a parity co-determined board (this includes privatized state-owned companies and public undertakings when fulfilling these requirements).<sup>61</sup> From 1 January 2016, these companies have to act to reach full compliance with the 30 % gender quota whenever a new member is to be appointed or elected.

Concerning the public sector and state-owned companies, the law provides for a 30 % statutory gender quota on all supervisory boards, boards of directors, administrative boards and similar supervisory bodies as well as 'relevant' decision-making bodies with at least three members covered by the amended Statute on Bodies within Federal Control. Under the amended Statute on Bodies within Federal Control, undertakings with at least three seats of the non-executive board within the purview of the federal Government or to be elected by the federal Government are subject to a 30 % from 2016 and then 50 % gender quota from 2018 with regard to these seats. As long as the federal level is holding shares which account for the decision over or the election of at least three members of the non-executive boards, the gender quota applies to these members in undertakings such as Deutsche Bahn AG, DB Netz AG, Airport Köln/Bonn Limited Liability Company, Gesellschaft für Anlagen- und Reaktorsicherheit, and the German Society for International Corporation.<sup>62</sup>

Furthermore, all private companies that are listed or subject to co-determination are obliged to set individual quantitative objectives with regard to the non-executive and executive board members as well as to the first and second management level below the board level. The companies are generally free to define these objectives; but when the proportion of members of the underrepresented sex falls below 30%, the individual quantitative objective must not fall short of the actual proportion achieved. The problem emerging in this respect is that companies with no women on their boards or in their higher management levels may set themselves a target quota of '0' because this does not fall short of the actual proportion of zero. The companies had to publish their first target quota by 30 September 2015, and reach their self-imposed goals by 30 June 2017 for the first time. The subsequent time periods for realising self-imposed target quotas must not exceed five years. Public undertakings or (partly) state-owned companies may be subject to regulation by civil law and thus, may be listed and/or subject to parity or other co-determination. In these cases, they are obliged to set themselves individual quantitative objectives as well.

### *3.3.5 Hard regulatory approaches: recruitment procedures and priority rules*

In the countries analysed above, it appears again that specific rules on recruitment or election procedures as well as priority rules are very scarce. A priority rule has only been mentioned by the **Icelandic** expert. In Iceland, a priority rule applies in case of equal qualifications, stemming from the Gender Equality Act (GEA) rights and obligations of employers on the labour market. Article 18 of this Act stipulates that particular emphasis shall be placed on achieving equal representation of women and men in managerial and influential positions. Affirmative action is not regarded as being contrary to the GEA, specifically its Article 24. In addition, there is a shift in the burden of proof when provisions of the GEA appear to have been violated. In that case, the presumed discriminator must demonstrate that the grounds for the treatment are not gender based unless the measures taken can be justified with reference to a lawful aim and the methods used to achieve the aim are appropriate and necessary. In **Belgium**, there is a sanction that in practice has the effect of a priority rule; when the target is not achieved, a person of the underrepresented sex must be appointed to the next vacant position, and otherwise the appointment is null and void. The same sanction applies if an appointment were to result in the target no longer being

61 The 30 % gender quotas can be fulfilled with regard to all board members or, upon request of the shareholders or the employees or both, with regard to the shareholder representatives and the employee representatives separately.

62 The amended Statute on Bodies within Federal Control requires an annual publication of all bodies within federal control including the number of board members to be appointed or elected by the federation. For the 2016 list, see the official documents of the Federal Parliament 18/11500, Annex 1, <https://www.bmfsfj.de/blob/115648/916d83985cd40e23540818f4fec2c1c0/bundestagsdrucksache-quotenbericht-data.pdf>, pp. 32ff.

achieved. In relation to selection procedures only the following ones have been mentioned. **France** only has the requirement that lists of candidates for a board must be divided between men and women, with a maximum difference of one. In **Italy**, the two regulations that enforce Act No. 210/2001<sup>63</sup> provide for two requirements as regards procedures. The first rule states that gender-balance principles, in case of board elections, apply to lists of candidates made up of at least three members. The second rule, also to be applied in case of board elections, states that if the enforcement of gender-balance principles does not give rise to an integer for the member of the less-represented gender the latter is to be rounded up.<sup>64</sup> The rounding up entitles the less-represented gender to have one more member compared to the application of the mere mathematical rule which is normally applied.

In **Germany**, there is no specific procedure regarding the selection of board members and the law does not account for the way in which the statutory gender quota or individual target quota are reached. Before the election of non-executive board members, however, nominations of candidates are published. Under the Stock Corporation Act, the executive board is also obliged to add certain information to these nominations before publishing, namely how many women or how many men have to be elected to comply with the statutory gender quota and whether the gender quota has to be reached regarding the non-executive board members as a whole or the shareholder and the employee representatives separately.

### 3.4 National exceptions for companies where the members of the underrepresented sex represent less than 10 % of the workforce

Regarding possible exceptions, the national experts were asked to answer the question whether their national law provides for an exception to any kind of legal obligations in order to enhance gender balance in company boards for companies where the members of the underrepresented sex represent less than 10 % of the workforce (cf. Article 4(6) GBB Directive). In addition, if there was such exception, they were asked to state whether there are any national measures to ensure that such companies still set individual quantitative objectives regarding gender-balanced representation of both sexes among all (executive or non-executive) director positions (cf. Article 4c(2) GBB Directive).

Clearly, Member States that have no public regulatory approach to promote a better gender balance in company boards (see Section 3.1) have no exceptions to the rule either. But also as regards States that have put such a public regulatory approach into place, such an exception is very rare. It could only be established that **Norway** avails itself of such type of exception, and then for companies where the members of the underrepresented sex represent less than 20 % of the workforce. The rules prescribed in Nos. 1 and 2 of the Public Limited Liability Companies Act<sup>65</sup> (as in Section 3.2.2) will not apply in cases where one gender accounts for less than 20 % of the total number of employees in the company at the time of election. These rules provide rules for boards consisting of two, three, four or five members. Thus, for the companies where one gender accounts for less than 20 % of the total number of employees in the company, only the rules for boards consisting of six members or more will apply.

### 3.5 Flexibility clause

The GBB-Directive proposal contains a so-called flexibility clause (in its Article 4b, 1a) which would allow Member States to follow their own rules and policies to achieve gender-balanced boards, without being obliged to implement the procedural obligations that the proposal imposes. This clause was detailed in Section 2.1 of this report. Most experts answered in the negative when asked whether the national law of their country would comply with any of the options mentioned there. Only **Norway** (yes, all three), **Italy**

63 Consob Decision No. 18098 of 8 February 2012 and d.p.r. No. 251/2012.

64 Thus, if application of the quota implies that 4.3 directors have to be of the underrepresented sex, this will be rounded up, which means that there will have to be 5 directors of the underrepresented sex. This is in contrast with the mathematical rule, on the basis of which 4.3 would usually be rounded off as 4.

65 Of 13 June 1997 No. 45 Section 6-11a, discussed in Section 3.3.



(yes, a and b), **Germany** (yes, a), **Belgium** (yes) and **Iceland** (yes) answered that their national law would comply with any of these options.

### 3.6 Policy measures

In addition to soft and hard regulatory approaches, based on some legal foundation, a number of Member States and EEA States have (also) adopted a broad range of policy measures. Some of these measures do not (only) concern the board level, but also lower management levels.

In **the Netherlands**, there are many awareness campaigns and policy measures, such as the government programme 'Women to the Top'. As part of this programme, letters have been sent to members of supervisory boards to ask attention for a better balance between men and women and to ask them to nominate 'board ready' women. This has resulted in a database with approximately 1000 'board ready' women. In addition, the Minister of Education and the chairman of the largest employers association have asked attention for the topic, both in interviews and during meetings, and they have engaged two influential people to actively contact members of company boards. The Government also introduced a website<sup>66</sup> which announces vacant board positions in the 200 biggest Dutch companies.

In **Estonia**, in February 2017, an Appointing Committee was established<sup>67</sup> which will appoint the supervisory board members of the 31 state-owned companies. State-owned companies' supervisory boards have about 150 members and have assets worth EUR 6 billion and employ nearly 15 thousand people. Unfortunately, the Committee comprises men only, four from private-sector business and management and from the public sector the chancellor of the Ministry of Finance and a rotating member. The work principles of the Appointment Committee are regulated in the amended State Assets Act, which entered into force on 16 July 2017,<sup>68</sup> but all the working documents of this Committee are top secret.

The **Danish** Government launched a charter in 2008 in order to increase the number of women in top management positions. This charter was the result of a cooperation effort with private and public companies. This is a voluntary charter with no formal effect. The purpose of the charter was to engage companies more actively in increasing the share of women in top management, for example by adopting a strategy for getting more women into management positions, by setting a goal for a better gender balance, or by focussing on career opportunities for women, recruitment and headhunting. Companies that approved the charter are obliged to report on the different initiatives.

The competent Ministry for Family, Senior Citizens, Women and Youth in **Germany** tries to encourage companies to develop their own policies and bring about cultural change regarding female leadership.<sup>69</sup> The Ministry supports research and political action, offers guidelines for the successful implementation of statutory requirements and, often in collaboration with the women-on-board initiative,<sup>70</sup> informs the public and enhances competition by publishing best practices and comprehensive statistics. In a practical guide that it published, it explains the new law on gender quota and presents best practices performed by leading companies such as the female leadership project by Commerzbank, the project 'leading across cultures and genders' by Bayer, the mentoring programme by Allianz, the executive flexible working times model by Bosch, the reconciliation project 'career with children' by Deutsche Bahn and the cultural change at Aesculap AG.<sup>71</sup>

66 [www.navigerennaardetop.nl](http://www.navigerennaardetop.nl). Website accessed 24 May 2017.

67 <https://www.rahandusministeerium.ee/et/uudised/riigi-ariuhingute-nimetamiskomitee-alustab-tood>, accessed 20 June 2017.

68 Article 80.1 of the State Assets Act was adopted in July 2017, RT I, 06.07.2017, 9, <https://www.riigiteataja.ee/en/eli/524072017014/consolide>, accessed 2 October 2017.

69 See <https://www.bmfsfj.de/zielsicher>.

70 This concerns a very important player in Germany's struggle for gender equality on boards: <https://www.fidar.de/>.

71 Federal Ministry for Family, Senior Citizens, Women and Youth (ed.) (2015), Zielsicher: mehr Frauen in Führung. Praxisleitfaden zum Gesetz, <https://www.bmfsfj.de/blob/83970/b4dad0318495566f9d4d6d78e50b1bc5/praxisleitfaden-data.pdf>.

In **Croatia**, public administration bodies and legal entities that are majority owned by the State are obliged, on the basis of the Gender Equality Act, to adopt action plans for the promotion and establishment of gender equality.<sup>72</sup> Action plans are to be adopted every four years on the basis of the analysis of the position of women and men, and may serve to achieve various aims of gender equality policy. Action plans have to be approved in advance by the Office for Gender Equality of the Republic of Croatia and failure to submit this plan within the prescribed period can result in monetary fines, ranging from HRK 3 000 to 10 000 (approximately EUR 400 – 1 350) for persons in charge in state administration bodies, or HRK 30 000 (approximately EUR 4 000) for legal persons majority-owned by the State. No fines have been imposed so far.<sup>73</sup> In 2013, the Croatian Ombudsperson for Gender Equality launched a public campaign and a research study as part of the PROGRESS project ‘Removing the glass labyrinth – equal access opportunities to the positions of economic decision-making’.<sup>74</sup> The project duration was two years and included the launch of a special website and promotion in the media. Four studies were carried out: on the participation of women and men in company boards and managerial positions in business entities (top 500 companies); on the participation of women and men in company boards and managerial positions in business entities (top 100 companies); of businesswomen’s perception of the barriers to career advancement to top-level positions in Croatia; and on the perception of employers on the benefits of gender equality in business decision-making.<sup>75</sup> Another important outcome included the establishment of a Register of Business Women.<sup>76</sup> Several educational seminars were organized, which resulted in the publication of two informative publications: Tools for the promotion of gender balance in business entities and Gender-balanced economic decision-making – societal and economic advantages.<sup>77</sup>

In 2015-2016, the **Slovak** Labour Ministry implemented the project ‘Support of balanced representation of women and men at managerial positions in organisations of the public and private sectors’, funded also under the European Commission’s PROGRESS subsidy scheme.<sup>78</sup> The Project was a reaction to existing inequalities in the representation of both sexes at these positions and sought to support the more balanced representation of women and men in management through several activities. Their purpose was to inform and sensitize the public, in particular the employers, to the persisting inequalities and to highlight the positive effects of more balanced representation of both sexes in management. The employers were also motivated by the regular competition ‘The Employer Friendly to Family, Gender Equality and Equal Opportunities’; in 2016 the employers were also evaluated on the basis of support of more balanced representation of women and men in decision-making positions in their companies.<sup>79</sup>

In **Malta**, the National Commission for the Promotion of Equality started a number of initiatives in order to empower more women to participate in decision-making positions,<sup>80</sup> which formed part of a project co-funded by the European Social Fund. Two research studies provided findings and recommendations to improve gender balance in decision-making positions, one of them analysing gender quotas and related measures that enhance the gender balance in the boardrooms.

In the **Czech Republic**, the Government Strategy for Equality of Women and Men in the Czech Republic for 2014-2020 and the Action Plan for balanced representation of women and men in decision-making positions 2016-2018 bear some relevance. However, no particular actions have been taken.

72 Article 11(1) GEA. The personal scope of this provision is very wide, and includes typical administrative bodies and entities, such as ministries, agencies or other administrative institutions, as well as institutions providing public services (education, healthcare and similar). However, executive and legislative bodies (such as the Government and Parliament) are not covered.

73 Article 34 GEA.

74 <http://staklenilabirint.prs.hr/>, accessed 5 June 2016.

75 All studies available in Croatian at <http://staklenilabirint.prs.hr/publikacije/>, accessed 5 June 2016.

76 [http://staklenilabirint.prs.hr/wp-content/uploads/2014/09/Baza-zena\\_final.pdf](http://staklenilabirint.prs.hr/wp-content/uploads/2014/09/Baza-zena_final.pdf), accessed 5 June 2017.

77 Both available in Croatian at <http://staklenilabirint.prs.hr/publikacije/>, accessed 5 June 2017.

78 <http://www.gender.gov.sk/en/300/> available in English, <http://www.gender.gov.sk/aktivity/projekty/projekt-progress/> available in Slovak.

79 [www.gender.gov.sk/ocenenia-zamestnavatelov-ustretoyach-k-rod](http://www.gender.gov.sk/ocenenia-zamestnavatelov-ustretoyach-k-rod).

80 [https://ncpe.gov.mt/en/Pages/Projects\\_and\\_Specific\\_Initiatives/Gender\\_Balance\\_in\\_Decision\\_Making.aspx](https://ncpe.gov.mt/en/Pages/Projects_and_Specific_Initiatives/Gender_Balance_in_Decision_Making.aspx), accessed 5 June 2017.



### 3.7 Assessment and concluding remarks

This chapter has shown that there is huge variety among the Member States as to whether any public regulatory approach towards the promotion of gender-balanced boards has been taken at all, and if so, whether this concerns merely setting soft targets without sanctions and/or of a hard nature involving mandatory quota and sanctions (those being discussed further in the next chapter). Furthermore, in some States these may have been supplemented with policy measures, while in others only such measures have been taken. Thus, **Croatia, Cyprus, the Czech Republic, Hungary, Latvia, Liechtenstein, Lithuania, Malta and Slovakia** have no public regulatory approach to a more balanced representation of women and men in company boards, but **Croatia, the Czech Republic, Malta and Slovakia** have developed some policy measures.

For those States that have developed a public regulatory approach to a more balanced representation of women and men in company boards, these show numerous differences. One can therefore observe that some States have adopted a (hard) public regulatory approach only regarding state-owned companies (**Greece, Luxembourg and Slovenia**). Other States have adopted a hard regulatory approach for state-owned companies and a soft one for private companies (**Finland**). Soft regulatory approaches can be found in **Austria, Bulgaria, Denmark, the Netherlands, Portugal and Spain**. Six States have enacted mandatory quotas in their legislation in order to reach a more balanced representation of women and men in company boards and have provided that non-compliance of such obligations may be sanctioned. The first State to do so was **Norway**, followed by **Iceland, Belgium, France, Italy and Germany**. **Romania** did not introduce mandatory quotas, but did provide for legal obligations for all entities that operate based on their own statutes or regulations ‘to promote and support balanced participation of women and men in leadership and decision’ and ‘to adopt the necessary measures’ for ensuring this goal. For some States, the relevant obligations can be found in equality law, in others in company law, or in both, for example in **Denmark**, and sometimes in labour law.

Comparing the scope of these national public regulatory approaches with the GBB-Directive proposal, the following conclusions can be drawn. The scope of the GBB-Directive is limited to listed companies. While most Member States that have introduced mandatory quota generally indeed did so for listed companies only (**Belgium**,<sup>81</sup> **France, Germany**<sup>82</sup> and **Italy**),<sup>83</sup> in **Norway and Iceland** the scope of application is not limited to listed companies. Yet, in Norway it is limited to public companies. Some Member States which have 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**). Furthermore, the aim of the GBB Directive of 2012<sup>84</sup> is to achieve a more balanced representation of men and women among the non-executive directors of listed companies. However, in the revised version of the proposal,<sup>85</sup> the aim is to achieve a more balanced representation of men and women among the directors, meaning both executive and non-executive directors, of listed companies. In some Member states the relevant provisions (still) 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.

81 In Belgium, the relevant provisions also apply to economic public bodies.

82 In Germany, the relevant provisions apply to private companies that are listed and are subject to full-parity co-determination, as well as any listed Societas Europaea with a parity co-determined board.

83 In Italy, the relevant provisions also apply to state-owned companies.

84 The 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 of 14 November 2012, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2012:0614:FIN>.

85 As confirmed by the Maltese Presidency to the Council on 31 May 2017. The report from the Presidency to the Council, 31 May 2017, Interinstitutional File: 2012/0299 (COD), [http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CONSIL:ST\\_9496\\_2017\\_INIT&from=EN](http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CONSIL:ST_9496_2017_INIT&from=EN).

Turning to the substance of the national approaches as compared to the GBB-Directive proposal, the standards for this assessment were already set out in more detail in Section 2.1. above. Considering the target: while 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 %. In **Italy** and **France** the quotas will increase over time from 20 % to 33 % in **Italy** and 40 % in **France**. The quotas were set at 30 % in **Germany**; in **Belgium** the quotas were set at one third and in **Iceland** at 40 %. Soft targets range from 30 % in **the Netherlands** and **Portugal**, to 40 % in **Bulgaria, Finland and Spain**. **Norway** is the only State that provides for an exception in the election rules: for companies where one gender accounts for less than 20 % of the workforce, there is not a requirement that the representatives must be one of each gender. Yet, this only applies to the specific rules concerning the election of employee representatives to the Board.<sup>86</sup> The regulation does not affect the composition of the rest of the Board. One may question whether this rule fully complies with the scope of the proposed Article 4(6) of the GBB Directive. This article allows Member States to provide for an exception for listed companies where the members of the underrepresented sex represent less than 10 % of the workforce. Furthermore, only very few States can avail themselves of the flexibility clause as provided for by Article 4b, 1a GBB Directive, as their national law complies with any of the options mentioned therein. In addition, only **Denmark, Finland and Germany** have taken legal measures to require companies to set individual quantitative objectives regarding gender-balanced company boards. Overall therefore, many States still fall short in setting the same level of ambition as contained in the GBB-Directive proposal and provide for a mandatory way to achieve the set target even less.

The GBB Directive also provides that Member States shall ensure that listed companies which do not meet the required objectives of the Directive apply clear, neutrally formulated and unambiguous criteria when selecting candidates for (non-executive) board positions. Furthermore, it requires the application of a priority rule. It has appeared that regardless of which regulatory approach – soft or hard – a State has adopted, recruitment requirements have been rarely provided for and if so, they are still of a fairly general nature (**Germany, Italy, France, Portugal, the Netherlands**). Even more strikingly, only the **Icelandic** expert has reported the use of a priority rule. In this respect, most countries therefore fall short in meeting the procedural obligations the GBB Directive seeks to impose.

A final issue to consider here, is whether at national level any specific measures are put forward to improve gender balance at company management level below the board(s) level. The few States that have enacted public regulation that also regards this level are **Austria, Denmark and Germany**. **German** law for instance provides that all private companies that are listed or subject to co-determination have to set individual quantitative objectives (target gender quotas) with regard to the first and second management levels below 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**. Ensuring that women are well-represented at levels of management below the board is an important issue to take into account in any legal or policy approach, given that underrepresentation at these levels will impact women's representation at board level.

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86 See Section 13 in Regulation FOR-2017-08-24-1277, Forskrift om de ansattes rett til representasjon i aksjeselskapers og allmennaksjeselskapers styre og bedriftsforsamling mv. (representasjonsforskriften).

## 4 Public monitoring and enforcement

This chapter will focus on the requirements that the legal systems of the States under consideration impose regarding the monitoring and enforcement of the public rules imposed on companies, as discussed in the previous chapter. The nature and scope of reporting obligations will be considered (Section 4.1), the bodies that are made responsible for monitoring compliance (Section 4.2) and the nature, scope and application of enforcement measures and sanctions, if any (Section 4.3). The chapter will wrap up with some concluding remarks (Section 4.4). Given the fact that in Section 3.1 it has already been established that quite a number of States lack any public regulatory approach whatsoever, there will be nothing to report on these States in this chapter on these topics. These States are **Croatia, Cyprus, the Czech Republic, Hungary, Latvia, Liechtenstein, Lithuania, Malta, and Slovakia**. In some cases monitoring and enforcement has been established in connection with corporate governance codes (e.g. **Spain, Sweden, UK**). These will be discussed in Chapter 5, because of their co-/self-regulatory nature.

### 4.1 Reporting obligations

As observed in Section 2.1, the GBB Directive proposes a reporting obligation in its Article 5. This Article provides that listed companies have to provide information to the competent authorities about the gender representation on their boards, distinguishing between non-executive and executive directors. In addition, listed companies will have to provide information about the measures taken in view of the objectives laid down in the Directive, and the relevant companies have to publish that information in an appropriate and accessible manner on their website. Some form of reporting obligation regarding gender-balanced boards now exists only in about half of the States under consideration: **Austria, Belgium, Bulgaria, Denmark, Finland, France, Germany, Iceland, Ireland, Italy, the Netherlands, Norway, Poland and the UK**. It appears that the legal foundations and scope of national reporting obligations varies, depending on whether it concerns States that have introduced specific legislation for promoting gender-balanced boards or not. Countries that have introduced specific reporting obligations as a result of adopting specific laws to increase the number of women on company boards are **Belgium, France, Germany, Greece, Iceland, Italy and the Netherlands**. Countries that have (sometimes additional) reporting obligations on the gender composition of company boards on the basis of general company law are **Austria, Bulgaria, Germany, Norway and the UK**. In some countries these obligations were only introduced pursuant to the transposition of EU Directives 2013/36 and 2014/95, presented already in Section 2.2 (**Bulgaria, Estonia, Finland, Ireland**). Below we will first discuss the national reporting obligations that ensue from the transposition of the previous Directives, to see to what extent these contain elements that regard gender-balanced boards at all (Section 4.1.1). Next, we will consider the national obligations that ensue from specific laws or company law (Section 4.1.2) from the perspective of their personal scope; their substantive scope, specifically whether there is an obligation to comply-or-explain in case of non-compliance with the target, quota or individual quantitative objective; their reporting frequency and the extent to which companies are obliged to make this information publicly available on their website and/or in any other way.

#### 4.1.1 National reporting obligations on the basis of EU Directives 2013/36 and 2014/95

A general observation is that while some of the national reporting obligations entail a comply-or-explain obligation, the actual duties are very often formulated in rather vague terms.

In **Greece**, the act<sup>87</sup> transposing Article 91 of Directive 2013/36 thus vaguely provides that financial institutions ‘ensure a wide range of qualifications for the election of members of their board, applying to this effect a policy that promotes the appropriate level of diversity in the board.’ It also provides that the Bank of Greece and the Capital Market Committee gather the information made public in accordance

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87 Paragraph 10 of Article 83 of Act 4261/2014 (OJ A 107.05.05.2014).

with Article 435(2)(c) of Regulation 575/2013/EU, that they use it for the comparative evaluation of the diversity policies in the boards and transmit it to the European Bank Authority.<sup>88</sup> There is no specification of the term 'diversity' nor is there any case law on this provision. The Greek act transposing Article 20 of Directive 2013/34 and Article 1(2) of Directive 2014/95 provides that limited liability companies include in their Management Report a Statement on Corporate Governance, which includes at least a description of the company's diversity policy as applied to the managing and supervisory bodies of the company, also regarding gender, as well as the aims of such policies, the way in which they have been applied and their results during the reporting period. There is no case law on this provision either.

In the **Netherlands** also, the transposition<sup>89</sup> of Directive 2013/36 only led to some general, vague provision that board members of a financial body must be suitable for their task and that financial bodies should have, inter alia, a clear, balanced and adequate organizational structure and division of tasks, competences and responsibilities. There are no specific obligations with respect to gender balance. The transposition act of Directive 2014/95 states that the legal entity has to provide information about environmental, social and personnel matters, that the company must report on the diversity policy with respect to the composition of the board of directors and the supervisory board and must mention the objectives of the policy, the way the policy has been executed and the results thereof in the past financial year. If the company does not have a diversity policy, it has to explain why.

In **Italy**, the transposition act<sup>90</sup> of Directive 2013/36/EU does not contain references to gender balance, whereas the one regarding Directive 2014/95/EU provides for large undertakings which are public-interest entities to include in their management report a non-financial statement containing information on the undertaking's development, performance, position and impact of its activity, relating to, as a minimum, environmental, social and employee matters, respect for human rights, anti-corruption and bribery matters. In this context, it also imposes a reporting obligation on the fulfilment of the gender equality principle within the undertaking.

The non-financial statement which large companies have to issue pursuant to the **Bulgarian** Accountancy Act implementing the two EU Directives has to contain the description of policies, activities and results that have been achieved as regards diversity and gender equality in management bodies of the enterprise, and as regards the number of women and men, age, geographical diversity, education, professional qualities and religion. In case of non-compliance with one or more of the issues subject to the non-financial statement, the statement must contain a clear and articulated justification for the reasons for non-compliance with the adopted policies. This obligation applies since January 2017 as part of the yearly report. Companies acting in the public interest and qualifying as large companies also have an obligation to make a statement on corporate governance publicly available, which according to the Law on Public Offering of Securities is also subject to the comply-or-explain principle. It must provide information on the composition and functioning of the administrative, executive and supervisory bodies and their committees, including the diversity policy applied to them in relation to age, sex, education, professional experience, the objectives of the diversity policy, the method of application and the results during the reviewed period. In case of non-compliance, the statement shall contain an explanation on the reasons.

In **Estonia** also, amendments were made to the Accounting Act for the purpose of implementing the two Directives, which entered into force on 1 January 2016.<sup>91</sup> A large undertaking whose securities granting voting rights have been admitted for trading on a regulated securities market of Estonia or another Contracting State, shall describe in the corporate governance report the diversity policies carried out in the company's management board and senior management and the results of the implementation thereof

88 Paragraph 11 of Article 83 of Act 4261/2014 (OJ A 107.05.05.2014).

89 Article 3:8 Wft (Act on Financial Supervision) and the 'Decision on prudential rules' that was established on the basis of Article 3:8 Wft.

90 Directive 2013/36/EU was implemented by legislative decree No. 72/2015.

91 Raamatupidamise seadus (Accounting Act), RT I, 27.12.2016, 3, <https://www.riigiteataja.ee/en/eli/517012017005/consolide>, accessed 2 June 2017.

during the accounting year. If no diversity policies have been implemented, the reasons for this should be explained in the report. The corporate governance report from the construction company Nordecon AS provides an interesting example of how this obligation is being complied with in practice. It states that: 'In 2016, the Group did not apply a diversity policy because both managers and employees are selected based on the Group's interests and people are hired and appointed based on their education, skills and prior work experience. However, the Group observes the policy of not discriminating against any candidate based on their gender or other factors.'<sup>92</sup>

The **Finnish** Government decision<sup>93</sup> of 17 February 2015 introduced a reporting obligation for large-cap and mid-cap listed companies (see also Section 3.3.2). These companies had to publish their aims concerning balanced participation by 30 June 2016, and by the beginning of 2017, the companies had to publish their progress in reaching this aim, and the measures taken. The Government monitors the listed companies' aims and measures on the matter, and expects the companies to report progress. The Government will assess the situation in the fall of 2018 and decide on the need of legislation on the basis of the assessment. This decision is clearly motivated by EU-law requirements, but the reporting duty aims at better self-regulation by the companies, and lack of reporting does not lead to any sanctions.

The **German** implementation<sup>94</sup> of the EU Directives amended the Commercial Code by adding that the information about measures to reach gender equality, social measures and human rights is a possible (but voluntary) content of the declaration on non-financial matters.

In **Ireland**,<sup>95</sup> the European Union (Disclosure of Non-Financial and Diversity Information by Certain Large Undertakings and Groups) Regulations 2017 came into operation on 21 August 2017 in respect of financial years commencing 1 August 2017.<sup>96</sup> Where a large traded company prepares a corporate governance statement, the statutory auditors of the company when preparing the report as required by the Companies Act 2014, shall state whether in their opinion, based on the work undertaken in the course of the audit, the information in respect of the diversity report<sup>97</sup> is contained in the corporate governance statement. If there is no diversity policy, the directors must provide a reason as to why there is no such policy; the statutory auditors must provide in their opinion that there is such a statement in the director's report or that there is an explanation for such absence.

#### 4.1.2 National reporting obligations ensuing from specific laws and company law

##### (i) Personal scope

In most countries, the reporting obligation applies to both executive and non-executive boards (**Belgium, Bulgaria, Greece, Italy, the Netherlands, UK**). In **Norway**, it applies across the unitary board system.

92 Nordecon AS (2017), *Nordecon Group annual report 2016*, <http://oam.fi.ee/et/announcement?id=4900&tab=1>, accessed 21 June 2017.

93 Valtioneuvoston periaatepäätös sukupuolten tasapuolisen edustuksen toteuttamisesta pörssi-yhtiöissä (Government decision on balanced gender participation in listed companies), Ministry of Justice 17 February 2015, [http://oikeusministerio.fi/material/attachments/om/ajankohtaista/uutiset/a\\_uutiset2015/jjBVuf5sF/porssiyhtioiden\\_hallitukset\\_tasa-arvo.pdf](http://oikeusministerio.fi/material/attachments/om/ajankohtaista/uutiset/a_uutiset2015/jjBVuf5sF/porssiyhtioiden_hallitukset_tasa-arvo.pdf), accessed 4 June 2017.

94 Statute on the improvement of the disclosure of non-financial information in management reports (CRD-Directive-Implementation Law) of 11 April 2017, [https://www.bgbl.de/xaver/bgbl/text.xav?SID=&tf=xaver.component.Text\\_0&toctf=&qmf=&hlf=xaver.component.Hitlist\\_0&bk=bgbl&start=%2F%2F%5B%40node\\_id%3D%27262569%27%5D&skin=pdf&tleve=-2&nohist=1](https://www.bgbl.de/xaver/bgbl/text.xav?SID=&tf=xaver.component.Text_0&toctf=&qmf=&hlf=xaver.component.Hitlist_0&bk=bgbl&start=%2F%2F%5B%40node_id%3D%27262569%27%5D&skin=pdf&tleve=-2&nohist=1).

95 Regulation 6 of the European Union (Disclosure of Non-Financial and Diversity Information by Certain Large Undertakings and Groups) Regulations 2017 S.I. No. 360 of 2017.

96 European Union (Disclosure of Non-Financial and Diversity Information by Certain Large Undertakings and Groups) Regulations 2017 S.I. No. 360 of 2017 implementing Directive 2014/495/EU. <https://www.djei.ie/en/Legislation/SI-No-360-of-2017.html>. Accessed 26 August 2017.

97 A description of the policy applied in relation to the board of directors with regard to aspects such as age, gender or educational and professional backgrounds, the objective of the diversity policy, how the policy has been implemented and the results of the policy in the financial year.

In **Germany**, however, private companies that are listed and subject to full-parity co-determination<sup>98</sup> are obliged to report on their compliance with the statutory 30 % gender quota only for non-executive boards. Private companies that are listed or subject to co-determination<sup>99</sup> are obliged to report on their target quota regarding executive and non-executive board positions as well as highest management positions.

Otherwise, the personal scope of the reporting obligations varies considerably, depending on the nature of the company, its size and/or financial value of the company. The **Italian** law only applies to state subsidiary companies, excluding listed companies. In **Greece** as well, the soft information obligation applies to legal persons whose board members are appointed in whole or in part by the State, legal persons of public law and local authorities, whether they have the legal form of companies or not. In **Norway**, all public liability companies are under an obligation to report on the gender representation in their board in the annual report of the status of the company.<sup>100</sup> Right after the quota rules were enacted a few companies transformed from public to private-owned limited liability companies in order to avoid the rules, but this has not remained a trend.

