



GUBERNA Proposition

Women on Boards Directive

Proposition of GUBERNA regarding the transposition of the Women on Boards Directive (EU) 2022/2381 and the measures needed to reach the objectives set out in the Directive

On 23 November 2022, the European Parliament adopted the so-called Women on Boards Directive, which had been pending since 2012, this is Directive (EU) 2022/2381 of the European Parliament and of the Council on *improving gender balance among directors of listed companies and related measures*.

This Directive has to be transposed in national law before 28 December 2024. At the current stage, a legislative proposal is being prepared. With the present proposition and for the reasons developed hereinafter, GUBERNA recommends opting for an implementation of a soft law approach through amendment of the Corporate Governance Code 2020.

This proposition builds further on earlier positions and recommendations by GUBERNA. For an overview of these positions, please consult our website:

<https://www.guberna.be/en/zoeken/DIVERSITY>.

1. Motivation of the Directive

The Directive aims at ensuring the application of the principle of equal opportunities between women and men¹ and achieving a **gender-balanced representation among top management and board positions**, by establishing a **set of procedural requirements** concerning the **selection of candidates** for appointment or election to director positions based on transparency and merit. By doing so, the European Union acts in accordance with the **general principle of non-discrimination** as externalized in the Treaty on the functioning of the European Union which states in its article 10 that in defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability age or sexual orientation.

¹ Gender equality is one of the fundamental values of the European Union and is part of EU primary law (Council conclusions of 7 Mar. 2011 on European Pact for Gender Equality (2011–2020), 2011/C 0155/02, at 1; European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the regions: A Union of Equality: Gender Equality Strategy, 2020–2025, COM (2020) 152 final, at 1.11 Article 2 and 3 (3) TEU and Art. 8 TFEU; Art. 23 Charter of Fundamental Rights of the European Union; Arts 2 and 3 Treaty of the European Union)

Earlier, the European Parliament, in its resolution of 6 July 2011 on women and business leadership, urged companies to attain the critical threshold of 30% female membership of governance 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 quota**. It would be important that such legislation be implemented **on a temporary basis** and serve as a catalyst for change and for rapid reforms designed to eliminate persisting gender inequalities and stereotypes in economic decision-making.

The European Parliament **reiterated the call for legislation** in its resolutions of 13 March 2012 and 21 January 2021.

In its communication of 4 March 2021 entitled The European Pillar of Social Rights Action Plan, the Commission pointed out that, in order to achieve the overall goal of an employment rate of at least 78% among the Union population aged between 20 and 64 years by 2030, it is necessary to strive to at least **halve the gender employment gap compared to 2019**.

To that effect, enhancing **women's participation in economic decision-making**, on 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.

2. Measures imposed by the Directive

The Directive introduces **two alternative objectives** to be achieved by 30 June 2026, depending on **the choice of the Member States**²:

- » Either national legislation ensures that women³ hold at least **40% of non-executive positions**.
- » Or national legislation ensures that women hold at least **33% of all director positions, both executive and non-executive**⁴.

For listed companies which are not subject to the second objective, Member States shall ensure the setting of **individual quantitative objectives with a view to improving the gender balance among executive directors to be achieved by 30 June 2026**⁵.

² Article 5(1) of the Directive

³ The Directive uses the terminology underrepresented sex. At this stage of societal evolution, in business environments, only women are concerned. Therefore, for clarity reasons, we will use women, even if in France a precedent was set where the city of Paris was sanctioned for an unbalanced promotion to the detriment of the male gender. (https://www.lemonde.fr/politique/article/2020/12/11/la-ville-de-paris-mise-a-l-amende-pour-avoir-nomme-trop-de-directrices_6063019_823448.html).

⁴ Numbers must be rounded in accordance with a table appended to the Directive.

