

**Statement of the Council's reasons: Position (EU) No 3/2022 of the Council at first reading with a view to the adoption of a Directive of the European Parliament and of the Council on improving the gender balance among directors of listed companies and related measures**

(2022/C 433/05)

**I. INTRODUCTION**

1. The European Commission submitted the above-mentioned proposal to the European Parliament and to the Council on 14 November 2012.
2. The proposal aimed to address the serious problem of women's under-representation on the boards of listed companies.
3. The European Parliament, during its 7th term, designated the Committee on Legal Affairs (JURI) and Committee on Women's Rights and Gender Equality (FEMM) as committees jointly responsible for the legislative proposal. The JURI Committee appointed Ms Evelyn Regner (SD, AT) and the FEMM Committee appointed Ms Rodi Kratsa-Tsagaropoulou (EPP, EL) as co-rapporteurs and voted on the report on 14 October 2013. The European Parliament adopted its first reading position, containing 66 amendments, on 20 November 2013. <sup>(1)</sup>
4. During the 9th term of the European Parliament, the JURI and FEMM Committees appointed respectively Ms Lara Wolters (SD, NL) and Ms Evelyn Regner (SD, AT) as the co-rapporteurs and, after the Council had reached its general approach on the proposal, decided jointly, on 16 March 2022, to enter into interinstitutional negotiations, based on the Parliament's first reading position.
5. In the Council, on 1 February 2013, the Working Party on Social Questions first examined the proposal. The Working Party also examined the impact assessment at this and subsequent meetings (18 February 2013 and 25 March 2013).
6. Progress reports were submitted to the EPSCO Council on 20 June 2013, 9 December 2013, 19 June 2014, 11 December 2014 and 18 June 2015. On 7 December 2015, the EPSCO Council examined a compromise text tabled by the Presidency but was unable to reach a qualified majority. A further progress report was presented to the EPSCO Council on 15 June 2017. Following further work at various levels, the Council reached a general approach on 14 March 2022. <sup>(2)</sup>
7. Between March and June 2022, negotiations took place between the European Parliament, the Council and, as facilitator, the Commission, with a view to reaching an agreement on the proposal. On 7 June 2022, the negotiators provisionally agreed on a compromise text, which was subsequently analysed and endorsed by the Committee of Permanent Representatives on 15 June 2022. <sup>(3)</sup>

<sup>(1)</sup> P7\_TA(2013)0488.

<sup>(2)</sup> 6468/22 + ADD 1.

<sup>(3)</sup> 9880/22 + ADD 1.

8. In carrying out its work, the Council also took account of the opinions of the European Economic and Social Committee of 13 February 2013 and of the Committee of the Regions of 30 May 2013.
9. Considering the provisional agreement between the co-legislators and following legal-linguistic revision, the Council is expected to adopt its position at first reading on the proposal in October 2022.

## II. OBJECTIVE

10. The Commission's proposal set a 40 % quantitative objective for the proportion of the under-represented sex on the boards of listed companies and an obligation for companies to work towards that objective, *inter alia*, by introducing procedural rules on the selection and appointment of non-executive board members.

## III. ANALYSIS OF THE COUNCIL'S POSITION AT FIRST READING

### A. General

11. Based on the Commission's proposal, the Parliament and Council have conducted negotiations with the aim of concluding an agreement at the stage of the Council's position at first reading (early second reading agreement). The text of the draft Council position fully reflects the compromise reached between the co-legislators.
12. The Parliament's position at first reading broadly confirmed the approach taken by the Commission in its proposal which presented a minimum standard for fair and transparent selection procedures for improving the gender balance on company boards, but did not set binding quotas. The Council's general approach, which was agreed more than nine years after the Parliament's first reading position, also endorsed this approach, while also stressing the need to acknowledge the different means by which the Member States could achieve the objectives of the Directive, in line with the principle of subsidiarity.
13. The compromise reflected in the Council position at first reading contains the following key elements:

### B. Structure and scope

#### a. Reorganisation of the text

14. The Council reorganised the structure of the text for greater clarity and in order to highlight the distinction between the objectives to be pursued by listed companies and the means to achieve them (see Articles 5 and 6) and in order to clarify the other provisions, including those concerning individual objectives, reporting and bodies for the promotion of equality (see Articles 5, 7 and 10). This restructuring also made it possible to clarify the functioning of the suspension clause (see below). In order to clarify the fact that suspension takes place when implementing the Directive, during the negotiations between the co-legislators, the relevant article was moved to the latter part of the text (see Article 12). The rest of the structure of the agreed text follows the logic introduced by the Council in its general approach.

#### b. Title

15. The title of the original proposal only referred to non-executive directors although the proposal in fact contained provisions applicable to executive directors as well. In order to ensure clarity, the Council amended the title so as to explain that the Directive covers *all* directors, i.e. *both* executive and non-executive directors. The same clarification was also made where relevant throughout the text. This approach was agreed by the co-legislators during the negotiations and is maintained in the compromise text.

c. **Definitions (Article 3)**

16. In the compromise text, the main definitions have been aligned with the Council's general approach. In particular, the definition of 'a listed company' refers to a company having its registered office in a Member State, and whose *shares* are admitted to trading on a regulated market.

d. **Objectives (Article 5)**

17. Two alternative objectives were already contained in the European Commission's proposal: 40 % for non-executive directors or 33 % for all directors, although the latter option was given less visibility. The Council reformulated the two objectives, making both equally explicit, with a view to clarifying the scope and the alternatives foreseen. The European Parliament had not seen a need for such a change and expressed the concern that it might appear to reduce the level of ambition. As a compromise, Article 5 was slightly reworded, so that it no longer uses the phrase 'aim to attain' but instead refers to the obligation of Member States to ensure that listed companies are 'subject to' one of the two objectives. However, the objectives themselves have been left unchanged.

e. **Public vs private companies, and companies in which members of the under-represented sex represent less than 10 % of employees**

18. The Council wished to delete the provision that made a distinction between public and private companies, the former being subject to an earlier target date. For its part, the Parliament wished to delete the provision that allowed Member States to exempt from the key provisions those companies in which members of the under-represented sex represent less than 10 % of employees. As a compromise, both provisions were deleted.