In some countries only very large companies are covered. In **Austria**, the obligation applies to stock companies that are enterprises of public interest and on average employ more than 500 employees during a reporting season as well as banks and insurance companies have to present non-financial information. The **Bulgarian** Accountancy Act also only covers enterprises that have at least 500 employees or that comply with two of the following three criteria: a balance value of assets of BGN 38 million (EUR 19,43 million); a net income from sales of BGN 76 million (EUR 38,86 million);<sup>101</sup> and/or an average number of 250 employees. Companies acting in the public interest pursuant to the definition in the Accountancy Act – which are those publicly listed, insurance companies and credit institutions – also have to include in their activities' report a declaration of corporate management pursuant to the Law on Public Offering of Securities. The **Dutch** regulation as well applies only to companies meeting two out of three criteria mentioned in Article 2:397(1) DCC. These criteria are: (1) the value of the assets, according to the balance sheet, exceeds EUR 20,000,000; (2) the net turnover in a financial year exceeds EUR 40,000,000; (3) the average number of employees in a financial year is higher than 250. In **Denmark**, a reporting obligation is imposed on state-owned public limited companies, companies whose shares, debt instruments or other securities are admitted to trading on a regulated market in an EU/EEA country and on large limited liability companies. In addition, it must concern companies employing more than 250 persons and having an annual turnover exceeding DKR 313.50 million (EUR 4212.69 million) or an annual balance sheet total exceeding DKR 156 million (EUR 20.96 million).<sup>102</sup> Boards, executive committee or similar collective managements of public limited companies and independent institutions are also under an obligation to report on a yearly basis.

In other countries the threshold is lower. In **Iceland**, public limited companies with more than 25 employees generally shall detail on an annual basis information regarding sex ratios among employees and the management of the Company. In the **UK**, the obligation applies to listed companies, i.e. a company whose shares can be bought or sold on the stock market. In **France**, companies which have to apply quota shall deliberate every year on the company's gender equality and wages policies and they are required to draft a report on the comparative situation of the general working and training conditions of women and men in the company set out by Article L1143-1 of the Labour code. This report is due for companies employing more than 50 workers.

98 Around one hundred companies in Germany.

99 Between 2.500 and 3.500 in Germany. Regarding different scores see Weckes, M. (2015), 30% Quote im Aufsichtsrat: Eine Eröffnungsbilanz, [https://www.boeckler.de/pdf/p\\_mbf\\_report\\_2015\\_12.pdf](https://www.boeckler.de/pdf/p_mbf_report_2015_12.pdf).

100 Accounting Act Section 3-3 a, cf. Section 3-3.

101 On the basis of the exchange rate of 3 October 2017.

102 On the basis of the exchange rate of 3 October 2017.



## (ii) Substantive scope; comply-or-explain obligation?

The picture is also quite diverse when it comes to whether there is an obligation on the part of the company to explain the reasons for non-compliance with the target, quota or individual quantitative objective that has been set by law, a so-called comply-or-explain obligation.

In **Austria**, corporate governance reports have to explain why staffing decisions in the reporting period have not conformed to the expectation of advancement measures or why reporting is declined. **Dutch** law obliges companies to report on the gender representation in their board when the target of 30 % is not reached and explain what measures the company took to comply with the target and what measures it will take to comply in the future. In **Germany**, for most private companies concerned, the report on the compliance with statutory or individual gender quota is part of their general reporting obligations under company law. The reporting obligations on the compliance with the statutory gender quota or the target gender quota were amended for stock corporations by the additional requirement to publish a detailed diversity concept, which implies setting out the aims to achieve more diversity in executive and non-executive board positions regarding age, gender, educational and employment background. It should also set out the means to reach its goal and the respective successes achieved. Regarding public undertakings or state-owned companies with at least three seats of the non-executive boards within the purview of the federal Government or to be elected by the federal Government, the respective federal Ministry is obliged to report immediately to the federal Ministry for Family, Senior Citizens, Women and Youth when the 30 % (or from 2018, 50 %) gender quota cannot be reached and explain the reasons why.

In the **UK**, there is a general obligation<sup>103</sup> which requires that in their annual strategic report, listed companies provide a breakdown showing, as at the end of the financial year, (a) the number of persons of each sex who were directors of the company; (b) the number of persons of each sex who were senior managers of the company (other than persons falling within sub-paragraph (a)); and (c) the number of persons of each sex who were employees of the company. In addition, the board diversity requirements are dealt with in the Financial Conduct Authority's Disclosure Guidance and Transparency Rules. If a company does not have a diversity policy, then it must explain why. These provisions overlap with the FRC Code.

In other countries there is no such comply-or-explain obligation. In **Greece**, there is an information obligation, yet it is considered a soft one for lacking any sanction on non-compliance. In **Norway**, there is an activity and reporting duty ensuing from the Gender Equality Act<sup>104</sup> which places an obligation on all employers to work for enhancing equal possibilities regardless of sex. Yet, there is no room for explanations; the company fulfils the target requirement or risks being dissolved. In **France**, the supervisory board shall hold its discussions on this basis on the issues mentioned in Article L2323-8 of the Labour Code and shall include information on the gender situation in the company. But there is no duty to report on non-compliance with the target. Several acts have also been adopted with an obligation to report on corporate social responsibility and since 2001, large companies are required to provide non-financial reports regarding social, environmental and governance aspects, including gender policy.

In **Iceland**, notifications regarding Boards to the Register of Companies regarding sex ratios on a Board shall be detailed. Public limited companies with more than 25 employees also have to provide information regarding sex ratios among employees and the management of the Company. If the Register is notified of a new board of directors where the provision of gender equality is not adhered to, the Register needs information on the number of employees and can in such cases turn to the Directorate of Internal Revenues to get the right numbers. The only legal remedy that the Register of Companies can resort to in the case of non-compliance is to reject the registration of the new board of directors.

<sup>103</sup> Section 414C(8)(c) of the Company Act 2006.

<sup>104</sup> Sections 23 and 24.



(iii) Reporting frequency and publicity

Regardless of the legal foundation, in most countries, these are annual reporting obligations (**Austria, Belgium, Bulgaria, Denmark, France, Germany, the Netherlands, UK, Norway**), often connected to the publication of companies' annual reports. In addition, the **German** Federal Government is obliged to submit a report to the Federal Parliament assessing board appointments and elections under federal control every four years. In some countries the frequency is not clear, such as **Greece**. In **Italy**, companies have to report to the Prime Minister or to the delegate Minister for Equal Opportunities on the compositions of their directors and auditors boards, within 15 days from their appointment, or substitution during their tenure. The Prime Minister or the delegate Minister for Equal Opportunities presents to the Parliament, every three years, a report on the state of implementation of legislation regarding gender-balanced state subsidiary boards.

In terms of making this information on the gender composition on boards publicly available through the company website, it appears that there is still quite some discretion left to companies to do so or not (**Austria, Belgium, Greece, Iceland, Italy, Norway, France**).

Such an obligation does exist, however, in some countries. In **Bulgaria**, the non-financial information and the declaration on corporate governance have to be included in the commercial registry and made publicly available on the website of the company. It can also be publicized through some official economic publications/reviews. In the **UK**, listed companies are required to make the report available on their websites and failure to do so might result in a fine.<sup>105</sup> In **Norway**, the information in the annual reports is publicly available. From 2017 onwards, the **German** Federal Government will publish an annual report on the participation of women and men in leading positions and on boards of private companies and in the civil service.<sup>106</sup> The federal ministries are obliged to publish all boards under federal control and the gender representation on these boards, including on their websites. Many private companies under the special obligation to report on their statutory gender quota or individual target quota are generally obliged to publish an annual management report in the electronic Federal Gazette, now including the report on gender quota as well. Private companies which are not under a general reporting obligation can either publish such a general report voluntarily or they are obliged to publish a statement with the same information on their management including gender quota on their websites.

## 4.2 Monitoring bodies

The national reports show that in so far there is no responsible body at all for monitoring the gender composition of company boards, and that in most cases this concerns the general national bodies responsible for monitoring gender equality issues (**Belgium, Finland, Greece, Portugal, Estonia**). Only in very few Member States, have specific bodies been created or made responsible for this purpose, depending in the first place on whether specific measures have been introduced to promote this, as discussed in Chapter 3 (**Italy, Iceland, Germany, Greece, Luxembourg**). In some cases these concern bodies that were established in connection with corporate governance codes (e.g. **Spain, UK**). These will be discussed in Chapter 5, because of their co-/self-regulatory nature.

The monitoring competences of general equality bodies are often limited. The **Finnish** Equality Ombudsman can monitor and support gender balance in companies but only where state-owned companies are concerned. The Ombudsman may request information from the companies concerning the implementation of the national applicable act, as well as perform inspections. Its enforcement measures are limited to demanding information from the companies in question, and counselling where infringement is suspected. On two occasions, the Equality Ombudsman has made a statement on the issue. First, in response to

<sup>105</sup> Company Act 2006 S 430 and S430(7).

<sup>106</sup> The first report of 9 March 2017 is available under <https://www.bmfsfj.de/blob/115648/916d83985cd40e23540818f4fec2c1c0/bundestagsdrucksache-quotenbericht-data.pdf>.

a request that the Ombudsman should bring cases concerning the duty on balanced participation to the Equality and Non-Discrimination Board, that the Ombudsman has no competence to bring cases before the Board. Second, she made a statement regarding a municipality-owned company that it had violated Finnish law by only nominating very few women for a board position. In **Belgium**, the Institute for Equality of Women and Men can only ask private companies for communication of their reports, these requests seemingly being answered without difficulty. Concerning public institutions, these must provide information upon the Institute's requests.<sup>107</sup> In **Croatia**, the Ombudsperson for Gender Equality has conducted a policy-building and awareness-raising campaign about gender-balanced boards.<sup>108</sup> In **Norway**, there is no systematic work following up the enterprises, but the Gender Equality Ombud will perform some controls for specific professions from time to time. The Ombud also provides guidance to employers on how to work systematically with equality issues.<sup>109</sup> In the **UK**, the Equality and Human Rights Committee also carries out work in this field.<sup>110</sup> In **Estonia**, the only body to study activities of members of advisory boards of state-owned companies is the Anti-Corruption Select Committee, installed in May 2015. This Committee can investigate issues of public interest or problems of significant importance, but gender issues are not considered as such. In February 2017, an Appointing Committee was formed,<sup>111</sup> which will appoint supervisory board members of the 31 state-owned companies. Unfortunately, this Committee comprises men only, four from the private sector and from the public sector the chancellor of the Ministry of Finance and a rotating member. State companies have assets worth EUR 6 billion and employ nearly 15 thousand people, and their supervisory boards have about 150 members.

In the following countries, a specific body was made responsible for following up on the gender quota or target provisions, which are mostly connected to some ministry. In **Italy**, regarding listed companies, the Consob (National Securities and Exchange Commission) is the monitoring body. The Prime Minister or the delegate Minister for Equal Opportunities is the monitoring body for state subsidiary companies. Companies' boards have to inform the Prime Minister or the delegate Minister for Equal Opportunities on the failure of fulfilling obligations on gender-balanced company boards during tenure; this information can be given by anybody who has an interest in the issue. In **Iceland**, the Ministry of Financial Affairs is responsible for the compliance with the 2010 gender quota legislation. It must ensure education for managers and boards of companies to inform them about their responsibilities and duties<sup>112</sup> and a database is to be established on those who have received such training to enable managers and directors to form a relationship and help companies find qualified managers and board members.<sup>113</sup> In **Germany**, the gender balance on company boards is one of the main projects of the Federal Ministry for Family, Senior Citizens, Women and Youth. But the reports of private companies are received by the electronic Federal Gazette and monitored by the respective committee of the Federal Office of Economy and Export Control or the Federal Office of Justice. In **Greece**, with a view to assisting the competent authorities in fulfilling their legal obligation to apply the quota and to achieve effective supervision of the composition of the boards, the General Secretariat of Gender Equality obtained a project entitled 'Development of the electronic application "implementation of the legislation regarding gender quotas in the organs belonging to or supervised by the Public Administration"', co-funded by the European Commission and the Greek Government. Public authorities are encouraged to visit the specific website<sup>114</sup> in order to register the multi-member bodies they are competent for. As the implementation of this project started in April 2017

107 Act of 16 December 2002.

108 *Zakon o ravnopravnosti spolova*, Official Gazette *Narodne novine* nos. 82/08 and 138/12.

109 The Ombud has produced a pamphlet on how to work with the activity and reporting duty following the various equality and anti-discrimination acts, see [http://www.ido.no/globalassets/brosjyrer-handboker-rapporter/diverse-pdf1/veileder-diskriminering\\_web.pdf](http://www.ido.no/globalassets/brosjyrer-handboker-rapporter/diverse-pdf1/veileder-diskriminering_web.pdf), accessed on 6 June 2017.

110 See <https://www.equalityhumanrights.com/en/advice-and-guidance/how-improve-board-diversity-six-step-guide-good-practice> (accessed 2 June 2017).

111 <https://www.rahandusministeerium.ee/et/uudised/riigi-ariuhingute-nimetamiskomitee-alustab-tood>, accessed 20 June 2017.

112 Parliamentary Doc. No. 1480, 2010-2011.

113 Parliamentary Doc. 426, 2009-2010.

114 <http://posostosi.isotita.gr>, accessed 10 June 2017.

only,<sup>115</sup> it is too early for any results to be identified. In **Luxembourg**, it is the Minister of Economic Affairs that monitors the implementation of the action plan, which does not entail any hard obligations however.

### 4.3 Enforcement measures and/or sanctions

#### 4.3.1 Introduction

It has already been noted in Sections 3.1, 3.2 and 3.3 of this report that in the cases in which national public regulators have adopted specific legal rules and obligations to achieve gender-balanced boards, there are countries that have linked them to a clear set of enforcement measures and/or sanctions and those which have not chosen to do so. Some countries also make a distinction between sanctions imposed on private and state-owned companies. Here we will consider these enforcement measures and sanctions in more detail, looking specifically at the nature and scope of the sanctions provided for, in particular to what element of the legal obligations they relate; to non-achievement of the target or non-compliance of the procedural (reporting) obligations. Moreover, can the sanctions imposed be considered as effective, proportionate and dissuasive, as the GBB-Directive proposal requires, not as regards failure to comply with the target it sets but to comply with the procedural obligations it imposes?

#### 4.3.2 Sanctions for failure to comply with the set target

In seven States, sanctions can be imposed in the case of appointments that contravene the law and for not realizing the targets (**Belgium, France, Germany, Greece, Iceland, Italy, Norway**). The **Greek, German, Belgian and French** law provide for annulment or nullity of board members' appointments and the last two countries also allow for suspension of board members' benefits. **Norwegian and Icelandic** law both provide for refusals of registry, although Norwegian law goes much further in this respect, even allowing for dissolution of the company. This last sanction may also be applied in **Italy**. **Italian** law also provides for the possibility of imposing financial sanctions. In **Greece**, persons wronged by a decision of an illegally established board may also seek, in addition to the annulment or declaration of nullity of the decision, financial compensation for financial and/or moral damages. In addition, **Romanian** law provides for a more generally framed duty combined with a financial sanction, whereas in **Portugal** this is still under discussion.

The **Belgian** Act of 28 July 2011<sup>116</sup> does not provide for any system of monitoring and enforcement, probably because the sanctions were considered to be powerful enough to deter any infringement. The first sanction applies both to private companies and to federal public economic bodies and the National Lottery (exclusively concerning members of boards of directors who are appointed by public authorities). If the target of at least one third is not achieved, the next director to be appointed must belong to the underrepresented sex, otherwise the appointment is null and void. The same sanction applies if the appointment were to result in the target no longer being achieved. The second sanction is specific to private listed companies. If the target is not achieved, the next general assembly of shareholders must appoint the board of directors in such a manner that the target is achieved. Failure to comply entails the suspension of any advantages, financial or otherwise, attached to the position of director, for all directors until the target is achieved. There is no known case law. However, the Institute for Equality of Women and Men has undertaken to conduct periodical surveys of the implementation of the Act.<sup>117</sup> Data are requested from each of the public bodies, and for a number of private companies randomly selected.

115 See the Circular of the Ministry of Administrative Reorganisation and the Ministry of the Interior, ΔΙΔΑΔ/Φ.37, dated 6 April 2017, 'Implementation and supervision of gender participation in multi-member administrative organs. Registration of multi-member organs in the electronic application of the supervision', available at: [http://www.karagilanis.gr/files/Egg\\_12383-17.pdf](http://www.karagilanis.gr/files/Egg_12383-17.pdf), accessed 4 June 2017.

116 Available in French and Dutch on [www.juridat.be](http://www.juridat.be), accessed on 17 May 2017.

117 See 'Second bilan de la loi du 28 juillet 2011 relative aux quotas de genre dans les conseils d'administration/ Tweede balans van de wet van 28 juli 2011 over gender quota in raden van bestuur' (2016), available on <http://igvm-iefh.belgium.be>, accessed on 17 May 2017.

In **France**, the sanction for non-compliance with the quota is annulment of board members' appointments, and board members' benefits can be suspended. This does, however, not result in the nullity of the deliberations in which the irregularly-appointed member took part. Those deliberations remain valid. It remains uncertain what the exact consequences are of the annulment of the board appointment. Furthermore, the law also provides a form of coercion since attendance fees for members of limited liability companies' boards may be suspended until the board's composition becomes valid.

In **Germany**, in case of non-compliance with the statutory 30 % gender quota on non-executive boards of private companies which are listed and subject to full-parity co-determination, the election is void and the seat designated for a member of the under-represented gender remains vacant. In case of non-compliance with individual quantitative objectives, there is no immediate sanction. But if the listed or co-determined company does not publish target quotas or the period to reach such individual objectives, it may not be able to write its annual management report properly and may therefore become subject to sanctions such as an administrative fine under Sections 334 and 335 of the Commercial Code.

In **Greece**, if the 33 % quota for members of boards of legal persons appointed by the State, legal persons governed by public law or local authorities has not been complied with, any person alleging that he/she has been wronged by a decision of the illegally established board, may lodge an action for the annulment of its decision. If the decision is annulled, the competent authority must proceed to the appointment of new members of the board, this time in accordance with the 33 % gender-quota requirement, and the legally established board must re-issue the decision.<sup>118</sup> If the illegally established board belongs to a legal person governed by private law, a person wronged by a decision of this board may seek a declaration of the nullity of the board decision by the competent civil court. In such case, the board must be re-established, in accordance with the 33 % gender quota requirement. In all cases, compensation for financial and/or moral damage may also be claimed. Yet, there is no case law so far on this.

In **Italy**, as regards listed companies, the law provides for a warning by the *Consob* (the National Securities and Exchange Commission) to apply the quota system within four months and, in case of non-compliance, for a fine from EUR 100,000 to EUR 1,000,000 (and from EUR 20,000 to EUR 200,000 in case of auditors) together with a second warning to comply within three months on penalty of dissolution of the company board. As regards state subsidiary companies, the law provides for a warning by the Prime Minister or the delegate Minister for Equal Opportunities to apply the quota system within 60 days and, in case of non-compliance, for a second warning to comply within 60 days on penalty of dissolution of the company board. There are no data available on the application of enforcement procedures.

If the Bill on Quotas of 5 January 2017, now under discussion in the **Portuguese** Parliament, is approved, several sanctions will apply, such as the invalidation of the irregular election/nomination as member of the board and the application of fines. However, this is a very sensitive point in the discussion.

The **Romanian** provision that the 'balanced participation of women and men in leadership and decision must be promoted and supported' is legally binding and can be sanctioned with an administrative fine between EUR 681 and EUR 22,727 (RON 3000 and RON 100,000). Yet, its enforcement is problematic in practice, as the following section shows.

**Norwegian** company legislation provides general provisions for the enforcement of the rules regarding the composition of the board. The rules regarding gender representation have a natural place in these general provisions regarding companies – on equal footing with other requirements such as for bookkeeping, accounting etc. Thus, no special rules have been adopted for enforcement of gender representation and this requirement will be enforced through the normal control routines followed by the Register of Business

118 Cf. *mutatis mutandis* Council of State (Supreme Administrative Court (Plen.) 2977/2014, Council of State 2977/2014, Athens Administrative Court of Appeal 811/2012, regarding decisions of service councils, which must be established in accordance with an analogous quota provided for by Article 6(1)(a) of Act 2839/2000. Service councils are provided for by Article 103(4) of the Constitution; they issue decisions regarding, inter alia, the promotion or dismissal of civil servants.

Enterprises. Under these rules, the Register of Business Enterprises will refuse to register a company board, if its composition does not meet the statutory requirements, just as it refuses registration if the chief executive officer or auditor does not fulfil the legal conditions. A company that does not have a board that fulfils the statutory requirements, may be dissolved by order of the Court of Probate and Bankruptcy.

In **Iceland**, if the targets are not met, a necessary amendment can be approved with a new decision of the shareholders' meeting, but a provision regarding this matter shall be entered into the Articles of Association of a Company. Such amendments must be notified to the Register of Limited Companies within a month and evidence of legality thereof may be required. The notification shall be signed by the majority of the Board of Directors or holders of Powers of Procuration. Registration shall be rejected if notices do not meet the instructions of the Act<sup>119</sup> or a company's Articles of Association or if decisions are not made in the manner resolved by Laws or in Articles of Association or if they have not been made within the period set. A person neglecting to give notice to the Register of Limited Companies in accordance shall be subject to fines or even detention. So far this provision has not been applied, and it is also unclear how that would be done in practice, since the Register of Limited Companies is not a judicial body.<sup>120</sup> Although these provisions constitute a form of restraint, the amended Acts on Public Limited Companies do not presuppose any sanctions if not complied with and there is no systematic monitoring in order to guarantee compliance.

#### *4.3.3 Sanctions for failure to comply with procedural or reporting obligations*

In other States, especially those that have not adopted any specific laws to promote gender-balanced boards, sanctions are lacking as a general rule. Yet, regarding the reporting obligation some States have provided for a comply-or-explain procedure, which may also ensue from general company law as discussed in Section 4.1. The failure to comply with this procedure, in particular the issuing of annual reports, may also be penalized. In **Bulgaria** for example, the failure to provide financial reports and/or annual activities' reports may trigger a fine of BGN 500 (EUR 255,65) to 3000 (EUR 1533,90) for the responsible persons, and a pecuniary sanction for the company of BGN 2000-5000 (EUR 1022,60 to 2556,50).<sup>121</sup> In case of recurrent infringement the sanction is doubled.

#### *4.3.4 Effectiveness, proportionality and dissuasiveness of sanctions imposed*

In the majority of countries effective, proportionate and dissuasive sanctions are lacking completely as regards achieving gender-balanced company boards. In relation to the sanctions discussed in Sections 4.3.2 and 4.3.3, the experts assess them as follows.

In some countries, it may still be too early to assess the actual effectiveness and dissuasiveness of sanctions before the deadline for compliance with the national rules and targets has passed. Yet, some remarks can be made on their potential effectiveness. This is the case for example for **Belgium**. The sanction of appointments being null and void is considered effective and dissuasive, whereas regarding the proportionate criterion, it raises the question of the absence of an escape clause in the case of a shortage of female candidates. As to public bodies, where the national act had to be implemented almost immediately, no difficulty seems to have arisen, but for private companies the situation can only be assessed when the last deadline for implementation has expired in 2019. The second Belgian sanction has resulted from a compromise, the initial bill providing that in case of failure to achieve the target, any decision adopted by an incorrectly composed board of directors would be null and void; however, in its opinion on the draft, the Council of State had objected that such a sanction would create inadmissible

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119 Article 150 and 156 of the Act on Public Limited Companies.

120 Interviews with staff of the Directorate of Internal Review in 2011 in a Master's thesis at the faculty of law, Reykjavík University [http://fjolbreyttforysta.is/wp-content/uploads/2015/03/%C3%9E%C3%B3rd%C3%ADs-Sif\\_MLritgerd.pdf](http://fjolbreyttforysta.is/wp-content/uploads/2015/03/%C3%9E%C3%B3rd%C3%ADs-Sif_MLritgerd.pdf) (accessed on 13 June 2017).

121 On the basis of the exchange rate of 3 October 2017.

legal insecurity for third parties.<sup>122</sup> Thus, the bill was amended and suspension of any advantages for all directors was inserted in place of nullity of decisions.<sup>123</sup> As a sanction, the national expert considers this an even bigger gun than the first one; indeed its very existence does cast aspersions on the effectiveness of the first sanction in private companies. Regarding **France** as well, as the sanctions have only applied since 1 January 2017 it is difficult to assess their effectiveness. On the one hand, as the legislation permitted significant advances for equal access to positions of responsibility for women and men in companies, it is possible to argue that the sanctions were effective. On the other hand, one can doubt their effectiveness for companies not respecting the quota, especially for small and medium-sized companies. For example, sanctions based solely on attendance fees cannot apply to medium-sized companies, since most of these do not pay attendance fees and have other methods of remuneration.

The **Romanian** and **German** experts have been rather critical of the effectiveness of the sanctions provided for. The **Romanian** expert considers that the law in question is formulated so generally that its binding nature is watered down. First, it is not applied in practice. Second, it risks of being challenged on the basis of the argument that the principle of legal certainty is breached because these legal provisions are not clear and precise. A decision of the National Council for Combating Discrimination (CNCD) illustrates how the provisions mentioned above are overlooked when talking about women on boards. In 2014, the CNCD found discriminatory the lack of initiative of a local administration to promote women in the board of the main public company at the local level in the country (they assigned four men out of a total of seven nominations that were all men). The decision is forward-thinking, although the CNCD issued only a written warning and a recommendation to consider taking affirmative measures to promote women on boards in the future.<sup>124</sup> However, it is not based on Article 21 of the Gender Equality Law, which the CNCD did not even mention in its decision, but on the general provisions regarding affirmative measures from the Anti-Discrimination Law.<sup>125</sup>

In **Germany**, the first monitoring report on the participation of women and men in leading positions and on boards of private companies and in the civil service published by the Federal Government has shown that the private companies which are listed and subject to full-parity co-determination acted in compliance with their obligation to strive for a 30 % gender quota on their non-executive boards. No election was void.<sup>126</sup> Yet, the German expert does not believe that the sanctions provided for by the law ensure effectiveness. Firstly, the one hundred companies concerned by the quota law were close to this goal from the beginning. The possibility of administrative fines under the Commercial Code also seems to be a rather theoretical option. A first assessment thus shows that many of the 2,500 to 3,500 companies obliged to set themselves quantitative objectives for executive and non-executive board positions as well as higher management positions have not published any target quota. It also revealed that the target quota for non-executive boards was missing with reference to the statutory quota, that the target quota for executive boards was anything but ambitious, and that the same was true for the target quota for higher management positions, although less so.<sup>127</sup> Three quarters of all MDax-listed Companies set themselves target gender quota of 0 % for their executive boards to be reached by 30 June 2017<sup>128</sup> and very modest target quota for their highest management levels.<sup>129</sup> No sanctions seem to have been imposed on companies which set themselves a 0 % target gender quota or ignored their reporting duties on the subject of gender equality. The German Women Lawyers' Association had suggested the introduction

122 <http://www.raadvst-consetat.be/dbx/adviezen/49473.pdf>.

123 <http://derefactie.be/cm/vrtnieuws/politiek/1.1036825>.

124 National Council for Combating Discrimination (Consiliul Național pentru Combaterea Discriminării (CNCD)), Decision No. 335 of 18 June 2014.

125 Government Emergency Ordinance No.137/2000 regarding the prevention and sanctioning of all forms of discrimination (Ordonanța nr.137/2000 privind prevenirea și sancționarea tuturor formelor de discriminare), Article 2(9).

126 The first report of 9 March 2017 is available at <https://www.bmfsfj.de/blob/115648/916d83985cd40e23540818f4fec2c1c0/bundestagsdrucksache-quotenbericht-data.pdf>.

127 See Fidar (2016), Résumé on the target quotas of the Women-on-Board-Index 100 companies, [https://www.fidar.de/webmedia/documents/wob-index-100/160115\\_Resueme\\_WoB-Index\\_100\\_III\\_end.pdf](https://www.fidar.de/webmedia/documents/wob-index-100/160115_Resueme_WoB-Index_100_III_end.pdf).

128 See Section 3.3.4, where it was explained why companies can limit themselves to setting a '0' target.

129 <http://www.spiegel.de/karriere/frauenquote-in-mdax-unternehmen-keine-weiblichen-vorstaende-a-1135060.html>.



of effective sanctions, such as the invalidity of resolutions of the respective board and corporate tax disadvantages but without success.<sup>130</sup> In May 2017, sixteen women's organizations launched their renewed Berlin declaration demanding the expansion of the statutory 30 % gender quota on all listed or co-determined companies including every *Societas Europaea* and British Public Limited Company; the introduction of a statutory 30 % gender quota for executive boards and higher management positions; and of effective sanctions such as the annulment of elections, annulment of decisions, financial sanctions, effective control of management reports and public assessment of the company's explanation in case of non-compliance with the statutory gender quota.<sup>131</sup>

A more positive account has been given by the following four country experts. In **Greece**, the quotas apply to boards of legal persons which are governed either by public law or by private law. Decisions of illegally established boards of the former type may be annulled by administrative courts, as they constitute administrative acts; decisions of illegally established boards of the latter type may be declared null and void by civil courts. In both cases the illegally established board must be re-established, in accordance with the quotas, and the decision must be re-issued; compensation for financial and/or moral damages may also be obtained. Therefore, the Greek sanctions are considered in compliance with EU requirements, yet case law has been lacking so far. The sanctions that are provided for by **Italian** law are considered effective, proportionate and dissuasive, although the procedure is very gradual as annulment of the board is provided after two warnings, the administrative fine for boards of auditors in listed companies being lower than that provided for boards of directors and in state subsidiary companies, and there only being the possibility of annulment of the appointment and no administrative fines. There are no data on monitoring and enforcement actions taken regarding listed companies, but as regards state subsidiary companies, a report of the monitoring authorities of 2014 shows that since 2012, the monitoring authority received 246 alerts of non-compliance of quotas provided by legislation.<sup>132</sup> These alerts gave rise to 25 infringement procedures and in their turn led to 18 first warnings: 9 of these were complied with; 5 received a second warning. 19 out of the 25 procedures started resulted in compliance by the company involved. So far there is no case law on these issues. The **Bulgarian** expert considers the sanctions for failure to issue annual activities' reports to be proportionate and dissuasive enough, but there is no practice yet in the specific field of measures for gender equality and of diversity policy. The information so far shows that large companies publish their reports with the respective statements on corporate governance. The **Icelandic** expert has considered that there is no effective legal remedy apart from the threat of not being (re-)registered, which means that companies are not really deterred from non-compliance. However, she stresses that it may be taken into consideration that the Icelandic legislation has gone further in terms of ensuring gender equality on the boards of public limited companies than most EU-Member States, and so the authorities focus on encouraging and motivating the shareholders to act in accordance with the law on the basis that it is in the companies' best interest rather than to apply sanctions other than the one provided for.

#### 4.4 Assessment and concluding remarks

What conclusions can be drawn then from the above analysis in the light of the obligations the GBB-Directive proposal seeks to impose? First of all, as regards the reporting obligation, it has appeared that some form of a reporting obligation regarding gender-balanced boards now exists in only about half of the States under consideration: **Austria, Belgium, Bulgaria, Denmark, Finland, France, Germany, Iceland, Ireland, Italy, the Netherlands, Norway, Poland and the UK**. The legal foundations and scope of these reporting obligations has been seen to vary considerably, depending also on whether it concerns States that have introduced specific legislation for promoting gender-balanced boards or not. Some of these countries have limited themselves to merely demanding information and there not being an explanation duty imposed. Countries that have introduced specific reporting obligations as a result of

130 See German Women Lawyers Association, Statement of 7 October 2014, <http://www.djb.de/Kom-u-AS/K1/st14-17/>.

131 Berlin declaration of 2017, <http://www.berlinererklaerung.de/>.

132 [http://www.reteperlaparita.it/wp-content/uploads/2014/07/All-6-slide\\_Parrella\\_29\\_maggio.pdf](http://www.reteperlaparita.it/wp-content/uploads/2014/07/All-6-slide_Parrella_29_maggio.pdf), last accessed 1 June 2017.



specific mandatory quota or soft target laws are **Belgium, France, Germany, Greece, Iceland, Italy** and **the Netherlands**.

Secondly, in terms of transparency and accessibility of such information and reports, this still leaves quite something to be desired: while in many of these countries there is a duty to provide this information in their annual company reports, it is very much left to the discretion of companies whether to make this information available on their website or not. Only in **Bulgaria, Germany, Norway** and **the UK** does such a duty exist.

Thirdly, the GBB-Directive proposal requires that the Member States put into place effective, dissuasive and proportionate sanctions so as to ensure that companies put into place the required procedures for reaching the target(s) that the Directive provides for. When considering the national public enforcement approaches in the light of this requirement, it appears that the seven States providing for a mandatory quota law in one form or another provide for sanctions, yet as regards failure to achieve the set target in their laws. In seven States, sanctions can be imposed in the case of appointments that contravene the law and for not realizing the targets (**Belgium, France, Germany, Greece, Iceland, Italy, Norway**). **Greek, German, Belgian** and **French** law provide for annulment or nullity of board members' appointments and the last two countries also allow for suspension of board members' benefits. **Norwegian** and **Icelandic** law both provide for refusals of registry, although Norwegian law goes much further in this respect, even allowing for dissolution of the company. This last sanction may also be applied in **Italy**. **Italian, German** and **Greek** law also provide for the possibility of imposing financial sanctions, yet the German law only for violations of reporting duties and this seemingly being a very theoretical option. Regarding the failure to comply with procedural obligations, this has been seen to concern only the non-publication of annual reports, which may contain statements on gender and/or diversity issues.

Overall, we can conclude that many States still fall short of meeting the requirements as set by the GBB-Directive proposal. Yet, the States that have provided for sanctions can be said to have gone beyond the Directive proposal, by setting sanctions for failing to comply with the set target. In some cases, it is still too early to assess their effectiveness and dissuasiveness and some experts doubt this, inter alia because of the vagueness of the (target) obligation imposed and of the imposition of fines being considered rather hypothetical. It indeed appears that so far few sanctions have been imposed at all, **Italy** showing most enforcement activity. Considering, however, that in the initial version of the Directive proposal annulment/voidness of appointments and administrative fines were indicated as meeting the effectiveness, dissuasiveness and proportionality requirement, the sanctions provided for in national legislation can be deemed to comply with the EU standard. In addition, some States have gone beyond the Directive requirements by establishing or nominating specific monitoring bodies.