⁵ Article 5(2) of the Directive. According to recital 46 to the Directive: *With a view 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 achieving such objectives by the date set out in this Directive. Those objectives should help companies to achieve tangible progress as compared with their current situation. That obligation should not apply to listed companies which pursue the objective of 33 % relating to all directors, whether executive or non-executive.*

To reach (one of) the alternative objectives, the Directive makes use of different instruments, including a **means of positive action** ⁶:

(i) Adjustment of the **process of selection of candidates** for appointment or election to director positions:

- » Setting up, in advance, of a selection process allowing a comparative assessment based **on clear, neutrally formulated and unambiguous criteria** that must be applied in a **non-discriminatory manner** throughout the entire selection process
- » **Priority to women** when choosing between candidates who are equally qualified in terms of suitability, competence and professional performance ⁷
- » **Obligation to inform the candidate(s)** of the qualification criteria, the comparative assessment and, where relevant, the considerations for exceptionally tilting the balance in favour of a male candidate
- » **Reversal of the burden of proof** in favour of unsuccessful female candidates before a court or other competent authority
- » **Informing shareholders or employees** who have to vote on the appointment or election of Directors of the obligations laid down in the Directive

(ii) **Reinforced reporting:**

- » Information shared yearly with the competent authorities and on the website of the company about the gender representation on their boards, distinguishing between executive and non-executive directors and regarding the measures taken with a view to achieving the applicable objectives
- » This same information can be shared through the Corporate Governance Statement, where applicable

⁶ Articles 6 and 7 of the Directive

⁷ Unless, in exceptional cases, reasons of greater legal weight, such as the pursuit of other diversity policies, invoked within the context of an objective assessment which takes into account the specific situation of a candidate of the other sex and which is based on non-discriminatory criteria, tilt the balance in favour of the candidate of the other sex.

To make the measures effective, Member States have to lay down rules on effective, proportionate and dissuasive sanctions ⁸ for infringement and make sure those are implemented.

To this end, the Directive recalls that **positive action is legally permitted:**

- » The **Treaty on the functioning of the European Union**⁹ permits positive action by allowing Member States to maintain or adopt 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.
- » **The Charter of Fundamental Rights of the European Union**¹⁰ provides that equality between women and men is 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 underrepresented sex.
- » In its case-law on positive action and the compatibility thereof with the principle of non-discrimination based on sex, the **Court of Justice of the European Union** accepted that priority can in certain cases be given to the underrepresented sex in selection for employment or promotion, provided that the candidate of the underrepresented 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 can 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.

⁸ Article 8 of the Directive Including, but not limited to fines or the possibility for a judicial body to annul a decision.

⁹ Article 157(4) of the Treaty

¹⁰ Article 23 of the Charter

3. Scope of the Directive

The measures are limited to companies whose shares are admitted to trading on a regulated market (**“Listed Companies”**), with an exception for SME’s¹¹.

The role of listed companies to that effect is motivated by two main reasons: (i) listed companies have **a particular economic importance, visibility and impact on the market as a whole** – such companies set standards for the wider economy and their practices can be expected to be followed by other types of companies – and (ii) the **public nature of listed companies** justifies their being regulated to a greater extent in the public interest¹².

4. Importance of gender balance

Academic research highlights since long the importance of a certain degree of diversity in decision making bodies¹³.

Regarding gender diversity, its positive contribution to firm (financial) performance has long been disputed. More and more however, research points out that gender quotas for company boards do have positive implications for the companies concerned: the presence of women on boards is associated with more efficient corporate governance practices¹⁴, more sustainability¹⁵ and, in some countries, even lower equity costs¹⁶.

At any rate, as confirmed by the Directive, the objective of gender diversity in decision making bodies goes way beyond considerations of firm performance or corporate governance. This old quest for diversity is of societal concern and touches on the fundamental values of the European Union.

¹¹ Article 2 of the Directive. An SME is 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 (article 3(8) of the Directive).

¹² Recital 27 to the Directive.

¹³ Goyal, R., Kakabadse, A., & Kakabadse, N. (2019). Board Effectiveness in Ftse 250 Companies: Diversity May Hold The Key. In A. Levrau, & S. Gobert (Eds.), *Liber Amicorum of LAA Van den Berghe Intersentia*.

