

Client Alert: Women on Boards Directive – A Crack in the Glass Ceiling, but Does It Go Far Enough?

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Women make up just 30.6% of board directors for the largest listed companies in the European Union (EU).^[1] In a bid to “*break the glass ceiling of listed companies’ boards*,”^[2] the European Parliament adopted a new law on 22 November 2022,^[3] designed to improve gender equality at board level. Dubbed the “Women on Boards Directive”, the new law will require EU member states to pass national laws to ensure women are better represented in the boardrooms of large listed companies. The legislation will apply to EU-listed companies with 250 employees or more or with an annual turnover over €50 million. The key provisions of the Women on Boards Directive include requirements that EU member states pass legislation which will:

- compel listed companies to include at least 40% of the “underrepresented” sex among non-executive directors (NEDs); or at least 33% among all directors by 30 June 2026. What this will mean is that no more than 60% of NEDs (or 67% of the entire board) can belong to any one sex;
- compel listed companies to report annually on the gender composition of their board and the measures they are taking to meet the target. Member states are, in turn, required to publish a list of companies that have failed to meet the target each year;
- compel listed companies who fail to meet the target to adjust their selection procedures and qualification criteria;
- compel listed companies to implement a gender equality policy designed to improve the gender balance at all levels in the company;
- compel listed companies choosing between equally qualified candidates to give priority to those from the “underrepresented” sex; and
- impose effective, proportionate, and dissuasive sanctions for companies who fail to comply, such as administrative fines or the possibility for a judicial body to nullify or annul existing directors’ appointments.

Whereas the key provisions appear clear, there is some ambiguity as to how the Directive will be applied in the EU member states. The Directive provides that member states can opt to suspend the Directive's requirements if they already have in place legislation which requires companies to achieve at least 30% of the "underrepresented" sex among NEDs or 25% among all directors. This effectively provides a loophole whereby some member states will be able to water down the Directive's requirements and require a lower quota of women on boards.

There is also considerable debate as to whether quotas are the right means of achieving diversity in the boardroom. By way of example, an EU study has demonstrated that the share of women on boards has increased more rapidly in member states with mandatory quotas than in those with only soft measures^[4]; on the other hand, a US study has concluded that pressure from investors was a more effective means at improving gender diversity on boards^[5]. The EU study also found that, while quotas had a positive impact on women's representation, they did not affect the positions that women hold within the board – noting that in countries with quotas, women were on average three times more likely to hold non-executive positions than executive ones^[6]. In addition, efforts to diversify corporate boards have come increasingly under attack in the US on the basis that they encourage discrimination, as described by our colleagues in the following alert, "Board Diversity Efforts: Factors for Companies to Consider Given Growing Scrutiny."

Conclusion

The Women on Boards Directive is clearly intended as a positive step in the direction of improving gender diversity in the leadership of EU listed companies. However, the Directive arguably does not go far enough. It was first tabled ten years ago, when it was seen as progressive and ambitious. Now, in 2022, it could be seen as a missed opportunity – focusing solely on women and not on LGBTQ+ and non-binary genders, race, or social mobility. Studies have shown that diversity is not only sociably desirable, but also strengthens companies' decision making, corporate governance, and financial performance^[7]. The Women on Boards Directive is a step in the right direction towards a diverse board, but there is much further to go.

Footnotes

[1] <https://institutdelors.eu/en/publications/cap-sur-la-parite-dans-les-instances-dirigeantes-des-entreprises-europeennes/>

[2] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L_.2022.315.01.0044.01.ENG

[3] <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:32022L2381>

[4] <https://institutdelors.eu/en/publications/cap-sur-la-parite-dans-les-instances-dirigeantes-des-entreprises-europeennes/>

[5] <https://www.bloomberg.com/news/articles/2022-11-22/big-investors-are-better-than-quotas-at-getting-more-women-on-boards?leadSource=uverify%20wall>

[6] <https://institutdelors.eu/en/publications/cap-sur-la-parite-dans-les-instances-dirigeantes-des-entreprises-europeennes/>

[7] See, e.g., Jason M. Thomas & Megan Starr, “Global Insights: From Impact Investing To Investing For Impact” at 5, The Carlyle Group https://www.carlyle.com/sites/default/files/2020-02/From%20Impact%20Investing%20to%20Investing%20for%20Impact_022420.pdf (finding that the “average earnings growth of Carlyle portfolio companies with two or more diverse board members” was 12% greater and five times faster than for companies that lack diversity)

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