## 5 Co- and self-regulatory approaches

### 5.1 Introduction

As the analysis in Chapter 3 has revealed, mandatory quotas or targets to promote gender-balanced boards have only been adopted in a small number of countries. While in such countries this development has often marked a shift from self-regulation to a soft and then harder public regulatory approach, other countries (still) give preference to a self- or co-regulatory approach or leave the issue completely to the corporate sector itself. To obtain a more comprehensive picture of the different national approaches in this domain, we therefore also need to consider self- and co-regulatory approaches that have been developed to address the problem of underrepresentation of women in company boards. Co-regulatory approaches are those that are 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-regulatory approaches are those 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.

The analysis in this chapter will proceed in three steps. First of all, we consider the extent to which countries that have developed a public regulatory, monitoring and enforcement approach still leave room for self-regulation and for companies to develop their own corporate policy regarding targets to be achieved and/or the monitoring and enforcement mechanisms for the realization of these targets (Section 5.2). The next step consists in considering how corporate governance codes are used as a co- or self-regulatory means to increase the number of women on boards, in addition to a public approach or if a public approach is lacking (Section 5.3). We will then look at other self- and co-regulatory initiatives that have been developed and, more generally, whether shareholders have in any way played a supporting role in enhancing gender-balanced boards (Section 5.4). This will give us more insight into how public and private roles and responsibilities are divided and may complement one another. Thirdly, an assessment is made of the co- and self-regulatory approaches in terms of their (perceived) impact and effectiveness, also in the light of the goals set by the GBB-Directive proposal (Section 5.4).

### 5.2 The scope for co- and self-regulation

Both where public regulatory approaches are present and lacking, there is considered to be ample scope for self-regulation in most countries. This is also considered to actually ensue from the transposition of the EU Directives discussed in Section 2.2, as the obligation it contains to issue corporate statements is actually based on self-regulation; the reporting is based on setting and implementing individual targets and indicators of the companies in the field of policies on diversity, equality, and human rights (**Bulgaria**). Yet, while in some countries self-regulation comes naturally – it is said to be at the heart of the **UK** approach, for example – it is lacking completely in the majority of States covered by this report, notwithstanding the scope national law leaves for it.

In several countries that did proceed to adopt quota laws, there is still considered to be scope for self- and co-regulation or they may actually presuppose this. While in **Belgium** the adoption of the Quota Act of 28 July 2011 marked the apparent victory of hard law over self-regulation (see Section 3.3.4), self-regulation and co-regulation are still supposed to fill certain gaps left by the law, such as the selection of directors, at least in private companies. In **Germany**, a quota law was adopted because over nearly twenty years, soft law and self-regulatory instruments had shown very limited effects on the gender balance on company boards. However, due to severe political, economic and societal controversies, the new statutory regulations only entail a binding statutory gender quota for the non-executive boards of some hundred companies in Germany. This still leaves room not only for extensive self-regulation and management policies but also public policy measures (see also Sections 3.3.4 and 3.6). The **Finnish** Government in a 2015 decision left it for the company to find the best way to improve the gender balance in listed companies through self-regulation, which is to show results by 2018, when the Government has

announced it will monitor development. The **Dutch** soft target law builds on the premise that companies will take the necessary action to comply with the target.

Yet, there are also two countries where self-regulation in this domain is considered problematic. In **Latvia** the narrow conception of equality and positive action is deemed an obstacle. In **Croatia**, given the fact that ‘special measures’ under Article 9 Gender Equality Act can be introduced only by a statutory instrument (i.e. law or other general regulatory instrument), it is highly debatable whether there is any room for self-regulatory initiatives. There are also contrary opinions, that private companies can adopt such measures in forms of internal rules.<sup>133</sup> However, there are no such examples so far. There are only sporadic examples of gender quotas for education at the level of individual companies.<sup>134</sup>

Measures that are taken at corporate level are not always very visible for the outside world, so it is not possible to provide a complete picture of this here. Yet, country reports show that these measures may be of a highly varied nature, including career policies, diversity plans with targets, internal networks, training sessions, mentoring, gender-balanced shortlists for vacancies, etc.<sup>135</sup> Such visibility is higher for countries that have adopted corporate governance codes, which we will now address.

### 5.3 Corporate governance codes

In this section, we consider how corporate governance codes are used as a device to bring about more gender-balanced boards in countries lacking a public approach or in addition to such an approach. Besides their legal basis or connection otherwise with the public regulatory framework (Section 5.3.1), we will analyse and compare these codes regarding their personal scope (Section 5.3.2); substantive scope (Section 5.3.3); and the ways and means by which they may be monitored and enforced (Section 5.3.4). Within this framework we will also consider their legal nature and effects.

#### 5.3.1 Legal foundation or other connection, if any, with the public regulatory framework

In about one third of the States covered by this report, provisions on gender-balanced company boards are contained in a Corporate Governance Code (CGC), which often have some legal foundation. In those cases, the CGC applies nation-wide to the companies that fall within its personal scope. This is the case in **Austria, Belgium, Germany, Finland, France, Ireland, the Netherlands, Poland, Slovenia, Spain, Sweden and the UK**. But such codes, as well as codes of conduct and practices, corporate governance policies and statements, may also apply at the individual corporate level (**Bulgaria, Norway**). In **Bulgaria**, the statement on corporate governance is part of the broader public monitoring approach, but the founding bodies for such practices can be of a public or a private nature. Not in all countries that have a CGC does it include rules on gender-balanced company boards (**Croatia**).<sup>136</sup> The **Austrian** Corporate Governance Code is a purely self-regulatory instrument and was adopted in January 2015.<sup>137</sup> It is based on annual evaluations and adaptations of the Code by a working group consisting of academics and managers.

In **Belgium**, on the initiative of the Financial Services and Markets Authorities, the autonomous public supervisory body, a Corporate Governance Commission was instituted in 2008, which later on took the legal form of a private foundation. This Commission produced a Corporate Governance Code in 2009 and by an Act of 6 April 2010 the Company Code was amended so as to oblige every company to have a corporate governance code, the Royal Decree of 6 June 2010 specifying that this must be the Corporate

133 See Ombudsperson for gender equality, <http://staklenilabirint.prs.hr/wp-content/uploads/2014/08/Mehanizmi-aktivnog-promicanja-stvarne-jednakosti-%C5%BEena-i-mu%C5%A1karaca.pdf>, accessed 3 June 2017.

134 For example, the largest telecom company in Croatia has a women quota of 40 % for training and education. [http://www.mamforce.hr/EasyEdit/UserFiles/HT\\_sa%C5%BEetak\\_MAMFORCE\\_COMPANY\\_201512.pdf](http://www.mamforce.hr/EasyEdit/UserFiles/HT_sa%C5%BEetak_MAMFORCE_COMPANY_201512.pdf), accessed 3 June 2017.

135 See e.g. for the Netherlands, <http://di-company.nl/referenties/praktijkvoorbeelden-en-diamanten/>.

136 [http://www.ecgi.org/codes/documents/croatia\\_2007\\_en.pdf](http://www.ecgi.org/codes/documents/croatia_2007_en.pdf), accessed 3 June 2017.

137 <http://www.corporate-governance.at/uploads/u/corpgov/files/code/corporate-governance-code-012015.pdf>.

Governance Code of the Commission.<sup>138</sup> The **Finnish** Corporate Governance Code 2015<sup>139</sup> imposes the National Code of Governance by the Securities Market Association, which requires companies to develop their own corporate level practice in light of the recommendations it entails. In **France**, the AFEP/MEDEF Code<sup>140</sup> was established by two employers' organisations (the *Association Française des Entreprises privées*, the French Association of private companies and the *Mouvement des entreprises de France*, the Movement of French Companies). This Code does not contain any mandatory provisions and only contains recommendations. The **German** Corporate Governance Code is entirely independent from the Government and does not represent binding law, although some parts of it repeat statutory law and it was published in the Federal Gazette. The commission that established it was composed only of private actors, including chairmen of the boards of important stock corporations, some of which concern privatized public undertakings such as Deutsche Telekom and Deutsche Post. Yet, it also included a speaker of the Hans Böckler Foundation which is very close to the trade unions. In the **Netherlands**, the founding body of the Dutch CGC is of a private nature (*Code Tabaksblatt*). The Code was designated as a Code of Conduct only, but by decision of 7 September 2017 the revised Code 2016 has been given a legal basis, obliging listed companies as of 1 January 2018 to comply with the Code.<sup>141</sup> In **Poland**, the Supervisory Board of the Warsaw Stock Exchange (GPW) issued some regulations concerning the enhancement of gender balance in company boards.<sup>142</sup> Trade on the Stock Exchange is regulated in the GPW Rules,<sup>143</sup> the regulations of Financial Supervision Commission and other laws. In 2009, the Ljubljana Stock Exchange, Association of Supervisors of **Slovenia** and the Managers' Association of Slovenia created the Code of Corporate Governance, which applies to a joint-stock company whose shares are listed on a regulated market. This is a purely private initiative without any foundation in or connection to public law. The **Spanish** National Commission of the Stock Market has established a Unified Code of Good Governance. The National Commission of the Stock Market is the body responsible for overseeing and inspecting the Spanish Stock Market and the activities of the companies involved in it. The chairperson of the National Commission of the Stock Market is appointed by the Government. In **Sweden**, a Governmental Commission on Business Confidence was established in 2004. Within this Commission, a group including representatives from the business sector was appointed to develop a corporate governance code, in collaboration with representatives from the business sector.<sup>144</sup> The code was introduced in 2005 and still applies, including provisions on gender balance in corporate boards. Upon its introduction on 1 July 2005, the Code was included in the listing requirements of the Stockholm Stock Exchange. The **UK** combines a voluntary approach with a legal framework. The UK Government, in 2010, invited Lord Davies to conduct a review to identify key issues that were preventing more women from becoming board members and to make recommendations to help improve the gender balance. Following the Davies Report, self-regulation is now encouraged on the basis of the UK Financial Reporting Council's (FRC) Corporate Governance Code,<sup>145</sup> which provides principles to support self-regulation. The FRC Code encourages companies to develop tailor-made policies to address under-representation in their boards and sets out a number of recommendations regarding the appointment process (see Section 5.3.3. below).<sup>146</sup> The FRC is a company

138 *Moniteur belge/Belgisch Staatsblad* of 28 June 2010.

139 <http://cgfinland.fi/wp-content/uploads/sites/6/2015/10/hallinnointikoodi-2015eng.pdf>, accessed 4 June 2017.

140 AFEP-MEDEF Corporate governance code of listed corporations (Revised June 2013), available at: <http://www.ecgi.global/code/afep-medef-corporate-governance-code-listed-corporations-revised-june-2013>.

141 See Stb 2017, 747 and <http://www.mccg.nl/download/?id=3367>, accessed 7 October 2017.

142 These are to be found in the 'Good Practices of Companies Listed on the GPW 2016', which have been created in accordance with the Commission Recommendation 2014/208/EU of 9 April 2014 on the quality of corporate governance reporting ('comply or explain'). Also referred to as the Corporate Governance Rules (Zasady Ładu Korporacyjnego). The Good Practices form an annex to the Resolution of the GPW Supervisory Board No. 26/1413/2015 of 13 October 2015. This document is in force since 1 January 2016. Published: [https://static.gpw.pl/pub/files/PDF/RG/Uch\\_RG\\_DB2016.pdf](https://static.gpw.pl/pub/files/PDF/RG/Uch_RG_DB2016.pdf), last accessed 28 May 2017.

143 The Stock Exchange Rules adopted by the resolution of the Stock Exchange Council (Supervisory Board) No. 1/1110/2006 with further changes. The consolidated text of the Rules of 1 September 2016, published on the web page of the Stock Exchange [https://www.gpw.pl/regulacje\\_prawne](https://www.gpw.pl/regulacje_prawne), accessed 3 June 2017.

144 Government White Paper SOU 2004:46 (available in Swedish only) <http://www.regeringen.se/49bb94/contentassets/4a10c18cc40c463fb9aef1cdf2ce4532/svensk-kod-for-bolagsstyrning>.

145 Financial Reporting Council (2016) *The UK Corporate Governance Code*, available at <https://www.frc.org.uk/Our-Work/Publications/Corporate-Governance/UK-Corporate-Governance-Code-April-2016.pdf> (accessed 30 May 2017).

146 On page 11, B.2.

that is jointly funded by the Government and the industry. Its board of directors is appointed by the Secretary of State for Business, Innovation and Skills. Hence, it is a mix of public and private and this is reflected in its core responsibilities.<sup>147</sup> **Ireland** has adopted a similar policy as the Irish Corporate Governance Annex states<sup>148</sup> that the Irish Stock Exchange recognizes the UK Corporate Governance Code.

### 5.3.2 Personal scope

The personal scope of the aforementioned corporate governance codes varies quite considerably. In some countries, it applies only to supervisory boards (**Slovenia, Spain**), whereas in others it applies to both (**Austria, Belgium, Ireland, France, Germany, the Netherlands, Poland, Sweden**). In the **UK**, it is geared to executive boards as well as in **Finland**. In **Sweden**, there is a single board of directors to which the CGC therefore applies. In all countries, they only apply to listed companies (even if they may voluntarily be applied also by other companies), but may be quite specific about which listed companies are covered.

In the **UK**, the current target of 33 % of women on boards is geared to the companies listed on the FTSE 350 (the Financial Times Stock Exchange).<sup>149</sup> The Hampton-Alexander Review has recommended that ‘all CEOs of FTSE 350 companies should take action to improve the under-representation of women on the Executive Committee and in the layer immediately below, the Direct Reports to the Executive Committee’.<sup>150</sup> The **Irish** Annex, which includes the UK CGC, is addressed to companies with a primary equity listing on the main securities market of the Irish Stock Exchange. The **Austrian** Corporate Governance Code applies to both executive and supervisory company boards, but only of Austrian exchange-listed companies, including exchange-listed European companies registered in Austria. It is recommended that companies not listed on stock exchanges follow this Code. A declaration of commitment to the Code is mandatory for Austrian companies that want to be admitted to the Prime Market of the Vienna Stock Exchange. Companies that are subject to the company law of another EU/EEA Member State and are listed on the Vienna Stock Exchange are called on to commit themselves to adhere to a corporate governance code recognized in this economic area and to publish this commitment, including a reference to the code complied with, on their websites. Companies that are subject to the company law of a non-EU/EEA country and listed on the Vienna Stock Exchange are called on to commit themselves to comply with the Austrian CGC. The **Slovenian** Corporate Governance Code applies to listed companies. These can be supervised either by the supervisory board (two-tier system) or the board of directors (one-tier system).

The **Swedish** CGC applies to all companies whose shares or depositary receipts are admitted to trading on a Swedish regulated market, which are now Nasdaq Stockholm and NGM Equity. The **Polish** Good Practices also apply to both privately and publicly owned companies. The **French** AFEP/MEDEF Code applies to 214 listed companies that have subscribed to it so far.

### 5.3.3 Substantive scope

National corporate governance codes cover a variety of themes, including gender equality, yet it can be observed that the gender-related references are often of a rather general and vague nature. Most codes lack any numerical target and sometimes do not even contain the aim of achieving a gender-balanced composition of the company board, **France, Spain** and **the UK** being exceptions in this regard by providing clear targets and **Sweden** as well since recently.

147 <https://www.frc.org.uk/about-the-frc/role-and-responsibilities>.

148 <http://www.ise.ie/search/?q=governance>. Accessed 1 June 2017.

149 Department of Business, Innovation and Skills (2015) *Women on Boards*, available at <https://www.gov.uk/government/publications/women-on-boards-2015-fourth-annual-review> (accessed 30 May 2017).

150 <https://www.gov.uk/government/news/rallying-call-for-female-boost-in-business-and-the-boardroom>, paragraph 2.1, page 10 (accessed 1 June 2017).

The **Belgian** Code merely states (at Point 2.1): '[The] composition [of the board of directors] is based on gender mix and more generally on diversity'. Interestingly, the Corporate Governance Commission that adopted this Code is presently composed of 14 members, of whom only 3 are women. Likewise, the **Slovenian** Code states that in the composition of the Supervisory Board 'the participation of both genders, age diversity and diversity in general must be respected.' The **Austrian** CGC mainly provides rules regarding the reporting on measures companies have taken to enhance the number of women on their boards (see the next section). The **Polish** Good Practices state that persons making decisions with regard to the election of executive and non-executive board members should aim to ensure the universality and diversity of those bodies, among other things with respect to sex, education, age and professional experience.<sup>151</sup> They also provide that the supervisory board prepares and presents the regular general meeting among other things with information on the 'composition of the council and its committees'.<sup>152</sup> As such, it only recommends preservation of diversity with regard to sex (as well as age, education and professional expertise), and not the promotion of a balanced participation of women and men in the bodies of companies listed on the GPW. Other specific measures to encourage companies to set individual quantitative objectives for this are lacking as well, but the GPW Rules provide for the possibility of the GPW Management to apply instruments for rewarding companies that implement the corporate governance rules in a duly manner, e.g. by lowering exchange fees.<sup>153</sup> Recommendation 9 of the **Finnish** CGC<sup>154</sup> requires that each company establishes its own principles concerning the diversity of the boards of directors. The rationale of the recommendation is that each company should take into account the scale of its operations, and its development stage. Gender is only one ground among other factors of diversity to be taken into account. The **German** CGC<sup>155</sup> was amended in 2010, encouraging listed private companies to specify concrete objectives regarding the composition of their supervisory boards and in particular to stipulate an appropriate degree of female representation, but with limited success (see below Sections 5.3.4 and 5.4). The **Dutch** Corporate Governance Code provides in Article 2.1.5 that companies should draft a diversity policy for their boards.

Considering the countries in which the CGC does contain a specific target, we can first refer to the **UK** where it already was a key recommendation in the original Davies Report<sup>156</sup> to set a target for the FTSE 100 to achieve a minimum of 25 % representation of women on boards by 2015. This target was extended to FTSE 250 in 2013.<sup>157</sup> In 2015 the target was extended to 33 % for the FTSE 350 by 2020.<sup>158</sup> Yet, this concerns a voluntary, 'soft' target as are the other recommendations of the Davies Report and the more recent Hampton-Alexander Review.<sup>159</sup> These recommendations in particular concern the appointment process, stating that it 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'.<sup>160</sup> It also recommends that executive headhunting firms, used by many companies to recruit board directors, develop a voluntary code of conduct. The Scottish Government's 'Partnership for Change' set up in 2015<sup>161</sup> to encourage (public, private and third-sector)<sup>162</sup> organizations to commit to achieving parity (50/50) between men and women on boards by 2020, is also voluntary. The **French** AFEP/

151 Recommendation II.R.2.

152 Recommendation II.Z.10.2.

153 Paragraph 29(6).

154 <http://cgfinland.fi/wp-content/uploads/sites/6/2015/10/hallinnointikoodi-2015eng.pdf>, accessed 4 June 2017.

155 Deutscher Corporate Governance Kodex, available at: <http://www.dcgk.de/en/code.html>.

156 Davies Report: *Women on Boards* (2011) available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/31480/11-745-women-on-boards.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/31480/11-745-women-on-boards.pdf) (accessed 30 May 2017).

157 Department of Business, Innovation and Skills (2013) *Women on Boards*, available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/182602/bis-13-p135-women-on-boards-2013.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/182602/bis-13-p135-women-on-boards-2013.pdf) (accessed 30 May 2017).

158 Department of Business, Innovation and Skills (2015) *Women on Boards*, available at <https://www.gov.uk/government/publications/women-on-boards-2015-fourth-annual-review> (accessed 30 May 2017).

159 <https://www.gov.uk/government/news/rallying-call-for-female-boost-in-business-and-the-boardroom> (accessed 1 June 2017).

160 Principle B.2 of the U.K. Corporate Governance Code, available at: <https://www.frc.org.uk/getattachment/ca7e94c4-b9a9-49e2-a824-ad76a322873c/UK-Corporate-Governance-Code-April-2016.pdf>.

161 See <http://onescotland.org/equality-themes/5050-by-2020/> (accessed 30 May 2017).

162 The third sector includes community groups, voluntary organisations, charities, social enterprises, co-operatives and individual volunteers.



MEDEF Code provides that companies shall reach a proportion of 20 % of women in their boards within three years from their 2010 general meeting or the admission of the company's shares to a regulated market, and of 40 % within six years of either event. For most members, in practice, this means by the end of 2016; for new members within six years from the beginning of their membership. The **Spanish** Unified Code of Good Governance<sup>163</sup> recommends that listed companies have a selection procedure of non-executive board members that is concrete and verifiable and that ensures that the proposals for the appointment or re-election are based on an analysis of the needs of the board.<sup>164</sup> The Code also establishes that the selection system should promote the diversity of knowledge, experiences and gender in the board and that it should promote the objective that in 2020 the number of female members represents at least 30 % of the total number of members of the non-executive boards of all listed companies.<sup>165</sup> The **Swedish** Code started out by merely posing a requirement that companies must 'strive for gender balance on the board'.<sup>166</sup> Yet, at a number of occasions, the Swedish Corporate Governance Board has acted to promote the development towards gender-balanced company boards, in the spring of 2014 urging company owners to speed up the process, and declaring that the gender division in company boards should be at least 40/60 % on a general level (i.e. not in each individual company) by 2020 at the latest. It also announced an intermediate target for 2017, when the balance should be 35/65 % on average in larger companies and 30/70 % on average in smaller companies. The Board also contacted a number of large companies, including nomination committee chairs, to discuss this ambition.

#### 5.3.4 Monitoring and enforcement mechanisms

All corporate governance codes presented above do not as such contain legally binding provisions, with only one exception (**Austria**). Their implementation mostly relies on a 'comply or explain' principle or rule (**Austria, France, Ireland, Poland, the Netherlands, Slovenia, Sweden, the UK**), but in some countries there is just a reporting obligation, without the requirement to present specific explanations (**Finland**), or it is simply left to companies to decide on this (**Belgium, Germany, Spain**).

Looking first at this second group of countries, in **Belgium**, no external monitoring process was provided for reasons of protecting the freedom of association, the Council of State insisting during the elaboration of the quota act that this principle, enshrined in Article 27 of the Belgian Constitution, must not be jeopardized. The **German** Code was not combined with any sanctions in case of breach of its obligations. In **Spain** as well, sanctions are lacking and the only monitoring mechanism put in place is the annual supervision by the National Commission of the Stock Market regarding the selection procedure for non-executive boards. Yet, its resolutions on this are not made public so it not possible to know what level of compliance there is. The **Finnish** Code does require listed companies to present a Corporate Governance Statement once a year and the monitoring of its new Recommendation 9 on diversity of the board of directors is also based on reporting. The Company Act does not require that the report is produced separately from the report of the board of directors to the shareholders, but the CGC recommends a separate report which is to be published on the company website. The statement should inform on the composition of the board of directors, and where the company's general meeting has established a shareholder's nomination board to carry out preparatory work on the election of directors, the company is to describe the election process, as well as the composition of the nomination board.

In the following countries, the CGC imposes a comply-or-explain obligation, but without any further sanctions being applied. The **Dutch** CGC provides that if fewer women are appointed in company boards than mentioned in the law (30 %), the relevant company has to explain the current state of affairs and has to describe the measures that will be taken to improve the situation. In the **UK**, the 2011 Davies Report already recommended that companies should provide annual reports indicating the number of

163 The Unified Code of Good Governance of the National Commission of the Stock Market (*Comisión Nacional del Mercado de Valores*); [https://www.cnmv.es/docportal/publicaciones/codigogov/codigo\\_buen\\_gobierno.pdf](https://www.cnmv.es/docportal/publicaciones/codigogov/codigo_buen_gobierno.pdf), accessed 16 May 2017.

164 Recommendation 14.

165 [https://www.cnmv.es/docportal/publicaciones/codigogov/codigo\\_buen\\_gobierno.pdf](https://www.cnmv.es/docportal/publicaciones/codigogov/codigo_buen_gobierno.pdf), accessed 16 May 2017.

166 Chapter 4 Section 1 of the Swedish Corporate Governance Code.



women on senior management teams and across their organization and develop the executive pipeline by developing senior members of staff and advertising non-executive positions. If companies do not comply with the recommendations mentioned in the previous section, they are required to explain why they have not done so, under the ‘comply or explain’ provisions.<sup>167</sup> More specifically, a separate section of the annual report should describe the work of the nomination committee, including the process it has used in relation to board appointments, its policy on diversity, including gender, any measurable objectives that it has set for implementing the policy, and progress on achieving the objectives. Ultimately, companies are accountable on this to their shareholders.<sup>168</sup> A company might be fined if it does not comply with its obligations regarding the annual reporting generally, not for not realising the target. The same goes for non-compliance with the **Irish Code**. The **Slovenian Code** also provides for voluntary compliance on the basis of comply-or-explain, which means that companies must either adjust their recruitment procedures according to the Code or explain their non-compliance with the recommendations. The company must include a Corporate Governance statement in its business report. At least once every three years a company shall ensure external assessment of the adequacy of the CG statement. The external assessment must be performed by an independent institution with relevant professional references.

Likewise, the **Polish GPW Rules**<sup>169</sup> make clear that the Good Practices do not contain generally binding provisions, but the ‘comply or report’ rule applies with regard to compliance with the recommendation regarding diversity. Companies listed in the GPW must report on their corporate website about the gender representation on their board, in an easily accessible form and in a designated place,<sup>170</sup> and include goals and elements of the diversity policy, such as sex, education profile, age, professional experience, and the methods of its implementation in a given reporting period. In case of non-compliance, it must present an explanation for this on its website and indicate how it intends to remedy the effects of such non-compliance and to prevent this in the future. This information needs to be published ‘immediately’, which is considered to be at least once per quarter. The handbook referring to this recommendation notes that ‘it should be assumed that the diversity policy lies in the hearts and minds, not in a document filed somewhere into a large folder. A company should explain why in a given reporting period it failed to come closer to the goal of creative diversity.’<sup>171</sup> In **Sweden**, a company may deviate from the provisions in the Code, provided that it clearly states in the annual corporate governance report that it has not complied with the rule, and explains both the alternative solution that has been chosen and the reasons why.<sup>172</sup> The main task of the Swedish Corporate Governance Board is to promote good corporate governance, by managing and improving – but not supervising – the Code. Since 2005, the Board has made many modifications to the Code, through the issuing of instructions and revisions. Along with the set-up of the 2014 goal, discussed in the previous section, the Board modified the Code so as to impose a stronger requirement on nomination committees to explain to the shareholders how they worked to strive for gender balance in the nomination process.<sup>173</sup> This explanation must be provided both in the notice of the shareholders’ meeting before the elections of board members are to be held and in the shareholders’ meeting where these elections take place, and on the company’s website.<sup>174</sup>

Yet, some of the comply-or-explain obligations are of a somewhat more compelling nature, given their status in the CGC or as a result of sanctions that may be imposed (**Austria, France**). The **Austrian CGC**<sup>175</sup> distinguishes between rules which contain mandatory legal requirements (L) and rules which

167 FRC Code at B.2.4.

168 See Financial Reporting Council (2016) *The UK Corporate Governance Code*, available at <https://www.frc.org.uk/Our-Work/Publications/Corporate-Governance/UK-Corporate-Governance-Code-April-2016.pdf> on page 4 (accessed 30 May 2017).

169 Paragraph 29.

170 Recommendation I Z.1.15.

171 See A. Nartowski *Dobre Praktyki spółek notowanych na GPA 2016*. Podręcznik. [https://static.gpw.pl/pub/files/PDF/Podrecznik\\_DPSN\\_2016\\_9\\_03\\_16.pdf](https://static.gpw.pl/pub/files/PDF/Podrecznik_DPSN_2016_9_03_16.pdf), last accessed 1 June 2017.

172 Chapter 10 Section 1 of the Swedish Corporate Governance Code. The statutory requirement to present a corporate governance report follows from Chapter 6 Section 6-9 of the Annual Accounts Act (1995:1554).

173 Chapter 2 Section 1 of the Swedish Corporate Governance Code.

174 Chapter 2 Section 6 and 7 of the Swedish Corporate Governance Code.

175 <http://www.corporate-governance.at/uploads/u/corpgov/files/code/corporate-governance-code-012015.pdf>.

apply on a 'comply-or-explain' basis (C). C rules must be followed and the reasons for any deviation must be stated in order to be in compliance with the Code. Certain legal provisions apply only to companies listed on the stock exchange in Austria. These rules are to be interpreted as a C rule for companies not listed on the stock exchange. This implies reporting on 'measures taken for the advancement of women in positions on the executive and the supervisory board and in management positions' as part of their corporate governance reports, but does not extend to being a sanctioned form of compliance.<sup>176</sup> Corporate governance reports must contain information on '(t)he measures taken to promote women to the management board, supervisory board and to top management positions',<sup>177</sup> including at least information on the share of women on the supervisory board and in management positions and a description of the measures taken to promote women to the management board, supervisory board and to management positions in the company during the reporting year.<sup>178</sup> Under the **French** AFEP/MEDEF Code, companies that do not meet the set targets have to explain and supply reasons for not doing so. AFEP and MEDEF have created a committee in charge of monitoring the application of the Code and of proposing amendments that it deems appropriate. The Financial Markets Authority (AMF) also publishes an annual report including information on board diversity and in particular on the proportion of women in the boardroom. Three years ago, the AMF established the 'name and shame' principle, publishing the names of companies not complying with the code. Since companies are not happy to have a finger pointed at them for bad practices, those singled out could well redouble their efforts to achieve the target. On the other hand, this principle is not applied to companies following the Middelnext code, since they are SMEs and the AMF considers that for them there is still plenty of opportunity for further progress.

## 5.4 Other co-/self-regulatory and private initiatives

In a few countries, private bodies have adopted charters to enhance gender-balanced boards (**Malta, the Netherlands, Slovakia**). The Women Directors in **Malta**,<sup>179</sup> an active, social, non-profit and voluntary organisation set up to help women make the right connections and to move up to board level in their own company or to take a non-executive board role or other board level roles in all sectors, launched the Women Directors Malta Charter with HSBC Bank Malta becoming its first signatory.<sup>180</sup> Obligations in the Charter include transparency measures including on promotion requirements, processes and outcomes in order to achieve greater meritocracy and a boardroom diversity policy with clear objectives. There must also be greater visibility in the appointment process of boards. Among the other actions it suggests are: the championing of gender diversity by chairpersons, CEOs and senior managers which would lead to a culture change; the development of soft goals and targets; regular reporting on progress; annual publication of processes and outputs and a biannual check so as to ensure that standards are maintained. The Charter offers quality marks recognizing different levels of goal attainment, intended to demonstrate to staff, agencies, aspiring female employees, sponsors and the public the companies' commitment to ensure equal access of women to the boardroom. HSBC Banks Malta plc provides a best practice as it has committed itself to promote gender diversity at board level across the country and already has five women serving as directors across their group of companies. In the **Netherlands**, the previous Minister Sybilla Dekker started the Taskforce 'Talent to the Top' in 2008, which subsequently developed the charter 'Talent to the Top', together with the social partners and the Ministries of Economic Affairs and of Education, Culture and Science. This charter has been signed by more than 2015 companies and other organisations.<sup>181</sup> These companies and organisations have committed themselves to appointing more women at the top-level of their organisation and the level immediately below that. They have made a plan how to do so and they exchange information with other organisations about best practices. In **Slovakia**,

176 <https://www.ris.bka.gv.at/Dokumente/Bundesnormen/NOR40188997/NOR40188997.pdf>, accessed June 12 2017.

177 Section 60 CGC.

178 § 243b Paragraph 2 No. 2 Business Code and §80 Stock Corporation Act.

179 <http://womendirectors.org.mt/> accessed 5 June 2017.

180 <http://www.independent.com.mt/articles/2016-12-16/company-news/HSBC-supports-diversity-in-Malta-s-boardrooms-6736168004> accessed 5 June 2017.

181 For more information see <http://di-company.nl/community/charter-en-monitor/>, accessed 24 May 2017.

a Diversity Charter was signed on 30 May 2017.<sup>182</sup> This is a voluntary initiative for promoting diversity management principles and the principles of equal treatment in the workplace, with the aim to keep the workplace free from all forms of discrimination and harassment. Since 2017, the Business Leaders Forum has taken over the role of administrator of the Diversity Charter. The realisation of this national Diversity Charter is in accordance with the Action plan for prevention of all forms of discrimination 2016–2019 under the Ministry of Justice of the Slovak Republic and the Ministry of Social Affairs, Labour and Family.<sup>183</sup>

Other purely private initiatives, including some best practices, are of a very diverse nature and include the following. In **Germany**, several company initiatives have been taken. In the spring of 2010, the Deutsche Telekom was the first DAX-30 company which set itself a 30 % women's quota in leadership positions to be achieved by 2015.<sup>184</sup> In 2016, it had reached the 40 % target for supervisory boards and 14 % for the executive boards. Some of the around hundred companies which are listed and subject to full parity co-determination have indeed reached a 40% women quota on their supervisory boards and a more than 20% women quota on their executive boards, but many still manage with no women on their executive boards at all.<sup>185</sup> In **Norway**, some firms have made equal opportunities a target on the company agenda and one strong public spokesperson is Petter Stordalen, CEO and owner of the Choice Hotels,<sup>186</sup> who has secured 40 % women in the leadership level of the Group and 54 % women in top-leadership and mid-leadership level of the employees. The **Swedish** expert has referred to two best practices examples: the Allbright Foundation and Battle of the Numbers. The Allbright Foundation provides statistics on gender diversity in top positions in Swedish companies, and participates in the public debate. In the reports that the Foundation publishes on a yearly basis, good examples are highlighted, while companies that fail to deliver in the area of gender equality are being black-listed.<sup>187</sup> Battle of the Numbers was a project that involved ten of the largest companies in Sweden. With the aim to increase the share of women in operative and decision-making positions, a team of women in the company were working closely with the management to promote gender balance at the top. The subsequent evaluation showed that the project led to increased awareness regarding the issue of gender equality in management positions in the companies involved.<sup>188</sup> In **Luxembourg**, the collaboration network DivBiz – Diversity in Business<sup>189</sup> has been created in order to promote gender equality in the economic sector. The members are the bankers association from Luxembourg, the federation of women entrepreneurs, the Business Federation Luxembourg, the Institute of administrators, the Luxembourg Institute of Socio-Economic Research, the house of coaching and McKinsey. As no activities are published by this network it is difficult to evaluate its impact. In **Slovenia**, there has been commitment for the Successful Future 15/2020 which was prepared in 2011 by the Manager's Association, providing plans for increasing the competitiveness of the Slovene economy in view of the goal to become part of the 15 most developed European countries in 2020.<sup>190</sup> In order to achieve this goal, an increase in the proportion of female managers in the company boards to at least 30 % by 2015 and 40 % by 2017 is considered necessary. Another document of the Managers'

182 <http://www.nadaciapontis.sk/clanok/prvyh-16-firiem-podpisalo-chartu-diverzity-slovensko/2344>.

