Working Paper - Provisional

Gender equality quota - An initial analysis of the proposed directive

Eddy Wymeersch
Prof (em) University of Gent

1. Objectives of the proposed directive

Since many years the European Commission has been working on projects dealing with gender equality especially in large companies. Early projects date back to 2012 and were updated several times. Further work was undertaken in the European Economic and Social Committee by the Committee of the Region and by the European Parliament[1]. In 2020 the Commission published a Q&A on a Gender Equality Strategy 2020-2025[2] . The Commission President states that the Commission will push for the adoption of the 2012 proposal for a Directive[3]
The Maltese presidency took up the challenge again, notwithstanding the opposition from several Member States. A new project is now being discussed under the title of a 'Proposal for a directive on improving the gender balance among directors of companies listed on stock exchanges and related measures[4]. This renewed interest reflects the trend of the times, as in our societies, women occupy a more prominent position, both in politics and in economic and financial companies, while this factor is not widely recognized in the decision-making processes. It also reflects the concerns that the female members of our societies -who have accumulated outstanding professional skills and expertise in many fields – have not been able to contribute to the economic processes with the same degree of prominence and authority in the economic world, although in the non-economic world they occupy often important and frequently leading positions. The judiciary could be mentioned as one example among others.

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

[2] 5 March 2020, Questions_and_Answers__Gender_Equality_Strategy_2020-2025

[3] See U.Von der Leyen; A Union of Equality: Gender Equality Strategy 2020-2025, COM(2020) 152 final 5 3; the 2020.;The directive is one of the priorities in the European Commission's new EU Gender Equality Strategy 2020-2025. See for the latest developments: European Parliament, Legislative Train 01.20227: Area of Justice and Fundamental rights, "Gender balance on Boards" , https://www.europarl.europa.eu/legislative-train/theme-area-of-justice-and-fundamental-rights/file-gender-balance-on-boards; E.Regner,on Gender Equality, https://www.theparliamentmagazine.eu/news/article/where-are-the-women
Relevant projects include: European Women on Boards: https://europeanwomenonboards.eu/; the project on Gender Equality Index, by the European Institute for Gender Equality.

[4] See: Proposal for a directive of the European Parliament and the Council on improving the gender balance among directors of companies listed on stock exchanges and related matters. 31 May 2017, Council, 9495/17, Interinstitutional file 2012/0299 (COPD00

The objective of the directive would be to bridge this gap and introduce a mechanism which will secure that women take part in economic life on an equal footing with their male counterparts, especially in directing and managing the largest companies which will benefit from their expertise, skills and knowledge[5], and this to the benefit of these companies, their shareholders and more widely of society as a whole. The general objective therefore is certainly to contribute to the public interest in society, while allowing the economic world to benefit from the knowledge, insights and specific expertise which the female part of our society has often successfully accumulated. These general objectives explain the support which this and other similar proposals should receive.

The directive proposal in fact addresses the participation of "women" in our business life. Women are not mentioned as such: the directive refers to the "under-represented sex", a euphemism for the subordinated position many women still occupy in our society. This expression might be ambiguous, as it might be used – but is clearly not applicable - in both directions. This idea is referred to as the "improvement of the gender balance"[6], whereby certain measures are intended to improve the position of the under-represented gender, as a rule the female gender, although their overall number in society is certainly higher than that of their male counterparts[7]. Question how this approach will be followed for the intermediate category, the LGTB.
Also, the proposed measures would not be applicable at all levels: they would only apply to the leading positions, and only in listed companies, as these stand for most of the largest businesses in our society. This partial scope of application is likely to trigger criticism as women are more and more actively included in other activities – e.g. in the medical sector, in higher education, in politics – while the skills they have accumulated can be used in all parts of today's society, such as their IT skills, management and social skills, and so on. In many other, equally important segments of our society, no comparable mandatory balancing applies, partly because the intrinsic qualities of the women active in these fields have since long been recognized and apply beyond any idea of gender subordination.

