

More female managers through gender quota legislation

On 27 March 2015, German Parliament passed the Equal participation of women and men in leadership positions in the private and public sectors Act (*Gesetz für die gleichberechtigte Teilhabe von Frauen und Männern an Führungspositionen in der Privatwirtschaft und im öffentlichen Dienst*). The companies affected now face several issues, first and foremost whether the quota applies to them and the consequences they face if they fail to meet the quota.

Introduction

On 6 March 2015, following a second and third reading of the draft bill, the Bundestag, the lower house of Germany's parliament, passed the draft legislation put forward by the left-right coalition government with the votes of the Christian Democratic Union and Social Democrats. The Bundesrat approved the law on 27 March 2015, also at the recommendation of the competent Family Affairs Committee.

The legislation aims to boost significantly the proportion of women in leadership positions in both the private and public sectors. The following rules apply to the private sector:

For listed companies with co-determination, i.e. employee representation on their supervisory boards, the 30% gender quota will apply from 1 January 2016. This means that in future, around 110 companies will have to have at

least 30% female supervisory board members.

Listed companies or companies with employee representation on their supervisory boards are also required to fix target levels in order to increase the number of women represented on the supervisory board, and in management and senior management levels. Around 3,500 companies will be affected by this provision.

The legislation also contains new provisions governing the public sector and civil service, which reflect the changes in the private sector.

The fixed gender quota

Scope

The 30% quota applies as from 1 January 2016. Existing supervisory board members will remain in office for the duration of their appointment. However, companies are required to

Key issues

- Legislative content of the statutory gender quota
- Scope of the fixed quota
- Consequences of failure to meet the quota ("empty chair" policy)
- Self-imposed targets

observe the quotas when appointing new supervisory board members.

Companies affected

The 30% quota applies to listed companies with employee representation on their supervisory boards under the Employee Codetermination Act (*Gesetz über die Mitbestimmung der Arbeitnehmer*, MitbestG), the Act of Codetermination in the Coal, Iron and Steel Industry (*Montan-Mitbestimmungsgesetz*, Montan-MitbestG) or the Supplementary Act on Codetermination in the Coal, Iron and Steel

Industry (*Montan-Mitbestimmungsergänzungsgesetz*, MitbestErG). Pursuant to section 3(2) of the German Companies Act (*Aktiengesetz*, AktG), listed companies are those with shares authorised for trading on the regulated market. This applies to public limited companies (*Aktiengesellschaften*, AG) and limited partnerships with share capital (*Kommanditgesellschaften auf Aktien*, KGaA), which as a rule have more than 2000 employees. Furthermore, the quota also applies to European public limited liability companies (*Societas Europaea*, SE), as well as companies created as a result of cross-border mergers, if these are listed and have administrative bodies with equal employee/shareholder representation. The quota thus applies to a total of 108 companies in Germany.

Executive bodies affected

The 30% quota applies to the supervisory boards of AGs and KGaAs. For SEs and companies created in the course of cross-border mergers, the quota applies – depending on the management structure – to the supervisory board or to the board of directors.

Joint or separate compliance

As a rule, in the AG and KGaA the quota is to be met by the supervisory board as a whole (joint compliance). One side exceeding the quota can thus balance out any shortfall on the other side. If the calculated quota results in a decimal point, the number is to be rounded up or down. In typical supervisory boards under the Codetermination Act, this should result in the following gender compositions: on a supervisory board with 20 members, a minimum of six persons representing the minority gender; in the case of 16 members, five persons representing the minority gender and for 12

members, four representing the minority gender.

Prior to the selection of the new supervisory board members, either side may contest the joint compliance. In that case, the gender quota would have to be met separately by each side (separate compliance). The figures are also calculated here by rounding up or down. While typical supervisory board sizes under the Codetermination Act of 20 (3 women/3 men) and 12 (2/2) do not result in any change to the proportion of women, separate compliance in a supervisory board with 16 members would result in a reduction of the gender quota: $0.3 \times 8 = 2.4$. Thus, each side is required only to appoint at least two women (or men, as the case may be) to the supervisory board.

Consequences of non-compliance

If the quota is not met, the consequences depend on whether the representative is selected on behalf of the shareholders or the employees. The following discussion is based on the separate compliance model.

Selection of shareholder representatives in breach of the quota

If the selection by the general meeting or appointment by other means fails to meet the 30% quota, the selection or appointment is rendered invalid. The places designated for the under-represented gender should remain unfilled ("empty seat"). The person selected or appointed will not become a supervisory board member.

With regards to the invalidity of the selection of the shareholder representative by the general meeting, a further distinction must be drawn be-

tween individual selection and selection as a block.

Individual Selection

In the case of individual selection – that is, the separate appointment of individual persons to the supervisory board – the first vote to breach the quota is invalid, as are all subsequent votes that breach the quota. The person selected in that case never becomes a valid supervisory board member; "his" place will remain unoccupied. If on a supervisory board comprising 20 members, four shareholder positions are newly appointed and if the supervisory board has hitherto been all-male, a total of three women have to be appointed to the supervisory board in order to meet the quota. If a man is selected in the first vote, this vote is valid since the quota can still be fulfilled by allocating the remaining three positions to women. However, it is essential that women be appointed in the following votes in order to meet the quota. If a man were to be selected, this appointment would be invalid and the post would remain unfilled.

Block selection

If the outcome of a block selection, (that is, the selection of several persons at once) does not comply with the quota, the selection is invalid with respect to all persons belonging to the over-represented gender. The posts for all of these persons will remain unfilled. If, for instance, ten posts are to be filled, and eight men, two women, and this "block" is selected, then the two women are validly appointed to the supervisory board. The appointment of the eight men, however, is invalid, leaving eight supervisory board posts unfilled.

This severe consequence represents a kind of maximum penalty. As a

result, individual votes are to be recommended to avoid the risk of invalidity of the selection of all members of the over-represented gender.

Selection of employee representatives in breach of the quota

Not all employee representatives are appointed in the same manner; their appointment is governed by the various requirements of the three co-determination acts:

Companies pursuant to the Codetermination Act and Supplementary Codetermination Act

In the case of separate compliance with respect to the selection of the employee representative the following applies: If the supervisory board has six or eight employee representatives, one company employee and one union representative must represent each gender. If the supervisory board has ten employee representatives, there must be two employee representatives of each gender representing the company and one union representative for each gender. If the minimum number per gender is not met, the selection of those candidates belonging to the majority gender with the lowest maximum number or the least votes – depending on the type of vote employed (proportional or majority) – is invalid.

Companies under the Act on Codetermination in the Coal, Iron and Steel Industry

In the case of companies governed by the Act on Codetermination in the Coal, Iron and Steel Industry, the quota is attained by other means. In these companies, the shareholders meeting as the electing body of the supervisory board members is bound by the suggestions of the Works Councils. Thus, the Works Councils are also under an obligation to make

suggestions that are in line with the quota requirements. If their proposals do not fulfil the requirements, the election has to be repeated by the Works Councils until such time as a suggestion in line with the quota has been submitted. The “empty seat” consequence does not apply here.

Scope for action in the event of failure to meet a quota

If the quota is not met, the supervisory board will remain quorate if at least half of the members take part in the vote. If, in exceptional cases, the vote of the supervisory board member who was not validly appointed is decisive, the validity of the decision is questionable. In that case, the general rules on the validity of supervisory board decisions in the event of contested votes apply.

The empty seat on the employee representative side is to be filled by means of a subsequent vote or – and this is likely to be preferred in view of the costs and time involved in a subsequent vote – by court appointment of a replacement. According to the intention of the lawmakers, in a proportional vote in which, for instance, the appointment of a male candidate is invalid, the woman placed next on the list is to be appointed. This approach is said to most accurately reflect the will of the voters.

Transitional rules

The 30% quota does not apply to votes that have been completed by 31 December 2015.

The 30% quota applies to all votes as from 1 January 2016.

Companies governed by the Act on Codetermination in the Coal, Iron and Steel Industry are not subject to the empty seat sanction. Thus, there is no

need for any transitional rules to cover these companies.

Targets (the "flexi-quota")

The new legislation also requires listed companies and companies with employee representation to implement targets for an increase in the proportion of women on the supervisory board, the management (executive committee or management board) and on first and second-tier executive levels, and to set deadlines for the attainment of these targets. In general, companies are co-determined if they employ more than 500 employees.

Scope

The targets are to be set for the first time by 31 August 2015. The first deadline is not permitted to be longer than two years; subsequent deadlines will be five years.

The supervisory board sets the targets for the management and the supervisory board itself. The management sets the targets for the first and second-tier executive levels below the management.

Content and consequences of failure to meet the quota

If, at the time the targets are set, the proportion of women is below 30%, the target is not permitted to be lower than the proportion attained.

Reporting duties are intended to exert a certain pressure on companies to set ambitious goals and to work towards attaining these. If targets are not met, reporting must be transparent. However, the Act does not stipulate precisely how this is to be carried out.

Furthermore, failure to meet targets is not subject to any sanctions – other than the reporting duties. The justification cited for this is that sanctions would provide companies negative incentives to set cautious and unambitious goals.

Changes in the public sector

In addition to the changes in the private sector, the legislation also contains several civil service reforms, which are intended to mirror those in the private sector. To this end, the Law on Appointment and Posting of Women and Men in Federal Bodies (BGremBG) and the Federal Equal Opportunities Act (BGleiG) are to be amended. In the BGremBG, the fixed gender quota of 30% is stipulated for all new appointments to positions in supervisory bodies where at least three seats are available to the Federal Government. Meanwhile, the BGleiG introduces the model of self-imposed targets for the federal administration.

Scope

The new rules apply only to the federal civil service. Institutions on the level of the Länder or municipalities are not affected; these are governed by local provisions.

If the Federal Government appoints at least three seats in a corporate body, e.g. in the supervisory board, the BGremBG applies. Pursuant to this, the fixed 30% quota must be observed when filling these three seats. As from 2018, the proportion is to be increased to 50%. However, existing appointees can remain in their posts until these expire.

The provisions governing the civil service do not apply to former state

companies that have been privatised, such as the German postal service, Deutsche Post, or Deutsche Bahn.

In addition to the fixed quota, under the Equal Opportunities Act, the federal administration is also subject to the target model. Each federal agency is to set specific targets and take measures to bolster the representation of the under-represented gender in each case. These targets and measures are to be contained in the equality plan of each agency and updated every four years.

The scope of the new provisions is not limited to the federal administration. Companies in which the federal government holds a majority share are also governed by the Equal Opportunities Act if they perform public tasks and form part of the indirect federal administration.

Consequences of non-compliance

If the requirements of the Law on the Appointment and Posting of Women and Men in Federal Bodies are not met, the Federal Ministry for Family, Senior Citizens, Women and Youth is to be notified and justification provided for the failure to meet the quota.

Severe sanctions in the event of failure to meet the fixed quota are not provided. The legislature assumes that state institutions will act in line with the law.

The civil service of the Federal Government is not subject to "severe" sanctions in the event of failure to meet the targets either.

Amended laws

The new legislation amends: the Companies Act, Limited Liability Companies Act, Law on Appointment

and Posting of Women and Men in Federal Bodies, Federal Equal Opportunities Act, the Co-Determination Acts and the SE-Implementation Act.

Recommendation

From 1 January 2016, the fixed gender quota of 30% applies to supervisory boards in all listed German companies with employee representation. Based on the preservation of the status quo for supervisory board posts appointed prior to 1 January 2016, the companies affected are only required to meet the quota incrementally, meaning that any openings that arise on the supervisory board are to be filled with persons belonging to the under-represented gender, until such time as the 30% quota is achieved. Otherwise, the post remains unfilled. We therefore recommend that all companies affected by the new rules start looking for suitable candidates now, to allow them to meet the quota as soon as possible.

Furthermore, companies are required to set themselves targets for the increase in the proportion of the under-represented gender at management level. Failure to meet these targets is not, however, subject to any serious sanctions. It remains to be seen what influence the media will have on the appointment of management posts.

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