183 <http://www.chartadiverzity.sk/charta-diverzity-sr/english-summary/>, available in English.

184 See: <https://www.telekom.com/en/media/media-information/archive/deutsche-telekom-is-first-dax-30-company-to-introduce-women-s-quota-353286>, accessed 22 November 2011.

185 See [https://www.fidar.de/webmedia/documents/wob-index-100/2016-11/161102\\_WoB-Index\\_100\\_II\\_Internet.pdf](https://www.fidar.de/webmedia/documents/wob-index-100/2016-11/161102_WoB-Index_100_II_Internet.pdf).

186 <https://www.nrk.no/telemark/stordalen/-lett-a-fa-flere-kvinnelige-ledere-1.13420817>, accessed on 6 June 2017.

187 Allbright Foundation (2016) *The Allbright report 2016*, available in English at [https://static1.squarespace.com/static/5501a836e4b0472e6124f984/t/587ca50fcd0f68a2e5dd7ef4/1484563733811/AllBrightrapporten+2016\\_ENG.pdf](https://static1.squarespace.com/static/5501a836e4b0472e6124f984/t/587ca50fcd0f68a2e5dd7ef4/1484563733811/AllBrightrapporten+2016_ENG.pdf).

188 Battle of the Numbers, *Final report, summary* (2013) [http://www.battleofthenumbers.se/site/wp-content/uploads/2012/11/BATTLE\\_summary.pdf](http://www.battleofthenumbers.se/site/wp-content/uploads/2012/11/BATTLE_summary.pdf).

189 <http://www.mega.public.lu/fr/acteurs/reseaux-contact/divbiz/index.html>, accessed 31 May 2017.

190 The document Commitment for the Successful Future: 15/2020 was created on the 20th anniversary of the Republic of Slovenia as a response of Slovenian managers to the demanding challenges and circumstances faced by our country since independence. The Commitment is a warning by Slovenian management, pointing out that two decades later Slovenia is in a situation that calls for immediate systemic changes. It is an incentive for a broad social debate about the country Slovenians want to live in, about what we are prepared to do for it and how the country should be managed to reach common goals.

Association<sup>191</sup> – Include.All from 2012 – comprises detailed guidelines for promoting gender equality. It presents the state of the (in)equality and measures to enable companies to promote equality in the field of education, plans and processes of recruitment and promotion etc. In **Malta**, thirty women who aspire to hold decision-making positions participated in a mentoring programme by professionals who occupy high-level jobs to acquire relevant knowledge and leadership, supervisory, decision-making, assertiveness and communication skills. Moreover, a Directory of Maltese and Gozitan Professional Women aiming to increase the visibility of professional women and their competences in various fields was also launched. The qualifications, experiences and skills of these professional women are highlighted to enhance their opportunities of being appointed to boards, committees or other decision-making bodies.<sup>192</sup> In the **UK**, 'Women on Boards UK' provides information, encouragement and connections to help women.<sup>193</sup> The Bank of **Ireland** is to achieve 25 % of women on its board by 2018. To this end, the Nomination and Governance Committee of the bank will report annually in the corporate governance section of the Bank's annual report on the process it has used in relation to bank appointments. All appointments shall be made on merit in the context of the skills and experience that the Board requires to be effective. The Committee reviews and assesses the Board's composition on behalf of the Board. The statement sets out the skills required. The Committee will consider candidate on merit against objective criteria and with due regard for the benefits of diversity on the Board.

In some other countries, private action is taken but is less visible to the outside world. In **Latvia**, it would appear that some big Scandinavian corporations operating there have implemented inclusive employment policies (for example, employment of sales persons of Roma origin and women at gas stations), which might also involve gender-balance measures at management level. But because gender-balance measures might be considered as contrary to the understanding of equality under Latvian law (see Section 6.2 of this report), the corporations do not disseminate information on this. Local undertakings do not address such issues.<sup>194</sup> In **Portugal**, without there being specific studies, it is considered common knowledge that some companies are taking actions in this area, mostly at plant level, including internal discussion and raising awareness on the topic, internal guidelines and codes of conduct, support practices specifically directed at working mothers, or gender quota in the access to managing positions under board level. However (and still with no data proof) employers seem to be less at ease with the subject when it comes to board positions, arguing that the choice of board members must rely on personal trust and not on numbers.

Some form of public-private cooperation concerns the following. In **Luxembourg**, the State can subsidise private projects. Companies wishing to participate in a positive action programme have to supply indications on the composition of their supervisory board and executive committee as well as on the objectives set at those two levels to reach a better balance between women and men. There is no obligation to reach the goals companies set themselves. Positive actions are not focused on gender balance in decision making, but on improving gender equality in the participating company generally.

On a final note, considering more specifically the role that shareholders may play in demanding improvements in gender balance at board level, it appears that so far this occurs only to a limited extent. One particular project that can be mentioned here has been the EWLA Project 'European women shareholders demand gender equality/ EWSDGE/' that was inspired by the GBB-Directive proposal.<sup>195</sup> It

191 <http://www.arhiv.uem.gov.si/fileadmin/uem.gov.si/pageuploads/EkonomskoOdlocanje/Smernice.pdf>, last accessed 14 June 2017.

192 National Commission on the Promotion of Equality (2015), 'The online Directory of Professional Women officially launched', available at: [https://ncpe.gov.mt/en/Documents/News\\_and\\_Events/Press\\_Releases/2015/2015%20Annual%20Conference%20PR\\_en.pdf](https://ncpe.gov.mt/en/Documents/News_and_Events/Press_Releases/2015/2015%20Annual%20Conference%20PR_en.pdf).

193 <https://www.womenonboards.net/en-GB/About-Us/Why-WOB-exists> (accessed 2 June 2017).

194 Society Integration Fund, research 'The research on the situation of women and men in the big enterprises in Latvia', Riga, 2014, page 93, available in Latvian at [http://www.sif.gov.lv/images/files/SIF/progress-lidzt/petijums/precizets\\_zinojums\\_final.pdf](http://www.sif.gov.lv/images/files/SIF/progress-lidzt/petijums/precizets_zinojums_final.pdf) (accessed on 31 May 2017).

195 "Successful EU bid: "European Women Shareholders demand Gender Equality", <https://www.ewla.org/news/22122014/successful-eu-bid-european-women-shareholders-demand-gender-equality>.

explored the attitudes towards greater involvement of women in board management in EU Member States, including for example **Bulgaria**. In addition, only the Swedish and German experts have mentioned the role of shareholders. In **Sweden**, this is because the members of company boards are appointed through election by the shareholders, in accordance with the Companies Act.<sup>196</sup> As described above, the nomination committee must also provide a specific explanation of its proposals with respect to the requirement to strive for gender balance at the shareholders' meeting where the election of board members is to be held.<sup>197</sup> In **Germany**, the introduction of statutory gender quota would have been impossible without the strategic campaigning of women's associations such as the German Women Lawyers' Association, which in 2009 initiated the campaign 'Women Shareholders Demand Gender Equality'.<sup>198</sup> Since then, women lawyers have been attending annual general meetings of the German listed companies and publicly asking questions concerning the gender balance on company boards, the individual target gender quota for board and higher management positions and the (often non-existing) gender equality concept. The German Women Lawyers' Association informs the public about these concrete meetings as well as the lack of female leadership in German companies in general and publishes legal expertise on the compatibility of gender-quota legislation with the Constitution as well as best practices and lists of legal demands.

## 5.5 Assessment and concluding remarks

Firstly, taking the GBB-Directive proposal as the basis on which to draw conclusions on the various co-/self-regulatory approaches, in particular those contained in corporate governance codes, it appears that their personal scope varies quite considerably. In some countries, the codes apply only to supervisory boards (**Slovenia, Spain**), whereas in others it applies to both (**Austria, Belgium, Ireland, Finland, France, Poland, Sweden**). In the **UK**, it is geared to executive boards in particular. In all countries, they only apply to listed companies (even if they may voluntarily be applied by other companies as well), but may be quite specific about which listed companies are covered in particular.

Secondly, when it comes to setting targets, most codes have appeared to lack the stipulation of any numerical target and sometimes do not even contain the aim of achieving a gender-balanced composition of the company board, **France, Spain** and **the UK** being exceptions in this regard by providing clear targets and **Sweden** as well since recently; France 40 % by 2016, Sweden 40 % by 2020, the UK 33 % by 2020, and Spain 30 %. Thirdly, there seems to be somewhat more attention in CGCs for stipulating specific requirements in relation to recruitment and selection procedures, whereas it was seen in Chapter 3 that on the public regulatory level such specific requirements are largely lacking. Particularly interesting here is the **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'.<sup>199</sup> In **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.<sup>200</sup>

Regarding monitoring and enforcement, most CGCs appear to entail a comply-or-explain obligation, even if the scope of the actual duty imposed may vary. The most interesting element coming to the fore in the comparative analysis, however, is the broader spectrum of carrots and sticks that may be applied so as to incentivise companies to comply with the corporate governance codes and other public-private initiatives and to promote gender-balanced boards. Naming and shaming policies are applied in some countries

196 (SFS 2005:551) A non-official translation of the Companies Act (SFS 2005:551) is available at [http://law.au.dk/fileadmin/www.asb.dk/omasb/institutter/erhvervsjuridiskinstitut-skjultforgoogle/EMCA/NationalCompaniesActsMemberStates/Sweden/THE\\_SWEDISH\\_COMPANIES\\_ACT.pdf](http://law.au.dk/fileadmin/www.asb.dk/omasb/institutter/erhvervsjuridiskinstitut-skjultforgoogle/EMCA/NationalCompaniesActsMemberStates/Sweden/THE_SWEDISH_COMPANIES_ACT.pdf).

197 Chapter 2 Section 7 of the Swedish Corporate Governance Code.

198 See <https://www.djb.de/themen/hv-projekt/>.

199 On page 11, B.2.

200 Recommendation 14.



(**France, Sweden**), whereas in other countries specific rewards are offered to companies developing best practices, such as quality marks (**Malta**), lowering exchange fees (**Slovenia**) and the publication of good examples (**Sweden, UK**).

What can be said about the (perceived) impact, credibility and effectiveness of the self-regulatory approaches discussed above, in terms of increasing the proportion of women on boards, the trickle-down effect of targets set, enhancing corporate best practices or otherwise, in the light of the goals set by the GBB-Directive proposal? Below we will present the experts' views on this.

Some experts have noted the difficulty of finding information on best practices and on the way in which Corporate Governance Codes possibly contribute to the progressive improvement of gender balance in boards of directors (**Belgium**). It has also been considered difficult to assess the impact of self-regulatory approaches in **France** because they are combined with a hard-law approach. However, it is possible to argue that for the companies concerned it has certainly contributed to the implementation of the law, as this might damage the reputation of a company. Equally, the **Dutch** expert has noted that companies who have an active policy in the field of improving the gender balance as a rule have more women in higher positions. However, there is no research that reports on the exact relationship between a company's policy and the number of women on their boards. This will also be difficult to measure, because there are various other factors involved as well. Since the figures improved slightly over the past few years, self-regulatory approaches have had some effect, in combination with the target law. Yet, the Netherlands are still very far from realizing the 40 % target by 2020 and also from the 33 % where the objective applies to both executive and non-executive directors, which in itself is comparable to the Dutch target of 30 %. The **Finnish** expert has observed that the fact that there already is mandatory legislation concerning publicly owned companies is a reminder that binding rules may be introduced if the self-regulatory means are not effective. Achievement of the quota, however, is considered more difficult for mid-cap companies and it is not clear how the situation will change when the social and health sector is outsourced to both public and private companies.

Others have emphasised that this will take time and that the initiatives of self-regulation cannot be expected to bring quick results, but that parallel action is required at the state level and from civil society as well, such as adequate awareness raising and training (**Bulgaria**). The **Maltese** expert has noted that the Charter by Women Directors Malta<sup>201</sup> has been launched only very recently, it being too early to highlight any noticeable changes or effectiveness. But he also notes that these voluntary measures have the potential of attracting a wider range of companies than those covered by the GBB-Directive proposal. Yet, given the starting position of Malta these measures will not make for sufficient progress in the timeline set by the proposal.

In other countries, in particular the **UK**, co-/self-regulation has been considered instrumental in improving how boards perform on gender diversity as a group. However, recent research by the British EHRC (Equality Human Rights Committee) has demonstrated that these achievements 'conceal wide variations in the performance of individual companies' – with most companies still falling below the 25 % level of the original target.<sup>202</sup> Given this underperformance in most companies, the UK expert believes that the UK has not made the progress necessary to meet the standards and timelines set by the GBB-Directive proposal. Based on the figures, now only 12.5 %, the **Irish** approval of the UK Governance Code is not considered sufficient either to reach the 30 % quota. The 'comply or explain' approach does not seem to ensure adequate progress, but the Irish expert believes that the new Regulations<sup>203</sup> on the reporting of

201 <http://womendirectors.org.mt/> accessed 5 June 2017.

202 Equality and Human Rights Commission (2016) *An Inquiry into Fairness, Transparency and Diversity in FTSE 350 Board Appointments*, available at <https://www.equalityhumanrights.com/en/publication-download/inquiry-fairness-transparency-and-diversity-ftse-350-board-appointments> on page 8 (accessed 30 May 2017).

203 European Union (Disclosure of Non-Financial and Diversity Information by Certain Large Undertakings and Groups) Regulations 2017 S.I. No. 360 of 2017.

diversity in respect of large companies will provide an impetus for companies to review their governance procedures, as the statutory auditors will have to comment on the statements made.

In Section 6.3 we will consider more generally the (perceived) impact, credibility and effectiveness of regulatory and enforcement approaches as developed in the States under consideration in this report.



## 6 Overall assessment and way forward

### 6.1 Introduction

Having described the variety of national regulatory, monitoring and enforcement approaches – both public and private – regarding the promotion of gender-balanced company boards, this chapter presents an evaluation based on the expert's views. First of all, we seek to identify and explain the reasons behind the various approaches; what political arguments explain the adopted approach – or the lack thereof – and what other possible factors may have played a role in this respect, of a societal, cultural, social-economic or constitutional nature as to the understanding and balancing of different rights? In this context, the role of women's organisations, female leaders and the media is also considered (Section 6.2). Secondly, this assessment is geared to drawing and bringing together conclusions regarding the extent to which the national approaches are in line with, or go beyond, the standards and requirements set by the GBB-Directive proposal (Section 6.3). Thirdly, it attempts to assess and compare the impact, credibility and (perceived) effectiveness of the different national approaches, also identifying elements that the national experts consider to be hindering and enabling forces in this regard. These may concern the State leading by example, the enforcement mechanisms provided for, the role played by the media but also flanking policies such as childcare facilities/benefits, flexible working hours, recruitment policies, etc. In this context, it will also be considered what the experts consider important steps for enhancing the national approach to the problem (Section 6.4). Finally, on this basis, it will be examined what the experts consider to be the best way forward at the European level, in the light of the national state of affairs and the expectations one may cherish of current approaches to enhance the number of women on boards (Section 6.5).

### 6.2 Explaining national approaches

#### 6.2.1 Political factors/context

The analysis so far has shown that on the political level the States under consideration in this report have taken one of the following lines: (i) a pro-mandatory quota approach; (ii) a contra-mandatory quota approach and (iii) no major political approach or debate whatsoever.

In the first group of countries which proceeded to adopt a quota law, the prospect of EU legislation on the matter has acted as a stimulus for this (**Belgium**), but also the Norwegian example has played such a role (**Belgium**). At the same time, political momentum has been of vital importance in some countries, where the issue was long controversial and debated before any law was adopted (**Belgium, Germany, Italy**). To avoid legally binding gender quota, employers' associations, economic leaders and business organizations in **Germany** employed every well-known argument from the absence of qualified female candidates over the incompatibility of gender quota with the Constitution to severe economic harm caused by the introduction of gender quota and even accusations that such statutory interference with economic freedom could lead to communism. Yet, the fact that the voluntary commitment of companies and self-regulation have not been implemented in practice and not brought the desired effects in Germany was an important incentive to adopt binding quota in the end.<sup>204</sup> The **Belgian** expert also pointed out a cultural mistrust of soft law. In other countries, the adoption of the quota law has gone hand in hand with inserting quota provisions into the corporate governance code, these apparently being considered as reinforcing one another (**France**). In a similar vein, the fact that the State had already adopted a quota approach in the sphere of politics has proven to be a relevant factor; in **France**, this paved the way for the 2011 Act, adopting the same approach for companies. It has been seen as a logical continuity and the achievement of social justice, underscoring that the balanced participation of men and women in decision making

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204 Survey by the Institute for Labour Market and Occupation Research in 2008, <http://doku.iab.de/forschungsbericht/2009/fb0409.pdf>.

is a fundamental precondition for a just and democratic society and that it is no longer conceivable that companies continue to deny themselves the benefit of women's experiences and competences. By contrast, the **German** expert signalled that the fact that public authorities have not been able to lead by example has been problematic, as the proportion of women in bodies under federal control has been decreasing for more than ten years and dropped to 20.7 % in 2014.<sup>205</sup> This is why the amended Statute on Bodies within Federal Control now introduces a 30 % and then a 50 % gender quota, demonstrating that a legally binding approach is needed in this domain as well.

In the second group of countries, an important reason for political resistance to the adoption of legally mandatory gender quota is the consideration that such measures need to be devised and implemented at the national level and not imposed by the European Union, the underlying argument also being that such targeted measures should only be imposed if voluntary measures do not bring about the desired results (**Malta**,<sup>206</sup> **the Netherlands**, **Sweden**, **the UK**). In **Poland**, any EU interference in this regard is considered to be contrary to the subsidiarity principle and there is only one public body actually addressing this issue at all: the Commissioner for Citizens' Rights. Yet, he can only question state bodies on the fulfilment of their obligations and make suggestions.<sup>207</sup> In line with the **Swedish** model of corporate governance, based on principles of self-regulation and autonomous negotiations between powerful social partners, the general approach has been that it is for the political institutions to stress the importance of and set the goals for gender balance, while the task of finding the right solutions should be left to the industry. A main argument against the introduction of quota has therefore always been that in the private sector, the matter has already been dealt with through autonomous initiatives managed by the businesses themselves, including the introduction of a well-functioning instrument for self-regulation, and that the business is both committed and capable of pushing the development towards gender-balanced company boards, and legislation is therefore not necessary to ensure this development. The **UK** is reluctant to impose hard targets or quotas – preferring to encourage businesses to make voluntary changes by identifying and promoting the 'business case' for doing so, e.g. highlighting the positive connections between gender diversity on boards and board performance, accessing the widest pool of talent, being more responsive to the market, and achieving better corporate governance.<sup>208</sup> More generally, an important argument against quota legislation relates to the property right of companies, which we will consider separately below. In addition, in **Finland**, **the Netherlands** and **Sweden**, the threat of statutory quotas has been a constantly present element in the discourse over the years. In **Sweden** concrete preparatory steps for legislation were taken in 2006 and 2016 so as to speed up progress and to mark the significance that is given to gender equality in company boards.<sup>209</sup> In January 2017, the Parliamentary Committee on Civil Affairs expressed the view that the question of gender balance of company boards should continue to be a matter for the shareholders to decide upon themselves, and the Government abandoned its plan to present the legislative proposal. In 2015, the **Finnish** Government held that there should be a minimum of 40 % of women and men on company boards by 2020, or legislative means will be used. Chamber of Commerce studies show that the number of women on boards has since risen steadily, companies reacting in this 'shadow of the law'. Traditionally, the right-wing parties (which are now in government)

205 See Fifth Report on the Statute on Bodies within Federal Control of the Federal Government of 16 December 2010, <http://dipbt.bundestag.de/dip21/btd/17/043/1704308.pdf>, and Women-on-Board-Index I of 30 September 2014, [http://www.fidar.de/webmedia/documents/wob-index/140930\\_WoB-Index\\_I\\_Internet.pdf](http://www.fidar.de/webmedia/documents/wob-index/140930_WoB-Index_I_Internet.pdf).

206 Nonetheless, the debate in this group of countries also reveals divergent views. A **Maltese** study shows that the vast majority of the respondents representing the general public are in favour of the introduction of gender quotas, but that the majority of respondents from non-governmental organizations and trade unions, public and private companies and political parties are against the introduction of gender quotas, most of these respondents being men.

207 See his report about equal treatment in the years 2016 -2019, addressing among others things the issue of introducing final quotas for the underrepresented sex in company management, of 22 November 2016, <https://www.rpo.gov.pl/pl/content/co-dalej-z-krajowym-programem-dzialan-na-rzecz-rownego-traktowania-minister-adam-lipinski-odpowiada>. See also <http://www.spoleczenstwoobywatelskie.gov.pl/aktualnosci/spotkanie-pelnomocnika-rzadu-ds-rownego-traktowania-adama-lipinskiego-w-sprawie-kobiet>, All documents accessed 6 June 2017.

208 See for example, Cranfield University School of Management (2016) *The Female FTSE Board Report 2016* Chapter 5 at <https://www.cranfield.ac.uk/som/expertise/changing-world-of-work/gender-and-leadership/female-ftse-index> (accessed 2 June 2017).

209 Government Report Ds 2016:32 *Jämn könsfördelning i bolagsstyrelser* (available in Swedish only) <http://www.regeringen.se/4a58e0/contentassets/d5335167a2ee4e17b4dd025c3a78b784/jamn-konsfordelning-i-bolagsstyrelser-ds-201632>.

have preferred self-regulation by companies, whereas left-wing and green parties have been interested in introducing legal obligations. The political discussion on gender quotas in company boards was more active during the previous government, which until 2014 included the Green party and the Left Alliance. In **the Netherlands**, while the temporary soft-target law has been prolonged in 2017, so as to allow companies to still make up for the lack of progress in the three previous years, the responsible Minister has clearly stated with a view to the future that ‘where there is no will, there will be a law’.<sup>210</sup>

In some countries, there is also resistance to quota for historical-political reasons: in **Slovakia**, this is due to negative experiences from the socialist era, with the formal 30 % quota for participation of women in the Parliament mostly applying to women nominated by the Communist Party.<sup>211</sup> In **Romania** as well, the opponents of affirmative measures for women use the cultural cliché reminiscent of Romanian communism when it was thought that women were artificially promoted in political councils or leadership positions to fulfil quotas, not for their merits. In **Hungary**, any quota system which would support the increasing participation of women in any sphere of public life is firmly refused by the ruling right-wing FIDESZ-KDNP permanent party alliance.

In the largest, remaining third group of countries, there has not been any serious political debate on the issue of gender-balanced boards, the reasons for this lack not always being very clear. In **Estonia**, Parliament has ordered a paper on women’s participation in listed company boards in 2013,<sup>212</sup> but the issue is often discussed in a patronizing way to ridicule this social problem. In April 2017, however, the Estonian President Kaljulaid pointed out the gender imbalance in society and the need for promoting gender equality and women’s position in decision-making. The President stressed the win-win situation of a more gender-balanced society and called upon all parties involved to initiate affirmative actions.<sup>213</sup> In the economic field, the **Luxembourg** Government made a commitment to set the example as regards its own mandate nominations. Beyond this, its policy is a pure policy of raising awareness and supporting different initiatives. In **Croatia**, it is only the Ombudsperson for gender equality asking attention for the issue. In **Latvia**, there is only support for soft-law instruments. The **Romanian** expert stressed that the adoption of the Gender Equality Law in 2002 was a condition to join the EU and while the legislative process was an occasion to include a wide list of advocacy goals with respect to gender equality, there was no specific political or societal support for the issue of women’s participation in company boards. **Norway** provides an exceptional case, there being not much debate on the specific rules on gender quotas on boards because they work so well, the only issue occurring from time to time being why the leaders of the boards still preferably appear to be men.<sup>214</sup> The shipping magnate Elisabeth Grieg has on numerous occasions suggested that the same rules as those applied to Public Limited Companies should be introduced regarding Private Limited Companies where they have 30-50 employees or more.<sup>215</sup> In the **Netherlands**, there has hardly been any political debate about the extension of the regulation that large companies ought to have 30 % of women on their boards and, if this is not the case, have to explain

210 See e.g. <https://www.mt.nl/business/diversiteit-bedrijfsleven-vrouwen-moeten-zich-minder-bescheiden-opstellen/533273>, last accessed 7 October 2017.

211 Thanks to the quotas, women had a 30 % representation in the Slovak Parliament in the period of 1976-1990. A marked decline occurred after the first free elections in 1990. Women then represented a minority of 12 % working in Parliament and this trend still continues. Female deputies regularly account for 15 to 20 % of all Members of Parliament and in the Government we regularly have 0 to 2 female Ministers, with the exception of 4 female Ministers in the period of 1994-98. Now 2 female ministers account for 17 % and 29 female deputies for 19 % of all Ministers and deputies. In local policy the situation is similar. Female Mayors and chairwomen of municipal councils represent 23 %.

212 Naiste osalus Euroopa börsiettevõtete juhtorganites (Women’s participation in listed company boards in Europe), Teemaleht No. 9 of 25 March 2013, [https://www.riigikogu.ee/wpcms/wp-content/uploads/2015/01/Teemaleht\\_9\\_2013.pdf](https://www.riigikogu.ee/wpcms/wp-content/uploads/2015/01/Teemaleht_9_2013.pdf), accessed 20 June 2017.

213 President’s Speech at the Conference of the Women’s Studies and Resource Centre (in Estonian), 28 April 2017, <https://president.ee/et/ametitegevus/koned/13232-vabariigi-president-eesti-naisuurimus-ja-teabekeskuse-kevadkonverentsil-28-aprillil-2017/index.html>, accessed 1 June 2017.

214 Radio interview of Jeanette Bergan, director at PwC; <https://tv.nrk.no/serie/dagsnytt-atten-tv/NNFA56052617/26-05-2017> as well as a report analysing the status of gender equality in 100 of the largest companies in Norway: <http://blogg.pwc.no/styringogkontroll/kan-eier-p%C3%A5virke-til-%C3%B8kt-likestilling-i-selskaper>, accessed 6 June 2017.

215 Grieg was awarded YS Equality Price 2015 for her criticism of the male-dominated employment and business market, <http://e24.no/jobb/likestillingspris-til-elisabeth-grieg/23540527>, accessed 6 June 2017.

the reasons why. While it became clear from the evaluation of the law that compliance is still lacking, no party expressly urged the Government to introduce sanctions. If the present law fails to have the desired effect, left-wing parties expressed to be in favour of establishing a quota, while right-wing parties are against this. In polls, a majority of people and businesses indicate that they do not favour a quota regulation. In **Lithuania**, the political debate is rather fragmented. There is a strong impression that the female quota question is raised only by a few (female) Members of the Parliament in internal political debate.<sup>216</sup> However, neither the social partners nor NGOs have shown any interest in the matter. In 2015, in the framework of the so-called social model, there were attempts to establish female quota in state (municipality) enterprises but the proposals failed because of the lack of political support and support of social partners. All the attempts to introduce quota have met scepticism from media and liberal economists. Critics argue that quotas only increase bureaucracy, do not solve the major social problems that prevent women from pursuing careers, and can artificially prevent people with higher qualifications to reach high positions.

### 6.2.2 *Protection of property rights*

The previous subsection already showed that in some countries the political debate has been strongly coloured by arguments relating to the autonomy of companies. This argument is also linked sometimes with the claim that gender quota infringe property rights of companies. In **Sweden**, in the light of the current achievements of self-regulation, proposals for quota legislation are therefore seen as calls for mere symbolic policies that would be implemented at the price of an infringement of property rights. In **Austria**, quotas are also perceived as an illegitimate intrusion on the civil and contractual autonomy of companies and consequently very difficult to legislate. In **Luxembourg**, imposing gender quotas on private companies is perceived as an intervention in the private business. The argument stating that companies are likely to leave the country is also often invoked. In **Iceland** as well, when the gender quota were introduced in company law, there was a strong divide between the political forces that consider themselves pro-business and the centre-left, favouring affirmative action as women were continuously lagging behind. The prevailing pro-business view was to consider gender quotas as an infringement of the right to property and privacy, while the pro-gender quota view focuses on the need to break the glass ceiling with affirmative action and decisive legal steps. In **Estonia**, the Government opposed gender quotas for company boards<sup>217</sup> on the grounds that listed companies themselves must be able to determine which specific skills the member of the supervisory board should have and how diverse the composition of its supervisory board needs to be. The goal must be to ensure a sufficiently capable and effective supervisory board conforming to company needs and professional, international and gender diversity not being a goal per se.<sup>218</sup>

### 6.2.3 *Understanding and scope of the concept of equality*

The lack of a public regulatory approach has also been explained by the concept of formal equality still prevailing in society and positive action and quota not yet being well understood (**Bulgaria**). In some countries, it is considered contrary to equality law or going beyond the concept of positive action to adopt mandatory quota legislation. While the **English** Equality Act allows for positive action that enables specific training for women to have the relevant skills necessary for senior roles or encouraging women

216 See, for instance, the evaluation of a recent proposal of the Minister of Economic Affairs to introduce women quotas (the representatives of one sex shall constitute not more than 2/3 of the members of the management board of state (municipality) owned enterprises. See <http://www.bernardinai.lt/straipsnis/2017-04-06-ukio-ministras-siulo-moteru-kvotas-valstybes-imoniu-valdybose/157783>, accessed 10 June 2017. See also <https://www.delfi.lt/verslas/verslas/i-juskauskaites-siulomi-pakeitimai-nustatant-privaloma-moteru-kvota-bendroviu-valdybose.d?id=68598982>, accessed 11 June 2017; <http://www.delfi.lt/news/ringas/lt/dpaulauskas-moteru-kvotos-valdybose-pernelyg-radikalu.d?id=60456473>, accessed 11 June 2017.

217 <https://www.valitsus.ee/et/uudised/valitsus-kinnitas-seisukohad-soolise-vordoiguslikkuse-kohta-ettevotete-noukogudes> (in Estonian), accessed 20 June 2017.

218 [http://ec.europa.eu/internal\\_market/consultations/2011/corporate-governance-framework/public-authorities/ministry-of-justice-estonia\\_et-en.pdf](http://ec.europa.eu/internal_market/consultations/2011/corporate-governance-framework/public-authorities/ministry-of-justice-estonia_et-en.pdf), accessed 2 June 2017.

to apply for board roles, it does not permit positive discrimination, such as the use of quotas.<sup>219</sup> The so-called ‘tie-break provision’ permits an employer to take a protected characteristic into consideration when deciding whom to recruit or promote, where people having the protected characteristic are at a disadvantage or are underrepresented, but this positive action can be taken only where the candidates are ‘as qualified as’ each other. In **Slovakia** there is objection<sup>220</sup> against the preference rule laid down in Article 4(3) of the GBB-Directive proposal, as it is considered that the application of this rule will lead to sex discrimination. So, it is considered that this is not in line with the national conception of equality. In **Croatia**, the definition of ‘special measures’ in the Gender Equality Act is considered wide enough to potentially include ‘special measures’ aiming to enhance the gender balance in company boards. However, such measures have to be laid down in laws and other regulations regulating specific areas of public life, and so far there has been no such law or regulation aiming to enhance the gender balance in company boards. Such a statutory instrument would be needed to implement it – and not merely an internal regulation at company level – because otherwise it would be considered discrimination.

In some countries, a constitutional reform was needed before quota laws could be introduced. In **France**, the Constitutional Court stated in the 1980s that quota were contrary to the constitutional principle of equality. Therefore a reform of the Constitution was necessary first to allow quota in political mandates and in economic activities. This took place in 2008. Article 1 of the Constitution now states that ‘Statutes shall promote equal access by women and men to elective offices and posts as well as to professional and social positions’ and it allows adopting quota. In **Cyprus** as well, the constitutionality of the proposal of the national Parliament to introduce a quota rule<sup>221</sup> has been contested by the President of the Cyprus Republic before the Supreme Court under Article 28 of the Constitution.<sup>222</sup> This Article 28 provides for gender equality, but creates difficulties in implementing positive action measures, particularly for the benefit of women as the under-represented sex, for aiming at substantive equality. On 5 July 2017, the Court<sup>223</sup> held that under Article 28 of the Constitution, it is clear that any gender quota rule violates the principle of equality as enshrined in the said Article and binds all according to Article 35 of the Constitution. In **Belgium**, no constitutional change was necessary. However, Article 27 of the Constitution (on the freedom of association) is the reason why no external monitoring is provided in respect of the Corporate Governance Code. In **Italy**, doubts as to the constitutionality of the quota rule was also raised by the Minister of Family Affairs and the President of the Constitutional Court. In **Germany** as well, the concept of gender quota has been and still is severely opposed by many politicians, law professors, judges and businessmen, claiming the incompatibility of any gender quota with the Constitution and grave injustice against men. Yet, the Federal Constitutional Court never decided in their favour and no constitutional reform has thus been required.