¹⁴ Atinc, G., Srivastav, S., & Taneja, S. (2022). The impact of gender quotas on corporate boards: a cross-country comparative study, *Journal of Management and Governance*, 26, 685–706. <https://doi.org/10.1007/s10997-020-09562-6>

¹⁵ Research has shown that gender diverse boards contribute to improvements not only in financial performance (Terjesen et al., 2016), but also on all three dimensions of ESG, i.e., environmental performance (Glass et al, 2016), social performance (Bruna et al., 2022), and corporate governance (Adams and Ferreira, 2009; Atinc et al, 2021).

¹⁶ Sarang, A., Aubert, N., & Hollandts, X. (2023). Board gender diversity and the cost of equity, what difference does gender quota legislation make? *International Journal of Finance & Economics*, 1-21. <https://doi.org/10.1002/ijfe.2774>

As stated by the Directive, in the aftermath of the COVID-19 crisis, **gender equality and inclusive leadership matter more than ever, in line with the need to make full use of the available pool of talent, of both women and men**. Research has shown that inclusion and diversity enable recovery and resilience. They are of vital importance in ensuring the Union's economic competitiveness, encouraging innovation and enhancing professional standards on boards.

5. Current situation in Belgium

In a global context of structural underrepresentation of women in decision making bodies, Belgian has been a **frontrunner** when it comes to gender quota, introducing in 1994 gender quota on election lists.

In 2011, the Belgian Corporate Governance Committee recommended including a target figure of 30% female representation on boards in the Corporate Governance Code, to be met by 2018. Due to the adoption of mandatory gender quota in Belgian law in 2011, the recommendation lost its relevance.

As a consequence of the gender quota law, applicable to listed companies, public companies and the National Lottery, **significant progress** was made related to the presence of female non-executive directors in boards of listed companies.

According to the preliminary results of the 2023 Monitoring Study of GUBERNA ¹⁷, the results evolved as follows:

- » Percentage of women directors on boards:
from 7,5% in 2008 to 36,7% in 2022¹⁸
- » Percentage of companies complying with the 33% quota:
from 9,7% in 2008 to 93% in 2022

¹⁷ Carried out by GUBERNA for the Commission Corporate Governance, results not published yet.

¹⁸ Note that these figures include the entire board of directors and therefore also the executive directors. According to the 2022 monitoring study, they make up a total of 14.5% of all directors within the surveyed boards of directors of Belgian listed companies. However, this group of executive directors consists of only 11.11% women.

However, the situation is wholly different as far as executive management teams are concerned. As highlighted by the study published by JUMP in June 2023, BEL 20 *Representation of women at the top*¹⁹ :

- » the number of women in executive committees in March 2023 is limited to **16,7%**
- » **over half of** the executive committees in 2020 held **no women**
- » during the same year 82% of the executive committees was composed exclusively of men or **comprised maximum one woman**²⁰ .

Indeed, related to executive management, the situation is far more complex than for non-executive board mandates which are by nature for a certain (shorter) duration whereas management functions are generally based on (longer) career evolutions and ideally the result of internal promotions.

6. Scope of the transposition into Belgian law

A question which is raised concerns the scope of the applicability of the objectives and measures set by the Directive, if transposed into Belgian law and in particular the questions:

within a Listed Company, whom is the Directive applicable to? Who are the directors targeted by the Directive, under Belgian law?

According to Directive ²¹, the notions board, director and (non)-executive director are defined as follows:

- (2) ‘board’ means an administrative, management or supervisory body of a listed company
- (3) ‘director’ means a member of a board, including a member who is an employees’ representative;
- (4) **‘executive director’ means a member of a unitary board** who is engaged in the daily management of a listed company or, in the case of **a dual board system**, a member of the board which carries out the management functions of a listed company;
- (5) ‘non-executive director’ means a member of a unitary board other than an executive director or, in the case of a dual board system, a member of the board which carries out the supervisory functions of a listed company;
- (6) ‘unitary board’ means a single board that carries out both the management and supervisory functions of a listed company;

¹⁹ <http://jump.eu.com/bel20-representation-women-top/>

²⁰ Internally acquired data from GUBERNA confirms these data. In December 2020, 14.6% of executive committee members in BEL 20 companies were women. In addition, 16% of the executive members within the boards of directors consisted of women.

