A Proper Crack in the Glass Ceiling
The Women on Boards Directive Explained

For many Irish companies, the creation and promotion of diverse, equal and inclusive workplaces has been a board agenda item for some time. The Women on Boards Directive is the next in a series of ESG-related measures moving quickly through the EU legislative process. This time, the focus is on the boardroom.

> *In 2021, women accounted for an average of 30.6 % of the members of boards in the EU's largest listed companies and for only 8.5 % of chairpersons (source: European Institute for Gender Equality)*

The directive revives and recasts an EU initiative first proposed in 2012. The proposal aims to improve gender balance on the boards of listed companies and reflects a drive by the EU, over the past decade, to address gender equality in economic decision-making. Most Irish listed companies are already engaging with these themes. The directive, however, marks a discernable gear shift in the campaign to achieve gender balance at board level.

The directive was adopted by the EU Council of Ministers on 17 October 2022 and by the European Parliament on 22 November 2022. The directive must next be published in the Official Journal of the EU and 20 days after that, it becomes law. Ireland, and other Member States, will then have two years to transpose the directive into national law. The transposition process will involve important policy deliberations. The Irish government has already signalled its support for the principles underlying the directive, reflecting its broader and ongoing commitment to ensuring more diverse and inclusive workplaces. In Dáil debates concerning the Irish Corporate Governance (Gender Balance) Bill (a Private Members' Bill which is unlikely to progress further), the government indicated that its focus, for the time being, would be on developments at EU level.

As the shape of the new regime begins to come into clearer focus, and with indications that the regime may, in time, extend to non-listed companies, Matheson looks at the changes ahead.

Gender Balance Targets

Under current proposals (and in a shift from the 2013 position), Member States have a choice. They must decide whether to require EU registered companies with shares listed on an EU regulated market to aim, by 30 June 2026, to have:

(a) members of the underrepresented sex hold at least **40%** of non-executive director positions (**NED Objective**); or

(b) members of the underrepresented sex hold at least **33%** of all director positions, including both executive and non-executive directors (**Board Objective**).

In an attempt to strike a balance between the gender balance agenda and the need to prevent interference with the day-to-day management of a company, the Women on Boards Directive distinguishes between executive (management) and non-executive (supervisory) directorships.

A listed company failing to meet the NED Objective or Board Objective, as applicable under national law, must adjust its board selection procedure. Member States must ensure that where listed companies are not subject, under national law, to the Board Objective, individual quantitative objectives with a view to improving the gender balance among executive directors are established.

Priority Given to Underrepresented Sex

Built into the proposal is an acknowledgment that across Member States and listed companies, there are different approaches to board selection. There is no attempt to harmonise national laws on selection processes or qualification criteria.

The core aim of the directive is that Member States ensure that, when listed companies are choosing between candidates for directorship positions who are equally qualified in terms of suitability, competence and professional performance, priority is given to the candidate of the underrepresented sex. Qualification and merit remain the essential criteria.

This approach should not, however, lead to an automatic and unconditional preference.

Listed Examples of Appropriate Selection Criteria

- Professional experience in managerial or supervisory tasks
- International experience
- Multidisciplinarity
- Leadership
- Communication skills
- Networking abilities
- Knowledge in specific relevant areas such as finance, financial oversight or human resources management

In exceptional cases, competing laws and policies may prevail. For example, broader diversity policies may exist at national or company level in director selection. The overriding of the gender balance approach should be the exception, be based on a case-by-case assessment and be objectively justified based on criteria which should not, in any event, discriminate against the underrepresented sex.

Selection Process

"Clear, neutrally formulated and unambiguous criteria" must be established in advance and applied in a non-discriminatory manner. The directive provides that diversity obligations must be met at the appropriate stage of the selection process in accordance with national law and the articles of association of the relevant listed company. The principles must be applied in preparing vacancy notices, the pre-selection and shortlisting phases, and in establishing candidate selection pools.

> *"This is a long-awaited moment, a moment to be celebrated as a breakthrough in gender equality. After ten years since its proposal by the European Commission, we will now have an EU law to break the glass ceiling of listed companies boards.*
>
> *There are plenty of women qualified for top jobs and with our new European law, we will make sure that they have a real chance to get them."*
>
> **Statement by EU Commission President von der Leyen together with Vice-President Jourová and Commissioner Dalli on 22 November 2022**

Unsuccessful candidates can require the listed company to inform them of the qualification criteria upon which the selection was based, the objective comparative assessment of the candidates under those criteria and, where relevant, the specific considerations exceptionally tilting the balance in favour of a candidate who is not of the underrepresented sex.

Development of Gender Equality Policies

Listed companies should put in place a gender equality policy targeted at achieving gender balance at all levels in the company. Examples of potential practices are given including the nomination of both a female candidate and a male candidate for key positions, mentoring schemes and career development guidance for women, and human-resources strategies designed to encourage diverse recruitment.

Why the Focus on Listed Companies?

The Commission sees listed companies as having a particular economic importance, visibility and impact on the market as a whole. They set standards for the wider economy and practices to be followed by other types of companies. The public nature of listed companies is regarded as justifying their being regulated to a greater extent in the public interest. In being seen as having a "dominant influence over listed companies", Member States have the legal tools at their disposal to accelerate change in this area. That said, the directive signals the potential extension of the directive to non-listed large companies at some time in the future.

The Member State competent to regulate the listed company will be the country in which the company has its registered office, rather than the one on whose regulated market the company trades its shares. The applicable law would be the law of the country in which the listed company has its registered office. A "listed company" means a company incorporated in a Member State whose securities are admitted to trading on a regulated market.

The regime will not apply to micro, small and medium-sized enterprises (as defined).

Reporting

The proposal envisages annual reporting by listed companies on board gender representation and the steps taken to meet the targets in the directive. The reporting should be contained in the corporate governance statement of listed companies and available on the company's website. Member States will also publish annually a list of the companies that meet the directive's targets, based on information supplied to them by listed companies.

Penalties and Suspension

Member States must introduce effective, proportionate and dissuasive penalties for listed companies failing to comply with national rules implementing the directive. Fines and annulments of appointments are cited as examples. The directive makes clear that listed companies must be held liable only for acts or omissions which can be attributed to them under national law.

In an interesting development, the directive features a provision relating to public procurement. Member States should ensure that, in the performance of public contracts and concessions, listed companies comply with applicable EU obligations under social and labour law.

Where the process for selecting candidates for appointment or election to the board is made through a vote of shareholders or employees, listed companies must ensure that voters are properly informed about the terms of the directive, including penalties for non-compliance by the listed company.

If a Member State already has in place an effective system matching the one proposed in the directive and fulfils other conditions, it can suspend the application of the directive. Ireland has no such domestic regime in place. Member States are also free to introduce measures that go beyond the proposed system.

Sunset Clause

The Women on Boards will expire on 31 December 2038. The Commission will consider whether there is a need to extend the duration of the directive beyond that date, or whether there is a need to amend it, for instance, by extending its scope to non-listed companies which do not fall within the definition of SMEs.

Matheson's View

Achieving gender balance in decision-making and politics is a key priority contained in the Commission's communication of March 2020 entitled 'A Union of Equality: Gender Equality Strategy 2020-2025'. The Women on Boards Directive sits alongside several other ESG-related proposals that the boards of Irish listed companies must engage with. Some important policy issues have yet to be settled. Companies that embark on change now, however, and "get ahead of the statistics" will be well-placed to succeed under the new regime.

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