#### 6.2.4 Market features

Some experts have also stressed the fact that small- and medium-sized companies dominate the economic spectrum, including family businesses (**Cyprus, Estonia**), where there is not much focus on the gender-balance issue. The **Estonian** expert has stressed in this respect that as a result management style is fragmented and varied and that organisational culture is low. Women could be formal members on boards of SMEs, but do not have access to actual management. The statistical overview of women in economic management could be misleading as such.<sup>224</sup> Given the particular features of the **Slovakian** market, the GBB-Directive proposal would actually only apply to 14 companies. In **Luxembourg** as

219 S.158 and 159.

220 Preliminary Opinion to the proposal for a Directive which was drafted by the Slovakian Ministry of Labour, Social Affairs and Family (Labour Ministry).

221 [http://www2.parliament.cy/parliamentgr/008\\_05g/008\\_05\\_4790.htm](http://www2.parliament.cy/parliamentgr/008_05g/008_05_4790.htm).

222 Case No. 2/246.

223 Reference number 2/2016 of Cyprus Supreme Court: Certain Legal Persons Public Law [Appointment of Boards of Directors] [Amendment] Law of 2016. See <http://www.cylaw.org/apofaseis/aad/>.

224 Eesti paistab silma arvukate naisjuhtidega (Estonia is prominent in remarkable share of women in management positions), [www.grantthornton.ee/insights-landing-page/naisjuhid-evei/](http://www.grantthornton.ee/insights-landing-page/naisjuhid-evei/), accessed 2 June 2017.



well, limiting a regulation to listed companies would not make sense, since there are only eight such companies in Luxembourg. One explanation for the rather poor number of women among executive directors of listed companies in **Finland** may be that these directors are mostly recruited in the domain of engineering, which is a strongly male-dominated education. The Finnish labour market is also highly gender-segregated, with women working mostly in the public sector and men in the private sector, which means that there are fewer women in private companies than in public administration. In **Malta**, the low employment rate of women is considered a hampering factor, even if it has improved substantially in the past years; in the last quarter of 2016, the employment rate for persons aged between 15 and 64 was 78.8 % for men and 52.9 % for women.<sup>225</sup>

### 6.2.5 Cultural factors

Quite a number of experts have referred to cultural factors that negatively impact on taking – public and private – action to promote gender-balanced boards (**Croatia, Cyprus, Czech Republic, Estonia, Hungary, Latvia**,<sup>226</sup> **Malta, Poland, Romania, Slovakia, Slovenia**). These factors include the patriarchal structure of society, traditional perceptions, gender roles and stereotypes that want and place women in the private sphere as caretakers or guide them in the choice of education and profession, which reduces the support in society and family for women to be in high management positions. Other important perceptions are that women are less important, not ‘tough’ and competent enough, have weaker reactions in situations of crisis and are less educated, but also that they are not flexible enough (**Croatia, Estonia**). Furthermore, the majority of hiring decisions are taken by men and clear selection criteria for management positions are lacking. These cultural factors also impact on the possibilities to reconcile work and family life, such as childcare facilities, parental leave also for fathers and flexible working hours, which are considered too limited so that women are discouraged from taking up high management positions when they have small children (**Estonia, Romania, Slovakia**). Furthermore, as a result of these societal pressures women may give priority to family life and put their careers on hold.<sup>227</sup> As such, gender equality is also not considered a strong social or cultural value in these countries and in the words of the former female Prime Minister Iveta Radičová, **Slovakia** has a missing history of modern conservatism; instead, traditional values have been preserved. As long as traditional conservatism prevails, the atmosphere is unfavourable regarding a change such as quotas.<sup>228</sup> In **Hungary**, the recurring statements in the past few years of Laszlo Kover, the Speaker of the Parliament, that the prime role of women is to give birth are telling.<sup>229, 230</sup> Moreover, in **Poland**, not only the weakness of actions targeted at increasing the participation of women in economic decision-making is considered problematic, but also the significant

225 [https://nso.gov.mt/en/News\\_Releases/View\\_by\\_Unit/Unit\\_C2/Labour\\_Market\\_Statistics/Documents/2017/News2017\\_052.pdf](https://nso.gov.mt/en/News_Releases/View_by_Unit/Unit_C2/Labour_Market_Statistics/Documents/2017/News2017_052.pdf), accessed 5 June 2017.

226 Society Integration Fund, ‘The research on the situation of women and men in the big enterprises in Latvia’, Riga, 2014, page 94, available in Latvian at [http://www.sif.gov.lv/images/files/SIF/progress-lidzt/petijums/precizets\\_zinojums\\_final.pdf](http://www.sif.gov.lv/images/files/SIF/progress-lidzt/petijums/precizets_zinojums_final.pdf), accessed on 31 May 2017.

227 <http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=8853> accessed 5 June 2017.

228 25 May 2015 <http://www.zenyvmeste.sk/radicova-na-kvoty-pre-zeny-slovensko-nie-je-pripravene>.

229 Like he did on 13 December 2015 at the Congress of the FIDESZ, the ruling political party [http://index.hu/mindekozben/poszt/2015/12/14/egy\\_csomo\\_negativ\\_terhestesztre\\_szamithat\\_kover\\_laszlo/](http://index.hu/mindekozben/poszt/2015/12/14/egy_csomo_negativ_terhestesztre_szamithat_kover_laszlo/). It is also telling what happened the next day and after that: Akos, a middle-aged pop icon in a TV interview continued to express the ultraconservative sentiments stating that it is not the role of women to earn equal wages. He argued that women’s wider hip destines women to give birth, while the wider shoulders of men destines men to bear more burden, including supporting the family. When a woman fulfils her destiny to belong to a man and give birth to the man’s child (sic), she is unable to work long enough hours to earn equal wages. As a reaction to these statements, Hungarian Telecom terminated its sponsorship contract with Akos, stating that the company’s value system does not correspond with that of the singer. Prime Minister Viktor Orban challenged Telecom, stating that the multinational company violated the constitutional value of freedom of speech of Akos when it penalised him for expressing his views. Furthermore, he ordered the Ministries and other government institutions to terminate their mobile internet contracts with Telecom. On the merit of the question he said that there is no sense in interfering with women’s matters because they would decide for themselves, [http://hvg.hu/kultura/20151214\\_Video\\_Akos\\_is\\_megmondja\\_mi\\_a\\_nok\\_dolga](http://hvg.hu/kultura/20151214_Video_Akos_is_megmondja_mi_a_nok_dolga).

230 See also Prime Minister Orban Viktor: Alkotmányos kérdéseket vet fel a Magyar telecom ügye. Constitutional issues brought up by the case of Hungarian Telecom. <http://www.miniszterelnok.hu/alkotmanyos-kerdeseket-vet-fel-a-magyar-telekom-ugye/>.



power of entities representing the interests of men, actively aiming at and acting in favour of preserving the status quo, although often not openly, and towards limiting the influence of women.<sup>231</sup>

By contrast, **Swedish** politics on gender equality rest on a strong consensus-oriented tradition, building on principles of collaboration between men and women to the benefit of both sexes, and promotes equal rights rather than special treatment of the weaker party. In this tradition, just like in the Swedish model of corporate governance, self-regulating and consensus-based solutions for gender equality make more sense than the imposition of statutory gender quotas.

#### 6.2.6 *The role of women's organisations and female leaders/politicians*

The national reports have also revealed an interesting, diverse picture when it comes to the role women's organisations and women in leadership positions have played in the debate on what measures to take to promote the gender balance in boards, and specifically as regards the introduction of mandatory quota rules. In only relatively few countries they appear to have been mostly supportive of this (**Luxembourg, Malta, Iceland**). In **Malta**, most women's organizations, including the Malta Confederation of Women's Organisations, the Foundation for Women Entrepreneurs and the National Council of Women, as well as the National Commission for the Promotion of Equality are in favour of adopting quotas, while Women Directors Malta is not of the opinion that legislation is the way forward since this is considered to increase tokenism and may lead to less qualified directors on the board.<sup>232</sup> In **Iceland**, the establishment of the Feminist Association in 2003 and the annual networking empowerment of women conferences contributed to making the first recommendation in 2006 to make it mandatory by law for companies to have gender-balanced boards of directors.<sup>233</sup> In **Italy**, the National Association of Female Managers has adopted a fierce position against proposals to soften Italian law and the sanctions it contains.

By contrast, in quite a large number of countries female leaders and (especially female) politicians have resisted gender quota, such as in **Germany** and **Estonia**. Many women do so because the few female leaders in the public or private sector are accused of being 'quota women', meaning that they do not hold their position due to their competence but to unjustified promotion. **Slovakian** female politicians have even regarded quotas as an insulting and degrading tool for women,<sup>234</sup> underscoring that barriers preventing women from entry into politics must be removed on a nation-wide scale.<sup>235</sup> The view that quotas for women in the management of large companies do not solve the problem of unequal opportunities for both sexes was also shared by the participants of a discussion on women in managerial positions.<sup>236</sup> Yet, some female MPs do support the setting of some quota because of the low representation of women in boards, but possibly only as a recommendation. In **Croatia** as well, women in top positions themselves generally oppose hard quotas, primarily because they find that persons should be nominated to managerial positions based on their skills and knowledge. Another reason for this attitude lies in the belief that any forced quota could result in a negative working atmosphere, and negative consequences for women in the long term.<sup>237</sup>

231 Compare summaries of the Report of the study by the Foundation of Female Business Leaders 'Women in the management of stock market companies in Poland. Why isn't there any change?' Warsaw, March 2015, [http://www.fundacjaliderekbiznesu.pl/pliki/Raport\\_KobietyWeWladzachSpolekGieldowych.pdf](http://www.fundacjaliderekbiznesu.pl/pliki/Raport_KobietyWeWladzachSpolekGieldowych.pdf) and of the report, Women in the management of stock exchange companies in Poland 2016. Time for change, Warsaw, May 2016, [http://www.fundacjaliderekbiznesu.pl/pliki/Raport\\_FLB\\_20-05%20Final.pdf](http://www.fundacjaliderekbiznesu.pl/pliki/Raport_FLB_20-05%20Final.pdf). Both documents accessed 5 June 2017.

232 <https://www.um.edu.mt/library/oar/bitstream/handle/123456789/17274/16LLD066.pdf?sequence=1&isAllowed=y> accessed 5 June 2017.

233 <http://www.visir.is/g/2008576701759/varadi-vid-astandinu-fyrir-tveimur-arum-sidan> accessed on 12 June 2017.

234 Female MEP of Slovenia, 7 February 2011.

235 Chairwoman of the Parliamentary Committee for Human Rights and Minorities, 24 February 2011. Also Slovenian male MEPs expressed this opinion and that quotas deteriorate the image of women in society, see <https://spravy.pravda.sk/domace/clanok/300025-slovenski-europoslanci-su-rozdeleni-v-nazoroch-na-kvoty-pre-zeny-vo-firmach/> and <http://europskaunia.oldweb-sulik.sk/europska-unia-schvalila-kvoty-pre-zeny/>.

236 <http://www.gender.gov.sk/panelova-diskusia-o-zenach-v-ekonomickom-rozhodovani/>.

237 Outcome of the project 'Removing the glass labyrinth – equal access opportunities to the positions of economic decision-making'.

### 6.2.7 The role of the media

Also when it comes to the role of the media, the picture is quite diverse. First of all, quite a number of experts have noted this influence to be marginal (**Belgium, Latvia, Slovenia, Spain, Sweden**) or rather invisible (**Austria, Bulgaria, Czech Republic, Greece, Lithuania, Poland**). In **Hungary**, the media is deeply divided politically (as goes for the entire society). The small part of opposition media which still resists the overwhelming influence of the ruling political party, criticizes the outrageously neo-conservative approach of the ruling political forces to the role of women in society. Still, even these media do not discuss the issue of participation of women in company boards. In other countries, the media are considered to be reactive rather than pro-active on this issue (**Iceland, Malta, Slovakia**). In **Malta**, regular articles are published on the initiative of experts in the field. However, an interesting incident which gave rise to some debate among women's groups on social networks was a comment in the run-up to the general elections in 2017 by a television presenter on national television who is also a shareholder of a popular newspaper on the possibility of finding enough women to ensure gender parity on boards.<sup>238</sup> In **Italy**, the media has taken positions both in favour and against the quota law. The concept of substantive equality still seems far from the debate on equal opportunities, the quota law being dealt with rather from the point of view of its efficiency. In **Portugal**, the topic is much debated in the media now that there is a proposal for a quota law being debated in Parliament. In **Slovakia**, the media report on quotas particularly when the issue is discussed in the EU. They often express the view that 'quotas humiliate women', that the 'introduction of mandatory quotas for women [will not strengthen] the position of women in business but on the contrary will weaken it', and that 'women have their place in business, but their position, like that of men, should depend on a combination of abilities, ambitions, talent and merits, not from the sex'.<sup>239</sup>

In quite a few other countries as well, such a negative approach of the media has been noted. The expert from **Cyprus** observed that the media generally promote men in informative broadcasts on political or economic issues, and that in entertainment shows, women are portrayed as housewives, and as the most responsible caretakers. Also, women who hold key positions will more often be criticized for their slightest mistake. So generally, the media do not promote gender equality, not even within their own structures. The **Estonian** expert has referred to the fact that there is misleading media information due to mixed messages about women's participation in economic decision-making and that the media also gives the floor to male business leaders who are against quotas and often express an opinion about women's incompetence, lacking management experience and unwillingness of women to be business leaders. For example, the chairman of the advisory board of Tallink (a listed company) was sure that for wise women a quota system is weird. He was sure that 'for women it is complicated to have a career and family with children, women have heavy burden and should decide, what they want'.<sup>240</sup>

Only in a few countries do the media actually seem to have made a positive contribution to the debate on gender-balanced boards. The **German** media is considered to be mostly in favour of gender quota to reach gender balance in company boards as a matter of justice. But of course, business-related media shows all arguments against the introduction of legally binding quota as mentioned under Section 6.2.1 above. In **Croatia**, the role of the media has played an important role in awareness raising. A media campaign was financed and launched as part of the project 'Removing the glass labyrinth – equal access opportunities to the positions of economic decision-making', with the broadcasting of a specially prepared television advertisement on this topic on prime time and the appearance of the Ombudsperson for gender equality in TV programmes and printed media.<sup>241</sup> An analysis of 2 532 articles published in printed media

238 <https://www.youtube.com/watch?v=Flr1mMWA07g>, accessed 5 June 2017.

239 <https://www.aktuality.sk/clanok/240384/komentar-kvoty-dehonestuju-zeny/>.

240 <http://www.aripaev.ee/uudised/2012/11/22/toivo-ninnas-sookvoodi-parast-tootada-on-imelik>; <http://www.aripaev.ee/uudised/2013/11/25/borsifirmad-suhtuvad-kvooti-kriitiliselt>; <https://www.employers.ee/uudised/ettevotted-sookvoodid-on-ajaraisk/>, accessed 21 June 2017.

241 The Ombudsperson promoted the activities of the project in 17 articles in the printed media and as a guest in 6 radio and 7 TV shows at national and regional level. In addition, the project was presented in 43 articles on Internet portals.

and Internet news portals in 2016 in connection with gender discrimination showed that the reporting on topics related to gender equality in the labour market is in second place (after domestic violence), with a coverage of 18 % in the total number of analysed articles.<sup>242</sup> These topics included issues concerning the participation of women in economic decision-making, women entrepreneurship, gender pay gap, etc. In **Norway**, the debate in the media is more focused on how to increase the number of women in leadership positions and in that regard, self-regulatory initiatives are being discussed. The **Finnish** Chamber of Commerce has an active media policy regarding the positive impact of self-regulation by listed companies, and provides regularly figures on the development. These reports do get media coverage. Yet, the government (or the parties now in government) have not very actively participated in the media discussions on the theme. The **Dutch** expert considered the debate in the Netherlands to be overall rather positive on the topic.

### 6.3 Comparing national approaches to the GBB-Directive proposal

In the concluding sections of the previous chapters (Sections 3.7, 4.4 and 5.5) we already compared the national public and private regulatory and enforcement approaches to the requirements the GBB-Directive proposal seeks to impose. Here we will combine the conclusions drawn in those sections and present an overall conclusion as to the extent to which the various national approaches – public or private – are in line with or deviate from the ambition level set by the Directive proposal. The specific elements to consider in this respect are i) the targets and the flexibility clause; (ii) the personal scope; (iii) the provision for specific recruitment procedures and for a priority rule; (iv) monitoring and enforcement procedures; and (v) sanctions.

At this point, it can be noted that there is still a considerable number of States which do not provide for any set of – public or private, hard or soft – rules, leading to the automatic conclusion that they fall short of reaching the aim of the GBB-Directive proposal since none of these countries ensures the target contained in the proposal (see also Section 6.4). These include **Croatia, Cyprus, the Czech Republic, Hungary, Latvia, Liechtenstein, Lithuania, Malta and Slovakia**.

#### 6.3.1 Target and flexibility clause

Considering first the targets: while the Directive sets this at 40 % for non-executive boards and at 33 % for both executive and non-executive boards, the national targets have been seen to range predominantly from 30 % in **Italy, Germany, the Netherlands, and Portugal** and 33 % in **Belgium** to 40 % in **Bulgaria, Iceland, Finland, France and Spain**. In **Norway**, the target depends on the size of the board, and if the board consists of more than nine members each gender shall be represented by at least 40 %. The relevant targets for state-owned companies also differ from 40 % in **Finland, Luxembourg and Slovenia** to 35 % in **Austria** and 33 % in **Greece**. Those contained in the laws of **Bulgaria, Finland, the Netherlands, Portugal, and Spain** are soft public targets, whereas those in the laws of **Belgium, France, Italy, Iceland, Germany, Greece and Norway** are mandatory ones. Considering corporate governance codes, in most cases these do not set any numerical targets, those in **France, Spain, Sweden and the UK** being exceptions in this regard: France 40 % by 2016, Sweden 40 % by 2020, the UK 33 % by 2020, and Spain 30 %. The 2017 **German** CGC repeats the statutory 30 % gender quota for supervisory boards, but does not contain any numerical targets of its own.

See Ombudsperson for Gender Equality (2015), *Annual Report for 2015*, <http://www.prs.hr/attachments/article/1923/Izvj%C5%A1%C4%87e%20o%20radu%20Pravobraniteljice%20za%20ravnopravnost%20spolova%20za%202015.pdf>; p. 65, accessed 5 June 2017.

242 Ombudsperson for Gender Equality (2016), *Annual Report for 2016*, [http://www.prs.hr/attachments/article/2188/IZVJEŠĆE\\_2016\\_Pravobraniteljica\\_za\\_ravnopravnost\\_spolova\\_CJELOVITO.pdf](http://www.prs.hr/attachments/article/2188/IZVJEŠĆE_2016_Pravobraniteljica_za_ravnopravnost_spolova_CJELOVITO.pdf), p. 253, accessed 5 June 2017.

Regarding the flexibility clause the Directive provides for, only **Norway** (yes, all three), **Italy** (yes, a and b), **Germany** (yes, a), **Belgium** (yes) and **Iceland** (yes) answered that their national law would comply with any of the three options the Directive formulates.

### 6.3.2 Personal scope

The national approaches also show great variation as to the (listed) companies to which they apply (state-owned companies or not), and the type of board that is covered (executive, non-executive or both). **Estonia, Finland, Greece, Luxembourg** and **Slovenia** only introduced a public regulatory approach towards state-owned companies. The **Greek** approach covers any legal person whose board members are appointed, in whole or in part, by the State, legal persons of public law and local authorities, irrespectively of whether the legal persons covered are governed by public or private law or whether they are companies listed on stock exchanges. In **Austria, Bulgaria, the Netherlands** and **Portugal**, the relevant legal obligations apply to both the executive and the non-executive directors, whereas in **Finland** and **Spain** they apply only to non-executive directors and in **Denmark** they apply only to the composition of the executive board. The same goes for the corporate governance codes: some apply only to supervisory boards (**Slovenia, Spain**), whereas in other countries it applies to both (**Austria, Belgium, Ireland, Finland, France, Poland, Sweden**). In the **UK**, it is geared to executive boards in particular. In all countries, they only apply to listed companies.

### 6.3.3 Recruitment procedure and priority rule

Most strikingly, public regulatory approaches – both soft and hard – hardly pay any attention to standards that recruitment procedures need to meet so as to ensure equal opportunities for women. This seems slightly more the case for corporate governance codes, but here also many of them still lack precise stipulations in this regard. The same goes for priority rules: so far only **Iceland** seems to have put such a rule into place. On this point, it can be concluded that the great majority of States does not meet the standards the Directive seeks to impose.

### 6.3.4 Monitoring and enforcement procedures

Reporting obligations have been put into place by way of both hard and soft regulatory approaches as well as on the basis of corporate governance codes. Actually, this appears to be the most developed and easily applicable mechanism for holding companies accountable for their compliance with set quotas and targets as well as other policies they have initiated to enhance the gender balance in boards, or more generally, gender equality and diversity. While in some States, this is limited to an information or reporting obligation, in many others it entails a comply-or-explain obligation.<sup>243</sup> Some of these have remained without sanctions, whereas others have introduced sanctions for failure to comply with the set quota or target. In a few States, specific monitoring bodies have been appointed for this but in many other States this remains within the competence of the general equality body whose actual monitoring possibilities may be limited.

### 6.3.5 Sanctions

The GBB-Directive proposal only requires that Member States ensure effective, dissuasive and proportionate sanctions if companies fail to comply with the procedural obligations the Directive imposes, not for failure to meet the target. Interestingly, in this respect it has appeared that the national approaches on the one hand do not meet the Directive's obligation, for failure to provide for specific sanctions for

243 The CGCs of Austria, France, Ireland, Poland, the Netherlands, Slovenia, Sweden and the UK provide for such an obligation. In some countries the law does not leave room for explanations, as non-compliance will lead to sanctions (Norway), whereas in other countries it limits itself to an information obligation for the lack of sanctions (Greece). Legal comply-or-explain types of obligations exist in Austria, Germany, Iceland, the Netherlands and the UK.

non-compliance with the procedural obligations. Yet, on the other hand they go beyond the Directive's standards by providing sanctions for non-compliance with the targets or quota set in their national laws (see also Chapter 7).

## 6.4 Impact, credibility and effectiveness of national approaches compared

In the previous section, we established that many national approaches fall short of setting an ambition level that is in line with that described in the GBB-Directive proposal. Here we will consider what expectations one may otherwise cherish regarding the current national approaches in terms of their effectiveness, first by considering the progress they have ensured or contributed to so far (Section 6.4.1) and second, by considering their credibility and capability or likeliness of bringing about the desired progress in the future (Section 6.4.2). In this respect, we will also identify enabling and hindering factors related to these approaches. A preliminary observation is that public regulatory approaches do not necessarily lead to better results than co-/self-regulatory ones, which may be explained by various reasons both of an internal nature (limitations in the law itself regarding e.g. personal and substantive scope, its binding nature) and of an external nature (limited trickle-down effect, State not leading by example, etc.).

### 6.4.1 Impact

We will consider progress mainly in terms of whether the number of women on company boards has risen over time in line with the quota or target set by the relevant national approaches. Starting here with the countries that have adopted a hard mandatory quota approach: these show different results. According to the **Belgian** Institute for Equality's surveys, and concerning boards of directors,<sup>244</sup> all public bodies missed the 1/3 target in 2012 (29.1 %), achieved it in 2014 (36.4 %) and narrowly maintained it in 2016 (34.7 %). In 'larger' private companies, when the deadline was not yet applicable, there was certain but insufficient improvement (from 12.7 % in 2012 to 21.6 % in 2016); the survey did not cover 'smaller' companies, for which the deadline is longer. The survey also provides data concerning management committees,<sup>245</sup> to which the Act does not apply. In public bodies, progress is extremely slow and modest: from 6.5 % in 2012 to 8.3 % in 2016. It seems to be more significant in private companies: from 10.3 % in 2012 to 17.9 % in 2016. In **France**, due to the introduction of the quota, the percentage of women on supervisory boards in CAC 40 listed companies has tripled in six years, rising from 10.7 % in 2009 to 34.1 % in 2015. This rise is also seen in SBF 120 listed companies, where the percentage of female board members increased from 9.3 % in 2009 to 32 % in 2015. Clearly, companies listed on the regulated Euronext Paris markets have, all in all, largely exceeded the initial 20 % threshold expected to be reached in 2014. In January 2017, it seems that the objectives of 40 % have almost been reached (women now representing 39 % on boards). However, there is little information available for medium-sized companies and certainly their compliance is uncertain.<sup>246</sup> In **Norway**, boards that are subject to gender-quota legislation are balanced with 39 % women. Yet, there remains gender imbalance in positions with responsibilities for profit & loss responsibility, such as CEO, country head, business-unit head etc.<sup>247</sup> The so-called trickle-down effect of the quota legislation has therefore not been as great as some may have expected. Research indicates that without a tough leader at the top demanding gender equality in all recruitment procedures and leadership positions, progress remains slow. This is a consequence of the discrimination that happens subconsciously every day: for instance, there is a tendency for men to recruit men with similar qualifications as they have themselves. An annually performed survey shows that only 7.5 % of CEOs are female and 11.5 %

244 The Act of 28 July 2011 does not distinguish between executive and non-executive directors.

245 Management committees (comités de direction / directiecomités) are compulsory in public bodies and optional in private companies.

246 Haut Conseil à l'égalité entre les femmes et les hommes, *Towards equal access of women and men to positions of professional responsibility: proportion of women on boards*, [http://www.haut-conseil-egalite.gouv.fr/IMG/pdf/hce\\_rapport\\_parite\\_eco\\_eng\\_20160209-2.pdf](http://www.haut-conseil-egalite.gouv.fr/IMG/pdf/hce_rapport_parite_eco_eng_20160209-2.pdf).

247 Centre for Research on Gender Equality (CORE) at Institute for Social Research (ISF). <http://likestillingsforskning.no/Topplederbarometer>, accessed on 6 June 2017. See survey on Norwegian Gender Balance Scorecard 200 2017 from February 2017, link on the page.



of chairpersons are female. In **Germany**, in May 2017, 27.9 % of the members of supervisory boards of the 108 private listed companies that are subject to the statutory 30 % gender quota, were female.<sup>248</sup> But concerning the executive boards, no fundamental change can be reported: in March 2017, the percentage of women on these boards was only 7. Strikingly, it has been found that there are more male executive board members with the name of Thomas and Michael than female executive board members at all.<sup>249</sup> A 2016 assessment of 412 (federal, state and local) public undertakings showed very slow progress: 28.4 % of the non-executive board members were female and 16.5 % of the highest management positions were held by women.<sup>250</sup> Only 32 % of the public undertakings had fulfilled their obligation to set themselves target gender quota and every second of them set targets below their actual percentage of women in leadership positions. In **Italy**, as regards listed companies,<sup>251</sup> at the end of June 2016, women's presence among executive directors' boards was over 30 % of the total and the figure is going to increase. The percentage has tripled compared with 2012 thanks to Act No. 120/2011. The number of companies where at least one woman has a seat on the executive directors' board has increased from 2/3 to almost 3/3 of listed companies. In 1/3 of all companies, women are president of the board or managing director. As regards state subsidiary companies,<sup>252</sup> in the 430 companies from which a communication on quotas in company boards has been received by the Ministry, 37 % of board members are women. The same website publishes data on state subsidiary companies contained in the Ministry's data base (3381 companies), where women on boards prove to represent 27.5% of the total.<sup>253</sup> In **Iceland**, the number of women sitting on corporate boards, or holding executive positions failed to increase between 2016 and 2017. Currently women make up 25.9 percent of board members in Iceland, up just 21.3 percent from 1999.<sup>254</sup> Women are still a minority of 25-40 %, depending on the size of the companies. As pointed out by the Minister of Welfare, the quota legislation has neither had the intended effect on the number of women as board chairmen nor in executive managerial positions.<sup>255</sup> Out of the 50 largest companies in Iceland, there are only 6 that have women CEOs or 12% of the largest, listed companies.<sup>256</sup>

In countries that did not introduce any hard mandatory quota but a soft public regulatory approach and/or co-/self-regulatory approaches, the results are varied as well. In **Spain**, various studies<sup>257</sup> show that the proportion of 40 % women has not been reached and that in 2016 there were only 19.83 % of women on non-executive boards. More specifically, this concerns an increase up from 10.56 % in 2010, but only in the companies included in the IBEX 35, which comprises only the 35 most important listed companies, which are usually more concerned about having a high standard of corporative social responsibility than other, smaller companies. There has not been any increase of women in the IBEX 35 executive boards,<sup>258</sup> while data regarding non-IBEX listed companies are not available. The **Dutch** figures show that there has been only a small increase between 2013 and 2016; the percentage of women on executive boards increased from 7.4 % to 9.6 % and on supervisory boards from 9.8 % to 11.2 %. In 2015, 14.2 % of

248 See <https://www.bmfsfj.de/bmfsfj/themen/gleichstellung/frauen-und-arbeitswelt/quote-fuer-mehr-frauen-in-fuehrungspositionen--privatwirtschaft/78562>.

249 Allbright Foundation (2017), Ein ewiger Thomas-Kreislauf?, <https://static1.squarespace.com/static/56e04212e707ebf17e7d7cd2/t/58e131722e69cfd46ac09d45/1491153295243/Allbright-Bericht-2017-Ausdruck.pdf>.

250 FidAR (2016), Public Women-on-Board-Index mit 412 öffentlichen Unternehmen, [https://www.fidar.de/webmedia/documents/public-wob-index/160101\\_Studie\\_Public\\_WoB-Index\\_III\\_end.pdf](https://www.fidar.de/webmedia/documents/public-wob-index/160101_Studie_Public_WoB-Index_III_end.pdf).

251 Consob's 2016 Report on corporate governance of listed companies <http://www.consob.it/web/area-pubblica/rcg2016>, last accessed on 26 May 2017.

252 The 2016 Minister of Equal opportunities' three-year Report on the state of implementation of the legislation on quotas in state subsidiary company boards [http://www.pariopportunita.gov.it/media/2786/relazione\\_-\\_triennio-appl-dpr-251\\_2012-inviata-a-parlamento.pdf](http://www.pariopportunita.gov.it/media/2786/relazione_-_triennio-appl-dpr-251_2012-inviata-a-parlamento.pdf), last accessed on 26 May 2017.

253 <http://www.pariopportunita.gov.it/media/2762/tabella-società-controllate-pa-1.pdf>, last accessed on 26 May 2017.

254 <https://kjarninn.is/skyring/2017-02-20-sex-konur-stjorna-i-50-staerstu-fyrirtaekjum-landsins/> Accessed on 6 September 2017.

255 <https://www.stjornarradid.is/rikisstjorn/skipan-rikisstjornar/raeda-radhera/2017/05/17/OECD-Rountable-on-Better-Governance-for-Gender-Equality/> Accessed on 6 September 2017.

256 <https://kjarninn.is/skyring/2017-02-20-sex-konur-stjorna-i-50-staerstu-fyrirtaekjum-landsins/> accessed on 6 September 2017.

257 For instance, annual report of the Corporative Government of the National Commission of the Stock Market (last one in 2013), <https://www.cnmv.es/portal/Publicaciones/PublicacionesGN.aspx?id=22>, accessed 20 May 2017 and report drawn up by ATREVIA and IESE (2016) IV Informe de las mujeres en los Consejos del IBEX, <http://www.iese.edu/research/pdfs/ST-0397.pdf>, accessed 20 May 2017.

258 According to the report drawn up by ATREVIA and IESE (2016) IV Informe de las mujeres en los Consejos del IBEX, <http://www.iese.edu/research/pdfs/ST-0397.pdf>, accessed 20 May 2017.



the companies had 30 % of women on their executive board and 17.8% had 30 % of women in their supervisory boards. However, 75 % of the boards and nearly two-thirds of the supervisory boards had no female members at all.<sup>259</sup> In **Sweden**, the share of women in the boards of all companies listed on the stock market is 32 %. For the large companies, the share of women is 36 %. In all listed companies, the number of women on the boards is steadily increasing. In the state-owned companies, 49 % are women.<sup>260</sup> The boards of the Stockholm stock exchange will be equal within the next ten years if the progress continues, and if the dramatic growth from last year continues, equal boards might be realised in just four years' time.<sup>261</sup> **Swedish** company boards are not yet gender equal, but the process has come a long way. So far, the industry's development has followed, and is even ahead of, its own schedule towards the goal of even gender distribution. In the **UK**, the original Davies Report<sup>262</sup> target set for the FTSE 100 group *overall*, to achieve a minimum of 25 % representation of women in boards by 2015 was met: the UK FTSE 100 group saw a rise from 12.5 % in 2010 to 26.1 % in October 2015. The FTSE 250 group was at 19.6 %, and the FTSE 350 average was 21.9 %.<sup>263</sup> The group data however concealed variations between companies and many were still below the target.<sup>264</sup> The rise was achieved through an increase in non-executive director appointments<sup>265</sup> and a recent inquiry by the Equality and Human Rights Committee found that progress on under-representation is often also met by reducing the board size rather than recruiting more women.<sup>266</sup> In reality, despite soft targets consistently being met at group level, boards remain overwhelmingly male and most companies have not met the target of the Davies review. In **Finland**, the number of female board members has risen from 7 % in 2003, and 12 % in 2008 to 25 % in 2016. 35 % of new board members elected in 2016 were women.<sup>267</sup> In its 2015 decision, the Government found that the figure for large-cap companies was 30 in 2015, and for all companies 23 %.<sup>268</sup> In **Poland**, in the management of listed companies on the main stock market of the GPW women represented 12.05 % in 2015, in comparison to 11.43 % in 2014. A similar, very modest increase was noted with regard to supervisory boards, where women represented 14.49 %, compared with 12.9 % in 2014. In addition, the largest stock market companies and companies with at least 25 % participation of the State Treasury have not been trendsetters so far, the level being similar to that of the entire market.