The proposed directive chooses another approach: it only addresses leadership positions in listed companies, as defined in the proposal. [8] Also, the directive

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[5] See Preamble, 10 b, citing "knowledge, competence and innovation"

[6] "Gender" has been defined in the Council of Europe Convention on preventing and combating violence against women and domestic violence, 11 May 2011, Article 3 (c) , as " 'Gender' shall mean the socially constructed roles, behaviours, activities and attributes that a given society considers appropriate for women and men"

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

[8] It only applies to listed companies mostly of the Limited by shares type. Some jurisdictions accept other company types to be listed e.g. the S.p.a, or the GmbH type. Listing on a stock exchange requirement would probably exclude companies traded on other trading facilities, such as multilateral trading platforms

requirement does not extend to the entire structure of these entities: it only addresses the positions of members of the board of directors, especially the non-executive directors - and including the labor representatives- both groups actively involved in the decisions of the company; it also applies to the executive directors, as members of the Executive Committee in charge of the daily management of the company's affairs[9]. These are the persons exercising the ultimate responsibilities in these companies; the directive's gender equality principle would apply to both groups. Their appointment will be governed according to the mechanisms applied in these companies, being whether elected or appointed by or on behalf of the shareholders, by decision of the general meeting or pursuant to a board decision. This aspect of their relationship to the company as a legal entity – including their possible dismissal - is left unmentioned in the proposal and may be the source of difficulties in its practical application

From a business point of view, the policy objective of the directive should be first and foremost to aim at securing companies to be able to call on the best, most able directors or executives[10]. This principle should apply to all top employments. Considering the economic and social importance of these companies and the effect of their activities on society in general, this is an objective of "public interest". Therefore it would have been logical to extend the gender requirement to leadership positions in all large economically active entities: by way of example among many, running the national railways, or the management of airport or harbours, where men and women have been cooperating since a long time.
It should take precedence over any other selection criterion such as race, gender, family origin, nationality, or others. It should be the outcome of a neutral, objective selection process aimed at hiring the most capable individuals for the leading functions in these companies, the decisions of which might have considerable consequences on society in general.

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

[9] As will be illustrated in the annex to the directive, the relative importance in terms of numbers is higher for the non-executives, than for executive directors.
[10] See Preamble 38: "This directive should not interfere with the possibility … to appoint the most qualified board members, and it grants a sufficiently long period of adaptation"

numerous scientific contributions[11]. The Commission did however not refer in detail to the economic aspect of the diversity debate; this is unfortunate as it would have underlined the equality between the sexes in terms of business acumen. [12] The Commission did not refer to the economic aspect of the diversity debate, nor present an analytical overview of the outcomes .

A somewhat extraordinary provision requires Member States to designate bodies for the promotion, analysis and support of gender balance in listed companies[13]. Reference is made to the directive 2006/54 of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation[14]. Will listed companies be interested in these recommendations?

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

An important point of discussion is the legal basis on which this directive should be based.
Some will refer to the other company law directives, based on article 114 TFEU, on "approximation of laws" which aims at the establishment and functioning of the internal market. The draftsmen have indicated article 157 (4) as the right legal basis. According to some, one should have preferred article 54 TFEU.[15]

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[11] Before adopting the EU legislation, it would be useful to have a more precise and comparative view on the pro- and cons of gender equality. Most of the many published papers, especially numerous on SSRN, are in support of a mandatory gender equality requirement.See e.g. Renee B. Adams and Daniel Ferreira, Women in the Boardroom and Their Impact on Governance and Performance,
SSRN: https://ssrn.com/abstract=1107721 or http://dx.doi.org/10.2139/ssrn.1107721; Marcus Noland, Tyler Moran and Barbara R. Kotschwar
Is Gender Diversity Profitable? Evidence from a Global Survey,
SSRN: https://ssrn.com/abstract=2729348 or http://dx.doi.org/10.2139/ssrn.2729348
But some are still opposing, Further details would be useful. There have also been some negative statements ; see eg. Bundesbank-Studie: Frauenquote ungeeignet, http://femokratie.com/bundesbank-studie-frauenquote-ungeeignet/04-2012/ Christine,. April 6 2012 with further details; Marianne Bertrand, Sandra E. Black, Sissel Jensen, and Adriana Lleras-Muney, Breaking the Glass Ceiling? The Effect of Board Quotas on Female Labor Market, Outcomes in Norway, NBER Working Paper No. 20256, June 2014; See: Record Number of Firms in Bloomberg Gender-Equality Index, https://www.tandfonline.com/doi/full/10.1080/13545701.2018.1442582, 27 January 2022; Durbin, Optimizing Board effectiveness with Gender Diversity, Are quotas the Answer? , IFC, A global Corporate Governance publication, 21

[12] According to the European Institute for Gender Equality (EIGE) , improving gender equality would by 2050 lead to an increase in the EU's GDP per capita by 6.1% to 9.6%, which amounts to €1.95 to €3.15 trillion: https://eige.europa.eu/gender-mainstreaming/policy-areas/economic-and-financial-affairs/economic-benefits-gender-equality; see; https://eige.europa.eu/gender-equality-index/2019 . Most opinions are strongly in support of diversity and its benefits: see under that topic, the long list of publications in SSRN. See also the Google Scholar page:
https://scholar.google.be/scholar?q=Harvard+Study+on+the+benefits+of+diversity&hl=nl&as_sdt=0&as_vis=1&oi=scholart; But no allusion was made to the dissenting views, see e.g., nt.11.

