



DIVERSITY IN LEADERSHIP IN FOCUS - IN NATIONAL LAW AND IN A NEW EUROPEAN DIRECTIVE

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Introduction

Earlier this year, the Danish Parliament passed into law a new regulation (the “Regulation”) strengthening the requirements for objectives and policies for the under-represented gender in executive positions in large companies. The Regulation will come into force on 1 January 2023. In light thereof, 3 December 2022, the Danish Business Authority issued new guidelines (the “Guidelines”) on gender balance in management.

The Guidelines and the Regulation

Fundamentally, the purpose of the Guidelines is to provide companies, advisers, accountants, and other stakeholders with an instrument for working with and reporting on target figures and the policy for increasing the proportion of the under-represented gender.

The Guidelines are based on the Regulation, and two statutory provisions regulate companies' obligations in relation to target figures and policies for the under-represented gender. The first provision is Section 39 c of the Danish Companies Act (in Danish: "selskabsloven"), which obliges companies to set up target figures and policies for the under-represented gender with the purpose of a more equal gender balance in the board rooms as well as executive positions in general. The other provision is Section 99 b of the Danish Financial Statements Act (in Danish: "årsregnskabsloven") which regulates companies' obligation to report on the developments in the gender composition for the purpose of more transparency. Both provisions have been changed in the Regulation and, consequently, in the Guidelines.

Which companies fall under the Obligation?

According to the Guidelines, the Regulation will apply to state-owned limited companies, large companies, and listed companies. Companies that are obligated to present financial statements and that are considered large within the meaning of Section 7 of the Danish Financial Statements Act will be covered by the Regulation, including companies that report according to the rules on large companies in accounting classes C and D.

According to the Guidelines, the so-called de minimis threshold is continued under the Regulation and includes companies that have employed fewer than 50 people in the most recent financial year. Such companies are not required to set out target figures and develop a policy. The Regulation in Section 99 b of the Danish Financial Statements Act provides, however, that companies must still disclose statistics on the gender balance and information on target figures, including a status report on the achievement of the target figures, in the management report (regardless of whether the de minimis threshold applies).

Also, the Guidelines state that the requirement to set target figures and develop a policy does not apply if a company meets the objective of equal gender balance (defined as a minimum of 40/60) at the management levels.

Target Figures and Policy Development at Group Level abolished

According to the Guidelines, it is no longer sufficient for a parent company to set target figures and develop a policy for the group, as each subsidiary company is obligated to set their own target figures and develop their own policy if the subsidiary company itself is subject to the Regulation.

The high-level requirements pursuant to the Regulation can be summarized as follows:

- Requirement to set up target figures for the under-represented gender in the governing body of the company;
- Requirement to set up target figures for the under-represented gender on the management level of the company;
- Requirement to develop a policy to increase the proportion of the under-represented gender at other levels of management in the company.

According to the Guidelines, the above-mentioned items must be included as one statement in the board of directors' and the management's report, and it will not be sufficient to state them on the company's website or in a supplementary report.

Setting Target Figures

Companies set target figures appropriate for the individual company. Neither Section 99 b of the Danish Financial Statements Act nor Section 139 c of the Danish Companies Act set specific quotas on the under-represented gender on the board. The Guidelines require the target figures to be ambitious as well as realistic and to promote a trend towards more equal gender representation in the management.

One of the changes in the Guidelines is that the requirement of setting target figures applies to both the board of directors as well as the executive board.

Penalties in national Regulation

Companies that fail to comply with the requirements to set out target figures and develop a policy on how to increase the gender balance in the company may be sanctioned by fines.

The EU Gender Equality Strategy

22 November 2022, the European Parliament approved a new EU Directive (the Women on Boards Directive) (the “Directive”) to ensure diversity on the boards of directors and executive positions of listed companies in EU member states. The new Directive aims to achieve more balanced representation of gender among board members, after acknowledging the fact that there is still a significant gender imbalance in the board rooms.

The Directive requires that listed companies ensure that at least 40% of their non-executive directors, or 33% of all director positions, including both executive and non-executive directors, is held by the under-represented gender. The member states must ensure that listed companies aim to achieve such individual quantitative objectives by 30 June 2026. By 28 December 2024, the member states must have implemented the Directive into national acts, regulations, and administrative provisions.

Since the Directive is solely intended for listed companies, the Directive will not apply to small and mid-sized companies with fewer than 250 employees. These companies are therefore excluded from the scope of the Directive.

Transparency in the Selection Process

Companies are required to base their recruiting processes on clear and neutral criteria established before the recruitment process starts for the purpose of ensuring transparency. Merit and qualification must remain the most essential criteria in the selection procedure. Some criteria might be, e.g., professional experience in management, supervisory functions, international experience, multidisciplinary, management and communication skills, networking skills, and knowledge.

Companies that have not achieved one of the objectives (40% of the company's non-executive directors or 33% of all director positions held by the under-represented gender) are obligated to include explanations as to why this is in their annual report. Further, the companies must make a comprehensive description of the measures that have been taken or that are intended to be taken to meet the objectives.

Further, in cases where several candidates appear to be equally qualified for the same position, the companies will be required to choose the under-represented gender, if there is no objective reason not to select the under-represented gender.

Penalties for Non-Compliance

Under the new Directive, member states must impose national sanctions on companies that fail to comply with the requirements of an open and transparent nomination process as well as the required gender balance. Possible sanctions for non-compliance include fines or the possibility for a judicial body to annul any decision concerning the selection of a board member or a director or to declare it null and void.

If you have any questions or require further information regarding any of the above, please do not hesitate to contact us:



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