



Women on boards - Factsheet 3

Legal Aspects

1. Purpose of the proposal

The purpose of the proposed directive on improving gender balance among non-executive directors of companies listed on stock exchanges” is to substantially increase the presence of the **underrepresented sex** on corporate boards throughout the EU by setting a **minimum objective of 40%** for members of the under-represented sex **for non-executive members of the board**, to be attained by 2020, or by 2018 in case of listed companies which are public undertakings. In order to attain the 40% objective, companies which have a lower share of the under-represented sex among the non-executive directors will be required to make appointments to those positions on the basis of a **comparative analysis of the qualifications of each candidate**, by applying clear, gender-neutral and unambiguous criteria. Priority shall be given to the candidate of the under-represented sex if that candidate is equally qualified as the candidate of the other sex.

2. Targets and scope of the proposal

Scope: The proposal applies to **publicly listed companies**, due to their economic importance and high visibility. Moreover, they tend to have larger boards and a similar legal status and functioning across the EU, providing for a necessary comparability of situations. **Small and medium-sized enterprises** with less than 250 employees and an annual turnover that does not exceed 50 million EUR **are excluded** from the scope even if they are publicly listed.

Targets: The proposed objective of 40% for the minimum share of the **under-represented sex** among non-executive board members is in line with the targets currently under discussion and set in a number of EU Member States/EEA countries. It is situated between the minimum of the ‘critical mass’ of 30% found to be necessary for gender diversity to have a sustainable impact on board performance and full gender parity (50%).

This is also in line with the calls from the European Parliament, which, in its resolution on women and business leadership of 6 July 2011, urged companies to attain the critical threshold of 30% female membership of management bodies by 2015 and 40% by 2020.

3. Legal basis

The EU's competence to act in issues of gender equality in employment and occupation is based on **Article 157(3) TFEU**. This provision is the specific legal basis for any binding measures aiming at ensuring the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, including so-called positive action providing for specific advantages in favour of the under-represented sex.

The proposal is based on Article 157(3) TFEU.

4. Compatibility of the Proposal with Case-law of the Court of Justice of the EU

The Court of Justice of the European Union (CJEU) has established criteria that need to be met in order to reconcile the two concepts of formal equality of treatment and positive action aiming to bring about de facto equality (by promoting the under-represented sex), both of which are recognised in Article 23 of the Charter of Fundamental Rights of the European Union as well as in Article 157 TFEU and in Article 3 of Directive 2006/54/EC on equal treatment of men and women in matters of employment and occupation.

The requirements stated in the case law are:

- (1) The measures must concern a sector in which women are **under-represented**. (**Kalanke case**, C-450/93).
- (2) They can only give priority to **equally qualified** female candidates over male candidates. (**Abrahamsson case**, C-407-98).
- (3) They must **not give automatic and unconditional priority** to equally qualified candidates of the under-represented sex, but must include a possibility of granting exceptions in justified cases which take into account the individual situation, notably the personal situation of each candidate. (**Marschall case**, C-409/95).

The proposal is in compliance with these requirements: Member States should ensure that in order to attain the 40% objective the **selection of the best qualified candidates** for non-executive directors is **based on a comparative analysis of the qualifications** of each candidate by applying pre-established clear, neutrally formulated and unambiguous criteria. **Priority should be given to the candidate of the under-represented sex if that candidate is equally qualified** as the candidate of the other sex in terms of suitability, competence and professional performance, and if an objective assessment taking account of all criteria specific to the individual candidates does not tilt the balance in favour of a candidate of the other sex.

5. Principle of subsidiarity

The **principle of subsidiarity** requires that the Union shall act only if and insofar the objectives of the proposed action cannot be sufficiently achieved by the Member States (necessity test), but can rather, either by reason of the scale or effects of the proposed action, be better achieved at Union level (test of EU value added).

Taking into account the current trends and tendencies in Member States, the objectives of achieving a higher percentage of women in boards of listed companies and the inherent gender equality and possible resulting economic and business benefits will not be attained if this issue is dealt with at Member State level only.

The measures introduced by several Member States vary broadly, while other Member States have not taken any action in this area. At the same time, discrepancies in terms of numbers of women on boards of the largest publicly listed companies are growing in Member States, with the key indicator ranging from 4% to 29%, a situation which jeopardises the attainment of the fundamental objective of gender equality in economic decision-making across the Union. Therefore, **the objectives of the envisaged action cannot be sufficiently achieved by the Member States on their own.**

Furthermore, the potential for competitiveness and growth inherent in fully exploiting the talent pool of the best qualified women for board positions can better be realised, by reasons of scale, if all Member States engage into that direction, in particular those where figures are currently low and no action has been taken or even envisaged.