[13] Article 7 (a)

[14] Focusing on access to employment, working conditions including pay and occupational social security schemes

[15] Art 54 , "TFEU" Companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Union shall, for the purposes of this Chapter, be treated in the same way as natural persons who are nationals of Member States.

Another point of controversy will be the introduction of these principles by way of an EU directive, a regulation or by non-binding EU measures leading to national measures. A "directive" would introduce binding provisions, but the Member States would have their own translation of the directive obligations, leading to diversity in the transposition. A "regulation" would introduce a directly applicable and identical regime in all Member States, but is likely to become too strict and not sufficiently flexible to deal with present practices in some Member States. Therefore, the idea has been mentioned to introduce the principles underlying the directive by an EU measure, leaving member states the freedom to shape the obligation in conformity with national provisions, and allowing companies to diverge under "a-comply-and-explain" regime. This would be comparable to the regime applied for the corporate governance codes, or might be part of the listing conditions[16] . In EU company law the three options have been adopted[17] .

The Commission adopted the format of a directive, based on article 157 (4)[18] which is part of the powers of the EU dealing with "social policy" and refers expressly to the "underrepresented sex to pursue vocational activities" what would include company leaders as qualified "workers" according to the EU legal framework .

A Council Staff Working Document stated for the definition of "workers":
"Therefore, the Council Legal Service (CLS) is of the view that the ruling of the Court in the Danosa case[19] confirms that Article 157(3) TFEU does not confer on the EU institutions the power to legislate on the composition of non-executive Boards. The social aspects of the proposal form its centre of gravity. In particular, the CLS confirms that non-executive Board members do not, in a general way, constitute "workers" in the meaning of EU law."[20]. The proposal is not 'a matter of employment and occupation". The Board members exercising executive functions should be analysed as "workers', in the context of an employment relationship. This positive action aims at increasing the gender balance, reducing gender gaps in employment and pay, and the development of human resources. *But "in no way, the proposal intends to harmonise company law."* [21].

'Companies or firms' means companies or firms constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law, save for those which are non-profit-making."
16 Some Member States considered that binding measures at EU level are not the best way to pursue the objective. Some states submitted an opinion that the proposal did not comply with the principle of subsidiarity (Denmark, Sweden, Netherlands, Poland United Kingdom and Czech Republic). Other States asked for stronger penalties, removal of exception for companies with less than 10% female workers, and extension to the EU owns institutions and agencies, and to cover non-listed companies. See EU Parliament, Parliament's resolution of 21 January 2021 on the new EU Gender Equality Strategy calling on the Commission to continue working with the Member States and EU presidencies to urgently break the deadlock in the Council.
17 According to Reuters data 30,6 % of EU states have adopted mandatory quota for listed companies but at different levels (Belgium, France, Italy, Germany, Austria, Portugal, Greece, the Netherlands), while 30,3% adopted divers soft measures (Denmark, Estonia, Ireland, Spain, Luxembourg, Poland, Romania, Slovenia, Finland, Sweden 30,3%). 16,6% had not taken any measures (Bulgaria, the Czech Republic, Croatia, Cyprus, Latvia, Lithuania, Hungary, Malta, Slovakia). https://www.reuters.com/business/sustainable-business/womens-quotas-company-boards-eus-frontrunners-laggards-2022-01-14/ January 14 2022; in the US:Nasdaq.
18 "With a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the underrepresented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers." This directive is part of labor law.
19 See the Danosa case: Danosa v. LKB Līzings SIA, C-232/09, 11 November 2011, where the Court as a board member, a pregnant woman cannot be dismissed on account of pregnancy and constitutes direct discrimination on grounds of sex contrary to provisions of directive 76/207/EEC
20 Council legal service, 11 June 2013, 8020/13, referred to in: the Commission Staff Working Document relating to the Directive, 16 July 2013, SWD (2013), 278 final .
21 See the arguments stated in the Preamble, 14. The directive only aims "at improving the gender balance"

