

EU Proposes Gender Balance Quotas for Listed Company Boards

On November 14, 2012, the European Commission adopted a proposal for a [directive](#) (the “Proposed Directive”) that aims to substantially increase the number of women on EU corporate boards. In the Commission’s view, non-binding efforts to enhance female board representation¹ have proven ineffective. The proposed measures are intended to be of a transitory nature (*i.e.*, until sustainable progress has been reached in the gender composition of boards). Accordingly, the Proposed Directive would expire on December 21, 2028.

The Proposed Directive applies to companies incorporated in an EU Member State having securities admitted to trading on a regulated market and not qualifying as small or medium-sized enterprises under EU law.² The Proposed Directive distinguishes between non-executive and executive directors and imposes binding requirements only with respect to the selection of non-executive directors.

The Proposed Directive creates binding requirements designed to increase the representation of the “under-represented” sex among non-executive directors to at least 40% by January 1, 2018 for listed companies that are public undertakings (*i.e.*, listed companies over which public authorities exercise directly or indirectly a dominant influence) and by January 1, 2020 for other covered companies. The Proposed Directive provides that covered companies must establish clear, neutrally formulated and unambiguous criteria for the selection of non-executive directors and perform an objective comparative assessment based on such criteria.³ Priority must be given to a non-executive director candidate of the under-represented sex if that candidate is equally qualified as a candidate of the other sex and if an objective assessment does not tilt the balance in favor of the candidate of the other sex. Upon the request of an unsuccessful candidate, companies will be required to disclose the

¹ Including the “Women on the Board Pledge for Europe” (*see* http://ec.europa.eu/commission_2010-2014/reding/womenpledge/index_en.htm).

² Commission Recommendation 2003/361/EC of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises, OJ L 124, May 20, 2003, p. 36.

³ The Proposed Directive takes into account the fact that the methods of recruiting and appointing directors differ from one Member State to another and from one company to another. The requirements concerning the selection of candidates should be met at the appropriate stage of the selection process in accordance with national law and the articles of association of the listed companies concerned, given that the Proposed Directive only establishes a minimum harmonization. (See preamble (27) to the Proposed Directive).

criteria on which the selection was based and the considerations that tilted the balance in favor of a candidate of the other sex.

With respect to executive directors, the Proposed Directive does not impose binding requirements to favor candidates of the under-represented sex, but requires covered listed companies to set individual targets for the representation of both sexes.

In their legislation implementing the Proposed Directive, Member States may provide for two exceptions to the quota for non-executive directors. First, Member States may provide that the 40% objective does not apply to companies whose workforce consists of less than 10% of the under-represented sex. Second, Member States may provide that the target will be met if the company can show that members of the under-represented sex hold at least one-third of all director positions (executive and non-executive).

The Proposed Directive also imposes reporting obligations on covered listed companies, who will have to provide information to the competent national authorities and on their websites (beginning from the second year after the adoption of the directive) on the gender composition of their boards, including the reasons why the targets referenced above have not been met, if applicable.

The Proposed Directive leaves broad discretion to Member States to determine the sanctions applicable to breaches of the companies' obligations, which may include administrative fines or nullity of the appointment or election of non-executive directors.

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If you have any questions, please feel free to contact any of your regular contacts at the firm or any of our partners and counsel listed on our website at <http://www.clearygottlieb.com>.

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