²¹ Article 3 of the Directive

(7) ‘dual board system’ means a system in which the management and supervisory functions of a listed company are carried out by separate boards;

According to these definitions, the directors targeted by the thresholds set by the Directive must be **members of either a unitary board or a dual board**.

Under Belgian Corporate law this means that they must be either member of the raad van bestuur/conseil d’administration in a unitary system, or member of the governing bodies in a dual system: *raad van toezicht/conseil de surveillance* or *directieraad/conseil de direction*.

However, the Executive Management, as we find it in most listed companies organised under the unitary system, is not a member of the legal body called the Board of Directors under Belgian law (except for the Executive Director to whom – as a sole person – the threshold will not apply).

This means in practice that the **option given to the Belgian legislator** to choose for the threshold of 33% related to all, including executive mandates would be largely **ineffective for Belgian listed companies** because its consequences **would be limited** to those companies where the “executive directors” are members of a formal legal board. This is only the case for the financial sector and for the listed companies which have made the choice of **a dual system**²².

An alternative reading could be that the notion *board* must be **interpreted more broadly** than according to the Belgian orgaantheorie/théorie de l’organe. It would then include **all forms of governance bodies**, also those that are not regulated by Belgian corporate law but which de facto perform the top management functions. This reading is not generally supported but can be based on the definition of board as any kind of body as well as on a number of recitals to the Directive motivating its adoption such as:

» (31) *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 and a unitary system combining the management and supervisory functions in a single board. 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** existing in the Member States.*

²² Following companies have made the choice of the dual system (in December 2022): Umicore (BEL 20), Euronav (BEL Mid), Intervest Offices & Warehouses (BEL Mid), TINC NV (BEL Mid)

- » (32) 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 perform a supervisory function and are not involved in the daily management of the listed company. This Directive aims to improve the gender balance **among both categories of directors**. In order to strike the right balance between the need to increase the gender balance of boards and the need to minimise interference with the day-to-day management of a company, this Directive distinguishes between those two categories of director.

However, both the answer of the Secretary of State Marie-Colline Leroy to the parliamentary question asked by Els Van Hoof²³ as the press announcement of 8 September 2023 announcing the introduction in Belgian law of gender quota in management committees in combination with increasing the quota for boards of directors²⁴ suggest that the Belgian legislator at this stage endorses the first interpretation, in line with Belgian corporate law, but seems willing to go further than the minimum requirements²⁵ set by the Directive.

7. Proposal

GUBERNA recognizes that from a societal point of view, it is important to implement measures to reinforce at short delay the participation of women in all leadership functions as well as to enhance gender diversity and inclusion throughout all the layers of the company.

GUBERNA also explicitly recognizes that it has been proven that quota are an effective means to obtain positive results as far as the societal value of gender equality is concerned.

GUBERNA thus endorses the objectives of the Directive.

However, GUBERNA points out that it is necessary to take into account the flexibility needed by companies to adjust the measures to their specific situation to safeguard their resilience and competitiveness.

Therefore, GUBERNA proposes making maximum use of soft law instruments to achieve the objectives set out by the Directive.

²³ <https://www.dekamer.be/doc/CCRA/pdf/55/ac1139.pdf> (voir pages 31 et 32 - 28 Question de Els Van Hoof à Marie-Colline Leroy (Égalité des genres, Égalité des chances et Diversité) sur "Les quotas pour les comités de direction" (55037698C)).