However, in an opinion dated 16 July 2013, the Commission, in a Staff Working Document concluded "that Article 157(3) TFEU does not confer on the EU institutions the power to legislate on the composition of non-executive Boards. In particular, it confirms that non-executive Board members do not, in a general way, constitute "workers" in the meaning of EU law."[22] When in 2017, the project was discussed again under the Maltese Presidency, the Commission delegate reaffirmed its view that Article 157(3) was an appropriate legal basis[23]

It suffers little debate whether the issue of appointing directors or executives in listed companies who mainly direct or address the efficiency of company conduct and management should not -or at least not only - be addressed from the individual social position of the candidates involved, but also from the overall organisation of the legal entity, to the extent that this issue deals with the process of designating optimal candidates functioning in company boards and offering best guarantees for the company's success. The purpose of this directive is not to define the individual social position of a candidate[24], but to shape the composition of the company's boards and policies, the gender issue being a component of the efficiency of company conduct[25].The directive has a very substantial and exclusive impact on the functioning of listed companies, as these play a leading role in our economic systems and pursue overall success, without affecting the position of other legal bodies. There is no credible reason not to accept that this directive in fact touches on company law matters, and does not address the position of "men and women in working life" as such.

3. Scope and objective of the proposed regime

The proposed directive only addresses leadership positions in listed companies, as defined in the proposal[26]. Non-EU companies[27], SME and medium sized enterprises are excluded[28], and this irrespective of their importance, the volume of their business, or their economic added value. No mention is made of conglomerates, as a consequence of which the directive would only apply to the listed (top) company. This restrictive view on gender equality has not prevented the Commission itself to follow a diversity approach[29].

It would have been logical to extend the requirement to leadership positions in all large economically active entities. Also, the directive requirement does not extend to the entire structure of these entities: it only addresses the positions of members of

22 Dated 11 June 2013, 8020/13ADD 1
23 See Council, 31 May 2017, 9496/17, sub "delegations'
24 See the arguments stated in the Preamble, 14.
25 This refers to the points frequently made in legal writing, as mentioned supra note.10
26 It only applies to listed companies mostly of the "limited by shares" type, the registered office of which is located in the EU. Some jurisdictions accept other company types to be listed e.g. the S.p.a, or the GmbH type. The 'listing on a stock exchange' requirement would probably exclude companies traded on other trading facilities. See the Multinational Trading Facilities and "the Organised Trading Facilities", See : ESMA Recommendations, 8 April 2021
27 Article 2 (a)
28 Article 3. Obviously, the directive excludes business entities other than companies, such as mutual association, prominent in the insurance sector.
29 In 2019, 41% of managers in the Commission were women (up from 30% in 2014). This included 37% of senior managers (up from 27%) and 42% of middle managers (up from 31%).

the board of directors, including the non-executive directors - including the labor representatives[30]- involved in the decisions of the company; it also applies to the executive directors, in charge of the daily management of the company's affairs[31]. These are the persons exercising the ultimate responsibilities in these companies; the directive's equal employment principle would apply to both groups. Their appointment will be governed by the mechanisms applied in these companies, whether being elected or appointed by or on behalf of the shareholders or by decision of the general meeting, or pursuant to such a decision. The procedure to be followed in large general meetings deserves further analysis: decisions will be taken candidate per candidate, as proposed by the selection committee, the female candidates being first in line up to the mandatory quota, followed by a free vote for the remaining seats. The position of the candidates in this procedure will be protected by some kind of objection procedure, making it necessary that the information on the outcome of the selection procedure will be made available to him after the selection procedure, as this information will include the arguments which "tilted in favour of the another selected candidate". After this communication, the company has to stand ready to prove that article 4(a)2 has not been breached, i.a. that an objective assessment took place leading to tilting the balance in favour of the effectively selected male candidate.

The proposed directive approaches the matter of representation of female members from an equal treatment (in fact from a proportional) approach. Underlying, while the Commission affirms the benefits of a gender diversified board in terms of economic benefits, it limits their presence to a pre-established quota.