It can therefore be concluded that **the objectives can be better achieved through coordinated action at EU level rather than through national initiatives of varying scope, ambition and effectiveness.**

6. Principle of proportionality

Under the **principle of proportionality**, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties. Non-binding measures such as EU-level recommendations and calls for self-regulation or a patchwork of national regulatory, non-regulatory and company initiatives, have not achieved and cannot be expected to achieve the objective of improving gender equality in economic decision-making throughout the EU (see chronology below).

The proposal is based on a **minimum harmonisation approach** and is limited to setting common objectives and general rules, thereby giving Member States sufficient freedom to determine how these should be best achieved at national level, taking into account national, regional or local circumstances including national company law and company board recruitment practices. **The proposal does not require undue changes to national company law** and respects the different board structures across Member States. Member States that already have an effective system in place will be able to keep it provided it is equally efficient as the proposed system. And Member States remain free to introduce measures that go beyond the proposed system.

Furthermore, the proposal does not cover small and medium-sized enterprises (SMEs), for which such measures could represent a disproportionate burden in relation to their size and resources.

Inbuilt safeguards will make sure that there is no unconditional, automatic promotion of the under-represented sex. In line with the Court of Justice of the European Union's case law on positive action preference shall be given to the equally qualified under-represented sex - unless an objective assessment taking into account all criteria specific to the individual candidates tilts the balance in favour of the candidate of the other sex (for example, a married male candidate stayed at home and looked after his children, but is nevertheless equally qualified as the single career female candidate).

The proposal also provides for a possibility of justifying non-compliance with the objective where the members of the under-represented sex represent less than 10 per cent of the workforce.

The temporary nature of the proposed Directive and the automatic expiry in 2028 further underpins its compliance with the principle of proportionality.

7. How EU Recommendations and self-regulation have failed – a chronology of facts:

In 1984 the Council adopted a recommendation on the promotion of positive action for women ([84/635/EEC](#)).

In 1996 the Council adopted a recommendation, upon proposal by the Commission, on the balanced participation of women and men in the decision-making process ([96/694/EC](#)).

In 2010 the Commission identified 'equality in decision making' as one of the priorities of the **Women's Charter** (COM(2012) 078) and of its **Strategy for Equality between women and men 2010-2015** (COM(2010) 491).

In 2011, the Commission's Vice-President Viviane Reding launched the **'Women on the Board Pledge for Europe'** calling for publicly listed companies in Europe to voluntarily commit to increasing women's presence on their boards to 30% by 2015 and 40% by 2020. A year later, only 24 companies had signed the pledge.

In the **European Pact for Gender Equality 2011-2020**, adopted on 7 March 2011, the **Council** acknowledged that gender equality policies are vital to economic growth, prosperity and competitiveness and urged action to promote the equal participation of women and men in decision-making at all levels and in all fields, in order to make full use of the pool of talent available.

The **European Parliament** called for legislation in its resolutions of 6 July 2011 on women and business leadership and of 13 March 2012 on equality between women and men in the European Union.

A 2011 **Eurobarometer survey** also revealed that a majority of Europeans (88%) think that women should be equally represented in company leadership positions and 75% are in favour of legislation on the condition that it takes into account qualification and does not automatically favour members of one sex.

In March 2012, the **Commission took stock of the situation** and found only an average improvement of just 0.6 percentage points over the past years. At this slow rate of progress it would take around 40 years before companies would naturally reach gender balanced representation in boards.

Between 5 March and 28 May 2012 the Commission held a public consultation inviting the public – individual businesses, social partners, interested NGOs and citizens – to comment on what kind of measures the EU should take to tackle the lack of gender diversity in boardrooms. The results have fed into the proposal presented by the European Commission today.

8. 50 years of EU action to promote Gender Equality

The **Treaty of Rome in 1957** already included the principle of equal pay for equal work. (Article 119 EEC, then 141 EC, now Article 157 TFEU). The background to this provision was mainly economic: the Member States wanted to eliminate distortions in competition between undertakings established in different Member States.

In **1976**, the Court of Justice of the European Union (CJEU) decided in the **Defrenne** case that Article 119 EEC had not only an economic but also a social aim. This judgment paved the way for modern European gender equality law. It has been followed by an impressive amount of case law.