²⁴ <https://www.tijd.be/politiek-economie/belgie/federaal/quota-voor-bel20-directies-op-tafel-zeker-een-op-drie-moet-vrouw-zijn/10491357.html>
<https://www.lecho.be/economie-politique/belgique/economie/vers-un-minimum-d-un-tiers-de-femmes-dans-les-directions-des-entreprises-du-bel-20/10491286.html>

<https://6d2dbbe9.prd.excom.fgov.be/fr/une-proposition-pour-renforcer-la-place-des-femmes-dans-les-instances-dirigeantes-des-entreprises>
<https://6d2dbbe9.prd.excom.fgov.be/nl/staatssecretaris-gendergelijkheid-gelijke-kansen-en-diversiteit-legt-invoering-quota-voor>

²⁵ Article 9 of the Directive authorizes Member States to introduce or maintain provisions which are more favourable than those laid down in this Directive.

GUBERNA recommends in particular that the objective of 33% of all director positions combined, including both non- executive and executive positions would be reached through the amendment of the Belgian Corporate Governance Code 2020. Executive position in this context is to be understood as all executive functions involved in the executive management of the company – de jure or de facto – in accordance with recitals 31 and 32 to the Directive.²⁶

In addition, to achieve the prescription of the Directive to opt for one of both objectives of its article 5 (1), the objective of 40% of non-executive director positions to be held by the underrepresented sex would be transposed into national law, leading to the amendment of article 7:86 of the Code of Companies and Associations.

Several motives argue in favour of the soft law solution:

- » The to be expected limited effectiveness of transposition of the second objective of the Directive (national legislation ensures that women hold at least 33% of all director positions, both executive and non-executive) into Belgian corporate law, as described hereinabove.
- » The Belgian Corporate Governance Code 2020 in its provisions regarding the executive management expressly aims at all executive directors and members of an executive committee²⁷ regardless of whether those directors are members or not of an executive body in accordance with Belgian Corporate Law. Listed companies must therefore be consistent and accept to take voluntary but transparent and stringent measures to accelerate the implementation of gender balance within their executive management. The results of research carried out in Norway suggest that when quota are carried out on a voluntary basis, they have positive effects on firm performance²⁸.

²⁶ The legislative proposal of December 9, 2020 to introduce gender quotas for the management committees of autonomous public companies and the National Lottery, DOC 55 1693/001, already aims at the minimum target of 33% for autonomy of public companies and the National Lottery. <https://www.dekamer.be/FLWB/PDF/55/1693/55K1693001.pdf>

²⁷ Belgian Corporate Governance Code 2020, definitions, p 6

²⁸ Garcia-Blandon, J., Argiles-Bosch, J., Ravenda, D., & Rodriguez-Perez, G. (2023). Female directors, board-gender quotas and firm performance: evidence from Norway, *Economic Research*, 36(1), 1-19. <https://doi.org/10.1080/1331677X.2022.2142822>

- » The application of the Belgian Corporate Governance Code is not without obligation. It is more than self-regulation to the extent that it is legally compulsory for listed companies to report on the compliance with the Code 2020 in their annual public report, while indicating where and when they opted for other measures, as well as why they chose these measures ²⁹. On top of possible legal consequences resulting from the lack of legal conformity of the annual report (including directors' liability), the transparency assured by its public character can generate market effects. Also, it has been proven that the comply or explain principle works well in Belgium ³⁰. The Corporate Governance Committee monitors on a yearly basis the application of the Code 2020 as well as the quality of the explanations and closely follows up the continuous improvement of the best practices by the Belgian listed companies.
- » Independently of all legal interpretations and discussions, the soft law approach has four important advantages:
 - (i) It allows companies to make-to-measure the steps to be taken to achieve the objectives
 - (ii) It assures adequate follow up by the Corporate Governance Committee as well as more flexible adaptation whenever necessary
 - (iii) It assures transparency towards financial markets and towards the relevant stakeholders, including women
 - (iv) It avoids the emergence of so-called decoupling practices where companies publicly assert making efforts while they do not fully internalize them ³¹

The measures proposed would be in line with the measures proposed by the Directive, including the setting of individual quantitative objectives, to achieve the goal objective of 33% of women in non-executive boards and executive committees board positions combined.

