



September 2012  
AK Position Paper

# Proposal for a Directive on improving the gender balance among non-executive directors of companies listed on stock exchanges

## About us

**The Federal Chamber of Labour is by law representing the interests of about 3.2 million employees and consumers in Austria. It acts for the interests of its members in fields of social-, educational-, economical-, and consumer issues both on the national and on the EU-level in Brussels. Furthermore the Austrian Federal Chamber of Labour is a part of the Austrian social partnership.**

**The AK EUROPA office in Brussels was established in 1991 to bring forward the interests of all its members directly vis-à-vis the European Institutions.**

### **Organisation and Tasks of the Austrian Federal Chamber of Labour**

The Austrian Federal Chamber of Labour is the umbrella organisation of the nine regional Chambers of Labour in Austria, which have together the statutory mandate to represent the interests of their members.

The Chambers of Labour provide their members a broad range of services, including for instance advice on matters of labour law, consumer rights, social insurance and educational matters.

Herbert Tumpel  
President

More than three quarters of the 2 million member-consultations carried out each year concern labour-, social insurance- and insolvency law. Furthermore the Austrian Federal Chamber of Labour makes use of its vested right to state its opinion in the legislation process of the European Union and in Austria in order to shape the interests of the employees and consumers towards the legislator.

All Austrian employees are subject to compulsory membership. The member fee is determined by law and is amounting to 0.5% of the members' gross wages or salaries (up to the social security payroll tax cap maximum). 560.000 - amongst others unemployed, persons on maternity (paternity) leave, community and military service - of the 3.2 million members are exempt from subscription payment, but are entitled to all services provided by the Austrian Federal Chambers of Labour.

Werner Muhm  
Director

## The AK position in detail

The BAK supports the intentions of the Directive proposal by the European Commission on substantially raising the share of women in management bodies of companies listed on stock exchanges in the European Union.

The still existing striking under-representation of women in management bodies of major companies listed on stock exchanges in the European Union at only 13.7 per cent and just 15 per cent share of non-executive directors render European legal provisions to increase the share of women within the meaning of improving the gender balance in the Union essential and necessary.

The BAK regards in particular binding legal provisions as particularly effective to achieve this objective.

In view of the balanced participation of women in decision-making processes, the current non-binding recommendations of the European Union to companies, which are based on the principle of self-regulation, have actually not taken any effect.

It is for that reason that the BAK explicitly welcomes the present Directive proposal.

However, in respect of effectively increasing the share of women in management bodies, individual points of the Directive have to be amended.

### **Article 3 Exclusion of small and medium-sized enterprises**

Article 3 of the Directive proposal provides for an exclusion of small and medium-sized enterprises, which should definitely be deleted.

The Directive does in any case only apply to companies listed on stock exchanges and it is not too much to expect of SMEs listed on stock exchanges to deal with the administrative burden that the implementation of the Directive provisions entails

Apart from that, small and medium-sized enterprises listed on stock exchanges are of particular economic significance and, due to their high level of awareness, are setting standards for the entire economic sector. Furthermore, their public visibility justifies the notion that they too are made subject to particular regulating measures in the public interest.

There is a possibility that under certain circumstances holding companies,

which are at the helm of a concern and in whose executive boards particular important corporate decisions are made, would fall under this exemption. This would definitely contradict the targets pursued by this Directive.

#### **Article 4 Objectives with regard to non-executive directors**

##### **Paragraph 1**

We explicitly welcome the provision that appointments have to take place on the basis of a comparative analysis of the qualifications of each candidate, by applying pre-established, clear, neutrally formulated and unambiguous criteria, as intransparent selection procedures may in many cases lead to discriminating appointments.

However, it is not clear whether the threshold of 40 per cent for dualist systems applies to the entire management body or separately to the representatives of both employees and employers.

##### **Paragraph 2**

From the point of view of the BAK, the last half-sentence of this paragraph ("but not exceeding 49 per cent") should be deleted without substitution. According to the present formulation, the rate of positions may not exceed 49 per cent. This provision implies that women resp. the under-represented sex may never fill 50 per cent or more of non-executive director positions.

The reason provided explains that the initially over-represented sex should not be discriminated against. However, this results ultimately in the establishment of the discrimination of the currently under-represented sex, which normally concerns women.

##### **Paragraph 3**

The proposal that in the selection of non-executive directors, priority shall be given to the candidate of the under-represented sex if that candidate is equally qualified as a candidate of the other sex, has to be welcomed within the sense of achieving the objective. The proposed opening clause is in accordance with the judicature of the ECJ on quota systems.

##### **Paragraph 4**

The obligation of companies to disclose, on the request of an unsuccessful candidate, the qualification criteria upon which the selection was based and the considerations tilting the balance in favour of a candidate of the other sex has to be welcomed in accordance with the principles of transparency and non-discrimination.

##### **Paragraph 5**

The provisions for a reversal of the burden of proof, which obliges a company to prove that paragraph 3 has not been breached in cases where the unsuccessful candidate can establish facts that he/she is equally qualified, is

an important instrument for the actual enforceability of the overall regulation.

### **Paragraph 6**

We reject the notion that companies listed on stock exchanges, where the under-represented sex represents less than 10 per cent of the workforce, is fully exempt from the obligation to fulfil the objective specified in paragraph 1. From the point of view of the BAK, this paragraph should be deleted as it would only lead to reinforcing the existing labour market segregation between women and men.

### **Paragraph 7**

We suggest that the objective laid down in paragraph 1 is only met where companies can show that members of the under-represented sex hold at least the minimum of one third of all director positions, irrespective of whether they are executive or nonexecutive.

## **Article 5 Additional measures by companies and reporting**

### **Paragraph 1**

It should be noted that in the past self-regulations by companies have hardly shown any effect and the European principle of gender equality also applies to executive directors and board members.

## **Article 6 Sanctions**

We explicitly welcome the provision that sanctions have to be effective, proportionate and dissuasive.

However, the type of sanctions has not yet been determined. Administrative fines and the nullity or annulment declared by a judicial body of the appointment or of the election of non-executive directors made contrary to the Directive have only been stated as examples.

From the point of view of the BAK this might be adequate as a first step when Member States indeed provide for sanctions, which make companies change their previous behaviour.

However, we would suggest for the future to provide for an evaluation of the effectiveness of the Directive and to consider in cases, where there is a lack of effectiveness, the standardisation of concrete serious sanctions, such as closing a company in case of repeated breaches or, in cases, where the quota has not been fulfilled, declaring the invalidity of the company formation.

Should you have any further questions  
please do not hesitate to contact

**Ruth Ettl**

T: + 43 (0) 1 501 65 2166  
ruth.ettl@akwien.at

**as well as**

**Ruth Naderer**

T: + 43 (0) 1 501 65 2660  
ruth.naderer@akwien.at

**and**

**Christof Cesnovar**

(in our Brussels Office)  
T +32 (0) 2 230 62 54  
christof.cesnovar@akeuropa.eu

**Bundesarbeitskammer Österreich**

Prinz-Eugen-Straße 8-10  
A-1040 Vienna, Austria  
T +43 (0) 1 501 65-0  
F +43 (0) 1 501 65-0

**AK EUROPA**

Permanent Representation of Austria to  
the EU  
Avenue de Cortenbergh, 30  
B-1040 Brussels, Belgium  
T +32 (0) 2 230 62 54  
F +32 (0) 2 230 29 73