In many jurisdictions gender diversity has been practiced for many years, and several EU states expressly have mandated it in their national regulation or conduct recommendations[32]. The directive proposes formal minimum quantitative proportions of representation. In many companies, the Board of directors is composed of executive and non-executive directors. Some legal systems have separated these functions over two boards, e.g. a supervisory board and a management or executive board. The quantitative requirements indifferently apply to both categories of boards, but base the calculation for gender allocation on whether the directorships relate to executive or non-executive functions

This threshold for the presence of one or several members of the under-represented sex would be put at different optional levels:

(a)for non-executive directors as members of both types of boards, the threshold is set at least at 40% of the number of non-executive mandates on these boards ; if the outcome of the calculation is an odd number, it will rounded off to the number closest to 40%, but less than 50%; therefore the 40% quota is not a ceiling.

[30] See on the labor representatives, Preamble 21. A separate application of the quantitative objectives to representatives of shareholders and employees would be possible in accordance with national company law. See Article 4 b(1b)

[31] The relative importance in terms of numbers is higher for the non-executives, than for executive directors.

[32] See nt. 11,

(b) As an alternative companies may also adopt the following composition ratio:

On the basis of all director positions, the quota is in general at least 33% of all director positions, i.e. the aggregate of executive and non-executive positions in both boards [33]. If there are only executives in the executive board, the total number will lead to a higher participation on non-executives in the Board of directors to reach the overall 33 % quota. If these percentages may result in an odd number, the outcome will be rounded off to the number closest to 33% - but less than 50%.

Both quota are applicable simultaneously[34]: the 33% quota applies to all directors; the 40% quota only to the non-executive directors. When the 33% quota has been reached, the 40% quota may still come into play. And reaching the 40% quota will make it easier to also reach the 33% quota

An example
A company has a general board with a general board with 12 members, and an executive board with 6 members, together 18 members. One the basis of the 40% quota, 4,8 members of the General board should be F, rounded off to 5; on the basis oif the 33% quota, the 33% quota leads to 18 * 033= 5,94 of 6 directors. Applying both criteria, this company should have at least 6 F directors, and these may be members of the general board or of the executive board. The company may e.g. choose for 5 F members in the general board, and 1 in the executive committee.

The effects of these limitations have to be well considered in advance, taking into account that the percentages only refer to minimum percentages and that a higher number of female members may be invited to one of the boards, especially to the general board allowing to reach the 40% level. Once the quota have been met for both percentages, the remaining positions are free from limitation. [35]

If the quota have not been respected, e,g. a male candidate was elected, while there was only one female position left, the decision would be void[36], although national law may dispose otherwise, allowing e.g. that the next appointment will correct this situation.

Also, it is unclear how this mechanism will apply to labor representatives: will they be submitting to the pre-selection procedure as described below? In the absence of any provision to the contrary, the same quantitative requirements will be applied to the shareholder representatives and to the employee representatives. If they would be qualified as non-executives, this will reduce the possibility to appoint non-labor non-executives. Therefore national law may provide that the quantitative objectives apply

33 See article 4(2) for the number of positions necessary to attain the objective closest to 40% but less than 50%; this percentage has been further detailed in the annex to the directive.
34 The text of the proposed directive states that the objectives will apply as 40% or 33%, the first for the non-executives, the second for all directors.
35 The percentage requirements have been formulated as alternatives in article 4 (1) for the application of the suspension of article 4 (b)
36 Article 4(b) 1 a refers to enforcement measures but allows for transitional measures

separately to shareholder and employee representatives[37] In some cases, this would affect the balance of power within the board.

The proposed directive contains no information about how these requirements will fit into. the company's decision-making rules. In the absence of any indication to the contrary, this procedure will follow the company law rules: the members of the General Board of directors are appointed by the general meeting of shareholders. The members of the Executive committee are appointed by the board of directors, maybe on the proposition of the committee. These bodies will make the assessment of the candidates on the basis of "clear, neutrally formulated and unambiguous criteria established in advance of the selection process"[38] and can thereby take into account the gender requirements if applicable in the individual case, i.e. after the minimum percentage requirements have been met.

There is no requirement that all directors should be subject to the pre-selection process: this would only apply when an appointment would relate to a position which might influence the 40% or 33 % limit[39]. Also, for candidates for positions beyond the 40% or 33 % limits, the requirements would not be applicable: once these limits have been reached, the company is free to appoint the persons it wants. And for appointments beyond these limits, freedom to appoint female persons is also unlimited: the limits are stipulated as "at least x % of … director positions" to be held by female members, but less than 50% [40] Flexibility in the number of female members would allow to call on new female expertise and dynamism