In countries that lack any approach, whether public or private, and have at most put some policy measures into place, the representation of women in higher management but also public positions is generally low, none coming near the 40 % target nation-wide as envisaged in the GBB-Directive proposal. In **Croatia** the average representation of women at supervisory and executive board level increased from 19.53 %

259 Monitor of the Commission 'Monitoring Talent to the Top', established by the **Dutch** Government.

260 Government Report Ds 2016:32, p. 21. Cf. also Eurostat statistics [http://ec.europa.eu/justice/gender-equality/gender-decision-making/database/index\\_en.htm](http://ec.europa.eu/justice/gender-equality/gender-decision-making/database/index_en.htm), [http://eige.europa.eu/gender-statistics/dgs/indicator/wmidm\\_bus\\_bus\\_wmid\\_comp\\_compbm](http://eige.europa.eu/gender-statistics/dgs/indicator/wmidm_bus_bus_wmid_comp_compbm). Government Report Ds 2016:32, p. 13.

261 The Allbright Foundation is an independent body that continuously maps business leaders and boards to highlight the issue of representation, with a focus on how to reach solutions. Allbright Foundation (2015) *Wanted: 220 Women*, available in English at [http://static1.squarespace.com/static/5501a836e4b0472e6124f984/t/5700bcc4f699bbaade54e3aa/1459666119191/ENG\\_So%CC%88kes%2C+220+kvinnor.pdf](http://static1.squarespace.com/static/5501a836e4b0472e6124f984/t/5700bcc4f699bbaade54e3aa/1459666119191/ENG_So%CC%88kes%2C+220+kvinnor.pdf).

262 Davies Report: *Women on Boards* (2011) available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/31480/11-745-women-on-boards.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/31480/11-745-women-on-boards.pdf) (accessed 30 May 2017).

263 Department of Business, Innovation and Skills (2015) *Women on Boards*, available at <https://www.gov.uk/government/publications/women-on-boards-2015-fourth-annual-review> (accessed 30 May 2017).

264 See Equality and Human Rights Commission (2016) *An Inquiry into Fairness, Transparency and Diversity in FTSE 350 Board Appointments*, available at <https://www.equalityhumanrights.com/en/publication-download/inquiry-fairness-transparency-and-diversity-ftse-350-board-appointments> (accessed 30 May 2017).

265 See <https://www.publications.parliament.uk/pa/cm201617/cmselect/cmbeis/702/70209.htm> at para 122 (accessed 2 June 2017). See also Equality and Human Rights Commission (2016) *An Inquiry into Fairness, Transparency and Diversity in FTSE 350 Board Appointments*, available at <https://www.equalityhumanrights.com/en/publication-download/inquiry-fairness-transparency-and-diversity-ftse-350-board-appointments> at page 26 (accessed 30 May 2017).

266 Equality and Human Rights Commission (2016) *An Inquiry into Fairness, Transparency and Diversity in FTSE 350 Board Appointments*, available at <https://www.equalityhumanrights.com/en/publication-download/inquiry-fairness-transparency-and-diversity-ftse-350-board-appointments> at page 27 (accessed 30 May 2017).

267 See <http://kauppakamari.fi/wp-content/uploads/2015/04/naisten-osuus-porssiyhtioiden-hallituksissa-nousee-jalleen.pdf>, accessed 1 June 2017 and <http://kauppakamari.fi/wp-content/uploads/2016/05/cg-selvitys-2016-naiset-porssiyhtioiden-hallituksissa.pdf>, accessed 1 June 2017.

268 Valtioneuvoston periaatepäätös sukupuolten tasapuolisen edustuksen toteuttamisesta pörssiyhtiöissä (Government's decision on balanced gender participation in listed companies), Ministry of Justice 17 February 2015.

in 2011 to 24.25 % in 2014.<sup>269</sup> In **Estonia**, in 2014, there were only 7.9 % women on executive boards and 18.2 % women on supervisory boards in 30 state-owned companies, some having no women on their board at all.<sup>270</sup> There were 15.2 % women on executive boards and 7.2 % on supervisory boards of 13 listed companies (Nasdaq OMX Tallinn).<sup>271</sup> The Chamber of Commerce and Industry is also a male-dominated organization regarding management and representation of members. In **Liechtenstein**, there are no gender-specific statistics for women in decision-making positions, but one study has been conducted which revealed that none of the 36 companies in Liechtenstein had any women occupying a line function<sup>272</sup> at all. Also the management boards and foundation boards (the boards of 'Stiftungen')<sup>273</sup> rarely include any women. Yet, the boards of the National Bank, the Liechtenstein Broadcasting Company, Telecom Liechtenstein and the Public Transport Company show a participation of women of between 25 % and 40 %.<sup>274</sup> In **Slovenia**, women occupy approximately 20 % of the boardroom seats of the largest listed companies, among the presidents of the largest listed companies only 5 % are women, showing no visible increase in the proportion of women on boards. In the **Czech Republic**, women are least represented in state-owned bodies and currently there is only one woman in all of the supervisory boards of the 13 Czech companies listed on the Prague Stock Exchange. Of the 127 positions in these 26 bodies, 9 are women (7 %) and 118 men (93 %). In **Austria**, it is important to note that middle-management positions (so-called *Prokura* positions) are starting points for careers in upper-management and executive positions, but that in 2016 just 15.8 % of such positions in the top 200 Austrian companies were held by women; in listed companies the proportion of women in *Prokura* positions is slightly larger at 20.3 %. In **Hungary**, women represent 7.4 % of the board members of the largest publicly listed companies (BUX index). This proportion is significantly below the EU average (15.8 %). There are no women board chairpersons or CEOs in the companies covered.<sup>275</sup>

A worrying trend is that in some of these countries, the situation is even deteriorating and female representation in boards decreasing (**Malta, Poland, Romania**). In **Malta**, in 2014 even fewer women were serving on company boards than before,<sup>276</sup> and the number has never exceeded 5 %<sup>277</sup> and also only 9 % of Malta's Ministers and Parliamentary Secretaries are women. In **Romania**, between October 2010 and April 2014, the proportion of women on boards of large listed companies (top 10) decreased by 10 percent, to 14 %.<sup>278</sup> At the end of 2015, the Professional Women's Network Romania reported that this percentage had further decreased to 12 %.<sup>279</sup> At the same time, the State is not taking the lead to promote members in the boards of public companies based on merit, not to talk about taking affirmative measures to promote women. At another level, it has also been noted in the **UK** that 'the number of female CEOs has actually declined during the past three years: there were nine women CEOs in 2014; in

269 Study on the participation of women and men in company boards and managerial positions in business entities (top 500) <http://staklenilabirint.prs.hr/wp-content/uploads/2014/09/Rezultati-istra%C5%BEivanja-provedenih-u-sklopu-Progress-projekta.pdf>, accessed 5 June 2017.

270 State Forest Management Centre. This Company has net assets EUR 1,254 billion (31 December 2014), no women on the management board (out of 3) or on the Supervisory Board (out of 9).

271 Laas, A. (2015). Women in business elite in Estonia. Paper presented at the Conference 'Make Profitable Investment! Closing Gender Gap in Economic Decision-making in Lithuania, Vilnius, 2 July 2015.

272 This is a Swiss expression for "Linienvorgesezte" that means "Führungskräfte" or "leitende Positionen".

273 This is of relevance as there are many foundations ('Stiftungen') in Liechtenstein. The legal form of a foundation is often chosen and people acting there are very influential.

274 The international and interregional project 'concern: women decide' between Vorarlberg in Austria, Graubünden in Switzerland and Liechtenstein. See further details on the Internet on the following websites: <http://www.interreg.org/projekte/P1/SZ3/ABH017> and <http://193.170.142.169/Joomla/index.php/projekte/betrifft-frauen-entscheiden/erhebungen> and for the individual report on Liechtenstein see <http://www.llv.li/files/scg/final-liechtenstein-v-3docx.pdf>, all accessed on 13 June 2017.

275 [http://ec.europa.eu/justice/gender-equality/files/womenonboards/womenonboards-factsheet-hu\\_en.pdf](http://ec.europa.eu/justice/gender-equality/files/womenonboards/womenonboards-factsheet-hu_en.pdf).

276 [http://www.maltatoday.com.mt/business/business\\_news/37990/malta\\_had\\_least\\_number\\_of\\_women\\_on\\_company\\_boards\\_in\\_2013#.WjkuuHmQxaR](http://www.maltatoday.com.mt/business/business_news/37990/malta_had_least_number_of_women_on_company_boards_in_2013#.WjkuuHmQxaR), accessed 5 June 2017.

277 <https://www.um.edu.mt/library/oar/bitstream/handle/123456789/17274/16LLD066.pdf?sequence=1&isAllowed=y>, accessed 5 June 2017.

278 National Agency for Equal Opportunities between Women and Men (*Agencia Națională pentru Egalitate de Șanse între Femei și Bărbați* (ANES)), Response No. 1797/A.C./D.M./SSPPMES/2017.05.22, citing Deloitte Report, Women in the Boardroom, A global perspective.

279 Deloitte and Professional Women's Network Romania Report, Women on boards in Romania, pp. 6, 8.

March 2017 there were only six'.<sup>280</sup> In **Poland**, a regression has been signalled in the management of the Stock Exchange.<sup>281</sup>

#### 6.4.2 Credibility and capability

In assessing the credibility of national approaches and their capability of realising the goal of gender-balanced boards as they have set themselves, many experts have observed that it is difficult to establish to what extent the progress made can be traced back to the adopted approach. The **Belgian** expert noted that the culture of political compromise in Belgium had resulted in window dressing rather than in actual reform. Concerning private companies, the expert stated that there is no indication that the positive development of female representation is due to the prospect of having to comply with the Act rather than to factors such as the average predominance of women among higher education graduates or to an impact of the Corporate Governance Code. As to public bodies, despite there being a duty to provide a motivated decision for the appointment of representatives, the result of the selection process is in most cases predetermined by political considerations, as seats are divided amongst the parties composing the coalition; applying a gender quota is nothing more than an extra complication. Moreover, the general impression is that the impetus which existed in 2011 was lost immediately afterwards because of the change in Government, so that whatever implementation the quota act has received was nothing more than going through the motions in the public bodies.

In **Sweden**, the self-regulatory approach has been criticized from time to time for delivering far too little progress, but since it has been seen to operate very much in the shadow of the law, there being continuous threats of mandatory gender quota being imposed, there has been continuous progress, as described above. While the approach has been deemed successful and credible, the national expert considers it difficult to estimate to what extent this results from the Swedish policy approach, and how much can be attributed to the internal work of the corporate sector, also given that the two have been interacting. In the **UK**, by contrast, there is general recognition that the rise of women on boards, although welcome, is still 'deceptive' and there is now growing support to increase the targets, to encourage companies to improve the pool of executive senior managers and to improve reporting/disclosure requirements in annual reports.<sup>282</sup> The Davies Report also recommended, amongst other things, that executive search firms, used by many companies to recruit board directors, develop a voluntary code of conduct. By 2011 over 80 firms had signed a Voluntary Code of Conduct and 17 had signed an enhanced Voluntary Code by 2014.<sup>283</sup> Accreditation under the Code is based on performance/output, as well as on quality. It acknowledges those firms that are at the forefront of helping boards enhance their gender balance, with a strong track record in promoting gender diversity in the FTSE 350 and having made much effort to fuel the progress towards 25 % on FTSE 350 boards. Accredited firms are required to have demonstrated the following in the previous 12 months: firstly, that at least 33 % of their FTSE 350 board appointments have been to women, secondly, to have supported the appointment of at least 4 women to FTSE 350 boards and, thirdly, to have a proven record of helping women to achieve their first board appointment. An additional category of accreditation was developed to recognise the efforts of firms working with boards outside the FTSE 350, with small-cap, private companies, mutual, or not for profit, and government organisations.<sup>284</sup> In relation to the use of positive action measures and/or the tie-break provision, the EHRC inquiry found

280 See BEIS Select Committee inquiry on corporate governance at <https://www.publications.parliament.uk/pa/cm201617/cmselect/cmbeis/702/70209.htm> at Paragraph 122 (accessed 2 June 2017).

281 The Report 'Women in the management of stock market companies in Poland. Why isn't there any change?' Warsaw, March 2015 [http://www.fundacjaliderekbiznesu.pl/pliki/Raport\\_KobietyWeWladzachSpolekGieldowych.pdf](http://www.fundacjaliderekbiznesu.pl/pliki/Raport_KobietyWeWladzachSpolekGieldowych.pdf) and the Report, Women in the management of stock exchange companies in Poland 2016. Time for change, Warsaw, May 2016, [http://www.fundacjaliderekbiznesu.pl/pliki/Raport\\_FLB\\_20-05\\_Final.pdf](http://www.fundacjaliderekbiznesu.pl/pliki/Raport_FLB_20-05_Final.pdf). Both documents accessed 5 June 2017.

282 See BEIS Select Committee inquiry on corporate governance at <https://www.publications.parliament.uk/pa/cm201617/cmselect/cmbeis/702/70209.htm> at Paragraphs 122-127 (accessed 2 June 2017).

283 Department of Business, Innovation and Skills (2015) *Women on Boards*, available at <https://www.gov.uk/government/publications/women-on-boards-2015-fourth-annual-review> (accessed 30 May 2017).

284 See Department of Business, Innovation and Skills (2015) *Women on Boards*, available at <https://www.gov.uk/government/publications/women-on-boards-2015-fourth-annual-review> p. 18.

a general lack of confidence in using these instruments and the EHRC has produced a guide on 'how to improve board diversity: a six step guide to good practice'.<sup>285</sup> In the view of the **Finnish** expert, the national approach has some credibility, but it is difficult to say whether the progress results from the motivated efforts the companies have made on their own accord, out of fear of binding legislation if there is no progress through self-regulation, or simply because there are more eligible women to nominate. The **German** expert believes that the national approach is a fine starting point but that neither a 30 % gender quota nor the restriction of legally binding quota to 108 companies can suffice. A 50 % statutory gender quota should apply to all public undertakings, (even partly) state-owned companies and bodies under federal control, and a 40 % gender quota regarding executive and non-executive board positions as well as higher management positions to all private companies which are listed or co-determined or both. She also considered it to be demoralizing but not surprising that 75 % of all MDax-listed companies set themselves a 0% gender quota regarding their executive boards for the first period until 30 June 2017.<sup>286</sup> However, there are no data available on how many of the companies under the obligation to set themselves individual quantitative objectives (target gender quota) with regard to the executive and non-executive board members as well as with regard to the first and second management level below board level have actually done so.<sup>287</sup> In **Croatia**, it is clear that until the public approach changes, the progress at the level of private companies will depend on good will and willingness of individual companies to acknowledge gender diversity. Evidence shows that some of the largest and most successful companies in Croatia do have gender-balanced company boards and cultivate workplace diversity policies in addition to mechanisms improving work-life balance, as part of their corporate social responsibility strategies, through internal codes and regulations, as well as collective agreements.

The **Czech** expert has observed that it is questionable whether only soft instruments are able to help achieve the goal of 40 % women represented in decision-making positions in 2020. While the National Equality Strategy considers it important to achieve a more balanced representation of women and men in decision-making positions in the public and private sphere and to achieve a degree of representation of women in decision-making positions in public and private sphere of at least 40 %, no concrete plans for its introduction have been submitted so far.<sup>288</sup> Likewise, in **Slovenia**, despite numerous measures taken at the organizational and institutional level, women are still underrepresented in company boards. Soft approaches have therefore not led to any significant progress and change in enhancing gender-balanced company boards in the private sector. The **Austrian** expert considers it vital, with a view to enhancing female participation in upper-management levels and in executive and supervisory boards, that the number of women at the starting point of management careers be enhanced. She considers quota regulations for the entry level of management career paths as equally important. The Austrian approach so far has not been very effective, which is also due to the 'leaky pipeline' phenomenon. Informally, executive search experts say that it is harder to find suitably qualified female applicants for higher management positions because of the tendency of women towards part-time work and consequent career impairments. The **Bulgarian** expert considered it a very positive tendency that reporting obligations for companies and self-regulatory measures encompass management in companies at different levels and do not only focus on non-executive boards.

Quite a variety of obstructing factors have been identified that affect the credibility and future effectiveness of national approaches. The **Icelandic** expert held that the slow process of increasing the influence of women in the corporate sector can be explained by the fact that men are still dominant due to their larger share of stocks and greater influence and networks in the corporate world; that politicians who promote gender issues also use this to promote their own agenda; and that companies tend to

285 See <https://www.equalityhumanrights.com/en/advice-and-guidance/how-improve-board-diversity-six-step-guide-good-practice> (accessed 2 June 2017).

286 See section 3.3.4 for the explanation of why companies can limit themselves to a '0%' target. See also <http://www.spiegel.de/karriere/frauenquote-in-mdax-unternehmen-keine-weiblichen-vorstaende-a-1135060.html>.

287 It must be noted that the Mdax-listed companies are only a (small, but very important) part of all companies under the obligation to set themselves individual quantitative objectives.

288 Government Strategy for Equality of Women and Men in the Czech Republic for 2014-2020, pp. 14-15.

pick successful men to be in the forefront while not necessarily the most qualified female candidates are given board seats to fill the quota. The **Croatian** expert believes that, generally, the current soft policy-building approach does not sufficiently highlight the standards and differentiation regarding the introduction of gender quotas and size of the company, or the length of transitional periods for the introduction of quotas. In order to ensure credibility and support for any future introduction of gender quotas, it is considered that the national authorities will have to work on building and enforcing flanking policies which will enable better work-life balance and allow women more active participation in the business environment. Given the correlation between the general trends in the labour market and the participation of women in company boards, priority should be given to improving the position of women in the labour market in general. According to a recent **French** study, the implementation of the French quota legislation still encounters two major difficulties: firstly, some of the companies and undertakings covered by it are unaware of the legislation; and secondly, the legislation does not provide for the terms and conditions of its implementation or the establishment of a monitoring mechanism. To be effective, it is considered to be in need of a yardstick and of a body to process the data and corresponding controls.<sup>289</sup> Moreover, the focus of most studies is on the proportion of women on CAC 40 and SBF 120 company boards because it is easier to collect data from these companies, so there is a dearth of research not only regarding the about 900 companies to which the legislation applies as well, but also regarding the nearly 10,000 public undertakings with recorded accounts. The **German** Allbright Foundation has explained<sup>290</sup> the striking homogeneity of German executive board members by informal recruitment procedures being detrimental to women, lack of professional headhunting for female leaders, lack of chairwomen of supervisory boards, cultural norms that lead to the exclusion of women in leadership positions, and a lack of effectiveness of internal gender equality programmes. In addition, the German expert has referred to the lack of sanctions as being problematic: a new approach must contain effective sanctions such as the annulment of elections, the substitute appointment by courts, the annulment of decisions, heavy fines and public naming and shaming. In **Malta**, the implementation of regulations and laws would ensure that a harmonized approach leading to effective change is in place. Given the small number of companies involved, it would also not be difficult to provide tailored solutions in order to achieve gender parity on their boards. Yet this has not been done to date. The **Italian** expert has specifically referred to the lack of reporting provisions for listed companies, but considers it most important that the Italian law is temporary, as it will apply for three periods of tenure of directors and auditors. The **Polish** expert has referred to the lack of political will to change the status quo and the marginal interest of politicians generally for the issue of equal participation and chances for women and men in managing the economy.

By contrast, the **Swedish** expert has referred to three important enabling forces that have contributed to the success of the Swedish approach. First of all, the threat of statutory quotas has been an important driving force for the corporate sector. A second factor has been the importance of the state leading by example. In 1999, when the share of women in state-owned company boards was 28 %, the Government set the goal of gender-balanced boards, with an intermediate target of 40 % women in 2003 which was met then and today this composition is 49 %. Important elements in this process have been the requirement for both female and male nominees in the appointment procedures, state-financed projects aiming to increase the share of women, and a duty to report on a continuous basis the proportion of women and men in state boards.<sup>291</sup> A third factor is the policy context embodied in the Swedish welfare system, which rests on and aims to implement gender equality, among other egalitarian values. This includes extensive rules on the right to parental leave and parental benefits, policies and legislative measures aimed at creating a more equal sharing of parental leave between men and women, and cheap and accessible high-quality childcare. The long-lasting and intense focus in the public debate on this

289 Haut Conseil à l'égalité entre les femmes et les hommes, *Towards equal access of women and men to positions of professional responsibility: proportion of women on boards*, [http://www.haut-conseil-egalite.gouv.fr/IMG/pdf/hce\\_rapport\\_parite\\_eco\\_eng\\_20160209-2.pdf](http://www.haut-conseil-egalite.gouv.fr/IMG/pdf/hce_rapport_parite_eco_eng_20160209-2.pdf).

290 Allbright Foundation (2017), *Ein ewiger Thomas-Kreislauf?*, <https://static1.squarespace.com/static/56e04212e707ebf17e7d7cd2/t/58e131722e69cfd46ac09d45/1491153295243/Allbright-Bericht-2017-Ausdruck.pdf>.

291 Written communication from the Government, Skr. 1999/2000:24.



subject and work-family reconciliation has fostered a climate where parental duties are not necessarily incompatible with a top career.

## 6.5 National plans to enhance gender-balanced boards

While the impact, credibility and future effectiveness have important limits in the experts' views, national plans to further promote gender-balanced boards appear rather limited in practice. In this section we will consider these plans, in addition to recent initiatives that have already been discussed in the previous chapters. As was established in Section 6.2.1, the issue of gender-balanced company boards is very low on the list of political priorities of quite a large number of countries and there is also quite some political and societal resistance to move towards the introduction of mandatory quota in many countries. In **Malta** for instance, companies may be more in favour of voluntary measures and will resist any type of sanctions. Some companies may even be more willing to pay a fine than be obliged to abide by gender-parity clauses.

While there are no concrete plans in this regard, there are only a few states in which the option of mandatory quota is considered, especially in those that have already adopted a soft public or private target. In **Finland**, **Sweden** and **the Netherlands** the prospect has been set by the national governments that if self-regulation fails to yield the result strived for, binding legislation may be introduced. Furthermore, in March 2017, the **German** Federal Minister for Family, Senior Citizens, Women and Youth expressed her disappointment with the results so far of the quota law and announced the serious consideration of amendments to the existing legal obligations such as an expansion of the statutory 30 % gender quota to cover a significant higher number of companies after the federal elections.<sup>292</sup> In the **Czech Republic**, the Action Plan for balanced representation of women and men in decision-making positions 2016-2018<sup>293</sup> has been seen already to comprise 35 tasks, for politics, public administration and business companies, including awareness raising, gender-balanced representation in recruitment boards and commissions, gender-balanced advertising, some positive measures, and the obligatory publication of data on the share of women and men in the decision-making positions of the largest companies in their annual reports. Yet, there are no plans so far to translate these into legislation.

Plans envisaged in **Norway** and **the UK** relate to the reporting obligation. In **Norway**, the Government has suggested removing the reporting duty on gender equality, but has encountered opposition to this suggestion by the Ombud, by researchers and by a Price Waterhouse Coopers report,<sup>294</sup> stressing the importance of the accessibility of information so as to be able to evaluate the effectiveness of corporate policy and of legislation. According to the Norwegian expert, if faster progress is to be realised, tougher rules on reporting should actually be introduced for all companies (including private liability companies) as regards the diversity ratio in the companies at all levels in the organisation, and as regards recruiting in general and of mid-level leaders and leaders. In the **UK**, by contrast, there are now plans to review the FRC Code,<sup>295</sup> in order to take account of the issues raised in the Hampton-Alexander Review and the BEIS Select Committee inquiry on corporate governance which, notably, has recommended that 'the FRC should amend the UK Corporate Governance Code, so that all FTSE 350 listed companies are required to disclose in their annual report the gender balance on the Executive Committee and direct reports to the

292 See <http://www.spiegel.de/karriere/manuela-schwesig-droht-firmen-mit-harter-quote-fuer-frauen-in-fuehrungsjobs-a-1137809.html>.

293 Available at <https://www.vlada.cz/cz/ppov/rovne-prilezitosti-zen-a-muzu/dokumenty/akcni-plan-pro-vyrovnane-zastoupeni-zen-a-muzu-v-rozhodovacich-pozicich-na-leta-2016---2018-147260/>, accessed 19 May 2017.

294 Radio interview of Jeanette Bergan, Director at PwC; <https://tv.nrk.no/serie/dagsnytt-atten-tv/NNFA56052617/26-05-2017> as well as a report analysing the status of gender equality in 100 of the largest companies in Norway: <http://blogg.pwc.no/styringogkontroll/kan-eier-p%C3%A5virke-til-%C3%B8kt-likestilling-i-selskaper>, accessed 6 June 2017. The proposal was debated in Parliament on 12 June 2017.

295 See <https://www.frc.org.uk/News-and-Events/FRC-Press/Press/2017/February/FRC-to-review-the-UK-Corporate-Governance-Code.aspx> (accessed 2 June 2017).



Executive Committee'.<sup>296</sup> The Action Plan of the Government of **Estonia** 2016–2019 promised to instate a procedure for larger state-owned companies to follow the information and publication rules of the OMX Baltic Market stock exchange, which has not been implemented as yet. The only Minister who promised to promote women's position in economic decision-making was Liisa Oviir,<sup>297</sup> Minister of Entrepreneurship from 14 January 2015 to 23 November 2016. In addition, the Action Plan pays attention to the promotion of gender equality only where it concerns political decision-making and the gender pay gap.<sup>298</sup> A legislative initiative of the Coalition to facilitate gender-equal election lists for the elections of the Parliament, local governments and the European Parliament failed to pass the first reading and was dropped.<sup>299</sup>

In **Cyprus**, gender mainstreaming is promoted in public policies for the first time now, this initiative being implemented by the Cyprus Academy of Public Administration, the Gender Equality Committee in Employment and Vocational Training and the National Mechanism for Women's Rights and Cyprus Ombudsman. The action plan for the training programme and the guide for the practical implementation of gender mainstreaming are under preparation. To achieve this, a ministerial decision will be required to make sure that the people who are supposed to participate in the training will not be replaced by their lower-level colleagues. The implementation of gender mainstreaming is believed to change attitudes and perceptions of stakeholders and to contribute to the balanced participation of men and women at all levels and in all sectors.

## 6.6 Remaining troublesome issues

In addition to the obstructing factors that have already been identified in Section 6.4 above at country level, some remaining general troublesome issues can be highlighted in particular. This concerns first of all selection procedures, which are considered problematic in quite a number of countries. The **Croatian** expert has emphasised the necessity to enhance transparency in hiring and decision-making processes at company level and the **Czech** one the low standard of objective and transparent rules for staffing and decision-making positions in the public and the private sphere.<sup>300</sup> The **Icelandic** expert considers it important that the selection process of candidates of the underrepresented sex is based on an assessment of qualified candidates. There is great frustration for example with the appointments to the boards of Pension Funds where the public interest is at stake. After currency controls were lifted in March 2017, the Pension Funds have been permitted to invest as much as they like in foreign financial markets.<sup>301</sup> It is therefore of immense public interest that the boards of these funds are staffed with qualified individuals of both sexes. The **Italian** expert has criticised the lack of selection criteria, of priority rules for candidates of the under-represented sex, of information procedures for candidates and of the inversion of the burden of proof. The **UK** expert has also emphasised that a recent study of the ECHR<sup>302</sup> has revealed that some companies do not have a transparent and objective selection process for non-executive appointments, that too many companies still rely on personal networks for recruiting to board roles and assess 'chemistry and fit' of candidates through the process, using terms that are vague and undefined and can lead to unconscious bias. Furthermore, too few appointment panels are trained

296 See <https://www.publications.parliament.uk/pa/cm201617/cmselect/cmbeis/702/70209.htm> at Paragraph 126 (accessed 2 June 2017).

297 <http://ekspress.delfi.ee/news/paevauudised/liisa-oviir-tahab-sookvoote-ja-ettevotte-tulumaksu?id=72397989>; <http://www.pealinn.ee/koik-uudised/liisa-oviir-tahab-sookvoote-ja-ettevotte-tulumaksu-n152035>, accessed 19 June 2017.

298 <https://www.valitsus.ee/et/valitsuse-tegevusprogramm> (in Estonian), accessed 20 June 2017.

299 Basic Principles of the Government Coalition between the Estonian Centre Party, the Estonian Social Democratic Party, and Pro Patria and Res Publica Union (IRL) for 2016–2019, [https://www.valitsus.ee/sites/default/files/basic\\_principles\\_of\\_the\\_government\\_coalition\\_between\\_the\\_estonian\\_centre\\_party\\_the\\_estonian\\_social\\_democratic\\_party\\_and\\_pro\\_patria\\_and\\_res\\_publica\\_union\\_irl\\_for\\_2016-2019.pdf](https://www.valitsus.ee/sites/default/files/basic_principles_of_the_government_coalition_between_the_estonian_centre_party_the_estonian_social_democratic_party_and_pro_patria_and_res_publica_union_irl_for_2016-2019.pdf), accessed 20 June 2017.

300 Government Strategy for Equality of Women and Men for 2014–2020, available at [https://www.vlada.cz/assets/ppov/rovne-prilezitosti-zen-a-muzu/dokumenty/Government\\_Strategy\\_for\\_Gender\\_Equality\\_2014\\_2020.pdf](https://www.vlada.cz/assets/ppov/rovne-prilezitosti-zen-a-muzu/dokumenty/Government_Strategy_for_Gender_Equality_2014_2020.pdf), accessed 19 May 2017.

301 <https://www.ipe.com/countries/nordic-region/icelands-pension-funds-free-to-invest-abroad-as-restrictions-lifted/10018006.article> (accessed on 15 June 2017).

302 Equality and Human Rights Commission (2016) *An Inquiry into Fairness, Transparency and Diversity in FTSE 350 Board Appointments*, available at <https://www.equalityhumanrights.com/en/publication-download/inquiry-fairness-transparency-and-diversity-ftse-350-board-appointments> (accessed 30 May 2017).

in equality law and avoiding unconscious bias. She believes that progress overall has been very slow and does little to improve pipeline diversity by considering root causes, to improve how to recruit, retain and develop employees, and to tackle the myths that provide the context for the lack of gender diversity that exists.<sup>303</sup> The **Spanish** expert considers it necessary to have some compulsory selection criteria established by law and that some kind of consequences and sanctions should be applicable in the case of non-compliance. More generally, the **German** expert has referred to the lack of transparency; despite all reporting obligations, it is nearly impossible to find out about the fulfilment of legal obligations of all companies concerned, including public undertakings and bodies under federal control. Moreover, the total ignorance regarding questions of structural discrimination, the demonization of gender quota and the display of old-fashioned gender stereotypes about male leadership and women in second row are far from helpful.

Other problems the national experts have stressed relate to the setting, monitoring and compliance with targets, the level of knowledge and awareness and the need for supporting institutional frameworks and programmes. In the **UK**, the ECHR report has specifically referred to the fact that aspirational national and EU targets do not reflect the actual gender diversity that exists in the general workforce; that despite the targets and FRC Code, there remains an unacceptable lack of gender diversity, especially in executive boards; that companies are able to meet targets by reducing the size of boards as opposed to recruiting more women; that companies may have policies on boardroom diversity but very few of them set objectives or targets or timeframes for achieving these targets; and that there is little knowledge of or use of positive action or the tie-break provision and, indeed, that there has been some evidence of unlawful discrimination – e.g. where specific women are targeted/all-female lists. Another problem identified in the **Czech Republic** is the non-existence of an institutional framework for achieving more balanced representation of women and men in decision-making positions and the vertical segregation in the labour market. The report established by the **French** Council<sup>304</sup> has proposed some improvement as regards reminding companies and undertakings of their legal obligations. These concern the assessment and monitoring of parity on boards, particularly thanks to the identification of data and monitoring and control bodies and to the assistance in the search for board members and the professionalization of board-member posts, particularly with practical tools (guide, applications, specific programmes) available to companies. It also relates to the sharing of responsibilities on boards by, for example, supporting programmes to promote the setting-up of businesses by women and gender diversity in the workplace and by making public procurement conditional on companies complying with their legal obligations.

## 6.7 Desired way forward at EU level

To conclude this chapter, we will now turn to the views the national experts have expressed on the desired way forward, especially when it comes to the question whether the GBB-Directive proposal should be adopted or not. Given that the situation of the Member States differs considerably, one can understand the different views taken on this.

Quite a few national experts underscore the importance of adopting the GBB-Directive proposal, not only from countries without public or private regulatory approaches but also from some that have put mandatory quota legislation into place. Starting with the latter group of countries, the **Belgian** expert has stated that, based on experience in the field of gender equality in labour and social security matters, hard EU directives are always required if one expects Belgium to move forward. In **Germany**, in May 2017, sixteen women's organizations launched their renewed Berlin declaration claiming the expansion of the statutory 30 % gender quota on all listed or co-determined companies including every *Societas*

303 E.g. see discussion in the Alexander-Hamilton Review (2016) on page 22: <https://www.gov.uk/government/news/rallying-call-for-female-boost-in-business-and-the-boardroom> (accessed 1 June 2017).

304 Haut Conseil à l'égalité entre les femmes et les hommes, *Towards equal access of women and men to positions of professional responsibility: proportion of women on boards*, [http://www.haut-conseil-egalite.gouv.fr/IMG/pdf/hce\\_rapport\\_parite\\_eco\\_eng\\_20160209-2.pdf](http://www.haut-conseil-egalite.gouv.fr/IMG/pdf/hce_rapport_parite_eco_eng_20160209-2.pdf).

