



„WOMEN ON BOARDS“

DIRECTIVE ON EQUALITY AMONG TOP POSITIONS IN
PUBLIC COMPANIES

LAW ALERT AUGUST 2023



Nearly ten years after the presentation of the draft by the European Commission, on November 23, 2022, the European Parliament ratified Directive 2022/2381 of the European Parliament and of the Council, focusing on enhancing the gender balance within the leadership of publicly listed companies and associated measure (the "Directive"). The objective of this Directive is to ensure the effective implementation, across Member States, of the principle of equal opportunities and fair treatment for both women and men within the labour market, encompassing employment conditions and career advancement.

The primary aim of the Directive is to instigate changes in the corporate governance practices of substantial public companies. It mandates Member States to establish procedures that target the attainment of gender balance in executive management roles.

While the incorporation of the Directive into Polish law is slated for December 28, 2024, considering the tenures of corporate bodies, it is advisable to commence taking preliminary measures to amend corporate governance regulations at this time. This proactive approach will enable companies to be well-prepared for realizing the gender parity benchmarks specified in the Directive by the middle of 2026.

OBLIGATED ENTITIES AND THEIR NEW OBLIGATIONS

Only public companies will be obliged to implement the established parities, but not all - micro, small and medium-sized enterprises (SMEs) are excluded. In view of the above, listed companies with **more than 250 employees** and an annual turnover **in excess of €50 million** or an **annual balance sheet total in excess of €43 million** will be required to amend their corporate governance rules to include:

- I. a procedure for the selection of members of company bodies based on objective criteria; and
- II. a safeguard mechanism that will give preference to minority candidates in the event of equal qualifications.

The directive aims to address the deficiency in transparency within the process of appointing candidates for the roles of executive and non-executive directors (who perform management and supervisory functions, respectively, as defined by the Polish legal system – indicating members of management boards, and members of supervisory boards or audit committees, respectively). This will be achieved by introducing appropriate and clearly formulated selection criteria for these positions. Companies bound by this requirement will be obligated to equally acknowledge the competencies, knowledge, and skills of candidates, regardless of their gender.

The implementation of minimum standards for the selection procedure and the objective, comparative, assessment of candidates' qualifications is anticipated to result in an improved gender balance in roles crucial to the company's significant investment and business deliberations.

According to the European Commission's perspective, the criteria introduced in this manner will guarantee the transparency of the selection processes. This will enable candidates to be evaluated impartially based on their individual merits, irrespective of their gender.

Simultaneously, if the outcome of the 'test of competence, knowledge, and skills' is identical for candidates of both genders, the company will be required to offer the position to the candidate of the gender that is less represented.

Furthermore, upon request from an unsuccessful candidate, the company is obligated to provide the criteria that formed the basis of the selection process, along with an objective comparative evaluation of candidates based on those criteria. Additionally, the specific considerations that ultimately led to the selection of the non-underrepresented candidate must be disclosed in the particular scenario. The Directive also mandates Member States to establish an appeal mechanism, allowing a challenge against the company's decision, to be presented before a court or another competent authority.

PARITY REQUIRED

Gender equality constitutes one of the fundamental rights safeguarded by EU law and is accorded specialized protection. EU institutions are entrusted with advancing equitable economic autonomy for individuals of all genders, reducing the gender wage gap, changing the gender equilibrium in decision-making roles, and fostering the equitable distribution of caregiving responsibilities.

However, the uneven distribution of women and men across distinct labour market sectors remains an ongoing concern. In May 2023, the European Institute for Gender Equality (EIGE) released data showing the count of women and men holding pivotal decision-making positions. This information is segmented by industry, yet in each sector, a notable gap can be observed between the representation of women and men in significant economic decision-making roles. In 2023, women accounted for only 34% of leadership roles made up of CEOs, board members, or employee representatives within the largest public enterprises.

As stipulated by the Directive, large public companies are mandated to achieve certain thresholds by 30 June 2026. Either a minimum of 40% of non-executive director positions, involving supervisory responsibilities, or a minimum of 33% of all directorial positions, encompassing both non-executive and executive directors, must be filled by individuals of the underrepresented gender. Consequently, corporations are compelled to synchronize the composition of their supervisory or audit committees and boards of directors with the aforementioned ratios by mid-2026. The discretion to select which of the mentioned thresholds will be applicable in their respective Member State is vested in the hands of national legislators.

MEANS OF ACHIEVING THE OBJECTIVES

Furthermore, the Directive introduces an imperative regarding reporting. Member States are obliged to submit annual reports to pertinent EU authorities concerning gender representation within boards of public companies. These reports must differentiate between executive and non-executive directors. Member States are also obligated to furnish information about any initiatives undertaken to fulfil the prescribed top-down gender parity. In parallel, public companies will be mandated to make the aforementioned information readily accessible on their websites.

While the Directive does not suggest specific penalties for non-compliance, it delegates this authority to Member States to formulate a compendium of measures applicable in cases where obligated entities violate the regulations enshrined in national law. Nonetheless, the Directive stipulates that the repercussions for transgressing established norms must be effectual, commensurate, and discouraging. Given these requisites, it is plausible that these sanctions might encompass pecuniary penalties (monetary fines) and may extend to more substantial actions such as the potential revocation or annulment of decisions made by authorities within a public company.

TIME AVAILABLE FOR IMPLEMENTATION

To expedite the attainment of gender equilibrium while allowing ample time for public companies to make necessary preparations, Member States are required to implement the Directive by 28 December 2024. By no later than 30 June 2026, significant public companies are expected to have integrated appropriate quotas. This makes it even more important to consider preliminary actions at present.

As a reminder, the existing Best Practices for WSE Listed Companies 2021, which public companies listed on the WSE have committed to adhere to, dictate the requirement for these companies to adopt a diversity policy governing the constitution of their management and supervisory boards. Consequently, public companies are mandated to define diversity objectives and criteria spanning aspects such as gender, education, expertise, age, or professional background. Pertaining to gender diversity, the condition established by the Best Practices for WSE Listed Companies 2021 is that the underrepresented gender should constitute no less than 30% of the respective board.

Legal Basis:

Directive (EU) 2022/2381 of the European Parliament and of the Council, dated 23 November 2022, regarding the enhancement of gender balance among directors of publicly listed companies, along with associated measures.

If you have any questions related to the issues presented, please contact our lawyers in the Company Law and Corporate Governance team:

