

Gender-quotas in German Companies: Federal Cabinet Adopts Draft Legislation

On December 11, 2014, the German Federal Cabinet adopted draft legislation with the aim of increasing women's participation in leadership positions in the public and private sector. The proposed bill will introduce, amongst other things, quotas for women on company boards. We expect the new provisions to come into effect in 2015. Pursuant to the current version of the draft bill, companies subject to the flexible-quota targets described below will then have to set their quotas by no later than June 30, 2015. The fixed-quota requirement described below will have to be observed as from January 2016.

Outline of the New Legal Regime

The new bill establishes specific requirements as to how leadership positions in private companies as well as the federal administration are to be assigned in order to achieve a better gender balance. Amendments most relevant to the private sector are reflected in the Stock Corporation Act (*Aktiengesetz* - AktG), the SE Implementation Act (*SE-Ausführungsgesetz* - SEAG) and the Law on Limited Liability Companies (*Gesetz betreffend die Gesellschaften mit beschränkter Haftung* - GmbHG), particularly in the provisions governing the management and the supervision of the relevant companies, as well as in the labor law regulations regarding co-determination.

Flexible-quota Targets

The proposed legislation introduces an individually defined gender-quota for the top three management levels of German companies that are either subject to co-determination – regardless of whether pursuant to the One-Third-Participation Act (*Drittelbeteiligungsgesetz* - DrittelbG) or the Co-Determination Act (*Mitbestimmungsgesetz* - MitbestG) – or listed on the stock exchange on a regulated market. In these companies, the supervisory board will be obliged to set quota targets for women representation in the management board in regular intervals (e.g. sec. 111 new para. 5 AktG, sec. 52 new para. 2 GmbHG). If, at the time the targets are set, the actual proportion of women at the level of the management board is less than 30%, these targets may not fall below the current proportion.

In order to ensure prompt compliance, the supervisory board will also determine deadlines for the achievement of the quota targets which may not exceed five years. Listed companies will have to disclose the targets that have been set and whether they were achieved or not (and the reason for non-compliance, if any) after the expiration of the deadline in their corporate governance declaration. Other affected companies will either have to include this information in their management report or, if not applicable, need to publish a specific report on this topic.

The management board, in turn, will proceed likewise and determine target quotas for the two management levels below the management board (e.g. sec. 76 new para. 4 AktG, new sec. 36 GmbHG).

Fixed-quota Requirement

As for the supervisory board, the new bill will apply a double-track approach.

The supervisory board of German companies that are either subject to co-determination or listed on the stock exchange will, in regular intervals, determine quota targets under the above-described requirements for itself (e.g. sec. 111 new para. 5 AktG, sec. 52 new para. 2 GmbHG).

With regard to German companies, however, that are both subject to equal co-determination pursuant to the Co-Determination Act and listed on a regulated market of a stock exchange, the more stringent concept of a fixed quota will apply. A new provision will establish a 30% minimum quota for each gender with regard to the composition of the supervisory board (e.g. sec. 96 new para. 2 AktG). The threshold generally applies to the board as a whole, namely is set as a percentage of all the shareholders' and the employees' representatives. Should either of these groups disagree, however, each of them will need to achieve the 30% quota separately.

If the election or appointment of a person to the supervisory board violates this 30% minimum requirement, the respective act will be deemed void (so-called "policy of the empty chair"). This means that, in case the members of the supervisory board are being elected or assigned individually one after another, the first act which violates the quota requirement (and, if applicable, every successive act) is invalid. If the board is being elected en bloc, the entire election or assignment is void with regard to the gender which is overrepresented.

The concerned companies will have to disclose in their corporate governance declaration whether the fixed quota was achieved or not and provide reasons in the event of non-compliance.