The conditions which candidates have to meet will be decisive for the people potentially called to join a board. The selection among the potential candidates resulting in one or several nominees may be done by the board, possibly presenting several potential candidates for election, although the directive contains no indication about this point. The general meeting will then select the candidate with the best credentials. The same process will apply for the candidates for the executive committee, to be proposed by the general board as well, but for these candidates the potential skills and availability will play a more decisive role. For both cases, nominees proposed by the shareholders will take part in the selection process within the quota like any other candidate to a position limited by the quota. The same would apply to labor representatives

Company law will determine how the members of the general board are elected, whether on the proposal of the board, or of a shareholder or group of shareholders, or even by the candidate itself. Depending on the vacancy of a seat within the quota, the candidates will be subject to the comparative vetting procedure of article 4 (a) 1. From the outset it will be unclear who is going to win the selection, certainly if several groups of shareholders insist on having their candidates selected and included in the pre-selection process for a position within the quota. This would lead

37 See Preamble (21). The directive itself provides no specific rules relating to labor representatives
38 See article 4(a). The analysis of these requirements will apply to all candidates, but it is up to the company to decide which candidates it will admit to the pre-selection procedure.
39 Article 4(a) applicable to 'listed companies which do not meet these objectives"
40 See the formulation of article 4 (1) (a) and (b)

to a series of votes on these candidates: how this sequence of candidates will be organised is left to the company's selection committee, on the basis of a comparative analysis of their qualifications.

As these functions will be exercised in private companies, a fully neutral process may not seem easily compatible with the legally based decision-making of the shareholders who are as owners/ beneficiaries of the managers responsible for the business activity of the company. Beyond the regulated quota, the other positions in the boards will be free, and attributed to the candidates according to the outcome of the elections in the general meeting. The shareholders may therefore strive for the application of the minimum 33% female quota as cumulatively applicable to both boards, what may lead to a free choice for the remainder 77%, whether executives, or non-executives .

4. Process for selection of candidates

With a view of obtaining optimal outcomes in the identification of the best candidates, the process for the designation of candidates to these leading positions should guarantee the neutrality and objectivity of the selection process. Today members of the decision-making bodies in listed companies are designated as a result of different processes: suggestions from the shareholders, especially from the significant shareholders, or from the most active ones, proposals from the management, often identified as a result of the search efforts of an external consultant, or even on the proposal of the candidate itself. For labor representatives, proposals will be endorsed by the representative labor organisations. In practice, many appointments for executive positions take place at the demand of the top management which is directly exposed to the operational needs of the company and formulates the conditions required from the prospective directors.

The directive states that for the appointments of non-executive positions which should attain by end 2022 at least 40% of the non-executive positions- or 33% for all directorships-, companies will carry out a recruitment process, based on "clear, neutrally formulated and unambiguous criteria established in advance of the selection process"[41]. Between the candidates – male or female – who are equally qualified in terms of "suitability, competence and professional performance", preference will be given to the candidate of the under-represented sex[42]. The objection procedure introduces an exception which would apply to the case of a male candidate if "an objective assessment taking into account of all criteria specific to the individual candidates *tilts the balance* in favor of the candidate of the other sex", i.e. of the objecting male candidate[43]. This exception would apply to an individual non-executive appointment within the 40% objective, or the 33% quota

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

42 Article 4(a) 2

43 See article 4a (2)

objective for all candidates . Once these criteria have been reached, the other positions would not qualify for the opposition procedure and therefore, appointments are free and cannot be contested by turned-down candidates.

The directive does not exclude that the pre-hiring process is organized differently e.g. on the basis of a public search program, managed by the board or by an external advisor on the basis of criteria defined by the board. The intervention of an external professional advisor will not only identify interesting candidates unknown to the company's management but will give a neutral assessment of them, thereby reducing the complexity of the process[44], and giving comfort to the members of the body appointing them. This additional step would contribute to the credibility of the overall process, allowing to meet and balance the diversity criteria.

Said criteria should reflect the well identified needs of the company and its management in terms of business expertise and insight, technical knowledge, social position, and other elements proper to the individual case, such as proximity to the local environment. There will not be one single predominant characteristic, but a hierarchy of characteristics in function of the needs of the company and the position to be filled on the board. The proposed directive also alludes to this balancing of objectives in the identification of candidates, which will be the subject of an analysis by the appointing body, and may be subject to an additional review by the company in case a candidate complains[45].

In order to make this procedure operational, the company will have to inform the candidates which have been considered about the essential evaluation criteria followed, including the objective comparative assessment and where applicable, the considerations which have tilted the balanced to the candidate of the other sex[46]. This opposition procedure should be based on "an objective assessment taking account of all criteria specific to the individual candidates "[47]. The company can be held liable for not abiding to the applicable national provisions.