Europaea and British Public Limited Company and the introduction of a statutory 30 % gender quota for executive board and higher-management positions. They also advocated effective sanctions such as the annulment of elections, annulment of decisions, financial sanctions, and effective control of management reports and public assessment of the company's explanation in case of non-compliance with these statutory gender quotas.<sup>305</sup> The German expert considers this the best way forward, given the ineffectiveness of soft and self-regulatory approaches without sanctions in Germany. At EU level, it is considered that any – necessary – measures to improve female leadership throughout the Union cannot be separated from social rights and gender equality measures, especially in these times of austerity measures, unemployment and social cutbacks which hit women the hardest. According to the **Greek expert**, the GBB Directive should require that national law provides for incentives aimed at encouraging self-regulatory measures. The **Norwegian expert** believes that the desired way forward at EU level is to introduce EU measures resembling Norwegian legislation as closely as possible. Only when the rules on gender representation are made non-negotiable, she considers that there will be a fast and noticeable change. It is therefore important that the gender-representation rules be placed on equal footing as other company legislation demands such as requirements regarding accounting and tax. When approached in this way, the Norwegian experience shows that no one actually questions their existence.

From the countries which mostly lack a hard or soft public or private regulatory approach, there is yet stronger support for adopting the GBB-Directive proposal. Given the ineffectiveness of the **Romanian** approach, some quota rules in the leadership and decision-making of stakeholders is considered necessary, even to bring about self-regulatory initiatives. Therefore, the adoption of the GBB-Directive proposal is considered crucial. The **Maltese expert** also believes that the proposal may be the ideal solution for effective change, but also signals that it will surely keep encountering resistance and risks being diluted further with limited scope and effect. Furthermore, there are only very few companies that are affected by the proposed directive in Malta. The desired way forward would be a culture change and this would ensure that the companies targeted go beyond what is included in the proposed directive. The expert from **Cyprus** believes that the delayed adoption of the proposal has shown EU ambivalence on the topic which has created a negative climate for companies, since there currently is no obligation, neither for companies nor for States to adopt such a policy. At national level, such initiatives are at level zero and in recent years the priorities and company hierarchies have changed, since their concern was their survival. Given the significant increase of the percentage of female board members in the countries that have put quota legislation into place, adopting the GBB-Directive proposal would force companies in Cyprus to implement it. It is also considered important, however, to apply the Directive at a later stage to all companies. The **Slovenian expert** advocates a gradual introduction of quotas and the provision of sanctions for non-compliance as well, given the ineffectiveness of the soft approach in Slovenia so far. The **Austrian expert** has stressed the visibility that regulatory approaches to enhancing diversity and gender-balanced boards entail, these being very well suited to promote equality politics publicly. The **Estonian expert** believes that a legal obligation is required to bring about change in Estonia, especially when it comes to giving priority to the candidate of the under-represented sex, and that an institutional framework is needed for the promotion, analysis, monitoring and support of gender balance in the boards of listed companies.

In the group of countries with soft public targets or privately set targets, there are more ambivalent views on the necessity and/or desirability of the GBB-Directive proposal, which apparently corresponds with the level of its (perceived) effectiveness. The **Spanish expert** is also supportive of the GBB-Directive proposal, but considers its 2012 version more adequate than the 2015 version, since the flexibility clause established in the 2015 proposal weakens the objective. The **Finnish expert** also believes that a legal bottom line seems necessary to bring about a uniform European and national participation system, but also stresses the need to maintain some flexibility. By contrast, the **Swedish expert** observed that establishing a target in the law to achieve gender-balanced company boards bears the risk of having a

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305 Berlin Declaration of 2017, <http://www.berlinererklaerung.de/>.

discouraging effect on corporate actors, in that they would no longer be autonomously entrusted with the task to achieve gender balance through self-regulation.

Other issues the experts have emphasised that need to be considered with a view to enhancing women on boards concerns the importance to create an enabling environment for women to take up such leadership positions. This concerns the provision of childcare facilities and benefits and flexible working time (**Bulgaria**), but also for instance changes in the policies governing school time in primary and secondary education which now negatively impacts on female labour participation (**Austria**). The role of experts and civil society has also been emphasised (**Bulgaria**). The **Czech** expert also emphasised the need for positive motivation of employers and companies: through tax incentives, awards for gender-friendly companies, balanced gender representation in company boards as one of the criteria to get public financing for company projects etc. The **Portuguese** expert has underscored the necessity of combining legally binding measures setting a target with the definition of compulsory plans at plant level and the promotion of voluntary programmes and initiatives between stakeholders.

## 7 Main conclusions

In this last chapter, we will highlight the main findings of this report as well as identify some key points for securing future progress. It will start with some general observations regarding the variety of national approaches (Section 7.1) and then zoom in on the extent to which they are in line with the GBB-Directive proposal (Sections 7.2 to 7.5). It will wrap up with some final reflections on the need to address root causes of under-representation of women in company boards and more general in decision making (Section 7.6).

### 7.1 General observations

The analysis in this report has shown that the regulatory and enforcement landscape of gender-balanced company boards throughout the EU and EEA Member States is very diverse, no approach being alike. This also goes for the results actually realised, some approaches having revealed themselves as more effective than others.<sup>306</sup> Factors impacting the effectiveness of both public and co-/self-regulatory approaches may be of an internal nature, relating to limitations in the law or corporate governance codes themselves as regards for instance the ‘softness’ of the obligations actually imposed, their personal and substantive scope, monitoring mechanisms or the lack of sanctions. But they may also be of an external nature, relating for example to the fact that the State fails to lead by example, the role of the media and cultural factors. Still, it has appeared that some States which have moved towards a more stringent, hard regulatory approach, have done so after having first stimulated self- or co-regulatory approaches, such as **Germany**. Furthermore, it has also become clear that the most stringent public regulatory and enforcement approaches have secured the quickest progress in terms of (coming close to) achieving the set target (**Belgium, Italy, France, Norway**), yet this does not go for all States that have introduced such an approach (**Germany, Iceland**). The States that have managed to put into place relatively successful self- and co-regulatory approaches – in particular **Sweden** and to some extent the **UK** and **Finland** – have done so very much ‘in the shadow of the law’, there being the constant threat that if these approaches do not bring the desired change, legislation will be introduced.

More generally, it has also appeared that the issue of gender-balanced company boards is very low on the list of political priorities of quite a large number of countries and that there is also quite some political and societal resistance to moving towards introducing mandatory quota in many countries. Several factors have been identified that can explain such resistance, including in particular the protection of the autonomy of companies and their property rights, a rather narrow, formal understanding of the concept of equality, and cultural factors. As a result, there are still quite a few countries that up until today lack both a public and/or private regulatory and enforcement approach to enhance gender balance in company boards, and may at best have put some policy measures into place. These include **Croatia, Cyprus, the Czech Republic, Hungary, Latvia, Liechtenstein, Lithuania, Malta and Slovakia**. The figures of the number of women on company boards in these countries are also in the lowest range. Yet, also as regards the countries that have put into place hard or soft public and/or private regulatory approaches, many of the national experts have expressed doubts as regards their credibility and capability to forge the desired change in the end, the **Swedish** expert being the major exception in this regard.

### 7.2 Targets

Building further on the assessments made in Sections 3.7, 4.4, 5.5 and the overall conclusions drawn in Section 6.3, and on the comparisons made between the national approaches and the GBB-Directive proposal, a first conclusion is that relatively few countries have set a mandatory 40 % target so far for non-executive boards and/or a 33 % target for both executive and non-executive boards. Only **Belgium, Italy, France and Iceland** can be said to comply with this. **Bulgaria, Finland and Spain** have set such

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<sup>306</sup> See Section 6.4.1 for a more detailed account.

targets as well in the framework of a soft public regulatory approach. In some countries, the legislation is only geared to state-owned companies, in that case the relevant targets also range from 40 % in **Finland, Luxembourg and Slovenia** to 35 % in **Austria** and 33 % in **Greece**. As such, they comply with the targets set by the Directive. **France, Spain, Sweden and the UK** have set such targets in the context of their corporate governance codes: France 40 % by 2016, Sweden 40 % by 2020, the UK 33 % by 2020,<sup>307</sup> and Spain 30 %. Except for the Spanish one, these can be said to comply with the target set by the Directive proposal. **Norway** has not set a numerical target, this depending on the size of the board. Yet, one can conclude that in terms of actual achievements, it is **Norway and Sweden** that come closest to the 40 % objective, the one applying a very strict top-down mandatory quota system, with severe sanctions, the other following a bottom-up self-regulatory approach, yet operating in the shadow of the law; if businesses do not realise the targets set, then hard legislation imposing quota is looming.

In some countries, companies are also required or encouraged to set their own individual quantitative objectives regarding gender-balanced boards, either on the basis of national public or self-/co-regulatory approaches.<sup>308</sup> This goes in particular for **Denmark, Finland, Ireland, Germany** and the **UK**. Furthermore, in a few States the public regulation also regards company management below board level: **Austria, Denmark and Germany**. 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**. Ensuring that women are well represented in lower, middle and senior management positions below board level is a hugely important issue that overall deserves more attention in all public and private regulatory and policy approaches, given that underrepresentation at these levels will impact on women's representation at board level, in particular at the executive level.

### 7.3 Procedural requirements regarding recruitment

Considering next the national and private approaches in the light of the procedural requirements aiming to ensure the transparency of selection procedures that the GBB-Directive proposal seeks to impose, one can conclude that from this perspective its adoption would surely have added value in all of the scrutinised countries. Firstly, there is the requirement to ensure that as long as companies do not achieve the set targets, appointments are made to board positions on the basis of a comparative analysis of the qualifications of each candidate and by applying pre-established, clear, neutrally formulated and unambiguous criteria. Yet, it has appeared that currently there is still very little attention in both the hard and soft public regulatory approaches for setting specific recruitment-procedure requirements. This is different for a few corporate governance codes (**Spain** and the **UK**). Given this state of affairs, it is not surprising that many national experts consider fair and transparent national recruitment procedures to still be a problematic issue that needs addressing, as seen in Section 6.6. Secondly, in the (s)election of board candidates, the Directive proposal also requires Member States to ensure that, when choosing between candidates who are equally qualified in terms of suitability, competence and professional performance, the companies concerned shall give priority to the candidate of the under-represented sex. This would only be different if 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. So, a priority rule needs to be applied as well. In this respect also, however, it has appeared that these are generally lacking in all countries even if national equality and positive action laws do allow for it, **Iceland** being the exception. With a view to ensuring full equality in practice, many women would surely benefit from the introduction of such a rule, at least when considering the actual figures of women on boards today. This does not go only for women in the countries that are lagging (far) behind in making any progress, but also for those in countries that have advanced considerably (such as the **UK and Sweden**) and specifically those that have introduced mandatory quota. While these have come close to realising the set targets, problems remain there as well in terms of the effectiveness of the approach taken, **Norway** included (see Section 6.4). These concern for

307 But this figure also applying to executive boards.

308 Cf. Article 4c(1) GBB-Directive, as discussed in Section 2.1.



instance the limited progress regarding the number of women on executive boards, the limited number of companies that are covered by such quota or target rules and the trickle-down effect.

## 7.4 Reporting on compliance

On a slightly more positive note, it has appeared that about half of the States under scrutiny in this report already apply some kind of comply-or-explain duty, as the Directive proposal also provides for; companies have to report on the measures they have taken to comply with the target and in case of non-compliance, they are required to explain why that is the case and what action they will be taking to remedy the situation. Yet, in some countries, this is more an information duty than an explanation duty.<sup>309</sup> So, on this point there also certainly is something to be gained from the adoption of the Directive, since the reporting obligation will then find application in all EU/EEA states and the actual scope of the comply-or-explain duty will have to be broadened in other countries. Furthermore, the accessibility and transparency overall of corporate policies and (non-)achievements in this domain still leave much to be desired. Even in countries that do have a reporting obligation and companies have to make statements in their annual reports on the gender balance of boards, or gender equality and diversity more generally, are not always under a duty to make this information available to a broader public via their websites, as the Directive proposal requires.

## 7.5 Enforcement and effective, dissuasive and proportionate sanctions

Finally, the Directive proposal also requires Member States to provide for effective, dissuasive and proportionate sanctions, not for not realising the quantitative target but for non-compliance of companies with the procedural obligations it imposes as regards the recruitment procedure and priority rule. Yet, monitoring, implementation and sanctions clearly emerges as a rather general, problematic issue throughout the EU/EEA Member States, obstructing the realization of progress overall and achievement of targets and quota. As such, one can say that there is still an important disjunction between the regulatory and enforcement dimension of national approaches, many experts having stressed the problems that remain in securing monitoring of and compliance with targets, when set at all, for failure to provide for specific monitoring bodies and enforcement mechanisms and sanctions.

In the previous version of the Directive proposal, two concrete examples were given of effective, dissuasive and proportionate sanctions: administrative fines and annulment of the board appointment. In the revised version, these examples have been removed and the nature and type of sanction is now left completely to the Member States to decide. Only a very limited number of States has provided for such sanctions at all, and it must be noted that these are geared towards non-compliance with the national target and are not imposed for breach of procedural obligations such as the ones contained in the GBB-Directive proposal. Yet, there is quite an interesting variety in these sanctions, providing us with an interesting toolbox of both carrots and – softer and harder – sticks. Carrots for well-performing companies are: 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**). On the stick side, we find: blacklisting and whitelisting (**Sweden**), naming and shaming of companies (**France**), voidness/nullity of board decisions and appointments (**Belgium, Germany**), annulment of the board decision (**France, Greece**), withdrawal of benefits from appointing board members (**Belgium, France**), refusal of registry of a company (board) (**Iceland, Norway**), dissolution of company (**Italy, Norway**), financial sanctions (**Italy, Germany, Romania**) as well as compensation for moral damages (**Greece**). Despite this broad spectrum of sanctions, one must also note, however, that so far the sanctions rarely seem to be applied in practice, **Italy** showing most enforcement activity. In addition, some experts also question the actual effectiveness and dissuasiveness

309 See Section 4.1.2 (ii) and 5.3.4 and footnote 249 for the situation in the various countries.

of the national sanctions provided for or consider that it is still too early to make any statements about this.

## 7.6 Going beyond regulation and enforcement

Stipulating target or quota rules and securing their compliance and enforcement in itself is not enough. What the national reports have revealed in particular as well, is that underrepresentation of women on boards can be seen as the tip of the iceberg where persistent traditional societal and cultural norms are still very much hiding underneath its surface. It is therefore hugely important to address the root causes of this underrepresentation. On the one hand, we see this reflected in the high level of gender stereotyping and positioning of women as caretakers in many CEE countries and also the Baltic countries which has been said to underlie the very low political attention for this problem and the very low numbers of women on boards. On the other hand, a country like **Sweden** where the value of equality ranks high in society and politics, corporate policy is much more likely to address the issue, even if this is also in the shadow of the law. Societal and cultural norms also impact negatively in a number of countries not only on women's educational and career choices, but also on the extent to which an enabling environment is created. Where equality is a highly valued societal norm, this environment is more conducive to women pursuing leadership careers. While many experts have emphasised that women are now generally higher educated than men, women's career choices are still very much coloured by societal norms and expectations: in many countries women still opt for careers in the public sector rather than the private one because it often enables them to better reconcile work and family life.

It is a fundamental question what this implies for the role of the EU in this domain: given this huge political, societal and cultural variety – reflecting in itself a broad range of hard and soft public and private regulatory and enforcement approaches – what European approach is a suitable one? To what extent can the law – in this case an EU Directive – be used as a steering mechanism to bring about change in the EU/EEA Member States? While it is clear that in some countries, especially those that have already adopted mandatory quota, it may not require such dramatic change but rather adjustment of the course already taken, in others it would have the effect of imposing a top-down crowbar to force change and to initiate any policy and legislation in this domain to begin with. In this respect, first of all, one must not forget that gender equality, equal opportunities and gender mainstreaming are core values of the EU/EEA to which the Member States have committed themselves and which are strongly anchored in the EU Treaties and the Charter of Fundamental Rights as foundational principles. But it is not to remain a principle just on paper, and needs implementation in daily life. The GBB-Directive proposal can be seen as an effort to bring this about specifically in the area of economic decision-making: women should have equal opportunities to be part of the exercise of this power. This is also what it essentially proposes by not imposing a target obligation but mainly procedural obligations that enhance equal opportunities for women and men in the recruitment and appointment process of board members. This means that it shows restraint, which is reinforced by the fact that it also still allows Member States to follow their own approach instead of the one proposed in the Directive, as long as it proves to be of equal effectiveness. Finally, as concluded above, the proposal has strong added value in tackling current gaps in most public and private approaches, including those that have adopted mandatory quota rules, which will need addressing to spark (further) progress, EU-wide in all Member States. It is also clear that so far only few States are actually likely to meet the 'equal effectiveness' benchmark – a condition for disapplying the procedural requirements of the directive. Many national experts have not only expressed support for the adoption of the Directive proposal, but even advocated for it to take further steps, such as also setting selection rules for the various committees that operate at board level and stimulating self-regulation.

In conclusion, the GBB proposal can be said to strike not only an adequate balance between EU and national interests, but also between the public interest of gender equality and the private interest

of business.<sup>310</sup> It enables the tackling of problems of obstruction and discrimination that women still frequently encounter in practice in trying to achieve management leadership positions. It may also provide the necessary counterweight to the worrying tendencies that have been signalled in this report in some Member States of growing gender stereotyping, renewed emphasis on women's role as primary caretakers and their supposed incompetence regarding leadership positions. As such, it may exactly be what is needed to bring about a mentality change and to enhance a more cognitively supported view in society, that securing equal representation of women and men in management positions and company boards is not only the right thing to do from the perspective of building resilient institutions and risk management, as acknowledged already in Directive 2013/36, but also from the perspective of achieving equality and social justice. This includes commitment towards this goal from a broad range of actors, including public bodies, civil society, women's organisations, board members and shareholders of private companies, and the media. Many national experts have stressed this, and also the need for supporting institutional frameworks and programmes more generally and for raising the level of knowledge and awareness. As the **Swedish** example shows, the State leading by example and a supportive role of the media can also be seen as important enabling factors in this regard. Yet, in most countries the role of the media has either not been visible or not been very supportive, and even hostile at times. But opening and securing pathways for women to enter corporate careers requires a broader effort from all concerned parties to create an enabling environment, including work-life balance, education, and other policies that are now still hampering women's participation in the labour market and their promotion to leadership positions.

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310 See also L.A.J. Senden, Getting Women on Company Boards in the EU – A Tale of Power-Balancing in Three Acts. In Nada Bodiroga-Vukobrat, Sinisa Rodin & Gerald G. Sander (Eds.), *New Europe – Old Values? Reform and Perseverance*, Switzerland: Springer International Publishing, 2015, pp. 77-95.

## Annex 1 – Questionnaire

### Questionnaire EELN thematic report 2017

#### Gender-Balanced Company Boards

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#### Introduction

On 14 November 2012, the European Commission put forward a 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 (hereafter: the Gender-Balanced Boards (GBB) Directive). The Directive sets a quantitative objective of 40% for the number of the under-represented sex on the non-executive boards of listed companies by 2023 (subject to change during Council negotiations), with a view to achieve a more balanced representation of men and women among the directors of large listed companies. The Member States would have to make sure that companies take the necessary steps to realize this, in particular by adopting procedural rules regarding the transparent and non-discriminatory selection and appointment of non-executive board members. Companies not complying with the 40% target would be required to apply the procedural rules and explain what measures they had taken in order to reach the target. For Member States applying the objective to both executive and non-executive directors, a lower target (33%) would apply. Priority can be given to the under-represented sex only if that candidate is equally qualified compared with the competitor of the other sex in terms of suitability, competence and professional performance.

A number of Member States have considered this proposal to be too far-reaching in the light of the subsidiarity principle. During the Luxembourg Presidency, the proposal was debated again with a view to address some delegations' subsidiarity concerns. This has resulted in a revised Article 4b, which contains a flexibility clause. As set out in the LUX Presidency Report,<sup>1</sup> this clause '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".' The current Malta Presidency has put the adoption of the GBB-Directive high on the political agenda again.

Against this background, the Commission seeks to obtain an up-to-date overview of the regulatory approaches of the Member States to enhance gender-balanced boards and of the monitoring and enforcement mechanisms; what rules, enforcement measures and policies have been put into place and with what effects?

#### Important guidelines for answering the questionnaire

- Please, provide an answer to every question separately. Always add sources and references to (legislative) measures and case law.

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1 Report from the Presidency to the Council, 15 December 2015, 14343/15, <http://data.consilium.europa.eu/doc/document/ST-14343-2015-INIT/en/pdf>.

- If the legislative measures referred to are an implementation of EU law, please indicate whether you consider this implementation: (1) to exceed the requirements of EU law, (2) to be satisfactory, (3) to be partly deficient, or (4) to be incorrect.
- Please ensure that you highlight recent developments in the legislation and the case law.
- Do not summarize several questions into one answer and do not cross-reference other answers, even if this means that you are repeating yourself.
- There are some YES/NO questions. Please always make a choice, even if this is complex or difficult. Details and nuances can be provided later on.
- Provide short descriptions of and full references to the most relevant case law (including opinions of equality bodies), if any.
- Some questions indicate possible answers or aspects of answers. Please do not ignore them but take them into consideration and indicate whether they are relevant or not.

Thank you for your collaboration!

## Questionnaire

Has any public regulatory, monitoring and/or enforcement approach been developed in your country, of a legal and/or policy nature, to enhance gender-balanced corporate boards?

- ▶ If yes, please answer the questions in Parts I, II and III of this questionnaire;
- ▶ If not, please start with question 14 and continue to the questions in part III.

### I. PUBLIC REGULATION AND POLICY

1. What **public regulatory approach** has been developed in your country in order to enhance gender balanced company boards? Please specify on the following points:
  - a. Is it of a (hard) legally binding nature and/or (soft) policy, voluntary nature?
  - b. In case of a legal approach, specify whether it concerns a company law act, equality law act or otherwise (for example, a Corporate Governance Code).
  - c. In case of a policy approach, specify what it comprises.
2. In case of a legal act, specify on the following points:
  - a. What **type of enterprises** are covered: SMEs, corporations (if so, which type of corporations: public or private limited companies and/or other entities, for example state owned-companies) or other entities having a certain number of employees, annual turnover, listed and/or unlisted and/or public undertakings (cf. Article 1, 2 and 3 GBB-Directive);
  - b. What **type of boards** are covered: executive, non-executive or both (please also specify whether the system of company law of your country provides for a unitary or dual board system) (cf. Article 4(1) GBB-Directive). Please indicate whether the national corporate law provides for a distinction between executive and non-executive directors.
3. What **obligations** are imposed by national regulation on the covered companies and boards? Please specify:
  - a. The figure to be reached (e.g. 30%, 40%); also specify whether this is or can be considered as a soft target or hard quorum (cf. Art. 4(1) and (2) GBB-Directive and see also questions 7-10 and 12);<sup>2</sup>

<sup>2</sup> A hard quorum usually goes along with more stringent enforcement mechanisms and sanctions, whereas a soft target lacks strong enforcement mechanisms and leaves more room to the companies themselves to devise measures to achieve such target.

- b. The timeline within which this figure is to be reached (cf. Article 4(1) and (2) and Article 4a (1) and (2) and 4b, (2) GBB-Directive);
  - c. Who is the beneficiary: women or the underrepresented sex;
  - d. Whether a specific selection of candidates, recruitment or election procedure is prescribed (cf. Art. 4a(1) GBB-Directive). If a specific procedure exists, specify whether it provides for a transparent selection of candidates, based on:
    - i. Pre-established, clear, neutrally formulated and unambiguous criteria;
    - ii. A comparative analysis of qualifications of candidates;
    - iii. An obligation to disclose qualification criteria and their application to a selection procedure (cf. Article 4a(3) GBB-Directive);
    - iv. Any other criteria or requirements.
  - e. Whether it provides for a priority rule (cf. Art. 4a(2) GBB-Directive). If a priority rule exists, please specify:
    - i. what it entails and specifically whether it only applies in case of equal qualifications of both candidates or not;
    - ii. whether it provides for a shift in the burden of proof in the case of an unsuccessful candidate of the underrepresented sex establishing facts from which it may be presumed that he/she was equally qualified as the appointed candidate of the other sex (cf. Article 4a(4) GBB-Directive).
  - f. Whether it provides for any other obligation apart from those mentioned above under d) and e).
4. Regarding possible **exceptions**:
- a. Does national law provide for an exception to any kind of legal obligations mentioned under question 3 above for companies where the members of the underrepresented sex represent less than 10% of the workforce? (cf. Article 4(6) GBB-Directive).
  - b. If so, are there any national measures to ensure that such companies still set individual quantitative objectives regarding gender-balanced representation of both sexes among all (executive or non-executive) director positions? (cf. Article 4c(2) GBB-Directive).
5. Are there any measures put into place by your country to require (or encourage) that companies set individual quantitative objectives regarding gender-balanced representation of both sexes amongst **executive and/or non-executive directors** (Article 4c(1) GBB-Directive)?
6. Would your national law comply with any of the options mentioned here below, so that your country can avail itself of the **flexibility clause** (Article 4b, 1a GBB-Directive):
- 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 enforcement measures apply in the case of non-compliance with these requirements;
  - b. national legislation requires that 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. national legislation requires that 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) [LSSK-which is three years after the adoption of the deadline].
7. Is there any other specific aspect in the **selection procedure of directors** that draws attention from the perspective of enhancing gender-balanced boards?
8. Are there any measures at national level put forward to improve gender balance at company management level **below the board(s) level**?



## II. MONITORING AND ENFORCEMENT/SANCTIONS

9. Does national law oblige companies to **report** about the gender representation on their board (cf. Article 5 GBB-Directive)?

Please specify:

- a. to which companies this obligation applies;
  - b. whether it regards both executive and non-executive boards;
  - c. whether companies are obliged to make this information available on their website and/or in any other way;
  - d. reporting frequency;
  - e. whether in case of non-compliance with the target, quorum or individual quantitative objective, there is an obligation to explain the reasons for this in the reporting.
  - f. CRD-Directive 2013/36 and Directive 2014/95 on the disclosure of non-financial information, which have to be implemented in the Member States by 31.12.2013 and respectively 06.12.2016 do already impose certain reporting obligations on companies covered by these directives. It would be very helpful if you could indicate what the transposition of these Directives in your country possibly entails in terms of putting in place a policy promoting diversity (including gender balance) on the management body and disclosing information on the gender-balance on boards or in the company more generally.
10. Please specify which (public or private) **body**/bodies is/are competent to promote, analyse, monitor and support of gender balance on the boards of companies, including the receiving of the reports mentioned in the previous question (Article 7a GBB-Directive).
11. Does your national law provide for rules on **enforcement measures** applicable to infringements of the national provisions as described under questions 3, 4b), 5, 6 and 7 above (cf. Article 6(1) GBB-Directive)? Please also specify, where possible, how application of these rules is ensured and cases in which they have been applied and with what outcome.
12. Does your national law impose any **sanctions** on companies for the non-compliance with the legal obligations as described under questions 3, 4b), 5, 6 and 7 (Article 6(2) GBB-Directive)? Please specify:
- a. What element of the legal obligations the sanctions relate to (e.g. non-compliance of the procedural obligations and/or non-achievement of the target);
  - b. The content and nature of the sanctions provided for as well as their addressees: e.g. administrative fines, nullity or annulment of the appointment or election of an executive and/or non-executive board member or otherwise;
  - c. Whether these sanctions comply in your view with the EU requirement of being effective, proportionate and dissuasive.
13. What monitoring and enforcement actions have actually been taken? Please specify, where relevant, what compliance there is with reporting obligations, what enforcement measures have been taken and/or what sanctions have been imposed, possibly by courts.

**\* question for all experts – even if no legal or policy measures are in place\***

14. Could you please assess the regulatory, monitoring and enforcement approach concerning the enhancement of the number of women in corporate boards in your country – where possible – in terms of:
- a. The political debate and arguments that explain the adopted approach or the lack of any approach;
  - b. Other possible factors explaining the national approach (e.g. societal, cultural views on the role of women, level of support for chosen approach) or its absence;

- c. The extent to which the national approach aligns with, or goes beyond, the standards and requirements set by the GBB-Directive proposal;
- d. The impact the approach has had so far; e.g. what increase in the proportion of women on boards, trickle-down effect, or otherwise is visible. Please refer to statistics or research if possible.
- e. The role played by the media;
- f. Your own view on the effectiveness and credibility of the national approach and what do you consider as hindering and enabling forces in this regard (e.g. think of the state leading by example, the enforcement mechanisms provided for but also flanking policies such as childcare facilities/benefits, flexible working hours, recruitment policies, etc.).

### III. CO-REGULATORY AND SELF-REGULATORY APPROACHES

- 15. In case your country has developed a public regulatory, monitoring and enforcement approach, to what extent does it leave **room for self-regulation** and for companies to develop their own company policy regarding targets to be achieved and/or the monitoring and enforcement mechanisms for the realization of these targets?
- 16. In case your country lacks a public approach or in addition to such an approach, what private, **self-regulatory initiatives** have been taken so as to increase the proportion of women on boards? In so far as information is available, please specify:
  - a. The level at which these initiatives have been taken: individual corporate level, branch level or otherwise;
  - b. Their form: internal guidelines, code of conduct/practices, charter, corporate governance code, awareness raising at national level, etc.;
  - c. Their substantive and personal scope: what obligations do they entail and for whom;
  - d. The ways and means by which they are possibly monitored and enforced.
  - e. Whether there have been instances in which shareholders expressly demanded improvements in gender balance at board level;
  - f. Where possible, please provide examples of the best practice implementing self-regulatory initiatives at company level.
- 17. Please **assess these self-regulatory approaches**– where possible – in terms of:
  - a. What has been their impact and effectiveness so far, in terms of increasing the proportion of women on boards, trickle-down effect, enhancing corporate best practices, or otherwise;
  - b. Whether you consider these sufficient to make the desired progress and to meet the standards and timelines set by the GBB-Directive proposal?
- 18. Could you summarize in a few lines how you assess the national public and/or private approaches to enhance the proportion of women on company boards in the light of the GBB-Directive proposal and what would be the **desired way forward** in your view, both on the EU and national level?
- 19. Are you aware of any national/sectorial/other **plans** in your country to establish any new approach addressing gender balance issue or revise the existing one(s)?

## **Annex 2 – GBB-Directive proposal, as amended by the Malta Presidency (31 May 2017 version)**



Council of the  
European Union

Brussels, 31 May 2017  
(OR. en)

9496/17

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**Interinstitutional File:**  
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**SOC 415**  
**GENDER 13**  
**ECOFIN 440**  
**DRS 36**  
**CODEC 882**

## REPORT

From:	Presidency
To:	Permanent Representatives Committee / Council
No. prev. doc.:	6874/17 SOC 160 GENDER 8 ECOFIN 164 DRS 7 CODEC 302
No. Cion doc.:	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 - Progress Report

## 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.<sup>1</sup>

The European Economic and Social Committee adopted its opinion on 13 February 2013.<sup>2</sup>

The Committee of the Regions adopted its opinion on 30 May 2013.<sup>3</sup>

The European Parliament adopted its position at first reading on 20 November 2013.<sup>4</sup>

All delegations have general scrutiny reservations on the proposal at this stage; UK and FR have parliamentary scrutiny reservations; and CZ, DK, SK, SI and LV have linguistic scrutiny reservations.

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<sup>1</sup> 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.

<sup>2</sup> OJ C 133, 9.5.2013, p 68.

<sup>3</sup> ECOS-V-039.

<sup>4</sup> P7\_TA(2013)0488 Rodi Kratsa-Tsagaropoulou (EPP/EL) served as Rapporteur for the FEMM Committee, and Evelyn Regner (S&D/AT) for the JURI Committee.

## II. THE COUNCIL'S WORK UNDER THE MALTESE PRESIDENCY

As the proposal had not been placed on the Council's agenda since December 2015, the Maltese Presidency decided it was time to take stock. Moreover, the Presidency was mindful of the fact that, while there is a broad consensus in Europe regarding the need to improve the gender balance in decision-making, particularly in the economic sphere and at the highest level, progress remains slow and uneven across the EU. Thus in April 2016, in the EU as a whole, just 23% of board members in the largest publicly listed companies, and a mere 7% of board chairs, were women.<sup>5</sup>

At its meeting on 15 March 2017, the Working Party on Social Questions examined a set of Presidency drafting suggestions (doc. 6874/17) which closely followed the text that had been discussed in the EPSCO Council on 7 December 2015.<sup>6</sup> In particular, 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 had 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(1a) defines three possible scenarios which would be deemed by law to guarantee "equal effectiveness" for the period until 31 December 2024.<sup>7</sup> Furthermore, pursuant to conditions specified in Article 4b(2), Member States may continue the suspension of the Directive's procedural requirements beyond 2024.

<sup>5</sup> [http://ec.europa.eu/justice/gender-equality/gender-decision-making/database/business-finance/supervisory-board-board-directors/index\\_en.htm](http://ec.europa.eu/justice/gender-equality/gender-decision-making/database/business-finance/supervisory-board-board-directors/index_en.htm)

<sup>6</sup> 14343/15.

<sup>7</sup> See also explanatory notes contained in docs. 14562/14 and 13942/15.



### Changes introduced by the Maltese Presidency

In the light of the time that has already elapsed during the discussions in the Council, the Presidency adjusted the implementation calendar, the target dates, the reporting deadlines and the sunset clause by adding two years.<sup>8</sup> Thus the Directive as currently drafted would require the Member States to ensure that listed companies aim to attain, by 31 December 2022 (rather than 2020), the objective that members of the under-represented sex hold at least 40 % of non-executive director positions, as well as the objective that members of the under-represented sex hold at least 33 % of all director positions, including both executive and non-executive directors. (See Article 4 and Recitals 22, 24a and 26.)

The implementation calendar was adapted by the Presidency to the effect that the suspensions based on Article 4b would expire on 31 December 2024 (rather than 2022) unless certain conditions were met. 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 2025 (rather than 2023). (See Article 4b.) The same date change was also made in Article 4c concerning individual quantitative objectives to be set by listed companies that are not subject to the objectives laid down in Article 4. (See Article 4c.)