Scope of Application

It is important to note that the scope of application of the new bill will be governed by a sophisticated legal regime. Different from what might have been assumed, the proposed legislation neither directly relates to specific legal forms of organization nor (immediately) to the size or turnover of a company. The crucial point will instead be whether a company is subject to co-determination – either pursuant to the One-Third-Participation Act or the Co-Determination Act – and/or listed on the stock exchange. Consequently, even small public stock corporations or partnerships limited by shares (*Kommanditgesellschaft auf Aktien*) will be concerned by the new legal regime just as private limited liability companies with more than 500 employees. Hence, the proposed legislation affects – in addition to most of the German blue chips – a large number of small and medium companies (*Mittelstand*). The government estimates that about 3.500 companies are concerned.

Please feel free to contact any of your regular contacts at the firm or Gabriele Apfelbacher (gapfelbacher@cgsh.com) or Oliver Schröder (oschroeder@cgsh.com) if you have any questions.

CLEARY GOTTLIEB STEEN & HAMILTON LLP

Office Locations

NEW YORK

One Liberty Plaza
New York, NY 10006-1470
T: +1 212 225 2000
F: +1 212 225 3999

WASHINGTON

2000 Pennsylvania Avenue, NW
Washington, DC 20006-1801
T: +1 202 974 1500
F: +1 202 974 1999

PARIS

12, rue de Tilsitt
75008 Paris, France
T: +33 1 40 74 68 00
F: +33 1 40 74 68 88

BRUSSELS

Rue de la Loi 57
1040 Brussels, Belgium
T: +32 2 287 2000
F: +32 2 231 1661

LONDON

City Place House
55 Basinghall Street
London EC2V 5EH, England
T: +44 20 7614 2200
F: +44 20 7600 1698

MOSCOW

Cleary Gottlieb Steen & Hamilton LLC
Paveletskaya Square 2/3
Moscow, Russia 115054
T: +7 495 660 8500
F: +7 495 660 8505

FRANKFURT

Main Tower
Neue Mainzer Strasse 52
60311 Frankfurt am Main, Germany
T: +49 69 97103 0
F: +49 69 97103 199

COLOGNE

Theodor-Heuss-Ring 9
50688 Cologne, Germany
T: +49 221 80040 0
F: +49 221 80040 199

ROME

Piazza di Spagna 15
00187 Rome, Italy
T: +39 06 69 52 21
F: +39 06 69 20 06 65

MILAN

Via San Paolo 7
20121 Milan, Italy
T: +39 02 72 60 81
F: +39 02 86 98 44 40

HONG KONG

Cleary Gottlieb Steen & Hamilton (Hong Kong)
Hysan Place, 37th Floor
500 Hennessy Road
Causeway Bay
Hong Kong
T: +852 2521 4122
F: +852 2845 9026

BEIJING

Twin Towers – West (23rd Floor)
12 B Jianguomen Wai Da Jie
Chaoyang District
Beijing 100022, China
T: +86 10 5920 1000
F: +86 10 5879 3902

BUENOS AIRES

CGSH International Legal Services, LLP-
Sucursal Argentina
Avda. Quintana 529, 4to piso
1129 Ciudad Autonoma de Buenos Aires
Argentina
T: +54 11 5556 8900
F: +54 11 5556 8999

SÃO PAULO

Cleary Gottlieb Steen & Hamilton
Consultores em Direito Estrangeiro
Rua Funchal, 418, 13 Andar
São Paulo, SP Brazil 04551-060
T: +55 11 2196 7200
F: +55 11 2196 7299

ABU DHABI

Al Sila Tower, 27th Floor
Sowwah Square, PO Box 29920
Abu Dhabi, United Arab Emirates
T: +971 2 412 1700
F: +971 2 412 1899

SEOUL

Cleary Gottlieb Steen & Hamilton LLP
Foreign Legal Consultant Office
19F, Ferrum Tower
19, Eulji-ro 5-gil, Jung-gu
Seoul 100-210, Korea
T: +82 2 6353 8000
F: +82 2 6353 8099