5. Application of the gender equality requirement in the company .

The proposed directive leaves it open which body will decide on the selection process of candidates; it will probably be the body where the appointments will have to be made i.e. the general meeting for the board of directors, or the board of directors for members of the Executive committee, where applicable on the advice of the nomination committee as a specialised committee of the board. The process should take place on the basis of a comparative analysis of the qualifications of each candidate, applying "clear, neutrally formulated and unambiguous criteria"

44 See article 4 (a) of the proposed directive stating that the selection of candidates takes place on "the basis of a comparative analysis of the qualifications of each candidate, by applying clear, neutrally formulated and unambiguous criteria established in advance of the selection process." The criteria are referred to as "suitability, competence and professional performance". It does not clarify who will adopt these criteria in detail.
45 See article 4 a (4), the company will have to prove that there was no breach of the selection criteria such as "suitability, competence, professional performance" established in advanced as mentioned in article 4a (2)
46 Article 4 a (3)
47 Article 4 a (2)

adopted in advance to the selection process[48]. Unclear is whether account should be taken of the specific needs of the position to be filled in - e.g. in terms of expertise - what seems logical, although may put pressure on the neutrality requirement. One smells the fear of a subjective process, the choice being determined by subjectivity or even favouritism. This selection process would normally lead to the proposal of the best qualified female candidate in order to attain the quantitative criteria. Only by way of exception can the company set aside the support of the directive for the female candidate.

The precedence to be given to candidates plays between all candidates with equal qualifications, in terms of suitability, competence and professional performance. Between these candidates, precedence will be given to the best placed candidate of the under-represented sex. If there are several candidates classified as comparable, the appointing body will have to make a decision and motivate its preference[49]. But several equally qualified candidates of the under-represented sex could be proposed for the choice of the general meeting. The choice will be final, subject to the opposition procedure from the male candidate presenting a stronger file.

The directive implicitly recognises that in some cases, this process may result in giving preference to a weaker female candidate. The directive therefore provides for some type of objection procedure from a candidate which has not been retained for appointment, in which case this plaintiff candidate alleges that he was "equally qualified" as compared with the selected candidate on the basis of "an objective assessment based of all criteria specific to the individual candidates "[50]. In this case the company will have to defend itself by proving[51] that, notwithstanding the provision giving priority to the female candidate, an "objective assessment …. which tilts the balance in favour of the proposed candidate of the other sex" [52]- i.e. the male candidate - justified "taking account of all criteria specific to the individual candidate", and this on the basis of the criteria considered most relevant. It is for the company to prove that the prerequisites – "equal qualification as to suitability, competence, professional performance" – have been met, and that the two candidates would be equally qualified in the pre-selection procedure , so that its decision allows a preference – "the tilting of the balance" - for the male candidate 'taking account of all criteria specific to the individual candidates" . The company has to prove that its choice did not breach the gender preference, except on the basis of the considerations tilting the balance in favour of the male candidate[53] This objection remedy is principally reserved to male candidates contesting the proposal favouring a female candidate, but whether it could be used by the company to give preference to a male candidate[54]. . The remedy cannot be used in a dispute

48 Article 4 a
49 This has already been decided in the ECJ case law: See Preamble, 25, nt 6.
50 Article 4 a (2)
51 This on the basis of article 4 a (4); the company has to prove that there has been no breach of article 4(a)2, i.e. that the 'balance tilted in favour of ' the selected male candidate
52 See article 4 a (2)
53 Article 4(a) 3(c) the decision to be adopted in light of the established facts from which it may be presumed that she was better qualified.
54 On the basis of article 4(a) 2.

opposing two candidates of the same sex, or between a female v a male candidate[55].

In certain cases, the company could be held liable for not abiding to the applicable national provisions[56]

6. Non-application of the directive.

In a certain number of cases, the directive will not apply, or will only partially apply. These cases often are based on the expectation that after time, the requirements of the directive will become widely applicable. These exceptions will render the directive's regime quite flexible.

A general exception relates to companies where the under-represented sex represents less than 10% of all employees[57]. One can imagine that to attain the 40% under-represented threshold, a large overhaul of the presently employed population would be necessary. The directive requirements would not be applicable.