By the same logic, the Presidency suggested that the Commission would be required to begin reporting on the application of the Directive by 31 December 2026 (rather than 2024). (See Article 9.) Finally, the sunset clause was revised to the effect that the Directive would expire on 31 December 2033 (rather than 2031). (See Article 10.)

The draft Directive as redrafted by the Maltese Presidency is annexed to this report.

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<sup>8</sup> The Presidency also made some minor technical changes that did not give rise to reactions.

**III DELEGATIONS' POSITIONS**

A majority of delegations supported the proposal and were willing to accept the Presidency's text. However, others were unable to support the draft Directive, notably on the grounds that it did not respect the principles of subsidiarity and proportionality.

In addition, one delegation indicated that it had difficulties with the legal basis proposed by the Commission. The Commission representative reaffirmed its view that Article 157(3) was an appropriate legal basis.

**IV CONCLUSION**

While all delegations are in principle in favour of improving gender balance on company boards, a number of delegations continue to prefer national measures (or non-binding measures at the EU level) whereas others support EU-wide legislation. Further work and political reflection will be required before a compromise can be reached.

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**ANNEX**

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,

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,<sup>9</sup>

Acting in accordance with the ordinary legislative procedure,

Whereas:

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<sup>9</sup> 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/EEC<sup>10</sup> 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/EC<sup>11</sup> 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.

<sup>10</sup> 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).

<sup>11</sup> 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 2015, women account for an average of 22.7 % of the members of boards of directors in the largest publicly listed companies, only 6.5 % of chairpersons, and 4.3 % 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,<sup>12</sup> 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.

<sup>12</sup> 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).

- (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 enterprises<sup>13</sup>.
- (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.
- (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.

<sup>13</sup> OJ L 124, 20.5.2003, p. 36.

- (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 2022. 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 2022.



- (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.<sup>14</sup>
- (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 2022. 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.

<sup>14</sup> 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.

- (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 Council<sup>15</sup>.

<sup>15</sup> 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).

- (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.
- (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,<sup>16</sup> 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:

<sup>16</sup> 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 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
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 2022 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 referred to<sup>17</sup> in 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.

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<sup>17</sup> Editorial change.

- 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) or 2,<sup>18</sup> 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. A Member State which has<sup>19</sup> suspended the application of Article 4a pursuant to paragraph 1 may continue this suspension beyond 31 December 2024 only if
- a) the national legislation complying with the requirements set out in paragraph 1a(a) remains applicable; or
  - b)
  - 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 2024.

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 2025.

<sup>18</sup> Technical correction.  
<sup>19</sup> Editorial change.

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 2022.
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 2022.

*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 Council<sup>20</sup>.

*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.
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.

<sup>20</sup> Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (OJ L 204, 26.7.2006, p. 23).

Article 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.
3. The Commission shall review the application of this Directive and report to the European Parliament and the Council by 31 December 2026 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 2033.

*Article 11*

*Addressees*

This Directive is addressed to the Member States.

Done at Brussels,

*For the European Parliament*

*For the Council*

*The President      The President*

**TARGET NUMBERS OF DIRECTORS OF THE  
UNDER-REPRESENTED SEX**

<b>Number of positions on the Board</b>	<b>Minimum number of non-executive directors of the under-represented sex necessary to meet the objective of 40% (Article 4(1))</b>	<b>Minimum number of directors of the under-represented sex necessary to meet the objective of 33% (Article 4(1)(b))</b>
1	-	-
2	-	-
3	1 (33,3%)	1 (33,3%)
4	1 (25%)	1 (25%)
5	2 (40%)	2 (40%)
6	2 (33,3%)	2 (33,3%)
7	3 (42,9%)	2 (28,6%)
8	3 (37,5%)	3 (37,5%)
9	4 (44,4%)	3 (33,3%)
10	4 (40%)	3 (30%)
11	4 (36,4%)	4 (36,4%)
12	5 (41,7%)	4 (33,3%)
13	5 (38,4%)	4 (30,8%)
14	6 (42,9%)	5 (35,7%)
15	6 (40%)	5 (33,3%)
16	6 (37,5%)	5 (31,3%)
17	7 (41,2%)	6 (35,3%)

18	7 (38,9%)	6 (33,3%)
19	8 (42,1%)	6 (31,6%)
20	8 (40%)	7 (35%)
21	8 (38,1%)	7 (33,3%)
22	9 (40,1%)	7 (31,8%)
23	9 (39,1%)	8 (34,8%)
24	10 (41,7%)	8 (33,3%)
25	10 (40%)	8 (32%)
26	10 (38,5%)	9 (34,6%)
27	11 (40,7%)	9 (33,3%)
28	11 (39,3%)	9 (32,1%)
29	12 (41,4%)	10 (34,5%)
30	12 (40%)	10 (33,3%)

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## Annex 3 – Overview national legislation, policy measures and reports

### Austria

#### Legislation

- Paragraph 243c of the Code of Corporations (*Unternehmensgesetz*), available at: <https://www.ris.bka.gv.at/Dokumente/Bundesnormen/NOR40188997/NOR40188997.pdf>.
- Paragraph 87 section 2a of the Stock Corporations Act (*Aktiengesetz*), available at: <https://www.ris.bka.gv.at/Dokumente/Bundesnormen/NOR40137567/NOR40137567.pdf>.
- Act on sustainability and improvement of diversity (*Nachhaltigkeits- und Diversitätsverbesserungsgesetz, BGBl I 20/2017*), available at: [https://www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA\\_2017\\_I\\_20/BGBLA\\_2017\\_I\\_20.pdf](https://www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA_2017_I_20/BGBLA_2017_I_20.pdf).
- Act on Equality of Women and Men on Supervisory Boards (*Gleichstellungsgesetz von Frauen und Männern im Aufsichtsrat, GFMA-G, BGBl I 104/2017*), 27 July 2017, available at: [https://www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA\\_2017\\_I\\_104/BGBLA\\_2017\\_I\\_104.pdf](https://www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA_2017_I_104/BGBLA_2017_I_104.pdf).<sup>3</sup>

#### Data

- Spitzer, S., Wieser, C. (2017), *Frauen Management Report* (Women's Management Report), available at: [https://www.arbeiterkammer.at/service/studien/frauen/Frauen\\_Management\\_Report.html](https://www.arbeiterkammer.at/service/studien/frauen/Frauen_Management_Report.html).

### Belgium

#### Legislation

- Act of 29 July 1991 concerning the formal motivation of administrative acts (*Loi relative à la motivation formelle des actes administratifs, M.B./B.S. 12.9.91*), 1 January 1992.
- Act of 16 December 2002 establishing the Institute for Equality of Women and Men (*Loi portant création de l'Institut pour l'égalité des femmes et des hommes M.B./B.S. 31 December 2002*), 31 March 2003.
- The Federal Act of 28 July 2011 amending the Act of 28 July 2011 modifying the Act of 21 March 1991 on the reform of certain economic public bodies, the Company Code and the Act of 19 April 2002 on the rationalization of the working and management of the National Lottery, in order to ensure the presence of women on boards of directors of the autonomous public bodies, listed companies and the National Lottery (*Loi modifiant la loi du 21 mars 1991 portant réforme de certaines entreprises publiques économiques, le Code des sociétés et la loi du 19 avril 2002 relative à la rationalisation du fonctionnement et la gestion de la Loterie Nationale afin de garantir la présence des femmes dans le conseil d'administration des entreprises publiques autonomes, des sociétés cotées et de la Loterie Nationale, M.B./B.S. 14.09.2011*), implemented at various dates according to the categories of bodies and companies concerned. Latest date: 1 July 2020.
- Act of 25 April 2014 concerning the status and supervision of credit institutions (*Loi relative au statut et au contrôle des établissements de crédit, M.B./B.S. 7 May 2014*), 17 May 2014.
- Act of 25 October 2016 concerning the status and supervision of listed companies and containing various measures (*Loi relative au statut et au contrôle des sociétés de bourse et portant des dispositions diverses, M.B./B.S. 21 November 2016*), implemented 1 December 2016, except for certain provisions which are linked with the transposition of Directives 2013/36/EU and 2014/65/EU.

#### Data

- Institut pour l'Égalité des Femmes et des Hommes (2016), *Second bilan de la loi du 28 juillet 2011 relative aux quotas de genre dans les conseils d'administration* (Second report on the Act of 28 July 2011 on gender quota for boards of directors), available at: [http://igvm-iefh.belgium.be/nl/publicaties/tweede\\_balans\\_van\\_de\\_wet\\_van\\_28\\_juli\\_2011\\_over\\_genderquota\\_in\\_raden\\_van\\_bestuur](http://igvm-iefh.belgium.be/nl/publicaties/tweede_balans_van_de_wet_van_28_juli_2011_over_genderquota_in_raden_van_bestuur).

3 Recent legislative developments concerning gender-balanced company boards in Austria, which took place after the cut of date of this report of 5 June 2017, are addressed in a newsflash, which can be found in Annex 4 to this report.

## Bulgaria

### Legislation

- Accountancy Act, (*Закон за счетоводството*), 1 January 2016, available at: [www.lex.bg/bg/laws/ldoc/2136697598](http://www.lex.bg/bg/laws/ldoc/2136697598).
- Law on Public Offering of Securities, (*Закон за публичното предлагане на ценни книжа*), 31 January 2000, available at: [www.lex.bg/laws/ldoc/2134697472](http://www.lex.bg/laws/ldoc/2134697472).

### Policy

- National Strategy on Gender Equality of women and men 2016-2020, (Национална стратегия за насърчаване на равнопоставеността на жените и мъжете за периода 2016-2020), adopted by Decision of the Council of Ministers No. 967, 14 November 2016. Available at: <https://www.mlsp.government.bg/index.php?section=POLICIES&l=409>.

## Croatia

### Legislation

- Articles 9-12 of the Gender Equality Act (*Zakon o ravnopravnosti spolova*, *Gazette Narodnenovine* nos. 82/08, 138/12, 69/17), 15 July 2008.

### Data

- Ombudsperson for Gender Equality, PROGRESS Programme of the European Union project “Dismantling the Glass Labyrinth – Equal Opportunity Access to Economic Decision-making in Croatia”, No. JUST/2012/PROG/AG/4157/GE, (*Uklanjanje staklenog labirinta – Jednakost prilika u pristupu pozicijama ekonomskog odlučivanja u Hrvatskoj*), available at: <http://staklenilabirint.prs.hr>
- Ombudsperson for Gender Equality (2016), *Izvešće o radu za 2015* (Annual Report 2015), available at: <http://www.prs.hr/attachments/article/1923/Izve%C5%A1%C4%87e%20o%20radu%20Pravobraniteljice%20za%20ravnopravnost%20spolova%20za%202015.pdf>. Available in English at: <http://www.prs.hr/attachments/article/2101/01%20-%20Annual%20Report%20for%202015%20-%20publication.pdf>.
- Ombudsperson for Gender Equality (2017), *Izvešće o radu za 2016* (Annual Report 2016), available at: [http://www.prs.hr/attachments/article/2188/IZVJEŠĆE\\_2016\\_Pravobraniteljica\\_za\\_ravnopravnost\\_spolova\\_CJELOVITO.pdf](http://www.prs.hr/attachments/article/2188/IZVJEŠĆE_2016_Pravobraniteljica_za_ravnopravnost_spolova_CJELOVITO.pdf).

## Cyprus

### Legislation

- Amending Act on Article 3(1) of the basic law on the establishment of certain public law entities (Appointment of Boards of Directors of 1988 (149/1988)). This act has been passed, but is dependent on a decision by the Supreme Court. Available at: [http://www2.parliament.cy/parliamentgr/008\\_05g/008\\_05\\_4790.htm](http://www2.parliament.cy/parliamentgr/008_05g/008_05_4790.htm).

### Data

- “War & Peace, the role of women in”, in: Leadership & Management, <https://www.slideshare.net/featured/category/leadership-management>.

## Czech Republic

### Policy

- Government strategy for equality of women and men in the Czech Republic for 2014-2020 (*Vládní strategie pro rovnost žen a mužů v ČR 2014-2020*), available at: [https://www.vlada.cz/assets/ppov/rovne-prilezitosti-zen-a-muzu/dokumenty/Government\\_Strategy\\_for-Gender\\_Equality\\_2014\\_2020.pdf](https://www.vlada.cz/assets/ppov/rovne-prilezitosti-zen-a-muzu/dokumenty/Government_Strategy_for-Gender_Equality_2014_2020.pdf).
- Government action plan for balanced representation of women and men in decision-making positions 2016-2018 (*Akční plán pro vyrovnané zastoupení žen a mužů v rozhodovacích pozicích na léta 2016-2018*), available at: <https://www.vlada.cz/cz/ppov/rovne-prilezitosti-zen-a-muzu/dokumenty/akcni-plan-pro-vyrovnane-zastoupeni-zen-a-muzu-v-rozhodovacich-pozicich-na-leta-2016---2018-147260>.



## Denmark

### Legislation

- Company Law Act (Consolidation Act No 1089/2015) (*Lov bekendtgørelse af lov om aktie- og anpartsselskaber*), 1 July 2015, available at: <https://www.retsinformation.dk/Forms/R0710.aspx?id=174205>.
- Equality Act (Consolidation Act No 1678/2013) (*Lovbekendtgørelse af lov om ligestilling mellem kvinder og mænd*), 1 January 2013, available at: <https://www.retsinformation.dk/Forms/R0710.aspx?id=160578>.

## Estonia

### Legislation

- Gender Equality Act (GEA, *Soolise võrdõiguslikkuse seadus*), RT I 2004, 27, 181; RT I, 06.07.2015, *Lovbekendtgørelse af lov om ligestilling mellem kvinder og mænd*.
- Accounting Act (AA, *Raamatupidamise seadus*), RT I 2002, 102, 600; RT I, 27.12.2016, 3, *Lovbekendtgørelse af lov om ligestilling mellem kvinder og mænd*.

### Data

- Ministry of Social Affairs and Turu-uuringute AS (2016), *Soolise võrdõiguslikkuse monitooring 2016* (Gender equality monitoring 2016), available at: [http://enut.ee/files/soolise\\_vordoiguslikkuse\\_monitooringu\\_raport\\_2016.pdf](http://enut.ee/files/soolise_vordoiguslikkuse_monitooringu_raport_2016.pdf).
- Laas, A. (2015), 'Women in business elite in Estonia', paper presented at the conference *Make the Profitable Investment! Closing Gender Gap in Economic Decision-making*, Lithuania, 2 July 2015.
- Grant Thornton (2015), 'Eesti paistab silma arvukate naisjuhtidega' (Estonia is prominent with a remarkable share of women in management positions), available at: [www.grantthornton.ee/insights-landing-page/naisjuhid-evei/](http://www.grantthornton.ee/insights-landing-page/naisjuhid-evei/).

## Finland

### Legislation

- Act on equality between women and men (609/1986), Section 4 a (2) (*Laki naisten ja miesten välisestä tasa-arvosta*) 15 April 2005.

### Policy

- Government's decision on balanced gender participation in listed companies, Ministry of Justice, (*Naiset pörssiyhtiöiden hallituksissa* / *Hallituksen päätös sukupuolten tasapuolisesta edustuksesta pörssiyhtiöissä*), 17 February 2015.

### Data

- Kauppakamari (2015), *Naisten osuus pörssiyhtiöiden hallituksissa nousee jälleen* (The proportion of women in boards of directors of listed companies rising again), available at: <http://kauppakamari.fi/wp-content/uploads/2015/04/naisten-osuus-porssiyhtioiden-hallituksissa-nousee-jalleen.pdf>.
- Keskus-Kauppakamari (2016), *Naiset pörssiyhtiöiden hallituksissa* (Women on the boards of directors in listed companies), available at: <http://kauppakamari.fi/wp-content/uploads/2016/05/cg-selvitys-2016-naiset-porssiyhtioiden-hallituksissa.pdf>.

## France

### Legislation

- First Grenelle Act (Act No. 2009-967, *Loi de programmation relative à la mise en oeuvre du Grenelle de l'environnement*), 3 August 2009.
- The Act on balanced participation between men and women on company boards (Act No. 2011-103, *Relative à la représentation équilibrée des femmes et des hommes au sein des conseils d'administration et de surveillance et à l'égalité professionnelle*), 27 January 2011.
- Second Grenelle Act (Act No. 2010-788, *Portant engagement national pour l'environnement, loi Grenelle*), 12 July 2011.
- Act on employment in public services and discrimination (Act No. 2012-347, *Relative à l'accès à l'emploi titulaire et à l'amélioration des conditions d'emploi des agents contractuels dans la fonction*

publique, à la lutte contre les discriminations et portant diverses dispositions relatives à la fonction publique), 12 March 2012.

- Act on true equality between women and men (Act No. 2014-873, *Loi pour l'égalité réelle entre les femmes et hommes*), 4 August 2014.

#### Data

- Haut Conseil à l'égalité entre les femmes et les hommes (2016), *Towards equal access of women and men to positions of professional responsibility: proportion of women on boards*, available at: [http://www.haut-conseil-egalite.gouv.fr/IMG/pdf/hce\\_rapport\\_parity\\_eco\\_eng\\_20160209-2.pdf](http://www.haut-conseil-egalite.gouv.fr/IMG/pdf/hce_rapport_parity_eco_eng_20160209-2.pdf).

## Germany

#### Legislation

- Law on the equal participation of women and men in leading positions of private companies and in the civil service (*Gesetz für die gleichberechtigte Teilhabe von Frauen und Männern an Führungspositionen in der Privatwirtschaft und im öffentlichen Dienst*), 1 May 2015, available at <http://dipbt.bundestag.de/extrakt/ba/WP18/643/64384.html>.

#### Data

- Weckes, M. (2015), *30% Quote im Aufsichtsrat: Eine Eröffnungsbilanz* (30% Quota in Supervisory Boards an Opening Balance), available at: [https://www.boeckler.de/pdf/p\\_mbf\\_report\\_2015\\_12.pdf](https://www.boeckler.de/pdf/p_mbf_report_2015_12.pdf).
- Deutscher Bundestag (2017), *Erste jährliche Information der Bundesregierung über die Entwicklung des Frauen- und Männeranteils an Führungsebenen und in Gremien der Privatwirtschaft und des öffentlichen Dienstes* (First annual information by the Federal Government on the development of the proportion of women and men at management levels and in bodies of the private sector and the civil service), available at: <https://www.bmfsfj.de/blob/115648/916d83985cd40e23540818f4fec2c1c0/bundestagsdrucksache-quotenbericht-data.pdf>.
- Bundesministerium für Familie, Senioren, Frauen und Jugend (2017), *Quote für mehr Frauen in Führungspositionen: Privatwirtschaft* (Quota for more Women in Leadership Positions: Private Sector), available at: <https://www.bmfsfj.de/bmfsfj/themen/gleichstellung/frauen-und-arbeitswelt/quote-fuer-mehr-frauen-in-fuehrungspositionen--privatwirtschaft/78562>.
- von Falkenhausen, J., Schulz-Strelow, M., (2016), *Public Women-on-Board-Index mit 412 öffentlichen Unternehmen* (Public Women-on-Board-Index for 412 Public Enterprises), available at: [https://www.fidar.de/webmedia/documents/public-wob-index/160101\\_Studie\\_Public\\_WoB-Index\\_III\\_end.pdf](https://www.fidar.de/webmedia/documents/public-wob-index/160101_Studie_Public_WoB-Index_III_end.pdf).
- Schulz-Strelow, M. (2016), *Resümee zu den Zielvorgaben der Unternehmen des Women-on-Board-Index 100* (Résumé on the target quotas of the Women-on-Board-Index 100 companies), available at: [https://www.fidar.de/webmedia/documents/wob-index-100/160115\\_Resuemee\\_WoB-Index\\_100\\_III\\_end.pdf](https://www.fidar.de/webmedia/documents/wob-index-100/160115_Resuemee_WoB-Index_100_III_end.pdf).
- FidAR (2016), *Women-on-Board-Index 100 II*, available at: [https://www.fidar.de/webmedia/documents/wob-index-100/2016-11/161102\\_WoB-Index\\_100\\_II\\_Internet.pdf](https://www.fidar.de/webmedia/documents/wob-index-100/2016-11/161102_WoB-Index_100_II_Internet.pdf).

## Greece

#### Legislation

- Paragraph 1(b) of Article 6 of Act 2839/2000 (OJ A 196/12.09.2000): Provisions concerning the Ministry of the Interior and other provisions (*Νόμος 2839/2000 Ρυθμίσεις Υπουργείου Εσωτερικών και άλλες διατάξεις*, ΦΕΚ Α' 196/12.09.2000), 12 September 2000.

## Hungary

#### Legislation

- No specific legislation about preferential treatment of women on company boards, only general provisions allowing preferential treatment in legislation or collective agreements; Article 11 of Act CXXV of 2003 Equal Treatment and the Promotion of Equality of Opportunities (2003 (évi CXXV. törvény, az egyenlő bánásmódról és az esélyegyenlőség előmozdításáról 11. §). 27 January 2004.

## Iceland

### Legislation

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- Acts on public limited companies and private limited companies, respectively No. 2/1995 with later amendments and No. 138/1994 (*Lög um hlutafélögnr. 2/1995, 30. janúar; Lög um einkahlutafélög, No. 138/1994, 28 December*).
- Gender quotas on the boards of pension funds: Act No. 122/2011 amending Pension Act No. 129/1997 (*Lög um breytingu á lögumnr. 129/1997, um skyldutryggingu lífeyrisréttinda og starfssemi lífeyrissjóða, með síðari breytingum (hæfi stjórnarmanna og framkvæmdastjóra, fjárfestingaheimildir, 27 September 2011*).

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## Ireland

### Legislation

- S.I. No. 360/2017 – European Union (Disclosure of Non-Financial and Diversity Information by certain large undertakings and groups) Regulations 2017, 21 August 2017.

### Policy

- The Irish Corporate Governance Annex states that the Irish Stock Exchange recognises the UK Corporate Governance Code, and this Code sets the standard for corporate governance internationally. Where a company has not complied with the Code, it is required to set out the nature, extent and reasons for non-compliance.

## Italy

### Legislation

- Act 12. 7. 2011, No. 120, Reform of decree 24.2.1998, n. 58 on financial intermediation and on quotas regarding access to company boards of listed companies (*Modifiche al test unico delle disposizioni in materia di intermediazione finanziaria, di cui al decreto legislativo 24.2.1998, n. 58, concernenti la parità di accesso agli organi di amministrazione e di controllo delle società quotate in mercati regolamentati*), 12 July 2011.
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- Legislative Decree 30.12.2016, No. 254, Implementation of Directive 2014/95/UE, which modifies Directive 2013/34/UE on communication of non-financial information and on information upon the diversity in undertakings and groups of big dimension (*Attuazione della direttiva 2014/95/UE del Parlamento europeo e del Consiglio del 22 ottobre 2014, recante modifica alla direttiva 2013/34/UE per quanto riguarda la comunicazione di informazioni di carattere non finanziario e di informazioni sulla diversità da parte di talune imprese e di taluni gruppi di grandi dimensioni*), 30 December 2016.

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## Luxembourg

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## Portugal

### Legislation

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### Policy

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## Romania

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### Policy

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## UK

### Legislation

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## Annex 4 – Flash report Austria: New legislation

<b>Country:</b>	Austria
<b>Title:</b>	Austria enacts legislation for a 30 % quota for women on supervisory company boards
<b>Date:</b>	23 November 2017
<b>Expert:</b>	Martina Thomasberger
<b><u>Context</u></b>	
<b>Issue at stake:</b>	Gender equality, women on boards
<b>Ground of discrimination:</b>	Sex
<b>Sources:</b>	Federal legislation
<b>Field:</b>	Employment
<b>Applicable law:</b>	Act on Equality of Women and Men on Supervisory Boards (Gleichstellungsgesetz von Frauen und Männern im Aufsichtsrat, GFMA-G, BGBl I 104/2017) published on 27 July 2017

### Content

**New legislation concerning gender equality on supervisory boards:** The governing coalition of the Social Democrats and the conservative People's Party ended in May 2017, and early elections for Parliament were scheduled for 15 October 2017. During the period after the falling apart of the governing coalition and the new elections, the process for the adoption of new legislation was more flexible than normal. Usually the Government drafts legislative proposals accompanied by explanatory notes. The explanatory notes are then submitted to stakeholders for an extensive assessment process before starting deliberations in Parliament. During the transition period before the elections, parties took the opportunity to draft legislation without this preliminary process. Social Democrats and Conservatives presented a joint proposal for Equality of Men and Women on Supervisory Boards, which was passed with the support of the Green Party in one of the last legislative sessions before the elections. Due to the more informal legislative process there are no explanatory notes or stakeholder evaluations of the legislation available. This has resulted in some ambiguities in the understanding of the new provisions.

**Key points of analysis:** From 1 January 2018, appointments and nominations to supervisory boards of listed stock companies, and of companies with more than 1000 employees whose boards consist of at least six seats, must consist of a minimum of 30 % of the underrepresented sex. Only 'single gender' companies (defined as companies that have a workforce with less than 20 % employees of one sex) are exempt from the new regulations. The 30 % quota is sanctioned with an 'empty seat' policy meaning that appointment votes and nominations that fail to meet the required minimum are void and board members holding such seats are barred from voting. The new regulations take effect on 1 January 2018 and are applicable to all board elections from that date onward. Current seat holders on company boards will not be affected.

**Analysis:** The quota is only required for company boards with six or more seats. This results in the fact that there may still be all-male company boards under the new legislation. The regulations state that quota calculations resulting in decimal points must be rounded up or down to reach full seat numbers if the decimals are 0.5 or more. Under Austrian law, supervisory boards consist of double the number of stakeholders compared to employees' representatives nominated by the works council. The quota can be fulfilled by counting all board members together, except in cases where shareholders' representatives and works council representatives object; in these cases, each group has to meet the quota requirement separately. Where there is a joint quota policy in place, the required seats can be filled by both groups or by one group alone, so that theoretically on a company board with eight shareholder seats and four

works council seats an all-female employees' delegation could meet the quota requirement without the shareholders having to act. The calculation rules also imply that in cases where shareholders and works councils decide to meet the quotas separately, only three seats would be enough to meet the requirement. For example: 30 % of eight shareholder seats results in 2.4 seats which is rounded down to 2 seats, and 30 % of four works council seats result in 1.2 seats which is rounded down to 1 seat, therefore the quota requirement would already be met in this case with only 3 instead of 4 seats. Experts in company law are debating the implications of the new legislation, e.g. the applicability on the level of limited liability of companies. The regulations are open to interpretation, meaning that it is not clear whether the quota requirement for company boards with at least 1000 employees has to be calculated for single companies or also for legally incorporated concern companies (which would be implied by regulations in the applicable legislation). Due to the unusual legislative process, there are no explanatory notes that would give some indication as to how the legislator understands the regulations. Much interpretation work will be left to the developing practice in companies and to legal expertise.

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## Annex 5 – Flash report Portugal: New legislation

<b>Country:</b>	Portugal
<b>Title:</b>	Recent developments in Portuguese Employment Law regarding Women on Company Boards
<b>Date:</b>	23 November 2017
<b>Expert:</b>	Maria do Rosário Palma-Ramalho
<b><u>Context</u></b>	
<b>Issue at stake:</b>	Women on Company Boards; new legislation
<b>Ground of discrimination:</b>	Sex
<b>Source:</b>	Legislation
<b>Field:</b>	Employment

### Content

**Key points of analysis:** The National Parliament has recently approved Law No. 62/2017 of 1 August 2017, concerning women on company boards. This law is applicable to public companies and public institutions (at central, regional or local level), and to listed private companies. It establishes a minimum representation of women on executive company boards and surveillance boards. For public companies, the required minimum of female board members will be 33.3 % as of 1 January 2018. For private listed companies, the set minimum will be 20 % as of 1 January 2018, but growing towards 33.3 % as of 1 January 2020.

### **Personal assessment:**

- For the first time in Portugal, a mandatory minimum quota for women on decision-making boards for private listed companies has been set (Article 1). Prior to this legislation, only public companies were submitted to such a rule and private companies were merely recommended to facilitate the access of women to board positions;
- The timetable for the adjustment of the companies to the minimum quota of 33.3 % is relatively short (Article 4 and 5), so the measure will be in place in the coming years;
- The notion of ‘boards’ for the purposes of this law is wide, in the sense that it includes executive boards, administrative boards and supervisory boards. And since the minimum quota of women is imposed on each of these boards (Article 1 (1), Article 3 and Article 4), the influence of women at all levels of decision-making in companies will be effective;
- The sanctions imposed for a breach of the minimum representation of women on company boards are severe, including the invalidity of the decision of the irregular board and, if the irregularity persists, the application of administrative fines (Article 6). These sanctions may be the key to ensure the practical implementation of this piece of legislation;
- The law also imposes on companies the duty to elaborate their annual equality plans. The aim of these plans is to achieve equal opportunities and equal treatment of women and men, and to promote the reconciliation of professional and family life in the company. These plans must follow the guidelines indicated by the Public Equality Agency in Employment Area (CITE) (Article 7). This is also a very important provision because until now, these plans were not mandatory.

### **Internet source:**

[www.dre.pt](http://www.dre.pt)

## Annex 6 – Flash report Spain: New legislation

<b>Country:</b>	Spain
<b>Title:</b>	The Government approved a Royal Decree transposing Directive 2013/36 and Directive 2014/95 on the disclosure of non-financial information specifically referring to measures taken by listed companies to increase the percentage of women on non-executive company boards.
<b>Date:</b>	30 November 2017
<b>Expert:</b>	María Amparo Ballester Pastor
<b><u>Context</u></b>	
<b>Issue at stake:</b>	Women on non-executive company boards
<b>Ground of discrimination:</b>	Sex
<b>Source:</b>	Legislation
<b>Field:</b>	Employment
<b>Applicable law:</b>	Royal Decree 18/2017, of 24 November 2017 on non-financial statement and diversity ( <i>Real Decreto-ley 18/2017, de 24 de noviembre, en materia de información no financiera y diversidad</i> )

### **Content**

On 24 November 2017, the Spanish Government approved Royal Decree 18/2017, on non-financial statement and diversity. This piece of legislation transposes Directive 2013/34/EU on annual financial statements, consolidated financial statements and related reports of certain types of undertakings, and Directive 2014/95 amending Directive 2013/34/EU regarding disclosure of non-financial and diversity information by certain large undertakings and groups. Royal Decree 18/2017 has been approved through an urgent legislative procedure, given that the deadline for the transposition of the above Directives had already passed.

Royal Decree 18/2017 has affected three pieces of legislation: the Code of Commerce (Royal Decree 22 August 1885), the Law of Corporations (Royal Legislative Decree 1/2010, of 2 July 2010) and the Law of Auditing (Law 22/2015, 20 July 2015). Referring specifically to the obligation of the disclosure of information for listed companies, the new Article 540.4.6 of the Law of Corporations states that a description of the diversity policy applied in the composition of the non-executive board of listed companies must be made public. The aspects to be taken into account include age, gender, and educational and professional backgrounds. The new Article 540.6.6 of the Law of Corporations states specifically that companies must refer to the measures they have taken to include women and reach a gender balance in their non-executive board (*Consejo de Administración*). If no such policy is applied, the statement must explain as to why this is the case. This Article almost literally reproduces what Article 20(1)(g) Directive 2013/34/EU, after having been modified by Directive 2014/95/EU stipulates, but adds a very interesting reference about the gender composition of non-executive boards. Article 540.4.6 of the old Law of Corporations already stated that companies were obliged to publicize the measures taken in order to obtain a gender-balanced non-executive board. However, the current Royal Decree states that, if no such policy is applied, the statement shall contain an explanation as to why this is the case. This addition reinforces the objective set in Article 75 of the Law on Effective Equality. This Article states that companies that are obliged to submit a non-abbreviated profit and loss account 'will try' to include in their company's non-executive boards a number of women in order to reach a balanced presence of women and men over a period of eight years from the date of entry into force of the Law (the deadline was 24 March 2015). The objective refers to very large companies which cannot submit abbreviated profit and loss accounts, employ more than 250 workers and have a turnover exceeding EURO 22 million a year.

The concept of a balanced presence of women and men is contained in the Additional Provision 1 of the Law on Effective Equality. According to this provision, the presence of women and men is well-balanced when the number of people belonging to one sex on non-executive boards does not exceed sixty percent. This means that the aimed percentage of the underrepresented sex is forty. This is a soft target, since companies only have the obligation to 'try' to reach it. Moreover, the obligation to aim for gender-balanced non-executive boards only applies to large companies included in Article 75 of the Law on Effective Equality, and only these companies would have to give explanations if no such policy is applied.

**Key points of analysis:** Royal Decree 18/2017, of 24 November 2017 on non-financial statement and diversity (*Real Decreto-ley 18/2017, de 24 de noviembre, en materia de información no financiera y diversidad*) imposes an obligation to provide a corporate governance statement in the management report of listed companies which shall include a description of the diversity policy applied when composing their non-executive board of the company (*Consejo de Administración*). This statement will specifically have to refer to the measures that, if taken, would serve to include women in order to reach a gender balance in their non-executive board. If no such policy is applied, the statement must contain an explanation as to why this is the case.

**Internet sources:**

- Royal Decree 18/2017, of 24 November 2017 about non-financial statement and diversity [http://noticias.juridicas.com/base\\_datos/Fiscal/608813-rdl-18-2017-de-24-nov-modifica-codigo-de-comercio-texto-refundido-de-la.html](http://noticias.juridicas.com/base_datos/Fiscal/608813-rdl-18-2017-de-24-nov-modifica-codigo-de-comercio-texto-refundido-de-la.html), accessed 28 November 2017;
- Law on Effective Equality between women and men, Law 3/2007 of 22 March 2007 [https://www.boe.es/diario\\_boe/txt.php?id=BOE-A-2007-6115](https://www.boe.es/diario_boe/txt.php?id=BOE-A-2007-6115), accessed 28 November 2017.



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