C. **Selection procedures**

a. **Positive action (Article 6)**

19. The Parliament's position contained several provisions applicable to the pre-selection phase. As a compromise, the co-legislators agreed on a wording that spells out clearly that positive action applies to the entire selection process. In line with this approach and in the light of the established case law on the subject, the compromise text specifies that the objective of improving gender equality should govern the whole process, including pre-selection, and that priority should be given to the under-represented sex provided that the candidate possesses equal qualifications to those of the candidate of the other sex, but not automatically or unconditionally.

b. **Information requirements (Article 6(3))**

20. The Parliament's position extended the list of information that companies would be required to provide to unsuccessful candidates. However, as part of the overall compromise, the relevant provisions were retained in a form close to what was originally proposed by the Commission.

D. **Suspension clause (Article 12)**

21. In its general approach, in a spirit of subsidiarity, the Council further developed and fine-tuned the suspension clause contained in the Commission's proposal, in order to provide essential flexibility to the Member States that had already taken equally effective measures to improve the gender balance on company boards and should therefore be allowed to suspend the procedural requirements set out in the Directive. However, the Parliament considered that the suspension clause contained in the Council's text was potentially too open-ended, and also unclear in parts, thus giving the impression of a loophole. As a compromise, the co-legislators agreed to specify that the suspension clause would only be available to Member States that had adopted national measures that were demonstrably 'equally effective', meaning that either binding quantitative measures in national legislation or actual results in terms of a specific percentage achieved should be required. Moreover, according to the compromise text, for a Member State to be able to avail itself of the suspension clause, the conditions must be fulfilled by the date of entry into force of the Directive.

22. Moreover, the compromise that was struck includes *a closed list of conditions* to be fulfilled by Member States in order to qualify for suspension and a clearer description of the core elements that the national legislation should include. It also omits the additional option contained in the Commission's proposal that would have allowed for a suspension based on momentum towards progress (rather than a specific percentage already achieved). In addition, a provision was inserted into the review article requiring the Commission to consider the possible need to revise the conditions of the suspension clause in its 2030 report. In addition, Member States making use of the suspension clause will also be required to report not only on whether and how they have fulfilled the applicable conditions, but also on whether they are making further progress towards a more balanced representation of both sexes, which is in line with their broader obligation to report on their progress in general. The compromise also stipulates that Member States apply the Directive and the Commission reports on this application.

#### **E. Dates and deadlines (Article 5)**

23. Given the number of years that had elapsed since the proposal was first conceived, the Council updated the dates and deadlines in its general approach. However, the Parliament, having adopted its opinion already in 2013, did not have the opportunity for such updating. The negotiations between the co-legislators focused on the transposition deadline and on the target date set with reference to the objectives of the directive, with the Parliament calling for a tighter calendar. The compromise agreed reverts to a standard transposition period of two years and sets the target date for reaching the quantitative objectives at 30 June 2026, halfway between the co-legislators' respective mandates.

#### **F. Penalties (Article 8)**

24. There was a significant gap between the position contained in the Council's general approach, which retained a short and general wording, referring to 'enforcement measures', and that of the Parliament, which was more detailed and would have obliged Member States to put in place specific penalties such as fines, annulment of appointments, and exclusion from public tenders and from access to European funds. The compromise text that was agreed uses the term 'penalties' and takes up the Commission's original idea of mentioning, by way of example only, fines and annulment of appointments. A general provision on public procurement has also been included, obliging Member States to ensure that, in the performance of public contracts and concessions, listed companies comply with applicable obligations relating to social and labour law, in accordance with applicable EU legislation. Finally, an alternative form of sanction or informal incentive was also included in the text as part of the compromise, namely, publication by Member States of a list of companies that have succeeded in meeting the quantitative objectives set in the Directive.

#### **G. Review (Article 13)**

25. In its position, the Parliament envisaged making explicit the possibility for the Commission to propose a revision of the scope of the Directive to include the European institutions and bodies, non-listed companies, sanctions and the suspension clause. The Council favoured a more general formulation, bearing in mind that the Commission in any case has the right of initiative when it comes to deciding on future proposals revising or supplementing the Directive. The compromise text invites the Commission to examine, in its 2030 report, the effectiveness of the Directive, the possible need to extend the scope of the directive at a later date to cover non-listed companies that are not SMEs, and one of the conditions of the suspension clause, namely the one based on progress made (Article 12(1)(a)). SMEs and the EU institutions are clearly excluded from the review article as it appears in the compromise that was reached. However, a recital on the exemplary role of the EU institutions has been added to take note of existing equality strategies (Recital 12).

#### H. **Technical annex**

26. In its position, the Council added a technical annex spelling out the specific number of director positions deemed necessary to attain the quantitative objectives that are expressed in percentages in the Directive. This annex is included in the compromise agreed by the co-legislators.

#### IV. **CONCLUSION**

27. The Council's position preserves the main objectives of the European Commission's proposal and fully respects the compromise reached in the informal negotiations between the Council and the European Parliament, with the support of the Commission.
  28. The compromise reached by the co-legislators was confirmed by a letter from the Chairs of the European Parliament's JURI Committee and FEMM Committee dated 16 June 2022. It is expected to be adopted by the Council as a first-reading position in due course.
-