The objectives of balanced gender representation will be deemed to be met for companies from Member States which have taken effective measures for meeting these objectives or have made progress coming close to these objectives: this exception will only apply to Member States where measures in that direction have been adopted before the entry into force of the directive[58]

In some states, a more favourable national regime of gender equality than provided for in the directive may already apply[59]. These national provisions may be maintained, provided that they do not introduce unjustified discriminations or affect the proper functioning of the internal market. The directive does not state that it will not be applicable, e.g. the rules on sanctions[60], or disclosure and reporting will still be applicable.

A similar idea is expressed in the transitional provision allowing a Member State to temporarily suspend the application of directive provisions on gender under-representation in the case the State has already adopted equally effective measures allowing to attain a more balanced representation leading over time to attain the 40% and 33% thresholds, or coming close to 30% or 25% of non-executive c.q. executive directors. This may be the case in which national legislation requires the female non-executive directors hold at least 30% of all non-executive positions or at

55 The formulation in article 4(a)2 seems to prevent this; the opponent should be of a different sex than the candidate proposed . This cannot be based on article 4(a) 4, which only deals with the burden of proof for the company that article 4(a)2 has been respected.
56 See article 6 (3)
57 Article 4(6); Preamble 24 a
58 Article 4 (b) 1; it would seem that this transitional regime would be limited to three years (article 8 -1)
59 See article 7; Preamble 22a
60 See article 6, (1) referring to national rules on enforcement; liability for acts or omissions may only be established on the basis of national law.

least 25% of all director position before the end of 2022.[61]. The suspension of the main regime in this case will be limited to end 2024. [62]

7. External Reporting- article 5

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

8. Infringements and Enforcement article 6

The proposed directive provides that Member states will adopt rules on enforcement and adopt measures to ensure application. Liability for acts or omissions attributed to the companies concerned will apply in accordance with national law.[63]

9. Entry into force

The new regime will enter into force on the 2022 according to the Maltese proposal. The objectives are planned to take effect from 30 September 2025.[64]It seems likely that this schedule will have to be postponed.

Conclusion

This proposed directive has been on the drawing board for about ten years. Member States have not been able to agree on the underlying policy. Whether that will change during the ongoing attempt to adopt the proposed directive is not sure[65].

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

The purpose of this directive is not to deal with the full subject of gender equality in the economic sector: it is limited to a specific class of large business firms, and

61 See article 4 b(1a) further dealing with the case of partial application, complemented with application to all listed companies not covered by national rules, including SME, and applicable to all board members and at least one lower level management member. Member States may provide that female member hold 33% of all director positions , executive or non-executives; Preamble 22.
62 See article 4 (1a) b and c for further details The date to be extended in the final version of the directive
63 Article 6(3)
64 Article 4 b(2), in fine.
65 Germany has announced it will not further oppose the discussion on the directive, but there is no information on the position of the other Member States which did not support.

leaves the other economic and other entities untouched, whatever their social functions: there is no general standard of gender diversity in our societies, applicable to the business, administrative, or other sectors. The directive further only deals with their highest decision-making levels, but the unbalance applies to all segments of these entities.

Even within this limited field, the directive only deals with the instruments to ensure gender balance; it does not indicate which body will be responsible for developing these rules, nor how candidates for these functions will be identified, and on which criteria these will be chosen. Who makes the appointments will be a matter of company law, but the proposals under this directive are not addressing the company's decision making bodies.

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

The main added value of this directive consists of putting forward formal gender quota, outlining the conditions along which this gender balance can be achieved: in this respect it rightly requires that candidates have to be selected as part of a -open - procedure, with a comparative analysis of the qualifications, with clear, neutral and unambiguous criteria. The selection procedure consists of choosing between the candidates meeting the criteria of suitability, competence and performance, priority being granted the under-represented sex. But there is no reference to the duty of the company to select the "best" candidate: the choice for a second or lower best candidate may lead to calamitous consequences for which the company may be responsible.

It is questionable whether for a limited objective such as the introduction of a formal gender proportion, a full scale, complex directive is necessary. The implementation in national law will create a complex set of binding rules, there where a more flexible approach is to be preferred, and would probably be more effective. As is already the case in several Member States, gender equality rules are included in the national corporate governance codes. These rules are legally binding, based on a comply-and-explain legal delegation, and enforceable thanks to the public attention for the mixed composition of board. Quota in a governance code may be equally effective, especially in listed companies with active shareholders, and enforceable thanks to the public attention for the mixed composition of board.
This approach would also avoid the difficult issues of conforming with company law, as is illustrated by the proposed directive's silence on this topic.