With the entry into force of the **Treaty of Amsterdam in 1999**, the promotion of equality between men and women became one of the essential tasks of the European Community (Article 2 EC). Since 1999 the EU has had the competence to take action to combat discrimination based on gender (Article 13(1) EC, now 19(1) TFEU). This Article provided a legal basis for the Directive on the principle of equal treatment between men and women in access to and the supply of goods and services (2004/113/EC).

EU gender equality is also an integral part of the **Charter of Fundamental Rights of the European Union** which prohibits discrimination on any grounds, including sex, (Article 21) and recognises the right to gender equality in all areas and the necessity of positive action for its promotion (Article 23).

In **2009, the Treaty of Lisbon** confirmed once again the importance of gender equality in the European Union. Equality between men and women is included in the common values on which the European Union is founded (Article 2 TEU), which means, for instance, that it will be a yardstick for determining whether a European state can be a candidate for accession. The promotion of equality between men and women is also listed among the tasks of the Union (Article 3(3) TEU), together with the obligation to eliminate inequalities. The Lisbon Treaty thus clearly reiterates the obligation of ensuring gender equality for both the Union and the Member States.

9. Important case law of the Court of Justice of the European Union ('the Court') in the area of Gender equality

Equal pay

In the **Defrenne II case** (C-43/75), the Court decided that equal pay claims could be made directly before national courts.

In the **Macarthy case** (C-127/79) the Court clarified that claims could also be made in comparison with for example a predecessor on the same job.

Positive action

Positive action measures are taken as part of an equal opportunities policy in order to redress the balance of past discrimination. The Court has developed criteria to assess the legality of positive action measures: they must be based on clear unambiguous criteria, address specific career inequalities and help the underrepresented sex to conduct their life on a more equal footing with the other sex.

The Court determined in the **Kalanke** case (C-450/93) that female job applicants with qualifications equal to men's could be given priority under certain conditions. In **Badeck** (C-158/97) the Court accepted a rule imposing binding quantified targets for women in sectors where women are under-represented, and giving priority in the selection procedure to women under certain conditions, notably that women and men candidates are equally qualified and that candidatures are the subject of an objective assessment which takes account of the specific personal situations of all candidates.

In the **Lommers** case (C-476/99) the Court held that a Dutch public sector scheme can, in compliance with EU law, reserve a limited number of subsidised nursery places for female employees as a compensation measure in the context of positive action.

Parenthood

Parenthood has been another area of concern for the Court. The Court has clarified that dismissal of pregnant women is discrimination on grounds of gender and has also extended protection to pregnant women employed on temporary contracts¹.

A woman who, at the time of recruitment, is pregnant was not obliged to inform her employer (**Tele Danmark** (C-109/00)). The **Busch** case (C-320/01) reiterated that the employee does not have to disclose her pregnancy to the employer.

Women can also be given extra benefits during maternity without this being considered unequal given that their situation is different from that of men (**Abdoulaye / Renault**, C-218/98). Women must also not be excluded from possibilities of promotion due to an inability to handle certain chores during pregnancy (**Silke**, C-207/98).

Exclusion from professions

Some professions have traditionally been reserved for men only, such as police and military. In the German **Kreil** case (C-285/98) the Court stipulates that a total exclusion of women does not comply with EU law.

Burden of proof

The burden of proof rules are essential for redressing inequality. The Court decided in **Danfoss** (C-109/88) that if there is a non-transparent pay-structure and statistical evidence shows a difference in pay for men and women the burden of proof shifts to the employer to justify that the difference of pay is due to other grounds than sex.

Pensions

Occupational pensions have to set the same pensionable age for women and men. A lower pensionable age for women cannot be justified as a 'positive action' measure because it does not help the women in her professional career. In several cases the Court clarified that the pension scheme of the civil service has to be treated as an occupational pension scheme. Female and male civil servants should thus have the same pensionable age (**Commission vs Italy**, C-46/07).

Unisex tariffs

In the **Test-Achats** case (C-236/09), the ECJ held that in the insurance services sector the derogation from the general rule of unisex premiums and benefits is invalid, with effect from 21 December 2012. As the use of actuarial factors related to sex was widespread in the provision of insurance services at the time when Directive 2004/113/EC was adopted, according to the Court it was permissible to continue with gender-differentiated tariffs for a transitional period. However, equal treatment requires that after the end of this transitional period tariffs should not differ according to sex anymore.

¹ Brown (C-394/96) and Melgar (C-438/99) respectively