As confirmed by research, the introduction of targets and the public monitoring of their fulfilment are important to guarantee the effectiveness of gender balance in decision making³².

²⁹ Article 3:6 § 2 of the Code of Companies and Associations

³⁰ Contrary to the Netherlands, where the Social Economic Council concluded in 2018 that the target figure set by Dutch soft law was not met because *the comply-or-explain mechanism does not work properly and only a limited number of companies complied with the legislation*. The Council proposed two measures: (1) mandatory quota for supervisory boards of listed companies and (2) *appropriate and ambitious targets* for the management boards and supervisory boards of large companies (van 't Foort-Diepeveen, R.A. (2021). Gender quotas for corporate boards: A comparison between Belgium and the Netherlands. *European Company Law Journal*, 18(4), 125-139. <https://doi.org/10.54648/eucl2021016>)

³¹ S. Terjesen, R. Aguilera, R. Lorenz, Legislation a Woman's seat on the board: Institutional Factors Driving Gender Quotas for Boards of Directors, *J Business Ethics*, 2015, p. 246

³² Another alternative to boost effectiveness is the establishment of a credible threat that hard law quota will be imposed if diversity goals are not achieved (Mensi-Klarbach, H., Leixnering, S., Schiffinger, M. (2021). The Carrot or the Stick: Self-regulation for Gender-Diverse Boards via Codes of Good Governance. *Journal of Business Ethics*, 170, 577-593. <https://doi.org/10.1007/s10551-019-04336-z>)

This would however not suffice: to avoid that the advantage of quota would be narrowed down to the scope of the quota ³³, GUBERNA would also recommend inserting in either the Corporate Governance Code itself or through an explanatory note a set of best practices to promote a wider equality reach on the work floor, through cultural change with a diversity and inclusion focus. This would include the setting up of gender equality policies in order to achieve gender balance at all levels ³⁴ paired with systemic change-oriented measures ³⁵ (such as putting gender equality and diversity on the agenda of the board of directors, implementing management training, developing HR-strategies designed to encourage targeted recruitment, setting up mentoring schemes and career development guidance for women, etc.).

GUBERNA recommends making such soft law effective within a short delay to stimulate companies to take the necessary measures to achieve the intended results within the time line set out by the Directive (30 June 2026), subject to the application of the comply or explain principle.

Finally, GUBERNA recommends broadening the scope of gender equality policies and systemic change-oriented measures beyond listed companies. All large companies, whether their ownership is public or private, have a leading role towards the market as a whole. Of course, for non-listed companies, no legally founded soft law framework is today in place. However, relevant policies, measures and adequate reporting can be encouraged through voluntary governance codes, such as the Code Buysse ³⁶, allowing public monitoring of the progress.

³³ According to research, quota however effective, can lead to silos of equality and do not necessarily have a spillover effect (Seierstad, C., Healy, G., Le Bruyn Goldeng, E., Fjellvaer, H. (2021) A quota silo or positive equality reach? The equality impact of gender quotas on corporate boards in Norway. *Hum Resour Manag Journal*, 31, 165–186. <https://doi.org/10.1111/1748-8583.12288>)

³⁴ Going further than article 3:6 § 2, 6° of the Code of Companies and Association according to which the scope of the diversity policy to be developed in line with the comply or explain principle is limited to the members of the board of directors, or, where applicable, the supervisory board and the management council, the persons charged with management and the persons charged with the daily management (*dagelijks bestuur/gestion journalière*) of the company.

³⁵ Research points out that diversity training is successful to promote equity only when coupled with relevant systemic changes. (A. Kalev, F. Dobbin, Companies need to think bigger than diversity training, HBR, <https://hbr.org/2020/10/companies-need-to-think-bigger-than-diversity-training>)

³⁶ <http://codebuysse.com/nl/default.aspx>